SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. EDWARD MATHEW WYCOFF, Defendant/Appellant.	Automatic Appeal Supreme Court No. S178669 (Contra Costa Superior Court Case No. 5-071529-2)

APPELLANT'S OPENING BRIEF

On Automatic Appeal from a Judgement of Death
Rendered in the State of California, Contra Costa County Superior Court

Honorable John W. Kennedy, Presiding

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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/Respondent,	)	Automatic Appeal
	)	No. S178669
v.	)	
EDWARD MATTHEW WYCOFF,	)	
Defendant/Appellant.	)	

APPELLANT'S OPENING BRIEF ON APPEAL

I.
STATEMENT OF THE CASE AND APPEALABILITY

A two count information was filed against Edward Wycoff in the Contra Costa County Superior Court on October 5, 2007. Count One alleged the first degree murder of Paul Rogers. Count Two alleged the first degree murder of Julie Rogers. Each of the two murder counts alleged the same three enhancements: use of a dangerous weapon - knife (Penal Code section 12022(b)(1); use of a dangerous weapon - "Wheel Barrel" (Penal Code section 12022(b)(1); and being armed with a firearm (Penal Code section 12022(1)(1). A single special circumstance allegation of multiple murder, Penal Code section 190.2(a)(3), was also alleged in connection with each of the two murder counts. (2CT 260-262.)

Wycoff was arraigned in the Superior Court on October 9, 2007 and pled not guilty to both counts and all of the enhancements. (2CT 263.) On January 9, 2008, a motion to dismiss the two firearm enhancements was granted. (2CT 295.)

Throughout the course of 2008, Wycoff filed and the court heard a number of *Marsden* motions seeking to relieve appointed counsel.[1] (2 CT 303-328, 346-379.) These proceedings culminated in an order from the court dated November 14, 2008, granting Wycoff's request for self-representation. (2 CT 412.) On December 29, 2008, David Briggs was appointed as Wycoff's advisory counsel. (2CT 461-462.) Wycoff remained self-represented during the remainder of the Superior Court proceedings up to and including sentencing.

On June 26, 2009, Wycoff's case was assigned to Judge John W. Kennedy for all purposes. (3CT 679.) Trial started with jury selection on September 14, 2009. (4CT 733.) A jury was sworn on October 8, 2009. (5CT 1307.) Opening statements were presented on October 14, 2009. (5CT 1326.) The prosecution rested its guilt phase case on October 20, 2009. (5CT 1341.) The defense rested its guilt phase case on October 22, 2009. (5CT 1342.) Closing arguments were presented on October 26, 2009. (5CT 1344.) The jury began its deliberations the next day, October 27, 2009. The jury reached its verdicts in one hour and forty minutes. (5CT 1347.) Wycoff was found guilty of both counts of first degree murder. The jury also found true the enhancements and the

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1 *People v. Marsden* (1970) 2 Cal.3rd 118.

multiple-murder special circumstance allegation. (5CT1349.)

The penalty phase of trial began the next day, October 28, 2009. (5CT 1479-1480.) Closing arguments for the penalty phase were presented on November 4 and 5, 2009. (5CT 1503-1505.) Jury deliberations took place on the afternoon of November 5. The jury deliberated for less than two hours before returning verdicts of death on both counts. (5 CT 1506-1508; 21RT 4626.)

A sentencing hearing was held on December 8, 2009. Wycoff made a verbal motion for new trial which was denied by the court. (21RT 4643.) The court then denied an automatic motion for modification of the death verdicts. (6 CT 1579-1587; 21 RT 4653.) The court imposed judgments of death on Count One, the murder of Paul Rogers, and Count Two, the murder of Julie Rogers. (6CT 1633-1636; 21RT 4721.)

This appeal is an automatic appeal following judgments of death which lie within the original jurisdiction of this Court. Cal. Const., art. VI, section 12; Penal Code section 1239.

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II.
STATEMENT OF THE FACTS

A. Guilt Phase Evidence

1. Introduction

Acting as his own attorney, Edward Wycoff freely admitted that he killed his sister, Julie Rogers, and her husband, Paul Rogers, in the early morning hours of January 31, 2006. At the guilt phase of trial, Wycoff testified that he intended to kill Julie and Paul and that he planned the killings for months. (16 RT 3590.) He was proud of what he did. During the penalty phase, Wycoff said that he was "the hero" for killing Julie and Paul and that he deserved a reward for doing so.[2] (19RT 4247.)

The facts presented at the guilt phase addressed three time periods. First, Wycoff described the events and his thoughts leading up to the night he killed Julie and Paul Rogers. Second, Wycoff, the two children of Julie and Paul who witnessed the killings, and the police described the events in the early morning hours of the killings. Third, Wycoff and various police officers described his arrest that same morning, evidence seized after his arrest, and statements Wycoff made about the killings to police and others after his arrest.

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[2] Although not presented as evidence at trial a psychologist appointed by the court prior to trial found that Wycoff was suffering from "Paranoid Schizophrenia" and was "a paranoid man suffering from severe mental illness." The psychologist concluded that Wycoff's decision to kill Julie and Paul Rogers was the product of his mental illness. (1CT 418, 427.)

No legally meaningful defense was presented at trial. Instead, Wycoff argued to the jury that he had not only a legal and moral right to kill Julie and Paul Rogers, but a moral duty to do so. He argued that when "some rotten people hate you and are about to destroy you, whether it be a moral destruction, a financial destruction, or a destruction of your family or property...you especially have the right to destroy them before they destroy you, but if you choose not to destroy those bad people, then you are a bad person yourself who believes in evil and you deserved to be destroyed." (17RT 3775-3776.) Wycoff believed that Julie and Paul Rogers were going to destroy him, "the rest of my family," and "steal my portion of my dad's inheritance." Therefore, Wycoff "owned them" and he believed that "not only do I have the right to destroy Julie and Paul but it was expected." (17RT 3776.)

Wycoff testified that Julie and Paul hated him and were determined to destroy him. The prosecution presented evidence that Wycoff planned and killed Julie and Paul Rogers. The jury deliberated for less than two hours before it found Wycoff guilty of two counts of first degree murder. (17RT 3808.)

2. Prior to the Killing of Julie and Paul Rogers

The background information about the events prior to the killing of Julie and Paul Rogers came almost entirely from Wycoff himself. He testified on direct examination in the form of a rambling narrative that often jumped from one subject to another. His

narrative was frequently vague and often the product of his paranoid delusions.

During Wycoff's narrative, the court told the jury that "as to all this testimony, I'm permitting Mr. Wycoff to testify with a broad scope with the understanding that you may consider his testimony as evidence relating to his state of mind, that being his intent, his motivations...I'm not admitting it for the truth of the matters asserted by Mr. Wycoff, so please don't understand it for the truth of the matters asserted but only as to his state of mind." (16RT 3412.) Unless indicated, the evidence described below is taken from Wycoff's narrative "as evidence of his state of mind."

Wycoff's sister, Julie Rogers, was almost eleven years older than Wycoff. They never really had a brother and sister relationship. (16RT 3387.) Wycoff always viewed Julie as an adult and not a sister. (16RT 3447.) Julie left for college when Wycoff was eight. A few months later Wycoff's other older sister, Debbie, died of an epileptic seizure. (16RT 3385.)

Wycoff described himself as having many problems during his childhood. He hated school. He was not loving, but hateful. He took drugs for hyperactivity. If he failed to take his drugs he would go "bonkers." However, he claimed he eventually outgrew his childhood problems. (16RT 3384, 3388.)

After Debbie died, Wycoff's family moved to a house on Matheny Way in the Citrus Heights neighborhood of Sacramento. Wycoff's grandmother, Irene Galloway, moved into the house with them. Wycoff described his grandmother as the worst person

in the world. He hated her. One day in 1986, Wycoff and his father were moving heavy furniture. Galloway didn't want the furniture moved. She argued with Wycoff's father. The next thing Wycoff knew, Galloway was on the floor and injured. (16RT 3468.) Wycoff believed that his father was drunk and that he knocked Galloway down. (16RT 3461.) Her hip was broken and she left the house in an ambulance. She never returned. Wycoff thought Galloway's departure from the house was one of the greatest things in the world. It brought peace to the house. (16RT 3389-3390.)

Julie married Paul Rogers after they met in law school. Wycoff didn't want Julie to get married. He saw no reason for it. (16RT 338.) Wycoff said that Julie only married Paul because he was rich. She did not love Paul. Paul wanted children while Julie did not. But Julie did not like working as an attorney so she decided to have children as a way to get out of work. (16RT 3453-3454.) According to Wycoff, Julie sold herself out by getting married and sold herself out a second time by having children. (16RT 3455.)

Wycoff thought that Paul was a communist, a socialist, and "very much a leftist." (16RT 3493.) Paul hated guns while Wycoff was a member of the National Rifle Association. (16RT 3554.) Wycoff believed that gun control was "hitting what you shoot." (16RT 3487.)

Julie and Paul had three children. Eric Rogers was 17 at the time of his parent's death. (14RT 2967.) Laurel Rogers was 12. (14RT 3106.) Eric and Laurel testified. Another son, Alex, did not testify and was not home when Wycoff killed Julie and Paul.

In 1993, Wycoff became a long haul truck driver. (16RT 3393.) Also in the early 1990s, Julie and Paul began showing disrespect for Wycoff. It started with little things. Eventually, Wycoff concluded that Julie and Paul hated him and "wanted to destroy me." (16RT 3489.) Wycoff believed that gave him the right to kill his sister and her husband. (16RT 3589.)

The disrespect and hatred that Julie and Paul had for Wycoff arose in many situations. For instance, the Christmas or birthday presents that Wycoff bought for Eric, Laurel, and Alex were not good enough. (16RT 3394.) Julie and Paul made the gifts from Wycoff "just disappear." (16RT 3397-3398.)

Right after Christmas in 1998, Wycoff went to a park with Paul, Eric and Alex. Wycoff noticed that Eric was getting "a bit hyper." Paul gave Eric a Ritalin pill. Wycoff had taken Ritalin as a child and didn't like it. He argued with Paul about giving Ritalin to Eric. Wycoff said that Paul "was over-prescribing the Ritalin because the kid was just standing there in a daze." Wycoff thought that Paul was doing this so "he didn't have to deal with the kid." (16RT 3402.)

In 2000 or 2001, Wycoff learned that Julie and Paul were also giving Ritalin to Alex. When the children came over to the house on Matheny Way that Wycoff shared with his father, they did not do anything but "sit there" because they were taking Ritalin. Wycoff realized what Julie and Paul were doing. (16RT 3404.) Julie and Paul wanted

the kids to be well mannered around Wycoff and Julie's father "to try and make a good impression on Dad." (16RT 3405.) Wycoff concluded that Julie and Paul were bad parents. (16RT 3447.)

Another instance of disrespect occurred in 2004. Julie and Paul knew that Wycoff did not like salad dressing. While in the kitchen Julie, Paul, and Wycoff discussed putting a bowl of salad on the table without dressing. Everyone could then choose which dressing to put on their own salad. However, after leaving the kitchen for a minute, Wycoff returned to see Paul pouring a whole bottle of salad dressing over the entire bowl of salad. Wycoff "knew it was outright disrespect of me from Julie and Paul." (16RT 3415-3416.)

In November, 2004, Wycoff's Aunt Lu, who was nearly a hundred years old and had dementia, was in a car accident near Reno. Julie and Paul had her placed in an assisted living community near Walnut Creek, California. Wycoff thought that Julie and Paul just wanted to get control over Aunt Lu and her assets. (16RT 3416.)

In 2005, Wycoff and Julie's father was in the hospital. He died on July 13, 2005. While their father was in the hospital he would rarely talk to Wycoff. (16RT 3420.) Julie "was totally in control of Dad." (16RT 3422.) Julie did not want their father talking to Wycoff. She wanted "to make sure she would be the last person to talk to Dad." (16RT 3424.) Julie arranged for hospice care for their father back at

the Matheny Way house. (16RT 3422.)

According to Wycoff, Julie wanted their father to die at home for several reasons. Julie wanted their father to die "in the middle of that house, so it would freak (Wycoff) out and creep (Wycoff) out and make (Wycoff) not want to live there any more, make (Wycoff) want to move out because someone died in that house." Julie intended to "add misery" to Wycoff's life. (16RT 3423.) Indeed, Wycoff said the house "was haunted after that. Things happened." However, Wycoff still "loved that house" and it was Julie who "got creeped out in that house, a scary feeling." (16RT 3423-3424.)

Julie controlled their father's medicine the day he was brought home from the hospital. She immediately began giving him morphine patches to make him sleep. (16RT 3425.) She wanted their father drugged "so he won't wake up." He died that night. (RT 3425-3426.)

According to Wycoff, Julie wanted their father to die because she had a vacation planned in August. "And Julie did not want Dad to die or have problems with Dad while she was on vacation. Julie wanted Dad to die before she went on vacation. So she set up the hospice thing so that dad would stop eating and die before Julie would go on vacation in August." (16RT 3423.)

After their father's death, Julie "made it perfectly clear that she was the executor of (his) estate. She was calling the shots, even though I lived at the house

and everything." (16RT 3426.) According to Wycoff, Julie agreed that she would go through everything in the house and anything she wanted to keep "she would run it through (Wycoff)." Wycoff claimed, however, that Julie and her children came to the house one day when Wycoff was not home. Julie let her children take whatever they wanted without discussing it with Wycoff. Even their mother's expensive jewelry was missing. When Wycoff returned home, he called Julie on the telephone. She didn't want to talk about it. Eventually, however, she admitted that she took their mother's jewelry. (16RT 3430-3431.)

At their father's funeral, photographs of Wycoff's hated grandmother, Irene Galloway, with their father were put on display. Wycoff realized what Julie was doing. He argued with Julie about the photos and then he "corrected that." (16RT 3433.)

The obituary for their father was late. Paul was supposed to have it done by the day of the funeral. "And a few people were actually blaming (Wycoff) for that, for the obituary, but it was Paul that was supposed to take care of that." (16RT 3433.)

Julie and Paul were supposed to bring Aunt Lu to the funeral. She never arrived. Julie said Aunt Lu was too upset to attend. Wycoff thought that was a lie. Wycoff believed that Julie wanted to keep Aunt Lu away from him. (16RT 3448.) Wycoff believed that Julie and Paul were taking over Aunt Lu's life and assets.

Julie put all of Aunt Lu's things into storage. She wanted to sell Aunt Lu's house. Julie made Aunt Lu's "oldest will" just "disappear." The oldest will included assets for Aunt Lu's step-daughters. Julie said she was going to "create" a new will that only included "herself more than other family members." (16RT 3449-3450, 3452-3453.)

After their father's funeral Julie came over to the Matheny Way house. She told Wycoff that half the house belonged to her. She wanted Wycoff to pay her rent. Wycoff insisted that they had agreed that he would take complete ownership of the house and Julie would get "all of these investments, 401Ks, and all this (sic) bank accounts, checking accounts." According to Wycoff, "this wasn't the same Julie." (16RT 3434.)

Julie, Paul and their family lived in El Cerrito, just north of Berkeley. After their August vacation, they began to remodel their house. On or about September 10, 2005, Wycoff drove down from Citrus Heights in his father's pickup truck to help Julie and Paul move their furniture from their house into a rental house about three blocks away. (16RT 3435-3436.) Wycoff saw a lot of bad things that day.

Julie told Wycoff that one of her neighbors was trying to build a house on a vacant lot. Julie and other neighbors had the building project stopped. The house was half-built and remained that way for several months. Wycoff came to the conclusion that Julie and Paul wanted their privacy and "they were willing to

destroy this other person that was trying to build the house..." According to Wycoff, "Julie and Paul told this person you cannot build your house. You cannot do this, and shut them down. And then (Julie and Paul) turned around and started building their own house, started working on their own house. It just - - you know, it just seemed so messed up." (16RT 3439.)

While they were moving furniture to the rental house, Eric would not help. Paul talked to Eric nicely trying to get him to help, but "it just wasn't working." (16RT 3440.) Wycoff thought "this was weird." Paul told Wycoff that he could not "make Eric do anything he doesn't want to do." Wycoff thought that Paul was being "so weak, so wimpy." In Wycoff's view, "you can make people do things they don't want to do...cause I've made people do plenty of things. Now, it's now always pleasant. It's not always nice, but there is (sic) ways to put on the pressure, turn up the heat, and make people get things done, make people do things." (16RT 3441.)

After moving furniture that day, Wycoff left his father's pickup truck with Julie and Paul. He had Julie drive him back to Citrus Heights. During the drive Julie called Rosemary Swart. Swart then spoke to Wycoff. She invited him over for dinner the following day. Wycoff thought that was unusual. (16RT 3444.)

The next day, while Wycoff was at Swart's house for dinner, Wycoff believed Julie went into his house and took their father's financial papers. He

noticed later that the grant deed to the house was missing. Other receipts for the house, like a receipt for a new roof, were also missing. At about the same time Wycoff noticed that his mother's jewelry was missing. Julie later confirmed that she had the documents and the jewelry. (16RT 3445-3446.)

Up until this time, the tax bill for the house had come in the name of their father. After the dinner with Swart, the tax bill came in the name of "Wycoff trust." Wycoff surmised that Julie got the grant deed to the house while he was a dinner with Swart. As executor of her father's estate she then put the house into a trust. According to Wycoff, she basically owned the house and she intended to take it away from him despite their agreement to the contrary. (16RT 3456.)

Wycoff asked Julie why she did this. Julie said she wanted to buy a house that bordered a park so that "it would be as if she had this huge backyard." When Wycoff thought about Julie's statement he realized that he already had what Julie wanted. The house on Matheny Way bordered a county flood plain that could not be built upon. He "already had that house that bordered on a park, basically." Julie, he thought, "was willing to take that away from me so that she could have that." (16RT 3456-3457.)

On January 5, 2006, Wycoff realized that he had not seen Aunt Lu for awhile. He knew she was in a nursing home in Walnut Creek, but he didn't know which one. He got in his van and drove to Walnut Creek. However, he couldn't

find Aunt Lu. (16RT 3458.) When he couldn't find Aunt Lu, Wycoff called Julie on the telephone.

Wycoff described his telephone conversation with Julie as "appalling." (16RT 3459.) Julie would not tell Wycoff where Aunt Lu was living. When he asked why, Julie said that she didn't want Wycoff to "bully" Aunt Lu. Wycoff could not believe she said that to him. (16RT 3460.)

The Wycoffs had always arranged to get together for Christmas. After their father died, Wycoff had hinted to Julie that he wanted to be invited to her house for Thanksgiving and Christmas. He was not invited for either holiday. During his January 5th telephone conversation with Julie, he learned for the first time that all of Paul's brothers, all uncles to Julie's children, had been at Julie's house for Christmas. Yet Wycoff, who considered himself the favorite uncle of the children, was not invited. (16RT 3459.)

After the telephone call with Julie on January 5, 2006, Wycoff "absolutely decided (he) had to kill Julie and Paul." The date was significant. Exactly 28 years earlier Wycoff's other sister, Debbie, had died. It "sort of blew (him) away" that he decided to kill his one living sister on the 28th anniversary of the death of his other sister. Wycoff also realized "that January 31st was coming up, the 20th anniversary of my dad getting drunk and knocking grandma (Galloway) down." (16RT 3461.) He decided that killing his sister on that day, January 31st, "would be the best day, it

would be symbolic." He started making plans to kill Julie and Paul. (16RT 3462.)

On January 23rd, Wycoff was hauling explosives through the southern Mojave Desert. He stopped his truck at a shipping yard and climbed a mountain to pray to God. He explained to God his plan to kill Julie and Paul. He told God that if killing Julie and Paul was wrong, then God should stop him before he did it or "send me a sign not to do this." Wycoff said, "...stop me, God, if this is not the thing to do." When he was done praying, Wyocff heard a rumble in the sky. He expected the source of the rumble to be an airplane. But when Wycoff looked up, he saw no airplane. (16RT 3466.) Wycoff didn't know whether the rumble meant "prayer received" or "you will be stopped." (16RT 3467.)

At about the same time as his prayer to God, Julie "did something really weird." She shipped a piano to Wycoff's house in Citrus Heights without telling Wycoff beforehand. It was the piano on which Julie learned how to play. According to Wycoff, "...that piano is more associated with Julie than probably any other piece of furniture in the world..." (16RT 3467.)

Wycoff connected the arrival of Julie's piano with the day Grandma Galloway departed the house forever. Wycoff thought that Julie sending him the piano "was a lot like" the day Galloway was injured and left the house. He said, "Now, if that is not a sign from God to kill Julie and Paul, then I don't know what is." (16RT 3469.)

Wycoff's last telephone conversation with Julie took place on or about January 26th. He called her from a parking lot on his way home from work. He was hoping for a miracle and that Julie would have a "change of heart" and "go 180 degrees." She didn't and the conversation went very badly. (16RT 3469.)

Wycoff reminded Julie that the anniversary of the day Grandma Galloway left the family house was approaching. He wanted to know how they were going to celebrate that anniversary. Julie said to Wycoff the "filthiest, dirtiest thing in the whole wide world." She told him to learn to forgive and forget because Wycoff had "all of these ghosts that are in your life, you are always going to be bothered by these ghosts. You are always going to have problems in life. You need to forgive." (16RT 3471.)

In the same conversation, or possibly an earlier one, Julie told Wycoff that if anything happened to her "there is going to be (a) lot of people coming after you." Wycoff assumed this meant that "Julie and Paul's friends and family would come after me." Wycoff believed that "Julie knew what she was doing to me was wrong, for Julie to say that. For Julie to say that, she knew that I had a right to come after her." (16RT 3473.) She knew that Wycoff was being wronged and she "knew that I had the right to punish her." That meant, according to Wycoff, that she knew he had the right to kill her and Paul. (16RT 3589.) He did, in fact, kill Julie and Paul. He planned the killings for months and freely admitted he intended to kill both of

them. He was proud of killing them. He felt no remorse. On the contrary, Wycoff was "proud of myself." He "did what had to be done...There is nothing to feel bad about here." (16RT 3591.)

3. The Killing of Julie and Paul Rogers

On January 31, 2006, Eric Rogers, then 17, lived with his mother and father in a rented house on Rifle Range Road in El Cerrito, California. This house was about three blocks from their own house which was being remodeled. His sister Laurel, then 12, also lived there. His brother Alex did not. Eric and Laurel knew their uncle, Edward Wycoff, as Ted or Uncle Ted. Wycoff had helped them moved into the Rifle Range house the previous September. (14RT 2966, 2968-2970, 3107-3109.)

At about 4:24 a.m. on January 31st, both Eric and Laurel heard yelling, screaming, breaking glass, and crashing sounds from inside the house. Eric thought there was an intruder in the house and knew right away that a fight was going on. (14RT 2971-2972, 3111, 3117.) The intruder was Wycoff. (16RT 3590.)

Wycoff described the situation as "just a fight." Once he entered the house he ran down the hallway at full speed. He was wearing a motorcycle helmet and had night vision goggles around his neck. He first encountered Julie in the hallway. (16RT 3505-3507.) Paul then joined the melee. Wycoff used a wheelbarrow

handle to hit Paul and repeatedly stabbed both Julie and Paul with a knife. (16RT 3509-3510.) He stabbed Julie in the stomach and then stabbed Paul in the back three times. The knife became stuck in Paul's back and Wycoff could not pull it out. (16RT 3511-3513.) While Wycoff was trying to pull the knife out of Paul's back, Julie walked off. Wycoff found her by following a trail of blood down the hallway, through the kitchen, and outside into the area around the swimming pool. After Wycoff went outside through a sliding glass kitchen door, he saw Laurel in the kitchen. She yelled "Eric," then walked back in the direction of the bedrooms. (16RT 3520, 3584.)

Wycoff found Julie outside near the pool. He hit her on the head as fast and as hard as he could with the wheelbarrow handle. She fell down. Julie said, "I'm dead," but Wycoff "just kept beating away." He believed that he hit her another 20 times. He then ran off leaving Julie "in a fetal position." (16RT 3521, 3556.) Wycoff jumped over a fence and ran up a hill in the backyard to where he had parked his bicycle. He rode his bicycle downhill to where he had parked his van. When he got to his van, Wycoff realized that he was bleeding. (16RT 3540-3541.)

When Eric first heard the fighting in the hallway, he thought his parents were being attacked by a burglar. He heard his mother say "stop it, stop it." Eric got out of bed and opened his bedroom door. In the main hallway he saw a dark-clothed figure in a motorcycle helmet struggling with someone out of view. Eric

had been told by his parents that if there was ever a burglar in the house he should hide and pretend to be asleep, then call the police. (13RT 2974-2976.)

While going back into his bedroom, Eric saw Laurel open her bedroom door. He went into her room instead. He used a cordless telephone in her room to call 911. He told the 911 operator that there was an intruder in their house. (14RT 2978, 3116-3117.)

While Eric was on the telephone with the 911 operator, things got quieter except for a thumping sound in the hallway. To Laurel it "sounded like dragging." (13RT 3118-3119.) Eric followed Laurel out into the hallway. He still had the cordless telephone in his hand. The lights were on. Blood was clearly visible. Laurel looked into the master bedroom and saw her father laying face down with a knife in his back. Eric told the 911 operator that they needed an ambulance. Laurel's immediate reaction was to run to the kitchen to get a towel to stop her father's bleeding. Eric crouched down over his father. Paul said, "Eric, I love you. I love you no matter what." The 911 operator continued to ask Eric questions. Eric told her that he thought he had seen the knife that was in his father's back at Wycoff's house in Citrus Heights. (13RT 2932; 14RT 2981-2983, 3121.)

When Laurel ran to the kitchen she saw a trail of blood going down the hallway, through the entryway near the front door, and into the kitchen area. The kitchen light was on. Once in the kitchen, Laurel saw that the sliding glass door to

the patio was open. Laurel saw a person on the patio wearing night vision goggles. She didn't recognize the person. She grabbed a towel, poured water over it, then ran back to her father. She put the towel around the knife and over the stab wound. Eric was still there and still talking to the 911 operator. Paul said, "It was your uncle." Laurel asked, "Ted?" Paul "sort of nodded in agreement." Laurel asked where her mother was. Paul said he didn't know. Paul told Laurel that he loved her and that he was sorry.[3] At one point he tried to get up, but Laurel told him to stay still. (14RT 3123-3126, 3131.) Laurel remained with her father until the police arrived. (14RT 3127.) Eric went to the front door. He saw broken glass and a stepping stone on the floor inside the entryway. When the police arrived he let them in the front door and made them aware that he had called them. (14RT 2983, 2988.)

El Cerrito Police Officer Christopher Purdy was on patrol when he received a dispatch at 4:25 a.m. indicating there was a prowler inside a residence on Rifle Range Road. He arrived outside the residence and waited for backup. While waiting, he heard a woman crying, whimpering, and making other subdued sounds that could have been coming from the pool area of the house. (13RT 2883-2884,

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[3] Wycoff testified that Paul told Laurel and Eric he "was sorry" because he was sorry for what he tried to do to Wycoff. According to Wycoff, Paul knew why he had been killed and "basically apologized to his kids" for trying to destroy Wycoff. (16RT 3469.)

2886-2888.)

After backup officers arrived, Officer David Hartung, also from El Cerrito, and Officer Khan from the Kensington police, Prudy approached the front door of the residence. The glass window on the left side of the front door had been broken. Glass was scattered all around the door area. Prudy reached in through the broken glass window to unlock the front door. Before he could do so, a white male teenager, Eric Rogers, opened the door. Eric was on the telephone. (13 RT 2889-2891, 2922.) Eric told the police that his father had been stabbed and directed them to a back bedroom. A few minutes later, when Officer Hartung asked Eric what happened, Eric said his uncle had broken into the house and stabbed his father. (13RT 2922, 2924-2925.)

Eric directed Officer Prudy to a back bedroom. When he arrived at the bedroom Prudy found Paul laying on the floor. A knife was stuck in Paul's back. A towel was wrapped around the base of the knife. Laurel was squatting next to Paul holding the towel around the knife. Purdy put on latex gloves and took over holding the towel around the knife. (13RT 2892-2894.)

Paul was still alive. Purdy asked Paul who did this. Paul said, "My brother-in-law, Ted." When Purdy asked why, Paul said it didn't matter "because I am dying." Paul made no more statements and died while lying on the floor. (13RT 2896-2898.)

A few feet from Paul's body Officer Purdy found a black motorcycle helmet with a ponytail attached to it. There was condensation on the helmet's visor. (13RT 2898-2899.)

While Officer Purdy was attending to Paul, Officer Hartung went to search the rest of the house because the assailant had not yet been found. He noticed a trail of blood leading down the hallway, past the front entryway, and into the kitchen. Hartung followed the trail of blood through the kitchen, out a sliding glass door, onto a patio, and down into the area around the pool. Behind a retaining wall he found Julie. She was on the ground and bleeding profusely. (13RT 2927.) She was alive, but had trouble breathing. Her abdominal area had been eviscerated and a significant portion of her intestines were outside her body. (13RT 2927-2928.)

Hartung told Julie she was going to die. He asked her who did this. She said, "son, son, okay." Hartung asked her if she meant that her son did this. Twice she said, "no, helmet, we don't have helmet." After that she was non-responsive and her breathing appeared to stop. (13RT 2929-2930.)

El Cerrito Police Officer Shawn Maples arrived at the residence shortly after the other officers. He heard Prudy's conversation with Paul, including Paul's statement that his brother-in-law was responsible. (13RT 2951.) Maples also made contact with Officer Hartung and Julie. She was laying on her back between a retaining wall and the pool. A majority of her lower internal organs were exposed

and she had one or more significant wounds to her head. She was bleeding profusely and not responsive while Maples was present. (13RT 2952.)

