EVERYTHING YOU NEED TO KNOW ABOUT PREPARING STATEMENTS OF APPEALABILITY, THE CASE AND THE FACTS

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Introduction

A criminal appellate brief always begins with the Three Statements: of the Case, of Appealability and of the Facts. For many advocates, preparing this part of the brief can be sheer tedium. Yet appeals can (and have) been won or lost based on the quality of these preliminary statements. In the best brief writing, once the important reader (appellate justice or clerk) has finished reviewing the table of contents and the three statements, he or she generally has a pretty good idea what's at stake in the appeal, and why the judgment should be affirmed or reversed.

It takes a lot of careful work to put together well crafted and effective Statements. Some panel attorneys, especially in the more complex, long-record cases, worry that they can never be fully compensated for the time necessary to write effective statements, especially fact statements. Guidelines for compensation for Statements of the Case and Facts are based on the length of the record, but with a maximum of 10 hours. Frequently in longer record, complex cases, the time spent on statements of the case and facts exceeds this considerably. However, this is an area where the appellate projects have some leeway in making limited recommendations for additional hours where merited.[2]

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1. This is a reprint, with minor revisions, of Lecture Materials I prepared for the Appellate Advocacy College, 2000. In that essay I shamelessly borrowed from, edited, and added to Colleen Rohan & Michael Ginther, *Guidelines for Writing an Effective Opening Brief*, prepared for FDAP's January 1996 seminar, with the consent of FDAP. All mistakes or foolish ideas herein are mine, not theirs. My thanks to Paula Rudman of FDAP for reviewing an earlier draft.

2. In reviewing a draft of this article, Paula Rudman commented to me that she could not recall FDAP recommending more than 20 hours for Statements; but that she

Prefatory Note on References to the Record on Appeal.

Rule 8.204(a)(1)(C) contains a very specific requirement about the need to cite to the record in an appeal, directing that every brief should . . .

> Support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears. If any part of the record is submitted in an electronic format, citations to that part must identify, with the same specificity required for the printed record, the place in the record where the matter appears.

Courts of appeal have often emphasized the importance of this rule and voiced their displeasure with noncompliance. (See, e.g., *Landfield* v. *Gardner* (1948) 88 Cal.App.2d 320, 322-323, *People* v. *Dougherty* (1982) 138 Cal.App.3d 278, 282-283.)

Two sets of issues arise as to the use of record references in the Statements of the Case and Facts. First, how to make shorthand references to the various parts of the record; and second, how meticulous one must be in making record references.

On the first point, where there is a single sequentially numbered clerk's transcript and a single sequentially numbered reporter's transcript, one can simply refer to these as "RT" and "CT" without need of a specific explanation. If, as is often the case, there are multiple augmentations, supplements, or multiple volumes with separate numbering, some additional shorthand references are needed, with a footnote alerting the reader to this. (See Sample No. 1, Statement of the Case, p. 1, fn. 1.)

As to the second point, many excellent advocates, and most appellate projects, recommend putting in record references for virtually every sentence in their Statements of the Case and Facts, believing this to be the most accurate and complete way of complying with Rule 8.204(a)(1)(C). A minority (including this writer) tend more often

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can recall spending *five times* that amount of time on a fact statement in a complex case. Frankly, this is an area where I, as a panel lawyer, was simply resigned to taking my lumps rather than sacrifice the quality and effectiveness of the fact statement in a long record, complex case.

to put record references at the end of each paragraph, especially in the Statement of Facts, on the belief that this greatly improves the flexibility and quality of the writing. What ultimately matters is whether the references are precise and accurate, and whether the reader – appellate judge, clerk or adverse party – will be able to find the matter stated in the pages provided. Irrespective of which path you follow in your own writing, it is always important to pinpoint record references carefully. It will never do to follow a long paragraph, or series of paragraphs, with sweeping references to many pages of the record (e.g., "RT 21-49").

At the same time, it is rarely, if ever, necessary to refer to *line* numbers, as opposed to page numbers, in your briefs. This limitation not only saves you enormous amounts of time, but improves the readability of the Statements.

The Statement of Appealability

Rule 8.204(a)(2)(B) requires that a brief "State that the judgment appealed from is final, or explain why the order appealed from is appealable." Most criminal appellate advocates put in a preliminary "Statement of Appealability" before the Statement of the Case that parrots the language of Rule 8.204(a)(2)(B), and indicates that the present appeal lies under Penal Code section 1237, subdivision (a). This dull and routine method is generally sufficient.

Another approach, which seems to better fit the narrative flow of the Three Statements, is to situate the Statement of Appealability *between* the Case and Fact Statements, including the filing of the notice of appeal as part of the appealabilitiy statement.

Finally, more attention to the appealability statement is required if the appeal is after a plea of guilty or no contest, or follows a postjudgment order. The statement of appealability in this situation should explain, where pertinent, that

(a) the appeal is made after a plea but is limited to matters occurring after entry of the plea which do not challenge the plea, and thus lies pursuant to Rule 8.304(b)(2)(B);

(b) a certificate of probable cause has issued as to issues which occurred prior to the plea or which challenge the plea and the appeal is proper under section 1237.5;

(c) the appeal concerns denial of a motion to suppress evidence, and is thus proper pursuant to Penal Code section 1538.5, subdivision (m); and/or

(d) the appeal is of an order after judgment affecting the substantial rights of the defendant (e.g., denial of a request for presentence credits) and is proper under section 1237, subdivision (b).

The Statement of the Case

The Case and Fact Statements are also required by Rule 8.204(a)(2), which provides that each brief shall "(A) State the nature of the action, the relief sought in the trial court, and the judgment or order appealed from . . .", and "(C) Provide a summary of the significant facts limited to matters in the record.

In a criminal case, the purpose of the Statement of the Case is to give the Court of Appeal a quick overview of pertinent procedural facts and events in the trial court. There is never any reason to include everything which transpired below. In the vast majority of cases, the Statement of the Case should be no longer than a page or two. But there are certain items which should always be included in the Statement of the Case; and there is other significant procedural background which can sometimes be effectively added in for tactical reasons.

A. The Essentials: A Chronological History of the Case

While there is no set formula for a Statement of the Case, a set of basic ground rules should almost always be followed. The Statement of the Case should be organized in chronological order. Begin with the content of the charging information or indictment, then move to the next relevant event, describing the procedures below in the same sequence they occurred, ending with the filing of the Notice of Appeal. If you follow this format, the clerk or judge who reads your brief will get an immediate, easy to

remember, general overview of the case.

Bear in mind that in the typical case, the clerk or judge who reads your brief has not read the record on appeal. The Statements of the Case and Facts provided in the appellate briefs – yours and the attorney general's – will usually be their sole source of information about what went on in your case. If your Statements of the Case and Facts are concise and easy to follow, you will be more likely to get, and keep, the court's attention.

1. **Charges Alleged Against Your Client**

The Statement of the Case should always tell the court what charges were alleged in the Information, including any enhancement allegations, with citations to the relevant code sections. Prior convictions, probation ineligibility allegations and the like should normally be summarized as well.

Keep this section short and easily understandable. For example, if the information alleges several counts, state what charge is alleged in which count. If several different enhancements are alleged, state what enhancements apply to what counts. Though it is not always possible, summarize when you can. For example, if the information alleges three counts of robbery and use of a deadly weapon as to Count 1, you need not separately describe each count. Simply state that the information charged appellant with three counts of robbery and that personal use of a deadly weapon was alleged as to Count 1. If there are a very great number of charges (e.g., 40 counts), you may wish to create a chart detailing the charges and enhancements. (See Sample #1, Statement of the Case, p. 2, fn. 3.)

Some care must also be taken with respect to amendments to pleadings, especially in cases with many counts and enhancing allegations. Frequently there will be one or several amended informations filed, and the charges on which a client is tried may differ in significant particulars from the original charges. It will rarely, if ever, be effective to spell out the details of all the amendments. Absent some need to dwell on the

amendments to the pleadings (e.g., if there is an appellate issue concerning untimely amendment), it is probably best to note that the client was charged by the original information on such-and-such date, then relate how he went to trial on the charges in the Third Amended Information, which can then be detailed. (See Sample # 1, Statement of Case, p.2, & fn. 3.)[3]

Since the Court of Appeal is familiar with the applicable codes, there is no reason to recount the elements of the crimes described in the Information. Just state the offense and the applicable code section, and refer to the pages in the clerk's transcript where the pertinent accusatory pleading is found.

2. **How the Conviction Came About**

You should next describe what procedures resulted in your client's conviction(s): a jury trial, a court trial, or a plea. Give the date on which these events occurred. If your client pleaded guilty as part of a plea bargain, briefly summarize the important terms of the bargain. In more complicated situations – e.g., a slow plea, guilty pleas as to some but not all charges, etc. – some care is required in explaining the unusual circumstances.

3. **Verdict**

If your client had a jury trial or court trial you must state the verdict. If the result was conviction on all counts, you can simply state that without repeating each charge. Briefly explain when charges were dismissed, or your client was acquitted on some charges and convicted of others. (See Sample #1, Statement of the Case, pp. 2-3.)

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3. I have always included a note to the effect that appellant entered a plea of not guilty to the charges at arraignment in superior court. I am advised by other Appellate College faculty that this is considered unnecessary. I will probably continue to do so out of habit and because it seems appropriate to the Statement of the Case

4. **Sentence**

Next, describe the sentence imposed and the date of sentencing. There is some question whether you need to detail the specifics of the sentence in the Statement of the Case (e.g., that the court imposed a four year middle term, with three consecutive one third middle terms, etc.). Many writers always do this. However, if no claim of sentencing error will be raised in the brief, this serves no important purpose; and sometimes care must be made not to delve into details which might alert the court or attorney general about a possible unauthorized sentence. (See Sample # 2, Statement of Case) Even where a limited claim of sentencing error is raised, it is usually not necessary to spell out all the sentencing details.

Occasionally, where sentencing error is a primary or particularly key issue in the appeal it may be worthwhile to give a succinct summary of some of the sentencing details in the Statement of the Case. Normally, the more exacting details of the sentence – e.g., the reasons stated by the court for sentence choices, the interrelation of various complex sentencing schemes, etc. – should be saved for the sentencing arguments in the issue portion of the brief.

5. **Notice of Appeal**

Finally, your Statement of the Case should usually conclude with a notation of the fact that a timely notice of appeal was filed, giving the date and appropriate record reference. (Alternatively, a small minority – perhaps it's only me – put this fact into the Statement of Appealability, as discussed above.)

B. **Optional Case-by-Case Matters**

1. **Motions**

If you are raising the denial of a specific motion as error on appeal – e.g., pretrial motions to suppress or sever, trial motions such as *Wheeler* or mistrial motions – the Statement of the Case should identify the nature of the motion, the date it occurred, and

the court's ruling. Only scant detail need be included; more thorough discussion of the procedural history of the motion belongs in the introduction to the argument on this point. (See Sample #2, Statement of Case, p. 2.) There is rarely any reason to mention motions decided favorably to the defense, or ones where the rulings do not give rise to an issue on appeal.

2. **Extraordinary Events**

During the course of a criminal trial any number of events might occur which could give rise to an issue on appeal: e.g., defendant being forcibly removed from the courtroom or compelled to be tried in jail clothes, a juror being excused for illness or misconduct, a lawyer being held in contempt, etc. Where these form the basis for an issue on appeal, they should be briefly mentioned in the Statement of the Case. Wait until the argument section of your brief to describe the underlying facts in detail.

