IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. ERIC CHRISTOPHER HOUSTON, Defendant and Appellant.	Case No.: S035190 Appeal From Judgment Entered in the Superior Court of Napa County, No. No. CR 14311 Hon. W. Scott Snowden, presiding

AUTOMATIC APPEAL FROM JUDGMENT OF DEATH

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF COUNSEL PURSUANT TO RULES 8.208 AND 8.630(b)(2)

David H. Schwartz certifies as follows:

1. I know of no entity or person that has a financial or other interest in the outcome of this appeal for listing in the certificate of counsel as required by Rule 8.208.
2. The incident from which the charges against Defendant arose involved over 90 direct victims and probably more than 200 people who were directly affected by Defendant's conduct, and they and their family and close associates may have strong emotional interests in the outcome of this proceeding. The names of all of these people are not known to me.
3. The Appellant's Opening Brief contains 130,914 words according to the word count feature of Microsoft Word 2007.

Dated: September 12, 2007

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DAVID H. SCHWARTZ

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STATEMENT OF THE CASE

A. Pretrial, *In Limine* and Jury Selection

Defendant[1] was initially charged by complaint[2] filed on May 4, 1992, in the Yuba County Municipal Court, with four counts of murder (§ 187[3]) nine counts of attempted murder (§§ 664/187) and one count of false imprisonment (Penal Code § 210.5), all allegedly committed on May 1, 1992. (1 CT 14-18[4]) The complaint alleged that Defendant had personally used firearms in connection with each offense (§§ 1203.06(c)(1), 12022.5), causing the offenses to become serious felonies (§ 1192.7 (c) (8)); that the murder counts were with special circumstances (§ 190.2 (a) (3)); and that Defendant had

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[1] The term "Defendant" as used throughout this document shall refer to Defendant and Appellant Eric Christopher Houston.

[2] Defendant was later charged by indictment on September 15, 1992. The charges noted here refer to the charges in the complaint filed on May 4, 1992 and differ from those in the indictment.

[3] All statutory references are to the Penal Code unless otherwise specified.

[4] Appellant uses the following citation form for Volumes one through five of the clerk's transcript: 1 CT 14-18 for Volume 1 of the clerk's transcript at pages 14 through 18. The clerk's transcript also includes nine supplements which will be cited in the following format: CT Supplemental–3 (v.2) 547 for volume 2 of the third supplement to the clerk's transcript at page 547. Appellant uses the following citation form for citations to the reporter's transcript: 1 RT 86 for volume 1 of the reporter's transcript at page 86. In many cases, line numbers are provided for citations; in these instances the format 1 RT 86:4-17 will be used for volume 1 of the reporter's transcript at page 86, lines 4 through 17 or 1 RT 86:4-101:7 for volume 1 of the reporter's transcript at page 86, line 4 through page 101, line seven. Where helpful, the last name of the witness or other speaker being referenced will precede the citation.

intentionally inflicted great bodily harm on the victim in committing one of the attempted murders (§ 12022.7). (1 CT 14-18)

Also on May 4, 1992, the Public Defender of Yuba County was appointed to represent Defendant. (1 CT 28) On June 1, 1992, Julian Macias first appeared as second counsel for Defendant. (1 RT:22)The prosecutor was Charles F. O'Rourke from Yuba County. (1 RT 1)

Many requests to conduct film and electronic media coverage were granted, and the media were present for many courtroom proceedings, from pre-trial through penalty. (1 CT 29-33, 79, 80, 89-91, 99, 100, 123, 143-149, 180-183; 3 CT 735, 782-785, 805-806, 810, 822, 849, 854, 862, 864; 4 CT 1145; 5 CT 1190, 1233-1234)

Grand jury proceedings were held in Yuba County on September 1, 2, 3, 9 and 10, 1992. (1 CT 191)

On September 15, 1992, Defendant was charged by indictment[5] in case no. 8368 with the following offenses, all allegedly committed on May 1, 1992 (1 CT 124-130; 5 CT 1163-1169)

- Four counts of murder (§ 187) with personal use of a firearm (§§ 1203.06 subd. (a)(1), 12022.5), each offense

[5] The indictment was originally filed on September 15, 1992. (1 CT 124) On February 23, 1993, Appellant filed a motion to set aside and dismiss the indictment. (2 CT 544) On March 8, 1993, after granting a change of venue motion to Napa County, (2 CT 435-436), the Yuba County trial court deferred ruling on the motion to set aside and dismiss the indictment for resolution by the Napa Court (3 CT 643), which denied the motion on May 27, 1993. (3 CT 720) The original indictment was corrected by manual interlineation (see 1 CT124 et seq.; 10 RT 2339:24-2342:28) and a conformed interlineated indictment was filed August 9, 1993. (5 CT 1163 et seq.) Citations in the instant brief are to the conformed indictment.

a serious felony (§ 1192.7, subd. (c)(8)) (5 CT 1163-1164 [Counts I-IV]);

- Ten counts of attempted murder (§§ 664, 187) with personal use of a firearm (§§ 1203.06, subd. (a)(1), 12022.5) on all counts, the infliction of serious bodily injury on eight counts, and each offense a serious felony (§ 1192.7, subd. (c)(8)) (5 CT 1164-1168 [Counts V-XIV]);
- Three counts of assault with a firearm (§ 245 subd. (a)(2)) (5 CT 1168 [Counts XV-XVII]);
- One count of false imprisonment of Victorino Hernandez, Joshua Hendrickson, Erik Perez, Jocelyn Prather, Eddie Hicks, Jake Hendrix and Johnny Mills (§ 236) for the purpose of protection from arrest, which substantially increased the risk of harm to the victims and for the purpose of using the victims as a shield (§ 210.5) (5 CT 1168-1169 [Count XVIII]).
- The indictment specially alleged that the murder counts, Counts I-IV, were a special circumstance within the meaning of section 190.2, subdivision (a)(3). (5 CT 1164)

On September 16, 1992, the Court confirmed the appointment of Julian Macias to represent Defendant at trial as co-counsel to Yuba County Deputy Public Defender Jeffrey Braccia. Braccia and Macias represented Defendant throughout the trial after its transfer to Napa County. (1 CT 133; 3 RT 524:22-525:8, 637:3-10; 25 RT 6115) In the same proceeding the trial court ordered that the municipal court

records in the same case, there numbered F-7445, be consolidated with the superior court file. (1 CT 134)

On September 28, 1992, Defendant filed a demurrer to the indictment, which was overruled on October 13, 1992. (1 CT 152; 3 RT 539:5-544:22)

Also on October 13, 1992, Defendant was arraigned and entered pleas of not guilty and not guilty by reason of insanity on Counts I - XVIII and denied the related weapons enhancement on Counts I - XIV. (1 CT 175-177)

On October 19, 1992, the trial court appointed Drs. Captane Thomson and Charles Schaffer to examine Defendant pursuant to Penal Code section 1027 and Evidence Code section 730. (1 CT 186; see 3 RT 554:6-555:3)

Also on October 19, 1992, the Yuba County trial court ordered that the transcript of grand jury proceedings be unsealed except for two pages. (1 CT 187)

On November 12, 1992, Defendant filed a motion to discover grand jury information and augment the grand jury transcript and record. (1 CT 189)

On November 18, 1992, Defendant filed an in camera ex parte motion for Defendant's counsel to be present at court-ordered psychiatric examinations. (1 CT 206)

On December 2, 1992, the prosecution filed a motion in Yuba County Superior Court to produce evidence concerning Federal Bureau of Investigation (hereafter, "FBI") videotapes of events at Lindhurst High School on May 1, 1992. (1 CT 235)

On December 14, 1992, the Federal Bureau of Investigation

filed a motion for a protective order under Code of Civil Procedure section 1987.1 and Penal Code section 1002. (1 CT 240)

On December 30, 1992, after an in camera hearing, the Yuba County trial court ordered that the complete videotapes of everything recorded by the FBI would be kept in the court's custody including a tape containing extremely sensitive material; that two videotapes designated S-1 and S-2, with certain portions edited out, would be provided to the district attorney; and that all tapes would be sealed and should be treated as sensitive. (1 CT 262-263)

On December 30, 1992, Defendant filed a notice of motion for a change of venue out of Yuba County. (2 CT 289, 431)

On December 31, 1992, the prosecution filed a motion to compel discovery from Defendant. (2 CT 426) On January 25, 1993, the Yuba County trial court initially granted the motion. (2 CT 497-498)

Defendant petitioned for review by the California Supreme Court, and on March 5, 1993, Defendant's petition was granted in Houston v. Yuba County Superior Court, Supreme Court Case No. S031221. (3 CT 665) On April 12, 1993, however, the prosecution withdrew its request for penalty phase discovery. (3 CT 669) Defendant's petition for review was dismissed as moot by the Supreme Court on January 13, 1994. (3 CT 665; CT Supplemental-4 (v.1) 3)

On January 4, 1993, the Yuba County Superior Court granted Defendant's motion for change of venue. (2 CT 435-436)

On February 17, 1993, the Yuba County trial court

ordered the case transferred to Napa County. (2 CT 543[6], 589)

On February 23, 1993, Defendant filed a motion in Yuba County Superior Court to set aside and dismiss the indictment. (2 CT 544)

On March 8, 1993, the Yuba County trial court disqualified itself from hearing Defendant's motion to set aside the indictment. (3 CT 643)

On May 17, 1993, Defendant presented evidence in the Napa County trial court in support of his motion to dismiss the indictment based on prosecutorial misconduct and the under-representation of minorities in the composition of the grand jury in Yuba County. (3 CT 682; 4 RT 839 et seq.)

On May 27, 1993, the Napa County trial court denied Defendant's motion to set aside and dismiss the indictment. (3 CT 720; 5 RT 1096:25-1102:16)

Jury selection began on June 8, 1993. (3 CT 740) Also on June 8, 1993, Defendant filed motions in *limine*: (1) to have defense trial motions considered to be made pursuant to relevant state and federal constitutional provisions (3 CT 738); (2) to inform prospective jurors of their civic duty to sit as jurors (3 CT 741); (3) to read particular scripts concerning trial proceedings to the prospective jurors and to seated jurors (3 CT 752); and (4) to apply *Witt*[7] and *Witherspoon*[8] to *voir dire* (3 CT 771[9]). On June 9, 1993, the defense

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[6] The year date on the minutes in the clerk's transcript is 1992 and appears to be a clerical error.

[7] *Wainwright v. Witt* (1985) 469 U.S. 412

[8] *Witherspoon v. Illinois* (1968) 391 U.S. 510

filed an in *limine* motion regarding the defense right to *voir dire*, which the trial court granted the same day. (3 CT 788; 6 RT 1360:10-1361:18)

On June 10, 1993, the prosecution and the defense accepted the court's script to be read to potential and seated jurors, which incorporated suggestions that had been made in Defendant's motion. (6 RT 1361:21-1364:25, 1381:1-20)

B. Guilt Phase

On June 17, 1993, the jury was impaneled with three alternates and both sides gave opening statements. (3 CT 803-804)

On June 21, 1993, the presentation of evidence by the prosecution began. (3 CT 807) On the same day, the trial court granted Defendant's motion that all objections made by the defense would be deemed to be under the federal and state constitutions. (11 RT 2428:24-2429:1)

On July 8, 1993, Defendant moved, at the conclusion of the prosecution's case, for a judgment of acquittal based on the insufficiency of the evidence under section 1118.1 and the trial court denied the motion. (3 CT 834-835; 18 RT 4340:14-4342:21)

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[9] The motion to apply *Witt* and *Witherspoon* filed on June 8, 1993, was originally erroneously entitled "In Limine Memorandum Regarding Defense Right to Voir Dire," which appears on the document in the clerk's transcript at 3 CT 771. Defense counsel orally explained the error on the record during trial proceedings on June 9, 1993, and said that the correct title was "Motion to Apply The Witt Standard for Anti-Death Penalty Jurors and Witherspoon Standard for Scrupled Jurors," and the trial court ordered that that title page be filed also; it appears in the record at 3CT 797. (6 RT 1358:25-1360:10; 3 CT 797)

On July 12, 1993, the presentation of evidence by the defense began and the defense rested on July 14, 1993. (3 CT 836, 841) The prosecution presented evidence in rebuttal on July 15, 1993. (3 CT 850-851) Both sides gave closing arguments to the jury on July 20, 1993. (3 CT 855-856)

Guilt phase deliberations began the morning of July 21, 1993. (3 CT 863) The jury returned its verdicts the afternoon of July 22, 1993 finding Defendant guilty on all counts as charged in the indictment and finding the existence of the multiple murder special circumstance; the trial court accepted the verdicts after polling the jury. (4 CT 953-1144)

The guilt phase verdicts and findings were as follows:

Count I – Guilty of the first degree [1]murder of Robert James Brens (§ 187) with personal use of a firearm within the meaning of sections 1203.06(a)(1), 12022.5, and 1192.7(c). (4 CT 956)

Count II – Guilty of the first degree[2] murder of Beamon Anton Hill (§ 187) with personal use of a firearm within the meaning of sections 1203.06(a)(1), 12022.5, and 1192.7(c). (4 CT 969)

Count III – Guilty of the first degree[3] murder of Judy M. Davis (§ 187) with personal use of a firearm within the meaning of sections 1203.06(a)(1), 12022.5, and 1192.7(c). (4 CT 982)

Count IV – Guilty of the first degree[4] murder of Jason E. White (§ 187) with personal use of a firearm within the meaning of sections 1203.06(a)(1), 12022.5, and 1192.7(c). (4 CT 995)

Count V – Guilty of the attempted willful, deliberate and premeditated murder of Thomas Hinojosai (§§ 664, 187) with personal use of a firearm within the meaning of sections

1203.06(a)(1), 12022.5, and 1192.7(c)[10]. (4 CT 1010)

Count VI – Guilty of the attempted willful, deliberate and premeditated murder of Rachel Scarberry (§§ 664, 187) with the intentional infliction of great bodily injury (§ 1022.7) and personal use of a firearm within the meaning of sections 1203.06(a)(1), 12022.5, and 1192.7(c). (4 CT 1019-1020)

Count VII – Guilty of the attempted willful, deliberate and premeditated murder of Patricia Collazo (§§ 664, 187) with the intentional infliction of great bodily injury (§ 1022.7) and personal use of a firearm within the meaning of sections 1203.06(a)(1), 12022.5, and 1192.7(c). (4 CT 1031-1032)

Count VIII – Guilty of the attempted willful, deliberate and premeditated murder of Danita Gipson (§§ 664, 187) with the intentional infliction of great bodily injury (§ 1022.7) and personal use of a firearm within the meaning of sections 1203.06(a)(1), 12022.5, and 1192.7(c). (4 CT 1043-1044)

Count IX – Guilty of the attempted willful, deliberate and premeditated murder of Wayne Boggess (§§ 664, 187) with the intentional infliction of great bodily injury (§ 1022.7) and personal use of a firearm within the meaning of sections 1203.06(a)(1), 12022.5, and 1192.7(c). (4 CT 1055-1056)

Count X – Guilty of the attempted willful, deliberate and premeditated murder of Jose Rodriguez (§§ 664, 187) with the intentional infliction of great bodily injury (§ 1022.7) and personal

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[10] The indictment against Appellant did not allege that any of the charged attempted murders was committed with premeditation and deliberation. See Argument V. infra

use of a firearm within the meaning of sections 1203.06(a)(1), 12022.5, and 1192.7(c). (4 CT 1067-1068)

Count XI– Guilty of the attempted willful, deliberate and premeditated murder of Mireya Yanez (§§ 664, 187) with the intentional infliction of great bodily injury (§ 1022.7) and personal use of a firearm within the meaning of sections 1203.06(a)(1), 12022.5, and 1192.7(c). (4 CT 1079-1080)

Count XII – Guilty of the attempted willful, deliberate and premeditated murder of Sergio Martinez (§§ 664, 187) with the intentional infliction of great bodily injury (§ 1022.7) and personal use of a firearm within the meaning of sections 1203.06(a)(1), 12022.5, and 1192.7(c). (4 CT 1091-1092)

Count XIII – Guilty of the attempted willful, deliberate and premeditated murder of John Kaze (§§ 664, 187) with the intentional infliction of great bodily injury (§ 1022.7) and personal use of a firearm within the meaning of sections 1203.06(a)(1), 12022.5, and 1192.7(c). (4 CT 1103-1104)

Count XIV – Guilty of the attempted willful, deliberate and premeditated murder of Donald Graham (§§ 664, 187) with personal use of a firearm within the meaning of sections 1203.06(a)(1), 12022.5, and 1192.7(c). (4 CT 1115)

Count XV – Guilty of assault with a firearm on Tracy Young (§ 245 subd. (a)(2)). (4 CT 1124)

Count XVI – Guilty of assault with a firearm on Bee Moua (§ 245 subd. (a)(2)). (4 CT 1129)

Count XVII – Guilty of assault with a firearm on Joshua[11] Hendrickson (§ 245 subd. (a)(2)). (4 CT 1134)

Count XVIII – Guilty of false imprisonment for protection from arrest as charged in the indictment (§ 210.5). (4 CT 1139)

Additionally, the jury found the special circumstance that Defendant had committed at least one first degree murder and at least one first or second degree murder within the meaning of section 190.2(a)(3). (4 CT 1008)

C. Sanity Phase

On July 27, 1993, proceedings to determine Defendant's sanity pertaining to all counts began with an opening statement and presentation of evidence by the defense; the defense rested its case on the same day. (4 CT 1147-1148)

On July 28, 1993, the prosecution began its sanity case with the presentation of evidence and rested on July 29, 1993. (4 CT 1149-1151)

On August 9, 1993, the jury began deliberations regarding sanity and returned its verdicts approximately three hours later, finding Defendant was sane at the time he committed all the offenses of which he had been convicted. (5 CT 1161-1187)

D. Penalty Phase

The penalty phase began on August 10, 1993, with the presentation of evidence by the prosecution, which rested its case the same day. (5 CT 1188-1189)

On August 11, 1993, the defense presented evidence including

[11] Verdict sheet reads "Josha Hendrickson," an apparent clerical error.

testimony by Defendant, and rested its case the same day. (5 CT 1191-1192)

On August 16, 1993, the jury returned its verdict sentencing Defendant to death. (5 CT 1218, 1230) The trial court ordered a probation report on counts V through XVIII. (5 CT 1218)

E. Sentencing

On September 15, 1993, Defendant filed motions to dismiss the special circumstance finding and to modify the penalty verdict under sections 1385 and 190.4. (5 CT 1274) On September 17, 1993, after a hearing, the trial court denied Defendant's motions to dismiss the special circumstance finding and to modify the penalty verdict. (5 CT 1287; 25 RT 6060:19-25)

On September 20, 1993, the trial court independently found that Defendant had committed all the offenses of which he had been convicted, that all of the allegations of personal use of a firearm and of the intentional infliction of great bodily injury found by the jury were true, and that the multiple murders special circumstance was true. (5 CT 1456-1458, 1460) The trial court sentenced Defendant as follows:

- Counts I-IV – death (5 CT 1460; 1462 [Commitment Judgment of Death]);
- Count V – life in prison for attempted murder, with an enhancement of four years for personal use of an assault weapon under section 12022.5, to be served consecutively (5 CT 1459);
- Counts VI-XIII – on each count, life in prison for

attempted murder, with an enhancement of three years for the intentional infliction of great bodily injury under section 12022.7, to be served consecutively, and an enhancement for personal use of an assault weapon under section 12022.5 stayed (5 CT 1459-1460);

- Counts XIV – life in prison for attempted murder, and an enhancement for personal use of an assault weapon under section 12022.5 stayed (5 CT 1460);
- Counts XV-XVII – on each count, one-third of the mid-term of one year for assault with a firearm, to be served consecutively (5 CT 1460);
- Count XVIII – upper term of eight years as the principal term for false imprisonment, to be served consecutively (5 CT 1460, 1490).[12]

The trial court ordered that all enhancements were to be served consecutively to the counts to which they applied and to each other. (5 CT 1460) Additionally, the trial court imposed a restitution fine of $10,000 on Counts V-XVIII. (5 CT 1460)

F. Appeal

The instant appeal is automatic. (Penal Code § 1239)

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[12] On September 22, 1993, an abstract of judgment was filed reflecting the sentences imposed. (5 CT 1478-1480) After receipt of a letter from the Correctional Case Records Manager of the California Department of Corrections, a second abstract of judgment was filed indicating that the sentence on Count XVIII was to be served consecutively. (5 CT 1490)

STATEMENT OF FACTS

A. Introductory Statement

This Statement of Facts is, unfortunately, quite lengthy. Many of the issues raised on this appeal need to be reviewed and evaluated in light of all of the facts adduced in the three stages of the trial. Defendant believes that by presenting an extensive and intensive description of the evidence here, excessive and repetitive recitation of facts in individual arguments has been reduced . The extensive presentation of facts here will also aid the Court in evaluating the prejudice that arose from the various errors that occurred in the trial court, and permits a more general discussion of prejudice in each argument.

There are eighteen separate conviction offenses. At the trial it was not disputed that on May 1, 1992 Defendant entered Building C at Lindhurst High School carrying several weapons and proceeded to shoot those weapons, with the result that four persons died and ten persons were injured by gunshot wounds from that firing, and that Defendant then held approximately 85 students hostage in the school building for approximately eight hours.

Virtually the entire trial was focused on the issue of Defendant's mental state at the time of the incident. His mental state at the time of the incident and in the several months preceding were the significant issues in contention for the guilt, insanity, and penalty phases of trial.

Thirty-seven witnesses testified to their observations of Defendant's behavior in the hours before the incident and during the incident, exclusive of any law-enforcement witnesses. On the day

following the incident Defendant was interrogated by law enforcement officers for over 90 minutes, and a videotape of that interview was played for the jury. During the period Defendant was holding students hostage, audiotapes were made of both the hostage negotiations and the sounds and statements being made by Defendant and others in the classroom where the students were being held. Six hours of such audiotapes were played for the jury. In addition, four expert witnesses testified at length to the nature of Defendant's mental illness and the import of that illness on his criminal culpability.

In this brief, for fourteen offenses (four alleged first degree murders, and ten alleged attempted murders), Defendant is raising contentions that the evidence introduced at trial was insufficient to support the verdicts based upon an absence of evidence of the required *mens rea*. Defendant believes that a detailed description of the evidence adduced is necessary to set the context for the insufficiency of evidence arguments.

Defendant also is attacking the introduction of the videotaped interrogation and the audiotapes recorded during the hostage negotiations without settled transcripts of either, when both sets of tapes have garbled sound with many statements wholly unintelligible and many more subject to differing interpretations as to their linguistic content. Defendant also submits that this appeal cannot be effectively prosecuted or decided by the Court given the absence in the record before this Court of any reliable record of what statements by Defendant the jurors either reasonably could be deemed to have heard or actually believed they did heard when these tapes were played.

In this brief Defendant will argue that given the specific facts

and specific state of the record here, the nature and extent of the missing evidence adduced at trial requires a reversal of the conviction *per se*. However, given this Court's prior jurisprudence regarding claims of inadequate appellate record, Defendant believes it likely that the Court will want to consider the impact of the missing record in the context of the evidence introduced for which the record exists, whether or not the Court ultimately accepts Defendant's position that a specific prejudice evaluation in this specific case is unnecessary.

It is Defendant's belief that setting forth the facts in reasonable detail in the Statement of Facts will facilitate, rather than burden, the Court's review of the claims raised on appeal.

B. Prosecution Case in Chief

1. May 1, 1992, Beginning Shortly Before 2:00 p.m. - Lindhurst High School, Parking Lot and First Floor of Building C

At between 1:40 and 1:45 p.m. on May 1, 1992, Neng Lor was in the parking lot of Lindhurst High School in Lindhurst, California[13]. Lor was waiting to pick up his sister from the high school when he saw Defendant[14] about a block away in the parking lot walking with a long gun. (Lor, 11 RT 2449:25-2451:27) According to Lor, Defendant went into Building C of the high school. Lor then heard two shots, and a teacher came running out of the building. The teacher told everyone to "get out of the place." (Lor, 11 RT 2452:8-2453:5)

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[13] Throughout the Statement of Facts, testimony is presented with testifying witness or trial exhibit and citation following.

[14] Defense Counsel stipulated that the man described by witnesses at Lindhurst High School was Defendant and thus the term "Defendant" will be used in summarizing witness testimony.

Patricia Morgan had been a teacher at Lindhurst High School for 24 years. On May 1, 1992 she had a Business Law class she was teaching at 2:00 p.m. in Building C. She had left her classroom and Building C and gone to the bathroom in the adjacent Administration Building. As she was returning to Building C she saw Defendant walking from the east toward Building C. Morgan noticed that he was wearing military fatigues like from "Desert Storm" and was walking with a determined cadence as if he knew where he was going. He was carrying a long gun or rifle that looked like the type of gun that the R.O.T.C. students carry. (Morgan, 11 RT 2464:20-2470:13, 2475:22-26).

Morgan did not recognize Defendant when she encountered him in the parking lot. She asked him if he had a permit for the gun. Defendant turned and looked at Morgan, but did not respond. He continued moving without break toward Building C. (Morgan, 11 RT 2470:14-2471:16) Morgan did not believe that Defendant made eye contact with her, but acknowledged that when interviewed by law enforcement initially she had said that his eyes had been glazed. (Morgan, 11 RT 2484:14-2485:3)

Morgan saw Defendant enter Building C. Morgan started to approach Building C as well. A couple of seconds after Defendant entered Building C, Morgan heard one "pop" sound from within Building C. She stopped, took a step or two further toward Building C and then less than ten seconds after the first "pop," she heard about two or three more "pops." The second set of "pops" seemed to come from her classroom in Building C (C-107). Upon hearing the additional "pops," Morgan changed direction and ran to the

Administration Building where she announced that there was someone with a gun shooting in Building C. (Morgan, 11 RT 2471:9-2473:19; 2485:26-2487:27)

Thomas Hinojosai was a student attending class in C-108b when Defendant entered the building. Hinojosai testified that when the door at the Northeast entrance opens, light shines down the hallway that can be seen inside C-108b. Hinojosai saw the light and looked to see who was coming. (Hinojosai, 11 RT 2552:7-2555:21)

Hinojosai saw Defendant walking west down the hallway from the Northeast Entrance. (Hinojosai, 11 RT 2555:19-2556:11) Defendant was wearing a black tee-shirt with a brown and tan camouflage hunting vest. A bandolier of bullets hung across his chest, crisscrossing from each shoulder to the opposite waist. He wore a black web belt with shotgun shell loops and a canteen and an ammunition pouch attached. He wore mirrored or dark sunglasses with gold trim. He also wore blue jeans, tennis shoes, and a black ball cap with a National Rifle Association logo. He held a shotgun and had a rifle attached to a strap over his right shoulder. (Exhibits 13-14; Hinojosai, 11 RT 2569:27-2570:11; Long, 17 RT 3967:16-25; Kaze, 13 RT 2929:12-2930:5; Scarberry, 11 RT 2593:5-21; Rodriguez, 11 RT 2670:12-2671:17; Martinez, 12 RT 2829:22-27, 2840:17-2841:5; Mojica, 12 RT 2857:2-6; Black, 18 RT 4190:28-4192:9-17; Ledford, 13 RT 3047:16-3048:24, 3054:3-20, 3088:17-3092:23)

The first classroom that Defendant reached was classroom C-108b on his left. C-108b had no door or curtain to the hallway, just an

opening into the hallway [leading to the northeast entrance] [16]. A partition used to separate C-108b from adjoining C-108a was closed. The student desks in C-108b were arranged facing away from the partition toward the wall with the opening to the hallway. (Hinojosai, 11 RT 2554:26-28, 2565:27-2566:9, 2578:16-19)

Defendant turned into the doorway of C-108b. Hinojosai noticed Defendant's dark sunglasses; he could not see his eyes. Defendant had a shotgun to his chest just below his right clavicle. He swung around the corner into the classroom and fired at Rachel Scarberry, a student sitting to the west of Hinojosai. Defendant then swung around in the doorway and fired at the classroom teacher, Robert Brens. Brens was leaning on a desk facing the back wall. Defendant shot Brens from about five feet away. When the shot struck him in the right side at the rib cage, Brens fell and crawled to the east wall. (Hinojosai, 11 RT 2556:5–2558:27; 2562:8-27; 2566:13-18; 2569:27-2570:13)

After shooting Brens, Defendant moved toward where Brens was slumping, swung around and "pointed" or "aimed" it at another student, Judy Davis. Davis was sitting toward the front of the class, about 3 feet in front of Hinojosai and 10 feet from the shooter. The shot hit Davis in the face and chest, causing her to fall over to the side. The shooter then pointed his gun at Hinojosai, who dived away as the blast went past, nicking his ear and shoulder. Lying on the floor, Hinojosai could see the feet of Defendant as he walked out of the classroom down the north hallway further into Building C.

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[16] Brackets are used throughout the Statement of Facts to identify information not in testimony but provided for clarification purposes.

(Hinojosai, 11 RT 2563:19-2567:3)

Rachel Scarberry testified that she was seated in C-108b two chairs behind the front entrance when Defendant entered. (Scarberry, 11 RT 2585:22-2586:10) Scarberry described him as having a strap across the front of his chest diagonally like the strap of a shotgun; she could see a barrel sticking up on his back. Scarberry also noticed that he wore sunglasses. (Scarberry, 11 RT 2593:5-24) She described Defendant as holding his gun at his waist with his right hand close to his chest level or sternum and with his left hand extended at chest level out in front about a foot with each palm cupped and pointed upwards. (Scarberry, 11 RT 2587:19-2588:5)

When Scarberry was hit she fell to the floor, but initially felt unfazed. Getting up, she saw Judy Davis getting shot, exclaiming "ugh," and falling with a thump, puddles of blood coming out of her head. When Brens was hit he flew back "quite a ways" against the curtain, and slid down to the floor. (Scarberry, 11 RT 2587:20-2589:22)

Defendant left room C-108b; turning left he moved further down the hallway west from the northeast entrance. The next classroom along the hallway was C-107, Patricia Morgan's classroom. Its doorway was to Defendant's right as he moved westward down the north hallway. (Trial Exhibit 3; Hinojosai, 11 RT 2566:27-2567:6).

Kasi Frazier was a student present in C-107 at about 2:00 on May 1, 1992. Like C-108b, C-107's doorway was merely an opening in the wall between the classroom and the hallway. The classroom had tables and little desks arranged in rows fanning out from the doorway which was at the southwest corner of the room. Frazier was

seated toward the middle of the room but near the western wall. His friend, Jason White, was seated slightly behind Frazier. Frazier heard three sounds that he thought at first were firecrackers but then recognized as shotgun blasts. He and the others in the classroom got down on the floor. (Frazier, 12 RT 2781:17-2783:26, 2798:1 – 2799:2, 2785:3-12, 2786:24-25, 2799:3-9; Trial Exhibit 3)

After a few seconds on the floor Frazier looked up and saw someone at the door to C-107 with a shotgun. He heard the shotgun fire and saw someone go to the floor. He looked across the room and saw that Jason White had been shot and was lying on the ground. Frazier testified that when he fired, Defendant appeared to be aiming the gun at White. (Frazier, 12 RT 2782:3-2787:4) White had gotten up from his chair and was moving along the north wall of C-107 from the west side of the room to the east side when he was shot. (Frazier, 12 RT 2800:6-2801:6)

After firing at White, Defendant proceeded further down the north hallway toward the west, out of the line of sight that Frazier had through the C-107 doorway. (Frazier, 12 RT 2788:24-2790:15)
Jose Rodriguez was a student in Ms. Ortiz' class in room C-105 of Building C. He was seated toward the back of the class opposite the classroom door which opened out on the north hallway of Building C. Rodriguez testified that he first saw light as the northeast door to Building C opened, then saw a man enter the building and walk down the north hallway outside of room C-108b. (Rodriguez, 11 RT 2653:13-2656:16, 2667:2-10, 2670:12-2672:13, 2673:5-8)

Rodriguez did not see Defendant go into room C-108b, but saw him fire several shots, between three and five, in rapid succession into

room C-108b. Rodriguez demonstrated how Defendant held the gun by holding his right hand across his chest at the center of his sternum and his left hand extended directly out to his left with his palms upward. (Rodriguez, 11 RT 2673:5-2674:26)

After Defendant fired into C-108b, Rodriguez saw him continue "walking fast" down the hallway toward the foyer area; Rodriguez did not see Defendant fire into C-107. When he reached the stairway in the middle of the north hall, Defendant fired toward the door of C-105. When he fired he was holding the gun in the same manner as when he fired into C-108b. The shot struck Rodriguez' feet and two other students in C-105 in their legs. (Rodriguez, 11 RT 2660:19-23, 2662:17-26, 2673:5-2678:3, 2680:22-2681:6)

Another student struck by the shot into room C-105, Patricia Collazo, had been standing by her seat in the back row of C-105 opposite the door to the hallway close to Rodriquez and Yanez when she heard somebody shooting. She looked down the hallway and saw Defendant outside of C-108b. (Collazo, 11 RT 2682:16-2687:14)

Collazo testified that she heard one gunshot and then saw Defendant fire toward C-105 as he was moving down the hallway from outside C-108b. Collazo was struck her in the leg. She19in the leg by gunshot pellets. She could not tell if Defendant was pointing the gun when he shot at her. Collazo demonstrated how he was holding the gun by holding her right hand up by her right shoulder and her left hand extended out in front of herself at about chest level with the palms turned upwards. (Collazo, 11 RT 2687:16-2690:13, 12 RT 2712:2-7)

After Collazo was shot Defendant fired two more shots into C-

105 and started moving to his left (i.e., southward). Collazo testified at trial that she estimated she watched Defendant in the hallway for one to two minutes, but admitted that she had told investigating officers shortly after the incident that she had watched him for four to five seconds and that had been her best memory at the time. (Collazo, 12 RT 2719:4-2720:12)

Maria Yanez was sitting inside C-105 near the door, one row in front of Jose Rodriguez and one row behind Patricia Collazo. She saw a shadow of a man standing outside Robert Brens' classroom (C-108b). In less than two minutes she heard 2 or 3 gunshots and got up to get away from the door. As she got up she was hit by shotgun pellets in both knees and fell. (Yanez, 12 RT 2727:3-2731:8, 2736:14-22, 2738:18-2740:1, 2743:20-23)

Nancy Jean Ortiz was the teacher for the class in C-105. As the shooting in C-108b started, Ms. Ortiz was in her office, which was at the south end of C-105 and separated from the classroom portion of C-105 by a curtain. The initial shots sounded like firecrackers to Ortiz. (Ortiz, 12 RT 2748:6-2750:8)

Ortiz exited her office into the hallway and went into the classroom portion of C-105. She hesitated slightly at the southeast corner of C-105 and saw a figure at the doorway to C-107. (Ortiz, 12 RT 2748:6-2751:27) She saw a male dressed in camouflage holding something in his hands across his body. At first it did not register with Ortiz what he was holding. He was standing with his legs spread apart looking or speaking into the classroom. When she came into the C-105 classroom she saw that the students had knocked tables over onto the floor. She did not remember if she asked or was told that

anyone was shot. She closed the door to C-105 and barricaded it with furniture. (Ortiz, 12 RT 2751:28-2753:3, 2778:14-20; Yanez, 12 RT 2732:22-25)

Danita Gipson was a student in classroom C-110b at the start of the sixth period around 2:00 p.m. She was sitting at her desk. There were 12 to 15 other students in the room, as well as John Kaze, a substitute teacher. Gipson heard three to five loud bangs coming from outside the classroom toward the north end of the building. Thinking there might be a fight going on, she walked out of the classroom northward until she reached the north end of the double staircase in the middle of the building. From that position she saw Defendant walking westward along the north corridor near the north stairway. He was about 25 to 30 feet away from her. Defendant had a long gun like a rifle or shotgun in his hand and another long gun on his back. (Gipson, 12 RT 2886:22-2899:5)

As she was looking at him, Defendant turned and saw Gipson, raised the gun to his face, put it against his shoulder, aimed, and fired at Gipson. As Defendant was raising the gun, Gipson realized he had a gun and turned and ran. The shot he fired hit her in the left buttock, causing her to fall. She lay on the ground for a second and then got up and ran back into C-110b. (Gipson, 12 RT 2890:14-2891:3)

The substitute teacher in C-110b, John Kaze, also had heard what sounded like gunshots coming from the north end of the building, and then observed a female student go out of the classroom. Kaze followed her out, thinking that if he did so she would return to the classroom. Outside the classroom he saw a man in the northern corridor moving away from the corridor across the northern foyer at

about a 45 degree angle. Kaze thought he saw the girl go past him back toward C-110b, but Kaze was focused on Defendant in the northern hallway. Defendant saw Kaze and changed his direction, starting to move toward Kaze who was by the doorway to C-110b. Kaze described Defendant as walking with a "light spring to his step," and looking like he was "having a good time." Kaze demonstrated how Defendant was carrying a gun with its butt end against his waist, held by his right hand with the barrel away from his body at a forty-five degree angle. (Kaze, 13 RT 2922:6-2928:7)

Kaze watched Defendant for a short time and then when Defendant was roughly at the center-post of the northern end of the central stairway Kaze turned his head to the right preparatory to going back into C-110b and at that point he was shot. Defendant said nothing to Kaze prior to shooting him. (Kaze, 13 RT 2928:10-2930:5)

When Gipson re-entered C-110b she saw the teacher, John Kaze, by the door, directly in front of her. The entire front of Kaze's shirt was covered with blood and he was bleeding from his nose and his mouth. They both went into the office that is next to C-110b and separated by a curtain with a small entrance on one side. (Gipson, 12 RT 2891:2-24)

Sergio Martinez was a student in room C-109a, the more southerly portion of room C-109. Martinez heard what sounded like four or five fire crackers coming from the direction of C-108b, C-107, and C-105. Martinez did not know what the noises were, but saw other students running away from the direction of the sounds. Martinez ran and hid in the southeast corner of C-109a. (Martinez, 12 RT 2812:26-2819:28, 2820:10-2821:10)

Martinez was on his knees looking up at the door frequently from behind a papier mâché project, and saw a man walking south down the hallway outside C-109. As Defendant came past the doorway he was pointing his gun at Martinez' chest, and Martinez dropped to the floor and rolled to his right side. Defendant, who was about 16-18 feet from Martinez, was holding the gun to his shoulder looking down the gun with his eye squinting. The gun went off and Martinez was hit in his left arm. Martinez heard another shot fired immediately after the one that hit him, but doesn't know if it was fired into C-109 or elsewhere. Defendant then moved further south and Martinez heard two to four additional shots from somewhere in Building C. (Martinez, 12 RT 2820:15-2822:20, 2829:18-2833:4, 2837:22-2838:14, 2841:15-2844:15, 2847:17-24)

Gerardo Mojica also was a student in C-109 during the sixth period. He was sitting in the C-109b portion of the room using a tape recorder when he heard three sounds he thought were firecrackers coming from the vicinity of the northeast entrance to Building C. The shots went "boom, boom, stop, then boom." Mojica, who was sitting three seats from the door to C-109, got up and looked out into the hallway. He saw the back of a man standing in the doorway to C-107. As he watched, it appeared to Mojica that Defendant fired a shot into C-107, although Mojica could not see a gun at that time. (Mojica, 12 RT 2849:7-2852:7, 2865:9-2866:8)

Defendant started moving westerly along the hallway from C-107, and then when he came to the corner of C-109, turned and moved in a southerly direction. Mojica ran into C-109a as he heard another shot being fired generally from the north hallway by the foot of the

north stairway. (Mojica, 12 RT 2852:20-2854:1) Mojica then saw Defendant in the doorway to C-109a and saw the barrel of his gun. Mojica jumped in the air and heard the gun go off. Mojica crawled to a safe location, where he stayed while he heard five or six more gunshots from the south end of Building C. (Mojica, 12 RT 2854:3-2855:10)

Joshua Hendrickson was in classroom C-204 on the second floor. He heard loud banging noises downstairs and went out of his classroom to the railing on the balcony. Looking down he saw a man standing with a long gun. Hendrickson saw Defendant look up at him, point his gun and shoot. Hendrickson back away from the railing as the gun went off and ran back into C-204. (Hendrickson, 14 RT 3183:16-3188:20)

Ketrina Burdette was in C-104a when she heard sounds like someone hitting the lockers. The sounds were coming from the North Foyer area. She got up and went outside the classroom to see what was making the noise. She heard more shots coming from the north foyer. Then Burdette saw a "guy" coming out of the foyer shooting. He had the gun in his right hand, holding the butt end of the gun against his armpit with his left hand extended out about shoulder height. She saw Defendant go from in front of another classroom over to the entrance to C-110a. (Burdette, 13 RT 3009:18-3014:2)

Bee Moua was a student in room C-104. He heard several shots, but thought someone was setting off stink-bombs, since that had occurred several days before in the school. He stayed at his desk and then saw other students running from the building. Moua got up from his desk intending to leave the building as well, but before he got to

the door he saw Defendant shooting into the classroom. At the first shot Moua dropped to the floor and then heard another shot. He did not see how Defendant was holding his gun and did not know where the shots went but he did hear them go by him. He could not remember where Defendant was when he shot into the classroom and he was not aware of Defendant aiming the gun at any person. (Moua, 13 RT 3111:24-3116:13, 3130:21-3131:18; 14 RT 3142:6-17)

Burdette, in room C-104a, saw Defendant shoot into C-102. She said he appeared to be shooting to the ceiling, holding the gun pointing upward as he shot twice into C-102. She did not hear Defendant say anything. (Burdette, 13 RT 3009:26-3010:8, 3023:16-3024:16)

Robert Ledford was teaching in C-102 when he heard some loud "popping sounds" a few minutes before two o'clock. The first two sounds were muffled and he ignored them, but the third was more distinct and caused him to go from the front of C-102 to the back of the room, and then to exit the classroom to look northward down the corridor, running in front of C-110 and C-109, into the common area. The sounds were spaced a few seconds apart. (Ledford, 13 RT 3041:28-3044:1, 3070:19-3072:20)

Ledford went into the common area to the foot of the south stairs and heard three more gunshots from the north end of the building in the area of the north staircase. The shots were again spaced a few seconds apart. Ledford was looking down the corridor running north past the middle staircase to C-106. Ledford saw a blur, heard echoes of another shot, and saw two boys running from the area of the boys' restroom between C-110 and C-109. One of the boys cut

and ran past the library and out of the building through the southwest doorway. The other boy, Daniel Spade, ran straight at Ledford yelling about a man with a gun. Spade slipped and fell as he approached Ledford. Ledford then yelled loudly into the common area "get down," directed Spade into C-102, and then turned and yelled "get down" into his classroom. (Ledford, 13 RT 3044:2-25, 3072:1-3076:21)

Ledford then moved a little eastward toward the southeast exit and yelled "Don" to Donald Graham, who was the teacher in C-101a. Graham leaned out of the door to C-101a holding the classroom phone in his right hand. Ledford shouted: "911. Man with gun. Shots fired." Graham asked Ledford to repeat what he had said. As Ledford repeated the message, Graham, who was about 20-25 feet away from Ledford, made a motion with his left hand pointing to something behind Ledford. Ledford understood this to mean Graham was indicating there was danger behind Ledford, and Ledford moved down the hallway so that he was behind the short wall extending north just to the east of the entrance to C-102. Ledford heard more shots coming closer and pressed his back against the wall. Then he heard desks being knocked over in C-102 and then in C-101a. Then Ledford heard a gunshot that was traveling eastward down the hallway towards the southeast entrance, past Graham, who leapt back into his classroom as it was fired. Ledford then heard clicking sounds that seemed to him to be Defendant reloading. He peered around the wall and with one eye saw Defendant standing right outside C-102, about 8-10 feet away to the northwest. (Ledford, 13 RT 3044:26-3047:14, 3049:20-22, 3077:18-3086:28)

Ledford saw that Defendant had sunglasses over his eyes; Ledford could not see his eyes. He had no real expression on his face. Ledford acknowledged that when he was interviewed by law enforcement he described Defendant as having a blank stare on his face and showing no emotion. (Ledford, 13 RT 3047:16-3048:24, 3054:3-20, 3088:17-3092:23)

Defendant was carrying the shotgun with the butt of the gun at the armpit pointing upward at about 15 to 20 degrees above the horizontal. Ledford saw Defendant lift the shotgun to his right shoulder with his left arm extended and his right arm in the trigger position, and fire into C-102. Defendant moved out of Ledford's sight into the C-102 classroom for five to ten seconds, then reappeared, facing toward the open area, walked slowly to the south staircase and proceeded to go up the stairs. At this point Ledford observed Defendant holding the butt of the shotgun at or slightly above his waist with the barrel going upward at a 45 degree angle in front of him. When Defendant reached the landing at mid-way up the south stairs, the rifle slung over his back dropped and slid back down to the floor. Defendant turned to come back down the stairs and Ledford hid himself. When Ledford again peered around the wall Defendant was nearly at the top of the south stairs. When Defendant reached the second floor he turned and began walking around the balcony. (Ledford, 13 RT 3049:2-3050:24, 3091:3-3097:12)

Donald Graham was teaching room C-101a when, at about 2:05 p.m. he heard a series of what sounded like firecrackers coming from the north end of the building. At first he heard three "explosions", then a pause, and then several more. The explosions continued for

"several minutes" and seemed to get closer to his classroom in the south end of the building. Graham got up and went outside the classroom into the hallway, looking westward. He saw Ledford step out of room C-102. He then saw Ledford make a hasty retreat back toward his classroom, but to go around to the east side of the short wall that stuck out into the hallway to the southeast exit as though he were extremely fearful of something. (Graham, 14 RT 3169:6-3174:4)

Graham then saw a person enter the area where the north-south hallway running in front of C-109 and C-110 intersects with the hallway running from the southeast to the southwest entrances to the building. The lights were off in the hallway and the sun was coming through the windows in C-104, causing the figure to be silhouetted to Graham. It appeared to Graham that the figure had a gun strapped to his back and another gun held in his hands in port arms position. Defendant saw Graham a moment after Graham saw him. Defendant began lowering his gun in Graham's direction by lowering his left hand and extending his left hand out in front of him as to if to point the weapon from the area of the shoulder or upper chest. Graham jumped back into the classroom. (Graham, 14 RT 3173:19-3176:1)

Just after Graham jumped back he heard a gunshot which struck a locker between Graham and Defendant. A pellet or fragment struck Graham in the left forearm. The students in C-101a had turned over their desks and were crouched behind them. Graham heard another gunshot, a period of silence, some further gunshots, and then silence. Graham heard Ledford shouting to his students to exit the building. Graham told his own students to do so as well, and the students exited the building through the southeast entrance. Graham followed his

students out. (Graham, 14 RT 3176:2-3177:19)

Angela Welch was a student in Mr. Ledford's class in C-102. She was seated in the classroom when she heard three or four loud noises "like a firecracker" coming from the "other end of the hall," i.e., north foyer area at the end of the corridor running past C-109 and C-110. Wayne Boggess then came running down the hall and into C-102 shouting "Mr. Ledford, call 911 because my teacher has been shot." Ledford and Boggess then ran out of the classroom, and Welch did not see Ledford after that. She did see Boggess at the southwest corner of C-110a turn around and take a few steps in front of C-110a just as Defendant was coming down the hallway in the area of the central stairs. She then saw Defendant fire and shoot Boggess who fell down. Welch was in C-102 standing next to Beamon Hill when she saw Boggess shot. (Welch, 14 RT 3153:20-3159:25)

After shooting Boggess, Defendant continued to walk toward C-102. Defendant was holding the gun with his right hand extending out and his left hand in back near the chest. Welch froze as she watched Defendant and made eye contact with him. Suddenly, Beamon Hill shouted "No" and pushed Welch out of the way as Defendant, without changing the position of his gun, fired. The shot hit Hill in the head causing him to fall to the ground. (Welch, 14 RT 3161:13-3162:27)

Hill's push sent Welch to the floor several feet away. She crawled under a table where she watched Defendant walk away out of the classroom. A few seconds later Defendant returned. Under the table, Welch saw Defendant only from the waist down. She saw Defendant's waist turning as Defendant looked around. Then

Defendant turned and for a second time left the classroom. Welch did not see Defendant again. (Welch, 14 RT 3162:28-3163:17)

Gregory Todd Howard was a student in room C-104. He heard loud noises outside the classroom from the area of C-107. He heard first one loud bang, and then two or three followed. Howard ran out of the classroom over to the south end of the middle stairway. He couldn't see anything there, so he ran over to the south door to the library area. There he saw students and some teachers in the library rushing away from him toward the door at the north end of the library by the northwest building exit. Howard then heard two more bangs and saw a flash of light coming from the area at the south end of the northern stairway by C-106, following which people who had just run out of the library ran back into the library heading south toward Howard, some diving under chairs. (Howard, 13 RT 2953:13-2957:14)

Howard turned and started to run back into C-104 when he remembered that his girlfriend, Lucy Lugo, was in C-110. He ran past the south stairway into C-110a. As he approached C-110a he saw John Kaze coming out of the door to C-110b, and as he went in to C-110a he heard a loud bang. Inside C-110a Howard met up with Lugo and Wayne Boggess. As he was talking to Lugo and Boggess, Kaze came into C-110a. He was bleeding from his nose, neck, and shoulders and asking students to help him. (Howard, 13 RT 2957:15-2959:10)

Frightened at seeing Kaze injured in that manner, Howard, together with Lugo and Boggess ran out of C-110a into the hallway. Boggess stopped at the corner of C-110a while Howard and Lugo ran

to the small corridor leading to the door of C-103a. Howard hoped to escape by getting into C-103a, but the door to that room was locked, trapping Howard and Lugo in the small corridor by a row of lockers. They tried to hide by the lockers when they heard somebody yelling loudly "get down everybody." When they heard the voice say "get down" a second time they both got down on the floor with their heads facing out toward C-110a. Howard heard another "get down," and saw Boggess still standing at the corner of C-110a by its doorway. Boggess seemed "in a daze" and was not responding to the calls to "get down." Boggess then looked over at Howard and Lugo on the floor, glanced back, and was shot in the face. The force of the shot sent Boggess up in the air; Boggess landed on his back, moaning and in convulsions. (Howard, 13 RT 2959:23-2962:22)

Howard then saw Defendant for the first time. Defendant was coming from the south foyer area near the south stairs and crossed in front of Howard's vision from left to right, entering C-102. Howard heard a shot go off. Defendant walked back out of C-102 within five to eight feet of Howard and Lugo, and then walked back into C-102 out of Howard's sight. An extended silence ensued, followed by Defendant walking back out of C-102 to within about five to six feet of Howard and Lugo. At first Defendant did not see them, but then turned, saw them, and pointed his gun at them, holding the gun butt slightly above waist level with the front of the gun supported by his left hand. Howard estimated the barrel of the gun was about two feet away from him and Lugo. Howard looked Defendant in the eyes. Defendant held the gun pointed at the two students "for a minute," then moved the gun into a position forty-five degrees out in front of

him, (characterized by the trial court as a "port arms position,") turned around, and went up the south stairs two stairs at a time. (Howard, 13 RT 2962:25-2968:19, 2975:5-8)

When Defendant passed out of Howard's line of sight Howard jumped up and started for the southeast exit. Looking up, he saw Defendant on the stairs. Defendant had a gun in his left hand and another gun slung on a strap over his left shoulder. Shells and "stuff" were falling out of Defendant's pockets, clattering down the stairs and onto the tile floor. Defendant was taking two stairs at a time. When Defendant was three or four stairs below the top, the gun slung on his right shoulder dropped and slid all the way down to the bottom of the stairs. This was a different, "skinnier" gun than had been pointed at Howard and Lugo. Howard quickly returned to where he had been lying on the floor. Defendant came back down the stairs and picked up his gun but did not attempt to pick up any of the fallen shells. Defendant went back up the stairs to the second floor balcony, however this time he took one stair at a time. Howard could hear Defendant moving along the balcony. Howard got up, grabbed his girlfriend Lugo, who Howard found to be too frightened to move, and dragged her out of the building through the southeast exit. (Howard, 13 RT 2970:7-2972:15, 2973:19-2977:11)

Lugo testified that, when the incident began, she was in C-110a where Mr. Kaze was the substitute teacher. She heard loud noises coming from the north foyer area of the building. Lugo and three other students, including Wayne Boggess, went to the door of C-110a and stuck their heads out to see what was happening. Lugo heard more loud noises that sounded closer and saw people running. Lugo

went back into C-110a and stood in front of the big chalk board. Her boyfriend, Gregory Howard came into the room through the C-110a doorway, and they backed up to some black cabinets. Lugo saw Kaze, who was holding his throat with one hand and had blood on his other hand. Howard grabbed Lugo by the hand and they ran out of C-110a over to the small hallway that leads to room C-103. Lugo thought Wayne Boggess was coming with them, but he remained outside the door to C-110a. (Lugo, 13 RT 2987:14-2992:16)

Lugo recalled someone yelling "get down, get down." Lugo and Howard stood by the lockers in the small hallway to C-103. Again she heard someone shouting "get down." She and Howard both went to the floor. Lugo looked over to Boggess who was still standing at the door to C-110a, looking at Howard and Lugo. She saw Boggess get shot, go up in the air, land, and go into convulsions. (Lugo, 13 RT 2992:18-2994:6)

Lugo put her head down and started to pray. She heard another shot that was close by, from the next room [C-102]. Then she looked up and saw Defendant about eight feet from her with his gun pointing at her and Howard. Lugo put her head down and then again looked up to see Defendant running up the south stairway. Lugo heard the gun fall on the stairs and banging as it slid down from stair to stair. Lugo did not hear the gun go off as it fell. Shotgun shells also started falling down the stairs. Then she saw Defendant come back down the stairs. Howard had started to get up, but when Lugo saw Defendant coming back down she pulled Howard back to the floor and they lay there while Defendant picked up the fallen gun and went back up the stairs. Howard then dragged Lugo out of the building through the southeast

exit. (Lugo, 13 RT 2994:7-2998:26, 3006:13-19)

At trial Defendant stipulated that he was Defendant observed by the preceding witnesses. After ascending the stairs, Defendant did not shoot at any other person nor physically attack or harm any other person during the incident.

Witnesses estimated the time during which Defendant was shooting on the first floor as from less than a minute to two minutes . (Hodkinson, 19 RT 4369:3-4370:12 (60 seconds); Vargas, 19 RT 4385:7-4386:25 (not even a minute); Hendrickson, 19 RT 3190:14-24 ("at least a minute"). At sentencing the trial judge made a slightly longer estimate of two to three minutes. (25 RT 6139:22-25)

2. May 1, 1992, From Approximately 2:05 p.m. Until Gunman Surrenders - Lindhurst High School, Building C, Second Floor

a) On Balcony

Witnesses testified that upon reaching the top of the stairs, Defendant walked south to north along the balcony (Parks, 15 RT 3526:1-20; Hendrickson, 14 RT 3190:25-3191:13), passing room C-201 (L. Hernandez, 19 RT 4377:23-4378:8, 4383:12-20) and C-204b (Hendrickson, 14 RT 3183:25-27, 3191:16-17). Defendant then returned and entered C-204b (Hendrickson, 14 RT 3191:18-23).

One witness testified that while Defendant walked along the balcony he carried two guns, one thrown over his shoulder and another in his hand (L. Hernandez, 19 RT 4383:12-20); another witness testified that he carried only one gun with the butt underneath his right arm at the elbow and his right hand holding the gun strapped

or "braced" upright in a nearly vertical position (Parks, 15 RT 3527:4-3528:1).

b) Entering C-204

Upon entering C-204b, Defendant told everybody to get on one side of the room and told the teacher, Ms. Cole, to leave the building. (Hendrickson, 14 RT 3183:23-3284:4; 3191:24-26)

Witnesses testified that Defendant appeared nervous and was holding the gun with the butt at his hip and the stock parallel to the ground or at a 45 degree angle, pointing in the direction of the students. (Perez, 15 RT 3414:15-3415:16)

Witnesses testified that once inside room C-204b, Defendant asked the students to help move a desk and a bookcase to partially block the doorway to C-204b. (Hendrickson, 14 RT 3201:22-3202:12; Hodkinson, 19 RT 4371:25-4372:2)

Testimony indicated that he said he did this so that if the S.W.A.T. team/sniper fired neither he nor the students would get shot (Hendrickson, 14 RT 3201:22-3202:21, 3216:26-3217:7; Owens, 16 RT 3611:8-17).

c) Lookouts

Defendant ordered four students to go out on the balcony and stairs and serve as lookouts for police. He yelled orders to them. (Perez, 15 RT 3384:7-25; Baker, 15 RT 3497:9-19)
Testimony indicated that Defendant sent students from C-204b to other areas of the second floor as well as to the first floor of the building to bring students to C-204b. (Hendrickson, 14 RT 3213:5-22)

d) Students from 205 to 204b

At some point (within 15 minutes per one witness) after Defendant entered 204b, students from C-205 joined the students in room C-204b. Some testimony indicates that the teacher in room C-205 interacted with a student on the balcony and was told to send her students to C-204b and to exit the building herself, other testimony indicated that Defendant went to C-205 and told the students there to come to C-204b, other testimony indicated that Defendant shouted these instructions to C-205. (Hodkinson, 19 RT 4370:13-4371:11; Daehn, 16 RT 3748:8-3749:23; Prather, 16 RT 3770:15-3771:23)

The students from C-205 walked single file to C-204b where they were told by Defendant to sit with the other students on the floor against the far wall. Defendant was holding the gun at waist level with the butt of the gun by his right hip and his left hand extended to hold the front of the gun at waist level. The gun was pointed at the students as they entered. One student testified that when the students from C-205 arrived in C-204b, Defendant asked them to help barricade the opening to the classroom. (Hodkinson, 19 RT 4371:25-4372:4; Daehn, 16 RT 3749:4-17, 3806:9-3807:1)

e) Students from 201 to 204b

At some point, .5 hours (Newland, 16 RT 3653:8-24), 1.5 hours (Baker, 15 RT 3495:7-14), or 2 hours (L. Hernandez, 19 RT 4378:22-25) after Defendant entered C-204b, the students from C-201 were directed by a female student (Baker, 15 RT 3495:2-6; Newland, 16 RT 3653:17-24) or "two students" (L. Hernandez, 19 RT 4378:7-28; Parks, 15 RT 3531:2-10) to leave their classroom to join the others in

C-204b; the teacher from C-201 was directed to leave the building. (Baker, 15 RT 3495:2-6) They were told that if the students didn't go to the room with Defendant Defendant would start shooting. (Parks, 15 RT 3531:11-18)

When the approximately 17 students arrived from C-201 to join the 30-40 students already in C-204b Defendant was hiding behind the bookcase with one gun. (Baker, 15 RT 3495:21-3497:8)

Defendant told the arriving students to join the others on the floor. Defendant had a shotgun which he held with the butt of the shotgun on his shoulder and his left arm on the forepiece or pump wrapped in the strap. Defendant seemed very agitated and followed each student with the shotgun as they came in telling each one he didn't want them "too close to me." (Newland, 16 RT 3654:15-3655:28) He had them lift up their arms and turn in a circle to make sure they had no weapons. (Parks, 15 RT 3535:2-5)

3. Spreading out

With the arrival of the additional students from C-205 and C-201, the room became crowded. Defendant stated that the students were too bunched up and too close to him. He told some of the larger students to move desks out of the classroom and told the students to spread out. (Baker, 15 RT 3495:21-3496:4) Defendant told the students to put their pens and pencils and purses in a corner so that they could not stab him in the neck. (Hendrickson, 14 RT 3212:1-6)

4. Destruction of Property

Defendant opened the file cabinet in C-204b. He looked through papers, made comments about the failing grades on the papers

and threw the papers over the balcony. Defendant made comments about the teacher, Mrs. Cole, whose classroom he was in, recalling an incident between Mrs. Cole and his sister. Defendant then was described as smashing the wall clock, tearing it off the wall, and throwing it over the balcony. (Newland, 16 RT 3657:10-3658:19; Moua, 14 RT 3151:2-18; see also testimony of Hicks, 15 RT 3445:11-19)

5. Students use the Bathrooms

At some point Defendant asked the students in C-204b if they had to use the restroom. Students testified that "about half" of the students (Baker, 15 RT 3513:13-18), or "a lot of us" (Parks, 15 RT 3541:12-13), or "most everyone" (Newland, 16 RT 3662:14-18) indicated that they needed to use the restroom.

Defendant began allowing students to leave C-204b to use the student bathrooms. The entrance to the student bathrooms was underneath the balcony and thus could not be seen from C-204b. (Hendrickson, 14 RT 3215:4-9) As students left in pairs to go to the bathroom, Defendant threatened to kill other students remaining in C-204b if the students going to the bathroom did not return. (Baker, 15 RT 3519:18-3521:20; V. Hernandez, 14 RT 3272:4-10) As students re-entered C-204b, male students were asked to lift their shirts so that Defendant could determine that they had no weapons. (Hendrickson, 14 RT 3212:22-28)

One witness testified that the first pair of students who went to the student restrooms returned but the second pair did not return; Defendant continued to allow students to use the student bathroom

(Baker 15 RT 3519:11-17) Another witness testified that after the second pair of students failed to return another student was sent to look for the second pair and also did not return; when this third individual did not return no additional students were permitted to go to the student bathrooms. (Parks, 15 RT 3541:18-3544:7) Testimony from another witness indicated that the first pair of students did not return and then no additional students were permitted to go to the student restroom (Newland, 16 RT 3663:21-3664:8). Although he made such threats repeatedly, apparently several students he allowed to go to the bathroom exited the building once they were out of sight underneath C-204b. Defendant never carried out any of his threats. (Baker, 15 RT 3518:9-3521:20; Parks, 15 RT 3541:18-3544:7; Newland, 16 RT 3663:21-3664:8)

Eventually a faculty bathroom key was delivered and students needing to go to the bathroom were instructed by Defendant to use the faculty bathroom across the first floor from C-204b. The first two pairs of students who left to use the faculty bathroom did not return, which angered Defendant. Nevertheless, he let an additional pair of students leave C-204b to go to the faculty bathroom; as with the first two pairs of students who left for the faculty bathroom, he threatened to kill students if they did not return. This third pair of students left for the faculty bathroom and then exited the building. Again Defendant's threats were not carried out. (Baker, 15 RT 3518:9-3521:20)

6. Students Released for Special Needs

In addition to the students who exited the building under the

guise of using the student or faculty bathrooms downstairs, several students were released by Defendant because they informed him of a special need. Defendant released one female student who was crying and another who claimed to be pregnant and one male student who claimed to be ill. (Hendrickson, 14 RT 3214:2-12; 3215:24-3216:2)

7. Assistance sent to Injured Students

Defendant told the police that he would have students remove the injured from the first floor; he then sent students downstairs to do so. (Mojica, 12 RT 2857:15-2859:20)

8. Warning Shot

Several witnesses testified that after several students left the building when going downstairs to use the student bathroom Defendant told police he wanted a key to the men's faculty bathroom. When, after a period of time, no key was produced, Defendant told the students he would be firing a warning shot – not to hit anyone but just to send a message. Defendant then fired a shot out across the library. (Hendrickson, 14 RT 3215:1-23, 3239:19-3240:17; Baker, 15 RT 3500:3-3521:20) Contradictory testimony indicated that Defendant told the students he was going to shoot somebody, turned the gun toward the library, and shot out a window in the library. (Parks, 15 RT 3539:13-3540:11)

9. Throw Phone

Sometime before 2:30 p.m. (Perez, 15 RT 3422:6-15) or about an hour or an hour and one half after the students from room C-201 came to 204 (Parks, 15 RT 3544:8-23), police rang on the school phone in the classroom to say they were going to deliver a telephone

("throw phone") to the building. When the police brought the throw phone into the building, Defendant had Perez talk to the police negotiator over the throw phone. Defendant did not at first give out his real name, but told Perez to tell the police negotiator his name was "George." Defendant told Perez what to say. At times Defendant would get angry and then he would talk to the negotiator himself, then give the phone back to Perez. (Perez, 15 RT 3385:11-22, 3388:6-3390:9, 3419:9-3423:4)

10.TV/Radio

Defendant instructed a student to obtain a television from a nearby classroom but the cable did not work. Another student was then sent to retrieve a radio. (Parks, 15 RT 3546:28-3548:11)

11.Supplies and Release of Students

Defendant asked the police to provide Advil, for students who complained of headaches, and for pizza and sodas. Defendant agreed to release some students in return. (V. Hernandez, 14 RT 3274:7-11.) Around 7:30 to 8:00 p.m. twelve pizzas, and a cooler containing sodas arrived; two students retrieved them. (V. Hernandez, 14 RT 3274:7-3275:13) One witness testified that there were 85 students in C-204b before the pizzas arrived (V. Hernandez, 14 RT 3274:23-27) and that Defendant released about 20 to 30 students in return for the pizza and sodas and another 20-30 in return for the Advil. (V. Hernandez, 14 RT 3328:25-3329:3, 3377:14-20) Another witness testified that there were 50 students in C-204b before the pizzas arrived and that groups of 10 were chosen for release. (Hicks, 15 RT 3451:12-3452:7) Another testified that fifteen students were released as the pizzas

arrived. (Mills, 18 RT 4311:19-4312:9) Defendant did not eat any pizza because he was afraid the pizzas may have been drugged. (V. Hernandez, 14 RT 3273:27-3274:6)

12. Reasons for coming to the school

Several witnesses testified to the reasons Defendant gave for coming to Lindhurst High School.

Virginia Black was a detective in the Yuba County Sheriff's Department who had come to the school as soon as she heard over radio dispatch that there were reports of a gunman on the campus. Approximately half an hour after Black arrived at the high school, she was in the administration building when a call came through the school intercom system. One of the secretaries handed the phone to Black. It was Defendant calling from C-204b demanding that the school bells be shut off. He stated that if the bells were not shut off he would start shooting students. In the conversation Black asked Defendant why he had come to the high school and what they could do for him. At some point in the conversation Defendant started to talk about his problems: that he had lost his job; that he had rent to pay of $420 or $450 per month; that he hadn't graduated; that he did not have a diploma; that he lived with his parents, etc. He then said he would call back later and hung up. (Black, 18 RT 4134:26-4135:15, 4138:23-4140:7, 4210:9-4212:3)

Various students who were in C-204b with Defendant testified as to what Defendant had said in the classroom which they interpreted as his reasons for coming to the school.

- Hicks testified that for a while after entering the room Defendant just sat there, cursing at everyone and himself. Then he started talking about why he was there. (Hicks, 15 RT 3440:7-26)
- While he threw papers off balcony and broke the clock, he continued ranting about Miss Cole and about Robert Brens. Concerning Brens Defendant said that Robert Brens had "betrayed" him, that Brens had failed Defendant in Economics or Civics. Defendant asked the students if they had had Brens as a teacher and asked them "Is he a jerk or what?" The students stated their assent[17]. (Newland, 16 RT 3658:13-3659:6)
- He said Brens, Mr. Ward (the Lindhurst High School principal), and the school in general had laid traps for him that prevented him from graduating, and that as a result he had lost his girlfriend and his job at Hewlett-Packard. (Newland, 16 RT 3659:13-21)
- He said he had worked as a temporary fill-in and was laid off, that he was guaranteed a permanent job and promotion if he went back, but he needed a high school diploma to go back. He said he had gone to the school to get his diploma, but they wouldn't let him have it because he had failed economics, civics, and a couple of

[17] Newland offered the opinion that the students' statement of agreement with the gunman's evaluation of Mr. Brens was the result of the gun he was holding.

other classes. He said his girlfriend had left him to join the Coast Guard. (V. Hernandez, 14 RT 3267:25-3269:2)

- Defendant said he had come to the school to make "Mr. Brens pay... He was going to make sure that none of the teachers ever made a mistake again like this [i.e.: treating a student as he was treated].. The teachers were "fools" who failed to spot him when he was on the school grounds. He had brought cans of gasoline straight to the school grounds without the teachers knowing about it, and he had planted this gasoline such that he only had to press a button and the school would blow up.[18] He had read books about police tactics and didn't want the police rappelling from the roof to get in the room. He passed a picture of his girlfriend around the room for the students to see what she looked like. (Parks, 15 RT 3537:20-3539:4)
- He "said that he shot a teacher downstairs, and that, you know, he was there for Mr. Brens." (Hicks, 15 RT 3442:3-27)
- He said "he came there to talk with Mr. Brens" because "he flunked him" and "it ruined his life." (Burdette, 13 RT 3015: 24-3016:5)

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[18] As discussed, a number of students testified Defendant said he had placed some sort of incendiary material around the school. No evidence was introduced that Defendant had, in fact, brought any incendiary material or device to the school.

- He wanted to teach the school administration a lesson. (V. Hernandez, 15 RT 3373:4-16, 3375:13-18)
- He said he lost his job because he didn't have a high school diploma and it was the school's fault so he was taking revenge. (Hendrickson, 14 RT 3206:6-8)
- He said he was there because Brens had flunked him out of his Civics class so he couldn't graduate. He wanted a newsman to come right away dressed only in his shorts and camera. He didn't believe he would make it out of the building alive that day. (Baker, 15 RT 3498:20-3499:9)
- Jake Hendrix testified that Defendant described what he thought the students were likely thinking about him – that he was a crazy blond-headed person. Defendant told the students that Brens had flunked him when he was a senior. He said that he couldn't go to the prom, for which he had rented a limousine; he had lost his job and his fiancé – all because he had failed high school. Defendant told the students that his fiancé had broken up with him – he passed her picture around the classroom. (Hendrix, 16 RT 3811:5-3812:3)
- Jocelyn Prather testified that Defendant repeated his statements about the girlfriend, the job, and Mr. Brens each time new students entered C-204b. They were not in response to questions – there were few questions, although when he talked the students would talk back to

him to keep him from getting angry. (Prather, 16 RT 3791:16-3793:1)

13.Threats and Pointing Gun in C-204b

Eddie Hicks was in C-204b when Defendant came in. Hicks testified that Defendant pointed the gun at the students repeatedly and pointed it at Erik Perez several times. He swayed the gun back and forth as he sat. Defendant threatened people who asked to go to the bathroom that he would shoot the person's friend if the person did not return. (Hicks, 15 RT 3436:15-23, 3444:7-23)

Another student, Robert Daehn, testified that Defendant said there was a student across the way and he had shotgun slugs that could shoot 100 feet away. Daehn testified that Houston told them that he didn't want to shoot anyone but he would if the students didn't cooperate. (Daehn, 16 RT 3754:16-3755:2)

Esther Baker testified that Defendant made repeated threats to people who he said could go to the bathroom that he would kill three, four, five people if they did not return. Baker also testified that Defendant had Erik Perez tell the police negotiators that he would start killing students if he did not get what he was asking for [pizza, Advil, key to faculty bathroom, etc.] Baker also testified that at one point Defendant pointed his gun at a student who was stationed as a lookout on the balcony right in front of C-204b. Defendant was frustrated because he wasn't getting what he was asking for over the negotiation phone, and he pointed the gun at the student "and made like he was going to shoot him." The student's head was turned such that he could not see what was happening. The students in C-204b let

out a collective gasp which caused Defendant to pull the gun away from pointing at the student. (Baker, 15 RT 3500:3-3503:14)

Parks said that Defendant did not aim the shotgun at any specific student, but did wheel the gun around several times with the butt at chest level holding the barrel up at a forty-five degree angle pointing the gun generally in the students' direction. Defendant did point the gun at students when they returned to the classroom, using it to indicate he wanted them to pull up their shirts so he could see they didn't have weapons. (Parks, 15 RT 3539:13-3540:11, 3541:18-3544:7, 3560:1-3561:12)

Other students also described these same or similar threats and aggressive behavior on the part of Defendant after he came to C-204b. (Baker, 15 RT 3518:9-3521:20; V. Hernandez, 14 RT 3272:4-10; Mojica, 12 RT 2862:3-8; Perez, 15 RT 3431:22-3432:22; Parks, 15 RT 3541:18-3544:7; Newland, 16 RT 3663:21-3664:8; Vargas, 19 RT 4394:28-4395:18; Prather, 3776:22-3777:20, 3781:8-14; Hendrix:3822:6-12; Mills, 18 RT 4322:15-25; Hendrickson, 14 RT 3203:3-12; Cook, 19 RT 4364:25-4365:6)

At no time did the gunman carry out any of his threats. (Perez, 15 RT 3431:22-3432:22; Baker, 15 RT 3518:9-3521:20; Parks, 15 RT 3541:18-3544:7; Newland, 16 RT 3663:21-3664:8; Hendrix, 16 RT 3822:6-12)

14.Discussion re shootings downstairs

Testimony from students who were in C-204b differed as to what Defendant said concerning what had occurred when he was on the first floor of Building C:

Jennifer Kohler testified that she remembered Defendant was relieved when the radio newscast playing in C-204b announced no one had been killed. (Kohler, 16 RT 3646:14-23)

Victorino Hernandez testified that after Defendant had been talking for a while about why he had come to the school, Defendant and students were listening to a radio newscast that described people being taken to the hospital, and Defendant expressed surprise that he had shot people. (V. Hernandez, 15 RT 3365:24-3366:9) In his Grand Jury testimony Victorino Hernandez had stated: "[A]ctually, [Defendant] had said that he had not really remembered who he shot. He remembered shooting people, but he didn't know who, and then when he told him about Mr. Brens, that's when he said he was happy. Well, he didn't actually say he was happy. He said, oh, well, he failed me anyway." (V. Hernandez, 15 RT 3372:12-28) However, at trial Victorino Hernandez testified that Defendant had discussed how many people he had shot and mentioned that he had shot two teachers and a student. A couple of the students said the teacher was Mr. Brens. Victorino Hernandez said Defendant responded that "Oh well, he failed me anyway." After the incident Victorino Hernandez told investigators Defendant did not seem aware that he had killed anyone. At trial Victorino Hernandez seemed to back away from that statement but did confirm that Defendant had not said anything to indicate he knew he had killed anyone. (V. Hernandez, 14 RT 3269:3-8, 3311:5-12; 15 RT 3365:24-3367:4, 3372:12-21)

Joshua Hendrickson testified that Defendant said he had shot a teacher and some students and he hoped that none of them died because he was trying only to wound them. Hendrickson was not sure

Defendant was referring to Robert Brens when he referred to having shot a teacher. (Hendrickson, 14 RT 3205:28-3206:3, 3234:8-26)

Ketrina Burdette testified that Defendant said he had come there to talk with Mr. Brens. At one point Defendant said he had never intended to kill anyone, at another time he said he could not believe what he had done, and, after a couple of hours, he said he had shot Robert Brens "in the ass," but he did not indicate that he knew he had shot anyone else. (Burdette, 13 RT 3014:23-3017:5, 3021:21-25, 3029:3-10, 3030:20-3032:18)

Erik Perez testified that Defendant said he didn't know if he had killed anyone but that he had hit some people and that he had only shot to maim them, not to kill them and was worried as to whether anyone had died. (Perez, 15 RT 3426:7-3428:17)

Eddie Hicks testified that Defendant said he had shot a teacher and others and that he was not aware that anyone had been killed. Hicks confirmed that he had told investigating officers that Defendant said he did not want any of the injured students to die. (Hicks, 15 RT 3461:20-28, 3455:21-3456:15)

Esther Christine Baker also testified she heard Defendant say that he didn't know anyone had been killed. (Baker, 15 RT 3520:1-13)

Andrew Parks surmised that Defendant knew he had killed Robert Brens because Defendant said of Brens "He would never do it again," but admitted on cross-examination that Defendant never said he thought he had killed Brens or even that he had shot Brens, and that Defendant had said that he hoped the people he shot were not dead. (Parks, 16 RT 3600:11-3601:6)

Olivia Owens testified that students in C-204b asked Defendant what teacher he had a grudge against; when Defendant said it was Mr. Brens, the students asked why he wasn't downstairs talking to him. Defendant stated, according to Owens: "that Mr. Brens was taken care of already." Owens did not remember how long after Defendant came into C-204b he made that statement [i.e., whether or not he had already been told by the other students that Brens had been shot]. Owens also said Defendant wanted any injured people downstairs moved out of the building and hoped that he hadn't killed anyone. (Owens, 16 RT 3609:4-16, 3625:16-3626:27)

Ray Newland testified that Defendant had a pair of thumb-cuffs in his pocket. Later on in the evening Defendant told Newland that he had brought only one pair of cuffs and hadn't planned on taking more than one person hostage. Newland also testified that Defendant stated he had shot at several people downstairs. He didn't explain why he had shot them except to say that they had come out at him or that he was afraid they would try and jump him. He said he didn't know who any of his victims were. He had shot a teacher and a few students, and he described the room where he shot the teacher – downstairs right where you come in from the faculty parking lot, and asked who that teacher was. The students said from the description of the room location it sounded like Mr. Brens and asked Defendant if the teacher had a beard. Defendant said he didn't know if he had a beard "but I shot him in the butt." Newland testified Defendant smiled as he said he had shot the teacher in the butt. (Newland, 16 RT 3660:11-24, 3669:9-3670:10, 3690:20-3691:11)

Robert Daehn said Defendant said he had come to the school to

get revenge, that he blamed the teacher Robert Brens for flunking him, and that he had shot Brens in the stomach but that he didn't hurt him and Brens was still alive. He said he shot some students but did not say how many, just describing where he shot them.[19] Daehn acknowledged that Defendant said he had just meant to wound the people he shot . (Daehn, 16 RT 3750:23-3751:22, 3765:15-3766:3)

Jake Hendrix said Defendant asked the students he sent down to remove wounded people from the building to tell him where on the body they had been shot. One of the students he sent down did return to C-204b and when the student told Defendant where the injured person had been shot, Defendant reacted by saying "Oh, my God," stating that he didn't intend to shoot them there, but only to hurt them by shooting towards the legs. (Hendrix, 16 RT 3810:4-3811:4)

Nubia Lucila Vargas remembered Defendant had said about the people shot downstairs: "Oh, my God, Oh, my God, What have I done? What have I done?" (Vargas, 19 RT 4393:13-4394:9)

Warren Cook was in C-204b for a portion of the time and was also on the stairs as a lookout. While he was in C-204b, but he did not remember when, he heard Defendant state that Defendant and a friend had talked about it being "neat" to go to the school one day and just shoot some people. Defendant also said he wasn't aiming to kill anyone and that he didn't know he killed anyone. (Cook, 19 RT 4361:14-4363:26)

Uncontradicted testimony from law enforcement witnesses established that during the incident a decision was made to withhold

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[19] At trial Daehn was not asked to elaborate on this statement.

from the media any information that any deaths had occurred. Law enforcement also cut the cables to the Building C to prevent Defendant from accessing television or radio news broadcasts about the incident. (Escovdeo, 17 RT 3911-3913; Tracy, 18 RT 4294:7-21) When Defendant asked the negotiators if anyone had been killed they told him no. (Tracy, 18 RT 4302:6-27)

15. Evidence on Defendant's State of Mind While In C-204b

The throw phone deployed into room C-204b around 4:00 to 4:15 pm on May 1, 1992 recorded both the telephone conversations between the negotiators and Defendant and the words and sounds in C-204b. (18 RT 4218:14-4220:11). These recordings were preserved on seven audio cassette tapes that were introduced as Exhibits 82-88, (18 RT 4221:8-4222:21) and admitted into evidence without objection. (18 RT 4225:25-4226:4) For approximately six hours beginning on the afternoon of July 7, 1993, Officer Charles Tracy was called to the witness stand to play Exhibits 82-88. (4237:18-4302:27) By stipulation, the Court Reporter was excused from reporting what could be heard in the courtroom as the tapes were played. (18 RT 4227:15-23) The record on appeal contains no agreed transcription of what could be heard when the prosecution played Exhibits 82-88.

Both students and law enforcement witnesses testified that during the negotiations Defendant asked the negotiators for a "contract" that would guarantee that if he surrendered his sentence would not exceed five years, that he would serve it in a minimum security facility and be afforded educational and employment opportunities so that he could pursue a career on his release. The

"contract" was also signed by a number of students in C-204b as "witnesses," because Defendant was afraid he would be double-crossed by the police. (Exhibit 54; Perez, 15 RT 3428:18-3431:21; Black, 18 RT 4146:25-4148:21, 4176:24-4177:13; Newland, 16 RT 3670:13-3672:4, 3680:23-3684:11) A copy of the contract was found in Defendant's wallet after he surrendered. (Williamson, 16 RT 3737:10-28)

Another document was passed around amongst the students in C-204b while being held hostage on which each wrote their name and phone numbers so that their parents could be informed they had not been harmed. (V. Hernandez, 14 RT 3284:21-3286:15; 15 RT 3356:21-3358:3; Hendrix, 16 RT 3819:11-21)

Several witnesses testified to a change in Defendant's mood during the course of the incident.

