In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **CHARLES CHITAT NG,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S080276

Orange County Superior Court Case No. 94ZF0195
The Honorable John J. Ryan, Judge

RESPONDENT'S BRIEF

VOLUME 1 OF 2

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STATEMENT OF THE CASE

Appellant was sentenced to death after being convicted of 11 counts of first-degree murder with a multiple-murder special circumstance. The proceedings took place over a 14-year period. They began in 1985, when the Calaveras County Justice Court issued a warrant for appellant's arrest. In 1991, appellant was extradited from Canada and made his first appearance in Calaveras County. Venue was subsequently transferred to Orange County, and the trial took place in 1998 and 1999.

During the proceedings, appellant made 38 *Marsden*[1] motions, beginning with his initial appearance with court-appointed counsel. Appellant repeatedly asked the court to appoint the attorney of his choice, Michael Burt, but Burt never agreed to accept the appointment under the conditions the court required. Less than four months before trial, appellant began representing himself, but the court later terminated his self-representation because he was using it to delay the trial. During the penalty phase, appellant phoned a juror at her home, but he failed to derail the trial.

A. Proceedings in the Calaveras County Justice Court

1. From the initial complaint to appellant's extradition: June 1985-September 1991

The proceedings began on June 8, 1985, when the Calaveras County Justice Court (CCJC) issued a warrant for appellant's arrest on suspicion of various crimes, including kidnapping, false imprisonment, and slavery. (1 CJCT 10-11.[2]) The following month, the court issued a new arrest warrant, based on suspicion of murder. (1 CJCT 12-15.)

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

[2] " CJCT" refers to the clerk's transcript from the Calaveras County Justice Court. "ACJCT" refers to the augmented clerk's transcript from the Calaveras County Justice Court. " CJRT" refers to the reporter's transcript

(continued...)

On July 15, 1985, the court appointed the Calaveras County Public Defender to represent appellant, who was then in custody in Canada. (2 CJCT 846; see 2 CJCT 528-529.) Three months later, on October 16, the Calaveras County District Attorney filed a complaint charging appellant with multiple counts of murder and kidnapping, among other crimes. (4 CJCT 1194-1199; ACJCT 13.)

On December 10, 1985, despite appellant's absence from the court's jurisdiction, the court appointed Garrick Lew to represent him. (4 CJCT 1231; see 4 CJCT 1161.) One week later, in Canada, appellant was convicted of robbery and other offenses and sentenced to four years and six months in prison. (6 CJCT 1780, 1782-1784.)

Thirteen months later, on January 14, 1987, the court appointed Michael Burt as appellant's second counsel. (5 CJCT 1469-1470.) Burt was a member of the San Francisco Public Defender's Office (SFPD), but the court appointed him as an independent contractor. (5 CJCT 1465-1467, 1469-1470.) On February 17, 1987, the United States asked Canada to extradite appellant. (6 CJCT 1794.)

On September 20, 1988, while appellant was still in Canada, the court ruled that it lacked jurisdiction to appoint counsel for him, because it had not obtained personal jurisdiction over him. The court thus removed Burt and Lew from the case. (1 CJRT 525, 530-531; 6 CJCT 1983-1984.)

(...continued)
from the Calaveras County Justice Court. "CSCT" refers to the clerk's transcript from the Calaveras County Superior Court. "CSRT" refers to the reporter's transcript from the Calaveras County Superior Court. "OCT" refers to the clerk's transcript from the Orange County Superior Court. "RT" refers to the reporter's transcript from the Orange County Superior Court. "Sealed 987.9 OCT" refers to the sealed clerk's transcript of Penal Code section 987.9 material from the Orange County Superior Court. "Sealed 987.5 RT" refers to the sealed reporter's transcript of Penal Code section 987.5 proceedings from the Orange County Superior Court.

2. From appellant's extradition to the preliminary hearing: September 1991-October 1992

On September 27, 1991, appellant, having finally been extradited from Canada, made his first appearance in the CCJC for arraignment. (2 CJRT 533-552.) On the same day, the court ordered him housed at Folsom Prison. (6 CJCT 2043-2044.)

On October 4, 1991, Burt and Lew filed a motion seeking appointment as appellant's counsel. (2 Sealed CJCT 447-469, 474(1)-474(33).) The motion included a declaration from appellant, who said he wanted them to represent him. (2 Sealed CJCT 474(30)-474(33).) It was later clarified that appellant was asking the court to appoint the entire SFPD's office, not just Burt. (2 CJRT 765, 780, 785.) On October 24, the court denied the motion, based on concerns about Burt's availability. (2 CJRT 784-787.) Instead, the court appointed Thomas Marovich and James Webster. (2 CJRT 788-791.)

On November 1, 1991, appellant made his first appearance with Webster and Marovich. (2 CJRT 795-796.) Before either party had the chance to speak, appellant announced that he was making a *Marsden* motion. (2 CJRT 796.) In the accompanying written motion, he said it was "imperative" that Burt and Lew represent him. (2 Sealed CJCT 632-633.) The court denied the motion. (2 CJRT 795-796; ACJCT 29.)

Three weeks later, on November 21, 1991, appellant filed his second *Marsden* motion and again asked the court to discharge Webster and Marovich and replace them with Burt and Lew.[3] (2 Sealed CJCT 647-657.)

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[3] Because appellant made many pro-per motions in the trial court, it may be helpful to distinguish motions made by appellant from those made by his lawyers. Respondent will therefore differentiate between motions made by "the defense," meaning those made by counsel, and motions made by "appellant," meaning those he made himself.

At the *Marsden* hearing, appellant said he did not recognize Webster and Marovich as his attorneys. (9 Sealed CJRT 925.) The court denied the motion. (9 Sealed CJRT 937-938.)

On January 10, 1992, appellant made his third *Marsden* motion, and the court denied it. (2 Sealed CJRT 1008-1017; ACJCT 33.) Also that day, the court entered a not-guilty plea on appellant's behalf. (ACJCT 32.)

On January 29, 1992, appellant filed his fourth *Marsden* motion. (ACJCT 33.) On February 7, he withdrew the written *Marsden* motion and made an oral *Marsden* motion instead. (3 Sealed CJRT 1389-1390.) In the oral motion, he complained that he could not have an effective rapport with Webster and Marovich because he trusted Burt and Lew, and he again requested their appointment. (3 Sealed CJRT 1396, 1398.) The court denied the motion. (3 Sealed CJRT 1419-1420.)

On February 21, 1992, appellant filed his fifth *Marsden* motion and again asked the court to dismiss Webster and Marovich and replace them with Burt and Lew. (4 Sealed CJCT 1168-1196.) On the same day, the court held a hearing and denied the motion. (3 Sealed CJRT 1463-1490.) A week later, the Calaveras County Superior Court (CCSC) denied appellant's petition for writ of mandamus, in which he sought the appointment of Burt and Lew. (9 CJCT 3138-3139.)

On March 20, 1992, appellant made his sixth *Marsden* motion, and the court denied it. (4 Sealed CJRT 1540-1567.) On April 3, the Court of Appeal denied appellant's petition for writ of mandamus regarding Burt and Lew. (4 Sealed CJCT 1303). On April 15, appellant petitioned this Court to review that decision. (4 Sealed CJCT 1268-1311.)

On April 17, 1992, appellant filed his seventh *Marsden* motion. (4 Sealed CJCT 1350-1404.) In it, he announced that he had filed a complaint against Webster and Marovich with the State Bar. (4 Sealed CJCT 1367-1371.) The court denied the motion. (4 Sealed CJRT 1572-

1624.) Appellant then said he wanted to represent himself. (4 Sealed CJRT 1622.) The court granted a continuance for appellant to consider this decision. (13 CJCT 4545, 4559; 4 CJRT 1656.) On April 24, appellant withdrew his request, because the court was not going to appoint Burt and Lew as his advisory counsel. (4 CJRT 1755.) Also that day, appellant made his eighth *Marsden* motion, which the court denied. (4 Sealed CJRT 1788-1793.) On June 18, 1992, in case no. S026114, this Court denied appellant's petition for review. (14 CJCT 4781.)

On September 10, 1992, appellant filed his ninth *Marsden* motion, and the court denied it. (6 Sealed CJCT 1842-1882A; 5 Sealed CJRT 2109, 2120.) On September 25, appellant filed his 10th *Marsden* motion, which the court denied. (6 Sealed CJCT 1903-1907; 6 Sealed CJRT 2404-2405.) One week later, on October 2, appellant filed his 11th *Marsden* motion. (6 Sealed CJRT 2468-2506.) The court denied the motion and stated that Webster and Marovich had "done an exemplary job . . . ." (6 Sealed CJRT 2482, 2502.)

3. The preliminary hearing: October 1992-November 1992

The preliminary hearing began on October 6, 1992, and ended on November 12, 1992. (ACJCT 49, 59.) On October 6, appellant filed a handwritten, pro-per motion to disqualify the judge, Douglas Mewhinney. (16 CJCT 5394-5414, 5417-5418; 6 Sealed CJCT 5415-5416.) The court struck the motion because it was partially untimely and showed no ground for disqualification. (6 CJRT 2517-2523; ACJCT 49.) Appellant then made his 12th *Marsden* motion, which the court denied. (6 CJRT 2523-2524; 6 Sealed CJRT 2525-2555.)

On October 7, 8, 9, and 16, 1992, appellant made his 13th, 14th, 15th, and 16th *Marsden* motions, respectively. The court denied each motion on the day appellant made it. (7 Sealed CJRT 2865-2874, 2993-3011;

8 Sealed CJRT 3147-3161, 3647-3707.) On October 28, Webster and Marovich informed the court that appellant was suing them for malpractice and seeking $1,000,000 in damages. (10 CJRT 4345-4346, 4359.) The court described the lawsuit as an "end run" around *Marsden* and found that it constituted another effort to remove Webster and Marovich. (10 CJRT 4355, 4362.)

On October 29, 1992, appellant filed another motion to disqualify Judge Mewhinney. This time, appellant argued that Judge Mewhinney should be disqualified because appellant was filing a complaint against him with the Commission on Judicial Performance. The court struck the motion because it did not state a basis for disqualification. (10 CJRT 4383-4385.)

On November 3, 5, and 12, 1992, appellant made his 17th, 18th, and 19th *Marsden* motions, respectively. The court denied each motion on the day appellant made it. (12 Sealed CJRT 4742-4756; 13 Sealed CJRT 5077-5186; 16 Sealed CJRT 5676-5704.) On November 12, at the end of the preliminary hearing, the court held appellant to answer on twelve counts of murder and one count of burglary, plus the special circumstances of multiple murder, burglary, and robbery. (15 CJRT 5728-5739; see also 1 CSCT 14-16.)

B. Proceedings in the Calaveras County Superior Court

1. From the filing of the information to the appointment of Judge McCartin: November 1992-December 1993

On November 20, 1992, the Calaveras County District Attorney filed an information charging appellant with twelve counts of first-degree murder, in violation of Penal Code[4] section 187, and one count of first-

[4] Subsequent statutory references are to the Penal Code unless otherwise indicated.

degree burglary, in violation of sections 459 and 460.1. Three of the murder counts included a burglary special circumstance under section 190.2, subdivision (a)(17)(vii), and one murder count included a gun-use allegation under section 12022.5. Additionally, the prosecution alleged a multiple-murder special circumstance under section 190.2, subdivision (a)(3). (1 CSCT 3-9.)

On December 2, 1992, the court temporarily reappointed Webster and Marovich as appellant's counsel. Webster and Marovich objected that appellant's malpractice lawsuit saddled them with a conflict of interest. (1 CSCT 309-310.) On December 18, the court declined to dismiss Webster and Marovich and instead reappointed them. (1 CSCT 385.) Also that day, appellant made his 20th *Marsden* motion, which the court denied. (1 Sealed CSRT 40-44.) Additionally, another CCSC judge stayed the malpractice suit until the conclusion of the criminal proceedings. (2 CSCT 482, 492; 1 CSRT 54.)

On January 12, 1993, Webster and Marovich filed a motion to set aside their appointment and vacate the entry of the plea. (2 CSCT 496-517.) They also asked the court to designate separate counsel to prepare a motion seeking the appointment of appellant's preferred counsel—also known as a *Harris*[5] motion. (2 CSCT 519-546.) The court appointed Ephraim Margolin to prepare the *Harris* motion, and also to prepare the *Harris* and *Marsden* arguments in a motion to dismiss. (2.CSCT 550; see also 2 CSCT 570-571.) The court later appointed Eric Multhaup to assist Margolin. (3 CSCT 1113.)

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[5] *Harris v. Superior Court* (1977) 19 Cal.3d 786.

On February 1, 1993, the defense filed a motion to dismiss the information under section 995.[6] (2 CSCT 590-782.) Also that day, the prosecution filed a notice of evidence in aggravation. (2 CSCT 783-784.)

On March 26, 1993, the defense filed a motion challenging appellant's incarceration at Folsom Prison. (4 CSCT 1209-1212.) On May 5, the defense filed a motion challenging various courtroom security arrangements. (5 CSCT 1624-1723.) On June 9, the court denied both motions. (8 CSCT 2941.) Also that day, appellant made his 21st *Marsden* motion, which the court denied. (6 Sealed CSRT 1612-1621)

On July 26, 1993, Margolin and Multhaup filed a motion to discharge Webster and Marovich and appoint Burt and Lew—essentially, a combined *Marsden* and *Harris* motion. The *Marsden* motion was appellant's 22nd. (8 Sealed CSCT 3045-3119.) On September 1, Webster and Marovich filed a motion to withdraw. (14 Sealed CSCT 5139-5170.) On September 8, the court began a hearing on the *Marsden* and *Harris* motions and the motion to withdraw. (14 Sealed CSCT 5096.) The hearing included testimony from mental health experts. (14 Sealed CSCT 5096-5098.) After the experts testified, the court appointed two additional mental health experts to evaluate appellant. (14 Sealed CSCT 5098, 5101-5102, 5112-5113.) The new experts submitted reports, and they testified when the hearing resumed. (14 Sealed CSCT 5189-5197, 5217-5218; 15 Sealed CSCT 5283-5284.)

On December 8, 1993, the judge who had been handling the case, Claude Perasso, recused himself. (15 CSCT at 5390.) Later that month, the Judicial Council assigned Donald McCartin, a retired judge, to the case. (15 CSCT 5410.)

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[6] The motion was denied by the Orange County Superior Court in 1998. (20 OCT 6965.)

2. The venue-transfer proceedings: January 1994-September 1994

On January 21, 1994, Judge McCartin took the bench for the first time. (15 CSCT 5504.) Judge McCartin said that it appeared appropriate to grant the *Marsden* motion, but, because both parties agreed that the trial could not take place in Calaveras County, the venue change should precede the appointment of new counsel. (15 CSCT 5504.) Judge McCartin thus conditionally relieved Marovich and Webster, pending the appointment of new counsel after the venue change. (15 CSCT 5506; 7 CSRT 2148-2149, 2153, 2159.)

The Judicial Council subsequently informed the court that Orange County and Sacramento County were willing to accept the case on a venue transfer. (15 CSCT 5547-5548.) Because Judge McCartin was from Orange County, the Judicial Council assigned another judge, James Kleaver, to select the new venue. (15 CSCT 5571; 7 CSRT 2296-2297.)

On April 8, 1994, Judge McCartin held another hearing on appellant's *Harris* motion but declined to rule on it before the new venue was selected. (16 CSCT 5698, 5700; 7 Sealed CSRT 2211-2243.) Also that day, Judge Kleaver selected Orange County as the new venue. (16 CSCT 5703-5704.)

One month later, the defense filed a petition for writ of mandate in this Court, challenging the transfer to Orange County. (17 CSCT 5949-6009.) The next day, the defense filed a motion in CCSC to set aside the venue transfer. (16 CSCT 5743-5828.) Meanwhile, this Court transferred the petition for writ of mandate to the Court of Appeal. On May 19, 1994, the Court of Appeal denied the petition. (17 CSCT 6012-6013.) The defense then filed a petition for review. (18 CSCT 6363-6397.) On June 30, the CCSC denied the motion to set aside the venue transfer. (19 CSCT 6737.) On August 18, this Court denied appellant's petition for review. (10 CSCT 6759.)

On August 30, 1994, the defense filed a new petition for writ of mandate in this Court, again challenging the venue change. (20 CSCT 6778–6836; see 21 CSCT 7318.) This Court again transferred the petition to the Court of Appeal. (21 CSCT 7318.) On September 6, the CCSC ordered appellant transferred the Orange County Sheriff's custody. (21 CSCT 7319.) On September 9, the Court of Appeal denied the petition for writ of mandate. (21 CSCT 7323.) On September 19, the defense filed a petition for review, and on September 29, this Court denied review. (1 OCT 93-130.[7])

C. Proceedings in the Orange County Superior Court

1. From the case's arrival to the competency hearing: September 1994-April 1998

On September 30, 1994, the parties made their first appearance in Orange County, and the court denied appellant's motion to have the SFPD appointed as his counsel. (1 OCT 143-144; 1 RT 31-33.) Instead, the court appointed the Orange County Public Defender (OCPD). (1 OCT 144; 1 RT 33.) On October 5, the case was assigned to Judge Robert Fitzgerald. (1 OCT 146.)

On January 13, 1995, the defense filed a motion to transfer venue to San Francisco. (2 OCT 230-290; see also 2 OCT 562-569.) On March 24, 1995, the motion was denied. (1 RT 111; 3 OCT 822.)

On July 29, 1996, appellant made his 23rd *Marsden* motion. (6 Sealed OCT 2031-2032A.) On August 2, Judge Fitzgerald granted the motion, relieved the OCPD, and appointed Gary Pohlson and George Peters as counsel. (1 Sealed RT 142(3)-142(9); 6 OCT 2058.) On August 9,

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[7] The order denying review in that case, no. S042283, does not appear in the record. Under separate cover, respondent is filing a motion seeking judicial notice of the order.

appellant filed a motion to relieve Pohlson and Peters and reappoint the OCPD—in essence, his 24th *Marsden* motion. The court denied the motion. (7 Sealed OCT 2091-2098; 1 Sealed RT 156(8); 1 RT 158.)

Appellant challenged this decision in a petition for writ of mandate, and on February 14, 1997, the Court of Appeal granted the petition. The court held that Judge Fitzgerald had abused his discretion by granting appellant's *Marsden* motion and denying his motion to reinstate the OCPD. The Court of Appeal ordered the trial court to reinstate the OCPD and reassign the case to a different judge. (*Ng v. Superior Court* (1997) 52 Cal.App.4th 1010, 1015, 1023-1024.) On February 24, the case was reassigned to Judge John Ryan, who would preside over it until its conclusion. (7 OCT 2160.)

On April 22, 1997, the defense filed a motion to have the burglary charge and six of the murder charges transferred to San Francisco. (7 OCT 2403-2431.) The defense also filed a motion to have appellant's shackles removed. (7 OCT 2294-2368.) On May 9, the court denied the transfer motion. (8 OCT 2819-2820.) As to the shackling motion, the court found a manifest need for some restraint but ordered that appellant's shackles be removed while he was in court, and that he wear a stun belt instead. (8 OCT 2821.)

On May 27, 1997, appellant filed his 25th *Marsden* motion. (9 Sealed OCT 2927-2940.) On June 20, the court denied the motion. (2 Sealed RT 372.) The court also denied appellant's request for separate counsel to handle his *Marsden* claim. (2 Sealed RT 352.)

On August 13, 1997, appellant filed his 26th *Marsden* motion and again asked the court to appoint "conflict free" counsel to assist him with it. (9 Sealed OCT 3146-3171.) On September 9, appellant sent the court a letter elaborating on the *Marsden* motion. (10 Sealed OCT 3558-3566.) On September 10, defense counsel requested a jury trial on appellant's

mental competency. (11 Sealed OCT 3567-3621.) On September 12, the court commenced a hearing on appellant's latest *Harris* motion, in which he again sought Burt's appointment. (11 OCT 3632.) On October 10, the court agreed to appoint Burt as cocounsel if Burt and the presiding judge could agree on Burt's compensation. (11 OCT 3700-3701; 2 RT 402.) Appellant then withdrew his *Marsden* and *Harris* motions, and defense counsel withdrew their motion for a competency trial. (11 OCT 3701.)

On January 16, 1998, appellant filed a new *Marsden* motion—his 27th—and said he was reviving all related motions. (11 Sealed OCT 3787-3797.) The court held a hearing on the *Marsden* and *Harris* motions but did not rule on them. (11 OCT 3799-3800.) In addition, Burt announced that could not accept the appointment, because he was not satisfied with the compensation the court was offering. (2 RT 424; see 2 Sealed RT 443)

On January 23, 1998, the court "revived" the defense's motion for a competency trial. (11 OCT 3804-3805.) On February 3, the defense requested the appointment of separate counsel to represent appellant at the competency trial. (11 OCT 3807-3827; see also 11 OCT 3913-3935.) On February 6, the court denied appellant's most recent *Marsden* motion. (3 Sealed RT 478-479.) The court also refused to appoint separate counsel for the competency trial. (3 RT 501, 513.) Additionally, the court declared a doubt as to appellant's competency, suspended the criminal proceedings, and instituted competency proceedings under section 1368. (12 OCT 3969; 3 RT 518.) The court appointed two mental health experts to evaluate appellant. (3 RT 515-516, 522.)

On February 10, 1998, the Court of Appeal denied appellant's petition for writ of mandate concerning his request for separate counsel for the competency trial. (12 OCT 3973.) On February 19, appellant filed a petition for review from this ruling. (12 OCT 3989-4025.)

On February 23, 1998, the trial court received a letter from appellant, in which he made his 28th *Marsden* motion. (12 Sealed OCT 4029-4032.) Appellant reaffirmed the motion in a letter dated March 20. (18 Sealed OCT 6163-6164; see 18 OCT 6177.) On March 20, the court denied the motion. (18 OCT 6177.) On March 31, appellant filed a motion for self-representation under *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562]. (18 OCT 6444-6446.) On April 17, he made his 29th *Marsden* motion, which the court denied. (3 RT 615-616.) The court deferred ruling on the *Faretta* motion until it determined whether appellant was mentally competent. (3 RT 614; see *People v. Lightsey* (2012) 54 Cal.4th 668, 691-692 [defendant may not represent self at competency trial].)

The competency trial took place on April 20, 1998. The defense submitted without a jury trial, based on the experts' reports and the defense attorneys' own declarations. (3 RT 695-696; see 19 OCT 6535-6544.) Defense counsel argued that appellant was mentally incompetent. (3 RT 695-696.) The court, however, found appellant mentally competent and reinstated the criminal proceedings. (19 OCT 6548-6549; 3 RT 703.) Appellant then moved for self-representation. (3 RT 706.) The next day, the court denied the motion, finding that appellant did not truly want to represent himself, and that his real purpose was to obstruct justice and delay the proceedings. (19 OCT 6552; 3 RT 732-735, 739-740.)

2. From the competency hearing to trial: April 1998-September 1998

On May 8, 1998, appellant filed another *Faretta* motion. (19 OCT 6677-6702.) At the hearing, he requested advisory counsel and an investigative team not associated with the OCPD. The court denied the motion, again finding it was an obstruction of justice. (19 OCT 6703.)

On May 15, 1998, appellant filed yet another *Faretta* motion. (19 OCT 6706-6711.) This time, appellant said he was willing to accept anyone as his advisory counsel (19 OCT 6707; 4 RT 812, 814.) The court granted the motion and appointed the OCPD as advisory counsel and standby counsel. (4 RT 835-836; 19 OCT 6713.)

On May 26, 1998, the OCPD filed a motion to withdraw as advisory and standby counsel. (19 OCT 6719-6752.) On May 27, the court denied the motion. (19 OCT 6793-6796; 4 RT 930-931.) On June 8, appellant filed a motion to discharge the OCPD as advisory and standby counsel. (19 OCT 6799-6819.) On June 17, the court denied the motion. (20 OCT 6893; 4 RT 938, 949-950.)

On July 15, 1998, appellant filed a supplemental motion to dismiss the information under section 995, and the court denied both the supplemental motion and the original motion under section 995, which had been pending since 1993. (20 OCT 6955-6966; see 2 CSCT 590-782.)

On August 5, 1998, appellant filed a motion to continue the trial six months, to March 1, 1999. (20 OCT 7033-7055.) He also filed a motion to suppress evidence under section 1538.5, and a motion to transfer counts II through VII to San Francisco, or alternatively, to "import" a jury from there. (20 OCT 7003-7032, 7056-7132).

On August 19, 1998, appellant moved for a new competency trial under section 1368. He also asked for new counsel to represent him at the proceeding. (21 OCT 7500-7517.) Two days later, the court denied the motion. (22 OCT 7565-7566.) Additionally, the court found that appellant was using his self-representation to delay the trial, so the court terminated his self-representation and reappointed the OCPD. (22 OCT 7567-7568; 5 RT 1067-1069.) The court then denied appellant's motion to suppress evidence under section 1538.5 and his motion to change venue or "import" a jury from San Francisco. (22 OCT 7568-7572.)

On August 26, 1998, the defense moved for a six-month continuance. (23 OCT 7573-7641.) Two days later, the court denied the motion and instead granted a thirteen-day continuance. (25 OCT 8421.) Appellant also made his 30th *Marsden* motion, which the court denied. (5 RT 1297-1298.)

On September 10, 1998, the prosecution filed an amended notice of evidence in aggravation. (25 OCT 8441-8442.) In addition, the prosecution filed an amended information, charging appellant with 12 counts of first-degree murder, in violation of section 187, plus a multiple-murder special circumstance under section 190.2, subdivision (a)(3). The charges were as follows:

- Count 1 - Sean Dubs;
- Count 2 - Deborah Dubs;
- Count 3 - Harvey Dubs;
- Count 4 - Paul Cosner;
- Count 5 - Clifford Peranteau;
- Count 6 - Jeffrey Gerald;
- Count 7 - Michael Carroll;
- Count 8 - Kathleen Allen;
- Count 9 - Lonnie Bond, Sr.;
- Count 10 - Robin Scott Stapley;
- Count 11 - Lonnie Bond, Jr.; and
- Count 12 - Brenda O'Connor. (25 OCT 8443-8446.)

Appellant pled not guilty and denied the special-circumstance allegation. (25 OCT 8454.)

3. Trial: September 1998-May 1999

On September 14, 1998, the first panel of prospective jurors was sworn in, and jury selection began. (25 OCT 8459.) On September 15, appellant filed his 31st *Marsden* motion. (25 OCT 8473; 25 Sealed OCT

8461-8472.) On September 21, he filed a supplemental pleading in support of the *Marsden* motion. (25 OCT 8553-8558; 25 Sealed OCT 8506-8552, 8559-8589.) On the same day, the court denied the motion, finding that appellant was attempting to manufacture a conflict and create delay. (25 OCT 8591; 6 Sealed RT 1536-1537.)

On September 24, 1998, the defense filed a motion to exclude the out-of-court testimony of Maurice Laberge, a deceased informant. (26 OCT 8668-8693.) On October 8, the court denied the motion. (29 OCT 9761.) Also on October 8, appellant filed his 32nd *Marsden* motion, and the court denied it. (29 Sealed OCT 9747-9756; 7 Sealed RT 1624-1649; 29 OCT 9747-9756, 9758-9759.) The court also denied the defense's motion for new competency trial. (7 RT 1542-1544; 29 OCT 9758.) Additionally, the parties stipulated that motions in limine would be deemed to have been made during trial, and the court granted the defense's motion to deem certain defense objections made on federal constitutional grounds to also include state constitutional grounds. (29 OCT 9759; 7 RT 1565.)

On October 13, 1998, appellant made his 33rd *Marsden* motion, and the court denied it. (7 RT 1700-1701; 29 OCT 9777-9778.) On October 14, the defense filed a motion to remove appellant's stun belt. (31 OCT 10213-10256.) On October 20, the jury and six alternate jurors were sworn in. (31 OCT 10430-10431.) On October 26, the court denied the motion to remove the stun belt. (33 OCT 11117.) Also that day, the prosecution and defense gave their opening statements, and the prosecution began presenting evidence. (33 OCT 11120.)

On November 5, 1998, appellant made his 34th *Marsden* motion, and the court denied it. (34 OCT 11245-11246; 17 RT 3939-3947.) On November 17, the prosecution rested its case-in-chief. (34 OCT 11426; 20 RT 4948.) On November 24, the defense filed a motion for acquittal under section 1118.1 as to counts 1 through 7—the Dubs, Cosner, Peranteau,

Gerald, and Carroll charges. (34 OCT 11435-11450.) On November 30, the court denied the motion, and the defense began presenting evidence. (34 OCT 11499-11500.)

On January 25, 1999, appellant made his 35th *Marsden* motion, and the court denied it. (35 OCT 11900-11902, 11904; 29 RT 6950-6953.) Also that day, the defense rested—without appellant having taken the stand—and the prosecution presented its rebuttal case and began its opening argument. (35 OCT 11905-11906.)

The next day, January 26, the prosecution finished its opening argument. (35 OCT 11911-11912.) The following day, January 27, appellant filed a handwritten note in which he (1) "demanded" that the court reopen the defense case so he could testify, and (2) requested another *Marsden* hearing—his 36th. (35 OCT 11937-11938; 30 RT 7127-7128.) At the court's invitation, appellant wrote down the reasons for his *Marsden* motion. (30 RT 7129; 35 OCT 11940.) After he did so, the court held a hearing and denied the *Marsden* motion. (35 OCT 11940.) However, the court allowed the defense to reopen its case so appellant could testify. (35 OCT 11941; 30 RT 7152-7153.)

Appellant began testifying that day. He finished testifying six days later, on February 2. (35 OCT 11941, 11951.) After appellant completed his testimony, the court denied the defense's request to call two additional witnesses. The prosecution did not present any further rebuttal evidence. (35 OCT 11951.)

The prosecution then gave a new opening argument, the defense made its closing argument, and the prosecution gave a rebuttal argument. (35 OCT 11952, 11956-11958, 11987-11988.) On February 8, 1999, the arguments concluded and the jury began deliberating. (35 OCT 11987-11988.)

On February 22, 1999, the court held an in-camera hearing regarding potential juror misconduct but found no misconduct. (35 OCT 12015.) On February 23, the jury sent the court a note stating it was deadlocked on one count, which turned out to be count IV, the murder of Paul Cosner. (35 OCT 12018; 39 OCT 13203.) On February 24, after discussing the deadlock with the jury, the court declared a mistrial on that charge.[8] (36 OCT 12250-12251; 34 RT 8216-8228.)

Also that day, the jury returned its verdicts on the eleven remaining charges. As to each of those counts, the jury found appellant guilty as charged. Appellant was thus convicted of first-degree murder as to Sean Dubs (count I), Deborah Dubs (count II), Harvey Dubs (count III), Clifford Peranteau (count V), Jeffrey Gerald (count VI), Michael Carroll (count VII), Kathleen Allen (count VIII), Lonnie Bond, Sr. (count IX), Robin Scott Stapley (count X), Lonnie Bond, Jr. (count XI), and Brenda O'Connor (count XII). (36 OCT 12225-12235, 12251; 34 RT 8229-8232.) In addition, the jury found the multiple-murder special circumstance true. (36 OCT 12236; 34 RT 8232.)

On February 26, 1999, the defense filed a motion to strike certain allegations from prosecution's notice of evidence in aggravation, and a motion to preclude imposition of the death penalty. (36 OCT 12271–12281; 38 OCT 12422-12563.) On March 4, the court partially granted the motion to strike, but denied the motion to preclude imposition of the death penalty. (39 OCT 12846.) Also that day, the court learned that appellant had filed a malpractice lawsuit against the Orange County Public Defender. The lawsuit also named appellant's lead attorney and one other deputy public defender as codefendants. (34 RT 8270-8271.)

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[8] The foreperson later told the court that the jury was deadlocked seven to five. (36 OCT 12251; 34 RT 8244.)

On March 8, 1999, the penalty phase began. The prosecution gave its opening statement and began presenting evidence, and it completed its case-in-chief the following day. (39 OCT 12860-12861, 12865.) On April 12, the defense began presenting its case in mitigation. (39 OCT 12917.)

On April 14, the court held a hearing on allegations that jurors had spoken with a prosecution investigator outside the courtroom. (39 OCT 12948-12949.) The court found that the investigator and one juror had committed misconduct by speaking to each other outside the courtroom. (37 RT 8962, 8966.) The court dismissed the juror and replaced her with an alternate. The court also denied the defense's motion for a mistrial. (37 RT 8666-8967, 8984 , 9041-9043.)

On April 21, 1999, the defense rested. (39 OCT 13042.) On April 22, the prosecution presented its rebuttal case and gave its opening argument. (39 OCT 13053.) On April 26, the defense gave its closing argument, and the jury began deliberating. (39 OCT 13064.)

On April 30, 1999, while the court was in recess, a juror phoned the bailiff and reported that she had just received a phone call from someone purporting to be appellant. (40 RT 9910-9913.) When the proceedings resumed on May 3, the court held a hearing about the incident. After the juror was questioned, both parties agreed she should stay on the jury, and the court admonished her that there was no proof appellant really was the caller. (40 OCT 13233-13234.) Later that day, the jury returned a verdict of death. (40 OCT 13231, 13236.)

Subsequent investigation revealed that it was in fact appellant who called the juror at her home. (43 OCT 14314-14315, 14321-14322, 14327-14328.)

4. Post-trial motions

On June 3, 1999, appellant filed a handwritten, pro-per pleading that included both his 37th *Marsden* motion and a motion to disqualify Judge

Ryan. (41 OCT 13830-13854.) On June 14, the defense filed a motion for new trial and a motion to reduce the sentence to life without the possibility of parole (LWOP). (42 OCT 13857-14019.) On June 16, appellant filed a supplemental handwritten motion to disqualify Judge Ryan. (43 OCT 14267-14290.) On June 28, the court struck the statement of disqualification and the supplemental statement of disqualification. (44 OCT 14375-14377.) On June 30, appellant filed one more motion to disqualify Judge Ryan (57 OCT 19516-19530), and defense counsel filed a supplement to the motion for new trial (57 OCT 19531-19537).

On June 30, 1999, the court sentenced appellant to death. (57 OCT 19588, 19597-19599.) In addition, the court imposed a $10,000 restitution fine under section 1202.4. (57 OCT 19599.) The court also (1) struck appellant's supplemental request for disqualification as untimely (57 OCT 19590); (2) denied the defense's motion for new trial (57 OCT 19590); (3) denied the defense's motion to reduce the sentence to LWOP (57 OCT 19590-19596); (4) denied the defense's motion to strike the special circumstance (57 OCT 19596); and (5) denied appellant's 38th and final *Marsden* motion (57 OCT 19597). Additionally, the court dismissed count IV, the Cosner murder, pursuant to the prosecution's motion under section 1385. (57 OCT 19599.)

STATEMENT OF FACTS

> "You can cry and stuff like the rest of them, but it won't do you no good. We are pretty, ha, cold-hearted, so to speak."
> —Charles Ng to murder victim Brenda O'Connor

A. Overview

Between July 1984 and April 1985, the twelve victims in this case—a family of three, a woman and her boyfriend, three single men, and another family of three and their friend—disappeared in northern California. Their disappearances seemed unrelated until a shoplifting incident led to the

discovery of their fates and to the two individuals—appellant and Leonard Lake—who caused their deaths.

In July 1984, Harvey Dubs, Deborah Dubs, and their son Sean disappeared from their San Francisco apartment. About three months later, in early November, Paul Cosner disappeared from San Francisco after going out to sell a used car. Two months after that, in January 1985, Clifford Peranteau failed to show up for his job at Dennis Moving, a San Francisco moving company, and was never seen again. A month later, in February, Jeffrey Gerald, who also worked for Dennis Moving, disappeared after telling his roommate that he was going out to do a "side job" of moving. The following April, Kathleen Allen disappeared after riding off with a stranger who was supposed to take her to Lake Tahoe to meet up with her boyfriend, Michael Carroll. Carroll also disappeared. Later that month, Lonnie Bond, Brenda O'Connor, and their son Lonnie Bond, Jr., disappeared from their home in the rural mountain community of Wilseyville. Their friend Scott Stapley also disappeared.

The victims' whereabouts remained unknown until June 1985. On June 2, appellant was spotted shoplifting at a hardware store in South San Francisco. He managed to abscond, but his cohort Leonard Lake was arrested for possessing an illegal weapon in the car that he and appellant were using. After Lake was brought to the police station, he committed suicide by taking a cyanide pill.

The car that appellant and Lake were using belonged to Paul Cosner, whose disappearance the police had been investigating. The discovery of Cosner's car and its contents soon led the police to a property in Wilseyville where Lake had been living. When the police entered the house, they unexpectedly found some equipment belonging to the Dubs family, whose disappearance they had also been investigating.

A major investigation commenced at the Wilseyville property. The discoveries there included

- thousands of human bone and tooth fragments;
- the bodies of three men (whose deaths appellant was not charged with);
- a bunker containing a hidden prison cell;
- property and documents belonging to many of the charged victims;
- a videotape—labeled "M-Ladies"—that showed appellant and Lake holding victims Kathleen Allen and Brenda O'Connor captive, admitting that there had been previous victims, and forcing Allen and O'Connor to choose between serving as sex slaves and being killed.

In addition, the bodies of Lonnie Bond and Scott Stapley—both shot in the head—were found near the Wilseyville property. A month after Lake's arrest, appellant was arrested in Canada.

There was abundant evidence implicating appellant in each of the charged murders. For example, he was observed coming out of the Dubs' apartment on the day they disappeared, near the time they were last heard from, and he appeared there again two days later. Both times, he was removing things from the apartment. When the police searched appellant's apartment, they found property belonging to the Dubs family and a map with their street circled.

Paul Cosner's glasses and driver's license were found buried near the Wilseyville property, in a container that also held a .22-caliber gun and some .22-caliber bullets. The bullets had an unusual manufacturer's marking, but the police found identical bullets in appellant's apartment. There were also two .22-caliber bullets lodged in Cosner's car. Trajectory

analysis indicated they were most likely fired from the back seat to the front-passenger area.

Appellant worked with Clifford Peranteau and was the only link between Peranteau and the Wilseyville property. Peranteau's belongings were found at the Wilseyville property, at appellant's apartment, and at appellant's hideout in Canada. Before Peranteau disappeared, appellant had invited him to a marijuana plantation in the mountains. After Peranteau disappeared, his employer, the Dennis Moving Company, received a forged letter, purportedly from Peranteau, asking that his paycheck be sent to a post office box near Wilseyville. Additionally, another Dennis Moving employee received a forged letter asking that Peranteau's winnings from the company's Super Bowl betting pool be sent to the same post office box. Both letters had been typed at the Wilseyville residence, and the letter about Peranteau's Super Bowl winnings was based on information Peranteau could not have known about when he disappeared, but appellant would have learned about later.

Appellant also worked with Jeffrey Gerald at Dennis Moving, and, as with Peranteau, appellant was the only link between Gerald and the Wilseyville property. Some of Gerald's belongings were found at the Wilseyville property. Before Gerald's disappearance, appellant had called his home numerous times, including twice on the day he disappeared. On that day, Gerald told his roommate that he was going off to do a "side job" of moving with appellant.

Michael Carroll's possessions were also found at the Wilseyville property. Appellant had called Carroll at his home sometime before Carroll disappeared. In the M-Ladies video, Kathleen Allen was told that appellant and Lake had been with Carroll the previous day and had subsequently buried his body. Allen was also told that she must help appellant and Lake gain access to Carroll's money and possessions and disseminate a story to

cover up his murder. Appellant later helped facilitate the sale of Carroll's car.

Allen appeared in the M-Ladies video as a captive of appellant and Lake. She was told she must agree to serve as their sex slave or they would shoot her and bury her in the same place they had buried Carroll. They forced her to strip naked and take a shower with appellant. In another scene, she gave appellant a massage, wearing only torn panties, while he lay naked on a bed. Her identification and other documents were found at the Wilseyville property.

Brenda O'Connor, Lonnie Bond (Bond), and their son Lonnie Bond, Jr. (Lonnie Jr.) lived next door to the Wilseyville residence. Scott Stapley was Bond's friend. Stapley was last seen alive on April 19, 1985, when he was about to drive O'Connor and Lonnie Jr. back to Wilseyville from San Diego. Five days later, appellant and Lake appeared in San Diego at the apartment that Stapley and his girlfriend had shared. They were driving Stapley's truck, and Lake told Stapley's girlfriend that Stapley, Bond, O'Connor, and Lonnie Jr. were all dead.

Like Allen, O'Connor appeared in the M-Ladies video as appellant and Lake's captive and was told that she must serve as their sex slave or be killed. She was also told that appellant and Lake had taken Bond and Stapley away, and that Lonnie Jr. was going to be given to another family. Appellant cut off O'Connor's T-shirt and bra with a knife, and he told her that she could "cry . . . like the rest of them," but it would not do her any good, because he and Lake were "pretty . . . cold hearted, so to speak." As with Allen, appellant and Lake forced O'Connor to strip naked and take a shower with appellant.

As noted earlier, the bodies of Bond and Stapley were discovered near the Wilseyville property. They were stacked on top of one another and stuffed in sleeping bags, with their hands and feet bound and ball gags

around their necks. Some of Stapley's belongings were found at the Wilseyville property, and his camera was found at appellant's hideout in Canada. Bond's bank card was found in appellant's apartment.

While appellant was imprisoned in Canada after his arrest, he created several cartoon drawings that incriminated him in the murders. One of the cartoons showed appellant in a San Quentin Prison cell decorated with pictures of the victims, together with the slogans "'no kill no thrill!" and "no gun no fun." Another cartoon showed Lake whipping Kathleen Allen while appellant ate a bowl of rice. Another showed appellant and Lake burning a body, while another made light of the fact that most of the victims' remains were never identified.

The defense presented extensive evidence to show that Lake could have committed the murders by himself. This evidence included Lake's role in several murders that appellant was not charged with, his preoccupation with photographing women, his plan to build a bunker for imprisoning a female sex slave, his domineering relationship with appellant, and his dislike of the Bond/O'Connor family. The defense also presented expert testimony criticizing the investigation and suggesting that DNA could have been extracted from some of the bone fragments recovered at the Wilseyville property.

Appellant took the stand after the defense had initially rested and the prosecution had given its opening argument. He denied any involvement in the murders. He admitted removing things from the Dubs' apartment two days after they disappeared but denied being there any other time. He admitted holding Allen and O'Connor captive, as shown in the M-Ladies video, but denied having sex with them or knowing that Lake intended to kill them. He admitted helping Lake bury Stapley and Bond but denied any role in their deaths. And he asserted that the cartoons from Canada were meant to satirize the charges and the investigation.

B. Prosecution Evidence at the Guilt Phase

1. Appellant's flight, the discovery of the murders, and the investigation in Wilseyville

a. The shoplifting and Lake's arrest in South San Francisco

On June 2, 1985, appellant shoplifted a vise from South City Lumber, a hardware store in South San Francisco. A customer, John Kallas, saw the theft and alerted the store's staff. Kallas, who was a reserve police officer, walked to the parking lot with a sales clerk and heard a car door slam. (12 RT 2976-2979, 2980-2981, 3032, 3038-3039.) Kallas looked to his right and saw appellant standing next to a Honda Prelude. (12 RT 2981-2983, 3000-3001; 13 RT 3074.) Appellant started walking out of the parking lot. The sales clerk asked appellant to stop, but appellant continued walking away. (12 RT 2983-2984.)

The Prelude's trunk door was ajar, so the sales clerk opened it. The stolen vise was inside. (12 RT 2985.) Kallas called the police. He was then approached by Leonard Lake, who offered to pay for the vise. Kallas told Lake that he should speak with the store's employees. (12 RT 2985-2987, 3023.)

A police officer arrived at the store and inspected the Prelude's trunk. He discovered a semiautomatic gun and a silencer inside. (12 RT 2992-2994, 2999-3000, 3003-3004.) The officer relayed the Prelude's license number to his department and learned that it was registered to Lonnie Bond. (12 RT 3002.)

Lake approached the officer and identified himself as R. Scott Stapley. He told the office that he "taken care" of the bill for the vise that his friend had taken. (12 RT 3006-3007.) He handed the officer a driver's license. It belonged to R. Scott Stapley. (12 RT 3007-3009.) Lake also told the

officer that the Prelude belonged to Lonnie Bond, who was "up north" and did not have a telephone. (12 RT 3008-3009.)

The officer arrested Lake for possessing a gun with a silencer. (12 RT 3010.) After being taken to the police station, Lake ingested cyanide and started convulsing. He died a few days later. (12 RT 3027-3028; 18 RT 4513-4514.) Before going into convulsions, he wrote a note to "Lyn" that stated, in part, "I love you. I forgive you. Freedom is better than all else. Tell Fern I'm sorry . . . . I'm sorry for all the trouble."[9] (Def. Exh. A; 12 RT 3035-3036.)

The police checked the Prelude's vehicle identification number and learned that the car was associated with a missing person, Paul Cosner. (12 RT 3013-3014; 13 RT 3074-3075.) That evening, the South San Francisco Police Department turned the vehicle over to Inspector Irene Brunn of the San Francisco Police Department. Brunn worked in the missing persons unit and had been investigating Cosner's disappearance. (12 RT 3014-3015, 3064, 3070-3071, 3074-3075.) Brunn found a PG&E bill inside the Prelude. It was addressed to Lake's former wife, Claralyn Balazs. (13 RT 3075-3076.) The bill's envelope listed an address in Wilseyville, a town in Calaveras County, located about three hours from San Francisco. (13 RT 3075, 3209, 3187.)

b. The discoveries at the Wilseyville property: the remains, the bunker, and the M-Ladies video

Inspector Brunn wanted to go to the Wilseyville address to search for appellant. (13 RT 3076-3077.) On the day after the shoplifting, she spoke with Balazs, who owned the Wilseyville property, and they agreed to meet there the next day. (13 RT 3076-3077, 3119; 18 RT 4528.)

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[9] Fern Eberling was Lake's sister. (18 RT 4512-4513.)

As planned, Inspector Brunn and another detective met with Balazs at the Wilseyville property. (13 RT 3076-3077, 3084-3085.) When Brunn entered the living room, she noticed two pieces of equipment that seemed connected with another—supposedly unrelated—case that she had been investigating: the disappearance of the Dubs family from their San Francisco apartment the previous July. (13 RT 3064-3066, 3077-3078.) Specifically, she saw a generator and a VCR that looked identical to equipment that was missing from the Dubs' home. (13 RT 3077-3078.) The generator's serial number had been removed, but Brunn checked the VCR's serial number and confirmed that the VCR indeed belonged to the Dubs family. (13 RT 3078.)

At that point, Balazs told Inspector Brunn and her partner that they had been there long enough, so the detectives secured the premises and obtained a search warrant. (13 RT 3121-3122.)

The authorities then began a major investigation at the Wilseyville property. Four separate law enforcement agencies participated. (13 RT 3126-3127.) Buried in the yard, the investigators discovered thousands of bone and tooth fragments. The fragments came from at least six people, including four adults, a child, and an infant. (17 RT 4166-4168; 18 RT 4403-4407; 19 RT 4598, 4602-4603, 4607.) All the fragments had been burnt. (17 RT 4166, 4168.) In addition to the bones and teeth, the investigators found a child's liver buried at the property. (17 RT 4232.)

The investigators also found three bodies buried in the yard. They identified two of the victims as Maurice Rock and Randy Jacobson. The third body, also a male, was never identified. (13 RT 3130-3132; 17 RT 4238-4239.) Years later, another body, Charles Gunnar, was also discovered under the yard. (17 RT 4169-4170, 4238-4239.) In addition,

based on DNA testing, prosecution experts opined that some of the remains at the property belonged to Sheryl Okoro.[10] (15 RT 3651.)

The investigators also found a videotape buried at the property. It bore the title of "M Ladies, Kathi, Brenda." (13 RT 3137-3138.) In the video's first scene, a young woman—later identified as murder victim Kathleen Allen—sits shackled in a chair and is told by two men—later identified as appellant and Lake—that she must agree to cook, clean, and "fuck" for them, or they will shoot her and bury her in the same place they had buried her boyfriend. Allen agrees to cooperate, is forced to strip naked, and goes off to take a shower with appellant. In the next scene, Allen, dressed only in panties, massages appellant while he lies naked on a bed and fondles her buttocks with his foot. In the last scene with Allen, Lake tells her that he knows she has been trying to beat down her door, and he threatens to whip her if she does it again. He then takes photographs of her.[11] (Peo. Exh. 22-A [Exh. 22-A]; 58 OCT 19666-19677; 13 RT 3143; 15 RT 3670-3671; 16 RT 3759.)

