SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, Vs. **DANIEL GARY LANDRY** Defendant and Appellant.	S100735 **AUTOMATIC APPEAL** (San Bernardino County Superior Court, Case No. FCH-02773)

ON AUTOMATIC APPEAL FROM THE SUPERIOR COURT,
STATE OF CALIFORNIA, COUNTY OF SAN BERNARDINO,
THE HONORABLE PAUL M. BRYANT, PRESIDING

APPELLANT'S OPENING BRIEF
(Volume One Of Three, Pages 1-136)

DONALD R. TICKLE
State Bar No. 142951
P.O. Box 400
Volcano, CA 95689-0400
(209) 296-4536 (voice & facsimile)
E-mail: drt@volcano.net

Attorney for Defendant-Appellant
DANIEL GARY LANDRY

DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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Plaintiff and Respondent,	]	**AUTOMATIC APPEAL**
Vs.	]	(San Bernardino County Superior Court,
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Attorney for Defendant-Appellant
DANIEL GARY LANDRY

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THE PEOPLE OF THE STATE OF CALIFORNIA	]	S100735
Plaintiff and Respondent,	]	(San Bernardino County Superior Court,
Vs.	]	Case No. FCH-02773)
DANIEL GARY LANDRY	]	**APPELLANT'S OPENING BRIEF**
Defendant and Appellant.	]	**(Automatic Appeal)**

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (California Rules of Court, Rule 8.600, subd. (a); Penal Code, § 1239, subd. (b); subsequent references to statutes are to the Penal Code unless specifically noted otherwise.)

STATEMENT OF THE CASE

On July 27, 1998, the San Bernardino County District Attorney by information charged appellant Daniel Gary Landry with four felonies: Count 1, on or about August 3, 1997, the willful, deliberate and premeditated murder (Penal Code, § 187, subd. (a); Count 1) of Daniel Addis ("Addis"); Count Two, the related capital charge of a fatal assault with a deadly weapon on Addis by a life prisoner with malice aforethought and by means of force likely to produce great bodily injury (Penal Code, § 4500; Count 3, on or about September 18, 1997, assault with a deadly weapon on Joseph Matthews by a

life prisoner with malice aforethought and by means of force likely to produce great bodily injury (Penal Code, § 4500); and Count 4, on or about October 15, 1997, custodial possession of a prison made stabbing weapon (Penal Code, § 4502). (1 Clerk's Transcript ("CT") 42-48.)

With respect to Counts 1, 2, and 3, the information alleged that appellant personally used a deadly and dangerous weapon (a knife). (Penal Code, § 12022, subd. (b)(1)). (1 CT 43.) With respect to all counts, the information alleged two theft-related burglaries as prior serious felony convictions (Penal Code, §§ 667, subd. (b)-(i), 1170.12, subd. (a)-(d)). (1 CT 46-47.)

Before trial, the court denied appellant's motion to sever trial of Counts 3 and 4. (2 CT 512-13.)

On March 5, 2001, a jury trial commenced, the Hon. Paul M. Bryant, presiding. (2 CT 545-46, 571-72.) On April 20, 2001, the jury found appellant guilty as charged of the four counts and found true all sentencing allegations. (4 CT 915-924.)

On May 2, 2001, the penalty phase trial commenced. (4 CT 957-58.) On May 25, 2001, the jury decided that the penalty for Count Two should be death. (4 CT 1048-49.)

On September 11, 2001, the trial court denied appellant's automatic motion to modify the death verdict (Penal Code, § 190.4, subd. (e)) and sentenced appellant to death for Count 2 (Penal Code, § 4500). (4 CT 1063.) For Counts 1, 3, and 4, the court stayed (Penal Code, § 654) an aggregate term of 129 years-to-life as follows: for Count 1, first degree murder, a "three strikes" term of 75 years-to-life (Penal Code, §§190, subd. (a), 667, subd. (e)(2), 1170.12. subd. (c)(2)), plus a one-year term for the weapon enhancement (Penal Code, § 12022, subd. (b)(1); 14 RT 3596-3597; 4 CT

consecutive "three strikes" term of 25 years-to-life, plus 3 years for use of a knife (Penal Code, § 12022, subd. (b)(1); 14 RT 3597); for Count 4, custodial possession of a weapon (Penal Code, § 4502, subd. (a)), a consecutive "three strikes" term of 25 years-to-life. (14 RT 3597.) In addition, the court imposed a $10,000 restitution fine (Penal Code, § 1202.4) and stayed a parole revocation fine in the same amount (Penal Code, § 1202.45). (14 RT 3596; 4 CT 1063.)

STATEMENT OF FACTS

I. The Prosecution's Guilt Phase Case.

A. The Addis Homicide (Counts 1 And 2).

1. The Assault On The Prison Exercise Yard.

On the morning of Sunday, August 3, 1997, correctional officers Frank Esqueda and David Bisares were assigned as the officers for the tower overlooking the four exercise yards at Palm Hall, the maximum security unit at the California Institution for Men ("C.I.M."), the state prison in Chino, California. (5 RT 1057-60.) They searched the yards for weapons before any prisoners were placed on the yard. Other officers conducted a visual strip search of each inmate at his cell. They also instructed the inmate to squat and cough in order to determine whether the inmate was trying to smuggle an item in his rectum. After the inmates dressed in shorts and a T-shirt, each walked through a metal detector on the tier. At the "sally port" leading to the exercise yard, an officer conducted a hand search of the inmates' shorts, T-shirts, and shower towels. Finally, an officer searched each inmate with a hand held metal detector just before the inmate's handcuffs were removed and he was released onto the exercise yard. (5 RT 1069-70; 1115-1118.)

Yard Two at Palm Hall was a "control compatible white yard" where only white inmates were allowed. (5 RT 1066-67.) On the morning of August 3, 1997, Officer Rosamaria Maldonado was the gate officer who individually

released 12-15 inmates onto Yard Two after removing their handcuffs. (5 RT 1070-71, 1074-75.) Most of the inmates were members of the "Nazi Low Riders" ("NLR"), the "Aryan Brotherhood" ("AB"), or the "Skinheads" prison gangs. A few, including Daniel Addis ("Addis"), were unaffiliated with any group. (5 RT 1067-68, 1182.) After all four exercise yards had been filled, Officer Esqueda from the guard tower heard inmate Gary Green[1] ("Green") yelling at Officer Maldonado, "'What's with the youngster Addis? Is he coming out? Bring him out." (5 RT 1148.)

Green was a member of the NLR and AB and the "shot caller" for the white inmates at Palm Hall, which meant that he was the person who had power over the white inmates. (5 RT 1133.) Green continued to shout at Officer Maldonado as he paced back and forth in a very agitated manner. (5 RT 1148.) Green "wanted to see the sergeant. It wasn't right, or something, that the youngster stay in." (5 RT 1079-80; 1134-35, 1164-65.) Officer Maldonado told Green that she did not know if Addis was going to come out and Green yelled, "'I want to talk to the f'ing Sergeant, the youngster has to come out.'" (5 RT 5148.)

Officer Esqueda had never before heard an inmate demand to have another brought out to the yard. (5 RT 1140.) At about 9:30 a.m., shortly after Green demanded to talk to the sergeant, Addis was escorted onto the yard. (5 RT 1148.) Despite calling for Addis to be brought out to the yard, Green did

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1. In documents produced by the prosecution, both "Green" and "Greene" are used to refer to this inmate. For example, a 1995 abstract of judgment from San Bernardino County refers to "Gary Edward Greene." (1 CT 186.) However, an abstract of judgment form Tulare County refers to him as "Gary Edward Green." (1 CT 189.) In documents admitted in evidence relating to the Addis homicide, the Department of Corrections referred to him as "Green". (*See, e.g.*, Exh. No. 51, 4 CT 1150-51; Exh. No. 561161-63.) At trial, the court reporter also transcribed his name as "Green." (*See, e.g.*, 5 RT 1148, foll.) Appellant will therefore use the surname "Green" to refer to this inmate.

not greet him after he arrived. The fact that the shot caller did not greet Addis indicated that Addis was not well received by the other inmates on the yard and raised a concern for his safety. (5 RT 1143-44.) Officer Esqueda had a telephone in the watch tower and he could have called the sergeant to freeze or shut down the yard or to remove an inmate from the yard. (5 RT 1141-42.)

Addis went and lined up with the other inmates on the yard. Green then led the inmates in exercises before they broke up to engage in activities such as handball and playing cards. (5 RT 1080-83, 1133-34; 6 RT 1275-76.) At around 11:15 a.m., Officer Esqueda saw Green, Addis, and appellant standing by the shower area on the yard. Green shook Addis's hand and told him, "'It's all right, Danny. Go ahead and play cards." (5 RT 1084.) Addis then went to the card table and started playing cards with other inmates. (5 RT 1084-85; 1138-40.) Green and appellant walked over and stood behind Addis on his left side, with appellant closest to Addis. (5 RT 1100.)

Officer Esqueda did not see any indication of a problem between Addis and Green or appellant. (5 RT 1100-1101.) Former inmate Ricky Rogers, who was playing cards with Addis, heard appellant ask Addis about another inmate who used to be housed on the third tier. It was a friendly conversation where no hostile words were spoken. (6 RT 1281-82.) Former inmate Richard Allen who was near the card table heard Addis "having words" and that appellant sounded angry, but Allen could not hear what was said. (5 RT 1247-48.)

A few minutes later, Officer Esqueda "saw a sudden movement with the left hand from inmate Landry to Addis' neck. ... A quick, stabbing-type movement." (5 RT 1085-86; 1100-1101.) Inmates Allen and Rogers saw the same thing from the yard. (5 RT 1234-35; 6 RT 1281-82.) Addis stood up and grabbed his neck, which started bleeding profusely. He staggered a few feet away from the card table and collapsed onto the ground. (5 RT 1086, 1094-95,

1170-75, 1237-38; 6 RT 1282-83.) Officer Esqueda sounded the yard alarm and ordered everybody on the yard to get down. Everyone complied except appellant and Green, who both ran away from the card table. Officer Esqueda again ordered them to get down and discharged one wooden block from his 37 millimeter block gun after which appellant and Green went face down on the yard. (5 RT 1086-88.)

An inmate manufactured stabbing weapon fell in front of appellant and there was blood on his left hand. The weapon was fashioned from flat metal stock, about five inches long, and sharpened to a point. (5 RT 1087, 1261; 6 RT 1315-17; Exh. Nos. 8 & 29.) In the shower area amidst some towels, Officer Esqueda later found a sheath made from cardboard wrapped with cellophane. (5 RT 1107-08.) It was common knowledge that inmates smuggled items like the weapon by "kiestering", *i.e.*, wrapping them in plastic and putting them in their rectum. It was possible to squat and cough without losing the item during an unclothed body search at an inmate's cell. (5 RT 1244-46.)

Multiple correctional officers responded to the yard alarm to remove Addis for medical treatment. (5 RT 1103.) Addis lost consciousness before he was carried out of the yard and he died in the ambulance en route to the prison hospital. (5 RT 1177-79; 8 RT 1825, 1848-51.) An autopsy performed two days later on August 5, 1997, determined that the cause of death was a stab wound to the neck that cut the internal jugular vein and the subclavian vein which caused massive bleeding into the chest cavity. (6 RT 1370, 1386-87, 1389; Exh. No. 49, 4 CT 1144 [autopsy drawing].)

As appellant lay on the ground in the yard after the stabbing, he was laughing and smirking. (5 RT 1154, 1180; 8 RT 1908-09.) Inmate Allen said to appellant, "'I don't' think he's going to make it, Smurf", referring to appellant by his nickname. Appellant laughed. (5 RT 1243-44.) Green called

out orders to the other inmates, telling them "'Do what they tell you. Don't get involved.'" (5 RT 1181.) Officers took the inmates off the yard to an interview room and individually questioned them. However, "the word came through, you know, from the guys, 'Everybody say 'No comment.'" (6 RT 1286-87.) A tablet in the interview room showed that everybody said "no comment." (6 RT 1288.)

After the stabbing, officers put appellant into a single cell in Cypress Hall, the administrative segregation unit in next to Palm Hall at C.I.M. (6 RT 1325-26.) On August 17, 1997, appellant called Officer Larraine Rounds over to his cell. (8 RT 1901-1903.) Appellant told her to tell the lieutenant in charge that if he was not moved from the back of the segregation unit he would "go off", "bang the rails" and plug his toilet and flood the tier. Officer Rounds told appellant that his actions would not get him moved because there was an on-going investigation into the death of Addis. (8 RT 1904-06.) Appellant interrupted her and said , "'I killed him, so I confessed I killed him. The investigation is over.'" (8 RT 1906-07.)

2. The Background To The Homicide.

Several correctional officers and inmates testified about the background to the assault on Addis. On May 27, 1997, Addis committed a battery on a correctional officer and he was put into administrative segregation at Cypress Hall. (6 RT 1423-25; Exh. No. 46, 4 CT 1159 ["Inmate Segregation Record"]; Exh. No. 65, 5 CT 1225-26.) On July 1, 1997, officers moved Addis from administrative segregation and placed him on the third tier of Palm Hall where they housed the "high-powered" white gang members. (5 RT 1066-67, 1136; 6 RT 1419-20; 8 RT 1784; 4 CT 1122-1123, Exh. No. 45 [inmate movement record].) However, Addis was not affiliated with any gang and he was an outsider amongst the group with power on the third tier. (7 RT 1595-96; *see also* 6 RT 1273-74; 8 RT 1782-83.)

Addis remained on the third tier until July 15, 1997. (6 RT 1419-20; Exh. No. 45; 4 CT 1122-1123.) On that date, Addis got the attention of Steve Kaffenberger, a housing officer, as he passed by Addis's cell. Addis said, "'Kaff, I need to get off the tier.'" (7 RT 1593-94.) For safety, Kaffenberger handcuffed Addis and escorted him down the tier to a holding tank to ask him why he needed to come off the tier. Addis said he had done something he should not have. He "had taken some tobacco from the woodpile, which would be whites, and that is a no-no." (*Ibid.*; 5 RT 1184 ["Mr. Addis was tapping into the kitty when he wasn't supposed to."].) Officer Kaffenberger informed Sergeant Perez that he needed to interview Addis because stealing tobacco could lead to an inmate being assaulted or beaten. (7 RT 1594-95.)

At Palm Hall, the sergeants maintained a daily sergeant's log book to communicate important information to the sergeants on other work shifts. (6 RT 1398-99.) The July 15, 1997, log book entry by Sergeant Perez stated that Addis was "'told to roll-off tier apparently because he stole two smokes when they were being passed down the tier.'" (Exh. No. 52; 4 CT 1152-53, original emphasis; 6 RT 1400.) In prison parlance, "rolling off the tier" meant that an inmate had been told to leave for his safety. (7 RT 1600-1601.) For this reason, officers the next day (July 16, 1997) moved Addis from Palm Hall to a single cell in administrative segregation in Cypress Hall. (5 RT 1166, 1168; 6 RT 1400, 1420; 4 CT 1123-24, 1128, Exhibit 45 ["Movement of Inmates"].)

Tobacco was illegal in state prison, but it nevertheless functioned as "almost a currency" amongst the inmates. (5 RT 11958.) It was common practice to have someone of lower status hold tobacco because inmates of higher status wanted to avoid the trouble of holding contraband. However, the tobacco belonged to the tier and it was controlled by the shot-caller on the tier. (5 RT 1185-86.) If an inmate stole tobacco, he put himself in danger and, if he did not follow orders, he put himself in even great danger. (5 RT 1187-88.)

The inmate would be in danger on the exercise yard, even if he was classified as yard eligible. (5 RT 1188-89.)

Every 30 days, a classification committee determined whether an inmate was eligible for time on an exercise yard. (7 RT 1664-65.) Addis's file showed that he had numerous enemies in prison and that he had previously requested protective custody. (7 RT 1672.) On July 30, 1997, a classification committee noted that on July 4, 1997, Addis was found guilty of assaulting a prison staff member. (Exh. No. 65, 5 CT 125-26.) Addis expressed no concerns at the classification hearing and the committee decided that he should continue to be eligible for yard time. (*Ibid.*; 7 RT 1665-66, 1669-70.) On July 31, 1997, officers moved Addis back to Palm Hall, but put him in a single cell on the first tier rather than on the third tier with the other white inmates. (6 RT 1422-1423; 4 CT 1125, Exh. No. 45; 4 CT 1160, Exh. No. 54.) However, the same exercise yard was used for all the white inmates at Palm Hall. (5 RT 1066-67.)

On August 3, 1997, most of the officers on duty at Palm Hall knew that Addis had rolled off the third tier, including Officer Esqueda, the tower officer assigned to monitor yard two, Sergeant Sams, the senior officer on duty, and other officers on duty that day. (5 RT 1136-37 [Officer Esqueda]; 5 RT 1182-83 [Officer Valencia]; 6 RT 1323-24 [Sergeant Sams]; 7 RT 1630-32 [Officer McAlmond]; 8 RT 1784-85 [Officer Ginn].) Officer Esqueda explained that rolling off the tier was also known as "raising your hand." It meant that Addis did not want to hang out with the group on his tier any longer, which typically occurred because the inmate had gotten in trouble with the group. (5 RT 1136-37.)

The inmates also knew and understood the significance of Addis rolling off the tier. Former inmate Richard Allen was on the yard at the time of the assault and he knew that Addis had recently rolled off the tier. Within prison

culture, an inmate who left the tier for any reason other than parole, court, or a transfer, was "considered a PC [protective custody] rat, and there's a good chance they will try to take your life for that." (5 RT 1248-49.)

On the morning of Sunday, August 3, 1997, Sergeant Arioma Sams was the senior officer on duty at Palm Hall. (6 RT 1304, 1337-38.) At the morning briefing before they started putting inmates on the yard, "officers or staff were telling me that [Addis] might not be in favorable conditions to go there." (6 RT 1324, 1333-35, 1337-38.) After Addis demanded that Addis be brought to the yard, Sergeant Sams instructed Officer Timothy Ginn to go and ask Addis if he wanted to go to the yard. (6 RT 1323-24.)

Officer Ginn knew that Addis had rolled off the third tier, which made him think that "something was wrong up there, because we had space up there" and he had been up there. (8 RT 1784-85.) Officer Ginn told Sergeant Sams that "'Addis is the guy that was up on the tier before but got a bed move to the other side. If he goes out, I think he may – get beat up,' because Addis was one of those guys who just ... didn't fit with the other white guys." (8 RT 1778.) Sergeant Sams responded, "'Well, our hands are tied. Addis has classification. His status has changed, and he has a right to go to the yard if he wants to.'" (8 RT 1779.)

Officer Ginn went and told Addis "'you have been cleared, Addis. Do you want to go to the yard?'" Addis said "'Yeah.'" As Ginn handcuffed Addis, he told him "'Look, man, you don't have to go if you don't want to.' He said, 'No. Fuck that. I want to go.' I opened the cell, took him out, and then I escorted him out to" Officer Maldonado at the yard gate. (*Ibid.*) Officer Ginn thought that Addis might get beat up, "punched around, something like that ...." (8 RT 1782-83.)

After Addis was stabbed, Ginn wrote an incident report. He did not mention his conversation with Addis. (8 RT 1794-95; *see* Suppl. CT 1

[8/03/97 DCD-827-C, Crime Incident Report by Correctional Officer Ginn].) Sergeant Sams prepared four reports related to the Addis homicide. (6 RT 1328-1330.) None of those reports mentioned his conversation with Officer Gin or that Addis had said that he wanted to go to the yard. (6 RT 1331-32.) That conversation was first reported during trial on March 13, 2001, when Correctional Officer David Lacey, who investigated the homicide and attended the trial, telephoned Sergeant Sams. During their conversation, Sergeant Sams for the first time said that he had sent Officer Ginn to ask Addis whether he wanted to go to the yard. (6 RT 1332-33; Exh. No. 48; 4 CT 1142-1143.)

Officer Laramie McAlmond testified that he overheard one or two officers questioning Addis about how he felt about going to the yard. Addis said "everything is fine, everything is worked out. I'm okay going to the yard. Addis said something like "everything is squashed, ... all the problems are worked out." Inmates use the term "squashed" when a problem is settled. (7 RT 1625-26.) On August 3, 1997, Officer McAlmond wrote a report about the assault on Addis. He did not mention that he overheard a conversation between Addis and other officers before he was placed on the yard. (7 RT 1630.) He first mentioned this when he was called by investigator Lacey during trial and about a week before he testified. (7 RT 1630-32.)

After Officer Maldonado put Addis on the yard, she told Sergeant Sams that the inmates had really wanted him out on the yard. (6 RT 1341-42.) However, Sergeant Sams had "no idea" why Maldonado told him this. "I just thought they wanted him out to the yard." (6 RT 1342-43.) It was not unusual for inmates to make demands. (6 RT 1309-10.) Sergeant Sams was not concerned about Addis's safety because Addis had not said anything on his way to the yard and he had gone to the yard without incident on the preceding Thursday. (6 RT 1344.) However, if the other inmates were not "receptive" of Addis, it meant that "something wrong" and Addis was in danger. (6 RT

1351.)

Sergeant Sams knew from the morning briefing that the other inmates might not be receptive to Addis and that something might occur if he went to the yard. (6 RT 1352-53, 1354.) He had "probably" read the entry in the sergeant's log book and been told that Addis had rolled of the tier for stealing tobacco. (6 RT 1400-1401.) He knew that meant other inmates had told Addis to move for his own safety. (6 RT 1402.) Officer Ginn had also told him that Addis might not be accepted on the yard. (6 RT 1404-405.) Nevertheless, Sergeant Sams did not stop Addis from going to the yard because he was classified as yard eligible and he did "not express a concern for his safety, a concern for his life." (6 RT 1406.)

However, Officer Esqueda testified that even if an inmate is classified as yard-eligible, an officer may stop him from going to the yard if he has reason to believe that the inmate is in danger and even if the inmate does not express a concern for his safety. (5 RT 1151-52.) Officer Valencia agreed. (5 RT 1188-89.) Moreover, if a shot caller demanded officers to bring the inmate onto the yard, Officer Valencia testified that in his experience, "[w]e would not bring an inmate down" and put him on the yard. (5 RT 1190.) A tower officer also had the authority to stop an inmate from going onto the yard if the situation looked bad for the inmate. (5 RT 1152-1153.)

On September 26, 1997, Sergeant Sams charged Green with a rules violation for his role in the in the assault on Addis. He stated: "On 08-03-07, you were involved in a Conspiracy to assault Inmate ADDIS, which resulted in his death. Information received indicates that you ordered the 'hit' on ADDIS, and that you were adamant about his arrival to the yard on that date." (Exh. No. 51, 4 CT 1150-51.) "It should be noted, GREEN has physically and verbally acknowledged to the Palm Hall Staff that he was, at the time of the ADDIS' assault and subsequent death, the 'shot caller' for the white inmate

population within Palm Hall. Furthermore, documentation in GREEN'S C-File confirm[s] that GREEN is a validated member of the white supremacists prison gang NLR (Nazi Low Rider)[.]" (Exh. No. 50, 4 CT 1147.)

On October 10, 1997, officers conducted a hearing with Green on the allegations in the rules violation report. (Exh. No. 50, 4 CT 1145.) Green pled not guilty and stated that he had "'no comment'" on the charge. (*Ibid.*) The lieutenant in charge found that Green "was involved in a conspiracy to assault ADDIS which resulted in his death. Information received indicates that GREEN ordered the 'hit' on ADDIS." (*Ibid.*) Green was found to have violated "CCR 3005(c) Force and Violence, specifically, Conspiracy to Commit Battery Resulting in the death of Inmate ADDIS, Daniel E-82882." (Exh. No. 50, 4 CT 1146.) The lieutenant gave Green a "warning" and "a reprimand", assessed 360 day credit forfeiture, and referred Green to the Institutional Classification Committee for program review and to the Board of Prison Terms for in-custody rule violations. (*Ibid.*; 6 RT 1416.) Sergeant Sams did not recommend that Green receive a Security Housing Unit ("SHU") term or any other form of special confinement. (6 RT 1417.)

Twenty days later, on October 30, 1997, Green was paroled from state prison. (6 RT 1419; Exh. No. 53, 4 CT 1157.) Sergeant Sams worked with Officer Maldonado for 3-5 months after the Addis homicide. He learned that she was having problems with officers on the unit, but he did not know that other officers had labeled her a snitch. (6 RT 1438-39.)

B. Expert Testimony Related To Prison Gangs.

Glen Willett, a "Senior Special Agent" for the "Special Services Unit" of the Department of Corrections, also know as "Law Enforcement Investigation Unit", testified as the prosecution's expert on prison gangs.[2] (7

2. Effective July 1, 2005, the Department of Corrections was re-named the Department of Corrections and Rehabilitation. (Penal Code, § 5000.)

RT 1719-1720.) In October 1998, Mr. Willett was assigned to track NLR gang members. (7 RT 1722.) Prior to that, his duties included investigation of white prison gangs such as the NLR and AB. (7 RT 1724-25.) For a long time, the AB controlled the white sub-culture within all the prisons of the Department of Corrections. However, by the early 1980's, AB gang members had been placed in SHUs and they no longer had the run of the prison yards. (7 RT 1725.)

The AB turned to the NLR to act as foot soldiers and to carry out the role AB could no longer perform because they had been locked up in SHUs. This continued until 1998, when the Department of Corrections designated the NLR as a prohibited prison gang and also locked up its members in SHUs. Prior to that time, NLR gang members mixed with the general prison population unless they individually did something that required placement in a SHU or administrative segregation. (7 RT 1725-26.)

When the NLR was active in the general population of white inmates, "you go along with the program or you get off the tier. Or you get off the yard." (7 RT 1729.) The NLR or AB would retaliate against an inmate who did not cooperate with the gang's program or showed disrespect. (7 RT 1730.) On the yard, the NLR required the inmates to line-up in formation for exercises and would have a roll call where they would call out the name of everybody who was in good standing. (*Ibid.*) Green led the exercises on the yard the day that Addis was killed. Appellant had occasionally led exercises. (5 RT 1228-29; 6 RT 1275-78.) Someone who led exercises was either a high ranking or a well respected NLR member. (7 RT 1730, 1740-41.)

In prison, stealing cigarettes from other inmates was enough to get an inmate killed. Rolling off the tier was considered a sign of weakness. An

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Appellant will use the former name because that was the name in effect at the time and used at trial and in the documents admitted in evidence.

inmate was in danger if did something he should not have done, or failed to do something he had been asked to do. (7 RT 1730-31.) Gang members or people associated with a gang may also kill for no reason in order to gain status within the gang. It showed that the inmate was "down for" the gang, *i.e.*, in support of the gang's philosophy. (7 RT 1732.) An experienced officer, such as a sergeant at Palm Hall, would understand the significance of an inmate rolling off the tier. He would also know that if an inmate stole something from a group of inmates thought to be gang members that the inmate person could be in serious danger. (7 RT 1742-43.)

AB gang members primarily used a shamrock or "666" as an identifying tattoo. They also used "Sinfin" to identify with the Irish Republican Army and to reflect a pledge of loyalty for life. (7 RT 1727-28.) Appellant had "Sinfin" and "Irish Pride" tattooed on his wrists and a caricature or a man with a shamrock tattooed on his stomach. (Exh. Nos. 11 & 36.) In Willett's opinion, these tattoos showed an affiliation with the AB. (7 RT 1732-33.) A tattoo was not mandated for NLR members. Therefore, the absence of a tattoo did not necessarily mean that someone was not an NLR member. (7 RT 1733-34.)

To monitor prison gangs, the Department of Corrections intercepted letters written by inmates. Over appellant's objection (see Argument Section IV., below), the prosecution presented evidence of two letters alleged to have been written by appellant to Joseph Lowery ("Lowery") a well-known and high-ranking NLR gang member with the street name of "Blue." (7 RT 1754.) The first letter was dated September 9, 1997, and alleged to be from appellant in administrative segregation at Cypress Hall, C.I.M., to Lowery at the San Bernardino County West Valley Detention Center. (See 5 CT 1227-1230, Exh. No. 66.) In Willett's opinion, the September 9, 1997, letter showed that appellant identified with white supremacist prison gangs because it included the phrases "dawg o' mine", "brother", and "comrade" which were gang terms.

(7 RT 1734-35.)

The second paragraph of the letter stated, "Yeah, this 187 kinda put me at ease, had to earn it, bein in prison for nothin', ain't happenin. Tell all I'm of pure and sound mind." (5 CT 1228.) The "187" was a reference to the Penal Code section for murder. In Willet's opinion, appellant was referring to the Addis homicide because the only murder attributed to appellant was that homicide. (7 RT 1735-36, 1753-54.) The phrase about being of pure and sound mind was an expression used by white supremacist gangs. Appellant's status would be elevated if he committed a murder and he was trying to get into the AB. (7 RT 1736-37.) The letter also stated that "this punk decides to disrespect me and threaten me harm, what nerve? Guess he came up short." (5 CT 1228.) In Willett's opinion, this was white supremacist parlance and indicated that someone had disrespected appellant's status or manhood. (7 RT 1744-45.) Assuming that the letter referred to Addis, it also indicated that Addis had threatened appellant. (7 RT 1755-56.)