Ortiz testified that after the first two hours of the incident, Defendant was no longer yelling as he had been at the outset. (Ortiz, 12 RT 2775:17-22) Ortiz started to hear Defendant talking and using profanities within fifteen minutes of the start of the incident. Defendant kept saying that if there were police there he would shoot students. The yelling of threats, orders, and profanities was constant for about the first two hours, then it changed and Defendant quieted down. (Ortiz, 12 RT 2774:17-2775:22)

Burdette testified that after an hour or so, the environment changed and there was talking between Defendant and students. (Burdette, 13 RT 3031:15-3032:15)

Eddie Hicks testified that Defendant's expression was different in the beginning than later in the day when Hicks was released. Hicks

testified that at the beginning, Defendant appeared confused and angry but later appeared calmer, although at times when talking to the negotiators he became more nervous. (Hicks, 15 RT 3460:6-18)

Owens testified that at the time gunman first entered C-204b, he appeared to be jumpy and scared. Later his mood changed and he became calmer. (Owens, 16 RT 3627:15-2628:1)

Newland testified that "We felt that he had calmed down and that he was to some degree more under control of his faculties than he had been before, and that he was more calm and that he could be reasoned with better. (Newland, 16 RT 3692: 13-17)

Hendrix testified that at the beginning Defendant seemed scared and panicky and was mumbling to himself. Defendant said he didn't want his mother to know where he was. Hendrix testified that he appeared "off the wall." He also acknowledged that he told the police that Defendant seemed "like he was out of it in some things but together in others." (Hendrix, 16 RT 3823:23-3825:8; 3827:19-28)

Vargas testified that Defendant was initially angry and that over the course of the evening he became a little nervous. (Vargas, 19 RT 4389:13-4390:17)

16. Surrender

Alan Long was a detective with the Yuba County Sheriff's Office who arrived at Lindhurst High School on May 1, 1992 along with Virginia Black. He testified that at approximately 10:20 p.m., Defendant, [having released all of the remaining students in C-204b,] agreed with the police negotiators to surrender. The negotiators instructed him to leave all weapons and some of his clothes in C-

204b. Defendant asked that there be no men in camouflage, in black, involved in his surrender. He came down the north stairway, and a uniformed officer was placed in the doorway to C-108 to talk Defendant down the stairs where he was taken into custody. (Long, 17 RT 3954:23-3955:20, 3966:5-3967:28)

At trial, many of the eyewitnesses were asked to identify the gunman they had seen in the school on May 1, 1992 as the defendant, Eric Christopher Houston. Defense counsel on each occasion stipulated that defendant Houston was the individual they had seen. (Lugo, 13 RT 2994:17-25; Burdette, 13 RT 3015:13-22; Ledford, 13 RT:3054:21-26; Moua, 13 RT 3121:27-3122:8; Welch, 14 RT 3163:20-3164:1; Hendrickson, 14 RT 3192:24-3193:10; Perez, 15 RT 3386:11-18)

C. Results of Autopsies of the Deceased; Evidence of Injuries Sustained by Survivors; Evidence Obtained from the Scene

Alan Long (detective with the Yuba County Sheriff's Office) testified that he arrived at Lindhurst High School on May 1, 1992 along with Virginia Black. Shortly after arriving he was directed by his superior, Lieutenant Escovedo, to enter Building C along with Sgts. Johnson and Durfor. "We entered C Building. And immediately to the - - went to the first classroom to the left..." In this classroom, C-108b, they saw a male subject and a young girl, both lying in the classroom. Sgt. Durfor checked the bodies and reported to Long that both were deceased. [These victims were Robert Brens and Judy Davis, respectively.] They then proceeded southward through C-108b, past the staff room and C-101a to the southeast

hallway, where they turned in a westerly direction and observed a male student lying in the middle of room C-102. Sgt. Durfor determined that the student was deceased. [This victim was Beamon Hill.] While Sgt. Long was looking out the doorway of C-102 providing cover for Sgt. Durfor, Long saw the bottoms of the feet of a male student lying just outside C-110a. The student's chest was moving and he was making sounds. Long told Durfor to cover him while he removed the student from the building. Long dragged the student down the hallway until he was out of the central area, then put the student on his shoulder and carried him out of the building through the same route he had come in. Long delivered the student to paramedics outside. [This student was Wayne Boggess.] Long testified that there had been a pool of blood where his head had been laying when Long started to drag him. Later that evening, when he reentered the building, Long observed a trail of blood across the floor that apparently was the result of Long's dragging him [Boggess]. Long identified exhibits 25 and 26 as photographs depicting the location where he found [Boggess] and the trail of blood from his dragging [Boggess]. (Long, 17 RT 3954:24-3962:13)

Immediately after the incident ended, the SED team went through Building C to determine if there were any additional suspects or students still in the building. In C-107 they found the body of a large white male student with a cowboy hat lying next to him. He was lying on his left side with a large pool of blood under his head. The student was dead. [This victim was Jason White.] (Long, 17 RT 3968:1-24)

The jury was shown Exhibit 56, a video of the condition of

Building C taken in the afternoon of May 2, 1992. In Exhibit 56 the bodies of the deceased had been removed and various items of evidence were marked on floors, desks, etc. The videos showed, among other things, the trail of blood left as Wayne Boggess was dragged from in front of C-101a by Sgt. Long during the incident. (Downs, 17 RT 4036:17-4050:19)

Dorian Faber, a pathologist providing services to Rideout Hospital in Yuba City, California, testified to the results of the autopsies he performed on Judy Davis, Robert Brens, Jason White, and Beamon Hill. (Faber, 11 RT 2629:2-2631:19, 2636:16-23, 2639:13-16, 2642:26-2643:2)

Faber testified that Robert Brens sustained multiple projectile type wounds to his back and chest on his right side and also on his right arm and left and right hands. Faber counted 51 discrete injuries, treating entry and exit wounds separately and also counting eburnations – burns caused by projectiles passing close to the skin. There were extensive internal injuries to the right lung, heart, and liver. The cause of death was bleeding from the projectile wounds. The wounds were typical of gunshot wounds. Faber recovered 13 projectiles from Robert Brens' body. The projectiles were approximately one-quarter inch in diameter. He opined that Brens would have died within minutes of the injury. (Faber, 11 RT 2636:20-2639:12)

Faber testified that Jason White sustained four serious projectile type injuries to his rib cage and back on the right side. There were entry and exit wounds for each, and the projectiles caused lacerations of the aorta and liver, lacerations and tears to the lungs, lacerations of

the right kidney, and fractures of the right ribs. The wounds were all to the right side of the body and extended from the top of the thorax down to the abdominal area. The cause of death was bleeding due to extensive injuries into both chest cavities caused by the projectiles. Seven projectiles, .24 inch lead pellets, were recovered from the body. He estimated that with the injuries sustained, Jason White would have lived for no more than two or three minutes after being shot. (Faber, 11 RT 2631:16-2635:27)

Faber testified that Beamon Hill sustained four wounds to the head, including one in the left-temple, one in the mid-forehead, and an exit wound in the mid-scalp. All injuries were limited to the head. The projectile that had progressed from the left temple had passed through the brain and brain stem, (from left eyebrow to right ear) causing his death. Faber recovered one projectile from the brain of Beamon Hill. It was essentially identical to the projectiles recovered from White and Brens. Based on the extent of bleeding that he observed, Faber estimated that Beamon Hill may have lived up to thirty minutes after being shot. (Faber, 11 RT 2639:13-2642:22)

Faber testified that Judy Davis sustained multiple projectile wounds to the head, face, chest, and hands. There were eight wounds to the head, neck and upper chest, seven wounds to the right hand and five wounds to the left hand. There was blood in both thoracic cavities, more in the right side than the left. The projectiles caused multiple injuries to the lungs and laceration to the aorta. The cause of death was exsanguination secondary to gunshot wounds. Faber recovered two projectiles from the body of Judy Davis. They both were identical to the ones in the other bodies. (Faber, 11 RT 2644:4-

2645:26)

Faber testified that in each case the projectiles were consistent with being fired from a shotgun. Additional projectiles were left in the bodies, but Faber testified that in each case the projectiles removed either were the cause of the wounds leading to death or representative of the projectiles that caused the wounds leading to death. (Faber, 11 RT 2649:3-6, 2651:5-18)

Ronald Ralston, a criminologist for the state, testified that the projectiles recovered from each of the four deceased victims were number four lead buckshot. The pellets recovered from the body of Jason White differed from the pellets recovered from the other bodies in that they were copper-coated number four buckshot. (Ralston, 18 RT 4112:17-4113:27)

Rachel Scarberry testified that after Defendant shot at her she did not at first know she had been hit but then felt a burning sensation in her chest while she was still in C-108b. After about twenty minutes she made it out of C-108b and Building C and was taken by ambulance to the hospital. She had several surgeries and, at the time of the trial, still had a projectile lodged between her sternum and her heart. (Scarberry, 11 RT 2590:4-9, 2594:1-2595:17)

Tracy Young in C-108b was hit in the right foot. She lost parts of two toes as a result of the gunshot. (Young, 11 RT 2602:27-2603:5, 2605:21-2606:14)[20]

Sergio Martinez testified that after he was shot, he did not at

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[20] At trial Tracy Young testified only that she had lost "part of my toes." In her grand jury testimony she was more specific that she lost a part of her big toe and a part of her second toe. (9/01/92 G.J. 91:2-10)

first know that he had been hit until he saw his arm twisted back on his shoulder with a lot of blood. The arm was numb. With help from a teacher Martinez got out of Building C in about half an hour. (Martinez, 12 RT 2831:27-2832:26)

Johnny Mills was in C-204b with the Defendant when a student who had just arrived in the classroom said there was a student lying on the floor wounded downstairs. Mills asked the Defendant if he could go down to assist the wounded student, indicating that he knew CPR and how to place tourniquets. At first Defendant was reluctant but then assented, giving Mills five minutes to attend to the student. Mills went down to C-109 and found a student [Martinez] lying on the ground with a penetrating wound just below the left shoulder. Mills placed a tourniquet on the student's wound. (Mills, 18 RT 4307:1-5, 4310:1-27)

During the post-incident investigation Sgt. Black retrieved a piece of bone fragment from Room C109a just east of the doorway to the classroom, by a papier mâché hut where Martinez had been working when Defendant approached. Dianna Sweet, a criminalist with the California Department of Justice testified that the item was a slug roughly the size of a quarter but with four times the thickness of a quarter with several pieces of bone fragment attached to it; this evidence was identified as TE046. (Black, 18 RT 4186:18-4187:16; Sweet, 18 RT 4124:6-10, 4132:28-4133:20)

John Kaze testified that after he had crawled out of the building he was taken by ambulance to the hospital. Kaze was hospitalized for a week. He had received three shotgun pellets in the left side of his nose, four pellets in his right shoulder, and two pellets under his collar

bone at the base of his neck on the right side. (Kaze, 13 RT 2935:21-2937:7)

Donald Graham was struck by a shot on his left forearm, but the injury was minor and he did not seek treatment. (Graham, 14 RT 3180:27-3181:6)

Redacted records relating to the hospitalization of Rachel Scarberry (Trial Exhibit 94), and Sergio Martinez (Trial Exhibit 98), and hospital records for Patricia Collazo (Trial Exhibit 95), Tracy Young (Trial Exhibit 93), Jose Rodriguez (Trial Exhibit 96), Maria Yanez (Trial Exhibit 97), Danita Gipson (Trial Exhibit 99), John Kaze (Trial Exhibit 100), and Wayne Boggess (Trial Exhibit 101) were admitted into evidence in the guilt phase. (21 RT 5070:26-5073:10)

Also introduced into evidence were the items of clothing, weapons, and paraphernalia that Defendant brought with him into Lindhurst High School on May 1, 1992. These items included the shotgun that Defendant had used – a Maverick brand 12-gauge pump action that would hold five 3 inch shells or six 2 ¾ inch shells with a normal trigger pull (Exhibit 10; Ralston, 18 RT 4096:25-4099:7; Black, 11 RT 4190:8-13).

Police witnesses testified that expended shotgun shells were found in Building C as follows:

- A 3 inch magnum four buck, Federal Brand expended shell (Exhibit 33); a 12 gauge magnum four buck expended shell, Winchester Super Double-X brand (Exhibit 34); and a 12 gauge double ought buck expended shell, Remington brand (Exhibit 35) - all were

found in the North Foyer hallway just outside the entrance to C-108b (Black, 18 RT 4179:23-4180:27)

- A 3 inch magnum four buck expended shell, Federal brand (Exhibit 36) found on the floor just inside C-108b to the west of the door opening (Black, 18 RT 4181:18-4182:5)
- A 12 gauge one-ounce expended shotgun shell, Winchester brand, Super X, (Exhibit 37), found in the open quad area of Building C (Black, 18 RT 4182:6-4183:5)
- A 12 gauge four buck expended shotgun shell, Winchester Brand, Super X magnum (Exhibit 38) found in the open quad area of Building C (Black, 18 RT 4183:6-15)
- A 12 gauge one ounce slug expended shotgun shell, Winchester Brand, Super X, (Exhibit 39) found in the main open quad area of Building C (Black, 18 RT 4183:16-4184:2)
- A 12 gauge one ounce expended shotgun shell Winchester Band Super X (Exhibit 40) found in the main floor of Building C, quad area (Black, 18 RT 4184:3-12)
- A 12 gauge 3 inch mag four buck expended shotgun shell, Federal brand, (Exhibit 41) found on the main floor of Building C, quad area (Black, 18 RT 4184:13-22)
- A 12 gauge four buck expended shotgun shell, Winchester brand Super XX (Exhibit 42), found in the

main floor of Building C in the open or quad area (Black, 18 RT 4184:23-4185:4)

- A 12 gauge one ounce slug expended shotgun shell, Winchester brand Super X (Exhibit 43) found in C-102 where the body of Beamon Hill was found (Black, 18 RT 4185:5-15)
- A 12 gauge four buck expended shotgun shell, Winchester Brand Super XX mag (Exhibit 44) found on the stairs on the lower portion of the south end of the center stairwell in Building C, (Black, 18 RT 4185:16-24, 4186:8-14)
- A 12 gauge one ounce slug expended shotgun shell, Winchester Brand Super X (Exhibit 45), found on the stairs on the lower portion of the south end of the center stairwell in Building C (Black, 18 RT 4185:25-4186:14)

Criminalist Ralston examined the thirteen expended shells and opined that 11 of them were fired from the shotgun recovered, (Exhibit 10), while the other two expended shells were consistent with being fired from Exhibit 10 but could not be positively identified as having been fired by Exhibit 10 due to the quality of the markings on the expended shells. (Ralston, 18 RT 4111:25-4112:16)

A .22 caliber rifle was found in the southeast corner of room C-204, leaning upwards against the wall (Exhibit 11). The butt of the gun had been sawed off. (Black, 18 RT 4190:16-27) When Exhibit 11 was received by the criminalist Ralston, it could not be fired or loaded due to there being one or two cartridges broken and jammed in the chamber and the bolt area. Ralston removed the jammed cartridges

and attempted to fire the rifle with new ammunition. The first two rounds he tried did not fire, but the second pair of rounds he tried fired normally. Ralston did not make a determination whether the gun had been recently fired because there was powder all over from the broken cartridges. He did not know how the gun malfunction had occurred or if it had been caused by the gun being dropped. (Ralston, 18 RT 4114:14-4115:15, 4117:7-4121:1, 4123:8-14)

Also found in C-204 was a brown and tan camouflage hunting vest. (Exhibit 13) In the left pocket of the vest were found a single $20 bill; a key ring with seven keys and one handcuff key; and thirteen unexpended shotgun shells, of which four were Winchester brand Super X one ounce slugs, one was a Winchester brand Super X magnum four buck, four were Federal brand three inch magnum four buck, one was a Remington brand slug, and three were Remington brand double ought buck shells. The right pocket contained a 50 bullet box of CCI .22 caliber long rifle bullets, of which there were 49 unexpended rounds; and fifteen 12 gauge shotgun shells consisting of four Winchester brand Super X one ounce slugs, three Federal brand three inch mag four buck, three Winchester brand Super Double X magnum four buck shells, three Remington brand double ought buck shells, and two Remington brand slugs. (Black 18 RT 4192:9-4193:9)

With the hunting vest was found a black web belt with shotgun shell loops and a canteen containing water attached to it. (Exhibit 14) There was testimony that an "Uncle Mike's" ammunition pouch (Exhibit 12) was attached to the web belt at one time, but had come off. The pouch contained 64 unexpended .22 caliber bullets and 16 unexpended shotgun shells consisting of three Remington brand 12-

gauge slugs, five Federal brand 3-inch magnum four buck, five Winchester brand Super X one ounce slugs, and three Winchester brand double X magnum double ought buck. (Black, 18 RT 4190:28-4192:8, 4195:22-4196:8, Akins 17 RT 3875:13-21 ; Exhibit 53b)

A pair of thumb cuffs (Exhibit 73) was found on the floor in the south portion of room C-204b. (Black, 18 RT 4189:18-4190:3)

D. Evidence of Defendant's Conduct Prior to Coming to Lindhurst High School on May 1, 1992

At about 4:30 p.m. on May 1, 1992, while Defendant was in C-204b holding the students hostage but before the police had set up the hostage telephone system to communicate directly with Defendant, Black received a call from a person who identified himself as David Rewerts. Rewerts told Black that he was Defendant's best friend and that he believed the gunman at the school was Defendant, because Defendant had been talking about going into Building C at Lindhurst High School and "shooting a few people just to see if he could get away with it." Rewerts also told Black other information about Defendant and his background, and she relayed what Rewerts had told her to Lt. Escovedo in the command center that had been established. (Black, 18 RT 4140:9-4143:15)

The prosecution called Rewerts as a witness in its case in chief. Rewerts testified that he had known Defendant since 1986 when Rewerts was a freshman and Defendant was a sophomore at Lindhurst High School. Rewerts testified that he and Defendant had become best friends. Rewerts stated that "around noon" on the day of the incident he was on his way to see Defendant when his neighbor told him not to go anywhere near Lindhurst High School because there

was a gunman loose at the school. Rewerts stated that when he heard this he thought the man at the school might be Defendant. Rewerts went into his own house and called Defendant's house. A person answered the phone and said that Defendant was not at home. Rewerts then drove to a friend's house and asked the friend what was happening. After the friend told Rewerts what he knew from the television of what was happening, Rewerts said he believed he knew the identity of the man at the school. Rewerts then called the police. Rewerts spoke with Black and told her that he thought the man at the school was Defendant. (Rewerts, 18 RT 4059:23-4062:12, 4067:18-25)

On direct examination Rewerts explained why, when he heard there was a gunman at Lindhurst High School, he immediately believed it was Defendant, his best friend: Starting three and one half to five months before the incident, Rewerts and Defendant had had conversations where Defendant had spoken of going to Lindhurst High School and shooting guns inside the school. There had been three or four such conversations over the three and one half to five month period prior to the incident. During these conversations both Rewerts and Defendant had been fantasizing about going to the high school and destroying things. On one occasion Rewerts had been reading a "Terminator" book[21] and Defendant had been reading passages to Rewerts out of a book on military tactics and police procedures. Rewerts began talking of "destroying things," and then the Defendant spoke of going to the high school, going into Building

[21] Referring to a book derived from the Arnold Schwarzenegger movies *Terminator 1* or *Terminator 2*.

C, and shooting "a couple of rounds " or "a couple of people" and then getting out and going around the fence by the baseball diamond behind Building C. Defendant did not mention names of people he would shoot. On each occasion Rewerts described his own discussion of destroying things as "pretty absurd," and he considered Defendant's mentioning shooting people as "idle talk," or "just passé talk." (Rewerts, 18 RT 4062:13-4066:2)

Rewerts testified that in 1992 Defendant owned two .22 caliber rifles, a shotgun, and a small "machine gun thing," that Defendant had never fired. Rewerts and Defendant had on one occasion gone shooting together at the Spenceville gun range and shot the shotgun. Defendant could cock the pump-action shotgun with one arm. Sometimes Defendant would have bruising on his shoulder after he had gone to the range to shoot. (Rewerts, 18 RT 4066:3-4067:17, 4070:6-14)

On cross-examination Rewerts agreed that the discussion of going to the high school was fantasy, "idle talk...Everybody says that they're going to go out and in anger that they're going to kill a person, but they don't." Rewerts and Defendant had seen the movie *Terminator 2* together, and they were "so pumped up about the movie that, you know, it was like the greatest movie that happened during the time." They talked about sending robots to the school. Rewerts considered it "B.S.ing" among friends. (Rewerts, 18 RT 4068:7-4069:28)

Rewerts also said that from the time he met Defendant, Defendant had been interested in "military type stuff" and that Rewerts had become fascinated with it as well. On the one occasion

that Rewerts had gone with Defendant to the Spenceville range, Defendant had carried his ammunition in boxes and had not carried any canteen. Rewerts estimated that Defendant went to Spenceville at least once a week and spoke about it a great deal. (Rewerts, 18 RT 4070:20-4071:28)

The prosecution called Defendant's mother, Mrs. Edith Houston, to testify in its case in chief. Mrs. Houston testified she lived with Defendant and that at about 8:00 a.m. on May 1, 1992 Defendant had driven her to the dentist where she had an appointment for a tooth extraction. This was earlier than Defendant normally got up ; she described Defendant as a "night person." After her appointment Mrs. Houston walked home from the dentist about 10:00 a.m. When she arrived home she found Defendant in the driveway polishing his car and waiting for the postman because it was the first of the month and his unemployment check was due. Mrs. Houston went inside and lay down because she didn't feel well. Defendant came into her room and asked her about a police scanner that belonged to Ronald Caddell, [Defendant's half-brother]. Mrs. Houston had Defendant bring the scanner to her in her bed and she "punched it up," but the batteries were dead, so Defendant returned it to the drawer in Ron's room. Defendant then went outside to wait for the mailman. (Edith Houston, 16 RT 3704:24-3706:13, 3712:28-3713:19)

Mrs. Houston testified that after Defendant went outside, Defendant's sister, Susan Nelson, came in. Mrs. Houston gave Susan money to buy her some soup and whatever Defendant wanted from the store; Defendant wanted a couple of candy bars. After Susan left, the mailman came. Defendant brought Mrs. Houston some MediCal

stickers and then left the house about 11:00 a.m. At about 3:00-3:30 p.m. Mrs. Houston accompanied Susan when she went to pick up her children at a grammar school. At the grammar school Susan learned there was "trouble" at Lindhurst High School. Susan and Mrs. Houston returned to Mrs. Houston's home. (Edith Houston, 16 RT 3706:12-3708:25)

Later that day, she wasn't sure when, a Sheriff's officer came to her door and asked her to come with him. Without taking her purse or anything else she was driven to Lindhurst High School where she met with an FBI agent who explained to her what was happening. She then accompanied several officers back to her house at 4816 Powerline Road ("Powerline Road") so that she could get her cigarettes, change her clothes, and show the officers where Defendant's bedroom was. By this time it was dark. The officers proceeded to conduct a search of Defendant's bedroom. Mrs. Houston saw that they took some receipts that were lying on Defendant's bed, a box of empty shells, a note that was underneath the bed covers, and a shopping list. Mrs. Houston stated that Defendant always made lists of things that he intended to buy, adding up how much they would cost to determine whether he had enough money to purchase them all. On the shopping list was a drawing of a vest. (Edith Houston, 16 RT 3709:12-3711:27; 3173:24-25)

Mikeail Williamson was an officer with the Yuba County Sheriff's Office on May 1, 1992. Williamson testified that he went to Lindhurst High School in response to radio calls regarding an incident going on at that location. At some point during the incident he met with Edith Houston who described the vehicle Defendant would have

been driving. Williamson took steps to locate the vehicle in the parking lot, and after discussing the matter with Lt. Escovedo, contacted Mike Johnson of the Marysville Police Department, introduced him to Edith Houston, and directed Johnson to do a search of Defendant's residence for evidence as to what kind of ammunition and weapons Defendant might be carrying, as well as a possible written plan. (Williamson, 16 RT 3715:1-3718:19)

On May 1, 1992, Mike Johnson was employed as a police officer by the city of Marysville. Johnson testified that he was instructed by Williamson to accompany Edith Houston to the Houston home on Powerline Road. Johnson seized samples of several shotgun shell boxes, shotgun shells, and .22 caliber bullets in boxes scattered on Defendant's bed. These items were placed in a bag that Johnson found on the bed. The bag and items were introduced into evidence as Exhibit 32. Johnson also found on the bed a handwritten document that he characterized as a "supply list." (Exhibit 31). During the course of the search Johnson received a call from Sgt. Downs telling him to look between the sheets of the bed for a note.[22] Johnson found the note (Exhibit 16) under the blanket or the sheets. He placed Exhibits 31 and 16 in the same bag (Exhibit 32) and returned them to Lt. Escovedo and/or Sgt. Downs. (Johnson, 17 RT 3983:2-10, 3986:3-3990:13) Eventually Exhibit 32 was given by Lt. Escovedo to Sgt. Williamson at about 10:00 p.m. on the night of May 1, 1992.

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[22] Sgt. Downs testified that during the hostage negotiations, Defendant asked whether the police had found a note he had left on his bed. Downs subsequently called Johnson to tell him to look for the note. (Downs, 17 RT 3995:23-3996:8)

(Williamson, 16 RT 3727:20-3828:8)

Exhibit 31, a sheet of graph paper, was introduced into evidence. It contained a handwritten list (see Figure 1) .

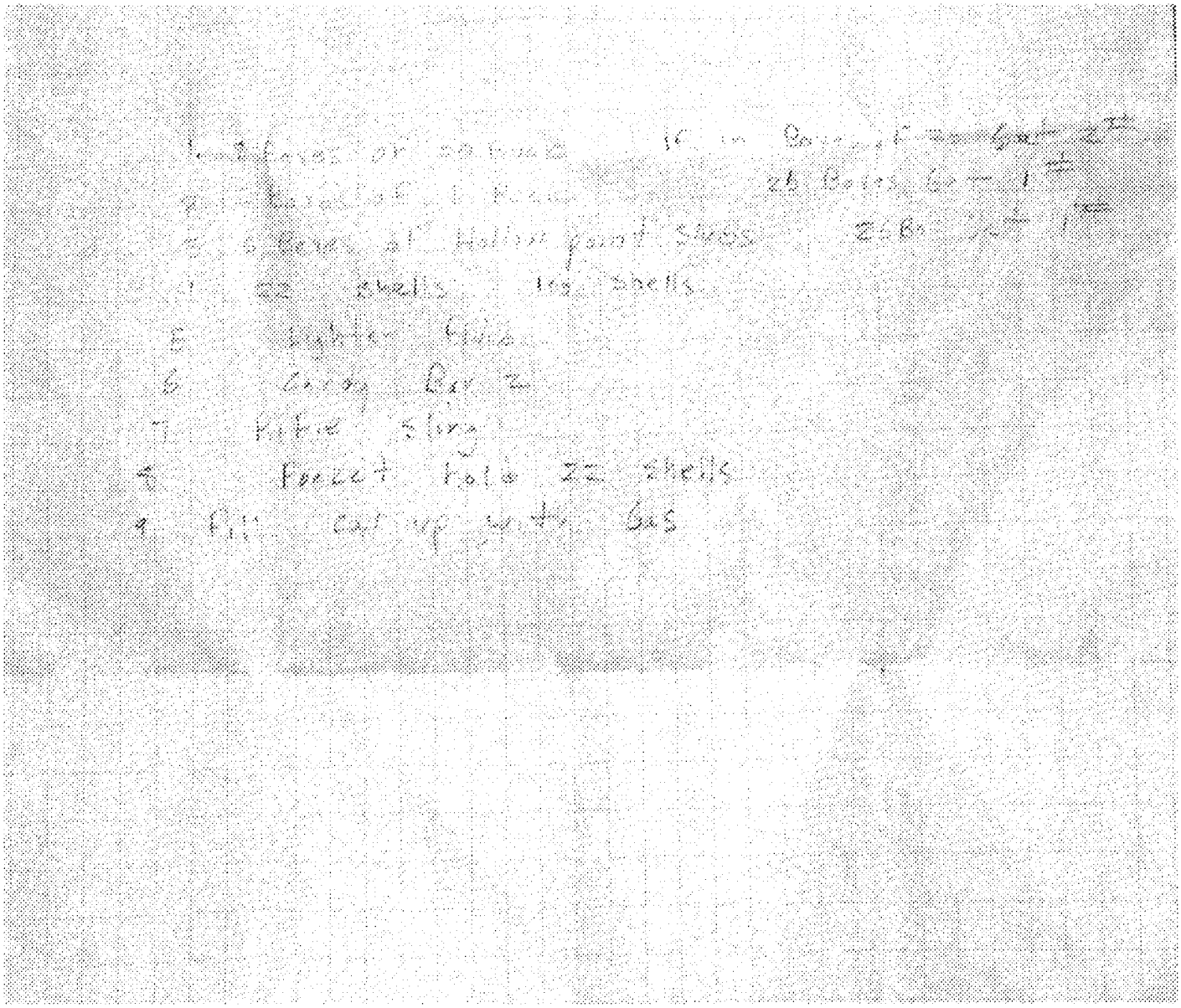

Figure 1 (Exhibit 31)

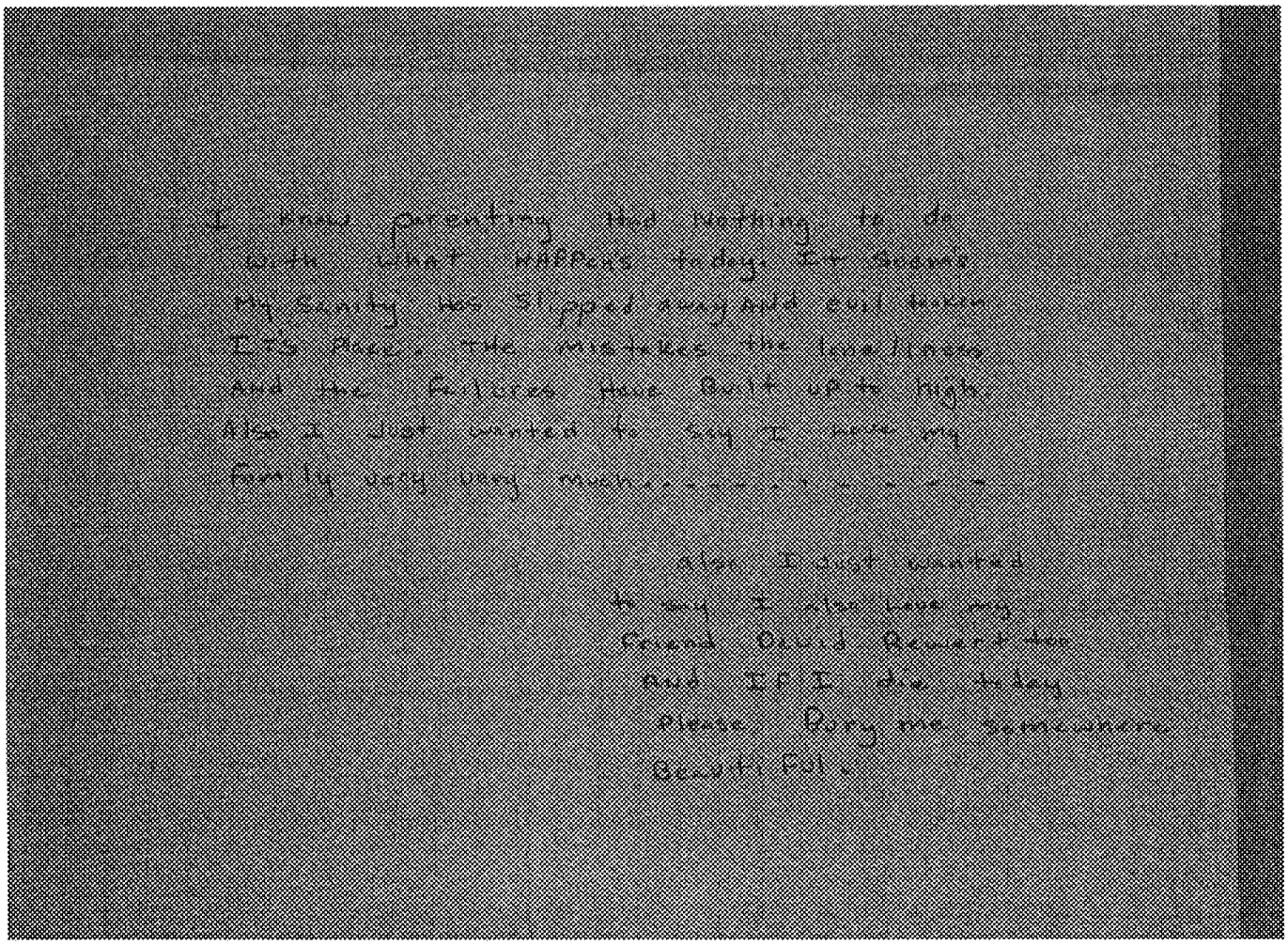

Figure 2 (Exhibit 16)

On May 3, 1992, Sgt. Williamson conducted another search of Defendant's bedroom. This search produced the items that were introduced into evidence as Exhibits 60, 61, 61A, 61B, 62A, 63, 64, 65, 66, and 67. (Williamson, 16 RT 3733:25-3734:2)

Exhibit 60 (Figure 3) was a piece of graph paper with some items of ammunition, numbers, and calculations, and drawings on it: (Williamson, 16 RT 3731:18-3732:1; Exhibit 60)

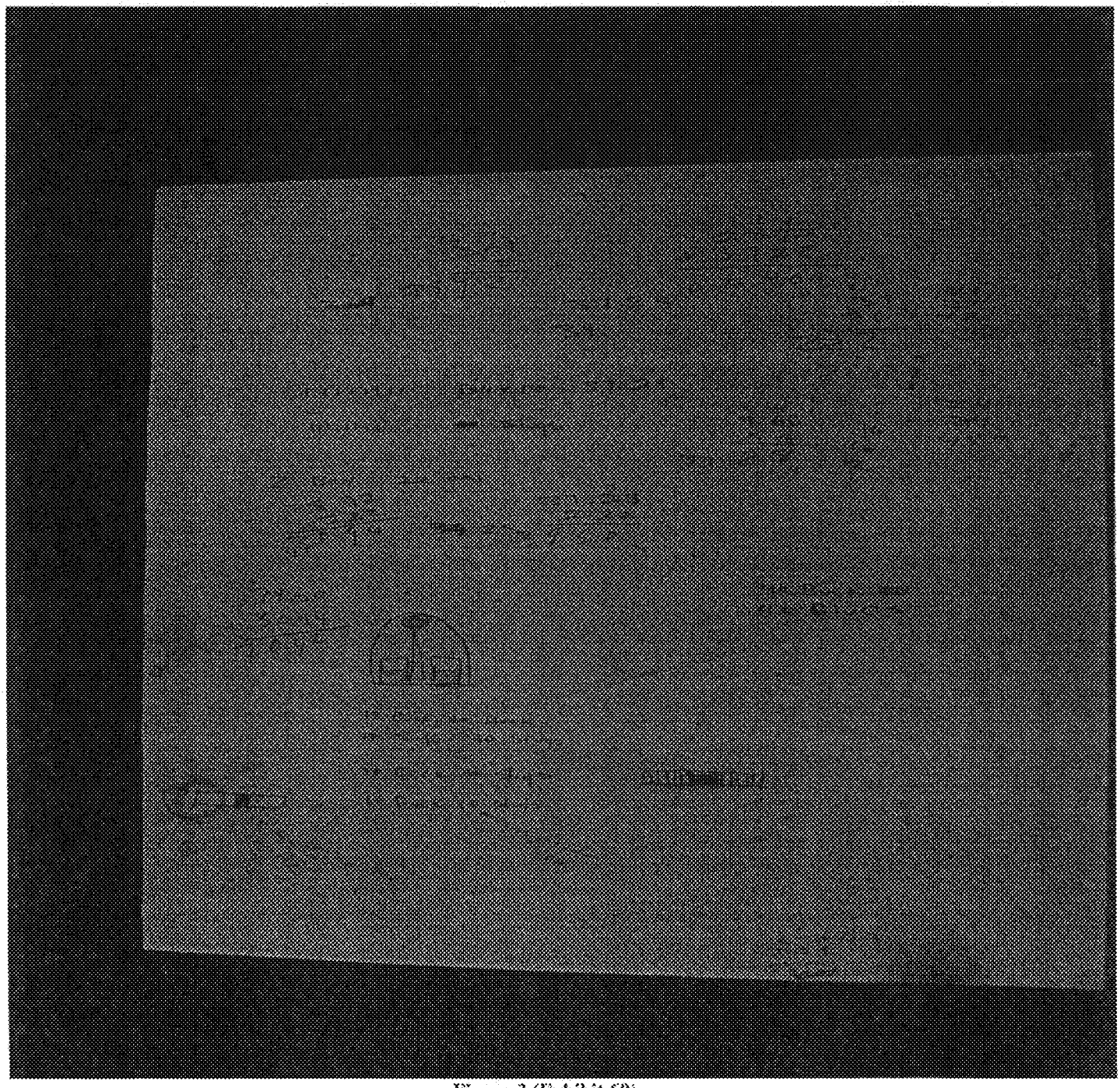

Figure 3 (Exhibit 60)

Exhibit 61 consisted of a large number of torn up pieces of paper found in a large cardboard box that was in Defendant's closet. Bill Connor, a Questioned Documents Examiner for the state, testified that he had assembled the pieces of paper into three sheets, each containing handwriting that belonged to Defendant. The reconstructed or partially reconstructed pages were introduced as Exhibits 61a (Figure 4), and 61b (Figure 5). (Williamson, 16 RT 3734:14-3735:4; Connor, 18 RT 4074:24-4091:12)

Williamson found ripped-up pieces of paper in a clear plastic bag in a garbage can outside the rear of the Powerline residence. Connor reconstructed a document from the paper fragments in the garbage. That reconstructed document was introduced as Exhibit 62a (Exhibit 6). (Williamson, 16 RT 3735:11-16; Connor, 18 RT 4074:24-4091:12)

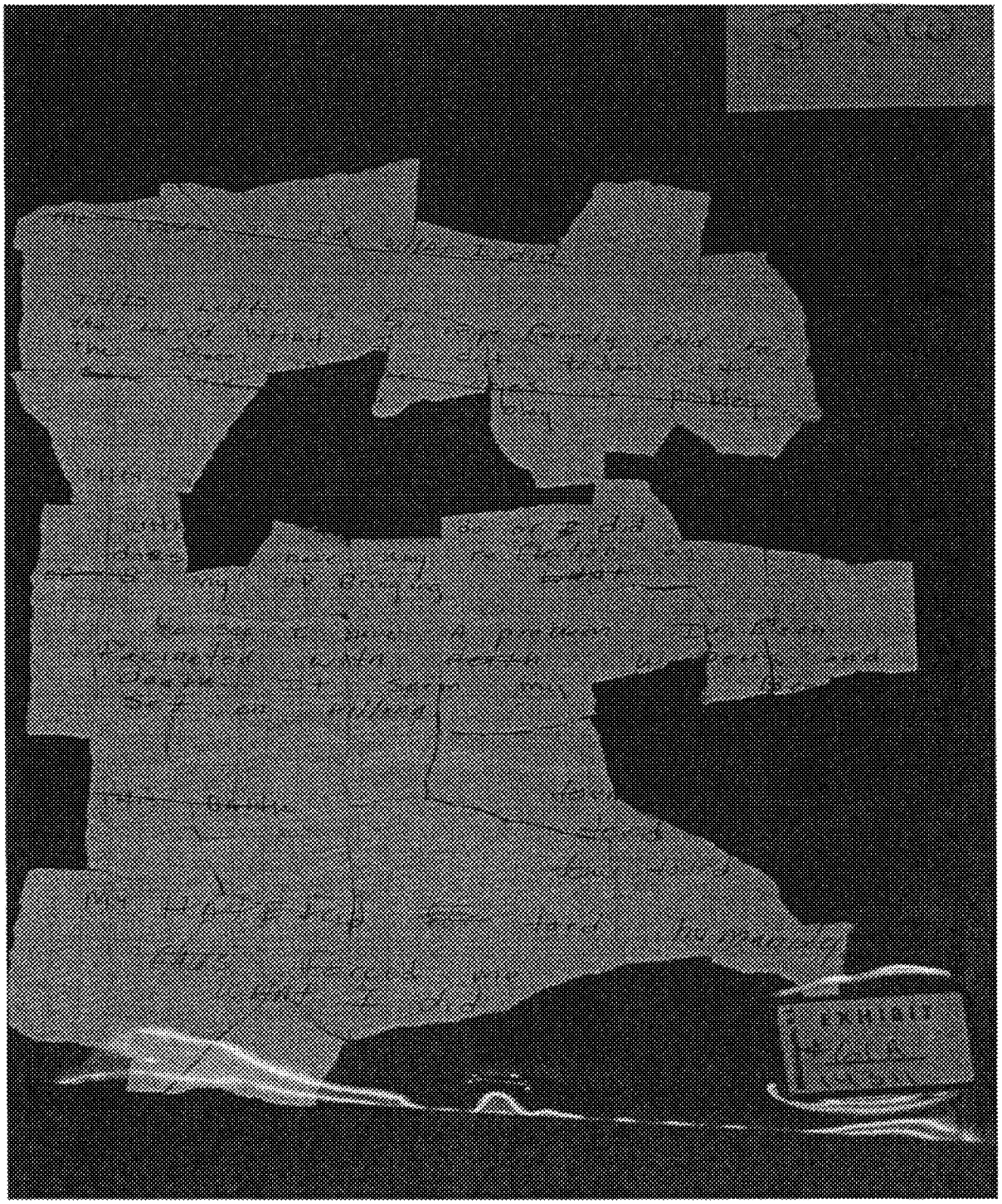

Figure 4 (Exhibit 61A)

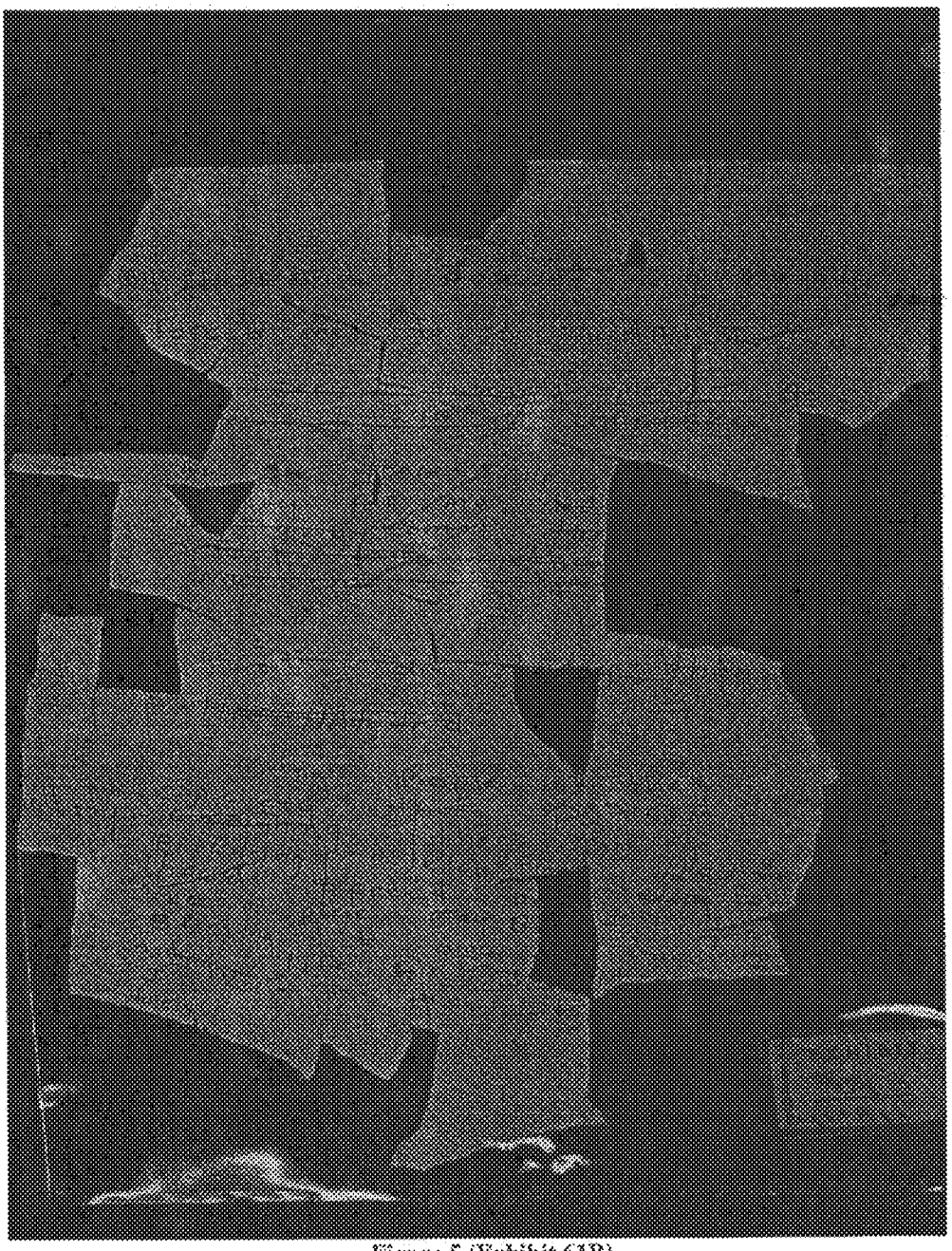

Figure 5 (Exhibit 61B)

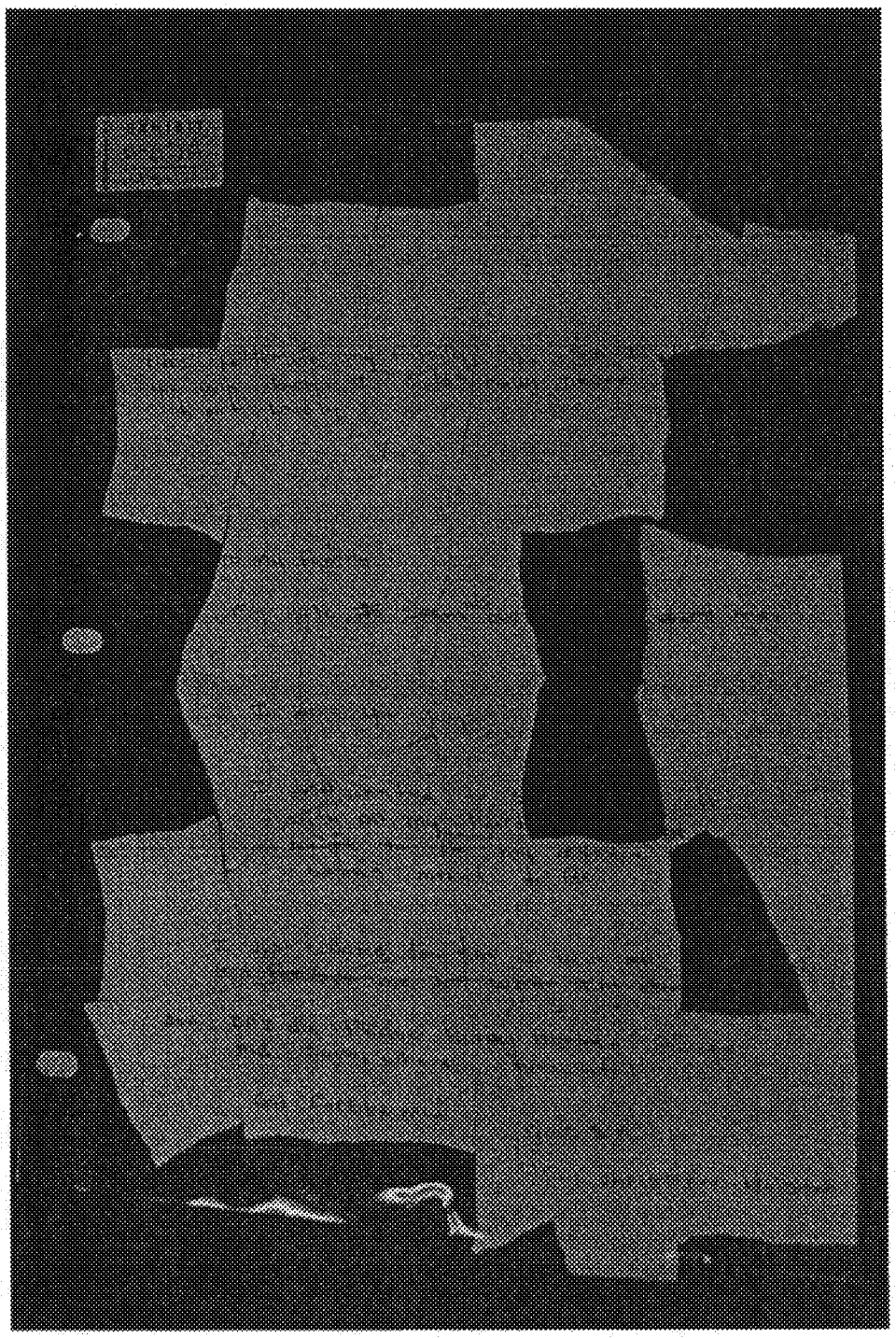

Figure 6 (Exhibit 62A)

Also found in the bedroom on the left side of the headboard on top of the quilts and bedspread was a note pad (Exhibit 63), and a drawing (Exhibit 64 (Figure 7)) that was part of the notepad. (Williamson, 16 RT 3735: 20-3736:2; Connor, 18 RT 4076:14-21)

Williamson also found on the right side of the bed at the top of the headboard a copy of the December 1991 edition of *S.W.A.T.* Magazine and a copy of *Modern Law Enforcement Weapons and*

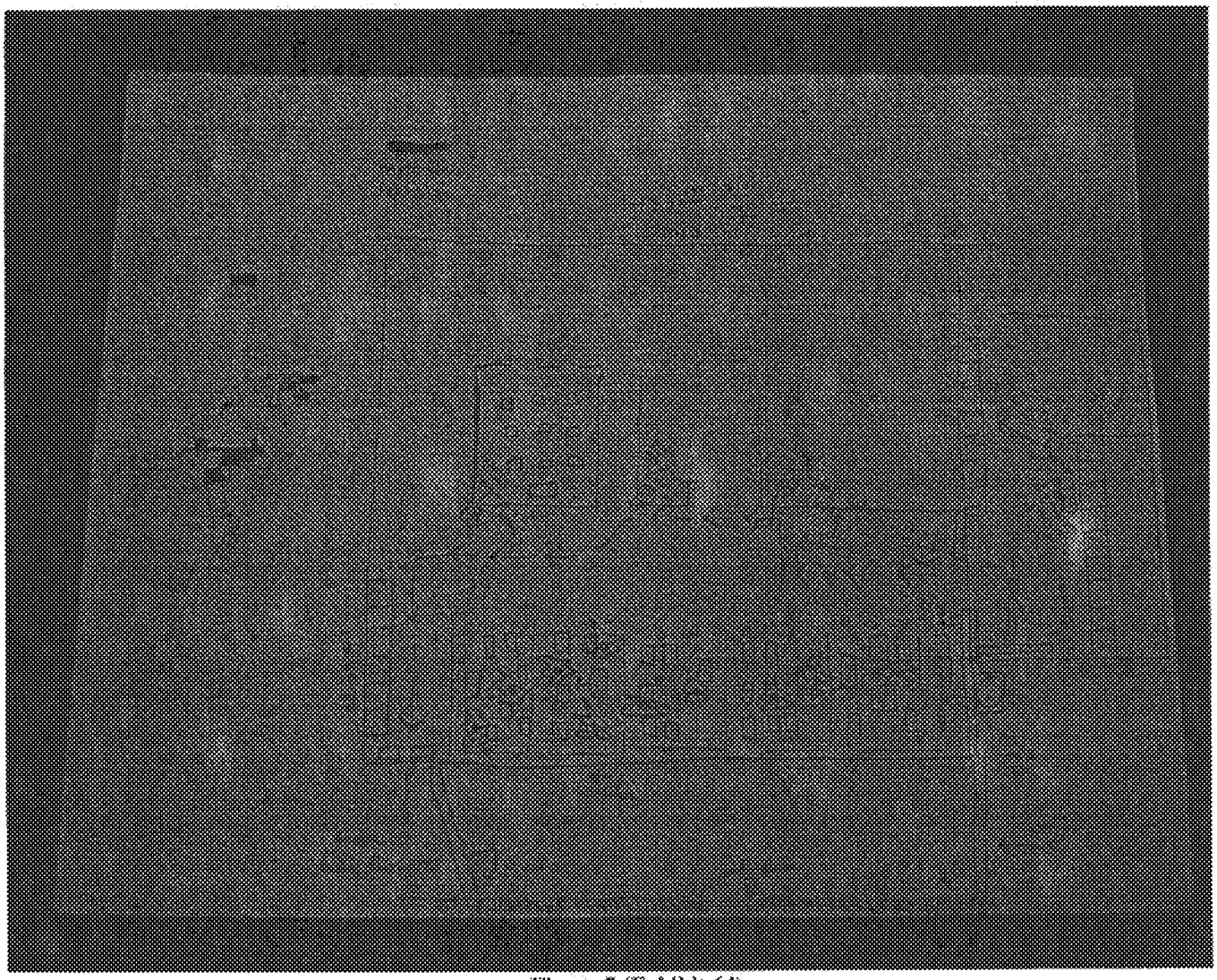

Figure 7 (Exhibit 64)

Tactics, All New Second Edition. (Both Exhibit 65) To the left of the

bed Williams found a copy of a 1982 edition of the California Penal Code, California Peace Officer's abridged edition. (Exhibit 66) On the floor of the bedroom closet was a bed sheet containing several sheets of sandpaper, and the sawed-off butt of a rifle. (Exhibit 67) (Williamson, 16 RT 3736:3-3737:9)

Williamson testified that he located Defendant's vehicle in the school parking lot directly in front of Building C. . (Williamson, 16 RT 3717:6-3719:8)

On May 4, 1992 Sgt. James Downs conducted a search of Defendant's vehicle, a 1985 Chevrolet Cavalier. In the vehicle he found a copy of *Modern Law Enforcement Weapons & Tactics* (Exhibit 58), a sales receipt from Mission Gun Shop (Exhibit 17) and a sales receipt from P.V. Ranch & Home, dated 5/1/92 at 13:23 hours. (Exhibit 19a) (Downs, 17 RT 3998:19-4001:17)

Georgia Tittle and her husband owned the Mission Gun Shop in Marysville. Tittle was shown Exhibit 17, a receipt from the Mission Gun Shop. She testified that she remembered the transaction and that it would have taken place between 11:00 a.m and 12:00 noon on May 1, 1992. She said the purchaser had a piece of white notebook paper with a list of "stuff he wanted." The purchaser asked Tittle if she had slugs; he wanted five boxes, but she only had four. He asked for double ought buck, which she didn't have, and he asked for some .22 shells. Doreen Shona ,[66] a friend who was helping out in the store that day , filled out the receipt (Exhibit 17). Tittle identified Defendant as the purchaser. The defendant's demeanor in the store was "like any other customer," Defendant walked in, asked for ammunition, saying "he and his father were going hunting," and she sold it to him. (Tittle,

17 RT 3842:12-3847:13, 3850:16-26)

Doreen Shona testified that she was working at the Mission Gun Shop on May 1, 1992, helping out Tittle, and that it was her handwriting on Exhibit 17. She positively identified Defendant as the purchaser connected to the receipt, although she initially testified that she "guessed" that was him because he had "lost a lot of weight." Tittle dealt with Defendant at first, recommending that he buy a brick of 500 rounds because it was the best value. Then another customer came in who needed Tittle's attention so Shona took over, ringing up Defendant's purchases. From the receipt, Shona stated that Defendant purchased four boxes of Winchester slugs, 12 gauge, and one box of Blazer .22 long rifle shells. Shona also testified that Defendant said he was going to go hunting with his father. (Shona, 17 RT 3851:24-3862:12)

Shari Devine testified that on May 1, 1992 she had been employed at Big Five Sporting Goods in Yuba City ("Big Five"). She identified Exhibit 18 as a receipt from Big Five, and that the receipt was issued on May 1, 1992 at 12:49 p.m.[23] She was working as cashier on that day but had no recollection of the transaction. From

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[23] Exhibit 18 was inside a red bag (Exhibit 32) that Detective Johnson used to collect things that he found in Defendant's room at the Powerline residence when he went there with Edith Houston on May 1, 1992. Johnson did not testify that he found Exhibit 18 at that time, in fact he described the other items and testified that those were the only items he seized that night[82]. He gave the bag to Lt. Escovedo and James Downs. The bag was given by Lt. Escovedo to Mikeail Williamson who inventoried its contents and identified the receipt as having been in the bag. (Johnson, 17 RT 3986:3-3990:13[83]; Williamson, 16 RT 3727:20-3728:8; 3730:6-18[84])

reading the receipt she testified that it reflected the sale of two boxes of 12 gauge 2 ¾ inch buck shot and four boxes of 12 gauge 3-inch buck shot. Each box had five shells to a box. Devine said that it was not common for customers to buy buck shot – most people bought Devon quail lead or some type of target load that came 25 shells to a box. (Devine, 17 RT 3863:24-3871:11)

Patsy Akins was employed as store manager at P.V. Ranch & Home in Linda, California on May 1, 1992. She was shown Exhibit 19 and identified it as a register tape from P.V. Ranch & Home dated April 17, 1992. She was then shown Exhibit 19a and identified that as a cash register tape from P.V. Ranch & Home dated May 1, 1992 with a time of 12:23 p.m. Akins had not been involved in the transaction represented by Exhibit 19a, but from the "skew number," a form of inventory control number used by the store, Akins determined that the merchandise that was purchased and reflected on Exhibit 19a was a box of 12 gauge 2 ¾-inch number 4 buck shot and a shell pouch to put around your waist to hold .22 caliber shells. Akins stated that Exhibit 12, the pouch found in Room 204-b, was the same type of pouch that was reflected as purchased on Exhibit 19a, but Akins could not state that it was the actual pouch reflected on Exhibit 19a. Akins testified that Exhibit 19 reflected the purchase of 12 gauge shotguns shells on April 17, 1992. The shells purchased on April 17, 1992 were Double A, not Double X buck. Akins believed the difference between Double A and Double X was that the shot was packed differently so as to create a different spread pattern. She did not know whether the pellets were different sizes. (Akins, 17 RT 3872:6-3880:14)

E. The Written Transcript of Defendant's Video-Taped Statement to Sheriff's Investigators on May 2, 1992

Sgt. Downs testified that on May 2, 1992, at around 10:30 a.m., he [with Sgt. Williamson] interviewed Defendant at the Yuba County Sheriff's Office. An initial interview was conducted that was not recorded. After the initial interview a video-taped interview was conducted. Downs testified that prior to questioning Defendant he read Defendant his Miranda rights, which Defendant acknowledged he understood. According to Downs, Defendant then stated that he was willing to talk to the officers. Downs had Defendant sign a card and initial each of the four questions on the card. (Exhibit 74) The parties stipulated that the videotapes were video and audio recordings of the second interview. They were marked as Exhibits 57a and 57b. (17 RT 4002:2-4005:22, 4018:1-5)

Exhibits 57a and 57b were played for the jury. By stipulation requested by the trial court, the court reporter was excused from transcribing the conversations on the tapes as they were played in the courtroom. At the next trial day, five days after the prosecution started playing the tapes, the prosecution produced what it contended was a written transcription of the conversations on Exhibit 57a and 57b. Subsequently, trial counsel for Defendant agreed that the transcript could be identified and given to the jury as an exhibit, so long as there was an instruction that the tapes were the evidence and their content was controlling. The transcript as presented was marked as Exhibit 89 and presented to the jury with an instruction that the videotape "is the evidence," and that Exhibit 89 was there to "facilitate the understanding of the evidence." (17 RT 4017:22-

4019:14, 4029:2-4031:7; 18 RT 4329:21-4331:25, 4336:22-4337:22)

> Defendant has reviewed copies of the videotapes (Exhibits 57a and 57b) and compared the tapes to the transcript given to the jury (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 1-102]Well first of all, when I went there, I popped the trunk, you know, and started to turn around, (unintelligible) frustration out on the pain but once I got out of the car it seems like everyone me I know by now, I mean they saw me with the gun and all they had to do was call the cops, just like I was in so deep now I just.... I didn't actually know what I was going to do once I got in there, I didn't know if I was to turn around...
>
> (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 2-3])

Downs then asks Defendant "why did you go there [the high school]?" Defendant responds:

> I don't know. I just thought, be, should do something, find something to actually do it, I don't know. I did have lots (unintelligible)
>
> Downs: So you went to finally accomplish something?
>
> Defendant: No. Not to accomplish, just to, I don't know, I was in the right fame of mind (unintelligible)
>
> (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 3])

Downs asks Defendant when it was he got to the high school. Defendant replies that it was about 1:50 p.m. to 2:00 o'clock, but then says he thinks that was the time because that was what he was told: "At least I think they said everything happened about two o'clock." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 3])

Downs then asks where Defendant parked his car. Defendant replies:

> Well, you don't have it located up in here, but I parked mine, all the teachers park in lots, but when you get into the teachers parking lot they go through a narrow thing, and then they all spread out and go into their own parking positions. I parked close to the right or I'm not sure it was the left. I think it was the left. And then I walked sideways up to there, and do what I told Mrs. Morgan on the right..
>
> Downs: Where did you see Mrs. Morgan?
>
> Defendant: I saw her, she was coming out from the, the other building, she was coming out from the main office, she was walking with a notebook in one hand.
>
> Downs: Oh, so you saw her outside before you got in the building.
>
> Defendant: Yeah. That's all I remember. She was coming towards the building and a...
>
> Downs: (unintelligible, a question is asked)
>
> Defendant: No. She just said what are you.. . .do you have a permit for that gun and I just fell apart, and I just ran in there, cause I, I couldn't even face her and uh, uh,, went in there..
>
> Downs: Which was the first classroom that you went to?
>
> Defendant: I think. . . I 'm pretty sure that I shot fours, I 'm not sure I shot fours first, and then uh. . . shot second, I shot uh..the (two people in this class second.
>
> (unintelligible, two people talking)
>
> Downs: Okay, so you shot these two people here. Did you shoot the teacher first or the girl first?

Defendant: I think I shot the teacher first.

Downs: Okay. How many rounds did you shoot at him?

Defendant: One shot, uh, with him and one shot with her.

Downs: Do you recall where you shot him?

Defendant: I thought I shot him in the back, I don't usually shoot in the back, I thought I shot him in the butt.

Downs: Okay. When you, were you sure...

Defendant: ... because of muzzle, I wasn't really holding the gun properly, cause I was more of a Remington stance, if you ever go to fire a shotgun, you need a, kind a, kind of have a firm ground and so you fire you just can't be really leaning around like this, the recoil will knock.. .

Downs: ...you said you were moving kind of fast, how come you were moving quickly?

Defendant: Cause I was scared. I didn't know what I was going to do. I didn't know if I was just going to walk in there. . .once I fired that first shot I said oh shit, its...I mean...

Downs: Okay (unintelligible) so you go on with this.

Defendant: Well, I 'm just.. .once I fired that shot I mean, I don't, you know, I'm in deep already.

(Exhibit 89 [CT Supplemental–5 (v.1 of 1) 3-4])

Downs and Defendant then engage in a discussion about how Defendant held the gun and liked to use the strap on the gun to hold it. Downs then asks Defendant what happened when he went into the first classroom:

I saw the teacher and he goes ... he opened his eyes, up really bad, all I can remember is pressing the trigger and.. .and then I...and then the girl didn't even have time to react. I think she just went like that and I fired and then I just ran...

Downs: Where was the teacher when you fired the first shot?

Defendant: He was sitting on the desk, I think he was on the first ... okay ... his, his umm ... his desk, if you were going into this classroom, his desk was located, the big desk was located right here. And then there was that students desk that were all up here, he was, one of the first ones, to get it, and the other girl was on, I think, on the other desk, well it was the big desk right next to him.

Downs: Was she sitting down, standing up?

Defendant: Uh, I think she was sitting down, I'm not sure, she could have been standing up.

Downs: Okay. So you shot him in the back and then you shot her second?

Defendant: Yeah.

Downs: Okay Where did you shoot her?

Defendant: I thought I shot her .... well, she was, she was okay, she was I think she was facing towards me so I thought I shot her maybe in the stomach or in the groin area.

Downs: Okay, how many times did you shoot her?

Defendant: One time.

Downs: One time.

Defendant: Yeah.

(Exhibit 89 [CT Supplemental–5 (v.1 of 1) 3-6])

Defendant then says that he was "pretty sure" he went from the first classroom and fired one shot into the "Spanish class..." "where all the Mexicans learn how to speak English." An exchange regarding the location of rooms in the building is followed by Downs asking:

> "Okay. Tell me about this kid in the gray shirt that you shot over here.
>
> Defendant: I don't remember shooting any...you mean the guy with the cowboy hat?
>
> Downs: Yeah. Tell me about him.
>
> Defendant: Well I just shoot..I don't remember shooting that way ... I could have, but...
>
> Downs: Well, I 'm sure. .
>
> Defendant: I mean, I didn't...
>
> Downs: I'm sure that you did.
>
> Defendant: Uh Huh (affirmative response)
>
> Downs: There was, there was a boy here that was shot, there was a wadding in here..
>
> Defendant: Uh Huh (affirmative response)
>
> Downs: ... and the rounds expended, it uh ... I mean had you gone down, did the shooting and gone backwards this is going to be the beginning.
>
> Defendant: This is in the beginning, it must have been.
>
> Downs: Okay. Was there anybody else in the room, was, was he the only one there?
>
> Defendant: He...I think there was like two or three other kids, or there could have been more, I'm not sure, but all I saw was him, cause he was up against the wall.

Downs: Okay, can you draw me..

Defendant: If, if, if I, if he ...

Downs: Can you draw me an X where he was?

Defendant: I didn't, I never seen him, but I don't remember shooting him. He was...at the chairs where all the kids were like going down, boom, boom, like this, he was like in the back.

Downs: Okay, in the back. How many times did you shoot him?

Defendant: If..I don't remember shooting him, but if I...I remember seeing him, but I don't ...

Downs: Kind of a big kid, gray shirt, cowboy hat.

Defendant: I remember shooting over there, but I thought I saw some guy that was wide open but I don't remember shooting a shot, and then uh, after that I came around here, came around here and that one kid, he popped his face out of this class, or.. .yeah, I think I fired, yeah, I fired at the one kid there and then there was one in the classroom beside the bulletin board or some board.

Downs: How many rounds did you shoot at him?

Defendant: Uh, I fired one at him, one at him...

Downs: That makes (unintelligible)

Defendant: Yeah.

Downs: Okay, so you fired one, okay one round here?

Defendant: Yeah.

Downs: Okay, and then there's a kid in here at the blackboard?

Defendant: Yeah, that had his butt facing me, and I shot him. (unintelligible) I shot him, I think right here.

Downs: You shot him in the leg?

Defendant: No, the side, the back of the butt...

Downs: How many rounds did you shoot?

Defendant: One shot.

Downs: Okay, he was...

Defendant: I only shot everybody one shot.

Downs: Okay so he's hiding behind the bulletin board.

Defendant: Yeah, well, his butt was sticking out.

Downs: Okay, and then where did you go from this room?

Defendant: And then, I mean, all I remember, if you said I shot down there, I think I shot one shot and it went all the way, there was one guy here and it must have hit him and then he moved down into here, or, or, I shot him and he was against that wall cause you said something about shooting some kind of, against the wall, so uh, and then, but it was a long distance and then I went up the stairs and I dropped ...

(Exhibit 89 [CT Supplemental–5 (v.1 of 1) 6-8])

Defendant is uncertain about which stairway he used to go to the second floor, but does state that the .22 rifle fell while he was climbing the stairs and fired off. Asked about the door that was shot out at the southeast entrance and the student shot in what is

presumably C-102 Defendant says:

> I don't know (unintelligible) there could have been any (unintelligible) in that area, I was scared, I went right, I went this far up, I went up the stairs right up to Miss uh, Miss Cole's class, and but, when I was shooting, when I first, when that one shot, or whatever, I fired it into the Library and it hit the classroom (unintelligible).
>
> (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 9])

A discussion then ensues on what Defendant did when he went up to the second floor, his throwing of the .22 into the first or second classroom, his handling of the teachers and students he found on the second floor, going into Mrs. Cole's room (C-204b). Defendant also comments on Mrs. Cole being a "mean," teacher. Defendant speaks of telling teachers to leave and sending students downstairs to find other students and to take care of wounded students downstairs, and how he held the gun when he went upstairs. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 10-13])

Defendant says he thinks he was reloading his shotgun as he went up the stairs and the .22 rifle fell. He believes he loaded four or five three-inch shells – four on the stairs and a fifth when he got "into the room." One was a slug. Defendant describes setting up the barricade and telling the students to move the chairs and the bookcase. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 13-14])

Defendant says once he was in C-204b some of the students there told him that there were students in other classrooms including students who were crying. Defendant says that students volunteered to bring these students to C-204b. When some kids arrived with a

teacher, Defendant told the teacher he didn't want any teachers to stay. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 15-16])

Sgt. Williamson then enters the interrogation room and tells Defendant that his mother has given information that he had gone to buy ammunition. Defendant then acknowledges purchasing ammunition on the day of the shooting with money from his unemployment check. He describes how he went to three different stores to purchase ammunition on the morning of the incident: to Guns and Ammo in Marysville, where he bought two boxes of buck, some 12 gauge slugs, and one box of 500 .22 shells which the salesperson insisted he buy instead of two boxes of fifty shells. When asked why he bought so much, Defendant refers to the capacity of his bandolier and that he knew from shooting at the range that he could hold about 20 shells in each pocket. Defendant tells the interrogators he tried to purchase double buck but they only had the smaller four buck. He says he wanted four buck because he was used to shooting it, used to the recoil it gave, but denies he wanted the larger ammunition because it had more power or because the shells had fewer pellets. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 17-19])

Defendant goes on to describe how he went regularly to the firing range at Spenceville, practiced shooting and loading, and shared guns with other shooters. He shows the interrogators how he reloaded using the shell holder on the butt of the gun to hold the ammunition. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 19-20])

Sgt. Williamson asks Defendant when he decided "to do this." The first time the question is asked Defendant does not seem to understand what is being asked. When Williamson asks a second time

Defendant responds:

> Uhh...Actually I, I more thought about it, but actually not until I drove out there and I saw Mrs. Morgan that everything, cuz I was thinking about just turning around and going back to Spenceville, once I saw Mrs. Morgan, she says, Where...where...Why you got that gun and do you have a permit for it, I just ran in there and uh, I just ran in there and started shooting.

(Exhibit 89 [CT Supplemental–5 (v.1 of 1) 20])

Defendant describes that three to four weeks prior to the incident he had talked to his friend David about a "dream" about going into the school and shooting, but it was just talk. Although he acknowledges doing some "planning," Defendant maintains to the interrogators that it was not until he was in the parking lot, saw the "oriental guy," and "when Mrs. Morgan just looked at me with those eyes..." that he thought he'd really go through with it. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 21])

Sergeants Downs and Williamson begin to pressure Defendant to admit that he had planned the incident for a considerable time. Defendant says again that he "planned it" but didn't have the intention to go through with it until he was in the parking lot. For several pages of transcript the officers repeatedly interrupt Defendant when he starts to talk, making it difficult to understand what he is attempting to say. Eventually Defendant states that he drew up the "plans" 3-4 days prior to the incident, telling the officers that he knew they had seen it where "it shows me going in there." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 21-25])

Defendant says he wrote up another list that was "up on, the

gasoline or whatever you saw" although Sgt. Williamson reminds him it was lighter fluid. Defendant says he "was thinking" of putting lighter fluid on each door so that there would be no way to get out, or maybe to make the fires at just three doors to the building so Defendant could get out the fourth. But he was just thinking this. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 25-26])

Williamson then asks Defendant why he did it, to which Defendant replies:

> Maybe to open up somebody's eyes to see some of the stuff that goes on and not just, the treatment of how the process of how the school works, and, and maybe make them understand a little bit better some of the stuff I went through. (unintelligible).
>
> Williamson: Alright. Why the gun?
>
> Defendant: Why the guns? Because I thought that no one else would listen and if I went up to other means, like up uh, going to the office and talking to the principal, I mean, uh, I seen that uh, a lot of people say violence don't work, but uh...

Defendant denies he went to the school with the intention of killing anyone:

> First of all I, actually I didn't plan on killing anyone, okay? If anyone died I don't know. But uh, actually I was just thinking about, there's a lot of people I shot, I shot them in the legs and the hips and stuff, but actually I just thought about maybe shooting, winging a couple of people when I was in there and then uh...
>
> Williamson: That way they'd take you seriously?

> Defendant: Well yeah. And then have uh, have the uh, news guys come in here and maybe get down some of the stuff that I was uh, that I was needing, needed here.
>
> (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 27])

Defendant says he thought the first person he shot was "the Mexican people." He denies knowing that the teacher he had shot in Room C-108b was Robert Brens. Defendant then shows the officers how he handled the gun when he first shot into room C-108b (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 28])

Pressed as to what he did in room C-108b, Defendant says he doesn't remember whether he shot the Mexicans or the girl and the teacher in C-108b first, stating that he was totally "out of mind." The officers then say to Defendant that saying he doesn't remember is just a way to minimize his involvement, that Defendant agreed to talk to them, and that they think every time he pulled the trigger must be burned into his memory. Defendant says that the only real image he has is the "guy and the girl, Mr..I just..you said it was Mr. Brens and the girl and the Mexicans that were in the Spanish class, that's all, and, and the guy that around, okay, cuz,.." at which point Williamson cuts him off to ask why the Mexicans? Defendant denies that it was anything racist, and then says that he was shooting at anything that came into his line of sight or moved. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 29-31])

Williamson then asks Defendant why everyone is telling them that Defendant went to the school for Brens. Defendant says he told some people upstairs that he wished Brens was there, stating that he

wished Brens was there because "He's the one that tortured me." Defendant then elaborated:

> He, he's, he's the one who decided if I was going to fail or pass. And it was, and, and to him it was nothing, it was like your whole life, it's just like he goes, okay, uh, you're not going to, you're not going to uh, er, you tell the spies and he went over and just started writing on those papers, like it was nothing to him. It the whole, it was my whole life. I had my prom set up, I had my, everything set up, and he just (sound of snapping fingers) blew it away, that quick.
>
> Williamson: Best days of your life.
>
> Defendant: Yeah.

Following that statement Downs leads Defendant to say that he was angry with Brens and hated him, "to an extent." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 31-32])

Defendant states that he had taken classes in C-108b and then is transcribed as saying "I had Mr. Brens in this room," but denies that he knew it was Brens when he looked in the room and fired at the teacher and the girl. Pushed to admit he went to the school because of Brens, Defendant then states that it was not "just because of him,"

> but everything that got stolen and not just because of the diploma, but everything, all the disappointments in my life and everything else that's been leading up to this, all the disappointments, and my parents, everything else See you know what you're trying to do, you're trying to press it out that the reason I went there was to shoot at Mr. Brens.
>
> (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 32-33])

Williamson says to Defendant he thinks it's more than that, "if a man looked at me and I was looking down the barrel of a...

> Defendant: Well that's you, I mean..
>
> Williamson: Well, that's true. That's true, but that why I'm, I'm hammering on this, I don't want there to be a shadow of.....
>
> Defendant: Yeah..like I would intentionally go in there to shoot Mr. Brens, right?
>
> Williamson: And I, I ask it right out. Did you know it was Mr. Brens when you shot him?
>
> Defendant: No I didn't.
>
> Williamson: Alright, but you knew it was somebody and you...
>
> Defendant: I knew it was some teacher and some other kid upstairs told me later on that it was not Mr. Brens, but I forgot what he said...
>
> Williamson: What did the teacher do that triggered you? Now, you say they were moving, he obviously wasn't running, he just...
>
> Defendant: The way he looked, I was like, Oh Fuck, started all this shit...
>
> Williamson: So then you panicked.
>
> Defendant: And, and I....
>
> Williamson: Why the girl? What triggered you to...why did you trigger the girl?
>
> Defendant: I don't know. I just saw her...
>
> Williamson:...and pumped...
>
> Defendant: ... and she was in line.
>
> (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 33-34])

Defendant describes what he remembers the boy Downs calls "the cowboy" in another classroom (C-107) looked like but doesn't remember shooting him, and says: "I saw him and then I turned, I turned this way and I fired at the Mexican class." Asked who he was shooting by the "Mexican class," Defendant responds:

> Uh, there was, I think I saw, a couple of pairs of legs and I saw some people, I think I saw like two, three people and they moved out of the way, I fired a shot, in it, and then later on some kids told me that there was some people in there and they were shot in the legs and I told some kids upstairs, go down there, grab the kids, and I want two sets of people to grab kids, take them out through where the pizza is and take them out there to an ambulance.
>
> (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 35])

Defendant refers to "a little bit more" of his "sanity" coming back as he was going up the stairs, and says that he was "out of mind." At Williamson's suggestion he agrees it was "stupid" and that he was "on instinct," and that he reloaded on instinct. Defendant says that when he was going up the stairs he started to get "a little better grip." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 35-36])

Defendant says he does not remember shooting at the "doors down here" [pointing apparently to a map of the building that is not visible on the video portion and is not further described on the audio portion], but does remember firing a shot at a boy who had "his butt stuck out..." inside a classroom. Defendant denies any memory of shooting the victim Downs refers to as "the black kid" [Beamon Hill

in C-102], but does agree that he was just walking and firing randomly. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 37-38])

Defendant states that when he went upstairs he didn't know if anyone was up there, but was looking for a place where he could have a vantage point to see what was happening and feel safer. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 38-39])

The officers then begin to pressure Defendant on what he planned to do at the school and discuss the diagram he drew of the school (Exhibit 64). Referring to the diagram, Defendant says:

> I was going to go in here and I was going to walk through like you drew on that little map, it's the same thing. But I didn't.
>
> And:
>
> Uh, well I had like little arrows pointing, but I didn't have arrows at people, I just had arrows of shooting at classrooms...
>
> And:
>
> No. Actually, if you look at that picture. All I have is desks set up there and the little closure bars. But you don't see no stick figures and (unintelligible, Downs and Houston both talking)
>
> Williamson: You said earlier, talking about uh, ten or fifteen minutes ago, you said I figured to maybe shoot a couple in the leg or something to do . . . . (unintelligible, Houston talking over him)
>
> Defendant: Yeah, yeah, that was later on, after I drew the picture, that was once I was going ...
>
> Williamson: That's what I'm saying, once you were going in what was the plan. How many did you think you needed...

Defendant: Start shooting people where they could get my point across, or shoot them in the butt or whatever.

Williamson: Okay, how many? Did you figure, as many as you could get ...

Defendant: Uh, Not a lot, just enough to get something done, I don't know.

Williamson: Did you figure you'd empty your shotgun and then you could decide what to do after that?

Defendant: Yeah.

Williamson: Okay. Is that true, or is that something I just put in your mind?

Defendant: No. No, I mean...

Williamson: I'm just looking for something that. ..I'm trying to put myself in your place and it's hard. If I'd known you for the last ten years, and known who you are I might be able to think, or if I was out there shooting with you, you know, but I'm not, I'm not one of your buds, so I don't know, so I'm trying to figure out what would I want to key on, what would I want to do with my, you know, what would my plan be, and I don't, that's what I'm trying to get from you.

Downs: Tell us your plan Eric. You went there to shoot these people. You planned it. What did you plan to do. If everything went according to your plans, tell me about it.

Defendant: When, after I shot these people?

Downs: Well...

Defendant: Or I went in there to shoot?

(Exhibit 89 [CT Supplemental–5 (v.1 of 1) 39-41])

[At this point the interrogation moves to Defendant's activities upstairs in C-204b.]

When Williamson speculates that Defendant had taken the hostages in order to get the media in, Defendant acknowledges wanting to talk to the media, but insists that he had not planned to take hostages but only to barricade himself in. He describes that after arriving in C-204b and hearing that there were students in other classrooms, he wanted to bring the kids all together in one group in case law enforcement came in shooting. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 41-42])

When he is asked if he expected to live, Defendant states that after he was upstairs he knew how "you guys react," and he figured he "was a dead man." Asked if he knew how badly he had shot the "one guy downstairs," Defendant says that it scared him that he had shot people, that "I would actually consider doing this." Defendant then denies he knew where his shot had struck "the teacher," Defendant responds: "Nope. Cause, cause like I said, I have totally different kind of bullets and uh, and I wasn't, I wasn't going to take the recoil and the ..." whereupon he is interrupted by Downs asking him why he didn't use bird shot or rock salt. Defendant responds that he didn't know if he was going to go up to Spenceville to the shooting range. Then Williamson asks Defendant if he had gone to the school before and "backed out." Defendant denies that, but says he had gone to the school "to just look around," to see if the classrooms were any different than "how it was." Pressed that he was "reconnoitering just like a good military man," Defendant responds: "Yeah, but it was like it was all theory, (unintelligible, approximately five words)" after which the discussion breaks down further and all are talking at once as Defendant asks if they are saying he committed "premeditated

murder," the officers press Defendant to "tell the truth," and Defendant starts to insist that they are "hounding" him. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 41-46])

After the officers acknowledge that Defendant has no criminal record, Defendant first denies that he planned out the shootings, but then seems to say that he not only went to the school several weeks earlier but took pictures of the building:

> Uh, you know, one thing that you guys are pressing that is totally falsified is that I planned this out from like, you know, well, like planned it out, that I intentionally was going to go and do it why I drew up those plans, that I, that was the first time that it was...
>
> Williamson: No. It built. it built on that. It built on the first conversation (unintelligible, two words). I'll tell you right now. I don't think you, that may, but, it just kept something you've got into and you got into it a little more.
>
> Defendant: Uh Huh (affirmative response) and a little more and so I walked up there one day, yeah.
>
> Williamson: And you've even driven to the school
>
> Defendant: Yeah.
>
> Williamson: Alright. See I know that.
>
> Defendant: Well you didn't know about the school did you? That I went there a couple of weeks ahead of time?
>
> Williamson: I...
>
> Defendant: Well you didn't see the camera pictures, did you?

(Exhibit 89 [CT Supplemental–5 (v.1 of 1) 47-48])

But then, after Williamson and Downs both compliment Defendant on his tactical skills and suggest he takes pride in them, Defendant responds by saying he didn't *take* pictures but was referring to his noticing surveillance cameras when he visited the building on a weekend:

> I walked, I walked into the school one day, uh, a couple of weeks ago, uh, I skirted the whole area, but (Downs and Houston both spoke, unintelligible, approximately four words) a tactical situation.
>
> Downs: Okay, is that when you took the pictures?
>
> Defendant: Well no, I said there is the pictures, there was cameras located all throughout the school and then you go back they have surveillance cameras located on the section of the school, uh, of the building, here and...
>
> Downs: Oh, so you wanted to avoid their surveillance cameras?
>
> Defendant: Well no. Actually I went through the whole school and I looked up and I said, Oh shit, they do have cameras.
>
> (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 48-49])

On leading questions from Williamson, Defendant seems to say that after firing the first shot at the teacher, he felt it was too late to go back:

> Well I don't. I mean, actually it was just like instinct, it 's this big boom boom, I mean everything happened so quick and... (unintelligible, Downs and Houston both

talking) and then back together on what happened. He's told me, well there was somebody shot over here, and there some else like, uh, Maybe I did screw it up, maybe they'll take you out.

Williamson: When you walked in that door the decision was made and it was a green light go.

Defendant: Uh, yeah, once I got Mrs. Morgan was right, standing behind me...

Williamson: That's a green light go and there's no way out of it now...

Defendant: After that first shot..

Williamson: Yeah. After that teacher dropped, that was it.

Defendant: Yeah.

Williamson: Okay, so it was too late to go back.

Defendant: Yeah.

Williamson: Okay.

Defendant: And then I'm flying up the stairs and got everything just... I was alone for a second and little kids were running and the gun dropped and fired out and I was reloading when I was going up and then that's...

(Exhibit 89 [CT Supplemental–5 (v.1 of 1) 49-50])

When questioned about his conversations with Rewerts, Defendant describes telling Rewerts about a dream he had about going to the school and Rewerts speaking of how he would do it if he did it. Defendant describes that he had forgotten where some of the classes were and drew his own "rough, real rough estimate." (Exhibit 89 [CT

Supplemental–5 (v.1 of 1) 50-51])

Williamson and Downs then question Defendant at some length about his purchases of ammunition and where he purchased the weapons. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 51-54]) On inquiry, Defendant says that he sawed off the butt of the .22 "about two nights before, the night before." He agrees with Sgt. Downs that he sawed off the butt so that the gun would be more maneuverable. He also put the hooks on that same night. He checked all his gear "before [he] got to the school." He wanted to bring the police scanner they had at the house, but there were no batteries and it had a loose connection. He asked his mother that day, and she said it wasn't working. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 54-56])

Defendant says that he wrote the note to his family about a week before the incident. He says he had written two or three other ones but had torn them up and flushed them down the toilet – he didn't put them in the trash because he knew his mother would find them if she went into the trash. According to Defendant, he tried to put the letter in terms they would understand if he got shot. He then appears to agree with Williamson that the note indicated he intended to do something "very terrible," that somebody was going to end up "very badly hurt or dead." Defendant's affirmative response is followed by further statements identified as "unintelligible." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 56-57])

Asked again whether he had planned on dying when he went there, Defendant says:

> Well like I wrote on the note, uh, I knew that, I mean the way you guys were situated,

> and the way your tactics are, I knew you could easily, if you wanted to...
>
> Williamson: especially after you'd killed someone
>
> Defendant: Yeah, yeah.
>
> Williamson: That's why it's so obvious to us Eric, to the two of us that you knew that you, somebody was likely to die when you got in there.
>
> Defendant: I knew that I was probably going to get killed too. That was as far as I was going to go.
>
> Williamson: Is that true then?
>
> Defendant: (unintelligible) I felt I had a good tactical situation, and the location and everything that maybe I had a chance to live, you know, guy on the stairs.
>
> (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 56-57])

Defendant and the officers then banter some about the food that was sent in. Defendant says he didn't eat the pizza because he thought the police might have done something to it. He then discusses how the students in C-204b were out of control, that he had not anticipated "when I started walking up there and I saw them, and I got into the group" that he would have such difficulty holding the hostages, and that having 80-some students made the room too hot. Defendant says he started sending students out because he needed to reduce the number of students so that it would be a more manageable group. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 57-58])

When Sgt. Downs asks Defendant if the students in C-204b knew that anybody downstairs was dead, Defendant responds:

"Well, yeah, well not dead, but they...Why, was there someone dead?"

Williamson: Four people dead.

Defendant: Four. I...

Downs: Did you guys know that upstairs?

Defendant: No. They all said that one person was in critical condition, one was going to the operation and the other ones were shot.

Williamson: They heard that on the radio?

Defendant: Yeah.

Williamson: They didn't know about the deaths. Kids had no idea. You had no idea, did you?

Defendant: Well, well, only from the radio.

(Exhibit 89 [CT Supplemental–5 (v.1 of 1) 58-59])

Defendant then asks about the "note" signed while he was in C-204b (promising him no more than five years in prison and educational amenities while incarcerated). Williamson denies ever seeing the note and Downs dismisses the question saying "What's done is done..." The officers then return to questioning why Defendant bought buck shot and hollow point slugs instead of bird shot if he did not intend to kill people. Defendant states that he was used to that ammunition; that slugs are more accurate; but Williamson confronts him with his skill at shooting and the fact that he was less than 20 feet away when he shot. Defendant thinks he was ten to fifteen feet away. Williamson asks him "And what did you shoot at?"

I shot at him. I shot at his back, or his lower butt, I'm not sure, cause the barrel of a shotgun (Williamson and Houston both

> talking, mostly unintelligible, Williamson says We're all people that use weapons.)
>
> (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 59-61])

The interrogation returns to Defendant's choice of weapon and ammunition. Defendant says he thinks he used only four buck, but he put slugs in one pocket and four buck in another, so that when he grabbed shells he would know what he was loading. The officers then take Defendant back through the shootings. Defendant says he made eye contact with "part of her eye" before he fired at Judy Davis, but did not see her go down, and then he "fired another one." Then he walked and then "fired one at the Mexican," and then he looked to the right and saw the "big buff" guy, but doesn't remember shooting him. The officers challenge Defendant that he shot him because he was "the perfect athlete," but Defendant denies that he either knew him or looked like an athlete. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 62-64])

A further discussion ensues of where Defendant shot on the first floor, but the participants again are referring to the diagram that is not visible on the tape or referenced in the transcript. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 65-67])

Defendant is asked about his associations – with the NRA, with survivalists, but denies any formal association with any groups. He is asked about the publications found in his car and in his home. He gives vague and rambling answers as to why he didn't set fire to the doors with the "gasoline." He says he knows how to make Molotov cocktails and thought about making them. (Exhibit 89 [CT

Supplemental–5 (v.1 of 1) 68-69])

Williamson then asks Defendant if he is sorry that Brens is dead. Defendant responds:

> I didn't know it was Mr. Brens.
>
> Williamson: Well I didn't say you did. I'm just saying are you sorry. You said you never liked the man.
>
> Defendant: I never liked the man when I told them when I was upstairs.
>
> Williamson: Yeah.
>
> Defendant: And I might have told David, no cause David didn't know I didn't graduate, I, I didn't tell him, or nothing, cause I just, I don't know, I just, that's something you just don't do though, I mean, I felt that was, I don't know, change our friendship or something, I don't know.
>
> Williamson: Had you know Brens was standing there when you were shooting would you have shot him?
>
> Defendant: It wouldn't, if he was there or not it, I doubt...
>
> Williamson: If you had known it was Brens and he had a big sign that said, I'm Mr. Brens, and you're walking down the hallway after shooting a kid, would you have shot him.
>
> Defendant: He was right in the path if it was him or not, even if it was Mr. Brens or not, that person would have...
>
> Williamson: It didn't matter. He was in your sights, he was gone.
>
> Defendant: If it was Mr. Brens, Mr. Burris, or whatever, it was just whoever came in eye contact.

Williamson: You didn't give a shit who, as long as...

Defendant: Uhh, yeah.

Williamson: You weren't being selective, saying this is a girl, I'm not going to shoot her, okay, I'11 shoot him?

Defendant: No, I wasn't selective. You guys are saying I shot one girl?

Downs: If they moved, you shot them?

Defendant: And uh, so..

Downs: is that right?

Defendant: Well, whoever came to my, my sight contact, yeah.

Downs: The uh, the teacher, the first teacher who got shot okay. He looked you in the face.

Defendant: Yeah.

Downs: Alright. And then you went to the girl.

Defendant: Uh Huh (affirmative response).

(Exhibit 89 [CT Supplemental–5 (v.1 of 1) 69-70])

Pressed once again to admit that he knew he was shooting Robert Brens when he fired on the teacher in the first room, Defendant denies that he knew, claims he was "totally out of it," and insists "Whoever it was that came into eye contact, that was in the line of fire I shot." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 70-71])

A further discussion then ensues in which Defendant appears to be asking questions about what the officers believe he did, and sometimes offering conjectures about where he may have been when

he fired shots. Defendant disputes with the officers which stairs he took to the second floor, (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 71-74])

The officers then offer Defendant a break, during which they leave the room. When they return , Defendant indicates that he has been able to hear them talking through the wall. The officers again press Defendant that the evidence is overwhelming that he knew he was shooting Brens in the first classroom. Defendant argues that he has witnesses from C-204b who will recount how Defendant joked that he thought Brens should pay for the pizza. Defendant notes that the hostage negotiator he spoke with over the phone told him only that one person was in the hospital in critical condition. The officers then concede that they didn't know the condition of the victims until they entered after the incident ended. Williamson reiterates that he wasn't a negotiator and didn't know what they were saying, but that the facts don't fit with Defendant's insistence on lost memory and lack of intent to kill Brens or others. Williamson then says he doesn't understand why Defendant is lying, to which Defendant reacts angrily "What do you mean! I'm not lying, okay? I'm not fucking lying." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 75-77])

Downs chides Defendant for having a selective memory. Defendant states:

> There might be something with you but like I said I have a slow proc, (unintelligible) process.
>
> Downs: Well how come you can remember the beginning and then you go. ..

