In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** v. **CEDRIC JEROME JOHNSON,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S075727

Los Angeles County Superior Court Case No. TA037977
The Honorable John Joseph Cheroske, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In an amended information filed by the Los Angeles County District Attorney, appellant was charged with murder of Gregory Hightower (count 1; Pen. Code, § 187, subd. (a)[1]), and murder of Lawrence Faggins (count 2; § 187, subd. (a)). As to both counts, the special circumstance of multiple murder was alleged (§ 190.2, subd. (a)(3)). It was further alleged as to both counts that appellant personally used a firearm (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)), and that a principal was armed with a firearm (§ 12022, subd. (a)(1)).[2] (19RT 5365-5368.)

In the first trial, the jury deadlocked as to all charges against appellant and codefendant Betton, and a mistrial was declared. (15RT 3486-3489.) Following the second jury trial, appellant was found guilty as charged, and the firearm allegations were found to be true.[3] (40CT 11611-11612; 24RT 1610.) The jury returned a verdict of death, and the trial court sentenced appellant to death. (25RT 1818, 1828-1834.) This appeal is automatic.

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution Evidence

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[1] Unless indicated otherwise, all further statutory references are to the Penal Code.

[2] Codefendant Terry Betton was charged with committing the same murders. (19RT 5365-5368.)

[3] Codefendant Terry Betton was convicted of first degree murder as to Faggins. The jury deadlocked as to whether codefendant Betton also murdered Hightower. (24RT 1633-1640.) The trial court dismissed that charge. On July 12, 2000, codefendant Betton's conviction was affirmed on direct appeal (case no. B130960). The Court of Appeal found that substantial evidence supported the conviction, and rejected a claim of sentencing error. Codefendant Betton's petition for review was denied by this Court on September 20, 2000 (case no. S090756).

Appellant and codefendant Terry Betton were friends. (20RT 679.)[4] The victims were Gregory Hightower (20RT 693, 719) and Lawrence "Dirty-C" Faggins (21RT 915). As described below, appellant, codefendant Betton, the victims, and the various eyewitnesses were all acquaintances before the fatal shootings occurred.

On the evening of September 26, 1996, a party was held at a home located in Jordan Downs in Los Angeles County to celebrate the fact that someone named "Psycho Sam" had been released from prison. (20RT 675-678, 21RT 816-817, 22RT 1034.) Among the dozens of people at the party (20RT 678, 22RT 1035), were Hightower and Faggins (21RT 818, 22RT 1034). Faggins was believed to have "snitched" on someone known as "Mo-C." (21RT 814.) At least some people at the party believed that Faggins was in danger and tried to warn him. (21RT 963.)

Meanwhile, appellant, codefendant Betton, and their acquaintance Tyrone Newton were in a nearby home. (2CTII 323-326.) In codefendant Betton's presence, appellant spoke about "getting rid of all the snitches." (2SCTII 323-324.) Indicating Hightower and Faggins, who appellant watched approach the party, appellant said, "we can do them right here and right now." (2SCTII 326.) Appellant asked Newton if he would kill Hightower, and Newton answered, "He ain't did nothing to me." Appellant replied, "It ain't the fact that he did something to you, we're getting rid of all the snitches." (2SCTII 327.)

At approximately 10:00 p.m., Charles "Pirate" Lewis, who had arrived at the party with Hightower, convinced Hightower that they should leave the party, saying that the party "just doesn't feel right." (21RT 818, 22RT 1023, 1033-1036.) Hightower, Lewis, and a woman got into

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[4] The Statement of Facts is based on evidence presented during the second trial.

Hightower's car, which was parked just outside. (2SCTII 332; 22RT 1036.) Faggins left the party at the same time. (21RT 823.) At this point, there were approximately 50 people outside. (2SCTII 330-332; 21RT 829.)

Appellant and codefendant Betton walked passed Hightower's car and both men began shooting at Faggins, who tried to run away. (2SCTII 328-329; 21RT 830-843.) Appellant and codefendant Betton fired repeatedly at Faggins, striking him four times in the back, and killing him. (2SCTII 330; 21RT 832-843, 915-922.) Appellant and codefendant Betton then walked over to Hightower's car. (2SCTII 330-331; 21RT 848-849.) Hightower told appellant it was wrong to have shot Faggins. (22RT 1087.) Appellant fired repeatedly at Hightower, striking him five times, and killing him.[5] (2SCTII 330-331; 21RT 848-849, 870-871.)

There had been numerous people outside during the shooting. Once it was over, many simply went back inside to the party. (2SCTII 332; 21RT 843-845, 853.) Lewis ran away and went home. (22RT 1040-1042.) Appellant and codefendant Betton ran away. (22RT 1115.) A significant number of people were outside when the police arrived at the scene at approximately 10:10 p.m.. (22RT 1022-1023.)

The most pertinent prosecution witnesses at trial were Newton, Robert Huggins, Lewis, Leonard Greer, and Rochelle Johnson.

On October 11, 1996, Newton, who was had been arrested for possession of cocaine, and was in custody, participated in a videotaped interview.[6] (20RT 780-783, 21RT 794.) Newton told the police that he

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[5] Numerous recently-expended casings of various calibers were found at the scene of the shootings. (21RT 893-902, 23RT 1180-1193, 1208-1213, 1224.)

[6] The videotape was played for the jury. (20RT 782-783, 21RT 792.)

was with appellant and codefendant Betton just before the shooting, heard appellant discuss killing Hightower and Faggins for being "snitches," and saw appellant shoot Hightower and Faggins while codefendant served as appellant's "back-up man." (2SCTII 322-331.) Newton said that Lewis and an unidentified woman were in Hightower's car during the shooting. (2SCTII 332.) During the interview, Newton said he feared for his and his family's safety, and did not want to testify. (2SCTII 335.) At trial, Newton claimed that his videotaped statement had been false, that the police had told him what to say, and that the police had promised to not press charges as to the drug arrest if he cooperated with them. (21RT 793, 800-801, 806-807.) Newton acknowledged knowing appellant, codefendant Betton, Hightower, and Faggins (20RT 777-778, 21RT 798), but claimed to have been home at the time of the shooting (21RT 799). At the time of trial, Newton was in custody pursuant to illegal narcotics sales. (20RT 779.)

Los Angeles Police Sergeant Chris Waters, who had conducted the videotaped interview, testified that Newton was promised nothing in exchange for his statement regarding the murder. (22RT 1094-1107.)

Robert Huggins was Hightower's younger brother. (21RT 815-816.) Huggins knew appellant and codefendant Betton prior to the shooting, and had known appellant for years. (21RT 819-820.) Huggins attended the party and left with Hightower and Lewis. (21RT 816, 822.) Huggins testified at trial that he saw appellant and codefendant Betton shoot Faggins. (21RT 831-843.) Huggins also testified that he saw appellant shoot Hightower, while codefendant stood nearby. (21RT 848-852.) Huggins drove to his girlfriend's house and directed her to call 911. (21RT 855-856.) Within a day of the shooting, Huggins reported what he had seen to his stepfather. But Huggins did not contact the police because he was frightened of appellant. (21RT 860.) Huggins was subsequently arrested. On December 30, 2006, while in custody, Huggins told the police that

appellant was the shooter. (21RT 933-934, 22RT 982, 23RT 1197-1200.)[7] Between Huggins's arrest and testimony at the preliminary hearing, he was placed in the same cell as appellant and codefendant Betton on multiple occasions. (21RT 934, 939.) During one encounter before the preliminary hearing, appellant, in codefendant Betton's presence, asked Huggins why he was speaking to the police. (21RT 935-936.) Appellant personally questioned Huggins during the preliminary hearing. (22RT 1008-1009.) Frightened for his safety, Huggins testified at the preliminary hearing that he had not seen the shooters. (21RT 936, 938, 967.)

Lewis testified that he left the party with Hightower, heard the gunshots, but did not see the shooter. After the shooting ended, Lewis ran home. (22RT 1033-1043.)

After Lewis testified, Huggins was recalled and said that on the night of the shooting, Lewis told Huggins that just before being shot, Hightower told appellant it was wrong to have shot Faggins, and asked why he had committed the shooting in front of so many people. (22RT 1082-1087.)

Leonard Greer lived approximately a block away from the shooting, and knew appellant and codefendant Betton. Greer's sister, Rochelle Johnson,[8] was codefendant Betton's girlfriend at the time of the shooting. (22RT 1110-1114.) Greer testified that he heard the gunshots and saw appellant and codefendant Betton running away. Appellant was holding what appeared to be a gun. (22RT 1114-1115.) Greer approached Hightower's car and saw Rochelle, crying and covered in blood. (22RT 1115-1116, 1148.) Rochelle said, "They didn't have to kill him. C.J.

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[7] Approximately one month after the shooting, Hightower's father told the police to speak to Huggins regarding the shooting. (23RT 1201, 1209.)

[8] Respondent will refer to Rochelle Johnson as "Rochelle" to distinguish her from her mother, Annette Johnson.

didn't have to kill him." (22RT 1116, 1148.) Annette Johnson, Greer's and Rochelle's mother, arrived a short time later. Annette encouraged Rochelle to move out of Jordan Downs so she "wouldn't have to be witnessing none of this." Rochelle and Annette exchanged heated words and Annette became so animated that she broke a window.[9] (22RT 1120-1122.) Police officers arrived a short time after and questioned Greer. Greer did not tell them about seeing appellant and codefendant Betton. (22RT 1122, 1162.) In March 1997, Greer went to the police station to register as a sex offender. During that visit, he asked to speak to the police about Hightower's killing. Greer falsely told Los Angeles Police Detective James Vena that he had seen the shooting. (22RT 1126-1132.) Subsequently, Rochelle contacted Greer and told him that Detective Vena had testified in the proceedings and played Greer's audiotaped interview. Fearing that he would be killed, Greer called codefendant Betton's attorney and said that everything he had told the police was simply due to anger he felt toward Rochelle. (22RT 1153, 1169.) Greer testified at a subsequent hearing in the proceedings. Rochelle confronted him outside the courtroom and called him a "snitch." (22RT 1126.) Detective Vena was present at the time and heard Rochelle called Greer "snitch." (23RT 1238.)

Rochelle gave conflicting statements regarding the night of the shooting. At trial, she testified that she went to the party and was there from approximately 9:30 p.m. to 11:30 p.m. She believed that while she was at the party, codefendant Betton was in their home a few buildings down. (20RT 674-680.) Rochelle stayed at the party until approximately 11:30 p.m. During that time, she spoke to Hightower. (20RT 679-680.) At

[9] Annette also testified. She acknowledged arguing with Rochelle about moving out of the area, and becoming so animated that she broke a window and cut her hand. (20RT 740-748.) But Annette denied that her concern was due to the belief that Rochelle had seen the shooting. (20RT 755.)

approximately 11:30, Rochelle walked home alone, intoxicated. Once home, she entered the bathroom, and while she was inside the bathroom, she heard screaming. (20RT 680-684.) Someone named "Miss Jessie" banged on the bathroom door and asked Rochelle for help. (20RT 684.) Rochelle (a nursing student) ran outside, saw Hightower bleeding in the car, and attempted to give him medical treatment. (20RT 684-688.) Codefendant Betton was in the apartment when Rochelle went outside and did not join her. (20RT 685-687.) Rochelle denied telling anyone that appellant and codefendant Betton shot Hightower and Faggins.[10] (20RT 715, 719.) Rochelle acknowledged confronting Greer for "lying" about the shooting, but denied calling him a "snitch." (20RT 720, 733, 737.)

Detective Vena testified that he spoke to Rochelle within two hours of the shooting. At that time, she told him that she had been at the party, and after Hightower left the party, the music stopped and everyone went outside. By the time she got outside, Hightower had already been shot. (23RT 1194-1195.)

Deputy Medical Examiner Irving Golden testified that Hightower suffered five gunshot wounds, including a fatal wound. (21RT 868-871.) Deputy Medical Examiner Solomon Riley testified Faggins suffered four gunshot wounds, including three fatal wounds. (21RT 914-922.) Evidence was also presented that .380, .45, .25, and nine-millimeter expended casings found at the scene of the shootings. (21RT 889-894.)

2. Codefendant Betton's Defense Evidence

Joyce Tolliver was the mother of Jocelyn Smith. Smith married appellant after he was arrested. (23RT 1326.) Tolliver had known appellant and codefendant Betton since they were children. (23RT 1326.)

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[10] Huggins testified that during the trial, Rochelle said to him, "They know who did it; why they still calling [me] to court?" (21RT 940.)

Tolliver testified that she was home and heard the shooting at approximately 10:30 p.m. She went outside and saw two men, one of whom was holding a gun. The men were not appellant and codefendant Betton. (23RT 1319-1326.) According to Tolliver, "Everybody in the projects knows [appellant]." (23RT 1336.)

With regards to Newton, evidence was presented that he was arrested immediately after making the videotaped statements to Sergeant Waters. (23RT 1262-1266.)

3. Appellant's Defense Evidence

Maureen Wallace had known appellant and codefendant Betton for years. (23RT 1382-1383.) She was driving near the scene of the shooting when she heard gunfire. Minutes later, she saw two men running, one of whom was carrying a gun. The men were not appellant and codefendant Betton. (23RT 1372-1377.)

Jocelyn Smith also testified on appellant's behalf. She married appellant on January 9, 1998. (23RT 1340.) She had extensively discussed the case with appellant, and also discussed it with Tolliver. (23RT 1357-1358.) At the start of Smith's testimony, in response to defense counsel's question, "where were you living," Smith made denigrating comments about defense counsel, and ignored the trial court's admonition to be quiet. After the court admonished Smith out of the jury's presence, Smith testified to the following. (23RT 1339-1343.) She and appellant lived in a home near the scene of the shooting. At approximately 7:45 p.m., she left home. At that time, appellant was home and asleep. After the shooting occurred, Smith went home. Appellant was asleep. (23RT 1343-1349.)

B. Penalty Phase

1. Prosecution Evidence

In 1993, appellant was convicted of selling marijuana. (25RT 1699.)

On September 17, 1998, jury selection was scheduled to begin in this case, and 400 prospective jurors were assembled in the jury assembly room. Appellant and codefendant Betton were brought into the room. Both men were wearing REACT[11] stun belts. At the moment that Judge Cheroske began to address the prospective jurors, appellant struck defense counsel Steven Hauser in the head. It appeared that appellant intended to further attack Hauser, so a sheriff's sergeant activated appellant's stun belt. The belt had no apparent effect on appellant. Sheriff's deputies attempted to restrain appellant, who repeatedly attempted to kick defense counsel. Appellant also attempted to spit on defense counsel. The belt was activated a second time, and eventually the deputies restrained appellant. (25RT 1703-17011.)

Evidence was also presented that Hightower had abandoned his former life of criminality, regularly spoke against gangs, and had been acknowledged by various politicians including President Bill Clinton. (25RT 1712-1730.)

2. Defense Evidence

Dr. Marshall Cherkas, a psychiatrist, reviewed appellant's medical records and spoke to him on May 16, 1998. (25RT 1741-1743.) The medical records indicated that appellant had a "low normal intellect." (25RT 1746.) Appellant's school records indicated that he was so disruptive that he attended 12 schools in a single year. Eventually, appellant was placed in a special program at UCLA, where he was described as "violent" and "threatening." (25RT 1746-1749.) Dr. Cherkas described his examination of appellant as "cursory," but opined that there was some indication that appellant was "psychotic." (25RT 1747.) Dr.

[11] "Remotely activated electronic restraint device." (25RT 1705.)

Cherkas had not reviewed any records made between 1978 and 1996.[12] (25RT 1750.) When Dr. Cherkas attempted to interview appellant, appellant was "very uncooperative." (25RT 1744.)

ARGUMENT

I. APPELLANT HAS FAILED TO OVERCOME THE PRESUMPTION THAT JUDGE CHEROSKE WAS UNBIASED

Making seven separate sub-claims, which in turn contain further sub-claims, appellant contends that his federal constitutional right to a fair trial was violated because Judge Cheroske was biased against him. (AOB 22-55.) Appellant cites the following examples as demonstrating Judge Cheroske's bias: (1) Judge Cheroske denied a motion to disqualify standby counsel without reading the motion filed by appellant (AOB 27); (2) Judge Cheroske refused to consider ex parte a request appellant made for funds (AOB 28-29); (3) Judge Cheroske ordered that appellant be removed from the courtroom, and in general treated appellant without respect (AOB 29-32); (4) Judge Cheroske threatened to revoke appellant's pro per status without valid grounds (AOB 32-35); (5) Judge Cheroske denied a motion to continue (AOB 36-41); (6) Judge Cheroske revoked appellant's pro per status (AOB 41-45); and (7) Judge Cheroske deceived appellant into believing he was testifying in the jury's presence, when the jury was actually not present (AOB 45-53). As described in greater detail below, appellant's claim is meritless, and in many instances is based on an inaccurate description of the record.

The general rule is that a defendant has a due process right under the state and federal constitutions to be tried by an impartial judge. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310 [111 S.Ct. 1246, 113 L.Ed.2d

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[12] Dr. Cherkas was somewhat vague as to which documents he reviewed. (25RT 1745-1746.)

302]; *People v. Brown* (1993) 6 Cal.4th 322, 332.) "[M]ost questions concerning a judge's qualifications to hear a case are not constitutional ones . . . ." (*Bracy v. Gramley* (1997) 520 U.S. 899, 904 [117 S.Ct. 1793, 138 L.Ed.2d 97].) The Due Process Clause requires a "'fair trial in a fair tribunal'" "before a judge with no actual bias against the defendant or interest in the outcome of his particular case." (*Id.* at pp. 904-905, citations omitted; see also *People v. Chatman* (2006) 38 Cal.4th 344, 363 [noting distinction between claims raised under the federal constitution and claims raised under the Code of Civil Procedure].) A reviewing court "must presume the honesty and integrity of those serving as judges." (*People v. Chatman*, *supra*, 38 Cal.4th at p. 364, citation and internal quotation marks omitted.)

Below is a detailed factual background concerning appellant's behavior during the first and second trials. Notable moments include the following: (1) Appellant was initially awarded pro per status on October 10, 1997, by Judge Irma J. Brown, and Judge Brown revoked that status *during the same court appearance* due to disruptive behavior by appellant (1CT 26, 30-31); (2) appellant called Judge Cheroske a "fucking racist" (1RT 238); appellant called Judge Jack W. Morgan "old and a racist" (2RT 370); appellant told Judge Kenneth Gale, "Suck my dick, you racist. I know you's a racist." (16RT 3510); (3) appellant's girlfriend Smith was excluded from the courthouse by Judge Morgan after Smith spoke to a prospective juror and followed her to the parking lot (6RT 1336-1342, 1355-1373, 1420); (4) appellant repeatedly spit on defense counsel (1RT 300-301, 16RT 3499, 20RT 635); appellant threatened to kill defense counsel and his family (2RT 424-425, 17RT 48); appellant physically attacked defense counsel in the presence of 400 prospective jurors (17RT 22-27); and (5) appellant threatened to harm Judge Cheroske (25RT 1848).

As described in greater detail, appellant has established no violation of his federal constitutional rights.

A. Factual Background

The first court appearance contained in the record occurred on September 26, 1997, before Commissioner Robert R. Johnson. (1CT 2.) Appellant asked to represent himself. Commissioner Johnson informed appellant that he would have to fill out paperwork. Appellant responded by alleging, "That's a violation of the California Constitution under the Fourth, Fifth, and Sixth Amendments. I have a right under *Faretta v. California* . . . ." Appellant continued, "I would like the record to reflect that you are denying me the right . . . ." Commissioner Johnson asked appellant to sit down. Appellant accused the Public Defender of unspecified misconduct, and attempted to make legal arguments on codefendant Betton's behalf. (1CT 4.) Commissioner Johnson asked appellant to stop interrupting him. (1CT 5.) Commissioner Johnson then asked codefendant Betton if he was willing to waive time. Codefendant Betton stated that he was not. Deputy Public Defender Ary Degroot indicated puzzlement at codefendant Betton's position, since an hour earlier, codefendant Betton had said he would waive time. Degroot asked for more time, noting that he was unprepared for the preliminary hearing. Commissioner Johnson granted a continuance. (1CT 6.)

On October 10, 1997, appellant appeared before Judge Marcelita V. Haynes. (1CT 7.) Judge Haynes stated that her understanding was that appellant wished to represent himself. Appellant responded to the court's comment by claiming that the fact he had not yet been given pro per status indicated "some kind of obvious effort to try to manipulate paperwork." (1CT 9.) Judge Haynes explained that she had just been assigned the case. Judge Haynes further noted that she had known attorney Steven Hauser, who had been assigned to represent appellant, since 1979, and believed him

to be a "very competent attorney" with "the ability to handle this kind of case." (1CT 9-10.) Appellant stated that he did not doubt Hauser's competence. (1CT 10.) Appellant stated that he had not spoken to Hauser. Judge Haynes asked appellant to speak to Hauser during a break in the proceedings while they awaited the judge who the case had been assigned to, and noted that the next court would consider the pro per request. Appellant agreed to do so. Judge Haynes further noted that she had presided over a previous matter in which appellant represented himself. She noted that in that proceeding, appellant believed she had "railroaded" him. (1CT 11-12.)

Later on October 10, the parties appeared before Judge Irma J. Brown, who began the hearing by noting that she had presided over another proceeding involving appellant. In that proceeding, appellant had moved to disqualify her. Judge Brown explained that she had the relevant paperwork ready for appellant if he wished to make another such motion. (1CT 13.) Appellant stated that he wished to represent himself, and accused the Public Defender, District Attorney, and "judges" of conspiring to violate his and codefendant Betton's rights. In response to Judge Brown's question, appellant stated that he did not intend to move for her disqualification because he believed she "should have taken it upon [herself] to remove [herself]." (1CT 14-16.) Judge Brown stated she saw no reason to disqualify herself, and directed appellant to stop interrupting her. (1CT 16-17.) Appellant again stated the he wanted to represent himself, asked for cocounsel to be appointed or "hybrid representation," and stated that he did not want standby counsel. Appellant further stated that he had spoke to Hauser, but believed "something ain't registered" because appellant had tried to make clear to Hauser that appellant would make "all the major decisions." Judge Brown noted that in the prior proceeding she presided over, appellant had represented himself. (1CT 18-22.) Before the matter of

representation was settled, appellant changed the topic, complaining that the prosecution "don't even have witnesses," and demanded discovery. (1CT 23.) Appellant further alleged that his speedy trial rights had been violated. (1CT 24.) Judge Brown asked appellant to stop talking so that she could grant his pro per request, but rather than remain silent, appellant claimed various legal violations. Judge Brown instructed appellant to make such allegations in appropriate motions, but appellant interrupted her again. (1CT 25.) Judge Brown granted appellant's request to represent himself, and gave him the accompanying paperwork describing the pro per rules. (1CT 26.)

Despite his earlier complaints about his speedy trial rights, appellant informed Judge Brown that he did not want to be arraigned. (1CT 26.) Judge Brown chastised appellant for continuing to interrupt her. Despite the admonishment, appellant accused the prosecution of "threatening" witnesses and "fabricating" evidence. Judge Brown again admonished appellant for his behavior, and asked if he wanted Hauser's assistance. Appellant responded, "I ain't made the decision." Judge Brown again asked for a decision, and appellant answered, "I'm not asking for nothing at this time." Judge Brown informed Hauser that he would not be appointed. (1CT 27-28.)

Judge Brown asked appellant if he wished to continue the arraignment so that he could file motions alleging the various claims he had mentioned. Despite previously stating that he did not want to be arraigned, appellant answered that he did not wish to waive time. Judge Brown asked, "Are you ready to be arraigned?" Appellant responded, "That's your decision." Judge Brown explained that she was trying to help appellant, in that he seemed to want to file a demurrer, but such a motion would have to be filed before the arraignment. By way of answer, appellant made various

unresponsive statements. (1CT 29-30.) Judge Brown again asked appellant if he was ready to be arraigned, and the following exchange occurred:

> [Appellant]: I'm not going to answer.
>
> The Court: All right, then, I am going to revoke your pro per status, Mr. Johnson.
>
> [Appellant]: I don't care, I won't come back into the courts.
>
> The Court: That's up to you sir. All right.
>
> Mr. Hauser, will you accept the appointment?
>
> [Appellant]: He's not representing me, I'm letting the record reflect that. I'm totally against this man representing me.

(1CT 30.) Judge Brown revoked appellant's pro per status, and appointed Hauser to represent him. Appellant continued to speak out. Hauser entered a not guilty plea on appellant's behalf. (1CT 30-31.)

The parties then began to discuss the preliminary hearing. Codefendant Betton had previously requested that Chester Taylor represent him. (1CT 18.) Taylor informed the court that he needed a continuance to November 6 to prepare for the hearing. However, codefendant Betton stated that he would not waive time. (1CT 32.) The following exchange occurred:

> [Appellant]: You heard what he said, man. Nobody cares. Man, get rid of him like I told you, man, get rid of that fucking sucker.
>
> The Court: Mr. Johnson, you're out of order, sir, I'm going to ask you to please be quiet unless the Court addresses you.
>
> [Appellant]: Did you see what he tried to do? The man does not wish to waive no time, your Honor.

(1CT 32.) Judge Brown directed appellant to be quiet. Codefendant Betton continued to state that he opposed any continuance, and Hauser and

Taylor both stated that they needed more time to prepare. Accordingly, Judge Brown continued the matter until October 24. (1CT 33-34.)

On October 27, the parties again appeared before Judge Brown.[13] (1CT 49.) Appellant requested to have his pro per status reinstated. Judge Brown asked appellant if he was ready to proceed on the preliminary hearing, and appellant answered that he was. Judge Brown asked appellant if he had spoken to Hauser, and appellant answered, that he had "on several occasions," and added, "He have his strategy and I have mine." Judge Brown expressed doubt that appellant was truly prepared to conduct the hearing. Appellant then changed subject, demanded discovery, and accused the prosecution of "switching" or "contaminating" his paperwork. Judge Brown noted that it seemed unlikely appellant would be ready to handle the hearing, since he was complaining about discovery. (1CT 51-53.)

The prosecutor explained the discovery matter appellant was referring to: The preliminary hearing had been set for October 24, and Huggins was scheduled to testify for the prosecution. Huggins, who was in custody, was left in the same room with appellant and codefendant Betton. According to Huggins, appellant walked up to him, smiled, and displayed a piece of paper that had the address of Huggins' girlfriend's home written on it. The prosecutor passed on the information to Judge Haynes, who ordered that the parties look through appellant's paperwork to see if it included any contact information that should have been blacked out. In the presence of Hauser and Hauser's investigator, the prosecutor then looked through the paperwork and blacked out such information. The prosecutor further noted

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[13] The parties briefly appeared on October 24. (1CT 36.) On October 15, 1997, Hauser filed a motion regarding the terms of his appointment. In the motion, Hauser stated that in his discussions with appellant, appellant had "ranted on continuously about incompetent defense attorneys." (1CT 44-47.)

that he had asked that all paperwork be taken from appellant, but Judge Haynes denied the request. (1CT 54-56.) Appellant announced that he did not trust defense counsel or the investigator, and complained that discovery had not been provided. Judge Brown directed appellant to stop bringing up other issues, and explained why his discovery complaints were not appropriate. Appellant responded by accusing the court of being "prejudiced, totally." (1CT 55-59.)

Attempting to draw the parties' attention to the matter at hand, Judge Brown again asked appellant if he was ready to conduct the hearing, and appellant answered that he was. Judge Brown cautioned appellant that she would again revoke his pro per status if he misbehaved. (1CT 59-63.) Appellant repeatedly stated that he wanted to call Huggins as his own witness at the preliminary hearing, and asserted that Huggins had spoken to defense investigator Stephen Thornton and told Thornton "he never made that statement" (i.e., refuted the statements he made to the police). (1CT 59-64.) The prosecutor noted that he no longer intended to call Huggins in light of what had occurred on October 24. (1CT 65.) Finally, before starting the hearing, Judge Brown asked who would cross-examine the prosecution witness, and appellant stated that Hauser would. (1CT 65.)

Detective Vena testified for the prosecution (1CT 65), and was cross-examined by Taylor (1CT 86), and then extensively cross-examined by Hauser. (1CT 100-133.) After Detective Vena completed his testimony, appellant again stated that he wished to call Huggins as a witness. The prosecutor noted that Huggins had denied making a statement to Thornton, and accordingly asked that appellant be forced to first call Thornton as a witness. (1CT 92-94, 138.) Over the prosecutor's objection, appellant was permitted to call Huggins as a witness. Appellant questioned Huggins personally. Huggins denied making any statement to Thornton. (1CT 159.) Thereafter, Thornton was called as a witness, and testified that Huggins

simply refused to talk to him, and had not recanted any statement made to the police. (1CT 169, 170-172.) At the conclusion of the hearing, the prosecutor asked that appellant be ordered to stay away from witnesses. Judge Brown so ordered appellant. Appellant demanded, "What you insinuating?" Judge Brown answered, "No insinuation, just an order." (1CT 179.) The prosecutor then asked to again be permitted to make sure appellant's discovery did not include the address of Huggin's girlfriend. Judge Brown indicated that the prosecutor could do so. Appellant asserted that it did not matter because he knew where she lived. (1CT 55, 182.)

On November 10, 1997, the parties appeared before Judge John J. Cheroske. (1RT 1.) Judge Cheroske asked appellant if he wished to continue representing himself with Hauser's assistance. Appellant answered affirmatively. The matter was transferred to Judge George Wu, "the pro per court." (1RT 1-3.)

Later that day, the parties appeared before Judge Wu, who also asked appellant if he wanted Hauser to serve as cocounsel. Appellant answered affirmatively, emphasizing that appellant intended to make all decisions. Judge Wu granted appellant's request for a continuance. Appellant attempted to ask for a continuance on behalf of codefendant Betton, but Judge Wu informed him that he could not do so. (1RT 4-8.)

The parties appeared before Judge Wu on November 14, 1997. Appellant immediately and repeatedly interrupted the court. Appellant then complained about being forced to wear handcuffs. Judge Wu explained that they were necessary for security. Appellant responded, "You're making a frivolous statement like you always do. This is an abuse of power." (1RT 9-11.) Judge Wu noted appellant's familiarity with the law and invited him to make a proper motion. Judge Wu then asked appellant if he wished to retain Hauser as cocounsel. Rather than answering the question, appellant complained that the matter was resolved. Judge Wu

asked appellant not to be "difficult" and repeated the question. Appellant vaguely indicated that he wanted Hauser "[f]or a couple of proceedings until I say so, when I'm ready, I want him to go." Hauser indicated that such status was acceptable, and Judge Wu ordered him to continue serving as cocounsel. (1RT 11-14.)

Judge Wu then attempted to arraign appellant. Appellant stated that he wished to file a demurrer and "file numerous motions." Judge Wu attempted to ascertain whether appellant actually wished to file a motion pursuant to section 995, since a demurrer would be "frivolous." Judge Wu asked appellant if he wanted a continuance to file such a motion. (1RT 15-17.) Rather than answering the question, appellant complained about the transcript, and stated, "I respect what the Court stated about making a frivolous motion. As for the demurrer, I would drop that and proceed in a respective - - the right course would be the 995 . . . ." However, appellant asked for more time to review the transcript because he believed part of it had been "intentionally deleted from the record." (1RT 18-19.) The parties agreed to continue the arraignment. (1RT 20.)