Maples had a police dog brought to the residence to search for the assailant. The dog ran from the front door to a street at the top of the hill behind the residence. The dog then lost the scent. (13RT 2955-2956.)

El Cerrito Police Officer Donald Horgan supervised the police investigation at the residence. When he arrived at the scene he was given a tour by Officer Maples. (14RT 2998-2999.)

Horgan followed the blood trail through the house, out the sliding glass door in the kitchen, into the pool area in the backyard, then over a fence. (14RT 3001, 3020, 3030.) There appeared to be blood going up the hillside from the backyard to a road at the top of the hill. (14RT 3030-3021.) Vista Road is at the top of the hill behind the residence on Rifle Range Road. Vista Road becomes Club View Road then goes downhill for about a half mile to the El Cerrito BART station. (14RT 3018-3019.)

Maples found a broken wheelbarrow handle in three different locations. One part of the handle was found near the front entryway into the residence. A second part was found in the bedroom where Paul died. A third part was found on the hillside behind the residence. The portion of the wheelbarrow handle found on the hillside had blood on it. (14RT 3024, 3028, 3033.)

Dr. Arnold Josselson performed the autopsy of both Julie and Paul Rogers. Paul Rogers had numerous stab wounds on his body, including four defensive wounds. He also had blunt force trauma to his head. The cause of his death was the 19 stab wounds he sustained, including the wound caused by the knife still stuck in his back, which lead to a fatal loss of blood. (15RT 3213, 3232-3234, 3262-3263.) He may have been conscious for three to five minutes after receiving the wounds. (15RT 3263.)

Julie similarly had 19 stab wounds. She also had 31 bruises. She had several abrasions and lacerations. She was hit with a blunt object near her eyes. The knife wound on her abdomen was 11 inches long. While she lived long enough to reach the hospital, she also died of blood loss from her multiple stab wounds. (15RT 3268-3269, 3279, 3284, 3300-3301.)

4. Events After the Deaths of Julie and Paul Rogers

After he got to his van, Wycoff's plan was to discard his things into a dumpster. He then planned to drive to a hospital near the mountains to address his wound. He planned on telling the hospital staff that his injury was from a mountain bike accident. (16RT 3558.)

Roseville Police Officer Phillip Mancini received a dispatch at 7:47 a.m. on January 31, 2006, directing him to the Kaiser Hospital in Roseville, outside

Sacramento. He was to contact and arrest a suspect in a murder case. When he arrived at the hospital he took Wycoff into custody. At that time Wycoff had a fairly large wound on this right leg. (15RT 3257-3258.) A test taken at the hospital showed that Wycoff did not have drugs or alcohol in his blood. (15RT 3253.)

Ian Wong and several other El Cerrito police officers were sent to Roseville to pick up Wycoff. Wong found Wycoff inside the emergency room at the Kaiser Hospital in Roseville. Wycoff was in the custody of the Roseville police. Wycoff was being treated for an injury to his leg. Wong took custody of Wycoff and transported him back to El Cerrito. (15RT 3190.)

Wycoff's van was located in the hospital parking lot and towed back to El Cerrito. Once there, it was searched pursuant to a warrant. (14RT 3081-3082; 15RT 3150.)

In Wycoff's van police found a number of incriminating items. A bicycle was found in the back of the van. (15RT 3156.) A pair of bloody gloves were found on top of the rear wheel of the bicycle. (15RT 3157-3158.) The police found a pair of night vision goggles on the front seat. (15RT 3154.) They also found a map of El Cerrito. Blood was found on the driver's seat and steering column. (15RT 3153.) A GPS device was found. (15RT 3176.) The police also found a .25 caliber Beretta handgun in the van. (14RT 3083; 15RT 3177.)

When a search was conducted of Wycoff's home in Citrus Heights the police found a receipt for Lasik eye surgery. Wycoff had eye surgery on January 27, 2006. They also found a receipt from a Lowe's hardware store for the purchase of a wheelbarrow handle on January 20, 2006. (15RT 3179-3180, 3200.) The police found hair that matched that found in the ponytail attached to the motorcycle helmet which Wycoff left in the bedroom where Paul Rogers died. (15RT 3178.)

The day after his arrest, Wycoff was interviewed by El Cerrito police officers. A portion of the video tape of that interview, Exhibit 61, was played for the jury. A transcript of Exhibit 61 is set forth in the Clerk's Transcript at Volume 8, pages 1961 to 2077.

Wycoff told the police he wanted to talk to them so he could tell his side of the story. He readily admitted that he killed Julie and Paul Rogers. (15RT 3183-3184.)

Wycoff described his relationship with Julie and Paul and how they hated him. He described them as "truly appalling people." (8CT 2003.) He described his preparation for killing them including climbing the mountain in the Mohave Desert and praying to God. (8CT 2004.)

He told the police he decided on January 4 or 5, 2006, that Julie "needs to die." (8CT 2012.) His plan was "to run into the house real quick, hit them on the head and then stab them and then run out." (8CT 2014.)

The night of the killings, he parked his van near the BART station in El Cerrito and rode his bicycle up the hill. He had on a motorcycle helmet and gloves. He was carrying a wheelbarrow handle and a knife. (8CT 2018-2020.) He parked his bicycle on Vista Road, walked down the hillside into the backyard and tried to find a way into the Rogers' residence on Rifle Range Road. (8CT 2021.) When he got to the front door, he decided to throw a cement paver through the window. He thought it was about 4:15 a.m. After breaking the window, he climbed through. He thought he cut his leg in the process. (8CT 2022.)

While Wycoff expected everyone to be asleep, he ran into someone in the hallway. He thought it was Julie. He "whacked Julie....then Paul kind of charged me." After he knocked Paul down, Wycoff got out his knife. (8CT 2023.) "And then it was just this horrible fight." Towards the end of the fight "Julie got up and started walking down the hallway slowly." Wycoff continued to stab Paul. (8CT 2024.) After he was convinced he "took care of Paul," Wycoff grabbed the wheelbarrow handle and followed the trail of blood into the kitchen looking for Julie. He caught up with her near the pool, stabbed her a few times, then "went, wham, with the stick on the back of her head." (8CT 2025.) When he was finished with his sister, he jumped over the fence, ran up the hill, got on his bicycle, and rode down the hill to his van. (8CT 2027.)

After getting in his van, Wycoff drove back towards Sacramento on a route

that did not cause him to pass through a toll booth. He thought a toll booth might take a photograph of his license plate. (8CT 2032.) He eventually made his way to the Kaiser Hospital in Roseville. (8CT 2036.)

Wycoff said he had to kill Julie and Paul. "I, I did this because I felt it had to be done. I felt that there were evil people in this world." (8CT 2069.) "And what I did, I don't, I don't see it as murder, you know. I see it as something, you know, a bunch of moral steps that had to be taken." (8CT 2071.) Wycoff said that he was "kind of happy because, you know, I guess you could call it leveling, I may have leveled some karma, you know. I stopped an evil person in this world that had too much power. I mean some people like, you know, Adolf Hitler, you know, you know, if you could just kill Adolf Hitler before he did what he did." (8CT 2074.)

Wycoff thought he would get away with killing Julie and Paul. Afterwards, he planned to raise their children. He thought he would wait a couple of days after their death, then "offer the kids to come live with me." (8CT 2045, 2055.) "And I would raise them right." (8CT 2010.) He never intended to hurt Eric or Laurel. (8CT 2044.)

On February 3, 2006, three days after killing Julie and Paul, Wycoff gave an interview to a reporter from the Contra Costa Times newspaper. Wycoff told the reporter that he had no regrets over what he did because he felt he "took down some bad people...and made the world a better place." (15RT 3309.) He told the

reporter that he "was appalled with what my sister and brother-in-law did." (15RT 3310.) Wycoff said that when he "bashed through the front window with a wooden wheelbarrow handle the handle broke and he cut his hand. He thought that he encountered Julie first, "then Paul came" and "it turned into a big bad struggle from there." He was sorry that Laurel had to witness some of the attack. (15RT 3311.) Finally, Wycoff said: "I don't think of myself as a murderer. Yes, I killed some people. I was supposed to make the world a better place." (15RT 3311-3312.)

In June, 2009, two pages of handwritten poetry were seized from Wycoff's cell at the county jail. The poetry was read at trial by a county sheriff. (16RT 3370-3372; Exhibit 65, set forth in the Clerk's Transcript, Volume 8, pages 2080-2081.) The poetry included the following lines: "I didn't get his spread, nor items few, but the death I scored is zero to two." (16RT 3374.) The poetry ended with the following lines: "My shitster was a theef, who maid an errer, I gave her greef as she died in terrer. Cut her husband like beef and I didn't spair her. And now the ground beneeth de cemitary prepers her." (8CT 2081; 16RT 3376-3377.)

5. Wycoff's Guilt Phase Closing Argument

Acting as his own attorney, Wycoff gave the closing defense argument at the guilt phase of trial. Wycoff told the jury that when Julie and Paul "made their intentions clear to me not only do I have the right to destroy Julie and Paul, but it

was expected...Everything that happened is Julie and Paul's fault. They brought death on to themselves. They have no one to blame but them." (17RT 3776.)

Wycoff admitted that he "put those demons under ground." But, he argued, he did not deserve to be punished for it. On the contrary, he "deserve[d] award and reward and to live a nice beautiful, peaceful life for this. You know, people need to look up at me and appreciate me for this, for all this." (17RT 3777.)

Wycoff argued that he was not a murderer, but a killer. He knew that "murder is wrong, murder is bad. It's illegal." (17RT 3777.) But sometimes you have to kill. Sometimes killing is something that has to be done. He argued, "I am not a murderer, I'm a killer, and I expect everybody in this world to appreciate me as such." (17RT 3778.)

Finally, he stood in front of the jury apparently with a box of cereal and a pen. He then said, as he repeatedly stabbed the box of cereal with the pen, "And you know something else, this is Kellog's Frosted Flakes. Its cereal. I'm a cereal killer. I'm a cereal killer. Make sure you spell cereal right...its not serial. It's cereal as in C-E-R-E-A-L." Wycoff then said that it was a joke, but he didn't know why people didn't laugh. He thought there were "too many short people and bigots in the room." (17RT 3782-3783.)

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B. Penalty Phase Evidence

1. The Prosecution's Case

The first witness called by the prosecution at the penalty phase trial was David Wentworth, an El Cerrito detective. Wentworth testified that he was present when Wycoff was brought into the El Cerrito police station for booking during the evening of January 31, 2006, the day of the offenses. (18RT 3923, 3925.) Some of Wycoff's statements to Wentworth during the booking process were tape recorded by the police. Wycoff's taped statements were played for the jury. Among mostly idle chatter, Wycoff said to Wentworth the following:

> You know, I should be executed for this. I believe in the death penalty. That's the way it should go down. I - I believe in the death penalty. And I should be executed. I mean I think it would make society a more moral place if this was handled the way it should be handled.
>
> (8CT 2092.)

Eric Christensen worked at the Contra Costa County detention facility in Martinez, California where Wycoff was detained prior to trial. Christensen testified that every telephone call made by an inmate is recorded. (18RT 3936.) The prosecutor then played for the jury taped telephone conversations Wycoff had with

a number of different people. Christensen incorrectly testified that Wycoff was not represented by counsel at the time of these conversations.[4] (18RT 3939.)

The first recorded telephone conversation played to the jury took place on February 4, 2006, just four days after the offenses. (8CT 2101-2116.) Wycoff's recorded conversation was with the "Campbells."

Primarily, Wycoff discussed with the Campbells his concern for taking care of his house. He thought "that house need to be taken care of because you know the uh, orphans? My sister's kids" were going to inherit it. "They're the only heir." (8CT 2107.) Wycoff also briefly mentioned to the Campbells that an attorney "that wants to represent me...thinks I'm kind of crazy in the head or something." Wycoff could not remember the name of the attorney. (8CT 2110.)

The next recorded telephone conversation played to the jury was to Brad Langer on February 2, 2006. (8CT 2117-2123.) Wycoff told Langer how to "put money on his books at the prison" so he could purchase things like dental floss. (8CT 2118.) During the conversation Wycoff mentioned that "[t]hings inside the house did not go right...I had it all planned out but uh, it just didn't go right..." (8CT 2121.) Wycoff also mentioned that it "really is a shame" that "those kids are orphans." (8CT 2122.)

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[4] As will be detailed below, during some of the taped telephone conversations Wycoff complained about his then court appointed lawyer, Daniel Cook. (9CT 2231.)

The next recorded telephone conversation played to the jury was another call to the Campbells. This call was made on February 7, 2006. Again, the conversation mostly concerned Wycoff's house in Citrus Heights. For instance, one of the Campbells mentioned that "Drew is taking care of the cat." (9CT 2127.)

The next recorded telephone conversation played to the jury was with Mike Lawson on February 28, 2006. (9CT 2134.) Lawson was apparently Wycoff's neighbor in Citrus Heights. (9CT 2175.) Only a small portion of this conversation was played. During this conversation, Wycoff mentioned that the people running the jail were "so communist around here" because he wasn't getting the letters sent to him. (9CT 2135.) Wycoff also asked Lawson if he believed that Wycoff was "sick and needed uh, treatment." Lawson said he did. Wycoff said he did "not want to go that route." He said the following to Lawson:

> And uh, I don't want to believe that. Because uh, the thing is - I made a moral choice and I don't think there's nothing sick about making a uh, moral decision. I mean, I uh, believe that uh, my sister and brother in law were evil and needed to be taken out. And uh, that's that. I had it all planned out. I planned to raise the kids. And take care of everything. But uh, it - it uh, didn't turn out right.
>
> (9CT 2135.)

Wycoff said he guessed he would get "20-25 years." "That's just a guess." (9CT 2136.) He premised this belief on the idea that multiple killers get life imprisonment with eligibility for parole, but that only really sadistic killers get executed. Wycoff said he was "not like that" and he didn't do "stuff like that." He surmised "probably the psychiatrists that are dealing with me will figure that out." (9CT 2137.)

The next recorded telephone conversation played for the jury was made on March 4, 2006, and was with "Uncle Charlie" who apparently lived in Oklahoma. (9CT 2159-2160.) Wycoff told Uncle Charlie that his sister Julie "married into a really screwed up family. There's a bunch of faggots over there. A bunch of people with screwed up beliefs. A bunch of gays and queers and drugs and everything else over there on Paul's side." (9CT 2161.) Wycoff explained that Julie and Paul "put Aunt Lou (Lu) into a nursing home and got $350,000 for Aunt Lou's house." (9CT 2161-2162.) "And they spent a lot of money. A lot of Aunt Lou's money." (9CT 2163.)

The next recorded telephone conversation played for the jury was with Drew Campbell on May 21, 2006. (18RT 3960.) Wycoff told Drew that he "chopped up two people on your birthday." Wycoff then corrected himself to say it was on the birthday of Drew's mother. Wycoff said, "It was January 31." (9CT 2174.)

The next recorded telephone conversation played to the jury was with Mike

Lawson on May 2, 2006. (18CT 3961.) Wycoff told Lawson that he had reviewed "a bunch of the discovery" in his case. He said the some of the statements made by Eric and Laurel were disappointing while "some of it was a little bit heart wrenching..." (9CT 2181.) Lawson said that he read some of the media reports about Wycoff. Lawson mentioned that Julie did not die until around 2 p.m. on January 31st. Wycoff did not know that. He thought she had died at the scene. Wycoff said, "I thought I finished her up there too." (9CT 2189.) Wycoff said he knew that "Paul told the kids that it was me." (9CT 2190.) Wycoff said that Eric was "not as moral as I am." However, Wycoff also said that he was "just one trait away from being a serial killer." He told Lawson, "I have the ability to go out into the world and - and just kill people. And really enjoy doing it." But, Wycoff added, "I have moral values. And that - and that's the thing that keeps me in check is I have morals and I try to do good...Now the thing is, I screw up from time to time." Wycoff explain that having morals was the one trait that kept him from being a serial killer. (9CT 2191.) Serial killers, Wycoff explained to Lawson, "don't have a conscience" and "don't have any morals. Well, it just so happens I have morals." Again speaking about Eric, Wycoff said he wanted to "raise him myself...get rid of the parents and raise that kid myself. And try to put things right." (9CT 2192.) "But, unfortunately, I got caught." (9CT 2193.)

The next recorded telephone conversation played to the jury was with

Uncle Charlie on March 5, 2006. (18RT 3990.) During this conversation Wycoff talked about his relatives and his work in the trucking industry. (9CT 2201-2213.)

The next recorded conversation played for the jury was with Mike Lawson on March 18, 2006. (18RT 3991.) During this conversation Wycoff talked about his then court appointed lawyer, Daniel Cook. Wycoff called Cook "a real dirt bag." Wycoff explained to Cook "why I killed those two people" but Cook "can't understand that..." Wycoff told Lawson that he was "a good person with morals. The fact that I killed two people doesn't mean I'm a bad person." (9CT 2231.)

The last recorded conversation played for the jury was with Mike Lawson on May 28, 2006. (18RT 3991.) During this conversation, Wycoff talked briefly about Julie's poor treatment of Aunt Lu and her failure to invite him over for Christmas. (9CT 2243-2244.) Wycoff also wondered why Lauren did not recognize him the night of the attack even though she "looked right at me." (9CT 2244.) Wycoff thought "there was a higher power in control of everything" during the attack. The higher power "erased the fears and uh, caused things to happened the way they did." (9CT 2250.)

After playing the tape recorded telephone conversations, the prosecutor read to the jury a letter written by Wycoff to his cousin, Lurinda Armanini. (18RT 3995.) The letter, referred to by the parties as the "Lurinda letter," was trial Exhibit 69 and appears in the Clerk's Transcript at pages 2253 to 2260. The eight page

single spaced letter was admitted into evidence by stipulation and read into the record by the prosecutor. (18RT 3996-4007.) In the body of the letter Wycoff stated that it was being written on May 5, 2006. (18RT 4006.)

The version of the letter read into the record by the prosecutor, as set forth in the Reporter's Transcript, does not contain the many spelling and punctuation errors contained in the original handwritten letter. The excerpts of Wycoff's "Lurinda letter" set forth below are taken from the Reporter's Transcript. Wycoff wrote:

> Even after the killification of the family's rogue elements, when I got hurt and trashed into emergency unit at Kaiser Hospital, my humor and thinking were definitely intact. Because when the doctors walked up and looked at me as I sat bleeding and dripping blood, one asked, quote, "How did you get in this condition?" end quote. I glanced myself over and then said, quote, "I had a Twinkie attack." But these scums didn't think that was funny and called the cops. What jerks.
>
> (19RT 3998-3999.)

> Lurinda, you said in your letter, quote, "You had absolutely no right to take the lives of Julie and Paul, no matter how much you hated them," end quote. Well, I did have the right. Not only do I have the right to protect my

family and the world from terror, but as a moral person, I am obligated.

Julie and Paul took Aunt Lu and locked her away in a nursing home, away from everyone, got rid of her will, and took control of her assets, and sold Lu's house after my dad died.

Julie and Paul poured overdose of Ritalin - poured overdoses of Ritalin down their son's throats and ruined their minds and lives. Julie had no respect for me, and was about to steal my house from me.

(18RT 4001-4002.)

Well, the beautiful thing is hate is very bad and a lot of good people had good reason to hate Julie and Paul, including me.

But I know from experience that when you kill someone you hate you don't hate them anymore, and that's better.

I did not plan on getting caught, but since I did, there are plenty of people who hate me. They were allies of evil with Julie and Paul.

...A long time ago and a world away, Jesus suffered badly for a week and had a horrible death, to supposedly take all of the sins of the world onto himself.

Me, here today, I've taken the hatred of several evil people associated with Julie and Paul on to myself, and I'm facing years of low-level misery in prison leading up to a peaceful, painful injecticution or gassecution.

Part of the plan was I would whack the parents and then finish raising my nephews and niece myself.

I would be the kids' savior by doing a better job raising them than Julie and Paul were doing. But then again, I got caught.

(18RT 4003-4004.)

As for their kids, I think I did them a slight favor by getting rid of such bad parents. As for everyone else, we need to ease their hurt by enlightening them with the truth about Julie and Paul...They brought it on themselves.

(18RT 4004.)

They would figure out that I'm the good guy in this, and everyone against me is bad.

(18RT 4005.)

Thank you, Lurinda, for your address. But I need your phone number so we can talk about how much of a wonderful person I am as we put this whole mess into proper perspective for you.

(18RT 4006.)

After reading the Lurinda letter the prosecutor read a second letter written by Wycoff. This handwritten single spaced letter was 20 pages long. It was admitted

into evidence by stipulation as trial Exhibit 70 and is set forth in the Clerk's Transcript at pages 2262-2281. This letter was referred to as the "Shining letter" by the parties. The letter itself indicated it was "started on August 1, 2006" and finished on September 11, 2006. (18RT 4013, 4040.) Like the previous letter it contains many misspelled words and erroneous punctuation. In numerous instances the letter repeated the words "redrum, redrum," which is murder written backwards. (9CT 2262, 2272, 2274, 2281.) Like the Lurinda letter, this letter was read to the jury by the prosecutor and his reading is set forth in the Reporter's Transcript without most of the spelling and punctuation errors. (18RT 4013-4040.) The letter is too long to quote extensively here. Below are some brief excerpts from that letter.

> Lurinda, I'm disappointed in you. I send you my brilliant letters of valuable knowledge to illuminate you with some rare truths that most people find hard to find in life, and you get angry and say, quote, "You don't care," end quote.
>
> That's a shame because I care about you and the rest of the family. If I didn't, then I wouldn't be writing you these long letters of high morality.
>
> I care about my family, and that is why I killed my sister and brother, Aunti Lou, because my family and me was under attack from a couple of demons.

I decided to be a man and to do something about it and I did. I would do the same for you. I would also do the same to you so keep it straight. (18RT 4014.)

But I don't deserve punishment for what I did. I deserve reward. What I did was not easy. It was hard. I killed the only two people left alive who knew me the most and for the longest.

I am a peaceful person who helps people and does not like to hurt people. I killed two people who like to hurt people and were doing it more and more.

What I accomplished should have happened eight years ago. The kids would be better. People, many people's lives would be better and the family would be richer.

My sister was an evil demonically possessed bitch, and my great Aunt Lu and I were put under her thumb. So I put that evil bitch under the ground. Now my sister and brother-in-law are exactly where they should be. But I am exactly where I should where I shouldn't be. I deserve to be in a nice paradise. I should be on a beautiful tropical island where it's never too hot or cold and is like Woody Guthrie's big rock candy mountains with soda water fountains and lemonade springs. It would be populated with young, gorgeous, naked women and have bubble gum and candy bars

growing on trees surrounded by warm seas of topaz and sandy beaches, very tall mountains covered with snows of vanilla ice scream to ski on, lots of friendly animals...Butlers would get me what I want and do what I want as I spend my time playing with explosives and blowing suff up.

(18RT 4016-4017.)

While the prosecutor was reading the Shining letter, Wycoff interrupted to say, "Isn't this kind of great?" The prosecutor ignored the interruption and continued to read Wycoff's letter. (18RT 4019.) Wycoff wrote:

Fact: I killed two people and got caught. There isn't anything I can say or do to change it or justify it to the laws of this screwed up world.

Fact: Thanks to my extreme education in things I discussed in my last letter to you, I know that by the laws of life, God, karma and nature I am already good, right and justified.

(18RT 4024.)

Wycoff's letter addressed in some detail Theodore Roosevelt, "who was president during World War II" and ordered the atomic bomb dropped on Japan, because Wycoff was often called "Ted" even though he preferred Edward. (18RT

4020-4023.) Wycoff wanted to be called "Edward because Ted throws me out of balance and screws up you, me, everybody, everyone and the world." (18RT 4023.) Wycoff's letter also addressed what he perceived as a number of parallels between the movie *The Shining* and his situation. He noted that in the movie the character played by Jack Nicholson "had a hallucination or past life memory or haunting or some kind of vision...where he saw a room flooded with blood and blood running down the walls." (18RT 4029.) Wycoff's letter stated, "Me, I am for real, not a hallucination. I really truly did leave a room flooded in blood and blood running down the walls of that house...two people were killed in this fine film, which just matches the number I had to kill in my situation." (18RT 4030.)

After reading Wycoff's letter, the prosecutor called several "victim impact" witnesses. Kent Rogers was Paul's youngest brother. (19RT 4097.) Kent took guardianship of Alex, then 15, while his other brother, Mark, took guardianship of Eric and Laurel. (19RT 4100.) After a year, Eric went off to college. Laurel wanted to live with Alex so Kent built an extra room to his house and Laurel came to live with him. Alex stayed at Kent's house until he was 18, then he moved out. Laurel still lived with Kent. (19RT 4101, 4106.)

All of the children were highly traumatized by the death of their parents. Kent and the children went to many hours of therapy as a family. (19RT 4103-4104.)

Douglas Bowman had known Paul since he was five years old. He was very close to Paul. He had known Julie since she started dating Paul when she was 19. They all went to college and graduate school together. Paul was the best man at Douglas' wedding and Douglas was the best man at Paul's wedding. (19RT 4110-4111.)

Douglas described Paul as intellectual, adventurous, social and outgoing. Julie was very social and connected to the community. About 700 people attended their memorial service. (19RT 4111-4112.)

Douglas was at work when he learned that Julie and Paul were dead. He felt "shock and horror." Later he felt anger that "somebody that Paul and Julie cared for and that took care of them could be so cruel and vicious as to take their lives for what are like minor irritants." (19RT 4116.) Douglas said that Wycoff was difficult to be around, but that Julie and Paul never spoke about him in a negative way. They accepted him the way he was. Douglas said that he wouldn't say that Paul liked Wycoff, but Paul cared for him as a relative. (19RT 4113-4114.)

Eric Rogers described his father as a loving parent who was always concerned about making things better and doing the right thing. (19RT 4120.) His mother Julie was a loving, compassionate, forgiving, liberal woman who was incredibly patient. (19RT 4120.) Eric said his parents did not believe in "bad people." When he and his siblings got into trouble, their parents said their actions

"needed adjusting." They would not react out of anger. (19RT 4121.)

Eric found out his parents were dead at about 3 p.m. on the day of their deaths. When he learned that they were dead his mind went blank. Laurel was crying so he grabbed her and held her just to help her out. (19RT 4123.)

After the death of his parents, everything changed. He moved in with his aunt and uncle. Later he went to college and got his own apartment. While he had been sober before his parents died, he maintained his sobriety after their deaths. He now felt like he did not have a home or a place to return to. That home did not exist anymore. (19RT 4124.)

On cross examination Wycoff asked Eric what punishment should be imposed. Eric said that Wycoff should get life without parole "because you're mentally childish. You are immature for your age." Eric added that other people said Wycoff had not changed since he was nine. (19RT 4127.)

Wycoff also asked Eric whether his life was messed up before his parents died. Eric said it had been, but he started getting better a year before his parents died. He had gone to juvenile hall because he made a "childish mistake" during a war protest. (19RT 4128.)

Laurel Rogers testified that her father was one of the most intelligent and compassionate people she had ever known. Her mother was like her father while also being creative and thoughtful. (19RT 4130.)

Laurel was 12 and in the seventh grade when her parents died. She was at the police station when her aunt and uncle told her. She was completely shocked. It "seemed fake" to her. (19RT 4132.)

The death of her parents changed Laurel's life in every respect. Everything she knew was completely gone. She developed anxiety problems and depression. She also developed a drug addiction and drinking problems. It was not easy for her to trust people or to be open with others. She developed a hatred for humanity. She went to therapy and a rehabilitation program. (19RT 4134.)

On cross examination Laurel said that she did not recognize Wycoff at the kitchen door at the time of the attacks. She only learned that the assailant was Wycoff when her father told her before he died. (19RT 4136.)

Wycoff asked Laurel about her father saying "I'm sorry" before his died. Wycoff asked Laurel is her father meant that he was sorry because he brought the attack on himself. Laurel responded, "absolutely not." She said her father was sorry he could not be there when they got older and to save the life of his wife. (19RT 4138.) After Laurel's testimony, the prosecutor rested.

2. Wycoff's Penalty Defense

Wycoff begin the defense penalty phase case by again testifying in the form of a narrative. (19RT 4153.) Wycoff's narrative had two parts. First, he

addressed some of the things the prosecutor raised in his penalty phase case-in-chief, such a statements Wycoff made in his letters and telephone conversations. Second, Wycoff played a number of video tapes he made over the years while he commented to the jury about what was being shown. For instance, he played a video of him fixing a truck he was driving back from Oregon. After showing how he fixed the truck he said to the jury, "There you see that I'm a genius. I know how to fix things." (19RT 4197.)

Wycoff started his narrative by saying that he was proud of Eric because Eric grew up to be a pretty good man. Wycoff said, "I did a good job getting rid of the parents, it was a good thing to do, it helped a lot." (19RT 4154-4155.) Near the end of his narrative, Wycoff said that Eric's "wish" that he not be executed should be honored. Wycoff said he did a lot for Eric and that Eric is "happy about me making him rich and changing his life like I did for him and his brother and sister." (19RT 4271-4272.)

Wycoff explained his May 2, 2006, telephone conversation with Mike Lawson in which he said he was one trait away from being a serial killer. Wycoff explained that his morals and desire to do good "keep me in check." "When Julie and Paul were stealing from me and messing up my family, I did do it. I used it positively. It's a trait that was used positively. And that's something to be happy about." (19RT 4156.)

Wycoff denied that he said to El Cerrito detective David Wentworth during his booking process that he should get the death penalty. What he said, Wycoff explained, was that from the public's perspective he should get the death penalty. He believed that he "deserve[d] no punishment. I deserve reward for this. I am a hero for all of this, see." (19RT 4158.)