> Defendant: Because. The trauma starts setting on, in when I first sh... the first person and then I, it just...
>
> [Defendant is then interrupted by Downs]
>
> (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 78])

Downs once again tries to take Defendant through the shots on the first floor. When Downs gets to the "kid in front of the classroom" Defendant says he remembers he was "real skinny," remembers him grabbing his leg, thinks he had on a white shirt and Levi's. Defendant remembers "the kid behind the board," because "he stuck his butt out." Defendant remembers he had a dark complexion, "Mexican, Yeah something like that." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 78-79])

Defendant states that he does not recall coming back downstairs after he went up and once again he denies that he is lying. Defendant then disputes Williamson's count of how many rounds he shot. Downs says he had said previously he did shoot that much and that he said he counted his rounds. Defendant disagrees saying he didn't count his rounds because he was using three inch magnums which he doesn't normally use. Defendant says he normally counts when he is firing but he didn't during the incident. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 80-81])

Defendant then denies that he said anything to the students when he was downstairs. He denies saying "Don't fuck with me" downstairs, although admits he did scream it when he was upstairs on the phone and to the kids in C-204b. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 81-82])

When Downs asks Defendant who he shot in the library, Defendant denies shooting anyone in the library, just the glass window. Williamson asks how the clock was knocked off the wall, and Defendant says he kicked it off the wall because he was "pissed off," whereupon Williamson seizes on that statement to show that Defendant *was* in the library. Defendant demurs that he was talking about the clock in C-204b, but the clock in the library must have been hit when he shot out the library window because the clock was just below the window. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 83])

Williamson again tries to lay out an explanation as to why Defendant did the shootings, interrupting Defendant's objections and asking him to agree. Defendant denies that he planned to kill anyone and insists that four buck, double ought buck, hollow point slugs, which he agrees with Downs are for "shooting elephants," was simply the ammunition he regularly used when he went target shooting at Spenceville [i.e., he did not select ammunition with an intent to kill people]. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 83-85])

Williamson then projects that Defendant was "so angry at these people" that when he aimed at them and pulled the trigger he got "the biggest relief, and rush you've had in months." But Defendant says it "wasn't a rush, it was scary...And I was scared." Then Downs pursues Williamson's theme:

> Okay. You, you hurt, Eric.
>
> Defendant: Yeah I hurt, and I'm going to hurt probably for the rest of my life. It hurts.
>
> Downs: And you wanted them ....and you wanted. ..and you wanted them to hurt too.

> You told me you wanted them to feel what you felt...
>
> Defendant: Not really hurt, but in a sense numbness, but hurt at the same time, you know what I'm saying?
>
> Downs: You wanted them to hurt too because you hurt. You said you wanted them to feel the way that you felt, right?
>
> Defendant: Right, that's, what I decided up on the stairs.
>
> (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 85-86])

But when Downs pushes the discussion to say that Defendant went there to seek out the teacher because Defendant hated him "because he flunked you in high school and you didn't get your diploma," Defendant begins to argue that the conversations upstairs with the students about Brens show he didn't believe he had shot Brens:

> First of all, I didn't know that was him, I didn't know that was him, everybody upstairs we all talked about that if Mr. Brens was here, we would pay, we would make him pay for the pizza, and I said, Yeah I said yeah, we should, and then some girl said he's at room now, and I said that's too bad, we said, and I asked one of them what kind of car's he have, and he don't have a Mustang, because he used to have a Mustang, he has some kind of station wagon car.
>
> (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 86-87])

Williamson then suggests to Defendant that he was seeking fame or infamy through the media: "They'll all remember me, and the

news media will go crazy and I'll be on television." Defendant responds:

> The reason I wanted the television thing up there is to put my point across, not just to get publicity and I think that I'm, but to share some of the pain I'm in too and some, some of the way they handle the students out there at Lindhurst, cause I knew damn well how they handle, that I seen personally, and now after all these years the kind of sit back until a certain point and I...
>
> (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 87])

Williamson and Downs return to arguing with Defendant that he intended to kill the victims; that the choice of ammunition shows that he did. Defendant asks if the "whole situation" would be different if he had purchased bird shot. Williamson backs off. Then Downs tries it this way:

> Eric, look at the facts. Look at the facts that we're looking at. You went out to buy ammunition, okay, that is designed to kill with. Okay?
>
> Defendant: I always buy ammunition designed to kill because that's what I practice with.
>
> (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 87-88])

And the three of them argue more about the significance of Defendant's choice of ammunition on the issue of his intentions when he went to the school. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 88-89])

Defendant reiterates that he didn't know he was shooting at

Brens when he fired the first shot at the teacher. "He looked totally, when I picture that guys face it didn't match Mr. Brens." At this point the tape runs out and a new tape is put in. The transcript shows that the interrogation continues.(Exhibit 89 [CT Supplemental–5 (v.1 of 1) 89-90])

When the tape resumes Williamson is speaking sarcastically of Defendant's contention that he only "wanted to blow their feet off" and that it was a "mistake that they died." Defendant responds:

> All I wanted to do is shoot. I, I, is to shoot at them but not, I mean just to shoot.
>
> Downs: Well did you think they were going to die when you shot at them?
>
> Defendant: No I didn't.
>
> Downs: Oh Bullshit. You shoot them at point blank range:
>
> Defendant: I wasn't at point blank range
>
> [Both talk for a couple of seconds]
>
> Downs: I'm talking, just a minute, just a minute. Ten feet away, you shoot a human being with a twelve gauge shotgun and you don't think that they going to die?
>
> Defendant: No.
>
> Downs: Eric, Come On!
>
> Defendant: He had his butt sticking up.
>
> (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 90])

Downs tries to discuss the victim with the "gray shirt." Defendant says he does not remember shooting him, that the victim turned (shows officers) and "smiled," and that "he looked like some

red neck." Williamson then challenges Defendant that he shot the victim because he looked like a redneck, and Defendant says he has nothing against rednecks or blacks, and that he didn't "single out anyone personally." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 90-91])

Downs then agrees that they don't think Defendant singled people out, but that he did come to the school to shoot the teacher, Brens:

> We don't think that you singled out certain people We have nothing to show us that, that is the facts here except the first person you killed is a teacher that failed you in high school that I'm sure you hate his guts, because you think, you hold him responsible for, for what happened to you after high school, that, that screwed up your life.
>
> Defendant: To a point, yes.
>
> Downs: Okay. Can we agree on that?
>
> Defendant: We can agree on that. I, first of all I didn't know know it was him.
>
> Williamson: When you walked around the school two weeks ago who did you see in that classroom?
>
> Defendant: I didn't see anyone. I just was looking around.
>
> Williamson: There was nobody in his classroom?
>
> Defendant: It was a Saturday or a Sunday.
>
> Williamson: Did you get inside the building?
>
> Defendant: No, you can't get in on a Saturday or Sunday.

> Downs: How did you get on the campus?
>
> Defendant: Just went over the back fence.
>
> Downs: Did you take your gun with you?
>
> Defendant: No. I only have two long ones. Walking around with a guns not gonna...
>
> (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 91])

Downs returns to the fact that the first person Defendant shot was Brens. He asks Defendant to give the teacher a name. Defendant "Uhh. Brens." Then Downs asks "Did you hate him?" Defendant responds:

> At that time I did and it built up, at, all the disappointments I guess built up, to ...all the disappointments built up to that I hated him by I knew that was him when I shot him.
>
> Downs Let's look at this from a logical point. A logical person....
>
> Defendant: First of all I thought his thing was all the way down at the other end.
>
> (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 91-92])

The officers discuss how Defendant was angry with Brens because he had failed to graduate and then lost his eight dollar an hour job at Hewlett Packard because he didn't have his diploma. Downs says things were "going bad" for Defendant and Defendant agrees:

> Real bad. At home I'm getting shit from my mom, getting shit from my brother.
>
> Downs: Okay. So things go bad. Alright. You get upset okay, You decide to do this thing. You go. ..

Defendant: I had all this free time on my hands.

Downs: Okay.

Defendant: Is that okay? I never want to do, Okay, so let's just go out and shoot awhile, okay, wait and then (okay, wait le't draw some and then I was reading a book and I said no way that's a good tactic I said I wait...

Williamson: What was in the book?

Defendant: It was just a, it was a three man, a, where this gun this gun like this, you got the pistol hand turn around and you shoot three different targets, with two targets intervals between all three targets.

Downs: Okay. Let's talk about the logical man theory. Okay here's you that hates Mr. Brens. Okay. And you decide to do this, you plan, you draw maps, you get your ammunition, you get all your stuff together and you go to the high school.

Defendant: Right

Downs: Okay. There are several thousand people at that high school.

Defendant: Right.

Downs: Okay. You go into a building. Why did you go in C Building?

Defendant: Why did I go in C Building?

Downs: Yeah.

Defendant: Because that's a, that's where most all the shit happened.

Downs: What happened in C building?

Defendant: I mean that's where all my classes were. That's where the biggest part of the problems there.

Downs: Is C building, that's why you went to C building.

Defendant: Yeah.

Downs: Okay. Did you go into C building? Because that's where your problems were. I can understand that. Then the very first person, other than the drama teacher, who you liked and she thinks very highly of you, right?

Defendant: She thought very highly...

Downs: Well, okay. The very first person that you encounter other than the drama teacher...

Defendant: And that was pure luck.

Downs: Okay... is the man that you hate, and he's the first maw that you shot, and the first person that you killed and then, from then on you went on a shooting spree in that building, shooting anybody that you encountered. Anybody that came into your path.

Williamson: Didn't matter anyway, he 'd already done one. That's it, that's the answer. He's already done one man, one man's dead so one or forty it don't matter. Just go out in a blaze of glory.

Downs: Those people that you shot at first. Okay, you shot them, they fell, they didn't move. You knew that you killed them, didn't you?

Defendant: Well I didn't...

Downs: Sure you did.

Defendant: No I didn't, because they, half of them had their butts up to me.

Downs: He was elevated?

> Defendant: I did some new stuff. The teacher that was, the first teacher, he was elevated.
>
> Downs: Can we call him Mr. Brens?
>
> Defendant: Well, at that time I didn't know who he was. He had his butt up against the wall and all I remember is his butt up there talking to the girl next to him. And then I shot him like, I thought I shot him in the mid back, butt, whatever, and then I shot her, I know I shot her in this area.
>
> Williamson: Wait a minute. He was sitting on the desk.
>
> Defendant: Yeah. He was like this. And she was right here.
>
> Williamson: You just said his butt was in the air.
>
> Defendant: Well I mean his butt, just, well, it was like, you know.
>
> (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 91-94])

Downs and Defendant return to discussing the person in the gray shirt whether he was a "jock" (Downs) or a "cowboy" (Defendant) and the extent of Defendant's memory of shooting that victim. Defendant says he remembers shooting the "one that was sticking his butt behind the... blackboard, and then the other one, and then one long shot straight down the hallway. And then going up the stairs." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 95-96])

Defendant says he was standing by the stairs when he fired the long shot straight down the hallway, and says "Now I remember going up the stairs." The officers press Defendant as to what or who he was shooting at when he fired the long shot down the hall. The officers

press Defendant that he shot "a big heavy set black kid," but Defendant says he doesn't remember that, only going "in about this far" and then going up the stairs:

> All I remember is coming, shooting, a long distance, going up the stairs, dropping the twenty-two, ah, and then it misfiring and then throwing it out.
>
> Downs: Why are you telling us part of it and not the other part? I don't understand.
>
> Defendant: Because I don't' remember the other part.
>
> Downs: You mean you stood there in front of this classroom and you shot this kid in the head and you don't remember doing that? But you remember everything else. That's unbelievable Eric. That's unbelievable.
>
> Defendant: I don't remember. I remember everything else. You can make it unbelievable.
>
> Downs: Do you believe it?
>
> Defendant: All I, that's all I remember. If I did it, if it comes down to it, okay, I did it.
>
> Defendant: Did you do it? Tell me the truth.
>
> Defendant: I have no recol... I can't say that stupid word again. I have no knowledge of shooting right then, right there, okay. All I remember is coming around the side.
>
> Downs: I'm asking you for the truth, is all I want.
>
> Defendant: I'm telling you the truth. Okay.
>
> Downs: Let's take give him a break.
>
> Williamson: No. We're done
>
> Downs: Okay. Thanks Eric.

(Exhibit 89 [CT Supplemental–5 (v.1 of 1) 96-98])

Williamson and Downs then leave the room for a few moments, return, and ask Defendant to sign a consent form for a search of his room at his home on Powerline Road. Finally Downs asks if Defendant has any questions he would like to ask them. Defendant says:

> Yeah, okay, if you're going to me in a cell with somebody else, this is like when someone has committed a crime like a felony or something, cause, I don't really feel like sharing a cell with someone that's sick, I mean, worse than, you know, what I did.
>
> Downs: Well, I'll express that to the jail staff.
>
> Defendant: Thanks. I don't want to get into a fight with someone whose already in here.
>
> Downs: Okay. Okay, Let's go.

With that exchange, the transcription ends. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 98-102])

F. Defendant's Evidence Introduced in the Guilt Phase

1. Mental Health Experts

In the defense case on guilt, the defense called C. Jess Groesbeck, M.D., a board certified psychiatrist who had testified in a number of criminal trials for both prosecution and defense. Groesbeck had interviewed Defendant three times for a total of 6.5 hours in the Yuba County Jail after his arrest and had reviewed various school and

medical records relating to Defendant, as well as police reports from the May 1, 1992 incident. (Groesbeck, 19 RT 4448:23-4457:3, 4460:16-4463:9, 4509:19-24)

Groesbeck summarized his findings from the interviews and document review: He stated that Defendant had come from a family where there was "an incredible amount of trauma." He stated that Defendant's mother had been abused by several members of her own family, an uncle whom Defendant knew as a child had killed three people in a fight, Defendant's grandmother had committed suicide, and Defendant's father had left the family at an early age so that Defendant had basically been raised without a father. (Groesbeck, 19 RT 19, 4465:14-28)

Groesbeck testified that he had learned that Defendant had had one brief contact with his father in 1986, but it was "unsatisfactory." Groesbeck described the father as alcoholic and "essentially, a negative influence." Defendant had a "step-brother" who was "kind of a father" to Defendant and who helped Defendant get a job, but Groesbeck concluded that it was "an uncertain relationship." Defendant also had a relationship with his sister's boyfriend who taught Defendant to shoot, got Defendant involved with "the military business " and guns. This also was "not a great relationship," Groesbeck said, but it furthered Defendant's abilities with guns and shooting. In summary, Groesbeck said that the multi-generational trauma in Defendant's background was important because studies show "...it has a profound influence on ones upbringing and behavior..." (Groesbeck, 19 RT 4466:1-27)

Groesbeck then testified that based on psychological testing and

school records, Defendant "has an organic brain syndrome. A developmental disorder, as well as a hyperactivity syndrome, which he had as a child, most likely. Adult developmental defect. Adult developmental disorder." There was a chronic permanent problem with the brain involving some form of brain damage. This meant that the left side of Defendant's brain, the part responsible for cognition thinking and speaking, did not function well. As a result, Defendant has difficulty with logical reasoning, with forming thoughts into verbal statements, and with arithmetic. These findings were confirmed both in testing results prior to May 1, 1992 and in the psychological testing conducted after the incident. (Groesbeck, 19 RT 4466:28-4468:6, 4469:1-5)

Groesbeck noted that Defendant's IQ score had fallen from 95 to 84 around the age of 16. Groesbeck noted this drop coincided with a time of great emotional change for Defendant, and with Defendant's being molested. At this point Defendant began to run into failures in adolescence. He had difficulties learning in school, could not pay attention and could not be controlled in the classroom. This provided the background to his high school experience. (Groesbeck, 19 RT 4468:2-23)

Groesbeck also noted that Defendant's medical records showed that Defendant had spinal meningitis as an infant. Groesbeck stated that such an illness at a young age can have traumatic effects on the brain. Additionally, Defendant suffered from severe asthma as a child. This too would lead to traumatic experiences, and a person with asthma often has separation anxiety and higher levels of needs than most infants. Groesbeck also opined that a photograph of

Defendant at a young age wearing a girl's dress with a statement written on the photograph to Defendant's father "saying he looks like a girl, you would think." This might have impacted Defendant's later problem with his sexual identity. Groesbeck also surmised that Defendant may have been abused as a child. His surmise was based upon a record that a social worker had been called when Defendant, as a child, was taken to the hospital to be treated for bronchitis. Groesbeck speculated that it would be unusual to call a social worker if there were not some indicia of abuse.[25] (Groesbeck, 19 RT 4472:16-4474:13)

Groesbeck diagnosed Defendant as having a personality disorder with two prominent areas. First, Defendant had a dependent personality – through most of his life being dependent on his mother, with needs that were not met and issues of abandonment. Defendant's mother was "gone a lot" and brought a lot of men into the home. Defendant had a lot of "need-seeking" behavior to satisfy those needs. (Groesbeck, 19 RT 4475:7-18)

Groesbeck further diagnosed Defendant has having a borderline personality disorder, meaning that Defendant's day-to-day functioning and contact with reality are unstable and very shaky. A borderline personality tends to overly idealize and overly devalue relationships. This is what Defendant started to do as an adolescent, which is the time when this disorder tends to appear. The disorder is also marked by affective mood shifts, where Defendant went from being very high

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[25] In later testimony Groesbeck corrects himself by indicating that the social worker was called for a 1988 hospitalization rather than the 1971 hospitalization. (19 RT 4545:15-21)

to very low. In the months prior to May 1, 1992, Defendant was going through severe mood swings. Also common to the diagnosis are serious suicide preoccupations. Groesbeck noted that Defendant had attempted suicide in 1988 after the loss of a female relationship, and had attempted suicide again in 1993 while in the county jail. Additionally, and most importantly in Groesbeck's opinion, Defendant suffered a disturbance in his class self-image going into May 1, 1992. (Groesbeck, 19 RT 4475:19-4476:27)

Groesbeck stated that the loss of self image Defendant suffered related not only to his worth in the world – how to work and be a value to yourself and your family, but also to his sexual identity: whether he was a man or a woman, or an effective man or woman. (Groesbeck, 19 RT 4477:5-28)

Groesbeck also opined that Defendant suffered from post-traumatic stress disorder – where an overwhelming stressful experience causes a specific reaction. This seemed to have occurred three times in Defendant's life. Groesbeck thought the condition could have started in childhood with childhood abuse, but noted that he was "labeling [it] speculation" because he had no solid data to establish that. Groesbeck did believe that Defendant suffered post-traumatic stress disorder in 1989 when he was molested by his teacher, Robert Brens. This happened two and possibly three times. On the first occasion, Brens apparently made an attempt to fondle Defendant in the genitals, which caused a significant overwhelming reaction in Defendant, who became obsessed with what it meant about Defendant. Defendant's sexual identity, which already was somewhat shaky, became even more fragile. The second occasion occurred

several months later when Brens put his hand down Defendant's pants and actually fondled Defendant's penis, causing Defendant some pain. A third occasion was that Defendant was orally copulated by Brens. After this incident Defendant was not only ruminating about it, but was quite depressed, drinking, and, as a result, had some homosexual experiences with his friend, David Rewerts. (Groesbeck, 19 RT 4478:19-4480:13)

Groesbeck noted that much of this history is minimized by Defendant, but these events were the most important trail to what happened on May 1, 1992. Defendant lacked the capabilities to process what has happened. Many young men and women are molested by older adults and don't respond the way Defendant did, but because of his resources, Defendant became obsessed, had recollections and dreams about it, felt humiliated about it and it led to his quasi-homosexual seeking behavior which led to more guilt and more denial for Defendant to deal with. Defendant minimized the question of his homosexuality and did not develop overt rage. Instead the rage went deep underground. He had a dissociative reaction where he stepped out of his memory or consciousness of what happened; he began to see his own actions as the actions of someone else, or just pushed them out of his memory. He began to compensate for his damaged self image as a man by his behavior with David Rewerts. That self-image was further damaged by his failed relationship with his girlfriend, his difficulty getting along with his mother and brother who were demanding that he support himself like other family members, and then his lost job, which he saw as caused by the failure to graduate high school which resurrected the

experience with Brens – the course that he couldn't pass because of fear of molestation by Brens. These events set the trigger for what happened on May 1, 1992. (Groesbeck, 19 RT 4480:14-4483:24)

Groesbeck opined that these developments lead to the final diagnosis, which is schizophreniform disorder – schizophrenia, which is the most serious of all mental illnesses, where the mind literally disorganizes at all levels. On top of the post-traumatic stress disorder, where Defendant tended to detach himself from the experiences he was having, he developed a core delusional system consisting of basically two frames: first is the abused child. Groesbeck felt this frame was illustrated by the movie Defendant was watching – "The Stalking of Laura Black," where he identified not with the stalker but with the victim. The second frame of the delusional system is best illustrated by the films Terminator I and II, and Predator I and II, which Defendant was watching the night before the May 1, 1992 incident and, which Groesbeck believes by one account Defendant had watched some 23 times. (Groesbeck, 19 RT 4483:25-4484:24)

Groesbeck testified he had watched a Terminator movie for the first time the night before his testimony. He found the movie illustrated dramatically two aspects of Defendant's delusional state: first, confusion or blurring of flesh and blood and metal – what is human and what is non-human, with violence becoming romantic and fascinating and a way to do good. Secondly, the movies portray that to save the child the father must sacrifice himself. The evil in the adults must be destroyed. Defendant had heard of a girl who had been failed by the high school just like he was, and in his confused surreal view of reality, Defendant went to the high school to save the

children, just as Arnold Schwarzenegger came from another planet to save the young boy in the movie. Defendant, who is dissociated and disattached, sees a world where body and metal are thrown around in an unreal world. (Groesbeck, 19 RT 4484:24-4486:1)

Groesbeck stated that he wasn't sure what Defendant had in mind when he went to the school that morning, "maybe to shoot people up, he wanted to bring the media in, he felt the S.W.A.T. team would come, he wanted to expose, particularly Brens. He wanted to advertise the molestation. But he wanted to save the children. And then he would die. He would die, much like, interestingly, the movie's character does, some of the movie characters." This was a delusional system generated by the factors Groesbeck had described. (Groesbeck, 19 RT 4486:2-15)

Groesbeck then listed his diagnoses of Defendant: First was a developmental disorder that he described as a learning disability. This occurred early in his life. Second was post-traumatic stress disorder, recurrent, caused by trauma in childhood, most likely child abuse, followed by the molestation by Robert Brens on at least three occasions, followed by some quieting of the PTSD until the stressors resulting from the incident on May 1, 1992. The PTSD manifested itself after the Brens molestations by intrusive recollections of those events, with almost everything he was doing in his life reflecting the humiliation of that event, which led to his avoiding other relationships and becoming more distant from others. (Groesbeck, 19 RT 4488:14-4489:21)

Groesbeck also noted diagnoses of depression and a dissociative disorder with dissociative states lasting anywhere from a

minute to hours. Groesbeck said that descriptions of Defendant during this period had him appearing with a glaze in his eyes, not being present, withdrawing and being distant from what is going on in his everyday life. (Groesbeck, 19 RT 4489:22-4490:25)

The final diagnosis given by Groesbeck was an Axis One disorder, "psychotic disorder, not elsewhere specified, which is a schizophreniform disorder." This was indicated primarily by Defendant's delusional symptom. Groesbeck believed the build-up for his delusional symptom had many sources -- the PTSD, the dissociative disorder, and the organic brain syndrome, as well as his borderline personality disorder and his dependent personality traits. (Groesbeck, 19 RT 4490:10-4491:5)

Groesbeck was asked to discuss the contents of Exhibits 16a, 62a, and 61a, the intact note to his family and the reconstructed note that had been torn up. Groesbeck characterized the intact note, Exhibit 16a, as fitting very well into his picture of Defendant in that time period before the incident – showing a man in "desperate straights [sic]." He noted Defendant's statement that his "sanity" had slipped and "evil has taken its place." Groesbeck felt the statement showed Defendant was desperately trying to hold on to reality but being overwhelmed by his internal struggles. Groesbeck also saw Exhibits 61a and 62a, the torn pieces and reconstructed note, as good evidence for his diagnoses that Defendant was in a psychotic delusional state assuming the notes were written at that time. Defendant's statements about being fascinated with death, weapons and killing, and hating humanity, showed the disorganized thinking Groesbeck had been discussing. (Groesbeck, 19 RT 4491:24-4493:18)

Groesbeck testified that Defendant had a "spotty" recollection of what had occurred at Lindhurst High School on May 1, 1992, remembering some events but not others. Groesbeck believed that after the incident Defendant had read and heard so much about the incident from other sources that it was difficult to ascertain what Defendant remembered himself and what he had learned later. (Groesbeck, 19 RT 4498:21-4499:7)

On cross-examination Groesbeck described the materials that he had reviewed to form his opinions. He did not have a transcript or tape recordings of the hostage negotiations with Defendant. He relied on results of some tests administered to Defendant in school ; he did not evaluate the tests but instead relied on Dr. Rubinstein's evaluation of the tests although she had not administered them herself. As for the tests administered by Rubinstein, Groesbeck did not know how to score them but relied on Rubinstein for the scoring. He did not have Rubinstein's interpretation of the test results verified by anyone else. (Groesbeck, 19 RT 4509:5-4518:8)

Groesbeck personally interviewed only Defendant. He also relied on summaries of interviews with students and other witnesses to the event. He understood there were actual interviews but he did not review them. He had not been given and did not review the videotaped interview with Defendant. He believed that it would have been better "for completion in perfection" for him to have reviewed that videotape. (Groesbeck, 19 RT 4518:9-4521:5)

Groesbeck was asked to describe what Defendant had told him about the events in the morning before the incident. Groesbeck said that Defendant had told him he had drunk six to eight cups of coffee

and some NoDoz, a caffeine pill, in the morning of the May 1, 1992. This made him shaky. Groesbeck stated that caffeine can make someone "hyper" and, if they are in an agitated stated, the caffeine can contribute to that. Although he hadn't researched the effects of caffeine, Groesbeck believed its effects would last several hours. (Groesbeck, 19 RT 4528:15-4530:15)

Groesbeck was questioned on the records concerning Defendant's treatment for spinal meningitis when he was two months old. He acknowledged that the treating physician did not note any residual effects from the disease. Groesbeck stated he referred to it because such a disease would be traumatic both physically and mentally. He has no evidence that there was any lasting physical effect, but it was an example of early childhood trauma. At the age of two months it would be difficult to document the psychological effects of such an experience. Groesbeck also acknowledged that his earlier testimony that a social worker had been called when Defendant was taken to the hospital for the spinal meningitis was incorrect, and that the incident where the social worker was called was for Defendant's hospitalization in 1988. (Groesbeck, 19 RT 4543:17-4545:21)

Groesbeck reiterated that his statements about Defendant being abused as a child were speculation based upon the information he had as to family background. He did not have a lot of hard data to support the child abuse. Apart from the notation as to the social worker, which occurred later, Groesbeck had relied for his speculation as to abuse on the photograph of Defendant as a young boy wearing a dress. Groesbeck had not actually seen the photograph, but it had

been reported to him by Dr. Rubinstein as coming from a family album. Groesbeck did not know the circumstances under which the photograph was taken. Defendant had never mentioned the photograph in his meetings with Groesbeck. Groesbeck obtained the information on Defendant's asthma from Defendant. He thought it was referenced in a medical record, but could not find that reference. He was confident that the asthma report was accurate. Groesbeck had indicated that Defendant had made two suicide attempts, one in March 1988 and one in May of 1993 in the Napa County Jail. He did not know if the 1993 attempt had been reported to the Jail authorities. (Groesbeck, 19 RT 4545:22-4549:6)

Defendant's problem with his sexual identity was tied for Groesbeck to his being molested by Robert Brens. Groesbeck learned of the molestation from Defendant, but it was corroborated by statements from Ricardo Borom, and from those statements it appeared to Groesbeck that the molestation was more extensive than Defendant reported, and that there may have been more than two incidents. It further appeared to Groesbeck that Defendant may have felt compelled to go along with the molestations in order to get a passing grade to graduate from high school. This put Defendant in a lot of turmoil, and he was drawn into a compulsive relationship with his friend David Rewerts. Groesbeck had not interviewed Mr. Borom but had read a summary of an interview that someone else had with Mr. Borom. Borom had reported statements made to him by Defendant. (Groesbeck, 19 RT 4549:11-4552:1)

Groesbeck described the incidents of molestation that Defendant had spoken about to him in the interviews. The first

incident was in the first three months of the school year in 1989. Defendant had gone to Brens' classroom to talk to him, and in the middle of the discussion Brens began to fondle Defendant, putting his finger between Defendant's crotch. Defendant was shocked but said nothing. From that time onward Defendant pulled away from females including a cheerleader with whom he had been romantically interested. (Groesbeck, 19 RT 4552:2-18)

The second incident occurred two or three months later in which Defendant again had gone to Brens' classroom during lunchtime. Defendant had not wanted to be alone with Brens, but it turned out he was. Defendant was wearing elastic gym pants, and Brens put his hand inside the pants, fondling Defendant's penis, twisting it, and causing a tear on the penis leaving a scar. (Groesbeck, 19 RT 4552:19-4553:2)

Groesbeck said the fact that Dr. Thompson's report stated that Defendant had related the incidents took place in March and April of 1988 did not raise a question as to Defendant's credibility. Dates of a year are one of the most common mistakes made by individuals, and the discrepancy was not critical in Groesbeck's opinion. He did not attempt to follow up and check out the information. Groesbeck acknowledged that Defendant hated Brens, and that when such emotions were present people were capable of making up allegations that weren't true and often had trouble keeping their facts straight. (Groesbeck, 19 RT 4553:18-4556:6)

Asked if there was anything to corroborate Defendant's statements as to the alleged abuse, Groesbeck responded that in interviewing subjects he looks for factual and emotional themes that

show an overall picture. How Defendant was affected by events in his life and the evolution of his behavior corroborated for Groesbeck the recitations of the incidents of molestation. The evolution of behavior started in 1988 with Defendant's suicide attempt, before the first incident of molestation as told to Groesbeck. Also the observations of Ricardo Borom as to Defendant's state when Defendant told him of the molestations were corroborative. These included that Defendant told Borom of the molestations after Borom told Defendant of his own experimentation with homosexuality. Borom observed that Defendant appeared depressed and was drinking heavily, and that Defendant's discomfort was due to Defendant's possibly being a homosexual. Borom did not state when these events took place. A second conversation took place at a barbecue at Borom's house. Defendant stated that after Brens' had fondled his penis, Defendant had willingly participated when Brens orally copulated Defendant. Defendant had stated he would do anything to graduate high school. Defendant did not relate this third incident to Groesbeck, and that made the information from Borom even more important, because it showed Defendant's need to deny the enormity of his sexual involvement with Brens and its impact on his psychological life. This was at the core of the massive disturbance that built up in Defendant and led him to develop his delusional system. (Groesbeck, 19 RT 4557:11-4561:15)

Groesbeck felt that the movie "The Stalking of Laurie Black" had had a major effect on Defendant's overall mental state. Groesbeck had not seen the movie – his information came from Dr. Rubinstein's therapy with Defendant. The movie that Groesbeck had watched had been "Terminator II." The conclusion that Defendant had

identified with the stalking victim in "The Stalking of Laurie Black" came from Dr. Rubinstein. (Groesbeck, 19 RT 4567:7-4568:25)

Groesbeck stated that he felt there was a twofold explanation as to why Defendant went to the high school on May 1, 1992. First was to rectify the wrongs that Brens had done to him, and second was the save the young people who were being flunked out by Mr. Brens and the administration – to perform a savior mission as it were. Groesbeck acknowledged he also felt Defendant went to the high school to advertise the molestation by Brens. Groesbeck was not surprised that in all of the witness interviews conducted by the police there was no mention of the Brens molestations. The molestation was Defendant's deepest darkest secret. Defendant may have been unable to tell the extent of his sexual involvement with Brens. In addition, Defendant's passivity as a man meant that even though he reasoned he was going to the high school to stand up to Brens and advertise the molestation, he was unable to admit it due to the shame and embarrassment. Groesbeck indicated that these conclusions were hypothetical and a further interview with Defendant would be needed to evaluate them. Groesbeck was not surprised that the only thing Defendant talked about concerning Brens during the incident was that Brens had flunked him. Defendant had told Groesbeck that he had been hesitant to make up the course because he didn't want to go back to Brens' class because of his fears of molestation. (Groesbeck, 19 RT 4568:26-4573:27)

Groesbeck did not interview or check with any family, friends, or associates of Defendant in forming his opinion. Groesbeck acknowledged that it was possible that Defendant was fabricating the

allegations about Robert Brens but he doubted that was the case. (Groesbeck, 19 RT 4574:7-26)

The defense also called Dr. Helaine Rubinstein, a clinical psychologist. In practice since 1976, she divided her time one-half to psychotherapy and one-half to medical-legal evaluations. She had testified previously in one capital case and in numerous hearings including about a dozen hearings involving juvenile offenders. In the year prior to testifying she had had only one other person that she evaluated for a criminal matter. In the past six years about five percent of her patients and twenty percent of her time had been for evaluations relating to criminal proceedings. Rubinstein was permitted to testify as an expert witness. (Rubinstein, 20 RT 4647:2-4649:3, 4651:4-15, 4653:16-4654:3 , 4656:13-16)

At the time of her testimony, Rubinstein practiced in San Francisco as an associate of Dr. Groesbeck, performing psychological testing for Groesbeck and his associates. She specialized in the diagnosis and treatment of mental disorders of youth. She also had a specialty in neuropsychology. (Rubinstein, 20 RT 4656:23-4658:9)

Rubinstein was retained by the Yuba County Public Defender's Office "to provide a psychological evaluation of [Defendant], to produce an opinion relative to [Defendant's] mental state, and to provide any psychological services that were deemed necessary." She first met Defendant at the Yuba County Jail on June 4, 1992. From her observations on that day she concluded that as of June 4, 1992 Defendant was "gravely disabled." Defendant was able to say his name, age, and that he was in the Yuba County Jail, but did not know the calendar date, day of week, time of day, or the names of the

President, Vice President, Governor, or any other personal or current information. Rubinstein testified that Defendant was significantly disoriented. Defendant was depressed and somewhat labile so that there were several incidents where he started to cry, with rapid onset. His affect was also at times inappropriate, such as smiling even as he cried as if she could not see his tears. His thought processes were tangential -- in his verbal communication he was cascading, roller-coastering from one subject to another to another to another, with no connective tissue and no apparent awareness that the listener couldn't follow. Rubinstein intervened to see if she could cause him to be aware of this process and if he had the capacity to alter it by telling Defendant she couldn't follow him. Defendant apologized and said "Part of my brain is missing and I can't find it." When she asked him which part of his brain was missing he replied "the part that knows things and comprehends and remembers." (Rubinstein, 20 RT 4658:19-4662:13)

At some time after June 4, 1992 defense counsel provided her with the booking tape (i.e., Exhibits 57a and 57b, the videotaped interrogation of Defendant), taped interviews with Edith Houston and Ronald Caddell, Defendant's mother and brother, a videotaped interview with David Rewerts, the hostage negotiation tapes, medical reports from 1971 and 1973, elementary school records, some police reports and some miscellaneous items including some notes that Defendant had written. Rubinstein reviewed these materials, including viewing the interrogation tape and listening to the six hours of hostage tapes. (Rubinstein, 20 RT 4660:5-4661:6)

On June 4th Rubinstein attempted to evaluate Defendant's

thought content. She found some of his thought to be rational and cogent – he knew his mother's name and where she lived and his brother and sister. Some of his thought content was delusional: that he had been born in Arizona and adopted at birth, that his adoptive parents, Bud and Edith Houston, had withheld from him who his biological parents were, but the information was contained in secret documents in a secret box that he had never seen but believed was hidden in his brother's room and that maybe a policeman could help Rubinstein locate them. (Rubinstein, 20 RT 4662:24-4663:16)

Rubinstein stated that on June 4, 1992 Defendant reported that he was experiencing auditory hallucinations of a male voice that was not particularly threatening or menacing but was running a commentary on their interaction: "The Doctor's here, Eric. Stand up. Smile. Shake hands. Sit down. Put your hands at your sides." The voice was telling him, guiding him as to what was occurring, the processes of the examination. He also described visions of faces of figures coming into his cell, into the room, or around the corner. Rubinstein interpreted these as visual hallucinations. (Rubinstein, 20 RT 4663:17-4664:5)

Rubinstein said that twice during the interview on June 4, 1992 she observed Defendant dissociate. Rubinstein described dissociation as a spontaneous temporary alteration in consciousness in which an individual is there in body but is not present in mind. The first time when she called Defendant back from his dissociative state by asking "Where are you Eric?" he told her: "A witch is burning me. My hands are tied. The fire is under me. The town's people are laughing at me, putting firewood under me." The second time when he

dissociated and she called him back Defendant said: "I am in the kitchen with my mother. She says, 'You are the Devil's child. I wish you had never been born.'" Rubinstein concluded from this first interview that Defendant was severely regressed and obviously psychotic. Because his symptoms were cross-diagnostic, i.e., could be caused by more than one condition, she considered it important to conduct further interviews. (Rubinstein, 20 RT 4664:6-4665:21)

Starting with her second or third visit to Defendant at the county jail Rubinstein began administering a series of psychological tests to Defendant. The testing was completed on June 24, 1992. The tests she administered included: the Wechsler Adult Intelligence Scale, Revised ("WAIS-R"), Wechsler Memory Scale, Form Two, the Bender Visual Motor Gestalt Test, the Hooper Visual Organization Test, the Trail Making Test, the Thematic Apperception Test ("TAT"), and the Minnesota Multiphasic Personality Inventory ("MMPI"). She also performed statistical computations on the WAIS-R results known as the Deterioration Index and the Topeka Lateralization Index to determine first, if Defendant's IQ had changed in the past five years and second to attempt to find the region of significance for lateralized brain damage. In her first interview Rubinstein spent 3 hours with Defendant and another 12 hours through June 24, 1992. In all she spent about 50 hours in direct services to Defendant – time actually spent with Defendant and another 25 hours reviewing documents, watching videos, etc. (Rubinstein, 20 RT 4665:22-4678:20)

Rubinstein concluded that that Defendant was manifesting pathology that belonged to more than one category or syndrome. Her

first diagnosis was Specific Developmental Disorder, Not Otherwise Specified, Chronic, a diagnosis coded as 315.90 in the Diagnostic and Statistical Manual of Mental Disorders. Rubinstein described this diagnosis as organic brain syndrome lateralized in the left hemisphere, manifesting primarily in auditory processing deficits. This left Defendant with an impairment in the ability to process complex auditory information like verbal directions, mental reasoning, and arithmetic reasoning. In lay terms, Rubinstein concluded that Defendant was brain damaged with a lesion in the left hemisphere of the brain that impaired his ability to understand information that was presented orally as opposed to being in writing or visual. He would have difficulty following verbal directions, listening to lectures, or processing what he heard. As he grew older and progressed in school the expectations for performance in this area would have grown and Defendant would have fallen further and further behind. (Rubinstein, 20 RT 4678:21-4680:25)

Rubinstein testified that while psychologists seldom are able to determine how such a disorder was acquired, there are a limited number of ways that such a condition develops: sometimes it is congenital, the child being born that way, learning disabilities tend to run in families. It can be caused by deprivation of oxygen in the birth canal or by early childhood illness such as spinal meningitis. It also can be caused by accidental or deliberately inflicted blows to the child's head. Asked whether she suspected child abuse in Defendant's case, Rubinstein stated:

> I had no reason, based on my testings specifically. Based on my interviewing and

> based on my ultimate understanding of the world of Eric's mind, his personality and psychopathology, I do in fact suspect child abuse.

Rubinstein said she found that Defendant had a "masochistic" component to his character, that he was self-punitive, and that she attributed that to being "on the losing end of a sadomasochistic relationship with another party." Rubinstein expressed concern regarding Defendant's relationship with his father, although the father had little interaction with Defendant. She also felt "sure" that there was a sadomasochistic dynamic between Defendant and his mother that would constitute "psychological abuse." Rubinstein said she had no actual evidence of any physical abuse. (Rubinstein, 20 RT 4681:7-4683:11)

Rubinstein's second diagnosis was of Attention Deficit Hyperactivity Disorder, Residual Phase, 314.01 in the DSM-3-R. The disorder is marked by an inability to sit still or concentrate. Rubinstein believed Defendant had that disorder and still had its residuals. She noted that Defendant's school records showed him classified as learning handicapped at the end of the third grade, with first grade level basic skills. His Individual Education Plan classified Defendant as learning handicapped and placed in special education in the third grade. He was in special education through the ninth grade. (Rubinstein, 20 RT 4683:12-4686:9, 4692:15-20)

Rubinstein's third diagnosis was of Post Traumatic Stress Disorder (DSM 309.89). Based on her discussions with Defendant, she believed the condition pre-existed the events of May 1, 1992 because Defendant described symptoms starting at age 16, when he

started to develop dissociative phenomena, obsessive and intrusive thoughts, started to have nightmares, and developed a strange, idiosyncratic way of coping with bad thoughts that were in his mind. The date of onset was corroborated by her learning that Defendant had suffered the severe trauma of homosexual molestation at that time by Robert Brens. When Rubinstein was interviewing Defendant after the incident, he reported between June 20 and June 24, 1992 five dreams regarding his being molested by Robert Brens in which Defendant was saying "You are mentally killing me. You are destroying the inside of my mind." Defendant also had flashbacks of the molestation by Brens as well as flashbacks of his arrival at the parking lot of the school on May 1, 1992. (Rubinstein, 20 RT 4687:8-4689:26)

Rubinstein testified that Post Traumatic Stress Disorder impairs the sufferer's concentration, attention, memory and ability to incorporate new learning. She was sure that it had affected Defendant's memory of the events of May 1, 1992, but was not certain in what specific way. Rubinstein had reviewed the videotape of Defendant's interview with Yuba County Sheriff's Officers. She believed Defendant's statements that he could not remember portions of what had happened on May 1, 1992 were consistent with her diagnosis of PTSD. In her interviews Defendant's reliving of the events of May 1, 1992 was limited to flashbacks of his arriving at the parking lot of the school, memories of seeing Miss Morgan, and his belief in seeing an Asian man in the parking lot – an event that Rubinstein did not know if it was true or a hallucination. Defendant also remembered in a general framework the hostage situation upstairs. Rubinstein stated that Defendant had no memory of shooting

anyone on May 1, 1992 and although she raised it with him 20 to 25 times, Defendant still did not have any such recollections. (Rubinstein, 20 RT 4693:13-4696:11)

Recalled for a second day of testimony, Dr. Rubinstein reiterated her observation that Defendant had manifested both directly and indirectly that he had no recollection of shooting anyone on May 1, 1992 although she has asked him about it approximately 25 times. Rubinstein found the statements of Defendant on the videotape interview with the investigating officers corroborated her observations. As she recalled the content of the tape, Defendant had "consistently and persistently denied any knowledge or memory of shooting anyone." In Rubinstein's view this absence of memory was not amnesia, where the events were imprinted in memory but then repressed, but rather represented a failure of the events ever to be imprinted in Defendant's memory in the first instance. Rubinstein had sought to determine if the absence of memory was the result of an intentional or unconscious repression of the events of May 1st by giving Defendant images from the Thematic Apperception Test (TAT) that were designed to trigger such memories – a picture of a gun, a picture of an operating room table with people standing over the table with another young man in the foreground separate from that interaction. Defendant's free association responses to these images indicated to Rubinstein that Defendant had no repressed memory of the incidents of May 1, 1992. Through cross-correlation between the TAT, the MMPI and the Bender Visual Motor Gestalt test Rubinstein ruled out that Defendant was consciously lying. (Rubinstein, 20 RT 4714:17-4721:25)

The third diagnosis that Rubinstein formulated was of schizophreniform disorder, DSM II 95.40 provisional. This is an acute psychotic reaction that is confined to a maximum of six months duration. It typically contains a prodromal or onset phase, an acute or volcanic phase, and then a resolution phase in which the person gradually moves toward recovery. It strikes people in the ages of 15 to 25, and, compared to psychotic illnesses of longer duration, it is more intense and encapsulated. (Rubinstein, 20 RT 4726:10-4728:9)

The subform of the schizophreniform diagnosis according to Rubinstein was "paranoid." Rubinstein tracked the genesis of the paranoia to age sixteen, when Defendant experienced homosexual molestation and resulting deterioration of his ego. This led to feelings of helplessness and powerlessness, fears of being overwhelmed by more powerful people and circumstances, and combined with confusion over his gender identity. These feelings built up and combined with later experiences to produce the paranoid core. (Rubinstein, 20 RT 4728:10-4730:16)

Rubinstein described speaking with Defendant at the jail in early July 1992, when Defendant asked her repeatedly: "Did I go crazy?" When Rubinstein asked Defendant to answer the question for himself, Defendant stated "Doctor, I know I lost my mind" and then broke down and cried for his "lost mind." In his grief, he started to discuss how, since he had lost his mind and would be seen as "the loony boy who went berserk in the school yard," "No one will ever know that I could have saved the children." Rubinstein stated that this was her first introduction to Defendant's "Savior Complex," a product of his paranoia in which he operated under the delusion that he had

special powers that he had dedicated to saving a piece of his world. (Rubinstein, 20 RT 4730:17-4732:20)

Rubinstein then testified to what Defendant had told her as to what he was going to "save the children" from and how he was going to do it: Defendant believed he had to "save the children" and "right the wrongs" that existed in the school system due to being treated with indifference and having their behavior misinterpreted by adults – that shy, frightened, and/or learning disabled children were regarded as aloof or unresponsive and not given adequate help. They are held accountable for circumstances beyond their control. To "save the children" Defendant had intended to go to Lindhurst High School, take Robert Brens hostage, handcuff him to a doorknob, and demand that reporters be brought in so that Defendant could explain the failings of the school system to the children, as he saw it. He had chosen Brens to take hostage because it had been the circumstances and conditions that prevailed between Mr. Houston and Mr. Brens that had resulted in Defendant's own failure, and that when Defendant had gone to seek assistance from Brens, Brens had responded with indifference. Asked whether Defendant indicated that he went to the school to kill Brens or anyone else, Rubinstein stated Defendant had told her he intended only to kill himself, once he had explained to the reporters how Brens had sexually molested him. Defendant believed he had no right to withhold information about his molestation by Brens because other children could be exposed to Brens' sexual predation, but that once Defendant had revealed his own molestation, he could no longer live. (Rubinstein, 20 RT 4732:21-4736:13)

Rubinstein stated that Defendant was suffering from the

disorders she had described on May 1, 1992. She put the onset of the prodromal phase of the schizophreniform disorder as April 1, 1992, and that it entered the acute phase about April 15, 1992, primarily because Defendant had associated the onset of certain symptoms with tax day. This progression was typical for persons suffering from Defendant's type of condition. (Rubinstein, 20 RT 4737:4-4738:14)

Rubinstein was asked about Defendant's early interest in weaponry and military subjects. She stated she believed that Defendant's interest stemmed from when he was five or six and played with children from military families that were stationed at a local airbase. She opined that Defendant was attracted to these families because they were intact, well-functioning families with a father present and interested in the family. Rubinstein testified that Defendant's developing interest in guns and military was a maladaptive effort to cope with castration anxiety and his feelings of helplessness, powerlessness and weakness. The guns and military information symbolized power and might and strength and protection against being overwhelmed by those who would harm him. She defined the term "castration anxiety" as the fear of losing male identity giving rise to feelings of helplessness and inadequacy. Defendant's castration anxiety was suggested to Rubinstein by the photograph she found in a photo album provided by Edith Houston, Defendant's mother, showing Defendant at a young age wearing a dress with the inscription on the back (referring to Defendant by his middle name): "See, daddy, Chris was a good girl. You never believe he's a boy." (Rubinstein, 20 RT 4738:15-4743:17)

Rubinstein testified that she had reviewed the note Defendant

left for his family (Exhibit 16a), the reconstructed notes that he had discarded (Exhibits 61a, 61b and 62), the list of materials (Exhibit 31), and the "Mission Profile" (Exhibit 64). Asked whether Defendant had planned the events of May 1, 1992, Rubinstein opined that he did not. (Rubinstein, 20 RT 4747:9-4752:17, 4767:20-4768:5)

Rubinstein also testified that from her review of materials she had learned that Defendant had viewed the movie "The Terminator" some 23 times, including on the night prior to May 1, 1992. She had viewed the movie and read the description on the jacket of the video. She believed the movie was pertinent to the paranoid form of schizophreniform disorder that Defendant suffered from in that it must have served to validate his already distorted view of the world. The movie related to Defendant's "savior complex" since it presents a "larger than life character, the powerful superhero with magical powers to change the future by changing the past." (Rubinstein, 20 RT 4768:7-4769:18)

On cross-examination, Rubinstein acknowledged that Defendant's responses to the pictures in the Thematic Apperception Test were not bizarre. She acknowledged that in the interviews of Edith Houston and Ronald Caddell they never said anything to indicate that Defendant had been molested or that he had spoken about Robert Brens. She acknowledged that David Rewerts said he did not know about Defendant being molested and testified that she was not sure whether David Rewerts said anything in his interview about Defendant complaining about Robert Brens. (Rubinstein, 20 RT 4779:21-26, 4790:24-4791:26)

Rubinstein testified that Defendant had told her he was

molested by Robert Brens on two occasions, and that he dated the first to March and the second to April of his eleventh grade year. In the first incident Defendant said he went to Brens' office to discuss a homework assignment. Defendant described Brens as standing in front of the desk and Defendant showed Rubinstein how Brens had fondled his genitals. On the second occasion he went to see Brens about a writing assignment that Defendant could not complete on his own. He went at lunch time believing that other people would be around. He went to the office and Brens put his hand down inside Defendant's pants, grabbed his penis, and twisted it with sufficient force to lacerate it. After two or three minutes Brens removed his hand and Defendant walked out of the office. Defendant denied having an erection on either occasion. After the second occasion Defendant stated that he had bruises on his penis and experienced pain on urination. Rubinstein stated that from her experience with molested children, Defendant's description of Brens' conduct was not atypical of molesters. (Rubinstein, 20 RT 4791:27-4794:19)

Questioned as to how much her diagnoses were dependent upon Defendant's reports of the molestation by Brens, Rubinstein stated that the molests had no bearing on the diagnoses of organic brain syndrome or hyperactivity disorder but were a factor in the diagnosis of PTSD and to a lesser degree in the diagnosis of schizophreniform disorder. However, she stated that if the molests had not occurred her diagnoses would not change because the psychiatric syndromes were apparent from her observations. The PTSD occurred at age 16, and if it were not prompted by the molests then it was prompted by something else that had not been revealed. (Rubinstein, 20 RT

4818:10-26)

2. Lay Testimony of Defendant's State of Mind

The defense called Ricardo Borom who testified under an instruction to the jury that his testimony was being admitted for the limited purpose of showing statements Defendant had made, but not for the truth of the matters contained in those statements. Borom testified that he had met Defendant when Defendant had worked at a McDonalds in Sacramento in the early part of 1989. They had worked together at the McDonalds for about five months and had developed a friendship that included socializing outside of work. The friendship had continued until the incident on May 1, 1992. Borom had met Defendant's mother and brother and had been to their home when they were in Sacramento but not when they moved back to the Marysville area. (Borom, 20 RT 4614:27-4618:7)

When Borom learned about the incident on May 1, 1992 Borom called Sacramento television channel 13, his favorite channel, to tell them he had some information about Defendant. They sent a reporter, Mark Saxenmeyer, to interview Borom at his home. Borom had called Channel 13 because in October 1989, in a conversation with Defendant at Borom's house, Defendant had told Borom of being molested by a teacher at his high school. Defendant had told Borom that Defendant was having problems with one of his grades in school and in order to graduate he had to do a sexual favor for the teacher. Defendant told Borom that Defendant had pulled out his penis and the teacher had fondled it and then orally copulated him. Defendant told Borom this had occurred in the gymnasium. Borom remembered

being told the teacher's first name was Robert, and thought the last name might be "Bent," but was "vague" on the actual last name. (Borom, 20 RT 4618:15-4621:15)

Borom and Defendant discussed the molestation on other occasions after October 1989. They discussed it again in November 1989. Borom described Defendant at the time of that second discussion as depressed and reclusive. They discussed it again within two to three weeks prior to the May 1, 1992 incident, when they met by chance at Bojangles, a "teen gay bar" in Folsom. In the conversation at the bar Defendant blamed the teacher for his feelings of homosexuality and for the frustration and depression that Defendant was having in his life at that particular time because of not being able to graduate from high school. That was the last time Borom saw Defendant before the incident. (Borom, 20 RT 4622:26-4624:27)

3. Prosecution's Rebuttal Evidence to Defense Witnesses

In rebuttal, the prosecution recalled David Rewerts. Rewerts was asked to describe the nature and extent of his relationship with Defendant, and testified that they were "best friends" and that on July 4, 1991 they had sexual contact. Rewerts said that from when they met until May 1, 1992 Defendant had never mentioned any sexual interaction with Robert Brens. Over objection, Rewerts testified that in his opinion Defendant would have told him about such a sexual encounter. On cross-examination Rewerts admitted that he and Defendant had had a falling out in part because Rewerts believed he had an exclusive homosexual relationship with Defendant. Rewerts

stated, however, that Defendant did not have "any other homosexual experiences that I know as a fact." (Rewerts, 21 RT 4915:26-4924:22)

The prosecution also called Richard Loveall in rebuttal. Loveall was assistant superintendent for educational services at Marysville Joint Unified School District. Loveall produced a document from the personnel file of Robert Brens showing that Brens was initially employed by Marysville Joint Unified School District in November 1988. (Exhibit 90) From his examination of the records Loveall testified that Brens was not employed by the school district prior to November 1988. Loveall also produced a record showing Defendant's grades for the 1988-89 year. It indicated that Defendant had taken two courses from Robert Brens during that academic year, the first being civics which he passed and the second, in the spring, being economics, which he failed. Loveall produced a record showing Defendant's grades for the 1989 summer term. (Exhibit 91) It showed that Defendant had taken two classes in summer school the following summer, one of which being economics, which he failed again. The teacher for the summer school economics course was Tony Gau. (Loveall, 21 RT 4926:22-4932:20)

G. Sanity Phase Evidence

1. Defendant's Mental Health Expert

The jury returned verdicts of guilty on all counts. Following the guilty verdicts, the evidence on Defendant's plea of not guilty by reason of insanity was presented.

In support of his plea Defendant recalled C. Jess Groesbeck, M.D. Groesbeck testified that subsequent to his prior testimony he had reviewed additional documents as well as his previous notes and materials, and had interviewed Defendant twice for about 3.7 hours in the past two days. Among the new materials that he had reviewed was the report from Dr. Paul Wuehler who had seen and tested Defendant a few days after the incident. Groesbeck said the raw results from the TAT test performed by Dr. Wuehler and the reports of dreams from Dr. Rubinstein, both of which he had not previously reviewed, he found especially helpful. He also reviewed the taped interview by Sgt. Downs with Defendant (Exhibits 57a and 57b) . (Groesbeck, 22 RT 5324:23-5326:21)

Groesbeck testified that the content of the dreams reported by Rubinstein reinforced his belief that Defendant's PTSD reflected not only the traumatic experience of the events of May 1, 1992, but the earlier sexual molestation by Robert Brens. Groesbeck felt strongly that Defendant experienced post-traumatic stress disorder over the sexual molestation and that this was reactivated when Defendant went through the May 1, 1992 shootings. The link between the dreams and his diagnosis was strong evidence to Groesbeck that Defendant had, in fact, experienced the molestations as he had described. (Groesbeck, 22 RT 5326:27-5329:13)

Groesbeck found the testing results from Dr. Wuehler very significant because the testing had been performed on May 7 and May 9, 1992, shortly after the incident. The testing showed that Defendant's ability to abstract was compromised and he demonstrated thought disorganization such as one sees in the schizophrenic and

psychotic reaction. He was consciously outside himself, depersonalized, and having hallucinations in the form of voices in his head telling him to do unrealistic things. Defendant was involved in a delusional system trying to manage his relationship with Brens. (Groesbeck, 22 RT 5333:13-5337:3)

Groesbeck explained the two prongs of the M'Naughten test for legal insanity. Initially, he testified that the prongs were conjunctive but then was corrected by the trial judge that the prongs were disjunctive. With respect to the first prong, Groesbeck testified that he found Defendant did know the nature and quality of his acts on May 1, 1992 although he was dissociated from those acts at least in the first part of the incident until he went upstairs. (Groesbeck, 22 RT 5337:4-5341:20)

With respect to the second prong, Groesbeck opined that Defendant did not meet its definition of sanity because "he was suffering from a psychotic delusion that led him to believe that what was right was right in terms of that psychotic delusion rather than what's based on a rational view of reality of what was going on in the real world." Groesbeck believed that Defendant developed a psychotic solution to his concerns, i.e., a solution that normal rational people would not choose. Groesbeck went back through the development of Defendant's psychotic state, stemming from the shock of the sexual molestations by Robert Brens and his failure at school, his homosexual experimentation with David Rewerts, his finding a "family" of sorts when he worked at Hewlett Packard and then losing that "family," due to his failure to have a high school diploma. Unemployed and living at home, he also was confronted with the

potential for his brother and mother leaving him. These stressors caused him to become suicidal and to focus on Brens as the cause of all of his problems. The suicide notes Defendant wrote as well as the entire plan he developed evolved out of Defendant's psychotic delusional situation. (Groesbeck, 22 RT 5341:21-5355:15)

Although Groesbeck relied heavily on the impact of the sexual molestations by Brens to explain the development of Defendant's psychotic solution, Groesbeck stated that his opinion that Defendant did not meet the second prong of the M'Naughton test for sanity would not change if the molestations had never happened. Because Robert Brens had flunked him and thereby interfered with his life, Defendant may have imbued Brens with powers of sexual persecution that themselves were delusory. (Groesbeck, 22 RT 5349:4-5351:11)

Groesbeck stated that Defendant reported hearing voices on May 1, 1992. The voices were of Brens saying "You're a failure. You flunked." Groesbeck believed these were "hallucinations that were fomenting and agitating the psychotic and deluded state." Defendant intended to commit suicide in order to martyr himself for the sake of the students who could be saved from flunking by his actions. During the incident Defendant was unaware of smells or bodies, indicating that he had detached from his sensory experiences. (Groesbeck, 22 RT 5361:26-5363:22)

Groesbeck opined that Defendant's statement at the end of the negotiation tapes, "I hope I did what was right" was a "tragic statement of the product of his delusional system," that Defendant thought his delusional belief that he was drawing attention to the wrongs at the school had been morally right. (Groesbeck, 22 RT

5367:15-27)

2. Mental Health Experts Called by the Prosecution

The prosecution called both of the psychiatrists appointed by the court in response to the entry of the plea under Penal Code Section 1027.

The prosecution first called Captane Thomson, M.D., a psychiatrist with board certification in forensic psychiatry as well as general psychiatry. Dr. Thomson interviewed Defendant for 3.25 hours on December 12, 1992. Thomson's opinion was that Defendant understood the nature and quality of his actions and understood that his actions were legally and morally wrong. (Thomson, 22 RT 5410:6-5413:16)

Thomson based his conclusions on what he testified Defendant had told him – that Defendant had described himself as being in a desperate condition, one of extreme emotional turmoil and having resentment of the school at having flunked while others, including school jocks, had been put on pedestals; that he had not been given remedial help, especially by Robert Brens; that he could not continue working at Hewlett Packard because of the lack of a diploma; that he was resentful about the occasions when he was sexually fondled by Robert Brens; and that he felt the need to bring attention to all of this. Thomson also noted the degree of planning that went into the incident as related by Defendant, as well as Defendant's description of the incident. Thomson did not think Groesbeck's diagnosis of a schizophreniform disorder was correct, stating that he found Defendant not to have a flat or inappropriate affect nor disorganized

thought process when he interviewed Defendant. (Thomson, 22 RT 5413:18-5421:2)

Thomson felt Defendant suffered more from a mood disorder, specifically, a psychotic depression. Thomson believed, however, that even if Groesbeck's diagnoses were correct, Defendant did not meet the "very conservative" criteria of the M'Naughton test for insanity, and that the presence of a psychosis did not, by itself, satisfy the criteria for insanity under M'Naughton. (Thomson, 22 RT 5419:15-5422:1)

Thomson described the "goodbye note," (Exhibit 16A), as "very neatly prepared coherent correctly spelled note," which confirmed Thomson's impression that Defendant "was in fair control of his faculties." Thomson also noted that Defendant wrote "it seems my sanity has slipped away and evil has taken its place." Thomson felt this demonstrated that Defendant understood that what he was planning to do was wrong. The note also indicated that Defendant expected to die that day. (Thomson, 22 RT 5425:8-5426:11)

Shown exhibits 61A, 61B, and 62A (the reconstructed notes), Thomson indicated the notes showed Defendant was engaged in planning, expressed his hatred of humanity, and in 62A he expressed the wish that "God forgive me," suggesting that he understood what he was going to do would require forgiveness and hence was legally and morally wrong. (Thomson, 22 RT 5426:15-5428:21)

On cross-examination counsel read various portions of the report from the second appointed psychiatrist, Dr. Schaffer. Thomson said he did not reach a clinical diagnosis for Defendant but said he agreed with a statement read from Schaffer' report that:

> [Defendant] is experiencing the clinical symptoms of a delusional, quote, paranoid disorder, and that this disorder is probably set within a broad context of other problematic characteristics and personality pathology.

Thomson also agreed with the statement in Schaffer's report that:

> [F]or this irritable and conflicted man to exhibit a systemic pattern is atypical but signs indicate that he is undergoing an acute major depression that is probably characterized by agitation and erratic qualities.

and that Defendant is:

> unable to control deep and powerful sources of threat. This characteristically angry and irritable man is now experiencing the clinical signs of an anxiety disorder.
>
> (Thomson, 22 RT 5440:4-5445:17)

On further questioning Thomson stated he believed the statements that counsel had quoted from Schaffer's report were not diagnoses by Dr. Schaffer but Schaffer's recitation of reports regarding the psychological tests Schaffer had asked Defendant to take. Thomson said that while the results from the MMPI and other psychological tests may suggest that Defendant had a schizophrenic disorder, Defendant did not so appear in direct clinical observation. (Thomson, 22 RT 5443:6-5445:17)

Thomson did feel that Defendant was suffering from a major mental illness in the form of depression, but found no evidence of a major thought disorder, although he was experiencing hallucinations

in the form of voices. Thomson agreed with Dr. Schaffer's diagnosis of major depression with psychotic features. Thomson opined that Defendant's mental illness did not place him so far from the norm as to meet the M'Naughton standard. (Thomson, 23 RT 5471:9-5474:18)

Thomson admitted that he saw no basis to believe that Defendant was fabricating and in fact believed Defendant's descriptions of the molestations. Thomson did not believe that it was appropriate to incorporate free association and dream interpretation into a forensic interview. Instead, Thomson interviewed the forensic subject to get a description of the event, what led up to the offense, what were his purposes and motives at the time, use of drugs or other substances, etc. in order to determine whether the subject's clinical condition was relevant to the M'Naughton criteria. (Thomson, 22 RT 5451:2-7, 5452:1-5453:20, 5458:7-16)

Thomson stated that "insanity" was no longer a term used in clinical practice, and was now only a legal term. In short, Thomson's position was that "one can be psychotic without being really insane." (Thomson, 22 RT 5460:22-5461:22; 23 RT 5476:18-5477:8)

The prosecution's second expert witness was Charles B. Schaffer, M.D., a board certified psychiatrist in private practice as well as being a professor of clinical psychiatry at U.C. Davis Medical School. Dr. Schaffer had examined Defendant on two occasions in November 1992. He had requested to interview Defendant's family members but had been told by the appointing judge in Yuba County that they had moved away and were difficult to locate. (Schaffer, 23 RT 5513:25- 5522:17)

Schaffer testified that Defendant had had thoughts of retaliation

for his failure to graduate from high school, including thoughts of going to the high school and shooting up the place as well as handcuffing Mr. Brens and bringing in the media to describe his unfair treatment. (Schaffer, 23 RT 5523:22-5524:14) Defendant told Schaffer that he had drawn three or four different maps of possible entries to the school and possible shooting areas and that he had shown one of the maps to David Rewerts. (Schaffer, 23 RT 5524:15-21)

After describing the information he obtained from Defendant in interviews and psychological test results, his impressions from watching the video tape interview with Defendant and listening to the hostage tapes, and from reviewing various police reports, and psychiatric and medical records, Schaffer opined that Defendant did not meet the M'Naughton tests for legal insanity. (Schaffer, 23 RT 5519:13-5520:1) Schaffer diagnosed Defendant as suffering from depression, either from major depression with psychotic features or from possible bipolar illness. He testified that Defendant also was suffering from post-traumatic stress disorder, and possible caffeine intoxication. Schaffer testified that while depression with psychotic features could affect the individual's ability to discern right from wrong in some situations, he did not think Defendant's mental illness had interfered "to that degree." (Schaffer, 23 RT 5519:13-5520:11, 5522:18-5546:27)

Dr. Schaffer felt that Defendant's post-traumatic stress disorder was caused by the events of May 1, 1992 and did not precede the incident and thus was not a contributing factor to the incident. Schaffer felt that the excessive doses of caffeine [9 No-Doz tablets

and four cups of coffee] altered Defendant's mental state, but that it did do so "to the extent" that it impaired his ability to know the nature and quality of his acts or distinguish right from wrong. Schaffer further diagnosed Defendant with a personality disorder, not otherwise specified. He did not believe the personality disorder played a role in impairing Defendant's ability to know the nature and quality of his acts or distinguish between right and wrong. (Schaffer, 23 RT 5547:17-5548:18)

Schaffer discussed that his diagnoses differed from the diagnoses found by Groesbeck and Rubinstein. Schaffer said he did not agree with the schizophrenic diagnosis found by Groesbeck and Rubinstein, but that even if the diagnosis were correct, it would not change his opinion that Defendant did not meet the test for insanity at the time of the incident. (Schaffer, 23 RT 5548:19-5550:21)

Schaffer had given Defendant test materials for several psychological tests that Defendant was to fill out on his own after Schaffer left. Schaffer then sent the tests to be scored by a third-party provider. Schaffer said he found the test results not very helpful. (Schaffer, 23 RT 5520:28-5521:20, 5554:26-5557:21) Schaffer was cross-examined on his having Defendant take the tests without any professional test administrator present and the fact that psychologists but not psychiatrists can be licensed to interpret raw test results. Schaffer also was questioned about the findings from the test results reported by the outside scorer, including that the scorer believed the tests may have been under-representing the extent of Defendant's psychological maladjustment and also the following statements:

> The client appears to be quite disturbed at this time; confused, disorganized and experiencing intense anxiety. He is overanxietal and obsessed with strange thoughts and feelings of inadequacy. He experiences feelings of unreality, tends to be preoccupied with fantasy and may be having delusions and hallucinations."
>
> And
>
> Individuals with this profile tend to be experiencing severe problems suggestive of psychosis. The possibility of a schizophrenic disorder should be considered as well as a schizoid or compulsive personality disorder. At times, some individuals with extreme anxiety disorders may produce similar MMPI profiles.

On re-direct Schaffer reiterated that even if the diagnoses found by Groesbeck and Rubinstein applied, his opinion as to Defendant's sanity would not change. (Schaffer, 23 RT 5554:26-5561:12, 5584:10-17)

H. Penalty Phase Evidence

1. Prosecution Evidence

In the penalty phase the prosecution presented the autopsy photographs of the four homicide victims, Robert Brens, Judy Davis, Jason White, and Beamon Hill (23 RT 5721:8-5723:27, Exhibits 20-24 and 102-103). The prosecution then showed exhibit 68, a videotape without sound depicting the condition of Building C in the early morning of May 2, 1992 after the incident had concluded. Sgt. Virginia Black, one of the investigating officers, testified giving a description of what was on the tape as it was being played. The tape showed the bodies of the four homicide victims in the classrooms

where they had been shot and a trail of blood following the course where Wayne Boggess, after being shot, was dragged out of the building by police officers during the course of the incident. It also showed the locations where expended and unexpended shotgun shells were found, locations where shots fired had hit walls, curtains, and other parts of Building C. (Black, 23 RT 5721:8-5729:13)

2. Defendant's Witnesses in Mitigation

Defendant's first witness in the penalty phase was Mrs. Edith Houston, Defendant's mother. She testified that she was the mother of three children; that Defendant's father, who was also the father of Defendant's sister, Susan Nelson; lived in Arkansas. Mrs. Houston had another son, Ronald, whose father was her first husband. A month before Defendant was born Mrs. Houston contracted pneumonia and had to be hospitalized. She was given oxygen and a drug to prevent Defendant from being delivered at that time. When it was time for Defendant's delivery it lasted 36 hours. She was told by the hospital to keep an eye on Defendant as he grew up because of the oxygen she had been administered. (Edith Houston, 24 RT 5742:21-5743:26)

When Defendant was three months old he contracted encephalitis or meningitis and was in isolation for two weeks. When Defendant was a year old he had pneumonia and after that started having asthma whenever he had a cold. Mrs. Houston had been potty training him and taking him off bottle feeding when he got pneumonia and Defendant regressed after his illness. Mrs. Houston said she worked in a beer bar for a while just prior to Defendant's birth but

was not employed after he was born. (Edith Houston, 24 RT 5743:26-5745:22)

When Defendant was in high school he took a number of philsopholin (phonetic) pills that Mrs. Houston had for her upper respiratory problems. "They" told his mother he took the pills to commit suicide. She had him taken to the hospital and they observed him until he came off the drug. (Edith Houston, 24 RT 5746:9-22)

Defendant's father left the family when Defendant was about one year old and his father and mother "split up completely" when he was about two years old. The father was doing a lot of drinking and running around with other women. There were fights between Defendant's parents at this time, and Mrs. Houston had "some suicidal things" herself. Mrs. Houston moved with her three children to Folsom and then to Orangevale, a small town close to Folsom. Defendant's father visited his children a few times in Folsom and Orangevale, but Defendant did not see his father again until he was eight when he went to Arkansas for a brief visit. In 1985, when Defendant was in high school, Defendant went to live with his father in Arkansas because he was having a lot of problems with his sister and Mrs. Houston was having problems controlling him. Defendant stayed a while but then called begging to come back because his father and stepmother in Arkansas were taking drugs and drinking and there was nowhere for Defendant to go when he wasn't in school. Also his father had suffered an industrial accident to his hand and was on medication. (Edith Houston, 24 RT 5747:9-5750:11)

Mrs. Houston said that when Defendant was in pre-school she first started to notice that he was falling behind. He was tested in

grade school in Folsom and she was told he was a "slow learner." Mrs. Houston testified that Defendant had to redo the third grade. He was placed in a special class one hour a day. The next summer he went to special school in Rancho Cordova for six weeks where Defendant seemed to learn more. The family moved to Orangevale and Defendant was placed in the "Persian School" there in Mr. Gredvig's class, where Defendant went up two grade levels. The house the family was living in was being sold, and Mrs. Houston moved the family to Marysville to be closer to her family. Defendant continued in special education in junior high and high school. Mrs. Houston had to go every year for his evaluation. Defendant didn't like her to go to the high school because he didn't want her seen there due to her weight. (Edith Houston, 24 RT 5750:14-5751:23, 5753:16-5754:5)

After Defendant's attempted suicide he was referred to a psychologist. He went once, but Mrs. Houston had a hard time getting to that one session because she didn't drive and Defendant did not see the psychologist again. Mrs. Houston was not interviewed regarding her observations of Defendant nor told what she might look for in Defendant's behavior that would indicate he was becoming suicidal. She did hide her medicine from Defendant. (Edith Houston, 24 RT 5754:6-5755:6)

Mrs. Houston described Defendant's work history through high school and afterwards. This included working at Beale Air Force Base and a program for latch-key children while in high school and working at McDonalds and a theater after " graduation" when the family moved to Sacramento. (Edith Houston, 24 RT 5755:27-

5757:16)

Mrs. Houston said that Defendant's demeanor and behavior changed after he finished his contract at Hewlett Packard in February of 1992. He became more depressed and reclusive. Although he still went jogging, he stayed in his bedroom much of the time, refusing to interact with her or his half-brother Ron and stopped seeing his friend David [Rewerts]. Whereas before, Eric and his mother would sit on the floor watching television and rub each other's feet, Defendant stopped doing that in the months leading up to May 1, 1992. Defendant also had previously come into his mother's room at night while she was talking on the CB radio to lie on her bed and talk to her. He stopped doing that as well. Mrs. Houston said Defendant's eating habits changed prior to May 1, 1992, but did not explain exactly how they changed other than that "the eating habits was kind of mixed up at our house towards the end there." (Edith Houston, 24 RT 5758:28-5761:1, 5764:14-5765:2)

In January of 1992 Mrs. Houston's sister Gloria had proposed moving in with the family. Defendant and Mrs. Houston were opposed to this. Gloria then proposed putting a trailer in the back yard at the house shared by Defendant, Mrs. Houston, and Defendant's half-brother Ronald. This caused a big rift in the family. Ronald then indicated that he wanted to move out. Everyone was going to go their own way, but there was not enough money for Defendant, who was on unemployment insurance, or Mrs. Houston, who lived on disability, to survive on their own. There was talk of Mrs. Houston and Defendant getting a place together. In the months before May 1, 1992 Defendant worried that the family would split up.

(Edith Houston, 24 RT 5772:24-5773:18)

Mrs. Houston said that Defendant was something of a loner and had few friends in high school; he was very shy. He seldom got in fights except with his sister, and befriended younger children and a child with a serious spinal problem. After returning to Marysville, Defendant was best friends with the eleven year old son of his sister's husband. Mrs. Houston described how in high school Defendant on several occasions spoke with friends or acquaintances when they were suicidal and talked them out of it over the phone. (Edith Houston, 24 RT 5758:3-27, 5761:22-5763:2)

Mrs. Houston described Defendant's fascination with guns and military matters from an early age. His half-brother Ronald belonged to a Boy Scout Law Enforcement Explorer Post and took Defendant shooting at Mather Air Force Base. Defendant had good eye/hand coordination and liked to shoot. Defendant liked to go shooting and read magazines about weapons and military and police training. She said that the family was not religious but that she tried to teach Defendant right from wrong. Prior to May 1, 1992 he had never been arrested, and although he would get angry with his sister and maybe push her, he never physically hurt anyone. As a child Defendant was generally truthful, although as he grew up he could "manipulate" her. (Edith Houston, 24 RT 5765:12-5769:1)

Mrs. Houston described discussions she had had with Defendant since he had been held in the County Jail pending trial. Asked if Defendant had discussed how he felt about his victims, Mrs. Houston said that at first "he didn't remember nothing," but Mrs. Houston said she knew he was sorry, and that the other night he had

cried on the phone that it "had caused us problems and that the news people were driving us crazy." Asked specifically whether Defendant had spoken about the victims, Mrs. Houston responded:

> Not very much, not hardly any. He's mostly talked about how sorry he is for what happened to us, how it made our family -- how our family felt. See, I have a lot of family. I'm the eldest of nine children and he wanted to know how my sisters felt about it, and my nephew, Jeffrey, my nephew his age. He wanted to know how they felt. He hasn't talk to them but he gets -- he hears from them.
>
> (Edith Houston, 24 RT 5770:3-5771:6)

Mrs. Houston said she felt she knew why Defendant did what he did – that she believed what happened between Defendant and the teacher [Brens] actually happened because Defendant had never lied to her, and that if "that" happened between Defendant and David [Rewerts], that was because her family was so much against gay people that it pushed Defendant over the edge and made him so unbalanced he didn't know how to ask for help. She thought it was a way of committing suicide. She said that Defendant had changed a lot since the incident, that he had trouble with his memory and can't remember things just as she can't remember things. Mrs. Houston said she wanted her son to live because he was her son and she loved him, but also because he still could contribute something to society: he is a good artist and plays the keyboard, asking rhetorically: "How do you know he's not going to write a great song and paint a great picture or write a great book or story?" (Edith Houston, 24 RT 5774:3-5776:2)

On cross-examination Mrs. Houston said that the difficulty she

was having controlling Defendant before he was sent to Arkansas related primarily to his arguing with his sister. This included some physical fighting or pushing but was mainly verbal. She then described an interaction she had with Defendant the night before the incident, in which she came into the kitchen at 8:00 or 9:00 p.m. to find Defendant cooking chili dogs. Mrs. Houston offered to cook dinner, as she usually did around 11:00 p.m., but Defendant rebuffed her, and when Mrs. Houston persisted he turned around to face her, used a four-letter word, and said "you're dead." This scared Mrs. Houston but she laughed in an effort to calm him down. (Edith Houston, 24 RT 5777:4-5779:14)

Mrs. Houston agreed with counsel that she tried to be a "loving mother" and that she never physically abused Defendant that she knew of. She always was kind to Defendant and tried her best to bring him up the best she could. (Edith Houston, 24 RT 5779:19-5780:11)

Questioned about her testimony that she knew why Defendant had done what he had done, she admitted that she had just expressed her opinion. As to what had happened between Defendant and the teacher, Defendant had never really told her what had happened, he'd never been able to talk about it with his mother, although he had told Susan [his sister]. (Edith Houston, 24 RT 5780:12-5782:20)

The defense also called Donna Mickel, who had been Defendant's co-supervisor when he worked at Hewlett Packard. She described herself as a strict supervisor who had terminated temporary employees for unexcused absences, insubordination, or poor performance. She described Defendant as an ideal employee and stated that she had wanted to rehire Defendant as a "flex force

worker" instead of a temporary "as soon as his three months was up." (Donna Mickel, 24 RT 5784:28-5789:15)

3. Defendant's Testimony in Penalty Phase

The last witness for the defense in the penalty phase was Defendant himself. After being advised by the Court of his right under the Fifth Amendment not to testify against himself, Defendant expressed that he understood the rights the Court had described and that it was his intention to waive those rights. (24 RT 5799:16-5800:23)

Defendant acknowledged that he had been found guilty on four counts of first degree murder and ten counts of attempted murder, and that the jury had found him sane at the time he committed those acts. Defendant then answered some questions about his early childhood – he remembered being very young and riding on the back of a motorcycle with his father, his family moving to Folsom, and not seeing his father again until he spent about four months with him in 1986-1987. Defendant said he went to Arkansas because his mother and sister and he were not getting along. Defendant said he left Arkansas and came back to his mother's because he wasn't getting along with his father and his father's wife, noting they were "heavy drinkers." He first identified his father's wife as "Denise" but then said it was "Cheryl." When he went to Arkansas was the first time he had met his stepmother. (Defendant, 24 RT 5801:22-5806:21)

Asked about where he went to school as a child, Defendant said he had gone to school in the Folsom area, to a pre-school or kindergarten, but he wasn't sure. He did not remember the name of

his first teacher. He lived at home with his mother, his brother Ron who now was thirty-four, and his sister Susan, who now was twenty-three. (Defendant, 24 RT 5807:2-5808:7)

Defendant was asked about his various jobs, his classes in high school, his friends, and other aspects of his life as a teenager. Defendant described working at Beale Air Force Base and at a program for latch-key children. Defendant had trouble remembering what classes he had taken and could give the names of only a few of his friends. He did say that David Rewerts was his friend and continued to be his friend. (Defendant, 24 RT 5811:11-5821:5)

Asked what classes he had taken in his senior year at Lindhurst High School, Defendant remembered he had taken a drama class from "Miss" Morgan. He remembered that Jason White, one of the four persons he had killed on May 1, 1992, was in that class and that they had done two or three skits together while in the class. Defendant stated that he and Jason White "were pretty good friends." (Defendant, 24 RT 5821:17-5822:19)

Defendant described the things that he thought were good about Lindhurst High School. These included the education process, the way they personalized things for each student, the approach the teachers took to each student, as well as rallies and parties. Defendant said he participated in these things; that he went to football games once in a while and had gone to one basketball game. Overall he said he enjoyed his time at Lindhurst High School. (Defendant, 24 RT 5823:1-18)

Defendant testified he had never been arrested, had any trouble with the law, or even received a traffic ticket prior to May 1, 1992.