Appellant next requested $10,000 in funds for an investigator. Hauser noted that he had already obtained an investigator and such funds. Appellant complained that he had "no faith in the investigator." Judge Wu explained that appellant would have to submit a statement justifying the funds. Appellant indicated that he did not intend to do so. Appellant further asked that the same amount of money be provided to codefendant Betton. When Judge Wu reiterated that appellant would have to file an appropriate motion, appellant exclaimed that the court was "clearly biased." (1RT 22-25.) Judge Wu returned to the matter of the arraignment once again, and asked appellant if he wished to continue the matter. Appellant refused to give a straight answer, accusing the court of putting him in an "awkward position." The matter was continued. (1RT 26-30.) Hauser

noted that he did not believe an extended continuance was in appellant's interest. (1RT 29.)

The parties appeared before Judge Wu on November 17, 1997. (1RT 32.) As Judge Wu attempted to arraign him, appellant interrupted, alleged that the preliminary hearing transcript was flawed and that the alleged errors were a "steady reflection of a policy that things have been deleted." Appellant further asked that the arraignment again be continued. Hauser noted that he did not "agree" with appellant. (1RT 33-34.) Judge Wu granted appellant's request, again continuing the arraignment. (1RT 38-40.)

The parties appeared before Judge Wu on December 16, 1997. Judge Wu asked for the parties to state their appearance, but appellant interrupted. (1RT 44.) Codefendant Betton stated that he wished to represent himself. Taylor described the request as a surprise. Appellant requested that Hauser be removed from the case. Judge Wu directed codefendant Betton to discuss the matter with Taylor. (1RT 45-46.)

After an intermission, codefendant Betton asked to represent himself, with Taylor serving as cocounsel. Appellant interrupted, complaining about his handcuffs. Judge Wu directed appellant to wait until codefendant Betton's request had been deal with. Judge Wu granted codefendant Betton's request. (1RT 47-51.)

Appellant repeated his request that Hauser be removed, and accused Hauser of lying to him and misrepresenting the law. Hauser refuted the allegations, asserted that he was doing his best, noted that appellant had refused to even tell him his address, and opined that appellant would voice the same complaints about any attorney. Appellant gave a long, rambling discourse, accused Hauser of having an "agenda," seemingly accused him of having a "sexual" relationship with Congresswoman Maxine Waters, and further claimed that Taylor had a "hidden agenda." (1RT 52-55.) Hauser

clarified that he had never met Waters, and explained that appellant was actually attempting to allege that she had a relationship with a witness in the case. Since appellant already had pro per status, and had represented himself in the past, Judge Wu granted appellant's request to relieve Hauser. Judge Wu cautioned appellant that he might not be able to have Hauser reinstated if he changed his mind. (1RT 56-57.)

Judge Wu then attempted to conduct the arraignment, but codefendant Betton requested a continuance "for a couple of weeks." Appellant joined in the request, again asserting the existence of "some kind of hidden agenda." Judge Wu agreed to continue the matter. (1RT 58-64.) Appellant asked for $50,000 for "all types of experts." Judge Wu instructed appellant to file a written motion before the next hearing. (1RT 64-65.) Appellant next suggested that Judge Wu disqualify himself based on his "past experience dealing with" appellant during which Judge Wu "threw [his] judicial weight towards the prosecution." Judge Wu invited appellant to make an appropriate motion. Appellant advanced other rambling allegations and again accused Judge Wu of being "prejudiced." (1RT 67-69.) Judge Wu awarded appellant $40 in funds and again told appellant to submit the name of an investigator if he wished to obtain a new one. (1RT 71.)

The parties appeared before Judge Wu on January 8, 1998. (1RT 76.) During that appearance, appellant filed a motion to disqualify Judge Wu. (1CT 219; 1RT 80.) Judge Wu filed a verified answer, denying and misdeeds, and noting that she had presided over a prior proceeding involving appellant (case no. YA036786). In that proceeding, appellant was charged with possession of an assault weapon, and Judge Wu had granted the prosecution's motion to dismiss. (1CT 224-226.) Judge Rose Hom struck the motion to disqualify. (1CT 232; 1RT 108-109.)

The parties appeared before Judge Wu on February 9, 1998. (1RT 100.) Appellant complained that the various motions he had filed had not yet been heard. Judge Wu explained that he could not rule on the motions while appellant's motion to disqualify had been pending. (1RT 105.)

Later that day, the parties appeared before Judge Hom.[14] (1RT 107.) Codefendant Betton announced that he was ready for trial. Appellant said he was "nowhere near" ready. Appellant also accused Hauser of "working with the district attorney" against him. (1RT 109-111.)

Later that day, the parties appeared before Judge Cheroske. Appellant complained that he did not have enough paper to make copies of motions for the prosecutor. Judge Cheroske agreed to make the copies for him. (1RT 114-117.)

The parties next appeared before Judge Cheroske on February 10, 1998. Judge Cheroske noted that he had reviewed the motions that had been filed. (1RT 120.) After discussing other matters, Judge Cheroske explained that he did not understand appellant's "nonstatutory motion to dismiss." Rather than explaining the motion, appellant complained about being handcuffed. Judge Cheroske directed the bailiff to unhandcuff one of appellant's hands. (1RT 129-130.) Appellant then proceeded to vaguely mention "a couple more motions" he wished to file, asked for a continuance, and said he would not be ready for trial in a week. (1RT 131-132, 136.) Appellant then expressed interest in entering into some sort of plea, although he also maintained his innocence. Appellant suggested that if the charges were dropped, he would leave the city and file lawsuits. (1RT 136-137.) Next, appellant requested funds, and asserted that Judge Wu had never provided any. Judge Cheroske responded that he had a copy

[14] The matter was transferred out of Judge Wu's courtroom once the prosecution decided to seek the death penalty as to appellant. (1RT 106.)

of an order by Judge Wu awarding funds. (1RT 138-140; see 1RT 71.) Appellant also mentioned that he had a specific investigator "in mind" that he wished to have appointed. Judge Cheroske invited appellant to file a motion. (1RT 140-141.)

On that same day, Hauser and the prosecutor appeared before Judge Hom. Appellant was not present. (1RT 142A.) Hauser explained that he believed it appropriate to remain as standby counsel because he believed it inevitable that he would eventually be reappointed as appellant's counsel. Hauser described a previous case in which appellant had to be excluded from trial due to misbehavior:

> Mr. Hauser: Mr. Johnson had a previous case actually related to some of the facts in this case where he was pro per. He also had a previous case that started out as a death penalty case, and then the death penalty was dropped, but it was a case that Mr. Gilbert Wright was the prosecutor on.
>
> And in that case he had difficulty in staying in the courtroom. He was excluded from the courtroom and his attorneys, Valerie Monroe and - -
>
> The Court: Mr. Herzstein.
>
> Mr. Hauser:- - John Herzstein proceeded in his absence.
>
> When this came up, which is a different case factually from those other cases, I was aware of all this. And apparently Mr. Johnson - - part of his modus operandi is to try to see how many defense attorneys he can go through and discourage and get off the case. And I realize that. He made that very clear from the first day, and I saw it as a challenge and wanted to come into the case and try to help him. And I met with him about four or five times and really tried to establish a rapport.
>
> I've been unsuccessful at that.

(1RT 142-144.) Judge Hom stated that she would discuss the matter with Judge Cheroske. (1RT 146.)

The parties next appeared before Judge Cheroske on February 18, 1998. (1RT 148.) Judge Cheroske announced that he was appointing Hauser as standby counsel. Appellant repeatedly objected, but Judge Cheroske explained that whether or not Hauser "even participates" in the case would depend entirely on appellant's behavior. Appellant continued to object. Judge Cheroske instructed appellant to stop interrupting, and invited appellant to file a written motion detailing his grounds for opposing Hauser's status. Appellant stated that he had no intention of filing more motions on the point. Accordingly, Judge Cheroske overruled the objection. (1RT 148-152.) Judge Cheroske further ruled that Taylor would remain on the case as standby counsel for codefendant Betton, but would not serve as cocounsel. (1RT 152-153.)

The prosecutor stated that he wished to continue the scheduled hearing regarding an informant until the following day. Appellant objected to the "delays tactics [sic]." Judge Cheroske noted that appellant was the one who had delayed the proceedings and added, "it's my information that you physically would refuse to come into the courtroom to even be arraigned. And finally, when you were finally brought into the courtroom, your plea was entered for you by another judge." (1RT 154-156.) Appellant denied refusing to come to court, and asserted that he had simply disapproved of the way security had attempted to handcuff him. (1RT 157.) Next, appellant complained that he was not receiving adequate time in the law library. Judge Cheroske noted that such a complaint was at odds with appellant's earlier suggestion that the proceedings were moving too slowly (if appellant had truly desired more library access, then he should have been pleased at the "slow" rate of the proceedings). (1RT 158.) Appellant attempted to file three motions. Judge Cheroske noted that appellant had to abide the rules of notice. (1RT 159.) Appellant requested $50,000 in funds. Judge Cheroske found that appellant had failed to state

sufficient grounds for the request, but did award him $40. Appellant responded by calling Judge Cheroske a "Star Chamber." (1RT 160-162.)

The parties appeared before Judge Cheroske on February 19, 1998. (1RT 165.) Appellant immediately interrupted Judge Cheroske and objected to Hauser's presence. Judge Chersoke instructed appellant to sit down and stop interrupting. Appellant again objected. The following exchange occurred, culminating in appellant's removal from the courtoom:

> The Court: Let me tell you something right now. You're in the wrong place, partner, to start your antics, because I'm going to find good cause real shortly - - if you continue to do the interruptions, destroy the courtroom decorum, I'm going to order that you wear a React Belt.
>
> Now, do you understand me?
>
> [Appellant]: Your honor, I, for the record - -
>
> The Court: You're a pro at this.
>
> [Appellant]: I have not did anything outrageous. I can object to anything you say. That is the law. You can show me - -
>
> The Court: I'm going to give you five, and then you're out of here.
>
> One, two, three - - are you going to keep talking or am I going to talk?
>
> [Appellant]: No, your honor, speak.
>
> I'm letting you know - -
>
> The Court: Fine. Remove him.
>
> [Appellant]: Let the record reflect - -
>
> The Court: Let the record reflect you're through the door.
>
> [Appellant]: The record reflect he violating the oath he has swore.
>
> I can speak. I can object.

The Court: Yes, you certainly can.

I wouldn't allow a lawyer to get by with what you're doing. I won't let you do it.

You heard what I have to say?

[Appellant]: Yes, sir.

I will continue to do that.

(1RT 165-166.) Appellant was removed from the courtroom. (1RT 166.) Out of appellant's presence, the prosecutor asserted that an informant was frightened and had been contacted by an acquaintance of appellant's. The prosecutor further noted that he had personally prosecuted appellant in a previous double-homicide case, and that in the proceeding, appellant had been found not guilty of one charge, and the jury had deadlocked as to the other. The prosecutor had moved to dismiss that other charge. (1RT 169-174.)

Appellant was permitted to return to the courtoom. After Judge Cheroske denied a motion, he permitted appellant to argue the point. Judge Cheroske overruled appellant's objection. Appellant accused Judge Cheroske of committing misconduct in making the ruling. Judge Cheroske permitted appellant to further argue the point. (1RT 177-181.) Judge Cheroske moved on to discuss another matter. Appellant repeatedly interrupted him. (1RT 184, 186.) Appellant called the prosecutor a "habitual liar." The following exchange occurred:

The Court: I don't tolerate lawyers calling each other derogatory names in my court, and I won't tolerate it from you. So don't refer to Mr. Wright again ever as a liar.

[Appellant]: He's fabricating stories then.

The Court: Do you have anything further?

[Appellant]: Yes, your honor.

The Court: What is it?

[Appellant]: Your honor, the man is dishonest.

(1RT 190.)

The parties appeared before Judge Cheroske on February 23, 1998. (1RT 193.) Judge Cheroske first directed appellant to fill out a pro per advisement form. Appellant did so, noting that he had represented himself in the past. (1RT 194; see 1CT 269.) Judge Cheroske further repeated the admonishments regarding appellant's duties as a pro per defendant in court. (1RT 195.) Judge Cheroske then attempted to discuss matters with codefendant Betton, and noted that appellant was giving codefendant Betton legal advice. (1RT 197.) Appellant interrupted Judge Cheroske. (1RT 198.) Judge Cheroske warned appellant that he would not tolerate further disruptive behavior, including interrupting the court, or calling the prosecutor names. (1RT 199-201.) Appellant responded:

> Yes, I've been a pro per several times. And what I've noticed is that the judges, some of them are racists, some of them bigots, some of them - - some of them have their belief that because an individual haven't went to school, haven't been taught by the law, that they ain't qualified to sit in this court and represent they self [sic], but that wasn't what the Sixth Amendment was built on.
>
> Anytime I feel that there's an issue for me to contest in this court, I'm going to speak up. I'm not going to be passive. I'm going to be very assertive. When it becomes time for me to be verbally aggressive, I will.

(1RT 202.) Appellant acknowledged that he would occasionally be "boisterous" and insisted that he would continue to accuse the prosecutor of lying. Judge Cheroske again cautioned appellant to follow the "rules of procedure and the courtroom protocol." (1RT 202-203.) Judge Cheroske proceeded to discuss various motions that had been filed. Appellant withdrew the motion he had filed pursuant to section 995. (1RT 205-206.)

Next, appellant accused Hauser and Taylor of rushing to hold the preliminary hearing as part of a "sinister" "complicity." (1RT 213-214.) Taylor refuted the assertion, stating, "Steve Hauser and myself, when we got this case, we specifically asked [appellant] to give us more time to do the preliminary hearing. It was at his insistence that we did the preliminary hearing at the time that we did." (1RT 214.) Appellant exclaimed, "He's trying to mislead the court." (1RT 214.) Appellant then expressed dissatisfaction with a ruling by the court. After appellant spoke for a few minutes, the following exchange occurred:

> The Court: Well, keep it within reason here. I'm trying to give you as much latitude as I can. I'm not going to give you any latitude any more than I would anybody else who is a lawyer here.
>
> [Appellant]: Your honor, I know you have had lawyers in this court for days on motions, so don't tell me that. We've been in here about 20 minutes.
>
> The Court: That's one.
>
> You've just told me what not to do.
>
> [Appellant]: I'm just saying to let you know.
>
> The record should reflect that.
>
> The Court: You're interrupting me.
>
> [Appellant]: I'm letting you know.
>
> The Court: I don't tolerate that from lawyers. I won't tolerate it from you.
>
> Have you got anything else you're going to say?
>
> [Appellant]: Yes, I've got a lot to say.
>
> The Court: You are not going to just sit here and talk. I don't allow lawyers to do that, sir. You are required to file your written motions, address your issues, and not ramble on.

(1RT 215-217.) Appellant indicated he had nothing to add to his motions. Judge Cheroske denied them. (1RT 218.) Judge Cheroske then moved on to appellant's request for $50,000 and concluded that appellant had failed to adequately justify the request. Appellant repeatedly interrupted the court. (1RT 219-220.)

Next, Judge Cheroske addressed appellant's motion to continue and asked what exactly appellant hoped to continue. The following exchange occurred:

> The Court: No, I mean, what is it you're trying to continue?
>
> [Appellant]: What is you talking about, what I'm trying to continue?
>
> The Court: That's two.
>
> [Appellant]: It's obvious.
>
> You asked me what I'm trying to continue. I told you.
>
> It's obvious.
>
> The Court: You're being disruptive. You are attacking the court personally. I don't take that from lawyers. You do it, and you're going to lose the pro per status. I thought you understood all that.

(1RT 220-221.) Instead of answering the court's question, appellant asserted that he needed a continuance "based on the seriousness of the charges and the necessary investigation that need to be conducted on every aspect on everything in here, witnesses, documents, testimony." Judge Cheroske clarified, "All I'm trying to ask you is what you want to continue. [¶] The trial date?" Appellant answered affirmatively, stated that he had no estimate as to when he would be prepared for trial, and said he would be better able to answer the question in two weeks. Judge Cheroske granted the continuance. (1RT 221-222.)

The parties appeared before Judge Cheroske on March 5, 1998. First, Judge Cheroske denied codefendant Betton's request for cocounsel. (1RT 225-227.) Next, Judge Cheroske denied appellant's continuance motion as being without adequate justification. (1RT 233.) Judge Cheroske then asked appellant and codefendant Betton if they wished to bifurcate the prior conviction allegations. Codefendant Betton answered affirmatively. Appellant refused to answer the question, instead moving to sever his trial from codefendant Betton's. Codefendant Betton further stated that he wished to abandon his pro per status and have Taylor reinstated as his attorney. (1RT 234-237.) Judge Cheroske warned appellant that he would not tolerate the filing of motions, such as the motion to sever, without proper notice. (1RT 237.) The following exchange occurred, in which appellant called Judge Cheroske a "fucking racist":

> [Appellant]: Let the record reflect he have been - - as far as me, he have denied me funds to get even for an investigator. I have requested 500 hours of - - 500 hours fee for an investigator.
>
> The Court: We've already dealt with this.
>
> [Appellant]: He have misrepresented the law, stating that I must tell him the people's names, which is not the truth.
>
> The Court: Mr. Johnson, your pro per status is revoked.
>
> Standby counsel, you are the attorney.
>
> [Appellant]: It doesn't matter. I won't participate in the proceedings.
>
> The Court: Is that what your election is going to be?
>
> [Appellant]: Yes.
>
> You can't stand up to me. My collateral attack against you will be unholy in this trial. Remember that.
>
> The Court: Remove him now, please.

[Appellant]: You fucking racist.

The Court: That's in the record, sir.

[Appellant]: I know.

You's a Polack, and you's a racist.

(1RT 238.) After appellant was removed from the courtroom, Hauser stated that his investigation was complete, and he was essentially prepared for trial. (1RT 239.)

After a brief intermission for the attorneys to discuss the trial date, Judge Cheroske stated, "I have been advised through the bailiff that Mr. Johnson has not only elected not to participate by coming into court, but has declined the use of the facility in the lockup that would allow him to listen to his trial; and for that reason, he's not hearing this and he's not here." (1RT 241.) Hauser asked to continue the matter until May 12. Codefendant Betton opposed the request. (1RT 241-242.) Hauser explained that he was attempting to investigate evidence for the penalty phase, and stated that he would attempt to ask appellant to agree to a time waiver. After a brief admission, Hauser informed the court that appellant would not agree to a time waiver. The court continued the matter over appellant's and codefendant Betton's objections. (1RT 242-243.)

On April 7, 1998, Judge Cheroske noted that codefendant Betton had failed to appear. As to appellant, Judge Cheroske stated, "Mr. Johnson has elected not to participate in the proceedings and also, as the record would reflect, had elected not even to listen in by way of a speaker." (1RT 246.)

On April 8, 1998, the following discussion occurred regarding appellant:

The Court: And has he indicated to the bailiff that he intends to join us today or no?

The Bailiff: I'll have to ask him again.

> Usually, once he finds out Mr. Hauser is here, he doesn't want to come out. But I could ask him. It will take just a second.

(1RT 249A.) After a brief intermission, the bailiff stated, "Mr. Johnson refuses to come out if Mr. Hauser is his attorney." (1RT 249A.) The parties agreed that there were no outstanding pretrial issues. (1RT 250.)

On April 20, 1998, Judge Cheroske stated the following regarding appellant, "Mr. Johnson is in the lockup. The bailiff has asked if he would be interested in joining the proceedings. He's indicated that he would not and that he doesn't want to see his attorney. So keeping with his wishes, we're going to proceed with what we're going to do here today." (1RT 252.)

Due to Judge Cheroske's unavailability, the parties appeared before Judge Hom on April 22, 1998. The bailiff noted that appellant had refused to leave his cell. (1RT 257, 260.)

Later that day, the parties appeared before Judge Jack W. Morgan, who was assigned the trial due to Judge Cheroske's unavailability. Hauser explained that appellant had refused to speak to him, and that it appeared that appellant would refuse to appear at trial unless his pro per rights were restored. Hauser stated that he had spoken to appellant's family, and believed that they would speak to appellant regarding his behavior. Judge Morgan noted that they needed to find out as soon as possible whether arrangements would have to be made so that appellant could listen to the proceedings from a cell. (1RT 263-265.)

The parties appeared before Judge Morgan on May 13, 1998. (2RT 283.) Judge Morgan noted that arrangements had been made so that appellant could listen to the proceedings if he so desired, and asked Hauser to find out if appellant wished to do so. Hauser stated that the last time he had tried to speak to appellant, appellant "cursed and spit" at him and did "various things." (1RT 300-301.) Judge Morgan directed the bailiff to

speak to appellant. (2RT 301.) Hauser explained to the court how appellant's behavior and been dealt with in a prior trial, stating, "I have been informed by Mr. Wright, as well as others, that in a prior trial Mr. Johnson did refuse to come into the courtroom. And he was provided with transcripts, dailies, which he apparently did read. So I would request that that be an additional option." Judge Morgan granted the request, ordering that daily transcripts be prepared for appellant. (2RT 302.) Hauser stated that he would attempt to speak to appellant again that day. (2RT 318.)

After an intermission, Hauser noted that he had failed to speak to appellant, but had been told by a bailiff that appellant planned on appearing in court. (2RT 357.) Discussing security arrangements, Judge Morgan indicated that appellant would most likely wear a stun belt. (2RT 357-359.)

After another intermission, Hauser stated that he spoken to appellant. Appellant indeed wished to appear and "didn't care" that he would have to wear a stun belt. (2RT 361.) Judge Morgan asked the bailiff if a stun belt was necessary, and the bailiff opined that appellant planned to "do something." (2RT 362.) The prosecutor then asked that appellant's girlfriend, Jocelyn Smith, be removed from the courtroom for her behavior. Judge Morgan warned her. (2RT 363.)

Appellant entered the court and promptly requested a "*Marsden* hearing." Judge Morgan denied the request. (2RT 365-367.) Appellant stated that he wished to be present and added, "I plan on participating." (2RT 367.) Judge Morgan ruled that appellant would wear a stun belt. (2RT 367.) Judge Morgan warned appellant to stop interrupting him, but appellant indicated that he would continue to do so. (2RT 368.) Appellant objected to being made to wear a belt, stating that he could have attacked counsel by now if he had intended to do so. (2RT 369.) Judge Morgan attempted to clarify whether appellant truly wished to remain in the courtroom. Appellant responded, "What I do say - - you act like you don't

hear. I know you're old and a racist." (2RT 370.) The following exchange occurred:

> [Appellant]: If I investigate your past and history, it would be retaining [sic] with racism. Your grandfather probably was racist, too. And that is proven, also.
>
> The Court: Make arrangements for the belt right away, and we'll take this gentleman downstairs to the jury assembly room. Do this as soon as possible.
>
> [Appellant]: Call the news. Tell them all.
>
> Ms. Smith: I will call the media.
>
> The Court: Ma'am, did I tell you not to speak?
>
> [Appellant]: That is my wife, mother fucker.

(2RT 370.) Appellant was removed from the courtroom. Judge Morgan again warned Smith that she would be removed if she did not behave. Smith responded, "I won't be back. I won't be back, but everybody else will." Smith continued, "Somebody else will be back. And I know what you all doing. And knowing what this white mother fucker is doing. And have him come to the project looking for me. I'll have somebody get your ass." (2RT 371.)

The prosecutor opined that appellant should be excluded from the proceedings. Hauser stated that he did not wish the jury to see appellant. (2RT 372.) After an intermission, Hauser told the court that appellant still wished to be present at trial. (2RT 373.) Judge Morgan again ruled that appellant would have to wear a stun belt, stating, "I am satisfied through my own witnessing of his conduct and attitude and statements today and prior proceedings that I conducted, as well as in a proceeding that he has conducted himself in regard to other judges, that this man is disruptive, is a threat, and can become violent. He is charged with a violent crime, and it is appropriate for him to be belted." (2RT 379.) Judge Morgan further

opined that codefendant Betton was a threat because he seemed to do whatever appellant "dictated." (2RT 380.) Sergeant Robert McLin warned that based on his "extensive contact" with appellant, he believed holding any portion of the proceedings in the jury assembly room (which was being considered because 400 prospective jurors had been assembled), would be a significant safety risk. Sergeant McLin stated, "I am quite familiar with Mr. Johnson's tactics resulting in delays and confusion and muddying the waters as far as judicial proceedings are concerned." (2RT 380-384.) Taylor opined that codefendant Betton would behave, explaining, "I have instructed him specifically time and time again not to follow Mr. Johnson, not to do anything Mr. Johnson says . . . ." (2RT 385.) Judge Morgan responded that, at the pretrial conference, "[Betton] was parroting the statements that Mr. Johnson was making, even though Mr. Johnson had been admonished not to say anything." Taylor acknowledged that the court's recollection was accurate. (2RT 385.) Judge Morgan repeated his ruling that appellant and codefendant Betton wear stun belts. (2RT 387.) Sergeant McLin noted that he was "extremely anxious" to resolve appellant's case, in light of the danger appellant posed. (2RT 388.)

After an intermission, Sergeant McLin declared that he had spoken to appellant and codefendant Betton in the presence of their attorneys regarding the stun belts. Both men had indicated they understood, but had refused to sign paperwork regarding the admonition. (2RT 394-395.) Judge Morgan warned appellant and codefendant Betton regarding their behavior, and both men stated that they understood. (2RT 396.) Judge Morgan informed appellant and codefendant Betton that he was willing to "wipe the slate clean" if they behaved. (2RT 396.) However, appellant responded that Judge Morgan's behavior had been "hostile, agitated, aggressive toward the defendant. And I responded in a - - the same courteous fashion." (2RT 397.) Appellant further claimed that he was not

ready for trial. (2RT 398.) Appellant repeatedly asked the court legal questions. Judge Morgan directed him to speak to Hauser. Appellant refused. Judge Morgan described Hauser as a "very outstanding attorney of exceptional competence," and invited appellant to voice specific complaints about Hauser. Appellant declined and instead stated, "When the news media come, I'm going to bring up these same issue [sic]. I'm telling you, sir." (2RT 399-403.)

Jury selection began. (2RT 403.) Appellant spoke out, asking to address the court. (2RT 414.) Out of the prospective jurors' presence, appellant complained that he had asked Hauser what his strategy was, and Hauser had simply answered that he was going to win. Judge Morgan told appellant that he had had ample opportunity to discuss strategy with Hauser, and that the middle of jury selection was not the appropriate time to do so. (2RT 415.) Appellant accused Judge Morgan of lying, "making excuses," and behaving in a "sinister, diabolical" manner. (2RT 416-418.) Judge Morgan attempted to speak with the attorneys regarding the prospective jurors, but appellant interrupted and again voiced his intent to speak to the media. (2RT 420.) The prosecutor stated that in the prospective jurors' presence, appellant called Hauser a variety of names, including, "punk ass motherfucker," and had threatened to "beat him up." (2RT 424.) The prosecutor could tell from a prospective juror's reaction that she had heard the threat.[15] (2RT 425.) Appellant asked for a specific deputy public defender to be assigned to represent him. Judge Morgan denied the request. (2RT 427.) Judge Morgan repeatedly asked appellant to stop talking, but appellant indicated that he intended to continue doing so. (2RT 445-447.) Appellant communicated with a prospective juror

[15] During this exchange, Hauser was not asked for, and did not volunteer a statement.

during jury selection, complimenting the juror on his honesty, and suggesting that other people in the courtroom were dishonest. (2RT 466.)

Jury selection resumed on May 19, 1998. (2RT 480.) Out of the jury's presence, appellant asserted, "Mr. Hauser smells like marijuana. This is the second time I accused him of being high on weed of marijuana." (2RT 503.) Once jury selection began, appellant spoke out, attempting to ask question during voir dire. (2RT 536.) Judge Morgan advised appellant to stop speaking, but appellant intended he would continue to do so. (2RT 567.) Hauser noted that he had a psychiatrist examine appellant, but the examination "wasn't very extensive because there was not cooperation." (2RT 571-572.)

The parties next appeared in court on May 20, 1998. (3RT 578.) Judge Morgan called "absurd" appellant's accusation that Hauser smelled of marijuana. The prosecutor and Taylor both stated that they had observed nothing supporting appellant's assertion. Hauser denied using controlled substances. (3RT 584-585.) Judge Morgan asked Hauser if he had communicated with appellant. Hauser answered, "he's certainly conveyed some of his desires to me." (3RT 587.) Appellant accused Hauser of lying about the law, so Judge Morgan asked for a specific example. Appellant responded, "Due process law." (3RT 594.) Judge Morgan asked appellant to elaborate, and offered to hold an in camera hearing. Appellant stated that he had "a lot" of additional examples, but when asked to list them, answered, "I think that's enough." (3RT 596-600.)

The prosecutor asked that a man in the courtroom identify himself, and noted that the man had attended the last trial involving appellant. Judge Morgan asked the man to identify himself. Appellant interjected, "He don't have to give his name. Can't arrest. If he arrest, you sue." Judge Morgan again ordered the man to identify himself, and the man continued to decline to do so. (3RT 602.) Judge Morgan repeated the

order, and the man asked if he was under arrest. Appellant repeatedly interjected, directing the man to not identify himself. (3RT 603-604.) The prosecutor stated that witness intimidation had occurred in this case, and that in the prior case concerning appellant, witnesses had told him that the man in the courtroom had approached them. (3RT 604.) Appellant again objected. Judge Morgan ordered appellant removed from the courtroom. (3RT 605.) The man continued to refuse to identify himself, but eventually stated that he was "Darnell Lucky." (3RT 606-607.) The prosecutor again asserted that witnesses had complained about the man in the prior proceeding, and that the matter had been brought to the trial court's attention. (3RT 608-609.)

Judge Morgan next held an in camera hearing to permit Hauser to respond to appellant's complaints. Hauser addressed appellant's complaints in detail, and stated that he had discussed the matters with appellant. (3RT 612-615.) Hauser noted that he had tried to work with appellant, and would continue to do so, despite appellant's reluctance to help. For example, Hauser explained that he had asked appellant what type of strategy appellant felt was appropriate. Appellant "just laughed and said, 'that's your job.'" (3RT 616-617.) During the hearing, appellant complimented Judge Morgan on his attentiveness and "intelligence." (3RT 618.) The court then discussed the medical records Hauser had obtained. Appellant stated that he was "totally against the records" being in Hauser's possession, even if the information would be "helpful" to the defense. (3RT 741-743.)

The proceedings resumed on May 21, 1998. During that proceeding, the prosecutor stated that friends of appellant had been attempting to stare him down in court. A court reporter told the prosecutor that she had heard appellant's girlfriend, Smith, refer to the prosecutor and say approximately, "she better not catch me walking in her neighborhood." (4RT 919-922.)

Also during that court date, appellant asked for a pen. The bailiff offered a pencil, which appellant refused, and then asked for a sharpener. The bailiff refused the request. Appellant complained that a pencil was inadequate. Judge Morgan disagreed. (4RT 932-933.)

The proceedings continued on May 26, 1998. (5RT 1045.) Judge Morgan held an in camera hearing, during which Hauser stated that he had tried to speak to appellant, but appellant had refused to speak with Hauser and instead responded with a "continuous tirade." (5RT 1048, 1055.) Judge Morgan advised appellant to cooperate with Hauser. (5RT 1055.) Appellant complained that Hauser had refused to file a motion arguing that any time a capital defendant was joined with a non-capital defendant, "that is automatically grounds for a dismissal." (5RT 1057.) Appellant called Hauser was "a very, very competent lawyer," but asserted that Hauser's goal was to "undermine" and "railroad" appellant. (5RT 1058.) Appellant again complained that his medical records had been given to Hauser. (5RT 1059.) Appellant claimed that he had a defense strategy, but did not explain it. (5RT 1058.) Judge Morgan asked appellant if he had explained the strategy to Hauser. Appellant stated that he had. Appellant called Hauser "very competent" and "a genius," but again accused Hauser of working against him. (5RT 1060-1061.) Judge Morgan invited appellant to list specific examples of ways in which Hauser had worked against him. Appellant cited the following: (1) Hauser told appellant his argument about severance was meritless; (2) Hauser told him his trial strategy was to cross-examine the prosecution's witnesses; and (3) Hauser said he did not intend to call an expert. Judge Morgan asked appellant if he had described to Hauser what type of expert he believed important. Appellant stated that he had not. Judge Morgan directed appellant to discuss the case with Hauser. (5RT 1061-1066.) Appellant then asserted that Judge Wu had been an impartial judge. Judge Morgan pointed out that appellant had tried to

disqualify Judge Wu as biased. (5RT 1059, 1069; see 1CT 219; 1RT 80.) Judge Morgan denied appellant's request for new counsel. (5RT 1070.) Later in the day, Hauser stated that appellant had told him he had a headache, and needed a break. (5RT 1126.)