The second letter, dated December 22, 1997, was alleged to be from appellant to Lowery with appellant signing the letter using his nickname of "Smurf". (5 CT 1231-1234; Exh. No. 67; 7 RT 1737.) The letter contained the expressions "'homey'", "'the KGB has been befuddled once again'", and "'O.K. then dawg o' mine, I hope this finds you in good health and strong mind'". In Willet's opinion, those expressions indicated an NLR affiliation. (7 RT 1737-38, 1740.) The letter also referred to NLR gang member Green by his nickname of "Mop" and to "Mr. Hayes", an AB gang member at Pelican Bay State Prison. (7 RT 1738-39.) Appellant was celled with Green at the time of the assault on Addis. (4 CT 1136.) This indicated that appellant was in good standing with the NLR shot-caller. (7 RT 1741.) As of August of 1997, the Department of Corrections had validated Green but not appellant as NLR gang members. (7 RT 1742.)

C. The September 18, 1997, Assault On Inmate Joseph Matthews (Count 3).

On September 18, 1997, medical assistant Jeffery Killian was dispensing medications in the administrative segregation unit of Cypress Hall at C.I.M. (6 RT 1508-1510.) Under prison security practice, the cell ports should have been opened and closed individually as medications were dispensed from cell to cell. However, Killian asked the floor officer to open several ports at one time and they were left open as Killian dispensed medications down the tier. (6 RT 1497-99, 1509-1510.) Killian had just given medication to appellant when officers Angel Perez and Michael Lourenco passed by with inmate Joseph Matthews. The officers were escorting Matthews back to his cell with his hands cuffed behind his back after Matthews had showered. (6 RT 1468-69, 1471-73, 1510-11, 7 RT 1524-26, 1532-34.)

Appellant asked Matthews, "'Joe want a cigarette?" Matthews ran over to appellant's cell and turned to reach his hands up to the port hole on the cell door. (6 RT 1474-76.) Matthews said "'I'm cut.'" Officer Lourenco grabbed Matthews and saw that he had been cut along the upper left side of his torso. (*Ibid.*; 1492-94; 1510-1513; 7 RT 1524-25, 1532-34.) The officers did not see a cigarette. In any event, Matthews would not have been allowed to keep one because smoking was not allowed in prison. (6 RT 1485-86; 7 RT 1540-41.) Afterwards, the officers heard the sound of a toilet flushing from appellant's cell. (6 RT 1476, 7 RT 1536-37.) The cut on Matthews' left torso was 7-8 inches long and fairly deep. It appeared to have been made with a razor blade. Killian gave first aid to Matthews and someone called for an ambulance because the cut required stitches. (6 RT 1514-15.)

Former inmate Matthews testified while on "lithium", a psychotropic medication which affected his memory. (7 RT 1606-07.) He knew appellant

as "Smurf". (7 RT 1608-09.) When he backed up to appellant's cell port, he got cut as appellant placed a cigarette in his hands. (*Ibid.*) Matthews believed that he had received 14 stitches for the cut and he now had a scar by his left ribs. (7 RT 1609-1610.) Matthews did not remember being interviewed by investigating Officer Lacey after the incident on October 2, 1997, because he was on a lot of psychotropic medications at the time. (7 RT 1611-12, 1756.)

Officer Lacey's notes from the interview indicated that Matthews said: "'I turned around to walk to my cell. Out comes Mr. Razor Blade on a toothbrush.' ... 'I saw it where he threw it in the trash.'" (7 RT 1699, 1757-58.) Lacey testified that inmates sometimes refer to the toilet as the trash. (7 RT 1758-59.) Matthews felt like the incident was a set-up. "That I was put in a position for it to happen." Escorting officers would not usually let an inmate make contact with anybody. (7 RT 1613-14.) The month before, Matthews had gotten in trouble for assaulting an officer as the officer tried to break up an incident between Matthews and another inmate. (7 RT 1614.)

D. <u>The October 15, 1997, Weapon Possession (Count 4).</u>

At around 11:00 a.m. on October 15, 1997, correctional officers Lopez and Flores conducted an unclothed visual body search of appellant in his cell in administrative segregation at Cypress Hall, C.I.M. (7 RT 1563-65, 1584-85.) After appellant had put his clothes back on and he had been handcuffed through the cell port, the officers slid open the cell door to take appellant to exercise on the tier. Apiece of metal in the shape of a dagger fell from above onto the concrete floor. (7 RT 1565-67, 1585-86.) The dagger was made from aluminum, about 1¾ inches long, and sharpened at both ends. (7 RT 1569-72, 1578-79.) After Officer Lopez picked up the weapon, Officer Flores looked at appellant and he shrugged and smiled. (7 RT 1586.) The officers secured appellant in the shower area and then searched his cell. They found a razor blade on the back rim of the toilet. (7 RT 1567-69, 1587-88.) The razor blade

appeared to be from the type of razor issued to inmates at C.I.M., but which the inmates were not allowed to keep after use. (7 RT 1572-73, 1587-88.)

II. The Defense's Guilt Phase Case.

A. Evidence From Officer Maldonado About The Circumstances Of The Addis Homicide.

The defense called as it's first witness, former correctional officer Rosamaria Maldonado. She had been employed as a correctional officer from 1990 until June 1998, when she took worker's compensation because of stress related to the Addis homicide. (8 RT 1801, 1859-60, 1873.) On August 3, 1997, she was on duty as the gate officer for the Palm Hall exercise yards. (8 RT 1801-02, 1832-34.) She knew Green as the shot caller for the white inmates on the third tier. After Green arrived on the yard, he started demanding that Addis be brought out onto the yard. (8 RT 1805-07.) Maldonado told Green to leave her alone and let her do her job. However, Green kept demanding for Addis as Maldonado put inmates onto the other yards. Green told her he needed to talk to the fucking lieutenant or sergeant. (8 RT 1807-09.) Green "was agitated. He wanted ... [Addis] to come out." (8 RT 1809.) Appellant did not bother Maldonado about getting Addis onto the yard. (8 RT 1845-46.)

Maldonado went into Palm Hall and asked whether Addis was coming out. (8 RT 1809.) When Addis appeared, Maldonado thought that he might have safety issues if he went out to the yard. (8 RT 1812.) She told him, "'You must be packing for them because they're dying to see you.'" (8 RT 1812-13.) By that, Maldonado meant that Addis must be hiding drugs or a weapon. Addis just looked at her and smiled and Maldonado put him out onto the yard. (8 RT 1843-44.) When Addis got on the yard, none of the other inmates greeted him except for Richard Allen, whereas all the inmates would normally greet someone who entered the yard. (8 RT 1814-15, 1844-45.)

Green just nodded at Addis, indicating that he should go line up with the rest of the inmates for exercises. (*Ibid.*)

Sergeant Sams was the duty sergeant that day. When Maldonado walked back to the landing, she told him, "'You know, Sarge, they're going to take him out.'" (8 RT 1815-17; Exh. No. 68, 5 CT 1235.) She meant that Addis would be hurt and possibly killed. Sergeant Sams responded, "'Come on, we got a lot of work to do.'" (*Ibid.*) Sergeant Sams and Officer Maldonado then left the area and went to do cell searches. (8 RT 1816.) About two hours later, a little after 11:00 a.m., Maldonado heard a gas launcher fired and ran back to the entrance to the yard. She saw Addis on his knees with one hand on the ground and the other holding his neck, which was bleeding profusely. (8 RT 1822, 1835-36.) Maldonado participated in removing Addis from the yard to an ambulance. He died as she gave him C.P.R. in the ambulance. (8 RT 1825, 1848-51.)

Maldonado denied that there was any conspiracy between the correctional officers and Green to kill Addis. (8 RT 1831-32.) No one told her that Addis was going to be hurt or killed on the yard. It was just a gut feeling that she had. (8 RT 1839-40.) Until just before she testified, Maldonado was unaware that Addis had been in administrative segregation for hitting an officer. (8 RT 1851-52.) After the homicide, Maldonado sought counseling with Dr. David Friedman. On May 27, 1999, she told Dr. Friedman that they knew "'an inmate was to be killed. We all knew it. I told the supervisor that he would be killed if we let him out of his cell.'" (8 RT 1856.) She told her sergeant, "'They are going to kill him.'" (*Ibid.*)

Maldonado claimed that Dr. Friedman was just paraphrasing what she had said and that she just had a gut feeling about the situation. (8 RT 1857-59.) She denied saying that, "'I tried to stop it.'" (8 RT 1863.) However, she admitted saying that the Addis homicide "'could open up a big can of worms.'"

(8 RT 1836.) She also denied saying, "'They killed him because they thought he was giving us information, which he was. He used to talk to [Officer] Kaffenberger a lot.'" (8 RT 1865; *see* 7 RT 1592-93.) Maldonado felt guilty about breaking "the code", *i.e.*, that an officer should not tell on another officer. (8 RT 1867-68.)

James Gleisinger, Ph.D., assisted Dr. Friedman in evaluating patients sent for a worker's compensation evaluation. (9 RT 2124.) On May 5 1999, Dr. Gleisinger interviewed Maldonado, took her history, and prepared a written report of the interview. The statements in quotation in his report were verbatim statements by Maldonado. (9 RT 2124-26.) His report stated: "She recalls 'the most dramatic thing was about 18 months ago an inmate was to be killed. We all knew it. I told the supervisor that he would be killed if we let him out of his cell.'" (9 RT 2126-27.) "She states, 'That inmate was let out even though everyone knew he would be killed if he was let out. I tried to stop it. That could open up a big can of worms. I told my sergeant that they're going to kill him.' She states that Sergeant Sams 'shrugged his shoulders.'" (9 RT 2127.)

Department of Corrections Officer David Lacey was assigned to investigate the Addis homicide and he attended trial as the prosecution's investigating officer. (3 CT 743-44.) On August 3, 1997, Lacey tape recorded an interview of Officer Maldonado and he turned the tape over to the District Attorney before trial. However, the prosecution just provided the defense with Lacey's written summary of the interview. (9 RT 2136-38.) That summary did not include Maldonado's statement, "'You know what, Sarge, they're going to take him out'", or that Sergeant Sams responded, "'come on, we've got a lot of work to do'". (9 RT 2138-41; 5 CT 1246, Exh. No. 74 ["Interview of Officer R. Maldonado"]; 5 CT 1245, Exh. No. 73 [excerpt of transcript of Maldonado interview].)

In December 2000, Maldonado made additional statements about the Addis homicide when interviewed in connection with her worker's compensation claim. She stated: "'The most negative situation was knowledge an inmate was to be killed. She told her supervisor the inmate was likely to be killed if they let him out of the cell. ... She previously told Sergeant Sams that this might occur and he shrugged his shoulders.'" (8 RT 1868-69.) Maldonado testified that the doctor had just paraphrased her statements and that "[i]t was not like that." (8 RT 1868-70.) However, she did say that people were harassing her at home and calling her a rat. (8 RT 1869.)

B. Expert Testimony About The Circumstances Of The Addis Homicide And The Assault On Inmate Matthews.

1. The Addis Homicide (Counts 1 & 2).

Steven Rigg worked 17 years for the Department of Corrections before retiring in 1998. (8 RT 1911.) From 1982-1986, he was a correctional officer at C.I.M., including Palm Hall, where he trained other correctional staff. In 1986, Rigg was promoted to sergeant and transferred to San Quentin where his assignments included the SHU. In 1988, Rigg transferred to Corcoran State Prison where he worked on the main line as a program sergeant and he also did two tours at the SHU. In 1992, Rigg was promoted to lieutenant and he continued to work both regular programs and administrative segregation. (8 RT 1911-13.)

In 1995, Rigg transferred to High Desert State Prison to assist in activating that facility and in 1998 he retired as an acting captain. (8 RT 1913.) He was forced to take medical retirement because while at Corcoran State Prison he conducted investigations and found that there had been a cover-up of a shooting of an inmate by an officer and that officers had put inmates on yards knowing that they would assault one another. (8 RT 1913-14.)

For this case, Rigg reviewed several materials, including: the staff reports about the Addis assault; the trial testimony of Sergeant Sams and of Officer Esqueda; and the reports related to the investigation of Green's role in the Addis homicide. (8 RT 1921-22; 4 CT 1161-63, Exh. Nos. 56, 57 and 58.) In Rigg's opinion, Green should never have been allowed to continue demanding that Addis be brought to the yard. He should have been immediately removed from the yard and disciplined for making a disturbance and distracting the tower gunner. (8 RT 1925-26.) Addis was an outcast from the NLR, which was the predominant group on the yard. He had rolled off the tier and the circumstances showed that he would be assaulted or killed because he was in trouble with the NLR. Green's agitated state and his yelling and demanding for Addis would lead any reasonable officer to conclude that there would be trouble on the yard and that Green was involved. (8 RT 1926-27.)

When Officer Maldonado informed the sergeant in charge that "'[t]hey're going to take him out'", referring to Addis, the appropriate action would have been to instruct the tower gunner to put down the yard and to remove Addis from the yard. (8 RT 1927.) The fact that Addis was classified as yard-eligible did not mean that the sergeant could not stop him from going to the yard. Having received information that Addis would be assaulted or killed, Addis should not have been put on the yard without a thorough investigation and a new classification hearing to address his yard eligibility. If the sergeant had a problem with making a decision to stop Addis from going to the yard, he should have contacted his supervisor. (8 RT 1927-29.)

Under the inmate code, there should be a greeting between the inmate and the yard leader and the other inmates down the line. If that didn't occur, it meant that something was wrong, particularly after Green had been agitated and disruptive. (8 RT 1933-34, 1935-36.) When the shot-caller later engaged the apparent target, attempted to reassure him, and told him to go and play

cards, it showed "a setup." (8 RT 1934.) Knowing the sequence of events, the tower gunner should have immediately put the yard down and searched for weapons when he saw Green and appellant approach Addis as he played cards. (8 RT 1936, 1969-70.) The record indicated that Addis had stolen tobacco from the "inmate store" and then rolled off the tier. Those were two offenses for which it was "very probable that you are not going to get a pass on them." From the inmate's point of view, rolling off the tier puts an informant or "snitch jacket" on an inmate. (8 RT 1934-35.)

Over the years, Rigg had dealt with prison gangs, including AB, and he had talked to many gang members. (8 RT 1938.) There was a command structure within the gang. The "shot callers" were the people with authority to tell others what to do, whether to carry or hold contraband or to commit an assault. (8 RT 1940.) If an inmate received an order to carry out an assault, he would be expected to do so. If the inmate did not follow through, he put himself at risk of being assaulted or even murdered. (8 RT 1941.) After committing an assault ordered by the shot caller, an inmate would be watched by other gang members. He would be expected to show no concern for the victim because that would be considered a sign of weakness by the gang and the inmate would fall into disfavor. Therefore, to avoid his loyalty being questioned, an inmate would adopt a façade after an assault. (8 RT 1957.)

Assuming appellant received an order to assault Addis and there were 12-15 other inmates on the yard, most of whom were gang members, appellant "would be a walking dead man" if he had refused to assault Addis. It was reasonable to believe that appellant rather than Addis would have been killed on the yard that day. (8 RT 1941-42.) Because the yard was run by the NLR shot-caller and filled with NLR gang members, appellant could not have obtained any assistance from the correctional staff without "fronting himself off" and requesting protective custody. However, there was no guarantee that

appellant would have been able to spend the rest of his sentence in protective custody, or that he would be safe there. Inmates have been assaulted and killed while in protective custody. (8 RT 1945-46.)

Prison staff can maneuver and manipulate inmates to produce assaults. For example, if an officer did not care for an inmate because he had assaulted another officer, he could transfer the inmate to a housing location or place him on a yard where he could be assaulted. This had occurred at Corcoran State Prison. (8 RT 1942-44.) An officer would also know that if an inmate unaffiliated with a gang was placed on a tier with high power gang members, the inmate would end up having to roll off the tier and that this would put him in trouble with the gang. (8 RT 1944-45.) The sequence of events showed that Sergeant Sams "possibly wanted this inmate assaulted" because he failed to take action to protect Addis. (8 RT 1966-67.)

The administrative hearing on Green's rule violation showed that he had ordered the "hit" on Addis and engaged in a conspiracy to commit battery resulting in death. (Exh. No. 50, 4 CT 1145-46.) On October 10, 1997, the penalty imposed for this offense was only a 360 day credit loss without a SHU term. (*Ibid.*) However, Green did not serve the time for his credit loss. He returned to the "main line" tier and he was paroled 20 days later on October 30, 1997. (8 RT 1974-75.) In effect, the C.D.C. "did not punish [Green] for being involved in a conspiracy as charged, yet they found him guilty." (8 RT 1975-76.)

2. The Assault On Matthews (Count 3).

Regarding the charged assault on Matthews, Rigg testified that the proper procedure for escorting from the shower back to his cell, "is a hands escort." The escorting officer should draw his baton, hold it at the ready, while controlling the inmate's movement with his other hand by a hold on the handcuffs behind the inmate's back. The officer should walk between the

inmate and the cells and control the inmate in such a way that if he attempted to turn or stop or to take off, he could immediately put a control hold on the inmate and stop him. (8 RT 1946-47.) The second, cover officer should walk behind the inmate to protect the escorting officer and the inmate. (*Ibid.*) For security purposes, cell ports should only be open one at a time and an officer should not escort an inmate past an open cell port. (8 RT 1947-48.)

C. Expert Testimony About Prison Gangs.

Anthony L. Casas worked over 22 years for the California Department of Corrections. In 1972, he became acting district parole agent for a high violence program, which included investigations of gang activity. (8 RT 1992-94.) The Director of the Department of Corrections asked Casas to organize a state prison gang task force comprised of federal, state and local law enforcement officers. (8 RT 1995-97.) After working with the task force, Casas held additional positions with the C.D.C., including associate warden at the California Men's Colony and at San Quentin State Prison, the position from which he retired in 1987. Throughout his career, Casas dealt with policies for the handling and safety of inmates and the operation of administrative segregation units. (8 RT 1997-99.) Since retirement, Casas continued to work with law enforcement on gang issues. (8 RT 1997.)

Inmates become involved in prison gangs in several ways. People may come into prison scared and a group like AB will offer them help and protection. However, this becomes a slippery slope. If the gang asks the inmate to become involved in dangerous activity and he tries to avoid getting involved, the gang will say that the inmate cannot disrespect the gang after it helped him. (8 RT 2001-02.) Someone who is big and strong may be able to avoid gangs from the outset and tell the gang that he just wants to do his own time. However, if a person is small and he does not have much experience, he may need a gang for protection. This would include someone like appellant,

who was 5'6" and 150 pounds when he entered prison, and who did not have a violent crime background but just a couple of burglaries. (8 RT 2002-03; Exh. No. 42, 4 CT 1109.)

Someone with a relatively short sentence such as 18-24 months sentence may be able to resist a gang because he knows that he will soon be getting out of prison. However, an inmate facing a longer sentence will do what he can to make sure that is protected in prison. (8 RT 2003.) Once an inmate is part of a gang, it is dangerous to try to get out. With most gangs, the only way out is death. Gangs such as the AB flourish because of their discipline. "You try to get out or don't do what you are told, you are taken out." (8 RT 2003-04.)

The gang may give orders to its members to do anything from rape to murder. If the inmate does not carry out the order, "[h]e can easily get killed. As a matter of fact, in most cases where your gangs are disciplined enough, that's precisely what happens. They want to put the message out that ... you don't break ranks, you don't misbehave, you don't ignore orders. You follow or you're gone." (8 RT 2005.) If a person falls out with a gang because he stole something or just didn't fit, he is in trouble because in prison, "everything is magnified." (8 RT 2005-06.)

An inmate who committed an assault ordered by the gang is expected to show pride and brag about the crime. Any sign of regret would be perceived as weakness and the inmate could be thrown out of the gang and be killed. (8 RT 2006-07.) Inmates observe prison staff. Based on how the staff handled Addis in this case, an inmate would conclude that it was useless to rely on the staff for safety. If an inmate wanted to get out of an order to commit an assault, he would have "nowhere to turn ...[,] he's got to go through with it unless he wants to take his chances. And from what he's seen, the chances

aren't that great" because there were other gang members on the yard and the staff failed to act on any of the signals of a safety problem. (8 RT 2010-11.)

Casas reviewed reports of the yard incident where Addis was killed. Trying to equate demand for an inmate to be brought to the yard with inmate demands for other things, "is really, really unthinkable." The events leading up to the Addis homicide were filled with "red flags" any of which "should have alerted a staff member that works these kinds of units that there was a problem. Collectively it's hard to describe how screwed up the whole situation was." (8 RT 2009.) A staff member has the authority to deprive an inmate of yard time if the inmate's safety is in jeopardy. This is called a "suspension of privilege pending an investigation to see if the inmate's life is in danger. ... I just don't understand why it wasn't done." (8 RT 2007.) When Officer Maldonado told her sergeant, "'You know what, Sarge, they're going to take him out,'" the appropriate action would have been to immediately take Addis and Green off the yard and conduct an investigation. The sergeant's hands were not tied after he was told that Addis would be assaulted on the yard. (8 RT 2010.)

D. Stipulations Re Prior Convictions.

With the agreement of appellant and the prosecution (8 RT 1986-1989), the trial judge read the following stipulation regarding appellant's prior convictions: "'The parties stipulate that the defendant suffered the following prior convictions: 1. The crime of first degree residential burglary, in violation of section 459 of the Penal Code, on or about the 10th day of July 1987, in the Superior Court of the State of California, in and for the County of Los Angeles. 2. The crime of first degree residential burglary, in violation of section 459 of the Penal Code, on or about the 2nd day of April, 1992, in the Superior Court of the State of California, in and for the County of Los Angeles." (8 RT 1990.)

III. The Prosecution's Penalty Phase Case.

In the penalty phase, the prosecution presented evidence of multiple incidents of other adult criminal activity (Penal Code, § 190.3, subd. (b) ["factor (b)"]) beginning in July of 1994, more than two years after appellant's return to custody in June of 1992 following a plea to one count of residential burglary with the intent to commit larceny. (4 CT 1101, 1191-92.) Over appellant's objection and by cross-examination of James Cueva ("Cueva"), a California Youth Authority ("C.Y.A.") casework specialist called as a witness by the defense (see Argument Section XVI., below), the prosecution also presented evidence of appellant's juvenile and adult theft-related criminal history and an escape from the Youth Authority.[3]

A. Appellant's Juvenile Theft-Related Offenses.

Based on a review of juvenile court records, Cueva testified about a series of juvenile offenses and placements after juvenile petitions were sustained against appellant. (12 RT 3054-63.) This were memorialized in a report which was admitted in evidence. (Exh. No. 96; 5 CT 1270-1273.) In February 1984 when appellant was 15 years-old (date of birth 7/10/1968), he and a friend committed a residential burglary. They broke into a neighbor's house because his friend wanted to get some drug money and took approximately $275 in cash. In September 1984 when appellant was 16 years-old, he and a friend committed a burglary of the dorm office at a juvenile custody camp and took property valued at $1,000. They escaped from the camp but were arrested a short distance away with most of the property still in their possession. (12 RT 3054, 3058-59; Exh. No. 96, 5 CT 1271-72.)

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3. Effective July 1, 2005, the CYA became known as the Department of Corrections and Rehabilitation, Division of Juvenile Facilities. (Welf. & Inst. Code, §§ 1703, subd. (c), 1710, subd. (a).) Appellant will use "C.Y.A." or "Youth Authority" because those names were used at trial.

B. Appellant's Adult Theft-Related Offenses.

Cueva also testified about the details of the crimes to which appellant pled guilty when he was 19 years-old (three counts of residential burglary, one count grand theft auto, one count of second degree, (commercial) burglary), as well as the details of six counts that were charged but dismissed as part of the plea. Because of his immaturity, appellant had been sent to the Youth Authority rather than to state prison. (12 RT 3021-22; Exh. No. 95, CT. Suppl. B 10; Exh. No. 42, 4 CT 1104.)

Appellant pled guilty to the following crimes: Count 1, on January 23, 1987, between 11:30 a.m. and 1:20 p.m., appellant and an accomplice broke into a residence and stole a 35 millimeter camera, three rings valued at $980, and $100 in cash; Count 2, on January 29, 1987, between 9:45 a.m. and 2:45 p.m., appellant broke into a victim's residence and stole a handgun valued at $350, a gold necklace valued at $700, and $100 in currency, and caused approximately $90 in damage to two living room windows; Count 3, on January 29, 1987, between 11:30 a.m., and 5:00 p.m., appellant broke into a residence and stole $800 in currency and jewelry valued at $116 and he caused $175 in damage to a back door; Count 4, on January 24, 1987, between midnight and 3:00 a.m., appellant and two codefendants stole a 1974 Datsun pick-up truck valued at $6,000, and they were arrested by the police at 3:30 a.m.; and Count 7, appellant on a date not specified broke into a hobby shop and stole radio controlled cars and equipment valued at $1,020 and caused $200 in damage by shattering a glass door. (Exh. No. 96, 5 CT 1270; 12 RT 3055-56; 3059-61.)

In connection with the plea, the charges related to the following allegations were dismissed: Count 6, on February 23, 1987, between 5:30 p.m. and 6:30 a.m., appellant and two codefendants smashed the window of a vehicle and stole sheep skin seat covers valued at $50 and caused $50 in

damage to the vehicle's window; Count 8, on February 10, 1987, appellant and a codefendant broke into a hobby shop and stole $100 in currency, a radio controlled car and other items with a total value of $4,600 and caused $236 in damage to a window and a security gate; Count 9, on February 11-12, 1987, between 11:30 p.m. and 7:20 a.m., appellant and the same codefendant broke into the same hobby shop and stole radio controlled cars and related items valued at $1,992 and caused $1,500 in damage by breaking a glass door; Count 10, on February 9-10, 1987, between 6:00 p.m. and 11:10 a.m., appellant and the same codefendant stole a vehicle valued at $600, four speakers valued at $400, and racket ball equipment valued at $85; and Count 11, on March 20, 1987, sheriff deputies found appellant prowling in the car port area of an apartment building and later discovered that appellant had taken the vehicle without permission. (Exh. No. 96, 5 CT 1272; 12 RT 3062-63.)

Based on his experience as a social worker within the CYA, Cueva concluded that appellant's offense history showed that he was a "chronic habitual offender." (12 RT 3063-64.)

On February 11, 1988, appellant pled guilty in Los Angeles County Superior Court to escape from the C.Y.A. (Welfare & Inst. Code, § 1768.7) and received a sentence of one year and four months consecutive to the term for his prior burglary and grand theft auto convictions. (Exh. No. 42, 4 CT 1106.) On March 9, 1988, appellant was transferred into the adult prison system from which he was paroled on May 13, 1991. (Exh. No. 42, 4 CT 1101, 1103.)

C. Adult Criminal Activity In State Prison.

On June 19, 1992, appellant pled guilty to one count of residential burglary to commit larceny and he was sentenced to eight years in state prison. (Exh. No. 42, 4 CT 1108; Exh. No. 64, 4 CT 1194-95, 5 CT 1224.) The

prosecution presented evidence that two years later appellant began to engage in criminal activity in state prison.

On July 22, 1994, a correctional officer at Calipatria State Prison conducted a routine search of appellant's cell after appellant and his cellmate went to the exercise yard. The officer recovered a manufactured weapon from a milk carton still filled with milk and weapon stock underneath the mattress of the top bunk. (10 RT 2475-78.) The weapon in the milk carton was made from part of a hard plastic cup, about 4¼ inches long, and affixed with a sharpened metal tip. (10 RT 2478, 2480-81.) The metal stock found under the mattress was unsharpened and about 2 3/8 inches long, 3/8 of an inch wide, and 1/6 of an inch thick. Inmates may sharpen metal stock by grinding it against the concrete floor. (10 RT 2478-79.) At a rules violation hearing, appellant pled guilty and said that the weapon and metal stock belonged to him. (10 RT 2479-80, 2481-83.)

On August 5, 1994, the tower gunner for an exercise yard at Calipatria State Prison saw appellant and another inmate approach inmate Cross and start fighting with him. Appellant then "slashed him, stabbed him with something." (11 RT 2545-46.) Cross received two lacerations and a scratch around his right ear. (11 RT 2546-47; 5 CT 1257, Exh. No. 78.) At Calipatria State Prison, appellant was known as an NLR member. (11 RT 2552.)