(Defendant, 24 RT 5823:26-5824:13)

Defendant testified that at Lindhurst High School he had Robert Brens for a teacher twice, the first time in Defendant's second semester of his junior year, when Mr. Brens taught U.S. history, and again in his senior year for economics. Brens started teaching the economics class in about November of his senior year. Asked if he was sure he had Brens as a teacher in his junior year, Defendant said he was "pretty sure." Defendant could not describe what the economics class dealt with, but after being asked to define the word economy, he agreed it made sense that the course dealt with "money and financial dealings." Defendant said that Brens allocated the same amount of time to him as to others in the class, except that Brens "narrowed out" certain people who were troublemakers or the "ones who couldn't hang in there." Defendant then noted that he had gotten in "a couple of fights" with Brens due to the teacher's "snotty attitudes" that developed at the end of the year. On one occasion Brens had told Defendant to "get the hell away from him" when Defendant was waiting to ask Brens about a paper while Brens was talking to someone else. On another occasion Defendant had come to school with an embarrassing hair cut and was wearing a cap to hide it. Defendant had asked the teachers if he could wear the cap in class to hide the haircut. Brens had said yes but then in the middle of class ordered Defendant to take his cap off. Defendant did not take his cap off but had gone up to Brens' desk, pushed all the books there on to the floor, then left the classroom and went to the principal's office. But overall Defendant felt that his experience with Brens in his junior year was positive and Brens was "pretty professional" and "a good

teacher." (Defendant, 24 RT 5824:14-5829:10, 5836:27-5837:5)

During his class with Brens in his senior year, problems began to develop later on in the year. Defendant said there were two or three students that Brens' was having trouble controlling, and Brens showed "anxiety" or frustration at his inability to control them. Defendant sat next to these students. Brens would focus his "energy" on other students, jumping on those students instead of the troublemakers. (Defendant, 24 RT 5829:12-5830:24)

Defendant then described an incident in December or January of his senior year where he came in before class to discuss a paper with Brens. Since it was before the start of classes there were no other students present. Brens was sitting on the desk and Defendant sat down next to him. Brens began to rub his hand against Defendant's penis through Defendant's jeans. This went on for about two minutes. Defendant did not report this to the principal because he was "scared of him."(Defendant, 24 RT 5830:25-5833:5)

After this incident Defendant had a couple of arguments with Brens in class, where Brens would "rag on us for no apparent reason." A second sexual incident occurred toward the end of the school year. Around lunch time Defendant went to the drama class but nothing was happening there so he went to Brens' classroom to discuss a paper. (Defendant identified Brens' classroom at the time as C-101A.) They were in a walled off cubicle in the classroom discussing a paper. Brens was again sitting on the side of his desk. Defendant was wearing cotton pants with an elastic waist band. Brens stuck his hand down Defendant's pants, grabbed Defendant's penis, and twisted it causing Defendant "excruciating pain." Afterwards Defendant had

trouble urinating. The two incidents were the only sexual incidents with Brens that Defendant could remember. Asked about the testimony of Ricardo Borom where Borom had said that Defendant had discussed an incident of oral copulation with Brens, Defendant said he had been intoxicated when he talked to Borom. (Defendant, 24 RT 5833:14-5839:11)

Prior to the first sexual incident with Brens Defendant had liked Brens and felt he was a really good teacher. Defendant still felt positive about Brens after the first incident but didn't want to get into a situation again of being alone with Brens. Defendant believed that Brens was sexually excited by what he had done, although it was not sexual for Defendant. After the second incident, which had lasted a minute and a half, Defendant was very scared and unfocused. He began to dislike Brens. Brens asked Defendant to stay after class at the ending of the year with two or three other students, but Defendant said he wasn't going to. Brens said Defendant had to make up the grade, but Defendant told himself he wasn't going to give Brens another opportunity to do the same thing again. The first person he remembered discussing the incidents with Brens with was his defense counsel and the doctor that defense counsel hired. Asked if he had told Borom about it before that, Defendant said he might have discussed the incidents with Borom once or twice. (Defendant, 24 RT 5843:16-5845:17)

Defendant said he didn't graduate because he was deficient in so many credits, including Brens' economics class, although Defendant did not know how many credits in all he was deficient. Defendant went to Brens seeking his help to complete the class and

get credit. Defendant said that Brens brushed him off "like a fly," saying he was busy and didn't have time for Defendant. A counselor at the high school told him he could make up the course in summer school. Defendant took the summer school class but failed it. He attributed his failure to the stress over the molestation, so that he didn't put any effort into it. He didn't try to take the class again because he was offered a job at a grocery store in Olivehurst that paid good money, although in fact the job had already been taken and he didn't work there but moved with his mother and brother to Sacramento. Defendant believed at the time that his failing grade in economics was what was preventing his graduation, and Defendant said he hadn't learned anything different as of when he was testifying. (Defendant, 24 RT 5839:14-5842:25)

After a break Defendant was asked if he was on any medication. Defendant said he was taking a stress reduction medication under prescription that was given to him at the Yuba County Jail. He named the medication as "Aporbap." When asked if the name was "Ativan," he said that sounded more correct. He also said he was taking a stomach medication on prescription. Defendant said he was taking the medication according to the prescribed dosage. Defendant said he had understood the questions asked of him so far that day, that the medication had not affected his ability to pay attention, and that the medications had no effect on his ability to understand the proceedings. Defendant was not sleepy but "quite awake." (Defendant, 24 RT 5846:5-5847:23)

Defendant was asked to describe his mental state in the month prior to the May 1, 1992 incident. He described it as "very distorted

... like a -- kind of like a cloud. Dissipating over me on a two to three week period." Asked what "dissipating" meant Defendant said "Hovering over, dissipating, taking over." Defendant had never experienced that before. He said that his suicide attempt in 1988 had been over a falling out with "the young girl," and that he had been "pretty foolish" and took some of his mother's pills, but had not actually expected to die. Following the suicide attempt he met once with a doctor Park, but Defendant didn't think it was necessary to go back. They had said only if something like that recurred should he go back. (Defendant, 24 RT 5848:5-5850:20)

Defendant said he lost his job at Hewlett Packard three months prior to May 1, 1992. He lost it because he lacked a high school diploma which he needed to get hired for the two-year extended period. Asked if he saw the necessity for having a high school diploma for his job as a computer assembler Defendant said yes, but could not remember what the necessity was. Defendant then admitted that he only understood what counsel was asking "a little bit" and counsel cautioned him not to answer a question if he didn't know the answer. On leading questions Defendant then agreed that he had done the job successfully without a high school diploma and it bothered him that he would need the diploma to continue in the job. (Defendant, 24 RT 5850:25-5853:5)

Defendant testified that beginning one to two months prior to May 1, 1992 he was hearing voices and having visions when he was asleep and awake, but not at "pacific" times, (by which counsel clarified that Defendant meant "specific" times). The frequency changed, with the voices and visions more present when he wasn't

busy and late at night. The voices were of Brens. He also had visions which he described as hallucinations of a lot of people laughing at him and irritating him. The voices also were telling him to go to Lindhurst High School. On two occasions Defendant had conversations with David Rewerts where Rewerts had been upset at some of his friends and wanted to get back at them. Defendant and Rewerts joked about ways to get back at Rewerts' friends. Rewerts talked about going to the friends' house and shooting it up, with Defendant responding that Rewerts could just "shoot them at the kneecap." They also discussed going to Lindhurst High School to shoot people . Defendant did not mention Brens "at that time." (Defendant, 24 RT 5853:6-5855:18)

Defendant was shown Exhibits 62a and 61a, the reconstructed notes, and Exhibit 16a the "goodbye note." Defendant said 62a and 61a were drafts of a letter he "was going to write" or "was thinking about writing." He said they were "very distorted," by which he meant distortions of his feelings. He wrote them in the week before May 1, 1992. The final note (Exhibit 16a) was the note he wrote the night before the incident. It was a "goodbye note" left for his "parents," by which he meant his mother and his brother who was "almost like a father" to him. The reference to his "sanity has slipped away and evil taken its place" meant he was slipping out of touch with reality and a cloud was coming over him and he knew it was something he couldn't stop at the time. He was hearing voices as he was writing the letter. The reference to "mistakes and the loneliness and the failures have built up too high" referred to the mistakes that occurred throughout his life from childhood to not graduating from high school to the molestation by Brens. The Brens molestation was a

"mistake" because Defendant felt "like I shoulda did something, but I didn't." Defendant wasn't sure why he put in "loneliness," but on prompting agreed that he had told all his friends to stay away and felt lonely with just his mother and brother in his life. (Defendant, 24 RT 5856:12-5861:18)

Defendant said he first decided about going to the high school about a week or two to three days before when he cut the stock off the .22 rifle and prepared the "map," (Exhibit 64), but Defendant also said Exhibit 64 ("Mission Profile") was drawn 2-3 days before the incident. Defendant kept his draft letters, "Mission Profile" and other materials hidden from his "parents." He also sawed the stock off the .22 two to three days before the incident. Defendant said that "in a sense" he had started to plan for going to the high school, but "didn't take it under real consideration. I thought it was just something that would pass, and I'd never do it." On a leading question Defendant agreed that as it grew closer to May first he felt he was losing control. He was hearing voices, including Brens, telling him to "do something about it." (Defendant, 24 RT 5862:2-5863:24)

Defendant then testified as to the events of the morning and afternoon of May 1, 1992: getting up at 7:30 or 8:00 (instead of his usual 11:00 or 12:00) to drive his mother three blocks to the dentist, getting and cashing his unemployment check. He testifies about going to the three stores to purchase ammunition, giving a lengthy discussion of the types of ammunition he purchased. He describes coming back home and assembling his weapons and supplies and putting them in his car, putting a few dollars of gas in his car, and driving to Lindhurst High School. Defendant said he was hearing

voices all through this period saying "Hurry up. Let's get going. Let's get this shit over with." He was not feeling hatred for the high school but rather felt "confusion" and "upset." (Defendant, 24 RT 5863:25-5871:19)

On his way to the high school Defendant was thinking "Something's going to happen, and something really big's going to happen." As he pulled into the parking lot at the high school he was still hearing voices. They were "getting more apparent, louder. More fiercer." The first thing he saw in the parking lot was an oriental man whom Defendant assumed was a student. The man was getting in his car, but when he saw Defendant with the shotgun he ran away. Then he saw Mrs. Morgan, who asked him did he have a permit for the weapon? Then he entered Building C where it was "really dark" inside. (Defendant, 24 RT 5870:10-5872:7)

As Defendant entered the building everything started to get "very blurry." He came to the first classroom and saw the "out figure of a person," by which he means an outline of a figure. The figure is "an apparent man." Defendant couldn't make out his details, just his height, width, and color of his clothing, not his facial features. Then Defendant sees the man "I see him – his expression like oh shit. And then I see him fall down on the ground, and then I see a big cloud of smoke go by me. And I was kind of scared. I just didn't know what it was." Defendant then says that the person who fell to the ground must have been Judy Davis. On further examination he says that figure he saw say "oh shit" was a man, but that he didn't see him fall but saw a second person, whom he assumes was Judy Davis, fall. He did not recognize the man, although now he knows the person was Brens

because "That's what they say." When Brens had taught Defendant his classroom had been on the opposite side of the building, so that Defendant did not expect Brens to be in the first classroom next to the northeast entrance. (Defendant, 24 RT 5872:14-5874:16)

Defendant remembered pumping the shotgun in C-108b but not pulling the trigger. Asked what his intention was, he stated: "I was just firing. Whatever. It didn't matter if it was moving or if it was a book or a desk, anything." Asked if he was intending to kill someone, Defendant replied: "My initial -- thought was just -- just start blowing stuff up. Shooting stuff...it could have been a person, it could have been a locker...Wasn't there after anyone pacific." Defendant said he wanted to "Make a lot of noise" so as to "start getting the attention." (Defendant, 24 RT 5874:17-5875:10)

Asked what he wanted attention for, Defendant stated: "To -- to get the media there to bring up some of the problems that the administration were having. And the apparent child molest that happened with me and Mr. Brens." Defendant's counsel then asked him what he meant by saying "the apparent child molest," and Defendant replied "I don't know." (Defendant, 24 RT 5875:13-23)

Defendant remembers walking and feeling "very heavy" probably from all the shells he was carrying. He turned to his right and saw a figure, "a bronkier (sic) looking guy," whom he now assumes was Jason White, but did not know it at the time. He then saw a teacher, whom he now assumes was John Kaze. Defendant made a left turn, walking down to the south end of the building "where Beamon Hill was apparently shot." Defendant said he had no memory of shooting Beamon Hill, nor had he ever seen Beamon Hill

before in his life. Defendant then made "a u-ee" and headed upstairs. On the stairs he dropped the .22 which he thought discharged. He got a ringing in his ear. That is when things started to "come back into reality," "coming clearer, focusing more." He no longer was hearing voices. Defendant estimated he spent two minutes on the first floor of Building C. (Defendant, 24 RT 5876:3-5879:22)

Defendant had brought thumb cuffs to the school. His intention was to handcuff Brens and bring in the media to explain to them what Brens had done to him those two times. Once on the second floor Defendant asked to have the media brought in a number of times, but the police did not comply. It took about three hours to gather all 87 students in classroom C-204b. Defendant became concerned that there were injured students on the first floor and sent students out from C-204b to find them and get them out of the building. About seven or eight o'clock in the evening, after getting the soda, pizzas and Advil delivered, Defendant started to think about ending the incident. (Defendant, 24 RT 5880:1-5883:17)

Defendant testified that he had no real plan when he entered Building C, rather he had "thoughts and ideas, writings and pictures," but "I really had no idea what was going to happen, happen as to the deaths and amount of people shot." Prior to going to the high school Defendant had drunk 3-4 cups of coffee and taken a handful of No-Doz from his brother's medicine cabinet. Asked what effect he thought the coffee and No-Doz would have, he answered "hiding my senses, keep me awake." (On a leading follow-up question he agreed it was to "heighten my senses.") Defendant had never used coffee or bought No-Doz before. (Defendant, 24 RT 5883:18-5885:4)

Asked if he thought he had a mental problem, Defendant said yes, and that beside his learning disorders "there is so many of them, it's just hard to grasp." Other disorders included speech impairment and a stress disorder such that whenever anything stressful got to him he "just shut down." In response to a leading question from his counsel he agreed that he often experimented with using words the meaning of which he did not know. Defendant described hearing voices after he was arrested and placed in the Yuba County Jail. He had visions, including visions of Brens tying him down in the electric chair and students appearing to him "hideously," with gunshot wounds, constantly bleeding, looking like they had just come out of the earth. The visions stopped after about three or four months, following his starting to take medication. The voices continued intermittently when he was under stress, and he had heard voices back in his cell after trial days. (Defendant, 24 RT 5885:5-5887:20)

Defendant's counsel then asked him why, throughout the trial, there had been almost no emotional reaction from Defendant. Defendant said he didn't know why. Defendant said he can't comprehend what happened – although he could remember the hostage part, he had no recollection of shooting or hurting anybody. His counsel then noted that Defendant had cried during references to the Brens molestation and asked Defendant why the jury shouldn't conclude that the only person Defendant cared about was himself. Defendant said that was wrong, that he thinks constantly about what happened and what might have been different if he didn't have a gun or had done something else different. Defendant said he thought of what the parents of the deceased victims go through and said "that

hurts." Defendant was asked if he knew what "remorse" meant. Defendant said yes, it meant "having pity," then said he didn't know. Asked if he could tell the jury how he was sorry for what he did, Defendant said "No, I can't," but on leading questions agreed that he was sorry for what he had done to the families, to the "children," to Sergio Martinez. (Defendant, 24 RT 5887:26-5890:2)

In closing his direct, counsel asked Defendant why he felt he should be sentenced to life in prison without parole. Defendant responded that he felt death would not accomplish anything. Asked what he would do if he weren't executed, Defendant said he would "Try to make something out of my life," and that he would "Learn why it happened." Defendant did not know if anything could be learned about his personality if he were placed in prison for life. Defendant did state he did not want to be executed. Asked if he felt that LWOP would be "fair" punishment, Defendant stated "Guess it depends whose parents – who the victims of – the parents, how they feel about it." (Defendant, 24 RT 5890:3-5891:3)

Defendant was cross-examined extensively about his accounts of the Brens' molestations. He reiterated his direct testimony that the first molestation had occurred in the 1988-89 senior year. Asked if he had told Rubinstein, Thompson, and/or Schaffer that the first molestation occurred in the spring of his junior year, Defendant alternately denied doing so and stated he couldn't remember and that he "might have said it." Defendant was questioned about when the interaction with Brens over his lacking credits to graduate occurred. Defendant said it occurred at the middle of the 1988-89 school year; that it occurred after the second molestation incident, toward the end

of the school year; and that it occurred about 3-4 months before the end of the school year. He was asked why, after the first molest when he recognized he didn't want to get caught alone with Brens he went to see him and placed himself alone with Brens again, Defendant stated there were people around in the area, then said he "thought" there were people around. Defendant admitted he didn't say anything although he thought there were people around, he was being fondled for a minute and a half, and he was being hurt by it. Defendant said he "probably felt there was no one around." He then said he "didn't know where opposing counsel had gotten a minute and a half," stating he didn't recall having so testified on direct examination. Defendant also did not remember until repeated questioning that he had told Rubinstein the fondling on the second occasion had caused a laceration of his penis. (Defendant, 24 RT 5891:14-5898:22)

Defendant stated he felt that he could not have reported Brens' molestations, and that if he had Brens would not have gotten in trouble. Defendant insisted that, although he loved David Rewerts and had seen him and hugged him the night before the incident, he had never told Rewerts about the Brens' molestations. Defendant said he didn't tell anyone about it, and that was why he was going to the high school – to reveal the molestation and then die. Defendant admitted that he didn't tell the student hostages about the molestation. He said he was still waiting for the media and, although he told the students he hated Brens for flunking him, he didn't tell them about the molestation because "that's something very dark and secret, and I wasn't going to give it up to a bunch of kids that didn't know anything about it." (Defendant, 24 RT 5898:23-5902:8)

Defendant also admitted that, although things were "getting foggier, more transparent" in the days just before May 1, he also was "lucid" at times. When he wrote the "goodbye note" (Exhibit 16a) he "had a good idea what was going to happen – something was going to happen." Defendant also admitted that he did nothing to prevent what occurred on May 1. The prosecutor then suggested that Defendant knew he shouldn't do what he did on May 1. Defendant responded: "In the right mind, I knew. I couldn't distinguish that and not did it. Yeah." (Defendant, 24 RT 5902:9-5903:20)

Defendant remembered writing that he had a fascination with death and weapons. Asked if that was a "distortion," Defendant said "A distortion, yeah. Probably under the mental stress that I was going through at the time." Defendant admitted that when he wrote Exhibit 16a he thought it possible that some harm might come to him, and that the police might want to kill or shoot him because of what he was doing. (Defendant, 24 RT 5904:27-5906:1)

Defendant also admitted that the double ought buck shot he purchased on May 1, compared to number four buck, had bigger pellets and can be "devastating" when fired at close range. Defendant volunteered that the shotgun he was using was made for that, "not a bird hunting gun" but made for defensive purposes. He then admitted that it was an "anti-personnel weapon." But Defendant insisted that the ammunition he purchased on May 1 was no different than the ammunition he typically purchased when he went target shooting. (Defendant, 24 RT 5906:21-5909:12)

Defendant was questioned about his statement on direct that he had no memory of shooting anyone on the first floor of Building C.

He was confronted with statements from the transcript of the videotaped interview with Downs and Williamson on May 2, 1992. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 1-102]) Defendant did not recall stating in the interview that he knew he had shot the teacher. He denied that he had stated in the interview remembering he had shot Judy Davis, contending instead that his response in the interview was based on a "guessed" that Judy Davis must have been shot in the groin area due to the location where she was standing and the position of his gun at the time. He remembered saying he had shot into the Spanish classroom, "hearing one loud shot" and seeing a student fall down but not that he had shot "the kid in the butt." Defendant did not remember stating to Downs that he had only "shot everybody one shot." Defendant said he became concerned about injured students on the first floor from listening to the radio, not from any memory of shooting them." Defendant had told the students that he would like to know where Brens was but did not order Brens brought to C-204b because he figured Brens already was out of the building. (Defendant, 24 RT 5910:3-5913:17)

On redirect Defendant said he had no idea what the word "lucid" meant. As for the term "distorted" he said it meant "not clear, abstract." Defendant had never read the transcript of the May 2, 1992 interview with Downs and Williamson, and he had no memory of what he had said during the interview. On re-cross examination Defendant said he had watched the video tape of the interview during the trial, and that he had answered truthfully during the May 2, 1992 interview. (Defendant, 24 RT 5914:14-5916:6)

Following Defendant's testimony the evidence on penalty was

closed.

ARGUMENT

I. THE ADMISSION OF THE VIDEOTAPES OF THE INTERROGATION OF DEFENDANT AND THE AUDIO TAPES CONTAINING STATEMENTS OF DEFENDANT WHILE HE WAS HOLDING STUDENTS HOSTAGE IN ROOM C-204B, WITHOUT AN ACCURATE AND RELIABLE RECORD OF THE INTELLIGIBLE AND UNINTELLGIBLE WORDS SAID ON THOSE TAPES, REQUIRES REVERSAL OF THE JUDGMENT BELOW IN ITS ENTIRETY

A. The Problems With the Tapes

1. Videotaped Interrogation of Defendant by Law Enforcement

During the guilt phase of the trial, on the afternoon of Thursday, July 1, 1993, Sergeant Downs of the Yuba County Sheriff's Office testified about the circumstances under which he and Officer Williamson questioned Defendant on May 2, 1992, the day after Defendant's arrest. Downs testified that he first interrogated Defendant without any recording equipment, and then following the initial interrogation, conducted a second interrogation using a video recorder. On cross-examination Downs testified that the reason the initial interrogation was not recorded was that, in the past, the Sheriff's Office had electronically recorded initial interviews with suspects, and that this had resulted in having the jury at the trial hear extended "confusing superfluous information." In Downs' opinion, it was not necessary to tape the initial interrogation and he chose not to.[26] (Downs, 17 RT 4005:2-17, 4006:11-4007:2)

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[26] Downs contended the initial interrogation was to see if Defendant would speak and to find out what he would say. The recorded interrogation, however, is not a recitation of some prepared statement that Defendant had agreed to make. Rather, it is very much a raw

After Downs testified about the manner in which the interviews had been conducted, the Court admitted into evidence Exhibits 57a and 57b, the original video tapes of the second interrogation. (17 RT 4005:14-22, 4018:1-4). Defense counsel stated they had no objection to the playing of the videos (Exhibits 57a and 57b). (17 RT 3952:9-11)

The prosecution commenced to play the video tapes. Prior to the start of the playing, the Court, *sua sponte*, in the presence of the jury, asked counsel if they would stipulate to excusing the court reporter from transcribing the audio portion of the video tapes. Defense counsel first stated that he had no objection, then stated he feared he "would get in trouble" if he refused the stipulation, and then stipulated.[27] (17 RT 4018:10-4019:4) A portion of the first tape was played on July 1, 1993. (17 RT 4019:14) When playing resumed on the next court day, the morning of July 6, 1993, the court reporter was again excused from transcribing the audio portion of the tape being played with the Court simply referencing the stipulation of the

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interrogation in which Downs and Williamson do most of the talking, repeatedly tell Defendant what they want him to say, but routinely interrupt Defendant when he does start to say something. It is difficult to imagine that the initial interrogation could have been any less coherent than the one that Downs chose to tape.

[27] In the context, the trial court's request before the jury that defense counsel accede to giving the court reporter a rest must be presumed to be coercive, and that presumption is reinforced by counsel's expression of concern that he would "get in trouble" if he didn't accede to the judge's request. It cannot be presumed that trial counsel would have any valid tactical reason for choosing to have a portion of the proceedings not reported. *Gardner v. Florida* (1977) 430 U.S. 349, 362.

previous court day. (17 RT 4032:13-27)

At the time the playing of the tapes started on July 1, 1993, the prosecution had not provided a transcript of the audio portion of the tape for the Court or defense as required per California Rule of Court 203.5 (now renumbered Rule 243.9). (17 RT 4029:2-6) Thus, at the Court's instigation and insistence, there was no contemporaneous transcription of the audio portion of the videotaped interrogation as it was played *and as it could be heard by the jury* in the Courtroom. Since no transcript had been proffered for use in lieu of a reporter's transcript, this action by the trial judge was a blatant violation of the trial court's duty to ensure that all proceedings in a capital trial are reported and a record preserved for appeal. (Penal Code § 190.9.)

On July 6, 1993, just prior to the start of the second session of playing the videotapes, Defendant's counsel informed the court that they had just been provided a 102 page transcript of the audio portion of the videotapes but had not had time to review it. Defendant's counsel expressed concern that the prosecution would offer the transcript as an exhibit before the defense had an opportunity to review it. In response, the prosecution stated that they intended to have Sgt. Downs authenticate the transcript by testifying that the transcript was "as accurate as it can be; there are inaudible portions and those portions I have no recollection as to what was said." The Court then said that reference to the transcript should wait until the defense had had an opportunity to review it. (17 RT 4029:2-4031:6)

The videotapes showing the remainder of the interview were then played, again the court excused the court reporter from transcribing what was audible in the courtroom. (17 RT 4032:13-

4033:1)

Although the prosecution represented that they were going to have Sgt. Downs verify the accuracy of the transcript (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 1-102]), this was, in fact, never done, and the record contains no basis for presuming the transcript (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 1-102]) to be an accurate transcription of the audio portion of Exhibits 57a and 57b.

On July 8, 1993 the Court engaged in a colloquy with counsel regarding the admission of the transcript of the audio portions of Exhibits 57a and 57b as Exhibit 89. Defense counsel stated that "We've reviewed it. We have no, no *vigorous* objection to the introduction of that as an exhibit. With the understanding that the Court will instruct the jury that the tape is the evidence and not the transcript." (18 RT 4329:16-4331:25, emphasis supplied). No evidentiary foundation was laid for the transcript nor was any testimony elicited as to its accuracy. The Court deemed that it would be the Court's exhibit, and when it was admitted the Court gave the following admonition to the jury:

> As to number 89, I need to explain to the jury what number 89 is. 89, ladies and gentlemen, is what we will call a transcript of the audio portion of the videotaped interrogation of the defendant that you saw earlier this week. There will be 12 copies of that, or maybe 15. I'm not sure how they set it up because you won't be seeing it until deliberations. But in any event, there will be 12 copies certainly for the 12 of you who are in deliberations and an original that would be the court's record.
>
> It's important that you understand that Exhibit 89 is intended to assist you in

> following the interrogation that's on the videotape. It is not the best evidence of what happened. The videotape is the best evidence of what happened.
>
> 89 is an attempt to get as much of the conversation down accurately as possible. But if there is any conflict between what's on number 89 and what's on the videotape the videotape prevails.
>
> In other words, Exhibit 89 was prepared by somebody later taking time to watch the videotape and type down what he or she believed he or she was seeing and hearing on the videotape.
>
> But the videotape is the evidence. 89 is nothing more than something that hopefully will facilitate the understanding of the evidence.
>
> (18 RT 4336:22-4337: 22)

The trial court's ruling in admitting Exhibit 89, the court's admonition to the jury as to what Exhibit 89 constituted and how it should be used, and the absence of any evidence in the record from which it could be inferred that Exhibit 89 is an accurate transcription of the audio portion of the video tapes, establish that the record on this appeal is missing any agreed or reliable transcript of what was played for the jury.

Exhibit 89 was admitted only as an "aid," and was not "evidence" that could be relied upon either by the jury or by this reviewing Court. As will be discussed, the failure of the trial court to ensure that the reporter made a contemporaneous transcription of what was intelligible as Exhibits 57a and 57b were played for the jury in the Courtroom means there is no record of this crucial two hours of taped evidence when it was played for the jury and no basis for

conducting a meaningful appellate review of Defendant's trial.

The lack of a reporter's transcript is fatally prejudicial to the effective prosecution of this appeal: the two-hour interview with Defendant only twelve hours after the incident ended is arguably the most significant evidence in a trial where the principal contested issue was Defendant's state of mind in entering the school and shooting the victims.[28] The lack of a reporter's transcript means that the only record of what the jury heard is contained on the videotapes themselves. The sound quality of the video tapes is such that people listening to the tapes cannot readily agree as to what Defendant is saying. Merely replaying the videotapes has not provided counsel, and will not provide this Court, with a reliable record of what the jury presumably heard. The conditions under which the tapes were played to and heard by the jury can no longer be duplicated. That would require, at a minimum, duplicating the acoustical properties of the trial courtroom as it existed 14 years ago and then playing the tapes on the equipment that was present 14 years ago.[29]

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[28] See, e.g., Defense counsel's argument to the jury in the guilt phase: "In closing, ladies and gentlemen, there's absolutely no quarrel with the fact that something terrible happened May first, 1992, at Lindhurst High School. I mean there is very little dispute that the person who committed whatever acts were committed was Mr. Houston. The question is why. And when we asked you in selecting you as jurors whether or not -- specifically we referred to a different phase of the trial -- but when we asked you if you all could take mental defenses seriously and not as some cop out, you agreed." (22 RT 5140:20-5141:2)

[29] There is also the question whether, after 14 years, there has been physical deterioration of the tapes that would have altered the sound quality.

The representation by the prosecution to the Court that the transcript prepared by the prosecution, Exhibit 89, is "as accurate as it can be; there are inaudible portions and those portions [Sgt. Downs has] no recollection as to what was said" (17 RT 4030:2-7) was misleading and patently untrue. The transcript is not as accurate as it could be, and many of the passages identified as "unintelligible" on Exhibit 89 are, in fact, audible and intelligible at least to some listeners using some equipment. This fact is established by the record on appeal and the stipulation of appellate counsel to a more accurate transcript of the audio portions of Exhibits 57a and 57b. (CT Supplemental – 4 (v. 5) 1329-1330; Exhibit 89 [CT Supplemental–5 (v.1 of 1) 3 and 105:10; 3 and 105:40; 5 and 107:16; 72 and 174:25; 82 and 184:28])

The record on appeal in fact contains *three* transcripts of the videotape: the one offered by the prosecution as trial Exhibit 89 (CT Supplemental–5 (v.1 of 1) 1-102), a transcript containing corrections to Exhibit 89 prepared by an assistant to appellate counsel for Defendant , (CT Supplemental–4 (v.2-4 of 5) 516-946), and a third transcript which was attached as Exhibit "A" to a Stipulation between Appellate counsel for showing their *agreed* changes to Exhibit 89 (stipulated revised Exhibit 89 [CT Supplemental–5 (v.1 of 1) 103-204]) Specifically, regarding the third version, the parties to this appeal have stipulated:

> 1. The document attached to this Stipulation as Exhibit "A" is a transcript of the videotapes of the statement given by Defendant Eric Christopher Houston to law enforcement

authorities on May 2, 1992. The two videotapes of the statement were introduced into evidence at trial as Exhibits 57a and 57b respectively and played for the jury. Exhibit "A" represents a revised version of the transcript of Exhibits 57a and 57b provided by counsel for the People at the time of trial, marked as Exhibit 89 at the trial in this matter, and admitted into evidence on July 8, 1993.

2. The revisions to Exhibit 89 that are incorporated into Exhibit "A" were the result of attorneys and/or staff on each side repeatedly replaying the video tape in a quiet setting on a number of occasions and listening, rewinding, and replaying passages that were difficult to make out. Counsel for each party suggested some changes to the language on Exhibit 89 and filled in some passages that are indicated as "unintelligible" on Exhibit 89. The entire process lasted several months.

3. The parties agree and stipulate that Exhibit "A" is a more accurate and complete written version of what is actually recorded on the tapes than what is set forth on Exhibit 89.

4. By this stipulation neither party is agreeing that either Exhibit 89 or Exhibit "A" represent what the jury heard when Exhibits 57a and 57b were played for the jury at trial.

5. This stipulation shall be without prejudice to either party challenging the accuracy of Exhibit "A" as a result of any electronic enhancement of Exhibits 57a and/or 57b or copies thereof.

(CT Supplemental – 4 (v. 5) 1329-1330)

A comparison of Exhibit 89 with the stipulated revised Exhibit

89 (Exhibit "A" to the stipulation of appellate counsel) shows substantial discrepancies between what the prosecution transcriber heard (or believed he/she had heard) listening to Exhibits 57a and 57b, and what appellate counsel heard (or believe they heard) listening to the same tapes. The discrepancies are not immaterial. Rather, the two versions have Defendant making diametrically opposed statements to the interrogating officers relevant to Defendant's *mens rea*.

Reviewing the differences between the two transcriptions reveals a number of startlingly contradictory interpretations [transcriptions] of what Defendant said on the tapes about the incident on May 2, 1992. For example:

- The prosecution transcriber heard Defendant stating that when he got out of the car in the Lindhurst High School parking lot he "was in the right frame of mind" to accomplish something, while appellate counsel have stipulated that the same passage should have Defendant stating he "wasn't in the right frame of mind and I was a little hesitant. I don't know what frame of mind I was in even when I went in there." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 3]; stipulated revised Exhibit 89 [CT Supplemental–5 (v.1 of 1) 105:9-10])

- The prosecution transcriber heard Defendant stating that he had "never seen" Jason White, while appellate counsel have stipulated that the same passage should have Defendant stating he did see Jason White but had no memory of shooting at him. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 7]; stipulated revised Exhibit 89

[CT Supplemental–5 (v.1 of 1) 109:29])

- When Defendant is talking about having students come up to Room C-204b the prosecution transcriber heard Defendant stating that he "screwed with one kid" while appellate counsel have stipulated that the same passage more accurately would read "I screamed to one kid." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 12]; stipulated revised Exhibit 89 [CT Supplemental–5 (v.1 of 1) 114:23])
- The prosecution transcriber heard Defendant stating that Robert Brens was "the one that tortured me" while appellate counsel have stipulated that the same passage more accurately would read that Robert Brens was "the one who flunked me." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 32]; stipulated revised Exhibit 89 [CT Supplemental–5 (v.1 of 1) 134:4])
- In discussing the shot(s) fired into C-102, the prosecution transcriber heard Defendant state that "I've started to recall where I actually was." while appellate counsel have stipulated that the same passage more accurately would read that "I'm just trying to recall where I actually was," (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 38]; stipulated revised Exhibit 89 [CT Supplemental–5 (v.1 of 1) 140:29])
- In a passage where Defendant was responding to a question by Sgt. Downs as to whether Defendant's plan in going to the school was to shoot people, the prosecution transcriber heard Defendant stating "...I was thinking of

getting up somewhere high and thinking about, this is once I was in there, once I was right here, I was thinking about just go upstairs it's a better spot and I won't worry about making shots." while appellate counsel have stipulated that the same passage more accurately would read "...I was thinking of getting up somewhere high and thinking about, this is once I was in there, once I was right here, I was thinking about just go upstairs it's a better spot and I won't worry about being shot." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 41(Emphasis supplied)]; stipulated revised Exhibit 89 [CT Supplemental–5 (v.1 of 1) 143:19-23(Emphasis Supplied)]) .

- Regarding the note that Defendant left for his family, the prosecution transcriber heard Defendant stating: "I knew that I was probably going to get killed too. That was as far as I was going to go." while appellate counsel have stipulated that the passage more accurately would read: "I knew that I was probably going to get killed too. That was why I wrote them the note." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 57]; stipulated revised Exhibit 89 [CT Supplemental–5 (v.1 of 1) 159:17-18])
- The prosecution transcriber heard Defendant state that he "couldn't" have fired more than six shotgun rounds, but appellate counsel have stipulated that the passage more accurately reads that Defendant said he "could've," not "couldn't." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 67]; stipulated revised Exhibit 89 [CT Supplemental–5 (v.1 of 1) 169:31])

- When Sgt. Williamson asked Defendant if he was "sorry that Brens is dead?" the prosecution transcriber heard Defendant say "I didn't know it was Mr. Brens." while appellate counsel have stipulated that the passage more accurately would read: "Yeah, I didn't know it was Mr. Brens." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 69]; stipulated revised Exhibit 89 [CT Supplemental–5 (v.1 of 1) 171:30])

- When Sgt. Downs asked Defendant "So whoever was there, you shot them. Did they..." the prosecution transcriber heard Defendant say "Whoever it was that came into eye contact, that was in the line of fire I shot," while appellate counsel have stipulated that the passage more accurately would read: "Whoever, whatever came into eye contact, that was, ah, that was in the line of fire I shot." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 71]; stipulated revised Exhibit 89 [CT Supplemental–5 (v.1 of 1) 173:6-7(emphasis supplied)])

- When Sgt. Downs asked Defendant "Did you hate him?" referring to Brens, the prosecution transcriber heard Defendant say: "At that time I did and it built up, at, all the disappointments I guess built up, to... all the disappointments built up to that I hated him by I knew that was him when I shot him." while appellate counsel have stipulated that the passage more accurately would read: "At that time I did and it built up, at, all the disappointments built up to that I hated him but I didn't know that was him

when I shot him." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 91-92 (emphasis supplied)]; stipulated revised Exhibit 89 [CT Supplemental–5 (v.1 of 1) 193:35-194:2 (emphasis supplied)])

In addition to the explicit substantive discrepancies in content, comparison of Exhibit 89 (CT Supplemental–5 (v.1 of 1) 1-102) with the stipulated revised Exhibit 89 (CT Supplemental–5 (v.1 of 1) 103-204) shows twelve different instances where counsel for the state and for Defendant have agreed that the prosecution transcriber mis-identified the speaker as Defendant when the actual speaker was a police interrogator, or vice-versa.[31] If presumably diligent repetitive listeners could have this many discrepancies in attribution of an intelligible statement, it is reasonable to believe that the jurors hearing the tape only once would also have attributed statements made by the interrogators to Defendant or statements made by Defendant to the interrogators. Since the police interrogators were repeatedly trying to put inculpatory words into Defendants' mouth, mishearings of the first type could well have been critically prejudicial to Defendant.

Exhibit 89 (CT Supplemental–5 (v.1 of 1) 1-102), the transcript provided to the jurors when they went to deliberate, contains over 80 instances where the prosecution transcriber considered the audio on the tape "unintelligible." Yet, the jury did not even have the benefit of Exhibit 89 when it listened to the audio, and the jurors were

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[31] See: CT Supplemental–5 (v.1 of 1) 11 and 113:28; 14 and 116:15; 31 and 133:10; 45 and 147:19; 45 and 147:27; 64 and 166:14; 66 and 168:17; 66 and 168:19; 74 and 176:36; 80 and 182:31; 83 and 185:24; 99 and 201:38.

instructed to rely on their memory of what they "heard" rather than Exhibit 89 to the extent the juror believed there to be any discrepancy. Using Exhibit 89 as a guide, the jury was effectively instructed to speculate as to what was being said over 80 times during the playing of Exhibits 57a and 57b.

The stipulated revised Exhibit 89 (CT Supplemental–5 (v.1 of 1) 103-204) shows 89 instances where appellate counsel for the State and for Defendant agreed the audio on the tape was unintelligible, of which 25 of these instances were places where there the prosecution transcriber believed the audio *was* intelligible.

These discrepancies illustrate three fundamental (and Defendant submits, insurmountable) problems with this current appeal:

First, that the jury necessarily was speculating as to the linguistic content of the videotape in reaching its verdicts;

Second, the profound absence of an appellate record from which to determine what the jury reasonably could be deemed to have heard the Defendant say about the incident or his state of mind at the time; and

Third, the degree to which both appellate counsel and this Court will be forced to speculate on the content of this evidence in either arguing or deciding the issues raised by this Appeal.

From the current record no presumption or inference can be drawn as to what the jurors reasonably would have heard as the videotapes were played: (1) the statements of Defendant as they appear in the original transcript, (2) the statements appear in the stipulated revised transcript, or (3) something different from both. As the jurors were instructed not to rely on Exhibit 89, the original

transcript, but instead to rely on what they believed they remembered hearing as the tapes were played, Exhibit 89 doesn't provide a record of what the jurors relied upon in reaching their verdicts. Nor was the jury instructed to disregard any portion of the tapes when they had difficulty making out what was said or determining who was speaking, leaving each juror free to guess at the linguistic content of poor audio quality, garbled speech and unintelligible sounds. Lacking a record of what jurors actually can be deemed to have heard, there is simply no way appellate counsel can effectively present issues on appeal, nor is there any way this Court can adequately review the record and determine whether the convictions and judgment are legally warranted.

B. Audio Tapes of Hostage Negotiations and Conversations in Room C-204b

On the morning of July 7, 1993 the prosecution called Charles Tracy from the Yuba City Police Department to describe the hostage negotiations and lay the foundation for the playing of approximately six hours of audio tape recordings of the conversations between the hostage negotiators and Defendant as well as words and sounds from room C-204b. Law enforcement authorities had provided a "throw phone" which was taken to room C-204b where Defendant was holding the students as hostages. The throw-phone was part of a self-contained telephone system with its own power supply. The end of the throw phone that was taken into C-204b consisted of a small box containing a telephone with 500-600 feet of telephone wire attached. At the other end of the wire was a briefcase which contained the phone management equipment that permitted two people to listen to

the conversation on the negotiators' side. (18 RT 4216:23-4218:13)

The throw phone had recording capabilities, not only for the conversations that took place over the phone system, but also for sounds occurring in the room where the phone was located. The throw phone was deployed into room C-204b around 4:00 to 4:15 pm on May 1, 1992 and began recording both the telephone conversations between the negotiators and Defendant, and the words and sounds in C-204b. (18 RT 4218:14-4220:11). The recording of the hostage negotiations and words and sounds in C-204b was preserved on seven audio cassette tapes that were introduced as Exhibits 82-88, (18 RT 4221:8-4222:21) and admitted into evidence without objection. (18 RT 4225:25-4226:4)

When Exhibits 82-88 were introduced and admitted no transcript of the tapes was provided to the Court, and no transcript of these tapes ever was produced by the prosecution.[32] Nevertheless, the

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[32] During record correction, several attempts were made to create a useable transcript of the audio tapes. A certified court reporter engaged by the Yuba County District Attorney in response to an order of the trial court first produced a transcript of the telephone conversations between the hostage negotiators and Defendant and/or the students he enlisted to speak for him over the throw phone. Since there was much more sound information on the tape than just the hostage negotiation discussions, the reporter was asked to redo the transcript with all audible information she could discern. Her description of the problems with this task appears at CT Supplemental–4 (v.5) 1326). Appellate counsel then attempted to determine jointly if this second transcription was accurate. Although they determined a number of inaccuracies, no agreement was reached on a certifying a transcript that could be included as a record of what had occurred at trial during the playing of the tapes. (CT Supplemental–6 (v.2) 271)

trial court requested and obtained a stipulation that the court reporter be excused from taking down intelligible words and statements that could be heard on the tapes as they were played in the courtroom. The reporter was present and reported what counsel, the trial judge, and the witness said during the playing of the tapes, including monitoring the timing of the comments, but did not take down what could be heard in the courtroom as being said on the tapes themselves. (18 RT 4227:18-4230:12)

Just prior to the start of playing the tapes, the prosecutor elicited from Officer Tracy that the portions of the tape reflecting recording of conversations over the phone with the negotiators would be clearer than the conversations recorded in the room when the phone was not in use. (Tracy, 18 RT 4239:3-10) At the start of the playing of the tapes, there was considerable difficulty getting the first tape to play so that it could be heard, although the nature of the problem is not evident from the record. (18 RT 4240:16-4243:25)

After about twenty minutes of playing the tape, with the tape player counter at "246," on side one of the first tape, the tape was stopped at the Court's request. The Court then commented on a "loud mechanical noise" that was on the tape. Officer Tracy explained that the noise was from the throw phone being moved across the floor. (18 RT 4244:5-4245:2) At "613" on the counter the tape again was stopped and the prosecutor asked Tracy whether he agreed that the sound quality of the tape being played had deteriorated. Tracy explained that the deterioration in the quality of the sound was due to the law enforcement personnel on May 1, 1992 using a warped audio tape to make the recordings. As the hostage negotiations progressed ,

the law enforcement personnel making the recordings realized they were using a damaged tape and changed to a better one. (18 RT 4245:6-4246:3)

During this testimony and interchange, the Court characterized what was being heard on the tape as "gobbledygook that is all but unintelligible," but then noted that "there are things that you can understand from time to time on the tape." (18 RT 4246:4-10)

At "619" on the tape counter the trial judge asked that the tape be stopped and summoned counsel to a discussion out of the presence of the jury. Apparently the Court was finding listening to the tape an irritating experience – the Court described it as "very grating to listen to it." (18 RT 4247:14-4249:28) Previously, Officer Tracy had testified that he had made copies of the tapes and that the copies had less background noise and contained more intelligible statements. (18 RT 4245:22-4246:22) The Court asked if the defense was willing to have the copies played, but the defense said it would require the prosecution to lay a foundation on the accuracy of the copies before they were played. The Court then expressed its concern that the copies were easier to listen to because they contained "less information," and the Court didn't want the jury to hear a copy of the tapes that had "less information" without a showing that the "elimination of sound enhances accuracy." (18 RT 4249:1-4250:26) The Court then ordered that the original tapes would continue to be played. Extensive discussion and confusion followed as to why there was no sound on Tape 2 (Exhibit 83) or on the back side of Tape 3 (Exhibit 84), but the tapes were played for the jury, presumably because they contained intelligible statements that the prosecution

must have believed bolstered its case. (18 RT 4254:2-4268:14))

When the playing of the tapes resumed on the morning of July 8, 1993, the Court again excused the Court reporter from taking down what could be heard on the tapes as they were played, although she was instructed to take down what was being said by the Court, counsel, and witness in the courtroom. (18 RT 4275:2-6)

In the afternoon session of July 8, 1993, after all the tapes had been played, Officer Tracy was examined further. The examination revealed:

(a) That there was a variance as to what could be understood on the tapes depending upon the equipment used and the acoustics of the room in which the tapes were played back. (18 RT 4294:27-4300:25);

(b) That when Exhibits 82-88 were played for the jury conversations between law enforcement and "George," who was in fact, Defendant, were audible; (18 RT 4298:7-12)

(c) That the voice of "George" and the way he was speaking and using words changed over time;[33] (18 RT 4298:8-4302:5) and

(d) That the topic of whether Defendant had killed anyone came up during the hostage negotiations, although Tracy could not

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[33] A major factual contention at trial was that Defendant was having a psychotic episode when he entered the school and shot people on the first floor, but that when he reached the second floor the psychosis was remitting and Defendant became more relaxed and coherent over time, leading to his voluntary surrender. (21 RT 5114:6-24) The prosecution disputed that Defendant was psychotic during the incident and urged the jurors to consider his "demeanor" in Room C-204 as conveyed on Exhibits 82-88 as evidence he had the required *mens rea* earlier when he had shot the victims on the first floor. (21 RT 5092:1-7; 22 RT 5158:15-24)

remember specifically the context in which the subject had arisen. (18 RT 4300:26-4302:19)

Apart from what Officer Tracy stated, the appellate record is devoid of any indications as to what the jury might have heard Defendant say on the six hours of audio tapes that were played or what admissions or confessions jurors reasonably could have heard Defendant make.

Thus, there is absolutely no record of what the jury can be deemed to have heard, or believed it heard, during the playing of the audio tapes. Nevertheless, the jury understood that the tapes contained statements being made by Defendant during the course of the incident, both to negotiators and in classroom C-204b generally, including statements about whether Defendant knew or believed he had killed anyone. Obviously the prosecution believed the tapes contained evidence significant to, and supportive of their case for deliberate, premeditated first degree murder, or they would not have forced the jury to endure listening to six hours of "grating" noise. It further must be presumed that a rational and reasonable trier of fact would put significant weight on both the content of statements and the vocal demeanor of Defendant while the incident was taking place.

Together with what they may have interpreted Defendant to have said in his interrogation the following day, what the jurors believed they heard Defendant say during the incident and the manner of his speaking would likely have been decisive in their evaluation of the expert mental health testimony and arguments of counsel relating to the principal issues in the trial:

Whether, due to mental illness, Defendant lacked the mental

state necessary to the charges of first degree murder, attempted murder, etc.;

Whether Defendant's mental condition at the time of the incident met the legal definition of insanity; and

The extent to which Defendant was suffering from mental illness at the time of the incident and the weight such mental illness, if it existed, should be given in mitigation of sentence.

Appellate counsel and this Court must resort to speculation to determine the content of the roughly 6 hours of evidence presented at the trial most crucial to each of these issues. In essence, appellate counsel is left to argue this appeal, and this Court is left to decide it, in an evidentiary vacuum.

C. There is No Practical Method for Settling the Record as to What Evidence Was Actually Presented to the Jury Because, in the Absence of a Court Reporter Taking Down What was Intelligible as the Tapes Were Played for the Jury, Determining What Intelligible Words the Jury Heard Would be Nothing More than Speculation.

As will be discussed below, many decisions of this Court addressing inadequate records and violations of Penal Code 190.9 with respect to having all proceedings transcribed have determined that the absence of a record was not prejudicial because the record could be reconstructed or settled. With respect to the absence from the record here of what was intelligible to the jury when it was played Exhibits 57a and 57b and Exhibits 82-88, no settlement or reconstruction is possible. The impossibility of settling the record is demonstrated by a comparison of Exhibit 89, the transcript of Exhibits 57a and 57b prepared by the prosecution during the trial, (CT Supplemental–5 (v.1 of 1) 1-102) and the stipulated revised Exhibit

89 (CT Supplemental–5 (v.1 of 1) 103-204) , the transcript of 57a and 57b that the parties have stipulated is *more* accurate than Exhibit 89 but not necessarily definitive of what is actually on Exhibits 57a and 57b. Comparing the two transcripts shows what *different people* have heard listening to 57a and 57b on *different equipment in different acoustical environments.*

Although the tapes could be listened to now, and indeed could probably be electronically enhanced to make out even more of what was said and make it out more accurately than the stipulated revised Exhibit 89 transcript appearing at CT Supplemental–5 (v.1 of 1) 103-204, a more accurate transcription of the sounds on 57a and 57b will not provide either counsel or this Court with a better understanding of what was audible and intelligible to the jury during trial. Indeed, it will only produce a *less accurate* version of the evidence actually presented to the jury.[34]

In the absence from the record of a transcript of the tapes determined accurate and presented to the jurors as definitive, along with the absence of any reporter's transcript of what could be understood by the reporter when the tape was played for the jurors, there is no useable record from which this appeal can be adjudicated. There is now, over 14 years later, no conceivable way of reproducing the playing of the tapes to determine what reasonably the jurors would

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[34] This paradox was illustrated by the trial judge's response when informed that copies of Exhibits 82-88 were more understandable because they reduced the distracting noise on the tape, that he didn't believe it was proper to play a tape with "less information" without laying a foundation that the elimination of information made the tape a more accurate recording of what had occurred in room C-204.

have interpreted the words on the tapes to be.

Defendant cites to the differences between Exhibit 89 (CT Supplemental–5 (v.1 of 1) 1-102)and the stipulated revised Exhibit 89 (CT Supplemental–5 (v.1 of 1) 103-204), to demonstrate that the "evidence," that is, the sound information audible when the tapes were played, has been subject to vastly differing transcriptions of the words being uttered. One of the benefits of having court reporters present to take stenographic notes of court proceedings rather than merely tape recording the sounds in the courtroom is precisely to provide a "certified" transcript of the *words* said during the proceedings.[35]

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[35] The tapes were introduced into the evidentiary record, but they are not the actual evidence that the jury heard or that this Court must consider in conducting its review. The electronic information encoded on the tapes cannot be accessed by human beings without the intermediation of video tape player, electronic amplification circuitry, audio speakers, and video monitor. Depending upon its characteristics, settings, etc., the intermediating technology will produce varying sounds and images that can result in different viewers/listeners reasonably hearing different linguistic content.

The California judicial system relies on certified court reporters to make "verbatim," (i.e., word-for-word) records of oral court proceedings. (Business & Professions Code § 8017) The substitution of an electronic recording for a human certified court reporter making a "verbatim" record of the oral proceedings is specifically prohibited in felony criminal proceedings. Govt. Code § 69957.

Normally the Courts and litigants rely on the certified court reporter to settle the linguistic content of the sounds uttered by witnesses, counsel, and judges presented in the Courtroom, i.e., interpreting the sounds uttered by witnesses, counsel, and the judge and making a word-for-word record of what they hear. Alternatively the linguistic content may be settled by providing a reliable transcript under CRC 243.9.

The current record on appeal here consists of electronic tapes subject to conflicting interpretations as to the linguistic content of the

Stenographic reporters spend years training to be able to listen to the sound of people speaking and accurately report "verbatim" the words spoken. Reporters and judges routinely request that counsel or witnesses repeat their statements and/or speak louder if and when the statements made are not intelligible to the reporter or the judge believes the jurors may not be able to make out what is being said. Appellate counsel and courts then have, for purposes of appeal, a record that can be deemed to reliably set forth the words witnesses uttered that can presumed to have been heard by the jury.

Here, because the reporter was excused from taking down what was intelligible on the tapes as they were being played for the jury, neither appellate counsel nor this Court have any record from which to argue or review the propriety of the judgment in light of the evidence presented. There is no way to know whether jurors heard the two hours of interrogation tapes as they were heard by the prosecution transcriber, as they were heard by appellate counsel, or in some other manner. Similarly, as to the six hours of time-of-incident audio recordings played to the jury (Exhibits 82-88), much of which is of very poor sound quality, there is no way to know what would have been audible and intelligible to the jury, and hence no way to reconstruct a record of what statements the jury can be deemed to have heard.

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sounds occurring when they are played, and there is no reliable settlement of that linguistic content by a human being. A reviewable record is simply unavailable.

D. This Appeal Cannot Be Prosecuted Without A Record Of What the Jury Actually Heard, Or Can Reasonably Be Deemed to Have Heard, Defendant Say in the Recorded Statements During the Incident and in His Interrogation by Law Enforcement the Day After the Incident.

1. It Violates Both California Statutory and Case Law, as well as Established United States Supreme Court Precedent on Due Process and Sixth Amendment Rights in Criminal Appellate Proceedings, to Review and Affirm a Capital Trial and Sentence on an Inadequate Appellate Record.

Penal Code Section 1239(b) "imposes a duty upon this Court 'to make an examination of the *complete* record of the proceedings had in the trial court, to the end that it be ascertained whether defendant was given a fair trial. . . .' (*People v. Perry* (1939) 14 Cal.2d 387, 392." *People v. Stanworth* (1969) 71 Cal. 2d 820, 833 (emphasis supplied).) The duty imposed by Section 1239(b) is required by the Legislature not only to satisfy rights belonging to the defendant upon whom a capital sentence has been imposed, but also a right in the "public generally." (*People v. Stanworth, supra.* at 834, citing *People v. Werwee* (1952) 112 Cal.App.2d 494, 500.)

Penal Code Section 190.9(a) as it read at the time of trial, required in pertinent part that:

> In any case in which a death sentence may be imposed, all proceedings conducted in the justice, municipal, and superior courts, including proceedings in chambers, shall be conducted on the record with a court reporter present. The court reporter shall prepare and certify a daily transcript these proceedings.

Under California Rule of Court 203.5 (now 2.1040) a party offering an electronic sound or sound and video recording into

evidence is required to tender a transcript of the electronic recording to the court and opposing counsel. The transcript must be included in the record on appeal. The record on appeal here does contain a transcript of Exhibits 57a and 57b, but that transcript (Exhibit 89) was not admitted as evidence and the parties to this automatic appeal have stipulated that it is inaccurate. In addition, there has been a total failure to comply with the Rule with respect to Exhibits 82-88, for which no transcript was prepared by the prosecution and no transcript was approved or stipulated to by the parties.

Thus, there is approximately eight hours of evidence presented to the jury for which there is no record from which this Court can perform its statutory duty to determine whether or not Defendant's sentence of death was entered following a fair trial.

"An incomplete record is a violation of section 190.9, which requires that all proceedings in a capital case be conducted on the record with a reporter present and transcriptions prepared. [Citation.]" (*People v. Wilson,* (2005) 36 Cal. 4th 309, 325, citing *People v. Frye* (1998) 18 Cal.4th 894, 941.) The missing record is not the result of inadvertence or unforeseen events. (cf. *People v. Chessman* (1950) 35 Cal. 2d 455.) The trial court and prosecutor both simply ignored the requirements of CRC 203.5 and Penal Code 190.9. The trial court made no attempt to ascertain, prior to the playing of the tapes, whether they were sufficiently audible and comprehensible to satisfy due process and Eighth Amendment reliability standards for their admission. Even after it became apparent to the Court that large portions of Exhibits 82-88 were unintelligible, the trial court neither stopped the playing of the tapes nor required the prosecution to

produce a trustworthy transcript.[36]

In addition to the right of the public generally, both this Court and the United States Supreme Court have repeatedly held that a defendant in a criminal case is entitled to a record adequate to permit "meaningful appellate review." (*People v. Seaton* (2001) 26 Ca1.4th 598, 699; *People v. Scott* (1997) 15 Cal.4th 1188, 1203.) "Meaningful appellate review" is precluded wherever record deficiencies prejudice a defendant's ability to prosecute his appeal. (*People v. Seaton, supra*, 26 Ca1.4th 598, 699; *People v. Alvarez* (1996) 14 Cal .4th 155, 196, fn. 8.) Such an inadequate record violates the Sixth,[37] Eighth and

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[36] Moreover, trial courts have a responsibility to ensure that the admission of electronic media evidence does not violate basic due process rights by determining that the evidence is reliable and understandable. See, *e.g., United States v. Robinson* (6th Cir. 1983) 707 F.2d 872, 876: trial court abuses its discretion if it admits tape recorded evidence that is not audible and sufficiently comprehensible for the jury to consider its contents." See also, *United States v. Jones* (10th Cir. 1976) 540 F.2nd 465, 470: ("recordings will be deemed inadmissible if the unintelligible portions are so substantial as to render the recording as a whole untrustworthy").

In utilizing transcripts as an aid for the jury, the trial court has a responsibility either to have trial counsel stipulate that the transcript is accurate or itself make a determination of accuracy by comparing the transcript to the tape. (*United States v. Slade* (D.C. Cir. 1980) 627 F.2d 293, 302. *Martinez v. State* (Fla. Sup. Ct. 2000) 761 So.2d 1074, 1086-1087.)

[37] Defendant has under the Sixth and Fourteenth Amendments to the United States Constitution a right to effective counsel on his automatic appeal. (*Douglas v. California* (1963) 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed2d 811; *People v. Kelly* (2006) 40 Cal.4th 106, 117.) Defendant is denied effective appellate representation if the trial record available to counsel cannot determine what the evidence was that was presented at trial on key issues that were in dispute.

Fourteenth Amendments to the federal Constitution, and Article 1, section 17 of the state Constitution. (*People v. Howard* (1992) 1 Cal. 4th 1132, 1166.) A complete and accurate record is also an essential component of appellate review, due process, and effective assistance of appellate counsel. (*People v. Barton* (1978) 21 Cal.3rd 513; see also *People of the Territory of Guam y. Marquez* (9th Cir. 1992) 963 F.2nd 1311, 1312-1315 [recognizing defendant's due process right to record sufficient for appeal].) Anything short of a complete transcript is incompatible with effective appellate advocacy. (*Hardy v. United States* (1964) 375 U.S. 277, 282.)

The United States Supreme Court correctly emphasizes the special need for accurate and complete records in death penalty cases. In *Parker v. Dugger* (1991) 498 U.S. 308, the court recognized "the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." (Id. at p. 321.)

In *Dobbs v. Zant* (1993) 506 U.S. 357, the Supreme Court held that it was error to refuse to consider the newly-discovered transcript of defense counsel's closing argument proffered in a habeas corpus proceeding to support the defendant's claim of ineffective assistance of counsel, stating, "We have emphasized before the importance of reviewing capital sentences on a complete record ." (Id. at p. 358, citing *Gardner v. Florida* (1977) 430 U.S. 349, 361 and *Gregg v. Georgia* (1976) 428 U.S. 153, 167, 198.)

Similarly, this Court has affirmed in the context of capital cases the "critical role of a proper and complete record in facilitating meaningful appellate review." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 63; see also *People v. Horton* (1995) 11 Cal.4th 1068, 1134:

(because "'the penalty of death is qualitatively different from a sentence of imprisonment, however long . . . there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case'"). More recently, in *People v. Cash* (2002) 28 Cal.4th 703, this Court recognized the critical nature of record review on appeal in determining the effect of trial errors. In *Cash*, this Court held it was necessary to reverse a death verdict per se because the trial court's refusal to ask relevant death-qualifying questions during *voir dire* made "it impossible . . . to determine from the record" (Id at 723.) whether the individuals who sat as jurors held disqualifying views. (See also, *Conover v. State* (Okla. Ct of Crim. App. 1999) 990 P.2d 291: lack of record of death qualification *voir dire* required remand for new sentencing hearing.)

Despite the statutory requirement set forth in Penal Code § 190.9 and the clearly enunciated constitutional necessity for a complete record for capital appeals, this Court's jurisprudence under Penal Code §190.9 has usually held that while it is error for the trial court to fail to have all proceedings recorded, the burden is on the appellant to demonstrate that they complained of deficiency is prejudicial:

> "'A criminal defendant is ... entitled to a record on appeal that is adequate to permit meaningful review. ... The record on appeal is inadequate, however, only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal. [Citation.] It is the defendant's burden to show prejudice of this sort.' "[Citation]
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> *People v. Huggins* (2006) 38 Cal. 4th 175, 204.

This Court's jurisprudence placing the burden on the appellant to show prejudice can create for the appellant a logical conundrum – a "Catch-22" – by being forced to demonstrate the prejudice arising from what is not present. This conundrum may not be significant when the extent of the unrecorded proceeding is small, but becomes more profound when the lapses in the record are more substantial. At one extreme, a record missing the answer of a witness or a juror to a single question may easily be shown to be prejudicial since the existing record showing the question asked and what had preceded and followed the answer might well make the prejudice clear. At the other extreme, an appellate record that contained only the direct examination by the prosecution of witnesses during its case-in-chief but no defense cross-examination or evidence presented by the defense, would presumably leave the appellant unable to overcome the presumption that the verdict was correct and that there was substantial evidence to support it, since the appellant would be unable to show that any questions had been asked by the defense that might have undermined the presumption that the verdict was legally sufficient.

In short, it is easier for an appellant to meet the burden to show that an inadequate record is prejudicial when the inadequacies represent "known unknowns" than when they constitute "unknown unknowns."

Defendant submits that there is a point where, from an objective basis, the quantity and/or significance of the proceedings and/or evidence missing from the record is such that a presumption must arise that the record is insufficient to satisfy the Defendant's Due

Process and Sixth, and Eighth Amendment rights to meaningful and reliable appellate review, relieving the Defendant of the burden of showing specific prejudice.

Thus, in *People v. Pinholster* (1992) 1 Cal. 4th 865, 919-923 the Court indicated that an inadequate transcript includes situations where "a large or crucial portion of the record is missing," or "in which a crucial item of evidence is not available on appeal." As the Court stated in *People v. Holloway* (1990) 50 Cal. 3d 1098, 1116: "The test is whether in light of all the circumstances it appears that the lost portion is 'substantial' in that it affects the ability of the reviewing court to conduct a meaningful review and the ability of the defendant to properly perfect his appeal." At some point the "substantiality" of the missing record must relieve appellant of the burden of showing specifically how the missing record was prejudicial. Defendant submits this is such a case.

Defendant's review of the decisions of this Court where a violation of Penal Code §190.9 has been raised reveals no case where the record was missing eight hours of evidence presented to the jury, nor where the missing record was of evidence that was as central to the primary issues on appeal as exists here. In its prior death-penalty opinions raising violations of Penal Code § 190.9, this Court has addressed missing records of bench conferences, conferences on instructions, pre-trial proceedings, and, where evidence was missing from the record, it was evidence of a tangential or secondary nature to the facts actually at issue in the trial. See, for example:

- *People v. Rogers* (2006) 39 Cal. 4th 826, 856-861: in-chambers conferences on juror hardship requests.

- *People v. Cook* (2006) 39 Cal. 4th 566, 586: pre-trial hearing on a discovery motion, hearing continuing preliminary hearing, hearing issuing a bench warrant for a witness.
- *People v. Huggins, supra*, 38 Cal. 4th at 204-205: failure to reconstruct jury instruction conference not prejudicial where instructions actually given were reported in the record and no showing that loss of sealed reports with unknown contents prejudiced ability to prosecute appeal.
- *People v. Hinton* (2006) 37 Cal. 4th 839, 918-920: unrecorded telephone consultation by court with counsel on responding to questions from jury; photographs of murder scene (replacements found); no showing of prejudice as to missing juror handbook.
- *People v. Heard* (2006) 31 Cal. 4th 946, 969-971: missing juror questionnaires not prejudicial to appellate review of *Wheeler/Batson* challenge to death qualification.
- *People v. Wilson* (2005) 36 Cal. 4th 309, 325-326: missing transcripts of instruction conferences did not preclude adequate review of claims of instructional error.
- *People v. Hernandez* (2003) 30 Cal. 4th 835, 877-878: missing bench and instruction conferences.
- *People v. Seaton* (2001) 26 Cal. 4th 598, 698-702, which involved many lost portions of record in court below, including, most significantly:
    - Missing endorsed written jury instructions not prejudicial where record contained reporter's

transcript of oral instructions given;

- Missing transcripts of instruction conferences not prejudicial because contents were summarized at length by trial court on record;
- Missing lists of jurors and transcript of hearing requesting modification of juror questionnaire concerning race of jurors not prejudicial because defendant waived his right to challenge the randomness of the jury selection process and failed to make any objections to the racial composition of the seated jury;38
- Loss of two trial exhibits related to blood sample relevant to identification of defendant as killer not prejudicial because defendant admitted killing.

- *People v Frye* (1998) 18 Cal.4th 894, 940-942: failure to report hearing where defendant claimed he had been coerced into waiving right to speedy trial not necessary to resolving issue;
- People v. Scott (1997) 15 Cal. 4th 1188, 1204: defendant could not establish existence of any unrecorded judicial proceedings and was fully able to litigate his issue on appeal.
- *People v. Samayoa* (1997) 15 Cal. 4th 795, 819-821: Defendant unable to establish that any "judicial proceedings" were not reported and unable to demonstrate any claim for which record is inadequate.
- *People v. Holt* (1997) 15 Cal. 4th 619, 708: Of 28

unreported proceedings, record settlement established an adequate record for 19 and no showing that other 9 unreported proceedings were consequential to any issue on appeal.

- *People v. Arias* (1996) 13 Cal. 4th 92, 158-159: only one unreported conference not resolved through settlement; defendant failed to show how unreported conference hampered his ability to raise any appellate issue.
- *People v. Padilla* (1995) 11 Cal. 4th 891, 966-967: Despite unreported jury instruction conferences, record was adequate to argue each of the points purportedly addressed in unreported proceedings.
- *People v. Freeman* (1994) 8 Cal. 4th 450, 509-511: unreported bench and in-chamber conferences reconstructed in record settlement process; defendant unable to show prejudice in his ability to argue appeal.
- *People v. Cummings* (1993) 4 Cal. 4th 1233, 1333: defendant failed to demonstrate prejudice from failure to report bench and in-chambers conferences.
- *People v. Hawthorne* (1992) 4 Cal. 4th 43, 66-68: settlement of record as to bailiff's communications with judge and to jury regarding whether they should continue deliberating deemed satisfactory to resolve issue on appeal.
- *People v. Fauber* (1992) 2 Cal. 4th 792, 836-837: Failure to transcribe reporter's reading of transcript to jury in jury room not prejudicial to prosecution of appeal.

- *People v. Roberts* (1992) 2 Cal. 4th 271, 325-326: defendant failed to show that unreported jury inquiry to court during guilt deliberations deprived him of right to appeal since underlying error, if any, was harmless; unreported jury inquiries during penalty phase deliberations "not so consequential" that failure to preserve a record constituted prejudicial error on appeal.
- *People v. Howard* (1992) 1 Cal. 4th 1132, 1164-1166: in case pre-dating § 190.9 fact that three bench conferences and one in-chambers conference were unreported was "not prejudicial because the record is adequate to permit defendant to argue each of the points purportedly addressed in the unreported conferences."

Only two of these cases involved evidence presented to the jury that was missing from the record on appeal: *People v. Hinton*, *supra.* and *People v. Seaton, supra.* In *Hinton* the missing exhibit was reconstructed by use of a copy. In *Seaton* the missing exhibits were not relevant to the issues raised on appeal.

In the present instance, as will be discussed below, the portions of the record that are missing involve evidence presented to the jury – almost eight hours in all – that undoubtedly was important to the jury's verdicts against Defendant in all three phases of the trial. That evidence is clearly relevant to a number of Defendant's claims on appeal, as to the merits of claims (e.g., Arguments IV [insufficiency of evidence to support attempted murder verdicts], and VI [insufficiency of evidence to support verdicts of deliberate, premeditated murder], and/or as to appraisal of the prejudicial impact

of various trial errors (e.g., Arguments VII and VIII [failures to give necessary cautionary instructions], IX [trial court's misconduct in disparaging defense mental health experts], X [improper instructions on sanity issue], and XI [prosecutor's misconduct in urging defendant's alleged lack of remorse as aggravating factor]).

E. Given the Extent of the Evidence for Which No Record Exists, Coupled with the Centrality of that Evidence to the Case as Presented at Trial, the Presumption Must Be that the Inadequate Record is Prejudicial to Defendant on This Appeal.

Long prior to the enactment of Penal Code § 190.9 this Court addressed what should be the response to claims of an incomplete or inadequate record in a criminal appeal. In *People v. Chessman*, (1950) 35 Cal. 2d 455, the appellant, appealing from a sentence of death, sought reversal based on the inadequacy of the appellate record. The court reporter who had reported the proceedings in the trial court had died before transcribing a considerable portion of the evidentiary portion of the trial. Another reporter completed the transcription using the deceased reporter's notes with assistance from handwritten notes made by the trial judge. Since the reporter who had taken the shorthand notes of the trial was no longer alive, there was no one to certify the record in strict accordance with the rules on appeal. (*People v. Chessman, supra,* 35 Cal.2d at 458-460.) Chessman urged summary reversal because the "the reporter's transcript filed with this court is not, and cannot be made, complete, accurate, and adequate for a fair disposition of his appeal." (*Id.* at 460-461.)

This Court, in a divided decision, rejected Chessman's contention of any automatic right to reversal based upon an

incomplete record or technical failure to certify the record's accuracy. Instead, the Court found the recreated record sufficiently accurate given the nature of the claims being made by Chessman on appeal – namely that his defense rested on claims that he had not committed the acts charged and was a victim of mistaken identity. The Court noted that it could decide the sufficiency of the evidence to support the verdicts because Chessman's defense was that he had not committed the crimes, and *not a defense based upon state of mind*:

> Appraisal of the sufficiency of the evidence, insofar as any contention of the defendant is concerned, presents no problems of gradations of possible states of mind of defendant, but only the questions whether certain behavior (which the People's witnesses testified and the jury believed was behavior of defendant) constituted kidnapping for the purpose of robbery with bodily harm, first degree robbery, attempts at robbery and rape, violation of section 288a of the Penal Code, and grand theft.
>
> *People v. Chessman*, *supra.* 35 Cal.2d at 462-463.

The *Chessman* decision has been followed by this Court on a number of occasions in the post-1977 death penalty era. (See, e.g., *People v. Howard, supra,* 1 Cal.4th at 1164-1165; *People v. Rogers, supra,* 2 Cal. 4th at 325-326.) In *People v. Pinholster* (1992) 1 Cal. 4th 865, 919-923, the Court indicated that an inadequate transcript includes situations where "a large or crucial portion of the record is missing," or "in which a crucial item of evidence is not available on appeal." As the Court stated in *People v. Holloway*, (1990) 50 Cal. 3d 1098, 1116: "The test is whether in light of all the circumstances it

appears that the lost portion is substantial in that it affects the ability of the reviewing court to conduct a meaningful review and the ability of the defendant to properly perfect his appeal."

This case presents the situations hypothesized in *Chessman, Pinholster, and Holloway*: missing is a large, crucial portion of the record, the absence of which negatively affects the ability of the reviewing court to conduct any meaningful review and prevents the defendant from properly perfecting his appeal.

In contrast to *Chessman*, defendant here did not contest that he committed the acts that caused the deaths of four individuals, or for which he was found guilty of attempted first degree murder on ten others. He admitted he was the perpetrator, but based his entire defense on a lesser "gradation of state of mind" than is required for conviction. Thus, defense counsel argued to the jury in the guilt phase:

> In closing, ladies and gentlemen, there's absolutely no quarrel with the fact that something terrible happened May first, 1992, at Lindhurst High School. I mean there is very little dispute that the person who committed whatever acts were committed was Mr. Houston. The question is why. And when we asked you in selecting you as jurors whether or not -- specifically we referred to a different phase of the trial -- but when we asked you if you all could take mental defenses seriously and not as some cop out, you agreed. (22 RT 5140:20-5141:2)
>
> and
>
> But if twelve of you will go in there, meaningfully deliberate, because I think the only result of a meaningful deliberation is going to be that there is credence to both Dr.

> Groesbeck, Dr. Rubenstein's opinion that Mr. Houston suffers from a mental disorder, that mental disorder negates whatever specific intent is required in this case for the four first degree murders he's a charged with -- he's charged with, as well as the ten attempted crimes he's charged with. And ladies and gentlemen, upon a full and complete deliberation, you cannot bring back first degree murder based on the facts in this case. You can bring back second degree murder under the two theories -- I suggest a wanton and reckless theory -- you can bring back voluntary manslaughter.
>
> (22 RT 5142:12-27)

The extent of the missing record is "large," approximately 8 hours or almost a day and one half of testimony. And, the missing 8 hours of record is of "crucial" evidence directly relevant to the sole defense of the case in each of the three phases of trial: guilt, sanity, and penalty.[39]

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[39] The relevance of Defendant's statement to the police and statements during the hostage situation are obvious for the issues raised in the sanity phase. Their relevance to penalty is, among other things, that defense counsel expressly made an argument for mitigation based upon lingering doubt as to Defendant's mental state for guilt. (24 RT 5974:28-5975:6, 6005:11-17) The jury was then instructed on lingering doubt as a mitigating factor. (24 RT 6008:26-6009:1) Only two witnesses beside Defendant himself were called by the defense in the penalty phase: Defendant's mother who pleaded for his life and suggested Defendant might do something artistic in prison if given a life sentence, and his supervisor at Hewlett Packard who said he was a good worker for the year he worked there. In his argument at penalty, the prosecutor repeatedly addressed Defendant's state of mind and psychological defenses. (24 RT 5957:27-4958:13, 5970:6-16, 5972:7-5973:27) The evidence presented in the guilt and sanity phases that Defendant was seriously mentally ill when he went to the high school and shot the victims was the most meaningful mitigation evidence the jury had to consider.

The missing record is not merely evidence, but the evidence that it must be presumed would be afforded the *greatest* weight by the jury, since it was, at least for the video tape of the May 2, 1992 interrogation, in the nature of a confession, given that on the tape Defendant admits shooting some victims although he denies having the state of mind for first degree murder. The audio tapes, however, are equally material and of great potential evidentiary weight, since they reveal Defendant during the actual incident, within two hours of the homicides, and while he is holding students hostage. The hostage negotiations included Defendant's discussions with the police over the "contract" that purportedly was to limit the extent and nature of his sentence. Thus, the audio tapes themselves involve a form of confession, since Defendant there too was indicating a degree of guilt for some actions. In addition, there was testimony that the audio tapes contain a discussion with Defendant as to whether anyone had been killed, although the record is missing the content of that discussion. The significance of such evidence for the jury cannot be overestimated:

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." Bruton v. United States, 391 U.S., at 139-140 (White, J., dissenting).

(Arizona v. Fulminante (1991) 499 U.S. 279, 296)

As noted, the tapes do not constitute a full confession, but only a partial confession, for they contain Defendants' ongoing assertions that he did not come to the school intending to kill, that he did not shoot intending to kill, that he did not know he had killed anyone, and that his memory of the events on the first floor was extremely spotty at best. Thus this evidence was likely very important to the jury by providing near-contemporary evidence of Defendant's time-of shooting mental state - both direct (what he asserted about his intent and understanding of the events) and circumstantial (how he was functioning in C-204b what he was saying to the students and negotiators, how he interacted the following day with his interrogators). The jurors, while not trained as mental health professionals, were likely to rely upon this evidence in evaluating the expert witness testimony and in reaching conclusions on the *mens rea*, sanity, and sentencing issues presented to them.

The portion of the record missing here is analogous to the types of missing evidence noted in *Pinholster* to be substantial enough to warrant reversal when missing from the appellate record. In *People v. Apalatequi* (1978) 82 Cal. App. 3d 970, 973-974, cited in *Pinholster, supra.,* the court reversed a judgment of conviction because the appellate record was missing the transcript of the prosecution's closing argument and could not properly evaluate the appellant's claim of prosecutorial misconduct during that argument. The court stated: "this [passing on the questions sought to be raised on appeal] we are unable to do in respect to the alleged prosecutorial misconduct in the arguments without being able to make an analysis of the entire

argument. A transcript is vital to a full consideration of the particular contentions of this defendant on appeal. There is simply no effective substitute for a reporter's transcript in this case." *People v. Apalatequi, supra,* at 973.

Similarly, here, there is no way for this Court to reliably pass on the sufficiency of evidence and trial error contentions Defendant raises without a record of what the jury can be deemed to have heard during the playing of eight hours of tape recorded statements crucial to the principal issues at trial.

In *Van White v. State* (Okla. Ct. of Crim. App. 1988) 1988 OK CR 47, 752 P.2d 814, at 820, the Oklahoma court vacated the conviction of first degree murder and death sentence and remanded for a new trial because the appellate record lacked a transcription of the *voir dire* of the jurors, noting "Most importantly, in the absence of a complete record, we cannot adequately conduct our mandatory sentence review to determine "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor . . ." The Oklahoma court further noted: "When the State seeks the ultimate penalty of death, it is appropriate that the State bear the responsibility for ensuring that a proper record is provided to enable this Court to conduct its mandatory sentence review under 21 O.S. Supp. 1985, § 701.13." *Ibid.*

Based upon an objective standard as to the quantity of the missing record, the inability to reconstruct what evidence was presented, and the centrality of that evidence to three verdicts issued by the jury in the trial court, the incompleteness of the record here must be presumed to be prejudicial. No effective appeal can be

developed and argued, and the Court's constitutional and statutory duty to review the convictions and judgment of death cannot be performed, given the gaps in the record before this Court. The guilt convictions and judgment of death must be reversed.

F. Appellate Counsel Cannot Effectively Argue Defendant's Case on Appeal in the Absence of a Record as to What the Jury Can Be Deemed to Have Heard Defendant Say During Eight Hours of Playing Recorded Evidence.

As previously noted, the entire trial, and each phase of the trial (guilt, sanity, and penalty), was a trial on the nature of Defendant's mental state before and during the incident. In the guilt phase, the prosecutor argued that the evidence, including what the jury heard on the tapes, required them to bring back a verdict of four first degree murders based on premeditation and deliberation. Defense counsel argued that the evidence did not support anything more than second degree murder and asked the jury to return four verdicts of murder in the second degree. Both counsel referred to the evidence of what the jury had heard during the playing of the video tapes (Exhibits 57a and 57b) and the audio tapes (Exhibits 82-88).

Charles O'Rourke, the prosecutor, told the jury, in his opening argument in the guilt phase, to "rely on your notes, your memories," in reaching a verdict. (21 RT 5082:15-18) He went on to tell the jury to listen to the tapes to decide whether "Houston knew what he was doing the whole time he was in C Building." (21 RT 5092:1-7)

In the guilt argument defense counsel asked the jurors repeatedly to rely on their memories of what they heard. (21 RT 5097:13) He then urged the jurors to review the interrogation video tapes and the hostage tapes (Exhibits 82-88) because they would find

no admission or confession there as to the essential elements of first degree murder:

> If there's a confession, if there's an admission, then ask yourself as to what. Because nowhere in there is there a confession as to deliberation, premeditation, planning, or intent to kill anyone. So if they're there, what are they there for?
>
> 22 RT 5136:24-5137:8

In his rebuttal, the prosecutor repeatedly asked the jury to consider the aural evidence of the videotapes and audio tapes for specific issues:

He asked the jury to review Exhibits 57a and 57b (the videotapes) and Exhibits 82-88 (the audiotapes) to decide if Dr. Rubinstein's assessment of Defendant's mental awareness and mental state during the incident was accurate. (22 RT 5146:3-19)

He urged the jury to consider the evidence that Defendant had put gasoline or lighter fluid around the school. (22 RT 5149:15-19; 5162:4-8)

He asked the jury to remember Defendant's discussion on Exhibits 57a and 57b about sawing off the butt of the .22 rifle. (22 RT 5153:7-19)

He repeated his request that the jury consider Defendant's "demeanor" as shown on exhibits 82-88 in evaluating his mental state. (22 RT 5158:18-24)

He told the jury that the videotaped interrogation (Exhibits 57a and 57b) "Makes clear that he knew what was going on around him," when he saw Mrs. Morgan in the parking lot and then went into the

high school. (22 RT 5158:25-5159:6)

He told the jury that Defendant's statements, including those on exhibits 57a and 57b that he didn't intend to kill anyone were the type of statements a child makes when caught doing something wrong: "Defense has made a lot about the fact that Mr. Houston claimed that he didn't intend to kill anyone. Nice afterthought. 'I shot them in places that could kill them, but I didn't mean for anybody to die.' Sounds like something one of one of our kids would say when they go and do something deliberately and get caught. 'Well, I didn't mean to do that, dad.' 'I didn't mean to do that, mom.' The fact of the matter is he did." (22 RT 5159:24-5160:4)

He told the jury that premeditation and deliberation was shown by what the prosecutor contended were Defendant's own statements on exhibits 57a and 57b that "he went to the school sometime before this incident took place to, for lack of a better word I'll use 'case' the place. He drew plans of the buildings. Walked into the school a couple of weeks ago, skirted the whole area, drew rough plans of some of the classes." (22 RT 5161:7-14)

Among the instructions given to the jury in the guilt phase was the following:

> If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he's now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient, by itself, to prove guilt, and its weight and significance, if any, are matters for your determination.
>
> 22 RT 5184:20-27

As will be argued *infra*, the defense made a motion at the conclusion of the prosecution's case in chief under Penal Code § 1118.1 that the evidence was insufficient to support the charges being brought. In this appeal Defendant argues that the evidence presented by the prosecution was insufficient as a matter of law to support either the four convictions on first degree murder, or the ten convictions on attempted first degree murder. The evidence on which the Section 1118.1 motion was made offered no comprehensible rational or psychological explanation for what had happened on the first floor of Building C. The conflicting and ambiguous testimony of the various students as to what they remembered Defendant saying in room C-204b offered the jury little basis to determine whether Defendant had deliberated and premeditated the killings that had occurred or whether they were merely collateral damage from the incompetent execution of an irrational scheme to take Robert Brens hostage in order to demand an audience with the news media so that Defendant could tell the world what had happened to him.

Both prosecution and defense urged the jury to focus on Defendant's statements on Exhibits 82-88 (the audiotapes) and 57a and 57b (the videotapes) – that would be the evidence that, according to the prosecution, would convince the jury Defendant had deliberated and premeditated the killings, or that, according to the defense, would show the absence of premeditation, planning and intent.

As will be discussed at length in Arguments IV and VI, *infra,* the evidence in the record is exceedingly thin to non-existent to support an inference that Defendant either (a) made any calculated decision to kill, or (b) had a specific intent to kill the individuals who

were charged as victims in the attempted murder counts. On this appeal, both based on the evidence in the record below, and as required by the ABA Guidelines,[40] appellate counsel is duty-bound to argue that the denial of the Penal Code § 1118.1 motion was error, and under Penal Code § 1239(b) this Court is duty bound to consider all of the evidence in the record to decide whether the ruling on that motion was error, both because Defendant has a due process right to have that issue heard and because this Court has a constitutional and statutory obligation to the people of the State of California to see that the convictions are legally justified and the imposition of the death penalty in this case is appropriate and is not being applied in an arbitrary or capricious manner.[41] However, neither appellate counsel nor this Court knows or can know what the actual evidence was that

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[40] ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ▪ February 2003, Guidelines 10.15.1.C. and 10.8.

[41] This Court has recognized that the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution require that the process for determining whether a particular defendant is to be charged and convicted of a capital crime, and to be sentenced to death for that crime, may not be done in an arbitrary and capricious manner. (*People v. Keenan*, (1988) 46 Cal.3d 478, 503; *Furman v. Georgia* (1972) 408 U.S. 238, 33 L.Ed.2nd 345, 92 S.Ct. 2726; *Ring v. Arizona* (2002) 536 U.S. 584, 605-606, 153 L.Ed.2nd 556, 574-575, 122 S.Ct. 2428, 2441-2442.) An essential part of protecting the process from arbitrary and capricious application is the constitutional right to review of the conviction and sentence of death. It is difficult to see how any review of a decision by the jury to convict Defendant of a death-eligible crime and its decision that aggravation outweighed mitigation justifying imposition of the death penalty would not be arbitrary and capricious when the review process is done without examination of the key evidence upon which the jury would have relied in making those decisions.

the jury can be deemed to have heard and was urged by both prosecution and defense trial counsel to consider as determinative of their decisions.

The evidence contained on Exhibits 82-88, for which there is no transcript to review, and the evidence on Exhibits 57a and 57b, for which there is a transcript that appellate counsel have stipulated is not accurate, is not mere surplusage. It is not the icing on the cake of the prosecution's case. With respect to the all-crucial mental requirement that the prosecution had to prove deliberation and premeditation, it is the three-layers of that cake and the icing. With respect to the sanity phase, it is the evidence the jury would have considered first in evaluating the conflicting expert testimony as to whether Defendant's mental illness met the *M'Naughton* test for insanity. As for penalty, as previously mentioned, the expert testimony as to Defendant's mental illness was the most, and probably the only, significant evidence in mitigation even though it was presented in the earlier phases of the trial. Again, the credibility of the experts as to Defendant's mental illness was undoubtedly tested by what the jurors believed they heard Defendant say during the playing of Exhibits 57a and 57b, and Exhibits 82-88. And, in each case, we don't know what that evidence was and have no method for finding out what it was.

As previously discussed, because appellate counsel does not know what the jury heard, appellate counsel is placed in a form of "Catch-22" in attempting to show how the inability to argue the unknown evidence prejudices Defendant on this appeal. However, although neither Exhibit 89 nor the stipulated revised Exhibit 89 presents the evidence heard at trial, they do suggest in their

differences some "known unknowns" in addition to the "unknown unknowns" that illustrate the nature of the prejudice:

As noted, the prosecutor asked the jury to review the evidence for which there is no transcript to determine if Dr. Rubinstein's assessment of Defendant's mental awareness and mental state during the incident was accurate. (22 RT 5146:3-19)

Is appellate counsel to argue, and is this Court to consider that issue based on the statement of Defendant set forth in Exhibit 89 that he "was in the right frame of mind" to accomplish something or the statement set forth in the stipulated revised Exhibit 89 that Defendant said he "wasn't in the right frame of mind and I was a little hesitant. I don't know what frame of mind I was in even when I went in there."(Exhibit 89 [CT Supplemental–5 (v.1 of 1) 3]; stipulated revised Exhibit 89 [CT Supplemental–5 (v.1 of 1) 105:9-10])

Similarly, should the appeal be argued on the basis of the statement of Defendant set forth in Exhibit 89 that with respect to the shots fired into C-102 he had "started to recall where I actually was," or the statement in the stipulated revised Exhibit 89 that "I'm just trying to recall where I actually was?" (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 38]; stipulated revised Exhibit 89 [CT Supplemental–5 (v.1 of 1) 140:29])

Is the evidence against Defendant the statement attributed to him in Exhibit 89 that "I knew I was probably going to get killed too. That was as far as I was going to go," or the statement in the stipulated revised Exhibit 89 "I knew I was probably going to get killed too. That was why I wrote them [his family] the note." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 57]; stipulated revised Exhibit 89

[CT Supplemental–5 (v.1 of 1) 159])

The prosecutor urged the jury to consider as evidence of planning that Defendant had said he "put gas around the school, Lighter fluid." (22 RT 5149:15-19) But no evidence was produced that Defendant actually had placed or attempted to place, or even brought any combustible material to the school. Both Exhibit 89 and the stipulated revised Exhibit 89 show that Defendant said he thought about it but never did it. Did the jury hear that statement, or did the jury hear Defendant say that he had done that? We don't know. Appellate counsel cannot effectively argue sufficiency of the evidence or prosecutorial misconduct in misstating the evidence on this issue, because there is no record of what the jury (and trial counsel) can be deemed to have heard when the tape was played.

Is this appeal to be based upon evidence that Defendant stated that he "screwed with" a student or that he "screamed to" a student? (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 12]; stipulated revised Exhibit 89 [CT Supplemental–5 (v.1 of 1) 114:23])

Is this appeal to be based upon evidence that Defendant felt he had been "tortured" by Robert Brens or that Brens had "flunked" him? (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 32]; stipulated revised Exhibit 89 [CT Supplemental–5 (v.1 of 1) 134:4])

Is this appeal to be based upon evidence that Defendant stated that he went to the second floor because it was "a better spot and I won't worry about making shots," or because it was "a better spot and I won't worry about being shot?" (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 41]; stipulated revised Exhibit 89 [CT Supplemental–5 (v.1 of 1) 143:19-23])

This Court has stated regarding its obligation to review the sufficiency of evidence in a capital case: "[t]o be sufficient, evidence of each of the essential elements of the crime must be substantial and we must resolve the question of sufficiency in light of the record as a whole." (*People v. Memro* (1995) 11 Cal.4th 786, 861 (*Memro II*).) Where the evidence in the record is circumstantial, the Court must determine whether the proof is such as will furnish a reasonable foundation for an inference of premeditation and deliberation, or whether it "leaves only to conjecture and surmise the conclusion that defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation." (*People v. Bender* (1945) 27 Cal.2d 164 at 179.) Circumstantial evidence which is highly ambiguous in terms of the inferences it could support as to the defendant's purposes will not suffice. (*People v. Anderson* (1968) 70 Cal.2nd 1531.) Evidence which on the surface appears supportive of the verdict may be found insubstantial when reviewed in light of the evidence in the record as a whole. (*People v. Memro* (1985) 38 Cal.3d 658, 695 (*Memro I*).)

Appellate counsel cannot make a sufficiency of the evidence argument based upon all of the evidence before the jury because the most important evidence of Defendant's state of mind was never transcribed and is not in the record on this appeal. Similarly, this Court cannot review the sufficiency of the evidence as to deliberation and premeditation on the basis of all of the evidence presented because critical evidence presented to the jury regarding Defendant's state of mind is not before the Court.

Further, because various of the trial errors raised by Defendant

(instructional error, and prosecutorial and trial court misconduct) are prejudicial precisely because they likely affected the jurors' appraisal of the mental state and sentencing issues presented to them, and because the untranscribed evidence was likely to have been crucially important to the jurors on these matters, the inadequate record precludes a reliable evaluation of the prejudicial impact of those trial errors.

The testimony of the eye-witnesses to Defendant's behavior as he was shooting on the first floor is only circumstantial evidence as to his state of mind. Even if some of that evidence would support an inference of deliberation and premeditation, it must be reviewed in light of the *entire* record, which, most crucially, means Defendant's own words as heard by the jury on the playing of Exhibits 82-88 (the audiotapes) and 57a and 57b (the videotapes). These words are missing from the appellate record.

Similarly, the conflicting and ambiguous testimony of the students who were in C-204b as to what Defendant said there about his purposes and what happened in the incident must be evaluated in light of what it can be deemed the jury heard Defendant say when Exhibits 82-88 were played, as well as his statements the following day as played on Exhibits 57a and 57b. Again there is no way to evaluate the hearsay testimony of the students as to Defendant's remarks in C-204b without knowing what is missing from the record.

Moreover, as discussed above, the absence of a record infects the appellate process not just for the guilt phase, but for the entire trial. Obviously, what Defendant said during the incident and in the videotaped interview strongly affected the evaluation of the expert

testimony on sanity and any mitigating weight such testimony might have had at penalty. Among other things, the differing transcriptions of Exhibits 57a and 57b offer starkly different evidence for whether in the interview Defendant was remembering what had happened or was attempting to reconstruct what had happened from what he was being told. Dr. Rubinstein, Defendant's expert psychologist, testified repeatedly that Defendant had no memory of shooting people on the first floor of Building C. (Rubinstein, 20 RT 4695:2-4696:11; 4714:17-4716:3). Whether Defendant's statements in the interview were heard by the jury as statements of his memory of events or statements of his reconstruction of events would probably mark the difference between whether jurors rejected Dr. Rubinstein's statements out of hand or gave them due consideration.

