IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. VAENE SIVONGXXAY, Defendant and Appellant.	No. S078895 (Fresno Superior Court No. 590200-2)

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Fresno
Honorable Gene M. Gomes, Judge

MICHAEL J. HERSEK
State Public Defender

DOUGLAS WARD
Senior Deputy State Public Defender
Cal. State Bar No. 133360
ward@ospd.ca.gov

1111 Broadway, 10th Floor
Oakland, California 94607
Phone (510) 267-3300

Attorneys for Appellant

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INTRODUCTION

Appellant and codefendant Oday Mounsaveng, both Laotian nationals, were convicted in 1999 of a string of commercial store robberies in Fresno County, culminating in the shooting death of Henry Song. Mounsaveng was sentenced to life without the possibility of parole; appellant was sentenced to death.

In this brief, appellant addresses certain contentions made by respondent, but does not reply to arguments which have been adequately addressed in the opening brief. The absence of a reply on any particular argument or allegation made by respondent and the failure to reassert any particular point made in appellant's opening brief do not constitute a concession, abandonment or waiver of the point by appellant, but indicates that the issue has been joined. [1]

1. The numbered arguments in this brief are consistent with those contained in Appellant's Opening Brief ("AOB") and Respondent's Brief

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ARGUMENTS

1. APPELLANT WAS DENIED HIS FUNDAMENTAL CONSTITUTIONAL RIGHT TO A TRIAL BY JURY

A. Appellant's Putative Waiver of His Right to Trial by Jury at the Guilt Phase Is Invalid

Appellant was tried and sentenced to death by a judge, not by a jury of his peers. In a one-page monologue, the trial court informed appellant (in respondent's words) that he had a right to a jury trial of 12 people selected in a process that involved defense counsel, the prosecutor, and the trial court, and that, if the prosecutor proved guilt beyond a reasonable doubt, the case would proceed to a penalty phase. (RB 38.) When the trial court asked whether appellant would "give up" his right to a jury trial, he responded, "Yes." (6 SRT 904; AOB 36-48.) That is the extent of the record on the waiver of appellant's right to trial by jury; there was no written admonishment.

The record does not show that appellant was aware that the right to a unanimous and impartial jury is an essential element or fundamental attribute of the right to trial by jury under state and federal law. [2] The issue on appeal,

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("RB"). All statutory references made herein are to the Penal Code, unless otherwise stated. The record on appeal is designated herein as follows: "SRT" refers to the reporter's transcript; and "CT" refers to the clerk's transcript.

2. See *Irvin v. Dowd* (1961) 366 U.S. 717, 722 [right to impartial jurors]; *Patton v. United States* (1930) 281 U.S. 276, 288 [the essential elements of trial by jury include 12 persons and a unanimous verdict]; *In re Boyette* (2013) 56 Cal.4th 866, 888 [right to impartial jury]; *People v. Wrest* (1992) 3 Cal.4th 1088, 1104-1105 ["The record contains a complete description of the essential elements of jury trial as conveyed to appellant"]; *People v. Collins* (1976) 17 Cal.3d 687, 693 ["the essential elements of the right to trial by jury" include the right to a unanimous verdict by 12 persons]; *People v. Howard* (1930) 211 Cal. 322, 324-325 [same]; *People v. Traugott* (2010) 184 Cal.App.4th 492, 500 [the essential elements of the fundamental right to a jury trial under the California Constitution include a unanimous verdict]; *People v. Oliver* (1987) 196

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then, is whether a waiver of the right to trial by jury is valid when the record does not show that the accused was aware of the full nature of that right. That issue is reviewed de novo. (See *United States v. Carmenate* (2d Cir. 2008) 544 F.3d 105, 107; *United States v. Duarte-Higareda* (9th Cir. 1997) 113 F.3d 1000, 1002.)

The answer to that question is plainly no. A waiver of the right to trial by jury is not valid unless it is "made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it[.]" (*People v. Collins* (2001) 26 Cal.4th 297, 307; see also *Patton v. United States*, *supra*, 281 U.S. at p. 312.) Such a waiver must be not only knowing and intelligent, but also "self-protecting." (*Adams v. McCann* (1942) 317 U.S. 269, 275, 278.) Moreover, there must be "evidence in the record" showing that the accused was fully aware of the nature of the right and the consequences of the decision to abandon it. (*People v. Collins*, *supra*, 26 Cal.4th at pp. 305-306 & fn. 2; see also *Adams v. McCann, supra*, 317 U.S. at p. 281; *People v. Wrest* (1992) 3 Cal.4th 1088, 1103.) Here, the record does not show that appellant was aware of the right to a unanimous and impartial jury. As the record does not show that appellant was aware of the full nature of the right, his putative waiver is invalid under state and federal law. (See *Adams v. McCann, supra*, 317 US. at p. 281; *United States v. Shorty* (9th Cir., Dec. 20, 2013, No. 11-10530) __ F.3d __ [2013 WL 6698061, *3] [failure to inform the defendant of the unanimity requirement]; *People v. Wrest*, *supra*, 3 Cal.4th at p. 1103.)

The right to a unanimous and impartial jury cannot be deemed merely part of the "ins and outs" of the right to trial by jury, as respondent appears to

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Cal.App.3d 423, 431, fn. 3 ["the essential elements of the right to trial by jury under the California Constitution also include the requirements that a jury in a felony prosecution consist of 12 persons and that its verdict be unanimous."].)

suggest. (RB 37, 49.) The concept of "trial by jury" is not self-evident. It has meaning only be reference to the fundamental attributes identified above: number of jurors, impartiality and unanimity. (See *People v. Richardson* (1934) 138 Cal.App. 404, 408-409; 5 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) § 511, p. 784 ["The Constitution assures the essentials of a common law jury trial in felony cases, and these, not subject to legislative or judicial curtailment, are (a) the number of jurors, (b) impartiality of the jurors, and (c) unanimity of the verdict"].) Fundamental attributes of the right that have existed since the founding of our country and California's passage into statehood (see *Apodaca v. Oregon* (1972) 406 U.S. 404, 407-408 (plur. opn.); *In re Hitchings* (1993) 6 Cal.4th 97, 110; Comment, *Jury Unanimity in California: Should It Stay or Should It Go?* (1996) 29 Loy. L.A. L.Rev. 1319) can hardly be treated as part of the "ins and outs" of the right. They are the right itself. When an accused is weighing whether to be tried by a judge or a jury, the record must reflect that s/he was fully aware of these attributes before a court can deem any waiver to be truly knowing and intelligent.

Where the record does not show that the accused was aware of those fundamental attributes, the presumption against the waiver of fundamental constitutional rights applies: courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights" (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464, internal quotation marks omitted), and any doubts arising from a defective record must be resolved in favor of the accused (*Carnley v. Cochran* (1962) 369 U.S. 506, 516; *Boykin v. Alabama* (1969) 395 U.S. 238, 242-243). Moreover, where, as here, there was no written waiver or admonishment, a jury waiver "is subject to greater scrutiny." (*United States v. Shorty, supra*, ___ F.3d. ___ [2013 WL 6698061, *4].) The trial court's monologue, when subjected to that scrutiny and the applicable presumptions, is manifestly deficient in imparting to appellant the full information that he required before effectuating a knowing and intelligent waiver of his right to

trial by jury.

There is no a question here of imposing a "litany" (a tedious or lengthy recitation) on the trial court. Less than 10 words were required to ensure that appellant was aware that he had the right to an impartial and unanimous jury. What is necessary, and what is missing in this case, is not a litany, but rather a record showing that appellant was aware of the full nature of the constitutional right that he purportedly chose to forego.

Respondent's main contention is that a trial court has no duty to inform an accused of the nature and consequences of a jury waiver where the accused is *represented by counsel*:

> Where a criminal defendant is represented by counsel and fails to show that either he or his counsel has been misled as to the result that might occur from waiving a jury trial, the trial court is not required to explain to that defendant the nature and consequences of his action of waiving a jury trial.

(RB 36.) In other words, respondent contends that a record that is inadequate to establish a valid waiver of a fundamental constitutional right is unnecessary where the accused has counsel. The unstated presumption is that defense counsel will always inform the accused of the information that is required by state and federal law to establish a valid waiver.

Respondent's contention is flawed in a number of respects. [3] First, the

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3. Respondent's argument is directed at absolving the trial court of any duty "to explain to [the] defendant the nature and consequences of his action of waiving a jury trial." However, state and federal law do not necessarily impose that duty upon the trial court. The accused must be aware of the nature of the right; but that awareness may be imparted by the trial court or trial counsel on the record, or in a written advisement. (See *United States v. Lilly* (3d Cir. 2008) 536 F.3d 190, 197-198; Note, *Right to a Jury Trial* (2011) 40 Geo. L.J. Ann. Rev. Crim. Proc. 559, 565, fn. 1675 [noting a circuit split regarding whether a colloquy between the judge and defendant is mandatory].) There is no doubt, however, that a trial court's duty under both state and federal law is to ensure that the *record* reflects a knowing, intelligent and

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contention is contrary to federal law. In *Adams v. McCann*, *supra*, 317 U.S. 269, the high court stated that "whether [the accused] had the advice of counsel" is relevant to the determination of the validity of a waiver. That is, while the presence of competent counsel is relevant, not dispositive. (*Id.* at p. 277.; see also *United States v. Shorty*, *supra*, __ F.3d. __ [2013 WL 6698061, *5].) Further, respondent's contention that representation by counsel suffices to establish a valid waiver is contrary to the requirement that *the record* must show that a waiver of the right to trial by jury was made with a full awareness of the nature of the right and the consequences of abandoning it. (*Adams v. McCann, supra*, 317 U.S. at p. 281; *People v. Collins*, *supra*, 26 Cal.4th at p. 307.) And, it is inconsistent with the above-mentioned rule that courts must "indulge every reasonable presumption against waiver" a fundamental constitutional right (*Johnson v. Zerbst*, *supra*, 304 U.S. at p. 464), and that any doubts arising from a defective record must be resolved in favor of the accused (*Carnley v. Cochran*, *supra*, 369 U.S. at p. 516; *Boykin v. Alabama*, *supra*, 395 U.S. at pp. 242-243).

Second, the cases cited by respondent are distinguishable because each involves more than the mere presence of counsel: in each, there was a colloquy, written admonishment, or statement by defense counsel on the record that established a valid waiver. For example, in *People v. Lookadoo* (1967) 66 Cal.2d 307, cited by respondent (RB 36), this Court concluded that:

> [T]he trial court in a criminal case is not required to explain to a defendant the nature and consequences of his action in waiving a jury trial where he is, as in the case at bar, represented by counsel and fails to show that either he or his counsel has been misled as to the result which might occur from his waiving a jury trial.

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protective waiver. (See *Adams v. McCann*, *supra*, 317 U.S. at p. 281; *Patton v. United States*, *supra*, 281 U.S. at pp. 312-313; *People v. Collins*, *supra*, 26 Cal.4th at pp. 308-309.)

(*Id.* at p. 311.) However, the record in that case showed a lengthy colloquy (more than 1,000 words as opposed to the 185 words here) between the court and the defendant regarding the nature of the right to trial by jury. (*Id.* at pp. 311-313 & fn. 1) Further, the defendant specifically stated that he had spoken to his attorney and understood the right. (*Ibid.*) This Court has not cited *Lookadoo* in many years on this point, but in *People v. Miller* (1972) 7 Cal.3d 562, the Court described the dispositive facts in *Lookadoo* as going beyond the mere presence of counsel: not only was the defendant "represented by counsel," according to *Miller*, he also "benefited from a detailed examination by the trial court into the nature and consequences" of the proposed jury waiver. (*Id.* at p. 567.)

The same is true of *People v. Tijerna* (1969) 1 Cal.3d 41, also relied upon by respondent. (RB 37.) The issue in that case was whether a jury trial waiver was invalid where the defendant was not advised that a jury's verdict must be unanimous. Answering that question in the negative, this Court reasoned:

> Defendant was represented by an attorney at both the preliminary hearing and at the trial, and he was carefully questioned before his waiver of a jury trial was accepted. He stated that he knew what a jury trial was, and he was also told that "That is when twelve people sit over here in the box and hear all the evidence." Under these circumstances, the court was not required to explain further to defendant the significance of his waiver of a jury trial.

(*Id.* at p. 45, footnote omitted.) [4] Again, the dispositive facts are that the

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4. In *People v. Robertson* (1989) 48 Cal.3d 18, a case involving the failure of the trial court to explain to the defendant the consequences of a jury deadlock in a capital case, this Court concluded:

> Defendant was represented by two apparently competent counsel who over the course of several days discussed with him "at length" the consequences and nature of his proposed waiver. Absent an assertion or evidence to the contrary, we

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defendant was carefully questioned about the jury trial waiver and stated on the record that he was aware of the nature of his right.

Respondent also reads *People v. Castaneda* (1975) 52 Cal.App.3d 334, 344 as holding that "no specific formula or extensive questioning required" for a valid waiver. (RB 36-37.) Appellant agrees. But in that case there was a colloquy during which the trial court explained the right to trial by jury ("there are twelve people on a jury. . . . It would be necessary for all twelve to agree before you could be found guilty"); the defendant personally stated that he did not want a jury; and defense counsel stated on the record that he had spent "between one and two hours" discussing the matter with his client. (*Id.* at pp. 343-345.)

With respect to *People v. Evanson* (1968) 265 Cal.App.2d 698, also cited by respondent (RB 36, 38-39), the defendant claimed that the trial court was required to provide him with "full advice concerning his rights and ascertaining through a procedure comparable to that required for an effective waiver of counsel that the waiver was competent." (*Id.* at p. 701.) The lower court rejected this argument, stating:

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

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> presume that competent counsel would have informed defendant of the effect of a jury deadlock.

(*Id.* at p. 36.) The information missing from the record in *Robertson* -- the consequences of a jury deadlock in a capital case -- is not part of the essential elements of the right to trial by jury. In appellant's case, the issue concerns indisputable, essential elements of that right. In any event, in *Robertson*, counsel discussed the right to a trial by jury at length with the defendant. The record in appellant's case lacks that crucial fact.

> which is to be waived and question him to ascertain whether the waiver is made with full appreciation of the consequences.

(*Id.* at pp. 701-702.) Defense counsel in *Evanson* stated on the record that he had explained to the defendant "his constitutional rights to a jury trial," and "the nature of a criminal case," and that the defendant understood his right. (*Id.* at p. 700.) That in itself was sufficient to establish a valid waiver. But the court also reasoned that "the waiver of a jury peculiarly involves tactical considerations which the defendant himself is ill equipped to appraise." (*Id.* at p. 702.) In this regard, *Evanson* is a relic because both state and federal courts now recognize precisely the opposite: the decision whether to waive a jury is of such importance and moment that it can only be made by the accused. (See *Florida v. Nixon* (2004) 543 U.S. 175, 187; *In re Williams* (1969) 1 Cal.3d 168, 177, fn. 8.) As it is the accused who must make the decision regarding whether to forego this fundamental constitutional right, it is the accused who must be aware of its essential elements or fundamental attributes.

Finally, respondent avers that the advisements given in this case were "far more detailed" than those given in *People v. Weaver* (2012) 53 Cal.4th 1056, where a jury waiver was upheld. (RB 39.) Not so. The advisements given in *Weaver* differ profoundly from those given here. The defendant in *Weaver* executed *two separate written waiver forms* regarding the right to a jury trial; the trial court explained a number of differences between a court trial and a jury trial, including: "if you have a jury trial . . . you have an absolute right to have the jury be unanimous. Meaning that all 12 jurors would have to agree to a decision." Further, the defendant stated on the record that *his attorney had fully explained to him* the terms "jury trial" and "court trial," and the difference between the two. Following the guilt phase, he signed a written waiver his right to a jury. The court stated that it would permit either side to withdraw its waiver of the right at the penalty phase, and called a recess to permit the defendant to consult with his attorneys and reconsider his decision. (*Id.* at pp.

1070-1071.) None of these facts is present in this case. Thus, respondent's contention that the advisements given in *Weaver* were "far more detailed" than those given here is 180 degrees from the truth.

The salient circumstances present in the cases discussed above are notably absent in this case: there was no lengthy colloquy, only a short monologue; there was no written admonishment; appellant was not carefully questioned, or questioned at all; he did not state that he understood the right to trial by jury or make any statement; and his counsel was not questioned and did not aver that he had discussed the matter with his client.

Third, respondent's contention -- that the mere presence of counsel suffices to find a valid waiver notwithstanding a defective record -- is at odds with the requirement that a court must consider the *unique circumstances* of each case, "including the background, experience, and conduct of the accused" in assessing the validity of a waiver of a fundamental constitutional right. (*Johnson v. Zerbst*, *supra*, 304 U.S. at p. 464; see also *Adams v. McCann*, *supra*, 317 U.S. at p. 278.) The unique circumstances in this case include the fact that appellant was a limited English speaker, uneducated adult immigrant from an impoverished, war-torn, communist-dominated country with no recent history of freedom and individual rights (Laos). Appellant's language and cultural barriers are salient facts that were known by the trial court and put the court on notice that appellant's waiver "might be less than knowing and intelligent." (*United States v. Duarte-Higareda*, *supra*, 113 F.3d at p. 1003; see also *United States v. Leja* (1st Cir. 2006) 448 F.3d 86, 94; *United States v. Mendez* (5th Cir. 1997) 102 F.3d 126, 129-130.) A trial court cannot reasonably assume that an immigrant's understanding of the American jury system is on par with a citizen steeped in the traditions of this country: "The criminal jury, right or wrong, is one of our most precious and characteristically American institutions. There is nothing like it anywhere else in the world." (Babcock, *A Unanimous Jury Is Fundamental to Our Democracy* (1997) 20 Harv. J.L. & Pub.

Pol'y 469, 473.)

There are other unique circumstances here that should have put the trial court on notice that appellant's one-word response was less than a knowing and intelligent waiver. This Court has concluded that where the record shows that the defendant discussed the decision with counsel and relied on counsel's advice, that fact strengthens the waiver's validity. (*People v. Scott* (1997) 15 Cal.4th 1188, 1209.) In this case, there is no indication in the trial court's monologue (or anywhere in the record) that appellant discussed the decision with counsel. Nor is there anything in the record showing that the purported waiver was based on trial tactics to obtain some advantage for the accused. (Cf. *In re Scott* (2003) 29 Cal.4th 783, 828-829 [trial counsel had valid tactical reason for advising client to waive a jury]; *People v. Hovarter* (2008) 44 Cal.4th 983, 1024, fn. 17 ["counsel assured the court that the decision to waive a jury was not made lightly and that they had tactical reasons for doing so"]; *People v. Robertson* (1989) 48 Cal.3d 18, 36-37 [counsel "expressed on the record their sound tactical reasons for advising defendant to waive a jury and consenting to the waiver"].)

Finally, waiver of the right to trial by jury in a capital case is one of the most important and difficult decisions that a defendant must make. Accordingly, in such cases the degree of caution which a trial court must exercise in accepting a jury waiver is at its apogee. (*Patton v. United States* (1930) 281 U.S. 276, 312-313.) The trial court's brief, translated monologue in this case fails to meet this standard: no questions were asked of appellant or defense counsel, and the court failed to inform appellant fully of the fundamental attributes of the right to trial by jury.

