No. S095223

SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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Deputy

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ROBERT MAURICE BLOOM,

Defendant and Appellant.

(Los Angeles County
Sup. Ct. No. A801380)

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of
the State of California for the County of Los Angeles

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ROBERT MAURICE BLOOM, Defendant and Appellant.	No. S095223 (Los Angeles County Sup. Ct. No. A801380)

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This appeal is from a final judgment imposing a verdict of death and is automatic under Penal Code section 1239, subdivision (b).

STATEMENT OF CASE

In 1982 appellant ROBERT MAURICE BLOOM was convicted in the Los Angeles County Superior Court of three counts of first degree murder. An allegation of a special circumstance under Penal Code[1] section 190.2, subdivision (a)(2) (multiple murder) was found true, and appellant was sentenced to death. This Court affirmed the judgment on appeal. (*People v. Bloom* (1989) 48 Cal.3d 1194.) Following an evidentiary hearing conducted in 1993, the Ninth Circuit Court of Appeals reversed appellant's conviction and sentence of death on the grounds that appellant

[1] All statutory citations are to the Penal Code unless otherwise specified.

had been denied effective assistance of counsel at the guilt phase of his trial. (*Bloom v. Calderon* (9th Cir. 1997) 132 F.3d 1267.) On July 23, 1998, the case was assigned to Judge Michael Hoff for a new trial. (1CT 27.)[2]

On July 23, 1998, appellant made a motion to represent himself, pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*), which was heard and denied. (1CT 33.) An independent attorney was appointed on July 27, 1998, to advise appellant regarding motions made pursuant to *Faretta* and *Marsden*, and was then relieved on August 27, 1998. (1CT 33-34.)

By information filed August 27, 1998, appellant was charged with three counts of violation of section 187, subdivision (a) (Count 1 – murder of Robert Bloom, Sr. [appellant's father]; Count 2 – murder of Josephine Lou Bloom [Bloom, Sr.'s wife]; Count 3 – murder of Sandra ("Sandy") Hughes [Josephine Bloom's daughter]). As to each count, allegations of personal use of a firearm (rifle) under sections 12022.5, subdivision (a) and 1203.06, subdivision (a) (I) were included, as were allegations that each murder was a serious felony under section 1192.7, subdivision (c). As to Count 3, an allegation of use of a scissors under section 12022, subdivision (b) was included. A single special circumstance allegation – multiple

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[2] "CT" refers to the clerk's transcript on appeal, preceded by the volume number. "RT" refers to the reporter's transcript, preceded by the volume number. "ICPRT" refers to a separate volume of the Reporter's Transcript containing transcripts of sealed in camera proceedings. "*Marsden* RT" refers to a separate volume of the Reporter's Transcript containing transcripts of sealed proceedings pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 ("*Marsden*"). Those sealed transcripts, or portions thereof, as well as certain confidential documents contained in Volume 25 of the Clerk's Transcript which are referred to in this brief, have been unsealed for that purpose pursuant to an order of this Court filed August 11, 2010.

murder – was made under section 190.2, subdivision (a) (3) as to each count. (1CT 43-46.) Appellant was re-arraigned on that information the same day, pled not guilty to all counts, and denied all allegations. (1CT 51-52.)

On September 10, 1998, appellant filed a motion to withdraw his pleas of not guilty and enter pleas of once in jeopardy. That motion was denied September 28, 1998. (1CT 53-69, 78.)

On November 10, 1998, appellant made a *Marsden* motion, which was denied. (1CT 79; *Marsden* RT 91-93, 110-111.)

On January 20, 1999, appellant again moved to represent himself, then withdrew the motion on February 25, 1999. (1CT 86-87; ICP RT 142-152.)

On January 18, 2000, following multiple continuances, appellant filed a motion to dismiss, on the grounds that he was being deprived of two necessary and exculpatory witnesses – Dr. Richard Naham, a psychiatrist who had evaluated him prior to the homicides, but whose license had since been revoked, and Dr. Arthur S. Kling, who had testified at appellant's first trial but was by then deceased. (1CT 100-105.) That motion was denied February 16, 2000. Appellant then entered a dual plea of not guilty and not guilty by reason of insanity to all counts. (1CT 111.)

On April 24, 2000, appellant filed a Supplemental Motion to Dismiss and for Curative Measures. (3CT 448-527.) The motion was denied on April 27, 2000. (3CT 662.)

On May 8, 2000, the matter was continued for trial at the request of defense counsel, but over appellant's objection, to May 24, 2000. (4CT 769-770.)

On July 19, 2000, appellant made another *Marsden* motion, which was denied. (4CT 854-855; *Marsden* RT 498-509.)

On September 1, 2000, appellant made yet another *Marsden* motion, which was treated as an oral motion to disqualify Judge Hoff pursuant to Code of Civil Procedure section 170.1. Judge Hoff recused himself, and the cause was transferred to Judge Darlene E. Schempp for trial. (4CT 863-864; *Marsden* RT 527-539.)

On September 11, 2000, jury selection began and appellant made another *Marsden* motion, which was denied. (5CT 1029-1030; *Marsden* RT 666-671.)

On September 18, 2000, appellant again made a *Marsden* motion, which again was denied. (9CT 2225-2226; *Marsden* RT 822-825.)

On September 27, 2000, eleven jurors were sworn. (23CT 6037-6038.) On September 28, 2000, those eleven jurors were "unsworn," and jury selection resumed. The same day, twelve jurors and six alternates were sworn. (23CT 6039-6041.)

On October 5, 2000, appellant made another *Marsden* motion, as well as a *Faretta* motion, seeking to represent himself at the penalty phase. The trial court denied the *Marsden* motion and took the *Faretta* motion under submission. (23CT 6049; *Marsden* RT 1929-1934.)

Opening statements commenced on October 6, 2000. (23CT 6050-6051.)

On October 10, 2000, appellant made another *Marsden* motion and addressed the trial court concerning his request to represent himself at the penalty phase. No ruling was made. (23CT 6056-6057; *Marsden* RT 2043-2062.)

On October 16, 2000, appellant made yet another *Marsden* motion. No ruling was made. (23CT 6067-6069; *Marsden* RT 2685-2693.)

On October 18, 2000, appellant's motion for a mistrial based upon the prosecution's guilt-phase cross-examination of Dr. Dale Watson, a

defense expert witness, was made and denied. (23CT 6070-6071; 22RT 2856.)

On October 23, 2000, appellant made another *Marsden* motion, which was denied. During the hearing on that motion, the trial court granted appellant's motion to represent himself at the penalty phase, should the case reach a penalty phase. (23CT 6073; *Marsden* RT 3031-3037.)

On October 30, 2000, appellant made another *Marsden* motion, which was denied. (23CT 6078-6079; *Marsden* RT 3614-3622.)

On November 1, 2000, appellant made a *Faretta* motion to represent himself at the sanity phase. The motion was taken under submission and thereafter denied on November 6, 2000, while the jury was deliberating at the guilt phase. (23CT 6084-6085, 6091-6092.)

Closing arguments took place November 1 and 2, 2000, and the matter was submitted to the jury on November 3, 2000. (23CT 6084-6086, 6089-6090.)

On November 8, 2000, the jury returned a verdict of guilty of first degree murder on Count One, finding appellant had personally used a firearm. One juror was then excused by stipulation for personal reasons, an alternate juror was sworn, and deliberations resumed. (23CT 6099, 6103-6104.) On November 9, 2000, two more jurors were excused by stipulation for personal reasons, two more alternate jurors were sworn, and deliberations resumed. (23CT 6105-6106.)

On November 14, 2000, the jurors indicated they were unable to reach a verdict on Counts Two or Three. The trial court then granted the prosecution's motion pursuant to section 1385 to dismiss the allegations of first degree murder as to Counts Two and Three. The jury was informed of those dismissals. After further deliberations, the jury returned verdicts of second degree murder on Counts Two and Three, with findings of personal

use of a firearm as to both counts and personal use of a scissors as to Count Three. The jury also found the one special circumstance allegation (multiple murder) true. (23CT 6108, 24CT 6213-6215.)

On November 20, 2000, appellant appeared in court and purportedly orally "waived" his right to be present during the sanity phase, which commenced that day in his absence. A defense motion for mistrial, for violation of section 1180, was denied. (24CT 6217-6219.) On November 21, 2000, closing arguments were given and the issue of sanity was submitted to the jury. (24CT 6220-6221.)

While the jury was deliberating, defense counsel declared a doubt as to appellant's competence, pursuant to section 1368. The trial court declared it had no doubt as to appellant's competence and declined to suspend proceedings. (24CT 6220-6221.)

On November 27, 2000, the trial court, the prosecutors and appellant discussed various matters regarding the penalty phase, without the participation of defense counsel. (24CT 6224-6225, 6241; 37RT 4545-4624.)

On November 30, 2000, the jury returned a verdict of sane as to Count One. (24CT 6231, 6233-6235.) After further deliberations, the jury indicated on December 4, 2000 that they were unable to reach a unanimous verdict as to Counts Two or Three. (24CT 6238-6240.)

On December 5, 2000, the trial court accepted appellant's withdrawal of his plea of not guilty by reason of insanity on Counts Two and Three, without his counsel's consent. Defense counsel were then relieved as counsel. Thereafter, the trial court advised appellant concerning self-representation, pursuant to *Faretta*. (24CT 6241-6242, 6263-6264.)

On December 6, 2000, the penalty phase commenced, with appellant representing himself. On December 7, 2000, after the prosecution

had rested, appellant made a motion for a directed verdict of life without possibility of parole, which was denied. Appellant also made a motion for mistrial, based on excessive security in the courtroom during the testimony of Curtis Wright. That motion was also denied. (24CT 6271-6272; 42RT 5106-5107.) The same day, the prosecutor asked the trial court to control appellant or to consider revoking his self-representation. The trial court admonished appellant, but allowed him to continue to represent himself. (42RT 5138-5140.)

On December 8, 2000, appellant made another motion for mistrial, based upon his cross-examination by the prosecution. The motion was denied. (24CT 6278-6279; 43RT 5328-5329.)

On December 11, 2000, the prosecution made a motion to have appellant's pro per status revoked. The trial court denied the motion. (24 CT 6280-6281.) That same day, appellant made motions to reinstate his plea of not guilty by reason of insanity to Counts Two and Three, to revoke his self-representation and have his previous attorneys reappointed to represent him, and for a mistrial. Appellant also declared a doubt as to his own competence. The trial court found appellant competent to stand trial, and denied each motion. The trial court also denied another motion for mistrial made by appellant that day. (24CT 6280-6281.)

On December 12, 2000, appellant made another motion for mistrial, alleging the prosecutor had engaged in misconduct for making too many objections. The motion was denied. (24CT 6282-6283.) On December 13, 2000, the trial court denied another motion by appellant to revoke his self-representation and have his prior counsel reappointed to represent him. (24CT 6284-6285.)

On December 18, 2000, a juror was excused pursuant to stipulation, due to a family emergency, and an alternate was sworn. (24CT

6288-6291.) On December 18 and 19, 2000, penalty-phase closing arguments were made, and on December 19, 2000, the matter was submitted to the jury. (24CT 6288-6291.) On December 20, 2000, the trial court excused another juror on a finding of hardship. Appellant's motion for mistrial was denied. An alternate juror was sworn. (24CT 6292-6294.)

On December 21, 2000, the jury returned a verdict of death. (24CT 6306, 6308-6309.) On January 5, 2001, the trial court deemed appellant to have made a motion to modify the death verdict pursuant to section 190.4, subdivision (e), denied the motion, and pronounced judgment, sentencing appellant to death and imposing a $1000 restitution fine pursuant to Government Code section 13967, subdivision (d). (24CT 6322-6334.)

STATEMENT OF FACTS

Guilt Phase

Prosecution Case

Several lay witnesses testified regarding the events of April 22, 1982, when appellant's father, Robert Bloom Sr. (Bloom, Sr.), his wife Josephine, and her daughter Sandra were killed. David Hughes, first, stated that he and Victoria Smith were asleep that morning in Hughes' van in the driveway of his parents' house on Sancola Avenue in Sun Valley. When Hughes awoke Bloom, Sr., was standing in front of the house next door, where he lived, yelling for appellant, who was out on the street, to "come back!" (17RT 2065-2070, 2072-2077.) Appellant ran down the street, with Bloom, Sr., chasing him. The two reappeared a few minutes later, walking back toward the house, appellant walking a little behind Bloom, Sr. Bloom, Sr., entered the house first, followed by appellant. (17RT 2078-2082.) Hughes did not see anything in either person's hands.

Five or 10 minutes later Hughes again heard Bloom, Sr., hollering in the front yard for appellant to "come back, come back, you don't want to

do that," or words to that effect. Appellant again headed down the street. (17RT 2082-2084.) A minute or two later Hughes heard a gunshot – a "small popping noise," like the sound of a .22 or .25 caliber gun. Bloom, Sr., grabbed himself around the middle, started jumping up and down, screaming, then turned and ran for the house. Appellant started chasing him, holding a rifle out in front of him as he ran. Hughes heard two more shots and glass breaking. (17RT 2084-2087, 2165.)

Bloom, Sr., reached the porch of his house and fell across the doorway, with the lower half of his body still outside. He was screaming and his legs were shaking. Appellant came up to the porch, then straddled Bloom, Sr.'s body. Hughes heard two more shots, and Bloom, Sr.'s legs stopped moving[3]. (17RT 2087-2089, 2126.) Appellant ran into the house. A few seconds to a minute later, Hughes heard Josephine Bloom scream, then two more shots, then the screaming stopped. Thirty seconds to a minute later Hughes heard another shot. (17RT 2090-2091.)[4] When the screaming stopped, Hughes got out of the van, went into his parents' house, and called 911. He then went back to get Smith from the van. (17RT 2092-2093, 2166.) He saw appellant standing in the dining-room window of the house next door. Appellant was "messing

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[3] Hughes originally told the police that one of the two shots hit Bloom, Sr., in the back while he was running to the house and that appellant only fired one shot in the doorway. (17RT 2101-2102, 2126.)

[4] Hughes previously estimated the interval at three to four minutes, and stated that from first hearing Bloom, Sr., hollering until appellant drove away took about five to 10 minutes. Hughes also variously estimated the distance from Bloom, Sr., to where Hughes lost sight of appellant as 25 feet, 50 feet and 300 yards. Hughes admitted that in prior statements and testimony he had given widely varying estimates of time and distance, as well as the number of shots. (17RT 2100-2101, 2109, 2113-2119, 2127, 2129-2130, 2132, 2137-2139, 2144.)

around" with the rifle, then put it down, then just stared out the window.[5] Appellant appeared confused, just staring off into space. (17RT 2094-2097, 2131-2132, 2166.) Hughes then saw appellant leave the house, put the rifle in Josephine's car, and, after stalling the car and restarting it, drive away. The police arrived within about five minutes. (17RT 2097-2099, 2132, 2166.)

Moises Gameros, who lived across the street and a few doors up from Bloom Sr., also awoke in the early morning of April 22, 1982, to hear Bloom, Sr., yelling "Robert." He looked out his window and saw Bloom, Sr., and appellant walking along the street. They kept a distance of about 30-40 feet between them, with appellant backing away from Bloom, Sr., as he advanced. (19RT 2455-2459, 2499-2500.) Bloom, Sr., said, "Well, that's it, Robert, I'm going to call the cops," and started walking back towards the house. Appellant followed, holding a rifle, not aiming it at anything. As Bloom, Sr., entered the house appellant was about 10 feet behind him. (19RT 2463–2463, 2465-2467, 2500-2502.) As appellant entered the house, Bloom, Sr., tried to grab the rifle from him, and then chased him back out into the street.[6] (19RT 2467, 2469-2470, 2503-2504, 2513-2517.)

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[5] In prior testimony Hughes did not mention that appellant was "messing around with the rifle" or "playing with the gun." Rather, appellant was simply standing there staring, "like he was kind of wondering what to do." (17RT 2095-2096, 2131.) The first time Hughes mentioned that appellant was "messing with the gun" was the day before he testified in this trial, 18 years after the events. (17RT 2131.)

[6] At the preliminary hearing Gameros testified the two were in the house for about a minute before appellant came running out. (19RT 2493.)

Gameros heard a shot.[7] Bloom, Sr., started screaming and turning around. The expression on his face said, "look what you did," as though it had not been intentional. As he went toward the house appellant followed and shot at him again. (19RT 2471-2474, 2504-2505.) Bloom, Sr., got to the porch and went down. Appellant stood over him and fired again. (19RT 2477-2478, 2505.) Appellant then "fumbled" with the rifle, stood there for 30 seconds to a minute, then entered the house. He came back out, stood outside for about five minutes, went back in, and after another five minutes came out, put the rifle in the car, walked back to the house, then back to the car, then slowly drove away. (19RT 2483-2485, 2488-2489, 2509.)

The prosecution presented testimony from a number of witnesses regarding events during the days preceding the homicides. Martin Medrano, an acquaintance of appellant's who had testified at appellant's first trial, was deceased by the time of the instant trial. Over defense counsel's objection, his prior testimony was read to the jury. According to Medrano, in April 1982 appellant offered him $1,200 if he could get him a gun; he said he had a contract to kill someone. Medrano did not believe appellant had such a contract, but agreed to get him a gun. (17RT 2184-2187, 2204-2205, 2209, 2214.) The next day Medrano told appellant he had gotten him a gun and appellant agreed to come up with the money. Appellant returned later, without the money, but offered to pay Medrano $400 or $500, which he said he would bring the next day. Appellant

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[7] In a sworn declaration executed in 1993 Gameros said that as appellant ran and Bloom, Sr., grabbed at his shoulder, appellant swung the rifle around with his right arm and shot Bloom, Sr., holding the rifle with one hand and not looking at Bloom, Sr., then turned to fully face him and continued shooting. (19RT 2516-2517.)

mentioned he had a .22 caliber rifle. Medrano had no intention of giving appellant a gun; he intended, though, to take appellant's money. (17RT 2189-2190.)

Medrano read about the homicides a few days later and learned a rifle had been used. (17RT 2214.) He did not tell anyone at the time about his exchange with appellant because he was a heroin addict and had violated parole, and so was avoiding law enforcement. (17RT 2192-2193.) At the time of his testimony at the first trial, however, Medrano was himself in jail for armed robbery and there saw appellant for the first time since they had spoken about the gun. Medrano approached a deputy sheriff, told him his story, and later talked to the prosecutor. He testified he received no promises regarding his sentence for armed robbery, to which he had already pled guilty. (17RT 2194-2197.)

Richie Avila testified that he and his girlfriend Christine Waller, both 14 in 1982, were friends of appellant's. Avila and appellant spent time together at Waller's mother's house and at Bloom, Sr.'s house. (18RT 2258-2260, 2327.) According to Avila, appellant and his father argued all the time, about everything appellant did. His father bullied appellant and disagreed with the way he looked, dressed, talked and walked. Appellant never fought back physically, and when he argued back, he always backed down in the end. (18RT 2272, 2278-2280.)

Because Waller was unavailable at appellant's retrial her prior testimony was read to the jury, over defense counsel's objection. She testified that appellant had spent time at her house, cleaning and doing other things to help the family. (18RT 2258-2259, 2273-2274, 2328.) Appellant was very formal with Waller's parents. (18RT 2345). Waller testified that Bloom, Sr., was always bullying appellant, who could never satisfy his father. Bloom, Sr., was verbally abusive, ranting and raving in a loud,

angry voice. Appellant would ask his father to leave him alone, his face flushed or pale. Waller saw appellant cry following confrontations with his father. Appellant would shake violently, shivering hard. He was plainly afraid of his father. Appellant tried to please him a lot, but his father would not accept it. Waller once saw Bloom, Sr., shoving appellant, threatening to call the police because appellant had taken the car without permission. As Bloom, Sr., taunted him, saying, "Why don't you fight back," appellant just tried to push Bloom, Sr.'s hands away from him. (18RT 2356-2359.) Waller also testified that appellant took good care of his half-sister Sandy, Josephine's daughter. He was protective of her and never mean. It seemed to be a mutually loving, caring relationship between them. (18RT 2349-2350, 2364-2368.)

Less than a week before the killings, appellant told Avila and Waller of an attempted break-in at Waller's house. Appellant said he heard something in the backyard and was struck by someone he then chased over the wall. No one else saw what appellant described. Appellant then stayed overnight at Waller's house for several nights, to protect the family. (18RT 2271, 2273, 2337-2338, 2345.)

On April 20, 1982, two days before the homicides, Avila and Waller were sitting on the couch at Waller's house, watching television. Appellant had left through the back door, telling Waller to stay in the house. Avila saw appellant's silhouette pass by the window, walking towards the backyard (18RT 2262-2263, 2329); Waller said he was walking toward the front. (18 RT 2331-2333, 2343.) By the silhouette, Avila said he could tell appellant was holding a rifle, which Waller recognized as her brother's. (18RT 2263, 2338-2339.) Ten minutes later, Avila heard five or six pops (18RT 2263-2264); Waller heard nothing. (18RT 2344.) When appellant came back inside, Avila could see he had a rifle under his coat. (18RT

2264, 2344.) The day before the homicides, Avila went by the trade school where appellant worked and told him his father was looking for him. Appellant got upset, and called his father from a pay phone. At the end of a ten-minute conversation, appellant said, angrily, "You're running my life now, but you won't be for long." (18RT 2266-2269, 2278.)

The night before the killings, Avila and appellant were again at Waller's house. While appellant was usually animated, talkative, playing the clown, that evening he was quiet, looked pale and seemed particularly tense. (18RT 2278-2280, 2352-2355.) Waller awoke at about 5:00 a.m. the next morning and went to wake appellant. She found no one in the room appellant was using, although the light was on and the bed looked slept in. She later learned of appellant's arrest. (18RT 2334-2336.)

Norma White, Christine Waller's mother, testified she met appellant about a year before the homicides, through her daughter Christine. Appellant came over to their house more and more often. He was always respectful and polite, to the point of asking permission to go walking with Christine. White had no fear for her daughter spending time with him. In the two weeks before the homicides, he spent the night at White's house several times. (19RT 2377, 2380-2383, 2397, 2399.) Appellant tried to work his way into White's family. White said she had tried to counsel him. (19RT 2398.)

White had met Bloom, Sr., about three times. Once, she got a call from her daughter to pick her up from Bloom, Sr.'s apartment. He was very upset, screaming and hollering about something appellant had done. Appellant could barely respond. Another time, Bloom, Sr., came by White's house when appellant was there. Again, Bloom, Sr., was very angry; again appellant did not argue back. (19RT 2389-2391.)

The day before the killings, appellant came by White's house at

about 5:30 or 6:00 p.m. He seemed different, very quiet. He was pale and his lips were white. He said there was nothing the matter; but something did not seem right. After her children were in bed, and her older boys gone, White and appellant stayed up and talked for about 45 minutes. He started to become his old self again. He asked if he could spend the night, and White agreed. (19RT 2384-2387.)

White's son, Raul Rosas, who lived with her at the time, testified that he had purchased a .22 semiautomatic rifle in 1980 or 1981. He had kept it in the trunk of his car after some gangbangers had shot at him. (19RT 2405-2407, 2418-2419.) He never showed it to appellant, and appellant never asked about it or handled it. (19RT 2408-2409, 2412.) The day of the homicides he heard on television that a .22 was involved. Rosas found his rifle was gone, and reported the rifle to the police as stolen. He testified he had never given appellant permission to use the rifle. (19RT 2410, 2412-2413.)

A number of law enforcement personnel also testified for the prosecution at the guilt phase. Joseph Dvorak, a sergeant in the Los Angeles Police Department, was the first to respond to the scene. (18RT 2237-2238.) He found the first victim in the doorway; the second in the hallway. Both were dead. (18RT 2239-2242.) He then found a young girl, alive but seriously injured, in a bedroom. Once rescue arrived, she was taken out the back door, and Dvorak secured the scene. (18RT 2243-2245, 2252.)

Michael McKean, also a police sergeant at the time, arrived on the scene at about 4:15 a.m. He drove towards Christine Waller's house with a neighbor of Bloom, Sr.'s who knew its location. The neighbor identified appellant, who was walking up the street. McKean arrested appellant, who complied with his directions. (20RT 2541-2546, 2569-2573.) McKean

located Josephine's car parked about one-and-half to two miles from where appellant was arrested. (20RT 2546-2548, 2550.)

Deputy Coroner Irwin L. Golden, M.D., testified concerning the autopsies of Bloom Sr., Josephine, and Sandra. The autopsies were conducted by another pathologist, since deceased. (20RT 2593-2595.) Bloom, Sr., who was 5'9" and weighed 200 pounds, had three bullet wounds. One bullet had entered the abdomen, penetrated the liver, and exited the small of the back. causing a life-threatening injury. (20RT 2596-2598, 2603.) Another had entered the front of the neck, traveled down to strike the left collarbone, where it broke apart, causing a fatal injury. A pattern of gunpowder stippling on the neck indicated this shot was fired from within 2½ to 3 feet. (20RT 2598-2601.) The third bullet entered the left cheek and eventually broke apart, leaving two exit wounds, behind the left ear and in the back of the neck. This bullet fractured the skull and fatally injured the left side of the brain. (20RT 2601-2603.)

Josephine had three fatal gunshot wounds to the head. One entered near the left ear and exited near the chin, damaging the left side of the brain. (20RT 2603-2605.) Another entered at the back of the head and exited in front of the left ear, damaging both sides of the brain. (20RT 2605-2606.) A third bullet entered the back of the head, lodging in the skull and causing massive injury to the left side of the brain. (20RT 2606-2607.) It could not be determined from what distance the shots were fired. (20RT 2607-2608, 2630-2631.)

Sandra suffered a fatal gunshot wound to the head and a non-penetrating gunshot "bounce wound" to the right upper arm. She was maintained on a respirator for two days, then died as a result of the wound to the head. (20RT 2609-2612.) She also suffered multiple shallow stab and cutting wounds to the head, neck, right arm, torso and right side of the

back. They could have been caused by a scissors recovered at the scene (Exhibit FF), which was described as a semi-sharp instrument. Some of the wounds were clustered, indicating wounds in a small area over a shorter period of time, and some were random. (20RT 2618-2624.)

William Welch, a police detective in charge of homicide investigations in the North Hollywood area, testified appellant was 5'7" and weighed 105 pounds when arrested. (20RT 2639-2640; Defense Ex. L.)

Defense Case

The defense presented lay and expert testimony regarding appellant's mental impairments and pervasive history of severe physical, psychological and emotional abuse appellant had suffered at his father's hands. (See, e.g., 24 RT 2971.) Among the lay witnesses, Robin Bucell, who, at 18, married Bloom, Sr., and spent three years with him, testified to regarding his controlling and abusive nature. (24RT 2964-2967, 3018.) Appellant was 10 when Bucell met him; he was small for his age and scrawny. Bloom, Sr., short, stocky and strong, was a tyrant – manipulative, controlling and abusive – and focused his tyranny on appellant, who could do nothing right in his father's eyes. (24RT 2971, 2991.) For example, when he came home with the wrong newspaper because the right one was sold out, Bloom, Sr., slapped him in the head and shoved him across the room, calling him an idiot. (24RT 2969-2970.)

Robin testified that appellant's father would beat appellant at least once a week, sometimes several times a week. Depending on how angry he was, he would shove appellant by the head or body, or send him into the bedroom, where Robin could hear him whip appellant with a belt, leaving welts on his buttocks and legs. Robin also saw Bloom, Sr., punch appellant. Yet appellant never fought back; he would cower, trying to protect himself with his arms. (24RT 2976-2977, 2997-2998.)

According to Robin, Melanie Bostic, appellant's mother treated appellant with kindness and love; she was proud of him and loved him. But she came and went, sometimes coming every other weekend, sometimes not coming for a month. She and Bloom, Sr., were openly hostile, fighting in appellant's presence. Appellant would cry and yell at them to stop. Bloom, Sr., told appellant he was living with him because his mother did not love him, whereas he did. (24RT 2971-2973, 2997-2998, 3001.) Appellant was emotionally confused – his father told him he loved him, yet beat him; his mother told him she loved him, yet abandoned him. (24RT 2974-2975, 2984.)

Robin got pregnant about seven months after she married Bloom, Sr. Bloom, Sr., never harmed their infant son Eric, but continued to abuse appellant. (24RT 2982-2984, 3001-3002.) He made Robin go back to work after Eric was born, sooner than she should have. Robin had no control over finances, nor any say in how the household was run. Bloom, Sr., controlled everything, including the money she earned. (24RT 2985-2986.) Bloom, Sr.'s mother came to live with them after Eric was born. He treated her terribly. He took her Social Security check and was mean and rude to her.

Robin testified that appellant was loving towards her, in a way, and appeared to have a loving relationship with his grandmother. He was happy when Eric was born and was attentive to him. (24RT 3008.) But it seemed to be difficult for appellant to be close to anyone. He did not play much with other children and he did not seem to be where he should be in school. He did not do things that Robin had done only a few years earlier, when she was his age. She did not think he was quite right in the way he perceived things; he did not seem normal. (24RT 2987, 3009-3013, 3015.)

Robin never called the authorities about the abuse appellant

endured, nor did she tell anyone else about it. As she put it, "We didn't do that back then. . . . Nowadays we have more protection of children." (24RT 2995.) She was also scared for herself and for Eric. (24RT 3017.) Bloom, Sr., had threatened to kill her, and she believed him. He told her he was a hitman for the Mafia, and she believed this, too. He threatened to kill her family as well. She was afraid for her life until the day Bloom, Sr., died. (24 RT 2978-2979, 2982.)

In August 1977, when Eric was about a year-and-a-half Robin decided to leave Bloom, Sr. She feared for her safety, Eric's safety and appellant's safety. One morning she packed clothes and important papers into a laundry basket and suitcase, and heaved the suitcase over the back fence. Appellant was watching television. Robin told him she was going to the laundromat, and left, with Eric. She did not tell appellant she was leaving for good. She went to a motel, and later called Bloom, Sr., and told him she had left him. At some point she went to her parents' house. Bloom, Sr., threatened to take Eric and kill her and her parents. Robin filed for divorce. Robin's divorce attorney was aware of Bloom, Sr.'s abuse of appellant. Bloom, Sr., threatened her lawyer and his family. (24RT 2988-2991, 2997.)

Bloom, Sr., was granted visitation rights with Eric, for every other weekend; but Bloom, Sr. took him every weekend. Because Robin had obtained a restraining order prohibiting Bloom, Sr., from coming to Robin's house, Eric was picked up at a designated location. Robin only saw appellant, if at all, when Bloom, Sr., was picking Eric up at that location. (24RT 2988-2992, 2997.) Whenever Eric returned from visiting Bloom, Sr., Robin checked him for bruises. (24RT 3003-3005.) She did not think it was healthy for Eric to see Bloom, Sr. beating appellant, and tried to end visitation for that reason. (24RT 3600-3007.)

When Bloom, Sr., died Eric was about six years old. (24RT 3600-3007.) At trial he testified about his weekend visits with his father, who was then living with his new wife, Josephine, and her daughter, Sandy. Eric was 5 or 6 years old at the time; Sandy was about two years older. (25RT 3049-351.) Eric spent most of his time there with appellant, who was 11 years older than Eric. If appellant was not there, Bloom, Sr., would leave Eric with a babysitter. (25RT 3079-3080.)

Sandy and Eric had a golden retriever. At one point, Bloom, Sr., said he was going to kill the dog. The next weekend, when Eric went back to visit, the dog was gone. He did not know what happened to it, but it upset him and Sandy. (25RT 3051-3052.)

Eric often saw Bloom, Sr., and Josephine fighting. Bloom, Sr., had a lot of girlfriends, even after he married Josephine, in February 1982. (25 RT 3053, 3083-3084.) If appellant was not there when Bloom, Sr., and Josephine were fighting, Sandy and Eric would run into another room. If appellant was around, he would take Eric and they would leave. They would try to take Sandy with them, but Josephine would not let them. Appellant treated Sandy well and tried to keep her out of harm's way. (25RT 3069-3071, 3074-3075.) Sometimes, when Bloom, Sr., was in a tirade, appellant would take Eric over to his friend Christine Waller's house; sometimes she would come over to be with them. Eric never saw any other friends or schoolmates of appellant's. (25RT 3071-3072, 3083-3084.)

Eric testified that he was afraid of his father, and appellant told him that he was afraid of him, too. (25RT 3055-3057.) Bloom, Sr., never beat Eric, but he routinely beat appellant – he hit appellant with a fist or open hand, kicked him, shoved him and threw things at him. Eric saw cuts, bruises, slashes and swollen black eyes on appellant as a result of beatings.

Appellant would get in between Bloom, Sr, and Sandy before Bloom, Sr., could raise a hand to her. Bloom, Sr., would swear and curse at appellant, call him "a piece of shit," a "shitbag," a loser, and tell him that he would not amount to anything. Appellant would not say anything or fight back. (25RT 3053-3059, 3061-3064, 3073-3074.)

Eric recalled a time when he and Bloom, Sr., were in the kitchen building a model car Robin had bought for Eric. Eric dropped a glass, which spilled, and Bloom, Sr., got up and started screaming and yelling at him. Appellant came in and got between them, and Bloom, Sr., and appellant got into an argument. They went into a small laundry room, swearing and yelling. Eric heard a rip and a thump. When Eric went in he saw that appellant had gone through the screen door, down the stairs, and was lying on the ground. (25RT 3058, 3082.)

On another occasion, Bloom, Sr., came home and ended up in the bathroom with appellant. Eric heard a crash and went into the bathroom. The mirror was broken and appellant's face was bloody and cut, with glass embedded in it. Josephine was taking the glass out with tweezers. Bloom, Sr., was pacing, cussing, screaming and yelling at appellant.

Eric also testified that Bloom, Sr., dunked appellant's head in the toilet, yelling and cussing, calling him a "little piece of shit" and a loser. Appellant would beg him to stop, but Bloom, Sr., did not stop. Another time, Bloom, Sr., and Josephine had been fighting all day, and appellant had come home a little late. Bloom, Sr., got angry and lifted up the whole kitchen table at one end and threw it at appellant. All the bowls, glasses and silverware on the table went flying, hitting appellant. (25RT 3061-3064.)

Eric also testified that in March 1982, about a month before the killings, appellant had a car accident. Bloom, Sr., pulled a flat tire off and

threw the rim at appellant, hitting him in the face and giving him a cut over his eye and a black eye. (25RT 3064, 3076.) Appellant told Eric he thought Bloom, Sr., was going to kill him. He said he was hurting, and that every time Bloom, Sr., did this sort of thing to him it hurt, and that he could not take much more of that kind of pain. Appellant said he did not think he would live to his next birthday. (25RT 3068-3069, 3986.)

The defense also called several expert witnesses. Dale Watson, Ph.D., a licensed clinical psychologist specializing in neuropsychology and forensic psychology, conducted a comprehensive neuropsychological assessment of appellant in 1993, consuming 11 hours over two days. (22RT 2700-2701, 2704-2708.) Appellant was cooperative, engaged in the testing process and frustrated by failures. Dr. Watson saw no signs of malingering. (22RT 2710-2711.) Appellant emphasized to Dr. Watson that he was not crazy.

Dr. Watson's neuropsychological testing revealed severe neuropsychological deficits and impairments associated with both hemispheres of appellant's brain, though primarily the right, as well as impairment in the left frontal area. Dr. Watson explained that the right side of the brain controls nonverbal communication as well as the left side of the body's sensory and motor processes. (22RT 2713-2717.) Appellant's deficits impair his ability to read social cues and process emotions. Appellant also exhibited significant impairment in problem solving, with deficits in fluid intelligence, on-the-spot solving in novel situations, interpreting emotional information and processing nonverbal communication, such as tone of voice and facial expressions. (22RT 2715-2717, 2726-2727, 2829.) He also displayed an inability to understand social context. (22RT 2728-2730.)

Testing also demonstrated that while appellant's verbal memory is

average, his visual memory deficits further suggest brain impairment in the right hemisphere. Other tests Dr. Watson conducted indicated that appellant processes visual information in a distorted way, which then impairs memory. (22RT 2720-2721.) One test demonstrated striking impairment in appellant's ability to process complex visual information. Testing on sensory and motor skills also showed impairment in the right hemisphere affecting motor abilities and the processing of complex sensory information. (22RT 2721-2724.) Another test showed that appellant's response to simple commands put him in the defective range, in the 2nd percentile, meaning appellant does not process language as effectively as 98% of the population. (22RT 2725-2726.)

Appellant's verbal IQ measured at 95, within the average range, but his performance IQ was only 67, within the mildly-retarded range. His full-scale IQ tested at 80, which by DSM-IV[8] standards placed him in the borderline range, between low average and retarded. However, the striking disparity between appellant's verbal and performance IQ is highly abnormal and indicative of brain damage or impairment. (22RT 2719-2720, 2834.)

Dr. Watson also noted oddities in appellant's behavior. He described compulsive behaviors, such as using four different kinds of soap each day, and washing each finger up and down and back and forth, and keeping meticulous track of where everything was in his cell, to the point of knowing if anything had been moved even a quarter of an inch. He recited the entire line of English kings from William the Conqueror in 1066 on. (22RT 2711-2712.)

Dr, Watson also noted developmental oddities, such as the fact that

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[8] Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (1984) p. 77.

appellant has two kidneys on one side[9] and dysmorphic facial features, which are consistent with birth defects and can be related to fetal alcohol syndrome or fetal Dilantin syndrome. (Dilantin, an anti-seizure medication which appellant's mother took while pregnant, is now known to have an impact on a fetus.) (22RT 2708-2709, 2731-2735, 2740; Defense Exhibits M, N.)

Dr. Watson conducted another comprehensive neuropsychological evaluation of appellant in 1999 and 2000, in three sessions of four-to-six hours each. The results overall were extremely consistent with the prior testing, with prominent right hemisphere impairment still evident. (22RT 2741-2743, 2751, 2769-2770.) Appellant's verbal IQ measured 112, or high average. His performance IQ, however, was 65, placing him in the extreme low range, the 1st percentile. His full scale IQ was 90. As noted, such a wide disparity between verbal and performance IQ is extremely rare, occurring in only 1 percent of the population. (22RT 2753-2754.)

In his 1999-2000 testing, appellant did very poorly with emotional processing. (22RT 2749.) Tests showed that his visual spatial processing is impaired, making it difficult for him to integrate visual information into a coherent whole (22RT 2758-2760); and that his sensorimotor abilities with his left hand are impaired, consistent with right hemisphere deficits. (22RT 2760-2761.) Appellant's responses on a Rorschach (inkblot) test (characterized as a personality test rather than a neurological test), were very concrete and perseverative; he repeated the same responses over and

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[9] Dr. Watson also noted that appellant was treated for with steroids for nephrosis of the kidneys at age 9 to 10 and as a result developed Cushing's Syndrome, which can cause cognitive impairment, not necessarily specific to the events of this case. (22RT 2746; 23RT 2880-2882.)

over, demonstrating his narrow ability to process visual information and a limited ability to generate information. (22RT 2765-2767.) Again in his 1999-2000 evaluation, Dr. Watson found no malingering, this time having specifically tested for it. (22RT 2750, 2819-2823, 2862.)

Dr. Watson also reviewed testing documented in appellant's school records. Testing administered in 1972 showed appellant had a full-scale IQ of 87, which is in the low average range, consistent with Dr. Watson's own results.[10] Appellant had been tested to see if he was a candidate for a "gifted" program; yet an 87 IQ is not close to "gifted." Dr. Watson explained that appellant's verbal abilities are deceiving, as the impairment can be almost invisible. Thus in his 1999-2000 testing appellant recited the line of French kings – an example of "crystallized knowledge" often mistaken for intelligence. (22RT 2744-2748; 23RT 2875.)

School records Dr. Watson reviewed also show that appellant had difficulty concentrating, visual spatial problems, and deficits in comprehension and judgment in social situations. In addition, a report of an abnormal EEG suggests disruption in brain function. (Dr. Watson explained that while an EEG is notorious for missing brain abnormalities approximately 50% of the time, a false positive is only remotely possible. (22RT 2744-2745; 23RT 2875, 2879.)

Dr. Watson opined that appellant's brain damage most likely was attributable to an incident in which appellant essentially drowned, at age two. He was taken to the hospital and pronounced dead-on-arrival, but then revived. Lack of oxygen to the brain (anoxia) can cause significant brain

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[10] Another IQ test from the school records showed appellant with an IQ of 110. However, because the records do not indicate what test was given, or how (individual or group administration), or by whom, its reliability could not be assessed. (22RT 2790-2793; 23RT 2902-2905.)

damage and leave permanent brain deficits. Where it occurs at an early age, it typically creates developmental and personality difficulties. Appellant's visual deficits, some impairment to the left frontal lobe and much of his right hemispheric impairment are consistent with anoxia. (22RT 2731, 2734-2379.)

Dr. Watson made a neuropsychological diagnosis of cognitive disorder not otherwise specified and/or specifically severe nonverbal neurocognitive dysfunction. Appellant's neuropsychological profile is consistent with brain damage; i.e., a generally severe level of impairment, with aspects profoundly impaired. The impairment is long term, dating back to infancy, and significantly impairs his ability to process information, particularly nonverbal information. His ability to understand, process and cope with emotional reactions is also impaired, as is his ability to react to new situations, to make decisions, to reason things out, to make judgments, and to weigh and consider options. (22RT 2767-2768.) Appellant's deficits are specific, not global. Some impairments are profound, but isolated. Not every ability was severely or profoundly impaired. (22RT 2777-2729, 2839, 2845-2847.)

Dr. Watson explained that while appellant's general ability to plan was fairly intact, he does have impairments that can cause him to be ineffectual in planning, partly because of his inability to read social cues. He also has difficulty with novelty. He is slow to process information, and emotional components further impair his ability to plan. If appellant's intended victim had abused him, physically and mentally, and dominated him in an unequal relationship, that would constitute such a problematic emotional component. If circumstances changed and a plan were abandoned, such as if the intended abuser/victim began pursuing appellant, that would significantly confound appellant's ability to plan. Long-term

planning is different from planning quickly in a stressful situation with emotional components. (23RT 2926-2930.)

The plan appellant conceived beforehand, as Dr. Watson understood it, was to kill Bloom, Sr., in his sleep. That plan unraveled and was abandoned. Appellant was trying to leave, but his father, always dominant, tracked him down. Appellant's actions in shooting his father were the product of his multiple mental impairments and the exacerbating emotional components involved. He then reacted to Josephine's screaming and the emotional tension and disruption in the house, and completed the killings. (23RT 2957-2960.)

In a report prepared in 2000, Dr. Watson opined, upon consideration of his testing as well as of evidence of the abuse and trauma appellant had suffered, that appellant "was because of mental defect unable to comprehend his duty to govern his conduct in accordance with the duty imposed by law." Dr. Watson opined that appellant had a dissociative experience lasting from the time appellant's father was shot to the time the killings had ended; he was uncertain whether it extended to the earlier period when appellant and his father were going up and down the street before the shooting. (22RT 2848; 23RT 2838-2939, 2951-2954.)

In his report Dr. Watson also stated that appellant appeared to meet the diagnostic criteria for Asperger's Syndrome, a developmental disorder probably related to autism, in which a person's ability to read social cues or empathize is impaired. Dr. Watson sent all his data and reports, including the raw data from his testing, to Dr. Brooks, the prosecution's neuropsychological adviser, who was in court during Dr. Watson's testimony. (22RT 2704; 23 RT 2898.) Dr. Brooks never testified at any point in the proceedings.

Mark J. Mills, J.D., M. D., also testified for the defense at

appellant's retrial. As he explained, he was originally appointed by United States District Court Judge Spencer Letts in 1993, in connection with appellant's federal court habeas corpus proceedings, to assist the court with the difficult psychological and psychiatric issues involved in appellant's case. At that time, based on his original review of the materials he was given and on a meeting with the psychiatrists retained by the parties, but without interviewing appellant, Dr. Mills concluded: (1) that appellant had been substantially physically abused by his father over a long period of time; (2) that appellant's history revealed a number of risk factors for neurologic or neuropsychological injury, including significant intrauterine fetal exposure to Dilantin, treatment of nephrotic syndrome with prednisone and Cytoxan, a drowning incident at approximately age 2, and a car accident in 1974; (3) that in high school, appellant was at times wild and impulsive and had few or no friends; (4) that appellant appeared to have some personality disorder, believed by a number of psychiatrists who had evaluated him to be a borderline personality disorder; (5) that most of the psychiatrists involved agreed he had no ongoing psychosis; and (6) that giving appellant's own rendition a measure of credence, notwithstanding he had given three or four versions, a competent psychiatrist could reach a diagnosis of dissociative disorder.

In 1993 Dr. Mills also testified that he believed appellant frequently lied, and that he felt it had been too long since the homicides for a current psychiatric evaluation to shed much light on appellant's mental state at the time. (26RT 3118, 3124, 3134-3137.) Based on his discussions with mental health experts retained by the parties, it was Dr. Mills' opinion in 1993 that appellant had no history of a protracted psychotic diagnosis, was not schizophrenic, not grossly organically impaired, not bipolar, not chronically delusional, with no paranoid disorder. Dr. Mills also opined

that appellant had moderate organic impairment and some sustained, enduring, right hemisphere damage that could make appellant both more impulsive and less deliberative. (26RT 3197-3198, 3237-3240.)

Dr. Mills explained that dissociation is a state of partial or decreased awareness, in which a person is capable of purposeful, coordinated activity. (26RT 3145-3147.) Dissociation is a non-volitional response, at times adaptive, to painful, stressful, overwhelming, emotionally charged events, where a healthier response, e.g., leaving, is unavailable. (26RT 3149.) A person in a dissociative state does not reason, but simply reacts, without exercising judgment or weighing and considering options. (26RT 3174.) Dissociation is often a response to significant abuse. People who have been significantly abused by loved ones over a long period have a much greater need to dissociate, and the dissociation is more apt to be much more intense. (26RT 3147, 3151.) In discussing the abuse he suffered, appellant said he was not really abused. He admitted he was hit a lot, with fists, belts and switches, and was hurt sometimes, but he thought he deserved it. (26 RT 3152.)

Dr. Mills also reported in 1993 that at age 15 to 16 appellant had an imaginary friend named Tony, with whom he would talk. At that age, this is abnormal and indicative of dissociation. (26RT 3155.) Eric Bloom also testified that appellant talked to himself, which is consistent with a dissociative state. (26RT 3155-3157.)

In 1999, in preparation to testify at appellant's retrial, Dr. Mills was provided with substantial additional material and information regarding appellant, more than he had in 1993. Notably, he was able to interview appellant, which he had not done in 1993. (26RT 3137-3138.) Dr. Mills also reviewed Dr. Watson's neuropsychological evaluation. This and other new information confirmed that appellant had suffered severe physical and

emotional abuse and led Dr. Mills to reaffirm his diagnosis of dissociative disorder. (26RT 3143-3144, 3205-3207, 3209-3211, 3226, 3233-3236, 3260) Appellant was particularly vulnerable to dissociation because of the very significant, even severe, areas of dysfunction of his brain, revealed by Dr. Watson's testing. Because novel or emotionally charged stimuli are particularly difficult for appellant, dealing with abuse would also be particularly difficult. (26RT 3148.)

Dr. Mills took everything appellant told him with considerable circumspection. The version of events that appellant told Dr. Mills, and which Dr. Philip Wolfson, who testified at the sanity phase, ultimately concluded was true, supported the diagnosis that appellant was in a dissociative state sometime around the killing of Bloom, Sr., and during the killing of Josephine and Sandra. Appellant admitted that he must have killed Josephine and Sandra, but had no clear recollection of doing so. Dr. Mills acknowledged he was suspicious of statements of non-recollection, but in this case the long history of abuse, appellant's difficulty processing information, witness testimony of appellant's staring off and looking odd, and family testimony regarding imaginary friends, among other things, indicate a dissociative-like event. (26RT 3158-3160.)

Dr. Mills opined that appellant dissociated, at the earliest, when he found his father awake, as that completely disrupted his expectations. At the latest, he dissociated after he had fired two shots into his father's head, prior to killing Josephine and Sandra. (26RT 3172-3173.) Some of the witnesses who saw appellant at the time of the killings gave information that further suggested dissociation. David Hughes described appellant as standing in a windows, with a blank stare, looking confused. Moises Gameros saw appellant go in and out the front door to the porch in an illuminated area, going back and forth in seemingly purposeless activity.

This is consistent with dissociation. (26RT 3153-3154.)

Dr. Mills also ultimately concluded, based on the additional information he obtained since testifying in 1993, that appellant suffers from Asperger's syndrome, a rare subset of autism that Dr. Mills was not aware of in 1993. (26RT 3139, 3143-3144.) As Dr. Mills explained, Asperger's disorder is a developmental disorder, characterized by the failure to develop certain key social skills, such as empathy, how to make interpersonal connections and certain motor skills. while linguistic skills develop normally or even ahead of normal. Because they are not intellectually impaired, persons with Asperger's syndrome can hold down relatively simple jobs and can be self-supporting, but are isolated and do not form warm human bonds. (26RT 3140-3142, 3185-3187, 3228.)

Thus, while appellant is not incapable of engagement, his social relations are clearly limited and disturbed. According to Dr. Mills, he substantially lacks the ability to empathize, and lacks social and emotional reciprocity. (26RT 3223; 27RT 3330-3332, 3335, 3340, 3352, 3392-3393.) He may be able, intellectually, to appreciate the effect of his actions, but he can not truly understand it. (27RT 3333-3334, 3352-3356.)

Dr. Mills described appellant as verbally adept, compliant and engaging. (27RT 3333, 3370.) He can briefly seem quite normal, but on closer look exhibits peculiarity, bizarreness, inappropriateness and an ongoing mental disorder. (27RT 3361-3363.) Appellant's ability to make eye contact is remarkably poor, inadequate and unusual. (27RT 3338-3339.) He moves in odd ways and twitches. Other doctors had commented on appellant's oddness and reported appellant engaging in bizarre grimacing. (27RT 3360-3361, 3364, 3366, 3398.) Declarations by people who knew appellant in high school described his unusual behavior, including odd movements, dancing in odd places and singing songs

inappropriately. (26RT 3161, 3273-3277, 3368-3369.) According to Dr. Mills, an inmate in jail with appellant soon after appellant's arrest described appellant's appearance as bizarre; he did not seem to have control over his arms, he paced up and down, he babbled to other inmates, and was "so incoherent I am not sure that he could've tied his own shoes, much less plan[ned] a crime." (27RT 3408.)

As Dr. Mills testified, the DSM-IV sets out six criteria for a diagnosis of Asperger's Disorder. Of four possible categories under Criterion A – qualitative impairment in social interaction – Dr. Mills found that two applied, that another probably applied, and that one was questionable. Only two categories were required to meet that criterion. (27 RT 3338-3340, 3343.)

On Criterion B – restricted, repetitive patterns of behavior, interests, and activities – Dr. Mills found that two of the four categories applied to appellant, although only one is required for the diagnosis. (27RT 3345.) As a basis for a finding that criterion B(1) was met, Dr. Mills described appellant's very unusual and detailed desire to memorize historical facts, such as the Kings and Queens of England, or the Electoral College votes for every presidential election, as well as his preferential reading for statistical abstracts, "probably the dullest reading on earth." Dr. Mills described appellant's focus on those somewhat arcane facts or series of facts devoid of any kind of other meaning as pathologic. (27RT 3346-3347.)

Dr. Mills also found the following criteria applicable: Criterion C – clinically significant impairment in social, occupational or other important areas of functioning; Criterion D – no clinically significant general delay in language acquisition; Criterion E – no clinically significant delay in cognitive behavior or in the development of age-appropriate self-help skills,

adaptive behavior, other than social interaction and curiosity about the environment in childhood; and Criterion F – no pervasive developmental disorder or schizophrenia. (27RT 3366-3367.) Because Asperger's Disorder is a developmental condition which is lifelong, because appellant had it in 1993, he had it in 1982 and before. It does not wax and wane, or fluctuate like other psychiatric conditions. (26RT 3169.)

Dr. Mills testified that Dr. Watson's conclusions from 1993 had been substantially strengthened and augmented by the 1999-2000 testing. The test results are consistent and reflective of brain damage, show a very dramatic discrepancy between verbal and performance intelligence, and reveal the kind of deficits Dr. Watson identified. (26RT 3188-3189, 3199.) Given that consistency of results Dr. Mills did not think there was any possibility that appellant had malingered. (26RT 3190, 3194, 3199.) Dr. Mills also noted that appellant had been taking 125-150 mg of Haldol, an anti-psychotic medication, intramuscularly every three weeks, equivalent to 50 milligrams per day. The average person would sleep for a day on a dose of five milligrams. That appellant was taking 10 times that dose indicated that he has an underlying psychotic illness even if not manifesting gross symptoms of psychosis. It is another indicator of appellant's disordered brain. (26RT 3162-3163.)

Dr. Mills also acknowledged that in November 1981, before the homicides, psychiatrist Richard Naham had evaluated appellant, diagnosed him with borderline personality disorder, opined he was potentially dangerous, and recommended he be institutionalized. In May 1984, Dr. Naham evaluated appellant again, this time diagnosing antisocial personality disorder. As Dr. Mills, noted, however, in the latter evaluation Dr. Naham did not realize he had evaluated appellant previously. Dr. Mills presumed that the November 1981 evaluation was more thorough and

comprehensive, with evidence of significant psychopathology. Ordinarily, borderline personality disorder endures, so if it were present in 1981, it would be there in 1984. (26RT 3164, 3280-3281.)

Dr. Mills also acknowledged that in 1983, after the homicides, Dr. Kling, who testified at appellant's first trial, had opined that appellant was competent, and diagnosed antisocial personality disorder. However, in 1993, when he had reviewed additional information, Dr. Kling concluded that his original evaluation was incorrect. Dr. Kling ultimately found appellant had a schizotypal personality disorder, and was significantly paranoid. Someone with a schizotypal personality disorder has difficulty appreciating certain aspects of reality; the border between fantasy and reality is blurred. Dr. Kling concluded that appellant was prone under stress to psychotic breaks, and concluded appellant had been transiently psychotic and dissociated at least at the time of the last two killings. (26RT 3167, 3170-3171, 3282-3286.)

Dr. Mills also refuted the opinion given in 1993 by Dr. John Stalberg, a psychiatrist retained by the state. Dr. Stalberg had concluded appellant had antisocial personality disorder. However, Dr. Mills explained that this opinion was contrary to those of the other psychiatrists who had evaluated appellant, and observed that such a diagnosis requires repeated offenses at or before age 16, which was not the case for appellant. Dr. Stalberg also had opined that appellant's partial recollection of the events meant he did not dissociate. Dr. Mills explained that that is not a correct interpretation of dissociative disorder. Dr. Stalberg also thought appellant had faked the 1993 neuropsychological tests. Dr. Mills' explained that those tests are difficult to fake, because validity scales are built-in. Dr. Mills also explained that Dr. Watson's second administration of testing in 1999-2000 confirmed appellant's intellectual disability, i.e., the wide

discrepancy between the average verbal and much lower performance scales. Further, Dr. Watson tested for malingering. Dr. Mills concluded that Dr. Stalberg had overreached beyond his own area of expertise, and that his conclusions were wrong. (26RT 3167-3168, 3188-3189.)

Dr. William Vicary, a psychiatrist, also testified for the defense at the guilt phase. He explained that he was originally appointed by the trial court in May 1984 to assess whether appellant was competent for a sentencing hearing.[11] He interviewed appellant, but otherwise had inadequate information about him. (28RT 3434-3435, 3441-3443, 3455, 3462.) During the interview, appellant was hyperactive, somewhat agitated, and spoke rapidly; but he was cooperative and answered all of the questions posed, and appeared to be articulate and of average intelligence. (28RT 3442, 3460-3461.) Appellant was generally in touch with reality, though not fully. Dr. Vicary observed paranoia, which generally is indicative of mental illness. (28RT 3443.) Appellant told Dr. Vicary a version of the homicides in which Bloom, Sr., used the rifle to shoot Josephine, after which appellant shot Bloom, Sr. In this scenario appellant did not know what happened to Sandy. (28RT 3461-3462.)

In a report to the trial court in 1984, and later as a witness called by the prosecution, Dr. Vicary opined that appellant understood the nature and purpose of the proceeding, and that, although there were problems, he could rationally participate in the sentencing proceeding. Dr. Vicary had less confidence in the latter prong of his opinion than in the former. Appellant had exhibited signs of mental disorder or disease and paranoia. Appellant was agitated, and Dr. Vicary thought his self-control was weak, though not to the degree that it would make appellant incompetent. Dr. Vicary testified

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[11] This jury was not told the nature of this proceeding, which was described simply as a low-complexity proceeding. (28RT 3436-3441.)

at that time that his opinion was limited by how little information he had about appellant and his case. (28RT 3446, 3470, 3493-3494,3519-3524, 3528.)

In 1993 Dr. Vicary reviewed additional records, including appellant's school records, medical records, military records, additional psychiatric and neuropsychological reports and evaluations, family medical, marriage and criminal records, and declarations from family, neighbors, and acquaintances, including witnesses to Bloom, Sr.'s abuse of appellant. He also interviewed appellant again. (28RT 3446, 3477-3480, 3484, 3509-3515.) Based on this additional information, Dr. Vicary changed his assessment of appellant's mental and neurological condition, now concluding that appellant had serious mental illnesses and brain dysfunction, and had not been mentally competent for most of the prior proceedings. (28RT 3447-3449.) Appellant clearly was seriously mentally ill, whether diagnosed as schizophrenic or as having a developmental disability. (28RT 3451-3453.)

Dr. Vicary also opined, based on the batteries of psychological tests appellant had been given, that appellant has significant brain damage, and he is more likely than a normal person to have a breakdown under stress. As a result, he could also have a psychotic break, begin to dissociate, lose his ability to cope and exercise judgment, have emotional eruptions and have his thinking become more and more illogical. (28RT 3449-3450, 3483-3485, 3491-3492, 3494-3495, 3499, 3516-3519.)

Dr. Vicary testified that appellant slipped under his radar screen in the 1984 evaluation, in part for want of documentation and in part because of the low threshold of the competence question he was assessing. Dr. Vicary acknowledged he was also fooled by appellant's verbal abilities. Because appellant was so articulate and verbal, it did not occur to him that

he could have brain damage. In 1984 Dr. Vicary was also unaware of the disparity between appellant's verbal and performance IQ scores. (28RT 3519-3524.)

In the 1984 interview with Dr. Vicary, appellant had expressed a strong hostility against anti-Semites, gentiles and Nazis. At the time, Dr. Vicary opined that his thinking in that regard did not appear to be delusional. (28RT 3461.) In 1993, after reviewing the additional materials and interviewing appellant again, Dr. Vicary changed that opinion, concluding that those hatreds were part of appellant's paranoia and delusion. (28RT 3461.)

Sanity Phase

Appellant was not present during the sanity phase.

Defense Case

Philip E. Wolfson, M.D., a psychiatrist whose primary practice is in treating patients, examined appellant for approximately 20 hours over a 2½ year period from 1990 to 1992. Based on the voluminous materials provided to him, what appellant told him, the myriad evaluations of appellant and his own training, he concluded that appellant suffered from a long-term mental illness, including at the time of the killings. He further concluded that at the time he shot each of the victims, appellant lacked substantial capacity to conform his conduct to the requirements of the law. (35RT 4265-4268, 4304-4308, 4315.)

Dr. Wolfson testified that in working with appellant he first had to pass the "Jew test" – appellant would not talk to a psychiatrist who was not Jewish. Dr. Wolfson had to show appellant he knew what it meant to be a Jew. The place where the examinations took place had to be secure, so that appellant could feel safe and not be observed. Appellant was quite paranoid. He often displayed an exalted sense of his own importance.

(35RT 4309-4310, 4344.) Dr. Wolfson had to earn appellant's trust and break down his defenses.

Appellant often lied to Dr. Wolfson, giving various accounts of what had happened, until Dr. Wolfson broke through to the version closest to the truth. (35RT 4308, 4343, 4403.) Dr. Wolfson challenged parts of appellant's stories, looking for corroboration. Appellant seemed to be trying to fit stories together to explain facts that were inexplicable. Appellant's stories were not believable, and appellant knew it, and knew Dr. Wolfson knew it. Dr. Wolfson ultimately wore appellant down. (35RT 4310-4311, 4397-4398, 4433-4434, 4440.)

Dr. Wolfson diagnosed appellant as having a mixed personality disorder with borderline and dependent personality disorder features, both of which have onset in early adulthood. (35RT 4269, 4286.) Dr. Wolfson explained that borderline personality disorder is a serious mental illness that involves a pervasive pattern of instability of interpersonal relationships, self-image and affects (moods or emotions), and marked impulsivity. (35RT 4269-4270, 4272.) "Borderline" originally described people who could go suddenly between psychosis and neurotic or ordinary behavior, moving between terrible states of mind in which they were really incompetent, out of their minds doing impulsive irrational things. (35RT 4284-4286.) In order to have a diagnosis of borderline personality disorder, at least five of the nine criteria listed in DSM-IV must be met, and appellant met seven of them (35RT 4270, 4281):

First: "Frantic efforts to avoid real or imagined abandonment." Dr. Wolfson noted that appellant's history was replete with abandonment, starting in early childhood: his mother would leave him and disappear for eight months to a year at a time; his father was put in jail. At the time of the killings, Bloom, Sr., was planning to put Josephine's house up for sale and

move. Appellant feared he would be left behind; at the same time, he hated his father. (35RT 4272-4273.)

Second: "Pattern of unstable intense interpersonal relationships." Dr. Wolfson described appellant as having poorly developed relationships with many people. He had great difficulty getting close to people on any sustained basis, though he tried. Appellant's relationships were often unpredictable, idealized and mostly imagined. For example, he idealized Norma White as the mother he wished he could have had and believed at times he could become part of her family, but he was ultimately an outsider, and never had a permanent place in that home. (35RT 4293-4295.) He also portrayed his relationship with Christine Waller[12] as intimate, though he had not really been her boyfriend. (35RT 4273-4274.) Appellant's relationship with his parents was chaotic and unpredictable. His mother was moody and explosive; she once held a shotgun to his head for 45 minutes. She would also disappear without him ever knowing when she might return. (35RT 4274.) Dr. Wolfson interviewed her in 1992 or 1993 and diagnosed her as having temporal lobe personality disorder, as well as mixed personality disorder with schizotypal elements, borderline features and histrionic traits. She has a terrible epilepsy disorder, both grand mal seizures and temporal lobe type of epilepsy. Her various diagnoses led her to irascible or labile behavior, with wild emotional displays and very wild statements. (35RT 4357-4359.)

Third: "Identity disturbance, markedly and persistently unstable self-image or sense of self." Throughout his life appellant's view of himself shifted. At one point he was thought by his mother to be a gifted student, only to have testing reveal his IQ was 87. He had an idealized self-

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[12] Dr. Wolfson described Waller as "a very troubled, strange human being." (35RT 4415.)

image far too grand to meet the realities of who he really is. At other times he had a base image of himself as unworthy and felt he could do nothing right. He was battered emotionally and physically for his smallest failing. (35RT 4275.)

Fourth: "Impulsivity in at least two areas potentially self damaging." Dr. Wolfson noted that two such acts occurred the year before the homicides. On one occasion appellant attempted a holdup at a church, using a BB gun. He tried to take a woman's purse, but when she would not let go of it he ran off and was caught and arrested. Another example was his strange behavior in the Navy during the same time period. People described him as unpredictable, weird, laughing in strange places, behaving inappropriately. (35RT 4270-4272, 4276-4279.)

Fifth: "Affective instability due to a marked reactivity of mood." Dr. Wolfson testified that appellant has, and prior to the homicides had, fluctuating moods, from highs to lows, from anger to hurt, from depression to almost mania. His internal emotional environment was constantly in flux. He was either clowning or in great despair. In his high school yearbook there were comments about how weird and strange he was. (35 RT 4270-4272, 4280, 4424.)

Sixth: "Chronic feelings of emptiness." Dr. Wolfson explained that because of the abandonment, traumatic punishment and his mother's instability, appellant has little sense of who he is. He suffers from a great sense of despair, particularly during the year prior to the killings. (35RT 4280.)

Seventh: "Transient stress-related paranoid ideation or severe dissociative symptoms." Dr. Wolfson testified that appellant clearly had some moments in the year prior to the homicides when he seemed absolutely psychotic. He was in extreme dissociation several times. As late

as age 17 or 18 he had an imaginary friend named Tony as a bad alter ego, which fits criteria for dissociative states. In psychiatric terms, Dr. Wolfson felt there was a split personality, although not as flagrant as with schizophrenia. In borderline personality disorder the hallmark is splitting into opposites, good and evil. Appellant presented as a black-white, concrete-thinking person. (35RT 4281-4282.)

Dr. Wolfson also explained that another feature of appellant's mixed personality disorder is dependent personality disorder, which, though not as developed a part of appellant's character as borderline personality disorder, is nonetheless extremely important. It is defined as a pervasive and excessive need to be taken care of that leads to submissive and clinging behavior and fears of separation beginning by early adulthood and present in a variety of contexts. It speaks to his relationship with both his father and his mother, though particularly his father, with whom he had a terrible relationship. His father dominated and controlled appellant, took money from him, abused him physically, and constantly berated him; yet appellant could never leave his father, and worried about being abandoned. (35RT 4282-4284.) Dr. Wolfson felt that the physical abuse of appellant by Bloom, Sr. was intermittent, not constant. The more constant verbal, emotional abuse is much more the issue in this case. (35RT 4356-4357.) Bloom, Sr. also made appellant take part in his cons and scams, which confused appellant morally. Appellant had a high moral sense of things, but under his father's influence could be a con himself. (35RT 4299.)

Dr. Wolfson noted that appellant moved in with his mother in 1979 for an extremely difficult two-year period. There was terrible instability, emotional upheaval and difficulty in this period of time. Appellant was intermittently out of touch with reality. (35RT 4286-4288, 4373-4375, 4417.) In February 1981, Bloom, Sr., moved in with Melanie as well, and

the fighting between the two of them escalated. Melanie told of Bloom, Sr., trying to strangle her with a telephone cord. Bloom, Sr., was eventually kicked out, headed for jail. (35RT 4286, 4425.)

Dr. Wolfson explained that appellant never developed an independent or autonomous sense of self. Rather than begin to emerge successfully at age 18 with realistic plans and goals supported by parents who wanted to see his development as an independent human being, appellant had a series of failures instead. He did not get oriented towards college, although that had been his hope. After high school he tried to follow the family career and enlisted in the Navy, but the experience turned out to be enormously stressful and ultimately unsuccessful. He was not ready to deal with the authority and rules and regulations of the Navy, in part due to his mental illness and in part due to his father's domineering authoritarianism. He did not brush his teeth or perform other hygiene, which is compulsory in the Navy. He laughed and giggled while standing detention with his squad. He had problems with authority figures, who were just like his father, and he lacked the social skills necessary to conform to being in the Navy. After 29 days he was found to be completely unfit and was discharged. (35RT 4409-4412.)

After his discharge from the Navy appellant had nowhere to turn, no place to go, no career path, no life path. (35RT 4281-4284.) His mental condition began to deteriorate. He moved back in with his mother which increased his stress level. Bloom, Sr., was still in jail. Appellant stayed with Melanie until his arrest for attempting to steal a woman's purse at church, as described above. (35RT 4287-4290.)

Dr. Wolfson noted that appellant was seen by Dr. Richard Naham as a result of this incident, five months before the homicides. Dr. Naham found appellant to be paranoid, on the verge of an explosion, and

recommended hospitalization: "there is no doubt in my mind without suitable inpatient psychiatric treatment he will continue to present an inordinate danger to others." Dr. Naham diagnosed borderline personality disorder, as evidenced by poor impulse control, explosiveness, inability to tolerate frustration, emotional immaturity, manipulativeness, with sociopathic trends. Appellant was just 18 at the time. (35RT 4279-4280, 4290-4293.)[13] Dr. Naham's findings regarding appellant's deteriorating mental condition and his recommendation that he be hospitalized were ignored. Appellant was never treated psychiatrically, much less hospitalized, as Dr. Naham had recommended. (35RT 4279-4280, 4293.) Appellant had been losing connection to reality for some time before the homicide, as evidenced by his shooting up Melanie's house with his BB gun, his attempt to steal the purse, and Dr. Naham's evaluation of appellant. Dr. Wolfson believed that appellant was psychotic at this point. (35RT 4306-4307, 4366, 4408, 4424-4425.)

Appellant then moved back in with Bloom, Sr., who had taken up with Josephine and was living in her house. His relationship with his father became even more intolerable. Bloom, Sr., was invasive and intrusive, hustling appellant and making him take part in his scams. Appellant knew Bloom, Sr., was conning Josephine, trying to get her to sign over half of the house to him. Appellant tried to resist his father's control, taking classes on stereo installation, but Bloom, Sr., took appellant's money. Then the house was put up for sale, and appellant feared his father might leave and not take

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[13] Dr. Naham saw appellant again after the homicides, but did not recognize him. According to Dr. Wolfson, by then appellant was a different person in terms of behavior, and the scope of the second evaluation was more minimal than the first. Dr. Naham's second report stated appellant had only antisocial personality disorder, possibly with paranoid features. Dr. Wolfson found this conclusion was supported by little data or research. (35RT 4370-4372.)

him with him. Appellant had no resources of his own, no finances to afford an apartment, no basis for feeling that he could succeed on his own. Thus, appellant was of two minds about being left behind. He wanted his father to keep providing the bare amount he did, a roof over his head and a constant presence, but he also felt completely undermined in his ability to develop independent possibilities for himself, to make his own way in his life. (35RT 4295-4296.)

Appellant was confused, and did not know what to do with himself. While confusion is a common state of mind for normal 18-year-olds, appellant was not normal. (35RT 4413.) Appellant spent more and more time with Christine Waller's family. He idealized Norma White as the mother he wished he could have had, but he was an outsider, and never had a permanent place in that home. (35RT 4293-4295.) Appellant was putting on an act for her, hoping and treating her as the mother he would have liked. His attempt to insinuate himself into Norma's family was irrational, but not insane. (35RT 4413-4414, 4418.)

Dr. Wolfson testified that appellant was in an agitated and confused state throughout this time, and was getting no psychiatric care. He could not envision any way out of the situation he was in, which exacerbated his underlying agitation, confusion, insecurity and despair, and increased his impulsivity and irrationality. (35RT 4296-4298.) He hated his father for abusing him, for abusing others, for taking advantage of women, for his scams, and for making appellant take part in them. (35RT 4298-4299.) However, his defiance of his father was minimal, and only verbal. He was much smaller than his father; half his weight. In his mind, appellant never got past the idea of simply wishing his father was dead, until his homicidal ideation was catalyzed when he saw the rifle at his friend Waller's house. (35RT 4300-4301.)

Dr. Wolfson explained that the insanity of appellant's actions began with the very idea of killing his father. He had had hateful and homicidal thoughts towards his father for many years. That appellant saw this as the only way out, the only option, at age 18, instead of leaving and moving in an independent direction, is insane. Dr. Wolfson believed that appellant knew killing his father was a crime, but on a personal level did not view shooting his father as unjust. He believed it was a just act. He saw no other escape. That framework was a product of appellant's mental illness. (35 RT 4298-4299, 4305-4306, 4340-4342, 4369.)

Appellant first started constructing an alibi with the story about the intruders who wanted to break into Waller's house; that he needed the rifle to protect her family and the house. (35RT 4301-4302.) But appellant's planning was extremely poor and out of touch with reality,[14] which is the definition of insanity. (35RT 4376-4379.)

Dr. Wolfson opined that appellant went from the Waller/White house to the Sancola Avenue house the night of the homicides with the intent to kill Bloom, Sr., but with no intent to harm Josephine or Sandra. At that time, appellant had the capacity to appreciate the criminality of his conduct with regard to his father, as evidenced by the fact that he did not kill him when he got there, because Josephine was in bed with him and he did not want to harm her. (35RT 4303-4304.) However, at the time appellant actually shot his father, he lacked a substantial capacity to conform his conduct to the requirements of the law. He was in the midst of the argument with his father and refused to surrender the gun to his father, who was chasing him. Appellant probably could have gotten away, but

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[14] For example, appellant did not take into account the effect the noise that shooting a rifle in the middle of the night in a small neighborhood would have. (35RT 436-4379.)

inexplicably, he fired. (35RT 4304-4305, 4435.)

Appellant's state of mind in the killing of Josephine and Sandra was different than that in killing Bloom, Sr. According to Dr. Wolfson, appellant was at first in a state of "crazy readiness" to kill his father; then decided not to do it, that he could not do it; then did it; then stood over his father, and shot him again. Dr. Wolfson described appellant as at that point in a totally altered state, having finished his "triumph" over his father. Appellant then heard screaming and responded by shooting the first screamer and then the second screamer – Josephine and Sandra. No mental process was involved; the speed and immediacy of the response, appellant's craziness, the absence of motive, all showed an animal base response that made no sense. Appellant had gone into a psychotic or dissociated state. (35RT 4307-4308, 4338-4339, 4436.)

Thus, with regard to the shooting of Josephine and Sandra, Dr. Wolfson opined that appellant was not able to conform his conduct to the requirements of law. Appellant was in an altered state of mind in which he was not thinking as a normal person, but as a substantially mentally disordered person who could not think through his actions. When appellant killed his father, he underwent a transformation. He became a different human being. "It's a completely crazy moment." He had killed his father and there was no going back. He was completely confused, dazed, and in another realm. (35RT 4312, 4428.)

In his last interview with Dr. Wolfson, appellant recanted previous stories and described the way he killed Josephine and Sandra. When he finally told Dr. Wolfson what happened in as much detail as he did, appellant was a totally shaken, despairing, self-loathing human being. This version conformed to the bulk of the materials and evidence regarding the commission of the crimes. Appellant was never able to reconcile the

physical act of shooting Josephine and Sandra with what was going on in his mind. He was never able to explain what he had done or why he shot Josephine and Sandra. He showed Dr. Wolfson how he stabbed Sandra. He demonstrated it in a "sort of gentle and loving way." Dr. Wolfson found this "horrible," and did not think that it conformed to the facts, but that it conformed to appellant's "movie of what happened" and probably his sense of trying to justify what he had done. Appellant had a profound emotional reaction and breakdown, and exhibited remorse, particularly over his rendition of the killing of Sandra. He cried profusely and had difficulty talking about it, with a different kind of emotional affect than he had previously had. He did not try to justify those killings in any way. (35RT 4312, 4428, 4397-4398, 4433-4434, 4440.)

Dr. Wolfson testified that in 1993 he attended a meeting about appellant with other psychiatrists, including Drs. Mills, Kling and Stalberg, in connection with proceedings before Judge Letts. (35RT 4312, 4399.) Dr. Stalberg had written a report concluding that appellant suffered a serious personality disorder but was in touch with reality. Dr. Stalberg considered the facts of the homicides as consistent with goal-directed rational behavior. In his report, he concluded that appellant had no psychiatric defense available, but that some mitigation arose from the significant abuse by Bloom, Sr. (35RT 4399-4401.) However, Dr. Stalberg had never interviewed appellant, and Dr. Wolfson disagreed with his conclusions. (35RT 4402.)

Dr. Kling had examined appellant about 16 months after the homicides. At that time he diagnosed appellant with antisocial personality disorder. However, Dr. Wolfson explained that when Dr. Kling made that diagnosis, he had inaccurate information about what had happened. He also had insufficient time, financial support and material to properly evaluate

appellant. After reviewing additional information, Dr. Kling changed his diagnosis to schizotypal personality disorder. He found it not unlikely that appellant had been unable to control his behavior, unable to know what he was doing in a rational manner, in a state of extreme stress, mental disorganization and anxiety. (35RT 4312-4315, 4407.)

At the 1993 meeting, all of the mental health professionals agreed that appellant was not psychotic before the homicides, and that he was dissociated, or out of touch with reality, for the second and third homicides. They had difficulty reaching agreement about the exact moment he dissociated. (35RT 4399.) They also agreed that appellant had a personality disorder, mixed in nature, borderline or schizotypal. (35RT 4434.)[15]

Regarding the mental health testimony from the guilt phase, Dr. Wolfson stated that he did not agree with Dr. Watson's testimony that appellant is severely mentally impaired. (35RT 4430.) Nor did he agree with Dr. Mills's diagnosis of Asperger's Disorder. (35RT 4399.) He was not asked for, nor did he give any basis for those disagreements.

Prosecution Case

The prosecution presented no evidence at the sanity phase.

Penalty Phase

Appellant represented himself at the penalty phase.

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[15] Dr. Wolfson had also reviewed reports by Drs. Kivowitz and Weiland. Dr. Kivowitz had concluded that appellant had a paranoid personality disorder, and that although he should have psychiatric treatment, he was not insane when he killed Bloom, Sr. Dr. Wolfson disagreed. (35RT 4403-4406.) However, he was not aware that Dr. Kivowitz had subsequently changed his opinion about appellant's mental state at the time of the killings. (35RT 4430; see 2CT 327-338.)

Dr. Weiland diagnosed appellant with paranoid disorder and antisocial personality disorder, or antisocial personality disorder with paranoid features. Dr. Wolfson partially agreed. (35RT 4429.)

Prosecution Case

The prosecution presented evidence of appellant's involvement in several prior incidents. First, on a day in November 1981, at about 11:00 a.m., appellant entered the Panorama Presbyterian Church in Panorama City, where a group was conducting a Bible study. (41RT 4849-4850.) He asked what they were doing, and asked for a Bible. Frances Summe, then age 64, gave him one. He then reached into his coat and pulled out a gun, pointing it at Summe's head. He grabbed the strap of her purse, saying, "give me your purse." Summe said, "no." There was a short tug-of-war, which Summe won. (41RT 4851-4853, 4861, 4881.) Another woman jumped up, knocking her chair to the floor and frightening appellant, who turned and left. Summe reported the incident to the police about an hour later. (41RT 4854, 4866.) During the incident, appellant never threatened Summe verbally, nor did he strike her physically. (41RT 4863-4864, 4882.)

Second, on May 3, 1984, Deputy Bruce Nance was monitoring inmates using the jail's law library at Men's Central Jail in Los Angeles. Curtis Wright and appellant, both inmates, were in the library. Nance heard a scuffle, looked up and saw appellant running from Wright, who was chasing him. There was blood squirting from the side of Wright's neck. Nance had seen a sharpened, five- to six-inch-long butter knife in appellant's hand; it ended up on the ground. Nance saw no injuries to appellant, nor did he ever see a weapon in Wright's possession. Wright was taken for emergency medical treatment. (41RT 4907-4914, 4916, 4935.)

Charles Simpson, Josephine's uncle, described a third incident, which occurred in February 1982, at Josephine and Bloom, Sr.'s wedding. (41RT 4975-4976.) Appellant told him he did not want his father to marry Josephine because he did not want Josephine and Sandra in the way. He was worried about whether he would be allowed to stay at their house.

Simpson told him he would be able to stay there and that maybe he would change his mind about the marriage. Appellant said, "If my dad lets Lulu [Josephine] or Sandy get in my way, I will kill Lulu and Sandy." Appellant also asked if he could call Simpson "Uncle Charles," and said, "Uncle Charles, if you get in the way, I will kill you." (41RT 4987-5000.) Simpson told Bloom, Sr., and Josephine about what appellant had said. Bloom, Sr., talked to appellant, who then changed his attitude and appeared to be at ease. (41RT 5005-5006.)

Simpson also testified that at the time of Josephine's death, both her parents were alive. Josephine and Sandra were close to Josephine's parents and to all her brothers, sisters, aunts and uncles. (41RT 4977-4978, 4982.) After learning of the shootings, Simpson went to the hospital where Sandra lay in a coma. She died at about nine o'clock that night. Her death was devastating. Simpson was in shock. He did not believe appellant could do something like this to his family. Sandra's father was very distraught; Josephine's mother was crying. (41RT 4978-4981, 5022.) Simpson stayed in touch with Sandra's father off and on after the murders. He was reluctant to talk about Sandra because he was so devastated. Simpson testified he thinks of Josephine and Sandra all the time. (41RT 4981.)

Simpson also testified that he wanted appellant to die in the gas chamber; that he deserved the death penalty. (41RT 5009, 5011; 42RT 5025.) He had been pushing the District Attorney's Office to aggressively pursue the death penalty in this case, was concerned that appellant had not revealed where the rifle was, and was worried appellant might get out of prison and kill him. (41RT 4991-4992, 5009.)

Defense Case

Appellant called Curtis Wright to testify on his behalf. Wright testified that when appellant stabbed him they were in the law library, with

two other inmates. Wright was typing a motion for appellant, as a favor. Appellant told Wright that he stabbed him because he wanted to "catch a case" in Los Angeles so he could stay there, because he had met a girl who had read about his case. After appellant stabbed Wright, appellant ran away, even though he was armed and Wright was not. Wright cornered appellant, who dropped the knife. Wright was taken to the hospital, where he stayed for four or five days. Wright was surprised appellant stabbed him; he and appellant had not been having problems before the incident. Some time later, when appellant was on the phone, Wright put a piece of tissue in appellant's jumpsuit and set it on fire, but the jumpsuit did not burn. Wright testified that this did not make them even; appellant's death would make them even. However, Wright did not want the jury to condemn appellant to death. (42RT 5091-5098, 5100-5103.)

Appellant also called three women who were, or had been, inmates in the Los Angeles County Jail, each of whom appellant had met on the bus transporting inmates from the jail to court. Each testified that appellant was polite and respectful, unlike other men on the bus who were rude and disrespectful. They had each written to appellant and said they would write to him, or visit him in prison, or send him packages. (42RT 5110-5117, 5125, 5141-5146, 5149-5150; 47RT 5708-5712.) Kathy Myers, first, had been in the Los Angeles County Jail after being arrested and giving a false name to the jail. (42RT 5125-5126.) Kelly Twomey was, at the time of her testimony, incarcerated for felony evasion of a police officer with wilful disregard for the safety of others, and had two other felonies on her record. (42RT 5144-5145.) Roz Kelly, a former actress who had played "Pinky Tuscadero" on the television show "Happy Days," had met appellant while she was in jail on a probation violation. She had a felony conviction from 1998 for shooting her neighbor's car alarm, and was found in violation of

her probation for hitting someone in the head with her cane. At the time of her testimony, she was on anti-psychotic and anti-depression medication. (47RT 5710, 5713-5715.)

Deputy Jodi Bolivar testified that she had dealt with appellant in the lockup in the courthouse. Appellant always complied with her instructions, never resisted her, and was very respectful. All her dealings with him had been very professional, and he never gave her cause for concern. (42RT 5151-5153.)

Judge Michael Hoff, to whom appellant's case was originally assigned,[16] testified that appellant sought three times, unsuccessfully, to discharge the Alternate Public Defenders assigned as his counsel, on the basis of irreconcilable differences and opposition to the psychiatric defense they intended to present. Appellant asked for sanctions against them. At one point appellant asked to represent himself, but withdrew the request at his next appearance. Appellant never gave any indication he was happy with defense counsel or their defense. (42RT 5156-5161.) Judge Hoff found no legal conflict between appellant and defense counsel. He testified that he did not know whether appellant was sincere or not, and did not know whether to believe him or not. Some of the things appellant said made sense and were very skillful. Other things he said were somewhat stupid. (42RT 5168-5170.) At one point, Judge Hoff considered having a doctor evaluate appellant. (42RT 5161.)

Deputy Cyril Sabbagh, a bailiff in Judge Hoff's courtroom, testified that appellant behaved professionally and cooperatively, showed

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[16] 1CT 27, 33. On the day set for trial before Judge Hoff appellant made a *Marsden* motion, on the grounds that defense counsel had refused to challenge Judge Hoff, whose son had been a high school classmate of appellant's. Judge Hoff transferred the case to Judge Schempp for trial. (*Marsden* RT527-539; 4CT 863-865.)

no disrespect to Sabbagh or Judge Hoff, and never gave Sabbagh any concern about security. (44RT 5419-5424, 5426-5429.)

Byron Bostic, another of Melanie Bostic's sons, and so appellant's half-brother, testified that when he was eight or nine years old he visited appellant in prison. Byron's mother never forced him to go; he chose to. Byron's sister, aged six or seven, and his father, visited appellant as well. These were contact visits in a visiting room with other inmates and their families, including small children and babies. There were never any problems, never any violence. Everybody was just happy to be visiting their families. There were guards, but they were not visible, and were not walking around the visiting room. (45RT 5496-5499, 5501-5503.) Byron also testified that he and Faith Craft had a daughter together, and that Faith had three children of her own. One of them, Anna Dean, visited appellant in jail. Byron considered all of them his children, and was raising them to think of appellant as their uncle. He would have no problem with them visiting appellant in prison. (45RT 5500, 5504.)

Anna Dean, 10 years old, referred to above, testified that her mother, Faith, lived with appellant's brother, Byron Bostic. She regarded appellant as her uncle. She had visited appellant in jail, behind glass. Appellant was nice to her, and she felt safe with him. She would continue to visit him in prison. She testified she loves him and knew appellant loved her. (43RT 5207-5210, 5216-5218.)

Robin Bucell, who was married to Bloom, Sr., from 1974 to 1977, and who testified at the guilt phase, testified again at the penalty phase. She stated she was trying to explain family dynamics, because no one really knew Bloom, Sr., or all that had happened. She thought appellant needed help and should receive life without parole. (45RT 5554-5555.)

Robin testified that Bloom, Sr., could be nice, personable, even

charismatic if he thought he could get something from someone, or needed something from them. But he was mean and hostile to those who did not serve his purpose. He started fights with neighbors and terrorized the residents of the apartment building they lived in. (45RT 5520, 5547-5549.) Robin wanted to leave Bloom, Sr., after just a month.

Bloom, Sr., was abusive to his mother, Anna Bloom, who came to live with them after Eric was born because Bloom, Sr., wanted Robin to go back to work. (45RT 5537, 5539.) Bloom, Sr., was verbally abusive to Robin, and once physically abusive as well. (45RT 5539-5540.) He was also extremely manipulative. Every two weeks, he would come to her place of work to pick up her paycheck. If she did not give him her paycheck, there would be verbal abuse and things she would not even want to think about. Within three years, from her paycheck and the money he made on various scams, he had $25,000 which he had hidden in the house. Bloom, Sr., forced Robin and appellant to lie for him. He threatened them with bodily harm if they did not do what they were supposed to. (45RT 5515-5518.) Robin described one of Bloom, Sr.'s many cons, for which he was finally arrested and charged with grand theft auto. (45RT 5535-5537.)

When Robin left Bloom, Sr., she took $7000 of the $25,000 Bloom, Sr., had in the house. She was concerned for her own and for Eric's safety. Appellant was 13 when Robin left. She did not tell him she was leaving for good, or where she was really going. She was afraid that if she told appellant, when Bloom, Sr., started threatening or hitting him, appellant would eventually tell his father where she had gone. (45RT 5521-5522.) Robin did not intervene in the abuse Bloom, Sr., inflicted on appellant because she felt threatened herself. (45RT 5518.)