The proceedings resumed on May 27, 1998. A prospective juror informed the court that a woman (later identified as appellant's girlfriend, Smith) had spoken to her at the end of the prior court session. (6RT 1336.) The prospective juror explained that at the end of the court session on May 26, a woman she had seen in the court audience approached her by the elevator and said, "You know, they are not guilty. They have been here for about 17 months." (6RT 1336-1340.) The prospective juror had seen appellant making a hand gesture to the woman. (6RT 1341-1342.) Appellant interrupted the proceedings three times, and was repeatedly told to stop talking. (6RT 1339, 1343.)

Judge Morgan then held an in camera hearing. Appellant accused Hauser of not being "competent." (6RT 1347.) Judge Morgan responded,

> Mr. Johnson, I have carefully observed this particular subject matter. And is my considered opinion, after an extensive evaluation, that your only purpose is to try to build up a ground for appeal if you should be convicted in this case. And that is your entire purpose for carrying on this way. You have a competent, effective counsel. You have even acknowledged he was competent. I think you are simply trying to play games with this Court. And I want that placed clearly in the record because I carefully observed that. And that is my considered evaluation of the matter. This is nothing more than game[s]manship by your trying to develop a ground or grounds for appellate lawyers and nothing else. And there is no substance, basis, or truth to it.

(6RT 1347-1348.) Appellant accused Judge Morgan of being "in complicity with the crimes" against him, claimed that the case had proceeded suspiciously quickly, and again complained that his case had not been severed from codefendant Betton's. (6RT 1348.)

Judge Morgan resumed the proceedings in open court. Appellant repeatedly spoke out, was advised to stop doing so, and indicated that he would continue to interrupt the proceedings. (6RT 1350-1351.) Judge Morgan brought the prospective juror back into the courtroom and advised her to not discuss the contact with the other jurors. Appellant interjected, "My wife systematically picked out for no reason." (6RT 1352.) Judge Morgan asked the prospective juror to leave the courtroom, and again ordered appellant to stop talking. Appellant indicated he would continue interrupting the proceedings. (6RT 1353.) Judge Morgan had the prospective juror return to court to further describe the contact. The prospective juror explained that Smith had appeared to wait for her in the courtroom elevator and then spoke to her. The prospective juror exited the elevator, and took a different one. Smith followed her out of the building. The prospective juror ran to her car. (6RT 1355-1356, 1372-1373.) Hauser explained that the woman being described was Smith, but stated to the court that appellant had asked him to argue to the court that ""there was reasonable doubt as to the accuracy" of the prospective juror's identification of Smith. (6RT 1361-1362.) Appellant repeatedly interrupted and stated that he would continue to do so, despite the court's admonishments. (6RT 1363.) During the discussion, Taylor asked Judge Morgan to admonish appellant to stop speaking to codefendant Betton in the presence of the jurors. Judge Morgan did so. (6RT 1416-1417.)

Smith was brought into court and denied speaking to the prospective juror. Judge Morgan concluded that she was lying, noted Smith's behavior on May 13, and ordered that she not come within 100 yards of the courthouse. (6RT 1419.) Appellant said to Smith, "Fuck them. Go and leave." Appellant then said to Judge Morgan, "Fuck you, peckerwood. Fuck you and suck my dick." (6RT 1420.) Before leaving, Smith added, "I'm going to sue all of you all." (6RT 1420.)

Later during jury selection on that date, the court reporter advised the court that she could not hear due to appellant's outbursts. Judge Morgan advised appellant to be quiet. (6RT 1453.) Jury selection was completed that day. (6RT 1582.)

Proceedings resumed on May 28, 1998. Judge Morgan held an in camera hearing, noted that appellant had communicated with Hauser during jury selection, and asked if he intended to continue doing so. Appellant gave a vague response. Judge Morgan repeated the question. Appellant responded that he had already told Hauser what strategy he should pursue. (6RT 1591-1592.) The presentation of evidence then began and the day was otherwise uneventful.

Proceedings resumed on May 29, 1998. (8RT 1817.) Judge Morgan asked appellant if he was communicating with Hauser. Appellant stated that he was, and noted that he had asked Hauser to file a "perjury motion" and that Hauser had done so. (8RT 1834.) Appellant added, "I do attempt to communicate with him about issues that come up. And I see him supporting the significance of them." (8RT 1835.) Judge Morgan asked appellant if there was any topic he wished to discuss with Hauser, but had not done so. Appellant answered, "No." (8RT 1835.) Hauser asked for arrangements to be made so that he could speak to appellant during the lunch break, and Judge Morgan agreed to do so. (8RT 1835.) The presentation of evidence then resumed.

After the lunch break, Hauser informed Judge Morgan that when he had attempted to speak to appellant, appellant "went off and said that he was going to tell the jury that he was representing himself at the prelim and that he was going to testify in this case and talk about me and my performance in the trial and various other things." (8RT 1932.) Hauser asked the court to admonish appellant "for his own sake." Hauser explained that he believed such behavior would prejudice the jury against

appellant. Accordingly, Hauser further requested that the court "exclude" appellant "if he goes off." (6RT 1932.) Judge Morgan admonished appellant to not speak in the jury's presence. (6RT 1934.)

The prosecutor informed the court of witness intimidation that had occurred in the hallway. Evidence was then presented out of the jury's presence that a member of appellant's gang, the Grape Street Crips, had a made a threatening comment regarding the fact that Huggins had testified. (8RT 2026-2036.)

Proceedings resumed on June 1, 1998. (9RT 2054.) Judge Morgan noted that both appellant and codefendant Betton were in jail clothing and had refused to put on plainclothes. Appellant stated that he wanted a new attorney, was wearing the jail clothing to protest the proceedings, and complained that Hauser had "refused to go into the specific questions I requested that he ask of the witnesses." (9RT 2054-2057, 2062.) Codefendant Betton indicated that he was willing to at least partially change into plainclothes. (9RT 2059.) Appellant also informed the court that he had spit on Hauser when Hauser had visited him in lockup. Judge Morgan had not previously heard about the incident. Appellant defended his actions and stated that he would continue to wear jail clothing. (9RT 2062-2063, 2067-2068.) Hauser stated that he felt he had appropriately cross-examined the witnesses. (9RT 2070.) Judge Morgan advised appellant to be quiet. Appellant responded, "I don't care about your damn warnings," and added, "Fuck your warnings." (9RT 2071.)

Later that day, a defendant was shot and killed in a neighboring courtroom - - the resulting commotion could be heard in Judge Morgan's courtroom. (9RT 2111.) At appellant's request, Hauser moved for a mistrial. Judge Morgan denied the motion. Appellant interrupted and ignored Judge Morgan's admonition to be quiet. (9RT 2119-2120.) Once

the jury was brought into the courtroom, appellant stated of Hauser, "I want to dump this boy." (9RT 2123-2124.)

The proceedings resumed on June 2, 1998. Judge Morgan admonished appellant to remain silent, particularly in the jury's presence. Appellant responded by mocking Judge Morgan's sense of hearing. (9RT 2125-2126.) Throughout the day, appellant directed Hauser to make various legal arguments. Hauser did so. (9RT 2128, 2130-2131, 2135-2136.)

Proceedings resumed on June 3, 1998. (10RT 2163.) Appellant criticized Hauser's cross-examination of prosecution witnesses. Judge Morgan opined that Hauser had done well. (10RT 2347-2348.)

Proceedings resumed on June 4, 1998. (11RT 2390.) Judge Morgan commended appellant for communicating with Hauser. Judge Morgan also urged appellant to wear plainclothes before the jury. (11RT 2575.)

The presentation of defense evidence began on June 5, 1998. (12RT 2577.) Taylor called four brief witnesses on codefendant Betton's behalf. (12RT 2651, 2690, 2738, 2752.) Codefendant Betton chose not to testify. (12RT 2774.) At the conclusion of codefendant Betton's defense case, Hauser noted that he still did not know whether appellant would testify. (12RT 2760.) Hauser called Detective Vena as a witness. After that testimony, Hauser explained that appellant wished to testify over his objection. (12RT 2773-2776.) Appellant then testified, and his testimony lasted two days. Appellant's testimony on direct was smooth and detailed, which indicated that he and Hauser had previously discussed the testimony in great detail. (12RT 2784, 2862.) During the second day of his testimony, appellant complained about Hauser's performance as his attorney. (13RT 2881-2882.)

At the conclusion of appellant's testimony, Hauser told the court that he had no additional witnesses. However, Hauser then spoke to appellant,

after which he informed the court that he actually wanted to call Smith. Hauser asked Judge Morgan to lift his order and permit Smith to return to the courthouse. After an intermission, Hauser stated that when he had discussed the matter with appellant a few days earlier, appellant had stated that he specifically did *not* want Smith to testify. (12RT 2883, 2887-2889, 2896, 2918.) Smith appeared in court and testified later that day as appellant's last witness. (13RT 2920.)

The presentation of evidence was completed on June 9, 1998. (14RT 3135.) Appellant asked for permission to give the closing argument. Judge Morgan denied the request, but granted appellant time to strategize with Hauser. (14RT 3146-3147.)

Closing arguments were given on June 10, 1998. Appellant wore plainclothes for the occasion. (15RT 3363.)

On June 17, 1998, the jury declared that they were deadlocked. The jury was directed to continue deliberating. (15RT 3446.) Appellant complained about Hauser's performance. (15RT 3447.)

The jury again declared that they were deadlocked, and a mistrial was declared on June 19, 1998. (15RT 3476-3486.) The record is somewhat unclear, but it appears that the jury was 11-1 in favor of appellant's guilt as to count 1, and divided evenly as to count 2. The jury was 5-7 in favor of not guilty as to codefendant Betton.[16] (15RT 3487-3489.) During the proceedings, appellant used profanity and was admonished for his behavior. (15RT 3479-3480.)

Proceedings resumed on July 7, 1998. (16RT 3498.) The hearing started with Judge Morgan telling appellant to be quiet. Appellant responded, "Fuck you and the staff. Fuck you and suck my dick." (16RT

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[16] During deliberations, an alternate juror was unable to make it to court because someone had slashed all four of his tires. (15RT 3403-3404.)

3498.) Judge Morgan noted that appellant had twice spit on Hauser, and directed the bailiff to summon additional security. Appellant continued to speak out. (16RT 3499.) Judge Morgan then rejected appellant's request to represent himself in light of appellant's "disruptive conduct." (16RT 3500.) Appellant exclaimed, "I told you to suck my dick. Remove yourself from my court. Fuck yourself. Suck my dick. Suck my dick. Fuck your momma. You's a racist." (16RT 3501.) Judge Morgan continued, "this man is not capable of conducting his own trial. He would turn the trial into a total circus." (16RT 3502.) Appellant stated that he would "keep on spitting on [Hauser]," shouted profanity at Judge Morgan, and asked if Judge Morgan's "momma and daddy" were "clans." (16RT 3502.) At that point, jurors on an unrelated matter walked through the courtroom. Appellant yelled at them, "They railroad these boys. Do not believe what these district attorneys are telling you." (16RT 3503.) Appellant also stated to someone in the courtroom, "Mother fucking lawyer. Dick face." (16RT 3506.)

On July 14, 1998, the parties appeared before Judge Kenneth Gale. (16RT 3508.) Appellant immediately spoke out and requested a new attorney. Judge Gale denied the request, and also denied a motion to sever appellant's trial from codefendant Betton's. (16RT 3508-3509.) Judge Gale warned appellant that he would not tolerate the behavior that had previously occurred, such as appellant spitting on Hauser. (16RT 3509.) Appellant attempted to leave the courtroom. Judge Gale ordered appellant to remain. Noting that appellant was not wearing "the belt," Judge Gale ordered the bailiff to ensure that he was wearing one in the future.[17] (16RT 3510.) Appellant exclaimed, "Suck my dick your racist. I know you's a

[17] It appears that appellant wore a stun belt throughout the first trial. (12RT 2776-2777.)

racist. You grew up in the '30s, '40s, '50s, and '60s. You's a racist." Appellant also called Judge Gale's parents racist. (16RT 3510.) Judge Gale directed the bailiff to bring a "muzzle" for appellant's next court appearance. (16RT 3514.)

The parties appeared before Judge Morgan on July 29, 1998. (16RT 3515.) Judge Morgan noted that during the last proceeding, appellant had asked for and was given permission to try to find private counsel. Judge Morgan asked appellant how the search was proceeding. Appellant stated that he believed he would have a new attorney if the matter was continued for 30 days. Judge Morgan continued the matter to September 17, 1998, and warned appellant that any new attorney would have to be ready for trial to begin on September 21. (16RT 3519-3521.) During the hearing, appellant asked to see an eye specialist. Judge Morgan provided the order. (16RT 3522.)

The parties appeared before Judge Cheroske on August 25, 1998.[18] (17RT 1.) Appellant complained about being required to appear before September 21, and claimed to be "in negotiations with counsel." (17RT 2.) Judge Cheroske explained that the 400 prospective jurors had been directed to appear on September 17, rather than September 21, and he simply wished to make sure that date would be acceptable. (17RT 17.)

Proceedings resumed on September 17, 1998. (17RT 18.) Before going to the jury assembly room so that the court could make introductory remarks (the panel of 400 was too large to fit into the courtroom), the parties discussed security. Hauser objected to the bailiff's plan to require appellant to wear leg chains, and expressed concern that the prospective

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[18] Judge Cheroske presided over the remainder of the trial proceedings. Per appellant's opening brief, Judge Cheroske was a former defense attorney, represented a defendant in a capital case, and also presided over a capital trial before the instant case. (AOB 29, fn. 19.)

jurors would be biased against appellant if they saw the restraints. Judge Cheroske ruled that chains would not be worn, and that appellant and codefendant Betton would simply wear stun belts. (17RT 20-22.)

The parties then went to the jury assembly room. Just as the prospective jurors were told to rise, appellant physically attacked Hauser. In the presence of the 400 prospective jurors, appellant struck Hauser in the head, repeatedly called Hauser a "mother fucker" and said to the prospective jurors, "I do not want this man. He do not represent my interest, ladies and gentlemen. [¶] I'm qualified to represent myself. [¶] This man has intentionally dumped me in trial." He continued, "They do a whole lot of illegal shit in these courtrooms. [¶] Fuck them." Appellant attempted to attack Hauser again. The bailiffs activated appellant's stun belt twice, but the belt had "little or no effect." Several bailiffs managed to subdue appellant. (17RT 22-24, 27, 25RT 1834.) After appellant was taken to lockup, he stated that he would attack Hauser again, if given the opportunity. (17RT 27.)

After the attack, Judge Cheroske ruled that appellant would not be permitted to return to the courtroom, and would only be permitted to listen to the proceedings via a speaker in a cell. Judge Cheroske explained,

> In my opinion, there is no other possible solution to prevent such outbursts again by Mr. Johnson.
>
> I also am making a finding that his actions today were intentional. I suspect that they were planned for one more time to try to disrupt the proceedings and delay it.

(17RT 25.)

Judge Cheroske asked Hauser if he would be able to continue representing appellant. Hauser answered, stating that he had "over 25 years of experience," and had represented "difficult clients before." (17RT 25.) Judge Cheroske stated that codefendant Betton would be permitted to

remain in court. Taylor asked that appellant be kept away from codefendant Betton, and explained,

> Mr. Johnson, in my opinion, has a huge influence on Mr. Betton.
>
> For example, initially, this morning, Mr. Betton had indicated that he would wear some of the clothing that I brought for him. And after they were brought out, Mr. Johnson had a conversation with Mr. Betton; and Mr. Betton decided to change his mind. Despite my pleadings with him in the back, he would not change.

(17RT 26.) Sergeant McLin advised the court that codefendant Betton should be required to wear a stun belt and leg chains for future proceedings, and opined that codefendant Betton was a threat because he would do whatever appellant suggested. (17RT 27.) Taylor opposed the use of leg chains, saying that codefendant Betton was "not . . . that much better" than appellant, but was "a little bit better." (17RT 28.) Judge Cheroske ruled that codefendant Betton would wear only the stun belt for the time being. (17RT 31.)

Taylor and Hauser both asked that the entire panel of 400 prospective jurors be dismissed. (17RT 32.) Before doing so, Judge Cheroske attempted to question the prospective jurors as to their feelings about what they had observed. (17RT 33.) More than 200 of the prospective jurors lined up to ask to be excused. (17RT 41.) One prospective juror stated that her heart was still "pounding." Another noted that appellant was "a violent guy." (17RT 37.) Judge Cheroske declared a mistrial, dismissed all 400 prospective jurors, and noted that it would take at least three weeks to assemble another panel of that size. (17RT 39-41.) The prosecutor asked that the proceedings be continued until November, but Judge Cheroske set a trial date in October, pursuant to Taylor's request. (17RT 42-43.) At the conclusion of the hearing, Judge Cheroske described Hauser's injuries,

stating, "the injuries received by Mr. Hauser were not superficial. You can see that his face is starting to now swell out to the side." (17RT 43.)

Proceedings resumed on September 21, 2008. (17RT 45.) Judge Cheroske noted that his understanding was that appellant had indicated that he did not wish to listen to the proceedings, and asked Hauser to question appellant as to his intentions. (17RT 45.) Judge Cheroske also noted that he was considering revoking appellant's phone rights. (17RT 46.) After a brief intermission, Hauser stated that appellant did not wish to listen to the proceedings. (17RT 47-48.) Sergeant McLin confirmed Hauser's report, and added that appellant had said to Hauser, "I'm going to kill you and your family, you punk mother-fucker." (17RT 48.) Judge Cheroske suggested to Hauser that he withdraw as counsel. Hauser responded that he was prepared to continue representing appellant, did not believe appellant had "any ability to carry out any of those threats," and did not believe that appellant "actually mean[t] them." (17RT 49.) The prosecutor noted that he would likely seek to present evidence of the attack at the penalty phase. Hauser contended that the fact that he had stayed on as appellant's advocate would work to appellant's advantage in making the assault seem less serious. (17RT 49.) Judge Cheroske asked whether the "extremely loud banging" audible in court was being made by appellant. Sergeant McLin confirmed that appellant was making the noise in lockup.[19] Judge Cheroske revoked appellant's phone privileges, stating, "Mr. Johnson, in my view, is an extremely dangerous person. I'm concerned for the safety of the witnesses. I'm concerned for the safety of his own counsel." (17RT 51.) Judge Cheroske stated that it would take until November to assemble another panel of prospective jurors, and noted that the prospective jurors

[19] Judge Cheroske described the banging as so loud that he "could barely conduct court." (17RT 56.)

called in for other trials had also been dismissed after they witnessed appellant's attack on Hauser. (17RT 46, 53.)

Proceedings resumed on October 2, 1998. Judge Cheroske noted that appellant had been brought to the courthouse, but had stated that he did not want to listen to the proceedings. (17RT 56.) After the prosecutor reiterated his intent to present evidence of the attack on Hauser at the penalty phase, Hauser again stated that he wished to continue representing appellant:

> I feel that I am the most qualified attorney in terms of knowing the case, knowing Mr. Johnson.
>
> At one time, he was cooperating with me. And I feel that his attack upon me and his latest outburst and things is merely a tool to either delay the trial or to eventually wind up defending himself, which I believe is what his goal is.

(17RT 58.)

The parties next appeared before Judge Cheroske on October 19, 1998. (17RT 62.) Judge Cheroske stated, "It is clear to this Court that despite any promises to the contrary, Mr. Johnson will continue to do any and everything possible to prevent the trial from proceeding." (17RT 64.) Judge Cheroske proceeded to summarize appellant's misconduct, as described above, and concluded that permitting appellant to enter the courtroom would "seriously jeopardize the security of the court." Judge Cheroske said any promise by appellant to behave would "simply be a subterfuge to gain access to the courtroom and allow him to continue his offensive, violent and outrageous conduct." (17RT 64-65.) Judge Cheroske stated that the only way in which appellant would be permitted to enter the courtroom would be while wearing shackles on his arms and legs, since the stun belt had failed to control his behavior. (17RT 65.) However, Judge Cheroske believed that proceeding with appellant in restraints would prejudice the jury against appellant *and* codefendant Betton by suggesting

that appellant had "the predisposition to commit violent crimes." Judge Cheroske believed that the resulting prejudice caused by such visible restraints would be greater than prejudice caused by excluding appellant from the courtroom and admonishing the jury to disregard his absence. (17RT 66.)

Judge Cheroske stated that he intended to read the following to prospective jurors: "Defendant Cedric Johnson has voluntarily absented himself from the proceedings. This is a matter which must not in any way affect you in this case." (17RT 68.) And at the end of the case, Judge Cheroske intended to read the following:

> The defendant, Cedric Johnson, has voluntarily absented himself from these proceedings. This is a matter which must not in any way affect you in this case. In your deliberations, do not discuss or consider this subject. It must not in any way affect your verdicts or any findings you may be asked to make.

(17RT 67-68.) Hauser suggested that the instruction be modified to say, "The fact of his voluntary absence should not be considered by you as evidence of guilt or relating to that." (17RT 71.) The prosecutor noted that at some point they would have to decide what to do if appellant asked to testify. (17RT 73.)

Judge Cheroske reiterated that appellant could listen to the proceedings, if he so desired. (17RT 67.) Judge Cheroske indicated that he would not order daily transcripts be made for appellant since appellant had said that he did not want to listen to the proceedings. Hauser noted that his understanding was that in an prior trial proceeding, appellant had been given the choice between "coming into the courtroom with a - - whatever you call that belt or reading the daily transcript. And he chose to read the daily transcript." (17RT 74-75.) Hauser also described his interactions with appellant during the first trial:

> [W]hen we came down to the defense, he did cooperate with me; and we were really getting along. And he did testify. His wife testified. And we seemed to have a good relationship from that point on in the trial. After the trial, we did not - - he has not communicated with me.
>
> So there really hasn't been a falling out between us, because we've never really discussed anything or had any disagreements.
>
> [¶]
>
> [T]here were no threats given to me prior to [the attack in front of the prospective jurors]; there was no breakdown in communication in terms of trial strategy or anything. There just wasn't any communication at all.

(17RT 69.)

Jury selection began on November 5, 1998. (17RT 76, 160.) Judge Cheroske expressed concern that codefendant Betton would attempt to disrupt the proceedings at appellant's direction, and explained, "there have been many situations, not probably reflected in the court reporter's transcript, but while we're in session, when the court has observed - - I had observed personally that Mr. Betton would confer with Mr. Johnson before making decisions regarding the court proceedings." (17RT 88-89.) As to appellant, Judge Cheroske stated that he believed appellant wished to be present in the courtroom "for the sole purpose of engaging in more disruptive behavior." Judge Cheroske added, "If some appellate court disagrees with me, that's the way it is. But they should have been here when it was happening." (17RT 95.) Judge Cheroske directed Hauser to continue checking with appellant to see if he had decided to start listening to the proceedings. (17RT 94, 179.) Also on November 5, the prosecutor stated that one of appellant's friends was outside, and the prosecutor did not wish the friend to have contact with a particular witness. (17RT 95-96.)

On November 9, 1998, bailiffs informed Judge Cheroske that appellant attempted to spit on Hauser when he asked appellant if he wished

to listen to the proceedings. Also, the bailiffs explained that appellant said that he wanted to plead guilty if he was not provided a new attorney. Judge Cheroske concluded that he would not permit such a plea because he did not believe the plea would be valid, and further deemed believed appellant was planning some sort of disruption. (18RT 180, 184.)

On November 10, 1998, Judge Cheroske noted that Hauser had attempted to speak to appellant, but appellant had refused to speak to him. Appellant did request transcripts for various court dates that had already occurred. Judge Cheroske denied the request. (19RT 487.) The parties then addressed what Judge Cheroske would tell the prospective jurors as to appellant's absence. Hauser objected to the jury being told that appellant had "voluntarily" absented himself. However, Judge Cheroske stated that the word was accurate because appellant absented himself due to this intentional behavior, and had furthermore declined to listen to the proceedings. Judge Cheroske rejected the prosecutor's request that the jury be told that appellant had refused to listen to the proceedings. (19RT 565-566.) A short time later, Judge Cheroske told the attorneys that he would give the following, revised instruction:

> The defendant, Cedric Johnson, will not be present for these proceedings. You are not to speculate as to the reasons for his absence, nor is this a matter which in any way can affect you or your verdict in this case.

(19RT 569.) No one objected, and Judge Cheroske proceeded to tell the prospective jurors,

> [T]he defendant Johnson will not be present for these proceedings. The Court is instructing you that you are not to speculate as to the reasons for his absence, nor is this a matter which in any way can affect you or your verdict in this case.

(19RT 2576.) The jury was sworn later that day. (19RT 627.)

Proceedings resumed on November 12, 1998. (20RT 635.) When Hauser attempted to speak to appellant, appellant refused to discuss the case and instead said in essence that he would "spit all over" Hauser if given the chance. (20RT 635.) The prosecutor stated that Annette Johnson, who had testified in the first trial, was now refusing to testify. Additionally, Rochelle Johnson had failed to show up in court. The prosecutor further noted concern about discussing another witness in light of a person in the courtroom audience. Judge Cheroske asked Annette if she knew where Rochelle was. Annette stated that she did not, and that she was concerned. (20RT 635-637.) The attorneys gave their opening statements to the jury. Hauser contended that the only evidence of appellant's guilt was noncredible witnesses. (20RT 660-661.) Taylor articulated the same trial strategy. (20RT 666.)

Despite the prosecutor's and Annette's concern, Rochelle appeared in court and testified, providing a partial alibi for codefendant Betton, her boyfriend. As noted in the Statement of Facts, above, the evidence strongly indicated that Rochelle was lying. Rochelle's initial statement to the police on the night of the shooting was that she had been at the party when the shooting occurred. She was also heard calling a prosecution witness a "snitch." Moreover, immediately after the shooting, Annette became so animated while arguing with Rochelle that Annette broke a glass pane and cut her hand. Although Annette and Rochelle both denied it, the most reasonable interpretation of that evidence was that Annette believed Rochelle knew who had committed the shooting. Annette Johnson also testified at the retrial, and denied that the argument on the night of the shooting had been over her concern that Rochelle had seen the shooting.

(20RT 740, 755.) Newton testified and disavowed the videotaped statements he made to the police. (20RT 779-781.)[20]

Proceedings resumed on November 13, 1998. (21RT 789.) Hauser noted that appellant had again refused to speak to him. (21RT 790.) Various witnesses testified.

Proceedings resumed on November 16, 1998. (22RT 975.) Judge Cheroske noted that he had received a lengthy letter from appellant.[21] Judge Cheroske further stated that he would no longer direct Hauser to ask appellant if he wished to listen to the proceedings. The bailiff would do so instead. (22RT 975.) As the prosecution case was nearly complete, Hauser listed his intended witnesses: he had placed Smith on call, and asked that body attachments be issued for Tolliver and Wallace. (22RT 976.) Various prosecution witnesses testified, including Lewis, who recanted his prior statement to have seen the shooting. (22RT 1043.) Greer initially told the prosecutor that he would not testify due to fear of appellant and other gang members, but ultimately testified. (22RT 1108-1110.)

Proceedings resumed on November 17, 1998. (23RT 1174.) The bailiff informed the court that he had attempted to speak to appellant, but appellant was "not communicating at all." (23RT 1174.) The parties discussed the prospect of appellant testifying on his own behalf. (23RT 1292.) Judge Cheroske stated that appellant would only be permitted to testify over a live video feed, and that they would ensure that it did not appear that appellant was testifying from a cell. Appellant would be able to

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[20] Far from showing favoritism to the prosecution, Judge Cheroske angrily chastised the prosecutor for failing to ensure that a videotape would play properly in court. (20RT 784-785.)

[21] In the letter, appellant indicated his conditional desire to plead guilty to all charges, alleged various constitutional violations, and claimed that he had behaved "courteously" during the proceedings. (39CT 11523-11526.)

hear the questions over a speaker. Judge Cheroske noted that appellant's testimony would be halted immediately if he attempted to disrupt the trial, or "inject error into the proceedings." (23RT 1292-1293.) Judge Cheroske directed Hauser to speak to appellant and find out his wishes. (23RT 1294.)

After a break, Hauser informed the court that appellant said he wanted to testify, but that appellant also said he would not answer Hauser's questions. The bailiff reported that appellant also said to Hauser approximately, "[I] should have taken the opportunity downstairs . . . in front of the original panel of 400 - - to slit your throat." (23RT 1295-1296.) Judge Cheroske, using a live video feed, spoke to appellant and told him that the lawyers were present. Appellant responded, "I don't have a lawyer." (23RT 1296.) Judge Cheroske asked appellant if he wished to testify on the next day, and the following exchange occured:

> [Appellant]: You know what I'm sitting here for. It's obvious, self-explanatory.
>
> The Court: I don't understand what you mean.
>
> [Appellant]: Self-explanatory, meaning it explains it for itself.
>
> The Court: Does that mean - - excuse me. Does that mean that you're going to testify?
>
> [Appellant]: That's right.
>
> The Court: You understand that if you testify, it's going to be a question and answer procedure. Mr. Hauser will ask the questions, and then you'll respond.
>
> Do you understand and agree?
>
> [Appellant]: Oh, yes, we understand it. We know how the proceedings supposed to work, but it don't seem to be functioning well in this courthouse.

(23RT 1297.) Judge Cheroske warned appellant that if he acted improperly, the court would terminate questioning immediately, and deem appellant to have waived his right to testify. Judge Cheroske asked appellant if he understood. Instead of answering, appellant stated that the court had violated various rules. (23RT 1291-1298.) The following exchange occurred, during which appellant indicated that he would attempt to disrupt the proceedings:

> The Court: Are you going to follow those rules?
>
> [Appellant]: I'm going to do what I think is best on my own behalf.
>
> You know, if I write the rules - - I understand you trying to set up criteria how you want me to operate.
>
> The Court: Do you understand what I said to you, sir?
>
> [Appellant]: I understand what you would like me to do.
>
> The Court: It's not what I'd like you to do. It's what you will do, Mr. Johnson.
>
> [Appellant]: I understand what you would like me to do, and there is no need for no further discussion. Let's wait until tomorrow and see what's going to happen.
>
> The Court: Do you understand what is going to happen - -
>
> [Appellant]: We will go forward, sir.
>
> You have a nice day, Judge Cheroske.

(23RT 1299.) Judge Cheroske asked appellant if he would communicate with Hauser. The following exchange ensued, during which appellant again indicated that he would disrupt the proceedings:

> [Appellant]: It ain't nothing to discuss with us.
>
> The Court: Well, you understand he's the one who is going to be asking you the questions?

[Appellant]: It doesn't matter.

The Court: Will you be able to answer his questions?

[Appellant]: It's irrelevant. We'll see what goes on tomorrow. Let's talk about it tomorrow.