There is usually no need to recount ordinary trial events (e.g., objections to the admission of evidence), which form the basis for a claim of error on appeal. This is better handled in the first part of the argument of the issue. A tactical exception can lie where there is only a single issue on appeal, or a primary one; in such cases, you can sometimes use the Statement of the Case as an introduction to the argument.

3. **Close Case Indicators**

You can often include procedural events which indicate the case was close. For example, you can mention that the jury deliberations were long ("After deliberating for over thirteen hours over three days, the jury found appellant guilty of first degree murder. (RT 248-259)"); that the court stated its difficulty in deciding a particular issue (i.e., "After opining that the evidence presented a `very close case,' the court denied the new trial motion. (RT 26)".); or that there was a previous hung jury (i.e., "On January 26, 1992, the court declared a mistrial after the jury deadlocked at 9 to 3 in favor of acquittal. Retrial began on March 5, 1992. (CT 185)") These comments should be made sparingly,

and are no substitute for the need to emphasize these favorable procedural facts in your discussion of prejudice in the argument portion of the brief.

C. **Events Which Are Rarely Included**

1. **Municipal Court Proceedings**

As a general rule the proceedings in municipal court – filing of the complaint, the preliminary hearing, etc. – have no bearing on the appeal and it is bad form to mention them in the Statement of the Case. As with all general rules there are exceptions. You need to note if your client pled guilty to a felony in municipal court that was certified to superior court for sentencing, with appropriate references to the record. Motions brought and denied in municipal court occasionally merit mention when they form part of the basis for an appellate issue. For example, if your client brought an unsuccessful motion to suppress evidence at the time of the preliminary hearing, pled guilty in superior court, and is appealing the denial of the suppression motion, the municipal court proceedings must be cited.

Sometimes the fact that certain events occurred in municipal court is critical to raising a particular error on appeal. For example, if *Brady* error occurred in your case, you may want to mention that an appropriate discovery motion was filed in the municipal court case. The fact that a *Faretta* motion or a *Marsden* motion was brought in municipal court may strengthen your argument that denial of the same motion in superior court was error.

There are countless possibilities depending upon the peculiarities of the facts in a particular case. The rule of thumb is: don't include it unless it is relevant to an issue you are raising on appeal.

2. **The Names of the Players**

It is normally not necessary or proper to include the names of the judge, the prosecutor or the defense attorney in the Statement of the Case. Some people (including the authors of the essay from which I am borrowing), believe it is usually not a good

practice to do this in the Argument portion of the brief either, contending it's better not to personalize the court's errors. In my view, it is proper to bring names in if you believe that personalizing the error or ineffectiveness will help your chances on appeal, e.g., where a negative reputation of prosecutor, judge, or defense counsel precedes the misdeeds in your case, or where you're really going to be hitting the villain in the piece hard for misconduct, malicious error, or ineffectiveness.

Also, where there are multiple players involved, e.g., issues concerning various substitutions of attorneys in the case, or multiple judges, you should naturally identify the individuals involved for clarity's sake.

D. Common Errors

1. Too Much Information/Not Enough Information

While it is important to keep your Statement of the Case as short as possible, it is equally important to provide sufficient information to apprise the court of the basic nature of the case and the critical events at or before trial. Section A, above, lists information which should always be included. Before filing an opening brief check your Statement of the Case to make sure these essentials are included.

Sections B and C above outline the various information which may or may not be included in your Statement of the Case depending on the particulars of your case. As emphasized earlier, the operative rule is, do not include procedural matters in the Statement of the Case unless there is a specific reason to do so. A Statement of the Case which includes irrelevant procedural details will be boring at best and extremely irritating at worst.

2. Overly Verbose Descriptions

Remember, the Statement of the Case is not a mere toss-off; rather, it is the judge or clerk's first entree into your client's case and the arguments by which you hope to persuade them to reverse the judgment. Thus, as with the entire brief, the Statement of

the Case requires careful editing as to content and form. Keep an eye out for long or overly detailed descriptions of the procedures, and delete them (or move them to the introductory part of your substantive arguments) when you find them. Your reader is more likely to become interested in the Statement, and therefore read and absorb it, if your writing is clear and to the point.

The Statement of Facts

As counsel for appellant in a criminal case you have the burden of persuading two of three judges to reverse either the verdict of twelve citizens after jury trial, the verdict of one of their brethren after court trial, or a sentence imposed on an individual convicted of a crime. Your first shot at meeting that burden is the Statement of Facts in the opening brief. Indeed, the court's understanding (or lack of understanding) of the facts frequently determines the outcome of the case.

The primary purpose of the fact statement is to let the court know what the case is about. A well crafted fact statement does much more. It is the means by which you take control of the case by setting up the legal issues you will be raising on appeal – by humanizing your client and/or mitigating the crime, by demonstrating the inadequacies of the prosecution's proof or the reasons why particular errors were prejudicial, and by establishing your credibility with the court.

A. **Get Organized**

The first step towards creating a persuasive Statement of Facts is to read the record carefully and to take comprehensive notes with page citations. That way, you will not have to reread the record as your notes will suffice. If possible, read the record all in one sitting or, with a long record, in one block of time. Most appellate lawyers agree that the best practice is to take careful, even copious notes when you read the trial portion of

the record.[4]

There are two principal theories about when to write the Statement of Facts. Many practitioners (including the authors of the original essay) recommend that you write a rough draft of the factual statement as soon as you have completed reading the record, while the facts are fresh in your mind. In such a draft, you should err on the side of over-inclusiveness, then edit out irrelevant matters and refine your language after you have had the chance to formulate the issues and do your legal research. If you cannot do a rough draft right away, do it as soon as you can. The longer the span of time between the reading of the record and the writing of the facts, the more likely it is that you will waste precious, and perhaps unbillable, time rereading portions of the record. It is also more likely that you will forget details or nuances that you originally intended to include.

Other practitioners, such as this writer, believe that the best Statement of Facts will be written after you have figured out, at least tentatively, what issues you will be raising on appeal, as the shape of the issues affects how you will organize your fact statement. For example, if lots of evidence was presented as to the identity of the perpetrator, but your issues on appeal all have to do with the instructions on homicide, you will need only the briefest summary of the identification evidence, and will want to pay a lot of attention to the circumstances surrounding the killing. If you choose, like me, to draft your fact statement when you are writing the rest of your opening brief, it is even more imperative that you make very careful, detailed notes when you review the record, which will hopefully be adequate to refresh your mind about the details of the case after the all-too-often long delay between review of the record and preparation of

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4. You need to decide whether you are better served by handwritten notes or computer-typed ones (or post-it notes for really short record cases). Although there are advantages and disadvantages to each route, I have found, after years of waffling between these two methods, that the end product of the computerized method is by far more useful.

the opening brief.

Finally, whichever of these two approaches you utilize, when your notes fail you or confuse you on some key point (or when you can't read your own handwriting), *always* go back to the record itself to find out what actually happened or was said.

B. **Matters Usually Excluded From the Statement of Facts**

In most cases, the Statement of Facts summarizes the facts *of the offenses* presented at the trial, not an account of the trial proceedings. The content of pretrial motions, arguments held outside the presence of the jury, opening and closing statements, discussions of jury instructions, the text of jury instructions, and the sentencing hearing and/or matters included in the probation report should not be included. If you plan to raise an error which occurred during one or more of the proceedings just mentioned you can describe the predicate facts in the argument section of the brief where that error is argued.

As with everything, there are exceptions to this rule. If your client pled guilty after the preliminary hearing, then your factual statement will probably be a summary of the preliminary hearing testimony.[5] If your client pled guilty and you are only appealing the denial of a pre-plea motion to suppress, then you can construct your fact statement from the evidence produced at that motion. When the facts come from a source other than the usual trial proceedings, this should be specified to the court, perhaps in a footnote.

The facts generally should not include lengthy verbatim quotes from the record. A sentence or key phrase may occasionally be quoted directly. But where the precise

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5. Here again, I have encountered differences of opinion. I have always prepared my fact statements in plea cases using the preliminary hearing evidence. Yet I was recently advised by Michael Kresser, the esteemed executive director of SDAP, that the fact statement in this situation should be from the *probation report*, since this is the source of facts which the trial court had and considered when it imposed sentence.

wording of a witness's testimony or ruling or jury admonition by the court is necessary to explain the basis of a legal error, the specifics of that testimony or ruling, including crucial verbatim quotes, can be presented in the argument section of the brief where the error is raised.[6]

C. **Be Clear, Concise and Engaging**

It is almost impossible to persuade a reader of anything with dull, dry writing. Likewise, when a fact statement is too long, complicated or confusing, all hope of persuasion is lost. It is thus very important to make your Statement of Facts as understandable, short and interesting as possible.

Unlike the sterile procedures outlined in the Statement of the Case, the human situations played out in trials of criminal cases are inherently interesting, sometimes even gripping. A well-written statement of facts succeeds when it concisely tells the story of the case in a humanizing, compelling manner.

In complex, long-record cases, it will often be impossible and unwise to edit the facts down to keep the Statement relatively short. Never leave out important details for the sake of brevity. When a complex, long-record case necessitates a lengthy fact statement (i.e., more than 10-15 pages), it is all the more important to make the discussion as clear, readable, and "novelistic" as possible.

1. **Avoid Witness-By-Witness Summaries**

The best approach to organizing a factual summary is to provide a chronological description of the underlying facts of the case (i.e. the facts of the offense(s) charged and the defense(s) presented). The worst approach, generally speaking, is a chronological description of how the evidence was presented at trial. In other words, avoid writing a

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6. Even there, caution is advised. Too lengthy verbatim record quotes can bore or distract the reader, a point we know from reading the attorney general's briefs. It is usually better to paraphrase all but the most crucial part of key testimony or procedure.

seriatim, witness-by-witness summary of trial testimony. Very often witnesses are called out of context or out of order at trial. A chronological rendition of trial testimony that was out of sequence in the first place creates a confusing, sometimes misleading and usually very uninteresting picture of the facts of the case. There is nothing worse than having to leaf back and forth between the pages of a Statement of Facts just to figure out what happened. Although some appellate practitioners, and a lot of deputy attorneys general, prepare their fact statements this way, the "witness-by-witness" account is a frequent "pet peeve" of appellate judges and their law clerks, and is almost always a bad idea for you and your client.

This is not to say that a witness-by-witness summaries are always unwise. Some cases lend themselves to this approach. For example, there may be three testifying eyewitnesses in the case, who describe very different events in their testimony and gave very different descriptions to the police. In such a case, it is almost impossible to give a chronological summary of what they saw collectively, and a witness-by-witness account serves to emphasize the differences in their testimony. In other cases, you can strengthen your factual summary with witness-by-witness accounts of discrete portions of the trial evidence (e.g., eyewitness testimony concerning the shooting incident, or divergent psychological evaluations of your client), with the rest of the fact statement organized into a chronological summary of the evidence. (See Samples 2 & 3, Statement of Facts for examples of this mixed approach.)

With that said, it should be reemphasized that it is almost always best to organize the facts so that your summary comes as close as it can to simply telling a story.

2. **Use Subsections When Helpful**

It is often a good idea, especially in factually complex cases, to break down your summary into subsections to enhance the reader's ability to remember what happened. For example, when an insanity defense is presented you may want to summarize the evidence of the crime under one subsection heading and the evidence regarding

appellant's mental illness under another subsection.