Wycoff said he recognized that it was unlikely that he would ever get out of prison. But as a double murderer he would "really rule" in prison. He would be a "shot-caller" and tell "the petty thieves, the robbers, the rapists what to do because I'm the king of all that...And that's a good thing. It will make them not want to come back to prison anymore..." (19RT 4161.)

Wycoff noted that his trial was expensive, but that what he did when he "played judge, jury and executioner" was "much more efficient." (19RT 4166.) He remarked that what "Julie and Paul were doing to me, that's killing somebody. Julie and Paul were destroying me in their way. I destroyed them in my way. I destroyed them the only way I could destroy them." (19RT 4168.) Finally, Wycoff told the jury: "The world out there could really use a man like me. They need a man like me to protect America's explosive supply and stuff. America needs a man like me out on the road, not behind bars." (19RT 4173.)

After this narrative, Wycoff played a number of video tapes. The videos apparently had no sound, so Wycoff commented on them while they were viewed

by the jury. Most were made by Wycoff during his trips as a long haul truck driver.

One video showed a solar eclipse in Baja, Mexico in 1991. (19RT 4180.) Another video showed Christmas time in 1995. Julie, Paul and Aunt Lu could be seen in this video. (19RT 4185.) A video showed Wycoff removing graffiti from a truck. (19RT 4192.) During one video, which Wycoff thought he had made in his garage in 1996, he told the jury, "I catch his hat on fire." Wycoff then said, "Aren't I the greatest? I finally got some people to laugh, finally." (19RT 4189.) Many videos showed incidents involving trucks. These videos showed a flat tire, a truck on fire, and a tree after it had been hit by a truck. (19RT 4220, 4222.) He showed numerous videos involving explosions. (19RT 4234, 4238-4239.)

After showing the video tapes of explosions, Wycoff told the jury that if he were a bad man he would have leveled Julie and Paul's house with explosives. He didn't, because there were children in the house and he is not a bad man. (19RT 4240-4241.)

At the end of his narrative, he told the jury that they were "going to have to vote what happens to a wonderful person like me." (19RT 4241.) He reminded the jury that "I'm the victim, not them. You know, I don't deserve this. I don't even deserve to be punished. I deserve reward. I'm the hero in this, you know." (19RT 4246-4247.) Since being arrested, Wycoff said he "had to educate the public about - - that I'm the victim, not Julie and Paul...so that the public would understand that,

you know, they don't need to execute me or send me to prison or punish me. They can understand that with what I did to Julie and Paul justice (was) served." (19RT 4267.) "The people of El Cerrito should thank me and be happy with me as a person for removing two crooks, two rip-off artists from their city." (19RT 4271.)

In the middle of Wycoff's narration, he presented two other witnesses. Keith Letl and Mike Lawson went on a trip with Wycoff to Feather Falls near Lake Oroville in June or July, 2004. They hiked about four and a half miles from a parking lot to the falls. They then descended down a rope into a ravine. After awhile Wycoff and Lawson climbed out of the ravine. Letl couldn't. (19RT 4205-4206, 4212-4214.) He remained in the ravine screaming for help. (19RT 4212.) Lawson remained at the top of the ravine while Wycoff went for help. Without a flashlight, Wycoff went back down the "treacherous trail" to the parking lot. When Lawson, who had the only flashlight, got back to the parking lot several hours later, there were already six or seven emergency vehicles there formulating a plan to rescue Letl. (19RT 4215.) Letl was rescued by helicopter at about 4 a.m. (19RT 4217.)

3. The Prosecution's Cross Examination of Wycoff

After Wycoff completed his direct examination narrative, the prosecutor asked the court to reconsider an earlier ruling on the admissibility of certain

evidence. In particular, the prosecutor sought to introduce evidence that Wycoff possessed a pair of brass knuckles and a grenade launcher. (19RT 4249.) The prosecutor also wanted to play a videotape concerning Wycoff killing cats. The prosecutor argued that Wycoff's claim of "good character" had opened the door to the admission of this evidence. The prosecutor admitted that this was not evidence of criminal activity, but solely as rebuttal to Wycoff's claim to be a moral person. (19RT 4250, 4260.)

The court ruled that the evidence was admissible to rebut "Mr. Wycoff's claims of good morality and the other general character evidence that he presented, which was extremely broad." (19RT 4252, 4262.) The court also held that "the inflammatory nature of the evidence is precisely its probative value." (19RT 4265.)

The prosecutor then conducted a cross-examination of Wycoff that included questions about numerous arguably bad acts committed by Wycoff over the course of his lifetime. In many instances the prosecutor played portions of the same videotapes Wycoff had played for the jury. In most instances, however, the prosecutor did not identify which videotape or which portion of a videotape was played.

In the middle of his cross examination, the prosecutor asked Wycoff if he would agree "that your morals are quite a bit different than most other people's morals that you know of?" Wycoff agreed. The prosecutor then asked if that was

going to stop Wycoff or whether Wycoff was "still going to do what you think is morally right?" Wycoff said it was not going to stop him and he would continue doing what he thought was morally right. (19RT 4295.)

Wycoff admitted that in one of his videotapes he used a flame thrower to burn graffiti off of a truck that did not belong to him. It belonged to his employer. (19RT 4272-4273.)

Wycoff admitted that he "embezzled a little bit" of ammonium nitrate from his employer. He explained sometimes "there's a little bit left over." (19RT 4283.)

Wycoff admitted that he falsified his trucker log books. "I mean, I falsified logbooks all the time..." (19RT 4318.) He explained that a log book "is a bunch of crap" and he knew when he was tired from driving. (19RT 4286.)

Wycoff admitted that he rented cars and drove them "about a hundred miles an hour." He explained that he always took the car "some place safe" so he could "just see how fast it goes." (19RT 4289.)

Wycoff admitted that he drove across someone else's property. While he was unsure about any particular incident, he thought he may have done that for revenge or because he "had some sort of a problem with them." (19RT 4302.) He did recall driving on "something like" a soccer field in Michigan. (19RT 4309.)

Wycoff admitted that he destroyed a "no parking" sign in Florida. He explained that sometimes "there is no good reason for a no parking sign.

Sometimes it's just communism. Sometimes it's wrong. I don't just destroy a no parking sign for no good reason." (19RT 4318.)

Wycoff admitted that he lied to get trucking jobs. He said, however, that he was honest enough to admit it and that he was "sure a lot of truck drivers have" lied to get jobs. (19RT 4292.)

He also admitted incidents with his trucking employers. While backing into a building to unload a truck he hit the roof and "all these chunks come falling down off the door." Wycoff insisted it was not his fault because a woman watched him back in and said nothing, "she just let me hit the thing – and then she goes, you know, like there was this horrible accident." The company then decided "to jerk me around." So, Wycoff explained, he got "to piss on them. I get to punish them. I get to do damage to them. I own them." (19RT 4303.) Apparently as revenge, he left a jar of urine on the front steps of the company's office. (19RT 4302.)

Wycoff admitted that if he had a grievance with a company he would "seek to destroy something. And if I destroy it I'll destroy it in a way that's fun and wonderful and – and I'll videotape it as it happens." (19RT 4307.)

Wycoff also recalled a time when someone was vandalizing his truck's trailer at night. He did not know who it was. But he admitted that he was going to kill that person if he found out who it was. (19RT 4319.)

After playing an unidentified video, the prosecutor asked Wycoff about

owning guns. Wycoff responded by saying that there was nothing illegal about owning guns and that he was a member of the NRA. The prosecutor asked if Wycoff took his guns into Canada while he was truck driving. Wycoff admitted that he knew it was illegal to take guns into Canada, but, "you know, they are, you know, a little bit communist..." He stated that "I got a load to deliver. I have things that need to be done...so I am not going to let a bunch of communism and rules stop me." (20RT 4366-4367.)

Apparently one video the prosecutor played involved Wycoff killing cats. Wycoff admitted killing at least 17 cats. (20RT 4345.) Wycoff explained that the cats he killed "are almost wildcats." These cats altered the "food chain" so that "you got no snakes, mice and, you know, hawks die off, and you know, it throws everything out of balance." The area around his house "use to have a lot of nice wildlife, all kinds of field mice, rats and snakes and gophers and just all kinds, and that's all gone because of these cats here, plus the ones behind the store that live off of the garbage behind the store and then go out in the field and kill everything." Wycoff explain that he was "a hero. I care about wildlife. That's why I kill these cats." (20RT 4348.)

Wycoff also explained that he was "very humane" in how he killed the cats. He said he "don't try and inflict a bunch of pain and sodomy and all this kind of thing...or try to blow them up or anything like that." (20RT 4415.) He also

explained that he didn't "like to bury things" because "when you bury things, you know it pollutes." He said that things "are meant to die on the surface and decay on the surface, and other things can feed off of that on the surface. It keeps the diversity going on the environment, going on the surface, you know." (20RT 4416.)

After playing a portion of an unidentified videotape, the prosecutor spent a great deal of time asking Wycoff about a particular cat that Wycoff killed. Wycoff killed the cat of his neighborhood friend, Ross. He then told Ross he had not killed his cat. (20RT 4350-4351.) Wycoff "put the suspicion" of killing the cat on another neighbor, Lee Hallstrom. He did this to get revenge on Hallstrom "for getting on me for parking trailers down the road." (20RT 4353.)

After the prosecutor played a portion of a videotape identified as Exhibit 76, the prosecutor asked a series of questions about Wycoff's neighborhood. (20RT 4368.) Wycoff admitted to taking "out that post" so he could get his car on and off his trailers like it should be. (20RT 4370.) He also admitted to having "bust the gate down" by backing his truck into it. The gate "didn't survive my truck." (20RT 4371.) He explained that he was "out there fixing the neighborhood, see." (30RT 4370.)

Wycoff also addressed an area near his house and behind some stores. Many cats were in the garbage and dumpsters behind the stores. The cats would eat at the

dumpsters then "go out in the woods and kill everything." A woman would come "around and dump[] food all over the place." (20RT 4368.) About that woman, Wycoff said, "We talked to her. We had wars with her. We threw rocks at her, and she just keeps doing it." Wycoff said he would have been morally justified if he killed the woman. (20RT 4372.) He also thought he would have been justified in shooting other people who dumped garbage there. (20RT 4373.)

After playing the videos, the prosecutor addressed several other areas. For instance he addressed some things raised in Wycoff's letters to Lurinda. The prosecutor asked if one reason Wycoff wrote the letters was so that he would "become famous or infamous and last beyond you so to speak." Wycoff said he would like to be famous. (20RT 4400.)

Wycoff also commented on the fact that Lurinda flew from Arizona to California to attend his preliminary hearing, but the hearing had been continued. Wycoff said that Daniel Cook, his court appointed counsel at that time, "did that to her. Cook screwed her over because Cook was mad at her for lying to the jail about me..." (20RT 4403.)

The prosecutor then asked Wycoff whether he had "threatened several of your attorneys..." (20RT 4405.) Wycoff explained that he "found out that they were no good" and he told them to "get off my case." When the attorneys would not get off his case, he "had to start getting violent with them and started playing

games jerking them around." After a while, "they got the message...and they got off my case." (20RT 4406.)

Wycoff admitted that he wrote or said he was so angry with the public defender's office that he "was calling them up and making death threats." He told them that if he got out of custody, he "would construct a bomb and blow your building up." He also would "tell lies to pit one public defender against another." He said all these things because he wanted them off his case. Wycoff thought that the public defenders "just had to manipulate me and play their games and lies. And I said 'No. No more lies. No more manipulations. We're done. Get off,' and they would not get off." (20RT 4409.)

Wycoff admitted that lots of things angered him. He said single parent families, homosexuals, communists, leftists, people against the NRA, vandals, and people that litter angered him. (20RT 4413.)

The prosecutor also asked about a number of things found in Wycoff's house after his arrest including brass knuckles and a grenade launcher. Wycoff said he didn't think it was illegal to possess a grenade launcher. (20RT 4416-4417.) The police also found handcuffs and thumb cuffs. (20RT 4420-4421.)

Police also found a number of videotapes and books. The videotapes included *Get Even, Improved Suppressors*, and *Building the Ultimate Tactical Shotgun*. The books included such titles as *Improvised Sharpened Weapons, The*

Criminal Use of False ID, Alarm Bypassing, Hitman, The Policeman is Your Friend and Other Lies, Poisoner's Handbook, and *Home-Built Flame Throwers.* (20RT 4419-4422.)

Turning finally to Wycoff's offenses, the prosecutor asked Wycoff if he believed in the death penalty for someone who committed certain crimes. Wycoff responded that he did believe in the death penalty, but that he should not be executed. (20RT 4378.) Wycoff explained that he "had a job. I did what had to be done, and I shouldn't be executed for that." (20RT 4379.) Wycoff said he was different from murderers on death row "because I'm a killer. Those guys are murderers...What they did was bad. They should be killed for that. I would not be like them." What Wycoff did "was justified." (20RT 4380.) At another point the prosecutor asked Wycoff, "[w]ho gets to decide?" Wycoff explained that he was good at "figuring out the way things should be." As a result, he said, "...perhaps I should decide what needs to be done...My mind is not cluttered with education and all these facts and figures and all this law crap, and you know my mind is not polluted with all that. I can purely look at something and purely figure it out." (20RT 4391.) If someone did not believe the same way Wycoff did about killing Julie and Paul then "they're wrong and they don't have good morals." (20RT 4394.) Wycoff believed that people "become stupid" when they disagreed with him. (20RT 4397.) Wycoff also thought that God was on his side, but he was "not

entirely sure." (20RT 4415.)

Wycoff again explained that Julie and Paul "decided to destroy me in their own way. And with that decision, I had them. They're mine. They belong to me...I'm number one. I came out on top, and they lost everything." (20RT 4383.) Wycoff said that he would kill Lurinda "if she went against the family...like Julie and Paul were doing." (20RT 4390.)

Finally, Wycoff was asked if he had any remorse for killing Julie and Paul. He said he was "a little bit" remorseful that the kids were "having a little bit of a problem" because they "sort of allow it to interfere with their lives a little bit." But otherwise, he said he "should be proud of myself for that." When asked if he had to do it all over again would he still kill Julie and Paul, Wycoff replied, "Of course I would." (20RT 4423.)

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III.
THE TRIAL COURT COMMITTED NUMEROUS INSTANCES OF REVERSIBLE ERROR WHEN IT (1) FAILED TO CONDUCT A HEARING INTO WYCOFF'S COMPETENCY TO STAND TRIAL; (2) FAILED TO CONDUCT A HEARING INTO WYCOFF'S COMPETENCY FOR SELF-REPRESENTATION; (3) AND APPLIED AN INCORRECT LEGAL STANDARD

Preface: "How in the world can our legal system allow an insane man to defend himself?" *Indiana v. Edwards* (2008) 544 U.S. 164, 177 (Quoting *amici curiae* brief for the State of Ohio.)

A. Introduction

Prior to trial, Wycoff had disagreements and expressed dissatisfaction with every attorney appointed to represent him. One such attorney noted that Wycoff had "an array of mental disabilities (which)...manifest themselves in Mr. Wycoff's marked limitations in the areas of empathy, attention, memory and social judgment." (2CT 352.) After several *Marsden* motions were denied, Wycoff sought to represent himself.

The court which was assigned to hear Wycoff's case at that time (Judge Bruiniers) agreed to consider Wycoff's handwritten motion for self-representation. However, after acknowledging Wycoff's "grandiosity and perhaps a fairly high level of paranoia," the court decided that before granting his request for self-representation Wycoff should be examined by a mental health expert. Dr. Good,

the psychologist appointed by the court for that purpose, found that Wycoff "is most probably suffering from Paranoid Schizophrenia." (2CT 418.) Dr. Good found that Wycoff was "incompetent to stand trial." (2CT 424.) Dr. Good also concluded that Wycoff's attempt to waive counsel was knowing and intelligent, but not rational. "...Mr. Wycoff's reasoning process is not rational and instead reflects the irrational thinking of a paranoid man suffering from severe mental illness." (2CT 427.)

Despite the findings of Dr. Good, the court permitted Wycoff to represent himself prior to trial, throughout the guilt and penalty phases of trial, and during post-trial proceedings. Without a hearing of any kind, the court also found Wycoff competent to stand trial.

After Wycoff's case was assigned to another court for trial (Judge Kennedy), and after a new prosecutor was assigned to the case (Mark Peterson), the issue of Wycoff's mental competency arose a second time. Four days prior to the start of trial the new prosecutor indicated that he had just learned of Dr. Good's report. The prosecutor also indicated that he had just reviewed a report from a second mental health expert which, like the report of Dr. Good, indicated that Wycoff suffered from paranoid schizophrenia. The prosecutor asked the trial court to reconsider the issue of Wycoff's competency. The trial court (Judge Kennedy) considered the previous findings made by Judge Bruiniers and again concluded that

Wycoff was competent to represent himself. The court further found, without a hearing, that Wycoff was competent to stand trial.

Both judges who addressed Wycoff's competency committed reversible error. There was substantial evidence before each court that Wycoff was incompet to stand trial. Despite such substantial evidence, neither judge conducted a hearing into Wycoff's incompetence. Similarly, both judges committed reversible error by failing to hold a hearing to determine whether Wycoff was competent to represent himself. Neither judge applied the correct standard for determining whether Wycoff was competent to stand trial. These errors, separately or combined, require reversal of all judgments imposed on Wycoff. These errors, separately or combined, deprived Wycoff of his constitutional rights to counsel, due process, a fair trial, and a reliable penalty phase determination.

B. Procedural and Factual Background

Wycoff's disagreement with his court appointed counsel first arose almost a year before his preliminary hearing. At that time Wycoff's lead counsel was Daniel Cook. Second counsel was David Briggs. Later, after Wycoff was granted self-representation, David Briggs became his advisory counsel.

On November 30, 2006, Wycoff made a verbal *Marsden* motion in court. He told the court that Cook did not "seem to be a very moral person to me." He

also complained that Cook and an investigator had gone to his home in Citrus Heights without telling him beforehand. (1RT 48.) Cook explained to the court that he had hired an investigator and together they had gone to Wycoff's home. Cook told the court that it "would be utterly incompetent not to look in such an obvious place for background materials and other information that could ultimately be used to defend Mr. Wycoff in the case." (1RT 49.) Wycoff replied only that he did "not like the way Mr. Cook is doing things." (1RT 52.) The court denied the *Marsden* motion. (1RT 53.)

Daniel Cook left the county's Alternate Defenders Office (ADO) in March, 2007. Roberto Najera, also from the Alternate Defenders Office, took over as lead counsel for Wycoff on March 5, 2007. (1RT 61.) Wycoff's preliminary hearing started on September 20, 2007.

On January 18, 2008, Wycoff made another verbal *Marsden* motion in court. Wycoff said the motion was against "Roberto Najera and his Alternate Defender's Office. I do not want another public defender from his office." (1RT 27.)

At the hearing on the *Marsden* motion Wycoff first complained about mistakes Daniel Cook supposedly made in the case. Contrary to what he said at the previous *Marsden* hearing, Wycoff complained that Cook and the investigator "should have been in" his home in Citrus Heights "right away in getting pictures and paperwork and things before my family went in there and took everything." He

complained that his family had gone into his home, removed documents, damaged things, and "drained my bank account." (1RT 29.)

Concerning Roberto Najera, Wycoff complained that despite an agreement that Wycoff would see all "the information that my investigators collect on me," he was not receiving any investigative reports or discovery. He also believed that Najera "is hostile to the case." (1RT 31.)

Najera explained to the court that Wycoff wanted to have his own set of defense investigative reports to review in the county jail. However, Najera would not let those reports remain in the jail with Wycoff because they contained work product and other things "that we will not be sharing with the District Attorney..." (1RT 33.)

Wycoff also complained that Najera wanted him "to take a bunch of these psych tests." He had taken some psychological tests when he was represented by Daniel Cook. Now, however, he was refusing to take any such psychological tests. Wycoff said his attorneys were using the defense investigative reports as "bait" - he could only see the investigative reports if he took the psychological tests. (1RT38.) He refused. As before, the court denied the *Marsden* motion.

On or about February 27, 2008, David Briggs was removed as second counsel for Wycoff. Ellen Leonida was appointed to take his place as second counsel. (CT 302, 350.)

On March 7, 2008, Wycoff filed a 26-page handwritten *Marsden* motion. (2CT 303-328.) In this motion Wycoff said his biggest complaint was that Najera "doesn't tell me much about what is going on in my case." (2CT 303.) Wycoff complained about the way Najera allowed him to view the discovery. While explaining his disagreement with Najera over the process of viewing videotapes, Wycoff said that in the beginning he "wonderd (sic) if some of my family members were demon possessed because of the bad things that they were doing at the end of their lives..." But seeing the photographs of his family members as part of the discovery "convinced me that my family were just bad people all allong (sic) and when I explained this to Roberto (Najera) he seemed a little angry." Wycoff believed that after this, Najera refused to bring him any more photographs or videotapes to review. Because Wycoff believed his attorneys stopped cooperating with him, he stopped cooperating with them. Every time they came to visit him at the county jail Wycoff refused to see them.

At one point, Wycoff explained, "I just hate everybody." (2CT 325.) Other times Wycoff was more specific, saying that Najera disrespected him by having non-contact visits in the jail. "The no-contact visit tells me that Hutcher (another lawyer from the county's Alternative Defender Office, or ADO) and Roberto (Najera) know thay have done me wrong, thay know that they deserve to have the crap beet out of them for how thay handled me, my case, my family, and thangs I

don't even know about." (2CT 326.) Wycoff concluded by asking the court to "fire my public defender Roberto Najara (sic) and the Alternate Defenders Office...If this cannot be done then I ask the court to fire Roberto Najara (sic) and I will represent myself in this case." (2CT 326.)

The hearing on Wycoff's written *Marsden* motion took place on April 22, 2008, before Judge Bruiniers. After listing Wycoff's complaints against Najera, the court commented that "some of that may be complicated by the fact that you refuse to meet with him, Mr. Wycoff." In response, Wycoff said that Najera had David Briggs removed as second counsel "because they (Najera and the ADO) knew the death penalty is going to be overturned, and they're going to take all the credit for themselves. Briggs did most of the work for overturning the death penalty, and I think that's wrong." (1RT 74.) Wycoff also made it clear that he did "not intend to talk to these people or cooperate with these people. I still don't." (1RT 76.)

On the other hand, Wycoff claimed he had no problem speaking on the telephone with David Briggs, who was no longer counsel of record. He explained that "Briggs has a private line to the jail. You can call Briggs and it's not monitored. It's a special line Briggs has." (1RT 78.)

Nareja was asked by the court to respond to Wycoff's complaints. Nareja said that the attorneys had never used the investigative reports as "bait" to get Wycoff to take psychological tests. Wycoff refused to take the psychological tests,

Nareja said, because he believed that "it was hopeless" and because "he believed that his actions (killing the victims) were right and that any kind of other defense would undermine the righteousness of what he had been doing when the problems arose." (1RT 85.) Najera concluded that Wycoff "is not ever going to be in a position of trusting anyone." (1RT 86.)

The court found that some of the problems Wycoff experienced with Najera "are going to arise regardless of who is appointed to represent you in this matter..." The court found "simply a refusal to cooperate with Mr. Najera" by Wycoff and denied the *Marsden* motion. (1RT 90.)

A few weeks later, on May 6, 2008, the court agreed to set a trial date of March 23, 2009. The court asked Wycoff if he was willing to waive time to that date. He said, "Yeah. And I'd also like to go pro per in this case." The court indicated that if Wycoff wanted to represent himself it would "set a time for a hearing on that." (1RT 101.)

Later in the same hearing, the court explained to Wycoff that he was charged with capital offenses and that "the district attorney has made an election to seek the death penalty in this matter." (1RT 104.) The court also indicated to Wycoff that every single time someone had attempted to represent themselves "the results have been unmitigated disaster." (1RT 105.)

Wycoff admitted that he was not qualified to represent himself, "but I just

got to get rid of Roberto (Najera). I have no problem with Briggs. But I'm doing this to get rid of Roberto...Which I tried to do and you denied it." (1RT 106.)

The court explained that if Wycoff's motive "to represent yourself (is) because you don't like Mr. Najera, that's not a basis for self-representation..." (1RT 106-107.) What the court believed Wycoff meant "is not that you truly want to represent yourself. I think you acknowledge that you're not qualified to do so." Wycoff responded, "That's right." The court then agreed to put the issue over to a later date after Wycoff was given "an advisement form" to "read over and think about." (1RT 107.)

The next court date was June 19, 2008. At that hearing Wycoff indicated that he still wanted to represent himself. He again indicated that he was "not competent to represent" himself. He also agreed with the court's statement that the reason he was "presenting his motion was that you were unhappy that the court denied your motion to relieve Mr. Najera on this matter." (1RT 111-112.) Wycoff also complained that Najera had not shown him any discovery for "almost a year" and that Narjera "is secretly, um, pursuing an insanity defense, and he's not telling me about - - he's trying to keep that secret from me so- - " (1RT 112.)

The court restated its question to Wycoff. The court again asked Wycoff if there was "any reason that you're seeking self-representation other than the fact that you're unhappy with the fact that I'm not removing Mr. Najera?" Wycoff

responded that he needed "to do things myself." (1RT 113.)

The court concluded, however, "from what I hear you telling me I don't see that you have any true desire to represent yourself." The court went on to say, "I think that this is nothing more than gamesmanship, Mr. Wycoff..." (1RT 115.) The court denied Wycoff's motion for self-representation. (1RT 116.)

The next court date was October 2, 2008. However, on September 22, 2008, the court received a handwritten letter from Wycoff. Wycoff's letter indicated that Roberto Najera had retired, that Wycoff wanted to "take over my case," and that he was "fed up with all theese attourneys." (2CT 387.) Wycoff wrote, "It seems like when atturneys work a case like mine thier are certan percedures to follow and thay will not deveate from those percedures no matter what I say. Even though I now know this I will still fight against my atturneys. The only sollution is for me to be my own lawyer." (2CT 389.)

Attached to Wycoff's letter was a form captioned "Advisement and Waiver of Right to Counsel (Faretta Waiver)." Wycoff had filled out the form, signed it, and dated it August 20, 2008. (2CT 390-393.)

At the October 2, 2008 hearing, again before Judge Bruiniers, Wycoff made it clear that he was "done with lawyers. I don't even want to do a *Marsden* anymore." He also indicated that he did not "even want (David) Briggs on the case...I mean, I can't, I can't work with these people." (1RT 122.)

The court indicated that it had "a responsibility to ensure before granting self-representation, and particularly in a case where the defendant's life is at stake, that he is in fact competent to represent himself for trial whether it's wise or not." The court further noted that based on Wycoff's contact with the court there "is certainly evidence of grandiosity and perhaps a fairly high level of paranoia." The then-prosecutor, Mr. Flynn, also noted that based on his "knowledge of the case of Mr. Wycoff, that there may be some evidence of mental defects." As a result, the court ordered that Wycoff be examined by a mental health expert and for that expert to advise the court whether Wycoff was "capable of waiving his right to counsel and self-representation in a case of this nature." (1RT 124.) The court explained to Wycoff that the mental health expert was "not going to be looking at the issue of whether you were sane or insane," because the court recognized that Wycoff was "adamantly opposed to the plea of not guilty by reason of insanity." (1RT 126-127.) Based on the court's representations, Wycoff agreed to cooperate with the mental health expert appointed by the court. (1RT 127.) The court appointed Dr. Paul Good "for the limited purpose of examining the defendant and determining his competence to waive counsel and for self-representation and the standards of *Indiana versus Edwards*." (RT 127.) Despite finding a basis for appointing Dr. Good, the court expressly stated that it had not seen any "evidence" that Wycoff "would not be competent to stand trial in this case." (1RT 123.)

Dr. Good examined Wycoff and submitted a 15-page report to the court.[5] (2CT 413-427.) Part of the "Background Information" Dr. Good obtained from Wycoff was that Wycoff "was a chronic bed-wetter through his early 20s," that he "had attention deficit problems and was hyperactive," and that he "had speech impediments which required therapy in kindergarten and the first grade." (2CT 414-415.) Wycoff was in special education until the sixth grade. He described himself as "aggressive on the playground and appears to have had interpersonal difficulties." Wycoff said he was "a loner" in high school who "had no interest in school activities or clubs." "He failed his courses and was transferred to a continuation school for his senior year, which did not go well, and finally he was home schooled and graduated." (2CT 415.)

Dr. Good's report set forth Wycoff's psychiatric history in some detail. Dr. Good noted that Wycoff's psychiatric problems began in the 1970s while Wycoff was born in December, 1968.

First, Wycoff was treated by his pediatrician "for attention problems and suicidal ideation." He was prescribed Ritalin, then Dextroamphetamine. In the 1980s he made two suicide attempts. Afterwards, he attended outpatient counseling with a Dr. Brody at Kaiser. According to Dr. Good, Wycoff "also was treated by a

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[5] On April 29, 2015, the Court granted Wycoff's motion to unseal the report of Dr. Good and the report of Dr. Tucker.

psychiatrist two or three times for school behavior problems." At about 17 or 18, "he was tried on the anti-psychotic medication Mellaril and the anti-manic Lithium." Wycoff sought psychiatric consultation in 1997 and was assessed as having ADD and again placed on Ritalin. He soon stopped taking the drug. In 2001, Wycoff "was diagnosed by Dr. Straussman as suffering from a Major Depression and prescribed anti-depressants Effexor and Lexapro. A year later he was placed on Strattera." (2CT 415.)