The next scene begins with another young woman—later identified as murder victim Brenda O'Connor—sitting with her hands bound, in the same chair where Allen had sat. Lake tells O'Connor that he and appellant hate her, and she must work, clean, and "fuck" for them, or they will rape her and shoot her. Lake also tells her that "Lonnie" and "Scott" have been taken away. O'Connor repeatedly pleads for her baby. Appellant slices off O'Connor's T-shirt and bra and tells her that she's "totally ours," and that

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[10] Appellant was not charged with killing Rock, Jacobson, Gunnar, Okoro, or the unidentified male. (25 OCT 8443-8446; 13 RT 3130-3131.)

[11] The videotape was played for the jury, and the jury received a transcript of it. (13 RT 3138-3140.) The videotape and transcript were admitted into evidence as People's Exhibits 22-A and 22-B. (28 RT 6819-6820.) Respondent will summarize the videotape in greater detail below.

"[y]ou can cry and stuff like the rest of them, but it won't do you no good. We are pretty, ha, cold-hearted, so to speak." Eventually, O'Connor strips naked and goes to take a shower with appellant, who tells her that it's a "house rule" that she be clean before he and Lake "fuck" her. (Exh. 22-A; 58 OCT 19677-19692; 13 RT 3143; see 17 RT 4091-4092.)

Besides the house, there was also a bunker on the Wilseyville property. (13 RT 3133.) Its front room contained a hidden doorway, which led to two more rooms in the back. (13 RT 3134.) One of those rooms contained a bed, dresser, desk, and some food. (13 RT 3134-3135.) The other room—the "cell"—measured about six and one-half feet long by three and one-half feet wide. Its door could only be opened from the outside. (13 RT 3134-3136.) It also had a small square opening containing a two-way mirror, so a person could look in but not out. (13 RT 3136-3137.) Inside the cell were a plastic bucket, a roll of toilet paper, and something that appeared to be a bed, consisting of a platform and a foam pad. (13 RT 3135-3136.) The cell's only illumination came from a light that plugged into a wall outlet. Without it, the cell was pitch-black. (13 RT 3135.)

c. The search of appellant's apartment

On June 7, five days after appellant fled from South City Lumber, the police searched his apartment in San Francisco. (16 RT 3885; 17 RT 3952-3953, 3956-3957.) Among the items they found were two boxes of .22-caliber ammunition (16 RT 3895-3896, 3901); a pamphlet about how to make a silencer for a .22-caliber gun (16 RT 3902-3903); an envelope addressed to appellant at Ft. Leavenworth, Kansas, with a forwarding address to Claralyn Balazs's address (13 RT 3085; 16 RT 3916-3918); photos of the bunker being constructed, including the hidden section (13 RT 3230-3236; 16 RT 3903-3905); and photos of cinderblocks and a foundation, with an address of Ft. Leavenworth, Kansas written on the back.

(16 RT 3904-3905). Additionally, the police found items belonging to murder victims Lonnie Bond, Clifford Peranteau, and the Dubs family, as well as a map of San Francisco, on which the Dubs' small street had been circled. (13 RT 3065-3066; 16 RT 3875, 3888-3890.)

d. Appellant's capture

In late June of 1985, 14-year-old Ronald Finlaison was riding his bicycle at Fish Creek Park in Calgary, Canada, when he came upon a small lean-to, which was located behind some bushes. (19 RT 4561, 4578-4582.) An Asian man was lying inside. (19 RT 4561, 4578-4583.) The man said he was tired and asked Finlaison to leave. Finlaison complied. (19 RT 4583.) Finlaison had seen a photo of appellant and made a connection between him and the man, so he told his parents about it. (19 RT 4584.)

On July 6, the Calgary police encountered appellant and seized a number of items from him, including a .22-caliber handgun that had previously belonged to Lake. They also seized some .22-caliber ammunition and a pair of handcuffs with a key.[12] (18 RT 4513, 4523-4527; 19 RT 4587, 4591-4592.)

The day after the police seized these items, Finlaison showed them the place where he had seen the Asian man camping. (19 RT 4562-4563.) The lean-to was still there, and a sleeping bag was nearby, concealed by some shrubbery. (19 RT 4564-4566.) Under the sleeping bag were some wooden planks, which covered a dugout that was large enough for a person to occupy. (19 RT 4566-4568.) The dugout contained some camping equipment, a camera belonging to murder victim Scott Stapley, and a towel

[12] The guilt-phase evidence did not include a description of appellant's arrest, though the penalty-phase evidence did. (34 RT 8336-8346, 8354-8372.)

from murder victim Clifford Peranteau's apartment. (16 RT 3866-3867; 18 RT 4497-4500; 19 RT 4568-4571, 4594.)

e. The discovery of Bond's and Stapley's bodies

The next day, July 8, back in Calaveras County, police officers were patrolling a dirt road about a quarter of a mile from the Wilseyville property when they noticed some tufts of material and cloth scattered on the ground. (13 RT 3198, 3200-3201, 3203.) Some of the material looked like insulation from a sleeping bag. It appeared that animals had dug it up, along with some bone. (13 RT 3199, 3201-3202.)

The investigators began excavating and discovered a shallow grave containing the bodies of Lonnie Bond and Scott Stapley. (13 RT 3199, 3202; 17 RT 4170-4171, 4223; 19 RT 4736-4739.) The bodies were in separate sleeping bags, one on top of the other. (13 RT 3203; 17 RT 4170.) There was a plastic bag around Bond's head. There were also plastic bags around Stapley's head, shoulders, and part of his torso. (17 RT 4173, 4179.) Stapley had been shot in the forehead and front teeth, and also near his collar bone. (17 RT 4182-4183.) His hands and ankles were bound with duct tape. (17 RT 4179-4181.) A leather strap with a ball gag was wrapped around his neck. (17 RT 4181.)

Bond had been shot once in the head. (17 RT 4175-4177.) His wrists were handcuffed together, his ankles were bound by a rope, and a cord with a ball gag was tied around his neck. (17 RT 4172-4176.) The handcuffs were later unlocked using a key found in Paul Cosner's Honda Prelude. It was on the same key ring as the ignition key. (18 RT 4362-4367.)

2. Harvey, Deborah, and Sean Dubs: Counts I-III

a. The disappearance

In July 1984, Harvey Dubs, his wife Deborah, and their 16-month-old son Sean were living in an apartment on Yukon Street in San Francisco.

(13 RT 3065-3066, 3393-3394; 14 RT 3403, 3418.) Yukon Street was essentially a narrow alley, about ten feet wide, consisting of some small cottages and houses. (13 RT 3066; 14 RT 3410, 3414.) The Dubs' apartment building had five units. (14 RT 3418.) A stairway led to the Dubs' doorway. It was the only way to enter their unit and did not serve any of the other units. (14 RT 3419, 3492-3493.)

Harvey Dubs worked at Petrov Graphic Types World, which was located about 15 minutes from the Dubs' apartment. (14 RT 3392-3393, 3400; 15 RT 3570-3571.) In addition to this job, Harvey had recently started a new business videotaping events, which he ran from his home. (14 RT 3405.)

On July 25, 1984, Harvey left work at about 5:00 p.m., which was earlier than usual. (15 RT 3575; see 13 RT 3066-3067; 14 RT 3395.) He told a coworker, Lauren Bradbury, that he was leaving early to meet someone at his house who would be buying some video equipment from him. He had listed the equipment in a newspaper ad. (15 RT 3570, 3575-3576, 3578.) Deborah picked him up from work, and Sean was in the car with her. (15 RT 3576.)

At about 5:45 that evening, Deborah was having a phone conversation with her friend Karen Tuck. (14 RT 3402-3404, 3407.) They were close friends—they had grown up together and they spoke frequently. (14 RT 3402-3403.) During the conversation, Deborah said she was expecting someone to come to the apartment in connection with Harvey's new video business. (14 RT 3404-3405.) While they were still talking, Deborah had to answer the door, so they ended the conversation.[13] (14 RT 3405.)

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[13] Tuck did not think Harvey was home yet, because Deborah had to answer the door. (14 RT 3407.)

Dorice Murphy lived across the street from the Dubs family. (14 RT 3409-3410.) At about 5:45 that evening, she saw an Asian man walking down the steps from the Dubs' apartment. (14 RT 3413-3414.) He was carrying an oblong suitcase, and it looked like he was straining to carry it. (14 RT 3414, 3435, 3450.) He loaded the suitcase into a beige Volkswagen Rabbit that had backed up onto Yukon Street. Another man had already come out of the driver's side and opened the trunk. (14 RT 3414, 3450; 18 RT 4509.) They then drove away. (14 RT 3441.)

The next day, Tuck phoned Deborah, but Deborah did not answer. (14 RT 3405.) In addition, Harvey failed show up for work and did not phone his boss, Stan Petrov, to report his absence. (14 RT 3392-3394.) This was "totally out of character" for Harvey, who was very conscientious and always informed Petrov when something was going to disrupt his work day. (14 RT 3394-3395.)

Someone else, however, did contact the company about Harvey's absence: A man identifying himself as "James Bright" phoned the firm that morning and reported that Harvey had gone to Washington State for a family emergency and would not be at work. (15 RT 3570-3573, 3576.) Lauren Bradbury, who had seen Harvey leave work the previous evening, answered the call. She thought the caller's statement was odd, because it would be out of character for Harvey to leave the company "stranded," and also because Harvey was an orphan from New York with no relatives, and Deborah was from the Bay Area. (15 RT 3573, 3579.)

Because the caller was saying dubious things, Bradbury tried to keep him on the line by asking a lot of questions. The caller became irritated, and when Bradbury asked for his phone number, he said he had no phone and hung up. (15 RT 3574.) Based on the background noise, it sounded like he was using a pay phone. (15 RT 3581.)

That evening, Deborah's father filed a missing persons report with the police. (13 RT 3064-3065, 3114.)

The next morning at about 11:30, Barbara Speaker, who lived directly under the Dubs' apartment, heard someone walking there. (14 RT 3489-3491.) She stepped outside and saw appellant closing the Dubs' front door.[14] Appellant left the keys in the door and descended the stairs. He saw Speaker and seemed startled. (14 RT 3491-3493.) He was carrying a flight bag and a duffel bag that were full and looked heavy. (14 RT 3497.)

Speaker knew the Dubs family was missing, and she said, "excuse me" to appellant as he was walking away. (14 RT 3491, 3494-3495.) Appellant kept walking, and Speaker said "excuse me" again. Appellant turned and looked at Speaker. She started asking if he was a friend of the Dubs family, but she froze in mid sentence. (14 RT 3495.) When appellant reached the end of Yukon Street, a Volkswagen Rabbit—which appeared to be the Dubs' car—came around the corner very fast and pulled over, and appellant jumped in. (14 RT 3495-3496.) The driver—later identified as Lake—was a Caucasian male with a full beard. (14 RT 3496-3497; see 30 RT 7249.)

About half an hour later, Karen Tuck's husband, George Tuck, came to the Dubs' apartment to see if he could find out anything. (14 RT 3453-3454.) He found a key stuck in the front door lock. It was attached to Deborah Dubs's key ring. (14 RT 3455-3456.) Tuck went inside and saw dishes and soapy water in the sink. The water looked like it had been "sitting there." A salt shaker had been knocked over. (14 RT 3456-3457.)

In Harvey and Deborah's bedroom, Tuck noticed some empty space on a shelf where Harvey had kept his cassette tapes and VCR's. Based on

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[14] It was undisputed that appellant was the man Speaker saw: He admitted it during his own testimony. (30 RT 7242-7243, 7406.)

the lack of dust, it looked like something had been removed. (14 RT 3457.) A VCR and some cassette tapes were missing. (14 RT 3458; 18 RT 4504-4505.)

That night, as Barbara Speaker was arriving home, she saw, through the Dubs' window, a man in their living room. (14 RT 3497-3498.) After entering her own apartment, she heard footsteps coming from the Dubs' apartment. (14 RT 3497.) She looked out her window and saw the man walking down the steps from the Dubs' apartment, carrying something large. He looked like the man she had seen picking up appellant in the Dubs' car earlier that day. (14 RT 3498.)

The Dubs family was never seen or heard from again. (13 RT 3066-3067; 14 RT 3395; 14 RT 3406, 3458; 15 RT 3575.) A week after they disappeared, their car was discovered in a parking lot at San Francisco International Airport. (13 RT 3069.) Their disappearance received extensive media coverage, but the police knew nothing about their fate until the following June, when Inspector Brunn discovered their property inside the Wilseyville residence. (13 RT 3070.)

b. The investigation

A few days after that discovery, Dorice Murphy examined a photo lineup and identified appellant as the man she had seen coming out of the Dubs' apartment on the day they disappeared. (14 RT 3420-3421; 18 RT 4479-4482.) Barbara Speaker likewise identified appellant from a photo lineup as the man she had seen coming out of the Dubs' apartment. (14 RT 3500-3502; 18 RT 4482-4484.)

During the excavations at the Wilseyville property, the investigators found a receipt from a video store issued to Harvey Dubs. It was dated July 24, 1985—the day before the family disappeared. (13 RT 3179.) They found it in a plastic bag, which also contained two items addressed to

appellant: an envelope postmarked the same day—July 24, 1985—and a letter dated two weeks earlier. (13 RT 3179-3181; 20 RT 4749-4750.)

During the search of appellant's apartment, the police found two videotapes labeled in Harvey Dubs's handwriting. (13 RT 3068-3069; 14 RT 3396-3397; 16 RT 3885, 3889-3891; 17 RT 3956-3957; 18 RT 4504; 19 RT 4950; 20 RT 4886-4888.) They also found two additional videotapes whose titles matched the titles on a list that Harvey had made of his videotapes. (13 RT 3068-3069, 3124; 14 RT 3396-3397; 20 RT 4487; Peo. Exhs. 10-A, 10-B.) Additionally, they found a VCR whose serial number had been removed. It was the same brand, GE, as a VCR that was missing from the Dubs' apartment. (17 RT 3952; 18 RT 4504-4505.) Finally, they found a map of San Francisco, on which someone had circled Yukon Street, where the Dubs family lived. (16 RT 3889-3890.)

3. Paul Cosner: Count IV[15]

a. The disappearance

Like the Dubs family, Paul Cosner lived in San Francisco. (17 RT 4035-4036; 18 RT 4349.) On November 2, 1984, he spoke with his sister, Sharon Sellito, and made plans to meet with her the next morning. (18 RT 4347-4348.) He also spoke with his girlfriend, Marilyn Namba, at about 7:00 that evening and made plans to meet approximately an hour later to watch a movie on television. (17 RT 4035-4037.)

During Cosner's conversation with Namba, he seemed rushed. He was selling a car that evening and said he was going out to deliver it to the buyer. (17 RT 4037.) The car he was selling, a Honda Prelude, was the same vehicle that appellant and Lake were using seven months later, when

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[15] As noted earlier, the jury failed to reach a verdict on this count. (36 OCT 12250-12251; 34 RT 8228, 8244)

appellant shoplifted the vise at South City Lumber and Lake was arrested. (12 RT 2981-2982; 2999-3005, 3009-3010; 17 RT 4038-4039.)

Cosner failed to show up for his date with Namba and did not call her. (17 RT 4039.) He also failed to show up for his meeting with Sellito the next morning. (18 RT 4348-4349.) Neither Namba nor Sellito ever heard from him again. (17 RT 4039-4040; 18 RT 4350-4351.)

b. The investigation

Cosner's whereabouts remained a mystery until his Prelude was discovered seven months later at South City Lumber. (13 RT 3073.) The police inspected the car and found two bullet holes inside: one in the front passenger-side door, above the speaker, and another in the headliner, above the passenger side of the windshield. (17 RT 4129-4131.) A .22-caliber bullet was recovered from each hole. (17 RT 4131.) The hole in the headliner was located behind the sun visor and would be concealed if the sun visor was in the "up" position. The passenger-side sun visor was a replacement, not an original part. (17 RT 4130.)

During the investigation, the police discovered a sun visor buried at the Wilseyville property. (17 RT 4161.) It contained an apparent bullet hole. (17 RT 4131-4132.) When the visor was installed in the passenger side of Cosner's car, its bullet hole lined up with the bullet hole in the headliner. (17 RT 4132-4133.) A trajectory analysis indicated that this bullet was fired from behind, most likely from the back seat, above the headrest. (17 RT 4134-4135.) In theory, it also could have been fired from the front seat, but it would have been awkward to hold a gun at that angle. (17 RT 4135.)

Trajectory analysis further indicated that, assuming the front-passenger door were closed, the bullet in that door was also fired from the back, behind the front-passenger seat. If the door were open and the car

were stationary, the shot could have come from anywhere on the right side. (17 RT 4135-4136.)

The investigators found some of Cosner's personal items buried in a plastic container about two miles from the Wilseyville property. (13 RT 3203-3204.) Inside the container was an envelope with "Cosner" written on it. (13 RT 3205.) The return address on the envelope was the Philo Motel, where Lake had once worked as the manager. (13 RT 3205; 15 RT 3652.) The envelope contained various items belonging to Cosner, including his glasses, driver's license, telephone calling card, Automobile Club card, and fishing license. It also contained the pink slip for a Honda. (13 RT 3205-3208; 15 RT 3686-3687.)

In the same container, the police also found a .22-caliber gun, a silencer that fit the gun, and a clip containing twelve .22-caliber bullets. (13 RT 3226-3228; Peo. Exhs. 82-A-82-D.) Some of the bullets were stamped with two interlocking rings. A firearms expert, Richard Gryzbowski, testified that he had never seen this kind of bullet before. (13 RT 3229; 17 RT 4128, 4137-4138.) The police, however, found a box containing the same type of bullets—with interlocking rings—when they searched appellant's apartment. (16 RT 3895, 3901-3902; 17 RT 4136-4137.) They also found a pamphlet describing how to make a silencer for a .22-caliber gun. (16 RT 3902-3903.)

Appellant was not at work on the day Cosner disappeared. (16 RT 3744.)

4. Clifford Peranteau: Count V

a. The disappearance

Clifford Peranteau worked with appellant at the Dennis Moving Company, a San Francisco firm specializing in office moves. They were in

the same crew and regularly worked together. (13 RT 3290-3292; 16 RT 3877-3878.)

Hector Salcedo also worked at Dennis Moving and was Peranteau's friend. Peranteau once told Salcedo that appellant had offered to take him to the hills to harvest marijuana. (17 RT 3978-3979, 4007-4008.) Sometime afterward, in December 1984 or January 1985, appellant came to Peranteau's San Francisco apartment while Peranteau and Salcedo were relaxing after work. He showed them a bag of marijuana and told them that his friend had a marijuana plantation "a couple [of] hours away in the hills," and if Peranteau and Salcedo went there to help him, they could take home some marijuana for themselves. (17 RT 3981-3982, 3988-3989.) Peranteau and Salcedo sometimes used marijuana, though not that day. (17 RT 3996.)

January 18, 1985, was the Friday before the Super Bowl. That night, Peranteau and Salcedo went out and drank beer in celebration of the San Francisco 49ers' appearance in the upcoming game. (17 RT 3980-3981; see 16 RT 3744-3746.) At about midnight or 1:00 a.m., Salcedo dropped off Peranteau at Peranteau's apartment. (17 RT 3981.) They were both scheduled to work the next day, so they said "I will see you tomorrow" to each other. (17 RT 3982.)

The next day, however, Peranteau failed to appear for work. (16 RT 3746; 17 RT 3980-3983.) Salcedo repeatedly phoned him, but no one answered. (17 RT 3983.) After Salcedo finished work, he went to Peranteau's apartment, but no one answered the door.[16] (17 RT 3983-3984.) Peranteau had planned to attend a Super Bowl party the next day at the home of Kenneth Bruce, another Dennis Moving employee, but he failed to show up or tell Bruce that he was not coming. (16 RT 3847-3848, 3856.)

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[16] Appellant worked for four hours that day. (16 RT 3746.)

Neither Bruce nor Salcedo ever heard from Peranteau again. (16 RT 3856; 17 RT 3985.)

During the week after Peranteau disappeared, Salcedo checked Peranteau's apartment again and saw that his motorcycle was missing. (17 RT 3985.) It had been there the previous time Salcedo checked the apartment. (17 RT 4004.)

Peranteau had lived with his girlfriend, Cynthia Tanner, until December 1984, when they broke up. (16 RT 3858-3859.) After Peranteau was reported missing, Tanner went into his apartment and observed that most of its contents were gone. (16 RT 3860.)

Also after Peranteau disappeared, Dennis Goza, the owner of Dennis Moving, received a letter—purportedly from Peranteau—that sought to explain his absence. (13 RT 3295-3296; 16 RT 3733-3734, 3748-3749.) The letter stated:

> Dennis: Sorry to leave on such short notice but a new job, place to live, and a honey all came together at once. Please send my check for the last three days I worked and my W-2 to my new address below. Thanks, Cliff.

(13 RT 3296, 3302; 16 RT 3749.)

An address was listed beneath Peranteau's signature. It was a post office box in Mokelumne Hill, a town about 20 miles from Wilseyville. (13 RT 3209, 3296-3297; 16 RT 3749.) The letter was typed, except for Peranteau's signature and address, which were handwritten. (13 RT 3296-3297.) The signature, however, did not look genuine, and the address was not written in Peranteau's handwriting. (15 RT 3858-3859; 16 RT 3869.) Subsequent analysis revealed that the letter was typed on an Olympic typewriter that investigators found in the Wilseyville residence. (13 RT 3359-3361; 20 RT 4876-4877.)

Before Peranteau disappeared, he had entered a Super Bowl betting pool. Most of the other participants also worked for Dennis Moving,

including the pool's organizer, Richard Doedens. (16 RT 3876-3879.) Peranteau won the pool but never showed up to claim his winnings. (16 RT 3879.) The result of the pool was a "big thing" at Dennis Moving, and the employees talked about it. (16 RT 3881-3882.) Sometime after the game, Doedens received a letter about the pool, purportedly from Peranteau. It bore a Wilseyville postmark, dated January 28, 1985. (16 RT 3880-3881.) The letter said:

> Hey, bro. I was hoping that Dennis would give you my address and you'd just mail along my winnings. Since I haven't heard from you yet, I'm sending along an addressed envelope to save you the trouble of spelling my name. Hey, how about them 'Niners, huh?

(16 RT 3779-3880.)

The letter was signed "Cliff." (16 RT 3880.) It came with an envelope preaddressed to Peranteau at the same Mokelumne Hill post office box that was listed in the letter Dennis Goza had received. (16 RT 3749, 3880-3881.) Like the letter to Goza, the letter to Doedens was typed on the Olympic typewriter later found in the Wilseyville residence, and the signature did not appear genuine. (13 RT 3360-3361; 16 RT 3869-3870; 20 RT 4877.)

In April 1985, almost three months after Peranteau disappeared, Lake sold Peranteau's motorcycle to a buyer in Wilseyville. (17 RT 3984, 4019-4022.) The bill of sale listed Peranteau as the seller. (17 RT 4022.) Lake did not claim to be Peranteau, but instead told the buyer that a friend in San Francisco had asked him to sell the motorcycle. (17 RT 4023.)

While appellant was working at Dennis Moving, he invited coworker Lawrence Boen to go shooting with him at a friend's property, a couple of hours from San Francisco. He told Boen that they could go there on a Friday night and return home the next day. (17 RT 4009-4012, 4017-4018.)

Boen did not own a gun and had never raised the subject of weapons with appellant, and he declined the invitation. (17 RT 4011-4012, 4017-4018.)

b. The investigation

In July, when the Canadian police searched appellant's hideout at Fish Creek Park in Calgary, they found a striped towel from Peranteau's apartment. (16 RT 3866-3867; 19 RT 4562-4563, 4569-4570, 4579-4584.) When the San Francisco police searched appellant's apartment, they found a pen and pencil set belonging to Peranteau. (16 RT 3875, 3889.)

Inside the Wilseyville residence, investigators found a mirror from Peranteau's apartment. (13 RT 3172-3173; 16 RT 3861-3862.) And inside the bunker, they found Peranteau's sweater and ski gloves. (13 RT 3175-3176; 15 RT 3866-3868.) Additionally, on the property, they found several more items from Peranteau's apartment, including a candlestick holder, a Buddha statue, a toy license plate, and a ceramic fish. (13 RT 3173-3175; 16 RT 3862-3866.)

5. Jeffrey Gerald: Count VI

Jeffrey Gerald also worked at Dennis Moving, and like Peranteau, he was in the same crew as appellant. (13 RT 3299; 16 RT 3877.) Gerald shared an apartment in San Francisco with a roommate, Terry Kailer. (17 RT 4040-4041.) On about 12 occasions prior to Gerald's disappearance, Kailer had answered the phone when a caller identifying himself as "Charlie" or "Charlie Ng" called for Gerald. He had a distinctive accent. (17 RT 4042-4043.)

On the morning of February 24, 1985, Kailer answered two calls from "Charlie Ng."[17] (17 RT 4042-4043.) Later that day, Gerald told Kailer that

[17] Pursuant to the parties' stipulation, four law enforcement officers would testify that when they interviewed Kailer, she did not mention the name "Ng" when she referred to "Charlie." (29 RT 6968.)

he had received a telephone call and was going to the bus station to meet appellant for a "side job" of moving. (17 RT 4041-4042.) Gerald also said he would be home by dinner time and would bring Chinese food. (17 RT 4043-4044.)

Gerald phoned his girlfriend, Sandra Krumbein, that day and told her that he was at the San Francisco bus station and was going to help a friend move for $100. (17 RT 4123-4126.) During the call, they made plans for Krumbein, who lived in New Jersey, to come to San Francisco. (17 RT 4126.)

After this call, however, Krumbein never heard from Gerald again. (17 RT 4126-4127.) Kailer never heard from him again either—and neither did his father or his close friend Ray Houghton, who played in a band with him. (17 RT 4044, 4095-4096, 4115-4116, 4122.) And Gerald never returned to work at Dennis Moving. (16 RT 3745-3746.)

Records from Dennis Moving showed that appellant did not work on the day Gerald disappeared. (16 RT 3746.) That night, someone at the Wilseyville residence phoned Dennis Moving. This particular number contained a recorded message, which instructed Dennis Moving's employees where to report the next day. A few minutes later, another call was made from the Wilseyville residence, this time to the home number of Dennis Moving's owner, Dennis Goza. (16 RT 3750-3751, 3781-3784; 28 RT 6835; Peo. Exh. 101.)

The next day, appellant worked at Dennis Moving. (16 RT 3746.) Also that day, someone at Wilseyville residence phoned Gerald's apartment. (16 RT 3783-3784; 17 RT 4046-4047; Peo. Exh. 101.) Two days after that, Terry Kailer came home from work and found Gerald's bedroom door ajar. (17 RT 4044.) Some of Gerald's possessions had been moved and others were missing, including his clothes, guitar, amplifiers, and some pictures.

(17 RT 4044-4045, 4119-4120.) Kailer filed a missing persons report. (17 RT 4049.)

After the case broke, Gerald's guitar was found in the Wilseyville residence, and his camera and social security card were found buried in the yard. (13 RT 3176-3177; 16 RT 3843; 17 RT 4116-4117, 4120-4122.)

6. Michael Carroll and Katherine Allen: Counts VII-VIII

a. The disappearances

Michael Carroll was discharged from the military in 1983 or 1984 and went to live with his foster brother, John Gouveia, in Milpitas. (13 RT 3339-3341.) During that time, Gouveia once answered a phone call for Carroll from someone identifying himself as Charles Ng. (13 RT 3342.) The caller initially identified himself as "Chuck." Gouveia asked if he was Charles Ng, and the caller laughed and answered, "Yeah. Just tell Mike I called." (13 RT 3348.)

Kathleen Allen was Carroll's girlfriend. (13 RT 3341.) She worked at the Safeway store in Milpitas. (13 RT 3272, 3318; 14 RT 3385-3386.) On Sunday afternoon, April 14, 1985, she received a phone call at work. (13 RT 3318-3319, 3324, 3327.) After the call, she told her friend and coworker Andrea Techaira that "Mike" had been shot and might be dead, and someone was coming to take her to Lake Tahoe to see him. (13 RT 3317-3318, 3319-3320, 3325.)

Allen also told her friend James Baio about the call. She phoned Baio and explained that Carroll had said he had gotten into some trouble in the Lake Tahoe area, and was sending someone to bring her there. (13 RT 3267-3268, 3270-3271.)

When Allen finished her shift at Safeway, she left the store and got into a copper colored Honda Prelude—which turned out to be Paul

Cosner's car. (13 RT 3074-3075, 3329-3331; 17 RT 4038-4039.) Inside the Prelude was a curly haired Caucasian male. (13 RT 3332.)

Allen spoke again with James Baio, who called her at a Milpitas hotel. (13 RT 3271-3272.) Allen sounded like she was in a hurry, and she told Baio that someone was in the room with her, and she could not talk. (13 RT 3273.) Later in the conversation, however, she told Baio that someone was there to pick her up. She said he was "kind of a weird guy," and he wanted to take pictures of her. (13 RT 3275.) Baio told Allen to call him when she arrived at her destination, but he never heard from her again. (13 RT 3274.)

Telephone records showed that at 1:01 that afternoon, someone at the Wilseyville residence called Allen's Safeway store. (14 RT 3384-2285; 16 RT 3781-3784, 3787; Peo. Exh. 101.) Also that day, Lake called an acquaintance in San Jose, George Blank, and asked for help with a car that had been stranded in Milpitas. (15 RT 3583-3584, 3586-3587.) Lake said the car belonged to some friends, and he would send a young man named Charles to deliver the keys. (15 RT 3587.) Blank arranged for his daughter, Debra Blank, to await Charles's phone call. (15 RT 3612, 3614.)

The next day, April 15, Allen called Fred Demarest, her manager at Safeway, and asked for the next four weeks off. (14 RT 3381-3382, 3387-3388.) She told Demerest that her boyfriend had found a job in the Lake Tahoe area, or had a good lead on one, and she wanted to accompany him there. Demarest granted her the time off. (14 RT 3388.) According to telephone records, someone at the Wilseyville residence called the Safeway store at 11:37 that morning. (14 RT 3384; 15 RT 3781-3784; Peo. Exh. 101.)

The following day, April 16, Debra Blank got a call from someone who identified himself as "Charles" and said he was Lake's friend. (15 RT 3612-3614.) Debra went to the bus station and met with appellant, who

gave her an envelope containing car keys and a letter.[18] (15 RT 3614-3618, 3626, 3629-3631.) The letter contained a diagram showing the car's location. (15 RT 3616.)

Debra gave her father, George Blank, the letter and keys. (15 RT 3587-3588, 3616-3617.) Blank followed Lake's directions and went to the Milpitas Safeway, where he found the car, a Mercury Capri. (15 RT 3589-3590.) It was Carroll's car. (15 RT 3588, 3590, 3593, 3611; Peo. Exhs. 100, 112-B.) The key fit the car, and Blank drove it home. (15 RT 3590.)

Ten days later, on April 26, Lake came to Blank's house, where he inspected the car and removed some items. (15 RT 3591-3593, 3601-3602.) He asked Blank to fix the car and try to sell it, and then reimburse himself for the cost of the repairs. (15 RT 3591-3592, 3602.) Lake was accompanied by Claralyn Balazs's father, Louie Balazs. (15 RT 3601-3603; see 32 RT 7639.)

About two weeks later, on May 8 or 9, Blank received a letter from Lake, together with some paperwork concerning the car. (15 RT 3592-3593.) The letter was signed by "Leonard" and stated, in part:

> Enclosed are the forms you should need. Also enclosed in it is an envelope and a deposit slip. After you take your share, send whatever is left to this account. I don't think she'll need to endorse your check if it is for deposit. These people are screw balls but they appreciate the help.

(15 RT 3595.)

Along with the letter, Lake had included a pink slip, a release of liability, and an insurance policy, all bearing Michael Carroll's name. (15 RT 3593-3594, 3596.) He also included a stamped, a preaddressed

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[18] Debra later identified appellant from a photo lineup as the man who gave her the keys. (15 RT 3617-3618, 3626, 3629-3631.) At trial, appellant admitted he was that man. (31 RT 7435.)

envelope from the Safeway Credit Union, and a blank deposit slip in Kathleen Allen's name. (15 RT 3594, 3596.)

On about the same date, May 8, Fred Demarest, the Safeway manager, received a letter that was purportedly from Allen. (14 RT 3388-3389; Peo. Exh. 103.) According to the letter, Allen's boyfriend had found a permanent job, and she was going to stay with him. She asked Demarest to clean out her locker and send her W-2 tax form to her. (RT 14 3389.) The letter had been typed on the Olympic typewriter that investigators later found in the Wilseyville residence. (13 RT 3360-3361; 14 RT 3388-3389; 20 RT 4875-4876.) The return address was a post office box in Wilseyville. (14 RT 3390.) The signature bore some of Lake's handwriting characteristics. (20 RT 4913-4914.)

Demerest never heard from Allen again. (13 RT 3274.) Neither did Allen's friends James Baio and Andrea Techaira, or her sister, Dian Allen. (13 RT 3320, 3274; 15 RT 3670-3672.)

John Gouveia also received a letter that was purportedly from Allen sometime after he saw Carroll for the last time.[19] (13 RT 3343.) The envelope bore the postmark of a town that started with "W." (13 RT 3343-3344.) Like the letter to Demerest, this letter asserted that Carroll and Allen had moved away:

> Dear John, Mike and I have moved up to Tahoe where Mike got a job with some friends. Our place doesn't have a phone yet, so Mike asked me to drop you a line and let you know the car is not working. And until we get the money to fix it, we'll have to have some friends get our stuff. We'll . . . send you a phone number as soon as we get one. Take care, Kathi.

(13 RT 3345-3346.)

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[19] Gouveia thought he received the letter during the first three months of 1985. (13 RT 3346.)

b. The M-Ladies video

As mentioned earlier, the investigators at the Wilseyville property discovered a videotape, labeled "M Ladies, Kathi, Brenda," which showed Allen in captivity. (13 RT 3137-3138.) The video begins with Allen sitting in a reclining chair, wearing blue jeans or sweatpants and a short-sleeved blouse. She is the only person visible. From off-camera, Lake tells her that "Mike owes us. Unfortunately, he can't pay." Lake explains that he and appellant are giving Allen a choice: "probably the last choice that we're going to give you." If Allen cooperates, then in about 30 days—which according to Lake would be May 15—"we will either drug you, blindfold you or in some other way make sure you don't know where you are and where you're going and take you back to the city and let you go." But, Lake continues, "If you don't cooperate with us, if you don't agree this evening, right now to cooperate with us, we'll probably put a round through your head and take you out and bury you in the same area that we buried Mike." (Exh. 22-A; 58 OCT 19666.)

Lake explains that "we do this because we're, we admit it, scared, nervous. We . . . never planned on fucking up, much less getting caught, and were not intending to get caught. It's the old no witnesses." (Exh. 22-A; 58 OCT 19666.)

Lake then informs Allen that she must give them information on Carroll's bank accounts and help them cover up Carroll's murder:

> We'll probably have you write some letters to the guy that's storing his furniture, his step, or foster brother . . . telling him some bullshit story about how you and Mike have, uh, moved off to Timbucktoo, and he's got a job doing this and that, and basically, we want to phase Mike off, just sort of just move him over the horizon, and, uh, let people know that, yeah, Mike moved off to God knows where, and we never heard from him again. That's semi-acceptable. If anyone wonders, no one's going to wonder too hard. (Exh. 22-A; 58 OCT 19666-19667.)

Lake then tells Allen that "While you're here, we'll keep you busy. You'll wash for us, you'll clean for us, cook for us, you'll fuck for us." He pauses and adds, "It's not much of a choice unless you've got a death wish." (Exh. 22-A; 58 OCT 19667.)

After some inaudible conversation between appellant and Lake, Lake tells Allen that "The fairness of what we're doing is, uh, not up for debate. We're not worried whether we're fair or whether we're good. We're just worried about ourselves." He adds, "In the last 24 hours we've been tired, nervous, a little high strung, perhaps. We expect you to do something about that. Believe me, we both need it." (Exh. 22-A; 58 OCT 19667.) He warns Allen that "If you don't go along with us, we'll probably take you into the bed, tie you down, rape you, shoot you and bury you." (Exh. 22-A; 58 OCT 19667-19668.)

After Lake says this, no one speaks. After more silence, Lake says, "Sorry lady, time's up. Make your choice." (Exh. 22-A; 58 OCT 19668.) Allen answers, "Well, I have to be available." (Exh. 22-A; 58 OCT 19668.) Lake orders her to "Spell it out for us on tape. I want to hear it from your own lips." Allen replies, "I can't spell it out. I'll do anything you want." (Exh. 22-A; 58 OCT 19668.)

Lake comes into view, kneels in front of Allen, and appears to manipulate the shackles around her feet. Still kneeling, he looks her in the face and says, "Mike was an ass." (Exh. 22-A.) He informs her that "Mike was getting ready to drop you, so he said. He said you were clinging on to him, you were asking things of him that he didn't want." Lake then asks appellant, "Today, was it today? Yesterday?" Appellant replies, "Yesterday." (Exh. 22-A; 58 OCT 19668.)

Lake adds that "He had some woman in the motel giving him a blow job. . . . Whether it's true or not, I don't know." Lake continues, "maybe

he just liked to talk big. He thought he was impressing us. He wasn't. He was disgusting us." (Exh. 22-A; 58 OCT 19668.)

Lake asks appellant if he has the keys for Allen's handcuffs. (Exh. 22-A; 58 OCT 19668.) Appellant, wearing jeans and a T-shirt, comes into view and unlocks her handcuffs. (Exh. 22-A.) Lake commands, "Stand up, Kathy. . . . Stay on your feet. Undress for us. We want to see what we bought." With an incredulous look on her face, Allen says, "Undress for you?" Lake orders her to "Take your blouse off. Take your bra off." Allen removes her blouse and bra, leaving her naked from the waist up, and Lake comments, "They're not all that bad." (Exh. 22-A; 58 OCT 19669.)

Appellant asks "what do you think? Take her pants off?" Lake replies affirmatively and adds, "we'll run her through the shower." Appellant asks if he should go too, and Lake replies "if you want." Lake unlocks Allen's leg manacles, and appellant comments, "This is, uh, surprisingly cooperative." (Exh. 22-A; 58 OCT 19669.) Lake replies, "Wisely cooperative, Charlie." Lake then gives Allen "a few ground rules." He admonishes her, "Do what you're told, cooperate with us, and there won't be any problems. If you create any problems whatsoever, you could very well die." (Exh. 22-A; 58 OCT 19669-19670.)

Lake orders Allen to keep undressing. Appellant tells Lake, "The piece is on the table." Allen says, "Excuse me for being shy," and Lake tells her she is going to be taking a shower. Appellant comments, "This won't be the first time. It won't be the last time." Lake responds, "Don't make it hard for her, Charlie. Kathy, undress please." Appellant comes into partial view, now wearing only briefs. Allen slowly removes her pants and then pauses. Lake orders, "Panties too." Allen does not immediately comply, and Lake says, "Kathy, I don't want to have to make an example of what we need to do to make you cooperate." Allen removes her panties,

leaving her naked. Lake says, "Go ahead, Charlie," and Allen walks out of view. (Exh. 22-A; 58 OCT 19670.)

In the next scene, appellant is lying naked on a bed, face down, while Allen straddles over him and gives him a massage. Allen is topless, wearing only panties, which have a large slit or tear in the crotch area. Appellant tells Allen to "get my ass, too," and she rubs lotion on him and begins massaging his buttocks, while he fondles her buttocks with his heel. (Exh. 22-A; 58 OCT 19671.)

In the last scene, Allen lies on a bed wearing only shorts. Lake accuses her of beating on the door and making noise. He says he knows this because the latch to her door is bent. He warns her that if she tries to make noise again, she will be "whipped very severely." (Exh. 22-A; 58 OCT 19671-19673.)

Lake then unshackles Allen, has her undress, and photographs her in various poses and attire. (Exh. 22-A; 58 OCT 19673-19676.) He tells her that he will have the photographs before she leaves. He instructs her to get dressed and "get warm," because she is going outside next. (Exh. 22-A; 58 OCT 19676.)

c. The investigation

The investigators found a two-gallon plastic barrel buried at the Wilseyville property. It contained Allen's checkbook and a box of her checks. It also contained an envelope labeled "Kathi." Inside the envelope were Allen's driver's license, social security card, and military identification, as well as two tax documents bearing her name. (13 RT 3157-3159; 15 RT 3702-3704.)

Several items belonging to Michael Carroll were also found in the plastic barrel, including his driver's license, ATM card, W-2 tax form, and paycheck stub. (13 RT 3162-3163; 15 RT 3705-3706.) Inside the

Wilseyville house, the investigators found six books with Carroll's name printed inside. (15 RT 3719-3721; 16 RT 3826-3827.)

During the search of appellant's apartment, the police seized a videotape that contained a very brief scene from the M-Ladies video. The scene appeared at the beginning of the tape, and it showed Allen sitting in the living room at the Wilseyville residence. (13 RT 3210, 3218-3220; 16 RT 3894.) It was followed immediately by some movie credits. (13 RT 3219-3220.)

The police also obtained copies of Allen's canceled checks from April and May of 1985. (15 RT 3635.) One of the checks was dated more than two weeks after Allen's kidnapping and was issued to Randy Jacobson, whose body was found at the Wilseyville property. (13 RT 3131-3132; 15 RT 3636.) According to a handwriting expert, Lake wrote the check's "face detail" and probably signed Allen's name. (20 RT 4880-4882, 4918-4919.) It looked like he was trying to imitate Allen's signature. (20 RT 4883.) Lake's handwriting also appeared to be on one of Allen's deposit slips from the Safeway Credit Union. (20 RT 4919.)

7. Brenda O'Connor, Lonnie Bond, Lonnie Bond, Jr., and Scott Stapley: Counts IX-XII

a. The disappearances

In January 1985, Lonnie Bond rented the house next door to the Wilseyville property. It was known as the Carter House. (13 RT 3357-3358; 18 RT 4326; 28 RT 6819; Peo. Exh. 19.) Bond lived there with his fiancée, Brenda O'Connor, and their son, Lonnie Bond, Jr., who was born in 1984. (13 RT 3358-3359; 17 RT 4090-4091, 4093; 18 RT 4271.) After Bond moved in, Lake complained to the Carter house's property manager that someone was firing gunshots from there, and that Bond was neglecting to lock the gate to their common driveway. (18 RT 4329-4330, 4334-4335.)

Scott Stapley, whose full name was Robin Scott Stapley, lived in San Diego with his girlfriend, Tori Ann Doolin. (18 RT 4267-4268.) Stapley worked as an in-home caregiver for elderly people, many of whom were terminally ill. (18 RT 4268, 4275-4276.) In February 1985, Stapley and Doolin traveled twice to Wilseyville to visit Bond and O'Connor. (18 RT 4281, 4299.) While Doolin was there, she met Lake. (18 RT 4281, 4284.)

Doolin last saw Stapley in San Diego, on the night of April 19, 1985. Stapley had retrieved all of Bond and O'Connor's belongings and loaded them into his pickup truck. (18 RT 4273.) He was about to pick up O'Connor and Lonnie Jr., and drive them back to Wilseyville to rejoin Bond. (18 RT 4273-4275.)

Four days later, on April 23, appellant got into a traffic accident near Interstate 5 in Kern County. He was driving Stapley's pickup truck. (18 RT 4273-4274; 19 RT 4715-4717, 4720-4723.) He appeared to be traveling with a middle aged Caucasian man and a dog. (19 RT 4715, 4722-4723.)

The next day, appellant and Lake showed up at Doolin's apartment in San Diego.[20] (15 RT 3631; 18 RT 4281-4284.) Doolin let Lake inside while appellant went to the truck and waited. (18 RT 4285, 4309.) Lake told Doolin that he had found "all of them"—i.e., Bond, Stapley, O'Connor, and Lonnie Jr.—dead in the cabin, and had burnt their bodies on a pyre and buried them. (18 RT 4285.)

Lake asked Doolin if he could take Stapley's belongings from the apartment. Lake explained that wanted to make it look like Stapley had moved out, so the police would not come "snooping around" in Wilseyville,

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[20] Doolin later identified appellant from a photo lineup. (15 RT 3631; 18 RT 4283-4284.) In appellant's own testimony, he admitted he was the person Doolin saw. (31 RT 7542-7543.)

where Lake was involved with illegal guns and marijuana. (18 RT 4286, 4312.) Doolin allowed Lake to take Stapley's bicycle, his clothing, and some other items. (18 RT 4286.)

On the same day that appellant and Lake appeared at Doolin's apartment, Doolin received a card from Stapley in the mail. (18 RT 4276-4277, 4282.) The envelope had been postmarked in Wilseyville two days earlier, on the afternoon of April 22. (18 RT 4277-4278.) The card and envelope were in Stapley's handwriting. (18 RT 4277, 4279.) Stapley wrote, "I am safe on Monday noon." (18 RT 4279.)

Doolin never saw Stapley again. (18 RT 4272-4273.) O'Connor's mother never saw or heard from O'Connor or Lonnie Jr. again. (17 RT 4090-4093.) In May, Lake told the Carter house's property manager that Bond and O'Connor had "skipped out." He also said they had given him their car because Bond owed him money. (18 RT 4328.)

Appellant was off work from April 21 through April 27. He was originally scheduled to work on April 22—the day Stapley wrote to Doolin from Wilseyville—but he then requested the day off. (16 RT 3755.) He told his boss, Dennis Goza, that his parents had been in a car accident in Southern California and he needed to travel there to help them. (16 RT 3755-3756.) According to telephone records, someone at the Wilseyville residence called Goza's house on April 21. (16 RT 3756, 3773, 3783-3784; Peo. Exh. 101.)

b. The M-Ladies video

O'Connor appears in the M-Ladies video after Allen. Initially, O'Connor is sitting on the reclining chair with her hands bound. Appellant then ties her legs to the chair and walks off-camera. He is fully dressed. (Exh. 22-A.) In response to a question that O'Connor apparently asked before the recording began, Lake states, "if you must know, I didn't do anything with them." He stresses the word "I," as if to imply that someone

else did something to them. O'Connor asks appellant what he did with them, and appellant responds that he didn't do anything. O'Connor asks, "Did you guys kill them?" and Lake replies, "No, we didn't kill them." (Exh. 22-A; 58 OCT 19677.)

O'Connor asks, "What are you going to do, kill us?" Lake responds that it is "sort of up to you, Brenda." (Exh. 22-A; 58 OCT 19677.) O'Connor asks why they are doing this, and Lake answers, "Cause we hate you." (Exh. 22-A; 58 OCT 19678.) O'Connor asks, "What did we do to you?" Lake replies, "Shut up. Ooh what a hairy day." (Exh. 22-A; 58 OCT 19678.)

O'Connor says something about "my baby down there," and Lake responds, "Your baby is sound asleep, like a rock." He continues by telling her that the neighborhood hasn't liked her and Bond since they moved in. O'Connor replies, "So we'll leave," and Lake answers, "We've closed you down . . . . We got together, and we took you away. We took Scott away." (Exh. 22-A; 58 OCT 19678.)

Lake then informs O'Connor that her baby is going to be taken away and given to a childless family in Fresno. (Exh. 22-A; 58 OCT 19678.) O'Connor responds, "You're not taking my baby away from me," and Lake, referring back to the family in Fresno, replies, "they've got one now." (Exh. 22-A; 58 OCT 19678-19679.) Appellant interjects, "It's better than the baby's dead, right?" O'Connor cries, "What do you mean they've got one now? That's my baby[.]" (Exh. 22-A; 58 OCT 19679.)

Lake informs O'Connor that she has a choice. Echoing his earlier words to Allen, he explains:

> By cooperating with us . . . you will stay here as our prisoner, you will work for us, you will wash for us, you will fuck for us, or you can say no, I don't want to do that, in which case we'll tie you to the bed, we'll rape you, and then we'll take you outside and shoot you.

O'Connor agrees to cooperate, and appellant comments, "That's wise." (Exh. 22-A; 58 OCT 19679.)

O'Connor asks, "Are you really going to take my baby away from me?" Lake answers, "Yes, we are. Personally, I don't think you're a fit mother." (Exh. 22-A; 58 OCT 19679.) O'Connor asks, "where's Lonnie at?" Lake responds that "They've been taken away" to "a place up in the hills where they'll split wood for the rest of their happy lives." (Exh. 22-A; 58 OCT 19679-19680.) Lake denies killing Bond and Stapley but explains that they are facing the same choice as O'Connor, and they may already be dead. (Exh. 22-A; 58 OCT 19680.) O'Connor asks, "Is that why you invited us over here for dinner?" Appellant replies, "It's part of the game." (Exh. 22-A; 58 OCT 19680.)