In longer, more complex record cases, you can help keep the reader's attention by breaking your fact statements up into chronological "chapters": e.g., "Background to Crime," "Planning the Crime," "The Crime," "After the Crime," "Police Investigation and Arrest of Appellant." I will often use catchy subtitles for these subsections of the Fact Statement.

Finally, as suggested above, in cases where several witnesses testify to the same events, but each offers a different version, you can enhance your reader's understanding of the factual conflicts at trial by presenting the testimony of each witness under a separate subsection heading (i.e., Joan Kelly's testimony; Frank Walton's testimony).

3. **Identify the Players**

An important function of the Statement of Facts is to clearly identify the various players in your case so the reader can keep track of them. (The idea here is to produce a Amy Tan short story; not a Tolstoy novel.)

In most cases this is relatively simple because there are only a few people involved; your client, two eyewitnesses, the arresting officer, the officer who took your client' statement. When there are many players, however, make sure you have carefully identified them. If four of the witnesses are members of your client's family and they all have the same last name, identify who they are initially so that the reader knows who testified to what. Sometimes, after initially identifying the players by name, a more streamlined and less distracting factual summary can be produced if you refer to them thereafter by first or last names, or by their roles – e.g., the bartender, the bouncer, the arresting officer. However, when you do this, remember to be consistent throughout your brief.

One important side-issue is how to identify your *client* in the fact statement. Many very capable advocates use the generic "appellant" to refer to their client almost without fail in their briefing. Others, including this writer, believe you are almost always

better off making some effort to humanize your client by referring to him or her by name in the fact statement. A "Mr." or "Ms." before the name can humanize the client in a formal sort of way; a first name, especially with a juvenile or younger client, has the same effect in an informal way.

A second concern about identifying your client arises in cases where identity is the key issue. In such instances, it is rarely helpful to do what the attorney general invariably does, which is to simply refer to the perpetrator as "appellant." When identity is not clearly established by eyewitness testimony or the defendant's admission, it is far more useful to describe this person as "the robber," "the shooter," or "the attacker."

4. **Be Complete**

When organizing your factual statement, be sure to provide an honest and complete picture of what happened at trial. You must include all relevant facts, regardless of whether they are good or bad for your client. If your client presented an alibi, but some portion of that alibi was disputed by a prosecution rebuttal witness, you must include that rebuttal testimony. If you do not, the Attorney General surely will, and you will lose credibility with the court. The rule with relevant "bad" facts is not to omit them; rather do what you can to mitigate them.

Along the same lines, make sure you don't inadvertently omit facts which are favorable to your client. If that same rebuttal witness admitted on cross-examination that he or she was offered a favorable deal in a pending case after agreeing to testify against your client, that fact should be in your brief because it suggests the witness's rebuttal testimony was unreliable.

5. **Omit Unnecessary Details**

Most readers quickly lose interest with writing that contains useless details. Irrelevant details add nothing to your brief and can seriously detract from its persuasiveness. Inclusion of too many such details telegraphs to your reader that you don't know what is important and what is not. Consider this carefully when determining

what facts to include in your summary of the evidence.

It is rarely necessary, for example, to include the exact address of the scene of the crime, or the direction in which the perpetrator fled when he ran from the store, the titles and ranks of the arresting officers, the chain of custody of evidence, or the exact location items of evidence were found at the crime scene.

Sometimes the entire testimony of witnesses that is critical for purposes of trial, is completely irrelevant on appeal and should be excluded wholesale. This frequently occurs with expert testimony. For example, pages of expert ballistic testimony, which established that your client's gun was the murder weapon, can be excluded from the facts on appeal if there is no dispute about the expert's conclusion. A simple statement that expert testimony established that the bullet found in the victim came from appellant's gun will suffice. (And here is the exception to another rule: namely, you can reference to scores of pages of transcript, "RT 180-241," for this curt factual summary.)

If a series of witnesses testify to the same general events, (for example, three friends of the defendant all testify that he was with them at a party at the time of the burglary charged against him) don't laboriously detail the testimony of each. Instead, summarize the testimony of one witness, then note that two other witnesses reported the same thing; or note that "Witnesses A, B, and C testified that . . ." Either way, note the names of the witnesses and cite the appropriate part of the record.

Of course, there will always be a tension between the need to be complete and the imperative of avoiding unnecessary details. The best approach is to err on the side of over-inclusiveness in your first draft of the fact statement, then whittle it down appropriately later on, when you know precisely which issues are being raised on appeal and which factual matters are significant in the case.

6. **Do Not Present Your Client in a Bad Light**

Always be vigilant about the manner in which you refer to your client or the manner in which you characterize the facts of your case so that you do not unnecessarily

portray your client in a bad light. For example, if your client screamed obscenities at the judge and trial counsel when a motion was denied, that irrelevant fact should be excluded. Although it occurred at the time of the motion, it adds nothing to your later legal argument that the motion was improperly denied.

If your client was convicted of strangling a seventy year old invalid with drapery cords then repeatedly hit her in the head, it is pretty hard to minimize the atrociousness of the crime, but you can avoid maximizing it. For example, rather than saying, "The evidence established that the 70 year old victim, an invalid for 20 years, was forcibly strangled with a curtain cord and then bashed repeatedly on the head," break up the information and use less colorful language. Describe the age and health of the victim in one portion of your facts, and save the description of the cause of death for a later portion. Then state simply that the victim was strangled and was hit several times, or words to that effect. You will still have a complete and accurate factual summary, but you will minimize the shock value of those facts.

Along these lines, don't leave out information that makes your client look good. If your client testified to an alibi which was corroborated by two witnesses who said the same thing she did, don't exclude any mention of those witnesses just because the content of their testimony was the same as your client's. At minimum, you should state that two witnesses corroborated your client's testimony, identify the witnesses and make appropriate citations to the record.

7. **Never Use Police Jargon**

Police officers often use stilted and tortured phrases in their testimony. This police jargon has no place in an appellate brief. The police officer in your case might testify, for example, that he "responded to the scene" and immediately "exited his vehicle" so as to "detain the black male subject." Don't write it up like that; change it to normal English and recount that the officer "arrived at the street corner, got out of his car and grabbed hold of appellant, detaining him."

8. **Identify the Source of the Evidence, Defense or Prosecution**

It is almost always a good idea to specify when the source of facts summarized comes from defense, as opposed to prosecution witnesses. Judges from the Fourth District frequently have suggested that fact statements be broken down into "Prosecution Evidence" and "Defense Evidence" sections, a practice often followed by many experienced criminal appellate advocates, including this writer. Others avoid this separation when it detracts from effective story telling and/or a succinct and focused presentation of the facts. If you don't separate out prosecution and defense evidence (and rebuttal, surrebuttal, etc.) into separate subheadings, you should find other ways of advising the court that the testimony being summarized came from a defense witness. (Examples: "Joe Smith, called as a defense witness, saw no blows struck by appellant at this point in time." "Officer Sanchez, called as a rebuttal witness, testified that Mr. Defendant told him that he had never been afraid of Mr. Victim.")

D. **Always Be Accurate**

It is extremely important to be accurate when summarizing the facts of your case. Appellate clerks and justices rely on the factual summaries contained in the briefs in deciding the case. If they discover your summary is not accurate they will disregard it and be even more likely than normal to rely on the Attorney General's rendition of the facts. Once that happens you've lost your ability to persuade because you've lost both your credibility and the court's attention.

1. **Never Distort or Exaggerate the Facts**

As mentioned earlier, a proper Statement of Facts includes the bad facts as well as the good. It is equally important not to distort, exaggerate or mislead the court about the facts you include. If an eyewitness testified that he or she is positive your client was the robber, you must say an eyewitness identified your client. You need not emphasize that identification by repeating that the witness stated he or she "would never forget that

face" or was "one hundred percent sure, no doubt about it." However, it would be highly improper to mislead the court by suggesting that the witnesses's identification was equivocal when it wasn't.

The same is true of facts helpful to the defense. If an eyewitness testified he or she believes your client was the perpetrator, but is not absolutely sure, don't exaggerate that testimony by claiming the witness was "unable to identify appellant". Give an honest description of the testimony. Save your characterization of that testimony (i.e. that the witness could not positively identify appellant) for the argument portion of your brief.

2. **Stay Within the Record: Never Present Matters in Your Factual Summary Which Are Not Part of the Record on Appeal.** Rule 8.204(a)(2)(C) provides that factual summaries should recount "the significant facts limited to matters in the record." Never run afoul of this rule. At minimum you will incur the distaste of the judge and/or clerk who reads your brief and lose your credibility. At maximum you run the risk of opposing counsel filing a motion to strike your brief and or the offending portions of your brief.

E. **Be Persuasive, Not Argumentative**

The Statement of Facts is not the place to affirmatively argue the merits of your case. This includes the use of argumentative adjectives and adverbs in the fact statement. At the same time, a well thought out and carefully organized factual summary can present the facts in such a persuasive manner that you will be effectively "arguing" your case between the lines. Don't write, "The officer recklessly swung his baton, striking appellant in the head." Instead, you can convey the same thing by sticking to the facts adduced in the testimony: "Moments after appellant put his arms behind his head, Officer Jones forcefully struck him in the head with his baton."

1. **Organize the Facts To Emphasize Good Points and Downplay Bad Ones**.

In your zeal to avoid being argumentative, you should avoid the opposite trap: making a fact statement read like respondent's sufficiency of evidence argument. A fact statement need not be presented "in a light most favorable to the prosecution"; rather, it is must be an accurate, thorough, fact-based summary by an advocate on behalf of his client. If you have a case in which various witnesses offered conflicting evidence, don't summarize the conflict in a way which favors the prosecution's proof on the counts of conviction. Instead, emphasize the conflicts in the manner you organize the facts. You can persuasively show how this makes the prosecution's evidence weak and the ultimate verdict questionable without ever arguing these points.

For example, if a damaging prosecution witness testifies to a series of things, some of which were impeached by testimony presented by another prosecution and/or defense witness, you can, in effect, "argue" that this witness should not be believed merely by the manner in which you put together the factual summary of this evidence. After each of the items claimed by such a witness you can immediately note the contrary testimony presented later at trial.

> "Ms. White testified the burglar was 6 feet tall and weighed over 200 pounds. [cite] Prosecution witness Jones, and defense witnesses Green and Wilson all agreed the man was of slight build, no taller than 5'5", no heavier than 150 pounds. [cite] Ms. White claimed the burglar had a large gun in his hand. [cite] None of the other witnesses to the crime agreed with her. Green and Wilson were sure the burglar had no weapon. Jones did not see the burglar's hands, but believed he would have seen a gun had the burglar been brandishing one. [cite]")[7]

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7. I frequently use footnotes for this kind of sniping. However, be forewarned: some judges report that they never read them.

2. **Avoid Editorial Comments and Personalities**

Editorial comments about the weight or sufficiency of the evidence have no place in your factual summary. ("Ms. Wilson, a patently incredible witness, stated that. . . .") Characterizations of the personalities or actions of the players at trial are equally improper. ("After repeatedly badgering defense witness Smith, the prosecutor finally elicited testimony that. . . .") Instead, make the same points through the organization of your facts or through the careful use of language, and save the choice judgmental comments for proper argument.

Pay attention as well to the manner in which you describe the various players at trial, trying to avoid lending undue respectability, and therefore credibility, to a witness you want to discredit. For example, if a police officer testifies he or she is the detective in charge of the Sonoma County Narcotics Eradication Task Force, you should just call him or her "officer." There is no need to emphasize the accomplishments or titles of such witnesses.