After Bloom, Sr., and Josephine married Robin felt better about Eric being with his father, because of Josephine and Sandy. She was

concerned that Bloom, Sr., would hurt Eric, not that appellant would. (45RT 5552-5554.) Appellant loved Eric and always treated him very kindly. (45RT 5520.)

Robin testified that Bloom, Sr., began a campaign of threatening to kill Robin, her two brothers, her parents and her divorce lawyer. Robin got a restraining order against Bloom, Sr., because she feared for herself and for Eric's safety, but she did not feel any safer with the restraining order. (45 RT 5522-5524.) Robin did not stop being scared of him until the day he died. Appellant did Robin and Eric a favor by killing Bloom, Sr. (45RT 5540-5541.)

Appellant testified on his own behalf. He said that at his first trial he had tried to con the jury and prosecutor, but was not going to do that this time. (43RT 5260, 5269-5270.) Appellant said he had lied when he testified at his first trial that he had no intention of shooting anyone when he went into the house; he was there to shoot and kill his father. (43RT 5294.)

Appellant was scared of his father his whole life. His father had hit him, though appellant could not say how many times because he is not a good historian and tended to block things like that out. He never hit his father before April 22, 1982. (43RT 5248-5249, 5295.)

Appellant had been staying at Norma White's and Christine Waller's house for about a week to a week and a half prior to April 22, 1982. He had been living with his father, Josephine and Sandra before that. Appellant testified that Christine was his girlfriend. Maintaining his relationship with Norma, Waller's mother, and protecting her innocence, was important to appellant. Appellant had many conversations with Norma, but he did not talk to her about his father, because that would have destroyed Norma's innocence. Appellant admitted it was wrong to lie to Norma about the "attempted break-in" at her house; there never was a

prowler. But it was a necessary evil to give him an alibi. (43RT 5227-5229 5256, 5317.) At that point he had already decided to kill, not murder, his father. (43RT 5237-5238, 5259, 5317.)

Appellant testified that getting the rifle was part of the alibi. He conned Adrian Rodriguez and Raul Rosas, Norma's sons, into giving him the rifle, ostensibly to protect Norma and the family.[17] Adrian was teaching appellant how to use the rifle, because appellant did not know how. Appellant had been practicing with the rifle for about two weeks at a field across the street from Norma's house. A few days before the homicides, someone else, not appellant, put a scope on the gun. (43RT 5245-5248, 5255, 5268, 5290.)

Appellant denied ever asking Martin Medrano for a gun, telling him he was planing to kill someone, or offering him $1200, $400 or $500 for one. Appellant never had that kind of money; he was forced to give Bloom, Sr., half of any money he made at the trade school. Appellant met Martin Medrano in jail when appellant was arrested for the church robbery. He only saw him on the streets once. Medrano called him over, wanted him to participate in a robbery, and showed him a gun. Appellant told him, "no." According to appellant, Medrano was a junkie and a liar. (43RT 5249, 5288-5289.)

Appellant testified that his father was a con man, and was always scamming women. He told appellant that Josephine was not his "type" – he generally preyed on younger women – but he wanted Josephine's house and considered her a "mark." Bloom, Sr., told her that if he stayed married for a year he would inherit $6 million from relatives in Europe, which was

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[17] According to appellant, Raul and Adrian were members of Sol Trece, a street gang, and it was not Norma's fault Raul was in jail for attempted murder. (43RT 5290.)

untrue. (43RT 5240-5244.) He was on probation at the time, and he told appellant that getting married would look good to his probation officer. Bloom, Sr., wanted appellant to back up his stories with Josephine, but appellant objected. After Bloom Sr. and Josephine were married, appellant told Josephine that Bloom, Sr., was conning her. Appellant wanted to get Josephine out of the marriage before his father could take her house and money. He did not want Sandy exposed to the influence of a con man. Appellant never approved of his father's cons, but did not have a choice. Appellant had been running these cons with his father "since he was knee-high to a puppy." Appellant swore Josephine to secrecy so she would not tell Bloom, Sr., that appellant was telling on him, "because then I would be in a world of shit." (43RT 5238-5243, 5251-5253.) Appellant told Josephine he was going to get her out of the marriage, but never told her about his plan to kill his father. (43RT 5254-5255.)

Appellant testified that on April 21, 1982, he went to Josephine's house to confirm that Josephine and Sandy would be spending the night at Desiree Meyer's house because Josephine and Bloom, Sr., were having major problems. Josephine wanted a divorce and thought she needed a cooling-off period. Appellant seized on their absence as a golden opportunity to kill his father, with no one else around. (43RT 5249-5251.) Josephine and Sandy were never part of his plan. (43RT 5282.)

Appellant explained that the rifle he used was behind the dresser in the bedroom he was staying in at Norma's house. (43RT 5255.) After Norma had gone to sleep, appellant walked to Josephine's house, which takes about a 20-30 minutes. He had keys to the house and planned to kill his father in his sleep. Appellant testified, "If I wake the old man up, I can't kill him." (43RT 5261-5262.) When he got there the lights were off. Appellant went into the bedroom to kill his father, but ran into a problem –

Josephine was in bed with him. Appellant went into Sandy's room and found her there, asleep. He went back to the other bedroom, woke Josephine, and went into the kitchen with her. (43RT 5261-5264.)

Appellant was angry at Josephine because she had lied to him; she should never have been there that night. Appellant wanted to know why Josephine and Sandy were not at Desiree's. Josephine wanted to know why appellant was at her house with a rifle. Appellant did not tell her he was there to kill his father. The discussion with Josephine turned into an argument, which was a mistake because it woke Bloom, Sr. (43 RT 5264-5267.)

Appellant testified that when his father came in appellant left the house. His father did not want him to leave, and followed. Appellant was walking backwards, up and down the street. He was on his way back to Norma's house. His father was telling him to come back. Appellant explained that he had the rifle, but that the only way he could kill his father was if his father were asleep. Appellant was keeping his distance so his father could not get close enough to lunge at him and take the rifle away. If Bloom, Sr. had rushed appellant, he could have taken the rifle from him. He was physically superior to appellant. Appellant testified that he did not remember what he was saying while his father was telling him to come back, that he went back to the house because his father was telling him to, but that he did not know whether he followed his father into the house. (43 RT 5217, 5279-5282.)

Appellant explained that he finally shot his father because he said he was going to call the police, and he would then have been the number one suspect. "It became a situation where it was now or never. So I pulled the trigger and shot him." (43RT 5308.) Bloom, Sr., jumped back and was jumping up and down, holding his stomach; then he ran toward the house.

Appellant shot at him twice more as he ran toward the porch, to try to keep him from making it into the house, and thought he hit the windows. Appellant shot him twice on the porch after he fell; he was wounded and vulnerable. "It was now or never. That's why I was shooting." (43RT 5282-5285, 5308.)

After appellant shot his father, he and Josephine stood looking at each other. Josephine was screaming, "Bobby, Bobby, no this is not what I wanted, this is not what I wanted." Appellant knew she had wanted out of the marriage, and he had told her he would help her. He had done her a favor, yet she was ungrateful and was screaming. Appellant explained that he could not let Josephine tell Norma, and destroy Norma's innocence, so he shot her twice, in rapid succession. She collapsed after the second shot. Appellant walked over to her and put the gun to her head and fired the third shot to make sure she was dead, and that Norma would never find out. Appellant did not want to kill Josephine; he liked her. She should have been at Desiree's. If he had known Josephine and Sandy were going to be at the house that night, he would never have gone over there. (43RT 5270, 5309-5310, 5321, 5337.)

Appellant testified that Sandy woke up when he shot Josephine. She went to her mother and became hysterical, trying to wake her. She started beating on him and he could not control her. He had the rifle in one hand and was trying to control her with the other. She was not resisting; she just did not want to leave her mother. "I couldn't control the situation. The situation was out of control." (43RT 5271, 5278, 5311.)

Appellant testified he shot Sandy and then ran out of bullets. Because she was not mortally wounded she could still tell Norma what appellant had done. He did not want to kill Sandy – he loved her like a little sister – but it was necessary to protect his relationship with Norma.

Appellant explained that his concern was not with his own freedom, but with Norma's innocence. He stabbed Sandy with a scissors 23 times, trying to kill her, but it did not work. He went out and found a live shell, loaded the gun, went back in and shot her in the face; but she still did not die. At this point appellant realized he had been in the house too long, and needed to dispose of the rifle and the car. (43RT 5311-5312.)

Appellant testified that he did not remember every moment of what happened. He did not remember whether Sandy was crying or screaming or trying to get away from him while he was stabbing her, but he did not think she was trying to get away. He did not remember where she was when he shot her the first time, or where he got the scissors. He did not remember where Sandy was in the bedroom when he stabbed her. He did not remember leaving the room. (43RT 5335-5338.) Appellant testified that he used a scissors on Sandy because he has a weak grip, and scissors were easier for him to grasp than a knife. Appellant also testified that he believed Sergeant Dvorak planted the knife that was found. Appellant also testified that he wiped his prints off the scissors before he left the house. (43RT 5295, 5338.) Appellant took the car because he needed to dispose of the rifle, which he did at Hanson Dam. (43RT 5286.)

Appellant testified that he had never had trouble with the gun when he was practicing shooting, but that it was malfunctioning the night of the killings. When he was seen staring out the kitchen window, he was not dissociating; he was simply confused about the gun and trying to figure out what was wrong with it. Appellant insisted he knew exactly what he was doing at every given moment. He maintained he is not crazy, not insane, and not mentally impaired. (43RT 5291, 5304.)

Appellant reiterated that Josephine and Sandy were never part of the plan. But they were not "witness kills," either, because that implies that

he was worried about the police. (43RT 5334.) Appellant's concern was that Norma White not find out that appellant had killed a man – "It would have destroyed her innocence." Going to prison would not matter, appellant testified – "I like prison." (43RT 5304, 5307-5308.)

Appellant testified that if Desiree's boyfriend had not led the police to where Christine and Norma lived, he would have been in bed, cleaned up, with an alibi, which Norma would have backed. The prosecution would have had nothing. That is why appellant wiped away fingerprints. (43RT 5313.)

Appellant testified again that none of it would have happened if Josephine had told him the truth and had been at Desiree's that night. "It's unladylike to tell a lie." (43RT 5273.) Appellant blamed Josephine for her death and for Sandra's. "This never would have happened if Josie would have done the ladylike thing and told the truth." Again, appellant testified that he did not plan to kill her, but that it was a necessary evil, to keep Norma from finding out that he had killed his father. (43RT 5306-5307.)

Appellant also testified that if he had known that David Hughes and Vicki Smith, who were in the van next to Josephine's house, had seen him shoot his father, he would have killed them too, to keep Norma from finding out. (43RT 5305, 5317.) Norma was more important to appellant than Josephine's and Sandy's lives, and more important than the lives of Hughes and Smith. (43RT 5317.)

Appellant also stated that he was testifying so that he could send all the transcripts to Norma, so that she would know the truth of what happened. (43RT 5256, 5269.)

Appellant testified that it was not his idea to present a mental defense to the jury; he did not want to trick them. The mental defense was his defense counsel's idea. Appellant denied he was crazy, mentally

impaired or ineffectual. "The damn rifle was ineffectual. It was malfunctioning." (43 RT 5313.)

Appellant claimed that he does not have Asperger's disorder. Concerning the first criterion for that disorder, appellant stated he was making eye-to-eye contact with one of his attorneys and with a defense paralegal (see 4RT 612-613; 6RT 765-766), with facial expressions and smiling. As for body postures, appellant said, "I talk with my hands." He said he could regulate social interaction, noting he played with the paralegal and entertained one of his lawyers during the trial. (43RT 5300.)

On the second criterion for Asperger's, a failure to develop peer relationships appropriate to developmental level, appellant noted that he was in ROTC for three years, though demoted from lieutenant to corporal or private for selling exams to new recruits. He had a relationship with Isaac Navarrette, and his best friend was Greg Salazar. He also had relationships with non-peers, such as Sandra and Christine's little brother Paul. (43RT 5301.)

On the third criterion, "lack of spontaneous seeking to share enjoyment, interests or achievements with other people, e.g., by lack of showing, bringing, or pointing out objects of interest to other people," appellant said that he had pointed out to the paralegal how nice a certain juror looked. (43RT 5301-5302.)

As for the fourth criterion, lack of social or emotional reciprocity, appellant stated that on two occasions he tried to bring "canteen" into court for one of his attorney's babies. He also stated that he would have the paralegal pick a number, and appellant would name the corresponding United States president. He would have her pick a year, and he would name the King of England. He stated that he could do it for France, too. "Can I socially interact? You're damn skippy. This is bogus." (43RT 5302-

5303.)

Appellant referred to the prosecutor's claim that someone with Asperger's would think of killing someone as stepping on an ant, would have no empathy or feelings, and would not be able to appreciate that someone was dead. Appellant said Josephine and Sandy were not bugs. "If anybody was a bug, it was the old man, not Josephine or Sandy." (43RT 5300-5303.)

Appellant testified that his father got what he deserved. The only remorse appellant has is that he did not do it when he was 16 or 17, because then his father would never have been involved with Josephine and Sandy. (43RT 5305.) "If anything is my fault it's the killing of the old man and frankly I should get a medal for it. He deserved it." (43RT 5311.) Appellant also told the jury, "I am not a murderer, I'm a killer, and I'm the nicest killer you are ever going to meet." (43RT 5313.) He claimed that he was not trying to get the death penalty. (44RT 5360.)

Appellant confirmed Curtis Wright's testimony that he wanted to kill him so that he could stay in the Los Angeles County Jail to develop a relationship with a "nice Jewish girl" he had met. (43RT 5318.) He said he tried to rob Ms. Summe at church because his father needed money and told appellant to get him some. Appellant denied that he was ineffectual just because the robbery was unsuccessful. (44RT 5384-5385, 5396.)

Appellant claimed that he had tried to get the addresses of various witnesses so that he could give the information to members of NLR (Nazi Low Riders) to have them do whatever was necessary to keep them from coming into court and obtaining a conviction. It would have been payback. Because of David Hughes, Victoria Smith and Moises Gameros, Norma found out, her innocence was destroyed, and appellant's relationship with her was destroyed. Appellant did not think he was that important in

Norma's life, but Norma was important to him. (43RT 5330-5332.)

Appellant also recited the Presidents of the United States from Washington through Clinton, and predicted the election of George W. Bush. (44RT 5400-5405.)

Melanie Bostic, appellant's mother, also testified at the penalty phase. She testified that she met Bloom, Sr., in Honolulu in 1961 when she was 19. She married him because he blackmailed her. They had had sex on the beach and he would not return her red underpants. He said that if she did not date him and do whatever he said he would tell her father and show him the underpants. Melanie's father was an officer and being considered to be a general. If there was any family scandal, it would count against the officer's military record. Melanie drank ammonia so she would not have to marry Bloom, Sr. She woke up in the hospital, and he was there saying, "you are going to marry me." She tried to annul the marriage while Bloom, Sr., was out to sea, but the Navy would not do it while he was away. (45RT 5561, 5566-5568.) Melanie's father disowned her for marrying Bloom, Sr. She did not see her father for 15 years. (45RT 5570.)

Melanie also testified that she and Bloom, Sr., fought constantly. They each started physical fights. She once called a rabbi to intervene. Bloom, Sr., did something to her in front of the rabbi, told the rabbi, "it's none of your fucking business," and pushed him out of the house. (45RT 5571-5573.) Bloom, Sr., once broke down the bathroom door with a heavy meat cleaver that he had taken from a butcher shop, and told Melanie he was going to kill her because she had refused to sleep with him. Melanie wanted to file for divorce, but he sweet-talked her out of it. (45RT 5573-5574.) They went hungry at times, and Bloom, Sr., forced her to beg for food in restaurants. (45RT 5574-5576.)

During her pregnancy with appellant, through the third trimester,

Bloom, Sr., beat her, and once threw her down a flight of stairs. She ran away, but he found her and forced her to go to Los Angeles with him. The violence continued there. He often said he was going to kill her. (45RT 5577-5579.)

Melanie admitted that she also abused appellant. Once while Melanie was feeding appellant in a highchair, when he was about two months old, he spat food at her, and she slapped him in response. Then she took the highchair and threw it, with appellant still in it. She put the highchair in the tub and tried to feed him there. Appellant was yelling and screaming. Melanie was screaming, "Eat this. Eat this." A neighbor heard appellant's screams, and came and took appellant away. (45RT 5579-5581.)

Melanie testified that when appellant was between two and four, she took an interest in "sadism."[18] She tried out all sorts of rituals on appellant. She surrounded him with black candles and offered him up to Satan in exchange for money, fame and Bloom, Sr.'s death. (45RT 5582.)

Melanie also described the time when appellant drowned. She was talking on the phone, not paying attention to him, when he drowned in the pool, at age two. She heard a splash and someone saying, "Oh, my God!" A neighbor got appellant out of the water. He was revived at the hospital and stayed there three days in an oxygen tent. At the hospital, Bloom, Sr., was very violent, and wanted to hit the doctor. The hospital staff threatened to call the police. (45RT 5582-5584.)

The first time Melanie saw Bloom, Sr., hit appellant was when appellant was only a month old. He struck appellant because he would not stop crying. Bloom, Sr., started beating appellant regularly when he was

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[18] The term "satanism" fits the context of Melanie's subsequent testimony more accurately than "sadism."

about two or three years old. Melanie intervened sometimes, but not very often. More than once she heard Bloom, Sr., tell appellant, "I'm going to fucking kill you." (45RT 5584-5585.)

Melanie testified that she finally left Bloom, Sr., and they filed for divorce three years later. Appellant was in elementary school at the time. Melanie could not say how old appellant was, because she did not pay attention to him. (45RT 5586-5588.) She was working in topless bars at the time. She had become deeply involved in nightclubs, and she liked the power. That was more important to her than raising appellant. After she left, she stayed away from appellant for a very long time. She changed her name to Candy. (45RT 5587-5588, 5598.)

When appellant visited her after the divorce, some of her boyfriends abused him. Appellant also witnessed her boyfriends and "bikers' inflict violence on Melanie. She taught him that if anything bad ever happened when he was with her, he was to be very quiet, not to move, and just be still. He did that once, which is what saved him. (45RT 5590-5592.) At some point Melanie had an abortion. When she told appellant about it he was very disturbed. He cried and said, "How could you kill my little brother or sister?" (45RT 5596-5597.)

Melanie described a babysitting scam Bloom, Sr, ran. He would place ads for babysitters, using appellant's and Eric's baby pictures, though they were grown at the time. He used the ads to extort sex from the women, and to get them to like him, support him, and pay his rent. He would send himself a telegram saying his oil well had come in. The women would think he was rich. Melanie testified that he used these women for prostitution. (45RT 5612-5614.)

Asked what she would like to see as the outcome of this trial, Melanie said she wanted appellant to be hospitalized. (46RT 5619.)

Appellant took the stand a second time and described his father's babysitter scam as "a classic." He would put an ad in the newspaper and find young, naive women, ages 18 to 21. He would tell them he needed a babysitter for his two sons, appellant and Eric. Then he made them his girlfriends, and then would pimp them out to other men for prostitution. He would beat them and take their money. He would abuse them physically and emotionally, and leave them scarred. (46RT 5622-5623.)

Appellant testified that he became very close to one of them, June Mack, while he was in high school. He had been there when his father interviewed her. She became his father's girlfriend. Appellant was with them on some of their dates. His father would set Mack up with other men, in appellant's presence. Mack would give him the money she earned. Appellant saw his father beat Mack more than once. She allowed this to go on for a year; then appellant helped her get away. (46RT 5623-5627.)

Appellant testified that his father did the same thing with a woman named Becky for a few months, again when appellant was in high school. Appellant saw his father beat her. Appellant described his father as very intimidating. He was violent towards those women, and would beat them when he did not get his way. (46RT 5630, 5636-5637.) When his father married Josephine he still had several of these girlfriends, and a couple during the short time they were married. Josephine did not know about them. (46RT 5628-5634.)

Appellant testified that his father was violent toward the women he involved, and toward others if he did not get his way. He was involved in other scams as well. Appellant said he put on evidence of these scams to show the jury that he did not kill a choirboy. He killed a grifter, and some people need killing. Again, appellant stated that Josephine should have told the truth and would still be alive if she had. It was not appellant's fault; it

was Josephine's fault. Under the circumstances, Sandra also needed to be killed. (46RT 5638-5639.)

Elizabeth Meyer, a guard in the High Power Module at the Los Angeles County Men's Central Jail, testified that as an inmate of that unit, appellant was respectful, cooperative and followed the rules. (47RT 5701-5706.)

Paul Mones, an attorney specializing in cases involving children, teens and adults who kill their parents, also testified. (47RT 5719-5720, 5770-5772.) He was hired by appellant's prior counsel on appeal and in federal postconviction to evaluate counsel's efforts during appellant's first trial, in the early 1980's. (47RT 5721.) From reviewing records and speaking to the attorneys on the case, Mones learned that appellant had been severely abused by his father and had witnessed the abuse of his mother. (47RT 5721.) He opined that appellant conforms to the typical profile of a battered child who kills his parents. (47RT 5729-5733.)

According to research by Mones and others, only a small percentage of abused children kill their parents. However, the majority of such cases involve child abuse and significant family dysfunction. A small percentage of children kill their parents for financial reasons, and others as a result of a delusional disorder. (47RT 5723, 5748.) Mones opined that appellant's killing of his father could be traced to the years and years of abuse his father had inflicted on him.

Mones also explained that when a child kills a parent, usually more than one shot is fired. This phenomenon is recognized in the literature as overkill, and reflects the child's fear of the parent and the felt need to ensure they are really dead. (47RT 5724, 5727-5728.)

Mones also opined that Bloom, Sr., had an abnormal history of seeking to dominate many aspects of appellant's life. He used repeated

physical abuse in various forms, and constantly belittled appellant. Hypothetically, if appellant were armed with a rifle, left the house and was on his way back to Norma White's house, and his father followed him and told him to come back, it is consistent with the abuse appellant suffered from childhood that he would do what he was told. Mones testified that the majority of teenagers who kill their parents only kill the abuser and do not kill other people, except incidentally, because they are there, or as a result of a mental breakdown after the initial homicide. (47RT 5729-5733.)

Mones testified that it is common for an abused child to seek out a surrogate mother. He opined that appellant's story about killing two other people to prevent such a surrogate mother from finding out that appellant had killed his father is not consistent with why an abused child kills others. Usually when other people are killed it is in a storm of emotion and psychological confusion. (47RT 5732-5733, 5738, 5777-5779.) Abused teenagers who kill their parents typically are physically aggressive only to immediate family members. (47RT 5768.) It is rare for a homicide against a parent to occur while the parent is striking the child. Typically, it happens when there is no physical aggression at the moment. (47RT 5773.)

According to Mones, abusive parents, for reasons having to do with their own mental health and issues of control, will focus their abuse on one particular child. (47RT 5736-5737.) Parents who abuse their children do it more in the presence of other family members than in front of non-family members. (47RT 5754.) An abused child may not be a good historian, blocking things out, unable to relate every detail of the abuse. (47RT 5753.)

Mones testified he would not be surprised to learn appellant's medical records for his treatment for his kidneys did not show any evidence of abuse, because medical personnel sometimes do not recognize the signs

of abuse. (47RT 5773.)

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I.

PROCEEDING WITH APPELLANT'S RETRIAL VIOLATED HIS STATUTORY AND CONSTITUTIONAL RIGHTS

The homicides in this case occurred in 1982, when appellant was 18 years old. He was first tried and convicted in 1983 and sentenced to death in 1984. In 1997, that conviction and sentence were vacated by the Ninth Circuit Court of Appeal, which found that appellant had received constitutionally inadequate assistance of counsel at the guilt trial due to his trial counsel's inexcusable failure to investigate the mental health issues which were central to appellant's defense, or to competently prepare and present the mental health evidence which was presented at that trial. (*Bloom v. Calderon* (9th Cir. 1997) 132 F.3d 1267, 1277-1278.) As the Ninth Circuit said,

> The complete lack of effort by Bloom's trial counsel to obtain a psychiatric expert until days before trial, combined with counsel's failure to adequately prepare his expert and then present him as a trial witness, was constitutionally deficient performance. . . . Presenting the witness at trial was a disaster. "Describing [counsel's] conduct as 'strategic' strips that term of all substance."

(*Id.*, at p. 1277 (citation omitted).)

> As a result of trial counsel's woefully deficient performance, however, [defense psychiatric expert] Dr. Kling was not provided with sufficient information and, as a result, his testimony not only failed to help the defense, it significantly hindered it. Kling's report (which he now acknowledges was inaccurate) permitted the prosecution to turn Kling's trial testimony against Bloom, and it gave the prosecution the ammunition it needed to secure guilty verdicts of first degree murder with special circumstances on all three counts.

(*Id.*, at p. 1278.)

The Ninth Circuit found that there was a reasonable probability that, had appellant received constitutionally adequate assistance of counsel,

the verdicts would have been different. (*Ibid.*) The resulting retrial which is subject of this appeal finally took place in 2000, more than 18 years after the homicides.

That retrial, due to the failures of prior counsel and the passage of time, was stacked against appellant from the start, presenting unwarranted and unfair burdens and obstacles to appellant's chances of receiving a fair trial and a reliable determination of guilt, sanity or penalty, lightening the burden of the prosecution at the guilt phase, and increasing the burden on the defense at the sanity phase. Due to the persistent effect of prior counsel's ineffective assistance, appellant was denied the effective assistance of counsel at this retrial, and was unduly and unconstitutionally impaired in his ability to present a defense at each of the three phases of the trial.

During pre-trial proceedings, defense counsel moved to dismiss the charges against appellant to avoid violating his due process and Fifth Amendment rights. (1CT 53, 100; 2 RT 215.) Among other things, counsel argued that the unavailability of expert witnesses whose testimony negated the premeditation, deliberation, and malice required for findings of first or second degree murder unfairly deprived appellant of "a meaningful opportunity to present a complete defense," *California v. Trombetta* (1984) 467 U.S. 479, 485. (1CT 104; 2RT 214-215.) The trial court denied the motion. (2RT 216.) The defense sought to present evidence in support of the motion, but was denied the opportunity by the trial court's determination that, regardless of what the defense could present, no remedy was available. (2RT 214-216.) In rejecting appellant's motion to dismiss, the court assumed the lost testimony would have been persuasive and the deprivation of defense evidence would be egregious; nonetheless, the court concluded there was no remedy for proceeding in violation of appellant's

constitutional rights. (2RT 214-216.) The court did rule, however, that there could be no reference during the retrial, whether directly or indirectly, to the verdicts rendered during appellant's first trial. (3RT 443.) This measure was required by Penal Code section 1180 and to protect appellant's state and federal constitutional rights. (See, e.g., *People v. Hogue* (1991) 228 Cal. App. 3d 1500, 1505.)

In a Supplemental Motion to Dismiss and for Curative Measures, defense counsel renewed the argument that the murder charges be dismissed, or in the alternative, that the court should preclude charges greater than manslaughter, preclude the possibility of the death penalty, or provide for other curative measures to reduce the prejudice from the delay and from former counsel's constitutionally inadequate performance. (3CT 448-527.) The trial court denied the supplemental motion. (3RT 246.)

The trial court erred in denying these motions. The resulting retrial violated appellant's right to a fair trial, to present a defense, to confront witnesses against him, and to a reliable adjudication of guilt, sanity, and penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as state constitutional and statutory law.

Because the retrial took place 18 years after the crimes, the unavailability of expert witnesses who had evaluated appellant's mental state at the time of the offense seriously hindered the only defense pursued at retrial: that appellant did not premeditate, deliberate, or harbor malice. (16RT 1993.) This weakness in the defense case was seized upon by the prosecution repeatedly and used to bolster the charges of first degree murder against appellant. The long delay from the time of the crimes to the retrial also resulted in the unavailability of key lay witnesses, and the prosecution's reliance on the unreliable and invalid prior testimony of those witnesses further undermined the fairness of appellant's retrial. Although

mention of the previous verdicts or related matters, such as appellant's incarceration, was prohibited, it was impossible for either side to comply with this order. As a result, not only was the jury improperly influenced by references suggesting appellant's culpability, but in attempting to avoid reference to the first trial, the defense also was forced to curtail its presentation of witnesses. Because these errors rendered appellant's trial fundamentally unfair he is entitled to reversal of the resulting convictions and sentence.

Penal Code section 1180 provides that the granting of a new trial places the parties in the same position as if no trial had been had. (*People v. Hogue* (1991) 228 Cal.App.3d 1500, 1505-1506.) Because of the constitutionally inadequate assistance of counsel appellant received at the first trial, and the consequent delay in obtaining this new trial, appellant was not, and could not, be put in the same position as if no trial had been had.

The lasting effect of prior counsel's ineffective assistance is demonstrated by the fact that, even given this retrial, it is still reasonably probable that, but for prior counsel's ineffective assistance, a more favorable result for appellant would have resulted. (*Strickland v. Washington*, *supra*, 466 U.S. at 694.) The lasting effects of prior counsel's failures to provide constitutionally adequate representation of appellant continue to "undermine confidence in the outcome" (*ibid.*) of the retrial. It is reasonably probable that, absent prior counsel's failures, no first degree murder verdict would have been returned, precluding a finding of the special circumstance, that no verdict of sanity would have been returned, again precluding a finding of the special circumstance, or that the jury would have returned a verdict of life without possibility of parole rather than death. Prior counsel's failures continued to give the prosecution, as in the first trial, "the ammunition it needed to secure guilty verdicts" (*Bloom v.*

Calderon, *supra*, 132 F.3d at p. 1278), a special circumstance finding and, ultimately, a verdict of death.

The trial court erred in ruling that no remedy was available for the prejudice done to appellant's chances for a fair trial. "[T]he most basic of the Constitution's criminal law objectives [is] providing a fair trial. As Justice Brennan put it, '[t]he Constitution would protect none of us if it prevented the courts from acting to preserve the very processes that the Constitution itself prescribes.' *Allen,* 397 U.S., at 350 (concurring opinion)." (*Indiana v. Edwards* (2008) 554 U.S. 164, —, 128 S.Ct. 2379, 2387.)

A. The unavailability of key expert witnesses undermined the presentation of a defense to the charges and prevented a fair retrial

In November 1981, about five months before the homicides, appellant was evaluated by a psychiatrist, Dr. Richard Naham, who concluded that appellant should undergo inpatient psychiatric treatment in the state psychiatric hospital. (1CT 63A; 3CT 453.) After appellant's arrest, appellant's first trial counsel retained Dr. Arthur S. Kling, also a psychiatrist, to evaluate appellant and determine his mental state at the time of the crimes. (1CT 60.) Dr. Kling was the sole defense expert at the first trial. Later in the first trial proceedings, the trial court appointed an expert to evaluate appellant following his plea of insanity, and another to evaluate appellant's competence to proceed. (1CT 65-65A.) The first trial convictions were overturned because counsel "did practically nothing" to prepare Dr. Kling or other mental health experts for their examinations of appellant. (1CT 59A.) Counsel failed to provide experts with information about appellant's "long history of severe childhood abuse," "generations of mental illness and domestic abuse" in appellant's family, illness and medications that could affect appellant's mental state, and jail records

demonstrating that prior to the first trial appellant attempted suicide, was referred for psychiatric observation and treatment, and was reported by a jail psychologist to experience auditory and visual hallucinations. (1CT 62-63A.)

Neither Dr. Kling nor Dr. Naham was available to testify during the retrial. (1CT 101-102.) In moving to dismiss the charges against appellant, defense counsel explained that Drs. Naham and Kling were the two experts who had examined appellant closest in time to the crimes and that their observations and opinions were the best evidence of appellant's mental state at that time. (2RT 215.) Counsel argued that their inability to present testimony from these two experts violated appellant's state and federal constitutional rights and would deprive appellant of a fair trial. (1CT 103-104; 3CT 448-449.) Counsel asked that the charges be dismissed, or in the alternative, asked that the court preclude charges greater than manslaughter, preclude the possibility of the death penalty, or provide other curative measures. (3CT 449.) The trial court did not dismiss any charges against appellant and provided no curative measures.

1. The loss of testimony violates due process when it impairs a defendant's ability to defend himself

The United States Supreme Court has long interpreted the Due Process Clause "to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." (*California v. Trombetta*, *supra*, 467 U.S. at 485; see also *People v. Sixto* (1993) 17 Cal. App. 4th 374, 381.) Furthermore, delay in the prosecution of a trial violates due process and Sixth Amendment rights when it impairs the defense, "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." (*Barker v. Wingo* (1972) 407 U.S. 514, 532; see also *United States v. Pallan* (9th Cir. 1978) 571 F.2d 497, 500

["due process prevents delays which result in unfair and unnecessary detriment to the defendant's ability to defend himself."]). The loss of testimony due to delay violates due process when it "meaningfully has impaired [a defendant's] ability to defend himself." (*United States v. Huntley* (9th Cir. 1992) 976 F.2d 1287, 1290; see also *People v. Mirenda* (2009) 174 Cal. App. 4th 1313, 1328 [affirming dismissal for violation of due process and speedy trial rights and explaining that "prejudice for due process or speedy trial violation claims may be shown by loss of material witnesses due to lapse of time or loss of evidence"].) Appropriate curative measures include dismissal. (See, e.g., *Mirenda*, *supra*, 174 Cal. App. 4th at 1333 [finding no abuse of discretion in not fashioning a remedy less than dismissal where "the loss of evidence favorable to the defense here could not fully be identified and assessed because so much time had passed."]) Short of dismissal, "[i]f reversal and the granting of a new trial are insufficient to ensure a fair trial upon remand, further relief should be granted." (*Sixto*, *supra*, 17 Cal. App. 4th at 381.) Courts err in failing to conduct a full hearing to evaluate prejudice to a defendant caused by delay. (See *Ibarra v. Municipal Court* (1984) 162 Cal. App. 3d 853, 858.)

2. The trial court erred by refusing to fashion curative measures to preserve appellant's constitutional rights

Although the trial court agreed that the loss of expert testimony was prejudicial to the defense, it incorrectly ruled there was no remedy for the resulting constitutional violations. (2RT 215-216; 3RT 246.) Following this ruling, counsel noted they were being forced to defend against the charges of murder by presenting mental state evidence indirectly, through other experts, to their detriment. (3RT 306; 14RT 1926.) Indeed, the prosecution seized on this fact repeatedly during cross-examination of the experts the defense did present, during the initial closing argument, and

again in the final closing argument. The absence of testimony from unavailable experts who had examined appellant close in time to the crimes fundamentally impaired appellant's ability to present a defense and violated his right to a fair trial.

Defense counsel viewed the only issue to be resolved at trial as appellant's mental state at the time of the crimes, as determined by mental health experts. (See, e.g., 3CT 449.) During both the guilt and sanity phases of trial, however, the prosecution was able to undercut expert testimony by the defense by highlighting the delay from the time of the offenses to the time that mental health evaluations of appellant were conducted. On cross-examination, Dr. Mills, a psychiatrist testifying for the defense, conceded that "if you're asked to opine about something that happened in '82 and you're doing it in 1993, it is very hard to get reliable information about what somebody was like 11 years earlier" (26 RT 3169), and that "it is better to see Robert closer to the time of the events or where one is try to assess his mental state than later" (26RT 3170). The prosecution returned to this issue several times during cross-examination of Dr. Mills, stating that:

> these tests [by any of the doctors except Dr. Naham] were done at such a late time and relative to the time of the killings ... and many of these examinations by doctors actually took place 10 and 12 and 15 years later? ... And in fact, Dr. Watson's final report, his last examination was in August of this year, 18 years after the incident, right? ... And that's not a timely manner to do these tests, is it?"

(27RT 3295-3296.) Dr. Mills responded by saying, "Well, I mean, obviously it is not timely manner (sic), but so in reality second best is as good as you get." (27RT 3296.) The prosecution then proceeded to cross-examine Dr. Mills about a different case in which he had testified that psychological tests were administered too late to be meaningful. (27RT 3297- 3300.) The prosecution continued, asking, "interviewing him 12

years later might not tell you a whole lot about whether he dissociated in 1982?" (27RT 3299), and "examinations by these doctors 18 months to 18 years after the fact ... were those tests ... given in a manner, in a timely manner such that you could take anything from them?" (*id.*), and finally, "You don't believe that in this case the fact that the tests were given in '93, examinations were made, a lot of them in '93, which is 11 years after the murder, would show more how the defendant was working in '93 rather than in '82?" (27RT 3300).

The prosecution also returned to this theme several times in closing argument, reading to the jury from the cross-examination of Dr. Mills about delayed examinations (30RT 3878 [reading prior question that "in this case some of these reports are 10, 12, 15 years after the event. How can you give them any credence at all...?"]), arguing to the jury that "you're supposed to come in here and believe that 18 years after the fact these doctors are able to tell you that [the defendant] was too impaired on April 22, 1982 to commit these crimes" (30RT 3857-3858), and criticizing Dr. Mills because his testimony was "based on tests that came years after the date of the event. ... I couldn't get him to say that the tests were too long after the event because he claimed to come up with a different diagnosis" (30RT 3878-3879). After the defense closing, the prosecution again reminded the jury that "[a]nother important thing about Dr. Mills' testimony was that he talked about the timeliness of tests." (32RT 4105.) The prosecution argued that "these [psychological] tests are of little value in telling you what the person is thinking at the time. They were given much too late. What they tell you is the person might be crazy now. They don't tell you what he was thinking on April 22, 1982." (32RT 4106.) Continuing, the prosecution added that "these doctors are testing him or examining him much later than [1983], some of them. And you are

supposed to believe those tests. They are testing him after he is deteriorating. They are testing him untimely ... because the tests weren't given in a timely fashion." (32RT 4106-4107; see also 32RT 4108 ["these tests weren't given in a fashion that would allow you to know what he was thinking 18, 15, 11, or 8 years before."].)

Following these arguments, the defense renewed objections about the unavailability of Drs. Kling and Naham and asked for a mistrial, citing, among other things the fact that the prosecution "argued that length of time between the crimes and the evaluations and she has a very good point ... [but] it's just not fair because the length of the delay was due to the ineffective assistance of counsel. So what that means is that Robert can never get a fair shake on the mental issue because we don't have any way of going back to the first trial and preserving the good testimony of Drs. Kling and Naham because they're not preserved and they're not available to us now." (32RT 4132-4133.) In the alternative, the defense asked the court to instruct the jury that the length of time should not be considered for any purpose. (32RT 4134.) The court did not rule on the motion for a mistrial or instruct the jury not to consider delay from the time of trial to the later proceedings when expert evaluations were conducted. (32RT 4134-4138.)

The prosecution made the same type of argument during the sanity phase, telling the jury:

> [W]hat I believe you are going to hear in the sanity phase is that these doctors who have interviewed the defendant in anywhere between eight years and 15 years, 18 years, after the murders are going to now proceed to tell you how the defendant felt on the morning of April 22, 1982. They're going to tell you what he was thinking or not thinking or what he had the capacity to think or not think, and they're going to go back and tell you what happened in the year before the murders. Although these doctors have interviewed him a substantial amount of time after the murders.

(35RT 4263-4264.) The prosecution concluded by advising the jury as

follows:

> [Y]ou need to just listen and see that there's no way that these doctors some 10, 15, 18 years later can go back and figure out and tell you to a preponderance of the evidence that that morning on April 22nd the defendant was too mentally ill to conform his conduct to the requirements of the law.

(32RT 4264.)

B. Appellant's inability to present expert witnesses who evaluated him close in time to the offenses violated his constitutional rights and requires reversal of his convictions

The sole defense presented to the jury was that appellant did not premeditate, deliberate, or harbor malice. As counsel argued during the guilt phase closing, "I told you that Robert is guilty of a manslaughter in this case. Three of them in fact. ... We are really focusing on one issue in this case. It is mental state." (31RT 3998.) During the guilt phase, the jury deliberated for four days before arriving at a verdict of first-degree murder on Count One (32RT 4142; 34RT 4202) and hung on Counts Two and Three (34RT 4222). The jury did not reach second degree murder verdicts on Counts Two and Three until the prosecution had dismissed the first-degree murder charges on those counts. (34RT 4230, 4232.) During the sanity phase, the jury deliberated for five days before reaching a verdict that appellant was sane as to Count One. (24CT 6220, 6224, 6226, 6233.) After approximately two more days of deliberations, the jury hung on sanity as to Counts Two and Three. (24CT 6236, 6238.) Without the first degree murder verdict on Count One, appellant would not have been eligible for the death penalty. Manslaughter verdicts on Counts Two and Three, similarly, would have prevented a penalty phase. Given the difficult the jury had in reaching its verdicts, it is plain that impaired presentation of expert testimony and the mental state defense was not harmless. (See

Chapman v. California (1967) 386 U.S. 18, 23.) For this reason, appellant's convictions must be reversed.

C. The unavailability of key lay witnesses undermined the presentation of a defense, caused the jury to consider misleading and unreliable information, and prevented a fair retrial

In addition to the rendering key expert witnesses unavailable, the long delay between the offenses and the retrial meant that critical lay witnesses also were unavailable during the retrial. As fully discussed in Claim II, below, the unavailability of Christine Waller and Martin Medrano resulted in the prosecution's reliance on their guilt phase testimony from the first trial, in violation of appellant's due process, confrontation, and other federal and state constitutional rights. Appellant's inability to confront testimony from these unavailable lay witnesses further undermined his ability to present a defense also violated due process and Eighth Amendment protections against the introduction of improper and unreliable testimony. (See, e.g., *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 647 [fundamental fairness requires that juries are not exposed to "misleading evidence important to the prosecution's case in chief" that is "likely to have an important effect on the jury's determination."]); *Gardner v. Florida* (1977) 430 U.S. 349, 358 [introduction of potentially unreliable or inaccurate evidence violates due process]; *Beck v. Alabama* (1980) 447 U.S. 625, 638 [rulings that diminish the reliability of the guilt determination violate the Eighth Amendment].)

D. Repeated references to appellant's prior trial and incarceration undermined the presumption of innocence, injected irrelevant and inflammatory information into the proceedings, and prevented a fair retrial

Reference to a former verdict or finding is prohibited by section 1180. (*People v. Peckham* (1967) 249 Cal. App. 2d 941, 946.) This includes a prohibition on "an indirect method of using and referring to defendant's former trial; implying prior criminality ... could not have failed to prejudice defendant in the eyes of the jury." (*People v. Kessler* (1963) 221 Cal. App. 2d 187, 191 [ruling that testimony by probation officer to statements made by defendant unfairly alluded to a former trial and guilt finding and reversing judgment].) These restrictions are based on a defendant's constitutional right to have a jury decide every element of the crime charged (*Duncan v. Louisiana* (1968) 391 U.S. 145), to the presumption of innocence (*In re Winship* (1970) 397 U.S. 358, 363-64), and to an opportunity for effective cross-examination (*Douglas v. Alabama* (1965) 380 U.S. 415). (*See, e.g., People v. Hogue* (1991) 228 Cal. App. 3d 1500, 1505.) Prohibiting references to a prior trial, verdict, or incarceration also protects the due process right that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." (*Taylor v. Kentucky* (1978) 436 U.S. 478, 485; see also *Jackson v. Denno* (1964) 378 U.S. 368, 388 [due process is violated by injecting "irrelevant and impermissible considerations" into the jury's assessment of the facts].)

In spite of the trial court's ruling that no mention of prior verdicts or incarceration would be allowed (3RT 443), the trial was so infused with this error that at one point the prosecution remarked, "listen, if [the jurors]

haven't already figured it out, then they aren't listening. We've had testimony from a prior case. We've had impeachment by prior testimony. They know there was some kind of prior something in this case." (26RT 3130). From early in the trial, the prosecution viewed observance of appellant's statutory and constitutional rights in this regard as impossible, stating that "I have to tell you something. We can do everything we want to do to keep these people from knowing, but you know ... some of them are going to find out." (5RT 730.) The court had observed the same problem, noting the jurors "could not help but know there was a prior trial." (4RT 585.)

With virtually every witness presented in its case in chief, the prosecution referred to prior proceedings or testimony. When the memories of witnesses failed, the prosecution referenced the prior trial to argue that earlier testimony was more accurate. (17RT 2101, 2109 [David Hughes]; 19RT 2383 [Norma White]; 19RT 2468, 2493, 2520 [Moises Gameros]; 20 RT 2547 [Michael McKean].) In reading the prior testimony of the unavailable lay witnesses, the court told the jury, "we will supply you with the date of that former testimony of Martin Medrano, ... [and] there's going to be testimony of another former witness to be read." (17RT 2218; see also 19 RT 2375].) The prosecutor at one point observed that "the fact that there was some [previous] court proceedings is obvious to this jury." (19 RT 2436.)

In addressing appellant's mental state, the prosecution asked one defense expert to discuss what "one would expect if someone had been incarcerated for a long time," implying appellant. (22RT 2862.) In cross-examining another expert, the prosecution referenced prior proceedings and asked, "In fact, one of the issues that you were most concerned with was the defendant's competency to be a defendant in a

criminal proceeding?" (26RT 3178.) The prosecution also asked an expert about findings in 1984 that appellant was competent to go forward with legal proceedings and elicited the answer that "in the jail setting in this particular circumstance he refused any help. He refused any treatment. He refused any medication. He was going to be transferred to another facility." (28RT 3456.) Later in the cross-examination of the expert about his competency evaluation of appellant in 1993, the prosecution elicited the answer, "Even people that are grossly psychotic can be competent to stand trial or do things like stand at the arraignment or for sentencing." (28RT 3494.) In closing, the prosecution referenced prior proceedings and the differing opinions of experts over time, arguing that "the defendant slipped under a lot of these psychiatrists' radar *the first time*." (30RT 3866 (emphasis added).)

Finally, the prosecution spent considerable time recounting appellant's testimony from the first trial, explaining that "he testified under oath in 1983" and arguing that "[h]e lied in his testimony, intricate lies, trying to explain away the evidence that the prosecution had against him." (16RT 1984; see also 26RT 3260 [in cross-examining defense expert, asking "have you read the testimony of the defendant in a prior hearing of this case where he related the events of that evening?"]; 26RT 3260-68 [asking questions related to appellant's prior testimony].) Even more egregious was the prosecution's use of statements made by appellant during the first trial when he was representing himself and arguing in favor of the death penalty. The prosecution referred to these statements as appellant's admission to the crime in 1983. (16RT 1968.) These and many other references to appellant's prior trial, proceedings, findings, and to his lengthy incarceration violated his statutory and constitutional rights and rendered his trial fundamentally unfair.

In addition to these errors, attempts to avoid referencing the prior trial or incarceration unduly limited the defense presentation of witnesses and further undermined the fairness of appellant's trial. For example, when the defense was trying to clarify a defense expert's role in prior proceedings to give context to his prior opinions, the prosecution objected and indicated that the door would then be opened for the prosecution to cover areas related to prior proceedings and findings. (26RT 3125-26.) After extensive discussion (26RT 3126-3133), the court directed counsel to cover the topics "as generically as possible" (26RT 3133). These and other similar limitations interfered with the appellant's ability to present a defense and further contributed to the fundamental unfairness of his retrial.

In light of the many ways in which appellant was prevented from presenting key evidence in his defense and the introduction of irrelevant, unreliable, and/or inflammatory evidence during the retrial, appellant's convictions and penalty must be reversed.

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II.

ADMISSION OF THE PRIOR TESTIMONY OF MARTIN MEDRANO AND CHRISTINE WALLER CONSTITUTED PREJUDICIAL ERROR AND REQUIRES REVERSAL OF THE ENTIRE JUDGMENT

The trial court erred in admitting, over appellant's objections, the testimony Martin Medrano and Christine Waller gave at appellant's first trial.[19] As appellant's counsel below argued, although these witnesses were found to be unavailable, their testimony was not admissible under Evidence Code section 1291 because: (1) as the Ninth Circuit found, appellant was denied effective assistance of counsel at the prior trial, (2) appellant was denied effective cross-examination of the witnesses, (3) appellant was not competent at his first trial and (4) the testimony at issue was more prejudicial than probative. (2CT 124-401; 2RT 201-214; 3RT 245-252, 265-270, 316-317; ICPRT 254-264; 17RT 2171-2172, 2175.) The trial court's admission of the former testimony, without benefit of a hearing on appellant's competence at his first trial, and without otherwise addressing the issue, violated appellant's rights to confrontation, due process, a fair trial, and a reliable adjudication of guilt, sanity and penalty.[20] (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15.) The erroneous admission of the evidence was prejudicial with respect to appellant's guilt, sanity and penalty cases and requires reversal of the entire judgment.

A. Summary of Relevant Facts

1. Martin Medrano's Prior Testimony

According to Medrano, in April 1982, a few days before the

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[19] Medrano's testimony appears at 17 RT 2183-2215; Waller's at 18RT 2327-2371.

[20] See Arg. I, *ante*.

homicides, appellant asked Medrano to get him a handgun, mentioning that he had a contract to kill someone. (17RT 2184-2187, 2204-2205, 2209.) Medrano did not believe that appellant had such a contract, but agreed to get appellant a gun. (17RT 2186, 2188, 2214.) However, Medrano, who was a heroin addict and strung out at the time, intended to take appellant's money without providing any gun. Medrano claimed appellant had first offered $1200 for a gun, then, a day later, offered $400-500, but never came up with any money. Medrano also testified that appellant said he had a rifle. (17RT 2187, 2189-2192, 2206, 2210.) Medrano did not see appellant after that, but saw in the newspaper a few days later that appellant had been arrested for murder and that a rifle had been used. Because Medrano was avoiding the law due to a parole violation, he told no one of appellant's request for a gun. (17RT 2193.)

At the time of appellant's 1983 trial, Medrano was in custody for armed robbery, to which he had pled guilty and was awaiting sentencing. A few days before testifying, Medrano saw appellant in the county jail. Medrano then approached a deputy sheriff with his story about appellant's request for a gun, leading to his testimony. Medrano claimed he did not receive any promises as to what kind of sentence he would get on the armed robbery. (17RT 2194-2197.) At the time he testified, Medrano had twice been convicted of felonies, armed robbery and forgery. (17RT 2195-2196.)

Defense counsel at the first trial had received no discovery concerning Medrano's statements, nor had he conducted any investigation of Medrano or the subject matter of his testimony. Yet he neither objected to the testimony nor requested a continuance to investigate or otherwise prepare for Medrano's testimony. (ICPRT 254-255.)

2. Christine Waller's Prior Testimony

Christine Waller was 14 at the time of the homicides and had known appellant for about two years. Appellant and Waller spent time together at her mother's house and at Bloom, Sr.'s house. (18RT 2327.) On occasion, appellant slept at Waller's house. (18RT 2328.) Appellant was very formal with Waller's parents. (18RT 2345.)

According to Waller, on April 20, two days before the homicides, appellant told her to stay in the house, and left Waller's house through the back door. Through the window, Waller saw appellant go toward the front of the house, towards a field across the street. He had what appeared to be a rifle, which Waller recognized as her brother's. When appellant returned about half an hour later she did not see the rifle. (18RT 2329-2331, 2339, 2342-2344.) Sometime in April, appellant had told Waller and her mother of an attempted break-in at Waller's house. Waller only knew of it from what appellant had told her. (18RT 2337-2338.) Appellant stayed at their house, sleeping there, to protect them. (18RT 2337-2338.)

Waller testified that the night before the killings appellant was at her house. At first he seemed rather pale, quiet, tense and upset, but then seemed all right half an hour later. (18RT 2352-2355.) At about 5:00 a.m. Waller knocked on appellant's door, but there was no response. She went in and saw that the light was on and the bed looked slept in, but no one was there. She learned later of appellant's arrest. (18RT 2334-2336.)

Waller also testified that appellant's father, Bloom, Sr., was always angry at appellant, ranting and raving, violent in his speech. Appellant would ask his father to leave him alone, and his face would go from really flushed to really pale. Waller saw appellant cry and shake violently after a confrontation with his father, whom he feared. Appellant tried in vain to please his father. Waller recalled an incident when Bloom, Sr. was shoving

appellant, saying he had called the police because appellant had taken the car without permission. Bloom, Sr. kept shoving appellant, yelling, "Why don't you fight back?" Appellant just tried to push his father's hands away from him. (18RT 2356-2359.)

According to Waller, appellant played with Josephine's daughter, Sandy, fixed her things to eat, and took good care of her. He was protective of her and never mean to her. It seemed to be a mutually loving, caring relationship. (18RT 2349-2350, 2364-2368.)

B. The Prior Testimony Should Have Been Excluded Because of Ineffective Assistance of Counsel at the Previous Trial

1. Argument and Ruling in Trial Court

With respect to former counsel's ineffectiveness, defense counsel below relied primarily on the Ninth Circuit Court of Appeal's finding of a "complete lack of effort" by appellant's prior counsel with respect to investigating, preparing and presenting a psychiatric defense. (*Bloom v. Calderon*, *supra*, 132 F.3d 1267, 1277.) As a result, defense counsel argued, prior counsel's cross-examination of Medrano and Waller and direct examination of Waller failed to satisfy the requirements of Evidence

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Code section 1291[21] or appellant's Sixth Amendment right of confrontation. (2CT 127-129, 3RT 250-252.) At a proceeding conducted in camera (ICPRT 254-264), defense counsel proffered a number of areas[22] in which former counsel had failed to cross-examine or otherwise challenge the testimony of Medrano and Waller. Counsel noted that Medrano had first come forward with his story while the prior trial was pending. Defense counsel informed the court that although no reports regarding Medrano's proposed testimony or rap sheets had been provided, former counsel conducted no investigation concerning Medrano's credibility or the reliability of his story, no investigation of Medrano's whereabouts in the jail when he said he saw appellant, no investigation of Medrano's and appellant's whereabouts on the streets when their alleged discussions took

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[21] Evidence Code section 1291 states:

> (a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:
> (1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or
> (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.
> (b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to:
> (1) Objections to the form of the question which were not made at the time the former testimony was given.
> (2) Objections based on competency or privilege which did not exist at the time the former testimony was given.

[22] Defense counsel offered to go into more detail, "more specific questions," but the trial court stated, "No, I want a general area and a brief explanation, that's all." (ICPRT 254, 264.)

place, and no investigation of what really induced Medrano to offer the testimony he gave. (ICPRT 255.) Former counsel failed to request a hearing pursuant to Evidence Code section 402 or an offer of proof as to what specifically Medrano would say, thus allowing Medrano to take the witness stand "cold." (ICPRT 254-257.) Former counsel also allowed the prosecutor, in questioning Medrano, to "lead him like crazy," without objecting. (ICPRT 255.)

Former counsel conducted little or no cross-examination into the details of Medrano's story, which would have led to relevant investigation and potential impeachment, such as asking in which newspaper he claimed to have seen coverage of appellant's arrest; to whom, if anyone, he had mentioned his story; details of the alleged meetings with appellant, including who was present, the words used by appellant, or specifics about the weapons and money allegedly discussed. (ICPRT 255-259.) Former counsel did not cross-examine Medrano about his subjective expectations of receiving some benefit from the prosecution or law enforcement for testifying in appellant's case, or whether his then-pending case had been delayed while he testified. Defense counsel at appellant's retrial noted that Medrano's story had come up during the time when an infamous jailhouse snitch, Leslie White, "and his cohorts," were obtaining information and, seeking deals on their own cases, going to law enforcement and claiming that defendants had confessed to them.[23] Yet former counsel did not investigate or cross-examine Medrano on his motive to lie. (ICPRT 258-259.)

Nor did former counsel cross-examine Medrano about how

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[23] See, e.g., *United States v. Bernal-Obeso* (9th Cir. 1993) 989 F.2d 331, 333 -334 [citing Report of the 1989-90 Los Angeles County Grand Jury regarding the willingness of jailhouse informants to manufacture evidence against defendants].)

appellant acted, or inquire in any way about appellant's mental health or indicators of his mental health, even though Medrano had known appellant for about two years. Defense counsel reiterated that former counsel had not done even a minimal investigation into appellant's history of mental illness. (ICPRT 255-256; see *Bloom v. Calderon*, supra, 132 F.3d at pp. 1271-1278.)

Medrano's story is in fact typical of jailhouse-informer testimony, in that it involves inculpatory statements attributed to appellant for which the informer is the only witness, with all other information readily available from news sources or public record.[24] Yet, as defense counsel put it, former counsel "just accept[ed] Mr. Medrano at face value." (ICPRT at p. 257.)

Concerning Waller's testimony, defense counsel informed the trial court that the defense had obtained an audiotape, which appellant's former counsel had not obtained, of police interviews of Waller and her brother, conducted within days of appellant's arrest. (ICPRT 260-264; 3RT 265-268.[25]) The audiotape demonstrated "a myriad of material . . . [i]n terms of [appellant's] other friends, why he didn't really hang out with other friends, crying a lot, shaking, pale, being jumpy, talking fast. . . . Being the center of attention and clowning around, . . . tipoffs how a person acts or tipoffs about any mental illness that exists." (ICPRT 260-263.) Defense counsel

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[24] See, e.g., Penal Code section 1127a; CALJIC No. 3.20 (Cautionary Instruction – In-Custody Informant). The only fact distinguishing Medrano from an in-custody informant is that he testified that statements were made to him by appellant outside of custody, rather than in custody. However, the first time Medrano mentioned the alleged statements to the prosecution was while he was in custody, during appellant's first trial.

[25] A transcript of the audiotape was provided to the trial court by defense counsel. (3RT 408-409, 414, 420-421; see also 17RT 2222.) A copy was made part of the record on appeal by settled statement. (1CT SuppII 161-213, 218.)

described this as the "tips of the iceberg." (ICPRT 261.) Former counsel failed to elicit any of this information or examine Waller about it.

Defense counsel explained that Waller was appellant's girlfriend at the time of his attempted robbery at a church with a BB gun, six months before the homicides. As a result of that incident, Dr. Richard Naham, a psychiatrist, prepared a report stating appellant was severely mentally ill, needed hospitalization, and "was basically kind of a time bomb." (ICPRT 260.) Yet former counsel asked Waller no questions about how appellant acted at the time of the incident, nor about any indications or symptoms of his mental illness. (*Ibid.*) Defense counsel also established that former counsel had failed to ask Waller any questions about appellant's relationships with his father, his stepmother, his stepsister, Waller herself, or Waller's family, or why appellant felt her family "was this Ozzie and Harriet-Father Knows Best kind of T.V. Wonderland family." (ICPRT 260, 263): "She would have been and in fact was a terrific observer of the interaction between Robert and his father for a period of two years of what led up to ultimately the flash point that created these homicides. There was just nothing brought out about that." (ICPRT 262-263.)

Defense counsel also argued that the audiotape undercut Waller's testimony that she had seen appellant with a rifle, and demonstrated that she had gotten information from her brother that was either completely wrong or at best speculative. Yet she was not cross-examined on this information, nor confronted about earlier statements she had made or the source of her information. (ICPRT 262; 3RT 402-403, 420-421.) Defense counsel pointed out that, in fact, all of the information Waller had about the rifle was hearsay, to which former counsel made no objection. (*Ibid.*)

Finally, defense counsel argued that because former counsel had failed to investigate or appreciate the mental health issues involved with

appellant, Waller's testimony regarding Bloom, Sr.'s abuse of appellant essentially trivialized and misrepresented the issue. (3RT 405-406.)

The prosecution opposed the defense motion to exclude Medrano's and Waller's prior testimony, arguing that former trial counsel "did a thorough and professional cross-examination" (3CT 635-637), that the Ninth Circuit did not comment upon former counsel's handling of any witness other than Dr. Kling (3CT 637-638), and that appellant had not previously raised the issue of "effectiveness of the cross-examination." (3CT 635, 638-639.)

After reviewing the testimony in question, as well as transcripts of police interviews of Waller and her brother, Judge Hoff ruled that the testimony would be admitted. (2RT 265, 269-270; 3RT 420-421.)

Judge Schempp, who presided at appellant's retrial after Judge Hoff recused himself, first confirmed Judge Hoff's rulings without further review. (3RT 502; 4RT 584-585.) However, further argument was heard prior to the reading of the testimony. (17RT 2171- 2179.) The defense renewed its objection that the testimony should not be allowed because neither Evidence Code section 1291 nor appellant's confrontation rights were satisfied as a result of prior counsel's ineffectiveness on the central issue of the mental defense at the prior trial. Appellant also reiterated that, as a matter of due process and fairness, as well as under Evidence Code section 352, the testimony should not be allowed. (17RT 2171.) Counsel also argued that the prior testimony, if allowed, would be presented with a false aura of completeness, especially as to mental state issues. (17RT 2171-2172, 2175.) Finally, defense counsel argued that Medrano had not been fully impeached with all relevant offenses reflecting moral turpitude, and had been convicted of further moral turpitude crimes after his testimony, about which appellant could not now cross-examine him (17RT

2173-2174), and that there were discrepancies and equivocations in Medrano's testimony about which prior counsel did not inquire. (17RT 2174-2175.)

The prosecution responded that prior counsel may have had tactical reasons for not asking certain questions, such as avoiding the fact that Medrano had first met appellant while they were both in jail. (17RT 2176-2177.)

Judge Schempp ruled that the Ninth Circuit's finding of ineffective assistance of counsel "was directed at the psychiatrist's testimony, I believe and was limited to that." (17RT 2175-2176.) Judge Schempp stated that some of Medrano's additional convictions were remote in time and would not be allowed as impeachment if Medrano was available to testify. (17RT 2178.) The court also opined that prior counsel's failure to ask questions that might have opened the door to evidence that Medrano had met appellant in jail appeared to have been trial strategy rather than ineffective assistance of counsel. However, the court failed to address the other deficiencies in the cross-examination identified by defense counsel. (17RT 2175.)

2. Because Appellant's Former Counsel Rendered Ineffective Assistance of Counsel at Appellant's First Trial, the Prior Testimony Was Unreliable and Its Admission Deprived Appellant of the Right To Confrontation, Due Process, a Fair Trial and a Reliable Determination of Guilt, Sanity and Penalty

In *People v. Ledesma* (2006) 39 Cal.4th 641, this Court addressed the question of the prosecution's use of testimony from a prior trial at which the defendant was denied the effective assistance of counsel. In that case, the prior testimony of certain defense witnesses was used by the

prosecution to cross-examine and impeach those witnesses at the retrial. The prosecution was able to use "omissions and inconsistencies between [the defense witnesses'] earlier testimony and their current testimony to imply that their current testimony was fabricated." (*Id.* at p. 686.) The defendant argued that such use of the prior testimony was improper because the omissions and inconsistencies were attributable to the prior counsel's ineffectiveness. This Court held that in assessing the propriety of using such prior testimony courts must examine "the circumstances surrounding the prior testimony *and how it was used in the subsequent trial*, to determine whether the evidence at issue is attributable to counsel's ineffective assistance and whether its use denied the defendant a fair trial in the subsequent proceeding." (39 Cal.4th at pp. 686-687 (emphasis added) (citing *People v. Sixto* (1993) 17 Cal.App.4th 374 [upholding trial court's denial of motion for certain findings and for exclusion of evidence as means of curing effect of ineffective assistance of counsel at prior trial]; *People v. Karlin, supra,* 231 Cal.App.2d 227 [defendant's admissions made at preliminary hearing, when his attorney had conflict of interest, could not be used at his subsequent trial]; see also *Ibn-Tamas v. United States* (D.C.1979) 407 A.2d 626 [defendant's testimony at first trial, after which mistrial was declared due to ineffective assistance of counsel, could be used at second trial only for impeachment purposes]; and *People v. Duncan* (Ill.App 1988) 527 N.E.2d 1060, 1062 [because ineffective assistance of counsel "colored the entire proceeding," defendant's testimony at first trial could not be used in second trial except for purposes of impeachment].)

In *Ledesma*, the witnesses the defense called at the retrial testified to matters that had not been elicited by the defendant's former, ineffective trial counsel. (*People v. Ledesma, supra,* 39 Cal.4th at p. 686.) Thus, the defendant was not deprived of any testimony, for the witnesses were

available and testified at the retrial. Moreover, the witnesses had the opportunity at the retrial to explain any omissions and inconsistencies between their former testimony and their testimony at the retrial, and the defense was able to present the jury with the failures of prior counsel. (*Id.* at pp. 687-688.) In those circumstances, this Court held, the use of the prior testimony did not deny that defendant a fair trial. (*Ibid.*)

In *Ibn-Tamas v. United States* (D.C. 1979) 407 A.2d 626, cited by this Court in *Ledesma*, the Court upheld the *limited* use of a defendant's prior testimony at a retrial, where defense counsel had been ineffective during that prior testimony. The Court focused on the reliability of the prior testimony as well as the reliability of the defendant's testimony at the retrial. The Court noted that "[t]he absence of effective counsel bears directly on the completeness, clarity, and thus reliability of a defendant's [prior] trial testimony." (407 A.2d at p. 642.) On the other hand, the reliability of the defendant's testimony at the retrial, and whether it should go untested by impeachment with prior testimony, was also at issue. (*Id.* at p. 643.) In that case, as in *Ledesma*, the defendant "was able to inform the jury fully [at the retrial] about the circumstances that arguably detracted from the value of such impeachment to the government. In addition, [defendant's] trial counsel was in a position to rehabilitate her testimony upon redirect examination if the impeachment appeared serious." (*Id.* at p. 645.)

In this case, however, the prosecution used Medrano's and Waller's prior testimony in place of live testimony, rather than to impeach it, because the two were unavailable. Thus Medrano and Waller were not available to explain, amplify or retract the testimony they had given at the first trial. The prior testimony was not admitted to test the reliability of live testimony in a trial otherwise untainted by former counsel's ineffectiveness.

In contrast to *Ledesma*, here the former testimony was presented and used as substantive evidence in support of the prosecution's case-in-chief, as well as to undercut the defense case regarding appellant's mental state and the abuse he suffered at his father's hands. Appellant's ability to respond to that testimony was limited to the examination conducted by former counsel, who had failed to take fundamental steps to test the veracity of Medrano's claims and the reliability of certain of Waller's testimony, or to elicit evidence supportive of a mental state defense, including substantial evidence concerning appellant's relationship with his father.

Thus here, in contrast to the situation in *Ledesma* and *Ibn-Tamas*, defense counsel were essentially bystanders during the prosecutor's recitation of the prior testimony, unable to do anything to clarify, expand or impeach it. Appellant did not have the opportunity, as the defendant did in *Ledesma*, to establish for the jury that the witnesses' prior testimony was unreliable because of prior counsel's failures in investigating, preparing and examining those witnesses. As a result, the jury was presented with the "cold record" testimony of Medrano and Waller as if it were the whole story, as if it had been fully tested through adversarial cross-examination by an adequately prepared advocate representing appellant, and as if it were therefore reliable as to its contents and as a complete exposition of any relevant facts to which these witnesses would have been able to testify. As defense counsel put it, the testimony was presented to the jury with a false "aura of completeness." (17RT 2171-2172, 2222; 30RT 3901.)

As in *Ibn-Tamas*, the absence of effective counsel at the prior trial "[bore] directly on the completeness, clarity, and thus reliability" of that prior testimony; yet appellant had no way to explain or even identify that unreliability for the jury. The circumstances relied upon in *Ibn-Tamas* to adjudge the use of the prior testimony as sufficiently reliable are absent

here. The prior testimony was unreliable, no explanation of the cause of that unreliability was available to the jury, and the prosecution's use of that testimony in appellant's retrial denied appellant the effective assistance of counsel anew.

Mancusi v. Stubbs (1972) 408 U.S. 204 (*Mancusi*), addressed a similar issue, but is distinguishable. In that case, the defendant's conviction had been vacated on federal habeas corpus for ineffective assistance, without regard to the actual performance of counsel at trial, but solely on the ground that counsel had been appointed to represent the defendant only four days before trial. On retrial, the primary prosecution witness was unavailable and the prosecution was permitted to present the witness' prior testimony. (*Id.* at pp. 209.) The defendant challenged the use of that testimony as a denial of confrontation, given the finding that former counsel had been ineffective. The Supreme Court concluded that the original finding of ineffectiveness had not addressed the effectiveness of counsel's examination of the witness, and proceeded to review that issue. The Court found that counsel at the retrial did not demonstrate any "new and significantly material line of cross-examination" that was not at least touched upon in the first trial. (*Id.* at pp. 214-215.) As to matters that had not been addressed in the prior cross-examination, the Court found that the absence of such examination "could not have prejudiced Stubbs' case as to any issue that the jury was authorized to deliberate under the trial judge's charge." (*Id.* at p. 216.)

Here the Ninth Circuit did not directly address the effectiveness of prior counsel's examination of Medrano or Waller. However, unlike in *Mancusi*, the finding of ineffective assistance of counsel at appellant's first trial was not founded on a per se rule unrelated to counsel's performance, but on counsel's failure to investigate, prepare and present substantial

evidence of appellant's significant mental health impairment, relevant to his state of mind and to whether he had formed the requisite intent for first degree murder. (*Bloom v. Calderon*, *supra*, 132 F.3d 1267, 1277.) The Ninth Circuit characterized prior counsel's handling of the principal defense psychiatric witness at the prior trial as "a disaster." (*Ibid.*)

As summarized above, appellant's counsel at the retrial demonstrated that former counsel's ineffectiveness extended to his examinations of both Medrano and Waller, who would have responded to effective examination with testimony relevant to and supportive of appellant's mental state defense – an issue that, unlike in *Mancusi*, "the jury was authorized to deliberate under the trial judge's instructions." (*Mancusi*, *supra*, 408 U.S. at p. 216.) Moreover, defense counsel identified "new and significantly material line[s] of cross-examination" (*id.* at pp. 214-215) which were not pursued by prior counsel and could not be pursued without the witnesses being present and testifying.

Defense counsel below also identified specific deficiencies in prior counsel's examinations of Medrano and Waller. When Medrano appeared as a witness, former counsel failed to request a continuance, failed to request an Evidence Code section 402 hearing to determine the substance as well as the credibility and reliability of the story Medrano would present to the jury and failed to cross-examine him on details that might have impeached him. (ICPRT 254-259.) As to Waller, counsel not only identified deficiencies in former counsel's examination, but identified and produced a source of information – the audiotape of the police interviews of Waller and her brother – which provided impeachment of damaging testimony from Waller as well as relevant and helpful evidence in support of appellant's defense, and which was either not available to, or ignored or overlooked by, former counsel.

In *People v. Sixto*, *supra*, 17 Cal.App.4th 374 (*Sixto*), cited with approval in *Ledesma*, *supra*, the Court recognized that a retrial after reversal of a judgment for ineffective assistance of counsel may not fully remedy the prejudice to the defendant. In *Sixto* the defendant's convictions and death sentence had been reversed by this Court due to ineffective assistance of counsel. (*In re Sixto* (1989) 48 Cal.3d 1247.) At his retrial, the defendant sought further relief from the effects of his prior counsel's ineffectiveness. As the court recognized:

> Sixto received relief from the prejudicially deficient performances of [prior counsel]: the California Supreme Court vacated his original convictions and remanded the matter for a new trial. (*In re Sixto*, *supra*, 48 Cal.3d at p. 1265, 259 Cal.Rptr. 491, 774 P.2d 164.) However, this does not necessarily mean Sixto received all the relief to which he was entitled. In many cases, no doubt, the granting of a new trial is sufficient to remedy the prejudice caused by an attorney's deficient performance and nothing further need be done in this regard. But the fact remains that every defendant in a criminal case has the right to a fair trial, be it an initial proceeding or a retrial. If reversal and the granting of a new trial are insufficient to ensure a fair trial upon remand, further relief should be granted.

(17 Cal.App.4th at p. 381.) The court in *Sixto* upheld the denial of various curative measures proposed by the defendant, such as requested findings on disputed factual questions, because those measures went beyond what was necessary to a fair trial, putting the defendant "in a better position than if he had not had incompetent counsel." (*Id.* at pp. 399-400, fn. 11.)

The reverse occurred at appellant's retrial. Appellant sought not to gain advantage, but to deprive the prosecution of the unwarranted advantage it had obtained through the deficiencies in former counsel's representation of appellant. By allowing the prior testimony of Medrano and Waller to be presented to the jury even though appellant had not had an opportunity to contest the accuracy and reliability of the testimony or the

credibility of the witnesses, the prosecution, not appellant, was put in a better position because appellant had incompetent counsel.

Unlike in *Ledesma* and *Mancusi*, here the trial court failed to consider "the circumstances surrounding the prior testimony and how it was used in the subsequent trial, to determine whether the evidence at issue is attributable to counsel's ineffective assistance and whether its use denied the defendant a fair trial in the subsequent proceeding." (*Ledesma*, *supra*, 39 Cal.4th at pp. 686-687.) While Judge Schempp did address certain of the "circumstances surrounding the prior testimony," at least as to Medrano's testimony, her analysis was primarily based upon the conclusion that "the issue of ineffective assistance of counsel was directed at the psychiatrist's testimony, I believe, and was limited to that. [¶] The court on the contrary did not find that he had ineffective assistance of counsel as far as the other witnesses." (17RT 2175-2176.) The trial court's determination that former counsel's ineffectiveness dealt only with Dr. Kling is not warranted by the Ninth Circuit's opinion or the showings made by appellant of the deficiencies and failures of former counsel in examining Medrano and Waller. Contrary to the trial court's conclusion, the thrust of the Ninth Circuit's opinion is former counsel's overall failure to investigate the key issue of appellant's mental health. Thus, for example, the Ninth Circuit addressed former counsel's deficiencies relating to experts who evaluated appellant, specifically Drs. William Vicary, Sergio Fuenzelida and Julian Kivowitz. (*Bloom v. Calderon*, *supra*, 132 F.3d at pp. 1275-1276.) The Ninth Circuit also noted former counsel's failure to obtain readily available records demonstrating the depths of appellant's mental impairments. Thus the Ninth Circuit's decision cannot reasonably be construed as giving a seal of approval to former counsel's handling of any particular witness.

Given the crucial relevance of appellant's mental condition, the

fact that neither Medrano nor Waller were strangers to appellant, and that Waller spent a good deal of time with appellant at critically relevant times, former counsel's ineffectiveness with respect to their testimony concerning appellant's behavior over time was fundamental. For example, former counsel failed to question Waller regarding appellant's behavior in the time surrounding appellant's attempted robbery of Frances Summe,[26] approximately six months before the homicides. During that period Dr. Naham had recommended appellant be committed to psychiatric care because he was a potential and inordinate danger to himself and others. Yet, former counsel was unaware of Dr. Naham's evaluation and recommendation due to his "complete lack of effort." (*Bloom v. Calderon*, *supra*, 132 F.3d at pp. 1274-1277.)

Thus, whether or not the Ninth Circuit found ineffective assistance as to witnesses other than Dr. Kling, it based its finding of ineffectiveness in part on deficiencies in former counsel's performance as to other witnesses and on deficiencies of investigation and preparation on the central issue in the case – appellant's mental condition. The deficiencies in former counsel's investigation and preparation of the defense undermine any confidence the trial court or the jury could reasonably have had in the reliability of the testimony of Waller and Medrano. Yet the jury heard their testimony as if it was accurate and complete, thus receiving a distorted view of the relevant facts.

Former counsel also made no attempt to question Medrano out of the presence of the jury about his first meeting appellant when they were both in jail, or otherwise investigate this issue. Former counsel could have asked relevant questions, obtained information for further investigation and

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[26] In the penalty phase, the prosecution introduced evidence of the attempted robbery of Ms. Summe as aggravation.

then made an *informed* tactical decision whether evidence about appellant's former incarceration in fact helped chronicle appellant's deteriorating mental state over the months before the homicides.[27] The Ninth Circuit's observation is thus equally applicable to any hypothetical tactical decision: "'Describing [counsel's] conduct as "strategic" strips that term of all substance.'" (*Bloom v. Calderon*, *supra*, 132 F.3d at p. 1277 [citation omitted].)

C. The Prior Testimony Was Inadmissible on Retrial Because Appellant Was Incompetent at the Time of the Previous Trial

1. Facts Relating to Appellant's Competence at His First Trial

At the conclusion of the prior penalty phase, the court conducted a competence trial, at which three psychiatrists testified. Dr. Hyman Weiland opined that appellant was not competent. (2CT 135-191.) Drs. Richard Naham and William Vicary concluded he was. (2CT 195-242, 245-276.) As the Ninth Circuit found, none of the three testifying psychiatrists had been provided with any substantial documentation or information regarding appellant's social, educational, medical, psychiatric or neurological history. (2 CT 279, 298-300; see also *Bloom v. Calderon*, *supra*, 132 F.3d at pp. 1275-1276.) During the course of the federal habeas corpus proceedings that led to vacation of the prior judgment, Drs. Weiland and Vicary were provided, and reviewed, substantial additional materials relevant to an

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[27] Dr. Wolfson testified that in the months prior to the homicides, appellant's mental state was deteriorating, and cited, inter alia, the Summe attempted robbery as evidence of this deterioration. (35RT 4277-4279, 4289-4293, 4306-4307, 4317-4319, 4366-4367, 4374-4375, 4408-4413, 4416.)

evaluation of appellant's mental state.[28] (2CT 280, 285-291, 298-300, 314-322.) Based on his review of these additional materials, Dr. Weiland stated he remained of the opinion that appellant was incompetent at the prior trial, and opined that the additional materials substantially bolstered his opinion. (Declaration of I. Hyman Weiland, M.D., Ph.D., attached as exhibit to the Opposition to Use of Former Testimony, 2CT 293-322.) Dr. Vicary, after reviewing the additional materials, and conducting an additional interview of appellant, changed the opinion he had expressed in his 1984 testimony and concluded that appellant was not competent at the time of his first trial.[29] (Declaration of William Vicary, J.D., M.D., attached as exhibit to the Opposition to Use of Former Testimony, 2CT 278-291.)[30]

The additional materials Drs. Vicary and Weiland reviewed included a neurological assessment that identified and explained the presence and severity of appellant's organic brain damage, and an abnormal EEG documented in appellant's elementary school records. (2CT 281, 291, 300.) The additional materials also demonstrated probable causes of the brain damage, including in-utero exposure to Dilantin and phenobarbital prescribed for his mother to control her grand mal epilepsy, and an incident

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[28] Dr. Naham had become unavailable as a witness in the interim. (2CT 324-325 (Declaration of Tonya Deetz).)

[29] Dr. Vicary noted in his declaration that his opinion of appellant's competence in 1984 related only to competence to be sentenced and not to appellant's competence to stand trial, to waive his right to counsel, or to represent himself. (2CT 278-279.)

[30] The only other opinion offered at the 1984 hearing that appellant was competent was that of a doctor who had not been provided the additional materials. Because his license to practice medicine had been revoked at some time after his 1984 testimony he was unavailable to review the additional materials to determine whether his opinion would be changed. That doctor's prior opinion, counsel contended, was therefore no longer reliable and should be excluded from consideration.

at age two, where appellant was pronounced dead-on-arrival after drowning in a swimming pool when initial efforts to revive him failed, before he was ultimately revived. (2CT 281, 291, 300.) The additional materials also included evidence of bizarre behavior in jail, including a suicide attempt, auditory and visual hallucinations and delusional beliefs, as well as behavior in both the jail and the courtroom which demonstrated that he was unable to control himself, including observations of appellant shaking and trembling. (See 2CT 281-282, 299-300.) The materials further documented habitual and sadistic physical abuse of appellant by his sociopathic father and abandonment by his mother, who had brain damage herself. (2CT 281, 299-300.)

Additionally, appellant submitted declarations by Drs. Julian Kivowitz (2CT 327-338), David Lisak (2CT 340-383) and Donald Verin (2 CT 387-401), who had each reviewed the additional materials and each opined that appellant had not been competent during his prior trial. Dr. Kivowitz had been appointed by the trial court prior to appellant's first trial to assess appellant's sanity and mental capacity at the time of the offenses. (2CT 328-329.) He examined appellant and prepared a report based solely on that interview, having been provided with no other information or materials about appellant or the homicides. After review of the substantial materials provided to him in 1994, Dr. Kivowitz described appellant's mental impairment as follows:

> 19. Based on the Los Angeles County Jail Records for Mr. Bloom, the declarations of William Verin, M.D., Joni Diamond, L.C.S.W., A.C.S.W., and Esther Horney, J.D., C.S.W., the two August 1983 evaluations of Arthur S. Kling, M.D., and others who witnessed his aberrant behavior, it is my conclusion that, at critical junctures in the legal process, Mr. Bloom was unable to provide [former counsel] with any information or direction as to his case, was unable to cooperate with [former counsel], and was unable to maintain the degree of mental health necessary to contribute to his

defense.

20. After Mr. Bloom's arrest for the death of his father, step-mother and step-sister, Mr. Bloom was described by mental health workers as being out of control and of undergoing marked changes of behavior. Fellow inmates provides [*sic*] several examples of aberrant behavior, including dancing and singing in his cell. Jail and court records indicate that, at various times, Mr. Bloom was incapable of maintaining personnel [*sic*] hygiene or even sufficiently eating. Los Angeles County Jail Records reveal that Mr. Bloom was hallucinating and had attempted suicide. A neurological evaluation conducted by Dr. Sergio Fuenzalida reveals a history of blackouts during which he loses consciousness. All of the above indicate an escalating deterioration in Mr. Bloom's mental health.

(2CT 334-335.)

Dr. Lisak, a clinical psychologist, included in his declaration a social history assessment addressing appellant's childhood and adult experiences, and his developmental, medical, social, educational, psychiatric, and neurological history, which was explicitly relied upon in or incorporated into the declarations of Drs. Weiland, Kivowitz and Verin. (2CT 299, 330, 390.) While acknowledging the difficulty in determining, 10 years later, appellant's mental functioning at the time of the prior trial, Dr. Lisak concluded that appellant's psychological disorders seriously undermined his competence:

> Ample evidence exists, however, that he experienced dramatic mood fluctuations throughout his incarceration, that he attempted suicide on one occasion, and that he received psychotropic medication during his incarceration at the Los Angeles County jail. Court records show that he was unable to hold his emotions in check during legal proceedings, had inappropriate outbursts during court proceedings, and trembled and shook when he became upset or experienced stress. Given that Robert has a serious dissociative disorder that is of long-standing duration, it is also likely that he experienced dissociative episodes throughout the legal proceedings. In my professional opinion, which I hold to a reasonable degree of certainty, it is extremely unlikely that Robert

> was able to aid and assist his attorney in a meaningful manner at all times during the proceedings against him.

(2CT 371.) Dr. Lisak also connected appellant's mental functioning to his attorneys' conduct:

> His ability to think rationally and soundly, to exercise judgment, and to understand consequences of his decisions was most likely further impaired by the treatment he received at the hands of both his attorneys. Robert related the events of the offenses to his first attorney in a straight forward [*sic*] manner, and the attorney subsequently withdrew from the case. Robert withdrew and did not accurately retell the events to his second attorney. Robert's perceptions of abandonment and betrayal reflect his years of abuse by his father, and he does not have the insight and ability to analyze a complex situation and act maturely.

(2CT 371-372.)

Dr. Verin, then Chief Psychiatrist of the Forensic Mental Health Unit for the Los Angeles County Department of Mental Health, stated in his declaration that appellant's jail medical records from arrest through sentencing revealed that in February 1983 appellant was evaluated by a staff psychologist upon a report that appellant was "very emotional and disturbed." That evaluation indicated that "although Mr. Bloom was oriented to time, place, and person, he experienced auditory and visual hallucinations and 'could see things in the future.' Dr. Pelto noted Mr. Bloom's 'strange hand movements' and his desire not to take 'any type of meds.'" (2CT 388.) The day following the evaluation appellant attempted to hang himself. Appellant "stated that he 'wants to kill himself, why not?' and appeared 'somewhat disoriented' to staff. Psychiatric staff placed him in four point restraints and monitored him closely for the next four days." (2CT 384.) During that observation, appellant was described as a "thin, poorly nourished, pale male with hyperemic gums and generalized signs of

undernourishment. . . . " (*Ibid.*)

Dr. Verin noted that, "although it is difficult if not impossible to determine the etiology of the neurological damage sustained by Mr. Bloom, its presence and severity are clear." (2CT 390.) Dr. Verin identified three possible causes of appellant's brain damage: 1) prenatal exposure to anticonvulsants taken by his mother to control her grand mal seizures; 2) serious cerebral insult from drowning at age two, when appellant was pronounced "DOA" at the hospital before being resuscitated; and 3) additional trauma during developmental years from physical assaults of his father, accidents and chronic illness. Dr. Verin noted that 2 years of treatment at age 10 for a serious kidney disorder involved treatment with prednisone, which often causes psychiatric consequences, and led to appellant developing Cushing Syndrome, which in turn frequently leads to psychiatric symptoms that include psychosis and agitation. (2CT 390-391.)

Dr. Verin found verification of appellant's brain damage not only in the impressive battery of tests administered by Dr. Watson, but also in Mr. Bloom's school records. His elementary school teachers referred him for an electroencephalogram (EEG) which showed abnormal brain activity. A battery of performance and achievement tests administered in the third grade showed weaknesses in verbal comprehension, perceptual discrimination, and judgment. He was unable to copy a diamond geometric design properly. (2CT 392.) Dr. Verin described appellant's extensive mental impariments, and their consequences, as follows:

> By the time 18 year old Robert Bloom was arrested for the shooting of his father and the tragic killing of his stepmother and stepsister, he suffered severe multiple mental impairments that affected his actions throughout the course of legal proceedings against him. His brain damage alone leaves him with confusing, faulty perceptions of the world around him. Although he struggles to make sense of verbal and visual stimuli, he is unable to interpret

> accurately events, other people's emotions and motive, abstract or complex ideas, and – at times – simple communications. He is often like a small child who is developing and discovering the meaning of his world. Although he has islands of performance in some areas and may appear at times to the lay observer to be functioning normally, his comprehension is inescapably limited by islands of vacancy where his brain is simply not functioning adequately. His perception and interpretation of stimuli is distorted, and he is unable to reach rational decisions based on the limited information he understands. His processing of stimuli in his environment is colored by his life experiences as well as his faulty perceptions. [¶] In my professional opinion, which I hold to a reasonable degree of medical certainty, Mr. Bloom was unable to cooperate meaningfully with counsel at his trial and to understand rationally and factually the proceedings against him.

(2CT 393.)

2. Trial Counsel's Argument At Retrial

Based on the materials summarized above, appellant argued below that the prior testimony of Medrano and Waller was inadmissible because appellant was incompetent to stand trial during the first trial, such that admission of the prior testimony at the retrial would deny him due process and the right to confrontation. (2RT 201-214, 216-224; 17RT 2171; 2CT 129; *Stevenson v. Superior Court* (1979) 91 Cal.App.3d 925, 930.) Appellant argued that former counsel's ineffectiveness further undermined confidence in that verdict. Counsel requested a hearing on the issue of appellant's competence at the first trial. (2RT 206-207, 218-219, 220-221; 2CT 129-130.)

Defense counsel demonstrated that the integrity and reliability of the prior competence verdicts had been thoroughly undermined. The Ninth Circuit had found that first trial counsel's ineffectiveness undermined confidence in the outcome of the proceedings. (*Bloom v. Calderon*, *supra*, 132 F.3d at pp. 1271, 1278; 2CT 129.) While the Circuit's finding of ineffective assistance was directed primarily at prior counsel's performance

in the guilt phase, the central issue in the 1984 competence trial – appellant's mental condition – was the very subject about which appellant's former counsel's investigation, preparation and presentation at trial was found to have been deficient. (2CT 129-130; *Bloom v. Calderon*, *supra*, 132 F.3d at p. 1277.)