The Court: No, sir, we're going to talk about it now.

[Appellant]: I don't want to even discuss it. I wish to testify on my behalf. There's nothing else to talk about therefore until I violate any type of order before the court. The Court of Appeal will assist, so you can't deny me.

I am not even going to answer any more of your questions. I choose to speak on my own behalf. I'm quite sure you're going to grant that.

So you have a nice day, Judge Cheroske.

(23RT 1299-1300.) Judge Cheroske again warned appellant, saying that if he misbehaved, he would "never have an opportunity to testify before the jury." (23RT 1301.) Hauser advised appellant not to testify. Appellant left the view of the video camera, ending his participation in the discussion. (23RT 1301-1302.)

The parties continued to discuss appellant's testimony. Hauser stated that he did not want appellant to testify: "I would prefer that he not testify. I don't believe he's going to cooperate with me at all. And I don't think it's going to help his case." Judge Cheroske stated that the decision lay with appellant, that they would start questioning, but terminate it if appellant did something improper. Hauser suggested that they hold, "a little test run, out of the presence of the jury, just to see if he is going to cooperate." "I will just ask a few preliminary questions. And if it goes fine, then I'd like to pause and have the jury come back in." (23RT 1302.) Judge Cheroske agreed to follow Hauser's suggestion. (23RT 1303.) The parties expected

the presentation of evidence to conclude on the following day. (23RT 1303.)

Proceedings resumed on November 18, 1998. (23RT 1308.) Hauser expressed concern that Smith, Wallace, and Tolliver were not present, and also noted that Tolliver had refused to speak to the defense investigator. The prosecutor volunteered to stipulate that Tolliver was unavailable despite the defense's diligent efforts. After the parties discussed at length the procedure they would use to put Tolliver's prior testimony into the record, Tolliver arrived with Smith. She was unapologetic for being late. (23RT 1308-1310, 1317, 1336.)

Hauser called Smith as appellant's first witness. (23RT 1339.) After Smith stated that she married appellant in January 1998 (23RT 1340), the following exchange ensued, leading to the jury being removed form the courtroom:

> [Hauser]: Now going back to September 26th of 1996, where were you living at that time?
>
> [Smith]: First of all, I'd like to state for the record that - -
>
> The Court: You don't state anything unless you're asked a question. So just sit back and relax.
>
> [Smith]: - - that you guys are not working for my husband, and you're not representing him.
>
> The Court: All right. That's it.

(23RT 1340-1341.) Judge Cheroske excused the jurors, admonished Smith, noted that she appeared to think the matter was funny, and warned her that she would be taken to jail if she misbehaved again. (23RT 1341.) After a brief intermission, Smith was permitted to resume her testimony. Judge Cheroske instructed the jury to disregard the statements quoted above. (23RT 1343.) Smith testified that she discussed the case regularly with

appellant, and had also discussed it with Dorothy and Joyce Tolliver. (23RT 1357-1358.)

After Smith's testimony concluded, the parties discussed the remainder of the case outside the presence of the jury. Hauser's investigator, Thornton, stated that he had spoke to Wallace 35 minutes ago, and offered to drive her to court. Wallace said she had a ride. However, she was still not in court and lived only 20 minutes away. (23RT 1360.)

The parties then discussed appellant's testimony. Judge Cheroske noted the concern he shared with counsel, "as to what sort of damage, irreparable damage, Mr. Johnson might be able to cause at this, the end of our second jury trial." (23RT 1361.) Accordingly, Judge Cheroske explained that they would do the following: identify themselves to appellant; Hauser would ask appellant "where were you living on the day of the crime"; they would evaluate appellant's response; and then they would decide whether to permit appellant to testify over the video feed to the jury. (23RT 1362.) The feed was activated and the attorneys identified themselves. No mention was made of the jury. (23RT 1363-1364.) The following exchange ensued:

> [Hauser]: Mr. Johnson, back on September 26th of 1996, where were you living?
>
> [Appellant]: First of all, I wish to greet the jury.
>
> Good morning to y'all.
>
> And I apologize for not being able to be present at my own so-called trial, but it's beyond my control.
>
> First of all, you do not represent my interests and never have.
>
> And all three of you attorneys work together. Everything you got going is totally illegal, and I'm totally opposed to it.
>
> [Hauser]: Is that where you live?

The Court: Did you hear the question?

[Appellant]: Excuse me?

[Hauser]: Where do you live?

[Appellant]: You do not represent my interest and never have.

What y'all doing is illegal.

You have never tried to do nothing to benefit me.

Y'all all working together.

I oppose what's going on.

I'm not illiterate, neither am I dysfunctional (sic). It shouldn't be conducted this way.

This is reasonable doubt, ladies and gentlemen, what's going on in this trial.

[Hauser]: So you don't want to testify. Is that what you're saying?

[Appellant]: You do not represent my - - I would appreciate if y'all read that letter I filed to the court Monday as a form of protest to what's going on to the jury to let them know that I'm not fooled or blind to what's going on.

This is a concerted effort to intentionally dump me in that courtroom, ladies and gentlemen. Consider that.

[Hauser]: Mr. Johnson, this is your chance. Now, are you going to testify or not?

[Appellant]: You do not represent my interest and never have, Mr. Hauser. I do not need to talk to you.

[Hauser]: Does that mean, "No"?

[Appellant]: You have not - - what about the tapes and everything y'all have to show that these witnesses was lying?

Y'all knew they was lying and tried to withhold that evidence. That's discriminatory in nature, and what y'all doing is a crime.

[Hauser]: Are you going to answer my questions?

[Appellant]: Do you understand that you are committing a crime?

You do not represent my interests and never have.

The Court: All right. Mr. Johnson, I take it then by your comments that you do not intend to follow the normal witness rules of question and answer, and you will continue to make these kind of comments.

Is that what you're going to do?

[Appellant]: Yes, Judge Cheroske.

(23RT 1364-1366.) Judge Cheroske informed appellant that the jury was not present, and ruled that appellant would not be permitted to testify.[22] (23RT 1366-1367.) As Wallace had still not arrived, the court announced the lunch break. (23RT 1368.) After the break, Wallace appeared and testified as appellant's last witness. (23RT 1371.)

After the prosecution completed a brief rebuttal case, the parties discussed an instruction regarding appellant's absence. Hauser objected to the court telling the jury that appellant had "voluntarily absented himself." Citing section 1043, subdivision (b)(1), Judge Cheroske stated that the instruction was accurate and appropriate because appellant had, through his actions, chosen to be absent during the proceedings.[23] Hauser expressed

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[22] In making the ruling, Judge Cheroske cited *People v. Hayes* (1991) 229 Cal.App.3d 1226, and *People v. Arias* (1996) 13 Cal.4th 92. (23RT 1367, 1407.)

[23] Section 1043 provides in the pertinent part:

(a) Except as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial.

(b) The absence of the defendent in a felony case after the trial has commenced in his presence shall not

(continued...)

concern that the jury would believe that appellant had escaped the court's jurisdiction, but Judge Cheroske responded that the jury would be instructed not to allow the matter to influence deliberations. (23RT 1401-1404.) Thereafter, Judge Cheroske read the jury instructions to the jury, including the following,

> Defendant Cedric Johnson has voluntarily absented himself from these proceedings. This is a matter which must not in any way affect you in this case.
>
> In your deliberations, do not discuss or consider this subject. It must not in any way affect your verdicts or findings you may be asked to make in connection with your verdicts.

(23RT 1422.) The parties gave closing arguments on the following day, and did not refer to appellant's absence. (24RT 1441, 1474, 1504, 1556.)

On November 30, 2009, the jury returned verdicts, finding appellant guilty as charged.[24] (24RT 1610.) The parties discussed the penalty phase. Hauser noted that he had continued to attempt to speak to appellant on a nearly daily basis. However, appellant refused to leave his cell and go to the attorney/client room. (24RT 1620-1621.) As to evidence, Hauser opposed presentation of evidence regarding threats appellant made against him. Hauser contended that although the statements may have been made

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(...continued)

> prevent continuing the trial to, and including, the return of the verdict in any of the following cases:
>
> (1) Any case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom.

[24] It is unknown how long it took the jury to reach those verdicts, since they had greater difficulty reaching verdicts as to codefendant Betton. (24RT 1633-1640.)

in a loud voice, they were privileged as between attorney and client. Judge Cheroske ruled that evidence of the threats would be excluded because there was no evidence that they had placed Hauser in sustained fear. (24RT 1638-1639.)

Proceedings resumed on December 1, 1998. Codefendant Betton requested a new attorney, refused to wear change into plainclothes for the trial as to the prior conviction allegations, and also refused to allow himself to be fingerprinted. (25RT 1649-1654.) While discussing the penalty phase, the prosecutor noted that one of his witnesses had refused to come to court. (25RT 1688.) Hauser stated that he had spoken to various of appellant's relatives, and expected some of them to come to court to testify. (25RT 1692.) Appellant refused to leave his cell. (25RT 1685.) The prosecutor presented penalty phase evidence, as described in the Statement of Facts. Hauser noted that appellant's brother had come to court, but had since left without explanation. (25RT 1740.) Hauser called psychiatrist Dr. Cherkas to testify on appellant's behalf. (25RT 1741.) Thereafter Hauser stated that he had no further witnesses for the day, although he had expected witnesses to be in court. (25RT 1752.) Hauser noted that appellant's mother refused to testify. (25RT 1758.) Hauser further stated that he did not want appellant to testify. Judge Cheroske concluded that no further discussion of the matter was needed since appellant had not told anyone that he wanted to testify at the penalty phase. (25RT 1760.) The prosecutor noted that he was also having difficulty finding a witness to testify regarding another murder appellant had allegedly committed. (25RT 1757.)

Proceedings resumed on December 2, 1998. (25RT 1762.) Hauser stated that he spoke to appellant's brother, Paul Johnson, on the previous evening. Paul stated that he had left the courtroom because he had become very emotional. Paul also indicated he would come to court and testify.

However, Paul had failed to show up. Judge Cheroske stated that he would personally attempt to secure Paul's presence, and stated that he would he would direct the jurors to have lunch, and hope that Paul arrived to testify. (25RT 1770-1772, 1777-1778.) The prosecutor suggested that they make a final effort to find out if appellant wished to testify. Judge Cheroske directed Hauser to speak to appellant. (25RT 1779.) After an intermission, a bailiff informed the court that when asked if he wished to speak to Hauser about testifying, appellant answered, "that he doesn't want anything to do with Mr. Hauser or anything to do with the trial." (25RT 1780.) Hauser told the court that he had spoken to Paul's girlfriend, and the girlfriend told him that Paul refused to speak to him. (25RT 1781.) Thereafter, the parties gave their closing arguments. Hauser minimized the relevance of appellant's attack against him in the jury assembly room. (25RT 1798.)

On the following day, the jury recommended the death penalty. (25RT 1816-1818.) Appellant refused to come to court to hear the verdict. (25RT 1821-1822.)

The sentencing hearing was held on December 18, 1998. (25RT 1824.) The proceedings were initially delayed because appellant was writing a statement. Eventually, he was brought to court in "full restraints." (25RT 1826-1827.) Appellant criticized the proceedings, and described his own behavior as "courteous." (25RT 1839.) He said he wished to handle his own appeal. (25RT 1843.) And he threatened Judge Cheroske and the attorneys, saying, "What you gon' do when I get out? You and I both know I'm getting out. All you lawyers." (25RT 1848.)

On appeal, appellant opposed the extensions of time his attorney requested to file the opening brief.

B. Appellant's Rights Were Not Violated

As noted, appellant's claim is that Judge Cheroske was biased against him. (AOB 22-55.) Appellant's claim and various sub-claims are

addressed in detail below. But initially, the claim is absurd on its face, as demonstrated by appellant's interactions with various other judges below. During the proceedings below, appellant appeared before five judges in addition to Judge Cheroske.

Judge Haynes noted that appellant had accused her of "railroading" him. (1CT 11-12.)

Judge Brown granted appellant pro per status, and then revoked it in the same hearing in light of appellant's misbehavior. (1CT 26-31.)

Appellant attempted to disqualify Judge Wu as biased. The motion was denied. (1CT 219, 232; 1RT 67-69, 80, 108-109.)

Appellant called Judge Morgan "old and a racist," and accused his grandfather of being racist (2RT 370), and repeatedly hurled profanity at Judge Morgan including, "suck my dick" (6RT 1420, 9RT 2071, 16RT 3498, 3501). Judge Morgan excluded appellant's girlfriend from the courthouse (6RT 1419), had appellant removed from the courtroom on one occasion (2RT 371), and ordered that appellant wear a stun belt throughout the proceedings in light of the danger he posed to courtroom security (2RT 379). Judge Morgan made a finding that appellant was intentionally attempting to inject error into the proceedings (6RT 1347-1348), and in denying appellant's request to represent himself, explained, "this man is not capable of conducting his own trial. He would turn the trial into a total circus" (16RT 3502).

Appellant called Judge Gale and Judge Gale's parents racist and told Judge Gale, "Suck my dick." (16RT 3510.) Noting that appellant was not wearing "the belt," Judge Gale ordered the bailiff to ensure that he was wearing one in the future. (16RT 3510.) Judge Gale also directed the bailiff to bring a "muzzle" for appellant's next court appearance. (16RT 3514.)

Thus, appellant's claim that Judge Cheroske was biased against him is absurd on its face. Appellant did his best to disrupt the proceedings. Judge Cheroske performed admirably in working to insure that The People, appellant, and codefendant Betton received a fair trial, despite appellant's relentless efforts to disrupt the proceedings. Appellant's claims are discussed in detail below.

1. Judge Cheroske Acted Within His Discretion In Denying Appellant's Motion After Appellant Stated That He Would Not File A Motion Supported By An Affidavit

Citing an incident that occurred before the first trial, appellant contends that Judge Cheroske demonstrated bias against appellant by the manner in which Judge Cheroske responded to appellant's motion to disqualify Hauser as standby counsel. Appellant's characterization of the record is that appellant made an appropriate oral motion in court, supported the motion with a written motion, and Judge Cheroske demonstrated bias by denying the motion without having read it. (AOB 27-28.) However, the record actually indicates that Judge Cheroske read the motion, attempted to explain to appellant what sorts of allegations would be needed in an appropriate motion, and ultimately denied the oral motion because appellant stated that he had no intention of filing a new motion.

On January 8, 1998, appellant filed a motion to disqualify Hauser. (1CT 210.) At the time, Judge Wu was presiding over the matter. (1RT 76.) Judge Wu was unable to consider the motion because appellant also filed a motion to disqualify Judge Wu. (1CT 219; 1RT 105.) The motion to disqualify Judge Wu was denied by Judge Hom because the motion "on its face discloses no legal grounds for disqualification . . . ." (1CT 233.) The matter was transferred to Judge Cheroske, and on February 10, 1998, Judge Cheroske stated that he had read the various motions filed by appellant. (1RT 120.) Judge Cheroske addressed some of appellant's

motions, although not the motion to disqualify Hauser, and noted that he did not understand at least one of appellant's motions. (1RT 129-130.) On February 18, 1998, Judge Cheroske announced that he was appointing Hauser as standby counsel. Appellant repeatedly objected, but Judge Hauser explained that whether or not Hauser "even participates" in the case would depend entirely on appellant's behavior. Appellant continued to object. Judge Hauser instructed appellant to stop interrupting, and invited appellant to file a written motion detailing his grounds for opposing Hauser's status, alleging specific facts supported by an affidavit signed under the penalty of perjury. Appellant stated that he had no intention of filing more motions on the point. Accordingly, Judge Hauser overruled the objection. (1RT 148-152.)

Thus, appellant's thesis is based on a faulty foundation - - that Judge Cheroske did not read the January 8 motion. Contrary to appellant's claim, the record indicates that Judge Cheroske did read the motion - - Judge Cheroske expressly said he had read appellant's motions. (1RT 120.) What actually happened on February 18 was Judge Cheroske attempted to *help* appellant by explaining what a meritorious motion would include. The January 8 motion filed by appellant was filled with unsupported accusations, vague allegations of misconduct, and complaints that did not show good cause for granting appellant's motion. (1CT 210-216.) Appellant refused to file a new motion. Accordingly, Judge Cheroske acted within his discretion in denying appellant's motion to disqualify Hauser. This is particularly true because by that point in the proceedings, it was obvious that appellant had no intention of following the rules of court and attempting to advance only legitimate legal arguments.

Additionally, appellant's January 8 motion, which was filed before Hauser was appointed standby counsel, simply did not address the situation as it existed on February 18. Judge Cheroske was appropriately interested

only in a motion that would address the merits of Hauser being standby counsel, and reasonably concluded that a motion filed before Hauser was made standby counsel could not possibly address the relevant issue.

Furthermore, appellant's argument is that Judge Cheroske refused to listen to him. However, appellant exhibited extremely discourteous and manipulative behavior with every judge he appeared before, as well as with his attorney.[25] He also accused codefendant Betton's attorney of conspiring against him. (1RT 213-214.) Such behavior would not be tolerated from an attorney, and Judge Cheroske was not required to tolerate it from a pro per defendant, either.

Finally, appellant had ample opportunities to argue that Hauser should be replaced, and made those arguments at every opportunity. Those arguments were rejected by Judge Morgan. (2RT 503; 3RT 584-585, 594-600, 612-618, 741-743, 5RT 1057-1070, 6RT 1347-1348, 10RT 2347-2348.) One such exchange was illustrative - - appellant accused Hauser of lying about the law. Judge Morgan invited appellant to offer a specific example. Appellant refused to do so. (3RT 596-600.)

In sum, the record refutes appellant's claim that Judge Cheroske did not read his motion, appellant has made no showing that anything about Judge Cheroske's ruling on the motion to disqualify was improper, and cannot possibly show prejudice since Judge Morgan repeatedly heard and rejected his request to remove Hauser from the case. Indeed, the only reason it became necessary for Hauser to represent appellant at trial was appellant's own relentless misconduct. For all of these reasons, appellant's first claim is meritless.

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[25] He has also opposed motions filed by his attorney in the instant appeal.

2. The Fact That Judge Cheroske Denied Appellant's Request For Funds In Open Court Did Not Establish That Judge Cheroske Was Biased

As to funds for pro per defendants, then-existing section 987.9,[26] provided:

> In the trial of a capital case or a case under subdivision (a) of Section 190.05, the indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of an application, a judge of the court, other than the trial judge presiding over the case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

Citing that section, appellant contends that Judge Cheroske donstrated bias against him by denying a request for funds in open court. (AOB 28-29.) However, there was no violation of the section, and even if there was a technical violation, it did not demonstrate bias.

Appellant made numerous requests for funds. On November 14, 1997, appellant requested $10,000 in funds. Judge Wu denied the claim in open court after appellant refused to file a supporting motion. (1RT 22-25.) On December 16, 1997, appellant requested $50,000 for "all types of experts." In open court, Judge Wu directed appellant to file a motion, and awarded appellant $40. (1RT 64-71.) On February 10, 1998, appellant

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[26] Section 987.9 was amended in 1988. The same language is now section 987.9, subdivision (a).

appeared before Judge Cheroske, requested funds, and falsely asserted that Judge Wu had never provided any. Judge Cheroske noted the prior order that awarded funds, and invited appellant to file a motion. (1RT 138-141.) On February 18, 1998, appellant repeated his request for $50,000, apparently relying on a motion he filed on December 16, 1997.[27] Appellant asked that the request be heard ex parte, but Judge Cheroske denied the request in open court, and directed appellant to file a motion supported by "specifics." Judge Cheroske awarded appellant an additional $40. (1RT 160-162.)

Appellant's complaint is that Judge Cheroske's act of denying the request for funds in open court demonstrated bias in that it violated section 987.9. First of all, there was no violation of the section. Section 987.9 provides that requests for funds should be confidential. Indeed, the statute provided that even "[t]he fact that an application has been made shall be confidential and the contents of the application shall be confidential." But appellant brought up the motion in open court. Judge Cheroske did *deny* the request in open court, but he did not disclose the contents of the motion. The fact that appellant had requested funds was not news to the prosecution - - appellant had already stated in open court that he wanted $50,000 for experts. (1RT 64-71.)

Thus, appellant's claim is not entirely clear. If his claim is that Judge Cheroske revealed confidential information, then his claim is simply factually erroneous. Appellant revealed the information himself. If his claim is that Judge Cheroske should have held an in camera hearing to allow appellant to explain his request, then the claim is meritless. No such hearing was required because appellant had failed to satisfy section 987.9's

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[27] A motion for funds does not appear to be contained in the record and is not cited by appellant in his opening brief. (See AOB 28-29.)

requirement that an "application for funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense." Appellant has not cited any such affidavit, much less contended that it justified his request for $50,000.

At worst, Judge Cheroske committed a hyper-technical violation of section 987.9 by telling appellant in open court that he would reconsider a request for funds if supported by a proper motion as defined in section 987.9. But any such hyper-technical violation does not signal any judicial bias, especially in the context of responding to an issue raised by appellant in open court. There was no need to hold a hearing because no motion filed by appellant indicated a need for a hearing. And there was no need to announce the denial of funds in camera to protect the confidentiality of appellant's request because appellant had already publicized his request, the amount of money requested, and the fact that it was for experts. For all of these reasons, appellant's claim is meritless. (See generally *People v. Alvarez* (1996) 14 Cal.4th 155, 236-237 [any misconduct on part of judges in discussing confidential application for funds made by defendant did not require reversal]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1133-1134 [same]; see generally *People v. Madrid* (1985) 168 Cal.App.3d 14, 18-19 [*Marsden* hearings need not necessarily be out of the prosecutor's presence when no confidential information will be disclosed].)

3. No Bias Was Demonstrated When Judge Cheroske Ordered Appellant To Be Briefly Removed From The Courtroom

Appellant contends that Judge Cheroske demonstrated bias during the proceedings leading to appellant's brief removal from the courtroom on February 19, 1998. (AOB 29-32.) Respondent does not agree with appellant's interpretation of the record, and submits that appellant's claim is meritless.

The parties appeared before Judge Cheroske on February 19, 1998. (1RT 165.) Judge Cheroske called the case, and the following exchange occurred, culminating in appellant's removal from the courtroom:

> The Court: The defendants are present. The District Attorney is present. The stand-by counsel for Mr. Johnson is present. And - -
>
> [Appellant]: I object to - -
>
> The Court: Oh, sit down, Just be quiet. It's not time for you to object.
>
> [Appellant]: I object to stand-by counsel.
>
> The Court: Let me tell you something right now. You're in the wrong place, partner, to start your antics, because I'm going to find good cause real shortly - - if you continue to do the interruptions, destroy the courtroom decorum, I'm going to order that you wear a React Belt.
>
> Now, do you understand me?
>
> [Appellant]: Your honor, I, for the record - -
>
> The Court: You're a pro at this.
>
> [Appellant]: I have not did anything outrageous. I can object to anything you say. That is the law. You can show me - -
>
> The Court: I'm going to give you five, and then you're out of here.
>
> One, two, three - - are you going to keep talking or am I going to talk?
>
> [Appellant]: No, your honor, speak.
>
> I'm letting you know - -
>
> The Court: Fine. Remove him.
>
> [Appellant]: Let the record reflect - -
>
> The Court: Let the record reflect you're through the door.

[Appellant]: The record reflect he violating the oath he has swore.

I can speak. I can object.

The Court: Yes, you certainly can.

I wouldn't allow a lawyer to get by with what you're doing. I won't let you do it.

You heard what I have to say?

[Appellant]: Yes, sir.

I will continue to do that.

(1RT 165-166.) Appellant was removed from the courtroom. (1RT 166.) Appellant was allowed to return to the courtroom a short time later and was permitted to make legal argument. (1RT 177-181.) He was also admonished for continuing misbehavior. (1RT 184, 186, 190.)

The foundation of appellant's claim is that Judge Cheroske acted improperly by "not allowing [appellant] to complete his well-founded objection to Judge Cheroske's reference to Hauser as 'stand-by counsel for [appellant],' given that the day before Judge Cheroske carefully explained to [appellant] that Hauser did not represent [appellant] at all, but actually represented the court as standby counsel . . . ." (AOB 31.) There are several problems with this assertion.

First, appellant ignores the fact that he interrupted Judge Cheroske to make the objection. As the previously-quoted colloquy demonstrates, Judge Cheroske told appellant that he needed to sit down because "[i]t's not time for you to object." (1RT 165.) The problem arose not because Judge Cheroske refused to allow appellant to speak, but because Judge Cheroske refused to allow appellant to violate the rules of courtroom decorum.

Second, what appellant *actually* objected to below was that Hauser was standby counsel. Appellant is now claiming that he was actually

asserting a legitimate, nuanced legal argument that although Hauser could remain as standby counsel, he should not be referred to as standby counsel *for appellant*. But that is simply not the objection appellant made below. As he did at essentially every appearance, appellant objected to Hauser's role in the proceedings. And consistent with his behavior before and after February 19, appellant made the objection in a rude manner designed to interrupt the proceedings. Appellant's claim is based on the assertion that he made an objection that was appropriate in the manner in which it was presented, and legitimate in terms of content. But both of those assertions are proven false by the record.

Furthermore, appellant criticizes Judge Cheroske for removing him from the courtroom and for calling him a "pro" at being disruptive and referring to him as partner. (AOB 31.) But Judge Cheroske was simply accurately describing appellant's behavior. By February 19, appellant had amply demonstrated that he intended to disrupt the proceedings at every opportunity. Most notably, Judge Brown granted and revoked appellant's pro per status in one proceeding. (1CT 30-31.) Judge Cheroske's view of appellant was shared by the numerous judges that appellant appeared before, and their shared view of appellant as disruptive and dangerous was amply supported by the record. (See generally *Illinois v. Allen* (1970) 397 U.S. 337, 343 [90 S.Ct. 1057, 25 L.Ed.2d 353] [trial judges confronted with disruptive defendants "must be given sufficient discretion to meet the circumstances of each case," and can remove disruptive defendants after appropriate warnings].) Additionally, the court's use of the word "partner" was not disparaging on its face and did not reflect any bias. (See generally *Liteky v. United States* (1994) 510 U.S. 540, 555 [114 S. Ct. 1147, 127 L. Ed. 2d 474] ["judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge."]; *People v. Chong*

(1999) 76 Cal.App.4th 232, 241-243 [repeatedly admonishing defense counsel in jury's presence did not amount to judicial misconduct].)

Appellant also complains that Judge Cheroske did not honor appellant's "full right to be heard." (AOB 31.) But again, this simply ignores the record. Appellant interrupted Judge Cheroske, continued to interrupt him, and thoroughly established that he had no intention of abiding by the common rules of courtroom decorum. Judge Cheroske was not required to allow appellant the opportunity to advance arguments at will. Moreover, appellant was allowed to return to the courtroom and to advance legal argument. Appellant's claims are meritless.

4. Judge Cheroske Appropriately Warned Appellant That He Would Revoke His Pro Per Status If He Continued To Misbehave

On February 23, 1998, Judge Cheroske warned appellant that if he continued to misbehave, his pro per status would be revoked. Isolating a few sentences from the admonition, appellant contends that Judge Cheroske demonstrated bias. (AOB 32-35.) Like the claims discussed above, this claim is meritless and simply does not accurately reflect what occurred below.

The appearance on February 23 began with Judge Cheroske noting that he had asked appellant to fill out and sign a pro per advisement form, because appellant had not yet been asked to do so. (1RT 193.) Judge Cheroske discussed the form with appellant, noting that appellant had not filled out certain lines. (1RT 193-195.) Judge Cheroske then orally admonished appellant regarding the risks of self-representation, and responsibility of behavior. As to behavior, Judge Cheroske stated, "The pro per is entitled to no special indulgence from the court and must follow all technical rules of substantive law, procedure and evidence in making motions, presenting evidence, conducting voir dire, and argument." (1RT

195.) In giving that advisement, Judge Cheroske noted that he was giving the admonition as it was recommended by the Court of Appeal in *People v. Lopez* (1977) 71 Cal.App.3d 568, 572 (*Lopez*). (1RT 195.) Appellant stated that he understood. (1RT 196.) Judge Cheroske then addressed codefendant Betton. Appellant interrupted Judge Cheroske twice. (1RT 198.)

Judge Cheroske said to appellant,

> You know, you've read the form that I've given you to sign, you've listened to the admonitions that I've given you, and by your statements, you've been advised of these rules and regulations regarding pro pers and their behavior many times.
>
> I'm aware of the fact that you represented yourself in prior cases, as a matter of fact, as a pro per. So I think you know what the rules are clearly as to pro pers. But I just want to clear the air between you and I at this point in time. And I want to do that based on some incidences that we've had already in our short relationship where you, in my opinion, were disruptive in that you were talking over me, you would not stop talking when I asked you to do so, and that you made personal attacks on the prosecutor in the case.
>
> Here's what I want to get straightened right now. I know that you're intelligent. I know that you know everything that there is to know probably about the pro per status. I think you've got a pretty good grasp of what the law is. And so that we don't have any misunderstandings - - you have dealt with probably eight or - - maybe even a dozen different judges in your career as a pro per.
>
> The appellate courts in their decisions involving a pro per seem to go into great detail with regard to commending trial judges for their infinite patience in dealing with pro pers who are disruptive, who don't follow protocol, and are just - - are just difficult to deal with.
>
> I frankly don't understand why an appellate court would ask a trial court to have to put up with anything from a pro per. And let me tell you why.

All of these cases tell us that a pro per is to be treated the same as an attorney and you're to conduct yourself as an attorney. And I accept that.

I don't - - I don't allow attorneys to interrupt. I don't allow attorneys to be disruptive. I don't allow attorneys to call their opposition names, tell them that they're liars, that sort of thing. I just don't do that. It doesn't matter to me if it's the most famous attorney in the State of California or a pro per. I figure you're all equal standing as it relates to following the rules. That's my opinion.

Now that means to me that this is the only hearing you're ever going to have as to whether or not you're behaving in a fashion that would be disruptive and would cause me to revoke your pro per status. Let me explain in detail.

And I'm going to order a copy of this transcript, because I want you to keep it with you. I want you to keep it with you throughout the rest of this trial.

We won't have any more hearings about behavior or anything to do with it. This is it. In the event that you come into this courtroom and you do things which I conclude are disruptive, that you're not following the protocol as a lawyer would, I don't intend to warn you. I don't intend to threaten you. I don't intend to just treat you with kid gloves and sit back and let you rant and rave on over me. I wouldn't do that for a lawyer. If a lawyer did that to me, I've got sanctions that I could impose. But I don't have those sanctions available to you.

So I want you to know from this point on that you will behave like a lawyer. In the event that you do not, sir, don't make any mistake about it - - I'm different than any of the other judges you've dealt with as a pro per - - make it clear to you, I would revoke your pro per status in a heart beat. And there will be no hearing about it. That's how it is going to happen.

I don't sit here and talk to lawyers every time they come in on a case, every time they have a motion. I don't have to tell them, "Now, be good; don't yell; don't scream; don't call other people names; don't be disruptive." I'm not going to do it with you, because you are now your own lawyer.

> So all of this by way of saying to you from this point on, you act like a lawyer. You act just like Mr. Taylor here does, and you act just like [the prosecutor], and just like Mr. Hauser, and all of the other attorneys you've dealt with.
>
> If you do that, we're just going to get along fine; and this case will just go along well. And we'll handle all the motions that come along, and then we'll pick a jury; and we'll have a trial. If it gets out of hand, you know what I'm going to do. And we won't go over this ever, ever again.

(1RT 199-201.)

Appellant responded that he would continue to be "verbally aggressive," had "conducted [himself] in the most courteous manner" in the proceedings to date, and intended to continue calling the prosecutor a liar. (1RT 202-203.)