After Wycoff's arrest and detention in the county jail in this case, he was examined by the jail's mental health unit. In February, 2006, Dr. Hanlin of the jail staff described Wycoff as have a "flat affect" and as having "grandiose thoughts about being justified in harming bad people." Dr. Hanlin "diagnosed a Delusional disorder with mixed schizoid, paranoid, and anti-social personality traits." Dr. Hanlin believed that Wycoff "might benefit from anti-psychotic medication," but Wycoff refused to take any such medication. (2CT 415-416.)

Finally, Dr. Good noted that Wycoff had been examined by psychiatrist Dr. Douglas Tucker six times beginning in February 2006, shortly after his arrest. Dr. Tucker "diagnosed Mr. Wycoff as suffering from Asperger's Disorder (a pervasive development disorder characterized by severe and sustained impairment in social interaction and stereotyped behavior), Paranoid Schizophrenia (a psychosis involving delusions and negative symptoms of flat affect), and Attention Deficit

Hyperactivity Disorder (a disorder of inattention, hyper activity and impulsivity)." (2CT 416.)

In his Diagnostic Formulation, Dr. Good described Wycoff as "a troubled person from childhood." Throughout his entire life Wycoff has "felt alienated, isolated and estranged from others." He "developed symptoms of paranoia with respect to his sister and his brother in law, fearing they were out to deprive him of his rightful inheritance from his father and Aunt Lew (Lu). These symptoms worsened in recent years. He felt his sister and his brother in law were bad people who chose evil, and that he was a good person. His delusions were so powerful that he was convinced that killing them was the right thing to do." Wycoff's problems with his court appointed attorneys "also reflects a grandiosity and narcissism in which he believes (he) can handle the complexities of death penalty litigation." (2CT 417.)

Dr. Good's diagnosis was "between Paranoid Schizophrenia and Delusional Disorder." However, Dr. Good concluded, with a reasonable degree of certainty, that "Mr. Wycoff is most probably suffering from Paranoid Schizophrenia. The diagnosis is based on the presence of paranoid and grandiose delusions, negative symptoms of flattened affect, and long standing interpersonal alienation." (2CT 418.)

Turning to the question of Wycoff's competency to stand trial, Dr. Good

found that Wycoff had "a factual understanding of the proceedings and intellectually understands the relationship between attorney and client." He understood the role of the Public Defender, the District Attorney, and the Judge. (2CT 418-419.)

Dr. Good also spoke to Wycoff about his relations with his court appointed attorneys. For instance, Wycoff said he "suspected that Cook was exploring an insanity defense and (Wycoff) didn't like it." Wycoff said winning with an insanity defense was "a small victory." Wycoff even said that avoiding the death penalty was another "small victory." Wycoff believed that his court appointed lawyers were not sharing discovery materials with him and were "keeping me in the dark" because "they want to make me go crazy. They are trying to win some small victory." Instead, Wycoff insisted that he needed "to handle my case myself. I need to know what people are thinking about me." (2CT 421.F)

Wycoff thought it "very unlikely" that a jury would find him not guilty by reason of insanity. On the other hand, he commented that a "jury of Republicans might say, 'Hey great, he killed a liberal.'" Wycoff said he "might try to pick a jury that believes in vigilante justice." (2CT 422.) At another point Wycoff said an insanity defense is "not worth it." He insisted that his attorneys "know I'm sane, and they were locking me away so that no one would discover I was really sane." (2CT 424.)

Wycoff was also against an insanity defense because such a plea would be "saying I was wrong, it was crazy to kill Julie and Paul. I wouldn't be true to my self if I did that. I know it was the right thing to do." (2CT 424.)

Wycoff also expressed no concern about the death penalty because he believed that there is "life after death. I believe in reincarnation. I've read the spiritual books. I believe in that. Death is not the end." (2CT 424.)

Wycoff concluded that all of his attorneys "are the enemy." "I consider them the bad guys. I can't deal with them. I cannot feed them, let them have the spotlight, the limelight, that comes with being in the news. This is a high profile case." (2RT 423.)

Dr. Good concluded his discussion of Wycoff's competency to stand trial with the following paragraph written in bold type:

> In summary, Mr. Wycoff's complaints about his attorneys focused on four areas; controlling who has access to him; refusing to allow him free reign with discovery; exploring an insanity defense; and avoiding the death penalty. Although he gave lip service to understanding the rationale behind these positions, his failure to appreciate the logic and wisdom of his attorneys is a function of his paranoid mental disorder. As a result of his hypercritical and suspicious stance towards his attorneys, Mr. Wycoff has

not shown the "present ability to consult with his lawyer[s]." Each of his past attorneys has failed Wycoff's tests of competency and loyalty, and he is likely to find fault with every new attorney that may be appointed. Self-importance and prideful independence lead Mr. Wycoff to believe that only he can represent himself. Because of his grandiosity, Mr. Wycoff is not able to rationally consider "telling his story" with the assistance of an attorney. On this ground, I find him incompetent to stand trial.[6]

(2CT 424.)

Turning to the question of whether Wycoff was competent to knowingly, voluntarily, and intelligently waive his right to counsel, Dr. Good reached a similar conclusion. For instance, Dr. Good concluded that Wycoff, "[l]ike many paranoid patients...is alert, conscious and **knows** that he is making a request to act as his own counsel in representing himself against the charges." (2CT 425; emphasis in original.) Dr. Good found that Wycoff knew he could receive the death penalty, but that he wanted "to tell his story in his own way and has concluded that he will feel much better no matter the outcome." (2CT 425.)

Dr. Good also concluded that "Wycoff's waiver is **voluntary** in the sense

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[6] Despite this express finding by Dr. Good, Judge Bruiners inexplicably concluded that "Mr. Wycoff has the ability to cooperate with counsel in his own defense should he choose to do so..." (1RT 139.)

that no one is forcing him to relinquish counsel and represent himself." (Id.; emphasis in original.) That is, that there were "no *external* forces or factors that interfered with the voluntary exercise of his free will. (Id.; emphasis in original.)

Dr. Good concluded that "Mr. Wycoff's waiver of counsel, however, is not **intelligent**, if what we mean by intelligent is the product of a rational reasoning process." (Id.; emphasis in original.) Dr. Good gave a number of examples to support his conclusions.

First, Dr. Good addressed Wycoff's perception that his attorneys "wanted to control access to him by friends, family and advisors." Wycoff grandiosely believed there were "hundreds of others" who wanted to get in contact with him. His attorneys wanted to act as "gatekeepers" to prevent Wycoff from damaging his own case like "the interview he gave with the newspapers immediately after the offense." However, "[t]hrough the paranoid defense of projection" Wycoff "disowns any responsibility for undermining his case and attributes malicious motives to his attorneys." (2CT 426.)

Second, Dr. Good addressed Wycoff's dispute with his attorneys over his access to the discovery. "Mr. Wycoff's lack of appreciation of the dangers of taking discovery back to his cell is typical of the rigid, and often naive thinking of a paranoid person." When his last attorneys failed to give him the discovery he requested, Wycoff "followed through with his threat to do 'bad things' - write

letters to the press." According to Wycoff, the "prosecutor was going to drop the death penalty, but my letter to the press got back to the DA and they reinstated the death penalty. I would not have written that letter if Najera and Headley had gotten off my case, given me my respect, my reports, my discovery. I told them I was going to work against the case. I'm a man of my word, and I did what I said." (2RT 426.)

Third, Dr. Good noted that Wycoff understood his attorneys "were actively pursuing an insanity defense, an option which he adamantly opposes." Dr. Good found that Wycoff "rejects in total" any "acknowledgment that he is mentally disturbed." "*He is in complete denial of his mental illness.*" (2CT 426; emphasis added.) Wycoff believed that his attorneys did not want him to interact with other people because those other people "would realize he was sane" and that would "undermine an insanity defense." Dr. Good found that this "illustrates the unyielding and inflexible cognitions of a paranoid state." (Id.)

Fourth, Dr. Good found that "Wycoff complained that central to the defense strategy (of his attorneys) is avoiding the death penalty, about which Wycoff is unconcerned...(because) he believes in an afterlife and has no worries about death." (2CT 426.) Dr. Good concluded that "[c]linically, I believe he is in denial about the danger he faces, and he substitutes hostility at those who take seriously his predicament." (2CT 426-427.)

Dr. Good again set forth his conclusions about Wycoff's competency to waive counsel in bold type. He concluded:

> In analyzing his waiver of counsel, it is my opinion that it is knowing and voluntary, but not intelligent. That is to say, Mr. Wycoff's reasoning process is not rational and instead reflects the irrational thinking of a paranoid man suffering from severe mental illness. The irrationality of his decision making to waive counsel is quite the same as his irrationality in deciding that it was morally right to kill his sister and brother in law to prevent them from stealing his inheritance, and in deciding that killing them would prevent further psychological harm to their children, about whom he ostensibly cares.
>
> (2CT 427.)

At a hearing on November 14, 2008, again before Judge Bruiniers, the court indicated that it had received and reviewed Dr. Good's report. (1RT 137.) The court verbally summarized Dr. Good's conclusions for the parties, who had not received a copy of the report. The court said that Dr. Good's "recommendation" is that while Wycoff's waiver of his right to counsel would be knowing and voluntary, "it would not be a quote/unquote intelligent waiver, and that his conclusion is that

Mr. Wycoff's reasoning process is not rational but instead reflects the irrational thinking of a paranoid man suffering from sever mental illness." (Id.)

However, after stating that "the standards applicable here under *Edwards* are less than clear," the court found that "it does appear to me that while there is a diagnosis of paranoia and appears to be consistent with the Court's own observations of Mr. Wycoff, I frankly do not think it rises to the level that would preclude Mr. Wycoff from electing to represent himself should he choose to do so." (1RT 138.)

Somewhat repeating itself, the court went on to state that "reviewing both the diagnostic impression of Mr. Wycoff, and there is a differential diagnosis of that is quote, 'between paranoid schizphrenia and delusional disorder,' unquote, I do not think that that precludes Mr. Wycoff from electing to represent himself should he choose to do so." (Id.)

The court did not share a written copy of Dr. Good's report with counsel. Defense counsel (Headley) stated only, "We have no - - we trust your reading of it, and I personally have no dog in this fight so."[7] (Id.)

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[7] Defense counsel clearly failed to adequately represent Wycoff in this instance by abdicating any obligation to represent Wycoff's interests. Defense counsel knowingly permitted his severely mentally ill client to represent himself knowing that his client could not adequately do so and would, in fact, present no legal defense to the charges and fail to present the most important of mitigating evidence. However, Appellant does not raise a claim of ineffective assistance of counsel in this automatic appeal. Such a

The prosecutor said he agreed with defense counsel. The prosecutor stated that he did not have "stand[ing]" to object and would, in any event, rely on "the Court's analysis of the report" by Dr. Good. (1RT 139.)

After hearing no objections from counsel, the court proceeded to determine if Wycoff understood "the dangers and disadvantages of self-representation" and the rights he would be waiving if he chose self-representation. The court reminded Wycoff that court appointed counsel were "available and willing to represent you." When asked if he was prepared to accept their services, Wycoff said, "No." (1RT 140.) The court then proceeded to ask Wycoff the questions on "the form." Wycoff said he understood all of his rights and the charges against him including that the death penalty could be imposed. (1RT 148.) At the end of the form questions, Wycoff stated again that he wish to represent himself. The court said it "will grant your motion for self-representation only because the Court is at least in my view *compelled* to do so under the requirements of *Faretta*, and I do not think that the *Edwards* case changes that result in at least under these circumstances." (1RT 149; emphasis added.) The court then ruled: "Defendant in this case is therefore granted the right to represent himself in pro per. Court specifically finds

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claim is best left to Wycoff's writ of habeas corpus in which it will be demonstrated that defense counsel had considerable evidence of Wycoff's mental illness, insanity, and incompetence to stand trial and incompetence to represent himself, but did not present such evidence to the court then deciding Wycoff's competency to stand trial and represent himself.

that the defendant is mentally capable of doing so, that he's been fully informed about his right to counsel. Court finds the defendant fully understands the implications of waiving his right to be represented by counsel and has voluntarily and rationally done so...defendant is granted pro per rights in custody." (1RT 150.)

The court then continued the case to consider whether it should appoint standby or advisory counsel for Wycoff. The court indicated that it would release to defense counsel and the prosecutor a redacted version of Dr. Good's report at the next court date. In other words, at the time the court granted Wycoff's motion for self-representation, neither defense counsel nor the prosecutor had access to Dr. Good's report. (1RT 152.)

The court did not, however, completely relieve the ADO as counsel of record for Wycoff. That office remained counsel of record for the limited purpose of presenting a packet of mitigating materials, including a psychiatric report, to the district attorney's office so that it could reconsider its decision to seek the death penalty against Wycoff. (1RT 153-155, 161.)

At a hearing over a month later, on December 17, 2008, the mitigation materials had not yet been presented to the district attorney's office. The materials had not been presented to the district attorney's office because Wycoff, now acting as his own counsel, was adamant that "he did not want (the ADO attorneys) to do that." (1RT 176.) After the court discussed the matter with Wycoff, he agreed to

permit the mitigating materials to be presented to the district attorney's office if it did not "hold anything up." (1RT 181.) At the same hearing, David Briggs was appointed as advisory counsel for Wycoff. (1RT 189.)

At a hearing on January 15, 2009, the still-appointed ADO counsel indicated that they had presented additional mitigating evidence to the district attorney's office. (1RT 204.) The court then relieved them as counsel for Wycoff. (1RT 205.)

On January 27, 2009, Mark Peterson made his first appearance as prosecutor in the case. He would be the prosecutor at Wycoff's trial. (1RT 218.)

On February 19, 2009, the prosecutor indicated that his office had received and reviewed the mitigation evidence submitted by ADO counsel prior to their release as counsel of record by the court. However, the prosecutor said his office would still seek the death penalty against Wycoff. (1RT 226.) The court set a trial date of September 14, 2009. (1RT 232.)

On June 26, 2009, Wycoff's case was assigned to Judge John Kennedy for all purposes including trial. (2RT 322.)

At a hearing on September 10, 2009, four days prior to the start of trial, the prosecutor, Mark Peterson, said he just became aware that day of the report of Dr. Tucker and the redacted report of Dr. Good. (3RT 590-591.) The prosecutor also just became aware that the court had granted Wycoff self-representation on

November 14, 2008, after receipt and review of Dr. Good's report. The prosecutor said that perhaps Dr. Good applied the wrong standard, but that, in any event when "I have a doctor's report that says his waiver is not intelligent that causes me some concern." (3RT 594.) The prosecutor also expressed concern that the court had read and reviewed Dr. Good's report, "but then went ahead and ruled that it was an intelligent, voluntary and knowing waiver." (Id.)

The prosecutor next indicated that he also read the report of Dr. Tucker which had been provided to the prosecutor by ADO counsel as evidence in mitigation, but apparently not to the court. (3RT 594-595.) The prosecutor noted that Dr. Tucker's report "supports in some sense Dr. Good's psychological or psychiatric diagnosis." (3RT 595.)

While the prosecutor indicated that he thought Wycoff "is competent to stand trial," he also said he "don't want to go all of the way through jury selection, the whole trial and then have this issue raise its head at some later date." (3RT 596.)

Wycoff responded that "these shrinkchiatrists (sic) and skrinkcologists (sic) are always messing things up, these court things." (3RT 599.)

Judge Kennedy agreed to take a brief recess to review the transcript of the hearing on November 14, 2008, presided over by Judge Bruiniers, and the reports of Drs. Tucker and Good so that it could "satisfy myself basically that I agree with

Judge Bruiniers that - - on the decision to let you represent yourself...(and) to satisfy myself that you are competent to go to trial." (3RT 599.)

The report of Dr. Douglas Tucker was dated September 19, 2008, and was addressed to then-appointed ADO counsel. (2CT 377-379.) Dr. Tucker indicated that he had examined Wycoff six times from February 2006, shortly after Wycoff's arrest, to March 2008. Dr. Tucker concluded that Wycoff met the DSM-IV diagnostic criteria for Asperger's Disorder which he described as "a Pervasive Developmental Disorder characterized by severe and sustained impairment in social interaction, and the development of restricted, repetitive patterns of behavior, interests, and activities. (2CT 377.) Dr. Tucker also found that Wycoff had Attention Deficit-Hyperactivity Disorder. Finally, Dr. Tucker found that Wycoff "meets the DSM-IV-TR diagnostic criteria for 295.30 Schizophrenia, Paranoid Type, with evidence of paranoid delusions and negative symptoms at least since January 2006, which have led to marked social dysfunction and impairment in his ability to communicate and collaborate with others." (2CT 378.) Dr. Tucker went on to state:

> He has suffered from paranoid delusions regarding family members (including the victims in this case), jail personnel, his attorneys, and others. Other symptoms have included magical thinking and overvalued ideas,

beliefs in a "spirit world." demonic possession, reincarnation, visitation by dead relatives, numerology, astrology, and ghosts. The severity of his paranoia appears to have increased following the death of his father on 7-13-05 which followed by seven years his mother's death on 1-16-99.

(2CT 378.)

After reading the transcript of the hearing on November 14, 2008, and the reports of Drs. Good and Tucker, the court indicated that it did "not have any doubt about Mr. Wycoff's competency to stand trial." (3RT 603.) The court also concluded that Wycoff's waiver of his right to counsel "is knowing, voluntary and intelligent within the meaning of *Faretta* and *Edwards*." (3RT 603.) After reading the unredacted version of Dr. Good's report, the court confirmed its "findings as to competency and *Faretta*." (3RT 606.)

The issue of Wycoff's competency to stand trial and to represent himself was not raised again in the Superior Court. Wycoff represented himself throughout the proceedings in the Superior Court including trial and sentencing.

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C. The Court Erred When It Failed to Conduct a Hearing Into Wycoff's Competency to Stand Trial

The due process clause of the federal Constitution's Fourteenth Amendment prohibits trying a criminal defendant who is mentally incompetent. *People v. Ary* (2011) 51 Cal.4th 510, 517, citing *Medina v. California* (1992) 505 U.S. 437, 439 and *Pate v. Robinson* (1966) 383 U.S. 375, 376. "The federal Constitution further demands that 'state procedures...be adequate to protect this right.'" *People v. Taylor* (2009) 47 Cal. 4th 850, 861, quoting *Pate v. Robinson, supra,* 383 U.S. at 378. "Both federal due process and state law require a trial judge to suspend trial proceedings and conduct a competency hearing whenever the court is presented with substantial evidence of incompetence, that is evidence that raises a reasonable or bona fide doubt concerning the defendant's competence to stand trial." *People v. Rogers* (2006) 39 Cal. 4th 826, 847, citing *Drope v. Missouri* (1975) 420 U.S. 162, 181.[8]

"California law reflects those constitutional mandates." *People v. Ary, supra,* 51 Cal.4th at 517. Penal Code section 1367 provides: "A person cannot be

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[8] Wycoff does not raise herein the substantive due process claim that Wycoff was, in fact, incompetent to stand trial. Such a claim will be raised in Wycoff's state habeas petition where Wycoff can present additional evidence to support such a claim. Here, Wycoff claims only that there was more than sufficient evidence on the record to require the trial court to conduct a hearing into Wycoff's competency to stand trial.

tried or adjudged to punishment while such person is mentally incompetent." Section 1368(b) procedurally implements section 1367. It states that "...the court shall order that the question of the defendant's mental competence is to be dete rmined in a hearing..." "The recent United States Supreme Court decision in *Pate v. Robinson, supra,* 383 U.S. 375, compels us to revise our interpretation of section 1368 of the Penal Code so that it comports with the requirements of due process of law." *People v. Pennington* (1967) 66 Cal.2d 508, 517.

"A defendant is incompetent to stand trial if he or she lacks a 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - (or lacks)...a rational as well as factual understanding of the proceedings against him.'" *People v. Lewis* (2009) 43 Cal.4th 415, 525, quoting *Dusky v. United States* (1960) 362 U.S. 402, 402. "After all, competence to stand trial does not consist merely of passively observing the proceedings. Rather, it requires the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense." *Odle v. Woodford* (9th Cir. 2001) 238 F.3rd 1084, 1089. Competency includes "both (1) whether the defendant has a rational as well as factual understanding of the proceedings against him and (2) whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Indiana v. Edwards, supra,* 554 U.S. 164, 170, internal quotations deleted. See also

People v. Blair (2005) 36 Cal.4th 686, 703 and *People v. Blacksher* (2011) 52 Cal. 4th 769, 797.

"The court's duty to conduct a competency hearing may arise at any time prior to judgment." *People v. Rogers, supra,* 39 Cal.4th at 847. "When a trial court is presented with evidence that raises a reasonable doubt about a defendant's mental competence to stand trial, federal due process principles require that trial proceedings be suspended and a hearing held to determine the defendant's competence." *People v. Ary, supra,* 51 Cal.4th at 517. "A court must order a hearing *sua sponte* if the evidence before it raises a bona fide doubt as to whether the defendant has become incompetent." *United States v. White* (9th Cir. 2012) 670 F.3rd 1077, 1082 (internal quotations deleted). "Only when 'the evidence raises a 'bona fide doubt' about the defendant's competence to stand trial must a trial judge *sua sponte* conduct an evidentiary hearing. *Davis v. Woodford* (9th Cir. 2003) 384, F.3rd 628, 644, quoting *Pate v. Robinson, supra,* 383 U.S. at 385. "The focus of the inquiry is the defendant's mental capacity to understand the nature and purpose of the proceedings against him or her." *People v. Blair, supra,* 36 Cal.4th at 711.

The failure to declare a doubt and conduct a hearing when there is substantial evidence of incompetence deprives the court of jurisdiction to proceed and requires reversal of the judgment of conviction. *People v. Rogers, supra,* 39 Cal. 4th at 847; *People v. Hale* (1988) 44 Cal. 3d 531, 541; *People v. Landermilk*

(1967) 67 Cal. 2d 272, 282. Failure to conduct such a hearing also deprives the defendant of his right to due process and a fair trial. *Drope v. Missouri, supra,* 420 U.S. at 162; *Pate v. Robinson, supra,* 383 U.S. at 385. In the context of the penalty phase of a capital trial, failure to determine a defendant's competency to proceed after a reasonable doubt as to competency has occurred also deprives the proceedings of the heightened level of reliability necessary in capital proceedings. *Johnson v. Mississippi* (1988) 486 U.S. 578, 584.

"Evidence of incompetence may emanate from several sources, including the defendant's demeanor, irrational behavior, and prior mental evaluations." *People v. Rogers, supra,* 39 Cal.4th at 847. "If there is testimony from a qualified expert that, because of a mental disorder, a defendant truly lacks the ability to cooperate with counsel, a competency hearing is required." *People v. Lewis, supra,* 43 Cal.4th at 526.

1. Judge Bruiniers Committed Reversible Error When He Failed to Conduct a Hearing Into Wycoff's Competency to Stand Trial

On November 14, 2008, the court, Judge Bruiniers presiding, reviewed the report of Dr. Good and considered Wycoff's motion for self-representation. As discussed above, Dr. Good's report, prepared at the request of Judge Bruiniers, expressly stated that Wycoff was incompetent to stand trial. Dr. Good found that

Wycoff was "most probably suffering from Paranoid Schizophrenia." This diagnosis was "based on the presence of paranoid and grandiose delusions, negative symptoms of flattened affect, and long standing interpersonal alienation." (2CT 418.) Dr. Good, besides all of the indications of mental illness and incompetency discussed above, expressly stated that "because of his grandiosity, Mr. Wycoff is not able to rationally consider 'telling his story' with the assistance of an attorney. On this ground, I find him incompetent to stand trial." (2CT 424.) Dr. Good's report also indicated that Wycoff was "in complete denial of his mental illness." (2CT 426.) Dr. Good's report alone constituted sufficient evidence that the "defendant truly lacks the ability to cooperate with counsel (thus) a competency hearing is required." *People v. Lewis, supra* 43 Cal.4th at 526. On the basis of Dr. Good's report alone, Judge Bruiniers should have suspended the proceedings and conducted a hearing to determine Wycoff's competency to stand trial.

There was, however, evidence in addition to Dr. Good's report which required the court to suspend proceedings and conduct a hearing to determine Wycoff's competency to stand trial. Dr. Good's findings were amply corroborated by Wycoff's own behavior before the court and the observations of both the prosecutor and the court. When viewed together, there was overwhelming evidence that Wycoff was incompetent to stand trial and the court erred by failing to conduct a hearing into his incompetency.

Judge Bruiniers stated that Wycoff displayed "evidence of grandiosity and perhaps a fairly high level of paranoia." The prosecutor at the time similarly said that "there may be some evidence of mental defects." (1RT 124.) These comments were made before Dr. Good was appointed. Indeed, Judge Bruiniers ordered Dr. Good to examine Wycoff precisely because he had substantial doubts about Wycoff's competency to waive counsel. Why that same evidence did not cause the court to question Wycoff's competency to stand trial is inexplicable.

Judge Bruiniers was also aware, before he appointed Dr. Good, that Wycoff was not able to rationally "tell his story," to use Dr. Good's words, with the assistance of counsel. Wycoff's "story," that is the defense he wanted to present at trial, was that he had a moral and legal right and a moral duty to kill the victims. (1RT 85.) All of his appointed defense counsel were understandably opposed to the presentation of such an irrational and legally meaningless defense. The court was aware that to a large extent Wycoff's disputes with his counsel stemmed from his insistence that such an irrational defense be presented. Ultimately, Wycoff chose self-representation just so he could present his irrational and legally meaningless defense. The court was aware that defense counsel wanted to present an insanity defense and that Wycoff refused to cooperate with the investigation of any such defense because it "would undermine the righteousness" of killing the victims. (1RT 85.) Again, it should be emphasized the Wycoff was in complete denial of

his mental illness. Wycoff's dispute with his counsel became so pronounced that Wycoff concluded "that they (court appointed counsel) deserve to have the crap beet out of them for how thay handled me, my case, my family, and thangs I don't even know about." (2CT 326.)

Wycoff did indicate that he could communicate on a limited basis with one court appointed attorney, David Briggs, after Briggs was removed as co-counsel. However, this "cooperation" was premised on the delusion that Briggs alone had a special "private" telephone line into the jail that was not monitored by the jail officials. (1RT 78.) Wycoff also harbored the delusion that Briggs was removed as his counsel because the other defense attorneys "knew the death penalty is going to be overturned, and they're going to take all the credit for themselves," instead of giving the credit to Briggs who "did most of the work." (1RT 76.)

Again, it bears emphasis that all of this information was known to the court *before* it appointed Dr. Good. Indeed, it was this substantial evidence of Wycoff's incompetency which caused the court to appoint Dr. Good. When Dr. Good's report is added to this already existing evidence, it is beyond question that the court had before it sufficient evidence necessitating a *sua sponte* hearing into Wycoff's competency to stand trial. Further, even *without* Dr. Good's report, the court itself recognized that sufficient evidence existed to question Wycoff's competency.

On October 2, 2008, during the hearing which lead to Dr. Good's

appointment, the court said that it saw no evidence "at all that Mr. Wycoff would not be competent to stand trial in this case." (1RT 123.) However, the court questioned whether Wycoff was "in fact competent to represent himself." Citing Wycoff's "grandiosity and perhaps a fairly high level of paranoia" the court concluded that it could not determine whether "those are simply personality disorders or whether they rise to the level of preventing Mr. Wycoff from being competent to waive counsel and represent himself at trial..." Therefore, the court appointed Dr. Good. (1RT 124.)

The court further stated that the standard for competency to stand trial and the standard to waive the right to counsel were the same. The court stated:

> And there was some indication in the Supreme Court cases that it was the same standard. In other words, whether you are competent to represent yourself was an issue that was judged by the same standards as whether you are competent to stand trial. I don't see any evidence you're not competent to stand trial. You may be competent to waive your right to counsel and to represent yourself. But before I allow you to do that, I think it's incumbent upon me to get the expert advice on that.
>
> (1RT 126.)

If the court believed, as it clearly stated, there was sufficient doubt about Wycoff's competency to waive his right to counsel, and the standard for such a wavier was the same as the standard for competency to stand trial, then the court must have also believed there was sufficient doubt that Wycoff was competent to stand trial. If the competency standards are the same, as the court stated, then it is logically impossible for there to be sufficient evidence to question one and not the other. *People v. Robinson* (2007) 151 Cal. App.4th 606, 612 (since there was a doubt about competency to stand trial, defendant could not knowingly and intelligently waive right to counsel). However, that is exactly what the court did. The trial court erred in failing to recognize that the evidence which it believed triggered an inquiry into Wycoff's ability to waive his right to counsel also triggered an inquiry into his competency to stand trial.

In any event, after the court received and reviewed Dr. Good's report there was certainly bona fide evidence that raised a reasonable doubt about Wycoff's competency to stand trial. The trial court erred at that time by failing to order a hearing into Wycoff's competency. The error deprived Wycoff of his rights to counsel, due process, a fair trial, and his Eighth Amendment right to a reliable penalty phase determination. These errors require "automatic reversal" without regard to prejudice. *United States v. Arlt* (9th Cir. 1994) 41 F.3rd 516, 524.

2. Judge Kennedy Committed Reversible Error When He Failed to Conduct a Hearing Into Wycoff's Competency to Stand Trial

Nearly a year later, Judge Kennedy committed the same reversible error Judge Bruiniers had committed. However, Judge Kennedy had before him even more evidence of Wycoff's incompetence to stand trial.

As detailed above, Judge Bruiniers appointed Dr. Good to examine Wycoff in order to determine whether Wycoff was competent to waive his right to counsel. As result of that examination, Dr. Good diagnosed Wycoff as a paranoid schizophrenic, among other things, who was not competent to stand trial or waive his right to counsel.