For the same reason, it is also a good stylistic point to refer to the prosecutor as "the prosecutor," never "the People."

3. **Use the Facts to Set Up Your Legal Arguments**

When you sit down to write the final version of your factual summary you should already know what legal issues you plan to raise. Make sure that your facts include those items of evidence necessary to set the scene for your legal arguments. If you plan to argue the evidence was insufficient to sustain the conviction, for example, your factual statement will generally need to be somewhat detailed since you want the Court of Appeal to have a comprehensive knowledge of the entire record when it determines the merits of your issue. The same rule holds for most claims of trial error, where you will often need to summarize the entire factual record in the case to argue that the case against appellant was not strong. If you plan to challenge the trial court's denial of a motion to exclude certain evidence, your factual statement should include the testimony or exhibits

which resulted in introduction of the offending evidence at trial, sometimes combined with an indication about the defense objection (if there was one). But remember, though, that it is usually inappropriate to highlight procedural facts, e.g., a defense objection, into a fact statement. Do it obliquely: "The letter, admitted over defense objection, detailed the codefendant's advice to the appellant about handling police inquiries. (RT 445)"

When there is no dispute about a particular event, you can simply concede that event on appeal. For example, in a mistaken identification case where there is no disagreement that the crime occurred and the argument on appeal concerns faulty eyewitness identification instructions, don't belabor the details of the crime. Describe it generally, concede it if appropriate, and focus instead on the specific conflicts between the descriptions of the perpetrator or other facts which indicate the identification was unreliable.

Conclusion

I have tried to outline all the important "do's and "don'ts" in preparing the introductory statements, giving some sense of various options employed by different advocates where there is not a uniformity of views. I sincerely hope that these ground rules and suggestions will help you do this important preliminary work in writing effective opening briefs.

Ultimately, though, you will develop (or have already developed) your own stylistic ways of approaching many of the matters addressed in this summary. You might, for example, put together very effective fact statements which rarely vary from a witness-by-witness format. After experimenting with a "chronological summary" approach, you may decide that your own style works better for you, and is far less time-consuming. But at least you will return to this style knowing that it displeases many appellate judges and clerks, and knowing that your burden to create an effective, thorough and crisp factual summary may be greater because of the style you have chosen.

More ink (or is it toner?) has probably never been spilled on this small subject of introductory statements in an opening brief. But no subject in appellate advocacy receives less attention for all its importance to quality brief-writing. If, as most believe, cases are generally won or lost with the opening brief, the Statements of Appealability, Case and Facts (with emphasis on the latter) are the crucial first salvos in which you must strive to effectively summarize the procedural and factual underpinnings of the appeal, establish your own skill and credibility as an advocate, and make significant steps toward demonstrating that an injustice deserving redress occurred in your client's case. Here's hoping the foregoing discussion is helpful to you in this key part of your very important work.

SAMPLE # 1: Statement of Case in Complex Multi-Count Case with Several Charging Informations, Confusing Transcripts & Weak Issues on Appeal [one of which went to the State Supreme Court, oddly enough]

APPELLANT'S OPENING BRIEF

Statement of the Case

Appellant Louis Defendanto was originally charged in a 31 count information with enhancement allegations. (CT 81-92) At arraignment on December 8, 1993 appellant pleaded not guilty on all counts and denied all enhancement allegations. (CT 80) Following a motion by the defense (CT 367-386), the trial court severed the robbery and related charges in Counts 6, and 18 through 23. (CT 420)[8]

A. **First Trial, H012762**

Thereafter, a 21 count First Amended Information was filed on March 1, 1994 charging appellant with one count of robbery (Pen. Code § 211[9]) with a firearm use allegation (§ 12022.5), six counts of first degree burglary and three counts of second degree burglary (§§ 459 and 460), five counts of receiving stolen property (§ 496), two counts of vehicle theft (Veh. Code § 10851), one count of possession of a sawed off shotgun (§ 12020, subd. (a)) and one count of ex-felon in possession of a firearm (§ 12021, subd. (a)).[10] Two prior prison terms (§ 667.5, subd. (a)) were

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8. The severed counts were tried separately under the same superior court number, 93-00609. As separate notices of appeal were filed after conviction in the two trials, the clerk's and reporter's transcripts on appeal from the first trial, Court of Appeal No. H012762, and from the second trial, Court of Appeal No. H013188, are separately numbered. For the sake of clarity and brevity in nomenclature, we refer to the record from the first trial simply as "RT" and "CT," and to the record in the second trial as "2 RT and "2 CT."

9. All statutory references, unless otherwise specified, are to the California Penal Code.

10. In rough chronological order by the correct names of the victims (some of the names in the pleadings are incorrect or misspelled), the crimes were as follows:

Date	*Victim*	*Charge*	*Count*
2/15/93	JD 1	§ 459 1st	1

alleged as enhancements. (CT 422-430)

Trial began on April 20, 1994 and lasted seven days. (RT 438-450, 514, 537) After deliberating for nine hours over three days, the jury found appellant not guilty for the robbery and receiving stolen property charges involving victims Lisa and Jeffrey Smith (counts 3 and 4), and guilty on all other charged crimes and found the firearm allegation true. (RT 450, 514, 537-542)[11] On June 3, 1994 appellant was sentenced to state prison for a total term of 29 years, including resentencing from an earlier Monterey County conviction. (CT 552, 2CT 1-3)

B. **Second Trial, H013188**

A second amended information involving the severed counts charged appellant with two counts of robbery (§ 211), one count of attempted robbery (§§ 664/211), two counts of assault with a firearm (§ 245, subd. (a)(2)), and one count of discharging a firearm with gross negligence (§ 246.3), with a firearm use allegation (§ 12022.5) on all charged counts. (2 CT 4-6) On June 30, 1994 appellant was arraigned on the second amended information, pled not guilty and denied

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2/25/93	JD 1	§ 496	2
2/28/93	JD 2	§ 459 1st	3
3/5/93	Jds 3 & 4	§ 459 1st	4
3/5-6/93	JD 5	§ 496	6
3/7/93	JD 6	VC § 10851	7
3/7/93	JD 7	§§ 459 & 211, and § 12022.5 alleg.	8 & 9
3/7/93	JD 8	§ 459 1st	10
3/8/93	JD 8	§ 496	16
3/8/93	JD 9	§ 459 2nd	11
3/9/93	JD 9	§ 496	17
3/8/93	Jds 10 & 11	§ 459 2nd	12 & 13
3/9/93	JD 12	§ 496	18
3/9/93	JD 13	§459 1st	14
3/9/93	JD 14	VC § 10851	19
3/9/93	JD 15	§ 459 1st	20
3/9/93	NA	§ 12020, subd. (a)	15
3/9/93	NA	§ 12021, subd. (a)	21

11. The prior conviction allegations were found true in a bifurcated court trial. (CT 542)

the enhancement allegations. (2 CT 7)

The second trial began on August 30, 1994 and lasted five days, with the jury finding appellant guilty of all charged counts and enhancements on September 7, 1994. (2 CT 36-45) On October 5, 1994 appellant was sentenced to state prison for a total term of 36 years, including resentencing from the first trial. (2 CT 128-131)

Statement of Appealability

A notice of appeal was timely filed after the first trial on June 14, 1994 (CT 558), and after the second trial on October 5, 1994. (2 CT 132) The appeals in Nos. H012762 and H013188 follow pursuant to section 1237, subdivision (a).

SAMPLE # 2: Case & Facts in Multi-Incident Robbery Case with Weak Eyewitness ID and Several Strong Appellate Issues.

APPELLANT'S OPENING BRIEF

Statement of the Case

Appellant Johnny Morton was charged in a nine count indictment concerning three separate incidents of alleged criminality. In the first incident, Morton was charged with two counts of second degree robbery (Pen. Code §§ 211/212.5, counts I and II)[12] of Harriet Pinter and Linda Doyle on February 2, 1992, with firearm use allegations as to each count (§ 12022.5, subd. (a)) and a separate charge of being an ex-felon in possession of a firearm. (§ 12021, subd. (a), count III) (CT 2-3)

The second incident involved a charge of robbery of Freida Mullin on February 3, 1992 (§§ 211/212.5, count V), with a firearm use allegation and a separate ex-felon with a firearm charge. (§ 12021(a), count IV) (CT 3-4)

With regard to the final incident, alleged to have occurred on March 30, 1992, Mr. Morton was accused of the attempted murder of Luan Tran (§§ 664/187, count VII), with a premeditation allegation (§§ 664/189), a firearm use allegation (§ 12022.5(a)) and a great bodily injury allegation. (§ 12022.7) Morton was further charged as to this same incident with second degree robbery (§§ 211/212.5, count VII) and assault with a firearm (§ 245, subd. (a)(2), count VIII), with firearm use and great bodily injury allegations as to each count, and with being an ex-felon in possession of a firearm. (§ 12021(a), count IX). Morton was also charged with a separate enhancement for a prior serious felony conviction incurred on August 26, 1991. (§§ 667/1192.7) (CT 4-6)

Trial began on April 22, 1993. Prior to empaneling the jury, defendant moved to sever the trial of the Tran attempted murder and related charges from the trial of the three other robbery counts. The trial court denied the motion after argument. (CT 75)

Prior to the presentation of evidence, the defense moved to exclude evidence of eyewitness identifications based on an impermissibly suggestive identification procedure used in

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12. All statutory references, unless otherwise specified, are to the California Penal Code.

the presentation of evidence before the grand jury. (CT 69-74) After evidentiary hearings, the trial court held in pertinent part that the procedure was impermissibly suggestive as to witness Linda Doyle. (CT 79-80) However, the court later concluded there was an independent basis for her in-court identification and allowed this testimony to come before the jury. (RT 367)

The presentation of evidence began on April 26, 1993 and lasted five days. (CT 80-89) Following argument and instruction, the jury reached the following verdicts: as to the February 2 incident involving victims Doyle and Pinter, Mr. Morton was found guilty on both counts of robbery; the firearm use allegations were found not true and the jury acquitted him on the ex-felon with a gun charge. Appellant was found not guilty on all charges in the February 3 incident involving victim Mullin. With respect to the Tran incident on March 30, the jury acquitted appellant of attempted murder, but found him guilty of robbery, assault with a firearm, the ex-felon with a firearm charge, and found the great bodily injury and firearm use allegations on these counts to be true. The jury also found appellant guilty of three lesser charges relating to Tran crimes, battery with serious bodily injury (§ 243, subd. (d), assault (§ 240), and battery (§ 242). (CT 90-91, 159-172) Following waiver of a jury, the trial court found the prior serious felony allegation to be true. (CT 212)

Mr. Morton was sentenced to state prison on August 3, 1993 for a term of 20 years, 8 months. The sentence included an eight month consecutive term for the section 12021(a) conviction. (CT 214-215)

Statement of Appealability

A notice of appeal was timely filed on August 27, 1993. (CT 216-217) This appeal follows pursuant to section 1237, subdivision (a).