Isolating a few sentences from the extensive warnings given by Judge Cheroske, and ignoring the fact that the warnings were given after he repeatedly interrupted the court, appellant argues that Judge Cheroske demonstrated bias because (1) he improperly stated that appellant's pro per status could be revoked simply for not behaving "like a lawyer"; (2) he improperly stated that he could revoke his status without holding a "hearing"; and (3) threatened to revoke appellant's status for pretrial misbehavior when a court can only take such action when there is an indication that such misbehavior would continue at trial. (AOB 33-34.) These claims are all meritless.

Judge Cheroske did not simply vaguely advise appellant to behave "like a lawyer." Rather, Judge Cheroske had appellant sign an extensive admonition form (1CT 265-269), admonished appellant in the manner suggested by the Court of Appeal in *Lopez*, and gave specific examples of what sort of behavior would not be tolerated (yelling, insulting other attorneys, and interrupting the court). There was nothing inappropriate about the admonishment and indeed, appellant does not appear to be

contending on appeal that a pro per defendant is entitled to interrupt a judge, yell in the courtroom, and call other attorneys insulting names. Such behavior would amount to serious, obstructionist courtroom conduct warranting termination of self-representation. (See generally *People v. Butler* (2009) 47 Ca.4th 814, 825 [trial court may terminate self-representation by a defendant who engages in serious and obstructionist misconduct]; *People v. Carson* (2005) 35 Cal.4th 1, 9 ["A defendant acting as his own attorney has no greater privileges than any member of the bar."].)

Also meritless is appellant's complaint that Judge Cheroske was biased in warning him that, if his misbehavior warranted such action, Judge Cheroske would terminate his pro per status without any further hearing. First of all, nothing about the statement demonstrates bias. Judge Cheroske was doing his best to give appellant a stern warning to behave. Obviously, such a warning was necessary - - even having his rights revoked earlier in the proceedings had not caused appellant to change his behavior. And even after being warned about behavior on February 23, appellant twice interrupted Judge Cheroske. Far from showing bias, Judge Cheroske's thorough admonition reflected a serious attempt to warn appellant about the importance of his behavior if he wanted to continue to represent himself. (See, e.g., *People v. Pena* (1992) 7 Cal.App.4th 1294, 1309-1310 [court may order removal of disruptive defendant who has been warned of that consequence for disruptive behavior]; *People v. Harris* (1920) 45 Cal.App. 547, 552-553 [no error where, in the jury's presence, judge threatened to have a "gag" put on the defendant].)

Second, appellant's claim is based on a faulty premise - - that *People v. Carson* (2005) 35 Cal.4th 1 stands for the proposition that a trial court may not revoke a defendant's pro per status without providing "notice, an opportunity to be heard, and a decision before an impartial hearing body . . .

." (AOB 34.) *Carson* does not stand for that proposition at all. *Carson* was concerned with a situation where a trial court revoked a defendant's pro per status based solely on *out of court* misconduct. In such a case, this Court noted that the trial court "may need to hold a hearing or may want to solicit the parties' respective arguments . . . and any evidentiary support" because there is unlikely to be "a contemporaneous memorialization" in the reporter's transcript. (*People v. Carson*, *supra*, 35 Cal.4th at p.11.) For example, in *Carson*, it was unclear as to exactly what the defendant had done, and since that information was not known, it could not be determined whether any misconduct "threatened the core integrity of the trial." Accordingly, the Court remanded the matter for a hearing to better establish what the defendant had done. (*People v. Carson*, *supra*, 35 Cal.4th at p. 13.) In making that ruling, the Court specifically distinguished the matter before it from a situation where a defendant's pro per status is revoked due to *in court* misbehavior:

> In a case of in-court misconduct, the record documenting the basis for terminating a defendant's *Faretta* rights is generally complete and explicit, without the need for further explanatory proceedings, because there is a contemporaneous memorialization either by the court reporter's recording events as they transpire in the courtroom or by the trial court's describing them for the record.

(*Id.* at p. 11, citations omitted.) Far from supporting appellant's claim, *Carson* directly refutes it. (See, e.g., *People v. Pena*, *supra*, 7 Cal.App.4th at pp. 1309-1310 [once warnings are give, court may order removal of disruptive defendant without further hearing].)

Appellant's third argument is similarly meritless. Since a trial court may appropriately deny self-representation in the first instance because of serious pretrial misbehavior (see, e.g., *People v. Welch* (1999) 20 Cal.4th 701, 735 [trial court appropriately denied defendant's request to represent himself on account of pretrial misbehavior]), it naturally follows that it may

properly advise a defendant that such misbehavior in the future will warrant revocation of self-representaion. Judge Cheroske demonstrated no bias by warning appellant of that fact. Appellant's claims are all meritless.

5. Judge Cheroske Demonstrated No Bias In Rejecting Appellant's Motion to Continue

Appellant contends that on February 23, 1998, and March 5, 1998, Judge Cheroske rudely denied his meritorious motion to continue the proceedings. (AOB 36-41.) Like the claims above, respondent disagrees with appellant's view of the record, and submits that the claim is meritless.

Initially, appellant's claim should not be viewed in a vacuum. On several occasions before March 5, he behaved inconsistently, complaining that the proceedings were moving too slowly, while at the same time, doing his best to delay the proceedings.

For example, on October 10, 1997, appellant complained that his speedy trial rights had been violated. (1CT 24.) Yet later in the same hearing, appellant stated that he was not prepared to be arraigned. (1CT 26.) Judge Brown asked appellant if he wished to continue the arraignment so that he could file motions alleging the various claims he had mentioned. Despite previously stating that he did not want to be arraigned, appellant answered that he did not wish to waive time. Appellant then gave a series of nonresponsive answers to Judge Brown's questions as to scheduling, which culminated in her revoking his pro per status. (1CT 29-31.) Urged on by appellant, codefendant Betton then refused to waive time even though Taylor stated that he was not prepared to proceed. (1CT 32-34.)[28]

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[28] On September 26, 1997, codefendant Betton refused to waive time. Deputy Public Defender Ary Degroot, then representing codefendant Betton, indicated puzzlement at codefendant Betton's position, since an hour earlier, codefendant Betton had said he would waive time. (1CT 6.)

On November 10, 1997, appellant attempted to request a continuance on behalf of codefendant Betton. Judge Wu informed appellant that he could not do so. (1RT 4-8.)

On November 14, 1997, Judge Wu asked appellant if he wished to continue the matter. Appellant refused to give a straight answer, accusing the court of putting him in an "awkward position." The matter was continued. (1RT 26-30.)

On February 9, 1998, appellant complained that the various motions he had filed had not yet been heard. Judge Wu explained that he could not rule on the motions while appellant's motion to disqualify had been pending. (1RT 105.)

Also on February 9, 1998, codefendant Betton announced that he was ready for trial. Appellant said he was "nowhere near" ready. (1RT 109-111.)

On February 10, 1998, appellant asked for a continuance, and said he would not be ready for trial in a week. (1RT 131-132, 136.)

On February 18, 1998, the prosecutor stated that he wished to continue the scheduled hearing regarding an informant until the following day. Appellant objected to the "delays tactics [sic]." Judge Cheroske noted that appellant was the one who had delayed the proceedings and added, "it's my information that you physically would refuse to come into the courtroom to even be arraigned. And finally, when you were finally brought into the courtroom, your plea was entered for you by another judge." (1RT 154-156.) Appellant denied refusing to come to court, and asserted that he had simply disapproved of the way security had attempted to handcuff him. (1RT 157.) Next, appellant complained that he was not receiving adequate time in the law library. Judge Cheroske noted that such a complaint was at odds with appellant's earlier suggestion that the proceedings were moving too slowly. (1RT 158.)

On February 23, 1998, appellant filed a "Notice of Motion to Continue." (2SCT 183-187.) The motion asked to "continue the above-entitled case" (2SCT 183), but did not specify a date to which the proceedings should be continued. The declaration filed in support of the petition stated that a continuance was warranted "based on seriousness of the charges, and on the necessary investigation that need to be conducted on 'every' aspect of the case. The declarant is not prepared to proceed." (2SCT 185.) The declaration offered no further details. The points and authorities filed in support of the motion included the heading, "Continue The Case," and the argument contained therein, noted a trial court's discretion to "continue a trial date." (2SCT 186.)

During the court appearance on February 23, 1998, appellant accused Hauser and Taylor of rushing to hold the preliminary hearing as part of a "sinister" "complicity." (1RT 213-214.) Taylor refuted the assertion, stating, "Steve Hauser and myself, when we got this case, we specifically asked [appellant] to give us more time to do the preliminary hearing. It was at his insistence that we did the preliminary hearing at the time that we did." (1RT 214.) Subsequently, Judge Cheroske admonished appellant for interrupting him and otherwise behaving without appropriate manners. (1RT 215-220.) During one exchange after appellant had argued a point at length, Judge Cheroske stated, "Well, keep it within reason here. I'm trying to give you as much latitude as I can. I'm not going to give you any latitude any more than I would anybody else who is a lawyer here." Appellant responded, "Your honor, I know you have had lawyers in this court for days on motions, so don't tell me that. We've been in here about 20 minutes." (1RT 217.)

Next, Judge Cheroske addressed appellant's motion to continue and asked what exactly appellant hoped to continue. The following exchange occurred:

The Court: No, I mean, what is it you're trying to continue?

[Appellant]: What is you talking about, what I'm trying to continue?

The Court: That's two.

[Appellant]: It's obvious.

You asked me what I'm trying to continue. I told you.

It's obvious.

The Court: You're being disruptive. You are attacking the court personally. I don't take that from lawyers. You do it, and you're going to lose the pro per status. I thought you understood all that.

(1RT 220-221.) Instead of answering the court's question, appellant asserted that he needed continuance "based on the seriousness of the charges and the necessary investigation that need to be conducted on every aspect on everything in here, witnesses, documents, testimony." Judge Cheroske clarified, "All I'm trying to ask you is what you want to continue. [¶] The trial date?" Appellant answered affirmatively, stated that he had no estimate as to when he would be prepared for trial, and said he would be better able to answer the question in two weeks. Judge Cheroske granted the continuance until March 5. (1RT 221-222.) In granting that continuance, Judge Cheroske stated that trial would not start "on March 6," but otherwise made no indication as to when he expected trial would begin. (1RT 222-223.) Judge Cheroske stated that on March 5, he expected that appellant would be better able to explain when he would be prepared for trial. (1RT 223.)

The parties next appeared before Judge Cheroske on March 5, 1998. Judge Cheroske denied appellant's continuance motion as being without adequate justification. (1RT 233.) Appellant insisted that he had alleged adequate grounds in support of the continuance in the motion. Judge

Cheroske repeated that the motion was denied. (1RT 233-234.) Thereafter, the parties discussed setting a trial date. Judge Cheroske stated that he would pick a date, and require that all evidentiary motions be filed at least ten days in advance of that date. (1RT 237.) Before a date could be agreed upon, appellant misbehaved and had his pro per status revoked. (1RT 238-239.) The matter was continued (1RT 242-243), and jury selection began on April 22, 1998 (2RT 403).

Appellant complains that Judge Cheroske demonstrated bias by failing to properly consider the motion to continue, failing to allow appellant to be heard, and misleading appellant by saying on February 23 that trial would not begin on March 6, and then on March 5, denying the motion to continue. (AOB 36-41.) These claims are all meritless.

As to the complaint that Judge Cheroske did not give appellant an adequate opportunity to be heard, the record demonstrates otherwise. Although appellant's motion to continue cited law regarding discretion to continue a trial date (2SCT 186), he did not provide any specific facts to explain how much more time he needed. (See § 1050, subd. (i) [continuance must be limited to "that period of time shown to be necessary by the evidence considered at the hearing"].) Judge Cheroske simply asked appellant to clarify the motion. Appellant chose to respond with hostility rather than simply answering the question. Appellant also refused to cite grounds for the motion, insisting that his motion had been adequate. (1RT 233-234.) Thus, appellant was not denied the right to be heard. He specifically said that he had nothing more to add on the topic.[29]

Appellant's complaint that Judge Cheroske misled him is similarly meritless. On February 23, Judge Cheroske continued the matter to March

[29] Appellant does not argue that Judge Cheroske abused his discretion in denying the motion to continue.

5, stated that trial would not begin on March 6, and specifically stated that he expected on March 5 that appellant would attempt to justify a continuance. At no time on February 23 did Judge Cheroske state when he expected trial would begin. He simply stated that it would not start on March 6. On March 5, when the parties considered the trial date, Judge Cheroske did deny appellant's inadequate motion to continue (appellant never did state a date in which he expected to be prepared), but he did not set March 6 as the trial date. Rather, he was about to set a new trial date when appellant's misbehavior disrupted the proceedings. Clearly the new date was not going to be March 6 since Judge Cheroske specified that evidentiary motions would have to be filed at least 10 days before the date he intended to pick. Indeed, trial did not begin until April 22. Thus, appellant's complaint that Judge Cheroske misled him is simply disproved by the record.

6. Judge Cheroske Demonstrated No Bias In Revoking Appellant's Pro Per Status

Appellant's pro per status was initially revoked by Judge Brown (1CT 30-31), reinstated, and eventually revoked again by Judge Cheroske (1RT 238). Appellant's claim appears to be that there was no legal basis supporting the revocation, and accordingly, that by revoking appellant's pro per status, Judge Cheroske demonstrated that he was biased. Appellant's claim is meritless.

The foundation of appellant's claim appears to again be the assertion that Judge Cheroske failed in his duty to hold a "full hearing" before revoking appellant's pro per status. But as explained above, there is no such requirement, and the case cited by appellant is specifically contrary to his position. (*People v. Carson*, *supra*, 35 Cal.4th at p. 11.) Regardless of whether the court's funding ruling was correct, the court was entitled to revoke self-representation when appellant failed to heed prior warnings that

revocation would occur if he continued to engage in serious disruptive behavior.

Appellant also seems to argue that there was no showing that he would be disruptive at trial. In making that argument, appellant seems to claim that the sole reason his status was revoked was because on March 5 he accused Judge Cheroske of "misrepresenting the law." (AOB 44.) That argument simply does not accurately reflect what occurred at trial. As detailed in the factual background above, appellant thoroughly demonstrated that he would do his best to disrupt the proceedings. Indeed, Judge Cheroske was the second judge to revoke his status. Appellant's behavior on March 5 was the final straw in causing Judge Cheroske to revoke his status, not the sole reason. Some of the notable moments of appellant's misbehavior included (1) when his pro per status was revoked by Judge Brown, appellant stated, "I don't care, I won't come back into the courts" (1CT 30); (2) in response to a ruling concerning codefendant Betton, appellant said, "Man, get rid of him like I told you, man, get rid of that fucking sucker" (1CT 32); (3) appellant accused Judge Brown of being "prejudiced, totally" (1CT 55-59); (4) appellant said to Judge Wu, "You're making a frivolous statement like you always do. This is an abuse of power" (1RT 9-11); (5) appellant accused Judge Wu of being "clearly biased" (1RT 22-25); appellant called Judge Cheroske a "Star Chamber" (1RT 160-162); (6) when warned of his behavior, appellant continued to speak out and was removed for the courtroom (1RT 165-166); and (7) when warned of his behavior, appellant said he would continue to be "verbally aggressive" and to call the prosecutor a liar (1RT 202). Ultimately, Judge Cheroske revoked appellant's pro per status after appellant accused him of misrepresenting the law. (1RT 238.) Appellant's behavior through the proceedings thoroughly demonstrated that he would continue to disrupt the proceedings and threaten the integrity of the trial. Indeed, appellant's

efforts to disrupt the proceedings intensified and continued until sentencing. There was no abuse of discretion in the trial court's revocation of appellant's self-representation, and no indication whatsoever that the ruling was the product of bias rather than appellant's pervasive, repetitive, obstructionist misconduct. (See *McKaskle v. Wiggins* (1984) 465 U.S. 168, 173 [104 S.Ct. 944, 79 L.Ed.2d 122] ["accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol"]; *Faretta v. California* (1975) 422 U.S. 806, 834, fn. 46 [95 S.Ct. 2525, 45 L.Ed.2d 562] ["trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct"]; *People v. Carson*, *supra*, 35 Cal.4th at p. 12 [trial court's decision to revoke defendant's pro per status is reviewed for abuse of discretion]; *People v. Clark* (1992) 3 Cal.4th 41, 116 [defendant has no right to turn "the trial into a charade in which a defendant can continually manipulate the proceedings in the hope of eventually injecting reversible error into the case no matter how the court rules"].)

7. Judge Cheroske Demonstrated No Bias In Making Every Effort Possible To Permit Appellant To Testify, Notwithstanding Appellant's Intense Efforts To Disrupt The Proceedings

Appellant contends that Judge Cheroske demonstrated bias by the manner in which Judge Cheroske tested whether appellant would use his opportunity to testify to disrupt the proceedings. (AOB 45-53.) However, far from demonstrating bias, Judge Cheroske made every effort possible to permit appellant to testify, notwithstanding appellant's intense efforts to disrupt the proceedings.

Appellant's extreme efforts to disrupt the proceedings are described in detail above. Most notably, appellant attacked Hauser, timing the attack so

that it would be seen by 400 prospective jurors, and thus cause a mistrial. By the end of the defense case in the third trial, it was abundantly clear that appellant would do anything possible to disrupt the proceedings. Indeed, Judge Morgan concluded that appellant was intentionally attempting to inject error into the proceedings (6RT 1347-1348) and hoped to "turn the trial into a total circus" (16RT 3502).

Nevertheless, Judge Cheroske hoped to respect appellant's right to testify. He sent Hauser to ask appellant as to whether he wished to testify. Appellant told Hauser that he wished he had killed Hauser when he had the chance. (23RT 1295-1296.) Judge Cheroske then directly asked appellant whether he wished to testify. The exchange between Judge Cheroske and appellant is discussed in detail above. After appellant stated that he wished to testify, Judge Cheroske warned appellant that if he acted improperly, the court would terminate questioning immediately, and deem appellant to have waived his right to testify. Judge Cheroske asked appellant if he understood. Appellant indicated that he had had no intention of answering Hauser's questions, and terminated the discussion. (23RT 1299-1302.) Hauser stated that he did not want appellant to testify because he feared appellant would not respond to his questions and would behave in a manner that would prejudice his case. (23RT 1302.)

At that point, Judge Cheroske faced a difficult decision. Appellant wanted to testify, and it was clear that he intended to testify in an inappropriate manner. Hauser did not want appellant to testify, but Hauser's opinion could not override appellant's desire. (See generally *People v. Nakahara* (2003) 30 Cal.4th 705, 717 ["Defendant had 'a fundamental right to testify in his own behalf, even if contrary to the advice of counsel.'"].) The decision came at the conclusion of the third trial on the matter, and thus significant time and resources had been devoted to the charges. Thus, there were three options for Judge Cheroske.

First, Judge Cheroske could have simply allowed appellant to testify. That option was particularly unappealing because it was virtually certain that appellant would behave in a manner that could cause a mistrial, and would continue his pattern of misbehaving in an attempt to disrupt the proceedings, and in the process damage the jury's view of him and the defense generally. Selection of this option was likely to lead to a violation of Judge Cheroske's duty "'to preserve the order of the court and see to it that all persons whomsoever, including the defendant himself, indulge in no act or conduct calculated to obstruct the administration of justice.'" (*People v. Merkouris* (1956) 46 Cal.2d 540, 556, citation omitted [no judicial misconduct where court threatened to gag defendant]; accord *People v. Slocum* (1975) 52 Cal.App.3d 867 , 883 [judge has the "responsibility to guard against outbursts by the defendant or others, or any conduct calculated to obstruct justice."]; see generally § 1044 ["It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."].)

Second, Judge Cheroske could have ruled that appellant had forfeited his right to testify by his behavior to date and the indication that he intended to try to cause a mistrial. (See, e.g., *People v. Hayes* (1991) 229 Cal.App.3d 1226, 1233-1234 [appropriate to exclude defendant from trial on account of his misbehavior; by his misbehavior, defendant forfeited right to testify]; see also *United States v. Nunez*, 877 F.2d 1475, 1478 (10th Cir. 1989) [defendant's right to testify may be waived by disruptive behavior; citing older Ninth Circuit cases]; *State v. Chapple* (Wash. 2001) 36 P.3d 1025, 1034 ["great deference is to be given to a trial judge's decision that a defendant had waived his right to testify through his or her conduct."]; *State v. Irvin* (Mo. Ct. App. 1982) 628 S.W.2d 957, 960 [A

defendant has no more right to take the stand and "testify in a way degrading to the judicial system than he has to rob a bank or to assault a constable."].) Judge Cheroske clearly did not want to make that ruling without giving appellant a chance to demonstrate he would not abuse his right to testify by turning it into another opportunity for disrespecting and disrupting the proceedings.

And third, Judge Cheroske could have opted to try one last time to determine whether appellant would behave appropriately. Judge Cheroske chose the third option and adopted Hauser's suggestion that they start appellant's testimony out of the presence of the jury, "ask a few preliminary question," see what happened, and then decide how to proceed. (23RT 1302-1303.) But before actually testing appellant's intentions, Judge Cheroske was reminded once more as to how incredibly unlikely it was that appellant would testify appropriately. Hauser called Smith, appellant's wife, who began her testimony by refusing to answer Hauser's questions, and instead accused Hauser of not "representing" appellant. (23RT 1340-1341.) Judge Cheroske admonished Smith for her behavior, and noted that she appeared to find the admonishment funny. (23RT 1341.)

After Smith's testimony, the parties discussed appellant's testimony a final time. Judge Cheroske stated that he would pursue Hauser's suggestion and have Hauser ask appellant a few preliminary questions in order to gauge appellant's intentions. Judge Cheroske explained that he feared, "what sort of damage, irreparable damage, Mr. Johnson might be able to cause at this, the end of our second jury trial." (23RT 1361-1362.)

The video feed was activated and the attorneys identified themselves. Notably, no one said to appellant that the jury was present. (23RT 1363-1364.) Hauser asked appellant where he lived at the time of the shootings. Instead of answering, appellant asserted that Hauser was working against

him, and that the proceedings were illegal. The following exchange occurred:

> The Court: All right. Mr. Johnson, I take it then by your comments that you do not intend to follow the normal witness rules of question and answer, and you will continue to make these kind of comments.
>
> Is that what you're going to do?
>
> [Appellant]: Yes, Judge Cheroske.

(23RT 1364-1366.) Judge Cheroske informed appellant that the jury was not present, and ruled that appellant would not be permitted to testify.[30] (23RT 1366-1367.)

Appellant characterizes those facts as demonstrating that Judge Cheroske was biased against him. But the record demonstrates the exact opposite. Appellant did his best, over and over, to try to disrupt the proceedings. Despite appellant's clear intent to continue in those efforts, Judge Cheroske tried to accommodate his desire to testify. There was no bias demonstrated. And although appellant complains that Judge Cheroske deceived him, there is nothing in the record indicating that Judge Cheroske or anyone else told him that the jury was present on the day his intentions were tested. Moreover, to the extent appellant was deceived, he was deceived because Judge Cheroske wanted to give appellant the opportunity to show he would not be disruptive if allowed to testify. For appellant to complain about Judge Cheroske's intentions or behavior is absurd. (See generally *People v. Manson* (176) 61 Cal.App.3d 102, 160-162 [no error where court, concerned that mistrial could be caused by defendants'

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[30] In making the ruling, Judge Cheroske cited *People v. Hayes* (1991) 229 Cal.App.3d 1226, and *People v. Arias* (1996) 13 Cal.4th 92 (23RT 1367, 1407.)

testimony, and facing situation where defendants intended to testify in the narrative, insisted that defendants first testify at an in camera hearing].)

In sum, appellant's claims are based on an inaccurate and unreasonably self-serving interpretation of the record. He has demonstrated no bias violating his federal constitutional rights. (See generally *United States v. Nunez*, *supra*, 877 F.2d at p. 1478 [no error in excluding defendant from trial; "In the final analysis, it boiled down to whether [the defendant], or the district judge, was going to conduct the trial."].)

II. JUDGE CHEROSKE ACTED WITHIN HIS DISCRETION IN EXCLUDING APPELLANT FROM THE TRIAL IN LIGHT OF APPELLANT'S RELENTLESS EFFORTS TO DISRUPT THE PROCEEDINGS

As described in the factual background set forth in Argument I, *ante*, appellant was excluded from the courtroom after his pattern of disruptive conduct culminated in a physical attack on his trial counsel in the presence of potential jurors who had been summoned for his retrial. After his removal, appellant rejected the option of listening to the proceedings. He now advances the following claims: (1) appellant's federal constitutional rights were violated because Judge Cheroske did not hold a hearing attended by appellant in which appellant could have attempted to convince Judge Cheroske to not exclude him (AOB 62-66); (2) appellant's due process rights to notice of the hearing, right to be present with counsel, and right to present evidence and cross-examine witnesses were violated by Judge Cheroske's failure to provide him a new attorney for such a hearing (AOB 66-69); (3) excluding appellant violated his federal constitutional rights because the instant case was a capital proceeding (AOB 69-75); and (4) the decision to exclude appellant from trial was erroneous (AOB 78-88). Respondent disagrees. Appellant was excluded from the proceedings after his relentless and intensifying efforts to disrupt the proceedings convinced Judge Cheroske that such action was necessary.

A. Factual Background

As described in detail in Argument I, above, appellant's efforts to disrupt the proceedings started during the first trial, and escalated until culminating with his physical attack on Hauser at the moment appellant was introduced to the 400 prospective jurors assembled for the second trial. After that attack, Judge Cheroske ruled that appellant would not be permitted to return to the courtroom, and would instead be permitted to listen to the proceedings over a speaker in a cell. In making that ruling, Judge Cheroske explained,

> In my opinion, there is no other possible solution to prevent such outbursts again by Mr. Johnson.
>
> I also am making a finding that his actions today were intentional. I suspect that they were planned for one more time to try to disrupt the proceedings and delay it.

(17RT 25.)

On a subsequent court date prior to trial, Judge Cheroske further explained his ruling. He summarized appellant's misconduct to date, and concluded that permitting appellant to enter the courtroom would "seriously jeopardize the security of the court." Judge Cheroske said any promise by appellant to behave would "simply be a subterfuge to gain access to the courtroom and allow him to continue his offensive, violent and outrageous conduct." (17RT 64-65.) Judge Cheroske stated that the only way in which appellant would be permitted to enter the courtroom would be while wearing shackles on his arms and legs, since the stun belt had failed to control his behavior. (17RT 65.) However, Judge Cheroske believed that proceeding with appellant in restraints would prejudice the jury against appellant *and* codefendant Betton by suggesting that appellant had "the predisposition to commit violent crimes." Judge Cheroske believed that the resulting prejudice caused by such visible restraints would be greater than

prejudice caused by excluding appellant from the courtroom and admonishing the jury to disregard his absence. (17RT 66.) Appellant subsequently wrote to a letter to Judge Cheroske, and claimed therein that he had behaved "courteously" during the proceedings, but had been "disrespected" because if his persuasive legal skills. (39CT 11525.)

Appellant repeatedly stated that he did not wish to listen to the proceedings. (See, e.g., 17RT 45-48, 56.) And appellant's misbehavior continued. For example, he threatened to kill Hauser and his family (17RT 48); made so much noise while in lockup that he disrupted proceedings in the courtroom (17RT 51); said he would "spit all over" Hauser if given the chance (20RT 635); and said he wished he had killed Hauser in front of the 400 prospective jurors (23RT 1295-1296). Judge Cheroske indicated willingness to permit appellant to testify over a video feed, but concluded that appellant had forfeited that opportunity through additional misconduct. (23RT 1292-1302, 1366-1367.) Judge Cheroske reiterated that he feared, if given the chance, appellant would find a way to cause a sufficiently serious disturbance as to necessitate another mistrial. (23RT 1361.)

At the sentencing hearing, appellant again described his own behavior as "courteous." (25RT 1839.) He also threatened Judge Cheroske and the attorneys, saying, "What you gon' do when I get out? You and I both know I'm getting out. All you lawyers." (25RT 1848.)

B. There Was No Error in Excluding Appellant From the Hearing on Whether he Should be Barred From the Courtroom

Appellant contends that his federal constitutional right to due process was violated because Judge Cheroske did not allow him to be personally present at the October 19, 1998, hearing when the court announced that appellant would be excluded from the courtroom for the trial. Appellant contends that if he had been allowed to be present at such a hearing, he

could have used the opportunity to convince Judge Cheroske that he would cause no further disturbances, or could have justified his behavior in attacking Hauser, or could have convinced Judge Cheroske to sever his trial from codefendant Betton's. (AOB 62-66.) Respondent disagrees.

The general rule is that "a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." (*Illinois v. Allen* (1970) 397 U.S. 337, 343 [90 S.Ct. 1057, 25 L.Ed.2d 353].)

The fact that appellant was not present for Judge Cheroske's pronouncement that he would be excluded from the courtroom did not amount to a federal constitutional violation. As to presence, the general rule is that the Due Process Clause of the federal constitution guarantees a criminal defendant the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure. That right does not apply when the defendant's presence would be useless, or the benefit but a shadow. (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745 [107 S.Ct. 2658, 96 L.Ed.2d 631]; *People v. Panah* (2005) 35 Cal.4th 395, 443.)

Appellant theorizes that his continued presence would have been valuable because he could have used the opportunity to convince Judge Cheroske that he would cause no further disturbances, or could have justified his behavior in attacking Hauser, or could have convinced Judge Cheroske to sever his trial from codefendant Betton's. (AOB 62-66.) The first problem with this argument is that appellant *did* speak about his behavior - - he wrote to Judge Cheroske and claimed that he had behaved "courteously" during the proceedings, but had been "disrespected" because of his persuasive legal skills. (39CT 11525.) Thus, the record directly

refutes appellant's new claim that he would have apologized for his behavior or offered some sort of compelling explanation that would have convinced Judge Cheroske to overlook appellant's extensive misconduct.

Second, appellant is now complaining that his federal constitutional rights were violated simply because he was not present at the moment Judge Cheroske *initially* announced that he would be excluded from the courtroom on October 19, 1998. But appellant was offered the option of listening to the proceedings and rejected that option. Appellant's choice to not participate in the proceedings makes a mockery of his claim that the mere fact that he was excluded from one hearing in the trial amounted to a federal constitutional violation. This is particularly true because after appellant stated that he did not want to listen to the proceedings (17RT 45-48, 56), Judge Cheroske further explained his ruling that appellant would not be permitted in the courtroom (17RT 64-65). Appellant at no time suggested that he wanted to explain his behavior. Indeed, appellant continued to misbehave at every opportunity, such as making so much noise in lockup that he disrupted the court proceedings, refusing to cooperate with Hauser's questions when called as a witness, and threatening Judge Cheroske at sentencing.

Third, appellant's claim that he could have convinced Judge Cheroske to overlook his behavior is belied by the record. Appellant disrupted the proceedings in increasingly extreme ways until Judge Cheroske had no reasonable option but to exclude him from the courtroom. As described in Argument II.E., below, Judge Cheroske acted well within his discretion in issuing the ruling. Nothing said by appellant would have changed his mind. (See *People v. Avila* (2006) 38 Cal.4th 491, 598 [defendant's absence at readback did not violate his federal due process rights]; *People v. Waidla* (2000) 22 Cal. 4th 690, 742 [defendant's absence from 17 different "proceedings" did not amount to a federal constitutional violation]; *People*

v. Box (2000) 23 Cal.4th 1153, 1191 [defendant may not have been present at hearing, but later had opportunity to contribute]; *Diaz v. Castalan* (C.D.Cal. 2008) 625 F.Supp.2d 903, 921 [defendant made no showing that his presence at hearing would have had an impact on court's decision to have him shackled]; see generally *United States v. Romero* (9th Cir. 2002) 282 F.3d 683, 689 [no right in federal court to be present for "argument upon a question of law"].)