Lake tells O'Connor that "Lonnie hasn't been all that bad . . . except for his shooting and his drug factory," but "you've been an asshole like I can't believe." O'Connor responds, "I can't stand it up here." Appellant orders O'Connor to "Explain those letter[s]." (Exh. 22-A; 58 OCT 19680.) O'Connor asks "What letters?" and Lake refers to the letters O'Connor wrote to Bond, which "weren't particularly flattering." (Exh. 22-A; 58 OCT 19680-19681.)

Lake informs O'Connor that they will probably keep her for a few weeks and then "pass [her] around . . . ." O'Connor asks, "Why do you guys do this?" Lake replies, "We don't like you. Would you like me to put it in writing?" Appellant adds, "It's done. Just take it whatever we tell you." (Exh. 22-A; 58 OCT 19681.)

Lake tells O'Connor, "We're going to, uh, sit back and enjoy ourselves. It's been a hectic day, and you are going to learn the true meaning of fuckface." O'Connor asks whether they hurt Bond, and Lake replies, "Well, to be honest, we weren't gentle with him, but I'll tell you

that at least he was alive when he, uh, walked out of here." (Exh. 22-A; 58 OCT 19682.)

Appellant, now shirtless and holding a knife, approaches O'Connor and slices off her T-shirt. He says, "Since you say you're hot, I'll take it off for you." Lake comments that O'Connor could have removed it herself, but appellant responds that it would be hard with the cuffs on. (Exh. 22-A; 58 OCT 19682.) O'Connor pleads, "Will you please just go get my baby?" As appellant finishes dismembering O'Connor's T-shirt, she says, "You can't keep my baby from me for sex." Appellant places manacles around O'Connor's ankles, and Lake comments that her baby is "an innocent in this." (Exh. 22-A; 58 OCT 19683.)

Lake tells O'Connor that she has "been something of a first-class asshole," but he and appellant are going to give her an opportunity to make up for it. He then tells appellant, "You're so crude, Charlie. I actually liked that T-shirt." (Exh. 22-A; 58 OCT 19683.) Appellant responds, "It's gone now." (Exh. 22-A; 58 OCT 19684.)

Appellant begins unfastening O'Connor's bra and says, "the old saying. Let's see what we're buying." He unfastens the back of the bra, slices the front in two, and cuts off the rest. O'Connor pleads, "Don't cut my bra off," and appellant replies, "Nothing is yours now. You'll be totally ours."[21] (Exh. 22-A; 58 OCT 19684.) He adds, "You can cry and stuff like the rest of them, but it won't do you no good. We are pretty, ha, cold-hearted, so to speak." (Exh. 22-A; 58 OCT 19684.)

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[21] The transcript indicates that appellant said, "It'll be totally ours," rather than "You'll be totally ours." The transcript also omits "The old saying." The court instructed the jury that the videotape controlled over the transcript, and the transcript was merely a guide to help them determine what was being said on the videotape. (13 RT 3138.)

Lake again asks appellant to remove O'Connor's handcuffs. Before appellant complies, he warns her, "I'll get my weapon handy in case you try to play stupid." (Exh. 22-A; 58 OCT 19684.)

Appellant removes O'Connor's handcuffs, and O'Connor complains about the heat and says she is feeling sick. Lake replies, "suffer," and displays a whip. Lake asks appellant if he is ready for a shower, and appellant says he is. (Exh. 22-A; 58 OCT 19685.) O'Connor asks whether she is going to take a shower, and Lake explains that she and appellant are going to take a shower. Appellant adds, "Yep. I always do. It's luckier." (Exh. 22-A; 58 OCT 19685.) Lake comments that "Charlie owes me one, so, uh, I get you first, but he's got his heart set on taking a shower with you, so who am I to turn him down." (Exh. 22-A; 58 OCT 19685-19686.)

Appellant asks if he should leave O'Connor's leg irons on, and Lake instructs him to remove them. Lake tells appellant, "I think she believes us" and then cautions O'Connor, "You better believe us, Brenda, or you'll be dead." Appellant adds, "Right." (Exh. 22-A; 58 OCT 19686.)

After appellant removes O'Connor's leg irons, Lake orders her to take off her jeans and panties. Appellant tells her, "Why don't you do it yourself while I do mine." O'Connor stands up and asks if she can undress away from the lights. Lake barks, "Right there," and appellant reiterates, "Right here." O'Connor complains about being dizzy, and Lake snaps, "I don't care. Do what you're told." (Exh. 22-A; 58 OCT 19686.)

O'Connor again complains of dizziness, and Lake orders her to move to the couch, away from the heat. Appellant then instructs her to sit down. O'Connor complains that she feels "real shaky and real dizzy" and is going to pass out. Appellant responds, "Well, you can pass out, but we're going to wake you up." (Exh. 22-A; 58 OCT 19687.)

Lake tells O'Connor he has "a lot of animosity" toward her and would "just as soon start [her] out with a nice firm whipping" to convince her they

are serious. O'Connor hesitates to lower her jeans, and Lake angrily commands her to "Slide them down and then sit down." He points a large handgun at her. She looks terrified. (Exh. 22-A; 58 OCT 19687.) She sits down on the couch, and, as Lake is pointing the gun at her head, she starts falling forward. Lake places the gun on the floor, and appellant picks it up. Lake guides O'Connor back to the couch and places his hand on her breast. Appellant asks O'Connor if she is feeling better and offers her some water. She accepts and says she is dizzy and hot. (Exh. 22-A; 58 OCT 19688.)

As O'Connor is drinking the water, Lake asks appellant, "isn't she a little [either better or bigger] than Kathy?" Appellant replies, "Maybe a little, basically the same." Lake says, "No, Kathy's was (inaudible)." (Exh. 22-A; 58 OCT 19689.)

O'Connor says she hears a "shuh" in the top of her head. Appellant offers her some aspirin, but Lake responds, "No." O'Connor says she has been feeling like this for a couple of days, "Like I'm pregnant or something." Appellant responds, "Not the right time for that shit." O'Connor says she doesn't want to have this baby. Appellant answers, "we told you what's going to happen to the baby. Just don't ask us or else it'll be history. So I don't want to hear nothing about it. It will be taken care of." (Exh. 22-A; 58 OCT 19689-19690.)

O'Connor pleads, "Give my baby to me. I'll do anything you want . . . ." Lake counters, "You're going to do anything we want anyway, and we don't want to have a dirty house around with the baby." O'Connor says, "He can't live without me," and Lake responds, "He's gonna learn." He orders O'Connor to remove her jeans and panties, and she complies. (Exh. 22-A; 58 OCT 19690.) As she is stripping, she says that she does not need a shower, but appellant responds, "Both of us [are] going to make sure you're clean before we fuck you. That's the house rule." Lake adds, "Traditional." (Exh. 22-A; 58 OCT 16690.)

Appellant says he's going to "make sure there's towels and all that other shit." (Exh. 22-A; 58 OCT 16960.) Lake leads O'Connor out of view. Some inaudible conversation takes place, and appellant can be heard saying, "wrong with this showerhead. It pisses me off." (Exh. 22-A; 58 OCT 19691.) Lake says, "Take care of her now, Charlie" and asks him to "make sure she brushes her teeth and uses mouthwash." (Exh. 22-A; 58 OCT 19691-19692.) The tape ends soon afterward. (Exh. 22-A.)

c. The investigation

When Lake was arrested at South City Lumber, he was carrying Stapley's credit cards and bank card. (12 RT 3040-3041.) As discussed earlier, the police discovered Bond and Stapley's bodies buried near the Wilseyville property. And at the Wilseyville property, they found Stapley's pickup truck. (13 RT 3168-3169; 18 RT 4274.) They also found his checkbook and supermarket discount card, which had been buried in the same plastic barrel that contained documents belonging to Kathleen Allen and Michael Carroll. (15 RT 3705-3707.) Also buried at the property were two of Stapley's shirts and an envelope bearing O'Connor's name. (13 RT 3167-3168; 18 RT 4269-4271; 28 RT 6824.)

There were blood spatters on a bedroom wall in the Carter house, where Bond and O'Connor lived. (15 RT 3661-3663.) In the same room, the police found a .380 shell casing. (15 RT 3663-3664.)

During the search of appellant's apartment, the police found Bond's bank card. (16 RT 3888-3889.) They also found a videotape that contained an unsettling image: A brief scene at the beginning of the video showed what appeared to be a corpse lying across a wheelbarrow. The corpse is

wrapped in some kind of covering, and its hands and feet seem to be bound. (13 RT 3220, 3222-3223; 14 RT 3538, 3541; 16 RT 3894.[22])

8. Appellant's cartoon drawings

Maurice Laberge met appellant in 1986, while they were imprisoned at Edmonton Penitentiary in Canada.[23] (20 RT 4775.) For about four or five months that year, they exercised together in the prison yard. (20 RT 4778-4779.) They also had adjoining cells and were able to pass writings back and forth. (20 RT 4776-4777.)

Appellant often gave Laberge cartoon caricatures relating to topics they had discussed in the exercise yard. (20 RT 4780-4781.) Laberge began forwarding these cartoons to his lawyer and taking notes about the things appellant told him. (20 RT 4780.)

Appellant told Laberge that he was very concerned about a videotape the police found at Lake's property. It depicted Kathi Allen and Brenda O'Connor. (20 RT 4782-4783.) Appellant explained that in the video, he flicked open a butterfly knife and cut a female's T-shirt after she complained that she was warm. He also said he went into the shower with the women. (20 RT 4783.)

Appellant also told Laberge that in one of these incidents, he stopped, made some rice, and came back and ate it while Lake was "carrying on" with Kathi Allen. (20 RT 4783.) He gave Laberge a cartoon depicting this incident. (20 RT 4783-4784.) In this cartoon, a man who is supposed to be Lake is raising a whip in one hand and fondling his penis with the other

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[22] The scene showing the bodies was played for the jury. (13 RT 3221.) A still photo created from the video was admitted into evidence. (Peo. Exhs. 79, 80; 16 RT 6831.)

[23] Laberge died in a car accident before trial. (20 RT 4761, 4834.) His testimony from appellant's extradition hearing was read into evidence. (See 20 RT 4756, 4762-4763.)

hand, while saying, "Oh, I love you Kathi, I really do!" A naked female, with her hands and feet bound, is kneeling on a bed or table and saying, "Ouch." A video camera is sitting on a tripod, and appellant is standing behind it, saying, "Rice is ready. Dinner time." (20 RT 4784; 28 RT 6841; Peo. Exh. 224.) Handwriting analysis showed that appellant wrote the words on this cartoon. (20 RT 4900.)

Appellant also gave Laberge a cartoon that bore the words, "Calaveras County Remains Claiming Section." In this cartoon, a man labeled "Boyd Stevens"—wearing a white lab coat—hands a large bag to another man and tells him, "and this bag I think is yours."[24] The bag is labeled "Dubs." In addition, a woman dressed in mourning is walking out of the room, carrying a small bag labeled "Allen." Another bag, labeled "Bond," is sitting on a table. It is larger than the Allen bag but smaller than the Dubs bag. (Peo. Exh. 226, original underscoring; 20 RT 4784-4785; 28 RT 6841.) Handwriting analysis showed that appellant wrote the words on the cartoon. (20 RT 4902-4903.)

Appellant gave Laberge another cartoon, depicting two men labeled "Slant"—Laberge's nickname for appellant—and "Lake." This cartoon contained four images. In the first two images, Slant and Lake are carrying a sleeping person on a stretcher. In the third image, they place the person—who is still sleeping—into a bonfire. In the final frame, the victim is engulfed in flames and cries, "'Ah! You mother fuckers!" Slant and Lake stand watching, and Lake laughs, "Hoo! Ha ha!" Appellant gave this cartoon to Laberge after discussing the procedure that he and Lake used to burn their victims. (20 RT 4785-4786; 28 RT 6841; Peo. Exh. 228.)

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[24] Dr. Boyd Stevens, the Chief Medical Examiner of San Francisco, participated in the investigation and examined the remains found at the Wilseyville property. (17 RT 4162-4189.)

Handwriting analysis showed that appellant also wrote the words on this cartoon. (20 RT 4906-4909.)

Appellant gave Laberge another cartoon after they had long discussions about all the people appellant had killed. The cartoon was labeled "San Quentin . . . Years Later." In it, appellant is sitting on a bed in a prison cell. The slogans "'no kill no thrill!" and "no gun no fun" are written on the walls. Additionally, pictures of the victims have been taped on the wall. They include a picture labeled "Bond's," showing a man, woman and baby; a picture labeled "Dubs," also showing a man, woman, and baby; and pictures of individuals labeled "Carroll," "Cosner," "Pearenteau [*sic*]," "Gerald," "Giuletti," and "Allen." (Peo. Exh. 230; 20 RT 4787-4788.) The cartoon's purpose was to show appellant's future after extradition. (20 RT 4788-4789.) Handwriting analysis showed that appellant also wrote the words on this cartoon. (20 RT 4904.)

After Laberge testified at appellant's extradition hearing, he was placed in a witness protection program. As part of the program, he received 36,000 Canadian dollars, paid in multiple installments. (20 RT 4789, 4824.) His participation in the program stemmed from his roles in appellant's case and an unrelated murder investigation. The prosecutor in the unrelated investigation requested that Laberge be placed in the program. (20 RT 4865-4866.)

Laberge had more than 40 prior criminal convictions, spanning a period from 1968 to 1982. (20 RT 4764-4770, 4797.) When he testified at appellant's extradition hearing, he was serving a 25-year sentence for armed robbery, kidnapping, unlawful confinement, and using a firearm. These crimes stemmed from a single incident. (20 RT 4763, 4770-4771.)

In that incident, Laberge and an accomplice conspired to kidnap a store manager and force him to open the store's safe. They went to the manager's house, discovered he was not home, and tied up his two sons at

gunpoint. After the manager returned home with his wife, Laberge tied up the wife and transported the manager to the store. He forced the manager open the safe, took money from the safe, and tied up the manager. (20 RT 4771-4773, 4789-90.) He later surrendered himself. (20 RT 4773.) At Laberge's own trial, he took the stand and denied committing these crimes, but at appellant's extradition hearing, he admitted committing them. (20 RT 4773-4774.)

It was stipulated that (1) one of the manager's sons, David, would testify that he was 15 years old at the time of the home invasion, and Laberge sexually assaulted him, and (2) the manager's other son would testify that he saw Laberge carry David into the bedroom and remain there with him for some time, and that David later asked the authorities to refrain from charging Laberge with sexual assault, because he did not want to testify about it. (20 RT 4790.)

Laberge had admitted to a parole officer, his brother, and four mental health professionals that he sexually assaulted David. But under oath, he had denied committing the sexual assault and denied admitting it to his parole officer or any mental health professionals. (20 RT 4791-4792.) Laberge was released on daytime parole in 1990 and full parole in 1991. (20 RT 4863.)

9. Appellant's relationship with Lake

In 1982, Lake asked his sister, Fern Eberling, to act as an intermediary between himself and appellant. Specifically, Lake asked Eberling to receive mail from appellant and forward it him, and to forward mail from him to appellant. Appellant was then living in Fort Leavenworth, Kansas. (18 RT 4513, 4521.) About six times that year, Eberling sent mail from Lake to appellant. (18 RT 4522.)

At the time of the murders, the Wilseyville property belonged to Balazs, and Lake had access to it. Though Lake and Balazs were divorced, they were still "seeing each other." (18 RT 4528.)

In August 1984, for about a month, appellant lived in an apartment that Eberling had rented but not yet moved into. (18 RT 4516-4520.) Lake asked her to let appellant to stay there. He told her that appellant's name was "Mike." (18 RT 4517.)

That year, appellant joined Lake, Eberling, and their mother for Thanksgiving dinner. (18 RT 4519-4520.) He was the only guest from outside the family. (18 RT 4520.)

In September 1984, Dennis Goza interviewed appellant for the job at Dennis Moving. (16 RT 3734-3735.) Lake accompanied appellant to interview. (16 RT 3738, 3776.) Goza had not expected to interview two people, but appellant told him that Lake—who introduced himself as "Leonard Blake"—was also looking for work and had served in the military with him. (16 RT 3738-3739.) Goza did not hire Lake, because Lake could not work full time. (16 RT 3739, 3761.)

Appellant worked for Dennis Moving until June 1985. (16 RT 3743.) During that time, coworker Kenneth Bruce heard him utter the slogans "No gun, no fun," "No kill, no thrill," and "Daddy die [*sic*], mommy cry [*sic*], baby fries." (16 RT 3847, 3849-3851.) Coworker Lawrence Boen also heard appellant say "no gun, no fun; no kill, no thrill," and "Daddy dies, Mommy cries, baby fries." (17 RT 4108.) Boen never took it seriously. (17 RT 4013, 4017.) Coworker Perry McFarland heard appellant say these things, and it bothered him. (17 RT 4108, 4113-4114.) And coworker Hector Salcedo heard appellant say "[n]o kill, no thrill," "[n]o gun, no fun," and "[b]aby fries, daddy dies, momma cries" at various times. (17 RT 3987.)

In December 1984, appellant rented a post office box in Pioneer, about 20 minutes from Wilseyville. When he rented the box, he did not use his real name and instead introduced himself as "Michael Kimoto." (16 RT 3791-3792, 3801-3803; 20 RT 4893-4896.) He listed "Donald Lake" as another person renting the box. (16 RT 3804.) Later, a tall, thin Caucasian using the name of Randy Jacobson came to retrieve mail from the box, and his name was added to the card. (16 RT 3800-3801, 3803.) When appellant was arrested in Canada seven months later, he was carrying Michael Kimoto's driver's license and social security card, which had both been stolen from Kimoto in 1983. (16 RT 3789-3790; 19 RT 4587, 4590-4591.) Other documents bearing Kimoto's name, including correspondence and a receipt, were seized from appellant's apartment. (16 RT 3891-3893.)

Also in approximately December 1984, appellant introduced Lake to his coworker, Perry McFarland, who needed some work done at his house. Appellant introduced Lake as "Tom." (17 RT 4097-4102.) After Lake performed the work, appellant told McFarland that Lake had taken some pictures of McFarland's wife. (17 RT 4102, 4105-4106.) McFarland then discovered that his photo album was missing a page. (17 RT 4106.) He told appellant about this, and appellant got "pretty upset" that Lake had stolen pictures of McFarland's wife. (17 RT 4106, 4109.) The next day, appellant returned the pictures to McFarland. (17 RT 4106.)

On June 3, 1985, the day after the shoplifting at South City Lumber, appellant phoned Dennis Goza and told him that a close friend had committed suicide, and he had flown to Honolulu to be with the friend's family. He never returned to work. (16 RT 3757-3758.)

C. Defense Evidence at the Guilt Phase

1. The life and times of Leonard Lake

a. Involvement in uncharged murders

(1) Donald Lake

Lake had a brother, Donald Lake. He did not respect Donald and thought he was lazy, and he told his sister, Fern Eberling, that people like Donald should be lined up and shot. (18 RT 4544.) He told Tania Levy that Donald was "mooching off" their mother and hurting her, and it would be better if Donald were dead. He also expressed an interest in killing Donald. (21 RT 5115.) He told Zephyr Bergera that Donald was stupid, and stupid people do not deserve to live. (21 RT 5136.)

In late 1982 or early 1983, Lake told Eberling he had found a job for Donald that involved taking care of someone's house in the mountains. Lake then went away with Donald, and Eberling never saw Donald again. (18 RT 4545.) Later, Lake's mother received a letter—supposedly from Donald—stating that he was going to Reno. (18 RT 4546.)

In October 1982, Lake rented a room in San Francisco using Donald's name. (24 RT 5867-5869; see 22 RT 5373; Peo. Exh. 565A.) The following month, he applied to join a club using Donald's name. (22 RT 5348, 5351-5354, 5356-5357.) In 1982 or early 1983, he told Kim Sarlo, an art student whom he wanted to photograph, that his name was Donald Lake. (22 RT 5360-5363.)

(2) Charles Gunnar

Charles Gunnar was a longtime friend of Lake, who had been the best man at Gunnar's wedding. (21 RT 5189-5190.) Gunnar and his wife, Victoria Johnson, separated in December 1982 but stayed in contact and were proceeding with a divorce. However, after approximately May 1983, Johnson never heard from Gunnar again. (21 RT 5188, 5190-5192, 5198.)

Lake told her Gunnar was alive somewhere, and he purported to act as an intermediary between them. (21 RT 5192-5193.) He also told her that she should stop the divorce proceedings. (21 RT 5198-5199.) Johnson responded that she would only stop the proceedings if she knew that Gunnar was dead. (21 RT 5199-5201.) Lake replied, "'I am not going to say he is dead . . . but be assured that he is not coming back.'" (21 RT 5199-5201.)

In the middle of 1983, Lake and Gunnar went away, purportedly to Nevada. In Gunnar's absence, Carol Wilson took charge of his children. (24 RT 5912-5913.) A couple of weeks later, Lake told Wilson that Gunnar had met a woman during the trip, and he did not know if Gunnar intended to return. (24 RT 5913.)

In May or June of that year, Eldena Martin, an acquaintance of Gunnar, called Gunnar's house, and Lake answered the phone. He told Martin that Gunnar had met a woman and moved north with her. (22 RT 5420-5425.) Martin began seeing Lake socially, and she repeatedly asked him where Gunnar was. (22 RT 5424, 5427.) Lake continued to tell her that Gunnar had moved away, and he refused to put Martin in touch with him. (22 RT 5428-5429.) Lake later held a garage sale and sold Gunnar's belongings. (21 RT 5191, 5203.)

Lake temporarily took care of Gunnar's two girls after Gunnar disappeared, but he then turned them over to George Blank. (15 RT 3599, 3606.) At that time, he told Blank to communicate with him through Balazs. (15 RT 3606-3607.) Gunnar's daughters received social security checks because their mother was deceased. (21 RT 5197.) At first, Balazs told Blank that she was receiving their checks, and she forwarded the money to Blank using money orders. (15 RT 3599-3600.) Eventually, the government informed Blank that the checks needed to go directly to him.

Blank then began receiving the checks directly. They were for a higher amount than Balazs had been sending. (15 RT 3601.)

Numerous witnesses, including appellant, testified that Lake went by the name of Charles Gunnar. (18 RT 4328-4330; 22 RT 5373, 5383-5384; 23 RT 5472, 5478, 5482, 5489-5490; 23 RT 5509-5511, 5565-5566, 5586-5587, 5597-5598, 5618, 5622-5624, 5703; 24 RT 5758, 5760-5761; 26 RT 6342-6344, 6355; 30 RT 7213-7214.) In 1992, Gunnar's body was found buried at the Wilseyville property. (17 RT 4169-4170, 4238-4239.) He had been shot at least seven times. (25 RT 6132-6133, 6139.)

(3) Maurice Rock, Randy Jacobson, and Sheryl Okoro

Maurice Rock lived in an apartment building in San Francisco known as the Pink Palace. The building featured small rooms and communal bathrooms. (23 RT 5644, 5650; 24 RT 5741-5742.) Rock had a neighbor, Tamara Dougher. He introduced her to Lake and told her that Lake's name was "Allen Dray." (24 RT 5740-5743.)

In the summer of 1984, Rock disappeared. (24 RT 5744-5745.) At first, Dougher was not suspicious, because Rock had said he was going to Allen Dray's ranch to pick marijuana. (24 RT 5745-5747.) A few months later, Dougher encountered Lake and asked him about Rock. Lake replied that Rock had never shown up at the ranch. (24 RT 5753-5755.) During the investigation of the instant case, Rock's body was found buried at the Wilseyville property. (15 RT 3707-3708.) His identification and other documents were also found there. (15 RT 3707; 16 RT 3824.)

Randy Jacobson also lived at the Pink Palace. (24 RT 5794-5795.) Lake had been seen in or near Jacobson's apartment. (24 RT 5783, 5786-5787, 5796-5797.) During the investigation, Jacobson's body was found buried at the Wilseyville property. (13 RT 3132.) He had died of cyanide poisoning. (17 RT 4230-4231.) When Lake was arrested at South City

Lumber in June 1985, he was carrying Jacobson's bank card. (12 RT 3042-3043.) In addition, a check from Kathleen Allen's bank account had been written to Jacobson, and it bore Lake's handwriting. It was dated more than two weeks after Allen disappeared. (15 RT 3636; 20 RT 4918-4919.) A letter to Jacobson's bank, supposedly from Jacobson, was typed on the Olympia typewriter found in the Wilseyville residence. (13 RT 3360-3361; 18 RT 4501-4502; 20 RT 4877.) And someone using Jacobson's name used the post office box that appellant had rented in Pioneer. (16 RT 3800-3801, 3803.)

Sheryl Okoro also resided at the Pink Palace. (23 RT 5644, 5660.) She lived with a wheelchair-bound African-American man. (23 RT 5661-5662.) During the investigation, her remains were discovered at the Wilseyville property. (15 RT 3651; 25 RT 6099-6100, 6109.) Mail was sent to her at the Wilseyville address. (23 RT 5586-5587, 5591-5592.) The investigators at the Wilseyville property found a photograph of Okoro that had been taken at the Wilseyville residence. In the picture, she was wearing a T-shirt with a picture of a tiger. During the investigation, the police obtained the same shirt from Balazs. (14 RT 3530-3531, 3533; 15 RT 3650.) On a letter signed "Sheryl Lynn Okoro," Lake had written the words, "whore, druggy, betrayed her race." (15 RT 3649-3650; 26 RT 6544.)

A pornography collector in Skokie, Illinois, received a letter from "Sheryl Okoro" in an envelope from the Philo Motel. (15 RT 3690-3692.) The police later searched the man's house and seized a pornographic videotape, in which Balazs appeared and called herself "Sheryl." (15 RT 3692-3694; 16 RT 3816.)

b. Invitations to Wilseyville

Sometime in 1983 or afterward, a man calling himself "Tom" invited San Francisco resident Robert Barufaldi to his place in the mountains.

(23 RT 5547, 5549.) Barufaldi did not answer the invitation but nevertheless received a letter with instructions to meet in a parking lot and ride to the mountains together. (23 RT 5549-5550.) Barufaldi did not go to meet the man, and the man later called him and was angry that he had not come. (23 RT 5550-5551.) The man then offered to meet at a parking lot in San Francisco, but Barufaldi declined. (23 RT 5551.) Barufaldi did not know if the man was Lake, but Lake's photo looked familiar. (23 RT 5547.)

At least twice, Lake invited Pink Palace resident Tamara Dougher to his ranch to pick marijuana, but she declined. (24 RT 5747-5749.)

In about 1983, at Balazs's suggestion, Colleen Poliakoff accompanied Lake to Wilseyville for a weekend and helped Lake build a structure he described as a bomb shelter. (23 RT 5551, 5533.) After they arrived, Lake asked Poliakoff whether she had told anyone she was going to be there. (23 RT 5536.) When Poliakoff said she had, Lake became angry and defensive. (23 RT 5536-5537.)

Between February and April of 1984, Lake invited Beverly Lockhart to a cabin in the mountains near Jackson. (22 RT 5408-5409.) Lockhart initially accepted the invitation but later declined. Lake "wasn't very pleased" about the cancellation. (22 RT 5409.) Lake also invited James Trotter to go to the mountains, but Trotter also declined. (24 RT 5797.)

On several occasion from about 1984 to the first half of 1985, Balazs invited Wesley Doidge to the mountains to go shooting. (24 RT 5732.) She also invited two of Doidge's coworkers. (24 RT 5736.) She told Doidge that Lake would be there too. (24 RT 5733-5735.) Doidge declined the invitations. (24 RT 5732-5733.)

Balazs also tried to sell Doidge a MAC-10 pistol, but Doidge was not interested. (24 RT 5731, 5736.) Balazs was the registered owner of a MAC-10 automatic pistol, which the United States Drug Enforcement Administration eventually turned over to the Calaveras County Sheriff's

Department. When the sheriff's department received the gun, it came with a silencer and a clip of ammunition. (24 RT 5938-5939.)

c. Photography, thefts, and relationships with women

Lake's former wife, Karen Roedl, saw photos Lake had taken of young women, some of which were sexually provocative. (21 RT 5027-5028, 5043-5045.) Lake showed another witness, "Mrs. M.," several albums containing photos of women. (21 RT 5091, 5097.) Some of the women were nude or partially nude. (21 RT 5097-5098.) Mrs. M. also saw photos of girls who looked like they were about 14 years old; they were fully clothed but were posed in a sexually suggestive manner. (21 RT 5099.)

In Lake's living room, Mark O'Lague saw at least 12 photo albums containing pictures of women, including nude women. (21 RT 5143, 5148-5149.) Richard Reeves also went to Lake's home and saw one or two shoeboxes full of photos of women "in various poses of undress." (21 RT 5156, 5165.) Lake showed Pamela Hays an album that contained photos of clothed women and photos of girls who looked like they were about 10 to 12 years old and were nude from the waist up. (22 RT 5320, 5326-5327.)

Twelve women testified that Lake photographed them or asked to. He photographed 16-year-old "Ms. L." clothed and asked to photograph her nude, but she initially refused. (21 RT 5050-5053, 5058.) He later coerced her into posing nude and then raped her. (21 RT 5053-5057.) He then coerced her into participating in additional sessions, where he again photographed her nude and had sex with her. (21 RT 5058.) Lake photographed his cousin Carolyn Richardson partially clothed. (24 RT 5905.)

Zephyr Bergera and Laverne Smith each refused Lake's requests to pose for nude photos. (21 RT 5130, 5134-5135, 5167, 5180-5181.) Lake

also wanted to take nude photos of Bergera's young daughter, but Bergera forbade it. (21 RT 5135-5136.) Valeria Hammon, Pamela Hays, Kim Sarlo, Marion Pray, and Pamela Burford all permitted Lake to photograph them clothed but refused to pose nude. (21 RT 5205-5215; 22 RT 5320, 5327-5329, 5360, 5364-5365; 23 RT 5476-5477, 5479-5480, 5641, 5646-5648.) Pray was 14 or 15 years old at the time. (24 RT 5478, 5484.)

Pamela Dougher initially agreed to let Lake photograph her but later changed her mind and refused. (24 RT 5740, 5749-5750.) Lake photographed 14-year-old Herlinda Heras clothed and invited her to his farm to take more pictures. Nothing came of the invitation, because Lake bought a motel and turned his attention to that. (21 RT 5221-5230.) When Tina Marquez was about 16, Lake photographed her clothed. She was a student at the school where Balazs worked, and Balazs referred her to Lake. (23 RT 5469-5474.)

During Karen Roedl's marriage to Lake, he slapped and hit her. (21 RT 5036-5037, 5046.) He also controlled her finances by going to the bar where she worked and taking her tips and paychecks. (21 RT 5037.) He once locked and boarded up their house, forcing Roedl to sleep in the car. After they separated, he repeatedly broke into her house. (21 RT 5038-5039.)

Another witness, Ms. M., lived with Lake but moved out after they had an argument and she ended up on the floor with his foot on her. (21 RT 5101.) Lake was violent and "manipulative" in his relationship with Tania Levy. (21 RT 5120-5121.)

Lake stole building materials from his employer when he worked for a government-funded program that upgraded low-income homes. (21 RT 5145-5147.) He was also involved in thefts when he lived at Greenfield Ranch in Northern California. (21 RT 5139; see 21 RT 5131-5132.) Two days after Charla Neilson declined Lake's marriage proposal, a man

matching his description broke into her apartment. (21 RT 5075-5076, 5085-5086.)

Lake knew how to start a fire using chemicals. (21 RT 5015-5016; 22 RT 5340-5343.)

d. Lake's "Miranda" fantasy and the construction of the bunker

Lake told several witnesses he wanted to build a bunker to use in a nuclear war or other calamity. (18 RT 4550; 21 RT 5105, 5120, 5171-5174; 22 RT 5289, 5292-5293; 23 RT 5435-5436; 26 RT 6331.) He started building one before he lived in Wilseyville. (21 RT 5120, 5169, 5171-5172.) He also told several witnesses that he carried cyanide and would take it if he were ever captured. (18 RT 4540; 21 RT 5142, 5180; 22 RT 5294, 5436.)

In the novel *The Collector*, a young man buys a van and a remote house in the country and then captures a young woman named Miranda and imprisons her in his cellar. He tells her that he is not going to hurt her and promises to keep her for only two weeks, but he breaks the promise. Miranda eventually dies of pneumonia, and the young man buries her in the garden. At the end of the book, he begins stalking another woman. (25 RT 6126-6128.)

Lake discussed *The Collector* in his diary. In an entry dated February 19, 1983, he wrote :

> Awe, The Collector. Has it really been near 20 years I have carried this fantasy and Miranda? How fitting. My lovely little village in Humbolt. My lovely little prisoner of the future. I suppose in my way I am the same whimp [*sic*] as the hero and in my way just as crazy.

(29 RT 6969-6970.)

During the investigation at the Wilseyville property, the police discovered a videotape in which Lake discussed his reasons for building the

bunker.[25] (13 RT 3223.) Lake apparently recorded the video on October 22 or 23, 1983.[26] (See 24 RT 5917; 31 OCT 10403.) In it, he said the following: His main reason for building the bunker was to construct a hidden cell where he planned to imprison and enslave a young woman. (31 OCT 10403-10404.) He was attracted to young, slim, attractive women and wanted an "off-the-shelf" sex partner whom he could "use" and "put . . . away" without bothering to entertain her or satisfy her emotional needs. (31 OCT 10404-10406.) His captive would also perform household chores and would function as a physical and sexual slave. (31 OCT 10406.) Lake planned to begin construction the next day by clearing the land. (31 OCT 10407.)

In October 1984, Pink Palace resident James Stewart accompanied Lake and Louie Balazs to the Wilseyville property. (24 RT 5758, 5760, 5764-5767.) While there, Stewart dug a trench and poured dirt the on top the bunker, which was dug into a hill. (24 RT 5767-5768.) Inside the house, marijuana was spread out over the living room floor, drying out. (24 RT 5771-5772.) Stewart never met appellant but heard Lake talk about his "buddie." (24 RT 5774, 5777-5778.)

e. Lake's commercial activities

Lake conducted at least three garage sales in Wilseyville; they took place in 1985 and possibly 1984. (23 RT 5588-5589.) The first garage sale

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[25] The videotape was played for the jury and admitted into evidence. It was labeled as prosecution Exhibit 81-A, though the defense offered it into evidence. (27 RT 6669-6670; 28 RT 6833.) A transcript of the video, labeled Exhibit 81-B, was also admitted into evidence. (28 RT 6833.) The record contains a copy of the transcript. (31 OCT 10403-10409.)

[26] In the video, Lake said that the date was October 22 or 23, and 135 Marines had been killed in Lebanon that day. (31 OCT 10403.) It was stipulated that United States embassy in Lebanon was bombed on October 23 or 24, 1983. (24 RT 5917.)

included mostly household items, including some expensive Corningware. (23 RT 5589.) During the last garage sale, Lake was selling a large amount of items, including one or two televisions. (23 RT 5590.)

Between March and May of 1985, Lake placed several ads in the Buy and Sell Press, a Mokelumne Hill publication where people listed items for sale. (23 RT 5596-5597, 5601-5607, 5609-5610.) In about March, he came into the publication's office, smelling like an animal that had rolled around in something dead. (23 RT 5612-5613.) On May 3, 1985, he placed an ad listing a Honda Civic, a Plymouth Fury, and a camper shell for a Chevy S10.[27] (23 RT 5609-5610.)

In May, Lake offered to sell a Plymouth to Shirley Barnett. He did not have title to the vehicle. (29 RT 6966-6967.) He also told James Southern that he was selling a pickup truck for a friend. (23 RT 5702-5703.)

2. Appellant's relationship with Lake

In 1980, Lake met Mark Novak. (26 RT 6327-6330.) Novak was serving in the Army, and while posted in Hawaii, he met and befriended appellant, who was in the Marines. (26 RT 6334-6335.) In approximately the summer of 1981, Novak told appellant about Lake, who shared appellant's interest in guns and survivalism, and he gave appellant Lake's address in Philo. (26 RT 6336-6337, 6339-6340.)

During part of 1982, appellant lived with Lake and Balazs in Philo. Their neighbor was Ernie Pardini. (23 RT 5664-5665, 5673-5674.) Pardini observed that appellant and Lake were always together. (23 RT 5665-5666.) According to Pardini, Lake frequently reprimanded appellant and "rode him

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[27] Lonnie Bond had previously purchased a Honda Civic. (27 RT 6594, 6609.) Scott Stapley's pickup truck was a Chevy S10. (15 RT 3657-3658.) Stapley had also driven Terri Doolin's Plymouth to Wilseyville and left it there. (18 RT 4286, 4291.) Lake asked Doolin for the pink slip when he and appellant visited her apartment in San Diego. (18 RT 4286.)

hard . . . ." (23 RT 5673.) Most of the time, Lake spoke to appellant in a degrading manner. (23 RT 5675.) He "ordered [appellant] around like a slave." (23 RT 5684.) Pardini considered it verbal abuse. (23 RT 5690.) Appellant seemed very subservient and willing to do whatever Lake said. (23 RT 5685.) It appeared he was trying to gain Lake's approval, and Pardini never heard him talk back to Lake. (23 RT 5675-5676, 5685.) He did not remember ever seeing appellant outside Lake's presence. (23 RT 5686.)

One day, Pardini's wife got upset because Lake was harassing her while she worked in her garden. Pardini confronted Lake and threatened him with physical harm if he did it again. (23 RT 5681-5682.) Lake responded that he would never fight with Pardini; he explained that he was a coward, and if someone wanted to fight him, he would come back later and shoot them. Pardini had frequently seen Lake carrying guns but did not take this seriously. (23 RT 5682.)

Appellant was out of California from April 29, 1982, to July 9, 1984. (23 RT 5669.)

3. Evidence pertaining to the specific charges

a. Dubs

After the case broke, the police went to Balazs' home, and she gave them videotapes of the movies *Scarface* and *Fanny and Alexander*. (27 RT 6583-6584, 6589-6591.) The "Captain Video" receipt found at the Wilseyville property indicated that Harvey Dubs had rented videos of these movies. The receipt was dated "7-24," the day before the Dubs' disappearance. (13 RT 3179; 27 RT 6590.) Balazs signed Debra Dubs's maiden name, Debra Nourse, on a credit card slip dated two days after the Dubs' disappearance. (20 RT 4927-4928; 26 RT 6543; 28 RT 6867; Def. Exh. 555.)

On August 10, 1984, 16 days after the Dubs family disappeared, their neighbor Dorice Murphy contacted the police and told them that earlier that day, she had seen a man whom she had previously seen near the Dubs' apartment close to the time they disappeared. (24 RT 5872-5875.) She described him as a well-dressed Caucasian, Mediterranean-looking man with a round face and curly hair. (24 RT 5876.) She followed him until he looked in his rear-view mirror, saw her, and cut across three lanes of traffic at high speed. (24 RT 5877.) He was driving a new white Honda with a paper license plate from a dealership in Oregon. (24 RT 5877-5878.)

In 1996, Mitch Hrdlicka, an investigator for the Calaveras County District Attorney's Office, spoke with Murphy about the Dubs' disappearance. (29 RT 6961-6962.) In his report, he typed that Murphy had said she saw "subjects" exiting the Dubs' home; however, he did not recall Murphy telling him she saw more than one person coming out of the apartment. (29 RT 6961-6964.) If Murphy had referred to "subjects" in the plural, Hrdlicka would have pursued it. (29 RT 6965.)

b. Cosner

Verna Parker lived across the hall from Cosner. (23 RT 5569-5570.) The last time she saw him was on a Friday. Three days later, she learned that he was missing. (23 RT 5571-5573.) A day or two before Parker last saw Cosner, she observed him backing his car out of the garage. (23 RT 5574.) Lake was standing in front of the garage door waiting for him. (23 RT 5575-5577, 5583; see 22 RT 5373.) Lake stared at Parker, which made her uncomfortable. (23 RT 5575-5576.) After Cosner backed out of the garage, he rolled down his window. Lake leaned in and they started talking. (23 RT 5577-5578.) No one else was with Lake. (23 RT 5579.)

c. Gerald

George Mucks managed a church camp adjacent to the Carter house. (23 RT 5508-5509, 5513-5515.) On February 25, 1985—the day after Jeffrey Gerald disappeared—Mucks heard bullets whizzing through the trees. (23 RT 5511-5513.) He walked to a nearby house and encountered "Lonnie," Lonnie's wife, a baby, and another man. (23 RT 5513-5515.) They said they had been target shooting. (23 RT 5515.)

Mucks then walked over to Lake's house. (23 RT 5516.) He walked around the house and banged on the side, yelling for "Charles" to come out. Lake did not come out immediately but eventually appeared at the front door. He seemed to be naked except for a bloody sheet wrapped around his arm. (23 RT 5517.) He told Mucks that he had cut himself on a circular saw. Mucks did not see or hear anyone else there. (23 RT 5518.)

On the same day, Lake was treated by Dr. Phillip Minton for a gunshot wound to his left hand. (23 RT 5618, 5622-5624; see 22 RT 5373.) He told Dr. Minton that the wound had occurred about 12 hours earlier, when a gun accidentally discharged. (23 RT 5624, 5628.) Dr. Minton removed a bullet slug—or a piece of one—from Lake's hand. It appeared to be a .22-caliber bullet. (23 RT 5628.)

d. Carroll and Allen

Joseph Sundberg was Michael Carroll's stepbrother and had lived with Carroll. (22 RT 5414.) Sometime in 1985, Lake and another man came to Sundberg's house to retrieve some of Carroll's belongings. (22 RT 5414-5416.) Sundberg had not known anything about this, but one of his brothers said Carroll had written a letter stating that some people were going to pick up his things. (22 RT 5415.)

After Lake entered the garage, he looked at Sundberg's wife and teenage daughter in an offensive manner. Sundberg told Lake to get out of

the garage and then took Carroll's possessions outside and gave them to an older man in the truck. (22 RT 5415-5417.)

Soon afterward, Sundberg saw Lake on the television news. (22 RT 5418-5419.) At trial, Sundberg examined a photo of Louie Balazs and testified that he was 80 percent sure Mr. Balazs was the man in the truck with Lake. (22 RT 5417; see 15 RT 3603, 3611; 28 RT 6868; Def. Exhs. MM, 569.)

After the case broke, Claralyn Balazs gave the police a gold chain necklace with a floating heart. (27 RT 6583-6584, 6587-6589.) Kathleen Allen had a gold chain necklace with a floating heart that she wore "all the time." (15 RT 3671.)

e. Bond, O'Connor, Lonnie Jr., and Stapley

Lake once complained to Karen Howsmon that his neighbors, the Bond family, were shooting guns all the time, and the wife would come over and borrow milk for her baby. (23 RT 5488, 5500-5502.) Lake told his neighbor James Southern that his other neighbors were "pests," and the woman often asked for a ride to the store so she could get milk for her baby. (23 RT 5688, 5703.) At some point, Lake told Southern that he believed it was okay to kill a person if they were bugging you, and you should be able to kill someone and forget about it. (23 RT 5704-5705.) Lake told Dr. Phillip Minton that he liked the Southerns but disliked his neighbors on the other side. (23 RT 5631-5632.) One reason he disliked them was because they fired guns. (23 RT 5636.) Lake also told his cousin, Carolyn Williams, about his neighbors who had a baby. He said the woman had stayed with him for a couple of days during the winter when the power went out, and that she was stupid, smoked too much, and was not a good mother. (24 RT 5880, 5892.)

In March or April 1985, Scott Stapley's friend, Terijo Kohler, loaned him some money to buy a used truck. (25 RT 6151-6153.) Stapley thought

he would be able to pay her back soon afterward; he told her there would probably be a drug sale, and he would pay her back when he made his money. (25 RT 6158.) Kohler last saw Stapley a short time later, when he was leaving San Diego with O'Connor and Lonnie Jr. (25 RT 6153-6154.)

In April 1985, Cody Landers met O'Connor and Lonnie Jr. at a house in Lodi and drove them back to their home in Wilseyville. (25 RT 6179-6181.) O'Connor told Landers that she was afraid to return to Wilseyville because of her neighbor, who kept approaching her and asking to take nude photos of her and Lonnie Jr. (25 RT 6181-6182.) When they arrived at O'Connor's house, Lake was sitting at the kitchen table dividing up about three pounds of marijuana, and Bond was also there. (25 RT 6182-6184; see 24 RT 5916-5917.) Landers stayed for about five minutes and did not see anyone else. (25 RT 6185.)

Curtis Everett and Marsha Bock were friends of Bond, O'Connor, and Stapley. (26 RT 6350-6351.) Everett and Bock lived together in Winton, approximately two hours from Wilseyville. (25 RT 6160-6161; 26 RT 6350-6351, 6359.) Sometime in April 1985, Everett and Bond were together in Paso Robles, where Bond was manufacturing methamphetamine. (25 RT 6162-6164, 6169.) Stapley was not there. (25 RT 6171.) The manufacturing process was not complete, and Bond planned to perform the next stage at his house in Wilseyville. (25 RT 6169-6170.) While in Paso Robles, Bond packed up the glassware used in the manufacturing process. (25 RT 6164-6166.)

During the methamphetamine operation in Paso Robles, Everett saw a Honda that he later observed in news reports about this case. He also saw a person wearing camouflage near the area where Bond was manufacturing the methamphetamine. (25 RT 6177-6178.) While Bond was still in Paso Robles, he phoned O'Connor. (25 RT 6174.) From what Everett could

discern of the conversation, things were not going well in Wilseyville, and O'Connor was frightened. (25 RT 6174-6175.)

On April 18, at about 2:00 a.m., Bond left Everett and Bock's house in Winton. (26 RT 6353.) He told Bock he was going to the cabin to confront Lake ("Charles Gunnar") and "settle the score." (26 RT 6355.) Bond was upset because Lake had said he was going to "have" O'Connor. (26 RT 6355.)

Bock had a feeling something bad was going to happen to Bond in Wilseyville, and she would never see him again. (26 RT 6355-6356.) She told this to Bond and begged him not to go. In response, Bond looked down at the floor and said, "yeah." (26 RT 6356.)

Everett asked Bond whether he could "handle" Lake, and Bond said that if he could not, then he had his .22. (26 RT 6357.) Bond planned to meet up with Bock and Everett a few days later, on April 23, but he failed to show up, and Bock never saw him, O'Connor, or Lonnie Jr. again. (26 RT 6357-6360.)

After Bond and his family disappeared, Bock went to their cabin with a detective. She saw some well-worn trails leading from a nearby house to the back door and every window of Bond's cabin. (26 RT 6353-6354.)

In May, Shirley Barnett was at the Wilseyville property and saw a stack of wood there. Lake told her that the wood had kept him, the neighbor girl, and her baby warm the previous winter. He also said the baby cried a lot and kept getting into his things, so he felt like killing him. He made this comment in passing, during a normal conversation. (29 RT 6966-6967.)

Dr. Boyd Stevens testified that the bodies of Stapley and Bond were partially covered by plastic garbage bags. (27 RT 6645-6647.) In Dr. Stevens' opinion, the gunshot wound that entered through Stapley's mouth was fired with the barrel inside his mouth. (27 RT 6649, 6651-6652.)

When the police visited Balazs's house after the case broke, they found some beakers there. They also collected 19 "chemical apparatus drawings" from her. (27 RT 6591, 6593, 6604.)

On May 28, 1985, "Miss C." spoke with Lake by telephone. (22 RT 5369, 5385.) Miss C. could hear some noise in the background and asked if anyone was with Lake. Lake said someone was in the house with him. He said she was homeless and pregnant, and her boyfriend had thrown her out. (22 RT 5385-5386.) He also said he was not going to keep her because she had too many problems. (22 RT 5386.)

In May, Lake's cousin, Carolyn Williams, visited him at the Wilseyville property and stayed about 10 days, until approximately May 27. (24 RT 5880, 5884.) One night, Lake cooked a rabbit for dinner. There were about eight or nine pieces. Richardson ate one or two pieces, and Lake ate about two and put the rest in the refrigerator. (24 RT 5888.) Sometime before lunch the next day, Richardson looked in the refrigerator, and all the rabbit was gone. Lake told her he had eaten it. (24 RT 5889.) One evening for dinner, Lake prepared chops and made extra ones, but they were gone the next morning. Lake's dog usually ate dog food. (24 RT 5890.)

4. Appellant's flight and the aftermath

In early June of 1985, appellant phoned his aunt, Alice Shum, and told her he wanted to go on vacation. She loaned him $200. (26 RT 6288-6289, 6305-6306.) She picked him up at a BART station and drove him to his apartment. He got his luggage, and Shum drove him to the airport. (26 RT 6306-6307, 6324-6325.)

