SUPREME COURT COPY

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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **EDWARD MATTHEW WYCOFF,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S178669

Contra Costa County Superior Court Case No.
5-071529-2
The Honorable John W. Kennedy, Judge

RESPONDENT'S BRIEF

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DEATH PENALTY

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INTRODUCTION

"It's murder. It's wrong. [¶] . . . [¶] And what I did, I don't, I don't see it as murder, you know. I see it as something, you know, a bunch of moral steps that had to be taken." "I do believe in self defense. And I think it's okay to, you know, to do something like this in self defense. But no, I never had to shoot somebody in self defense. I've never hurt anybody like this." "This is something you do to somebody when they deserve it, you know. I don't like this kind of stuff."

Edward Wycoff offered this justification to police shortly after murdering his sister and her husband in the early morning hours of January 31, 2006. Wycoff took the same approach when representing himself at trial, explaining to the jury he murdered the victims to prevent them from robbing him of his inheritance—his childhood home. Wycoff recognized that his chance of succeeding in this defense was slim, but decided to pursue the defense anyway, to stay "*true to my self [sic].*" In the penalty phase, Wycoff attempted to persuade the jury that he was not inherently dangerous, was a productive member of society, committed the murders out of necessity, and possessed redeeming qualities. The jurors considered whether this and anything else about Wycoff's character, background, or actions merited leniency, and determined Wycoff deserved death.

This appeal is about the process by which the trial court safeguarded Wycoff's Sixth Amendment right to govern his own defense. Not one but two judges found Wycoff competent to do so. On appeal, Wycoff contends the asserted ineptness of his defense should have alerted the trial court to his incompetence to stand trial and represent himself. That he insisted he was sane and that the murders were justified, Wycoff asserts, should have alerted the court to the fact that he was insane and should not be permitted to defend himself. But by this logic, the only way Wycoff could prove he

was competent to represent himself was to agree he was insane, at least at the time of the murders. The trial court judiciously followed the law and prevented such a result by permitting Wycoff to present his defense.

In addition to claims that the trial court should have held a hearing into his competence to stand trial and represent himself, Wycoff alleges that the prosecutor committed misconduct, that the prosecutor improperly noticed victim impact evidence, that the court erred by admitting rebuttal evidence at the penalty phase, that the court erred by limiting victim impact testimony, and that the death penalty is unconstitutional. All of the claims fail. The guilt and penalty verdicts should be affirmed.

STATEMENT OF THE CASE

On July 8, 2009, the Contra Costa County District Attorney filed a first-amended information charging appellant Edward Wycoff with the January 31, 2006 premeditated murders of his sister Julie Ann Rogers and her husband Paul Robert Rogers. (Pen. Code, § 187—counts 1 and 2.[1]) As to both counts the information alleged Wycoff personally used a knife and wheelbarrow handle, both deadly and dangerous weapons. (§ 12022, subd. (b)(1).) The information also alleged a multiple-murder special circumstance as to both counts. (§ 190.2, subd. (a)(3).) (3 CT 682-684.)[2]

The People filed a notice of intention to seek the death penalty on April 24, 2008. (2 CT 337.) On November 14, 2008, the court granted Wycoff's motion for self representation. (2 CT 412; 1 RT 149-150.)

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[1] Future undesignated statutory references are to the Penal Code.

[2] An original information filed October 5, 2007 charged Wycoff with the same counts and enhancements but also alleged as to both counts that Wycoff was armed with a firearm (§ 12022, subd. (a)(1)). (2 CT 260-262.) The firearm enhancements were dismissed pursuant to section 995 on January 9, 2008. (2 CT 295.)

On October 27, 2009, a jury found Wycoff guilty of both counts. The jury found all personal-use allegations and both multiple-murder special circumstances true. (5 CT 1351-1355; 17 RT 3819-3822.) On November 5, 2009, the jury fixed the penalty for the murders at death. (5 CT 1507-1508; 21 RT 4628.)

On December 8, 2009, the court denied Wycoff's automatic motion for modification of the verdict. (6 CT 1579-1587; 21 RT 4652.) The court imposed the death penalty for both murders. On both counts, the court imposed a one-year prison sentence for Wycoff's use of a knife, and imposed but stayed a one-year prison sentence for his use of a wheelbarrow handle. The court ordered that the sentences for Wycoff's use of a knife run consecutive. The court entered an order of commitment pending execution of the death sentence. (6 CT 1633-1636; 21 RT 4719-4721.)

This matter is before this Court on automatic appeal. (§ 1239.)

STATEMENT OF FACTS

I. GUILT PHASE

A. Prosecution Case

1. The murders

In September 2005, Julie and Paul[3] moved their family into a rental home in El Cerrito while their permanent home was being remodeled nearby. (14 RT 2968-2969.) The rental home sat at the top of a hilly, wooded area directly adjacent to open space. (14 RT 3002-3004.) Wycoff, Julie's younger brother, helped the family move. As a result, he knew the home's layout. (14 RT 2970, 3109-3111.)

[3] We refer to individuals with the same surname by their first name to avoid confusion. We intend no disrespect.

Around 4:25 a.m. on January 31, 2006, Eric and Laurel Rogers, then 17 and 12 years old, respectively, awoke to sounds of a struggle or "fight" in the main hallway. (14 RT 2967, 2970-2974, 3106-3107, 3111.)[4] Paul screamed, "What are you doing? What are you doing? What are you doing?" Julie screamed, "Stop it. Stop it." (14 RT 2972-2973.)

Eric thought his parents were being attacked by a burglar. (14 RT 2974-2975.) He got out of bed and looked into the hallway. There, he saw a figure dressed in black and wearing a motorcycle helmet, struggling with someone he presumed were his parents. (14 RT 2975-2976.) The figure was the same height and build as Wycoff. (14 RT 2984.)

Eric went to Laurel's room and called police from a landline. (14 RT 2978.) He reported there was an intruder in their house. (People's Exh. 53 [911 call].) Eric and Laurel pretended to sleep. (14 RT 2978, 3115-3116.)

Meanwhile, the struggle continued. At one point, Julie or Paul yelled Eric's name. After a while the hallway became quiet. (14 RT 2973, 2979-2980, 3114.) Laurel came out of her room. There was blood on the wall and hallway floor. (14 RT 3119-3120.) Storage bins were tipped over and their contents strewn on the floor. Paul was face down on the floor in the master bedroom, his left hand "in an enormous pile of blood, and he had a knife in his back." (14 RT 2981.)

Laurel rushed to the kitchen and ran water over a towel at the sink. (14 RT 3121-3122.) Out of the corner of her eye, she saw that the kitchen's sliding glass door was open. Someone wearing night-vision goggles and dressed in black was outside on the patio. (14 RT 3123.) Laurel had seen night-vision goggles in Wycoff's room at his house in Citrus Heights. (14

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[4] Julie and Paul's other son, Alex, was not living with the family at the time. (14 RT 2969, 3107.)

RT 3128.) In shock, Laurel went back to the master bedroom and pressed the towel to Paul's wound. (14 RT 3124-3125.)

Eric followed a trail of blood to the master bedroom and found Laurel hunched over Paul. (14 RT 2981, 3125.) He told the 911 dispatcher his father had been stabbed. (People's Exh. 53.)

Paul told Laurel, "[I]t was your uncle." (14 RT 3125.) Assuming he meant Wycoff, Laurel asked, "Ted[?]" Paul nodded in agreement. (14 RT 3126.) Eric told the dispatcher the attacker was his "Uncle Ted," or Wycoff. (14 RT 2984; People's Exh. 53.) To Laurel, Paul said, "I'm so sorry," and, "I love you." (14 RT 3126.) To Eric, he said, "Eric, I love you. I love you no matter what. I love you." (14 RT 2981-2982.)

In the meantime, Officer Christopher Purdy arrived and waited in front of the house for backup. (13 RT 2885-2886.) He heard sounds of a female whimpering coming from the house, possibly from the pool area. (13 RT 2887-2889.) After other officers arrived they proceeded to the front door. There, officers noticed the window to the left of the doorway had been smashed out. (13 RT 2889-2890.) A shard of glass protruded from the bottom of the window frame. (13 RT 2907-2908.) There was glass and blood in the entry area. The front door was locked. (13 RT 2890-2891, 2907-2908, 2922.)

In the master bedroom, officers found Paul, still alive, on his stomach in a pool of blood. (13 RT 2892-2893, 2895, 2915, 2950.) He had a bump on his forehead and stab wounds in his back. (13 RT 2897-2898.) Near his feet was a motorcycle helmet to which was attached a ponytail of braided hair. The helmet's visor had fresh condensation in it. (13 RT 2898-2899.)

Purdy asked Paul who had done this. Paul said, "My brother-in-law, Ted." (13 RT 2896.) Purdy asked why. Paul said, "[I]t doesn't matter." Purdy asked, "[W]hy not[?]" Paul said, "[B]ecause I'm dying." (13 RT

2896.) Paul gasped for air and eventually became lifeless. He died before medical personnel arrived. (13 RT 2900-2902.)

Another officer followed a trail of blood down the hallway, through the kitchen, and out the sliding glass door. (13 RT 2926-2927.) There, near the pool, was Julie. She was injured and bleeding profusely but still breathing with difficulty. Significant portions of her intestines were outside of her body due to a large cut in her abdomen, which appeared "eviscerated." (13 RT 2927-2929.) Julie was transported to a hospital, where surgery to save her life was unsuccessful. (14 RT 3007; 15 RT 3284.)

2. Wycoff is arrested

Wycoff was arrested at a Kaiser hospital in Roseville, near his home, just before 8:00 a.m. on January 31, 2006. (14 RT 3037; 15 RT 3257-3258.) He had a wound on his right leg, a scratch on his chin, and abrasions on his right and left hands. He received stitches for a cut near his left thumb. (15 RT 3193-3196, 3258.) Wycoff was 37 years old, 6 feet 5 inches tall, and weighed approximately 300 pounds. (15 RT 3181.)

3. Crime scene and investigation

Officers discovered a light dangling from one of the light fixtures in front of the El Cerrito house. (14 RT 3009.) There was blood on the piece of glass protruding from the broken window frame near the door. (13 RT 2940-2941, 2947.)

A blood trail began near the master bedroom and proceeded down the hallway, into the kitchen, and out to the backyard. Outside, the trail led from Julie's body to the backyard fence. (14 RT 3001, 3007-3008, 3031, 3062.) The fence had a broken slat and was smeared with blood. (14 RT 3020-3021.) The blood continued up the hillside leading to a road called Vista. (14 RT 3021, 3023-3024.)

Officers found a wheelbarrow handle broken into three parts throughout the house. (14 RT 3024-3025, 3028.) One piece by the front entrance had a notch in which small pieces of glass were imbedded. (14 RT 3010-3011, 3041-3042.) Another piece was found in the master bedroom near the bed. (14 RT 3024, 3028, 3033.) The last piece was found behind the house at the bottom of steps leading up the hillside. It had a rounded end with blood on it. (14 RT 3070-3073.)

In the kitchen, blood was smeared or splattered on the dishwasher and found on the cabinet, latch of the sliding-glass door, and floor. (13 RT 2937-2938.) Officers found a torn, bloody knife sheath at the end of the hallway. (14 RT 3015-3016, 3042.)

There was blood on the bed, sheets, coffee table, and storage boxes in the master bedroom. (14 RT 3033-3034, 3081.) The ponytail on the helmet in the master bedroom appeared to be made of human hair. (15 RT 3177-3178.) There was blood on and around the helmet and an LED headlamp strapped to its front. (13 RT 2954-2955; 14 RT 3049.) What appeared to be pieces of night-vision goggles sat near Paul's body. (14 RT 3045-3046.) The knife retrieved from Paul's back had a spike-like feature on the handle designed to cause blunt-force trauma. The injury to Paul's forehead was consistent with that part of the knife. (14 RT 3067-3068, 3070, 3075-3076.) A K-9 Unit tracked a scent from the front of the home to the wooded hill behind it. (13 RT 2955-2956.)

Officers found Wycoff's van at the Roseville Kaiser. (14 RT 3081-3082.) Inside the van they found night-vision goggles, a bicycle with a light on the handlebars, bloody gloves, a map of El Cerrito, blue jeans, a plaid shirt, a windbreaker, a flashlight, and a bloody Leatherman knife. (15 RT 3155-3162, 3167-3168.) There was blood on the bicycle's light and on the night-vision goggles. (15 RT 3158, 3164.) The left-eye piece of the goggles was missing. (15 RT 3164-3166.) Officers found a semi-

automatic, loaded, .25-caliber Beretta in an organizer on the back of the passenger seat. (14 RT 3083-3084; 15 RT 3162-3163.)

Inside the plaid shirt in the van was a handwritten note which read on one side: "helmet, yogurt, cheese." On the other side were the words: "LED," "headlamp," "ax," "helmet," "motorcycle," "black clothes," "knives," and "gal," an apparent abbreviation for "gallon." (15 RT 3160, 3166-3167.) Inside the jeans was a receipt from In-N-Out Burger dated January 31, 2006, at 12:09 a.m. (15 RT 3161, 3170.)

Officers searched Wycoff's home in Citrus Heights near Sacramento. There, they found a ponytail of human hair matching the one found in the El Cerrito home. (15 RT 3174, 3178.) Officers also found a receipt for Lasik surgery conducted on Wycoff on January 27, 2006, a receipt from Lowe's for a wheelbarrow handled dated January 20, 2006, at 10:06 a.m., and a box that had once housed the Beretta. (15 RT 3179-3180, 3200.)

4. Autopsies

A forensic pathologist conducted autopsies of Paul and Julie. (15 RT 3205-3206, 3211, 3265.)

Paul was 48 years old, 5 feet 11 inches tall, and 197 pounds at the time of death. (15 RT 3211.) He had four stab wounds. (15 RT 3213.) One, likely the final wound, had punctured Paul's right chest cavity, and was caused by the knife found in his back. (15 RT 3214, 3263.) Paul was also stabbed in the right upper arm, causing a wound that passed entirely through that arm, in the left shoulder, causing a fatal wound that fractured his left humerus and passed into his left chest cavity, and in the lower right shoulder. (15 RT 3216-3217.)