Thus, contrary to respondent's contention, a court cannot stop at the fact that counsel was present in assessing the validity of a purported waiver of the fundamental constitutional right to trial by jury. Where there are unique circumstances indicating that a waiver of that right might be less than knowing

and intelligent, the record must show that the defendant was fully informed of the right, and understood the benefits and burdens foregoing that right.

In sum, an assumption that competent counsel will explain to his or her client the "ins and outs" of a jury trial versus a bench trial is reasonable because the vast number of defense attorneys perform competently and advise their clients concerning their constitutional rights. (See *People v. Robertson*, *supra*, 48 Cal.3d at p. 36.) But such a presumption cannot be permitted to supplant the basic requirements for a valid waiver of a fundamental constitutional right: a *record* showing a knowing and intelligent decision by the accused; that is, a decision made with a *full* awareness of the nature of the right being abandoned and the consequences of abandoning it.

Assuming arguendo that the mere presence of counsel can establish a valid waiver of a fundamental constitutional right despite a defective record, it would be unreasonable to rely upon that rule where, as here, there are serious doubts as to the competence or undivided loyalty of the accused's counsel. (See *People v. Robertson*, *supra*, 48 Cal.3d at p. 36 [presuming that counsel would inform the defendant of certain information "[a]bsent an assertion or evidence to the contrary"].) In this case, defense attorney Rudy Petilla represented appellant several months after he represented the defendant in *People v. Doolin* (2009) 45 Cal.4th 390, under a flat-fee agreement in Fresno County. In *Doolin*, this Court recognized that an attorney who receives a flat fee in advance may have a "conflicting interest" to dispose of the case as quickly as possible. (*Id.* at p. 416.) As jury trials are "famously" time consuming and expensive for an attorney (Gross, *Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence* (2012) 56 N.Y.L. Sch. L.Rev. 1009, 1023), a waiver of the right to trial by jury would perforce expedite the case.

In *Doolin*, this Court understandably concluded that the vast majority of attorneys "are not so unethical as to neglect their clients' interests to advance their own." (*People v. Doolin*, *supra*, 45 Cal.4th at p. 416.) Such

malfeasance is the exception, not the rule. However, there are suggestions that this case involves the exception. [5] Appellant does not raise a conflict of interest claim or an ineffective assistance of counsel claim in this appeal; any such claims must await the appointment of habeas corpus counsel. (See *Doolin*, *supra*, at p. 429 ["defendant has the opportunity to expand upon the record in the context of his right to pursue a writ of habeas corpus"].) He has set forth the information above to support his argument that respondent's contention regarding the presence of counsel, whatever its merits in other cases may be, should not apply where, as here, there are some doubts concerning counsel's undivided loyalty to his client's interests. In this case, those doubts, combined with the fact that there is nothing in the record showing that counsel discussed with appellant the nature of the right to trial by jury and the likely consequences of its waiver, should cause even the most forgiving to pause before applying respondent's one-size-fits-all presumption.

Given that the record fails to show that appellant was fully aware of the fundamental attributes of his right to trial by jury and the consequences of waiving that right, the absence of a written waiver, and the unique

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5. In 1997, the year that he was appointed to represent appellant, two separate unpublished opinions concluded that Mr. Petilla intended to defraud creditors in connection with a bankruptcy filing stemming from his gambling debts. (*Petilla v. Bank One LaFayette* (9th Cir., Aug. 25, 1997, No. 96-17317) 122 F.3d 1073; *Petilla v. First Card National Bank* (9th Cir., June 3, 1997, No. 96-17037) 116 F.3d 485; see also *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18 [A party is permitted to cite unpublished federal opinions].) In 2001, the Review Department of the State Bar concluded, based on the federal fraud cases, that Mr. Petilla had committed acts involving moral turpitude and dishonesty, and described his conduct as "at worst, akin to embezzlement and, at best, akin to abusing one's position of trust for personal gain." (*Matter of Petilla* (Rev. Dept. 2001) 4 Cal. State Bar Ct. Rptr. 231, *1, *17.) Copies of these opinions are attached hereto. Mr. Petilla's State Bar case is cited in Witkin under the meaning of "moral turpitude" in attorney disciplinary proceedings. (1 Witkin, Cal. Procedure (5th ed. 2008), § 481, p. 598.)

circumstances of this case, the state has not shown that appellant's purported waiver was knowing and intelligent. Appellant's putative waiver of that right at the guilt phase is invalid.

B. The Putative Waiver of the Right to Jury for the Special Circumstance Determination Is Invalid

In *People v. Memro* (1985) 38 Cal.3d 658, 704, this Court held that "an accused whose special circumstance allegations are to be tried by a court must make a separate, personal waiver of the right to jury trial." In *People v. Diaz* (1992) 3 Cal.4th 495, the Court clarified that the special circumstance waiver need not be distinct in time, but that "*the record* must show that the defendant is aware that the waiver applies to each of these aspects of trial." (*Id.* at p. 565, emphasis added.)

Respondent's concedes that a "[w]aiver of a defendant's right to have a jury determine the truth or falsity of an alleged special circumstance must be made by the defendant personally and must be 'separate' in that the record must show the defendant is aware the waiver applies to both the guilt and the special circumstances." (RB 47-48.) Here, the trial court did not mention the special circumstance in its monologue: the court only stated that it would decide appellant's "guilt beyond a reasonable doubt," and then immediately began speaking of the penalty phase. (RB 35.)

Respondent attempts to fill the void with the trial court's statement that it "alone, will make those decisions":

> The trial court's statement in the present case that "this Court, alone, will make those decisions" (6 SRT 905) is also similar to the waiver in *Weaver*, which included "all triable issues before the court." (*People v. Weaver*, *supra*, 53 Cal.4th at p. 1075.)

(RB 43.) That contention is grossly misleading. In this case, the meaning of the trial court's reference to "those decisions" can only be discerned by reading any preceding statements that refer to its decisions. And those preceding statements make *no* mention of the special circumstance, either

explicitly or impliedly; they refer solely to the determination of guilt. (6 RT 903-904.) In *Weaver*, on the other hand, the trial court's "all triable issues" statement was accompanied by specific references to the special circumstance. (*People v. Weaver*, *supra*, 53 Cal.4th at pp. 1070-1071, 1075.) The court in *Weaver* twice explained that before the case could proceed to the penalty phase, findings would be required on "a special circumstance[.]" (*Id.* at pp. 1074-1075.) Thus, when a trial court mentions the special circumstance determination and refers to "all triable issues," it may be presumed that the defendant understood the connection between the two. (*Id.* at p. 1075.) Here, it is unreasonable to connect the court's "those decisions" statement to the special circumstance determination because it made absolutely no reference to that determination.

If respondent is asking this Court to presume that an uneducated, non-English speaking immigrant from a war-torn, communist country, would have understood the trial court's phrase that it "alone, will make those decisions" as including the unmentioned special circumstance determination, it is asking for something that is unreasonable on its face. Moreover, it is asking this Court to violate basic principles of waiver under state and federal law. Given the importance of the right to trial by jury as a fundamental guaranty of the rights and liberties of the people, "every reasonable presumption should be indulged against" its waiver. (*Hodges v. Easton* (1882) 106 U.S. 408, 412; see also *Johnson v. Zerbst*, *supra*, 304 U.S. at p. 464.)

Respondent's reliance on *Diaz* and *People v. Wrest*, *supra*, 3 Cal.4th 1088 (RB 42), is a stretch too far: in each case, the trial court *explicitly* mentioned the special circumstances, and in each case, the *defendant responded* that he was waiving his right to jury for the special circumstances. (*People v. Diaz*, *supra*, 3 Cal.4th at pp. 564-565; *People v. Wrest*, *supra*, 3 Cal.4th at pp. 1102-1104.) Neither occurred here: the special circumstance was not mentioned and appellant did not respond that he was waiving the right to trial by jury for the

special circumstance determination.

It is difficult to fathom why respondent discusses *People v. Granger* (1980) 105 Cal.App.3d 422, a case that is directly contrary to its position. (RB 40-41.) In *Granger*, the appellate court concluded that the trial court erred in failing to take a waiver of the defendant's right to trial by jury for the special circumstance. (*Id.* at p. 428.) Five years after *Granger*, respondent urged that the case was wrongly decided, but this Court rejected that argument. (*People v. Memro*, *supra*, 38 Cal.3d at pp. 701-702.) Here, respondent changes course and contends that *Granger* found error based on the possibility that the defendant was misled:

> the "elaborate and careful" explanations of the other rights given in that case may have misled the defendant into thinking he had no right to a jury trial on the special circumstance allegations.

(RB 43.) That reading of *Granger* is both errant and foreclosed by this Court's decision in *People v. Deere* (1985) 41 Cal.3d 353:

> *Granger* held that the defendant's waiver of a jury trial in a murder case did not extend to the special circumstances phase of the case, because the trial court failed to adequately explain to the defendant the availability of a trial on that issue.

(*Id.* at p. 360.) [6] *Deere* does not mention that the defendant in *Granger* was "misled."

Nothing in the record that establishes that appellant was aware of his right to trial by jury for the special circumstance. It would be pure speculation to conclude that appellant knowingly and intelligently waived that right. The putative waiver of his right to jury for the special circumstance was invalid.

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6. *Deere* has been disapproved on other grounds. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1228, fn. 19.)

C. The Putative Waiver of the Right to Trial by Jury at the Penalty Phase Is Invalid

In *People v. Hovarter*, *supra*, 44 Cal.4th 983, this Court, in a unanimous opinion, concluded:

> Because the default position in criminal cases is a trial by jury, with a jury trial waiver the exception, the first paragraph of section 190.4, subdivision (b) must be read to mean that, despite the fact an accused waived his right to a jury for the guilt phase, the trial court must presume the defendant wants a jury to try the penalty phase unless a jury is again waived. In other words, as an added protection for criminal defendants, a single jury trial waiver given early in the trial process is insufficient; a defendant must reaffirm his waiver for the penalty phase.

(*Id.* at pp. 1026-1027.) In this case, the trial court did not have appellant reaffirm his waiver for the penalty phase. Although *Hovarter* was decided shortly after this case was tried, respondent does not rely on that fact. After all, *Hovarter* was simply construing the language of section 190.4, a statute adopted decades before that case was decided. Instead, respondent contends that *Hovarter's* conclusion "appears to be dicta" (RB 47) and is insufficient authority:

> appellant does not cite, and respondent is not aware of, any authority other than *Hovarter* for the proposition that a defendant must "reaffirm" his jury trial waiver at the penalty phase.

(RB 46-47.) In appellant's view, the legislative enactment of section 190.4 and this Court's unanimous decision in *Hovarter* are sufficient authority for the rule that a defendant must reaffirm his jury trial waiver at the penalty phase. Further, the *Hovarter* court's analysis of section 190.4 and the right to trial by jury were integral to its conclusion that a defendant may waive a jury for a penalty phase retrial without violating section 190.4 or the Sixth Amendment. The lack of additional authority may be due to the fact that *Hovarter* involved a matter of first impression (*id.* at p. 1024), and the Court did not mince words:

> Because the default position in criminal cases is a trial by jury,

> with a jury trial waiver the exception, the first paragraph of section 190.4, subdivision (b) *must be read* to mean that, despite the fact an accused waived his right to a jury for the guilt phase, the trial court must presume the defendant wants a jury to try the penalty phase unless a jury is again waived.

(*Id.* at p. 1026, emphasis added.) Certainly, the Benchguide used by California trial courts for the penalty phase of a capital case -- a secondary authority -- did not understand *Hovarter's* holding to be "dicta":

> When jury is waived, obtain a waiver from defendant, defense counsel, and prosecutor, even if there were waivers at earlier stages of the case. A jury waiver for one phase of a death penalty trial is not effective for any other phase.

(Cal. Judges Benchguides, Death Penalty Benchguide: Penalty Phase and Posttrial, Benchguide 99 (CJER 2011 rev.), § 99.2, p. 99-8.)

Respondent discusses several cases that it forthrightly admits do not address whether a separate waiver need be taken before the penalty phase. (RB 45-46) As those cases did not address the issue raised here, they are not pertinent: a case is not authority for a proposition not considered. (*People v. Brown* (2012) 54 Cal.4th 314, 330.)

Respondent notes that there is "no federal constitutional right to have a jury determine whether or not to impose the death penalty" (RB 46), but fails to explain why this makes any difference. A fundamental constitutional right is not diminished because its source is state law. Federal law aside, in California, a defendant has a constitutional and statutory right to have a jury determine whether or not to impose the death penalty. And in California, a waiver of the right to trial by jury must be reaffirmed at penalty.

Appellant also notes that the substance of respondent's proposition is questionable. Appellant has argued that jury unanimity in a capital case is required by federal law in a capital case under the Sixth, Eighth, and Fourteenth Amendments. (AOB 43 & fn. 13) In *Schad v. Arizona* (1991) 501 U.S. 624, after noting that there is no federal right to unanimity in criminal

cases, the high court added the phrase "at least in noncapital cases." (*Id.* at p. 635).[7] However, even assuming that the federal right to unanimity does not apply to capital cases, an accused "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion [citation], and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the state." (*People v. Robertson*, *supra*, 48 Cal.3d at p. 37.) The denial of the state law right by virtue of an invalid waiver would be arbitrary, and violate due process and equal protection guarantees. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343 [state law may create for a defendant a liberty interest under due process]; *City of Cleburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 439 [the Equal Protection Clause essentially requires that "all persons similarly situated should be treated alike"].)

Respondent rails against the "severe constraints on trial courts" by requiring a separate waiver at the penalty phase. (RB 48.) But this Court has already found that taking a separate waiver for the special circumstances is not likely to be "overly time consuming." (*People v. Memro*, *supra*, 38 Cal.3d at p. 704.) Ironically, respondent admits that the *Memro* court "stated that the rule announced was unlikely to have any 'dramatic effect' on the trial of guilt and special circumstances[.]" (RB 41, quotation marks in original.) Taking a jury waiver is straightforward, and is done every day in this state's trial courts. To describe the Legislature's "added protection" for this core, fundamental constitutional right (*People v. Hovarter*, *supra*, 44 Cal.4th at p. 1027) as imposing a severe constraint on the trial courts is, at the very least, immoderate.

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7. At least 47 states require a unanimous criminal jury verdict. (Thomas, *Nonincorporation: The Bill of Rights After Mcdonald v. Chicago* (2012) 88 Notre Dame L.Rev. 159, 201, fn. 292.)

D. Denial of the Right to Trial by Jury Is Structural Error That Requires Reversal

Respondent, in discussing what it refers to as "harmless error," concedes that an invalid waiver of the right to a jury trial at the guilt phase requires automatic reversal. (RB 49.) This rule was made clear by the high court in *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282: "The deprivation of [the right to trial by jury] with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" This Court agreed with that analysis in *People v. Ernst* (1994) 8 Cal.4th 441, 449, and *People v. Collins*, *supra*, 26 Cal.4th at p. 311. (AOB 47; see also *People v. Holmes* (1960) 54 Cal.2d 442, 443-444 [invalid jury waiver required summary reversal].) Lower federal courts also agree that the deprivation of the right to trial by jury is structural error that requires automatic reversal of the conviction. (*Miller v. Dormire* (8th Cir. 2002) 310 F.3d 600, 604.) In *United States v. Duarte-Higareda*, *supra*, 113 F.3d 1000, the court held that the trial court's failure to ensure the adequacy of the defendant's jury waiver "affected the basic framework of [his] trial and we cannot determine whether this effect was harmless." (*Id.* at p. 1003.) In *United States v. Williams* (7th Cir. 2009) 559 F.3d 607, the court recognized that an "invalid jury waiver certainly affects the framework of a case in the sense that the determination of guilt or innocence will be made by a judge rather than a jury, and it would be a dubious enterprise to try and show that a jury likely would have reached a different result than the judge did." (*Id.* at p. 614.)

Respondent correctly points out that this Court has left open the question of prejudice with respect to an invalid waiver of the right to trial by jury on the special circumstances (*People v. Memro*, *supra*, 38 Cal.3d at pp. 704-705), and that several cases from the lower appellate courts have found such error to be harmless. (RB 49-50.) However, these cases were decided under the erstwhile rule that the right to a jury trial on a special circumstance

allegation is of statutory, rather than constitutional, derivation. (See *People v. Gastile* (1988) 205 Cal.App.3d 1376, 1382; *People v. Moreno* (1991) 228 Cal.App.3d 564, 573.) That rule is no longer valid. This Court now recognizes that a special circumstance is equivalent to an element of a crime, and that an error relating to a special circumstance violates the federal Constitution. (See *People v. Lewis* (2008) 43 Cal.4th 415, 520-522.)

Respondent appears to recognize that federal constitutional error is involved, as it contends that the error was harmless under the federal beyond-a-reasonable-doubt standard. (RB 50.) But its assertion that the error was harmless is based on its view of the strength of the evidence. This Court rejected that reasoning in *Collins*:

> Harmless error review is inapplicable to a violation of the right to a jury trial because where a case improperly is tried to the court rather than to the jury, there is no opportunity meaningfully to assess the outcome that would have ensued in the absence of the error.

(*People v. Collins*, *supra*, 26 Cal.4th at pp. 311-312, internal quotation marks omitted.) The result is analogous to the holding in *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, where the defendant's Sixth Amendment right to counsel of choice was violated: "Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." (*Id.* at p. 150.)

With respect to the penalty phase error, respondent avers that it "is not aware of any authority regarding the prejudice standard to be applied," and submits that the standard from *People v. Watson* (1956) 46 Cal.2d 818, should be applied. (RB 50-51.) Assuming that a prejudice standard were to be applied, this Court would surely look to the standard announced in *People v. Brown* (1988) 46 Cal.3d 432, 448 for state-law penalty phase errors: whether the error contributed to the verdict. Further, respondent would place the responsibility on the defendant to show harm from the error. (RB 51.) This

is inconsistent with the federal law standard for constitutional error found in *Chapman v. California* (1967) 386 U.S. 18, 24, which places the burden upon respondent to show that the error was harmless. And, once again, respondent offers only a rehashed, strength-of-the evidence argument. As noted, *Collins*, *Ernst* and the other cases set forth above explicate why that approach is fatally flawed: as there is no opportunity meaningfully to assess the outcome that would have ensued in the absence of the error, the error is equivalent to a structural defect in the proceedings. Further, the practical effect of the putative waiver was to forfeit appellant's fundamental right to have 12 decision makers at the penalty phase, each of whom would have had the power to veto the death sentence. (See *Wiggins v. Smith* (2003) 539 U.S. 510, 537.)

In a novel twist, respondent suggests that the standard should be as follows:

> [A]ny error in this regard should be deemed harmless unless there is a reasonable probability the defendant would not have waived jury trial had the trial court attempted to take a second waiver at the commencement of the penalty phase.

(RB 51.) It fails to explain how a reviewing court can make this determination other than by unguided speculation in an alternative universe. Reversal of the death judgment is required.