Defense counsel further contended that the prior verdict of competence could not be considered, because, the judgment against appellant having been vacated, that verdict no longer had any binding effect, nor any collateral estoppel effect. Penal Code section 1180,[31] noted counsel, provides that the granting of a new trial places the parties in the same position as if no trial had been had. (*People v. Hogue* (1991) 228 Cal.App.3d 1500, 1505-1506; 2CT 130.)

Finally, defense counsel argued that the passage of time did not defeat appellant's right to have his competence litigated, noting that there has never been a time limit placed on the determination of competence at a prior proceeding, citing *Stevenson v. Superior Court*, *supra*, 91 Cal.App.3d 925, *Chambers v. Municipal Court* (1974) 43 Cal.App.3d 809, and *Jennings v. Superior Court* (1967) 66 Cal.2d 867. (2CT 130.)

3. The Trial Court's Rulings

Judge Hoff ruled that the Ninth Circuit had granted appellant relief based upon ineffective assistance of counsel, not appellant's competence or lack thereof at the first trial, and that, therefore, the 1984 verdict that

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[31] Penal Code section 1180 states:

> The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict or finding cannot be used or referred to, either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the accusatory pleading.

appellant was competent would stand. Without comment on the expert declarations submitted by appellant, the court ruled that the issue would not be further litigated. (2RT 216-219; 3RT 316-317.) Judge Schempp then confirmed Judge Hoff's rulings. (3RT 502; 4RT 584-585.) Before the prior testimony was read to the jury, further argument on appellant's objections to the prosecution's use of the former testimony took place. (17RT 2171-2179.) Judge Schempp then again ruled that the former testimony would be admitted, without directly addressing appellant's objection based upon his incompetence at his first trial. (17RT 2175-2179.)

4. The Trial Court Erred In Denying a Hearing on Appellant's Competence at His First Trial

A defendant's trial while incompetent violates state law and federal due process guarantees. (*Pate v. Robinson* (1966) 383 U.S. 375, 385; *People v. Pennington* (1967) 66 Cal.2d 508, 516-517.) Testimony taken at a proceeding during which the defendant is incompetent to proceed may not be admitted at a later trial of that defendant as former testimony under Evidence Code section 1291 without violating the defendant's due process and confrontation rights. (*Stevenson v. Superior Court*, *supra*, 91 Cal.App.3d at p. 930; cf. *Hale v. Superior Court* (1975) 15 Cal.3d 221, 228; U.S. Const., 5th, 6th, 8th, 14th Amends.; Cal. Const. Art. 1, §§ 7, 15.) The trial court was thus presented with the question of whether appellant was competent at the time of the first trial. If he was not, Medrano's and Waller's prior testimony could not lawfully be admitted.

The court below erred in declining to conduct a hearing on appellant's competence at the first trial. First, the 1984 competence verdict only addressed competence after the penalty verdict, and only competence to be sentenced, rather than competence to stand trial. (See 2CT 125, 278-279, 296; see also *People v. Bloom* (1989) 48 Cal.3d 1194, 1203.)

Moreover, the reversal of the judgment by the Ninth Circuit effectively vacated the prior judgment, including the verdict of competence, which could not therefore bar appellant from litigating on retrial the issue of his competence. (*People v. Hogue* (1991) 228 Cal.App.3d 1500, 1505-1506; Pen. Code, §1180.) Second, by basing his ruling solely upon the the original trial judge's rulings and the 1984 competence determination, Judge Hoff ignored substantial evidence presented by appellant undercutting the reliability of the 1984 competence determination and establishing substantial likelihood that appellant was not competent at the time of the first trial. Judge Hoff's ruling was thus an abuse of discretion.

Even assuming, arguendo, that the 1984 competence verdict was not vacated by the Ninth Circuit's reversal of the judgment, a jury finding that a defendant is competent is subject to challenge on the basis of new evidence that gives rise to a serious doubt about the validity of the competence finding. When a competence hearing has already been held and the defendant was found to be competent to stand trial, a trial court is required to conduct a second competence hearing if it is presented with "a substantial change of circumstances or with new evidence" that gives rise to a "serious doubt" about the validity of the competence finding. (*People v. Jones* (1991) 53 Cal.3d 1115, 1153; *People v. Marshall* (1997) 15 Cal.4th 1, 33; *People v. Kaplan* (2007) 149 Cal.App.4th 372, 383-384.)

> The requirement of substantial evidence that a defendant is incompetent is satisfied if at least one expert who is competent to render such an opinion, and who has had a sufficient opportunity to conduct an examination, testifies under oath with particularity that, because of mental illness, the accused is incapable of understanding the proceedings or assisting in his defense.

(*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1047.)

Appellant submitted substantial evidence, under this definition, that appellant was incompetent during the first trial. That evidence

simultaneously raised a serious doubt about the validity of the 1984 competence finding. In the face of that evidence, the trial court's unquestioning reliance on the 1984 verdict was erroneous and wholly unreasonable.

The declarations of Drs. Weiland, Vicary, Kivowitz, Lisak and Verin unquestionably meet the standard of substantial evidence that appellant was, at the time of the prior trial, incapable of rationally assisting counsel in his defense. Drs. Weiland and Vicary were not only competent to render such an opinion, but had each conducted at least one examination of appellant prior to the 1984 competence trial, and had testified to their opinions on the subject at the 1984 competence trial. In 1993, after review of the substantial additional materials relevant to appellant's mental, social, educational, medical and neurological history, Dr. Vicary also conducted further examinations of appellant. Drs. Kivowitz, Lisak and Verin were likewise competent to render such an opinion,[32] and Drs. Kivowitz and Verin had contemporaneous contact with appellant during his incarceration about the time of his first trial. (2CT 329, 388-389; see also *Bloom v. Calderon*, *supra*, 132 F.3d at pp. 1275-1276.)

Moreover, the declarations, especially compared to the testimony from the 1984 competence trial, constituted new evidence which gave rise to a serious doubt about the validity of the 1984 competence finding. Dr. Vicary, who had testified in 1984 to an opinion that appellant was competent, in his declaration stated that review of the additional materials, along with his additional examinations of appellant, had changed his opinion, and he concluded that appellant had not been competent. (Declaration of Dr. Vicary, 2CT 278-291.) In his testimony in the 1984

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[32] The prosecution did not contest the qualifications or competence of any of the experts upon whose declarations appellant relied.

proceeding, Dr. Vicary had expressly stated that during his interview of appellant in 1984, he noticed evidence of a mental disorder or mental disease, i.e., a trend in his thinking that was "consistent with [appellant] having some degree of paranoia," although at the time he did not think that it was of such a degree that it would affect whether or not appellant understood the nature of the proceedings or could cooperate with counsel. (1984 Testimony of Dr. Vicary, 2CT 254-255, 259.) Dr. Vicary had also testified that, concerning appellant's ability to cooperate with counsel:

> I'm less confident about that part of my opinion. . . . It is possible that this man could become so agitated and paranoid that he would actually become psychotic, and at that point he might very well have marked impairment in rationally cooperating with counsel, not because he's faking or he's just being antagonistic and difficult, but because he actually is into some kind of paranoid state. At this point however, the evidence is that he is not in such a state. [ ] He's not in such a condition now and he really isn't close to being in such a condition now.

(2CT 259-260.)

Dr. Vicary also explained in his 1984 testimony that, although he attempted to obtain information prior to examining appellant, he had not received any material from appellant's former counsel about appellant other than the transcript of the preliminary examination in this case. In general, Dr. Vicary testified at the hearing, he felt that that was an insufficient amount of information for a proper evaluation. (2CT 264-265.)

This failure by former counsel to provide mental-health experts with relevant materials was at the core of the Ninth Circuit's finding of ineffective assistance of counsel:

> However, when the defense's only expert requests relevant information which is readily available, counsel inexplicably does not even attempt to provide it, and counsel then presents the expert's flawed testimony at trial, counsel's performance is deficient.

(*Bloom v. Calderon*, *supra*,132 F.3d at p. 1278.) Dr. Vicary's problems with getting relevant information from former counsel are also addressed in the Ninth Circuit opinion. (*Id.* at p. 1276.) Dr. Vicary's change of opinion was not the result of merely rethinking his previous opinion, but of reviewing substantial additional relevant information, and further interviewing appellant.

Dr. Weiland, who had testified in 1984 to an opinion that appellant was not competent, confirmed that opinion in his declaration, and opined that the additional materials substantially bolstered that opinion. (Declaration of Dr. Weiland, 2CT 293-322.)

Dr. Naham had testified that appellant was competent. (1984 Testimony of Dr. Naham, 2CT 195-242.) Because his medical license was revoked after the 1984 hearing, appellant was unable to determine whether his opinion would have changed after reviewing the additional materials. (Declaration of Tonya Deetz, 2CT 324-325.) It is a fair inference on this record, however, that, had Dr. Naham reviewed the additional materials,[33] his opinion would have changed as well.

An analogous situation was presented in *Deere v. Woodford* (9th Cir. 2003) 339 F.3d 1084 (*Deere*). In that case, one doctor, appointed by the trial court, had examined the defendant and found he was competent. Defense counsel and the prosecutor stipulated to the doctor's report, and the

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[33] In fact, the additional materials included Dr. Naham's own evaluation of appellant six months prior to the homicide, in which he had found that appellant was a potential danger to himself and to others, would benefit from inpatient psychiatric treatment, was not suitable for outpatient treatment, and, without suitable treatment, would continue to present an inordinate danger to others. (See 3CT 452-454, 474; *Bloom v. Calderon*, *supra*, 132 F.3d at p. 1274.) When he testified at the 1984 competence hearing, Dr. Naham, as well as every other expert that testified, and former counsel, was apparently unaware of this previous evaluation.

trial court found the defendant competent. The trial court then accepted the defendant's guilty plea and ultimately sentenced him to death. (*Id.* at p. 1085.) However, defense counsel had also had a psychologist examine the defendant at around the same time as the appointed doctor's examination, but had specifically instructed the psychologist to stay away from the question of the defendant's competence.

Eleven years later, on federal habeas corpus review, the defendant in *Deere* submitted a declaration by the psychologist stating that, had he been asked to express an opinion on defendant's competence, he would have reported that his competence to plead guilty was "very questionable," and that while the defendant "'was competent in the limited sense of knowing what was going on around him, so that he understood the nature of the criminal proceedings [, . . . his] mental disorders rendered him unable to assist counsel in the conduct of a defense in a rational manner.'" (*Deere, supra,* 339 F.3d at p. 1085.)

The defendant in *Deere* also submitted a declaration by a board-certified psychiatrist who had reviewed documents supplied to him and had examined the defendant 10 years after the trial court proceedings. In a declaration the psychiatrist opined that the defendant "suffers from the effects of organic brain damage which affects him cognitively, neurologically and behaviorally," "that there was substantial evidence that the defendant's thought processes were illogical and disturbed during his post-arrest incarceration," that the defendant's "multiple impairments . . . rendered him incompetent to rationally comprehend his trial proceedings or to aid and assist counsel." The psychiatrist concurred in the conclusion of the psychologist that the defendant had not been competent to stand trial. (*Deere, supra,* 339 F.3d at p. 1086.)

The issue in *Deere* was whether or not the district court had erred

by refusing the defendant an evidentiary hearing on his allegation that he was not competent to plead guilty at the time of the plea. (*Deere, supra,* 339 F.3d at p. 1086.) The Ninth Circuit noted, regarding the psychiatrist's 1993 declaration, that "belated opinions of mental health experts are of dubious probative value and therefore, disfavored." (*Ibid.*) However, the Court recognized that the psychologist's opinion was different, because it was based on his two examinations of the defendant performed within days of the guilty plea, and therefore was probative of the defendant's mental status at that time. And the psychologist had not rendered an opinion earlier on the issue of competence because he had been instructed not to. "Viewed together, the declarations of [the psychologist and the psychiatrist who examined appellant in 1992] 'create a real and substantial doubt' as to [defendant]'s competency to plead guilty, if they are taken at face value and assumed to be true." (339 F.3d at pp. 1086-1087.) As a result, the Court held that an evidentiary hearing was required to evaluate the evidence relevant to the defendant's claim. (*Id.* at p. 1087.)

Appellant acknowledges that the denial of a hearing on the admissibility of former testimony differs procedurally from the denial in *Deere* of an evidentiary hearing on federal habeas corpus. Nevertheless, *Deere's* analysis of the evidence, including the lapse of time between the initial competence inquiry and the defendant's allegations in federal court, is instructive on the appropriate response to appellant's allegations and evidence in this case: the declarations submitted by appellant below "create[d] a real and substantial doubt" of appellant's competence at his first trial, and a determination of whether appellant was competent at the prior trial was required before testimony from that trial could be admitted against appellant under Evidence Code section 1291. The supporting evidence appellant submitted included declarations of four experts (Drs.

Weiland, Vicary, Verin and Kivowitz) who had examined appellant relatively contemporaneously to the former trial, two of whom had testified regarding his competence prior to sentencing in that proceeding. These declarations were, "therefore, probative of [appellant's] mental status at the critical time." (*Deere*, *supra*, 339 F.3d at p. 1087.)

As in *Deere*, Dr. Vicary's declaration offered a reasonable explanation for why he had reached a different conclusion earlier. Dr. Weiland stated that he continued to believe, as he did in 1984, that appellant was incompetent. Dr. Kivowitz explained that his appointment only requested evaluation of appellant's sanity at the time of the crimes. Thus, he had not expressed an opinion on the subject of appellant's competence at the time. Dr. Verin's knowledge of appellant's mental condition came initially from his position at the time of appellant's arrest and trial as Chief Psychiatrist of the Forensic Mental Health Unit for the Los Angeles County Department of Mental Health, where he was responsible for all inmates at the Los Angeles County Jail with psychiatric problems, such as appellant. He was never asked at the time to express an opinion of appellant's competence. (Declaration of Donald W. Verin, M.D., 2CT 388.) Considered together with the declaration of Dr. Lisak, this evidence "create[d] a real and substantial doubt" as to appellant's competence at the prior trial, and raised a serious doubt about the validity of the 1984 competence verdict.

Judge Hoff's reliance on the prior trial judge's opinion on competence was misplaced, given the substantial new evidence that appellant was incompetent. Although a trial court's reliance on its observations of a defendant in the courtroom is not error where the defendant has failed to present substantial evidence of incompetence (*People v. Ramos* (2004) 34 Cal.4th 494, 509), "[o]nce such substantial

evidence appears, a doubt as to the sanity of the accused exists, no matter how persuasive other evidence – testimony of prosecution witnesses or the court's own observations of the accused – may be to the contrary." (*People v. Pennington* (1967) 66 Cal.2d 508, 518; accord, *Pate v. Robinson* , *supra*, 383 U.S. at pp. 385-386 ["While [the defendant]'s demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue."]; *Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1089 ["personal observations cannot overcome the significant doubt about [the defendant]'s competence raised by the clinical evidence"].) Because appellant submitted substantial evidence of incompetence as a matter of law, it necessarily raised a reasonable doubt about his competence at the first trial. The trial court should either have granted a hearing to determine whether appellant was competent at the prior trial, or, in the alternative, have held on the basis of the showing made in the declarations that prior testimony from that trial could not be admitted against appellant.

Judge Hoff did not determine that the evidence appellant presented was insufficient to raise a doubt as to appellant's competence at the first trial. Rather, he refused to consider it, ruling that the issue would not be "relitigated." Such a refusal to consider the substantial evidence that appellant was incompetent at the first trial constituted an abuse of discretion. The failure to consider all of the evidence relevant to an exercise of discretion constitutes an abuse of that discretion: "'To exercise the power of judicial discretion all the material facts . . . must be both known and considered.'" (*In re Cortez* (1971) 6 Cal.3d 78, 85-86, citing and quoting *People v. Surplice* (1962) 203 Cal.App.2d 784, 791.) "A failure of the trial court to consider all the evidence is a failure to exercise discretion and requires reversal of the determination." (*Schlumpf v.*

Superior Court (1978) 79 Cal.App.3d 892, 901.)

By allowing the prosecutor to introduce the prior testimony of Waller and Medrano despite substantial evidence that appellant was incompetent at the time of the first trial, and without considering that evidence, the trial court violated appellant's rights to due process, to a fair trial and to confrontation.

D. The Erroneous Admission of the Prior Testimony Was Prejudicial to Appellant's Guilt, Sanity and Penalty Phases

Under either the *Chapman*[34] or *Watson*[35] standard, the effect of the erroneous admission of the prior testimony on the jury's guilt verdicts was undoubtedly prejudicial, whether considered alone or in conjunction with the other errors in this case. (See, e.g., *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [errors that might not be so prejudicial as to amount to a deprivation of due process, when considered alone, may cumulatively produce a trial that is fundamentally unfair]; see Arg. I, *ante*; Arg. XV, *post*.)

The prosecution used the testimony of Medrano and Waller to support its case-in-chief, relied on it extensively in argument at the guilt phase and at the penalty phase, and emphasized it in cross-examination of defense expert witnesses at both the guilt and sanity phases, in an attempt to undercut the defense evidence of abuse and of appellant's impaired mental state at the time of the homicides. For example, in argument at the guilt phase, the prosecution relied upon Waller's testimony to support the prosecution's theory that appellant planned and premeditated his father's murder, and that the planning and premeditation were not diminished by

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[34] *Chapman v. California* (1967) 386 U.S. 18, 24.

[35] *People v. Watson* (1956) 46 Cal.2d 818, 836.

any mental illness or other psychiatric condition. (See, e.g., 30RT 3809-3810.) The prosecution also relied on Waller's testimony in an attempt to undermine the defense evidence regarding the severity and the frequency of Bloom, Sr.'s abuse of appellant, as well as to challenge the testimony of the defense mental-health experts and to suggest that their testimony was biased. (See, e.g., 30RT 3858, 3876, 3887, 3889-3890, 3895; 31RT 4073.) The prosecution further relied upon Waller's testimony to argue that appellant was "normal," and not suffering from any of the conditions the defense mental-health experts had identified in appellant. (See, e.g., 30RT 3858, 3884; 31RT 4073.) Even more specifically, the prosecution noted the absence of any testimony from Waller that appellant recited lists of English kings, in arguing that non-expert testimony did not support Dr. Mills' diagnosis of Asperger's syndrome.[36] Yet the failure of prior counsel to elicit such evidence was the result of his ineffective assistance in failing to conduct an investigation of appellant's mental health, which would have revealed the relevance of such testimony.

The prosecution relied upon Medrano's testimony as evidence of planning, premeditation and deliberation undiminished by any mental illness (see, e.g., 30RT 3811, 3837; 32RT 4081, 4083), as well as to support speculation about other planning activities appellant might have undertaken.

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[36] As the prosecutor argued to the jury:

> The defendant doesn't have that preoccupation. There has been no evidence in this case of that kind of preoccupation. Not one civilian witness who knew him before the murders has mentioned that he even knows the kings of England. The only people who know that are the doctors. [¶] *If it was such a preoccupation, why wouldn't Christine [Waller] have mentioned,* yeah, he did this really weird thing where he kept talking about the kings and queens of England all the time.

(30RT 3884 (emphasis added).)

(See, e.g., 30RT 3811.)

The prejudice to appellant is not limited to the prosecution's use of the former testimony, however. Appellant demonstrated below that former counsel's failure to investigate Medrano and Waller deprived appellant at his retrial of cross-examination from which a reasonable jury might have received a significantly different impression of the credibility or reliability of their testimony, as well as additional evidence supporting the defense case.

Had the cross-examination appellant sought been precluded by the trial court rather than lost through former counsel's ineffectiveness, the effect of the error would be tested by "assuming that the damaging potential of the cross-examination were fully realized. . . ." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.) In this case, such an assumption would result in a cross-examination in which Medrano's answers demonstrated, for example, that he expected that he would get some advantage in his own case from his testimony in appellant's case, or had discussions with law enforcement or the prosecution which led him to believe he would receive some advantage, or from whom he had received some information about appellant's case upon which he based his story; that his alleged meetings with appellant took place at a time and location at which it could have been demonstrated that either Medrano or appellant in fact could not have been present; and that appellant's behavior was consistent with the diagnoses of mental illness, both when Medrano first knew him and during the meetings Medrano described.

Similarly, "assuming that the damaging potential of the cross-examination were fully realized," Waller would have disclosed on appropriate cross-examination that a portion of her testimony was based not upon personal knowledge but on hearsay, resulting in exclusion of the

evidence. Waller would also have disclosed substantial evidence of the abuse of appellant by his father, and the effects of the abuse on appellant. Waller would have testified to appellant's behavior at the time of the attempted robbery of Ms. Summe and in the months, weeks and days preceding the homicides, which would have corroborated the testimony of, e.g., Robin Bucell, Eric Bloom and Melanie Bostic, and supported the opinions of appellant's expert witnesses. By allowing the former testimony to be read to the jury, the trial court allowed the jury to make its guilt determinations on prejudicially incomplete and unreliable evidence.

"'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation.]" (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) That the jury saw this as a close case is apparent. This case was not factually complex and involved a single explosion of violence over a matter of seconds or, at most, minutes. The defense conceded that appellant had committed the homicides. Yet the verdict on Count One was returned only after four days of deliberation. (23CT 6089-6094, 6099, 6103-6104; see *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [six hours of deliberations is evidence of a close case]; *People v. Rucker* (1980) 26 Cal.3d 368, 391 [9 hours]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [6 hours]).)

During those four days of deliberation, the jury asked for testimony to be read back and for further instruction on crucial elements in the case. (23CT 6097-6098; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["[j]uror questions and requests to have testimony reread are indications the deliberations were close."]; *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40 [request for read back of critical testimony demonstrating close case]; see also *People v. Hernandez, supra,* 47 Cal.3d at pp. 352-353; *People v.*

Filson, supra, 22 Cal.App.4th at p. 1852.)

Moreover, having returned a verdict of first degree murder on Count One after four days of deliberation, the jury deliberated on Counts Two and Three for approximately three more days. (23CT 6104-6108; 24CT 6213-6215.) After seven days of deliberation, the jury was unable to reach a decision on these two counts. On Count Two, the jury was split two ways, with seven for first degree murder and five for second degree murder. On Count Three, the jury was split three ways, six for first degree murder, five for second degree murder, and one for involuntary manslaughter. (34RT 4223-4224.) That the jury had difficulty rendering a unanimous verdict on Counts Two and Three is manifest. (cf. *People v. Gainer* (1977) 19 Cal.3d 835, 854-56.) The verdicts of second degree murder on Counts Two and Three were reached only after the prosecution dismissed first degree murder charges on those two counts. (24CT 6213-6215; 34RT 4225-4235.)

It is therefore reasonably likely that, in the absence of the former testimony, a result more favorable to appellant at the guilt trial would have resulted. Reversal of the entire judgment is therefore required even under the *Watson* standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) However, since the error deprived appellant of his federal constitutional rights to confrontation, due process, a fair trial and a reliable jury determination of guilt, the error must be assessed under the *Chapman* standard. (*Chapman v. California* (1967) 386 U.S. 18, 24; U.S. Const. 5th, 6th, 8th & 14th Amends.) Respondent cannot demonstrate that either the guilt verdicts or the verdict of sanity on Count One were not attributable, at least in part, to the prejudice introduced by the former testimony. Moreover, since appellant's death sentence rests on an unreliable guilt verdict, and the death verdict was not surely unattributable to this error

(*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279), the death verdict is itself unreliable, obtained in violation of appellant's Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishment, and the death judgment must therefore be reversed. (*Caldwell v. Mississippi* (1985) 472 U.S. 320.)

E. Conclusion

For all of the foregoing reasons, appellant's Fifth, Sixth, Eighth and Fourteenth Amendments rights to confrontation, fundamental fairness, fair and reliable guilt and sanity determinations, and a reliable, fair and individualized sentence, as well as his corresponding rights under California law, were violated as a result of the trial court's erroneous admission of the prior testimony of the two critical prosecution witnesses. Appellant's convictions and death judgment must therefore be reversed.

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III.

THE TRIAL COURT VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS BY FAILING TO SUSPEND THE CRIMINAL PROCEEDINGS AND INITIATE COMPETENCE PROCEEDINGS

A. Introduction

The question of appellant's competence to stand trial was presented to the trial court in a variety of ways throughout the proceedings. For example, while in the Los Angeles County Jail awaiting this retrial, appellant was involuntarily committed pursuant to Welfare & Institutions Code section 5150. Although notified by the jail, the trial court apparently made no inquiry into the circumstances. Further, as explained in Argument II, *ante*, in a motion to preclude admission of prior testimony from appellant's 1983 trial, the defense sought to establish that appellant was incompetent at that trial. In support of the motion, the defense filed declarations from five qualified experts, at least three of whom had examined appellant at the time of the prior trial, opining that he was not competent at the prior trial. These declarations also demonstrated appellant's lifelong and enduring mental illness and cognitive deficits. The prosecution, although arguing against revisiting the question of appellant's competence at the prior trial, also conceded that if appellant was incompetent at the prior trial, then he was still incompetent, and his present competence should be determined before trial began. Yet the trial court refused to "relitigate" appellant's prior competence, or to conduct any inquiry into present competence.[37]

The content and manner of appellant's numerous *Marsden* motions, taken alone, also raised doubts about his competence to rationally consult with and assist counsel. In the course of those *Marsden* hearings,

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[37] See Arg. II, *ante*, incorporated into this argument by this reference.

defense counsel described appellant as "skirting the edges of competence," and stated that in any other case, he would have declared a doubt of appellant's competence "eons ago." However, defense counsel's evaluation of appellant as presently competent was based upon an erroneous understanding of the standard for competence to stand trial. Defense counsel focused not on appellant's ability to rationally consult with and assist counsel, but on whether counsel "required" appellant's assistance or consultation and on whether appellant actively interfered with the defense. No inquiry into appellant's competence took place as a result of any of those proceedings or of counsel's characterization of appellant's competence.

In addition to the five mental health expert declarations concerning appellant's competence at the prior trial which were submitted pretrial, two psychiatrists and a neuropsychologist testified at the guilt phase of the retrial to appellant's mental illness and brain damage, consistent with the opinions expressed in the declarations, establishing that appellant's mental illness and cognitive deficits were substantially long-standing and enduring, and affected his ability to process information, to comprehend social norms, to understand and rationally evaluate the views of others, to react to novel situations, to make decisions, to reason things out, to make judgments and to weigh and consider options. Appellant was diagnosed with a dissociative disorder, either a borderline or schizotypal personality disorder, and an underlying psychotic illness, as evidenced by his history of response to extremely strong doses of antipsychotic medication. He had a history of delusions and paranoia. He was described as more likely than a normal person to have a breakdown under stress, which could make his thinking more and more illogical. He was also diagnosed with Asperger's Disorder, a pervasive developmental disorder on the autism spectrum, which involves

deficits in empathy and social relations, a lack of social or emotional reciprocity and the inability to truly understand the effect of his actions on others.

Yet, according to the mental health experts, appellant's verbal skills are intact, tending to mask his deficits to an untrained observer. One psychiatrist explained that, in the absence of an adequate history of appellant, appellant's verbal ability led the psychiatrist to miss the possibility of brain damage and mistakenly determine that appellant was competent at the time of his first trial.

As the trial approached, and as it continued, and as mental health experts continued to testify to appellant's cognitive deficits and mental illness, appellant filed more frequent *Marsden* motions, showing increasing agitation. He became more difficult for defense counsel to "manage," even in the courtroom with a witness on the stand. Still, no inquiry was made into appellant's competence.

Appellant eventually absented himself from the courtroom rather than attend his sanity trial. After the issue of sanity was submitted to the jury, defense counsel cited "substantial changes" in appellant and declared a doubt as to appellant's competence. The trial court, however, refused to suspend proceedings and order a competence trial, or even to appoint experts to evaluate appellant to assist the court in assessing whether or not there was a doubt of his competence.

When the jury was unable to decide whether appellant was sane on Counts Two and Three (which would have precluded a penalty phase in the absence of a sanity retrial), the trial court then allowed appellant to withdraw his plea of not guilty by reason of insanity (NGI) as to those counts, despite defense counsel's refusal to consent to the withdrawal, and despite the irrationality of appellant's explanation for his decision to

withdraw the plea.[38]

The trial court then allowed appellant to represent himself at the penalty phase without the necessary assurance that he was knowingly and intelligently waiving his right to counsel with an actual understanding of the risks and disadvantages of doing so.[39] Although both the prosecutor and appellant made motions to reinstate defense counsel during the penalty phase, the trial court denied those motions, despite appellant's conduct of the case demonstrating that his behavior and his decisions were not wholly rational, but were likely the product of his mental illness and cognitive deficits. Instead, the trial court allowed what the prosecutor called a "circus" and a "mockery of justice" to continue through to the jury's return of a death verdict.

Defense counsel, subpoenaed by appellant to testify at the penalty phase, refused to do so, even when threatened with contempt, on the grounds that appellant was not competent, and that any waivers he had purportedly made were invalid. During the penalty phase, appellant made a motion to reinstate his NGI plea, claiming he had not understood all the consequences of withdrawing the plea. The trial court denied the motion without inquiry into relevant facts from available witnesses upon which appellant relied.[40]

Throughout the trial, the trial court, which characterized the overwhelming evidence of appellant's mental illness and cognitive impairments as "psychobabble," relied on its own observations of appellant during court proceedings, to the total exclusion of substantial evidence

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[38] See Arg. IV, *post*, incorporated into this argument by this reference.

[39] See Arg. VI, *post*, incorporated into this argument by this reference.

[40] See Arg. V, *post*, incorporated into this argument by this reference.

which raised doubts of appellant's competence. The trial court applied an erroneous legal standard to the determination of whether to suspend proceedings and order a competence trial, resulting in a violation of statutory and constitutional mandates.

The trial court did eventually appoint a psychiatrist, Dr. Sharma, to examine appellant to confirm that he was competent to waive the attorney-client privilege, in an attempt to counter defense counsel's refusal to testify. After appellant refused to cooperate with Dr. Sharma, the latter testified that he could not conduct a meaningful evaluation under the circumstances. Nevertheless, the trial court ordered defense counsel to testify for appellant,[41] but did nothing to inquire further into appellant's competence.

Throughout, the trial court showed a distinct antipathy, or at least a pronounced skepticism, toward defense psychiatric and neuropsychological evidence as well as an erroneous understanding of the court's constitutional and statutory responsibilities regarding competence. The trial court had before it substantial evidence raising a doubt that appellant was competent to stand trial, much less to represent himself at a capital penalty trial. The trial court's failure and refusal to suspend proceedings was based on factual and legal errors, and violated appellant's constitutional rights to substantive and procedural due process of law, a fair trial, trial by jury, confrontation and cross-examination, equal protection and reliable guilt, sanity and penalty verdicts. Reversal of the entire judgment is required.

B. Relevant Law

A criminal defendant may not be tried unless he is competent and the state must give the defendant access to procedures for determining his competence. (*Pate v. Robinson* (1966) 383 U.S. 375, 386 (*Pate*); *Drope v. Missouri* (1975) 420 U.S. 162, 172 (*Drope*); *Odle v. Woodford* (9th Cir.

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[41] Defense counsel refused to testify despite the trial court's order.

2001) 238 F.3d 1084 (*Odle*).) Trial of an incompetent defendant violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution (*Medina v. California* (1992) 505 U.S. 437, 449; *Cacoperdo v. Demonsthenes* (9th Cir. 1994) 37 F.3d 504, 510) and article I, section 15 of the California Constitution. When there is a reasonable doubt regarding the competence of a criminal defendant, the trial judge must suspend criminal proceedings and hold a competence hearing. (*Pate, supra,* 383 U.S. at 85; *People v. Hale* (1988) 44 Cal.3d 531, 539-540.) The trial court's failure to take that step in the instant case, despite clear indication and defense counsel's expressed belief that appellant was not competent to proceed, violated Penal Code section 1367 et. seq., and deprived appellant of his rights to substantive and procedural due process of law, a fair trial, trial by jury, confrontation and cross-examination, equal protection and reliable guilt, sanity and penalty verdicts as guaranteed under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, as well as Article 1, sections 7, 15, 16, and 17 of the California Constitution and Penal Code sections 1367 et seq.

The test for competence to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – whether he has a rational as well as factual understanding of the proceedings against him." (*Boag v. Raines* (9th Cir. 1985) 769 F.2d 1341, 1343; *People v. Lawley* (2002) 27 Cal.4th 102, 131 [defendant mentally incompetent if unable to understand nature of the criminal proceedings or to assist counsel in conduct of defense in rational manner].)

Due process requires a state court to hold a hearing where substantial evidence before the court "indicate[s] the need for further inquiry" into the defendant's competence. (*Drope*, *supra*, 420 U.S. at p.

180.) Because there are no "fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed[,] the question [of competence] is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." (*Ibid.*; see also *McMurtrey v. Ryan* (9th Cir. 2008) 539 F.3d 1112, 1118.)

A trial court's duty to conduct a competence hearing arises when substantial evidence raising a doubt as to mental competence is presented at any time before judgment. (*Drope, supra*, 420 U.S. at p. 181; *People v. Danielson* (1992) 3 Cal.4th 691, 726; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1110.) When the evidence casting doubt on an accused's present competence is less than substantial, whether to order a hearing is subject to the discretion of the trial court. (*Pennington, supra*, 66 Cal.2d at p. 518; *People v. Merkouris* (1959) 52 Cal.2d 672, 678-679, disapproved on other grounds in *Pennington, supra*, 66 Cal.2d at p. 518.) That discretion is removed when there is substantial evidence of incompetence. "Where the evidence raises a 'bona fide doubt' as to a defendant's competence to stand trial, the judge on his own motion must impanel a jury and conduct a [competence] hearing. . . ." (*Pate, supra*, 383 U.S. at p. 385.) A bona fide doubt should exist where there is substantial evidence of incompetence. (*Moran v. Godinez* (9th Cir. 1995) 57 F.3d 690, 695; see also *Drope, supra*, 420 U.S. at p. 180; *People v. Hale, supra*, 44 Cal.3d at p. 539.) When a defendant shows that the evidence before the trial court raised such a doubt as to competence, but no competence hearing was held, the conviction must be set aside; if the prosecution then wishes to retry the defendant, a hearing must be held to determine present competence. (*Pate, supra,* 383 U.S. at p. 387; *Drope, supra*, 420 U.S. at p. 183.) Similarly, where a trial court has abused its discretion in the determination of whether the evidence raises a doubt as to the defendant's competence, reversal is required. (*Pennington,*

supra, 66 Cal.2d at p. 518; see also *People v. Welch* (1999) 20 Cal.4th 701, 740.)

In determining whether there is substantial evidence to require a competence hearing, the trial court must consider all of the relevant circumstances. (*Drope*, *supra,* 420 U.S. at p. 180.) "Substantial evidence" of incompetence is judged by an objective standard. It does not mean unconflicting evidence. (See, e.g., *People v. Young* (2005) 34 Cal.4th 1149, 1219; *People v. Welch*, *supra*, 20 Cal.4th at p. 738.) Nor does it mean evidence sufficient to raise a *subjective* doubt regarding the defendant's competence in the mind of the trial judge. (See, e.g., *People v. Jones* (1991) 53 Cal.3d 1115, 1153 ["substantial evidence" is measured by an objective standard and, hence, cannot be defeated by the trial court's own observations of the defendant or the judge's subjective belief that he appears competent]; accord, e.g., *Pennington*, *supra*, 66 Cal.2d at p. 518; *People v. Castro* (2000) 78 Cal.App.4th 1415, 1402.)

It bears emphasis that the initial question is *not* whether the defendant is definitely incompetent, but merely whether there is sufficient doubt in that regard. The trial court's sole function is to determine whether there is any evidence which, assuming its truth, raises a doubt about the defendant's competence. (*Moore v. United States* (9th Cir. 1976) 464 F.2d 663, 666 (emphasis added).)

The constitutionally-mandated procedure governing competence questions in California is codified in Penal Code Sections 1367 *et seq.* (See *Pennington*, *supra*, 66 Cal.2d at p. 518.) Section 1367 provides that a trial may not occur if "the defendant is unable to understand the nature of the criminal proceedings *or* to assist counsel in the conduct of a defense in a rational manner." (Pen. Code, §1367, subd. (a) (emphasis added).)

Section 1368 provides the mechanism for ensuring the protection of the defendant by imposing two obligations on the trial court.[42] First, Section 1368 requires the trial court to inquire about the defendant's mental competence when *any doubt* about such competence arises. In addition, Section 1368 imposes a duty on a trial court to order a competence hearing if there is substantial evidence that the defendant is incompetent. (*People v. Guzman* (1988) 45 Cal.3d 915, 963.)

Due process requirements are not satisfied if the court merely takes evidence to guide it in determining if it should declare the existence of a doubt as to the defendant's competence; the trial court has no discretion on whether or not to order a competence hearing once there exists substantial evidence giving rise to a doubt regarding competence. (*People v. Superior Court* (*Marks*) (1991) 1 Cal.4th 56, 69.) If a state fails to observe its statutorily-prescribed procedures aimed at testing whether a defendant is competent to stand trial, then that defendant's right to procedural due process has been violated. (*Drope, supra*, 420 U.S. at p. 172; *Matheney v. Anderson* (7th Cir. 2001) 253 F.3d 1025, 1040.)

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[42] Section 1368 provides in relevant part:

(a) If ... a doubt arises in the mind of the trial judge as to the mental competence of the defendant, he or she shall state the doubt on the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent.... At the request of the defendant or his or her counsel or upon its own motion, the court shall recess the proceedings ... to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time. [¶] (b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing," and even if "counsel informs the court that he or she believes the defendant is mentally competent, the court may nevertheless order a hearing."

The matter cannot be waived by defendant or his counsel. (*In re Davis* (1973) 8 Cal.3d 798, 808; see also *Pate, supra*, 383 U.S. at p. 384; *People v. Marks* (1988) 45 Cal.3d 1335, 1340, 1342.) Thus, the trial court is obligated to conduct a hearing even if defense counsel objects or asserts a belief that the defendant is competent. (*People v. Guzman, supra*, 45 Cal.3d at p. 963; Pen. Code §1368, subd. (b).)

The statutory scheme as well as the case law, to the extent it leaves any discretion to the trial court, strictly limits that discretion, recognizing the specific expertise of qualified mental health experts on the issues involved in determining competence. The sworn opinion of a qualified expert that a defendant is not competent is conclusive on the issue of whether there is a doubt of competence under section 1368. (*People v. Stankewitz* (1982) 32 Cal.3d 80, 92; *Pennington, supra*, 66 Cal.2d at p. 519.) Presented with such an opinion, the trial court is compelled to hold a hearing, and failure to do so constitutes a deprivation of the defendant's due process rights and constitutes reversible error. (*Pate, supra*, 383 U.S. at p. 386; *Pennington, supra*, 66 Cal.2d at p. 521.) Thus, for purposes of determining whether a doubt as to competence exists, a qualified expert may not be ignored or discounted based upon the whim, personal predilection or prejudice of a trial judge. (Cf. *People v. Samuel, supra*, 29 Cal.3d 489 (jury verdict, finding defendant competent despite substantial uncontradicted expert testimony of the defendant's incompetence, overturned on appeal).)

Moreover, the ultimate determination of competence is not left solely to the trial court's discretion. Rather, section 1369 requires that upon suspension of proceedings to conduct an inquiry on a defendant's competence, the trial court must appoint one or more psychiatrists or licensed psychologists to examine the defendant. Upon a trial of the issue

of competence, the trier of fact, whether court or jury, cannot find the defendant competent in the face of substantial uncontradicted evidence of incompetence. (*People v. Samuel*, *supra*, 29 Cal.3d 489.)

Moreover, the California statutory scheme recognizes and incorporates the need for even more specialized expertise where questions of competence involve developmental disability. Section 1369 requires in part that:

> If it is suspected the defendant is developmentally disabled,[43] the court shall appoint the director of the regional center for the developmentally disabled established under Division 4.5 (commencing with Section 4500) of the Welfare and Institutions Code, or the designee of the director, to examine the defendant.

This Court has recognized that one of the purposes of section 1369's requirement that the trial court appoint the director of the regional center is to ensure that a developmentally disabled defendant's competence to stand trial is assessed by those having expertise with such disability, so that the court can make an informed determination of the defendant's competence to stand trial. (*People v. Leonard*, *supra*, 40 Cal.4th at pp.

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[43] Section 1370.1, subdivision (h) defines "developmental disability" as follows:

> As used in this section, "developmental disability" means a disability that originates before an individual attains age 18, continues, or can be expected to continue, indefinitely and constitutes a substantial handicap for the individual, and shall not include other handicapping conditions that are solely physical in nature. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include handicapping conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

1389-1391.) "Court-appointed psychiatrists and psychologists may not have this expertise, because their experience may pertain to mental illness rather than developmental disability." (*Id.* at pp. 1390.)

Hence, where there is substantial evidence raising a suspicion that the defendant has a developmental disability and is incompetent, the appointment of psychiatrists rather than the director of the regional center for the developmentally disabled is clear error. (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1388; *People v. Castro* (2000) 78 Cal. App.4th 1402, 1417-1418; *In re L.B.* (2010) 182 Cal.App.4th 1367, 1371-1375.) And while a trial court's finding of competence following a hearing will be upheld on appeal if credible and substantial evidence supports it, that rule does not apply where the proper procedures – such as the appointment of the director of the regional center – have not been followed. (See, e.g., *People v. Castro*, *supra*, 78 Cal.App.4th at pp. 1418-1419.)

The trial court in appellant's case committed error under state law (*People v. Leonard*, *supra*, at p. 1388; *Pennington*, *supra*, 66 Cal.2d at p. 521; *People v. Castro*, *supra*, at pp. 1417-1418; Pen. Code §§1367 et seq.) and violated appellant's Eighth and Fourteenth Amendment rights to due process (*Drope*, *supra*, 420 U.S. at p. 172; *People v. Castro*, *supra*, at pp. 1419-1420; *McGregor v. Gibson* (10th Cir. 2001) 248 F.3d 946, 954) and heightened reliability in "all stages" of this capital proceeding. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305; *Beck v. Alabama*, *supra*, 447 U.S. 625,637-638.)

C. Because There Was Substantial Evidence That Appellant Was Incompetent to Rationally Comprehend the Proceedings or Assist Counsel, the Court Erred in Failing to Order a Competence Hearing Pursuant to Penal Code Sections 1367 et seq.

Prior to and through the return of the jury's verdicts of guilt, and through the sanity phase of the trial, the record establishes there was substantial evidence before the trial court demonstrating the need for further inquiry into appellant's competence. Even assuming arguendo that the evidence had not yet reached that point, upon defense counsel's declaration of a doubt as to appellant's competence after submission of the issue of sanity to the jury, the necessity of a hearing to determine appellant's competence was manifest. Thereafter, the evidence demonstrating a substantial question whether appellant was competent continued to mount. Yet at every point, the trial court failed and refused to appoint qualified experts to evaluate appellant's competence or to suspend proceedings and conduct a competence trial.

The record establishes that the trial court applied an incorrect legal standard in its determination whether to suspend proceedings and conduct a competence trial. Instead of objectively evaluating the evidence on the issue to determine whether it raised a doubt about appellant's competence, the trial court insisted it be convinced, or at least entertain a subjective doubt, that appellant was incompetent. Thus the trial court erroneously relied solely upon its own observations of appellant in court, and its own interpretations of what was observed, to the exclusion of expert testimony, and without regard to defense counsel's interactions with appellant, including those outside the courtroom. Furthermore, the trial court imposed its own subjective views of mental health evidence, arbitrarily rejecting the substantial psychiatric consensus that appellant was seriously mentally ill,

cognitively impaired, and developmentally disabled. The trial court ignored the controlling statutory scheme that recognizes the need for specific expertise in evaluating defendants with developmental disabilities, and mandates the appointment of the regional center in a case such as this.

The trial court failed to consider the rationality of appellant's understanding of the proceedings, the rationality of his interactions with counsel, or the rationality of his decisions. Instead, the trial court placed undue and unwarranted reliance upon appellant's apparent ability to present a position articulately, despite expert testimony that made clear that this ability was misleading. In so doing, the trial court ignored substantial evidence that appellant's judgment, his decisions, and his understanding of the proceedings were not wholly rational.

The trial court also failed to recognize defense counsel's misapprehension of the constitutional standard for competence to stand trial, or to recognize that counsel's initial statements of concern about, but belief in, appellant's competence actually reflected appellant's inability to rationally consult with counsel, and thus his incompetence to stand trial. Moreover, the trial court arbitrarily and erroneously disregarded defense counsel's eventual declaration of a doubt as to appellant's competence during jury deliberations on sanity and upon appellant's withdrawal of his NGI plea to Counts Two and Three.

While the evidence raising a doubt of appellant's competence was substantial, and failure to suspend proceedings and conduct a competence hearing therefore constitutes reversible error, the trial court's numerous errors in evaluating the evidence and the question of appellant's competence constituted an abuse of discretion, requiring reversal on that ground as well. On either ground, as a result of the trial court's failure to suspend proceedings and conduct a competence hearing, the entire

judgment must be reversed.

1. There was substantial evidence to raise a doubt as to appellant's competence prior to the guilt verdicts

When this case was returned to the Los Angeles County Superior Court for retrial in 1998, the trial court was on notice that a competence hearing had been conducted following appellant's 1983 trial, before sentencing. (See *People v. Bloom* (1989) 48 Cal.3d 1194, 1203, 1217; *Bloom v. Calderon* (1997) 132 F.3d 1267, 1270, 1276.) While appellant was at that time found competent, the trial court on retrial was also on notice that appellant's counsel at the prior trial was found to have rendered ineffective assistance of counsel in his investigation, preparation and presentation of relevant mental health evidence. (*Bloom v. Calderon*, *supra*, 132 F.3d at pp. 1270-1278.) The trial court was thus on notice that the reliability of the 1984 finding of competence was open to question, if not to substantial doubt.

Soon after appellant was returned to Los Angeles for retrial, the trial court received further notice that appellant was mentally unstable when appellant was found by the Jail Mental Health Service to meet LPS criteria[44] and had been committed to a designated facility. (25 CT (Confidential) 6335-6336.) Yet the trial court made no inquiry into the circumstances of that LPS finding and commitment.

Judge Hoff, to whom the case was first assigned for retrial, had, as early as January 1999, determined that there was some question about appellant's competence. He stated his intention to appoint a psychiatrist

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[44] The Lanterman-Petris Short Act (Welf. & Inst. Code §§ 5001 et seq.) provides for involuntary commitment "[w]hen any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled. . . . " (Welf. & Inst. Code § 5150.)

and a neurologist to evaluate appellant to aid the court in determining whether appellant was competent in connection with a motion by appellant to represent himself. (ICPRT 148-151.) Appellant withdrew that motion before any evaluation took place, and Judge Hoff, for reasons unstated, decided not to have appellant evaluated. (2RT 163.)

Prior to the commencement of the retrial, the trial court had before it the declarations from 1993 of five mental health experts and the 1984 testimony of two of those experts and a third. As demonstrated in Argument II, *ante*, incorporated herein by reference, these were addressed to and demonstrated appellant's incompetence at his prior trial. All but one[45] of those mental health experts opined not only that appellant was incompetent at the time of his prior trial, but that his incompetence was based on severe, longstanding mental illness and brain damage. The declarations also documented appellant's suicide attempts, his auditory and visual hallucinations and his delusional beliefs, as well as his medication with antipsychotic drugs. The mental health experts described appellant's faulty and distorted perceptions of verbal and visual stimuli, and his difficulties and even inability to accurately interpret events or abstract or complex ideas, and on occasion, his difficulties with simple communication. His impaired ability to reach rational decisions on the basis of what he *was* able to understand was also noted. The declarations demonstrated that these expert opinions were not based simply upon interviews of appellant, but were supported by extensive historical documentation of appellant's social, medical, psychiatric, educational and family history, as well as neuropsychological testing.

As demonstrated in Argument II, *ante*, those declarations constituted substantial evidence that appellant was not competent at the

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[45] See fns. 27, 29, *ante*.

prior trial. Their probative value was not limited to 1983, however. Even the prosecutor argued below that if appellant was not competent at the prior trial, there was no reason to believe he was competent for the retrial. The prosecutor argued further that, given defense counsel's position that appellant's competence was "a fluid situation" and "day-to-day" (2RT 211), the trial court should determine present competence before trial began, rather than wait. (2RT 203, 211-212.) Under the prosecution's reasoning, the declarations establishing a substantial doubt that appellant was competent at the first trial constituted substantial evidence that he was not competent at his retrial. The trial court, under the prosecution's reasoning, was required to suspend proceedings and hold a hearing on appellant's competence, as the prosecutor suggested. The trial court committed reversible error by failing to do so.

Moreover, as the case continued to trial and through the guilt phase, substantial additional evidence was presented casting further doubt as to appellant's competence. Appellant's odd behavior at court appearances was noted by the prosecution as well as by the trial court. (See e.g., 2RT 211-214.)[46] The record of the proceedings up to and through this retrial is replete with evidence of appellant's paranoia and delusions, both from appellant and from other witnesses. For example, appellant's

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[46] After the prosecutor and defense counsel had noted that appellant was swaying in his seat, the trial court stated:

> Mr. Bloom has been swaying today. That's a new behavior, I've never seen that before, and I've seen Mr. Bloom I don't know how many times, lots and lots of times. He's different when he comes to court on several occasions.

(2RT 214; see also 42RT 5021 ["Just don't rock – ."].)

accusation that Dr. Sharma was "a Christian spy" (25CT 6337[47]), and his repeated references to defense counsel Tonya Deetz as appellant's "consigliere" and the "consigliere" of "the principality of Israel,"[48] apparently equating himself to "the principality of Israel," and reference to prosecutor Samuels as "one of his subjects" because she is Jewish. (*Marsden* RT 529, 532-533, 535, 666, 668.)

Other evidence of appellant's paranoia and delusions include his allegation of a conspiracy by his former appellate lawyer to "sabotage" his case, with defense counsel following the appellate lawyer's instructions and "pursuing his agenda." (*Marsden* RT 92-93, 98-106,[49] 668.) Appellant characterized the mental defense to which he objected as part of that conspiratorial agenda. (See *Marsden* RT 666-667.) To the same effect were appellant's accusation that trial counsel had "sabotaged" a motion by not using the "words and phrases" he had instructed be used during argument on the motion. (*Marsden* RT 100-101.)[50] Appellant's rant about poisoned ants on cookies served to him in the jail (*Marsden* RT 108-109) suggests possible hallucinations as well as delusions. His allegation that Judge Hoff had been "executing a personal agenda" in his rulings on

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[47] A portion of 25CT 6337 remains sealed. (See fn.2, *ante*.) Appellant here refers only to that portion which as been unsealed.

[48] Drs. Vicary and Wolfson had noted that some of appellant's delusions centered on being Jewish. So far as is known to appellate counsel, the term "consigliere" has nothing to do with Judaism or Jewish culture. Appellant's use of the term was a likely conflation with his apparent delusions about being a member of the Mafia. (See, e.g., 3RT 268-270; 17RT 2214; 35RT 4292.)

[49] Portions of *Marsden* RT 99-100 remain sealed. Appellant here relies solely on those portions which were unsealed (See fn. 2, *ante*.)

[50] See fn. 49

defense motions, based on Judge Hoff's disclosure that his son had been in high school with appellant, but did not know appellant, further demonstrates appellant's paranoia and its interference with defense counsel's conduct of the case. (*Marsden* RT 527-539.)

Appellant also demonstrated an odd, likely delusional, understanding of the judicial system. He called television shows to check the accuracy of legal advice given him by defense counsel. He argued that defense counsel should subpoena Justice Stanley Mosk and the three Ninth Circuit judges on the panel that granted relief in federal habeas corpus proceedings, to explain the intended impact of their opinion. (*Marsden* RT 101-103.) Appellant offered to pay for lunch for Judges Hoff and Schempp at McDonald's or Taco Bell so Judge Hoff could tell Judge Schempp that appellant was competent (*Marsden* RT 2691), and paid a "complement" to Judge Schempp, stating "this Court is a lady and deserving of respect because I see no difference between this Court and Judge Judy" (15RT 1943), further raising questions about the rationality of his view of how the judicial system works as well as of his rather peculiar views of reality generally. Appellant's "permission slips," by which he sought permission from the trial court to do various things in representing himself, were a truly odd procedural vehicle. Similarly, appellant's continuing references to the trial court as "the Lady of the Court,"[44] was such an odd affectation as to raise substantial questions concerning the rationality of appellant's understanding of the proceedings and of his thought processes as well as his connection with reality. (33RT 4164-4178, 40RT 4704-4709, 4747-4805, 41RT 4813-4828, and 47RT 5806-5829.)

Even appellant's choice of penalty witnesses was so odd that the trial court must have questioned appellant's rationality. For example, appellant's apparent glee at having Roz Kelly agree to testify on his behalf

raised serious questions as to the rationality of his purpose in calling Kelly as a witness, as well as the rationality of his understanding of the concept of mitigation in a penalty phase. Kelly is the actress who had played "Pinky Tuscadero" on the television show *Happy Days*. Appellant alternately referred to her as Roz Kelly and Pinky Tuscadero, and told the trial court, "Pinky's going to be a great witness. I am the only one in Men's Central Jail that has been able to latch onto a movie star. No one else catching women on the bus has caught as big a fish as Pinky Tuscadero. I caught her and I'm keeping her." (33RT 4183.)

In discussing Kelly, appellant also made a comment that raised a significant question of his understanding of the proceedings, and of his situation:

> And Roz Kelly is going to be a character witness. And I am going to be arguing for life.
>
> *And I think Shellie should indicate, since I have indicated, I mean, Miss Samuels should indicate if she is going to argue for death* because I think Roz Kelly can explain to the jury that when they give me life without parole that I am going to have somebody to take care of me while I am in prison.

(33RT 4183 (emphasis added).) The implication that appellant believed the prosecution might *not* argue for the death penalty in the penalty phase of a capital trial is another strong indication that appellant's understanding of the proceedings was less than rational.

Appellant also demonstrated an irrational and unrealistic view of the facts and issues relevant to the prosecution as well as to the defense of his case at all three stages of the trial. (See, e.g., *Marsden* RT 500-503 [appellant claiming that the prosecution had no evidence against him on Counts Two and Three]; *Marsden* RT 1931-1932 [same]; *Marsden* RT 3034 [following prosecution case-in-chief, appellant characterized the evidence against him on Counts Two and Three as "flimsy, inconsequential and

weak"].)

Appellant's odd relationship with defense counsel, especially Tonya Deetz, raises substantial questions about the rationality of his "consultation" with counsel. Aside from his paranoia regarding Deetz's part in the"conspiracy" with his former appellate lawyer, appellant referred to Deetz variously as his "consigliere" (see, e.g., *Marsden* RT 529, 532-533, 535), a friend (15 RT 1937) and "like a sister" (*Marsden* RT 3617; see also 44 RT 5410 ["my sister Tonya"]), while deriding her as "a naive little school girl" (*Marsden* RT 3617), a "femme fatale" (*Marsden* RT 2057) and not fit to practice law (*Marsden* RT 3617). He referred to her "petty jealousies and high school insecurities" (*Marsden* RT 3616), and asked the trial court to appoint a lawyer to help him file an ethics complaint against her with the State Bar. (*Marsden* RT 3617.) He twice asked for monetary sanctions against her.[51] (*Marsden* RT 535; 15 RT 1944.) He "accepted her resignation" as "consigliere to the principality of Israel" (*Marsden* RT 666), and later agreed that "our personal relationship was over and we are no longer friends." (15 RT 1937.) Yet he subpoenaed her to testify as a character witness in the penalty phase. (See 43RT 5182-5199; 46RT 5641-5667.)

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[51] On one occasion, he asked for sanctions of $27,000 against Deetz and $1,000,000 against Applebaum. Although he asked that Deetz's sanctions be suspended "because [she] has two baby boys at home that she has to feed, clothe and put through college" (*Marsden* RT 534-535), he wanted the sanctions from Applebaum collected:

> Seymour can write a check today or Seymour can go to the bank Tuesday, because the banks are closed on Monday. Seymour can go to the bank on Tuesday, September 5th and withdraw the million dollars from his savings account to pay the fine.

(*Marsden* RT 535-536.) On another occasion, he asked for sanctions of $1,000 against Deetz and $10,000 against Applebaum. (15RT 1942-1944.)

He fixated on "control" of the strategy of the case, complaining that Deetz had not used the "words and phrases" he had instructed her to use in arguing a motion (*Marsden* RT 100)[52], referring to instructions he had given Deetz (*Marsden* RT 499, 532-534), asking Judge Hoff to replace Applebaum because he would not move to recuse Judge Hoff as instructed by appellant (*Marsden* RT 528), and repeatedly asking the court to instruct defense counsel to do what appellant wanted or to refrain from what appellant did not want (see, e.g., *Marsden* RT 104-110, 508-509). He stated more than once that control of the strategy was very important to him.[53] (See, e.g., *Marsden* RT 32, 1934.)

The greatest impediment to rational consultation with counsel, however, appears to have been appellant's adamant denial of, or inability to acknowledge, his own mental illness and cognitive deficits. One of the basic facts of this case, of the available defenses and of potential mitigation available to appellant, is the fact that appellant is mentally impaired – the expert consensus is that he is mentally ill and has brain damage, and there is unrebutted expert testimony that he has a developmental disability.[54] Yet appellant, because of these conditions, could not rationally consult with counsel about them, and took active steps to frustrate the presentation of valid defenses and powerful mitigation based on those conditions. Where

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[52] See fn. 49

[53] He later referred to the granting of his motion to represent himself at penalty phase as "a judicial coup." (*Marsden* RT 2057.)

[54] Whether or not the specific diagnosis of "Asperger's Disorder" is technically accurate within the meaning of Section 1370.1, appellant's brain damage and its consequences, having originated before age 18, qualifies as a developmental disability. As Dr. Watson stated, "anybody who has had brain injury will have some aspects of – particularly in the right hemisphere will have something that looks kind of like Asperger's." (22RT 2861.)

the fact most fundamental to the defense, intrinsic to the defendant, is one which the defendant cannot recognize or acknowledge because of mental illness, developmental disability or brain damage, rational consultation about that defense is necessarily and substantially compromised. The impairments and mental illness presented for appellant a disconnection from crucial aspects of his life experience, affecting the reliability and rationality of his interpretations of the information he perceived, his interactions with others and, most importantly, of his judgment and his decisions. Rational consultation with counsel concerning his defense in a capital trial was virtually impossible, or at the least fraught with obstacles that appellant did not, or could not, perceive.

Appellant's denial of his mental impairments, and his actions taken without consideration of, but likely as the result of, those impairments, were themselves symptomatic of the mental impairments, which thus constituted a formidable barrier to rational consultation with counsel. Appellant's distorted view of the strength of the prosecution's case on Counts Two and Three, strongly suggests that his perception and processing of information are distorted, but more importantly, that appellant was unable to rationally weigh the alternatives to a mental defense, such as simply challenging the weight of the evidence. His insistence on the latter course cannot be said to have resulted from rational consideration of the alternatives or rational consultation with counsel. That defense counsel determined that appellant was competent because counsel did not "need" appellant to consult further undermined any possibility of rational consultation.

Moreover, defense counsel expressed their own concerns about appellant's competence. Defense counsel had repeatedly notified the trial court that appellant was "severely mentally ill" and "skirting the edges of competence." (See, e.g., ICPRT 148-150 ["long history of mental illness,"

"history of neurological problems," "some indications of right brain damage," "how he processes information . . . is in question"]; 2RT 212 ["This is a person with very complex mental health issues."]; *Marsden* RT 505-506 [appellant's opposition to mental state defense is "part of his illness of how he perceives things and he processes information due to some neuropsychiatric difficulties that he has, temporal lobe problems"]; 4RT 612 ["It is understatement to say we have a very difficult client to deal with who is profoundly mentally ill."]; *Marsden* RT 670 [defense counsel informs trial court that appellant had been medicated with Haldol, an antipsychotic drug, but had not taken it for a couple of months, becoming "increasingly agitated;" appellant "may be interfering with the orderly presentation" of the defense]; 15RT 1948-1951 ["In my mind, Mr. Bloom has always been skirting the edges of incompetence;" "the ability to cooperate with counsel in a rational manner so as to prepare a defense, but for the unique posture of this case, I believe Mr. Bloom would be incompetent;" "But as we get closer, he's again skirting the edges of his ability to cooperate with counsel, interference in the trial process due to a mental illness, disease or defect, and I think the court needs to be aware of this;" "if this were a different type of case in terms of how it came to us, vis-a-vis the preparation that needed to be done, where I needed to confer with the client, needed to plan strategy with the client, I would have declared a 1368 doubt eons ago"].)

While not expressly declaring a doubt of appellant's competence prior to or during the guilt phase, the only basis for defense counsel withholding such a declaration appears to have been a mistaken understanding of the standard for competence. Whether a doubt was expressly declared or not, defense counsel made it repeatedly and abundantly clear that there were substantial concerns about appellant's

competence.

The record before the trial court also included evidence that appellant was actively interfering with defense counsel's conduct of the case. Aside from his repeated attempts to forestall a mental health defense, appellant acted in opposition to counsel's advice in challenging Judge Hoff's impartiality, resulting in Judge Hoff's decision to recuse himself. (*Marsden* RT 527-539.) Appellant also disclosed tactical decisions by defense counsel (*Marsden* RT 3031), accused counsel of fabricating the mental defense that was presented (*Marsden* RT 1933, 3033, 3615; 37 RT 4556), and asked the trial court to restrict counsel's argument, at least once successfully. (*Marsden* RT 823-824.)

Even assuming the indications of appellant's paranoia and delusions, his unusual beliefs about the judicial process and his interference with counsel's efforts would not, standing alone, have constituted evidence substantial enough to have mandated a competence hearing, those matters did not stand alone. Coupled with and seen in the context of the overwhelming consensus of expert opinion regarding appellant's mental illness, cognitive deficits, developmental disability and past incompetence, as well as defense counsel's repeated statements of concern about appellant's competence, no reasonable judge could fail to have entertained a reasonable doubt of appellant's competence.

At no time, from appellant's return to Los Angeles for retrial through the guilt phase, did any mental health expert present any opinion either in testimony, by declaration or in a report that the diagnoses and opinions expressed in the expert declarations or testimony were erroneous, or unsupported by the available information. While the prosecution had a consulting neuropsychologist, Dr. Brooks, who attended portions of the trial, and who had been provided the raw data from Dr. Watson's

neuropsychological testing, Dr. Brooks never testified, nor was any report by Dr. Brooks ever submitted to the trial court.

The trial court had evidence that appellant had been medicated with an antipsychotic medication, Haldol. Defense counsel informed the trial court that appellant had stopped taking the antipsychotic medication some months before trial and had become "increasingly agitated." (*Marsden* RT 670.) According to Dr. Mills, the dosage appellant was taking and his reaction to that dosage were a strong indication that appellant had some underlying psychotic process. (26RT 3162-3163.)

That appellant's agitation increased, and his ability to control himself decreased, as the trial went on is evidenced by the increasing frequency of appellant's *Marsden* motions (ultimately totaling 11), as well as by the increasingly emotional and histrionic nature of his accusations in those motions (see, e.g., *Marsden* RT 528-536, 666-668, 1930-1933, 2057-2059, 2689, 2691, 3031-3035, 3615-3619), and by instances of appellant arguing loudly with defense counsel at counsel table in the presence of the jury (see *Marsden* RT 2691-2692). His agitation and attempts to interfere with defense counsel escalated as the trial approached, escalated further as the presentation of the defense case approached, and further again as defense counsel presented the testimony of Drs. Watson, Mills and Vicary. During the trial, appellant disclosed confidential information to the trial court because he thought defense counsel's tactical decision not to immediately disclose that information was "rude and disrespectful." (*Marsden* RT 3031.)

The trial court had to admonish appellant that his arguments with counsel while a witness was testifying were audible to the court and the jury. (*Marsden* RT 2691-2693.) Earlier in the proceedings, defense counsel had requested that a paralegal be allowed to sit at counsel table

during the trial to assist in counsel's "management" of appellant during trial. (4RT 612-613.) After the trial court denied the request, defense counsel renewed it, citing appellant's distracting behavior, interfering with counsel's attention to jury voir dire. (6RT 765-766.) The trial court later acknowledged defense counsel's efforts to keep appellant calm during trial. (28RT 3498.)

All of this information was before the trial court well before the jury returned its guilt phase verdicts, and raised a serious doubt that appellant was competent. This conclusion stands despite defense counsel's assertion that appellant had not yet passed the threshold they had established, for defense counsel's understanding of competence was at odds with the standards required by the Constitution. While defense counsel declined to "declare a doubt" of appellant's competence prior to or during the guilt phase, counsel's statements in a hearing the day before opening statements demonstrate that such a doubt in fact existed well before counsel finally expressly declared that it did. The following demonstrates defense counsel's misunderstanding of the relevant standard:

> [T]he second prong [is] the ability to cooperate with counsel in a rational manner so as to prepare a defense, *but for the unique posture of this case*, I believe Mr. Bloom would be incompetent. . . .[B]ecause of the unique posture of this case, *I don't need to talk to Mr. Bloom about facts, I don't need to talk to him about strategy.* In many ways this was laid out because of the voluminous materials in preparation that arose out of the various appeals and ultimately the habeas proceedings and what the lawyers and the various mental health professionals did, our predecessors did. *So I don't need Mr. Bloom to cooperate with me in that sense.* . . . [I]f this were a different type of case in terms of how it came to us, vis-a-vis the preparation that needed to be done, *where I needed to confer with the client, needed to plan strategy with the client,* I would have declared a 1368 doubt eons ago . . . . I don't want to be accused of sandbagging in any way, shape or form, but it's something that's troubled us, I've alluded to it before, and, *quite*

truthfully, if there is interference where he is in my view not cooperating with preparation of the case in a rational way, where he starts interfering with the tactical process, my view is that I will have to declare a doubt and then we'll do what we do.

(15RT 1948-1950 (emphasis added); see also 36RT 4524.)

Competence does not focus solely on counsel's need to consult with a rational defendant, but also on the defendant's right to rationally participate in the defense, not just as another witness or a source of facts. Competence requires not just that the defendant be available to counsel, but that the defendant have the ability to *consult* rationally with counsel, to be able to understand rationally, not just factually, the charges against him, the evidence against him, the available defenses and the evidence relevant to them, the choices that must or can be made and the consequences of those choices. The defendant must also be capable of making rational decisions based on a rational understanding of those matters.

Defense counsel's statement here that he would have "declared a 1368 doubt eons ago" if the case had not been so well factually developed and he had needed to confer and plan with his client is like saying that appellant was *not* competent, but that counsel did not need him to be. The point, however, is that appellant had a constitutional right not to be tried if incompetent.

Defense counsel's statements certainly did not relieve the trial court of its independent duty to initiate competence proceedings in the face of substantial evidence raising an objective, reasonable doubt regarding appellant's competence. (See, e.g., *United States v. John*, *supra*, 728 F.3d at p. 957 [substantial evidence raising doubt regarding defendant's competence demanded hearing despite defense counsel's statement that he believed his client was competent]; *United States v. Timmins* (9th Cir. 2002) 301 F.3d 974, 981 [same – "Courts must resist the unquestioning

acceptance of counsel's representations concerning client competence"].) It was the trial court's responsibility to recognize that counsel's view of competence was unduly limited, and that the true import of counsel's statements was that appellant was, and for "eons" had been, incompetent.

In *Odle v. Woodford*, *supra*, 238 F.3d 1084, the Ninth Circuit held the trial court was required to conduct a competence hearing based upon the clinical evidence of mental impairment even though defense counsel did not declare a doubt as to the defendant's competence. In fact, "no one questioned [the defendant]'s competence over the course of two years of pre-trial proceedings and twenty-eight days of trial." (*Id.* at p. 1089.) In appellant's case, of course, defense counsel eventually did question appellant's competence. The Ninth Circuit's observations about the limitations of personal observations by non-medical court personnel are nonetheless applicable to the trial court's obstinate refusal to entertain a doubt of appellant's competence:

> The observations of those interacting with [the defendant] surely are entitled to substantial weight. *But personal observations cannot overcome the significant doubt about [the defendant]'s competence raised by the clinical evidence*. The record revealed an extensive history of mental impairment, and expert testimony and jail records suggested that [the defendant]'s mental problems lay not just in the past, but continued to the time of trial.

(*Id.* at p. 1089 (emphasis added).) In appellant's case, the trial court not only had the clinical evidence before it, but had defense counsel's repeated statements of concern regarding appellant's ability to rationally cooperate with counsel, and counsel's statement that in any other case he would have declared a doubt under section 1368 "eons ago." But rather than give any weight to this evidence, the trial court relied instead on its own subjective view of mental illness and on its own interpretation of appellant's behavior in court. As discussed in section D. *post*, this assessment of appellant's

competence was thus both factually and legally erroneous.

The trial court was mandated to suspend proceedings and conduct a competence hearing based upon the evidence before it well before any guilt verdict was returned by the jury. Failure to do so deprived appellant of due process as well as a fair and reliable determination of guilt, sanity and penalty, and requires reversal here. (*Drope*, *supra*, 420 U.S. at p. 127; *Pate v. Robinson*, *supra*, 383 U.S. at p. 386; *People v. Pennington*, *supra*, 66 Cal.2d at p. 521.)

2. There was substantial evidence raising a doubt that appellant was incompetent prior to the jury's verdict in the sanity phase

The day the matter was submitted to the jury at the sanity phase defense counsel declared a doubt that appellant remained competent, stating there had been "substantial changes in the last couple of days with Mr. Bloom." (36RT 4523.) By that point, the trial court already had before it additional information corroborating defense mental health testimony in a manner that further raised doubt as to appellant's competence. Dr. Vicary had opined in the guilt phase that appellant was more likely than a normal person to "snap," meaning suffer a breakdown, under stress, such as the stress of the trial, and particularly the stress of listening to mental health experts testify that he was mentally ill, which appellant adamantly denied. Dr. Vicary had testified that appellant could have a psychotic break, could begin to dissociate, could lose his coping ability and judgment, could begin to have emotional eruptions, or could begin to engage in progressively more illogical thinking. (28RT 3449-3450, 3494-3495, 3499, 3517-3519.)

The trial court was thus clearly on notice that, as the trial went on, appellant's mental state might deteriorate. (See *McMurtrey v. Ryan* (2008) 539 F.3d 1112, 1126 [judge's responsibility to be alert for changing conditions especially strong where the court is on notice from psychiatrist

that the stress brought about by trial might cause the defendant's mental state to deteriorate]; *Drope, supra*, 420 U.S. at p. 181 ["Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial."].) Moreover, the court had observed appellant's escalating agitation and repeated attempts to undercut defense counsel's presentation of the defense, and had even referred to those difficulties as a "breakdown" in the attorney-client relationship (15RT 1941), and to defense counsel as having been "abused verbally" by appellant (*Marsden* RT 3037).

After sitting through days of such mental health testimony at the guilt phase, and faced with a sanity phase devoted solely to further testimony regarding his mental impairment, appellant chose – and was erroneously permitted – to absent himself from the sanity proceedings. (35RT 4252-4253; 24CT 6217; see Arg. VIII, *post.*) Given the substantial evidence already in the record at that point of appellant's mental illness and cognitive deficits, appellant's "choice" to absent himself from the sanity phase itself further called into question appellant's competence and compelled a hearing on that issue, and was likely the product of mental illness and cognitive deficits, in response to the stress of the trial and the testimony to which he had to listen. Having been presented with expert psychiatric opinion that deterioration of appellant's mental state was a possible outcome of the stress of this trial, the trial court erred in failing to suspend proceedings and conduct an inquiry into appellant's competence before proceeding to the sanity phase, especially in appellant's absence.

Even if appellant's abrupt decision to absent himself from the sanity phase, coupled with the other information raising doubts about appellant's competence, were not enough to compel a competence hearing,

defense counsel's declaration of a doubt of appellant's competence added substantially to the evidence of incompetence. While a trial court is not compelled to order a competence hearing merely upon the declaration of a doubt by defense counsel (see, e.g., *People v. Howard* (1992) 1 Cal.4th 1132-1161), neither may the trial court ignore such a declaration where it is supported by other evidence raising a doubt as to the defendant's competence. Counsel's representations regarding a client's mental state and ability to rationally assist in the defense and consult with counsel are entitled to great weight. (*Medina v. California*, *supra*, 505 U.S. at p. 450; accord *Drope*, *supra*, 420 U.S. at p. 177 and fn. 13; *People v. Howard*, *supra*, 1 Cal.4th at p. 1164; *McGregor v. Gibson*, *supra*, 248 F.3d at pp. 954-955, 959-960; *Torres v. Prunty*, *supra*, 223 F.3d at p. 1109.) Here, given the expert evidence that the stress of the trial might cause appellant to "snap," counsel's assertion that appellant's behavior had significantly changed over a matter of days, including when appellant was not directly observed by the court (36RT 4523), raised further doubt of appellant's competence. Counsel had previously repeatedly expressed their concern, but had withheld an actual declaration of doubt. Assuming arguendo the trial court could reasonably have relied on counsel's reticence, once counsel did declare a doubt, that declaration effectively called into question not only appellant's behavior in the presence of the court and the jury but also his ability to rationally cooperate and consult with counsel out of the courtroom. Upon defense counsel's declaration of a doubt, there was no reasonable basis for the trial court's continued failure and refusal to order a competence evaluation and trial. (*Medina v. California*, *supra*, 505 U.S. at p. 450; *Drope*, *supra*, 420 U.S. at p. 177 and fn. 13 ["an expressed doubt in that regard by one with 'the closest contact with the defendant,'" is unquestionably a factor which should be considered]; *McGregor v. Gibson*

(10th Cir. 2001) 248 F.3d 946, 954-955, 959-960; *Torres v. Prunty* (9th Cir. 2000) 223 F.3d 1103, 1109.)

The trial court's apparent reasons for refusing to suspend proceedings are both factually and legally insupportable. First, the court mistakenly believed defense counsel had not observed appellant's condition while he was absent from the proceedings. In fact, as counsel explained, he had substantial contact with appellant outside court during that time[55] (36RT 4524), and appellant's behavior on those occasions was a significant factor in defense counsel's determinations regarding appellant's competence during sanity deliberations.

The trial court, on the other hand, had not seen appellant since he absented himself from the proceedings and had never observed appellant outside of the courtroom. A defendant's ability to consult rationally with counsel necessarily involves such consultation outside the courtroom as well as during court proceedings. By ignoring defense counsel's declaration the trial court erroneously relied solely on its own observations of appellant in the courtroom, to the exclusion of reports from counsel regarding appellant's behavior outside the courtroom.

Second, the trial court stated, "Well, at this point there's no requirement – no need for him to cooperate with you. We are merely waiting for the verdict to come in the sanity phase." (36RT 4524.) The trial court was clearly in error, both factually and legally, in so stating. Defense counsel correctly reminded the trial court that the law required suspension of proceedings if the doubt of appellant's competence arose "at any time" before judgment. (36RT 4524-4525; Pen. Code, § 1368.) The

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[55] Despite being corrected by defense counsel on this point, the trial court later repeated the false assertion that defense counsel had had no contact with appellant during this period. (45RT 5493.)

point of a competence inquiry is not whether the defendant can assist counsel in doing what counsel wants to do. In fact, the proper inquiry regarding competence is upon whether the defendant can fully understand and rationally participate in the proceedings and in his defense. Even if appellant had no attorney, his competence, the rationality of his understanding of the proceedings and of his decisions regarding presentation of his defense, was in question. [56]

Furthermore, the trial court's reference to the lack of any need for appellant to cooperate with counsel was factually incorrect. Appellant's ability to understand and rationally consider his situation and to make rational decisions became crucial when, after seven days of deliberation, the jury was unable to reach a verdict on sanity as to Counts Two and Three. Appellant's inability to rationally consult with counsel then led to the irrational withdrawal of appellant's plea of not guilty by reason of insanity. (See Arg. IV, *post.*)

Upon defense counsel's declaration of a doubt that appellant was competent, the evidence before the court raising a doubt of appellant's competence was unquestionably substantial, and left no question but that the proceedings should have been suspended and an inquiry into appellant's competence should have been conducted. The trial court's refusal to do so denied appellant due process as well as the right to a fair trial and reliable determination of guilt, sanity and penalty. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1 §§ 7, 15, 16, 17; *Drope*, *supra*, 420 U.S. at p. 127; *Pate*, *supra*, 383 U.S. at p. 386; *Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305; *Beck v. Alabama*, *supra*, 447 U.S. 625; *Pennington*, *supra*, 66 Cal.2d at p. 521.)

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[56] See Arg. VI, *post*.

3. There was substantial evidence raising a doubt that appellant was competent after defense counsel's declaration of a doubt, including at the time appellant withdrew his NGI plea and throughout the penalty phase at which he represented himself

Following defense counsel's declaration of a doubt that appellant was competent, the evidence establishing a doubt continued to mount. Appellant's decision to withdraw his plea of NGI, the "reasons" given for that decision, counsel's refusal to join in the withdrawal of the plea or to agree that withdrawal of the plea was in appellant's interest (40RT 4693), and counsel's reiteration of their doubt of appellant's competence (40RT 4715-4716, 4726-4727), all raised a doubt whether appellant's decisions were the product of a rational thought process or based upon a rational understanding of the choices available to him or the procedural context in which the choices were made. (These circumstances are more thoroughly discussed in Argument IV, *post,* which is incorporated herein by this reference.)

A defendant's "self-defeating" behavior, such as a "guilty plea with no attempt to seek concessions from the prosecution may, when coupled with other evidence of mental problems, raise doubts as to the defendant's competency." (*Burt v. Uchtman* (7th Cir. 2005) 422 F.3d 557, 565, and authorities cited therein; accord *Drope*, *supra*, 420 U.S. at pp. 179-180; *Pate*, *supra*, 383 U.S. at pp. 385-386; *Chavez v. United States* (9th Cir. 1981) 656 F.2d 512, 519 [desire to plead guilty with no attempt to plea bargain, when combined with other evidence]; *Torres v. Prunty*, *supra*, 223 F.3d at p. 1109 [insistence on wearing jail garb and being shackled during proceedings] *United States v. Sandoval* (E.D.N.Y. 2005) 365 F.Supp.2d 319, 325; see also *Agan v. Dugger* (11th Cir. 1987) 835 F.2d 1337, 1340.) In this case, appellant's withdrawal of his NGI plea and the reasons he gave

for doing so, especially coupled with the other evidence raising a doubt of appellant's competence, amounted to just such "self-defeating" behavior, and should have resulted in the trial court suspending proceedings and conducting a competence hearing. Appellant also later moved to reinstate his plea of NGI, on the grounds that he had not understood the consequences of withdrawing the plea. In support of that motion, appellant informed the trial court that he had difficulty processing oral communication and that defense counsel were available and ready to corroborate appellant's difficulty. The trial court erroneously rejected appellant's representations and denied the motion, despite corroboration from the record, and without allowing defense counsel to provide the proffered corroboration. These circumstances are more thoroughly discussed in Argument V, *post,* which is incorporated herein by reference.

Appellant's conduct in representing himself at the penalty phase, his treatment of prosecution witnesses, his refusal to cooperate with Dr. Sharma, his testimony and his argument to the jury all raised additional doubts about his competence and the rationality of his thought processes as well as his understanding of the proceedings. Appellant insulted his attorneys on a regular basis, claimed that the entire mental health case they had put on was fabricated, asked that they be sanctioned in various extraordinary amounts, sought appointment of an attorney to assist him in making a complaint about them to the State Bar, and yet sought to have them return to his representation during the middle of the penalty phase, and to have Deetz testify on his behalf as a character witness. His willingness to attack the honesty, integrity and capability of any (and all) of the attorneys in extremely vituperative fashion, and then act as if nothing had occurred, is consistent with Dr. Mills' diagnosis of Asperger's Disorder. That appellant expected the prosecutor to give him a grade on his

performance in representing himself, particularly given the way he interacted with her, and that he asked the trial court to order her to do so (see 50RT 6144-6145), similarly raises substantial question about the rationality of his understanding of the proceedings.[57]

Similarly, appellant treated numerous witnesses in a manner which suggested his inability, or impaired ability, to empathize, again consistent with Asperger's Disorder. (See, e.g., 22RT 2861-2862; 27RT 3351-3356, 3394.) Appellant's treatment of Frances Summe (41RT 4860-4896, 4898-4899) was rather remarkable in this regard, as was his treatment of Curtis Wright (42RT 5089-5104) and Charles Simpson (41RT 5009-5111; 42RT 5021-5027). His response to a juror's request to be excused from the jury during penalty deliberations because her mother's health was deteriorating similarly suggested an impaired ability to empathize. (50RT 6137-6138.)

Appellant's obsession with memorizing lists, which Dr. Mills opined was consistent with a diagnosis of Asperger's Disorder (27RT 3345-3347, 3350), made its appearance during appellant's penalty phase testimony when, on direct, appellant stated, "Ask yourselves: can a crazy person, an insane person do this?" He then recited for the jury, in chronological order, the Presidents of the United States. (44RT 5399-5406.) Appellant's question to Summe – did she find it "odd that the Los Angeles Police Department sent you a Jewish detective to identify me?" – further evidences his paranoia and delusions. (41RT 4892.) Appellant's testimony and argument to the jury that Josephine was to blame for her own

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[57] Appellant berated and allegedly threatened the prosecutor in the courtroom during a break while the judge and jury were absent. (44RT 5456-5458; see also 44RT 5453-5454 [appellant stated he was going to tell the jury that Samuels was persecuting him because she was Jewish, and that Gorin, another member of the prosecution team, was a Russian communist who was persecuting him].)

death and that of Sandra because she had not spent the night at a friend's house that night also suggests that appellant was not fully rational in his selection of a mitigation "defense." (See, e.g., 43RT 5264, 5272, 5306-5307, 5310-5311.)

The trial court had further evidence that appellant was acting irrationally, in his representations to the court and to the jury: having stated that his intention in representing himself was to obtain a death verdict, and to "teach [the prosecution] a civics lesson in how to prosecute a death penalty case" (15RT 1938-1940), appellant later stated he would argue for life and denied that he was seeking state-assisted suicide. (43RT 5191.) Yet the prosecutor stated during the penalty phase appellant gave the jury "more information from which they will come back with the death penalty than the prosecution has by his own statements, by his own testimony." (44RT 5450.) Appellant characterized the jury as "weak" because it had been unable to reach a sanity verdict on Counts Two and Three, and wanted the penalty phase tried to a new jury. (40RT 4718-4720.)

It is true that this Court has held that "a defendant's preference for the death penalty and overall death wish does not *alone* amount to substantial evidence of incompetence requiring the court to order an independent psychiatric evaluation." (*People v. Ramos* (2004) 34 Cal.4th 494, 509, italics added; accord *People v. Guzman*, *supra*, 45 Cal.3d at p. 964.) However, it is equally true that suicidal behavior or ideation and other self-defeating behavior, "in combination with other factors, may constitute substantial evidence raising a bona fide doubt regarding a defendant's competence to stand trial." (*People v. Rogers*, *supra*, 39 Cal.4th at p. 848; accord, e.g., *Drope, supra*, 420 U.S. at pp. 166-167, 179-180 ["we need not address the Court of Appeals' conclusion that an attempt to commit suicide does not create a reasonable doubt of competence to

stand trial as a matter of law" because that attempt "did not stand alone"; the attempt in combination with other evidence created reasonable doubt as to competence to stand trial]; *United States v. Loyola-Dominguez* (9th Cir. 1997) 125 F.3d 1315, 1318-1319; *Moran v. Godinez* (9th Cir. 1994) 57 F.3d 690, 695-696.)

Appellant's refusal to cooperate with Dr. Sharma raises substantial questions about appellant's rationality. The trial court had appointed Dr. Sharma to evaluate appellant's competence to waive the attorney-client privilege, in an attempt to forestall defense counsel's objections to testifying at the penalty phase pursuant to appellant's subpoenas. (43RT 5197-5199, 5220.) The court made clear that it did not expect appellant to be found incompetent. (See, e.g., 43RT 5222.) It was explained to appellant a number of times that Deetz would not act as a character witness because she believed appellant was not competent to waive the attorney-client privilege and that there had been inadequate inquiry into appellant's competence. Similarly, it was explained to him that the point of Dr. Sharma's evaluation was to counter that position, with a finding that appellant was competent to waive the privilege. It was explained a number of times that unless he cooperated with Dr. Sharma, Deetz would not testify, and the trial court would not order Deetz to testify, even as a character witness, or hold her in contempt if she refused. (43RT 5196-5197, 5222; 44 RT 5466, 5475, 5478-5479.)

Appellant did not appear to understand any of this. He took changing positions on whether to cooperate with Dr. Sharma, eventually opting not to. (43RT 5220-5221; 44RT 5465-5467, 5475-5478.) He alternately expressed fear that Dr. Sharma might find him incompetent, and took the position that Dr. Sharma would find him competent because he found everyone competent. (44RT 5465-5467; see also 43RT 5220-5221;

44 RT 5477.) Appellant even asked the prosecutor to sit in on the evaluation to act as a witness that appellant was competent, in case Dr. Sharma found him incompetent. (43RT 5221.) He asked for the opportunity to rebut any finding of incompetence, and got the trial court to agree that it would probably take appellant's word over Dr. Sharma's on the subject. (43RT 5221-5222.) After Dr. Sharma reported that appellant's refusal to cooperate made evaluation impossible, appellant somehow concluded that Dr. Sharma had found appellant incompetent to waive the attorney-client privilege, and that the trial court agreed with him, although neither was true. (44RT 5475-5480.) The trial court ultimately ordered Deetz to testify, which she refused to do.

There are numerous other instances demonstrating that appellant did not understand things that were explained to him, in a way that strongly suggests his ability to process information was impaired, particularly when orally communicated. Appellant at one point said he understood the case would not be retried if the jury was unable to reach a unanimous penalty verdict, based upon something the prosecutor had said. It was then explained to him that whether the case would be retried was not up to that prosecutor, nor had the decision been made whether there would be a retrial, or which deputy district attorney would handle any retrial. (40RT 4721-4723.) Yet appellant later repeated his belief that the case would not be retried, only to be corrected again. (42RT 5037-5038.) Finally, toward the end of the penalty phase, appellant asked the trial court if he could tell the jury in closing argument that if the jury hung on the penalty decision, the prosecution would not retry the case. (44RT 5473.) When the request was denied and appellant was again corrected about his misperception on this issue, appellant then asked, "Would the record reflect that the D.A. lied to me and now she wants to retry the case?" (44RT 5475.)