Finally, any federal constitutional violation was harmless beyond a reasonable doubt. (See generally *Chapman v. California* (1967) 386 U.S. 18, 23 [87 S.Ct. 824, 17 L.Ed.2d 705]; see e.g., *People v. Davis* (2005) 36 Cal.4th 510, 532-533 [defendant's absence from an evidentiary hearing was a harmless violation of his federal constitutional rights]; *United States v. Barragan-Devis* (9th Cir. 1998) 133 F.3d 1287, 1289-1290 [error in not informing defendant and his attorney of juror's question was harmless because defendant could not have convinced trial court to act differently and even if question had been handled differently, it would not have changed the verdict]; *Diaz v. Castalan*, *supra*, 625 F.Supp.2d 921[any error in excluding defendant from hearing as to whether he should be shackled was harmless error].) Nothing said by appellant would have changed Judge Cheroske's mind. Indeed, we know that far from regretting his behavior, appellant believed he had been "courteous," and continued to try to disrupt the proceedings. Moreover, appellant's instant claim that he placed a tremendous value on being present for every moment of the proceedings is proven hollow by the reality that he voluntarily absented himself in a prior criminal trial (1RT 142-144, 2RT 302), absented himself through conduct on multiple occasions in this trial, and repeatedly declined to listen to the proceedings (1RT 241, 246-250, 252, 257-260, 17RT 47-48, 56, 25RT 1821-1822). Indeed, on one occasion, he was *prevented* from leaving the

courtroom. (16RT 3510.) For all of these reasons, appellant's claim must be rejected.

C. Appellant's Misconduct Did Not Require Notice, AFormal Hearing, or New Counsel Before the Court Found Appellant Forfeited His Right to Personal Presence

Building on the claim discussed above, appellant contends that not only was Judge Cheroske required to provide him with notice and a formal hearing before ruling that he would be excluded from the courtroom, but also that Judge Cheroske should have appointed a new attorney to represent appellant. (AOB 66-69.) The first flaw in appellant's claim is that there was no requirement that Judge Cheroske hold a hearing before excluding appellant from the courtroom. Appellant committed the various acts that led to his exclusion from the courtroom in court and on the record. Judge Cheroske personally witnessed much of the misconduct, including the attack on Hauser. Accordingly, there was no need to hold a noticed, formal hearing as appellant contends, which would have afforded him the right to present and cross-examine witnesses. (See *People v. Huggins* (2006) 38 Cal.4th 175, 202-203 [where there was oral outburst by defendant who wanted to be absent from trial, trial court could have ruled that defendant was being disruptive and ordered him removed from the courtroom].)

State v. Lehman (Minn.App. 2008) 749 N.W.2d 76, involved facts extremely similar to the instant case. There, after the prosecutor rested its case, the defendant, who was represented by counsel, personally requested a mistrial and also requested a new attorney. The trial court denied both motions. When the jury was brought back into the courtroom, the defendant physically assaulted his attorney. The defendant and jury were removed from the courtroom. Out of the defendant's presence, the trial court announced that the defendant would be shackled for the remainder of the trial. Appellant was brought back into the courtroom. His attorney

asked to be relieved as counsel. The court granted the request and further determined that the defendant had forfeited his right to counsel. The defendant represented himself (against his own wishes) and was shackled for the remainder of the trial. (*Id.* at pp. 79-80.) On appeal, the defendant challenged the court's rulings and further contended that his federal constitutional rights were violated because the court did not hold an evidentiary hearing before making its rulings, and also made its rulings when he was not present in the courtroom. These claims were all rejected by the Minnesota Court of Appeal. That court concluded that there was no need for a hearing because the relevant conduct occurred in the trial court's presence. (*Id.* at pp. 82-83.) Moreover, any error in making the ruling when the defendant was not present in the courtroom was harmless beyond a reasonable doubt because nothing the defendant could have said would have changed the court's mind. (*Id.* at pp. 85-86.)

Similarly, in *United States v. Leggett* (3rd. Cir 1998) 162 F.3d 237, the district court concluded that the defendant had forfeited his right to counsel after the defendant physically attacked his attorney in the courtroom. On appeal, the Third Circuit concluded that the district court was not obligated to have held an evidentiary hearing before finding that the defendant had forfeited his right to counsel. No such hearing was required because the defendant had committed the misconduct in the district court's presence. (*Id.* at pp. 250-251.)

Here, as in the above-cited cases, there was no need for an evidentiary hearing because the misconduct occurred in Judge Cheroske's presence. And snce there was no need for a hearing, appellant was certainly not entitled to a new attorney at such a hearing.

King v. Superior Court (2003) 107 Cal.App.4th 929, cited by appellant (AOB 66-69), does not hold otherwise. There, the defendant made various physical attacks and verbal threats against a series of

attorneys appointed to represent him. The last attorney appointed to represent the defendant met privately with the trial court and asked the court to conclude that the defendant had forfeited his right to counsel. The court held an evidentiary hearing during which the various attorneys testified to the defendant's misconduct, which had occurred out of the courtroom. During that hearing, the defendant's appointed attorney presented evidence against the defendant and made no effort to argue on his behalf. The trial court ruled that the defendant had forfeited his right to counsel. (*King v. Superior Court*, *supra*, 107 Cal.App.4th at pp. 934-937.) The Court of Appeal reversed, finding that the defendant's due process rights had been violated.

King is inapposite. First, that case was concerned with forfeiture of the right to counsel, and specifically distinguished the issue it faced from the decision to exclude a defendant from the courtroom, which it considered to be a less serious concern. Second, that case involved an evidentiary hearing where the misconduct occurred out of the trial court's presence. Since the hearing required the presentation of evidence, there was a need for the defendant to be represented by counsel who could confront that evidence. Third, the defense attorney in that case actively worked against the defendant. That did not occur in this case. And finally, the Court of Appeal in *King* was concerned because it appeared that the trial court could have chosen an "intermediate" step such as warning the defendant and/or excluding him from the courtroom rather than finding that he had forfeited his right to counsel. Unlike in *King*, and as described in greater detail in Argument II.E., below, there was no intermediate step that Judge Cheroske could have taken in light of appellant's extensive efforts to disrupt the proceedings. Thus, appellant's reliance on *King* is misplaced.

Furthermore, as to the claim that appellant's right to counsel was violated because Hauser worked against him, *People v. Perry* (2006) 38

Cal.4th 302, is instructive. There, the trial court held a hearing to determine whether or not to exclude the defendant's wife and sister-in-law from the proceedings due to disruptive behavior. During the hearing, at which the defendant was not present, the defendant's attorney did not argue that it was appropriate to allow both women to remain in court. Rather, the defendant's attorney warned the court that if both women were excluded, the defendant would likely become extremely disruptive in court and even attack someone. The codefendant's attorney suggested that the court only exclude the wife, and permit the sister-in-law to remain. The court adopted that suggestion. (*Id.* at pp. 310-311.) On appeal, the defendant cited *King* and contended that his federal constitutional rights were violated because his attorney worked against him and because he was not present for the hearing and given the opportunity to advance such an argument. This Court rejected the claims. As to the claim that the attorney had abandoned him, the Court pointed out that there had been no showing of ineffective assistance of counsel or conflict between the defendant and counsel, and no reason to believe that any other attorney would have done anything differently. Moreover, the Court concluded that defense counsel had actually acted in the defendant's best interest in attempting to prevent a situation where the defendant would have disrupted the proceedings and prejudiced his own case. (*Id.* at pp. 314-315; see also *People v. Martinez* (2009) 47 Cal.4th 399, 423 [rejecting claim that defendant's right to be present was violated and that his attorney failed to represent him]; see generally *People v. Catlin* (2001) 26 Cal.4th 81, 163 [defense attorneys are not required to make frivolous arguments].)

As in *King*, appellant has made no showing that Hauser was ineffective or worked against appellant or that any other attorney would have made some sort of compelling argument that would have changed Judge Cheroske's mind. To the contrary, as in *Perry*, Hauser worked to

help appellant, consistently pursuing strategies that he hoped would lessen the possibility that appellant would disrupt the proceedings and prejudice his own case. The instant case is even more favorable than in *Perry* because here Hauser did not characterize appellant as violent. Rather, Hauser repeatedly asserted that he did not take appellant's threats seriously.

To the extent appellant suggests that the court should have appointed new counsel to represent his interests at the hearing because Hauser had a conflict of interest based on concern for his personal safety (see AOB 68), the court was not required to appoint independent counsel. (See *People v. Smith* (1993) 6 Cal.4th 684, 696-697 [defendant is not permitted to force substitution of counsel by his own conduct "that manufactures a conflict"].) Accordingly, appellant's claim must be rejected.

D. A Defendant May Be Excluded From The Courtroom For Misconduct Even In A Capital Case

Citing the 'acute need' for reliable decision-making when the death penalty is at issue (AOB 69), appellant contends that under the federal constitution," a defendant cannot be excluded from the proceedings in a capital case. (AOB 69-75.) Respondent disagrees.

First, in general, a defendant may be excluded from trial if such action if warranted by misbehavior. (*Illinois v. Allen*, *supra*, 397 U.S. at p. 343.) Second, a defendant may be excluded from trial in a capital proceeding. (*People v. Medina* (1995) 11 Cal.4th 694, 737-738 [defendant repeatedly removed from courtroom for disruptive behavior; "Being tried on capital charges does not confer the right to disrupt court proceedings"]; accord *People v. Welch* (1999) 20 Cal.4th 701, 773.) Third, in the appropriate case, a defendant may be excluded from the entirety of a trial. (See *People v. Medina*, *supra*, 11 Cal.4th at p. 738 [capital defendant excluded from entirety of guilt and penalty phases and almost all of jury selection]; *People v. Majors* (1998) 18 Cal.4th 385, 415 [capital defendant "relinquished"

right to be present by threatening to be disruptive].) These authorities plainly establish that even in a capital case, a defendant can forfeit his right to personal presence by engaging in disruptive conduct in the courtroom.

The rule suggested by appellant does not make sense, either. Since appellant does not seem to be disputing a trial court's authority to restrain a defendant, the unstated, but necessary foundation of appellant's claim is that a defendant's federal constitutional rights would best be respected by having him remain in the courtroom, but shackled and gagged so that trial may proceed. Appellant's alternative claim is that a capital defendant's federal constitutional rights are violated whenever he is excluded from the *entirety* of a trial. The necessary foundation of *that* claim is that a defendant's federal constitutional rights are best protected by first having the jury see him physically restrained, then having the jury witness him disrupt the proceedings, and then having the trial proceed in his absence.

In other words, appellant is claiming that the right to be present at trial is the ultimate constitutional right and trumps all other concerns. Initially, this claim ignores the settled law that a defendant does not have the right to be present at all proceedings. Moreover, the right to personal presence, while significant, is only one of several other important trial concerns, such as the defendant's right to the presumption of innocence, a defendant's right to counsel, the trial court's duty to control the proceedings, and the right of the People and any codefendant to a fair jury and a fair trial. In the appropriate case, and as described in greater detail in Argument II.E., below, this was such a case, those other concerns may outweigh a defendant's right to personal presence. (See, e.g., *King v. Superior Court*, *supra*, 107 Cal.App.4th at p. 943 [more appropriate choice would have been to protect defendant's right to counsel, by excluding the defendant from the courtroom]; see generally *People v. Medina* (1995) 11 Cal.4th 694, 738 ["Being tried on capital charges does not confer the right to

disrupt court proceedings."]; *People v. Pigage* (2003) 112 Cal.App.4th 1359 ["We balance a felony defendant's constitutional and statutory right to be present at trial with the society's interest in the orderly process of court"].)

E. Judge Cheroske Appropriately Excluded Appellant From Trial

"'Broadly stated, a criminal defendant has a right to be personally present at certain pretrial proceedings and at trial under various provisions of law, including the confrontation clause of the Sixth Amendment to the United States Constitution, the due process clause of the Fourteenth Amendment to the United States Constitution, section 15 of article I of the California Constitution, and sections 977 and 1043.'" (*People v. Kelly* (2007) 42 Cal.4th 763, 781, citation omitted.)

"'An appellate court applies the independent or de novo standard of review to a trial court's exclusion of a criminal defendant from trial, *either in whole or in part,* insofar as the trial court's decision entails a measure of the facts against the law.'" (*People v. Perry* (2006) 38 Cal.4th 302, 311, citation omitted, italics added.) However, "appellate courts must give considerable deference to the trial court's judgment as to when disruption has occurred or may reasonably be anticipated." (*People v. Welch*, *supra*, 20 Cal.4th at p. 773, citing *Illinois v. Allen*, *supra*, 397 U.S. at p. 343 ["trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case."].)

Here, appellant contends that Judge Cheroske erroneously excluded him from the courtroom. (AOB 75-88.) Respondent disagrees.

Appellant's first argument is that under *Illinois v. Allen* and section 1043, a defendant may not under any circumstance be excluded from trial until after trial has "commenced," and a trial does not actually "commence"

until the jury selection has begun. (AOB 78-80.) As to *Illinois v. Allen*, appellant quotes the following language:

> we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

(AOB 76-77, quoting *Illinois v. Allen*, supra, 397 U.S. at p. 343.) But nothing in *Illinois v. Allen* requires a court to wait until the trial actually commences before it can find a disruptive defendant has forfeited his right to personal presence at trial.

Section 1043 does not support appellant's claim, either. Under section 1043, a defendant is present when a trial "commences" if he is "physically present in the courtroom where the trial is to be held" and "understands that the proceedings against him are underway." A trial court need not wait until after jury selection has begun in order to excuse a defendant under section 1043. Indeed, waiting may cause problems such as encouraging the defendant to be more disruptive, or making more complicated that court's explanation to the jury for why the defendant is no longer present. (*People v. Ruiz* (2001) 92 Cal.App.4th 162, 168-169.)

Arguing otherwise, appellant relies on dictum from *People v. Concepcion* (2008) 45 Cal.4th 77. (AOB 79.) Appellant is certainly correct that, in a footnote in that case, this Court said, "For the purposes of section 1043, a jury trial begins with jury selection. (*People v. Granderson* (1998) 67 Cal.App.4th 703, 709, 79 Cal.Rptr.2d 268 (*Granderson*).) Defendant does not contend otherwise." Because the matter was not at issue in *Concepcion*, this Court did not address the issue of when a trial commences for purposes of the statute, i.e., whether a defendant such as appellant could be found to have forfeited his right to be present at his jury

trial based on a pattern of disorderly, disruptive, and disrespectful misconduct during earlier proceedings courtroom and his threat to continue that misconduct before the jury. Moreover, *Granderson*, which was cited in *Concepcion*, does not actually stand for the proposition that "for the purposes of section 1043, a jury trial begins with jury selection."

In *Granderson*, the defendant was present on the first day of jury selection, but was thereafter absent. He contended on appeal that section 1043 had been violated because trial did not commence under that statute until jury section was completed. (67 Cal.App.4th at p. 706.) The court of appeal rejected the claim and concluded, "for the purpose of section 1043(b)(2), the Legislature intended the word 'trial' in the phrase 'after the trial has commenced in [the defendant's] presence' to include the critical stage of jury selection." (*Id.* at p. 709.) The Court of Appeal at no time stated that trial did not commence *until* jury selection had begun. To the contrary, it indicated that trial commenced even earlier: "a criminal jury 'trial' has 'commenced' *at least* from the time that impaneling the jury begins, regardless of when jeopardy attaches." (*Id.* at p. 708, citation omitted, italics added.)

Thus there is no support for appellant's claim that trial had not commenced at the time Judge Cheroske made his ruling. And as discussed above, *People v. Ruiz*, which thoughtfully addressed the issue, is directly to the contrary. (See also *People v. Howze* (2001) 85 Cal.App.4th 1380, 1391, 1395 [prior to beginning of jury selection, defendant refused to leave cell and come to court, and in doing so, waived right to be present]; *Smith v. Mann* (2d. Cir 1999) 173 F.3d 73, 76 [no federal constitutional requirement that trial "commence" before a defendant is deemed to have waived his right to be present at trial].)

Appellant's second argument is simply an extension of his first - - a defendant may not be excluded from trial unless he disrupts the "trial," and

since trial proceedings had not "commenced" in this case, appellant necessarily did not do anything to disrupt the "trial." (AOB 80.) As explained above, this claim is based on a flawed premise. Under *Ruiz* and the other cases cited above, proceedings had begun in the instant case, and appellant had done his best to disrupt them. Indeed, he had caused a mistrial and created a significant delay in that it took a period of time to obtain another panel of prospective jurors.

Moreover, a trial court need not wait until the defendant cause a disturbance in the trial, as long as there is sufficient evidence to fear that he will do so if given the opportunity. (See, e.g., *People v. Lewis* (2006) 39 Cal.4th 970, 1031-1032 [appropriate to shackle defendant in light of reports of out of court misconduct]; *People v. Medina*, supra, 11 Cal.4th at pp. 730-731 [appropriate to shackle defendant even though decision to shackle was based on defendant's misconduct in another trial and out of court misbehavior].)

Appellant's third argument is that Judge Cheroske was required to and failed to warn appellant that continued misconduct could result in his being permanently excluded from the courtroom. (AOB 80-81.) A similar claim was made and rejected in *People v. Sully* (1991) 53 Cal.3d 1195. There, the defendant was excluded and complained that he had not been given an express warning pursuant to section 1043. In rejecting the argument, this Court found that such a warning had been implied by statements made by the trial court and that an express warning was "unnecessary in view of defendant's actual disruption of the trial and his expressed intention to do so again." (*Id.* at p. 1240; see generally *People v. Majors* (1998) 18 Cal.4th 385, 415 ["The trial court's ability to remove a disruptive or potentially disruptive defendant follows not only from section 1043, subdivision (b)(1), but also from the trial court's inherent power to establish order in its courtroom."]; *People v. Rogers* (1957) 150 Cal.App.2d 403 [noting that

technical application of section 1043 would lead to absurd results unintended by the legislature].)

United States v. Shepherd (8th Cir. 2002) 284 F.3d 965 is also instructive. There, after the close of evidence, but before closing argument, the defendant complained about his attorney's performance. The trial court found the complaint meritless and directed the defendant sit down. The defendant refused. The court ordered him removed from the court. The exchange occurred out of the jury's presence. The defendant did not thereafter return to the courtroom, and was found guilty by the jury. (*Id.* at pp. 966-967.) On direct appeal, the defendant contended that his federal constitutional rights were violated because the trial court never warned him that he could be removed from the courtroom. The Eighth Circuit rejected the claim, finding that the Supreme Court in *Illinois v. Allen* specifically directed that there were no hard and fast rules as to the manner in which a trial court dealt with a disruptive defendant. (*Id.* at pp. 967-968.) The Eighth Circuit further noted that the trial court had acted to prevent the defendant from prejudicing his own case:

> It appears that the trial judge thought that if Shepherd remained in the courtroom his demeanor would harm his case in the eyes of the jury. The trial judge's decision was based on his view that the best way to achieve a just verdict for Shepherd was to remove him. *Allen* recognized that one of the factors a trial judge should consider when choosing a method to deal with an unruly defendant is the effect the method may have on the jury's feelings toward the defendant. *Allen*, 397 U.S. at 344, 90 S.Ct. 1057. We see little need to second-guess the trial judge's decision that removal was the best way for Shepherd to receive a just verdict.

(*Id.* at p. 968; *State v. Hudson* (1990) 574 A.2d 434, 444 [defendants waived right to be present even though "there was no explicit evidence that these defendants knew that the trial would proceed in their absence"]; *United States v. West* (4th Cir. 1989) 877 F.2d 281, 287 [warnings to

codefendant adequately put defendant on notice that he too could be excluded from the courtroom]; see also *Gilchrist v. O'Keefe* (2d. Cir. 2001) 260 F.3d 87, 97 ["At a minimum Supreme Court case law stands for the proposition that, even absent a warning, a defendant may be found to have forfeited certain trial-related constitutional rights based on certain types of misconduct"]; *United States v. Nichols* (2d. Cir. 1995) 56 F.3d 403, 416 ["only minimal knowledge on the part of the accused is required when waiver is implied from conduct"].)

Thus, as the cases cited above explain, neither the federal constitution, nor California statute, are violated simply because a trial court removes a defendant without first expressly warning him that such action could occur. "The manifest purpose of the warning requirement in the statute is to inform a defendant of the consequences of further disruptions so as to allow him a final opportunity to correct his behavior." (*People v. Sully, supra*, 53 Cal.3d at p. 1240.) Here, appellant knew he could be removed from the courtroom if he misbehaved. He had been excluded from the courtroom in a prior trial. (1RT 142-144, 2RT 302.) He had been previously and repeatedly removed from the courtroom in this case by Judge Cheroske and Judge Morgan. (1RT 165-166, 238, 2RT 371, 3RT 605.) He had been warned in general and over and over again about the repercussions he would face if he continued to misbehave, and yet his efforts to disrupt the proceedings only intensified. He had been handcuffed and made to wear a stun belt. Judge Gale opined that he should be made to wear a "muzzle." (16RT 3514.) The bailiff had wanted to have appellant shackled, but Hauser convinced Judge Cheroske to order a stun belt instead. (17RT 20-22.) In this case, as well as a prior proceeding, appellant had for a time refused to come to court unless his demands were met. (2RT 252, 263-265, 302.) He also attempted to leave the court. (16RT 3510.) His wife was excluded from the courthouse by Judge Morgan. (6RT 1419.) In

appellant's presence, Hauser asked Judge Morgan to consider excluding appellant from the trial because he feared that appellant's misconduct would prejudice the jury against him. (6RT 1932.) In sum, appellant received extensive warnings that he could be removed from the courtroom if his continued to misbehave. He had ample opportunity to correct his behavior, but opted not to do so. Indeed, Judge Morgan concluded that appellant's goal was to inject error into the proceedings. (6RT 1347-1348, 16RT 3502.) Appellant's argument is meritless.[31]

Appellant's fourth argument is that there was no showing that he would disrupt the proceedings. In advancing this argument, appellant asserts that (1) a defendant may not be excluded unless he causes a disturbance "during trial"; and (2) the defendant's misconduct makes it "impossible" to conduct the trial. As to the latter argument, appellant suggests that Judge Cheroske could have instead chosen to bind and gag appellant, or allowed appellant to remain and hope that he would behave, or replaced Hauser with a new attorney and hope that action placated him. (AOB 81-86.). These arguments are all meritless.

Initially, appellant's arguments are based on the same flawed premise discussed above. There is no requirement that a trial court wait for a defendant commit misconduct during trial. (*People v. Price* (1991) 1 Cal.4th 324, 406 ["A trial court need not wait until actual violence or physical disruption occurs within the four walls of the courtroom in order to find a disruption within the meaning of section 1043."].) And there is no requirement that a trial judge ignore all other concerns in order to protect a

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[31] Respondent does not concede that appellant was not expressly advised that he could be excluded from the courtroom on account of misconduct. He was admonished at least once off the record, although it is not clear what that admonishment entailed. (2RT 394-395.)

defendant's right to be present at trial. A defendant has no constitutional right to manipulate a trial through misconduct.

On the topic of dealing with a disruptive defendant, *Illinois v. Allen* is instructive. There, the defendant was disruptive in court, threatened to harm the trial judge, and stated that restraints would not prevent him from being disruptive in the future. The trial court excluded the defendant from the trial, allowed him to return when he promised to cooperate, and later excluded him for a significant portion of the prosecution case when he caused further disruption. (*Illinois v. Allen*, *supra*, 397 U.S. at pp. 339-341.) Analyzing the options available to the trial court, the Supreme Court noted that sanctioning the defendant for contempt would likely have proven useless because he faced a far greater sanction if found guilty at trial. It also would have likely proven useless to imprison the defendant for a time and delay the proceedings until he agreed to cooperate because the defendant could actually intend to delay the proceedings in the hopes of discouraging adverse witnesses. (*Id.* at pp. 344-345.) Accordingly, in light of the defendant's behavior, neither excluding him from the courtroom, nor "total physical restraint" would have violated his constitutional rights. (*Id.* at p. 346.) Thus, regardless of whether removing the defendant from his own trial "was the only way" that the "judge could have constitutionally solved the problem he had," there was nothing showing that the "judge did not act completely within his discretion." (*Id.* at p. 347; see also *Foster v. Wainwright* (11th Cir. 1982) 686 F.2d 1382, 1388-1389 [upholding defendant's expulsion from courtroom and noting "[T]he appellate court is not in as good a position as the trial judge to determine the effect a defendant's disruptive conduct may have had on the proceedings. Even though facial expressions, gestures and other nonverbal conduct are often tremendously significant, they cannot be transcribed by the court reporter."]; *United States v. Kizer* (9th Cir. 1978) 569 F.2d 504, 506-507

["Any right Kizer might have had to discharge her attorney did not give her license to disrupt the orderly progress of her trial."]; *State v. Callahan* (N.C.App. 1989) 378 S.E.2d 812, 814 [exclusion upheld where defendant shouted in courtroom and refused to state that he would behave].)

Here, as in *Illinois v. Allen*, Judge Cheroske made appropriate choices in light of appellant's behavior. Appellant acted disruptively before every judge he appeared before in this case, and he acted disruptively in a prior trial. He acted disruptively in the presence of the jury in the first trial (2RT 414, 425, 536, 567, 6RT 1453, 6RT 1934, 9RT 2123-2124), and in the presence of the jury panel initially assembled for the second trial, and when he was called to testify in the retrial. He acted disruptively when he was represented by Hauser, and when he was representing himself. He acted disruptively when he was represented by the public defender (1CT 4), and also when he was represented by attorneys in prior cases (1RT 142-144). He claimed early in the proceedings that the Public Defender had committed misconduct against him (1CT 4), but later asked that the Public Defender be reappointed (2RT 427).[32] Hauser expressed concern that appellant's misbehavior would prejudice the jury against appellant. (6RT 1932.) Taylor also expressed concern that appellant's misbehavior would reflect poorly on codefendant Betton. (6RT 1416-1417.) Appellant's wife disrupted the proceedings, and appellant's friend disrupted proceedings (3RT 602-609). Appellant encouraged their behavior. Appellant's typical response to admonishments about misbehavior was to curse and assert that he would continue to misbehave. Despite being removed from the courtroom repeatedly, he continued to misbehave. He disrupted the proceedings with his voice. And he disrupted the proceedings with

[32] Appellant also opposed the requests for extensions of time filed by his attorney in the instant appeal.

violence. His instant crimes involved great violence committed in front of numerous witnesses, there was at least some indication that he had committed violent acts in the past, and he faced a possible sentence of death.

In sum, the record amply supported Judge Cheroske's (and Judge Morgan's) conclusion that appellant would never stop trying to disrupt the proceedings. Moreover, Judge Cheroske did not simply exclude appellant because he wished to prevent disruption. Rather, Judge Cheroske excluded him because he believed such action was necessary to prevent appellant from prejudicing his own case, and codefendant Betton's right to a fair trial. (17RT 64-66.) Those concerns were expressly shared by both Hauser and Taylor. No constitutional error occurred.[33] As this Court has said, "We generally defer to a trial court's determination as to when disruption from a defendant may be reasonably anticipated. [Citation.] Such deference is particularly warranted where, as here, the likelihood of disruption turns on the credibility of a defendant's own representations to the trial court." (*People v. Majors* (1998) 18 Cal.4th 385, 415.)

Appellant's fifth argument is that his federal constitutional rights were violated because Judge Cheroske never advised appellant that he could return to the courtroom if he was willing to behave appropriately. (AOB 86-87.) This argument is simply a rephrasing of the claims discussed above. As explained, there are no rigid rules controlling a trial court's options in dealing with a disruptive defendant, and the language of section 1043 does not require the judge to provide an express advisement regarding

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[33] Indeed, if Judge Cheroske had instead ruled that appellant would be forced to remain in the courtroom bound and gagged, or even to remain in the courtroom until he had disrupted the proceedings in the jury's presence, then appellant's claim on appeal simply would have shifted to the assertion that *those* choices violated his federal constitutional rights.

reclaiming the right to be present at trial. Here, Judge Cheroske (and Judge Morgan) believed that appellant would never stop trying to disrupt the proceedings. The record overwhelmingly supports that conclusion. Neither the federal constitution, nor California statute, required Judge Cheroske to conduct a daily kabuki ritual where he would ask appellant if he would behave, and instead leave it to appellant to inform the court that he was willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings. (See § 1043, subd. (c)); see generally *United States v. Nunez* (10th Cir. 1989) 877 F.2d 1475, 1478 [no requirement that a defendant receive advisements "*ad infinitum*" regarding the possibility of returning to the courtroom].)

F. Any Error Was Harmless

As explained no error occurred. However, to the extent there was error, it was harmless. As this Court has explained,

> Under the federal Constitution, error pertaining to a defendant's presence is evaluated under the harmless beyond a reasonable doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705. (*People v. Robertson* (1989) 48 Cal.3d 18, 62, 255 Cal.Rptr. 631, 767 P.2d 1109; see *Campbell v. Rice* (9th Cir.2005) 408 F.3d 1166, 1171-72.) Error under sections 977 and 1043 is state law error only, and therefore is reversible only if "'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' (*People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243.)" (*People v. Jackson*, *supra*, 13 Cal.4th at p. 1211, 56 Cal.Rptr.2d 49, 920 P.2d 1254; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 738-739, 60 Cal.Rptr.2d 1, 928 P.2d 485.)

(*People v. Davis* (2005) 36 Cal.4th 510, 532-533; accord *People v. Perry* (2006) 38 Cal.4th 302, 312 ["Erroneous exclusion of the defendant is not structural error that is reversible per se, but trial error that is reversible only if the defendant proves prejudice."].) "Defendant has the burden of demonstrating that his absence prejudiced his case or denied him a fair

trial." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1357, citations omitted.) In *Bradford*, any erroneous exclusion of the defendant from the courtroom during various witnesses' testimony was harmless as the defendant "failed to explain how his attendance during the testimony of [those] witnesses would have altered the outcome of his trial." (*Id.* at p. 1358; see also *People v. Davis*, *supra*, 36 Cal.4th at pp. 533-534 [defendant failed to demonstrate that his absence was prejudicial].)

Any erroneous exclusion was also found harmless in *United States v. Shepherd*, *supra*, 284 F.3d at p. 968. There, the court noted that, "One of the primary advantages of the defendant being present at his trial is his ability to communicate with his counsel." (*Id.* at p. 968, citation omitted.) Since the defendant had been removed due to anger at his attorney and with the court for not replacing that attorney, it was unlikely that the defendant would have communicated with his attorney in such a way as to improve his chances at trial. Thus, any error was harmless. (*Ibid.*)

Here, as in the above-cited cases, any error was harmless. Appellant was excluded from the retrial. At that point, Hauser was well-acquainted with the evidence, as well as appellant's opinion of appropriate strategies to pursue. Appellant had also become increasingly insistent that he would not speak to Hauser. Accordingly, this case is quite similar to *Shepherd*, and any error was harmless. Moreover, Hauser reasonably feared that appellant would prejudice his own case if he remained in the courtroom. Thus, appellant has failed to show that any error caused him prejudice.

III. APPELLANT FORFEITED HIS RIGHT TO TESTIFY

Rearticulating the same claims discussed above, appellant contends that his federal constitutional right to testify was violated by Judge Cheroske's rulings. (AOB 93-124.) Respondent disagrees.