Paul had 15 incised wounds, or wounds that were caused by a knife but consistent with "slashing," on his back, head, chest, and thigh. (15 RT 3211-3212, 3224-3227, 3230.) Four were defensive wounds on his right-hand fingers, consistent with Paul having attempted to shield himself from

a knife attack. (15 RT 3213, 3229.) A wound on his foot could have been a defensive wound. (15 RT 3215, 3229-3230.) Paul had seven other blunt-force injuries, or scrapes, including on his head, ankle, thigh, midback, and left leg, consistent with a club-type object such as a wheelbarrow or knife handle. (15 RT 3227-3228, 3230, 3264-3265.)

Julie was 47 years old, 5 feet 8 inches tall, and 203 pounds at the time of death. (15 RT 3265.) She was found with 19 knife wounds. (15 RT 3268.) An 11-inch wound along her abdomen was surgically repaired before the autopsy. (15 RT 3269-3270.) Julie's remaining knife wounds included wounds to the right side of her chest, a wound to the right side of her chest that entered the chest cavity, a wound to the left side of her scalp that penetrated to the skull, a wound near her left temple, wounds to her left thigh, a wound to her right forearm, a seven-inch deep wound to her right lower back, a wound to her right back that penetrated at least four inches deep into the abdominal cavity, another four wounds to her back, including one seven-inches long, a wound that went through her left ear, and two wounds to the back of her head. (15 RT 3270-3275.) Julie's significant back wounds were consistent with having been attacked from behind while she lay on her stomach. (15 RT 3274.)

Julie had four lacerations—caused when a blunt object such as a knife handle or piece of wood strikes and tears the skin—including near her right eye, underneath her left eye, and on the left side of her scalp. (15 RT 3267-3268, 3272, 3275, 3281.) She had 31 bruises all over her body, including on her thighs, legs, right ankle, right hand, and right foot. (15 RT 3268, 3282-3283.) She had six abrasions, or scratches. (15 RT 3268.) Redness around her eyes indicated she was hit there by a fist or blunt object. (15 RT 3279-3280.) She had defensive wounds on her left palm and the back of her right hand. (15 RT 3282, 3297.)

5. Wycoff confesses

Officers interviewed Wycoff on February 1, 2006 after he was advised of and waived his *Miranda*[5] rights. (15 RT 3182-3183; People's Exh. 61; 8 CT 1961-2076 [transcript].) The interview was taped and admitted at trial. (15 RT 3182, 3185, 3201.)

In the interview, Wycoff admitted he committed the murders and planned them in advance. (8 CT 1994, 2010, 2011.) His plan was to break into Julie and Paul's home, hit them on the head, then stab them. (8 CT 2014.) He did not intend to be apprehended and planned to leave no evidence he was the killer. (8 CT 2010, 2013.) He remembered the layout of the house after helping the family move. (8 CT 2014-2015.)

Wycoff decided to commit the murders on January 31, the anniversary of the day his grandmother, whom he despised, moved out of his home. (8 CT 2006-2008.)

Wycoff bought tickets to see the band Coldplay perform the night before the murders, which he later explained he intended as an alibi. (8 CT 2015-2016; 15 RT 3310.) Wycoff chose not to use a gun for the murders. (8 CT 2013-2014.) An NRA member, he did not want the murders to be "another statistic" liberals could use to argue against guns. Apparently to promote gun ownership, he planned to argue that Paul and Julie could have prevented their murders if they owned guns. He also believed it would not be moral to kill Julie and Paul with a gun, since they did not believe in guns and would not be armed. (8 CT 2003, 2013-2014.)

Wycoff chose a knife he believed would work well for the murders. (8 CT 2018-2019.) He also went to Lowe's and bought a wheelbarrow handle. He tested the handle to see if it would break and determined it

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[5] *Miranda v. Arizona* (1966) 384 U.S. 436.

would be sufficient. (8 CT 2019.) About two weeks before the murders, he made a handwritten list of items he would need. (8 CT 2039-2040.)

Wycoff did not want the children to be home for the murders. He learned from Julie that Alex was not living with them. He knew Eric and Laurel sometimes spent the night elsewhere. (8 CT 2013.)

Wycoff decided to disguise his face with a motorcycle helmet for the murders. He attached hair that had been his mother's to the back of the helmet. He fashioned an LED light on the helmet and lights on his bicycle to help him see in the dark. (8 CT 2018.) Since he normally wore Levi's, he decided to wear sweatpants to commit the murders. (8 CT 2026.) He planned to dispose of the wheelbarrow handle, bicycle, helmet, and sweat clothes in a dumpster after the murders. (8 CT 2045.)

Wycoff studied maps of El Cerrito and planned a route there in advance. (8 CT 2019.) Suspecting toll-booth cameras would record his license plate, he planned a route home that bypassed tolls. (8 CT 2032-2033.) He had Lasik surgery the Friday before the murders, believing it would help him see better during the murders. (8 CT 1994, 2047.)

The night of the murders, Wycoff packed gloves, his bicycle, night-vision goggles, sweat clothes, and the motorcycle helmet in his van. Expecting there would be blood splatter, he also brought a change of clothes. (8 CT 2018, 2020, 2045.)

Wycoff went to the Coldplay concert. The concert ended at about 11:15 p.m. Afterwards, he went to In-N-Out Burger and ate. (8 CT 2016-2017.) He returned to his van in the In-N-Out Burger parking lot and—believing the van may be photographed near the scene—disguised the van by removing its antenna and other items. He planned to place the items back on the van when he got home after the murders. (8 CT 2016, 2018.)

Wycoff set off for El Cerrito. There, he drove to an intersection above Julie and Paul's house and confirmed it was downhill from there to

the house. (8 CT 2018-2019.) He parked his van near the BART station, changed into his sweats, and taped the wheelbarrow handle to his bike. There were police near the BART station, so he waited until everything was clear. Around 2:00 a.m. he walked his bike up the hill. He left his bike at the top of the hill and walked down the hill to the house. (8 CT 2019-2021.)

At the house, Wycoff tried to determine the best way in. (8 CT 2021.) A light came on in front unexpectedly, so he broke it. He found the front door locked. He considered going around the back but worried there would be obstacles, so he threw a paver through the front door instead. (8 CT 2021-2022.) Around that time, he began to have second thoughts.

> [F]or like several minutes, I was going through my mind, okay, this is what I'm gonna do, this is where I'm gonna go, rehearsing it in my mind. And I just really didn't want to do it, but I told myself this is something that has to be done. These are horrible, rotten people and, you know, what they're doing to their kids. It's just something that has to be done. And I forced myself to do what had to be done.

(8 CT 2022.)

Wycoff ran through the window, breaking the wheelbarrow handle in half and probably cutting his leg. He ran down the hallway. To his surprise, he found Julie and Paul awake. (8 CT 2022-2023.) He hit Julie on the head with the remaining half of the wheelbarrow handle. (8 CT 2023.) Paul charged Wycoff. Wycoff hit Paul a couple of times. Paul fell on the floor on his back and kicked with his feet. Wycoff took out his knife. Julie confronted Wycoff, so he attacked her. Paul jumped on Wycoff and grabbed Wycoff around the head. Julie fell on the bed and Wycoff stabbed her. It was "just a horrible blur of stuff." (8 CT 2023-2024.)

Wycoff stabbed Paul in the back but realized he could not remove the knife. At some point Julie got up and walked down the hallway slowly. Paul was flailing and yelling. Wycoff heard a gurgling sound, "like blood

in [Paul's] lungs or something." (8 CT 2024.) Paul said something like, "'Okay, okay,' like he was giving up . . . ." (8 CT 2026.)

Convinced he "took care of Paul," Wycoff grabbed the wheelbarrow handle and ran after Julie. (8 CT 2025.) He followed a trail of blood into the kitchen. He saw Julie walk out the backdoor and followed her outside. There, he ran up behind her and hit or stabbed her with the handle an uncertain amount of times. (8 CT 2025-2026.) Julie eventually fell to the ground, where Wycoff continued to stab or hit her over the head. Eventually, Julie said calmly, "I'm dead." (8 CT 2026.)

When he "finished with [his] sister," Wycoff jumped over the fence. (8 CT 2027.) He ran up the hill, got on his bike, and rode down the hill. He saw a fire engine coming up the hill, so he stopped and hid until it went by. (8 CT 2027, 2029.) At the bottom of the hill he noticed a big cut in his leg. (8 CT 2047-2048.) As he got on the freeway, he saw a police car driving in the opposite direction with its lights on. (8 CT 2029.)

Wycoff drove toward his home but began to feel lightheaded from loss of blood. Believing he might die, he stopped at a Walmart parking lot. (8 CT 2032-2033.) He reflected on the murders and determined that, contrary to his plan, he would be apprehended.

> Oh, my God, there's gonna be DNA left behind. My helmet got pulled off. And I just figured, I figured that eventually you guys would catch up to me. I didn't think it would be so quick at the hospital, but I figured I'd go down for this in a few days. I kind of knew.

(8 CT 2033-2034.) Wycoff drank water and soda. He eventually felt well enough to get back on the freeway. (8 CT 2034.) He decided to go to a hospital and determined Roseville was his best choice, because there he could say he had just been injured while mountain biking nearby. "I just, you know, I tried to make it look as best I could." (8 CT 2036.)

Wycoff explained he murdered Julie and Paul because they were trying to take his home. Wycoff and Julie had agreed that when their father died, Wycoff could keep the family home in Citrus Heights, in which Wycoff lived. In return, Julie would inherit all their father's money. (8 CT 1965-1966, 1968-1969, 1988.) When their father died, Wycoff kept his end of the bargain, allowing Julie to keep their father's savings and forwarding her their father's financial statements. As executor of their father's estate, however, Julie began insisting the Citrus Heights house was half hers. (8 CT 1968-1969.)

Wycoff believed Julie had no need for his home. She was a lawyer but married into wealth and did not work. (8 CT 1965-1966, 1987.) Their father left Julie's children $350,000 for college. (8 CT 1966-1967.) Julie and Paul had two homes. (8 CT 1985.) When Wycoff asked Julie why she needed half the Citrus Heights home, Julie said she wanted to buy a house in the mountains bordering a national or state park. (8 CT 1987.)

In Wycoff's opinion, Julie had become a "home wrecker" and a hypocrite. (8 CT 1966-1968, 1987-1998, 2001.) She initiated a lawsuit and halted construction of a neighbor's home just because some of her panoramic view would be "a little bit restricted . . . ." (8 CT 1986-1987.) Wycoff discovered Julie was mismanaging the assets of his beloved Aunt Lu, who was in a nursing home. (8 CT 1995-1998.) Julie sold Aunt Lu's home and kept the money. Julie was rewriting Aunt Lu's will and writing checks from Aunt Lu's bank accounts, which Wycoff discovered after reviewing Aunt Lu's bank statements. (8 CT 1997-1998, 2002.)

Julie moved Aunt Lu to another nursing home but was evasive about her whereabouts. (8 CT 1996, 1998-1999, 2001, 2011.) On January 4 or 5, Julie told Wycoff she would not tell him where Aunt Lu was, "So you won't bully her." (8 CT 2011-2012.) Although he had already decided to kill Julie, that comment made Wycoff certain Julie had to die. (8 CT 1994,

2011-2012.) Someone else needed to get control over Aunt Lu's estate—"someone with morals." (8 CT 2003.)

Julie and Paul had other moral defects. (8 CT 1994). Julie failed to invite Wycoff over for Thanksgiving or Christmas that year, and instead called Wycoff only to talk about money and their father's trust. (8 CT 1983-1985.) Politically, Paul was "way over to the left," a communist. (8 CT 2003.)[6] He and Julie mistreated their dogs (8 CT 1973-1974) and failed to maintain their house (8 CT 1994-1995). They were weak parents who could not discipline their children and instead over-medicated them with Ritalin. (8 CT 1974-1977, 1981.) Eric was an alcoholic and using drugs by the age of 13 or 14. (8 CT 1977.) After the murders, Wycoff planned to raise the kids, and "raise them right." (8 CT 2010.)

Wycoff was "very disappointed" about his execution of the murders. (8 CT 2042.) The wheelbarrow handle turned out to be weak and broke as soon as he went through the glass. His gloves and helmet came off. He should have picked gloves with straps and also strapped the helmet on. (8 CT 2019.) The night-vision goggles were blurry. (8 CT 2020, 2041.) His sweatpants got pulled down and dragged on the floor, and he cut himself on the glass window. (8 CT 2026, 2031.)

Wycoff "didn't like the scuffle that took place in the house" (8 CT 2042) and had hoped the murders would go "a little smoother" (8 CT 2046). "[T]here was just so much pushing and shoving." (8 CT 2046.) "[I] am, you know, really sorry that that had to happen." (8 CT 2046.) He regretted Laurel had seen some of it. (8 CT 2043-2044.)

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[6] Of his own political views, Wycoff said he was a "moderate." He was "a little bit conservative" for California but "a bit more liberal" than the rest of the country. (8 CT 2004.)

Wycoff primarily regretted having been caught. He had anticipated he would be a suspect but hoped police would not be able to identify him as the killer. (8 CT 2044.) Since he had been caught he could not raise the children the way he believed was proper. (8 CT 2010, 2055.)

Wycoff acknowledged that murder was wrong but insisted his crimes were necessary. (8 CT 2071.) He said he did not feel better after confessing to the murders, explaining:

> There's no moving forward for me after what happened. You know, for me, it's over. [¶] . . . [¶] I'm probably the most hated person in the Bay Area, despite what I intended to do. People are probably saying I'm the rottenest person in the whole Bay Area.

(8 CT 2057.) Wycoff emphasized that he had never done anything like this before. (8 CT 2062, 2069.)

> Listen, you know, I'm not the kind of guy that does stuff. I don't, I don't like –[¶] . . . [¶] No, I don't like killing people. It's—this is the first time I've ever done this. I'm not happy about this. I, I did this because I felt it had to be done.

(8 CT 2069.)

> It's murder. It's wrong. [¶] . . . [¶] And what I did, I don't see it as murder, you know. I see it as something, you know, a bunch of moral steps that had to be taken.

(8 CT 2071.)

> I do believe in self defense. And I think it's okay to, you know, do something like this in self defense. But no, I never had to shoot somebody in self defense. I've never hurt anybody like this.

