

APPENDIX E

DECISION OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
DATED NOVEMBER 8, 1988

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4 DECISION OF THE SUPERIOR COURT
5 OF THE STATE OF CALIFORNIA
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10 THE COURT: ALL RIGHT. MR. HEARNSBERGER,
11 MISS HUSTON HAS SUBMITTED AN INSTRUCTION "SYMPATHY FOR THE
12 DEFENDANT." IF YOU HAVE NO OBJECTION, I INTEND TO GIVE
13 IT.

14 MR. HEARNSBERGER: I DO HAVE AN OBJECTION.

15 THE COURT: ALL RIGHT.

16 MR. HEARNSBERGER: I THINK THAT THE LAW IS
17 UNQUESTIONABLY CLEAR THAT THE JURY MUST BE ALLOWED TO
18 CONSIDER SYMPATHY FOR THE DEFENDANT IN THE PENALTY PHASE.
19 HOWEVER, THE LANGUAGE "TO CONSIDER SYMPATHY FOR THE
20 DEFENDANT'S FAMILY" IS NOT A STATEMENT OF THE LAW, AND I
21 THINK IT'S PROBABLY AN IMPROPER STATEMENT OF THE LAW.

22 THE COURT: I'M NOT AWARE OF ANY AUTHORITY FOR THAT
23 PROPOSITION, MISS HUSTON.

24 MS. HUSTON: YOUR HONOR, THE CASES, AS WE KNOW,
25 HAVE DISCUSSED SYMPATHY AS BEING A FACTOR THAT THE JURY
26 MAY TAKE INTO CONSIDERATION IN DISCUSSING THAT.

27 THE COURT: I THINK IT'S FOR THE DEFENDANT, THOUGH.
28 THE PENALTY IS GOING TO BE IMPOSED ON THE DEFENDANT. AND

1 THE SAME AS YOU CAN'T TAKE INTO CONSIDERATION THE EFFECT,
2 IMPACT ON THE VICTIM'S FAMILY, BY THE SAME REASONING, THE
3 DEFENDANT SHOULD RECEIVE THE PENALTY BASED UPON HIS
4 BACKGROUND AND RECORD AND INVOLVEMENT. THAT'S WHAT THE
5 CASES STAND FOR THE PROPOSITION; IN PARTICULAR, THE VICTIM
6 IMPACT STATEMENTS.

7 THOSE CASES LIKE BOOTH VERSUS MARYLAND THAT
8 YOU'VE CITED TO THE COURT AND CALIFORNIA CASES THAT CITE
9 BOOTH VERSUS MARYLAND APPEAR TO STATE THAT UNDER THE LAW
10 AND IN ALL PROPRIETY, THE DEFENDANT SHOULD BE SENTENCED
11 BASED UPON HIS INDIVIDUAL MERITS OR DEMERITS, SO TO SPEAK,
12 AND THE LANGUAGE THAT'S USED IN THE CASES IS BASED UPON
13 HIS BACKGROUND, RECORD AND INVOLVEMENT IN THE OFFENSES IN
14 QUESTION.

15 AND AS I SAY, BY PARODY OF REASONING, THE
16 DEFENDANT SHOULDN'T BE PUNISHED OR RECEIVE A LESSER
17 PUNISHMENT BECAUSE OF HIS FAMILY. HE SHOULD RECEIVE OR
18 NOT RECEIVE BASED UPON HIS INDIVIDUAL BACKGROUND, RECORD
19 AND INVOLVEMENT.

20 IN ANY EVENT, I'M NOT AWARE OF ANY AUTHORITY
21 THAT STANDS FOR THE PROPOSITION THAT THE JURY SHOULD TAKE
22 INTO CONSIDERATION SYMPATHY FOR THE DEFENDANT'S FAMILY.

23 MS. HUSTON: THAT MAY BE CORRECT, YOUR HONOR. BUT
24 CONVERSELY, I'M NOT AWARE OF ANY AUTHORITY THAT SAYS THAT
25 THE JURY MAY NOT TAKE INTO CONSIDERATION SYMPATHY FOR THE
26 DEFENDANT'S FAMILY.