Statement of the Facts

Prosecution Evidence

A. **February Robberies**

1. **Doyle-Pinter Robberies, February 2, 1992**

a. **Harriet Pinter.** On February 2, 1992, Harriet Pinter of Massachusetts was visiting her friend Linda Doyle in San Francisco. At around 7 p.m., they

were walking down Laguna Street.[13] As they crossed Bush, Harriet noticed a man leaning against the driver's door of a yellow, hatchback car parked diagonally on the corner. A few seconds after passing this man, another man grabbed Linda from behind, saying, "Give me your purse." (RT 369-370, 380, 409)

The man was holding a gun to Linda pointed at her right side and Linda quickly gave him her purse. Pinter was in shock at first and scared throughout the robbery. The robber then pointed the gun at her face, from about a foot and a half away, telling her several times to give him her purse. Pinter's purse got stuck on her jacket sleeve when she tried to pull it off, and she was staring at the barrel of the gun and the robber's face during the ten to fifteen second period it took to get the purse off her shoulder. Doyle and Pinter then ran off south on Laguna. (RT 374-379, 411-413, 423-424)

Pinter described the robber as Black, in his early twenties and about five feet eight. The top of his head was covered by a dark round hood, with a jacket covering the hooded sweatshirt. The robber had unusual almond shaped eyes, full lips and a slightly wide nose.[14] Pinter remembered that the place the robbery occurred was poorly lit. (RT 381-382, 385, 411)

Pinter was first asked to make an identification on March 3, 1992 when she viewed a photo spread in Milton, Massachusetts. A detective showed her two sets of six photos each and told her to look at the photos and see if she saw the man who robbed her or the man standing by the car. (RT 406-407)[15] Pinter took one photo, 5-D, from the first group and identified it as the man she thought was the robber, writing he "appears to be the man with the gun," and noting he was wearing a hood at the time. She picked that photo out because it most resembled the robber. (RT 398-401, 406-407, 415-416) She picked another photo from the second spread, indicating it "appeared to be the person leaning against the small compact car." (RT 401-402)

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13. All street names mentioned herein are in San Francisco.

14. Pinter could see some of the robber's hair underneath the hood, and noticed it was different than the hair in the photograph she was shown of Mr. Morton, though she said nothing at the grand jury about seeing any of his hair. (RT 418-420)

15. When Pinter saw the photo spread, she assumed there must be a suspect in there, as they wouldn't have sent the pictures to Massachusetts. She had spoken with Linda about looking at the photos. (RT 425-426)

At the grand jury, Doyle was shown a blown up photograph of the one she had tentatively picked out in Milton. When asked if this was the man who robbed her, she said, "I guess that looks like him." (RT 417, 422) At trial, Pinter made an in-court identification of appellant Johnny Morton as the robber. (RT 397)

b. **Linda Doyle.** Doyle remembered that just after 7 p.m. that evening she and Harriet were walking south on the east side of Laguna toward Geary. She was talking intently with Harriet and did not see anyone as they crossed Bush or recall walking around a car parked on the corner. About an eighth of the way down the block, a man came at her right side from the street, put a gun in her ribs and demanded that she and Harriet give him their purses. Doyle pulled her purse over her head and handed it to the robber. (RT 434-435, 438-439, 462) The robber then put a gun to her head, and said, "Now your friend's purse." Harriet had trouble getting it off her shoulder, and Doyle ran off as Harriet handed her purse to the robber. (RT 440, 446-447)

Doyle saw the man's face while he was robbing her and described him as 20 to 26 years old, five feet eight, medium build, with hair in dark corn rows and stubble on his face. He had dark almond eyes and a pronounced profile with a jutting jaw. The robber was wearing a sweatshirt with a hood covering his head, but Doyle could see his hair when he grabbed Harriet's purse. He had a dark leather jacket on which resembled a 49ers jacket Doyle was shown in court, though she did not remember a 49ers helmet insignia on the front of the jacket. (RT 440-443) She described the lighting situation as "very dark." The whole thing happened quickly, two minutes or less, and Doyle was in shock. (RT 445, 466, 468)

Two days after the robbery, Doyle viewed three sets of six photographs each that were shown to her by Inspector Hall. She picked out two photographs--5-B and 5-D as resembling the robber. She told the inspector she couldn't pick out anyone positively, and that she didn't want to identify the wrong guy.[16] (RT 449-451, 456, 608) Seven months later, Doyle attended a live

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16. Doyle testified she had a strong feeling about 5-D and told her husband about this a couple of days later, but that she never told this to Inspector Hall. (RT 450-451, 456-457)

According to Hall, Doyle expressed no preference as to either of the two photos she picked out. She left Doyle her card and told her to phone if she thought of anything further. Hall took no steps to find anything out about the other guy whose photograph

lineup. Mr. Morton was present at the lineup as number 5. Doyle identified number 3, who had corn rows in his hair, which Morton did not. She told the police she wasn't sure, writing, "Always a chance I might have made a mistake, but I believe this is the man that I saw in the pictures." (RT 452-453, 461-462) Doyle made an in-court identification of appellant as the robber. (RT 445)[17]

Officer Brian Delahunty took reports from Doyle and Pinter about the robbery. Each described a black man in his twenties wearing a black leather jacket with a hood covering his head. The officer drove around the area, but found nothing. (RT 523-524)

2. **Mullin Robbery, February 3, 1992**

After leaving her office at 6:30 p.m. on February 3, 1992, Freida Mullin walked down Octavia between California and Pine carrying her purse and a carton of milk in a bag. She noticed a small beige car come around the corner, slow down, then saw a man get out of the passenger side and walk toward Mullin pointing a gun at her. He paused then said, "Give it to me, Give it to me." Mullin flung her purse onto the ground. The robber bent down, picked it up and got back into the car, which then drove down Octavia. The whole thing took ten to fifteen seconds. (RT 534-540)

The robber was a black man in his twenties with a wide nose and a beard shadow on his face. He was wearing a solid-colored dark jacket, dark pants and a brown knit cap folded over to cover his hair and forehead. He was taller than Mullin, who is five feet five. (RT 540-542)

Mullin reported the robbery to the police. An hour later, the officers who took her statement brought her to the Western Addition to look at some possible suspects and a car. She saw two guys wearing clothing different from the robber; either could have been the robber, but Mullin was not sure. She was positive the car the police showed her was the one she had seen in the robbery, both based on its shape and the license number. (RT 546-548, 564)[18]

Doyle selected. (RT 615-617)

17. Neither Doyle nor Pinter would talk to a defense investigator when he called them. Both admitted identifying with the prosecutor, Harry Dorfman, as "their lawyer" in the case. (RT 428-431, 472-475)

18. It was stipulated that a fourth victim, Susan Wong, was robbed near Cleary Court at 6:30 p.m. on February 3. Ms. Wong identified Tyrone Williams at the same

Mullin was shown photographs by Inspector Hall but could not make a positive identification. She picked out a photo of Johnny Morton as the person who most resembled the robber, having the right shaped face and skin tone. At the live lineup, she was unable to make any identification. Looking at Mr. Morton in the courtroom, Mullin could only note a resemblance and say he was "possibly" the man who robbed her. (RT 556-562, 607-608)

3. **The Yellow Car, Williams and Stroud**

The next morning, Officer Delahunty became aware that some of the stolen property had been recovered on the 400 block of Fulton near some housing projects. When he later heard a broadcast report about the Mullin and Wong robberies committed around 6:30 the next evening in the same area, Delahunty had a hunch the robberies were connected. Thinking the robbers might leave property in the same area, Delahunty drove through a housing project parking lot.[19] He found a stolen Toyota Tercel which matched the description and license number of the car used in the Mullin robbery. (RT 510-512, 526, 531)[20]

Just after this, Delahunty saw Tyrone Williams and Nyamo Stroud as they were walking west on McAllister. Delahunty detained the two men because they matched the descriptions of the robbers and were near the car. Both appeared very nervous when detained, and Williams had his jacket on inside out. Victims Mullin and Wong were brought in for a cold show about five minutes later. Mullin couldn't identify either. Wong positively identified Williams after she saw him up closer. (RT 513-516, 526, 528-530, 882-883)

Inspector Laurel Hall searched the stolen Tercel and found Ms. Pinter's US Air identification card between the two front seats and a black pellet gun in the glove compartment. The gun shoots only BB pellets, not bullets, but resembles a semiautomatic weapon. (RT 604-

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cold show, and Ms. Mullin's keys were ultimately recovered in Ms. Wong's purse. Williams plead guilty to the robbery of Wong. (RT 882-883)

19. This parking lot area where he found the car is a typical gathering place for low income African American youth and young adults. Delahunty rarely made arrests in that particular area. (RT 530)

20. The car, a 1980 Tercel which had been stolen two other times recently, had been discovered stolen by its owner near his home on Steiner near Geary and O'Farrell on January 30, 1992. (RT 477-479)

605, 611-612)[21]

Criminalist Paul Forslind developed a latent left palm print off the Tercel on February 4, 1992 above the door on the roofline. The print matched a known print of appellant Johnny Morton; another print Forslind found did not. (RT 486-494, 504-505) Based on where he found the print, the person placing it on the car could have been standing, leaning into the car, or getting out of it. (RT 506-508)

Inspector Hall put together the photo spreads used for identification. There were three separate spreads of six photos each, targeted at the three suspects, Morton, Williams, and Stroud. Hall chose the other photos in the spread based on the resemblances of the photos to the targeted suspect, and not based on the descriptions given by the victims. (RT 613-614) In addition to her photographic identification of Mr. Morton, Pinter picked a non-targeted photo, not the targeted Tyrone Williams, as the man she saw leaning against the car. (RT 884-887) Pinter, Doyle and Mullin agreed that the photos of Williams or Stroud were not photos of the man who robbed them with a gun. (RT 401-403, 449-451, 560, 606-607) The victim in a third robbery in which Mr. Morton was not charged, Susan Wong, picked out Tyrone Williams's photograph and could not identify a second man. (RT 618-619)

B. **Luan Tran Robbery and Shooting**

Stephen Klower was working at his office at St. Mary's Cathedral on Cleary Court on March 30, 1992. His Toyota pickup was parked directly outside the door from where he was working, with his leather jacket and camera inside the locked cab. At about 2:30 p.m., Klower heard a sound like something hitting an iron gate and went outside to investigate. He saw a man next to his pickup looking into the passenger seat. When Klower advanced, the man retreated; Klower followed as the man walked toward a blue, motorcross type bicycle on the sidewalk, which he grabbed. Klower moved toward the man until they were face to face, with the man straddling the bicycle. Klower asked him if he had thrown something at the gate. The man said yes, and asked Klower what he was going to do about it. Klower said it wasn't cool, told the man he'd call the police and asked him to leave; the man asked Klower to leave, and they stared at

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21. The pellet gun looked like the gun the robber used, according to victim Linda Doyle. (RT 443-444) The police tried unsuccessfully to recover prints from the BB gun. (RT 875-877)

each other for about fifteen seconds. Finally, the guy left on his bike up Cleary Court toward Geary, then turned west on Geary. Klower went back to work. The whole thing took about three minutes, during half of which Klower was face to face with the man. (RT 624-633, 636, 654)

Klower described the man as Black, twenty years old or less, dressed all in black with a baseball cap and a black 49ers jacket with a logo on the back. He identified appellant Morton as the guy he saw that day. (RT 634-636)

Luan Tran is from mainland China. On March 30, 1992, Tran went to the Chinese consulate on Geary to extend her visa. She was walking home with her purse, which contained her wallet, passport, entry documents and other papers as well as sixty or seventy dollars in tips from her restaurant job. (RT 659-662)