At guilt the prosecutor argued Defendant's lack of remorse as evidence of guilt, and at penalty, the prosecutor argued aggressively that Defendant showed no remorse, and hence was deserving of the death penalty. (Defendant contends these arguments were each prosecutorial error, see Argument XI, *infra*.) The comparison of Exhibit 89 with the stipulated revised Exhibit 89 shows at least two significant discrepancies relevant to the prosecutor's arguments and the jury's consideration of remorse: Exhibit 89 has Defendant sounding as if he wasn't sorry that Robert Brens was dead, but the stipulated revised Exhibit 89 has him expressly stating that he was sorry that Brens was dead. In Exhibit 89 the interrogation with Defendant closes with Defendant asking the officers that he not be placed in a cell because he doesn't want to share a cell with a serious criminal, and then is shown as stating "Thanks, I don't want to get

into a fight with someone whose [sic] already in here." The stipulated revised Exhibit 89, however, has Defendant stating "Unintelligible, I don't want to get into any more trouble than I'm already in." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 102]; stipulated revised Exhibit 89 [CT Supplemental–5 (v.1 of 1) 204])

The difference between the two versions is significant – in the Exhibit 89 version Defendant speaks as if he is ready to have a violent altercation with a potential cell mate – his aggressiveness remains undiminished, while the stipulated revised Exhibit 89 version suggests Defendant is beginning to understand the seriousness of what he has done and wants to avoid any situation where he might end up in additional trouble. Which version did the jury hear? We don't know which version, or indeed, whether they heard something different from either version. Without transcripts this appeal cannot be argued or decided. Without transcripts, any review of the major issues raised by this appeal will be in substantial violation of Defendant's constitutional process rights to a fair, complete, and reliable appellate review under both the California Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

G. The Trial Court Committed Prejudicial Error When It Permitted the Playing of the Video Taped Interrogation and the Audio Tapes of C-204b During the Hostage Negotiations Without First Verifying A Written Transcript That Accurately Represented What Was Intelligible on the Electronic Tapes.

As previously discussed, the audio on Exhibits 57a and 57b, and on Exhibits 82-88 is of poor quality. Exhibits 57a and 57b appear to contain different statements by Defendant depending upon (a) the

equipment used to listen to them, (b) the acoustical setting used to listen to them, and (c) the amount of time spent replaying the various portions that are difficult to hear. The comparison of Exhibit 89, used at trial and provided to the jury during deliberations, and the stipulated revised Exhibit 89 which appellate counsel have stipulated is *more* accurate, but not necessarily definitive, shows that the discrepancies are significant and prejudicial to Defendant.

Exhibits 82-88 are even less intelligible than Exhibits 57a and 57b. By the trial court's own description, they are "gobbledygook that is all but unintelligible," *but* "there are things that you can understand from time to time." (18 RT 4246:4-10)

The admission of the tape exhibits without a verified accurate transcript and an admonition to the jury to disregard any material that the verified transcript reflected as unintelligible constituted a violation of Defendant's due process rights to a fair trial under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution for a number of reasons, including:

No transcript of the tapes either stipulated to or verified by the court as accurate was admitted as the best evidence of what was being said on the tapes in order that the jury would be considering a uniform reliable set of evidence. The failure to do so was a violation of the trial Court's duty under former CRC 203.5.

In direct violation of Penal Code § 190.9, the trial judge, although lacking any reliable transcript, permitted the tapes to be played but excused the court reporter from reporting what was audible and intelligible on the tapes as they were played so that a transcript would exist that could be presumed to accurately reflect what was said

and what portions of the tapes the jury was to accept as not intelligible as the tapes were played.

The trial court failed to instruct the jury not to guess at any portion of the tapes that was not clearly audible and intelligible as indicated on a transcript found to be accurate by the trial court.

Since significant portions of the tapes were unintelligible or extremely difficult to make out except by extensive review, without an agreed or Court verified transcript, and/or a court reporter's transcript to be deemed definitive as to what was said on the tapes and what was not intelligible, it fell upon each individual juror to make up his or her own unique version of the most crucial evidence relevant to Defendant's state of mind.

In *Gardner v. Florida* (1977) 430 U.S. 349, the petitioner was sentenced to death based at least in part upon confidential information in a probation report that, under state law, was not provided to the defendant or his counsel. The Supreme Court held that the imposition of a death sentence based upon evidence not available to, and not rebuttable by, the defendant, violated his federal right to due process, his rights under the Sixth Amendment to effective counsel, as well as his Eighth Amendment rights. (*Gardner, supra,* at 357-361.) The Court noted the then established principle that "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Id.* at 358.) The Court further found that the imposition of secrecy on the evidence available to the sentencing judge but not the defendant or his counsel risked having the sentence imposed on the basis of evidence that "may bear no closer relation to

fact than the average rumor or item of gossip." (*Id.* at 359.) Additionally, the Court stated that the argument that it was sufficient to trust the Florida judges to exercise their discretion in using the secret material "in a responsible manner" "rests on the erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts." (*Id.* at 360.)

These considerations in *Gardner* are directly analogous to the situation found in the present case. In violation of statute (Penal Code § 190.9) and court rule (CRC 203.5) the trial court permitted the jurors to listen to the tapes without ensuring their trustworthiness and without ensuring the existence of a written record or transcript establishing that all participants, trial judge, counsel, and each juror, were working from a common and reliable set of evidence. Without a shared reliable transcript of the admitted tapes, each juror was free to use his or her own imagination in determining what Defendant was saying on the tapes. Each individual juror's subjective understanding of what evidence the tapes may contain was, and remains, inaccessible to any of the participants in the legal proceedings necessary to ensure the proceedings adhere to basic due process standards – neither the trial judge, trial counsel, nor now the reviewing court or counsel on appeal, know the linguistic content of what each trial juror considered in reaching the verdicts on guilt, sanity, and death. This evidence used by the fact finders is as unknown as the officially secret probation report was in *Gardner.*

In *Gardner*, Florida law prohibited defendant and defense counsel from learning the content of significant evidence that the trial

judge was relying upon to determine sentence. Since the evidence was not disclosed to defense counsel and defendant, it could not be tested for its truth value. To the extent the evidence was trustworthy, the defendant was denied the right to present evidence that would serve to explain, mitigate, or rebut the impact of the secret evidence. This was a blatant violation of the defendant's federal due process rights, and his rights under the Sixth Amendment and Eighth Amendment.[42]

Here, the trial court's multiple violations of state law and basic lack of attention to ensuring a reliable record of the proceedings allowed the jurors to listen to electronic evidence of poor audio quality, with many unintelligible portions and portions open to varying subjective interpretations as to its linguistic content. There is no way to know whether each juror's subjective understanding accurately reflects what is actually said on the tapes. As stipulated, there is yet no definitive version of what is said on the tapes. Different persons listening to the tapes have heard different things. Different listeners have found different passages intelligible and unintelligible. Determining now a reliable and accurate transcript of what is said on them would launch appellate counsel and this Court on an uncharted sea of fact-finding. But even if the Court at the appellate level determined definitively what the tapes say, that would not resolve

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[42] The *Gardner* Court also dismissed arguments that trial counsel could waive the error. In *Gardner* trial counsel had failed to request a copy of the secret report. The *Gardner* Court held that any waiver would have to be a knowing and informed waiver by the defendant himself, and that trial counsel could not possibly have a tactical reason for not examining the report. *Gardner v. Florida, supra.,* at 361-362.

what the jurors reasonably would have heard and thought they said to rely upon in making their decisions.

The failure of the trial court to ensure a common and reliable record of the content of the aurally challenging information on the tapes left the substance of that evidence as inaccessible to Defendant and his counsel as the probation report that the Florida legislature ruled could not be disclosed to Gardner's counsel. In the same fashion as in *Gardner*, Defendant's counsel was precluded from challenging the truthfulness and trustworthiness of what each juror *thought* they heard, or to present evidence to explain, rebut, or mitigate the impact of what each juror *thought* they heard.

Trial courts have a fundamental duty to ensure that the evidence introduced for consideration at trial is reliable, trustworthy, and intelligible to the fact-finder. It is an abuse of discretion for a trial court to fail to take reasonable steps to ensure that electronic evidence to be played to a jury is accurate and trustworthy, and intelligible:

> It is well settled that the admission of tape recordings at trial rests within the sound discretion of the trial court. United States v. Enright, 579 F.2d at 988. United States v. Cooper 365 F.2d 246, 250 (6th Cir. 1966), cert. denied 385 U.S. 1030, 17 L. Ed. 2d 677, 87 S. Ct. 760 (1967). That discretion presumes, as a prerequisite to admission, that the tapes be authentic, accurate and trustworthy. United States v. Haldeman, 181 U.S. App. D.C. 254, 559 F.2d 31 (D.C. Cir. 1976), cert. denied sub nom. Mitchell v. United States, 431 U.S. 933, 97 S. Ct. 2641, 53 L. Ed. 2d 250 (1977). Moreover, they must be audible and sufficiently comprehensible for the jury to consider the contents. United States v. Bryant, 480 F.2d 785, 789 (2d Cir. 1973). Recordings will be deemed inadmissible if the "unintelligible

> portions are so substantial as to render the recording as a whole untrustworthy." United States v. Jones, 540 F.2d 465, 470 (10th Cir. 1976), cert. denied, 429 U.S. 1101, 51 L. Ed. 2d 551, 97 S. Ct. 1125 (1977). Cooper, 365 F.2d at 250.
>
> *United States v. Robinson* (6th Cir. 1983) 707 F.2d 872, 876, footnote 4.

United States v. Robinson, supra., was cited with approval in *People v. Polk* (1996) 47 Cal.App.4th 944, 953-956. Indeed, California Courts recognized as early as 1953 that inaudible or unintelligible electronic recordings introduced to a jury without a determination of their reliability and determination of their actual linguistic content could be prejudicial error requiring reversal. In *People v. Stephens* (1953) 117 Cal.App.2d 653, the appellate court reversed a conviction for forgery where tapes were introduced and played for the jury that required the jury to guess as to their content. Describing the state of the record, the *Stephens* court said:

> That the conversations were not only inaudible but unintelligible is indicated by reference to the reporter's transcript wherein on many occasions the official reporter inserts the word "unintelligible." Apparently, the reporter recorded what she heard and could understand, but left out what she could not. How many different versions of "what was said" there were in the jury room is a matter of conjecture.
>
> *People v. Stephens, supra*, at 661.

The Court concluded:

> The case is one wherein there is lacking that element of fairness essential to due process...The right of an accused in a given case to a fair trial, conducted substantially according to law, is at the same time the

> right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. 'It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.'" (People v. Wilson, 23 Cal.App. 513, 524 [138 P. 971].)
>
> *Ibid,* at 663.

In the present case, the trial court's failure cannot be judged simply on an abuse of discretion standard, for the trial court was under a statutory mandate to ensure a complete record of all proceedings in the trial (Penal Code § 190.9.) and its failure to do so was plain error. Moreover, as *Gardner* held, on appeal the defendant cannot be charged with any failure by his counsel to insist on compliance with § 190.9 or his right to a complete appellate transcript, nor can any such omission by counsel alter or detract from this Court's obligation to review the capital judgment against defendant on the basis of a complete record.[43]

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[43] As the *Gardner* Court explained:
"Since the State must administer its capital-sentencing procedures with an even hand [citation], it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in *Furman v. Georgia.* (Fn. omitted.) In this particular case, the only explanation for the lack of disclosure is the failure of defense counsel to request access to the full report. That failure cannot justify the submission of a less complete record to the reviewing court than the record on which the trial judge based his decision to sentence petitioner to death." (*Gardner v. Florida, supra,* 430 U.S. at 361.)

In *People v. Polk, supra,* the Court found that the admission of the tapes and transcript was not prejudicial error because, among other things, the trial court had followed each of the prescriptions to trial courts laid out in *U.S. v. Robinson, supra.* The *Polk* decision noted that the *Robinson* court had instructed Sixth Circuit federal trial courts (1) to have the parties stipulate *to the accuracy of the transcript to be used as an aid for the jury*; or, (2) that the trial court should make its own pretrial determination of accuracy by reading the transcript against the tapes; or (3) (and least preferable) the parties could present two transcripts to the jury, the prosecution and defense's version. In addition, the *Robinson* court had instructed that the word "inaudible" should be inserted into the transcript "in order to preclude jury speculation regarding unintelligible portions of the tape." (*People v. Polk, supra,* at 954, discussing *U.S. v. Robinson, supra,* 707 F.2d at pp. 876-877.)

The *Polk* court distinguished the case before it from the situation in *Robinson* as follows:

> In *Robinson* both the trial court and appellate court noted innumerable inaccuracies in the transcripts. (707 F.2d at p. 878.) In addition, the transcript purported to translate and transcribe inaudible portions of the tape. The appellate court found the tapes so inaudible as to preclude transcription. (707 F.2d at p. 879.) The *Robinson* court found in these circumstances

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In addition to the constitutional imperative addressed in *Gardner*, this Court, of course, as previously noted, also has a state-law obligation to review a death judgment on the basis of a complete record. (*People v.7 Perry, supra*, 14 Cal.2d at 392; *People v. Stanworth, supra*, 71 Cal. 2d at 833-834; *People v. Wilson, supra*, 36 Cal.4th at 325; Penal Code sections190.9 and 1239 (b).)

> even two versions of the tape would not have assisted the jury, but might have inspired wholesale speculation and confusion.
>
> The Sixth Circuit reversed the convictions. The tape recordings were the primary evidence against the defendants. In addition, the trial court had failed to employ any of the enumerated safeguards to ensure the accuracy of the transcripts.
>
> *People v. Polk, supra,* 47 Cal.App.4th at 954.

In the case now before this Court, the trial court failed to employ any of the safeguards required by *Robinson*:

First, the trial court permitted the prosecution to play the video tape for the jury without first presenting a transcript to the Court which could be reviewed for accuracy. The prosecution presented defense counsel with its proposed transcript of the video tape only on the commencement of the second day of playing the tape, without affording counsel an opportunity to review it for accuracy. Rather than provide the jury with a transcript pre-determined to be as accurate as possible in order that the jury could follow the tape by means of the transcript, the jury was required to listen to the video tape with its substantial number of unintelligible portions and with many portions open to differing interpretations without any transcript to guide them and assure that they all would be considering the same, verified evidence when they listened to the tape. For the audio tapes, Exhibits 82-88, the prosecution never proffered any transcript and the trial court never asked for one, even after it was apparent to the judge, as the tapes were being played, that they were largely "unintelligible" albeit with some things that could be made out.

Second, the trial court *never* required the prosecutor to present evidence on the record that the transcript of the video tapes it had prepared (Exhibit 89) was accurate. Rather, counsel merely made a representation as to what his witness *would say* if he were called. As noted, no transcript was ever proffered for the audio tapes.

Third, the trial court never actually obtained a stipulation from counsel that the transcript *was accurate*. Rather, it is obvious that defense counsel punted on the issue of the transcript's accuracy by obtaining assurance from the trial court that it would instruct the jury that the transcript of the video tape was only an aid and that, in the event of any discrepancy, they should rely on what they heard and not what was in the transcript. (18 RT 4329:16-4331:25)

Fourth, the trial court conducted no independent review of either the video tapes or the audio tapes to determine their admissibility and to develop accurate transcripts that would give the jury the intelligible linguistic substance on the tapes.

The trial court's instruction to the jury only compounded the problem those tapes presented: the court told the jury what they heard or believed they heard when the tapes were played was the evidence and controlled over Exhibit 89 as to what Defendant was saying on Exhibits 57a and 57b.. Indeed, while Defendant submits that Exhibit 89 is prejudicially inaccurate as to what Defendant actually says on Exhibits 57a and 57b,[44] no review of the discrepancies between the tape and the transcript will support a harmless error analysis, because the jurors were instructed to disregard the substance of the transcript

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[44] See part I.H. of this argument, *infra.*

in favor of their own subjective belief as to what they heard when the tapes were played.

Alone, but also coupled with its instruction, the trial court explicitly invited the jury to speculate as to the linguistic content of the unintelligible and semi-intelligible portions of the video tapes. And, since they were given no transcript setting forth the content of Exhibits 82-88, the jurors were to speculate as to the substance of what was being said on those tapes. At no time were the jurors ever told not to speculate or to disregard any segments of the tapes where they were uncertain as to the words being spoken or the identity of the speaker. Thus, "how many different and varied interpretations were placed upon what the recordings conveyed by the various jurors is a matter of pure conjecture." (*People v. Stephens, supra,* 117 Cal.App.2d at 662.)

Finally, like *Robinson* and *Stephens*, and unlike *Polk*, the content of the tapes was crucial evidence: in this case for determination of Defendant's degree of culpability, of whether he had committed death-eligible crimes, of whether he was sane at the time he committed them, and of whether the death penalty was the appropriate sentence.

The admission of the video tapes played for the jury (Exhibits 57a and 57b) and the admission of the audio tapes played for the jury (Exhibits 82-88) was fatally prejudicial error by the trial court requiring reversal of the convictions and sentence of death.

H. The Trial Court Committed Prejudicial Error by Allowing the Jury to Use Exhibit 89 in Deliberations Without First Certifying its Accuracy.

The trial court prejudicially infected the jury deliberations by permitting Exhibit 89 to be given to the jurors to utilize in jury deliberations. Although the trial court instructed the jurors that what they heard, or believed they heard when the tapes were played was the best evidence and Exhibit 89 was only to be used as an aid, the trial court also instructed the jurors that Exhibit 89 was "an attempt to get as much of the conversation down *accurately as possible*." (18 RT 4337:6-13) When the trial court gave the jury this instruction it had neither made any independent review as the accuracy of Exhibit 89 nor received into evidence and testimony that would support its endorsement of Exhibit 89 as the most accurate transcription possible.

Defendant has previously set forth how the inaccuracies in Exhibit 89, as compared to the stipulated more accurate version contained in the record correction of the record on appeal, were prejudicial to his case. The inaccuracies directly support the prosecution's contentions as to Defendant's state of mind, his alleged intentionality in fatally shooting the homicide victims, the alleged lack of support for the opinions of Defendant's experts as to his mental illness and qualification for the insanity defense, and his alleged lack of remorse for his actions.

The more accurate version stipulated to by counsel on appeal, in significant ways supports Defendant's contentions at trial on each of these issues.

The trial court's baseless and erroneous endorsement to the jurors that Exhibit 89 was accurate was prejudicial error requiring

reversal of the judgment in its entirety. By permitting use of Exhibit 89 and providing its judicial seal of approval without any basis for so doing, the trial court undermined Defendant's right to due process and a fair trial and precluded the reliability essential to a capital conviction and sentence in violation of Defendant's rights under the Eighth and Fourteenth Amendments. (*Beck v. Alabama* (1980) 447 U.S. 625,637-38 (heightened reliability is required by the Eighth and Fourteenth Amendments for conviction of a capital offense); *Zant v. Stephens* (1983) 462 U.S. 862, 879 (Eighth and Fourteenth Amendments require reliable, individualized capital sentencing determination); *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 (same); *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85 (same).) Under *Chapman v. California* (1967) 386 U.S. 18, and *Arizona v. Fulminante* (1991) 499 U.S. 279, 306-307, the error cannot be said to be harmless beyond a reasonable doubt. The entire judgment is infected by this error and must be reversed.

I. The Trial Court's Error in Admitting the Audio and Video Tapes by Playing Them Without a Verified Transcript Setting Forth Their Intelligible Linguistic Content Was Structural Error Requiring Reversal of the Entire Judgment.

The trial court error in permitting the jurors to listen to the audio tapes and the videotaped interrogation of Defendant, without first ascertaining the linguistic content of what was being said and what portions of the tape were unintelligible, necessarily left it to each juror to interpret for him or herself what Defendant was saying from sound that was either unintelligible or highly ambiguous as to the words being stated. This necessarily left each individual juror free to

speculate and apply their own subjective evaluation of what it was that Defendant had said during the course of the incident and what he has said to police interrogators the following day.

That Defendant planned to go to the school with guns and shoot them inside Building C was largely conceded. What his state of mind was when he arrived at the school, entered it, and fired his guns, including whether he intended to kill anyone, were the issues in contention. The key evidence to determining the matters actually in issue in the trial were the statements made by Defendant on the audio tapes and on the videotapes. The trial court's error in admitting those tapes without a verified transcript setting forth the intelligible linguistic content and limiting the jury's consideration to that predetermined intelligible linguistic content left each juror to make his or her own subjective speculation as to the content of key evidence on which they would decide Defendant's guilt, his claim of insanity, and ultimately, his penalty.

A trial conducted entirely or in significant part on evidence which is left to the subjective speculation of each juror is so lacking in basic procedural due process that the error is structural and reversal is required without any harmless error analysis. Further, such a proceeding is clearly incompatible with achieving the reliability essential to a capital conviction and sentence, and hence in violation of Defendant's rights under the Eighth and Fourteenth Amendments. (*Beck v. Alabama, supra*, 447 U.S. at 637-38; *Zant v. Stephens, supra*, 462 U.S. at 879; *Woodson v. North Carolina, supra*, 428 U.S. at 304; *Johnson v. Mississippi, supra*, 486 U.S. at 584-85.)

The United States Supreme Court has described "structural

error" as "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," as contrasted with errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented," (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281; *People v. Robinson* (2005) 37 Cal.4th 592, 636, ftn 21.)

The evidence of the audio and video tapes erroneously presented to the jury defies analysis by harmless error standards because (a) its content is unknown, and (b) it is the primary evidence on the issues in contention for which the jury had to reach its verdict. A trial in which the principal evidence on which the trier of fact makes its decision is unknown to the defendant (or, for that matter, even to the judge or prosecutor) transcends mere error in the admission of evidence. If the key evidence in the case is known only to the individual jurors based on their speculation as to what they heard, any ability of defense counsel to challenge the validity of that evidence, to offer contradictory evidence, or to put the evidence in context or diminish its significance, is rendered futile. Thus, it is tantamount to a trial without the assistance of defense counsel.[45] By permitting an evidentiary presentation in which each juror was both instructed and, as a practical matter, required, to determine the

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[45] The situation here is thus distinguishable from the erroneous introduction of a coerced confession, such as occurred in *Fulminante, supra.* There, defense counsel, because they could *know* the evidence being considered, could counter it by introducing evidence showing the confession's coerced nature and arguing its inherent unreliability. They also could introduce evidence from sources other than the defendant to show that the content of the coerced confession was inconsistent with other credible evidence.

content, (and not merely the significance or weight), of the evidence being presented, there occurred ""a complete abdication of judicial control over the process," of the sort which this Court has indicated constitutes "structural error." (*People v. Robinson, supra,* 37 Cal.4th at 636.[46])

Since the linguistic content of the evidence heard by each juror was and is unknown, it is literally impossible to quantitatively (or qualitatively) assess the weight of that evidence in the context of the other evidence presented which appears in the appellate record and is not uncertain.

At the very least, because the error at issue here implicates Defendant's fundamental constitutional rights to due process, the assessment of prejudice should be made under the standard of *Chapman v. California* (1967) 386 U.S. 18, which places the burden on the prosecution to demonstrate beyond a reasonable doubt that such error did not prejudice the defense.

The structural error in letting the jury speculate and determine on an individual and subjective basis the key evidence in the case requires reversal of the judgment and convictions without a showing

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[46] In *Robinson*, this Court contrasted the situation before it, where the contention was that the trial judge had erred in responding to a jury request to have certain evidence re-read, with that in *Riley v. Deeds* (9th Cir. 1995) 56 F.3d 1117, where the trial judge had been absent and the read-back process had been handled by a law clerk. In the trial here, the trial judge was physically on the bench, but he was requiring each juror to determine for himself or herself what was the evidence they were hearing. The trial judge thus had "completely abdicated" his essential role as the arbiter of the evidence the jury would hear.

that the error was harmless beyond a reasonable doubt.

II. THE JUDGMENT MUST BE REVERSED BECAUSE THE INDICTMENT WAS HANDED DOWN BY A GRAND JURY WHOSE MEMBERS WERE SELECTED BY CONSTITUTIONALLY IMPERMISSIBLE METHODS AND WHOSE PROCEEDINGS WERE PREJUDICIALLY FLAWED.

A. Facts Adduced Regarding the Method for Selecting Grand Jurors and the Composition of the Pool

Prior to the start of the trial Defendant brought a motion challenging the indictment on four grounds:

1. The prosecutor ordered critical portions of the grand jury proceedings to be unreported in violation of penal code section 190.9;

2. The prosecution failed to comply with the requisites of Penal Code sections 934 and 935 by refusing to produce evidence requested by the grand jury;

3. The selection and composition of the grand jury which indicted Defendant violated the due process clause and his sixth amendment right to a trial by a fair cross section of the community;

4. The grand jury was not adequately *voir dired* regarding extensive, prejudicial pre-indictment publicity. (3 CT 721-722)

The motion was denied on all grounds. Defendant submits that the denial was erroneous as to each of the four grounds.

A summary of the evidence adduced at the hearing on the motion is as follows:

The record of the grand jury proceedings showed that the prosecution had any transcription stopped on at least three occasions during the grand jury proceedings while the prosecutor addressed the

grand jury, including answering questions from the grand jurors off the record. (1 RT 50:11-15; 87:26-89:7; 346:15-22)

The Defense called Bonita Marqua, who had been the sole Yuba County Jury Commissioner from 1990 to 1993. She had no written directions or procedures given to her by the Yuba County Courts, but took her directions from the language of the Government and Penal Codes, and if she had questions, she asked the presiding judge. Ms. Marqua had two subordinates who assisted her in compiling lists of jury pool members and related tasks. (4 RT 851:3-857:9)

Ms. Marqua testified that during the years she was Jury Commissioner, grand jury members were selected through two methods – (1) members of the County Board of Supervisors and civic groups such as the Rotary Club would nominate individuals and individuals would come in and submit their own names, and (2) the remaining names were chosen by a "random" draw of names from the assembled jury pool. (4 RT 857:17-858:23; 867:5-22) For the 1992 grand jury list, the Yuba County presiding judge, Judge Buckley, directed Ms. Marqua to provide a list of prospective grand jurors from the grand jury list – between 25 to 30. She believed the actual number was 28. Ms. Marqua was given no direction as to how to assemble the names of the list of grand jurors. (4 RT 866:2-11)

Marqua had no recollection whether any names were submitted by supervisors or others for the 1992 grand jury list except for one person. No record was kept identifying which names on the list of 200 were drawn at random and/or which were placed there by nomination. There were no records indicating any nominations of specific persons

for the 1992 list. (4 RT 867:23-868:2) Marqua said the "random" names for the list were selected by starting with the list of persons eligible for jury duty, a list of about 10,000 names assembled by a random draw from Department of Motor Vehicle records and voter registration lists. Questionnaires were sent to the 10,000 names seeking information on their interest and availability to serve. From those who responded, 200 names were selected as follows: the questionnaires that were returned were assembled in alphabetical order according to the respondent's name, and then an individual went by hand through the boxes and pulls out 200 questionnaires "at random." (4 RT 868:3-871:27; 5 RT 929:17-931:4)

After the 200 questionnaires were drawn from the boxes, the names of the 200 were submitted to the District Attorney's Office and all of the Municipal and Superior Court judges to screen out convicted felons and persons under investigation. Ms. Marqua did not believe that any names were deleted from the 200 selected for 1992 through this process. (4 RT 875:1-22)

Notification was then sent to each of the 200 advising them that their name had been picked and asking them to advise if they were able to serve. For persons on the 200 list who did not respond an attempt was made to contact them by phone. (4 RT 879:1-881:28) Individuals could request removal from the list based on a set of criteria including verified medical conditions, having moved from the county, age, conscientious objection, etc. A list of the 200 with notations as to those who claimed exemptions from service existed. Neither the list nor the questionnaire contained any information concerning the person's ethnicity or race. (4 RT 886:24-889:11)

Ms. Marqua testified that she personally did the physical selection of the 200 questionnaires from the 10,000. There were approximately 8-9 file drawers. From each drawer she pulled out about 20-25 files. There was no specific process for picking a questionnaire other than trying to pick questionnaires from "the whole length of the drawer." She had no count of and did not consider the alphabetical distribution of last names in the 10,000 names, nor did she have any information concerning the distribution of last names by ethnic background in the 10,000 list. There was no effort to select names in proportion to the population of the respective supervisorial districts or in proportion to the ethnic composition of the county. (4 RT 905:13-908:13; 5 RT 920:7-26)

After culling out the names of persons who did not want to serve and/or could not serve, Ms. Marqua submitted a list of about 30 names to the Presiding Judge who then interviewed those individuals. (5 RT 933:15-25; 942:1-28).

The parties also stipulated as to the ethnic and racial background of certain individuals who had served on the grand jury. The prosecutor refused to stipulate that these were the only people on the grand jury with minority status. Defendant's counsel accepted this stipulation but with the proviso that Defendants were asserting that these were the only minorities who had served or were in the pool, because there were no records from which the ethnic/racial background of any pool member could be determined. A second stipulation laid the foundation for admission of the Jury Commissioner records of the names on the list of 200 for the pool. The prosecution also represented that for the 1992-1993 grand jury

four Hispanics served on that grand jury. (5 RT 992:12-994:13; 979:1-980:5; 1017:9-27)

The defense expert, Peter Sperlich, testified that based on the information he was asked to assume by Defense counsel, that comparing the number of Hispanics on the grand juries from 1986 through 1982, the expected number of Hispanics that would have appeared through random selection of the county population, as adjusted, was 70% lower than expected and the chances of that under-representation occurring randomly was 5 out of 100. (5 RT1020:5-1022:11) Sperlich testified that similar disparities existed for African-Americans, Asians, and American Indians:

> It is my opinion that in the time span from 1986 to 1993 in Yuba County there was a substantial and significant under representation of Hispanics, Blacks, Asians, American Indians not attributable to random fluctuation or accident, but being of such a magnitude that one must consider a systematic working in the system which lead to that sort of exclusion.
>
> 5 RT 1031:2-8

Sperlich also testified to a number of reasons that could have accounted for the disparities. The reasons included: (1) lack of follow-up of people who did not respond to the initial questionnaire sent to the 10,000 people on the master list; (2) the lack of follow-up if people on the list of 200 did not respond to the request to come in and be interviewed; (3) a lack of uniform application of the list of permissible excuses for not serving; (4) the fact that the draw of questionnaires from the 10,000 was not random in a statistical sense, even if it was "blind;" and (5) the inclusion of nominees and self-

nominees in the list. (5 RT 1031:22-1034:16)

B. The Prosecutor's Decision to Conduct Portions of the Grand Jury Proceedings Off-Record Requires Reversal of the Judgment240

On three occasions at least, as shown in the record, the prosecutor chose to conduct aspects of the Grand Jury proceedings off record. (1 RT 50:11-13; 87:26-88:7; 2 RT 346:15-22) There is no record of those proceedings for this Court to review.

Defendant was entitled to a complete transcript of the entire grand jury proceeding—not just a transcript of testimony. Failure to ensure such a transcript made proceeding to trial on an indictment produced from the faulty grand jury proceeding prejudicial error. (*Dustin v. Superior Court* (2002) 99 Cal.App.4th 1311, 1322-1323.)

As discussed in *Dustin*, the burden is on the prosecution to demonstrate that there was no prejudice to Defendant from the failure to ensure a record of the entire proceedings. "In the absence of a transcript, coupled with the fact that no judge or defense representative was present, it is difficult to imagine how a defendant could ever show prejudice." *Dustin v. Superior Court, supra*, at 1326.

The judgments of death and guilt must be reversed due to the failure to maintain a record of the entire Grand Jury proceedings.

C. The Prosecution Failed To Comply With The Requisites Of Penal Code Sections 934 And 935 By Refusing To Produce Evidence Requested By The Grand Jury246

Penal Code section 934 provides in pertinent part: "The grand jury may, at all times, ask the advice of the court, or the judge thereof, or of the district attorney, or of the county counsel." Section 934 also

provides in pertinent part: "The district attorney of the county may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by the grand jury and may interrogate witnesses before the grand jury whenever he thinks it necessary."

> Penal Code section 939.7 provides: The grand jury is not required to hear evidence for the defendant, but it shall weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it shall order the evidence to be produced, and for that purpose may require the district attorney to issue process for the witness.

Near the end of the proceedings the prosecutor was asked by the grand jury whether it would be shown the taped interview of the defendant. The prosecutor then stated:

> Mr. Foreman, I have a number of questions that probably should be referred back to the jury for purposes of consideration at this time. The grand jury, of course, has the authority to require the production of additional witnesses if they so desire or if it so desires. One of the questions that came to us, which was this question is for the D.A. later, states 'Will we be able -- will we be seeing the tape of the interview?" and I take that to refer to the interview with Eric Houston.

The prosecutor continued his comments indicating:

> I should tell you that the tape runs, my recollection is, about two hours.
>
> (2 RT 479:6-20)

The grand jury also requested to know if the police had taped

the incident with which Defendant is charged:

> Did the police tape a portion of the May 1st event, can we see it?

The prosecutor replied with:

> I would respond to that question by stating that there is a tape of the negotiations which took place with the negotiators which is an audiotape which is approximately seven hours, I believe, seven to eight hours. Probably seven.
>
> (2 RT 480:3-9)

The prosecutor continued by stating:

> There was also some tape recording made as previously testified to through a tape, a videotape that is in the possession of the FBI, which we have not received possession of yet, which is basically after the pizza and the colas were delivered per the testimony of the witnesses -- and I can't remember them all, but Hendrickson and Mills I believe were a couple of them, of what was going on inside the building after all of the events downstairs where the injured were. But inside the room where the hostages were being held, the people that we want to call hostages were being held, it's just that it's my understanding this is a tape just of those events which I believe have already been described in some detail by other witnesses
>
> (2 RT 480:10-22)

The prosecutor then informed the foreman that before presenting instructions the grand jury should meet outside its presence to determine whether it desired additional information from the prosecution. (2 RT 480:23-481:2)

The effect of the prosecutor's comments was to dissuade the

grand jury from viewing the taped recordings it had requested by citing the additional hours necessary to complete a viewing. The prosecutor's statements regarding the contents of the tapes are inadmissible hearsay in violation of Penal Code section 939.6(b) as it read in 1992, which required that "[the grand jury shall receive none but evidence that would be admissible over objection at the trial of a criminal action. . ." The prosecutor's statements were an implicit denial that any exculpatory evidence was contained on the tapes and precluded the jury from deciding whether Defendant's statements, demeanor or state of mind required consideration of lesser included offenses to the first degree murders charged in the indictment.

Moreover, the grand jury was not instructed that the prosecutor's statements were not to be considered as evidence and the prosecutor's statement: "In other words, you use basically the same standards used by a regular jury except for the fact that you consider the evidence that's been presented as if there was no evidence brought from the other side." (2 RT 499:9-13)The prosecutor erroneously instructed the jury that it could not consider or request evidence not already presented by the prosecution. The statements were exacerbated by his instructions: "Production of all evidence is not required. Neither side is - - no side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence . . . or to produce all objects or documents mentioned or suggested by the evidence." (2 RT 496:17-22) and "Second, you must apply the law that I state to you to the facts as you determine them . . . You must accept and follow the law as I state it to you, whether or not you agree with the law." (2 RT 492:23-26.) The upshot of the

prosecutor's statements left the jury with conflicting instructions regarding their authority to subpoena witnesses or evidence. The prosecution had already decided there was sufficient evidence to return the indictment. The consequence of the prosecutors' manipulation of the grand jury proceedings fail to comport with the demands of the due process clause of the federal or state Constitution. (See *People v. Backus* (1979) 23 Cal.3d 360, 392.) and requires that the indictment be set aside.

D. The Selection and Composition of the Grand Jury which Indicted Defendant Violated the Due Process Clause and the Sixth Amendment Right to a Trial by a "Fair Cross Section of the Community

A grand jury unrepresentative of the community can be challenged as a violation of the "fair cross section" requirement of the 6th Amendment, made applicable to the state through the 14th Amendment. (*Duren v. Missouri* (1978) 349 U.S. 357.) The right to trial by a jury drawn by a representative cross-section of the community is a right "guaranteed equally and independently by the Sixth Amendment to the federal Constitution and by article I, section 16 of the California Constitution." (*People v. Wheeler* (1978) 22 Cal.3d 258, 272.) A defendant can object to absence of a fair cross-section of the community in the selection of a grand jury even if he/she is not a member of the underrepresented groups. "[The Sixth Amendment entitles every defendant to object to a venire that is not designed to represent a fair cross-section of the community, whether or not the systematically excluded groups are groups to which he himself belongs." (*Holland v. Illinois* (1990) 493 U.S. 474, 110 S.Ct. 803, 805. See also, *Peters v. Kiff* (1972) 407 U.S. 493.)

In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the underrepresented group is a cognizable group; (2) that the representation of that group on the grand jury lists is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the selection process. (*Duren v. Missouri, supra*, 439 U.S. 357, 365.) Statistical evidence alone will suffice to establish a prima facie case of systematic exclusion. "Traditionally, in this type of attack on the composition of the grand or petit juries, the statistical evidence, if sufficiently probative, has been given the effect of making a prima facie case for the attackers, shifting the burden onto the prosecution's shoulders." (*Montez v. Superior Court* (1970) 10 Cal.App.3d 343, 348.)

A prima facie showing of discrimination shifts the burden to the prosecution to show lack of discrimination. "Once a prima facie case of invidious discrimination is established, the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." (*Alexander v. Louisiana* (1972) 405 U.S. 625, 631.) Mere claims of good faith by the selectors of the grand jury are insufficient to dispel a prima facie case of systematic exclusion: "The Court has squarely held, however, that affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion." (*Id*, at 632.)

> [W]here sufficient proof of discrimination in violation of the Fourteenth Amendment has been made out and not rebutted, this Court uniformly has required that the conviction be set aside and the indictment returned by the unconstitutionally constituted grand jury be quashed.
>
> (*Mitchell v. Rose* (1979) 443 U.S. 545, 551.)

The 1992-1993 grand jury which indicted Defendant did not contain a person of African-American descent; a person of American-Indian descent; a person of East Indian (Punjabi) descent or a person of Hmong descent despite the existence of substantial numbers of each of the groups in Yuba County: In documents obtained from the Yuba County Library the composition of the grand jury for the five years preceding 1992-1993 illustrates the selection of only two possible Hispanic surnamed persons in grand jury lists dated from the 1987-1988 grand jury. Census data regarding Yuba County clearly indicates the presence of the groups cited above. (See Appendix B to the Memorandum of Points and Authorities in Support of Motion to Set Aside and Dismiss Indictment at 2 CT 576)

Notwithstanding the generally recognized cognizable groups including blacks (Peters v. Kiff (1972) 407 U.S. 493 at pp. 499, 502), Mexican-Americans (*Castaneda v. Partida* (1977) 430 U.S. 482, 492), and American-Indians (see *Hirst v. Gertzen* (9th Cir. 1982) 676 F.2d 1252, 1256 n 5); East Indians (Punjabis) and Hmong are equally cognizable

Although in essence a question of fact, the determination that a particular class of persons constitutes an identifiable group can become firmly entrenched in prior case law. On this basis, women'

and non-white ethnic minorities' are identifiable groups. (*Quadra v. Superior Court of San Francisco* (1975) 403 F.Supp. 486, 493.) "Since each of these sub-groups (ethnic minorities including Asians, Hispanics and Blacks) is probably an identifiable group, the combination of them into one group (non-white ethnic minorities) is permissible for the purposes of statistical allegations." *Quadra v. Superior Court of San Francisco* (N.D.Cal. 1974) 378 F.Supp. 605, 617.)

On January 15, 1993 the defense filed a Motion for Supplemental Discovery of Grand Jury Information, seeking grand jury information for the five years preceding the 1992-1993 grand jury. 2 CT 457-468) On February 1, 1993 the motion was denied without prejudice; the court instructed counsel for Defendant to seek the records informally from the jury commissioner. (2 CT 531) On February 9, 1993, the Clerk of the Superior Court was requested to provide the defense with grand jury documents and information for the years 1987-1992(See Appendix C to the Memorandum of Points and Authorities in Support of Motion to Set Aside and Dismiss Indictment at 2 CT 580) The Clerk informed the defense that the records would be available on February 19, 1993; On February 19, 1993 the Clerk informed the defense that the records would be available on February 24, 1993; On February 24, 1993, the Clerk stated that the records would be available on February 25, 1993; On February 25, 1993, the clerk informed the defense that she was unable to locate the grand jury records for the years requested by the defense. (See Appendix D to the Memorandum of Points and Authorities in Support of Motion to Set Aside and Dismiss Indictment at 2 CT 582)

The three-pronged test required in *Duren, supra*, requires a defendant to establish that "... (3) that this under-representation is due to systematic exclusion of the group in the jury selection process." (*Duren v. Missouri, supra*, at p; 364.) Without any records to establish the historical exclusion required by Duren, Mr. Houston is denied his due process right to contest the composition of the grand jury which indicted him.

It is statistically logical to assume that the grand jury selected for 1992-1993 was a reflection of the "poor of jurors from which the grand jury was drawn and that, inferentially, the same exclusion and underrepresentation existed in the selection of the Yuba County grand jury for the preceding five years.

The lack of representation in the pool from which grand jurors were selected requires reversal of the judgment of guilt and sentence obtained from the faulty grand jury indictment.

III. THE TRIAL COURT'S FAILURE TO QUESTION PROSPECTIVE JURORS UNDER OATH VIOLATED DEFENDANT'S RIGHTS TO DUE PROCESS AND AN IMPARTIAL JURY

A. Introduction

Defendant was entitled under the Sixth and Fourteenth Amendments of the federal constitution and Article 1, sections 15 and 16 of the California Constitution to be tried by a fair and impartial jury, "a right of particular significance in capital cases because of the magnitude of the decision and because jury unanimity was required." (*Gray v. Mississippi* (1987) 481 U.S. 648, 659, fn. 9; see also *id.,* at pp. 658, 668; *Morgan v. Illinois* (1992) 504 U.S. 719, 726-728.)

At Defendant's trial, the jury was selected from randomly-

chosen panels of individuals through questioning by written questionnaires and in-person *voir dire*.

Reversal of the entire judgment is required because the trial court's failure to administer an oath of truthfulness on the record to potential jurors before jury selection *voir dire* as required by Code of Civil Procedure section 232, subdivision (a) and Penal Code section 190.9, subdivision (a) was structural error, and constituted a denial of Defendant's rights to trial by an impartial jury, meaningful Appellate review, and the elevated level of reliability required by the due process requirements of the federal Fifth and Fourteenth Amendments and the Eighth Amendment in a capital case.

B. The Law Required *Voir Dire* of Prospective Jurors Under Penalty of Perjury and Administration of the Truthfulness Oath On the Record

Code of Civil Procedure section 232, subdivision (a), requires, and required at the time of Defendant's trial, that the trial court administer an oath of truthfulness to prospective jurors before questioning them concerning their qualifications to serve. (*People v. Carter* (2005) 36 Cal.4th 1114, 1175-1176; People *v. Lewis* (2001) 25 Cal.4th 610, 630.) Specifically, the statute provided:

> Prior to the examination of prospective trial jurors in the panel assigned for voir dire, the following perjury acknowledgement and agreement *shall* be obtained from the panel, which shall be acknowledged by the prospective jurors with the statement 'I do': [¶] "Do you, and each of you, understand and agree that you will accurately and truthfully answer, under penalty of perjury, all questions propounded to you concerning your qualifications and competency to serve as a trial juror in the matter pending before

> this court; and that failure to do so may subject you to criminal prosecution."
>
> (Emphasis supplied)

And Penal Code section 190.9, subdivision (a) (1), provided at the time of Defendant's trial as follows, in pertinent part:

> In any case in which a death sentence may be imposed, all proceedings conducted in the justice, municipal and superior courts, including proceedings in chambers, *shall* be conducted on the record with a court reporter present. The court reporter shall prepare and certify a daily transcript of these proceedings.
>
> (Emphasis supplied)

This Court has emphasized that "the trial courts should meticulously comply with Penal Code section 190.9, and place all proceedings on the record." (*People v. Freeman* (1994) 8 Cal. 4th 450, 511.) This obligation extends to routine matters and outweighs any burden on the trial court that may be caused by meticulous compliance (*ibid.*), and should have been met in Defendant's case to protect his rights to an impartial jury, reliable verdicts, and meaningful appellate review of his capital trial under the Sixth, Eighth and Fourteenth Amendments. (See discussion and authorities cited below.)

C. The Trial Court Failed to Question Potential Jurors Under Penalty of Perjury

At Defendant's trial only one group of potential jurors was sworn to tell the truth before jury selection *voir dire* was conducted. Additionally, the general questionnaire filled out by prospective jurors, which included questions relevant to an inquiry about attitudes

toward the death penalty, did not require signing under penalty of perjury.[47] Thus, a substantial number of the prospective jurors questioned in Defendant's case, including all but one of those ultimately seated as jurors, were never sworn to tell the truth with regard to their qualification to serve on the jury.

D. The Trial Record

Jury selection proceedings at Defendant's trial were conducted as follows:

(1) On the morning of June 8, 1993, the trial judge went to the jury room to address 172 prospective jurors on the record and in the presence of attorneys for both sides. (5 RT 1149:16-1150:6, 1158:14-21, 1181:11-15) He explained the nature of the case, the anticipated length of trial, and the process of jury selection and directed the clerk to distribute questionnaires to venire members requesting excusal from service on the basis of hardship. No oath was administered at that time. (5 RT 1158:20-1165:1) The hardship questionnaires were then reviewed back in the courtroom by counsel, who stipulated to the immediate excusal of 38 people. (5 RT 1178:25-1183:19) The court directed a clerk to inform those people that they could leave. (5 RT 1183:20-22) Subsequently, both sides stipulated to the excusal of two additional people for hardship. (5 RT 1185:1-19)

The court and counsel returned to the jury room, the court excused the two additional people, explained to the remaining 132

[47] The questionnaires given to those individuals who wanted to request excusal from service on the basis of hardship were signed under penalty of perjury. (See, for example, CT Supplement – 3 (v. 10) 2369) Appellant raises no issue with regard to those questionnaires.

venire members the next phase of the selection procedure, and ordered the general questionnaires to be distributed to them. (5 RT 1195:18-1196-1199:26) These questionnaires included general questions designed to reveal bias and questions relevant to inquiry under *Witherspoon/Witt*,[48] but they did not require signature under penalty of perjury, or indeed, any signature whatsoever. (CT Supplemental–3 (v.1) 2-20)

On the morning of June 9, 1993, with 35 potential jurors present in open court, the trial court remarked: "They have already been sworn for *voir dire* in the – by the jury commissioner, true, or – they're nodding yes. That's the usual procedure . . ." (6 RT 1211:11-28) This is the only indication on the trial record that *any form of oath* was ever administered, and it does not establish that the oath was given to anyone other than these 35 from this first panel of 132 people, or that the 35 people received the oath required by Code of Civil Procedure § 332. Thus, the record is silent with regard to the remaining 97 panel members and does not support a conclusion that they had been sworn.

The first panel of which 132 remained after initial hardship excusals, was questioned for cause by the court and counsel over the course of the next four court days, on June 9, 10, 11 and 14, 1993. Ultimately 82 more potential jurors were excused, leaving 50 who would be subject to the exercise of peremptory challenges. (9 RT 2069:13-17)

On the morning of June 15, 1993, a second panel of 136

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[48] *Wainwright* v. *Witt* (1985) 469 U.S. 412; *Witherspoon v. Illinois* (1968) 391 U.S. 510.

prospective jurors was assembled. (9 RT 2108:4-28; CT Supplemental –3 (index) i-xvi) The trial court and counsel agreed to condense the process of selection by excusing 92 people for hardship (CT Supplemental–3 (index) i-xvi) without *voir dire*, leaving 44 from this group to be questioned for cause (9 RT 2108:4-28). There is no record of an oath of truthfulness ever being given to these 44 people.

Other than the trial court's remarks on June 9, 1993, quoted above, there is no indication on the trial record that an oath of truthfulness was administered at any time to any other potential jurors. Thus, of the total of 176 people who were questioned about their qualifications to serve as jurors, apparently 141 of them never promised to tell the truth. Only one of the jurors ultimately seated, Thomas Birkholz, was among the initial 35 who acknowledged they had been sworn for purposes of *voir dire*.[49]

E. Settlement of the Record

The trial court normally has full control over the settlement of the trial record, but that general principle does not apply where the court acts arbitrarily. (*Marks v. Superior Ct.* (2002) 27 Cal.4th 176, 195; *St. George v. Superior Court of San Mateo County* (1949) 93 Cal. App. 2d 815, 817 ["As long as the trial judge does not act in an arbitrary fashion he has full and complete power over such a record."].) Moreover, the general rule of deference to the trial court's version of events in the context of record settlement is based on the premise that the trial court will settle the record based on actual

[49] Even so, the record fails to disclose their oath actually complied with the requirements of Code of Civil Procedure section 232, subdivision (a).

knowledge, perceptions, and personal recollection of the judge who was present when an event in question occurred. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 61-66; *Burns v. Brown* (1946) 27 Cal. 2d 631, 636 [citing *In re Gates* (1891) 90 Cal. 257, 259-260; *Vance v. Superior Court* (1891) 87 Cal. 390, 393].)

During the process of certifying the record on appeal in the case at bar, Appellate Counsel asked for a determination as to whether the oath of truthfulness required by Code of Civil Procedure section 232, subdivision (a), had been administered to all prospective jurors. (CT Supplemental–4 (v.2) 400) At a hearing on May 15, 2003, the following dialogue occurred between appellate counsel [Mr. Schwartz] and the trial court:

> "MR. SCHWARTZ: . . . It's – the only record is that when the first group comes in and is place in the – here's some people placed in the jury box for hardship you are going to go through actual question of hardships and you make reference saying the jury has been sworn and you indicate on the record the people are nodding yes and that is the full extent. And that's only on the first panel of – whether or not there's been a swearing of this panel for voir dire purposes –
>
> "THE COURT: I'm actually going to have to go back and look at it because I know, and I knew at the time that you, in a death penalty case you don't do things that aren't on the record. And if we don't have a transcript of what I said to the panel in the jury assembly room my guess is we can get one.
>
> "MS. HOKANS [counsel for respondent]: There is a transcript of what you said.
>
> "THE COURT: In the jury assembly room? All right that is what I intended to ask.

"MR. SCHWARTZ: But there's no indication that the jury was sworn.

"THE COURT: Okay. . . . I'm sure that knowing I said [sic] wasn't transcribed so that as much as I – unless we found somebody who remembered something more, as much as I'll be able to settle, if you will, is that the oath that was given is [] the standard oath at the time was administered by jury assembly room staff because that, up until this became an issue in this case has been the uniform practice of the Superior Court throughout. I said that the way I did because in your request for certification you are talking about confirmation of it being under penalty of perjury. I don't remember when the law changed as to the verbiage of the oath. But I hazard to guess that it was since the Houston trial. I think at the time of the Houston trial the oath was, do you solemnly swear to answer questions et cetera so help you god. Not the language that we now use that is prescribed by statute that says you solemnly state under penalty of perjury et cetera. And do you understand that your failure to do so many subject you to criminal prosecution. I think the law changing the verbiage[50] of that oath has happened since whenever this was – when was this, 1991 or 3?

"MR. SCHWARTZ: '93.

"THE COURT: 93. I think it[']s happened since then, but I'm not sure. Whenever the law changed it was the practice of the Court to do it in the way the law required. So, to the extent I can settle a statement those would be the pieces that would be in it. Beyond that I, we will, have to live with the extent to which a record does or does not exist.

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[50] The trial court was mistaken. There was no change in the text of Code of Civil Procedure section 232 from 1989 to 2003. (LEXSTAT CAL. CODE CIV. PROC. S. 232)

"MR. SCHWARTZ: Is there any way to determine or settle when the jury staff would have administered the oath? That is would it have been prior to your coming down and making a statement or –

"THE COURT: Before.

"MR. SCHWARTZ: Before.

"THE COURT: Yes. That can be settled. What should we do next? Do you want me to create language, or do you want me to direct one of you to -- or should we just wait because there's some more problematic ones coming up and we will do it sort of in the context of them when we get up to Yuba County. . . . Let's leave this as a question mark so far other than I think I could, with a few minutes research, find out what the language was in effect at the time as to how the verbiage of the oath was and I'll be prepared to settle a statement that said that's the language that was used and it was used by court staff and it was used on both panels and it was administered before the judge arrived. The judge arrived in the jury assembly room to speak to the prospective jurors. And beyond that I don't think I can certify more of a record than that."

(26 RT 6181:17-6184:8)

It is apparent on the face of this record that the trial court acted arbitrarily in settling the record with regard to administration of the oath of truthfulness to prospective jurors. The trial judge's remarks clearly indicate that he had no actual memory or knowledge of whether the oath had in fact been administered to all prospective jurors, nor, specifically, to all those ultimately seated as jurors. This was not merely a failure of recollection that needed refreshing from court personnel or trial records. (Compare *People v. Hawthorne* (1992) 4 Cal.4th 43, 61-66.) Instead, the trial court relied on blind

faith that all members of both panels had been given the oath outside of court and off the record, with neither the judge, nor counsel, nor Defendant present.

The fact is that the trial court took no steps on the record at the time of trial to comply with Code of Civil Procedure section 232, subdivision (a), and there was no factual basis for the purported settlement during record certification proceedings that the oath had been given. The reporter's transcript for June 9, 1993 reflects that at that time Judge Snowden had no personal knowledge that the jury panel had been sworn, and he relied not on an affirmation from any court official charged with the duty to see that the oath was administered in accordance with statute, but relied merely on the indications of some prospective jurors, who could not be presumed to understand whether or not the appropriate procedure had been followed.

At most, the May 15, 2003 hearing established that the usual practice either in that courthouse, or in that county, probably in non-capital cases, was that prospective jurors would be sworn off the record to tell the truth before they entered the courtroom for jury selection *voir dire*. But there is nothing in the record to support the trial court's facile assertion that this was actually done in Defendant's capital case. The court did not even ask court personnel whether anyone had an affirmative memory of administering the truthfulness oath, as it had done at trial on June 9, 1993.

In these circumstances, the trial court's speculation-based settlement of the record did not reliably resolve the issue, and its casual approach cannot satisfy the serious and substantive

constitutional requirements which were not met at Defendant's trial.

F. Previous Opinions by this Court Do Not Control the Issue

This Court addressed instances of failure to swear jurors for *voir dire* in two previous cases, *People v. Lewis* (2001) 25 Cal.4th 610 and *People v. Carter* (2005) 36 Cal.4th 1114, neither of which controls Defendant's case because in both of those cases there were circumstances which essentially cured the failure to give the required oath before *voir dire* and which are not present in Defendant's case. In addition, the federal authority on which the *Lewis* opinion relied to support a harmless-error analysis is inapposite to Defendant's case and the reasoning of the *Carter* opinion is faulty.

G. The *Lewis* Opinion Relied on Federal Case Authority Inapposite to Defendant's Case and Is Factually Distinguishable

In *People v. Lewis, supra,* 25 Cal.4th 610, this Court relied on opinions of the federal courts of appeals in other circuits as authority for its determination that no prejudice had been caused in that case by the trial court's failure to swear jurors before *voir dire*, where the questionnaires were signed under penalty of perjury and the oath was administered before voir dire occurred. (*Id.,* at pp. 630-631.) The cases, *United States v. Martin* (6th Cir. 1984) 740 F.2d 1352 and *Cooper v. Campbell* (8th Cir. 1979) 597 F.2d 628, are completely inapposite to the issue presented by Defendant's case.

First, neither *Martin* nor *Cooper* involved the failure to administer an oath of truthfulness to prospective jurors before conducting *voir dire*. Rather, the issue in both of those cases concerned the appropriate timing of swearing in jurors before they

heard evidence, i.e., an oath about performance of the duties of a juror. (*United States v. Martin, supra,* 740 F.2d at 1358 ; *Cooper v. Campbell, supra,* 597 F.2d at 629.) The "duty" oaths which had been administered with questionable timing in both *Martin* and *Cooper* were akin to the section (b) oath in California, which is irrelevant to the instant issue. At Defendant's trial, the section (b) "duty" oath was given as the law required; the jury was properly and timely sworn before hearing evidence at Defendant's trial. At issue here is the trial court's complete failure to give the section (a) "truthfulness" oath to prospective jurors before they answered questions on their qualifications to serve as jurors.

Further, neither *Martin* nor *Cooper* was a capital case and thus neither required the level of due process scrutiny on appeal required in the case at bar. (*Lockett v. Ohio*,(1978) 438 U.S. 586 at 605; *Gardner v Florida, supra,* 430 US at p. 358; *Woodson v. North Carolina, supra,* 428 US at p. 305; *Gregg v. Georgia, supra,* 428 U.S. at p.187.)

Second, in *People v. Lewis* (2001) 25 Cal.4th 610, the trial court had failed to administer the oath required by Code of Civil Procedure section 232 subdivision (a) before prospective jurors filled out their questionnaires, but the questionnaires themselves were signed under penalty of perjury and *the oath was administered* in open court *before voir dire.* (*Id.*, at p. 629.) The only issue on appeal was whether administering the oath after questionnaires had been completed was reversible error. Because in *Lewis* the jurors had signed the questionnaires under penalty of perjury, this Court concluded that there was no reason to think that the potential jurors would have taken their obligation to tell the truth on the questionnaires any less

seriously than in *voir dire* itself. (*Id.*, at pp. 630-631.)

In contrast, at Defendant's trial however, the questionnaires were *not* signed under penalty of perjury, *nor* were the prospective jurors under oath when they were questioned in *voir dire*. Defendant notes that the large majority of those questioned for cause at Defendant's trial never saw the reference to perjury on the hardship questionnaires, because they were distributed only to venire members who wanted to request excusal for hardship. (5 RT 1164:12-27)

Here, it is not a question as to whether the timing or manner of administering an oath to tell the truth substantially complied with the statute, but whether death qualification *voir dire* can be deemed valid in the absence of *any* oath being administered. Clearly, the answer is "no."

H. The Carter Opinion is Poorly Reasoned and Factually Distinguishable

In *People v. Carter*, *supra*, 36 Cal.4th 1114, this Court similarly concluded that the appellant failed to establish prejudice from the trial court's failure to swear some of the prospective jurors pursuant to subdivision (a) before *voir dire*, including a number who were seated as jurors. (*Id.*, at p. 1176-1177.) First, the *Carter* court focused on the fact that the required oath under subdivision (b)[51] of Code of Civil

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[51] Code of Civil Procedure section 232, subdivision (b), provides as follows: "As soon as the selection of the trial jury is completed, the following acknowledgment and agreement shall be obtained from the trial jurors, which shall be acknowledged by the statement 'I do':

'Do you and each of you understand and agree that you will well and truly try the cause now pending before this court, and a true

Procedure section 232 had been administered to the seated jurors, and reasoned that since the jurors could be presumed to have properly performed their duties, no prejudice had been shown from the failure to administer the oath under subdivision (a). However, the fact that the oath about deciding the case based solely on the evidence was administered, both in *Carter* and at Defendant's trial, is simply irrelevant to the instant issue. Clearly, the oath to answer questions truthfully during jury selection under subdivision (a), and the oath to "well and truly try the cause" and render a verdict based on the evidence under subdivision (b), serve two completely different functions.

The point of the first oath, under subdivision (a), is to ensure that the court and counsel will be able to make sound judgments in excusing jurors for hardship, for cause, and in the exercise of peremptory challenges. The purpose of *voir dire,* and most particularly of death qualification *voir dire*, is to be able to obtain from prospective jurors information that is both uniquely personal and almost entirely within the sole knowledge of the prospective juror. California Courts have recognized the inherent reliability of information conveyed under oath as compared with information conveyed by a person not under oath. (See, e.g., *Brizuela v. CalFarm Ins. Co.* (2004) 116 Cal. App. 4th 578, 592: failure of insured to provide information supporting an insurance claim under oath "deprives the insurer of a means for obtaining information necessary

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verdict render according only to the evidence presented to you and to the instructions of the court.'"

to process the claim.")

Absent the administration of an oath prior to *voir dire*, there is no reason to believe that a prospective juror would necessarily answer questions about his or her beliefs regarding the death penalty in an honest manner. The oath is necessary to overcome the reluctance of many people to honestly express their personal beliefs in the presence of strangers, as well as to provide *some* inhibition to persons who would deliberately respond to death qualification *voir dire* dishonestly, either to ensure their removal from the panel or to attempt to be chosen to sit in judgment on a notorious and highly publicized case. Surely the need of the trial court and counsel in a capital case to have the answers of veniremen under oath is no less than the need of insurance companies for sworn answers before paying a claim.

The subsequent administration of the second oath to the panel members selected for the petit jury simply cannot cure the lack of reliability of previously made unsworn *voir dire* answers. A person chosen for the jury who, for whatever reason, has lied, dissembled, or prevaricated on the questionnaire or during *voir dire*, could still honestly and sincerely take the second oath, under subdivision (b). Otherwise, there would be no reason for the law to require the first oath at all, and "[t]he law neither does nor requires idle acts." (Civ. Code § 3532.)

Even were this Court to believe that *Carter* on its particular facts, was correctly decided, the faulty process here was crucially different than the process in *Carter*. The Court in *Carter* relied heavily on the fact that there the unsworn prospective jurors had filled out their general questionnaires under penalty of perjury, "a

circumstance that undoubtedly impressed upon the prospective jurors the gravity of the matter before them and the importance of being truthful and thereby ameliorated at least in part the trial court's failure to timely administer the oath . . . ." (*Id.*, at 1177.)

The record here contains no basis for presuming that the unsworn panel members answered questions in *voir dire* under any impression that they could be prosecuted for perjury if they did not speak truthfully. The questionnaires used for *voir dire* were *not* signed under penalty of perjury, and the majority of the people questioned for cause never saw the hardship questionnaires which referred to perjury. Again, the *death qualification voir dire* particularly seeks information about the individual's beliefs and sentiments that are independently unverifiable and that many persons would be reluctant to share with strangers. In the absence of an oath, it is to be expected that some, if not many individuals will answer such questions based upon what they believe are the "acceptable" answers or what they believe are the answers needed to achieve a goal of avoiding or being approved for, service on the jury.

Clearly neither *Lewis* nor *Carter* resolved the issue presented in the case at bar, and their reasoning cannot be applied here.

I. The Trial Court's Failure to *Voir Dire* Potential Jurors Under Oath on the Record at Defendant's Capital Trial Violated His Federal Constitutional Rights and Requires Reversal

The failure to administer the oath of truthfulness at Defendant's capital trial was a critical error both because of the heightened reliability constitutionally mandated at the guilt and sentencing phases of a capital trial and the constitutionally mandated process of jury

selection included questioning concerning attitudes about the death penalty under the principles set out in *Wainwright v. Witt* (1985) 469 U.S. 412, and *Witherspoon v. Illinois* (1968) 391 U.S. 510, a line of inquiry "rooted in the constitutional right to an impartial jury." (*Darden v. Wainwright* (1986) 477 U.S. 168, 178; see *Witherspoon v. Illinois, supra,* 391 U.S. at p. 522, fn. 21; *People v. Cunningham* (2001) 25 Cal 4th 926, 975.)[52] The same standards apply to jury selection under state law based on both the federal and state constitutions. (*People v. Jones* (2003) 29 Cal.4th 1229, 1246, citing *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146 and *People v. Guzman* (1988) 45 Cal.3d 915, 955.)

The trial court's failure to administer the oath of truthfulness to prospective jurors before *voir dire* therefore violated Defendant's right to an impartial jury at his capital trial.

Further, the minimum safeguard to ensure that the selection of Defendant's jury was conducted in an atmosphere as conducive to truthfulness as humanly and reasonably possible, which could have been afforded by the administration of the oath required by state law, must be held to be the process due to Defendant at his capital trial. (*Ford v. Wainwright* (1986) 477 U.S. 399, 428 (conc. opn. of O'Connor, J.) [clear mandatory language in state law requires

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[52] The same is true, of course, as to questions bearing on fitness to serve at the guilt and sanity phases of trial. Whether because of embarrassment or an affirmative desire to sit as a juror, a prospective juror not under oath may choose to conceal facts which, if disclosed, would indicate a disqualifying bias bearing on guilt or sanity phase issues. Such a juror may nonetheless believe, albeit mistakenly, that he or she could fairly decide the case on the evidence presented.

protection under Due Process clause]; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Hewitt v. Helms* (1983) 459 U.S. 460, 466.)

Such procedural requirements are constitutionally compelled because, "[w]hen a defendant's life is at stake, the [United States Supreme] Court has been particularly sensitive to insure that every safeguard is observed. [Citations.]" (*Gregg v. Georgia* (1976) 428 U.S. 153, 187.) Thus, a heightened degree of due process is required in capital cases. (*Lockett v. Ohio* (1978) 438 U.S. 586, 605; *Gardner v Florida* (1977) 430 U.S. 349, 358; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305), *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) Defendant's right to due process was violated by the trial court's omission of the truthfulness oath.

J. Failure to Administer the Oath of Truthfulness to Prospective Jurors Was Structural Error Requiring Reversal Per Se

Leaving prospective jurors free to make false statements during *voir dire* violated Defendant's right to trial by an impartial adjudicator under the Sixth and Fourteenth Amendments because it was an error going to the heart of the trial process which "could never be harmless." (*Rose v. Clark* (1986) 478 U.S. 570, 578, fn. 6; *Tumey v. Ohio* (1927) 273 U.S. 510, 535.) Just as "the entire conduct of the trial from beginning to end is obviously affected by . . . the presence on the bench of a judge who is not impartial[,]" (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310), the trial is affected in exactly the same way by a jury selected by a process lacking basic indicia for impartiality.

In view of the federal constitutional requirement of an *elevated*

level of due process in a capital case (*Lockett v. Ohio, supra,* 438 U.S. at p. 605; *Gardner v Florida, supra,* 430 US at p. 358; *Woodson v. North Carolina, supra,* at p. 305.) and of the further constitutionally-compelled requirement of reliable capital guilt and penalty verdicts (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.), Defendant's verdicts, which have been returned by jurors who were free to conceal the truth about their backgrounds or views, particularly those about the death penalty, must be reversed.

K. Failure to Administer the Oath of Truthfulness on the Record Led to an Incomplete Record, Requiring Reversal

Imposition of the death penalty must be subject to meaningful appellate review. (*Rushen v. Spain* (1983) 464 U.S. 114, 120; *Woodson v. North Carolina, supra,* 428 U.S. at p. 303; *Marks v. Superior Court* (2002) 27 Cal.4th 176, 192; *People v. Hawthorne* (1992) 4 Cal.4th 43, 67.) In the absence of any indication in the record in any form which might indicate that prospective jurors understood their legal obligation to answer all questions put to them fully, accurately, and truthfully, this Court must disregard the unsworn testimony of the prospective jurors at Defendant's trial, and rational review of the record of jury selection at Defendant's capital trial is not possible. Particularly in view of the heightened degree of due process required in capital cases (see, e.g. *Lockett v. Ohio, supra,* 438 U.S. at p. 605.) and the fact that a reviewing court must have confidence that both guilt and penalty verdicts in such cases are reliable (*Beck v. Alabama, supra,* 447 at pp. 637-638.), the impossibility of meaningful review of the entire jury selection process requires reversal of the entire judgment.

There is no aspect of the trial that compensates for the trial court's omission of the truthfulness oath or offers any assurance that the ordinary lay people called for jury duty at Defendant's trial understood that the *initial questioning* was under penalty of perjury. And given the nature of this "major case," (5 RT 1102:13), it is inevitable that, in the absence of such knowledge, some people answered questions untruthfully or incompletely in order to be selected for service on the jury or to avoid it, or simply to protect personal privacy to which they were not entitled. Media coverage of Defendant's case had been so extensive that the trial was transferred from Yuba County to Napa. The trial court itself remarked before jury selection began, "I don't think there is, for want of a better term, a bigger criminal action pending in northern California than this case. There may not be a more emotional, lengthy, complicated criminal case pending in California." (5 RT 1101:15-19)

During the jury selection process the trial court noted that "a full third of the people" initially called for jury duty did not request excusal for hardship, which the court took to be "a real sign to me that as a group they're taking this very seriously." (5 RT 1191:13-16) An equally plausible explanation for the apparently low number of hardship excusal requests, however, is that many people affirmatively wanted to serve on Defendant's jury, given the high community interest in the famous case. In such an atmosphere it could reasonably be expected that some people would give in to the temptation to prevaricate, or to give partial answers, if they thought they might be disqualified for giving full, truthful, and candid responses.

On the other hand, among those who went through the *voir dire*

process, there are also likely to have been people who did *not* want to serve because of the seriousness, notoriety, and expected length of the trial. This is to be expected to some extent in any capital case, but given the nature of the particular crimes charged in this case, involving multiple murders and many young victims in a school setting and the prospect of a long trial, it is even more likely that some people on the panels did not want to serve, and were inclined to be less than completely truthful in order to avoid being selected.

L. Reversal Is Required Under the Reasoning of *Gray v. Mississippi*

Defendant was entitled to have people on his jury who were opposed to the death penalty so long as they were capable of performing their duties under the law. If even one such person evaded jury service by answering questions untruthfully because no oath of truthfulness was administered , then Defendant's situation is analogous to that of the defendant in *Gray v. Mississippi,* (1987) 481 U.S. 648, where the United States Supreme Court held that the erroneous excusal of even one prospective juror under *Witherspoon/Witt* required reversal per se. (*Id.*, at p. 665.)

As in *Gray* the very nature of the error makes it impossible for Defendant to demonstrate prejudice. The *Gray* court concluded that "[t]he nature of the jury selection process defies any attempt to establish that an erroneous *Witherspoon-Witt* exclusion of a juror is harmless." (*Id.*, at p. 665.) The high court explained that "the relevant inquiry is 'whether the composition of the *jury panel as a whole could possibly have been affected* by the trial court's error' [emphasis in cited opinion]. *Moore v. Estelle* (5th Cir. 1982) 670 F.2d

56, 58 (specially concurring opinion), cert. denied, 458 U.S. 1111 (1982)." (*Gray v. Mississippi, supra,* 481 U.S. at p. 665, underlining added by Defendant.).)

Defendant submits that this standard has clearly been met: certainly, the composition of the jury panel as a whole could possibly have been affected by the fact that the ordinary laypersons questioned in *voir dire* did not appreciate their moral and legal obligation to answer all questions "accurately and truthfully."

M. Reversal is required under *Chapman v. California*

At the very least, because the error at issue here implicates Defendant's fundamental constitutional rights to due process and an impartial jury, the assessment of prejudice should be made under the standard of *Chapman v. California* (1967) 386 U.S. 18, which places the burden on the prosecution to demonstrate beyond a reasonable doubt that such error did not prejudice the defense. In Defendant's case, that would require establishing *beyond a reasonable doubt* that each person questioned in writing or orally at Defendant's trial understood the moral and legal obligation to respond truthfully and accurately, and that there is no reasonable possibility that a single qualified person was excluded from the panel because he or she misled the court or counsel during jury selection, and that no seated juror concealed or distorted any facts that could reasonably have been the basis for a challenge for cause or the exercise of a peremptory challenge. On this record it is impossible for respondent to meet that standard and reversal is required.

N. The Issue is Cognizable on Appeal

Defendant's right to be tried by an impartial jury is a fundamental constitutional right and no objection at trial was required to preserve the issue for appeal. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277; *Hughes v. United States* (6th Cir. 2001) 258 F.3d 453, 463: (trial counsel cannot waive client's right to an impartial jury); *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280; *Rose v. Clark* (1986) 478 U.S. 570, 578.)

O. Conclusion

For all the reasons and under all the authorities cited, Defendant is entitled to a reversal of the entire judgment.

IV. THE EVIDENCE WAS INSUFFICIENT TO CONVICT DEFENDANT ON ANY OF THE ATTEMPTED MURDER COUNTS, BOTH AT THE CLOSE OF THE PROSECUTION CASE-IN-CHIEF WHEN DEFENDANT'S SECTION 1118.1 MOTION WAS ERRONEOUSLY DENIED, AND AT THE CLOSE OF GUILT PHASE EVIDENCE

A. The Trial Court Erred in Denying Defendant's Motion to Dismiss the Attempted Murder Counts under Section 1118.1 Because there Was Insufficient Evidence of those Crimes

At the close of the prosecution's case in the guilt phase on July 8, 1993, Defendant moved to dismiss the counts of murder[53] and attempted murder on the ground that the prosecution had presented insufficient evidence of the element of specific intent with regard to those counts. (18 RT 4340:25-4341:8) The trial court denied the motion. (18 RT 4342:16-21)

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[53] See Argument VI (infra) on the insufficiency of the evidence with regard to the murder counts.

The trial court's denial of the motion with regard to the attempted murder counts was error because insufficient evidence had been presented to sustain a conclusion beyond a reasonable doubt that, at the time that Defendant was walking through Lindhurst High School and shot the victims named in Counts V through XIV, he was actually, specifically, trying to kill those particular individuals.

Defendant's convictions of attempted murder should be reversed both because the trial court abused its discretion and because they directly violate his right to due process under the state and federal constitutions. (U.S. Const., Amend. XIV; Cal. Const. Art. 1, § 15; *Jackson v. Virginia* (1979) 443 U.S. 307, 324.)

B. Standard of Review

The task of the reviewing court when a criminal defendant raises a challenge to his conviction based on insufficient evidence is to "review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible, and of solid value--from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578 [162 Cal. Rptr. 431, 606 P.2d 738]; *People v. Berryman* (1993) 6 Cal.4th 1048, 1083 [overruled on other grounds by *People v. Hill* (1998) 17 Cal.4th 800, 823]; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [61 L. Ed. 2d 560, 99 S. Ct. 2781].)" (*People v. Cole* (2004) 33 Cal.4th 1158, 1212.) Review of the denial of an 1118.1 motion made at the end of the prosecution case focuses on the state of the evidence at the time the motion was made. (*Id.*, at p.

1213.)

C. Defendant Could Not Constitutionally Be Convicted of Attempted Murder in the Absence of Proof Beyond a Reasonable Doubt of Every Element of the Crime

Defendant was convicted of ten counts of attempted murder as defined in Penal Code section 187, in violation of Penal Code Section 664.[54] (4 CT 1010, 1019-1020, 1031-1032, 1043-1044, 1055-1056, 1067-1068, 1079-1080, 1091-1092, 1103-1104, 1115)

Each of these convictions was for a separate crime with a distinct victim, and the evidence on each count must be evaluated individually in order for the respective guilt verdicts to stand.

The victims named in the counts at issue were Thomas Hinojosai, Rachel Scarberry, Patricia Collazo, Danita Gipson, Wayne Boggess, Jose Rodriguez, Mireya Yanez, Sergio Martinez, John Kaze, and Donald Graham. (4 CT 1010, 1019-1020, 1031-1032, 1043-1044, 1055-1056, 1067-1068, 1079-1080, 1091-1092, 1103-1104, 1115)

The United States Supreme Court has held that the Fourteenth Amendment "forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt. (See *Jackson, supra*, at 316; *In re Winship* (1970) 397 U.S. 358, 364, 368, 90 S. Ct. 1068 (1970)." (*Fiore v. White* (2001) 531 U.S. 225, 228-

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[54] Section 664 provides as follows in pertinent part: "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts, as follows: (a) . . . If the crime attempted is [] one in which the maximum sentence is life imprisonment or death, the person guilty of the attempt shall be punished by imprisonment in the state prison for five, seven or nine years."

229; *In re Winship* (1970) 397 U.S. 358, 364; *Jackson v. Virginia* (1979) 443 U.S. 307, 324; U.S. Const., Amends. V, XIV; see also Cal. Const., Art. 1, § 24.) The high court has explained that "[t]he question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence. The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless. (E.g., *Mullaney v. Wilbur*, 421 US, at 697, 698, 44 L Ed 2d 508, 95 S Ct 1881 (requirement of proof beyond a reasonable doubt is not 'limit[ed] to those facts which, if not proved, would wholly exonerate' the accused).) Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar." (*Jackson v. Virginia, supra,* 443 U.S. at p. 324.)

Here, the evidence supported a conclusion that Defendant committed assault with a deadly weapon on these victims and that he inflicted serious bodily injury on Wayne Boggess and John Kaze – but it was inadequate to establish that he affirmatively, specifically intended for any of these people to die and he has therefore been "unconstitutionally convicted and imprisoned" for attempted murder.

Defendant acknowledges that "[w]hen the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence–i.e., evidence that is credible and of solid value–from which a *rational* trier of fact could have found the defendant guilty *beyond a reasonable doubt.*" (*People v. Green* (1980) 27 Cal.3d 1, 55 [emphasis supplied]; *People v. Ochoa*

(1993) 6 Cal.4th 1199, 1206.) However, the more serious the charge, "the more substantial the proof of guilt should be in order to reasonably inspire confidence." (*People* v. *Blakeslee* (1969) 2 Cal.App.3d 831, 837.) Attempted murder is one of the most serious charges that can be made against a defendant.

On the state of the evidence at Defendant's trial – both at the close of the prosecution case in chief and close of the guilt phase trial – no rational juror reasonably could have concluded beyond a reasonable doubt that he specifically intended to kill any of the victims named in the counts at issue.[55] The convictions of attempted murder are not supported by the record and must be reversed.

D. The Crime of Attempted Murder Requires the Specific Intent to Kill

The crime of attempted murder requires that the prosecution prove beyond a reasonable doubt that the defendant acted with the *specific* intent to kill the *particular victim.* (*People v. Bland* (2002) 28 Cal.4th 313, 331; see also *People v. Smith* (2005) 37 Cal.4th 733, 740; *People v. Visciotti* (1992) 2 Cal.4th 1, 58 and cases cited therein.) And the intent element of attempted murder is a "pivotal

[55] Appellant will first show that, based upon the evidence adduced at the time of the motion to dismiss pursuant to Penal Code § 1118.1 no rational juror could have concluded reasonably that the evidence showed beyond a reasonable doubt that defendant intended to kill any of the victims named in the attempted murder counts. Appellant will also argue in a final subsection of this Section IV that even if evidence introduced in guilt following the close of the prosecution's case in chief is considered, no rational juror could have concluded reasonably that the evidence established the elements of attempted murder beyond a reasonable doubt.

requirement." (*Martinez v. Garcia* (9th Cir. 2004) 379 F.3d 1034, 1038.)

At Defendant's trial the prosecutor argued to the jury that Defendant entered the school "with specific intent to kill" (21 RT 5093:26-27), but the prosecutor did not argue that he entered the school with the specific intent to kill any particular person or persons. Rather, the prosecution argued that Defendant went to the school to kill "someone" and "somebody." (21 RT 5089:22-27) The prosecutor never referred to any actual evidence of Defendant's specific intent to kill any of the *particular people* he shot and only wounded, all of whom were strangers to him. The omission was not an oversight: there was no such evidence.

Again, "[t]o be guilty of attempted murder, the defendant *must intend to kill the alleged victim*, not someone else. The defendant's mental state must be examined as to *each* alleged attempted murder victim." (*People v. Bland, supra,* 28 Cal.4th at p. 328.)

When focusing on Defendant's state of mind in this context, it is important to distinguish between implied malice and specific intent to kill. Arguably, Defendant's jurors could reasonably have convicted him of the actual second degree murder of those victims who died of their gunshot wounds, based on a finding of implied malice, if they believed that Defendant had "performed 'an act involving a high degree of probability that it will result in death, which act [was] done for a base, anti-social purpose and with a wanton disregard for human life.'" (*People v. Johnson* (1981) 30 Cal.3d 444, 447-449, citation

omitted.)[56] However, "Implied malice . . . cannot coexist with a specific intent to kill." (*People v. Murtishaw* (1981) 29 Cal.3d 733, 765.) As this Court has observed, "[i]t is now well-established that a specific intent to kill is a requisite element of *attempted murder*, and that mere *implied malice is an insufficient basis* on which to sustain such a charge." (*People v. Lee* (1987) 43 Cal.3d 666. at 670 (emphasis supplied); see discussion and authorities cited in *People v. Swain* (1996) 12 Cal.4th 593, 604-605; *People v. Ratliff* (1986) 41 Cal.3d 675, 695; *People v. Johnson* (1981) 30 Cal.3d 444, 447-449; *Murtishaw, supra*, 29 Cal.3d at p. 764; see also *Lara v. Ryan* (9th Cir. 2006) 455 F.3d 1080.)

Therefore the theory of implied malice is not applicable to any of the counts of attempted murder of which Defendant was convicted.

The convictions for attempted murder cannot be supported under a theory of "transferred intent," since the doctrine of "transferred intent" does not apply to the crime of attempted murder. (See *People v. Smith, supra,* 37 Cal.4th at pp. 740-741, and cases cited therein.)

Nor can the theory of "concurrent intent" involving victims in a "zone of harm" be applied to the case at bar. This theory has been clearly explained in *Bland*, where the defendant and an accomplice killed an intended victim by firing into a car and also wounded two passengers in the car, and this Court affirmed the attempted murder

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[56] As argued in Section VI of this Brief, this is the standard for evidence to support murder in the *second degree*. There is no evidence in the record sufficient to support a finding that any of the actual murders were carried out with deliberation and premeditation as required for murder in the *first degree*.

convictions with regard to those passengers. (*People v. Bland, supra,* 28 Cal.4th at p. 318.) In reaching that result, this Court reasoned that concurrent intent to kill exists "'when the nature and scope of the attack, while *directed at a primary victim*, are such that we can conclude that the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity.'" (*Id.*, at p. 329, quoting from *Ford v. State* (1992) 330 Md. 682 [625 A.2d 984].) That is, "'[w]here the means employed to commit the crime against a *primary victim* create a zone of harm around that victim, the fact finder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.'" (*Id.*, at p. 330.)

The "kill zone" theory is inapplicable here, however, because there was no evidence presented to establish that there was a "primary victim" whom Defendant intended to kill when he shot the people named in counts V through XIV. The record will not support a finding that Defendant concurrently intended to kill the victims of the alleged attempted murders, in order to accomplish the killing of the primary victim because they were in the intended victim's vicinity, or a "zone of harm." There is, therefore, no support in the record for finding, under that theory, that Defendant had the specific intent to kill the people named in the attempted murder counts.

For the convictions of attempted murder to be valid, the jury was required to find, based on the evidence presented at trial, that Defendant affirmatively, specifically, intended that Thomas Hinojosai, Rachel Scarberry, Patricia Collazo, Danita Gipson, Wayne Boggess, Jose Rodriguez, Mireya Yanez, Sergio Martinez, John Kaze, and Donald Graham should die.

E. The Circumstances of the Shootings Do Not Reasonably Support Findings of Specific Intent to Kill

The evidence presented at Defendant's trial, viewed in the light most favorable to the judgment and discussed, below, with regard to each of the subject victims, arguably established that Defendant was behaving recklessly and without regard for the victims' lives or safety, and arguably supported convictions of assault with a deadly weapon on these victims, but did not support a rational conclusion beyond a reasonable doubt that he specifically *intended* to *kill* them.

It was not enough to show merely that Defendant shot these people, or even that he intentionally shot them. "'Specific intent to kill is a necessary element of attempted murder. It must be proved, and *it cannot be inferred merely from the commission of another dangerous crime.*' [Citation.]" (*People v. Collie* (1981) 30 Cal.3d 43, 62, (emphasis supplied); see also *People v. Snyder* (1940) 15 Cal.2d 706, 708 [specific intent for attempted murder "must be proved by evidence or the inferences reasonably deducible therefrom and may not be based upon a presumption."].)

In *People v. Ratliff* (1986) 41 Cal.3d 675, the defendant demanded money from two gas station employees and then shot them at close range, killing one and wounding the other. (*Id.,* at p. 684.) Reversing the attempted murder conviction for failure to instruct on specific intent with regard to the victim who did not die, this Court pointed out that, "Although it seems clear that defendant had the intent to shoot and thus disable his victims, there was no *further evidence of a specific intent to kill* necessary to sustain an attempted murder conviction." (*People v. Ratliff* (1986) 41 Cal.3d 675, 695,

(emphasis supplied); see also *People v. Johnson* (1981) 30 Cal.3d 444, 447-449 [specific intent not necessarily established where defendant fired two shots at close range at victim who had reached into defendant's car and had uttered racial epithets]; compare *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1552 [sufficient evidence of intent where defendant was hired to kill victim and repeatedly stabbed him in chest and heart] and *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1208 [sufficient evidence of intent where gang member shot several times at passengers in car because he believed victims to be rival gang members].) In the case at bar, it is not even clear, as in *Ratliff*, that Defendant intended to disable each of his victims, and assuming, *arguendo*, that the jury could reasonably have concluded that he did intentionally *shoot* them, there was certainly "no further evidence" that he specifically intended to *kill* them.

Beyond the fact that he fired shots at them, the prosecution failed to present any substantial evidence that Defendant was specifically trying to kill Hinojosai, Scarberry, Collazo, Gipson, Boggess, Rodriguez, Yanez, Martinez, Kaze, or Graham,. His convictions of attempted murder were therefore obtained in violation of his right to due process under the Fourteenth Amendment of the federal constitution and must be reversed. (*Fiore v. White, supra,* 531 U.S. 225.)

F. The Circumstances of the Shootings Did Not Indicate that Defendant Was Affirmatively Trying to Kill Any of the Victims

1. Thomas Hinojosai (Count V)

Hinojosai was a student in classroom C-108b, the first

classroom that Defendant came upon when he entered C-building. (Hinojosai, 11 RT 2552:7-26) He testified that Defendant entered the classroom wearing sunglasses and carrying a shotgun, that he shot Rachel Scarberry, Robert Brens and Judy Davis, and then, from about 15 feet away, without moving the gun, aimed or pointed the gun at Hinojosai who dived away as the blast went past him nicking his ear and shoulder. (Hinojosai, 37111 RT 2556:14-2565:18) Defendant then walked out of the classroom. (Hinojosai, 11 RT 2566:23-2567:6)

There was no evidence presented to show that Defendant knew Hinojosai or had any reason to harm or kill him, nor that Hinojosai represented any kind of threat or impediment to Defendant, real or imagined, nor that any purpose of Defendant's would be served by killing him. If Defendant had wanted to inflict a fatal wound, he certainly could have done so. Instead, he shot once in his direction, nicked him, and left.