Similarly, appellant somehow came to believe that the trial court would not sentence him to death regardless of the jury's verdict. He asked the trial court, "Will the record reflect that the Judge will not sentence me to death if the jury comes back with a verdict of death?" The trial court replied that the record would not so reflect. (44RT 5475.) Yet appellant repeated his belief that the trial court would not sentence him to death a number of times, even at the time of sentencing, despite the absence of any indication that it was so, and the trial court's repeated responses that it was not so. (42RT 5038-5039; 51RT 6161, 6166.) Despite this evidence of appellant's difficulties with processing information, the trial court never considered the possibility that these instances were evidence of appellant's cognitive deficits.

D. The trial court's refusal to have appellant evaluated and to hold a hearing to determine whether he was competent was based on both legal and factual errors

The trial court repeatedly demonstrated its application of an erroneous legal standard, as well as its inappropriate scepticism and disdain generally toward expert mental health testimony, by: characterizing the expert testimony as "psychobabble" (*Marsden* RT 3621); substituting its own "expertise" ("I think the Court's opinion of his competence is as qualified as any psychiatrist at this point" [46RT 5655] and impressions ("I've seen you and it would take a lot of convincing to convince me that you are incompetent to represent yourself" [43RT 5222]); stating "I think you can get doctors to say anything you want." (*Marsden* RT 3621); opining that further psychiatric evaluation would be pointless ("I would also not have any confidence in any psychiatrists that examined the defendant since he has told in great detail how he malingered, how he knew how to work the system" (46RT 5654-5655); and concluding that "not one

psychiatrist, doctor or whatever they were that testified convinced me that [appellant] wasn't competent" (43RT 5191).

In fact, the trial court did not have to be "convinced" that appellant was not competent. "The doubt which triggers the obligation of the trial judge to order a hearing . . . is not a subjective one but rather a doubt determined objectively from the record." (*People v. Humphrey*, *supra*, 45 Cal.App.3d 32, 36; accord, e.g., *People v. Jones*, *supra*, 53 Cal.3d at p. 1153; *People v. Pennington*, *supra*, 66 Cal.2d at p. 518; *People v. Castro*, *supra*, 78 Cal.App.4th at p. 1402; *McGregor v. Gibson*, *supra*, 248 F.3d at p. 952; *United States v. Williams* (5th Cir. 1988) 819 F.2d 605, 619.) Consistent with this objective standard:

> Although section 1368, subdivision (a), refers to a doubt that arises "in the mind of the judge as to the mental competence of the defendant," case law interpreting this subdivision establishes that when the court becomes aware of substantial evidence which objectively generates a doubt about whether the defendant is competent to stand trial, the judge must on its own motion declare a doubt and suspend proceedings even if the trial judge's own observations lead the judge to a belief that the defendant is competent.

(*People v. Castro*, *supra*, 78 Cal.App.4th at p. 1415, citing *People v. Jones*, *supra*, 53 Cal.3d at p. 1153 and *People v. Pennington*, *supra*, 66 Cal.2d at p. 518.) Thus, "personal observations cannot overcome the significant doubt about [the defendant]'s competence raised by the clinical evidence." (*Odle*, *supra*, 238 F.3d at p. 1089.) The trial court's responsibility was thus not to weigh the evidence and resolve the ultimate question of appellant's competence, but to determine whether there was evidence which, if true, raised a doubt as to appellant's competence. (*Moore v. United States*, *supra*, 464 F.2d at p. 666.)

Here there was substantial evidence raising an objective, reasonable doubt regarding appellant's competence, especially his ability to

participate in his defense in a rational manner. Once presented with such evidence, the court had no discretion to decline to declare a doubt and suspend criminal proceedings based on its own observations of appellant's demeanor or its subjective belief that he was competent. (See, e.g., *People v. Jones*, *supra*, 53 Cal.3d at p. 1153 ["substantial evidence" is measured by an objective standard and, hence, cannot be defeated by the trial court's own observations of the defendant]; accord, e.g., *People v. Pennington*, *supra*, 66 Cal.2d at p. 518.)

In *People v. Lewis and Oliver*, *supra*, 39 Cal.4th 970, this Court affirmed a trial court's decision not to hold a competence hearing despite conflicting expert opinions. In that case, the trial court had determined that the expert who opined that the defendant was incompetent was less than credible, was tentative in his opinion, disregarded contrary evidence, and disregarded substantial relevant information considered by the experts who considered the defendant competent. (39 Cal.4th at pp. 1046-1048.) In this case there is no such basis in the record for the trial court's rejection of the declarations and testimony of the mental health experts. There was no substantial conflict in the expert testimony at trial, or in the expert declarations submitted before trial. While the psychiatrists and other experts who had evaluated appellant gave varying diagnoses, the consensus was that he was seriously mentally ill, and suffered from moderate-to-severe brain damage.

Moreover, the trial court here did not specify any particular flaw in the defense mental health declarations or testimony. No deficiency in the qualifications of the defense experts, in the adequacy of their opportunities to evaluate appellant, or in the methodology or reasoning supporting their opinions was mentioned. No contrary expert opinion was cited. Rather, it appears the trial court simply harbored a categorical antipathy toward or at

least a profound distrust of defense mental health experts.[58]

The trial court's rejection of expert psychiatric opinions on the basis of appellant's claims that he malingered and knew how to "work the system" (see, e.g., 46RT 5654-5655), despite the absence of *any* description of how he supposedly did so,[59] or any evidence that he had sufficient knowledge of neuropsychological testing to successfully alter the results of Dr. Watson's testing, was wholly unwarranted and unreasonable. The trial court essentially took as true the word of appellant that he malingered and the implicit assertion that he somehow affected the results of Dr. Watson's testing and the evaluations conducted by Dr. Mills and Dr. Vicary, as well as the opinions of Drs. Lisak, Wolfson, Kivowitz and Verin. among others who had evaluated appellant. The trial court accepted that bald assertion over the substantial evidence of a consistent and overwhelming consensus among the mental health experts that appellant, as well as being severely

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[58] Prior to Dr. Sharma's aborted evaluation of appellant, the trial court indicated it would probably accept the opinion of appellant, a mentally ill defendant with demonstrated brain damage, over the opinion of Dr. Sharma if Dr. Sharma came to a different conclusion than the court had. (43RT 5222.) Of course, the trial court later rejected appellant's opinion when he declared a doubt of his own competence, which was contrary to the trial court's opinion. (44RT 5448; 46RT 5652.)

[59] In his closing argument appellant gave two examples of his malingering: not having recognized what an elbow was and not recognizing the word "cork." (48RT 5988.) In fact, Drs. Watson, Mills and Vicary testified that those matters did not affect the results of the testing or the conclusions to be drawn from it. (23RT 2925-2926; 26RT 3198-3203; 28 RT 3491-3492, 3515-3517.) Dr. Watson did not rely on either point as important. (23RT 2925-2926.) Nor, according to Dr. Watson and Dr. Mills, was either point necessarily an example of malingering. (22RT 2814-2818; 26RT 3165-3166.) Furthermore, that the examples were originally raised by the prosecution during cross-examination of the mental health experts places the reliability of appellant's derivative claims in doubt.

mentally ill, had a damaged brain which substantially impaired his cognitive abilities. Despite the expert testimony of Drs. Watson, Mills and Vicary that the results of two separate administrations of neuropsychological testing were consistent in showing severe brain damage, and that no malingering, if any occurred, had affected the outcome of the testing or the conclusions to be derived therefrom, the trial court accepted appellant's assertions to the contrary. Moreover, the mastery of psychiatry, psychology and neuropsychological testing the court attributed to appellant does not explain his refusal to cooperate with Dr. Sharma, who, according to appellant, always found defendants competent. (44RT 5467.) It is more consistent with the belief that he would *not* be able to fool Dr. Sharma (see 37RT 4561), and would thus be found incompetent. (See 43RT 5220.) The trial court unreasonably accepted appellant's claim to have "worked the system".

The evidence is otherwise clear and uncontradicted that nothing that appellant did which *he* may have thought was manipulating the evaluations had any actual effect on those evaluations. The evidence from Dr. Watson was that performance on the neuropsychological tests he conducted were not easily faked. (22RT 2863 ("it does require fairly sophisticated understanding to be able to malinger").) Dr. Mills testified similarly. (26RT 3168 ("Those tests as a group are hard to fake. There are validity scales built into it."), 3382 ("Even trained professionals who administer these tests daily cannot fake these things.").) There is no evidence in the record to the contrary.

Dr. Watson, Dr. Mills and Dr. Vicary were all in accord that the results of the two separate sets of neuropsychological testing, one conducted in 1993 and one conducted in 1999-2000, were consistent with each other and consistent with the other evidence. (22RT 2742, 2751; 26

RT 3187-3188, 3194-3195, 3197, 3199; 27RT 3383; 28RT 3483-3485, 3491-3492, 3516-3517.) There is no evidence in the record to the contrary. Dr. Mills testified that, based upon the consistency of results as well as the testing Dr. Watson did for malingering in 1999-2000, he did not think there was any possibility of malingering by appellant that affected the results. (26RT 3167-3168, 3188-3189, 3194; 27RT 3381-3383; see also 28RT 3483-3485, 3491-3492, 3516-3517 (Dr. Vicary).) Again, there is no evidence in the record to the contrary.

The trial court's rejection of expert testimony in this case was contrary to the statutory scheme of sections 1367 et seq. and the constitutional protections implicit therein. The statutory scheme, as well as the case law, recognizes some discretion in the trial court to order a competence hearing where the evidence of incompetence is less than substantial. (*Pennington*, *supra*, 66 Cal.2d at pp. 518-519.) However, the statutory scheme, as well as the case law applying constitutional requirements, does not give the trial court discretion to arbitrarily dismiss the uncontradicted testimony of qualified mental health experts, whose testimony is supported by substantial clinical and historical documentation. The statutory scheme and the case law recognize the specific expertise of qualified mental health experts. Deference to such expert opinion, especially where uncontradicted and supported by a substantial clinical and historical record, is appropriate at this stage of an inquiry into competence. Arbitrary rejection of such expert opinion amounts to not only an abuse of the trial court's limited discretion, but also a denial of the constitutional guarantees recognized by the United States Supreme Court as well as this Court.

Moreover, the California statutory scheme recognizes and incorporates the need for even more specialized expertise where questions

of competence involve developmental disability. (Pen. Code, §§ 1369, 1370.1; *People v. Leonard*, *supra*, 40 Cal.4th at pp. 1389-1391; *People v. Castro*, *supra*, 78 Cal.App.4th at pp. 1417-1418.) "[A]ppointment of the director of the regional center for the developmentally disabled (§ 1369, subd. (a)) is intended to ensure that a developmentally disabled defendant is evaluated by experts experienced in the field, which will enable the trier of fact to make an *informed determination* of the defendant's competence to stand trial." (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1391 (emphasis added).)

As a result of the testimony of Drs. Watson and Mills, the trial court had before it, during the guilt phase, substantial evidence that appellant had a specific developmental disability, i.e., Asperger's Disorder, or some similar cognitive deficits arising from either in utero Dilantin exposure or anoxia from drowning at age two. Appellant's condition, therefore, originated before appellant attained age 18. According to Drs. Watson, Mills and Vicary, appellant's condition continues, can be expected to continue indefinitely, and constitutes a substantial handicap for appellant. Appellant's condition therefore meets the statutory definition of developmental disability in section 1370.1. The trial court violated section 1369's mandate by failing to appoint the director of the regional center to evaluate appellant.

Perhaps as a product of the trial court's own attitudes towards mental health issues, the trial court failed to inquire into matters relevant to the question of appellant's competence. There is no evidence in the record of any inquiry into the circumstances of appellant's pretrial LPS commitment. The trial court showed no curiosity about the extensive historical, medical, psychiatric, educational and social history documentation upon which the medical experts relied. Nor is there any

evidence in the record of any inquiry by the trial court into the status of appellant's psychiatric medication.

The trial court was informed that appellant had been taking Haldol, an antipsychotic medication, that he had stopped taking it, and that he had been getting increasingly agitated. (*Marsden* RT 670.) The court had been informed that the dosage appellant had been taking and his reaction to that dosage were strong indicators that appellant suffered some underlying psychotic process. (26RT 3162-3163.) Appellant had also been noted at various times to be "swaying" or "rocking" in court. (See 2RT 211-214; 42 RT 5021.)

Under these circumstances the trial court had a duty to inquire into the question of psychiatric medication, e.g., whether it had been prescribed for appellant, for how long, whether appellant was following medical orders regarding the medication, either in taking the medication or refusing it, and whether he continued to refuse the medication or had resumed taking it. (*See Miles v. Stainer* (9th Cir. 1997) 108 F.3d 1109, 1112 ("Since the state court file contained doctors' warnings that Miles' competence depended on medication which he often refused to take, it was incumbent upon the state trial judge to ask him whether he had been taking his medication before accepting his guilty plea."); see also *Moran v. Godinez* (9th Cir. 1992) 972 F.2d 263, 265 (court's failure to inquire about the four psychiatric medications defendant was taking raised reasonable doubt about competence), overruled on other grounds, (1993) 509 U.S. 389.)

The trial court failed to evaluate both prongs of the test for competence – whether the defendant has 1) a rational as well as factual understanding of the proceedings against him, and 2) sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding. (*Dusky*, *supra*, 362 U.S. at p. 402; *Boag v. Raines*, *supra*,

769 F.2d at p. 1343; *People v. Lawley*, *supra*, 27 Cal.4th at p. 131.)

The trial court appears to have limited its assessment to only a portion of the first prong, i.e., whether appellant had a factual understanding of the proceedings, without regard to the rationality of that understanding. However, the trial court ignored the testimony that appellant's verbal proficiency masked the underlying deficits and mental illness. The trial court further ignored anything which undercut the conclusion that appellant's understanding of the proceedings was rationally based. The trial court also ignored Dr. Vicary's testimony that appellant's judgment and decision-making could deteriorate, becoming more irrational under the stress of this trial. The first prong appears to have been the trial court's only concern, the limit of its consideration of the evidence and the sole basis for repeated rejection of any doubt of appellant's competence. Yet even in consideration of the first prong, the trial court considered only evidence which suggested competence and ignored any contrary evidence.

The trial court apparently believed that, because appellant was articulate and had a general understanding of some logistical and procedural components of the guilt and penalty phase,[60] and had some reasoning ability, he was therefore competent.[61] In the absence of any contrary

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[60] There is no indication that he had any similar understanding regarding the sanity phase.

[61] See, e.g., 36 RT 4534-4535 ["I know there's times when he's a little more agitated than others, but he has behaved himself throughout this proceeding and has never been disruptive to the court and he seems extremely intelligent. He knew the prongs of what it is about mental defense. I do not -- at this point I will not declare a doubt as to his competency."]. The prosecution focused on the fact that appellant was coherent and recognized the roles of the participants in the trial (36RT 4535-4537), but did not address the rationality of his decisions and behavior.

evidence, that might be an acceptable premise. The information before the trial court, however, established that even qualified psychiatrists had been originally misled by appellant's verbal presentation until objective evidence of his cognitive deficits and damaged brain as well as substantial historical documentation demonstrating his mental illness and the probable causes of the damage to his brain were presented. Dr. Watson testified that appellant's verbal skills mask his deficits to an untrained observer. (22RT 2730, 2757.) Dr. Vicary testified that, in his initial evaluation of appellant in 1984, before he had any information of appellant's social, medical, psychiatric, educational or family history, or the results of neuropsychological testing, he was fooled by appellant's verbal abilities, that appellant "slipped under his radar" "because he was so articulate and verbal, it did not occur to me that he could have any brain damage." (28RT 3522.)

By relying upon appellant's verbal presentation, the trial court relied predominantly, if not exclusively, on only a portion of the first prong of the competence standard, i.e., that appellant had a factual understanding of the nature and purpose of the proceedings, without regard to the rationality of his understanding or of his reasoning, judgment or decision-making, which are equally important to a determination of competence.

The trial court's attention to prong two was equally inadequate. Only once did the court explicitly address appellant's ability to rationally consult with counsel – erroneously asserting that "at this point there's no requirement – no need for him to cooperate with you" (36RT 4524), after defense counsel declared a doubt that appellant was competent. While there was evidence throughout the record of appellant's non-cooperation with counsel, and that it resulted from his mental illness, cognitive deficits and developmental disability, the court never addressed appellant's resistance to

counsel's conduct of the case other than to indicate that if appellant did something to interfere with the defense the court would "get the waivers or whatever on it . . . so that it won't appear as incompetence of counsel if he is not following your advice. I don't know anything further to do at this time." (*Marsden* RT 671.) Of course, suspending proceedings under section 1369 would have been not only an available option in such an instance, but mandatory where, as here, substantial evidence indicates appellant's actions were the result of mental illness, developmental disability and brain damage.

Nor did the trial court address the doubts and representations earlier expressed by defense counsel when, during the penalty phase, both the prosecutor and the trial court itself described appellant as uncontrollable. (See 42RT 5138-5140; 44RT 5391.) When the trial court rejected defense counsel's declaration of doubt of appellant's competence, the trial court noted that appellant "has behaved himself throughout this proceeding and has never been disruptive to the court." (36RT 4534-4535.)

Odle, *supra*, 238 F.3d 1084, is instructive. There, the state relied upon the defendant's calm demeanor in the courtroom to support the failure of the trial court to order competence proceedings. (*Id.* at p. 1088.) The Ninth Circuit noted, however, that the calm demeanor resulted not from the defendant's seeming competence, but from trial counsel's efforts in managing what was perceived as the potential for defendant "to explode irrationally in court." (*Id.* at p. 1089, fn. 6.) As the court noted, "[w]hile this evidence was not available to the state trial judge, it illustrates the danger of relying on calm behavior in the courtroom as a guide to mental competence."

In appellant's case, defense counsel's attempts to "manage" appellant's behavior in court were known to the trial court, and were only

partly successful.[62] After defense counsel were removed from the case, the trial court acknowledged it could not control appellant, described his behavior as "making a mockery of the justice system" and "working against your own best interest," and told appellant, "you are your own worst enemy." (42RT 5139-5140.) Thus, the trial court here had clearer indications of appellant's difficulties than did the judge in *Odle*, yet refused to consider that appellant's competence was in question. When, without counsel, appellant became "uncontrollable" in court, and was "making a mockery" of the trial, the trial court apparently never recognized appellant's failure to cooperate with the court as corroboration of Applebaum's opinion that "I just do not feel he's able to cooperate at this point with counsel and I believe it is due to a mental illness." (36RT 4524.) While defense counsel had repeatedly expressed a belief that defense counsel's difficulty with appellant stemmed from his mental infirmities, the trial court apparently never considered that appellant's behavior and conduct of the penalty phase were the result of those mental infirmities.

E. Conclusion

While any specific fact – the expert declarations opining that appellant was incompetent at his prior trial; the evidence of specific brain trauma in utero and/or at age two; the consistent results in Dr. Watson's neuropsychological testing over two separate courses of testing, demonstrating severe brain impairment and cognitive deficits; the

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[62] See, e.g., 4RT 612-613 (requests for paralegal to sit at counsel table to help manage appellant); 6RT 765-767 (Applebaum's reference to Deetz conferring with appellant interfering with defense conduct of voir dire); *Marsden* RT 2692 (appellant and Deetz arguing at counsel table in presence of jury); 28RT 3498 (trial court's acknowledgment of counsel's efforts to keep appellant calm); 37RT 4584 (appellant stating that he was playing with the paralegal, Rosa Martinez, and/or Deetz at counsel table); 43RT 5300, 5303 (same); 45RT 5985, 5994 (same).

overwhelming consensus of approximately eight mental health experts that appellant was seriously mentally ill and cognitively impaired; defense counsel's repeated warnings to the trial court that counsel had serious concerns about appellant's competence; the evidence concerning appellant's antipsychotic medication; Dr. Vicary's opinion that appellant might "snap" under the pressure of trial; defense counsel's eventual expression of doubt that appellant was competent and representation that appellant's behavior had changed during the period that appellant absented himself from the courtroom during sanity phase; the fact of the hung jury on sanity; the irrational bases for appellant's withdrawal of his NGI plea; defense counsel's refusal to consent to the withdrawal of the NGI plea; appellant's peculiar behavior in preparing for his penalty phase; his bizarre, inappropriate and irrational behavior in representing himself during the penalty phase; his refusal to cooperate with Dr. Sharma; his request to reinstate his NGI plea and to reinstate defense counsel to represent him – might individually be insufficient to have required the trial court to suspend proceedings and hold a competence hearing, the cumulative weight of those factors leaves no conclusion available other than that there was an objective doubt as to appellant's competence. Suspension of proceedings, appointment of the regional center or other qualified experts, followed by a hearing to determine whether he was competent were required. On this record, under the specific facts before the trial court, the failure to do so deprived appellant of due process and a fair trial, and requires reversal of the entire judgment.

Because the trial court failed to hold a hearing in this case, in the face of substantial evidence of appellant's incompetence, appellant was tried while incompetent; the error is structural and requires reversal of the entire judgment. (*Rohan v. Woodford, supra,* 334 F.3d at p. 818, citing

Satterwhite v. Texas (1988) 486 U.S. 249, 256-257.) In the alternative, the penalty judgment must be reversed and the matter remanded for reinstatement of appellant's plea of not guilty by reason of insanity and retrial of the issue of sanity.

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IV.

THE TRIAL COURT ERRED IN ALLOWING APPELLANT TO WITHDRAW HIS PLEA OF NOT GUILTY BY REASON OF INSANITY

After the jury had deadlocked 9-3 on Counts Two and Three at the sanity phase the trial court erroneously allowed appellant to withdraw his plea of not guilty by reason of insanity (NGI) to those two counts. Defense counsel did not consent to the change of plea, which acted as a guilty plea to two counts of second degree murder and an admission of the sole special circumstance. Allowing appellant to withdraw his plea without consent of counsel violated section 1018. Even assuming arguendo that section 1018 did not prohibit withdrawal of the NGI plea, the trial court abused its discretion by accepting the withdrawal without having inquired adequately into appellant's competence, or taken steps to assure that appellant adequately and rationally understood the nature and consequences of his decision. The court's errors denied appellant due process of law, a fair jury trial, and a fair and reliable determination of guilt, sanity and penalty. (U.S. Const., 5th, 6th, 8th, 14th Amends.; Cal. Const., Art. 1, §§ 7, 15, 16, 17; *Drope v. Missouri* (1975) 420 U.S. 162, 172 (*Drope*); *Beck* v. *Alabama* (1980) 447 U.S. 625, 637-638; *Boykin v. Alabama* (1969) 395 U.S. 238, 243-244; *People v. Chadd* (1981) 28 Cal.3d 739 (*Chadd*).) As a result, the judgment must be reversed and the matter remanded to the trial court for retrial on appellant's plea of not guilty by reason of insanity on Counts Two and Three.

A. Introduction

Because the verdicts of guilt on Counts Two and Three were not complete absent a determination of sanity, the special circumstance allegation that appellant was convicted of more than one count of murder, at least one of which was in the first degree, was similarly incomplete without

that determination. (*People v. Marshall* (1929) 99 Cal.App. 224, 227 ["[T]he nature of the judgment is wholly dependent upon the verdict or finding of the jury as to the sanity of the accused."].) Thus, unless appellant was found sane as to at least one of those two counts, the jury's multiple murder special circumstance finding could not stand. Therefore, after the jury was unable to reach a verdict on sanity as to Counts Two and Three, appellant's withdrawal of his NGI plea acted as a guilty plea to those counts of murder and as an admission of the special circumstance allegation.

This Court has recognized that the state's interest in avoiding wrongful convictions and wrongful executions is served by Penal Code section 1018's requirement that defense counsel consent before a plea of guilty to a capital crime will be accepted. Those same interests were at stake in appellant's decision to withdraw his NGI plea, to which defense counsel did not consent. Moreover, substantial evidence raised a doubt that appellant was competent to stand trial or to withdraw his NGI plea. Further, given the context of the withdrawal of the plea and the overwhelming evidence of appellant's mental illness, developmental disability and brain damage, there was substantial reason to believe appellant did not adequately understand the choices available to him or rationally consider the consequences of those choices.[63]

Yet the trial court failed to acknowledge the dubious rationality of appellant's decision to withdraw his plea, defense counsel's refusal to concur, or the increased penal consequences, including peril to appellant's life, which the withdrawal of the plea raised. The trial court failed to resolve the doubts raised about appellant's competence, and failed to

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[63] Appellant incorporates Arguments II and III, *ante*, as if fully set forth herein.

adequately question either appellant or defense counsel to ensure that appellant adequately comprehended his situation and that his decision to withdraw the plea was the product of rational consideration of the choices available to him and the consequences of those choices. Consequently, the trial court's acceptance of appellant's withdrawal of the plea was error.

As a result, the judgment as to guilt on Counts Two and Three and the special circumstance finding, as well as penalty, must be reversed and the matter remanded for reinstatement of appellant's NGI plea and for retrial of the sanity phase on Counts Two and Three.

B. Relevant Legal Authority

Penal Code section 1018 precludes a plea of guilty to a capital offense without the consent of counsel. (Pen. Code, § 1018; *Chadd*, *supra*, 28 Cal.3d 739, 754; *People v. Massie* (1985) 40 Cal.3d 620, 623-625 (*Massie*); *People v. Alfaro* (2007) 41 Cal.4th 1277, 1299-1301.) That statute reflects and implements this state's interests in preventing unjust convictions in capital cases by the defendant's concession of guilt or waiver of a defense other than as the result of a rationally determined choice made with the advice and consent of counsel. (See *Chadd*, *supra*, 28 Cal.3d at pp. 748-751; cf. *People v. Vaughn* (1973) 9 Cal.3d 321, 327.) The restrictions on accepting pleas or changes of plea regarding capital murder were "an effort to eliminate the arbitrariness that *Furman* [*v. Georgia* (1972) 408 U.S. 238] found inherent in the operation of prior death penalty legislation. (*Chadd*, *supra*, 28 Cal.3d at p. 750.) Thus, the requirement of the consent of counsel protects the interest of the state as well as of the defendant, to prevent unjust or wrongful convictions and death sentences in capital cases. Section 1018 further mandates that it be construed liberally "to effect [the] objects [of the statute] and to promote justice."

Other than in a case where the change in plea acts as a plea of

guilty to a capital charge, a defendant generally may enter or withdraw a previously entered NGI plea at any time before or during trial, upon a showing of good cause subject to the sound discretion of the trial court. (Pen. Code, §§ 1016, 1018; *People v. Boyd* (1971) 16 Cal.App.3d 901, 907-908; *People v. Guillebeau* (1980) 107 Cal.App.3d 531, 544; *People v. Herrera* (1980) 104 Cal.App.3d 167, 172.)

While entry of an NGI plea is a decision for the defendant with which counsel cannot interfere (*People v. Clemons* (2008) 160 Cal.App.4th 1243, 1251-1252; *People v. Gauze* (1975) 15 Cal.3d 709, 717-718 (*Gauze*)), once entered, it is generally a matter for the trial court's discretion whether it may be withdrawn. (*People v. Medina* (1990) 51 Cal.3d 870, 899 (*Medina*); see *People v. Cartwright* (1979) 98 Cal.App.3d 369, 386.)

The court's failure to consider all of the evidence relevant to an exercise of discretion constitutes an abuse of that discretion: "'To exercise the power of judicial discretion all the material facts . . . must be both known and considered.'" (*In re Cortez* (1971) 6 Cal.3d 78, 85-86, citing and quoting *People v. Surplice* (1962) 203 Cal.App.2d 784, 791; see also *Schlumpf v. Superior Court* (1978) 79 Cal.App.3d 892, 901 ["A failure of the trial court to consider all the evidence is a failure to exercise discretion and requires reversal of the determination"].)

If there is a question of the defendant's competence or evidence sufficient to support a finding that the defendant was insane at the time of the crimes, a trial court may not allow withdrawal of an NGI plea after trial has commenced unless the court has assured that the withdrawal of the plea is a free and voluntary choice made with adequate comprehension of the consequences. The Court in *People v. Redmond* (1971) 16 Cal.App.3d 931 (*Redmond*) explained the trial court's obligation:

(1) The trial court should reassure itself that a defendant at the time

> he seeks to withdraw his insanity plea is presently sane, i.e., that he is capable of understanding the nature and purpose of the proceedings against him, that he comprehends his own status and condition with reference to such proceedings, and that he is able to assist his attorney in the conduct of his defense. . . . (2) If defendant is found to be presently insane, the solution is obvious. . . . (3) If defendant is found to be presently sane, then a series of questions should be propounded to such defendant and to his counsel and the answers thereto be made of record to meet requirements of *Boykin v. Alabama* (1969) 395 U.S. 238 . . . ; *In re Tahl* (1969) 1 Cal.3d 122 . . . ; and *People* v. *West* (1970) 3 Cal.3d 595 . . . , insofar as they might be applicable to the situation presented. (4) If the court be satisfied that such defendant is making a free and voluntary choice with adequate comprehension of the consequences, then withdrawal of the plea should be permitted.

(*Id.* at p. 938, (citations omitted); *People v. Merkouris* (1956) 46 Cal.2d 540, 553 (*Merkouris*).)[64]

Assuming arguendo that section 1018 does not prohibit withdrawal of an NGI plea after the defendant has been found guilty of a capital crime, the inquiries set out in *Redmond* become particularly critical before withdrawal of the plea can be allowed. (See *Merkouris*, *supra*, 46 Cal.2d at p. 552 [error to allow withdrawal of NGI plea after conviction of first degree murder, ensuring defendant would receive death penalty].) Where the defendant attempts to withdraw a plea of NGI without counsel's consent after having been convicted of capital murder, the trial court must ensure that the defendant "understands the gravity of his predicament." (*Merkouris*, *supra*, 46 Cal.2d at p. 553.)

This Court must "'indulge every reasonable presumption against waiver' of fundamental constitutional rights." (*Johnson v. Zerbst* (1938)

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[64] *Redmond* involved non-capital charges. *Merkouris* predated the amendment to section 1018 which prohibited a guilty plea to capital charges without consent of counsel. (See *Chadd*, *supra,* 28 Cal.3d at pp. 749-750.)

304 U.S. 458, 464.) "The purpose of the 'knowing and voluntary' inquiry . . . is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced." (*Godinez v. Moran* (1993) 509 U.S. 389, 401; see also *Boykin v. Alabama* (1969) 395 U.S. 338, 243-244 (defendant pleading guilty must have "a full understanding of what the plea connotes and of its consequence").)

C. Proceedings Below

Appellant was not present during the sanity proceedings until after the matter was submitted to the jury. (See Arg. VIII, *post.*) On December 4, 2000, after it appeared that the jury was unable to reach a unanimous verdict on sanity as to Counts Two and Three, the trial court inquired as to the defense's intention regarding whether a mistrial should be declared and the matter retried. (39RT 4675-4676.) After some discussion with appellant, defense counsel Applebaum informed the court that appellant wanted to know whether co-counsel Deetz would continue to represent appellant if there were a retrial of the sanity phase. If Deetz were going to continue to represent him in a retrial, "then that would be fine with Mr. Bloom." (39RT 4677.) However, Deetz was not present, and appellant would not accept Applebaum's representation that Deetz would continue to represent him. The matter was put over to the next day so that Deetz could contact appellant directly.[65] (39RT 4679-4680.)

On December 5, 2000, after approximately two hours of discussion with Applebaum and Deetz, appellant withdrew his NGI plea, without their consent. The prosecution sought waivers from appellant. (40RT 4690-

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[65] The next day, when appellant withdrew his NGI plea, Deetz was present. No mention was made of her availability for a sanity retrial. (40 RT 4683-4689.)

4693.) The trial court found the waivers were intelligently and knowingly made. Upon inquiry from the court, defense counsel stated their disagreement that withdrawal of the NGI plea was in appellant's best interests under *People v. West* (1970) 3 Cal.3d 595. The trial court made no further inquiry, stating, "All right. I won't press it then." (40RT 4693.) The trial court then relieved Applebaum and Deetz as counsel, although the trial court had not yet taken a *Faretta* waiver. (40RT 4695-4696.)

After the court had informed the jury of the withdrawal of the plea, and while appellant was representing himself, the prosecution brought up the possible applicability of Penal Code section 1018, stating a colleague thought appellant's withdrawal of his NGI plea was tantamount to a guilty plea, which would require consent of counsel. Ultimately the prosecution argued that defense counsel cannot interfere with a defendant's right to withdraw an NGI plea. (40RT 4710-4711; citing *Medina*, *supra*, 51 Cal.3d 870, *Gauze*, *supra,* 15 Cal.3d 709, and *Redmond*, *supra*, 16 Cal.App.3d 931.) The prosecution then asked the court to make a finding, for the purposes of appeal, that appellant was presently sane or that the court had no reason to believe that he was not sane, and that the court had held that appellant's withdrawal of his plea was voluntary. (40RT 4712.) The trial court responded:

> Well, one thing at a time. First, let me make a finding as to your competency.
>
> As I stated before, I think you are very articulate. I think you are aware of every single thing and understand the nature of and the consequences of everything that has happened in this court. And you are certainly well versed on the law.
>
> And I know sometimes you became agitated with the whole procedures as many of us do, even the jurors here. I think your agitation is explained by the process and what is going on. But I find you are fully competent to represent yourself. And I see no signs of mental incompetence.
>
> So Mr. Bloom, you have your hand raised. Do you want to

say something to me?

> Mr. Bloom: Thank you. And I would just like to put on the record that agitation does not go violent. I am not violent. I am not violent.

(40RT 4713-4714.)

The prosecution also asked that a record be made of what had transpired between appellant and defense counsel in the lockup before appellant withdrew his NGI plea, to establish that appellant's plea withdrawal was a strategic decision by appellant. (40RT 4712, 4714-4715.) The prosecutor stated, "He came out here and he just withdrew his plea and the [*sic*] counsel won't consent. And counsel expressed a doubt as to his competence a few weeks ago." (40RT 4715.)

Defense counsel, despite having been relieved, were present and objected to any such inquiry, on the ground that, although appellant was now representing himself, the inquiry concerned discussions conducted while defense counsel were representing him:

> Either he is allowed the [*sic*] withdraw his plea without our consent or not. I think the People have cited you authority. We don't concur. We do still have a doubt about his competency. That hasn't changed. We didn't say it this morning, but we still feel that way.

(40RT 4715-4716.) The trial court stated it believed appellant had made a strategic plan to withdraw the plea rather than waive the jury and have the trial court find appellant was sane.[66] (40RT 4716-4717.) The court told appellant he need not divulge the conversation with defense counsel, which was privileged.

However, appellant stated he waived the privilege, "because the

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[66] Mistrial and retrial of sanity before a new jury was also available, and was in fact the only rational option. The trial court did not address this as an option considered and rejected in this "tactical decision."

Lady should know exactly what went into my decision making process because it was directed against you." He said they discussed Judge Schempp herself, but that prosecutor Samuels "was the subject of most [of the] discussion during that two hours. . . . That's what went on in the back room as to why I came in here and withdrew NGI." (40RT 4717-4718.) Appellant said he wanted the "Lady to declare a mistrial and discharge the jury," at which point he would have withdrawn his NGI plea and picked his own penalty phase jury. Appellant described the existing jury as weak, having failed to reach a sanity verdict, and that they would wind up hung in the penalty phase as well. Appellant said Deetz would not let him do what he wanted, and said that if he followed that course "the Lady of this Court would make a determination that I was playing games and you would take away my pro per status, [and would] kick me out of court and send me to another judge." Appellant said he told Deetz "that I didn't want to lose the Lady. That I wanted to keep the Lady of this Court." (40RT 4718-4720.) Judge Schempp acknowledged she would not have kept the case had a mistrial been declared, but that it was a matter of judicial assignment and had nothing to do with appellant or the case. (40RT 4720.) Appellant said:

> Despite whatever happens between me and Miss Samuels, there is not going to be a verdict in this case. . . . I am not going to say I can beat Miss Samuels flat out, but I am telling you I am going to hang this jury. I am going to hang this jury from the highest tree. There is not going to be a verdict.

(40RT 4720-4721.)

After some discussion about items appellant wanted from defense counsel, Applebaum stated with respect to the earlier waivers associated with appellant's withdrawal of his NGI plea: "[J]ust to be clear about this, I mean, I believe he understands the words. Thing is, how he processes it in his mind is another story. And I still believe he is not competent under

1368 of the Code." (40RT 4727.)

D. The Trial Court Erred By Allowing Appellant To Withdraw His NGI Plea

1. Allowing appellant to withdraw his insanity plea without the representation or consent of counsel violated the protections against ill-advised pleas meant to prevent erroneous imposition of the death penalty

Following dismissal of appellant's counsel, the prosecution raised the issue of whether the court properly could receive appellant's changed plea against the advice of counsel under section 1018. (40RT 4712.) The prosecution argued that *Medina*, *supra*, 51 Cal. 3d 870, and *Gauze*, *supra*, 15 Cal. 3d 709, stood for the proposition that section 1018 was not violated so long as appellant changed his plea voluntarily. (40RT 4711.) The court asked whether *Medina* and *Gauze* "distinguish an ordinary case as opposed to the one facing the death penalty or life without as 1018 referred to," and the prosecution answered, "this is a penalty trial so I presume it was a capital case." (40RT 4712.) The court replied, "[t]hat sounds logical." (40 RT 4712.) At the prosecutor's request, the court then went on to inquire about appellant's reasons for changing his plea, as set forth above. The trial court never specifically ruled on the requirement of consent of counsel under section 1018.

The authorities cited by the prosecution do not support their position. Although *Medina* was a capital case, it did not address section 1018's bar on pleas to capital offenses against the advice of counsel. The question in *Medina* was whether a defendant could reinstate a plea of not guilty by reason of insanity – adding defenses as opposed to forgoing them – against the advice of counsel. (*Medina, supra,* 51 Cal. 3d at 899-900.)

The court in *Medina* concluded that under those circumstances the decision was defendant's to make, citing *Gauze* and *Redmond*, *supra*, 16 Cal. App. 3d 931, both non-capital cases. (*Id.* at p. 900.) These decisions, focusing on the personal rights of a defendant in a non-capital context, have been squarely distinguished from capital cases.

The actions of the trial court, by allowing appellant to withdraw his NGI plea to Counts Two and Three without counsel's consent, then relieving counsel, and while appellant was representing himself, determining that the changed plea was valid despite section 1018, violated the clear mandate of section 1018 to protect against such injustices and violated appellant's due process, Sixth Amendment, and Eighth Amendment rights.

A mistrial on those two counts would have made appellant ineligible for the death penalty. Where a defendant enters both not guilty and NGI pleas, a verdict of guilty on the former plea is not complete unless and until the defendant is found sane on the latter plea. (*People v. Marshall*, *supra*, 99 Cal.App. at p. 228.)[67] Instead of declaring a mistrial, however, the trial court allowed appellant to withdraw his plea of not guilty by reason of insanity, converting his assertion of an insanity defense to conviction of murder with special circumstances. (40RT 4684-89.)

As this Court has explained, "[o]ver 30 years ago the Legislature deemed it necessary to impose special precautions against ill-advised guilty pleas, drawing a distinction according to the severity of the potential punishment." (*Chadd*, *supra,* 28 Cal.3d at p. 749.) Furthermore, the Court observed that the "fact that the requirement of counsel's consent to guilty

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[67] The jury's verdict on an NGI plea must be unanimous. (*People v. Troche* (1928) 206 Cal. 35, 44; *People v. Bales* (1974) 38 Cal.App.3d 354, 355-357; *People v. Bradshaw* (1935) 5 Cal.App.2d 528, 531.)

pleas in capital cases was enacted as part of [an effort to eliminate arbitrariness in death penalty cases] demonstrates that the Legislature intended it to serve as a further independent safeguard against erroneous imposition of a death sentence." (*Id.* at p. 750.)

These limitations on accepting a plea or change of plea regarding capital murder were "an effort to eliminate the arbitrariness that *Furman* [*v. Georgia*, 408 U.S. 238 (1972)] found inherent in the operation of prior death penalty legislation." (*Chadd*, *supra*, 28 Cal. 3d at p. 750; see also *Furman v. Georgia*, *supra*, 408 U.S. at p. 241 (arbitrary imposition of the death penalty violates due process and the Eighth Amendment ban on cruel and unusual punishment). The statute seeks to ensure that the requirements and protections of section 1018 "shall be liberally construed to effect these objects and to promote justice." (Penal Code, § 1018.)

The Court has rejected as "manifestly improper" constructions of section 1018 that would "obliterate the Legislature's careful distinction between capital and noncapital cases, and render largely superfluous its special provision for the former." (*Massie*, *supra*, 40 Cal. 3d at p. 624.) The special provisions of section 1018 for pleas involving the death penalty are meant to protect against just the type of uncounseled and ill-advised actions of appellant that unnecessarily and unjustly exposed him to the death penalty. (*See Redmond*, *supra*, 16 Cal. App. 3d at p. 938 (the circumstances of a particular case can cause the effect of withdrawal of an insanity plea to be a guilty plea).)

Unlike the provisions of section 1018 applicable to non-capital cases, the limitations on pleas to capital offenses do not afford trial courts discretion to accept a plea or change in plea without the assistance and consent of counsel. (See *Massie*, *supra*, 40 Cal. 3d at p. 625 ("it was within the Legislature's power to determine, as it has, that a defendant who wants

to plead guilty in a capital case must be represented by counsel who exercises his independent judgment in deciding whether to consent to the plea"). As such, the trial court violated its constitutional obligations as well as non-discretionary duty to ensure that appellant not only was represented by counsel throughout the change in plea, but also that counsel consented to it. (*See, e.g., Stop the Beach Renourishment v. Florida Dep't of Envntl. Prot.* (2010) __ U.S. __, 130 S. Ct. 2592, 2615 (Kennedy, J., concurring) (a judicial decision that eliminates or substantially changes established rights is arbitrary or irrational under the Due Process Clause); *Richmond v. Lewis* (1992) 506 U.S. 40, 50 (1992) (aside from questions of state law error, a capital case tainted by error that is arbitrary or capricious violates due process and the Eighth Amendment); *Neumann v. Melgar* (2004) 121 Cal.App.4th 152, 171 (trial court erred in failing to carry out non-discretionary duties imposed by statute).

Allowing appellant to withdraw his insanity plea without the consent of counsel was error that requires reversal of appellant's convictions on Counts Two and Three, the finding of special circumstances, and the death penalty. (*Massie, supra*, 40 Cal. 3d at p. 626.) This error was exacerbated by the fact that the court's only consideration of the validity of appellant's changed plea occurred when appellant was not represented by counsel. (*See McMann v. Richardson* (1970) 397 U.S. 759, 771, fn.14 ("Since *Gideon v. Wainwright*, 372 U.S. 335 [] (1963), it has been clear that a defendant pleading guilty to a felony charge has a federal right to the assistance of counsel"); Pen. Code, § 1018.)

2. Assuming arguendo that section 1018 did not preclude withdrawal of the NGI plea, the trial court abused its discretion accepting the withdrawal in this case

If this Court holds that section 1018 does not preclude the withdrawal of an NGI plea without counsel's consent under the circumstances presented here – where the effect was a plea of guilty to a capital charge – still, the trial court erred by allowing appellant to withdraw his plea. Given the substantial evidence that raised a doubt of appellant's competence, Dr. Wolfson's testimony that appellant was insane at the time of the homicides charged in Counts Two and Three (35RT 4304-4308, 4315-4317, 4321, 4338, 4435-4436), and the jury's inability to reach a sanity verdict on those counts, the trial court abused its discretion by accepting appellant's withdrawal of the NGI plea and proceeding to a penalty phase. Moreover, in this case the trial court erred by accepting the withdrawal of the plea under the circumstances presented here without adequate inquiry into the basis of defense counsel's withholding of consent. (Pen. Code § 1018; *Redmond, supra*, 16 Cal.App. 3d at p. 988.)

In *Merkouris*, after the jury had returned a verdict of first degree murder "without recommendation,"[68] the defendant sought to withdraw his NGI plea despite counsel's advice to try the issue. There was conflicting psychiatric evidence as to whether the defendant was competent to stand trial, and that conflict had not been resolved by a determination of competence under section 1368. (*Merkouris, supra,* 46 Cal.2d at pp. 551-552.) The evidence that appellant was insane at the time of the crimes was sufficient "to make the question one of fact which should have been tried."

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[68] Under former section 190, where a verdict of first degree murder was returned without recommendation as to punishment, "the law impose[d] the death penalty." (*People v. Perry* (1939) 14 Cal.2d 387, 392.)

(*Id.* at p. 553.) The trial court inquired of the defendant concerning his desire to withdraw the plea, specifically asking the defendant if he understood that if he withdrew the plea, he would "stand convicted of first degree murder with the death penalty," to which the defendant responded that he did. (*Id.* at p. 552.) The trial court allowed the withdrawal of the plea.

On appeal, this Court recognized that "[t]he colloquy between the court and the defendant relative to a withdrawal of the plea of not guilty by reason of insanity shows that the defendant did not understand the gravity of his predicament. (*Merkouris*, *supra,* 46 Cal.2d at p. 553.) Based upon the inadequate colloquy, the evidence supporting the NGI plea, counsel's desire to try the issue and the unresolved competency issues, this Court concluded the "trial court clearly abused its discretion in permitting defendant personally to withdraw his plea of not guilty by reason of insanity." (*Id.* at p. 555.)

In *People v. Guerra* (1985) 40 Cal.3d 377 (*Guerra*), the Court upheld the withdrawal of an NGI plea where the defendant sought to withdraw the plea "[a]fter the appointed experts concluded he was sane at the time of the crimes *and* mentally competent to stand trial, and after the court determined he was competent." (40Cal.3d at pp. 383-84 (emphasis added).) This Court relied on the exception to *Redmond*'s requirements, set out above, "where there is no doubt of a defendant's sanity in the mind of the trial court *and* the reports of examining psychiatrists unanimously indicate that such defendant was sane *at the time of the offense*." (*Guerra*, *supra*, 40 Cal.3d at p. 384, quoting *Redmond*, *supra*, 16 Cal.App.3d at p. 939 (emphasis added).)

Unlike the situation in *Guerra*, here no expert opined that appellant was sane at the time of the crimes charged in Counts Two and Three or that

he was mentally competent at the time of trial. To the contrary, Dr. Wolfson testified appellant was insane at the time of the crimes, as did Drs. Watson and Mills. Moreover, as explained in Argument III, above, there was substantial evidence raising a doubt that appellant was competent to stand trial. Dr. Mills testified that appellant suffered from mental illness, including an underlying psychotic process, developmental disability and brain damage, which suggested incompetence to stand trial. Dr. Watson testified concerning appellant's brain damage and resulting cognitive and other deficits. Dr. Vicary testified that appellant was incompetent at his first trial, based in part upon longstanding brain damage and mental illness,[69] which was present at this trial as well. The prosecution had itself argued that if appellant was incompetent at the prior trial, there was no reason to believe that he was presently competent. (2RT 203, 211-212.)

Assuming arguendo the trial could accept this change of plea without counsel's consent, the court was nevertheless required, before allowing appellant to withdraw his NGI plea, to resolve the doubts about appellant's competence and to and ensure that appellant's choice was the result of an adequate understanding of the situation and the choices available to him and of a rational consideration of the choices and their consequences.

Appellant successfully withdrew an NGI plea at his prior trial. In affirming that judgment, this Court distinguished *Merkouris* and *Redmond*, and followed *Guerra*, on the basis that at appellant's prior trial, "neither the trial court nor defendant's own experts had indicated any doubt regarding his sanity." (*People v. Bloom*, *supra*, 48 Cal.3d at p. 1214.) But the record

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[69] Declarations by Drs. Weiland, Kivowitz, Lisak and Verin, submitted pretrial by defense counsel, were to the same effect regarding appellant's lack of competence at the prior trial. (2CT 293-322, 327-401; see Arg II, *ante*.)

on which that conclusion was based was devoid of such evidence because appellant's former counsel rendered ineffective assistance of counsel. (*Bloom v. Calderon*, *supra*, 132 F.3d 1267, 1271-1278.) At appellant's retrial, not only did Drs. Wolfson, Mills and Watson testify that appellant was insane at the time of the homicides charged in Counts Two and Three, but the weight of the expert opinion before the trial court strongly supported the conclusion that appellant was also incompetent at the time of the retrial. Thus, while *Guerra* may have been controlling based upon the record of the first trial, *Redmond* and *Merkouris* are controlling now.

The trial court here erred not only in failing to take adequate precautions to ensure appellant's competence, as explained in Argument III, above, but also by failing to conduct an inquiry adequate to ensure that appellant understood the choices available to him and that his choice to withdraw the NGI plea was based upon a rational consideration of those choices and their consequences. It was in fact the prosecution who made the primary inquiry. (40RT 4690-4692.) Given appellant's multiple mental and cognitive impairments, the prosecutor's advisement was inadequate, in that it failed to identify the possible outcomes clearly, and misstated potential outcomes of a sanity retrial.

In the first place, the prosecutor referred only to the jury's potential finding on appellant's present sanity, never to his sanity at the time of the commission of the homicides charged in Counts Two and Three, which was the issue at stake pursuant to the NGI plea: For example: "You are withdrawing the N.G.I., but you have the right to have a jury determine *your sanity*." And: "Do you understand that the jury would have to unanimously find *whether or not you are sane* and you are deciding to give that right up . . . [.]" (40RT 4690-4691 (emphasis added).) That appellant stated that he understood this does not establish that he in fact understood

the actual issues at stake.

The prosecutor's explanation of the consequences of a sanity retrial as opposed to the withdrawal of the NGI plea were also insufficient. The prosecutor described appellant's "best case scenario" as follows: "What would happen is you would have a new trial on sanity and then potentially you would not be getting life or death, you would just potentially be getting 27-to-life. That's the best scenario for you in case you were to get a new trial and you were found insane in the new trial." (40RT 4692.) In fact, to avoid a penalty phase, appellant did not need to be found insane; he needed to avoid a finding of sanity. Repeated hung juries would have prevented a penalty phase. (Cf. *People v. Hernandez* (2000) 22 Cal.4th 512 [trial court has no authority to dismiss or otherwise dispose of a defendant's NGI plea after repeated hung juries, where there is substantial evidence from which a jury might find the defendant to have been insane].) And again, the prosecutor referred only to sanity, rather than sanity at the time of the two homicides.

Moreover, immediately after the guilt verdicts were taken, the trial court, as well as the prosecutor, had erroneously advised appellant that the jury's guilt verdicts and finding of the special circumstance automatically triggered a penalty phase:

> MS. DEETZ: One question. Do the verdicts trigger a penalty phase, a first and two seconds?
>
> THE COURT: That's the way –
>
> MS. SAMUELS: Yes. They absolutely, yes, without question. 100 percent positively triggers a penalty phase.
>
> MS. DEETZ: You, the Lady of this Court, are telling Robert Bloom that the verdicts by this jury trigger a penalty phase?
>
> THE COURT: Yes, Mr. Bloom, they do. The jury will consider

whether it will be death or life without possibility of parole. (34RT 4239.)

The trial court was wrong. With a plea of NGI a sanity trial would be required before it could be determined whether a penalty phase was authorized. The jury would then have to find appellant sane on the first degree murder (Count One) and sane on at least one of the second degree murders (Counts Two and Three) for those verdicts and the special circumstance finding to be complete. Nowhere before withdrawing his NGI plea does it appear that appellant was made aware of this crucial fact.

To the contrary, appellant appears to have relied on the trial court's erroneous advisement. Shortly after the above exchange he stated:

> I was thinking maybe that *now that we are having a penalty phase, regardless* that maybe it's not premature, if we can all, including Ms. Samuels, Ms. Samuels can come to court tomorrow and we can talk about things so we know who is who and what's what during penalty.
>
> Because the last stuff that I would like to get solved so I can be prepared to go day one when penalty starts.
>
> *We are going to penalty. So with all due respect, this is no longer premature.* And if this jury finds me insane, then I will just withdraw *Faretta* and go to a hospital. So it's no big deal.

(34RT 4246 (emphasis added).) Appellant thereafter absented himself from the sanity phase and instead began planning for a penalty phase, at which he expected to represent himself.

None of appellant's statements on the record betray any understanding that the penalty phase was not automatic at that point in the proceeding. No one ever clarified for him that he did not have to be found insane on all three counts in order to avoid a penalty phase; that a finding of insanity or a hung jury on any two counts, or on Count One alone, would preclude a penalty phase. The prosecutor did state, in objecting to further discussions about penalty phase before the sanity phase was complete, "[i]f

he wants a sanity, let's see what happens at the sanity. And if he doesn't get found insane, then we can discuss the penalty phase after he no longer has his attorneys." (34RT 4251.) But that comment implied there would be but one sanity verdict, or that a sanity verdict on any count would lead to a penalty phase. It in no way clarified that there could be different verdicts on sanity among the three counts, or that verdicts of insane or a hung jury as to Count One or Counts Two and Three would prevent a penalty phase. Indeed, even the prosecutor was confused:

> MS. SAMUELS: I'm going to just – I don't know, I had said before that I didn't think we should go on to penalty because counsel's still here and it's sort of a bizarre situation where the defendant is – has this aspect of being *Faretta* in the future if in fact there is a penalty phase. Although I'm not certain what happens, even if he's declared insane at this phase, is there no penalty phase then?
>
> MS. DEETZ: It would depend.
>
> MS. SAMUELS: There would be no penalty phase?
>
> MS. DEETZ: It would depend on how many verdicts of insane there are.
>
> MS. SAMUELS: Right. The defendant seems to be having a problem right now. We certainly don't need to keep him out here if he needs to not be here.
>
> THE COURT: Let's do this Monday morning.

(36RT 4537.) While this is the closest anything in the record comes to addressing the error previously made by the trial court, it is clear that the issue was never fully explained to appellant; nor can this Court have any confidence that appellant understood this exchange, or even heard it, given that he "seem[ed] to be having a problem" at that point.

Nothing in the prosecution's advisements to appellant addressed,

let alone corrected, the trial court's prior erroneous advice to appellant that the guilt verdicts made a penalty phase automatic. The trial court never referred to or corrected its prior erroneous advice. There is no basis for a conclusion upon which any confidence can be placed that appellant understood that the trial court and the prosecution had both been wrong about whether the penalty phase was automatic regardless of the sanity phase, or that he understood that if, upon retrial of sanity on Counts Two and Three, the jury did not return verdicts of sanity as to at least one of those counts, there would be no penalty phase.

Ultimately, appellant's decision to withdraw his NGI plea made no sense – withdrawing the plea provided no benefit, yet eliminated a viable defense to Counts Two and Three as well as to the special circumstance allegation, made appellant immediately death eligible, and eliminated any chance of parole. A "guilty plea with no attempt to seek concessions from the prosecution may, when coupled with other evidence of mental problems, raise doubts as to the defendant's competency." (*Burt v. Uchtman* (7th Cir. 2005) 422 F.3d 557, 565, and authorities cited therein; *Chavez v. United States* (9th Cir. 1981) 656 F.2d 512, 519 [desire to plead guilty with no attempt to plea bargain, when combined with other evidence, raised doubts of defendant's competence]; *United States v. Sandoval* (E.D.N.Y. 2005) 365 F.Supp.2d 319, 325; see also *Agan v. Dugger* (11th Cir. 1987) 835 F.2d 1337, 1340 [remanding for evidentiary hearing where defendant's "self-defeating behavior," including confessing to crime, waiving all constitutional rights regarding crime and pleading without seeking benefit, and attempting to prevent defense counsel from presenting mitigating evidence, along with other evidence, "should have alerted [counsel] to the possibility that [defendant] was incompetent to render his guilty plea" to capital murder].)

That appellant's reason for doing so was to have Judge Schempp remain on the case is such an irrational and questionable basis for the decision that it raises further doubt whether appellant understood "the gravity of his predicament" (*Merkouris*, *supra*, 46 Cal.2d at p.553.) If he wanted Judge Schempp to continue to preside over his penalty phase because he believed she would not impose the death penalty regardless of the jury's verdict (see 44RT 5475), this only further demonstrates appellant's irrationality.

This Court cannot rely upon the fact that appellant was technically represented by counsel when he withdrew the NGI plea as assuring that he had been adequately advised of the consequences, or that he understood those consequences or the alternatives available. The trial court had substantially undercut the relationship between appellant and defense counsel at that crucial juncture by allowing appellant to represent himself in proceedings concerning the penalty phase prior to actually discharging counsel pursuant to appellant's *Faretta* motion, by the court's rejection of counsel's declaration of doubt whether appellant was competent, and by such statements as "at this point there's no requirement – no need for him to cooperate with you. We are merely waiting for the verdict to come in the sanity phase." (36RT 4524; see Arg. VI, *post.*) The trial court's interference with the attorney-client relationship was substantially prejudicial in this instance, where appellant was making a crucial decision, discarding the only viable defense he had to the special circumstance finding, and doing so against the advice of defense counsel. The court's intrusion into and interference with the attorney-client relationship violated appellant's due process and Sixth Amendment rights, effectively encouraging appellant to act independently of counsel, even counter to counsel's advice, resulting in not only appellant's withdrawal of the NGI

plea but undertaking to represent himself at the penalty phase without the assistance of counsel. That interference alone is justification to reinstate appellant's NGI plea to Counts Two and Three. (See Arg. VI, subheading C, *post*.)

Moreover, counsel's declaration of doubt that appellant was competent was essentially a declaration that appellant had been unable to understand counsel's advice. That defense counsel would not consent to or join in the withdrawal of the plea, or agree that withdrawal of the plea was in appellant's interest, and believed that appellant was incompetent, put the trial court on notice that the withdrawal of the NGI plea risked an unjust or wrongful conviction and finding of the special circumstance, thus guaranteeing an unreliable penalty determination and risking an arbitrary and unjust imposition of the death penalty. Yet the trial court took little or no note of counsel's position, and made no inquiry of defense counsel concerning the basis for counsel's disagreement ("All right. I won't press it, then." (40RT 4693)), or of appellant to ensure his comprehension of the choice he was making and its consequences.

This Court has stated that counsel's disagreement with a defendant's choice regarding the entry of an NGI plea is not sufficient *alone* to prevent the defendant's implementation of that choice. (*Medina*, *supra*, 51 Cal.3d at p. 900.) However, combined with the evidence raising a doubt of appellant's competence, the irrational "tactical" reasons appellant gave for withdrawal of the plea, the substantial evidence that appellant was insane at the time of the last two homicides, the jury's inability to reach a unanimous verdict as to those two counts, and the fact that in the absence of a finding of sanity on at least one of the two counts no special circumstance finding would stand, counsel's refusal to consent in this case must be considered to have triggered a requirement of substantially closer scrutiny

by the trial court of appellant's understanding of the choices available to him and the consequences of those choices, as well as scrutiny of the rationality of the choice made. It must also be considered to have triggered some inquiry of counsel as to their reasons for withholding that consent. (See *Redmond, supra*, 16 Cal.App.3d at p. 938)

The trial court allowed the withdrawal of the plea despite the clear lack of benefit to appellant, in contrast to the substantial and dire consequences, without any apparent notice or consideration of the effect on the fairness of the proceedings or the reliability of any eventual judgment. The trial court may as well have been taking a guilty plea to a reckless-driving charge given the court's inattention to the extraordinarily unwise, ill-considered and perilous choice made by a mentally ill, developmentally disabled and brain-damaged defendant to intentionally risk the death penalty without *any* potential benefit from that choice.

Even assuming arguendo that appellant was competent, the evidence was overwhelming that he had substantial limitations due to mental illness, developmental disability and brain damage. It was incumbent on the trial court to make some reasonable accommodation to those limitations to ensure that appellant actually had a factual and rational understanding of his choices and their consequences. Rather, the trial court relied upon appellant's unreasonable denial of his own limitations to allow appellant to hang himself.

In support of appellant's withdrawal of his NGI plea, the prosecution cited *Redmond, supra,* 16 Cal.App.3d 931, for the proposition that defense counsel cannot interfere with a defendant's choice to withdraw an NGI plea (40 RT 4710-4711), apparently believing that the mere recitation of "findings" that appellant was competent and that withdrawal of the plea was "knowing and voluntary" was sufficient. This interpretation of

Redmond is unwarranted, especially in light of *Merkouris*. These cases recognize that a trial court has a duty to do more than merely preside over the withdrawal of an NGI plea after a pro forma waiver of rights. Where there is evidence of incompetence and/or evidence of a viable sanity defense, and especially where a jury has been unable to reach a unanimous verdict on sanity after a trial on that issue, the trial court must do more to ensure the rationality of the defendant's understanding of his choices and the consequences.

The prosecution also relied upon *Gauze*, *supra*, 15 Cal.3d 709. (40 RT 4711.) *Gauze*, however, is clearly distinguishable from appellant's case, not least because it was a non-capital case, in which the policies underlying the requirement of defense counsel's consent to a guilty plea do not apply. In *Gauze* defense counsel had stated his belief that an NGI defense was a viable option, but the defendant did not agree and did not enter such a plea. On appeal, the defendant relied upon *Merkouris*, arguing that an NGI defense should have been presented despite his unwillingness to enter the plea. This Court distinguished *Merkouris* on three specific grounds. First, the Court noted that the decision whether or not to enter an NGI plea was a decision solely for the defendant, not counsel or the trial court, to make. In contrast, *Merkouris* involved withdrawal of an NGI plea. (*Id.*, at p. 718.) Second, the Court noted that the defendant had twice been found competent to stand trial, in contrast to the lack of a competence determination in *Merkouris*. (*Ibid.*) Third, the Court noted that, faced with a sentence of life in prison rather than a possible lifetime commitment upon a verdict of not guilty by reason of insanity, the defendant in *Gauze* had made "a free and voluntary choice with knowledge of its consequences." (*Ibid.*)

On those same three points, *Gauze* is distinguishable from the

circumstances here, which are substantially similar to *Merkouris*. Against defense counsel's advice, appellant sought to withdraw an NGI plea, as was the case in *Merkouris*, but not *Gauze*. Withdrawal of such a plea is not automatic, but is subject to the discretion of the court upon a showing of good cause. (Pen. Code, §§ 1016, 1018; *People v. Boyd*, *supra*, 16 Cal.App.3d at pp. 907-908; *People v. Guillebeau*, *supra*, 107 Cal.App.3d at p. 544; *People v. Herrera*, *supra*, 104 Cal.App.3d at p. 172.) As demonstrated above, in a capital case, withdrawal of an NGI plea requires consent of counsel. Furthermore, as set forth in Argument III, above, there was substantial evidence raising a doubt that appellant was competent to stand trial, which doubt was never resolved by appointment of experts to evaluate him or by a hearing pursuant to section 1368. Additionally, appellant's choice was itself a strong indicator that it was not the product of a full understanding of the situation or a rational consideration of the options and their possible consequences. The discussions after the fact concerning appellant's "reasons" for withdrawing his NGI plea strongly support the conclusion that appellant, like the defendant in *Merkouris*, "did not understand the gravity of his predicament."

The prosecution also cited *Medina*, *supra*, 51 Cal.3d 870. (40RT 4711.) *Medina* is similarly distinguishable from *Merkouris* and appellant's case. In *Medina*, the issue was whether the reinstatement of the defendant's withdrawn NGI plea was error because trial counsel disagreed, as a tactical matter, with the defendant's request to reinstate the plea. (51 Cal.3d at pp. 899-900.) This Court held that trial counsel's disagreement alone could not prevent the defendant's personal decision to reinstate his NGI plea. (*Id.* at p. 900.) Appellant here was trying to withdraw an NGI plea, not reinstate one. Reinstatement of the NGI plea in *Medina* did not amount to an abandonment of a viable defense or automatically qualify that defendant for

a penalty phase, as was the case with appellant. Furthermore, appellant's withdrawal of the plea took place after a hung jury on that plea, indicating the viability of the insanity defense, which was not the case in *Medina*, in which counsel believed that the insanity defense was not viable. (51 Cal.3d at p. 899.) *Merkouris* and *Redmond* were inapplicable in *Medina*. They are directly applicable here, and compel the conclusion that the trial court erred in allowing appellant to withdraw his NGI plea.

In this case the trial court accepted without question what was the functional equivalent of a guilty plea to capital murder without the consent of counsel and without any reflection on the record of appellant's understanding of the substantial and dire consequences of that change of plea. *Merkouris* and *Redmond* demanded closer scrutiny of appellant's withdrawal of the NGI plea than the trial court conducted here, as do the policies underlying section 1018. "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." (*Boykin v. Alabama*, *supra*, 395 U.S. at pp. 243-244.)

Assuming the trial court had any authority to accept this change of plea in the absence of counsel's consent, the failure to resolve the substantial doubts about appellant's competence, the failure to assure that appellant comprehended the situation he was in and the choices to be made, the failure to assure that he made the choice to withdraw his plea based upon a rational consideration of the consequences of that choice, and the failure to consider and give substantial, if not conclusive, weight to defense counsel's withholding of consent, separately and in combination, render the trial court's decision to allow appellant to withdraw his NGI plea an abuse of discretion, violating appellant's due process rights, depriving him of a

fair jury trial on guilt, sanity and penalty, and raising a substantial doubt about the reliability of both the guilt and penalty judgment. (U.S. Const., 5th, 6th, 8th, 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16, 17; *Drope*, *supra*, 420 U.S. at p. 172; *Beck* v. *Alabama*, *supra*, 447 U.S. at pp. 637-638; *Johnson v. Zerbst* (1938) 304 U.S. 458, 468.) As a result, the judgment must be reversed and the matter remanded for a retrial of the sanity phase.

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V.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO REINSTATE HIS PLEA OF NOT GUILTY BY REASON OF INSANITY

During the penalty phase, appellant moved to reinstate his plea of NGI on the grounds that he had not understood the choices available to him or their consequences. Specifically, appellant explained that he had not understood that, if the sanity phase as to Counts Two and Three were retried, he might not be sentenced either to life without possibility of parole or to death, and that had he understood that, he would not have withdrawn the NGI plea. Given the trial court's failure to ensure that appellant was competent to stand trial (see Arguments III, IV, *ante*) or that he knowingly and intelligently waived counsel at the penalty phase (see Argument VI, *post*), or that he rationally understood what he was doing in withdrawing his NGI plea (see Argument IV, *ante*), this should have come as no surprise.

In support of his motion appellant offered references to the record regarding his lack of understanding of the sanity phase and to defense counsel's doubt of his competence. He also explained he had had no sleep the night before he withdrew the plea, was confused when he withdrew the plea, had not understood prosecutor Gorin's advisement, and only came to understand the consequences when he read the transcript of those proceedings. He further alleged that he had difficulty processing oral information and needed things to be in writing. He also proffered defense counsel as corroborating witnesses and asked for a hearing.

It is perhaps also not surprising that the trial court gave appellant's motion short shrift and held no hearing, despite evidence in the record corroborating appellant's allegations, and without allowing defense counsel to appear and corroborate appellant's account. The trial court's denial of

appellant's motion to reinstate his NGI plea as to Counts Two and Three constituted an abuse of discretion, and violated appellant's constitutionally guaranteed rights to due process, a fair trial, assistance of counsel, an impartial fact-finder, a fair hearing on his motion, and reliable determinations of guilt, sanity and penalty. (U.S. Const., 5th, 6th, 8th, 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16, 17.) As a result, the judgment must be reversed and the matter remanded to the trial court for retrial on appellant's plea of not guilty by reason of insanity as to Counts Two and Three.

A. Proceedings Below

Appellant was permitted to represent himself at the penalty phase. On Monday, December 11, 2000, after completing his testimony, appellant made a motion to reinstate his NGI plea.[70] (44RT 5434-5447.) He explained that Applebaum was waiting for a call from the court to come in to address the matter. (44RT 5434, 5440, 5441.) He cited portions of the transcripts from December 5, 2000 relating to Applebaum's refusal to join in appellant's waivers regarding a retrial of the sanity phase (40RT 4692-4693), Deetz's reiteration of defense counsel's doubt as to appellant's competence (40RT 4715), and Applebaum's explanation that while he thought appellant understood the words of the waiver, "how he processes it in his mind is another story, and I still believe he is not competent under 1368 of the Code." (40RT 4726). Appellant also cited the transcript from November 1, 2000, regarding his motion to represent himself at the sanity phase, in which he had stated, three times, that he did not understand the

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[70] Before his testimony resumed that morning, the court told appellant that matters he wished to take up with the court would be heard that afternoon. (44RT 5344.) Outside the presence of the jury, he was assured the record would reflect that what he would say that afternoon, he meant to say that morning before his testimony resumed. (44RT 5350.)

intricacies of the sanity phase. Appellant also noted that the trial court had cited the complexity of the issues in denying the motion. (30RT 3795-3796; 33RT 4145-4146.)

Appellant then stated that he had been told, and was under the impression, that if he had a retrial on sanity the trial court "was going to kick me out of court and send me to another court, and that my rights were not going to be the same in front of another judge not only insofar as pro per for penalty, but in so far [*sic*] as the sanity phase." (44RT 5440.) He explained that until he read the transcripts, he did not understand the consequences of his waivers or of the withdrawal of the NGI plea. (44RT 5440-5441.) He stated:

> I was confused when I did it.
>
> First off, the jury hung on Monday. I stayed up all night thinking about Tonya [Deetz]. Thinking about whether Tonya was going to retry sanity. Thinking about what was going to happen during the retrial.
>
> I came into court with no sleep. I was confused. I spent over two hours discussing this with Tonya and with Seymour [Applebaum], but mostly with Tonya who has been like a sister to me. Okay?
>
> And the waivers that Mr. Gorin was giving, they didn't come from the Court. I didn't understand what he was saying.
>
> I knew what he was saying, but I didn't understand the consequences until I read the transcript of December 5th. Okay?
>
> I want to reinstate those pleas and I want to go nunc pro tunc. That's my first motion. And Seymour is waiting on the phone because I have two more motions to make to the Judge if the Lady would just address this issue.

(44RT 5440-5441.)

The prosecution opposed the motion, stating that the first they had heard that appellant had difficulty understanding matters put to him orally was during cross-examination of appellant that day.[71] The prosecution also

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[71] See 44RT 5361-5364, 5366-5367, 5374, 5383, 5387-5388.

argued that appellant had explained his reasoning for withdrawal of the plea, i.e., not wanting to lose Judge Schempp as the trial judge, and the possibility that there were three sympathetic jurors, reflected by the hung jury on sanity.[72]

Appellant responded that his counsel could come into court and "inform the Lady of the Court that until I read things on paper I don't comprehend the information and I don't process it." (44RT 5443.) He argued that the court had abused its discretion in brushing aside counsel's declaration of a doubt as to his competence. (44RT 5442-5443.) The trial court then asked, "Has this all been as you so classically described it bullshit, then, when you are telling the jury you are totally competent and sane? [¶] Are you trying to con them as Miss Samuels has asked you?" (44 RT 5444.) Appellant responded:

> No. I would just like to say as far as penalty, I know penalty. I know guilt. I am talking about sanity.
>
> I don't understand the consequences or the intricacies of sanity. And I withdrew those pleas against objections and over the objections of defense counsel who told the Judge on the very same day that they still had a doubt under 1368 and it was just brushed aside.
>
> I signed a waiver as to *Faretta versus California*, but I never signed a waiver as to these withdrawals of NGI.
>
> Miss Acosta [a bailiff] put a piece of paper in front of me. I seen it. I didn't even read it, but I expect when I read it in the transcript it was a *Faretta* waiver. The Court didn't make any inquiry as to what I was doing in withdrawing the NGI.
>
> I don't understand what Mr. Gorin was telling me that if I had a sanity retrial that there was a potential that I would get 27 to life. I got 18 years in the system. What makes you think that I would normally give up a chance at an early shot at parole and being back out on the street rather than risk death or life?

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[72] To the contrary, appellant had explained that those three jurors showed the jury was "weak;" he wanted a new jury, except that with a retrial he would lose Judge Schempp. (40RT 4718-4720.)

I didn't understand the consequences of what I was doing. And Seymour and Tonya will tell you that when it comes to mouth to mouth stuff, I don't process the information well. I need to read stuff in the transcript.

They didn't want me to withdraw the pleas. I did it against advice of counsel. I didn't understand what I was doing.

. . .

But on Saturday I had the chance to read the transcripts from December 5th, December 6th and December 7th. And it was only when I read the December 5th transcript of when I withdraw the NGI that I realized the consequences of what I had done.

And it was not done by a competent defendant. And we need to examine this issue before we get into a situation where we are just going to leave it up to the appellate courts. We shouldn't just brush this off to the appellate court. It should be addressed now.

(44RT 5444-5445.)

The trial court responded in part as follows:

You were advised of all of the problems once you represented yourself and you chose to do it. I went through each *Faretta* question. Listen to me. Keep your hand down. I didn't interrupt you.

Mr. Bloom: I'm sorry.

The Court: I asked you orally each *Faretta* motion and you answered it responsively. There wasn't any indication that you couldn't process the portion of the questions I was giving you.

The record is clear that you understood your rights when you withdrew your plea.

And I did not say that I would kick you out of the court. I said I would not retry this case.

And I didn't say that your rights if it went to another court would be -- I forgot what words you used, but any court would treat you fair.

And your request to reinstate your not guilty by reason of insanity plea is denied. You are clearly able to process information orally. And the record is replete with it. You have been able to do

> that up until today when you started taking notes [73] and yet you were able to come back very quickly on redirect and just go boom, boom, boom through your notes and answered the questions.

(44RT 5445-5447.) The trial court then denied appellant's attempt to declare a doubt about his own competence (44RT 5448), and denied his motion to have defense counsel reappointed to represent him. (44RT 5448-5449, 5452-5455.)

Two days later, on December 13, 2000, during a hearing outside the presence of the jury concerning whether defense counsel would testify at the penalty phase pursuant to a subpoena from appellant, appellant reiterated the arguments he had previously made – that he was not competent to waive his NGI plea; that he has difficulty understanding what is spoken, rather than written, and therefore did not understand prosecutor Gorin's oral admonitions, but realized what he had done when he read the transcripts; that he had not slept the night before he withdrew his NGI plea and was not attentive; that he didn't understand the sanity phase proceedings, and that his attorneys could corroborate what he was telling the court. (46RT 5650-5652.) Thereafter, the trial court reiterated its lack of doubt that appellant was competent, but did not address the question of appellant's problems with processing information conveyed orally. Nor did the trial court ask defense counsel about appellant's representations on that question. (46RT 5652-5667.)

B. The Trial Court Abused Its Discretion By Denying Appellant's Motion to Reinstate His NGI Plea on Counts Two and Three

A criminal defendant is entitled to move the court to reinstate a withdrawn insanity plea at any stage of the trial. (*People v. Guillebeau, supra*, 107 Cal.App.3d at p. 544.) The determination whether to allow

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[73] See, e.g. 44RT 5365-5366, 5368-5370, 5375-5377, 5383, 5393, 5410.

reinstatement of the plea is addressed to the sound discretion of the trial court. (Pen. Code, §§ 1016, 1018; *People v. Medina, supra,* 51 Cal.3rd at p. 899; *People v. Guillebeau*, *supra*, 107 Cal.App.3d at p. 544; *People v. Herrera* , *supra*, 104 Cal.App.3d at p. 172; *People v. Boyd, supra*, 16 Cal.App.3d at p. 908.) However, section 1018 requires that a motion to reinstate an NGI plea be considered liberally "to effect [the] objects [of the statute] and to promote justice." One purpose of that statute is the prevention of convictions in capital cases obtained by a defendant's concession of guilt and waiver of any defense as a result of anything other than a rationally determined choice made with the advice and consent of counsel. (*People v. Chadd*, *supra*, 28 Cal.3d at pp. 748-751.)

The trial court's failure to consider all of the evidence relevant to an exercise of discretion itself constitutes an abuse of that discretion: "'To exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision.'" (*In re Cortez* (1971) 6 Cal.3d 78, 85-86, citing and quoting *People v. Surplice* (1962) 203 Cal.App.2d 784, 791.) "A failure of the trial court to consider all the evidence is a failure to exercise discretion and requires reversal of the determination." (*Schlumpf v. Superior Court* (1978) 79 Cal.App.3d 892, 901.)

The standard for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." (*North Carolina v. Alford* (1970) 400 U.S. 25, 31, citing *Boykin v. Alabama* (1969) 395 U.S. 238, 242; *People v. Howard* (1992) 1 Cal. 4th 1132, 1177.) Withdrawal of an NGI plea is governed by the same standard where there is substantial evidence supporting a finding that the defendant was insane at the time of

the crime. (*People v. Redmond* (1971) 16 Cal.App.3d 931, 938; *People v. Merkouris* (1956) 46 Cal.2d 540, 553-555.)

Here the trial court abused its discretion in denying appellant's request to reinstate his NGI plea. The court refused even to conduct a hearing to allow appellant to present evidence that he had not understood the prosecutor's oral advisements until he read them in the transcript because of cognitive deficits which interfered with his ability to fully process oral communication, again rejected arguments regarding appellant's incompetence and ignored other factors, such as that appellant had not slept the night before he withdrew the plea. The trial court continued to apply its own ill-informed and profoundly skeptical view of the mental health issues and testimony, baselessly projecting an unwarranted assumption of rationality and intent onto the behavior of a brain-damaged, developmentally disabled and mentally ill defendant.

The court for the most part failed to directly address appellant's request to withdraw his NGI plea. First, the court relied on appellant's purported understanding of his *Faretta* waivers, though appellant was not at that point challenging them. Nevertheless, as demonstrated in Argument VI below, the *Faretta* "waivers" were themselves substantially flawed, and fail to support a finding that appellant understood the risks and dangers of self-representation. In fact, immediately after the court denied his motion to withdraw his NGI plea appellant moved to revoke his self-representation and reappoint counsel, in part based upon not having understood the consequences of representing himself.

The trial court next ruled that the record was clear that appellant understood his rights when he withdrew his NGI plea. Again, this addressed a different point than that actually being made by appellant, which was that he had not understood the consequences of withdrawing his

NGI plea, forgoing the chance at receiving a 27-to-life sentence rather than life without possibility of parole or death.

In rejecting appellant's explanation that he did not process oral information well, the court characterized the record as "replete" with indications to the contrary, when in fact the record confirms that appellant typically relied upon written materials in addressing the trial court. His requests for "permission slips" regarding presentation of his penalty case were written. (33RT 4164-4178; 37RT 4623-4624; 38RT 4662; 40RT 4704-4709, 4747-4805; 41RT 4813-4828.) His *Marsden* motions regarding Dr. Watson's and Dr. Mills' guilt phase testimony were written, with appellant then reading them to the court several days after he had read the transcript. (*Marsden* RT 3031-3037; *Marsden* RT 3614-3622.) Other *Marsden* and *Faretta* motions made were written, then read to the trial court. (*Marsden* RT 1929-1934 [October 5, 2000]; 15 RT 1935-1944 [*Faretta* motion October 5, 2000]; *Marsden* RT 2043-2062 [October 10, 2000; in his "Opening Remarks," appellant noted his motion was 90 percent written and 10 percent oral]; see also *Marsden* motion RT 527-539 [September 1, 2000 motion to recuse Judge Hoff].)

Furthermore, the record included Dr. Watson's testimony that appellant's brain damage caused difficulty with receptive language but not with expressive language (23RT 2932), precisely the difficulty appellant claimed caused him not to understand the consequences from Gorin's oral advisements. (See also 22RT 2726, 2848.) Dr. Watson also testified that appellant's brain damage impaired his problem-solving abilities and his ability to reason effectively, especially in novel situations, and where coupled with an emotional context. (22RT 2715-2717, 2727-2728, 2769, 2772; 23RT 2928-2930.) Immediately before withdrawing the NGI plea, appellant was faced with what was an unquestionably novel situation for

him,[74] a hung jury on sanity. Appellant had asserted over a month earlier that he did not understand the "intricacies" of a sanity phase. (30RT 3795-3796.) A further emotional component was evidenced by appellant's concern about whether Deetz, "who has been like a sister to me," would be available to retry sanity, as well as by his emotional or otherwise non-rational attachment to "the Lady of the Court," Judge Schempp. The situation led appellant to not sleep the night before withdrawing his plea. Even assuming arguendo that appellant's brain damage and mental illness did not render him incompetent to stand trial, all of these factors combined with appellant's cognitive deficits to interfere with appellant's ability to comprehend or fully "process" what the prosecutor had stated regarding the consequences of withdrawing the NGI plea.

The advisement appellant did not fully understand involved a novel concept – different from advisements about the rights to confrontation, to a jury trial, to present witnesses and to a unanimous jury verdict, which were rather routine,[75] such as appellant may well have read in his preparations for trial, or with which he might have been otherwise familiar. The advisement about the consequences of withdrawing an NGI plea was far from routine, even for the trial court or counsel. Yet, the court took no steps to ensure that appellant *did* understand the prosecutor's admonishments and ultimately the consequences of withdrawing his NGI plea.

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[74] Even the prosecution was confused at some points. (See, e.g., 34RT 4239 (Samuels says guilt verdicts "100 percent positively triggers a penalty phase"); 36RT 4537 (Samuels confused about how sanity verdicts affect whether or not there is a penalty phase).)

[75] At that, the prosecutor misstated the issue which would be the subject of the trial which appellant was waiving, referring to a jury determination "of your sanity" and "whether or not you are sane," rather than whether he was sane at the time of the homicides in Counts Two and Three. (40RT 4690-4691; see Arg. IV, *ante*.)

Moreover, as discussed in Arg. IV, *ante*, immediately after the guilt verdicts were taken the trial court, as well as the prosecutor, had erroneously advised appellant that the guilt verdicts and finding of the special circumstance automatically triggered a penalty phase. (34RT 4239.) Nothing in Gorin's advisements regarding withdrawing the NGI plea addressed this prior erroneous advice, much less corrected it. The trial court never referred to or corrected its prior erroneous advice. Thus, there is ample evidence from which to conclude that appellant withdrew his NGI plea believing that a retrial of the sanity phase could have no effect upon whether he would have to undergo a penalty phase.

The trial court's finding that appellant was "able to process information orally" misses the point. Appellant did not contend he was unable to process oral information; he said that he did not process it well, and that he understood what was said, but not the consequences (44RT 5441, 5445). Similarly, Applebaum had said of appellant's waivers: ". . . I believe he understands the words. Thing is, how he processes it in his mind is another story." (40RT 4727.) By failing to conduct a hearing at which appellant could present evidence supporting his claim, the trial court denied the motion based on an incorrect understanding of the claim appellant had made and the evidence which supported it.

Finally, the requirement of Penal Code section 1018 that a guilty plea to a capital charge not be accepted without consent of counsel,[76] coupled with its mandate that its terms be "liberally construed to effect [its]

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[76] As explained in Argument IV, *ante*, appellant's withdrawal of the NGI plea to Counts Two and Three was effectively a plea of guilty on those counts and the special circumstance. As a result, even if section 1018 is not directly applicable to withdrawal of an NGI plea, the state's interests in avoiding wrongful convictions and executions underlying that section are fully applicable here.

objects and to promote justice," dictates that the trial court should have granted appellant's motion to reinstate his NGI plea, especially in light of the minimal effort the trial court had made to ensure that appellant adequately comprehended the consequences of withdrawing the plea at the time it was withdrawn. (See Arg. IV, *ante*.)

The trial court's refusal to consider the evidence and argument appellant proffered in support of his motion to reinstate his NGI plea rendered the trial court's ruling an abuse of discretion and denied appellant due process. In *People v. Herrera* (1980) 104 Cal.App.3d 167, the defendant, having pled not guilty, sought to enter an NGI plea prior to trial. The trial court erred in refusing to allow the plea without considering the proffered argument and evidence:

> [T]he trial judge . . . ignored Herrera's counsel's clear attempts to distinguish the law presented to the court by the district attorney. He refused to read the documents in support of the defendant's motion made available to him. He denied the motion because it was made just prior to trial, when in fact it was first made . . . seven days prior to trial at a time when, because of the motion judge's diligence, the defense was first discovered. Such a refusal as suggested by [*People v.*] *Boyd* [(1971) 16 Cal.App.3d 901, 908], is a refusal to consider the motion and a failure to exercise the statutorily provided discretion of Penal Code section 1016. This principle is underlined by Justice Tobriner most recently in *People v. Chavez* (1980) 26 Cal.3d 334, 347, 161 Cal.Rptr. 762, 770, 605 P.2d 843, 851: "A judicial decision made without giving a party an opportunity to present argument or evidence in support of his contention 'is lacking in all the attributes of a judicial determination.' "

(104 Cal.App.3d at p. 172.)[77]

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[77] "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, *but upon inquiry. . . .*" (*Truax v. Corrigan* (1921) 257 US

(continued...)

Similarly here, the trial court refused to consider evidence appellant proffered in support of his claim that he had not understood what he was giving up by withdrawing his NGI plea. The trial court refused to hear from Applebaum and refused to conduct a hearing. Moreover, the trial court's denial of the motion was based on the trial court's continued erroneous refusal to consider the substantial evidence of appellant's brain damage and mental illness and the effects thereof on his competence, upon his comprehension of the relevant circumstances and upon the rationality of his decision-making. (See Args. II, III and IV, *ante*.)

Under *Redmond*, *supra*, 16 Cal.App.3d at p. 938, and *Merkouris*, *supra*, 46 Cal.2d. at pp. 553-555, and in light of the policies underlying section 1018, in the circumstances presented here, where there is reason to question appellant's competence, his understanding of the consequences, and the rationality of his decision to withdraw his NGI plea in the first instance, and in the face of defense counsel's disagreement with that choice, the trial court was required to undertake a careful and probing inquiry, taking into account the available and proffered evidence, before exercising discretion to disallow reinstatement of the NGI plea. Yet it failed to do so.

C. Conclusion

The denial of appellant's motion to reinstate his plea of not guilty by reason of insanity constituted an abuse of discretion, deprived appellant of due process, an impartial fact-finder, a fair hearing on his motion, the assistance of counsel, a fair jury trial on guilt, sanity and penalty and a reliable determination of guilt, sanity and penalty, and requires reversal of the judgment and remand to allow the reinstatement and retrial of

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[77] (...continued)
312, 332 (emphasis added); see e.g., *In re William F.* (1974) 11 Cal.3d 249, 254-255 [due process requires fundamental fairness in the fact-finding process].)

appellant's NGI plea on Counts Two and Three. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16, 17; *Beck* v. *Alabama* (1980) 447 U.S. 625, 637-638; *North Carolina v. Alford, supra*, 400 U.S. 25, 31; *Johnson v. Zerbst* (1938) 304 U.S. 458, 465.)

Even assuming arguendo that allowing withdrawal of the NGI plea did not violate appellant's rights, the trial court's denial of his motion to reinstate his NGI plea was an abuse of discretion, based upon legal and factual errors and made without consideration of all of the evidence relevant and necessary to an informed exercise of discretion. If reversal of the judgment and retrial of the sanity phase on Counts Two and Three is not ordered, at a minimum the matter should be remanded to allow appellant the opportunity to present evidence and argument supporting his motion to reinstate his NGI plea (see *People v. Boyd, supra,* 16 Cal.App.3d at pp. 907-909), and for that decision to be made based upon the evidence relevant to the motion.

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VI.