27 THE COURT: NEITHER AM I. I'M JUST FAMILIAR WITH
28 BOOTH VERSUS MARYLAND AND CALIFORNIA CASES THAT ADDRESS

1 THE ISSUE OF THE PROPER BASIS FOR IMPOSING PUNISHMENT ON
2 THE DEFENDANT AND --

3 MS. HUSTON: I THINK THAT TYPICALLY IN EVERY CASE
4 OF THIS NATURE, THE MOST PREVALENT TYPE OF EVIDENCE DURING
5 A PENALTY PHASE IS EVIDENCE FROM THE FAMILY ABOUT THE
6 BACKGROUND AND THEIR FEELINGS ABOUT THE DEFENDANT, AND
7 THIS TYPE OF EVIDENCE WOULD APPEAR TO BE IN FRONT OF THE
8 JURY.

9 THE COURT: AND IT'S VERY PROPER.

10 MS. HUSTON: AND IT WOULD APPEAR TO BE THAT SINCE
11 THE FAMILY'S EMOTIONAL STATE AND THEIR REACTION TO THE
12 SITUATION WHICH THEY AND THE DEFENDANT FIND THEMSELVES,
13 THAT SINCE THAT EVIDENCE IS BEFORE THE JURY, THAT IT WOULD
14 BE PROPER FOR THE JURY TO CONSIDER IT ALL, AND SYMPATHY OR
15 POSSIBLE SYMPATHY WOULD JUST BE AN INHERENT FACTOR IN
16 THAT.

17 THE COURT: WHETHER THEY DO UNCONSCIOUSLY --
18 OBVIOUSLY, THE JURY IS GOING TO BE AWARE OF THE EFFECT ON
19 THE DEFENDANT'S FAMILY. NOW, WHETHER THEY, AS HUMAN
20 BEINGS, CONSIDER IT UNCONSCIOUSLY, THAT'S UP TO -- YOU
21 KNOW, WHAT CAN I DO. THAT'S WHATEVER'S GOING TO AFFECT
22 THEM.

23 BUT AS FAR AS THE LAW IS CONCERNED, WE CAN
24 INSTRUCT THEM ON WHAT THE LAW IS, AND THE LAW IS THAT THE
25 DEFENDANT SHOULD BE PUNISHED BASED UPON HIS INDIVIDUAL
26 RECORD, HIS INDIVIDUAL BACKGROUND AND HIS INDIVIDUAL
27 INVOLVEMENT. THAT'S THE BASIS FOR PUNISHING IN A CERTAIN
28 WAY OR PUNISHING IN ANOTHER WAY. THAT'S THE BASIS, THE

1 PROPER BASIS FOR THE PUNISHMENT.

2 IN ANY EVENT, I UNDERSTAND WHAT YOU'RE
3 REQUESTING. I BELIEVE THAT IT WOULD BE IMPROPER TO GIVE
4 THIS INSTRUCTION. I WILL GIVE IT STRIKING "AND HIS
5 FAMILY." AND IF YOU CAN COME UP WITH ANY AUTHORITY, I
6 WOULD BE HAPPY TO RECONSIDER.

7 MS. HUSTON: THANK YOU.

8 THE COURT: BUT I TAKE IT THAT YOU WANT ME TO
9 STRIKE "REQUESTED BY THE DEFENDANT" AND WANT ME TO GIVE IT
10 ON MY MOTION.

11 MS. HUSTON: THAT'S FINE, YOUR HONOR, IF THE COURT
12 WILL DO SO.

13 THE COURT: IS THAT THE WAY YOU WANT IT?

14 MS. HUSTON: YES. WELL, AS LONG AS THE RECORD
15 STANDS THAT THE ORIGINAL INSTRUCTION AS ORIGINALLY
16 SUBMITTED WAS REQUESTED BY THE DEFENDANT SINCE THERE IS
17 GOING TO BE A MODIFICATION.

18 THE COURT: WELL, WE'VE MADE A STATEMENT FOR THE
19 RECORD.

20 MS. HUSTON: OKAY.

21 THE COURT: I CAN EITHER PUT YOU DOWN AS REQUESTING
22 IT OR I'LL PUT IT DOWN AS GIVEN AS MODIFIED.

23 MS. HUSTON: THAT'S PROBABLY MORE APPROPRIATE.

24 THE COURT: DID YOU WISH TO BE HEARD,
25 MR. HEARNSBERGER.

26 MR. HEARNSBERGER: NO, I DO NOT.

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THE COURT: THEN WE HAD ANOTHER INSTRUCTION THAT WAS CALLED SYMPATHY FOR A DEFENDANT AND IT WAS REQUESTED BY THE DEFENDANT AND IT WILL BE GIVEN AS MODIFIED, IF YOU'LL RECALL. I'M GOING TO CALL THIS DEFENSE SPECIAL INSTRUCTION NO. 1.