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2. THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH BASED IN PART ON HIS PUTATIVE POSSESSION IN JAIL OF A SMALL METAL ITEM, WITH NO PROOF THAT IT WAS SHARP OR DANGEROUS

A. The Trial Court Erroneously Relied on Possession of the Small Piece of Metal in Sentencing Appellant to Death

A jail guard testified that appellant, while incarcerated during trial, was found in possession of a small piece of metal five inches long and one inch wide. The guard had no recollection of any other characteristic of the item and disposed of it. At the penalty phase, the prosecutor introduced the incident under section 190.3, factor (b) as a violation of section 4502, which forbids inmates to possess a "sharp instrument." (16 SRT 3403, 3405.) An inmate's possession of a sharp instrument poses a threat of violence in jail, and is typically admissible under section 190.3, factor (b). (E.g., *People v. McKinnon* (2011) 52 Cal.4th 610, 688 [possession of a metal stabbing instrument nine inches long].)

The issue raised by appellant -- whether the alleged incident constituted a crime under section 4502 and posed a threat of violence under section 190.3, factor (b) -- is reviewed de novo. (See *People v. Taylor* (2010) 48 Cal.4th 574, 656; *People v. Butler* (2009) 46 Cal.4th 847, 872; AOB 51.)

Respondent devotes a paragraph of its brief to section 4574, a statute which applies to inmates in possession of a "deadly weapon":

> Section 4574 proscribes any incarcerated person from possessing any "firearm, deadly weapon, explosive, tear gas or tear gas weapon[.]" A deadly weapon is one "likely to produce death or great bodily injury." It is the potential of an item that determines its classification. "The application of section 4574, subdivision (a), is necessarily broad because of manifest security concerns in prisons. Therefore, possession of a potentially dangerous item is a crime of relatively strict liability[.]"

(RB 54, internal citations omitted, brackets in original.) Appellant sees no need to take issue with any point in this legal disquisition because it is patently

irrelevant to this case. The prosecutor here relied on section 4502, not section 4574. (16 SRT 3405.) The trial court, in its findings, referred to section 4502, not section 4574. (17 SRT 3736.) As far as appellant is aware, section 4574 was never mentioned at trial. (AOB 53, fn. 19.) Respondent fails to explain why it discusses the statute, fails to connect it to the facts of this case, and fails to explain how a small piece of metal of unknown characteristics is likely to produce death or great bodily injury. Indeed, the record strongly suggests that the piece of metal was not a "deadly weapon": the jail disposed of the item, the guard had no memory of the item, and appellant was not disciplined or referred for prosecution for possessing a deadly weapon.

Respondent, relying on *People v. Harris* (1950) 98 Cal.App.2d 662 (RB 54), contends that it is "a reasonable inference that a piece of metal that size [five inches long and one inch wide] is similar to a chisel in function, which comes within section 4502." (RB 55.) In *Harris*, the prisoner was found in possession of a metal item which the court of appeal examined:

> It is a steel wood chisel, with the wooden handle broken off, is about six inches long, three-quarters of an inch wide, an eighth of an inch thick, and has a sharpened point.

(*Id.* at p. 663.) Not surprisingly, the court concluded that the chisel was a "sharp instrument" under section 4502. (*Id.* at p. 666.)

A chisel is "[a] metal tool with a sharp beveled edge, used to cut and shape stone, wood, or metal." (American Heritage Dictionary (4th ed. 2006) at p. 326.) In this case, the item could not have been a chisel, or even equivalent to one. There is no evidence that it had a beveled edge, a sharp edge, a point, or a handle (either present or broken off); and no evidence of its flexibility, stiffness, weight, or function. Only speculative fancy can fashion a chisel from the evidence in the record. An inference that reasonably and logically follows from a preliminary fact is one thing; guesswork is another. (*People v. Massie* (2006) 142 Cal.App.4th 365, 374.) "Mere conjecture, surmise, or

suspicion is not the equivalent of reasonable inference and does not constitute proof." (*People v. Anderson* (1968) 70 Cal.2d 15, 24, internal quotation marks omitted; see also *In re H.B.* (2008) 161 Cal.App.4th 115, 119-120.)

Respondent simply cannot bring itself to admit the obvious: there is no evidence that the small piece of meal was "sharp" or had a sharpened point. It has no answer to the principle that "to be a 'sharp instrument' under section 4502, the object must be sharp." (*People v. Hayes* (2009) 171 Cal.App.4th 549, 560.) Given the two known dimensions -- five inches long and one inch wide -- the item could not have had a point. As the thickness of the item is unknown, there is no evidence in the record to support a finding that it was sharp on its edge. Sharpness may be in the eye of the beholder, but this item was rectangular, not sharpened to a point. Thus, as in *People v. Forrest* (1967) 67 Cal.2d 478, 481, where this Court found that a certain knife was not a dirk or dagger "as a matter of law," this small piece of metal of unknown characteristics cannot qualify as a sharpened or stabbing instrument under section 4502 as a matter of law. (See also *People v. La-Grande* (1979) 98 Cal.App.3d 871, 872-873 [concluding that "an unaltered awl is not a dirk or a dagger as a matter of law"].) The prosecution failed to prove this incident beyond a reasonable doubt, and the trial court erred in considering this incident in aggravation under section 190.3, factor (b). [8]

B. The Trial Court's Reliance on this Evidence in Sentencing Appellant to Death Is Prejudicial, Both Individually and When Considered with the Other Penalty Phase Errors

With regard to prejudice, respondent contends that the standard announced in *People v. Watson* (1956) 46 Cal.2d 818, 836, should be applied.

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8. Respondent contends that appellant's failure to object on constitutional grounds constitutes forfeiture of those claims. (RB 55) Appellant addressed that issue in his opening brief. (AOB 58, 70-71.)

(RB 55.) But this Court has "long applied a more exacting standard of review" than the *Watson* standard when assessing whether a state-law error was prejudicial at the penalty phase of a capital trial. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.) In fact, this Court applied the *Brown* standard in *People v. Lewis* (2008) 43 Cal.4th 415, 531, one of cases cited by respondent in its prejudice discussion. (RB 55.) This is not a matter of semantics. The *Brown* standard is clearly more exacting than the *Watson* standard: the former requires a *reasonable possibility* that the error affected the verdict, while the latter requires to a *reasonable probability* that a more favorable result would have been reached absent the error. Further, this Court has concluded that the *Brown* standard is the same "in substance and effect" as the test for prejudice enunciated in *Chapman v. California* (1967) 386 U.S. 18 (*People v. Nelson* (2011) 51 Cal.4th 198, 218, fn. 15), and, the *Chapman* standard is more exacting than the *Watson* standard (*People v. Cahill* (1993) 5 Cal.4th 478, 510; *People v. Diaz* (2013) 213 Cal.App.4th 743, 760). Under the appropriate standard of review, the burden is on the beneficiary of the error -- respondent -- to prove that it was harmless beyond a reasonable doubt. (*People v. Pearson* (2013) 56 Cal.4th 393, 463.) The appropriate inquiry is not whether the verdict would have been rendered absent the error, but whether the verdict actually rendered "'was surely unattributable to the error.'" (*Ibid.*, quoting *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

Respondent's contention that the error was *trivial* (RB 55) is belied by the record and common sense. The prosecution did not believe that the incident was trivial: it fought for the introduction of this incident and relied upon it in closing argument. (AOB 50, 59.) It utilized this evidence because it believed that it would materially strengthen its chances of obtaining a death sentence. (See *People v. Spencer* (1967) 66 Cal.2d 158, 169, fn. 11.) That fact distinguishes this case from *People v. Lewis*, *supra*, 43 Cal.4th 415, cited by respondent (RB 55), where "the prosecutor did not exploit the evidence in

closing argument." (*Id.* at p. 531.)

Nor does it matter whether the prosecutor mentioned the incident one or one hundred times: the trial court got the point. Evidence that a defendant possessed a sharp instrument in jail is similar to evidence of an escape and weighs heavily in the sentencer's determination of penalty, due in large part to the inevitable inferences that arise therefrom: past and future dangerousness and a failure to adjust to confinement. (See *People v. Lancaster* (2007) 41 Cal.4th 50, 95; *People v. Jackson* (1996) 13 Cal.4th 1164, 1232.) The fact that the trial court explicitly relied on the jail incident as support for its death sentence establishes that the error contributed to and affected the verdict. (17 SRT 3755-3758.) As noted in appellant's opening brief, counsel for the codefendant Oday Mounsaveng exploited the incident for these very reasons: "You've heard nothing, Your Honor, about Oday Mounsaveng causing trouble in the jail or having a shank or beating up people or cussing at people or raising hell. . . . So he is not a threat of danger to anyone and to no one in the future." (17 SRT 3676; see also 17 SRT 3691-3692.) Thus, Mounsaveng's counsel used the incident to argue that his client, unlike appellant, did not pose a danger in the future and would not fail to adjust to confinement. (AOB 59-60.)

When evaluating an error's effect on the verdict under the *Chapman* standard (and presumably the *Brown* standard), a reviewing court must look to the *entire record*, including the mitigating evidence. (See *People v. Aranda* (2010) 55 Cal.4th 342, 367.) In this case, appellant grew up in a war zone in a third-world, communist country. His family was poor; he was uneducated and forcibly conscripted into the army as a child; he was shuffled from one war refugee camp after another; he may have been on drugs during the crime; and he showed remorse when confessing to the crime. (AOB 61, fn. 22; 17 RT 3755.) The weight of this mitigating evidence was diminished by the erroneous admission of the aggravating evidence and, therefore, could not be

fairly considered by the sentencer. The fundamental principle that a capital sentencer must be able to give meaningful effect to a defendant's mitigation (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 246-248) is not satisfied where the defendant is allowed to introduce his mitigation, but the mitigation is considered and weighed against a welter of inadmissible, damaging aggravation. That is to exalt form over substance. For there to be a fair consideration of the mitigation, it must be considered and weighed against admissible aggravation.

The decision between life and death is rarely a foregone conclusion; it may be influenced by even a small addition to the evidence for death:

> The aggravating evidence in [the defendant's] case was strong, but it was not so overwhelming as to preclude the possibility of a life sentence. Heinous crimes do not make mitigating evidence irrelevant.

(*Hovey v. Ayers* (9th Cir. 2006) 458 F.3d 892, 930.) Thus, the high court has recognized that "the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion given to the sentencer." (*Satterwhite v. Texas* (1988) 486 U.S. 249, 256; see also *Mills v. Maryland* (1966) 486 U.S. 367, 376-377 ["In reviewing death sentences, the Court has demanded even greater certainty that the [sentencer's] conclusions rested on proper grounds"].) When the sentencer weighs an invalid factor in its decision, "a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." (*Stringer v. Black* (1992) 503 U.S. 222, 232.) The error that occurred here placed significant weight on death's side of the scale. Standing alone, that error requires reversal.

But this error does not stand alone. It is one of three serious penalty phase errors where the trial court considered and relied upon inadmissible and damaging aggravating evidence in sentencing appellant to death: this claim involves the putative possession of a sharp instrument in jail; the next involves

a putative threat to a jail guard; and the third, a non-violent walkaway from prison. If this Court believes that the error raised herein is not sufficient in and of itself to require reversal, then reversal is required when the error is viewed in the context of the other penalty phase errors. The trial court considered and relied upon these errors together in concluding that appellant posed a continuing threat of violence. This Court must do the same in determining whether the penalty phase errors were prejudicial: it must consider the cumulative effect of those errors upon the death sentence. (AOB 59-60.) [9]

Reviewing courts have recognized the need for cumulative error review in a variety of contexts. (E.g., *Taylor v. Kentucky* (1978) 436 U.S. 478, 487 & fn. 15 [instructional errors]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303 [evidentiary errors]; *People v. Hill* (1998) 17 Cal.4th 800, 844 [errors at closing argument].) When assessing errors committed at the penalty phase of a capital case, cumulative error review is particularly important, not only because of the need for heightened reliability when life is at stake, but also due to the unique circumstances of the penalty determination. The sentencer in a capital case is given great discretion, must consider and balance the evidence on both sides, and must make a moral decision based on individualized assessment of the defendant. In making the ultimate decision, the balance of aggravating and

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9. Respondent attempts to dispose of cumulative error review by noting: "Appellant is entitled to a fair trial, not a perfect one, even where his life is at stake." (RB 66.) It is true that an accused is not entitled to a perfect trial: "Perfection falls not to the share of mortals." (Lane et al, *Too Big a Canon in the President's Arsenal: Another Look at United States v. Nixon* (2010) 17 Geo. Mason L.Rev. 737, 776, quoting George Washington.) But appellant never claimed otherwise. His claim is that the impact of the three penalty phase errors, whether considered individually or cumulatively, violated his rights under state and federal law and denied him a fair trial at the penalty phase, thus requiring reversal of the death judgment.

mitigating factors must be scrupulously accurate. Erroneously admitted aggravating evidence, and the inferences that arise therefrom, skew the balance. The weight of the evidence in favor of death is artificially inflated, and the weight of appellant's mitigating evidence is perforce reduced. Cumulative error review, by taking account of the full impact of capital sentencing phase errors, redresses that imbalance.

Respondent's brief concludes with an unexplained observation: "the federal Constitution allows consideration of non-statutory as well as statutory aggravating factors. (See *Barclay v. Florida* (1983) 463 U.S. 939, 947.)" (RB 56.) The most direct answer to this observation is that California law does not: "A prosecutor is not permitted to introduce aggravating evidence that does not fall within the listed statutory aggravating factors." (*People v. Thomas* (2012) 54 Cal.4th 908, 945.) Appellant also notes that the passage in *Barclay* cited by respondent is followed by this statement: "It was not irrational or arbitrary to apply these aggravating circumstances to the facts of this case." (*Barclay v. Florida*, *supra*, 463 U.S. at p. 947.) Here, appellant was denied a long-standing, core protection under California's death penalty scheme: the limitation of aggravating factors to those listed in the statute. When a capital case sentencer violates that protection by considering and relying on evidence outside the listed factors, its action is unprincipled and arbitrary. The death sentence must be reversed.

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3. APPELLANT'S ANGRY AND AMBIGUOUS RETORT TO A JAIL GUARD WAS NOT AN UNLAWFUL THREAT UNDER SECTION 69, AND WAS ERRONEOUSLY RELIED UPON BY THE TRIAL COURT IN SENTENCING APPELLANT TO DEATH

While appellant was detained in jail during trial, he was involved in a fight with another inmate. The prosecution's notice of aggravation and its witness described the incident as an "altercation" that resulted in cuts and scratches to both participants. (3 CT 787; 16 SRT 3281-3285, 3412.)

The prosecution presented no witness to testify about the altercation. However, a jail guard who investigated the incident several days thereafter did testify at the penalty phase. He concluded that appellant was the aggressor, and informed appellant that he would be placed in solitary confinement: i.e., appellant would be isolated, locked alone in a cell 24 hours a day, and taken out of the cell every other day for a 30-minute shower. In response, appellant assumed an angry stance and yelled several times: "I see you all the time on the streets, I'll remember you." [10] The guard deemed this a threat and gave appellant a rules violation. (16 SRT 3413, 3421.) He did not ask appellant what he meant by the statement, did not ask for a translator (appellant's command of the English is not good, according to the guard), and did not know whether appellant was later found guilty of the alleged rule violation. Appellant apparently complied with the guard's orders and proceeded peacefully to solitary confinement. The guard had no further contact with

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10. The guard's testimony initially suggested that appellant was placed in solitary confinement as a result of his statements: "He was housed in isolation, given a rule violation for the statements." (16 SRT 3413.) His later testimony makes clear, however, that appellant's angry retort was made in response to the solitary confinement punishment: "I was interviewing him, and then when I told him what was going to happen to him as far as isolation, that's when he became hostile at the same time." (16 SRT 3418; see also 16 SRT 3412-3413, 3414.)

appellant. (16 SRT 3416-3417, 3420, 3424.)

Over defense objection, the prosecution was permitted to introduce this incident at the penalty phase under section 190.3, factor (b) as a threat in violation of the first clause of section 69: that clause proscribes the use of a violent threat in an attempt to deter an officer in the performance of his duties. (*In re Manuel G.* (1997) 16 Cal.4th 805, 813; *People v. Lacefield* (2007) 157 Cal.App.4th 249, 255.) To establish a violation of the first clause, the prosecution is must prove beyond a reasonable doubt that the defendant, with the specific intent of deterring the officer's performance of duties, made a statement that reasonably appeared to be a serious expression of an intention to inflict bodily harm. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153; *People v. Hines* (1997) 15 Cal.4th 997, 1060; *People v. Nishi* (2012) 207 Cal.App.4th 954, 967.)

As with the prior claim, review of this claim is de novo: whether the alleged conduct constituted a crime under section 69 is a legal question, as is the question of whether the conduct posed an express or implied threat of force or violence under section 190.3, factor (b). (See *People v. Taylor* (2010) 48 Cal.4th 574, 656; *People v. Butler* (2009) 46 Cal.4th 847, 872.)

Respondent mentions section 69 only once, when it quotes the prosecutor as arguing that the incident "comes in under factor B [*sic*] as a violation of section 69 of the Penal Code." (RB 57.) Its primary contention appear to be that threats by an inmate that occur "immediately after an otherwise admissible violent criminal incident are admissible under factor (b)." (RB 58.) That contention is repeated at the end of its argument: "appellant's threat was properly admissible as being made immediately after an otherwise admissible violent incident." (RB 60.) In other words, irrespective of section 69, the statements were admissible under section 190.3, factor (b) because they occurred immediately after an admissible altercation.

This contention is plainly without merit. First, it is directly contrary to

the manner in which the issue was presented and argued at trial. The incident litigated at trial was the alleged threat to the jail guard, not the altercation. (AOB 90.) The prosecutor argued that appellant's statements were admissible as a threat under section 69. (16 SRT 3736.) As far as appellant is aware, the prosecutor never made the argument, now raised by respondent, that the incident was admissible under factor (b) because it occurred "immediately" after the fight. Nothing in the record shows that the defense or the trial court were aware of this theory of admissibility. As appellant had no notice of this theory of admissibility, it cannot be raised for the first time on appeal. (See *Sheppard v. Rees* (9th 1990) 909 F.2d 1234, 1236-1237 ["The Sixth Amendment guarantees a criminal defendant a fundamental right to be clearly informed of the nature and cause of the charges in order to permit adequate preparation of a defense"]; *People v. Smith* (1983) 34 Cal.3d 251, 270-271 [Attorney General's new theories cannot be raised for the first time on appeal].)

Second, there was no "properly admitted evidence" regarding the altercation because the prosecution, for whatever reason, chose not to present the testimony of the guards who witnessed it. (AOB 66, fn. 22; 16 SRT 3404-3405; 17 SRT 3570-3571, 3630.) As respondent acknowledges (RB 57), the trial court concluded that absent eyewitness testimony, the fight was "probably inadmissible." When the court asked defense counsel whether he wanted to strike any reference to the fight, counsel replied that the prosecutor "hasn't presented that yet." The court agreed, stating "Right." (16 SRT 3405.) Thus, contrary to respondent's premise, there was no evidence of an otherwise admissible violent incident that would permit the introduction of the putative threat.