THE TRIAL COURT ERRED IN ALLOWING APPELLANT TO REPRESENT HIMSELF AT THE PENALTY PHASE

A. Introduction

Assuming arguendo the trial court committed no reversible error by failing to suspend proceedings to conduct competence proceedings (see Arg. III, *ante*), or by allowing appellant to withdraw his NGI plea to Counts Two and Three (see Arg. IV, *ante*), or by denying appellant's motion to reinstate that plea (see Arg. V, *ante*), still, the evidence of appellant's mental illness, brain damage, developmental disability and cognitive deficits, and the patent irrationality of so many of his decisions, demonstrate that appellant did not make a "knowing and intelligent" decision to waive counsel and to represent himself at the penalty phase. Even if no error occurred in accepting appellant's waiver of counsel, denial of appellant's motions to reinstate defense counsel requires reversal of the resulting death judgment.

The day before opening arguments at the guilt phase appellant made a motion to represent himself at the penalty phase. The trial court took the matter under submission and then granted the motion while the jury was deliberating, over the objection of defense counsel, who remained counsel of record through the sanity phase. Not until after the sanity phase, after appellant had withdrawn his NGI plea to Counts Two and Three and the trial court had discharged defense counsel, did the court conduct any inquiry or colloquy to ensure that appellant's waiver of counsel was made knowingly and intelligently. When the court finally did undertake a colloquy it was wholly insufficient under *Faretta v. California* (1975) 422 U.S. 806. Instead of warning appellant of the dangers and disadvantages of self-representation, the trial court encouraged appellant's choice, assuring

him of his qualifications to represent himself, and made no effort to look behind appellant's misguided, and unquestionably odd, assurances that he knew what he was doing. In the end, the trial court never asked for, or obtained, a direct and express waiver of counsel from appellant.

During the penalty phase, the prosecutor twice moved to revoke appellant's pro per status, arguing that he was making a mockery of the proceedings. Both requests were denied. A few hours after the prosecutor's second motion, appellant made his own motion to revoke his self-representation and reinstate defense counsel. Surprisingly, the prosecutor then switched positions and opposed appellant's motion, which the trial court denied. Appellant renewed his motion later in the proceedings, the prosecution again opposed the motion, and the trial court again denied it.

The trial court erred in allowing appellant to represent himself without having knowingly and intelligently waived his right to counsel with an actual awareness and understanding of the dangers and disadvantages of doing so. The death judgment must therefore be reversed. Moreover, the trial court erred in denying appellant's motions to reinstate counsel, both because it was apparent that his waiver of counsel had not been knowing and intelligent, and because his self-representation had resulted in a proceeding that failed as the fair trial to which appellant was entitled under the state and federal constitutions. Furthermore, the trial court abused its discretion in denying those motions based on considerations irrelevant to the motions and without considering material and relevant evidence appellant proffered.

B. Proceedings Below

The bulk of the facts demonstrating substantial doubt of appellant's rationality, including his mental impairments, have been extensively

discussed in Arguments II, III, IV and V, above. Rather than repeat those discussions here, appellant incorporates those arguments herein by reference.

1. Appellant's exchanges with the court while he was represented by counsel and before his *Faretta* motion was addressed

On October 5th, 2000, the day before opening statements in the guilt phase, appellant made a *Marsden* motion as well as a *Faretta* motion. The *Marsden* motion was based on appellant's disagreement with counsel about the mental state defense they were pursuing. Appellant informed the court that his counsel "are about to crawl into bed with the prosecution team and hand them their case on a silver platter." (*Marsden* RT 1930.) Appellant stated that "if [counsel] had any balls, they would assist me in contesting these criminal charges and not sacrifice me on the altar of a mental defense that is destined to lose and be rejected by the jury. (*Marsden* RT 1932.) Appellant believed that "the end result is going to be the jury returning with guilty verdicts of first degree murder against me. I find this whole situation to be intolerable and outrageous." (*Marsden* RT 1933.) Immediately following these arguments, appellant made a *Faretta* motion in which he sought to represent himself in the event of a penalty phase. (15RT 1935.) In spite of his fear that counsel's efforts would not successfully prevent murder convictions, which would have precluded a penalty phase, the reason appellant gave for his intention to seek pro per status for the penalty phase was that "[counsel] and myself have a conflict of interest in regards to the penalty phase because they want to argue for life and I want to argue for death. ... My trial strategy during the penalty phase is going to be the aggressive pursuit of a death verdict... I have every intention of persuading the jury to return a death verdict in this case." (15RT 1939.) "I have the cunning and natural instincts of a prosecutor and

I have no patience or respect for the left wing and liberal agenda of [counsel]." (15RT 1940.)

At the October 5th hearing, appellant also revealed that he had been talking to one of his lawyers about "this *Faretta* issue on several occasions over the past two years," and counsel had been trying to change his mind about pursuing pro per status and would continue to do so. (15RT 1936-37.) The trial court responded that the matter would be reserved and addressed "if and when it goes to the penalty phase ... I will address it again at the closing of the sanity phase." (15RT 1942.) The guilt phase began on October 6, 2000 (16RT 1963), and ended November 14, 2000 (34 RT 4234-35). The sanity phase began on November 20, 2000 (35RT 4258), and ended on December 4, 2000 (39RT 4681).

On October 10, 2000, appellant made a *Marsden* motion based on counsel's refusal to provide him with jury questionnaires and material from his first trial that he wanted to prepare for his self-representation. (*Marsden* RT 2044-47, 2058-59.) Appellant explained that he wanted certain answers provided in the jury questionnaires because "I need to know and understand the mindset of the jury if I am going to persuade them to return a death verdict. I need to know how these people tick." (*Marsden* RT 2045.) Appellant also wanted the sex of each juror. "I need to know if they are Mr. or a Mrs. So that when I address them ... they know who I am talking to." (*Marsden* RT 2046.) This information was only relevant to appellant if the case went to a penalty phase, he still wanted to represent himself at that point, and he were grated pro per status. Nonetheless, the court ruled that appellant was entitled to obtain the juror questionnaires for his penalty phase preparations. (*Marsden* RT 2047-2048.) Defense counsel objected to dissemination of the jury information as "grossly premature," and the court agreed, stating "I think we are all in agreement it is premature." (*Marsden*

RT 2048.)

The court continued to entertain requests by appellant regarding the questioning of witnesses and closing argument during the October 10 hearing. (*Marsden* RT 2048-2059.) Appellant wanted permission from the court on such things as giving his opinion on trial testimony, quoting the Bible, and using the words "bastard" and "bitch" during his closing argument. (*Marsden* RT 2054-2055.) Appellant also asked the court for permission "to engage the jury in a free and open dialogue concerning the truth." (*Marsden* RT 2056.) After letting appellant speak at length about these requests, the court stated that it was premature to give her permission. (*Ibid.*) Finally, appellant complained that counsel were not responding to his penalty phase requests, and, referring to defense counsel Deetz, stated that "I would like to remind this court of the adage, and I quote, 'hell hath no fury like that of a woman scorned.'" (*Marsden* RT 2057.) Counsel had refused to comply with appellant's requests for assistance preparing for the penalty phase "in advance of the court granting his motion unless the court orders [it]." (*Marsden* RT 2061.) The court determined that "so long as counsel is still handling the case, I will not order anything to be turned over." (*Ibid.*) The court, however, asked appellant, "If you do represent yourself at the penalty phase, if we get there, do you have a time estimate how long this is going to take, your portion of the case?" (17RT 2064.)

Later on October 10, 2000, the court again allowed appellant to address the court with the prosecution present and in spite of the objections of appellant's counsel. (17RT 2225-2226.) Defense counsel stated that "I'm objecting to this whole process, first of all. My view at this point it's starting to interfere with the defense of this case. As a lawyer, I mean I can't – Mr. Bloom has a right, I suppose, to go in propria persona, but he's not there. He may never get there." (17RT 2228.) "It seems to me we're

so premature with all of this. I don't want to start muddying the record up and having Mr. Bloom interfere with the defense process. It's going to create tremendous problems for us and I just think it's wrong at this stage. Let us try our case in guilt and sanity." (17RT 2229.) The court at that point agreed to "let counsel of record control the strategy as to how they defend Mr. Bloom." (17RT 2230.)

On October 23, 2000, appellant made another *Marsden* motion to dismiss counsel because he did not like the mental state defense and he was afraid that he would be sentenced to death because of it. (*Marsden* RT 3033.) Appellant made an emotional plea to fire his lawyers because they "have screwed me. I have no advocate to plead my cause." (*Marsden* RT 3034) Appellant stated that counsel was "not willing to fight for me," "you have put a noose around my neck," and that "my jury is going to convict me of capital murder. And this is your fault, Tonya, your defense." (*Marsden* RT 3034-3035.) Appellant concluded by saying "Damn it, Tonya, we could have beat this case, but instead you have put me on the fast track back to death row ... Damn it, damn it, damn it. Tonya has screwed me but good." (*Marsden* RT 3035.)

The record is clear that on October 23rd, as he had expressed at other times during the proceedings, appellant did not want to return to death row, sentenced to death. (See, e.g., *Marsden* RT 501 (explaining during a *Marsden* hearing that "I think [the mental state defense is] going to send me back to death row, so I want to get around that.").) He later confirmed this, stating that he intended to argue for a life sentence. (33RT 4169.) In spite of this change of heart from his October 5 *Faretta* motion, and without a request from appellant, the court stated that "If it gets to the penalty phase, I will let you represent yourself, okay?" (*Marsden* RT 3036.) In fact, during the October 23rd proceeding there was no indication that appellant still

intended to seek pro per status. On October 25, 2000, appellant clarified that he did not raise *Faretta*, "it was the court." (26RT 3111.) "[L]et me just say that I didn't say nothing about *Faretta* on Monday. It was the Lady of this court that said that 'you are going to represent yourself during penalty.' Okay? So that's a settled issue in my mind." (26RT 3114.) During another *Marsden* hearing on October 30, 2000, the court assured appellant that she thought he was competent, that defense expert opinions about his competency were "psychobabble," and that "I think you can get doctors to say anything you want." (*Marsden* RT 3621.)

On November 6, 2000. while the jury was in guilt phase deliberations, appellant asked to address penalty phase issues with the court because he was concerned about delaying the proceedings by doing it later. Appellant explained his understanding that either the jury would not convict him of capital murder and there would be no penalty phase "or they are going to come back with verdicts that mandate a penalty phase and then we are going to have a penalty phase anyways." (33RT 4153.) Without correcting appellant's failure to understand the implications of the sanity phase, the court stated that "it would be premature, but I would sort of like an idea of what the subject matter is." (33RT 4154.) Over the objections of counsel (33RT 4154-4155), the court then held an extended session with appellant acting in pro per in order to discuss his requests, many of which were presented to the court in the form of "permission slips" (33RT 4164), for what he would and would not be allowed to do if he represented himself. (33RT 4155-4182.) Among other things, appellant asked that the prosecutor's co-counsel be "banished from the court," because "I don't think it's fair that Shellie have co-counsel, especially if her co-counsel is not even doing nothing. He is just sitting there like a lump of wood." (33 RT 4163.) After stating that he was going to be arguing for life at the

penalty phase, appellant also argued that the prosecutor "should indicate if she is going to argue for death." (33RT 4183.) In explaining his penalty phase witnesses, appellant informed the court that he would call Roz Kelly, who was serving jail time and who appellant had met on the bus between jail and the courthouse. "I have had a crush on Roz Kelly since high school. Pinky Tuscadero is the bomb. I have had a crush on her since high school. . . . And she has been giving me beef and cheese on the bus. Beef and cheese sticks. ... And Roz Kelly is going to be a great help. . . . She's a great witness. And she's a great lady." (33RT 4183.)

The court returned to these exchanges with appellant on November 8, 2000 (34RT 4208-11) and on November 14, 2000, was prepared to have appellant litigate penalty phase issues just after the guilt phase verdicts and before the sanity phase (34RT 4250 (ordering appellant returned to court to address penalty phase issues with the prosecution)). At this point, the prosecution also objected, stating that "I don't think it is appropriate that we put these attorneys aside so that we can discuss penalty. I do not think it's appropriate we keep slipping in and out of pro per status every time we discuss the penalty phase. And I would object to doing that. . . . . [T]he people aren't interested in prematurely discussing penalty phase with someone who is still (sic) has two attorneys." (34RT 4250-51.)

On November 21, 2000, after the jury had begun deliberating on sanity, defense counsel, in appellant's presence, declared a doubt that appellant was competent. In response, the court stated, "Well, at this point there's no requirement – no need for him to cooperate with you. We're merely waiting for the verdict to come in the sanity phase." (36RT 4523-4524.) After allowing appellant to respond extensively, the court refused to declare a doubt of appellant's competence. (36RT 4525-4535.) The prosecutor then repeated her concern that penalty phase discussions not

continue while appellant was still represented. (36RT 4537.) The court ordered appellant to return the following Monday, November 27, 2000, "and we'll have a full hearing on *Faretta*[.]" (36RT 4538.) The court also informed appellant that "I'm not relieving your counsel until there's a [sanity phase] verdict." (36RT 4539.) Counsel asked if the court would be granting the *Faretta* motion as soon as there is a verdict in the sanity phase and the court responded that "I'm not facing it at this point. You are still counsel of record until the verdict is in." (*Ibid.*)

When the parties returned to court on November 27, 2000, the jury was still in sanity phase deliberations. The court began the proceeding by stating that "[w]e are here now on Mr. Bloom's request to go pro per if we reach the penalty phase, is that correct? . . . Where shall we start? Perhaps with your witness list?" The prosecution asked for clarification on whether the court already had made a ruling that appellant would be given pro per status for the penalty phase, and the court replied that "I said if we reached the penalty phase and that was still his request, I would grant it. But I still think it's premature until it comes right to the moment." (37RT 4546.)

The court then conducted another lengthy hearing with appellant in pro per. Defense counsel Applebaum stated at one point, "We are not party to these proceedings in any way." (37RT 4572.) During that hearing, appellant asked for seven court orders, and gave the court 16 "requests," three petitions for relief,[78] and 30 "permission slips." Among other matters discussed, appellant explained that he was "waiving all privilege over the

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[78] One concerned what appellant saw as a possible conflict of interest stemming from Samuels' husband being employed by the Attorney General's Office, where he handled capital cases. Another sought to determine how three alternates who had been substituted onto the jury would have voted regarding Count One. A third sought to determine which jurors had voted which way on Counts Two and Three at the guilt phase. Each of the petitions was denied. (37RT 4619-4622.)

last two years" and would call his defense lawyers as witnesses in the penalty phase. (37RT 4555.) He stated his intention to attack as "fabricated" the mental defense counsel presented at the guilt and sanity phases. (37RT 4556.) He also wanted to call a witness to testify about what lawyers learn in law school: "Do they teach these people to concede guilt? Do they teach these people to crawl into bed with the prosecution and screw their client? Is that what they teach these people at law school?" (37RT 4557.) Among other witnesses such as prison guards and other inmates on the bus and in jail, appellant also wanted to call the defense paralegal to "testify that during the guilt phase . . . that I was much more concerned with playing with her . . . I just mean conversating (sic) and playing the game of picking the presidents, she picked the number and I named the president . . . That I was more concerned with entertaining her than with paying attention to what was going on in guilt because . . . it was all garbage." (37RT 4584.) Appellant also wanted information from both the prosecution and defense counsel and the court ordered them to provide appellant with transcripts and reports from the trial. (37RT 4592-4611.)

On November 28, 2000, following the court's discovery orders for the penalty phase, and without the knowledge of defense counsel, the prosecutor visited appellant at the jail to provide him discovery and discuss penalty phase issues with him. (38RT 4637-38.) On November 30, 2000, after addressing the jury's request for a read back of testimony, the court entertained additional pro per requests and argument from appellant. (38 RT 4646-64.) While the jury continued deliberating, the court allowed appellant to obtain discovery and make further pro per requests and arguments. (38RT 4668-73 (December 1, 2000 proceedings).) On December 4, 2000, the jury indicated that it was unable to reach verdicts on two of three counts. (39 RT 4674.)

2. *Faretta* Colloquy

On December 5, 2000, after allowing appellant to withdraw his NGI plea without the consent of counsel (40RT 4689-4693; see Arg. IV, *ante*), the trial court relieved defense counsel and substituted appellant in pro per for the penalty phase (40RT 4695-4696). The court informed the jury of the withdrawal of the NGI plea and of appellant's self-representation at the upcoming penalty phase. (40RT 4696-4700.) Thereafter, the trial court addressed appellant out of the presence of the jury as follows:

> THE COURT: All right. Mr. Bloom, by the *Faretta* case I'm required to give you certain things and *I know you understand them and know all the consequences* but it's necessary for the record if this case is on appeal, which it probably will be some day, that the other court understands that you understood what I'm saying. Okay? So let's start.
>
> *You understand, of course, that you have the right to be represented by counsel and you have knowingly and intelligently given up that right, so we are past that.* [79]
>
> And you understand that there are many dangers and disadvantages in acting as your own lawyer and some of which are you are too involved in your own case to make the right decision in handling your case. Do you understand that?
>
> MR. BLOOM: Yes, ma'am.
>
> THE COURT: You do not have the legal training or experience to make the right decisions about your case. Do you understand that?
>
> MR. BLOOM: I understand that Ms. Samuels and Mr. Gorin are more experienced than me, but, yes, I do understand. They have more experience.
>
> THE COURT: And, as you have just acknowledged, that you will

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[79] The record does not reflect any waiver of counsel before this point other than the waiver of the right to counsel at any retrial of sanity, as part of the withdrawal of appellant's NGI plea to Counts Two and Three. (40 RT 4689-4693.) Nothing in those proceedings indicates appellant was advised concerning his right to, or waiver of, counsel at the penalty phase.

be opposed by an experienced prosecutor who will know how to handle the case, you certainly recognize that?

MR. BLOOM: I also recognize on legal matters Ms. Samuels is probably a lot smarter than me, *but I made better grades in high school.*

THE COURT: All right. You understand you'll receive no special treatment from the court?

MR. BLOOM: I wouldn't ask you for none.

THE COURT: And you will be required to follow the same rules and procedures that a lawyer must follow. Do you understand that?

MR. BLOOM: Okay.
Can I say something about that?

THE COURT: Sure.

MR. BLOOM: Okay. I want to qualify that answer.

I do understand that; however, I would like to say that if I accidentally make a mistake, it's a mistake on ignorance. So if I make a mistake, it's not on purpose.

I understand what you said, but, if I make a mistake, it's not on purpose, it's not to offend you or to offend Ms. Samuels, it's on ignorance because, like I said before – but, yes, I do understand that. But it will be an honest mistake.

THE COURT: Okay. You will – and you understand you'll be expected to know as much as an attorney does in handling your case?

MR. BLOOM: I know my case very well.

THE COURT: I think that's apparent.

MR. BLOOM: And I know Ms. Samuels' case very well.

THE COURT: *And I'm sure you understand* that if you – that if you are not happy with the penalty, the result of the case, that you cannot raise the issue of it would have been a different result if I

had a lawyer, they could have done better. You've made your choice and it was free –

MR. BLOOM: I can't claim I.A.S. [*sic*] against myself.

THE COURT: Right.

MR. BLOOM: I understand that.

I want you to know that I'm not going to complain about you on appeal. I'm going to complain about Tonya and Mr. Applebaum, not about you, just about Tonya and Mr. Applebaum.

THE COURT: Complain about anyone you need to. If I'm included in that, I understand.

MR. BLOOM: I wouldn't do that.

THE COURT: *You know the elements with which you are charged, I am certain, and you know the consequences and you know the defenses, that it's aggravating factors versus mitigating factors, you understand and know all of that, I'm sure?*

MR. BLOOM: Aggravation has to substantially outweigh mitigation.

THE COURT: Correct.

MR. BLOOM: Penal Code Section 190.3. I'm not stupid.

(40RT 4701-4704 (emphasis added).) At some point appellant signed a form entitled "Waiver of Right to a Lawyer," but did not answer any of the questions on it in writing. A handwritten notation states, "Taken Orally." That handwriting does not appear to match that in appellant's signature. (24CT 6241.)

3. Motion to Reinstate Counsel

On December 7, 2000, the second day of the penalty phase, the prosecutor complained about appellant's conduct – that he was using offensive language, not following the trial court's rules, abusing his pro per

privileges, and "trying to make a circus of this hearing" – and asked the trial court to control him or consider revoking his pro per status. (42RT 5138-5139.) The trial court acknowledged not being able to control appellant and admonished appellant that "you are making a mockery of the justice system in front of the jury and it is not going to set well. And if your goal is to get life without parole, I think you're working against your own best interest. You are your own worst enemy." (42RT 5139-5140.)

The morning of December 11, 2000, the fourth day of the penalty phase, the prosecutor renewed her motion to revoke appellant's pro se status:

> [H]e is uncontrollable in the courtroom, he does not honor objections, he says whatever he wants to say despite objections and this Court's rulings. He's making a mockery of this entire trial. This is a travesty and I would ask the Court to please revoke his pro per privileges and assign him an attorney so we may conduct the rest of this penalty phase in an orderly proper fashion instead of this ridiculous circus that the defendant is creating here.

(44RT 5391.) The trial court agreed with the prosecutor's characterization of appellant's conduct, but denied the motion because "it would cause a delay to appoint other attorney. The Alternate Public Defender said they would not step back into this case . . . . Ms. Deetz and Mr. Applebaum, one or the other, said that quite sometime ago. So we'll just have to conclude as we are." (44RT 5391.)

That afternoon, appellant moved to reinstate his NGI plea as to Counts Two and Three. (See Arg. V, *ante*.) After that motion was denied, he moved to revoke his self-representation and reappoint defense counsel:

> MR. BLOOM: I have more. I have more. And I just want to say on the record that as of this moment, as of this moment I am renouncing pro per status. And I want my 6th Amendment right to assistance of counsel.
>
> If the Lady will simply go into chambers, pick up the phone, Seymour Applebaum and Tonya Deetz will be here like that. And

they will represent to the Court and make a motion for a mistrial on the grounds that they didn't have the opportunity to cross examine prosecution witnesses.

They never would have put an incompetent defendant on the stand. They wouldn't have called witnesses that I had called.

So I am going to make a motion for a mistrial as my last act as pro per. I am giving up pro per. I am invoking my 6th Amendment right to assistance of counsel. And I want former counsel brought in under the 6th Amendment of the Constitution. And I have more once you deny this.

THE COURT: If they want to come in and question your witnesses that you have under subpoena, fine, but we won't go back and relitigate anything else.

MR. BLOOM: Well, Seymour will come into court if you will call him.

THE COURT: Okay.

(44RT 5448-5449.) The prosecutor objected to "now having an attorney come in or changing the procedure in any way. He made his bed and now he needs to sleep in it." (44RT 5450.) The prosecutor argued that appellant was playing games and creating issues for appeal,

> because now the defendant is seriously looking at the death penalty because he himself has created that situation.
>
> He has given the jury more information from which they will come back with the death penalty than the prosecution has by his own statements, by his own testimony.
>
> And I am sure that he has some remorse about that because maybe he really doesn't want the death penalty, although I don't know whether he wants the death penalty or not.

(44RT 5450.) The trial court agreed, stating that appellant had:

> put [defense counsels'] reputation, their ethics in issue before the jury. And they would be totally ineffective to come in at this point after what you have done to represent you. You have made your

> own bed and to use an old phrase, you will just have to lie in it. [80] I think you are being very cunning and manipulative. Upon reflection you probably think I should have done this or I shouldn't have done that. I should have changed my attitude, but *you knew the consequences when we started this as a pro per.* And you will continue to until we complete this case.

(44RT 5452-5453 [emphasis added].)

Appellant repeated his request for a hearing to have Applebaum and Deetz testify regarding his lack of understanding of the consequences and his difficulty with oral communication. The trial court denied a hearing, stating, "No, the record reflects completely to the contrary." (44RT 5453; 24CT 6280-6281.)

On December 13, 2000, the sixth day of the penalty phase, the court conducted a hearing on appellant's subpoena of Applebaum and Deetz as witnesses at the penalty phase. They were present, represented by Michael Goodman, another attorney from their office. At that hearing appellant renewed the motion to reinstate defense counsel:

> [C]ounsel informed me that they would step in right now and take over. I don't want to be pro per. I want assistance of counsel. I have a Sixth Amendment right to assistance of counsel and Tonya's ready to step in with Seymour Applebaum right now.

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[80] This reasoning of the trial court is of a sort which has previously come under criticism.

> Even at midtrial in a non-bifurcated proceeding, a trial court's unexplained refusal to permit a defendant to revoke his assertion of the right to self-representation would surely constitute an abuse of discretion. *A trial court cannot insist that a defendant continue representing himself out of some punitive notion that that defendant, having made his bed, should be compelled to lie in it.*

(*Grandison v. Maryland* (1986) 479 U.S. 873, 876 (Marshall, J., dissenting from denial of cert.) (Emphasis added).)

> I renounce pro per status. I want counsel for defense. I don't understand these proceedings. I need help; I need assistance. Let them step in and take over. They are willing to do it.

(46RT 5656; 24CT 6284-6285.) The trial court told Applebaum and Deetz that because of appellant's statements to the jury about them and their "bullshit defense," they would have no credibility with the jury if they were to step in as counsel at that point. (46RT 5656.) Goodman stated the Alternate Public Defender's office would be compelled to take the case if appointed, and noted that Deetz and Applebaum, on reviewing the record, likely would move for a mistrial and possibly seek reinstatement of appellant's NGI plea. (46RT 5657.) The trial court then denied the motion to revoke appellant's self-representation. (46RT 5657.)

C. The Court's Interference in the Attorney-client Relationship and Improper Communications with Appellant Violated Appellant's Due Process and Sixth Amendment Rights

On October 5, 2000, appellant informed the trial court that he intended to exercise his right to self-representation if the trial advanced to a penalty phase because he wanted to argue in favor of the death penalty and his counsel wanted to argue for life. (15RT 1936-1939.) The record made clear that counsel had been involved in an ongoing effort to dissuade appellant from this course of action. The court ruled that the motion under *Faretta* would be reserved and decided at the close of the sanity phase. (15 RT 1942.) In spite of this ruling, in the middle of the guilt phase during an October 23rd *Marsden* hearing, unprompted by any request from appellant and when appellant had indicated he did not want a death sentence, the trial court stated that appellant would be allowed to proceed in pro per during the penalty phase. During the remainder of the guilt and sanity phases, the trial court conducted hearings with appellant acting pro per, over the objections of both counsel and the prosecution, to discuss

penalty phase issues. It was not until December 5, 2000, after termination of the sanity phase, that the court finally inquired about appellant's desire to represent himself. The court's repeated and substantial interference in the attorney-client relationship and improper communications with appellant violated appellant's due process and Sixth Amendment rights.

The trial court's unprompted promise early in the proceedings that appellant could represent himself during the penalty phase, conduct of numerous proceedings where appellant was encouraged and allowed to act without counsel, her comments disparaging counsel's approach to appellant's defense and repeatedly telling appellant that she believed he was competent, and her statement during jury deliberations in sanity that "at this point there's . . . no need for [appellant] to cooperate with [counsel] " (36 RT 4524), prejudicially interfered in appellant's relationship with his attorneys and improperly influenced and encouraged his self-representation.

As a general matter, it is a defendant's responsibility to renew a pending *Faretta* motion; absent renewal, it may be presumed that the defendant "had second thoughts about the wisdom of representing himself and abandoned the idea." (*People v. Kenner* (1990) 223 Cal.App.3d 56, 62.) Particularly where, as here, counsel for appellant had been attempting to dissuade appellant from representing himself (15RT 1936-37), the trial court's repeated and substantial intrusion in that decision impinged on "the critical obligation of counsel to advise the client of the advantages and disadvantages" of "matters of great importance." (*Padilla v. Kentucky* (2010) __ U.S. __, 130 S. Ct. 1473, 1484.) This interference violated appellant's due process and Sixth Amendment rights. (See *United States v. Irwin* (9th Cir. 1980) 612 F.2d 1182, 1185.) As this Court has recognized, "[u]ndesirable tactical conflicts, trial delays, and confusion often arise when a defendant who has chosen professional representation" is allowed to make

pro per motions. (*In re Barnett* (2003) 31 Cal.4th 466, 472 (internal quotation omitted).) Furthermore, due process concerns of fundamental fairness exist when a judicial officer implicitly urges a particular course of action on a defendant. (*United States v. Bruce* (9th Cir. 1992) 976 F.2d 552, 557.) "[L]egitimate concerns exist even when the judge does not urge a particular course of action upon the defendant: the unequal positions of the judge and the accused . . . raise a question of fundamental fairness regardless of the degree or type of judicial involvement." (*Ibid.*)

The improper influence of the trial court raising appellant's self-representation sua sponte is apparent in appellant's reaction: "[L]et me just say that I didn't say nothing about *Faretta* on Monday. It was the Lady of this court that said that 'you are going to represent yourself during penalty.' Okay? So that's a settled issue in my mind." (26RT 3114.) And counsel early on expressed a growing concern that the court's continued communications with appellant over counsel's objections interfered with the defense: "I don't want to start muddying the record up and having Mr. Bloom interfere with the defense process. It's going to create tremendous problems for us and I just think it's wrong at this stage. Let us try our case in guilt and sanity." (17RT 2229.)

Although the prosecution initially objected to interactions with appellant while he was still represented, the court's continued treatment of appellant as a pro per defendant resulted in the prosecutor visiting appellant in jail and having discussions with him. This clearly was improper, as evidenced by the court's order sustaining the defense objection to such contact and ordering the prosecution to conduct all further exchanges with appellant in open court. (38RT 4638.) The contact with the prosecution, however, exacerbated the court's improper influence and interference in appellant's relationship with counsel regarding his self-representation. As

appellant stated in discussing his conversations with the prosecutor about the penalty phase, "I want Ms. Samuels to know that I did not tell [counsel] anything that we talked about. I did not betray Ms. Samuels at all. . . . [Counsel] does not know the content of that conversation, that's between me and Ms. Samuels." (38RT 4650-51.)

The trial court had ruled that any resolution of *Faretta* issues was premature because the court would wait to determine if appellant still wanted to waive counsel after the sanity phase. (See, e.g., *Marsden* RT 2689; 37RT 4546.) In reality, however, the court's numerous proceedings with appellant acting in pro per to prepare for the penalty phase created a certainty for appellant, not only that he would represent himself, but also that there was going to be a penalty phase. This played out to devastating effect when the sanity phase ended with a hung jury. In spite of the fact that the hung jury meant that appellant was not eligible for the death penalty, appellant explained that "to keep the Lady on the bench and to keep me in court and to keep my pro per status, that's why I had to come in here and withdraw NGI." (40RT 4720.)

The trial court's intrusion into and interference with the attorney-client relationship and encouragement of appellant to act against the advice of counsel and to represent himself at the penalty phase at the very least undermines the waivers of rights obtained as a result, i.e., appellant's withdrawal of his NGI plea to Counts Two and Three (see Arg. IV, *ante*) as well as purported waiver of counsel at the penalty phase.

Just as judicial intrusion on a defendant's decision to plead guilty pursuant to plea negotiations requires that the defendant be allowed to replead, without having to show that actual prejudice has resulted" from that intrusion (*United States v. Bruce*, *supra*, 976 F.2d at p. 558), so here must the penalty judgment resulting from appellant's self-representation by

reversed and his NGI pleas to Counts Two and Three be reinstated.

D. The Record Does Not Support a Finding That Appellant's Waiver of Counsel and Decision to Represent Himself Were Knowing and Intelligent

A criminal defendant has a Sixth Amendment right to conduct his own defense, provided that he knowingly and intelligently waives his Sixth Amendment right to counsel. (*Faretta, supra,* 422 U.S. at pp. 835-836; *People v. Bradford* (1997) 15 Cal.4th 1229, 1363.) A finding that a defendant is competent to stand trial is not sufficient. The trial court must still ensure that the waiver of constitutional rights is knowing and voluntary. (*Godinez v. Moran*, *supra*, 509 U.S. at p. 400; *Faretta, supra,* 422 U.S., at p. 835.)

A defendant seeking to represent himself "should be made aware [by the trial court] of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' [Citation]." (*Faretta, supra,* 422 U.S. at p. 835.) "No particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1070.) Rather, "the test is whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." (*Ibid.*; *People v. Burgener* (2009) 46 Cal.4th 231, 240-241.)

Inquiry into whether waiver of rights is knowing, voluntary and intelligent requires examination of "the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464; *Edwards v. Arizona* (1981) 451 U.S. 477, 482.) To validly waive counsel, a defendant must actually understand all of the relevant considerations; thorough advice

from the court alone is not sufficient. (See *Godinez v. Moran*, *supra*, 509 U.S. at p. 401, fn. 12); *United States v. Cash* (11th Cir. 1995) 47 F.3d 1083, 1088.)

A trial court considering whether a defendant's waiver of counsel is knowing and intelligent "must investigate as long and as thoroughly as the circumstances of the case before him demand. . . . A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered. [¶] . . . [A] mere routine inquiry – the asking of several standard questions followed by the signing of a standard written waiver of counsel – may leave a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel." (*Von Moltke v. Gillies* (1948) 332 U.S. 708, 723-724; accord, *Johnson v. Zerbst* (1938) 304 U.S. 458, 464; *Westbrook v. Arizona* (1966) 384 U.S. 150, 151; *People v. Burnett* (1987) 188 Cal.App.3d 1314, 1319-1320.)

A thorough *Faretta* inquiry requires, at a minimum, that the court engage the defendant in a dialogue about the charges, defenses, punishments, and risks, and seek to elicit a "narrative response"– rather than simply "yes" or "no" answers – to the court's inquiries. (See, e.g., *Mata v. Johnson* (5th Cir. 2000) 210 F.3d 324, 330.) A written waiver form requiring the defendant to initial boxes next to standard advisements provides little basis for the conclusion that the defendant understands the risks and disadvantages of self-representation in his particular case unless the trial court ensures through questioning that the defendant actually understood the form and understood "the disadvantages of self-representation, including the risks and complexities of the particular case." (*People v. Koontz*, *supra*, 27 Cal.4th at p. 1070.)

California law has long recognized the trial court's duty to conduct a "careful inquiry" where a defendant's mental capacity to recognize or understand the risks and disadvantages of self-representation may interfere with a knowing and intelligent waiver. (*People v. Teron* (1979) 23 Cal.3d 103, 114; *People v. Burnett*, *supra*, 188 Cal.App.3d at p. 1318; see also *People v. Wolozon* (1982) 138 Cal.App.3d 456, 460-461.)

On appeal, this Court must independently examine the entire record to determine whether the defendant knowingly and intelligently waived the right to counsel. (*People v. Burgener*, *supra*, 46 Cal.4th at p.241; *People v. Doolin* (2009) 45 Cal.4th 390, 453.) The burden is on the prosecution to prove that the waiver was knowingly and intelligently made. (*Brewer v. Williams* (1977) 430 U.S. 387, 404.) This Court must "'indulge every reasonable presumption against waiver' of fundamental constitutional rights." (*Johnson v. Zerbst*, *supra*, 304 U.S. at p. 464.)

When appellant initially made his motion to represent himself at the penalty phase the trial court took the matter under submission, without discussing the dangers and disadvantages of self-representation or otherwise ensuring that any waiver of counsel was knowing and intelligent. (15 RT 1935-1942.) Later, during the guilt phase, the trial court effectively granted the motion sua sponte, again with no inquiry, warning or waiver of counsel. (*Marsden* RT 3035-3036.) During guilt deliberations, the trial court allowed appellant to represent himself in open court, outside the presence of the jury, over objection of defense counsel, who were still counsel of record. (33RT 4153-4190.) During sanity deliberations, after allowing appellant to withdraw his NGI plea to Counts Two and Three, despite his counsel's declaration of a doubt that appellant was competent and their refusal to consent to withdrawal of the plea, the trial court discharged defense counsel, substituted appellant, and announced the substitution to the

jury (40RT 4695-4700) – all before conducting any colloquy regarding the dangers and disadvantages of self-representation or securing a waiver of counsel.

The after-the-fact colloquy ultimately conducted was wholly insufficient, in that no mention was made of the relevant circumstances of this case, which included the evidence of appellant's mental illness, developmental disability, brain damage and cognitive deficits, or of appellant's repeated denials thereof. In fact, as in *People v. Burgener*, the trial court encouraged appellant's choice to represent himself, and assured him of his qualifications to represent himself. (*People v. Burgener*, *supra*, 46 Cal.4th at pp. 237-243.) Moreover, and rather astonishingly, the trial court never asked appellant whether, in light of the matters referred to in the colloquy, he waived his right to counsel. The trial court's "inquiry" into appellant's understanding of the risks of self-representation (40RT 4701-4704) can hardly be considered the "exceedingly careful inquiry" this Court has recognized as necessary (*People v. Teron*, *supra*, 23 Cal.3d at p. 114), or the "penetrating and comprehensive examination of all the circumstances" contemplated in *Von Moltke v. Gillies, supra,* 332 U.S. at p. 724. Rather, it more closely matches the "mere routine inquiry – the asking of several standard questions followed by the signing of a standard written waiver of counsel" that "may leave a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel." (*Ibid.*)

> The test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case.

(*People v. Bloom* (1989) 48 Cal.3d 1194, 1225; *People v. Pinholster* (1992)

1 Cal.4th 865, 928-929; *People v. Noriega* (1997) 59 Cal. App. 4th 311, 323.) As in *Burgener*, *supra*, "[o]n this record, where the trial court not only failed to advise defendant [adequately of the risks and disadvantages of self-representation], but instead actively encouraged defendant to represent himself, we cannot conclude that defendant's waiver of counsel was knowing and intelligent." (*People v. Burgener*, *supra*, 46 Cal.4th at p. 243 (citations omitted).)

A proper advisement of the right to counsel in relation to a *Faretta* motion must address the particular facts and circumstances of the case as well as the stage of the proceedings. (*Iowa v. Tovar* (2004) 541 U.S. 77, 88; *People v. Burgener*, *supra*, 46 Cal.4th at p. 242.) Here the trial court's colloquy with appellant addressed neither. Rather, as in *Burgener*, the trial court "actively encouraged defendant to represent himself" (46 Cal.4th at p. 243), seemingly reinforcing appellant's mistaken belief that he had an adequate understanding, instead of ensuring that he actually was fully aware of the perils of self-representation. The court never told appellant, or even suggested, that it was an unwise choice to represent himself in any case, but especially at the penalty phase of a capital case. Rather, the court seemed in complete agreement with appellant's decision, reassuring him that he had an adequate understanding of the law and the risks, and leading him through the advisements in such a way as to obtain a waiver. Nothing in the trial court's interactions with appellant suggests the trial court, as required, "'indulge[d] every reasonable presumption *against* waiver' of fundamental constitutional rights." (*Johnson v. Zerbst*, *supra,* 304 U.S. at p. 464 (emphasis added).) To the contrary, the trial court approached the colloquy as a mere formality and repeatedly assured appellant that he "understood" what he was waiving, what he was undertaking, and what he was up against.

For example, the trial court initiated the colloquy by stating, "by the *Faretta* case I'm required to give you certain things and *I know you understand them and know all the consequences*, but it is necessary for the record . . . ." (40RT 4701 (emphasis added)); thus showing the court approached the colloquy as a mere formality, with the outcome predetermined. This attitude permeated the waiver proceedings. At one point, the trial court, rather than conduct an actual inquiry, merely stated to appellant: "You know the elements with which you are charged, I am certain, and you know the consequences and you know the defenses, that it's aggravating factors versus mitigating factors, *you understand and know all of that, I'm sure*?" (40RT 4703 (emphasis added.) Yet the court never *identified* those elements, charges, consequences or defenses, or asked appellant to do so. Appellant's reference to one section of the statute – "Penal Code Section 190.3. I'm not stupid." – does not, in this case especially, establish that he had a full and rational understanding of the concepts of aggravation and mitigation, or how the jury was to reach the requisite normative decision on penalty. (See *People v. Brown* (1988) 46 Cal.3d 432, 448.) In fact, appellant was not even asked if he understood he could be sentenced to death.

Even when appellant gave a response that should have given the trial court pause – "on legal matters Ms. Samuels is probably a lot smarter than me, *but I made better grades in high school*" – the court never explored the possibility that appellant's response might betray a flaw in his understanding of the proceedings or the issues to be addressed. (40RT 4701-4702 (emphasis added).) The trial court responded simply, "all right." (40RT 4702.) By itself, the emphasized comment is odd. In light of the other oddities and distortions in appellant's apparent understanding of the proceedings and the expert testimony which had provided an explanation of

these oddities and distortions as products of mental illness, brain damage and developmental disability, appellant's equation of his high school grades to a capital prosecutor's legal training illustrated his distorted understanding of the proceedings and magnified scope of the disadvantage self-representation would subject him to. Appellant's response demanded further careful inquiry to determine whether appellant's desire to represent himself was truly knowing and intelligent. Instead, the trial court merely went on with the advisements, seemingly unaware of appellant's strangeness, unconcerned that his peculiar answers might signify deficits in his thought processes and understanding.

Perhaps the most striking deficiency in the colloquy is that the trial court never actually asked appellant if, in the light of the matters discussed, he actually waived counsel. Instead, the trial court stated, "You understand, of course, that you have the right to be represented by counsel and you have knowingly and intelligently given up that right, *so we are past that.*" (40 RT 4701 (emphasis added).) The trial court, however, was wrong.[81]

Nor was appellant advised that he might not be able to change his mind after the penalty phase began; that any request to give up self-representation and obtain the assistance of counsel again would be subject to the discretion of the trial court and might be denied. This deficiency assumed some importance later in the penalty phase, when appellant did seek to revoke his self-representation, as discussed below. (See *People v. Lawrence* (2009) 46 Cal.4th 186, 189, fn. 1; *People v. Stanley* (2006) 39 Cal.4th 913, 929-931 [*Faretta* motion properly denied because defendant did not understand that reappointment of counsel might not be granted].)

The facts and circumstances of this case demanded a thorough and careful inquiry before accepting a waiver of counsel from appellant, not the

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[81] See fn. 79, *ante.*

casual and after-the-fact assurances the court provided here. If appellant was not competent to stand trial *with* counsel, as argued in Argument III, above, then plainly he was not competent to proceed *without* counsel. At a minimum he fell within the "gray area" described by the Supreme Court in *Indiana v. Edwards*, *supra*, 128 S.Ct. 2379 – if arguably competent to stand trial *with counsel*, appellant was not competent to represent himself *without counsel*.[82] (125 S.Ct. at p. 2385-2388.) Under the circumstances, the trial court had a duty to conduct a "careful inquiry" into the question of whether appellant's waiver was knowing and intelligent. The trial court's failure to conduct such an inquiry, and its reliance upon a pro forma advisement cannot sustain the waiver in this case.

This Court has recognized the importance of psychiatric evidence in this context. In *People v. Teron*, the Court found no error in accepting the defendant's waiver of counsel because no facts suggesting mental illness were known to the trial court at the time. (*People v. Teron*, *supra*, 23 Cal.3d at p. 114.) In this case, however, substantial, essentially uncontradicted expert testimony regarding appellant's mental illness, developmental disability, brain damage and cognitive deficits was before the court. To the extent that the evidence did not squarely settle the matter, it was incumbent upon the trial court to seek further psychiatric evaluation of appellant, directly addressing the issue of waiver of counsel and self-

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[82] This Court has recently held, in *People v. Taylor* (2009) 47 Cal.4th 850, that, at the time relevant to appellant's trial, California trial courts had no test of mental competence to apply in relation to a *Faretta* motion but that set forth in *Dusky v. United States* (1960) 362 U.S. 402. Appellant does not here assert that the trial court's error arose from a failure to consider appellant's competence to represent himself, as was the issue in *Taylor*. Rather, the error here arises from the court's failure to ensure appellant was knowingly and intelligently waiving counsel, a question distinct from that of competence to self-represent. (See *Godinez v. Moran*, *supra*, 509 U.S. at p. 401, fn. 12.)

representation.[83] This the trial court failed to do before letting appellant represent himself.

The trial court did later attempt a limited evaluation of appellant's competence to waive the attorney-client privilege, by having Dr. Sharma attempt to evaluate him on that question. (24CT 6276; see Arg. III, *ante*.) The inadequacy of that effort is manifest. When appellant refused to cooperate with Dr. Sharma, the court simply went on with the penalty phase, allowing appellant to continue to represent himself. What came out of the evaluation did not support a conclusion that appellant was competent, or that his waivers were knowing and intelligent or made with an understanding of the attendant risks and disadvantages. If anything, the entire process confirmed appellant did not have a rational understanding of the proceedings, or of his own mental and cognitive infirmities, and was incompetent. By no means could that aborted evaluation serve as an adequate substitute for the requisite "exceedingly careful inquiry."

As the Court in *People v. Burnett* recognized, before a waiver of counsel can be knowingly and intelligently made, the defendant must possess "a reasonably accurate awareness of his situation, including not simply an appreciation of the charges and the range and nature of possible penalties, but *also of his own physical or mental infirmities*, if any." (*People v. Burnett*, *supra*, 188 Cal.App.3d at p. 1327 (emphasis added).)

> Realization of the risk of self-representation necessarily involves an element of sober self-examination. A defendant who does not

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[83] The contrast with Judge Hoff's consideration of appellant's pretrial motion to represent himself is instructive. Judge Hoff agreed appellant should be evaluated, and accepted defense counsel's suggestion that an evaluation by a doctor with more specialized expertise than those on the court's panel would be appropriate, given the complexity of appellant's mental health issues. (ICPRT 145-151.) No evaluation took place, however. Appellant withdrew his motion. (2RT 163.)

> appreciate the extent of his own disability cannot be fully aware of the risk of self-representation where the disability significantly impairs his capacity to function in a courtroom.

(*Id.* at p. 1325.) As is clear from the record, appellant rejected the expert and historical evidence of his own mental illness, developmental disability, brain damage and cognitive deficits, and rejected the irresistible conclusion that there was something wrong with him, something abnormal in his perceptions and thought processes. As a result, appellant insisted on presenting a "mitigation" case that was fundamentally irrational, partially focused on *negating* the substantially mitigating evidence of his mental and cognitive infirmities.

The evidence before the trial court also raised substantial questions as to whether appellant understood and was able to use relevant information rationally to fashion a response to the prosecution's case in aggravation. (See *People v. Burnett*, *supra*, 188 Cal.App.3d at p. 1327.) In *Marsden* hearings during the guilt phase, appellant exhibited a distorted understanding of the meaning and probative value of the prosecution's evidence, as well as of the defense mental health expert evidence. (See, e.g., *Marsden* RT 500, 1930-1932, 3032-3036, 3615.) In denying any doubt of appellant's competence, the trial court and the prosecution focused on appellant's superficial understanding of the logistics of court proceedings, his "coherence" in addressing the court, and his "intelligence." (See 36RT 4534-4538.) What the trial court ignored was evidence that appellant did not comprehend the substantial evidence demonstrating his own mental impairments, or how to use that information rationally in "fashion[ing] a response to the charges."

As the penalty phase proceeded, appellant's use of the information he presented could not be dismissed as merely the product of inexperience with legal matters. His treatment of various witnesses, especially Frances

Summe, Charles Simpson and Curtis Wright, exemplified a distorted understanding of the proceedings, the people involved and the impact of his behavior on them. That appellant called Curtis Wright as his own witness, and the examination that resulted, reflect a distorted understanding of the concepts of aggravation and mitigation. Appellant's testimony and argument blaming Josephine for her own death and for Sandra's, and his argument and testimony that these were not "witness kills" because they were carried out to prevent Norma White from learning that appellant had killed his father, which would have "destroyed [White's] innocence," similarly reflect an irrational, distorted and delusional view of the applicable law. Appellant's recitation of the names of the United States Presidents, to show the jury he wasn't crazy (44RT 5397-5406), reflects his distorted understanding of his own intelligence. His inappropriate "maniacal" laughter during the proceedings, as with his other inappropriate behavior, betrays the deficits in empathy, reciprocity, and ability to judge the emotional reactions of others to his behavior, which Drs. Mills and Watson described as symptomatic of Asperger's Disorder. (See Arg. III, *ante*.) His argument demonstrated a distorted and irrational view of the norms relevant to the jury's ultimate decision:

> *You have to choose between my mock trial award from 1979, which I won in a high school competition*, and you have to choose between that and Ms. Samuels' law degree at Loyola University and Mr. Gorin's law degree at U.C.L.A.
>
> And what is a trial if not a show? Of course it's a show. *You've got to pick the better advocate. Not who do you like personally, but whose case did you like better.*

(48RT 5925-5926 (emphasis added).)[84]

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[84] The prosecutor stated that, "I think the defendant has done some things that *I can't understand why he would do them*," and "He has put in *things that don't appear to help him*, but *he does seem to believe* he has a strategy whereby those things will serve him in the end. [¶] Now, I don't

The record demonstrates that the trial court allowed appellant to represent himself before obtaining a knowing and intelligent waiver of counsel, that the court's colloquy with appellant regarding the dangers and disadvantages of self-representation was wholly inadequate, that the court never actually requested or obtained a waiver of counsel at the penalty phase, and that the resulting penalty phase could not and did not result in a fair trial or reliable determination of penalty. The death judgment must therefore be reversed.

E. The Trial Court Abused Its Discretion By Denying Appellant's Motion to Reinstate Defense Counsel during the Penalty Phase

Even if this Court finds appellant's waiver of counsel and decision to represent himself at the penalty phase were knowing and intelligent, still, by the time appellant made his first motion to revoke his self-representation and reinstate defense counsel, there was a substantial question whether he appreciated or understood the dangers and disadvantages of self-representation, and it was clear that continuing the penalty phase in the absence of counsel would deny appellant a fair trial. By the time appellant renewed his motion to revoke his self-representation, that conclusion had been bolstered substantially.

Nonetheless, and although the *prosecutor* had twice previously moved to revoke appellant's self-representation, the trial court denied appellant's motions as well, refusing to consider the possibility that his behavior and handling of his penalty case was a result of, and evidence of,

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know what he is going to say when he testifies so *I am not sure how he thinks these things will help him . . . .*" (43RT 5189-5190.) The prosecutor also argued to the jury, "This has been a case where the defendant has acted so odd and so strange and so manipulative that *it is impossible to understand what he is trying to achieve here.*" (43RT 5189 (emphasis added).)

his multiple mental impairments, or that his waiver of counsel had not been knowingly and intelligently made with an actual understanding of the dangers and disadvantages of self-representation.

A defendant's midtrial request to revoke his self-representation and to reinstate defense counsel is a matter for the trial court's discretion, to be exercised in light of the totality of the circumstances. (*People v. Lawrence* , *supra*, 46 Cal.4th at p. 192; *People v. Gallego* (1990) 52 Cal.3d 115, 163-164.) Factors identified as relevant to that exercise of discretion include:

> (1) defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the trial proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney.

(*People v. Elliott* (1977) 70 Cal.App.3d 984, 993-994; *People v. Lawrence*, *supra*, 46 Cal.4th at p. 192; *People v. Gallego*, *supra*, 52 Cal.3d at pp. 163-164.)

The first factor, appellant's "prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation," provides no basis for denying appellant's request to reinstate counsel. Appellant had never previously asked for reinstatement of counsel after being granted self-representation. He had represented himself with advisory counsel at his prior penalty phase in 1983 without requesting substitution of counsel during trial. (*People v. Bloom*, *supra*, 48 Cal.3d at pp. 1214-1225.) If anything, his prior history in this regard undercuts the prosecution's argument that appellant was "playing games" by moving to revoke his self-representation. The trial court did not address this factor in denying the motions.

The second factor, "the reasons set forth for the request," strongly supported appellant's motion. The reasons appellant explicitly identified were that defense counsel would not have put an incompetent defendant on the stand or have called the witnesses appellant called. (44RT 5448.) When appellant renewed his motion, he stated, "I want counsel for defense. I don't understand these proceedings. I need help; I need assistance." (46 RT 5656.)

Moreover, immediately before his motion to reinstate counsel, appellant had moved to reinstate his NGI pleas to Counts Two and Three. (See Arg. V, *ante*.) That his grounds for that motion – that he had not understood the consequences of withdrawing his NGI pleas – were also proffered in support of his motion to revoke self-representation and reinstate counsel was implicit. The prosecutor and the trial court understood as much, and addressed those grounds in response to appellant's motion to revoke self-representation.

In support of his motion to reinstate his NGI plea, appellant also had told the court he had difficulty processing oral information, which, he explained, was why he had not understood the consequences of withdrawing the plea. This is consistent with Dr. Watson's testimony, and with defense counsel's warning that appellant did not understand the waivers taken orally when he withdrew his NGI plea. (See Arg. IV, *ante*.) Because of that difficulty it was also likely that appellant's purported waiver of counsel had not been "knowing and intelligent" or made with an adequate awareness of the risks and disadvantages of self-representation. The entire colloquy concerning the dangers and disadvantages of self-representation, inadequate as it was, was conducted orally, as noted on the "Waiver of Right to a Lawyer" form appellant signed, but did not otherwise complete. (24CT 6241.) It is reasonably likely that appellant's problems

with processing oral information were a contributing factor to his conduct at the penalty phase, resulting in what the prosecutor called "a ridiculous circus." (44RT 5391.)

As with the trial court's refusal to reinstate appellant's NGI pleas, its failure to consider relevant proffered evidence renders the denial of the motion to reinstate counsel an abuse of discretion. "'To exercise the power of judicial discretion all the material facts . . . must be both known and considered.'" (*In re Cortez* (1971) 6 Cal.3d 78, 85-86, citing and quoting *People v. Surplice* (1962) 203 Cal.App.2d 784, 791.) "Judicial discretion must be informed, so that its exercise does not amount to a shot in the dark." (*Estate of Herrera* (1992) 10 Cal.App.4th 630, 637; see also *Schlumpf v. Superior Court* (1978) 79 Cal.App.3d 892, 901 ["A failure of the trial court to consider all the evidence is a failure to exercise discretion and requires reversal of the determination"].) The evidence that appellant had difficulty processing oral information, including the proffered corroboration from counsel, was clearly relevant and material to appellant's request to reinstate counsel, as well as to the validity of any waiver of counsel. The trial court's refusal to consider that evidence constituted an abuse of discretion. Furthermore, the trial court abused its discretion by the continued arbitrary rejection of the substantial evidence of appellant's mental impairments, all of which was relevant and material to the validity of appellant's original decision to represent himself, as well as to his motion to reinstate defense counsel.

The trial court failed to address the third factor relevant to the revocation of self-representation, "the length and stage of the trial proceedings." That factor lends little support, if any, to denial of the motion. Only the penalty phase, not a protracted proceeding, would have been affected by granting appellant's motion, which he made as soon as he

could after he read the transcripts that led him to realize that he had not understood the consequences of withdrawing his NGI plea. (See Arg. V, *ante*.) Only three of the eventual 11 days of the penalty phase had been completed. The prosecution had rested on the second day, after presenting only three witnesses. (See 24CT 6268-6294, 6308-6309.) A large part of the remainder of the penalty phase consisted of discussions and proceedings relating to appellant's self-representation, such as appellant's refusal to cooperate with Dr. Sharma and defense counsel's refusal to testify pursuant to appellant's subpoena. (44RT 5474-5480; 24CT 6281; 45RT 5486-5494.) None of those discussions or proceedings would have been necessary had appellant's motion been granted, whether by reinstating counsel to complete the penalty phase, as the court originally seemed to consider, or by declaration of a mistrial, as appellant requested.[85]

The fourth factor, "disruption or delay which reasonably might be expected to ensue from the granting of such motion," similarly does not support denial of appellant's motion. In fact, given the disruption attendant on appellant's continued self-representation – "making a mockery of the process," "a ridiculous circus" – even if revoking appellant's self-representation had required some delay, it would not necessarily have resulted in significantly more disruption, if any. The trial court did not mention disruption or delay in denying appellant's motion. Nor did it undertake an inquiry regarding facts relevant to this factor.

The trial court had stated, in denying the prosecution's second motion to revoke appellant's pro per status:

Ms. Samuels, I agree that he is doing all of the things that you said

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[85] In fact, that the penalty phase proceeded with this jury at all was only because the trial court had erroneously allowed appellant to withdraw his NGI plea to Counts Two and Three rather than retry the sanity phase on those two counts before a new jury. (See Arg. IV.)

> he did, but it would cause a delay to appoint other attorney [*sic*].
>
> The Alternate Public Defender said they would not step back into this case or pick it up once they were relieved. Ms. Deetz and Mr. Applebaum, one or the other, said that quite sometime ago. So we'll just have to conclude as we are.

(44RT 5391.) In fact, nowhere on the record does it appear that either Deetz or Applebaum told the court they would not step back into the case once they were relieved. On the other hand, when appellant first moved to revoke his pro per status and reinstate counsel, the trial court first responded, "If they want to come in and question your witnesses that you have under subpoena, fine, but we won't go back and relitigate anything else." (44RT 5449.) However, after the prosecution opposed the motion, the court simply denied it. (44RT 5449-5453.) When appellant later renewed his motion to reinstate counsel, Michael Goodman of the Alternate Public Defender's Office stated they would be compelled to take the case if the trial court re-appointed them, that Applebaum and Deetz would need time to review the record, and likely would move for a mistrial or seek to reinstate appellant's NGI plea. But Goodman did not condition reinstatement on a continuance, a mistrial or reinstatement of the NGI plea. (46RT 5656-5657.)

Goodman thus made clear that the trial court's "understanding" of the situation at the time of the prosecution's second motion to revoke appellant's pro per status was wrong. Had the court inquired, or called Applebaum when appellant first sought reinstatement of counsel, it would have learned the Alternate Public Defender's position. Even after learning that Applebaum and Deetz would in fact accept reinstatement, the trial court denied appellant's renewed motion, without giving reasons and addressing the relevant factors from *Elliott*.

The third and fourth factors, insofar as they relate to the possibility

of prejudice to the prosecution (*Elliott, supra,* 70 Cal.App.3d at pp. 994-998), weigh in favor of appellant's request on another basis – the prosecutor had twice asked for the same relief that appellant was requesting, making clear that appellant's continued self-representation presented more of a problem to the prosecution, the jury and the witnesses than was warranted. (42RT 5138-5140; 44RT 5391.) By making two successive motions to revoke appellant's self-representation, the prosecutor unquestionably viewed reinstatement of counsel as an acceptable result.

Muddying the waters, though, is the fact that the prosecution took two diametrically-opposed positions on whether appellant's pro per status should be revoked. A few hours after the second of their own motions was denied, appellant made his motion to revoke his pro per status and to reinstate defense counsel. Without addressing her own prior attempts to revoke appellant's self-representation, the prosecutor this time opposed appellant's motion, arguing that appellant was just playing games to create an issue on appeal, that appellant had given the jury more reason to return the death penalty than had the prosecution, and that "[h]e made his bed and now he has to sleep in it." (44RT 5449-5450.) However, the prosecutor noted no specific prejudice to the prosecution.

The fifth factor, the likelihood of defendant's effectiveness in advocating on his own behalf if required to continue to act as his own attorney, strongly supports the granting of the motion. It is clear that, as the trial court acknowledged, appellant was his "own worst enemy" representing himself. (42RT 5139.) The prosecutor concluded that appellant had presented the jury with more reasons to return the death penalty than had the prosecution. (44RT 5450.) Appellant's testimony and argument to the jury that Josephine was to blame for her own death and that of Sandra, his treatment of witnesses Summe, Simpson and Wright, and his

inappropriate laughter during proceedings (see Arg. III, *ante*), all reflected his mental impairments and irrational thought processes, yet provided the prosecution with substantial fodder for closing arguments. These circumstances substantially undercut any notion that appellant had waived counsel with a knowing, intelligent or rational understanding of the risks and disadvantages of representing himself. That appellant's continued self-representation would merely prolong the "mockery" that the penalty phase had become, depriving appellant of a fair trial, amply justified reinstating counsel.

A sixth, and fundamental, factor must be considered in the totality of circumstances here: appellant's initial waiver of counsel and decision to represent himself were not based on a knowing and intelligent understanding or assessment of the risks and disadvantages of doing so. The trial court's failure to conduct an adequate inquiry at that time was compounded by its failure to do so later, when appellant proffered evidence of a specific cognitive deficit unquestionably relevant to his ability to represent himself and the validity of his initial waiver. In denying appellant's initial motion the court said to appellant, "you knew the consequences when we started this as a pro per." (44RT 5452-5453.) To the contrary, as explained above, the record does not support a finding that appellant had an actual, intelligent and rational understanding of the consequences of self-representation. There is no support in the record for the conclusion that appellant understood that his right to assistance of counsel was no longer absolute, but subject to the court's discretion. The court in its eventual colloquy with appellant about the dangers of self-representation made no mention of that consequence of waiving counsel.

Where a defendant has been fully advised before choosing self-representation, "his later change of mind properly [bears] less weight in the

trial court's discretionary decision on the revocation request." (*People v. Lawrence*, *supra*, 46 Cal.4th at pp. 195-196.) On the other hand, defects in the trial court's handling of a defendant's request to represent himself weigh in favor of allowing revocation of that waiver. (*People v. Hill*, *supra*, 148 Cal.App.3d at pp. 761-762.) Thus, in *Lawrence*, this Court upheld the denial of a defendant's request to revoke his *Faretta* waiver after the jury had already been selected and sworn. The defendant had specifically been warned that the trial court might deny a request to give up self-representation and require the defendant to proceed without counsel. (*Lawrence*, *supra,* 46 Cal.4th at p. 191.) This Court noted that the defendant had been "extensively warned when he chose to represent himself about the difficulties self-representation would entail. Nothing new or unforeseeable had occurred in the interim. . . . The colloquy tended to show not that he had suddenly learned he would be at a disadvantage in the trial, but that . . . he had simply reweighed the pros and cons of self-representation and changed his mind as to the best course." (46 Cal.4th at p. 195.)

Here, in contrast, something unforeseen happened to appellant between the start of the penalty phase and his motion to revoke his self-representation – he had reviewed the transcripts of his NGI plea withdrawal and discovered that he had not understood the consequences of that decision. He raised the issue, and made his motions to reinstate his NGI plea and to revoke his self-representation as soon as possible thereafter. He had not "simply reweighed the pros and cons of self-representation and changed his mind." Moreover, he had not been informed at the time of the *Faretta* colloquy that revocation of self-representation and reinstatement of counsel would be discretionary with the trial court. This was a disadvantage of self-representation of which he had not been warned, not

one that he voluntarily, knowingly and intelligently accepted.

The totality of the circumstances relevant to appellant's motions to revoke his pro per status and reinstate defense counsel cannot be fully determined from this record because the trial court failed to inquire of appellant or defense counsel adequately, or to allow the presentation of evidence corroborating appellant's claim that he had difficulty understanding oral, rather than written, communication. What circumstances do appear in the record do not support the trial court's denial of appellant's motion, but strongly supported the need for revocation of self-representation and reinstatement of counsel to ensure that the penalty phase provided appellant a fair trial.

F. The Trial Court's Errors Require Reversal

In *People v. Burgener* this Court observed that the United States Supreme Court "has not yet decided whether a defective *Faretta* waiver is reversible per se, although it has stated somewhat cryptically that the right to be represented by counsel, 'as with most constitutional rights, [is] subject to harmless-error analysis . . . unless the deprivation, by its very nature, cannot be harmless.'" (*People v. Burgener*, *supra*, 46 Cal.4th at p. 244 (citations omitted).) In *Burgener* the Court found it unnecessary to resolve the question. (*Id.* at p. 245.)

In fact, the conclusion that a defective *Faretta* waiver constitutes reversible error per se is compelled by a number of Supreme Court rulings recognizing that "some errors necessarily render a trial fundamentally unfair," and that the denial of the right to counsel is one such error. (*Rose v. Clark* (1986) 478 U.S. 570, 577 ["Harmless-error analysis thus presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury"]; *Chapman v. California*, *supra*, 386 U.S. at p. 23 [right to counsel is "so

basic to a fair trial that [its] infraction can never be treated as harmless error"]; see also *Cordova v. Baca* (9th Cir. 2003) 346 F.3d 924, 930 [" if a criminal defendant is put on trial without counsel, and his right to counsel has not been effectively waived, he is entitled to an automatic reversal of the conviction"].)

The Supreme Court has recognized that certain structural errors, "whose precise effects are unmeasurable but without which a criminal trial cannot reliably serve its function," are reversible per se. (*Sullivan v. Louisiana* (1993) 508 US 275, 287.) The consequences of such error "are necessarily unquantifiable and indeterminate" (*Id.* at p. 282), and thus the prosecution can never meet its burden of proving that such an error is harmless. (See also, *Arizona v. Fulminante* (1991) 499 US 279, 309-310 [per se reversal for "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless error' standards"].) Structural errors "'defy analysis by "harmless-error" standards' because they 'affect the framework within which the trial proceeds,' and are not 'simply an error in the trial process itself.'" (*United States v. Gonzalez-Lopez* (2006) 548 US 140, 148; see also *Neder v. United States* (1999) 527 US 1, 7-9.).

The complete denial of counsel at a critical stage of criminal proceedings is structural error. (*United States v. Cronic* (1984) 466 US 648, 659 fn. 25; *Menefield v. Borg* (9th Cir. 1989) 881 F.2d 696, 701, fn. 7 ["Under harmless error jurisprudence, Sixth Amendment violations that pervade trial require automatic reversal of the tainted proceedings"].)

> [A] defective waiver waives nothing and thus is of no consequence. See *Johnson v. Zerbst*, 304 U.S. 458, 468, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) ("If the accused ... is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a ... bar to a valid conviction and sentence depriving him of his life or his liberty.").

(*Cordova v. Baca*, *supra*, 346 F.3d 924, 926.)

Allowing appellant to represent himself at the penalty phase in this case, without a valid waiver of counsel made knowingly and intelligently with actual awareness and understanding of the dangers and disadvantages of doing so, constituted a complete denial of counsel at a critical stage of the proceedings. Automatic reversal is therefore required.

Even if a harmless error rule is found to be applicable, reversal is required, for the error cannot be found harmless on this record beyond a reasonable doubt. The error affected the penalty phase, which resulted in a verdict and judgment of death. In that circumstance, even for non-constitutional errors, reversal is required when there is a reasonable possibility that the jury would have rendered a different verdict had the error not occurred. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) This Court has recognized that the "reasonable possibility" standard of review for penalty phase error and the "reasonable doubt" standard of *Chapman* "are the same in substance and effect." (*People v. Ashmus* (1991) 54 Cal. 3d 932, 965.) In this case, it cannot be established that appellant's self-representation was harmless beyond a reasonable doubt.

In *People v. Lawrence*, *supra*, this Court noted that it did not need to decide whether the erroneous denial of a defendant's midtrial motion to revoke a *Faretta* waiver "would have deprived defendant of his constitutional right to representation by counsel or whether such a deprivation would require reversal without consideration of prejudice." (*People v. Lawrence*, *supra*, 46 Cal.4th at p. 196.) Should this Court find that the denial of appellant's midtrial motions to reinstate defense counsel constitutes the only *Faretta* error, that question would be presented squarely here.

When appellant sought to reinstate defense counsel, the trial court

had before it additional information that it did not have when the original waiver was taken. That additional information indicated that appellant's waiver had not been knowing and intelligent. The trial court's failure to inquire further, and instead to arbitrarily reject the substantial evidence that appellant had not knowingly and intelligently waived his right to counsel as surely denied appellant his right to counsel as had any error made when the trial court accepted the "waiver" in the first place.

The harm to appellant's rights to counsel and to a fair trial spanned the entire penalty phase, from beginning to end. The fact that additional evidence that appellant's understanding of the proceedings and the disadvantages of self-representation was not rational came to light after his initial waiver, during his presentation of his case, simply confirms that he did not have an intelligent or rational understanding of the risks and disadvantages of doing so at a relevant point in the proceedings. There is no basis, therefore, for applying a different prejudice standard to the mid-penalty phase error than to the initial erroneous grant of self-representation prior to the penalty phase.

The result of the trial court's errors was a penalty phase that can in no way be construed as having provided appellant due process or a fair trial. Even assessed under the *Chapman* standard, respondent cannot meet its burden of demonstrating beyond a reasonable doubt that the errors did not contribute to the jury's death verdict. The prosecutor herself believed appellant, without counsel, provided the jury more reasons to impose the death penalty than the prosecution did itself. (44RT 5450.) The trial court told appellant that he was his own worst enemy and was working against his own interests in conducting the penalty phase as he did. (42RT 5139-5140.) Had appellant not been allowed to represent himself, had he been represented by counsel throughout the penalty phase, it is not only

reasonably possible that the jury would not have returned a verdict of death, it is more likely than not. The prosecution appeared to take that position prior to the penalty phase. (See 40RT 4722.) The People can not take a contrary position now.

G. Conclusion

The penalty phase in this case was a farce, providing appellant nothing resembling a fair trial. Nor, from the record, could any reasonable observer have perceived it as fair. As a result, appellant was deprived of his Sixth Amendment right to the assistance of counsel, as well as his rights to a fair trial, due process and a reliable determination of penalty guaranteed by the Sixth, Eighth and Fourteenth Amendments. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 468; *Indiana v. Edwards* (2008) 554 U.S. 164, 128 S.Ct. 2379, 2387; *Beck* v. *Alabama* (1980) 447 U.S. 625, 637-638; U.S. Const., 5th, 6th, 8th, 14th Amends.; Cal. Const., art. 1 §§7, 15, 17.) His death sentence must therefore be reversed.

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VII.

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION TO REPRESENT HIMSELF AT THE SANITY PHASE

The trial court denied appellant's request to represent himself at the sanity phase. Should this Court find the trial court did not err in failing to suspend proceedings to assess appellant's competence, pursuant to Penal Code section 1368 (see Arg III, *ante*), then it should also find the trial court violated appellant's Sixth and Fourteenth Amendment rights by denying his motion to represent himself at the sanity phase.[86] Accordingly, as a matter of federal constitutional law, the judgment of sanity on Count One, the special circumstance finding, and the death judgment must be reversed and remanded for retrial of the sanity phase and, if necessary, the penalty phase. *Faretta, supra,* 422 U.S. 806; U.S. Const., 6th, 14th Amends.)

A. Proceedings Below

On November 1, 2000, after the jury had been instructed at the guilt phase, but before closing arguments, appellant asked to be allowed to represent himself at the sanity phase. He said that because the trial court did not give voluntary manslaughter instructions on Counts Two and Three, he felt it was a "necessary evil" to "break [his] word" to the court that he would only seek to represent himself at the penalty phase. He also said there were certain problems concerning the penalty phase that affected the

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[86] Nothing in this argument concedes that appellant was competent to stand trial (see Argument III, *ante*), that allowing withdrawal of his NGI plea was proper (see Argument IV, *ante*), that refusing to reinstate his NGI plea was proper (see Argument V, *ante*), or that the record supports a finding that his self-representation at the penalty phase was made knowingly, intelligently and voluntarily (see Argument VI, *ante*). The trial court's denial of appellant's *Faretta* motion regarding the sanity phase was made on an erroneous legal basis, independent of the legal and factual bases of the errors demonstrated in those arguments.

sanity phase, and that if they were resolved he would withdraw his request to represent himself at the sanity phase. (30RT 3794-3797.) He acknowledged that he did not understand all of the "intricacies" of the sanity phase, but noted that prosecutor Samuels had recently said she had never done a sanity phase. "And Shellie [Samuels] hasn't done it and I haven't done it. So we can just do it for the first time together." (30RT 3795-3796.)

The trial court told appellant this would not put them on an equal footing, and that Samuels was referring to procedure: "The fact that defense goes first. Things are just a little different procedurally. But cross-examination and direct examination, everything will go like the trial as far as calling the witnesses and rules of evidence. Nothing else is different." (30RT 3797-3798.) The trial court took the matter under submission. (30RT 3798.)

On November 6, 2000, after guilt phase deliberations had begun, the court denied appellant's motion, noting it was untimely and within the court's discretion, rather than an absolute right. The court cited the complexity of the case as a strong factor in denying the motion, as well as the difficulty appellant would have scheduling psychiatric witnesses from the county jail, which would result in disruption of the proceedings. The court also stated that the jury would not be able to ignore that the court was allowing appellant to represent himself in a trial on the question of whether he was sane at the time of the commission of the crime, and would likely interpret that as the trial court having personally found appellant competent enough to represent himself at such a serious stage of the trial. (33RT 4145-4146.)

The jury returned its guilt verdicts on Counts Two and Three and its special circumstance finding eight days later, on November 14, 2000.

(24 CT 6214-6215.) The sanity phase began November 20, 2000. (24CT 6217.) In fact, it was continued from November 15 to November 20 to accommodate scheduling of the defense witnesses. (24CT 6216.) Only one witness, Dr. Wolfson, testified at the sanity phase. The court erroneously allowed appellant to absent himself from the courtroom during the sanity proceedings. (24CT 6217-6218 See Arg.VIII, *post.*)

B. A Criminal Defendant Has a Sixth Amendment Right to Self-Representation As Long As Doing So Will Not Unjustifiably Disrupt the Trial or Obstruct the Administration of Justice

A criminal defendant is entitled under the Sixth and Fourteenth Amendments to represent himself so long as he "clearly and unequivocally" declares his wish to do so and "proceed without counsel" and "voluntarily and intelligently elects to do so." (*Faretta*, *supra*, 422 U.S. at pp. 807, 835; accord, *Indiana v. Edwards* (2008) 554 U.S. 164, 128 S.Ct. 2379, 2383.) Although the Court in *Faretta* did not explicitly state the reasons a defendant may be refused self-representation, it implicitly indicated that the permissible bases for denying the right are narrowly drawn. The Court made clear that the right to self-represent may be terminated when the defendant "deliberately engages in serious and obstructionist misconduct." (*Faretta*, *supra*, 422 U.S. at p. 834, fn. 46.) Logically, the grounds for denying the right in the first place must be similarly circumscribed. Thus, a competent defendant can be denied self-representation only when it is shown that proceeding pro se will seriously and unjustifiably disrupt or obstruct the trial. (See *Indiana v. Edwards*, *supra*, 128 S.Ct. at p. 2384 [no right under *Faretta* to abuse the dignity of the courtroom, avoid compliance with rules of procedural or substantive law, or engage in serious or obstructionist misconduct].)

The Court in *Faretta* did not have occasion to consider the

timeliness of a defendant's assertion of the right because the defendant had made the request well in advance of trial. (*Faretta*, *supra*, 422 U.S. at p. 807.) But nothing in *Faretta's* holding or rationale imposes a timeliness requirement. (See *Moore v. Calderon* (9th Cir. 1997) 108 F.3d 261, 265 (conc. opn. of Fernandez, J.).)[87]

Shortly after *Faretta* was decided, this Court, in *People v. Windham* (1977) 19 Cal.3d 121 (*Windham*), held that to invoke this "constitutionally-mandated unconditional right to self-representation," a defendant had to do so "within a reasonable time prior to the commencement of trial." (*Id.* at p. 128.) When the request is made within a reasonable time before the commencement of trial, the trial court must permit the defendant to represent himself if he has voluntarily and intelligently waived his right to counsel. (*Ibid.*) However, according to *Windham*, once a defendant proceeds to trial represented by counsel, the decision to grant or deny a demand for self-representation is within the trial court's discretion. (*Id.* at pp. 128-129.) The Court identified the factors to be considered in assessing a mid-trial request for self-representation as: "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (Ibid.) *Windham* made clear that the "reasonable time" requirement "should not be and, indeed, must not be used as a means of limiting a defendant's constitutional right of self-representation." The requirement is merely designed to ensure defendants do not "unjustifiably delay a scheduled trial

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[87] Recently, the United States Supreme Court created a narrow, "severe mental illness" exception to the right of self-representation, but said nothing about timeliness. (*Indiana v. Edwards*, *supra*, 128 S.Ct. at p. 2388.)

or . . . obstruct the orderly administration of justice." (19 Cal.3d at p. 128, fn. 5 (italics omitted); *People v. Mayfield* (1997) 14 Cal.4th 668, 809.) This concern with delay and obstruction is consistent with *Faretta*:

> We are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by federal law and by most of the States, and no such result has thereby occurred. Moreover, the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.

(*Faretta*, *supra*, 422 U.S. at p. 834, fn. 46.)

This Court views the *Faretta* right as being unconditional if asserted a reasonable time prior to trial, and discretionary if asserted close to the time of trial or after trial has begun. Yet, no opinion of this Court discusses why this is the case, either legally or logically. There is nothing in *Faretta* itself to support such a distinction, and a reading of *Windham* that is consistent with *Faretta* does not warrant such a distinction. Apart from the aspect of a knowing and voluntary relinquishment of the right to counsel, there is no logical or legal reason why the right to self-representation should depend on anything more than an unequivocal request and a determination by the trial court that granting the request will not result in unreasonable delay or affect the orderly administration of justice. It would be unreasonable to construe *Faretta* as making a doctrinal distinction between an assertion of the right to self-representation made before trial and one made during trial.

C. The Trial Court Erred In Denying Appellant's *Faretta* Motion

Appellant's request to represent himself at the sanity phase was unequivocal. At first, he said he wanted to represent himself but would withdraw his request if an unspecified "penalty issue" were resolved. (30

RT 3798.) Then, just before the trial court denied his request, he made clear he was no longer concerned about the penalty issue, and still wanted to represent himself at the sanity phase:

> Ms. Deetz: And I think the way it was phrased was that he has certain concerns about penalty.
>
> The Defendant: Not anymore.
>
> Ms. Deetz: Well, I don't know then. Whatever.
>
> The Court: It is still your desire to go pro per at the sanity phase, if we get there; is that correct?
>
> The Defendant: Yes, ma'am.

(33RT 4144-4145.) There was nothing conditional or equivocal about appellant's request at this point. (Compare, e.g., *Jackson v. Ylst* (9th Cir. 1990) 921 F.2d 882, 888-889 [impulsive, emotional outburst after denial of motions for new trial and substitution of counsel]; *People v. Marshall* (1997) 15 Cal.4th 1, 14-27 [history of vacillating about whether defendant wanted to represent himself; assertion of request in rambling, virtually incoherent diatribe].) The court's failure to inquire into the nature of the issue appellant had wanted resolved, or even to mention it, demonstrates that it considered the request to be unequivocal, and treated it as such. (*People v. Dent* (2004) 30 Cal.4th 213, 219.)

Nor did the trial court make any finding suggesting appellant intended to delay the proceedings, nor would the record support such a finding. Appellant did not seek to delay the sanity phase and in fact had done nothing to delay or disrupt the proceedings to that point. He made his request before the end of the guilt phase, 14 days before the sanity phase actually began, and made no request for a continuance. (Compare, e.g., *People v. Williams* (1990) 220 Cal.App.3d 1165, 1170 [denial of untimely

Faretta motion upheld where defendant delayed trial for eight months].)

The trial court also failed to inquire into the specific factors underlying appellant's request, and denied the request based upon improper and insupportable grounds. As noted, this Court, in *Windham*, held that where a defendant makes a mid-trial request to represent himself, "the trial court *shall* inquire *sua sponte* into the specific factors underlying the request thereby ensuring a meaningful record in the event that appellate review is later required." (*Windham*, *supra*, 19 Cal.3d at pp. 128-129 (emphasis added); see also *People v. Hardy* (1992) 2 Cal.4th 86, 195; *People v. Clark* (1992) 3 Cal.4th 41, 98-99.) The trial court's only inquiry at the time of appellant's initial request was as to whether the request was unequivocal. After appellant clarified that it was, the court stated, "Well, I will take your comments under submission. There will be time to discuss it when the jury is deliberating." (30RT 3798.)

However, no subsequent "discussion" took place. Five days later, on November 6, 2000, with guilt deliberations continuing, the trial court confirmed that appellant still wanted to represent himself at the sanity phase, and then denied the request, without making any inquiry "into the specific factors underlying the request." (*Windham*, *supra*, 19 Cal.3d at pp. 128-129; 33 RT 4144-4146.) The failure of the trial court to inquire rendered the denial of the request an abuse of discretion, undermining the reasons given for that ruling. (*People v. Herrera* (1980) 104 Cal.App.3d 167, 175; compare, e.g., *People v. Frierson* (1991) 53 Cal.3d 730, 742 ["The court thoroughly investigated the quality of counsel's representation, the reasons for the request, and the expected delay."].)

The failure to consider all of the evidence relevant to an exercise of discretion itself constitutes an abuse of that discretion: "'To exercise the power of judicial discretion all the material facts . . . must be both known

and considered.'" (*In re Cortez* (1971) 6 Cal.3d 78, 85-86, citing and quoting *People v. Surplice* (1962) 203 Cal.App.2d 784, 791.)

In fact, as appellant had explained, his decision to seek to represent himself at the sanity phase was the result of the trial court's decision not to give voluntary manslaughter instructions on Counts Two and Three. (30 RT 3797.) Thus, his request was based on a recent change in circumstances, and was made within a reasonable time after that event occurred. Appellant thus tendered "a reasonable justification for the delayed motion." (*Windham, supra,* 19 Cal.3d at p. 128, fn. 5.) As this Court recognized in *Windham*, "When the lateness of the request and even the necessity of a continuance can be reasonably justified the request should be granted." (*Ibid.*)

The trial court cited "disruption" of the proceedings as a basis for denying the request:

> "the scheduling of of [*sic*] witnesses that are all psychiatrists would be extremely difficult for you. Your counsel have made it quite clear they would not be back-up counsel. And for you to arrange or calling [*sic*] psychiatric witnesses from the county jail would be very difficult and it would end with a disruption in the court proceedings."

(33RT 4145-4146.) However, the trial court did not ask appellant whether he was ready or able to schedule necessary witnesses. Nor did the court consider readily-available alternatives, some a matter of local court policy, which the court later employed at the penalty phase to ameliorate the same "difficulties" upon which the court denied appellant's request at the sanity phase. For example, after granting appellant's motion to represent himself at the penalty phase, the trial court sua sponte appointed appellant's mother

as a "legal runner"[88] pursuant to "Los Angeles County Pro Per Policy." (24 CT 6242; Super. Ct. L.A. County, Local Rules, Rule 6.41.) On December 7, 2000, the court appointed an investigator to aid appellant in scheduling expert witnesses, also a matter covered by the Pro Per Policy. (42RT 5106-5107; Super. Ct. L.A. County, Local Rules, Rule 6.41.)

The trial court did not explain why such measures would not resolve any potential "difficulty at the sanity phase. Nor did the trial court inquire to determine any *facts* about any potential disruption of the proceedings or about the actual difficulty appellant might face in scheduling any expert witnesses. For example, the trial court did not inquire regarding how many expert witnesses appellant intended to call in the sanity phase, or whether any intended expert witnesses had already been scheduled by defense counsel. As it turned out, the sanity phase did not start until six days after the return of the final guilt verdicts because of the schedules of the defense expert, and only one defense expert was called. (24CT 6216.)

Furthermore, the trial court improperly relied on "the complexity of the case" as a basis for denying appellant's request. (33RT 4145.) Neither *Faretta* nor *Windham* provides any support for such a consideration. Moreover, the court did not let the "complexity of the case" prevent it from granting appellant's *Faretta* motion for the penalty phase.

In discussing the complexity of the case, the trial court made its one reference to any "reason" for appellant's request – that appellant felt he and the prosecutor would be on even footing because she had never tried a sanity phase: "And I indicated that was not a good reason because all of her other skills, of which I am sure you are very well aware, will still be there and be in place." (33RT 4145.) The court made no reference to any other

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[88] "[A]n individual designated to make deliveries to and from the court on defendant's behalf." (*People v. Blair* (2005) 36 Cal. 4th 686, 730.)

reason for appellant's request, contrary to *Windham*'s mandate. To the extent the trial court denied the motion in part because of a belief that appellant had a misunderstanding about some factual matter relating to representing himself, such a misunderstanding was a wholly insufficient basis upon which to deny self-representation, particularly with no inquiry. The trial court had already addressed appellant's possible misunderstanding about the prosecutor's experience and skills and the procedural differences between guilt and sanity trials. Appellant thereafter persisted in his request for self-representation. (30RT 3797-3798.)

The trial court's statements about Samuels' experience and skills, and its explanation that the differences involved in a sanity phase are "only procedure," would have been appropriate in warning appellant of the risks of self-representation, ensuring a knowing and intelligent waiver of the right to counsel (*Faretta*, *supra*, 422 U.S. at pp. 834-835); see also *People v. Lancaster* (2007) 41 Cal.4th 50, 68, but were not matters properly considered in denying appellant's request (*People v. Silfa* (2001) 88 Cal.App.4th 1311, 1321-1323; *People v. Robinson* (1997) 56 Cal.App.4th 363, 367, 371-373).

The trial court's final basis for denying appellant's request was the concern that it might convey to the jury the impression that the court thought appellant was competent. (33RT 4146.) Yet the jury's reaction to a defendant's self-representation is not relevant to whether or not the court should grant a request for self-representation. It may be a consideration for the defendant,[89] and it may well have been an appropriate matter for the

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[89] It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for (continued...)

court to raise in warning appellant about the disadvantages and risks of representing himself to ensure that his waiver of counsel was knowing and intelligent. It was not, however, a valid basis for denying a defendant's request to represent himself.[90]

The trial court's conflation of appellant's sanity at the time of the commission of the offense with his competence to represent himself is particularly hard to understand. The two concepts are legally and factually distinct. Factually, sanity at the time of the offense concerned events more than 18 years prior to trial, while appellant's competence was dependent upon whether he had a rational understanding of the proceedings then underway and the ability to rationally participate in his defense. Legally, the two states of mind are evaluated under entirely different standards. Any concern that the jury would be confused about the two concepts would presumably have been dealt with by the sanity phase instructions.

Under *Windham*, the overriding focus of the trial court in exercising its discretion must be on the reason for, and specific factors relating to, the defendant's mid-trial request. The trial court's failure to inquire, and its focus on legally irrelevant considerations, render the denial of self-representation at the sanity phase an abuse of discretion under *Windham*.

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[89] (...continued)

> the individual which is the lifeblood of the law.' *Illinois v. Allen*, 397 U.S. 337, 350-351, 90 S.Ct. 1057, 1064, 25 L.Ed.2d 353 (Brennan, J., concurring).

(*Faretta*, *supra*, 422 U.S. at p. 834.)

[90] The court's concern that the jury might believe it had found appellant "competent enough to represent [him]self at a very serious stage in the trial" is at odds with the court's willingness to allow appellant to represent himself at the penalty phase, also "a very serious stage in the trial."

The other factors that should have been considered under *Windham* do not militate against self-representation. First, the trial court made no mention of the quality of counsel's representation, or of appellant's numerous *Marsden* motions detailing his conflicts with defense counsel's handling of his case. Although obviously-deficient legal representation may support a defendant's *Faretta* motion, a silent record, or even evidence of competent representation, does not defeat a self-representation request. The *Faretta* right is not intended to guarantee effective representation, but to ensure "the inestimable worth of free choice" with regard to one's own defense. Indeed, the high court in *Faretta* warned that, in most cases, defendants would fare better with "counsel's guidance than by their own unskilled efforts" but nonetheless concluded that "[p]ersonal liberties" like the right to defend pro se "are not rooted in the law of averages." (*Faretta*, *supra*, 422 U.S. at p. 834.)