As soon as she turned onto Cleary Court from Geary, she noticed a Black man approaching her from behind to her left. The man passed her, and she could see he was holding an old-looking gun pointed downward. He pointed the gun at her and grabbed her purse, saying, "Give me your purse, give it to me, give it to me." Tran was trying to walk towards St. Mary's, which seemed like a safer location. At the same time, Tran was tying to negotiate with him, telling him she was a foreign student and he should just take her wallet and money but not her purse because she did not want to lose her passport and visa documents. The man kept saying, "I don't care." (RT 663-667)

The robber got very angry, put the gun to her head and grabbed at the purse with his other hand. Tran brushed the gun away with her free hand and never let go of the purse. As they moved towards the cathedral parking lot, the man started hitting her with the gun and pushing her to the ground. Tran got up, and the man got madder, stomping his feet and brandishing the gun. They struggled for the purse, and the man cursed her and appeared to stomp or stumble with his feet at the same moment that Tran heard two shots fired. After the shots the man pushed her and hit her back onto the ground. (RT 668-675, 715-718, 731-732)[22]

Tran had been hit by the shots but didn't know it at the time. The robber hit her with the gun and cursed at her again and was finally able to get the purse from her because of her weakened condition. He walked towards his bicycle and got onto it, putting the purse and gun in

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22. When she spoke with the police immediately after the robbery, Tran said nothing about any shots being fired. (RT 817)

his jacket. But the purse fell out and Tran crawled and walked over to it. They both grabbed the purse, pulled at it for a while until it ripped open, spilling its contents onto the ground. The man grabbed her wallet, got on his bike and rode off, with Tran asking him why he bothered to fight with her, since after all he only got the wallet. The bike turned onto Geary as Tran was picking her documents up off the ground. (RT 676-679, 681)[23]

The whole thing took seven or eight minutes, and Tran could see the man's face most of the time. He was a good looking Black youth wearing a black cap and black jacket with orange letters on the back. There was no hood over the cap. (RT 679-681, 702, 709-711)

About twenty minutes after seeing the man by his truck, Stephen Klower heard what sounded like firecrackers or small caliber gunfire. He saw the police arrive and speak to a young Chinese girl. The person she was describing sounded like the guy he had seen earlier, and Klower told the police. Two days later, Klower immediately picked a photo of Mr. Morton out from a spread. In October of 1992, Klower picked Morton out in a live lineup. (RT 637-638, 641-647)

Tran went home after speaking with the police. She felt a sharp pain in her stomach when she drank a glass of water, and discovered a bullet hole just below her chest and an exit wound near her left buttock. She called 911 and was taken to the hospital, where she was operated on that evening. (RT 685-687)[24]

Tran identified Morton in a photo spread on April 1, 1992, and later picked him out in a live lineup. She identified Morton in court as the man who robbed her, and identified a Giants

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23. Dennis Shelley was driving down Cleary when the incident occurred and chased the robber west onto Geary for two blocks until he realized he was travelling the wrong way on a one way street. He flagged down a policeman and told him what happened and the officer took off after the assailant. (RT 737-748) Shelley identified appellant at trial and in an earlier lineup as the man he was chasing, basing his identification on the appearance of the back of the man's head and shoulders. (RT 751-756)

24. San Francisco Medical Examiner Boyd Stephens reviewed Tran's medical records. The bullet passed through her left abdominal wall without striking any major vessels but perforated a valve in the small vessels, requiring a laparotomy, an incision to the abdomen and surgical repair of the injuries. Without the surgery, the injury could have been fatal. (RT 567-572)

jacket seized from Morton's house as the one worn by the robber. (RT 695-698)

Crime scene investigator Spencer Gregory lifted fingerprints from Klower's pickup truck which matched those of Johnny Morton. (RT 579-586) Gregory retrieved a bullet from the back seat of a car whose window had been shot out at the scene of the Tran shooting incident. A second bullet was recovered from Tran's clothing at the hospital. (RT 587) A criminalist examined both bullets identifying them as .25 automatic bullets which could have been fired by a Derringer. (RT 587, 773-778, 882-883)

Morton was arrested by inspector Gary Jiminez on April 21, 1992 at an apartment of two women where Morton's mother had told the police he would be. Morton had fifty dollars in his pocket, and Jiminez seized two caps and two jackets from the apartment. (RT 798-801, 806-807)

Defense Evidence

A. **February Robberies**

At around 2 a.m. on February 3, 1992, Lee Harris, a private security guard, responded to a call about some loud, drunken teenagers in the parking lot of an apartment complex near Fulton and McAllister. When he arrived, he saw about 15 kids drinking and playing loud music. Harris phoned the police; by the time they arrived, the youths had gone. Harris and the police found two purses and some personal items, including the drivers licenses for victims Doyle and Pinter, scattered about in the same area the kids had been partying. (RT 782-788, 823-825)

The day after the Mullin and Wong robberies, Wong called the police to report her purse had been found at Golden Gate and Laguna. A set of keys in the purse were not Wong's, and were later identified by Mullin as hers. (RT 833-835)

District Attorney Investigator Karen Hibbit-Walls got a warrant to arrest Tyrone Williams on August 25, 1992 for the Wong robbery. She and Investigator Friday went to Williams's grandmother's apartment at 940 McAllister to look for him. Williams identified himself, and Hibbit-Walls informed him she had a warrant to arrest him. Williams asked her what for, and Hibbit-Walls showed him a photograph of Johnny Morton she had brought with her. Shortly after this, as Friday tried to handcuff Williams, he bolted into a bedroom and escaped. (RT 856-862, 864-866)

B. **Tran Robbery-Shooting**

Verland Fulgencio, an electrical engineer who parked near Geary and Cleary on March

30, saw the struggle between an Asian woman and a Black guy on a bike. Fulgencio could not make a definite identification at a lineup. He thought that 5-D, whom he recognized as defendant Morton, most resembled the man on the bike. (RT 836-839, 850-852)

SAMPLE 3: Case and Facts in Nasty Robbery 3 Strikes Case with Average ID Testimony Where *Faretta* Error is Principal Issue.

APPELLANT'S OPENING BRIEF

Statement of the Case

Appellant Edward Everett Horton was charged by information with robbery (Pen. Code § 211), and with a 1981 prior felony conviction for robbery. (Pen. Code §§ 1192.7, subd. (c), 667, subds. (b)-(i) and 1170.12; CT 1-2) Arraignment was waived after his preliminary hearing on January 16, 1996, with a plea of not guilty entered to the charges. (CT 0.2) The prosecution twice amended the information, first to charge a second prior conviction for burglary as a prior prison term (Pen. Code § 667.5), and then to allege the same prior as a prior serious felony and "strike" prior pursuant to Penal Code sections 1192.7, subdivision (c), 667, subdivisions (a), and (b)-(i), and 1170.12. (CT 57-64)

The presentation of evidence on the robbery charge began on March 19, 1996, and lasted three days. (CT 75-78) After argument and instructions the jury found Mr. Horton guilty on March 25, 1996. On the same day following a bifurcated trial on the priors, the jury found them to be true. (CT 144-149)

On April 22, 1996 Mr. Horton was sentenced to a term of 25 years to life pursuant to the Three Strikes law, with a 5 year enhancement pursuant to Penal Code section 667, subdivision (a). (CT 193)

Statement of Appealability

Notice of appeal was timely filed on April 22, 1996. (CT 194) This appeal follows pursuant to Penal Code section 1237, subdivision (a).

Statement of the Facts[25]

1. **Prosecution Evidence.**

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25. As none of the issues challenge the sufficiency of the evidence or errors concerning the trial on the substantive offense of robbery, the factual summary presented here is cursory.

Lucia Gonzales was walking in the vicinity of 19th and E Streets in Sacramento at around 5 p.m. on November 25, 1995 when a man she identified as appellant Edward Horton asked her for some directions. When she walked away, Mr. Horton grabbed her from behind, pulled her away from the sidewalk, threw her down near a tree, struck her on the side of the head, pulled her purse away from her and ran off. (RT 153-158)

Miguel Rodriguez heard the victim's screams and saw the robbery in progress. The robber, identified by Rodriguez as appellant, ran down 19th Street and up an alley; Rodriguez followed him for several blocks, losing sight a couple times but finding him again, even crossing his path at one point without confronting him. Eventually Rodriguez saw Mr. Horton go into a building. (RT 200-213) Meanwhile, another neighbor who heard the victim's screams spoke with her and called 911. (RT 190-194)

Rodriguez returned to the scene of the robbery and told the police what he had seen. (RT 213-214, 254) Officers Nakata and Chargin went to the building on 18th Street and knocked on the window of the apartment next to the front door. Admitted by a female occupant, the officers saw two black men, Mr. Chedaka and appellant Horton, who roughly matched the victim's description of the robber. They also found Gonzales's stolen purse in the back yard of the building. (RT 282-288, 302-308)

The police separately showed Chedaka and Horton to victim Gonzales and witness Rodriguez. Both said Chedaka was not the robber, then identified Horton as the robber. (RT 158-159, 256-258)

2. **Defense Evidence.**

Appellant's wife Denise Horton lived separately from appellant. She visited him on November 25, 1995 at his house at 22nd and G. At about 5:15 to 5:30 that day they went to McAnaw's drug store to cash Mr. Horton's check, the proceeds of which he gave to her. Mrs. Horton then dropped her husband off at a house at about 5:45 p.m. and saw him knocking at the front door as she drove away. (RT 320-325)

Mr. Horton testified on his own behalf and denied committing the charged robbery. He saw his wife at his house that afternoon, and left with her between 5 and 5:20 p.m. to go cash his disability check at a market.[26] He gave his wife the money for their children, and she dropped him off at a house on 8th and E. He was at the house for about ten minutes when the police arrived. (RT 355-362) Horton admitted he had two prior felony convictions. (RT 358)

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26. The canceled disability check was introduced into evidence, as was the check stub, which was in Mr. Horton's pocket when he was arrested. (People's Exhibit 10; Defense Exhibits A-1, A-2, and A-3.)

Diana Hall, the proprietor of McAnaw's Pharmacy, testified on rebuttal that she only works until 1 p.m. on Saturdays, and that the employees who work at the store are told not to cash checks after she leaves. Looking at the bank stamp on Mr. Horton's disability check, which appeared to bear a date of December 4, 1995, she opined that the check would probably have been cashed on that date (a Monday) in the morning or the preceding Friday, but not on November 25, in the previous week. (RT 431-438)

SAMPLE 4: Case with Unusual Procedural History and Facts with Weak Eyewitness ID.

STATEMENT OF THE CASE

A two-count information filed March 10, 1987 in Solano County Superior Court charged appellant with kidnapping for the purpose of robbery (Pen. Code, §§ 207, 209, subd. (b)) and robbery (Pen. Code, § 211). (CT 13) A jury was selected on July 13, 1987. (CT 56) Following a single day of trial and an hour of jury deliberations on July 15, deliberations commenced anew on July 16 due to the substitution of an alternate. (CT 95-96) Deliberations continued for a day and a half, during which the jury asked several questions and requested a re-read. (CT 88-91, 96, 99, RT 186-191) On July 17, 1987, the jury returned guilty verdicts on both counts. (CT 99-101)

Following a 90-day diagnostic referral pursuant to Penal Code section 1203.03 and approximately eight months of continuances during which appellant was screened for drug programs, the court suspended imposition of sentence on July 7, 1988, and placed appellant on probation on conditions including participation in a drug program. (CT 116, 118-119, 190, 207-208, see CT 136-189)[27]

A notice of appeal was executed July 20, 1988 but was not received by the superior court clerk until September 8 of that year. On June 29, 1989, the superior court ordered the notice of appeal filed under the doctrine of constructive filing. (CT 210-211, 233) However, the appeal was subsequently dismissed on February 7, 1990, due to a mix-up regarding appellant's address, as a result of which appellate counsel was not

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27. Appellant's probation was revoked on December 13, 1990, and he was sentenced to life with the possibility of parole for the kidnapping for robbery, with a concurrent midterm of three years for the robbery. A petition for a writ of habeas corpus will be filed in conjunction with this appeal, challenging this sentence on grounds that it is unauthorized and was the product of ineffective assistance of counsel. (A transcript of the sentencing hearing, of which the Court is requested to take judicial notice, will be attached as an exhibit to the habeas petition.)

appointed. On May 6, 1994, this Court granted appellant's motion to recall the remittitur and reinstate the appeal.