Third, appellant's statements to the guard did not occur "immediately" after the altercation, as is required by the cases cited by respondent. (RB 58, 60; cf. AOB 67, fn. 27.) In *People v. Kipp* (2001) 26 Cal.4th 1100, the defendant attempted to escape from the Los Angeles County jail and, while being

subdued, threatened to kill the officer. The prosecution did not argue that the death threat violated a penal statute (at the time, the now-applicable threat statute, section 422, had not been adopted), but rather that it was admissible "as part of the attempted escape." (*Id.* at p. 1133 & fn. 3.) This Court agreed and concluded that "threats made while in custody *immediately after* an otherwise admissible violent criminal incident are themselves admissible under factor (b)." (*Id.* at p. 1134, emphasis added.) Similarly, in *People v. Montiel* (1993) 5 Cal.4th 877, the defendant tried to escape arrest, fought with the officer, and made threats while being subdued. (*Id.* at pp. 915-916.) As in *Kipp*, this Court concluded that:

> Even if defendant's threats were not themselves crimes, they occurred *in the course of* a violent, criminal resistance to arrest, and they were thus admissible under factor (b) to demonstrate the aggravated nature of defendant's unlawful conduct.

(*Id.* at pp. 916-917, internal citation omitted, emphasis added.)

Kipp and *Montiel* conclude that a statement to a guard that is otherwise inadmissible under factor (b) may be admitted to provide context to admissible violent criminal conduct. "Context" is not an unlimited concept, however; it requires at a minimum a temporal connection, as *Kipp* and *Montiel* make clear. The statement must occur "in the course of" or "immediately" after the admissible conduct. This temporal nexus provides the basis upon which otherwise inadmissible aggravating evidence may be considered and relied upon by the sentencer in a capital case.

The context rule does not apply here for two reasons. First, as noted, there was no substantial evidence of violent criminal conduct -- i.e., the altercation -- because the prosecution chose not to introduce evidence of that incident. (16 SRT 3382-3384.) Second, the statements were not admissible to provide context for the altercation because the required temporal nexus between the two is absent: appellant's angry retort occurred several days after the altercation; it did not occur during the course of or immediately after an

admissible violent incident. Appellant's statements cannot provide context to an incident that the prosecution chose not to litigate.

To the extent that respondent contends that appellant's statements violated section 69, this too lacks merit. Section 69 is not directed at threats simpliciter, but rather at threats of violence that are intended to deter the lawful performance of an officer's duties. (*In re Manuel G.*, *supra*, 16 Cal.4th at pp. 814-815; *People v. Superior Court (Anderson)* (1984) 151 Cal.App.3d 893, 897.)

Not all angry or heated statements to a jail guard violate section 69, or are admissible under factor (b). In *People v. Tuilaepa* (1992) 4 Cal.4th 569, this Court took note of the "general notion" that "abusive and even threatening language" is not inevitably admissible under factor (b). (*Id.* at p. 590.) Even a death threat to a guard may be only "an angry retort" and therefore inadmissible under factor (b). (*Ibid.*) In *People v. Silva* (1988) 45 Cal.3d 604, where the defendant told a police officer that "he would kill the first police officer to step inside his cell if he was not permitted to visit with his wife," the Attorney General conceded error, and this Court viewed the statement as simply "heated frustration from being deprived of visits by his wife." (*Id.* at p. 636.) Similarly, in *People v. Pinholster* (1992) 1 Cal.4th 865, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459, where the defendant stated that "if he were not sent to state prison he would 'go out on the streets and do something to get back in,'" this Court observed that the statements were "arguably inadmissible." (*Pinholster*, *supra*, at pp. 961-962.) In *People v. Rodrigues* (1994) 8 Cal.4th 1060, where the defendant threatened to "kick [a guard's] ass," respondent did not argue that the incident "constituted conduct properly falling under section 190.3, factor (b), or that there was substantial evidence in the record of a Penal Code violation." (*Id.* at pp. 1170-1171.) In short, "mere angry utterances or ranting soliloquies, however violent" do not

violate threat statutes. (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 861-862.) [11]

Respondent attempts to distinguish *Tuilaepa* on the basis that "appellant admitted a rules violation" for the altercation. (RB 59) However, the defendant in *Tuilaepa* did not contest whether the incidents had occurred. (*People v. Tuilaepa, supra*, 4 Cal.4th at pp. 587-591.) Respondent also notes that the defendant in *Tuilaepa* was locked in his cell, while appellant was not. But *Tuilaepa* involved section 71, which requires that "it reasonably appears to the recipient of the threat that such threat could be carried out." (*Id.* at p. 590, fn. 8.) Although section 69 does not require that showing, it does require that a threat reasonably appear to be a serious expression of an intention to inflict bodily harm. (*People v. Hines, supra*, 15 Cal.4th at p. 1060.) Appellant sees little difference in those requirements. Whether or not a defendant is locked in a cell, the question is whether the statement constitutes a serious expression of an intention to inflict bodily harm in an attempt to deter an officer from performing his duties. *Tuilaepa* may not involve the same penal statute, but the issue it presented -- whether statements qualified as a threat -- is similar to that presented here.

Remarkably, respondent contends that appellant's statements were "rather chilling" as opposed to the "angry outburst" in *Tuilaepa.* (RB 59.) The exact opposite is true. The defendant in *Tuilaepa* made explicit death threats to the guards, and threated to burn a guard's face. (RB 58.) By contrast, appellant said, "I see you all the time on the streets, I'll remember you." (16 SRT 3413.) Surely, explicit death threats to a guard are more chilling than the strange and ambiguous statements made by appellant.

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11. In his opening brief, appellant set forth statements that have been held to violate section 69 (or other criminal threat statutes), typically statements with an unmistakable threat of great violence and physical action designed to deter the officer from performing his duties. (AOB 67.)

Taken literally, appellant's first statement -- "I see you all the time on the streets" -- was a statement of lawful conduct, which would not constitute a violation of section 69. (See *In re Manuel G.*, *supra*, 16 Cal.4th at pp. 814-815; *People v. Superior Court (Anderson)*, *supra*, 151 Cal.App.3d at pp. 894-895.) If not taken literally, the statement made little sense. The guard testified that this was his first and only contact with appellant. (16 SRT 3420.) Therefore, appellant could not have seen him all the time on the streets." The guard did not testify that the term "streets" had a different meaning in a custodial context from its normal meaning.

An unequivocal statement of an intent to do harm may not be required to establish a violation of section 69. (See *People v. Iboa* (2012) 207 Cal.App.4th 111, 119-120; *In re Ryan D.*, *supra*, 100 Cal.App.4th at p. 861.) But the statute requires a serious expression of an intention to inflict bodily harm and a discernible intent to deter the officer. (*People v. Hines*, *supra*, 15 Cal.4th at p. 1061; *People v. Iboa*, *supra*, 207 Cal.App.4th at pp. 118-119.) Here, as noted, appellant's statements were ambiguous, as might be expected from a person without a command of the English language. (See *In re George T.* (2004) 33 Cal.4th 620, 635 [ambiguous nature of poem, and the circumstances surrounding its dissemination, failed to establish that the poem constituted a criminal threat]; *People v. Walker* (1988) 47 Cal.3d 605, 639 [concluding that an ambiguous statement did not violate section 69].) Ambiguous or not, however, the statements do not contain a serious expression of an intention to inflict bodily harm, or a discernible intent to deter the officer.

It is also true that context may assist in determining whether a statement qualifies as a true threat. (See *People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1153; *People v. Iboa*, *supra*, 207 Cal.App.4th at pp. 119-120.) But respondent's idea of context is a one-sided description of appellant's angry appearance, his close physical proximity to the guard, and the alleged (and discredited) proximity in time between the altercation and statements that occurred days

later. (RB 59-60.) The true context includes more. When the guard ordered him to change jumpsuits, appellant complied. The guard then informed him that he was being placed in solitary confinement; i.e., that he would be locked alone in a cell, 24 hours a day, and let out only every other day for a 30-minute shower. Solitary confinement is no small punishment, [12] and appellant would remain there for two years. He reacted by assuming an angry stance and making the two statements noted above. Appellant does not have command of the English language. Neither statement explicitly attempted to deter the officer's performance of his duties, and neither appeared to be a serious expression of an intention to inflict bodily harm. Appellant, having expressed his anger, apparently proceeded peacefully to solitary confinement. (16 SRT 3420.) The guard did not call for backup, and did not request the prosecutor to charge appellant with a crime. In fact, he had no further contact with appellant. The guard's actions are not consistent with a person who feels that he has been threatened with violence.

Respondent points out that the guard took appellant's words as a threat. (RB 59-60.) But it is difficult to describe the guard's view of a "threat" as anything but tautological: "In our position as a correctional officer, umm, any time a person or inmate threatens you, that's considered something that's considered a threat." (16 SRT 3418.) When pressed by the trial court to state what he observed, not his interpretation, the guard testified, "He was angry at me." (16 SRT 3421.) Jail guards must feel free to pursue their lawful duties

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12. Courts have long recognized the psychopathological effects of solitary confinement upon inmates. (See *In re Medley* (1890) 134 U.S. 160, 167-171 [concluding that solitary confinement for four weeks was "an additional punishment of the most important and painful character"]; *McClary v. Kelly* (W.D.N.Y. 1998) 4 F.Supp.2d 195, 208 [the notion that "prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this Court as rocket science"].)

without fear of violence. (See *People v. Martin* (2005) 133 Cal.App.4th 776, 782.) But it is not against the law for a pretrial detainee to express anger. "[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." (*People v. Iboa*, *supra*, 207 Cal.App.4th at p. 120, fn. 4, quoting *City of Houston, Tex. v. Hill* (1987) 482 U.S. 451, 461.) Regardless of the guard's belief, whether a statement violates section 69 is a question of law to be decided by a court, not by a guard. [13]

Respondent also contends that appellant's statements are similar to those at issue in *People v. Hines*, *supra*, 15 Cal.4th 997, a capital case involving section 69. In a parenthetical description, it summarizes this Court's holding:

> threats than an officer would "be sorry [he] ever saw" the defendant, that the defendant would kill the officer, and that the defendant would kick an officer if he searched the defendant's property all admissible under factor (b)[.]

(RB 60, first brackets in original.) Even in this truncated description, the key fact that distinguishes *Hines* from this case is readily apparent: a direct threat to kill the officer. Indeed, the defendant in that case made three explicit threats, including the death threat, and each involved physical action that could be reasonably construed as an attempt to discourage the guard from performing his duties. (*Id.* at p. 1059.) In this case, by contrast, neither appellant's statements nor his actions could reasonably be construed as an attempt to deter the guard from performing his duties or as a serious expression of an intention to inflict bodily harm. He complied with the guard's orders, changed his clothes without incident, and did not physically resist in any manner. His angry reaction and insensate retort are a far cry from

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13. Appellant notes that proof of the subjective state of mind of the officer purported threatened is not required under the statute. (See *People v. Hines*, *supra*, 15 Cal.4th at p. 1061, fn. 15 [§ 69 does not require that the recipient of the threat actually fear that the threat will be carried out].)

the death threats in *Hines*. [14]

When placed in context, appellant's angry, ambiguous statements appear to be nothing more than that. By describing them as "chilling," respondent is inappropriately embellishing the plain meaning of the words "so that the law may reach them." (*United States v. Bagdasarian* (9th Cir. 2011) 652 F.3d 1113, 1120.) More apt is the observation made by this Court in *People v. Boyd* (1985) 38 Cal.3d 762, 774: "trivial incidents of misconduct and ill temper" should not be the basis for a death sentence. Appellant's statements were not threats under section 69 as a matter of law. Concomitantly, the prosecution failed to prove this incident beyond a reasonable doubt. The trial court erred in considering this incident in aggravation.

As regards the prejudice that ensued from the trial court's consideration of this incident, respondent's argument is brief:

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

(RB 60.) Respondent meant to refer to Argument Two, not Argument Three, but the slip is revealing. As discussed in the last issue, each of these claims involves the sentencer's consideration of erroneously admitted aggravating evidence. In all three, that evidence should not have been considered by the sentencer or given "any weight in the penalty determination." (*People v. Boyd.*,

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14. It also bears noting that *Hines* was decided before *In re Manuel G.*, *supra*, 16 Cal.4th 805, where this Court concluded that section 69 "does not reach threats made only in response to or in retaliation for an officer's past performance of his or her duties." (*Id.* at p. 817 & fn. 6; AOB 91.) Appellant's statements, to the extent they had any meaning other than an expression of anger, were made in response to the guard's past performance of his duties: his placement of appellant in solitary confinement. Respondent does not address this argument.

supra, 38 Cal.3d at p. 773.) In all three, the trial court relied on the incident in sentencing appellant to death. As appellant has argued, these errors must be considered both individually and cumulatively in assessing prejudice.

Appellant reiterates (see Arg. 2, *ante*) that the correct standard of review for federal law error at the penalty phase is derived from *Chapman v. California* (1967) 386 U.S. 18, 24; for state law error, the standard is found in *People v. Brown* (1988) 46 Cal.3d 432, 447-448. Second, the trial court explicitly relied on the jail incident as support for its death sentence: that fact establishes beyond a reasonable doubt that the error contributed to, that is, affected the verdict. Third, this type of aggravating evidence, allegedly threatening a jail guard, inevitably invokes inferences of past and future dangerousness and a failure to adjust to confinement, each of which weighs heavily in the sentencer's determination of penalty. Fourth, the incident was exploited by counsel for the codefendant. Fifth, the weight of the mitigating evidence here was diminished by the erroneous admission of aggravating evidence and, therefore, could not be fairly considered. The trial court's error in admitting the evidence, in considering it in aggravation, and in explicitly relying on it as a basis for its death sentence requires reversal of that sentence under any standard of review. If the Court believes that the error is not sufficient in and of itself to require reversal, then reversal is required when it is viewed in the context of, or cumulatively with, the other penalty phase errors.

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4. THE TRIAL COURT ERRED IN RELYING ON APPELLANT'S NONVIOLENT WALKAWAY FROM A PRISON CAMP IN WASHINGTON STATE NINE MONTHS BEFORE THE CAPITAL CRIME AS A CIRCUMSTANCE OF THE CRIME IN SENTENCING APPELLANT TO DEATH

A. The Claim Should Be Addressed on the Merits

Appellant's attorney introduced prison documents showing that appellant committed a nonviolent walkaway from a prison camp in Washington State nine months before the capital crime. The walkaway occurred at the end of appellant's prison term, and may have been motivated by a fear of deportation to Laos, where he would likely be killed by the Laotian government. (17 SRT 3634-3636.) Defense counsel introduced those documents at the guilt phase, and failed to object at the penalty phase to the trial court's consideration of the walkaway as a circumstance of the crime under section 190.3, factor (a). (AOB 75-77.) The attorney is the captain of the ship (*In re Horton* (1991) 54 Cal.3d 82, 95), and a failure to object to error may be imputed to the client and result in forfeiture of a claim. But application of the forfeiture rule is not automatic. (*People v. McCullough* (2013) 56 Cal.4th 589, 593.) That rule should not be applied where, as here, the captain appears to have been asleep at the helm.

Respondent notes that a failure to object to evidence offered under factor (b) of section 190.3 can result in forfeiture. (RB 62, citing *People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1052.) But appellant's walkaway was admitted under factor (a), as a circumstance of the crime, not under factor (b) as conduct involving a threat of violence. While a similar forfeiture rule may apply to evidence offered under factor (a), respondent provides no argument why such a rule should apply here. There are differences between the two factors, including the fact that by pleading not guilty, appellant challenged the prosecution's presentation of "the circumstances of the crime." (See *People v. Tully* (2012) 54 Cal.4th 952, 1010 [a defendant's plea of not guilty placed all

material issues in dispute].)

In his opening brief, appellant argued that the claim should be addressed on its merits because it presents a pure question of law, a well-established exception to the forfeiture rule. (AOB 77.) Respondent contends that a pure question of law is not present because "[w]hether an escape is admissible under any of the factors is dependent on the individual facts of the case[.]" (RB 63.) Appellant agrees with that proposition as a general matter, but in this case, the "individual facts" are known and undisputed. The walkaway was evidenced by a document, Exhibit 121, as respondent recognizes. (RB 62.) No credibility determinations were made; and no independent evidentiary analysis is required of this Court. All that remains is a pure question of law: whether the walkaway was admissible as a circumstance of the crime under section 190.3, factor (a). This Court is in as good a position as the trial court to decide that issue, and clearly has the discretion to do so. (See *People v. Runyan* (2012) 54 Cal.4th 849, 859, fn. 3; *People v. Yeoman* (2003) 31 Cal.4th 93, 118; *People v. Mills* (1978) 81 Cal.App.3d 171, 175-176.) Application of the pure question of law exception is particularly appropriate "when the enforcement of a penal statute is involved," or the error fundamentally affects the validity of the judgment. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) Both of these circumstances are present here: the erroneous admissibility of this aggravating evidence fundamentally affected the death verdict, as is discussed below. This Court has also observed that a defendant "is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera* (1997) 15 Cal.4th 269, 276.) The right to a reliable, accurate and individualized sentence must be counted as fundamental, and that right is denied when a defendant is sentenced to death based in part on evidence that is inadmissible at the penalty phase. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-586.)

Respondent recognizes that addressing the merits of the claim would

"arguably" increase reliability of the penalty determination. (RB 63-64.) [15] That is an astonishing recognition. If reaching the merits of a claim would arguably increase the reliability of the death sentence, then application of a procedural bar would arguably decrease the reliability of that determination. Respondent's recognition that addressing the merits of the claim may increase the reliability of the factfinding that precedes the imposition of a death sentence is consistent with the demands of the Eighth and Fourteenth Amendments. (See *Deck v. Missouri* (2005) 544 U.S. 622, 632.) It is consistent with this Court's long-standing practice of scrutinizing the penalty phase of a capital trial "with considerable care." (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1028; see also *People v. Lew Fat* (1922) 189 Cal. 242, 247 ["In view of the fact, however, that this is a capital case, we have carefully scrutinized the record"].) It is consistent with the forfeiture statute itself, Evidence Code section 353: the Assembly Judiciary Committee's comment on the statute states that the objection requirement is "subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law." (*People v. Mills* (1978) 81 Cal.App.3d 171, 175-176.) And it is consistent with The American Bar Association's recommendations for reviewing capital cases: appellate courts "should review under a knowing, understanding, and voluntary waiver standard all claims of

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15. Respondent's brief states:

> [T]he circumstance that ignoring the forfeiture rule in the present case might lead to greater reliability in the penalty determination is arguably applicable to any capital case, which would result in the forfeiture rule never being applied to any case of arguable *Boyd* error. Appellant does not advance any argument that the circumstance of arguably increased reliability of the penalty determination applies uniquely to his case as compared to other capital cases in which *Boyd* error is asserted.

(RB 63-64.)

constitutional error not properly raised at trial and on appeal and should have a *plain error rule* and apply it liberally with respect to errors of state law." (Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases, Report of the American Bar Association's Recommendations Concerning Death Penalty Habeas Corpus* (1990) 40 Am.U. L.Rev. 1, 10, emphasis added.)