(8 CT 2071.) "This is something you do to somebody when they deserve it, you know. I don't like this kind of stuff." (8 CT 2072.)

6. Wycoff tells a reporter the murders were justified

The parties stipulated that if called as a witness a reporter from the Contra Costa Times would testify that he went to the jail on Friday, February 3, 2006, and that Wycoff said the following:

> Edward Wycoff began planning in September how he would approach his sister and brother-in-law and kill them. [¶] 'What I wanted to do was get rid of them, leave no evidence and get out. [¶] Wycoff said he has no regrets for what he did. [¶] 'Overall, overall I feel like I took down some bad people, said Wycoff, who added he only saw his sister once or twice each year over the past 15 years. [¶] 'I made the world a better place[.']
>
> Speaking coherently and politely Wycoff said Friday that he was upset with the [']liberal political views of his sister and her husband and, also, concerned about how his sister was managing their father's estate and how she was treating an aunt.[']
>
> Wycoff said he and his sister had made an informal agreement after their father died last July. Wycoff would get the house and his sister would get his financial assets. However, he said his sister started asking Wycoff to pay her each month for the house. [¶] He said he was also upset that his sister moved their great aunt into a nursing home and began taking control of her assets. [¶] 'I was just getting fed up with the life she was leading,[']' he said. [¶] 'I was appalled with what my sister and brother-in-law did[.']
>
> Wycoff said he went to a Cold Play concert on Monday night at Arco Arena in Sacramento, the first concert he had ever attend [*sic*] in his life. He said I didn't drink or use drugs, which he says he never does. [¶] 'I thought it could be a bit of an alibi,[']' he said. '[I]t seems like somebody who goes to a Cold Play concert wouldn't do this[.'] [¶] He arrived in front of the Rogers' home and thought about what he was going to do. [¶] 'I had to tell myself this is something that has to be done,[']' he said. [¶] . . . [¶]
>
> Wycoff said the couples' daughter, Laurel, saw some of the attack. [']I'm real sorry that she had to witness that[,'] he said. [¶] He said he had a gun, but did not bring it into the house. [']I always have a little Beretta in the van,[']' he said.

He insists that he does not hear voices and that he has never killed anyone before. [¶] [']I don't think of myself as a murderer. Yes, I killed some people. I was supposed to make the world a better place,['] he said.[7]

(15 RT 3309-3312.)

7. Wycoff writes poetry about the murders

On June 4, 2009, officers searched Wycoff's jail cell and found handwritten poetry. The poetry included the verses:

Quick as I Tread, Trough cold morning dew
fast I fled, from That Blooded crew

You won't steel my Homested, and you'll never even sue
I'll kill you instead, in a Bloody red Brew

(8 CT 2080; 16 RT 3371, 3375, spelling errors in original), and:

Since you've found, That family is The Best to flees,
Under the ground, you will rest in Peace,

My shitster was a Theef, who maid an errer
I gave her greef, as she died in Terrer
Cut her husband like Beef, and I didn't spair-her,
and now for the ground Beneeth, The cemitary prepers her

(8 CT 2081; 16 RT 3376-3377, spelling errors in original).

B. Defense Case

1. Wycoff testifies that he committed the murders out of necessity

Wycoff presented to the jury his reasons for committing the murders. He explained in detail that Julie used his father's hatred of him to secure

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[7] We have changed the internal punctuation of this passage to effectuate the direct quotations in the passage. The prosecutor's use of the words "Quote" and "End quote" have been omitted and replaced with quotation marks where the article appeared to provide a direct quote.

more of the estate for herself (16 RT 3395) and that Julie removed property from the house without his consent or knowledge (16 RT 3430-3432).

Their relationship eventually deteriorated over the house. Despite their agreement that Wycoff could keep the house, in August Julie began insisting the house was half hers and demanding Wycoff pay her rent. (16 RT 3433-3434.) "[T]his wasn't the same Julie." (16 RT 3434.) Julie justified taking the house by telling Wycoff he needed to get his own life (16 RT 3453), and said she and Paul may divorce (16 RT 3463). When Wycoff countered that Julie owned a lot of property, including a home on the Russian River and property in Hawaii, she said she would not get much in the divorce. (16 RT 3463.)

Wycoff eventually discovered Julie had taken the deed to the house and original bills of sale from their father's filing cabinet without telling him. (16 RT 3444-3447.) It was not until he received a tax bill in the mail that he discovered Julie placed the home in a trust named after their father, the "Edward L. Wycoff Trust." (16 RT 3456.)

Julie waited until their father died to sell Aunt Lu's home. (16 RT 3449.) Wycoff went to Aunt Lu's home and found bills and bank statements showing Julie had been writing checks on Aunt Lu's accounts. Julie depleted one account to almost $10,000 in one month. When Wycoff confronted Julie, she became angry. (16 RT 3451-3452.) Julie admitted she was rewriting Aunt Lu's will to include just "closer family members, which means Julie was going to write a will that includes herself more than other family members." (16 RT 3452.)

Wycoff detailed instances illustrating Julie's other selfish conduct. Julie was unconcerned with their father when he died. Rather than assist their father with a feeding tube, she allowed him to die because she had a family vacation planned. (16 RT 3422-3423, 3426-3427.)

Wycoff detailed instances illustrating Julie and Paul's poor parenting, including instances where they over-medicated their children with Ritalin. (16 RT 3400-3405, 3413-3414, 3447-3448.) Wycoff was particularly disturbed with what he learned and observed while helping the family move that September, including that the children had damaged the house with self-made Napalm and that Julie had used her influence with the El Cerrito Planning Commission to shut down construction of a neighbor's home. (16 RT 3437-3438, 3447, 3442.)

Wycoff decided to commit the murders in September. "I knew what Julie and Paul were about to do to me. I didn't like the idea of having to kill Julie and Paul, but it looked like those—[that] is what it was coming down to, that's what had to be done." (16 RT 3461.) After the murders, he intended to retrieve Aunt Lu from the nursing home. It would be one of the "corrections [he] had to make after Julie and Paul were out of the picture." (16 RT 3462.)

2. Cross-examination

On cross-examination, Wycoff detailed planning and executing the murders largely consistent with his earlier confession. (16 RT 3479-3485, 3503-3523, 3540-3543, 3547-3548, 3556-3558.) He insisted he would not have hurt Julie's children. (16 RT 3514.)

Wycoff recognized the prosecutor technically proved his case (16 RT 3510 ["Well, you know, might as well [make the facts clear]. You proved your case"]), but emphasized that the murders were necessary. He detailed his rationale for the crimes and explained he murdered Julie and Paul because they wanted to destroy him financially. (16 RT 3489-3493.) The murders were not triggered by past wrongs or insults, and he would not have murdered Julie and Paul over little things. It was not until his father died and Julie attempted to take his home that he decided to kill her. (16 RT 3550-3551, 3572-3573.)

After the murders, Wycoff planned to "move Aunt Lu into [the house], probably build a new bedroom for the kids, you know, three kids." He planned to give Aunt Lu the master bedroom. (16 RT 3570.) He thought about getting caught before the murders, and knew if he was caught he would be arrested and charged. (16 RT 3571-3572.) Wycoff was disappointed he got caught and could not raise the children, but was proud of what he accomplished. Paul and Julie "did not get away with ruining me, Aunt Lu, and just whatever else they were doing." (16 RT 3543.)

Regarding his confession to police, Wycoff said, "[I]f I can do something like this, it shouldn't be too hard to talk about something like this." (16 RT 3557.) Wycoff spoke to the newspaper because he realized he had been caught, believed there would be rumors and speculation, and wanted to "set the story straight." (16 RT 3566.) He admitted he liked notoriety but noted, "Well, I'm infamous rather than famous. I'd rather be famous." (16 RT 3567.)

II. PENALTY PHASE

A. Prosecution Case in Aggravation

1. Wycoff's booking statements

The People introduced Wycoff's booking statements made on January 31 and February 1, 2006. (18 RT 3923, 3928, 3932, 3950; People's Exh. 67; 8 CT 2082-2100 [transcript].) In them, Wycoff asked, "How often do you get someone like me in here that does something like that?" (8 CT 2090), and said, "Boy this is gonna be one hell of a shock to a lot of people" (8 CT 2091). He said:

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

(8 CT 2092.)

2. Wycoff's jail calls

The People introduced ten jail calls made by Wycoff in custody. (18 RT 3950-3961, 3990-3991; 8 CT 2101-2123; 9 CT 2124-2252 [People's Exhs. 68A through 68J].)[8] The calls generally showed Wycoff continued to believe the murders were justified and had no remorse.[9]

In one call, Wycoff told Brad Langner, his co-worker, that he planned to get away with the murders so he could "raise [his] sister's children properly." (8 CT 2120.) He was not happy about how things went inside the house and said it was a shame the children were orphans. Wycoff would not have given the children Ritalin and drugs. (8 CT 2121-2122.)

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[8] We do not discuss all the calls here. In sum, the jail calls admitted were: (1) a February 4, 2006 call to the Campbells; (2) a February 7, 2006 call to Brad Langner; (3) a February 7, 2006 call to the Campbells; (4) a February, 28, 2006 call to Mike Lawson; (5) a March 4, 2006 call to Uncle Charlie; (6) a May 21, 2006 call to Drew Campbell; (7) a May 2, 2006 call to Lawson; (8) a March 5, 2006 call to Uncle Charlie; (9) a March 18, 2008 call to Lawson; and (10) a May 28, 2006 call to Lawson.

[9] The transcripts of the jail calls provided in the clerk's transcript are over inclusive in that they include portions of the calls not played for the jury. People's Exhibit 68A was played from page 18 to page 28, line 1164. (18 RT 3953; 8 CT 2117-2111.) People's Exhibit 68B was played in its entirety. (18 RT 3954-3955; 8 CT 2117-2123.) The prosecutor intended to play pages 9 and 10 of People's Exhibit 68C, but upon Wycoff's request also played pages 11 and 12. (18 RT 3955-3956; 9 CT 2125-2128.) The prosecutor intended to play pages 70 through 73 of People's Exhibit 68D, but upon Wycoff's request also played pages 88 through 91. (18 RT 3956-3957; 9 CT 2134-2137, 2152-2155.) People's Exhibit 68E was played from pages 163 to 171, and then from pages 173 until 180. (18 RT 3959-3960; 9 CT 2156-2164, 2166-2173.) Only pages 244 and 245 were played of People's Exhibit 68F. (18 RT 3960; 9 CT 2174-2175.) People's Exhibit 68G was played in its entirety. (18 RT 3960-3961; 9 CT 2180-2200.) People's Exhibit 68H was played from page 156 to 162. (8 RT 3990; 9 CT 2212-2218.) People's Exhibit 68I was played from page 36 to 51. (18 RT 3991; 9 CT 2221-2236.) Finally, People's Exhibit 68J was played from page 198 to 207. (18 RT 3991; 9 CT 2243- 2252.)

Langner said people felt scared because they had befriended and trusted Wycoff. (8 CT 2120.) Wycoff understood the sentiment, stating, "I can see—I can see how it would be like that," and, "[I] can see that. I—yeah, there's the—there's a hell of a lot of people in this world that are uh, truly shocked." (8 CT 2121.) Wycoff offered, "[I]'m not the kind of guy that uh, likes to do stuff like this. I just felt I had to do it." (8 CT 2122.)

In a call to his friend Mike Lawson, Wycoff said he was doing "pretty good." (9 CT 2134.) He explained he did not want to receive psychological treatment:

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

(9 CT 2135.) Based on books he read by crime-author Ann Rule, Wycoff guessed he would get 20 or 25 years in prison. Wycoff said he was not sick or sadistic, such as killers who hurt and raped women or liked hurting people. (9 CT 2136.) It was those killers that got executed. Wycoff was confident he could show he was not like those killers. (9 CT 2137.)

Lawson said people were surprised by the murders because Wycoff had no history of such crimes. (9 CT 2137.) Wycoff explained the murders were not his norm, but were "just a one time uh, decision. Moral decision that I had to make." (9 CT 2137.)

In a call to "Uncle Charlie,"[10] Wycoff attempted to explain the murders. He said Julie married into a "screwed up" family and had taken

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[10] Uncle Charlie appeared to be Wycoff's father's brother. (See 9 CT 2160-2161.)

over Aunt Lu's[11] estate. (9 CT 2161.) Julie put Aunt Lu in a nursing home, sold her house, and kept the money. (9 CT 2162.) Wycoff described seeing Aunt Lu's bank statements and discovering Julie stole Aunt Lu's money. (9 CT 2163-2164.) Wycoff described the problems with Julie's children, including Eric's drug use. (9 CT 2167-2168.) Wycoff believed the amount of Ritalin the children were given was unnecessary. Julie and Paul should have given the children just a little bit of Ritalin, enough to keep them focused for school hours. (9 CT 2169.)

Wycoff expressed regret that, because of the murders, the children now loathed him. "I don't know what they think of me now but uh, before this they-they thought I was like uh, like the greatest person in the world." (9 CT 2171.)

In another call to Lawson, Wycoff said he received his discovery and listened to Eric and Laurel's statements. (9 CT 2181.) He found the statements both "disappointing" and "heart wrenching." (9 CT 2181.) He learned Eric had been in juvenile hall after getting arrested at a peace march with a Molotov cocktail. (9 CT 2182.) He was released before the murders. (9 CT 2183, 2193.) He had been to rehab but relapsed and got into drugs again. (9 CT 2184.) Julie had been secretive about this with Wycoff and their father. (9 CT 2183.) A judge had ordered Eric and Alex not to talk or be near one another. (9 CT 2183, 2185.) Accordingly, they were living separately, with different members of Paul's family. (9 CT 2185.)

When Lawson expressed hesitation about discussing the murders (9 CT 2190), Wycoff attempted to explain himself. He said he was a moral person who tried to "do good" and did not enjoy killing. (9 CT 2191.) He worried Eric was like him but was not as moral. Wycoff said that because

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[11] Aunt Lu is referred to in these transcripts as "Aunt Lou." For consistency, we use the previous spelling.

he could commit murder but was a moral person, he was "one trait away from being a serial killer." (9 CT 2191.)

> [T]here's just one thing, though. I have moral values. And that—and that's the thing that keeps me in check is I have morals and I try to do good, do good, do good. And—and it keeps that in check. Now the thing is, I screw up from time to time. You know. I can talk about things like this.