Sometime between June 2 and June 5, 1985, Balazs asked Lake's sister, Fern Eberling, and Lake's mother, Gloria Eberling, to accompany her to Wilseyville at night to retrieve some belongings. (18 RT 4531-4533.) Balazs seemed slightly anxious. (18 RT 4533.) Gloria Eberling went with

Balazs to Wilseyville that evening. (18 RT 4532.) Fern Eberling later told an investigator that Balazs was panicking about "some videotapes and stuff up there." (18 RT 4534-4535.)

Sandra Bonecher was a good friend of Balazs. (24 RT 5811-5813.) When the case broke, Balazs told Bonecher that she couldn't believe Lake was involved, and it must have been appellant. (24 RT 5820, 5826.) Also after the case broke, Balazs came to Bonecher's house carrying a pillowcase with some items inside. She told Bonecher it came from Wilseyville, and she needed to store it with her. (24 RT 5813-5814.) Balazs was in tears and extremely upset. (24 RT 5815.) Bonecher allowed Balazs to store the items in her closet. (24 RT 5814.) When Balazs later retrieved the property, she told Bonecher that it included some pages of a diary that she did not want "them" to find. (24 RT 5816.)

Bonecher later told a defense investigator that just after the news of the murders broke, Balazs came to her house and said that Lake could not have been involved, and she was going to put it all off on appellant. (27 RT 6610-6615.) Later in the interview, Bonecher said this was not what she meant, and she did not want to do anything to hurt her best friend. (27 RT 6616-6618.) Bonecher had met appellant on New Year's Eve 1981 with Lake and Balazs. (24 RT 5820-5821.) Appellant had been very shy and quiet. (24 RT 5821.)

5. Expert Testimony

a. Bones and teeth

Dr. Gregory Golden, a forensic dentist, examined the dental specimens that were determined to have come from children. In his opinion, their possible age range was between six and seven years old. (24 RT 5958, 5967-5968.) It was reasonable to conclude that some of the specimens were in the lower end of this range, because they did not show

much wear. (24 RT 5989.) It was possible the specimens came from more than one child, but there was no evidence they did. It was more likely they only belonged to one child, because no duplicate teeth were found. (24 RT 5969.) Dr. Golden examined one specimen that had been glued together; he did not know who glued it. (24 RT 5982-5983.) Forensic dentists frequently glue together specimens that fit, but this one did not fit. (24 RT 5983-5984.)

Another dentist, Dr. Harold Slavkin, used a scanning electron microscope to examine dental specimens recovered in this case. (26 RT 6205-6207; see 24 RT 5961.) He concluded that two roots and two crowns came from the same individual or very closely related individuals, and their age range was "erupted teeth through young adulthood . . . ." (26 RT 6207, 6210-6212.) He could not state with certainty that the roots or crowns came from the same individual. (26 RT 6215.)

Phillip Walker, Ph.D., an anthropologist, examined remains collected in this case. They all showed evidence of burning. (26 RT 6230-6234.) He examined a left petrosal bone and a right petrosal bone and concluded they came from at least one child, probably about four years old. (26 RT 6248-6249.) He did not examine any petrosals that appeared to come from an infant. (26 RT 6249.) Dr. Walker also examined two rib fragments and concluded that they could have come from the same child, who was probably about three and one-half to four years old. (26 RT 6249-6250, 6252, 6261.) One of these fragments had previously been listed as coming from an infant. (26 RT 6249-6250.) Dr. Walker also examined a mandibular condoyle that had been labeled as belonging to a child. He concluded that it probably belonged to an adult. (26 RT 6263-6365.)

Forensic anthropologist Judith Suchey examined and photographed every piece of bone recovered in this case and did not see any bones that were obviously not human. (27 RT 6453, 6458, 6513.) She agreed with Dr.

Walker that the rib fragments belonged to a child, not an infant. (27 RT 6515.)

According to Dr. Suchey, the "archaeological technique" is necessary for recovering buried evidence, whether skeletal or artifactual. (27 RT 6459-6460, 6471-6472.) This technique involves gridding and mapping the top of the surface, excavating in levels, and documenting the position of items before removing them. (27 RT 6460.) It is important to know what items are associated with what other items. (27 RT 6462.) Also, if there are partial remains, it is important to know where one person's remains end and another person's remains begin. (27 RT 6463.) This method is very time consuming and requires assembling a team, devising a plan, and sometimes securing more funding. (27 RT 6466-6467.)

In Dr. Suchey's opinion, the investigators in Wilseyville should have employed the archaeological method in uncovering the items in the trenches. Further, no decisions regarding the excavation should have been made without retaining an archaeologist, and a forensic pathologist should not have been in charge of the scene. (27 RT 6472-6473, 6510-6511.) It is possible that more information would have been available if the authorities had used the archaeological method. (27 RT 6464, 6473.) It would be known whether two of the rib fragments were found together. (27 RT 6474.) Also, radiocarbon testing could have been performed to determine whether the bones were modern or older. (27 RT 6482.)

In reviewing the evidence, Dr. Suchey found a human ulna that had been marked as an animal bone. (27 RT 6498.) She also found part of a hip bone in a body bag with some rubble. (27 RT 6500.) In view of the autopsy reports, Dr. Suchey would have first investigated whether the bone belonged to Randy Jacobson. (27 RT 6507.) It should have been checked for identification but was not. (27 RT 6502.) Dr. Suchey opined that the

bones in this case were not packaged properly. And no record was kept of who had touched them. (27 RT 6503.)

b. DNA

Mitochondrial DNA is DNA found outside a cell's nucleus. (25 RT 6073.) If a DNA reference sample for a given individual is not available, then an analyst can use mitochondrial DNA from a maternally related relative as a reference sample. (25 RT 6076-6078.) Using this method, the analyst can determine whether the two samples are maternally related. (25 RT 6077.) By the time of appellant's trial, mitochondrial DNA analysis had gained acceptance in the scientific community. (25 RT 6120.)

In 1985, mitochondrial DNA extraction from bone was not yet being performed; the first paper on it was published in 1989. (25 RT 6114.) To extract mitochondrial DNA from a bone specimen, a piece of the specimen must be removed. At the time of appellant's trial, it took at least two weeks to extract and analyze mitochondrial DNA for a single specimen, and it cost about $1,000 to $2,000. (25 RT 6122.)

Kevin Miller, Ph.D., a criminalist specializing in DNA analysis, examined approximately 100 bone specimens in connection with this case. (25 RT 6071-6072, 6080-6081.) According to Dr. Miller, if a bone specimen contains protein, it also contains DNA. (25 RT 6083-6084.) In an experiment, Miller looked for collagen—a protein—in bone samples that were burnt at various temperatures for various amounts of time. (25 RT 6084-6086.) He did this by measuring the way the bone absorbed light. (25 RT 6086-6088.) He was not permitted to alter the bones recovered in this case, so he looked for collagen by scanning them for a color reading. (25 RT 6092-6093.) Based on the bones' color, he determined whether they had enough collagen to yield DNA. (25 RT 6093-6094.) This was the first time any scientist had conducted such an experiment to determine the

possibility of extracting mitochondrial DNA from burnt bone. (25 RT 6099.)

Miller finished this experiment about a month before he testified at trial. (25 RT 6112.) Of the 101 bones he tested, he concluded that 23 were good candidates to contain DNA. (25 RT 6096-6097.)

At the time of trial, nine states had accepted mitochondrial DNA analysis in criminal cases, but California had not. (25 RT 6097-6098, 6119.) And no peer review journal had published a study on the use of collagen as a predictor of DNA presence. (25 RT 6098-6099.)

Dr. Mark Stoneking, who worked with the prosecution on DNA analysis in this case, had not seen any published literature on the likelihood of extracting DNA based on the burnt specimen's color or appearance. (25 RT 6120, 6122.) Even for a specimen that was not burnt, environmental conditions could cause DNA to degrade and become unusable. (25 RT 6122.)

In 1990, DNA experts working for the prosecution tested bone material at various temperatures and degrees of burning to determine whether it was feasible to conduct DNA analysis on partially burnt bone fragments and human tissue. Their results showed that bones burned for 15 minutes at 400 degrees could yield reliable mitochondrial DNA. (25 RT 6119-6121.) This was the first time anyone had conducted such an experiment. (25 RT 6120-6121.) At that time, no crime lab in the United States was conducting mitochondrial DNA analysis for court cases. (25 RT 6121.)

A criminalist was able to extract mitochondrial DNA from some of the tissue and bone found at the Wilseyville property. There was a 99.5 percent probability that this DNA belonged to someone related to Sheryl Okoro's mother and sisters. (25 RT 6099-6100, 6109, 6121.)

An organ identified as a child's liver was found at the Wilseyville property, and DNA testing indicated that it did not belong to Sean Dubs or Lonnie Bond, Jr. (25 RT 6118-6119.)

c. Fingerprints

The investigators in Wilseyville lifted about 80 identifiable fingerprints from the Wilseyville residence, the bunker, and the Carter house. (26 RT 6361-6362, 6364.) One of the prints belonged to appellant; it appeared on a wine bottle in the kitchen. (26 RT 6364-6365.) Twenty-three prints belonging to Lake were found in the residence, and seventeen were found in the bunker, including some in the hidden rooms. (26 RT 6367-6368.) Lake's fingerprints and Lonnie Bond's fingerprints appeared on some chemical glassware found in the bunker. (26 RT 6369.) In addition, two prints belonging to Balazs were found in the residence. (26 RT 6371.) In the Carter house, the investigators found some unidentifiable prints and some belonging to Bond. (26 RT 6369-6370.) Some people leave more fingerprints than others. (26 RT 6375.)

6. Appellant's testimony

a. Background; relationship with Lake

After the defense had rested and the prosecutors had finished their opening argument to the jury, the defense moved to reopen its case so appellant could testify. The court granted the motion. (30 RT 7152-7153.)

On the witness stand, appellant denied intending to kill any of the victims, agreeing with Lake to kill any of them, or being present when any of them were killed. (30 RT 7356; 32 RT 7677-7678.)

Appellant met Lake after Mark Novak gave him Lake's name and address. He then stayed with Lake in Philo for about six months. (30 RT 7389.) In about April 1982, Lake was arrested on weapons charges, and appellant was arrested for offenses he had committed while serving in the

Marine Corps. He was taken to Hawaii and court-martialed there. (30 RT 7389; 31 RT 7618-7619.) In the court-martial, appellant was convicted of burglary and theft of government property—both felonies. He was sentenced to three years in prison and incarcerated at Fort Leavenworth. (30 RT 7217-7218.)

During the court-martial, appellant admitted he was not an American citizen and had no legal status in this country. (30 RT 7400; 31 RT 7621.) He had expected to be deported to Hong Kong after completing his sentence, and he admitted this during the court-martial. (30 RT 7218; 31 RT 7622; 32 RT 7642-7644.) However, he never told Lake and Balazs that he expected to be deported, and they apparently believed he was going to return to California and rejoin them. (39 RT 7401.)

During appellant's incarceration, Lake sent him photos showing various stages of the bunker's construction. Lake told appellant that he wanted to build the structure in case of a nuclear war. Appellant did not know that Lake's real purpose was to imprison a sex slave. (30 RT 7190-7191, 7395-7396.) Balazs acted as an intermediary for most of the correspondence between appellant and Lake. (30 RT 7161.)

When appellant was released from Fort Leavenworth, he listed Balazs's residence as his forwarding address. (30 RT 7250, 7400.) He did not list an address in Hong Kong, because he did not know whether the military would forward his mail there. (31 RT 7623-7624.) After being released, he visited a friend in Oklahoma. He had hoped to get a job there but did not. He returned to California on July 9, 1984. (30 RT 7401-7402.) Balazs picked him up at the airport and brought him to Lake. (30 RT 7404-7405.)

Appellant was born in Hong Kong and left there at age 18. (30 RT 7168-7169.) When he first met Lake, he viewed Lake as a patriot because Lake had served with the Marines in Vietnam, and he looked up to Lake

because Lake had held a higher rank and was knowledgeable about different things. (30 RT 7165-7166.) He felt respect and loyalty toward Lake. (30 RT 7169-7170.)

When appellant was released from Fort Leavenworth, his self-esteem was low, but Lake accepted him as a friend even though he was not a citizen, could not drive, had no job, and had a criminal record. (32 RT 7673-7674.) During this period, Lake was more secretive, paranoid, and security-conscious than he had been in Philo. Lake did not want appellant to know about a lot of the things he was involved in. (30 RT 7213.)

Appellant first visited Wilseyville in July 1984. (31 RT 7487.) To get there, he would take a bus from San Francisco to Stockton, where Lake would pick him up. (30 RT 7181.) Appellant thought that Balazs sometimes brought his mail to Wilseyville. Appellant would read the mail and dispose of it there. (30 RT 7250.) Lake told appellant about the bunker's secret chamber but said it was his domain and did not allow appellant there. (30 RT 7191-7192.)

Lake instructed appellant to open a post-office box in Mike Kimoto's name and to add Donald Lake's name. (30 RT 7216; 31 RT 7490-7491.) Lake gave appellant Kimoto's identification and explained that he and Balazs had seen it while strolling on Sunset Beach, and they stole it because the photo depicted an Asian who looked like appellant. (30 RT 7216-7217; 31 RT 7488.) Appellant thought Lake was going to use the post-office box "for some minor scam . . . ." (31 RT 7491-7492.) Lake usually drove appellant to different post offices to check on Lake's mail. Appellant believed this was part of Lake's illicit activity. (30 RT 7216.)

Lake sometimes stayed with appellant in San Francisco, and he kept some of his belongings at appellant's apartment, including clothes, ammunition, and marijuana. (30 RT 7183-7184.) Lake also kept things

there that he intended to sell at flea markets. The marijuana found at the apartment belonged to Lake. (30 RT 7184.)

Dennis Moving had a phone number that its employees could call to find out whether they were scheduled to work the next day. Appellant gave this number to Lake in case Lake was unable to reach him but wanted to know whether he was working. (30 RT 7225.)

Slogans like "No kill, no thrill," "Momma Dies, Daddy fries, baby cries," and "no gun, no fun" were chants used while running in formation in the Marines. (30 RT 7171-7172.) When appellant uttered these slogans to his coworkers at Dennis Moving, it was understood as humor or "locker room talk"; in fact, appellant's coworkers would sometimes begin the phrases, and appellant would finish them. (30 RT 7173-7174.)

b. Dubs

Appellant denied any involvement in the Dubs' disappearance and did not agree with Lake to kill them. (30 RT 7283, 7310.) He denied he was the person Dorice Murphy saw leaving the Dubs' apartment on the day they disappeared. (30 RT 7246-7247.) But he admitted he was the person Barbara Speaker saw coming out of the Dubs' apartment two days later. (30 RT 7242-7243, 7406.) This occurred after Lake asked him for help with a "job." Lake drove him to the Dubs' apartment in a Volkswagen Rabbit, gave him a key, and instructed him to go inside and retrieve two bags that were sitting next to the doorway. (30 RT 7243, 7249; 31 RT 7480-7481, 7484.) Appellant complied and retrieved the bags from the apartment. (30 RT 7243-7244; 31 RT 7480.) Lake did not tell appellant who owned the Volkswagen Rabbit, why he wanted appellant to get the bags, or why no one was home. (30 RT 7249; 31 RT 7482-7485.)

Appellant did not know how the map with the Dubs' street circled ended up in his apartment. (30 RT 7245.) Lake had a key to the apartment and brought over the videotapes that belonged to the Dubs family. (30 RT

7247; 31 RT 7477-7478.) He also brought over the VCR with no serial number. (30 RT 7235; 31 RT 7485.) The television reception in Wilseyville was bad, so Lake sometimes brought his VCR to appellant's apartment so appellant could make videotapes for him by copying them from his own VCR to Lake's VCR.[28] (30 RT 7235; 32 RT 7659-7660.)

At appellant's extradition hearing, Maurice Laberge testified that appellant admitted his involvement in the Dubs murders. According to Laberge, appellant said he and Lake got good video equipment from the Dubs' apartment; that killing little Sean Dubs was "strange" and "not easy" but was "part of the operation"; and that "'I kept the good VHS tapes when we finished with the Dubs.'" (31 RT 7475-7477.)

Appellant also told Laberge that he tried the "asshole death grip" on Deborah Dubs. According to appellant, the "asshole death grip" involved putting pantyhose around a woman's neck and strangling her while having anal intercourse with her. (31 RT 7448-7450.) Appellant denied making any of these admissions to Laberge or talking about the "asshole death grip." (30 RT 7241-7242, 7245; 31 RT 7448-7449, 7479.)

However, appellant admitted writing the caption for a cartoon that used this term. The cartoon depicted a man having what could be anal intercourse with a woman, while holding something like a rope around her neck and saying, "I'ma give you Master Ng's asshole death grip bitch." (31 RT 7451-7452; 32 RT 7696; Peo. Exh. 244.) Appellant meant the cartoon to be a satire on police reports that said he had used this phrase, and to show "how ludicrous" it was. (31 RT 7451.) Appellant only wrote the caption and did not draw the cartoon. (31 RT 7449.)

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[28] In the spring of 1985, Lake told witness Tanya Wright that he had a friend in San Francisco who taped movies for him. (24 RT 5711, 5723-5725.)

c. Cosner

Appellant had nothing to do with Cosner's murder and did not agree with Lake to kill Cosner. (30 RT 7260.) Lake told appellant that Cosner's Honda Prelude was a "hot car," which he had obtained from drug dealers. (30 RT 7260; 31 RT 7496.)

At appellant's extradition hearing, Laberge testified that appellant told him that he did not want to kill Cosner but Lake wanted Cosner's Honda; that Lake wanted Cosner's identification because Cosner resembled Lake; that appellant shot Cosner behind the ear and was then "all paid up with Lake"; that it was a difficult "operation" because Cosner was uncooperative; and that after Cosner was shot, he made a gurgling sound. (31 RT 7494-7495.)

Appellant denied making these statements. (30 RT 7335.) He also denied owing Lake any money or knowing how Cosner was killed. (31 RT 7495.)

d. Peranteau

Appellant denied any involvement in Peranteau's disappearance. (30 RT 7180.) Contrary to Hector Salcedo's testimony, appellant never visited Peranteau's apartment, did not know where Peranteau lived, and never told Peranteau about a place he could get marijuana. (30 RT 7203-7204.)

Appellant had nothing to do with the letter—purportedly from Peranteau—concerning Peranteau's winnings from the Super Bowl pool. (30 RT 7204-7205.) Likewise, he had no role in taking Peranteau's property to Wilseyville and did not know how it got there. (30 RT 7207-7208.)

Lake brought Peranteau's pen and pencil set to appellant's apartment. (30 RT 7188.) Appellant surmised that he possessed Peranteau's towel

because Lake sometimes left laundry at appellant's apartment for appellant to wash, and their laundry sometimes got mingled together. (30 RT 7303-7304.)

Appellant worked ten hours on January 18, 1985, the day Peranteau was last seen. (30 RT 7175-7177.) He did not recall seeing Peranteau that day. (30 RT 7176.) He worked four hours the next day, which was the day Peranteau failed to appear for work. Appellant did not remember whether he worked in the morning or afternoon that day. (30 RT 7177-7178.) He had never seen Peranteau's motorcycle and did not know that Peranteau owned one. (30 RT 7202-7203.) Peranteau sometimes smoked marijuana during breaks at work. (30 RT 7203.)

Appellant once introduced Peranteau to Lake when they were all together in a streetcar. (30 RT 7206-7207.)

At appellant's extradition hearing, Laberge testified that appellant told him that he had shot Peranteau in the head and burned Peranteau's body but forgot to remove Peranteau's handcuffs, which also got burned (31 RT 7508-7509); that appellant admitted taking Peranteau's pen set and said he made a mistake by keeping it (30 RT 7230-7231; 31 RT 7507); and that appellant said Peranteau and Gerald would never be found, because he burned their bodies after he and Lake killed them (31 RT 7509-7510). Appellant denied making any of these statements. (30 RT 7210-7211, 7230-7231, 7241; 31 RT 7507, 7509-7510; 32 RT 7663.) Laberge had access to a list of items recovered at Wilseyville that included burnt handcuffs. (32 RT 7663.)

e. Gerald

Appellant worked with Gerald occasionally, but not too often. (30 RT 7220.) Appellant denied being involved in Gerald's disappearance or in the removal of property from his apartment. (30 RT 7227.) Appellant never

called Gerald's number to ask him to meet at the bus station and never met Gerald at any bus station. (30 RT 7221-7222; 32 RT 7664.)

Appellant was not in Wilseyville on February 24, the day Gerald disappeared. (30 RT 7225-7226.) He worked eight hours the next day, February 25. (30 RT 7223.) He also worked on February 26 and February 27, the day Gerald's apartment was burglarized. (30 RT 7226-7227.)

Lake told appellant that his hand was shot while he was struggling with a guy who tried to steal his "dope." (30 RT 7224; 31 RT 7511-7512.)

Laberge stated that appellant had said he tried to have Gerald killed so he would move up in seniority. At trial, appellant denied making this statement and asserted that he had more seniority than Gerald. (30 RT 7220-7221.) Seniority was a factor in determining who got overtime work. When Gerald had an unauthorized absence, appellant told Dennis Goza that Gerald's seniority should start from the bottom again. (31 RT 7514.)

f. Carroll and Allen

Allen was the first female whom appellant helped Lake to imprison. (30 RT 7283.) Appellant did not think Lake was going to kill Allen and was not involved in any plan or agreement to kill her, and he never engaged in sexual intercourse or oral sex with her. (30 RT 7285, 7295; 31 RT 7533, 7539.) He knew Allen was there against her will, but he thought Lake was trying to modify her behavior to turn her into a willing sex partner. (30 RT 7282.)

Appellant came to Wilseyville on April 14—the day Allen disappeared—but did not remember how he got there. (31 RT 7412-7413.) After appellant arrived, Lake said he was going to bring a woman there to fulfill his so-called "Miranda" fantasy. He asked appellant to wait for him. (31 RT 7411-7412.) Appellant called Dennis Moving at 4:19 p.m. (31 RT 7411.) At about 7:30 p.m., Lake picked up Allen in San Jose, which was about three hours from Wilseyville. (31 RT 7412.) Appellant did not

remember the first time he saw Allen. (31 RT 7421.) It was "not something [he] enjoyed," and he theorized that his "subconscious might be blocking it." (31 RT 7422.)

The M-Ladies video was recorded the night Allen arrived. (31 RT 7422.) On the video, appellant said Allen was being "surprisingly cooperative," because he thought she would try to fight or run away. (30 RT 7282-7283.) Appellant told Lake that the "piece" was on the table, because he was concerned that Allen might grab the gun and shoot Lake. (31 RT 7568.) Appellant thought Lake did not mean most of the things he was telling Allen on the video, and that he was only saying them to gain her cooperation. Appellant was "standing there just . . . wondering what [he] should do . . . ." (30 RT 7284.)

Appellant took a shower with Allen that night, and they were both naked, but no sex acts occurred. (31 RT 7425-7427, 7535.) Appellant thought he took a shower with Allen because Lake wanted someone to watch Allen at all times. (31 RT 7426.) When asked why he did not simply watch Allen from outside the shower, appellant replied that it was the kind of thing that was done "without much forethought . . . ." (31 RT 7426-7427.) But appellant admitted that in the video, he said he wanted to take a shower with Allen. (31 RT 7427.)

The scene where Allen gave appellant a massage "most likely" occurred on the same night as the previous scene. (31 RT 7424.) Appellant did not know why there was a slit in Allen's panties when she gave him the massage. (31 RT 7423-7424.) Appellant was naked during the massage, but he felt sorry for Allen, so he did not engage in sexual activity with her. (31 RT 7533-7534.) Lake did not order appellant to get the massage from Allen, but appellant did it so that the video would show her being compliant. (31 RT 7534.) Appellant told Allen to "'scoot down and don't forget to get my ass,'" because he knew the camera was rolling. (31 RT 7535.) But the

things he said on the video did not reflect his true feelings. (31 RT 7536.) The massage was appellant's last physical contact with Allen. (31 RT 7537-7538.)

Appellant was not paying attention when Lake told Allen to "'cooperate or we will bury you in the same place we buried Mike.'" (30 RT 7285-7286; 31 RT 7558.) Instead, appellant was concentrating on Allen's behavior. (30 RT 7285-7286; 31 RT 7558.) He was "hypervigilant" in paying attention to her, because he was worried about what she might do, despite the fact she was handcuffed. (31 RT 7558-7559.)

The morning after Allen's capture, appellant saw her in the living room. By this time, she was subdued and cooperative and was not chained. (31 RT 7436.) Allen was still alive when appellant left for San Francisco the following day. (30 RT 7291-7292; 31 RT 7437.)

Appellant did not know anything about Michael Carroll's death. (31 RT 7558.) He had no agreement with Lake to kill Carroll and did not bury Carroll or help Lake do so. (30 RT 7286, 7307.) And he never called Carroll's home. (30 RT 7287-7288.)

Appellant was not present when Carroll told Lake that he was getting ready to drop Allen, she was clinging to him, and he had received oral sex from another woman. Instead, appellant heard about this conversation from Lake. (30 RT 7286-7287.) It was true that on the video, Lake asked appellant whether the conversation had occurred "'today'" or "'yesterday'" and appellant answered, "'yesterday.'" But appellant really meant that it was "yesterday" that Lake told him about the conversation. (30 RT 7287.)

Appellant was off work from April 14 through 16 and then worked from April 17 to 20. (30 RT 7288-7290.) Records from Dennis Moving indicated that he was originally scheduled to work on April 15—the day after Allen was captured—but he then requested the day off. (31 RT 7415.)

Appellant admitted he "most likely" called the Dennis Moving office on April 15 at 7:42 a.m. and "most likely" called Dennis Goza 15 minutes later. (31 RT 7418-7419.) He was "most likely" at the Wilseyville property when someone called Allen's Safeway store later that morning, but he did not witness the call. (31 RT 7419-7420.)

Lake gave appellant an envelope containing some keys to deliver to Debra Blank at the San Jose bus station. Appellant did not know who the keys belonged to. (30 RT 7300-7301.) He delivered them to Blank on April 16. (31 RT 7435.)

Appellant admitted creating the cartoon that depicted Lake whipping a woman labeled "Kathy" while appellant stands behind a video camera eating rice. (31 RT 7428, 7430; see Peo. Exh. 224.) Appellant made the cartoon because Laberge had read the M-Ladies transcript, and in the video, Lake told Allen that it would sexually excite him to whip her. (31 RT 7428-7429.) Appellant drew himself eating rice because in the video, Lake told Allen that she must cook for him. In fact, neither Allen nor O'Connor ever cooked for them, so this image was "essentially [a] satire of the whole unrealistic situation placed on [the] transcript." (31 RT 7429.)

At the extradition hearing, Laberge testified that appellant told him that

- he could hear the handcuffs clicking in the video (30 RT 7371);
- when Allen was in the house, she was dressed only in pantyhose, which had a slit cut in the crotch area (31 RT 7441);
- it was hard to have sex with Allen while she was wearing the irons (31 RT 7441-7442);
- he and Lake decided to kill Allen more quickly because she tried to break out of her cell (31 RT 7442);
- he put a gun in Allen's vagina and made her call Safeway to ask for time off (30 RT 7299; 31 RT 7442-7443);

- after Allen called her boss, it was "party time" (31 RT 7443); and
- Lake typed a letter for Allen, and appellant mailed it so no one would get suspicious (31 RT 7443).

Appellant denied making any of these statements to Laberge. (30 RT 7374-7375; 31 RT 7440-7443.) He admitted that in the M-Ladies video, there was an opening in the crotch of Allen's panties, and that nothing in the M-Ladies transcript referred to this. (31 RT 7374-7375.) After seeing the video for the first time, appellant told Laberge that he could hear handcuff noise on it. (30 RT 7371-7372.)

g. Bond, O'Connor, Lonnie Jr., and Stapley

On April 20, 1985, appellant phoned Lake from work, and Lake said he was in "some kind of a jam" and wanted appellant to come to Wilseyville. Appellant asked Lake what kind of jam he was in, but Lake would not tell him. (31 RT 7522-7524.) Appellant went to Wilseyville, and Lake told him they were going to get another girl. Because there was only one bunker, appellant assumed Lake had already freed Allen. (31 RT 7540.)

Lake also told appellant he needed to go to San Diego and wanted appellant to accompany him, because appellant had a driver's license. (31 RT 7528-7530.) Lake did not have a license and was concerned that if the police pulled him over, they would discover his identity and arrest him. (31 RT 7528-7529.)

Appellant first saw Scott Stapley's truck—with the "AHOYMTY" license plate—on April 22 or early the next morning, after he and Lake had recorded the M-Ladies video with O'Connor. (31 RT 7521, 7531; see 18 RT 4274.) Lake told appellant that the truck belonged to someone he knew, and they were going to use it to "pick up some stuff from San

Diego." (31 RT 7529-7530.) Appellant assumed that Lake put O'Connor back in the bunker before they left for San Diego. (31 RT 7544-7545.)

Appellant and Lake drove to San Diego and proceeded to Tori Doolin's apartment. Doolin brought out a 10-speed bicycle and some other things and loaded them in the truck. (31 RT 7542-7543.) Appellant and Lake then drove back to Wilseyville. (31 RT 7543.) Appellant wanted Lake to drop him off in San Francisco, because he was worried about keeping his job, and the situation with O'Connor was "so unpleasant." But Lake said he needed appellant's help with one more thing. (31 RT 7548-7550.)

After they arrived back in Wilseyville, Lake showed appellant two bodies under the porch. (30 RT 7319-7320; 31 RT 7547-7548, 7550.) At first, appellant did not know the identity of either body; he had never seen Stapley or Bond before. (30 RT 7271, 7274, 7320, 7325; 31 RT 7525.) At Lake's direction, appellant bound up Bond's arms and legs, handcuffed him, and put a gag on him. (30 RT 7272-7273.) Lake did the same to Stapley. (30 RT 7323.) Lake said he wanted to make it look like they had been killed by rival drug dealers "or biker-type people." (30 RT 7272, 7323.)

Appellant and Lake put the bodies in the truck and drove to a spot about half a mile from the house, where Lake said he had already dug a hole. (31 RT 7554.) Appellant then helped Lake bury the bodies. (30 RT 7273; 32 RT 7605.)

After they finished, appellant told Lake that he "just can't stand this," and it was "getting too far." (31 RT 7624.) Appellant returned to the Bay Area as soon as he could. (31 RT 7624-7625.) But even after appellant saw the bodies, he still thought Lake was eventually going to free O'Connor. (31 RT 7575.)

Appellant was not present when Bond or Stapley were killed, and he never agreed with Lake to kill them. (30 RT 7323.) Lake had told

appellant he was having a conflict with his neighbors because they were manufacturing methamphetamine. (30 RT 7271, 7275.) Lake was also worried that the neighbors were firing guns. He was afraid these activities would attract the sheriff. (30 RT 7276.) Though the police found Bond's credit card in appellant's apartment, appellant did not bring it there. (30 RT 7277.) Lake gave Stapley's camera to appellant after they returned from San Diego in appreciation of appellant's help. (31 RT 7602.)

At some point after appellant returned to San Francisco, he spoke with Lake and asked about O'Connor. Lake said his cousin was there, and he did not want to have a conversation. (31 RT 7626-7627.)

Lake "had a lot of hatred" for O'Connor. (30 RT 7337.) He said he hated her because she always tried to borrow money from him in exchange for sex, but she never "[paid] off" by having sex with him. (30 RT 7338.) Also, Lake once went into O'Connor's house and saw some derogatory things she had written about him. (30 RT 7337-7338.) Appellant first saw O'Connor when Lake brought her into the house in handcuffs and they recorded the M-Ladies video. (30 RT 7336-7337; 31 RT 7527.) Before bringing her in, Lake told appellant to get ready for "'M Ladies II . . . .'" (31 RT 7571.)

Appellant knew that Lake intended to imprison O'Connor. He intended to help Lake by projecting solidarity with him, so O'Connor would comply with Lake and would not try to escape. (30 RT 7339.) Appellant never intended to hurt O'Connor. (30 RT 7340.) He knew that Lake "hated" O'Connor and that Lake spoke of her with "vengeance in his voice," but he did not think Lake was going to kill her, because he did not consider Lake the kind of person who would kill a woman. (31 RT 7541-7542, 7546.) Lake had told appellant he had killed some Viet Cong but had never killed women or children. (32 RT 7668.) While they were recording

the video, appellant thought O'Connor's baby was in the bunker. (31 RT 7573.)

Appellant behaved aggressively toward O'Connor on the M-Ladies video because Lake hated O'Connor, and Lake set the tone. (30 RT 7341-7342.) When Lake told O'Connor that her baby was "'sound asleep like a rock,'" appellant did not know where the baby was; in fact, he had not seen the baby and had no personal knowledge of what happened to it. (30 RT 7343-7344.) Likewise, appellant was not involved in taking Bond and Stapley away. (30 RT 7344-7345.)

Appellant did not know why he said, "'it is better than the baby is dead, right,'" after O'Connor said, "'you are not taking my baby away from me.'" It was "just in the heat of the moment." When appellant said "'we're pretty cold hearted,'" he was trying to intimidate O'Connor. (30 RT 7345.) O'Connor did not cook, clean, or have sex with appellant, and he did not know if she did so for Lake. (30 RT 7346.)

When Lake told O'Connor that if she did not cooperate, they would rape her and shoot her, appellant thought Lake was merely trying to make her cooperate and did not think Lake was being sincere. (30 RT 7346-7447.) When O'Connor asked Lake, "'Is that why you invited us here for dinner,'" and appellant responded, "'it is part of the game,'" he did so to show solidarity with Lake. (30 RT 7347.) When Lake told O'Connor that he would probably keep her for a few weeks, appellant believed him and did not think Lake was going to kill her. (30 RT 7348.)

Appellant acted "in the heat of the moment" when he told O'Connor that if she passed out, they would wake her up again. What he was feeling and what he was saying were "like two different things." (30 RT 7349.)

When O'Connor asked Lake whether they had hurt Bond, and Lake responded that they were not gentle with him, appellant did not speak up and say he had nothing to do with Bond, because he considered Lake's

utterances to be "rhetorics." (30 RT 7350-7351.) Appellant sliced off O'Connor's shirt and bra because he thought it would erotically arouse Lake. (30 RT 7351.) Specifically, appellant was inspired by a scene in one of Charles Bronson's *Death Wish* movies, where some thugs do this to a female victim. Lake had told appellant that he liked this scene. (31 RT 7581-7583.) Appellant was shirtless during the videotaping because it was hot in the house. (31 RT 7583.)

Appellant did not know why he told O'Connor that "'Nothing is yours now. It will be totally ours.'"[29] It was "just one of those comments that [he made] in passing in the heat of the moment." (30 RT 7351.)

Appellant told O'Connor that he would get his weapon in case she tried "to play stupid," because he wanted her to believe that he and Lake were serious about getting her to cooperate. (30 RT 7351.) With regard to taking a shower with O'Connor, appellant did not know why he told her "'I always do that. It is luckier.'" It was "just one of these comments that come out without much thinking about it." (30 RT 7352.) Appellant admitted taunting and intimidating O'Connor but denied ever hurting her. (30 RT 7352.) He took a shower with her, during which they were both nude. (31 RT 7545-7546.) Afterward, Lake took O'Connor into his bedroom and closed the door. (31 RT 7546.) The last time appellant saw O'Connor, she was in Lake's bedroom, and Lake was about to take her outside. (30 RT 7352-7353.)

Appellant admitted that his acts on the M-Ladies video were "outrageous," and he regretted them. He explained that he had been

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[29] As noted in footnote 21, *ante*, the transcript indicates that appellant said, "It'll be totally ours," rather than "You'll be totally ours," which is audible on the videotape. (58 OCT 19684; Exh. 22-A.)

"young and impetuous" and "surrendered [his] independent judgment . . . ." (32 RT 7678.)

At the extradition hearing, Laberge testified that appellant told him that

- "'Scott Stapley and Lonnie Bond weren't burned. I shot them full of holes and then we buried them.'" (31 RT 7556-7557.)
- "'Lonnie Bond had the speed factory, his old lady was a skinny speed freak. She's the one in the video whose T shirt I cut off and we threaten[ed].'" (31 RT 7557.)
- "'[W]e picked [Stapley] up in town and he wanted to get out right away. He must have figured it out. I put the gun in his mouth so hard, it broke a piece of his tooth.'" (31 RT 7557.)

Appellant denied making these statements. (30 RT 7330-7332, 7355; 32 RT 7669.) He admitted that in the M-Ladies transcript, no one referred to O'Connor being skinny. (30 RT 7375.) At trial, Dr. Stephens testified that tooth fragments were found in Stapley's throat. (31 RT 7557.) Appellant thought he had shown Dr. Stevens' autopsy report to Laberge. (32 RT 7669-7670.)

Appellant worked eight hours on April 18, eight hours on April 19, and seven hours on Saturday, April 20. (30 RT 7273-7274.) Lake kept the keys to Bond's handcuffs. Appellant did not bring Bond's credit card to his apartment. (30 RT 7277.)

h. Relationship with Laberge; the cartoon drawings

While imprisoned in Canada, appellant asked the prison administration if someone could exercise with him. (32 RT 7645.) At the extradition hearing, a prison official testified that Laberge asked to exercise with appellant. (32 RT 7645-7646.) Appellant usually brought his legal paperwork to the exercise yard, because that was when he requested to

make phone calls to his lawyer. Laberge often asked appellant about the materials, and appellant sometimes let Laberge read them. (30 RT 7328.)

Appellant never made any self-incriminating statements to Laberge. (30 RT 7370.) Appellant and Laberge passed materials to each other under their cell doors. (32 RT 7657.) Laberge coaxed appellant into drawing cartoons related to the case. (30 RT 7196.) Laberge would draw part of a cartoon and slide it over to appellant, who would embellish it and send it back. (30 RT 7195-7196.) They created cartoons as humor, not to reflect reality. (32 RT 7659.)

Appellant let Laberge look at the police reports, the M-Ladies transcript, Lake's diary, and other materials. He did so because "outrageous" rumors were circulating, and he wanted to dispel them. (30 RT 7228, 7367-7369.) Laberge also asked appellant about his conversations with his attorney. Appellant told Laberge what his lawyer thought about the case and about the prosecution's evidence. (30 RT 7198.)

Appellant admitted drawing People's Exhibit 226, the "remains claiming section" cartoon. (31 RT 7610.) In that cartoon, Dr. Stevens handed a bag to a man and said, "and I <u>think</u> this bag is yours." (30 RT 7326; Peo. Exh. 226.) The word "think" was underlined because appellant had shown Laberge an article that said the authorities could not identify many of the remains. The cartoon's point was to show Dr. Stevens giving unidentified remains to the family members. (30 RT 7326-7327.) A mouse was drawn over the words "Calaveras County" to indicate that the authorities were doing a "Mickey Mouse job," and that appellant would not get a fair trial "because [of] some of these foul-ups . . . ." (30 RT 7327.)

Appellant admitted drawing part of the "San Quentin . . . Years Later" cartoon. Specifically, he drew the portion depicting himself in the cell. Laberge drew the pictures of the victims on the wall and returned it to appellant, who added their names. (30 RT 7199-7200; see Peo. Exh. 230.)

Appellant did not intend for the victims' pictures to constitute an admission that he had killed them. Appellant did not think he would receive a fair trial, and this cartoon was a "doomsday fantasy." (30 RT 7199.) Petitioner drew a frog in the cartoon because his nickname for Laberge was "Frog," and the frog meant Laberge had originated the cartoon. (30 RT 7200-7201.) Petitioner wrote "no kill, no thrill" on a wall, because he believed that the prosecution was trying to convict him based on the "wild sayings" made by employees of Dennis Moving. (30 RT 7201-7202.)

Appellant never told Laberge he killed any babies; however, appellant created a cartoon that depicted himself holding a baby by its legs, over a wok with hot oil. (31 RT 7452, 7461-7463; Peo. Exh. 245-D.) In this cartoon, appellant is saying, "Ahi-ya! Daddy dies mommy cries baby fries!" In addition, a woman is bound naked to a pole, and a man labeled "Joe" has been decapitated, with his head on a plate. (Exh. 245-D.) Appellant explained that this cartoon satirized the reports that referred to the slogan "Daddy dies, momma cries, baby fries." (31 RT 7463.) Appellant created the cartoon because Laberge had been "goading" him to draw cartoons showing the ridiculousness of the accusations. (31 RT 7463-7464.)

Appellant also created the cartoon labeled People's Exhibit 245-B. (31 RT 7464-7465.) In that cartoon's first frame, a woman holding a baby walks up to a door labeled "Slant's Day Care." In the next frame, the woman walks away from the doorway, holding what appears to be a smoldering baby on a plate, and exclaims, "Microwaived!", while appellant stands waving in the doorway and says, "Bye bye." (Exh. 245-B; 31 RT 7466.) Appellant created this cartoon in reaction to fellow inmates' accusations that he had put babies in a microwave. (31 RT 7466-7467.)

Appellant also created the cartoon labeled People's Exhibit 245-A. (31 RT 7468.) In this cartoon, appellant is holding a baby by its foot and

swings it into something, accompanied by the words "crash" and "smash." In addition, Laberge is holding a baby by its hair and is about to give a karate chop to its neck, while Lake is holding a pillow case containing a baby and placing it into a wooden barrel containing some sort of liquid. Lake is saying "Swimy Poo! No kill no thrill!" A sign hanging over the scene says, "Lake's Baby Dies School." (Peo. Exh. 245-A; 31 RT 7472-7475.) Appellant created this cartoon in reaction to "verbal harassment" about "mass murdering babies . . . ." (31 RT 7472-7473.)

Laberge denied to appellant that he had committed a sexual assault during the robbery in Lethbridge. (30 RT 7236.)

i. Lake's arrest and appellant's flight

On the day Lake was arrested, he asked appellant to steal a vise from the lumber store. (30 RT 7253-7254.) Appellant went to Balazs's house after he thought someone had seen him taking the vise. Balazs drove appellant back to the lumber store while he hid in the back seat. Balazs said she saw Lake with some police officers. (31 RT 7596-7598.)

Appellant fled to Canada because Lake had told him that the Honda Prelude was "hot," and appellant feared this would lead to police questioning that would reveal his citizenship status, which would then result in his deportation to Hong Kong. (30 RT 7261-7262.) Appellant brought handcuffs to Canada in order to sell or barter them. (31 RT 7602-7603.) When appellant was arrested in Canada, he possessed a gun he had purchased from Lake for target shooting. (30 RT 7263-7264.) The "Chinese" ammunition in appellant's apartment was left there by Lake, and so was the booklet on how to make a silencer. (30 RT 7264-7265; 31 RT 7501-7502.) Appellant initially testified that he had never made a silencer, but when confronted with a signed statement he had given in 1982, he admitted he made a silencer that year. (31 RT 7500-7501.)

D. Prosecution Evidence at the Penalty Phase

1. Appellant's prior crimes and his escape from military custody

In October 1981, appellant committed the crimes of larceny of government property worth more than $100; conspiracy to commit larceny of government property worth more than $100; and unlawful entry with intent to commit larceny of government property. The following month, he escaped from confinement at a military facility. (34 RT 8401.) When he escaped, his Marine guards were temporarily holding him in an office. (34 RT 8402-8403.) He disappeared when the Marine in the room with him briefly dozed off. His guards thought he escaped out the window. Before escaping, he had been quiet and respectful. (34 RT 8403-8405.)

Appellant remained at large until April 29, 1982, when he was arrested near Philo. (34 RT 8401, 8408.) Afterward, the police searched a multi-unit dwelling on the premises. (34 RT 8410-8411.) In one of the rooms, they found two photos of appellant and some firearms, including a .38-caliber revolver, two loaded rifles, a pistol, and an automatic pistol. (34 RT 8412-8414.) Additionally, they found nunchakus (a martial arts weapon), two Chinese throwing stars, a billy club, and some mail containing the name of Richard Lee. (34 RT 8411-8412, 8415-8416.) Lake and Balazs were present during the search, and there was no indication that anyone besides Lake, Balazs, and "Lee" occupied the dwelling. (34 RT 8417-8418.)

2. Appellant's capture in Calgary

On July 6, 1985, Sean Doyle was working as a security guard at a department store in Calgary, Canada, when he saw appellant put some cans of soda and salmon into his shopping bag. (34 RT 8336-8339; see 34 RT 8346, 8352.) Appellant then appeared to put some more items into the bag

and left the store without paying. (34 RT 8339.) Doyle and another security guard approached him, and Doyle told him he was under arrest. After Doyle and the other guard escorted appellant back into the store, appellant reached into his fanny pack, and the other guard shouted that appellant had a gun. (34 RT 8341.)

Doyle brought appellant to the ground, and they struggled over the gun. (34 RT 8341-8342.) Appellant kicked Doyle and loosened his grip on the gun. (34 RT 8346.) He fired the gun and bit Doyle's wrist. (34 RT 8343.) As they struggled, both had their hands on the gun, and appellant managed to pull it around to Doyle's chest. (34 RT 8354.) Doyle reached up and pushed it away, and it went off again. (34 RT 8344, 8354.) Doyle did not think his push caused the gun to fire. (34 RT 8355.) He felt a sensation in his hand that resembled a hammer blow. (34 RT 8344.) He managed to gain control of the gun and continued to struggle with appellant until the police arrived. (34 RT 8345-8346.)

Donald Bishop was the police officer who arrived and joined the struggle. (34 RT 8356-8359.) Bishop felt a gun in appellant's hand and ordered him to release it, but he did not respond. (34 RT 8359-8360.) Appellant tried to free up the arm that held the gun, but Bishop pushed it back under him. Bishop was finally able to subdue appellant. (34 RT 8360.) Another officer was also involved in the altercation. (34 RT 8364.) After appellant was arrested, he became cooperative. (34 RT 8367, 8372.)

Appellant's gun was a .22-caliber semi-automatic pistol. (34 RT 8361, 8364-8365.) It was jammed, meaning there was a live round stuck in the clip, halfway into the chamber, making it impossible to fire until the bullet was cleared. (34 RT 8366, 8368.)

The second gunshot had passed through Doyle's finger, depriving him of most sensation in the finger and leaving him unable to control or straighten it. (34 RT 8347.)

3. Testimony about the victims

a. The Bond/O'Connor family

Sharon O'Connor (Mrs. O'Connor) was Brenda O'Connor's mother and Lonnie Jr.'s grandmother. (34 RT 8380-8381.) Brenda, the youngest of eight children, was 20 years old when she died. (34 RT 8381.) Mrs. O'Connor was very close with Brenda and loved her very much. (34 RT 8385.) When Brenda was younger, she was always doing things for people, like raking leaves and shoveling snow for old people. (34 RT 8385-8386.) Lonnie Jr. was "the sweetest little guy" and would follow Mrs. O'Connor's husband all over the house. (34 RT 8387.)

Brenda's death was very hard on Mrs. O'Connor, and it almost tore the family apart. (34 RT 8385-8386.) The children all grew up together, including Lonnie Bond and his brother, Art. (34 RT 8386-8387.) The absence of Brenda's remains was hard on the family because they could not have a funeral. They held a memorial in their backyard and planted a pink rose bush because pink was Brenda's favorite color. (34 RT 8387.)

Sandra Bond was Brenda's sister. (34 RT 8388-8389.) She was married to Bond's brother, Art. (34 RT 8389-8390.) Bond's death affected Art a lot. Brenda and Sandra were pregnant at the same time, and Sandra "kind of lost her identity" in the family after Brenda died. (34 RT 8390-8391.) Her son was four months older than Lonnie Jr., and she had thought they would grow up together. (34 RT 8390.)

b. Peranteau

Robert McCourt was Clifford Peranteau's younger brother. He last saw Peranteau in 1980 and last spoke with him in 1984, when Peranteau called and asked when he was going to come to California. (34 RT 8392-8393.) According to McCourt, Peranteau "liked everybody and anybody." (34 RT 8393.)

Peranteau and McCourt had 10 siblings. Their mother had emotional problems and abused the children, but Peranteau was "always the one" who said they should still care about her. (34 RT 8393-8394.) Because their mother was single and had so many children, Peranteau and his siblings grew up in institutions. Peranteau went to a strict institution, where he would be placed in "solitary confinement" for missing school. Despite this, he sometimes left the institution, took his siblings out of school, and spent time with them, because he wanted to ensure they stayed in contact. (34 RT 8394.) Peranteau kept in contact with all his brothers and sisters and sent them something once a month. (34 RT 8395.)