Respondent faults appellant for failing to argue that the need for heightened reliability applies "uniquely" to his case capital case. (RB 63-64.) No such argument is required, however, because the acute need for heightened reliability applies to all capital cases. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) But there are unique circumstances here: appellant's own attorney introduced the evidence in question, apparently oblivious to the repercussions at the penalty phase; there is mitigating evidence; the co-defendant received a life sentence; and the error here is one of three instances where the trial court considered and relied upon inadmissible aggravation in imposing the death sentence.

The state has "a strong interest in reducing the risk of mistaken judgments in capital cases." (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1299.) Forfeiture of this claim would not further that interest. As respondent recognizes, addressing the issue on the merits of the claim may increase the reliability of this Court's review of the death sentence. The merits of the claim should therefore be addressed.

B. The Walkaway Was Not Part of the Circumstances of the Offense Under Section 190.3, Factor (a)

As noted, evidence of appellant's nonviolent walkaway from a prison camp was admitted as a circumstance of the crime under section 190.3, factor (a), not as conduct involving a threat of violence under factor (b). Respondent does not dispute that the walkaway was inadmissible under either factor (b) or (c). It was neither violent nor inherently dangerous, as is required for admissibility under factor (b) (see *People v. Castaneda* (2011) 51 Cal.4th 1292,

1334-1335 [evidence of defendant's nonviolent escapes was inadmissible factor (b)]; and there was no conviction, as is required under factor (c). Nor does respondent contend that the evidence was admissible on any other basis; for example, to rebut mitigating evidence. (E.g., *People v. Keenan* (1988) 46 Cal.3d 478, 514.)

Given that the incident was inadmissible under factors (b) or (c), the issue is whether a nonviolent walkaway that occurred nine months before the capital crime and a thousand miles away is admissible as part of the circumstances of the crime under factor (a). [16] Respondent relies upon *People v. Turner* (1990) 50 Cal.3d 668, where the capital crime occurred within months after the defendant had been released from prison. This Court concluded that the prosecutor could properly suggest in argument that the "homicide took place under 'circumstances' indicating defendant's unwillingness to learn from prior punishment[.]" (*Id.* at pp. 713-714; RB 64.) The Court later described the defendant's prior prison term as "a circumstance' of the capital crime which is logically relevant to penalty, since it suggests that defendant was unswayed from criminal conduct by his recent incarceration." (*Id.* at p. 717, fn. 31.)

Appellant's opening brief discusses *Turner* and several other cases that have construed factor (a) to include a defendant's prior escape or prison term. (AOB 79-81; see also *People v. Wader* (1993) 5 Cal.4th 610, 667-668; *People v. Johnson* (1992) 3 Cal.4th 1183, 1243.) Each of the factors in section 190.3 is designed to direct the sentencer's attention to specific and commonly understandable facts regarding the crime and the defendant. (*People v. Tuilaepa*

16. Respondent allows that five months elapsed from the walkaway, calculating from the commencement of the string of robberies. (RB 64.) But the lack of a temporal connection between the walkaway and the circumstances of the crime is evident whether one accepts five or nine months.

(1992) 4 Cal.4th 569, 595.) Incidents that are "not within the statutory list" are irrelevant and entitled to no weight in the life and death determination. (*People v. Boyd* (1985) 38 Cal.3d 762, 773, 775.) The purpose of section 190.3 is not "to place all conceivably relevant 'bad character' evidence before the [sentencer]." (*People v. Balderas* (1985) 41 Cal.3d 144, 202.) Nonviolent criminality is of "limited importance" to a death penalty determination. (*Ibid.*) Accordingly, the statute prevents the sentencer from hearing evidence of conduct which, although criminal, is not of a type which should influence a life or death decision. (*People v. Boyd*, *supra*, 38 Cal.3d at p. 776.) In other words, the fact that evidence may be "logically relevant to penalty" does not suffice for admissibility under the statute. The statute prescribes what is admissible.

A nonviolent walkaway that occurred nine months before the capital crime and a thousand miles away cannot be wedged in to factor (a) as part of the "circumstances of the crime" without doing violence to the plain meaning of the words. And if a nonviolent incident is inadmissible, any inferences drawn therefrom, such as an unwillingness to learn from prior incarceration, future adjustment, or a continuing pattern of criminality are inadmissible.

The record here also strongly suggests that neither the prosecution nor the trial court believed that the walkaway was truly part of the circumstances of the crime. The prosecution did not attempt to introduced the incident at the guilt phase. (Cf. *People v. Kipp* (2001) 26 Cal.4th 1100, 1125-1126.) The trial court did not consider the incident itself, but rather relied upon it to draw an aggravating inference: that it showed a "continuing pattern of ongoing violent conduct and criminality." (16 SRT 3757.) [17] As the incident was nonviolent, it

17. The trial court stated that it was not considering the walkaway itself in aggravation, probably because it recognized that the incident was nonviolent. (16 SRT 3757.)

could not rationally show a continuing pattern of violent conduct. As regards a pattern of ongoing criminality, that is the purpose of factors (b) and (c), not factor (a). The purpose of factor (b) is to show defendant's propensity for violence; the purpose of factor (c) is to show that the defendant was undeterred by the previous criminal sanctions. (*People v. Lewis* (2001) 25 Cal.4th 610, 664; *People v. Melton* (1988) 44 Cal.3d 713, 770.) Even respondent, in its brief, refers several times to factor (b) and "*Boyd*" error. (RB 62, 63-65; *People v. Boyd*, *supra*, 38 Cal.3d at pp. 773-774) Thus, the record shows that even though the walkaway was admitted under factor (a), the trial court did not considered it under factors (b).

Respondent contends that the trial court, in considering the circumstances of the crime, could take into account that it was committed by "a person who had recently escaped from incarceration to show appellant's dangerousness." (RB 64.) Appellant had not "recently" escaped, as the walkaway occurred nine (or even five) months before the capital crime. More importantly, the walkaway was concededly nonviolent: respondent does not explain how a nonviolent incident demonstrates a defendant's dangerousness.

By a twist of logic, a nonviolent incident that was inadmissible under the statute and should have had no place in the life or death decision, was recast as part of appellant's "status" at the time of the capital crime, and then admitted under factor (a), as part of the circumstances of the crime. The trial court erred in admitting the incident under that factor and in relying upon inferences drawn therefrom in sentencing appellant to death..

C. <u>The Error Is Prejudicial</u>

As regards prejudice, this Court has correctly observed that the "erroneous admission of escape evidence may weigh heavily in the [sentencer's] determination of penalty." (*People v. Gallego* (1990) 52 Cal.3d 115,

196.) [18] In this case, where the escape was nonviolent, what weighed heavily was the aggravating inference that the trial court drew therefrom: showing a continuing pattern of ongoing violent conduct and criminality.

Respondent points to several cases where the erroneous introduction of escape evidence at the penalty phase was found to be "relatively trivial" and, thus, harmless. (RB 8, quoting *People v. Carrington* (2009) 47 Cal.4th 145, 194 & *People v. Farnam* (2002) 28 Cal.4th 107, 189-190.) Appellant doubts the usefulness of such comparisons in a capital case because each case and each defendant is different, the aggravating and mitigating circumstances differ widely from case to case, and the sentencer must consider all of those factors in reaching its moral determination as to the appropriate sentence. In fact, respondent's forfeiture argument contends that the admissibility of an escape is "dependent on the individual facts of the case[.]" (RB 63.) What is trivial in one case may be a lodestone in another.

Moreover, the two "trivial" cases cited by respondent involved *attempted* escapes. In *People v. Carrington*, *supra*, 47 Cal.4th 145, the jury was instructed to view the evidence an escape attempt with caution, thereby "diminish[ing] the likelihood that the jurors gave significant weight to this evidence," and the prosecutor explicitly argued that the escape evidence paled compared to the other factors. (*Id.* at pp. 193-194.) In *Farnam*, the attempted escape was undoubtedly trivial as the defendant was "a repeat sexual predator and

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18. Respondent quotes this Court's opinion in *People v. Wright* (1990) 52 Cal.3d 367, 426: "We have never held that *Boyd* error *alone* constituted reversible error." (RB 65, emphasis in original.) As noted, *Boyd* error refers to the erroneous admission of aggravating evidence under section 190.3, factor (b), not factor (a) as occurred here. But the result is the same: the trial court erroneously considered and relied upon significant evidence in aggravation, including adverse inferences drawn therefrom, in sentencing appellant to death. That error was not "alone": the erroneous admission of aggravating evidence occurred three times. (Args. 2, 3 & 4.)

murderer." (*People v. Farnam*, *supra*, 28 Cal.4th at pp. 189-190.)

In this case, unlike most capital cases, the reasoning of the sentencer is on the record. And that record, quoted for one-half of a page in respondent's brief (RB 62), shows that the trial court considered and relied on an inference drawn from the walkaway incident as a basis for sentencing appellant to death. If the inference were trivial, the trial court would not have explicitly relied upon it as a reason for imposing death. The death sentence must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 448.) If the Court believes that the error is not sufficient in and of itself to require reversal, then reversal is required when it is viewed in the context of, or cumulatively with, the other penalty phase errors. (See Args. 2 & 3, *ante*.)

//

CONCLUSION

For all of the reasons stated above, appellant's convictions and death sentence must be reversed.

DATED: December 31, 2013.

MICHAEL J. HERSEK
State Public Defender

DOUGLAS WARD
Senior Deputy State Public Defender
Cal. State Bar No. 133360

1111 Broadway, Suite 1000
Oakland, California 94607
Phone: (510) 267-3300

Attorneys for Appellant

CERTIFICATE AS TO LENGTH OF BRIEF

Pursuant to California Rules of Court, rule 8.630(b)(2), I hereby certify that I have verified, through the use of our word processing software, that this brief, excluding the tables, contains approximately 15,100 words.

DATED: December 31, 2013.

DOUGLAS WARD
Senior Deputy State Public Defender

Attorney for Appellant
VAENE SIVONGXXAY

ATTACHMENTS TO APPELLANT'S REPLY BRIEF: TWO UNPUBLISHED FEDERAL OPINIONS AND A STATE BAR COURT OPINION

Petilla v. Bank One LaFayette (9th Cir., Aug. 25, 1997, No. 96-17317) 122 F.3d 1073

122 F.3d 1073, 1997 WL 559423 (C.A.9 (Cal.))
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 122 F.3d 1073, 1997 WL 559423 (C.A.9 (Cal.)))

C

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Ninth Circuit.
In re: Rodolfo Enriquez **PETILLA**, Debtor,
Rodolfo Enriquez **PETILLA**, Appellant,
v.
BANK ONE LAFAYETTE, N.A., Appellee.

No. 96-17317.
Submitted Aug. 25, 1997.[FN**]

FN** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a); 9th Cir. R. 34-4.

Decided Sept. 3, 1997.

Appeal from the United States District Court for the Eastern District of California Robert E. Coyle, Chief District Judge, Presiding

Before: SCHROEDER, FERNANDEZ, and RYMER, Circuit Judges.

MEMORANDUM[FN*]

FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

***1** Chapter 7 debtor and attorney Rodolfo Enriquez Petilla appeals pro se the district court's affirmance of the bankruptcy court's judgment following a trial in favor of Bank One Lafayette, N.A. ("Bank One"). The bankruptcy court held that Petilla's credit card debt to Bank One was nondischargeable under 11 U.S.C. § 523(a)(2)(A) and entered judgment for Bank One in the amount of $12,268.65 plus costs and interest.

We have jurisdiction pursuant to 28 U.S.C. § 158(d). This court independently reviews the bankruptcy court's rulings on appeal from the district court. *See Levin v. Maya Constr. Co. (In re Maya Constr. Co.)*, 78 F.3d 1395, 1398 (9th Cir.), *cert. denied*, 117 S.Ct. 168 (1996). We review the bankruptcy court's conclusions of law de novo and the court's findings of fact for clear error. *See Alsberg v. Robertson (In re Alsberg)*, 68 F.3d 312, 314 (9th Cir.1995), *cert. denied*, 116 S.Ct. 1568 (1996). A finding of whether a requisite element of a section 523(a)(2)(A) is present is a factual determination that we review for clear error. *See Anastas v. American Sav. Bank (In re Anastas)*, 94 F.3d 1280, 1283 (9th Cir.1996). We affirm.

Petilla contends that the bankruptcy court erred by finding that Petilla intended to defraud Bank One. This contention lacks merit. "[A] court may infer the existence of the debtor's [fraudulent] intent not to pay if the facts and circumstances of a particular case present a picture of deceptive conduct by the debtor." *Citibank (South Dakota), N.A. v. Eashai (In re Eashai)*, 87 F.3d 1082, 1087 (9th Cir.1996).[FN1]

FN1. We have looked to certain nonexclusive factors to determine a debtor's intent to defraud. *See American Express Travel Related Servs. Co. v. Hashemi (In re Hashemi)*, 104 F.3d 1122, 1126 n. 2 (9th Cir.) (listing the factors), *cert. denied*, 117 S.Ct. 1824 (1997).

Here, there is evidence in the record to support the bankruptcy court's finding that Petilla intended to defraud Bank One: (1) Petilla made approximately $12,000 in charges on his Bank One credit card close to the filing date of his bankruptcy peti-

tion [FN2]; (2) Petilla's charges exceeded his account's credit limit by $2,600; (3) On the same day, Petilla made multiple charges from different credit cards, withdrawing large amounts of cash on each card; (4) Petilla was an accountant and an attorney, who, by inference, knew he could attempt to avoid the charges by filing for bankruptcy; (5) Petilla was "loading up" debt prior to filing his bankruptcy petition by making large charges on his various credit cards; and (6) Petilla used his credit primarily for gambling. Given the evidence in the record, the bankruptcy court did not clearly err by finding that Petilla did not have the intent to repay his debt to Bank One. *See American Express Travel Related Servs. Co. v. Hashemi (In re Hashemi)*, 104 F.3d 1122, 1126 (9th Cir.), *cert. denied*, 117 S.Ct. 1824 (1997).

> FN2. Petilla made the following charges on his Bank One credit card prior to the filing of his bankruptcy petition on July 20, 1994:(1) May 28 ($3,001.50); (2) June 10 ($3,001.00); (3) June 11 ($3,001.00); and June 11 ($3,099.99).

We refuse to consider Petilla's contention that the bankruptcy court erred by failing to make a determination that Bank One justifiably relied on his representations to repay, because Petilla failed to raise this issue below. *See Sierra Club, Inc. v. Commissioner*, 86 F.3d 1526, 1532 n. 13 (9th Cir.1996) (issues not raised below will not be considered on appeal).

***2** Petilla also contends that the bankruptcy court erred by failing to take into account evidence of his custom and habit to pay off his credit card debt. This contention lacks merit because the exhibits Petilla wanted to admit at trial were received as evidence and considered by the bankruptcy court.

AFFIRMED.

C.A.9 (Cal.),1997.
In re Petilla
122 F.3d 1073, 1997 WL 559423 (C.A.9 (Cal.))

END OF DOCUMENT

Petilla v. First Card National Bank (9th Cir., June 3, 1997, No. 96-17037) 116 F.3d 485

116 F.3d 485, 1997 WL 312545 (C.A.9 (Cal.))
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 116 F.3d 485, 1997 WL 312545 (C.A.9 (Cal.)))

C

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Ninth Circuit.
Rudolfo E. **PETILLA**, Appellant,
v.
FIRST CARD NATIONAL BANK, Appellee.

No. 96-17037.
Submitted June 3, 1997 FN**

FN** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a); 9th Cir. R. 34-4.

Decided June 9, 1997.

Appeal from the United States District Court for the Eastern District of California, No. CV-95-05592-REC; Robert E. Coyle, Chief District Judge.

Before: NORRIS, LEAVY, and TASHIMA, Circuit Judges.

MEMORANDUM FN*

FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

***1** Chapter 7 debtor and attorney Rodolfo Enriquez Petilla appeals pro se the district court's affirmance of the bankruptcy court's judgment following trial in favor of First Card National Bank ("First Card"). The bankruptcy court held that Petilla's credit card debt to First Card was nondischargeable under 11 U.S.C. § 523(a)(2)(A) and entered judgment for First Card in the amount of $7,038.87 plus costs and interest.

We have jurisdiction pursuant to 28 U.S.C. § 158(d). This court independently reviews the bankruptcy court's rulings on appeal from the district court. *See Levin v. Maya Constr. (In re Maya Constr. Co.),* 78 F.3d 1395, 1398 (9th Cir.), *cert. denied,* 117 S.Ct. 168 (1996). We review the bankruptcy court's conclusions of law de novo and the court's findings of fact for clear error. *See Alsberg v. Robertson (In re Alsberg),* 68 F.3d 312, 314 (9th Cir.1995), *cert. denied,* 116 *S.* Ct. 1568 (1996). A finding of whether a requisite element of a section 523(a)(2)(A) is present is a factual determination we review for clear error. *Anastas v. American Sav. Bank (In re Anastas),* 94 F.3d 1280, 1283 (9th Cir.1996). We affirm.

1. 11 U.S.C. § 523(a)(2)(A)

Section 523(a) (2)(A) precludes discharge of any debt obtained by "false pretenses, a false representation, or actual fraud." To establish the nondischargeability of a debt under section 523(a)(2)(A), a creditor must show:

(1) the debtor made the representations;

(2) that at the time he knew they were false;

(3) that he made them with the intention and purpose of deceiving the creditor;

(4) that the creditor relied on such representations;

(5) that the creditor sustained the alleged loss and damage as the proximate result of the representations having been made.

Britton v. Price (In re Britton), 950 F.2d 602, 604 (9th Cir.1991). "These requirements mirror the elements of common law fraud, and the creditor is

required to prove each by a preponderance of evidence." *American Express Travel Related Servs. Co. v. Hashemi (In re Hashemi),* 104 F.3d 1122, 1126 (9th Cir.1997) (citation omitted), *cert. denied,* 65 U.S.L.W. 3762 (U.S. May 19, 1997) (No. 96-1530).

a. Fraudulent intent

Petilla contends that the bankruptcy court erred by finding that Petilla intended to defraud First Card. This contention lacks merit. "[A] court may infer the existence of the debtor's fraudulent intent not to pay if the facts and circumstances of a particular case present a picture of deceptive conduct by the debtor." *Citibank (South Dakota), NA. v. Eashai (In re Eashai),* 87 F.3d 1082, 1087 (9th Cir.1996). FN1

FN1. We have looked to certain non-exclusive factors to determine a debtor's intent to defraud. *See In re Hashemi,* 104 F.3d at 1126 n. 2 (listing the factors).

Here, there is evidence in the record to support the bankruptcy court's finding that Petilla intended to defraud First Card: (1) Petilla made over $7,000 in charges on his First Card credit card close FN2 to the filing date of his bankruptcy petition; (2) Petilla was in poor financial condition because his monthly income was exceeded by his gambling debts, which he could not expect to pay from his income; (3) On the same day, Petilla made multiple charges from different credit cards, withdrawing large amounts of cash on each card; (4) Petilla, who was an accountant and an attorney, was financially sophisticated; (5) Petilla was "loading up" debt prior to filing his bankruptcy petition by making large charges on his various credit cards; and (6) Petilla used his credit primarily for gambling. Given the evidence in the record, the bankruptcy court did not clearly err by finding that Petilla did not have the intent to repay his debt to First Card. *See In re Hashemi,* 104 F.3d at 1126.