Second, the "defendant's prior proclivity to substitute counsel" factor, if anything, favored self-representation. The fact of appellant's numerous *Marsden* motions documents his dissatisfaction with his attorneys' representation. His request to represent himself was not a sudden ploy to derail the trial, but rather was the manifestation of a genuine, continuing, and unresolved discontent with his legal representation, apparently brought to a head by the trial court's decision to give voluntary manslaughter instructions only as to Count One.

Under these circumstances, assuming arguendo that there was no error from the trial court's failure to suspend proceedings pursuant to Penal Code section 1368,[91] the trial court's denial of appellant's *Faretta* motion, which forced him to proceed to a sanity trial in a capital case with counsel

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[91] See Arg. III, *ante*; see also fn. 86, *ante*.

he did not want, was an abuse of discretion. (See *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1057 [trial court abused its discretion in denying mid-trial *Faretta* motion, where defendant did not request a continuance, was prepared to proceed with the trial, had profound disagreement with defense counsel about how case should proceed and did not show proclivity to substitute counsel, and where no indication that self-representation would obstruct orderly administration of justice]; *People v. Nicholson* (1994) 24 Cal.App.4th 584, 593-594 [trial court abused its discretion in denying *Faretta* motion in a special circumstances murder case, where self-representation was requested for a legitimate reason, there was no request for a continuance, and there was no reason to believe there would be any delay or disruption].)

D. Reversal of the Judgment of Sanity on Count One, the Special Circumstance Finding and the Death Judgment Is Required

The erroneous denial of the right of a defendant to represent himself is a matter of constitutional magnitude requiring reversal per se.

> Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless.

(*McKaskle v. Wiggins*, *supra*, 465 U.S. at p. 177, fn. 8; *People v. Robinson*, *supra*, 56 Cal. App. 4th at p. 373; *People v. Tyner* (1977) 76 Cal.App.3d 352, 356.)

Various California courts of appeal have ruled that the erroneous denial of a mid-trial request for self-representation is subject to reversal only if it is reasonably probable that a result more favorable to appellant would have been reached in the absence of the error. (*People v. Rogers, supra*, 37 Cal.App.4th at p.1058; *People v. Nicholson*, *supra*, 24

Cal.App.4th at pp. 594-595; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050-1051;see *People v. Watson* (1956) 46 Cal.2d 818, 836.) This has been based upon this Court's reference to such a mid-trial request as "based on non-constitutional grounds." (*Windham*, *supra*, 19 Cal.3d at p. 129, fn. 6; *People v. Bloom* (1989) 48 Cal.3d 1194, 1220.) However, as this Court stated in *Windham*,

> Our imposition of a 'reasonable time' requirement should not be and, indeed, must not be used as a means of limiting a defendant's constitutional right of self-representation. We intend only that a defendant should not be allowed to misuse the *Faretta* mandate as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice.

(19 Cal.3d at p. 128, fn.5.) There is no basis on this record to conclude that appellant sought to misuse his request to represent himself at the sanity phase as a means to delay the trial, unjustifiably or otherwise, or to obstruct the orderly administration of justice. (See *People v. Tyner*, *supra*, 76 Cal.App.3d at pp. 354-356.) Appellant's motion was based on his constitutional right to represent himself, as set forth in *Faretta*. To the extent the timing of his motion rendered it subject to denial based upon legitimate, relevant grounds supported by the record does not diminish the constitutional basis of his motion. Where the denial of the motion was, as here, based upon grounds that were either irrelevant to the issue or unsupported by the record, it was appellant's constitutional right to represent himself that was violated. As stated in *McKaskle v. Wiggins*, *supra*, "The right is either respected or denied; its deprivation cannot be harmless." (465 U.S. at p. 177, fn. 8.)

The trial court's erroneous denial of appellant's right to represent himself at the sanity trial therefore requires reversal of the sanity verdict on Count One as well as the special circumstance finding and the death judgment, and remand for a new sanity trial on all three counts.

VIII.

THE TRIAL COURT ERRED BY ALLOWING APPELLANT TO ABSENT HIMSELF FROM SANITY PHASE PROCEEDINGS

The trial court violated appellant's state and federal constitutional and statutory rights by permitting appellant to absent himself during the taking of evidence at the sanity phase. The court erred as a matter of law under sections 977[92] and 1043 [93], which together require a nondisruptive capital defendant to be present during the taking of evidence and prohibit the trial court from taking a waiver of presence. Moreover, the trial court's

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[92] Section 977 provides in relevant part:

> (b)(1) In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present. . . .

[93] Section 1043 provides in relevant part:

> (a) Except as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial.
>
> (b) The absence of the defendant [FN1] in a felony case after the trial has commenced in his presence shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases:
>
> (1) Any case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom.
>
> (2) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent.

failure to ensure that appellant's purported waiver was knowing, intelligent and voluntary violated his rights to confrontation and due process under both state and federal law. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464; U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §§ 7 and 15.)

A. Relevant Law

A criminal defendant has a right to be present at trial under state statutory (§§ 977, 1043) and constitutional law (see Cal. Const., art. I, section 15). Moreover, under sections 977 and 1043, a nondisruptive capital defendant cannot waive his or her presence during the taking of evidence before the trier of fact. (*People v. Weaver* (2001) 26 Cal.4th 876, 967-968.)

> [W]hen read together, sections 977 and 1043 permit a capital defendant to be absent from the courtroom only on two occasions: (1) when he has been removed by the court for disruptive behavior under section 1043, subdivision (b)(1), and (2) when he voluntarily waives his rights pursuant to section 977, subdivision (b)(1). However, section 977, subdivision (b)(1), the subdivision that authorizes waiver for felony defendants, expressly provides for situations in which the defendant cannot waive his right to be present, including during the taking of evidence before the trier of fact. Section 1043, subdivision (b)(2), further makes clear that its broad 'voluntary' exception to the requirement that felony defendants be present at trial does not apply to capital defendants.

(*People v. Jackson* (1996) 13 Cal.4th 1164, 1210.) Proceeding with the taking of evidence in a capital case in the absence of a nondisruptive defendant is prohibited, and constitutes error. (*Ibid.*; *People v. Young* (2005) 34 Cal.4th 1149, 1214.) That is what occurred here.

A criminal defendant also has a right to be present at trial under the Due Process Clause of the Fourteenth Amendment. (*Snyder v. Massachusetts* (1933) 291 U.S. 97, 106-107; *United States v. Gagnon* (1985) 470 U.S. 522, 526.) "A leading principle that pervades the entire law of criminal procedure is that after indictment found, nothing shall be done in the absence of the prisoner." (*Lewis v. United States* (1882) 146

U.S. 370, 372; see also *Hopt v. Utah* (1893) 110 U.S. 574.) The defendant's presence is required "at all stages of the trial where his absence might frustrate the fairness of the proceedings." (*Faretta v. California, supra,* 422 U.S. at p. 819 fn. 15, citing *Snyder v. Massachusetts*, *supra*; *Shields v. United States* (1927) 273 U.S. 583, 588-589 [defendant entitled to be present "from the time the jury is impaneled until its discharge after rendering the verdict."]; *United States v. Smith* (6th Cir. 1969) 411 F.2d 733, 736 ["We view the presentation of evidence, the charge to the jury, the return of the jury's verdict and the imposition of the sentence as one continuous proceeding."].)

The federal Constitution guarantees a defendant "the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 744-745; cf. *People v. Davis* (2005) 36 Cal.4th 510, 530. This right is rooted in the confrontation clause of the Sixth Amendment, as well as the due process clause of the Fifth and Fourteenth Amendments. (*United States v. Gagnon*, *supra*, 470 U.S. at p. 526; *Pointer v. Texas, supra,* 380 U.S. at p. 403; *Bustamante v. Eyman*, *supra*, 456 F.2d at p. 273.)

A defendant may waive his or her federal constitutional rights, provided such waiver is voluntary, knowing, and intelligent. (*Johnson v. Zerbst, supra*, 304 U.S. at p. 464; *Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662, 671-672.) Every reasonable presumption against the loss of a right to be present at a critical stage must be indulged. (*Illinois v. Allen* (1970) 397 U.S. 337, 343; *Johnson v. Zerbst*, *supra*, 304 U.S. at p. 464; *Campbell v. Wood*, *supra*, 18 F.3d at p. 672.)

B. Proceedings Below

On November 14, 2000, at the conclusion of the guilt phase, the court erroneously advised appellant as to the law regarding the relevance of the sanity phase to the question of appellant's death-eligibility:

> MS. DEETZ: You, the Lady of this Court, are telling Robert Bloom that the [guilt] verdicts by this jury trigger a penalty phase?
>
> THE COURT: Yes, Mr. Bloom, they do. The jury will consider whether it will be death or life without possibility of parole.

(34RT 4239.) This was, of course, not true. Whether a penalty phase would take place, i.e., whether appellant would be death eligible, depended on the outcome of the sanity phase, which potentially could undermine the multiple murder special circumstance finding. Appellant expressly took the court at its word. (34RT 4246 [". . . now that we are having a penalty phase, regardless . . ."].) The court failed to correct its misstatement of the law before allowing appellant to absent himself from the sanity phase.

On November 20, 2000, the first day of the sanity phase, defense counsel informed the court that appellant did not want to be present. Outside the presence of the jury, the court asked appellant what his desire was, and told him he had the right to be present. Appellant told the court he did not want to be present during testimony, but wanted to be present for the reading of the sanity verdicts. Defense counsel told appellant he would not have any speakers or hearing devices in the lockup, but that defense counsel would provide appellant with transcripts of the proceedings. (35RT 4252-4254.) No written waiver of appellant's presence was requested or executed. In appellant's absence, the trial court told the jury, "Mr. Bloom has chosen not to be present during this second phase of the sanity proceedings which he has a right to make that choice. (Sic)" (35RT 4258.) The court did not admonish the jury not to speculate about the reasons for

appellant's absence or to allow it to affect their deliberations. (*Compare*, *People v. Young, supra,* 34 Cal.4th at p. 1213.) Dr. Wolfson testified in appellant's absence, and both sides rested the same day.

The next day, the trial court asked if appellant wished to be present. Defense counsel indicated appellant did not want to be present, but did want to be present when the verdicts were read, and wished to be brought in to court after the jury began deliberations to address his motion for self-representation. (36RT 4449.)

That afternoon, after the jury had begun deliberating, defense counsel had appellant brought into the courtroom and declared that he had a doubt as to appellant's competence to proceed, under section 1368, stating, "I think there have been substantial changes in the last couple of days with Mr. Bloom." (36RT 4523.) As more fully discussed in Argument III, *ante*, the trial court nonetheless erroneously refused to suspend proceedings to determine appellant's competence.

C. The Trial Court Violated State Law by Allowing Evidence to Be Taken Before the Jury in Appellant's Absence

As stated above, this Court has determined that sections 977 and 1043, read together, preclude a capital defendant from waiving his or her presence during the taking of evidence before the trier of fact. (*People v. Young*, *supra*, 34 Cal.4th at p. 1214; *People v. Jackson*, *supra*, 13 Cal.4th at p. 1210.) The trial court therefore erred as a matter of law by permitting appellant – a nondisruptive capital defendant – to be absent during the taking of evidence at the sanity phase, regardless of the sufficiency of any admonition or the adequacy of any waiver. As demonstrated below, reversal of the sanity verdict on Count One as well as the resulting penalty judgment is therefore required.

D. The Trial Court Failed to Inquire Adequately to Determine That Appellant's Waiver of His Presence Was Knowing, Intelligent and Voluntary, As Required Under Federal Law

The trial court also violated appellant's federal constitutional rights, by failing to obtain a knowing, intelligent and voluntary waiver of his right to be present at the sanity phase. "The purpose of the 'knowing and voluntary' inquiry . . . is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced." (*Godinez v. Moran* (1993) 509 U.S. 389, 401.) As explained in Arguments II-VI, above, the record establishes a bona fide doubt as to appellant's competence to stand trial or to waive his constitutional rights. In fact, appellant's decision to absent himself from the sanity phase itself contributes to that doubt. (See Argument III, p. 58, *ante*.)

Moreover, as explained in Argument IV, the record establishes substantial doubt that appellant understood the significance of the sanity phase in this case. And, as noted, the trial court advised appellant that the guilt verdicts guaranteed there would be a penalty phase (34RT 4239), which was not true, given that the outcome of the sanity phase could undermine the multiple murder special circumstance finding.

The court conducted only a minimal inquiry regarding appellant's waiver of presence. The colloquy focused primarily on the duration of appellant's absence, i.e., that appellant wanted to return to hear the sanity verdicts because he thought that his motion for self-representation would then be ripe. The court made no inquiry as to appellant's understanding of the significance of the sanity phase and failed to correct its previous misstatements on the subject. Nothing in the record demonstrates that appellant understood the sanity phase to be anything more than a pro forma

exercise unrelated to the eventuality of a penalty phase. Nor did the court inquire into appellant's reason for absenting himself. Had the court inquired further and sufficiently to ensure appellant's understanding of the significance of the sanity phase in this case, it is reasonably probable that appellant – if in fact competent and capable of rationally consulting with counsel – would have chosen to participate in the sanity proceedings.

Moreover, the trial court's perfunctory acceptance of appellant's decision to absent himself leaves this Court with an inadequate record upon which to determine, with respect to appellant's claim of constitutional error, whether or not appellant voluntarily, knowingly and intelligently waived his right to be present at the sanity phase. That question is a mixed question of law and fact, reviewed de novo. (*Campbell v. Wood*, *supra*, 18 F.3d at p. 672.) In that review, this Court must indulge every reasonable presumption against the a finding of waiver (*Ibid.*; Illinois *v. Allen*, *supra*, 397 U.S. at p. 343).

What the record does show is that appellant made his decision to absent himself from the sanity phase, just as he later withdrew his NGI plea to Counts Two and Three, on a fundamentally erroneous understanding of the significance of the sanity proceedings with respect to his death eligibility. There are no countervailing indications, and the trial court, having contributed to his misunderstanding, did nothing to correct or even to discover the errors.

This Court cannot reliably determine that appellant's decision to absent himself from the sanity phase was based upon a voluntary, knowing and intelligent waiver of his constitutional right to be present. The resulting sanity verdict on Count One, the special circumstance finding and the penalty verdict must all therefore be reversed.

E. The Errors were Prejudicial

Appellant's absence from the sanity phase denied him a fair trial because the sanity phase was a critical stage of the proceedings, and crucial to the outcome of his trial. Assuming arguendo that appellant was competent, his presence during the sanity phase would hardly have been "useless" (*Snyder v. Massachusetts, supra*, 291 U.S. at p. 106), "negligible" or as a mere "observer" (*Hegler v. Borg* (9th Cir. 1995) 50 F.3d 1472, 1477). Thus, as a matter of due process, "a fair and just hearing" obviously was "thwarted by his absence." (*Kentucky v. Stincer, supra*, 482 U.S. at p. 745; *Snyder v. Massachusetts, supra*, 291 U.S. at p. 108.) Appellant was excluded from a stage of the criminal proceedings at which he had an "active role to play." (*Rice v. Wood* (9th Cir. 1996) 77 F.3d 1138, 1141 (en banc).)

If a defendant is denied his constitutional right to be present during a critical stage of criminal proceedings, the reviewing court must evaluate the nature of the error. Reversal is automatic if the defendant's absence constitutes a "structural error," that is, an error that permeates "[t]he entire conduct of the trial from beginning to end" or "affect[s] the framework within which the trial proceeds." (*Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 309-310.) The Ninth Circuit has held that "a defendant's absence from certain stages of a criminal proceeding may so undermine the integrity of the trial process that the error will necessarily fall within that category of cases requiring automatic reversal." (*Hegler v. Borg*, *supra*, 50 F.3d at p. 1476 .) To merit a finding of structural error, a defendant must have been excluded from a stage of the criminal proceedings at which he had an "active role to play." (*Rice v. Wood*, *supra*, 77 F.3d at p. 1141; see also *Hegler, supra*, 50 F.3d at pp. 1476-77 [holding that the "determinative factor" as to whether the defendant's absence constituted a structural error

was whether the defendant's ability to "influence the process was negligible"].) In addition, the erroneous exclusion of the defendant must, "like the denial of an impartial judge or the assistance of counsel, affect the trial from beginning to end." (*Rice v. Wood, supra*, 77 F.3d at p. 1141.)

On the other hand, harmless error review is appropriate if the defendant's absences constitutes a "trial error," that is, an error which "occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Id.* at pp. 307-08.)

This case presents a situation where the deprivation, by its very nature, precludes traditional harmless error analysis, for the precise effect of appellant's absence cannot be identified. What the record does establish, however, is that the question of appellant's sanity at the time of the homicides was not a simple one for the jurors, who struggled longer in deliberations before reaching their verdict on Count One than the rest of the sanity phase had taken.[94] Even under the *Watson* standard for state law error, "[i]n a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant." (*People v. Zemavasky* (1942) 20 Cal.2d 56, 62.)

Assuming arguendo that appellant was competent, appellant's availability to consult with counsel during Dr. Wolfson's testimony might

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[94] On November 21, 2000, closing arguments were given and the issue of sanity was submitted to the jury. (24CT 6220-6221.) On the fifth day of deliberations, November 30, 2000, the jury returned a verdict of sane as to Count One, which verdict had been signed by the foreperson the previous afternoon. (24CT 6231, 6233-6235; 38RT 4635.) After further deliberations, the jury indicated on December 4, 2000 they were unable to reach a verdict as to Counts Two or Three. (24CT 6238-6240.)

have had an effect on the evidence received by the jury. (Compare *People v. Weaver*, *supra*, 26 Cal.4th at p. 968 (lack of live witnesses at sanity phase reduced potential value of assistance absent capital defendant could have given counsel).) Appellant's mere presence may have affected a juror's view of the evidence, just as his absence may well have affected them. The trial court informed the jury that appellant had chosen not to attend the sanity phase, and (erroneously) that he had a right to so choose, but did not instruct the jury that his absence should not affect their consideration of the evidence or their verdicts. (Compare *People v. Young*, *supra*, 34 Cal.4th at p. 1214 (absence of capital defendant harmless based in part on admonition not to speculate about absence or allow it to affect deliberations); cf. *People v. Dickey* (2005) 35 Cal.4th 884, 924 (absence harmless due in part to admonition not to consider absence in deliberations).)

Moreover, it cannot be determined what effect attendance at the sanity phase would have had on appellant's otherwise irrational withdrawal of his NGI plea as to Counts Two and Three after the jury was unable to reach a unanimous verdict on appellant's sanity on those homicides.

However, even if reversal is not automatic, the burden is now on the State to show that the trial court's error was "harmless beyond a reasonable doubt." (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Wright, supra,* 52 Cal.3d at p. 403 [any violation of a defendant's right to be present at all critical stages of his trial constitutes federal constitutional error, requiring reversal unless the error can be demonstrated to be harmless beyond a reasonable doubt].)[95] This "burden of proving

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[95] Although this Court has stated that the burden is on the defendant to demonstrate his absence prejudiced his case or denied him a fair and impartial trial (*People v. Jackson*, *supra*, 28 Cal.3d at pp.309-10; *People v. Duncan* (1991) 53 Cal.3d 955, 975), this clearly refers to the defendant's

(continued...)

harmless error is a heavy one." (*Bustamante v. Eynman, supra*, 456 F.2d at p. 271.) "The standard by which to determine whether reversible error occurred . . . is not whether the accused was actually prejudiced, but whether there is 'any reasonable possibility of prejudice.'" (*Wade v. United States* (D.C. Cir. 1971) 441 F.2d 1046, 1050.)

It must be emphasized that, precisely by virtue of a defendant's exclusion from a trial, or a portion thereof, it is logically impossible for that defendant to ever show how his presence in fact *would* have – as opposed to *could* have – "changed the course or outcome of a trial." (*United States v. Novaton* (11th Cir. 2001) 271 F.3d 968, 1000.) But a defendant's "right to be present would cease to exist" if he were required to make such a showing in order to establish prejudice. (*Ibid.*) Such a requirement "would transfer the burden on the prejudice issue from [the government] to the defendant." (*Ibid.*; see *Chapman v. California, supra*, 386 U.S. at p. 24.)

To the extent this Court nevertheless requires the defendant to prove what would *actually* have happened had he been present, this Court would be violating the federal Constitution and United States Supreme Court precedent. It would also constitute a denial of a defendant's due process right to a full and fair hearing on appeal (U.S. Const., 14th Amend.)

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[95] (...continued)
burden to establish that his due process right to be present has been *implicated*. While an accused has a due process right to be present only when his presence bears a reasonably substantial relation to the fullness of his opportunity to defend against the charge (*Snyder, supra*, 291 U.S. at pp. 105-08.), once the defendant has shown this is the case, and that his absence is thus a denial of due process, the burden shifts to the State to prove the constitutional violation was harmless beyond a reasonable doubt. (See *Rushen v. Spain, supra*, 464 U.S. at p. 119; *People v. Whitt* (1990) 51 Cal.3d 620, 671-72 (Broussard, J. conc. and dissenting) ["when the error violates the federal Constitution, the defendant need not show prejudice; rather, the prosecution must establish the absence of prejudice"].)

because it would effectively insulate from appellate review an asserted denial of a defendant's fundamental right to be present. Such a claim is tantamount to a contention that a defendant can safely be excluded from any proceeding in the trial court, for any or no stated reason, because he can never establish on appeal what he would have said or done had he been present. This is not, and cannot be, the law in California; and it does not comport with an accused's federal constitutional protections.

Any argument that the defendant suffered no prejudice from his absence because his attorney was present and represented his interests similarly must be soundly rejected:

> It cannot be argued that appellant's absence was per se harmless because his counsel was at all times present to guard his interests. . . . [T]he presence of counsel is no substitute for the presence of the defendant himself. The right to be present at trial stems in part from the fact that by his physical presence the defendant can hear and see the proceedings, can be seen by the jury, and can participate in the presentation of his rights.

(*Bustamante v. Eyman*, *supra*, 456 F.2d at p. 274 [footnote omitted].)

> Although the presence of counsel is certainly a relevant factor to be considered in determining whether a defendant's absence was harmless, the right to be present at trial – grounded in the Confrontation Clause and the Due Process Clause – is not a gossamer right inevitably swept away simply because a defendant is represented, in his absence, by counsel. The right to be present is distinct from the right to be represented by counsel. The right to be present would be hollow indeed if it was dependent upon the lack of representation by counsel. Furthermore, such a rule would ignore the fact that a client's active assistance at trial may be key to an attorney's effective representation of his interests.

(*United States v. Novaton, supra*, 271 F.3d at p. 1000.)

The trial court's failure to ensure appellant's decision not to attend the sanity phase of his capital trial was voluntary, knowing and intelligent, cannot be shown to be harmless beyond a reasonable doubt. (*Chapman v.*

California, supra, 386 U.S. at p. 24; see *United States v. Gordon* (D.C. Cir. 1987) 829 F.2d 119, 124-129.) Whether viewed as structural error or not, the sanity verdict on Count One, the special circumstance and the judgment of death must be reversed.

Similarly, the court's patent violation of sections 977 and 1043, constituting state law error, requires reversal, because "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson, supra,* 46 Cal.2d at p. 836; *People v. Jackson*, *supra*, 13 Cal.4th at p. 1211; *People v. Weaver*, *supra*, 26 Cal.4th at p. 968.) As described above,[96] the question of appellant's sanity on any of the three counts was not a foregone conclusion. Not only was the jury unable to reach a verdict on Counts Two and Three, the verdict of sanity on Count One came only after four days of deliberation, three days more than the evidentiary portion of the sanity phase itself took. (See *People v. Filson* (1994) 22 Cal.App.4th 1841, 1852, disapproved on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452 [relying in part on deliberations "longer than the evidentiary phase of the trial" in finding reversible error under either *Watson* or *Chapman*].) In this case, "any doubt as to [the error's] prejudicial character should be resolved in favor of the appellant." (*People v. Zemavasky*, *supra*, 20 Cal.2d at p. 62.) The sanity verdict on Count One, the special circumstance and the resulting penalty judgment must therefore be reversed, and appellant's plea of not guilty by reason of insanity reinstated as to all three counts.

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[96] See also Argument IV, *ante*.

IX.

IMPROPER ARGUMENT AND CROSS-EXAMINATION BY THE PROSECUTOR DURING THE GUILT PHASE VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND RENDERED HIS TRIAL FUNDAMENTALLY UNFAIR

The prosecution introduced its case in chief by reading a confession appellant made during his first trial when he represented himself to argue in favor of the death penalty. The jury in appellant's retrial heard this conclusive statement on the only issue it had to determine – appellant's mental state – although the trial court had ruled that appellant's argument from the prior trial was inadmissible in the prosecution case in chief. Throughout the remainder of the guilt phase, the prosecution continued to engage in misconduct involving the mental state defense. The prosecution vouched for the credibility and veracity of prosecution witnesses from the first trial in an attempt to discount mental health experts for the defense, elicited expert opinion on the ultimate issue of appellant's mental state at the time of the crimes, disparaged the mental state defense and defense experts, commented on appellant's failure to testify during cross-examination and closing arguments, and relied on facts not in evidence in her closing argument. These actions, and the inadmissible and prejudicial information presented to the jury because of them, violated the prosecution's "duty to refrain from improper methods calculated to produce a wrongful conviction," (*Berger v. United States* (1935) 295 U.S. 78, 88), and violated appellant's rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, sections 1, 7, 17 and 24 of the California Constitution, and California Penal Code section 1180. Ultimately, these errors rendered appellant's trial fundamentally unfair.

A. The prosecutor's improper use of appellant's statements from his first trial as an admission of guilt violated appellant's constitutional and statutory rights

In her opening statements, the prosecutor told the jury that "[t]he totality of the evidence in this case is going to show you . . . that rather than being mentally deficient, the defendant in this case was capable of formulating and did formulate a rather sophisticated plan to kill his father." (16 RT 1967.) The prosecutor went on to tell the jury that

> By the defendant's own admission in 1983, this is a quote of the defendant: 'This man was going to die. Weeks before this, sure, thoughts went through my head, 'I'm going to kill the old man, sure. The difference is putting it into action. Eventually this man was going to die and eventually he was going to die by my hand. He just speeded up the results.' So the defendant stated – and 1983 is after the murders. But that was the statement made by the defendant after the murders showing that he in fact had intended for some time prior to killing his father that he was going to kill his father. (16 RT 1968.)

The prosecutor read this admission to the jury despite the court's ruling that appellant's prior argument was not admissible as an admission.

The first trial judge to rule on the admission of appellant's statements was Judge Hoff, who recused himself shortly before the trial began. (*Marsden* RT 539.) Although Judge Hoff ruled that appellant's first trial argument could be used by the prosecution in cross-examining defense experts, he did not rule that appellant's argument could be utilized in the prosecution case in chief. (2RT 298-303.) Just before trial, the defense asked the new trial judge, Judge Schempp, to prohibit the prosecutor from referring to appellant's statements in her opening remarks because they wanted the court to address their objections to the use of appellant's prior testimony and argument in the prosecution's case in chief. The court responded that the prosecution "is certainly not going to get into that in the opening statement." Misrepresenting Judge Hoff's prior ruling, the

prosecutor replied that "[i]t doesn't matter, it's not contested; it's all been ruled on." Defense counsel argued that use of appellant's statements in the prosecution case in chief was disputed; however, the court stated, "I'm not going to hear any more of this. These things have all been ruled on and Ms. Samuels knows how to make a proper opening statement on what she expects to prove." (14RT 1927.) The parties again argued about the admissibility of appellant's statements after the prosecution's opening because the prosecutor planned to read to the jury further excerpts of appellant's argument. (19RT 2426-41.) When Judge Schempp finally addressed defense objections to the use of appellant's argument in the prosecution case in chief, she ruled that none of appellant's argument could be used by the prosecution as an admission. (19RT 2441.) Judge Schempp later informed the parties that when she spoke with Judge Hoff, he appeared "horrified" by the prosecution characterization of his prior ruling. (19RT 2450.)

The prosecutor's misrepresentation of Judge Hoff's prior ruling and subsequent presentation of appellant's inadmissible argument from the first trial was misconduct that violated appellant's statutory and constitutional rights and rendered appellant's trial fundamentally unfair.[97] (*See Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 647 (a prosecutor's introduction of "specific misleading evidence important to the prosecution's case in chief" violates due process); *United States v. Kojayan* (1993) 8 F.3d

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[97] The trial court's failure to clarify the inadmissibility of such prejudicial statements prior to the prosecutor's use of them in her opening statement was prejudicial error that also violated appellant's right to a fair trial. *People v. Cowan* (2010) 50 Cal. 4th 401, 460 (recognizing that failure of substitute judge to become familiar with the trial record can constitute prejudicial error); *Piercy v. De Fillipes* (1963) 215 Cal. App. 2d 284, 289 (reversing judgment where the trial court's failure to rule on objection to testimony was prejudicial to objecting party).

1315, 1323 (ruling that prosecutor's misstatements violated due process and recognizing that "statements from the prosecutor matter a great deal"); *People v. Hill* (1998) 17 Cal. 4th 800, 823, 830 (a prosecutor's "deliberate or mistaken misstatements" of fact or law constitutes misconduct); *People v. Pitts* (1990) 223 Cal. App. 3d 606, 722 (it is improper for a prosecutor to present inadmissible and prejudicial evidence to a jury in the form of argument).)

As the United States Supreme Court recently acknowledged, a confession is "blatantly prejudicial information" that individuals cannot reasonably be expected to ignore. (*Skilling v. United States*, __ U.S. __ (2010) 130 S. Ct. 2896, 2902.) For this reason, courts have long held that impermissibly exposing a jury to a confession violates due process. (*See Jackson v. Denno* (1964) 378 U.S. 368, 388, n.18 (explaining that "[t]he Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.") (internal quotation omitted).) This is true because "[c]onfessions are indisputably damning evidence" and are "probably the most probative and damaging evidence that can be admitted against [a defendant]." (*Doody v. Schiriro*, 548 F.3d 847, 869-70 (internal quotation omitted).)

The prosecution's comments also implicated other specific rights of appellant. (*See Darden v. Wainwright* (1986) 477 U.S. 168, 182.) The record indicates that during appellant's first trial appellant was suicidal, suffering from auditory and visual hallucinations, and represented himself in order to argue that he should be sentenced to death. (1CT 62-63A; 3RT 315.) To use appellant's prior argument from these invalidated proceedings as an admission of guilt violated his constitutional rights. (*See, e.g., Spaziano v. Florida* (1984) 468 U.S. 447, 456 (the Eighth Amendment's

requirement of enhanced reliability in guilt determinations, serves "to eliminate distortion of the fact-finding process"); *Doody*, *supra*, 548 F.3d at 870 (erroneous introduction of a confession when "the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury," violated due process).) Furthermore, the introduction of such statements from appellant's prior trial violated section 1180, which requires that "[a]ll the testimony [in a retrial] must be produced anew," and mandates that "[t]he granting of a new trial places the parties in the same position as if no trial had been had." (Penal Code § 1180.)

B. The prosecution engaged in misconduct when questioning mental health experts about the mental state defense

To present the defense that appellant did not premeditate, deliberate, or harbor malice at the time of the crimes, counsel retained mental health experts who evaluated appellant and testified about his mental state. Dr. Mills was a psychiatrist appointed during federal habeas corpus proceedings to advise the district court on the neurological and psychiatric issues in appellant's case. (26RT 3124; 26RT 3134.) Defense counsel then retained Dr. Mills for the retrial. His primary findings were that because of prior abuse, appellant had dissociated during the crime, and suffered from brain damage and Asperger Syndrome. (26RT 3139-3140; 26RT 3145-3150.) Dr. Watson is the psychologist hired during the federal habeas corpus proceedings who performed neuropsychological testing on appellant in 1993. (22RT 2704-2705.) He was retained by appellant's retrial counsel and performed a second round of testing for the retrial in 1999 and 2000. (22RT 2741.) Dr. Watson's primary conclusions were that appellant suffered from brain damage and had dissociated during the crime. (22RT 2733; 22RT 2767-68; 23RT 2955.) Dr. Vicary, a psychiatrist, evaluated

appellant's competence to be sentenced during the first trial, revised his conclusions when presented with additional evidence and information during federal habeas corpus proceedings, and testified during the retrial in support of the conclusions of Drs. Watson and Mills. (28RT 3425-3426; 28RT 3444-3451; 28 RT 3484.)

The credibility and findings of the defense mental health experts were critical during the guilt phase. Rather than confront such evidence "fairly, staying well within the rules" (*Kojayan*, *supra*, 8 F.3d at 1323), the prosecutor impermissibly vouched for the prior testimony of two jailhouse informants in an attempt to undermine the mental state defense, improperly asked experts to opine on the ultimate question of appellant's mental state, was sarcastic and disparaging towards defense experts, and commented on appellant's failure to testify.

1. The prosecution vouched for the credibility and veracity of jailhouse informants to counter the mental state defense

The defense argued that appellant dissociated during the crimes because of a history of abuse by his father. The fact of appellant's dissociation was the key to their mental state defense. (*See, e.g.,* 31RT 3938 ("the point is the dissociation, not what the particular mental illness may be").) To undermine this position, in her cross-examination of Dr, Mills the prosecutor heavily relied on the 1982 preliminary examination testimony of two jailhouse informants, Mariano Alatorre and Rodney Catsiff. (21RT 2668 (prosecutor refers to Alatorre and Catsiff testimony as "highly relevant" to her questioning of mental health experts).) Mr. Alatorre and Mr. Catsiff were housed in the Los Angeles County Jail with appellant following his arrest in 1982. Both men came forward with information appellant allegedly had provided to them about the crime, including his reasons for committing murder, the type of weapon he used,

and how many times he stabbed Sandra Hughes. (21RT 2668.) During federal habeas corpus proceedings, both informants recanted in whole or in part the testimony they had given in this case. (26RT 3249.) During the retrial, the prosecutor stated that the Los Angeles District Attorney's Office policies regarding jailhouse informants were such that, "There was no way my office at this time considering their policy on jailhouse informants would ever allow me to call [Alatorre and Catsiff] as witnesses." (21RT 2672.)

Because the Alatorre and Catsiff statements had been provided to Dr. Mills, however, the court ruled that the prosecutor could cross-examine Dr. Mills about his reliance on their statements, over defense objection. (21RT 2675.) The prosecutor also argued that a limiting instruction would cure any potential prejudice that could arise from the use of the statements, stating that "the jury's instructed that they can hear about these things, but they're not being offered for their truth, they're only being offered in being able to evaluate the ultimate opinion of the psychiatrists. So I won't be getting in any of these things for their truth." (21RT 2680.) Nonetheless, over a continuing objection that the testimony was false and unreliable (26RT 3242), the prosecutor throughout her cross-examination of Dr. Mills sought to establish the truth of the recanted testimony through improper vouching and reference to facts not in evidence.

a. Questioning and argument about the veracity of the Alatorre and Catsiff testimony

Without asking whether Dr. Mills relied on the Alatorre and Catsiff testimony, the prosecutor asked Dr. Mills if someone in a dissociative state, as Dr. Mills believed appellant to have been at the time of the crimes, could remember details of the crime that appellant supposedly provided to Mr. Alatorre and Mr. Catsiff. (26RT 3242-3243.) Dr. Mills replied that he did

not rely on the Catsiff testimony about how many times Sandra Hughes had been stabbed, because Mr. Catsiff "completely recanted that perjurious (sic) testimony. ... [He] acknowledged that he was a jailhouse stoolie who was making up testimony for benefit." (26RT 3243-3244.) The prosecutor countered by attempting to bolster the truth and credibility of the recanted testimony by asking "how would [Mr. Catsiff] know how many times Sandy was stabbed if the defendant didn't tell him?" (26RT 3245.) When Dr. Mills noted that during habeas proceedings Mr. Catsiff said that he was given newspaper clippings and met with an officer who provided the testimony to him, the prosecutor then defended Mr. Catsiff's discredited testimony by stating, "Well, we have with Mr. Catsiff he actually wrote down notes after having the conversation with the defendant. He wrote down five pages of notes." The defense objected that these were facts not in evidence, but the prosecutor simply rephrased the question about the notes as an improper and prejudicial hypothetical question: "Hypothetically, if Mr. Catsiff wrote down his conversation with the defendant. . . . ." (26RT 3245) The prosecutor also argued that acting as informants and providing the police with testimony "doesn't necessarily mean they are lying, it just means they would like to get some information they could use for their own benefit, right?" (26RT 3246.)

The prosecutor also tried to establish the veracity of the Catsiff testimony by suggesting that, when appellant supposedly gave this information to Mr. Catsiff, there was no autopsy report indicating the number of times Sandra was stabbed. The defense again objected to the prosecutor assuming facts not in evidence, and the court directed the prosecutor to rephrase the question. (26RT 3246.) Continuing to rely on facts not in evidence, the prosecutor suggested that the first officer arriving on the crime scene saw Sandra and called the paramedics, that Sandra was

taken out of the house immediately, and that no other police officers had seen her before she was taken to the hospital. The prosecutor argued to Dr. Mills that "except for the doctors until the autopsy report, nobody would really know how many times Sandy was stabbed, would they?" The defense objection to the questioning as calling for speculation was sustained. (26RT 3247.)

In spite of the fact that during habeas proceedings Mr. Alatorre and Mr. Catsiff explained how they obtained information from sources other than appellant or had simply lied about the information they provided, the prosecutor urged Dr. Mills to accept that "in their testimony they talk about the type of weapon used. And they are correct. One of them says the police don't have the gun which turns out to be correct. They say how many times Sandy was stabbed which we are pretty close to correct." (26RT 3252.) The prosecutor tried to establish that the fact that Mr. Alatorre and Mr. Catsiff had provided some similar information supported the veracity of their statements, and stated that at the time Mr. Catsiff denied providing testimony in exchange for leniency. (26RT 3253.)

After the lengthy questioning in which she repeatedly vouched for the veracity of the Alatorre and Catsiff testimony, the prosecutor then attempted to elicit a concession from Dr. Mills that if the Alatorre and Catsiff testimony were true, he could not diagnose appellant as having dissociated during the crimes. (26RT 3258.) When Dr. Mills stated that "Well, we have facts indicating clearly it is not true," the prosecutor berated Dr. Mills for believing the recantations and refusing to believe the first trial testimony. (26RT 3269.) The prosecutor attempted to discredit Dr. Mills' position by asking why Mr. Alatorre and Mr. Catsiff would "not [be] worried about perjury when they swear under oath in court to tell the truth and they don't tell the truth?" (26RT 3270.) The prosecutor returned to

this theme during her closing argument, referencing Dr. Mills' understanding that a detective had provided information to Mr. Alatorre and Mr. Catsiff and stating that "It is very popular these days to blame things on the police. ... I am still asking you do you think it is reasonable that the detective in this case took these jailhouse snitches, put them on the stand and they were lying?" (32RT 4096-97.) During her closing statements, the prosecutor again argued the reasons she believed the Alatorre and Catsiff testimony should be regarded as true, including that "under oath ... they would not admit getting something for [their testimony]." (32RT 4098.) After urging the truth of the Alatorre and Catsiff testimony as undermining Dr. Mills' diagnosis, the prosecutor concluded that "you have the doctor disregarding what doesn't fit into his diagnosis. Just that simple. The pile of stuff in this case that you have to ignore if you want to believe the defense just keeps getting bigger and bigger." (32 RT 4098.)

b. The prosecutor's questioning, argument, and comments constitute misconduct

Throughout her cross-examination of Dr. Mills, the prosecutor committed misconduct by repeatedly conveying her belief that there were many reasons to accept the Alatorre and Catsiff testimony as true and suggesting she had personal knowledge of facts not in evidence to support the veracity of the testimony. Such vouching is inherently dangerous because it "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather that its own view of the evidence." (*United States v. Young* (1985) 470 U.S. 1, 18; *see also United States v. Berger* (1935) 295 U.S. 78, 88 ("improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none"); *People v. Huggins* (2006) 38 Cal. 4th 175, 206-07 (improper

vouching "involves an attempt to bolster a witness by reference to facts outside the record.") (internal quotation omitted); *People v. Hill* (1998) 17 Cal. 4th 800, 827-28 (misconduct for prosecutor to refer to facts not in evidence "because such statements tend to make the prosecutor his own witness" and "can be dynamite to the jury because of the special regard the jury has for the prosecutor") (internal quotations omitted).)

Furthermore, in suggesting during her closing argument that the Alatorre and Catsiff testimony was true because the investigating detective would not have put them on the stand if they were lying, the prosecutor committed additional prejudicial error that undermined the fairness of appellant's trial. (*See, e.g., United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1224 (plain error for prosecutor to equate defense testimony with calling a government official a liar); *People v. Zambrano* (2004) 124 Cal. App. 4th 228, 242 (countering defense version of events by forcing the conclusion that law enforcement officers were lying is "an attempt to inflame the passions of the jury" that constitutes misconduct).) The prosecutor's questions to Dr. Mills also implied that the prior testimony should be given more weight than subsequent recantations because it was provided "under oath." Improper vouching occurs where a jury reasonably could have understood the prosecutor's questions and argument "as an expression of [her] belief that the government witness [ ] was telling the truth and the defendant [ ] was lying." (*United States v. McKoy* (1985) 771 F 2d 1207, 1211.)

By vouching for the veracity of the Alatorre and Catsiff testimony over defense objections, the prosecutor sought to use her influence to disprove the defense that appellant dissociated at the time of the crime. The prosecutor's improper questions and argument violated appellant's constitutional rights and rendered appellant's trial fundamentally unfair.

2. The prosecutor's questioning and argument on other matters related to the mental state defense further violated appellant's rights

Throughout the prosecution questioning of mental health experts for the defense, the prosecutor improperly asked defense experts to opine on appellant's mental state and questioned them with disparaging sarcasm when she disagreed with them. The prosecutor also committed misconduct by implicitly referencing appellant's decision not to testify and relying on facts not in evidence in her closing statement. These actions and misconduct further undermined the fairness of appellant's trial.

a. Improper questioning on appellant's mental state

California law provides that, "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact." (Penal Code § 29.) This prohibition includes eliciting opinion on the ultimate issue of the defendant's mental state through hypothetical questions. (*See People v. Bordelon* (2008) 162 Cal. App. 4th 1311, 1327.) Prejudicial questioning of experts for such inadmissible opinions warrants reversal of the resulting conviction. (*People v. Halvorsen* (2007) 42 Cal. 4th 379, 434 (Kennard, J., concurring and dissenting); *People v. San Nicolas* (2004) 34 Cal. 4th 614, 663.) Furthermore, the "deliberate asking of questions calling for inadmissible and prejudicial answers is misconduct." (*People v. Pitts* (1990) 223 Cal. App. 3d 606, 734.)

In spite of these prohibitions, the prosecutor attempted to elicit

opinions from the defense experts about appellant's specific intent. After setting forth her theory of appellant's planning and asking whether he had the capacity to create and carry out such a plan "to get away with it," the prosecutor asked, "Doesn't that reflect not only his ability to make that plan, but the fact that he in fact carried it out?" (23RT 2950.) The prosecutor also asked whether three lethal shots fired at Josephine Bloom "show that the defendant knew exactly what he was doing when he killed her, that he was intending to kill her?" (23RT 2952 (eliciting the answer from Dr. Watson that "I think it probably does.").) After providing her theory of how Sandra Hughes was killed as a hypothetical scenario, the prosecutor asked Dr. Watson, "Doctor, is this person trying to kill Sandra Hughes or not?" (23RT 2953.) The prosecutor summarized by stating that "So his plan is to kill his father and get away with it, he succeeds in killing his father he succeeds in killing the witnesses, he succeeds in getting rid of the evidence, he succeeds in everything but getting back to Christine's without getting caught." (23RT 2953.)

The defense objected: "I'm going to object to this whole line at this point. Move to strike it. This is the ultimate issue. This is for the trier of fact." The court responded, "Well, I've lost the question," and asked the prosecutor to start over again. (23RT 2953.) After reviewing Dr. Watson's testimony again, the prosecutor asked, "But was the plan possibly to kill his father and get away with it?" to which Dr. Watson stated, "I think originally that's probably part of the plan, yes." (23RT 2956.) The prosecutor engaged in a similar pattern of cross-examination on ultimate issues with Dr. Mills, again over defense objections. (*See, e.g.,* 27RT 3313 (asking Dr. Mills if a person in a dissociative state could "intend to do the things they are doing" and "Did Robert intend to shoot Jo three times in the head?").) The prosecutor's improper questioning elicited defense expert opinion that

appellant planned the crimes and acted according to that plan in killing three people. These conclusions on appellant's specific intent substantially prejudiced appellant in a case in which the only contested issue was appellant's mental state.

b. Disparaging and sarcastic questioning

It is misconduct for a prosecutor to denigrate the defense as a sham or otherwise disparage the defense. (*See United States v. Sanchez* (9th Cir. 1999) 176 F.3d 1214, 1224 (ruling that misconduct occurs when the prosecution suggested that the defense simply concocted a story for the sake of the defense).) "A prosecutor's rude and intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Samoya* (1997) 15 Cal. 4th 795, 841 (internal citations omitted).)

Throughout her cross-examination of defense experts, the prosecutor referred to expert opinions and the mental state defense in a disparaging and sarcastic manner. Referring to neurological deficits to which Dr. Watson testified, the prosecution asked how "would you expect to see those deficits rearing their ugly heads?" (22RT 2845.) Again, in questioning Dr. Mills about his Asperger diagnosis, the prosecutor asked, "You first said that you saw this Asperger's rear its ugly head in looking at Dr. Watson's reports?" (26RT 3184-85.) Dr. Mills replied that "I don't think it is appropriate to joke about something that is potentially so serious as this man's mental disorders." (26RT 3185.)

In describing Dr. Watson's testimony on direct, the prosecutor stated, "You are saying he's so mentally ... whacked-out ... that he cannot conform his behavior to the requirements of law?" (23RT 2951-52; see also p. 2954 (asking "what you are telling this jury is despite the fact that the

actions of the defendant are consistent with a plan, during that short time in the middle he was too whacked-out to know what he was doing, is that what you are telling us?").) Of Dr. Watson's opinion regarding appellant's dissociation, the prosecutor asked, "would you say, then, that if he was descending into madness at the time that he first shot his father, he then ascended from madness after he killed Sandra?" (23RT 2955 (in answering, Dr. Watson stated, "I believe that he had a dissociative experience during that period of time.").) Regarding Dr. Watson's conclusions about appellant's IQ, the prosecutor asked, "But basically we have to take [some of the IQ tests] which you've made a point of saying is consistent with your I.Q. test, with a grain of salt, or maybe a whole tub of salt?" (22RT 2791.)[98]

Finally, the prosecutor asked Dr. Watson if he was "aware of a number of articles that have come out that have said basically mental health professionals are not very good at telling when people are telling the truth?" (22 RT 2804.) The defense objected to the question as assuming facts not in evidence, and the objection was sustained, however the prosecutor continued questioning along this line. (*See* 22RT 2805 (asking "Are you aware of any articles that talk about the fact that psychologists are notoriously poor at identifying malingering and that's why tests are given?" and "Are neuropsychologists any better at telling whether people are malingering than regular psychologists?").) This suggestion that Dr. Watson was not qualified to identify malingering, the sarcastic dismissal of

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[98] This pattern of sarcasm and disparagement extended to non-substantive exchanges in front of the jury during the cross examination of Dr. Mills. For example, in response to the prosecutor requesting a moment to review her materials, Dr. Mills responded "I'm not going anywhere." The prosecutor replied," I wasn't talking to you. You don't get to go anywhere." (27RT 3331.)

Dr. Watson and Dr. Mills' opinions, and reference to supposed studies not in evidence constituted additional misconduct that prejudiced appellant.

c. Comments on the absence of testimony from appellant

"[T]he Fifth Amendment forbids comment by the prosecution on the accused's silence." (*Griffin v. California* (1965) 80 U.S. 609, 615.) As this Court has explained, "A prosecutor is prohibited from commenting directly or indirectly on an accused's invocation of the constitutional right to silence. Directing a jury's attention to a defendant's failure to testify runs the risk of inviting the jury to consider the defendant's silence as evidence of guilt." (*People v. Lewis* (2001) 25 Cal. 4th 610, 670.) Furthermore, "[p]ursuant to *Griffin*, it is error for a prosecutor to state that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf." (*People v. Hughes* (2002) 27 Cal. 4th 287, 371.) It also is improper for a prosecutor to comment on a defendant's emotions or behavior in the courtroom as evidence of his guilt. (*Beardslee v. Woodford* (9th Cir. 2004) 358 F.3d 560, 586; *see also People v. Jurado* (2006) 38 Cal. 4th 72, 129 (emotional displays must be "intended to convey a particular meaning to another person" to qualify as assertive conduct).)

Dr. Vicary testified that under stressful situations, appellant was likely to "snap," which included having a psychotic break, an emotional explosion, or entering into a dissociative episode. (28RT 3450.) During cross-examination, the prosecutor established that appellant's trial also was a stressful situation, suggesting that the jury could infer from the absence of conduct communicating appellant's distress in the courtroom that he did not break down in stressful situations. (28RT 3495.) The defense objected to these implications, arguing, "First of all, nobody knows if he snapped or not

in this situation." The defense continued by noting that "we are managing this case – when I say 'managing this case,' I think the Court knows what we're doing, You know, there's lots of things that happened during the proceedings in this trial which are not for the jury to see and shouldn't be that suggest all kinds of things." (28RT 3496-3497.) Counsel argued that commenting on the absence of assertive conduct by appellant to indicate his distress violated *Griffin*. The court acknowledged the defense efforts to manage the courtroom setting, stating, "I recognize you've kept [appellant] calm here by the assistance of the paralegal or Ms. Deetz throughout the trial." Nonetheless, the court overruled the defense objections (28 RT 3498), and the jury was free to infer facts about appellant's mental state during the crime from the absence of outbursts during court proceedings.

During guilt phase closing argument, the prosecutor noted that questions remained about the crimes, but argued that "we will never know what [appellant and his father] were talking about out there or what got him out of the house," and asked, did appellant intend to "find another live round to shoot [Sandra Hughes] again? Is that what he was doing at the kitchen window? We will never know that." (30RT 3831.) After the break in argument, the defense objected to both instances as *Griffin* error, asked the prosecutor to be cited for misconduct and made a motion for a mistrial. The judge denied the motion. (30RT 3848-49.) The prosecutor, however, had implied that because appellant failed to exculpate himself about such unknown and unknowable information, the jury could infer that he acted intentionally, not in a dissociative state, and therefore was guilty of first degree murder. These references to appellant's silence during the guilt phase violated his Fifth Amendment rights.

d. Improper reliance on facts not in evidence

In her guilt phase closing statement, the prosecutor argued against voluntary manslaughter by reminding the jury that "there is some evidence in this case that [Bloom Sr.] wasn't always a tyrant and there is some evidence in this case that he loved his son . . . he wasn't always not a nice man. You heard the telegrams in the Navy – to the Navy when [appellant] was in the Navy and they were loving." (30RT 3894.) In fact, the telegram statements were read by the prosecutor during her questioning of a witness. The statements were not in evidence and the prosecutor had been allowed to reference the statements only because they were not posited for their truth. Her subsequent reliance on the statements as evidence to counter the heat of passion defense was additional misconduct that violated appellant's due process and Confrontation Clause rights, his rights under the Eighth and Fourteenth Amendments to a determination of guilt based on reliable and accurate information, and his rights under the California law.

During the guilt phase of the trial the prosecution called one rebuttal witness, appellant's mother, Melanie Bostic. One of the only reasons the prosecution wanted Ms. Bostic to testify was so that she could be asked about telegrams Bloom Sr. ostensibly had written to appellant prior to the crime. (29RT 3708.) In response to defense objections that the content of the telegrams was inadmissible hearsay, the prosecutor argued they were not offered for their truth, but would be referenced to show Bloom Sr. did tell appellant that he loved him, "directly in contradiction to what [Ms. Bostic] testified to yesterday. She was aware of those letters. So that answer is untrue." (29RT 3712.) The court then allowed the prosecutor to read several excerpts from the telegrams to Ms. Bostic; instead, however, the prosecutor only asked Ms. Bostic to confirm that the

telegrams were from Bloom Sr. and that in them, he made several affectionate and supportive statements to appellant. (29RT 3726-3732.) The defense objected, arguing that "she was simply asked whether or not she recalled reading certain things in those telegrams and never asked whether or not that factored into any opinion she had or any testimony that she gave." (29RT 3737-38.) The trial court then allowed the prosecutor to follow up by asking Ms. Bostic whether the telegrams changed her previous testimony that Robert Bloom Sr. never said that he loved appellant. (29RT 3738-3740.)

This series of events, and the prosecutor's reliance on the telegram statements in closing argument, demonstrate that the prosecutor misrepresented her intent in using the statements, that the court erroneously allowed the prosecutor to question Ms. Bostic further to correct her improper references to the statements, and that the telegram statements were erroneously presented to the jury for their truth in order to undermine the quilt phase defense.

C. The prosecutor's misconduct was not harmless

In evaluating the impact of the prosecutor's improper questioning and argument, her comments must be viewed in the context of the trial. (*See Darden v. Wainwright* (1986) 477 U.S. 168, 179.) As noted, the sole defense at trial was based on appellant's mental state (*see, e.g.,* 31RT 3998), and defense counsel presented evidence and argued to establish voluntary manslaughter in the killing of appellant's father and involuntary manslaughter of the other two victims. (30RT 3802; 31RT 4012.) The evidence the prosecution presented to establish the elements of murder were limited and primarily circumstantial. (*See* 30RT 3809-10 (attempting to establish intent with evidence that appellant set up "a situation where he has someplace to go before the murders and after the murders" and practiced

with a rifle); *see also* 32RT 4081 (citing as evidence of intent an overheard comment by appellant to his father that "you won't be [running my life] for long").) Once the prosecutor was prohibited from relying on appellant's prior argument as an admission to the crimes, the prosecutor acknowledged that the ruling "puts me a very bad position." (19RT 2441; *see also id.* at 2451 (arguing that she needed appellant's argument for her case: "I do need it. I think I need all the evidence I can get.").)

The jury had a difficult time reaching verdicts during the guilt phase, deliberating for four days before arriving at a verdict of first degree murder on Count One (32RT 4142; 34RT 4202) and hanging on Counts Two and Three (34RT 4222). The jury did not reach second degree murder verdicts on Counts Two and Three until the prosecution dismissed the first-degree murder charges on those counts. (34RT 4230, 4232.) Furthermore, the effect of the prosecution's misconduct during the cross-examination of Dr. Mills carried over to the sanity phase because the jury asked to have Dr. Mills' entire testimony read back during their sanity deliberations. (37RT 4627.) Given the difficulty the jury had in reaching its verdicts on the question of appellant's mental state, it is plain that the prosecutor's misconduct was not harmless and appellant's convictions must be reversed.

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X.

THE TRIAL COURT PREJUDICIALLY ERRED IN ALLOWING CROSS-EXAMINATION OF DR. WATSON CONCERNING APPELLANT'S AND DEFENSE COUNSEL'S BEHAVIOR AND DEMEANOR DURING THE GUILT PHASE

The trial court erred in overruling defense counsel's objections and in denying their motion for mistrial regarding the prosecution's cross-examination of Dr. Dale Watson concerning the behavior and demeanor of appellant and defense counsel at counsel table. The hypothetical questions posed were unsupported by adequate foundation, introduced irrelevant, unreliable, inadmissible and prejudicial considerations on the issue of guilt, and improperly and unconstitutionally infringed on appellant's rights to assistance of counsel at trial, to not testify at the guilt phase of his trial, to due process, to a fair trial, and to a reliable determination of guilt, sanity and penalty. (U.S. Const., 5th, 6th, 8th, 14th Amends.; Cal. Const., art. 1, §§ 1, 7, 15-17; Evid. Code §§ 352, 721, 801, 803.) As a result, the judgment of guilt, including the sanity verdict on Count One, and the resulting death judgment, must be reversed. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Chapman v. California* (1967) 386 U.S. 18, 24.)

A. Proceedings Below

On direct examination of Dr. Watson, the psychologist who had conducted neuropsychological testing of appellant in 1993 and again in 1999-2000, the defense asked no questions about Asperger's Disorder. On cross-examination, over defense counsel's objection, the prosecutor elicited Dr. Watson's agreement that in his report he had stated that appellant appeared to meet the criteria for Asperger's Disorder, and that the diagnosis should be studied further. Dr. Watson did not diagnose appellant as having Asperger's Disorder, either in his report or in his testimony. (22RT 2857-

2858.)

On cross-examination Dr. Watson also testified that he thought there was some evidence appellant met, among others, Criterion 1 of Category A for the DSM-IV diagnosis of Asperger's Disorder (hereafter Criterion A-1), i.e., "marked impairment in the use of multiple nonverbal behaviors such as eye to eye gaze, facial expression, body postures, and gestures to regulate social interaction." The prosecutor then asked, "Well, if one were to watch him in court say today, he makes eye contact with his attorneys –." (22RT 2852.) Defense counsel immediately objected, on the grounds the question was "absolute speculation." (*Ibid.*) The prosecution rephrased the question:

> Hypothetically, if the defendant were to sit in the courtroom and make good eye contact with his defense attorneys and their assistant, and to watch the witnesses testify, and to then talk to his attorney, and then go back to watching the witness testify, would that tend to not be part of the Criteria A?

(22RT 2852-2853.) Defense counsel again objected, on the grounds it was an improper hypothetical and lacked foundation. (22RT 2853.) At the bench, they explained that the factual assumptions in the hypothetical could not be proved, and were not true. As an offer of proof, from their perspective interacting with appellant, defense counsel described appellant's eye-to-eye gaze, facial expressions and body postures as "completely inappropriate." (22RT 2853.)

The prosecutor claimed the question was based upon a list prepared by a prosecution expert who had been sitting in the courtroom for the previous three days, that it was true based upon her own observations, and that "everybody in this courtroom has seen him do each and everything that I have suggested." (22RT 2853-2854.)

The trial court stated, "Well, I certainly observed eye-to-eye

contact. I certainly observed numerous facial expressions. [¶] So I think it is proper. But you can also put on your doctor who observed it." (22RT 2854.) The prosecution never called the expert as a witness.

Defense counsel explained that these observations were beside the point:

> MS. DEETZ: It is not asking whether or not he makes eye-to-eye contact or facial expressions. It is whether or not – the point is the appropriateness. You can see him looking, but you don't know what[,] what's going on between the two of us. You can see the gestures, but you don't know if they are appropriate or not. . . . [] What I am suggesting is it is improper to bring in the relationship of Robert in the courtroom with his lawyers because none of you are privy to what's going on there. You don't know if it is appropriate or inappropriate. And the doctor sitting in the courtroom doesn't know the context. He's just looking at the – he doesn't know what we are talking about or whether it is appropriate or not.

(22RT 2854-2856.)

The trial court responded:

> As a hypothetical it certainly seems there has been constant eye-to-eye gaze between counsel. There is between the Court and the defendant numerous times. And as he has looked around during the courtroom at different times to refer to someone and when I say Miss Samuels he looks at that direction. I think that's what eye-to-eye gaze is. So ask it as a hypothetical.

(22RT 2853.)

Defense counsel further objected and asked for a mistrial, accusing the prosecution of invading the attorney-client privilege by having an expert sit in the courtroom to assess attorney-client interactions and then questioning Dr. Watson about what appeared to be going on in their conversations. (22RT 2855-2856.)

The trial court responded: "It is not verbal. It is not an invasion of privacy." (22RT 2856.) Defense counsel responded:

> It's assertive conduct, Your Honor. It doesn't have to be verbal. And it is an interpretation when you have no idea what's going on. [] I could be yelling at him under my breath at the same time as smiling at him in terms of trying to control the situation and that's in fact what happened sometimes.

(22RT 2856-2857.)

The trial court denied the motion for mistrial. (22RT 2857.) The prosecutor then asked Dr. Watson:

> Hypothetically, if the defendant is sitting next to the person that's sitting next to him, the woman that's sitting next to him making eye contact, smiling, gesturing with his hands, nodding up and down, speaking to her, she is speaking back to him, does that tend to tell you that we haven't met the criteria A-1?

(22RT 2857.)

Dr. Watson responded, "That would tend to argue against that." (*Ibid.*) He then elaborated:

> I do want to clarify something though, and I think it's been misstated a little bit, which is that you have selected one sentence from the report which had Mr. Bloom appears to meet the diagnostic criteria for Asperger's Disorders. [*sic*]
>
> After I discussed the [dis]order I said thus Mr. Bloom has many features consistent with this disorder. I want to be clear that I have not specifically made this diagnosis. I have asked that it be ruled out, but I have not made the diagnosis.

(22RT 2857-2858.)

On redirect examination, Dr. Watson referred to appellant's behavior he thought relevant to the applicability of Criterion A-1:

> His facial expression is kind of – it has an awkwardness to it. It just doesn't kind of fit sometimes. [¶] Now, I think he does sometimes have eye to eye gaze, but there's this kind of awkwardness about his – certainly with gestures. It's very awkward.

(23RT 2933.) Defense counsel then addressed with him the relevance of interactions at counsel table:

Q But in terms of these types of behaviors, does it depend on the context of what is going on; in other words, not just the facial behavior or the eye gaze, but the context within which this discourse may be going on?
A I would assume context is important.
Q Well, it talks about as part of this criteria to regulate social interaction?
A Right.
Q Counsel made reference to discussions at counsel table between the defense and Robert. [¶] Would you consider any discussions between a legal representative and a client, a defendant, in a capital case a social interaction?
A It's a social interaction in the sense of there's an interaction going on between people. Again, it's kind of – you don't know the content of it. Is it, again, trying to manage behavior from counsel to the defendant? You just don't know. I mean it's hard to say.

(23RT 2933.)

B. The Trial Court Erred In Permitting Cross-examination Regarding Courtroom Interactions Between Appellant and His Counsel

The courtroom demeanor of a non-testifying defendant in the guilt phase of a capital trial is legally irrelevant and inadmissible as evidence of guilt, and comment thereon by the prosecution is improper. (*People v. Heishman* (1988) 45 Cal.3d 147, 197.) Moreover prosecutorial comment on the demeanor of a non-testifying defendant infringes on that defendant's right not to testify. (*Ibid.*; *People v. Boyette* (2002) 29 Cal.4th 381, 434-435.) Appellant did not testify at the guilt phase. Thus, his courtroom demeanor and behavior were not evidence to be considered by the jury in the guilt phase. The prosecutor's reference to appellant's demeanor and behavior was therefore improper, and the trial court erred in overruling appellant's objections and denying the mistrial.

Nor was appellant's courtroom demeanor and behavior a proper subject for cross-examination of Dr. Watson. It was not relevant to Dr. Watson's testimony or opinion on direct examination regarding appellant's

neuropsychological testing or the brain damage demonstrated by that testing. Aside from the fact that the defense did not ask Dr. Watson any questions about Asperger's Disorder on direct examination, Dr. Watson testified on cross-examination that he had never diagnosed appellant with Asperger's Disorder. Nor did Dr. Watson, in his testimony or in his report, find that Criterion A-1 of the DSM-IV criteria for a diagnosis of Asperger's Disorder was applicable to appellant. Rather, his testimony on cross-examination was only that there was "some evidence" that appellant meets that criterion. (22RT 2858.) On the other hand, Dr. Mark Mills, who did diagnose appellant with Asperger's Disorder, did not determine whether Criterion A-1 was applicable to appellant, and did not rely on that criterion in making the diagnosis.[99] (27RT 3334, 3340.) Moreover, according to Dr. Watson and Dr. Mills, as well as the DSM-IV, a finding that Criterion A-1 applies is not a necessary prerequisite for diagnosing Asperger's Disorder, nor does its inapplicability preclude the diagnosis. (22RT 2852; 27RT 3334, 3340.)

Because Criterion A-1 was not the basis for any diagnosis of Asperger's Disorder by any expert, nor necessary for such a diagnosis, the question of whether or not appellant met that criterion was collateral and irrelevant. As a result, cross-examination on the subject, especially cross-examination directed to the demeanor and interactions of appellant and his counsel, was irrelevant and improper:

> [A] witness testifying as an expert . . . may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her

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[99] "I had a question mark for Criterion One. I had sort of a probably for Criterion Two. I thought he had Criterion or met Criterion Three. I thought he met Criterion Four." (27RT 3334.) The prosecutor did not question Dr. Mills about appellant's or defense counsel's demeanor or interactions during the trial.

> expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion.

(Evid. Code, § 721, subd. (a).) The applicability of Criterion A-1 was, at most, tangential to the subject of Dr. Watson's testimony, to the matter upon which his opinion was based, and to the reasons for his opinion. That some circumstance, i.e., interactions between appellant and defense counsel at trial, might "tend to argue against" a finding that appellant met Criterion A-1 added nothing to Dr. Watson's credibility, as he did not make such a finding.

While "a broader range of evidence may be properly used on cross-examination to test and diminish the weight to be given the expert opinion than is admissible on direct examination to fortify the opinion" (*People v. Coleman* (1985) 38 Cal.3d 69, 92), the trial court must exercise its discretion pursuant to Evidence Code section 352 to prevent the risk of prejudice from such cross-examination. (*Ibid.*) Moreover, Evidence Code section 803 provides that "[t]he court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion."

Hypothetical questions fall within the scope of proper expert testimony only when they are supported by evidence properly received at trial. (*People v. Sims* (1993) 5 Cal.4th 405, 437, citing *Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 860 ("The expert should base the opinion upon facts personally observed or upon a hypothesis supported by the evidence.") While, on cross-examination, there is a wider latitude for questioning expert witnesses, hypothetical questions must be "fair in scope and fairly relate to the state of the evidence in the case . . . ." (*Dincau v. Tamayose* (1982) 131 Cal.App.3d 780, 799.)

The prosecutor's hypothetical to Dr. Watson was not based on any

evidence in the case, nor did it concern evidence which it was in the power of the prosecution to present. Rather, it was based upon matters which were not a proper basis for expert testimony, relied upon speculation and conjecture rather than evidence, and infringed on appellant's exercise of constitutionally-protected rights. The cross-examination unconstitutionally infringed on appellant's right not to testify and upon his right to assistance of counsel. (See *United States v. Schuler* (9th Cir. 1987) 813 F.2d 978, 981-982; *United States v. Carroll* (4th Cir. 1982) 678 F. 2d 1208, 1209-1210; *People v. Schindler* (1980) 114 Cal.App.3d 178, 187-189.)

Criterion A-1, by its terms, is concerned with whether the patient's use of nonverbal mannerisms in regulating social interaction is impaired, rather than appropriate and effective. Such a determination necessarily takes into consideration the reactions and responses of the person or persons with whom the patient is interacting, as well as the patient's nonverbal mannerisms in reaction and response to the other person. The trial court's reliance simply on observations of eye-to-eye contact and facial expressions (22RT 2853-2854) thus missed the point. The prosecutor's questioning concerning the interactions of appellant and defense counsel necessarily included consideration of the demeanor and behavior of defense counsel as well as of appellant. Without reliable evidence of the content and context of those interactions, no reliable determination of impairment or appropriateness can be made. As counsel represented to the trial court, counsel "could be yelling at him under [his] breath at the same time as smiling at him in terms of trying to control the situation and that's in fact what happened sometimes." (22RT 2856-2857.) This focus on both appellant and defense counsel unconstitutionally infringed upon appellant's exercise of his right to the assistance of counsel. The content and context of the interactions of appellant and his counsel, being confidential and

privileged, were not cognizable or relevant evidence.

Testimony or comment about the demeanor and behavior of appellant and defense counsel during their courtroom interactions, in the absence of evidence of the content and specific context of those interactions, necessarily invokes speculation about privileged matters. If evidence of the content and context of appellant's and defense counsel's interactions was not admissible, a fortiori, speculation about such matters is completely outside the scope of the evidence properly available for the jury's consideration, and a wholly unreliable basis for expert opinion. Due process forbids inferences based on speculation. (See *People v. Morris* (1988) 46 Cal.3d 1, 21; see also, *People v. Garceau* (1993) 6 Cal.4th 140, 179 [impliedly agreeing that if "the probative value of ... testimony hinge[s] upon unreasonable speculation," its admission "abridg[es the defendant's] right to due process"]; see generally, *McKinney v. Rees* (9th Cir.1993) 993 F.2d 1378, 1384 [admission of evidence violates due process if no relevant and "rational inferences" may be drawn from it].) A reliable determination of whether or not appellant's "nonverbal mannerisms" during interactions with defense counsel demonstrated impairment in their use, or, rather, that they were appropriate and effective, would have depended on testimony by defense counsel themselves or some other reliable evidence of the content and context of those interactions, including evidence regarding counsel's participation in those interactions.

The prosecutor's cross-examination injected into the jury's considerations matters that fundamentally and necessarily were manifestations of appellant's exercise of his right to counsel. The meaning of the interactions could not reliably be analyzed or determined without a direct invasion of that right, either through jury speculation about attorney-client interactions or by compelling otherwise privileged testimony

concerning those interactions. If prosecutors were free to rely on a defendant's courtroom behavior and demeanor in interacting with counsel, the effect would be:

> to eviscerate the right to remain silent by forcing ... defendant[s] to take the stand in reaction to or in contemplation of the prosecutor's comments. In effect the defendant would be compelled to testify to explain any actual or possible behavior that the prosecutor might bring to the jury's attention....[T]here is no reason for use of such comments that would justify even a slight opening of the door to an invasion of constitutional rights.

(*United States v. Schuler* (9th Cir. 1987) 813 F.2d 978, 982.)

The reasoning and holding of *Schuler* are applicable here. Appellant had a Fifth Amendment right not to testify, and he elected to exercise that right at the guilt phase. His communications with counsel were confidential and privileged from disclosure by the Sixth Amendment. He had no effective way to dispute the prosecutor's insinuations without either taking the witness stand and explaining his own cognitive impairment, or having defense counsel do so, or having an appropriate expert directly involved in attorney-client interactions present during trial in order to testify if necessary.

Moreover, the prosecutor's exchange with Dr. Watson – which amounted to "comment on [appellant's] . . . off-the-stand behavior" – "constitute[d] a violation of the due process clause of the fifth amendment." (*United States v. Schuler*, *supra*, 813 F.2d at p. 981.) In particular, it violated the due process "right not to be convicted except on the basis of evidence adduced at trial." (*Ibid.*)

"Ordinarily, a defendant's nontestimonial conduct in the courtroom does not fall within the definition of 'relevant evidence' as that which tends logically, naturally, or by reasonable inference to prove or disprove a material issue' at trial." (*People v. Garcia* (1984) 160 Cal.App.3d 82, 91.)

Neither appellant's demeanor and behavior while interacting with defense counsel, nor counsel's demeanor and behavior during those interactions, were relevant evidence. There was no way Dr. Watson, the trial court, or a juror could reliably determine, based on reason rather than speculation, whether appellant's use of physical mannerisms in his interactions with counsel was impaired or not. A juror could only draw the desired inference by speculation concerning the content and context of those interactions.

The defense had not presented any evidence or asked any question relating to appellant's in-court demeanor, unlike the situations in *People v. Smith* (2007) 40 Cal.4th 483, 525, where a defense expert at defense counsel's prompting analyzed defendant's courtroom conduct, or *People v. Heishman*, *supra*, 45 Cal.3d at page 187, where the prosecutor's comment on defendant's facial expressions during the penalty phase were held unobjectionable because the defendant had placed his own character in issue as mitigation. The defense here had not questioned Dr. Watson about Asperger's Disorder at all. The prosecution, over defense objection, introduced the subject with Dr. Watson.

That the prosecution relied upon questions purportedly prepared by a prosecution expert, based on that expert's observation and evaluation of interactions between appellant and defense counsel in the courtroom, does not justify or validate the prosecutor's cross-examination here. To the extent the prosecutor's purported expert actually witnessed behavior sufficient to undercut a determination that Criterion A-1 applied to appellant, that expert could only have done so by improperly and unconstitutionally invading confidential attorney-client communication, i.e., by determining the content and context of those interactions. Otherwise, any analysis of the behavior depended upon speculation and conjecture and would be wholly unreliable.

C. The Error Was Prejudicial and Requires Reversal of the Judgment

While comment on a defendant's courtroom demeanor has been evaluated under the *Watson*[100] test for state law error (*People v. Garcia*, *supra*, 160 Cal.App.3d at pp. 93-94, fn. 12; *People v. Medina* (1990) 51 Cal.3d 870, 896), in this case the *Chapman*[101] standard applicable to error of constitutional dimension governs, because the error denied appellant his Fourteenth Amendment right to due process, infringed directly upon appellant's Fifth Amendment right not to testify at the guilt phase, as well as his Sixth Amendment right to the assistance of counsel at trial, transforming his exercise of that right into evidence to be used against him. The jury was directed, by the prosecutor's questions and the trial court's rejection of appellant's objections to those questions, to consider not only appellant's own demeanor and behavior in dealing with counsel, but also counsel's demeanor and behavior in dealing with appellant, and to speculate on the content, context and meaning of those interactions.

The greatest harm from the prosecutor's cross-examination concerning the interactions of appellant and defense counsel is not from Dr. Watson's answers, nor the direct effect those answers might have had on the jury's assessment of Dr. Watson's testimony. The most serious harm came from the invasion of the attorney-client relationship, directing the jurors' attention to consideration of the demeanor and behavior of both appellant and defense counsel, and provoking speculation as to the content and context of those interactions, in an effort to undermine the credibility generally of the defense mental-health expert testimony. The trial court's ruling virtually transformed appellant and defense counsel into witnesses,

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[100] *People v. Watson* (1956) 46 Cal.2d 818, 836.

[101] *Chapman v. California* (1967) 386 U.S. 18, 24

albeit unsworn and non-testifying, who by their conduct in the courtroom were displaying legitimate evidence relevant to the jurors' assessment of the expert opinions and testimony presented by the defense.[102] The unreliability of consideration of such matters, and the continued consideration of the demeanor and behavior of appellant and defense counsel throughout the trial, in light of the centrality of the mental health evidence to the defense case, rendered the otherwise brief cross-examination on this point inordinately prejudicial.

Moreover, the prosecutor specifically referred to the inapplicability of Criterion A-1 during closing argument. (30RT 3879-3890.) While the prosecutor claimed to be referring to Dr. Mills's testimony, the primary discussion of that issue occurred during the cross-examination of Dr. Watson. The prosecutor's reprise of this straw-man argument concerning the applicability of Criterion A-1 thus highlighted these improper and prejudicial matters to the jury.[103]

That appellant committed the homicides in this case was never disputed by the defense. The central issue in both the guilt and sanity

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[102] See *United States v. Wright*, *supra*, 489 F.2d at p. 1186 ["What the jury may infer, given no help from the court, is one thing. What it may infer when the court in effect tells it that the courtroom behavior of the accused constitutes evidence against him is something altogether different."]; *United States v. Pearson* (11th Cir.1984) 746 F.2d 787, 796 [in overruling defense objection and in failing to give a curative instruction, the court effectively gave the jury an incorrect impression that defendant's behavior off the stand was evidence upon which the prosecutor was free to comment].

[103] The prosecutor misstated the evidence, telling the jury Dr. Mills had found Criterion A-1 applicable (30RT 3879-3880), which was not true. (See 27RT 3334.) The prosecutor also misstated Dr. Watson's testimony, telling the jury he had found Asperger's Disorder (30RT 3880), which was contrary to his testimony. (See 22RT 2857-2858.)

phases was appellant's mental state at the time of the homicides, and depended largely upon the opinions of the mental-health witnesses called by the defense. The trial court, by allowing the prosecution's cross-examination regarding attorney/client interactions during the trial, allowed the jurors to rely upon improper, unreliable and unconstitutional considerations in assessing the mental-health evidence and in their deliberations on appellant's mental state, rendering the resulting verdicts unreliable. The prejudicial effect of the trial court's error continued through the sanity phase, not only because the guilt verdicts were unreliable, but because the jurors' consideration of the interactions of defense counsel and appellant during the guilt phase was part of the evidence which the jury was to consider during the sanity phase, which resulted in a verdict of sanity on Count One.

"'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation.]" (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) As demonstrated, that the jury saw this as a close case is apparent.

Respondent cannot establish beyond a reasonable doubt that the error did not contribute to the jury's guilt verdicts or the verdict of sanity as to Count One. The judgment of guilt on all three counts, including the special circumstance and sanity verdict as to Count One, as well as the penalty verdict, must therefore be reversed. (*Sullivan*, *supra*, 508 U.S. at p. 279; *Chapman*, *supra*, 386 U.S. at p. 24.)

XI.

THE TRIAL COURT ERRED BY REFUSING TO GIVE VOLUNTARY MANSLAUGHTER INSTRUCTIONS ON COUNTS TWO AND THREE, REQUIRING REVERSAL ON THOSE COUNTS

Appellant requested voluntary manslaughter instructions on all three counts. While the trial court at first agreed such instructions should be given (28RT 3610-3611), upon being directed by the prosecution to *People v. Spurlin* (1984) 156 Cal.App.3d 119 and *People v. Saille* (1991) 54 Cal.3d 1103, the court denied the request as to Counts Two and Three, in violation of appellant's rights to due process, to a fair jury trial, to present a defense and to a reliable determination of guilt, sanity and penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments. (*People v. Breverman* (1998) 19 Cal.4th 142, 188-189, dis. opn. of Kennard, J.; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 698-699; *Osborne v. Ohio* (1990) 495 U.S. 103, 122-124 and fn. 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) The error cannot be found harmless beyond a reasonable doubt, and therefore requires reversal of the convictions on Counts Two and Three, as well as of the special circumstance finding and the death judgment.

A. Proceedings Below

1. Guilt Phase Evidence Supporting Voluntary Manslaughter Instructions

The prosecution conceded, and the trial court found, there was evidence to support instructions on voluntary manslaughter, on the basis of heat of passion, as to Count One, the homicide of Bloom, Sr. (28RT 3606.) The evidence demonstrated that Josephine Bloom was killed seconds after Bloom, Sr., and that Sandra Hughes was killed within 30 seconds to a minute after that. All were within a matter of feet of one another, in the same rather small house. (See, e.g., 17RT 2090-2091, 18RT 2254.)

The prosecution's evidence demonstrates that before he was shot Bloom, Sr., was "hollering" at appellant outside the house. Soon after Bloom, Sr. convinced appellant to enter the house, appellant fled the house, followed by Bloom, Sr., who continued to yell at him. Appellant was 18 years old, 5'7", 105 lbs. (20RT 2639-2640.) Bloom, Sr., was 5'9", 200 lbs – nearly twice appellant's weight. (20RT 2603.)

The evidence also established that Bloom, Sr., had abused appellant throughout his life, physically and emotionally. He had bullied him, yelled at him and belittled him repeatedly. (18RT 2272, 2278-2280, 2346-2351; 24RT 2969-2971, 2975-2977, 2997-2998; 25RT 3055-3059, 3061-3064, 3075-3076, 3082.) Appellant never fought back. He was afraid of Bloom, Sr., and tried to please him. (18RT 2347-2349, 2356-2359; 19RT 2389-2391; 24RT 2976-2977, 2984; 25RT 3059-3060, 3073-3074.) About a month before the homicides, appellant told his brother, Eric, that he thought Bloom, Sr. would kill him, and that he didn't think he would live to his next birthday. (25RT 3068-3069.)

The afternoon before the homicides, appellant had an argument over the phone with his father, who had been looking for him. Appellant said, angrily, "You're running my life now, but you won't be for long." (18RT 2265-2269, 2275-2278.) That evening, when he arrived at Norma White's house, appellant was quiet, tense and pale. (18RT 2279-2280, 2353-2355.) According to Christine Waller, that was consistent with how appellant reacted when something was wrong or was upsetting him, such as when Bloom, Sr, confronted him. (18RT 2348, 2353-2355.)

The evidence presented by the prosecution also demonstrated that the homicides arose out of a sudden quarrel between appellant and his father. David Hughes heard Bloom, Sr., hollering at appellant, then saw him chase appellant down the street. A few minutes later, Bloom, Sr., went

inside the house, with appellant trailing behind. Hughes then[104] again heard Bloom, Sr., hollering at appellant as he ran down the street. (17RT 2072-2084.) Hughes then heard a gunshot, saw Bloom, Sr., grab his body and run toward the house, with appellant following, holding a rifle. Hughes heard two more gunshots, one of which hit Bloom, Sr. Hughes then saw Bloom, Sr., fall across the doorway. Appellant ran up to him, and Hughes heard another shot. Bloom, Sr.'s legs stopped moving.[105] (17RT 2084, 2087, 2101-1202, 2126, 2165.) Within seconds, Hughes heard Josephine scream, then two more shots. Within 30 seconds to a minute, Hughes heard another shot. (17RT 2090-2091.) After calling 911 Hughes saw appellant standing at the kitchen window, looking confused, just staring into space. Appellant then picked something up and drove away in Josephine's car. (17RT 2094-2099, 2131-2132, 2166.) At trial, Hughes estimated that from first hearing Bloom, Sr., hollering at appellant, until appellant drove away, took five to ten minutes. (17RT 2100-2101, 2140.)

Moises Gameros, who lived a few doors down and across the street from Bloom, Sr., also heard him yelling at appellant. Looking outside, he saw the two walking down the street, with appellant, holding a rifle, backing away from Bloom, Sr. He heard Bloom, Sr., say, "Well, that's it, Robert, I'm going to call the cops," and start walking toward the house, with appellant following about 20 feet behind, holding a rifle. (19RT 2462-

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[104] In earlier testimony Hughes estimated they were in the house three to four minutes, but expanded that to five to ten minutes in his testimony at this trial. (17RT 2100-2101, 2138-2140.)

[105] While Hughes testified that appellant shot Bloom, Sr. twice at the doorway, he had originally told the police, in 1982, that one of the two shots fired while Bloom, Sr. was running toward the house hit Bloom, Sr. in the back and that appellant only fired one shot in the doorway. (17RT 2101-1202, 2126.)

2463, 2465-2467, 2493, 2500-2502.) A minute after appellant followed Bloom, Sr., into the house Gameros saw appellant come running back out.[106] (19RT 2493-2494.) Bloom, Sr., then chased appellant, trying to grab him. After losing sight of appellant Gameros heard a shot, at which point Bloom, Sr., started screaming and turning around.[107] The expression on Bloom, Sr.'s face was "look what you did," meaning it was not intentional. Bloom, Sr., then ran toward the house. Appellant followed and shot at him again. (19RT 2467, 2469-2474, 2503-2505, 2513-2517.) Bloom, Sr. reached the porch and fell. Appellant stood over him and fired again. (19RT 2477-2478, 2505.) Then he went into the house, came back out, stood for about five minutes, went back in, and after another five minutes, came back out, put the rifle in the car, walked back to the house, then back to the car, then drove away at about ten miles per hour. (19RT 2483-2385, 2488-2489, 2509.)

2. Instruction Conference

Appellant requested voluntary manslaughter instructions on all three counts. The prosecution agreed there was substantial evidence supporting voluntary manslaughter instructions on Count One, but opposed such instructions on Counts Two and Three. The prosecution argued that there was no evidence that Josephine or Sandy did anything that could in any way mitigate malice on Counts Two and Three. (28RT 3606-3607.)

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[106] This is based on Gameros's testimony at the preliminary examination in 1982. At trial, Gameros testified that as appellant entered the house, Bloom, Sr. tried to grab the rifle from him. (19RT 2467, 2469-2470, 2503-2504, 2513-2517.)

[107] In a 1993 declaration under penalty of perjury, Gameros said that, as appellant ran and Bloom, Sr., grabbed at his shoulder, appellant swung the rifle around with his right arm and shot Bloom, Sr., holding the rifle with one hand and not looking at Bloom, Sr. He then turned around fully facing Bloom, Sr. and continued to shoot. (19RT 2516-2517.)

The prosecution characterized the defense as "the defendant went into either a dissociative state, a psychotic episode, or he has Asperger's Syndrome" (28 RT 3606), and argued that if the jury believed the expert testimony, they would have to acquit, but that if they did not they would have to find first- or second-degree murder. (28RT 3606-3607.)

The trial court initially agreed with the defense that voluntary manslaughter instructions should be given on all three counts, concluding it was for the jury to decide whether any heat of passion that might have provoked the killing of Bloom, Sr., had cooled by the time he killed Josephine and Sandra. The court gave the prosecution additional time to present authority on the issue. (28RT 3610-3612.)

The next day the prosecution cited *People v. Spurlin*, *supra*, 156 Cal.App.3d 119, as precluding a finding of heat of passion unless the victim was the one who had provoked the defendant, i.e., as requiring appellant have had an "independent heat of passion as to the victims that he killed." (28RT 3609; 29RT 3660, 3665.) The prosecution also cited *People v. Jackson* (1980) 28 Cal.3d 264, which involved felony murder, as holding that "predictable conduct by a resisting victim would [not] constitute the kind of provocation sufficient to reduce a murder charge to a voluntary manslaughter." (29RT 3661.) Consequently, the prosecution argued, evidence of Josephine's screaming, on its own, could not justify a finding of heat of passion. The prosecution also noted there was no evidence as to whether Sandra had screamed. (29RT 3661, 3666-3667, 3669.) On the other hand, the prosecution cited *People v. Saille*, *supra*, 54 Cal.3d 1103, for the proposition that involuntary manslaughter instructions should be given, because if the jury did not find malice, based on appellant's mental state, the appropriate verdict would be involuntary, not voluntary, manslaughter. (29RT 3662, 3668.)

The defense argued that *Spurlin*, decided well after the homicides in this case, did not apply, and that the law at the time was, and continues to be, that the defendant's state of mind, not the conduct of the victim, is the determining factor as to whether malice is negated. If the jury found appellant was provoked into acting under a heat of passion, the question for the jury would be whether he killed Josephine and Sandra while he was still under the influence of that heat of passion, or whether there had been a sufficient cooling off period. (29RT 3664-3665.) The defense also noted that this Court had held in *People v. Humphrey* (1996) 13 Cal.4th 1073, and *People v. Minifie* (1996) 13 Cal.4th 1055, that the defendant's state of mind, not the victim's conduct, determines whether a defense or mitigation is applicable. (29RT 3668-3671.) The defense also noted that in the 16 years since *Spurlin* the CALJIC heat of passion instructions had not changed, still focusing on the defendant's state of the mind, and that neither Penal Code section 192 nor the CALJIC instructions addressed who the provocateur had to be. (29RT 3670, 3675.)

The defense also noted that the prosecution had extensively cross-examined the defense experts in an attempt to undermine the proposition that appellant was in a dissociative state, leaving the issue as one for the jury to determine. The jury, defense counsel argued, could reject the idea of dissociation while still accepting that the homicides were committed in the heat of passion. (29RT 3668.)

The prosecution responded that, in the Use Notes for CALJIC No. 8.42, *Spurlin* is cited for the proposition that "Provocation can only serve to reduce murder to manslaughter when the victim actually initiated the provocation." (29RT 3670.)

Addressing *Saille*, the defense argued it was not the law at the time of the homicides, and thus was inapplicable; that at the time of the

homicides there was a difference between malice aforethought and intent to kill, whereas *Saille* later equated intent to kill with malice. (29RT 3671-3674.) The defense argued that the law, instructions and theories applicable in 1982 were applicable in this case. (29RT 3674.)