MS. HUSTON: FINE.

THE COURT: WELL, IF THAT'S AGREEABLE, THAT'S JUST FOR PURPOSES OF IDENTIFYING IT. YOU'LL RECALL THAT I STRUCK THE LANGUAGE "OR FOR THE FAMILY."

MS. HUSTON: YES.

THE COURT: AND YOU HAD -- YOU HAD REQUESTED IT AS

1 SUBMITTED, AND I GAVE IT AS -- OR I INTEND TO GIVE IT AS
2 MODIFIED STRIKING "OR FOR THE FAMILY."

3 MS. HUSTON: I THINK THE RECORD IS CLEAR, YOUR
4 HONOR.

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JURY INSTRUCTION GIVEN

Defense Special Instruction #1

SYMPATHY FOR THE DEFENDANT

984

Requested by People		Given as Requested		Refused
Requested by Defendant		Given as Modified	✓	Withdrawn
	X	Given on Court's Motion		<i>Agnes M. Beyer</i>

Judge

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You may take sympathy for the defendant ~~into~~ into
consideration in determining whether or not to extend mercy to
the defendant.

ARGUMENT OF THE PROSECUTOR

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2 AND THEN THE FINAL FACTOR IS ANY OTHER
3 CIRCUMSTANCES WHICH EXTENUATES THE GRAVITY OF THE CRIME
4 EVEN THOUGH IT WAS NOT A LEGAL EXCUSE FOR THE CRIME.

5 SO IF THERE IS ANY OTHER THING THAT HAS NOT
6 SPECIFICALLY BEEN BROUGHT OUT IN ONE OF THE FACTORS THAT
7 ARE UP ON THE BOARD THAT YOU FEEL SHOULD BE CONSIDERED AS
8 A FACTOR IN MITIGATION, YOU MAY DO SO.

9 THREE OF THE THINGS THAT I DON'T KNOW WHAT
10 THE DEFENSE IS GOING TO ARGUE AND I'M NOT GOING TO BE ABLE
11 TO STAND BACK UP HERE AND TALK ABOUT THEM LATER, SO I WILL
12 DISCUSS THEM NOW, ASSUMING THAT THEY'RE GOING TO BE
13 BROUGHT OUT IN DEFENSE ARGUMENT, AND THAT IS SYMPATHY FOR
14 THE DEFENDANT; THE DEFENDANT SHOWED REMORSE; THE DEFENDANT
15 WOULD BE ABLE TO ADJUST TO THE PRISON SETTING.

16 FIRST OF ALL, WITH REGARD TO SYMPATHY FOR THE
17 DEFENDANT, IF THERE BE ANY, IF YOU FEEL THAT IT IS
18 APPROPRIATE, ONE OF THE THINGS THAT I WANT TO POINT OUT TO
19 YOU AND YOU CAN CONSIDER IS THAT SYMPATHY FOR THE
20 DEFENDANT MEANS EXACTLY THAT. IT DOES NOT MEAN SYMPATHY
21 FOR HIS FAMILY. IT DOES NOT MEAN SYMPATHY FOR THE VICTIM
22 OR THE VICTIM'S FAMILY.

23 NOW, IT'S OBVIOUS THAT WE HAVE SEEN SOME OF
24 THE DEFENDANT'S FAMILY MEMBERS COME IN HERE AND TESTIFY,
25 AND THEY ARE VERY TOUCHED. THEY ARE VERY EMOTIONAL. THEY
26 ARE VERY HURT, AND THAT IS UNDERSTANDABLE. BUT YOUR
27 DECISION IS NOT BASED ON WHETHER THEY FEEL BAD ABOUT WHAT
28 HAPPENED ANY MORE THAN YOUR DECISION CAN TAKE INTO ACCOUNT

1 THE LOSS TO THE VICTIM'S FAMILY, BECAUSE THAT IS NOT WHAT
2 YOUR JOB IS. YOUR JOB IS TO DECIDE WHAT YOU'VE HEARD HERE
3 AND WHAT THE DEFENDANT HAS DONE AND WHAT HIS BACKGROUND IS
4 AND WHETHER HE DESERVES THAT CONSIDERATION.

5 AND WHY, IF ANY REASON, IS THERE TO FEEL
6 SYMPATHY FOR HIM?

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