(9 CT 2191.)

Lawson said the murders confused him because he knew Wycoff to be a good person who helped people. (9 CT 2192.) Wycoff explained that despite what he had done, he had a conscience:

> The thing is everybody's got all these traits. Everybody's got strengths and weaknesses. And people that go out and do serial killings and stuff, you know, there's-there's some things that, um, like they don't have a conscience. They don't have—there's just a lot of things that they don't have that inhibit them.

(9 CT 2192.) Wycoff speculated that Eric had the traits of a serial killer, and may try to kill him some day. However, Wycoff believed Eric would be justified in doing so: "And I'd let him do it. I mean, if he wants to kill me after what I did, uh, I think he's got the right to do that." (9 CT 2192.)

In another call, Uncle Charlie asked Wycoff if he was scared. Wycoff said he was emotional but not scared. "No one loves me. And uh, you know—so I'm the kind of guy that can uh, stand alone and I can handle something like this." (9 CT 2215.) He said, "I killed two people," "But it's not like I did anything wrong. I mean, just because something's illegal, doesn't mean it's wrong. The thing is, these were two very, very bad, evil people." (9 CT 2216.)

In another call to Lawson, Wycoff explained he did not like his attorney, Daniel Cook, because Cook could not understand the murders were justified. He explained: "[I]'m a good person with morals. The fact that I killed two people doesn't mean I'm a bad person." (9 CT 2231.)

"[T]he fact that something is illegal doesn't make it wrong. My sister was stealing from my family. [¶] . . . [¶] She was destroying people's lives." (9 CT 2231.)

Wycoff later attempted to persuade Lawson that the murders were borne of necessity. Wycoff had reviewed more of the discovery and confirmed that his family was under attack. Paul and Julie had failed to invite Aunt Lu over for Christmas, despite that she was in a nursing home and that Paul and Julie were stealing probably half a million dollars from her. (9 CT 2243.) "[W]hat [Julie] did [to] my Aunt Lou? She was about to do to me because dad put—her—the trust in her control." Julie was "bout to screw me over big time." (9 CT 2245.)

Wycoff was disappointed people did not understand his rationale for committing the murders. "There's a whole bunch of people in this world who don't want to talk to me, don't want to deal with me." (9 CT 2247.) Lawson asked Wycoff if he could see why people did not want to talk him. Wycoff said he could, "Because we are living in a messed up world," but said people could still listen to his side. (9 CT 2247-2248.)

3. Wycoff's letters to Lurinda Armanini

The prosecutor introduced two letters Wycoff wrote to his father's cousin, Lurinda Armanini, while in custody in 2006. (18 RT 3994-4007, 4013-4040; 9 CT 2253-2302 [People's Exhs. 69 and 70A]; 15 RT 3317.)

In the first letter, written on April 6, 2006 (18 RT 3996), Wycoff told Armanini he was not a sadistic serial killer who enjoyed killing. He was not like Ted Bundy or the Unabomber, who were "serial murderers, two bad people who like to harm others." (18 RT 3997.) "I'm a good person who killed two bad people who liked to harm others." (18 RT 3997.)

Wycoff said things were dark for him. His future was grim, and his life was wasted. (18 RT 3998.) Nonetheless, he was mentally stable. He believed his ability to laugh at himself evidenced that he was mentally

sound. (18 RT 3998-3999.) His planning of the murders was further evidence that he was mentally stable. He first began to deliberate about the murders in August or September. By mid-January he had already planned the murders and determined he would conduct them in a three-hour time period. "[I] didn't just on a sudden decide to kill two people. I didn't just pop a pill, get angry and decide to kill. I was planning to do it more and more as I saw more and more evil." (18 RT 3999-4000.)

Wycoff wrote that in most murders, the killer is usually evil and the victim is good. In this situation, however, he was the "good guy," the victim, not the criminal. (18 RT 4001.) He explained that Julie and Paul hurt him and his family. (18 RT 4001-4002.) "I wasn't destroying my family by killing them. I was saving them." (18 RT 4002.)

When Armanini did not respond favorably, Wycoff wrote her another letter. Wycoff began the second letter on August 1, 2006, and completed it on September 11, 2006. (18 RT 4013, 4040.)[12] In it, Wycoff made a variety of references to the movie The Shining and told Armanini he did so to trick her into believing he was crazy. (18 RT 4013, 4015, 4019 [telling Armanini she should not fall for his "stunts," like his reference to the devil in his last letter, and his "jokes" or references to The Shining in this letter], 4027-4031, 4040.)

Wycoff wrote that he killed Julie and Paul because he cared about his family. (18 RT 4014.) It was unfortunate he got caught, but he hoped Armanini could understand him. "My life is over but yours isn't. And since I've got the time, I'm going to try and enlighten every one I can." (18 RT 4014-4015.) Attempting to explain himself, Wycoff said,

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[12] At Wycoff's request, Armanini's intervening letter was admitted into evidence and read by the prosecutor. (18 RT 4007-4008; 8 CT 906 [Def. Exh. A].)

> What I did was not easy. It was hard. I killed the only two people left alive who knew me the most and for the longest. [¶] I am a peaceful person who helps people and does not like to hurt people. I killed two people who like to hurt people and were doing it more and more.

(18 RT 4016.) Wycoff insisted the murders were necessary but recognized the law did not agree, saying, "I killed two people and got caught. There isn't anything I can say or do to change it or justify it to the laws of this screwed up world." (18 RT 4024.) In closing, Wycoff asked Armanini not to turn against him:

> I think you know that I could not get into any more trouble than I am in right now. I am facing first degree multiple murder charges, and I am facing the death penalty. This is the ultimate charge and the maximum punishment. [¶] Right now I can rob a bank, steal a car or even kill again, and this state couldn't punish me one bit more. I have achieved the ultimate. [¶] The evidence against me is overwhelming. It is also underwhelming, and I am whelmed every bit in between. [¶] There are 100 nails in my coffin, but for you, Lurinda, to make it 101, now that is just too petty for me to accept.

(18 RT 4034-4035.)

4. Victim impact evidence

Paul's brother Kent discussed the difficulty of raising Paul's children after the murders. Kent took custody of Alex after the murders, and his brother Mark took custody of Eric and Laurel. (19 RT 4100.) Kent had three children of his own. To accommodate Alex and Laurel, who moved in with Kent after Eric went to college, Kent remodeled his home and built an additional room. (19 RT 4101-4102.) Paul and Julie's children were highly traumatized. They went to frequent family therapy sessions. The situation put a strain on Kent's own family and relationships. Alex and Eric had problems with the legal system. (19 RT 4103-4105.)

On cross-examination, Kent confirmed Alex was in wilderness camp before the murders due to problems relating to an anti-war rally in San Francisco. He believed a judge had ordered the brothers separated. (19 RT

4107-4109.) Kent agreed that Eric and Alex's legal trouble began before their parents died. All the children were in therapy before their parents died. (19 RT 4109.)

Doug Bowman testified that he had grown up with Paul. (19 RT 4110-4111.) Paul was curious, intellectual, adventurous, and outgoing. He easily made friends. (19 RT 4111.) Paul talked to Bowman frequently about challenges Paul had with his children and with Wycoff. (19 RT 4114.) Although "things had gone wrong sometimes," Paul saw the new house as an opportunity to turn things around. (19 RT 4115.) Julie was dynamic, caring, and a great athlete. (19 RT 4115-4116.) Paul and Julie were very connected to their community and family. (19 RT 4112, 4116.)

Bowman had known Wycoff for some time. Wycoff was difficult to be around, but Paul and Julie were compassionate and always sought to include him. (19 RT 4112-4113.) Julie and Paul "didn't see people as bad, they saw them as what they were and they really cared for other people and that was the people they were." (19 RT 4113.)

Eric testified that Paul was patient, loving, kind, and made his children his first priority. He was liberal, forgiving, and "let things slide." (19 RT 4120.) Julie was loving, compassionate, patient, forgiving, and also liberal. (19 RT 4120-4121.)

> [S]omething that is really important in describing both of them is that they didn't believe in like bad people, like we struggled growing up, we got in a lot of trouble and they never thought that we were bad, just that our actions maybe needed adjusting, and they were not vengeful. They wouldn't react out of anger, they didn't—I feel like if they were alive today they would have something to say to all of us.

(19 RT 4121.)

Life was difficult for Eric after the murders. He had become sober prior to the murders, but the murders challenged his sobriety. In the end, he managed to stay sober. (19 RT 4124.) Eric missed most being able to talk

to his parents and having a home to return to. (19 RT 4125.) His favorite memories of his parents were traveling with them to such places as Turkey, Israel, Indonesia, Hong Kong, Japan, and Tahiti. He got his "act together for the most part" by the summer before the murders. They spent that summer around Bora Bora, on a boat as a family. (19 RT 4125.)

On cross-examination, Eric told Wycoff:

> [I]t would be wrong for you to get the death penalty, you specifically, because you're mentally childish. You're very immature for your age. [¶] I know people who have known you for a long time, and they say you haven't changed much since you were about nine years old.

(19 RT 4127.) Eric agreed his life was "messed up" before his parents' murder. (19 RT 4128.) Although he said he straightened up his life before his parents died, he admitted he had gone to juvenile hall three months before the murders. (19 RT 4128.)

Laurel testified that Paul was one of the most intelligent and compassionate people she had known. He was understanding, patient, calm, and open minded. Julie was creative, kind, and thoughtful. (19 RT 4130.) Laurel missed most her parents' openness and accepting natures. She missed skiing with them and traveling with them to places like Bora Bora and Bali. (19 RT 4135.)

The murders changed every aspect of Laurel's life. She had to move away from her community and friends. She developed anxiety and depression and went to a lot of therapy. She became insular and developed a hatred for humanity. She developed a drug addiction and drinking problems. She had just come back from rehab. (19 RT 4134.)

On cross-examination, Laurel admitted she had been in therapy before her parents died, because her parents worried about how her "brother's situation" would impact her. (19 RT 4139.) Although she described Julie

as "perfect," she recalled an incident in 2002 where Julie was drunk and acted inappropriately. (19 RT 4139-4140.)

B. Defense Case in Mitigation

Wycoff presented his own testimony and the testimony of two friends in his case in mitigation. During his direct-examination, he also presented the jury with homemade videotapes detailing his work as a truck driver, his time with friends and family, and his experiences in nature.

1. Wycoff testifies that he committed the murders out of necessity, would be productive in prison, and did not deserve the death penalty

Wycoff testified that while Julie and Paul were not physically harming him, he nonetheless acted in self defense. "[W]hat they were doing to me they were killing me. To them taking my house and destroying me financially for them that would be killing somebody." (19 RT 4168.) "Julie and Paul killed me, or were about to kill me in their own way." (19 RT 4169.) To make matters worse, Julie and Paul did not need the money from the home. Without a home, he would have been in financial ruin. "[I]'m just, you know, a truck driver. I work, you know, I pay bills, taxes and stuff. And Julie and Paul didn't need that extra little money, they were millionaires. And yet, you know, that little bit of money, that house, that would have financially destroyed me." (19 RT 4166-4167.)

Wycoff emphasized the murders were a last resort. Julie and Paul "were stealing from me and I couldn't stop it." (19 RT 4166.) He could not take them to court. If he had assaulted them they would have come after him. (19 RT 4167.) Wycoff had no other way to save himself and his family, and corrected the situation the only way he could. (19 RT 4167-4169.) Wycoff acknowledged the enormity of having killed his own family, and suggested he would not kill someone he did not know. (19 RT 4160.)

Wycoff emphasized that Eric believed he should not receive the death penalty (19 RT 4154-5155), and said "[E]ric's wishes should [be] honored" (19 RT 4173).

Wycoff suggested he would be productive in prison and should not be put on death row. He was "a working man." (19 RT 4240.) In prison, he could strive to get into better programs and improve. In contrast, there was nothing to hope for on death row. (19 RT 4159.) "[I]t's wrong to just throw a person away like that." (19 RT 4160.) In prison, Wycoff would ensure that the other prisoners—the petty thieves, robbers, and rapists—would never want to come back to prison. (19 RT 4161.)

Wycoff responded to a variety of points made by the prosecutor in his case in aggravation. Regarding his statement in a jail call that he was one step away from a serial killer, Wycoff said he meant only that he had the ability to commit murder. He was a good man, and his morals prevented him from being such a killer. (19 RT 4156.) Wycoff acknowledged people thought he was bad or evil, but said if that were true, he would have killed Julie and Paul's children. (19 RT 4155.) Wycoff knew how to manufacture explosives and could simply have leveled Julie's house. He chose not to do so because there were children in the house, and he did not like to destroy things. (19 RT 4240-4241.)

Wycoff addressed at length the comment he made during booking that he should receive the death penalty. He said this comment was taken out of context, and that he intended simply to acknowledge that *society* believed he should get the death penalty:

> The press was involved, it was going—it was all over the news, I saw the news trucks out there, and I realized how the public would look at this. And when I said those words about the death penalty I was saying it from a perspective of what the public would think if they were looking at this. And from a publics' perspective, yeah, I should get the death penalty, but I did not say I deserve the death penalty, and I don't deserve the death penalty.

(19 RT 4158.) Wycoff explained he believed the public would misconstrue his motives for committing the murder.

> [E]verybody is going to be watching this case, watching what is going on, and I realized that everyone is going to form an opinion, you know, what is society going to see, what is our society going to see when they look at this case? And I looked at everything and I realized no one is going to care about me, no one is going to care that I was truly the victim in this. They were going to say they were the victims, Julie and Paul were the victims . . . they are not going to see me as the victim, . . . when I was the one that was being stole from. They were trying to steal my house.
>
> And—and I realized, you know, how is this going to look, you know, how is this going to look, and it just hit me, wow, from the way society sees it I should get executed for this. And I saw it coming. I knew this trial was coming. Four years ago, for years in the making I seen it coming, and it just hit me. My, God, the way society sees this I should get executed and I should—and I just blurted it out right there in the police department.

(19 RT 4245-44246.) Wycoff had since been trying to educate the public by telling them about Julie and Paul, so that "from that point forward . . . I won't have to get the death penalty." (19 RT 4158.) He recognized he would have to struggle to explain he was the true victim. (19 RT 4246.)