Several months before Wycoff's case was assigned to Judge Kennedy for trial, Mark Peterson took over as prosecutor. On September 10, 2009, just four days prior to trial, Peterson informed the court that he had just learned of Dr. Good's report indicating that Wycoff was incompetent. Peterson told Judge Kennedy that he did not want to conduct an entire trial only to have the issue of Wycoff's competency "raise its head at some later date." (3RT 596.) Judge Kennedy agreed to reconsider the rulings of Judge Bruiniers concerning Wycoff's competency.

Judge Kennedy then took a recess from the in-court proceedings. During the recess Judge Kennedy reviewed the Reporter's Transcript of the hearing held by

Judge Bruiniers on November 14, 2008, the report of Dr. Good, and the report of Dr. Douglas Tucker. The report of Dr. Tucker apparently had not been made available to Judge Bruiniers. It had been provided to the prosecutor by ADO counsel as mitigating evidence before counsel were relieved by Judge Bruiniers and before Peterson appeared in the case. (See 1RT 204-205.)

As discussed above, Dr. Tucker, who first examined Wycoff shortly after his arrest, found that Wycoff was a paranoid schizophrenic "with evidence of paranoid delusions...which have led to marked social dysfunction and impair his ability to communicate and collaborate with others." (2CT 378.) Dr. Tucker found other symptoms of severe mental illness, including "magical thinking, overvalued ideas, beliefs in a 'spirit world,' demonic possession, reincarnation, visitation with dead relatives, numerology, astrology, and ghosts." (Id.)

Thus, Judge Kennedy had before him the opinions of two mental health experts that Wycoff was overtly psychotic, while Dr. Good expressly found that Wycoff was not competent to stand trial. Yet, despite the opinions of both Drs. Good and Tucker, Judge Kennedy stated that he did not have "any doubt about Mr. Wycoff's competency to stand trial." (3RT 603, 606.) No further inquiry into Wycoff's competency to stand trial was conducted.

As discussed above, the failure of a court to declare a doubt and conduct a hearing into a defendant's competency to stand trial, when there is substantial

evidence of incompetence, deprives the court of jurisdiction to proceed and requires reversal of the judgments without regard to prejudice. *People v. Rogers, supra,* 39 Cal.4th at 847. Failure to conduct such a hearing also deprives the defendant of his right to counsel, due process, and a fair trial, as well as the heightened level of reliability necessary in capital proceedings. *Drope v. Missouri, supra,* 420 U.S. at 181; *Johnson v. Mississippi, supra,* 486 U.S. at 584; *United States v. Arlt, supra,* 41 F.3rd at 524.

The evidence before Judge Kennedy of Wycoff's incompetence to stand trial was more than "substantial." It was, in fact, overwhelming. Indeed, there was no evidence to the contrary. Judge Kennedy's statement that he had no doubt that Wycoff was competent to stand trial was as astonishing as it was erroneous. Judge Kennedy's failure to declare a doubt and conduct a hearing into Wycoff's competency to stand trial was reversible error.[9]

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[9] If Judge Kennedy had declared a doubt about Wycoff's competency, he would have been required to appoint counsel for Wycoff who was, at that time, self-represented. Penal Code section 1368(a). *People v. Lightsey* (2012) 54 Cal.4th 668, 692.

3. Judge Kennedy Committed Reversible Error When He Failed to Conduct a Hearing into Wycoff's Competency to Stand Trial "At Any Time Prior to Judgment"

As noted above, the "court's duty to conduct a competency hearing may arise at any time prior to judgment." *People v. Rogers, supra,* 39 Cal.4th at 847. Evidence of incompetence "may emanate from several sources, including the defendant's demeanor, irrational behavior, and prior mental evaluations." *Id.*

As discussed above, Dr. Good found that Wycoff was paranoid and delusional. For instance he sought to represent himself because he needed "to know what people were thinking about him." (2CT 424.) Wycoff's delusions included the belief that his sister and brother-in-law were "evil" and that killing them was the right thing to do. Dr. Good described Wycoff's delusions as grandiose, including his "thoughts about being justified in harming bad people." (2CT 415.) Dr. Good had also indicated that Wycoff was in complete denial of his mental illness. (2CT 426.)

Wycoff's severe mental illness manifested itself throughout the trial and post-trial proceedings during which he was permitted to represent himself. Instances of Wycoff's irrational, paranoid, and delusional behavior during these proceedings are too numerous to fully recount here. Each instance, however, reflected exactly what Dr. Good described as the symptoms of Wycoff's severe

mental illness and were indicative of Wycoff's incompetence to stand trial. Nevertheless, not once did the trial court stop to question Wycoff's competency to stand trial. The court's failure to do so was reversible error.

Set forth below are some instances of Wycoff's irrational behavior that should have caused the court to suspend the trial proceedings and conduct a competency hearing. These instances of Wycoff's psychotic behavior must be considered in the context of the trial court's knowledge of Wycoff's mental illness as described in the reports and opinions of Drs. Good and Tucker, which the court had reviewed just four days prior to the start of trial. Singularly or collectively, Wycoff's courtroom behavior before, during, and after trial was substantial evidence of his incompetence.

In presenting his "defense" at trial Wycoff repeatedly admitted that he planned the killings, that he intended to kill the victims, that he killed the victims, that he fled the scene of the killings, and that he attempted to conceal evidence of his role in the killings. Put another way, Wycoff conceded every element of the charged offenses. His "defense," which was not a defense at all, was that he was morally and legally justified and morally compelled to kill the victims. He saw the killings as "a bunch of moral steps that had to be taken." (8CT 2071.) As a result, he was proud of killing the victims. He thought he was a hero and deserved a reward. Finally, when asked what he would do if he had the chance to do it all over

again, Wycoff said he would "of course" kill the victims again.

Well prior to trial, Dr. Good told the court that the Wycoff's "irrationally in deciding that it was morally right to kill his sister and brother in law" was the product "of a paranoid man suffering from severe mental illness." (2CT 427.) Throughout the trial and post-trial proceedings, Wycoff repeatedly presented this delusion as a legal "defense" to the charged offenses and, at the penalty phase, as a basis for a sentence less than death. Not once did the trial court question whether the repeated assertion of this delusion as a legal defense was evidence of incompetency. Dr. Good had unambiguously said it was evidence of incompetence.

There were other instances of Wycoff's delusions, grandiosity, and paranoia. For instance, at the end of his opening statement at the guilt phase, Wycoff told the jury that he probably had a few "fans" in the courtroom who wanted autographs from him. He told his fans "if anybody wants autographs or anything, just get in touch with Mr. Briggs." (13RT 2871-2872.)

As part of his closing statement at the guilt phase Wycoff repeatedly stabbed a cereal box and told the jury that he now was a "cereal killer." When no one laughed, Wycoff remarked that there were too many "short people" and bigots in the courtroom. (17RT 3782-3783.)

Prior to the start of the penalty phase, the court discussed whether the two letters Wycoff wrote to his cousin, Lurinda Armanini, were admissible. In these

letters Wycoff repeatedly stated he killed the victims and that he would be a savior to the victims' children. Wycoff made no objection the admission of the letters. In fact, he called one of the letters "a masterpiece" and "brilliant, brilliant writing." (17RT 3833-3834.)

During the same discussion, the prosecutor indicated his intent to introduce into evidence a grenade launcher seized at Wycoff's home. Wycoff said he wanted the grenade launcher introduced into evidence at the penalty phase because "that's a man's weapon." He wanted all his "homies in prison" to see that he "messed around" with grenade launchers and he would "blow stuff up" because it would get him more respect in prison. (17RT 3840.) When the prosecutor argued that the grenade launcher should be admitted under the prosecution's theory, not to enhance Wycoff's reputation in prison, Wycoff responded that there was something truly wrong with the prosecutor. (17RT 3846-3847.)

During his opening statement to the jury at the penalty phase, Wycoff told the jurors that their guilt verdicts were wrong and that the jury needed to "revote and take that decision back because it was wrong." (18RT 3908.) Out of the presence of the jury the court admonished Wycoff not to make such threatening comments to the jury. (18 RT 3911.)

During the prosecutor's penalty phase case, an attorney for Eric Rogers sought the admission of Eric's "victim impact testimony." Eric wanted to testify

that he opposed the the imposition of the death penalty on Wycoff because it would further exacerbate the pain of losing his mother and father. The prosecutor opposed the admission of the testimony and argued that it was inadmissible. (18RT 3967, 4055.) Wycoff also *opposed* the admission of Eric's testimony because he thought Eric's lawyer "was disrespectful" to him. Wycoff called Eric's lawyer "a dirt bag" and said he would "return evil for evil." Wycoff said he would "teach" Eric's lawyer that "you don't treat people like this." (18RT 3968, 4061-4062.) Wycoff was angry at the lawyer because the lawyer would not accept his telephone calls. (18RT 3967-3973, 4060.)

During the penalty phase the prosecutor read to the jury one of the letters Wycoff wrote from the county jail to his cousin Lurinda Armanini. This letter was referred to as the "Shining letter." In this letter, which repeated the word "Redrum" (murder spelled backwards) many times, Wycoff admitted to killing the victims and stated that his sister was "an evil demonically possessed bitch" who, along with her husband, are "underground...exactly where they should be." (18RT 4017.) Wycoff's letter further explained that he deserved to be rewarded for killing the victims and he deserved to be in paradise "on a beautiful tropical island where it's never to hot or cold and is like Woody Guthrie's big rock candy mountain..." (Id.) At this point in the proceeding, Wycoff interrupted the prosecutor to exclaim to the jury, "Isn't this great?" (Id.)

Wycoff's narrative testimony during the defense portion of the penalty phase displayed nearly all of the symptoms of his psychosis and incompetence. Wycoff explained that he "did a good job getting rid of the parents, it was a good thing to do, it helped a lot." (19RT 4155.) He explained that if he truly was an evil man he would have also killed Eric and Laurel. (Id.)

Wycoff explained that he was one trait away from being a serial killer. His morals, which he called "a gift," "keep me in check" and distinguished him from a murderer. (19RT 4156.)

Wycoff explained to the jury that "there is a lot of bad people in prison," but that "when a guy like me goes to prison, he rules." Wycoff explained, "...me being a double killer, you know, I, you know, I really rule, you know, so I got a good thing going in prison, I call the shots, I tell people what to do. And that's a good thing." (19RT 4161.) About being in prison Wycoff said, "I'm the king of all of that." (Id.)

Wycoff discussed his "first two public defenders" even though neither of those lawyers ever appeared before the jury. He did so while explaining to the jury "what fags and gays and queers are to me." (19RT 4162-4164.) He described his lawyers as homosexual "faggots" who are also molesters and rapists. And, he explained, "as soon as I figured that out, I caused them a lot of headaches." (19RT 4164.)

Wycoff ended his narrative by telling the jury that the "world out there could really use a man like me. They need a man like me to protect America's explosive supply and stuff. America needs a man like me out on the road, not behind bars." (19RT 4173.)

While playing his homemade videotapes for the jury, Wycoff made several comments. For instance, he exclaimed, "There you see that I'm a genius. I know how to fix things." (19RT 4197.)

Wycoff reminded the jury that they "are going to have to vote on what happens to a wonderful person like me." (19RT 4241.) "I don't deserve to be punished. I deserve reward. I'm the hero for this, you know." (19RT 4247.)

During his first penalty phase closing argument Wycoff again threatened the jurors. Wycoff told the jurors that "whatever you decide in this trial, whatever your verdict is, remember when you deliver your verdict, I'm going to be looking right at you. I'm going to be staring you down. So make sure you deliver the right verdict." (21RT 4545.) This statement to the jury came the day after Wycoff testified that "people certainly do bad things to me. And, you know, someone has got to stand up and strike back...there has to be consequences for that." (20RT 4456.)

Near the very end of this closing argument Wycoff explained to the jury that "if you are perfectly paranoid, you're perfectly aware of everything around

you...perfect paranoia is perfect awareness." (21RT 4556.) He ended his closing argument by saying he hoped that "the press seeks me out...so I can walk up to the camera and say 'I'm going to Prisonyland.'" He then noted that "there's a lot of midgets and short people in this courtroom that don't quite understand humor." (21RT 4557.)

In his final closing argument at the penalty phase Wycoff called killing the victims a "masterpiece" that needed some "finishing touches and unfortunately I got caught." (21RT 4591.) He again explained that he "did not do anything wrong. Everyone in this world needs to accept that Julie and Paul were wrong. And remember this when you go to vote, that Edward is a righteous man. Fix that in your brain. Edward is a righteous man." (21RT 4593.)

At his sentencing hearing, Wycoff argued to the court that it "should not sentence me to punishment. Instead, you should set me free. You know, just, you know, walk out of here, be done with this. And I can get back to truck driving and making videotapes and running people off the road...blowing stuff up and things, and everyone can be happy. I'll be a happy person in society again." (21RT 4641.)

Before the court imposed judgment it asked Wycoff if he had anything to say. Wycoff then gave a rambling statement for approximately half an hour. First he welcomed everyone to his birthday party and asked if "everyone is having a good time?" (21RT 4684.)

He said he was angry about the verdicts and that he "didn't get a chance to badmouth anybody or yell at anybody." (21RT 4685.) He explained that he was "a trustworthy, wonderful guy." While he heard that people said he had "some kind of mental problem or they think I'm mentally challenged" he said that he was not "because I'm pro per. I'm representing myself." (21RT 4686-4687.) Wycoff explained that "the psychiatrist tested me and found out that I am just competent enough to represent myself, and I've got just enough intelligence and education to represent myself...there's nothing wrong with me. There's no fool for a client here." (21RT 4687.)

Wycoff said that his sister was a "mosquito sucking blood...Suck my money, my inheritance away, and then shit on me and fly away." But, Wycoff explained, "I slapped it and brushed it off from my life." (21RT 4691.)

Wycoff then read a poem to the jury. The poem addressed his sister and ended with the following lines:

> You call me Ted
> but it's your life you blew
> with that man that you wed
> it's you that I slew
> You didn't get ahead
> it's you that you screw
> the discovery I've read
> said your house was askew
> I did what I said
> I did what I do
> now Julie is dead
> and Paul is too

(21RT 4696.)

After reading the poem, Wycoff remarked, "This is some truly, truly brilliant poetry. I have discovered a real gift." (Id.)

After a lunch recess, Wycoff said to the court, "Let's talk about killing people." (21RT 4709.) He said that in "Commie-fornia" that "killing someone is A-okay." To Wycoff, "It's great to kill someone here because when you kill someone, you get that free trip to Prisoneyland, and for killing someone you get free room and board, free utilities, free food, free education, free health care, free dental...I mean, wow crime sure as hell does pay, doesn't it? You know, so it's great to kill a person." (21RT 4710.)

At the end of his comments, Wycoff again pointed out his righteousness. "I'm a righteous man. All my life, I knew I would accomplish something really great, and this case is it." (21RT 4716.) The court then imposed two judgments of death.

After reviewing the reports of Drs. Good and Tucker, the court was on notice of Wycoff's incompetency as a result of his psychosis and its symptoms. Wycoff's behavior at trial repeatedly demonstrated the correctness of Dr. Good's opinion that Wycoff was not competent to stand trial. The court simply ignored this substantial evidence and committed reversible error when it failed to conduct any hearing into Wycoff's competency.

D. The Trial Court Committed Reversible Error When It Failed to Conduct a Hearing Into Wycoff's Competency to Waive His Right to Counsel

Under the Sixth and Fourteenth Amendments a defendant in a state criminal case has a right to counsel at all critical stages in the proceedings. However, that constitutional right to counsel may be waived by a defendant who wishes to represent himself. *Faretta v. California* (1975) 422 U.S. 806, 807. "The Sixth Amendment, when naturally read, thus implies a right of self-representation." *Id.*, at 821. While California law provides "no constitutional or statutory right to self-representation," this Court has recognized that "California law is subject to the United States Constitution, including the Sixth Amendment right to self-representation, as established in *Faretta, supra,* 422 U.S. 806, and its progeny." *People v. Johnson* (2012) 53 Cal.4th 519, 526.

Self representation, therefore, requires the defendant to waive his Sixth Amendment right to counsel. The waiver of any constitutional right, including a defendant's waiver of his right to counsel, must "be intelligent and voluntary before it can be accepted." *Godinez v. Moran* (1993) 509 U.S. 389, 402. "*Faretta* held that the Sixth and Fourteenth Amendments include a constitutional right to proceed *without* counsel when a criminal defendant 'voluntarily and intelligently elects to do so.'" *Indiana v. Edwards, supra,* 54 U.S. at 170, quoting *Faretta v. California, supra,* 422 U.S. at 807; emphasis in *Faretta.* While courts must indulge every

reasonable presumption against the waiver of a constitutional right, it may permit "an intelligent and competent waiver by the accused." *Johnson v. Zerbst* (1938) 304 U.S. 458, 461.

In most cases the question of the defendant's competency to waive his right to counsel and represent himself does not arise. In *Godinez v. Moran, supra,* 509 U.S. at 401 fn. 13, the Supreme Court stated: "We do not mean to suggest, of course, that a court is required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his right to counsel. As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant's competence." Similarly, in *People v. Johnson, supra,* 53 Cal.4th at 530, this Court noted that a "trial court need not routinely inquire into the mental competence of a defendant seeking self-representation. It needs to do so only if it is considering denying self-representation due to doubts about the defendant's mental competence."

In short, like competency to stand trial, a defendant has a procedural due process right to a hearing on his competency to waive his Sixth Amendment right to counsel in any case in which the court has a good faith belief that the defendant is not mentally competent to waive that right. "Before allowing a defendant to waive his right to counsel, a court must be satisfied that the defendant is competent to do so." *United States v. Washington* (8th Cir. 2010) 596 F.3rd 926, 940, quoting

United States v. Crawford (8th Cir. 2007) 487 F.3rd 1101, 1105. "Due process requires that a state court initiate a hearing on the defendant's competence to waive counsel whenever it has or should have a good faith doubt about the defendant's ability to understand the nature and consequences of the waiver, or to participate intelligently in the proceedings and to make a reasoned choice among alternatives presented." *Harding v. Lewis* (9th Cir. 1987) 834 F.2d. 853, 856. See also *Cuffle v. Goldsmith* (9th Cir. 1990) 906 F.2d 385, 392, quoting *Westbrook v. Arizona* (1966) 384 U.S. 150: "Under these circumstances, the trial court had a 'protecting duty' to conduct an inquiry into the issue of his competence to waive his right to counsel and proceed as his own attorney." "This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 244.

A "good faith" doubt of a defendant's competence to waive his right to counsel and to represent himself exists "when there is substantial evidence of incompetence...Evidence of incompetence includes, but is not limited to, a history of irrational behavior, medical opinion, and the defendant's behavior at trial." *Harding v. Lewis, supra,* 834 F.2d at 856. "The medical evidence of (petitioner's) mental impairments and the opinion that he 'was not *completely* out of touch with reality' met this standard." *Cuffle v. Goldsmith, supra,* 906 F.2d at 392; emphasis

in original.

In *People v. Teron* (1979) 23 Cal.3rd 103, 115, fn. 7, disapproved on other grounds in *People v. Chadd* (1981) 28 Cal.3rd 739, 750, fn 7, this Court stated: "Before granting defendant leave to represent himself, the trial court must determine whether the defendant has the mental capacity to waive his constitutional right to counsel with a realization of the probable risks and consequences of his action. More recently, in *People v. Taylor, supra,* 47 Cal.4th at 871 fn. 10, this Court endorsed *Teron* by stating that "upon hearing evidence that raises a serious question regarding the defendant's mental capacity the trial court should suspend proceedings and order a psychiatric examination, presumably with an eye to appointing counsel."

A defendant seeking self-representation must be competent in two distinct ways. First, a defendant seeking self-representation must waive his constitutional right to counsel. As with the waiver of any constitutional right, the defendant's waiver must be knowing, voluntary, and intelligent. *Faretta v. California, supra,* 422 U.S. at 807. Put conversely, a defendant who cannot knowingly, voluntarily, or intelligently waive his right to counsel is not competent to do so.

Secondly, a defendant seeking self-representation must also have the mental "ability to conduct trial proceedings." *Indiana v. Edwards, supra,* 554 U.S. at 173. While distinguishing *Godinez v. Moran, supra,* 509 U.S. 389, the *Edwards* court

noted: "To put the matter more specifically, the *Godinez* defendant sought only to change his pleas to guilty, he did not seek to conduct trial proceedings, and his ability to conduct a defense at trial was expressly not at issue."

In *People v. Johnson, supra,* 53 Cal.4th at 530, this Court quoted *Indiana v. Edwards, supra,* 554 U.S. at 175-176 as holding that "competence to represent oneself at trial" required the ability "to carry out the basic tasks needed to present one's own defense without the help of counsel." The *Johnson* opinion also found "helpful to a large extent" standards for competency set forth in two law review articles including the requirement that "for certain key decisions, such as selecting the defense to pursue at trial, a defendant should be capable of justifying a decision with a plausible reason." *People v. Johnson, supra,* 53 Cal.4th at 530.

Thus, a trial court permitting a defendant to waive his right to counsel and to represent himself must conduct a hearing into that defendant's competency if there is substantial evidence that the defendant cannot knowingly, voluntarily, or intelligently waive his right to counsel or if there is evidence that the defendant suffers from a mental illness "to the point where they are not competent to conduct trial proceedings themselves." *People v. Johnson, supra,* 53 Cal.4th at 63, quoting *Indiana v. Edwards, supra,* 554 U.S. at 178.

In this case, substantial evidence existed that Wycoff was not competent to represent himself under any standard. Both Judge Bruiniers and Judge Kennedy

were acutely aware that Wycoff suffered from severe mental illness and that a good faith doubt existed concerning his ability to competently waive his right to counsel and competently represent himself. Both committed error by failing to conduct a hearing into Wycoff's competency. Reversal is automatic and harmless error analysis does not apply. *United States v. Keen* (9th Cir. 1997) 104 F.3rd 1111,1115; *United States v. Arlt, supra,* 41 F.3rd at 524.

1. Judge Bruiniers Committed Reversible Error When He Failed to Conduct a Hearing Into Wycoff's Competency to Waive His Right to Counsel

As was the case with the question of Wycoff's competency to stand trial discussed above, Judge Bruiniers was keenly aware of the substantial evidence indicating that Wycoff was not mentally competent to waive his right to counsel and to conduct the trial proceedings himself. Indeed, Dr. Good, the court's own expert, expressly informed Judge Bruiniers that Wycoff was *not* competent to waive his right to counsel. Judge Bruiniers also knew that if granted self-representation Wycoff intended to present a defense that was based entirely on his paranoid delusion that killing the victims was not only justified and righteous, but morally necessary.

Judge Bruiniers committed reversible error when he failed to suspend the proceedings and conduct a hearing into Wycoff's competency to waive his right to

counsel and represent himself at trial.

In his report to Judge Bruiniers, Dr. Good expressly stated that Wycoff, "[l]ike many paranoid patients...is alert, conscious, and **knows** that he is making a request to act as his own counsel in representing himself against the charges." (2CT 425; emphasis in original.) Dr. Good also recognized that Wycoff's waiver was voluntary "in the sense that no one is forcing him to relinquish counsel and represent himself." (Id.)

However, Dr. Good also expressly found that Wycoff's waiver "is not **intelligent**, if what we mean by intelligent is the product of a rational reasoning process." (Id., at 425; emphasis in original.) Dr. Good stated that Wycoff's "reasoning process is not rational and instead reflects the irrational thinking of a paranoid man suffering from severe mental illness." (2CT 427.)

In his report, Dr. Good addressed specific instances of Wycoff's irrational thinking and paranoia that indicated his decision to waive his right to counsel was not made intelligently or rationally, but was the product of his mental illness. Dr. Good found that Wycoff's irrational "decision making to waive his right to counsel is quite the same as his irrationality in deciding that it was morally right to kill his sister and brother in law to prevent them from stealing his inheritance, and in deciding that killing them would prevent further psychological harm to their children, about whom he ostensibly cares." (2CT 427.)

Judge Bruiniers knew as early as April 22, 2008, that Wycoff would not cooperate with his appointed counsel, in part because counsel wanted to explore an insanity defense, while Wycoff believed that killing his sister and brother in law was morally "right and that any kind of other defense would undermine the righteousness of what he had been doing when the problems arose." (1RT 85.) In his *Marsden* motion of March 7, 2008, Wycoff equated his court appointed counsel with his sister and brother in law, whom he claimed he had righteously killed. Wycoff wrote the following in his *Marsden* motion:

> In my case I allegibaly killed 2 greedy, scummey, licing mannipulative Atturneys. Well that is almost axsactly what Roberto (Najera) and (Susan) Hutcher are, and now this evil man Roberto is become the source of anything about me. I know that this evil man will use all this information on me to do evil. I am a good man and I can't allow that."
>
> (2CT 313.)

Later in the same letter, Wycoff wrote that appointed attorneys Najera and Hutcher "have done me wrong, thay deserve to have the crap beet out of them for how thay handle me, my case, my family, and thangs I don't even know about." (2CT 326.)

Wycoff made it clear to Judge Bruiniers that he would refuse to cooperate with any attorney who would not present the defense Wycoff wanted presented - that Wycoff had a moral and legal right and a moral duty to kill his sister and brother-in- law. The defense Wycoff wanted to present was not a defense of any kind, but a paranoid delusion.

On July 10, 2009, Wycoff told the court that his defense was that he had "an explanation, a reason" for the killings. He wanted to select a jury that believed, like him, "you have got the right to take revenge if someone is trying to destroy you like Julie was going to destroy me."

Wycoff's defense was, as Dr. Good noted, a product of his mental illness. It was, arguably, evidence only in support of a plea of not guilty by reason of insanity. See *People v. Skinner* (1985) 39 Cal.3rd 765, 781. Wycoff had no plausible or rational reason for wanting to present this "defense."

Judge Bruiniers knew he had a responsibility or protecting duty to ensure that Wycoff was "in fact competent to represent himself for trial whether it's wise or not." (1RT 124.) Indeed, Judge Bruiniers expressly appointed Dr. Good to determine whether Wycoff was "capable of waiving his right to counsel and self-representation in a case of this nature." (Id.) Dr. Good expressly found that Wycoff could *not* intelligently waive his right to counsel. The court had absolutely no evidence to support a contrary opinion. Nevertheless, Judge Bruiniers

inexplicably found that he was "compelled" under the "requirements of *Faretta*" to grant Wycoff's request for self-representation.

It cannot be argued that by appointing Dr. Good the court fulfilled its "protecting duty" to conduct a hearing into Wycoff's competency to waive counsel and represent himself. First, after appointing Dr. Good to examine Wycoff, Judge Bruiniers completely ignored Dr. Good's opinion. Indeed, Judge Bruiniers never explained why he was "compelled" to grant Wycoff's request for self-representation in spite of Dr. Good's opinion that Wycoff was not competent.

Secondly, no hearing of any kind was held. At the proceeding on November 14, 2008, when Judge Bruiniers granted Wycoff's motion for self representation, neither defense counsel nor the prosecutor were permitted to actually see or review any part of Dr. Good's report. Neither counsel took a position on the issue of Wycoff's competency. A hearing to determine a defendant's competency to waive his right to counsel must consist of more than the court considering the report of a single mental health expert, while denying counsel access to the report, then rejecting the very conclusion reached by the court's own expert.

Judge Bruiniers committed reversible error by failing to conduct a hearing into Wycoff's competency to waive his right to counsel and represent himself. That error requires automatic reversal of all judgments imposed on Wycoff.

2. Judge Kennedy Committed Reversible Error When He Failed to Conduct a Hearing into Wycoff's Competency to Waive His Right to Counsel

On September 10, 2009, the trial prosecutor asked Judge Kennedy to reconsider the ruling of Judge Bruiniers that Wycoff was competent to waive his right to counsel and represent himself. The prosecutor was concerned that Wycoff was, in fact, not competent to represent himself. Indeed, the prosecutor noted that Dr. Good's report was "uncontradicted in the record by any other doctor...then we have Judge Bruiniers' ruling, that just causes me some concern." (3RT 594.)

During a recess in the proceedings, Judge Kennedy considered the reports of Drs. Good and Tucker and the transcript of the proceeding before Judge Bruiniers on November 14, 2008. Judge Kennedy also had the benefit of seeing Wycoff represent himself in court at proceedings on July 10, August 5 and 27, and September 8, 2008. After the recess, Judge Kennedy held that Wycoff was competent to represent himself. At no time was a hearing of any kind held to determine Wycoff's competency. Throughout the proceeding Wycoff continued to represent himself.

The reports of Drs. Good and Tucker, and Wycoff's in-court behavior, constituted more than sufficient evidence to require Judge Kennedy to conduct a hearing into Wycoff's competency to waive his right to counsel and to represent himself. Judge Kennedy's failure to conduct such a hearing was reversible error

that deprived Wycoff of his right to counsel, due process, a fair trial, and a reliable penalty phase determination.

As discussed above, Dr. Good expressly found that Wycoff could not intelligently waive his right to counsel. Dr. Good concluded that Wycoff's "reasoning process is not rational and instead reflects the irrational thinking of a paranoid man suffering from severe mental illness." (2CT 427.)

Dr. Tucker similarly found that Wycoff was a paranoid schizophrenic with paranoid delusions. Dr. Tucker similarly found that Wycoff's paranoid delusions centered on his family members, including the victims, and that the severity of his paranoia had increased following the death of Wycoff's father in July, 2005, six months prior to the offenses. (2CT 378.)

Judge Kennedy also personally observed Wycoff in the courtroom several times before the prosecutor raised the issue of Wycoff's competency on September 10, 2009. During these in-court proceedings, Wycoff's severe mental illness and delusions were quite obvious. It was also quite obvious that Wycoff's request for self-representation was the product of his delusions.

A proceeding was held on July 10, 2009, to address the written questionnaires to be completed by the prospective jurors. During this proceeding the court addressed several questions Wycoff wanted included on the questionnaire.