Peranteau never got to meet McCourt's daughter or any of his other siblings' children. Peranteau's mother was "on medication" and had been hospitalized five times "because of this mess." She did not want McCourt to bring a picture of Peranteau to the trial, because she did not want appellant to have the satisfaction of seeing him again. (34 RT 8394.) She refused to accept Peranteau's death and did not allow a service to be held for him; instead, she would say he was traveling the country because of what he went through as a child, and eventually decided to "walk away from his past . . . ." (34 RT 8394-8395.)

c. Dubs

Jeffrey Nourse was Deborah Dubs's cousin, but she was more like a sister to him. (34 RT 8426-8428.) According to Nourse, Deborah had a "zest for life" and was a "joy to be around." She was artistic and was a cartoonist. Harvey Dubs was a "very quiet, very loving, very caring human being." (34 RT 8429.) Nourse continued to think about Deborah, Harvey, and Sean every day. They were especially missed at Thanksgiving every year, and their names were brought up in the family's prayers. Nourse further explained, "It is just not the same. We miss the enthusiasm, the excitement . . . . it is just their presence." (34 RT 8430.)

Karen Tuck Smith grew up with Deborah. (34 RT 8431.) Deborah was her "soul mate" and "best friend ever." (34 RT 8433.) They spoke on the phone almost every day. (34 RT 8432.) Smith was on the phone with Deborah on the day the family disappeared, when someone came to Deborah's door at about 5:45 p.m. (34 RT 8433, 8435.) Deborah had "a zest for life" and "such warmth and kindness and so much to give." (34 RT 8432.) Smith had been "distraught completely" by Deborah's death and deeply missed her. (34 RT 8433.) Sean Dubs was "just endearing" and had a "quizzical little smile." (34 RT 8432-8433.)

d. Gerald

Roger Gerald (Mr. Gerald) was Jeff Gerald's father and testified that Jeff was fun-loving, humorous, and very nonviolent. (34 RT 8436.) "He was a great young man." (34 RT 8436-8437.) Mr. Gerald had a very close relationship with Jeff. He coached Jeff's Little League team and was involved in Cub Scouts. Jeff's death had been "very very difficult" for the family, and the void it left in their lives was unexplainable. (34 RT 8437.) The effect of his death was "there constantly," and Mr. Gerald did not expect it to ever go away for himself, his wife, or his daughter. (34 RT 8437-8438.) He continued asking himself "why?"—but there was no answer. (34 RT 8438.)

Jeff Gerald's sister, Denise, testified that he was "probably the finest person I have ever been able to be with or spend time with . . . ." (34 RT 8442-8443.) He was "funny, passive, life loving, comical, [and] warm." He loved music, and at the time of his death, his main goal was to become a better musician. (34 RT 8443.) Jeff's death left a void in Denise's life. She was no longer a sister and would never be an aunt. She explained that "This has taken [my] mother from me. She is alive but a part of her died with that one phone call. I lost my father that I knew. . . . The void is great; the void is forever. The loss is unbelievable." (34 RT 8443-8444.)

e. Allen

Diane Allen was Kathleen's younger sister. (34 RT 8445.) She described Kathleen as "a very strong, intelligent person, just someone you wanted to be around." Kathleen could always make Diane laugh and always had the answer when Diane had a problem. She "wanted to take care of people." (34 RT 8446.) Kathleen's murder "destroyed" her family because it killed her mother, who could not handle the tragedy of losing her daughter and waiting for appellant to be extradited from Canada. (34 RT 8446-8447.) Kathleen never got to marry, see Diane get married, or to meet Diane's son. Her murder "destroyed [Diane's] life. It [was] not fair. Because she was a good person." (34 RT 8448.)

f. Stapley

Dwight Stapley (Mr. Stapley), Scott Stapley's father, testified that Scott was the youngest of his and his wife's four children. (34 RT 8449-8450, 8552.) When Scott was in the seventh and eighth grades, he was a student at the school where Mr. Stapley was the principal. Scott played tennis and wrestled in high school, and his parents followed him closely. (34 RT 8450.) When Scott was in community college, his parents had two homes because their jobs were far apart, and he lived with Mr. Stapley. They "went from being father and son to roommates, buddies, and [it was] quite a wonderful experience . . . ." (34 RT 8450-8451.)

The family learned about Scott's death when a news anchor phoned them. (34 RT 8451.) Mr. and Mrs. Stapley followed appellant's case from the beginning. They attended court proceedings in Canada, Calaveras County, and Orange County, and they spent their life savings on it. (34 RT 8451-8452.) Their other children were just beginning to "deal with" Scott's murder. One was starting to undergo counseling and another would probably do so. (34 RT 8452-8453.) For years, every time Mr. and Mrs.

Stapley would pass each other, they "would grab each other and cry." (34 RT 8453.)

Scott's mother, Lola Stapley, described Scott as "just a great big overgrown teddy bear." (34 RT 8455.) People "naturally gravitated to him. He had that personality, he never met a stranger, everyone was a friend to him." One day, shortly after Scott outgrew Mrs. Stapley, he lifted her up while she was scolding him, and he said, "Now you can scold me. You are taller than I am." (34 RT 8455.) When he put her down, he told her, "Momma Joe, it is going to be okay." From then on, he called her "Momma Joe." (34 RT 8455-8456.)

Scott's death "absolutely devastated" Mrs. Stapley. She underwent psychological counseling for three years. (34 RT 8456.) Her older children did not accept what had happened for a long time. Scott's sister was pregnant when he died, and she named the baby Brandon Scott Stapley-Koda. Brandon was 13 years old at the time of trial and wrote a prize-winning school essay entitled "I Wish I Could Have Met My Uncle Scott." (34 RT 8457.) At family dinners, there was now "always an empty chair at the table," but Mrs. Stapley felt Scott was there in spirit. (34 RT 8458-8459.)

E. Defense Evidence at the Penalty Phase

1. Family members

a. Alice Shum

Alice Shum was appellant's aunt and was present when he was born, in Hong Kong. (35 RT 8589-8590.) During part of appellant's childhood, Shum lived in an apartment with appellant, his parents, his two sisters, and his grandmothers. (35 RT 8590.) Appellant shared a room with Shum and his sisters. (35 RT 8590, 8592.) Shum moved to the United States in 1973. (35 RT 8593.)

When appellant was a child, he seldom fought with other children. (35 RT 8594-8595.) As a young boy, he was shy and quiet and had few friends. (35 RT 8594, 8599.) He did not talk much, except with his older sister Betty. (35 RT 8595-8596.) He liked to talk to her because he trusted her. When he trusted someone, he liked to talk to that person but seldom anyone else. (35 RT 8595-8596.) Shum never saw appellant show disrespect toward older family members. (35 RT 8601.)

While Shum was living with appellant and his family, she saw his father beat him. (35 RT 8593.) He used a dust stick or a rattan stick. (35 RT 8594, 8623.) The most frequent reason was appellant's poor grades or failure to do his homework. (35 RT 8594.) Appellant sometimes cried during the beatings, but his father sometimes told him to stand there and not cry. (35 RT 8595.) Appellant's father worked long hours and paid for appellant's education in private schools. (35 RT 8612.)

Appellant came to the United States in 1979 to attend a private college in the Bay Area. His father paid for it. (35 RT 8612-8613.) At that time, Shum had two little sons. (35 RT 8600.) Appellant really liked little children and liked to play with Shum's sons. (35 RT 8605-8606.) When he came to Shum's house, he would play with them, take them out, and buy them something to eat. (35 RT 8601.)

Shum had received many cards from appellant over the years, including Mother's Day cards and Christmas cards. (35 RT 8602-8603.) The defense introduced a birthday card appellant sent to Shum's son. Inside the card, appellant had drawn a picture of himself carrying her son when he was small. (35 RT 8603-8604; 40 RT 9773; Def. Exh. 688.) The defense also introduced some origamis (folded paper figures) that appellant had sent Shum, including a bullfighter, a teddy bear, and some hearts. (35 RT 8605-8606; 40 RT 9773; Def. Exhs. 689-691.)

Shum considered appellant to be a responsible person. (35 RT 8606.) When he borrowed money from her, he paid her back as soon as he had money. (35 RT 8606.) When he crashed into Shum's neighbor's car, he immediately notified the neighbor. (35 RT 8607.) Shum still loved appellant. (35 RT 8608.)

b. Hubert Shum

Shum's son Hubert was appellant's cousin and was born in 1976. (37 RT 9064-9065, 9073.) He was 8 years old when he last saw appellant and 23 when he testified. (37 RT 9066-9067, 9071.) His brother Andrew was two years younger. (37 RT 9065.)

When Hubert and Andrew were small, appellant would visit their home and play games with them, give them piggyback rides, and take them out for ice cream. (37 RT 9066.) Appellant was always fun to be with in those days, and Hubert had only happy memories of him. (37 RT 9066, 9069-9070.)

Hubert still spoke with appellant from time to time when appellant called to speak with Hubert's mother. (37 RT 9066.) Hubert was studying graphic design, and appellant would ask how he was doing in school and would talk about art. (37 RT 9066-9067.) Appellant also sent cards, which were hand drawn and water colored. (37 RT 9067.) The cards were addressed to Hubert's mother, his brother, and Hubert. (37 RT 9071.) Appellant had also sent Hubert some origami. The defense introduced one of the origamis, which Hubert described as "very intricate and detailed." (37 RT 9068; 40 RT 9773; Def. Exh. 690.)

Hubert started speaking with appellant again at about the time he started college, about three or four years before he testified. (37 RT 9071-9072.) His parents had sheltered him from appellant's case. (37 RT 9072.) The case had been painful for Hubert's family. (37 RT 9073.) He thought that if not for this case, "we would have been really close." (37 RT 9073.)

Appellant meant a lot to him. (37 RT 9073.) When they spoke on the phone, Hubert still had a common bond with appellant, and he had only good memories of him and did not want to think about "all the other stuff." (37 RT 9069-9070.) He still loved appellant and knew that appellant cared. (37 RT 9069-9070.) He would "definitely feel the void" if appellant was no longer part of his life, and he tried not to think about it. (37 RT 9070.)

c. Benny Chung

Benny Chung was appellant's cousin and was five years older than appellant. (37 RT 9074-9075.) Chung left Hong Kong when appellant was about 13 years old. (37 RT 9075.) He knew appellant when appellant was still a toddler and was playing in a play pen. (37 RT 9075-9076.) He grew up with appellant and took swimming lessons with him. He described appellant as a "normal kid" and had good memories of playing with him. (37 RT 9076.) Appellant's parents always tried to make a good life for their children. (37 RT 9082.) They disciplined the children, but Chung testified that "we all got disciplined that way, too." (37 RT 9082-9083.)

Chung was still in contact with appellant and talked with him on the phone. (37 RT 9078.) They usually talked about family, and it seemed appellant needed outside contact. Chung valued the time he spent speaking with appellant. (37 RT 9079.) Appellant was a part of Chung's childhood, and if appellant were to be executed, it would have a "life-long effect" on Chung, who said, "I do care about him and I love him." (37 RT 9079-9080.)

d. Alice (Ng) Kan

Appellant's sister, Alice Kan, did not testify, but the defense introduced, by way of a stipulation, statements she made to Dr. Terry Gock. (38 RT 9170.) When Kan and her siblings were growing up, Kan tended to be by herself and was not very involved with them. She had a good relationship with appellant then, but they did not talk much. (38 RT 9171.)

The family tended to do things together, and the children were "'insulated'" and did little outside the family. Kan thought that she and her siblings tended to be naïve, easily influenced, and gullible because of their sheltered, protective upbringing. (38 RT 9172.)

According to Kan, their parents were not verbally affectionate and did not praise them. In an effort to motivate the children, they would criticize them and praise other people's children. Kan believed this caused her and her siblings to lack self-confidence as adults. (38 RT 9173.)

Kan described appellant as curious and naughty when he was growing up. (38 RT 9174.) He was particularly good and gentle with younger children and would play with them and share his toys with them. (38 RT 9174-9175.) Their father meted out the discipline, and their mother would report their transgressions to him. (38 RT 9175.) The children would get anxious when they heard their father arriving home and would try to hide, because they feared being punished. (38 RT 9175-9176.) He usually worked late, and they were usually disciplined long after their misdeeds, without being reminded what they had done. He often spanked appellant with a feather duster cane, which was a common practice in Hong Kong. Appellant bore the brunt of their father's physical punishment, but Kan remembered one incident where appellant and their sister Betty cried and hugged each other as he was caning them. (38 RT 9176.)

In another incident, appellant became tremendously upset when their father threw away a doll that he carried around. On another occasion, appellant came home to find that a pet chicken he had been raising had disappeared, and he was told it had been slaughtered and was being prepared for dinner. Appellant told Kan that this bothered him tremendously. (38 RT 9177-9178.)

Kan thought appellant did not receive much positive reinforcement or guidance growing up. His teachers generally considered him naughty, and

his parents disciplined him with punishment and criticism. (38 RT 9178.) Their father was generous in allowing his wife's family to live with them, but he did not know how to support his children emotionally. (38 RT 9178-9179.)

e. Betty Ng

Appellant's other sister, Berry Ng, did not testify, but her statement to Dr. Terry Gock was admitted by stipulation. (38 RT 9179.) Betty felt close to appellant when they were growing up. (38 RT 9180.) Their father worked late evenings, and their mother worked part time. There were nine people living in their small apartment. When appellant was about nine years old, they moved to a larger apartment, and some of the relatives moved out. (38 RT 9180.) Betty also recalled a sad period when their sister Alice was hospitalized for almost a year. (38 RT 9180-9181.)

According to Betty, appellant was shy and quiet even as a young child. He was curious in a mischievous way; for example, he once crawled from one room to another via the balcony ledge. (38 RT 9181.) As a teenager, he was sad and withdrawn and did not talk much to his family. After he accidentally started a fire in his eighth-grade chemistry class, he became so depressed that he did not communicate with his family. His mother took him for one counseling session but did not follow up. (38 RT 9182.)

Their father made decisions about everything for the three children. Betty did not socialize much and had no close friends while growing up. She believed this protective upbringing made all three children dependant on others to make decisions for them, even as adults. (38 RT 9182.) It also left them overly trusting and immature in dealing with other people. (38 RT 9182-9183.)

Betty considered appellant to be "kind at heart." He was kind and gentle to younger children and very fond of pets. (38 RT 9183.) As a child, he brought a turtle and a puppy home, but his mother took them away.

(38 RT 9183-9184.) Betty also described the incident, also related by her sister Alice, where appellant's pet chicken was slaughtered. (38 RT 9184.)

Appellant was always very loyal to his few friends and would do anything for someone he trusted. He was very insecure and frequently asked Betty if she loved him. As the only son, he had more pressure to perform and excel than his sisters and was expected to be the "showpiece of the family"; however, he was mischievous and curious. (38 RT 9184.) Their father had unrealistic expectations of him. Once, when appellant cried profusely while getting immunizations as a young child, their father told him that men did not cry and did not allow him to cry while he was getting the shot. (38 RT 9185.)

Their parents' most important expectations concerned doing well in school. (38 RT 9185.) Their father would strike them in their hands with a feather duster for getting failing grades. (38 RT 9185-9186.) Both parents were very critical of them. Their mother often compared them unfavorably with other children in their presence, and they were seldom praised. (38 RT 9186.) Like her sister Alice, Betty testified that their mother would recite their misdeeds to their father when he came home, and he would then spank them often without telling them why. For this reason, they sometimes hid when they heard him coming home. (38 RT 9186-9188.) He believed that severe punishment made the children less likely to misbehave in the future. (38 RT 9190-9191.) The beatings sometime left welts, and Betty sometimes had to put antiseptic on herself and appellant because of the bleeding. (38 RT 9187.)

Appellant was physically punished as early as age five, and it continued into his teen years. Once, their father tied him to the window bar and beat him with a feather duster cane, and their grandmother got on her knees and begged him to stop. (38 RT 9188.) Betty also recalled an incident where their father threw away appellant's favorite doll, and another

incident where he refused to replace appellant's painting supplies after appellant lost them, which made appellant drop out of his painting class. (38 RT 9190.)

When appellant was about 14, he and Betty went to live with their uncle in England. (38 RT 9191.) Their uncle had mood swings and was difficult to relate to. He did not seem to accept appellant and constantly criticized his manner and appearance. (38 RT 9191-9192.) He was stingy with money and food and would not allow appellant and Betty to take second helpings during meals. (38 RT 9191.) Appellant lived in a separate house, which was very cold. He had to help slaughter animals and prepare them for meals. Appellant's mood initially improved when he went to England, but under his uncle's criticism and mistreatment, he again became withdrawn. (38 RT 9192.) When their mother came to visit and complained about the conditions they were living in, their uncle and his wife kicked them out, and appellant's mother took appellant back to Hong Kong. While still in England, appellant talked about joining the Marines. The authority and status of people in uniform seemed to appeal to him, and he wanted to make his father proud. (38 RT 9193.)

2. Marine life

a. Raymond Guzman

Raymond Guzman went through Marine infantry training with appellant at Camp Pendleton. The training took about six months. (36 RT 8755.) Appellant was quiet and kept to himself, but Guzman socialized with him when they were off duty. (36 RT 8756, 8758.) He never saw appellant drink alcohol, smoke, get into a fight, or get angry with another Marine. (36 RT 8756-8758.) Guzman was surprised by appellant's participation in the armory break-in, because appellant kept to himself and did not seem like the kind of person who would do that. (36 RT 8758.)

One of the chants Guzman learned in training was something like, "Bravo Company, kill, kill, kill. (36 RT 8758-8759.) Appellant really liked martial arts. (36 RT 8762.) Guzman would see him doing martial arts while they were "in the platoon," about two or three times per week. (36 RT 8761.)

b. Hugh Daugherty

Hugh Daugherty met appellant in the Marine Corps in late 1982. (36 RT 8763-8764.) They were both assigned to an antitank missile. (36 RT 8764.) Appellant was under Daugherty's command for about six months. (36 RT 8764, 8771-8772.) During that time, they were together "basically 24 hours" per day. (36 RT 8766.)

Daugherty considered appellant's performance as a Marine to be above average. He did everything Daugherty told him. (36 RT 8765.) Daugherty described appellant as a "loner" and very quiet. He never saw appellant use narcotics, get drunk, or chase women. (36 RT 8767.) He saw appellant practice martial arts, probably twice per week. (36 RT 8767, 8771.) It was not unusual for a Marine to be interested in guns. (36 RT 8772.)

c. David Burns

David Burns was a sergeant in appellant's platoon at the Kaneohe Marine Corps Air Station in Hawaii. (36 RT 8773-8774.) He first met appellant in 1981 and had daily contact with him. (36 RT 8773, 8777-8778.) He rated appellant's performance in following and carrying out orders as outstanding. He considered appellant as "a Marine of the best order that we had." Appellant followed his orders correctly "almost 100 percent of the time." If appellant had to be corrected in doing something, he would ask questions about what he did wrong and would then correct the mistake. According to Burns, appellant was "outstanding in that respect."

(36 RT 8778.) Appellant also underwent training in an anti-tank weapons system, and his performance was again outstanding. (36 RT 8779-8780.) He handled the anti-tank system "quite well." (36 RT 8780.)

Appellant functioned as a gunner in the anti-tank weapon system. His job was to protect the person who fired the missile. That person had to stay in position, and therefore was "completely vulnerable," and his life could depend on the gunner protecting him. (36 RT 8783.)

According to Burns, appellant was very quiet and kept to himself, though he attended the platoon's social functions. (36 RT 8781.) Burns never had to discipline him and never saw him fight with another Marine. (36 RT 8780-8781.) Appellant's rank was lance corporal, which was just above private first class. A lance corporal would not give many orders to other Marines. (36 RT 8781-8782.) Burns knew appellant was involved in martial arts. Other platoon members were as well. It was "in keeping with" their job and was seen as a positive thing. (36 RT 8785-8787.)

Burns explained that principle of "semper fidelis"—meaning "always faithful"—is inculcated into Marine recruits during training. (36 RT 8774-8776.) The semper fidelis principle means that a Marine has allegiance to his or her superiors and fellow Marines. Marines are "always interdependent," and each knows the other is going to "back [him] up." (36 RT 8774-8775.) It also means one can depend on the word of a superior or a fellow Marine. The semper fidelis principle is "absolutely critical" to the Marine Corps. (36 RT 8776.)

Many recruits do not make it through Marine basic training. Basic training does not demean its trainees, but instead causes them to deemphasize civilian beliefs in questioning authority; instead, "If somebody tells you to do something, you do it." (36 RT 8777.)

Appellant's participation in the armory theft was "quite surprising" to Burns. From what Burns had seen, it was "out of character . . . ." (36 RT

8778.) It "just took [Burns] aback," and it was inconsistent with the principle of semper fidelis. (36 RT 8784.)

d. Bradley Chapline

Bradley Chapline was also a Marine sergeant. After the appellant was apprehended for the armory break-in, he was placed in Chapline's custody. Chapline had custody of him in Hawaii and later during the trip to Leavenworth Prison. (36 RT 8788.) While appellant was in his custody, Chapline was in contact with him for 12 hours a day, 7 days a week. (36 RT 8789.) He got to know appellant "pretty well." (36 RT 8788.)

Appellant was quiet, but when he did speak, he was well-spoken and seemed well educated. Chapline had "no problems with him whatsoever." (36 RT 8791.) Chapline never heard appellant use obscenities or saw him drink alcohol or smoke. He and appellant had a mutual respect. (36 RT 8797.) After Chapline got to know appellant, he concluded that appellant had the tools to be a very good Marine. It was difficult for Chapline to accept that appellant had "thrown that away." (36 RT 8800-8801.)

While appellant was in custody in Hawaii, he was hospitalized with a broken leg. (36 RT 8789.) Chapline thought appellant's hospitalization lasted several months. (36 RT 8802.) Appellant complained to Chapline about something that someone else did to him in the hospital. (36 RT 8792.) Chapline then admonished some of appellant's guards about their conduct and told them it had better never happen again. (36 RT 8793-8794.)

During one conversation, appellant and Chapline discussed whether it was difficult for a member of a minority group to advance in the Marines. Chapline believed it was. (36 RT 8797.) Appellant told Chapline that he broke into the armory "to get even with the Marine Corps." He explained that he wanted to be a leader and an officer and to prove how good he was. (36 RT 8803.) Appellant also said he thought the Marines were treating

him unfairly because of his race, and if he could not be famous, he would be notorious. (36 RT 8803-8804.)

According to Chaplin, there was a lot of tension between Caucasian members of the military and the town's Asian-American population. Also, some Marines did not like Asian-Americans in uniform. (36 RT 8805-8806.) Appellant told Chapline that he was not an American citizen, and his recruiter had illegally enlisted him in the Marine Corps. (36 RT 8789-8790.) In Chapline's conversations with appellant, it was "pretty much understood" that appellant was going to be deported. (36 RT 8790.)

Marine recruits learned certain chants in basic training. (36 RT 8799.) This included "no kill, no thrill" and "no gun, no fun." (36 RT 8800.)

3. Prison Life

a. John Mitchell

John Mitchell worked at the Saskatchewan Penitentiary in Canada for approximately three to six months while appellant was there. (38 RT 9140-9141.) Appellant was then housed in the general population. (38 RT 9146.) Appellant worked as the editor and typesetter of the weekly prison newsletter. (38 RT 9144.) Mitchell supervised him in this capacity and had daily contact with him. (38 RT 9141-9142.) Appellant had his own office space. He walked there without a guard and was not shackled while he was there. (38 RT 9142-9143.)

An inmate needed specific talents and permission to have a job like appellant's. (38 RT 9142-9143.) The job involved receiving information for the newsletter, typing it up, printing it, and having it distributed. (38 RT 9144.) It required skills in typing, spelling, and grammar. (38 RT 9145.) Appellant had skills in writing, typing, and putting things in the appropriate context. (38 RT 9154.) He was probably better at spelling and grammar than Mitchell. (38 RT 9146.) He also had the ability to make decisions on

his own. (38 RT 9155.) He appeared to be well educated. (38 RT 9146.) Other inmates would come and see him with articles or concerns they wanted the newsletter to address. (38 RT 9147-9148.)

Mitchell was never concerned about appellant's interactions with other inmates. Appellant was a good employee and respected authority. He was well dressed and well mannered, and "it was a pleasure to have an inmate of his caliber." (38 RT 9149-9150, 9159.) His prison shirt and pants were always pressed; he wore them "like a uniform." (38 RT 9153.) He was a "very good inmate to work with" and was "very professional in his work." (38 RT 9152.)

b. Alene Meads

Alene Meads was a correctional officer at California State Prison, Sacramento (CSPS). (36 RT 8630-8631, 8635.) Appellant was housed in the administrative segregation protective housing unit, because his case was notorious. (36 RT 8633, 8635-8636, 8633, 8659.) Notorious inmates are housed in protective custody because they are in danger of being killed by other inmates. (36 RT 8633-8634.) Inmates in the protective custody unit eat alone in their cells and are not allowed to mingle. (36 RT 8632.) The inmates known as "safe-keepers" have been charged with crimes but not yet convicted. (36 RT 8634.) Usually, they are housed at CSPS because the county where they are being tried cannot house them. (36 RT 8635.)

While appellant was at CSPS, he lived in his own cell, exercised alone, and was not allowed to have contact with other inmates without barriers, or to mingle with other inmates. (36 RT 8635-8636, 8639.) He was allowed to exercise two or three times per week. (36 RT 8641-8642.) Besides walking around the exercise area, he often helped sweep it. (36 RT 8642.) He had to be handcuffed and strip searched every time he was taken to the

mini-yard.[30] (36 RT 8643-8644.) While making phone calls to his attorney, he had to be handcuffed and placed in a cage. (36 RT 8645-8646.)

Meads opined that appellant had been a "class A inmate," and that if all the inmates in her unit had been like him, she would not have resigned from her job because of stress. (36 RT 8651.) Meads had been with appellant without any barriers and never feared him. He never behaved aggressively toward her, called her any names—which other inmates commonly did—or behaved badly toward her. (36 RT 8651-8652.) She never had any negative experience with him. (36 RT 8654.) In the approximately three years that appellant was housed at CSPS, no weapon was ever found in his possession or his cell. (36 RT 8645, 8652.) Meads considered him "extremely bright," though she often thought he was depressed. (36 RT 8655, 8657.)

On many occasions, Mead heard other inmates ridicule appellant or say "bad things" as he passed their cells or they passed his. (36 RT 8653.) She also heard other inmates threaten him and use foul language at him. She never heard him respond to the threats or use foul language at another inmate. (36 RT 8654.)

c. William Conedy

William Conedy was appellant's "block officer" at CSPS. (36 RT 8662.) Conedy testified that when appellant arrived at CSPS, he was placed in the harshest, most stringent housing environment available. (36 RT 8446.) He was then moved to another block, which was still an isolation block, and he remained in an isolation block for his entire stay at CSPS. (36 RT 8664-8665.) He was "almost treated with kid gloves," in

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[30] The defense introduced photos of CSPS's administrative segregation unit, a cell like appellant's cell, and the "mini-yard" where appellant exercised. (Def. Exhs. 692-695; 36 RT 8640-8643; 40 RT 9773.)

that he received everything he was supposed to, and the staff went out of its way to accommodate his needs. (36 RT 8665-8666.)

Two officers and a sergeant were required to transport appellant within CSPS. (36 RT 8667.) Appellant would be shackled in handcuffs and leg irons. Conedy, however, escorted appellant alone to the shower and never had a problem with him. (36 RT 8668.) He also occasionally escorted appellant to the yard alone. (36 RT 8673.) One reason he felt no need for additional escort was that he did not feel particularly threatened by appellant. (36 RT 8674.) Appellant was well-behaved, and Conedy never had problems with him and never saw him assault anyone. (36 RT 8670-8671.)

d. Joseph Dittman

Joseph Dittman was also a Correctional Officer at CSPS and worked in the visiting area. (36 RT 8676.) Appellant probably used the visiting area more frequently than any other inmate, mostly because of visits related to his legal proceedings. (36 RT 8688.) During the year and a half that Dittman had contact with appellant, appellant never "acted out," used foul language, or acted violently, and Dittman never found any weapon or contraband on him. (36 RT 8684-8686.)

e. Gerald Coleman

Gerald Coleman worked in the CSPS library from 1991 to 1995. (36 RT 8722-8723.) He had contact with appellant for about two or three years. (36 RT 8724.) Appellant used the library about one or two times per week, for two to three hours at a time. (36 RT 8732-8733.) Appellant was strip searched and placed in restraints before using the library, and escort officers brought him there from his cell. (36 RT 8725, 8730.) After appellant arrived at the library, he was locked in his work area, but his

restraints were removed. (36 RT 8726.) He was searched again before being taken back to his cell. (36 RT 8729.)

Appellant was polite and courteous with Coleman and never "acted out" or cursed at him. (36 RT 8728.) Appellant was compliant during the searches, and Coleman never found any contraband on him. (36 RT 8729-8730, 8734-8735.)

f. James Tinseth

James Tinseth was also a Corrections Officer. (36 RT 8690.) While appellant was housed at CSPS, Tinseth facilitated his first three trips to Calaveras County for court appearances. (36 RT 8691, 8693.) The trip took about 45 minutes, through winding hilly roads. (36 RT 8698.) Before getting into the van, appellant would strip and undergo a body search. (36 RT 8692.) After getting dressed again, he would be placed in restraints, which restricted his movement. (36 RT 8692-8693; 40 RT 9773; Def. Exh. 683.)

During the trips to court, appellant rode in the back of the van, in an area closed off by a screen. (36 RT 8695-8696; 40 RT 6773; Def. Exh. 682.) The air conditioner did not cool that section of the van. On at least one occasion during the summer, it got uncomfortably hot in the back. (36 RT 8697-8698.) The first time Tinseth traveled with appellant to Calaveras County, appellant threw up most of the way. (36 RT 8701.)

Appellant was always compliant and courteous when Tinseth was placing the restraints on him and putting him into the van, and Tinseth never had any trouble with him. (36 RT 8694.) He always behaved well with Tinseth and never tried to escape. (36 RT 8702-8703.)

g. Maurice Geddis

For about a year, Correctional Officer Maurice Geddis helped transport appellant to court appearances in Calaveras County and

supervised him at the courthouse. (36 RT 8708-8710, 8712.) During courtroom recesses, appellant was placed in a cage. (36 RT 8712-8713; 40 RT 9773; Def. Exh. 681.) The cage's purpose was to ensure appellant was in a secure place if something happened outside the court. (36 RT 8712-8713.) The cage was located in a jury room, which did not have bars on its windows or doors. (36 RT 8717.) Immediately outside the jury room was a parking lot, and beyond the parking lot were fields and mountains. (36 RT 8718.) This was a high profile case, and guards were posted on the courthouse roof for additional security. (36 RT 8719.)

Geddis remembered appellant throwing up in the van on three occasions. (36 RT 8714-8715.) The corrections officers were always able to give him a plastic bag. (36 RT 8715.) Geddis never had any trouble with appellant, who never refused a directive and was always courteous and compliant. (36 RT 8715-8716.) Geddis had experienced trouble with other inmates. (36 RT 8716.)

h. James Kaku

James Kaku worked for the Orange County Sheriff's Department. (36 RT 8736.) He had contact with appellant at the Orange County jail while he was supervising inmate workers in feeding and housekeeping duties. This took place in a module where the inmates were kept isolated from each other. (36 RT 8737.) Kaku came into contact with appellant during approximately one meal per day. He described appellant's behavior as "Pretty normal." (36 RT 8738.) Appellant was quiet, polite, and respectful, and Kaku had no complaints about him. (36 RT 8738-8739.) When asked whether he would describe appellant as a model inmate, Kaku replied, "Pretty much so." (36 RT 8739.)

i. Deron Redding

Deron Redding also worked for the Orange County Sheriff's Department at the county jail. (36 RT 8742.) At one point, he worked in the module where appellant was housed and had daily contact with him. (36 RT 8742-8744.) Appellant's behavior around Redding was "quiet and respectful," and Redding never had a discipline problem with him and never saw him in a conflict with the jail's staff or other inmates. (36 RT 8744, 8747, 8752.)

When Redding worked in appellant's module, appellant was housed in his cell by himself. (36 RT 8747.) He was not permitted to be unsupervised in the presence of other inmates. (36 RT 8748.) Every second day, for two hours, appellant was in the "day room," where he could walk around and speak with other inmates through the door. (36 RT 8748-8749.)

j. Lance Blanchard

Lance Blanchard told the defense the following: He was originally imprisoned for rape and assault with intent to maim and disfigure. Afterward, he got into an altercation that led to the stabbing death of another prisoner. His total sentence was 34 years. (38 RT 9167.) Appellant told Blanchard that he committed a "flimsy" crime in Calgary in order to get caught committing a crime in Canada, but he did not intend to kill anyone. Appellant had a computer in his cell, and he "turned Blanchard on" to computers. Blanchard and other inmates petitioned the administration to give appellant time in the yard with other inmates, but the administration refused. (38 RT 9168.)

Blanchard did not testify at trial, but the jury watched a video of an interview the defense had conducted with him. (38 RT 9165-9167.) The video and a transcript of it were admitted into evidence. (Def. Exhs. 706,

706-A; 40 RT 9773.) The interview took place in March 1999 at a Canadian prison. (Def. Exh. 706-A ["Exh. 706-A"], p. 1.) Blanchard spoke under oath (*id.* at p. 3) and said the following:

Blanchard met appellant at Prince Albert Prison when they were both housed in the Special Handling Unit (SHU). (Exh. 706-A, pp. 3-5.) Blanchard was serving a sentence for homicide. (*Id.* at p. 9.) He and appellant were in segregation, which meant they could not associate with the general population. (*Id.* at p. 5.) Appellant was never allowed to mingle with other inmates. (*Id.* at pp. 18-19.) Blanchard was never physically present with appellant, but their cells were next to each other, so they could talk and pass letters back and forth. (*Id.* at pp. 5-6.)

Appellant gave Blanchard a book about Taoism and explained Taoism to him. By doing this, appellant taught Blanchard how to find inner peace, and that "violence was not the way." (Exh. 706-A, pp. 8-10.) As a result, Blanchard had no more anger or frustration. He used to enjoy fighting, but now he would not harm another human being. (*Id.* at p. 10.) Appellant also taught Blanchard how to find peace and "internal power." Blanchard usually did not talk about his life with other people, but he did with appellant. (*Id.* at p. 11.) The authorities "couldn't believe" the change in Blanchard's behavior. (*Id.* at p. 21.) Blanchard had been in the SHU longer than any inmate in Canada, but because of the change in his behavior, he was placed in less restrictive settings. (*Id.* at pp. 21-22.)

According to Blanchard, appellant was mistreated by correctional officers and other inmates. The correctional officers did things like taking food off his plate and denying him a shower or time to exercise. (Exh. 706-A, p. 12.) The inmates mistreated appellant by putting urine and feces on his cell door. (*Id.* at pp. 14-15.) They also put paper under his door and burned it. (*Id.* at p. 15.) The guards knew about these acts but did nothing

to stop them. (*Id.* at p. 14.) The guards asked inmates to fabricate misconduct by appellant so he could be punished. (*Id.* at pp. 15-16.)

Appellant never got angry about his mistreatment or retaliated for it. (Exh. 706-A, pp. 13, 16.) He told Blanchard that retaliation "wasn't his way," and that was why he taught Blanchard about Taoism. (*Id.* at p. 16.) In fact, one of the things appellant taught Blanchard was to refrain from reacting. (*Id.* at p. 17.)

Blanchard considered appellant his "Ichida," or master, and believed that appellant would provide a benefit and a good example to other inmates. (Exh. 706-A, pp. 22-23.) If Blanchard were ever released, he intended to establish a Tao center dedicated to appellant. (*Id.* at p. 23.)

k. Anthony Casas

Anthony Casas was a litigation and criminal justice consultant. Before that, he had worked for 23 years for the California Department of Corrections. (38 RT 9195.) During that time, he served as the associate warden at two prisons. (38 RT 9196-9197.) Before testifying at appellant's trial, he had qualified as an expert in corrections and prison adjustments in several California counties and Nevada. (38 RT 9203.)

According to Casas, the primary factors for evaluating an inmate's prison adjustment are (1) a pattern of disciplinary violations; (2) whether he refuses to do what he is told; (3) his job performance; and (4) his involvement in conspiracies or gangs. (38 RT 9210.)

While appellant was incarcerated at Leavenworth, he had no disciplinary violations. (38 RT 9211.) He was in the general population for his entire stay. (38 RT 9213.) During that time, he completed courses in philosophy and psychology and was about to complete a course in data processing. (38 RT 9212-9214.) He earned custody credits, which indicated he behaved appropriately. (38 RT 9216.) He was also part of a group of inmates who fixed a hot water overflow and received an

exceptionally good write-up for doing so. (38 RT 9217-9218.) His job performance evaluations were all positive, and some of them were "glowing reports." (38 RT 9218.) While at Leavenworth, appellant requested to be reinstated in the Marines upon his release. He was apparently working toward reinstatement. (38 RT 9219-9220.)

During appellant's incarceration in Canada, which lasted almost six years, he had three disciplinary violations. (38 RT 9221, 9227.) One was for passing a bowl of hot rice to share with another inmate, another was for possessing a martial arts kick pad, and the third was for using offensive language. (38 RT 9222.) In California, these violations would be considered very minimal. (38 RT 9223.) Appellant was in solitary confinement for all but six or seven months of his time in Canada. He had no violations when he was in the general population. (38 RT 9227.)

In Canada, appellant completed college correspondence courses in psychology, biology, and organizational behavior. (38 RT 9229.) He also completed courses in advanced composition, systems analysis design, English, and economics. (38 RT 9230-9232.) He took all these courses while in virtual solitary confinement. (38 RT 9232.) One of his teachers wrote that he had consistently been an excellent student. (38 RT 9229-9230.) Appellant also won an award from Athabasca University for an administration course. (38 RT 9230.) According to Casas, it was rare for a prisoner to do this while in solitary confinement. (38 RT 9232-9233.)

A memorandum from the warden at Saskatchewan Penitentiary stated that while in segregation, appellant had been a "model inmate" and never caused any security concern. The warden questioned how much longer he could defend the decision to keep appellant in segregation. (38 RT 9234.)

Although appellant indicated that he was "'depressed, stressed and isolated,'" in solitary confinement, he never acted out. (38 RT 9235-9237.)

Casas also discussed appellant's disciplinary violations at CSPS. Specifically, appellant was cited for possessing a razor blade in a switch plate in his cell, and possessing the metal clasp for a manila envelope. (38 RT 9237, 9240.) At CSPS, a special tool would be needed to remove a switch plate from the wall, and nothing in the record indicated that the cell had been searched before appellant occupied it. (38 RT 9238.) The metal clasp was found in a visiting booth after appellant had finished a visit. (38 RT 9240-9241.) Nothing in the record indicated that the booth had been searched before appellant entered, nor did the record show when the booth was last used or cleaned. (38 RT 9241, 9243.) If appellant had wanted the clasp, he would have taken it with him. (38 RT 9242.) If Casas had reviewed this violation, it is likely he "would have thrown the write-up out." (38 RT 9242-9244.)

Appellant was also cited for possessing origami paper, which Casas did not regard as a severe violation. (38 RT 9244.) This kind of art would have been allowed on death row. (38 RT 9244-9245.) Casas was aware of the CSPS staff members' favorable testimony about appellant, and he described it as "unusual" and "significant." (38 RT 9246.) The fact appellant developed scabies (body sores) while in solitary confinement indicated he was internalizing his experiences. (38 RT 9247.)

In the Orange County jail, appellant had one disciplinary violation, for possession of contraband. The contraband was a tip from an Afro comb. (38 RT 9248-9249.) Casas disagreed with the characterization of this item as an "escape tool," because, while it could be used to poke an eye or ear, it could not kill anyone. (38 RT 9250-9251.) In addition, the records did not indicate how long appellant had been in the cell where the tip was found, or whether the cell was searched before he occupied it. (38 RT 9250.) It appeared to have been treated as a minor violation. (38 RT 9251-9252.)

In Casas's opinion, there was "no question" appellant had adjusted well to prison life, and if he were sentenced to life without the possibility of parole, he would adjust well. He would also be classified as someone who could adjust well and would not present a danger to the staff, other inmates, or the public. (38 RT 9252-9253.) On a scale of one through ten, with ten representing the best possible inmate, Casas rated appellant at ten. (38 RT 9254.)

4. Friends outside prison

a. Betty Kirkendall

Betty Kirkendall first came in contact with appellant in about 1983, when he was imprisoned at Leavenworth. (36 RT 8836, 8842.) Kirkendall's son had been murdered, and she got involved with a prison ministry as a way of dealing with her grief. Appellant and Kirkendall corresponded in writing for about two years. (36 RT 8837.) They wrote frequently. (36 RT 8847.)

Through these letters, Kirkendall came to see appellant as a very giving person. He was very comforting to her, and their communication was "really wonderful." She had written to other inmates, and appellant was different: "There was no smutty filth." (36 RT 8838.) Kirkendall did not receive any emotional support from her husband, who was abusive. (36 RT 8839-8840.) Appellant's letters comforted her. (36 RT 8841.) In Kirkendall's letters, she wrote about her murdered son and her relationship with her husband. (36 RT 8842.) She came to consider appellant a very good friend and cared a great deal for him. (36 RT 8846.)

Kirkendall met appellant June 1984, after his release from Leavenworth. (36 RT 8842-8843.) They met at the house of appellant's friend in Oklahoma. (36 RT 8850.) Kirkendall brought her sister to the first meeting. (36 RT 8843.) A day or two later, appellant and Kirkendall

met again at a motel and had sex. (36 RT 8843, 8850-8851.) Kirkendall did not recall that she ever heard from appellant after that. She did not expect the relationship to develop from there, because she was old enough to be his mother. (36 RT 8852.)

Kirkendall was not corresponding with appellant at the time of trial. She was still married to her abusive husband and thought he would get angry if she and appellant continued to correspond. (36 RT 8846.)

b. Chuck Farnham

When Chuck Farnham testified, he had known appellant for slightly over a year. He got to know appellant after writing him a letter about their shared interest in origami. (36 RT 8817.) Their relationship started with written correspondence, and by the time of trial, they spoke by phone about twice a week. Appellant comforted Farnham after his father died. Farnham was surprised appellant could have a genuine concern about him given "all of [appellant's] problems." (36 RT 8818.)

When appellant called Farnham, he would ask about Farnham's family and issues in Farnham's life; he was not "calling to kind of dump on [Farnham]." (36 RT 8818-8819.) They would also talk about appellant's family and his day-to-day conditions. (36 RT 8819-8820.) Appellant had shared information with Farnham about how to make certain types of origami animals and "helped [him] out a lot" with origami. (36 RT 8820.)

Farnham viewed appellant as a very close friend who could be there when he needed him. If Farnham needed something emotionally, appellant would provide it without being asked. Farnham knew appellant had been convicted of 11 murders, but this affected his opinion of appellant "[n]ot one bit." (36 RT 8821.)

c. Ron Peterson

Ron Peterson began corresponding with appellant approximately two years before he testified at trial, after he learned about appellant's interest in origami. (36 RT 8822-8823, 8829.) Eventually, they began talking by phone two to four times per week. (36 RT 8823.) They talked about a wide range of subjects, including aviation, current events, and Chinese culture. (36 RT 8822-8823.) Appellant had a "great sense of humor." (36 RT 8828.) Sometimes appellant would speak with Peterson's wife, who was from Hong Kong. (36 RT 8823-8824.)

According to Peterson, appellant was very talkative during their conversations, and it was "pretty obvious" he was longing for human contact. (36 RT 8824.) Peterson cared about appellant and valued his thoughts and friendship. (36 RT 8825, 8828.) If appellant were taken out of Peterson's life, Peterson would "absolutely" feel a sense of loss. (36 RT 8828.) The defense introduced some cards that appellant had drawn or painted and sent to Peterson. (36 RT 8825-8828; 40 RT 9773; Def. Exhs. 701-702.)

d. Isaac Chang

Isaac Chang met appellant in 1990, while appellant was in prison in Canada. At that time, Chang was doing an internship as a church seminary student, and the prison chaplain asked him to visit appellant. (36 RT 8830-8831.) For three months, Chang visited appellant every other week. (36 RT 8831.) He later visited appellant twice in California. (36 RT 8831-8832.)

When Chang visited appellant in Canada, appellant always talked about his loneliness and the difficult conditions in the prison. (36 RT 8832-8833.) They also talked about Jesus, the Bible, and eternal life. At that time, appellant appeared depressed, unhappy, lonely, and isolated. Chang

thought their discussions about Christianity helped. (36 RT 8833.) Appellant told Chang he had accepted Jesus as his personal savior, and Chang believed him.. (36 RT 8834.) Chang later visited appellant at Folsom Prison, and appellant again seemed lonely and depressed. (36 RT 8833.)

5. Mental health experts

a. Abraham Nievod, Ph.D.

Dr. Abraham Nievod was a psychologist, with a Ph.D. in clinical psychology. (38 RT 9279.) He had previously qualified as an expert in various state and federal courts. (38 RT 9280-9281.) One of his subspecialties was influence techniques. (38 RT 9281.)

Appellant's lawyers first contacted Dr. Nievod in 1993 to conduct psychological testing, including an interview. (38 RT 9285-9287.) They also retained a psychiatrist, Dr. James Missett. Dr. Nievod conducted the tests that year. (38 RT 9287.) The court then appointed two additional experts, psychologist Douglas Liebert and psychiatrist Gary Davis, who also evaluated appellant. (38 RT 9288-9290.) Dr. Nievod tested appellant again in 1996 and 1998. (38 RT 9300-9301.)

In preparation for his testimony, Dr. Nievod read his own report, plus those of Dr. Liebert, Dr. Davis, and therapist Elyse Taylor. (38 RT 9290-9291.) He also read Lake's journal, reports about appellant's conduct in the military and in prison, a report about appellant's family, and the drawings that Laberge turned over. Additionally, he watched the M-Ladies video and Lake's "philosophy tape." (38 RT 9291-9294.)

In Dr. Liebert's testing in 1993, appellant scored very high on schizoid personality disorder, avoidant personality disorder, and dependent personality disorder. (38 RT 9310-9311, 9315.) Schizoid persons do not know how to relate to others or carry on long-term relationships. They are

often described as "loners." (38 RT 9311-9312.) As far as appellant was concerned, this was consistent with testimony from the Marine court-martial, where witnesses described him as a loner. (38 RT 9312.) It was also consistent with declarations from appellant's family members that appellant kept to the apartment as a child and lacked friends. This kind of childhood will help produce a schizoid personality. (38 RT 9313.)

People with avoidant personality disorder avoid groups of people, and also close relationships with many people, because they fear rejection. (38 RT 9313.) Frequently, they also have dependent personality disorder, because they become very attached to their few friends. People with dependant personality disorder focus on one person, who becomes the most important person in their lives. (38 RT 9314.) This relationship makes them feel safe. (38 RT 9314-9315.) They fear making independent judgments and taking the initiative. They "will do almost anything" to maintain the dependant relationship, because the other person "is their anchor in the world." (38 RT 9315.)

Appellant scored very low with regard to narcissistic personality disorder, anti-social personality disorder, and aggressive-sadistic personality disorder. (38 RT 9316-9317.) His score was in the normal range for borderline personality disorder and schizotypal personality disorder, and it was extremely low for paranoid personality disorder. (38 RT 9322.) His score on the paranoid-personality scale indicated he was more trusting than suspicious. (38 RT 9322-9323.) This was consistent with being a dependent personality. (38 RT 9324.)

b. Paul Leung, M.D.

Paul Leung, M.D., was a psychiatrist specializing in Asian family structure and culture. (37 RT 9084-9085.) He had lived in Hong Kong for nine years while growing up. (37 RT 9086.) In preparation for his testimony, he reviewed interviews with appellant's family members, reports

from witnesses who knew appellant, and reports by psychologist Douglas Liebert, Gary Davis, M.D., James Missett, M.D., Abraham Nievod, Ph.D., and Stuart Grassian, M.D. (37 RT 9088-9090.) He also had conversations with appellant's father. (37 RT 9097.)

Dr. Leung testified about family structure in Hong Kong at the time appellant grew up. A typical household included parents, children, and grandparents. (37 RT 9090-9091.) Appellant's household, which included two aunts, was a large family. (37 RT 9091.)

In a traditional Hong Kong family, the father was the authority figure, and children were expected to obey their parents. (37 RT 9091-9092.) The father was a "very stern" figure, whom the children needed to fear. Unlike in Western culture, a father in Hong Kong would not portray himself as a friend to his children. (37 RT 9092-9093.)