On August 23, 1994, an officer at Calipatria State Prison was escorting inmate Hemphill back from the law library to his cell. Appellant and inmate Lowery, naked except for their socks, rushed towards them from the shower section. Each had a weapon in hand. (11 RT 2556-57, 2717-18.) Lowery swung and hit the officer in the cheek. When the officer pushed back, Lowery slipped to the ground in his wet socks and the officer handcuffed him. (11 RT 1557-60.) Appellant ran after Hemphill, who was handcuffed behind his back. (11 RT 2615-16, 2719.) However, another officer responded to the noise,

ordered appellant down, and he complied. (11 RT 2561; 2615-16.) From both appellant and Lowery, officers recovered a piece of metal stock sharpened to a point and wrapped with a piece of cloth for a handle. (11 1516-18, 2562.) The lock mechanism for the shower had been pried open. (11 RT 2561.)

On August 29, 1994, appellant and Lowery were in administrative segregation at Calipatria State Prison and on "walk alone" status in separate exercise yards. (11 RT 2534-36.) They periodically yelled at the tower officer to distract him. (11 RT 2537.) Lowery started to reach up to the fence and the tower officer called for assistance because he suspected that they were trying to remove part of the chain link fence. (11 RT 2537-39.) An officer later inspected the area and found a piece of chain-link missing from the fence between the two yards that had not been missing the day before. This was a concern because inmates may use pieces of fencing to fashion weapons. (11 RT 2620-22.)

On August 30, 1994, appellant was taken to the infirmary at Calipatria State Prison for contraband watch. (10 RT 2496-97.) Appellant was given an opportunity to remove contraband and he did so by making a bowel movement into a bag. (10 RT 2499.) An officer recovered a weapon made of round metal stock with a cloth handle, about five inches long and an eighth of an inch in diameter, that had been sharpened to a point at one end. It appeared to have been fashioned from a piece of chain link fence. (10 RT 2500-01.)

On September 11, 1994, an officer searched the cell at Calipatria State Prison occupied by appellant in the lower bunk and Lowery in the upper bunk. The seam of the lower bunk mattress had been ripped. Inside, they found a stabbing instrument and a piece of a ratcheting mechanism that had been broken off of a handcuff. (11 RT 2731-32, 2736-37.) The stabbing instrument was made from a piece of Plexiglas, about 2¾ inches long, 7/8 of inch wide, ¼ of an inch thick. Plexiglas had been placed on the front of all cells to prevent

"gassings", *i.e.*, throwing bodily fluids at staff. (11 RT 2733, 2735.) The inmates had learned to cut the Plexiglas using tooth powder and a strip of wetted sheet. The piece of Plexiglas could then be sharpened by rubbing it on the concrete floor. (11 RT 2734-35.) At an administrative hearing, appellant pled guilty and was assessed a 360 day credit loss. (11 RT 2737.)

On September 22, 1994, an officer at Calipatria State Prison escorted appellant to a classification committee meeting attended by the deputy warden, an inmate counselor and a lieutenant. (10 RT 2470-71.) As the escorting officer led appellant to his seat, appellant pulled away from the officer's grasp and lunged across the table towards the deputy warden while his hands were handcuffed behind his back. (10 RT 2473-74.) Appellant made it about three-quarters of the way across the table and he probably would have contacted the deputy warden's upper body area with his head if she had not moved. (10 RT 2474.)

On October 21, 1994, four inmates, including appellant, at Calipatria State Prison were withholding food trays to protest an unspecified grievance. (10 RT 2442-2445, 2448-49; 11 RT 2636.) This was a concern because inmates may fashion weapons from food trays. (10 RT 2448-49; 11 RT 2635-36.) Appellant refused orders to give up his tray and barricaded himself in his cell with his mattress. (*Ibid.*) When appellant refused to leave his cell, an officer fired rubber bullets to knock the mattress back from the cell door. (11 RT 2639-40.) Another officer fired a "taser" at appellant through the cell port. (10 RT 2447, 2455-56.) A taser shoots pieces of metal hooked to a wire and delivers an electric shock to knock the target off balance. (10 RT 2450.)

A five man extraction team then entered appellant's cell to recover the food tray and to remove appellant from the cell. When the officers entered the cell, appellant was standing on the table at the far end of the cell and an officer struck appellant with a shield, causing him to fall onto his bunk. (10 RT 2451-

52, 2454.) Appellant put his arms under his body and kicked his legs so that the officers could not shackle him. An officer was able to put handcuffs on appellant but he kept kicking the man who tried to hold his legs. An officer finally put his whole body on appellant's legs and shackled him. (10 RT 2445-47; 11 RT 2641-42.) Appellant continued to try to kick and swing his hands after he was cuffed and shackled. (11 RT 2642.) Appellant received puncture wounds to his back and left chest consistent with the use of the taser. (10 RT 2450; 11 RT 2640.) A federal court decision (*Coleman v. Wilson* (E.D. Cal. 1995) 912 F.Supp. 1282) has since restricted the use of tasers in California state prisons and they are no longer in use. (11 RT 2651-53.)

On November 27, 1994, an officer searched appellant's cell at Calipatria State Prison. He found a small, inmate manufactured knife, about two and 5/16 inches long, ¾ of an inch wide, a 1/16 of an inch thick that had been sharpened to a point at one end. (11 RT 2695-96.) The knife was stuck in the gap along the side of the upper bunk where it was bolted to the wall. (11 RT 2597-98.) After a rules violation hearing, appellant was assessed a 360 day credit loss and a 15 month SHU term. (11 RT 2699, 2702-03.)

On February 12, 1995, the tower officer overseeing the exercise yard for inmates in administrative segregation at Calipatria State Prison saw appellant approach inmate Singson and strike him eight or nine times with a "stabbing-like" motion. (11 RT 2582-85.) The officer ordered the yard down but appellant continued to strike Singson in the head. The tower officer fired one round from his ".37 millimeter" rifle which shoots a rubber "baton" round at appellant after which appellant got down on the ground. Appellant said "'Let's see if you can find this one.'" Appellant then rolled over and threw an apparent weapon over the wall into the "mainline" yard where there were more than 200 inmates. (11 RT 2585-87, 2692.)

An officer retrieved the weapon. It was made from a piece of rolled

metal, 3¾ inches long, 1/16 of an inch in diameter, and sharpened to a point with a small cloth handle. (11 RT 2588, 2690.) Singson received four wounds to the right side of his face and head, including a laceration below the eye and a puncture wound to the head. (11 RT 2588-89; Exh. No. 80, 5 CT 1260-61.) At a rules violation hearing, appellant was found guilty of a stabbing assault and possession of a weapon. (11 RT 2690-91.)

On March 3, 1995, at around 11:40 p.m. at Calipatria State Prison, an officer saw appellant and inmate Lowery on the bottom bunk "wrapped up on each other just kind of hitting each other" with "blows to the head and upper body area." The officer ordered them to stop fighting and, after a short time, they complied. (11 RT 2751-53.) The officer took Lowery to the infirmary because he had two wounds consistent with being slashed, a three inch laceration on his forehead and a one and a half inch laceration on his abdomen. Appellant had minor scrapes and abrasions. He told a sergeant that he had flushed a weapon down the toilet. (11 RT 2753-54.) At a rules violation hearing, appellant was found guilty of slashing and assessed a 360 day credit loss. (11 RT 2755-56.)

On March 23, 1995, an officer at Calipatria State Prison escorted appellant to the infirmary because a metal detector indicated that he had contraband in his anal cavity. (11 RT 2623, 2626.) An X-ray showed the presence of an object and an officer watched appellant remove the object from his rectum. (11 RT 2624.) It was a piece of plastic cup and a weapon manufactured from a comb that was about 1¼ inches long, ½ inch wide, 3/16 of an inch thick, and sharpened to a point at one end. Both items were wrapped in toilet paper and cellophane. (11 RT 2625.)

On April 10, 1995, officers escorted appellant and inmate Lowery from Calipatria State Prison to the Imperial County Court House in El Centro, California. (11 RT 2523-2525.) After placing them in a holding cell, an

officer did a security check and noticed that Lowery had gotten one hand loose from his waist chains. A chair had been "partially dismantled" and pieces of metal were missing. (11 RT 2527.) Officers searched the holding cell but did not find the missing metal. Upon return to the prison, both appellant and Lowery were X-rayed and the X-ray for appellant was positive. An officer instructed appellant to give up the object. Appellant squatted and pushed a piece of metal rod out of his rectum that had been wrapped in plastic with string. The metal rod was about four inches long, 1/8 inch in diameter, and sharpened to a point at one end. (11 RT 2528-2530.) On March 30, 1995, appellant went to classification committee. The committee noted that appellant needed psychiatric treatment. (11 RT 2764-65.)

On May 3, 1995, appellant was taken from administrative segregation at Calipatria State Prison to the infirmary and placed on "contraband watch status." (10 RT 2486-87.) Appellant asked the escorting officer, "'Do you want it?'" Appellant then made a bowel movement into a plastic bag taped inside a toilet and handed the officer a "wrapped piece of metal." (10 RT 2488.) It was a weapon made from a fingernail clipper, with an overall length of about 4½ inches with about a 1½ inch blade at the tip. (10 RT 2489-91.)

Just after midnight on May 31, 1995, an officer at Calipatria State Prison observed inmate Moore, appellant's cell mate, kneeling at the back of the cell and scratching an object on the ground in a manner consistent with sharpening a weapon. (11 RT 2756-57.) Officers removed Moore and appellant and searched the cell. They found an inmate manufactured weapon inside appellant's mattress. The weapon was made of flat metal stock sharpened to a point on one end. Officers also found that the weld for the metal seat of the desk had been broken and the seat removed and cut into several pieces. (11 RT 2757-59.) Prisoners could cut metal using string and an abrasive such as tooth powder, kool-aid, or iced tea powder. (11 RT 2760-

61.) At a rules violation hearing, appellant pled guilty and received a 360 day credit loss. (11 RT 2762.)

Later on May 31, 1995, appellant was put in a cell for contraband watch. He asked an officer to bring him a cup of water. (10 RT 2502-03.) When the officer returned, he found a piece of metal wrapped in white paper on the ground between appellant's cell and an adjacent cell. The piece of metal was about three inches long, an inch wide, and 1/16 of an inch thick. The officer asked appellant where the object came from and appellant said, "'I kicked that piece out of my cell because I want to get out of here.'" (10 RT 2504.)

On June 24, 1995, at around 4:40 p.m. at Calipatria State Prison, an officer heard loud banging from appellant's cell and saw appellant on top of inmate Moore, hitting him in his upper torso and face area with clenched fists. The officer asked appellant to stop and he complied, after which he was placed in handcuffs and removed from the cell. A medical assistant observed mild swelling to appellant's right hand. Moore had lacerations to both hands and went to the infirmary. (12 RT 2775-76.) Appellant was under the influence of inmate manufactured alcohol, some of which was found within his cell. (12 RT 2778-79.) At a rules violation hearing, appellant admitted he was guilty of participating in a fight and received 90 days credit loss and ten days confined to quarters. (12 RT 2777-78.)

On July 14, 1995, an officer at Calipatria State Prison escorted inmate McGarvey to a holding cell to be searched before going to the exercise yard. (11 RT 2565-67.) The officer heard the yard gunner officer yell "'Get down'" and then saw appellant and inmate Day in their boxer shorts running from the shower area towards McGarvey. (*Ibid*; 11 RT 2626-28; 12 RT 2781-83.) Day had one weapon and appellant had "a stabbing device" in one hand and "a slashing device" in the other hand. The slashing device was a broken piece of

a state issued razor affixed to a small handle. The other weapon was a piece of metal sharpened to a point with a handle wrapped onto it. (11 RT 2568-69, 2721-22.) Appellant and Day complied with the order to get down after the yard gunner chambered a round in his assault rifle. (11 RT 2569-70, 2571-72.) The tumbler of the shower lock appeared to have been forced back using a weapon. (11 RT 2573-74, 2576.) No rules violation hearing occurred in connection with this incident. (11 RT 2730)

On July 21, 1995, appellant was on "walk-alone" at Calipatria State Prison in a yard for inmates in administrative segregation. The tower gunner saw appellant stick his hand through the handcuff port and slash inmate Bongiorno on the left arm as he walked in an adjacent yard. When ordered to get down, appellant ignored the order and walked over to the toilet and flushed something. (12 RT 2784-85.) Bongiorno received a six to eight inch laceration on his left arm. (*Ibid.*); Exh. No. 84, 5 CT 1265-66.) Prior to the slashing, the tower officer did not see Bongiorno do anything to appellant. (12 RT 2785-86.) At a rules violation hearing, appellant was found guilty and assessed a 360 day credit loss and a 24 month aggravated SHU term. (12 RT 2787-88.) On October 19, 1995, appellant went to a classification committee in connection with the Bongiorno incident. The committee affirmed the disciplinary actions taken and retained appellant in administrative segregation pending a psychiatric review. (12 RT 2791-92.)

On September 11, 1995, appellant pled guilty in Imperial County Superior Court to one count of possession of a deadly weapon by a prisoner (Penal Code, § 4502) and he was sentenced to a term of 25 years-to-life under the "three strikes" law. (Penal Code, § 667, subd. (e); Exh. No. 42, 4 CT 1110.)

The parties stipulated that on December 13, 1995, after appellant arrived at Corcoran State Prison from Calipatria State Prison, a scan of

appellant's rectal area with a metal detector gave a positive reading. When asked what he had in his rectum, appellant stated: "'I give it up. I have weapons.'" (12 RT 2771-72.) Appellant voluntarily retrieved four objects from his rectum: two plastic stabbing weapons made from a plastic cup and sharpened to a point; one slashing type weapon; and 13 pencil leads and a bundle of string. The slashing weapon consisted of a razor blade affixed to a plastic spoon handle and it was about three inches long and one-half inch wide. For the rules violation, appellant was assessed a 360 day credit loss. (*Ibid.*)

On March 11, 1996, appellant was on the yard for inmates in administrative segregation at the R.J. Donovan Correctional Facility. The tower gunner officer saw appellant running and inmate Miller staggering back towards the wall with blood running down his back. (11 RT 2670-72.) The officer ordered the yard down, but appellant did not comply. He ran and put something in the toilet and flushed it before he got down on the yard. (11 RT 2673.) Inmate Miller had been stabbed. He received two, one-half inch puncture wounds, one on the left side of his head and the other on the left side of his neck. (11 RT 2674.)

On March 21, 1996, an officer searched appellant's cell in the administrative segregation unit at the R.J. Donovan Correctional Facility. Under the top layer of the mattress in the bottom bunk, the officer found a jagged edged piece of metal, 2½ inches long and 1½ inches wide, with sharp corners. A piece of black caulk from the windows had been used to make the piece of metal stick to the mattress cover. (11 RT 2676-78.) The outline of a stabbing device had also been scored on the metal table top inside the cell. (11 RT 2679-80.) When asked how he used the metal, appellant said that he used it cut "fish lines", *i.e.*, cloth threads used to pass contraband back and forth between cells. (11 RT 2680-81.) At a rules violation hearing, appellant was found guilty and assessed a 120 day credit loss. (*Ibid.*)

On August 6, 1996, at around 11:15 a.m. at Centinela State Prison, the officer overseeing the administrative segregation yard observed appellant and inmate Myers attack inmate Labat, hitting him on the body and arms. Appellant and Myers complied when an officer ordered them to get down. (12 RT 2793-94.) After removing the other inmates from the yard, officers found two weapons made of sharpened metal stock with melted plastic to form a handle. The weapon found under appellant was 4½ inches long and ¾ of an inch thick. (12 RT 2794-95, 1297.) A second weapon found lying between appellant and Myers was about two inches long and 1/8 of an inch think. (12 RT 2795-96.) The officers also found a cylindrical piece of plastic wrap on the yard that was covered with fecal matter and opened at one end. (12 RT 2797.)

Labat received minor lacerations to his right arm above and below the elbow which were consistent with the weapons found on the yard. (12 RT 2796.) All three inmates were reported for a rules violation. (12 RT 2798-99, 2799-2800.) At a hearing, appellant was assessed a 360 day credit loss and a SHU term. Appellant said, "'Both weapons were mine. Myers didn't use a weapon. He used his fist.'" (12 RT 2798.) The officer who observed the incident did not see how it began. (12 RT 2799.) He did not see appellant stab Labat. (12 RT 2801-02, 2803-04.)

On October 27, 1996, as inmates were starting to come off the exercise yard for the SHU at Corcoran State Prison, the yard gunner noticed inmate Sanson bleeding from his head and backing up as appellant walked towards him. 12 2808-2810.) The officer ordered the inmates to get down and all complied except appellant. The officer yelled at appellant several more times, chambered a round, and pointed his "mini 14 rifle" at appellant. Appellant ran and dropped something into the toilet and flushed it before getting down on his stomach. (12 RT 2810-12.)

Sanson received a total of 19 stitches for a six inch laceration on the top

of his head and a two and a half inch laceration on the left side of his chest. (12 RT 2812-13; Exh. No. 85, 5 CT 1267-68.) A videotape of the yard showed Sanson squatting against the wall and appellant standing in front of him. When the officer ordered recall, appellant went towards Sanson and started slashing him on the top of his head. There was no indication that Sanson had attacked Landry. (12 RT 2813-16.) At a rules violation hearing, appellant was assessed a 360 day credit loss. (12 RT 2817.)

On April 16, 1997, appellant was in the SHU at Corcoran State Prison. During a routine search of his cell, an officer found a piece of a hard plastic cup and two pieces of Plexiglas in his mattress. (11 RT 2592-94.) Appellant told an officer "'[t]he weapons are mine.'" (12 RT 2772.) Some Plexiglas was found missing from the front of a nearby cell. (11 RT 2594-95.)

The parties stipulated that on April 19, 1997, a correctional officer conducted a search of appellant's cell at Corcoran State Prison. On the right side of the bunk assigned to appellant, the officer found a partially sharpened piece of metal stock between some pages of legal work that had appellant's name and C.D.C. number. The metal stock had a half-moon shape. It was about 1½ inches long, 3/8 wide, and partially sharpened on the outer edge. At a rules violation hearing, appellant pled guilty and received a 120 day credit forfeiture. (12 RT 2772-74.)

On May 6, 1997, an officer at Corcoran State Prison noticed a piece of Plexiglas missing from the front of appellant's cell and conducted a cell search. In appellant's mattress, the officer found a piece of Plexiglas and a piece of a plastic cup about 3 7/8 inches long, an inch wide, and a quarter inch thick that had been sharpened to a point. The weapon was wrapped in toilet paper and light plastic and tied with a string. It appeared to be ready to be inserted into the rectum. (11 RT 2597-2600.)

On April 18, 2001, while appellant was in court for this case, a sergeant

searched appellant's cell in administrative segregation at the San Bernardino County jail where appellant was housed alone. The sergeant found a single razor blade sitting on the table in the cell. (12 RT 2878-79.) The blade appeared to be from the type of razors given out to inmates in the general population. However, a razor would not have been issued to appellant in administrative segregation so it would have been smuggled into the cell. (12 RT 2880-81.) When appellant returned from court, the sergeant asked him about the razor blade. Appellant said that he used it to sharpen his pencil. (12 RT 2881-82.) Inmates were permitted to buy pencils and could give them to an officer to be sharpened or they could be sharpened by rubbing them on the floor or walls. (12 RT 2982-83.)

IV. The Defense's Penalty Phase Case.

A. Introduction.

In the penalty phase, the defense presented evidence of appellant's life before his first acts of force or violence which occurred two years after he had been sent to Calipatria State Prison for a theft-related burglary. (10 RT 2437; Exh. No. 42, 4 CT 1108; Exh. No. 64, 4 CT 1194-95, 5 CT 1224.).) This evidence chronicled appellant's physical, sexual, and mental abuse as a child and the long-term consequences of those experiences, including post-traumatic stress disorder, multiple suicide attempts, schizoid personality disorder and bipolar disorder. Appellant also presented evidence that his criminal activity in state prison resulted from the denial of adequate mental health care and treatment by prison staff.

B. Family Background.

Appellant's maternal aunts (Peggy Robles and Cynthia Vaughn), maternal grandparents (Esther and Clarence Renfro), and his father (Gary Landry) testified about appellant's family background.

Appellant's mother Linda Landry was born deaf because her mother

Esther Renfro had measles while she was pregnant. Her "deafness covered up that she had some mental problems ...." (12 RT 2886-87, 2889.) As a child and adolescent, Linda was "always" in trouble. (*Ibid.*) She would just go crazy and explode and the police often came to the Renfro's house because Linda was out of control. (*Ibid.*; 12 RT 938-39.) When Linda was 11-13 years old, she set a lot of fires. (12 RT 2887, 2889.) On one occasion, she set fire to the garage and the curtains in the house while her parents were out. (12 RT 2887, 2915.) At dinner on the same day, Linda grabbed a paring knife and pointed it at her sister Peggy. (12 RT 2887.) She then ran down the street to a neighbors house and attacked a pregnant woman with the knife as she showered while her husband was out mowing the lawn. (12 RT 2888-89, 2297-98.) When the police arrived, Linda fought with the officers before they were able to subdue her and take took her into custody. After a juvenile court hearing, Linda was put into a series of foster homes. (*Ibid.*; 12 RT 2893-94, 2915, 2937.)

When Linda was 20 or 21 years-old, she married Gary Landry, who was also deaf, and the two communicated by reading lips or sign language. (12 RT 2894-95.) After appellant was born, his parents did not nurture him or show him affection. (12 RT 2896, 2942.) When appellant was a toddler, they would just put him in a play pen and leave him alone. (12 RT 2944, 2961.) Appellant was always hoarse because he was crying and yelling and there was nobody to hear him. (12 RT 2945.) Eventually, the Renfro family installed a device that would flicker the lights in order to alert Linda when appellant was crying. (12 RT 2895.)

However, Linda used illegal drugs, such as "blue jays, yellow jackets, ... whites, reds." (12 RT 2917.) The family would come over and find appellant crying in his crib with the lights flashing, the house in disarray, and Linda passed out and unable to get up. (12 RT 2896.) Appellant's father Gary

had little to do with appellant and he did not intervene when appellant was alone and crying. (12 RT 2897.) Linda and Gary never changed the sheets in appellant's crib and they turned gray. (12 RT 2889.)

The Landry household was "filthy dirty" with broken glass and curdled milk on the floor. (12 RT 2894-95, 2944-45.) Once, when aunt Peggy visited, she found appellant crawling on the floor amidst the broken glass. (12 RT 2898.) When appellant was older and able to walk, his parents would leave him home alone and appellant would get out of his crib and wander the neighborhood. (12 RT 2889.) Appellant's paternal grandparents live a couple of blocks away. On one occasion, they found appellant asleep under their car where appellant had crawled when his parents had not come home. (12 RT 2946.) On another occasion, appellant was found scavenging for food in the neighbor's garbage cans. (13 RT 3102.) Another time, Peggy and her husband came over and found appellant in the bathtub with feces and water running over the edge and his mother was "just passed out." After that incident, they decided to move in with the Landry's for a few months to try to help. (12 RT 2888-89, 2907.)

Peggy and her sister Cindy testified that appellant's father Gary and his friend "Jerry" would put live cats in the dryer and turn it on, which in one instance killed a cat. They thought this was funny and "just the neatest thing." (12 RT 2901, 2928-30, 2948.) Gary also put dogs in cages in the back yard. He would starve them to make them mean and then taunt them with his friends. (12 RT 2901-02.) Gary denied that he did these things. (12 RT 2996, 3003, 3010-12.)

Gary and Linda Landry often engaged in heated arguments. Gary complained that he brought home the money but Linda did not cook or keep house. "She went out with her friends and did drugs all the time. They were ... constantly fighting that she wasn't holding up her end of the bargain." (12

RT 2902.) When appellant was a toddler, Gary and the family learned that Linda was a lesbian and having affairs with other women. Gary spray painted "'bad wife'" and "'bad mother'" in huge writing all over the walls in the house because he was angry at Linda for not coming home. (12 RT 2946-47.) Above the crib in appellant's room, Linda drew graphic pictures of naked women having sexual relations with one another. (12 RT 2947-48, 2983-85.)

When appellant was about four years old, his maternal grandparents (Esther and Clarence Renfro) took appellant away from Linda and Gary. (12 RT 2983-84, 2907; 13 RT 3345.) Appellant would not talk, but just grunted and pointed when he wanted something. Over a period of several months, they were able to coax him to begin talking. (12 RT 2950, 2955.) Appellant "had extreme nightmares" where he would scream and be scared to death. (12 RT 2951.) He would hoard food and hide it under his bed. (12 RT 2952.) After appellant had been with the Renfros for about a year, Linda went to court and regained custody of him. (12 RT 1921-22, 2952-54.)

A few months later, Linda brought appellant back to her parents. It was like starting over again. (12 RT 2922, 2954-55; 13 RT 3346.) When appellant returned, he had changed. His grandparents could not tell what was going on inside of him anymore, so they took appellant to psychologist and psychiatrists to see if they could break through. (12 RT 2932-33, 2910.) Appellant continued to receive psychiatric care throughout his childhood and adolescence. (12 RT 2972.)

At home with his grandparents and aunts, appellant was a "gentle soul. .... Always just a very kind, generous person" and not angry or aggressive. (12 RT 2906, 2958-59.) The Renfros sent appellant to kindergarten when he was about 5½ years old. (13 RT 3346.) However, he did not interact with others at school or join in with them on the playground. (12 RT 2957.) The Renfros started to get calls about appellant making noises and disturbing the

class. (12 RT 2975.) Appellant was good at home but from a young age he had problems when he got outside the home. (13 RT 3346-47.)

When appellant was in kindergarten, his grandparents took him for therapy three times a week at Long Beach Memorial Hospital. (13 RT 3350-51.) At 6-8 years old, the Renfros put appellant in a hospital residential treatment program for children with mental health problems until their insurance coverage ran out. (13 RT 3351-53.) Appellant did not have any self-confidence or self-esteem "from a very, very small age ...." (12 RT 2957-58.)

Appellant continued to have problems through his school years and he was put in special education classes. This was hard for appellant because he had to ride on a special school which showed he was not going to a regular school. (13 RT 3348-49.) When appellant was an early adolescent, his grandparents sent him to "Memorial Hospital" for periods of extended treatment with psychiatrists and psychologists. (12 RT 2910.) During high school, appellant was suspended many times for cutting classes, disturbing the class, and not doing his school work. (12 RT 2975-76.) The grandparent's put appellant in a residential mental health treatment program at "College Hospital" until their insurance coverage ran out. (13 RT 3353.)

When appellant was 15 years-old, he had his first contact with the law. Appellant and a friend went into the friend's house next door to the Renfros and took some money. (12 RT 2926-27.) Mr. Renfro called the police because they wanted to do what was right and to teach appellant a lesson. Appellant was made a ward of the court and put in juvenile custody for a period. (*Ibid.*; 12 RT 2932.) When appellant was 16 or 17 years-old, he stole a car and the Renfros never got him back. (12 RT 2928, 2976.) Appellant sometimes ran away from juvenile custody camps back to the Renfros. They would call the camp and bring him back the next morning. (13 RT 3356-58.)

When appellant was sent to prison for after he committed a burglary as an adult, the Renfros tried to get him psychological help but to no avail. (12 RT 2933.)

C. Appellant's Juvenile Wardship, Probation Reports, And Mental Health Care And Treatment.

Scott Guffey, a defense investigator, made an audiotape of his review of appellant's Los Angeles County juvenile court file. (13 RT 3309; Exh. No. 102 [tape recording].) With the agreement of the prosecution, the audiotape was played for the jury and subsequently transcribed into the record by the court reporter.[4] (13 RT 3304-05, 3312.) Probation reports and other documents collected by probation officers provided the following information.

In February 1984, when appellant was 15 years-old, he acted as a lookout for a neighbor's son when the son broke in to his family's home and took $250 property, including currency. (13 RT 3312, 3314.) The boys were apprehended by appellant's grandmother shortly after the break-in. (13 RT 3318.) Appellant admitted his involvement, apologized to the neighbor, and returned $69. (13 RT 3312-13, 3315.) When appellant's grandfather found out about the burglary, he took appellant to the police. (12 RT 2927; 5 CT 1271.)

On April 2, 1984, appellant's grandparent's placed appellant in College Hospital in Cerritos, California, a residential mental health treatment facility. (13 RT 3313-14.) Dr. David M. Giem, M.D., the attending psychiatrist who admitted appellant to College Hospital, noted complaints of "'stealing, lying, oppositional behavior. However, minor's problems have been quite severe for a long period of time. Since kindergarten he has had a chronic history of behavior problems, primarily hyperactivity and learning difficulties. Minor

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4. For two years, the defense tried to subpoena appellant's juvenile court file. During the defense penalty phase, the juvenile court called to say that appellant's file was finally available and the investigator went and made an

has received professional help from psychologists and pediatricians off and on through most of his late childhood. Since minor has been in treatment at College Hospital, his progress has been slow. He is rather immature for his age and is easily lead and influenced by negative peers.'" (*Ibid.*.) Dr. Giem recommended a closed placement for appellant. (13 RT 3318-19.) Appellant's therapist, Douglas Harrington, Ph.D. was "'quite concerned'" about appellant's situation and recommended six to twelve months of residential treatment. (13 RT 3316-17.)