2. Wycoff introduces tapes showing him spending time with family and friends, enjoying nature, and working as a truck driver

Wycoff introduced 25 homemade videotapes during his direct-examination. (19 RT 4177-4178, 4180-4181, 4184-4185, 4187-4189, 4190-4197, 4220, 4222-4223, 4226-4228, 4232-4239; Def. Exhs. B through Z.) The tapes generally attempted to humanize Wycoff.

Some tapes showed Wycoff enjoyed and appreciated nature, enjoyed spending time with friends and family, and had a sense of humor. (See, e.g., 19 RT 4185, Def. Exh E. [Wycoff, his parents, and Julie and Paul and their children opening and playing with gifts on Christmas in 1995]; 19 RT

4232-4233, Def. Exh. U [Wycoff and his family, including Julie and Paul and their children, on Christmas 2002]; 19 RT 4177-4178, Def. Exh. B [Wycoff and a neighbor after a big snowstorm in 1990]; 19 RT 4180-4181, Def. Exh. C [Wycoff enjoying a solar eclipse in Mexico in 1991 with friends]; 19 RT 4188-4189, Def. Exh. H [Wycoff lighting bottle rockets with friends in 1996]; 19 RT 4192-4193, Def. Exh. L [Wycoff marveling at the view from Mount Evans in Colorado]; 19 RT 4226, Def. Exh. R [Wycoff at the top of a peak in the Sierra Nevadas in 2003]; 19 RT 4236, Def. Exh. W [Wycoff climbing Mount Butte near Mount Shasta in 2004].)

Wycoff also introduced tapes showing he was a skilled and resourceful truck driver. (See, e.g., 19 RT 4184-4185, Def. Exh. D [Wycoff depicting how he backed his truck through the mud to avoid a ditch]; 19 RT 4187, Def. Exh. F. [Wycoff explaining he maneuvered his truck through a snowstorm in Washington state]; 19 RT 4187-4188, Def. Exh. G [Wycoff explaining the aftermath of his truck being hit by a train in Idaho]; 19 RT 4189, Def. Exh. I [Wycoff, in a local news interview, describing how he attempted to avoid the Idaho accident]; 19 RT 4190-4191, Def. Exh. J [Wycoff and other truck drivers strategizing how to reach their destinations in a snowstorm]; 19 RT 4191-4192, Def. Exh. K [Wycoff removing graffiti from his truck]; 19 RT 4193-4197, Def. Exh. M [Wycoff explaining how he fixed his truck's mud flap and prevented it from burning]; 19 RT 4222, Def. Exh. O [Wycoff attempting to get help after his truck caught on fire]; 19 RT 4234-4235, 4238-4239, 4242-4243, Defense Exhs. V, Y and Z [depicting explosives Wycoff helped transport or load].)

The record suggests Defense Exhibit H made the jury laugh. (19 RT 4189.) Wycoff later testified of his tapes, "[I] came in here and I brightened it up, I started doing jokes and started showing you what kind of person I am, and it brightened up and later in the day some of you—I actually finally got some of you to laugh." (19 RT 4242.)

3. Keith Letl and Mike Lawson testify that Wycoff may have saved Letl's life

Wycoff's friends Keith Letl and Mike Lawson testified about a time they explored a place called Feather Falls with Wycoff. (19 RT 4205, 4212.) Letl became trapped at the bottom of a ravine. He struggled with asthma and realized his rescue inhaler was empty. (19 RT 4205-4206.) His brother had died a year earlier of asthma. Soon it was nightfall. (19 RT 4212.) Letl believed he might die: "[I] basically, you know, during the night tried to make my peace with my God and say, you know, 'If this is the time for me, then that's what it is.'" (19 RT 4207.)

While Lawson stayed by the overlook, Wycoff found a way to the top. There was no cellphone reception, so Wycoff left to get help. (19 RT 4206-4207, 4214-4216.) Wycoff was the only one who brought a flashlight. Although it was pitch-black outside, Wycoff left his flashlight with Lawson. (19 RT 4210, 4215.) He made his way to the parking lot. The path was five or six miles long, all uphill, and contained many switchbacks. (19 RT 4210, 4213, 4216.) The trail was dark and treacherous. (19 RT 4215.)

In the parking lot, someone let Wycoff use a phone to call 911. (19 RT 4206-4207, 4216.) An emergency rescue was orchestrated. At dawn, a helicopter rescued Letl from the ravine. (19 RT 4216-4217.) Lawson said it was possible Wycoff saved Letl's life. (19 RT 4218.)

C. Cross-Examination and Rebuttal Case

The prosecutor cross-examined Wycoff extensively on the tapes he introduced, adducing or attempting to adduce admissions that Wycoff intentionally damaged employers' property, lied to employers, or was responsible for the problems he purported to fix. (See, e.g., 19 RT 4273-4276, 4279, 4283-4284, 4286, 4288, 4292, 4294, 4300, 4308.) The prosecutor attempted to make the same points by cross-examining Wycoff

on other tapes seized from Wycoff's home but not admitted at trial. This evidence apparently depicted Wycoff damaging or admitting to damaging property, including that of his employers. (See, e.g., 19 RT 4289-4290, 4291-4293, 4298, 4301-4305, 4306, 4309, 4320.)

The prosecutor admitted a tape depicting Wycoff lamenting about graffiti and garbage behind a warehouse near his house. (People's Exh. 76; 20 RT 4464.) Wycoff said people who did such things had low morals and said he would shoot them. He expressed anger that the owner of the property put a gate behind the warehouse and admitted he destroyed the gate. He despised a woman who was feeding cats behind the warehouse, and said he would shoot her. (20 RT 4370-4372; People's Exh. 76.)

In rebuttal, the People admitted a tape depicting Wycoff handling a dead cat and describing how he killed it. Wycoff admitted the cat belonged to a neighbor, Curtis, and said it was the second of Curtis's cats he killed. Wycoff planned to set a neighbor up for the death of Curtis's cat. Later, Wycoff described killing at least 17 cats in his neighborhood. (People's Exh. 73; 20 RT 4343-4349, 4356, 4464.) Another tape showed Wycoff lying to a neighbor, Ross, about having killed his cat. Wycoff suggested to Ross that another neighbor, Lee, killed his cat. (People's Exh. 74; 20 RT 4350-4353.)

On redirect, Wycoff said he destroyed the gate behind the warehouse because the gate increased bad activity behind the warehouse. Without the gate, it was easier to get behind the warehouse and catch the culprits. (20 RT 4452-4453.) Regarding the evidence of him killing cats, Wycoff said he only killed cats that killed other wildlife. (20 RT 4455.) He was around a lot of other animals and did not kill them. (20 RT 4449-4450, 4454-4455.)

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO CONDUCT A HEARING INTO WYCOFF'S COMPETENCE TO STAND TRIAL

Wycoff alleges that two judges, Judge Bruiniers and Judge Kennedy, erred by failing to sua sponte initiate a hearing into his competence to stand trial. Wycoff claims there was substantial evidence of incompetence before both judges in the report of Dr. Good, a psychologist Judge Bruiniers appointed to advise on whether Wycoff could waive counsel and represent himself. Wycoff also argues Good's report coupled with his behavior before both judges constituted substantial evidence of his incompetence. (AOB 61-110.) Wycoff does not raise the substantive due process claim that he was in fact incompetent to stand trial. (AOB 88, fn. 8.)

We disagree. The court appointed Good to determine whether Wycoff could waive counsel and represent himself, not whether he was competent to stand trial. To the extent Good's report addressed Wycoff's competence, Good failed to conclude with particularity that Wycoff was incompetent. Second, both judges found no doubt as to Wycoff's competence to stand trial, and their findings were supported by substantial evidence. Third, Judge Bruiniers permitted the parties to be heard on the issue. Finally, even if the court erred, the remedy is a retrospective competency hearing, not per-se reversal.

A. Background

1. Wycoff's history with counsel

For reasons unrelated to Wycoff, Wycoff was rotated through four attorneys. Wycoff's first attorney, Michael Kotin of the Public Defender's Office, represented Wycoff until February 23, 2006, when the case was

transferred to the Alternate Defender's Office due to a conflict. (1 ART 2[13]; 1 CT 164.) Daniel Cook subsequently represented Wycoff from around March 27, 2006 to February or March 2007, when Cook resigned from the Alternate Defender's Office. (1 CT 169; 2 CT 349-350; 1 ART 51-52, 62.) Roberto Najera then represented Wycoff until around August 2008, when Najera too resigned from the Alternate Defender's Office. (1 ART 62; 1 CT 229; 2 CT 349-350.) Thereafter, David Headley represented Wycoff until Wycoff was granted the right to represent himself on November 14, 2008. (2 CT 350, 412; 1 RT 150.)

Attorney David Briggs first associated as *Keenan* counsel[14] under Cook. (1 ART 34; 2 CT 349.) Briggs had a cooperative relationship with Wycoff. (See, e.g., 2 CT 312-314, 352, 357; 1 ART 52; 1 RT 106, 169.) Briggs continued to represent Wycoff as *Keenan* counsel under Najera, but was dismissed from the case due to a professional dispute on February 27, 2008. (2 CT 353.) Najera then appointed attorney Ellen Leonida as *Keenan* counsel. (1 RT 96.) Wycoff had a relatively cooperative relationship with Leonida. (See, e.g., 1 RT 106, 113; 2 CT 386.)

Despite his dismissal, Briggs continued to represent Wycoff in matters unrelated to his criminal case. (2 CT 350.) When Najera left the Alternate Defender's Office, Briggs moved in a *Harris* motion[15]—with Wycoff's cooperation—to represent Wycoff in his criminal case. (2 CT

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[13] We refer to the bound volume of reporter's transcripts containing the proceedings on February 2, 2006, February 16, 2006, February 23, 2006, May 22, 2006, July 25, 2006, November 30, 2006, February 5, 2007, March 5, 2007, April 5, 2007, May 10, 2007, June 14, 2007, July 19, 2007, and August 23, 2007 as "1 ART."

[14] *Keenan v. Superior Court* (1982) 31 Cal.3d 424; see also section 987, subdivision (d).

[15] *Harris v. Superior Court* (1977) 19 Cal.3d 786; see also section 987.2, subdivision (d).

346-376.) The matter became moot when Wycoff successfully moved to represent himself. (1 RT 150, 169.) Briggs was eventually appointed Wycoff's advisory counsel. (1 RT 188-191; 2 CT 462.)

Wycoff made three *Marsden*[16] motions to relieve attorneys Cook and Najera, all of which were denied.

a. *Marsden* to remove attorney Cook

Wycoff moved to relieve Cook on November 30, 2006. (1 ART 47-54.) Wycoff complained Cook went to his home to confiscate materials without his consent, visited him only once a month, and was delaying the case. (1 ART 48.) Wycoff said he liked Briggs. (1 ART 52.) The court denied the motion. (1 ART 53.)

b. First *Marsden* to remove attorney Najera

Wycoff moved to relieve Najera on January 18, 2007. (1 RT 26-41.) Wycoff alleged Najera did not share discovery with him and was inefficient. (1 RT 28-30.) "[M]y biggest complaints are he doesn't give me very much discovery. I'm not getting a lot of my discovery. He doesn't tell me what—much about what's going on in my case or what he knows, what he finds out." (1 RT 28.) Wycoff said Najera agreed to show him investigative reports but failed to do so. (1 RT 30.)

Najera offered, "I am quite fond of Mr. Wycoff. My own perception is that we were working well together." (1 RT 33.) Najera said he had seen Wycoff regularly until the past month, when he had taken vacations. (1 RT 33.) Najera believed "the heart of the problem seems to be the investigative reports. That's the only real issue that seems to have created an obstacle here." (1 RT 35.) Najera explained he could not let Wycoff keep discovery

[16] *People v. Marsden* (1970) 2 Cal.3d 118.

in his cell because it contained information that if confiscated could be released to Wycoff's detriment. (1 RT 33, 36.)

Wycoff explained that a dispute had arisen over psychological testing. Wycoff had agreed to cooperate with Najera's requests for psychological testing on the condition that he be allowed to see investigative reports and other discovery. (1 RT 38.) Najera failed to deliver the reports, so Wycoff refused to take the tests. Since he refused to take the test, Briggs was ordered not to read reports to Wycoff. Wycoff thus complained his attorneys were using the reports as "bait." (1 RT 38.)

Briggs, present for the *Marsden*, said both sides' description was accurate. (1 RT 38-39.) Of Wycoff's allegations about Briggs, Briggs said, "It's accurate." (1 RT 39.) The court denied the motion. (1 RT 41.)

c. Second *Marsden* to remove attorney Najera

On March 7, 2008, Wycoff wrote a letter to Judge Bruiniers seeking to remove Najera and the Alternate Defender's Office from his case. (2 CT 303-328; 1 RT 53.) Wycoff again alleged Najera refused to share discovery with him and was inefficient. (2 CT 305-308, 320.) He said his attorneys refused to give him an adequate opportunity to review discovery seized from his home. (2 CT 303-305.) Wycoff had provided Najera with a list of things he wanted in his case, including transcripts of police interviews and jail psychological reports. Najera promised to give Wycoff the materials but never did. (2 CT 319.) Contrary to Najera's assertions, Wycoff said deputies did not confiscate discovery from inmates' cells. (2 CT 303, 305.) Wycoff observed that, in comparison to Najera, Briggs was efficient and utilized their meetings together wisely. (2 CT 307-308.)

Wycoff believed Najera purposefully withheld discovery from him to better develop an insanity defense. Wycoff had told Najera that reviewing his discovery made him believe his family were just bad people and not, as he once thought, possessed by demons. (2 CT 308-309.) This undermined

an insanity defense, so Najera stopped bringing Wycoff discovery he had promised. (2 CT 309-310.) Wycoff said Najera wanted him to seem "crazy" so he could win a "small victory" in the case. (2 CT 309-310.) Wycoff did not believe they could persuade a jury he was insane, stating it "would [not] affect the out come of my case at all." (2 CT 310; see also 2 CT 323-324.)

Wycoff insisted he tried to cooperate with Najera. (2 CT 311.) It was only when Najera went back on his word by failing to deliver discovery that Wycoff stopped cooperating with him. (2 CT 311-312.)