A. Judge Cheroske Appropriately Concluded that Appellant had Forfeited his Right to Testify During the Guilt Phase

A defendant's federal constitutional right to testify may be deemed forfeited on account of the defendant's disruptive conduct. (See, e.g., *People v. Hayes* (1991) 229 Cal.App.3d 1226, 1233-1234 [appropriate to exclude defendant from trial on account of his misbehavior; by his misbehavior, defendant forfeited right to testify]; see also *United States v. Nunez*, 877 F.2d 1475, 1478 (10th Cir. 1989) [defendant's right to testify may be waived by disruptive behavior; citing older Ninth Circuit cases]; *State v. Chapple* (Wash. 2001) 36 P.3d 1025, 1034 ["great deference is to be given to a trial judge's decision that a defendant had waived his right to testify through his or her conduct."]; *State v. Irvin* (Mo. Ct. App. 1982) 628 S.W.2d 957, 960 [A defendant has no more right to take the stand and "testify in a way degrading to the judicial system than he has to rob a bank or to assault a constable."].)

For all of the reasons discussed above, Judge Cheroske appropriately concluded that appellant had forfeited his right to testify during the guilt phase, contrary to appellant's contention. (AOB 94-99.)

Arguing otherwise, appellant repeats the assertions that have been discussed and rejected above - - he should have been given more warnings in the hope that further warnings would change his conduct, or he should have been appointed a new attorney in the hope that a new attorney would have appeased him, or he should have been permitted to testify in the hope that he would behave. (AOB 99-104.) All of those claims are meritless, as discussed in detail above.

Appellant also suggests that the trial court should have spontaneously suggested that appellant's testimony from the first trial be read into the record. (AOB 102-103.) However, it was not the trial court's

responsibility to make such a suggestion, and there is no indication that appellant would have consented to that option. (See generally *State v. Mosley* (Tenn. Crim. App. 2005) 200 S.W.3d 624, 633 [defendant forfeited right to testify on account of his misconduct; "To hold otherwise would reward the defendant for his disruptive conduct by excusing him from cross-examination."].)

B. Apellant Was Not Entitled to a New Attorney to Represent him at a Hearing on Whether he had Forfeited his Right to Testify

Repeating the claim discussed above, appellant contends that his federal constitutional rights were violated because he was not present at the moment the trial court concluded that he had forfeited his right to testify (AOB 106-108), and because he was not appointed a new attorney to represent him at a hearing on the matter (AOB 104-105). Those claims are meritless, as discussed in Arguments II.B.-II.C., above.

C. There Was No Fifth Amendment Violation

Appellant contends that his Fifth Amendment right to remain silent was violated because he was tricked into testifying when he erroneously believed that the jury was present. (AOB 109-112.) First, this claim is forfeited because it was not raised at trial.

Second, there was no violation, let alone a prejudicial one. As explained above, there is no statement in the record in which Judge Cheroske told appellant that the jury was present. Moreover, appellant was neither asked for, nor volunteered any statement that could have been used to prove the truth of the instant charges. Indeed, no effort was made to use his statement at the guilt or penalty phase, a significant distinction from the authorities cit by appellant. (See AOB 110-112.) To the extent appellant's claim is that Judge Cheroske had no authority to explore whether appellant intended to use his opportunity to testify as a means of causing a mistrial,

appellant's claim is meritless as discussed above. Indeed, such an argument is absurd in light of appellant's competing claim that Judge Cheroske did not give appellant enough of an opportunity to state his intentions.

D. Judge Cheroske Appropriately Concluded that Appellant Had Waived His Right to Testify at the Penalty Phase

Appellant contends that Judge Cheroske erred in concluding that he had waived his right to testify at the penalty phase and by excluding from two hearings on whether he would testify. (AOB 112-118.) However, the record indicates that Judge Cheroske was entirely willing to consider allowing appellant to testify at the penalty phase. Hauser did not want appellant to testify (25RT 1760), appellant made no effort to voice a desire to testify, and indeed appellant stated he did not want to testify at the penalty phase (25RT 1780). Accordingly, appellant forfeited this claim, and the record certainly does not support a conclusion that the trial court violated his right to testify. (See generally *People v. Evans* (2008) 44 Cal.4th 590, 600 [appellant forfeited his right to testify at sentencing]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1332-1333 [even though there was some indication of conflict between defendant and defense counsel, trial court was not required to obtain defendant's explicit waiver of the right to testify].)

IV. APPELLANT WAS GIVEN AN APPROPRIATE OPPORTUNITY TO VOICE HIS COMPLAINTS ABOUT DEFENSE COUNSEL

Appellant contends that on July 7, 1998, July 14, 1998, and September 17, 1998 (all dates after his first trial ended with a hung jury), he was given an inadequate opportunity to voice his complaints about Hauser. (AOB 125-143.) Respondent submits that appellant was given an adequate opportunity to voice his complaints where he was permitted to complain

about Hauser on no less than eight separate court dates. Moreover, the record establishes that appellant voiced complaints about Hauser solely as a tactic to disrupt the proceedings.

An indigent defendant who desires new appointed counsel must show that his appointed counsel is constitutionally inadequate. (See generally *People v. Marsden* (1970) 2 Cal.3d 118.) "'[A] *Marsden* hearing is not a full-blown adversarial proceeding, but an informal hearing in which the court ascertains the nature of the defendant's allegations regarding the defects in counsel's representation and decides whether the allegations have sufficient substance to warrant counsel's replacement.'" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 803.)

The record reflects that appellant was given an opportunity on almost every court date during the first trial to voice complaints about counsel. The record also reflects that appellant made *Marsden* motions solely as a means of disrupting the proceedings.

For example, after his pro per rights were revoked for a second time on March 5, 1998, appellant refused to speak to Hauser, and refused to come to court to participate in the proceedings. (1RT 252, 263-265, 300-301.) However, on May 13, 1998, the day jury selection was scheduled to begin, appellant came to court and requested a *Marsden* hearing. Judge Morgan declined to hold such a hearing in light of the timing of the motion. (2RT 365-367.) A short time later on that same day, appellant complained that he had asked Hauser what his strategy was, and Hauser had simply answered that he was going to win. Judge Morgan told appellant that he had had ample opportunity to discuss strategy with Hauser, and that the middle of jury selection was not the appropriate time to do so. (2RT 415.)

On May 19, 1998, appellant claimed that Hauser smelled of marijuana. (2RT 503.) On the following day, Judge Morgan called "absurd" appellant's accusation that Hauser smelled of marijuana. The

prosecutor and Taylor both stated that they had observed nothing supporting appellant's assertion. Hauser denied using controlled substances. (3RT 584-585.) During the discussion, appellant accused Hauser of lying about the law. Judge Morgan asked for a specific example. Appellant responded, "Due process law." (3RT 594.) Judge Morgan asked appellant to elaborate, and offered to hold an in camera hearing. Appellant stated that he had "a lot" of additional examples, but when asked to list them, answered, "I think that's enough." (3RT 596-600.) Judge Morgan invited Hauser to respond to appellant's complaints. Hauser addressed appellant's complaints in detail, and stated that he had discussed the matters with appellant. (3RT 612-615.) Hauser noted that he had tried to work with appellant, and would continue to do so, despite appellant's reluctance to help. For example, Hauser explained that he had asked appellant what type of strategy appellant felt appropriate. Appellant "just laughed and said, 'that's your job.'" (3RT 616-617.)

On May 26, 1998, appellant was once again given an opportunity to voice complaints about Hauser, and accused Hauser of working against him. (5RT 1060-1061.) Judge Morgan invited appellant to list specific examples of ways in which Hauser had worked against him. Appellant cited the following: (1) Hauser told appellant his argument about severance was meritless; (2) Hauser told him his trial strategy was to cross-examine the prosecution's witnesses; and (3) Hauser said he did not intend to call an expert. Judge Morgan asked appellant if he had described to Hauser what type of expert he believed important. Appellant stated that he had not. Judge Morgan directed appellant to discuss the case with Hauser. (5RT 1061-1066.)

Appellant again complained about Hauser on May 27, 1998. Judge Morgan described appellant's repeated complaints as baseless and nothing more than an effort to inject error into the proceedings. (6RT 1347-1348.)

On May 28, 1998, Judge Morgan asked appellant if he intended to continue speaking to Hauser. Appellant gave a vague response. Judge Morgan repeated the question. Appellant responded that he had already told Hauser what strategy he should pursue. (6RT 1591-1592.)

On May 29, 1998, appellant stated that he was speaking with Hauser. Judge Morgan asked appellant if there was any topic he wished to discuss with Hauser, but had not done so. Appellant answered, "No." (8RT 1835.)

On June 1, 1998, appellant stated that he wanted a new attorney, and informed the court that he had spit on Hauser when Hauser had visited him in lockup. (9RT 2062-2063, 2067-2068.) Hauser stated that he felt he had appropriately cross-examined the witnesses. (9RT 2070.) Judge Morgan advised appellant to be quiet. Appellant responded, "I don't care about your damn warnings," and added, "Fuck your warnings." (9RT 2071.)

On June 3, 1998. (10RT 2163.) Appellant criticized Hauser's cross-examination of prosecution witnesses. Judge Morgan opined that Hauser had done well. (10RT 2347-2348.)

The jury again declared that they were deadlocked, and a mistrial was declared on June 19, 1998. (15RT 3476-3486.)

As appellant points out, on July 7, 1998, appellant said, "I ask these proceedings be ceased so I can get another attorney." Judge Morgan answered, "I am not getting you another attorney." Appellant then indicated that he would retain his own attorney. (AOB 3503; 16RT 3503.) Appellant criticizes Judge Morgan's behavior for failing to hold a *Marsden* hearing in violation of his federal constitutional rights. (AOB 127-128.) However, at no time did appellant indicate that he had specific complaints about Hauser that he wished to voice.[34] In light of appellant's behavior,

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[34] Moreover, what appellant omits to mention, is that his request for new counsel on July 7, came after he repeatedly told Judge Morgan, "Fuck (continued...)

and the fact that Judge Morgan had already permitted him to complain about Hauser on May 13, May 19, May 26, May 27, May 28, May 29, June 1, and June 3, Judge Morgan was not obligated to further investigate appellant's complaints about Hauser. This was particularly true because there was no reason to believe that appellant had suddenly stumbled upon a new, legitimate reason that Hauser's continued representation would be unconstitutional.

As appellant points out (AOB 126), he again requested new counsel on July 14, 1998. Judge Gale denied the request. (16RT 3508-3509.) Appellant told Judge Gale, "Suck my dick you racist. I know you's a racist. You grew up in the '30s, '40s, '50s, and '60s. You's a racist." Appellant called Judge Gale's parents racist. (16RT 3510.) Again, appellant made no indication that he had specific, new (let alone meritorious) complaints about Hauser. In light of appellant's behavior, and the fact that he had been given extensive opportunity to complain about counsel, Judge Gale was not obligated to investigate appellant's complaints. (See *People v. Barnett* (1998) 17 Cal.4th 1044, [court properly denied request for further *Marsden/Faretta* hearing where "defendant's objections were repetitive of previous ones" (at pp. 1103, 1109-1110) and properly denied later motion where "nothing signficant had happened to affect the attorney-client relationship since the previous *Marsden* motion" (at p. 1110)])].)

(...continued)
you and suck my dick," "Fuck your Momma. You's a racist," and asked Judge Morgan if his parents were "clans." (16RT 3498-3502.) Thus, the sum of appellant's behavior on July 7 indicated that he was interested in disrupting the proceedings, and had no legitimate complaint to voice about Hauser.

Moreover, On July 29, 1998 (16RT 3519-3522), and August 25, 1998 (17RT 1-2), appellant represented that he was attempting to obtain new, retained counsel. At no time did he indicate that he wished to articulate a new, legitimate reason that Hauser's continued representation would be unconstitutional.

As appellant points out (AOB 126), on September 17, 1998, appellant stated of Hauser, "I do not want this man. He do not represent my interest, ladies and gentlemen." (17RT 22-23.) However, that statement was not made as part of an honest effort to articulate a legitimate complaint about Hauser. Rather, the statement was shouted to a room full of 400 prospective jurors after appellant physically attacked Hauser in a clear effort to cause a mistrial. Again, appellant made no indication that he had specific, new complaints about Hauser. In light of appellant's behavior, and the fact that he had been given extensive opportunity to complain about counsel, Judge Cheroske was not obligated to investigate appellant's complaints.

In sum, the record reflects that appellant was given ample opportunity on no less than eight separate court dates to voice complain about Hauser. During those proceedings, appellant made it crystal clear that he simply wished to use *Marsden* motions and other similar tactics to disrupt the proceedings. By comparison, by July 7, 1998, Hauser had ably handled one trial in which appellant was not convicted. There was no error.

Alternatively, any error in failing to hold a hearing was harmless beyond a reasonable doubt in light of appellant's many opportunities to voice his displeasure with counsel. (See, e.g., *People v. Leonard* (2000) 78 Cal.App.4th 776, 787 [any error in failing to conduct an adequate *Marsden* hearing was harmless].)

If this Court concludes that appellant should have received further Marsden hearings, then the matter may be remanded for a post-trial

Marsden hearing to allow appellant to attempt to demonstrate that he should have been provided a new attorney. If no such showing is made, the judgment should then be reinstated. (*People v. Lopez* (2008) 168 Cal.App.4th 801, 815.)

V. APPELLANT WAS NOT DENIED THE RIGHT TO COUNSEL AT HIS SECOND TRIAL

Appellant contends that he was constructively denied counsel at his second trial due the breakdown in communication with his attorney that began after a mistrial was declared at his first trial. (AOB 144-192.) Respondent disagrees. To the extent that appellant relies on complaints about Hauser that have previously been discussed in this brief, it is plain that appellant was not denied his right to counsel at the second trial. Moreover, the record thoroughly established that appellant's complaints were solely made in an effort to disrupt the proceedings and to manufacture a conflict with Hauser.

The Sixth Amendment does not guarantee a "meaningful relationship" between the accused and his attorney. (*Morris v. Slappy* (1983) 461 U.S. 1, 14 [103 S.Ct. 1610, 75 L.Ed.2d 610]; *People v. Montiel* (1993) 5 Cal.4th 877, 905.) "[A] defendant may not force the substitution of counsel by his own conduct that manufactures a conflict." (*People v. Smith* (1993) 6 Cal.4th 684, 696, citation omitted.) "[T]he number of times one sees his attorney, and the way in which one relates with his attorney, does not sufficiently establish incompetence." (*People v. Hart* (1999) 20 Cal.4th 546, 604, citation and internal quotation marks omitted.) Also, a defendant "is not entitled to claim an irreconcilable conflict arose merely because she was not permitted to veto counsel's reasonable tactical decisions." (*People v. Memro* (1995) 11 Cal.4th 786, 858, 876-877 [defense counsel's refusal to tell defendant who he intended to call as witnesses did not entitle defendant to a new attorney], citations omitted; *People v. Lucky* (1988) 45 Cal.3d 259,

281 ["There is no constitutional right to an attorney who would conduct the defense of the case in accord with the whims of an indigent defendant"].) To the extent there is a credibility question between defendant and counsel, a trial court is entitled to accept counsel's explanation. (*People v. Smith*, *supra*, 6 Cal.4th at p. 696.)

In order to resolve appellant's claim that he was denied counsel at his second trial because of a breakdown in attorney-client communications, it is once again necessary to summarize the history of appellant's relevant conduct, beginning at his first trial. Judge Haynes described Hauser as a "very competent attorney" with "the ability to handle this kind of case." (1CT 9-10.) Judge Morgan described Hauser as a "very outstanding attorney of exceptional competence." (2RT 399-403.) Appellant himself called Hauser was "a very, very competent lawyer" and "a genius." (5RT 1058-1061.)

By comparison, appellant's intense misbehavior was constant even when Hauser was not representing him. Appellant twice obtained permission to represent himself, and twice was stripped of that right due to misconduct. (1CT 30-31.) He accused the Deputy Public Defender initially assigned to represent him in this case of misconduct, but later asked for the Public Defender to be reappointed. (1CT 4; 2RT 427.) He demonstrated shocking disrespect toward all of the judges that he appeared before. And he opposed the extension requests filed by his attorney on the instant appeal.

Furthermore, the record establishes that appellant acted in bad faith in an attempt to manufacture a conflict with Hauser and thereby delay the proceedings. The record also establishes that appellant ably communicated with Hauser when it suited him.

Appellant first requested permission to represent himself before even speaking to Hauser. (1CT 7-12.) After his apparent first conversation with

Hauser, appellant complained that Hauser had failed to accept that appellant would make "all the major decisions." (1CT 18-22.) Before the preliminary hearing, when asked if he had spoken to Hauser, appellant answered, that he had spoken to Hauser "on several occasions," and added, "He have his strategy and I have mine." (1CT 51-53.) After being granted pro per status for a second time, appellant stated that he wanted Hauser to continue to participate as cocounsel "[f]or a couple of proceedings until I say so, when I'm ready, I want him to go." (1RT 11-14.) Once his pro per rights were revoked for the second time, appellant refused to come to court until his rights were restored. (1RT 263-265.) Appellant attempted to convince Hauser to request to be relieved from the case through shocking behavior, such as spitting on him. (1RT 300-301.) When that misbehavior did not achieve the desired results, appellant spoke to Hauser, expressing his wishes to participate in the trial. (2RT 361, 373.) Just as jury selection began, appellant opted to discuss trial strategy with Hauser. (2RT 415.) Appellant once again opted to coerce Hauser into abandoning the case, cursing him and threatening to harm him in the prospective jurors' presence. (2RT 424.) That tactic did not achieve the desired result, so appellant falsely accused Hauser of smelling of marijuana. (2RT 503, 3RT 584-585.) Appellant changed tactics again, speaking to Hauser about legal issues, and then voiced baseless complaints about Hauser's performance. (3RT 587-600.) Hauser attempted to inquire into appellant's wishes, but appellant refused to articulate any specific tactic, and opposed Hauser's attempt to obtain and present defense evidence. (3RT 616-618, 741-743, 5RT 1059.) Appellant declined to explain any alternate trial strategy to Judge Morgan. (5RT 1058-1061.) When given another opportunity to make specific complaints about Hauser, appellant voiced various frivolous complaints and refused to provide any specifics. (5RT 1061-1066.)

Eventually, Judge Morgan said of appellant's repeated *Marsden* motions:

> Mr. Johnson, I have carefully observed this particular subject matter. And is my considered opinion, after an extensive evaluation, that your only purpose is to try to build up a ground for appeal if you should be convicted in this case. And that is your entire purpose for carrying on this way. You have a competent, effective counsel. You have even acknowledged he was competent. I think you are simply trying to play games with this Court. And I want that placed clearly in the record because I carefully observed that. And that is my considered evaluation of the matter. This is nothing more than game[s]manship by your trying to develop a ground or grounds for appellate lawyers and nothing else. And there is no substance, basis, or truth to it.

(6RT 1347-1348.)

On a subsequent proceeding, Judge Morgan noted that appellant had communicated with Hauser during jury selection, and asked if he intended to continue doing so. Appellant gave a vague response. Judge Morgan repeated the question. Appellant responded that he had already told Hauser what strategy he should pursue. (6RT 1591-1592.) Thus, appellant either was communicating with Hauser, and conveyed his wishes to his full satisfaction, or appellant lied to the court.

On the following day, it appeared, albeit briefly, that appellant was fully cooperating with Hauser. Judge Morgan asked appellant if he was communicating with Hauser. Appellant stated that he was, and noted that he had asked Hauser to file a "perjury motion" and that Hauser had done so. (8RT 1834.) Appellant added, "I do attempt to communicate with him about issues that come up. And I see him supporting the significance of them." (8RT 1835.) Judge Morgan asked appellant if there was any topic he wished to discuss with Hauser, but had not done so. Appellant answered, "No." (8RT 1835.) Hauser asked for arrangements to be made so that he could speak to appellant during the lunch break, and Judge

Morgan agreed to do so. (8RT 1835.) However, that cooperation was short-lived, as appellant once again attempted to derail the proceedings - - after the lunch break, Hauser informed Judge Morgan that when he had attempted to speak to appellant, appellant "went off and said that he was going to tell the jury that he was representing himself at the prelim and that he was going to testify in this case and talk about me and my performance in the trial and various other things." (8RT 1932.)

Appellant's next tactic was to refuse to change out of his jail clothing unless he was provided a new attorney. Appellant explained that Hauser had refused to "refused to go into the specific questions I requested that he ask of the witnesses." (9RT 2054-2057, 2062.) Again, appellant's own words establish that appellant communicated with Hauser when he chose to. Appellant further boasted of having once again spit on Hauser.

The record establishes that appellant continued to speak to Hauser when it suited him - - Hauser advanced various legal arguments at appellant's direction. (9RT 2128, 2130-2131, 2135-2136.) Judge Morgan commended appellant for communicating with Hauser. (11RT 2575.) The nature of appellant's direct testimony indicated that he and Hauser had previously discussed the testimony in great detail. (12RT 2784, 2862.)

Despite the fact that the prosecution failed to obtain a guilty verdict in the first trial, appellant continued to use various tactics to try to remove Hauser. He spit on Hauser in court. (16RT 3499.) He managed to obtain continuances based on the false assertion that he would retain counsel. (16RT 3519-3521, 17RT 2.) Ultimately, he attacked Hauser in the jury assembly room, and threatened, in front of witnesses, to kill Hauser and his family. (17RT 22-24, 27, 48.) He made additional threats throughout the trial. (23RT 1295-1296.)

Those facts can only reasonably support one conclusion: appellant tried to manufacture a conflict with counsel as one of many strategies in

thwarting justice. Appellant's shocking misconduct did not entitle him to a new attorney, and indeed, it is clear from the record that his relentless misconduct would have continued unabated even if he had been provided an endless supply of exceptional attorneys.

By comparison, Hauser acted in appellant's best interest at every turn. For example, he did not volunteer that appellant had spit on him. Judge Morgan learned of the incident only after appellant boasted of the misdeed. (9RT 2062-2063, 2067-2068.) Rather than pursuing charges against appellant for the threats appellant made, Hauser dismissed them as insincere. (17RT 49.) Those threats would have been used against appellant during the penalty phase, except Hauser convinced Judge Cheroske to exclude them because the threats did not place him in sustained fear. (24RT 1638-1639.) When the prosecutor noted that he would likely seek to present evidence of the attack at the penalty phase, Hauser contended that the fact that he had stayed on as appellant's advocate would work to appellant's advantage in making the assault seem less serious. (17RT 49.) True to his word, during closing argument, Hauser minimized the relevance of appellant's attack against him in the jury assembly room. (25RT 1798.) Also, asking Judge Cheroske to question appellant out of the presence of the jury as means of testing appellant's intentions was an appropriate strategic move to prevent appellant from prejudicing his own case through misconduct.

Moreover, appellant communicated with Hauser when it suited him. (17RT 69.) Of course, by the time of the second trial, any further communication was of questionable value in light of the fact that Hauser had already litigated the matter and thus knew appellant's opinions. Indeed, it made little sense to remove Hauser, who was intimately familiar with the case, had already ably handled the first trial, and was willing to continue in his representation, in the quixotic hope of finding new,

competent, and willing counsel that would satisfy appellant. For all of these reasons, the failure to appoint new counsel did not violate appellant's federal constitutional right to an attorney at his second trial.

Ignoring the forest for the trees, appellant focuses on trivial complaints and portrays events as occurring in a vacuum. For example, he complains that Hauser violated the attorney-client privilege when Hauser told the court that he had made a motion at appellant's direction. (AOB 153-154.) Such a claim ignores the reality of the proceedings - - appellant made serial *Marsden* motions; essentially the entire proceedings below were a continuous *Marsden* hearing in which appellant voiced accusations against Hauser, and Hauser responded to those accusations by telling the various judges about his communications with appellant. Under those circumstances, appellant could not possibly have expected his communications with Hauser to be kept confidential. (See generally *City & County of S.F. v. Superior Court* (1951) 37 Cal.2d 227, 234-235 [attorney-client privilege "cannot be invoked unless the client intended the communication to be confidential"]; accord *People v. Johnson* (1989) 47 Cal.3d 1194, 1228 [no violation of attorney-client privilege when conversation is not intended to be kept confidential].) Indeed, appellant, who voiced complaints about so many topics, never complained at trial that the attorney-client privilege had been violated. By telling the court that he was advancing arguments at appellant's direction, Hauser indicated that he was successfully communicating with appellant. Moreover, any trivial disclosure simply reflected a valid strategic decision to maintain credibility with the court. (See, e.g., *People v. Vargas* (1975) 53 Cal.App.3d 516, 527-528 [no violation of attorney-client privilege: disclosing confidential

statement by defendant to the court was a reasonable strategic decision ultimately in defendant's best interest].)[35]

Appellant complains that Hauser should have objected to the fact that appellant was physically restrained during the October 27, 1997, and December 16, 1997, hearings. (AOB 156-159.) However, appellant has made no showing that any objection by Hauser would have been deemed meritorious in light of the severity of the charges and appellant's extensive misbehavior, including an attempt to intimidate a witness and use of profanity in court. (1CT 32, 54-56; see generally *People v. Fierro* (1991) 1 Cal.4th 173, 220 [since there is no danger of prejudicing a jury, lesser justification is required for restraints used at a preliminary hearing]; *In re Deshaun M.* (2007) 148 Cal.App.4th 1384, 1387 [for same reason, lesser justification required for restraints used during juvenile proceeding].) Indeed for appellant to argue that such restraints were a violation of his rights is rather ridiculous in light of his subsequent in court attack on Hauser. Failing to articulate a frivolous motion did not establish that Hauser was conflicted and needed to be replaced. In fact, appellant was representing himself during the cited time period, and complained about the restraints. His complaints were rejected because Judge Wu believed the restraints were necessary to preserve courtroom security. (1RT 9-11.)

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[35] Appellant did not cite this, or the other claims addressed below, as grounds justifying appointment of new counsel. Accordingly, these claim should be deemed forfeited. Appellant appeared before numerous judges over an extended period of time. It was not Judge Cheroske's obligation to search the record for instances that could support appointment of new counsel. (See, e.g., *People v. Spirlin* (2000) 81 Cal.App.4th 119, 128 [defendant's complaint about *Marsden* proceeding forfeited for failure to raise at trial]; see generally *People v. Bills* (1995) 38 Cal.App.4th 953, 961 [defendant has "very heavy burden" during *Marsden* hearing].)

Appellant complains that Hauser should have objected to appellant being made to wear a stun belt during the first trial. (AOB 159-165.) Again, Hauser was not deficient in any way. By the time Judge Morgan decided to order appellant to wear a stun belt, appellant had engaged in extensive misconduct. He had had been stripped of his pro per rights by two different judges, and had been removed from the courtroom for misconduct on multiple occasions. Hauser likely did not object to the stun because he believed that (1) Judge Morgan was thoroughly justified in ordering appellant restrained; (2) having appellant wear a stun belt was preferable to any visible restraint which might prejudice the jury; and (3) appellant, due to his personality, was extremely unlikely to be distracted or embarrassed by being made to wear the belt. (See generally *People v. Mar* (2002) 28 Cal.4th 1201, 1219-1220 [regarding problems with making defendants wear stun belts].) Indeed, far from being cowed into submission by the stun belt, appellant testified during the first trial, and attacked Hauser at the beginning of jury selection.

Appellant contends that the fact that Hauser sought to remain on the case despite appellant's wishes established that Hauser was motivated by money, and that financial interest amounted to a conflict of interest in violation of appellant's federal constitutional rights. (AOB 167-172.) However, there is nothing in the record indicating that Hauser could not have simply obtained representation of a different defendant, or made any strategic choice because it somehow maximized his earnings. (See, e.g., *People v. Doolin* (2009) 45 Cal.4th 390, 421-430 [even though retained counsel failed to interview obvious witnesses and was deficient in other ways, no showing that counsel was conflicted due to interest in maximizing earnings by minimizing money spent on investigation]; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1009-1010, disapproved on another point by *Doolin, supra,* at p. 421, fn. 22 [no showing defense counsel was

motivated by financial interest in opposing defendant's motion for self-representation; nothing in record indicated that attorney could not have simply been appointed to represent another defendant].)

Pointing to a request for payment apparently drafted by Hauser, appellant contends that Hauser breached his duty of confidentiality and loyalty. (AOB 149-153, citing 1CT 44.) Appellant's chief claim is that the document was not filed under seal. However, the document is not marked as filed (there is no file stamp). Thus, it is not clear whether Hauser actually requested that the document be filed or whether he asked that it be filed under seal. In any event, there was no breach of duty by Hauser. It does not appear that he made any disclosure obtained from appellant in confidence. Indeed, it does not appear that he learned of appellant's criminal history (described in the document) from appellant, let alone that such information as not public knowledge. Describing appellant as possibly mentally unstable was a passing comment in requesting payment for representing appellant. And accurately characterizing appellant's mental state was part of Hauser's duty as an officer of the court. (See, e.g, *People v. Lewis* (2006) 39 Cal.4th 970, 1048, fn. 25 [not improper where defense counsel indicated to trial court that defendant was feigning mental illness].) Moreover, portraying appellant as mentally unstable was also part of Hauser's efforts to work on appellant's behalf - - Hauser advanced the argument as part of his effort to convince the jury to not select the death penalty. Thus, appellant has not established that Hauser breached any duty, let alone that such breach was so significant as to have resulted in a total breakdown of the attorney-client relationship at the second trial.

In sum, appellant's many complaints are meritless and do not come close to showing that the failure to provide him a new attorney violated his federal constitutional rights to counsel at his second trial. In light of the overwhelming evidence that appellant was simply hoping to manufacture a

conflict with Hauser, it clear from this record that appellant was not denied his right to counsel at the second trial based upon a breakdown in the attorney-client relationship.

VI. THE COURT DID NOT ERR IN FAILING TO DISCHARGE APPELLANT'S TRIAL COUNSEL.

It appears that the claims articulated in pages 193 through 224 simply repeat the claims discussed above - - Hauser should have been replaced by a different attorney, and no hearing should have been held without appellant's presence. (AOB 193-224.) These claims are meritless for the same reasons discussed above. Appellant's extensive misconduct did not entitle him to a new attorney, and appellant was not entitled to any additional hearings.

VII. HUGGINS'S VOLUNTEERED STATEMENT DID NOT ENTITLE APPELLANT TO A NEW TRIAL

Appellant contends that a mistrial should have been declared after Huggins testified that he was frightened of appellant because "[h]e had already beat two cases like this already." (AOB 227-249; see 21RT 860.) Respondent submits that the trial court acted within its discretion in denying the motion and instead providing an admonition that cured any harm from this volunteered remark.

The general rule is that a trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged. A trial court's ruling denying a mistrial is reviewed for abuse of discretion. (See *People v. Williams* (2006) 40 Cal.4th 287, 323 ["Nothing in the record undermines the trial court's implicit conclusion that the prosecutor's brief episode of inappropriate conduct did not irreparably damage defendant's chance of receiving a fair trial."]; see, e.g., *People v. Lewis* (2006) 39 Cal.4th 970, 1029 [in declining mistrial motion, court reasonably declined to investigate whether jury heard comment so as not to highlight the

matter]; *People v. Ramirez* (2006) 39 Cal.4th 398, 462 [in murder trial, trial court did not abuse its discretion in resuming deliberations the day after the jury learned that one of the jurors had been murdered]; *People v. Williams* (1997) 16 Cal.4th 153, 211 [fact that witness volunteered inadmissible evidence was not so prejudicial as to merit a new trial]; *People v. Price* (1991) 1 Cal.4th 324, 428 [witness's reference to his polygraph test did not require a mistrial as the comment was brief and any prejudice was cured by an admonition]; *People v. Wharton* (1991) 53 Cal.3d 522, 565-566 [immunized witness's blurted-out insinuation that defendant had retaliated against him for testifying did not require a mistrial and was cured by an admonition and the witness's further testimony]; *People v. Rhinehart* (1973) 9 Cal.3d 139, 152 [witness's inadvertent answer, if error, was not sufficiently prejudicial to justify mistrial]; *People v. Rose* (1996) 46 Cal.App.4th 257, 260-261, 264 [affirming denial of motion for new trial where jury accidentally received a police report concerning the defendant's "surreptitious videotaping of an adult female coworker, which had been excluded from the evidence."].)