Disciplining children by force was common in that culture. (37 RT 9093-9094.) This included hitting them with dust sticks or broom sticks. (37 RT 9094.) Beating was an expected response for a child who was not meeting his parents' expectations for school performance or had not done his homework well. (37 RT 9103-9104.) Beatings were considered the only way to ensure that a son came out well. (37 RT 9104.) Dr. Leung read reports indicating that appellant's father tethered him to a post during beatings so he would not run away. (37 RT 9094-9095.) This was "a bit more harsh" than the usual discipline. (37 RT 9095.)

If a family had only one son, the parents would have high expectations for him, and would want to provide as much as possible so he would grow up the way they wanted him to. (37 RT 9096.) Appellant's father had very high expectations for him and expected him to get the best education possible and make something of himself. (37 RT 9097.) Because of these expectations, he disciplined appellant much more than his daughters. (37 RT 9097-9098.) This affected appellant's mental state, and

when appellant discussed his childhood home, he usually talked about his father's discipline, his fear of his father, and the guilt he felt for being unable to meet his father's expectations. (37 RT 9098.)

The family was the center of one's life, and personal feelings and desires were less important than the family. (37 RT 9099.) Appellant's family of nine lived in a high-rise apartment, which was typical in Hong Kong. These apartments were usually much smaller than American apartments. (37 RT 9099-9100.) Hong Kong was a very crowded city, but typically, an individual's world, other than work, was inside his or her apartment, and "as a rule, you don't contact the outside world." (37 RT 9189-9100.) It was common for people to have neighbors for 20 years and not know them. (37 RT 9100.) Dr. Leung described this as a "cultural paranoia . . . ." (37 RT 9100-9101.) Individuals were very dependant on their families, and young people living at home were not encouraged to think independently within the home. (37 RT 9101.) Submissive behavior was "demanded of the children," and one did not say "no" to one's elders. (37 RT 9111, 9113.)

Appellant's family was a typical middle class Hong Kong family. (37 RT 9102.) His father was a "[s]elf made person" who had succeeded in the business world as the manager of a German camera company. Appellant and his sisters attended a very good private school. (37 RT 9102.) Education was regarded as the only way to assure a child could succeed. (37 RT 9102-9103.) Appellant's father told Dr. Leung that he wanted to make sure all his children went to school, especially appellant. His purpose in life had been to ensure that appellant studied well and made something of his own life. (37 RT 9103.)

Dependant personality disorder (DPD) is a clinical condition characterized by a "pervasive need to be taken care of . . . ." DPD sufferers engage in "clinging" and submissive behavior toward the person they

depend on. (37 RT 9107.) Common features of the disorder include difficulty making everyday decisions; a need for excessive advice and reassurance; a need for others to assume responsibility for major areas of one's life; difficulty expressing disagreement based on fear of loss or disapproval; difficulty initiating projects or doing things on one's own; urgently seeking a new relationship as a source of care and support when a close relationship ends; and an unrealistic preoccupation with being left to care for oneself. (37 RT 9109-9110.)

If appellant suffered from DPD, the Hong Kong family structure would foster or exacerbate his dependence traits, because individuals there are not encouraged to question their parents' decisions, or make independent decisions, before becoming adults; instead, they are encouraged to depend on their parents for all their support. (37 RT 9111.) Dr. Missett's report from 1993 also concluded that appellant's Hong Kong upbringing affected his DPD. (37 RT 9114-9115.)

In Dr. Leung's opinion, it was very likely appellant suffered from DPD. (37 RT 9113-9114.) Other traits that appeared present were obsessive-compulsive disorder, schizoid personality disorder, and avoidance personality. (37 RT 9114.) DPD does not deprive a person of the ability to make decisions. (37 RT 9115.)

c. Stuart Grassian, M.D.

Dr. Grassian, a psychiatrist, specialized in the psychiatric effects of stringent confinement conditions. (35 RT 8519.) In preparation for his testimony, he reviewed appellant's prison records. (35 RT 8523.) He also reviewed witness statements, photos, psychological testing records, interviews with appellant, and a brief summary of the facts of the case. (35 RT 8524-8525.) He also interviewed appellant twice, for a total of about six hours. (35 RT 8524, 8530.)

None of appellant's incarceration records mentioned any violence by appellant during his incarceration. (35 RT 8525-8526.) Appellant escaped once, from his Marine guards in Hawaii. (35 RT 8526.) In the past 12 to 13 years, appellant had spent most of his time in solitary confinement, except for six months in the general population in Canada and two and one-half years in the general population at Leavenworth. (35 RT 8526-8527.) Generally, prisoners in solitary confinement are alone in their cells for 22 to 24 hours per day, with restricted visits and limited opportunities for communication with other inmates. (35 RT 8527-8528.) There is often no radio or television and very limited reading materials. Inmates were only permitted to exercise in very confined areas. (35 RT 8528.) There is nothing to distract the inmates. The only stimulations are "noxious," including the smell of feces and rotten food, loud clanging on the bars, and the sound of mentally disturbed inmates. (35 RT 8529.)

After spending some time in these conditions, inmates cannot focus on anything. Any stimulus, such as water dripping, becomes noxious, and some inmates develop obsessions. (35 RT 8529-8530.)

In 1994, Dr. Grassian interviewed appellant and discussed his experience in solitary confinement. (35 RT 8530.) At the time, appellant was experiencing "[t]erribly, very profound, very pronounced obsessional thinking." (35 RT 8530-8531.) He was preoccupied with constant hunger, smells, and the "enormous overriding preoccupation with his desperate need to have [attorney] Michael Burt assigned to his case . . . ." (35 RT 8529-8530.) Appellant could not stop thinking about these things, which made it difficult to converse with him. (35 RT 8530-8531.)

Appellant told Dr. Grassian he could not stop thinking about the fact his hair was too long and he could not get nail clippers. For a significant time while appellant was incarcerated, he was apathetic and seriously depressed, which resulted from his solitary confinement. (35 RT 8531-

8532.) He was also obsessed with a skin problem that caused him to itch. (35 RT 8534; see Def. Exh. 677; 40 RT 9773.)

In Dr. Grassian's opinion, appellant's condition in solitary confinement "severely" affected his ability to work with his lawyers. Solitary confinement substantially impairs a person's ability to think, concentrate, remember, maintain attention, complete a thought, and therefore cooperate in his or her own defense. (35 RT 8532-8533.) People charged with "massive crimes" become obsessed with things like access to a shower or whether they receive rice with their food. (35 RT 8533.)

Appellant was in solitary confinement during all his time in Canada, except for about six or seven months. (35 RT 8534-8535.) From Dr. Grassian's conversations with appellant and his review of appellant's records, he concluded that when appellant was placed in the general population, he immediately "latched onto" the authority figures there and "became an excellent . . . model prisoner . . . ." (35 RT 8534-8536.) Appellant was an editor of the prison newspaper, worked hard at it, and was apparently cooperative and polite. (35 RT 8536.)

Appellant did not have any write-ups for infractions at Leavenworth, and his three write-ups for infractions elsewhere in Canada were for very minor transgressions, like possessing an exercise pad, passing a warm bowl of rice to another prisoner, and once using foul language toward someone in authority. (35 RT 8537.) His low number of write-ups was "kind of unusual," and the record contained many remarks about how docile and well behaved he was. (35 RT 8537-8538.) Considering appellant's 17-year history of incarceration, his written-up infractions were "strikingly few and trivial . . . ." (35 RT 8543.) While appellant was in solitary confinement in Canada, he sponsored two Korean orphans out of his earnings. (35 RT 8544-8545; 40 RT 9773; Def. Exh. 679.)

Dr. Grassian identified a photo of the "cage" where appellant was kept during court recesses in Calaveras County. (35 RT 8545-8546; Def. Exh. 681.) Another photo depicted the way appellant was transported from CSPS to Calaveras County. (35 RT 8547; 40 RT 9773; Def. Exhs. 682-683.) At first, appellant was placed on a narrow bench, but he rocked around so much that he fell and hurt himself. He also threw up a couple of times. Subsequently, he was placed on the floor. (35 RT 8547.)

Given that appellant had spent approximately 14 out of 17 years in solitary confinement, Dr. Grassian opined that his adjustment was "very unusual." He explained that appellant had behaved in a "docile, compliant, passive fashion over all these years," without ever "blowing up" or "acting out . . . ." (35 RT 8547-8548.)

Dr. Grassian agreed with Dr. Nievod that appellant was suffering from DPD and also possessed traits of avoidance personality disorder, anxiety, and severe chronic depression. (35 RT 8548-8549, 8552.) He also agreed that appellant's DPD was severe. (35 RT 8553.) According to Dr. Grassian, appellant had "a great deal of difficulty" when he was not surrounded by structure and authority. A person with DPD has no "engine," i.e., "nothing inside of themselves to guide them." Such people "cling" and "desperately reach out for someone to . . . provide that engine . . . ." (35 RT 8552-8553.) Appellant's DPD correlated strongly with his good adjustment to prison, because in prison, "it is pretty easy to find people who . . . will tell you what to do and how to live your life." (35 RT 8552-8553.) DPD does not deprive the sufferer of free will or the ability to make decisions; instead, it is an "internal experience" of fear, emptiness, and "just wanting to reach out and find somebody to take care of me, someone to lead me, someone to guide me." (35 RT 8553, 8584-8585.) DPD sufferers are desperate to find an authority figure to guide them. (35 RT 8553-8554.) Upon finding such a figure, the dependent personality

"will attempt to sacrifice himself, attempt to become their buddy, [and] easily become their lackey." (35 RT 8554.)

Appellant's DPD was demonstrated by other aspects of his life besides prison. As a child, he was "morbidly shy," and no one encouraged him to be assertive or show initiative. When appellant's teachers told his father that he had not said anything in class, his father would beat him with a cane, but appellant was so anxious he did not know what to say. His father would also punish him for expressing any emotion, and even for crying, which left him "constantly feeling debased, devalued, of no value, [and] stupid, which he was called a lot." (35 RT 8554.) All the features of appellant's DPD were "clearly present" when he was a child in Hong Kong. (35 RT 8558.) Even then, he tended to sacrifice for others in order to be liked and accepted. (35 RT 8558-8559.) He lacked the tools to be independent. This manifested itself in his inability to function in college and his inability to drive, which requires the capacity to make one's own decisions. (35 RT 8554-8555.)

Appellant spoke to Dr. Grassian about the Marine Corps' culture of "semper fi," which means "always faithful," always belonging to a group, and having a higher purpose. (35 RT 8555.) Appellant's Marine career was "doomed" because he was an illegal alien and thus had no opportunity to excel and advance. (35 RT 8555-8556.) Appellant exhibited the "semper fi" mentality when he said he coerced one of his coconspirators into participating in the armory break in, even though the coconspirator said he had not been coerced. (35 RT 8556-8558.)

Nevertheless, appellant's time in the Marine Corps was probably the most successful of his life, because he made friends and developed some competence. Dr. Grassian opined that appellant broke into the armory because he felt "stuck" in a low-ranking position and did not feel fully included, "so he had to do something that would be glorious, and fraternal."

(35 RT 8585.) Dr. Grassian thought that it was "the one time in his life unfortunately that he acted." (35 RT 8587.)

Appellant's severe DPD also manifested itself in his relationship with Michael Burt, his attorney in about 1985 and 1986. (35 RT 8563-8564.) Appellant "became fixated" on Burt "as the one who could rescue him and save him, kind of a new father figure." This made it difficult for appellant to participate effectively with other attorneys. (35 RT 8564.) Appellant's dependence on Burt was magnified by the fact that it occurred during his incarceration. (35 RT 8564-8566.)

People with appellant's personality type are not predestined to cruelty. (35 RT 8566-8567.) But given their need for an authority figure, they can get involved with an authority figure who is predestined toward cruelty, like Charles Manson, David Koresh, or Jim Jones. (35 RT 8566-8567.) Appellant was exactly the kind of person who could have ended up in Guyana, drinking Kool-Aid during the People's Temple massacre. And though appellant was not predestined toward violence and sadism, and "it is almost the luck of the draw with where you end up if you are a follower." (35 RT 8568.)

Persons with DPD have trouble initiating actions on their own, and Dr. Grassian would not generally expect them to exhibit leadership qualities. (35 RT 8571.) However, in 1981, appellant admitted that he devised the plan to rob the armory, and that he asked others to join the plan, purchased the bolt cutters, posted another person in the armory, and awoke a confederate the next day and instructed him to make arrangements to hide the stolen weapons. (35 RT 8572-8574.)

After appellant was arrested and brought back to Hawaii, he admitted directing others to break into the armory, and he referred to one participant as a "'weak willed individual'" whom he could control. (35 RT 8574-8575.) He also admitted the details of his escape from Hawaii, his flight to San

Francisco, and his subsequent linkup with Lake. (35 RT 8576-8578.) Further, he described the kinds of weapons that he asked Lake to buy for him and how he modified those weapons. (35 RT 8578.)

Dr. Grassian reviewed drawings or notes that appellant exchanged with Laberge. (35 RT 8580.) He thought the drawings said more about appellant's relationship with Laberge than about what had happened in California. (35 RT 8587.) Dr. Grassian never saw the M-Ladies video. (35 RT 8581.)

ARGUMENT

I. THE TRIAL COURT DID NOT DEPRIVE APPELLANT OF DUE PROCESS BY TRANSFERRING VENUE FROM CALAVERAS COUNTY, WHERE HE COULD NOT GET A FAIR TRIAL, TO ORANGE COUNTY, WHERE HE COULD

While this case was still in Calaveras County, the defense repeatedly insisted that appellant could not get a fair trial there. Now, however, appellant contends that the venue change from Calaveras County to Orange County deprived him of his right to procedural due process. (AOB 158-214.) Respondent disagrees. Most obviously, appellant's complaints fail based on the lack of prejudice, because the venue change did not result in an unfair trial. Moreover, appellant's arguments are all based on the right to procedural due process, but venue-change proceedings do not implicate that right. Finally, there was nothing improper about the venue-change proceedings; on the contrary, they were scrupulously fair, and appellant got what he was entitled to: a transfer from a venue where he could not get fair trial to one where he could.

A. Procedural History

1. The defense's evidence regarding Calaveras County's unsuitability

While this case was still in the Calaveras County Justice Court, the defense moved to close the preliminary hearing to the public. (8 CJCT 4484-4489; 14 CJCT 4790-4792, 4897-4903.) At a hearing in August 1992, the defense presented expert testimony to support the motion. Its experts, Roy Childs and Gary Howells, had studied public opinion about this case in Calaveras and Contra Costa Counties. (5 CJRT 1974, 1979-1980.) Their survey found an extremely high degree of prejudgment in Calaveras County, where 98.1 percent of participants recognized the case merely by description. (5 CJRT 1984.) Of those who recognized the case, 56 percent believed appellant was "definitely guilty," and another 25 percent believed he was "probably guilty." Compared to other high profile cases that Childs had surveyed, this was an "unusually high" percentage of people prejudging the defendant. (5 CJRT 1989-1990.)

In addition, 91 percent of respondents recognized appellant's name, and 72.7 percent recognized Leonard Lake's name. (5 CJRT 1993-1994.) This was an unusually high rate of name recognition. (5 CJRT 1994.) Further, 66.7 percent indicated they would definitely support the death penalty if appellant were convicted, and another 14 percent said they probably would. (5 CJRT 2001-2002.)

In Contra Costa County, 53.9 percent of participants recognized this case without any mention of appellant's name, and 72 percent recognized it when his name was mentioned. (5 CJRT 1982-1984, 1986.) Of those who recognized the case, 51.6 percent believed appellant was definitely or probably guilty. (5 CJRT 1990.) Further, 41.3 percent indicated they would definitely support the death penalty if appellant were convicted, and another 12.6 percent said they probably would. (5 CJRT 2002.)

Childs opined that if appellant were tried in Calaveras County "tomorrow," he could not get a fair trial, because there were very few people who had not formed an opinion about his guilt. (5 CJRT 2005-2006.) Childs' opinion was "not as clear" for Contra Costa County, but he noted that the recognition rate of 72 percent there was higher than in other cases that he had studied where courts had ordered a venue change. (5 CJRT 2006.)

Childs also testified that in general, "people forget about high visibility crimes very slowly." The percentage of people who recognize such a case declines by about one percent each year. (5 CJRT 1978.) The news coverage of this case appeared to be "much greater" than the coverage of other cases Childs had surveyed. (5 CJRT 2033-2034.)

2. The venue-transfer agreement and the status conference of January 21, 1994

In its motion to dismiss the information under section 995, filed in July 1993, the defense argued that Calaveras County lacked territorial jurisdiction over counts II through VII, the Dubs, Cosner, Peranteau, and Gerald murders, and instead, the proper venue was San Francisco. (9 OCT 3348-3375.) Similarly, the defense argued that trying these charges in Calaveras County would violate appellant's right to a jury drawn from the vicinage where the crimes occurred, but a trial in San Francisco would satisfy this requirement. (9 OCT 3376-3382.) In response, the prosecution argued that Calaveras County had territorial jurisdiction over counts II through VII, and a trial there would satisfy the vicinage requirement. (13 OCT 4683-4693.) The prosecution also argued that the vicinage issue was "'unripe,'" because the defense had indicated it would be waiving vicinage by moving for a venue change. (13 OCT 4693.)

After all of the judges in Calaveras County had been recused or disqualified from this case, the Judicial Council was asked to assign a new judge. (15 CSCT at 5390-5391.) In a letter to the Judicial Council summarizing the case's status, the prosecutor stated that both parties assumed venue would be transferred to another county. The prosecutor expressed a preference for Southern California because the case was less publicized there. (15 CSCT 5392-5393; see also 15 CSCT 5395-5307.)

On December 30, 1993, the Judicial Council assigned Judge Donald McCartin, a retired Orange County judge, to the case. (15 CSCT 5410; see also 15 CSCT 5441.) By this time, more than two years had passed since appellant had first appeared in court, and more than one year had passed since he had been held to answer. (See 6 CJCT 2043-2044; ACJCT 59.) Despite the defense's insistence that appellant could not get a fair trial in Calaveras County, it had not moved for a venue change.

On January 21, 1994, Judge McCartin held a status conference. (15 CSCT 5504.) Several issues were pending, including (1) appellant's motion to discharge his current court-appointed attorneys and replace them with Michael Burt and Garrick Lew; (2) the motion of appellant's attorneys, Thomas Marovich and James Webster, to withdraw from the case; and (3) appellant's latest *Marsden* motion. (15 CSCT 5486-5487; 7 CSRT 2102.)

Another of appellant's attorneys, Ephraim Margolin, asserted that vicinage principles required that six of the counts be tried in San Francisco. (7 CSRT 2105.) Furthermore, added Margolin, both parties stipulated that venue would be transferred out of Calaveras County. (7 CSRT 2107.)

Judge McCartin suggested that appellant's new attorneys be selected after the new venue was selected. (7 CSRT 2107-2108.) With regard to pretrial publicity, Judge McCartin noted that there had been "basically zero

publicity" about this case in Los Angeles and Orange Counties. (7 CSRT 2111.)

Judge McCartin also said he wanted to address venue and vicinage before the other pending issues. (7 CSRT 2127-2128.) Margolin suggested that vicinage be decided before venue, because if vicinage belonged to San Francisco, it could affect the decision on venue. (7 CSRT 2130-2131.) The prosecutor asked the court to rule on venue first. (7 CSRT 2133-2134.)

Judge McCartin suggested that the parties first stipulate to a venue change, then refer the matter to the Judicial Council, and finally raise any vicinage concerns after the transfer. (7 CSRT 2134-2136.) He noted that publicity might be a problem in San Francisco but he had not read anything about the case in Los Angeles or Orange Counties. (7 CSRT 2135-2136.)

The prosecutor stated that the prosecution had proposed a stipulation to change venue but still permit the defense to raise a vicinage argument. Defense attorney Marovich explained that any stipulation to a venue change would not waive the vicinage issue. (7 SCRT 2137.) Judge McCartin said he would let the attorneys submit documents for the court to forward to the Judicial Council. (7 CSRT 2139-2140, 2142, 2144, 2148, 2154-2155.)

As to the status of appellant's attorneys, Judge McCartin clarified that (1) he was conditionally relieving Marovich and Webster, pending the appointment of new counsel, and (2) he was discharging Margolin and Eric Multhaup, except with regard to the *Harris* issue. (7 CSRT 2153; 15 CSCT 5506.)

The following discussion then took place regarding the agreement to change venue:

> THE COURT: All right. So it is stipulated that the change of venue will go to the Judicial Counsel [*sic*] forthwith, ask them to rule on it. And upon their ruling, we will go forward to that particular change of venue, the selection of 987 judge to select a new attorney, or attorneys, undoubtedly plural for Mr. Ng, will

be decided by the -- well, in the particular case, if in fact having a trial judge -- and I would assume whoever follows me, if in fact I bite the dust, would have the same procedure.

¶ . . . ¶

And the change of venue, as I said, is by stipulation. And both sides, as I understand it, may add a few things.

Mr. Margolin, if you gentlemen want to add anything that goes to the Judicial Counsel [*sic*], just do it by a letter with a copy to your opposition. And I would assume that would be --

MR. MARGOLIN: Your Honor, the change of venue, naturally, is only as to six counts. I'm repeating myself, perhaps.

THE COURT: Right. You're stipulating that he's home free on Counts 1, 8, 9, 10, 11 and 12 and so forth. Two through seven, he's got a vicinage problem.

MR. MARGOLIN: That's right.

THE COURT: I understand you're not stipulating away, no. I think that's loud and clear.

(7 CSRT 2156-2157.)

The court clarified that the parties would provide their documents to the clerk for submission to the Judicial Council. (7 CSRT 2160.) According to the minute order for that date, the parties stipulated to a venue change on all counts, but the defense reserved the right to raise the issue of vicinage on counts II through VII.[31] (15 CSCT 5506.)

3. Events leading to the *McGown* hearing

Six days later, in a minute order, Judge McCartin informed the parties that he had been mistaken about the venue change procedure. He explained that after the case was referred to the Judicial Council, the Judicial Council

[31] These counts were later renumbered I through VI.

would identify a county or counties that could accept the case. After that, *the court* would conduct an evidentiary hearing concerning the available counties, as required by *McGown v. Superior Court* (1977) 75 Cal.App.3d 648, and would then select the new venue. Based on this new information, Judge McCartin reappointed Margolin and Multhaup to represent appellant at the *McGown* hearing. (15 CSCT 5514-5515.)

Both parties filed letters for transmission to the Judicial Council setting forth their positions on venue and vicinage. (15 CSCT 5516-5542.) In a letter from attorneys Margolin and Multhaup, the defense reiterated that appellant could not get a fair trial in Calaveras County. The letter asserted that vicinage belonged to San Francisco for the Dubs, Cosner, Gerald, Carroll, and Peranteau murders, and suggested that the remaining counts also be transferred there. (15 CSCT 5517.) However, attorney Webster sent the court a letter stating that there was no stipulation to transfer venue on the Dubs, Cosner, Gerald, and Peranteau charges (despite the impossibility getting of a fair trial in Calaveras County), but he would stipulate to transfer those counts if the other charges were also transferred to San Francisco. (15 CSCT 5542.)

On February 1, 1994, the court forwarded the Judicial Council a set of documents that included the letters from the parties. (15 CSCT 5543.) On March 4, 1994, Judicial Council staff attorney John Toker informed the court, by letter, that the Judicial Council's role in venue transfers was "ministerial," and the Judicial Council could not consider any papers "for legal or judicial purposes." Instead, the Judicial Council was required to rely on information from the court, based on the court's own review of any pertinent evidence. (15 CSCT 5545.)

Later, the Judicial Council informed the court that Orange County and Sacramento County were willing to accept the case, but San Francisco was not. In a letter, Judge McCartin relayed this to the parties. (15 CSCT

5547-5548.) He set the *McGown* hearing for April 8. (15 CSCT 5546-5547.)

On March 14, 1994, appellant filed a motion to have the San Francisco County Public Defender—and specifically Deputy Public Defender Michael Burt—appointed to represent him regarding the trial site selection issues. (15 CSCT 5549-5556.) On March 21, 1994, the court denied the motion. (15 CSCT 5563.)

In addition, the court summarized its conversations with John Toker of the Judicial Council. The court noted that it had informed Toker that the defense requested a transfer to San Francisco but the prosecution preferred Southern California. The court also noted that Toker had encountered great difficulty finding trial sites; that "San Francisco County specifically refused to take and had stated that it can not handle the particular case under any circumstances"; and that Toker was unable to obtain any location besides Orange and Sacramento Counties. The court also observed, "It has been obvious from the beginning, and both parties have repeatedly stated, that trial cannot be conducted in Calaveras County . . . ." (15 CSCT 5564.)

Because Judge McCartin was from Orange County, one of the possible trial sites, the Judicial Council assigned Judge James Kleaver to conduct the *McGown* hearing. (15 CSCT 5571; 7 CSRT 2296-2297.)

On April 5, 1994, three days before the *McGown* hearing, the defense filed a pleading purporting to "revoke" its agreement have counts II through VII transferred, unless their destination was San Francisco. (15 CSCT 5588-5593.) The defense acknowledged, however, that on January 21, it had agreed to have all 12 counts referred to the Judicial Council for assignment. (15 CSCT 5589.)

On April 5, 1994, three days before the *McGown* hearing, the defense, through attorneys Margolin and Multhaup, filed a motion to (1) correct the "miscommunications" regarding San Francisco's availability, and

(2) continue the *McGown* hearing. (16 CSCT 5594-5604.) Two days later, Webster and Marovich filed a motion to suspend all venue-related proceedings. (16 CSCT 5618-5646.)

On April 8, before the *McGown* hearing began, Judge McCartin ruled on several motions. He denied the defense's motion to refer the case back to the Judicial Council. (7 CSRT 2266-2269.) He did not make any order regarding the appointment of Michael Burt. He explained that such an appointment "takes the case . . . to San Francisco." (7 CSRT 2270; 16 CSCT 5700.)

Judge McCartin also denied the defense's motion to continue the *McGown* hearing, subject to Judge Kleaver's reconsideration. (7 CSRT 2273-2276; 16 CSCT 5700.) In addition, he denied the defense's motion to correct the "miscommunication" regarding San Francisco's availability. (7 CSRT 2278; 16 CSCT 5700.)

4. The *McGown* hearing and Judge Kleaver's decision to transfer the case to Orange County

Judge Kleaver took the bench for the *McGown* hearing. (7 CSRT 2296; 16 CSCT 5702.) He noted that all parties agreed that a venue change was necessary. (7 CSRT 2297-2298.) He declined to revisit Judge McCartin's ruling denying the defense's motion to revoke the venue-change agreement. (7 CSRT 2308-2309.) He also denied the defense's request to consider San Francisco as a possible venue and its requests to continue the *McGown* hearing and submit evidence regarding the suitability of San Francisco. (7 CSRT 2316, 2335-2336; 16 CSCT 5703.) At the end of the *McGown* hearing, he ordered all counts transferred to Orange County. (7 CSRT 2336-2337; 16 CSCT 5703-5704.)

A month later, the defense filed a petition for writ of mandate in this Court, challenging the transfer to Orange County. (17 CSCT 5949-6009.) The next day, the defense filed a motion in Calaveras County to set aside

the venue-transfer agreement. (16 CSCT 5743-5828.) This Court transferred the petition for writ of mandate to the Court of Appeal, and on May 19, 1994, the Court of Appeal denied the petition. (17 CSCT 6012-6013.) The defense then filed a petition for review. (18 CSCT 6363-6397.)

On June 30, 1994, the Calaveras County Superior Court held a hearing on the defense's motion to set aside the venue-transfer agreement. Judge Thomas Curtin heard the motion. (19 CSCT 6733.) After listening to testimony, Judge Curtin denied the motion. (8 CSRT 2633-2635, 2637, 2640; 19 CSCT 6737.)

On August 18, 1994, this Court denied the defense's petition for review. (10 CSCT 6759.) On August 30, 1994, the defense filed a new petition for writ of mandate in this Court, again challenging the venue change. (20 CSCT 6778–6836; see 21 CSCT 7318.) This Court again transferred the petition to the Court of Appeal. (21 CSCT 7318.)

On September 6, 1994, the Calaveras County Superior Court ordered appellant transferred to the custody of the Orange County Sheriff. (21 CSCT 7319.) On September 9, 1994, the Court of Appeal denied the defense's petition for writ of mandate. (21 CSCT 7323.) The defense filed a petition for review, and on September 29, 1994, this Court denied review. (1 OCT 93-130.)

5. Venue-related proceedings after the transfer

On January 13, 1995, in the Orange County Superior Court, the defense filed a motion to transfer venue to San Francisco. (2 OCT 230-290; see also 2 OCT 562-569.) Two months later, the court denied the motion. (1 RT 111; 3 OCT 822.) Two years later, on April 22, 1997, the defense filed another motion to transfer venue to San Francisco, this time for counts II through VIII—the Dubs, Cosner, Peranteau, and Gerald murders. (7 OCT 2403-2431.) On May 9, 1997, the court denied the motion. (2 RT 208-209; 8 OCT 2819.)

On August 5, 1997, the defense filed a supplemental motion to dismiss the information under section 995, based in part on challenges to venue and vicinage. (9 OCT 3131-3143.) On July 15, 1998, the court denied the motion. (4 RT 988; 20 OCT 6965.) On August 5, 1998, appellant, now representing himself, filed yet another motion to transfer venue to San Francisco, or in the alternative, to import a jury from San Francisco. (20 OCT 7003-7029.) On August 21, 1998, the court denied the motion. (5 RT 1183-1185; 22 OCT 7571-7572.)

On September 24, 1998, after the court had terminated appellant's self-representation, the defense filed a motion to preclude the prosecution from introducing evidence regarding the Dubs, Cosner, Gerald, and Peranteau murders (now renumbered as counts I through VI), and from referring to such evidence in its opening statement. The defense argued that based on vicinage principles, the court lacked jurisdiction over those charges. (25 OCT 8636-8645.) On October 8, the court denied the motion. (29 OCT 9759; 7 RT 1545.)

On November 24, 1998, after the prosecution had completed its guilt phase case-in-chief, the defense moved for acquittal on the Dubs, Cosner, Gerald, and Peranteau murders. (34 OCT 11435.) In part, the defense argued that the Orange County court lacked jurisdiction and over these counts, and that appellant had not waived his right to vicinage. (34 OCT 11447-11449.) The court denied the motion. (34 OCT 11499; 21 RT 4954.)

After the penalty phase, the defense raised vicinage again in a motion for new trial. (42 OCT 13857, 13945-13949.) The court denied the motion. (57 OCT 19590; 40 RT 9957.)

B. All of Appellant's Claims Fail Based on the Lack of Prejudice, Because the Transfer Did Not Result in an Unfair Trial

Appellant makes numerous complaints about the venue transfer to Orange County. (AOB 158-214.) This Court can quickly dispose of them based on the lack of prejudice, because the transfer did not result in an unfair trial.

In criminal cases, "venue simply denotes the place or places appropriate for a defendant's trial." (*People v. Posey* (2004) 32 Cal.4th 193, 207.) Venue does not encompass questions of fundamental jurisdiction; it is a statutory creation, and it "implicates legislative policy, not constitutional imperative." (*Id.* at pp. 208-209, internal quotation marks omitted; accord, *People v. Zegras* (1946) 29 Cal.2d 67, 68.) A defendant seeking a venue change has no right to select the new venue: "the court, not the defendant, determines where the trial shall be transferred." (*People v. Cooper* (1991) 53 Cal.3d 771, 804.) The purpose of a venue change "is to ensure the defendant a fair trial [citation], not to encourage forum shopping." (*Ibid.*)

On appeal, a defendant challenging the denial of a motion to change venue must show both error and prejudice. There is prejudice only if it is reasonably likely "that a fair trial was not *in fact* had." (*People v. Cooper*, *supra*, 53 Cal.3d at pp. 805-806, original italics; accord, *People v. Davis* (2009) 46 Cal.4th 539, 578.) The appellate standard of review is thus "*retrospective*." (*People v. Williams* (1989) 48 Cal.3d 1112, 1125, original italics.) Where—as here—the appellate court reviews a ruling that transfers venue, the question should be the same: "whether . . . it is reasonably likely that the defendant in fact received a fair trial." (See *People v. Vieira* (2005) 35 Cal.4th 264, 278.)

This Court's holding in *People v. Stanley* (1995) 10 Cal.4th 764, is instructive. In *Stanley*, the trial court granted the defendant's motion to change venue, but the defendant claimed that his attorney performed effectively by failing to demand an evidentiary hearing to determine the proper county for transfer. (*Id.* at pp. 790, 792.) This Court denied the claim, in part, because "nothing in the record hints the choice of Butte County prejudiced defendant." (*Id.* at p. 792.) In other words, when a decision to change venue is challenged on appeal, there is no ground for reversal unless the choice of the new county resulted in an unfair trial.

Here, appellant has not demonstrated that the transfer to Orange County resulted in an unfair trial. On the contrary, each juror who decided this case indicated that he or she could judge the case fairly, and "[s]uch statements must be presumed to be true." (*People v. Preston* (1973) 9 Cal.3d 308, 313; see 7 RT 1718 [juror 227]; 7 RT 1766, 1825, 8 RT 1899-1900, 11 RT 2598 [Juror No. 207]; 11 RT 2515, 2528 [Juror No. 287]; 11 RT 2590-2591, 2595-2596, 2598 [Juror No. 263]; 9 RT 2227 [Juror No. 215]; 7 RT 1767 [Juror No. 301]; 8 RT 2057, 2069 [Juror No. 213]; 8 RT 2007, 2021-2022 [Juror No. 245]; 7 RT 1723-1724, 8 RT 1902, 11 RT 2598, 40 OCT 13508 [Juror No. 140]; 11 RT 2687, 2694, 2699 [Juror No. 174]; 11 RT 2787-2788 [Juror No. 157]; 11 RT 2756 [Juror No. 283]; 8 RT 1964 [Juror No. 110].[32]) Because the choice of Orange County did not result in an unfair trial, there is no basis for reversal, regardless of appellant's complaints about the way Orange County was selected.

Appellant does not assert that pretrial publicity in Orange County prejudiced him; instead, he argues that he was prejudiced because Orange

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[32] All of the jurors listed above decided both the guilt phase and the penalty phase, except Juror Nos. 157 and 174. Juror No. 174 decided the guilt phase but was dismissed during the penalty phase and replaced by Juror No. 157. (39 OCT 12949; 40 OCT 13294.)

County had a smaller Chinese-American population than San Francisco. (AOB 213-214.) This argument fails for several reasons. First, San Francisco's demographic characteristics are irrelevant, because there is no reason to assume that without the alleged errors, the Calaveras County court would have selected San Francisco as the new venue. Appellant speculates that San Francisco would have been the new venue, but such speculation cannot support a claim on appeal. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1300; *People v. Seibel* (1990) 219 Cal.App.3d 1279, 1299). Moreover, appellant's speculation is refuted by the fact San Francisco refused to accept the case. (15 CSCT 5564; 8 CSRT 2539.)

Further, even assuming San Francisco would have been the new venue, appellant still does not show prejudice. As a threshold matter, appellant improperly relies on sources outside the record. Specifically, he bases his argument on population statistics obtained via the internet. (AOB 200.) But appellate jurisdiction is limited to the four corners of the record. (*In re Carpenter* (1995) 9 Cal.4th 634, 646.) "Matters not presented by the record cannot be considered on the suggestion of counsel in the briefs." (*People v. Merriam* (1967) 66 Cal.2d 390, 397, internal quotations marks omitted.) Hence, appellant cannot rely on demographic statistics that are absent from the record. (See *TSMC North America v. Semiconductor Mfg. Intern. Corp.* (2008) 161 Cal.App.4th 581, 593, fn. 2 [appellate court could not consider State Department report that was available on the internet but not part of trial record]; *People v. Docherty* (1960) 178 Cal.App.2d 33, 39 ["Newspaper articles outside the record will not be considered by an appellate court"].)

Moreover, even if this Court could consider appellant's population statistics, they would not show prejudice. Appellant maintains that San Francisco County had more Chinese Americans, as a percentage of its population, than Orange County. (AOB 200.) But there was nothing

prejudicial about this, because appellant had no right to have Chinese Americans on his jury; as this Court has explained, "no litigant has the right to a jury that . . . necessarily includes members of his own group, or indeed is composed of any particular individuals." (*People v. Wheeler* (1978) 22 Cal.3d 258, 277; accord, *Batson v. Kentucky* (1986) 476 U.S. 79, 85 [106 S.Ct. 1712, 90 L.Ed.2d 69] ["a defendant has no right to a 'petit jury composed in whole or in part of persons of his own race'"].)

Further, appellant bases his argument on invalid assumptions about Chinese Americans. He maintains that the relative scarcity of Chinese Americans in Orange County, as compared to San Francisco, prejudiced him, because his defense at the guilt and penalty phases relied on evidence of Chinese cultural traits and experiences. (AOB 213-214.) But it is impermissible to assume that Chinese American jurors would have evaluated the evidence differently than other jurors. (See *Batson v. Kentucky*, *supra*, 476 U.S. at p. 87 ["A person's race simply 'is unrelated to his fitness as a juror'"].)

In addition, the suggestion that Chinese American jurors would have evaluated the evidence differently than others juror is speculation, which, again, is forbidden on appeal. Moreover, appellant's argument makes no sense, because the evidence he presented at trial concerned the Chinese culture of Hong Kong (see Statement of Facts, *ante*), not the culture of Chinese Americans, a community whose presence here dates back to the 1840's. (See *Chae Chan Ping v. United States* (1889) 130 U.S. 581, 594-595 [9 S.Ct. 623, 32 L.Ed. 1068] [discussing the history of Chinese immigration].) And appellant is further speculating when he asserts that (1) there were no Chinese Americans on the jury, and (2) if the case had been transferred to San Francisco, there *would* have been Chinese Americans on the jury. The record does not support either of these assertions.

Appellant also argues that the purported flaws in the venue-change procedure were prejudicial because he was tried "in a county that had no legitimate jurisdiction" over the charges. (AOB 213.) But the Orange County court unquestionably had jurisdiction over the case. Venue does not implicate subject-matter jurisdiction or personal jurisdiction. (*People v. Thomas* (2012) 53 Cal.4th 1276, 1282; *People v. Posey*, *supra*, 32 Cal.4th at p. 208.) "[A] superior court has subject matter jurisdiction with regard to any felony offense committed within the state, no matter where the offense was committed." (*People v. Simon* (2001) 25 Cal.4th 1082, 1097.) It is thus "beyond dispute that any superior court to which a felony proceeding has been transferred has subject matter jurisdiction over the proceeding . . . ." (*Ibid.*) Hence, the Orange County court had jurisdiction over this case.

In sum, Argument I of appellant's brief, regarding errors in the venue-related proceedings, is meritless because appellant has not demonstrated that the choice of Orange County resulted in an unfair trial.

C. Appellant's Claims Also Fail Because Venue-Change Proceedings Do Not Implicate Procedural Due Process

Appellant's complaints about the venue transfer consist almost entirely of assertions that the trial court deprived him of procedural due process. Specifically, he makes the following arguments:

- He was deprived of due process by the "unilateral abrogation of crucial components of the trial site selection agreement" (AOB 174-192);
- He was deprived of due process by the trial court's refusal to continue the *McGown* hearing (AOB 192-202);
- He was deprived of due process by the trial court's refusal to consider San Francisco as a venue even after the Judicial

Council indicated San Francisco was unavailable (AOB 202-206);

- He was deprived of due process (and the effective assistance of counsel) when the trial court refused to appoint new trial counsel before selecting the new trial site (AOB 207-211);
- He was deprived of due process by the trial court's refusal to set aside the venue transfer (AOB 211-212); and
- He was deprived of due process by the transfer of counts II through VII, because he never agreed that they be referred to the Judicial Council (AOB 212-213).

In other words, appellant contends that the trial court, through various missteps in the venue-transfer proceedings, violated his right to procedural due process. But these claims all fail, because a state court's venue-transfer proceedings do not implicate procedural due process.

As the United States Supreme Court has explained, the due process guarantee only applies to the deprivations of life, liberty, and property: "The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that *one of these interests* is at stake." (*Wilkinson v. Austin* (2005) 545 U.S. 209, 221 [125 S.Ct. 2384, 162 L.Ed.2d 174], italics added; accord, *Board of Regents of State Colleges v. Roth* (1972) 408 U.S. 564, 569 [92 S.Ct. 2701, 33 L.Ed.2d 548]; *People v. Litmon* (2008) 162 Cal.App.4th 383, 395.) Hence, there can be no violation of procedural due process when the procedure in question did not deprive the defendant of one of these rights: "Only the denial or misapplication of state procedures that results in the deprivation of a *substantive right* will implicate a federally recognized liberty interest. . . . [And] state procedures that do not protect substantive rights do not create

independent substantive rights" (*Moran v. Godinez* (9th Cir. 1994) 57 F.3d 690, 698, italics added.)

Venue, however, is not a substantive right; in fact, it is not a constitutional right at all. (*People v. Posey*, *supra*, 32 Cal.4th at pp. 208-209; *People v. Zegras*, *supra*, 29 Cal.2d at p. 68.) The errors that appellant alleges in the venue-transfer proceedings did not directly implicate his interest in freedom from restraint or his interest in life; instead, they merely addressed the issue of where his trial would take place. Therefore, the errors alleged by appellant cannot violate procedural due process. (See *People v. Rundle* (2008) 43 Cal.4th 76, 134-136 [violation of capital defendant's statutory right to presence during all testimony did not deprive him of due process, because it "did not directly implicate his interest in freedom from restraint"].)

The Fifth Circuit's holding in *Cook v. Morrill* (5th Cir. 1986) 783 F.2d 593, is on point. *Cook* involved a Texas statute, which required that a hearing take place before the trial court could order a venue change. On habeas corpus, the defendant argued that the trial court deprived him of procedural due process by forbidding him from confronting and cross-examining witnesses at the hearing. The Fifth Circuit denied this claim. The court explained that the defendant had no constitutional right to have his trial in a specific venue, so he had "no protected fourteenth amendment right requiring the protection of due process" at the venue hearing. (*Id.* at p. 596.) Appellant had no such right here either.

The cases appellant relies on do not support his assertion that that the venue-transfer proceedings deprived him of due process. (See AOB 202.) For example, *Hicks v. Oklahoma* (1980) 447 U.S. 343 [100 S.Ct. 2227, 65 L.Ed.2d 175], involved an incorrect jury instruction, which informed the jury that if it found the defendant to be a habitual offender, it must sentence him to 40 years in prison. The instruction was wrong, because the

minimum sentence was really 10 years. (447 U.S. at pp. 344-346.) In *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, a capital case, the sentencing judge weighed the aggravating and mitigating circumstances in a manner that violated the state's statutory requirements. (*Id.* at pp. 1297, 1299-1300.) And in *Rust v. Hopkins* (8th Cir. 1993) 984 F.2d 1486, another capital case, state law required that aggravating circumstances be proved beyond a reasonable doubt, but the sentencing panel improperly applied a less stringent standard. (*Id.* at p. 1493.)

In each of these cases, the state-law error directly implicated the manner in which the state would deprive the defendant of a substantial right—in *Hicks*, the right to liberty, and in *Fetterly* and *Rust*, the right to life. In contrast, the venue-transfer proceedings here bore no direct relation to appellant's conviction and sentence; instead, they only concerned the location of his trial. In complaining about the way Orange County was selected, appellant is like an Olympic sprinter who loses his race and then challenges the results by complaining about the way the host city was chosen.

In sum, venue-change proceedings do not implicate procedural due process, because they do not deprive a defendant of life, liberty, or property. Appellant's venue-related claims therefore fail, since they are based on procedural due process.

D. The Trial Court Did Not Deprive Appellant of Due Process by Abrogating the Terms of the Trial-Site-Selection Agreement

1. Overview

Despite the manifest lack of prejudice and the absence of any constitutional underpinning for appellant's complaints, respondent will address each complaint on the merits. Appellant first contends that the trial court deprived him of due process by abrogating the terms under which he

agreed to the venue change. He bases this claim on the notion that the venue-change agreement was comparable to a plea bargain, but in fact, they are not comparable, so this entire claim is based on an invalid premise.

More specifically, appellant complains that, contrary to his expectation when he agreed to a venue change, the Judicial Council refused to review the documents that he submitted to show that San Francisco would be the best venue. But this argument is unfounded, because it was the court, not the Judicial Council, who chose the new venue, and in any event, the Judicial Council investigated San Francisco's availability but found that San Francisco was unavailable.

Appellant also maintains that the Calaveras County court fraudulently tried to steer the case to Orange County, but the record refutes this. Appellant then asserts that the court erred by denying his motion to revoke the transfer agreement, but the court never ruled on that motion, and appellant forfeited this claim by failing to press for a ruling. In any case, appellant's motion to revoke the transfer agreement was meritless and was based on his invalid analogy that likened the venue-change agreement to a plea bargain.

2. The defense steadfastly maintained that appellant could not receive a fair trial in Calaveras County

Appellant's complaints about the venue change must be viewed in light of his frequent—and undisputed—assertion that he could not get a fair trial in Calaveras County. The defense always maintained that the trial could not take place in Calaveras County. For example, in 1992, in connection with his motion to close the preliminary hearing, the defense presented evidence that in Calaveras County, 98.1 percent of those surveyed recognized this case by description, even without mention of appellant's name. (5 CJRT 1984.) Of that 98.1 percent, 56 percent believed appellant was "definitely guilty," and another 25 percent believed

he was "probably guilty." (5 CJRT 1989-1990.) Compared to other high profile cases, this was an "unusually high" percentage of people prejudging the defendant. (5 CJRT 1989-1990.) Additionally, 66.7 percent indicated they would definitely support the death penalty if appellant were convicted, and another 14 percent said they probably would. (5 CJRT 2001-2002.) Based on these findings, the defense's expert witness testified that appellant could not get a fair trial in Calaveras County. (5 CJRT 2005-2006.)

Subsequently, in the defense's motion to set aside the information, the defense asserted that the widespread publicity about this case had "reached the four corners of [Calaveras County], thereby tainting the jury pool." (10 CSCT 3551.) In a status conference memorandum of January 1994, the defense pointed out that it and the prosecution agreed "that the one place where the case can never be tried is Calaveras County." (15 CSCT 5438, original underscoring.) In a letter to the Judicial Council, the defense stated that "[a]ll parties agree that none of the counts may properly be tried in Calaveras County . . . ." (15 CSCT 5517.) At the January 21, 1994, status conference, defense counsel stated that "it is stipulated by the prosecution and the defense that under any circumstances change of venue will remove it from Calaveras County." Counsel added that all parties agreed "that a change of venue out of this county is a necessity." (7 CSRT 2107.)

Two months later, in a letter to San Francisco Superior Court, the defense again stated that "All parties are agreed that Calaveras County is unsuitable as a trial site for any of the charges . . . ." (15 CSCT 5569.) At the *McGown* hearing, the court stated "We start first with the proposition that all concerned have agreed that Calaveras County is an improper venue because of pretrial publicity, and so on, and that venue transfer is necessary." (7 CSRT 2297-2298.) No one objected to this statement. (7 CSRT 2298.)

Three years later, in a motion to transfer venue from Orange County to San Francisco, the defense admitted that Calaveras County "cannot lawfully try these counts" because appellant "cannot possibly get a fair trial there." (7 OCT 2430.) And in August 1998, appellant's counsel conceded that "everybody stipulated that Calaveras County can't give him a fair trial . . . ." (5 RT 1184.)

3. The venue-transfer agreement was not comparable to a plea bargain

Appellant maintains his right to due process was violated, because he agreed to a venue change under conditions that were subsequently abrogated. According to appellant, these conditions included the following: (1) he could submit evidence for the Judicial Council to consider in designating the choices for the new venue; (2) the Judicial Council would consider this evidence; and (3) he was not stipulating to a venue change for counts II through VII (the Dubs, Cosner, Peranteau, and Gerald murders). (AOB 174-178, 183-184.)

Appellant argues that these conditions were abrogated when (1) the Judicial Council refused to consider the documents he submitted through the court; (2) the Judicial Council temporarily misplaced the documents; (3) the court did not promptly inform him that the Judicial Council would not consider the documents; and (4) the court did not instruct the Judicial Council to try to place the case in San Francisco. (AOB 174-185.) Appellant argues that these "breaches" of the agreement, and the court's subsequent refusal to cancel the agreement, deprived him of due process. (AOB 174, 181-192.)