The prosecution responded that *Saille* was based on the elimination of diminished capacity in 1981, and reiterated but did not change the law, demonstrating that the elimination of nonstatutory voluntary manslaughter occurred prior to the homicides in this case. (29RT 3674-3675.)

The trial court then denied manslaughter instructions as to Counts Two and Three:

> All right. I am going to the give voluntary manslaughter on Count 1. I will not give it on Counts 2 and 3 based on the fact that voluntary manslaughter would appear to be contrary to the mental disorder defense that has been raised.
>
> This is contrary to what I indicated yesterday, but I was not familiar with the *Spurlin* and *Saille* case[s] and I have read those in their entirety as they were presented to me this morning.
>
> It also dramatically changed my opinion because I believe I said yesterday I wasn't going to give involuntary manslaughter, but so far I'm persuaded by the case that counsel submitted to me that was *Saille*, S-a-i-l-l-e, and I will hear your argument as to how you regard that one.

(29RT 3676-3677.) The trial court thereafter gave instructions on involuntary manslaughter on all three counts. (29RT 3771-3772, 3780-3781; 23CT 6144, 6160.)

3. Jury Deliberations on Counts Two and Three

After seven days of deliberation, three days after returning a verdict of first degree murder on Count One, the jury was unable to reach a verdict on Counts Two and Three. (23CT 6089-6094, 6103-6108, 24CT 6213-6215.) The jury was split on degree as to Count Two, with seven jurors voting for first degree murder and five voting for second degree murder. There was a three-way split on Count Three, with six voting for

first degree murder, five voting for second degree murder, and one voting for involuntary manslaughter. (34RT 4223-4224.) The deadlock was broken when the prosecution dismissed first degree murder charges on Counts Two and Three. (24CT 6213-6215; 34RT 4225-4235.) Ten minutes after being informed of the dismissal, the jury returned verdicts of second degree murder on both counts. (24CT 6213-6215.)

B. The Trial Court Erred in Refusing to Give Voluntary Manslaughter Instructions on Counts Two and Three

1. The Trial Court's Duty to Instruct

Denying instruction on a defense theory of the case by refusing an instruction on lesser-included offenses supported by the evidence, violates federal constitutional rights to due process, to fair trial by jury, and to present a defense. (*United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 159-160; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201; see also *Mathews v. United States*, *supra*, 485 U.S. at p. 63 [citing *Stevenson v. United States* (1896) 162 U.S. 313; *Keeble v. United States* (1973) 412 U.S. 205, 213.) In a capital trial, failure to instruct on a noncapital lesser included offense violates the Due Process Clause and the Eighth Amendment. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 633-38; *Vickers v. Ricketts*, *supra*, 798 F.2d 369; see also *Hopper v. Evans*, *supra*, 456 U.S. 605.)

A criminal defendant has a state constitutional due process right to have the jury instructed on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present. (*People v. Barton* (1995) 12 Cal.4th 186, 194-195; *People v. Sedeno* (1974) 10 Cal.3d 703, 715; *People v. Turner* (1990) 50 Cal.3d 668, 690.) On request, the trial judge must instruct on every included offense that the evidence tends to prove. (*People v. Noah* (1971) 5 Cal.3d

469, 478.) Before a requested instruction must be given on a lesser offense there need only be evidence sufficiently substantial to merit consideration by the jury. (*People v. Barton*, *supra*, 12 Cal.4th at p.195, fn. 4; *People v. Flannel* (1979) 25 Cal.3d 668, 684-685 and fn. 12.) In determining whether sufficient evidence supports an instruction, the Court does "not refer to the credibility of the evidence." (*People v. Middleton* (1997) 52 Cal.App.4th 19, 33, citing *People v. Mayberry* (1975) 15 Cal.3d 143, 151.) Substantial evidence is evidence sufficient to deserve consideration by the jury; evidence that a reasonable jury could find persuasive. (*People v. Barton*, *supra*, 12 Cal.4th at p. 201, fn. 8; see *People v. Vasquez*, *supra*, 32 Cal.4th at p. 116.) "The testimony of a single witness, including the defendant, can constitute substantial evidence requiring the trial court to instruct" on a lesser included offense. (*People v. Lewis* (2001) 25 Cal.4th 610, 646.) Doubt as to the sufficiency of the evidence to warrant instructions is resolved in favor of the defendant. (*People v. Flannel*, *supra*, 25 Cal.3d at p. 685; *People v. Cleaves* (1991) 229 Cal.App.3d 367, 372.)

The trial court also has the obligation to give instructions on the general principles of law relevant to the issues in the case before it, including instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense are present. (*People v. Vasquez* (2004) 32 Cal.4th 73, 115 [defendant has state constitutional right to have jury determine every material issue presented by evidence].) This obligation exists even if the parties object to such instructions. (*People v. Breverman* (1989) 19 Cal.4th 142, 154, 159 [obligation to give lesser included offense instruction not limited by the strategy, ignorance, or mistake of the parties].) This is the only way to give effect to the *Barton* edict that the verdict be no harsher nor more lenient than the evidence merits. (*Id.* at p. 159.) Further, the rule is to be

interpreted broadly, so that the trial court must instruct on all lesser included offenses raised by the evidence, not just those which seem the strongest based on the evidence or those upon which the parties have openly relied. (*Id.* at p. 155.)

The requirement that the jury receive comprehensive instructions on every supportable theory of a lesser included offense is particularly critical in capital cases. Giving the jury the opportunity to convict on a lesser offense when supported by the evidence ensures that the jury will give the defendant the full benefit of the reasonable doubt standard. When the evidence establishes that the defendant is guilty of a serious, violent offense but leaves some doubt as to an element justifying a conviction of a capital offense, the failure to give the "third option" inevitably enhances the risk of an unwarranted conviction. This "kind of risk cannot be tolerated in a case where a defendant's life is at stake." (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638.)

In *Beck*, the United States Supreme Court established that every capital defendant is entitled to a reliable lesser included noncapital offense instruction if the offense exists under state law and the evidence supports the instruction. (*Beck v. Alabama*, supra, 447 U.S. at p. 627; see also *Everette v. Roth*, *supra*, 37 F.3d at p. 261 [omission of lesser included voluntary manslaughter instructions violates federal due process where it results in "fundamental miscarriage of justice"]; *Vujosevic v. Rafferty*, *supra*, 844 F.2d at p. 1028 [failure to instruct on lesser included offense supported by the evidence violates federal due process].) Thus, in a capital case, where the evidence warrants a lesser included offense instruction, due process requires that the court give the instruction sua sponte. (*Vickers v. Ricketts* (9th Cir. 1986) 798 F.2d 369, 374.)

Moreover, at a defendant's request, the trial court is required to

give the jury an instruction that pinpoints the defendant's theory of the case, when it is supported by substantial evidence. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142, citing *People v. Saille*, *supra*, 54 Cal.3d at p. 1119; *People v. Elam* (2001) 91 Cal.App.4th 298, 308 ["The court must instruct the jury with respect to every defense theory of the case that is supported by substantial evidence."].) In addition, a criminal defendant has a federal constitutional right to adequate instructions on the defense theory of the case. (*Conde v. Henry*, *supra*, 198 F.3d at p. 739; *United States v. Mason* (9th Cir. 1990) 902 F.2d 1434, 1438.) The defendant also has a right to instruction on inconsistent defenses. (*Mathews v. United States* (1988) 485 U.S. 58, 63-64; *People v. Barton*, *supra*, 12 Cal.4th at p. 195; *People v. Atchison* (1978) 22 Cal.3d 181, 183; *People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn.7.)

This Court must independently determine whether the trial court erred by failing to instruct on a lesser included offense. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) This determination is a mixed question of law and fact and is made without deference to the trial court's ruling. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) There is a presumption, however, that "[d]oubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused." (*People v. Ratliff* (1986) 41 Cal.3d 675, 694; *People v. Flannel*, *supra*, 25 Cal.3d at pp. 684-685.)

2. Voluntary Manslaughter

Voluntary manslaughter is a lesser included offense of murder. (*People v. Wickersham* (1982) 32 Cal.3d 307, 326; *People v. Sedeno*, *supra*, 10 Cal.3d at p. 719.) The distinguishing element is malice. (Pen. Code §192; *People v. Coad* (1986) 181 Cal.App.3d 1094, 1106.) A defendant who commits an intentional and unlawful killing, but who lacks malice, is

guilty of voluntary manslaughter. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 153; *People v. Barton*, *supra*, 12 Cal.4th 186, 199.) An intentional unlawful homicide is voluntary manslaughter if the killer's reason was actually obscured as the result of a strong passion aroused by provocation sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection, and from this passion rather than judgment. (*People v. Lasko* (2000) 23 Cal.4th 101, 108; *People v. Breverman*, *supra*, 19 Cal.4th at p. 163.) A killing may constitute voluntary manslaughter if "shown to have been committed in a heat of passion upon sufficient provocation" (*People v. Sedeno*, *supra*, 10 Cal.3d at p. 719), for in such a case the absence of malice is presumed (*People v. Berry* (1976) 18 Cal.3d 509, 515). Thus, a person who intentionally or unintentionally kills as a result of provocation, that is, upon a sudden quarrel or heat of passion, lacks malice and is guilty not of murder but of the lesser offense of voluntary manslaughter. (*People v. Lasko*, *supra*, 23 Cal.4th at pp. 108, 109.) Where evidence of a sudden quarrel or provocation is presented, the prosecution has the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of the sudden quarrel or in the heat of passion. (*Mullaney v. Wilbur*, *supra*, 421 U.S. at pp. 703-704; *People v. Rios* (2000) 23 Cal.4th 450, 462; CALJIC No. 8.50; CALCRIM No. 570.)

Voluntary manslaughter requires "a passion as would naturally be aroused in the mind of an ordinarily reasonable person" (*People v. Steele* (2003) 27 Cal.4th 1230, 1252), which is an objective standard. (See also *People v. Middleton*, *supra*, 52 Cal.App.4th at p. 32.) While it is an objective standard, it must take into account the circumstances known to the defendant at the time. In assessing his mental state at the time of a charged crime, "a defendant is entitled to have the jury take into consideration all the elements in the case which might be expected to operate on his mind."

(*People v. Smith* (1907) 151 Cal. 619, 628; accord *People v. Minifie* (1996) 13 Cal.4th 1055, 1064; *People v. Bridgehouse* (1946) 47 Cal.2d 406, 410, overruled on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.)

"[T]he passion aroused need not be anger or rage, but can be any '"violent, intense, high-wrought, or enthusiastic emotion"' [Citation], other than revenge. [Citation]." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 163; see, e.g., *People v. Barton*, *supra*, 12 Cal.4th at p. 202 [defendant confronted victim after an "upset [ting] traffic accident" between victim and defendant's daughter]; *People v. Brooks* (1986) 185 Cal.App.3d 687, 694 [defendant was "very upset"]; *People v. Logan* (1917) 175 Cal. 45, 49 ["heat of passion may result from terror, anger, or jealousy"].)

As with any other mental state, the subjective component of heat of passion may be shown through circumstantial evidence. (See *People v. Barton*, *supra*, 12 Cal.4th at p. 202 [jury free to reject defendant's direct testimony that killing was accidental and to infer from circumstantial evidence that killing was intentional and committed in a reasonable heat of passion]; *People v. Bridgehouse*, *supra*, 47 Cal.2d at p. 409 [although defendant testified that he could only recall encountering wife's paramour and nothing else preceding killing, evidence that he was "white and shaking" after a series of provocative events was itself sufficient circumstantial evidence to establish heat of passion]; *People v. Brooks*, *supra*, 185 Cal.App.3d at p. 696 [heat of passion can be inferred from circumstantial evidence]; *People v. DeLeon* (1992) 10 Cal.App.4th 815, 824 [same]; *People v. Hoskins* (Mich. 1978) 267 N.W.2d 417, 419 [defendant may prove state of mind circumstantially; any contrary rule violates privilege against self-incrimination]; cf. *People v. Iniguez* (1994) 7 Cal.4th 847, 857; *People v. Renteria* (1964) 61 Cal.2d 497, 499.) Indeed, evidence

of provocation itself is circumstantial evidence from which the jury can infer the defendant killed in an intense emotion or a heat of passion. (*People v. Wickersham*, *supra*, 32 Cal.3d at pp. 323, 329; *People v. Bridgehouse*, *supra*, 47 Cal.2d at pp. 409-414.)

As to the objective component, no specific type of provocation is required under section 192. (*People v. Berry*, *supra*, 18 Cal.3d at p. 515; accord *People v. Lasko*, *supra*, 23 Cal.4th at p. 108; *People v. Breverman*, *supra*, 19 Cal.4th at pp. 162-163; *People v. Valentine* (1946) 28 Cal.2d 121, 141-144.) Provocation "may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation or reflection." (*People v. Lee* (1999) 20 Cal.4th 47, 59.) A heat of passion may be aroused by a series of events over a considerable period of time. (*People v. Berry* (1976) 18 Cal.3d 509, 515-516.)

"[I]f sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter." (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 327.) However, "[n]o particular period of time need elapse between a passion-producing quarrel and the subsequent killing. . . ." (*People v. Edgmon* (1968) 267 Cal.App.2d 759, 765.) Rather, "what constitutes a reasonable cooling time in a particular case depends upon the nature of the provocation and the circumstances surrounding its occurrence – a matter to be determined by the jury as a question of fact." (2 LaFave, Substantive Criminal Law (2d ed. 2003) § 15.2(d), pp. 786-787; see, e.g., *People v. Berry*, *supra*, 18 Cal.3d at p. 515; *People v. Edgmon*, *supra*, 276 Cal.App.2d at pp. 762-766 [defendant and father argue, resulting in physical fight; defendant leaves, goes home, retrieves gun, returns 15 to 30 minutes later and shoots bleeding and incapacitated father five times]; *People v.*

Brooks, *supra*, 185 Cal.App.3d at p. 695 [two hours elapse between provocative revelation and killing]; *People v. Birreuta* (1984) 162 Cal.App.3d 454, 462, fn. 6 [defendant argues with wife and a second woman in the latter's home, struggles with the second woman, goes home, returns, breaks in, and shoots wife and the second woman multiple times]; see also Perkins & Boyce, Criminal Law (3d. Ed. 1982) The Law of Homicide, § 1, 100.)

3. The Trial Court Erred in Denying Voluntary Manslaughter Instructions on Counts Two and Three as "Contrary to the Mental Disorder Defense That Has Been Raised"

The trial court erred as a matter of law in concluding that "voluntary manslaughter would appear to be contrary to the mental disorder defense that has been raised." (29RT 3676.) A defendant has the right under the federal and state constitutions to instruction on lesser included offenses even where inconsistent with the defense presented:

> When the charged offense is one that is divided into degrees or encompasses lesser offenses, and there is evidence from which the jury could conclude that the lesser offense had been committed, the court must instruct on the alternate theory even if it is inconsistent with the defense elected by the defendant . . . .

(*People v. Sedeno*, *supra*, 10 Cal.3d at p. 717, fn.7; *People v. Barton*, *supra*, 12 Cal.4th at p. 195; *Mathews v. United States*, *supra*, 485 U.S. at pp. 63-64; U.S. Const., 5th, 6th, 8th, 14th Amends.; Cal. Const. art. 1, §§ 7, 15, 16, 17.) The trial court's conclusion that voluntary manslaughter was inconsistent with the defense was also factually erroneous. The mental state evidence supported an argument that when appellant killed Josephine and Sandra he was still operating under a heat of passion arising from the quarrel with his father and stemming from substantial, long-term physical

and emotional abuse suffered at his father's hands. The prosecution's argument – if the jury believed the defense expert testimony, they would have to acquit, but if they did not believe it, they would have to find first- or second-degree murder – is simply wrong. (28RT 3606-3607.) As defense counsel argued below (29RT 3668), the jury could reject the concept that appellant was in a dissociative state during any or all of the homicides, yet still find the homicides were committed in the heat of passion. (See *People v. Barton*, *supra*, 12 Cal.4th at p. 202 [jury free to reject defendant's direct testimony that killing was accidental and to infer that killing was intentional and committed in heat of passion].) Defense counsel also noted that the prosecution had made a substantial effort cross-examining the defense experts in an attempt to undermine the proposition that appellant was in a dissociative state. This, counsel correctly argued, left the issue to the jury. (29RT 3668.) The court's refusal to give voluntary manslaughter instructions on Counts Two and Three improperly and unconstitutionally removed that issue from the jury.

4. Appellant Was Entitled to Voluntary Manslaughter Instructions on Counts Two and Three Even Absent Evidence Of Provocation By the Victims in Those Counts

The trial court also erroneously rejected voluntary manslaughter instructions on Counts Two and Three based upon *Spurlin*, *supra*, 156 Cal.App.3d 119, and the belief that the victim had to be the one who actually provoked the heat of passion. (See 29 RT 3676-3477.) *Spurlin* was wrongly decided, applying an analysis rejected by this Court.

At common law, the defendant had to actually have killed in a heat of passion and upon adequate provocation for a homicide to qualify as voluntary manslaughter. (See, e.g., *Regina v. Welsh* (1868) 11 Cox Crim.

C. 336, 338; *Mullaney v. Wilbur*, *supra*, 461 U.S. at p. 693 [recounting development of heat of passion doctrine].) Unlike the modern rule, the common law strictly limited or "pigeon-holed" the categories of adequate provocative conduct. (*Brown v. United States* (D.C. Ct. App. 1990) 584 A.2d 537, 540; see also, e.g., *Regina v. Mawgridge* (Q.B. 1707) 84 Eng. Rep. 1107, 1114-1115; LaFave, *supra*, § 15.2(b) at pp. 777-778; *Perkins & Boyce*, *supra*, at pp. 86-87.) "Provocative words [were] not . . . adequate provocation, [no matter how] abusive, aggravating, contemptuous, false, grievous, indecent, insulting, opprobrious, provoking, or scurrilous they [might] be." (*Perkins & Boyce*, *supra*, at p. 93; *Mawgridge*, *supra*, at pp. 1114-1115.) Similarly, the common law actually required the defendant to observe or see the provocative act. (See LaFave, *supra*, § 15.2(b) at pp. 780-781.)

In 1872, the Legislature repealed Section 23 of the Crimes and Punishment Act of 1850 by enacting section 192. Section 192 omits any language defining or limiting the conduct which can provoke a heat of passion. Hence, as this Court explained 64 years ago:

> A code section is presumed to be a continuation of the common law only when it and the common law are substantially the same. Section 23 of the Crimes and Punishment Act of 1850 was substantially the same as the common law on the subject but section 192 of the Penal Code, which superseded it, is not substantially the same. . . . [T]he fact that the common law limitation on the types of circumstances which could be regarded as furnishing adequate provocation to reduce a homicide to manslaughter was originally a part of the statutory law of this state is not a proper basis for holding that it is still the law. On the contrary such fact, in light of the repeal of the statute which incorporated it, together with enactment of a new law on the same subject with the important limitation deleted, strongly suggests that the Legislature intended a more liberal rule.

(*People v. Valentine*, *supra*, 28 Cal.2d at pp. 142-143.) Because section

192 omits the language qualifying or limiting adequate "provocation" to particular categories, it modified the common law to broaden or "liberalize" the standard. (*People v. Valentine*, *supra*, 28 Cal.2d at pp. 139-143; accord, *People v. Logan*, *supra*, 175 Cal. at p. 48.)

Section 192 does not explicitly require any "provocation." Nevertheless, voluntary manslaughter under section 192, subdivision (a) does require that the heat of passion be reasonable under an objective, reasonable person standard. (*People v. Valentine*, *supra*, 28 Cal.2d at pp. 136-144; *People v. Logan*, *supra*, 175 Cal. at p. 48.) Thus, "provocation" – understood as a shorthand reference to this reasonable person requirement – is still necessary under section 192. (See *People v. Valentine*, *supra*, 28 Cal.2d at pp. 136-144; *People v. Logan*, *supra*, 175 Cal. at p. 48; accord, *People v. Guitierrez* (2002) 28 Cal.4th 1083, 1142.) Unlike the rigid categories of provocative conduct recognized at common law, the reasonable person standard is the pivot around which the "provocation" requirement turns under section 192. (See *People v. Valentine*, *supra*, 28 Cal.2d at pp. 136-144.)

People v. Logan, *supra*, 175 Cal. 45, was one of the earliest decisions by this Court to directly consider the scope of provocation as measured by the reasonable person standard. In so doing, it adopted the standard set forth in *Maher v. People* (Mich. 1862) 10 Mich. 212. (175 Cal. at p. 49; see, e.g., Taylor, *Comment: Provoked Reason In Men and Women: Heat of Passion Manslaughter and Imperfect Self-Defense* (1986) 33 U.C.L.A. L.Rev. 1679, 1694.) As the Court in *Logan* explained, the fundamental nature of the inquiry is:

> whether or not the defendant's reason was, at the time of his act, so disturbed or obscured by some passion – not necessarily fear and never, of course, the passion for revenge – to such an extent as would render ordinary men of average disposition liable to act

> rashly or without due deliberation and reflection, and from this passion rather than judgment.

(*People v. Logan*, *supra*, 175 Cal. at p. 49, citing *Maher*, *supra*.) The Court in *Maher* observed "the almost infinite variety of facts presented by the various cases as they arise [citation omitted]," and concluded that "[t]he law can not with justice assume, by the light of past decisions, to catalogue all the various facts and combinations of facts which shall be held to constitute reasonable or adequate provocation." (*Maher v. People*, *supra*, at pp. 222-223.) California continues to apply this standard today. (*People v. Valentine*, *supra*, 28 Cal.2d at pp. 136-144.) As this Court has consistently recognized, "no specific type of provocation [is] required under section 192. . . ." (*People v. Berry*, *supra*, 18 Cal.3d at p. 515; accord, *People v. Lasko*, *supra*, 23 Cal.4th at p. 108; *People v. Breverman*, *supra*, 19 Cal.4th at pp. 162-163.)

Although words alone were insufficient to amount to adequate provocation under the common law and former section 23 of the Crimes and Punishment Act of 1850, there is no such limitation under section 192. (*People v. Valentine*, *supra*, at pp. 141-142.) Words sufficient to provoke a reason-obscuring passion in a reasonable person are adequate "provocation." (*Ibid.*) Similarly, although information communicated to the defendant was insufficient provocation at common law, it is sufficient under section 192 if it would provoke passion in a reasonable person. (See, e.g., *People v. Bridgehouse*, *supra*, 47 Cal.4th at pp. 408-414 [wife's revelation of affair]; *People v. Brooks*, *supra*, 185 Cal. App.3d at pp. 693-694 [revelation that defendant's brother was killed and defendant's belief that it was victim who killed him].)

Significantly, unlike repealed section 23 under the former Crimes and Punishment Act of 1850, which required provocation from the "person

killed," and unlike statutes in other jurisdictions which have adopted the common law, section 192 does not explicitly impose any requirement that the provocation come from the "person killed."

Given both the omission in section 192 of any language requiring provocation from the victim and the history of the statute, it follows that although common law categories of provocation would satisfy the reasonable person requirement of section 192, "adequate provocation" is not limited to those categories. The critical question is whether the act or event would "provoke" a reasonable person into a state of passion. Under the reasonable person test, the focus is not on what actually occurred, but rather on how a reasonable person would perceive a particular event and whether it would provoke in him a reason-obscuring passion. (See, e.g.,; *People v. Barton*, *supra*, 12 Cal.4th at p. 202 [jury could reasonably conclude that although victim was unarmed, defendant believed victim was armed]; *People v. Brooks*, supra, 185 Cal.App.3d at pp. 693- 695 [information communicated to defendant led him reasonably, if mistakenly, to believe victim had killed his brother].)

Consistent with the principle that provocation is measured only by the objectively reasonable person test and not by any particular categories, in 1946 this Court implicitly recognized that a reasonable person can be provoked to passion as to a victim where he or she reasonably associates or connects the victim with a third party's passion-provoking conduct. (*People v. Bridgehouse*, *supra*, 47 Cal.2d 406, 411-414.) In *Bridgehouse*, the defendant's wife revealed she had been having an affair for over a year. Sometime later, the defendant discovered, among other things, clothing belonging to his wife's paramour in the closets of his home and that his wife had used a family credit card to purchase a gift for him. Several months after his wife's revelation, the defendant moved out of the family

home, filed for divorce and sought custody of their children. At his wife's request, the defendant met with her at their home several days later. She told him she would fight the divorce and would kill him if he tried to take their children away from her. The next morning, the defendant, who was armed, went to his mother-in-law's home to collect some of his son's clothing. There he unexpectedly encountered his wife's paramour. According to his mother-in-law, the defendant was white and shaking. She went into the kitchen to get him a glass of water. When she returned, the defendant was in the act of shooting the paramour. He was convicted of second degree murder. (*Id.* at pp. 407-411.)

Although the defendant's wife, not the victim, was the primary provocateur, and although there was no evidence that the victim had actually engaged in any outward act of provocation immediately before the defendant shot him, this Court reversed the second degree murder conviction. (*People v. Bridgehouse*, *supra*, 47 Cal.2d at p. 414.) Focusing not on the source of each provocative event, but on the defendant's state of mind and whether the series of events would have provoked a reasonable person's passion against the victim, this Court held that "as a matter of law . . . under the circumstances here presented there was adequate provocation to provoke in the reasonable man such a heat of passion as would render an ordinary man of average disposition likely to act rashly or without due deliberation and reflection." (*Ibid.*) Consequently, this Court reduced the crime from second degree murder to voluntary manslaughter. (*Ibid.*) Thus, consistent with the settled rule that "no specific type of provocation is required" under section 192, *Bridgehouse* stands for the principle that "provocation" under that statute is limited by nothing more than the reasonable man requirement. Thus, the application of the heat of passion doctrine to a given set of facts should be a clear and straightforward

exercise.

Unfortunately, these clear waters have been muddied by *People v. Spurlin*, *supra*, 156 Cal.App.3d 119, in which the Court of Appeal relied on the inapposite common law tendency to categorize conduct that constitutes provocation. The court held that voluntary manslaughter instructions were properly given as to the defendant's killing of his wife, whose conduct on the night of the killing "can be said to have ignited his long-smoldering resentment of her sexual conduct bringing about an intense, high-wrought reaction leading to her death." (*Id.* at p. 126.) However, the court also held that such instructions were properly withheld as to the subsequent killing of a child, who had slept throughout the events:

> [The defendant] confessed to the police and testified before the jury [the child]'s life was taken, not as a result of rage or passion or anger aroused by [the child] but as part of a plan to eliminate [defendant's] family. Under common law principles, [the child]'s death was not the consequence of adequate provocation or heat of passion directed at him.

(*Ibid.*)

In framing the issue as to whether the "provocation must be caused by the victim" (*People v. Spurlin*, *supra*, at p. 125), the court recognized that nothing in section 192 explicitly requires that provocation come from the victim, but reasoned that "statutory voluntary manslaughter derives from common law principles." (*Id.* at p. 126.) From its examination of the common law, the court concluded the provocation must ordinarily come from the victim. (*Id.* at p. 126.) Finding that the facts did not fall within any of the commonly recognized exceptions to this victim-as-provoker "rule," the court affirmed the murder conviction as to the defendant's son. (*Spurlin*, *supra*, at p. 129.) While an examination of the common law may have been a legitimate starting point for academic analysis, it was an entirely inappropriate basis for the court's decision. As this Court has

explicitly held, provocation under section 192 is broader than the common law definition. (*People v. Valentine*, *supra*, 28 Cal.2d at pp.141-143)

Unfortunately, since *Spurlin*, several published decisions have simply cited that case without independent analysis (or have cited cases that cite *Spurlin* without independent analysis) in fleeting and unconsidered recognition of a general "rule," subject to limited exceptions, that provocation must come from the victim.[108] Perhaps even more alarming, considering the number of trials that do not result in published appellate decisions on the issue, the Comment to CALJIC No. 8.40, the standard voluntary manslaughter instruction, states: "Provocation can only serve to reduce murder to manslaughter when the victim actually initiated the provocation." *Spurlin* is the only authority the committee cites for this proposition.

That there in fact is no rigid requirement under section 192 that the provocation come from the victim finds compelling support in two more recent decisions of this Court. In *People v. Minifie*, the defendant entered a bar where one of the victims, Tino, was sitting at a table with a group of others. Tino had broken a foot and was on crutches. He knew who the

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[108] (See, e.g., *In re Thomas C.* (1986) 183 Cal.App.3d 786, 798 [citing *Spurlin* in support of general "rule"]; *In re Cordero* (1988) 46 Cal.3d 161, 191 and fn.4 (conc. opn. of Mosk, J. [citing *Spurlin* and *Thomas C.*]); *People v. Steele*, *supra*, 27 Cal.4th at p. 1253 [citing *Thomas C.*]; *People v. Lee*, *supra*, 20 Cal.4th at p. 59 [citing *Thomas C.*, *supra*, but also recognizing exception where defendant reasonably, but mistakenly, believed victim was provoker]; *People v. Manriquez* (2005) 37 Cal.4th 547, 583 [citing *Lee*]; *People v. Avila* (2009) 46 Cal.4th 680, 705 [citing *Lee*]; *People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1247 [citing *Lee* and *Thomas C.*]; *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1411 [citing *Lee*, *Thomas C.*, and *Spurlin* in support of general rule and reasonable belief exception]; *People v. Bobo* (1990) 229 Cal.App.3d 1417, 1443 [citing *Spurlin*].)

defendant was and disliked him because he had killed one of Tino's friends, Jackie Knight. The defendant knew Tino by sight as a friend of Knight's who had been a pallbearer at his funeral. The defendant and Tino approached each other, exchanged words, and Tino punched the defendant in the face, knocking him to the floor. Tino's crutches fell and he turned to grab them.

The defendant pulled a gun, fired at Tino, and struck him and a bystander, Nordahl. The defendant claimed he had acted in self-defense. In support of his claim, he moved to present evidence that after he killed Knight, he had received a number of threats from Knight's family and friends. Because the defendant conceded that Tino had never previously threatened him, the trial court excluded evidence of the threats from the Knight family and friends. The defendant was convicted of assaulting both Tino and Nordahl, the unintended victim. (*People v. Minifie*, *supra*, 13 Cal.4th at pp. 1060-1064.)

This Court held the trial court erred. The third party threats were relevant and admissible as to the assaults on both Tino and Nordahl. (*Id.* at p. 1065.) The Court explicitly rejected the Attorney General's position that " '[a]bsent a showing that the defendant has reason to believe the victim has himself adopted the threat, third-party threats should be inadmissible to support the objective reasonableness of self-defense.'" (*Id.* at p. 1067.) This Court explained that while the victim's behavior is certainly relevant, the flaw in the Attorney General's argument:

> is that it assumes the law of self-defense centers on the victim's act and intent. To the contrary, the law recognizes the justification of self-defense not because the victim "deserved" what he or she got, but because the defendant acted reasonably under the circumstances. Reasonableness is judged by how the situation appeared to the defendant, not the victim. . . . If the defendant kills an innocent person, but circumstances made it reasonably appear

> that the killing was necessary in self-defense, that is tragedy, not murder. The test, therefore, is not whether the victim adopted the third party threats, but whether the defendant reasonably associated the victim with those threats.

(*Id.* at p. 1068.)

Of course, self-defense, like heat of passion manslaughter, requires the defendant to have responded to some conduct – a threat in the case of self-defense and provocation in the case of heat of passion manslaughter. Self-defense, like heat of passion manslaughter, incorporates a reasonable person standard, under which the conduct may ordinarily come from the victim. (See *LaFave*, *supra*, § 15.2(b) at p. 784 and fn. 76 [legal principles relevant to self-defense are analogous to heat of passion doctrine].) If self-defense, which actually justifies the killing of the victim, does not turn on whether the victim "deserved" what he or she got, certainly the mitigating effect of heat of passion does not either. In both cases, the question is whether the defendant acted "reasonably;" a question "judged by how the situation appeared to the defendant, not the victim." (*People v. Minifie*, *supra*, 13 Cal.4th at p. 1068; see, e.g., *People v. Valentine*, *supra*, 28 Cal.2d at pp. 136-144.)

Thus, just as in the self-defense context, heat of passion may mitigate the killing of an otherwise innocent victim if the defendant reasonably, though mistakenly, believes that the victim engaged in provocative conduct. (See, e.g., *People v. Humphrey* (1996) 13 Cal.4th 1073, 1083 [self-defense]; *People v. Lee*, *supra*, 20 Cal.4th at p. 59 [heat of passion]; *People v. Brooks*, *supra*, 185 Cal.App.3d at pp. 693-694 [heat of passion].) Similarly, just as in the self-defense context, the heat of passion doctrine mitigates the killing of an otherwise innocent victim if the defendant accidentally killed the victim in an assault on the provocateur. (See, e.g., *People v. Minifie*, *supra*, 13 Cal.4th at p. 1065 [self-defense];

People v. Carlson, *supra*, 37 Cal.App.3d at p. 351 [heat of passion].) Hence, for the same reasons that a claim of self-defense is available where the defendant "reasonably associates" the victim with the threatening conduct of a third party – regardless of whether the victim actually adopted the threats – so too must heat of passion be available as mitigation where the defendant "reasonably associates" the victim with the passion-provoking conduct of a third party.

Indeed, this Court implicitly recognized as much in *People v. Breverman*, *supra*, 19 Cal.4th 142. In that case, the evidence showed that several of the defendant's friends had been in a fight with two passing youths, Kim and Ju, in front of the defendant's residence. The following evening, Kim returned with seven or eight friends, including the victim, Suryastmadja. While several of the young men were armed with weapons, including a baseball bat, there was no specific evidence that the victim was armed. Kim slashed the tire of the defendant's car, parked in front of the residence. When the defendant came out to check on the car, some of Kim's friends challenged the defendant to fight. There was no specific evidence that the victim was one of the challengers. The defendant went back inside. A few minutes later, Kim and some of his friends approached the defendant's residence, but the victim and another young man stayed back. The first group, not including the victim, began hitting the defendant's car with their weapons. From inside his residence the defendant fired several shots toward the young men, then went outside and emptied his gun into the group of fleeing men. The victim was shot in the head and killed. The defendant appealed his conviction in part on the ground that the trial court erred in failing to instruct on voluntary manslaughter in the heat of passion. (*Id.* at pp. 149-152.)

Even though the only evidence as to the victim in *Breverman* was

that he was with the group who intimidated the defendant and vandalized his car, and although there was no evidence that the victim was armed or challenged the defendant to fight, this Court found the trial court erred in failing to instruct on voluntary manslaughter. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 163.) This Court examined all of the circumstances leading to the shooting – including the acts of the victim's companions – and considered how those circumstances affected the defendant's state of mind and how they would have affected a reasonable person, in concluding that the evidence was sufficient for a jury to find the defendant killed the victim in a reasonable heat of passion. (*Ibid.*)

In sum, section 192 has never imposed a rigid requirement that provocation come from the victim killed in order for a defendant to demonstrate a reasonable heat of passion. As *Minifie* and *Breverman* demonstrate, if an act or event would provoke a reasonable man into an impassioned state directed towards one victim, then it is sufficient provocation to mitigate that crime to voluntary manslaughter if the defendant was so provoked. Once reason and judgment have been obscured by passion, when it has not cooled – whether due to additional provocation, the lack of sufficient time passing, or chaotic circumstances – malice remains absent. The absence is not based on the fault or non-fault of third parties, but upon the defendant's state of mind, as he is still acting with his reason and judgment "disturbed or obscured." (*People v. Berry*, *supra*, 18 Cal.3d at p. 515.)

Once the heat of passion has been reached, malice is negated unless a reasonable cooling-off period has passed before the homicide. As stated in CALJIC No. 8.43,

> Where the influence of the sudden quarrel or heat of passion has ceased to obscure the mind of the accused, and sufficient time has elapsed for angry passion to end and for reason to control his

> conduct, it will no longer excuse express or implied malice and reduce the killing to voluntary manslaughter. The question, as to whether the cooling period has elapsed and reason has returned, is not measured by the standard of the accused, but the duration of the cooling period is the time it would take the average or ordinarily reasonable person to have cooled the passion and for that person's reason to have returned.

If no reasonable cooling-off period occurs, or circumstances prevent any reasonable opportunity for the heat of passion to cool, the defendant's state of mind remains in the heat of passion, with reason and judgment "disturbed or obscured." That sufficient provocation came from the first victim, and that none is shown as to a second or third victim killed within seconds of the first, does not alter the defendant's state of mind at the time of the subsequent homicides. Defendant's state of mind governs, not the behavior of the victim. (See *People v. Minifie*, *supra*, 13 Cal.4th at p. 1068.) "Heat of passion" is not a judgment on the fault or lack thereof of the victim, but on the defendant's mental state in acting in the face of sufficient provocation. (See *People v. Brooks*, *supra*, 185 Cal.App.3d at p. 696.)

If one is provoked to a heat of passion, and acting upon such unreasoning passion, kills the provoker, and is immediately, without a reasonable time for that passion to cool, confronted by the reaction of a third person, it is unreasonable to expect, even theoretically, that one's response to that third person will be governed by reason or judgment. If there has been no reasonable cooling-off period, one's reason and judgment are still obscured by that same heat of passion. Thus, where sufficient evidence of heat of passion exists as to the first of a group of homicides and there is no evidence that the immediately subsequent homicides were not the result of that same heat of passion, the prosecution fails in its burden to prove beyond a reasonable doubt that the subsequent homicides were not

voluntary manslaughter. That is the case here. At the very least, it is properly a question for the jury to determine.

There was no evidence at the guilt phase as to what part, if any, Josephine played in Bloom, Sr.'s quarrel with appellant prior to the homicides, or as to whether appellant associated her with Bloom, Sr.'s provoking conduct, or as to what actions were taken by Josephine, other than screaming, after appellant shot his father. What is in the record is evidence of a quarrel between Bloom, Sr., an abusive bully, and appellant. They were moving in and out of the house as appellant withdrew and was ordered back by his father. This was followed by a short explosion of violence with no reasonable cooling-off period separating the homicides of each of the victims. The jury could reasonably have found that Josephine and Sandra were killed in a heat of passion. Voluntary manslaughter instructions were required as to those two counts, and the trial court committed reversible error by refusing those instructions.

5. Retroactive Application of *Spurlin* Violated Due Process

An unforeseeable judicial enlargement of a criminal statute, applied retroactively, violates the federal due process right to fair warning of what constitutes criminal conduct. (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 353; *see also Rogers v. Tennessee* (2001) 532 U.S. 451, 459; *LaGrand v. Stewart* (9th Cir.1998) 133 F.3d 1253, 1260 ("[T]he Due Process Clause ... protects criminal defendants against novel developments in judicial doctrine).) The test is "whether the construction actually given the statute was foreseeable." (*McSherry v. Block* (9th Cir.1989) 880 F.2d 1049, 1053 (citation omitted); *see also Oxborrow v. Eikenberry* (9th Cir.1989) 877 F.2d 1395, 1399 ("An unforeseeable, albeit legitimate, construction of a state law by the courts may not be retroactively applied to

a defendant."). "The beginning point for a *Bouie* analysis is the statutory language at issue, its legislative history, and judicial constructions of the statute." (*Webster v. Woodford* (9th Cir.2004) 369 F.3d 1062, 1069.)

As set forth above, nothing in the language of section 192 itself suggests in any way that voluntary manslaughter can occur only where the provocation came from the victim.

As shown above, in concluding that provocation must come from the victim to negate malice, *Spurlin* erroneously interpreted section 192 solely by reference to common law principles. (*People v. Valentine*, *supra*, 28 Cal.2d at pp. 138-144.) A review of this Court's interpretations of section 192, from 1946 through the time of the crimes in this case, demonstrates that this Court had clearly and thoroughly rejected any categorical restriction on what could constitute adequate provocation sufficient to negate malice. Rather, this Court, without deviation, held that the sole test was whether under the circumstances, the provocation was sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection, and from this passion, rather than judgment. (See *People v. Valentine*, *supra*, 28 Cal.2d at pp. 136-144; *People v. Berry*, *supra*, 18 Cal.3d at p. 515; *People v. Borchers*, *supra*, 50 Cal.2d at p. 329; *People v. Bridgehouse*, *supra*, 47 Cal.2d at p. 409; see also *People v. Logan*, *supra*, 175 Cal. at p. 49.)

Neither CALJIC No. 8.42 as it read at the time of the crimes, nor as it was given at appellant's 1983 trial (1CTSuppII 38-44, 50-51, 215-216), nor the Use Notes for that instruction at the time,[109] gives any indication that a categorical restriction on voluntary manslaughter based upon identity of victim and provoker applied. (Cf. *Clark v. Brown* (9th Cir. 2006) 450

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[109] See CALJIC Nos. 8.40-8.44 (4th ed. 1979)

F.3d 898, 915 ("no indication whatsoever in CALJIC 8.81.17, as it existed at the time of Clark's trial, that the concept of "concurrent" purposes in the context of special circumstance predated the California Supreme Court's decision in *Clark*.") Consequently, *Spurlin's* categorical restriction of voluntary manslaughter was unforeseeable based upon the language of the statute as well as upon long-settled judicial constructions of the statute.

It was a further violation of due process and fundamental fairness to apply the *Spurlin* categorical restriction to appellant's retrial. Appellant had received voluntary manslaughter instructions as to all three counts at his 1983 trial. (1CTSuppII 38-44, 50-51, 215-216.) That trial was flawed due to prior counsel's failure to investigate and present relevant and available defense evidence adequately. Had he done so, he would have developed much of the additional evidence presented at this retrial that supports voluntary manslaughter instructions, such as the abuse appellant suffered at the hands of his father, and the expert testimony regarding the effect of that abuse on appellant's state of mind that night. It is reasonably probable that had the prior jury heard that evidence, it would have returned voluntary manslaughter verdicts on all three counts, or at least on Counts Two and Three. (Cf. *People v. Bloom* (1989) 48 Cal.3d 1194, 1235-1236 (Mosk, J., dissenting) (evidence insufficient on Counts Two and Three to sustain verdicts of first degree murder).)

Application of a judicial decision rendered after that flawed first trial to limit the available verdicts in appellant's retrial is fundamentally unfair and continues the prejudicial effects of prior counsel's ineffectiveness. (Cf. *People v. Sixto* (1983) 17 Cal.App.4th 374, 381.) Thus, even assuming arguendo that *Spurlin* might otherwise be given retroactive effect, doing so in this case, to appellant's prejudice, denied appellant due process of law. (U.S. Const., 14th Amend.)

On the facts of this case, the trial court should have instructed the jury on voluntary manslaughter as to Counts Two and Three. The court's failure to do so deprived appellant of his federal constitutional rights to present a defense and to adequate instructions on the defense theory of the case. (*Conde v. Henry*, *supra*, 198 F.3d at p. 739.) Moreover, the court deprived appellant of his right to reliable fact-finding in a capital case under the Eighth and Fourteenth Amendments. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-333; *Beck v. Alabama*, *supra*, 447 U.S. 625, 637-638; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

C. The Error Was Prejudicial and Requires Reversal of Counts Two and Three

Because the evidence supporting voluntary manslaughter on Counts Two and Three placed the burden on the prosecution to prove beyond a reasonable doubt that those two homicides were not committed in a heat of passion, the instructions, which failed to so inform the jury, were incomplete as to the element of malice. (*Mullaney v. Wilbur*, *supra*, 421 U.S. at pp. 703-704; *People v. Rios*, *supra*, 23 Cal.4th at p. 462; see *People v. Wharton* (1991) 53 Cal.3d 522, 570-572; see also *People v. Breverman*, *supra*, 19 Cal.4th at pp. 188-191, 194 (dis. opn. of Kennard, J.) Factual questions posed by the omitted voluntary manslaughter instructions were not necessarily resolved adversely to appellant. (*People v. Edwards* (1985) 39 Cal.3d 107, 117; *People v. Sedeno*, *supra*, 10 Cal.3d at p. 721.) The instructions thus lightened the burden of the prosecution and allowed the jury to convict appellant of second degree murder without having found beyond a reasonable doubt that heat of passion was absent, violating appellant's rights to due process, to a fair jury trial, and to a reliable determination of guilt, sanity and penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 277-

278; *Rose v. Clark* (1986) 478 U.S. 570; *People v. Flood* (1998) 18 Cal.4th 470, 503-507.)

Per se reversal is required when a trial court fails to instruct on the defendant's theory of the case, precluding argument on that theory. (*Conde v. Henry*, *supra*, 198 F.3d at pp. 740-741; *United States v. Escobar DeBright*, *supra*, 742 F.2d at pp. 1201-1202.) It is reversible error to refuse a manslaughter instruction in a case where murder is charged, and the evidence would warrant a conviction for manslaughter. (*People v. Edwards*, *supra*, 39 Cal.3d 107, 116; *People v. Ceja* (1994) 26 Cal.App.4th 78, 86.)

Assuming the error is not reversible per se, it is subject to the standard set forth in *Chapman, supra*, 386 U.S. at p. 24, for errors violating federal constitutional rights. Under that standard, the error requires reversal of Counts Two and Three and the special circumstance finding unless it is harmless beyond a reasonable doubt. Here, there is a reasonable possibility that the omitted instruction contributed to the second degree murder verdicts, and thus the special circumstance finding. Respondent bears the burden of establishing beyond a reasonable doubt that the error was harmless, i.e. that the verdicts were "surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279; *Chapman*, *supra*, 386 U.S. at p. 24.) The question is whether any rational juror, properly instructed, could have found in favor of the defendant. (*People v. Flood*, *supra*, 18 Cal.4th at pp. 503-507.)

"'In a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation.]" (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249.) The jury's obvious difficulty reaching a unanimous verdict on Counts Two and Three demonstrates that the jury did not

consider the evidence regarding appellant's state of mind as to Counts Two and Three to be clear cut. This case involved a single explosion of violence over a matter of seconds or, at most, minutes. Yet, having returned a verdict of first degree murder on Count One after four days of deliberation, the jury deliberated on Counts Two and Three for approximately three more days. (23 CT 6089-6094, 6103-6108, 24 CT 6213-6215; see *People v. Cardenas* (1982) 31 Cal.3d 897, 907 [six hours of deliberations is evidence of a close case]; *People v. Rucker* (1980) 26 Cal.3d 368, 391 [9 hours]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [6 hours]).) The verdicts of second degree murder on Counts Two and Three were reached only after the prosecution dismissed first degree murder charges on those two counts. (24 CT 6213-6215; 34 RT 4225-4235.)

Even more telling that this was a close case is the fact that after seven days of deliberation, the jury was unable to reach a decision on these two counts. That the jury had difficulty rendering a unanimous verdict on Counts Two and Three is thus manifest. (cf. *People v. Gainer* (1977) 19 Cal.3d 835, 854-56.) The jury's deliberations were necessarily focused on the very issue to which these refused instructions related – appellant's state of mind, since the defense had conceded appellant had committed the homicides. The arguments of counsel, therefore, focused almost exclusively on appellant's state of mind. However, refusal of the instructions deprived appellant of the opportunity to present argument to the jury that the homicides in Counts Two and Three were only voluntary manslaughter, not murder.

The verdicts the jury did eventually reach, second degree murder on both Counts Two and Three, do not demonstrate any rejection of the heat-of-passion theory, for they were precluded from any determination on that theory, and had heard no argument on it as to those two counts.

Moreover, at least one juror, voting for involuntary manslaughter, was apparently of the opinion that the prosecution had not established malice as to Count Three. Had the option of an intentional killing without malice been available, it is reasonably possible that at least that juror would have reached that verdict rather than apparently compromising on second degree murder, and that others who initially voted for second degree murder would have found voluntary manslaughter a more appropriate alternative more fitting to the facts of this case.

The jury demonstrated its difficulty with determinations regarding appellant's mental state, submitting questions to the trial court during deliberation and asking for further instruction. (23CT 6091-6092, 6097, 6103-6104; 34RT 4192; see *People v. Filson* (1994) 22 Cal.App.4th 1841, 1852; *People v. Hernandez* (1988) 47 Cal.3d 315, 352-353; see also *People v. Mathews* (1994) 25 Cal.App.4th 89, 100.) The jury also requested readback of the testimony of David Hughes (23CT 6098; 34RT 4192), whose testimony regarding appellant standing at the kitchen window looking confused was addressed in the closing arguments of both the prosecution and the defense (30RT 3824-3827, 3831; 31RT 3940-3942, 4035; 32RT 4104-4105, 4108, 4111-4112), and had been relied upon as a basis for Dr. Mills' opinion regarding appellant's state of mind (26RT 3153-3154, 3316-3318, 3397). Hughes' testimony regarding the events immediately preceding appellant shooting at his father, and the manner in which the shooting occurred, was also a focus of the closing arguments for both sides. (30RT 3824-3827, 3831; 31RT 3940-3942, 4035, 4060-4061; 32RT 4104-4105, 4108-4109, 4111-4112.) The request for readback of that testimony suggests a close case on the issue of appellant's mental state. (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["[j]uror questions and requests to have testimony reread are indications the deliberations were

close."]; *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40 [request for read back of critical testimony demonstrating close case]; see also *People v. Hernandez, supra,* 47 Cal.3d at pp. 352-353; *People v. Filson, supra,* 22 Cal.App.4th at p. 1852.)

While the jurors' verdict of first degree murder on Count One would appear to reflect a rejection of the theory that the shooting of Bloom, Sr., was the result of a heat of passion arising from a sudden quarrel, thus undercutting the theory that appellant's actions with Josephine and Sandra were the result of that same heat of passion, the verdict on Count One itself cannot stand. As demonstrated in Arguments I, II, and IX-XI, prosecutorial misconduct as well as prejudice from the delay in trying appellant due to former counsel's ineffective assistance and prejudicial errors in the admission of evidence, in instructions, and in cross-examination of Dr. Watson require the reversal of Count One. Without a valid conviction on Count One, the instructional errors on Counts Two and Three must be evaluated on the evidence presented, without regard to the verdict on Count One.

D. Conclusion

The trial court erred in refusing voluntary manslaughter instructions as to Counts Two and Three, thereby violating appellant's rights to due process, to a fair jury trial, to present a defense and to a reliable determination of guilt, sanity and penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Osborne v. Ohio*, *supra*, 495 U.S. at pp. 122-124 and fn. 17; *Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *Mullaney v. Wilbur*, *supra*, 421 U.S. at pp. 698-699; *People v. Breverman*, *supra*, 19 Cal.4th at pp. 188-189, dis. opn. of Kennard, J.; *Conde v. Henry*, *supra*, 198 F.3d at pp. 739-740; *Everette v. Roth* (7th Cir. 1994) 37 F.3d 257, 261; *Vujosevic v. Rafferty* (3rd Cir. 1988) 844 F.2d 1023, 1027-1028.)

While the error is structural, and thus requires reversal without assessment of prejudice, even under the *Chapman* standard, the error cannot be found harmless beyond a reasonable doubt, and therefore requires reversal of the convictions on Counts Two and Three, as well as of the special circumstance finding and the penalty judgment.

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XII.

THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY DIRECTED THE JURY TO FOCUS ON CONDUCT BY APPELLANT AS EVIDENCE OF GUILT

A. Introduction

The trial court gave two instructions that erroneously permitted the jury to infer evidence of appellant's guilt. These instructions, pursuant to CALJIC Nos. 2.06 and 2.52, related to attempts to suppress evidence and flight:

> If you find that a defendant attempted to suppress evidence against [himself] in any manner, such as [by destroying evidence] or [by concealing evidence], this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any are for you to decide.

(23CT 6119 [CALJIC No. 2.06]);

> The flight of a person immediately after the commission of a crime, or after [he] is accused of a crime, is not sufficient in itself to establish [his] guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

(23CT 6133 [CALJIC No. 2.52].)

These instructions were erroneously given. They were unnecessary, misleading and argumentative. Moreover, they permitted the jury to draw irrational inferences against appellant. The instructional errors deprived appellant of his Sixth, Eighth and Fourteenth Amendment rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt and special circumstances. Accordingly, reversal of the entire judgment is required.

B. CALJIC Nos. 2.06 and 2.52 Improperly Duplicated the Circumstantial Evidence Instructions

The giving of CALJIC Nos. 2.06 and 2.52 was unnecessary. This Court has held that specific instructions relating to the consideration of evidence that simply reiterate a general principle upon which the jury already has been instructed should not be given. (See *People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455; *People v. Berryman* (1993) 6 Cal.4th 1048, 1079-1080, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800.) In this case, the trial court instructed the jury on circumstantial evidence with the standard CALJIC Nos. 2.00, 2.01 and 2.02. (23CT 6116-6118.) These instructions informed the jury that it may draw inferences from the circumstantial evidence, i.e., that it could infer facts tending to show appellant's guilt – including his state of mind – from the circumstances of the alleged crimes. There was no need to repeat this general principle in the guise of permissive inferences of guilt, particularly since the trial court did not similarly instruct the jury on permissive inferences of reasonable doubt about guilt. This unnecessary benefit to the prosecution violated both the due process and equal protection clauses of the Fourteenth Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479 [state rule that defendant must reveal his alibi defense without providing discovery of prosecution's rebuttal witnesses gives unfair advantage to prosecution in violation of due process]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violates equal protection].)

C. CALJIC Nos. 2.06 and 2.52 Are Unfairly Partisan and Argumentative

These instructions were not just unnecessary, but were also impermissibly argumentative. The trial court must refuse to deliver any

instructions that are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) The vice of argumentative instructions is that they present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly highlight "isolated facts favorable to one party, thereby, in effect, intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as those that "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 437.) Even if they are neutrally phrased, instructions that "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871) or "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9) are argumentative and hence must be refused. (*Ibid.*)

Judged by this standard, CALJIC Nos. 2.06 and 2.52 are impermissibly argumentative. Structurally, they are almost identical to the instruction reviewed in *People v. Mincey*, *supra*, 2 Cal.4th at page 437, footnnote 5, which read as follows: "If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense wilful, deliberate, or premeditated." The instruction here tells the jury, "[i]f you find" certain facts (flight and suppression of evidence in this case and a misguided and unjustified attempt at discipline in *Mincey*), then "you may" consider that evidence for a specific purpose (showing guilt or consciousness of guilt in this case and concluding that the murder was not premeditated in *Mincey*). This Court found the instruction in *Mincey* to be argumentative (*id.* at p. 437), and should hold CALJIC. Nos. 2.06 and 2.52

to be impermissibly argumentative as well.

In *People v. Nakahara* (2003) 30 Cal.4th 705, this Court rejected a challenge to consciousness-of-guilt instructions, based on analogy to *Mincey*, *supra*, holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction" but rather a proposed defense instruction that "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense.' [Citation.]" (30 Cal.4th at p. 713.) However, this holding does not explain why two instructions that are identical in structure should be analyzed differently or why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not.

"There should be absolute impartiality as between the People and defendant in the matter of instructions . . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527 [citation]; accord, *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon, supra,* 412 U.S. at p. 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law (*Lindsay v. Normet*, *supra*, 405 U.S. at p. 77). Moreover, the prosecution-slanted instructions violated due process by lessening the prosecution's burden of proof. (*In re Winship* (1970) 397 U.S. 358, 364.)

To insure fairness and equal treatment, this Court should reconsider the cases that have found California's consciousness-of-guilt and flight instructions not to be argumentative. Except for the party benefitted by the instructions, there is no discernible difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th 705, 713; *People v. Bacigalupo* (1993)1 Cal.4th 103, 123 [CALJIC No. 2.03

"properly advised the jury of inferences that could rationally be drawn from the evidence"]) and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence." (*People v. Wright*, *supra*, 45 Cal.3d at p. 1137.)

Finding that a flight/consciousness of guilt instruction unduly emphasizes a single piece of circumstantial evidence, the Supreme Court of Wyoming held that giving such an instruction always will be reversible error. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, it joined a number of other state courts that have found similar flaws in the flight instruction. Courts in at least eight other states have held that flight/consciousness of guilt instructions should not be given because they unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d. 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App.1979) 604 P.2d 1330, 1333; see also *State v. Nelson* (Mont. 2002) 48 P.3d 739, 745 [reasons for the disapproval of flight instructions also applied to an instruction on the defendant's false statements]; *State v. Bone* (Iowa 1988) 429 N.W.2d 123, 125 [flight instructions should rarely be given]; *People v. Larson* (Colo. 1978) 572 P.2d 815, 817-818 [same].)[110]

The argumentative consciousness-of-guilt and inference of guilt instructions in this case invaded the province of the jury, focusing the jury's

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[110] Other state courts also have held that flight instructions should not be given, but their reasoning was either unclear or not clearly relevant to the instant discussion. (See, e.g., *State v. Stilling* (Or. 1979) 590 P.2d 1223, 1230.)

attention on evidence in a manner favorable to the prosecution, placing the trial court's imprimatur on the prosecution's theory of the case, and lessening the prosecution's burden of proof. They therefore violated appellant's Fourteenth Amendment due process rights to a fair trial and equal protection, his Sixth and Fourteenth Amendment right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury, and his Eighth and Fourteenth Amendment right to a fair and reliable capital trial.

D. CALJIC Nos. 2.06 and 2.52 Permitted the Jury To Draw Irrational Permissive Inferences about Appellant's Guilt

These instructions suffer from an additional constitutional defect – they embody improper permissive inferences. The instructions permit the jury to infer one fact, such as appellant's consciousness of guilt, from other facts, i.e., suppression of evidence. (See *People v. Ashmus* (1991) 54 Cal.3d, 932, 977.) A permissive inference instruction can intrude improperly upon a jury's exclusive role as fact-finder. (See *United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.) By focusing on a few isolated facts, such an instruction also may cause jurors to overlook exculpatory evidence and lead them to convict without considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (en banc).) A passing reference to consider all evidence will not cure this defect. (*United States v. Warren*, *supra*, 25 F.3d at p. 899.) These and other considerations have prompted the Ninth Circuit to "question the effectiveness of permissive inference instructions." (*Ibid*; see also *id.* at p. 900 (conc. opn. of Rymer, J.) ["I must say that inference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury."].)

For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal*, *supra*, 967 F.2d at p. 926.) The Due Process Clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.) In this context, a rational connection is not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*Ulster County v. Allen*, *supra*, 442 U.S. at pp. 165-167, and fn. 28; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313.) This test is applied to judge the inference as it operates under the facts of each specific case. (*Ulster County v. Allen*, *supra*, at pp. 157, 162-163.)

In this case, there was no dispute that appellant caused the deaths of Bloom, Sr., Josephine and Sandra. His guilt of some form of homicide, unless found insane at the time, was a foregone conclusion. The only issue at the guilt phase was whether, as to each homicide, he would be found guilty of first degree murder, second degree murder, or manslaughter. Under the facts here, irrational inferences were permitted, concerning appellant's mental state. The improper instructions permitted the jury to use the undisputed evidence that appellant left the scene of the homicides and disposed of the rifle and car to infer, not only that appellant had killed three people, but that he did so while harboring the intents or mental states required for conviction of first- and second-degree murder. Although consciousness-of-guilt evidence in a murder case may bear on a defendant's state of mind after the killing, it is *not* probative of his state of mind

immediately prior to or during the killing. (*People v. Anderson* (1968) 70 Cal.2d 15, 32-33; see also LaFave, Substantive Criminal Law (2nd ed. 2003), vol. 2, § 14.7(a), pp. 481-482.)

Therefore, appellant's departure from the scene, or his disposal of the rifle and car, upon which the consciousness-of-guilt inferences were based, were not probative of whether he harbored the mental states for first degree murder at the time he killed Bloom, Sr., or Josephine, or Sandra. There was no rational connection – much less a link more likely than not – between his departure from the scene, or his disposal of the rifle and car, and consciousness by him of having committed any of the homicides with (1) premeditation, (2) deliberation, or (3) malice aforethought.

This Court has previously rejected the claim that flight and consciousness-of-guilt instructions permit irrational inferences concerning the defendant's mental state. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 348 [CALJIC No. 2.03]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579 [CALJIC Nos. 2.03 & 2.52]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03, 2.06 & 2.52].) However, appellant respectfully asks this Court to reconsider and overrule these holdings and to hold that in this case delivery of these instructions was reversible constitutional error.

Because CALJIC Nos. 2.06 and 2.52 permitted the jury to draw irrational inferences of guilt against appellant, use of the instructions undermined the reasonable-doubt requirement and lightened the prosecution's burden of proof, thereby denying appellant his Sixth and Fourteenth Amendment rights to a fair trial and due process of law. The instructions also violated appellant's Sixth and Fourteenth Amendment rights to have a properly instructed jury find that all the elements of the charged crime had been proven beyond a reasonable doubt, and, by reducing the reliability of the jury's determination and creating the risk that

the jury would make erroneous factual determinations, the instructions violated his Eighth and Fourteenth Amendment rights to a fair and reliable capital trial.

E. Reversal Is Required

Giving CALJIC Nos. 2.06 and 2.52 was error of federal constitutional magnitude as well as a violation of state law. Accordingly, appellant's murder convictions and the special circumstance findings must be reversed unless the People can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see *Schwendeman v. Wallenstein, supra*, 971 F.2d at p. 316 ["A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].)

The error in this case was not harmless beyond a reasonable doubt. As discussed above, the evidence concerning appellant's state of mind was substantially contested and by no means clear cut. The prosecutor in closing argument emphasized appellant's flight and disposal of the rifle and car as evidence of appellant's planning and of his state of mind the night of the homicides and to negate the defense psychiatric and neuropsychiatric evidence. (See, e.g., 30RT 3832-3833, 3852-3853; 32RT 4104.) Since flight and disposal of the rifle and car were not disputed, it was almost certain that the jury found the instructions applicable, and reasonably likely that the jurors construed the instructions as supporting the prosecution's arguments regarding that evidence, undercutting the defense case. Moreover, the error affected the only contested issue in the case, i.e., the nature or degree of the homicides. The effect of these instructions was to tell the jury that appellant's own conduct showed he was aware of his guilt for the very charges he disputed. That the jury considered this a close case is apparent, as demonstrated in Arguments II and X, *ante*. In the context of

this case, these instructions were not harmless beyond a reasonable doubt. Therefore, the judgments on the murder convictions and the special circumstance allegation must be reversed.

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XIII.

A SERIES OF GUILT PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT, REQUIRING REVERSAL OF THE ENTIRE JUDGMENT

The trial court instructed the jury with CALJIC Nos. 2.01, 2.02, 2.21, 2.22, 2.27, 2.51, and 8.20. (23 CT 6117-6118, 6128-6129, 6131-6132, 6145, 6152.) These instructions violated appellant's right not to be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" (*In re Winship, supra*, 397 U.S. at p. 364), and thereby deprived defendant appellant of his constitutional rights to due process and trial by jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 7, 15-16; *Sullivan v. Louisiana, supra,* 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Victor v. Nebraska* (1994) 511 U.S. 1, 6.) They also violated the fundamental requirement of reliability in a capital case, by relieving the prosecution of its burden to present the full measure of proof. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama, supra*, 447 U.S. at pp. 637-638.) Because these instructions violated the federal Constitution in a manner that can never be "harmless," the judgment must be reversed. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 275.)

Appellant recognizes that this Court has previously rejected many of these claims. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224; *People v. Crittenden* (1994) 9 Cal.4th 83, 144.) Nevertheless, he raises them here for this Court to reconsider those decisions and in order to preserve the claims

for federal review, if necessary.[111]

A. The Instructions on Circumstantial Evidence – CALJIC Nos. 2.01 and 2.02 – Undermined the Requirement of Proof Beyond a Reasonable Doubt

The jury was given two interrelated instructions – CALJIC Nos. 2.01 and 2.02 – that addressed the relationship between the reasonable doubt requirement and circumstantial evidence. (23 CT 6117 [CALJIC No. 2.01; sufficiency of circumstantial evidence – generally]; 23 CT 6118 [CALJIC No. 2.02; sufficiency of circumstantial evidence to prove specific intent or mental state].) These instructions, addressing different evidentiary issues in almost identical terms, advised appellant's jury that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (23 CT 6117-6118.) These instructions thus informed the jurors that if appellant reasonably appeared to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt. The instructions undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process, trial by jury, and a reliable capital trial

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[111] In *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, this Court ruled that "routine" challenges to the state's capital-sentencing statute will be considered "fully presented" for purposes of federal review by a summary description of the claims. This Court has not indicated that repeatedly-rejected challenges to standard guilt phase instructions will also be deemed "fairly presented" by an abbreviated presentation. Accordingly, appellant more fully presents those claims here.

(U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17).[112]

First, the instructions compelled the jury to find appellant guilty and the special circumstance true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra*, 397 U.S. at p. 364.) The instructions directed the jury to convict appellant based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to be "reasonable." (23 CT 6117-6118.) An interpretation that appears reasonable, however, is not the same as the "subjective state of near certitude" required for proof beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty"].) Thus, the instructions improperly required conviction on a degree of proof less than that constitutionally mandated.

Second, the circumstantial evidence instructions required the jury to draw an incriminatory inference when the inference appeared "reasonable." The instructions thus created an impermissible mandatory inference that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted it by producing a reasonable exculpatory interpretation. Mandatory presumptions, even if explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of a crime. (*Francis v. Franklin* (1985) 471 U.S. 307, 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

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[112] Although defense counsel did not object to these instructions, the errors are cognizable on appeal because they affect appellant's substantial rights. (§ 1259; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.)

In *People v. Roder* (1983) 33 Cal.3d 491, 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to its existence. Accordingly, this Court should invalidate the instructions given here, which required the jury to presume all elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless appellant produced a reasonable interpretation of that evidence pointing to his innocence. The jury may have found appellant's defense unreasonable but still have harbored serious questions about the sufficiency of the prosecution's case. Nevertheless, under the erroneous instructions, the jury was required to convict appellant of murder if he "reasonably appeared" guilty of murder, even if the jurors still entertained a reasonable doubt of his guilt. The instructions thus impermissibly suggested that appellant was required to present, at the very least, a "reasonable" defense to the prosecution's case when, in fact, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215.)

The prosecutor's closing argument included just such an interpretation of the instructions:

> I suggest there is a reasonable interpretation in the evidence that he went there with the intent to lure his father out of the house and shoot him outside that house. The scope on the gun is the perfect example. . . . We know he went there with a scope. We know he got his father out of the house. It is a reasonable interpretation that was his intent.

(40RT 4083.) That "interpretation" is nothing but speculation, based upon one otherwise unexplained detail, that the rifle had a scope on it, which detail was itself based solely on eyewitness testimony of dubious reliability. (17RT 2089-2090 [David Hughes].) Whether it was a "reasonable interpretation" or not, it falls woefully short of being a sufficient basis for

finding beyond a reasonable doubt that appellant killed his father with premeditation, deliberation and malice. Yet the prosecutor presented it in the context of discussing the instructions on reasonable inferences from circumstantial evidence, and presented it as just such an inference as the jury must accept because it was "reasonable."[113]

For these reasons, there is a reasonable likelihood the jury applied the circumstantial evidence instructions to find appellant guilty on a standard less than the federal Constitution requires.

B. CALJIC Nos. 2.21, 2.22, 2.27, and 8.20 Also Vitiated the Reasonable Doubt Standard

The trial court gave four other standard instructions that magnified the harm arising from the erroneous circumstantial evidence instructions, and individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC Nos. 2.21 (witness wilfully false – discrepancies in testimony), 2.22 (weighing conflicting testimony), 2.27 (sufficiency of testimony of one witness), and 8.20 (deliberate and premeditated murder). (23CT 6128-6129, 6131, 6152.[114]) Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. Thus, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, and violated the constitutional prohibition against convicting a capital defendant on any

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[113] The prosecution also argued other "reasonable" inferences from evidence that in fact could not be established beyond a reasonable doubt, e.g., 30RT 3826-3827, 3831.

[114] The second page of CALJIC No. 8.20 is placed out of order in the Clerk's Transcript, at 23CT 6145.)

lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Winship*, *supra*, 397 U.S. at p. 364.)[115]

CALJIC No. 2.21 lessened the prosecution's burden of proof. It authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless, "from all the evidence, [they believed] the probability of truth favors his or her testimony in other particulars." (23CT 6128.) That instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses if their testimony had a "mere probability of truth." (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].) The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case must be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable," or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC No. 2.22, regarding the weighing of conflicting testimony (23CT 6129), specifically directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing, replacing the constitutionally-mandated standard of "proof beyond a reasonable doubt" with one indistinguishable from the lesser "preponderance of the evidence standard."

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (23CT 6131), erroneously suggested that the defense, as well as the prosecution, had the burden of proving facts. The

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[115] Although defense counsel did not object to these instructions, appellant's claims are still reviewable on appeal. (See fn.112, *ante*.)

defendant is only required to raise a reasonable doubt about the prosecution's case, and cannot be required to establish or prove any "fact." (*People v. Serrato* (1973) 9 Cal.3d 753, 766.)

Finally, CALJIC No. 8.20, which defines premeditation and deliberation, misled the jury regarding the prosecution's burden of proof. The instruction told the jury that the requisite deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation. . . ." (23CT 6152.) In that context, the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, as opposed to raising a reasonable doubt. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean absolutely prevent].)

Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard under which the prosecution must prove each necessary fact of each element of each offense "beyond a reasonable doubt." In the face of so many instructions permitting conviction on a lesser showing, no reasonable juror could have been expected to understand that he or she could not find appellant guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated appellant's constitutional rights to due process, trial by jury, and a reliable capital trial. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17.)

C. The Motive Instruction Also Undermined the Burden of Proof Beyond a Reasonable Doubt

The trial court instructed the jury under CALJIC No. 2.51, as follows:

> Motive is not an element of the crimes charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

(23CT 6132.)

The defense objected to CALJIC No. 2.51, arguing that because the defense admitted the act, i.e., that appellant had committed the homicides, the instruction's reference to lack of motive as "tend[ing] to show the defendant is not guilty" was unnecessary and an "unfair characterization" of the relevance of motive in this case. (29RT 3638-3639.)

This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. However, due process requires substantial evidence of guilt. (*Jackson v. Virginia, supra,* 443 U.S. at p. 320 [a "mere modicum"of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

The motive instruction stood out from the other standard evidentiary instructions given to the jury. Notably, other instructions addressing an individual circumstance expressly admonished that it was insufficient to establish guilt. (See, e.g., 23CT 6119 [CALJIC No. 2.06, efforts to suppress evidence are "not sufficient by itself to prove guilt . . ."];

23CT 6133 [CALJIC No. 2.52, same as to flight].) Giving the motive instruction immediately before the flight instruction highlighted its different standard.

Because CALJIC No. 2.51 is so obviously aberrant, it undoubtedly prejudiced appellant during deliberations. The instruction appeared to include an intentional omission that allowed the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning could mislead reasonable juror as to scope of instruction].)

This Court has recognized that differing standards in instructions create erroneous implications. (*People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [if a generally applicable instruction is expressly applied to one aspect of a charge but not another, the inconsistency may be prejudicial error].) Here, the context highlighted the omission, so the jury would have understood that motive alone could establish guilt, effectively placing the burden on appellant to negate or show an alternative to the motive advanced by the prosecutor.

Moreover, the instruction was misleading as to the probative value of the evidence of motive to the primary issue in this case. Motive may have some probative value where identity is at issue. However, it has little probative value in a case such as appellant's, given that the issue here was not whether appellant had committed the homicides, but what his state of mind was during each one. The evidence tending to establish that appellant had a motive to kill his abusive father had some probative value for both the prosecution and the defense, but was primarily established by the defense. The defense mental health experts relied on the evidence as supporting the

conclusion that appellant dissociated at some point during the incident. The evidence also established Bloom, Sr.'s long-term provocation, leading to a sudden quarrel with appellant, leading appellant to act in the heat of passion. Whether appellant shot his father with premeditation and deliberation or in the heat of passion – even whether he shot him with intent to kill – was the issue, and in any of the alternatives, a jury could find appellant had a motive. Yet the instruction equated motive only with "guilt," and lack of guilt with lack of motive. The instruction told the jury to consider motive as a circumstance "tend[ing] to establish the defendant is guilty." It did not tell the jury that the same evidence could establish provocation, heat of passion, or a dissociative state in which appellant did not premeditate, deliberate or harbor malice. (Cf. *People v. Martinez* (1984) 157 Cal.App.3d 660, 669.) It thereby put a thumb on the scales in preference for the prosecution's view of the evidence.

CALJIC No. 2.51 failed to state the applicable law impartially, invited the jury to draw inferences favorable to the prosecution, and lessened the prosecution's burden of proof, depriving appellant of due process, a fair trial, equal protection and a reliable determination of guilt, sanity and penalty. (*Wardius v. Oregon* (1973) 412 U.S. 470, 474; *Lindsay v. Normet* (1972) 405 U.S. 56, 77; *Winship, supra,* 397 U.S. at p. 364.)

D. The Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions

Although each challenged instruction violated appellant's federal constitutional rights by lessening the prosecution's burden, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [CALJIC Nos. 2.22 and 2.51]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [false testimony and circumstantial evidence instructions]; *People v.*

Crittenden (1994) 9 Cal.4th 83, 144 [circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [CALJIC Nos. 2.02, 2.27)].) While recognizing the shortcomings of some of the instructions, this Court has consistently concluded the instructions must be viewed "as a whole," and that when so viewed the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and give the defendant the benefit of any reasonable doubt, and that jurors are not misled when they are also instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court characterizes as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood the jury applied the challenged instructions in a way that violates the federal Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions are "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin* (1985) 471 U.S. 307, 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity."].)

Furthermore, nothing in the challenged instructions explicitly informed the jurors that those instructions were qualified by the reasonable doubt instruction. It is just as likely the jurors concluded that the reasonable

doubt instruction was qualified or explained by the other instructions that contain their own independent references to the evaluation or sufficiency of particular evidence.

E. Reversal Is Required

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was structural error, which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) Minimally, because the instructions violated appellant's federal constitutional rights, reversal is required unless the prosecution can show the error was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.) The prosecution cannot make that showing here. That the jury found this a close case is apparent, as demonstrated in Arguments II and X, *ante*. Because these instructions distorted the jury's consideration and use of circumstantial evidence, lessened the prosecution's burden and diluted the reasonable doubt requirement, the reliability of the jury's findings is undermined. The dilution of the reasonable-doubt requirement by the guilt phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.) Accordingly, appellant's judgment must be reversed in its entirety.

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XIV.

THE TRIAL COURT'S ERRONEOUS EXCLUSION FOR CAUSE OF FOUR PROSPECTIVE JURORS BECAUSE OF THEIR DEATH PENALTY VIEWS REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE

The trial court conducted sequestered jury voir dire pursuant to *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 69-81 (*Hovey*), and excused several prospective jurors for cause due to their purportedly impaired ability to return a death verdict. (See *Wainwright v. Witt* (1985) 469 U.S. 412 (*Witt*); *Witherspoon v. Illinois* (1968) 391 U.S. 510 (*Witherspoon*).) However, as to four prospective jurors the record does not support the trial court's finding of impairment. The excusal of these prospective jurors violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article I, sections 1, 7, 15 and 16 of the California Constitution. Reversal of appellant's death judgment is therefore required. (*Gray v. Mississippi* (1987) 481 U.S. 648, 658, 668 (*Gray*).)

The trial court excused four prospective jurors who gave no indication that their views about capital punishment in the abstract would impair their ability to serve as jurors. Rather, they were excused based on their responses to hypothetical questions that asked for prejudgment of the penalty decision based upon assumed findings of aggravation and mitigation that in fact were based upon contested facts to be established through evidence at the trial.

Although this Court has approved providing prospective jurors with the facts of a case during voir dire, it has not approved dismissing prospective jurors for cause based on their attitudes towards specific evidence at issue in the case, or their responses to questions calling for

prejudgment of the penalty decision. Instead, the Court has required that dismissed jurors have demonstrated an abstract inability to impose death in the general type of case before them. Here, the jurors were dismissed, not on this basis, but based on their attitudes toward specific assumed findings of aggravation and mitigation, i.e., based upon a hypothetical prejudgment of the ultimate penalty decision. The trial court committed reversible error under *Witherspoon* and *Witt* by excusing these four jurors.

A. Applicable Legal Principles

The exclusion of "all jurors who express conscientious objections to capital punishment . . . violates the defendant's Sixth Amendment-based right to an impartial jury and subjects the defendant to trial by a jury 'uncommonly willing to condemn a man to die.'" (*People v. Hayes* (2000) 21 Cal.4th 1211, 1285, quoting *Witherspoon, supra*, 391 U.S. at p. 521.) The Supreme Court has held that "*Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the state's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment "on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." (*Adams v. Texas* (1980) 448 U.S. 38, 48 (*Adams*).) In *Witt, supra*, the Court held that under the federal Constitution, "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (469 U.S. at p. 424, quoting *Adams, supra*, 448 U.S. at p. 45 (fn. omitted).) The same standard is applicable to a defendant's claims under the California Constitution. (See, e.g., *People v. Guzman* (1988) 45 Cal.3d 915, 955; *People v. Ghent* (1987) 43 Cal.3d 739, 767.) Thus, all the state may

demand is "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Adams*, *supra*, 448 U.S. at p. 45.)

It is reversible error to exclude for cause a juror who says that he or she can follow the instructions and oath in regard to the death penalty. (See *Gray, supra*, 481 U.S. at pp. 667-668.) The exclusion of even a single prospective juror in violation of *Witherspoon* and *Witt* requires automatic reversal of a death sentence. (See *Gray*, *supra*, 481 U.S. at pp. 659-667; *Davis v. Georgia* (1976) 429 U.S. 122, 123; *People v. Stewart* (2004), *supra*, 33 Cal.4th 425, 445.)

The relevant inquiry is whether the juror can perform his or her duties in accordance with the court's instructions and the juror's oath. (*Gray*, *supra*, 481 U.S. at p. 658.) The mere fact that a prospective juror expresses "scruples about the death penalty" does not by itself establish the juror's inability to conscientiously perform the duties of a juror in a capital case; rather, such scruples may "merely heighten the [prospective] jurors' sense of responsibility." (See *Gray, supra*, 481 U.S. at p. 653, fn. 3; *Witherspoon, supra*, 391 U.S. 510.)

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

(*Lockhart v. McCree* (1986) 476 U.S. 162, 176; see also *Witherspoon*, *supra*, 391 U.S. at p. 514, fn. 7 [recognizing that a juror with religious or conscientious scruples against capital punishment "could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State"]; *People v. Kaurish* (1990) 52 Cal.3d 648, 699 [neither *Witherspoon* nor *Witt* "nor any of our

cases, requires that jurors be automatically excused if they merely express personal opposition to the death penalty"].)

The focus of any inquiry is and must be on the juror's ability to honor his or her oath as a juror:

> The *Witherspoon-Witt* [ ] voir dire seeks to determine only the views of the prospective jurors about capital punishment in the abstract, to determine if any, because of opposition to the death penalty, would "vote against the death penalty without regard to the evidence produced at trial." (*People v. Adcox* (1988) 47 Cal.3d 207, 250, 253 Cal.Rptr. 55, 763 P.2d 906; *Wainwright v. Witt*, *supra*, 469 U.S. 412, 416, 105 S.Ct. 844, 848.) Such a juror may be excused because he or she would be unable to faithfully and impartially apply the law. The inquiry is directed to whether, without knowing the specifics of the case, the juror has an "open mind" on the penalty determination.

(*People v. Clark* (1990) 50 Cal.3d 583, 597.)

The prosecution, as the moving party, bears the burden of proof in demonstrating that a juror's views would "prevent or substantially impair" the performance of his or her duties. (*Stewart*, *supra*, 33 Cal.4th at p. 445.) "As with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality. . . . It is then the trial judge's duty to determine whether the challenge is proper." (*Witt*, *supra*, 469 U.S. at p. 423; see also *Stewart*, *supra*, 33 Cal.4th at p. 445.) "A motion to excuse a venire member for cause of course must be supported by specified causes or reasons that demonstrate that, as a matter of law, the venire member is not qualified to serve." (*Gray, supra*, 481 U.S. at p. 652, fn. 3.)

Although the trial court's "determinations of demeanor and credibility" are entitled to deference by the reviewing court *(Wainwright v. Witt, supra*, 469 U.S. at p. 428), the Sixth Amendment requires that a trial

court's resolution of the issue of juror bias be examined in "the context surrounding [the juror's] exclusion" in order to determine whether it is "fairly supported by the record" (*Darden v. Wainwright* (1986) 477 U.S. 168, 176; *Witt, supra*, 469 U.S. at p. 434). Excusal of a prospective juror cannot be upheld unless there is substantial evidence in the record supporting the trial court's ruling. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962.) This Court therefore must independently assess the jurors' responses on the record "as a whole," in the correct factual context, and in light of the proper legal standards. (See *Darden v. Wainwright, supra*, 477 U.S. at p. 176.) Moreover, this Court can accord no deference to the trial court's decision to discharge a prospective juror where the trial court has applied an erroneous legal standard. (See *Gray, supra*, 481 U.S. at p. 661, fn. 10 [deference to the trial court's factual findings "is inappropriate where, as here, the trial court's findings are dependent on an apparent misapplication of federal law"]; cf. *Witt, supra*, 469 U.S. at p. 427, fn. 7.)

B. The Trial Court Erred In Dismissing Four Prospective Jurors Based On Their Responses To Voir Dire Questions That Asked For Prejudgment Based Upon Hypothesized Findings of Fact

In *People v. Fields* (1984) 35 Cal.3d 329, 356-357, this Court held that a trial court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him or her, regardless of his willingness to consider the death penalty in other cases. However, the Court also explicitly stated that: "When the court excludes a juror on this ground, however, it must take care to avoid violation of *Witherspoon's* command that a juror can be dismissed for cause only if he would vote against capital punishment 'without regard to any evidence that might be developed at the trial of the case ....' (391 U.S. at p. 522, fn. 21.)"

(35 Cal.3d at p. 358, fn. 13.) Thus:

> If a prospective juror has been informed of the evidence to be presented, his asserted automatic vote may be based upon this information, in which case exclusion of the juror because of his views on the death penalty would violate *Witherspoon*. For example, a juror who announces that he would automatically vote against death in the case before him because he has been told (whether true or not) that the prosecution case rests entirely on circumstantial evidence is not casting a vote without regard to the evidence, and cannot be excluded under the *Witherspoon* formula.

(*Ibid.*)

Similarly, under the *Witt* formulation, this Court has stated that death-qualification voir dire "seeks to determine only the views of the prospective jurors about capital punishment in the abstract, to determine if any, because of opposition to the death penalty, would 'vote against the death penalty without regard to the evidence produced at trial.' [Citations.]" (*People v. Clark* (1990) 50 Cal.3d 583, 597.) Questions concerning "circumstances likely to be present in the case" are allowed to aid in the determination of whether the juror "would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances." (*People v. Kirkpatrick, supra,* 7 Cal.4th at 1005; *People v. Ervin, supra,* 22 Cal.4th at p. 70.) However, death-qualification voir dire must focus on the prospective jurors' attitudes toward the death penalty in the abstract, and not seek a prejudgment of the facts to be presented at trial. (*People v. Pinholster* (1992) 1 Cal.4th 865, 915-916; *People v. Clark, supra*, 50 Cal.3d at p. 597.)

Questions that ask prospective jurors to affirm that they can vote for a death sentence based on hypothesized findings of facts as to aggravation and mitigation impermissibly force them to prejudge the case before they have heard any evidence or received any instructions on the

law. This is the opposite of what a juror's duties require, which is to listen to and consider the evidence, and to follow the instructions of the court in an impartial manner. (*Witt, supra*, 469 U.S., at pp. 421, 422, fn. 4.) Thus, a juror's answers to such questions are not a permissible basis for cause dismissals. This Court, therefore, has cautioned that:

> [D]eath-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented.

(*People v. Cash, supra,* 28 Cal.4th at p. 721.)

Cause challenges are only permissible where a "juror's reluctance to impose the death penalty was based *not on an evaluation of the particular facts of the cas*e, but on *an abstract inability* to impose the death penalty" in the type of case before him or her. (*People v. Ervin, supra*, 22 Cal. 4th at p. 70, citing *People v. Pinholster, supr*a, at p. 916 (emphasis added).) A juror may be dismissed who indicates she or he would never vote for death in a case because it was a particular type of case (e.g., felony murder, only one victim, youthful defendant) without consideration of the circumstances and regardless of the factors in aggravation or mitigation. (*Ibid.*)

While "allowing the parties to ask questions regarding the particular facts of the case," this Court has held that death-qualification based on such questions will be upheld only where "more relevant questions and answers provide the basis for the court's decision." (*People v. Pinholster, supra,* 1 Cal.4th at p. 918.) Although in *Pinholster* prospective jurors were questioned about their views in light of the facts of

the case, this Court found it crucial that "the trial court refused to excuse the prospective jurors for cause *until there was a clear indication that their views about capital punishment in the abstract* would substantially impair their ability to perform their duties." (*Ibid.*, emphasis added.) This Court found that "the questions provided a basis for deciding something about the juror's views in the abstract; not only was each of these two jurors asked his attitude toward a case phrased in terms of the facts of this case, but the answer to these questions led to the ultimate and crucial question whether the juror could vote for the death penalty in *any* burglary-murder case." (*Ibid.*; emphasis added.) Similarly, in *Ervin*, this Court upheld the prosecution's challenges, finding that "each of the prospective jurors in question expressed a similar *abstract inability to impose death* on the hirer in a murder-for-hire case." (*People v. Ervin*, *supra*, 22 Cal.4th at p. 71.)

If the prospective juror expresses an inability to impose the death penalty because of a circumstance likely to be present in the case being tried, then a challenge for cause might, but does not necessarily, lie. In upholding the dismissal of two jurors because they could not consider a death verdict in a felony-murder situation regardless of the evidence, this Court observed:

> The people of the State of California have determined that burglary-murder is a category of crime for which a defendant may be subject to death, depending on the circumstances. [Citations.] This prospective juror unequivocally stated his inability to follow the law in this respect. His position was an abstract one regarding the felony-murder special circumstance, not a matter of evaluating the particular facts of this case.

(*Pinholster*, 1 Cal.4th at p. 917; see also *People v. Ervin*, *supra*, 22 Cal.4th at pp. 70-71.)

The relevant "facts or circumstances likely to be present in the case being tried" are not descriptions of evidence or theories that might be in

dispute at the penalty phase, but facts or circumstances which are uncontested or that will necessarily have been established as facts upon which any penalty determination is to be based. (See *People v. Livaditis* (1992) 2 Cal.4th 759, 772 [age of defendant and lack of a prior murder conviction]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1093-1095 [age of defendant]; *People v. Cash*, *supra*, 28 Cal.4th at p. 721 [defendant's guilt of a prior murder].) A prospective juror may not be excluded merely because specified mitigation might, or even probably would, lead that juror not to impose the death penalty, because the law permits consideration of mitigation evidence. (*People v. Heard*, *supra*, 31 Cal.4th at pp. 965, 967, fn. 10.)