STATEMENT OF FACTS

At 7:30 on the morning of December 20, 1986, Christine Comacho left for work. (RT 39-40) While walking to her car, which was parked in the parking lot near her Fairfield apartment, she was approached by a man wearing a green army jacket and red high-topped tennis shoes. (RT 14, 40, 53) The man asked her for a ride, saying his car had broken down. (RT 14-15, 52-53) At first she refused, telling the man he could use a nearby pay phone to call for help. But after he had asked her several times, she agreed to give him a ride, and he got into the car with her. (RT 15, 53)

As she was backing out of the parking lot, the man put his hand in the side pocket of his army jacket, claimed he had a gun, and asked her for money. (RT 15-17, 53) She didn't see a gun and told him she didn't have any money. (RT 15-16) He said that "wasn't good enough." (RT 16) Comacho tried several times to stop the car, but the man told her to keep driving. (RT 17) He kept his hands in his jacket pockets. (RT 16)

Finally she admitted she had some money and gave the man her wallet, after first surreptitiously dropping her credit cards onto the floor by her feet. (RT 19, 54) The man took the six dollars and change she had in her wallet. (RT 18-19) He noticed she had on two rings and asked her for them. She took off the rings and gave them to him. One was a man's wedding band worth about $100. The other was a Black Hills gold ring worth about $75. She also had on some earrings and a black sports watch, but the man didn't ask for these. (RT 18-20)

After they had driven about a block-and-a-half to Union Avenue, the main street closest to her house, and about two blocks down Union, the man told Comacho to turn right on a side street. After driving between a half-a-block and a block down the side street, she made a U-turn and headed back to the main street, where she turned back in the

direction of her apartment. After another block or two, the man told her to stop and let him off, which she did. The total distance she drove before turning around was five or six blocks, and the total distance she drove with the man in the car was eight or ten blocks. (RT 31-33, 42-43, 54; see map at CT 94)[28] Before leaving, the man took a towel she had in the car and wiped the door handle. He told her not to call the police, as he knew where she lived. (RT 20-21, 34)

After the man got out of the car, Comacho continued on her way to work. She worked all day and did not mention the incident to anyone. When she got home that evening, her boyfriend convinced her to call the police. (RT 44)

Some time after 8:30 p.m. that evening, Comacho went to the police station to report the incident. (RT 21, 34, 44-45) She was shaking and crying when she made the report. Later, after she calmed down somewhat, she met with an officer who helped her create a composite photograph of the robber.[29] She was still nervous and scared but was able to participate by picking out photos of facial parts which she thought most closely resembled the robber. (RT 44-45)

Comacho's recollection of the man's appearance was based on her initial view of him before he got into her car. Once he was in the car, she did not look at him. (RT 41,

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28. A copy of exhibit 9, a map of the area travelled, appears at page 94 of the clerk's transcript. The path taken by Comacho and the robber began near her apartment on Tabor Avenue about a block and a half east of Union Avenue. They proceeded west on Tabor to Union, then south on Union past Travis Boulevard to an unidentified side street "not as far as Tennessee Street" and a block or two from the intersection of Tabor and Union. On the side street, they travelled half a block or a block before making a U turn and heading back toward Union. At Union, they turned back in the direction of Comacho's apartment and travelled another block or two, but not back as far as Travis, before the robber got out of the car.

29. Apparently, this composite looked very much like appellant, with the exception of the hairline. (RT 115-116) The police several times asked Comacho whether the robber had been wearing a hat and actually showed her several hats. She was sure, however, that the robber had not been wearing a hat. (RT 46, 57)

60) Despite the fact that he was arm's length away in the other front bucket seat of her car for about five or ten minutes, she could not remember what kind of pants he was wearing. (RT 40-41, 52)

On January 14, three-and-a-half weeks after the incident, Fairfield police officer Lanny Vance called Comacho down to the police department to view a photo lineup of six men. After looking at the photos for about five minutes, she selected number five, a picture of appellant, as the man who had robbed her. (RT 25-27, 46) She said she was positive about her identification. (RT 34, 72)

About an hour later, however, Comacho had doubts. She called Vance from her job at Raley's drug store and told him she wanted to look at the photos again. (RT 34, 66) Vance told her that either she could come down to the police station to review the photo lineup or he would bring it to her at work. He brought the lineup to Raley's, where she viewed it in the employees' break room. He asked her why she wanted to look at it again. (RT 38, 66) After looking at it again, she once more identified appellant's photo as that of the robber, saying she was positive about her identification. (RT 34, 72)

Based on Comacho's photo identification, appellant was arrested at the Fairfield house where he lived with his mother. (RT 70, 76, 103) About three weeks after the robbery, just before he was arrested, appellant had had surgery to remove a colostomy bag he had worn since receiving a bullet wound in August, 1985. (RT 100, 109, 113) The bag had been visible unless he wore very loose clothing, and it had impeded his movement. (RT 104-105, 110, 112) Both he and his mother testified that, although they had no specific recollection of December 20, 1986, appellant was normally home asleep at 7:30 a.m. during December and January. (RT 102, 110)

The day after the arrest, police searched appellant's house but failed to find red high-topped tennis shoes or a green army jacket like the ones worn by the robber. (RT 70-71, 76-77) Both appellant and his mother, who bought all his clothes and did his laundry, testified that he had never worn shoes or a jacket like those described. (RT 101,

105, 108-109, 113) Appellant owned a blue sweat jacket which he wore regularly, and he owned white tennis shoes and sandals. (RT 101, 108-109) He had no clothing stored at locations other than the Fairfield house. (RT 111)[30]

Police found a man's ring during the search; it was not Comacho's. (RT 45, 71)

On February 9, 1987, Comacho was unable to positively identify appellant as the robber at a live lineup. (RT 27-29, 37, 48-49, 66, 73)[31] After looking at the lineup for about five minutes,[32] Comacho put a question mark by number five, appellant's number, on the lineup form. (RT 28, 48) He looked like the person but she "wasn't really sure because they all look[ed] similar." (RT 28) On a scale of ten, she was sure to a degree of about five or six that appellant was the robber. (RT 29)

At the preliminary hearing later in February, Comacho testified that she was positive appellant was the robber because he was the only black man in the courtroom. (RT 49-51) At trial, however, she testified that her identification was not based on that

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30. Police officer Vance testified that he had information that appellant had been kicked out of his mother's house in Fairfield and was living with friends on Almond Street in Suisun. At one point during cross-examination, Vance testified that he had "firsthand knowledge" that appellant was living in Suisun at the time of the offense; however, Vance apparently misunderstood the question and finally said that whether he had ever seen appellant in Suisun "depends on your definition." (RT 77-78) Vance also testified that appellant's mother told him she had kicked appellant out of the house and that appellant was living in Suisun. (RT 118) However, appellant's mother testified this had occurred in August and that appellant had lived with her continuously from September, 1986 until his arrest in February, 1987. (RT 102-103, 105-106) While no "indicia", i.e., mail addressed to appellant, was found in the Fairfield house, clothing and jewelry belonging to appellant were found there. (RT 75) According to Vance, the search warrant affidavit said "something to [the effect] that" appellant resided at his mother's house at 32 Villa Court in Fairfield. (RT 121)

31. Appellant had asked to be placed in position number five, the same number as the photo of him Comacho had identified in the photo lineup. (RT 65, 68)

32. At the preliminary hearing, Comacho testified that she looked at the lineup for five to ten minutes. (RT 48)

circumstance. She stated that the more she saw appellant by himself, the more positive she became that he was the man who robbed her. She thought that if she saw him more, she would become even more positive. (RT 51-52) However, except when asked to identify him, Comacho did not look at appellant during the trial. (RT 41)

Sample 4: Case and Facts in LWOP Murder-Robbery Case with Strong Challenges to Special Circumstances.

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an appeal from a final judgment of conviction following a jury trial and is authorized by Penal Code section 1237.

STATEMENT OF THE CASE

On September 11, 1992, an amended information was filed in Alameda County Superior Court, charging appellant Antonio McMullen, together with codefendants Darnell Timms and Solomon Wilson, in count one, with the murder of Alberto Prado (Pen. Code, § 187). The information contained a special circumstance allegation that the murder had occurred during a robbery (Pen. Code, § 190.2, subd. (a)(17)(i)). The information further alleged that Timms had used a firearm in the commission of the offense (Pen. Code, §§ 1203.06, 12022.5), and, as to appellant and Wilson, that a principal had been armed with a firearm (Pen. Code, § 12022, subd. (a)). Count four, later renumbered two,[33] charged appellant and Timms with assault with a firearm on Ricardo Balbuena (Pen. Code, § 245, subd. (a)(2)); count five, later renumbered three, charged appellant and Timms with the same offense on Pablo Soto Vargas.[34] As to Timms, it was further alleged that he personally used a firearm and inflicted great bodily injury in the course of the assaults. (Pen. Code, §§ 12022.5, 12022.7.) Further, the information charged that Timms had a prior conviction for possession for sale of cocaine base; no priors were charged against appellant or Wilson. (CT 204-209)

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[33] The information had originally charged Timms in counts two and three with attempted premeditated murder of Balbuena and Vargas (Pen. Code, §§ 187, 664), with personal use and great bodily injury allegations. An amendment of the information on May 19, at the commencement of trial, eliminated these two counts and added Timms to the assault counts, renumbered two and three, with the personal use and g.b.i. allegations to attach to those counts. A great bodily injury allegation as to Timms in count one was also dismissed on that date. (CT 504)

[34] Wilson was charged with the assault counts in a separate information, which was filed as a result of a clerical error. (See CT 214) These counts were dismissed as part of a plea bargain. See infra, p. __.