As discussed above, appellant's due process claim fails because (1) the venue change did not result in an unfair trial; (2) venue-change procedures in state court do not implicate procedural due process; and

(3) venue is a statutory creation, and appellant did not have a constitutional right to a trial in any specific venue.

Moreover, there was an unspoken coerciveness underlying the conditions that appellant wanted to attach to the venue transfer. Appellant himself insisted he could not get a fair trial in Calaveras County. A venue change was therefore necessary, and appellant had no business telling the court that he would only agree to such a transfer under certain conditions. The only alternative was unending delay. Appellant's attempt to attach conditions to the venue were thus based on an implicit threat to delay the proceedings. The "abrogation" of these conditions therefore cannot provide a basis for reversal. (Cf. *People v. Windham* (1977) 19 Cal.3d 121, 128, fn. 5 [defendant may not use the right to self-representation "as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice"].)

Appellant's claim also fails because it is based on his faulty analogy to plea bargains. Appellant argues that he agreed to the venue change under certain conditions, those conditions were not satisfied, and therefore, he was deprived of due process. Based on this conclusion, he maintains that this Court must return him to the position he occupied before the venue change, the same way a defendant whose plea agreement is violated may return to the position he or she occupied before the plea agreement. (AOB 181-185.) But the venue-transfer agreement is not comparable to plea agreement: They differ in character and consequence.

Plea agreements are "central to the administration of the criminal justice system . . . ." (*Missouri v. Frye* (2012) ___ U.S. ___ [132 S.Ct. 1399, 1407, 182 L.Ed.2d 379].) As the Supreme Court has explained, "'A plea of guilty is more than a voluntary confession made in open court. It also serves as a stipulation that no proof by the prosecution need by advanced . . . . It supplies both evidence and verdict, ending controversy.'"

(*Boykin v. Alabama* (1969) 395 U.S. 238, 243-244, fn. 4 [89 S.Ct. 1709, 1712, 23 L.Ed.2d 274], ellipsis in original, quoting *Woodard v. State* (Ala.Ct.App. 1965) 171 So.2d 462, 469.) Further, by pleading guilty, a defendant waives several rights under the federal Constitution, including the privilege against compulsory self-incrimination, the right to a jury trial, and the right to confrontation. (*Boykin, supra*, 395 U.S. at p. 243.)

Such weighty consequences did not attach to the venue agreement here. The agreement did not relieve the prosecution of its burden of proof or serve as an admission of appellant's guilt, and appellant did not waive his right against self-incrimination, his right to a jury trial, or his right to confrontation. Instead, he agreed to a transfer from a county where he could not receive a fair trial to one where he could. His analogy to a plea bargain thus fails, because the consequences of a venue transfer are nothing like the consequences of a guilty plea.

Appellant's analogy also fails because the nature of a plea bargain differs from that of the venue-transfer agreement. Plea bargaining is akin to a contract that the defense and prosecution negotiate. It "contemplates an agreement negotiated by the People and the defendant and approved by the court." (*People v. Orin* (1975) 13 Cal.3d 937, 942.) In this process, "the defendant agrees to plead guilty in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged." (*Ibid.*)

In contrast, the venue-transfer agreement was not the product of bargaining between the prosecution and defense; instead, it was suggested by the court, discussed by the court and the parties, and eventually agreed upon. (7 CSRT 2134-2137, 2139-2140, 2142-2144, 2148, 2153-2160.) And since neither party had an interest in an unfair trial—which would have occurred if the case had stayed in Calaveras County—there was no mutual consideration, as there is with a plea bargain.

Finally, the policy concerns that are violated when a plea bargain is broken were not offended here; on the contrary, the venue transfer promoted these concerns. As this Court has explained, "in the context of a broken plea agreement, there is more at stake than the liberty of the defendant or the length of his term. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice . . . ." (*People v. Mancheno* (1982) 32 Cal.3d 855, 866.) Here, a notorious serial murder case was transferred from a venue where the defendant could not receive a fair trial to one where he could. This promoted the government's honor and public confidence in the fair administration of justice; hence, the venue transfer had the opposite effect of a broken plea bargain.

In sum, appellant's analogy to a broken plea bargain is invalid.

4. The Judicial Council's refusal to review the parties' submissions did not affect the ultimate venue decision

Judge McCartin referred the case to the Judicial Council for venue purposes after the hearing of January 21, 1994. Near the beginning of that hearing, appellant's counsel stated that the parties stipulated "that under any circumstances change of venue will remove it from Calaveras." (7 CSRT 2107.) During the ensuing discussion, the parties and court agreed that the parties could submit documents for the Judicial Council to consider, and the court would then forward them to the Judicial Council. (7 CSRT 2142, 2144, 2148, 2154-2155, 2157, 2160.)

Consequently, the parties submitted documents for the court to transmit to the Judicial Council. These documents explained the parties' positions on venue and vicinage. (15 CSCT 5516-5542.) Appellant's submission included a letter from attorneys Margolin and Multhaup, which

conceded that none of the counts could be tried in Calaveras County. (15 CSCT 5517.)

The court forwarded these documents to the Judicial Council. (15 CSCT 5543.) The Judicial Council, however, refused to consider them because it would be inconsistent with the Judicial Council's "ministerial role" in venue-change matters. (15 CSCT 5545.)

Appellant complains that the Judicial Council's refusal to review these documents "breached" the terms of the venue-transfer agreement, and that if the Judicial Council had reviewed the documents, "it would [have] put San Francisco at the top of the list of potential candidates . . . ." (AOB 178-179.) This complaint is baseless for several reasons.

To begin with, the Judicial Council could not have breached the terms to the agreement, because it was not a party to the agreement, and the agreement did not require it to review the documents. The agreement allowed the parties to submit documents for transmission to the Judicial Council—and they did. (7 CSRT 2142, 2148-2150, 2154-2157, 2160-2161; 15 CSCT 5516-5543.)

Further, appellant's argument relies on his analogy to plea bargains, but, as discussed above, this analogy is unsound, and contract principles did not govern the venue-transfer agreement. Additionally, appellant's complaint is based on the assumption that, if he had known the Judicial Council was not going to review his materials, he would have allowed the case to stay in Calaveras County, where he could not get a fair trial. This assumption is dubious, and in fact, it is refuted by defense counsel's statement "that under any circumstances [a] change of venue will remove it from Calaveras." (7 CSRT 2107.)

Moreover, appellant misunderstands the Judicial Council's role. He asserts that if the Judicial Council had reviewed his materials, it would have placed San Francisco "at the top of the list . . . ." (AOB 178.) But the

Judicial Council's job was not to rank the eligible counties; instead, its role was to "suggest a court or courts that would not be unduly burdened by the trial of the case." (Cal. Rules of Court, former rule 842 [hereafter "rule 842"]; *People v. Hayes* (1999) 21 Cal.4th 1211, 1279, fn. 27.) It was then the *court's* duty to choose the new venue. (Rule 842; *People v. Cooper*, *supra*, 53 Cal.3d at p. 804.) Thus, regardless of whether the Judicial Council had reviewed appellant's submissions, it was not going to designate San Francisco—or any other county—as the top candidate.

Indeed, even if the Judicial Council had ranked the potential new venues, appellant is merely *speculating* that it would have placed San Francisco first—and speculation cannot support a claim on appeal. (*People v. Carasi*, *supra*, 44 Cal.4th at p. 1300.)

Finally, appellant's argument is a red herring, because the San Francisco court declined to accept the case. It informed the Judicial Council that it could "not handle [the case] under any circumstances." (15 CSCT 5564; accord, 7 CSRT 2286; 8 CSRT 2503-2504, 2516, 2539.) After the defense heard about this, it bypassed the Judicial Council and sent the San Francisco court a ex-parte letter explaining why the case belonged there. But even then, the court did not change its position. (15 CSCT 5569-5570; 8 CSRT 2540-2541.) Hence, the Calaveras court's handling of the venue transfer is a moot point, because San Francisco refused to accept the case.

5. It is irrelevant whether Judge McCartin acted promptly in informing the defense that the Judicial Council would not examine the documents the defense had submitted

Judge McCartin referred this case to the Judicial Council after the hearing of January 21, 1994. (15 CSCT 5506.) He later forwarded the parties' documents to the Judicial Council, along with a cover letter dated February 1, 1994. (15 CSCT 5543.) John Toker, a staff attorney for the

Judicial Council, then informed Judge McCartin that the Judicial Council would not examine these materials, because the Judicial Council's role was merely to find venues that could take the case, and it was the court's job to actually select the new venue. (7 CSRT 2266-2267.) Judge McCartin received Toker's phone call within a week after informing the Judicial Council that there was going to be a venue transfer. (7 CSRT 2266-2267; 2412-2413.) In a letter dated March 7, 1994, the court informed the parties that the Judicial Council would not be considering their submissions, because the Council's role was "strictly ministerial . . . ." (15 CSCT 5547.)

Appellant complains that Judge McCartin failed to promptly inform the defense that the Judicial Council had declined to consider its documents. (AOB 179-180.) But again, the Judicial Council's job was to find venues that would not be unduly burdened by taking this case. (Rule 842.) This task was "ministerial." (15 CSCT 5545.) The defense's pleadings, which argued that the case belonged in San Francisco, were irrelevant to this task.

And again, the Judicial Council's refusal to review the defense's materials made no difference, because the Judicial Council still investigated whether San Francisco was available, and it discovered that San Francisco was unavailable. The defense's submissions to the Judicial Council would not have changed this, nor would Judge McCartin's purported delay in informing the defense that the Judicial Council would not be reviewing its documents.

6. As Judge Curtin found, there was no fraud in the venue selection

Appellant's argument also fails because it relies on the erroneous premise that the venue-selection process was fraudulent. First, appellant argues that the venue stipulation was invalid because Judge McCartin fraudulently concealed the fact that the Judicial Council had declined to

consider the defense's submissions. (AOB 188.) But there was nothing fraudulent about Judge McCartin's actions, since there is no evidence he tried to deceive anyone. Indeed, only five days after the parties agreed to the venue transfer, Judge McCartin informed the parties that a *McGown* hearing was required because *the court, not the Judicial Council*, would be choosing the new venue. (15 CSCT 5514-5515.) And the purported "fraud" had no effect, because the Judicial Council investigated San Francisco's availability, as the defense had asked.

As a further basis for "fraud," appellant complains that, at the time of the venue stipulation, Judge McCartin knew that the Judicial Council was aware that the prosecution sought a transfer to Orange County. (AOB 185.) As discussed below, it appears that some Judicial Council staff members knew that the prosecution preferred a transfer to Southern California; however, there was nothing improper about this.

In a declaration, Judge McCartin stated that in December 1993, before he was assigned to this case, he spoke with Chris Hoffman, a secretary for the Judicial Council's Judicial Assignment Commission. Hoffman told Judge McCartin that she thought the trial site might be changed because of publicity, and it was her understanding that the defense wanted the case to go to San Francisco and the prosecution preferred Orange County. (19 CSCT 6456-6457.)

At the hearing on the defense's motion to withdraw the venue stipulation, Judge McCartin testified about his conversation with Hoffman. He recalled Hoffman telling him that the case would probably move north or south because of publicity. (8 CSRT 2393-2394.) Hoffman knew that the prosecution preferred Southern California and the defense wanted it "to go to San Francisco or go north." (8 CSRT 2394-2395.) "Southern California" referred to Los Angeles, Orange, and perhaps San Bernardino Counties. (8 CSRT 2395.) As to Northern California, Judge McCartin

thought that Hoffman "specifically indicated 'probably go to San Francisco,' I think was her wording." (8 CSRT 2396.)

At the same hearing, Judicial Council attorney John Toker, who was responsible for finding available venues, testified that he spoke with Hoffman, and she did not tell him that he should "push the case toward Southern California or Orange County." (8 CSRT 2496.) She merely told him that Orange County was available. (8 CSRT 2498.) No one told him to direct the case to Orange County. (8 CSRT 2539.)

Based on this evidence, appellant complains that, at the time of the venue stipulation, Judge McCartin knew that the Judicial Council was already aware that the prosecution sought a transfer to Orange County. (AOB 185.) As detailed above, it does appear that some Judicial Council staff members knew that the defense wanted a transfer to San Francisco while the prosecution preferred Southern California.[33] But again, there was nothing improper about this. The Judicial Council's role was to identify a county or counties that could accept the case. In this effort, it contacted counties in Northern and Southern California, including San Francisco. There was no reason that the Judicial Council's awareness of the parties' preferences would prevent it from carrying out its duty.

Appellant also maintains that Judge McCartin affirmatively recommended to the Judicial Council that the case be transferred to Orange County, and that the defense would not have stipulated to the venue change if it had known this. (AOB 185-186.) This argument is also unfounded.

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[33] On December 9, 1993, in connection with the pending assignment of a new judge by the Judicial Council, the prosecution sent the Judicial Council a letter summarizing the case's status. (15 CSCT 5392-5393.) The letter mentioned that all parties were proceeding under the assumption the case would be transferred out of Calaveras County, and that the prosecution preferred a transfer "to Southern California where publicity has been less extensive . . . ." (15 CSCT 5393.)

To begin with, appellant's contentions are irrelevant, because the Judicial Council did not choose the new venue.

In any event, Judge McCartin did not attempt to steer the case to Orange County; on the contrary, he remained scrupulously neutral. The background of appellant's contention is as follows: As noted above, John Toker testified that no one told him to direct the case to Orange County. (8 CSRT 2539.) A worksheet that Toker used listed Orange County as a venue that the judge would like considered. It also listed Sacramento County as a suggested venue. (8 CSRT 2456, 2467.) Toker testified that Mary Beth Todd, a clerk at the Calaveras County Superior Court, told him that the judge would like Orange County to be considered. She also told him that the parties' venue preferences should be considered. (8 CSRT 2476, 2550.) Toker was also asked to investigate whether San Francisco County could take the case. (8 CSRT 2530.) Indeed, the court informed Toker that the defense had requested San Francisco and the prosecution preferred Southern California. (15 CSCT 5564.)

Todd testified that she did not remember being told that Judge McCartin wanted Orange County considered, but she might have told Toker that Judge McCartin was from Orange County. (8 CSRT 2054-2055.) Toker later told Todd that he was also considering Sacramento and San Joaquin Counties. (8 CSRT 2558.)

Judge McCartin testified that he did not remember whether he told Toker that he wanted Orange County considered. (8 CSRT 2590.) He asked Toker to consider Monterey County and also suggested San Bernardino and San Diego Counties. Fresno County may have also been

mentioned. (8 CSRT 2590-2592, 2594.[34]) In his declaration, Judge McCartin said that he never told the Judicial Council he preferred any specific county. (19 CSCT 6458.)

Appellant's attorney, James Webster, testified that on April 8, 1994, he spoke with Judge McCartin outside the courtroom. According to Webster, Judge McCartin said the Judicial Council had "caught him in a weak moment" when it had contacted him in December 1993 about taking the case, and that in December 1993, the case was going to go to Los Angeles or Orange County. (8 CSRT 2600-2601.) In Judge McCartin's declaration, however, he stated that he did not recall saying this to Webster. (19 CSCT 6456-6457.)

As noted above, appellant contends he would not have stipulated to the venue change if he had known that Judge McCartin had recommended a transfer to Orange County without also recommending San Francisco. But as the preceding summary demonstrates, there was no substantial evidence that Judge McCartin had recommended a transfer to Orange County; on the contrary, after the Judicial Council informed the court that Orange County was a viable candidate, Judge McCartin recused himself from the venue selection. (15 CSCT 5515.) And again, it was Judge Kleaver, not the Judicial Council, who chose the new venue. The only party seeking to direct the case to a specific county was the defense, which relentlessly tried to foist it on San Francisco.

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[34] At the April 8 hearing, Judge McCartin said he had suggested Monterey County to Toker, but Monterey County had "stiffed him so badly moneywise that it's not going to Monterey." (7 CSRT 2182.)

7. Appellant has forfeited his argument that he revoked his consent to the venue transfer, and in any event, the argument is meritless because it is based on an invalid analogy to a plea bargain

After the defense learned that the Judicial Council would not review the materials he had submitted, it sought to revoke the venue stipulation. (15 CSCT 5588-5593; 7 CSRT 2308.) The defense argued for revocation at the *McGown* hearing, but Judge Kleaver declined to rule on this question because it was outside the scope of his assignment, which was solely to conduct the *McGown* hearing. (7 CSRT 2308-2309.)

Appellant now contends the court erred by denying the motion to revoke the agreement. (AOB 190-192.) But he does not identify any place in the record where the court actually denied it. Judge Kleaver declined to consider the motion but did not deny it. The defense could have renewed the motion and sought a ruling, but it did not. In the absence of such a ruling, appellant has abandoned his motion, and has thus forfeited his claim. (*People v. Bolin* (1998) 18 Cal.4th 297, 312-313; see also *People v. Baldwin* (1976) 62 Cal.App.3d 727, 744 [without a ruling, there is nothing to appeal].)

In any event, appellant's argument is meritless. Appellant maintains that he was entitled to withdraw his consent because the venue agreement was tantamount to a broken plea bargain. (AOB 191.) But, as discussed above, the venue stipulation was nothing like a plea bargain, so appellant's claim fails. In any event, assuming there was error, it benefited appellant, because it resulted in the transfer from a venue where he could not get a fair trial to one where he could.

E. The Trial Court Did Not Deprive Appellant of Due Process by Denying His Request to Continue the *McGown* Hearing

The defense asked the court to continue the *McGown* hearing in order to (1) revisit San Francisco's availability, and (2) give him time to survey pretrial publicity in Sacramento and Orange Counties. He now contends the court deprived him of due process by denying this request. (AOB 192-202.) This claim, like the others, fails because the venue-change proceedings did not implicate procedural due process, and there was no prejudice. Moreover, there was no reason to revisit San Francisco's availability, and a continuance to conduct surveys about Sacramento County and Orange County was unnecessary because there was no dispute that the case was more heavily publicized in Sacramento County.

1. Procedural history

On January 27, 1994, six days after the parties entered into the venue stipulation, the court issued a supplemental order. In it, the court explained that it had not known about the procedure mandated by *McGown*, and that under this procedure, the court would select the new venue after (1) receiving the Judicial Council's list of counties that could take the case, and (2) holding an evidentiary hearing on the venue options. (15 CSCT 5514-5515.) In a minute order dated March 7, 1994, the court scheduled the *McGown* hearing for one month later, on April 8, 1994. It also informed the parties that Orange and Sacramento Counties were the available venues. (15 CSCT 5546.)

On April 5, 1994, the defense filed a motion to continue the *McGown* hearing. It argued that (1) further proceedings were necessary to determine whether San Francisco was really unavailable, and (2) the parties needed time to conduct jury surveys concerning Orange and Sacramento Counties. (16 CSCT 5594, 5599-5601.) At the hearing on April 8, defense counsel

stated that the defense had applied for funding to conduct such surveys, and had contacted a jury polling organization. The funding application was still pending, and the studies could be completed within 60 to 90 days after funding was granted. (7 CSRT 2265.) In addition, counsel asked the court to grant the continuance so the Judicial Council could again inquire whether San Francisco could accept the case. (7 CSRT 2265, 2272; see 7 CSRT 2260-2263.)

Judge McCartin declined to refer the case back to the Judicial Council to revisit San Francisco's availability. He stated that under rule 842, questions of pretrial publicity and witness hardship—the factors that the defense that wanted the Judicial Council to consider—were issues for the court, not the Judicial Council. (7 CSRT 2268-2269.)

Judge McCartin asked the defense what information it would seek through jury polling. (7 CSRT 2270-2271.) Counsel responded that the defense wanted to determine the publicity and prejudgment levels in Orange and Sacramento Counties, and "to get an idea of the County's position as far as racial factors which might adversely affect the fairness of the trial." (7 CSRT 2271.) Counsel also argued that under rule 842, the court could transfer the case to a county that the Judicial Council had not designated. (7 CSRT 2272.)

Judge McCartin clarified that, according to his conversation with John Toker, San Francisco "wasn't available, period." (7 CSRT 2272.) He further explained that, according to Toker, San Francisco had accepted "the two guys" case and a case from Contra Costa County, and also had a lot of capital cases "coming down the lane . . . and that was detrimental to San Francisco, because of their case load." (7 CSRT 2274.)

Concerning a continuance to conduct polling, Judge McCartin stated that the media coverage in Southern California was "nil," and that he was knowledgeable about newspaper coverage of criminal matters there and did

not remember seeing anything about this case except perhaps for one article. He added that he did not know about the publicity level in Northern California, but it seemed that someone could obtain information on publicity in Sacramento within 30 days. (7 CSRT 2275.)

Judge McCartin concluded that there was no basis for continuing the *McGown* hearing. (7 CSRT 2276.) He added that "it's a foregone conclusion that this case no longer remains in Calaveras County." (7 CSRT 2278.) He left it for Judge Kleaver to decide whether the court could transfer venue to a county that the Judicial Council had not designated. (7 CSRT 2279-2280.) He also suggested that the parties could submit information on publicity within 30 days after the hearing. (7 CSRT 2280.)

As previously arranged, Judge Kleaver took the bench for the *McGown* hearing. (7 CSRT 2296.) He announced he would not review any of Judge McCartin's rulings. (7 CSRT 2297.) He also remarked, "We start first with the proposition that all concerned have agreed that Calaveras County is an improper venue because of pretrial publicity, and so on, and that venue transfer is necessary." (7 CSRT 2297-2298.)

The prosecutor argued that a continuance should be denied because there was already a sufficient record for choosing the new venue. He also argued that the case had attracted substantial publicity in Sacramento County, and that the defense had previously submitted "numerous news articles from Sacramento, as well as television media accounts from Sacramento." He added, "it's been a very notorious case in the press out of Sacramento." (7 CSRT 2310.) Defense counsel conceded that there was no reason to doubt Judge McCartin's statements concerning the lack of publicity about the case in Orange County. (7 CSRT 2315.)

Judge Kleaver declined to consider any venue besides Orange and Sacramento Counties. (7 CSRT 2299-2300, 2316.) He noted that two or three trucks from Sacramento television stations were outside the

courthouse, and it was likely that a good number of the media present were from Sacramento. (7 CSRT 2318-2319.) He also acknowledged the apparent lack of interest in this case in Orange County. (7 CSRT 2318-2319.)

Defense counsel again argued that nothing in rule 842 prevented the court from transferring the case to a county that the Judicial Council had not designated. (7 CSRT 2328.) Defense counsel conceded that it might be true there was a lot of pretrial publicity in Sacramento, and that the defense had even said so in its prior pleadings. (7 CSRT 2331.) Judge Kleaver denied the motion for a continuance and ordered the case transferred to Orange County. (7 CSRT 2335-2336.)

2. A motion to continue a venue-change hearing does not implicate due process, and in any event, appellant did not show good cause for a continuance

a. There was no compelling reason to grant a continuance

According to appellant, the trial court violated his right to procedural due process by refusing to continue the hearing in order to survey public opinion in Sacramento and Orange Counties and revisit San Francisco's availability. (AOB 192-202.) Again, appellant's claim fails because (1) the venue change did not result in an unfair trial; (2) procedural due process guarantees do not apply to venue-change proceedings; and (3) venue is a statutory creation, and appellant did not have a constitutional right to a specific venue. In other words, the denial of a continuance could not have violated appellant's right to due process.[35]

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[35] In *McGown v. Superior Court*, *supra*, 75 Cal.App.3d 648, the Court of Appeal stated that "If rule 842 is construed to authorize a determination of new venue ex parte, a grave doubt of its constitutionality (continued...)

In any event, the trial court properly refused to grant a continuance. As appellant concedes, he wanted a continuance in order to reexamine San Francisco's availability and demonstrate that Sacramento and Orange Counties were unsuitable compared to San Francisco. (AOB 192; 7 CSRT 2271-2272.) But neither of these excuses merited a continuance. The question of San Francisco's availability had already been answered: The San Francisco court had "specifically refused" to accept the case "and stated it [could] not handle the particular case under any circumstances." (15 CSCT 5564.) Given San Francisco's categorical refusal to accept the case, and the availability of two other large urban counties, it made no sense to further delay the proceedings by revisiting San Francisco's availability.

Likewise, there was no compelling reason to grant a continuance to survey pretrial publicity in Sacramento and Orange Counties. The defense conceded that this case was heavily covered by the media in Sacramento, the closest large city to Calaveras County. Indeed, at the *McGown* hearing, defense counsel stated, "the Court has also indicated that Sacramento has a lot of pretrial publicity. That may, in fact, be true. And as a matter of fact, we've stated that in our pleadings." (7 CSRT 2331.) Similarly, in its motion to close the preliminary hearing, the defense asserted that the case had attracted an "astronomical" amount of media coverage, and to prove it, the defense submitted 106 television news clips from Sacramento television

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(...continued)
upon due process attack would arise." (*Id.* at p. 652.) Respondent believes this is incorrect, because venue-change proceedings do not implicate procedural due process. In any event, the trial court here did not make an ex-parte venue determination.

stations (and 65 more from Bay Area stations).[36] (13 CJCT 4486; 14 CJCT 4951-4958.)

In fact, the parties opposing the motion to close the preliminary hearing included three Sacramento news channels—KCRA, KOVR, and KXTV—as well as McClatchy Newspapers, the publisher of the Sacramento Bee. (15 CJCT 4908; see *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 719 [identifying KCRA as a Sacramento television station]; *Alim v. Superior Court* (1986) 185 Cal.App.3d 144, 147 ["McClatchy Newspapers is the publisher of the Sacramento Bee"]; *People v. Smith* (1987) 188 Cal.App.3d 1495, 1502 [identifying KXTV as a Sacramento television station]); *Fullmer v. Workers' Comp. Appeals Bd.* (1979) 96 Cal.App.3d 164, 167 [identifying KOVR as a Sacramento television station].) This further demonstrated the Sacramento media's intense interest in this case. Indeed, on the day of the *McGown* hearing, two or three trucks from Sacramento television stations were parked outside the courthouse. (7 CSRT 2318-2319.)

Thus, appellant cannot dispute that this case attracted heavy media coverage in Sacramento. And regardless of whether such coverage would have required a venue change *out* of Sacramento County, "it may still be large enough to persuade a court not to transfer the case *to* that county." (*People v. Davis*, *supra*, 46 Cal.4th at p. 574, italics added.)

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[36] The Sacramento sample included 38 clips from a single four-day period, plus 64 clips from a period slightly over five months long. (14 CJCT 4951-4955.) It appears that the four-day period was from September 24, 1991, to September 27, 1991, and the five-month period was from October 11, 1991, to March 20, 1992. The index of clips lists the overall dates as "9/24/92-3/20/92." (14 CJCT 4951.) But the list was filed in August of 1992, so it could not have contained clips from September 1992. (14 CJCT 4948-4949.)

Appellant also cannot—and did not—dispute that the case was less publicized in Orange County. At the hearing on appellant's motion to close the preliminary hearing, defense counsel acknowledged that the case had attracted less media attention in Southern California. (5 CSRT 2250-2251.) Subsequently, at the status conference of January 21, 1994, Judge McCartin, who was from Orange County, stated that there had been "basically zero publicity" about the case in Los Angeles and Orange Counties, and he had read nothing about it there. (7 SCRT 2111, 2136.)

Similarly, at the hearing of April 8, 1994, Judge McCartin reiterated that media coverage in Southern California was "nil." (7 CSRT 2274.) He did not remember seeing anything about this case except perhaps for one article. (7 CSRT 2275.) And defense counsel said he had "no reason to doubt Judge McCartin" about the lack of publicity in Orange County. (7 CSRT 2315.)

In short, it was undisputed that this case was heavily publicized in Sacramento County but much less so in Orange County.[37] Consequently, there was no reason to grant a continuance—and further delay the trial—in order to conduct a survey to demonstrate something that everyone already knew.

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[37] Of the thirteen jurors who ultimately decided this case, nine had never heard of it until they learned about it in court. (40 OCT 13375, 13380, 13405, 13410, 13420, 13425, 13451, 13456, 13466, 13471, 13481, 13486, 13496, 13501; 41 OCT 13587, 13592, 13631, 13636.) Of the four jurors who had already heard about the case, one had heard about it from someone at work (40 OCT 13390, 13395), another had first heard about it approximately two weeks beforehand, from the television news (40 OCT 13435, 13440-13441), another had heard about it on television (40 OCT 13541, 13546), and another had seen a reference to it in the newspaper but did not know any details (41 OCT 13602, 13607). None of these four jurors had any opinion about the case before they were called for jury duty. (40 OCT 13396, 13441, 13547; 41 OCT 13608.)

Appellant argues that if an extension had been granted, he could have presented evidence that San Francisco County had a larger Chinese-American population than Orange County, and that Orange County's Vietnamese-Americans were "likely to harbor divergent cultural traditions and ambivalent cultural attitudes toward Chinese Americans . . . ." (AOB 200, original underscoring.)

By asserting that the defense wanted a transfer to San Francisco because of San Francisco's ethnic composition, appellant tacitly admits that the defense was forum shopping. (See *People v. Posey, supra,* 32 Cal.4th at p. 222, fn. 12 [forum shopping is the practice of choosing the most favorable jurisdiction].) This defeats his argument, because the purpose of a venue change is not to encourage forum shopping. (*People v. Cooper, supra,* 53 Cal.3d at p. 804.)

In any event, appellant's assertion about population statistics in Orange and San Francisco Counties must be disregarded, because the record does not support it. (See *In re Carpenter*, *supra*, 9 Cal.4th at p. 646; *People v. Merriam*, *supra*, 66 Cal.2d at pp. 396-397; *TSMC North America v. Semiconductor Mfg. Intern. Corp.*, *supra*, 161 Cal.App.4th at p. 593, fn. 2.) The same applies to his allegation about Vietnamese-American cultural attitudes.

And again, appellant had no right to have Chinese-Americans—or any other ethnic group—represented on the jury. (*Batson v. Kentucky*, *supra*, 476 U.S. at p. 85; *People v. Wheeler*, *supra*, 22 Cal.3d at p. 277.) Moreover, his suggestion that Vietnamese-Americans hold negative attitudes toward Chinese-Americans is just the kind of ethnic profiling that *Batson* and *Wheeler* forbid.

b. *McGown* did not support a continuance

Appellant further argues that the court's refusal to grant a continuance violated the requirements of *McGown*. (AOB 192-193, 199.) He is

incorrect. In *McGown*, the Fresno County Superior Court granted the defendant's motion for change of venue. The Judicial Council informed the judge that nearby Stanislaus County and two other counties could accept the case. The judge then encountered the prosecutor outside of court and informed him that the case would probably be transferred to Stanislaus County. The judge asked whether the prosecutor knew anything about pretrial publicity in Stanislaus County, and the prosecutor replied that he would look into it. Soon afterward, the judge informed defense counsel that the case would probably be transferred to Stanislaus County. (*McGown*, *supra*, 75 Cal.App.3d at p. 650.)

At the next hearing, the judge began the proceedings by announcing that the new venue would be Stanislaus County. (*McGown*, *supra*, 75 Cal.App.3d at p. 650.) The judge based this decision, in part, on the lack of adverse publicity there. The judge also denied the defendant's request for a continuance to investigate pretrial publicity in Stanislaus County. (*Id.* at pp. 650-651.)

The defendant filed a petition for writ of mandate, and the Court of Appeal ordered the trial court to hold an evidentiary hearing before choosing the new venue. (*McGown*, *supra*, 75 Cal.App.3d at pp. 650, 654.) According to the Court of Appeal, rule 842 implicitly required the trial court to conduct such a hearing before selecting the new venue, and the trial court abused its discretion by refusing to order a continuance for the hearing. (*Id.* at pp. 652-653.)

McGown is distinguishable from the instant case. To begin with, here, unlike in *McGown*, appellant is raising his claim in a post-judgment appeal, not a pretrial writ, so there is no basis for reversal unless appellant had a biased jury—which he did not. (*People v. Cooper*, *supra*, 53 Cal.3d at pp. 805-806.) In addition, unlike in *McGown*, the trial court here held the required hearing. And at the hearing, it was undisputed that this case

was highly publicized in Sacramento; indeed, the defense had presented evidence of this. It was also undisputed that there was much less publicity in Orange County. In short, *McGown* does not support appellant's claim.

For all these reasons, the denial of a continuance did not deprive appellant of due process.

F. The Trial Court Did Not Deprive Appellant of Due Process at the *McGown* Hearing by Failing to Consider San Francisco

As discussed above, at the *McGown* hearing, Judge Kleaver refused to consider a transfer to San Francisco, because San Francisco had informed the Judicial Council that it would be unduly burdened by taking the case, and the Judicial Council thus had not designated San Francisco as a possible venue. (7 CSRT 2335-2336; 16 CSCT 5703.) Appellant maintains that, contrary to Judge Kleaver's conclusion, rule 842 permitted the court to consider venues that the Judicial Council had not designated as candidates, and Judge Kleaver's failure to consider San Francisco deprived him of due process. (AOB 202-206.)

Again, appellant's claim fails because (1) the procedural due process guarantee does not apply to venue-transfer proceedings; (2) the venue change did not result in an unfair trial; and (3) the Constitution did not entitle him to the venue of his choice.

Additionally, appellant's argument conflicts with the purpose of rule 842. Here, in response to the Judicial Council's inquiry, San Francisco had indicated it could "not handle [this] case under any circumstances." (15 CSCT 5564) Imposing this case on San Francisco would thus have defeated rule 842's purpose, which was to facilitate a transfer to a venue that would not be unduly burdened by the case. Moreover, even if the court had believed it *could* transfer the case to a venue not designated by the Judicial Council, it is unlikely the court would have foisted a case of this

magnitude onto a venue that had declared itself unable to accept it. Indeed, forcing this case on San Francisco would have been senseless given that Orange County and Sacramento County were available.

Besides the fact San Francisco would be unduly burdened by the case, pretrial publicity militated against a transfer there. The high level of publicity was demonstrated by the defense's own evidence. This evidence specifically concerned Contra Costa County, which was in the same media market as San Francisco. (See *Odle v. Superior Court* (1982) 32 Cal.3d 932, 938 [Contra Costa County is "part of the San Francisco metropolitan area," and is "served by the metropolitan newspapers as well as the local and regional press"].) At the defense's motion to close the preliminary hearing, it presented evidence demonstrating the high level of pretrial publicity in Contra Costa County. (5 CJRT 1982-1984, 1986, 1990, 2002, 2006.) The defense's expert testified that the recognition rate for this case there was higher than in other cases he had studied where a change of venue had been ordered. (10 CJRT 2006.) Because Contra Costa County is in the same media market as San Francisco, it is reasonable to assume that the publicity level was at least as high in San Francisco. This factored against a transfer to San Francisco.

Indeed, the defense implicitly conceded that publicity had poisoned the San Francisco jury pool. In its motion to set aside the information, the defense argued that the evidence of an "extremely high" case recognition and prejudgment in Contra Costa County demonstrated that jury pools throughout the state had been "tainted," imposing "significant damage" on his right to an impartial jury, and demonstrating that no county in the state could hold the trial. (10 CSCT 3551, 3555; 14 CSRT 4952.) While it is improbable that the Contra Costa findings were relevant to Southern California, appellant cannot dispute that if—as he claimed—pretrial

publicity had damaged his right to a fair trial in Contra Costa County, then it had also damaged his right to a fair trial in nearby San Francisco.

In short, the court's refusal to consider San Francisco did not deprive appellant of due process.

G. The Trial Court's Refusal to Appoint Michael Burt to Represent Appellant at the *McGown* Hearing Did Not Deprive Appellant of the Effective Assistance of Counsel

Next, appellant contends the trial court deprived him of the effective assistance of counsel at the *McGown* hearing by failing to appoint Michael Burt to represent him there. (AOB 207-211.) This claim fails, because appellant has not shown that his attorneys performed incompetently at the hearing, or that appointing Burt for the hearing would have altered the outcome at trial.

1. Procedural history

On October 24, 1991, after appellant's extradition from Canada, the Calaveras County Justice Court appointed Thomas Marovich and James Webster as his attorneys. From the beginning, appellant objected to their appointments. (7 CJCT 2186, 2252; ACJCT 29.) He followed this initial objection with a long series of *Marsden* motions. (ACJCT 29, 33-35, 37-39, 45, 47-52, 56-58; 13 CJCT 4511-4513; 14 CJCT 4919-4923; 1 CSCT 386.)

Fifteen months later, on January 20, 1993, the court appointed Ephraim Margolin to represent appellant for two purposes: (1) to prepare a motion asking the court to appoint the attorney of appellant's choice (a *Harris* motion), and (2) to prepare a motion to set aside the information under Penal Code section 995, specifically addressing the *Marsden* and *Harris* issues. (2 CSCT 570-571.) A few weeks later, the court appointed

Eric Multhaup to assist Margolin. (2 CSCT 1113, 1119-1120; 2 CSRT 496-497.)

On January 21, 1994, the court said it was prepared to rule on the *Marsden* motion but preferred to complete the venue change before appointing new counsel. (15 CSCT 5504.) The court conditionally relieved Marovich and Webster, pending the appointment of new counsel after the venue change. (15 CSCT 5506.) The court also relieved Margolin and Multhaup, except for their work on the *Harris* issue.

Six days later, the court learned that it was required to conduct a *McGown* hearing before choosing the new venue. The court reappointed Margolin and Multhaup to represent appellant at the hearing. (15 CSCT 5514-5515.) Webster and Marovich remained appellant's attorneys, pending the appointment of new counsel after the venue change. In the meantime, the court ordered them to continue representing appellant as necessary, or as Margolin and Multhaup requested. (15 CSCT 5515.)

On March 14, 1994, the defense filed a motion to have the San Francisco County Public Defender appointed to represent appellant at the *McGown* hearing. (15 CSCT 5549, 5553-5557.) The defense argued that none of appellant's four attorneys were going to represent him at trial, but the SFPD had a "reasonable likelihood" of doing so. (15 CSCT 5553-5554.) The defense also pointed out that the SFPD was already representing appellant on a charge in San Francisco (the murder of Donald Giuletti), and he had a strong relationship with Deputy Public Defender Michael Burt and other members of that office. (15 CSCT 5555.)

A week later, the court denied the motion but explained that Burt could seek appointment after the venue transfer. (15 CSCT 5563.) Before the *McGown* hearing began, the defense again asked the court to appoint Burt, and the court again refused. (15 CSCT 5699-5700.)

2. The court did not deprive appellant of due process, and appellant's four attorneys were not ineffective

Appellant argues that the court's refusal to appoint Burt for the *McGown* hearing deprived him of due process and the effective assistance of counsel. (AOB 207-211.) Respondent disagrees. Appellant's due process claim fails because, as discussed earlier, the venue change did not result in an unfair trial, the guarantee of procedural due process does not apply to venue-change procedures, and appellant had no constitutional right to the venue of his choice.

Appellant's ineffective-assistance-of-counsel claim also fails. In *Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674] (*Strickland*), the Supreme Court has articulated a two-part test for ineffective assistance of counsel. First, the defendant must show that, considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. (466 U.S. at p. 688.) The burden is on the defendant to prove specific acts or omissions of counsel that are alleged not to be the result of reasonable professional judgment. (*Id.* at p. 690.)

Strickland imposes a "highly demanding" standard on defendants to prove "gross incompetence." (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 382 [106 S.Ct. 2574, 91 L.Ed.2d 305].) It is strongly presumed counsel's conduct was within the wide range of reasonable assistance, and that counsel exercised acceptable judgment in all significant respects. (*Strickland, supra*, 466 U.S. at p. 689.) An appellate court should reverse on ineffectiveness grounds "only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." (*People v. Rich* (1988) 45 Cal.3d 1036, 1096.)

In addition to proving incompetence, the defendant must affirmatively prove prejudice. (*Strickland, supra*, 466 U.S. at p. 693; *People v. Freeman*

(1994) 8 Cal.4th 450, 484.) Prejudice is only established if appellant shows a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. (*Williams v. Taylor* (2000) 529 U.S. 362, 391, 394 [120 S.Ct. 1495, 146 L.Ed.2d 389].) Thus, the defendant "must establish prejudice as a demonstrable reality, not simply speculation as to the effect of the errors or omissions of counsel." (*In re Clark* (1993) 5 Cal.4th 750, 766, internal quotation marks omitted; see *Williams*, *supra*, 529 U.S. at p. 394.) The defendant bears the burden of proving both incompetence and prejudice by a preponderance of the evidence. (*People v. Mayfield* (1993) 5 Cal.4th 142, 206.)

Appellant's claim fails under this standard. As to the first prong of *Strickland*, appellant has not identified any incompetent acts or omissions by his attorneys at the *McGown* hearing. As to the second prong, he has not demonstrated—or even asserted—that such acts or omissions affected the verdicts. Hence, he has not shown that his attorneys were ineffective.

His argument is also based on an invalid premise. He maintains that the court should have appointed Burt because Margolin and Multhaup were not familiar enough with the evidence to "effectively evaluate" the proposed new counties. In other words, they could not "evaluate the defense case strategy with respect to the choice of county." (AOB 207, 210.)

But this argument assumes there was a connection between the defense's trial strategy and the location of the new venue—which does not make sense. The purpose of a venue change is to ensure a fair trial. (*People v. Cooper*, *supra*, 53 Cal.3d at p. 804.) But issues of trial strategy are irrelevant to whether a given county can provide a fair trial. It would be ridiculous, for example, to assert that Orange County could provide appellant with a fair trial if his defense were mistaken identity, but not if it

were self-defense. Thus, appellant's argument fails because it relies on an invalid premise.

Moreover, the record does not support appellant's argument. Appellant maintains that Burt "had the best grasp of the overall case strategy of any of the attorneys involved," but appellant does not cite anything in the record to support this assertion, so the court must disregard it. (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 816, fn. 5; *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239; Cal. Rules of Court, rule 8.204(a)(1)(C).)

In any event, it is doubtful that Burt's knowledge of this case exceeded that of Webster, Marovich, Multhaup, and Margolin. Burt had previously been assigned to the case from November 1986 to September 1988, while appellant was still in Cañada. His assignment ended three years before appellant's extradition to California, four years before the preliminary hearing, and five and one-half years before the *McGown* hearing. (See ACJCT 17, 49; 6 CJCT 1983-1984.)

In contrast, Margolin and Multhaup were already representing appellant in the venue proceedings and had previously handled other specific issues, and Webster and Marovich had already been appellant's trial counsel for three and one-half years. (7 CJCT 2186; ACJCT 29; 15 CSCT 5515.) Thus, there was thus no reason to suspect that Burt knew the case better than appellant's four attorneys.

Further, the record refutes the notion that Multhaup was unfamiliar with the evidence. In an earlier declaration, Multhaup had stated that he read the preliminary hearing transcript and believed there were "numerous substantive legal issues" that needed to be addressed in a motion to dismiss under section 995. (5 CSCT 1618.) Since Multhaup read the preliminary hearing transcript and evaluated the issues, it cannot be said he was unfamiliar with the evidence.

Appellant analogizes this case to *Brooks v. Tennessee* (1972) 406 U.S. 605 [92 S.Ct. 1891, 32 L.Ed.2d 358].) (AOB 209.) But the analogy is inapt. *Brooks* involved a state statute, which required any criminal defendant testifying at trial to do so before introducing any other witness's testimony. (406 U.S. at pp. 605-606.) The Supreme Court held that, by requiring defendants to testify either first or not at all, this rule violated the defendant's right to remain silent. (*Id.* at p. 612.) It also "deprived [defendants] of the 'guiding hand of counsel,'" thereby depriving them of due process, by (1) preventing counsel from making the tactical decision whether the defendant should testify without first having the opportunity to evaluate the overall defense evidence, and (2) preventing a defendant who had not testified first from taking the stand, even though counsel might want to call the defendant later. (*Id.* at pp. 612-613.)

Brooks is distinguishable from the instant case. First, in this case, appellant is making a claim of ineffective effective assistance of counsel under the Sixth Amendment. Employing the language of *Strickland v. Washington*, he contends he was deprived of "the effective assistance of counsel." (AOB 207, 211.) The *Strickland* standard therefore applies here. *Brooks*, on the other hand, did not address ineffective assistance of counsel under *Strickland*; instead, the Court held that Tennessee's statute violated due process by hindering defense counsel's ability to make tactical decisions.

Moreover, in *Brooks*, the unconstitutional statute interfered with defense attorneys in a specific manner: It prevented them from (1) making fully-informed decisions whether their clients should testify, and (2) calling their clients to testify when the overall evidence rendered it advantageous. (*Brooks*, *supra*, 406 U.S. at pp. 605-606.) Here, in contrast, appellant has not identified anything that the court's refusal to appoint Burt prevented the defense from doing—on the contrary, at the *McGown* hearing, appellant

was represented by four accomplished attorneys, all of whom addressed the court and argued against an immediate transfer to Orange or Sacramento Counties and in favor of the defense's unending efforts to move the case to San Francisco. (7 CSRT 2300-2310, 2313-2316, 2319-2324, 2329-2330, 2336 [Margolin]; 7 CSRT 2324-2326, 2334-2335 [Multhaup]; 7 CSRT 2327-2328, 2333-2335 [Marovich]; 7 CSRT 2330-2332 [Webster].)

In sum, the court did not deprive appellant of due process or the effective assistance of counsel by refusing to appoint Burt to represent him at the *McGown* hearing.

H. The Trial Court Did Not Deprive Appellant of Due Process by Refusing to Set Aside the Venue Change

Appellant contends the trial court deprived him of due process by denying his motion to set aside the venue transfer, which was based on allegations that Judge McCartin had secretly engineered a transfer to Orange Country. (AOB 211-212.) But the court heard evidence on this issue, made factual findings, and rejected appellant's charges of wrongdoing, and appellant has not refuted these findings here. On the contrary, record shows that Judge McCartin was fastidiously neutral on the venue issue.

After Judge Kleaver chose Orange County as the new venue, the defense filed a motion to set aside the venue-change agreement. (16 CSCT 5743-5828.) On June 30, 1994, the court heard the motion. Judge McCartin recused himself and was replaced by Judge Curtin. (19 CSCT 6733.) The hearing included testimony from Judge McCartin, John Toker, Mary Beth Todd, and James Webster. (8 CSRT 2341.)

After hearing this testimony, Judge Curtin denied the motion. (8 CSRT 2633-2635, 2637, 2640; 19 CSCT 6737.) Appellant now contends this ruling deprived him of due process, because the evidence at the hearing demonstrated that Judge McCartin "sabotaged" the January 21,

1994 status conference, "covered up" that sabotage at the April 8, 1994 hearing, and "successfully orchestrated a transfer to Orange County." (AOB 211.)

As a threshold matter, with just one exception, appellant fails to cite the record to support these allegations. (AOB 211-212.) For this reason alone, his claim fails. (*Mueller v. County of Los Angeles*, *supra*, 176 Cal.App.4th at p. 816, fn. 5; *City of Lincoln v. Barringer*, *supra*, 102 Cal.App.4th at p. 1239; Cal. Rules of Court, rule 8.204(a)(1)(C).)

Moreover, like appellant's other claims regarding the venue change, this one fails because the venue change did not result in an unfair trial, venue-change procedures do not implicate procedural due process, and appellant did not have a constitutional right to the venue of his choice.

Furthermore, the record does not support the allegations of wrongdoing that formed the basis for the motion to set aside the venue stipulation. In denying the motion, Judge Curtin made several findings of fact. They include the following:

- No fraud was used to induce the parties to stipulate to the venue change. (8 CSRT 2634, 2640.)
- At the time of the stipulation, Judge McCartin "had no idea" where the new venue would ultimately be. (8 CSRT 2639.)
- The court and the attorneys entered into the stipulation in good faith; the Judicial Council acted on it in good faith; and there was no hidden agenda. (8 CSRT 2637.)
- The hearing of January 21, 1994, was not a sham; no one had already decided that the matter would be transferred to Southern California; the Judicial Council did not tell Judge McCartin, at the time of his appointment, that the case was going to Southern California; and the Judicial Council did not

agree with him in advance that the case was going to Southern California. (8 CSRT 2637-2638.)

These findings receive deference on appeal if substantial evidence supported them. (See *People v. Rogers* (2009) 46 Cal.4th 1136, 1157 [denial of suppression motion under section 1538.5]; *People v. Dykes* (2009) 46 Cal.4th 731, 751 [denial of *Miranda* claim]; *People v. Richardson* (2008) 43 Cal.4th 959, 992-993 [denial of challenge to confession].)

Appellant's allegations of wrongdoing by Judge McCartin clash with Judge Curtin's findings that Judge McCartin (1) arranged the venue stipulation in good faith; (2) did not use fraud to induce the stipulation; (3) had no hidden agenda; and (4) did not know in advance where the case was going. Appellant does not contend that these findings were unsupported by substantial evidence, so his claim fails.