FN2. Petilla made the following charges on his First Card credit card prior to the filing of his bankruptcy petition on July 20, 1994:(1) June 3 ($35.54); (2) June 7 ($23.68); (3) June 11 ($3,099.99); June 12 ($3,099.99); June 24 ($133.84); and July 4 ($524.99).

b. Justifiable reliance

***2** We refuse to consider Petilla's contention that the bankruptcy court erred by failing to make a determination that First Card justifiably relied on his representations to repay, because Petilla failed to raise this issue below. *See Sierra Club. Inc. v. Commissioner,* 86 F.3d 1526, 1532 n. 13 (9th Cir.1996) (issues not raised below will not be considered on appeal).

2. Custom and habit evidence

Petilla contends that the bankruptcy court erred by failing to take into account evidence of his custom and habit to pay off his credit card debt. This contention lacks merit because the exhibits Petilla wanted to admit at trial were received as evidence and considered by the bankruptcy court. FN3

FN3. To the extent that Petilla contends that the bankruptcy court failed to consider this evidence to show that Petilla had the intent to repay his debt, we reject this contention. As stated above, the bankruptcy court's finding that Petilla did not intend to repay his debts was not clearly erroneous.

3. Bankruptcy court's jurisdiction to enter judgment after determining dischargeability of the debt

Petilla contends that the bankruptcy court lacked jurisdiction to enter a monetary judgment after it determined that Petilla's debt was nondischargeable. We rejected this contention in *Cowen v. Kennedy (In re Kennedy),* 108 F.3d 1015, 1017 (9th Cir.1997).

AFFIRMED.

C.A.9 (Cal.),1997.
Petilla v. First Card National Bank
116 F.3d 485, 1997 WL 312545 (C.A.9 (Cal.))

END OF DOCUMENT

Matter of Petilla (Rev. Dept. 2001) 4 Cal. State Bar Ct. Rptr. 231

Not Reported in Cal.Rptr.2d, 2001 WL 664247 (Cal.Bar Ct.), 4 Cal. State Bar Ct. Rptr. 231
(Cite as: 2001 WL 664247 (Cal.Bar Ct.))

C

Review Department of the State Bar Court of California.
In the **Matter** of Rodolfo Enrique **PETILLA**, A Member of the State Bar.

No. 96–O–05725.
May 14, 2001.

Donald R. Steedman, Office of the Chief Trial Counsel, The State Bar of California, San Francisco, for the State Bar of California.

Rodolfo Enrique Petilla, in pro. per., Fresno, for Respondent.

OPINION ON REVIEW

WATAI, J.

***1** Respondent Rodolfo Enrique Petilla [FN1] seeks our review of a hearing judge's decision finding that respondent incurred credit card debts of $19,327 without intending to repay them. Respondent incurred those debts almost exclusively by obtaining cash advances on two of his credit cards. He admittedly used and lost those cash advances while gambling. Almost immediately after losing the money, respondent attempted to discharge the debts in bankruptcy. The hearing judge concluded that, by incurring those debts without intending to repay them, respondent committed acts in violation of the proscription of committing acts involving moral turpitude, dishonesty, or corruption set forth in Business and Professions Code section 6106.[FN2]

FN1. Respondent was admitted to the practice of law in the State of California on December 12, 1983, and has been a member of the State Bar since that time.

FN2. All further statutory references are to the Business and Professions Code unless otherwise indicated.

In light of the found acts of moral turpitude, [FN3] the hearing judge recommended that respondent be suspended from the practice of law for two years, that execution of the suspension be stayed, and that respondent be placed on probation for two years with conditions, including that he be actually suspended during the first sixty days of his probation and until he makes restitution to the credit card company that he has still not repaid. The hearing judge also recommended that, while respondent is on probation, he be ordered not to gamble and to attend Gamblers Anonymous meetings at least two times a week.

FN3. The State Bar also charged that this same conduct violated respondent's statutory duty, under section 6068, subdivision (a), to support the laws of the United States and this state, but the hearing judge dismissed the charge as duplicative of the section 6106 violation. (See *In the Matter of Whitehead* (Review Dept.1991) 1 Cal. State Bar Ct. Rptr. 354, 369.) The State Bar does not challenge this dismissal on review, and we adopt it on de novo review, but clarify that it is with prejudice (Rules Proc. of State Bar, rule 261(a)).

On review, respondent asserts the following four points of error: (1) that the evidence is insufficient to warrant discipline; (2) that the hearing judge's decision is void because it was not timely filed and because it was, according to respondent, not properly served on him; (3) that the hearing judge's recommended restitution requirement is illegal; and (4) that there is no rational basis to support the hearing judge's recommended requirement that respondent attend Gamblers Anonymous meetings. If we sustain either or both of his first two points of error, respondent requests that we reverse the hearing judge's decision and dismiss this proceeding. If we do not sustain either of his first two points, respondent alternatively requests that we modify the hearing judge's discipline recommenda-

tion to delete either or both of the requirements that respondent make restitution to his unpaid creditor and that he attend Gamblers Anonymous meetings.

The State Bar argues that all of respondent's points of error are meritless and urges us to adopt the hearing judge's findings and discipline recommendation.

After independently reviewing the record (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); FN4 *In re Morse* (1995) 11 Cal.4th 184, 207), we agree with and sustain respondent's fourth point of error in which he contends that there is no rational basis to support the recommendation that he be ordered to attend Gamblers Anonymous meetings, but we reject his other three points of error. We adopt the hearing judge's findings of fact (with minor modifications) and conclusion that respondent is culpable of violating section 6106 as charged. In addition, we adopt the hearing judge's conclusions as to aggravating and mitigating circumstances.

> FN4. All further references to rules are to these Rules of Procedure of the State Bar unless otherwise indicated.

***2** Because there is no basis to support the recommended requirement that respondent attend Gamblers Anonymous meetings, we delete that requirement from the hearing judge's discipline recommendation. We also independently delete from the hearing judge's discipline recommendation the provision recommending that respondent remain on actual suspension until he makes restitution to the credit card company that he has still not repaid and, instead, recommend that respondent be required to make restitution to that company within the first 90 days of his probation. With these two modifications and a few additional modifications of a minor nature, we adopt the hearing judge's discipline recommendation.

I. The Evidence Is Sufficient to Warrant Discipline.

After independently reviewing the evidence, we adopt the hearing judge's findings of fact with minor modifications and hold that the evidence is sufficient to warrant discipline. Accordingly, we reject respondent's first point of error.

The key issue in this proceeding is whether, from May 28, 1994, to July 4, 1994, respondent made charges and obtained cash advances on two credit cards totaling $19,327 without intending to repay the charges and advances. Unquestionably, the act of borrowing money without intending to repay it is dishonest and involves moral turpitude. Section 6106 provides that an attorney's commission of an act of dishonesty or of an act involving moral turpitude or corruption is the basis for the attorney's suspension or disbarment regardless of whether the attorney committed the act while acting in the capacity of an attorney or while engaged in the practice of law.

At least in the absence of an admission by the attorney, proving that he or she borrowed money without intending to repay it is rarely, if ever, capable of being proved with direct evidence. Such intent may be proved by direct or circumstantial evidence. (*Geffen v. State Bar* (1975) 14 Cal.3d 843, 853, citing *Zitny v. State Bar* (1966) 64 Cal.2d 787, 792.) Likewise, an attorney's culpability is not required to be established by direct evidence; circumstantial evidence is sufficient so long as it is clear and convincing. (*Medoff v. State Bar* (1969) 71 Cal.2d 535, 550–551; *Utz v. State Bar* (1942) 21 Cal.2d 100, 103 ["charges of professional misconduct may be established upon circumstantial evidence"].)

In the present proceeding, the only direct evidence on the issue of whether or not respondent intended to repay the $19,327 in credit card debts at the time he incurred them is respondent's testimony. Respondent testified that, when he made the charges and obtained the cash advances totaling $19,327, he intended to repay them in full with either his gambling winnings, his earned income, or both. He also testified that, at the time he incurred the debts, he had sufficient "liquid resources" with

which to repay them in full. In addition, respondent asserts that, at the time, his home was worth more than $100,000 and that his mortgage balance was only $69,373 so that he had home equity of a little more than $30,000.

*3 In his decision, the hearing judge did not expressly state whether he believed or rejected respondent's testimony that he intended to repay the credit card debts when he incurred them. Nonetheless, because the hearing judge found that respondent incurred the credit card debts without intending to repay them, it is clear that he rejected respondent's testimony, albeit implicitly. After independently reviewing the record and giving deference to the hearing judge's implicit rejection of respondent's testimony (rule 305(a)), we also reject respondent's testimony that he intended to repay the $19,327 in credit card debts when he incurred them. Of course, our rejection of respondent's testimony does not, in itself, create affirmative evidence to the contrary. (*In the Matter of Anderson* (Review Dept.1997) 3 Cal. State Bar Ct. Rptr. 775, 785, and cases there cited.)

Because we have rejected respondent's testimony and because there is no other direct evidence in the record regarding whether or not respondent intended to repay the $19,327 in credit card debts when he incurred them, we must review the record and determine whether the hearing judge's findings that respondent incurred the debts without intending to repay them is supported by clear and convincing *circumstantial* evidence. Because we find such clear and convincing evidence, we shall adopt the hearing judge's findings.

From approximately late 1983 to early 1992, respondent practiced law in a law firm or partnership type of practice. Then, in April 1992, he began practicing law as a sole practitioner. Respondent's practice is primarily criminal defense. He is a State Bar certified specialist in criminal law.

Even though respondent was never licensed as a Certified Public Accountant (CPA) in California, he took and passed the California CPA Examination before he incurred the $19,327 in credit card debts.[FN5] Furthermore, before he incurred the credit card debts in question, respondent was licensed as a CPA in the Philippines. In addition to his extensive knowledge of accounting and financial matters as evidenced by his passage of the California CPA Examination and CPA licensing in the Philippines, respondent is and was before he incurred the questioned credit card debts very sophisticated in accounting and financial matters. Respondent was formerly employed as the chief accountant for Longs Drug Store; district accountant of East Bay Municipal Utility District; director of finance and accounting of the Federal Land Bank in Berkeley; and a director, treasurer, chief accountant, and vice president of various major corporations in the United States including Bicoastal Financial Corporation, a corporate "trading company" that has purchased other companies for as much as $1.6 billion.

> FN5. According to respondent, he never received his California CPA license because he did not want to complete the accounting experience requirement (i.e., the requirement that he practice public accounting under the supervision of a licensed CPA for a specified number of years).

In addition, respondent is a "twice-certified college instructor" and has taught part-time at a community college in California for many years—both before and after he incurred the questioned credit card debts.

*4 Respondent claims that his gambling was limited to playing blackjack, that he gambled only in various Nevada casinos, and that he went gambling no more than three or four times a year except in 1994 when he went at least ten times from January to July 4. In respondent's related bankruptcy proceeding, which is discussed below, he testified that he went gambling at Nevada casinos at least once or twice a week in May to July of 1994.

Respondent also testified that he usually took with him $5,000 or $10,000 in cash for gambling each time he went to Nevada and that he once took as much as $24,000. When respondent would lose all of the gambling money he took with him, it would ordinarily not upset him. He opines that a $2,000 to $3,000 gambling loss at Lake Tahoe or Las Vegas was the equivalent to the cost of a boat cruise for him and his wife.

Respondent claims that, except in 1994, he has always been able to pay his debts (including his gambling debts). In fact, before the summer of 1994, respondent routinely paid off large credit card balances in full when he received the bills (according to respondent, he did this to avoid having to pay any interest); he did not ordinarily make installment payments. On July 20, 1994, respondent filed a voluntary petition for bankruptcy under chapter 7 of the Bankruptcy Code in which he sought to discharge $57,054 in debts (almost all of which were gambling debts). As we understand respondent's position, respondent was forced to file for bankruptcy at the age of 54 because of a "free fall" that he experienced at the blackjack tables in late May 1994 to early July 1994. From the record, respondent's "free fall" may appropriately be described as a losing streak during which he lost tens of thousands of dollars.

The record does not disclose how much money respondent actually lost during his "free fall." Presumably, this is because respondent failed to keep records of his winnings and losses. What the record does disclose is that, during the 12–month period preceding his bankruptcy filing, respondent repaid *at least* $114,611 in gambling debts, which is calculated as follows: (1) approximately $62,111 in cash advances that respondent obtained on his credit cards (see Exhibit B to respondent's "Appellant's Opening Brief"); and (2) $52,500 in "gambling markers" from three Nevada casinos (see Exhibit C to respondent's "Appellant's Opening Brief").[FN6] In addition, the record establishes that respondent incurred gambling losses of *at least* $111,000 during that same 12–month period.[FN7] The record does not clearly disclose whether this $111,000 in gambling losses includes all or part of the $57,054 in debts that respondent listed for discharge on his bankruptcy petition.

> FN6. A marker is the functional equivalent of a cash advance from a casino. Casinos do not make actual cash advances (i.e., advances of United States currency); instead they issue casino chips that have specific dollar amounts assigned to them, which they accept in lieu of cash when the borrower places a bet.
>
> FN7. Respondent states on form 7 of his bankruptcy petition that this figure of $111,000 is an estimate of his gambling losses based on a method he denominates as "a net worth method."

In addition, the record discloses that respondent incurred the $57,054 in debts that he listed on his bankruptcy petition during a 37–day period from May 28, 1994, to July 4, 1994. Of this $57,054 in listed debts, $25,000 was for gambling markers from three Nevada casinos and the remaining balance of $32,054 was for debts he incurred on four of his credit cards. Of the $32,054 in credit card debts, approximately $30,464 was for cash advances and related charges and fees and approximately $1,590 was for miscellaneous charges and purchases. According to respondent, he did not borrow the $25,000 in gambling markers until after he had obtained the cash advances totaling approximately $30,464 and lost them gambling.

***5** After respondent filed for bankruptcy, three of the four credit card companies filed adversarial proceedings against him in bankruptcy court alleging that his debts to them were nondischargeable under title 11 United States Code section 523(a)(2)(A) (hereafter section 523(a)(2)(A)). Section 523(a)(2)(A) provides that debts incurred by false pretenses, false representations, or actual fraud are to be declared nondischargeable. To es-

tablish a debt's nondischargeability under section 523(a)(2)(A), a creditor must establish five elements. (*American Express Travel Related Services Co. v. Hashemi* (*In re Hashemi*) (9th Cir.1996) 104 F.3d 1122, 1125, hereafter *Hashemi.*) Those five elements are identical to the elements of common law fraud and are as follows: (1) that the debtor made a representation; (2) that the debtor knew the representation was false; (3) that the debtor made the false representation with the intent and purpose of deceiving the creditor (this element is commonly referred to as "fraudulent intent"); (4) that the creditor relied on the debtor's false representation; and (5) that the creditor sustained a loss as a proximate result of the false representation. (*Ibid.*) A creditor is required to establish these elements only by a preponderance of the evidence. (*Grogan v. Garner* (1991) 498 U.S. 279, 291.)

One of the three credit card companies moved to dismiss its adversarial proceeding. The bankruptcy court granted that company's motion to dismiss, and respondent's debts to that third credit card company and his debts to the fourth credit card company as well as his gambling markers to three casinos were thereafter discharged when the bankruptcy court filed its order of discharge on October 10, 1994.

The other two credit card companies maintained their adversarial proceedings against respondent and pursued their claims against him to judgment. Those two companies are Bank One and First Card. Between May 28, 1994, and July 4, 1994, respondent made charges and obtained cash advances totaling $12,268 on his credit card from Bank One and totaling $7,059 on his credit card from First Card. Respondent's debts to these two companies total $19,327 and are the subject of this disciplinary proceeding. Respondent's remaining debts of $37,727, which were discharged in bankruptcy, are not questioned or otherwise challenged in this disciplinary proceeding.[FN8] Nonetheless, as noted below, we do consider respondent's debts on the third and fourth credit cards for purposes of determining whether he had the intent to repay the $19,327 in questioned debts on his credit cards from Bank One and First Card.

> FN8. Respondent's remaining $37,727 in debts are calculated as follows: $4,015 in debts on the third credit card, $8,712 in debts on the fourth credit card, and $25,000 in gambling markers.

Respondent was the only witness in each of the adversary proceedings. Because there is no right to jury trial in dischargeability proceedings (*Hashemi, supra,* 104 F.3d at p. 1124), the bankruptcy court was the finder of fact in each of these proceedings. In determining whether respondent's debts to Bank One and First Card were nondischargeable, the bankruptcy court applied the 12 non-exclusive factors that the Bankruptcy Appellate Panel of the Ninth Circuit set forth in *In re Dougherty* (Bankr.9th Cir.1988) 84 B.R. 653, 657.[FN9]

> FN9. The 12 *Dougherty* factors are (1) the length of time between the credit card charges and the filing for bankruptcy, (2) whether the debtor consulted an attorney before making the credit card charges, (3) the number of charges made, (4) the amounts of the charges, (5) the debtor's financial condition at the time the charges were made, (6) whether the debtor's charges exceeded the card's credit limit, (7) whether the debtor made multiple charges on one day, (8) whether the debtor was employed at the time the charges were made, (9) the debtor's continuing prospects for employment, (10) the financial sophistication of the debtor, (11) whether there was a sudden change in the debtor's buying or spending habits, and (12) whether the purchases were for necessities or luxuries. (84 B.R. at p. 657.)

***6** In Bank One's adversarial proceeding, the bankruptcy court applied the 12 factors and found that respondent engaged in actual fraud when he in-

curred the $12,268 in debts on his Bank One credit card and, accordingly, entered a judgment declaring respondent's debts to Bank One nondischargeable under section 523(a)(2)(A).[FN10]

> FN10. Respondent attacks this fraud finding on the asserted grounds that the bankruptcy court did not address or find each of the five elements of fraud. (See *Hashemi, supra,* 104 F.3d at p. 1125 [creditors must establish each of the five elements of common law fraud].) Respondent contends that, because the bankruptcy court's fraud finding is defective, it is unfair to use it against him in this disciplinary proceeding. We do not address respondent's attacks on the bankruptcy court's fraud finding because the hearing judge did not and we do not give it preclusive effect under principles of collateral estoppel. In addition, as noted below, reliance upon the bankruptcy court's fraud finding is not necessary to establish respondent's culpability for the charged section 6106 violations.

In First Card's adversarial proceeding, the bankruptcy court also found that respondent engaged in actual fraud when he incurred the $7,059 in debts on his First Card credit card and, accordingly, entered a judgment declaring respondent's debts to First Card nondischargeable under section 523(a)(2)(A).[FN11] Even though Bank One did not do so, First Card sought a money judgment against respondent from the bankruptcy court. Consequently, the bankruptcy court awarded First Card a money judgment against respondent in the amount of $7,059.[FN12] The bankruptcy court also awarded First Card its costs and statutory interest.