One question Wycoff wanted on the questionnaire required the jurors to state their opinion "of people who like to kill extreme leftists because they hate them?" (2RT 371.) Wycoff explained that this question "helps me pick the type of jury I'm looking for." (2RT 372.) Put another way, Wycoff wanted a jury of people "who liked to kill extreme leftists because they hate them." The prosecutor explained to Judge Kennedy that Wycoff believed that killing the victims was "justified" so this question was "an explanation for why (Wycoff) did some things." However, the prosecutor noted, such an explanation doesn't "go to a defense of the case." (2RT 373.)

Another question Wycoff wanted the jurors to answer concerned truck drivers. Wycoff wanted the jury to know that he was a truck driver who hauled explosives. He feared that "here in California a lot of people don't like truck drivers" and other "hard working people..." (2RT 374.)

Another question Wycoff wanted the potential jurors to answer concerned revenge. (2RT 382.) Wycoff wanted "a jury that believes that you have got the right to take revenge if someone is going to destroy you, like Julie was going to destroy me, I want to have a jury that believes you have got the right to get revenge or justice, or to take things into your own hands." (2RT 383.) Wycoff explained that he wanted a jury "that would allow me to walk out of here maybe, maybe not" based on his belief that he had "the right to get revenge." (2RT 285.)

Wycoff also wanted a question included on the questionnaire which asked potential jurors if they believed "people should have the right to take the law into their own hands." (2RT 388.) After discussing a Romanian dictator, Wycoff explained that he would "like to have a jury that believes that you have a right to get rid of evil people...especially if they are on your back, you know, trying to destroy you, trying to ruin you, you know." (2RT 389.)

After discussing the jury questionnaires, advisory defense counsel (Briggs) raised with the court a problem with the arrangements made for Wycoff to view the physical evidence. Advisory counsel did not want anyone from law enforcement present when Wycoff viewed the evidence because "it would be very difficult for Mr. Wycoff not to make comments on the evidence even if he intended not to because of his mental disabilities." (2RT 400.) Advisory counsel pointed out to the court that Judge Bruiniers acknowledged that Wycoff had attention deficit disorder and schizophrenia. (2RT 400-401.) However, when advisory counsel mentioned Wycoff's mental illness Wycoff directed advisory counsel, "Don't bring that out." (2RT 4001.)

A second discussion about viewing the physical evidence occurred in court on August 5, 2009. Wycoff said he wanted to see his van because he wanted to know if it was being properly maintained, "if the tires are still inflated," and "whether the batteries are being kept charged." (3RT 429-430.) Wycoff also said

he wanted to see his grenade launcher because it "makes me look like more of a man to own something like that...a nice republican jury would, you know, look at that grenade launcher and they would be proud, you know." (2RT 431.)

Wycoff's in-court behavior demonstrated that all of the symptoms of his mental illness persisted right up to the hearing on September 10, 2009. Wycoff still suffered from the delusion that he was "justified" in killing the victims because they were "evil people." He expected the jury "would allow me to walk out of here" if it understood his "right to take the law into (his) own hands." His maintained this delusion even after the court and the prosecutor expressly told him that he had no such right and his delusion did not constitute any kind of legal defense.

None of this evidence of Wycoff's severe mental illness gave Judge Kennedy any pause. However, Wycoff was clearly suffering from a paranoid delusion or delusions that directly affected his competency to waive his right to counsel and represent himself. His delusion was that he had a moral and legal right and a moral duty to kill the victims and that a jury would acquit him, even reward him, if it correctly understood his position. This delusion was both the cause and goal of his self-representation. Judge Kennedy failed to recognize the nature and extent of Wycoff's delusion. He should have conducted a hearing into Wycoff's competency to waive his right to counsel and represent himself. His failure to do so was reversible error.

E. Both Judge Bruiniers and Judge Kennedy Failed to Exercise Their Discretion to Apply the "Higher Standard" of *Indiana v. Edwards*

Faretta recognized that the "right to defend is personal" and "although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law." *Faretta v. California, supra,* 422 U.S. at 834. In *McKaskle v. Wiggins* (1984) 465 U.S. 168, 178, the court noted that "the right to appear *pro se* exists to affirm the accused's individual dignity and autonomy."

This Court has stated that as a result of *Faretta's* "strong constitutional statement, California courts tended to view the federal self-representation right as absolute, assuming a valid waiver." *People v. Taylor, supra,* 47 Cal.4th at 872. In *People v. Johnson, supra,* 53 Cal.4th at 526, this Court noted that this absolutist view "was strengthened by the later decision in *Godinez v. Moran, supra,* 509 U.S. 389." See also *People v. Lightsey, supra,* 54 Cal.4th at 694: "This absolutist view of the federal right was further cemented by a common interpretation of the high court's subsequent decision in *Godinez v. Moran...*" Similarly, in *People v. Bradford* (1997) 15 Cal.4th 1229, 1365, this Court noted that "a defendant has a federal, *unconditional* right of self-representation..." (Emphasis added.)

The absolutist view of the right to self-representation held that if a defendant was competent to stand trial he was necessarily competent to waive his right to

counsel and represent himself. "Whether the question for the trial court is competence to stand trial or competence to waive counsel and represent oneself, the competence standard is the same..." *People v. Blair, supra,* 36 Cal.4th at 711, citing *Dusky v. United States* (1960) 362 U.S. 402 and *Godinez v. Moran, supra,* 509 U.S. 389.

An absolutist right to self-representation was expressly rejected in *Indiana v. Edwards, supra,* 128 U.S. at 171, "because *Faretta* itself and later cases have made clear that the right of self-representation is not absolute." After *Edwards* courts recognized that the right to self-representation was not absolute. For instance, in *United States v. Ferguson* (9th Cir. 2009) 560 F.3rd 1060, 1068, the court stated: "The district court...repeatedly referring to Defendant's 'absolute right' to represent himself once the court found him competent to stand trial. *Edwards* changed that proposition."

Edwards concerned "gray-area" defendants. A gray-area defendant is one who is competent to stand trial under the standard of *Dusky v. United States, supra,* 363 U.S. 402, but requires "a somewhat higher standard that measures mental fitness for another legal purpose." *Indiana v. Edwards, supra,* 554 U.S. 172. The "higher standard" described in *Edwards* seeks to measure the self-represented defendant's "ability to conduct trial proceedings...and his ability to conduct a defense at trial... *Id.,* at 173. The *Edwards* court concluded that "the Constitution

permits judges to take a realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." *Id.*, at 177-178.

The *Edwards* court found this "higher standard" was necessary for gray-area defendants because of "the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling." *Id.*, at 176. Such a "spectacle" would "not affirm the dignity" of a self-represented defendant and would destroy both the fairness and the appearance of a fair trial. *Id.*, at 177. See also *United States v. Ferguson, supra,* 560 F.3rd at 1069: self-represented defendant's "failure to defend himself seriously jeopardized the fairness of the trial and...at the very least, seriously jeopardized the *appearance* of fairness." (Emphasis in original.)

This Court has pointed out that *Edwards* did not hold "that due process mandates a higher standard of mental competence for self-representation than for trial by counsel." *People v. Taylor, supra,* 47 Cal.4th at 877. *Edwards* held only that a state *may* impose a higher standard on gray-area defendants. In *People v. Lightsey, sura,* 54 Cal.3rd at 694, this Court noted that after *Edwards* "states may validly impose a mental-illness-related limitation on the right to self-representation." See *United States v. Thompson* (9th Cir. 2009) 587 F.3rd 1165, 1171: "*Edwards* held that states are free to assess the defendant's competency for

purposes of self-representation under a different standard..." This Court has held that the "higher standard" of *Edwards* is applicable in California courts. Thus, California "trial courts may deny self-representation in those (gray-area) cases where *Edwards* permits it." *People v. Johnson, supra,* 53 Cal.4th at 527.

Assuming arguendo that Wycoff was competent to stand trial, he certainly was nevertheless a "gray-area" defendant. As discussed above, a "gray-area" defendant is one who is competent to stand trial, yet may not be mentally able to rationally conduct trial proceedings as a self-represented defendant. A contemporaneous diagnosis of mental illness certainly would place any defendant in the gray area. See *People v. Weber* (2013) 217 Cal. App.4th 1041, 1054: "defendant does not suffer from any mental illness, that is, he is not a 'gray area' defendant as that term is used in *Edwards*."

Judge Bruiniers questioned Wycoff's competency to represent himself. He noted Wycoff's grandiosity and paranoia. He expressly appointed Dr. Good to determine Wycoff's "competence to waive his right to counsel and for self-representation (under) the standards of *Indiana v. Edwards*." (1RT 127.) Dr. Good specifically found that Wycoff was a paranoid schizophrenic with paranoid delusions who could not intelligently waive his right to counsel.

Judge Kennedy had even more information than Judge Bruiniers about Wycoff's mental illness. Judge Kennedy had the second opinion of Dr. Tucker that

Wycoff was a paranoid schizophrenic with paranoid delusions.

Thus, Wycoff was certainly a gray-area defendant seeking self-representation as that term is used in *Edwards*. Yet, both Judge Bruiniers and Judge Kennedy, despite being aware of *Edwards*, nevertheless assumed that Wycoff had an *absolute* right to waive his right to counsel and represent himself. Neither judge stated at any time that under *Edwards* the court had the discretion to deny Wycoff's motion for self-representation because he lacked the mental ability to rationally conduct his own defense.

After going through the "form" questions concerning Wycoff's waiver of his right to counsel, Judge Bruiners asked Wycoff one "last and final time" if he gave up his right to counsel. Wycoff said he did. Judge Bruiniers then remarked that he "will grant (Wycoff's) motion for self-representation only because the Court is at least in my view *compelled* to do so under the requirements of *Faretta*, and I do not think that the *Edwards* case changes that result in at least under these circumstances." (Emphasis added.) Judge Bruiniers then "granted (Wycoff) the right to represent himself in pro per" and expressly stated "that the defendant is mentally capable of doing so..." (1RT 149-150.)

Prior to reconsidering Wycoff's competency, during a discussion of the written juror questionnaire, Judge Kennedy stated that he wanted to tell the jurors that "Mr. Wycoff has an absolute right to represent himself." (2RT 512.)

At the hearing on September 10, 209, Judge Kennedy said that he agreed "with Judge Bruiniers that under the standards that have been set out in *Faretta* and *Edwards* ..." Wycoff could represent himself. Judge Kennedy concluded, "So I'll reaffirm Judge Bruinier's finding that you (Wycoff) are entitled to represent yourself under *Faretta* and we will continue that status." (3RT 603.)

After the September 10th hearing, Judge Kennedy repeatedly told prospective jurors that Wycoff "has an absolute constitutional right to represent himself in this matter even though he himself is not an attorney or not a member of the bar." (3RT 776, 849; 4RT 927, 997.)

Both judges applied an incorrect standard. There is no "absolute right" to self- representation as each judge presumed. Judge Bruiners was not "compelled" to grant Wycoff self-representation by *Faretta* and *Edwards* as he claimed. Both judges had the discretion to, and should have, utilized the "higher standard" set forth in *Edwards* and in this Court's opinion in *Johnson*, but failed to do so. Had either judge utilized the *Edwards* standard they would have concluded that Wycoff was not competent to waive his right to counsel or represent himself.

In order to exercise its discretion, a court must be aware of its discretion. Put another way, a court abuses its discretion when it is unaware that it has discretion. *People v. Carmony* (2004) 33 Cal.4th 367, 377. See also *United States v. Joseph* (9th Cir. 2012) 716 F.3rd 1273, 1280: "...we reversed and remanded where

we found that the district court might possibly have exercised its discretion had it been aware that the law permitted such discretion." Here, neither judge was aware of his discretion under *Edwards* to reject self-representation to a gray-area defendant such as Wycoff. Both judges believed that the *Faretta* standard and the *Edwards* standard were the same and that under that standard Wycoff had an absolute right to represent himself. Both judges were wrong. As a result, Wycoff was deprived of his Sixth Amendment right to counsel, as well as due process, a fair trial, and a reliable penalty phase determination. *People v. Lightsey, supra,* 54 Cal.4th at 697, citing *United States v. Cronic* (1984) 466 U.S. 648, 655; *United States v. Arlt, supra,* 41 F.3rd at 524.

IV.
THE PROSECUTOR COMMITTED SYSTEMATIC MISCONDUCT THROUGHOUT THE TRIAL PROCEEDINGS

A. Introduction

The prosecutor at trial, Mark Peterson, had a problem. No later than September 10, 2009, four days prior to the start of trial, the prosecutor knew that two different mental health experts had concluded that Wycoff was severely mentally ill. Dr. Good diagnosed Wycoff as being "between Paranoid Schizophrenia and Delusional Disorder." (2CT 418.) Dr. Tucker had diagnosed Wycoff as suffering from Asperger's Disorder, Attention Deficit-Hyperactivity Disorder, and Schizophrenia, Paranoid Type. (2CT 377-378.) Dr. Good also noted that starting six days after Wycoff's arrest in February 2006, Dr. Hanlin of the county jail's Mental Health Unit diagnosed Wycoff as suffering from "a Delusional disorder with mixed schizoid, paranoid, and anti-social personality traits." (2CT 415-416.)

The prosecutor also knew from Dr. Good's report that "Mr. Wycoff's psychiatric history began in the 1970s when he was treated by his pediatrician for attention problems and suicidal ideation. (2CT 415.) Dr. Good also noted that Wycoff had made two suicide attempts, had been treated by a psychiatrist for school behavior problems, had sought psychiatric consultation in 1997, and was diagnosed "as suffering from a Major Depression" in 2001. (Id.)

The prosecutor also knew that Wycoff's "capacity for insight lacks depth and self awareness. Mr. Wycoff does not feel that he is mentally ill now or in the past." (2CT 417.) Dr. Good expressly stated that Wycoff "is in complete denial of his mental illness." (2CT 426.) The prosecutor similarly knew that while Wycoff was represented by appointed counsel prior to trial he had refused to take psychological tests and was adamantly opposed to any investigation of an insanity defense. (1RT 85, 126-127.)

The prosecutor knew prior to trial that Wycoff, acting as his own attorney, planned to present as a defense at trial that he was morally and legally justified in killing Julie and Paul Rogers. (2RT 373.) Prior to jury selection Wycoff told the court and prosecutor that he wanted a jury "that believes that you have got the right to take revenge if someone is going to destroy you like Julie was going to destroy me..." (2RT 383-385.) The prosecutor knew that Wycoff's "defense" was not a legal defense to the charged offenses. (2RT 389.)

Finally, the prosecutor knew prior to trial that killing Julie and Paul Rogers was itself the product of Wycoff's mental illness. Dr. Good had concluded that Wycoff's irrationality in deciding that it was morally right to kill his sister and brother in law was the product of "a paranoid man suffering from severe mental illness." (2CT 427.)

While the prosecutor knew all of the above described facts and

circumstances prior to trial he also knew that it was very unlikely that Wycoff would present any mental state evidence or defense at any phase of the trial. The prosecutor knew, as Dr. Good had stated, that Wycoff completely denied he had any mental illness. Indeed, when asked prior to trial whether he was going to offer psychological or psychiatric testimony, Wycoff said, "I don't intend to." (2RT 501.)

However, the prosecutor knew he had a problem. The prosecutor knew that even if no mental health defense was presented, no mental health evidence was presented, and no mental health expert testified, the jury might still conclude, based upon Wycoff's in-court behavior, the evidence Wycoff intended to present at trial, and the evidence of the circumstances of the offenses themselves, that Wycoff suffered from some sort of mental illness or defect. Put another way, the prosecutor feared that while Wycoff did not intend to present a mental state defense, it would be obvious to the jurors that his behavior in the courtroom and the presentation of his "defense" to the killings were the product of a delusional mind. To prevent the jurors from reaching that conclusion and possibly finding Wycoff not guilty or deserving of a sentence less than death, the prosecutor engaged in systematic misconduct. The prosecutor systematically and repeatedly told the jurors falsehoods and repeatedly asserted facts for which no evidence was presented. For instance, during voir dire, the prosecutor repeatedly told potential jurors, including

potential jurors who became trial jurors, that for the thirty-eight years prior to the charged offenses Wycoff exhibited no signs of mental illness. Such an assertion was completely false and the prosecutor knew it was false.

The prosecutor's misconduct affected every stage of the trial, from voir dire to the closing arguments at the penalty phase. Such systematic misconduct violated due process because the misconduct "taken as a whole" gave the jury a "false impression." *Downs v. Hoyt* (9th Cir. 2000) 232 F.3rd 1031, 1038. See also *Deck v. Jenkins* (9th Cir. 2014) 768 F.3rd 1015, 1022: prosecutor's misleading arguments to the jury may rise to the level of a federal constitutional violation.

B. Factual Background

1. Misconduct During Jury Selection

On July 10, 2009, prior to the start of voir dire, during a discussion of the written questionnaire to be given to potential jurors, the prosecutor asked the court whether it was necessary to question potential jurors about "the defendant's mental health, brain damage, physical or emotional abuse." He added that to his "knowledge that isn't going to be - - have any reason to indicate that that's going to be introduced." (2RT 365.)

During the same hearing Wycoff explained the nature of his intended defense. He told the court that he wanted a jury "that believes that you have got the

right to take revenge if someone is going to destroy you like Julie was going to destroy me, I want to have a jury that believes you have the right to get revenge or justice, or to take things into your own hands." (2RT 383.) Wycoff called this "sort of just...self defense." (2RT 384.) Wycoff said that based on his defense he wanted a jury "that would allow me to walk out of here maybe, maybe not." (2RT 385.)

On August 27, 2009, during a hearing to discuss the final version of the jury questionnaire, the prosecutor again raised the issue of evidence of Wycoff's mental illness. The prosecutor asked whether proposed questions 92 through 96, all of which addressed mental illness and mental health experts, should remain in the written questionnaire. The prosecutor stated that "Mr Wycoff indicates that he is not going to" introduce any such evidence.[10] However, the prosecutor stated that he was concerned that even in the absence of the introduction of any mental health evidence or opinions the jurors "are going to go hey this guy has got some mental illness." (2RT 500.) When asked by the court whether he was, in fact, going "to offer psychological or psychiatric testimony on your behalf," Wycoff responded, "I don't intend to." (2RT 501.) Wycoff then hesitated and responded that he might

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[10] Under Penal Code sections 1054.3 and 1054.7, Wycoff was required to disclose to the prosecutor thirty days prior to trial the witnesses he intended to call as well as any reports of experts he intended to call. The prosecutor's statement, made four days prior to trial, indicated that Wycoff had not disclosed any such mental health evidence or expert witnesses.

have "one of the guys that did some testing on me...come in and say, yeah, he (Wycoff) believes it (killing the victims) was a good thing to do." (Id.)

The court began questioning individual potential jurors on September 24, 2009. (5RT 1085.) After the court's questions, the prosecutor and Wycoff were each permitted to question the potential jurors. While potential jurors were questioned individually, this occurred while up to seven other potential jurors were present. Thus, all eight potential jurors heard all questions asked of each of the other potential jurors.

That same day the prosecutor began a pattern of misconduct that he was to repeat throughout the jury selection process. He asked a series of questions about mental health experts and mental illness in general. However, no such evidence was ever presented at trial. Indeed, as discussed above, Wycoff had affirmatively indicated that he did not intend to present such evidence at trial, with the possible exception that he might present the testimony of one of the unnamed "guys that did some testing on me" that he subjectively believed killing the victims "was a good thing to do." Such evidence, if it had been introduced by Wycoff, would not have been evidence of a mental state defense but only evidence that Wycoff actually believed his own delusion.

This misconduct first occurred on the first day of questioning individual jurors. The prosecutor asked a potential juror a series of questions about "factors"

which would weaken or rebut the opinions of mental health professionals experts assuming they testified. For instance, the prosecutor asked if the potential juror would consider "who is paying them...as a factor that...might influence their testimony."[11] (5RT 1243.) The prosecutor then asked the potential juror whether he would "consider a factor such as there has never been a history of mental health problems for Mr. Wycoff, would you consider that in your decision." (5RT 1244.)

The prosecutor's questions came exactly two weeks after the hearing at which the same prosecutor informed the court that he had just reviewed Dr. Good's report which indicated that Wycoff was incompetent to stand trial or represent himself. (3RT 596.) The prosecutor had also discussed Dr. Tucker's report at the same hearing. Dr. Good's report in particular set forth Wycoff's extensive history of mental illness including the diagnosis of Dr. Straussman in 2001 that Wycoff was suffering from a major depression. (2CT 415-417.) The factual premise of the prosecutor's question, that "there has never been a history of mental health problems for Mr. Wycoff" was false and the prosecutor knew it was false.

The next court day, the prosecutor resumed his pattern of asking potential jurors questions about Wycoff's lack of "mental illness." (6RT 1353-1354, 1357.)

On September 29, 2009, the prosecutor returned to this theme. While

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[11] Dr. Good, of course, was appointed by the court, paid by the court, and reported directly to the court.

questioning Juror 102, who became a trial juror, the prosecutor said that the jurors could compare the testimony of mental health experts with "other facts that you know in the case." (7RT 1635.) As "other facts" which the juror could compare to the opinions of mental health experts who never testified, the prosecutor offered the false assertion that no one else saw "these symptoms or any problems from Mr. Wycoff in 38 years." (Id.) The prosecutor further added that mental health experts only examined "Mr. Wycoff three years after the crime - - after the crime was committed." (Id.) Both assertions were, of course, false. Again, the prosecutor had reviewed Dr. Good's report just two weeks earlier. He knew, for instance, that Dr. Hanlin of the county jail's Mental Health Unit examined Wycoff within days of his arrest and described Wycoff as having a delusional disorder with mixed schizoid and paranoid traits. The prosecutor also knew that Wycoff had attempted suicide twice and had been prescribed anti-psycotic medication as a teenager.[12] (2CT 415-416.)

The next court day, September 30, 2009, the prosecutor repeated his questions to potential jurors concerning false and nonexistent evidence that "for 38 years" Wycoff exhibited no signs of mental illness. (8RT 1733.) He also repeated his questions that assumed that Wycoff was examined by a mental health expert

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12 Dr. Good had written: "Mr. Wycoff's psychiatric history began in the 1970s (Wycoff was born in 1968) when he was treated by his pediatrician for attention problems and suicidal ideation." (2CT 415.)

only "years after the crime was committed." (Id.) The group of potential jurors who heard these questions included Juror #22, who was a juror at trial. (8RT 1734.)

The next court day, October 1, 2009, the prosecutor repeated his questions. To a potential juror who expressed reservations about mental health experts, the prosecutor again discussed mental health examinations "four years after he committed the crime." (9RT 2063.) The prosecutor then asked the same potential juror to "compare that to other people who have been around him all of their lives for 38 years" and presumably saw no signs of mental illness. (Id.) The prosecutor knew these factual assertions were false.

The next court day, October 5, 2009, the prosecutor again returned to this theme. The prosecutor again asked potential jurors to compare a mental health expert's opinion to "what family members of Mr. Wycoff say about him." (10RT 2232.)

The next court day, October 6, 2009, the prosecutor repeated his now routine questions. He again asked a potential juror if he would compare the opinion of mental health experts with the testimony of what "family members say about Mr. Wycoff regarding his mental state...(and) whether he's exhibited signs of mental illness in his entire life." (11RT 2337.)

Later that same day, the prosecutor repeated his questions. He asked a

potential juror if he could compare the opinion of a mental health expert with evidence that Wycoff had never "been diagnosed with any mental condition before..." (11RT 2421.) Such a factual assertion was clearly false and the prosecutor knew it was false.

Finally, on the last day of jury selection, October 7, 2009, the prosecutor repeated his questions. He again asked if the potential jurors could compare the opinion of a mental health expert "to what other family members say about Mr. Wycoff's mental state." (11RT 2589-2590.)

Wycoff did not object to any of the prosecutor's false factual assertions. Why would he? Wycoff was in complete denial of his mental illness and did "not feel that he is mentally ill now or in the past." (2CT 417.) While the prosecutor's factual assertions were false, in his delusional state Wycoff believed them to be true. Hence, Wycoff would not, or more precisely could not, object to the prosecutor's misconduct.

2. Misconduct During the Guilt Phase

As discussed above, Wycoff admitted in his testimony during the guilt phase of trial that he killed Julie and Paul Rogers. He also admitted that he planned the killings and intended to kill Julie and Paul. He presented no legal defense. Instead, he argued that he had a moral and legal right to kill the victims because Julie and

Paul intended to "destroy" him.

No evidence that Wycoff was mentally ill was presented by either party. No mental health experts testified.

At the start of the prosecutor's cross-examination, Wycoff was asked if he was psychotic when he killed Julie and Paul. Wycoff testified that he was not psychotic, he was not schizophrenic, and that he was not hearing voices. He added that the "psychiatrists I talk to say I'm fine." (16RT 3477.) Of course the prosecutor knew Wycoff's testimony was false. However, the prosecutor made no attempt to correct this false testimony. No psychiatrist who examined Wycoff thought he was "fine." In fact, both Drs. Good and Tucker believed he was a paranoid schizophrenic while Dr. Hanlin found Wycoff to be delusional with schizoid and paranoid traits six days after the offenses.

Having Wycoff testify falsely that the mental health experts who had examined him found him to be "fine," the prosecutor was able to put evidence before the jury that Wycoff did not suffer from any mental illness. Such evidence countered the prosecutor's fear that the jury would, in the absence of any mental health expert opinion, "go hey this guy has got some mental illness." (2RT 500.) Additionally, the prosecutor knew that Wycoff would not and could not object to his own testimony even if it was false.

Later during Wycoff's cross-examination, the prosecutor asked Wycoff if it

was true that he had not "seen a doctor for years." (16RT 3562.) Wycoff said that in 2004 he went to a psychiatrist to get Strattera, a drug he described as "for ADD," because he "liked the advertisements." Wycoff said he was somewhat, but not really, depressed in 2004. (16RT 3563.)

Again, the prosecutor knew Wycoff's testimony was false. Dr. Good had expressly noted: "By 2001 he was diagnosed by Dr. Straussman as suffering from a Major Depression and prescribed anti-depressants Effexor and Lexapro. A year later he was placed on Strattera." (2CT 415.)

During his guilt phase closing argument, the prosecutor told the jury that the only evidence "of mental disease, mental disorder, or mental defect" in the case was ADD and depression. (17RT 3719.) At the end of his argument the prosecutor returned to his theme. He argued that "there is no mental illness" in this case. (17RT 3764.) In fact, the prosecutor knew that Wycoff was mentally ill. He intentionally mislead the jury.

During his closing argument Wycoff told the jury that everything that happened to Julie and Paul was their fault. "They went against me wrongly. They tried to take everything from me. So I owned them. They were mine to dispose of." (17RT 3776.) Wycoff argued that he deserved to be rewarded for what he did and "to live a nice, beautiful, peaceful life for this. You know, people need to look up at me and appreciate me for this, for all of this." (17RT 3777.)

In his closing rebuttal argument, the prosecutor told the jury almost immediately that "[n]one of what (Wycoff) said is obviously a defense to the crimes..." (17RT 3784.) However, the prosecutor admitted that Wycoff's argument could create the danger "that you would at some point start thinking - - I'm getting back to the fact that Mr. Wycoff has some mental issues because of some of the things he said here." (Id.) The prosecutor went on to argue that the jury should not "be tricked or fooled by that." (17RT 3785.)

Later, the prosecutor again acknowledged that the jurors may have "concerns about his mental state." (17RT 3787.) To counter that possibility, the prosecutor argued: "Mental disease, ADD. Hasn't been seeing a doctor. Hasn't been taking medication. Last time he had depression was two years ago." (17RT 3787-3788.)

Again, the prosecutor's argument was both false and misleading. As the prosecutor well knew, there was far more to Wycoff's mental illness than ADD and a depression "two years ago." The prosecutor first introduced the falsehood then relied upon that falsehood to convince the jury that Wycoff was not mentally ill in any fashion.

3. Misconduct During the Penalty Phase

At the start of the penalty phase, before opening arguments were given, the court instructed the jurors that they were to consider and by guided by the

aggravating and mitigating factors "if applicable." Among the factors the jury was instructed to consider were factor (d), whether the defendant was under the influence of extreme mental or emotional disturbance, factor (f), whether the defendant reasonably believed there was a moral justification for his conduct, and factor (h), whether the defendant was impaired as a result of a mental disease or defect. (18RT 3885.)

In his opening statement, the prosecutor told the jury that "the People intend to present no evidence regarding Mr. Wycoff's alleged mental disease, disorder or disturbance." (18RT 3903.) Curiously, the prosecutor never explained who "alleged" Wycoff had a mental disease or defect. The prosecutor called no mental health expert as a witness at the penalty phase. However, the prosecutor's presentation of Wycoff's writings as part of his case-in-chief, including the letters he wrote to Lurinda, contained abundant evidence of Wycoff's mental illness.

The prosecutor also presented Wycoff's tape-recorded telephone conversation with Mike Lawson on February 28, 2006. During this call Wycoff asked Lawson if he thought Wycoff "was sick and needed, uh, treatment." Lawson said he believed Wycoff was "sick." However, Wycoff responded that he didn't want to believe that. Instead, Wycoff said he made a moral choice to kill Julie and Paul and he didn't think there was anything "sick about making a uh, moral decision.' (9CT 2135.) In short, it was the prosecutor who raised the issue of

Wycoff's mental illness, not Wycoff.

During his closing argument at the penalty phase, the prosecutor argued that there was no evidence that Wycoff was under the influence of an extreme mental or emotional disturbance at the time of the offenses. Thus, according to the prosecutor, mitigating factor (d) did not apply. (20RT 4515.)