Here, when asked to explain why he did not promptly report the crime to the police, Huggins said that he was frightened of appellant because "[h]e had already beat two cases like this already." (21RT 860.) The trial court admonished the jury to disregard the statement, but denied appellant's motion for a mistrial. (21RT 931-932.)

Appellant contends that Huggins's statement irreparably damaged his right to a fair trial, and that the trial court accordingly abused its discretion in denying the mistrial motion. However, that argument ignores the reality of the case.

Huggins testified at trial that he saw appellant and codefendant Betton shoot Faggins. (21RT 831-843.) But the jury also heard evidence that Huggins did not report the shooting until after he had been arrested for an

unrelated matter. (21RT 933-934, 22RT 982, 23RT 1197-1200.) The jury also knew that Huggins testified at the preliminary hearing that he had not seen the shooters. (21RT 936, 938, 967.) In other words, the jury had the option of either believing Huggins' testimony, and concluding that appellant was a shockingly dangerous killer, or disregarding Huggins' testimony as the product of a dishonest criminal hoping to secure favorable treatment from the police. If the jury believed Huggins was telling the truth, then the jury already believed that appellant was a cold-blooded killer, guilty of the instant crimes. If, on the other hand, the jury did not believe Huggins, then the jury would have disregarded the stricken comment as just another lie. There was nothing about the statement that would have had a significant impact on the jury's credibility determination under these circumstances.

Moreover, the statement itself was vague, and the jury was directed to disregard it. Appellant characterizes the record as showing that the jury was told that appellant had "beaten two prior murder cases." (AOB 245.) But that is simply not true. The statement was far more vague - - "[h]e had already beat two cases like this already." (21RT 860.) Thus, not only did the statement not explicitly allege that appellant had committed other *murders*, but also, by its own terms, the statement seemed to suggest that appellant had somehow prevailed when *charged* with committing other crimes. Of course, if the jury was inclined to believe the defense theory of the case, that Huggins was lying, then the fact that appellant had beaten two other cases would tend to strengthen the conclusion that the police were intent on framing appellant. Indeed, the jury heard no further evidence explaining how Huggins knew about the other cases.

Appellant also contends that the penalty phase deliberations were contaminated by the statement. (AOB 245-249.) However, the jury was directed to disregard the statement, and the prosecution made no reference

to the statement during the penalty phase. There was no reasonable possibility that Huggins's volunteered remark had any effect on the jury's penalty phase decision. (*People v. Price* (1991) 1 Cal.4th 324, 471 [noting that defendant was correct that evidence was inadmissible at the penalty phase, but reversal not required because there was no reasonable possibility that the error affected the penalty verdict].)

VIII. ROCHELLE'S STATEMENT TO GREER WAS PROPERLY ADMITTED AS A PRIOR INCONSISTENT STATEMENT

At trial, Rochelle denied telling anyone that appellant and codefendant Betton shot Hightower and Faggins. (20RT 715, 719.) Subsequently, Greer testified that he saw Rochelle shortly after the shooting. She was crying and covered in blood and said, "They didn't have to kill him," "C.J. didn't have to kill him." (22RT 1115-1116.) Judge Cheroske overruled appellant's hearsay objection.[36] (22RT 1116.)

Appellant contends that Greer's testimony as to Rochelle's prior statement should have been excluded. Appellant advances two theories for exclusion: (1) the statement was not inconsistent with any other statement; and (2) even if the statement was spontaneous and inconsistent, it was not based on personal knowledge. (AOB 250-262.) Respondent disagrees.

First, the prior statement was clearly inconsistent with Rochelle's trial testimony. "'Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement . . . .'" (*People v. Ervin* (2000) 22 Cal.4th 48, 84, citation omitted; accord *People v. Hovarter* (2008) 44 Cal.4th 983, 1008; see generally Evid. Code, § 1235.) A trial court's ruling on factual questions, such as whether a statement was inconsistent, or whether a declarant made a statement based on personal knowledge, is reviewed for abuse of discretion. (*People v. Hovarter* (2008)

[36] No specific theory of admissibility was discussed.

44 Cal.4th 983, 1008; *People v. Phillips* (2000) 22 Cal.4th 226, 235-236.) Greer's testimony that Rochelle said "C.J. didn't have to kill him" was directly contradictory to Rochelle's testimony that she never told anyone that appellant was one of the shooters.

Second, there was substantial evidence that Rochelle's statement that appellant was the killer was based on personal knowledge. The evidence was that the killings were committed in front of a large group of people, that people at the party knew Faggins was in danger, and that Rochelle had been at the party. Rochelle made the statement in question shortly after the shooting, and at the location the shooting, and was crying and covered in blood at the time. Rochelle's mother was so upset about Rochelle's involvement in the shooting that she broke a window out of frustration of not convincing Rochelle to find a new place to live. The sum of those facts was substantial evidence that Rochelle's statement that appellant was the shooter was based on personal knowledge. Because the trial court's ruling was supported by substantial evidence, it must be affirmed. (See, e.g., *People v. Jones* (1984) 155 Cal.App.3d 653, 661 [circumstantial evidence indicated declarant's statement was based on personal knowledge]; compare *People v. Phillips*, *supra*, 22 Cal.4th at p. 236-237 [upholding trial court's ruling as based on substantial evidence: evidence indicated that witness's statement could not possibly have been based on personal knowledge].)

In any event, any error in admitting the statement was harmless under any standard. There was other evidence that dispositively established appellant's guilt, as summarized earlier in the Statement of Facts .

IX. JUDGE CHEROSKE DID NOT EXCLUDE ANY EVIDENCE REGARDING NEWTON'S EFFORTS TO EXCHANGE INFORMATION FOR FAVORABLE TREATMENT

Appellant contends that Judge Cheroske abused his discretion in excluding evidence regarding Newton's efforts to exchange information for favorable treatment by the police. Appellant furthers contends that the error was so egregious as to violate his federal constitutional rights. (AOB 263-278.) However, the record reflects that Judge Cherokse did not exclude any evidence.

A. Factual Background

The undisputed evidence was that Newton spoke to the police about this case only after being arrested on unrelated drug charges. (20RT 780-783, 21RT 794.) At trial, Newton testified that his videotaped statement had been false, that the police had told him what to say, and that the police had promised to not press charges as to the drug arrest if he cooperated with them. (21RT 793, 800-801, 806-807.) Newton testified that he told Sergeant Waters, who conducted the videotaped interview, that he had received favorable treatment on other occasions after providing information to the police. (21RT 807.) Newton was arrested after speaking to Sergeant Waters (23RT 1266), but was released soon thereafter and not prosecuted for the drug offense (21RT 807). The jury heard evidence that, at the time of trial, Newton was in custody pursuant to illegal narcotics sales. (20RT 779.)

Sergeant Waters testified that Newton was promised nothing in exchange for his statement regarding the murder. (22RT 1094-1107.) Taylor sought permission to present evidence that, during the videotaped interview, Newton had asked Sergeant Waters for favorable treatment. Taylor also wanted to ask whether Newton had mentioned receiving favorable treatment on prior occasions. Judge Cheroske indicated concern

about such questioning because the parties had already played an edited version of the videotaped interview, had not prepared a transcript including the comments Taylor wanted to ask about, and accordingly, Judge Chersoke believed the questioning would confuse the jury by making them wonder why they had not heard the comments when shown the videotape. (22RT 1099-1106.) In making that ruling, Judge Cheroske emphasized that his ruling was tentative, saying "for right now, the objection is going to be sustained." (22RT 1100.) Hauser and Taylor both contended that the ruling amounted to federal constitutional violations. (22RT 1101.)

Thereafter, Taylor asked Sergeant Waters what Newton had said, and Sergeant Waters testified that Newton said approximately, "[Y]'all know the more y'all get me off y'all line, the happier I will be." (22RT 1107.) After that testimony, neither Taylor nor Hauser made any claim that there was additional testimony on the topic that they wished to present. Later, Taylor called Newton as a defense witness, played an additional portion of the videotaped interview, and established that Newton claimed that the shooting had occurred at approximately 4:00 p.m. (2SCT 354; 23RT 1262-1265.)

B. There Was No Improper Exclusion of Evidence

Appellant contends that Judge Chersoke abused his discretion and violated appellant's federal constitutional rights by initially preventing him from questioning Sergeant Waters as to whether Newton mentioned being given favorable treatment on other occasions. (AOB 263-278.) Judge Cheroske made clear that his ruling was tentative, and was based out of concern of confusing the jury. Neither Taylor nor Hauser made any subsequent request to present further evidence on the topic. The record indicates that Judge Chersoke would have reconsidered his ruling - - during the defense case, Taylor was permitted to play for the jury an additional portion of the videotaped interview. By failing to re-visit the issue after the

court expressly invited the defense to do so, and instead choosing to play a portion of the videotaped interview to elicit the alleged excluded evidence, appellant's state and federal claims were forfeited. (See generally *People v. Ervine* (2009) 47 Cal.4th 745, 777 [evidentiary claim forfeited because not made at trial].)

Alternatively, to the extent Judge Chersoke's ruling resulted in the exclusion of evidence, it was an appropriate exercise of his discretion because any further evidence on the topic would have been confusing and cumulative. The Sixth and Fourteenth Amendments guarantee state criminal defendants "'a meaningful opportunity to present a complete defense.'" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 [106 S.Ct. 2142, 90 L.Ed.2d 636], citation omitted.) Nevertheless, the right to present relevant testimony is not without limitation, and may, in appropriate cases, "bow to accommodate other legitimate interests in the criminal trial process." (*Michigan v. Lucas* (1991) 500 U.S. 145, 149 [111 S.Ct. 1743, 114 L.Ed.2d 205], citations and internal quotation marks omitted.) "[E]rroneous evidentiary rulings can, in combination rise to a level of a due process violation." (*Montana v. Egelhoff* (1996) 518 U.S. 37, 53 [116 S.Ct. 2013, 135 L.Ed.2d 361].) But a defendant is not denied his right to present a defense "whenever 'critical evidence' favorable to him is excluded." (*Ibid.*) Accordingly, the application of the rules of evidence does not violate a defendant's right to present a defense, and, although the "complete exclusion" of evidence establishing a defense could theoretically rise to the level of a constitutional violation, the exclusion of defense evidence on a minor point does not. (*People v. Cunningham* (2001) 25 Cal.4th 926, 998-999.)

Trial courts have broad discretion in determining the relevance of evidence. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1282.) Additionally, under Evidence Code section 352, a trial court "in its discretion may

exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Here, the undisputed evidence was that Newton only spoke to the police after being arrested on an unrelated drug charge, asked for favorable treatment during the interview, made a significant error about when the crime occurred, and was ultimately not prosecuted for the crime he had been arrested for. The jury also knew that Newton had committed at least one subsequent drug offense. And of course, Newton testified that his videotaped statement was false, made solely in the hopes of obtaining favorable treatment, and that he had received such favorable treatment on other occasions. Thus, the jurors heard all of the evidence on the topic that appellant wished them to hear. The only evidence that was not presented was Sergeant Waters acknowledging that Newton said he had received favorable treatment on prior occasions. Such evidence had trivial value in light of the other evidence that the jury heard. Indeed, the relevant question was whether Newton lied in exchange for favorable treatment in this case, and the jury heard ample evidence from which to draw such a conclusion. Thus, to the extent evidence was excluded, the evidence had trivial relevance. Accordingly, Judge Cheroske acted within his discretion in excluding further evidence about the videotaped interview. There was no violation of state or federal law.

In any event, it is not reasonably likely that appellant would have received a more favorable result even if additional evidence had been presented. (See generally *People v. Ayala* (2000) 23 Cal.4th 225, 271 [any error in excluding evidence was harmless under *Watson*].) As explained above, the evidence was cumulative to other evidence presented above, and had trivial value since the real question was whether Newton received

favorable treatment for his role in this case. For the same reason, any federal constitutional violation was also harmless.

X. THE FAILURE TO GIVE CALJIC NO. 2.71.7 WAS HARMLESS

During a videotaped interview, Newton told the police that just before the shooting, appellant discussed killing Hightower and Faggins for being "snitches." (2SCTII 322-331.) As noted in respondent's prior argument, extensive evidence was presented calling into question whether Newton's videotaped statement was truthful. The trial court gave various jury instructions about evaluating testimony (CALJIC Nos. 2.13 [prior consistent or inconsistent statements], 2.20 [believability of witness], 2.21.1 [discrepancies in testimony], 2.21.2 [witness willfully false], 2.22 [weighing conflicting testimony], 2.23 [believability of witness convicted of a felony] (40CT 11555-11560.) However, the trial court did not give CALJIC No. 2.71.7, which provides:

> Evidence has been received from which you may find that an oral statement of [intent] [plan] [motive] [design] was made by the defendant before the offense with which [he] [she] is charged was committed.
>
> It is for you to decide whether the statement was made by [a] [the] defendant.
>
> Evidence of an oral statement ought to be viewed with caution.

Appellant contends that the trial court violated his federal constitutional rights by failing to sua sponte instruct the jury pursuant to CALJIC No. 2.71.7. Specifically, appellant theorizes that in the absence of the instruction, the jury might have used no caution in evaluating Newton's recorded statement that Johnson discussed killing the victim as snitches. (AOB 279-292.)

It appears that appellant is correct that the trial court should have given the instruction sua sponte. (See *People v. Wilson* (2008) 43 Cal.4th

1, 19.) But it is equally clear that the error was harmless. Newton testified that his videotaped interview was a lie told to obtain favorable treatment on his own drug offense. Thus, the jury obviously knew that it had to decide whether Newton's testimony was truthful. Indeed, the other jury instructions given directed them to evaluate his credibility. In view of Newton's repudiation that appellant ever made the oral admission, the jury necessarily would have evaluated that evidence with the same caution contemplated by the omitted instruction. (See *People v. Slaughter* (2002) 27 Cal.4th 1187, 1200 [purpose of instruction is to assist jury in determining if statement was actually made].) Accordingly the instructional error was harmless. (See, e.g., *People v. Wilson*, *supra*, 43 Cal.4th at pp. 19-20 [failure to give CALJIC No.2.71.7 was harmless]; *People v. Stankewitz* (1990) 51 Cal.3d 72, 94 [same].)

XI. NO ERROR OCCURRED WHEN JUDGE CHEROSKE INSTRUCTED THE JURY THAT APPELLANT HAD VOLUNTARILY ABSENTED HIMSELF FROM THE PROCEEDINGS; THE JURY WOULD NOT HAVE MISUNDERSTOOD THE FLIGHT INSTRUCTION

Appellant advances three related claims. First, he claims that Judge Cheroske should not have told the jury that appellant had "voluntarily" absented himself from the proceedings because appellant's absence was involuntary. Second, he claims that Judge Cheroske should have sua sponte omitted an inapplicable portion of the flight instruction. And third, appellant contends that the two instructions could have combined to mislead the jury into thinking that appellant's absence from the proceedings was evidence of flight that indicated his guilt. (AOB 293-308.) Appellant's claims are not a reasonable interpretation of the record.

First, the instruction as to appellant's absence was accurate. Judge Cheroske told the jury:

> Defendant Cedric Johnson has voluntarily absented himself from these proceedings. This is a matter which must not in any way affect you in this case.
>
> In your deliberations, do not discuss or consider this subject. It must not in any way affect your verdicts or findings you may be asked to make in connection with your verdicts.

(23RT 1422.) Appellant contends that the instruction was false because his absence was involuntary. However, in advancing that claim, appellant is simply refusing to take responsibility for his actions. Although he periodically *said* that he wanted to be present at trial, he demonstrated otherwise through his extensive and repeated misconduct, which was the functional equivalent of him voluntarily absenting himself from trial. The instruction was accurate and actually *helped* appellant in that it told the jury not to consider his absence. After all, the fact that he used such shocking tactics to try to derail the proceedings could have been interpreted as evidence of his consciousness of guilt, as would an instruction stating that appellant's absence from the trial was involuntary.

Second, no prejudicial error occurred as to the flight instruction. Initially, there was substantial evidence of flight - - Greer testified that he saw appellant and codefendant Betton run away after the shooting. (22RT 1114-1115.) Accordingly, Judge Cheroske instructed the jury pursuant to CALJIC No. 2.52:

> The flight of a person immediately after the commission of a crime *or after he's accused of a crime* is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other provided facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide.

(23RT 1417-1418, italics added.) Appellant contends that the italicized portion of the instruction as inapplicable, and accordingly should have been

omitted sua sponte. Any such error was harmless. The instruction did not specify whether it applied to appellant or codefendant Betton, the jury was never given a definition of "accused," and no attempt was made by the prosecutor to misuse the instruction. Moreover, the jury was told, pursuant to CALJIC No. 17.31, to disregard any instruction unsupported by evidence. (24RT 1570.) Thus, any error in failing to strike the inapplicable portion of the instruction was harmless. (See, e.g., *People v. Carrillo* (2008) 163 Cal.App.4th 1028, 1038-1039 [any error in failing to give flight instruction was harmless in light of the nature of the evidence]; *People v. Carter* (2005) 36 Cal.4th 1114, 1182-1183 [any error in giving flight instruction was harmless - - "The instruction did not assume that flight was established, but instead permitted the jury to make that factual determination and to decide what weight to accord it."]; *People v. Barnett* (1998) 17 Cal.4th 1044, 1153-1154 [jury would have simply disregarded inapplicable flight instruction].)

Third, it is not reasonably likely that the jury was confused by the instructions in the manner theorized by appellant. Ignoring the evidence and totality of the instructions, appellant theorizes that the jury would have concluded from the two instructions cited above that (1) appellant was not present at trial because he fled the court's jurisdiction; and (2) evidence of that flight indicated that he was guilty of the charged crimes. First, this theory ignores the fact that the jury was specifically told that it could not use the fact of appellant's absence in any way. (23RT 1422.) Second, the theory simply does not make sense. The jury heard testimony from Greer that appellant fled immediately after the shooting. The jury also heard evidence that Greer repeatedly lied about what he had seen. (22RT 1122-1132, 1153, 1162, 1169.) Thus, there was certainly a credibility decision for the jury to make as to the evidence of flight - - either Greer's statement that he saw appellant run away was truthful and later denial of that

statement simply reflected fear of appellant, or Greer's statement was part of a concerted campaign of police misconduct permeating the case. By comparison, the jury did not hear any evidence that appellant fled after being "accused." It is inconceivable that the jury, which was required to resolve actual conflicting evidence presented at trial to determine if appellant fled the scene, would have speculated that it could find flight on another theory that was unsupported by any trial evidence. (See generally *People v. Lewis* (2009) 46 Cal.4th 1255 [not reasonably likely jury misunderstood or misapplied jury instructions]; *People v. Bramit* (2009) 46 Cal.4th 1221, 1247 [presumed that jury followed trial court's instructions]; *People v. Brasure* (2008) 42 Cal.4th 1037, 1062 [in determining whether instructions were confusing, must consider the totality of the instructions])

XII. ANY FAILURE TO GIVE CALJIC NO. 2.23.1 WAS HARMLESS

Appellant contends that the trial court committed reversible error in failing to instruct the jury with CALJIC No. 2.23.1 (Believability of a Witness – Commission of Misdemeanor). (AOB 309-320.) Respondent disagrees.

Huggins testified that he saw the shooters. However, he did not tell the police what he had seen until he was arrested on an unrelated matter. (21RT 860, 21RT 933-934, 22RT 982, 23RT 1197-1200.) And at the preliminary hearing, Huggins testified that he had not seen the shooters. (21RT 936, 938, 967.) The jury also heard evidence that Huggins was convicted of misdemeanor spousal abuse in 1997. (22RT 1092.)

As appellant points out, the jury was instructed with CALJIC No. 2.20 regarding evaluating witness credibility. That instruction stated in the pertinent part, "In determining the believability of a witness you may consider anything that has a tendency to prove or disprove the truthfulness of the testimony of the witness, including but not limited to any of the following . . ." The enumerated list of factors included "the witness' prior

conviction of a felony," but did not, as appellant points out, include a witness's prior conviction of a misdemeanor, which is separately addressed in CALJIC No. 2.23.1. (23RT 1414-1415.)

Appellant contends that the trial court should have sua sponte instructed the jury pursuant to CALJIC No. 2.23.1 to consider Huggins' prior misdemeanor conviction in evaluating Huggins's credibility, and that the failure to do so was so egregious as to violate his right to a fair jury trial. (AOB 309-320.) Respondent disagrees.

People v. Horning (2004) 34 Cal.4th 871 is directly on point. There, this Court found harmless any error in failing to include a felony conviction among the specific factors listed in CALJIC No. 2.20:

> Biaruta testified on direct examination that he had a burglary conviction for which he was serving a 12-year prison sentence. On cross-examination, defense counsel elicited that he also had convictions for resisting arrest and criminal trespass. The court did give most of CAJLIC No. 2.20, including that, "In determining the believability of a witness, you may consider *anything* that has a tendency in reason to prove or disprove the truthfulness of the testimony of the witness including but not limited to any of the following . . . ." (Italics added.) Accordingly, the jury was permitted to consider the felony conviction (and the witness's other convictions) on credibility. Defense counsel thoroughly cross-examined Biaruta and challenged his credibility. He argued that the jury should not "believe the word of a convicted felon who was in the Arizona prison." The prosecutor cited Biaruta's testimony only briefly in his opening argument, and even he stated that Biaruta was "certainly no prize in his own right." The record thus refutes defendant's claim that the jury evaluated Biaruta's testimony as if it had come from a thoroughly credible witness and without considering his felony conviction.

(*Id.* at p. 911.)

Like the jury in *Horning*, appellant's jury was told by CALJIC No. 2.20 that it could consider anything that had a tendency in reason to prove or disprove the truthfulness of a witness. Although misdemeanor

convictions were not specifically mentioned in the examples listed in the instruction, nothing in the instruction precluded consideration of that factor. Furthermore, the significant point was that Huggins gave directly competing statements regarding what he had seen on the night of the shooting.

Moreover, not giving CALJIC No. 2.23.1 was an error in appellant's favor. That instruction provides:

> Evidence showing that a witness, _____ engaged in past criminal conduct amounting to a misdemeanor may be considered by you only for the purpose of determining the believability of that witness. The fact that the witness engaged in past criminal conduct amounting to a misdemeanor, if it is established, does not necessarily destroy or impair a witness's believability. It is one of the circumstances that you may consider in weighing the testimony of that witness.

Because the jury was not given that instruction, they were not told that evidence of Huggins' prior misdemeanor conviction had only limited relevance. (See *People v. Horning*, *supra*, 34 Cal.4th at p. 911 [noting that "Defendants usually want such a limiting instruction when they themselves had testified and been impeached with a felony conviction, not when a *prosecution* witness had the conviction."].)

XIII. GIVING CALJIC NO. 17.41.1 WAS NOT ERROR

Appellant contends that instructing the jury with CALJIC No. 17.41.1 violated his federal constitutional rights. (AOB 321-333; 24RT 1571.) Appellant does not offer any persuasive reason for this Court to reconsider its previous rejection of this contention. Accordingly, this claim should be rejected for the same reason it was rejected in *People v. Wilson* (2008) 44 Cal.4th 758, 805-806.

XIV. THE STANDARD GUILT PHASE JURY INSTRUCTIONS DID NOT REDUCE THE BURDEN OF PROOF

First, appellant contends that the trial court reduced the burden of proof by giving CALJIC Nos. 2.01, 2.02, and 8.83.1. (AOB 335-383.) Second, appellant contends that the trial court reduced the burden of proof by giving CALJIC Nos. 2.21.2, 2.22, 2.27, 2.51, and 8.20. (AOB 338-343.) Since appellant has offered no persuasive reason for this Court to depart from its prior holdings, these claims should be rejected for the same reason they were rejected in *People v. Friend* (2009) 47 Cal.4th 1, 53 and the cases listed therein. (See also *People v. Brasure* (2008) 42 Cal.4th 1037, 1059.)

XV. NO INSTRUCTIONAL ERROR OCCURRED DURING THE PENALTY PHASE

First, appellant contends that CALJIC Nos. 8.85 and 8.88 were insufficient to convey to the jury that it could consider mercy in determining appellant's penalty. (AOB 346-354.) This claim was rejected in *People v. Whisenhunt* (2008) 44 Cal.4th 174, 226, and should be rejected here since appellant offers no persuasive reason for this Court to depart from its prior holding. (See 25RT 1809-1815.)

Second, appellant contends that Judge Cheroske should have told the jury that death was a "worse sentence" than life without the possibility of parole. (AOB 350-354.) This concept was adequately expressed by CALJIC No. 8.88, which told the jury that, "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (25RT 1815.) It is presumed that the jury followed CALJIC No. 8.88. (See, e.g., *People v. Wilson* (2008) 44 Cal.4th 758, 834.)

XVI. APPELLANT'S CONSTITUTIONAL CHALLENGES TO THE DEATH PENALTY ARE MERITLESS

A. Section 190.2 Is Not Overly Broad

Appellant contends that section 190.2 is unconstitutionally overbroad. (AOB 355-356.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Farley* (2009) 46 Cal.4th 1053, 1133.)

B. Section 190.3, Subdivision (a), Does Not Violate the State and Federal Constitutions

Appellant contends that section 190.3, subdivision (a), fails to appropriately guide the jury in its deliberations. (AOB 356-357.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Farley*, *supra*, 46 Cal.4th at p. 1133.)

C. The Fact that Penalty Need Not Be Determined Beyond a Reasonable Doubt Did Not Violate the state and Federal Constitutions

Appellant contends that the beyond a reasonable doubt standard must be used during the penalty phase. (AOB 357-358.) Except for prior unadjudicated violent crimes, this Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Farley*, *supra*, 46 Cal.4th at p. 1133.)

D. Judge Cheroske Was Not Required to Instruct the Jury that There Was No Burden of Proof During the Penalty Phase

Appellant contends that the jury should have been told that there was no burden of proof at the penalty phase. (AOB 359-361.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding.

(*People v. McWhorter* (2009) 47 Cal.4th 318, 379; see also *People v. Farley*, *supra*, 46 Cal.4th at p. 1133.)

E. No Unanimity Was Required as to the Aggravating Factors

Appellant contends that the jury's findings as to aggravating factors should have been unanimous. (AOB 361-362.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Farley*, *supra*, 46 Cal.4th at p. 1134.)

F. No Unanimity Was Required as to Unadjudicated Criminal Activity

Appellant contends that jury's findings as to unadjudicated criminal activity should have been unanimous. (AOB 362-363.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1317.)

G. The Penalty Phase Instructions Were Not Impermissibly Vague

Appellant contends that the standard penalty phase instructions were impermissibly vague. (AOB 363-364.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Farley*, *supra*, 46 Cal.4th at p. 1134.)

H. No Requirement that the Jury Determine that Death is the "Appropriate" Punishment

Appellant contends that the jury should have been instructed to determine whether death was the "appropriate" punishment. (AOB 364-365.) This Court has previously held that absent a defense instruction, the

trial court was not required to give such an instruction. (*People v. Farley*, *supra*, 46 Cal.4th at p. 1133.)

I. No Requirement that Jury be Explicitly Told that Aggravating Factors Must Outweigh Mitigating Factors to Choose Death

Appellant contends that the jury should have been instructed to choose life imprisonment without parole if the mitigating circumstances outweigh the aggravating circumstances. (AOB 365-366.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Carrington* (2009) 47 Cal.4th 145, 199.)

J. No Requirement that Jury be Told About the Burden of Proof for Mitigating Factors and that Unanimity Was Not Required as to Mitigating Factors

Appellant contends that the jury should have been instructed that unanimity was not required as to mitigating factors and that the defendant had no burden of proof as to mitigating circumstances. (AOB 366-367.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1317; *People v. Farley* (2009) 46 Cal.4th 1053, 1133.)

K. No Requirement that Jury be Told of the Presumption of Life

Appellant contends that the jury should have been told that the law favors life and presumes life imprisonment without parole to be the appropriate sentence. (AOB 367-368.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. McWhorter*, *supra*, 47 Cal.4th at p. 379.)

L. Written Findings Were Not Required

Appellant contends that jury should have been required to make written findings. (AOB 368.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Farley*, *supra*, 46 Cal.4th at p. 1134.)

M. Use of the Word Extreme Was Not Error

Appellant contends that the instructions should not have used restrictive words such as "extreme." (AOB 369.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Farley*, *supra*, 46 Cal.4th at p. 1134.)

N. No Error in not Deleting Inapplicable Factors

Appellant contends that inapplicable factors should have been deleted from the jury instructions. (AOB 369.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Taylor* (2009) 47 Cal.4th 850, 899.)

O. No Error in not Instructing that some Factors Were Solely Relevant as Mitigators

Appellant contends that the jury should have been told which factors may be considered only in mitigation. (AOB 369-370.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Taylor*, *supra*, 47 Cal.4th at p. 899.)

P. Intercase Proportionality Was Not Required

Appellant contends that the absence of intercase proportionality renders the Death Penalty unconstitutional. (AOB 370.) This Court has

previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Farley*, *supra*, 46 Cal.4th at p. 1134.)

Q. No Equal Protection Violation

Appellant contends that the California's Death Penalty Scheme provides inadequate procedural protections violating the Equal Protection Clause. (AOB 371.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Farley*, *supra*, 46 Cal.4th at p. 1134.)

R. International Norms Do Not Render the Death Penalty Unconstitutional

Appellant contends that California fails to comply with international norms, thus rendering the death penalty unconstitutional. (AOB 371-372.) This Court has previously held to the contrary and appellant has not advanced any persuasive arguments requiring this Court to reject its prior holding. (*People v. Taylor*, *supra*, 47 Cal.4th at p. 900.)

XVII. THERE WAS NO CUMULATIVE PREJUDICE

Appellant contends that the errors at trial caused him cumulative prejudice. (AOB 373-374.) However, as discussed above, any errors were trivial and nonprejudicial, whether reviewed separately or cumulatively. (See generally *People v. Friend* (2009) 47 Cal.4th 1, 90 [no cumulative prejudicial error].)

CONCLUSION

Accordingly, for the foregoing reasons, respondent respectfully requests the judgment of conviction and sentence of death be affirmed.

Dated: May 25, 2010

Respectfully submitted,

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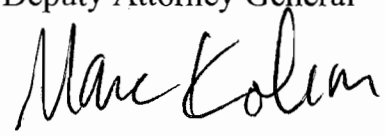

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 46,809 words.

Dated: May 25, 2010

EDMUND G. BROWN JR.
Attorney General of California

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DECLARATION OF SERVICE

Case Name: **People v. Cedric Jerome Johnson** **No.: S075727**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On May 26, 2010, I served the attached **[RESPNDENT'S BRIEF]** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

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On May 26, 2010, I caused 13 copies plus original of the **[RESPONDENT'S BRIEF]** in this case to be delivered to the California Supreme Court at **350 McAllister Street, First Floor, San Francisco, CA 94102-4797** by **US Mail.**

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 26, 2010, at Los Angeles, California.

Mary Emami
Declarant


Signature

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