On these facts, there was no rational basis for concluding that Defendant affirmatively wanted Hinojosai, in particular, to die, or that he shot him specifically intending to kill him.

2. Rachel Scarberry (Count VI)

Ms. Scarberry testified, consistently with other witnesses, that she was in her classroom C-108b when Defendant, whom she did not know, appeared in the doorway pointing a gun into the room. (Scarberry, 11 RT 2586:7-2587:11) Hinojosai saw Defendant holding the gun at his chest, swinging around the corner into the classroom and firing at Scarberry. (Hinojosai, 11 RT 2556:12-17) Even though she was hit, Scarberry initially thought it was just a joke. (Scarberry,

11 RT 2587:13-24) She realized she had actually been shot when she felt a burning sensation in her chest area. (Scarberry, 11 RT 2590:4-9) Scarberry testified that Defendant then shot at Robert Brens and Judy Davis, and left that classroom. (Scarberry, 11 RT 2588:14-27)

Again, there was no evidence presented to suggest that Defendant knew Scarberry or that he had any reason to want to kill her, which certainly he was in a position to do if that had been his intent. After she was shot and before Defendant fired his last shot in the room and left, Scarberry got back up on her feet. (Scarberry, 11 RT 2587:12-2588:19). Had Defendant harbored a specific intent to kill Scarberry he surely would have noted that she was still alive and now standing. Nothing prevented him from shooting her again, which one would certainly expect him to do if he intended her death. The only rational conclusion on these facts is that he harbored no specific intent for her to die.

3. Patricia Collazo (Count VII)

Ms. Collazo was in Ms. Ortiz' classroom [C-105], standing near the doorway, when she heard one gunshot. (11 RT 2682:16-2687:22) Collazo saw Defendant394 in the hallway outside C-108b and then saw him walking from the C-108b towards the stairwell and firing a shot, which struck her in the knee. (11 RT 2687:16-2690:13, 2692:22-24; 12 RT 2712:2-7) Collazo testified that she could not tell whether he was actually pointing the weapon at her but that the he did not move the gun from its position when he left C-108b. (11 RT 2690:6-10; 2712:8-26) After she was shot, she didn't feel anything and didn't realize she was wounded, so she walked to a corner of the

classroom and lay down. (11 RT 2690:14-23)

Collazo testified that at some point after she was shot, she heard Defendant yelling "[f]or all the students to get out from the classrooms or else he was going to start shooting at some other students." (11 RT 2693:3-27) She did not hear him say anything about killing anyone, let alone anything to suggest that he specifically wanted to kill *her* or anybody else. (11 RT 2693:28-2694:6)

There was no evidence to suggest that Defendant knew who Collazo was, or had any reason specifically to want to kill her, that he shot at her with that intent, or even that he actually aimed at her before he shot. There was no evidence that he paid any attention at all to her after wounding her in the knee, and he did nothing to prevent her leaving the school when she did so about two and a half hours later – conduct wholly inconsistent with his having an intent to cause her death. (11 RT 2693:2-4)

4. Danita Gipson (Count VIII)

Ms. Gipson was a student along with 12 or 15 others in substitute teacher John Kaze's classroom, C-110b. (12 RT 2886:22-2888:3) There was no evidence that Defendant knew her. At trial, she testified that after hearing some bangs and thinking that a fight might be going on, she went out into the hallway and walked about 50 feet down the hall towards Defendant, whom she saw walking by a stairway. (12 RT 2888:4-2890:2) He turned, saw her, and raised one of the guns, aiming it toward her. (12 RT 2890:17-21) Gipson turned and began to walk away from him, but he shot her once in the left buttock. (12 RT 2890:23-28) She lay on the floor for a second, then

got up and ran back to the classroom. (12 RT 2891:1-3) It all happened in quick succession (12 RT 2899:25-2900:13), and Defendant did not shoot at her again.

The prosecution presented no evidence to establish that Defendant wanted Gipson to die, and again, the circumstances of the shooting suggest otherwise. Had Defendant harbored a specific intent to kill Gipson he surely would have recognized that she was still alive after she was hit by his shot. He had the opportunity to shoot her again when she was on the floor, but he did not do so, and made no effort at all to pursue her as she returned to the classroom. There is simply nothing in the evidence presented at trial to create a rational basis for inferring that Defendant intended for Gipson to die.

5. Wayne Boggess (Count IX)

Wayne Boggess was shot when he left classroom C-110a with two other students, Lucy Lugo and Gregory Howard, after they saw Kaze come into that room, wounded and bleeding. (Howard, 13 RT 2958:5-2962:7) The three students went into the hallway. Lugo and Howard headed down a small corridor toward another room, but Boggess paused and stood outside the doorway. (Howard, 13 RT 2959:25-2960:19; Lugo, 13 RT 1991:15-2992:5) Someone shouted "get down everybody" and "get down," but Boggess, described at trial as "like in a daze," [57] remained standing. (Howard, 13 RT 2961:4-28; Lugo, 13 RT 2992:3-2993:19) Defendant had entered the hallway at

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[57] Howard believed it was Appellant himself who was yelling at everyone to "get down." (Howard, 13 RT 2977:12-2978:10) However, Robert Ledford, the teacher in C-102, testified that he yelled to his students "get down." (Ledford, 13 RT 3044:18-28)

that point, and fired one shot at Boggess which caused him to fly up and then fall to the floor in convulsions. (Howard, 13 RT 2962:6-28) Defendant then walked along the hallway into Classroom C-102. (Howard, 13 RT 2963:9-21) Boggess was wounded in the head, back, chest, and arm (25 RT6092:26-27), and was eventually dragged out of the building and carried to medics by a police officer. (Long, 17 RT 3960:1-21)

Although the shooting had a tragic result the record does not support a finding that when he fired the shot Defendant wanted Wayne Boggess dead. There was no evidence presented to establish that Defendant had any past relationship with Wayne Boggess, or specifically sought his death, and, again, the circumstances of the shooting indicate otherwise. If Defendant had specifically intended for Boggess to die, he could easily have accomplished that goal. Several of the witnesses who saw Boggess right after he was shot testified that he was clearly was still alive. (Gipson, 12 RT 2894:15-28; Lugo, 13 RT 2993:20-24; Howard, 13 RT 2962:20-2963:3) When the police entered the building Boggess was still on the floor and "obviously alive" (17 RT 3958:6-18). Defendant continued with his shooting spree after shooting Boggess, but made no attempt to shoot Boggess again. The evidence of Defendant's intent in shooting Wayne Boggess is entirely circumstantial. Viewed in its entirety this circumstantial evidence does not support an inference that Defendant specifically intended to kill Boggess, and certainly would not permit a rational trier of fact to conclude beyond a reasonable doubt that Defendant intended Wayne Boggess' death.

6. Jose Rodriguez (Count X)

Jose Rodriguez was a student in classroom C-105 and was seated "in the direction of the door," which was open and gave him a view into the hallway. (Rodriguez, 11 RT 2653:17-2656:16) He saw Defendant fire some shots into C-108b and then approach classroom C-105. (Rodriguez, 11 RT 265611-2659:8) Defendant then shot into C-105 and the pellets hit Rodriguez in the feet. (Rodriguez, 11 RT 2660:19-23) Rodriguez then got up and ran away from the door, toward the front of the classroom. (Rodriguez, 11 RT 2660:24-2661:9) Again, after Rodriguez was struck by the gunshot into C-105, he was clearly still alive and yet Defendant made no attempt to shoot him again. Certainly, had Defendant intended Rodriguez to die, he would have taken note of this and taken further action.

Rodriguez was not hindering Defendant's activities, and there was no evidence that Defendant actually aimed at him or even looked specifically at him, nor that Defendant knew him or had any reason, past or present, to want him to die.

7. Mireya Yanez (Count XI)

Mireya Yanez was also a student in classroom C-105 and was sitting by the door when she heard shots coming from someplace outside the room. (Yanez, 12 RT 2728:20-2730:8) She saw a "shadow of a man" down the hall near the door to classroom C-108b. (Yanez, 12 RT 2730:16-2731:2, 2740:13-2741:4) She was getting up to move away from the door when she was shot in both knees and fell. (Yanez, 12 RT 2729:21-25, 2736:14-22) About two and a half hours later another student carried her out of the building to an ambulance. (Yanez, 12 RT 2735:23-2736:5)

Again, there was no evidence that Defendant knew Yanez or that he had singled her out to shoot her with the intent of killing her. If he had actually wanted to kill her, he could easily have done so.

8. Sergio Martinez (Count XII)

Sergio Martinez, a student in classroom C-109, heard four or five loud sounds that he thought were firecrackers. (12 RT 2814:21-2816:11) He saw his classmates running to hide and he ran to the corner of the classroom and dropped to his knees, at which point Defendant appeared in the doorway and looked at him. (Martinez, 12 RT 2816:16-22, 2820:11-22) Martinez saw Defendant point a gun at him and shoot him once, wounding him in the arm. (Martinez, 12 RT 2820:23-24, 2830:2-15)

There was no evidence suggesting that Defendant knew Martinez, or that he intended for him to die.

9. John Kaze – Count XIII

John Kaze was working as a substitute teacher in classroom C-110b and heard some shots outside the classroom that sounded as though they were coming from the north end of the building. (Kaze,13 RT 2921:26-2922-11) He saw a student leave the classroom and followed her out into the hallway in order to bring her back in. (Kaze, 13 RT 2922:19-2923:28) Kaze saw Defendant, who also saw him and started walking toward him. (Kaze, 13 RT 2925:3-2926:9) Kaze turned his head back toward the door to the classroom and Defendant shot him once, causing pellet injuries to his nose, shoulder, and upper chest below the collar bone. (Kaze, 13 RT 2928:18-22, 2936:22-2937:7) Kaze walked back into the classroom to the area

where a group of students had gathered and lay down on the floor, but after a short time he got up and walked over to look out the classroom door again. (Kaze, 13 RT 2931:3-2932:6) He subsequently was able to exit the building without any further encounter with Defendant. (Kaze, 13 RT 2934:1-6)

There was no evidence that Defendant knew Kaze or that he had any reason to want him to die. Considering that Kaze got up and walked away immediately after being shot, had Defendant harbored a specific intent to kill Kaze he would have recognized that Kaze was not dead, yet he did not pursue him or do or say anything to indicate that he intended for Kaze to die.[58]

10.Donald Graham – Count XIV

Donald Graham was teaching in classroom C-101a when he heard explosive sounds he thought were firecrackers. (Graham, 14 RT 3169:22-3170:11) Graham went over to the doorway and out in the hallway to see what was going on. He saw Robert Ledford step out of his classroom and then hide behind a short wall shortly before Defendant came into Graham's view. Defendant noticed Graham and lowered his gun in Graham's direction. (Graham, 14 RT 3171:19-3174:27) Graham jumped back into the room and heard a gunshot, which struck a metal locker in the hallway and caused a metal

[58] Nor would the evidence support an inference that Defendant intended to kill teachers as a category of persons. He walked away from Mrs. Morgan in the parking lot; did not pursue John Kaze, Robert Ledford or Donald Graham, and expressly let Patricia Cole leave the second floor although he then proceeded to tell the student hostages how he disliked her. (16 RT 3658:4-12)

fragment to catch his left forearm. (14 RT 3174:28-3176:14) In the next minute or so Graham heard a few more shots and then silence, and when he heard another teacher tell his students to leave the building, Graham did the same with his class, following the students out of the building. (Graham, 14 RT 3176:18-3177:19)

Since Graham managed to get back inside the room before the shot which hit the locker was fired, it would have been obvious to Defendant that Graham was not dead and probably not even wounded. Had Defendant harbored a specific intent to kill Graham it would be reasonable to expect Defendant to pursue him. However, although there is nothing in the record to suggest any real or apparent obstacle to Defendant pursuing Graham, he did not do so. This evidence can support an inference only that Defendant harbored *no* intent to kill Graham. There was no evidence that Defendant had any idea who Graham was or had any reason to want him to die. Assuming Defendant had any intent at all, the only rational conclusion on these facts is that Defendant shot at Graham to make him move away from his position at the classroom doorway looking into the hall, but not to kill him.[59]

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[59] Circumstantial evidence which is highly ambiguous in terms of the inferences it could support as to the defendant's purposes is insufficient to support a verdict requiring specific intent. Whether the inferences that can be drawn from circumstantial evidence are ambiguous must be determined in light of the record as a whole. (*People v. Anderson*, (1968) 17 Cal.2d 15, at 31. *People v. Memro* (1985) 38 Cal.3d 658, 695 (*Memro I*).)

G. The Totality of the Evidence Indicated That Defendant Did Not Harbor the Requisite Specific Intent

1. Lack of Affirmative Evidence of Intent to Kill the Named Victims

It is inescapable that there simply was no evidence presented by the prosecution in the guilt phase to establish the element of specific intent to kill with regard to any of the counts for attempted murder. In addition to the circumstances of the shootings recounted above, there is a glaring lack of evidence of any other kind to establish *mens rea.* There was no evidence, for example, that Defendant had made any statement, either to his friend in privacy before the shootings, or to anyone else, indicating that he wanted any of the victims in Counts V through XIV actually to die, or that he intended to shoot anyone to kill them. There was no evidence that he had entered the school with any awareness of the identities of any of the individuals he shot but did neither kill, nor that he bore any of the victims of alleged attempted murder any malice. The handwritten notes found in his bedroom did not include any of the victims' names or any words that might imply an intention to kill any specific person or anyone at all. And, as the sequence of events unfolded at the high school, nobody heard Defendant say or do anything indicating that he held any animosity toward any of these particular individuals, that he believed he would benefit in any way from their deaths, nor that he wanted or intended for any of them to die. When on the second floor he supported the removal of the wounded victims so that they could receive medical care. (Owens, 16 RT 3626:19-24; Hendrix, 16 RT 3810:4-10; Mills, 18 RT 4310:1-27)[60]

[60] Defendant's lack of intent to kill is corroborated by the testimony of

Moreover, based on the prosecution's evidence of each of these shootings, it must have been apparent to Defendant that none of these victims was dead after they had been shot, and absolutely nothing prevented him from killing any of them, if that had been his intent, yet he took no steps to try to ensure that the shots would be fatal.

For the reasons stated in Argument I, *supra,* Defendant submits that neither the audio tapes (Exhibits 82-88), the videotape of Defendants' interrogation on May 2, 1992 (Exhibits 57a and 57b), nor the transcript of that video prepared by the prosecution (Exhibit 89), may be used to support the verdicts on Counts V through XIV. Given the unavailability of a settled record as to what the jury reasonably would have heard when Exhibits 82-88 and 57a and 57b were played, including the manifest unreliability of Exhibit 89 as an aid to determining what they heard, there is no way for counsel to argue or this Court to review that evidence for purposes of attacking or supporting the verdicts. Without waiving those arguments, Defendant informs the Court that in the many instances in which Counsel for Defendant has listened to Exhibits 82-88 and 57a and 57b, at no time has Counsel heard any statements by Defendant stating or suggesting

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the students held hostage in C-204 that Defendant did not appear to know that anyone had been killed. (Perez, 15 RT 3426:7-3428:17; Hicks, 15 RT 3461:20-28, 3455:21-3456:15; Baker, 15 RT 3520:1-13; Hendrix, 16 RT 3810:4-3811:4) During the hostage negotiations the police were careful not to let Defendant know that anyone had been killed for fear that knowledge of the consequences of what he had done would provoke him to further violence. (Escovedo, 17 RT 3911-3913; Tracy, 18 RT 4294:7-21; Tracy, 18 RT 4302:6-27)

that he held an intention to kill any of the victims named in Counts V through XIV.

2. Affirmative Evidence that Defendant Had No Intent to Kill

a. Statements to Police

[The following argument is based on the content of Exhibit 89, the transcript of the audio portion of the videotape produced by the prosecution and provided to "assist" the jury during deliberations and to "facilitate the understanding of the evidence."[61] (18 RT 4337:6-22) Defendant contests the accuracy of this Exhibit and submits that it cannot be used to support the verdicts on Counts V through XIV. However, if the content of this prosecution-produced exhibit would undermine the verdicts on Counts V through XIV and

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[61] As discussed in detail in Argument I of this Brief, Exhibit 89 was admitted into evidence only to assist the jury and not as the "best evidence" of what Defendant said in his May 2, 1992 interview. (18 RT 4337:6-22) As stipulated by the parties on appeal, Exhibit 89 is not an accurate transcription of the interview. For purposes of arguing evidence sufficiency only, Defendant refers to Exhibit 89 because it was provided to the jury and there is no available record of what the jury can be deemed to have heard when the videotapes, Exhibits 57a and 57b, were played for them. Furthermore, because the appellate record lacks a transcription of the audio portion of the videotapes as it was intelligible and sounded when played for the jury in the courtroom, neither the transcript nor the tapes themselves can properly be used to support a finding of evidence sufficiency.

In the context of the current discussion, it should be noted that Exhibit 89 has Defendant stating: say "Whoever it was that came into eye contact, that was in the line of fire I shot," (Exhibit 89 [CT Supplemental- 5 (vol. 1 of 1) 71] and Stipulated Revised Exhibit 89 [CT Supplemental-5 (vol. 1 of 1) 173:6-7] (emphasis supplied)) However, the record lacks any basis for inferring the jury heard the statement one way or the other.

serve to demonstrate that the prosecution failed to produce evidence that would support findings of guilt beyond a reasonable doubt on any or all of these counts, Defendant is entitled to present such content and argue it on this appeal. Assuming the Court grants relief on Defendant's Argument I due to the inadequacy of the record, Defendant also would be entitled to appellate relief in the form of a judgment of acquittal on Counts V through XIV if the evidence in the record on those counts shows no basis to support the verdict as a matter of law.

Defendant was interrogated by the police at length on May 2, 1992, the day after the crime. The police interrogators repeatedly appealed to Defendant to express his pride in a facility to use firearms and knowledge of military tactics as an encouragement to admit he intended to kill the persons he shot. Defendant's responses to these appeals consistently reflect his obsession with weapons tactics, but he never admitted an intention to kill. Rather, Defendant told the interrogators that he had been shooting at anybody he saw for no particular reason other than that they were moving or came into his line of sight. (Exhibit 89 [CT Supplemental–5 (b From the dialogue between the officers and Defendant during that interrogation, it is clear that this was the police's understanding of Defendant's conduct at that time, which was most likely based on the physical evidence, including the nature of the surviving victims' injuries, as well as statements from victims and witnesses.

There was nothing Defendant was reported as saying on Exhibit 89 or at any other time, indicating that he specifically intended for Hinojosai, Scarberry, Collazo, Gipson, Boggess, Rodriguez,

Yanez, Martinez, Kaze, and/or Graham to die.

On the contrary, Exhibit 89 has Defendant saying repeatedly that when he went to the school, he did not know what he was going to do. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 2-3, 4, 20])

Even when questioned about the specific shooting incidents, as reported on Exhibit 89, Defendant's responses to police questioning indicated that he had no particular purpose other than simply to shoot at "anything" that came in his line of sight. ((Exhibit 89 [CT Supplemental–5 (v.1 of 1) 29-31, 70-71])

Exhibit 89 provides no suggestion that Defendant actually was thinking of trying to kill particular people or anyone at all. For example, Exhibit 89 has Defendant stating: "I only shot everybody one shot." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 8]; Exhibit 57A)) Following are some of the passages where Exhibit 89 has Defendant discussing how he chose whom to shoot:

> [Q.] Were you, were you, anything moving quick that how you fired at or, or what set....?
>
> [A.] Yeah. Anything out here.
>
> [Q.] Were you holding the trigger, is that what you shoot . . .
>
> [A.] Anything that, anything that came in the sight of fire.
>
> [Q.] So if you saw a person moving you shot at them? Or whoever was moving, right?
>
> [A.] Yeah, yeah.
>
> [Q.] It wasn't a racist thing?
>
> [A.] No.

[Q.] It wasn't a boy/girl thing.

[A.] No, it never...

[Q.] Age had nothing to do with it?

[A.] No.

[Q.] If you saw a person you shot at them?

[A.] Right.

[Q.] Okay. So you weren't discriminating?

[A.] No, it wasn't about anything.

(Exhibit 89 [CT Supplemental–5 (v.1 of 1) 31 (emphasis supplied)])

And similarly:

[Q.] After you shot him where did you go?

[A.] After, after I saw him.

Williamson[.] Oh, okay. I thought you saw him. Where did you go after that?

Houston[.] Uh, That's all I remember. I saw him and then I turned, I turned this way and I fired at the Mexican class.

Downs[.] Okay. Who were you shooting at here by this Spanish class, the Mexican class?

Houston[.] Uh, there was, I think I saw, a couple of pairs of legs and I saw some people, I *think I saw like two, three people and they moved out of the way, I fired a shot, in it,* and then later on some kids told me that there was some people in there and they were shot in the legs and I told some kids upstairs, go down there, grab the kids, and I want two sets of people to grab kids, take them out through where the pizza is and take them out there to an ambulance.

Williamson[.] So, *you weren't looking for anybody* when you were in here, *all you*

were looking for was the targets. Just something, and then it just started happening?

Houston[.] *Yeah.*

Williamson[.] After the first one it got . . .

Houston[.] Well, once I shot it's then it was, it seemed like – there's no turning back. But, but, then it kicked in a little bit farther and once I got away from the kids I started walking up the stairs, that what [I'm] doing is wrong and that's why I didn't shoot anybody upstairs or anything like that.

(Exhibit 89 [CT Supplemental–5 (v.1 of 1) 35-36 (emphasis supplied)])

And similarly,

[Q.] Had you known Brens was standing there when you were shooting would you have shot him?

[A.] It wouldn't, if he was there or not it, I doubt . . .

[Q.] If you had known it was Brens and he had a big sign that said, I'm Mr. Brens, and you're walking down the hallway after shooting a kid, would you have shot him[?]

[A.] He was right in the path if it was him or not, even if it was Mr. Brens or not, that person would have . . .

[Q.] It didn't matter. He was in your sights, he was gone. If it was Mr. Brens, Mr. Burris, or whatever, it was just whoever came in eye contact. You didn't give a shit who, as long as . . .

[A.] Uh, yeah.

[Q.] You weren't being selective, saying this is a girl, I'm not going to shoot her, okay, I'll shoot him?

[A.] No, *I wasn't selective.* You guys are

saying I shot one girl?

[Q.] If they moved, you shot them? And uh, so . . . is that right?

[A.] Well, *whoever came to my, my sight contact, yeah.*

[Q.] The uh, the teacher the first teacher who got shot okay. He looked you in the face.

[A.] Yeah.

[Q.] Alright. And then you went to the girl.

[A.] Uh Huh (affirmative response)

[Q.] Okay. Once you shot him, why did you continue on?

[A.] Huh?

[Q.] I mean, you knew that was him.

[A.] Cause, like I said I was *totally out of it* and my instincts took over. I mean, uh, I mean if you ever *shot at targets* it whatever comes in view, I mean . . .

[Q.] So whoever was there, you shot them. Did they . . .

[A.] Whoever it was that came into eye contact, that was in the line of fire I shot.

(Exhibit 89 [CT Supplemental–5 (v.1 of 1) 70-71 (emphasis supplied)])

Thus, according to the prosecution transcript of the interrogation, Defendant's statements to the police the day after the shooting reflect that Defendant was shooting randomly, with no specific intent at all, and there is certainly no support in this interview for a conclusion that he was affirmatively trying to kill any particular person as opposed to merely wounding them. These statements do

support an inference that he was acting recklessly, and without regard for human life – a criminal intent, but one which cannot support a conviction of attempted murder.

3. Statements to David Rewerts

According to Defendant's close friend David Rewerts, in the months before May 1, 1992, he and Defendant discussed on several occasions the idea of going to Lindhurst High School and shooting "a couple of rounds" or "a couple people." (Rewerts, 18 RT 4063:1-4064:10) But Rewerts did not testify that Defendant ever actually said that he wanted to *kill* anybody at the school, or that he wanted anybody at the school to die.

On direct examination Rewerts first testified that when he was visiting Defendant, "the subject just got brought up where he would like to go to the school and sho[o]t a couple of people." (Rewerts, 18 RT 4062:22-23) He also testified that Defendant had talked of going to the high school to "shoot a couple rounds." (Rewerts, 18 RT 4063:7-11) The prosecutor asked, "When he says shoot a couple rounds, did he say anything about shooting any persons?" And Rewerts replied, "I can't recall that right now." (Rewerts, 18 RT 4063:15-17)Rewerts then testified that Defendant had talked of "going back [to the high school] and shooting a couple people." (Rewerts, 18 RT 4064:4-5) Rewerts then testified that Defendant had not named anyone in particular. (Rewerts, 18 RT 4065:18-25)

Thus, there was no evidence presented at trial indicating that Defendant ever actually told Rewerts that he planned to kill anybody,

nor that he particularly wanted anyone to die.[62]

H. The Trial Court's Ruling Was Irrational

On this record, it is questionable whether the trial court even exercised its discretion in any meaningful sense when it ruled on Defendant's 1118.1 motion. The entirety of its consideration of the motion was as follows: "The test on a motion pursuant to Section 1118.1 is whether there is evidence which would support a jury's verdict if a jury found beyond a reasonable doubt the guilt of the defendant. There is. The motion will be denied." (18 RT 4342:16-21)

This conclusory statement is belied by a careful review of the record on the attempted murder counts, as Defendant has demonstrated. At the time of the 1118.1 motion the prosecution had not presented evidence to support a rational conclusion beyond a reasonable doubt that Defendant had acted with the requisite specific intent to kill the named victims in Counts V – XIV. The trial court's denial of the motion was arguably irrational, and at least, unsupported by the record. It should be reversed.

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[62] In characterizing his conversations with appellant as "idle talk," Rewerts opined that "Everybody says that they're going to go out and in anger that they're going to kill a person, but they don't." (Rewerts, 18 RT 4068:5-18) But he did not report at any time that appellant himself had actually talked of killing or dying rather than merely "shooting."

I. Nothing Introduced into Evidence After the Close of the Prosecution Case in Chief Provided Any Additional Support For Finding that Defendant Acted with the Requisite Specific Intent to Kill or Otherwise Made the Record Sufficient to Support the Attempted Murder Convictions

Defendant previously has described at some length the evidence adduced in his defense case in the guilt trial, including the testimony of Drs. Rubinstein and Groesbeck and the testimony of Ricardo Borom. (See discussion, *supra*, at pages 128 *et seq.*) Neither expert provided any evidence that would support any finding that Defendant intended to kill anyone when he went to the high school. Both experts testified that he had no intention to kill, but that he was seeking to "save the students there by telling the media about what had happened to him. (Groesbeck, 19 RT 4485:3-20, 4468:26-4469:6, 4580:14-4581:15; Rubinstein, 20 RT 4730:17-4735:21)

Thus, whether the review is limited to the evidenced adduced at the close of the prosecution's case, when the trial court denied Defendant's Penal Code Section 1118.1 motion, or the review encompasses all of the evidence presented considered by the jury in making its guilt verdict, the record will not support a finding by a rational juror that the evidence supported a finding beyond a reasonable doubt that Defendant intended to kill any of the victims named in Counts V through IV. (*Jackson v. Virginia, supra*, 443 U.S. 307, 317-320.)

J. Conclusion

Defendant submits that there must be *something* beyond simply shooting and wounding a victim, on which a conviction of attempted murder can be seen to rest. Otherwise any non-fatal shooting would,

without more, be an attempted murder, and that is not the law. The element of specific intent to kill the particular victim must be proved. Here it was not proven.

For all the reasons and under all the authority cited above, Defendant's convictions of attempted murder in Counts V through XIV must be reversed.

V. DEFENDANT'S LIFE SENTENCES FOR TEN COUNTS OF ATTEMPTED MURDER AND THE JURY'S SPECIAL FINDINGS OF PREMEDITATION AND DELIBERATION ON THOSE COUNTS MUST BE REVERSED BECAUSE THEY WERE UNAUTHORIZED BY LAW

A. Introduction

Assuming, *arguendo*, that this Court concludes that there was sufficient evidence to convict Defendant of the attempted murder of each of the ten named victims (see Argument IV, *infra*) Defendant submits that the special findings of premeditation and deliberation on those counts were invalid and the imposition of life sentences for them was an act beyond the court's jurisdiction. (*In re Hess* (1955) 45 Cal. 2d 171, 175.) This is so because the indictment did not allege that the attempted murders were committed with willfulness, premeditation, and deliberation as required by the principles of due process and the express language of Penal Code sections 664 and 1170.1. (U.S. Const., Amends. VI, XIV; Cal. Const., Art. 1, Sec. 24; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Cole v. Arkansas* (1948) 333 U.S. 196, 201; *People v. Valladoli* (1996) 13 Cal.4th 590,

607; *People v. Bright* (1996) 12 Cal.4th 652, 670-671; *In re Hess, supra,* 45 Cal. 2d at p. 175.)

B. The Indictment Failed to Allege that the Attempted Murders Were Willful, Deliberate and Premeditated

At the time of the offenses, Section 664, subdivision (1)[63] provided as follows, in pertinent part:

> Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempt, as follows: 1. . . . if the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punishable by imprisonment in the state prison for life with the possibility of parole
>
> . . . . The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact.
>
> (Emphasis Supplied)

Additionally, this Court has held that section 664's provision for a life sentence imposes a penalty enhancement for attempted murder that was willful, deliberate, and premeditated. (*People v. Bright* (1996) 12 Cal.4th 652, 670-671.) Penal Code Section 1170.1, subdivision (e), provides in pertinent part: "All enhancements *shall be alleged* in the accusatory pleading." (Emphasis supplied.)

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[63] The subdivisions have been renumbered and the same language now appears in section 664, subdivision (a).

The indictment filed against Defendant, however, failed to charge the fact that the attempted murders were willful, deliberate and premeditated. The ten counts of attempted murder were charged as follows:

> THAT Defendant(s) ERIC CHRISTOPHER HOUSTON, did in the County of Yuba, State of California, on or about May 1,1992, commit a FELONY, namely: Violation of Section 664/187 of the Penal Code of the State of California, to wit: did willfully and unlawfully attempt to commit the crime of murder in violation of Section 187 of the Penal Code of the State of California, in that he did willfully and unlawfully, and with malice aforethought, attempt to murder [victim's name], a human being.
>
> It is further alleged that in the commission and attempted commission of the above offense, the said defendant(s), ERIC CHRISTOPHER HOUSTON personally used a firearm(s), within the meaning of Penal Code Section 1203.06(a)(1) and 12022.5 and also causing the above offense to become a serious felony pursuant to Penal Code Section 1192.7 (c).
>
> (5 CT 1164-1168)

Nor did the allegation of willful, premeditated, and deliberate attempted murder appear directly or indirectly in any other place in the indictment.

C. The Special Findings of Premeditation and Deliberation and the Life Sentences Imposed for Attempted Murder Were Unauthorized by Law

Each verdict returned on Counts V through XIV found Defendant guilty of the attempted murder of each victim "a violation of Section 664/187 of the California Penal Code, as charged in [the

relevant Count] of the Indictment." (4 CT 1010, 1019-1020, 1031-1032, 1043-1044, 1055-1056, 1067-1068, 1079-1080, 1091-1092, 1103-1104, 1115) Each of these verdicts also contained a specific finding "that the crime attempted was willful, deliberate, and pre-meditated murder." (Ibid.) Based on the special findings, the trial court sentenced Defendant to consecutive life sentences on Counts V through XIV. (5 CT 1459-1460; 25 RT 6130:3-6135:8)

Each of the enhancement special findings was the practical equivalent of conviction and punishment of Defendant for an uncharged offense in direct violation of his rights under the Sixth and Fourteenth Amendments of the federal constitution and under Article 1, section 24 of the state constitution. (*Cole v. Arkansas, supra,* 333 U.S. at p. 201; *Jackson v. Virginia* (1979) 443 U.S. 307, 314; *Gray v. Netherland* (1996) 518 U.S. 152, 168; *People v. Valladoli, supra*, 13 Cal.4th at p. 607.)

Further, as a violation of the express terms of sections 664 and section 1170.1(e), each enhancement finding and sentence also constituted a denial of Defendant's federal due process right to the correct application of state law provisions in which he had a clear liberty interest. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Vansickel v. White* (9th Cir. 1999) 166 F.3d 953; *Campbell v. Blodgett* (9th Cir.1992) 997 F.2d 512, 522, cert. denied (1994) 510 U.S. 1215; *Fetterly v. Paskett* (9th Cir.1993) 997 F.2d 1295, 1300; *People v. Marshall* (1996) 13 Cal.4th 799, 850-851; *People v. Moreno* (1991) 228 Cal.App.3d 564, 579.)

As this Court set forth in *People v. Thomas* (1987) 43 Cal.3d 818 at 823, (parallel citations omitted by Defendant indicated by "[]";

other citations omitted by *Thomas* court.):

> We begin with the preeminent principle that one accused of a crime must be 'informed of the nature and cause of the accusation.' (U.S. Const., Amend. VI.) 'It is fundamental that "When a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime. [Citations.] This reasoning rests upon a constitutional basis: 'Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.' [Citation.]" (People v. West (1970) 3 Cal.3d 595, 612 [citations].)' (People v. Lohbauer (1981) 29 Cal.3d 364, 368 []; see also In re Robert G. (1982) 31 Cal.3d 437, 440 []; People v. Anderson (1975) 15 Cal.3d 806, 809 []; In re Hess (1955) 45 Cal.2d 171, 174-175 []; In re Oliver (1948) 333 U.S. 257, 273 [].) 'No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.' (Cole v. Arkansas (1948) 333 U.S. 196, 201 [].)"
>
> Consistent with these fundamental principles, this Court has long held that "[a] person cannot be convicted of an offense (other than a necessarily included offense) not charged against him by indictment or information, whether or not there was evidence at his trial to show that he had committed that offense. (*People v. Smith*, 136 Cal. 207, 208 []; *People v. Arnett*, 126 Cal. 680, 681 []; *People v. Wallace*, 9 Cal. 30, 32; *In re Colford*, 68 Cal.App. 308, 311 []; People v. Arnarez, 68 Cal.App. 645, 648, 651 []; *People v. Akens*, 25 Cal.App. 373, 376 []; see also People v. Mahony, 145 Cal. 104, 107-109 []; [citation]." (*In re Hess,*

supra, Cal.2d at pp.174-175, parallel citations omitted; see also *People v. Valladoli, supra,* 13 Cal.4th at p. 607)

D. Conclusion

The jury's special findings of premeditation and deliberation on Counts V through XIV were unauthorized by law and must be vacated. The imposition of life sentences for Counts V through XIV was an act in excess of the trial court's jurisdiction and those sentences must be reversed and the case remanded for resentencing on those counts. (*Hess, supra,* 45 Cal.2d at p. 175.)

VI. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT VERDICTS OF FIRST DEGREE MURDER BOTH AT THE CLOSE OF THE PROSECUTION CASE-IN-CHIEF WHEN DEFENDANT'S SECTION 1118.1 MOTION WAS ERRONEOUSLY DENIED, AND AT THE CLOSE OF GUILT PHASE EVIDENCE

A. Standard for Review

At the close of the prosecution case in chief Defendant moved for acquittal under Penal Code § 1118.1. The motion was denied. (18 RT 4340:14-4342:21) Defendant submits that the evidence in the record at the time the motion was made under Penal Code §1118.1 was insufficient as a matter of law to support any of the four convictions of first degree murder based upon premeditation and deliberation, as required both by Section 1118.1 and by the due process clauses of the Fourteenth Amendment to the United States Constitution and article I, section 15 of the California Constitution.

Defendant also submits that the evidence in the record at the close of the guilt phase and submission of guilt issues to the jury was

insufficient as a matter of law to support any of the four convictions of first degree murder based upon premeditation and deliberation, as required by the due process clauses of the Fourteenth Amendment to the United States Constitution and article I, section 15 of the California Constitution.

Where the section 1118.1 motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point. (*People v. Trevino* (1985) 39 Cal.3d 667, 695, (disapproved on another point in *People v. Johnson* (1989) 47 Cal.3d 1194, 1219-1221.) A defendant need not articulate the grounds for his motion for acquittal, and there is no requirement that the motion be made in a particular form. (*People v. Belton* (1979) 23 Cal.3d 516, 521.) Thus, in *Belton*, this Court held that the defendant's motion for an acquittal was made in proper form where defense counsel merely stated he did not think there was sufficient evidence to convict the defendant of any crime. (*Id.*, at pp. 521 & fn. 6, 522-523.)

Defendant was found guilty of four counts of deliberate premeditated murder – murder in the first degree. Defendant submits that these verdicts are not supported by substantial evidence.

The elements of murder in the first degree were described to the jury as follows:

> All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree. The word willful, as used in this instruction, means intentional. The word deliberate means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed

> course of action. The word premeditated means considered beforehand.
>
> (22 RT 5197:1-11)

The task of the reviewing court when a criminal defendant raises a challenge to his conviction based on insufficient evidence is to "review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible, and of solid value--from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Berryman* 6 Cal.4th 1048, 1083; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [61 L. Ed. 2d 560, 99 S. Ct. 2781]; *People v. Cole* (2004) 33 Cal.4th 1158, 1212.)

The United States Supreme Court has held that the Fourteenth Amendment "forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt. See *Jackson, supra*, at 316; *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970)." (*Fiore v. White* (2001) 531 U.S. 225, 228-229) (See also U.S. Const., Amends. V, XIV; see also Cal. Const., Art. 1, § 24.) And the high court has explained that

> [t]he question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence. The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless. E.g., *Mullaney v. Wilbur*, 421 US, at 697, 698, 44 L Ed 2d 508, 95 S Ct 1881 (requirement of proof beyond a reasonable doubt is not 'limit[ed] to those facts which, if not proved, would wholly exonerate' the accused). Under our system of

> criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar."
>
> *Jackson v. Virginia, supra*, 443 U.S. at p. 323-324.

For purposes of this appeal Defendant does not contest that on May 1, 1992 at about 2:00 p.m. he came to Building C at Lindhurst High School armed with a shotgun and a .22 rifle, entered the building, and in the course of about 2 minutes fired the shotgun multiple times hitting 14 persons and various items of property. Four of the persons Defendant hit with gunfire died from their wounds. These actions lacked legal justification. The presumption then is that these homicides constituted murder in the second degree. (*People v. Anderson* (1968) 70 Cal.2d 15, 25.) In order to support the first degree murder verdicts on the four homicides, the record must show substantial evidence that would support beyond a reasonable doubt that Defendant deliberated and premeditated *killing* people in connection with these homicides.

In the absence of substantial evidence of deliberation and premeditation, a defendant who commits a homicide in the course of committing certain enumerated felonies also may be found guilty of first degree murder. However, in this case Defendant was not charged with felony murder, no felony murder theory was argued to the jury and the jury was not instructed on the felony murder doctrine. Thus the first degree murder verdicts must stand or fall solely on the sufficiency of the evidence that Defendant deliberated and premeditated the killings. Sufficient evidence to support such findings beyond a reasonable doubt does not appear in the trial record either at

the close of the prosecution case in chief when Defendant's section 1118.1 motion was erroneously denied or at the close of the guilt phase evidence.

Defendant submits the evidence "leaves only to conjecture and surmise the conclusion that Defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation." (*People v. Bender* (1945) 27 Cal.2d 164, 179.) At most, the evidence shows the commission of unlawful acts, the consequences of these acts were dangerous to life and/or that Defendant acted with "an abandoned heart," (*People v. Bender, supra.* at 178), but there is no evidence that Defendant acted "with the specific intent to take life." (*Ibid.)*

To prove a case for first degree murder based upon premeditation and deliberation, the prosecution was required to put forth evidence that "the slayer *killed* as a result of careful thought and weighing of considerations; as a deliberate judgment or plan; carried on cooly and steadily, [especially] according to a preconceived design." (*People v. Bender, supra.*, at 183; *People v. Anderson, supra.*, at 26 (emphasis supplied))

Although it need happen only "in a brief interval" prior to the act, for the defendant to have acted in a "deliberate" manner he must have 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." The *evidence* must show the act to have been the product of a "cold, calculated judgment," no matter how little time took place for that judgment to form. (*People v. Memro* (1995) 11 Cal.4th 786, at 862-863, citing to *People v. Perez* (1992) 2 Cal.4th

1117, 1123, and *People v. Bloyd* (1987) 43 Cal.3d 333, 348.)

It is not sufficient that the evidence shows a specific intent to kill:

> Moreover, we have repeatedly pointed out that the legislative classification of murder into two degrees would be meaningless if "deliberation" and "premeditation" were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill. (People v. Wolff, supra, 61 Cal.2d 795, at p. 821; People v. Caldwell, supra, 43 Cal.2d 864, at p. 869; People v. Thomas (1945) 25 Cal.2d 880, 898 [156 P.2d 7].)
>
> *People v. Anderson, supra*, 70 Cal.2d at 26.

In the decision in *People v. Anderson* (1968) 70 Cal.2d 15, this Court set forth the methodology that a reviewing court is to follow in assessing the sufficiency of evidence in a trial court record that will permit a jury finding of murder in the first rather than in the second degree: planning, motive, and method. When evidence of all three categories is not present, there must be "very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing." (*People v. Eliot* (2005) 37 Cal.4th 453, 470-471.) Although subsequent decisions have stated that the three categories of evidence are not "normative but descriptive," this Court has continued to adhere to the *Anderson* method of analysis for deciding evidence sufficiency for first degree murder.

Moreover, "[t]o be sufficient, evidence of each of the essential elements of the crime must be substantial and we must resolve the question of sufficiency in light of the record as a whole." (*People v. Memro* (1995) 11 Cal.4th 786, 861 (*Memro II*).) Where the evidence in

the record is circumstantial, the Court must determine whether the proof is such as will furnish a reasonable foundation for an inference of premeditation and deliberation, or whether it "leaves only to conjecture and surmise the conclusion that defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation." (*People v. Bender, supra.*, 27 Cal.2d at 164 at 179.) Circumstantial evidence which is highly ambiguous in terms of the inferences it could support as to the defendant's purposes will not suffice. (*People v. Anderson, supra,* 70 Cal.2d at 31.) Evidence which on the surface appears supportive of the verdict may be found insubstantial when reviewed in light of the evidence in the record as a whole. (*People v. Memro* (1985) 38 Cal.3d 658, 695 (*Memro I*).)

The evidence presented by the prosecution was drawn largely from the testimony of the students and teachers who were present in Building C when Defendant entered and started shooting. Their description of the carnage caused as Defendant fired his shotgun this way and that, into classrooms and down hallways, and the terror and psychological and physical pain it created in the survivors, was both compelling and horrific. It is not surprising that the jury reacted to this evidence by voting for four first degree murders. However, it is not the psychological impact of Defendant's actions on victims and witnesses that determines Defendant's degree of culpability, but the actual evidence of Defendant's mental state as it exists in the trial record. That evidence, viewed dispassionately, will not support a verdict greater than four counts of *second* degree murder.

B. *Anderson* Evidence Type (1) – Planning: There is no Evidence in the Record that Plaintiff Planned or Expected the Death of Anyone Except Himself

The first type of evidence that the reviewing court is to examine in determining a claim of insufficiency of evidence to support deliberate premeditated murder is "(1) facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity *directed toward, and explicable as intended to result in, the killing* ---- what may be characterized as 'planning' activity." (*Anderson, supra.* 70 Cal.2nd at 26-27, emphasis supplied.)

For purposes of this argument,[64] Defendant does not dispute that there is substantial evidence in the record that could support the inference that Defendant planned to go to Lindhurst High School and shoot his gun(s) there. The key questions, however, are: 1) what exactly was it he planned to do? and, 2) did the evidence of planning introduced at trial actually support a finding that Defendant made, at any point in his conduct, a calculated decision to kill? A close review of the record shows *no evidence* that Defendant's planning activities

[64] The testimony of Defendant's experts at trial was that prior to and through the homicides defendant was suffering from severe mental illness and that the evidence of his "planning" the events of May 1, 1992 was symptomatic of his mental illness and not a result of any deliberate and calculated plan. Defendant continues to assert this defense, but recognizes that, for purposes of this insufficiency argument, the jury was free to reject Defendant's evidence of mental illness and/or its relevance to his degree of culpability for the homicides. This expert testimony, of course, having been presented in the defense case, is not relevant to the Court's appraisal of the correctness of the trial court's denial of Defendant's 1118.1 motion at the close of the prosecution case in chief, but is relevant only to the overall sufficiency of the evidence. (See section E. of this argument, *infra.*)

were based upon a calculated decision to take any person's life, or even that he anticipated his actions would result in any death other than possibly his own.

At the point in time when trial counsel made the motion under Penal Code § 1118.1, evidence of planning in the record came from five sources: (1) Defendant's videotaped interrogation by law enforcement conducted the day after the incident; (2) Testimony of David Rewerts, Defendant's friend, as to their sharing fantasies about launching an armed assault on the school; (3) Testimony of students held hostage by Defendant in room C-204b as to what Defendant said *after* the shootings regarding his "planning" and intentions prior to the incident; and (4) physical evidence including the guns and ammunition Defendant brought to the school, a list of things to purchase, a purported sketch of Building C at the high school, and a note and drafts of a note that Defendant left for his family.

At the time the guilt charges went to the jury, additional evidence had been presented – primarily the testimony of Defendant's experts in the guilt phase as to what Defendant told them in interviews and testimony from Defendant's half-brother, Ronald Caddell, concerning Defendant's habit and practice with respect to target shooting and Defendant's behavior during the months and weeks leading up to the incident.

As previously noted, evidence that in itself might give rise to an inference that Defendant deliberated and premeditated murdering his victims must be viewed in light of the entire record to determine whether the inference to be drawn is reasonable in light of all of the evidence, and not just when certain evidence is viewed in isolation.

Defendant first will analyze the evidence put forward in the prosecution's case-in-chief, demonstrating that the evidence introduced as to planning, motive, and manner in which the homicides occurred is, from the prosecution standpoint, *at best*, highly ambiguous as to whether Defendant ever made a calculated decision to kill anyone, either up to the time when he arrived at the school, or in the course of his shooting on the first floor of Building C. Standing on its own, the state of the evidence introduced in the prosecution's case-in-chief required the trial court to grant the motion under Penal Code Section 1118.1.

In the last section, Defendant will discuss how, in light of evidence offered by the defense in the guilt phase, the prosecution's circumstantial evidence for deliberation and premeditation became even more ambiguous, demonstrating that, at the close of the guilt phase of evidence, there still was no substantial evidence to support the first degree murder verdicts as required by the due process clauses of the Fourteenth Amendment to the United States Constitution and article I, section 15 of the California Constitution.

1. Defendant's May 2, 1992 Interrogation by Law Enforcement

As discussed in detail in Argument 0 of this Brief, Exhibit 89, the prosecution-prepared transcript of the May 2, 1992 police interrogation of Defendant, was admitted into evidence only as a tool to assist the jury and not as the "best evidence" of what Defendant said in that interview. As stipulated by the parties on this appeal, Exhibit 89 is not an accurate transcription of the interview. There is no available record of what the jury can be deemed to have heard

Defendant say when the videotapes (Exhibits 57a and 57b) were played for them.

As argued extensively *supra,* because the appellate record lacks a transcription of the audio portion of the videotapes as it sounded when played for the jury in the courtroom, including what was intelligible and what was not, neither the transcript nor the tapes themselves can properly be used to support a finding of evidence sufficiency.[65]

Nonetheless, in case the Court rejects Defendant's arguments regarding the inadequacy of the appellate record and the trial court error in playing the tapes without verified transcripts of the content of the intelligible statements and instruction to the jury not to speculate on those portions identified as unintelligible, Defendant will include in this argument on evidence sufficiency a description of Defendant's statements as they appear on Exhibit 89. Exhibit 89, however, for the reasons previously set forth in Argument I, cannot be deemed to accurately represent either (1) the actual linguistic content of Exhibits 57a and 57b, or (2) what would have been audible to the jury when these exhibits were played in the courtroom.

According to Exhibit 89, Defendant told the interrogating officers that three to four weeks prior to the incident he had "had a dream about going into the school and shooting." He had told his friend David Rewerts about the dream. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 21]) It was at that time that Defendant started discussing going to the school with Rewerts: "I said. I said it

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[65] See Argument I, supra.

would be so easy to just go in there and he was telling me that it would be easy, he said, he said something like uh, some kind of, bring in some kind of robot or something, some kind of robotech robot and he said that would be more better and uh, he said that would be so easy just..." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 24]) Officer Williamson then suggested that what Defendant was thinking of doing was to "kick somebody's ass" and/or burn the school down, to which Defendant replied: "Yeah, something like that. I can't really remember but I can remember shooting..." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 24])

Exhibit 89 then has Defendant acknowledging that he "drew up the plans" for, (in Williamson's words) "assaulting the school," and that, "it would be so easy to just walk in there and go like this and like this." (pointing to a piece of paper on the desk). (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 25])

Shortly thereafter the words attributed to Defendant in Exhibit 89 can be viewed as his admitting that he considered or planned to put lighter fluid on all four doors to the building and "booby-trap" it like a "fire bomb." (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 26])

Asked about why he brought the guns to the school, Exhibit 89 has Defendant agreeing that otherwise he wouldn't be taken seriously, but explicitly denying any intention of killing anyone: "First of all I, actually I didn't plan on killing anyone, okay? If anyone died I don't know. But uh, actually I was just thinking about, there's a lot of people I shot, I shot them in the legs and the hips and stuff, but actually I just thought about maybe shooting, winging a couple of people when I was in there and then uh..." (Exhibit 89 [CT

Supplemental–5 (v.1 of 1) 27])

A few minutes later Exhibit 89 has Williamson returning to what Defendant's plan was on going to the school.

Williamson: Okay, what was the plan?

Houston: You mean the plan about going into the school?

Williamson: What were you going to do step by step upon entering the school?

Houston: I was going to go in here and I was going to walk through like you drew on that little map, it's the same thing. But I didn't.

Williamson: But then you were going to (Houston and Williamson both talking) had you decided, or even thought of how people you would shoot?

Houston: Uh, well I had like little arrows pointing, but I didn't have arrows at people, I just had arrows of shooting at classrooms.

Williamson: The questions is, had you mentally thought about and decided how many people you needed to shoot and how you were going to shoot them?

Houston: Uhh..

Williamson: There was arrows for direction of travel, firing..

Houston: Uhh..

Williamson: Honest. Come on Eric (unintelligible)

Houston: Well hey.

Williamson: Alright. Honest. Please.

Downs: Tell me what did you think about Eric. What did you think, did you think it would take a certain number to get the point across?

Houston: No. Actually, if you look at that picture. All I have is desks set up there and the little closure bars. But you don't see no stick figures and (unintelligible, Downs and Houston both talking)

Williamson: You said earlier, talking about uh, ten or fifteen minutes ago, you said I figured to maybe shoot a couple in the leg or something to do . . ..(unintelligible, Houston talking over him)

Houston: Yeah, yeah, that was later on, after I drew the picture, that was once I was going...

Williamson: That's what I'm saying, once you were going in what was the plan. How many did you think you needed...

Houston: Start shooting people where they could get my point across, or shoot them in the butt or whatever.

Williamson: Okay, how many? Did you figure, as many as you could get...

Houston: Uh, Not a lot, just enough to get something done, I don't know.

Williamson: Did you figure you'd empty your shotgun and then you could decide what to do after that?

Houston: Yeah.

(Exhibit 89 [CT Supplemental–5 (v.1 of 1) 39-40])

Nowhere in the prosecution's version of the interrogation of Defendant by law enforcement does Defendant admit that his plan or intention was to kill. Rather, he consistently states that his intention was to go to the school, fire off his gun, perhaps wounding people, for the purpose of getting attention so people would listen to his grievances.

2. Testimony of David Rewerts re His Conversations with Defendant About Assaulting the School

The testimony of Defendant's friend, David Rewerts, presented the same picture: Rewerts testified that three and one-half to four months before the incident he had spent the night at Defendant's house and they had talked about a lot of things. The "subject just got brought up where he would like to go to the school and shot [sic] a couple of people." (Rewerts, 18 RT 4062:22-23). Asked to be more specific, Rewerts stated:

> A. First time he said he'd like to go to – like to -- due to the openness of C Building he would walk in and shoot a couple rounds and go outside the back and off the - around the fence on the back of Lindhurst High School diamond field.
>
> Q. Okay. Diamond field?
>
> A. Okay. There's a baseball field right behind the school and soccer field and football field.
>
> Q. When he says shoot a couple rounds, did he say anything about shooting any persons?
>
> A. I can't recall that right now.

(Rewerts, 18 RT 4063: 7-17)

Rewerts said that the subject came up two or three times afterwards. He said he could recall one such conversation:

> A. One I recall was when we were -- I was staying over at his house. And I was going through a couple of his books, and I was talking about destroying things. And it was more -- it was pretty absurd what I was saying. So he was going, then he told me that all I was just -- and then all he was talking about was going back and shooting a couple people.
>
> Q. That's what Mr. Houston –
>
> A. This is what Mr. Houston said, yes.
>
> Q. Mr. Houston said all I was talking about was going back to –
>
> A. -- the high school and shooting a couple people.
>
> Q. And do you recall what you were doing when this conversation occurred?
>
> A. Yeah. I was reading a Terminator book.
>
> Q. What -- How about the defendant, was he reading something?
>
> A. He was reading to me quotes out of a book and military tactics and police procedures, et cetera –
>
> Q. And you said he -- I'm sorry. Go ahead.
>
> A. -- and hostage situations.
>
> Q. And you said that he was reading quotes from the books?
>
> A. Yeah.
>
> Q. Now every time that this subject came up about shooting at the high school, first of

all was it your understanding that he was talking about Lindhurst High School?

A. Yeah.

...

Q. Let me step back a second. This subject about shooting at the high school came up how many different times?

A. Three or four times, just passe talk.

Q. And was there a particular location named during each conversation?

A. No names.

Q. Where the shooting –

A. No names.

Q. Let me finish.

A. Oh.

Q. Was there a particular location named where the shooting was to take place?

A. Building C.

(Rewerts, 18 RT 4063:26-4066:2)

On cross-examination Rewerts confirmed that the discussion he related had occurred after he and Defendant had gone to see the movie *Terminator 2*. (Rewerts, 18 RT 4068:19-23). Rewerts' testimony that Defendant was speaking of shooting people at the school, when placed in the context of a conversation sparked by the movie *Terminator 2*, is, at best, highly ambiguous as to whether any inference can be drawn of a decision to kill people, since, as discussed *infra*, the hero in *Terminator 2* shoots people with either the specific intent *not to kill them* or with the specific knowledge that when

shooting a specific character in the movie, that character cannot be killed or permanently injured by his shots.

The testimony of Rewerts does not provide any substantial evidence that Defendant planned to kill anyone at Lindhurst High School.

3. Defendant's Statements to Students in Room C-204b

During the hours that Defendant held students hostage in room C-204b he talked repeatedly about why he had come to the school and various aspects of "planning" for the incident. These statements, as related by the various students and viewed in their entirety, will not support an inference that Defendant came to the school to kill or that, in the 60 seconds to three minutes he was firing his gun on the first floor he made any calculated or deliberate decision to kill anyone.[66]

Students who were held by Defendant in room C-204b after the shootings had ended testified variously about what Defendant had said during their ordeal about his "planning" the event:

- That he had been reading the Penal Code and planning it for a while. (Burdette, 13 RT 3017:6-14)
- That he had been at the school "earlier" and had "checked things out." (Hendrickson, 14 RT 3207:14-21)

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[66] With respect to the length of time Defendant was downstairs shooting the consensus of the witnesses is from one minute to no more than three: see e.g., Hodkinson, 19 RT 4369:36-4370:12 (60 seconds); Vargas, 19 RT 4385:7-4386:25 (not even a minute); Hendrickson, 19 RT 3190:14-24 ("at least a minute"); and see the trial judge's estimate of two to three minutes expressed during sentencing 25 RT 6139:22-25.

- That he had wanted to shoot a teacher, whom he didn't name, and that he had shot some students and hoped they weren't dead. (Hendrickson, 14 RT 3206:18-27)
- That he had read books about police tactics and studied S.W.A.T. team tactics (Hendrickson, 14 RT 3208:9-17)
- That he had read a lot of books about law and "stuff like that," and that he had come to the high school about a week before the incident to case Building C and then come earlier that day or sometime before to place gasoline around the building[67]. (V. Hernandez, 14 RT 3269:9-3270:2) Hernandez' trial testimony that Defendant had put a time frame on when he had come to the school was contradicted by introduction of Hernandez' testimony to the Grand Jury where he had said Defendant "never really talked about planning out or going and casing the building," although he had said he had read up "a little bit" on law and had gone to the school before. (V. Hernandez, 15 RT 3359:28-3361:18)
- That he had come to the school earlier and practiced how he was going to get in; also that he had "things" with gasoline that would blow up if his plan didn't work. (Perez, 15 RT 3397:5-3398:3)
- That he had been to the school a few days to a couple of weeks earlier; that he had read tactic books on Army

[67] As discussed, a number of students testified Defendant said he had placed some sort of incendiary material around the school. No evidence was introduced that Defendant had, in fact, brought any incendiary material or device to the school.

S.W.A.T. teams; that he had read about what the penalty was for crimes; and that he had placed gasoline all around the building and all he had to do was set something off and "we could go like in an instant." (Hicks, 15 RT 3442:11-27)

- That Defendant had in his possession a pair of thumb cuffs and said that he had not planned to take more than one hostage. (Newland, 16 RT 3660:14-24)
- That he had wandered the entire school campus before and no one had stopped him. Also, that he had read up on police tactics his "all [his] life," but that the police had come "too quickly" and "that's not good;" Defendant had expected it to take longer for the police to arrive. (Newland, 16 RT 3668:27-3669:8, 3672:19-3673:9)
- That if the police "tried anything" he had a "big surprise" for them that he had prepared earlier. (Newland, 16 RT 3673:10-15)
- That he said he had brought cans of gasoline straight to the school grounds, planted this gasoline and all he had to do was press a button or something and so the school would blow up. He said he had read books on the subject of police rappelling from the roof. (Parks, 15 RT 3538:11-25)
- That he said he had come in earlier and checked out the school. He said he had gasoline poured around Building C and if something happened he could light a match. That he knew how the S.W.A.T. team worked and what they would try and do. (Owens, 16 RT 3608:3-3609:3)

- That he had put yellow gas around the building. (Baker, 15 RT 3498:20-3499:9)
- That he was at the school earlier but didn't say how much earlier. He had poured gasoline all around the building so if they tried to do anything he could just light a match or something and they'd all be gone. (Jennifer Kohler, 16 RT 3638:21-3639:5)
- That Defendant had come to the school at night and checked it out; that he had read police tactics and knew how the police would try to get him out. (Prather, 16 RT 3776:5-16)
- That Defendant had come to the school earlier in the day to check it out, and that, showing the students the set of thumb cuffs he had brought, he had not planned on taking so many hostages. (Hendrix, 16 RT 3813:19-22, 3814:6-16).

Although Defendant had told the students about putting gasoline around the building, there was no evidence introduced that Defendant, had, in fact, brought to or used any flammable substance at the school. The testimony from the students held hostage in C-204b provided no substantial evidence that Defendant planned to kill anyone at Lindhurst High School.[68]

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[68] As previously noted (in Argument I), six hours of audio cassette tapes (Exhibits 82-88) containing sounds recorded in room C-204 during the period the students were held hostage were played for the jury. The audio quality was extremely poor and no transcript was introduced; nor was the court reporter asked to transcribe what was audible in the courtroom as the tapes were played. Because there is no record of, and no way to reliably reconstruct what would have been audible to the jurors, and no transcript introduced in the trial record,

4. Physical Evidence

The prosecution offered a number of items of physical evidence that indicated Defendant had planned to go the school with guns and create an incident. None of this evidence, however, demonstrated that Defendant planned to kill anyone at the school, while significant items of evidence point to a contrary inference.

Defendant sawed off the stock of his .22 rifle. (Exhibit 67) In his statement Defendant said he sawed it off to provide him greater mobility. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 54-55])

In Defendant's bedroom officers found a list of items, purportedly that Defendant planned to purchase and/or assemble for his assault on the school. The items were primarily ammunition, but also included lighter fluid, a rifle sling, and filling up his car gas tank. (Exhibit 31)

Other items from which it might be inferred that Defendant planned to assault the school included his taking of a canteen for water, his placing different types of ammunition in different pockets, and putting hooks into his rifle stock to carry it with a sling. Each of

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the contents of Exhibits 82-88 cannot be used to analyze or support the sufficiency of the evidence for the verdicts on any charges, including the four first degree murder verdicts. Further, because there is no transcript even purporting to set forth the linguistic content of those exhibits, Defendant cannot include a discussion of the evidence presented through the playing of Exhibits 82-88. For what it's worth, however, counsel for Defendant has listened to Exhibits 82-88, and while counsel has no way of knowing what would have been audible to the jury or what jurors may have believed they heard, counsel heard nothing which lent support to a finding that any of the homicides was deliberate, premeditated murder.

these is consistent with Defendant's admitted intention to go to the school and shoot it up, but none of these items raise an inference, one way or the other, whether his plans included shooting people with the intention of killing them.

Other items of evidence that were highlighted by the prosecution as demonstrating Defendant's planning and intentions were: (1) The type of ammunition he purchased and brought to the school; (2) the note he left for his parents (Exhibit 16a), and the draft notes that he tore up (Exhibits 61a and 62a); and the "Mission Profile," (Exhibit 64). They will be addressed in that order.

Defendant came to the school with a .12 gauge shotgun and a .22 rifle. The evidence shows that these were weapons Defendant owned and used regularly when he went target shooting at the Spenceville shooting range, Defendant was using these weapons before he first discussed with David Rewerts assaulting the high school. (Rewerts, 18 RT 4066:3-4067:17, 4071:23-28; Caddell, 19 RT 4410:12-4412:21) According to Exhibit 89, the prosecution's version of what was said in the videotaped interrogation (Exhibits 57a and 57b), the interrogating officers pressed Defendant as to why he had come to the school with what the officers characterized as "anti-personnel" ammunition for the shotgun: double ought buckshot; number 4 buckshot, and slugs, ammunition that he had purchased the morning of the incident. Each time he was asked Defendant responded that this was the type and amount of ammunition he used when he went to Spenceville. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 19, 72, 85, 88]). That Defendant bought this kind of ammunition before was corroborated by Exhibit 19, showing, a receipt dated April

17, 1992 from Peavey Ranch & Home for .12 gauge shotgun shells that was found in Defendant's car.[69]

The prosecution was thus unable to show that Defendant's conduct in purchasing ammunition in the amount and type that he used at the school was anything different than his normal ammunition purchases. While it is true that Defendant could have purchased less lethal ammunition, the record is devoid of any basis on which it could be inferred that Defendant deliberately purchased the ammunition he used for its potential lethality. His purchases of ammunition are wholly consistent with his prior entirely legal behavior on days he received his unemployment checks: to purchase buckshot shells and slugs and go to Spenceville to target shoot. The evidence that Defendant purchased the same types of ammunition on the morning of May 1 that he normally did for target shooting on other days when he received his unemployment check is not substantial evidence of a calculated and premeditated intention to kill.

Exhibits 61a and 62a were drafts of notes found in Defendant's bedroom that Defendant apparently wrote and then tore up. Each was partially reconstructed, but neither can be read in its entirety. Because of missing pieces, the content of each draft note is riddled with ellipses that make an understanding of its substance largely

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[69] Defendant's statements in the prosecution transcript of the videotape were corroborated by Defendant's half-brother, Ronald Caddell who was called as a witness by the defense. He testified that in the spring of 1992, on the days Defendant received his unemployment check and when it arrived, Defendant would purchase ammunition and go target shooting at the Spenceville range. (Caddell, 19 RT 4412:9-21)

guesswork. Not only were the notes torn up, but in writing them Defendant crossed out words and seems to have rewritten phrases or sentences on the draft itself. Exhibit 61a does appear to state "You see I have a problem Iv Been Facinated with ~~death~~ weapons and death. It seem my [missing] Be[missing] set on killing." Exhibit 62a appears to contain the fragment: "My hate ~~is~~ seem[ids] ove[missing] ~~tord~~ me." At best, the meaning of these fragments is obscure and speculative.[70]

However, not only is the meaning of the words appearing on Exhibits 61a and 62a uncertain, Defendant *chose* to discard both drafts. No evidence was introduced at guilt as to the reason they were discarded and another note left for Defendant's family. The jury necessarily had to work on pure conjecture as to whether they actually reflected Defendant's thinking at the time or whether they were discarded because the statements did not accurately reflect what Defendant was thinking at the time.

Exhibit 16a appears to be the note that Defendant chose to leave for his family to find. The note could be read to indicate that Defendant understood he was going to do something wrong, and that he might end up dead. The language does not permit an inference that Defendant had made a decision he would be killing people. Read as the end of a progression of the two torn up draft notes, Exhibit 16a even could be read as a rejection of any thought of killing other people, since the words "hate" and "killing" have been omitted from

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[70] During Defendant's testimony in the penalty phase, Defendant referred to Exhibits 61a and 62a as letters he was "thinking about writing" and that Exhibit 16a was the "final result." (RT 5857:24-5858:14)

this final version. The note is consistent with a belief that Defendant's actions were effectively suicidal, but does not present any substantial evidence of a calculated and premeditated intention to kill others.

In arguing for premeditation and deliberation, the prosecutor highlighted Exhibit 64, the "Mission Profile," as an example of Defendant's "planning." (22 RT 5150:2-4) Defendant does not contest that Exhibit 64 would give rise to a reasonable inference of planning. Again, however, the question is: an inference of planning what?

The prosecutor reminded the jury that some students testified that the last class of the day would end at 2:40 in the afternoon and the number "240" was written on Exhibit 64. There was no testimony explaining what the number on Exhibit 64 referenced, or that there was any link between the number "240" written on the document and the time classes got out. Defendant arrived at the school at roughly 2 pm. Connecting the two pieces of evidence, as suggested by the prosecutor, is simply speculation.

In any event, the number doesn't raise an inference that Defendant intended to kill anyone. To the contrary, a more reasonable inference that could be drawn from "240" is that Defendant planned to come to the school after school was out of session and the building would have been largely empty of people.

The prosecutor also reminded the jury that Defendant had written "Mission Gun Shop" with its hours of operation on Exhibit 64. This note does not enhance any inference of deliberation.

Primarily, as noted by the prosecutor, the layout of Exhibit 64 bears a superficial resemblance to the layout of the first floor of

Building C and shows what are possibly directions in which Defendant planned to shoot. Again, superficially, the shots might seem to reflect the shots that Defendant actually fired. At the commencement of guilt phase evidence, the prosecution introduced a scale model of building C at Lindhurst High School (Exhibit 1) and a diagram of the first floor of Building C (Exhibit 3). Any comparison of Exhibit 64 with the actual layout of the first floor of Building C as shown in Exhibits 1 and 3, will not support a reasonable inference that Exhibit 64 represents a plan for the shooting of people, either as carried out or at all.[71]

First, as noted in the prosecution transcript of Defendant's videotaped interrogation, (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 39-40]), Exhibit 64 contains no figures that appear to represent people. Rather, what is shown on Exhibit 64 is a "plan" to travel through the high school building shooting at classrooms, lockers and desks, and then exiting.

Additionally, the floor plan shown in Exhibit 64 is significantly different than the floor plan on Exhibits 1 and 3. As shown on Exhibits 1 and 3, room C-108b, where Scarberry, Hinojosai, Brens,

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[71] Although a number of students testified that Defendant had claimed he had come to the school and "cased" Building C (see e.g., RT 3269:9-3270:2), in the prosecution transcript of Defendant's videotaped interrogation, Defendant describes how he was unable to get into Building C because it was locked. (Exhibit 89, [CT Supplemental–5 (v.1 of 1) 91]) No evidence was introduced indicating that Defendant had, in fact, reconnoitered the interior of Building C. In light of the evidentiary record, Exhibit 64 is clearly not the product of deliberate calculations based on studied observations of the proposed target (Building C).

and Davis were shot, is a classroom with its entrance on the north side onto the hallway through which Defendant entered the building. This classroom does not exist in Exhibit 64. Exhibit 64 shows a proposed path coming through the door and traveling west, then turning left and shooting into a classroom that had a door on its west side – C-109b. Exhibit 64 shows no shots being fired into C-108b. The first shot to be fired is at lockers along the entry way. The second shot appears to be at the desks in what would be C-109b. Proceeding southward, Exhibit 64 shows shots being fired into what would be C-111, then C-110b and C-110a. The "Mission Profile" then has the path turning left again and exiting the building. There are no proposed shots into any classroom that would correspond to C-107 (where Jason White was shot) or C-102 (where Beamon Hill was shot.) In short, not one "planned" shot on Exhibit 64 corresponds to any lethal shot fired on May 1, 1992 and the document will not support an inference that in creating it Defendant was calculating the killing of anyone.

In summary, while there is substantial evidence from which it could be inferred that Defendant thought about and possibly even planned an attack on Building C, there is no meaningful evidence that he calculated and deliberated the killing of anyone at the school when he was doing his planning.

C. *Anderson* Evidence Type (2) – Motive: The Record is Devoid of Any Evidence Defendant Harbored a Motive to Harm Any of the Victims Other than Robert Brens

For purposes of this argument on the sufficiency of evidence, Defendant will concede that the record in the guilt phase of the trial contains evidence that he harbored animosity toward Robert Brens.

Evidence introduced in guilt attributed to Defendant remarks about Brens indicating that Defendant considered Brens responsible for Defendant's failure to graduate high school, for the breakup of a relationship, and for other subsequent failures in Defendant's life. (Hicks, 15 RT 3440:7-26, 3442:3-27; Newland, 16 RT 3658:13-3659:6-21; V. Hernandez, 14 RT 3267:25-3269:2, 15 RT 3373:4-16, 3375:13-18; Parks, 15 RT 3537:20-3539:4; Baker, 15 RT 3498:20-3499:9; Hendrix, 16 RT 3811:5-3812:3; Prather, 16 RT 3791:16-3793:1)

Defendant also stated that he harbored animosity toward the school administration in general. He made hostile remarks about Mr. Ward, the principal, and about Patricia Cole, the teacher in C-204b as well as Mr. Brens. (Newland, 16 RT 3657:20-3658:22, 3659:13-21). It is notable, therefore, that although Defendant encountered Patricia Cole when he went to the second floor, he didn't shoot her but told her she had to leave the building and she left. (14 RT 3191:16-3192:1)

As for Brens, Defendant told the students in C-204b that "He wanted to teach somebody or people a lesson; the school. He wanted the (sic) teach the people in the administration and stuff like that a lesson at the school." (V. Hernandez, 15 RT 3375:16-18), Based on his statements to the students, his intention was not to kill Brens but to take him hostage, bring in television reporters, and publicly reveal Defendant's story of mistreatment at the hands of Brens and the school administration. (V. Hernandez, 15 RT 3498:16-3499:2) Moreover, although one student claimed Defendant acknowledged he had shot Brens, several others testified that Defendant acted in ways that indicated to them he did not know that Brens had been shot.

For example, Victorino Hernandez testified that when Defendant told the students in C-204b that he had shot a teacher and was told it had been Brens, Defendant stated words to the effect of "oh, well, he failed me anyway." (V. Hernandez, 14 RT 3269:3-8) Ray Newland testified that although some of the students in C-204b knew there were dead persons downstairs, they did not want to tell Defendant that because they were afraid Defendant "would flip out" if he knew he had killed anyone. (Newland, 16 RT 3669:25-3670:20) Olivia Owens testified that at some point while holding the students hostage in C-204b Defendant had said in response to questions about why he wasn't downstairs talking to Brens about his grievances stated that Mr. Brens was "taken care of already." (Owens, 16 RT 3609 4-16) There is no evidence in the record to indicate whether this statement was made by Defendant before or after he had been told by the students that the teacher he had shot was Brens. The statement is thus highly ambiguous as to whether it constituted an admission by Defendant that he had completed an intended task or that, having learned after the fact that Brens was shot, recognized that confronting Brens with his grievances was now out of the question.

Defendant, who claimed he had read the Penal Code and presumably understood something about the severity of punishment for various crimes, sought and obtained promises from the hostage negotiators that if he surrendered he would get a light sentence of not more than five years. They sent up a "contract" to assure Defendant his sentence would not exceed five years in a minimum security facility. (Newland, 16 RT 3670:11-27) This conduct is inconsistent with inferring that Defendant knew he had killed anyone.

Johnny Mills described Defendant joking that Robert Brens should pay for the pizza and cokes that were delivered. (Mills, 18 RT 4321:1-3) Defendant's statements to the students in C-204b corroborate the prosecution transcript of Defendant's statements in the videotaped interrogation that he did not know anyone was dead from the shots he had fired on the first floor. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 58-59]) While Defendant's statements to the students support a finding that Defendant held animosity toward Brens, they will not support an inference that Defendant calculated and deliberated the killing of Brens or any other individual. The evidence would support a finding that Defendant's intention was to confront Brens with what he had done to Defendant, but not an intention to assassinate him.

Defendant also allowed students to go downstairs to assist in getting wounded victims out of the building in order to obtain medical treatment as well as asking those students to tell him where on their bodies the victims were injured. (Owens, 16 RT 3626:19-24; Hendrix, 16 RT 3810:4-16; Exhibit 89 [CT Supplemental–5 (v.1 of 1) 12])

Many students who were in C-204b testified that Defendant repeatedly threatened them with his shotgun and told them that he was going to shoot people if they did not come back from the bathroom or otherwise did not follow his commands. What is notable about these threats was that Defendant did nothing to impress on the students that they were real, and some students soon began to realize the threats were hollow. (Perez, 15 RT 3431:22-3432:22; Baker, 15 RT 3518:9-3521:20; Parks, 15 RT 3541:18-3544:7; Newland, 16 RT 3663:21-3664:8)

The only shot fired by Defendant once he reached C-204 was a shot at the clock in the library, and Defendant first warned the students that he was going to fire the gun as a warning to the police, so that the students should not be concerned that he intended to harm them. (Hendrickson, 14 RT 3239:19-3240:7; Baker, 15 RT 3503:15-25; 3515:28-3516:19)

The entire record describing Defendant's conduct on the second floor, starting within a few minutes of the shootings, indicates a lack of intention to shoot or kill anyone. His behavior in Room C-204b is not supportive of an inference that Defendant had formed a calculated intent to kill when he was shooting on the first floor.

The evidence in the record of the prosecution's case in chief that Defendant wanted Robert Brens dead is non-existent. Although certainly angry with Brens and wanting to make a statement about how he had been treated as a student, even immediately after the shootings Defendant's conduct was inconsistent with any inference that the death of Brens or anyone else was his objective or motive.

The record also is totally devoid of evidence Defendant had any motive to harm Judy Davis, Jason White, or Beamon Hill. Defendant did not know these victims. As will be shown henceforth, they appear to have been shot at random and the fact that their wounds were fatal appears to have been a matter of chance, not design. Killing students was inconsistent with Defendant's stated aims in coming to the high school – to show how it had mistreated him and continued to mistreat the students who were there.

There is no evidence from which to infer that the deaths of Judy Davis, Jason White and Beamon Hill served any meaningful purpose

either with respect to his reasons for coming to the school or in implementing his actions once he was there and started to shoot. As will be discussed *infra.*, Defendant's first shot at Rachel Scarberry is inexplicable, as are his shots at Judy Davis and Thomas Hinojosa. There is no evidence in the record from which it could be inferred that any of the persons shot at in C-108b, including Brens, were interfering or about to interfere with Defendants' actions – either to disarm him or prevent him from moving about the building. Further, no rational inference can be drawn that he shot anyone in C-108b in order to eliminate witnesses.

Nor was any evidence introduced that Jason White or Beamon Hill or anyone else shot after Defendant left C-108b had been witnesses to what had happened in C-108b or otherwise threatened to interfere with any intended action by Defendant. No evidence was introduced to suggest that Defendant selected persons to shoot at based on their ethnicity, gender, or social affiliations. Indeed, apart from Robert Brens, the record is completely devoid of evidence from which any rhyme or reason could be inferred as to why Defendant fired at any individual.

D. *Anderson* Evidence Type (3) – Manner of Committing Homicide

1. Homicide of Robert Brens

The prosecution's strongest case for deliberate premeditated first degree murder was for the killing of Robert Brens. As previously noted, the record contains evidence from which it could be inferred that Defendant was angry with Robert Brens because he believed the teacher was responsible for Defendant failing to graduate, missing his

senior prom, losing his employment at Hewlett Packard, etc. The prosecutor in his guilt argument implied that Defendant entered Building C, entered Brens' classroom and then shot Brens first. (21 RT 5092:8-11) As will be shown, this version of the events is inconsistent with the eyewitness testimony and not supported by any substantial evidence in the record.

The prosecutor sought to match the "Mission Profile" to the actual evidence of the shootings, suggesting that Defendant had planned to enter the school and shoot into C-108b, the room where he expected to find Brens. As previously noted, however, the "Mission Profile," Exhibit 64[72], has Defendant coming into the building through the northeast entrance, moving westerly down the hallway, firing a shot northwest at the lockers to his right, then turning left in order to proceed south and fire shots into C-109, C-111, and C-110, before turning left again and leaving through the southeast door.

Contrary to the scheme in the "Mission Profile," Defendant entered through the northeast entrance, moved westerly down the hallway, but halfway down the hallway turned left to enter classroom C-108b – the door on his left. Brens was leaning on his desk at the front of the classroom. Defendant could not have seen Brens from the hallway before he entered the classroom. [See Fig. 8] Defendant would have seen Brens after he entered the classroom, but nevertheless, the eyewitnesses testified that Defendant did not shoot at Brens when he entered, but apparently without reason, fired his first shot at Rachel Scarberry, a student whom he didn't know.

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[72] Exhibit 64 is reproduced in this brief at page 83, *supra.*

Diagram of Probable Layout of Classroom C-108b as Drawn From Evidence

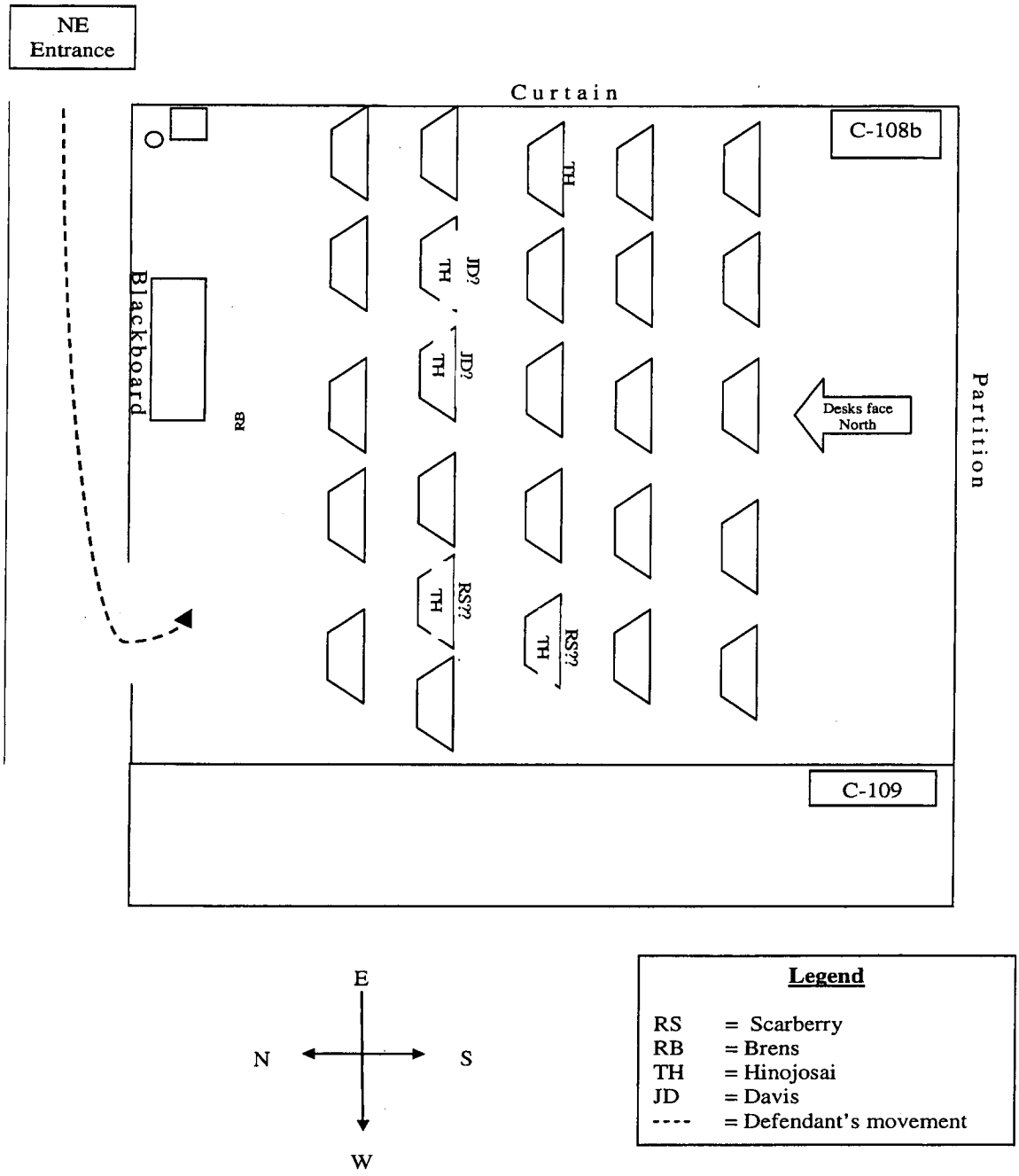

Figure 8 (Probable Layout of C-108b)[1]

[1] Sources in the record supporting the Diagram in Figure 8 are: Scarberry sitting directly to the west of Hinojosai (Hinojosai, 11 RT 2556:18-23); Entrance doorway without doors (Hinojosai, 11 RT 2554:26-28); Brens was sitting to the diagonal northwest of Hinojosai

Thus, Thomas Hinojosai testified:

> Q. Okay. And what did the man do, the first time that you saw him? What was he doing?
>
> A. He walked in the classroom and he had the gun to his chest, a twelve gauge shotgun, had a shotgun to his chest. He swung around the corner and he shot at Rachel Scarberry and --
>
> Q. In relation to you, where was Rachel seated?
>
> A. She was sitting straight across the room from me.
>
> Q. Straight from --

(Hinojosai, 11 RT 2557:18-20); Gunman was 5 feet from Brens (Hinojosai, 11 RT 2562:24-27); Gunman was 10-11 feet away from Scarberry (Hinojosai, 11 RT 2562:28-2563:5); Judy Davis was 3 feet in front of Hinojosai diagonally to his left. (Hinojosai, 11 RT 2563:23-26); Judy Davis was 15 feet away from Brens (Hinojosai, 11 RT 2563:27-28); Hinojosai was 15 feet away from the gunman (Hinojosai, 11 RT 2565:13-15); Hinojosai looking at Scarberry's side (Hinojosai, 11 RT 2566:10-12); Students looking towards the door, front of class (Hinojosai, 11 RT 2566:2-9); Brens is seated in the front of the room leaning on his desk, facing the class and the back wall. (Hinojosai, 11 RT 2566:13-18); Scarberry was seated two chairs behind the front entrance (Scarberry, 11 RT 2586:7-10); Furniture were tables with 2 chairs behind them with 2 students at each table (Scarberry, 11 RT 2586:11-16); Another student shared Scarberry's table, sitting to her left. (Scarberry, 11 RT 2586:17-23); Judy Davis was seated two desks to the right of Scarberry. (Scarberry, 11 RT 2589:3-7); Gunman wasn't in the room when he shot Scarberry. (Scarberry, 11 RT 2598:10-14); After he shot Scarberry, he took 1-2 steps toward the right (Scarberry, 11 RT 2598:5-9; Exhibit 51 still photograph of room from the corner (testimony says SE corner); Exhibit 68, crime scene video (with bodies).

A. Straight across on the other side of the room.

Q. Would that be west of you?

A. Yeah, west of me.

Q. Okay. And could you tell if Rachel was shot?

A. Yes, I could.

(Scarberry was wounded)

(Hinojosai, 11 RT 2556:12-25)

Hinojosai continued:

Q. And after the man fired that shot, what happened next?

A. He swung around in the doorway and he shot Mr. Brens in the right -- in his right ribs, in the right side of his chest.

MR. MARQUEZ: The record reflects, your Honor, he's --

THE COURT: He is pointing to the rib cage on the right side.

MR. MARQUEZ: Thank you, your Honor.

BY MR. MARQUEZ:

Q. And in relation to where you were seated, where was Mr. Brens?

A. The diagonal northwest.

(Hinojosai, 11 RT 2557:7-20)

Hinojosai continued:

Q. Now, after the gunman shoots Mr. Brens, what occurred next?

A. He followed Mr. Brens over towards the wall. He turned around; he shot at Judy Davis.

Q. Okay. And where was Judy Davis in relation to you?

A. She was three feet in front of me diagonally to my left.

Q. Okay. And how close was she to Mr. Brens?

A. Good 15 feet.

Q. Okay. And what if anything happened next?

A. After he shot Judy --

Q. Let me stop you there. The gunman shot Judy Davis, is that correct?

A. Yes.

Q. Could you tell where Judy Davis was shot?

A. In the face and upper chest.

Q. And where was the gunman holding the gun when he shot Judy Davis?

A. He was aiming. He had it towards his shoulder, and he was looking down the barrel.

Q. And about how far away was the gunman from Judy Davis when he fired the shot?

A. Ten feet.

(Hinojosai, 11 RT 2563:19-2564:14)

Rachel Scarberry's testimony is consistent with Hinojosai's:

Q. Can you tell us what you first noticed that was a little different?

A. A man appeared in front of the door with a gun pointed into the classroom.

Q. Okay. And what did you see this man do?

A. He just appeared in front of the door and then fired a shotgun.

Q. Okay. Where did he fire the shotgun?

A. Towards me.

Q. Okay. Did you see how he was holding the shotgun at the time that he fired it towards you?

A. He was holding it at his waist.[73]

(Scarberry, 11 RT 2587: 8-19)

After being hit by the first shot, Scarberry fell over but got up, not understanding she had been hit. She could not remember whether Defendant shot Brens or Judy Davis next, but did remember both of them being shot. (Scarberry, 11 RT 2587:20-24, 2588:14-27)

Significantly, after Brens was shot, Brens rolled over and crawled to the east wall, pulling down a podium. (Hinojosai, 11 RT 2562:8-22) Defendant walked over toward him. Brens was visibly still alive, groaning and humming and rocking back and forth up against the wall. Nevertheless, Defendant left room C-108b without doing anything further to Brens. (Hinojosai, 11 RT: 2566:13-

[73] As previously noted, Hinojosai described Defendant as holding the gun at "chest" level. (Hinojosai, 11 RT 2556:14-17) Scarberry went on to demonstrate how Defendant was holding the shotgun when he came in the room. The Court first identified it as at "chest" height, then after a colloquy, at "sternum" level. (11 RT 2587:27-2588:12) Tracy Young also described Defendant as holding the gun at sternum level. (11 RT 2607:21-2608:3)

2568:12) This evidence is inconsistent with a finding that Defendant premeditated and calculated the killing of Brens. Knowing that Brens was not dead and having no impediment to shooting him again to ensure he was killed, Defendant instead walked out of the classroom.