Similarly, the prosecutor argued that Wycoff's mental "capacity is not impaired." He further argued that Wycoff "knew exactly what he was doing." (20RT 4516-4517.) Thus, according to the prosecutor, mitigating factor (h) did not apply.

Finally, while again addressing whether Wycoff suffered from a mental disease or defect, as described in factor (h), the prosecutor argued that Wycoff had no such mental disease or defect but that he was instead "'crazy like a fox." (20RT 4525.)

The prosecutor knew each of these statements were false. For example, the prosecutor's argument that Wycoff "knew exactly what he was doing" when he killed the victims was based on Wycoff's guilt phase testimony. There Wycoff said he was not psychotic, not schizophrenic, and was not hearing voices when he killed the victims. However, the prosecutor knew Wycoff was schizophrenic and delusional. More importantly, the prosecutor knew that Wycoff was in complete denial of his mental illness. In short, the prosecutor used Wycoff's mental illness

against him to argue to the jury that he had no mental illness and, as a result, should be executed. The prosecutor's misconduct fraudulently deprived the jurors deciding Wycoff's fate of the truth.

C. The Misconduct Requires Reversal of the Judgments

"A defendant's due process rights are violated if prosecutorial misconduct renders a trial 'fundamentally unfair.'" *Drayden v. White* (9th Cir. 2000) 232 F.3rd 704, 713, quoting *Darden v. Wainwright* (1986) 477 U.S. 168, 183. "The Supreme Court has defined a 'fair trial' as 'a trial resulting in a verdict worthy of confidence.'" *Deck v. Jenkins, supra,* 768 F.3rd at 1024, quoting *Kyles v. Whitley* (1995) 514 U.S. 419, 434. The deliberate misstatement of fact is misconduct. *People v. Hill* (1998) 17 Cal.4th 800, 823. Making references to facts not in evidence is also misconduct. *Id.*, at 827. Of course, the prejudice of this type of misconduct is greater when the "facts" not in evidence to which the prosecutor makes reference are actually false. Such misconduct is arguably more egregious than the introduction of false evidence. Misconduct "must be viewed in context; only by doing so can it be determined whether the prosecutor's conduct affected the fairness of the trial." *United States v. Young* (1985) 470 U.S. 1, 11.

The context here is unique. Wycoff represented himself. He did not raise his mental state and did not present any mental state evidence. On the contrary, he

testified that mental health experts who examined him found him to be "fine." Yet, it was obvious to everyone, including the prosecutor and the court, that Wycoff had some degree of mental illness even without considering the reports of Drs. Good and Tucker. Prior to trial the court noted that there was "certainly evidence of grandiosity and perhaps a fairly high level of paranoia" while the prosecutor remarked "that there may be some evidence of mental defects." (1RT 124.) In order to prevent the jurors from reaching the same conclusion, that Wycoff was mentally ill and therefore possibly not guilty or that death was not warranted, the prosecutor systematically mislead the jury about Wycoff's mental health. He did so by asserting facts for which there was no evidence and which were simply false. As a result, Wycoff was denied federal and state constitutional rights to due process, a fair trial, and a reliable penalty determination. *Brecht v. Abrahamson* (1993) 507 U.S. 619, 637; *Smith v. Phillips* (1982) 455 U.S. 209, 219.

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V.
THE PROSECUTOR'S NOTICE OF AGGRAVATING EVIDENCE WAS PREJUDICIALLY INSUFFICIENT

On September 1, 2009, two weeks prior to the start of trial, the prosecutor filed his "Notice of Intention to Present Penalty Evidence." (3CT 718-719.) This notice described the aggravating evidence the prosecutor intended to introduce at the penalty phase of trial. On September 8, 2009, the prosecutor filed a supplemental notice of penalty phase evidence. (3CT 726.) These "notices" failed to adequately describe the aggravating evidence the prosecutor intended to present, and did present, at the penalty phase of Wycoff's trial. As a result, Wycoff was deprived of his right to a fair, reliable, and impartial penalty phase trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. *Sheppard v. Rees* (9th Cir. 1990) 909 F.2d 1234, 1238: "A trial cannot be fair unless the nature of the charges against a defendant are adequately made known to him or her in a timely fashion." Therefore, Wycoff's penalty phase judgment must be reversed.

The prosecutor's "Notice of Intention to Present Penalty Evidence" filed on September 1, 2009, stated, in relevant part:

> ...the People intend to present evidence as factors in aggravation during the penalty phase of the above-entitled case. That evidence will include, but not be limited to, the following:

1. All of the evidence presented during the guilt phase of trial, or any other preceding phase of the trial;
2. "Victim impact" evidence;
3. Any other circumstance of the crime for which the defendant has been convicted...
4. The facts and circumstances of any other criminal activity by the defendant which involved the use or attempted use of force or violence...including but not limited to the possession of explosives by the defendant on July 6, 1992 in violation of Health and Safety Code section 12305...

(3CT 718-719.)

The prosecutor's supplemental notice filed on September 8, 2009, added only the following: "Threats of violence made by the defendant on March 28, 2006." (3CT 726.)

At no time did the prosecutor's supplemental notice describe the "victim impact" evidence he intended to introduce. Thus, the notice Wycoff received described the evidence the prosecutor intended to introduce as victim impact evidence as simply "victim impact evidence" and nothing more.

Penal Code section 190.3 "requires the prosecution to provide notice to a

capital defendant of the aggravating evidence in the case." *People v. Jennings* (1991) 53 Cal.3rd 334, 391. The purpose of the notice required by section 190.3 "is to afford capital defendants notice of the evidence actually to be used at the penalty phase without the need to utilize the discovery procedures used to obtain information about the evidence on which the prosecution is relying to establish guilt." *Matthews v. Superior Court* (1989) 209 Cal.App.3rd 155, 158. "The purpose of the notice required by section 190.3 is to advise the accused of the evidence against him so that he may have a reasonable opportunity to prepare a defense at the penalty phase." *People v. Hart* (1999) 20 Cal.4th 546, 639.

In Wycoff's case, the prosecutor's notice concerning victim impact evidence provided no notice at all. Other than the phrase "victim impact evidence," the prosecutor's notice said nothing. The prosecutor's notice did not even list the names of the witnesses he intended to call to provide such victim impact evidence.

In fact, at the penalty phase, the prosecutor called four witnesses who presented victim impact evidence. These witnesses were Kent Roger, Douglas Bowman, Eric Rogers, and Laurel Rogers. Indeed, four of the six witnesses called by the prosecutor at the penalty phase testified as victim impact witnesses.[13]

Describing "victim impact evidence" as "victim impact evidence" without

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[13] The two prosecution witnesses who did not provide victim impact evidence were Eric Christensen and David Wentworth. They were both police officers.

more is insufficient notice. In *People v. Cunningham* (2001) 25 Cal.4th 926, 1016, this Court found adequate notice where "defense counsel received general written notice as well as more specific oral notification prior to trial. Counsel received additional specific written information, including the police report..." In *People v. Bradford, supra,* 15 Cal.4th at 1359 the prosecutor "filed a notice describing several categories of aggravating evidence..." The trial court found this notice "wanting" and insufficient. However, this Court found that the initial insufficiency was cured because the prosecutor provided police and medical reports which contained "dates, names, and specific information" about the aggravating evidence. See also *People v. Yeoman* (2003) 31 Cal.4th 93, 134: prosecution provided "the police reports" to the defendant. Similarly, in *People v. Jennings, supra,* 53 Cal.3rd at 391, the notice provided by the prosecution "was largely in the general language of section 190.3, without setting forth the particular nature of any piece of evidence." This Court found the notice "facially deficient," but noted that defense "counsel had been provided with all relevant reports" giving defense counsel "actual notice of the aggravating evidence prior to trial."

Concerning victim impact witnesses in particular, this Court has held "that disclosure of the identity of victim impact witnesses is sufficient, and the defendants are not entitled to a summation of the witnesses' expected testimony." *People v. Williams* (2013) 56 Cal.4th 165, 196, quoting *People v. Benavides* (2005)

35 Cal.4th 69, 107. In both *Williams* and *Benavudes* the prosecutors specifically named the witnesses they intended to call to provide victim impact evidence. The prosecutor at Wycoff's trial did not provide any such notice. As a result, Wycoff was deprived of adequate notice of the witnesses to be called against him. He had no way of preparing for the testimony of the majority of the prosecution's penalty phase witnesses.

"If notice is not given, and the adversary process is not permitted to function properly, there is an increased chance of error [citation], and with that, the possibility of an incorrect result." *Lackford v. Idaho* (1991) 500 U.S. 110, 127. The Sixth Amendment and basic principles of due process guarantee a defendant the fundamental right to be informed so that he may have a meaningful opportunity to prepare an adequate defense. *Cole v. Arkansas* (1948) 333 U.S. 196, 201. Notice must be sufficiently detailed to enable a defendant to address all of the relevant issues in his defense. *Russell v. United States* (1962) 369 U.S. 749, 766-768. It must be said that this is particularly true where the defendant is self-represented. The failure to provide adequate notice of the aggravating evidence to be presented against Wycoff in this case cannot be considered harmless under any standard and reversal of the penalty phase verdict is required.

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VI.
THE TRIAL COURT ERRED WHEN IT PERMITTED THE PROSECUTOR TO INTRODUCE REBUTTAL EVIDENCE OF WYCOFF'S "BAD CHARACTER"

A. Introduction

As he had at the guilt phase, Wycoff testified on his own behalf at the penalty phase. His penalty phase testimony mirrored his guilt phase testimony. He explained to the jury that his sister and brother-in-law were out to "destroy" him and, as a result, he had a moral and legal right to kill them. Concerning penalty, he told the jury that "America needs a man like me out on the road, not behind bars." (19RT 4173.)

On cross-examination, with the trial court's express approval, the prosecutor was permitted to question Wycoff about nearly every allegedly immoral or bad act Wycoff had committed over the previous nineteen years. The court reasoned that Wycoff's penalty defense had been premised on an "extremely broad" claim of "good character" and "good morality." Therefore, the prosecutor was entitled to present an extremely broad view of Wycoff's immoral or bad character.

The court's decision to allow the prosecutor to present such "extremely broad" evidence of Wycoff's supposedly "bad character" was erroneous for two reasons. First, Wycoff's penalty defense was not premised on evidence of Wycoff's "good character." Wycoff's penalty defense was premised on his own

delusional system of morality which he asked the jury to accept. The prosecutor's rebuttal evidence did not rebut Wycoff's evidence of "good character" because Wycoff's evidence was not "good character" evidence. Instead, the prosecutor's rebuttal evidence further demonstrated the delusional nature of Wycoff's defense, which was based on his own moral code and how he operated within that delusional moral code. Second, even if it could be said that Wycoff's penalty defense was premised on his "good character," the prosecutor's "bad character" rebuttal evidence was far broader than was permissible.

The court's errors were prejudicial and deprived Wycoff of his right to due process, a fair trial, and a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution as well as their state constitutional counterparts. Reversal of the judgment of death is required.

B. Factual Background

As addressed above, *ante* pp. 48-52, Wycoff's penalty phase defense was presented nearly entirely through his narrative testimony. Wycoff's penalty phase narrative had two parts. First, he addressed some of the evidence which the prosecutor had presented in his penalty phase case-in-chief. For instance, Wycoff addressed the recorded telephone calls he made to various individuals from the

county jail after his arrest. He also made statements about his moral justification for killing the victims. For instance, Wycoff remarked that Julie and Paul Rogers were out to destroy him and that he destroyed them instead "in my way." Wycoff told the jury that instead of being punished the world "could really use a man like me...to protect America's explosive supply and stuff." (19RT 4173.)

The second part of Wycoff's penalty phase narrative consisted of Wycoff playing numerous videotapes in the courtroom. Many of the videotapes had no sound. However, Wycoff made statements to the jury while the tapes were being played. Often he said nothing at all. Wycoff said the videotapes showed "myself over the last 19 years." The videotapes showed that he was a "real person" who "should be out there doing stuff, doing stuff like I'm doing in these videos, see." (19RT 4173-4174.) The first videotape played by Wycoff showed a solar eclipse in Mexico in 1991. (19RT 4180.) Many of the videotapes showed Wycoff at his job driving trucks to and from various interstate locations. (19RT 4187-4188.) For example, one video showed Wycoff fixing a problem with his truck while returning from Oregon. While playing this videotape for the jury, Wycoff said, "There you see that I'm a genius. I know how to fix things." (19RT 4196-4197.) Another videotape showed him removing graffiti from a truck. (19RT 4192.) While playing another videotape of him fixing a problem with a truck, Wycoff told the jury that this "shows I'm an intelligent man. I know how to do things and I belong out there

fixing things." (19RT 4195.) Many of the videotapes concerning trucks and truck driving showed truck accidents, flat tires, fires, and other such incidents. (19RT 4220-4228.) For instance one videotape showed an incident involving Wycoff's truck hitting a tree. Wycoff said he spoke to the owner of the tree and "it was decided that I would clean up their yard." (19RT 4220.)

Several of Wycoff's videotapes did not show trucks or trucking related events. One videotape, marked Exhibit E, showed family members at Christmas in 1995. Other then identifying the people shown in the videotape as his family members, Wycoff said little about this videotape The videotape showed Julie and Paul who "are there alive." Wycoff's mother is also shown alive. Wycoff commented: "This is back when we were all a family. When my mom died, everything went to hell. But this is back when we were a real family." (19RT 4185.)

Another videotape, marked Exhibit U, again showed family members at Christmas. This time it was 2002, and Wycoff said, "my dad is dying." The videotape also showed Julie, Paul, Laurel, and Aunt Lu. Wycoff commented that this videotape "is like one of our last happy moments as a family. This is when things were coming apart is what this shows." (19RT 4232-4233.

At the end of his narrative he told the jury that they were "going to have to vote what happens to a wonderful person like me." (19RT 4241.) He reminded the

jury that "I'm the victim, not them. You know, I don't deserve this. I don't even deserve to be punished. I deserve reward. I'm the hero in this, you know." (19RT 4246-4247.) Wycoff said he "had to educate the public about - - that I'm the victim, not Julie and Paul...so that the public would understand that, you know, they don't need to execute me or send me to prison or punish me. They can understand that with what I did to Julie and Paul justice was served." (19RT 4267.) "The people of El Cerrito should thank me and be happy with me as a person for removing two crooks, two rip-off artists from their city." (19RT 4271.)

After Wycoff's penalty phase presentation, the prosecutor sought to have the trial court reconsider an earlier ruling concerning the admissibility of evidence that Wycoff possessed a pair of brass knuckles and a grenade launcher. The prosecutor also sought to play a videotape during which Wycoff discussed killing cats. The prosecutor argued that Wycoff's penalty phase defense was based upon a claim of "good character" and, therefore, Wycoff opened the door to the admission of evidence of his "bad character." (19RT 4249-4250, 4260.)

The court agreed. The court found that evidence of "bad character" was admissible to rebut "Mr. Wycoff's claims of good morality and the other general character evidence he presented, which was extremely broad." (19RT 4252, 4262.) Concerning the brass knuckles and grenade launcher in particular, the court ruled that "possession of these items does rebut the very broad testimony Mr. Wycoff

gave...of being a morally upstanding person of good character that Mr. Wycoff has described himself has opened the relevance of weapons..." (19RT 4252-4253.)

Wycoff objected, saying the prosecutor is "doing something sneaky." (19RT 4255.) Wycoff said that if the prosecutor "decides to play a video to the jury, he can't unplay it because it has already been played. And I object to it..." (19RT 4256.) Concerning the videotape of Wycoff discussing killing cats, Wycoff said, "Objection. I know what he's going to play. I object to it." (19RT 4256-4257.)

Thereafter, the prosecutor conducted a cross-examination of Wycoff concerning numerous instances of arguably immoral and otherwise "bad" conduct that spanned the nineteen years of Wycoff's life prior to his arrest. The prosecutor's cross-examination was certainly not limited to the evidence of the brass knuckles, the grenade launcher, and the videotaped discussion of Wycoff killing cats. The prosecutor's cross-examination of Wycoff is set forth in some detail above. (*Ante*, pp. 49-57.) Among the many things the prosecutor asked Wycoff were questions about books and videotapes found in his house after his arrest. These books included such titles as *Alarm Bypassing* and *The Policeman is Your Friend and Other Lies*. (20RT 4418-4422.)

The prosecutor also introduced evidence that Wycoff had taken firearms into Canada, which he knew to be illegal. (20RT 4366-4367.) The prosecutor introduced evidence that Wycoff had busted down a gate so he could park his truck.

(20RT 4371-4372.) The prosecutor introduced evidence that Wycoff had threatened several of his court appointed lawyers with violence. (20RT 4406.) The prosecutor also introduced evidence that Wycoff "embezzled"some ammonium nitrate, (19RT 4283), falsified his trucking log books, (19RT 4286, 4318), drove across a soccer field, (19RT 4309), destroyed a "no parking" sign in Florida, (19RT 4318), lied to get trucking jobs (19RT 4291), and stole fire extinguishers, (19RT 4307). Wycoff also admitted that he wanted to kill whoever had vandalized his truck-trailer one night. (19RT 4319.)

The prosecutor repeatedly asked Wycoff about killing cats. (20RT 4344-4353, 4356, 4367, 4372, 4415-4416.) Wycoff admitted he killed cats. But he said he was "humane about it." (20RT 4415.)

The prosecutor also asked Wycoff about those who disagreed with his morals and that "any time someone disagrees with you that angers you?" (20RT 4414.) Wycoff agreed that many people made him angry including single parents, homosexuals, communists, leftists, people against the NRA, vandals, people that litter, and those that "engage in graffiti." (20RT 4413.)

C. Limitations on "Bad Character" Evidence as Rebuttal

While a state "has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in," that rebuttal evidence must be

relevant in its own right. *Dawson v. Delaware* (1992) 503 U.S. 159, 167-168: Aryan Brotherhood evidence not admissible to rebut good character evidence.

Similarly, this Court has held that by "introducing evidence of good character, a defendant places his or her character in issue, thus opening the door to prosecution evidence tending to rebut that 'specific asserted aspect' of the defendant's character." *People v. Mitcham* (1992) 1 Cal.4th 1027, 1072, quoting *People v. Rodriguez* (1986) 42 Cal.3rd 730, 791-792. However, "the scope of bad character evidence offered in rebuttal must relate directly to the particular character trait concerning which the defendant has presented evidence." *People v. Mitcham, supra,* 1 Cal.4th at 1072; see also *In Re Ross* (1995) 10 Cal.4th 184, 207: "penalty phase rebuttal evidence must relate directly to a particular incident or character trait defendant offers in his own behalf." Put another way, "[r]ebuttal evidence is relevant or admissible if it tends to prove a fact of consequence on which the defendant has introduced evidence." *People v. Valdez* (2012) 55 Cal.4th 82, 170.

For example, in *People v. Ramos* (1997) 15 Cal.4th 1133, 1172-1173, the defendant presented evidence of "a devout faith" while incarcerated that suggested he had turned away from misdeeds involving force or violence. In rebuttal, the prosecutor was permitted to introduce evidence that the defendant had been cited for possession of handmade knives on five occasions while incarcerated. Similarly in *People v. Siripongs* (1988) 45 Cal.3rd 548, 576-577, the defendant introduced

evidence that he was a devout Buddhist and one characteristic of a devout Buddhist was honesty. In rebuttal, the prosecutor was permitted to introduce evidence of the defendant's prior convictions involving dishonesty. In *People v. Mitcham, supra,* 1 Cal.4th 1027, 1072, the defendant presented witnesses "who testified to his good character and reputation in elementary and junior high school." In rebuttal, the prosecutor was permitted to present evidence of the defendant's "acts of delinquency, including incidents of violence, directly related to this general picture of a well-behaved youth presented by the defense." In *People v. Valdez, supra,* 55 Cal.4th at 170, the defendant presented evidence "of his intelligence, his positive performance in school, and other positive aspects of his background..." The prosecutor was permitted to call a rebuttal witness regarding a 1991 fighting incident at high school where the defendant said he was going to put a bullet into the witness's head and said "he was going to kick the other supervisor's ass."

D. Wycoff Did Not Present "Good Character" Evidence

At Wycoff's penalty phase, the rebuttal evidence the prosecutor presented did not "relate directly to the character trait concerning which the defendant has presented evidence." *People v. Mitcham, supra,* 1 Cal.4th at 1072. Therefore the court committed reversible error by admitting the broad range of "bad character" evidence presented by the prosecutor.

The twist here, which the trial court and prosecutor utterly failed to recognize, is that the so-called "good character" evidence Wycoff introduced only concerned Wycoff's own delusions and was not evidence of conduct any rational juror would consider "good" or mitigating. It was, instead, evidence of Wycoff's own delusional moral code and how he perceived his conduct within that code. For instance, Wycoff believed killing cats was evidence of good character. In more precise terms, Wycoff introduced his so-called good character evidence to prove that under his delusional moral code he was "the greatest" and an "intelligent man" who knew how to get things done. (19RT 4189, 4195.) He believed his delusional "morals keep me in check" which "proves that I'm a real man (and) if I have to do something like this (killing the victims) I will do it...And that's, you know, something to be happy about. Not a gift that was wasted." (19RT 4156.) In short, Wycoff did not present what any reasonable juror would consider "good character" evidence.

In the middle of his cross-examination of Wycoff, the prosecutor asked if Wycoff would agree that his "morals are quite a bit different than most people's morals..." Wycoff agreed. The prosecutor then asked if that fact, that Wycoff knew his moral code was different, would stop him from doing what he thought was "morally right." Wycoff replied that knowing his moral code was "quite a bit different" from "most other people's morals" would not stop him from doing what

he believed was morally right under his own moral code.

What the prosecutor presented as rebuttal evidence did not rebut "the character trait concerning which the defendant has presented evidence." Instead, the rebuttal evidence presented by the prosecutor further corroborated the fact that Wycoff operated under his own delusional moral code in which he believed he was a "genius" for doing things that any rational juror would consider repulsive.

The prosecutor admitted this point. The prosecutor told the court: "He thinks killing cats is good. That's one of the reasons he thinks killing certain people is a good thing. So it further illustrates his mental state, which is a relevant piece of evidence." (19RT 4261.)

Indeed, Wycoff believed that every piece of bad conduct evidence presented by the prosecutor only further demonstrated his delusional view that he was a "genius" who deserved reward for his conduct. When the prosecutor presented evidence that Wycoff killed cats, Wycoff explained that he only killed "wildcats" that disrupted the food chain. If he didn't kill the cats "you got no snakes, mice and, you know, hawks die off, and you know, it throws everything out of balance." (20RT 4348.) When asked about stealing ammonium nitrate from his employer, Wycoff explained that sometimes "somebody slights me" by not loading his truck fast enough, so he will "get revenge" and "pay evil for evil" by "taking some of the product for myself." (19RT 4284.) Wycoff admitted he destroyed a "no parking"

sign in Florida and explained that "there was a damned good reason for" doing so. (19RT 4319.) "Sometimes it's just communism." (19RT 4318.)

Bad character evidence is only admissible to rebut the "particular character trait concerning which the defendant has presented evidence." *People v. Mitcham, supra,* 1 Cal.3rd at 1072. Neither the court nor the prosecutor ever identified any "particular character trait" that Wycoff's "good character" evidence sought to prove. Wycoff thought that it proved that he was a genius whose morality permitted him to kill cats and his human victims. No rational juror believed that Wycoff's good character evidence was presented to prove the "particular character trait" that he was a genius who was morally permitted to kill. Wycoff's evidence only proved that he was delusional. The prosecutor's bad character evidence did not rebut the evidence that Wycoff was delusional, it only reinforced it.

The prosecutor made this exact point in his "final thoughts" to the jury during his closing argument at the penalty phase. The prosecutor stated that "the things he (Wycoff) talked about, the things he believes, the attitudes he holds, and the things he did are repulsive and wrong and evil." (21RT 4575.) The prosecutor repeated that Wycoff was "evil" and that "you have in this case in a very real sense almost touched evil. I mean, it's palpable. It's here in the courtroom." (Id.)

The prosecutor was not asking the jury to weigh Wycoff's good character evidence against the bad character evidence admitted in rebuttal in order to present

"a more balance picture of his personality." *In Re Ross, supra,* 10 Cal. 4th at 207. Instead, the prosecutor asked the jury to consider both Wycoff's "good character" evidence and the rebuttal evidence as proof that Wycoff was evil. As such, the rebuttal evidence was not admissible and the jury's consideration of that evidence was error.

E. Even If Wycoff Had Presented "Good Character" Evidence, The Prosecutor's Rebuttal Evidence Was Impermissibly Broad

Even if Wycoff's evidence could somehow be considered "good character" evidence, the prosecutor's introduction of rebuttal evidence of "bad character" went far beyond the scope of permissible rebuttal evidence.

Wycoff's penalty phase defense for the most part concerned his career as a truck driver. Wycoff argued that his trucking videos show that he was "a genius" who knew "how to do things." Such a person, he argued, should be returned to society, not executed. When Wycoff presented two videos that showed his family at Christmastime several years apart he did not argue that these videos showed anything like a positive family life or "good character." Instead, he remarked that the video showed "when things started coming apart," that is, when Julie and Paul started the process of destroying him.

Even if Wycoff's evidence were somehow considered evidence of "good character" the evidence presented by the prosecutor as rebuttal was overly broad.

Put another way, the prosecutor's rebuttal evidence was not focused on a "particular character trait concerning which the defendant has presented evidence." As the prosecutor stated, the rebuttal evidence simply proved that Wycoff was "evil."

Many of the incidents about which the prosecutor introduced evidence constituted criminal offenses. The prosecutor presented evidence that Wycoff illegally carried firearms into Canada, threatened his attorneys with violence, destroyed a gate and a parking sign, embezzled property, stole fire extinguishers, and killed cats. Neither the prosecutor nor the court ever determined what particular character trait this evidence supposedly rebutted.

Presumably this evidence was admitted by the court to rebut Wycoff's claim that he was a genius whose conduct should be rewarded. However, the prosecutor's evidence rebutted that claim, if at all, not by showing that Wycoff was hardly a genius, but by showing only that he was delusional, that his delusions were violent, and, if not executed, he would remain dangerous even in prison. As such, the prosecutor's rebuttal evidence was impermissibly broad and corrupted the penalty phase of trial. In particular, this error permitted the jury to consider evidence that was unrelated to any aggravating factor and thus the jury was not "suitably directed and limited." *Godfrey v. Georgia* (1980) 446 U.S. 429, 427. This error resulted in a denial of Wycoff's rights to due process, a fair trial, and reliable penalty phase verdict.

VII.
WYCOFF WAS UNCONSTITUTIONALLY DEPRIVED OF THE TESTIMONY OF ERIC ROGERS AT THE PENALTY PHASE OF TRIAL

A. Factual and Procedural Background

On October 29, 2009, in the middle of the prosecution's penalty phase case, a attorney for Eric Rogers filed a pleading which sought to have Eric testify at the penalty phase of trial. (5CT 1483-1487.) When the in-court proceedings began that day, the attorney for Eric Rogers, Ted Cassman, was in the courtroom. Cassman indicated that Eric wanted to testify as a victim impact witness and to say "that the death penalty in this case would further exacerbate his tragedy and his pain and his suffering." (18RT 3973.) The court decided that the issue was "of some complexity and first impression" and it would address it after the weekend. (18RT 3970, 3978.)

Eric's pleading argued that he had a right to testify under Article I, section 28 (b)(8) of the California Constitution which had been enacted as part of Proposition Nine in November, 2008. Section 28(b)(8) provides, in relevant part, that a victim to a crime shall "be heard, upon request, at any proceeding including any...sentencing...in which a right of the victim is at issue."

Eric's pleading stated that he wished to testify that he did "not want my uncle to receive the death penalty. For me, giving him the death penalty would just exacerbate the pain and tragedy that I have suffered as a result of my parents'

death...It would mean that I have to live for the rest of my life knowing that after he took my parent's from me, his hatred prevailed and my parents' love lost..." (5CT 1486.)

On Monday, November 2, 2009, the court issued a written order "regarding victim testimony." (5CT 1494-1500.) The court's written ruling stated, in relevant part:

1. The People may present testimony from the relatives and associates of the Julie and Paul Rogers on the impact their death had on the witness.
2. A witness may describe some of the endeavors and activities of Julie and Paul Rogers as they explain the impact their death had on them.
3. The opinions of Paul and Julie Rogers on the issue of capital punishment and any actions they took in connection with their beliefs on this issue are not admissible.
4. The People may not elicit from any witness his or her opinion on the death penalty or on the appropriate punishment for the Defendant in this case.
5. The Defendant may elicit from any relative or any witness who had a substantial relationship with Julie and Paul Rogers any evidence

relating to the Defendant's background or character, including their opinion on whether the Defendant should be sentenced to life imprisonment without parole, if that opinion is based upon or reflects directly or indirectly on the Defendant's character.

6. Neither party may elicit testimony or argue to the jury that sympathy for the Defendant's family or friends should be considered a mitigating factor.

(5CT 1497-1498.)

When the in-court proceedings resumed, the court reiterated that no witness could testify concerning the opinions of Julie and Paul Rogers "about the death penalty." Eric Rogers could, however, could testify whether he thought Wycoff should be executed as long as his testimony was based upon "the defendant's character." (19RT 4089.) The court reserved any ruling concerning whether Eric Rogers had "an independent right" to testify. (19RT 4090.) The court said it would reconsider that issue at the end of the penalty phase. (Id.)

Eric Rogers was called as a prosecution victim-impact witness. Eric described his father as a loving parent who was always concerned about making things better and doing the right thing. (19RT 4120.) His mother Julie was a loving, compassionate, forgiving, liberal woman who was incredibly patient. (Id.)