> FN11. Respondent also attacks this fraud finding on the asserted grounds that the bankruptcy court did not address or find each of the five elements of fraud. (See our discussion in footnote 10 above .)
>
> FN12. The bankruptcy court's judgment was actually for $7,038.87. We obtained the $7,059 figure from the "schedule of current position on certain dates" that respondent prepared and which was admitted in the hearing department as Exhibit 2. We consider the $20.13 difference between the two figures to be immaterial and, therefore, do not address the issue further.

Respondent appealed the two bankruptcy court judgments to the United States District Court for the Eastern District of California. But the district court affirmed both judgments. Respondent then appealed to the Ninth Circuit Court of Appeals. And, in separate unpublished memorandum opinions, the Ninth Circuit affirmed both of the bankruptcy court's judgments. Respondent sought reconsideration in the Ninth Circuit, which was denied. Thereafter, the Ninth Circuit's memorandum opinions became final and the bankruptcy court's judgments against respondent became final.

Because the bankruptcy court's findings that respondent committed actual fraud when he incurred the $19,327 in debts on his Bank One and First Card credit cards were made under the preponderance of the evidence evidentiary standard, and not the clear and convincing evidentiary standard that is applicable in attorney disciplinary proceedings, the hearing judge correctly declined to apply principles of collateral estoppel to bind respondent with those civil findings in this proceeding. (*In the Matter of Kittrell* (Review Dept.2000) 4 Cal. State Bar Ct. Rptr. ___, ___ [typed opn. p. 12]; *In the Matter of Applicant A* (Review Dept.1995) 3 Cal. State Bar Ct. Rptr. 318, 329.) Nonetheless, because the bankruptcy court's findings are supported by substantial evidence, they are entitled to a strong presumption of validity in the State Bar Court. (*Lefner v. State Bar* (1966) 64 Cal.2d 189, 193; *In the Matter of Applicant A, supra,* 3 Cal. State Bar Ct. Rptr. at p. 325.)

Contrary to respondent's contention, the hearing judge, in making his culpability findings, correctly reweighed the evidence and testimony from

the two adversarial proceedings under the clear and convincing evidentiary standard and gave respondent a fair opportunity in this proceeding to contradict, temper, or explain the evidence and testimony from the adversarial proceedings with additional evidence. (*In the Matter of Kittrell, supra,* 4 Cal. State Bar Ct. Rptr. at p. ___ [typed opn. pp. 12–14].) In addition, the hearing judge correctly permitted the State Bar to present additional evidence on the issue of respondent's culpability. (*Ibid.*)

*7 As we noted above, the dispositive issue in this proceeding is whether respondent made the charges and obtained the cash advances totaling $19,327 on his Bank One and First Card credit cards without intending to repay them. As we also noted above, the act of borrowing money without intending to repay it involves dishonesty and moral turpitude as a matter of law. Thus, to establish respondent's culpability for the charged section 6106 violations, the State Bar need only prove that he incurred these $19,327 in credit card debts without intending to repay them. Unlike Bank One and First Card who were required to prove the five elements of common law fraud to obtain a judgment declaring that respondent's debts to them are nondischargeable under section 523(a)(2)(A), the State Bar is not required to establish each of the five elements of common law fraud to establish the charged violations of section 6106.

After he weighed all the evidence, the hearing judge was "clearly convinced that Respondent borrowed without an intent to repay the money, which is an act of dishonesty." Our independent review of the record also leads us to this conclusion.

While this is not a dischargeability proceeding under the bankruptcy code, we do consider the 12 *Dougherty* factors to be a helpful guide in determining whether respondent incurred the $19,327 in credit card debts without intending to repay them. "[T]he *Dougherty* factors provide a useful means of objectively discerning intent based on the probabilities of human conduct." (*Household Credit Serv. v. Ettell* (*In re Ettell*) (9th Cir.1999) 188 F.3d 1141, 1145.) Even though we view the objective inferences drawn from a consideration of the *Dougherty* factors to be highly probative of whether an attorney incurred a debt without intending to repay it, we do not view them as dispositive. (Cf. *Ettell, supra,* 188 F.3d at p. 1145.) The 12 factors "are non exclusive; none is dispositive, nor must [an attorney's] conduct satisfy a minimum number in order to prove [lack of] intent [to repay]." (*Hashemi, supra,* 104 F.3d at p. 1125.)

The length of time between the credit card debts and the filing of bankruptcy.

Respondent incurred all but a small portion of the $19,327 in questioned debts on his Bank One and First Card credit cards by obtaining seven cash advances on those cards between May 28, 1994, and July 4, 1994. Those seven cash advances total $18,828.[FN13]

> FN13. The remaining portion of the $19,327 total consists of a miscellaneous charge of $141 on June 21, 1994, a miscellaneous charge of $134 on June 24, 1994, and interest and service charges of $224.

Respondent correctly points out that he obtained most of these seven cash advances during the three-day period from June 10, 1994, to June 12, 1994. During that three-day period, respondent obtained five out of the seven advances. Those five advances total $15,302. Respondent had previously obtained one of the seven advances on May 28, 1994. That advance was for $3,001. Thus, at the end of the three-day period on June 12, 1994, respondent had obtained six of the seven advances totaling $18,303 ($15,302 plus $3,001) on his Bank One and First Card credit cards. Respondent obtained the seventh and last advance on July 4, 1994. That advance was for $525.

*8 With respect to the debts totaling $12,727 that respondent incurred on his other two credit cards between May 28, 1994, and July 4, 1994, all but a small portion of the $12,727 were for cash advances. Specifically, respondent obtained five cash

advances totaling $11,350 on those two credit cards.

Respondent testified that, by early July 1994, he had lost not only all of the $18,828 in cash advances he obtained from his Bank One and First Card credit cards, the $11,350 in cash advances he obtained from his other two credit cards, and the $25,000 in gambling markers listed on his bankruptcy petition, but also all of his remaining funds and liquid assets. Respondent claims that, after he received his July credit card billing statements, he concluded that he was forced to file for bankruptcy. And he did so on July 20, 1994, without attempting to work out a repayment plan with even one of his creditors.

When respondent was asked in the hearing department whether he contacted any of the credit card companies in an attempt to work out a repayment plan before he filed for bankruptcy, he answered: "No. They were contacted by the bankruptcy court." And, when he was asked whether he considered paying off the credit card debts in installments before he filed for bankruptcy, he also answered: "No." Moreover, respondent testified that he was not aware that he could make minimum monthly payments on his credit card debts instead of paying them off in full when he received the bills; he testified that he did not finally become aware of the monthly payment option "until all of this came to a head. When we were preparing for trial, then I began to look at this." He further testified that he "was not fully conscious of [the credit card companies' minimum pay provisions]. I don't know how else to put that. And my not being fully conscious of it is probably because I didn't care. I owed the money. I paid it in full." Not only is respondent's testimony not believable, it is inconsistent with his claim that he always paid his credit cards bills in full to avoid having to pay any interest. It is also inconsistent with his testimony in the bankruptcy court.

Respondent testified in Bank One's adversarial proceeding: "And you notice on [Bank One's billing] statement, and I would represent that on all these statements until I got into real serious trouble in June and July [1994] I never even had to pay any late fees, a late charge. I always paid the thing on time. Okay. According to the billing cycle. [¶] Now, not only that [Bank One's] bills as well as bills of all the other credit companies *always had* an amount called a minimum payment small amount, and I didn't even do that. I always paid the entire statement when due ...." (Emphasis added.)

In his closing arguments in Bank One's adversarial proceeding, respondent argued: "Now, on the date that I borrowed from [Bank One] I had enough funds to pay them and I have habitually, habitually paid [Bank One] and all the other credit card companies on time in full although their statements *always said* that I could pay the small minimum payment every month and that they would be satisfied with that. [¶] I always paid them in full until the really serious problem came up [in June and July 1994], and that is [evidence] of my intention, Your Honor, to pay. It's a habit, it's a custom and I habitually pay them on time in full even though under the terms of their own statements that they gave me, I could have paid just a little bit at a time." (Emphasis added.) Respondent's testimony and closing arguments in bankruptcy court simply don't make sense unless respondent knew for years that when he got a credit card billing statement (including Bank One's statements) he had the option of either paying the amount due in full to avoid having to pay any interest [FN14] or making at least the stated minimum payment and thus incur interest charges on the unpaid balance.

> FN14. As we noted above, respondent even claims that, before the summer of 1994, he always paid his credit cards off as soon as he received the statements to avoid having to pay any interest.

Whether respondent consulted another attorney concerning bankruptcy before the debts were incurred, and respondent's financial sophistication.

***9** There is no evidence that respondent consul-

ted a bankruptcy attorney before he incurred the $19,327 in questioned credit card debts. Nevertheless, we find that, at a minimum, respondent knew that he could attempt to avoid repaying these debts by filing a bankruptcy petition. Furthermore, in light of respondent's legal training and extensive accounting and financial experience as outlined above, his claim of being completely ignorant of bankruptcy law is simply implausible.

The number and amount of respondent's charges.

As indicated above, on his credit cards from Bank One and First Card, respondent obtained seven cash advances totaling $18,828 and made two miscellaneous charges totaling $275 ($141 plus $134) right before filing for bankruptcy. Six of those seven cash advances were for more than $3,000. Furthermore, three of the seven advances totaling $9,201 were obtained on the same day—June 11, 1994.

And, as indicated above, respondent also obtained five cash advances totaling $11,350 on his other two credit cards. Three of the five cash advances were for more than $3,000. Furthermore, three of the five advances totaling $7,725 were obtained on the same day—June 11, 1994. Thus, on June 11, 1994, respondent obtained six cash advances totaling $16,926 on his four credit cards.

Whether respondent's charges and cash advances were above his credit limits.

After obtaining the seven cash advances totaling $18,828 on his Bank One and First Card credit cards, respondent had only $1,350 of his $8,500 credit limit remaining on his Bank One credit card and had exceeded his $9,500 credit limit on his First Card credit card by $2,770. Furthermore, after obtaining the five cash advances totaling $11,350 on his third and fourth credit cards, respondent had exceeded his credit limits on each of those cards.

Respondent's financial condition at the time of the charges and cash advances.

Respondent also argues in his "Appellant's Opening Brief" that he "always had sufficient liquid resources in Fresno Banks on each date that he received cash advances from Bank One and First Card. On [June 12, 1994], the total owed to these two credit card companies was $18,362.69 against $35,432.45 in liquid resources. (Exhibit A). Even considering all credit card charges, including those whose dischargeability in bankruptcy were not questioned, on June 12, 1994, Respondent had a total of $29,293.50 versus liquid resources of $35,432.45." According to respondent, the fact that he allegedly had sufficient liquid resources with which to repay the cash advances from Bank One and First Card on the day he obtained them, strongly supports his claim that he intended to repay the debts in full. We cannot agree. Respondent's factual assertion itself is misleading. Respondent did not have $35,432.45 "in liquid resources in Fresno Banks." Of this $35,432.45, $14,700 was only a line of credit at First Interstate Bank. Yet, on "Exhibit A" to his "Appellant's Opening Brief" and on State Bar Exhibit 2, respondent lists that line of credit as though it were a bank account at First Interstate Bank in which he had $14,700 on deposit. (While respondent testified that his "liquid resources" included a $14,700 credit limit, he also testified that "liquid resources" were his "cash assets" and that "liquid resources" are what was in his bank accounts.)

***10** Moreover, respondent's comparison of his $18,362.69 in cash advances from Bank One and First Card as of June 12, 1994, to his alleged $35,432.45 in liquid resources on June 12, 1994, does not provide an accurate picture of his financial condition on that date. Using respondent's liquid asset comparison method, an accurate picture of respondent's financial condition on June 12, 1994, may be obtained by comparing his *total credit card debts* (i.e., his debts on all four of the credit cards; not just his debts on his Bank One and First Card credit cards) to his *total liquid assets* (i.e., cash on hand, cash in the bank, and marketable securities). On June 12, 1994, respondent's *total credit card debts* were $29,293.50,[FN15] and his *total liquid assets* were $20,732.45 ($35,432.45 less $14,700).

Thus, on June 12, 1994, respondent's debts on all four of his credit cards exceeded his liquid assets by $8,561.05. In other words, excluding the alleged equity in respondent's home, respondent had a negative net worth of $8,561.05 on June 12, 1994.

> FN15. This figure includes respondent's $18,303 total cash advances on his credit cards from Bank One and First Card as of June 12, 1994, plus $10,931 in charges and cash advances that respondent had incurred on his third and fourth credit cards as of June 12, 1994.

According to respondent's bankruptcy petition, he incurred the $25,000 in gambling markers listed in his bankruptcy petition during the 10–day period between June 25, 1994, and July 3, 1994, which was after he had obtained all but the seventh of the questioned cash advances on his Bank One and First Card credit cards. Thus, respondent argues that we should not consider these $25,000 in markers when determining his financial condition when he obtained the first six of the seven questioned cash advances. We agree. The fact that respondent borrowed an additional $25,000 days after he had already obtained the first six cash advances is irrelevant to respondent's financial condition when he obtained those first six advances.

However, the $25,000 in markers are relevant to determining respondent's financial condition on July 4, 1994, when he obtained the seventh and last of the questioned cash advances. According to Exhibit A to his "Appellant's Opening Brief," respondent's liquid resources totaled $20,082 on July 4, 1994; accordingly, his liquid assets on that day totaled only $5,382 ($20,082 less $14,700). Thus, before respondent obtained the seventh cash advance on July 4, 1994, his total debts of $56,529 *exceeded* his actual liquid assets of $5,382 by $51,147. In other words, excluding the alleged equity in respondent's home, respondent had a negative net worth of $51,147 before he obtained the questioned cash advance, which as noted above was for $525.

We reject respondent's description of the $525 cash advance as small and not material. Regardless of the amount, obtaining a cash advance without intending to repay it is dishonest and involves moral turpitude.

We also consider highly relevant the facts that, on June 10, 1994 (which was the same day that respondent obtained a $3,001 cash advance from Bank One), respondent repaid a $5,000 marker to a Las Vegas casino; and (2) that, on June 11, 1994 (which is the same day on which respondent obtained six cash advances totaling $16,926 on his four credit cards), respondent repaid markers totaling $10,000 to two Las Vegas casinos. Thus, it is clear that respondent "effectively" used, if not actually used, all or part of these advances to repay preexisting gambling debts.

***11** Moreover, respondent's claim that he intended to repay the cash advances with his gambling winnings is not convincing. Respondent's alleged intent or hope to repay the cash advances from his gambling winnings is too speculative and unreasonable to constitute or evidence intent to repay. (See *American Express Travel Related Servs. Co. v. Nahas* (*In re Nahas*) (Bankr.S.D.Ind.1994) 181 B.R. 930, 934; *In re Hansbury* (Bankr.D.Mass.1991) 128 B.R. 320; but see *AT & T Universal Card Servs. v. Alvi* (*In re Alvi*) (Bankr.N.D.Ill.1996) 191 B.R. 724, 734 [debtor's hope to repay debts from gambling winnings is evidence of intent to repay].) This is particularly true in this case where respondent is obtaining large cash advances on the same day he is repaying gambling debts in the form of casino markers. And it is particularly true in this case where respondent has not proffered any documentary evidence to support his claims that, before his "free fall," he was an experienced and "successful" or "winning" blackjack player. Moreover, in light of the fact that respondent never kept any records of his gambling winnings and losses, any hope of repaying any portion of his credit card debts with gambling winnings is unreasonable.

We do not find respondent's claim that he intended to repay the cash advances with his income to be convincing evidence of intent to repay. Without question, his income was inadequate and unpredictable in relation to the large amount of debt and net gambling losses he was incurring for, at least, the 12 months prior to the filing of his bankruptcy petition. This strongly suggests that respondent incurred the $19,327 in debts to Bank One and First Card without intending to repay them.

During the last eight months of 1992 (which was the first year in which respondent began practicing law as a sole practitioner), respondent earned a net income from practicing law of $6,358.15, which is approximately $795 per month. In 1993, his net income from practicing law rose to $34,615.85, which is approximately $2,885 per month. For the period of January 1994 until July 18, 1994 (which was two days before respondent filed his bankruptcy petition), respondent's *gross* income (i.e., income before business expenses—law office rent, telephone, etc.) was $21,617.63, which is approximately $3,325.79 per month. And, for the four months immediately before he filed for bankruptcy (i.e., April, May, June, and July 1994), his *gross* income was only $1,620 per month.

In other words, before respondent filed his bankruptcy petition in July 1994, his approximate gross monthly income was either $3,325 .79 or $1,620. However, his personal living expenses alone were, at least, $2,200 per month. Even if respondent could reasonably have expected that his net income from his law practice would double from $34,615.85 (or $2,885) per month in 1993 to $69,231.70 (or $5,769.31 per month) in 1994, his income would still have been insufficient and inadequate to repay the large debts and gambling losses he was incurring.

***12** During a short period, respondent obtained multiple cash advances on his credit cards either almost meeting or exceeding his credit limits, continued to obtain credit in the form of gambling markers from various casinos, and then apparently lost all of his remaining "liquid assets" during his "free fall" from late May 1994 to early July 1994. He argues that he was then *forced* to immediately file bankruptcy in mid July 1994 without even considering or attempting to work out a repayment plan with his creditors or, if he is really totally ignorant of bankruptcy law as he claims, without seeking the advice of a bankruptcy attorney to determine if there were alternatives to immediately filing a chapter 7 petition for complete discharge (i.e., a chapter 13 petition under which respondent could have had a court ordered workout plan with respondent's creditors).

In summary, respondent incurred debts totaling $57,054 within a period of 37 days, all but exhausting his credit line with the credit card companies and receiving substantial credit from the casinos, and then filed to have them discharged in bankruptcy within just 16 days after he obtained his last credit card cash advance. Respondent claims not to have consulted an attorney, but rather was persuaded to seek bankruptcy protection by Donald Trump, who spoke of his bankruptcy experience on television. We do not lose sight of the fact that it is respondent, himself an attorney and a CPA who is very sophisticated financially, who would have this court believe that he was ignorant of bankruptcy laws. We are not persuaded.

"Intent to repay requires *some* factual underpinnings which lead a person to a degree of certainty that he or she would have the ability to repay. Mere hope, or unrealistic or speculative sources of income, are insufficient." (*Chemical Bank v. Clagg* (Bankr.C .D.Ill.1993) 150 B.R. 697, 698, emphasis added.) The record clearly establishes respondent's hopeless financial condition, at least, from May 28, 1994, through July 4, 1994, if not during the entire 12–month period preceding his bankruptcy petition. Despite his meager and unpredictable income and monthly living expenses in excess of $2,200, respondent continued to make charges and obtain cash advances totaling $32,054 on his four credit cards in the face of staggering gambling losses and

lack of adequate liquid assets to repay his debts.

In sum, respondent could not have possibly failed to perceive the hopelessness of repaying his mounting cash advances in the face of his gambling losses and lack of assets and current income. The circumstantial evidence clearly and convincingly establishes that respondent incurred the $19,327 in credit card debts to Bank One and First Card without intending to repay it.