Wycoff accused Najera of attempting to circumvent his lack of cooperation. (2 CT 312.) Since Wycoff refused to meet with Najera, Najera brought Briggs along for meetings with Wycoff. Wycoff respected Briggs and initially met with them, but eventually stopped meeting with Najera even when accompanied by Briggs. (2 CT 312.) Wycoff complained Najera put Briggs in charge of trying to "bribe[]" him with reports, and ordered Briggs not to share reports with Wycoff until he took a psychological test. (2 CT 315.) Wycoff also complained that Najera and Briggs gave him inconsistent answers regarding the existence of various discovery and that Najera's control over the case was delaying it. (2 CT 318-320.) Wycoff further complained that Najera relieved Briggs without his consent. Wycoff said Briggs was a good attorney who had devoted himself to Wycoff's case. (2 CT 312-314, 328.)

Wycoff complained Cook knew he was leaving the case but did not tell Wycoff. (2 CT 317.) Wycoff said he would refuse to cooperate with whomever Najera appointed to replace Briggs. (2 CT 312-313, 328.) Since he had been failed by Cook and Najera, Wycoff said he would not cooperate with any attorney from the Alternate Defender's Office. He requested an attorney that was not from the Alternate Defender's Office or, if he could not have another attorney, requested the right to represent

himself. (2 CT 327-328.) He agreed Najera and Hutcher were "very good in the courtroom" (2 CT 327), but said he had no choice but to have them removed from his case, even if he had to be his own attorney to do so (2 CT 328).

A hearing was held on April 22, 2008. (1 RT 69-91.) Although he had been dismissed by this time, Briggs attended the hearing because Wycoff summoned him there as a witness. (1 RT 66-68.)

Wycoff reiterated his complaints at the hearing. He said he would refuse to see Hutcher or Najera when they came to see him. (1 RT 75.) "[I] still do not intend to talk to these people or cooperate with these people. I still don't." (1 RT 76.) Wycoff said since Cook left his case "in the middle," he could see Najera doing the same thing. (1 RT 76.)

Briggs told the court that the dynamic between Najera and Wycoff had become a "complicated, difficult situation . . . ." (1 RT 79.) Briggs said Wycoff did not trust Najera because Najera failed to uphold his promise to Wycoff. (1 RT 79.) Briggs did not believe Wycoff was attempting to manipulate the court, but said based on his "unique mental processes" Wycoff felt he genuinely could not trust Najera. (1 RT 79-80.)

Of Wycoff's relationship with Najera, Briggs said "the failures of communication" were "somewhat on both sides." (1 RT 80.) Briggs said Najera did not follow Briggs's suggestions about how to work with Wycoff. (1 RT 80.) "And in fact I recall sitting in one room with Mr. Najera and Mr. Wycoff in which Mr. Wycoff accused Mr. Najera of dishonoring a promise. Mr. Najera's response was to accuse Mr. Wycoff of exactly the same thing. And I don't think that that is still going to resolve in an effective attorney/client relationship." (1 RT 80.)

Briggs said Wycoff was a difficult person, but was "someone that I think will cooperate, at least substantially if not fully with an attorney he trusts." (1 RT 80.)

Briggs confirmed that his dismissal exacerbated Wycoff's problems with Najera. (1 RT 82.) Briggs also confirmed that Najera had precluded him from meeting with Wycoff alone, which further exacerbated Wycoff's distrust of Najera: "[M]r. Wycoff wasn't consulted and the fact that he and I had a good working relationship that I was first prevented from speaking to him and then dismissed is something that has cemented his feelings . . . ." (1 RT 82.)

After Briggs left the room, Najera countered that Wycoff, due to some "mental issues," would have trouble trusting any attorney. (1 RT 83.) Najera said he made a tactical decision not to let Wycoff keep copies of discovery. (1 RT 84.) He said Wycoff refused to take the psychological evaluation, for which "[h]e gave a number of reasons, in fact, and one was his belief that it was hopeless; second, that he believed that his actions were right and that any kind of other defense would undermine the righteousness of what he had been doing when problems arose." (1 RT 85.)

Najera alluded to a miscommunication between him, Briggs, and Wycoff. (1 RT 85.) The miscommunication concerned "information that was being communicated to Mr. Wycoff or leaving Mr. Wycoff with different impressions. I asked Mr. Briggs to accompany me up to see Mr. Wycoff so we can clarify what the source that problem was. In my view that did not occur. That was not handled appropriately, and that was one of the problems." (1 RT 85.)

Najera told the court he could retain his position as Wycoff's attorney and felt "strongly that I can actively and do everything in my power to assist Wycoff in his case." Najera had no negative feelings toward Wycoff and felt he was the best attorney to represent him. (1 RT 85.)

In response to Najera's allegations, Wycoff said he could cooperate with an attorney. He said he did not have any real problem with Kotin, his first attorney. (1 RT 87.) Wycoff did not want to have the problems he

was having with Najera, but Najera broke his promises. (1 RT 87-89.) "By January, by the time I quit seeing him we weren't getting anywhere. It was just dragging. Just his way of doing things. It was just dragging. We weren't getting through everything." (1 RT 89.) Wycoff said he would take the psyche test. "I mean, first I want some cooperation, and then I'll take that test." (1 RT 89-90.) Of Najera and Hutcher, he said, "I refuse to cooperate with them after everything that they've done." (1 RT 90.)

The court said initially, "the issue comes down to Mr. Wycoff's distrust of Mr. Najera and his refusal to cooperate with Mr. Najera." (1 RT 81-82.) "It seems to me that the issue focuses on the attorney/client relationship, and quite candidly, Mr. Wycoff, the fact that you are refusing to cooperate with your counsel is your choice." (1 RT 82-83.) While the court believed some of the problems would arise regardless of who represented Wycoff, it told Wycoff, "[T]he issue comes down to whether you are willing to cooperate with Mr. Najera and the defense." (1 RT 90.)

The court denied the motion, ruling, "[W]hat I have before me at the moment is a record, which at least in my view reflects simply a refusal to cooperate with Mr. Najera." (1 RT 90.) The court noted Najera had not said he could no longer represent Wycoff. (1 RT 91.)

2. *Faretta* motions and related background

Wycoff moved twice to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806, and was permitted to do so after his second request. Also relevant and discussed below is the intervening *Harris* motion made by Briggs and accompanying declaration from Wycoff.

a. First *Faretta* motion and hearing

On May 26, 2008, Wycoff told the court he would "like to go pro per on this case." (1 RT 101.) The court admonished Wycoff that representing himself, particularly in a capital case, was unadvisable. (1 RT 104-107.)

The court invited Wycoff to explain why he was qualified to represent himself. Wycoff responded,

> Well, I'm not—I wouldn't say I'm exactly qualified. These guys are more qualified, but I just got to get rid of Roberto. I have no problems. I have no problem with Ellen here. I have no problem with Briggs. But I'm just doing this to get rid of Roberto.

(1 RT 106.) The court said it had observed "that you don't like Mr. Najera, that you choose not to cooperate with him for a number of reasons that you think are very valid reasons; but nevertheless, that it not a basis to remove him." (1 RT 106.)

After the court again advised Wycoff about the dangers of self-representation, Wycoff acknowledged he was not qualified to represent himself: "That's right. I'm not qualified, but it has to be done." (1 RT 107.) "And I'm willing to represent myself to get [Najera] off my case." (1 RT 108.) The court gave Wycoff an advisement and waiver of rights form to take with him and said they would reconvene on June 19. (1 RT 107-108.)

At the hearing on June 19, 2008, Wycoff admitted he brought the *Faretta* motion to have Najera dismissed. However, he said, "I also need to do things myself. I need to see things myself, as well, without things being filtered through him. I need to see what's out there, what's going on." (1 RT 112-113.) Wycoff said he was satisfied with Leonida's representation, but, "If I can't get rid of Mr. Najera, I'm going to stop seeing her, because [Najera's] the one in charge." (1 RT 113.) Wycoff said he would try representing himself for a while but would "change it" if he did not like being pro per. (1 RT 114-115.)

The court denied the motion as equivocal. (1 RT 115.) When the court told Wycoff Najera was a highly skilled attorney who had won a victory in the United States Supreme Court, Wycoff said, "I think he got lucky." (1 RT 117.)

b. *Harris* motion

Briggs filed a *Harris* motion to take over as counsel on or around August 24, 2008. (2 CT 346-375.)[17] In an accompanying declaration, Briggs detailed Wycoff's relationship with his attorneys. (2 CT 349-355.)

Briggs confirmed Wycoff's complaints that Cook had failed to provide him with the discovery, stating, "Mr. Cook in fact was not providing Mr. Wycoff with documents and information Mr. Wycoff was requesting." (2 CT 351.)

Briggs averred, "When Najera began representing him, Mr. Wycoff was initially very enthusiastic. He and Mr. Najera had a cooperative and productive attorney-client relationship for several months." (2 CT 351.) The relationship began to deteriorate when Wycoff complained that promises to allow him to see reports were not honored. "In response to these complaints, Najera refused to provide Wycoff with any of the requested reports. In addition, Mr. Najera did not talk with Mr. Cook or Mr. Fine to determine whether Wycoff was correct that he had been promised these reports." (2 CT 351.) Briggs further averred, "During the same period, Mr. Najera was carrying a heavy trial caseload, and he took a vacation, which prevented him from maintaining regular contact with Mr.

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[17] Briggs filed the motion confidentially with Presiding Judge Mary Ann O'Malley, but said he was not sure if Judge O'Malley or Judge Bruiniers was the correct judge to decide the motion. (2 CT 346.) The record indicates Judge Bruiniers was aware of the motion and tasked with deciding it. (See 1 RT 151 [defense counsel and Judge Bruiniers discussing the motion], 169 [Judge Bruiniers telling Briggs, "I know you have made a motion to be appointed on Mr. Wycoff's behalf and that is inconsistent with his election to proceed in pro per"], 237 [Judge Bruiniers asking Wycoff, "If I were to appoint Mr. Brigs as . . . Harris counsel for you for trial, would you accept him as your trial lawyer?"].) We thus presume Judge Bruiniers read the *Harris* motion. We note additionally that Wycoff refers to the Harris motion in his brief. (AOB 61, quoting 2 CT 352.)

Wycoff." Briggs confirmed Wycoff's account that Najera ordered Briggs not to visit Wycoff alone. (2 CT 352.)

Briggs said, "Mr. Wycoff has an array of mental disabilities which have not been fully diagnosed." (2 CT 352.) In Briggs's opinion, "no attorney will be able to maintain an effective attorney-client relationship with Mr. Wycoff unless the attorney has frequent personal contact with him." (2 CT 352-353.) Nonetheless, Briggs averred, "During the entire period of my representation of Mr. Wycoff, we had a cooperative and effective attorney-client relationship." (2 CT 352.) Briggs said he told Najera and Hutcher about the need to maintain personal contact with Wycoff, but as a result he was dismissed from the case. (2 CT 353.)

Briggs appeared to confirm Wycoff's complaint this his case was "dragging." (1 RT 89.) At the time of Briggs's dismissal, much of the "massive" potential mitigation evidence—including "close to 300 home videos, two computer hard drives, and more than four boxes of financial records, plus a large number of school records, medical records, and witness interviews"—"had not been examined, and even less of it had been effectively organized for use at trial." (2 CT 354.) Briggs believed Headley was on vacation; for this reason, Briggs believed "Headley has not yet begun working on Mr. Wycoff's case." (2 CT 353.)

Wycoff signed a declaration stating he was prepared to cooperate with Briggs: "I do trust David Briggs. I agree with most of his strategies for the trial of my case. He has been honest with me and he has worked hard on my case. I am prepared to cooperate with him and work with him to try to get the best result possible from my case." (2 CT 357.)

c. Second *Faretta* motion and appointment of Dr. Good

On September 22, 2008, Wycoff sent Judge Bruiniers a letter asking to represent himself. (2 CT 386-389; 1 RT 119.) In the letter, Wycoff said

he tried to get in touch with Headley but Headley was on vacation. (2 CT 386.) Wycoff believed Leonida had been relieved. Wycoff said Leonida was wonderful and was being fired "for no good reason." (2 CT 386.) Wycoff acknowledged Briggs filed a *Harris* motion but said he was fed up with attorneys and wanted to do things for himself. (2 CT 387.)

Wycoff did not trust Headley would be different than his other lawyers. (2 CT 388-389.) He had seen only a few pictures and a few hundred pages of discovery in two and a half years. (2 CT 387.) In addition, his attorneys "have been taking my case in a direction that I don't want to go." (2 CT 387.) They were trying to make him look insane when he was not, and were building a case that he was brain damaged. "It seems like when atturneys work a case like mine thier are certan percedures to follow and thay will not deviate from those percedures no matter what I say." (2 CT 388, errors in original.) Wycoff said this was unacceptable and he would work against his attorneys even if it hurt his case. (2 CT 388.)

> Even though I now know this I will start to fight against my atturneys. The only sollution is for me to be my own lawyer. [¶] I request a hearing to wave my right to counsel and go pro per in persona in my own case. If you have any suggestions Id love to hear them. Thangk you, Edward Wycoff.

(2 CT 389, errors in original.) Wycoff attached to his letter a signed advisement and waiver of right to counsel. (2 CT 390-393; 1 RT 119.)

At a hearing on October 2, 2008, Wycoff said his lawyers were not allowing him to be "a part of my case. I'm not being given any discovery or anything. I mean, I'm being left out of my own case." (1 RT 122.) Since the last two alternate defenders presented problems, Wycoff did not want to work with Headley. "I'm done with lawyers. I don't even want to do a *Marsden* anymore." (1 RT 122.) "[I] don't even want Briggs on the case," "this is something I got to do myself." (1 RT 122.)