Eric said his parents did not believe in "bad people." When he and his siblings got into trouble, their parents said their actions "needed adjusting." They would not react out of anger. (19RT 4121.)

After the death of his parents, everything changed for Eric. He moved in with his aunt and uncle. Later he went to college and got his own apartment. While he had been sober before his parents died, he has maintained his sobriety. He now felt like he did not have a home or a place to return to. His home did not exist anymore. (19RT 4124.)

On cross examination, Wycoff asked Eric what punishment should be imposed. Eric said that Wycoff should get life without parole "because you're mentally childish. You are immature for your age." Eric added that other people said Wycoff had not changed since he was nine. Eric then said, "People have witnessed you in the courtroom behaving like a child..." However, at that point, Eric was cut-off by an objection from the prosecutor. The objection was sustained by the court and thereafter Wycoff asked Eric about other matters. (19RT 4127.)

After the completion of Wycoff's cross-examination by the prosecutor, the court again addressed the issue of Eric's testimony. Eric's lawyer, Cassman, argued that Eric had a right to testify that was independent of either the prosecutor's or Wycoff's right to call him as a witness. (20RT 4429.) Cassman pointed out that Eric's earlier testimony at the penalty phase had been "interrupted" by the

prosecutor's objection. Cassman stated that Eric would "complete his testimony concerning the reasons why he believes that the death penalty should not be imposed on his uncle based on who his uncle is." (20RT 4430.) Cassman made an offer of proof that if permitted to testify, Eric would say that Wycoff was "not mentally well," that "he does not believe his uncle is evil," and that "Eric believes that it all just gets twisted up inside his uncle's mind and comes out wrong." (Id.)

Cassman also stated that Eric wanted to "clear up the record concerning the desires of the other members of his family concerning the death penalty." Specifically, Wycoff had said, "apparently in misapprehension or misinformed on direct," that the rest of Eric's family disagreed with Eric's position on the death penalty (against Wycoff)."[14] Eric wanted to testify that Wycoff's assertion was "wrong and false and untrue" because the "overwhelming majority of his family," including his brother Alex and sister Laurel, "all continue to oppose the imposition of the death penalty" on Wycoff. Indeed, Cassman stated that Eric and his family had "expressed their opinions to the District Attorney's Office in this matter." (20 RT 4431.)

Wycoff's position on the matter was, as usual, delusional at best. Wycoff

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[14] During his direct-examination at the penalty phase, Wycoff said that Eric was a "real man" for opposing the imposition of the death penalty on Wycoff "because by saying that he went against the opinions of his family and a lot of other people..." (19RT 4154.)

said that earlier in the proceedings he was neither for nor against Eric's testimony. Now he was against it because Eric's lawyer, Ted Cassman, "has avoided me." (20RT 4434.) Wycoff explained, "And I killed two attorneys that were screwing up my family, and this man (Cassman) is obviously ripping Eric off, doing things for Eric, making Eric think he's on Eric's side when he is not. So since I have already killed two attorneys that were screwing up my family and Mr. Cassman here is screwing up and ripping off my family, I just want...want Cassman to see where we stand on all of this." (20RT 4434-4435.)

The court refused to let Eric testify further. The court said that Eric's testimony "would violate Mr. Wycoff's 8th Amendment right under the federal constitution...his right to a fair trial and not to be subject to cruel and unusual punishment by the State, the process of the court system and this trial that is Mr. Wycoff's 8th Amendment right." (20RT 4437.) The court further held that Eric's testimony was inadmissible "because it is not relevant." (Id.) The court further ruled that Eric had no right to testify independently of being called as a witness by the prosecution or Wycoff. (20RT 4439.)

After the court's ruling Wycoff presented his own narration as re-direct-examination. After a brief re-cross-examination the presentation of penalty phase evidence ended.

B. The Trial Court's Multiple Errors

The trial court never correctly understood the nature of Eric's proposed testimony. Eric wanted to testify in two different ways. First, Eric wanted to testify as a victim impact witness. Eric would have testified that he did not want Wycoff executed because it would further "exacerbate the pain and tragedy that I have suffered as a result of my parents' death." Secondly, Eric wanted to testify as the defendant's family member about "who his uncle is." This testimony would have included Eric's belief that Wycoff was "not mentally well" and as result was not "evil." Eric would have said that Wycoff "gets twisted up inside his...mind and comes out wrong." Because Wycoff "was not mentally well," Eric believed that he should not be executed but sentenced to life without parole.

The court's written order expressly stated that Wycoff could elicit testimony from any family member the opinion that Wycoff should be sentenced to life without parole if that opinion was based upon Wycoff's background or character. Yet, inexplicably, the court refused to permit Eric to so testify.

On cross-examination, Wycoff asked Eric if he should be executed. Eric said Wycoff should not be executed and began to explain why, that Wycoff was "mentally childish," when the prosecutor objected. The court ruled that "the question has been answered" and told Wycoff to proceed with a different question. Wycoff did as the court ordered and changed subjects. He asked Eric about his life

prior to the death of his parents. (19RT 4127-4128.)

Eric should have been permitted to tell the jury that he believed that Wycoff was "not mentally well," that his mind "gets twisted up," and that as a result Wycoff was not "evil." If presented to the jury, such evidence would have forcefully undercut the prosecutor's closing argument that Wycoff was a "repulsive" and "evil" person who deserved the death penalty. (21RT 4575.) Eric's testimony was clearly evidence from a family member and based upon Eric's assessment of Wycoff's character. It was, therefore, admissible under the court's written order. The court erred in preventing this portion of Eric's testimony.

Additionally, during his cross-examination by Wycoff, Eric was never permitted to testify as a victim that the pain he suffered from the death of his parents would be exacerbated by Wycoff's execution. Such evidence was clearly admissible victim-impact evidence. The court improperly prevented this testimony by cutting-off Eric's cross-examination.

The court had the opportunity to correct its mistakes when Eric renewed his bid to testify near the end of the penalty phase proceedings. However, the court once again refused to let Eric testify. The court's ruling was erroneous in several respects.

First, Wycoff, in his own delusional way, objected. However, Wycoff's objection was not based on any legal principle or rule. Wycoff objected because

Eric's lawyer, Ted Cassman, refused to speak to him or accept his telephone calls. (20RT 4436: "I have tried to call him, but he avoids me. For the past week I have called him he avoids me. But no, submitted. I - - I'm now against it." Put another way, Wycoff did not object to Eric's testimony, he only objected to Eric's attorney. Further, Wycoff made it clear that he had no objection to Eric's testimony previously, when Eric was on cross-examination and the court cut short Eric's testimony. (20RT 4435: "I am - - I was neither for nor against it, but now I'm against it.") Had the court not erred in the first instance, Wycoff's delusional objection would have never occurred.

Second, the court ruled that *Wycoff's* Eighth Amendment rights prevented Eric from testifying that Wycoff should not be executed. The court's ruling was erroneous. Indeed, the court never explained how the admission of testimony that Eric did not want Wycoff executed violated Wycoff's constitutional rights. The court referenced *Payne v. Tennessee* (1991) 501 U.S. 808 and *Booth v. Maryland* (1987) 482 U.S. 496. Neither case supported the court's ruling. Finally, the court's own written ruling stated that Wycoff could elicit testimony from a family member that he should not be executed if that opinion was based on Wycoff's character.

Booth held that victim impact evidence was not admissible. *Payne* overruled *Booth* and held that victim impact evidence was admissible. However, *Payne* expressly stated that "*Booth* also held that the admission of a victim's family

members' characterization and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at trial in this case." *Payne v. Tennessee, supra,* 501 U.S. at 830 fn. 2. The *Booth* evidence discussed in the *Payne* footnote did not concern evidence of the defendant's character. *Booth* itself described this evidence as the victim's "family members' opinions and characterizations of the crimes." *Booth v. Maryland, supra,* 482 U.S. at 508.

This Court, citing *Payne*, has expressly noted that testimony from a family member who believes that the defendant should not be executed "is proper mitigating evidence as indirect evidence of the defendant's character." *People v. Lancaster* (2007) 41 Cal.4th 50, 98: "This evidence is admitted, not because the person's opinion is itself significant, but because it provides insight into the defendant's character." See also *People v. Ervin* (2000) 22 Cal.4th 48, 102.

Eric's testimony that Wycoff should not be executed because he was "not mentally well" was exactly the kind of evidence permitted by *Lancaster* and not excluded by *Payne*. Indeed, the court's written order had expressly permitted such evidence. The court' order permitted Wycoff to elicit the opinion of any family member that Wycoff should not be executed if that opinion was based upon Wycoff's background or character. The court erred by not following its own ruling. *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986)

476 U.S. 1, 4.

Eric's testimony that Wycoff's execution would further exacerbate the pain he suffered as a result of the death of his parents was exactly the kind of testimony permitted by *Payne*. Eric was a victim impacted by Wycoff's delusional acts. As such, he sought to testify that Wycoff's acts caused him "pain and tragedy" which would triumph over his parents' "love" if Wycoff was executed.

Thirdly, Eric wanted to testify so that he could correct a misstatement of fact made by Wycoff. On direct examination Wycoff said that Eric's family was of the opinion that Wycoff should be executed. Eric sought to testify to the contrary that overwhelming majority of his family, including his brother and sister, opposed the imposition of death on Wycoff.

The court erred when it cut-off Eric's testimony during cross-examination. The court could have corrected that error by permitting Eric to testify, as Eric's attorney argued, as an independent witness under Article I, section 28(b)(8) of the California Constitution.

Section 28(b) states that in "order to preserve and protect a victim's right to justice and due process, a victim shall be entitled to the following rights." Subsection (8) provides, in pertinent part, that a victim has a right to "be heard, upon request, at any proceeding, including any...sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue."

No one doubted that Eric was a "victim" within the meaning of section 28(e). Instead, the court held that the penalty phase of Wycoff's trial was not "any proceeding" involving sentencing or at which "a right of the victim is at issue." The court was wrong.

No case has defined what is encompassed by the "any proceeding" language of section 28. However, it is hard to imagine that the Legislature meant to exclude the penalty phase of a capital trial from "any proceeding." If it meant to exclude the penalty phase of a capital trial from "any proceeding" it would have said so. It didn't.

Nor can it be said that section 28 created a right beyond what was then constitutionally permissible. As discussed above, *Payne* excluded evidence from the victim's family about the crime, the defendant, and whether the defendant should be executed. *Lancaster*, on the other hand, permitted evidence from the defendant's family about his character. Section 28 did not create an open-ended right for any victim to testify about any subject. Section 28 merely created a right for the victim to testify. It did not alter existing law limiting what the victim could testify about. Here, an unusual circumstance existed. Eric was *both* a victim and a relative of the defendant.

Finally, the court had a duty to ensure that Wycoff received a reliable penalty determination. It has long been recognized that there is a "special need for

reliability in the determination that death is the appropriate punishment." *Johnson v. Mississippi, supra,* 486 U.S. at 584.

Wycoff had erroneously told the jury that Eric's family were of the opinion that Wycoff should be executed. If permitted to do so, Eric would have testified that the "overwhelming majority of his family" was against Wycoff's execution, including his sister and brother. The court should have permitted Eric to testify so that he could have corrected the false evidence introduced by Wycoff. Its failure to do so deprived Wycoff of his rights to due process, to a fair trial, to present evidence, and a reliable penalty phase verdict. *Green v. Georgia* (1979) 442 U.S. 95, 97; *Washington v. Texas* (1967) 388 U.S. 14, 18-19.

C. The Court's Errors Require Reversal of the Penalty Judgment

The Eighth and Fourteenth Amendments prohibit a court from excluding any evidence "relevant to the defendant's background or character or to the circumstances of the offense which mitigate against imposing the death penalty." *Penry v. Lynaugh* (1989) 492 U.S. 301, 318. The erroneous rulings deprived Wycoff of evidence from Eric which was relevant to both Wycoff's character and the circumstances of the offense and from which the jury "could reasonably find that it warrants a sentence less then death." *Tennard v. Dretke* (2004) 542 U.S. 274, 285. As a result, the penalty judgments against Wycoff must be vacated.

VIII.
THE TRIAL COURT ERRED WHEN IT PERMITTED WYCOFF TO REPRESENT HIMSELF AT THE PENALTY PHASE OF TRIAL

A. Introduction

As discussed above, Wycoff represented himself throughout the trial proceedings, including the penalty phase, despite questions concerning his mental competence. Even assuming he was competent to represent himself, Wycoff had no right to represent himself at the penalty phase of a capital trial and the trial court erred when it permitted him to do so. As a result, the trial court violated Penal Code section 686.1 and Wycoff was denied his Sixth Amendment right to counsel as well as his rights to due process, to a fair trial, and a reliable penalty phase determination at that proceeding.

B. There Is No Right to Self-Representation At the Penalty Phase

The Sixth Amendment provides that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...and to have the Assistance of Counsel for his defence." Penal Code section 686.1 requires that "the defendant in a capital case shall be represented in court by counsel at all stages of the preliminary and trial proceedings."

However, this Court and the lower courts of this state have long concluded that *Faretta v. California, supra,* 422 U.S. 806 trumped both the Sixth Amendment

and section 686.1 and permitted self-representation in capital cases. In *Faretta v. California, supra,* 422 U.S. at 818, the Supreme Court found support for a "right of self-representation...in the structure of the Sixth Amendment, as well as the in the English and colonial jurisprudence from which the Amendment emerged." *Faretta* expressly recognized that the "right to defend is given directly to the accused" for it is he who "will bear the personal consequences of a conviction." *Id.*, at 819-820, 834. *Faretta* was, of course, a non-capital case and did not address whether the right of self-representation extended to the penalty phase of a capital trial.

As a result of *Faretta's* "strong constitutional statements, California courts tended to view the federal self-representation right as absolute, assuming a valid waiver." *People v. Taylor, supra,* 47 Cal.4th 850, 887. See also *People v. Doolin* (2009) 45 Cal.4th 390, 453: "The right of self-representation is absolute..." This Court has also held that the "right of self-representation applies to the penalty phase of a capital trial." *People v. Boyce* (2014) 59 Cal.4th 672, 702. This Court has previously rejected the claim made here that the right of self-representation does not extend to the penalty phase of a capital trial. *People v. Blair, supra,* 36 Cal.4th at 736-740; *People v. Koontz* (2002) 27 Cal.4th 1041, 1073-1074; *People v. Bradford, supra,* 5 Cal.4th at 1364-1365; *People v. Bloom* (1989) 48 Cal.3rd 1194, 1222-1223; *People v. Clark* (1990) 50 Cal.3rd 583, 617.

However, the Supreme Court has rejected the "absolute" view of

Faretta that this Court and other California courts have adopted. In *Martinez v. Superior Court* (2000) 528 U.S. 152, the United States Supreme Court addressed whether *Faretta's* right to self-representation extended to appeal. The court found that it did not. In essence, the court reasoned that *Faretta* extended only to the determination of guilt or innocence and did not extend to appellate proceedings. The *Martinez* court stated: "The status of the accused defendant, who retains a presumption of innocence throughout the trial process, changes dramatically when a jury returns a guilty verdict." *Id.* at 162. The count went on and considered the "change in position of the defendant" following the return of a guilty verdict. It concluded that "the autonomy interests that survive a felony conviction are less compelling than those motivating the decision in *Faretta*." *Id.* at 163. Therefore, after a guilty verdict, the government's interest in ensuring the integrity and efficiency of the proceedings "outweigh an invasion of the appellant's interest in self-representation." *Id.*

The absolutist view of the right to self-representation was firmly rejected in *Indiana v. Edwards, supra,* 554 U.S. at 171: "...because *Faretta* itself and later cases have made clear that the right of self-representation is not absolute." In *United States v. Ferguson, supra,* 560 F.3rd at 1068, the court stated: "The district court...repeatedly referred to Defendant's 'absolute right' to represent himself once the court found him competent to stand trial. *Edwards* changed that proposition."

This Court has recently recognized that after *Edwards* "the right of self-representation is not absolute." *People v. Boyce, supra,* 59 Cal.4th at 702. All of this Court's opinions finding an absolute right to self-representation at the penalty phase of a capital trial predate the *Edwards* opinion.

What *Edwards* made clear was that in some contexts self-representation "undercuts the most basic of the Constitutional's criminal law objectives, providing a fair trial." *Edwards v. Indiana, supra,* 554 U.S. at 176-177. Therefore, the *Edwards* court held that in the situation before it, a defendant of questionable mental competency, "the Constitution permits States to insist upon representation by counsel..." *Id.*, at 178.

The *Edwards* rationale applies particularly to the penalty phase of a capital proceeding. It has long been recognized that there is a "special need for reliability in the determination that death is the appropriate punishment." *Johnson v. Mississippi, supra,* 486 U.S at 584. Once a capital defendant has been found guilty of murder and at least one special circumstance, the defendant's autonomy interests no longer outweigh the state's interest in the integrity of death judgments. California's interest in a reliable penalty determination is expressed in section 686.1. At that point, the competing interests between the defendant's non-absolute right to self-representation and the state's interest in reliable death judgments "tips in favor of the state." *Martinez v. Court of Appeal, supra,* 528 U.S. at 691.

Therefore, once a capital defendant has exercised his right to self-representation at the guilt phase and is convicted, his right to self-representation has been fulfilled and must give way at the penalty phase to the state's interest in reliable death judgments.

Five years prior to *Edwards*, in *People v. Dent* (2003) 30 Cal.4th 213, 215, this Court reversed a capital judgment "under the compulsion of *Faretta*..." Dent had sought self-representation prior to trial. The trial court denied his request because it "was a death penalty trial." *Id.*, at 218. This Court stated that Dent had a "nearly absolute right at this point in the proceedings to represent himself." *Id.*, at 222 fn. 2.

Justice Chin, joined by Justices Baxter and Brown, concurred in the result, "but only under the compulsion of *Faretta* and its progeny." *Id.*, at 222. Justice Chin, quoting the earlier observation of Justice Mosk, noted that it was unfortunate that *Faretta* was a non-capital case because it "did not distinguish between mere traffic infractions and the heightened requirement of cases in which the issue is life or death." Justice Chin further noted that California had adopted section 686.1 and similar statutes which "still exist, although obviously *Faretta* rendered them invalid." *Id.*, at 224. Justice Chin ended his concurring opinion by stating: "There is much to be said for modifying *Faretta*, at least in capital cases, to give the trial court discretion to deny a request for self-representation when no good ground

exists for the request and the defendant is not capable of effective self-representation." Certainly, Wycoff was not "capable of effective self-representation." In any event, Justice Chen concluded, "such modification is not for us to do...we must await further instruction on the point from the high court which originated the *Faretta* principle." *Id.*, at 225.

The "further instruction" Justice Chin was waiting for in 2003 came in the Supreme Court's *Edwards* opinion in 2008. Under *Edwards*, trial courts can deny self-representation to defendants at the penalty phase of a capital trial. Under *Edwards*, California's express intent to have defendants in capital trials represented by counsel at the penalty phase of trial, as embodied in section 686.1, should be given effect.

Wycoff's self-representation at the penalty phase of his trial was a complete farce. The first thing Wycoff did was threaten the jurors, for which he was admonished by the court. (18RT 3909-3911.) It went downhill from there. At the end of his cross-examination, Wycoff stated that he had no remorse for killing Julie and Paul Rogers and if he had to do it over, "of course" he would. (20RT 4423.)

The failure to provide Wycoff counsel at the penalty phase of his trial requires reversal of the judgment of death without any showing of prejudice. *United States v. Arlt, supra,* 41 F.3rd at 524; *People v. Robles* (1970) 2 Cal.3rd 205, 218-219.

IX.
CUMULATIVE ERROR REQUIRES THAT THE GUILT AND PENALTY VERDICTS BE REVERSED

A judgment of death must be evaluated in light of the cumulative error occurring at the guilt and penalty phases of trial. It is particularly true that an error at the guilt phase of trial, while not requiring the reversal of that stage of trial, may have an impact on the jury's penalty determination. *People v. Hayes* (1990) 52 Cal. 3rd 577, 644; *People v. Brown* (1988) 46 Cal. 3rd 432, 466.

Numerous errors occurred at the guilt and penalty phases of Wycoff's trial. Separately or combined, they require that the death judgment entered against Wycoff be reversed.

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X.
CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED BY THE TRIAL COURT, VIOLATES THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW

In *People v. Schmeck* (2005) 37 Cal.4th 240, a capital appellant presented a number of often raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. *Id.* at 303. This Court acknowledged that in dealing with these claims in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these claims for subsequent review. *Id.* at 303, fn. 22. In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more that (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or similar claim in a prior decision, and (iii) ask[ing] us to reconsider the decision." *Id.* at 304.

Appellant Wycoff has no wish to unnecessarily lengthen his brief. Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed since then,[15] Wycoff identifies the following systemic and

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[15] See, e.g. *People v. Taylor* (2010) 48 Cal.4th 574 and *People v. McWhorter* (2009) 47 Cal.4th 318.

previously rejected claims to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them:

1. *Factor(a)*: Section 190.3(a), permitting a jury to sentence a defendant to death based on the "circumstances of the crime," is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death, is vague and standardless, and violates Wycoff's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, to equal protection, to a reliable and non-arbitrary determinations of the appropriateness of the death penalty and that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. The jury in this case was instructed in accord with this provision. (18RT 3884.) In addition the jury was not required to be unanimous as to which "circumstance of the crime" amounting to an aggravating circumstance had been established, nor was the jury required to find that such an aggravating circumstance had been established beyond a reasonable doubt, thus violating *Ring v. Arizona* (2002) 536 U.S. 584 and its progeny and Wycoff's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." *Id.* at 609. This Court has repeatedly rejected these arguments. See, e.g. *People v. Collins* (2010) 49 Cal.4th 175, 259-261; *People v. Mills* (2010) 48 Cal.4th 158, 213-214; *People v. Martinez* (2010) 47 Cal.4th 911, 967. These decisions

should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

2. *Factor (i)*: The trial judge's instructions permitted the jury to rely on Wycoff's age in deciding if he would live or die without providing any guidance as to when this factor could come into play. (18RT 3885.) This aggravating factor was unconstitutionally vague in violation of due process and the Eighth Amendment right to a reliable, non-arbitrary penalty determination and requires a new penalty phase. This Court has repeatedly rejected this argument. See e.g. *People v. Mills, supra,* 48 Cal.4th at 213; *People v. Ray* (1996) 13 Cal.4th 313, 358. These decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

3. *Inapplicable, vague, limited and burdenless factors*: At the penalty phase, the trial court instructed the jury in accord with standard instruction CALJIC 8.85. (18RT 3884-3885.) This instruction was constitutionally flawed in the following ways: (1) it failed to delete inapplicable sentencing factors, (2) it contained vague and ill-defined factors, particularly factors (a) and (k), (3) it limited factors (d) and (g) by adjectives such as "extreme" or "substantial," and (4) it failed to specify a burden of proof as to either mitigation or aggravation. These errors, taken singularly or in combination, violated Wycoff's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable

and non-arbitrary determinations of appropriateness of the death penalty and that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has expressly rejected these arguments. See, e.g. *People v. Mills, supra,* 48 Cal.4th at 214; *People v. Martinez, supra,* 47 Cal.4th at 968; *People v. Schmeck, supra,* 37 Cal.4th at 304-305. This Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

4. *Failure to narrow*: California's capital punishment scheme, as construed by this Court in *People v. Gacigalupo* (1993) 6 Cal.4th 457, 475-477, and as applied, violates the Eighth Amendment by failing to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not. This Court has repeatedly rejected this argument. See *People v. Mills, supra,* 48 Cal.4th at 213; *People v. Martinez, supra,* 48 Cal.4th at 967; *People v. Schmeck, supra,* 37 Cal.4th at 304. The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

5. *Burden of proof and persuasion*: Under California law, a defendant convicted of first-degree special-circumstance murder cannot receive a death sentence unless a penalty phase jury subsequently (1) finds that aggravating circumstances exist, (2) finds that the aggravating circumstances outweigh the

mitigating circumstances, and (3) finds that death is the appropriate sentence. The jury in this case was not told that these three decisions had to be made beyond a reasonable doubt, an omission that violates the Supreme Court decisions in *Ring v. Arizona, supra,* 536 U.S. 584, and its progeny. Nor was the jury given any burden of proof or persuasion at all. These were errors that violated Wycoff's rights to due process, to a jury trial, to equal protection, to a reliable and non-arbitrary determination of the appropriateness of the death penalty, and to freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. See, e.g. *People v. Mills, supra,* 48 Cal.4th at 213; *People v. Martinez, supra,* 48 Cal.4th at 967; *People v. Schmeck, supra,* 37 Cal.4th at 304. This Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

6. *Written findings*: The California death penalty scheme fails to require written findings by the jury as to the aggravating and mitigating factors found and relied on, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravations outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. See, e.g. *People v. Mills, supra,* 48 Cal.4th at 213; *People v. Martinez, supra,* 48 Cal.4th at 967. This Court's decisions should be

reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

7. *Mandatory life sentence*: The instructions given at Wycoff's trial failedto inform the jury that if it determines mitigation outweighs aggravation, it must return a sentence of life without parole. This omission resulted in a violation of Wycoff's rights to due process, to a jury trial, to equal protection, to a reliable and non-arbitrary determination of the appropriateness of the death penalty, and to freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. See, e.g. *People v. McWhorter, supra,* 47 Cal.4th at 379; *People v. Carrington* (2009) 47 Cal.4th 145, 199. This Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

8. *Vague standard for decision-making*: The instruction that jurors may impose a death sentence only if the aggravating factors are "so substantial" in comparison to the mitigating circumstances that death is warranted (18RT 3887) creates an unconstitutionally vague standard, in violation of Wycoff's rights to due process, to a jury trial, to equal protection, to a reliable and non-arbitrary determination of the appropriateness of the death penalty, and to freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. See, e.g. *People v. Carrington* (2009) 47 Cal.4th 145, 199; *People v.*

Mendoza (2000) 24 Cal.4th 130,190. This Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

9. *Intercase proportionality review*: The California death penalty scheme fails to require intercase proportionality review, in violation of Wycoff's rights to due process, to a jury trial, to equal protection, to a reliable and non-arbitrary determination of the appropriateness of the death penalty, and to freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. See, e.g. *People v. Mills, supra,* 48 Cal.4th at 213; *People v. Martinez, supra,* 48 Cal.4th at 967. This Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

10. *Disparate sentence review*: The California death penalty scheme fails to afford capital defendants with the same kind of disparate sentence review as is afforded felons under the determinate sentence law, in violation of Wycoff's rights to due process, to a jury trial, to equal protection, to a reliable and non-arbitrary determination of the appropriateness of the death penalty, and to freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. See, e.g. *People v. Mills, supra,* 48 Cal.4th at 213; *People v. Martinez, supra,* 48 Cal.4th at 967. This Court's decisions should be reconsidered

because they are inconsistent with the aforementioned provisions of the federal Constitution.

11. *International law*: The California death penalty scheme, by virtue of its procedural deficiencies and its use of capital punishment as a regular punishment for substantial numbers of crimes, violates international norms of human decency and international law - including the International Covenant of Civil and Political Rights - and thereby violates the Eighth Amendment and the Supremacy Clause as well, and consequently Wycoff's sentence of death must be reversed. This Court has repeatedly rejected these arguments. See, e.g. *People v. Mills, supra,* 48 Cal.4th at 213; *People v. Martinez, supra,* 48 Cal.4th at 968; *People v. Schmeck, supra,* 37 Cal.4th at 305. This Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

12. *Cruel and unusual punishment*: The death penalty violates the Eighth Amendment's proscription against cruel and unusual punishment. This Court has repeatedly rejected these arguments. See, e.g. *People v. Thomson* (2010) 49 Cal.4th 79, 143-144; *People v. McWhorter, supra,* 47 Cal.4th at 379. This Court's decisions should be reconsidered because they are inconsistent with the aforementioned provision of the federal Constitution.

13. *Cumulative deficiencies*: Finally, the Eighth and Fourteenth

Amendments are violated when one considers the preceding defects in combination and appraises their cumulative impact on the functioning of California's capital sentencing scheme. As the United States Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." *Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6. Viewed as a whole, California's sentencing scheme is so broad in its definition of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. To the extent that Respondent hereafter contends that any of these issues is not properly preserved, on the grounds that, despite *Schmeck* and the other cases cited herein, Wycoff has not presented them in sufficient detail, Wycoff will seek leave to file a supplemental brief more fully discussing these issues.

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XI.
CONCLUSION

For the reasons set forth above, the guilt and/or penalty phase judgments imposed upon Appellant Edward Wycoff by the Superior Court for Contra Costa County must be vacated.

Dated: June 26, 2015

Respectfully submitted

DAVID A. NICKERSON
Attorney for Appellant
EDWARD MATHEW WYCOFF

CERTIFICATE OF COUNSEL

(RULE 8.630(b)(1)

I, David A. Nickerson, am court appointed counsel for Appellant Edward Wycoff in this automatic appeal. I conducted a word count of this brief using my office computer's Word Perfect software. On the basis of that computer-generated word count, I certify that this brief is 46,272 words in length excluding the tables and certificates.

Dated: June 26, 2015

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DAVID A. NICKERSON

PROOF OF SERVICE BY MAIL

I declare that I am over the age of eighteen years and not a party to the within-entitled action. My business address is 32 Bridgegate Drive, San Rafael, California, 94903. On June 30, 2015, I served the attached:

APPELLANT'S OPENING BRIEF: PEOPLE V. EDWARD WYCOFF
Supreme Court case # S178669

in said cause, by placing a true copy thereof enclosed in a sealed box with postage fully prepaid thereon in the United States mail at San Rafael, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on June 30, 2015, at San Rafael, California.

DAVID NICKERSON