In this case the trial court erroneously excluded four prospective jurors who indicated that, given the presumed findings of aggravation and mitigation set forth on voir dire by the prosecutor, they would not vote for the death penalty. Those presumed findings, however, included limited "facts" in aggravation, balanced against more "facts" in mitigation than would be presented at trial. Thus, the questions posed by the prosecution included a consideration of aggravating evidence as well as a version of mitigating evidence. Further, nothing in the excluded jurors' responses demonstrated an unwillingness or an impaired ability to consider and evaluate the aggravating or mitigating evidence, or to determine the facts relevant to the jurors' ultimate penalty determination, in accordance with the instructions to be given at trial. Therefore, their answers demonstrated no disqualifying views or beliefs.

Moreover, the hypothesized mitigation was not uncontested.[116]

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[116] The prosecution's characterization in penalty phase closing argument of the evidence of abuse and mental illness did not match in any way its (continued...)

The prosecutor did not concede that appellant was seriously abused by his father throughout his life, or that appellant was mentally ill, and in her case-in-chief asked her witnesses if they had seen evidence of abuse of appellant. (See, e.g., 18RT 2273; 19RT 2389-2392; 20RT 2563, 2575.) During the defense case in the guilt and sanity phases, the prosecution challenged appellant's lay and expert witnesses about the extent and nature of any abuse. (23 RT2891-2892; 26RT 3211-3226; 28RT 3480; 30RT 3872-3873, 3887-3889, 3891, 3894; 32RT 4116-4117.)

Similarly, the prosecution challenged the evidence concerning the nature, extent, and even existence of appellant's mental illness, questioning prosecution witnesses about appellant's behavior and state of mind prior to the killings (18RT 2261; 19RT 2404; 20RT 2564-2566), challenging the factual basis, the analysis and the credibility of defense expert witnesses on the question of appellant's mental illness, including extensive argument on these points to the jury. (See, e.g., 30RT 3838-3847, 3850-3896; 31RT 4059-4060, 4067-4071.)

Thus the four prospective jurors were excused not because of their views on uncontested facts or circumstances, such as age or the nature of

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[116] (...continued)
characterization of the mitigation to the excluded jurors on voir dire. (See e.g. 48RT 5840-5841, 5879-5881, 5902-5905, 5907-5908.) By the time of the penalty phase argument, the evidence presented in mitigation bore virtually no resemblance to the picture the prosecutor had painted at voir dire for the excluded jurors. Appellant, representing himself at the penalty phase, proclaimed to the jury that he was not mentally ill, and "trashed" the mental defense put on by defense counsel at the guilt and sanity phases. (See, e.g., 42RT 5049, 5060, 5064-5065; 48RT 5972-5978, 5983-5990; 49RT 5993-5999.) He did not adopt the position that he was abused, indicating that he did not know if what happened should be characterized as abuse. (See, e.g., 43RT 5248-5249; 48RT 5928-5430, 5944, 5949, 5968.)

the special circumstance, but because of their responses to hypothesized findings of fact regarding aggravation and mitigation that in fact they could only have made after consideration of the reliability and credibility of the evidence. The excluded jurors were never asked whether, and did not indicate that, mere presentation of evidence of abuse or mental illness would result in a verdict of life without parole. Rather, the one excluded juror (No. 1650) who was asked indicated that she could evaluate the evidence and determine for herself whether there was mental illness, and the extent of that mental illness, if any. (See 10RT 1250-1251.)

The excluded jurors did not indicate any impairment in their ability to follow the trial court's instructions to determine penalty after considering the evidence of aggravation and mitigation. What the prosecution asked for, essentially, were predictions – prejudgments – of the jurors' verdicts if the jurors found "lifelong abuse" and/or "significant mental illness" after considering the evidence. If the jurors found the abuse and/or mental illness, they would be required to consider those facts in mitigation. It would have been entirely consistent with following the court's instructions to find that such mitigation outweighed any aggravation presented. Nothing in the excluded jurors' voir dire demonstrated that they would not properly consider evidence of both aggravation and mitigation before reaching a penalty verdict. Had the prospective jurors who were dismissed for cause not been made to assume a set of facts that the prosecution itself apparently did not believe would be supported by the evidence, their remaining responses would not have supported a finding of disqualification under *Witherspoon* and *Witt*. For these reasons, the dismissals of the jurors based on presumed facts did not meet the *Witt* standard.

1. Prospective Juror No. 1650

a. Questionnaire (15 CT 3878-3906)

In her questionnaire, Prospective Juror No. 1650 indicated that one of her children, age 42, was on SSI as a result of a mental condition (15 CT 3879, 3892-3893), and had consulted mental health professionals since the age of 16. (15 CT 3879, 3892). Asked about testimony from a psychologist or psychiatrist, she checked the choice that she would "Always accept as correct his/her opinion." (15 CT 3885.) Regarding the death penalty, she indicated her support for the death penalty, and explained that her position had changed over the past 10-15 years, from not having favored it. (15 CT 3887.)

In response to the question (No. 69) whether, believing that the prosecution had proved the defendant guilty of first degree murder beyond a reasonable doubt, she would nonetheless refuse to find the defendant guilty of first degree murder just to prevent the penalty phase from taking place, she circled, "Yes," and explained, "If the person has a mental problem I would have a problem with the death penalty." Asked a similar question (No. 70), whether, even if proven, she would refuse to find the special circumstance true to prevent the penalty phase from taking place, she circled, "No." Asked a third question (No. 71), whether, if the defendant were found by the jury to be guilty of first degree murder and the special circumstance were found to be true, she would automatically refuse to vote in favor of the death penalty and automatically vote for life without possibility of parole, without considering any evidence of aggravating and mitigating factors, she circled, "No." Asked a fourth question (No. 72), whether in the same circumstance she would automatically refuse to vote for life without possibility of parole and automatically vote for the death penalty without considering any evidence of aggravating and mitigating

factors, she circled, "No." (15 CT 3889-3890.) She indicated in response to questions 73 and 74 that she would follow the court's instructions and set aside her own feelings regarding what the law ought to be. (15 CT 3891.) In response to statements (Nos. 77-79) about whether certain kinds of crimes (intentional killing of a child, of any person, of more than one person) should always get the death penalty, she marked "strongly disagree" as to each, with the comment, "You must look at the circumstance." (15 CT 3891-3892.) In response to questions (Nos. 80-81) whether in a sanity phase she would automatically find the defendant sane in order to get to a penalty phase, or automatically find the defendant insane to avoid dealing with the death penalty issue, she checked, "No." (15 CT 3892.) She also indicated she would have no difficulty keeping an open mind until she had heard all the evidence, the arguments of counsel, and the court's instructions. (15 CT 3895.)

Initially, before she received an explanation of the trial process, including the relevance of mental illness to guilt and sanity as well as to penalty, and that reaching a penalty phase presupposed that the jury had found appellant sane, Prospective Juror No. 1650 stated in her questionnaire that she would be unable to return a verdict of death if the defendant was mentally ill. (15CT 3889.) However, as explained below, after receiving further explanation, she stated she would have no problem with the death penalty if appellant was found sane. (10RT 1246-1247.)

b. Voir Dire (10RT 1242-1261)

During *Hovey* voir dire Prospective Juror No. 1650 was asked about her statement on question 69, that "if the person has a mental problem, I would have a problem with the death penalty." First the trial court asked her questions to ensure she understood the three-phase (guilt, sanity, penalty) trial. The trial court then asked,

> Would you have any difficulty imposing the death penalty if in following my instructions you are given the choice that you may impose it or may not, you have a choice between that and life without possibility of parole, could you listen to the aggravating circumstances and the mitigating and decide which would be appropriate?

Juror No. 1650 responded, "Yes." (10RT 1243.)

The trial court then asked for her opinions about mental health professionals, including psychologists and psychiatrists. She responded,

> Well, I believe in -- in what they do, that there is a need, you know, for mental health -- for psychiatrists, and that they do -- can determine whether a person is -- that he has difficulty mental or –

(10RT 1244.) The trial court did not follow up on or otherwise attempt to clarify that response.

Defense counsel then questioned Prospective Juror No. 1650. Referring to her answer to question No. 69, and explaining that to even get to a penalty trial, the jury would have to have found beyond a reasonable doubt that appellant had committed murders, and that he was sane, counsel then asked, "If you already believed that the individual was sane and convicted of several murders, does that change your answer?" Prospective Juror No. 1650 responded, "Then I wouldn't have a problem with it – if they found that he was sane – with the death penalty." (10RT 1246.) She then confirmed that, after hearing the evidence in aggravation and mitigation, which might include evidence that the defendant had "been abused maybe as a child and maybe had some mental illness, but he's not insane at the time of the offense," she could vote for either death or life without parole. (10RT 1247.)

Defense counsel then explained that the court would instruct the jury that they could vote for death only if the aggravating circumstances substantially outweighed the mitigating circumstances, but that imposition

of the death penalty was never required, and a juror could always vote for life. He asked the prospective juror if she felt the crimes were bad enough and the aggravating circumstances substantially outweighed the mitigating circumstances, could she vote for death if it was a proper case for her, or for life if it was a proper case for her. Prospective Juror No. 1650 responded, "Yes." (10RT 1247-1248.)

The prosecutor then questioned Prospective Juror No. 1650:

> Q. You've been hearing about sanity and mental illness and it's kind of confusing here. But let's get you to the penalty phase because that's what we're talking about here.
>
> At that point you will have decided the defendant was not insane at the time that he murdered three people and that one of those three people was an eight-year-old girl. And then you are going to be in the penalty phase and you are going to hear aggravating – well, you are going to hear maybe aggravation from the prosecution or certainly the crimes themselves are aggravating, and you are going to hear mitigation from the defense, and *you are going to hear that the defendant is mentally ill.* And you may have already decided that he wasn't insane, but there is a huge spectrum between being insane and being completely 100 percent rational.
>
> *If you find during the penalty phase – actually you have already decided that he wasn't insane, but he is significantly mentally ill, could you give a person who you felt was significantly mentally ill the death penalty*?
>
> A No.
>
> Q Can you see yourself in the penalty phase after having decided that the defendant was sane legally, he knew what he was doing, he understood the consequences of his actions, but in the penalty phase you find that he is mentally ill, severely or otherwise, that he is not normal, that he is a disturbed young man, could you give him the death penalty?
>
> A No.

(10RT 1248-1249 (emphasis added).)

Defense counsel then explained that it would be up to the juror to determine from the evidence whether the defendant was significantly mentally ill or not, or not mentally ill at all. Prospective Juror No. 1650 confirmed that she would feel comfortable making that determination, would listen to both sides and consider the evidence from both sides in making that determination, and that if she determined, from the evidence presented, that he was not significantly mentally ill or not mentally ill at all, she could give the death penalty if she felt it was warranted. (10RT 1250-1251.)

The trial court then asked Prospective Juror No. 1650 whether the fact that her daughter has mental problems would "in any way cause you to be more sympathetic instead of following the evidence or would that enter into your decision making?" The juror responded, "It just helps me to understand – I mean I know a little bit more about mental illness. But I know that all people that are mentally ill don't commit crimes, so *I would have to listen to the evidence*." (10RT 1251 (emphasis added).) The trial court than asked, "Well, the term Mr. Applebaum[117] used was, I believe, significantly mentally ill which is – you'll have to determine sane or insane. Can you distinguish that or do things that are mental problems – is it a gray area?" Prospective Juror No. 1650 replied, "Well, it – I don't know if it would be a problem. I would have to listen to the – again, to the circumstances and the evidence." (10RT 1251.)

Defense counsel then questioned the juror further, confirming her answer on the questionnaire (question No. 74) that she could set aside her feelings and follow the instructions the trial court would give the jury. (10 RT 1252.)

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[117] Actually, it was prosecutor Samuels who first used the term "significantly mentally ill" with this prospective juror. (10RT 1249.)

The prosecutor then resumed her questioning:

> Q I just want to ask you again. Maybe I misunderstood your answer.
>
> If at the end of this case we get to a penalty phase where you have decided the defendant has murdered three people and that he was sane, legally sane, at the time that he did it and that you were instructed by the judge that you may return the death penalty if you find the aggravating circumstances outweigh the mitigating circumstances, you may, but you never have to, you always have the option of life without parole.
>
> If in your own mind you find that the aggravating circumstances substantially outweigh the mitigating circumstances, but you also believe in your heart that the defendant is mentally ill, would you ever give him the death penalty?
>
> A I don't think I could give him the death penalty if I actually believed –
>
> Q That he was mentally ill?
>
> A – that he was mentally ill.
>
> Q Even if the court instructed you as I said?
>
> A Wait. If the court instructed me otherwise, that he wasn't mentally --
>
> Q No. If the court instructed you on measuring the aggravating versus the mitigating and that the aggravating had to substantially outweigh the mitigating, and let's say you get there, let's say you believe that the aggravating substantially outweighs the mitigating, so now you do have the option of the death penalty but you also believe that the defendant is mentally ill. Could you give him the death penalty believing that he is mentally ill?
>
> A No.

(10RT 1253-1254.)

c. Challenge for Cause, Argument and Ruling

The prosecution challenged Prospective Juror No. 1650 for cause at a side bar conference, arguing that the juror was "saying that if she finds that the defendant is mentally ill, she will automatically not vote for the death penalty" and that is good cause for dismissing her from the jury. (10 RT 1254.) The defense argued that the juror was simply saying she was considering mental illness as mitigation. (10RT 1254-1255.) The trial court noted that the question pre-supposed that the juror had determined that aggravation outweighed mitigation, and the juror still stated that she would not return the death penalty if appellant were mentally ill. (10RT 1255.) The defense noted that it had not been explained to the juror that mental illness can be considered as mitigation. While the trial court then suggested that defense counsel clarify that point with this juror (10RT 1255), defense counsel was never given that opportunity.

Instead, the prosecution objected that defense counsel would seek to have the juror state that mental illness as mitigation would cause her to find that aggravation did not outweigh mitigation, which was not the hypothetical the prosecution had presented. The defense responded that the hypothetical misstated the law. Further, the defense noted that the juror had said she could listen to the evidence and might determine that appellant was not mentally ill, or not substantially mentally ill, and could return a death verdict in that instance. The prosecution argued that her questions to the juror had changed, to asking whether any mental illness, not just a substantial mental illness, would prevent her from returning a death verdict. Defense counsel suggested following up to find out whether any degree of mental illness would preclude the prospective juror from returning a verdict of death. (10RT 1255-1257.)

The trial court then questioned the juror further:

> THE COURT: Assuming that the case proceeds to the penalty phase and one of the mitigating factors that you are to consider is that the defendant has a mental illness of some type, would it matter to you whether it was a substantial mental illness or could it be just a slight mental illness? Would any mental condition whatsoever preclude you from voting for the death penalty?
>
> PROSPECTIVE JUROR 1650: No, he would have to have really mental problems to commit – it would have to be proven that he was mental – that he committed the crimes because of – due to a lot of his mental inabilities to cope and to rationalize.
>
> It wouldn't just be just a little bit mental like he couldn't read or write or something like that or -- but I mean there's so many – it would be hard for me if I felt that he was hearing voices or there was different – some problems as to why he committed the crimes, but –
>
> THE COURT: All right. Hypothetically, if there was evidence that he was hearing voices, would that be enough to convince you that he should not receive the death penalty?
>
> PROSPECTIVE JUROR 1650: Yes.

(10RT 1257-1258.) The trial court then addressed counsel at the bench:

> THE COURT: Well, I don't know. I hardly think I would call that a substantial mental illness. I would hardly think I would call that substantial. I read that in so many psychiatric reports which are far from the issue of sanity or insanity. But I just read one today coming up on a sentencing where he hears voices and I don't think that falls under substantial. Hearing voices – there's too many that hear voices.

(10RT 1258.) Counsel then argued further:

> MS. SAMUELS: . . . Without casting aspersions, to stand here now and imply that in penalty there's going to be only evidence that the defendant is a little mentally ill when he's

pled [not] guilty by reason of insanity, the defense in the guilt phase is that he was completely mentally whacked-out, and now to argue this as though – what if it just comes out that he's just a little mentally ill? That is ludicrous.

There is no way that is the way the evidence is going to come out in this case if we get to a penalty phase. If the jurors think that he's sane enough to go to a penalty phase, the entire defense at penalty is that he's mental. And now to say, well maybe if he's not that mental it wouldn't affect her, well, come on.

They are going to show that he is way mental and it is going to affect her and she already has said she can't be fair. This is just a ludicrous argument.

MR. APPLEBAUM: Well, you know what, Ms. Samuels just proved my point. If we get to a penalty phase after putting on this great width and depth of mental illness, the jurors already rejected it because we're putting on mental defenses for the purposes of guilt. We're putting on a sanity phase. And if we get into a penalty phase, they've rejected all of the mental illness arguments.

MS. SAMUELS: They've rejected him for purposes of not being able to form intent and not be able to premeditate and deliberate. That is a world apart from being mental.

Someone can be substantially mental and still be able to form intent and understand the consequences of their actions.

The idea that there's any idea here that this guy is just a little mental and that he's going to come under her threshold of mental illness is, in my opinion, ludicrous based on what I know about this case and about the defense at this point after reading their doctors' reports.

I don't believe this woman could read any of their doctors' reports or listen to the evidence of any of their doctors and talk about a minor mental illness. This guy has been categorized as everything from completely crazy to just mildly very crazy. This whole argument is ludicrous, in my opinion.

(10RT 1258-1259.) The trial court then ruled, excusing the juror:

> THE COURT: I'm not going to ask for a stipulation. On my own I'm going to excuse her. I do not think she can be fair, and a great deal of that is based on the fact that she said her daughter has mental problems, her daughter has seen healthcare professionals. Her daughter is on S.S.I. from a mental condition. I think she has preconceived ideas as to what the criteria would be for mentally ill and I'm going to excuse her for – on the court's motion for cause.
>
> MR. APPLEBAUM: Last comment?
>
> THE COURT: Okay.
>
> MR. APPLEBAUM: If a person is hearing voices and they're really hearing voices, they're actively psychotic and flouridly [*sic*] psychotic in my view. So --
>
> MS. SAMUELS: Thank you for putting that on the record, Dr. Applebaum.
>
> MR. APPLEBAUM: You are welcome.

(10RT 1260.) The trial court then excused Prospective Juror No. 1650. (10 RT 1260.)

d. The Court Erred In Dismissing Prospective Juror No. 1650

The trial court's reliance upon Prospective Juror No. 1650's daughter having a mental condition as indicating that "she has preconceived ideas as to what the criteria would be for mentally ill" is not supported by the voir dire answers she gave. She was asked only one question about her daughter's mental condition and the effect it might have on her ability to follow the evidence. Her response was in no way disqualifying, and provides no support for the trial court's finding: "It just helps me to understand – I mean I know a little bit more about mental illness. But I know that all people that are mentally ill don't commit crimes, so I would have to listen to the evidence." (10RT 1251.)

In fact, the trial court's question itself reveals it was employing an erroneous standard: "Would this in any way cause you to be more sympathetic instead of following the evidence or would that enter into your decision making." (10RT 1251.) The implication that being "more sympathetic" somehow conflicts with or precludes "following the evidence" reveals the court's mistaken belief that being sympathetic to mitigation is a disqualifying characteristic. In fact nothing in *Witherspoon*, *Witt*, *Adams* or any of this Court's decisions remotely suggests that being sympathetic to a certain type of mitigation amounts to a disqualifying impairment.

In addition, the prosecutor's questioning was misleading: if Prospective Juror No. 1650 found that the aggravating circumstances outweighed the mitigating circumstances, but also believed appellant was mentally ill, could she return a penalty of death? While she replied, "no," at that point in the voir dire she had received no explanation that mental illness *was* a mitigating factor which could, alone or in combination with other mitigation, outweigh any aggravation. Thus, the assumption implicit in the hypothetical question – that Prospective Juror No. 1650 had already found that aggravation outweighed mitigation – was baseless, and cannot afford a basis for concluding she would not be able to follow the instructions she would have been given at a penalty phase, or that she would not be able to follow the juror's oath.

This Court has recognized that a challenge for cause will not lie in this circumstance. In *People v. Heard*, *supra*, 31 Cal.4th 946, a prospective juror ("Juror H.") indicated on his juror questionnaire that he thought life without the possibility of parole would be a worse punishment than the death penalty and wrote as an explanation: "Perhaps the special circumstances are due to past psychological experiences and I would consider prison." (31 Cal.4th at p. 960.) When the trial court asked Juror

H. whether he thought "past psychological factors . . . would weigh heavily enough that [he] probably wouldn't impose the death penalty," he responded: "Yes, I think they might." (*Id.* at p. 961.) Juror H. further agreed with the trial court that psychological factors "might auger [*sic*] toward life without possibility of parole" and that he was "absolutely committed to that position." (*Ibid.*) However, after the trial court explained to Juror H. that California law considers death the more serious punishment, and that the death penalty can only be imposed if the aggravating circumstances outweigh the mitigating circumstances, Juror H. indicated that he understood the law and would do "whatever that law states." (*Id.* at p. 960.) This Court held that "[in] view of [Juror] H.'s clarification of his views during voir dire, we conclude that his earlier juror questionnaire response, *given without the benefit of the trial court's explanation of the governing legal principles*, does not provide an adequate basis to support [Juror] H.'s excusal for cause." (*Id.* at p. 964, original italics.)

Moreover, this Court noted that:

> The circumstance that the existence of "psychological factors" might influence H.'s determination whether or not the death penalty would be appropriate in a particular case certainly does not suggest that H. would not properly be exercising the role that California law assigns to jurors in a death penalty case. (See *People v. Jones* (1997) 15 Cal.4th 119, 163, fn. 13, 61 Cal.Rptr.2d 386, 931 P.2d 960, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1, 72 Cal.Rptr.2d 656, 952 P.2d 673 [recognizing that a challenge for cause "will not lie" in such circumstances].)

(31 Cal.4th at p. 965.) This Court also noted in *Heard* that:

> The circumstance that unspecified psychological factors "probably" or "might" lead a prospective juror not to impose the death penalty certainly does not provide a basis for excusing the prospective juror for cause. The law permits consideration of such factors. Had [the prospective juror] answered in the negative, defendant could have challenged him.

(*Id.* at p. 967, fn. 10.)

The prosecutor's question here improperly separated the concept of mental illness from the concepts of aggravation and mitigation, thus misleading Prospective Juror No. 1650 concerning the legitimate weighing of mental illness as mitigation, and distorting the juror's prior answers, which had demonstrated that she would consider the evidence and make a determination concerning the existence and degree, if any, of mental illness. Out of the presence of the prospective juror, defense counsel pointed out that mental illness as mitigation had not been explained to her, and that he intended to do so. The trial court agreed he should (10 RT 1255), but after further argument by the prosecutor, took over questioning. The trial court then did refer to mental illness as a mitigating factor, but focused the questioning on whether it would matter to her whether the mental illness was "substantial" or not. Prospective Juror No. 1650 indicated the degree of mental illness did matter to her. The circumstance of someone hearing voices as an example of substantial mental illness was then raised. Although there was no evidence of appellant hearing voices in connection with the crimes at issue, the trial court asked if evidence that appellant was hearing voices would convince her that appellant should not receive the death penalty. Prospective Juror No. 1650 said, "yes." (10RT 1257-1258.)

Juror No. 1650's answers, taken as a whole, do not establish that the juror would have been unable to follow the court's instructions to consider the evidence of aggravation and mitigation. She did not say that mere presentation of evidence of abuse or mental illness would result in a verdict of life without parole. She confirmed that she was comfortable evaluating the evidence of mental illness, and would listen to both sides before making any determination. (10RT 1250-1251.) She also confirmed that after hearing the evidence in aggravation and mitigation, if appellant

wasn't found insane at the time of the offense, she could vote for either penalty, whichever was warranted. (10RT 1247, 1250.) She also confirmed that she could set aside her feelings and follow the trial court's instructions. (10RT 1252.)

Prospective Juror No. 1650's answers to the prosecution's questioning did not indicate that she would refuse to fully consider or evaluate all of the evidence before reaching a verdict. The very questions asked by the prosecution presupposed that she had done so, that she had properly found both aggravation and mitigation. She never said, as did the juror at issue in *People v. Fudge*, *supra*, that she would only consider a single factor, that "she would vote for life imprisonment and 'wouldn't care what the circumstances were,' that she would 'disregard' the other factors." (7 Cal.4th at pp. 1094-1095.) Instead, Prospective Juror No. 1650 would consider all the evidence, including evaluation of the evidence of mental illness before reaching a decision.

The trial court's statement that "I would hardly think I would call [hearing voices] a substantial mental illness" (10RT 1258) amounted to an evaluation by the trial court of the weight of mitigation. Essentially, by finding Prospective Juror No. 1650 unqualified to sit as a juror, the trial court imposed its own view of mitigation and mental illness upon the proceedings, precluding an otherwise qualified juror from sitting on the jury in this case because that juror's views differed from the trial court's.

There was nothing inappropriate or disqualifying about Prospective Juror 1650's responses. On the contrary, her views were entirely consistent with the Eighth Amendment principle that the sentencing determination in a capital case must be "directly related to the personal culpability of the criminal defendant," and must "reflect a reasoned *moral* response to the defendant's background, character, and crime." (*California v. Brown*

(1987) 479 U.S. 538, 545 [conc. opn. of O'Connor, J.] (italics in original).) As the Supreme Court has explained: "If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 319, quoting *Brown, supra*, 479 U.S. at p. 545 [conc. opn. of O'Connor, J.].)[118]

The trial court substituted its own view of the weight of mitigation for that of the juror, finding the juror's view unreasonable and "preconceived." This was error of constitutional magnitude. The evaluation of the applicability and weight of both aggravation and mitigation is a matter for the jury, rather than the court. (*People v. Freeman* (1994) 8 Cal.4th 450, 524; Pen. Code, §190.3.) Just as it is constitutional and reversible error for a trial court to exclude evidence proffered by the defense as mitigation because the trial court does not view the evidence as mitigating (see *Lockett v. Ohio* (1978) 438 U.S. 586; *Skipper v. South Carolina* (1986) 476 U.S. 1; *Hitchcock v. Dugger* (1987) 481 U.S. 393; *Tennard v. Dretke* (2004) 542 U.S. 274; *McKoy v. North Carolina* (1990) 494 U.S. 433), it violates the constitution under *Witherspoon* and *Witt* for a trial court to exclude a juror because that juror may weigh particular

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[118] See also *Brewer v. Quarterman* (2007) 550 U.S. 286, 288-289 ("we have long recognized that a sentencing jury must be able to give a "'reasoned moral response'" to a defendant's mitigating evidence – particularly that evidence which tends to diminish his culpability – when deciding whether to sentence him to death"); *Abdul-Kabir v. Quarterman* (2007) 550 U.S.233, 245-255 (reviewing cases establishing Eighth Amendment principle that jury must be able to consider and give effect to evidence of defendant's background and character in determining penalty).

mitigation differently or more heavily than the trial court might.

The trial court erred by excusing Prospective Juror No. 1650 for cause on the basis of her responses to hypotheticals assuming specific findings of fact, made after consideration of the evidence, concerning aggravation and mitigation. The trial court also erred by basing its conclusion that Prospective Juror No. 1650 was impaired on the trial court's own view of the nature and weight of mental illness as mitigation.

2. Prospective Juror No. 8050

a. Questionnaire (20CT 5371-5399)

To question No. 59, "Do you have a personal, religious, philosophical, or other belief that makes it difficult or impossible for you to sit as a juror here?" Prospective Juror No. 8050 responded, "Maybe." (20 CT 5379.) In response to question No. 63, asking for his general feelings regarding the death penalty, he responded, "I go back and forth. I don't think it's a deterrent to crime. Sometimes I think it's a legislated emotional response to crime." (20CT 5380.) Responding to question No. 65 that he felt the death penalty is used too often, his explanation was, "Too many cases have legal accessibility problems from a money standpoint. The DNA question. Not always an even playing field." (*Ibid.*) In response to question No. 66 he stated that his view on the death penalty had changed over the years, explaining "I go back and forth." (*Ibid.*)

To each of the questions regarding automatic verdicts based on views regarding capital punishment (question Nos. 69-72), he responded, "No." (20CT 5382-5383.) He responded to question No. 74 that he would set aside his own feelings regarding what the law ought to be and follow the law as the court explains it. (20CT 5384.) To each of question Nos. 77 through 79, regarding whether intentional killing, intentional killing of a child or intentional killing of more than one person should always result in

the death penalty, he circled "strongly disagree," and explained as to each, "There are no absolutes." (20CT 5384-5385.) To question Nos. 80 through 82, regarding a sanity phase, he responded that he would not automatically find a defendant sane to get to a penalty phase, nor insane to avoid a penalty phase, and that a victim being related to the defendant would not matter. (20CT 5385.) To question No. 104, he responded that he would have no difficulty keeping an open mind until he had heard all the evidence, all the arguments of counsel and the instructions from the court. (20CT 5388.)

b. Voir Dire and Ruling (11RT 1334-1344)

In response to the trial court's questioning, Prospective Juror No. 8050 confirmed his answer to question 63, stating,

> I have been thinking about this the last week and I have a hard time with it.
>
> I mean, if you take all of those questions that you're asking in total that I answered, I have a problem with poorer defendants not having enough money to get better legal counsel.
>
> I don't understand why we have the death penalty. I don't believe it is a deterrent. I think it is more of an emotional response that's been legislated most of the time.
>
> So I mean, this is just how I honestly feel. Now, I like to think that I would be able to follow the rules, but emotionally that's how I feel about it.

(11RT 1335.)

The prosecutor asked if, given that the law never requires a juror to return a verdict of death, but always allows the option of life without parole, would he ever vote for the death penalty? He responded, "I don't know. Honest to god, I don't know. I would like to think I would be able to follow the rules and not think about it, but I would have to think about it and I just don't know." (11RT 1336.) The prosecutor reviewed the findings the jury would have to make before reaching a penalty phase, then stated:

> And you're going to hear some mitigating evidence. You're going to hear about the defendant's life. You're going to hear about a horrible life. You're going to hear about a life you wouldn't wish on your worst enemy.
>
> And your [*sic*] going to hear about mental problems. the same mental problems that were already given to you in the other phases that you have decided were not enough to negate culpability, but you are still going to have some mental problems here.

(11RT 1337.) After stating that the court's instructions would allow the death penalty if the aggravating circumstances substantially outweighed the mitigating circumstances, but would not require the death penalty, the prosecutor asked,

> Q Now, based on how you feel now about the death penalty, would you ever give him the death penalty knowing you have the option to not give him the death penalty?
>
> A Probably not. I would probably go with life in prison.

(11RT 1338.)

Upon questioning by defense counsel, Prospective Juror No. 8050 indicated he did not know what he would do, that "I know how I feel emotionally about it and I know how I feel intellectually about it and they conflict." (11RT 1339.) He confirmed he would not vote automatically for life, "But I would think if I would think about it I would lean towards life. . . . I definitely weigh heavy on the life side." (11RT 1340.)

At a bench conference, the prosecutor challenged Prospective Juror No. 8050. (11RT 1341.) After argument by counsel, the trial court denied the challenge:

> He did say "I have a problem with the death penalty." Then he paused and said "sometimes." And then he said, "it wouldn't be automatic, but I am definitely leaning that way."
>
> I think you need a commitment. Once again, we have somebody that is 90 percent hanging on one side of the wall, but they still have that bit of openness. So I am not going to grant a

challenge for cause, but I will give you a chance to ask him a few more questions.

(11RT 1342.)

The prosecutor then began further voir dire, as follows:

Q Sir, if we go into the penalty phase of this case and *you have heard that the defendant was abused his whole life, and you have heard that the defendant has had physical problems, and if you hear that the defendant has mental problems, has had mental problems, if you hear as I expect you will that the defendant was even having – even in utero was having medical things done to him by drugs his mother was taking, and you hear how badly his father abused him his whole life, his father being one of the victims in this case,* and then you're given the instruction by the judge that if the aggravating circumstances substantially outweigh the mitigating circumstances you may vote for the death penalty, okay? And you go back into the jury room is there any chance you're going to come out of there with a death penalty?

A No.

Q No chance?

A No chance. *Not with that scenario.* No way.

MS. SAMUELS: I have no further questions.

MR. APPLEBAUM: One last one. [ ]

Q Same scenario.

A Okay.

Q One of the victims, you would see pictures of this beautiful eight-year-old girl –

MS. SAMUELS: I object. We don't know what the evidence is here.

THE COURT: Sustained.

Q BY MR. APPLEBAUM: All right. One of the victims is an eight-year-old girl stabbed some 20 odd times and then shot in the face.

Automatic one way or the other?

A Not with all the circumstances of the life that was just described to me. No, I would not vote for the death penalty.

(11RT 1343-1344 (emphasis added).) The trial court then granted the prosecutor's challenge, excusing Prospective Juror No. 8050. (11RT 1344.)

c. The Court Erred In Dismissing Prospective Juror No. 8050

The trial court initially found Prospective Juror No. 8050 qualified to sit as a juror. (11RT 1342.) The prosecutor then presented the juror with a hypothetical that assumed facts in mitigation – that appellant was badly abused his whole life by his father, who was one of the victims; that appellant had physical and mental problems; and that "even in utero [appellant] was having medical things done to him by drugs his mother was taking." (11RT 1343.) The prosecutor then asked the juror to prejudge the case on those assumed facts, asking whether he could return a death verdict if that required a finding that aggravating circumstances substantially outweigh the mitigating circumstances. Juror No. 8050 responded, "No chance. Not with that scenario. No way." (11RT 1343.)

The prosecutor's hypothetical characterized the evidence in mitigation as a given, without acknowledging that the prosecution intended to contest its validity. The prosecutor never asked whether Prospective Juror No. 8050 was prepared to evaluate such evidence and determine whether the presumed facts were proven. As demonstrated above, at pp. 399-400, the prosecution in fact vigorously challenged the evidence concerning the extent and severity of any abuse suffered by appellant at his father's hands. The prosecutor's hypothetical assumes "how badly his

father abused him his whole life,"[119] whereas at guilt, sanity and penalty, aggressively disputed the conclusion that any abuse had occurred during appellant's whole life, or if it had, it was limited.

As with Prospective Juror No. 1650, the prosecutor asked Prospective Juror No. 8050 to assume findings of aggravation and mitigation had been made, and thus to predetermine the result of the weighing process. The prospective juror's response was entirely consistent with compliance with the trial court's instructions and with a juror's oath. The prospective juror did not indicate any refusal or even resistance to considering any other evidence. Rather, asked to prejudge on assumed facts, his answer is consistent with the conclusion that the assumed mitigation outweighed the assumed aggravation.

The effect of the hypothetical prejudgment posed by the prosecution is clear. Before the hypothetical, the trial court had stated that it would deny the challenge for cause. After the hypothetical, the trial court granted it. Yet nothing in the hypothetical or in Prospective Juror No. 8050's answers demonstrated any impairment in his ability to abide by his oath and follow the trial court's instruction, or revealed any additional or deeper antipathy to the death penalty in the abstract than disclosed in his previous answers, or otherwise demonstrated anything other than that Juror No. 8050 was qualified to sit as a juror on appellant's case.

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[119] Earlier in the voir dire of this prospective juror, the prosecution had used a similar characterization of the evidence of abuse by appellant's father:

> And you're going to hear some mitigating evidence. You're going to hear about the defendant's life. You're going to hear about a horrible life. You're going to hear about a life you wouldn't wish on your worst enemy.

(11RT 1337.)

The trial court committed constitutional error, in violation of *Witherspoon* and *Witt*, by granting the prosecution's challenge for cause.

3. Prospective Juror No. 3606

a. Questionnaire (19CT 5023-5051)

Prospective Juror No. 3606 answered "No" to question No. 59, "Do you have a personal, religious, philosophical, or other belief that makes it difficult or impossible for you to sit as a juror here?" (19CT 5031.) In response to question No. 63, asking for her general feelings regarding the death penalty, she responded, "I am against it in theory. However there are some people I could have let them get the death penalty. I don't like the idea of the state killing people." (19CT 5032.) Responding to question No. 65 that she felt the death penalty is used too often, her explanation was; "The death penalty is not given with any consistency [*sic*]. Each state has their own rules. Minorities seem to be on death row in larger proportion than whites. More poor men on death row than rich. Too much doubt about some cases." (*Ibid.*) She responded to question No. 66 that her view on the death penalty had changed over the years, explaining; "Have become more ambiguous about my opinion. Really don't want to have it but can see why some people get it." (*Ibid.*)

She answered "No" to each of the questions regarding automatic verdicts based on views regarding capital punishment (question Nos. 69-72). (19CT 5034-5035.) She responded to question No. 74 that she would set aside her own feelings regarding what the law ought to be and follow the law as the court explains it. (19CT 5036.) To each of question Nos. 77 through 79, regarding whether intentional killing, intentional killing of a child or intentional killing of more than one person should always result in the death penalty, she circled "strongly disagree," and explained, "[n]eed to know entire story and events," "need to know circumstances," and "[n]eed

to know circumstances and entire story." (19CT 5036-5037.) To question Nos. 80 through 82, regarding a sanity phase, she responded that she would not automatically find a defendant sane to get to a penalty phase, nor insane to avoid a penalty phase, and that a victim being related to the defendant would not matter. (19CT 5037.) To question No. 104, she responded that she would have no difficulty keeping an open mind until she had heard all the evidence, all the arguments of counsel and the instructions from the court. (19CT 5040.)

b. Voir Dire (11RT 1467-1476)

Upon questioning by the trial court, Prospective Juror No. 3606 confirmed her answers to question Nos. 69 through 72. (11RT 1467.) Defense counsel asked about her answers to question Nos. 63-66, to the effect that, in her mind, some convicted murderers should get the death penalty, but that she did not personally want to be involved in that situation. No. 3606 responded:

> That's probably true. I suppose on some I rather they didn't get the death penalty. That may be, you know, but on the other hand I think there are probably some people I wouldn't mind that did. . . . I think there could be some people that I wouldn't mind if they did get the death penalty.

(11RT 1468-1469.) The trial court asked if she could vote for the death penalty if it became necessary, and she responded, "I think so. I'm not sure. It would have to be awful." (11RT 1469.) She told defense counsel she felt she could vote for the death penalty if it was the right situation. (*Ibid.*) Asked if, knowing that she would never be required to return a verdict of death, but could return a verdict of life without parole, could she return a verdict of death if she felt the murders and the aggravation were such that it was the right situation, she responded, "Probably. I mean, you know, it is so ambiguous that not knowing, but if it is horrible enough I probably could

because there are some people that I, you know, we don't need them on earth anymore." (11RT 1470.) She reiterated that her vote either way would not be automatic, and that she could vote for death, although her "preference would be life in prison." (*Ibid.*)

The prosecutor began her questioning of Prospective Juror No. 3606 by discussing the sanity phase. (11RT 1471-1472.) She then asked:

> Okay. So you have already decided that. That the defendant has enough mental wherewithal to understand his actions and he is not legally insane.
>
> And now we get to the penalty phase and you hear that while he was legally sane, *he is severely mentally ill and has profound mental problems. He is a very disturbed young man. Was abused constantly for the first 18 years of his life. And including when he was in utero and his mother took drugs and you were to hear all that, and in addition you hear one of the three people he killed, the father abused him everyday of his life for the first 18 years of his life.*
>
> Do you see any circumstance where you would hear those facts and be able to come back and face that man and tell him that you give him the death penalty?

(11RT 1472 (emphasis added).) Prospective Juror No. 3606 responded, "Probably not." (*Ibid.*)

In response to further questioning by the prosecutor Prospective Juror No. 3606 confirmed that she was against the death penalty in theory. Asked if she would have any trouble voting for the death penalty on a horrendous crime, she replied, "It certainly wouldn't be easy, but I suppose I could." (11RT 1472.) The prosecutor's questioning then continued:

> Q. Could you do it *having heard of the mitigating circumstances such as I have stated to you*?
>
> A. That would probably be a life imprisonment or, you know, mental hospital so he could get, you know, help and care.
>
> Q *If you came away from the penalty phase believing the defendant is mentally ill*, could you give a mentally ill person the

death penalty?

A No.

(11RT 1472-1473 (emphasis added).)

Defense counsel then clarified that to get to a penalty phase, the jury would have to have rejected any mental defenses at the guilt phase, finding the defendant guilty of wilful, deliberate, premeditated first degree murder with malice aforethought, and have found him sane at the sanity phase. Asked whether could she vote for death if the crimes were horrendous enough, Prospective Juror No. 3606 answered, "I can only say that it would have to be just really horribly horrendous" and "I guess I could say I don't think I could say never do either one. My proclivity would be toward life imprisonment without parole." Asked if the conditions were right, could she vote for death, she replied, "I don't know. To tell you the truth, I don't know." (11RT 1473-1476.) Finally, defense counsel asked:

> Q . . . If a person killed three people, first degree murder, willful, premeditated, one of the girls, one of the victims rather was a little girl, eight-year-old girl, and she is also stabbed 20 some odd times with a scissors and then shot in the face, sane at the time of the commission of the offense, yes, abused as a child, the defendant. Yes, mentally ill, but not insane.
>
> A Then I would say no. If he is mentally ill I could not give him the death penalty.
>
> Q No matter what degree of mental illnesses?
>
> A Uh-uh.

(11RT 1476.)

c. Ruling Below

The prosecution challenged prospective juror No. 3606. Defense counsel submitted the matter without argument. The trial court granted the challenge, excusing Prospective Juror No. 3606. (11 RT 1476.)

d. The Court Erred In Dismissing Prospective Juror No. 3606

Before being questioned by the prosecutor Prospective Juror No. 3606 had demonstrated in her questionnaire and on voir dire that she was ambivalent about the death penalty but thought she could return such a verdict in the right situation, and could put aside her own feelings and follow the court's instructions. The prosecutor began her questioning with an awkward discussion to the effect that a finding of sanity did not preclude a finding of severe mental illness or profound mental problems. (11RT 1471-1472.) She then propounded a hypothetical that included the "fact" that though legally sane at the time of the homicides, appellant was "severely mentally ill and had profound mental problems," "was abused constantly for the first 18 years of his life," including in utero through drug use by his mother, and that one of the people he killed was his father who had abused him everyday of his life. She then asked, "Do you see any circumstance where you would hear those *facts* and be able to come back and face that man and tell him that you give him the death penalty? (11RT 1472 (emphasis added).)

Prospective Juror No. 3606 responded, quite reasonably, "probably not." (*Ibid.*) After asking Prospective Juror No. 3606 about her questionnaire response that she opposed the death penalty "in theory," the prosecutor asked if she could vote for the death penalty "having heard of the mitigating circumstances such as I have stated to you?" The prospective juror responded that it "would probably be a life imprisonment or. . . mental hospital so he could get . . . help and care." The prosecutor then asked, "If you came away from the penalty phase believing the defendant is mentally ill, could you give a mentally ill person the death penalty?" The prospective juror responded, "No." (11RT 1472-1473.)

Once again, the prosecution initiated the discussion of the "facts" of the case, positing a characterization of the presumed defense mitigation case – "severely mentally ill," "profound mental problems" "constantly abused for the first 18 years of his life," "father abused him every day of his life for the first 18 years of his life." No mention was made that the prosecution would contest those "facts" throughout all phases of the trial. No question was asked concerning the prospective juror's ability to fairly evaluate the evidence and determine whether it established the mitigation assumed in the question. The prosecution was effectively asking the prospective juror to prejudge the case on hypothesized facts. The net effect was to obtain a prejudgment that, if the defense was successful in convincing this juror to credit such a case in mitigation, and the prosecution failed to successfully minimize appellant's mental illness and the abuse he had suffered, the prosecution would lose at penalty phase. That is not a legitimate constitutional basis for finding the prospective juror unqualified under *Witherspoon* and *Witt*.

Prospective Juror No. 3606's responses did not indicate she would return a verdict of life without parole without considering the evidence in aggravation as well as in mitigation. In fact, throughout her voir dire, and in her questionnaire answers, she was consistent in wanting to know the relevant circumstances before making a decision. (19CT 5036-5037, 5040; 11RT 1470, 1473-1476.) She confirmed on voir dire that, even if instructed that she would not be required to return a verdict of death, she could probably do so if she felt that was the right thing (11RT 1470), and her responses to the prosecutor's hypotheticals were consistent with a reasonable, qualified juror following the court's instructions and coming to a penalty verdict after fully considering all the relevant aggravating and mitigating evidence. She confirmed in her questionnaire that she could set

aside her feelings and follow the court's instructions. (19CT 5036.) Nothing in her answers on voir dire conflicted with those responses.

Prospective Juror No. 3606 was challenged by the prosecution not because she had moral scruples against the death penalty in the abstract that might impair her ability to follow the court's instructions, but because she might vote for life without parole if the prosecution did not successfully undercut the defense's mental health evidence and evidence of abuse. The trial court committed constitutional error, in violation of *Witherspoon* and *Witt*, by granting the prosecution's challenge for cause.

4. Prospective Juror No. 5339

a. Questionnaire (21CT 5456-5483A)

Prospective Juror No. 5339 answered "No," to question No. 59, "Do you have a personal, religious, philosophical, or other belief that makes it difficult or impossible for you to sit as a juror here?" (21CT 5464.) In response to question No. 63, asking for his general feelings regarding the death penalty, he responded: "Only when necessary. If police officer is killed or multiple amount of murder." (21CT 5465.) He responded to question No. 65, regarding his feelings on how the death penalty is used, by circling "about right." (21CT 5465.)

To each of the questions regarding automatic verdicts based on views regarding capital punishment (question Nos. 69-72), he responded, "No." (21CT 5467-5468.) He responded to question No. 74 that he would set aside his own feelings regarding what the law ought to be and follow the law as the court explains it. (21CT 5469.) To question No. 77, asking his views on whether anyone who intentionally kills a child should always get the death penalty, he underlined "Agree Somewhat," and explained "Depends on circumstances." (21CT 5469.) To question No. 78, asking his views on whether anyone who intentionally kills another person should

always get the death penalty, he underlined "Disagree Somewhat," and explained, "Mental [and] physical capacity can effect [*sic*] a person." (*Ibid.*) To question No. 79, asking his views on whether anyone who intentionally kills more than one person should always receive the death penalty, he underlined "Agree Somewhat," with no further explanation. (21 CT 5470.) To question Nos. 80 through 82, regarding a sanity phase, he responded that he would not automatically find a defendant sane to get to a penalty phase, nor insane to avoid a penalty phase, and that a victim being related to the defendant would not matter. (21CT 5470.) To question No. 104, he responded that he would have no difficulty keeping an open mind until he had heard all the evidence, all the arguments of counsel and the instructions from the court. (21CT 5473.)

b. Voir Dire (12RT 1614-1625)

Upon inquiry by the trial court, Prospective Juror No. 5339 confirmed his answers to question Nos. 69-72. (12RT 1615.) Defense counsel asked about his answer to question No. 63, concerning his general feelings about the death penalty. Prospective Juror No. 5339 reiterated that "the police officer part I would be very strong on, I think, but I don't know, I'm not as much – I used to be very strong on the death penalty, but now I'm not as strong as I used to be. I don't know why I put that down." (12 RT 1619.) Asked whether a certain number of murders would trigger strong feelings about giving the death penalty, he responded, "Yes, I think the multiple amount I guess would, especially maybe if it was in the twenties, thirties or forties or whatever." (*Ibid.*) Asked to explain his choice of "agree somewhat," on question No. 79, to the proposition that anyone who intentionally kills more than one person should receive the death penalty he responded:

Let's see, gee, I don't know quite how to answer that, sir. I'm kind

> of half and half on that. [¶] I think it depends on the – how the person – what the person shows. If they show remorse and in this situation of the amount of remorse or what they show and their mental attitude towards things probably would make a difference to me.

(12RT 1619-1620.)

Defense counsel then asked Prospective Juror No. 5339 whether, after the jury had found appellant guilty of three first degree murders, and found that he was sane at the time, the fact of three first degree murders would make the death penalty automatic in his mind, or whether he would want to hear more about appellant before determining punishment. Prospective Juror No. 5339 said he would want to hear more about him as an individual, and that in making his penalty determination, he would consider additional aggravating circumstances, such as having stabbed somebody, and mitigating circumstances, such as having been terribly abused as a child, or having mental health problems. (12RT 1620-1621.)

Prospective Juror No. 5339 also stated that he was more pro-life without parole than pro-death penalty where more than one person was murdered. (12RT 1621-1622.) He answered that he thought he could consider voting for death if instructed that he could only do that if he found the aggravating circumstances substantially outweighing the mitigating circumstances, but then responded that he probably could not consider voting for death if instructed that he was not required to vote for death, but could always vote for life without parole. (12RT 1622.) However, when defense counsel then asked whether, if he felt that the crimes were bad enough, he could he see a situation where after listening to both aggravating and mitigating circumstances, he could and would vote for death, Prospective Juror No. 5339 confirmed that it depended on the evidence presented, that he would weigh aggravation and mitigation, and that he

could return the verdict that he thought was proper and just, whether it was death or life without parole. (12RT 1622-1623.)

The prosecutor then asked Prospective Juror No. 5339 if he was a little uncomfortable with his last answer to defense counsel, and he stated, "I'm getting a little bit confused about some of the things." (12RT 1623.) The prosecutor then explained that, under the trial court's instructions, the death penalty would never be required, and could only be considered if the juror found "that the aggravating or bad things about the defendant substantially outweighed the good things about the defendant." (12RT 1624.) She then asked whether, even if the juror found that the aggravating factors,

> that three people are killed and the fact that one of them's an eight-year-old girl and the fact that they were relatives or whatever other things about those crimes you find aggravating, – even if you find that substantially outweighs the evidence that you hear from the defense about the defendant's horrible childhood and the fact that he's mentally ill and the fact that he's been abused his whole life, if you are given the choice of voting for life without parole, would you ever vote for death?

(12RT 1624.) Prospective Juror No. 5339 responded, "No, I don't think so." (*Ibid.*) The prosecutor asked if he was saying that as long as there were an option of life without parole he would always choose that over the death penalty, and he responded, "Yes." (12RT 1624-1625.)

c. Ruling Below

The prosecution challenged Prospective Juror No. 5339. Defense counsel submitted the matter. The trial court granted the challenge and excused No. 5339. (12RT 1625.)

d. The Trial Court Erred In Dismissing Prospective Juror No. 5339

Prospective Juror No. 5339, in his questionnaire, demonstrated no scrupled objection to the death penalty, even choosing "about right" to

describe his feelings on how the death penalty is used. (21CT 5465.) He indicated that his verdicts on guilt, sanity and penalty would not be automatic, and that he would set aside his own feelings and follow the trial court's instructions. (21CT 5467-5469.) He confirmed his answers on voir dire, noting that "I used to be very strong on the death penalty, but now I'm not as strong as I used to be." (12RT 1619.) He indicated he had a preference for life without parole, but that his verdict would depend on the evidence, that he would weigh aggravation and mitigation, and that he could return the verdict he thought was proper and just, whether it was death or life without parole. (12RT 1621-1623.)

As with the other prospective jurors discussed above, until the prosecutor asked her hypothetical question about the "facts" of the case, nothing in Prospective Juror No. 5339's responses would have justified a finding of substantial impairment. Upon posing the "fact"-based hypothetical and obtaining the answers, the prosecution immediately challenged this prospective juror. No other basis for the trial court's ruling granting the challenge appears.

Again, the hypothetical question posited findings of aggravation and mitigation and asked the prospective juror to prejudge the penalty based upon those purported findings. The juror was not asked whether he could fairly and impartially evaluate and consider the evidence before *making* such findings. Moreover, the hypothetical presented a false choice – whether, having decided that the assumed aggravation outweighed the assumed mitigation, the prospective juror might nonetheless conclude that the assumed mitigation warranted a verdict of life without parole.

The prospective juror had not been instructed fully concerning the weighing process involved in determining what penalty was warranted. Nor had the prospective juror been instructed fully that a single mitigating

circumstance could legitimately be found to outweigh all aggravating circumstances. Returning a verdict of life without parole under the hypothesized facts would be fully in keeping with the juror's oath and the court's instructions. Nothing in Prospective Juror 5339's responses to the hypothetical questions demonstrated any additional or deeper antipathy to the death penalty in the abstract than that disclosed by his previous answers. The hypothetical itself presumed the juror's consideration of the aggravation and the mitigation before reaching a verdict. The juror's answer cannot, therefore, be interpreted as indicating that he would return a life-without-parole verdict without regard to the aggravation. Thus, Prospective Juror No. 5339's answer to the prosecutor's hypothetical was not disqualifying under *Witherspoon* or *Witt*.

The trial court committed constitutional error, in violation of *Witherspoon* and *Witt*, by granting the prosecution's challenge for cause.

D. The Trial Court's Errors in Excusing These Jurors Requires Reversal of the Death Judgement

In her closing argument at the guilt phase, the prosecutor spent a large part of her argument challenging the defense evidence regarding the nature and extent of the abuse appellant suffered at his father's hands. (30 RT 3806-3808, 3857, 3866-3876, 3886-3890, 3893-3894; 31RT 4043.) She devoted an even larger portion of her argument to challenging the defense evidence regarding the nature and extent of appellant's mental illness and the validity of the defense experts' opinions concerning appellant's mental illness. (30RT 3842-3866, 3873, 3875-3886, 3891-3892, 3895-3896, 3899; 31RT 4059-4071.)

Consequently, a prospective juror's response that, if defense evidence were credible, he or she would return a verdict of life without possibility of parole says little or nothing about how that juror would

evaluate the balance the evidence in aggravation and mitigation actually presented. The point is illustrated by the fact that, despite the jury's inability to reach a verdict on sanity as to Counts Two and Three, with three jurors having credited the defense mental health evidence and determined that appellant was insane when he killed Josephine and Sandy, the jury unanimously returned a verdict of death after appellant repudiated the mental health evidence his counsel had presented at the guilt and sanity phases. That a jury that had deadlocked on sanity would unanimously find that aggravation substantially outweighed mitigation undermines the reasoning that underlay the prosecution's challenge to Prospective Juror Nos. 1650, 8050, 3606 and 5339 and the trial court's decision to excuse each of them.

No substantial evidence supports the trial court's finding that Prospective Juror Nos. 1650, 8050, 3606 and 5339 were substantially impaired in their ability to comply with their oaths as jurors. The trial court's findings are therefor due no deference from this Court and the judgment of death must be reversed. (*Gray, supra*, 481 U.S. at p. 661, fn. 10, 668.)

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XV.

THE TRIAL COURT'S INSTRUCTION AT THE PENALTY PHASE TO DISREGARD INSTRUCTIONS GIVEN AT OTHER PHASES OF THE TRIAL, AND THE FAILURE TO GIVE OTHER NECESSARY AND APPROPRIATE INSTRUCTIONS, REQUIRES REVERSAL OF THE DEATH JUDGMENT

At the penalty phase the court instructed the jury with CALJIC No. 8.84.1, in pertinent part as follows: "You will now be instructed as to all of the law that applies to the penalty phase of this trial. [¶] You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. *Disregard all other instructions given to you in other phases of this trial.*" (49RT 6126 (emphasis aded).)[120] The court then instructed the jury with CALJIC Nos. 8.85, setting forth the factors for the determination of penalty, 8.87 regarding other criminal activity, and 8.88, the concluding instruction. (49RT 6126-6130.) These were the only instructions given prior to deliberations.[121]

Contrary to the recommendation in the Use Note to CALJIC No. 8.84.1, the trial court did not instruct the jury with "all appropriate

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[120] Appellant did not object to the instructions given at the penalty phase. Nevertheless, because the instructional error affected appellant's substantial rights, the claim is not barred from appellate review. (See fn. 112, *ante*; see also *People v. Harris* (2008) 43 Cal.4th 1269, 1319; *People v. Moon* (2005) 37 Cal.4th 1, 37.)

[121] Upon substituting an alternate juror during deliberations, the trial court instructed the jury pursuant to CALJIC No. 17.51.1 [Substitution of Juror During or For Penalty Phase], but not CALJIC No. 17.51 [Substitution of Juror After Deliberations Begun]. (50RT 6140-6143; see Arg. XVI, *post*.)

instructions beginning with CALJIC 1.01, concluding with CALJIC 8.88." The court erred by instructing the jury to disregard prior instructions while failing to give not only those instructions, but also CALJIC Nos. 17.30-17.50 [jury cautionary instruction, jurors' duties instructions, concluding instructions].

The trial court's failure to give standard instructions at the penalty phase regarding how the jury should consider evidence and argument violated state law, as well as appellant's constitutional rights under both the federal and state constitutions. The trial court's error deprived appellant of protection afforded by complete and accurate jury instructions under California law, in violation of due process guarantees of the federal Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) The error further violated appellant's rights to confrontation, due process, equal protection, a fair jury trial, and a reliable determination of penalty. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 17; *Gardner v. Florida* (1977) 430 U.S. 349; *Taylor v. Kentucky* (1978) 436 U.S. 478.)

The court has a duty to instruct *sua sponte* on the general principles of law relevant to the evidence (see 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Trial, § 2924, pp. 3584-3586 and cases cited therein), including general principles relating to the evaluation of evidence. (See *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883-884 [credibility of witnesses]; *People v. Reeder* (1976) 65 Cal.App.3d 235, 241 [expert testimony].)

This Court has held that where the trial court has told the jury to disregard the guilt phase instructions, "it must later provide it with those instructions applicable to the penalty phase." (*People v. Moon* (2005) 37 Cal.4th 1, 37.) The Court has recently reiterated "that trial courts should

take pains to ensure that penalty phase juries are fully and properly instructed." (*People v. Harris* (2008) 43 Cal.4th 1269, 1319; see also *People v. Carter* (2003) 30 Cal.4th 1166, 1218 [noting "potential for prejudice" absent penalty phase evidentiary instructions]; *People v. Babbitt* (1988) 45 Cal.3d 660, fn. 26.)

Where standard evidentiary instructions were provided in the guilt phase but omitted in the penalty phase, this Court has assumed that reasonable and intelligent jurors will both recall those instructions and correctly assume that they apply in the penalty phase, but only in the absence of an instruction to the contrary. (See, e.g., *People v. Saunders* (1995) 11 Cal.4th 475, 561; *People v. Hawthorne* (1992) 4 Cal.4th 43, 73; *People v. Daniels* (1991) 52 Cal.3d 815, 885.) However, where the penalty phase jury is instructed to disregard the guilt phase instructions, the assumption is not viable. (*People v. Carter*, *supra*, 30 Cal.4th at p. 1219.) Because jurors are presumed to have understood and faithfully followed the trial court's instruction (see *People v. Hovarter* (2008) 44 Cal.4th 983, 1005; *People v. Mendoza* (2007) 42 Cal.4th 686, 699), at the penalty phase the jurors in this case are presumed to have intentionally paid *no* attention to *any* of the instructions given prior to the penalty phase. By instructing the jury to disregard previous instructions and abdicating its duty to instruct the jury *sua sponte* on general principles for evaluating evidence, the trial court left the jurors at appellant's penalty phase without sufficient guidance to enable them to reliably assess the evidence from the guilt, sanity and penalty phases of appellant's capital trial, or to reliably determine penalty based only on relevant, admissible evidence.

By giving CALJIC No. 8.84.1, the trial court told the jury to disregard instructions that limited the jurors' consideration of such evidence as statements made by appellant to the mental health experts (CALJIC No.

2.10; 23CT 6128), references by those experts to declarations, school records, medical records and other information relied upon in forming their opinions (23CT 6123), and which admonished the jurors that various matters were not to enter into their deliberations. (23CT 6120-6121.) The trial court also instructed the jury to disregard instructions on how to consider circumstantial evidence, prior inconsistent statements, expert testimony, stipulations, and statements of the judge and counsel, instructions concerning deliberations, and even the instructions explaining how to evaluate the credibility of witnesses, conflicting testimony, confessions, and admissions. (23CT 6113, 6116-6119, 6126-6133, 6136-6137, 6139-6141, 6177, 6179-6180.) The trial court's directive to disregard the instructions previously given, and the failure to re-instruct the jury, left the jury without any guidance as to how to assess witness credibility, including expert-witness testimony,[122] as well as other basic instructions necessary to appropriately channel the jurors' discretion in determining appellant's sentence. (*Gregg v. Georgia* (1976) 428 U.S. 153, 192-193; *Proffitt v. Florida* (1976) 428 U.S. 242, 258.)

Moreover, the jury was told that in penalty deliberations it was to "determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise." (24CT 6297; 49RT 6126.) The jury was not told to consider the evidence from the other phases under the rules that applied at those phases. Rather, they were told that in making fact findings they were to disregard the prior rules and limitations. It is thus reasonably likely the jury concluded that one effect of disregarding the prior

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[122] While the jury was instructed concerning expert testimony and hypothetical questions at the guilt phase (23CT 6139, 6141), it received no such instruction regarding the testimony of Paul Mones, who testified at the penalty phase as an expert concerning children who kill their parents.

instructions was that the various limitations on consideration of evidence that applied at the guilt and sanity phases did not apply to the penalty determination. It is reasonably likely that the jurors thereby considered evidence from those prior phases for purposes for which the evidence was not admitted, or even admissible. The trial court's penalty instructions gave the jurors license to base their penalty determinations not only on properly admitted evidence but also on other information presented during the guilt and sanity proceedings – information that was limited in its admissibility, inadmissible for the truth, or of questionable reliability – without limitation and in disregard of prior rulings of or admonitions from the trial court during those proceedings.

For example, the jurors were free to consider the prior testimony of jailhouse informants Catsiff and Alatorre, relied upon by the prosecution in cross-examination of Dr. Mills, for its truth, despite the inadmissibility of that prior testimony for that purpose. (See 26RT 3243-3271; 27RT 3418-3420.) Similarly, the jury was free to consider the testimony concerning the medical records from the Facey Clinic as establishing the absence of abuse during that period of appellant's life, despite the inadmissibility of those records for that purpose.

Missing from the instructions at the penalty phase in appellant's case were fundamental instructions. For example, the trial court's instruction at the penalty phase referred to the "evidence received during the entire trial" (24CT 6297; 49RT 6126), but the trial court omitted – and told the jury to disregard – CALJIC No. 2.00, which defines "evidence." In addition, the court omitted – and told the jury to disregard – CALJIC No. 1.02 [Statements of Counsel – Evidence Stricken Out – Insinuations of Questions – Stipulated Facts]. The critical role CALJIC No. 1.02 plays in safeguarding a defendant's constitutional rights to be judged solely on the

evidence is amply illustrated by the decisions of this Court holding that its provision alone will "cure" the otherwise prejudicial impact of impermissible statements. (See, e.g., *People v. Sanchez* (1995) 12 Cal.4th 1, 70 [instruction with CALJIC No. 1.02 "vitiated the misleading effect of any inaccurate remarks by the prosecutor"]; *People v. Sandoval* (1992) 4 Cal.4th 155, 182 [CALJIC No. 1.02 cured effect of prosecutor's reference in cross-examination to improper matter not in evidence].)

The trial court also instructed the jury to disregard CALJIC Nos. 1.03 [Juror Forbidden to Make any Independent Investigation] and 17.30 [Jury Not to Take Cue from the Judge]. (23CT 6114, 6177.) The importance of the latter instruction to the jurors' "normative" decision on penalty is shown by the trial court's comments rebuking and disparaging appellant in the presence of the jurors during the penalty phase (see, e.g., 46 RT 5616-5617), and making and sustaining its own objections to appellant's examination of witnesses. (See, e.g., 45RT 5538, 5544.) Under the trial court's instruction, the jury was free to take cues from the trial court's attitude toward appellant as expressed more directly at appellant in the penalty phase, in which he represented himself, than in prior phases in which he was represented by counsel. Yet state law and the Fifth, Eighth, and Fourteenth Amendments guarantee that penalty judgments must be based solely on the evidence adduced at trial. (See, e.g., *Taylor v. Kentucky* (1978) 436 U.S. 478 [due process guarantees that judgments be based solely on evidence admitted at trial]; *Gardner v. Florida* (1977) 430 U.S. 349, 362; *People v. Sandoval* (1992) 4 Cal.4th 155, 194 ["Penalty determinations are to be based on the evidence presented by the parties and the legal instructions given by the court."].) The combination of the specific instruction to not follow the legal guidance provided at the guilt and sanity phases, with the lack of affirmative guidance concerning the evaluation and

consideration of evidence in penalty phase deliberations, thus violated appellant's right to a fair, reliable, and evenhanded capital-sentencing determination. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

The state cannot demonstrate beyond a reasonable doubt that no harm resulted from the trial court's failure to provide guidance to the jury as to how to assess the evidence in determining appellant's sentence. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) In a capital case the jury's sentencing decision is a discretionary, fact-specific determination (see *Tuilaepa v. California* (1994) 512 U.S. 967), and the process by which the decision is reached affords the jurors wide latitude. It is essential that the jurors be aware of the framework they must use in assessing the evidence that was presented during the course of the trial. By leaving the jury unfettered by fundamental rules for evaluating evidence, the trial court removed any assurance that the verdict was reached in a fair, reliable, and trustworthy fashion.

The verdict of death was not a foregone conclusion, given the jury's difficulties in reaching unanimous verdicts in the guilt phase, and the inability of the jurors to reach a unanimous verdict in the sanity phase on Counts Two and Three. The absence of any instruction concerning the evaluation and consideration of evidence, or of any instruction governing the findings of fact required of the penalty jury, deprives the eventual verdict of any validity, and renders the verdict wholly unreliable.

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XVI.

THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY TO BEGIN PENALTY DELIBERATIONS ANEW UPON REPLACEMENT OF A SITTING JUROR WITH AN ALTERNATE JUROR

Upon substituting an alternate juror for a sitting juror during penalty phase deliberations, the trial court failed to instruct the jury to set aside its prior deliberations and start anew, in violation of appellant's rights to due process, a jury trial and a reliable determination of penalty. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, § 16; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *Brown v. Louisiana* (1980) 447 U.S. 323; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480; *People v. Collins* (1976) 17 Cal.3d 687; Pen. Code, §§ 1089, 1163, 1164.) The penalty judgment must therefore be reversed.

Toward the end of the second day of penalty deliberations, one juror was excused due to her mother's medical condition. (24 CT 6290-6291, 6293-6294.) An alternate was substituted, and the trial court instructed the jury pursuant to CALJIC No. 17.51.1:

> Members of the Jury. A juror has been replaced by an alternate juror. . . . The alternate juror was present during the presentation of all of the evidence, arguments of counsel, and reading of instructions, during the guilt phase of the trial and sanity phase. However, the alternate juror did not participate in the jury deliberations which resulted in the verdicts and findings returned by you to this point.
>
> For the purposes of this special phase of the trial, the alternate juror must accept as having been proved beyond a reasonable doubt, those guilty verdicts and true findings rendered by the jury in the guilt phase of this trial and Count 1 of the sanity phase. . . .
>
> Your function now is to determine, along with the other jurors, in the light of the prior verdict or verdicts and findings and the evidence and law what penalty should be imposed. Each of

> you must participate fully in the deliberations including any review as may be necessary of the evidence presented in the guilt and sanity phase of the trial.

(24CT 6303; 50RT 6141-6143.[123]) The court failed to instruct the jury, pursuant to CALJIC No. 17.51, to disregard its previous deliberations and to begin anew. The reconstituted jury returned its death verdict the next day, after less than two hours of deliberation. (24CT 6294, 6308-6309.)

The right to a unanimous verdict by 12 jurors in criminal cases is secured by the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163 & 1164; *People v. Collins*, *supra*, 17 Cal.3d at p. 693) and is protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution (*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346; *Vitek v. Jones*, *supra*, 445 U.S. at p. 488). Because this is a capital case, the right to a unanimous verdict is also guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The purpose of the unanimity requirement is to ensure the accuracy and reliability of the verdict (*Brown v. Louisiana*, *supra*, 447 U.S. at pp. 331-334; *People v. Feagley* (1975) 14 Cal.3d 338, 352), and there is a heightened need for reliability in the procedures leading to the conviction of a capital offense (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9; *Beck v. Alabama, supra,* 447 U.S. at p. 638). Therefore, jury unanimity is required in capital cases.

In *People v. Collins, supra,* 17 Cal.3d 687, this Court held that, as a matter of state statutory and constitutional law, the right to a trial by 12 jurors whose verdict must be unanimous includes the right to have each juror engage in all jury deliberations:

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[123] After first giving the instruction without mentioning the sanity phase, the prosecutor stated that it should be included, so the court repeated the instruction as quoted.

> The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberation of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interaction as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset if a new juror enters the decision-making process after the 11 others have commenced deliberations. The elements of number and unanimity combine to form an essential element of unity in the verdict. By this we mean that a defendant may not be convicted except by 12 jurors who have heard all the evidence and argument and who together have deliberated to unanimity.

(*Id.* at p. 693.) Therefore, an alternate juror may join the jury after deliberations have begun, but the jury must be instructed to disregard all past deliberations and begin anew. (*Id.* at p. 694.)

CALJIC No. 17.51[124] embodies the *Collins* rule, and provides, in

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[124] CALJIC No. 17.51 states:

Members of the Jury:

A juror has been replaced by an alternate juror. You must not consider this fact for any purpose.

The People and [the] defendant[s] have the right to a verdict reached only after full participation of the twelve jurors who return the verdict.

This right may be assured only if you begin your deliberations again from the beginning.

You must therefore set aside and disregard all past deliberations and begin deliberating anew. This means that each remaining original juror must set aside and disregard the earlier deliberations as if they had not taken place.

(continued...)

relevant part, that in a panel reconstituted after substitution of an alternate, all jurors "must therefore set aside and disregard all past deliberations and begin deliberating anew." This means that each remaining original juror must set aside and disregard the earlier deliberations as if they had not taken place." The trial court erroneously failed to instruct the jury pursuant to CALJIC No. 17.51 or to otherwise instruct the reconstituted jury to disregard previous deliberations and begin deliberations anew.

The denial of a unanimous verdict by 12 jurors constituted structural error. Such errors, involving "'structural defects in the constitution of the trial mechanism . . . defy analysis by "harmless-error" standards,'" (*Arizona v. Fulminante*, *supra*, 499 U.S. at p. 309) because they are "necessarily unquantifiable and indeterminate (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282).[125] Such errors always require invalidation of a judgment. (*Id.* at p. 279.)

Assuming arguendo this Court does not find the error structural,

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[124] (...continued)

You shall now retire to begin anew your deliberations in accordance with all the instructions previously given.

[125] Moreover, whether federal constitutional error or not, the error is structural and requires reversal without harmless error analysis. The United States Supreme Court has held that structural errors need not be of constitutional dimension. (*United States v. Curbelo* (4th Cir. 2003) 343 F.3d. 273, 280, citing *Nguyen v. United States* (2003) 539 U.S. 69, 81.) In *Nguyen*, the Supreme Court recognized that when an error "involves a violation of a statutory provision that 'embodies a strong policy concerning the proper administration of judicial business' courts may vacate the judgment without assessing prejudice." Statutory provisions governing the number of jurors required to convict a criminal defendant, or to sentence him to death, embody such policy considerations.

still, the error cannot be found harmless, and reversal is required. Federal constitutional error, such as this, is assessed under the test of *Chapman, supra,* 386 U.S. at p. 24, requiring reversal if the error is not harmless beyond a reasonable doubt. In *People v. Collins*, *supra*, 17 Cal.3d 687, this Court assessed the failure to properly instruct a reconstituted jury as state law error only, governed by the test of *People v. Watson, supra,* 46 Cal.2d at p. 836, which requires reversal only if there is a reasonable probability that the defendant would have obtained a more favorable verdict absent the error. (*People v. Collins*, *supra*, 17 Cal.3d at p. 697; see also *People v. Proctor* (1992) 4 Cal. 4th 499, 536-538; *People v. Renteria* (2001) 93 Cal.App.4th 552, 560-561.) However, those cases involve deliberations on guilt, whereas the error here involved deliberations on penalty. Errors of state law during a capital penalty phase require reversal if there is a reasonable possibility that error affected the verdict. (*People v. Brown* (1988) 46 Cal. 3d 432, 446-449.) This is the same in substance and effect as *Chapman's* "reasonable doubt" test. (*People v. Ashmus* (1991) 54 Cal.3d 932, 990; *People v. Gonzalez* (2006) 38 Cal. 4th 932, 960–961.)

"[T]he closeness of the case and the comparison of time spent deliberating before and after the substitution of the alternate juror [are] factors to be considered when determining prejudice from *Collins* error." (*People v. Odle* (1988) 45 Cal.3d 386, 405.) In *Griesel v. Dart Industries, Inc.* (1979) 23 Cal.3d 578, 585, *Collins* error was found to be prejudicial "because the jury had deliberated for seven days before the substitution, and rendered its verdict less than four hours after substitution." In *Collins* itself this Court found the error harmless because the case against the defendant was "very strong," the jury had only deliberated for about an hour before the substitution, and the jury returned its verdict after several additional hours. (*People v. Odle, supra*, 45 Cal.3d at pp. 405-406; see also *People v.*

Proctor, *supra*, 4 Cal.4th at pp. 536-538; *People v. Martinez* (1984) 159 Cal.App.3d 661, 665-666.)

In appellant's case, the juror substitution took place on the second day of penalty deliberations, after the jury had deliberated for approximately 4½ hours. (24CT 6290-6291, 6293-6294.) When she asked to be excused, that juror told the trial court the jury was unlikely to reach a verdict that day. (50RT 6135.) After an alternate juror was substituted, the reconstituted jury deliberated for only about 15 minutes further that day. (24CT 6294.) The jury deliberated for less than 2 hours the next day before returning its death verdict. (24CT 6294, 6308-6309.) The comparatively short time of deliberations by the reconstituted jury, especially in light of the excused juror's belief that a verdict would not have been reached the day of the substitution, strongly suggests that the reconstituted jury took up deliberations where they had left off, rather than begin anew.

Moreover, a death verdict was by no means a foregone conclusion. The jurors had difficulty reaching unanimous verdicts on all counts in both the guilt and sanity phases. At least some of the jurors appear to have credited the defense mental-health testimony during the guilt phase, initially deadlocking on Counts Two and Three between first and second degree murder, with one juror voting for involuntary manslaughter on Count Three. (34RT 4223-4224.) Similarly, the jurors' inability to reach a unanimous verdict at the sanity phase on Counts Two and Three demonstrated that some of them found the defense had established appellant was insane at the time of the commission of the homicides in Counts Two and Three. (24CT 6238; 39RT 4674-4675.) There were clearly differences of opinion about the evidence and about appellant's mental health. Certainly, it cannot be determined beyond a reasonable doubt on this record that a reconstituted jury, instructed to begin penalty instructions anew, would have returned a

verdict of death.

For the foregoing reasons, the trial court's failure to instruct the jury to disregard previous penalty phase deliberations and to begin penalty deliberations anew violated appellant's state statutory rights as well as his state and federal constitutional rights. Reversal of appellant's death sentence is required.

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XVII.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently-phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve the claims for federal review. Should this Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. The Broad Application of Section 190.3, Factor (a) Violated Appellant's Constitutional Rights

Penal Code section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See 24 CT 6298 [CALJIC No. 8.85 (2000 Revision)].) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the

defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing. Here, the prosecutor argued that the death penalty was warranted because, among other things, one of the victims was eight years old (34RT 4241; 48RT 5846-5850, 5856, 5891, 5895, 5909) while another was 32 (34RT 4242; 48RT 5854) and the third victim's age was not mentioned; appellant planned and intended not to get caught (48RT 5877-5878, 5882, 5887-5892, 5904, 5909-5910); and appellant testified that he was not to blame, and showed no remorse. (48 RT 5839, 5862-5864, 5867-5868, 5881-5882, 5895, 5906, 5912, 5915-5916.)

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that this Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36

Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges this Court to reconsider this holding.

B. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

1. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence, except as to proof of prior criminal acts. (24CT 6300 [CALJIC No. 8.87].)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Ring v. Arizona* (2002) 536 U.S. 584, 604, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 871, 166 L.Ed.2d 856], now require that any fact used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make factual findings: (1) that aggravating factors were present; and (2) that the aggravating factors were so substantial as to make death an appropriate punishment. (24CT 6301-6302 [CALJIC No. 8.88].) Because these additional findings were required before the jury could impose the death sentence, *Apprendi*, *Ring*, *Blakely*,

and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on another ground in *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). This Court has rejected the argument that *Apprendi*, *Ring*, and *Blakely* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges this Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Appellant further contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected appellant's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair, supra*, 36 Cal.4th 686, 753.) Appellant requests that this Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the state had the burden of persuasion regarding the existence of any factor in aggravation and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (24CT 6298-6299, 6301-6302), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutionally minimal standards, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges this Court to reconsider its decisions in *Lenart* and *Arias*.

Even assuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction

that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

It violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance that the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) This Court reaffirmed this holding after the decision in *Ring v. Arizona, supra.* (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Fifth, Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the Equal Protection Clause of the federal Constitution. In California, when a criminal defendant has been

charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the Equal Protection Clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the Equal Protection Clause of the federal Constitution and by its irrationality violate both the Due Process Clause and the Cruel and Unusual Punishment Clause of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks this Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's capital sentencing scheme. In fact, the jury was instructed that unanimity was not required. (24CT 6300 [CALJIC No. 8.87].) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth,

and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson, supra*, 25 Cal.4th 543, 584-585.) Here, the prosecution relied heavily upon the evidence of an attempted robbery of Frances Summe and an assault on Curtis Wright, arguing that the evidence showed that appellant was a violent predator (48RT 5886-5887, 5911, 5916); that he showed no remorse (48RT 5882, 5884-5885, 5887); that his crimes were premeditated and calculated (48RT 5883, 5886, 5891-5892, 5911-5913); that he was violent before committing the homicides in this case and after (41RT 4844); and that he would continue to be dangerous in the future (48RT 5900, 5912).

The United States Supreme Court's decisions in *Cunningham v. California*, *supra*, 549 U.S. 270, *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks this Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (24CT 6301-6302.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather, it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other

hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

This Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

6. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense

theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the non-reciprocity involved in explaining how a death verdict may be warranted, but failing to explain when a life without parole verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions Violated the Fifth, Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 292-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that the jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also

required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital sentencing determination, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The Penalty Jury Should Be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th

Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th & 14th Amends.), and his right to the equal protection of the laws (U.S. Const., 14th Amend.).

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to ensure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

C. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges this Court to reconsider its decisions on the necessity of written findings.

D. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see 24CT 6298-6299 [CALJIC No. 8.85]; Pen. Code, § 190.3, factors (d) and (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (See *Mills v. Maryland, supra*, 486 U.S. 367, 384; *Lockett v. Ohio, supra*, 438 U.S. 586, 604.) Appellant is aware that this Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case, including factors (e) [victim a participant in or consented to homicide] and (j) [defendant an accomplice and minor participant]. The trial court failed to omit those factors from the jury instructions (24CT 6298-6299), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's Eighth Amendment rights. Appellant asks this Court to reconsider its decision in *People v. Cook, supra*, 39 Cal.4th 566, 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely As Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No.

8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (24CT 6298-6299.) This Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). Appellant's jury, though, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks this Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are relevant only as mitigators.

E. The Prohibition Against Intercase Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., intercase proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct intercase proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For

this reason, appellant urges this Court to reconsider its failure to require intercase proportionality review in capital cases.

F. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes, in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.06.) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that this Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks this Court to reconsider.

G. California's Use of the Death Penalty As a Regular Form of Punishment Falls Short of International Norms

This Court has repeatedly rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, and "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook, supra*, 39 Cal.4th 566, 618-619; *People v. Snow*

(2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges this Court to reconsider its previous decisions.

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XVIII.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Assuming arguendo that none of the errors in this case requires reversal by itself, their cumulative effect nevertheless undermines any confidence in the integrity of the guilt, sanity and penalty phase proceedings and warrants reversal of the judgment of conviction, including the sanity verdict on Count One, and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Greer v. Miller* (1987) 483 U.S. 756, 764; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [reversing guilt and penalty judgments in capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error]; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [errors that might not, alone, be so prejudicial as to amount to a deprivation of due process may cumulatively produce a trial that is fundamentally unfair]; *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"].) Where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) Reversal is required unless it can be said that the

combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying *Chapman* to totality of errors when federal constitutional errors combined with other errors].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (*In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [error may be harmless at guilt phase but prejudicial at penalty phase]; *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing error at penalty phase]; *People v. Brown* (1988) 46 Cal.3d 432, 466 [error at guilt phase requires reversal of penalty determination if there is a reasonable possibility the jury would have rendered a different verdict absent the error]; see also *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137.)

Where, as here, the case was a close one, in which the jury showed difficulty in reaching each verdict at each phase of the trial, and failed to reach unanimity on appellant's sanity at the time of the homicides of Josephine and Sandra, the substantial risk that multiple errors distorted the jurors' consideration of the evidence to appellant's prejudice undermines the reliability of the verdicts and requires reversal of the judgment.

Appellant's commission of the three homicides was not disputed. Only appellant's state of mind at the time was at issue in the guilt and sanity phases. That was how the case was tried, and how it was argued to the jury. The jury, however, demonstrated some difficulty with resolution of that question. The jury submitted questions to the trial court during deliberations, asking for further instruction (23CT 6091-6092, 6097, 6103-6104; 34RT 4192) and readback of testimony (23CT 6098; 34 RT 4192).

Although the homicides involved a single explosion of violence over a matter of seconds or, at most, minutes, the jury took four days to return a verdict of first degree murder on Count One, and three more days before reaching second degree murder verdicts on Counts Two and Three. Immediately before those verdicts, the jurors were divided three ways on Count Three, with one juror voting for involuntary manslaughter. (34RT 4223-4224.) The verdicts of second degree murder on Counts Two and Three and the finding of the special circumstance were returned only after the prosecution dismissed first degree murder charges on those two counts. (24CT 6213-6215; 34RT 4225-4235.)

However, the jury's deliberations and, ultimately, their verdicts were distorted, to appellant's prejudice, by each of the various errors which appellant has demonstrated occurred at the guilt phase. From the start, the trial court's errors prejudiced the defense, tainting the jury and the jury's verdicts and distorting the reliability of the fact-finding function of the trial through all three phases.

In jury selection, the trial court erroneously excused four jurors based upon non-disqualifying views regarding mental health issues. (See Arg. XIV.) At the guilt phase, the obstacles to the defense and assistance to the prosecution resulting from former counsel ineffective assistance at the first trial and the consequent delay in retrying appellant (see Arg. I), the erroneous admission of unreliable prior testimony (see Args. I, II) and the erroneous consideration of the interactions between appellant and his counsel during the trial (see Arg. X), the misconduct of the prosecutor (see Arg. IX) and the erroneous refusal of voluntary manslaughter instructions on Counts Two and Three (see Arg. XI) prejudicially undermined the defense mental health evidence and distorted the jury's determination of the core issue at the guilt and sanity phases at the guilt and sanity phases of the

trial – appellant's mental state at the time of the homicides. The flawed instructions on circumstantial evidence, motive, flight and suppression of evidence further lightened the prosecution's burden, and distorted the relevance and probative value of certain evidence, directing the jurors to questionable interpretations of the circumstantial evidence and to unfavorable interpretations of the evidence. (See Args. XII, XIII.) Appellant was deprived of a full and fair determination of the elements of the charges against, and of his defenses, by the trial court's refusal to give voluntary manslaughter instructions on Counts Two and Three. (See Arg. XI.) The combined effect of these errors was to undercut the defense case and provide unwarranted and improper support for the prosecution. As set forth in each argument, each of the errors, if considered separately, constitutes reversible error. Considered together, the flawed nature of the guilt phase and the consequent unreliability of the verdicts and special circumstance finding are stark.

Furthermore, these errors necessarily affected and further distorted the jury's deliberations at the sanity phase, where the jury had more difficulty reaching verdicts. Compounding their effect was the error in allowing the sanity phase to proceed in appellant's absence. (See Arg. VIII.) The error in allowing appellant to withdraw his NGI plea allowed made the special circumstance finding complete, despite the jury's inability to reach unanimous sanity verdicts, which would have determined appellant's eligibility, or non-eligibility, for the death penalty.

At the penalty phase, the verdict of death was not a foregone conclusion, given the jurors' difficulties in reaching unanimous verdicts in the guilt phase, and their inability to reach a unanimous verdict on sanity on Counts Two or Three. Before the penalty phase, the prosecutor herself appeared to believe a verdict of death was unlikely. (See 40RT 4722.)

The instructional errors at the penalty phase, in combination with the errors undercutting the guilt and sanity verdicts, rendered the ultimate verdict of death unreliable. That appellant was allowed to represent himself at the penalty phase despite substantial evidence that he had not knowingly and voluntarily waived his right to counsel, and then was made to do so after requesting reinstatement of defense counsel, transformed an already flawed proceeding into, in the prosecutor's words, a "mockery" and "ridiculous circus." That "circus" was not the fair jury trial to which appellant was entitled, and the resulting death verdict cannot be considered reliable. Reversal of the death judgment is mandated because it cannot be shown that the penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.)

Any of the errors in this case, standing alone, was sufficient to undermine the prosecution's case and the reliability of the jury's ultimate verdicts, and none can be found harmless beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Chapman*, *supra*, 386 U.S. at p. 24.) Certain of the errors require reversal of the judgment per se, or portions thereof, without assessment of prejudice. (See Args. III-VIII, X, XIV-XVII.) Considered separately, or in combination, the errors deprived appellant of a fair trial, due process and a reliable determination of guilt, of sanity, and ultimately, of penalty. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi* (1988) 486 U.S. 578, 585; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 330-331; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *Gardner v. Florida* (1977) 430 U.S. 349; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643; *People v.*

Brown (1988) 46 Cal.3d 432, 448.)

The combined impact of the errors requires reversal of appellant's convictions, including the sanity verdict on Count One and the death sentence.

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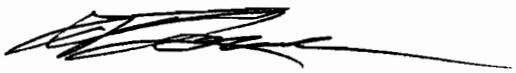
CONCLUSION

For all the reasons stated above, the entire judgment must be reversed. Should the entire judgment not be reversed, still, appellant's pleas of not guilty by reason of insanity to Counts Two and Three must be reinstated and remanded for a retrial on those pleas, and the sentence of death must be reversed.

DATED: January 4, 2011

Respectfully submitted,

MICHAEL HERSEK
State Public Defender



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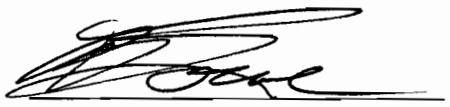
(CAL. RULES OF COURT, RULE 8.630(b)(2)

I, William Lowe, am the Senior Deputy State Public Defender assigned to represent appellant Robert Maurice Bloom in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count I certify that this brief is 141,269 words in length.



WILLIAM LOWE
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Robert Maurice Bloom* Calif. Supreme Ct. No. S095223
Los Angeles Co. Sup. Ct. No. A801380

I, Glenice Fuller, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; and that on January 5, 2011, I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

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

Office of the Attorney General
Attn: Michael Johnsen, D.A.G
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Robert M. Bloom
(Appellant)

Addie Lovelace
Death Penalty Coordinator
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Each said envelope was then, on January 5, 2011, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 5, 2011, at San Francisco, California.

Glenice Fuller
DECLARANT