The court said that while it would normally at that point "satisfy myself that you understand what you're giving up and the detriment you would suffer by choosing to represent yourself" (1 RT 122-123),

> The United States Supreme Court recently, in the matter of *Indiana versus Edwards* [(2008) 554 U.S. 164] . . . indicated that there are different standards that the Court must apply in determining whether a defendant, whether a capital case or not, is competent to waive the right to counsel. That is a separate and distinct standard that on that [*sic*] we're determining whether the defendant is competent to stand trial.
>
> The Court has not seen any evidence at all that Mr. Wycoff would not be competent to stand trial in this case. And certainly the issue here has nothing to do with Mr. Wycoff's mental state at the time of the offenses which are charged here. And the Court, obviously, has no opinion on those issues, and I have no evidence on those issues before me.
>
> But while I think providing a less than explicit guidance in the *Edwards* decision, the Supreme Court has, at least in my opinion, indicated that this Court has a responsibility to ensure before granting self-representation, and particularly in a case where the defendant's life is at stake, that he is in fact competent to represent himself for trial whether it's wise or not.
>
> But the Court has observed in the appearances here Mr. Wycoff is certainly evidence of grandiosity and perhaps a fairly high level of paranoia. Whether those are simply personality disorders or whether they rise to the level of preventing Mr. Wycoff from being competent to waive counsel and represent himself at trial, I cannot determine without expert advice. It is therefore the Court's intention to appoint an expert under 730 of the Evidence Code solely for the purpose of an examination of Mr. Wycoff and to advise the Court whether Mr. Wycoff is, under the standards of *Indiana versus Edwards*, capable of waiving his right to counsel and self-representation in a case of this nature.

(1 RT 123-124.)

The prosecutor agreed with the procedure, noting "there may be some evidence of mental defects" which the court under *Edwards* could consider

in deciding "whether or not [to] grant his motion to represent himself in this case." (1 RT 124-125.) Headley had no opposition to Wycoff's motion but asked the court to keep the expert letter confidential so it would not be "foddered for advocacy" between him and the prosecutor. (1 RT 125.) The court explained the procedure to Wycoff:

> What I've said is this: There are different legal standards that apply. There was at least, until fairly recently, the California Supreme Court at least in the *People versus Halverson* (phonetic) said it was the same standard. And there was some indication in the Supreme Court cases that it was the same standard.
>
> In other words, whether you are competent to represent yourself was an issue that was judged by the same standards as whether you are competent to stand trial. I don't see any evidence you're not competent to stand trial. You may well be competent to waive your right to counsel and to represent yourself. But before I allow you to do that, I think it's incumbent upon me to get the expert advice on that.

(1 RT 125-126.) The court appointed Good "for the limited purpose of examining the defendant and determining his competence to waive counsel and for self-representation and standards of *Indiana versus Edwards*." (1 RT 127; see also 2 CT 384 [order appointing Good].)

d. Good's report

In a confidential letter to Judge Bruiniers dated November 10, 2008 (2 CT 413-427), Good reported Wycoff suffered a differential diagnosis between paranoid schizophrenia and delusional disorder (2 CT 418). Good believed it was "most probably" paranoid schizophrenia. (2 CT 418.)

Good stated: "Based on the 14 dimension of the CAI-R, Mr. Wycoff would be found competent to stand trial were he to proceed with counsel." (2 CT 418.) Good found Wycoff had a "rational as well as factual understanding of the proceedings against him" and "knows how to work with counsel in the abstract . . . ." (2 CT 420.) Wycoff understood the

charges, the consequences of being found guilty and receiving the death penalty, the pleas he could enter, the consequences of being found not guilty by reason of insanity, the role of the parties, his right to testify, the substantial evidence against him and likelihood he would be found not guilty ("very slim, 1%"), how he was expected to help his attorneys, that his statements to police and to a newspaper constituted confessions, how to cross-examine and object to testimony, and how to behave properly in the courtroom. (2 CT 418-420.)

Nonetheless, Good found Wycoff's "Problematic Relationship with Counsel" rendered him "incompetent to stand trial." (2 CT 420, 424.) Good based this conclusion on Wycoff's failure to appreciate the logic and wisdom of his attorneys, that he was hypercritical and suspicious of his attorneys, that he was likely to find fault with every attorney appointed, that he believed due to "self-importance and prideful independence" that only he could represent himself, and that "[b]ecause of grandiosity, Mr. Wycoff is not able to rationally consider 'telling his story' with the assistance of an attorney." (2 CT 424.)

Good then found Wycoff could knowingly and voluntarily waive counsel. He was alert, conscious, and familiar with basic trial tasks. He could address the court and jury and claimed to understand the risks of representing himself. (2 CT 425, 427.) However, Good found Wycoff's waiver was not intelligent, "if what we mean by intelligent is the product of a rational reasoning process." (4 CT 425.) Good based this conclusion on Wycoff's "misperception of [his attorneys'] motives," misunderstanding of the risks involved, minimizing of the precariousness of his predicament, and impaired judgment. (2 CT 425-427.)

3. Judge Bruiniers's findings

The parties convened on November 14, 2008 to discuss Good's report. (1 RT 136.) The report was marked as a confidential court exhibit. The

court said that while Wycoff's interviews disclosed in the report would remain confidential, the court would share Good's ultimate conclusions and provide counsel with a redacted copy of the report. (1 RT 136-137; see also 2 CT 428-433 [redacted version of report].)

The court told counsel Good concluded Wycoff's waiver would not be intelligent, "because his reasoning process is not rational but instead reflects the irrational thinking of a paranoid man suffering from severe[] mental illness." (1 RT 137.) However, the court believed Good's diagnosis was insufficient to deprive Wycoff of his Sixth Amendment right to self-representation:

> And on review of Dr. Good's report, and again particularly since I think the standards applicable here under *Edwards* are less than clear, it does appear to me that while there is a diagnosis of paranoia and [that] appears to be consistent with the Court's own observations of Mr. Wycoff, I frankly do not think it rises to the level that would preclude Mr. Wycoff from electing to represent himself should he choose to do so.
>
> So again, I felt it was appropriate to get an opinion on this matter based on the analysis, but reviewing both the diagnostic impression of Mr. Wycoff, and there is a differential diagnosis and that is quote, 'between paranoid schizophrenia and delusional disorder,' I do not think that that precludes Mr. Wycoff from electing to represent himself should he choose to do so.

(1 RT 137-138, italics added.) The court invited counsel to review the report before being heard but counsel declined. (1 RT 138-139.)

The court found, "[I]t does appear that Mr. Wycoff has the ability to cooperate with counsel in his own defense should he choose to do so and at this point has elected not to do so." (1 RT 139.) The court then advised Wycoff regarding his rights and admonished him that waiving his right to counsel was inadvisable. (1 RT 139-149.) The court granted Wycoff's *Faretta* motion, stating it

specifically finds that the defendant is mentally capable of doing so, that he's been fully informed about his right to counsel.

Court finds the defendant fully understands the implications of waiving his right to be represented by counsel and has voluntarily and rationally done so, and that he has been fully advised and aware of the pitfalls, dangers, and consequences of acting as his own attorney.

(1 RT 149-150.) The minute order of the hearing states: "The Court finds defendant is mentally competent, literate and capable of a knowing and intelligent waiver of counsel." (2 CT 412.) The court stayed the order granting Wycoff self-representation so the Alternate Defender's Office could remain on the case and present mitigating information to the District Attorney's Office on Wycoff's behalf. (1 RT 155-157; 2 CT 412.)

On November 21, 2008, the court gave Headley and the prosecutor redacted copies of Good's report. (2 CT 434; 1 RT 161.) Headley and Leonida were still counsel of record. (1 RT 160.) The court told counsel:

At the last hearing I did indicate that despite the advice received from Dr. Paul Good indicating that Mr. Wycoff exhibited paranoid symptoms and was—and in Dr. Good's words, most probably suffering from paranoid schizophrenia with diagnosis—again his words—diagnosis is based on the presence of paranoid and gradiose [*sic*] delusions, negative symptoms of flattened affect, and longstanding interpersonal alienation.

And I think I indicated on the record that it appeared to me that certainly the indications or presence of paranoia has been manifest in Mr. Wycoff's dealing with his counsel, that, nevertheless, I—it did not appear to me that those diagnostic findings were sufficient under the cases of the [*Edwards*] pronouncement by the Supreme Court on these issues to deny Mr. Wycoff his right under *Faretta* to proceed with self representation, however ill advised that decision might be.

(1 RT 161, italics added.)

4. Judge Kennedy's findings

Judge Kennedy began presiding over the case on June 26, 2009. (3 CT 679; 2 RT 322.) On September 10, 2009, the prosecutor, who was now

Mark Peterson,[18] said he found a file containing Good's redacted report and the transcript of the November 14, 2008 hearing. The file also contained a copy of the report of Dr. Tucker, a psychologist the defense had appointed to meet with Wycoff. (3 RT 590-591; 2 CT 377-379.) Tucker's report diagnosed Wycoff with ADHD, Asperger's disorder, and schizophrenia, but did not opine on Wycoff's competence. (2 CT 377-379.)[19]

The prosecutor gave the court and Briggs a copy of the transcript of the November 14, 2008 hearing and the reports of Good and Tucker. Wycoff was already in receipt of Good's report. (3 RT 591-592.)

The prosecutor explained Good was appointed to determine whether Wycoff was competent to represent himself, but appeared to also address competency to stand trial. (3 RT 592.) The prosecutor noted Good found Wycoff "competent to proceed with counsel," but later said Wycoff was incompetent to stand trial on the basis of difficulties with attorneys. (3 RT 592.) The prosecutor found the report troubling because Good appeared to analyze Wycoff using "two different standards—one is he competent to stand trial if he represents himself, but he is not competent to stand trial if represented by an attorney." (3 RT 593.) "And I don't know if there are two different standards, so that presents some difficulties." (3 RT 593.)

The prosecutor noted Good found Wycoff's waiver of counsel was not intelligent. (3 RT 593.) The prosecutor said: "Dr. Good seems to think simply because Mr. Wycoff disagrees with some of his attorneys' analysis

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[18] Mark Peterson's first appearance on the case appears to have been January 15, 2009. (1 RT 218.)

[19] Tucker's report was dated September 19, 2008. (2 CT 377.) The defense provided Tucker's report to the District Attorney's Office some time between December 17, 2008 and January 15, 2009, as part of a mitigation presentation to the death penalty review team. (See 1 RT 153, 176, 203; see also 3 RT 594.)

and how they are thinking that it's, quote, unquote, not an intelligent waiver." (3 RT 594.)

The prosecutor noted Judge Bruiniers disagreed with Good's conclusion. (3 RT 594.) The prosecutor offered, "I certainly think Mr. Wycoff is competent to stand trial from what I have seen. I believe he is—certainly a knowing, voluntarily and intelligent waiver can take place and has taken place, but with this record I am concerned about any possible issues on appeal." (3 RT 595.) The prosecutor further noted:

> [M]r. Wycoff's participated very competently since I have been in the case. He has filed a motion to suppress, which in fact portions of it have been granted. He has raised objections to questions in the questionnaire, suggested questions in the questionnaire. So I think time and his participation in these proceedings have further illustrated his competency to stand trial. Further illustrated that his waiver of counsel is knowing and intelligent and voluntary, but I want to make sure the record is clear and that this issue is addressed.

(3 RT 596.)

Wycoff said he wanted to represent himself and was satisfied doing so. (3 RT 596-597.) He said Judge Bruiniers's decision had solved a lot of problems and brought "peace on this case. I am getting what I wanted, I'm seeing everything, I'm a part of the case." (3 RT 597.)

Judge Kennedy observed, "I can tell you that from our interactions over the last several months I don't—haven't seen any reason to question either of those premises [of whether Wycoff is competent to stand trial and represent himself], but [Mr.] Peterson is I think being extra careful to make sure that I . . . have a chance to review the same things Judge Bruiniers reviewed and see if I agree with his conclusion." (3 RT 599-600.)

Over a recess, Judge Kennedy reviewed the transcript of the November 14, 2008 hearing and the reports of Good and Tucker. (3 RT 602.) He subsequently ruled:

> [B]ased on all that I have reviewed and our participation, or I should say my participation in the case and my interactions with Mr. Wycoff, I do not have any doubt about Mr. Wycoff's competency to stand trial.
>
> My view is that Mr. Wycoff clearly understands the nature and purpose of these proceedings, the roles of the respective participants and the fact that this is a matter of utmost seriousness in that it is a potential death penalty case, but he fully understands that . . . and [is] capable of understanding all of the issues that I have discussed. [¶] He is capable of presenting a defense and mitigation evidence if the matter gets to a penalty phase.
>
> On the issue of the *Faretta* findings that, Judge Bruiniers made, I also agree with Judge Bruiniers that under the standards that have been set out under *Faretta* and *Edwards* and the cases that have interpreted them, that Mr. Wycoff does have the right to represent himself; that he is competent to make the decision whether to represent himself or not; that he has chosen to do so, and that that choice is knowing, voluntary and intelligent within the meaning of *Faretta* and *Edwards*.
>
> That doesn't mean that it is necessarily the wisest choice. You have been told many times that people are discouraged from representing themselves, but that is not the issue. The issue is whether you understand the downside risks and the rights that you have and with full understanding of those have made your decision to represent yourself. [¶] And I do believe that you are capable of making that decision within the standards that are controlling. [¶] So I'll reaffirm Judge Bruiniers'[s] finding that you are entitled to represent yourself under *Faretta* and we will continue that status.

(3 RT 601-604, italics added.) Judge Kennedy confirmed this ruling after reviewing the unredacted version of Good's report. (3 RT 606.)

Later, after presiding over both phases of the trial and sentencing, Judge Kennedy stated:

> I did want to state for the record that in the time we spent on this case over the last several months, and the many days and hours that we have been in court, it's my view, and I don't think I ever had occasion to state it clearly on the record, that there was no basis for

> assertion of an insanity defense in this case which was discussed a little bit as part of the process. And it's my view that Mr. Wycoff has at all times demonstrated that he is competent to stand trial and has been competent to stand trial and to waive his right to counsel. [¶] In other words, Mr. Wycoff, I believe that Judge Bruiniers made the correct decision allowing you to represent yourself.

(21 RT 4788-4789.) Wycoff said, "Oh, so do I." (21 RT 4789.) Briggs said he disagreed, but based on information the court was not privy to. (21 RT 4793.)