II. The Hearing Judge's Decision Is Not Void.

In his second point of error, respondent contends that the hearing judge's decision is void (1) because the hearing judge did not file the decision within 90 days after he took the case under submission as required by rule 220(b) [FN16] and (2) because, according to respondent, the Clerk of the State Bar Court did not properly serve a copy of the hearing judge's decision on him. For the reasons stated below, we reject both of respondent's arguments and hold that the hearing judge's decision is valid although it is superseded by this opinion on review (*In the Matter of Hunter* (Review Dept.1994) 3 Cal. State Bar Ct. Rptr. 81, 87 [on de novo review, review department opinions supersede hearing department decisions]).

FN16. Respondent incorrectly cites rule 220(c) in his appellant's brief.

A. The 90–day time limit in rule 220(b) is neither mandatory nor jurisdictional.

***13** In 1998, the State Bar Board of Governors amended rule 220. It adopted a new subdivision (b) to that rule. That new subdivision (b), which applies in all cases in which the matter was taken under submission on or after February 1, 1999, provides that "[t]he Court shall file its decision within ninety (90) days of taking the matter under submission, unless a shorter period for filing the decision in an expedited proceeding is required by statute, by Supreme Court rule, or by these rules." In the present case, the hearing judge took the matter under submission on November 15, 1999.[FN17] Therefore, under rule 220(b), he should have filed his decision no later than February 14, 2000.[FN18] However, he did no do so. He filed his decision four days late on February 18, 2000.

FN17. Respondent erroneously recites in his appellant's brief that the hearing judge took the case under submission on November 12, 1999.

FN18. The 90th day was actually February 13, 2000; however, that day was a Sunday. Accordingly, the hearing judge's decision was not due until the following Monday, February 14, 2000.

First, respondent cites no authority for his novel proposition that a late filed decision is void. And, clearly, we are unaware of any. Second, construing the 90–day time limit in rule 220(b) as mandatory or jurisdictional would be unjustifiably inconsistent with the long-standing Supreme Court precedent that, once it has been established that an attorney has engaged in professional misconduct, the misconduct will not be disregarded because of irregularities in the disciplinary proceeding unless the irregularities reasonably can be seen to have resulted in *actual unfairness or specific prejudice* to the attorney. (See, e.g., *In re Gross* (1983) 33 Cal.3d 561, 566–567.) Third, such a construction would be inconsistent with our own Rules of Practice that have long provided (in relevant part) that no proceeding *shall* be dismissed, nor *shall* the recommended discipline be reduced, nor *shall* the disposition of a State Bar Court proceeding be influenced in any manner solely because of a hearing judge's failure to comply with the filing deadlines set forth in the Rules of Practice. (Former Provisional State Bar Ct. Rules of Prac., rule 1130(d), now State Bar Ct. Rules of Prac., rule 1130(e).)

In sum, we hold that the 90–day time limit in rule 220(b) is neither mandatory nor jurisdictional, but directory. Accordingly, we reject respondent's contention that the hearing judge's decision is void because it was filed four days after the expiration of the ninety-day time limit. Furthermore, because re-

spondent has failed to establish that he has suffered any actual harm or prejudice, he is not entitled to any relief for the hearing judge's failure to file his decision within the time prescribed in rule 220(b). "The claimed 'injustice' done to [respondent] is that because of the delay his future was made uncertain .... Undoubtedly this created a period of pressure and tension for [respondent], but this fact alone does not require a dismissal of these proceedings." (*Arden v. State Bar* (1959) 52 Cal.2d 310, 316.)

B. The clerk properly served a copy of the hearing judge's decision on respondent.

Respondent contends that the hearing judge's decision is void because, according to respondent, the Clerk of the State Bar Court did not properly serve a copy of the decision on him. In support of this novel contention, respondent claims that the clerk was required to serve a copy of the hearing judge's decision on him by mailing a copy to him at the address he maintains on the official membership records of the State Bar (official address). Respondent further claims that the clerk did not mail a copy of the decision to him at his official address,[FN19] but instead improperly mailed it to the address of his old office, which he describes as "an old, abandoned, vacant business suite."

> FN19. Respondent admits to using his home address as his official address. Section 6002.1, subdivision (a)(1), expressly requires an attorney to use his *current office address* as his official address unless he does not have an office address. Throughout these proceedings, respondent has admittedly maintained a law office. Accordingly, it is clear that respondent has used his home address as his official address in violation of section 6002.1, subdivision (a)(1).

***14** Not surprisingly, respondent cites no authority to support his novel theory that a clerk's failure to correctly serve a copy of a court's decision renders the decision void. And we are unaware of any. In any event, we reject respondent's contentions because we find that the clerk properly served a copy of the hearing judge's decision on respondent.

Rule 61(b) clearly provides that, except with respect to the initial pleading in a proceeding, a respondent shall be served at the respondent's official address "*unless,* with respect to the proceeding in connection with which the service is made, the [respondent] has counsel of record or *has designated a different address for service in the response* ...." (Emphasis added.) Moreover, rule 103(c)(1) clearly requires that a respondent's response (or answer) to the notice of disciplinary charges (NDC) must contain "an address on service of the respondent in the proceeding." And that address for service is the address listed in the upper left-hand corner of the first page of the response. (Cf. State Bar Ct. Rules of Prac., rule 1110(b)(1); see also State Bar Ct. Rules of Prac., rule 1110(h) ["A party who is not represented by counsel shall sign the party's pleading and state the party's address and telephone number on the first page of the pleading."].)

On May 27, 1999, a copy of the NDC in this matter was properly served on respondent at his official address. Thereafter, on June 14, 1999, respondent, appearing in propria persona, filed and served his response (answer) to the NDC.

In the top left-hand corner on the face page of his response and directly below his name, his State Bar membership number, and his title "Attorney at Law," respondent listed his address as: 2115 Kern Street, Suite 103–M, Fresno, CA 93721 (the Kern Street address).[FN20] By listing the Kern Street address on the face page of his response to the NDC, respondent designated the Kern Street address as his address for service in this proceeding. (Rules 61(b), 103(c)(1); State Bar Ct. Rules of Prac., rule 1110(b)(1) & (h).) Respondent's contentions to the contrary are not only meritless, but frivolous.

> FN20. On June 14, 1999, respondent also filed a "Status Conference Statement"

> form that he filled out and signed. That form contains a specific section in which the respondent (or his attorney if he has one) is to write his name and address. In that section, respondent wrote his name and again listed the Kern Street address as his address for service.

Respondent listed the Kern Street address as his address on every pleading that he filed in this matter before the hearing judge filed his decision. And every document or notice that the clerk served on respondent after respondent filed his answer to the NDC and before the hearing judge filed his decision was served on respondent at the Kern Street address. There is no evidence that respondent ever complained to the clerk or notified the clerk that he wanted to be served at a different address. Nor is there even an allegation by respondent that he did not receive the copy of the hearing judge's decision that was *properly* served on him at the Kern Street address.

III. The Hearing Judge's Restitution Recommendation is Not Illegal.

In April 1999, which was eight months before the trial in this proceeding, respondent finally repaid the $7,059 in purchases that he charged and the cash advances he obtained on his First Card credit card between May 28, 1994, and July 4, 1994. However, respondent has still not repaid the $12,268 in cash advances he obtained on his Bank One credit card between May 28, 1994, and July 4, 1994.

***15** Respondent contends that, because he used the $12,268 in cash advances that he obtained on his Bank One credit card to play blackjack, they are gambling debts. Citing *Metropolitan Creditors Service v. Sadri* (1993) 15 Cal.App.4th 1821, respondent further contends that, because his debts to Bank One are "gambling debts," they are not enforceable in California. Respondent then argues that, because his "gambling debts" to Bank One are not enforceable in California, the hearing judge's recommendation that he be ordered to make restitution to Bank One in the amount of $12,268 is illegal. We disagree.

In California, it is well established that restitution in attorney disciplinary proceedings is not a form of debt collection. (Cf. *Brookman v. State Bar* (1988) 46 Cal.3d 1004, 1008–1009 [restitution is not imposed solely because the attorney has not paid a debt discharged in bankruptcy].) Nor is it used as a means of compensating the victim of wrongdoing. (*Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1044.) However, restitution is an important part of rehabilitation and public protection because it forces errant attorneys to confront, in concrete terms, the harm that their misconduct has caused. (*Brookman v. State Bar, supra,* 46 Cal.3d at p. 1009.) Because the responsibilities of a lawyer differ from those of a layman, a lawyer may be required to make restitution as a moral obligation even when there is no legal obligation to do so. (*In the Matter of Distefano* (Review Dept.1991) 1 Cal. State Bar Ct. Rptr. 668, 674.)

In sum, we not only conclude that the hearing judge's recommendation that respondent be required to make restitution to Bank One is legal, we also conclude that it is appropriate and necessary to respondent's rehabilitation and for protection of the public. Accordingly, we too shall recommend that respondent be ordered to make restitution to Bank One.

IV. There Is No Rational Basis To Support the Recommendation that Respondent be Required to Attend Gamblers Anonymous Meetings.

We agree with respondent's contention that there is no factual basis to support the hearing judge's recommendation that he be required to attend Gamblers Anonymous meetings. We addressed a similar issue in *In the Matter of Koehler* (Review Dept.1991) 1 Cal. State Bar Ct. Rptr. 615, 629. In that case, we held that, before a mental health treatment condition may be recommended, there must be either expert *or* other clear evidence of a mental or other problem requiring such treatment. (*Ibid.*, citing *In re Bushman* (1970) 1 Cal.3d 767, 777, dis-

approved on other grounds in *People v. Lent* (1975) 15 Cal.3d 481, 486, fn. 1.)

The State Bar neither impeached nor rebutted respondent's testimony that he has not gambled since 1994. The State Bar did not proffer any expert testimony that respondent suffers from compulsive gambling. Nor is there any other evidence in the record establishing or indicating that respondent currently suffers from compulsive gambling.

***16** The State Bar's reliance on *In re Kelley* (1990) 52 Cal.3d 487 to support the hearing judge's recommendation that respondent be ordered to attend Gamblers Anonymous meetings is misplaced. In *Kelley* the Supreme Court rejected Kelley's "contention that referral to the State Bar alcohol abuse program [was] unsupported by the evidence and unnecessary to protect the public. As the State Bar points out, the first step after referral is evaluation and screening for suitability of enrollment in the program. We agree with the review department that two drunk driving convictions, the second involving a violation of a court order based on the first, warrant this measure even absent an evidentiary finding that petitioner in fact suffers from such a problem." (*Id.* at pp. 498–499.) Kelley's two drunk driving convictions, the second of which was committed in violation of the terms of the criminal probation imposed on her as a result of her first conviction, distinguish *Kelley* from the present case. Another distinguishing factor is that in *Kelley* the Supreme Court noted that Kelley's drunk driving convictions and the circumstances surrounding them indicated that she had a problem of alcohol abuse. (*Id.* at pp. 495–496, 498.)

In sum, there is no basis to support the requirement that respondent attend Gamblers Anonymous meetings. In our view, the hearing judge's recommended probation condition requiring that respondent refrain from all gambling will adequately serve the purposes of attorney disciplinary proceedings.

V. Aggravating and Mitigating Circumstances.

A. Aggravating circumstances.

We adopt the hearing judge's finding that respondent's failure to repay any portion of his 1994 debts to First Card until 1999 establishes respondent's indifference towards rectification of and atonement for the consequences of his misconduct, which is an aggravating circumstance under standard 1.2(b)(v) of the Standards for Attorney Sanctions for Professional Misconduct.[FN21] Similarly, we adopt the hearing judge's findings that respondent's failure to repay any portion of his $12,268 nondischargeable debt to Bank One is also an aggravating circumstance and supports our finding that respondent had no intention to repay.

> FN21. The standards are found in title IV of the Rules of Procedure of the State Bar. All further references to standards are to this source.

B. Mitigating circumstances.

Respondent has been practicing law for more than 16 years without any prior record of discipline. We adopt the hearing judge's finding of this mitigating circumstance pursuant to standard 1.2(e)(i).

However, respondent is not entitled to any mitigation for making restitution to First Card in April 1999 because it was made under the pressure of the State Bar's investigation and initiation of disciplinary proceedings against him and the pressure of First Card's money judgment against him. (*Warner v. State Bar* (1983) 34 Cal.3d 36, 47 [an attorney is not entitled to any mitigation for restitution made as a matter of expediency or under pressure]; cf. *In the Matter of Ike* (Review Dept.1996) 3 Cal. State Bar Ct. Rptr. 483, 490 ["compliance with a criminal restitution order, no matter how timely, is not a mitigating circumstance"].) To conclude otherwise would inappropriately reward respondent with mitigation merely for doing what he was already legally required to do.

VI. The Appropriate Level of Discipline.

***17** In determining the appropriate level of discipline, we first look to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090;

In the Matter of Koehler, supra, 1 Cal. State Bar Ct. Rptr. at p. 628.) Standard 1.3 provides that the primary purposes of discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (See also *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

The applicable sanction in this proceeding is found in standard 2 .3, which provides that an attorney's culpability of an act of moral turpitude shall result in actual suspension or disbarment depending upon the extent of harm, the magnitude of the act, and the degree to which it relates to the attorney's practice of law. In the present proceeding, the magnitude of the misconduct is substantial because it involves dishonesty with respect to money. We agree with the hearing judge that "Respondent's dishonesty in repeatedly borrowing money with no intention of repaying the same is serious and simply inexcusable."

Next, we look to decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311; *In the Matter of Taylor* (Review Dept.1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) The parties have not cited any cases, and we are unaware of any, involving an attorney's borrowing money from credit card companies without intending to repay it.

Even if there is no clear and convincing evidence that respondent made actual misrepresentations to Bank One or First Card in order to obtain the credit cards and to make purchases and obtain cash advances on them, respondent's use of the credit cards to obtain goods and cash without intending to repay the debts is, at worst, akin to embezzlement and, at best, akin to abusing one's position of trust for personal gain. Accordingly, like the hearing judge, we conclude that a period of actual suspension is required. The hearing judge cited *In the Matter of Mitchell* (Review Dept.1991) 1 Cal. State Bar Ct. Rptr. 332. In that case the attorney misrepresented his educational background on his resume, which he used while he was seeking employment as a lawyer. (*Id.* at p. 339.) We viewed the attorney's "willingness to repeatedly use false and misleading means to secure a perceived advantage in the employment process [to be] a matter of serious concern, despite the lack of misconduct during the 'practice of law.' [Citation.]" (*Ibid.*) In *Mitchell* we recommended and the Supreme Court imposed a 60–day period of actual suspension on the attorney. (See *id.* at p. 342.) At a minimum, respondent's misconduct was as serious as the attorney's in *Mitchell;* accordingly, we shall not recommend less than a 60–day period of actual suspension in this case. Moreover, because the misconduct was unrelated to and, apparently, did not adversely affect any of respondent's clients, we shall not recommend more than a 60–day period of actual suspension.

***18** After carefully reviewing the record independently and weighing all the appropriate factors, we conclude that the hearing judge's recommendation of a two-year period of stayed suspension and a two-year period of probation on conditions, including a 60–day period of actual suspension, is the appropriate level of discipline.

VII. Discipline Recommendation.

We recommend that respondent Rodolfo Enrique Petilla be suspended from the practice of law in the State of California for a period of two years; that execution of the two-year period of suspension be stayed; and that Petilla be placed on probation for a period of two years on the following conditions.

1. Petilla shall be actually suspended from the practice of law in the State of California during the first 60 days of this probation.

2. Petilla must comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all the conditions of this probation.

3. Petilla must report, in writing, to the State

Bar's Probation Unit in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which Petilla is on probation ("reporting dates"). However, if Petilla's probation begins less than 30 days before a reporting date, Petilla may submit the first report no later than the second reporting date after the beginning of Petilla's probation. In each report, Petilla must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

(a) in the first report, whether Petilla has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation since the beginning of this probation; and

(b) in each subsequent report, whether Petilla has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation during the period.

During the last 20 days of this probation, Petilla must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, Petilla must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

4. Subject to the assertion of any applicable privilege, Petilla must fully, promptly, and truthfully answer all inquiries of the State Bar's Probation Unit and any assigned probation monitor referee that are directed to Petilla, whether orally or in writing, relating to whether Petilla is complying or has complied with the conditions of this probation.

5. Within one year after the effective date of the Supreme Court order in this **matter**, **Petilla** must: (1) attend and satisfactorily complete the State Bar's Ethics School; and (2) provide satisfactory proof of completion of the school to the State Bar's Probation Unit in Los Angeles. This condition of probation is separate and apart from Petilla's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, Petilla is ordered not to claim any MCLE credit for attending and completing this course. (Accord Rules Proc. of State Bar, rule 3201.)

***19** 6. Petilla must abstain from all gambling.

7. Within 90 days after the effective date of the Supreme Court order in this **matter**, **Petilla** must: (1) make restitution to Bank One, or the Client Security Fund if it has paid, in the amount of $12,268 plus interest thereon at the rate of 10% simple interest per annum from June 11, 1994, until paid; and (2) provide satisfactory proof of such restitution to the State Bar's Probation Unit in Los Angeles.

If Petilla contends that he is unable to pay this amount, he must (1) ask, within the first 30 days after the effective date of the Supreme Court order in this matter, the State Bar's Probation Unit in Los Angeles to assign to him a probation monitor referee and (2) submit to that referee, within 30 days after being notified of the referee's assignment, a written plan for the prompt payment of as much of the amount as he is able to pay. The submission of any such plan by Petilla must include satisfactory proof of his financial condition and the amount he is able to pay. On the motion of Petilla or the State Bar, any decision by the referee to approve or reject any payment plan proposed by Petilla is subject to de novo review by the State Bar Court.

VIII. Professional Responsibility Examination.

We recommend that Petilla be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the ef-

fective date of the Supreme Court order in this matter and to provide satisfactory proof of passage of the examination to the State Bar's Probation Unit in Los Angeles within that same year.

IX. Costs.

We recommend that the costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with section 6086.10 of the Business and Professions Code and that those costs be payable in accordance with section 6140.7 of the Business and Professions Code.

OBRIEN, P.J. and STOVITZ, J., concur.

Cal.Bar Ct.,2001.
In re Petilla
Not Reported in Cal.Rptr.2d, 2001 WL 664247 (Cal.Bar Ct.), 4 Cal. State Bar Ct. Rptr. 231

END OF DOCUMENT

DECLARATION OF SERVICE

Re: ***People v. Vaene Sivongxxay*, No. S078895**

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, 10th Floor, Oakland, California 94607. A true copy of the attached:

APPELLANT'S REPLY BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

The Honorable Kamala Harris
Attorney General of the State of California
110 W. "A" Street, Suite 1100
San Diego, California 92101

Mr. Vaene Sivongxxay
P.O. Box P-39500
Tamal, California 94974

Fresno County District Attorney
2220 Tulare St., Suite 1000
Fresno, California 93721

Fresno County Superior Court
Clerk of Court
1100 Van Ness Avenue
Fresno, CA 93724-0002

Each said envelope was then, on December 31, 2013, sealed and deposited in the United States Mail at Oakland, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 31, 2013, at Oakland, California.

Neva Wandersee