On May 16, 1984, the juvenile court sustained a juvenile petition for the first degree burglary of the neighbor's house and made appellant a ward of the court. (13 RT 3312, 5 CT 1271.) Prior to the burglary incident, appellant had not been in any trouble and there was no evidence that appellant was involved in gang activity. (13 RT 3313-15.) Appellant understood that he had problems and asked to be put in a hospital setting where he could get the help he needed. (13 RT 3315.)

A May 21, 1984, report from appellant's high school stated that appellant had received passing grades but needed improvement "'in work habits and cooperation.' ... [M]inor has been a very troubled young man. He has been trying very hard to improve his behavior and has been receiving professional counseling.'" (13 RT 3313.)

A June 5, 1984, letter from Dr. Giem diagnosed appellant with "atypical depression" and attention deficit hyperactivity disorder ("ADHD"). (13 RT 3319.) He was being treated with 50 milligrams of "Mellaril" four times daily and he had demonstrated definite treatment gains since his last psychiatric admission. (13 RT 3319-20.) "'Danny was raised in a deficit earlier family environment in which he suffered several traumatic childhood experiences that included his parents divorce, age five, and a repeated history or parental

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audio recording of his review. (13 RT 3304, 3309-10.)

rejection, abandonment and neglect. The Renfros were granted legal custody of Danny in 1974. During the course of Danny's treatment at College Hospital, Danny has begun to take the initial steps in working through the emotional pain associated with the experiences identified above. However, Danny's continued vulnerability can be witnessed by episodes of depression, hopelessness, suicidal ideations and gestures and acting out behavior, *i.e.*, impulsiveness and temper tantrums.'" (13 RT 3320.)

"'Presently Danny is suicidal and will continue to need further acute care psychiatric hospitalizations as he is a potential danger to himself. On June 4th ... Danny planned to hang himself, which was followed by an attempt to cut his wrists with a sharp-edged rock. This suicidal gesture was precipitated by feelings of being abandoned by his grandparents. Danny is currently on suicide precaution.'" (13 RT 3320-21.) "In consideration of Danny's progressively deteriorating history, *i.e.*, violating school and parental authority, poor academic performance, inability to establish peer relations and infringing upon the law, it is clearly evident Danny will require a structured and supervised environment following his discharge from an acute care psychiatric facility." (13 RT 3321.) Accordingly, Dr. Giem and Dr. Herrington recommended that the juvenile court place appellant in a residential treatment center. (13 RT 3321-22.)

On June 10, 1984, College Hospital discharged appellant because his grandparent's insurance coverage ran out. (13 RT 3327-28.) The juvenile court placed him in "Rancho San Antonio", a juvenile facility that permitted home visits. (13 RT 3323-24.) Appellant got in trouble for "'sneaking smokes and playing around'" and he was placed on a "behavior contract" and denied home visits for four weeks. (13 RT 3324.) Appellant figured that he would be sent to Juvenile Hall so on September 10, 2004, he and a friend took some cigarettes, clothes, and backpacks from the dorm at Rancho San Antonio and

went "'AWOL'" in Simi Valley. (13 RT 3424-25; 5 CT 1271.) On September 12, 2004, the Simi Valley police arrested appellant when he was hanging around a hospital. (*Ibid.*) Appellant told his probation officer that going AWOL was a dumb thing to do and that it was wrong to take property from the Rancho San Antonio juvenile facility. (13 RT 3325.)

On October 1, 1984, the juvenile court sustained a petition for misdemeanor burglary related to the theft from Rancho San Antonio and ordered a community camp placement for appellant. (13 RT 3331; 5 CT 1272.) After two weeks at Camp Page, appellant left without permission and walked home to his grandparent's house. They returned him to juvenile hall the next day. (13 RT 1331.) On October 30, 1984, the juvenile court sent appellant to a Camp Gonzales, a "security camp." (13 RT 1331-32.) However, on November 8, 1994, appellant was transferred to a Camp Kilpatrick because he was too immature for the senior boy's security camp. During his stay at Camp Kilpatrick, appellant was involved in at least three escape attempts. (13 RT 3332.) Appellant understood that he needed help, but he wanted to live with his grandparents rather than at the camp. (13 RT 3328-29.)

After the escape attempts, appellant was placed in the "'Intensive Care Unit'" at Camp Kilpatrick for several two week periods so that he could be seen weekly by Dr. Paul Grossman, the camp psychiatrist. (13 RT 3332.) Appellant had made two suicide attempts after each of which he was sent to "Central Juvenile Hall" for psychiatric evaluations. (*Ibid.*; 13 RT 3328-29.) Dr. Grossman noted that appellant had "'some deep-rooted psychological problems that affect the manner in which ... [he] functions.'" (13 RT 3332-33.)

On June 24, 1985, Dr. Grossman reported that, at the time of his admission to Camp Kilpatrick, appellant had been off his medications (Melaril and Ritalin) for six months. "If anything, we have found Daniel's problems to

be an inability to control periodic depressions. They seem to overwhelm him for no apparent reason and he lapses into a severe retarded apathetic state. During these episodes, he is prone to make suicidal gestures, yet he has no awareness that he is in a depression. The ward's early history is that of severely abused and deprived background. Both parents are deaf. At their best, would leave him alone at home unsupervised days at a time. At worst, he would be forced to view his mother's lesbian lovemaking which would trigger violent fights between the mother and father. The father is an alcoholic who would often abuse the minor when drunk. Daniel Landry is severely disturbed emotionally and our feeling is that he deserves incarceration in a psychotherapeutic setting such as Kirby Center.'" (13 RT 3330-31.)

On September 10, 1985, the juvenile court placed appellant at the Kirby Center, a closed, juvenile residential treatment center. (13 RT 3335-36.) A February 27, 1986, probation report by Kathy Holmes, M.S.W. ("Holmes"), provided additional information about appellant. Appellant's initial adjustment at the Kirby Center was erratic and unstable because appellant could not decide whether to go AWOL or to stay and work on his problems. (13 RT 3335-36.) "'Fortunately he decided to do the latter. The deep seated psychological problems that Danny Landry ... has been acting out and running away from revolves around issues of molestation. From age five- six years old his parents had another couple residing in the home. The male who was his father's best friend sexually molested and psychologically abused him for the full year that they resided together. Due to fear and further treatment of abuse, Danny never told anyone of his emotional problems, and his emotional problems increased as he matured." (13 RT 3336.) "Unable to resolve this trauma, Danny molested his favorite four-year-old cousin approximately three years ago. His cousin told on him and that case was investigated by the Department of Public Social Services. Danny denied the allegations but his

grandparents were so alarmed they placed him in College Hospital for psychiatric treatment." (13 RT 3336-37.)

"Despite his hospitalization placement and the counseling of the staff and psychiatrist at camp, Danny would not talk about this and became increasingly more depressed and suicidal. Last October he admitted to his grandparents that he had molested his cousin and told them of his own molestation. Since this disclosure, his aunt, his victim's mother, has attended three conferences with him ... to work on and resolve the shame, embarrassment and grief that he felt." (13 RT 3336-37.)[5] The probation officer recommended that appellant remain a ward of the court (Welfare & Inst. Code, § 602) with the case set for review in six months. (13 RT 3338.)

On July 18, 1996, Holmes reported that since appellant's placement at the Kirby Center he had exhibited "'considerable growth and maturity.'" However, he had periodic setbacks connected to his pending release and fear of returning home. After nearly two years in custody, appellant feared that he would not succeed in the community. (13 RT 3339.) "In addition, minor had not yet completed his goals in therapy, which were connected to his relationship with his mother and another molestation ....'" (13 RT 3339.)

After staff "confronted" appellant about "his acting out behaviors following Sunday visits from his mother", appellant "informed this officer that one of his mother's lesbian girlfriends had also been molesting him around the age of six. Dan was angry that his mother had renewed acquaintances with this woman as it stirred up many bad memories for him. He made the decision to have ... her visitation rights pulled and she was informed that he no longer wished to maintain contact with her. Miss [*sic*] Landry denied knowledge of

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5. Dr. Lipson (see Statement Of Facts, Section IV.E.3., below) explained that appellant's sexual abuse of his cousin was consistent with appellant's own sexual abuse and was clinically referred to as "trauma reenactment." (13 RT

this molestation, referred to Dan as crazy and became angry with him for referring to her as an inadequate mother. Their contact was discontinued four months ago and minor is more relaxed since her departure.'" (13 RT 3339-40.)

Appellant did well in the school at the Kirby Center. (13 RT 3341.) He was "on the 'A' list nearly every week. His behavior in the cottage is stable and he has made meaningful relationship with the both peers and staff alike. ... His prognosis for the future is regarded as good and it would appear that he has received maximum benefit from the program. Minor will have his 18th birthday on July 20, 1986," and he was scheduled to be released to his grandparents on July 16, 1986. (13 RT 3341.) Accordingly, the probation officer recommended termination of the juvenile court jurisdiction over the case. (13 RT 3342.)

D. Appellant's Mental Health Evaluation And Treatment Plan After His First Adult Property Crimes.

On June 9, 1987, when appellant was 19 years-old, he pled guilty to three counts of theft-related first degree (residential) burglary (Penal Code, § 459), one count of grand theft auto (Penal Code, § 487, subd. 3) and one count of second degree (commercial) burglary (Penal Code, § 459), with a maximum time of confinement of six years. (Exh. No. 95, CT. Suppl. B 10; Exh. No. 42, 4 CT 1104; Exh. No. 96, 5 CT 1270.) When interviewed about his new offenses, appellant accepted responsibility for his conduct and did not claim that he had been railroaded or received poor representation from his attorney. (12 RT 3072-73.)

The Superior Court sent appellant to the California Youth Authority rather than to state prison because of his immaturity and lack of sophistication. (Exh. No. 42, 4 CT 1104; Exh. No. 95, CT. Suppl. B 10; 12 RT 3021-22.) In October of 1987, James Cueva, a CYA casework specialist, prepared a 90-day

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evaluation of appellant at a reception center diagnostic clinic. Cueva was the lead person on a assessment team that included a psychologist, a psychiatrist, a social worker, youth counselors, and youth correctional officers. (12 RT 3016-3025; see 5 CT 1270-1273, Exh. No. 96; Suppl.B CT 8-12.) Cueva personally interviewed appellant and prepared the final report of appellant's status for purposes of placement and services while in custody. (12 RT 3023-25.)

Cueva further documented appellant's neglect and abuse as a child and his mental health problems. Appellant's mother was a drug addict who neglected appellant during his early years and his father disappeared from appellant's life at the age of nine. (Exh. No. 95, Suppl.B CT 8.) In addition to being deaf, his parents had a lot of emotional problems. Appellant had unpleasant memories of fist fights between them. They lived on doughnuts and his parents never bathed him. Appellant did not learn to speak until he was 7 years-old. (*Ibid.*)

When appellant was 12 years-old, he was placed at College Hospital for counseling and special education classes. (Suppl.B CT 8.) In high school, he was suspended for cutting classes and fighting and sent to the Kirby Center, a residential placement facility for youth with mental and emotional problems. In the past, he had been prescribed Thorazine and Ritalin to deal with his hyperactivity problems. (Suppl.B CT 8-9; 12 RT 3027-28.) Appellant had worked at a Wienerschnitzel restaurant and in the sporting goods department of a retailer but quit both jobs after he committed some petty thefts and feared that he would be caught. (Suppl.B CT 9-10.)

Appellant admitted to being sexually molested on two separate occasions. When he was six years-old, a friend of his father's forced appellant to orally copulate him. (Suppl.B CT 8.) When he was 8 years-old a woman who was a friend of his mother's forced appellant to orally copulate her and to be copulated by her. (*Ibid.*; 12 RT 3028.) Appellant described himself as

someone who was always planning or doing something illegal like disconnecting alarms, breaking store windows, and stealing stereos. (Suppl.B CT 10.) He saw himself as just taking up space and he had nothing positive to say about himself and he had no goals, plans, or expectations for life. (*Ibid.*; 12 RT 3032-33.)

Throughout the interview appellant seemed guarded and depressed and psychologically absent in an effort to dissociate himself emotionally from his family background and sexual molestation. (12 RT 3035-36; Suppl.B CT 11.) He was obsessed with the idea of suicide and had thought about hanging himself with a bed sheet, "it is very effective, I've done it before." (Suppl.B CT 11.) At a juvenile camp, appellant had attempted suicide by hanging and had passed out but he survived because the sheet ripped. Appellant liked cutting himself with razor blades and sticking staples on his body because that helped relieve his tensions. (*Ibid.*)

Cueva concluded that appellant had "poor impulse control, poor insight, poor judgment, and no self esteem." (Suppl.B CT 11.) He exhibited "psychomotor retardation," feelings of worthlessness, self reproach, and excessive guilt, with "acute chronic depression, and passive aggressive tendencies. His unresolved anger towards his parent's figures have been channeled into antisocial activities for society. Inmate seems emotionally dead, unable to respond in a beneficial way to any situation. Inmate feels dirty and does not like his body, and this is possibly due to the sexual abuse which occurred to him while he was a young child. This young man has had extreme traumatic experiences which make him a high risk individual for perpetuation of his victimization status." (Suppl.B CT 11.)

Appellant's "acute chronic depression" was not a "reactive depression" related to his custodial status. (12 RT 3072.) Cueva recommended a "specialized counseling program" for appellant because of his "serious ...

emotional and mental problems and he needed intensive treatment", including individualized psychotherapy. (12 RT 3068-69, 3072; Suppl.B CT 12.) Cueva completed his report on October 28, 1997. (Suppl.B CT 12.) On October 31, 1987, appellant was placed on suicide watch after he threatened to kill himself. (Suppl.B CT 13.)

E. Expert Testimony About Appellant's Adult Mental Health Issues And The Denial Of Treatment While In State Prison.

1. Testimony By Dr. Lantz.

In January and February 2001, Joseph A. Lantz, Ph.D., a clinical psychologist with a focus on forensic psychology and neuropsychology, interviewed and tested appellant on three occasions, totaling about seven hours. (13 RT 3074-77, 3080.) The purpose of the clinical interview was to asses appellant's overall demeanor and mental functioning. Psychological testing was conducted to compare appellant to others of the same sex, age, and educational. (13 RT 3081-85.) Other tests were designed to reveal malingering and Dr. Lantz found no evidence of this or that that appellant was attempting to present a false picture of himself for obvious gain. (13 RT 3085-87.) Appellant was cooperative and pleasant throughout and displayed appropriate effort at testing. (13 RT 3182-83.)

Tests designed to identify the presence of brain damage showed that appellant functioned within the "normal range" and without any significant impairment. (13 RT 3088-85, 3088, 3179.) Appellant's only deficit was in the ability to concentrate and to learn new information. However, appellant performed well considering his limited academic experience. (13 RT 3089-90, 3179-80.) The Minnesota Multiphasic Personality Inventory ("MMPI") test showed "social introversion." This meant that appellant was someone who was not comfortable with himself and felt isolated and as though he did not fit into the world. (13 RT 3097-98.)

Dr. Lantz reviewed the 1987 report by Mr. Cueva and the interviews of appellant's aunts (Cynthia Vaughn and Peggy Robles) by the defense investigator. He also had conversations with appellant's maternal grandparents (Esther and Clarence Renfro). Appellant's personal history was consistent with the personality disorder indicated by the MMPI and it was extremely significant to understanding appellant's personality development. (13 RT 3098-3100.)

Appellant's mother Linda Landry was "a very seriously disturbed individual." Even as a young girl, she was "a very dangerous, frightening person to be around." (13 RT 3100.) She "obviously had had some type of mental disorder ... which had a tremendous impact on her behavior." (*Ibid.*) In particular, Dr. Lantz noted that Linda had attacked a pregnant neighbor with a knife, after which she was removed from her parent's home and placed in foster care. (13 RT 3100-3101.) She "was totally unprepared to be a mother." (13 RT 3101.) Appellant was raised in a household of "chaos" and filth as a youngster by parents who chronically fought with one another. (13 RT 3101-02.)

As a result of his mother's rampant drug use and frequent absences, appellant was often unsupervised. (13 RT 3102.) When appellant was three or four years old, the police were called because appellant was walking through the neighborhood foraging for food in trash cans. Because his parents were deaf, appellant grew up with essentially no communication and he did not learn to talk until his grandparents obtained custody. (*Ibid.*) There was physical violence between the parents and appellant's father beat appellant to get him to be quiet and to go to sleep at night. (13 RT 3103.) Both men and women sexually abused appellant before he was eight years-old. (*Ibid.*) Appellant had no day care, preschool education, or kindergarten until he was placed in the care of his grandparents. (13 RT 3103.)

Personality is in part genetically determined. However, it is also formed by early life experience and a person's world view is set by the age of six. (13 RT 3103.) By that time, appellant had been deprived of the nurturing and care necessary to develop a sense of self worth and the ability to manage the world. (13 RT 3103-04.) Appellant "was almost like a feral child growing up without ... human contact during those early years." (13 RT 3104.) The denial of nurturing, compounded by his father's torturing of animals and appellant's emotional, physical, and sexual abuse, produced mental problems that had continuing effects years later. (13 RT 3104-05.)

A person raised in such extreme conditions "is much more at risk to develop a personality in which there is no trust, there's no sense of relationship, there's no sense of common bond with other people so that you're very much isolated. Not just emotionally, but in every way you don't feel part of the world. You don't feel a connection with other people because you were never taught how to feel that way as a child." (13 RT 3105.) This background, along with appellant's lack of normal language development, affected appellant's peer development and relationships beyond "those early years of damage .... It's something that you don't recover from." (*Ibid.*) Appellant's grandparents provided care, structure and nurturing. However, the damage from the early years was so extreme and pervasive that it could not be overcome by what they did. (13 RT 3107-08.) Appellant could function at home, but not out in the world. "I don't think that there is anything that the grandparents could have done to prevent that from happening." (13 RT 3108.)

By the age of 12, appellant was hospitalized and diagnosed as "emotionally handicapped" and with attention deficit disorder. (13 RT 3207, 3209-10.) Appellant may have had a chance if he had been able to stay with his grandparents after they first took him from his parents. However, he lost the sense of security he had for a period when his mother regained custody and

he was sexually molested by one of his mother's friends. Appellant "had very little chance in terms of developing into a normal life, and the problems that he started coming into ... were entirely predictable based on what his earlier history was." (13 RT 3111-12.)

Under the standards of the Diagnostic and Statistical Manual of Mental Disorders, Dr. Lantz diagnosed appellant as having a "schizoid personality disorder." (13 RT 3108.) That disorder was "very fixed" and "enduring" and defined the "permanent way in which the individual understands his or her world and how they interact with the world." (*Ibid.*) "The hallmark of a schizoid personality is a marked detachment from relationships. These are people that simply feel no bond, no connection with other people. It's not the same thing, say, as antisocial personality where you prey on other people, you victimize other people. That's not it. A person with schizoid personality, they don't derive any pleasure from life, from relationships. They'd much rather be alone. They feel better when they're alone. They become anxious if they have to be around other people. They can be easily manipulated by other people." (13 RT 3109.)

Appellant's adolescent offenses were consistent with his schizoid personality disorder and his attention deficit/hyperactivity disorder (ADHD). The hallmark of the latter is hyperactivity, inattention and impulsivity. Children with ADHD are unable to regulate their behavior and are constantly in trouble outside the home. (13 RT 3110-3111.) From the age of five, appellant was treated by a psychologist at Long Beach Memorial Hospital. This continued for several years and appellant was eventually given medication ("Ritalin"). However, even with those efforts, appellant was unable to conform. (13 RT 3111.) His juvenile theft conduct reflected a "conduct disorder", *i.e.*, behavior by an adolescent who had a hard time following rules and regulations. That behavior was the result of appellant's

early years in an environment where he had to fend for himself and to meet his own needs. Appellant was more at risk for conduct disorders because of the impulsivity and lack of judgment associated with his ADHD. (13 RT 3197-99.)

One of the prison psychologists had diagnosed appellant with an "anti-social personality disorder" and another diagnosed appellant with intermittent explosive personality disorder. Dr. Lantz disagreed with both diagnoses. Appellant had a schizoid personality disorder with attention problems that manifested with some of the same behavioral problems. (13 RT 3199-3201.) A person of appellant's small size and background when placed in the violent setting of prison had committed violent acts. However, considering appellant's entire history, he was not "a characterlogically violent person" despite episodes of violence. (13 RT 3201-3202.)

2. Testimony by Dr. Gawin.

Frank Gawin, M.D., testified as an expert in psychiatry about appellant's mental health issues and the treatment he had received since his first adult theft-related offenses at the age of 19. Dr. Gawin graduated Phi Beta Kappa from the University of California, Berkeley, and received his medical degree from Stanford University. After graduating from Stanford, he did a residence in psychiatry at Yale University, where he subsequently became a faculty member for six years and received a Fulbright Scholarship for additional study. Since 1990, Dr. Gawin had been on the faculty of the medical school at the University of California, Los Angeles, where he taught, conducted research, and continued to see patients. (13 RT 3116-18.)

As a psychiatrist, Dr. Gawin addressed "Axis I" disorders, which are biologically mediated disorders of the mind related to alterations in brain chemistry. AXIS II disorders, such as addressed by Dr. Lantz, were personality disorders. (13 RT 3119-3121.) Dr. Gawin did not interview

appellant. He reviewed appellant's medical records from the Department of Corrections, which were admitted in evidence as Exhibit No. 95.[6] (13 RT 3128; Suppl CT B 1-98.) Those records showed that appellant had bipolar disorder, which is an Axis I disorder. (13 RT 2121-22.)

Bipolar disorder was formerly called manic depressive illness. The two poles of the disease are extreme activation and an extreme depression. In the manic phase, people have episodes of feeling very intense and energized. (13 RT 3121-22.) They get a lot of things done but "usually with very poor judgment about the fact that they are revved up and have this increase in energy." (13 RT 3122.) At best, the person will have a feeling of elation and be quite happy and friendly to others. However, "that often switches to irritability and sometimes to paranoia itself." (*Ibid.*) The episodes may last a week, but they "usually last several months, if not years, unless they are treated." (*Ibid.*)

When a bipolar person is in a manic state, "irritability often increases dramatically and with that the capacity for violence increases. There is a decrease in impulse control, diminishment in judgment of consequences and understanding of consequences, and ... there are also problems with perception such that these individuals can sometimes be particularly suspicious or hyper vigilant or paranoid and that can often make them angry at other people, even though other people may not have done anything to them. So, as a consequence, mania is often associated with violence and so is hypomania." (13 RT 3123.)

There is a genetic component to bipolar disorder and it may be transmitted through one side of the family. (13 RT 3126-27.) The information

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6. Exhibit No. 95 is contained in "Supplemental-B" of the clerk's transcript. In referring to this Exhibit, appellant has cited to the printed numbers at the bottom of the page rather than to the handwritten numbering.

about the behavior of appellant's mother was consistent with bipolar disease. (13 RT 3195.) As a juvenile and adolescent diagnosis, appellant had been diagnosed as ADHD. Bipolar disorder in children sometimes presents as hyperactivity and is mistaken as ADHD. (13 RT 3130-31.)

Dr. Gawin reviewed the records of appellant's mental health history while in state prison for his burglary convictions. These records showed that prison officials knew that appellant had bipolar disorder and additional emotional and psychological problems. On April 12, 1988, appellant reported that he was depressed, unable to sleep, and he was hearing voices telling him to kill himself. He was paranoid at night, scared of people, and he feared dying. The psychiatrist prescribed "Melaril", which is like "Thorazine", and "Sinequan", an anti-depressant. (CT Suppl B. 14-15.) The use of those medications indicated that appellant was being treated like a bipolar disorder patient. (13 RT 3134-35.)

On April 28, 1988, appellant was seen by a medical technical assistant ("MTA") at C.I.M. (CT. Suppl. B 24; 13 RT 3138.) Appellant admitted prior use of PCP, cocaine, marijuana and a lot of drinking. (CT. Suppl. B 25.) Appellant seemed "scared" and again reported hearing voices telling him "'to kill myself.'" (*Ibid.*) The MTA said that appellant seemed manipulative. However, he put appellant on "psych" service because of his report of hearing voices. (*Ibid.*; 13 RT 3138.)

Appellant was transferred to the California Men's Colony where, on May 5, 1988, he was seen by Sherman E. Butler, M.D., the senior psychiatrist at the prison. (CT. Suppl. B 25.) The doctor decided that appellant was malingering and that he did not need psychiatric services. Appellant said that he did not want to take medication and the doctor discontinued his medications. (*Ibid.*; 13 RT 3138-39.) Dr. Gawin observed that it is not uncommon for people taking the medications to start to feel better and think

that their problem has been eliminated and they can stop taking medication. However, the symptoms are usually only suppressed and they come back when medications are stopped. (13 RT 3139.)

On June 19, 1990, while still at the California Men's Colony, appellant saw R.C. Brandmyer, M.D. and requested Lithium "'to calm down.'" (CT. Suppl. B 27.) However, the doctor found "no indication for any psychotropic med[ications]" and a "clear contraindication for Lithium" in appellant's recent medical history. Therefore, he ordered no medications for appellant. (*Ibid.*; 13 RT 3139-40.)

Three days later on June 22, 1990, appellant complained that he was hearing the voice of the man who had sexually molested him when he was five years-old at age 5. (CT. Suppl. B 27.) Appellant also said that he could not stand other inmates and he got very paranoid. (*Ibid.*) Someone else prescribed Lithium. However, another doctor discontinued the Lithium on July 26, 1990. (*Ibid.*) According to Dr. Gawin, medical tests should have been ordered to monitor Lithium levels because Lithium can cause liver damage and "stroke-like" damage to the brain. (13 RT 3141.) None of appellant's prison medical records contained any indication of testing to measure appellant's blood level of Lithium. (13 RT 3141.)

On May 13, 1991, appellant was paroled from state prison. (Exh. No. 42, 4 CT 1101.) On June 19, 1992, appellant pled guilty to another theft-related burglary and received a sentence of eight years. (Exh. No. 4 CT 1108, Exh. No. 62, 4 CT 1194-95.) On July 17, 1992, while at the reception center at the California Correctional Institution, appellant reported that he was a manic depressive and he had previously been prescribed 900 milligrams of Lithium. (CT. Suppl. B 30; 13 RT 3141.)

On September 3, 1992, the day after appellant arrived at Calipatria State Prison, appellant again reported that he was manic depressive and that he had

been taking Lithium. (Exh. No. 95, CT. Suppl. B 31; 13 RT 3142.) On September 25, 1992, a doctor saw appellant but ordered no medications and said that appellant should return to the clinic in a month. (Exh. No. 95, CT. Suppl. B 33-34; 13 RT 3143.)

On September 14, 1992, a state assemblyman at the request of appellant's grandmother wrote James Gomez, the Director of the Department of Corrections, "regarding Daniel's mental health and psychiatric care." (Exh. No. 95, CT. Suppl. B 32.) "According to Mrs. Renfro, Daniel has not been through a psychiatric evaluation and is not in a facility to receive the appropriate therapy should he need counseling." (*Ibid.*)

On October 20, 1992, the Director Gomez wrote back to the assemblyman. He stated that appellant's records showed "no evidence of any serious mental illness" and there was no need for psychiatric medication. (Exh. No. 95, CT. Suppl. B 35.) Appellant could not, therefore, be placed in a facility "based on psychiatric reasons." (*Ibid.*)

On July 6, 1994, Mrs. Renfro wrote to Calipatria State Prison stating that she had been trying "for years" to get help for appellant. "He is finally trying to face the fact that he needs help. ... He has tat[to]oed his arms legs neck & forehead. He is on a path of self destruction." (Exh. No. 95, CT. Suppl. B 36.)

On July 19, 1994, Calipatria State Prison received a "to whom it may concern" letter from appellant. Appellant wrote a letter "out of concern for my mental state and <u>future</u> after prison. During my stay here at Calipatria, I have (for some 2 years now) attempted to receive psychological treatment." (Exh. No. 95, CT. Suppl. B 37.) In the past, he had been diagnosed as manic depressive and treated with Lithium, but he had unsuccessfully attempted to get the prison to renew his prescription. "As a plea for help. I will/and want to enter a program (available at C.M.C.) for my condition, or just simply put I

want help, and someone to talk to ...." (*Ibid.*) "I am presently in ad-seg (in Calipatria) for a stabbing assault, in my past I have no prior violence, or such misbehavior. I was found guilty and given a 24 month S.H.U. term. I know I must pay for these crimes I have been accused of, but I would like to be endorsed (after S.H.U. term) to C.M.C.-East, or any such facility having programs to help, not just punish inmates." (*Ibid.*)

On August 19, 1994, appellant requested a psychological consultation for "help to prevent coming back to prison ...." (Exh. No. 95, CT. Suppl. B 38.) Appellant asked for counseling and a drug program after he competed his SHU term. (*Ibid.*)

On February 24, 1995, A. Millan, M.D., a staff psychiatrist at Calipatria State Prison, conducted a psychological evaluation of appellant. (13 RT 3144-45.) Appellant requested counseling to find out "why I keep coming to prison." (Exh. No. 95, CT. Suppl. B 39.) "I need an understanding." (Exh. No. 95, CT. Suppl. B 40.) Dr. Millan noted that appellant was "fully aware of the new 'three strikes' law and fears that it might apply to him and he will receive twenty five (25) years to life. On 8/30/94, a weapon was recovered from his rectum." (Exh. No. 95, CT. Suppl. B 40, 43.) Dr. Millan recommended transferring appellant to another prison where he could receive a psychological evaluation ("CAT J") and noted in July 1994 both appellant and his grandmother had requested treatment. Dr. Millan made a diagnosis of "intermittent explosive personality disorder." (*Ibid.*; 13 RT 3145.) Dr. Gawin explained that this was "an exclusionary diagnosis" and it did not apply unless there was no other disorder present that could explain explosive episodes. (13 RT 3145.)