If Defendant had made a calculated decision to kill Brens, why didn't he shoot Brens first when Brens was the first person he saw in the classroom? Why leave Brens alive and walk out of the classroom? Why leave the area such that Brens could be removed from the building for treatment? Viewed in the overall context, there is no substantial evidence in the manner in which Robert Brens was shot to indicate it was a deliberate premeditated killing.

2. Homicide of Judy Davis

As previously noted, no evidence was presented that Defendant had any pre-existing relationship with Judy Davis. His first shot was toward Rachel Scarberry, another person he didn't know. Although a pellet penetrated Scarberry's chest, the shot did not cause any obvious life-threatening injury and twenty minutes later she left C-108b under her own power. (Scarberry, 11 RT 2593:25-2594:7)

Unfortunately, the shot that hit Judy Davis caused fatal injuries. Yet the prosecution provided no evidence that Defendant had made a calculated decision to kill Scarberry when he shot her or to kill Davis when he shot her. The evidence of his *mens rea* in shooting Scarberry and shooting Davis is indistinguishable. In neither case does the evidence support a finding that he made a decision to kill either person, or even that he made a decision to kill someone, when he fired his gun in room C-108b. The evidence does not support a finding of

first degree murder in the killing of Judy Davis.

3. Homicide of Jason White

As with Judy Davis and Rachel Scarberry, no evidence was introduced in the guilt phase that Defendant had any prior relationship with Jason White when he shot him in classroom C-107.[74] The testimony showed that, upon leaving room C-108b, Defendant proceeded westerly further down the hallway that ran from the door though which he had entered the building. The next classroom was C-107, whose entrance appeared to his right. Witnesses testified that Defendant stood in the doorway and fired his shotgun. No evidence indicated that Defendant actually entered the classroom. Kasi Frazier testified that he saw Defendant at the entrance to C-107 holding the gun to his shoulder, looking down the pointer and aiming. After seeing Defendant aiming into the room, Frazier saw Jason White get up and run behind Frazier from the west side of the room to the east side. Frazier ducked, the gun went off, and then Frazier saw Jason White lying on the ground injured. Defendant then continued to walk down the hallway. (Frazier, 12 RT 2782:25-2786:27; 2788:24-2789:8; 2800:2-2801:6)

This is the sum total of evidence on which the jury could base a finding of first degree murder of Jason White. While there is a statement that Defendant aimed the gun, there is no evidence he aimed

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[74] In the penalty phase Defendant testified that he had taken a drama class with Jason White in Ms. Morgan's classroom and considered him a "friend." He did not know it was Jason White who had been shot in C-107 until the following day. His testimony offered no basis for inferring that Defendant wanted to kill Jason White. (24 RT 5821:17-5822:18; 5876:3-21)

it at Jason White or made any decision that Jason White should be killed. The "Mission Profile" does not indicate that any shots are to be fired into any classroom that could correspond to C-107. There was no evidence suggesting any motive for Defendant to shoot Jason White. This evidence is insufficient as a matter of law to overcome the presumption of second degree murder and raise it to murder in the first degree.

4. Homicide of Beamon Hill

Once again, no evidence was introduced that Defendant had any prior relationship with the decedent or that he had any motive in shooting either at Beamon Hill, nor any prior relationship with or motive in shooting Angela Welch, the girl Beamon Hill pushed away just before he was hit.

The evidence adduced in the guilt phase of trial showed that Defendant entered room C-102, raised his gun and fired. As he fired, Beamon Hill pushed Angela Welch to the ground and was struck by the force of the shotgun blast. Evidence also was adduced that Defendant fired into the ceiling and curtains in C-102 with no apparent reason or objective other than the act of firing his gun. (Burdette, 13 RT 3023: 16-3024:14)

Angela Welch was in Mr. Ledford's class in C-102 when the incident started. After hearing a loud noise, Ms. Welch left the classroom and went over to the library. (Welch, 14 RT 3155:2-11) Welch then saw Wayne Boggess run down the hallway into C-102 and shout to Ledford that he should call 911 because Boggess' teacher had been shot. Ledford ran out of the classroom. Boggess turned

around, took a few steps out of the classroom, and was shot. Welch was standing next to Beamon Hill in C-102 when she saw Boggess shot. (Welch, 14 RT 3156:7-3158:17). After Boggess was shot, Welch watched Defendant as he continued to walk towards C-102. Just before entering the classroom Defendant stopped. Welch portrayed Defendant as holding the shotgun with his right hand out in front of him and his left hand in back next to his chest, with each of his fists clenched. (Welch, 14 RT 3161:11-28).

As he was holding the gun, Welch made eye contact with Defendant. Beamon Hill then shouted "no" and pushed Welch away to the floor. Without changing his stance or grip, Defendant fired his shotgun and Hill was hit with a few pellets from the blast. (Welch, 14 RT 3162:17-3163:2; Faber, 11 RT 2639:20-2640:16) After firing, Defendant turned around and went out of the classroom, then came back in a few seconds later, looked around, and left once again. That was the last Welch saw of Defendant. (Welch, 14 RT 3163:4-14) This is the totality of the evidence of how Beamon Hill was fatally shot.

Other witnesses testified concerning the shots fired in C-102, but they were not in a position to see what actually was going on in C-102 at the time Hill was shot: Gregory Todd Howard was with his girlfriend, Lucy Lugo, in the small alcove just to the west of room C-102. Howard watched Defendant go into C-102 and heard a loud bang, but did not see the shot fired. (Howard, 13 RT 2963:28-2964:14) As noted, Ketrina Burdette was in room C-104 and saw Defendant shoot into C-102 holding his gun pointing upward, firing twice into the ceiling. (Burdette, 13 RT 3023:16-3024:14)

Robert Ledford, the teacher in C-102, after leaving the

classroom, and going toward the entrance to C-101 and the Southeast entrance, hid behind the short north/south wall that jutted into out from the eastern end of the entrance to C-102. (Ledford, 13 RT 3072:17-3082:9) Ledford was looking toward the north and hearing shots, the sounds from which were growing closer as Defendant moved southward. (Ledford, 13 RT 3082:11-28) Ledford heard a shot fired down the hallway that runs in front of C-102 toward the southeast entrance to Building C. Donald Graham, another teacher, was standing in the entrance to C-101a, further east toward the building entrance. Ledford saw Graham jump back into C-101a when the shot was fired. (Ledford, 13 RT 3078:25-3080:4, 3084:15-3085:4) Ledford then heard a clicking sound like a gun being reloaded. With just his right eye Ledford peered around the outcropping wall back toward the entrance to C-102 to see Defendant. (Ledford, 13 RT 3085:7-3086:24) Ledford saw Defendant standing at the door to C-102, bring the shotgun to his shoulder and fire into C-102. He then saw Defendant walk into C-102 and five or ten seconds later walk out toward the south stairway. (Ledford, 13 RT 3092:23-3094:24) It is apparent from his testimony that Ledford could not see what, if anything, Defendant was shooting at. Ledford noted, however, that when he shot in the classroom Defendant's expression was a "blank stare." (Ledford, 13 RT 3096:8-11)

According to the prosecution transcript of the videotaped interrogation of Defendant on May 2nd, Defendant repeatedly denied any memory of shooting into C-102. (Exhibit 89 [CT Supplemental–5 (v.1 of 1) 38, 71, 96-98])

The autopsy recovered one pellet from Beamon Hill's body,

which was "essentially identical" to all of the pellets recovered from the other homicide victims – number 4 buckshot. (Faber, 11 RT 2641:7-18; 2648:14-22; Ralston 18 RT 4113:14-17) Sergeant Long testified that the number 4 buckshot shells Defendant was using contained 24 pellets each. (Long, 17 RT 3976:15-3977:6) The autopsy showed that Beamon Hill was hit with just three pellets, since he had four wounds, one of which was an exit wound. (Faber, 11 RT 2639:20-2640: 16). There was no testimony as to exactly where Defendant was pointing the gun when he shot, but the results of the autopsy demonstrate that his shot was not fired directly at Beamon Hill, given that only 3 out of 24 pellets from the shot hit him.

That there was a significant probability that someone might die when Defendant shot into C-102 is not disputed, but there is no evidence in the record to indicate that Defendant had made a calculated decision to kill anyone in C-102 at the point in time when he fired the shot that tragically killed Beamon Hill.

E. Other Evidence Negating an Inference of Deliberate Calculated Decision to Kill

While there is evidence in the record that Defendant was familiar with using a shotgun and that he shot several of his victims at a range and with ammunition that was likely to cause severe injury or death, whether this evidence would permit the jury to draw inferences that Defendant killed deliberately and with premeditation must be analyzed in light of the record as a whole. (*People v. Memro* (1985) 38 Cal.3d 658, 695 (*Memro I*)) If, viewed in context of the entire record of the case in chief, (or under due process standards, under the guilt record as a whole), the evidence is ambiguous as to the

inferences that could be drawn, then it is insufficient.

The shots that Defendant fired at reasonably close range must be viewed in context with all of the shots that he fired, where they were fired, and what he appeared to be doing in firing them.

No victim was shot more than once. This is highly significant, because at least two of the victims seriously wounded by his shots at close range were also obviously still alive after he had shot them -- Robert Brens and Wayne Boggess. Defendant was in a position both to see that each was still alive and to shoot them again or remove them to a location where they could not received medical assistance to ensure their death. That he did not do so leaves the evidence that he shot them at relatively close range causing serious injury highly ambiguous as evidence from which to infer a deliberate decision to kill.

To make the distance of the shots fired at Brens and Boggess sufficient to infer a deliberate decision to kill in the face of any failure to follow through requires a further inference that Defendant *twice* decided to kill the person he was shooting at, but, in the split second following each shot, changed his mind.

If Defendant's decision had been to kill people at random, he passed up many opportunities to shoot at people at close range. Most notable was the testimony of Gregory Todd Howard and Lucy Lugo, who were on the floor with Defendant pointing his gun at them from a only two or three feet away, but Defendant fired no shot at them.

As previously discussed, of all the victims, the trial record provides a possible motive only for Robert Brens, and Defendant left Brens' classroom with Brens visibly and audibly still alive. Nor was

there any evidence to indicate that Defendant had ascertained that any of the other three homicide victims were dead when he moved on following a single shot. The manner of shooting the victims supports, and does not undermine, the statements attributed to Defendant in the prosecution's transcript of the videotaped interrogation (Exhibit 89) indicating that he merely shot at who or what came into his line of sight:

> Williamson: Had you know Brens was standing there when you were shooting would you have shot him?
>
> Houston: It wouldn't, if he was there or not it, I doubt...
>
> Williamson: If you had known it was Brens and he had a big sign that said, I'm Mr. Brens, and you're walking down the hallway after shooting a kid, would you have shot him.
>
> Houston: He was right in the path if it was him or not, even if it was Mr. Brens or not, that person would have...
>
> Williamson: It didn't matter. He was in your sights, he was gone.
>
> Houston: If it was Mr. Brens, Mr. Burris, or whatever, it was just whoever came in eye contact.
>
> Williamson: You didn't give a shit who, as long as...
>
> Houston: Uhh, yeah.
>
> Williamson: You weren't being selective, saying this is a girl, I'm not going to shoot her, okay, I'll shoot him?
>
> Houston: No, I wasn't selective. You guys are saying I shot one girl?

Downs: If they moved, you shot them?

Houston: And uh, so..

Downs: is that right?

Houston: Well, whoever came to my, my sight contact, yeah.

(Exhibit 89 [CT Supplemental–5 (v.1 of 1) 70])

The statements attributed to Defendant in Exhibit 89 are consistent with the explanation Defendant gave to the students in C-204 about why he shot people on the first floor:

Q: Did he talk about having shot some people?

A: Yeah. He said –

Q: What did he say about that?

A: He said downstairs, when he came in he had shot at several people. He didn't explain why he had shot them, except that they had come out at him, or that he was afraid that they would try and jump him. And he said that he shot a teacher and he shot a few students.

(Newland, 16 RT 3669:9-16)

Defendant's shots hit the following persons and things in approximate order:

One shot hit Rachel Scarberry (chest)

One shot hit Robert Brens (right side, back, chest, right arm, left and right hand)

One shot hit Judy Davis (head, face, hands)

One shot hit Thomas Hinojosai (ear and shoulder)

One shot hit Jason White (middle body)

One to three shots fired into C-105. Three students are hit: Jose Rodriguez (feet), Patricia Collazo (right knee), Maria Yanez (knees)

One shot hit somewhere on the second floor balcony in front of C-204b, where Joshua Hendrickson leaned over railing (Hendrickson, 14 RT 3183:16-3188:20)

One shot hit Sergio Martinez (back, arm)

One shot hit a podium at close range [CT Supplemental–5 (v.1 of 1) 71]

One shot hit John Kaze (upper body)

One shot hit Danita Gipson (left buttock)

One shot hit the upper portion of a locker outside C-110 (Exhibit 56)

One shot hit Wayne Boggess (head, back, chest, arm)

One shot hit Donald Graham (left forearm)

One shot hit Beamon Hill (temple, forehead, scalp)

One to three shots were fired into C-102 at the curtain and ceiling (Exhibit 56, Burdette, 13 RT 3024:3-14)

One or two shots were fired at the southeast entrance door (Downs, 18 RT 4057:3-25; Exhibit 56); [CT Supplemental–5 (v.1 of 1) 71

One shot hit the clock in the library (Exhibit 56)

The catalogue of Defendant's shooting in Building C demonstrates not a calculated decision to kill, but rather an indifference as to whether people in or about his line of fire lived or died. A mental state that is indifferent to whether others live or die necessarily precludes making a *calculated* decision that others should die. The evidence of Defendant's behavior, while difficult to

understand and deeply disturbing, is sufficient for a finding of second degree murder, but does not satisfy, as a matter of law, the requirements for deliberate and premeditated murder in the first degree.

F. Additional Evidence Adduced in the Defense Case on Guilt Undermining the Reasonableness of Inferences that Defendant Deliberated and Premeditated Any of the Killings.

As previously noted, the *only* evidence that prior to the incident Defendant intended to shoot *people* and not just "the school," came from the testimony of David Rewerts about his conversations and fantasizing with Defendant over how a "Terminator" like assault on the school would be "cool."[75] This evidence must be viewed in light of the entire record, including evidence adduced during the defense case on guilt and the uncanny resemblance of Defendant's appearance and demeanor with the cinematic depiction of the "Terminator" character.

Other uncontroverted evidence introduced during the defense case in the guilt phase indicated Defendant's fascination with the "*Terminator*" movies. In addition to David Rewerts' testimony about how much he and Defendant obsessed about the Terminator movies, Defendant's half-brother, Ronald Caddell, testified that Defendant was "fascinated" with the movies, had seen them a number of times

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[75] This testimony, described above in Section B.2 of this Argument, was part of the prosecution's case in chief. Defendant submits that the admission of Rewerts' testimony on this point without a cautionary instruction to the jury concerning his potential to be charged as an accomplice was prejudicial error. See Argument ??, *infra.*

with friends, had purchased books and other spin-off material about the movie, and had watched "*Terminator 2*" at home the night before the incident. (Caddell, 19 RT 4418:6-12, 4437:5-13). Dr. Groesbeck stated Defendant may have seen the "*Terminator*" movies 23 times. (Groesbeck, 19 RT 4484:19-24)

The descriptions of Defendant given by eyewitnesses to the shootings correspond to a significant extent to the image of Arnold Schwarzenegger as the "Terminator" pictured on the cover of the video cassette of "*Terminator I*" introduced into evidence. (Exhibit 203, Hinojosai, 11 RT 2569:27-2570:11; Long, 17 RT 3967:16-25; Kaze, 13 RT 2929:12-2930:5; Scarberry, 11 RT 2593:5-21; Rodriguez, 11 RT 2670:12-2671:17; Martinez, 12 RT 2829:22-27; Mojica, 12 RT 2857:2-6; Black, 18 RT 4190:28-4192:9-17)

The connection between the discussion of "shooting" people and the movie "*Terminator 2*" is not insignificant in relation to an evaluation of whether Defendant's statements to Rewerts indicated a calculated and deliberate decision to kill people at the high school. The principal character in *Terminator 2*, played by Arnold Schwarzenegger, is a human-like robot that is transported from the future to the present time to protect a teenage boy from being killed by an even more advanced robot (also transported from the future) made of an intelligent self-repairing liquid metal. The Schwarzenegger character must protect the boy from the advanced robot as well as from police and military forces who mistakenly believe the Schwarzenegger character, the boy, and the boy's mother, are violent criminals.

In the movie, the Schwarzenegger character repeatedly fires

shotgun blasts at the advanced robot from close range. The shots blow holes in the advanced robot, but the robot quickly self-repairs its holes and resumes its pursuit of the boy. Just as significant, although the Schwarzenegger character shoots a number of human beings in the movie, he has been programmed to follow any instructions given by his boy-protectee and the boy has instructed the Schwarzenegger character that he is *not* to kill humans. The Schwarzenegger character, along with the boy, enters a mental hospital and then an office complex, each time firing at people in the legs or otherwise shooting to wound but not to kill. [76]

In light of the *Terminator 2* story line and the evidence of

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[76] A detailed plot description of the film *Terminator 2* can be found at http://www.filmsite.org/term2C.html. The following except from the plot description is illustrative:

> When John [the boy] and the Terminator pull up at the hospital's entrance and the guard gate, John forces his machine/friend/protector to remember his non-violent credo, making him swear to it:
>
> John: Now, you gotta promise me you're not gonna kill anyone, right?
>
> Terminator: Right.
>
> John: Swear.
>
> Terminator: What?
>
> John: Just put up your hand and say, 'I swear I won't kill anyone.'
>
> Terminator: (mimicking the hand gesture) 'I swear I will not kill anyone.'
>
> Faithfully keeping his promise, the Terminator pulls out his .45 pistol and shoots the security guard in both knees, telling John: "He'll live." They drive into the open gate.

Defendant's familiarity with it, the evidence that Defendant fantasized or planned a *Terminator 2* -like assault on the school building, even including shooting at people in the building, does not create any necessary inference that he formed any desire or intention to kill people. Indeed, if anything, it suggests a state of mind that no one would die from Defendant's actions, however unrealistic that expectation was.[77]

This Court has required the giving of CALJIC 2.01 and/or 2.02 when the prosecution seeks to prove a specific intent or mental state substantially or entirely upon circumstantial evidence. (See *People v. Thornton* (2006) 41 Cal.4th 391, 440-441; *People v. Hughes* (2002) 27 Cal.4th 287, 347.) CALJIC 2.02 provides in relevant part:

> [Y]ou may not [find the defendant guilty of the crime charged ... unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent and mental state]but (2) cannot be reconciled with any other rational conclusion.
>
> Also, if the evidence as to any specific intent or mental state permits two reasonable

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[77] Defendant's mental health experts opined that when Defendant came to the building, entered, and began shooting he was suffering from a psychotic delusion and lacked the capacity to understand what he was doing. In this evidence sufficiency argument, Defendant is not asking for a finding that the evidence compels a finding that he could not distinguish between fantasy, as depicted in the *Terminator II* movie, and reality. Rather, Defendant is merely pointing out that evidence that Defendant and Rewerts were fantasizing about attacking the school and shooting á la *Terminator2* did not support an inference of a calculated decision to kill because, to the extent Defendant was fantasizing emulating the character in the movie, no one would die from Defendant's gunshots.

> interpretations, one of which points to the existence of the specific intent or mental state and the other to its absence, you must adopt that interpretation which points to its absence.

Since shooting up the school and even people in it in the fashion of *Terminator 2* does not in any way necessarily indicate a calculated desire to kill, Rewerts' testimony about Defendant's statement cannot rationally support a conviction for deliberate, premeditated first degree murder.

The evidence of Defendant's discussions with David Rewerts about going to the school and shooting people does not provide any substantial evidence of planning supporting a calculated decision to kill.

VII. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY TO VIEW ACCOMPLICE REWERTS' TESTIMONY WITH CAUTION AND ITS ADMISSION OF REWERT'S LAY OPINION THAT DEFENDANT WAS LYING ABOUT BEING MOLESTED BY BRENS VIOLATED DEFENDANT'S RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND RELIABLE GUILT AND PENALTY VERDICTS

A. Introduction

As argued in Sections IV and VI, Defendant submits that the evidence adduced at trial in the prosecution's case in chief was insufficient to support convictions for any of the nine counts of attempted murder or the four counts of first degree deliberated premeditated murder. However, should the Court conclude that the evidence was sufficient to support any of the counts of attempted murder or first degree deliberated premeditated murder, Defendant

presents this Argument VII concerning error in admitting testimony of David Rewerts without warning the jury that Rewerts, as a matter of law, could be considered an accomplice and his testimony should be viewed with extreme caution.[78]

David Rewerts, a critical prosecution witness, testified that in the months before the crime he and Defendant, who was his "best friend," claimed he had talked several times with Defendant where Defendant discussed going to their old high school and shooting people in Building C. (Rewerts, 18 RT 4060:3-22, 4062:13-4066:2, 4068:3-4069:28, 4072:9-26) Rewerts' testimony is the *only* evidence in the record suggesting that Defendant's planning of an attack on Lindhurst High School included an intention to shoot people, and not just property.

Rewerts' testimony also was very damaging when, over objection, he testified that if Defendant had been sexually molested by Robert Brens Defendant most certainly would have told Rewerts of that fact and that Rewerts was confident such molestation never happened.

Rewerts also knew that Defendant had several guns, and on one occasion he did some shooting himself with Defendant at a target range. (Rewerts, 18 RT 4066:3-4067:17) As the crime was underway, Rewerts called the police and told them he thought the

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[78] If the Court accepts Defendant's position in this Argument VII that the jury should have been cautioned as to Rewerts' testimony, Defendant requests that the Court then revisit the arguments on sufficiency of the evidence in light of the lack of corroboration and diminished weight to be given to Rewerts' key testimony that Defendant discussed shooting "people" weeks before the incident.

gunman was probably Defendant. (Rewerts, 18 RT 4061:4-4062:12) At trial Rewerts exonerated himself by claiming that the conversations were just idle talk. (Rewerts, 18 RT 4062:25-28) In hindsight, in light of the events of May 1, 1992, Rewets' description of his conversations with Defendant became a central piece in the prosecution's evidence that Defendant planned a deliberate attack on the school and the people there.

Under the authorities discussed below, Rewerts could have been charged in the instant case as an accomplice, and Defendant's jury should have been so instructed.[79] Most important in the context of this case, the jury should have been instructed to view Rewerts' testimony with caution, particularly insofar as it incriminated Defendant and exonerated himself. (*People v. Guiuan* (1998) 18 Cal.4th 558.)

The trial court's failure to give accomplice instructions with regard to Rewerts lightened the prosecution's burden of proof, constituted a denial of Defendant's rights to due process and trial by jury, and rendered his convictions and sentences unreliable, requiring reversal under the Fifth, Sixth, Eighth and Fourteenth Amendments of the federal constitution. (*Carella v. California* (1989) 491 U.S. 263; *Beck v. Alabama*, supra, 447 U.S. 625.); *In re Winship* (1970) 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068.) (*Cabana v. Bullock* (1986) 474 U.S. 376, 384-385.)

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[79] The instant discussion assumes, *arguendo*, that this Court concludes that there was sufficient evidence to support the conclusion that Defendant harbored the required intent and mental state for the crimes of which he was convicted.

B. The Evidence Supported a Conclusion that Rewerts Was an Aider and Abettor

1. An Aider and Abettor Is One Who Knowingly Promotes, Encourages or Instigates a Crime Committed by Another

Penal Code Section 31 defines principals to a crime as: "[a]ll persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission . . . ." And an accomplice is defined in Penal Code Section 1111 as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." At the time of Defendant's trial, these principles were stated in standard jury instructions in common use.[80]

Further, this Court has explained that a person aids and abets the commission of a crime when he,

> acting with (1) *knowledge* of the unlawful purpose of the perpetrator; and (2) the *intent* or purpose of committing, *encouraging*, or facilitating the commission of the offense, (3) by act or *advice* aids, *promotes, encourages or instigates*, the commission of the crime."

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[80] The instructions, as they should have been given at Defendant's trial, were as follows: "The persons concerned in the commission or attempted commission of a crime who are regarded by law as principals in the crime thus committed or attempted and equally guilty thereof include: . . . [¶] 2. Those who aid and abet the commission or attempted commission of the crime." and "An accomplice is a person who was subject to prosecution for the identical offense charged . . . against the defendant on trial by reason of aiding and abetting or being a member of a criminal conspiracy." (CALJIC Nos. 3.00, 3.10 (5th Ed. 1988).)

(*People v. Beeman* (1984) 35 Cal.3d 547, 561, emphasis supplied.) [81]

At the time of Defendant's trial, this definition was included in the pattern instruction CALJIC No. 3.01.[82]

Rewerts, of course, testified in effect that he did not intend to abet the crime (see discussion, *post*), but where the factual question of accomplice status is in dispute, the question is one for the jury. (*People v. Brown* (2003) 31 Cal.4th 518, 556-557; see *People v. Sully*

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[81] It is worth noting that in *Beeman*, where this Court clarified the intent element necessary for aider and abettor liability, the facts were similar to those in the case at bar with regard to Rewerts' involvement. In *Beeman*, the appellant had presented evidence that "although he knew there was a possibility [the actual perpetrators] would try to rob [the victim], appellant thought it very unlikely they would go through with it. He judged [one of the actual perpetrators] capable of committing the crime but knew he had no car and no money to get to Redding. Appellant did not think [the other perpetrator] would cooperate." (*Id.*, at p. 553.) The convictions were reversed because this Court concluded that there was a reasonable possibility that a correctly instructed jury would have concluded that the appellant had given the perpetrators helpful information or otherwise assisted them, but without the requisite intent. (*Id.*, at pp. 562-563.)

[82] "A person aids and abets in the commission of a crime when he or she, [¶] (1) with *knowledge* of the unlawful purpose of the perpetrator and [¶] (2) with the intent or purpose of committing, *encouraging*, or facilitating the commission of the crime, by act *or advice* aids, *promotes, encourages, or instigates* the commission of the crime. [¶] A person who aids and abets the commission of a crime need not be personally present at the scene of the crime. . . . [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting. (CALJIC No. 3.01 (5th ed. 1988), emphasis supplied.)

(1991) 53 Cal.3d 1195, 1227.)

2. Rewerts' Testimony Was Evidence that He Aided and Abetted the Crimes

Rewerts testified that when he was spending time with Defendant in the months before the crime, the subject of shooting people at the high school came up three or four times. (Rewerts, 18 RT 4063:18-26) In spite of the prosecutor's efforts to keep the focus on Defendant's statements rather than Rewerts' own role, and Rewerts' characterization of the discussions as "idle talk," the jury reasonably could have concluded that in fact Rewerts was a full participant in those conversations, that he may have been the instigator, and that he at least "encouraged" Defendant to carry out the crime.

Rewerts testified that during the few months preceding the crime, he and Defendant went to see the movie, *Terminator II*, and that afterwards they were both "pumped up" because it was "the greatest movie that happened during the time." (Rewerts, 18 RT 4068:19-4069:12) He was visiting at Defendant's house when they first "talked about the subject a little bit." (Rewerts, 18 RT 4062:13-24) He said "the subject just got brought up where [Defendant] would like to go to the school and sho[o]t a couple of people." (Rewerts, 18 RT 4062:22-23) Specifically, Defendant "said he'd like to go to – like to – due to the openness of C Building he would walk in and shoot a couple rounds and go outside the back and off the – around the fence on the back of Lindhurst High School [baseball] diamond field." (Rewerts, 18 RT 4063:5-11)

Rewerts also testified that when he was at Defendant's house

reading "a *Terminator* book," Rewerts himself was "talking about destroying things. And it was more – it was pretty absurd what I was saying." (Rewerts, 18 RT 4063:27-4064:13) He also testified that "all he was talking about was going back and shooting a couple people." (Rewerts, 18 RT 4064:3-5)[83] On that same occasion, according to Rewerts, Defendant was reading out loud to Rewerts from a book about military tactics, police procedures, and hostage situations. (Rewerts, 18 RT 4064:14-22)

Rewerts testified further that during the same time period, he knew that Defendant "owned a shotgun, two .22 semi automatic rifles, and a small little like machine gun thing." (Rewerts, 18 RT 4066:3-8) Rewerts went with Defendant to a target range and they both practiced with Defendant's shotgun. (Rewerts, 18 RT 4066:9-4067:17)

Thus, based on Rewerts' own testimony and in view of the entire body of evidence introduced at the guilt phase, the jury could reasonably have concluded that he: (1) had *knowledge of Defendant's plan* to shoot people at Lindhurst High School and that he (2) *advised* and/or *encouraged* Defendant, (3) with the *intent* of encouraging the commission of a crime by his *advice, promotion, encouragement, and/or instigation.*

Further, an aider and abetter is liable for any crime that is a natural and probable consequence of the crime originally aided and abetted. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 106-

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[83] In fact, Rewerts' testimony at 18 RT 4063:27-4064:13 is ambiguous, in that he could be seen as saying that Defendant was actually commenting on what Rewerts' was saying, ("Q: Mr. Houston said all I was talking about was going back to – A: the high school and shooting a couple of people." 18 RT 4064: 8-10).

108.) At Defendant's trial, the jury reasonably could have concluded that the murders were natural and probable consequences of a crime instigated and encouraged by Rewerts to go to the school, shoot it up, perhaps even shoot at people, even though Rewerts never actually contemplated or intended to kill anyone.

Rewerts denied that either he or Defendant had criminal intent when they were discussing the crime, testifying that it was just a "fantasy."[84] By not charging Rewerts but using his testimony of the conversation as evidence of Defendant's premeditation and deliberation, the prosecution was impliedly supporting a characterization of the conversation as fantasy on Rewerts' part but deadly serious on Defendant's. Seen in this light, Rewerts' description of the conversations as "fantasy" is simply that: a characterization, and, although it may well be true, it was a highly self-serving one for Rewerts. In assessing Rewerts' credibility as to what transpired in the conversation, and particularly who brought up "shooting people," the jury needed to know that Rewerts had a strong penal interest in describing his side of the conversation in a manner that supported his "fantasy" characterization, since in testifying he easily might implicate himself as an accomplice in crimes, the consequences of which he never intended or envisioned.

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[84] On cross-examination, defense counsel asked: "When you spoke with [Defendant] about -- -- four months or so prior to the May 1st incident in your testimony you indicated *you had discussed shooting or going to the school* and so forth. Do you have that in mind?" (Rewerts, 18 RT 4068:5-15, emphasis supplied) And Rewerts answered, "Yeah." (Ibid.) And when defense counsel asked if "the *two of you* were talking about a fantasy?" Rewerts again replied, "Yeah, just idle talk." (Ibid., emphasis supplied)

This last point is particularly relevant because at one place in the record Rewerts' own testimony suggests that it was Rewerts, and not Defendant, who initiated a discussion of shooting "people" at the school: Rewerts' testimony at 18 RT 4063:27-4064:13 could be seen as saying that Defendant was actually commenting on what Rewerts was saying: ("Q: Mr. Houston said all I was talking about was going back to – A: the high school and shooting a couple of people." 18 RT 4064: 8-10). By putting the initiation of the concept of "shooting people" in Defendant's mouth, and not his own, Rewerts provided highly incriminating evidence against Defendant on the murder and attempted murder charges while exculpating himself.

This Court has observed that the mental state of one accused of being an accomplice "is rarely available except through his or her testimony. The trier of fact is and must be *free to disbelieve the testimony and to infer that the truth is otherwise* when such an inference is supported by circumstantial evidence regarding the actions of the accused. Thus, an act which has the effect of giving aid and encouragement, and which is done with knowledge of the criminal purpose of the person aided, may indicate that the actor intended to assist in fulfillment of the known criminal purpose." (*People v. Beeman* (1984) 35 Cal.3d 547, 559, emphasis supplied)

Thus, if the jury had understood the law of accomplice liability, it could reasonably have concluded that Rewerts that his characterization of his and Defendant's relative roles in planning the crime was, at least possibly, an attempt to avoid criminal liability to himself both by inculpating Defendant as the person who raised the possibility of shooting people at the school and of then independently

developing his own plan to attack the school.

C. The Trial Court Should Have Told the Jury to View Rewerts' Testimony with Caution

Rewerts' testimony was, to paraphrase the language of the United States Supreme Court, "presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well [have been] the product of [his] desire to shift or spread blame, curry favor, avenge himself, or divert attention to another." (*Lee v. Illinois* (1986) 476 U.S. 530, 545; see also *Lilly v. Virginia* (1999) 527 U.S. 116, 132 [accomplice confessions untrustworthy because "likely to be attempts to minimize the declarant's culpability"]; *Bruton v. United States* (1968) 391 U.S. 123, 141; *Douglas v. Alabama* (1965) 380 U.S. 415, 419.)

This Court has recognized that "the testimony of an accomplice on behalf of the prosecution is subject to distrust because such witness has the motive, opportunity, and means to help himself at the defendant's expense..." (*People v. Guiuan* (1988) 18 Cal.4th 558, 567; see also discussion and authorities cited at pp. 570-576 (conc. opn. of Kennard, J.) That widely recognized fact gives rise to the longstanding rule that "trial courts, on their own initiative, must warn juries that the testimony of accomplices who testify on behalf of the prosecution is inherently unreliable . . . ." (*Id.*, at p. 570 (conc. opn. of Kennard, J.).)

At Defendant's trial, the trial court should have instructed the jury that Rewerts was an untrustworthy witness and that his testimony should be viewed with caution.

D. Defendant Was Prejudiced by the Trial Court's Failure to Give Accomplice Instructions

At the time of Defendant's trial, the standard instructions regarding accomplice testimony actually contained two cautions: first, that such testimony should be viewed with distrust (CALJIC 3.18, *post*) and second, that a conviction could not be based on such testimony unless it was corroborated by other evidence tending to connect the defendant with the crime (CALJIC 3.11 (1990 Revision).)

The corroboration requirement protects the defendant from an unfair conviction in cases where the identity of the perpetrator is in issue, that is, where more than one person could have been the direct perpetrator and particularly, when there is evidence that the accomplice could have been the direct perpetrator. (See, e.g., *People v. Boyer* (2006) 38 Cal.4th 412; *People v. Frye* (1998) 18 Cal.4th 894; *People v. Gordon* (1973) 10 Cal.3d 466, disapproved on another point in *People v. Ward* (2005) 36 Cal.4th 186, 212; *People v. Perry* (1972) 7 Cal.3d 756; *People v. Miranda* (1987) 44 Cal.3d 57.) Here, the identity of the shooter was not at issue, and Rewerts' testimony was not introduced to prove that Defendant was the shooter. Defendant does not, therefore, allege prejudice because of any lack of corroboration of his involvement in the crimes committed on May 1, 1992.

The standard cautionary instruction at the time of Defendant's trial was the following:

> The testimony of an accomplice ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with care and caution and

in the light of all the evidence in the case.

(CALJIC 3.18 (5th Ed. 1988);[85] see *People v. Williams* (1988) 45 Cal.3d 1268, 1314).)

Rewerts' testimony was highly prejudicial to Defendant in several key respects:

First, Rewerts' testimony was the only evidence suggesting that Defendant's planning for attacking the high school included an intention to shoot "people." Apart from Rewerts' testimony putting the words "shooting a couple of people" in Defendant's mouth, all other evidence of planning to shoot at people is very weak to non-existent: The prosecutor put on evidence that Defendant had purchased "anti-personnel" ammunition the morning of the incident, but it was the same type of ammunition that Defendant used regularly for target practice. Defendant's "Mission Profile" drawing, Exhibit 64, had Defendant firing into classrooms, but there are no representations of people in the classrooms, only desks.

Second, according to Rewerts Defendant was the person first to bring up shooting "people" during their fantasy sessions. But as noted, Rewerts' own testimony is at one point suggestive that it was he, Rewerts, who first brought up the subject of shooting "people." If the jury had believed that it was Rewerts who had planted the idea of

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[85] In the *Guiuan* opinion, this Court recommended a revision to this language, but held that giving the 1988 instruction was not reversible error in the absence of an objection and request to modify the instruction. (*People v. Guiuan, supra*, 18 Cal.4th at pp. 560, 569.) The current instruction covering the subject is CALCRIM 33.

shooting "people" at the school in Defendant's mind, rather than Defendant initiating the idea, Defendant's other actions, particularly in light of the evidence of Defendant's mental illness, would be cast in a far different light. Defendant would then have appeared far more as an individual manipulated by his best friend and under a mental disability, than a person coming up with his own idea to seek some sort of revenge on the school that had flunked him.

Third, as discussed below, Rewerts was recalled by the prosecution in rebuttal to the defense case on guilt to undermine a key fact on which Defendant's mental health experts had premised their opinions as to what had triggered his mental health deterioration in the weeks leading up to the May 1, 1992 incident. The experts had testified that Defendant had related to them that he had twice been molested sexually by Robert Brens while a student in Brens classes. Ricardo Borom, a gay co-worker with Defendant at Burger King with whom Defendant had discussed his sexual life was called by the defense to corroborate that Defendant had told him of a molestation by a teacher at his high school.

The prosecution's principal attack on the mental health testimony presented by the defense in the guilt phase was to challenge the veracity of Defendant's recitation of his being molested by Brens. The prosecution vigorously attacked Borom's credibility and then called Rewerts in rebuttal. The prosecution elicited from Rewerts that he and Defendant had spoken about their sexual desires and on one occasion had sexual relations. Over objection, Rewerts was permitted to opine that his relationship with Defendant was such that Defendant would have told him if Defendant had been molested by Brens and he

was confident no such sexual interaction had occurred. (Rewerts, 21 RT 4918:19-4921:27)

Apart from the lack of competency to render that opinion as discussed *infra.*, Defendant was prejudiced by having the jury evaluate the remark without the caution that Rewerts' status as an accomplice in aiding and abetting what became Defendant's homicidal attack on the school required all his statements to be viewed with suspicion. Rewerts had previously testified that he took Defendant's statements about attacking the school as "idle talk" – a characterization that served to exculpate Rewerts from charges that he knowingly conspired with or aided and abetted Defendant in his attack on the school. Knowledge that Defendant claimed that Brens had twice sexually accosted Defendant against Defendant's will would severely challenge the veracity of Rewets' claims that discussions of attacking the school were nothing but adolescent fantasy. Moreover, Rewerts admitted in cross-examination on his rebuttal testimony that he had been jealous when Defendant had sexual relationships with girls and that he desired to have an exclusive homosexual relationship with Defendant. (Rewerts, 21 RT 4922:16-4923:6)

Rewerts' admission of his jealousy and desire for an exclusive relationship with Defendant, coupled with an admission that Defendant had told Rewerts he had been sexually molested by Brens would have not only challenged Rewerts' claim of innocence in the fantasy conversation, it would have given him a motive to encourage and abet an attack on the school aimed at Brens. Had the jury been properly instructed, Rewerts' claim to be the authoritative witness on Defendant's sexual experiences would have been viewed with

skepticism and evaluated in light of the substantial interest Rewerts had in denying knowledge of any concrete reason Defendant might be seeking to attack the school, take Brens hostage, or worse.[86]

Thus, the prosecution's burden of proof with regard to Defendant's intent, an essential element of every offense charged, was unfairly lightened, in violation of his Sixth Amendment right to a jury trial and his Fourteenth Amendment right to due process under the federal constitution. (*Apprendi v. New Jersey* (2000) 530 U.S. 466; *United States v. Gaudin* (1995) 515 U.S. 506, 510; *Sullivan v. Louisiana* (1993) 508 U.S. 275; *People v. Flood* (1998) 18 Cal.4th 470; see also *People v. Galaza* (9th Cir. 2003) 328 F.3d 558 [mid-trial instruction that defendant's testimony established criminal intent violated Sixth Amendment right to jury determination of every element]; *United States v. Sayetsittyi* (9th Cir. 1997) 107 F.3d 1405, 1414 [due process right to have jury consider any defense that negates element of offense].)

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[86] As previously discussed, Defendant is not contesting that he planned an attack on Lindhurst High School, but he is contesting that there was sufficient evidence presented in the prosecution case in chief or the guilt phase overall to find that he calculated and deliberated killing anyone. Rewerts' admission that he participated in discussions that led to Defendant's attack on the school makes him an accomplice, without adding to the existing quantum of evidence that Defendant deliberated and premeditated killing people at the school, or that he had intent to kill specifically the victims in the counts for attempted murder. It does, however, call into substantial question the degree to which Rewerts' testimony can be relied upon to sustain the convictions for murder and attempted murder, especially when different answers to the questions posed would have implicated him deeply in Defendant's planning for his criminal, albeit intended non-lethal, assault on Lindhurst High School.

Moreover, because the jury's consideration of the entire defense theory of Defendant's lack of intent was undermined by Rewerts' untrustworthy testimony, its guilt verdicts on the capital murder counts were unreliable and obtained in violation of Defendant's right to scrupulous due process and a reliable verdict in a capital case. (*Beck v. Alabama* (1980) 447 U.S. 625.)

The omission of accomplice instructions with regard to Rewerts' testimony violated Defendant's fundamental constitutional rights, and Defendant submits that the prosecution cannot demonstrate beyond a reasonable doubt that, if the jury had understood that it could consider Rewerts' role in conceiving, planning, and encouraging the crime when it assessed the evidence of Defendant's intent, it would have reached the same results. (*Chapman v. California* (1967) 386 U.S. 18, 25.) Defendant's convictions must therefore be reversed.

The error in failing to give proper instruction on Rewerts' role as an accomplice also prejudiced Defendant in the penalty phase: Because Defendant's jury did not understand that it could consider Rewerts' own role in the crime as a mitigating factor. Therefore, the penalty verdict is unreliable and should be reversed under the Eighth and Fourteenth Amendments. (*Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Lockett v. Ohio* (1978) 438 U.S. 586, 605; *Gardner v Florida* (1977) 430 US 349, 358; *Woodson v. North Carolina* (1976) 428 US 280, 305.)

E. The Admission Of David Rewerts' Lay Opinion That Defendant Had Never Been Sexually Molested Was Prejudicial Error

As discussed, in the guilt phase Defendant's mental health experts had testified that Defendant had told them that Robert Brens had twice sexually molested him while he was a student at Lindhurst High School, and that each molestation had taken place in Building C during school hours. (Rubinstein, 20 RT 4791:27-4793:6)

As presented by experts, the reported experience of having been molested by Brens sounded central to their findings, diagnoses, and explanations for how Defendant's mental conditions affected his *mens rea* at the time of the incident. For example, Dr. Rubinstein, when asked "what effect the Brens molestations had on Defendant," answered as follows:

> A. Mr. Macias, it destroyed Mr. Houston's mind. Mr. Houston as we have already discussed developed a post traumatic stress disorder in response to those incidents of molestation. As time progressed every time the experience of the molestation was represented to Mr. Houston he suffered a period of symptom formation. This occurred and endured. And if you'll recall my description of the symptoms of post traumatic stress that Mr. Houston was experiencing and manifesting after May the 1st, 1992, specifically on and after June the 4th, 1992, when I first began to examine him you will see representations of the trauma of the molestation everywhere. In his dreams, in his projective tests, in his delusions, in his flashbacks.
>
> (Rubinstein, 20 RT 4736:15-4737:3)

Dr. Groesbeck also placed great emphasis on the report of the Brens' molestations. Groesbeck identified the molestations by Brens

as "the most important" stressor contributing to the post traumatic stress disorder that he had diagnosed in Defendant. (Groesbeck, 19 RT 4488:28-4489:5)

The defense called Roberto Borom to corroborate the fact that Defendant had experienced sexual molestation by Brens prior to the May 1, 1992 incident. Borom, who had worked with Defendant at a McDonald's restaurant in 1989, testified that in the fall of 1989 Defendant had told Borom of having a homo-sexual interaction with a teacher at least a year prior to the incident Borom, 20 RT 4615:22-4621:15).

The prosecution's principal attack on the mental health testimony presented by the defense in the guilt phase was to challenge the veracity of Defendant's claim of his being molested by Brens. The prosecution vigorously attacked Borom's credibility and then called Rewerts in rebuttal. The prosecution elicited from Rewerts that he and Defendant had spoken about their sexual desires and on one occasion had sexual relations. Over repeated objections, Rewerts was permitted to opine that his relationship with Defendant was such that Defendant would have told him if Defendant had been molested by Brens and he was confident no such sexual interaction had occurred. (Rewerts, 21 RT 4920:17-4922:27)[87]

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[87] Defendant first objected in discussion out of the presence of the jury when the prosecution proposed recalling Rewerts to the stand to testify, *inter alia,* that Defendant would have told him if he had been molested by Brens. (See generally, 21 RT 4857:6-4861:20.), where the Defense objected to the testimony as calling for speculation.) During this colloquy, the Court described the offer of proof as follows: "The offer of proof that says I want to put Rewerts on the stand to testify that he and Houston talked about sexual matters

Specifically, the prejudicial testimony (without objections or colloquy) was as follows:

> Q. And did Mr. Brens – strike that. Did the defendant, Mr. Houston, ever say anything to you about the defendant ever touching Mr.-Brens in a sexual manner?
>
> A. No.
>
> Q. And is that the type of thing that –
>
> [colloquy]
>
> Q. Is that the type of thing that with the type of relationship that you had with the defendant that you would discuss certain matters with the defendant?
>
> A. Yes.
>
> Q. Is that the type of matter or subject matter that the defendant would discuss with you?
>
> A. Yes.
>
> Q. And in your opinion had Mr. Brens touched the defendant in a sexual manner?
>
> [objection, colloquy]
>
> Q. In your opinion based upon the relationship and the type of relationship you had with Mr. Houston, is that the type of thing, having sexual contact with Mr. Brens, that the defendant would have talked to you about had it occurred?
>
> A. Yeah. We were friends. I believe that he would have told me such a thing about

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openly during the period when this alleged molest occurred and would have, if it were true, talked about it, but there was no talk about it." (21 RT 4860:21-26) The Court then stated it would permit the testimony. (21 RT 4861:19-20) A second objection was raised when the specific question was asked. (21 RT 4920:20-21)

> Mr. Brens touching him or doing anything else. I believe that he would have told me.
>
> Q. And again, he did not tell you any such thing, is that correct?
>
> A. No.
>
> (21 RT 4920:14-4921:27)

The admission of Rewerts' lay opinion that Defendant was not molested because Defendant would have told him of such an event had it occurred was error. Rewerts' opinion was an opinion on Defendant's veracity with respect to his relating experiences of sexual molestation to the experts and to Borom. A lay witness is not competent to testify as to the veracity of a specific statement of another.

Testimony of lay witnesses is governed by Evidence Code §800:

> If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:
>
> (a) Rationally based on the perception of the witness; and
>
> (b) Helpful to a clear understanding of his testimony.

This Court has made it plain that lay opinion about the veracity of particular statements by another is inadmissible:

> Lay opinion about the veracity of particular statements by another is inadmissible on that issue. As the Court of Appeal recently explained (People v. Sergill (1982) 138 Cal.

> App. 3d 34, 39-40 [187 Cal. Rptr. 497]), the reasons are several. With limited exceptions, the fact finder, not the witnesses, must draw the ultimate inferences from the evidence. Qualified experts may express opinions on issues beyond common understanding (Evid. Code, §§ 702, 801, 805), but lay views on veracity do not meet the standards for admission of expert testimony. A lay witness is occasionally permitted to express an ultimate opinion based on his perception, but only where "helpful to a clear understanding of his testimony" (id., § 800, subd. (b)), i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed. (People v. Hurlic (1971) 14 Cal. App. 3d 122, 127 [92 Cal. Rptr. 55]; see Jefferson, Cal. Evidence Benchbook (1972) § 29.1, pp. 495-496.) Finally, a lay opinion about the veracity of particular statements does not constitute properly founded character or reputation evidence (Evid. Code, § 780, subd. (e)), nor does it bear on any of the other matters listed by statute as most commonly affecting credibility (id., § 780, subds. (a)-(k)). Thus, such an opinion has no "tendency in reason" to disprove the veracity of the statements. (Id., §§ 210, 350.)
>
> *People v. Melton* (1988) 44 Cal.3d 713, 744.

Eliciting Rewerts' lay opinion that his relationship with Defendant was such that Defendant would have confided in him if Defendant had been molested by Brens was objectionable under each of the three rationales given in *People v. Melton, supra.*

First, whether or not Defendant had been telling the truth to the experts and to Borom was for the jury to decide based on facts, not speculation. Indeed, the jury, which presumably was disinterested in the Rewerts/Houston relationship, would be in a better position to evaluate whether the molestations were something Defendant could be

expected to disclose to Rewerts or something he was more likely to conceal.

Second, assuming for the sake of this argument that it was not objectionable for Rewerts to testify to the facts that he and Defendant often discussed sexual matters and that Defendant had not mentioned the molestation, his further opining that therefore the molestation did not occur was neither helpful nor necessary "to a clear understanding of his testimony." Each side should have been free to argue whether or not the fact that Defendant had not mentioned the molestations to Rewerts supported any inference that Defendant had not told the truth to the experts and Borom, and the jury, using its common sense, would have drawn the inference it believed appropriate. The erroneous admission of the opinion did not assist the jury in drawing an inference, but took that task away from them. That the molestations did not occur was now a fact in evidence, based upon the opinion of Defendant's best friend and confidante.

Third, while the opinion was not helpful or necessary, it injected a further implied fact into the evidence: namely that Defendant *was* a liar—someone who didn't tell the truth and couldn't be trusted in general. This evidence of Defendant's character was introduced through the erroneous ruling although no proper admissible question was asked Rewerts as to Defendant's reputation for honesty.

The United States Constitution's pledge of due process of law guarantees a criminal defendant a trial conducted with fundamental fairness. (*Lisenba v. California* (1941) 314 U.S. 219 (1941); *Moore v. Dempsey* (1923) 261 U.S. 86.) The admission of objectionable

evidence can be so prejudicial as to deprive the criminal defendant of the fundamental fairness guaranteed by due process. (*Walker v. Engle* (8th Cir. 1983) 703 F.2d 959, 962-968.) Where the improperly admitted evidence is crucial and highly significant, due process has been denied. (*Bundy v. Dugger* (11th Cir. 1988) 850 F.2d 1402, 1422.)

Moreover, the Sixth Amendment, as applied to the States through the Fourteenth Amendment, guarantees the right of trial by jury in all state nonpetty criminal cases. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 159-162.) The purpose underlying the right is to "prevent oppression by the Government" (*Williams v. Florida* (1970) 399 U.S. 78, 100, and "[t]his purpose is attained by the participation of the community in determinations of guilt and by application of the common sense of laymen who, as jurors, consider the case." (*Ballew v. Georgia* (1978) 435 U.S. 223, 229.)

As with the failure to give the accomplice testimony cautionary instruction, the admission of Rewerts' lay opinion on Defendant's veracity as to specific statements unfairly lightened the prosecution's burden of proof by removing a significant issue from jury consideration in violation of his Sixth Amendment right to a jury trial and his Fourteenth Amendment right to due process under the federal constitution. (*Apprendi v. New Jersey* (2000) 530 U.S. 466; *United States v. Gaudin* (1995) 515 U.S. 506, 510; *Sullivan v. Louisiana* (1993) 508 U.S. 275; *People v. Flood* (1998) 18 Cal.4th 470; see also *People v. Galaza* (9th Cir. 2003) 328 F.3d 558; *United States v. Sayetsittyi* (9th Cir. 1997) 107 F.3d 1405, 1414 [due process right to have jury consider any defense that negates element of offense].)

Moreover, because the jury's consideration of the entire defense theory of Defendant's lack of intent was undermined by Rewerts' incompetent opinion, its guilt verdicts on the capital murder counts were unreliable and obtained in violation of Defendant's right to scrupulous due process and a reliable verdict in a capital case. (*Beck v. Alabama* (1980) 447 U.S. 625.)

The prejudice from this improper lay opinion testimony was profound. As noted, Defendant did not testify in the guilt phase, but his statements to the mental health experts describing the sexual molestations *would have been heard by the jury* as the linchpin holding together their opinions that Defendant was mentally ill and psychotic at the time of the incident and would not have had the requisite *mens rea* for first degree murder by premeditation and deliberation.[88] Since the jury had no direct basis for evaluating Defendant's credibility on this issue, Rewerts' opinion that Defendant was lying about the molestations would have carried tremendous weight. That the person claiming to be Defendant's best friend and sexual intimate thought Defendant had never been molested was a kiss of death.

Although he didn't directly argue Rewerts' testimony that the

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[88] Both defense experts testified that their opinions would not change even if they assumed that the Brens molestations had not occurred. (Rubinstein, 20 RT 4818:10-26; Groesbeck, 22 RT 5349:4-28 (sanity phase)) Nevertheless, from a lay perspective, since no evidence of any other concrete traumatic experience of comparable severity was in evidence, if the Brens molestations were a fabrication, then the Defense mental health explanation for Defendant's behavior was left untethered in the record to any concrete experiences or events in Defendant's life.

molestations didn't happen, the prosecutor in his argument on guilt argued that the opinions expressed by Drs. Groesbeck and Rubinstein were erroneous because Defendant had given them false information. Thus, the prosecutor told the jury:

> The information [Groesbeck and Rubinstein] got from Mr. Houston in regards to when he was allegedly molested, the information in regards to Mr. Houston's going to summer school -- they made assumptions that were not based on any information in fact, such as some kind of childhood abuse or the effects of meningitis. These were conclusions that were drawn out of thin air. That doesn't mean that given the right information, they couldn't have come to correct conclusions. But it shows us what might or what can happen when you rely on only one source for information, and that source being a person charged with a crime.
>
> O'Rourke 22 RT 5156:20-5157:3

The erroneous admission of Rewerts' lay opinion surely also undermined the probability that the jury would give Defendant a fair and unprejudiced evaluation of his insanity defense. The sanity phase was based entirely upon mental health testimony. The jury already had learned that the trial judge believed all psychology was "mumbo jumbo stuff." Compounding the trial court's diminishment of the entire focus of the sanity phase, Rewerts' testimony stripped the mental health opinions of their principal concrete underpinning in the record: to the average lay person a homosexual molestation of a student by a teacher would generally be viewed as (a) not the fault of the student and (b) likely to cause significant psychological trauma. If the sexual molestations by Brens never occurred, Defendant's stated

reasons for attacking the school – failing to graduate, missing the prom, losing his job, losing his girlfriend – were circumstances largely within Defendant's control and/or the sort of common life experience that lay persons do not associate with psychological trauma or believe likely to precipitate severe mental illness. Once Rewerts opined that the molestations had no basis in fact, all of the mental health expert testimony in sanity would have seemed simply "mumbo jumbo."

The error in admitting Rewerts' opinion surely affected the jury's consideration of penalty as well. While it is true that in the penalty phase the jury had the opportunity to observe Defendant's own testimony, including his explanation on cross-examination as to why he did not tell Rewerts of the molestation by Brens (24 RT 5900:6-5902:8), by this time in the trial the jury twice would have made decisions based upon, at least in part, Rewerts' opinion that Defendant was lying about the molestation. It is doubtful that at such a late stage in the proceedings, the jury would have been able to view and evaluate Defendant's testimony on this issue in a neutral and objective light.[89]

The judgments of guilt and sentence should be reversed due to the erroneous admission of David Rewerts' opinion as to Defendant's veracity with respect to the molestations by Robert Brens.

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[89] In his argument in penalty, the prosecutor returned to the theme that the molestations were a fabrication. (O'Rourke, 24 RT 5959:9-5960:25).

VIII. BY STATING HIS SCORNFUL OPINION OF MENTAL HEALTH TESTMONY THE TRIAL JUDGE FATALLY POISONED ALL THREE PHASES OF THE JURY TRIAL PROCEEDINGS.

A. The Judge's Poisonous Comments

At trial Defendant did not challenge that on May 1, 1992 he had entered the school and fired his weapon multiple times resulting in the death of four persons and the wounding of ten others. However, the testimony relating the events of May 1, 1992 from those who had the misfortune to be present revealed little or nothing as to Defendant's mental state, intent, or objectives when he entered the school and began firing.

Defendant's defense throughout the trial was focused on his mental illness and mental impairments. This evidence was presented through the testimony of Defendant's expert witnesses, Helaine Rubinstein, Ph.D., a clinical psychologist, and Jess Groesbeck, M.D., a psychiatrist. Mental health experts called by the prosecution in the sanity phase, while disagreeing with some of the diagnoses put forward by the defense experts, all agreed that Defendant was significantly mentally impaired and/or mentally ill at the time of the incident and in general.

In the guilt phase, Defendant's experts testified to their diagnoses of Defendant's multiple mental impairments as they related to Defendant's ability to form an intent to kill and to deliberate and premeditate. In the sanity phase, Dr. Groesbeck offered his opinion that due to his mental illness, Defendant's behavior at the school stemmed from his delusional belief that the students at the school were being mistreated and that he, as the "Terminator," was there to

"save the children" from the teachers and administrators at the school. Groesbeck opined that this delusional scheme inverted Defendant's sense of what was morally right and wrong, satisfying the California test for insanity.

No additional mental health testimony was put on in the penalty phase, but the jury was instructed to consider all of the evidence in the record (24 RT 6006:6-12), and the evidence of his mental impairments and illness remained probably the most significant evidence in mitigation presented to the jury.

As noted, in the guilt phase Defendant presented the unrebutted testimony of two expert witnesses – Helaine Rubinstein, Ph.D., a clinical psychologist, and Jess Groesbeck, M.D., a Board Certified psychiatrist. (Rubinstein, 20 RT 4647:3-25; Groesbeck, 19 RT 4449:1-4451:8) Rubinstein had first met and interviewed Defendant on June 4, 1992, a little more than a month after the incident, and by the time of trial had spent over 50 hours with Defendant. She had conducted extensive psychological testing, reviewed many school and medical records of Defendant, and reviewed video tapes of witness interviews and Defendant's interrogation. (Rubinstein, 20 RT 4660:14-26, 4669:12-27, 4678:4-210)

Dr. Groesbeck had interviewed Defendant and reviewed some of the materials developed in the criminal investigation, but he also relied heavily on information and opinions provided by Rubinstein. (Groesbeck, 19 RT 4518:9-4520:8, 4521:6-4522:23, 4576:23-4578:7)

Early on in the direct examination of Dr. Rubinstein, the trial Judge, in a facetious *sua sponte* interjection into defense questioning on direct examination, disparaged Dr. Rubinstein by associating her

with the avant-garde poet and bohemian Gertrude Stein:

> Q. You were asked yesterday about the relative number of criminal cases that you had examined or patients that you had examined as opposed to non-criminal cases. Does that -- is that significant or is it for your purposes a matter of a brain is a brain is a brain?
>
> A. A brain is a brain is a brain. I don't believe a heart surgeon needs to know whether his patient has been accused of a crime or not to perform the procedures that he's been trained to perform.
>
> THE COURT: Is that Gertrude Rubinstein? I'm sorry. Go ahead with your answer, Doctor.
>
> (20 RT 4722:20 - 4723:5)

Shortly thereafter, Defendant's counsel was asking Dr. Rubinstein questions about her approach to clinical psychology when the prosecutor objected to a question as leading. In overruling the objection the trial judge made a highly dismissive characterization of Dr. Rubinstein's field of practice:

> Q. In the field of psychology is it correct that the history of psychiatry and psychology, Dr. Freud, for example, is necessarily incorporated in your examinations?
>
> A. My theoretical position is the fundamental psychodynamic theory, psychoanalytic theory. These concepts and principles were originally developed in the 1800's by Dr. Freud and expanded and continued and re-revised by ego psychologists and theorists.
>
> Q. There is oft times a criticism of psychiatry and psychology that contends that psychology and psychiatry is nothing

> more than Freud and Freud is nothing more than saying people have problems because they hate their mother or their father. You may have heard that in different forms. How do you respond to that?
>
> MR. O'ROURKE: Your Honor, I'm going to object to the question. It's leading. Quite frankly as far as I can tell is leading.
>
> THE COURT: Well, I'm going to overrule the objection. It is proper to ask an expert a leading question. And I think it's an understandable question. It's really all the psychology stuff is mumbo jumbo stuff.
>
> Would you please answer the question.
>
> (20 RT 4724:13-4725:10)

Both of these disparaging statements came before Dr. Rubinstein had stated any opinions or diagnoses of Defendant, thereby coloring everything that she was to say thereafter, including her opinions about various neuropsychological deficits and psychiatric impairments and related facets of Defendant's personal history making it improbable that he acted with the requisite mental state for deliberate and premeditated first degree murder, and also including her test findings and interview reports that were relied upon by Dr. Groesbeck in his testimony in both the guilt and sanity phases of the trial.

B. The Trial Judge's Disparagement of Dr. Rubinstein and Psychology In General Constituted Prejudicial Misconduct Requiring Reversal of the Conviction and Judgment

A trial judge must always remain fair and impartial. (*Kennedy v. Los Angeles Police Department* (9th Cir. 1989) 901 F.2d 702, 709.) He "'must be ever mindful of the sensitive role [the court] plays in a

jury trial and avoid even the appearance of advocacy or partiality.'" (*Ibid*, quoting *United States v. Harris* (9th Cir. 1974) 501 F.2d 1, 10.) A trial judge commits misconduct if he makes discourteous remarks so as to discredit the defense or create the impression it is allying itself with the prosecution. (*People v. Santana* (2000) 80 Cal.App.4th 1194, 1206-1209; *People v. Carpenter* (1997) 15 Cal.4th 312, 353; *People v. Fudge* (1994) 7 Cal.4th 1075, 1107; *People v. Clark* (1992) 3 Cal.4th 41, 143.)

In *People v. Sturm* (2006) 37 Cal.4th 1218, 1237-1238 this Court reversed a sentence of death due to comments made by the trial judge about defense counsel and defense expert witnesses, stating: "Trial judges 'should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other."

The trial judge's disparagement of the defense expert and the trial judge's comments had the effect of undermining the defense case, violating the right to counsel, to compulsory process and the right to a jury trial, and rendered the trial fundamentally unfair and unreliable in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (See *United States v. Mostella* (9th Cir. 1986) 802 F.2d 358, 361 [trial judge's participation may overstep the bounds of propriety and deprive the parties of a fair trial]; *United States v. Larson* (9th Cir. 1974) 507 F.2d 385, 389 [trial judge's responsibility is to preside in the manner and with the demeanor to provide a fair trial to all parties]; *People v. Rigney* (1961) 55 Cal.2d 236, 241 [trial judge may examine witnesses to elicit or clarify testimony, but may not become an advocate for either party or under the guise of

examining witnesses comment on the evidence or cast aspersions or ridicule on a witness].)

The judge's unfair and biased comments violated Defendant's due process rights. It is well recognized that particularly in a death penalty case "it violates a defendant's due process rights to subject his life, as well as his liberty and property, to the judgment of a court in which the judge is not neutral or fair." (*DelVecchio v. Illinois Dept. of Corrections* (7th Cir. 1993) 8 F.3d 509, 514.)

The trial judge's expressions displaying scorn for Dr. Rubinstein's area of expertise made "fair judgment of the evidence she was presenting impossible." (*Liteky v. United States* (1994) 510 U.S. 540, 555.)

> Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials. For this reason, and too strong emphasis cannot be laid on the admonition, a judge should be careful not to throw the weight of his judicial position into a case, either for or against the defendant." *People v. Campbell*, (1958) 162 Cal. App. 2d 776, 787.

While California law permits a judge to examine witnesses to elicit or clarify testimony, (*People v. Rigney*, (1961) 55 Cal.2d 236, 241), the trial judge "must not ... under the guise of examining witnesses comment on the evidence or cast aspersions or ridicule on a witness." (*Ibid.*) It is misconduct for jurors to form or express opinions on any subject connected with the trial until the evidence is closed and the case submitted to them. (Penal Code § 1122, C.C.P. § 611) When the trial judge conveys his opinion on the credibility of a witness prior to the close of evidence and instruction "there is grave

danger not only that they may induce the jury to form an opinion before the case is finally submitted to them, but that the jury will substitute the judge's opinion for their own." (*People v. Rigney, supra.* 55 Cal.2d at 241; see also *People v. Terry* (1970) 2 Cal.3d 362, 398 (overruled on other grounds by *People v. Carpenter* (1997) 15 Cal.4th 312 at 381): indication to jury that judge would give "little weight to psychiatric diagnosis" is judicial misconduct.)

When the trial judge twice expressed categorical deprecatory opinions about what Dr. Rubinstein was going to testify to, *before* she had even expressed an actual opinion on Defendant's mental state, he unfairly and prejudicially weighted the jury's potential evaluation of her testimony unfavorably to Defendant.

In his first remark the Judge associated Dr. Rubinstein with the lesbian avant-garde poet Gertrude Stein. Although most probably the judge was attempting to interject some humor into the proceedings ("always a risky venture during a trial for a capital offense," *People v. Sturm, supra.* 37 Cal.4th at 1238), his statement unfortunately implied that Dr. Rubinstein would be talking gibberish or deliberately attempting to confuse.

While highly regarded by some literary critics and scholars, Gertrude Stein has long been identified in the public mind as an exemplar of a deliberate, even mocking obscurantism in modern art and literature of the twentieth century.[90] The Columbia Desktop Encyclopedia states that Stein's writing "emphasizes the sounds and

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[90] Stein's notoriety also arose from her living in an openly lesbian relationship long before such relationships were generally accepted and for her partner's recipe for marijuana brownies.

rhythms rather than the sense of words. By departing from conventional meaning, grammar, and syntax, she attempted to capture 'moments of consciousness,' independent of time and memory." (*The Columbia Encyclopedia*, Fifth Edition. 1993, p. 2615)

As a chronicler of Gertrude Stein's literary reception in America noted, there is a "long tradition" of using her name "as a convenient punch line for spoofs of modern art." (Curnutt, *The Critical Response to Gertrude Stein*, Greenwood Press, 2000, p. 3) Contemporary detractors of Stein "fixated on her corpulence, her burgeoning reputation as an egotistical preceptor, her mannish appearance, and her stylistic propensity for what was derisively dubbed 'baby talk.'" *(Ibid.)* Contemporary critics of Stein described her as deliberately writing that which did not make sense in the normal meaning of the term, of belonging to a group of artists "obsessed with the subconscious itchings of their souls."[91]

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[91] See, e.g., Gold, *Gertrude Stein, A Literary Idiot*, a critical evaluation written in 1934, in which the author encapsulates the popular prejudice as to what Stein represented:

In essence, what Gertrude Stein's work represents is an example of the most extreme subjectivism of the contemporary bourgeois artist, and a reflection of the ideological anarchy into which the whole of bourgeois literature has fallen.

What was it that Gertrude Stein set out to do with literature? When one reads her work it appears to resemble the monotonous gibberings of paranoiacs in the private wards of asylums. It appears to be a deliberate irrationality, a deliberate infantilism. However, the woman's not insane, but possessed of a strong, clear, shrewd mind. She was an excellent medical student, a brilliant psychologist, and in her more "popular" writings one sees evidence of wit and some wisdom.

And yet her works read like the literature of the students of padded cells in Matteawan.

The trial judge's identification of Dr. Rubinstein with Gertrude Stein set the stage for his off-hand comment indicating his opinion of the subject matter of her expert testimony: "mumbo-jumbo." The American Heritage Dictionary of the English Language, 4th Ed. 2000 defines "mumbo jumbo" as "1. Unintelligible or incomprehensible language; gibberish. 2. Language or ritualistic activity intended to confuse." By characterizing the subject of clinical psychology as "mumbo jumbo" the trial judge signaled to the jury, before Dr. Rubinstein even had expressed an opinion on an issue in the case, that the judge considered psychology to be unintelligible gibberish.

> Example: "I see the moon and the moon sees me. God bless the moon and God bless me and this you see remember me. In this way one fifth of the bananas were bought."

The above is supposed to be a description of how Gertrude Stein feels when she sees Matisse, the French modernist painter. It doesn't make sense. But this is precisely what it is supposed to do--not "make sense" in the normal meaning of the term.

The generation of artists of which Gertrude Stein is the most erratic figure arduously set out not to "make sense" in their literature. They believed that the instincts of man were superior to the reasonings of the rational mind. They believed in intuition as a higher form of learning and knowledge. Therefore, many of them wrote only about what they dreamed, dream literature. Others practiced a kind of "automatic writing" where they would sit for hours scribbling the random, subconscious itchings of their souls. They abandoned themselves to the mystic irrationalities of their spirits in order to create works of art which would be expressions of the timeless soul of man, etc. The result unfortunately revealed their souls as astonishingly childish or imbecile.

The literary insanity of Gertrude Stein is a deliberate insanity which arises out of a false conception of the nature of art and of the function of language.

(reprinted in Curnutt, *The Critical Response to Gertrude Stein,* Greenwood Press, 2000, p. 209.)

With the benefit of the judge's dismissal of the testimony as "mumbo-jumbo," on cross-examination the prosecutor focused on Dr. Rubinstein's administration of the two psychological tests she administered that required her to make a qualitative interpretation of Defendant's responses rather than evaluate his responses on quantitative scales. At one point the prosecutor, having elicited from Dr. Rubinstein her opinion that Defendant's response to a drawing in the Thematic Apperception Test indicated that Defendant identified as a lonely and isolated individual, asked the witness whether that response might have been caused by Defendant being housed in isolation at the time the test was administered. (Rubinstein, 20 RT 4774:20-4783:9) While this was not inappropriate cross-examination and while individual jurors were entitled to give Dr. Rubinstein's testimony whatever weight they felt it deserved, Defendant was entitled to have that process take place without having had the judge express his own bias that the subject of her testimony was going to forsake the obvious and the concrete for statements of a subjective nature designed to confuse.

Dr. Rubinstein's testimony was the foundation of Defendant's mental health defense, on guilt, insanity, and for purposes of mitigation at the penalty phase. Dr. Groesbeck, the psychiatrist who testified for Defendant, worked as a team with Dr. Rubinstein and relied heavily on Rubinstein's reports of her interviews with Defendant, her review of records and interviews with family members and other persons with knowledge of Defendant, as well as the confirmation of diagnoses between Rubinstein and Groesbeck. For example, Groesbeck relied on Rubinstein to evaluate the results from

psychological testing performed in Defendant's childhood. (Groesbeck, 19 RT 4512:8-20). Groesbeck relied on Rubinstein's interpretation of the tests she personally administered to Defendant and he did not have the results independently reviewed. (Groesbeck, 19 RT 4515:25-4518:8) Groesbeck testified he learned from Rubinstein about Defendant's uncle who was convicted of murder and his grandmother who committed suicide. (Groesbeck, 19 RT 4521:6-4522:16) When challenged by the prosecutor on cross-examination that all of his information about Defendant's family background was based on uncorroborated statements from Defendant himself, Groesbeck defended himself by stating that some of the information had been corroborated by Dr. Rubinstein. (Groesbeck, 19 RT 4563:27-4564:14) Most significantly, Groesbeck said he relied upon Rubinstein's clinical observations and assessments of Defendant as she was the person who had "more information about him from a clinical point of view than anyone." (Groesbeck, 19 RT 4576:23-4578:8)

Thus, Defendant's only other mental health witness, Dr. Groesbeck, had his credibility closely tied to that of Dr. Rubinstein. Further, the jury was likely to assume that the judge's disparaging commentary ("really all the psychology stuff is mumbo jumbo stuff") was fully applicable to Dr. Groesbeck's testimony. From the jury's point of view there was little difference between a psychologist testifying as to DSM diagnoses and their significance and a psychiatrist testifying on the same subject, and the jury had no reason to suspect that the judge's view would have been any less skeptical as to Dr. Groesbeck's testimony than as to Dr. Rubinstein's.

In his closing argument in the guilt phase, the prosecutor pushed the assertion that Dr. Rubinstein and Dr. Groesbeck had formed opinions without a proper factual foundation, an assertion which was reinforced by the judge's inappropriate comments:

> They also formed an opinion that Eric Houston suffered from child abuse. But where are the facts to show that Eric Houston suffered from child abuse? They didn't even get that from Eric Houston. There seemed to be a lot of supposition in their testimony in coming to a conclusion. This could cause this, this could cause that. And then we form an opinion that we're suffering a disorder because of these things? I don't think that's factual, ladies and gentlemen. What you would anticipate professionals doing is -- in forming these kinds of opinions is gathering as much information as they could.
>
> (22 RT 5145:11-22)

Later on in his closing the prosecutor reminded the jury that Groesbeck had gotten a lot of his information for his own opinions from Dr. Rubinstein (22 RT 5156:13-15) and then argued that both Groesbeck's and Rubinstein's conclusions "were drawn out of thin air." (22 RT 5156:25-26) Near the conclusion of his argument the prosecutor stated:

> Ladies and gentlemen, the defense in this case is blue smoke. It has absolutely no substance whatsoever. It does not affect any legal issue which will be before you.
>
> (22 RT 5162:9-12)

The "blue smoke" metaphor was repeated by the prosecutor in his argument at the sanity phase "Everything else is just blue smoke.

An attempt to confuse, attempt to put a doubt where there was no doubt." (23 RT 5673:3-5). Finally, at the penalty phase, the prosecutor reminded the jury of the Judge's comment that the expert mental health testimony was "mumbo-jumbo:"

> We've heard an awful lot of testimony in this case about Eric Houston's state of mind on May the 1st, 1992. Most of it in the phrase that was used earlier in this trial was mumbo jumbo.
>
> (24 RT 5957:27-5958:2)

The trial judge's errors were therefore not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

C. The Disparagement of Psychology Prejudiced the Defendant in the Sanity Phase of the Trial.

The only evidence presented at the sanity phase of the trial was the testimony of three psychiatrists: Dr. Groesbeck for the defense and Drs. Thomson and Schaffer for the prosecution.

As discussed at greater length in the Argument VII D, *infra*, the defense and prosecution experts both opined that Defendant suffered from serious mental disabilities and illness, but disagreed over whether his mental illness satisfied the legal standards for insanity. Although a genuine conflict among the experts existed as to the issue of sanity, Defendant was entitled to have the jurors evaluate the expert psychiatric opinions on their merits, and to consider whether Dr. Groesbeck's analysis and diagnosis leading to a conclusion that Defendant was legally insane at the time of the incident was more persuasive than the prosecution experts who contended his multiple

mental illnesses did not deprive him of legal sanity.

Instead, due to the judge's improper disparagement of mental health opinions and testimony in general, the jury was effectively told they were excused from taking *any* expert mental health testimony seriously. The result was that the sanity phase trial was rendered meaningless, as it consisted entirely of evidence that the judge already had told the jury was just "mumbo-jumbo."

D. The Disparagement of Psychology Prevented the Jury From Giving Full Consideration to The Most Significant Evidence in Mitigation of Penalty

When the trial judge disparaged both Dr. Rubinstein and psychological testimony in general, he effectively limited the jurors' consideration of the most significant evidence introduced in the trial in mitigation.

Four mental health experts testified at trial: Drs. Rubinstein and Groesbeck for Defendant, and Drs. Thompson and Schaffer, court appointed experts testifying for the prosecution in the sanity phase. While these experts disagreed over the precise diagnoses to attribute to Defendant's mental condition and over whether he met the legal definition for insanity, all of these experts were of the opinion that Defendant suffered from serious mental illness. The following summarizes the diagnoses either given or agreed to by the four different expert witnesses:

Expert	**Diagnosis**	**RT References**
Groesbeck	Developmental Disorder (Organic Brain Syndrome)	19 RT 4466:28-4469:5
Groesbeck	Dependent Personality Disorder	19 RT 4474:19-4475:18

Groesbeck	Borderline Personality Disorder	19 RT 4475:19-4477:28
Groesbeck	Posttraumatic Stress Disorder	19 RT 4478:19-4481:19
Groesbeck	A Dissociative Disorder	19 RT 4481:24-4483:24
Groesbeck	Psychotic Schizophreniform Disorder	19 RT 4483:25-4486:15
Rubinstein	Developmental Disorder (Organic Brain Syndrome)	20 RT 4679:2-4680:25
Rubinstein	Attention Deficit Hyperactivity Disorder	20 RT 4683:13-4684:16
Rubinstein	Posttraumatic Stress Disorder	20 RT 4687:8-4688:20
Rubinstein	Psychotic Schizophreniform disorder, paranoid type -- DSM2 95.40, provisional	20 RT 4726:10-4728:23
Thomson	Psychotic Depression	22 RT 5420:24-26
Thomson	Acute Major Depression	22 RT 5441:12-5442:4
Thomson	Schizotypal Personality Disorder	22 RT 5442:5-17
Schaffer	Major Depression with psychotic features	23 RT 5545:13-19
Schaffer	Possible Bipolar Disorder	23 RT 5545:25-27
Schaffer	Posttraumatic Stress Disorder (post but not pre-incident)	23 RT 5545:28-5546:1; 5547:17-24
Schaffer	Possible caffeine intoxication	23 RT 5546:3

The unchallenged evidence that Defendant suffered from serious mental and emotional problems was the most significant evidence introduced at trial in mitigation of sentence. At the penalty phase, defense counsel called only three witnesses: Defendant's

supervisor when he worked at Hewlett Packard, who testified that he had been a good worker, Defendant's mother and Defendant. Both Defendant's mother and Defendant made subjective appeals for why a life sentence should be entered – essentially to spare Defendant's family from the pain of his execution and because Defendant might still be able to produce something of value from his life if he were permitted to life.

The most powerful and objective evidence in mitigation was the testimony from the mental health experts in the guilt and sanity phases. However, the experts' opinions and analyses all had been tainted as "mumbo-jumbo" prior to their testimony. Each expert had been examined and cross-examined extensively on the meaning of the tests administered by Dr. Rubinstein and their differing selections of diagnoses drawn from the DSM . Thus each expert, whether defense or prosecution had been cast in the mold of "Gertrude Rubinstein" testifying to psychological "mumbo-jumbo."

The trial court's comments on the validity of psychology and psychological testimony interfered with and prevented the jury from fully considering and giving appropriate weight to the mitigation evidence of Defendant's mental illness. This was a blatant violation of Eighth Amendment jurisprudence established by the United States Supreme Court that "the sentencer may not refuse to consider or be precluded from considering "any relevant mitigating evidence." (*Skipper v. South Carolina* (1986) 476 U.S. 1, at 4.) The rule that the sentencing jury may not be prohibited or discouraged from hearing and giving appropriate weight to mitigating evidence has been acknowledged by this Court as well. (*People v. Whitt* (1990) 51

Cal.3d 620, 663.)

Here, although the evidence was introduced, the improper and prejudicial comments by the trial court interfered with the jurors' ability to apply the weight of such evidence in mitigation as they otherwise would have found appropriate. Instead, they were counseled to disregard the evidence of mental illness as obscurantist "mumbo-jumbo." The error requires reversal of Defendant's sentence of death.

E. The Trial Judge's Misconduct in Prejudicing the Jury Toward Dr. Rubinstein and Mental Health Testimony Was Not Waived Because No Post-Comment Admonition Would Have Cured the Prejudicial Effect

Respondent may contend that Defendant may not challenge the Judge's prejudicial comments on appeal because no objection to the comments was raised at trial. However, "failure to object does not preclude review 'when an objection and an admonition could not cure the prejudice caused by' such misconduct, or when objecting would be futile. [citations]" (*People v. Sturm, supra.* 37 Cal.4th at 1237.)

When the Judge made known his view of the witness and of psychological theory in general even before Dr. Rubinstein had uttered an opinion on the case, he had cued the jury to his bias. Objecting and asking the judge to give an admonition that his personal skepticism that psychology was just "mumbo jumbo" was merely his own view and should not influence the jury's evaluation would only have highlighted the fact that the central authority figure in the courtroom was dismissing this testimony out-of-hand. Any admonition would have, in effect, been heard by jurors as the judge stating to the jury, in effect, "don't pay attention to my dismissive

opinion of psychological testimony. [Although I am the Judge and I have more experience dealing with criminal law and evidence than any other person in this courtroom], you are free to decide that my take on psychological testimony is wrong."

Defense counsel was therefore stuck with the Hobson's choice of asking for an admonition that reminded and reinforced the signal that the Judge put no weight in expert mental health testimony, albeit telling the jurors they could ignore that fact if they chose, or hoping that, as the trial went on, the force of the statement would fade in jurors' memories. Moreover, the admonition would have come immediately preceding the portion of Dr. Rubinstein's testimony where she would be describing her activities in evaluating Defendant and setting forth her opinions on Defendant's mental state. Since Dr. Rubinstein's approach and analytical orientation involved significant subjective interpretation on her part, the admonition would have focused the jury's attention on the most aspects of her testimony most vulnerable on cross-examination.

In *People v. Mahoney* (1927) 201 Cal.618, 623, this Court noted that once a witness was "permitted to testify as an expert his testimony should have gone to the jury unimpaired by the comment of the court thereon." In *Mahoney* the Court found far more oblique comments than those in the present case fatal to the judgment despite the lack of objection, and stated: "Realizing the eagerness with which juries grasp the suggestions of the trial judge, we can appreciate the fact that no weight would be attributed by them to [the expert's] testimony after the remarks just quoted." (*Ibid.*)

In *People v. Lynch*, (1943) 60 Cal.App.2d 133, 144-145, the

Court of Appeal reversed a conviction due to error including the Judge's comment to the jury endorsing the competency of an expert witness to testify on psychiatric matters. The Court found the comment was not cured by the admonition contained in the instruction to the jury set forth in Penal Code § 1127. (See also *People v. Terry* (1970), 2 Cal.3d 362 at 398 (disapproved on other grounds by *People v. Carpenter* (1997) 15 Cal.4th 312, 381)): "when an objection and an admonition could not cure the prejudice caused by improper remarks, failure to object does not preclude urging the error on appeal.")

The prejudicial comments of the trial judge towards expert mental health testimony in general and Dr. Rubinstein in particular were incurable and prejudicial, and require reversal of the judgment of conviction and sentence of death.

IX. DEFENDANT WAS DENIED THE RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL COURT TOLD THE JURY THE WRONG TEST FOR INSANITY AND PROHIBITED CONSIDERATION OF THE EVIDENCE OF MENTAL DISEASE AND DEFECT COMBINED

A. Introduction

The heart of Defendant's defense during the sanity phase was that he did not understand at the time he committed the shootings that *what he was doing* was wrong, *and* that his lack of understanding was caused by the *interplay of all* the psychological impairments described by expert testimony and lay witnesses. The jurors, therefore, needed to understand that: (a) they must find Defendant insane if a preponderance of the evidence showed that, at the time of the shootings, he did not understand the *wrongfulness of his conduct*; and (b) they could consider the effect of *both* his mental disease *and* his

mental defects, operating together, on his ability to understand that what he was doing was wrong.

The trial court, however, erroneously told the jury that, in order to be found legally insane, Defendant was required to prove that he was unable to understand the difference "between right and wrong," rather than whether *his conduct* was wrong. Additionally, although as set forth in the preceding Argument VIII, the evidence adduced in the guilt and sanity phases showed that Defendant suffered from a plethora of mental defects and diseases with the various experts identifying at least eleven different diagnoses, the jury was instructed that they needed to find that Defendant's incapacity resulted from *either* a mental disease "*or*" a mental defect, rather than allowing consideration of evidence that his incapacity was the result of a *combination* of the diseases and defects presented in the evidentiary record. (23 RT 5680:10-5681:22)

B. The Trial Court Failed to Instruct the Jury That If Defendant Did Not Understand Because of Mental Disability That His Conduct Was Wrong He Was Insane

The trial court instructed Defendant's jury that: "A person is legally insane when by reason of a mental disease or mental defect he was incapable of knowing or understanding the nature and quality of his act or incapable of *distinguishing right from wrong* at the time of the commission of the crime." (23 RT 5680:26-5681:2) This language was drawn from the pattern instruction known as CALJIC 4.00, although it was changed slightly as the trial judge read it to the

jury. [92]

That instruction was wrong. It has never been the law in this state that, in order to establish his insanity, a defendant must prove that at the time of the crime he could not distinguish generally between right and wrong. Rather, the test has always been whether a defendant, because of mental incapacity, did not understand the wrongfulness *of his conduct* at the time he committed the act charged as a crime. (*People v. Skinner* (1985) 39 Cal.3d 765, 771-777.) "The rule that a defendant must know *what he is doing* is 'wrong and criminal' has been recognized as the accepted formulation since the first decision in this state (*People v. M'Donell*, 47 Cal. 134) and has been followed consistently . . . . [Citation.]'" (*Id.*, at p. 780, emphasis

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[92] The entire instruction as given at Defendant's trial: "Ladies and gentlemen of the jury, the defendant has been found guilty of the crimes charged in the indictment. You must now determine whether he was legally sane or legally insane at the time of the commission of the crimes. This is the only issue for you to determine in this proceeding.

"You may consider evidence that of his mental condition before, during, and after the time of the commission of the crime as tending to show the defendant's mental condition at the time the crimes were committed.

"Mental illness and mental abnormality, in whatever form *either* may appear are not necessarily the same as legal insanity. A person may be mentally ill *or* mentally abnormal and yet not be legally insane.

"A person is legally insane when by reason of a mental disease *or* mental defect he was incapable of knowing or understanding the nature and quality of his act or *incapable of distinguishing right from wrong* at the time of the commission of the crime.

"The defendant has the burden of proving his legal insanity at the time of the commission of the crime by a preponderance of the evidence." (23 RT 5680-5681 (emphasis supplied); 4 CT 1152-1154)

added, and see cases cited therein; see also *People v. Coddington* (2000) 23 Cal.4th 529, 608.)