In any event, substantial evidence supported Judge Curtin's findings. At the June 8 hearing, John Toker, who handled this matter for the Judicial Council, testified that no one told him to try to see that the case went to Orange County. (8 CSRT 2496, 2539.) Similarly, in an affidavit, Judge McCartin declared that he never expressed a desire to the Judicial Council that the case go to any specific county. (19 CSCT 6458.) Indeed, Judge McCartin recused himself from the *McGown* hearing because his home county, Orange County, was in the running. (15 CSCT 5515.) These were not the actions of a judge trying to "orchestrate" a transfer to Orange County.

Toker also testified that Mary Beth Todd of the Calaveras court told him that Judge McCartin wished Orange County to be *considered*, along with the counties that the parties preferred. (8 CSRT 2476, 2550.) Toker knew that the defense preferred San Francisco, and he investigated San

Francisco's status and discovered that San Francisco was unavailable. (8 CSRT 2503-2504, 2530, 2539; see also 15 CSCT 5564.)

Todd, in turn, testified that she did not remember telling Toker that Judge McCartin wanted Orange County considered, but she may have told Toker that Judge McCartin was from Orange County. (8 CSRT 2054-2055.) Toker later told Todd that he was also considering Sacramento and San Joaquin Counties. (8 CSRT 2558.) Judge McCartin testified that, in conversations with Toker, he mentioned Monterey, San Bernardino, San Diego, and possibly Fresno Counties. (8 RT 2590-2592, 2594.)

In view of this testimony, there was substantial evidence supporting Judge Curtin's findings that Judge McCartin did not engage in any wrongdoing. In contrast, appellant has not pointed to any substantial evidence supporting his contrary allegations. (See *United States v. Cardall* (10th Cir. 1976) 550 F.2d 604, 606 [allegations of judicial misconduct "should not be lightly made"].)

Appellant also appears to argue that the venue stipulation should have been set aside because Judge McCartin did not *encourage* the Judicial Council to place the case in San Francisco. (AOB 212.) But appellant again misconstrues the Judicial Council's role, because it was the court, not the Judicial Council, who chose the new venue.

In sum, the trial court did not deprive appellant of due process by denying his motion to set aside the venue stipulation. Appellant's accusations against Judge McCartin are unfounded, and Judge Curtin's factual findings had ample support in the record.

I. The Defense Agreed to a Transfer of All the Charges, Including Counts II - VII

Finally, appellant maintains that he never agreed to have counts II through VII referred to the Judicial Council for venue purposes, and the trial court therefore deprived him of due process by transferring them out of

Calaveras County.[38] (AOB 212-213.) This claim is also meritless. Regardless of whether appellant agreed to the transfer, again there can be no due process violation because (1) the venue change did not result in an unfair trial; (2) venue-change procedures do not implicate procedural due process; and (3) appellant did not have a constitutional right to the venue of his choice.

Further, appellant's claim is illogical at its core: In the trial court, he insisted that he could not receive a fair trial in Calaveras County, but now, he argues that the court deprived him of due process by *removing* the case from there. It is difficult to comprehend how the court could have deprived appellant of due process by moving the case from a venue where he could not get a fair trial to one where he could.

In any event, contrary to appellant's current assertion, the defense indeed agreed to the transfer of counts II through VII. To begin with, the defense's own pleading confirms this. After the January 21 status conference, the defense filed a motion to revoke the venue-change agreement. In this motion, the defense purported to withdraw its "agreement to *permit counts II through VII to be transferred* to an alternate trial site . . . ." (15 CSCT 5588, italics added.) The defense conceded that it had "agreed at the January 21 hearing that *all counts* could be transferred to the Judicial Council for assignment," under the condition that, in the future, it could argue that vicinage principles required the transfer of counts II through VII to San Francisco. (15 CSCT 5589, italics added.)

Hence, the defense confirmed, in writing, that it agreed to a venue change for counts II through VII. If this were not enough, the record from

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[38] The counts in question included the Cosner murder. Appellant was not convicted of that charge, so its transfer does not present any appealable issue. For consistency's sake, however, respondent will still refer to the transfer of "counts II through VII."

the January 21 status conference further bears it out. At the status conference, attorney Margolin stated that "it is stipulated by the prosecution and the defense that under any circumstances change of venue will remove it from Calaveras" and "that the change of venue out of this county is a necessity." (7 CSRT 2107.)

Attorney Marovich added that under existing case law, a stipulation for change of venue waived any vicinage arguments, but in this case, it "would have to be very, very clear, that there would be no waiver of anything." (7 CSRT 2137.) In other words, he stated that he would only stipulate to a venue change if he could retain the right to raise the vicinage issue for counts II through VII, the only charges where vicinage was in question.

Marovich later reiterated that "for the record, very clearly . . . Mr. Ng does not waive his right to vicinage in San Francisco," and he wanted the Judicial Council to know this when it considered a new venue. (7 CSRT 2143-2144.) If the transfer agreement had not encompassed counts II through VII, Marovich would have had no reason to make this statement.

It is true that Margolin later stated, "the change of venue, naturally, is only as to six counts." (7 CSRT 2157.) The court responded, "You're stipulating that he's home free on counts 1, 8, 9, 10, 11, and 12 and so forth. Two through seven, he's got a vicinage problem." Margolin confirmed. "That's right." (7 CSRT 2157.) The court replied that it understood that appellant was not "stipulating away" his vicinage argument on counts II through VII. (7 CSRT 2157.) Webster subsequently added, "Just to make sure the record is absolutely clear that we are not stipulating to a change of venue on Counts 2 through 7." (7 CSRT 2158.) The court replied, "Correct." (7 CSRT 2158.)

While this language, taken in isolation, suggests that the defense had not agreed to a venue change for counts II through VII, it was clear based

on the entire proceeding that the defense was entering into an unconditional stipulation to change venue for the Bond, O'Connor, Stapley, Carroll, and Allen murders—thereby waiving its vicinage argument—but as to the other counts, it was agreeing to a transfer only if it could resurrect its vicinage argument afterward.

Indeed, at the April 8 hearing, Margolin reaffirmed that the transfer pertained to all 12 counts: He stated, "we agreed to a change of venue out of Calaveras with the express understanding that we do not waive Defendant's vicinage rights." (7 CSRT 2264.) Thus again, he acknowledged that the defense consented to a transfer of the Dubs, Peranteau, Gerald, and Cosner counts—the only charges where vicinage was an issue.

Respondent notes that, later at the same hearing, Marovich opined that it was questionable whether the court had jurisdiction to proceed with the *McGown* hearing for counts II through VII, because the defense had not stipulated to a venue change for those counts. (7 CSRT 2291.) And after Judge Kleaver took the bench for the *McGown* hearing, Webster stated that he and Marovich had *not* agreed to a transfer for counts II through VII. (7 CSRT 2330.)

But these statements were inconsistent with the defense's numerous prior acknowledgements that the transfer *included* counts II through VII. Further, the court had appointed Margolin and Multhaup to represent appellant at the *McGown* hearing, so they spoke for the defense in the venue proceedings. (15 CSCT 5514-5515.) And they acknowledged that they had agreed to a transfer of all the charges.

In short, the defense agreed to a venue transfer for all the charges. And again, there was no conceivable prejudice, because the transfer did not result in an unfair trial. Indeed, if the transfer was erroneous, then the error

benefited appellant, because it moved the case from a venue where he could not get a fair trial to one where he could.

II. THE VENUE TRANSFER DID NOT VIOLATE APPELLANT'S RIGHT TO VICINAGE UNDER THE STATE OR FEDERAL CONSTITUTIONS

As to the Dubs, Peranteau, and Gerald murders, appellant argues that his trial in Orange County violated his right to vicinage under the Sixth Amendment and the California Constitution. (AOB 214-240.) Both claims are meritless. Appellant's claim under the federal Constitution fails, because the Sixth Amendment's vicinage requirement does not apply to the states. Appellant's claim under the state Constitution likewise fails, because the venue transfer waived any vicinage challenge to Orange County. Appellant argues that, despite the well-established principle that a venue change waives vicinage rights, the parties' venue stipulation allowed him to challenge Orange County based on Orange County's lack of any relationship to the crimes. But the venue stipulation only allowed the defense to reassert the argument that it had been making before the transfer—that appellant's vicinage rights required a transfer to San Francisco based on *Calaveras* County's lack of relationship to the crimes. And on appeal, appellant is not challenging Calaveras County's relationship to the crimes.

Moreover, even if the venue stipulation allowed the defense to challenge Orange County based on the lack of vicinage there, this would not transform vicinage into an appealable issue. The defense had long insisted that appellant could not get a fair trial in Calaveras County and a venue change was therefore required. It was thus undisputed that the case could not advance to trial without a venue transfer. By imposing conditions on its consent to such a transfer, the defense was threatening to hold the case hostage in Calaveras County and indefinitely delay the trial. This was

impermissible, because a defendant cannot manipulate his rights to delay the proceedings.

Finally, there was no prejudice, because purported error did not affect the verdicts; on the contrary, the transfer benefited appellant by moving the case from a venue where he could not get a fair trial to one where he could.

A. Procedural History

As noted earlier, in the defense's motion to dismiss the information, filed in 1993, the defense argued that a trial in Calaveras County on the Dubs, Cosner, Peranteau, and Gerald murders, which were then designated as counts II to VII, would not satisfy appellant's vicinage rights, but a trial in San Francisco would.[39] (9 OCT 3376-3382.) The prosecution disagreed and argued that Calaveras County satisfied the vicinage requirement because it had a reasonable relationship to the crimes. (13 OCT 4683-4693.)

On January 21, 1994, during the discussion of the venue stipulation, the prosecutor pointed out that the prosecution had previously proposed a stipulation that would change venue but would nevertheless allow the defense to raise its vicinage argument again after the transfer. (7 SCRT 2137.) After the parties entered into the venue stipulation, the prosecution explained, in a letter to the Judicial Council, that the stipulation preserved the defense's ability to raise its vicinage claim after the transfer, and thus, the new court would decide vicinage-related issues, such as "whether Calaveras County has vicinage as well as venue . . . ." (15 CJCT 5534.)

On April 8, 1994, before the *McGown* hearing began, the prosecution reiterated its understanding of the venue stipulation. The prosecutor

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[39] As in Argument I, respondent will continue referring to these charges as counts II to VII, though they were later renumbered as counts I to VI.

explained that after the transfer, the defense could still make its vicinage claim "the same way that they would make it" if the case were still in Calaveras County—in other words, the defense could still argue that appellant's vicinage rights were being violated because Calaveras County lacked a reasonable relationship to the crimes. (7 CSRT 2176.) The prosecutor added that the prosecution had "never entered into a stipulation or agreement not to make any arguments we could make in Calaveras County." (*Ibid.*) Defense counsel appeared to disagree. (7 CSRT 2176-2177.)

After the transfer, the defense repeatedly raised the issue of vicinage for counts II to VII. For example, in January 1995, the defense filed a motion to transfer venue to San Francisco. (2 OCT 230-290; see also 2 OCT 562-569.) In part, the defense argued that these counts should be transferred based on a lack of vicinage in Calaveras County. (2 OCT 253-266.) The court denied the motion. (1 RT 111-112; 3 OCT 822.)

Two years later, in April 1997, the defense again moved to transfer counts II to VII to San Francisco and again based its claim on vicinage. This time, however, the defense argued that the charges should be transferred based on a lack of vicinage in *Orange* County, not Calaveras County. (7 OCT 2403, 2429-2430.) The court denied the motion. (2 RT 208-209; 8 OCT 2819.) According to the court the appropriate question was whether Calaveras County—not Orange County—was a proper county for vicinage purposes. (2 RT 206-207.) And based on the evidence, the court found that "Calaveras County certainly had vicinage." (2 RT 209.)

In August 1998, appellant, now representing himself, filed a motion to transfer venue to San Francisco or import a jury from there, and again, he argued that Orange County had no vicinage relationship with counts II to VII. (20 OCT 7003, 7021-7028.) The court denied the motion, again concluding that the issue was whether the charges had a vicinage

relationship with Calaveras County. (5 RT 1183-1185; 22 OCT 7571-7572.)

The next month, after the court terminated appellant's self-representation, the defense filed a motion to preclude the prosecution from introducing evidence regarding counts II to VII, based on the lack of vicinage in Orange County. (25 OCT 8636-8645.) The court denied the motion for the same reason it had denied appellant's pro-per motion. (29 OCT 9759; 7 RT 1545.)

At the guilt phase, after the prosecution had presented its case-in-chief, the defense moved for acquittal on counts II through VII, based, in part, on Orange County's lack of vicinage. (34 OCT 11435, 11447-11449.) The court denied the motion. (34 OCT 11499; 21 RT 4954.) Finally, in a motion for new trial, the defense again raised vicinage. (42 OCT 13857, 13945-13949.) The entire motion was denied. (57 OCT 19590; 40 RT 9957.)

B. There Was No Violation under the Federal Constitution, Because the Sixth Amendment's Vicinage Requirement Does Not Apply to the States

Under the Sixth Amendment, a criminal defendant is entitled to trial "by an impartial jury of the State and district wherein the crime shall have been committed . . . ." (U.S. Const., 6th Amend.) As to counts II to VII, appellant contends his trial in Orange County violated this requirement, because none of these crimes took place there. (AOB 214, 217-226.) But in *Price v. Superior Court* (2001) 25 Cal.4th 1046 (*Price*), this Court held that the Sixth Amendment's vicinage requirement is not incorporated into the Fourteenth Amendment's due process clause, and therefore, it does not apply to the states. (*Id.* at p. 1065; accord, *People v. Posey*, *supra*, 32 Cal.4th at pp. 222-223; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1119.) Appellant's claim thus fails.

Appellant argues that *Price* was wrongly decided, and the federal vicinage requirement should apply to the states. (AOB 220-226.) But there is no reason to reverse *Price*. "Principles of stare decisis present a formidable obstacle" to appellant's request to revisit a prior holding. (*People v. Garcia* (2006) 39 Cal.4th 1070, 1080.) As this Court has explained:

> [i]t is . . . a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy, known as the doctrine of stare decisis, is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system . . . .

(*Ibid.*, internal quotation marks omitted.) Under stare decisis principles, a "reexamination of precedent may become necessary when subsequent developments indicate an earlier decision was unsound, or has become ripe for reconsideration . . . ." (*Ibid.*, internal quotation marks omitted.)

No such reexamination is called for here. In this Court's thorough and detailed analysis in *Price*, this Court examined "the history of both the Sixth and the Fourteenth Amendments, the concept of vicinage as it existed in this country and England when each amendment was adopted, the views of other courts, and the arguments of the parties." (*Price*, *supra*, 25 Cal.4th at p. 1059.) Based on this analysis, this Court concluded that:

- the history of the Fourteenth Amendment does not show a clear intent to apply the vicinage clause to the states;
- the vicinage requirement is not fundamental and essential to the right to a jury trial;

and therefore

- the vicinage requirement does not apply to the states. (*Id.* at pp. 1059-1069.)

Appellant has not identified any subsequent developments showing that this analysis was unsound or is ripe for reconsideration. (See AOB 220-223.) On the contrary, as the Ninth Circuit has pointed out, "[t]he only [federal] circuits to squarely address the issue have concluded that the Fourteenth Amendment did not extend federal vicinage protection to the states," and "[m]ost state courts to address the issue have likewise held that the vicinage clause does not apply to the states." (*Stevenson v. Lewis* (9th Cir. 2004) 384 F.3d 1069, 1071.) In short, there is no reason to reconsider *Price*, and appellant's Sixth Amendment claim fails. (See *People v. Posey*, *supra*, 32 Cal.4th p. 223 [declining to reconsider *Price*].)

C. There Was No Violation under the State Constitution

1. The venue-transfer agreement did not permit the defense to challenge venue based on Orange County's relationship to the crimes

Our state Constitution guarantees the right to a trial by jury. (Cal. Const., art. I, § 16; *Price*, *supra*, 25 Cal.4th at p. 1071.) This guarantee includes "an implicit vicinage right." (*Price*, *supra*, at p. 1071.) This right is satisfied "by trial in a county having a reasonable relationship to the offense or to other crimes committed by the defendant against the same victim." (*Id.* at p. 1075.)

Appellant argues that his trial in Orange County for counts II to VII violated his right to vicinage under state law, because Orange County had no reasonable relationship to the crimes.[40] (AOB 226-237.) Respondent

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[40] Again, appellant does not contend Calaveras County lacked a vicinage relationship with these charges; instead, his claim only pertains to Orange County. (AOB 227-231, 235.) Indeed, given the enormous amount of evidence found by law enforcement in Calaveras County—including the massive quantity of unidentified burnt bone and tooth fragments that were buried next to the victims' personal effects—appellant could hardly claim that Calaveras County lacked a reasonable relationship to the murders.

disagrees. It is true that Orange County had no reasonable relationship to the crimes, but appellant's claim still fails. A venue change waives the defendant's vicinage right. (*People v. Guzman* (1988) 45 Cal.3d 915, 938-939; *People v. Remiro* (1979) 89 Cal.App.3d 809, 838.) Thus, under normal circumstances, the defense would have been precluded from raising any vicinage challenge whatsoever after the transfer to Orange County.

Here, however, the defense agreed to the venue change on the condition that, after the transfer, it could reassert the vicinage argument that it had been making about counts II through VII. Appellant now appears to argue that this proviso allowed him to challenge vicinage based on Orange County's lack of relationship to the crimes. (AOB 215-216, & fn. 20.) Respondent disagrees, because the venue agreement only permitted appellant, after the transfer, to reassert the argument—which he is not making here—that *Calaveras* County lacked vicinage over those counts.

This is the only reasonable interpretation of the agreement. As discussed above, before the venue stipulation, the defense had been arguing that Calaveras County lacked a vicinage relationship with counts II to VII, that San Francisco had a vicinage relationship with those charges, and that therefore, they should be transferred there. At the same time, the defense was also asserting that a venue transfer—which legally eliminates vicinage as an issue—was necessary for a fair trial. And in the defense's first vicinage challenge after the transfer, the defense again argued that the case should be transferred to San Francisco because *Calaveras* County had lacked a reasonable relationship to the crimes. Thus, the only commonsense interpretation of the venue stipulation is that it allowed the defense, in the new venue, to reassert the argument it had previously been making—that vicinage was not satisfied in Calaveras County.

This agreement, of course, gave appellant a windfall: He got his case removed from an unfavorable venue, but he was still able to argue that his

vicinage rights required a transfer to San Francisco based on the purported lack of vicinage in Calaveras County. In other words, the agreement let him have his cake and eat it too.

It makes no sense to interpret the agreement as granting appellant a bigger windfall by permitting a vicinage challenge to the new venue. Most of our state's 58 counties lacked a reasonable relationship to the murders. Thus, if appellant were permitted to challenge vicinage based on the *new* venue's lack of connection to the crimes, an additional transfer would have been nearly inevitable. This would have made the original transfer futile and guaranteed further postponement in a case that was already much delayed. In short, under the generous terms of the venue stipulation, appellant was permitted to challenge Calaveras County's vicinage relationship with counts II through VII, but not Orange County's relationship. The venue transfer thus vitiated any vicinage challenge to Orange County, and appellant's claim—which only challenges vicinage in Orange County, not Calaveras County—fails.

2. The defense's repeated assertions that appellant could not receive a fair trial in Calaveras County were tantamount to a motion to change venue, and any contrary conclusion would validate the defense's implicit threat to delay appellant's trial indefinitely

As discussed above, it was the defense who steadfastly insisted that a venue change was necessary because of prejudgment publicity in Calaveras County. To review, the defense presented expert testimony regarding the "unusually high" prejudgment rate in Calaveras County, and the expert testified that it was impossible for appellant to get a fair trial there. (5 CJRT 1984, 1989-1990, 2001-2002, 2005-2006.) In written pleadings before the transfer, the defense similarly proclaimed that the widespread publicity in Calaveras County had tainted the jury pool, and that "the one

place where the case can never be tried is Calaveras County." (10 CSCT 3551; 15 CSCT 5438, original underscoring.) Moreover, at the January 1994 status conference, defense counsel stated that a venue change was a "necessity," and that the parties "stipulated . . . that under any circumstances change of venue will remove it from Calaveras County." (7 CSRT 2107.) The defense also informed the Judicial Council that "that none of the counts may properly be tried in Calaveras County," and it similarly advised the San Francisco court that "Calaveras County is an improper venue because of pretrial publicity . . . ." (15 CSCT 5517, 5569.)

The defense's assertions that Calaveras County was an improper venue, and that a fair trial was impossible there, must be deemed tantamount to a motion to change venue, thereby waiving the issue of vicinage. This is the only reasonable interpretation of the defense's repeated declarations that Calaveras County was unsuitable. Otherwise, it made no sense for the defense to insist that appellant's trial could not take place in Calaveras County, but at the same time, refuse to consent to a transfer unless the court satisfied its demands.

In this situation, the only conceivable reason to refrain from seeking a venue change was to delay the trial. Indeed, it was obvious that this case could not proceed toward trial *until* it arrived in a new venue. By the time the January 1994 status conference took place, the case had already been languishing in Calaveras County for 27 months—and more than 8 years had passed since the discovery of the murders. (See 6 CJCT 2043.) By then, Judge McCartin had granted appellant's *Marsden* motion, and appellant was slated to receive new attorneys. (7 CSRT 2113; 15 CSCT 5504, 5506.) And it was clear that the appointment of new counsel would occur after the venue transfer, because it made no sense to appoint counsel before learning where in this vast state the trial would take place.

It was also evident that the new attorneys would need abundant time to familiarize themselves with the evidence and prepare for trial. Attorney Margolin told the court that new counsel would "face 80,000, maybe 100,000 pages of documentation which will have to be digested," and he estimated it would take a year. (7 CSRT 2193.) And only after digesting the record could appellant's new attorneys formulate his defense and prepare their pretrial motions. Hence, it was obvious that this case could not move forward *until* venue was changed, and that each day it remained in Calaveras County constituted another day of delay.

Thus, even if this Court interprets the venue stipulation the way appellant suggests, it does not transform vicinage into an appealable issue. As mentioned above, a motion to change venue dispenses with the issue of vicinage. And given the defense's insistence that the trial could not take place in Calaveras County, its resistance to the venue transfer on vicinage grounds constituted a transparent threat to hold the case hostage in Calaveras County and delay the trial indefinitely.

But a defendant cannot manipulate his rights to delay the proceedings. (See *People v. Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5 [defendant may not use the right to self-representation "as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice"]; *People v. Daniels* (1969) 71 Cal.2d 1119, 1142 ["a defendant's right to counsel of his choice may not be abused for the purpose of delay"]; *United States ex rel. Kleba v. McGinnis* (7th Cir. 1986) 796 F.2d 947, 952 [the "'Sixth Amendment does not give an accused the power to manipulate his choice of counsel to delay the orderly progress of his case'"].) Because the defense here used vicinage as a threat to prevent the indisputably necessary venue change—and thus to delay the trial—appellant cannot now claim that the proviso allowing him to raise vicinage after the venue change transformed vicinage into an appealable issue.

Indeed, this could lead to an absurd result. If vicinage were a cognizable issue, appellant's convictions and sentence could theoretically be reversed in a case where *he* asserted that a venue change was required; where the law provided that a venue change dispenses with the vicinage requirement; and where he "preserved" the issue of vicinage under the threat of indefinitely delaying his trial. Courts do not countenance such bizarre results. (See *City and County of San Francisco v. Jen* (2005) 135 Cal.App.4th 305, 312.)

Appellant also appears to assume that, if a venue change is necessary and the crimes have a reasonable relationship to another county, then the case must be transferred there. But there is no authority supporting this proposition, and it conflicts with the well-established rule that a venue change waives vicinage. (See *People v. Guzman*, *supra*, 45 Cal.3d at pp. 938-939; *People v. Remiro*, *supra*, 89 Cal.App.3d at p. 838.)

Near the end of appellant's argument, he maintains that Orange County lacked vicinage over the other six counts: the murders of Carroll, Allen, Bond, O'Connor, Lonnie Jr., and Stapley. (AOB 239.) But the defense made no such claim in the trial court; on the contrary, it conceded that appellant was "home free" on vicinage for those counts, and its objection only applied to the Dubs, Peranteau, Cosner, and Gerald murders. (7 CSRT 2157.) Hence, it is undisputable that appellant waived vicinage for those charges. Additionally, appellant has forfeited this claim because he failed to raise it in the trial court. (See *People v. Clark* (1993) 5 Cal.4th 950, 988, fn. 13; *In re Marriage of King* (2000) 80 Cal.App.4th 92, 116.)

In sum, the trial in Orange County did not violate appellant's vicinage right under state law.

D. There Was No Prejudice

Under the California Constitution, "No judgment shall be set aside . . . for any error as to any matter of procedure, unless, after an examination of

the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) A miscarriage of justice occurs only if it is reasonably probable that a result more favorable to the defendant would have been reached absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) It is appellant's burden to show prejudice. (*People v. Johnson* (1988) 47 Cal.3d 576, 591.)

Appellant does not contend that the purported vicinage violation was prejudicial under this standard; instead, he argues that the error is "structural" and renders his convictions reversible per se. Alternatively, he maintains that the error is prejudicial under the "harmless beyond a reasonable doubt" standard that applies to violations of the federal Constitution. (AOB 231-237; see *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

Appellant is incorrect, because the Sixth Amendment's vicinage requirement does not apply to the states, so any error concerning vicinage is evaluated under California's "miscarriage of justice" standard. (Cal. Const., art. VI, § 13; see also *Price*, *supra*, 25 Cal.4th at p. 1065.) Appellant does not contend there was prejudice under this standard, so he has not stated a claim for relief.

Moreover, contrary to appellant's argument, the purported error is not structural. Structural errors "necessarily render a trial fundamentally unfair." (*Rose v. Clark* (1986) 478 U.S. 570, 577 [106 S.Ct. 3101, 92 L.Ed.2d 460].) In other words, when a structural error occurs, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . ." (478 U.S. at pp. 577-578; accord, *Arizona v. Fulminante* (1991) 499 U.S. 279, 310 [111 S.Ct. 1246, 113 L.Ed.2d 302].) But an error regarding vicinage does not affect the trial's function as a vehicle for reliably determining guilt and

innocence—on the contrary, "a vicinage guarantee . . . is not necessary to ensure a fair trial . . . ." (*Price*, *supra*, 25 Cal.4th at p. 1065.) Hence, a vicinage error is not structural.

Appellant further argues that under state law, the purported error should be deemed structural, and thus reversible per se, because otherwise, there is no remedy for a vicinage error, and trial courts could flout vicinage rules "with impunity." (AOB 236.) But again, our state Constitution permits reversal only if the error caused a miscarriage of justice. (Cal. Const., art. VI, § 13.) It does not authorize reviewing courts to apply a different prejudice standard as a prophylactic against future violations. On the contrary, errors that are not "jurisdictional in the fundamental sense" are "reviewed under the appropriate standard of prejudicial error . . . ." (*People v. Letner* (2010) 50 Cal.4th 99, 139, internal quotation marks omitted.) Moreover, appellant's argument is inconsistent with the presumption that trial courts correctly apply the law. (See Evid. Code, § 664; *People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.) And appellant is wrong when he asserts there is no remedy for an incorrect vicinage ruling: A defendant can challenge such a ruling by means of a pretrial petition for writ of mandate. (*Price*, *supra*, 25 Cal.4th at pp. 1051-1053.)

And though the *Chapman* standard does not apply here, respondent notes that appellant has not shown prejudice under that standard either. To begin with, appellant bases his prejudice claim on the assumption that the case should have been transferred to San Francisco, but this assumption is unfounded, because the Orange County court had no authority to transfer the case there. A court's jurisdiction to transfer criminal cases to another county is limited by statute. (See *Jackson v. Superior Court* (1970) 13 Cal.App.3d 440, 444.) Section 1033 allows such a transfer upon the defense's motion for a change of venue. (Pen. Code, § 1033, subd. (a).) As discussed previously, when a venue change is granted, the case must be

referred to the Judicial Council to identify counties that would not be unduly burdened by the transfer. (Cal. Rules of Court, former rule 842.) In addition, section 1115 allows a transfer if the crime was committed exclusively in another county. (Pen. Code, § 1115.)

None of these provisions permitted a direct transfer to San Francisco here, so even if appellant's vicinage claim had been meritorious, the remedy would have been a transfer back to Calaveras County. And since appellant could not get a fair trial there, the alleged error was harmless under *any* standard; indeed, it benefited appellant by leaving the case in a venue where he could get a fair trial.

Appellant's assertion of prejudice also fails because it is unsupported by the record. Appellant argues there was prejudice because (1) San Francisco has many more Chinese-Americans than Orange County; (2) Orange County has many more Vietnamese-Americans than San Francisco; and (3) Orange County's Vietnamese-American, Chinese-American, and Caucasian populations are less sympathetic toward people of Chinese ancestry than San Francisco's Chinese-American and Caucasian populations are.[41] (AOB 237-238.) But the record does not support any of these assertions, so they must be disregarded. (*People v. Merriam*, *supra*, 66 Cal. at pp. 396-397.)

In addition, appellant's stereotypes regarding Vietnamese-American, Caucasian, and Chinese-American jurors are forbidden by *Batson v. Kentucky*, *supra*, 476 U.S. at p. 87. Further, his argument conflicts with

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[41] Appellant has not provided any information about the number of Chinese-Americans in Calaveras County, but in any event, a defendant's vicinage right does "not oblige the trial court to transfer the trial to the available county most demographically congruent with [the county where the crime was committed]." (*People v. Remiro*, *supra*, 89 Cal.App.3d at p. 838.)

People v. Brown (1988) 46 Cal.3d 432, a case which demonstrates that subjective factors regarding the jurors, such as their ethnic backgrounds, are irrelevant to a prejudice analysis. Specifically, this Court held that, in examining prejudice,

> we will "exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like. A defendant has no entitlement to the luck of a lawless decisionmaker. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision."

(*Id.* at p. 448, quoting *Strickland v. Washington*, *supra*, 466 U.S. at p. 695.) Thus, the jurors' ethnic backgrounds are irrelevant in determining prejudice. Moreover, appellant can only speculate what the jury would have looked like if the case had been tried in San Francisco. In any event, appellant's contention that the San Francisco jury pool's ethnic makeup would have been more favorable to him confirms, again, that he was forum shopping. (See *Simon v. State* (Miss. 1997) 688 So.2d 791, 803-804.)

Finally, appellant maintains that his death sentence must be vacated, because it is based on all 11 of his murder convictions, and his "improper" trial in Orange County for the Dubs, Peranteau, and Gerald murders influenced the jurors toward a death verdict. (AOB 240-241.) But even if those murders had not been tried in Orange County, they still could have been introduced as aggravating factors at the penalty phase. (Pen. Code, § 190.3.)

In sum, even if the trial court violated appellant's right to vicinage, there was no prejudice.

III. THE TRIAL COURT DID NOT DEPRIVE APPELLANT OF DUE PROCESS IN ITS ADJUDICATION OF THE MENTAL COMPETENCY ISSUES

In April 1998, the trial court held a competency trial under section 1368 and found that appellant was mentally competent. In August 1998

and October 1998, appellant moved for a renewed competency trial. The court denied both motions. Appellant now makes three claims of error regarding the competency proceedings; specifically, he contends the trial court deprived him of due process by (1) refusing to appoint him separate, "independent" counsel for the April 1998 competency trial; (2) declining to order a renewed competency trial in August 1998; and (3) again declining to order a renewed competency trial in October 1998.[42] (AOB 354-391.)

Respondent disagrees. Contrary to appellant's assertion, his attorney, William Kelley, did not have a conflict of interest requiring the appointment of separate counsel for the competency trial, and in any event, there was no conceivable prejudice, because appellant got what he wanted at the competency trial: a finding that he was competent.

Both of appellant's requests for a renewed competency trial were based on an August 1998 declaration by psychiatrist Abraham Nievod, who evaluated appellant just three months after the court found him competent. But Dr. Nievod's declaration did not trigger the requirement for a new competency trial. To begin with, the declaration did not demonstrate that appellant's condition had deteriorated since the recent competency trial; in fact, it did not even address that question. Moreover, the declaration did not constitute new evidence casting a substantial doubt on the trial court's recent competency finding, because (1) the declaration did not comprise new evidence, but instead restated a diagnosis that Dr. Nievod had presented several years earlier; (2) the declaration cast no doubt on appellant's ability to understand the proceedings; and (3) the declaration

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[42] Respondent is addressing the issues of mental competency, choice of appointed counsel, termination of self-representation, interference with self-representation, and *Marsden*—appellant's claims III through VII—in a different order than they appear in appellant's brief. Respondent believes these issues are most easily understood in the order presented here.

failed to address—or even acknowledge—the trial court's recent finding of competency or the experts' reports that supported it.

A. The Court Did Not Err by Refusing to Appoint Separate Counsel for the April 1998 Competency Trial

1. Relevant proceedings

On January 16, 1998, appellant's lawyers, William Kelley and James Merwin of the OCPD, informed the court that they felt obligated to request a competency hearing, and that appellant opposed their request. (2 Sealed RT 433-434.) Afterward, in a written motion, they asked the court to appoint separate, "independent" counsel to represent appellant at the competency trial. (11 OCT 3807-3827; see also 11 Sealed OCT 3913-3935.) They argued that appellant needed separate counsel, because they would be witnesses at the proceeding. (11 OCT 3809-3815; see also 11 Sealed OCT 3913-3920, 3923-3926.)

The motion included declarations by Kelley and Merwin. Kelley opined that appellant's obsession with Michael Burt rendered him incapable of cooperating in his own defense. Merwin stated that appellant's obsession with Burt prevented him from cooperating with Merwin, with any other lawyer whom Burt had not approved, or with any lawyer not "obsessively attempting to reunite him with Burt." (11 OCT 3825.) Kelley and Merwin also sent the court a letter stating that they had a conflict of interest in representing appellant at the competency trial. (11 OCT 3936.) In response to the motion, the prosecution argued that separate counsel should not be appointed. (11 OCT 3828-3837.)

On February 6, 1998, the court held a hearing on the motion for separate counsel. At the hearing, Kelley also made an oral motion for the OCPD to withdraw from the competency proceeding, based on the purported conflict of interest. (3 RT 481-483; see also 3 RT 503-504.) The court denied both motions. (3 RT 501, 513.)

In addition, the court declared a doubt about appellant's competency, suspended the criminal proceedings, and instituted competency proceedings. (12 OCT 3969; 3 RT 518.) According to the court, the question was whether appellant suffered from a mental disorder that prevented him from cooperating with his lawyers. (3 RT 498.) The court appointed two psychiatrists to evaluate appellant: Dr. Paul Blair, whom Kelley requested, and Dr. Kaushal Sharma. (3 RT 514-516.) The prosecution did not request any particular expert. (3 RT 515.)

The OCPD then filed a petition for writ of mandate in the Court of Appeal, challenging the denial of its motion to withdraw and its motion for separate counsel. On February 10, 1998, the Court of Appeal denied the petition. (12 OCT 3973; see 12 OCT 3989-4025.)

Five weeks later, on March 18 and 19, 1998, the reports of Drs. Blair and Sharma were filed. (18 Sealed OCT 6146, 6153.) The competency hearing took place on April 20. The defense submitted without a jury trial, based on the reports of Drs. Blair, Sharma, and Anderson (who had evaluated appellant the previous year at the defense's request), and on Kelley's and Merwin's recent declarations. (3 RT 695-696; see 19 OCT 6535-6544.) The prosecution submitted based on the reports of Drs. Blair and Sharma. (3 RT 696.)

The court ruled that appellant was not incompetent, had no mental disorder, and was capable of assisting his lawyers, and it reinstated the criminal proceedings. (3 RT 703; 19 OCT 6548-6549.) The court based this ruling on the above-mentioned reports and declarations, its own observations of appellant, and the writings appellant had submitted to the court. (3 RT 695-696, 699-700.) The court found Dr. Sharma's report the most convincing. (3 RT 700-701.) In addition, the court had reviewed the earlier testimony of the mental health experts from Calaveras County. Though neither party offered this testimony at the competency trial, the

court explained that even if it were offered, it would not change the outcome. (3 RT 697.)

2. The disagreement between appellant and Kelley regarding appellant's mental competency did not create a conflict of interest

Appellant contends the trial court erred by refusing to appoint separate counsel to represent him at the competency trial. (AOB 384-386.) More specifically, he argues that separate counsel was necessary because Kelley had a conflict of interest. According to appellant, Kelley had a conflict because (1) Kelley sought to have appellant found incompetent, while appellant denied being incompetent, and (2) Kelley maintained that appellant could not cooperate because of his mental illness, but instead, Kelley's own shortcomings might have caused the relationship to break down. (AOB 384-386.)

The right to effective assistance of counsel under the Sixth Amendment and the California Constitution includes the right "to representation free from any conflict of interest that undermines counsel's loyalty to his or her client." (*People v. Doolin* (2009) 45 Cal.4th 390, 417.) The state and federal Constitutions use the same standard for conflict of interest claims. (*Id.* at p. 419.) Under this standard, if counsel "'actively represent[s] conflicting interests,'" prejudice is presumed. (*Id.* at p. 18, quoting *Mickens v. Taylor* (2002) 535 U.S. 162, 166 [122 S.Ct. 1237, 152 L.Ed.2d 291].)

Besides active representation of conflicting interests, a conflict of interest can also arise "when an attorney's loyalty to, or efforts on behalf of, a client are threatened by the attorney's own interests." (*People v. Gonzales* (2011) 52 Cal.4th 254, 309.) In such a case, prejudice is not presumed; instead, the defendant must "show that counsel performed deficiently and a reasonable probability exists that, but for counsel's

deficiencies, the result of the proceeding would have been different." (*Id.* at pp. 309-310; see *Strickland, supra,* 466 U.S. at pp. 687, 694.)

Here, the purported conflict did not involve Kelley's representation of conflicting interests, so appellant must demonstrate (1) an actual conflict; (2) deficient performance; and (3) prejudice. But appellant does not show any of these. As noted above, appellant first argues that Kelley had a conflict of interest because Kelley asserted that appellant was incompetent, while appellant disagreed. (AOB 384.) This, however, did not constitute a conflict of interest. To begin with, Kelley did not have any personal interest in having appellant found incompetent. (See *People v. Gonzales, supra*, 52 Cal.4th at p. 309.) Further, appellant had no legitimate interest in proceeding to trial if he were incompetent; as this Court has explained, once there has been a prima facie showing of incompetence, "counsel does not act against a defendant's interest in pursuing a finding of incompetency even if it is against the defendant's wishes." (*People v. Blacksher* (2011) 52 Cal.4th 769, 853.) And there is no requirement that separate counsel be appointed in such circumstances. (*Ibid.*)

Thus, Kelley's disagreement with appellant about appellant's competency did not create a conflict of interest.

3. The fact appellant faulted Kelley for appellant's own lack of cooperation did not create a conflict of interest

Appellant also argues that Kelley had a conflict of interest, requiring separate counsel, because Kelley had an interest in denying his own fault for appellant's lack of cooperation. (AOB 384-386.) According to appellant, separate counsel might have presented appellant's personal position—that he was in fact competent—more effectively. Appellant explains that

> [i]ndependent counsel could have framed the issue in a distinctly different manner that reflected *appellant's position*, i.e., that

> appellant and Kelley had reached an irremediable breakdown in their relationship, likely attributable to personality traits and conduct on both their parts, but that the breakdown was independent of appellant's preference for Michael Burt.

(AOB 385, emphasis added, original underlining omitted.)

But appellant's argument, by its own terms, demonstrates that the purported conflict did not cause prejudice: He maintains that separate counsel would have done a better job of showing he was competent, but in fact, the court *agreed* that he was competent. In other words, appellant got what he wanted: a finding of competence. His conflict-of-interest claim thus fails based on the undisputed lack of prejudice.

In any event, appellant does not show deficient performance either. To show deficient performance, appellant must identify specific acts or omissions that amounted to professional incompetence. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 690.) Here, appellant speculates that "[i]ndependent counsel could have framed the issue in a distinctly different manner . . . ." (AOB 385.) But such speculation cannot show deficient performance. (See *People v. Blacksher*, *supra*, 52 Cal.4th at p. 854 ["Even if the court had appointed independent counsel, it is speculative to assume defendant would have cooperated with new counsel," or that the results of a competency evaluation would have been favorable].)

In sum, Kelley did not have a conflict of interest at the competency trial, and the court had no duty to appoint separate counsel.

B. The Court Did Not Err by Declining to Order a Renewed Competency Trial in August 1998

1. Relevant proceedings

As noted above, for the April 1998 competency trial, the parties offered the reports of three psychiatrists: Drs. Anderson, Blair, and

Sharma. Dr. Anderson's report, dated May 14, 1997, had been filed in August 1997. (9 Sealed OCT 3173, 3175.)

Dr. Anderson examined appellant twice in May 1997. (9 Sealed OCT 3177, 3181.) He opined that appellant suffered from bipolar disorder and had a history of recurrent depression and "associated Obsessive Compulsive Disorder." (9 Sealed OCT 3185.) Anderson also opined that appellant understood the nature of the charges and proceedings but was "unable to participate in his defense in a rational manner . . . because of the extent of his Obsessive Compulsive Disorder . . . ." (*Ibid.*) According to Anderson, appellant's disorder was related to his "persistent desire" to have Burt represent him, and to his beliefs that his rights were being violated and he was being subjected to excessive security. (*Ibid.*) Anderson predicted that if Burt were appointed, it would eliminate or decrease appellant's obsessive compulsive disorder, but if Burt were not appointed, appellant "most likely would regress to a psychotic disorder – such as Delusional (Paranoid) Disorder, or Schizophrenic Psychosis."[43] (*Ibid.*)

The court-appointed expert, Dr. Sharma, reached a different conclusion than Dr. Anderson. Dr. Sharma examined appellant twice in February 1998. (Appellant refused to participate in a third interview.) (18 Sealed OCT 6146-6147.) With "a strong level of confidence," he concluded that appellant was competent, and appellant's lack of cooperation with counsel did not stem from mental illness. (18 Sealed OCT 6152.) He also concluded that appellant was not suffering from any identifiable mental disorder, and could understand the nature and purpose

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[43] Anderson's prognosis was not borne out over time: Though Burt was never appointed, appellant endured two more years of criminal proceedings without becoming psychotic.

of the proceedings and rationally cooperate with his lawyers. (18 Sealed OCT 6147-6148.)

As to appellant's ability to understand the proceedings, Dr. Sharma noted that appellant could "describe in minute detail" the case's history and the case law "better than ninety-nine percent of the criminal defendants" whom he had previously examined for forensic purposes. (18 Sealed OCT 6149.) He concluded that appellant's explanations for his lack of cooperation with counsel were "clearly suggestive of a person who not only knows his choices but also has made a very rational decision based on his interpretation of what is best for him." (18 Sealed OCT 6151.) Sharma also opined that Dr. Anderson's conclusions were "highly speculative and almost nonsensical," and he characterized as "absurd" Anderson's assertion that appellant would become schizophrenic if he did not get the attorney of his choice. (*Ibid.*)

The other court-appointed expert, Dr. Blair, evaluated appellant on February 27, 1998. (18 Sealed OCT 6154.) Appellant participated on the conditions that he chose the topics they discussed and he decided whether to continue cooperating. He "declined to fully participate in the interview process" without Burt or a "'non-representative attorney being present.'" (*Ibid.*) Despite appellant's limited cooperation, Dr. Blair concluded that appellant gave a valid mental-status examination. (18 Sealed OCT 6155.) Dr. Blair offered a tentative diagnosis of narcissistic personality disorder and paranoid personality traits, ruling out delusional disorder of the persecutory type. (18 Sealed OCT 6154.) He concluded that appellant was able to understand the proceedings, "have a meaningful dialogue with his attorney," and "play an active and meaningful role in his own defense." (18 Sealed OCT 6155.)

As noted above, the competency trial took place on April 20, 1998, and the court found appellant competent. In a motion for self-

representation on May 8, 1998, appellant accused Kelley and Merwin of initiating the competency proceedings in order to discredit his claims against them. (19 OCT 6677-6678.) Likewise in court, he accused them of using the competency proceeding to "intimidate" him so he would not disclose his privileged communications with them. (4 RT 747.) A week later, on May 15, appellant made another motion for self-representation, and the court granted it. (19 OCT 6712.)

Less than a month later, on June 11, appellant requested funding to employ psychologist Abraham Nievod. (5 Sealed 987.9 OCT 1581-1590.) Despite his recent assertion that his lawyers had acted in bad faith by questioning his competency, he now said he wanted Dr. Nievod to evaluate his mental state. (5 Sealed 987.9 OCT 1582-1583, 1588.) The court approved the funding request. (5 Sealed 987.9 OCT 1585-1586.)

On August 19, 1998, while appellant was still representing himself, he filed a motion for a new competency trial and for the appointment of separate counsel for the proceeding. (21 OCT 7500-03, 7516-7517.) Despite his recent, repeated insistence that he was competent, he now maintained that he was incompetent. He based his motion on a declaration by Dr. Nievod, who had previously testified at the 1993 *Marsden* hearing in Calaveras County. (21 OCT 7500-7502; see 14 Sealed CSCT 5096-5097.)

In Dr. Nievod's declaration, he noted that he had previously interviewed and tested appellant in 1993 and 1994, and again in February 1996, after the transfer to Orange County. (21 Sealed OCT 7505-7506.) Nearly two and a half years later, in July 1998, Nievod met with appellant four times. (21 Sealed OCT 7506.) Nievod concluded that the results had "been consistent throughout" the years, showing dependent personality disorder, anxiety, and depression. (21 Sealed OCT 7506-7507.) Nievod added that appellant's depression was "much more profound and debilitating" than before; appellant had a prominent anxiety disorder and

his anxiety was worse now; appellant showed signs of post-traumatic stress disorder; and his most significant disorder was dependent personality disorder. (21 Sealed OCT 7507-7510.)

Dr. Nievod also opined that appellant's cognitive abilities had become more impaired, and his disorders affected his ability to make reasoned, informed, and insightful judgments. But appellant was not psychotic, and there was no evidence of hallucinations or pervasive delusions. (21 Sealed OCT 7512.) Additionally, according to Nievod, appellant believed that Kelley did not have his interests as a priority, had impeded Burt's appointment, had failed to prevent appellant's "degradation" in jail, and was part of a legal system that "was acting in concert to eventually murder" him. (21 Sealed OCT 7513.) These beliefs were sincere and were a product of appellant's mental condition, and appellant's rejection of Kelley did not result from any intent to manipulate or delay the proceedings. (21 Sealed OCT 7513-7514.) Further, appellant's "impaired thought process" interfered with his ability to "make meaningful judgments based on informed, insightful analysis of his legal proceedings." (21 Sealed OCT 7515.)

The prosecution opposed a new competency trial. (21 OCT 7518-7522.[44]) On August 21, 1998, the court held a hearing on the motion. At the hearing, the court said it had read Dr. Nievod's new declaration and reread his testimony from Calaveras County. It had also reread the testimony of the other mental health experts from Calaveras County and the more recent reports by Drs. Anderson, Blair, and Sharma. (5 RT 992-993, 995, 1005.)

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[44] In the Clerk's Transcript, two pages of this pleading are out of order. (21 OCT 7519-7520.)

In support of his motion, appellant argued that he was incompetent, and that the circumstances had changed during the four months since the competency hearing. (5 RT 993, 997, 1010.) The court, in turn, noted that appellant would only talk to the psychiatrists and psychologists whom he wanted to talk to, and that it was a "game." (5 RT 998.)

After the court said this, appellant asked to continue the hearing—and several other hearings scheduled for that day—because he felt "confused and tired . . . ." (5 RT 998-1001.) The court observed that appellant did not look tired or sound confused. (5 RT 1001.) The prosecutor opposed any continuance. She argued that appellant was trying to delay and manipulate the proceedings, appellant had filed four motions scheduled for hearing that day, and there were witnesses present for the hearings who had traveled great distances. (5 RT 1002.) She also observed that "it is normal to expect that a defendant who choses [*sic*] to represent himself in a death penalty [case] might have moments, might have days when he is stressed and tired and confused." (5 RT 1003.)

The court denied the motion and found no substantial change in circumstances in the four months since the competency trial, and no new evidence calling its prior finding into question. The court also said it was watching and listening to appellant, and there was nothing wrong with his mental ability. The court concluded that appellant "obviously" understood the nature of the proceedings, appellant was "without question" able to rationally assist counsel or act as his own counsel, and Dr. Sharma's conclusions were still valid. (5 RT 1015.)