On March 16, 1995, Dr. Millan noted that appellant had "a long history of psychiatric treatment and has had many mental diagnosis including manic-depressive illness, which was treated with Lithium and other anti-psychotic

and anti-depressant medications. Currently he is feeling depressed and has insomnia along with suicidal ideation. He is willing to take medications but due to court proceedings he requested to defer his medications for a couple of weeks." (Exh. No. 95, CT. Suppl. B 44, 45.)

On March 30, 1995, a classification committee confirmed a disciplinary action against appellant for fighting with his cell mate Lowery during which appellant slashed Lowery on the torso and appellant received minor abrasions to the right side of his face. (Exh. No. 95, CT. Suppl. B 47.) The committee retained appellant in administrative segregation but noted appellant's "need of psychiatric treatment." (*Ibid.*; 13 RT 3146.)

On July 10, 1995, Dr. Millan saw appellant again and appellant requested counseling after his court case.[7] However, he did not want any medications. (13 RT 3146; Exh. No. 95, CT. Suppl. B 48.)

On October 19, 1995, appellant appeared before a prison classification committee after slashing inmate Bongiorno. (13 RT 3146.) The committee recommended keeping appellant in administrative segregation "pending psychiatric review." (Exh. No. 95, CT. Suppl. B 49; 13 RT 3146.)

On November 2, 1995, D.F. Middleton, Ph.D., saw appellant and concluded that appellant was anti-social, extremely violent and dangerous with psychosexual aggressive impulses, and that appellant did not meet the criteria for the inmate mental health population. (Exh. No. 95, CT. Suppl. B 50-52, 53, 13 RT 3147.) Dr. Gawin disagreed entirely with the conclusion that appellant did not need mental health services. (13 RT 3147.)

On December 27, 1995, after appellant had been transferred from Calipatria State Prison to Corcoran State Prison, E.R. Gates, Ph.D., evaluated

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7. This court case appears to be the case where appellant on September 11, 1995, pled guilty to possession of a deadly weapon by a person confined in a penal institution (Penal Code, § 4502) and for which he received a "three

appellant. The staff had referred appellant to Dr. Gates because of a question of whether he needed medications and whether he should be continued on "walk-alone status". (Exh. No. 95, CT. Suppl. B 55.) Appellant stated that he was "mad, angry always.' ... Has always tried to stay away from people. Was frustrated out on street re: people – because many divisions. Here – just tries to protect self." (*Ibid.*)

Dr. Gates noted that appellant had an "extensive" psychiatric history with prior hospital stays. He had done well when prescribed Mellaril and Thorazine helped him sleep. His prior diagnoses included adjustment disorder, anxiety, intermittent explosive disorder, manic-depressive, major depression. According to his records, appellant seemed motivated for treatment. (Exh. No. 95, CT. Suppl. B 56.) Dr. Gates diagnosed bipolar disorder and anti-social personality disorder. (*Ibid.*; 13 RT 3148.) In Dr. Gawin's opinion, the diagnosis of anti-social personality disorder was not particularly significant because most people who are incarcerated meet the criteria for anti-social personality disorder. (13 RT 3148.) Dr. Gates concluded that appellant had a mood disorder for which medication might be helpful and referred appellant for a psychiatric consultation. (CT. Suppl. B 56; 13 RT 3148.) "Perhaps if on meds, he may stabilize and get a hold of his behavior." (*Ibid.*)

On December 29, 1995, appellant was prescribed chlorpromazine (aka "Thorazine") for one year. (Exh. No. 95, CT. Suppl. B 57, 58; 13 RT 3148.)

On January 8, 1996, Beverly Barr, Ph.D., diagnosed appellant as having a psychotic disorder and an intermittent explosive disorder. (13 RT 3149; Exh. No. CT. Suppl. B 62-63.) Her initial treatment plan was for appellant's symptoms to be stabilized on medication pending a new custody placement. Appellant's medication compliance was reported as "good." (*Ibid.*)

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strikes" sentence of 25 years-to-life. (4 CT 1110.)

On January 22, 1996, a counselor saw appellant and reported that he was willing to establish rapport, respect, and a therapeutic alliance. (Exh. No. 95, CT. Suppl. B 56.)

On February 22, 1996, Donald R. Welk, M.D. saw appellant "in routine psych medications rounds." (Exh. No. 95, CT. Suppl. B 64; 13 RT 3149-50.) Appellant was on 50 m.g. of Thorazine. (*Ibid.*) Appellant was polite and cooperative and said that he was doing well since he had been put on that medication. He was not depressed or suicidal and Dr. Welk stated that the "[p]atient is stabilizing." (CT. Suppl. B 64.) The plan was to keep appellant on medication for three months and to do a follow-up evaluation at that time. (*Ibid.*)

On February 23, 1996, appellant was transferred to the R.J. Donovan Correctional Facility for "psych services." (Exh. No. 95, CT. Suppl. B 66-67; 13 RT 3150.) However, there was no record that he received any treatment at that facility. (*Ibid.*)

On May 3, 1996, appellant was back at Corcoran State Prison and Dr. Welk saw appellant "in routine psych medications rounds." (Exh. No. 95, CT. Suppl. B 68; 13 RT 3150.) Appellant requested continuation of his current medications and said that Thorazine helped him to stay calm and think and also helped him to sleep. Dr. Welk observed that appellant seemed to "do best when on meds." (*Ibid.*) The plan was to keep appellant on medication for three months and do a follow-up evaluation at that time. (Exh. No. 95, CT. Suppl. B 68-69.)

On June 2, 1996, appellant refused his medication and Dr. Welk stopped his prescription on June 3, 1996. (Exh. No. 95, CT. Suppl. B 70-71; 13 RT 3163-64.)

On July 9, 1996, appellant was transferred from Corcoran State Prison to the California Correctional Institution. (Exh. No. 95, CT. Suppl. B 73.)

Appellant informed the medical staff that he was currently under care for psychiatric reasons and that he had been diagnosed with a mental illness but that he was unsure of the diagnosis and he had no prescriptions. (Exh. No. 95, CT. Suppl. B 73-75.) Appellant denied that he had ever attempted suicide and denied that he had any current mental health problems. (*Ibid.*) Appellant was released to custody without a referral for mental health treatment. (*Ibid.*; 13 RT 3150.)

On August 13, 1996, appellant denied any current psychiatric problems or complaints. (Exh. No. 95, CT. Suppl. B 75.)

On February 19, 1997, a doctor at Corcoran State Prison saw appellant for a mental health evaluation. Appellant said that he had stopped his medications eight or nine months ago and that he no longer needed psychiatric help. (Exh. No. 95, CT. Suppl. B 76; 13 RT 3151.) The doctor concluded that appellant was stable without medications and recommended discontinuing appellant from mental health services if appellant was "free of crisis" for a year. (*Ibid.*) In Dr. Gawin's opinion, it was incorrect to discontinue medications because the patient said that he did not need them anymore. After an initial episode, medications should be continued for at least six months and more appropriately for 18 months. (13 RT 3151.) Moreover, appellant had still not received a "modulator" for his bipolar disorder. He should have received a "preventive" such as Lithium "to enable the recovery to continue." (*Ibid.*)

On February 22, 1997, a lieutenant ordered appellant placed in administrative segregation and noted "Medical/Psyche concerns[.]" (Exh. No. 95, CT. Suppl. B 78; 13 RT 3151.)

On March 3, 1997, a medical assistant interviewed appellant and he denied having any psychological problems. (Exh. No. 95, CT. Suppl. B 79; 13 RT 3152.)

On April 4, 1997, appellant was back at Corcoran State Prison, and "C. Davis, M.D., noted that appellant met the criteria for inclusion in the "Mental Health Services Delivery System (MHDSS)." (Exh. No. 95, CT. Suppl. B 80.) Appellant stated that he had been diagnosed as bipolar and he went from depression to anger and that he wanted something to smooth him out. He did not like Thorazine but Lithium kept him stable. (Exh. No. 95, CT. Suppl. B 81.) Dr. Davis issued a prescription for Lithium. However, as of April 25, 1997, appellant had still not received his Lithium. (Exh. No. 95, CT. Suppl. B 81-82; 13 RT 3152.) Dr. Davis instructed the staff to be sure to please see that appellant got his Lithium. (Exh. No. 95, CT. Suppl. B 82.) This apparently did not occur because on May 8, 1997, there was another order for Lithium. (Exh. No. 95, CT. Suppl. B 84, 13 RT 3152.)

On May 19, 1997, a "Confidential Medical/Mental Health Transfer Summary" prepared prior to appellant's May 27, 1997, transfer to C.I.M. stated that appellant had no mental health problems ("none") and that he was receiving no medications ("none"). (Exh. No. 95, CT. Suppl. B 87-88; 13 RT 3152.)

On July 17, 1997, appellant while at Palm Hall at C.I.M. denied any mental health problems or any prior diagnosis or treatment for mental illness and said that he was not receiving any medications. (Exh. No. 95, CT. Suppl. B 89; 13 RT 3152.)

On August 3, 1997, appellant fatally stabbed Addis. On August 12, 1997, Caroll Yap, M.D., discovered that appellant was not on the medications that had been ordered for him at Corcoran and ordered Lithium for appellant. (Exh. No. 95, CT. Suppl. B 93-94; 13 RT 3153.) Dr. Yap noted that appellant's May 19, 1997, mental health summary was negative for mental health problems and medication and that on July 17, 1997, appellant denied any previous psychiatric care or medications. (*Ibid.*) However, a person in

medical records informed Dr. Yap that appellant had been diagnosed with bipolar disorder and that on May 8, 1997, a psychiatrist had ordered Lithium for appellant. (Exh. No. 95, CT. Suppl. B 94.) In Dr. Yap's opinion, appellant was "mentally ill" and he required medication so he requested a treatment plan ("Madrid Chron") for appellant. (Exh. No. 95, CT. Suppl. B 93.) However, custody staff told Dr. Yap that a treatment plan was unnecessary because appellant was unlikely to be transferred back to Corcoran State Prison. (*Ibid.*)

On September 4, 1997, appellant while still at C.I.M. reported that he was doing well on Lithium and "D. Webb, Ph.D." stated that appellant was in partial remission. (Exh. No. 95, CT. Suppl. B 95-96.) On the same date, the first mental health treatment plan was created for appellant. He was diagnosed as bipolar and that his most recent episode was "hypomanic." The treatment plan was for appellant to be seen daily by a "psych tech" and weekly for psychotherapy. (Exh. No. 95, CT. Suppl. B 97-98; 13 RT 3153.)

Dr. Gawin considered the federal decisions of *Madrid v. Gomez* (1995) 889 F.Supp. 1146 [Holding that that the delivery of both physical and mental health care at Pelican Bay State Prison violated the inmates Eighth Amendment right to be free of cruel and unusual punishment.]) and *Coleman v. Wilson, supra,* 912 F.Supp. 1282 [Holding that lack of mental health care and certain policies and procedures for handling mentally ill inmates in California state prisons violated their rights under the Eighth and Fourteenth Amendments.] in evaluating whether appellant received adequate mental health treatment while in the custody of the Department of Corrections. (13 RT 3154-55.)

In Dr. Gawin's opinion, appellant treatment "was entirely inadequate." The constitutional minimum standards required inmates to be able to make their medical problems fully known to medical staff. On several occasions, poignant requests by appellant and his family for treatment and medication

were refused. (13 RT 3155.) In some instances appellant refused medication. However, there was no basis to conclude that appellant was malingering. (13 RT 3155.) The records in the possession of the C.D.C. showed that appellant had a mental illness because of repeated references to suicidal ideation, mood fluctuations, severe depression, and auditory hallucinations. (13 RT 3156.) The records also showed a deficient delivery of mental health treatment to appellant under the standards set forth in the federal decisions. (13 RT 3156-57.) On multiple occasions, doctors had recommended treatment and transfer for that purpose. However, long periods passed without appellant receiving any treatment. In sum, appellant received a "dismal" level of care that, in other contexts, would be a basis for legal action against the physicians. (*Ibid.*)

The best environment for someone with bipolar disorder, whether or not he was on medication, was an environment with minimal stress. The profound stress of the prison environment would not be therapeutic. (13 RT 3157-58.) When stressors are superimposed on bipolar disease, the subject can flip into either mania or severe depression. The use of a taser on a mentally disordered inmate as occurred with appellant at the Corcoran state prison, "would be stressful in the extreme." (13 RT 3158.)

Appellant understood the nature of his acts when he engaged in criminal activity. However, someone who is bipolar can be out of control within their disorder. (13 RT 3165.) Evidence of planning and multiple episodes would diminish the likelihood that the violent episodes were the consequence of acute mania with irritability. However, another factor was hypomania, which was the last diagnosis for appellant. (13 RT 3166.) During hypomania, a persons judgment "is profoundly impaired." (13 RT 3166.) People in that state can still plan and react, "but they have no capacity to exercise understanding of the consequences of their acts. And that can continue in a chronic manner, during which people could make such mistakes in judgment several times and it could

occur repeatedly." (*Ibid.*) Someone who is either hypomanic or manic may enjoy committing crimes and harming others at the time but find those actions "abhorrent" when he is not in those states. (13 RT 3167-68.)

The judgment problems associated with hypomania may also lead to refusing medication or asking for it to be discontinued. When manic, the person feels a sense of speeding up and, therefore, that they are mentally sharper. For either reason, they may not want medication. However, when there are stressors in the environment such as prison, it is not appropriate to discontinue medications that keep someone who is bipolar from getting ill. (13 RT 3169.)

3. Testimony By Dr. Lipson.

Glen Lipson, Ph.D., a diplomat in forensic psychology, testified as an expert on prison mental health services. As a graduate student, Dr. Lipson did a rotation with the Psychological Services unit of the San Diego Police Department and he interned at the federal Metropolitan Correctional Center in San Diego. (13 RT 3219, 3222-23.) After graduation, Dr. Lipson's first positions was in mental health at the United States Penitentiary at Leavenworth, Kansas. (13 RT 3219-20.) He also worked with the Menninger Clinic, the police department, and the District Attorney in Topeka, Kansas. After the federal courts ordered the State of Nevada to institute a mental health care system in its prisons, Dr. Lipson worked with the Nevada prison system bring its mental health services up to the necessary standards. (13 RT 3220-21.) He continued to work on inmate mental health services until 1993, when he went into private practice. Since then, Dr. Lipson has consulted in both civil and criminal cases for District Attorneys, public defenders, and private attorneys, and he has evaluated inmates in the California prison system. (13 RT 3222, 3226.)

The essential elements of mental health services for inmates begin with

screening to identify those who are mentally ill and to distinguish those who may be malingering. Second, there must be an adequate file created so that after an inmate is diagnosed as mentally ill the information will be available and treatment will continue when the inmates moves between facilities. Third, the system must be responsive to inmate requests for mental health services and proactively prevent problems. (13 RT 3229.)

For example, correctional officers must be trained to identify the symptoms which show that an inmate is having a difficult time because of mental health problems. This may be indicated by changes in appearance, such as by tattooing the face, or when an inmate is fearful and uncomfortable around people. (13 RT 3229-31.) As pertinent here, staff should know that, when someone with bipolar disorder is in the manic phase and "feeling high", he may deny any mental health problems. (13 RT 3231.)

In addition, laboratory work must be done to monitor blood levels and compliance with medications and to identify side effects and to assess how well the inmate is doing on medication. (13 RT 3231-33.) One of the biggest issues with all psychiatric disorders is compliance with medications. Accordingly, staff must continue to work with the inmate to ensure that he stays on prescribed medication. (13 RT 3232-33.) For example, at the Leavenworth federal penitentiary, mental health staff would meet weekly with an inmate with mental health problems who had been placed in administrative segregation because that environment is very stressful. (13 RT 3233.)

Dr. Lipson met with appellant on two occasion in January and February of 2001 while appellant was awaiting trial at the West Valley Detention Center in San Bernardino County. Dr. Lipson also reviewed appellant's juvenile and adult records related to his mental health history and treatment in custody. Based on his review of those materials and his interviews of appellant, Dr. Lipson concluded that appellant since childhood had suffered from a serious

mental disorder. (13 RT 3246-47.) This was due to childhood trauma and a biological disposition for mental health problems based on his family history. Heritable health problems include depression and bipolar disorder. (13 RT 3247-48.)

Appellant's mental health problems included "unresolved post-traumatic disorder" from childhood trauma. This disorder can lead to various symptoms such as suicide attempts, self-mutilation, acting out, and aggression. (13 RT 3248.) There was also an "attachment disorder" which means that the appellant had "difficulty getting close to people and bonding and forming relationships." (*Ibid.*) For someone who has been traumatized, relationships are difficult and frightening. Appellant therefore tended to stay away from people if possible. As appellant's attachment disorder developed in adulthood, he could properly be diagnosed as "schizoid." This manifests as someone who is preoccupied with his own world and does not connect with other people. (13 RT 3248-49.) Appellant's records also reflected bipolar disease with episodes of mania and depression. (13 RT 3249.)

There were indications that appellant sometimes "feigned problems." However, the records consistently showed someone with problems in dealing with his emotions and adapting, and fitting into the prison system. People may feign problems, such as hearing voices, because it is the only way to get attention for their psychological problems. However, this does not mean that the person is not having real problems. (13 RT 3249-50.) When "feeling up", a person with bipolar disorder may deny psychological problems. (13 RT 3250.)

In Dr. Lipson's opinion, appellant had a real disorder and he was not malingering or faking. From the standpoint of forensic psychology, an evaluator can not simply accept what a person says but must look for verifications. (13 RT 3250-51.) Appellant's records verified mental health

problems by documenting his suicide attempts related to his extended periods of molestation by men and women. (13 RT 3250-51.) Overall, appellant's records showed a very toxic and damaging childhood. Because of his grandparent's limited financial resources, they were not able to keep appellant in the right programs for an extended period of time. (13 RT 3255.) At an early age, appellant needed six to 12 months of individualized therapy because someone with his attachment problems would not work well in a group. (13 RT 3255.)

Given the nature of appellant's mental health problems, prison posed multiple problems for him. Prison is "a very predatory environment with very dangerous people." (13 RT 3256.) Appellant was small, so in order to adapt he did a lot of exercises to bulk up and appear more intimidating. He tried to keep to himself and stay away from people because he had problems with people. While in custody after his first burglary convictions and until mid--1994 after another burglary conviction, appellant did not act violently but appeared to have been the victim of assaults. Appellant's records contained reports of a lot of different injuries to him which suggested that he was the victim of intimidation and violence. However, appellant did not report those incidents as assaults so that the situation would not escalate. (13 RT 3256-57.)

Appellant's subsequent violent behavior reflected the "diathesis stress model" of behavior. That means that if someone with a mental disorder is put in a violent and very stressful environment, the stress will very often send the person "over the edge" so that he acts out more. (13 RT 3257.) Given appellant's history of mental health problems, the proper way to handle him when he entered the prison system would have been to obtain his mental health records in order to understand his past diagnosis and treatment. (13 RT 3257-58.)

After appellant's first violent behavior began, there should have been a

psychiatric evaluation in order to find the best way to intervene with someone whose behavior is escalating. Acting out in violence is a very often a sign that someone is mentally ill and is under stress and having problems. (13 RT 3257-59.) Appellant's file contained information from many doctors showing that he had mental health issues that needed to be followed. A person with bipolar disorder and who was suicidal and acted out when depressed may not be aware that he is having a psychiatric problem. (13 RT 3258-59.)

Once appellant was diagnosed with bipolar disorder, treatment protocols should have been written and meetings held with appellant to explain the nature of the disorder because there is a lot of denial and lack of understanding of bipolar disorder. (13 RT 3259-60.) Staff should also have evaluated his placement because inmates may be afraid to receive mental health treatment because it makes them look vulnerable to others. (13 RT 3260.) The only treatment plan in appellant's records was from September 4, 1997. (13 RT 3261-62.) The request for a "Madrid Chrono" meant that appellant was mentally ill and needed treatment. (13 RT 1362-63.)

In sum, the records in Exhibit No. 95 showed that appellant had not been properly treated or followed under the standards for prison inmates. First, the staff failed to obtain appellant's prior mental health records. Second, they failed to keep appellant maintained on medication. Third, after the initial violent incidents, they failed to do a mental health evaluation and intervention. (13 RT 3263-64.) In September of 1992 and again in July of 1994, appellant and his family contacted the Department of Corrections about their concern for his mental health and requested psychological treatment. (13 RT 3264-66; see Exh. No. 95, CT. Suppl. B 32, 36-37.) However, those requests were improperly denied because the Director of the Department of Corrections said that there was no evidence that appellant had a serious mental illness. (13 RT 3266, see Exh. No. 95, CT. Suppl. B 35.)

F. Expert Testimony About Calipatria State Prison.

For more than 22 years with the Department of Corrections, Anthony L. Casas held positions from correctional officer to associate warden at San Quentin State Prison. (13 RT 3285.) As explained in the guilt phase of the trial, his responsibilities included developing and implementing departmental policies for the handling and safety of inmates. (8 RT 1997-99.) At the penalty phase, Mr. Casas testified about conditions at Calipatria State Prison, where appellant's first violent episodes occurred in 1994.

Calipatria State Prison opened in 1992. Thereafter, "a variety of things went wrong besides the design." (13 RT 3286.) Because the physical location of the prison was so unattractive, correctional officers did not want to work there. As a result, the prison was staffed by correctional officers who had just graduated from the training academy and had no choice for their assignments. "So you had inexperienced unseasoned correctional officers. You had supervisors that were not of the highest quality." (13 RT 3286-87.) The chief deputy warden had management problems and he was demoted and transferred. (13 RT 3287-88.) While the prison was still in "shake down" mode in 1992-1995, there were a lot of incidents and problems and Calipatria State Prison developed a reputation as being violent and out of control. (13 RT 3288-89.) The problems were "a lot worse" than those at Pelican Bay state prison which had received more publicity. (*Ibid.*)

In early 2000, Casas became involved in brokering an arrangement for appellant to provide information about the NLR through a process known as "debriefing." When that occurs, the inmate provides information that "burns his bridges with the gang" and the department puts the inmate in protective custody. (13 RT 3289-90.) In 2000, Glen Willett of the Department of Corrections Special Service Unit ("SSU") met with appellant and debriefed him about NLR. However, by that time, appellant had been out of the state

prison system for two years pending trial, so he was told that his information was stale. (13 RT 3295-96.)

Casas also attempted to make arrangements for appellant to provide information to the F.B.I. The F.B.I. showed an interest in meeting with appellant and an F.B.I. agent contacted the San Bernardino County District Attorney. However, the District Attorney was not interested in brokering a deal in this case. (13 RT 3291-92.) Nevertheless, as a result of his debriefing, appellant was in protective custody at the time of trial. (13 RT 3290.)

GUILT PHASE ARGUMENTS

I.

REVIEW OF SEALED RECORDS IS NECESSARY TO ENSURE THAT APPELLANT RECEIVED ALL MATERIALS RESPONSIVE TO HIS DISCOVERY REQUESTS.

A. Introduction.

By subpoenas and written motions, appellant made discovery requests for the Department of Corrections confidential file ("C-file") for himself, the homicide victim Daniel Addis, and Gary Green, the NLR/AB shot-caller who ordered the "hit" on Addis. (See Sections B.1. & B.2., below.) By the same methods, appellant also requested discovery materials from the files of correctional officers who were witnesses to the incidents that led to the charges against him. (*See* Section B.3., below.)

The trial court ordered the holders of the discovery materials to produce them to the court for *in camera* review. The court disclosed some of the materials to appellant but withheld others and had copies of all the materials it reviewed placed under seal in the court file. Under procedures established by this Court, appellant respectfully requests the Court to independently review of the materials placed under seal to ensure that he received all that he was

entitled to receive under state and federal law. (*See, e.g., People v. Hughes* (2002) 27 Cal.4th 287, 330.) If the Court finds additional discoverable materials, appellant further requests an opportunity to review them and to submit additional briefing on their significance to the guilt and penalty phase issues.

The trial court's rulings on appellant's discovery requests are reviewed for an abuse of discretion standard. (*People v. Prince* (2007) 40 Cal.4th 1179, 1285.) Because appellant has not seen the materials placed under seal, he is unable to ascertain whether the trial court properly exercised its discretion. Nevertheless, appellant emphasizes that the "disclosure of all relevant and reasonably accessible information, to the extent constitutionally permitted, facilitates 'the true purpose of a criminal trial, the ascertainment of the facts.' [Citation.]" (*In re Littlfield* (1993) 5 Cal.4th 122, 131.)

"As this court long ago held in *People v. Riser* (1956) 47 Cal.2d 566, 586 [305 P.2d 1], 'the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits." (*In re Michael L.* (1985) 39 Cal.3d 81, 103-104.) Therefore, the accused is entitled to "'pretrial knowledge of any unprivileged evidence, or information that might lead to the discovery of evidence, if it appears reasonable that such knowledge will assist him in preparing his defense ....' [Citation.]" (*People v. Memro* (1985) 38 Cal.3d 658, 677.)

A defendant is also entitled to any discovery "as mandated by the Constitution of the United States." (Penal Code, § 1054, subd. (e).) Under the Due Process Clause of the Fourteenth Amendment, the prosecution has a duty "even in the absence of a request therefore, to disclose all substantial material evidence *favorable to an accused*, whether such evidence relates directly to the

question of guilt, to matters relevant to punishment, or to the credibility of a material witness." (*People* v. *Ruthford* (1975) 14 Cal.3d 399, 405-406, emphasis in original, citing, *inter alia*, *Brady v. Maryland* (1963) 373 U.S. 83 [10 L. Ed. 2d 215, 83 S. Ct. 1194]; *Giglio v. United States* (1972) 405 U.S. 150, 153-54 [92 S. Ct. 763, 766, 31 L. Ed. 2d 104], overruled on another point by *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 7.)

"Evidence is favorable and must be disclosed if it will either help the defendant or hurt the prosecution." (*People v. Coddington* (2000) 23 Cal.4th 529, 589.) The test for materiality "is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." (*Kyles v. Whitley* (1995) 514 U.S. 419, 434-35 [115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490].) Nor is the defendant seeking discovery required to show that "his defense would have ultimately succeeded." (*In re Brown* (1998) 17 Cal.4th 873, 891; *accord Kyles, supra,* 514 U.S. at p. 434.) Rather, disclosure is necessary if the evidence would "'create a reasonable doubt of the defendant's guilt when taken into consideration with all the evidence in the case.' [Citation.]" (*Ibid.*)

As to the scope of disclosure, the prosecution has "the duty to learn of any favorable evidence known to the others acting on the government's behalf in the case." (*Id.* at p. 878; *accord Kyles, supra,* 514 U.S. at p. 437.) The courts have "consistently 'decline[d] to draw a distinction between different agencies under the same government, focusing instead upon the "prosecution team" which includes both investigative and prosecutorial personnel.' [Citation.] 'A contrary holding would enable the prosecutor to avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency ....'[Citation.]" (*Ibid*; *see also Giglio v. United States* (1972) 405 U.S. 150, 154 [92 S. Ct. 763, 766, 31 L. Ed. 2d 104]; *Kyles,*

supra, 514 U.S. at p. 439-40.) "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." (*Banks v. Dretke* (2004) 540 U.S. 668, 696 [124 S.Ct. 1256; 157 L.Ed.2d 1166].)

B. The Discovery Requests At Issue.

1. The Department of Corrections Confidential Files For Appellant, Addis, and Green.

Appellant by subpoenas and written motions made discovery requests for the Department of Corrections confidential file (known as the "C-file") for himself, the homicide victim Daniel Addis, and Gary Green, the NLR/AB shot-caller who ordered the "hit" on Addis. The trial court reviewed those files *in camera*, disclosed some materials from them to the defense, and ordered copies of the entire C-files placed under seal in an envelope in the Superior Court file. (1 RT 250-251, 266.) Appellant requests this Court to review the C-files for appellant, Addis, and Green to ensure that he received all discoverable materials.