On October 16, 1992, the court denied appellant's motion under Penal Code section 995 to dismiss the special circumstance. (CT 226; see CT 177-188)

On April 28, 1994, codefendant Solomon Wilson pleaded guilty to first-degree murder, pursuant to a plea bargain for the dismissal of the special circumstance and arming allegations, together with the two assault charges. (CT 211) The plea bargain, which required him to testify against his codefendants, further provided that he would be committed to the California Youth Authority pursuant to Welfare and Institutions Code section 1731.5 and thus would be released at age 25. (RT 306-309)[35]

Jury selection commenced on May 11, 1994, and trial began on May 19. (CT 470, 504) On May 26, at the close of the prosecution's case, the court denied appellant's motion to dismiss the special circumstance under Penal Code section 1118.1. (CT 511; see CT 512-514) At the close of trial, the court refused appellant's requested instructions with respect to the "major participant" and "reckless indifference to human life" elements of the special circumstance. (CT 524-527, RT 588, 604-606, 615-616)

On June 6, 1994, after deliberating a total of eleven hours over three days and requesting readbacks of accomplice Solomon Wilson's testimony, the jury returned verdicts of guilty as charged and found the special circumstance allegations against both defendants true. (CT 620-635)

On July 15, 1994, codefendant Timms was sentenced to life without possibility of parole. (CT 659-660)

On October 28, 1994, at his scheduled sentencing hearing, appellant moved to strike the special circumstance. Acknowledging that both the probation officer and the prosecutor supported this motion, the court continued the matter to allow briefing on its authority to impose a lesser sentence. (Unnumbered CT re sentencing, hereinafter CT Sent., at pp. 5-21)

On December 16, 1994, the court denied appellant's motion to strike the special

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[35] This Court may take judicial notice of the records of the Alameda County Superior Court showing that Wilson was, in fact, sentenced in accordance with the plea bargain. (Alameda County No. C112123C, Abstract of Judgment filed 12/9/94; see Evid. Code, § 452, subd. (d), 459; People v. Easley (1983) 34 Cal.3d 858, 882, fn. 15.) A certified copy of the abstract of judgment is appended to this brief, for the convenience of the Court.

circumstance or to reduce the offense to second-degree murder. The court imposed a sentence of life without possibility of parole for the murder, with concurrent midterms for the remaining offenses. (CT Sent. 28-29)

Appellant's notice of appeal was timely filed on February 14, 1995. (CT Sent. 31)

STATEMENT OF FACTS

Appellant, age 19, Solomon Wilson, age 17, and Darnell Timms, who was 18 and nicknamed "Peer Pressure," were longtime friends. (CT[36] 350, 447; RT 271, 274-275, 278, 322-323) On the afternoon and evening of November 22, 1991, Wilson and Timms were "kicking it" on Prince Street in Berkeley. (RT 272, 274) Some time that evening, they went over to Wilson's house on 45th Street and West in Oakland. (RT 275) No one else was home. They "kicked it some more," playing Nintendo and listening to music. (RT 276) At some point, Wilson called appellant and invited him to join them. (RT 326)[37]

A few weeks earlier, Wilson had bought a handgun on the street for ninety-five dollars. Wilson didn't know a lot about guns; he thought it looked like a .45 but didn't know what brand. (RT 285-286) Before appellant came over, while Timms and Wilson were alone at Wilson's house, Timms began handling the gun; the two boys passed it back and forth between them. (RT 285, 287, 324) Wilson took it apart and put it back together and laid it down on the living room table. (RT 324-325) At some point before appellant arrived, Wilson noticed that the gun was no longer on the table. (RT 325-327) He assumed Timms had it, since no one else was in the house. (RT 285) Timms's possession of the gun didn't bother Wilson, since he and Timms were friends. (RT 288)

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[36] Most citations to Clerk's Transcript in the statement of facts refer to transcripts of appellant's first and third taped statements to the police, which were admitted as evidence at trial. (See RT 388-389, 393-394) Counsel has made limited use as well of the transcripts of co-defendant Darnell Timms's taped statements, which were admitted only against Timms (see RT 399-400, 404, 407, 415) where necessary to supply undisputed facts.

[37] On direct examination, Wilson testified that he and Timms went over to his house at about 10:00 or 11:00 p.m. and that appellant joined them there at about midnight. (RT 276-277) On cross-examination, however, Wilson testified that he called appellant from his house at about dusk and invited him over and that appellant arrived about an hour and a half later. (RT 326)

After appellant arrived, the three continued listening to music and playing Nintendo. (RT 277) They got high on drugs and alcohol, snorting 1/4- to 1/2-ounce of powder cocaine, drinking a couple of 40-ounce bottles of Olde English Ale, and smoking some marijuana. (RT 314-317, 345-354, 356-357)[38] At one point, while appellant was playing Nintendo in the living room and Wilson and Timms were talking near the front door, about twelve feet away, Wilson believed he saw the gun in Timms's possession. (RT 328-331)

In the early morning hours, Timms began talking about robbing the 24-hour Jack-in-the-Box at the corner of 45th and Telegraph. (RT 280-281) Neither appellant nor Wilson really wanted to go, but they finally gave in. (RT 281-282, 314, 323, 355)[39] Wilson didn't think they

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[38] On cross-examination by Timms's trial attorney, Wilson testified that the three consumed between a quarter-ounce and a half-ounce of cocaine, several joints of marijuana, and "a lot" of Olde English 800 (fortified beer). (RT 314-317) On redirect, in response to questioning about the price of the cocaine, Wilson explained that he had a connection and was able to purchase cocaine for $25-30 a gram. He said that each of the three had purchased some of the cocaine, which totalled about fifteen grams (almost a half-ounce). (RT 345-349) The prosecutor then introduced in impeachment part of Wilson's statement to the police, in which he said that the three had consumed two 40-ounce bottles of Olde English Ale and one joint of marijuana, and that appellant and Timms had "some" cocaine, of which Wilson did not partake. (RT 350-352) Wilson had also told the police that, by the time of the crime, he was not high but "almost all the way down," having smoked the marijuana hours earlier. (RT 353-354)

On recross, Wilson reiterated his cross-examination testimony as to the amount of cocaine and other drugs consumed. He said he didn't think a quarter-ounce or half-ounce of cocaine was a lot for three people to go through in a single evening. However, he admitted he was high at the time of the offense. (RT 356-357)

Wilson stated he lied to the police about the amount of drugs consumed because he was scared. He thought the police already knew about the robbery-murder but didn't know about the drugs, and he wasn't going to tell them. (RT 358-359)

In Timms's statement, which was not admitted against appellant, he stated that they were "getting drunk;" he drank about three 40-ounce beers, and they split $30 worth of marijuana. (CT 433)

[39] On direct examination, Solomon Wilson testified that appellant didn't want to participate in the robbery. (RT 281-282) Appellant said something like, "I don't want to go through that shit." (RT 314) Wilson testified that he had told the police when first questioned that appellant had been a reluctant participant in the robbery. (RT 323) This is borne out by the transcript of Wilson's statement to the police, December 18, 1991 at 7:10 a.m., in which he stated that appellant didn't really want to do the robbery, and that "I think we could have, I think me and Ton [appellant] could have pushed a little more that we didn't wanna go. I don't . . . I think we didn't

were "thinking straight." (RT 317)

The three young men walked down 45th Street to the Jack-in-the-Box, which was about three blocks from Wilson's house. (RT 283, 333) It took longer than usual to walk there because "everyone was hesitant." (RT 333)

Once there, Wilson stopped towards the back of the parking lot (RT 289, 334-337; see RT 500-503, 339) to act as lookout (RT 291). Timms walked to the rear of the restaurant. (RT 291-292) Appellant went toward the drive-through window. (CT 459)

A Jack-in-the-Box employee, Ricardo Balbuena Nila, opened the back door to take the garbage out. (RT 146, 292-293) Timms, who had covered his face, pointed the gun at Balbuena Nila and ordered him back inside. (RT 148, 156, 191) Timms went inside, pointed the gun at a second employee, Alberto Prado, and ordered both Prado and Balbuena Nila to walk toward the front of the restaurant. (RT 149, 181) There, a third employee, Pablo Vargas, was working, cleaning up and making coffee. (RT 181) Timms herded all three men toward the drive-through window and ordered them twice to open the cash register. (RT 150-151, 182) Timms fired a warning shot into the floor, demanding that they give him the money quickly. (RT 151, 182) Pablo Vargas opened the register with a key. (RT 151, 183)

Appellant, who was standing outside the drive-through window, then slid open the window, grabbed cash out of the register, and fled down 43rd Street. (CT 460-461, RT 152, 184) After appellant fled, Timms shot three times,[40] wounding all three men. (RT 154, 186) Prado's wound was fatal. (RT 213, 217)

Timms fled through the parking lot, down 45th Street. A witness saw a man who

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wanna look like, uh, cowards." (CT 318; see also Probation Report, p. 7) However, this statement was not admitted at trial. Instead, Wilson was impeached with another portion of his statement: "I -- I could have said I didn't want to go. I did say I didn't want to go, but it was like I was waiting for Tone [appellant] to say he didn't want to go, and he never said -- and then it was like I felt kind of outvoted, I don't know. We always do things together." (RT 355)

[40] In his statements to the police, Timms consistently maintained that he fired the shots when he panicked after the three men advanced toward him. (CT 417-419, 430, 438-439, 441) These statements were not admitted against appellant.

matched Wilson's description running through the parking lot with Timms. (RT 500-503)[41] Wilson testified, however, that he had left as soon as he saw Timms go in the back door of the Jack-in-the-Box and was several blocks away when he heard the shots. (RT 294-295) He testified that Timms caught up with him and they ran together back to Wilson's house. (RT 295-296) A few minutes later, appellant arrived. (RT 297)

The three of them got a ride over to appellant's house. They hung out there. The sun was just coming up. At some point, Wilson asked Timms what had happened at the Jack-in-the-Box. Timms said something like, "they was laughing at him and they was approaching him."[42] Wilson thought Timms said something about shooting someone in the leg. (RT 298)

The three young men divided up the proceeds of the robbery, which totalled about two hundred dollars. (RT 299-302, 356)[43] Wilson got about $50; Timms probably got a little more. Wilson was not sure how much appellant got. (RT 299-300)

Wilson testified that the last time he saw his gun after Timms used it in the robbery, appellant was putting it under his mattress. (RT 303) Timms, in a statement which was admitted against him but not against appellant, told police he had thrown the gun away under a freeway overpass as he ran from the scene of the robbery. (CT 292-293)

Sometime that night, Wilson found out on the news that someone had died in the robbery. He called Timms and asked him what had happened, but Timms didn't want to talk about it. (RT 304)

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[41] Rosita Dawkins, a homeless person who was sleeping in a car in the parking lot, testified that a man with his face covered fled, accompanied by another, shorter man. (RT 500-503) The victims had testified that the shooter, Timms, had his face covered during the crime. Wilson was shorter than Timms at the time of the offense; appellant was much taller. (RT 339)

[42] Wilson was impeached with his out-of-court statement that Timms said "them fools was laughing at me and that's why he shot them." (RT 299)

[43] At trial, Wilson didn't remember who had divided up the money, but he was impeached with his pretrial statement in which he said it had been appellant who had divided it up. (RT 300-301, 356)

Appellant's statement, admitted against him at trial, says that the money totalled $160 and that he kept half. (CT 460) Appellant, however, had identified only Timms as a co-participant in the robbery; Timms, when apprehended, identified Wilson as the third participant.

About two weeks later, appellant was identified as a suspect in the robbery through his fingerprints, which were found on the drive-through window. (RT 243, 267, 382-383, 390, 423, 433) He was arrested, confessed, and named Timms as the gunman. (CT 457-461; RT 390-394, 426, 431) Timms was immediately arrested and told police Wilson had been present during the robbery. (RT 428-429)

Wilson was arrested eleven days later. (RT 305) Wilson, who, along with appellant and Timms, had been facing life without parole, made a plea bargain two weeks before trial. In exchange for his testimony, he was permitted to plead guilty to first-degree murder without the special circumstance. As a result of his plea, he would be committed to the California Youth Authority (which he described as a "mini-penitentiary") and would be released in five years, at age 25.[44] (RT 306-309)

[44] See Welf. & Inst. Code, § 1731.5. See footnote 3, supra.