The California standard is consistent with the requirements of due process under the recent opinion of United States Supreme Court in *Clark v. Arizona* (2006) ___ U.S. ___ 126 S.Ct. 2709, 165 L.Ed. 2nd 842,[93] which made it clear that the *sine qua non* of legal insanity is "moral incapacity," i.e. the defendant's inability to recognize at the time he commits an act that the *act he is committing* is wrong.[94] (*Id.*, at 126 S.Ct. 2709, 2718-2723, 165 L.Ed. 2nd 858-862.) But that is not the standard that was explained to Defendant's jury, and it must be presumed "that jurors, conscious of the gravity of their task, attend closely the *particular language* of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the

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[93] "The landmark English rule in *M'Naghten's Case*, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843), states that ' jurors ought to be told . . . that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.'" [Citation.]" (*Clark v. Arizona* (2006) ___ U.S. ___, 126 S.Ct. 2709, 2718-2719, 165 L.Ed. 2nd 858.) *Clark* held that this traditional two-prong definition of insanity commonly known as the *M'Naghten* rule was not required by due process, since a defendant who did not know the nature and quality of his act, ipso facto, could not know that it was wrong.

[94] The *Clark* court explained that the test for "lack of moral capacity" is "whether a mental disease or defect leaves a defendant unable to understand that *his action* is wrong." (*Clark v. Arizona* (2006) ___ U.S. ___, ___; 126 S.Ct. 2709, 2719, 165 L.Ed. 2nd 859, emphasis supplied.)

instructions given them." (*Francis v. Franklin* (1985) 471 U.S. 307, 324, fn. 9, emphasis added.)

C. The Erroneous Instruction Was Not Cured by Any Other Instructions

The error in giving CALJIC 4.00 must be evaluated on appeal in the context of all the instructions given and the entire record. (*People v. Jablonski* (2006) 37 Cal. 4th 774, 831.) The trial court did give further instructions at the sanity phase, one of which gave the jury a different test for insanity. After explaining the burden of proof, the definition of preponderance of the evidence, what to do if the evidence was easily balanced, and the definition of the word "wrong" in the context of an insanity trial, the trial court also told the jury at Defendant's request (23 RT5620:11-20) that: "[a] person who understands that his act is against the law but is incapable of distinguishing whether it is morally right or morally wrong is legally insane." (23 RT 5681:19-22) Ironically, that sentence, taken alone, was a correct statement of the law, and if that had been the definition of insanity given to Defendant's jury, the instant issue would not arise.

But instead, the jury had already been told that the test for insanity based on moral capacity was whether Defendant was "incapable of distinguishing right from wrong," with no reference to his conduct. (23 RT 5681:1) These are simple English words, and the jury must be presumed to have given them their normal meaning. (*People v. Chavez* (1951) 37 Cal. 2d 656, 668.)

So, if the jury decided that Defendant *was* able to distinguish "right from wrong" *generally*, the fact that they might also have believed that he could *not* make that distinction regarding the act of

shooting would not change their conclusion that he was legally sane.

If the jury believed that although Defendant did not realize that his actual shooting of people was wrong, he *could* "distinguish between right and wrong" in the abstract, then under the instruction as given, the jury would have been compelled to conclude that he was sane.

For example, the jury could easily have believed that on the day of the crime, if Defendant had been asked if killing innocent people was wrong he would have said yes, yet, had he been asked *while he walked through the first floor* of the school if what he was doing—shooting people—was wrong, he would have said "I have to shoot some people (although I don't want to kill them) if I am to save the children from being hurt by the teachers and the school system." The jury might have considered, as trial defense counsel argued (23 RT 5637:13-5638:14), that in Defendant's deluded mind he was like the "Terminator" in the movies, or like a soldier of some kind. We expect that soldiers in active combat can distinguish between right and wrong, and at the same time believe that shooting at enemy soldiers is not wrong, even though it would be wrong if no state of war existed. A person suffering from a psychotic delusion that his country had declared war on Lindhurst High School and thus it was sanctioned for him to shoot at its staff would meet the California definition of insanity although he would answer the (for him) abstract question: "If the government said the war against Lindhurst High School was over, it would be morally wrong for me to shoot anybody there." However, Defendant's jury was effectively told that *such a person would not be insane under California law*. Rather, the jurors were told that,

regardless of any mental delusions that might have made the shootings seem moral to Defendant, the test for insanity was whether he could "distinguish right from wrong" *in general and* without reference to his own conduct.

Defendant recognizes that CALJIC 4.00 reiterated the language of Penal Code section 25, subdivision (b), enacted in 1982 and intended by the Legislature to codify *M'Naghten's* rule. (*People v. Lawley* (2002) 27 Cal.4th 102, 169; *People v. Kelly* (1992) 1 Cal.4th 495, 533; *People v. Skinner, supra,* 39 Cal.3d at p. 769.) But Section 25 was not intended as a jury instruction, and simply repeating its bare language as CALJIC 4.00 does, fails to accurately convey the California standard. As this Court has stated,[95]

> Insanity, under the California *M'Naghten* test, denotes a mental condition which renders a person incapable of knowing or understanding the nature and quality of his act, or incapable of distinguishing right from wrong *in relation to that act.* (*People v. Wolff* (1964) 61 Cal.2d 795, 801 [].)' (*People v. Kelly, supra,* 10 Cal.3d 565, 574.)"
>
> (*People v. Skinner, supra,* 39 Cal.3d at p. 779, emphasis supplied.)

The relevant language in *M'Naghten* itself is: "'. . . he did not

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[95] Penal Code section 25, subdivision (b), provides, and provided at the time of Defendant's trial: "In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong."

know *he was doing* what was wrong.'" (*Clark v. Arizona, supra,* ___ U.S. ___, at p. ___ [126 S.Ct. 2709, 2719, 165 L.Ed. 2nd 858.)

D. The *Jablonski* Opinion Does Not Resolve This Issue

In *People v. Jablonski* (2006) 37 Cal. 4th 774 this Court held that any ambiguity in the phrase "incapable of distinguishing right from wrong" in CALJIC 4.00 had been cured by another instruction given in that case. (*Id.*, at pp. 831-832.) The additional instruction in *Jablonski* was, in pertinent part: "'If during the commission of the crime the defendant was incapable of understanding that his act was morally wrong or was incapable of understanding that his act was unlawful, then he is not criminally liable.'" (*Id.*, at p. 831.) This Court found that the additional instruction cured the problems with CALJIC 4.00 because it "clearly focus[ed] the jury's attention on defendant's capacity to distinguish right from wrong at the time of the commission of the crimes." (*Id.*, at p. 832.)

Defendant respectfully submits that the *Jablonski* court did not actually address the problem with CALJIC 4.00 identified in that case and in the instant case. Defendant does not contend that the instructions at his trial failed to focus the jury on *when* his incapacity occurred. The point is that the instruction failed to focus the jury on the *nature* of the incapacity that would justify a verdict of insanity. The question was whether Defendant was unable to recognize that his own conduct was wrong, while he was committing the criminal acts, and not merely whether he could distinguish right from wrong without

reference to his own conduct.[96] (*People v. Skinner, supra,* 39 Cal.3d at p. 779, underlining added.) Trial defense counsel argued that Defendant "thought he was doing what was morally right. . . ." (23 RT 5640:8-9)

It appears from the *Jablonski* opinion that the instructions in that case were flawed in the same way as in Defendant's case, and that the additional instruction did not cure the error for the same reasons as those explained, *supra*, in the instant argument. *Jablonski* should be reconsidered and harmonized on this point.

E. The Error Was Not Cured by Arguments of Counsel

The arguments of trial defense counsel did focus on whether Defendant had understood that what he was doing was wrong. (See, e.g., 23 RT 5629: 17-18, 5639:26-27, 5640:1-14) But the arguments of counsel cannot cure a constitutionally deficient instruction. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 488-489; see *Boyde v. California* (1990) 494 U.S. 370, 384 ["arguments of counsel generally carry less weight with a jury than do instructions from the court"]; *People v. James* (2000) 81 Cal.App.4th 1343, 1365, fn. 10 [arguments of counsel can exacerbate an instructional error, but cannot cure one].) In *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926 , counsel for both sides had correctly stated the law on which the trial court gave an

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[96] The pattern instruction known as CALCRIM 3450, promulgated by the Judicial Council of California Task Force on Jury Instructions, now states the test correctly: that a defendant is insane if, because of his mental impairment, he "did not know or understand the nature and quality of [his] act or did not know or understand that [his] act was morally or legally wrong."

erroneous instruction. (*Id.*, at p. 969.) The Ninth Circuit Court of Appeals granted habeas corpus relief as to the judgment of death, recognizing: "California's general approach to evaluating a jury's interpretation of an instruction based on the plain meaning of the language and the judicial *presumption that jurors follow the court's instructions as law* and consider attorneys' statements to be advocates' arguments." (*Ibid.*, emphasis supplied)

Additionally, the erroneous instruction was provided to the jury in written form to take into deliberations. (23 RT 5684:15-17) It can be presumed that the jury was guided by the written instruction. (*People v. McLain* (1988) 46 Cal.3d 97, 111, fn. 2.) This Court has previously relied on the fact that the jury was given a correct written instruction to conclude that giving an erroneous oral instruction caused no harm. (See, e.g., *People v. Garceau* (1993) 6 Cal.4th 140, 189-190; *People v. Andrews* (1989) 49 Cal.3d 200, 216.) By the same token, the written instruction in the *same* form as the erroneous oral instruction certainly reinforced the terms of that instruction.

Moreover, although counsel for both sides mentioned the correct test for sanity focusing on Defendant's understanding that his conduct was wrong, they both also reiterated the same erroneous test for insanity that the court had given, i.e., that it was whether Defendant was "incapable of distinguishing right from wrong . . . ." (23 RT 5630:12-14 [defense], 5668:19 [prosecution].) The prosecutor ultimately argued: "...the facts tell you quite frankly that he knew what he was doing and he knew the nature and the quality, and he knew right from wrong. And you should stay focused on that because that's the real issue here. Everything else is just blue smoke." (23 RT

5672:26-5673:3)

Also, the trial court had previously instructed the jury in the guilt phase as follows: "You must accept and follow the law as I state it to you, whether or not you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions." (22 RT 5180:5-8)

In these circumstances, the arguments of counsel did not significantly diminish the high likelihood that the jury was misled by the erroneous instruction, which would have been viewed as the "definitive and binding statement[] of the law." (*Boyde v. California, supra,* 494 U.S. at p. 384.)

F. The Erroneous Instruction Seriously Prejudiced Defendant Because His Defense Was That He Did Not Understand That His Conduct Was Wrong When He Committed the Shootings

Defendant did not contest at trial the fact that he committed the shootings which led to his convictions of capital crimes and of attempted murders. His defense, affirmatively raised in the second phase of the trial, was that at the time he was walking through the first floor of the school and opening fire on the people there, he did not realize that what he was doing was wrong, and that his awareness shifted dramatically as he mounted the stairs to the second floor. In other words, he was temporarily insane when he did the actual shootings.

Trial defense counsel asked the jury "to consider the evidence that for the first ten minutes of this incident at Lindhurst High School there was, there was an Eric Houston that was possessed by

something. He was a person not in his right mind or he wouldn't have done it. And compare and contrast that with the Eric Houston as soon before the incident terminated." (23 RT 5678:6-12; see also 23 RT 5658:22-27)

The prosecutor explicitly acknowledged that Defendant was relying on the defense of temporary insanity (23 RT 5671:18-23), which is recognized as a defense to crime in this state as fully as permanent insanity, and may be of very short duration. (*People v. Kelly* (1973) 10 Cal.3d 565, 576-577, [superseded on another point by Section 25.5, see *People v. Boyer* (2006) 38 Cal.4th 412, 469]; *People v. Ford* (1902) 138 Cal. 140, 141-142.)

There was substantial circumstantial and direct evidence to support this defense.

Defendant spoke to the police on May 2, 1992, the day after the incident. The prosecution transcript of Defendant's interrogation (Exhibit 89) attributes to Defendant words to the effect that he first realized that what he was doing was wrong when he started walking up the stairs to the second floor. Following is an excerpt from the prosecution transcript of that interview:

> Houston: Well, once I shot it was, then it was, it seemed like there's no turning back. But, but, then it kicked in a little bit farther and once I got away from the kids I started walking up the stairs, that what I'm doing is wrong and that's why I didn't shoot anybody upstairs or anything like that.
>
> Williamson: I realize that.
>
> Williamson: We realized that, but that's why we were afraid that maybe or we were hoping that maybe you'd get rational and start . . .

Houston: ...Yeah, that's starting to sink, *that's when a little more of my sanity popped back in.*

Williamson: ...Well, I don't know that it's insanity that's the question . . .

Houston: Well, well all the way up to here it was insanity, right?

Williamson: Well it was stupid.

Houston: It was stupid and it was, and it was, and *I was out of my mind* . . .

Downs: Shouldn't have happened.

Williamson: You knew what you were doing, it boils to a point, I mean...

Houston: Once I was coming up there, it's just, my whole thought, *I was just probably just out of it.*

Williamson: Were you working on instinct?

Houston: Yeah, I was on instinct, when I came in here, but I was...

Williamson: What were you thinking to yourself when you were doing this?

Houston: What was I thinking? All I was thinking is... uh...

Williamson: Well, you, you trained. Right?

Houston: My instincts just came in, [just] came up, came up and then *once I was up the, started walking up the stairs, it seemed like I had a little better grip* and that's why I...

(Exhibit 89, [CT Supplemental–5 (v.1 of 1) 35-36 (emphasis supplied)])

In addition to these statements, the prosecution's evidence

established that Defendant never fired a weapon upstairs at the high school – a fact consistent with his temporary insanity defense.

G. The Trial Court Failed to Instruct the Jury That It Could Consider the Combined Effect of Mental Disease and Mental Defect

1. The Jury Must be Presumed to Have Understood the Word "or" In Its Ordinary Disjunctive Sense

As Defendant has previously explained, the trial court instructed the jury at the sanity hearing using the following language taken from the pattern instruction CALJIC 4.00: "A person is legally insane when by reason of a mental disease *or* mental defect he was incapable of knowing or understanding the nature and quality of his act or incapable of distinguishing right from wrong at the time of the commission of the crime." (23 RT 5680:26-5681:2 (emphasis supplied))

Defendant's objection is essentially this: that the word "or" in the phrase "mental disease or mental defect" does not mean "and." Rather, "or" is a simple English word and Defendant's jury must be presumed to have given it its ordinary meaning. As this Court once said with regard to the word "perpetrate": "the word has no technical meaning peculiar to the law. It must be assumed that the jurors, being familiar with the English language, understood the term in its usual or ordinary meaning." (*People v. Chavez* (1951) 37 Cal. 2d 656, 668; *cf. People v. Holt* (1997) 15 Cal.4th 619, 688 [no explanation of non-technical terms in instruction required].) If jurors can be expected to understand the meaning of "perpetrate," then certainly they can be

expected to understand the word "or."

This instruction effectively told Defendant's jury that it must examine the evidence of mental disease *separately* from the evidence of mental defect, to determine whether either *one* or the *other* had caused his inability to understand, as we walked through the first floor of the school shooting people, that what he was doing was wrong. This was an erroneous and prejudicial restriction on the jury's consideration of the evidence presented by the defense at the sanity hearing. Defendant's federal constitutional right to present a defense was violated because there is more than a reasonable likelihood that the jury at his sanity trial applied CALJIC 4.00 in a way that prevented their consideration of constitutionally relevant evidence. (See *Boyde v. California, supra,* 494 U.S. at p. 380.)

Defendant acknowledges that the original test for insanity under *M'Naghten* (see footnote 86, *supra*, in the instant argument) used this same disjunctive and it has been often quoted. The United States Supreme Court, however, has recently pointed out that "[h]istory shows no deference to M'Naghten that could elevate its formula to the level of fundamental principle . . . ." (*Clark v. Arizona, supra,* (2006) ___ U.S. at p. ___; 126 S. Ct. at p. 2719, 165 L.Ed. 2nd 859.)

There is no authority in law nor any reason based on logic, medicine, or psychology, that justifies a rule that a criminal defendant may establish legal insanity where his mental incapacity is caused by mental disease, such as a delusional psychosis, *or* by a mental defect, such as organic brain damage and/or a subnormal IQ, but not by the effects of *both* types of conditions. Such a rule, which was stated to the jury at Defendant's trial, is irrational, serves no legitimate purpose

of the state, and violates Defendant's federal constitutional rights to present a defense, to have a jury determine the facts in his case, and to fundamental fairness.

2. The Erroneous Instruction Seriously Prejudiced Defendant Because His Defense Was That His Temporary Moral Incapacity Was Caused By a Combination of Mental Disease and Mental Defect

Defense counsel urged the jury in the sanity phase "...to take all of the facts, all of the details that have been presented to you and review them, find a thread in all of that evidence that applies to this law. Nobody can tell you that factor A, B, C or D applies, and F, G, and H don't. You have to think about everything that you've heard and seen and been exposed to." (23 RT 5630:14-20)

Defense counsel emphasized the interplay of the evidence presented by the various experts: "In the testimony that you listened to at this phase of the trial, that is the psychiatrist, Dr. Groesbeck, Dr. Thomson and Dr. Schaffer, if you are able to listen and review and think about everything that was said by everybody, that is the experts, there is a common theme, a common thread. There is consistency about what they're saying. . . . The theme is there. They agree." (23 RT 5632:21-5633:2) He then pointed out that the testimony by some of the students indicating that Defendant had looked like someone on drugs was also evidence that Defendant was not in his "right mind." (23 RT 5633:3-5634:7)

With regard to "mental disease," trial defense counsel reminded the jury that Dr. Groesbeck's evaluation was that he was suffering

from a "psychotic delusion" (23 RT 5635:3-6) He also highlighted the prosecution expert's agreement with Dr. Shaffer's conclusion that Defendant showed the symptoms of a "delusional paranoid disorder." (23 RT 5641-5642) Counsel also referred to the prosecution expert's agreement with the defense expert that Defendant had "acute major depression . . . probably characterized by agitation and erratic qualities." (23 RT 5643:2-5)

With regard to "mental defect," Defendant's counsel reminded the jury of the evidence that Defendant "...was a marginal person mentally. He had a low I.Q. He had organic brain damage. . ." (23 RT 5638:21-22) In addition, counsel pointed to the prosecution's expert's opinion that Defendant had "some organic brain disorder" (23 RT 5638:24-25) and had taken enough No-Doz to have impaired judgment (23 RT 5640:20-21), and that he "had learning difficulties . . . [and] may have had a learning disorder." (23 RT 5649:19-25)

Defense counsel also argued that on the day of the crimes "[Defendant's] brain was not -- was not there in parts." (23 RT 5638:5) And he highlighted the ways Defendant's psychological problems interacted with each other: the expert testimony that Defendant's delusions affected him as they did because of his particular personality, which was in turn a function of his low I.Q. and organic brain damage; and the evidence that Defendant had suffered major losses in his life that can lead to "major mental disorders." (23 RT 5639:6-27)

All of this taken together, Defendant's counsel argued, led to the conclusion that Defendant "...was not comprehending. He was not capable of knowing what he was doing was morally wrong." (23

RT 5639:22-27) Counsel asserted repeatedly that the expert testimony combined with lay witnesses' observations of Defendant at the high school during the shootings established that Defendant was not in his "right mind." (e.g. 23 RT 5636:1, 5647:21, 5656:4, 5679:12, 5679:18)

Trial defense counsel did not draw the jury's attention to the phrase at issue here, which was understandable, since it was an incorrect statement of the law and undermined the defense. But he did emphasize the importance of the word "or" in the phrase "knowing or understanding." He pointed out that the jury must find Defendant insane if it concluded *either* that he was incapable of *knowing* the nature and quality of his act *or* that he was incapable of *understanding* the nature and quality of his act. Counsel argued, "It's either – either – not both prongs in the *M'Naghten* test which must be found before someone is insane." (23 RT 5647:3-5; see also 23 RT 5631:6-5632:4) That was both legally correct and a common sense understanding of the phrase "knowing or understanding" in the instruction, and on cross examination the prosecution's expert, Dr. Thomson, agreed that this was the correct statement of the test. (23 RT5646:24-28) The prosecutor did not dispute the point, and exactly the same analysis applies to the equally clear and simple phrase "mental disease or mental defect." The word "or" simply does not mean "both."

H. Reversal Is Required

For all the reasons and under all the authority set out above, the insanity instruction given at Defendant's trial misstated the law, and

Defendant's convictions of murder and attempted murder must be reversed because it is highly probable that the jury followed the plain language of the instruction and applied it unconstitutionally to the evidence. "When there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside." (*Francis v. Franklin, supra,* 471 U.S. at p. 324; fn. 8; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Boyde v. California, supra,* 494 U.S. at pp. 380-381 [misleading or ambiguous instructions violate due process where reasonably likely jury misunderstood law].)

Defendant's convictions of murder and attempted murder must also be reversed because the insanity instruction given at his trial constituted a denial of his right to "a meaningful opportunity to present a complete defense." (*California v. Trombetta* (1984) 467 U.S. 479, 485; see also *Chambers v. Mississippi* (1973) 410 U.S. 284, 294.)

Reversal is also required because the erroneous instruction on insanity violated Defendant's fundamental due process right to present a defense (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294; *People v. Jackson* (1984) 152 Cal.App.3d 961, 967)), his fundamental right to be presumed innocent unless the prosecution proves every element of the charged offenses including mens rea (*Clark v. Arizona* (2006) U.S. ___, 126 S.Ct. 2709, 2729; *United States v. Sayetsitty* (9th Cir. 1997) 107 F.3d 1405 [right to have jury consider defenses recognized by state law which negate elements offense]); his right to an elevated degree of due process in a capital case (*Zant v. Stephens* (1983) 462 U.S. 862, 884-885; *Gardner v. Florida* (1977) 430 US 349, 358; *Woodson v. North Carolina* (1976) 428 US 280, 305), and his right to

the reliable determination of guilt in a capital case (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638, 643). Executing him in these circumstances would be disproportionate to his individual culpability and would constitute cruel and unusual punishment prohibited by the Eighth Amendment. (*Furman v. Georgia* (1972) 408 US. 238, 240; *Gregg v. Georgia* (1976) 428 U.S. 153, 187; *People v. Skinner* (1985) 39 Cal.3d 765, 774.)

X. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT WHEN HE TOLD THE JURY TO CONSIDER DEFENDANT'S PURPORTED LACK OF REMORSE AS A BASIS FOR FINDING GUILT AND LATER AS AN AGGRAVATING FACTOR ON WHICH TO BASE IMPOSITION OF THE DEATH PENALTY

A. The Prosecutor Improperly Called Attention to Defendant's Failure to Testify in the Guilt Trial by Arguing Defendant's Apparent Lack of Remorse as a Evidence Supporting Guilt.

Defendant did not testify during the guilt phase of the trial. During his argument on guilt, the prosecutor closed by referencing the Defendant's demeanor in the courtroom during portions of the trial:

> And if you've noticed throughout this trial, during defense counsel's opening statement and during their argument, the defendant cried. But when we talked about Bob Brens, and Judy Davis, and Jason White, and John Kaze, and Sergio Martinez, and Wayne Boggess, and Beamon Hill, or Patti Collazo, or Mireya Yanez, or Jose Rodrigues. There was no emotion. Because all Eric Houston cares about is Eric Houston. And Eric Houston can do no wrong, because everybody else has screwed it up for him.
>
> (22 RT 5160:5-14)

The prosecutor's comment was improper and prejudicial. Comment during the guilt phase of a capital trial on a defendant's courtroom demeanor is improper (*People v. Heishman* (1988) 45 Cal.3d 147, 197) unless such comment is simply that the jury should ignore a defendant's demeanor (*People v. Stansbury* (1993) 4 Cal.4th 1017 at 1058):

> In criminal trials of guilt, prosecutorial references to a nontestifying defendant's demeanor or behavior in the courtroom have been held improper on three grounds: (1) Demeanor evidence is cognizable and relevant only as it bears on the credibility of a witness. (2) The prosecutorial comment infringes on the defendant's right not to testify. (3) Consideration of the defendant's behavior or demeanor while off the stand violates the rule that criminal conduct cannot be inferred from bad character." (*People v. Heishman, supra*, at p. 197.)
>
> quoted in *People v. Boyette* (2002) 29 Cal.4th 381 at 434.

The prosecutor's statement therefore violated his right against self-incrimination protected by the Fifth Amendment to the United States Constitution, the due process (Fifth Amendment and 14th Amendment) right to have guilt or innocence determined solely on the basis of evidence adduced at trial and the due process (Eighth and 14th Amendments) right to a fair and reliable determination of guilt and penalty in a capital case

> In the absence of a curative instruction from the court, a prosecutor's comment on a defendant's off-the-stand behavior constitutes a violation of the due process clause of the Fifth Amendment. That clause encompasses the right not to be convicted except on the basis of evidence adduced at

> trial. The Supreme Court has declared that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds . . . not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485, 56 L. Ed. 2d 468, 98 S. Ct. 1930 (1978). We have recognized that a prosecutor may not seek to obtain a conviction by going beyond the admissible evidence.
>
> *United States v. Schuler* (9th Cir. 1987) 813 F.2d 978, 981.

The prosecutor's comments were highly prejudicial and necessarily focused the jury's attention on the failure of Defendant to testify at guilt.

Each of the three grounds for declaring such argument misconduct is evident here:

First, since Defendant did not testify, his credibility as a witness was not before the jury. In defence of guilt, Defendant had proffered the testimony of Dr. Groesbeck, the psychiatrist, and Dr. Rubinstein, the psychologist, describing Defendant's various mental conditions and illnesses as those had bearing on his mental state at the time of the incident. The experts had portrayed Defendant as suffering from both organic brain damage that impaired his cognitive functioning coupled with both chronic and acute mental illness that left him unable to cope with personal traumatic experiences (e.g., the molestation by his teacher) and life reversals (failure to graduate, loss of job and girlfriend) and which led to Defendant experiencing a psychotic break that ended in the tragedy of May 1, 1992. The import of the testimony for the guilt phase was that Defendant was not calculating and

deliberating murder when he went to the high school and started shooting.

The prosecutor deliberately sought to juxtapose against the experts' portrait of Defendant his own characterization of Defendant's courtroom behaviour as evidencing extreme selfishness and self-absorption coupled with an absence of feeling for his victims. While Drs. Groesbeck and Rubinstein had testified as to what Defendant had told them in interviews, the issue for the jury was their credibility as experts, including the reasonableness, or lack thereof, in relying to form their opinions on what Defendant told them. The prosecutor's argument asked the jurors to perform their own alternative psychological evaluation of the Defendant based upon evidence outside the record – a task the jurors were incompetent to perform.

In addition, during the guilt phase several student victims had described Defendant during the incident as demonstrating what appeared to be significant concern and compassion for the students.

For example, Jennifer Kohler testified that when Defendant heard a radio news report stating (falsely) that no one had been killed, he was relieved. (16 RT 3646:14-23). Ray Newland testified that Defendant was "reassured" when he was told by police during the hostage negotiations that while someone was in critical condition, no one was dead and all victims seemed to have good prospects for recovering. (16 RT 3685:17-3686:6). Lovette Hernandez testified that when the last four students in C-204 left Defendant shook their hands and apologized for what had happened. (19 RT 4382:11-16.)

By characterizing Defendant's non-testimonial behavior as inconsistent with feelings of compassion or remorse for his victims,

the prosecutor was directly implying that Defendant had lied to the experts but would not take the stand to say the same things to the jury directly. The prosecutor also was attempting to introduce rebuttal evidence to the testimony of the students indicating that Defendant's state of mind was not consistent with calculated and premeditated first degree murder. Defendant's behavior in crying several times during the trial and not crying at other times was not testimonial and not a waiver of his privilege against testifying, but the comments of the prosecutor made it into such at the same time as those comments highlighted that had taken the stand to testify under oath.

Second, the argument immediately and necessarily highlighted Defendant's exercise of his privilege not to testify as evidence of guilt: It drew attention to the fact that Defendant had spoken to Drs. Groesbeck and Rubinstein but would not speak to the jury, presumably because he had been false with the experts and, no doubt, with those students who testified to behavior during the incident that was inconsistent with the prosecutor's claim that Defendant was a cold-blooded murderer. Moreover, if Defendant's expressions of sorrow and composure during the proceedings could be used by the prosecution as valid evidence from which to ask the jury to infer criminal intent, then Defendant's Constitutional right not to take the stand and to have no adverse inference drawn from that exercise was meaningless.

Third, the comments also were designed to present Defendant as having a bad character when his character was irrelevant to the issue of guilt. But the implication that Defendant had a bad character because of when he cried and when he didn't only heightened the

unfairness of the comments. Assuming for the sake of this argument only that the prosecutor's description of when Defendant cried and when he didn't was accurate, the pattern described is neither inconsistent with a lack of remorse nor does it compel a conclusion that remorse was absent. A reasonable juror would have noted from the comments that if Defendant had testified he might have explained satisfactorily what was happening for him when he cried and how the behavior did not indicate a lack of remorse. However, since Defendant did not testify, his exercise of his Constitutional right necessarily reinforced the conclusion that the prosecutor wanted the jurors to draw: That the incompetent and irrelevant evidence from outside the record showed that Defendant had shot and killed with calculation and deliberation since he was a person who lacked concern for anyone but himself.

The guilt judgment should be reversed due to the prosecutorial misconduct in pointing to Defendant's failure to testify and his non-testimonial demeanor during the trial.

B. The Prosecutor Improperly Argued the Evidence of Defendant's Lack of Remorse Adduced in the Penalty Phase as a Non-Statutory Aggravating Factor Supporting Death

Twice during his closing argument in the penalty phase the prosecutor raised what he characterized as the Defendant's lack of remorse as a reason why Defendant deserved the death penalty, i.e., as an aggravating factor.

Relatively early on in the argument the prosecutor noted that Defendant had shown no "sympathy" for the victims during the "entire trial:"

> And Eric Christopher Houston would like you to have sympathy for him. He didn't show very much sympathy for the people who were in Building C on May the 1st, 1992. As a matter of fact he has shown absolutely no remorse during this entire trial as to what happened to those kids and teachers at Lindhurst High School on May the 1st, 1992 Not even when he took the stand yesterday and was given the opportunity did he show any real remorse. Any real I'm sorry for what I did type attitude.
>
> (24 RT 5957:16-26)

The second occasion occurred near the end of his penalty argument:

> Yesterday Mr. Houston testified. He was asked by his counsel okay, when you fired the gun, as best you can recall, what were you intending to do?
>
> Answer, I was just firing, whatever. It didn't matter if it was moving, or if it was a book, or a desk, anything.
>
> Okay. You were intending to kill someone?
>
> Answer, my initial thought was just -- just start blowing stuff up, shooting stuff.
>
> Question, okay. Answer, what -- it could have been a person, it could have been a locker. It could have been a person, it could have been a locker.
>
> But it's interesting to note that none of those witnesses who saw Mr. Houston use that shotgun testified that he ever aimed that shotgun at anything other than human beings. And to this day, that man has not shown any remorse for any one of those individuals who were injured on May the 1st, 1992. He has not shown any emotion about their loss of life. His whole concentration has been on Eric Houston and

> Eric Houston's family.
>
> If you remember Edith Houston, when she testified yesterday, stated or was asked if Mr. Houston had ever talked about the victims, and her answer was he was just sorry for what he did to the family.
>
> (24 RT 5970:17-5972:12 (emphasis supplied))

Lack of remorse is not a statutory factor in aggravation and it is error for a prosecutor to argue lack of remorse as an aggravating factor in penalty. (*People v. Bonilla* (2007) 41 Cal.4th 313, 355, 357; *People v. Cook* (2006) 39 Cal.4th 566, 611.) Imposing a sentence of death on the basis of an aggravating factor not permitted under state law violates the Fifth, Sixth, and Eighth Amendments to the United States Constitution. *Zant v. Stephens* (1983) 462 U.S. 862, 880-882.

This Court has repeatedly held that while a prosecutor may not argue lack of remorse as an aggravating factor, he may argue lack of remorse for the absence of mitigation. However, in light of the failure of the California sentencing scheme to inform jurors as to what is to be considered mitigating and what is to be considered aggravating (see Argument XII, *infra.*), the distinction carries little practical difference.

Here, on both occasions when the prosecutor brought up the lack of remorse in penalty argument, he did so without explaining that the jury should not find mitigation based on remorse since there was no persuasive evidence of remorse. On each occasion the prosecutor argued clearly that Defendant deserves the death penalty because Defendant still, more than a year after the incident, was failing to demonstrate any remorse for his actions. This is using lack of remorse

as an aggravator, contrary to this Court's repeated admonitions.

It is thus likely that the jury aggravated sentence upon the basis of what was, as a matter of state law, a non-existent aggravating factor. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated petitioner "as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." (*Stringer v. Black (1992)* 503 U.S. 222, 235 (1992).) This is, of course, incompatible with the Eighth Amendment mandate requiring a reliable, individualized capital sentencing determination. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85.)

Further, the likelihood that the jury aggravated sentence upon the basis of nonstatutory aggravation (i.e., a missing mitigator) deprived petitioner of an important state-law generated procedural safeguard and liberty interest -- the right not to be sentenced to death except upon the basis of statutory aggravating factors. (*People v. Boyd* (1985) 38 Cal. 3d 762, 772-775.) Thus, the prosecutor's argument, as likely understood by the sentencing jury, violated petitioner's Fourteenth Amendment right to due process. See, *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 (noting that "state laws which guarantee a criminal defendant procedural rights at sentencing, even if not themselves

constitutionally required, may give rise to a liberty interest protected against arbitrary deprivation by the Fourteenth Amendment's Due Process Clause"; and agreeing that Washington state statute created a liberty interest in having state supreme court make certain findings before affirming death sentence).

The prosecutor's repeated arguments implying that Defendant's lack of remorse was an aggravating factor were misconduct requiring reversal of the sentence.

XI. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT DEFENDANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, Defendant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

Because of this Court's explicit admonition to appellate counsel in *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, Defendant does not here fully discuss or analyze this Court's opinions in previous cases rejecting arguments similar to those presented here, but limits his discussion on these issues to identifying the constitutional violations of California's death penalty law as written and as applied at Defendant's trial, and the United States Supreme Court authority and other authority supporting his positions.

To date the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the U.S. Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) __U.S.__, 126 S.Ct. 2516, 2527, fn. 6, 165 L.Ed.2d 429.)[97] See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms,

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[97] In *Marsh,* the high court considered Kansas's requirement that death imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at p. 2527.)

may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime — even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) — to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute — but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction.

A. Defendant's Death Penalty Is Invalid Because Penal Code § 190.2 Is Impermissibly Broad.

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)"
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> *(People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. *(People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against Defendant the statute contained at least 24 offenses that could be charged as "special circumstances" purporting to narrow the category of first degree murders to those murders most deserving of the death penalty.[98] These special circumstances are so

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[98] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-three.

numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1983) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Ca1.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.

B. Defendant's Death Penalty Is Invalid Because Penal Code § 190.3(A) as Applied Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Penal Code Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[99] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[100] or having had a "hatred of religion,"[101] or threatened witnesses after his arrest,[102] or disposed of the victim's body in a manner that precluded

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[99] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

[100] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.,* 494 U.S. 1038 (1990).

[101] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.,* 112 S. Ct. 3040 (1992)

[102] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.,* 113 S. Ct. 498.

its recovery.[103] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge *(Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. *(Tuilaepa, supra,* 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.) Factor (a) is used to embrace facts which are inevitably present in every homicide. *(Ibid.)* As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a

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[103] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

murder... were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." *(Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to a Jury Determination of Each Factual Prerequisite to a Sentence of Death; It Therefore Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (Penal Code § 190.2) or in its sentencing guidelines (Penal Code § 190.3). Penal Code Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are

proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

1. Defendant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, Defendant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state

Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi]; Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring]; Blakely v. Washington* (2004) 542 U.S. 296 [hereinafter *Blakely];* and *Cunningham v. California* (2007) __ U.S. __,127 S. Ct. 856; 166 L. Ed. 2nd 856 [hereinafter *Cunningham].*

As Justice Kennedy has pointed out, "[j]ury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will *reflect the conscience* of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452, conc. opn. of Kennedy, J., underlining added; see *Allen v. United States* (1896) 164 U.S. 492, 501 ["The very object of the jury system is to secure uniformity by a comparison of views, and by arguments among the jurors themselves."].) Both the normative aspect of the sentencing process in this state (*People v. Carpenter* (1997) 15 Cal.4th 312, 417) and the "acute need for reliability in capital sentencing proceedings" (*Monge v. California* (1998) 524 U.S. 721, 732) support the requirement of unanimity with respect to factual findings during penalty deliberations. It is worth noting that the federal death penalty statute explicitly states that "a finding with respect to any aggravating factor must be unanimous." Title 21 U.S.C. § 848(k).

At the very least, the Sixth Amendment jury trial guarantee requires that on a jury of twelve members, a critical mass of jurors,

i.e. a large majority of near-unanimous proportion, must reach agreement on aggravating factors before death can be considered or imposed. (See *Brown v. Louisiana* (1980) 447 U.S. 323 [six-person unanimity rule retroactive); *Burch v. Louisiana* (1979) 441 U.S. 130 [unanimity required for six-member jury]; *Johnson v. Louisiana* (1972) 406 U.S. 356, 364 [capital defendants may constitutionally have greater rights than other defendants].) This is a necessary component of the process due to the defendant in a capital case, where the federal constitution requires a "greater degree of reliability" than in non-capital cases. (*Caldwell v. Mississippi* (1985) 472 U.S.320, 328-330; *Lockett v. Ohio, supra*, 438 U.S. at p. 604; *Gardner v. Florida, supra*, 430 U.S. at 360-362.)

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. *(Id.* at p. 478.)

In *Ring,* the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (Id., at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law *(Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (Id., at 598.) The court found that in light of *Apprendi, Walton* no longer controlled. *Any* factual finding which

increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely,* the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." *(Blakely v. Washington, supra,* 542 U.S. at 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. *(Ibid.)* The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. *(Id.* at 313.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *(Id.* at 304; italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on

judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that [a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *(United States v. Booker, supra,* 543 U.S. at 244.)

In *Cunningham*, the high court rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham v. California, supra,* __U.S.__, 127 S.Ct. at 868 *et seq.*, 166 L.Ed. 2nd at 873, *et seq.*) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

2. In the Wake of Apprendi, Ring, Blakely, and Cunningham, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. *(People v. Fairbank, supra;* see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore

not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweighs any and all mitigating factors.[104] As set forth in California's "principal sentencing instruction" *(People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to Defendant's jury (24 RT 6009:13-17), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

Evidence Code Section 115[105] provides that preponderance of the evidence is that standard of proof where no other standard has been provided by law.

There is no authority under any applicable law or principle for the imposition of a criminal sentence in the absence of a determination by at least a preponderance of the evidence, that the

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[104] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; the jury's role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." *(People v. Brown* (1988) 46 Cal.3d 432, 448.)

[105] Evidence Code section 115 provides as follows in pertinent part: "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."

facts on which the penalty verdict is based are true. In the context of a capital proceeding in California, such facts include the relevant aggravating factors listed in section 190.3, whether those factors are substantial compared to the mitigation, and whether those factors are so substantial compared to the mitigation that a sentence of death is warranted.

Assuming, *arguendo*, that the trial court was not required to instruct the jury to use the reasonable doubt standard, then its failure to instruct the jury with regard to the preponderance standard violated Defendant's right under the Due Process clause to the correct application of state law in a capital sentencing proceeding. (*Ford v. Wainwright* (1986) 477 U.S. 399, 428, conc. opn. of O'Connor, J. ["where a statute indicates with 'language of unmistakable mandatory character, 'that state conduct injurious to an individual will not occur absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause."]; *Hewitt v. Helms* (1983) 459 U.S. 460, 466 [Due Process-protected liberty interests arise from the U.S. Constitution and state law]; *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Vitek v. Jones* (1980) 445 U.S. 480, 488-491.)[106]

The failure to require the jury to apply some standard of proof to the factual determinations underlying its sentencing choice resulted in a death verdict that is unreliable and violates the Eighth Amendment. (*Mills v. Maryland* (1983) 486 U.S.367, at 383-384.) Moreover, there is a very real probability that, in the absence of

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[106] This Court has previously rejected this argument or one very similar to it. (See, e.g., *People v. Manriquez* (2005) 37 Cal.4th 547at 589; *People v. Box* (2000) 23 Cal.4th 1153, 1216.)

guidance from the trial court, Defendant's jurors applied widely varying and perhaps legally impermissible standards of proof when considering aggravating and mitigating evidence in the penalty phase, resulting in a capital sentencing proceeding that was arbitrary and capricious, in violation of the Eighth Amendment, which requires that "[c]apital punishment be imposed fairly, and *with reasonable consistency*, or not at all." (*Eddings v. Oklahoma* (1981) 455 U.S. 104, 112, emphasis supplied; see *Mills v. Maryland, supra*, 486 U.S. at p. 374; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Furman v. Georgia* (1972) 408 U.S. 238.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[107] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment

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[107] In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (Id., 59 P.3d at p. 460)

notwithstanding these factual findings.[108]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." *(People v. Demetroulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely,* and *Booker,* a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of fact finding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[109] In *Cunningham* the principle that any fact which

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[108] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. *(People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown 1)* (1985) 40 Cal.3d 512, 541.)

[109] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in

exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (*Id.*, __U.S.__, 127 S.Ct. at 863-4., 166 L.Ed. 2nd at 867-8) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi's* bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [Citation omitted]." *(Cunningham, supra,* __U.S.__, 127 S.Ct. at 864, 166 L.Ed. 2nd at 869.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.*, p. __U.S.__, 127 S.Ct. at 870, 166 L.Ed. 2nd at 875-6.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to

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the words of the majority here, it involves the type of fact finding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra*, __U.S.__, 127 S.Ct. at 868, 166 L.Ed.2nd at 873.)

> punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely,* 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black,* 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line").
>
> *(Cunningham, supra,* at __U.S.__, 127 S.Ct. at 869, 166 L.Ed. 2nd at 874.)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.

In its effort to resist the directions of *Apprendi,* this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. *(People v. Anderson* (2001) 25 Cal.4th 543, 589.) After *Ring,* this Court repeated the same analysis: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." *(People v. Prieto, supra,* 30 Cal.4th at p. 263.)

This holding is simply wrong. As Penal Code Section 190, subd. (a)[110] indicates, the maximum penalty for *any* first degree

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[110] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in

murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts — whether related to the offense or the offender — beyond the elements of the charged offense." (*Cunningham, supra,* __U.S.__, 127 S.Ct. at 863, 166 L.Ed. 2nd at 867.)

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks *Apprendi's* instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [*Ring*] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid;* see 200 Ariz., at 279, 25 P.3d, at 1151.
>
> *(Ring, supra.* 536 U.S. at 604)

Just as when a defendant is convicted of first degree murder in

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the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." *(Ring, supra,* 530 U.S. at 604.) Penal Code Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *(Ring,* 530 U.S. at 604.) In *Blakely,* the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 542 U.S. at 328; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham,* is the end of the inquiry as far as the Sixth

Amendment's applicability is concerned. California's failure to require the requisite fact finding in the penalty phase to be made unanimously and beyond a reasonable doubt violates the United States Constitution.

3. Whether Aggravating Factors Outweigh Mitigating Factors Is a Factual Question That Must Be Resolved Beyond a Reasonable Doubt.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. If so, the jury then weighs any such factors against the proffered mitigation. A determination that the aggravating factors substantially outweigh the mitigating factors – a prerequisite to imposition of the death sentence – is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring, supra,* 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *State v. Ring* (Az. 2003) 65 P.3d 915; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State*, 59 P.3d 450 (Nev. 2002).[111]) No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U2.S. 721, 732

[111] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether aggravating circumstances substantially outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death).

["the death penalty is unique in its severity and its finality"].)[112] As the high court stated in *Ring, supra,* 122 S.Ct. at pp. 2432, 2443:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

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[112] In its *Monge* opinion, the U.S. Supreme Court foreshadowed *Ring,* and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "[I] *n a capital sentencing proceeding,* as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' (Bullington v. Missouri,] 451 U.S. at p. 441 (quoting Addington v. Texas, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (Monge v. California, supra, 524 U.S. at p. 732 (emphasis added).)

4. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Exist and Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[The procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." *(Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. *(In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *(Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual

determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship, supra,* 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship, supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977)19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky, supra,* the U.S. Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State

> brings a criminal action to deny a defendant liberty or life... "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the `weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."
>
> (455 U.S. at p. 755.)

The failure to apply the reasonable doubt standard when its use is mandated by the federal constitution is reversible error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282.) Moreover, "[t]he 'minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.'" (*Santosky v. Kramer, supra,* 455 U.S. at p. 755, quoting from *Vitek v. Jones* (1980) 445 U.S. 480, 491, brackets in *Santosky*.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky,* involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky, supra,* 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual

error." *(Winship, supra,* 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." *(Woodson, supra,* 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

Evidence Code section 520 provides: "The party claiming that a person is guilty of crime *or wrongdoing* has the burden of proof on that issue." (emphasis supplied.) In the sentencing phase of a capital trial, all aggravating factors relate to wrongdoing by the defendant, but Defendant's jury was not instructed that the burden of proof was on the prosecution with regard to those factors. Therefore, Defendant's jurors had no guidance about what to do if they thought that the evidence was 50-50 about the existence of any of the facts necessary to sentence Defendant to die. The trial court should have instructed the jury that the prosecution had the burden of proof with regard to aggravating factors, and the failure to ensure that the jury correctly applied state law on this point constituted a denial of Defendant's right to Due Process under the federal constitution. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.) Moreover, since the prosecution has the burden of persuasion with regard to sentence in non-capital cases (Rule 4.420(b), Calif. Rules of Court), to provide *less* protection to a defendant in a capital case violates the Equal Protection under the Fourteenth Amendment. (See *Bush v. Gore*

(2000) 531 U.S. 98, 104-105; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417 [state rule must be applied evenhandedly].)

Finally, assuming *arguendo* that the federal constitution did not require the prosecution to carry the burden of proof with regard to sentencing, the jurors should have been told that neither side carried a burden of proof or persuasion.

This was especially important at Defendant's trial, where the defense had presented a great deal of mitigating evidence and argument concerning Defendant's mental and emotional problems. The jury needed to understand that Defendant was not required to carry any particular burden of persuasion with regard to such evidence. The failure to so instruct the jury created the reasonable probability that one or more jurors in fact placed such a burden on Defendant in direct violation of his Fourteenth Amendment right to due process. Moreover, if the jurors had understood that the prosecution had the burden of persuading them that death was the appropriate sentence and that Defendant was *not* required to convince them that they should spare his life, some of them might well have concluded that the prosecution had not carried its burden, since the prosecution really offered nothing beyond the facts of the crime, which were already known to the jurors, as the reason they choose death. Thus, the penalty verdict is unreliable and violates the Eighth and Fourteenth Amendments, requiring reversal. (*Zant v. Stephens, supra,* 462 U.S. at pp. 884-885; *Gardner v Florida, supra,* 430 U.S. at p. 358; *Woodson v. North Carolina, supra,* 428 U.S at p. 305.)

In *Monge*, the U.S. Supreme Court expressly applied the Santosky rationale for the beyond-a-reasonable-doubt burden of proof

requirement to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' *([Bullington v. Missouri,] 451 U.S. at p. 441 (*quoting *Addington v. Texas, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (Monge v. California, supra,* 524 U.S. at p. 732 (emphasis added*).) The sentencer of a person facing the death penalty is required by the due process and Eighth* Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

5. *California Law Violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.*

The failure to require written or other specific findings by the jury regarding aggravating factors deprived Defendant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538 at 543; *Gregg v. Georgia, supra,* 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances *(People v. Fairbank, supra),* there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v.*

Sain (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. *(People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. *(In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[113] The same analysis applies to the far graver decision to put someone to death.

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Penal

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[113] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 *et seq.*)

Code Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S.957, at 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra;* Section D, *post),* the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" *(People v. Demetrulias, supra,* 39 Cal.4th at pp. 41-42) and "moral" *(People v. Hawthorne, supra,* 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; *post-Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *ante.)*

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra* [statute treating a jury's finding that aggravation and mitigation are in

equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

6. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed.

The prohibition against the arbitrary and capricious infliction of death as a punishment is the most fundamental principle underlying capital jurisprudence in this country. (*Furman v. Georgia* (1972) 408 U.S. 238; *Godfrey v. Georgia* (1980) 446 U.S. 420, 427; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) In *Pulley v. Harris* (1984) *465 U.S. 37,* 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential

component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review.*"

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris,* in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of--comparative-proportionality review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris,* 465 U.S. at 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that *cannot be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra.* (See Section A of this Argument, *ante.)* The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante),* and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante).* Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh, supra),* this absence renders that scheme unconstitutional.

Further, the prohibition against a proportionality review based

on comparison to other cases prevents a determination of whether Defendant, a mentally ill and mentally defective defendant, has been sentenced to die for a crime that no other jurisdiction would punish by death, and in violation of the principle that this state's death penalty scheme must comport with "the evolving standards of decency that mark the progress of a maturing human society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100-101; *Roper v. Simmons* (2005) 543 U.S. 551, 560-564.) Defendant's sentence must be reversed because it cannot be determined whether it is out of line with the punishments of others—particularly other mentally ill and mentally defective defendants—who have committed worse crimes or bear greater moral culpability for their crimes.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, at 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.) This Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

7. *The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.*

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

The U.S. Supreme Court's recent decisions in *U. S. v. Booker, supra, Blakely v. Washington, supra, Ring v. Arizona, supra,* and *Apprendi v. New Jersey, supra,* confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Defendant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

8. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Defendant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. *(Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

In Defendant's penalty phase trial, the prosecution argued that his mental illness was not "extreme" and therefore should be disregarded:

> We've heard an awful lot of testimony in this case about Eric Houston's state of mind on May the 1st, 1992. Most of it in the phrase that was used earlier in this trial was mumbo jumbo.
>
> 24 RT 5957:27-5958:2
>
> The gravity of his crime is so great that even if you take whatever emotional problems he was undergoing, and *obviously people who commit murder have some kind of emotional problems*, and if you take his age, the nature of the crime so outweighs those factors that it leaves you very little room to decide that the factors in aggravation outweigh those in mitigation substantially.
>
> 24 RT 5990:13-19 (emphasis supplied)

These comments by the prosecutor in arguing penalty suggested to the jury that they should not consider Defendant's mental illness "extreme." Indeed, the suggestion is that any person convicted of a murder will have some kind of mental or emotional illness, so

evidence of such should be disregarded. The argument highlights the prejudice arising from an instruction in the language of factor (d). Rather than giving the evidence of mental illness the weight it deserved, the instruction on factor (d) told the jury that if the evidence of mental illness did not meet a level of what they considered "extreme," they should disregard it entirely.

In light of the consensus among both defense and prosecution experts that Defendant suffered from serious mental illnesses and conditions, the instruction on factor (d) had to be prejudicial. It deprived Defendant of his right to have the jury consider and freely weigh all of the mitigating evidence it had before it.

9. *The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.*

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. *(Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. *(People v. Kraft, supra,* 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, *"no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors." (People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)
>
> *People v. Morrison* (2004) 34 Cal.4th 698, 730; (emphasis supplied.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be

harmless. *(Ibid.)* If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)[114]

The very real possibility that Defendant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived Defendant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors *(People v. Boyd* (1985) 38 Cal.3d 765, 772-775.) - and thereby violated Defendant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].)

It is thus likely that Defendant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State - as represented by the trial court - had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth

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[114] There is one case now before this Court in which the record demonstrates that a juror gave substantial weight to a factor that can only be mitigating in order to *aggravate* the sentence. See *People v. Cruz,* No. SO42224, Appellant's Supplemental Brief.

Amendment, for it made it likely that the jury treated Defendant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." *(Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S.104, at 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Non-Capital Defendants.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, *e.g.*, *Monge v. California, supra,* 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential

treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. *(People v. Olivas, supra; Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto,*[115] as in *Snow,*[116] this Court analogized the process of

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[115] "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto, supra*, 30 Cal.4th at p. 275.)

[116] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Snow, supra*, 30 Cal.4th at p. 126, fn. 3.)

determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias, supra,* 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., Penal Code Sections 1158, 1158a.) When a California judge is considering which sentence is appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."[117]

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *ante.)* And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no

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[117] In light of the Supreme Court's decision in *Cunningham, supra,* if the basic structure of the DSL is retained, the findings of aggravating circumstances supporting imposition of the upper term will have to be made beyond a reasonable doubt by a unanimous jury.

reasons for a death sentence need be provided. (See Section C.3, *ante.)* These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[118] *(Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland, supra,* 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra.*)

E. The Death Penalty Is Cruel and Unusual Punishment[119]

The death penalty is "an excessive and unnecessary punishment that violates the Eighth Amendment." (*Furman v. Georgia, supra,* 408 U.S. 238, 358-359, conc. opn. of Marshall, J.) Moreover, as Defendant has demonstrated, *supra*, the California death penalty scheme is "fraught with arbitrariness, discrimination, caprice, and mistake." (*Callins v. Collins* (1994) 510 U.S. 1141, 1144, dis. opn. of

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[118] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact finding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." *(Ring, supra,* 536 U.S. at p. 609.)

[119] This Court has previously rejected this argument or one very similar to it. (See, e.g., *People v. Manriquez, supra,* 37 Cal.4th at p. 590; *People v. Samayoa* (1997) 15 Cal.4th 795, 865-865.)

Blackmun, J.) This is because there is an irreconcilable conflict between the requirements of individualized sentencing under *Lockett v. Ohio, supra*, 438 U.S 586 and of consistency under *Furman v. Georgia, supra,* 408 U.S. 238. (*Callins v. Collins,* supra, 510 U.S. at pp. 1155-1157.) For the reasons explained in Justice Marshall's concurring opinion in *Furman* and Justice Blackmun's dissenting opinion in *Callins v. Collins* the imposition of the death penalty on Defendant violates his right under the Eighth Amendment to be free from cruel and unusual punishment and his sentence should be reversed. (*Furman v. Georgia, supra,* 408 U.S. 238, 315-372, conc. opn. of Marshall, J.; *Callins v. Collins, supra*, 114 S.Ct. at pp. 1128-1138.)

F. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms Of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty Now Violates the Eighth and Fourteenth Amendments to the United States Constitution.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366.) The nonuse of the death penalty or its limitation to "exceptional crimes such as treason"— as opposed to its use as regular punishment— is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S.815, at 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have now

abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www. amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, `subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.' (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1894) 159 U.S. 113, at 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304 at 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina,* O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to

extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra,* 536 U.S. at 316.)

Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. *(Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the *most serious crimes.*"[120]

Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. *(Cf. Ford v. Wainwright* (1986) 477 U.S. 399*; Atkins v. Virginia, supra.*)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Defendant's death sentence should be set aside.

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[120] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence,* 46 Case W. Res. L.Rev. 1, 30 (1995).

XII. ARTICLE I, SECTION 27 OF THE CALIFORNIA CONSTITUTION, ENACTED BY PLEBISCITE VOTE ON INITIATIVE PROPOSITION 17, IS UNCONSTITUTIONAL, VIOLATING THE DUE PROCESS, EQUAL PROTECTION AND GUARANTEE CLAUSES OF THE UNITED STATES CONSTITUTION, ARTICLE IV, SECTION 4, AND THE 5TH AND 14TH AMENDMENTS THERETO

A. The Facts

In February 1972, the California Supreme Court in *People v. Anderson* (1972) 6 Cal.3d 628 declared the death penalty to be unconstitutional under the "cruel or unusual" provision of Art. I, sec. 6 (now 17) of the California Constitution. (Cf. *California v. Ramos* (1983) 463 U.S. 992). In November 1972 Proposition 17, an initiative measure to overturn or contravene the Anderson decision, was enacted by a majority of those voting in the general election, inserting Article I, Sec. 27 into the state constitution. Article I, sec. 6 (now 17) of the California Constitution has never been changed and Anderson has never been judicially overruled.

Article I, Sec. 27 undertook to overrule the Anderson construction of the California Constitution that had legally created a substantive "right" not to be executed as punishment for crime. Using the initiative process of voter approval of a single provision, Proposition 17 both enacted death penalty statutes and mandated how the judicial branch was to construe those enacted statutes in reference to the "right" declared in Art. I, Sec. 6 (now 17) and all other provisions of the California Constitution. The following are the pertinent words of the three parts of the two-paragraph measure enacted by the voters.

Part I

> All statutes of this state in effect on February 17, 1992... imposing, or relating to the death penalty, are in full force and effect, subject to amendment or repeal...

Part II

> The death penalty provided for under these statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishment under the meaning of Article I, Section 6.

Part III

> nor shall such punishment for such offenses be deemed to contravene any other provision of the California Constitution.

In a dictum, a minority of the California Supreme Court in *People v. Frierson*, (1979) 25 Cal.3d 142 said that Article I, Section 27 did not violate the California state constitution, concluding Section 27 "validates the death penalty as a permissible punishment under the California Constitution" (Id. at p.186.), and Art I, Sec. 27 was permissible as an initiative amendment under state law (*Id.* at p. 187.). The State has treated the *Frierson* dictum as dispositive and re-instituted the death penalty under which petitioner has been sentenced to death. The minority who authored the dictum in Frierson did not review any of the federal claims stated herein.

The clause in Part III was reviewed in *People v. Superior Court (Engert)*, (1982) 31 Cal.3d 797, where the state contended that Part III precluded review of any death penalty statute under the provisions of the state constitution. The California Supreme Court held that the

statute was unconstitutional under both state and the minimum standards of federal due process. (*Engert, supra.* 31 Cal.3d at 806.) Further, in the *Engert* holding on state law, the California Court purported to rewrite this clause in an attempt to avoid confronting its unconstitutional assault on the separation of legislative and judicial powers contained in Proposition 17. A dissent by the author of the *Frierson* minority dictum complained that the majority "in familiar fashion has precluded any high court review."[121] (*Engert, supra.* 31 Cal.3d at 814.)

Both the *Frierson* and *Engert* decisions were challenged in the District Court as "disingenuous evasions" by the state court – ignoring words and rephrasing the central question – in order to shield the federally impermissible initiative from review by the United States Supreme Court. (*United States v. Locke* (1985) 471 U.S. 84; *George Moore Ice Cream Co., Inc. v. Rose* (1933) 289 U.S. 373.)

B. The Applicable Law

Article I. Section 27, enacted by initiative Proposition 17, is here challenged under the Due Process, Guarantee and Equal Protection clauses of the U.S. Constitution as it

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[121] By holding the statute violated the minimum federal due process standards, the California Court sidestepped whether, after the addition of Article I, Sec. 27, the California Constitution still afforded capital defendants the right to review of state death penalty statutes by state courts on independent state constitutional grounds. By holding that the *Engert* decision rested on both state and federal due process standards, the state court prevented the language of Article 1, Sec. 27 from being challenged in the United States Supreme Court as a violation of the federal Guarantee Clause and federal due process and equal protections principles.

- Purports to eliminate the fundamental substantive constitutional "right" to life (no death penalty as punishment) legally established under state law in *Anderson*;
- Uses the anti-republican process of a popular majority vote (plebiscite) to eliminate the fundamental constitutional right; and
- Combines the enactment of statutes (a legislative function) and mandates how those statutes were to be construed in reference to the State Constitution by the judicial branch (a judicial function).

The particulars of these individual contentions are stated in the following paragraphs.

People v. Anderson, supra, held that the California State Constitution protected the citizens of California from execution by their State government because state executions violated the State Constitution's ban on "cruel or unusual" punishments, and that the death penalty, even if not "unusual," was nevertheless cruel. The ban on "cruel or unusual" punishments remains in the California Constitution, and *People v. Anderson* has never been overruled. Nevertheless, the State of California has executed thirteen persons and sentenced more than 650 others to be executed (including Defendant) on the basis of a popular vote decreeing that *Anderson's* construction of the California Constitution should not be applied for the protection of certain selected criminal offenders.

Proposition 17, as it undertook to contravene Anderson and eliminate the fundamental substantive right found by the *Anderson*

court by the anti-republican process of a majority vote on a privately sponsored ballot measure in an election, violated the Due Process clause of the 14th Amendment. A state-created substantive right, once created, may not be removed except in accordance with federal due process. (*Paul v. Davis* (1976) 424 U.S. 693; *Medina v. California* (1992) 505 U.S. 1244; *Hodges v. United States* (1906) 203 U.S. 1, 15; *Roberts v. Acres* (7th Cir. 1974) 495 F.2d 57; *Landrum v. Mosta* (8th Cir. 1978) 576 F.2d 1320. This rule applies equally to initiatives, for what a state may not do by legislative action it may not do by initiative. *Citizens Against Rent Control v. City of Berkeley* (1981) 454 U.S. 290. The use of the initiative process of direct democracy to eliminate a fundamental "right" fails to satisfy federal requirements of Due Process and violates the Guarantee Clause as well, for fundamental rights are not subject to vote and depend on the outcome of no election. *West Virginia State Bd. of Education v. Barnette* (1943) 319 U.S. 624, 638; *School District of Abington v. Schempp* (1963) 374 U.S. 203, 236; *Furman v. Georgia* (1972) 408 U.S. 238, 268.)[122]

Article I, Section 27, as enacted by initiative, also violates the separation of powers principle because it combines both the legislative (Part I) and the judicial function (Parts II and III) in a

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[122] *Cf.* Justice Brennan, concurring in *Furman v. Georgia*, 408 U.S. 238, 268 (1972):

> The right to be free of cruel and unusual punishment, like the other guarantees of the Bill of Rights, may not be submitted to a vote [and depends] on the outcome of no election.

single measure enacted by a single body (a majority of the voters voting in a general election). The core idea of the separation of powers principle is that the legislative power to enact laws (statutes) and the judicial power to construe laws (statutes) shall not be in the same person or body. (*The Federalist* 47 (Madison).)[123] The preeminent importance of this principle "in any free constitution" was federally recognized in *Meyers v. United States* (1926) 272 U.S. 52, 116, and recently reasserted federally in *Plaut v. Spendthrift Farm, Inc.* (1995) 514 U.S. 211, 217.

Article I, Section 27, as enacted by initiative, independently violates the separation of powers principle and the subsumed doctrine of Judicial Review by purporting to mandate in Part II how the judiciary was to construe and apply Art. I, Sec. 6 (now 17) in reference to the enacted statutes.[124] The doctrine of Judicial Review is an intrinsic part of the separation of powers principle. (*Marbury v. Madison* (1803) 5 U.S. 137, 176. (Interpreting and applying the Constitution "is the very essence of judicial power.") California has followed the federal law in this regard since 1858. (*Nogues v. Douglass* (1858) 7 Cal. 65, 69-70; *Marin Water Co. v. Railroad Com.* (1916) 171 Cal. 706, 711-712; *Raven v. Deukmejian* (1990) 52 Cal.3d

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[123] *See also*, Madison, *The Federalist 10.*

[124] *But see*, *People v. Bean*, (1988) 46 Cal.3d 919, at 958. Neither the section itself nor its history indicated that the drafters and electorate intended "to affect the continuing applicability of the state Constitution in death penalty trials insofar as the defect in the statute in question does not relate to the death penalty per se." The state court skirted the question whether the section permitted the state court to find the state constitution required a more stringent standard than required under the federal constitution.

336, 354-355.) It does not lie within the legislative power to construe -- or mandate how the judicial branch shall construe -- a Constitution or a fundamental right declared therein. The final arbiter of the California Constitution is the Supreme Court of California, not a majority of the voters in a given election.

Article I, Section 27, as enacted by initiative, by violating the separation of power principle, as indicated above, also violates Due Process in the 14th Amendment to the United States Constitution. (Cf. *Plaut v. Spendthrift Farm, Inc. supra*, 514 U.S. 211.)

Petitioner submits that a state constitutional amendment to (1) eliminate a fundamental right by the anti-republican process of a majority vote in an election approving a measure that (2) both enacts laws (statutes) and mandates how the judicial branch shall construe the enacted statutes, by usurping the power of judicial review constitutes such a multiple violation of the separation of powers principle that it violates the due process clause of the 14th Amendment to the U.S. Constitution.

Although the Supreme Court has as yet not undertaken to determine whether the separation of powers principle is secured by the Guarantee Clause, the Kansas Supreme Court has so held. (*Van Sickle v. Shanahan* (Kansas Sup.Ct. 1973) 511 P.2d 223, 235-41 .) Petitioner submits that while not every violation of the separation of powers principle may be secured by the Guarantee Clause, if ever state conduct can be held to violate that clause, Art. I, Sec.27, as enacted by popular vote on a private initiative, qualifies.

Article I, Sec. 27 (Part III) as enacted by initiative, in addition to violating the principle of separation of powers and the doctrine of

judicial review, as above contended, also violates the equal protection clause of the 14th Amendment to the U.S. Constitution in that it deprives all defendants prosecuted under the statutes enacted by Section 27 (Part I), as distinguished from all other defendants, of the protection provided by all the other provisions of the California Constitution. It was the clear intention of Proposition 17 to have the validity of the enacted statutes deemed valid under all the provisions of the California Constitution. Without the availability of independent review under the state constitution, California death penalty statutes could only be reviewed or invalidated under federal law. The legislative analysis provided to the voters in 1972, p. 42, stated:

> This measure would therefore make effective the *statutes* relating to the death penalty to the extent permitted under the United States Constitution.
>
> (Emphasis supplied)

The *Frierson* minority, which approved Article I, Section 27, quoted this language at page 185 of the opinion, italicizing the words "to the extent permitted under the United States Constitution." This position was reasserted by the author of the *Frierson* minority view in his dissent in *People v. Superior Court (Engert) supra*, 31 Cal.3d 797, 814, stating that Section 27 was adopted "for the purpose of 'reinstating the death penalty to the extent permitted by federal constitutional law'" asserting the state statute was constitutional under federal due process.

The holding in the majority decision in *Engert* upholding the statute under the due process clause in the State Constitution, as well

as under that clause in the United States Constitution, was a patent and disingenuous attempt to avoid Supreme Court review of the plain language of Section 27, and is devoid of legal force and effect. (*United States v. Locke*, *supra*, 471 U.S. 94; *George Moore Ice Cream Co. v. Rose*, *supra*, 289 U.S. 373.)

The construction of Part III in the *Engert* dictum constitutes an impermissible attempt to avoid its unconstitutionality. (*Service Employees International Union AFL-CIO CLC v. Fair Political Practice Commission*, (E.D. Cal, 1990) 747 F.Supp. 580, 585), aff. 955 F.2d 1312 (9th Cir. 1992). As stated in that opinion quoting *United States v. Monsanto* (1989) 491 U.S. 600 at 611 as it quoted *United States v. Albertini* (1985) 472 U.S. 675, 680: , "'interpretive canons are not a license for the judiciary to rewrite the language enacted by the legislature.'")

For the reasons stated, petitioner's sentence of death is a void judgment and this Court must grant the writ to prevent petitioner's execution pursuant to that judgment.

XIII. THE CUMULATION OF ERROR INFECTED ALL THREE PHASES OF THE TRIAL, WITH MANY ERRORS REINFORCING THE PREJUDICE OF THE OTHER ERRORS, RESULTING IN A FUNDAMENTAL DENIAL OF DUE PROCESS AND A MISCARRIAGE OF JUSTICE

A. The Doctrine of Cumulative Error

In examining the trial court record in a criminal case to determine the existence of constitutional or state law error requiring reversal, reviewing courts, including this Court, have never limited their consideration to individual instances of error

viewed in isolation. Instead, consideration has also been given to the cumulative effect of multiple errors, where present, to assess the full nature and extent of potential prejudice to a criminal defendant's right to a fair trial. (See, *e.g.,People v. Underwood* (1964) 61 Cal. 2d 113, 125; *People v. Cardenas* (1982) 31 Cal. 3d 897, 907); *People v. Kronemyer* (1987) 189 Cal. App. 3d 314, 349.) The doctrine of cumulative error which has developed from this decisional authority was stated and explained in *People v, Bell* (1987) 44 Cal.3d 137, 157:

> When the record discloses a number of errors that were individually insubstantial, their cumulative effect may still require reversal. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal 5359, p. 362.) Reversals have been ordered when it was reasonably probable that a different result would have been reached but for the errors (see, e.s., Delzell v, Dav (1950) 36 Cal. 2d 349, 351-352, 223 P.2d 625; Gackstetter v. Market Street Rv. Co. (1933) 130 Cal. App. 316, 327, 20 P.2d 293) or when a criminal defendant has been denied the fair trial guaranteed by the due process clauses of the federal and state Constitutions.

This doctrine potentially part of every criminal appeal and has been recognized and applied in a wide variety of contexts. As noted in *People v. Kronemyer*:

> We disagree with the People's counterclaim that the "cumulative error doctrine" is inapplicable. Theoretically, it always applies, for the litmus test is whether defendant received due process and a fair trial. Accordingly, we review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a

> result more favorable to defendant in their absence.
>
> 189 Cal. App. 3d at 349 (citations omitted).

Thus, the cumulative error doctrine has been applied to situations of repeated prosecutorial misconduct, *People v. Kirkes* (1952) 39 Cal. 2d 719, 726; *People v. Hudson* (1981) 126 Cal. App. 3d 733, 741; to erroneous evidentiary rulings, *People v. Holt* (1984) 37 Cal. 3d 436, 459; *People v. Cardenas, supra*, 31 Cal. 3d at 907; and often to cases involving a variety of errors. *People v. Holt, supra,* 37 Cal. 3d at 459 (errors in admission of evidence, improper witness impeachment, and erroneous instruction); *People v, Robertson* (1982) 33 Cal. 3d 21, 54-55 (1982) (cumulative error in admission of evidence, prosecutionts closing argument, and jury instructions).

The cumulative error doctrine is particularly appropriate to consideration of penalty-phase error in a capital case, given the importance of the life-or-death issue involved and the discretionary and largely normative responsibility imposed on the penalty-phase jury. *People v. Brown* (1989) 46 Cal. 3d 432, 447-448 .

The "reasonable probability" standard for reversible error discussed in Bell does not apply to cumulative error affecting the penalty phase of a capital case, for which reversal is required whenever the error represents a "reasonable possibility" that the penalty determination was influenced. People v, Robertson (1982) 33 Cal. 3d 21, 63 . The standard for federal constitutional error requires a heightened scrutiny at least as vigorous. Compare *Satterwhite v. Texas* (1988) 486 U.S. 249 (harmless error rule of *Chapman v. California* (1967) 386 U.S. 18, 24, applicable to any capital sentencing error

which does not require reversal per se with *Penry v. Lvnaugh* (1989) 492 U.S. 302, 328, *Brewer v. Quarterman* (2007) __ U.S.__, 127 S.Ct. 1706, 1712, 167 L.Ed.2d 622, 629. (any capital sentencing error which forecloses the jury's consideration of potential mitigating evidence reqires reversal per se.)

The jury's role in the penalty proceeding involves such "vast discretion," its deliberative process is much more susceptible to the prejudicial effect of successive errors. This follows from the innumerable ways in which improper evidence, argument, instruction, and other defects in proceedings can influence the complex and idiosyncratic exercise of human judgment on issues like the value of human life, the appropriateness of granting mercy, and the basic justice of imposing the extreme punishment of death.

Cumulative error operates to enhance the potential for prejudice in two ways. The first, noted by Justice Broussard in his concurring and dissenting opinion in *People v. Luckv* (1988) 45 Cal. 3d 259, 305, is that each error in a criminal trial contains some possibility, however small, of prejudicing the jury's verdict, which can never be entirely eliminated as a risk to the reliability of the conviction. Multiplying the incidence of error thus necessarily multiplies the cumulative risk that one or more of the errors in fact had a prejudicial impact, in the absence of which a different verdict might have resulted.

Beyond this simple additive effect, however, there is also the possibility that multiple errors in the conduct of a criminal trial will interact to produce a combined prejudicial effect greater than the sum of their individual potential for prejudice. This second effect of cumulative error has been recognized repeatedly by California courts.

See, *e.g., People v. Hudson*, supra, 126 Cal. App. 3d at 741. Justice Mosk, concurring in *People v. Hovey* (1988) 44 Cal. 3d 543 at 586 noted this potential for harm from repeated error in a criminal trial:

> I am concerned at what point a series of errors, analytically deemed harmless individually, become prejudicial when evaluated collectively. On this general subject there appears to be a conflict between mathematics and literature. On the the other hand, as Plutarch pointed out nearly 20 centuries ago in *Of the Training of Children*, "water continually dropping will wear hard rocks hollow."

A jury trial is a dynamic process, dynamic in ways that are not always fully apparent from the written record. In this context, multiple errors can combine to create a pernicious synergism and a potential for prejudice that can pervade an entire phase of proceedings.

B. Each of the Errors Discussed in this Brief Compounded and Reinforced the Prejudice to Defendant, Denying Him a Fair Trial at Guilt and Penalty and a Failure to Permit Him an Individuated Evalutation of His Mitigating Evidence at Penalty.

1. Cumulative Error in Guilt

In analyzing the effect of cumulative error on Defendant's convictions of first degree murders and attempted murders, it helpful to begin by looking at the quantum and quality of the evidence that rationally could support those convictions. As discussed in Arguments IV and VI, the evidence in the record for attempted murder and first degree deliberate premeditated murder is either wholly lacking or almost negligible and equally capable of supporting inferences for acquittal on those counts.

There was no evidence in the record that Defendant harbored

malice against any of the persons named as victims of attempted murder. Therefore, the convictions stand only upon whatever circumstantial evidence was presented regarding how Defendant fired upon those victims. While several of the alleged attempted murder victims were fired upon at close range, others were fired upon from distances unlikely to cause lethal injury (Collazo, Yanez), or in a manner most consistent with seeking to keep the victim from approaching Defendant (Graham). However, even those fired upon at closer range were obviously not killed by the shots yet there is not a single item of evidence in this record that Defendant sought any further harm to any shooting victim, although in each case he had the time and unobstructed capacity to do so.

Nor is there any basis in the record to support a finding that any attempted murder victim was shot while Defendant was seeking to kill some other specific person such that the victims could be deemed to have been in a "kill zone."

Additionally, as discussed in Argument V, the instructions given for the attempted murder counts were faulty and misled the jury as to what it was necessary for them to find before they could convict on those counts. It is notable that the jury brought back convictions on every attempted murder count, making no distinction between Defendant's shots at Yanez and Collazo, where the shots were made a considerable distance and the injuries were relatively minor, or at Graham, where he was shielded by a doorway, and for instance, his shooting of Boggess, where the shot was more direct and the resulting injuries severe. The fact that the jury brought back guilty verdicts on all counts suggests that they believed that every shot Defendant fired

in the direction of a person or persons was done with the intent to kill whoever was in the line of fire. The record does not contain any evidence to support such a conclusion.

The prejudicial errors on the attempted murder counts necessarily infected the deliberations on the counts for first degree murder. For Defendant's actions in shooting Brens, Davis, White, and Hill were indistinguishable in manner and circumstance from his shooting Hinojosai, Scarberry, and Graham, with the one exception that the former died and the latter did not. Given the error in instruction on attempted murder, it is reasonable to assume that the jury believed the difference between attempted murder and first degree deliberate premeditate murder is simply whether a person in the line of fire dies as a result of the shot.

When the evidence of the 90 seconds to two minutes of shooting on the first floor is analyzed free of the frightening and disturbing carnage that resulted, there is a dearth of evidence to support either the first degree deliberate premeditated murder counts or the attempted murder counts.

The defense position was that Defendant lacked the *mens rea* for deliberate premeditated murder in the first degree or attempted murder due to his mental illness and mental impairments. The mental illness defense was severely undercut from the start, however, due to the trial judge advising the jury that in his opinion expert psychological evaluations were entitled to little weight and that he was mentally associated Dr. Rubinstein with Gertrude Stein. Once the judge gave the mental illness defense the negative imprimatur of "mumbo jumbo," and that one of its principal proponents was

"Gertrude Rubinstein", the jury had its cue to ignore rather than consider evidence that explained Defendant's behavior as something other than the behavior of a vicious killer.

If the jury had any lingering doubts about whether to give the mental illness defense any weight in its consideration, such doubt would have been eliminated when Defendant's best friend, David Rewerts, was permitted erroneously to opine that Defendant hadn't ever been molested by Robert Brens and therefore was lying to the defense experts. The jury was permitted to hear Rewerts' highly damaging and incompetent opinion as to Defendant's veracity in speaking with the mental health experts. But the jury was not instructed to view Rewerts' testimony with caution since he risked implicating himself as an accomplice if he showed himself as instigating an attack on the school or understood that Defendant might have a concrete reason for desiring to act out on the school (i.e., that he had been sexually molested by a teacher.)

Once Rewerts testified that Defendant was lying to the experts about being sexually molested, no reason remained for any juror to spend any effort attempting to evaluate the testimony supporting Defendant's mental illness defense. Not only was that evidence "mumbo jumbo," it was predicated upon Defendant's lies to the experts.

If there was evidence to support the *mens rea* for the attempted murders and first degree deliberate premeditated murder, it came from two sources, neither of which is in the record on appeal but both of which were introduced into the proceedings in error.

First, it came from the prosecutorial misconduct in his guilt

argument pointing to Defendant's demeanor in the courtroom, which the prosecutor suggested showed lack of remorse, as evidence supporting Defendant's guilt – that he was cold-hearted and remorseless about his actions, and that conduct, not part of the evidence introduced in the case, demonstrated that he had planned and calculated the murders and attempted murders.

Second, that evidence may have come from what jurors believed they heard when the videotape of the interrogation and the hostage negotiation audio tapes were played. Due to the mistakes of the trial court, there is no record of what the jurors can be deemed to have heard when those tapes were played. Hence, if this appeal is to be decided on its merits it will be decided on the basis of unknown evidence introduced at trial. That unknown evidence is the evidence the jury almost certainly focused on in determining Defendant's state of mind on May 1, 1992.

While the record is silent as to the content of what the jurors can be deemed to have heard, the record speaks clearly as to the reliability of that evidence: The evidence was what each juror speculated or imagined they were hearing when the two sets of tapes were played. For the audio tapes, we know this because the trial judge himself characterized the tapes as largely unintelligible with occasional words that could be understood. It was left entirely to the speculation of each juror to decide what was unintelligible and what could be understood. It also was left entirely to the speculation of each juror who was speaking words they found intelligible.

With respect to the video tapes of the interrogation, the record demonstrates that different listeners hear different things being said on

the tapes. The parties have stipulated to many substantive changes to the transcription as heard by the prosecution's transcriber, and have further stipulated that those changes do not reflect a definitive transcript. While it is assumed that the Respondent will disagree with Defendant on the prejudicial impact of the stipulated changes, there can be no dispute that different people hear different words being spoken when they listen to the tapes. Different people listening also have different opinions about what words are intelligible and which are not. Further, different people listening have different opinions about whether words are being spoken by Defendant or by his interrogators. In sum, while we don't know what they heard, we do know that there is no basis to assume that what they believed they heard reliably tracked the actual words spoken at the time either set of tapes was recorded.

The jurors listened to each set of tapes without any transcript to aid them in deciphering what they were hearing. For the audio tapes, no transcript ever was produced at trial. For the video tapes, a transcript was provided to the jurors *for their deliberations,* but the jurors were instructed to rely on their memories of what they heard, not the transcript (Exhibit 89). For purposes of appeal we assume the jurors followed the judge's instructions and deliberated based on their recollections of their aural impressions from the tapes, not what was on the written transcript.

For those jurors who may have chosen to disobey the judge's instruction, they would have been relying on a transcript which the parties have stipulated is faulty in numerous respects and which even a cursory review will reveal prejudiced Defendant.

In combination, these errors in the guilt phase amount to a denial of fundamental due process rights. Defendant was convicted based upon evidence that is unknown to the reviewing Court, is necessarily a product of speculation, and cannot be reliably assumed to be authentic. In addition the jury was cued in that the trial judge had a low opinion of expert mental health evidence, erroneously permitted to hear Defendant's best friend say Defendant was lying to the mental health experts, and told by the prosecutor to use information outside the evidentiary record to find Defendant guilty of the crimes charged.

A fundamental issue infecting the entire prosecution arises from this Court's failure to adequately define the distinction between first degree deliberate and premeditated murder and murder in the second degree. Death eligibility requires a conviction of murder in the first degree. A person convicted only of second degree murder cannot be made subject to the death penalty. However, the quality and quantum of proof distinguishing deliberate premeditated murder from second degree murder as defined by this Court is both undefined and undecipherable. Defendant submits that the distinction between first degree deliberate premeditated murder and second degree murder, as construed and applied by this Court, renders the distinction void for vagueness.

The Eighth Amendment demands that the death penalty not be administered in a way that is cruel and unusual. Towards this end, the criteria that make defendants eligible for the death penalty—which in California are termed "special circumstances"—must "genuinely narrow the class of persons eligible for the death penalty and must

reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Romano v. Oklahoma* (1994) 512 U.S. 1, 7 (quoting *Zant v. Stephens, supra*, 462 U.S. at 877)). Eighth Amendment narrowing is also accomplished by the states' "constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) Thus, aggravating circumstances must not be unconstitutionally vague. See (*Tuilaepa v. California, supra*, 512 U.S. 967, 972.)

Although the Fifth Amendment also demands that laws not be unconstitutionally vague, the vagueness inquiry is not parallel to the Eighth Amendment analysis. Under the Fifth Amendment, due process is satisfied so long as "a penal statute define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (*Houston v. Roe* (9th Cir. 1999) 177 F.3d 901, 907 (citing *Kolender v. Lawson* (1983) 461 U.S. 352, 357.))

The difference between the constitutional inquiries applied under the Fifth and Eighth Amendments can be simply stated: the Fifth Amendment only looks for the existence of a line between the categories of murder, whereas under the Eighth Amendment, that line must be drawn in the right place—where capital murder is a small fraction of first degree murder.

In other words, a void-for-vagueness challenge under the Due Process Clause asks whether the statutory language distinguishes among classes of murder so that defendants have proper notice,

whereas a challenge under the Eighth Amendment's cruel and unusual punishment clause asks whether the statute sufficiently narrows the application of the death penalty. Compare *Kolender, supra,*, 461 U.S. at 357 (under due process, void-for-vagueness doctrine requires a penal statute to define criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement) and *Houston, supra*, 177 F.3d at 907 (with reference to a due process challenge, the "legislature and courts have created a thin but meaningfully distinguishable line") with *Godfrey v. Georgia*, , 446 U.S. 420, 427-28 (1980) (under the Eighth Amendment, capital sentencing scheme must provide a meaningful basis for distinguishing the few cases in which the penalty is imposed from the many cases in which it is not).

Defendant submits that the death qualifying convictions of first degree murder and the subsequent imposition of the sentence of death fail the vagueness tests under both the Fifth Amendment Due Process test and the Eighth Amendment due process test. Defendant's death eligibility cannot rest on evidence of conduct that is indistinguishable from conduct constituting murder in the second degree.

On this record the guilty verdicts cannot stand.

2. Cumulative Error in Sanity Phase

The same cumulating errors that vitiated any meaningful jury consideration of the mental illness defense in guilt carried over into the sanity phase, which could be seen as consisting entirely of "mumbo jumbo" speak. In the sanity phase, the trial judge's derision

of expert psychological evaluations would have tarnished not only the Defendant's expert, but the prosecution experts as well.

Each expert found Defendant suffering from serious mental illness and debilitating conditions. Significantly, both of the prosecution experts either accepted Defendant's description of his molestation by Robert Brens as true or were agnostic. Given that the jury had heard Rewerts declaim that the molestation was a lie, it is likely the jury felt that even the prosecution experts lacked credibility.

The additional instructional error in the sanity phase compounded the pre-existing prejudice by defining the test for insanity so as to logically negate a finding of insanity based upon a psychotic delusion – the very basis upon which Dr. Groesbeck had given his opinion that Defendant did not meet the second prong of the *M'Naughten* standard.

Defendant was entitled to have the jury deliberate the case for insanity on its merits. The compounded cumulative error in the trial denied him that right.

3. Cumulative Error in Penalty

In the penalty trial the errors that prejudiced Defendant's mental illness defense in guilt prevented the jury from giving appropriate weight to that evidence in mitigation of sentence. As the evidence of mental illness was the most significant evidence offered in mitigation, the errors that impaired its consideration, coupled with the prosecutor's direct reference to the judge's "mumbo-jumbo" remark, prevented any meaningful consideration of that evidence. Added to the error was the prosecutor's misconduct in twice

suggesting to the jury that Defendant's apparent lack of remorse should be considered in aggravation.

Under *Gardner v. Florida, supra*, the sentence of death must be vacated.

XIV. CONCLUSION

For the reasons set forth, Defendant respectfully urges this Court to reverse his convictions on guilt in their entirety and to vacate the sentence of death. In addition, the Court should find that the record contains insufficient evidence to sustain convictions on either the attempted murder counts or the four counts of first degree murder by deliberation and premeditation.

Dated: September 12, 2007

David H. Schwartz
Counsel for Defendant and
Appellant Eric Christopher
Houston

PROOF OF SERVICE BY MAIL

I, Joan W. Fong, declare:

I am over the age of eighteen and not a party to this action. My business address is One Market Plaza, Steuart Tower, Suite 1600, San Francisco, California 94105.

On September 12, 2007, I served the within

AUTOMATIC APPEAL FROM JUDGMENT OF DEATH

APPELLANT'S OPENING BRIEF;

CERTIFICATE OF COUNSEL PURSUANT TO RULES 8.208 AND 8.630(b)(2)

on the following persons in this action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully paid into the United States Mail at San Francisco, California, addressed as follows:

CALIFORNIA APPELLATE PROJECT 101 Second Street, #600 San Francisco, CA 94105	JULIE A. HOKANS, Esq. Office of the California Attorney General 1300 "I" Street, #125 P. O. Box 944255 Sacramento, CA 94244-2550
SUPERIOR COURT OF CALIF. COUNTY OF NAPA Criminal Division 1111 Third Street Napa, California 94559-3001	SUPERIOR COURT OF CALIF. COUNTY OF YUBA (Criminal Division) 215 Fifth Street Marysville CA 95901

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September ~~12~~ 13, 2007 in San Francisco, California.

Joan W. Fong

Joan W. Fong