By a memorandum and a declaration based on the preliminary hearing transcript and prior discovery obtained, defense counsel explained the rationale for requesting the C-files. (1 CT 120-126, 132-138.) The fatal assault on Addis charged as murder (Penal Code, § 187, subd. (a), Count 1) and as a capital offense (Penal Code, § 4500, Count 2) occurred on the exercise yard of Palm Hall, the housing unit for high security inmates at the California Institution For Men ("C.I.M.") in Chino, California. (1 CT 121, 134.) The available information indicated that before the stabbing occurred correctional officers knew that Addis would be assaulted and that Green was the central figure in orchestrating the assault. Nevertheless, after Green demanded that Addis be brought to the yard, correctional officers released Addis onto the yard and did nothing to prevent harm to him. (*Ibid.*)

Accordingly, the circumstances under which Addis was placed on the yard were suspect. Department of Corrections reports stated that appellant and Green were members of a prison gang known as the "Nazi Low Riders" ("NLR")and that Green was the "shot caller" for the white inmates at Palm Hall with the authority to order "hits" by NLR on other inmates. (1 CT 121, 123, 136.) Addis was not associated with the NLR and he was not housed on the same tier as inmates associated with the NLR gang. Under usual procedures, Addis would not exercise with that that group. (1 CT 122.)

At the hearing on prison rules violation against Green for his role in the Addis homicide, the senior hearing officer (Lieutenant W.L. Jefferson) documented the following findings based upon unidentified and/or "confidential" sources of information:

> More than one source independently provided the same in that GREEN was involved in a conspiracy to assault ADDIS which resulted in his death. Information received indicates that GREEN ordered the 'hit' on ADDIS. Confidential source(s) indicate that GREEN was overheard yelling at Officer R. Maldonado stating 'bring that wood ADDIS to the yard and bring him now.' GREEN yelled several times to Officer Maldonado. Green repeatedly questioned Officer Maldonado about ADDIS coming to the yard. Officer Maldonado stated that GREEN started pacing back and forth in a very agitated manner when suddenly GREEN shouted, 'I want to talk to the fucking Sergeant or Lieutenant. The youngster has got to come out.' Officer Maldonado stated that when ADDIS finally exited the building ... she found it peculiar that GREEN never acknowledge[d] ADDIS' presence on the yard like he did the other White inmates, with handshakes and hugs. ... Officer Esqueda also stated that when ADDIS entered the yard, GREEN nor any other inmate, acknowledge[d] ADDIS until the very end of yard time, at which time GREEN was observed shaking ADDIS' hand and telling ADDIS, 'go ahead Danny, go to the table and play cards. It's all right.' Officer Esqueda also stated that several minutes after telling ADDIS 'it's all right', GREEN approached the table where ADDIS was playing cards. Immediately upon GREEN'S arrival, ADDIS was assaulted by

> LANDRY. During the time of ADDIS' assault and subsequent death, GREEN was the 'shot caller' for the White Management inmates in Palm Hall Ad/Seg. GREEN'S C-file confirms that GREEN is a validated member of the White supremacists prison gang Nazi Low Rider (NLR). This Senior Hearing Officer elects to hold GREEN accountable for violation of CCR 3005(c) Force and Violence, specifically, Conspiracy to Commit Battery Resulting in the Death of Inmate [A]DDIS, Daniel E-82882." (1 CT 122-23, 135-136.)

Evidence presented at the preliminary hearing showed that the inmates were searched multiple times before they were released onto the exercise yard. At his cell, every inmate was subjected to an unclothed body search. Officers also searched the clothing items and shower towel that inmates were permitted to bring onto the yard. Just prior to release onto the yard, correctional officers scanned the inmates with a metal detector to locate any weapons. The yard itself was searched for weapons before any inmate was released for exercise. (1 CT 123-124, 136-37.)

In sum, the available information indicated that: no weapon could be on the exercise yard without the knowledge of the correctional officers because of the multiple searches performed beforehand; before Addis was released onto the yard, correctional officers knew that Green, the NLR shot-caller had ordered a "hit" on Addis; Green demanded that officers bring Addis to the yard and asked for the officer in charge to ensure that this occurred; officers put Addis onto the yard in spite of all the information that Addis's life was at risk; and that after Addis was brought onto the yard and shunned by the other inmates, officers took no action to prevent harm to him.[8] (1 CT 124-125; 137-138.)

The statements by the officer at the hearing for Green confirmed that

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8. As explained below in Section B.2., the defense subsequently learned that Addis had been placed in Palm Hall after he had committed a battery on a

undisclosed sources of information existed that were relevant to the circumstances of the offense and appellant's defense that he acted under the duress of the NLR shot-caller who had the authority to have appellant killed. (1 CT 132-33.) The information sought could also be mitigating evidence to show that others bore responsibility for Addis's death and/or that they had been negligent in their duties. (*Ibid.*) Therefore, to develop a defense for both the guilt and penalty phases of the trial, appellant needed to know the identities of the persons with knowledge of the circumstances leading up to the assault on Addis and the internal investigation done of that incident.

Accordingly, appellant requested the C-files for appellant, Addis, and Green. The procedural background to these requests was as follows. On June 26, 2000, appellant filed and served a subpoena on the custodian of records at Corcoran State Prison to appear as a witness and to produce appellant's "complete CONFIDENTIAL C-file ...." (1 CT 95, 99, 100.) Neither the prosecution nor the Attorney General, who represented the Department of Corrections in the discovery proceedings, disputed that appellant's C-File was located at Corcoran State Prison at the time of appellant's request. (1 CT 96, 102-112 ["Memorandum Of Points And Authorities In Support Of Motion To Quash Subpoena And/Or Conduct An In Camera Hearing"].)

On August 14, 2000, the Attorney General as counsel for the California Department of Corrections filed a motion to either quash the subpoena for appellant's own file or to conduct an *in camera* hearing. (1 CT 96, 109-110.) The Attorney General contended that appellant's file was "presumptively privileged" and that the procedural; requirements for making the file available had not been met. (1 CT 102-105.) In addition, the Attorney General contended that the subpoena request was overbroad and that an inmate's confidential file was not discoverable based on the "official information

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correctional officer.

privilege", citing Evidence Code section 1040, and the "Information Practices Act" , citing Civil Code sections 1798.1, 1798.3, 1798.24, and Penal Code sections 2600 and 2601. (1 CT 106-109.)

On September 6, 2000, appellant filed an opposition to the Attorney General's motion to quash the subpoena for his own confidential file. (1 CT 117-126.) Appellant argued that he was entitled to receive his complete confidential prison file under state law and that withholding of that file would violate his right to due process of law under the Due Process Clause of the Fourteenth Amendment and his Sixth Amendment rights to information necessary to confront and to cross-examine the evidence against him. (1 CT 117-119.)

On September 7, 2000, after informal discovery requests and subpoenas, appellant also filed a motion requesting the C-Files for Addis and Green. (1 CT 127-128, 147, 151, 168.) Appellant argued that he was entitled to receive these materials under state law (Penal Code, § 1054, *et seq.*) and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (1 CT 127.) In particular, appellant argued that he was entitled to this discovery based on his right to access to all evidence that could throw light on the issues in the case (*People v. Riser, supra,* 47 Cal.2d 566; *Giles v. Maryland* (1967) 386 U.S. 66 [87 S. Ct. 793; 17 L. Ed. 2d 737]) and his due process, confrontation, and cross-examination rights. (1 CT 130-32, citing, *inter alia, People v. Reber* (1986) 177 Cal.App.3d 523, 531-32; *Brady, supra,* 373 U.S. 83; *Kyles, supra,* 514 U.S. 419; *Giglio, supra,* 405 U.S. 150; U.S. Const., 6th & 14th Amends.)

On September 20, 2000, the Attorney General filed an opposition to appellant's request for the C-files for Addis and Green. (1 CT 152-164.) The Attorney General argued based on *People v. Barrett* (2000) 80 Cal.App.4th 1305, that the files for Addis and Green had to be requested by subpoena duces

tecum rather than by motion pursuant to Penal Code section 1054. (1 CT 153.) Moreover, on the Attorney General's view, the files requested were not discoverable because they had "no direct connection to the present investigation or charges against Defendant." (*Ibid.*)

On September 22, 2000, appellant filed a reply to the Attorney General's opposition. (1 CT 165-173.) Appellant argued that *People v. Barrett, supra,* did not apply because appellant was seeking exculpatory evidence and/or evidence that would mitigate punishment for the crime which the prosecution was required to produce under the United States Constitution. (1 CT 166-67; citing Penal Code, § 1054, subd. (e)(1); *Brady, supra,* 373 U.S. 83; *Kyles, supra,* 514 U.S. 419.) The Department of Corrections was involved as an investigating agency for the charged crimes. Therefore, the prosecution had a duty to provide the requested materials. (*Ibid.*) Moreover, appellant had served subpoenas on the Department of Corrections for the C-files for himself, Addis, and Green, and they should therefore be submitted to the court for *in camera* review. (1 CT 168.)

On September 29, 2000, the trial court held a hearing on the discovery requests for the inmates files. (1 CT 174; 1 RT 225.) The court found that appellant had complied with the procedural requirements for the discovery of the C-files. (1 RT 238.) The court and parties agreed that the court should conduct an in-camera review of those files and accept declarations from the custodian of records that accurate copies of the files would be provided to the court. (1 RT 250, 253-254.)

On October 26, 2000, the trial court stated that it had reviewed the C-files *in camera* and had tentatively decided to release some of their contents to the defense. (1 RT 256-257.) Defense counsel agreed to enter into a protective order that he would not disclose the material to anyone, including appellant. (1 RT 259.) The trial court gave the Attorney General an

opportunity to object in camera to the release of any of those materials. (1 RT 257-258.) The sealed transcript of that in camera hearing, which appellant has not seen, is reported at 1 RT 260-264. Afterwards, the court stated that what it heard in camera had not changes its mind about what was discoverable. (1 RT 266.)

The court created packets of the materials from the C-files of appellant, Green, and Addis it agreed to disclose to the defense. (*Ibid.*) Copies of those materials are included in the clerk's transcript. (*See* 1 CT 181; 1 CT 182-297 [Green]; 1 CT 298-2 CT 314 [appellant]; 2 CT 315-316 [Addis].) The remaining contents of the C-files were placed under seal in an envelope in the Superior Court file. (1 RT 250-251.) Appellant requests the Court to review the C-files for appellant, Green, and Addis.

Appellant notes that the trial court disclosed only one page from Addis's C-file. It was a December 29, 1992, report of an unrelated incident involving Addis that occurred at Folsom State Prison, more than four years before his August 3, 1997, homicide at C.I.M. (2 CT 316.) Where the Department of Corrections investigated the alleged murder of Addis (*see* 1 CT 122-23, 135-36), it is difficult to believe that documents related to the investigation would not be in the inmate's C-file.

2. The Trial Court Should Have Permitted Defense Counsel To Review Addis's C-File After New Records Materialized Shortly Before Trial.

On March 7, 2001, after the jury was sworn but before opening statements, appellant filed a "Motion At Trial For Discovery" with a supporting declaration by defense counsel. (2 CT 571-572, 575-581.) In pertinent part, appellant stated that on or about February 13, 2001, the prosecution for the first time provided the defense with a copy of an incident report showing that on May 27, 1997, Addis had assaulted a correctional

officer. (2 CT 577; 4 RT 898.) This document explained why Addis was placed in Palm Hall and it had not been included in the set of documents released to the defense after the court reviewed Addis's C-file. This development showed that the prosecution had access to materials in the Addis's file that had not been disclosed to the defense. (2 CT 576.) The prosecutor admitted that correctional officer Lacey, who assisted the prosecution at trial, was able to provide materials to her from Addis's file. (*Ibid.*)

Under these circumstances, appellant argued that denial of an opportunity to review Addis's file would violate appellant's right to reciprocal discovery recognized by *Wardius v. Oregon* (1973) 412 U.S. 470 [93 S. Ct. 2208; 37 L. Ed. 2d 82], his right to *Brady* material (*Brady, supra,* 373 U.S. 83), and his rights to due process, to a fair trial, and to the effective assistance of counsel. (2 CT 576-77, 578-579, citing U.S. Const., 5th, 6th and 14th Amends.)

On Friday, March 9, 2001, the trial court held a hearing on appellant's discovery motion. (See 2 CT 576.; 4 RT 956, 963-964) The prosecutor stated that in 1997 Department of Corrections Officer Lacey provided her with the document showing that in May 1997 Addis had assaulted a correctional officer. However, she had not produced the document because "it did not appear to be relevant." (4 RT 964-965.) The prosecutor claimed that she had not known until the previous Monday, during jury selection that a component of the defense was staff complicity in the Addis incident. (4 RT 965.) The trial court found it "odd" that this information had "come to light really quite late in the game" because the defense had "made it quite clear that the information would have been relevant ...." (4 RT 965, 966-967.)

Appellant asked to review Addis's file for information to support his defense, subject to the court's review for information too "sensitive" to be disclosed to defense counsel. (4 RT 967.) The Attorney General, who

represented the Department of Corrections at the hearing, objected that appellant was entitled only to have the court take another look at the Addis file. (*Ibid.*) The court said that it had re-reviewed the Addis file "page by page." (4 RT 968.) The document relating to the Addis's assault on a correctional officer had been in the file attached to a document involving another incident. "But there are no other documents in the file that are discoverable and the court will deny your request to go through the file." (4 RT 968.)

Appellant respectfully submits that under the circumstances, his counsel should have been able to review Addis's file. "Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, it does speak to the balance of forces between the accused and his accuser." (*Wardius, supra,* 412 U.S. at p. 474.) The high court has "been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial. [Citations]." (*Id.* at p. 474, fn. 6.) Accordingly, "in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street." (*Id.* at p. 475.) "Indeed, the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor." (*Id.* at pp. 475-476, fn. 9.)

In this case, the government identified no state interest to overcome appellant's due process right to information from Addis's prison file that could lead to the discovery of admissible evidence. Therefore, subject to a protective to which defense counsel had agreed (1 RT 259), he should have been permitted to review Addis's file, particularly where both the prosecutor and the court had failed to identify relevant material.

Appellant requests the Court to give his appellate counsel an

opportunity to review the file at this time because of appellate counsel's duty to preserve evidence of habeas counsel. (*In re Clark* (1993) 5 Cal.4th 750, 811 ["'Until the appointment of habeas corpus counsel, [appellate counsel] has the duty to '*preserve evidence* that comes to the attention of appellate counsel if that evidence appears relevant to a potential habeas corpus investigation.'", quoting Supreme Court Policies Regarding Cases Arising From A Judgment Of Death, Policy 3, Standard 1-1.) In addition, the circumstances confirm the importance of appellant's request to have this Court conduct an independent review of Addis's file.

3. Correctional Officer Personnel Files.

By subpoena duces tecum to the Department of Corrections and a supporting motion for discovery, appellant requested records from the personnel files of the 14 correctional officers who were witnesses to the three incidents from which the charges arose. Specifically, appellant requested discovery related to correctional officers F.A. Esqueda, D. Bisares, Sergeant A. Sams, E.M. Valencia, R. Maldonado, T.L. Ginn, L.S. Rounds, Cervantes, K.J. Asher, L. McAlmond, Investigator D. Lacey, M.A. Lourenco, Perez, and T. Lopez. (2 CT 329-330, 331.)

Appellant sought materials from the files reflecting: lack of credibility (*People v. Hustead* (1999) 74 Cal.App.4th 410); dishonesty, untruthfulness, veracity, false arrest, or conduct unbecoming an officer or neglect of duty (*Pierre C. v. Superior Court* (1984) 159 Cal.App.3d 1120); and acts involving moral turpitude (*People v. Wheeler* (1992) 4 Cal.4th 284). (2 CT 330, 332.) In particular, appellant requested records of (1) internal affairs complaints in the officers' personal file; (2) internal affairs complaints in any general file; (3) the personnel files of each officer including but not limited to evaluations, academy evaluations, and other performance evaluators; (4) and informal files kept by supervising officers including comments by citizens, other officers

and/or supervisors.

The requests were based on statute (Evid. Code, §§ 1043-71; Penal Code, § 832.5, 832.7), appellant's constitutional right to relevant evidence (Former Cal. Const., Art. I, § 28, subd. (d), current § 28, subd. (f)(2)), the Due Process Clause of the state and federal constitutions (Cal. Const., Art. I, §§ 7, subd. (a), 15; U.S. Const., 14th Amend.), appellant's Sixth Amendment rights to confront and cross-examine the correctional officers who would be witnesses against him, and appellant's due process and Sixth Amendment rights to present a defense. (2 CT 334-337, 338-341; 2 RT 307-308.)

By declaration, defense counsel stated that all of the officers about whom information was sought were directly involved in the investigation of the crimes charged against appellant and, with the exception of Investigator Lacey, they were present at C.I.M. when the events at issue occurred. In addition, the prosecution had identified all of the correctional officers for whom discovery was sought as witnesses it intended to call at trial. (2 CT 345-46.) Defense counsel incorporated by reference his prior declaration in support of his request for the inmate files as discussed above in Section B.1. This explained the relevance of the requested correctional officer files to the defense theory of correctional officer complicity and/or negligence in the events leading up the Addis homicide. (2 CT 346.)

The Attorney General on behalf of the Department of Corrections filed an opposition to appellant's discovery requests and a motion to quash the subpoena duces tecum. (2 CT 417-436, 437-453.) The Attorney General argued that the files for the correctional officer were privileged and/or confidential pursuant to Penal Code section 832.7 and Evidence Code section 1040, subdivision (b). (2 CT 427-453.) Moreover, the Attorney General asserted that the discovery requests were overbroad and oppressive and that defendant had made an insufficient showing of good cause and relevance. (2

CT 422-23.) Alternatively, the Attorney General requested an in-camera hearing before the court ordered disclosure of any records. (2 CT 345-46.)

On January 10, 2001, the trial court held a hearing on the discovery issues related to the correctional officer files. (2 CT 467-468; 2 RT 306-308.) The court did not rule on the objections raised by the Attorney General. (2 RT 306-309.) It ordered the custodian of records to produce records related to 3 of the 14 officer witnesses, Officer Esqueda, Sergeant A. Sams, and Officer Maldonado. (2 RT 309, 310, 311; 2 CT 467.) As to the other officers, the court denied the request, finding that appellant "failed to make a good cause showing for each of the other officers' records or review of those records." (*Ibid.*)

On January 18, 2001, the trial court informed the parties that it had reviewed the personnel files for Sergeant Sams, Officer Esqueda, and Officer Maldonado and had found no discoverable materials in any of the files. (2 RT 370-371; 2 CT 488.) The court ordered the records sealed and kept available for later appellate review. (*Ibid.*; 2 CT 488; 2 RT 370-371.)

Because appellant has not seen the sealed files, he is unable to ascertain whether the trial court erred in finding no discoverable materials in the officer's files. However, appellant emphasizes Officer Esqueda was the lead witness against appellant at trial. (5 RT 1040; 1057, foll.) Sergeant Sams was the officer in charge at Palm Hall and the prison yard on the day that the assault on Addis occurred. He investigated the events leading up to the assault and at trial testified for the prosecution to justify how Addis had been handled by staff on that day. (5 RT 1147; Exh. No. 51, 4 CT 1150; Exh. No. 60, 4 CT 1166-69.) Therefore, their knowledge and credibility were important issues in the case.

Officer Maldonado, the gate officer who released Addis onto the yard and was originally on the prosecution's witness list. However, as discussed in

more detail below, the prosecutor decided not to call her as a witness when she became reluctant to testify after disclosing that she had been harassed at home and called a rat. (8 RT 1869.) Because of the Addis homicide, Maldonado left the Department of Corrections and sought psychological counseling. She told her therapist that that the staff knew that "'an inmate was to be killed. We all knew it. I told the supervisor that he would be killed if we let him out of his cell.'" (8 RT 1856.) Given this evidence, is difficult to believe that there were no discoverable records in Maldonado's personnel file.

"*Pitchess* [*v. Superior Court* (1974)] 11 Cal.3d 531 ["*Pitchess*"] and its statutory progeny are based on the premise that evidence contained in a law enforcement officer's personnel file may be relevant to an accused's criminal defense and that to withhold such relevant evidence from the defendant would violate the accused's due process right to a fair trial." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1227.) Accordingly, appellant requests this Court to closely examine the personnel files related to Sergeant Sams, Officer Esqueda, and Officer Maldonado which were copied and sealed by the trial court. (*People v. Prince*, *supra*, 40 Cal.4th at p. 1285 ["This court routinely independently examines the sealed records of such in-camera hearings to determine whether the trial court abused its discretion in denying a defendant's motion for disclosure of police personnel records."].)

4. Additional Files Related To Officer Maldonado Held By The State Compensation Insurance Fund, Singleton Investigations, And In Her Health And Safety File At The California Institution For Men.

On March 7, 2001, defense counsel appellant filed a "Motion at Trial For Discovery" based, *inter alia*, on recently acquired information related to Officer Maldonado. (2 CT 575-582.) Appellant sought discovery related to Maldonado from the State Compensation Insurance Fund (SCIF) and the California Institution for Men (C.I.M.) where Maldonado was employed at the

time of the Addis homicide. (3 CT 638-640.)

Defense counsel informed the court that after the jury was sworn on March 5, 2007, the prosecutor told him that that a year after the Addis homicide Officer Maldonado left the Department of Corrections on medical retirement for mental and emotional problems related to the Addis homicide. (2 CT 580; 4 RT 957-58.) Maldonado was presently resisting appearing as a witness at trial. (4 RT 958, 2 CT 577, 580-81.)

Accordingly, appellant requested discovery of information related to the circumstances of her separation from the Department of Corrections as relevant to the question of the staff's role in the Addis homicide. (2 CT 577, 4 RT 958-60.) He argued that these materials were crucial to the preparation of his defense and that the prosecution had a due process obligation to produce them as evidence material to issues of guilt and punishment. (2 CT 578-579, citing, *Moore v. Illinois* (1972) 408 U.S. 786, 794-795 [92 S.Ct. 2562; 33 L.Ed.2d 706] ["The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment."]; *United States v. Agurs* (1976) 427 U.S. 97 [96 S.Ct. 2392; 49 L.Ed.2d 342]; *inter alia, Kyles, supra,* 514 U.S. at pp 437-438; *Brady, supra,* 373 U.S. at p. 87.)

The trial court granted the defense request for an order shortening time and held a hearing on March 9, 2001, just before opening statements had been scheduled to begin. (2 CT 582; 3 CT 663; 4 RT 956-57.) At the hearing, defense counsel provide the court with additional information. On March 7, 2001, the prosecution for the first time provided a tape recording of an August 3, 1997, interview of Maldonado which described her knowledge of the events leading up to Addis being placed on the exercise yard, including her belief that Addis would be assaulted. (4 RT 958.) In addition, the prosecutor informed

defense counsel that she no longer intended to call Maldonado as a witness at trial. (4 RT 958-959.)

The trial court reviewed Maldonado's personnel file a second time. It found "there are no relevant or discoverable medical or severance records contained in that file. So, that issue is resolved." (4 RT 963.) However, the court agreed that there was reason to believe that Maldonado's medical retirement from the Department of Corrections was related to the Addis homicide. Therefore, appellant was entitled to subpoena records from the entities that were likely to have records related to her retirement. (4 RT 958-960.)

On March 9, 2001, defense counsel filed and served a subpoena duces tecum for all records for the period 1997-1998 relating to the employment and medical retirement of Officer Maldonado from the Department of Corrections that may be held at C.I.M. and the SCIF.[9] (3 CT 638-640.)

On March 9, 2001, the Attorney General filed an opposition to any additional discovery related to Maldonado. (3 CT 629-637; 4 RT 1003-1004.) The Attorney General argued that the defense had failed to show any grounds for further examination of records relating to Maldonado and had failed to comply with safeguards for protecting privileged medical records. Alternatively the Attorney General requested in-camera review by the trial court and an appropriate protective order before the release of any records. (*Ibid.*)

On March 19, 2001, the trial court held a hearing and stated that it had received a packet of documents from the SCIF in response to the defense

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9. Appellant also requested discovery from the California Public Employee Retirement System ("CalPERS"). (3 CT 638-640.) However, appellant subsequently informed the court that counsel for CalPERS would file declaration under penalty of perjury that there were no records relating to Maldonado. (4 RT 1002.)

subpoena duces tecum. (4 RT 1000-1001.) The custodian of records for C.I.M. had also brought to court the "health and safety file" and the worker's compensation records relating to Maldonado. (4 RT 1007-1008.) The custodian of records for Dr. Friedman, the psychiatrist who examined Maldonado in connection with her worker's compensation claim, also brought his responsive records to court. The custodian of records for Dr. Friedman objected that the records were irrelevant and protected by the psychotherapist-patient privilege and requested in-camera review of the records. (4 RT 1004, 1005.)

With the agreement of defense counsel, the trial court conducted an in-camera review of all the records produced and ordered copies of the records reviewed to be sealed and placed in the court file. (4 RT 1003, 1006-1008, 1012.) The court agreed to let counsel for both parties copy the records they found relevant from Dr. Friedman's files, subject to a protective order. (4 RT 1014, 1015-16.) The court also reviewed the materials from the SCIF and Maldonado's health and safety file from C.I.M. It concluded that there was nothing responsive in those files that was not also contained in the records from Dr. Friedman. (4 RT 1014-15.) Appellant requests this Court to review the files from the SCIF and C.I.M. relating to Maldonado.

On March 27, 2001, the trial court held a hearing to address additional records related to the investigation of Maldonado's worker's compensation made by "Singleton Investigations" at the request of the SCIF. (5 RT 1209.) The Attorney General objected that those materials were not public records and that they contained confidential medical records relating to Maldonado. The Attorney General also argued that the defense was not entitled to the records because it had failed to comply with *Pitchess* procedures and not show good cause for discovery. (5 RT 1209-1211.)

The court found good cause for shortening time for the discovery

request because the defense had previously complied with the relevant *Pitchess* procedures for records relating to Officer Maldonado. (5 RT 1211.) Accordingly, the government had an obligation to produce the records and the defense did not need to go back to square one. (*Ibid.*) The trial court conducted an in-camera review of the records from the Singleton Investigations file and found nothing discoverable. (5 RT 1213, 1216.) The court ordered the court clerk to photocopy the file to retain under seal for appellate review. (5 RT 1217.) Appellant asks this Court to review the file from Singleton Investigations for any discoverable materials related to the Addis homicide and the reasons for Maldonado's severance of employment from the Department of Corrections.

II.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED APPELLANT'S MOTION TO SEVER THE TRIAL OF THE CHARGES RELATED TO THE CAPITAL/MURDER OFFENSE (COUNTS ONE AND TWO) FROM THE UNRELATED AND LESSER CRIMES (COUNTS 2 & 3) WHICH OCCURRED WEEKS LATER.

A. Introduction.

The principal charges against appellant related to the fatal assault on Addis on August 3, 1997, which was charged as both murder (Penal Code, § 187, subd. (a)) in Count 1 and the capital offense (Penal Code, § 4500) in Count 2. The information combined charges for two unrelated offenses which occurred weeks later and involved different witnesses and circumstances: Count 3, the alleged September 18, 1997, assault on inmate Matthews (Penal Code, § 4500); and Count 4, the alleged October 15, 1997, possession of a prison made stabbing weapon (Penal Code, § 4502, subd. (a)). (1 CT 42-48.)

On January 30, 2001, appellant filed a "Motion for Order Granting Separate Trials of the Charges Contained in the Information." (2 CT 489-500.)

Pursuant to section 954, appellant argued that there was good cause for severance of trial of the capital/murder charges from Counts Three and Four because he had a separate defense to the capital/murder charges. He requested an opportunity to make an in-camera offer of proof based on proposed testimony by appellant. (2 CT 497.)

In addition, appellant argued that the evidence related to the other charges was not cross-admissible and it would have a prejudicial spillover effect. (2 CT 499.) Judicial economy would be served by severance because none of the witnesses for the lesser charges were the same as for the capital/murder charges. (2 RT 497-98.) Severance was also necessary to assure a fair trial in accordance with the Due Process Clause of the state and federal constitutions and in the interests of reliability required in capital trials by the Eighth Amendment. (2 CT 489, 497; Cal. Const Art., Art. I., §§ 7, subd. (a), 15; U.S. Const. 5th, 8th, & 14th Amends.)

On February 1, 2001, the prosecution filed an opposition brief. (2 CT 501-509.) The prosecutor argued that joinder was proper because the four counts charged the same class of crimes, appellant had made an insufficient showing of prejudice, and joint trial was in the interest of judicial economy. (*Ibid.*)

On February 8, 2001, the trial court held a hearing at which appellant made an in-camera offer of his proposed testimony in support of a defense to the capital/murder charges. (2 CT 510; 2 RT 373-374.) The court ordered the transcript of the proffer sealed. (2 RT 382; see 2 RT 375-380 [sealed transcript].) Appellant requests this Court to review the sealed transcript in connection with the severance issues.

On February 9, 2001, the trial court stated that it had reviewed the authorities relied on by appellant, re-read the preliminary hearing transcript, and considered appellant's proposed testimony. (2 RT 403.) It denied the

motion for severance with the following ruling:

> Defendant has failed to make an adequate showing that there exists a substantial danger of prejudice resulting from joint trial of the charges contained in the information. The court finds that the four charges involve conduct by a defendant while a prisoner at the California Institution for Men within a two month period. Each occurred at Palm Hall unit of the California Institution for Men.
>
> The offenses are of the same class of crime, either assaultive conduct by a prisoner or the possession of a prison-made weapon necessary to commit similar assaults. Each of the offenses involved prison-made weapons. Each of the assaults were committed by prison made weapons against fellow prisoners. None of the charges appear to be weak in relation to the others. And the prejudice to the defendant would appear small. That, in fact, is the order." (2 RT 403-404; *see also* 2 CT 512.)

As next explained, the trial court committed several errors in denying severance of trial of the lesser charges. The result was a violation of appellant's fundamental rights to due process, to a fair trial, to trial by jury, and to reliable capital case proceedings. (Cal. Const., art. I, §§ 7, subd. (a), 15, 16, 17; U.S. Const., 5th, 6th, 8th & 14th Amends.)

B. <u>The Standard Of Review</u>.

Joint trial of separate offenses is permissible when they are "connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts ...." (Penal Code, § 954.) Even if the statutory requirements for joinder are satisfied, "the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." (*Ibid.*; *see, e.g.*, *People v. Zambrano* (2007) 41 Cal.4th 1082, 1128.) As such,

section 954 reflects the "legislative recognition that severance may be necessary in some cases to satisfy the overriding constitutional guaranty of due process to ensure defendants a fair trial." (*People v. Bean* (1988) 46 Cal.3d 919, 935, citing *Williams v. Superior Court* (1984) 36 Cal.3d 441, 452.)

"Whether offenses properly are joined pursuant to section 954 is a question of law and is subject to independent review on appeal; the decision whether separate proceedings are required in the interests of justice is reviewed for an abuse of discretion. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 984-85.) "[R]eviewing courts must analyze realistically the prejudice which flows from joinder in light of all the circumstances of the individual case." (*People v. Smallwood* (1986) 42 Cal.3d 415, 425.) The burden is on the party seeking severance to establish that there is a substantial danger of prejudice requiring that the charges be separately tried. (*People v. Sapp* (2003) 31 Cal.4th 240, 258.)

"'[T]he propriety of a ruling on a motion to sever counts is judged by the information available to the court at the time the motion is heard.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.) However, "[e]ven if a trial court's severance or joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the 'defendant shows that joinder actually resulted in gross unfairness amounting to a denial of due process.'" (*People v. Mendoza* (2000) 24 Cal.4th 130, 162, citations and internal quotations omitted.)

"'The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever ....'" (*People v. Kraft* (2000) 23 Cal.4th 978, 1030.) "'Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are

unusually likely to inflame the jury against the defendant; [or] (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.'" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1120, quoting *People v. Bradford* (1997) 15 Cal.4th 1229, 1315.)

Additional factors include whether the defendant has a separate defense and he would be prejudiced because he desired to testify about one charge but not another (*People v. Sandoval* (1992) 4 Cal.4th 155, 173-174), and whether joint trial is in the interest of judicial economy to avoid duplication of testimony (*People v. Smallwood, supra,* 42 Cal.3d at pp. 426-27). However, "the pursuit of judicial economy and efficiency may never be used to deny the a defendant his right to a fair trial. (*Williams v. Superior Court, supra,* 36 Cal.3d at pp. 451-52.) Measured against these standards, the trial court committed several errors.

C. The Charged Weapon Possession (Count Four) Was Not Of The Same Class Of Crime As The Other Crimes Nor Connected Together In Its Commission With Them.

As noted, joinder is permitted for "two or more different offenses connected together in their commission ... or two or more different offenses of the same class of crimes or offenses." (Penal Code, § 954.) The first three charges of murder (Penal Code, § 187, subd. (a)) and two counts of assault by a life prisoner (Penal Code, § 4500) were all assaultive crimes and, therefore, of the same class. (*See, e.g., People v. Alvarez* (1996) 14 Cal.4th 155, 187-88.) However Count 4, the allegation that on or about October 15, 1997, Landry possessed "a prison made stabbing weapon" in violation of section 4502, subdivision (a), was not. (1 CT 46.) Nor was it connected together in its

commission with any of the other alleged crimes. Accordingly, joint trial of Count 4 was not authorized by section 954.

The trial court concluded that possession of a prison made weapon was of the same class as the assaultive crimes because it involved the "possession of a prison-made weapon necessary to commit similar assaults." (2 RT 404.) This conclusion was legally incorrect and not supported by substantial evidence. "Offenses of the same class are offenses which possess common characteristics or attributes." (*People v. Smallwood, supra,* 42 Cal.3d at p. 424, fn. 5, citing *People v. Kemp* (1961) 55 Cal.2d 458, 476.) Murder (Count 1) and section 4500 (Counts 2 & 3) required an assault committed with malice aforethought. (*People v. St. Martin* (1970) 1 Cal.3d 524, 537 ["'The words malice aforethought in section 4500 have the same meaning as in sections 187 [murder] and 188 [malice definition].' [Citation.]"].)

In contrast, possession of a weapon by an inmate (Penal Code, § 4502, subd. (a)) simply requires knowing possession of a weapon without any assaultive conduct.[10] (*See, e.g., People v. Saavedra* (2007) 156 Cal.App.4th 561, 571 ["Thus, to establish the section 4502 offense the prosecution need not prove that the inmate carried the weapon for an unlawful purpose."]; *People v. Strunk* (1995) 31 Cal.App.4th 265, 272 [For section 4502, prosecution need only prove that an inmate was knowingly in possession of a prohibited object.]; *People v. Rodriguez* (1975) 50 Cal.App.3d 389, 395 [For section

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10. Penal Code section 4502, subdivision (a) provides: "Every person who, while at or confined in any penal institution, while being conveyed to or from any penal institution, or while under the custody of officials, officers, or employees of any penal institution, possesses or carries upon his or her person or has under his or her custody or control any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, sandclub, sandbag, or metal knuckles, any explosive substance, or fixed ammunition, any dirk or dagger or sharp instrument, any pistol, revolver, or other firearm, or any tear gas or tear gas weapon, is guilty of a felony and shall be punished by imprisonment in the

4502, "intended violent use is not an element of possession."].)

The evidence presented at the preliminary hearing confirmed that the alleged violation of section 4502, subdivision (a) (Count 4), did not possess common characteristics or attributes with the assaultive crimes that occurred several weeks earlier. With respect to Count 4, correctional officer Thomas Lopez testified that on October 15, 1997, he and another officer went to remove appellant from his cell in the "Cypress Segregation" unit of Palm Hall to release appellant for exercise on the tier. (1 RT 121-23.) After appellant was searched and handcuffed, Lopez slid open the cell gate and heard a piece of metal hit the floor under the rail for the cell gate. Lopez found a piece of aluminum metal stock sharpened at both ends. Lopez then photographed the weapon and put it into evidence. (1 RT 127-129.)

The trial court believed that the weapon possession was of the same class as the other crimes because the weapon could be used "to commit similar assaults." (2 RT 404.) However, the prosecution presented no evidence at the preliminary hearing that appellant assaulted, attempted to assault, or intended to assault anyone at the time the weapon was seized.[11] In fact, the evidence at the preliminary hearing showed that appellant was handcuffed and cooperating with the officers at the time they removed him from his cell and the weapon fell to the ground. (1 RT 123-27.)

Section 954 also permits joiner of offenses of a different class if they were "nevertheless 'connected together in their commission' ... [and] linked by a common element of substantial importance.'" (*People v. Valdez* (2004) 32 Cal.4th 73, 119 [Charge of murder and escape from custody (Penal Code, §

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state prison for two, three, or four years, to be served consecutively."

11. In the penalty phase trial, the prosecution presented no evidence that appellant engaged in any assaultive conduct after the charged September 18, 1997, assault on inmate Matthews. (Count 3; Penal Code, § 4500; *see* Statement Of Facts, Section III., above.)

4532, subd. (b)) properly joined where apparent motive for a later escape was to avoid prosecution for the murder.], internal quotation and citation omitted.) The trial court found that the weapon possession was connected in its commission with the other counts because it "occurred at Palm Hall unit of the California Institution for Men" and it involved a "prison-made weapon ...." (2 RT 404.)

As to the first point, prison staff determined custody placement, not appellant. (See 1 RT 81-82.) There is no evidence that the incidents had anything to do with Palm Hall itself. As to the second point, the weapon found on October 15, 1997, had no connection to the prior alleged assaults on Addis on August 3, 1997 (Count 1 & 2), or on Matthews on September 18, 1997 (Count 3). The weapon used in the assault on Addis was seized on the prison yard shortly after the incident. (1 RT 36.) The weapon used in the assault on Matthews was immediately flushed down the toilet by appellant. (1 RT 86-87, 114.)

Case law shows that a weapon possession offense is properly tried with crimes of a different class where the weapon at issue was used in the other crimes. (*See, e.g., People v. Cunningham, supra,* 25 Cal.4th at p. 984 [Firearm at issue in charge of being a felon in possession of a firearm (§ 12021, subd. (a)), "was the same" as used in the other charged offenses.]; *People v. Pike* (1962) 58 Cal.2d 70, 84 ["Where an accusatory pleading charges separate offenses each involving the use of the same gun in their commission, the joinder has been held to be proper under section 954."]; *People v. Scott* (1944) 24 Cal.2d 774, 779 [Joint trial of weapon possession and rape charges proper where weapon used to intimidate the rape victim.].)

Conversely, the courts have found that the trial court erred in ordering joint trial of a weapon possession offense unrelated to an earlier assault. For example, in *People v. Walker* (1974) 37 Cal.App.3d 938, the defendant was

charged with possession of a concealable firearm by an ex-felon (Penal Code, § 12021) and armed robbery (Penal Code, § 211). The trial court denied a motion to sever made after the preliminary hearing. The record showed that three persons were involved in an April 2, 1973, bank robbery using a rifle and an unidentified "pistol." (*People v. Walker, supra,* 37 Cal.App.3d at p. 940.) When the defendant was arrested 106 days later in the bedroom of a residence, the police "saw a .38 caliber revolver in a jacket pocket in an open closet, apparently in the same room where defendant was arrested." (*Ibid.*)

The Court of Appeal found that evidence of the later possession of the revolver was inadmissible in connection with the robbery charge. "We agree with defendant, though both offenses involve a handweapon, there is no 'common element,' where, as here, the handweapon used in each otherwise unrelated crime is not identified as being the same weapon used in both crimes, and any connection based on a class of weapons is attenuated by a considerable time difference in the commission of the crimes." (*Id.* at p. 941.) In contrast, "joinder is generally proper where a specific weapon is common to more than one crime." (*Id.* at p. 942.) As previously noted, the weapon seized in this case on October 15, 1997, was not the same weapon used in either of the two prior assaults which occurred weeks earlier and where the weapon was either seized or flushed away. Accordingly, the applicable law and facts show that the trial court erred in finding that Count Four was properly joined for trial with the other counts.

D. The Factors Relevant To Severance Where The Statutory Requirements For Joint Trial Are Met Also Show That Severance Should Have Been Granted.

1. The Evidence Of The Unrelated Crimes Was Not Cross-Admissible.

Even assuming that Count Four met the statutory requirements for joinder, the other factors relevant to the analysis show that the trial court should have ordered a separate trial of the capital/murder charges from Counts Three and Four. Where the statutory requirements for joinder are met, the salient factor "in assessing whether a combined trial [would be] prejudicial is to determine whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others. If so, any inference of prejudice is dispelled. [Citation.]" (*People v. Memro* (1995) 11 Cal.4th 786, 849; *People v. Zambrano, supra,* 41 Cal.4th at p. 1129.)

The absence of cross-admissibility does not by itself demonstrate prejudice.[12] (Penal Code, § 954.1; *People v. Memro, supra,* 11 Cal.4th at p. 850 [Although "'we have held that cross-admissibility ordinarily dispels any inference of prejudice, we have never held that the absence of cross-admissibility, by itself, sufficed to demonstrate prejudice.' [Citation.]"].) Nevertheless, "[c]ross-admissibility is the crucial factor affecting prejudice." (*People v. Stitley* (2005) 35 Cal.4th 514, 531.)

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12. "In cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading, or where two or more accusatory pleadings charging offenses of the same class of crimes or offenses have been consolidated, evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact." (Penal Code, § 954.1)

Under Evidence Code section 1101,[13] other crimes evidence is inadmissible to establish a character or disposition to commit another crime. (Evid. Code, § 1101, subd. (a).) However, such evidence may be admissible to establish other facts, including identity, intent, motive, or common plan. (Evid. Code, § 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393-94.) Based on the trial court's ruling, the only suggested basis for finding the evidence cross-admissible was a putative common plan or scheme to commit assaults using prison-made weapons. (2 RT 404.)

In order to be admissible to show a common plan or scheme, the evidence of another crime "must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'" (*People v. Catlin* (2001) 26 Cal.4th 81, 111, quoting *People v. Ewoldt, supra,* 7 Cal.4th at p. 402.) In this case, the weapon possession charge did not result in an assault or even an attempted assault. Moreover, all three incidents involved substantially different circumstances, indicating the absence rather than the presence of a common plan or scheme.

At the preliminary hearing, the prosecution presented evidence that that

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13. Evidence Code section 1101 provides: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act. [¶] (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

the August 3, 1997, assault on Addis (Counts 1 & 2) occurred on the exercise yard at Palm Hall when multiple inmates were present and that the assault was orchestrated by Gary Green, the shot-caller for the white inmates at Palm Hall. (1 RT 25-32, 55-60.) The September 18, 1997, assault on Matthews (Count 3) occurred 47 days later when appellant was confined alone in his cell in administrative segregation. Inmate Matthews broke away from two escorting officers and came over to the cell port after appellant asked Matthews if he wanted a cigarette. (1 RT 82-86, 94-101.) The October 15, 1997, weapon possession offense did not involve an assault or attempted assault and the prosecution presented no evidence that other inmates were present. It occurred as appellant was handcuffed and being removed from his cell by an officer and a weapon fell to the floor when the officers slid the cell gate open. (1 RT 121-127.) Given these substantial dissimilarities and the fact that a different weapon was used in each incident, there was no basis to conclude that the three incidents were all part of a common plan or scheme.

2. Likelihood Of Improperly Influencing The Jury.

The next consideration is whether some of the charges were unusually likely to inflame the jury against the defendant. (*People v. Gutierrez, supra,* 28 Cal.4th at p. 1120.) The focus is not simply on the charges themselves but also on the evidence surrounding them. (*People v. Balderas* (1985) 41 Cal.3d 144, 174.) Appellant recognizes that the evidence related to the capital/murder charge for stabbing and killing Addis reflected a violent and serious crimes.

However, joint trial of the subsequent and unrelated assault and weapon possession offense with the capital/murder charge was likely to influence the jury against appellant's attempt to defend against the capital/murder charges. The later incidents suggested that appellant had a general disposition to violence, which was inadmissible evidence at the guilt phase of trial. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 393 ["Subdivision (a) of section 1101

prohibits admission of evidence of a person's character ... to prove the conduct of that person on a specified occasion."].)

They also undercut his defense of duress and staff complicity and/or negligence in the Addis homicide based on the facts peculiar to that incident. Accordingly, the other incidents were inflammatory in the sense of creating an emotional bias against appellant with respect to the most serious charges. (*People v. Crittenden* (1994) 83, 133 [Improper prejudice relates to evidence that creates "an emotional bias against . . . an individual, while having only slight probative value with regard to the issues."].) Accordingly, this factor also supported severance of the unrelated charges.

3. Risk of Improper Spillover Effect.

The next factor is whether "'a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges ....'" (*People v. Gutierrez, supra,* 28 Cal.4th at p. 1120, citation omitted.) The concern is "the likelihood that a jury not otherwise convinced beyond a reasonable doubt of the defendant's guilt of one or more of the charged offenses might permit the knowledge of the defendant's other criminal activity to tip the balance and convict him. (See *Williams v. Superior Court, supra,* 36 Cal.3d 441, 451.) If the court finds a likelihood that this may occur, severance should be granted." (*People v. Bean, supra,* 46 Cal.3d at p. 936.)

The evidence related to the capital/murder case included an eyewitness (Officer Esqueda), who would testify that he saw appellant strike at Addis's neck and later saw blood on appellant's hand and a weapon on the ground in the prison yard next to appellant. (1 RT 30-37.) The evidence related to the other offenses was not so clear. As to the assault on Matthews (Count 3), no correctional officer saw the assault or a weapon, no weapon was recovered,

and appellant made no admissions. (2 CT 496.) As to Count 4, a weapon was found on the floor outside appellant's cell when the cell door was opened. However, there was no evidence that appellant made the weapon or that he placed it in the position from which it fell. (*Ibid.*)

Even assuming that the evidence for the three incidents was of comparable weight, severance should have been granted because of the risk of a prejudicial spillover effect to the capital/murder charges. Appellant presented a defense of duress and staff complicity and/or negligence to the capital/murder charges. However, those factors were not present in the subsequent incidents, which would then function as improper disposition evidence. (Evid. Code, § 1101, subd. (b); *People v. Ewoldt, supra,* 7 Cal.4th at p. 393.) As a result, appellant's ability to defend against the most serious charges would be weakened by the spillover effect. (2 CT 496-97, 499.)

Several courts, including this Court, have cautioned that even "'when cautioned juries are apt to regard with a more jaundiced eye a person charged with two crimes than a person charged with one.'" (*People v. Smallwood, supra,* 42 Cal.3d at p. 432, fn. 14, quoting *United States v. Halper* (2d Cir. 1978) 590 F.2d 422, 431, internal citation and quotation omitted; *accord Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084 ["'[J]oinder of counts tends to prejudice jurors' perceptions of the defendant and of the strength of the evidence on both sides of the case.'[Citation]."].) The "danger" is that the jury will "aggregate all of the evidence, though presented separately in relation to each charge, and convict on both charges in a joint trial; whereas, at least arguably, in separate trials, there might not be convictions on both charges. (*Williams v. Superior Court, supra*, 36 Cal.3d at pp. 453-454.) For the same reasons, "[j]oinder in this case will make it difficult not to view the evidence cumulatively." (*Ibid.*)

4. Capital Case Factor.

Severance of Counts 3 and 4 was also proper because the murder of Addis was also charged as a capital offense pursuant to section 4500. "[S]ince one of the charged crimes is a capital offense, carrying the gravest possible consequences, the court must analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital case." (*Williams, supra*, 36 Cal.3d at p. 454; *accord People v. Gutierrez, supra,* 28 Cal.4th at p. 1120.) A need for greater scrutiny also derives from the heightened need for reliability imposed by the Eighth Amendment on the guilt phase of a capital trial. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38 [100 S. Ct. 2382, 65 L. Ed. 2d 392] ["To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination."], footnote omitted.) As discussed further below, this rule applies with particular force in this case, because appellant had a separate defense to the capital/murder charges.

E. Severance Should Also Have Been Granted Because Appellant Had A Separate Defense To The Capital/Murder Charges And Explained Why His Proposed Testimony Was Not Relevant To The Other Charges.

It has long been recognized that "the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defence ...." (*McElroy v. United States* (1896) 164 U.S. 76, 79 [17 S. Ct. 31, 41 L. Ed. 355]; *see also Williams v. Superior Court, supra,* 36 Cal.3d at p. 446, 451 [Addressing issue of whether "trial on the consolidated charges would unfairly prejudice his defense."], footnote omitted; *People v. Balderas, supra,* 41 Cal.3d at p. 175 [Addressing whether joint trial impaired appellant's ability to present a diminished capacity defense to any of the charges.].) In this case,

appellant proffered a defense of duress and the mitigating circumstance of prison staff complicity and/or negligence to the capital/murder charges that did not apply to the other two incidents.

Appellant requested and the trial court without objection from the prosecution granted him an opportunity to make an in-camera offer of proof of how he would testify in support of a defense that applied only to the capital and murder charges. (2 RT 373-74.) Appellant explained that joint trial of the offenses would place him in the position of having to testify to some charges but not to others. (2 CT 497.) The court ordered the transcript of the offer of proof placed under seal and it is reported at pages 374 through 380 of volume two of the reporter's transcript. Appellant requests this Court to review the sealed transcript in connection with his claims of error and prejudice from the denial of severance.

The federal courts have held that severance is not mandatory every time a defendant wishes to testify to one charge but not to another. "'If that were the law, a court would be divested of all control over the matter of severance and the choice would be entrusted to the defendant.' [Citation]." (*United States v. Archer* (7th Cir. 1988) 843 F.2d 1019, 1022.) Nevertheless, where a "'defendant may be willing to take the stand and testify as to one count but might prefer to remain silent and put the government to its proof on another count[,]' ... severance may be necessary." (*Ibid.*, quoting *United States v. Lewis* (8th Cir. 1976) 547 F.2d 1030, 1033, *cert. denied*, 429 U.S. 1111, 97 S. Ct. 1149, , 51 L. Ed. 2d 566 (1977).)

"Because of the unfavorable appearance of testifying on one charge while remaining silent on another, and the consequent pressure to testify as to all or none, the defendant may be confronted with a dilemma: whether, by remaining silent, to lose the benefit of vital testimony on one count, rather than risk the prejudice (as to either or both counts) that would result from testifying

on the other." (*Baker v. United States* (D.C. Cir. 1968) 401 F.2d 958, 976, *cert. denied*, 400 U.S. 965, 91 S. Ct. 367, 27 L. Ed. 2d 384, (1970); *accord United States v. Sampson* (2nd Cir. 2004) 385 F.3d 183, 190-191; *People v. Smallwood, supra,* 42 Cal.3d at p. 432 [A defendant's "willingness to testify as to one charge could not help but leave an unfavorable impression with regard to the other."].) However, the "need for severance does not arise 'until the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other.'" (*United States v. Archer, supra,* 843 F.2d at p. 1022, quoting *Baker v. United States, supra,* 401 F.2d at p. 977.)

In *People v. Sandoval* (1992) 4 Cal.4th 155, this Court applied the federal standards but found that the defendant made an insufficient offer of proof. "Defendant's showing fell far short of anything that would have satisfied the federal standards or any standard this court might adopt. Defendant neither explained the nature of the testimony he wished to give in the Belvedere Park case nor his reasons for not wanting to testify in the Wells case. The trial court did not abuse its discretion in denying severance. (*Id.* at p. 174.) In contrast, appellant in the sealed proceedings in this case both explained the nature of his testimony and his reasons why that testimony was not appropriate to the other charges (Counts 3 & 4). (*See* 2 RT 374-80 [sealed transcript].) Thus, unlike the defendant in *People v. Sandoval, supra,* appellant's offer of proof showed why severance was necessary. Therefore, the trial court erred in denying severance after being informed of appellant's proposed testimony.

F. Judicial Economy Favored Severance Because There Would Have Been No Duplication Of Evidence And The Lesser Charges Would Have Been Resolved After Trial Of The Capital/Murder Charges.

Judicial economy is an additional factor to be considered in assessing whether severance should have been granted. In general, "trial of the counts together ordinarily avoids the increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials." (*People v. Bean, supra,* 46 Cal.3rd at p. 936.) However, "[w]here there is little or no duplication of evidence, 'it would be error to permit [judicial economy] to override more important and fundamental issues of justice. Quite simply, the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial.'" (*People v. Smallwood, supra,* 42 Cal.3d at p. 427, quoting *Williams, supra,* 36 Cal.3d at pp. 451-52, internal citation omitted.)

In this case, the prosecution at the preliminary hearing presented no witnesses in common to the three incidents thereby demonstrating that separate trials would not have involved the duplication of evidence. (*See* 1 RT 20-141.) Moreover, there was every reason to believe that a verdict on the capital/murder charges would have led the parties to reach a disposition on the other charges. It is unlikely that the prosecution would have committed the resources to take the lesser charges to trial if a jury convicted appellant of the capital/murder charges. If prosecution failed to get a verdict on those charges, it is unlikely that it would have pressed for trial on the lesser charges because appellant was already facing a three strikes sentence of 25 years-to-life that would commence on February 10, 2000. (Exh. No. 42, 4 CT 1099 ["Additional term of commitment received for Imperial Co. case CF0334 with a term of 25 yrs. To life pursuant to P.C. 667(e). Life term begins 2/10/2000."].) Accordingly, considerations of judicial economy weighed in

favor of severance of the lesser charges.

G. Under State Law, Reversal Is Required Because The Circumstances Show Undue Prejudice From Joint Trial.

Under state law, reversal is required if the denial of severance posed a substantial danger of undue prejudice. (*People v. Sapp, supra,* 31 Cal.4th at p. 258.) The preceding analysis shows that such a danger existed in this case because the evidence was not cross-admissible, there was a substantial risk of undue influence and a spillover effect from the evidence of lesser charges because they would serve as improper disposition evidence, and appellant's ability to defend against the capital/murder charge was impaired because he had a defense to those charge that did not apply to the lesser charges.

Appellant emphasizes that "[c]ross-admissibility is the crucial factor affecting prejudice." (*People v. Stitley, supra,* 35 Cal.4th at p. 531.) In this case, none of the evidence related to the three separate incidents was cross-admissible. As a result, appellant was unfairly burdened with the cumulative effect of the unrelated assault and weapon incidents in defending against the capital/murder charges. The prejudice of joint trial was compounded by the fact that the trial court did not instruct the jury that each count charged a distinct crime and that the jury must decide each count separately. (CALJIC No. 17.02; *see also* CALCRIM No. 3515 [" Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one."].)[14]

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14. All citations to CALJIC are to the Sixth Edition, which was used at both the guilt and penalty phases of the trial. (See 3 CT 836-899; 4 CT 900-913; 4 CT 1003-1045.) CALJIC No. 17.02 provides: "Each count charges a distinct crime. You must decide each count separately. The defendant may be found guilty or not guilty of any or all the crimes charged. Your finding as to each count must be stated in a separate verdict." The CALCRIM instructions cited in this brief, with the accompanying "Bench Notes", are available on-line at: http://www.courtinfo.ca.gov/jury/criminaljuryinstructions/index.htm.

Although the trial court did not have a sua sponte duty to give such an instruction (*People v. Beagle* (1972) 6 Cal.3d 441, 456), the reviewing courts have recognized it mitigates prejudice where other crimes evidence is not cross-admissible. (*See, e.g., United States v. Lane* (1986) 474 U.S. 438, 449 [88 L. Ed. 2d 814, 106 S. Ct. 725] ["When evidence on misjoined Count 1 was introduced, the District Court provided a proper limiting instruction, and in the final charge repeated that instruction and admonished the jury to consider each count and defendant separately."]; *People v. Geier* (2007) 41 Cal.4th 555, 578 [Prejudice dispelled when the jury was instructed with CALJIC No. 17.02.] *Davis v. Woodford* (9th Cir. 2004) 384 F.3d 628, 639 ["Notably, any prejudice was further limited through an instruction directing the jury to consider each count separately."].)

Moreover, the prosecution in closing jury argument exploited the error in a way which demonstrated the prejudice to appellant's ability to defend against the capital/murder charges. The prosecutor noted that after stabbing Addis, appellant "slashed Matthews for no reason. And then caught making his next weapon in October. So all these facts together show you what is in the mind of the defendant and that it is a clear, clear situation of first degree, premeditated murder." (10 RT 2279.) "There is no reason why we should treat this evidence as any less 'crucial' than the prosecutor -- and so presumably the jury -- treated it." (*People v. Cruz* (1961) 61 Cal.2d 861, 868.) Accordingly, the "jury argument of the district attorney tips the scale in favor of finding prejudice." (*People v. Minifie* (1996) 13 Cal.4th 1055, 1071.)

H. Due Process Also Requires Reversal Because Forcing Appellant To Defend Against Two Additional Charges While On Trial For His Life Deprived Him Of A Fair Trial.

When the simultaneous litigation of more than one offense renders a defendant's trial fundamentally unfair, the result is a denial of the right to due process of law under Fifth and Fourteenth Amendments to the United States Constitution. (*Bean v. Calderon, supra,* 163 F.3d at p. 1084; *United States v. Lane, supra,* 474 U.S. at p. 446 fn. 8 ["Improper joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial."].)

"[T]here is 'a high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible.'" (*Ibid.*, quoting *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322.) Prejudice occurs because "'it is much more difficult for jurors to compartmentalize damaging information about one defendant derived from joined counts, than it is to compartmentalize evidence against separate defendants joined for trial ....'" (*Ibid.*) In addition, jury studies establish "'that joinder of counts tends to prejudice jurors' perceptions of the defendant and of the strength of the evidence on both sides of the case.'" (*Ibid.*)

In *Bean v. Calderon, supra*, 163 F.3d 1073, the Ninth Circuit reversed convictions for the murder, robbery and burglary of one victim (Eileen Fox) due to improper joinder of those charges with the charges of murder, robbery and burglary against another victim (Beth Schatz), which occurred three days later. (*Id.* at pp. 1076, 1083-1086.) At the joint trial, the prosecutor argued that both groups of crimes, which were separated by three days and 10 blocks, displayed a similar modus operandi. (*Id.* at p. 1083.) On direct appeal, this

Court found that the circumstances of the two sets of crimes were not sufficiently similar to support cross-admissibility of the evidence. However, it affirmed the trial court's denial of severance on the grounds that neither set of offenses was more inflammatory or rested on greater evidence than the other, and the state received significant benefits from joinder. (*Ibid.*; *People v. Bean, supra,* 46 Cal.3d at pp. 939-40.)

The Ninth Circuit found that evidence of the defendant's "guilt in the Schatz crimes tainted the jury's consideration of Bean's complicity in the Fox offenses." (*Id.* at p. 1085.) Nothing in the record indicated that the jury compartmentalized the evidence of the two incidents. (*Id.* at pp. 1085-1086.) Accordingly, the Ninth Circuit found a prejudicial violation of the defendant's due process rights and reversed the convictions related to Eileen Fox. (*Id.* at p. 1086.) For analogous reasons, a due process error requiring reversal occurred in this case. Nothing in the record indicated that the jury compartmentalized the evidence of the two later incidents from the capital/murder charges and the jury received no instruction such as CALJIC No. 17.02 to show that it should do so.

Moreover, the prosecutor in closing argument expressly encouraged the jury to use the evidence of the later charges to convict appellant of the capital/murder charges. (10 RT 2279.) Given these circumstances, appellant was deprived of his right to a fair trial on the capital/murder charges and the violation of his right to due process of law (U.S. Const., 5th & 14th Amends.) requires reversal of his capital and murder convictions (Counts 1 & 2).

III.

THE DENIAL OF APPELLANT'S REQUEST FOR QUESTIONS ON THE JURY QUESTIONNAIRE ABOUT PROSPECTIVE JUROR'S VIEWS ON PRISON SAFETY VIOLATED STATE AND FEDERAL LAW.

A. Introduction.

The trial court and counsel for both parties agreed to submit a written questionnaire to the jury as part of the voire dire process. Counsel met and conferred about the questions and then submitted a proposed questionnaire to the trial court for approval and resolution of any disputed questions. (1 RT 272-273, 276-78.) Appellant proposed two questions to which the prosecution objected and the trial court refused to include in the questionnaire.

Question 40B stated: "Please indicate which statement best describes your opinion of life in the prison system prior to hearing the evidence in this case: ___ Prisoners are safer on the inside than they would be on the outside. ___ Prisoners are about as safe on the inside as they would be on the outside. ___ Prisoners are less safe on the inside than they would be on the outside." (Court Exh. No. 1, 4 CT 1084; 2 RT 318-19, 323-24.)

Question 40C stated: "Whatever your opinion as to the safety of living in the prison system may be, how willing are you to consider evidence that many prisoners' primary task on the inside is staying alive?" (*Ibid.*)

The prosecution objected that these two questions were "argumentative and prejudging." (2 RT 320, *see also* 2 RT 316-17.) The prosecution also objected that the question about prisoner safety was ambiguous. "Safety from what? Safety from trucks running them down? It is so ambiguous." (2 RT 320-21.) Appellant argued that the questions were important because the trial would center upon evidence related to what prison life was like and the way guards interacted with prisoners. (2 RT 317.) The questions were proposed to

elicit any "preconceived notions" prospective jurors might have about those issues and "the status prisoners are in with regard to their safety." (2 RT 320.) The court refused to include the proposed questions on the jury questionnaire. (2 RT 321 ["I'm not inclined to permit the 'B' subpart. .... And I'm not prepared to do the 'C' subpart."].)

As an alternative, appellant suggested the question of whether a juror "'would agree to consider evidence that many prisoners have to be concerned about their safety.'" (2 RT 321.) The prosecutor objected that this question was "still argumentative." (*Ibid.*) The court agreed to allow the following question which was included on the questionnaire given to the venire: "Would you be willing to consider evidence that living in the prison system, that is to say being a prisoner, is an ongoing experience entirely different from living in society as you know it? Please Explain" (*See* 1 Supp. CT A 11 [question 96b]; 2 RT 321-22; 4 CT 1084.)

In this case, all of the charged crimes and all of the proposed factor (b) evidence in aggravation offered by the prosecution related to incidents that occurred in prison. (Penal Code, § 190.3, subd. (b); *see* 2 CT 458 [Amended "Notice of Intention to Introduce Evidence In Aggravation (Pursuant to Penal Code section 190.3"]; 4 CT 942 ["Second Amended Notice of Intention to Introduce Evidence in Aggravation (Pursuant To Penal Code section 190.3)"].) Therefore, answers to the questions proposed by appellant were necessary to expose juror bias about prison inmate safety and survival, to lay the foundation for challenges for cause, and to explore prospective jurors views on issues related to the circumstances of the charged capital offense that would be important to the decision of whether or not to impose the death penalty.

The failure to include the questions on the jury questionnaire violated appellant's state and federal rights to due process, a fair trial, an impartial jury, and to the reliable determination of guilt and penalty in a capital case. (U.S.

Const. Amends, 5th, 6th, 8th, & 14th Amends.; Cal Const., Art I., §§ 7, subd. (a), 15, 16, 17; *Sawyer v. Smith* (1990) 497 U.S. 227, 243 [110 S. Ct. 2822; 111 L. Ed. 2d 193] ["All of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense."].) Trial counsel for appellant did not object on constitutional grounds to the denial of the questions on the jury questionnaire. Nevertheless, appellant's constitutional objections are cognizable for several reasons.

First, given the trial court's ruling, an attempt to make any further objection would have been futile. The duty to object in more detail is excused when an "objection ... would have been futile ...." (*People v. McDermott* (2002) 28 Cal.4th 946, 1001; *People v. Kitchens* (1956) 46 Cal.2d 260, 263 ["[A]n objection would have been futile, and 'The law neither does nor requires idle acts.' (Civ. Code, § 3532.)"].) On the same rationale, the United States Supreme Court has addressed constitutional claims where the circumstances show that further objection would have been futile. (*See, e.g., Estelle v. Smith* (1981) 451 U.S. 454, 468, fn. 12 [68 L.Ed.2d 359; 101 S.Ct. 1866] [Citing with approval *United States v. Smith* (5th Cir. 1979) 602 F.2d 694, 708, fn. 19, which states "that the apparent futility of objecting to an alleged constitutional violation excuses a failure to object"]; *Douglas v. Alabama* (1967) 380 U.S. 415, 422-23 [85 S. Ct. 1074; 13 L. Ed. 2d 934].)

Second, the constitutional issues are purely questions of law based on the same facts at issue in the state law claims of error. Under these circumstances, the courts have frequently considered constitutional claims. (*See, e.g., People v. Yeoman* (2003) 31 Cal.4th 93, 117 ["As a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that

which would also determine the claim raised on appeal."]; *Ward v. Taggart* (1959) 51 Cal.2d 736, 742 ["Although this theory of recovery was not advanced by plaintiffs in the trial court, it is settled that a change in theory is permitted on appeal when a question of law only is presented on the facts appearing in the record."].)

Finally, a reviewing court may consider constitutional issues not raised in the trial court "to forestall a later claim that trial counsel's failure to predicate his motion on those additional grounds reflects constitutionally inadequate representation, and because in the context of this case the new theories raise only issues of law and factual questions that this court decides independently." (*People v. Mattson* (1990) 50 Cal.3rd 826, 854; *accord People v. Barber* (2002) 102 Cal.App.4th 145, 150.)

B. Applicable Legal Principles.

California law permits the use of jury questionnaires to voire dire prospective jurors. (Code Civ. Proc., § 205, subd. (c) ["The court may require a prospective juror to complete such additional questionnaires as may be deemed relevant and necessary for assisting in the voire dire process ...."]; subd. (d) ["The trial judge may direct a prospective juror to complete additional questionnaires as proposed by counsel in a particular case to assist the voire dire process."]; *People v. Stewart* (2004) 33 Cal.4th 425, 456, fn. 19 ["statutory authority for use of juror questionnaires is provided by Code of Civil Procedure, section 205, subdivisions (c) and (d)"]; *see also* Code Civ. Proc., § 223 ["The court may submit to the jury additional questions requested by the parties as it deems proper."].)

"Limitations on voir dire are subject to review for abuse of discretion." (*People v. Jenkins* (2000) 22 Cal. 4th 900, 990.) "[T]he entire voir dire must be considered in making that judgment." (*People v. Holt* (1997) 15 Cal.4th 619, 661.) "A trial judge's exercise of discretion in the questioning of

prospective jurors during voir dire commands deference from an appellate court, but not without limit. '[W]ith the heightened authority of the trial court in the conduct of voir dire . . . goes an increased responsibility to assure that the process is meaningful and sufficient to its purpose of ferreting out bias and prejudice on the part of prospective jurors.'" (*People v. Mello* (2002) 97 Cal.App.4th 51, 519, quoting *People v. Taylor* (1992) 5 Cal. App. 4th 1299, 1314.) "Undue limitations on jury selection ... can deprive advocates of the information they need to make informed decisions rather than rely on less demonstrable intuition." (*People v. Lenix* (2008) 44 Cal.4th 602, 625.)

"A trial court abuses its discretion when it refuses to allow an inquiry which bears a substantial likelihood of uncovering jury bias. [Citation.] Trial counsel must be allowed, within reason, to effectively probe the recesses of a juror's mind in order to determine his or her real attitudes and prejudices." (*People v. Martinez* (1991) 228 Cal.App.3d 1456, 1460; *accord People v. Box* (2000) 23 Cal. 4th 1153, 1179.) "'Where . . . the trial judge so limits the scope of voir dire that the procedure used for testing does not create any reasonable assurances that prejudice would be discovered if present, he commits reversible error.'" (*People v. Chapman* (1993) 15 Cal.App.4th 136, 141, quoting *United States v. Baldwin* (9th Cir. 1979) 607 F.2d 1295, 1298.)

The right to adequate voire dire is also guaranteed to a criminal defendant as a matter of constitutional law. "[O]ne accused of a crime has a constitutional right to a trial by impartial jurors. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [148 Cal.Rptr. 890, 583 P.2d 748]; *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132].) 'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.' [Citation.]" (*In re Hitchings* (1993) 6 Cal.4th 97, 110, internal citation and quotation omitted)

"In a state such as California that in capital cases provides for a sentencing verdict by a jury, 'the due process clause of the Fourteenth Amendment of the federal Constitution requires the sentencing jury to be impartial to the same extent that the Sixth Amendment requires jury impartiality at the guilt phase of the trial.' [Citations.] California's Constitution provides an identical guarantee. [Citations.]" (*People v. Earp* (1999) 20 Cal.4th 826, 852-53; Cal. Const., Art. I., §§ 15, 16; *accord People v. Bolden* (2002) 29 Cal.4th 515, 536.)

"*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. [Citation.] Similarly, lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges where provided by statute or rule . . .." (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188 [68 L.Ed.2d 22, 28-29, 101 S.Ct. 1629].)

"The ability of a defendant, either personally, through counsel, or by the court, to examine the prospective jurors during voir dire is thus significant in protecting the defendant's right to an impartial jury. ... As the United States Supreme Court has stated, '*Voir dire* examination serves to protect [a criminal defendant's right to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on voir dire may result in a juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges." (*In re Hitchings, supra*, 6 Cal.4th at pp. 110-111, quoting *McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 554 [78 L.Ed.2d 663, 670, 104 S.Ct. 845], plur. opn. of Rehnquist, J..)

Accordingly, a defendant must be permitted to make "a suitable inquiry

. . . to ascertain whether [each] juror has any bias, opinion, or prejudice that would affect or control the fair determination by him [or her] of the issues to be tried." (*Connors v. United States* (1895) 158 U.S. 408, 413 [15 S. Ct. 951, 953, 39 L. Ed. 1033]; *accord People v. Cash* (2002) 28 Cal.4th 703, 720 ["A challenge for cause may be based on the juror's response when informed of facts or circumstances likely to be present in the case being tried."].)

These rules apply with particular force in capital cases. Appellant's Eighth Amendment right and interest in questioning jurors about the prison issues was to prevent the seating of a jury "'uncommonly willing to condemn a man to die.'" (*Wainwright v. Witt* (1985) 469 U.S. 412, 418 [105 S. Ct. 844; 83 L. Ed. 2d 841], quoting *Witherspoon v. Illinois* (1968) 391 U.S. 510, 521 [105 S. Ct. 844; 83 L. Ed. 2d 841].) Reversal is required if the trial court's failure to ask the proposed questions "render[ed] the defendant's trial fundamentally unfair." (*Mu'Min v. Virginia* (1991) 500 U.S. 415, 425-426 [114 L. Ed. 2d 493, 111 S. Ct. 1899]; *accord People v. Bolden, supra,* 29 Cal.4th at p. 538.)

C. The Proposed Questions Were Necessary To Expose Possible Biases Of Potential Jurors And To Ensure A Fair And Impartial Jury On Issues Related To Prisons That Were Central To This Case.

Measured against the foregoing standards, the trial court's refusal to permit the questions proposed by the defense was reversible error. Appellant correctly pointed out that the central issue in the case in both the guilt and penalty phases related generally to what prison life was like and in particular to issues of inmate safety and survival. (2 RT 317, 320.) As set forth in detail in Argument Section I.B., above, appellant's discovery requests put the trial court on notice that those issues were central to the defense to the capital/murder charges.

Briefly, the available evidence indicated: that no weapon could be on

the yard without the knowledge of the correctional officers because of the multiple searches performed beforehand; that before Addis was released onto the yard, correctional officers knew that Green, the NLR shot-caller had ordered a "hit" on Addis; that Green demanded that officers bring Addis to the yard and asked for officer in charge to ensure that this occurred; that in spite of all the information that Addis's life was at risk, officers put Addis onto the yard; and that after Addis was brought onto the yard and shunned by the other inmates, officers took no action to prevent harm to Addis, apparently because he had assaulted a correctional officer. (1 CT 124-125, 132-33, 137-138; 2 CT 577; 4 RT 898.) In addition, the prosecution's factor (b) evidence all involved evidence of uncharged assaults and weapon possession incidents in prison. (2 CT 319 ["Notice of Intention to Introduce Evidence In Aggravation (Pursuant to Penal Code section 190.3"]; 2 CT 458 [amended notice]; 4 CT 942 [second amended notice].)

Thus, the record confirmed appellant's position that issues of prison safety and survival would be central issues at trial. Accordingly, it was critical for appellant to determine during voire dire whether potential jurors had any bias, prejudice, particular knowledge, or point of view on those issues. A trial court's failure to permit a specific question on voire dire may be harmless if other questions addressed the same issues. For example, in *People v. Earp* (1999) 20 Cal.4th 826, the defendant was charged with the sexual molestation and killing of an 18-month-old child. The trial court refused the defendant's proposed questions for a jury questionnaire which addressed each prospective juror's "'background, relatives, friends, associates, feelings'" on the subject of child molestation. (*Id.* at p. 851.) The defendant argued that these questions were necessary to enable the defense to intelligently exercise its challenges for cause. (*Ibid.*)

This Court found no error because the "court's jury questionnaire did

have this general question regarding juror experience with crime and the criminal justice system: 'Have you or any close friend or relative ever been involved in a criminal incident or case either as a victim, suspect, defendant, witness, or other?' ... The court's questionnaire also included questions about child molestation." (*Ibid.*) For example, after explaining that defendant was charged with "sexual misconduct involving the death of a child," the jurors were asked whether that would affect their ability to be fair and impartial. They were also asked how the nature of that charge would affect their decision whether to vote for the penalty of death or life imprisonment without the possibility of parole. (*Id.* at pp. 851-52.) Under these circumstances, "the trial court's voir dire procedure fully satisfied the requirements of the state and federal Constitutions that a fair and impartial jury determine questions of guilt and of penalty." (*Id.* at p. 853.)

In this case, no other question on the jury questionnaire addressed the issues of inmate safety and survival. The questionnaire contained four questions, some with subparts, on the other issues related to prisons. Moreover, they did not elicit responses by the jurors as about inmate safety and survival.

Question 95 stated: "Have you ever visited a jail, state prison, or federal prison? Yes ... No If yes, please explain[.]" (CT. Suppl. A 11.)

Question 96a stated: "What are your views on the prison system in California?" (*Ibid.*)

Question 96b stated: Would you be willing to consider evidence that living in the prison system, that is to say being a prisoner, is an ongoing experience entirely different from living in society as you know it? Please explain: _____" (*Ibid.*)

Question 97a stated: "Please indicate which statement best describes your attitude toward the alleged abuse of prisoners by prison guards:

"___ Under no circumstances could I imagine such abuse occurring[.]

"___ Under some circumstances I could imagine such abuse occurring[.]

"___ Under most circumstances I could imagine such abuse occurring[.] (*Ibid.*, original emphasis.)

Question 97b stated: "Are you willing to consider evidence regarding this subject. Yes No." (*Ibid.*)

None of these question were sufficient to address the issues of inmate safety or survival. Question 97 addressed physical abuse by prison guards. As the case developed, that subject was not at issue with respect to any of the charges against appellant. (See Statement Of Facts, Sections I.A. & III.A., above.) The questions about visiting someone in prison or in jail (Question 95) and views on the prison system (Question 96) were too general to substitute for appellant's proposed questions.

The inadequacy of the questions permitted was confirmed by the answers given by the jurors and alternate juror actually seated.[15] In response to Questions 95, 96, and 97, none of the seated jurors or alternates identified or addressed matters related to the safety or survival of inmates. (CT. Suppl. A 11, 30, 49, 69, 88, 107, 127, 146, 165, 184, 203, 222, 241, 260, 279, 298.)

The question about visiting a jail or a prison and asking to explain (Question 95), elicited either a simple "yes" or "no" without any substantive explanation (1 CT. Suppl. A 11 ["No"]; 1 CT. Suppl. A 30 ["Yes[,] jail"]; 1 CT. Suppl. A 49 ["No"]; 1 CT. Suppl. A 69 ["No"]; 1 CT. Suppl. A 89 ["No"]; 1 CT. Suppl. A 107 ["No"]; 1 CT. Suppl. A 127 ["No"]; 1 CT. Suppl. A 146 ["No"]; 1 CT. Suppl. A 165 ["Yes[,] inmate visitation"]; 1 CT. Suppl. A 184

15. The questionnaires for the seated jurors and alternates are contained in Volumes 1 and 2 of Supplement A to the clerk's transcript as indicated by the fact that their names were redacted, in contrast to the prospective jurors who

["No"]; 1 CT. Suppl. A 203 ["No"]; 1 CT. Suppl. A 222 ["Yes[,] visited my son in jail"]; 1 CT. Suppl. A 241 ["No"]; 1 CT. Suppl. A 260 ["Yes[,], son traffic warrants"]; 1 CT. Suppl. A 279 ["No"]; 1 CT. Suppl. A 298 ["yes[,] as social worker"].)

When asked for views on the prison system (Question 96), the issue identified by seven jurors was overcrowding (1 CT. Suppl. A 49, 127, 146, 165, 203, 222, 298.) Other remarks included "no opinion" (1 CT. Suppl. A 11), "prison system is effective" (1 CT. Suppl. A 30), "do not know" (1 CT. Suppl. A 69), "I have no experience to make an assessment" (1 CT. Suppl. A 88), "no opinion on the California prison system" (1 CT. Suppl. A 107), not applicable ("N/A") (1 CT. Suppl. A 184), "too lenient on convicted felons" (1 CT. Suppl. A 241), "none" (1 CT. Suppl. A 260), and not applicable ("N/A") (1 CT. Suppl. A 279).

The question about abuse of prisoner by prison guards (Question 97) indicated that the jurors could imagine it occurring in some circumstances (1 CT. Suppl. A 11, 30, 49, 88, 107, 127, 146, 165, 184, 203, 222, 241, 260, 279, 298) or in no circumstance (1 CT. Suppl. A 69). However, as noted, none of the charged crimes involved the abuse of prisoners by guards.

In sum, the questionnaires completed by the seated jurors and alternates shows that questions permitted by the trial court were not understood by the jurors to address the subject areas of prisoner safety and survival as addressed by appellant's proposed questions. Accordingly, the trial court erred in refusing to include appellant's proposed questions on the jury questionnaire in violation of appellant's rights to due process, a fair trial, an impartial jury, and the reliable determination of guilt and penalty in a capital case. (U.S. Const. Amends, 5th, 6th, 8th, & 14th Amends.; Cal Const., Art I., §§ 7, subd. (a), 15, 16, 17.).

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were not selected.

D. The Judgment Must Be Reversed Because Of The Denial Of Adequate Voire Dire.

"[R]eversal of the judgment is required only if the voir dire was 'so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair.'" (*People v. Bolden* (2002) 29 Cal.4th 515, 538, quoting *People v. Holt* (1997) 15 Cal.4th 619, 661; *see also People v. Stewart, supra,* 33 Cal.4th at p. 458; *Mu'Min v. Virginia, supra,* 500 U.S. at pp. 425-426.) Several circumstances show that the denial of the proposed jury questions resulted in fundamental unfairness. In this case, defense counsel relied "almost entirely on the questionnaire" to evaluate prospective jurors. (2 RT 341.) "I make my judgments pretty much based on the questionnaires and with some clarifications, usually about death penalty issues more than anything." (2 RT 343.)

The court agreed to allow some "individual voire dire on any issue, whether its death penalty or other ...." (*Ibid.*) However, the extent of individual voire dire depended on the jury questionnaires. When defense counsel asked for an "average of five minutes" of individualized voire dire, the court responded, "I think we sort of need to see what questionnaires come back before I commit to something on that." (3 RT 345.) Thus, in the view of both the court and defense counsel the questionnaires were critical to the process of jury selection. However, as explained above, the answers given by the jurors to the questions permitted by the trial court did not address or elicit information about the level of inmate safety (Proposed Question 40B) or survival in prison (Proposed Question 40C) posed by the capital/murder charges.

The evidence developed at trial confirmed the importance of these issues at both the guilt and penalty phases of the trial. The guilt phase evidence showed that multiple officers on duty, including Sergeant Sams, the

officer in Addis, knew that Addis's safety was at risk because he had to roll off the tier. (7 RT 1600-1601 [In prison parlance, "rolling off the tier" meant that an inmate had been told to leave for his safety.]; 6 RT 1402 [same]; 5 RT 1136-37 [Officer Esqueda]; 5 RT 1182-83 [Officer Valencia]; 6 RT 1323-24 [Sergeant Sams]; 7 RT 1630-32 [Officer McAlmond]; 8 RT 1784-85 [Officer Ginn].) As Sergeant Sams admitted, at the morning briefing before they started putting inmates on the yard, "officers or staff were telling me that [Addis] might not be in favorable conditions to go there." (6 RT 1324, 1333-35, 1337-38.)

Officers also knew that the shot-caller for the gang (Green) had demanded for Addis to be brought to the yard and that Addis would be assaulted on the yard dominated by NLR gang members. Officer Ginn told Sergeant Sams that if Addis "'goes out, I think he may – get beat up ....'" (8 RT 1778.) Former inmate Richard Allen explained that an inmate who had left the tier for any reason other than parole, court, or a transfer, was "considered a PC [protective custody] rat, and there's a good chance they will try to take your life for that." (5 RT 1248-49.)

Nevertheless, the officers delivered Addis to the yard and the sergeant told Officer Maldonado to leave and left himself even after Maldonado told him that Addis would be killed. (9 RT 2127 ["'I told my sergeant that they're going to kill him.' He says, 'Come on we got a lot of work to do.'"]; 6 RT 1342-43; 8 RT 1815-17.) The subsequent investigation proved that Green had ordered a hit on Addis. (Exh. No. 50, 4 CT 1147; Exh. No. 51, 4 CT 1150-51.) There was also substantial evidence that appellant's safety and survival was at risk because he would be killed if he had not carried out the assault. Anthony L. Casas, a retired Department of Corrections officer with 22 years of experience explained that an inmate who was small and inexperienced may need a gang for protection. This would include someone like appellant who

did not have a background of violent crime but just a couple of burglaries. (8 RT 2002-03.)

However, joining a prison gang for protection was the beginning of a slippery slope. When the gang asked the inmate to become involved in dangerous activity, the inmate could not avoid getting involved without putting himself at risk. (8 RT 2001-03.) "You try to get out or don't do what you are told, you are taken out." (8 RT 2003-04.) If an inmate refused to carry out an order to commit an assault, "[h]e can easily get killed. As a matter of fact, in most cases where your gangs are disciplined enough, that's precisely what happens. They want to put the message out that ... you don't break ranks, you don't misbehave, you don't ignore orders. You follow or you're gone." (8 RT 2005.) Based on how the prison staff had handled Addis, an inmate would conclude that it was useless to rely on the staff for safety. (8 RT 2010-11.)

Steven Rigg, who had worked 17 years with the Department of Corrections and dealt with prison gangs, also testified as a defense expert on issues related to inmate safety and prison gangs. (8 RT 1911-14, 1938.) Rigg explained that "shot callers" within the gang are the people with authority to tell others what to do, including whether to commit an assault. (8 RT 1940.) If an inmate received an order to commit an assault, he would be expected to do so. If appellant had failed to comply, he "would be a walking dead man" and he could have been killed right then on the prison yard because it was dominated by gang members. (8 RT 1942.)

Appellant could not have obtained any assistance from the correctional staff without "fronting himself off" and requesting protective custody. However, there was no guarantee that appellant would have been safe there because inmates have been assaulted and killed while in protective custody. (8 RT 1945-46.) "So it would have been very difficult for him to receive assistance from staff, especially knowing how the unit was being operated." (8

RT 1946.) Glen Willett, the prosecution's prison gang expert, confirmed that if an inmate did not cooperate with the gang's program or showed disrespect, the NLR or AB would retaliate against him. (7 RT 1730.)

Thus, the guilt phase evidence confirmed that the trial of the case would involve substantial issue of inmate safety and that an inmate was indeed confronted with the task of trying to stay alive. (2 RT 318-19; 4 CT 1084.) The same was true of the penalty phase. Glen Lipson, Ph.D., a diplomat in forensic psychology, testified a defense expert on prison mental health services. (13 RT 3219.) Appellant's records showed that he had suffered since childhood from a serious mental disorder. (13 RT 3246-47.) This included a schizoid personality disorder, post-traumatic stress disorder, and bipolar disorder with episodes of mania and depression. (13 RT 3248-49.)

Given the nature of appellant's mental health problems, prison posed multiple problems because prison is "a very predatory environment with very dangerous people." (13 RT 3256.) Appellant's records from his first imprisonment contained reports of a lot of different injuries to him which suggested that he had been the victim of intimidation and violence. (13 RT 3256-57.) Appellant's subsequent violent behavior reflected the "diathesis stress model" of behavior. That meant that if someone with a mental disorder was put in a violent and very stressful environment and left untreated, the stress will often send the person "over the edge" so that he acts out in a violent way. (13 RT 3257.) Such behavior is very often a sign that someone is mentally ill, under stress, and having problems. (13 RT 3257-59.)

Frank Gawin, M.D., the defense psychiatric expert, testified in more detail about the effects of the prison environment on appellant's bipolar disorder. "The best environment for someone with bipolar disorder, whether or not on medications, is one with minimal stress." (13 RT 3157.) A prison environment would produce "profound stress" and not be therapeutic. People

with bipolar disorder normally cycle in regular intervals between the poles of their disease. However, "those intervals can be altered when one superimposes stressors which can ... flip people into mania or into severe depression." (13 RT 3157-58.) As a result, the stress of the violent prison environment created a situation where appellant's bipolar disorder would manifest in violent behavior. (*Ibid.*.)

In the manic phase, "irritability often increases dramatically and with that the capacity for violence increases. There is a decrease in impulse control, diminishment in judgment of consequences and understanding of consequences, and ... there are also problems with perception such that these individuals can sometimes be particularly suspicious or hyper vigilant or paranoid and that can often make them angry at other people, even though other people may not have done anything to them. So, as a consequence, mania is often associated with violence and so is hypomania." (13 RT 3123.)

In sum, the record shows that to fairly defend the case in both the guilt and the penalty phases of the trial, appellant needed to be able to probe the jurors' minds to determine their attitudes and prejudices, both known and unknown, about inmate safety and survival. Appellant needed to determine whether the jurors without preconceptions could objectively review evidence that an inmate such as appellant may be trapped in the cruel dilemma of killing or being killed and that prison gangs may exert more control over inmate safety and survival than the prison guards. At the penalty phase, these issues continued to be of critical importance for evaluating whether the circumstances of the capital crime (Penal Code, § 190.3, subd. (a)) justified imposition of the death penalty, particularly when a person with appellant's mental health problems was confronted with the stressors of the prison environment. For all these reasons, the denial of adequate voire dire resulted in a trial that was fundamentally unfair and the judgment must be reversed.