B. Applicable Law

Both the due process clause of the Fourteenth Amendment and California law prohibit the state from trying or convicting a defendant while he or she is mentally incompetent. (§ 1367; *People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1032; *Drope v. Missouri* (1975) 420 U.S. 162, 181; *Pate v. Robinson* (1966) 383 U.S. 375, 378.) A defendant is incompetent to stand trial if he or she lacks a "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—[or lacks] a rational as well as a factual understanding of the proceedings against him.'" (*Dusky v. U.S.* (1960) 362 U.S. 402, 402; see also § 1367, subd. (a).) "Under both the federal Constitution and state law, the trial court must suspend criminal proceedings and conduct a competency hearing if presented with substantial evidence that the defendant is incompetent." (*Mai*, *supra*, at p. 1032; see also § 1368.) The failure to declare a doubt and conduct a competency hearing when there is substantial evidence of incompetence requires reversal of the judgment of conviction. (*People v. Blair* (2005) 36 Cal.4th 686, 711, disapproved on other grounds in *People v. Black* (2014) 58 Cal.4th 912.)

"Evidence is not substantial enough to mandate a mental competence hearing unless it raises a reasonable doubt on the issue." (*People v. Lewis and Oliver* (2014) 39 Cal.4th 970, 1047.) Evidence that "merely raises a

suspicion that the defendant lacks present . . . competence but does not disclose a present inability because of mental illness to participate rationally in the trial is not deemed 'substantial' evidence requiring a competence hearing." (*People v. Deere* (1985) 41 Cal.3d 353, 358, disapproved on other grounds in *People v. Bloom* (1989) 48 Cal.3d 1194, 1228, fn. 9.) "A reviewing court generally defers to the trial court's observations and assessments in this regard." (*Lewis and Oliver*, *supra*, at p. 1047.) "[A]bsent a showing of 'incompetence' that is 'substantial' as a matter of law, the trial judge's decision not to order a competency hearing is entitled to great deference, because the trial court is in the best position to observe the defendant during trial." (*Mai*, *supra*, 57 Cal.4th at p. 1033.) "An appellate court is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper." (*Ibid.*, citations omitted.)

At the same time, the Sixth Amendment protects the right of a criminal defendant to conduct his own defense, provided that the defendant knowingly and intelligently waives his right to the assistance of counsel. (*Faretta*, *supra*, 422 U.S. at pp. 819-821, 835-836.) A defendant's technical legal knowledge or skills are irrelevant to the assessment of his knowing exercise of the right to defend himself. (*Id.* at pp. 835-836.)

The requirement that a defendant knowingly and intelligently waive the right to counsel is distinct from the Fourteenth Amendment's requirement that the defendant be competent to stand trial. The purpose of requiring a defendant to validly waive counsel is to determine whether the defendant in fact understands the significance and consequences of his decision and whether that decision is voluntary. In contrast, in an inquiry into a defendant's competence to stand trial, "the question is whether [the defendant] has the ability to understand the proceedings." (*Godinez v. Moran* (1993) 509 U.S. 389, 400, fn. 12; see also *People v. Taylor* (2009)

47 Cal.4th 850, 874 [the knowing and voluntary waiver requirement is "not a *competence* standard"].)

Relevant here, in *Edwards* the Supreme Court recognized the existence of "gray-area defendants": those who are competent to stand trial but who suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves. (*Edwards*, *supra*, 554 U.S. at pp. 173-174, 177-178.) In such cases states are permitted, though not required, to impose a "mental-illness-related limitation on the scope of the self-representation right" and insist upon representation by counsel where a defendant "lacks the mental capacity to conduct his trial defense unless represented." (*Id.* at pp. 171, 174.)

Edwards described the mental capacity needed to represent oneself as the ability "to carry out the basic tasks needed to present [one's] own defense without the help of counsel." (*Edwards*, *supra*, 554 U.S. at pp. 175-176; see also *People v. Johnson* (2012) 53 Cal.4th 519, 530.) This is different than competency to stand trial, which "*assumes* the defendant will be defending through counsel." (*Taylor*, *supra*, 47 Cal.4th at p. 877; see also *Edwards*, *supra*, at pp. 174-175.) "Mental illness itself is not a unitary concept." (*Edwards*, *supra*, at p. 175.) "In certain instances an individual may well be able to satisfy *Dusky*'s mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel." (*Id.* at pp. 175-176.)

As a matter of first impression, this Court in *Johnson* accepted the invitation of *Edwards* and held that California trial courts could, in their discretion, deny a gray-area defendant his Sixth Amendment right to represent himself so long as doing so was consistent with *Edwards*—namely, so long as the "defendant suffers from severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the

defense without the help of counsel." (*Johnson*, *supra*, 53 Cal.4th at pp. 528, 530-531.) The Court explained that trial courts could, but were not mandated to, inquire into a defendant's competence to represent himself:

> A trial court need not routinely inquire into the mental competence of a defendant seeking self-representation. It needs to do so only if it is considering denying self-representation due to doubts about the defendant's mental competence. When a court doubts a defendant's competence to stand trial, it 'shall appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant.' (Pen. Code, § 1369, subd. (a).) Similarly, when it doubts the defendant's mental competence for self-representation, it may order a psychological or psychiatric examination to inquire into *that* question. To minimize the risk of improperly denying self-representation to a competent defendant, 'trial courts should be cautious about making an incompetence finding without benefit of an expert evaluation, though the judge's own observations of the defendant's in-court behavior will also provide key support for an incompetence finding and should be expressly placed on the record.'

(*Id.* at pp. 530-531; see also *Godinez*, *supra*, 509 U.S. at p. 401, fn. 3 ["We do not mean to suggest, of course, that a court is required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his right to counsel. As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant's competence"].)

C. Judge Bruiniers Did Not Abuse His Discretion by Failing to Sua Sponte Initiate Competency Proceedings

Wycoff contends Judge Bruiniers erred by failing to sua sponte conduct a hearing into his competence to stand trial. Wycoff contends Good's report alone and the report along with his behavior before Judge Bruiniers provided substantial evidence of his incompetence. (AOB 91-96.) The claim fails.

1. Good did not opine with particularity that Wycoff was incompetent to stand trial

Good's report did not provide substantial evidence of incompetence because Good failed to opine with particularity that Wycoff was incompetent to stand trial. This Court has said that "[the substantial evidence] standard is satisfied if at least one expert who is competent to render such an opinion, and who has had a sufficient opportunity to conduct an examination, testifies under oath with particularity that, because of mental illness, the accused is incapable of understanding the proceedings or assisting in his defense." (*Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1047; see also *People v. Pennington* (1967) 66 Cal.2d 508, 519.) "Only then does the trial court have a nondiscretionary obligation to suspend proceedings and hold a competency trial. Otherwise, we give great deference to the trial court's decision not to hold a competency trial." (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 465, citations omitted.)

However, an expert's opinion without more does not necessarily constitute substantial evidence of incompetence. "[T]he question as to what constitutes such substantial evidence in a proceeding under section 1368 'cannot be answered by a simple formula applicable to all situations.'" (*People v. Laudermilk* (1967) 67 Cal.2d 272, 283.) A trial court may "conclude that [an expert's opinion does] not satisfy the substantial-evidence standard described above" (*Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1048), and can "properly . . . assess the weight and persuasiveness of [a doctor's] findings and conclusions" (*People v. Lawley* (2002) 27 Cal.4th 102, 132). "'The chief value of an expert's testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; . . . it does not lie in his mere expression of conclusion.'" (*Id.* at p. 132, citing *People v. Bassett* (1968) 69 Cal.2d 122,

141 ["'[e]xpert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the *facts* and the validity of the *reasons* advanced for the conclusions'"].)

"In resolving the question of whether, as a matter of law, the evidence raised a reasonable doubt as to defendant's mental competence, [this Court] may consider all the relevant facts in the record." (*People v. Young* (2005) 34 Cal.4th 1149, 1217; see also *Laudermilk*, *supra*, 67 Cal.2d at p. 286 [trial court did not err by declining to declare a doubt based on "an examination of all the pertinent evidence before the trial court"].)

Thus, in *Lewis and Oliver*, this Court found no error in the trial court's decision not to hold a competence hearing despite that a psychologist, Dr. Davis, testified the defendant was incompetent because he could not assist his defense. (*Lewis and Oliver*, *supra*, 39 Cal.4th at pp. 1046-1048.) The trial court found Dr. Davis was not credible and heard testimony from two other psychologists who found the defendant competent. (*Id.* at pp. 1046-1047.) On appeal, the defendant argued that Dr. Davis's testimony that he was incompetent compelled competency proceedings. (*Id.* at p. 1048.) This Court disagreed, stating that "independent of both its doubts about Dr. Davis's credibility and the contrary testimony of other experts, the court could conclude that Davis's opinion did not satisfy the substantial-evidence standard described above." (*Ibid.*) Specifically, the record supported the trial court's finding that Dr. Davis's opinion was pre-fixed, ignored alternate scenarios, and disregarded contrary evidence. (*Ibid.*)

Similarly, in *Sattiewhite*, this Court found the trial court did not err by failing to sua sponte declare a doubt despite a psychologist's testimony during the penalty phase that the defendant had brain damage and mental disabilities. (*Sattiewhite*, *supra*, 59 Cal.4th at pp. 466-467.) The Court found the defendant failed to establish that the diagnoses interfered with his

ability to understand proceedings or assist counsel, and that the doctor's testimony failed to show the defendant's competence had changed since the pretrial report of another doctor finding the defendant competent. (*Id.* at pp. 466-467.) Moreover, the evidence "addressed defendant's alleged intellectual disability, [and] did not pertain to the question of competence to stand trial. Although a defendant's incompetence to stand trial might, in some cases, be inferred from evidence of severe intellectual disability, the penalty phase evidence of possible incompetence presented here was not so substantial as to deprive the trial court of discretion. Therefore, we defer to the trial court, which heard the penalty phase evidence, observed defendant and the witnesses, and did not form a doubt about defendant's mental competence." (*Id.* at p. 467.)

Finally, in *People v. Weaver* (2001) 26 Cal.4th 876, a psychiatrist testified in the sanity phase of trial that the defendant was incompetent because he appeared to be out of touch with reality, was suffering from chronic undifferentiated schizophrenia, and was hallucinating. (*Id.* at pp. 953-954.) The psychiatrist admitted his conclusion was based on the defendant's in-court demeanor and not from an actual examination, and admitted he had not seen other instances in which the defendant coherently and responsively responded to questions. (*Id.* at p. 953.) "The trial court concluded it had no doubt as to defendant's competency, stating: 'I just quite frankly don't believe that a doctor can from the witness stand, when he is not examining a patient or not even observing a person except secondarily to his testimony, can render an opinion like that on the witnesses stand . . . .'" (*Ibid.*) This Court affirmed, finding the evidence fell "far short of being substantial" and thus "the trial court's conclusion that Dr. Owre's testimony was not substantial evidence establishing a doubt of defendant's competence is entitled to deference on appeal." (*Id.* at pp. 953-954.)

The same is true here. Contrary to Wycoff's claim, Good's report was insufficient to deprive the court of its discretion to declare a doubt. First, it is not clear Good intended to or did opine as to Wycoff's competence to stand trial at all. Good rendered only one opinion—that Wycoff could not represent himself because he could not intelligently waive counsel. (2 CT 427.) Although Good premised this opinion on a somewhat lengthy explanation of observations and sub-conclusions, none of these were presented as his ultimate conclusion or the opinion he was appointed to render. (Compare 2 CT 424 with 2 CT 427.)

This limited opinion made sense given the parameters of Good's appointment. Judge Bruiniers appointed Good for the purpose of advising whether "Mr. Wycoff is, under the standards of *Indiana versus Edwards*, capable of waiving his right to counsel and self-representation in a case of this nature." (1 RT 124.) The order appointing Good stated:

> The Court states that while there is no apparent reason to question the defendant's capacity to stand trial under PC 1368 standards, the Court must be satisfied, under the standards set forth in Indiana v. Edwards 128 S.Ct 2379 (2008) that the defendant does not suffer from any mental illness that would render him incompetent to conduct trial proceedings pro se.
>
> The Court therefore appoints Dr. Paul Good pursuant to Evidence Code Sec. 730 as the Court's expert for the limited purpose [of] evaluating and advising the Court as to the defendant's capacity to waive counsel and represent himself under Indiana v. Edwards.

(2 CT 384.) Good began his report by stating he examined Wycoff to determine whether "he suffers from 'severe mental illness' that would render him *incompetent to conduct trial proceedings by himself.* Specifically, you have appointed me . . . to provide you with a confidential report on the issue of *whether the defendant has the capacity to waive counsel and represent himself.*" (2 CT 413, italics added.) Outlining his report, Good wrote he would "first determine if Mr. Wycoff has a severe

mental illness, and second, if the waiver is 'knowing, voluntary, and intelligent.'" (2 CT 413.) In other words, Good stated that the only opinion he would render was whether Wycoff could validly waive counsel and represent himself.

Good's opinion appeared to comport with the court's instructions. Good first stated Wycoff was "competent to stand trial were he to proceed with counsel." (2 CT 418.) Good supported this conclusion with traditional competency findings that Wycoff understood the charges, the roles of the various players, the expectations of his attorneys, how to assist his attorneys, and the strength of the evidence against him. (2 CT 418-420.)

Specifically, Good found Wycoff "interacted in a generally appropriate manner," "was alert to and oriented to person, place, time and situation," "managed to follow the flow of the interview," and was capable of controlling his emotions. (2 CT 416.) Wycoff displayed "no evidence of overwhelming anxiety or pervasive dysphoria," was adjusted to his situation, had a "clear, coherent, and goal oriented" thought process, and his "perceptions contained no abnormalities such as auditory or visual hallucinations." (2 CT 416-417.) Wycoff's memory "was good and he recalled remote events easily," and "[h]e displayed a concrete ability for abstract thought." (2 CT 417.) Wycoff reported "no current suicidal or homicidal ideation" and had adequate impulse control. (2 CT 417.)

Good found Wycoff had a rational and factual understanding of the proceedings. (2 CT 420.) Wycoff understood the charges and role of the judge, prosecutor, defense attorney, and witnesses. Wycoff understand the pleas he could enter as well as the consequences of testifying in his own defense. Wycoff understood the case against him was strong, assessed his chance of acquittal as "very slim," and identified with particularity the evidence the state would use to prove his guilt. (2 CT 418-419.)

Wycoff places great emphasis on the fact that Good later perceived he was "incompetent to stand trial" due to his problematic relationships with counsel. (2 CT 424; AOB 92.) But Wycoff neglects to acknowledge in his argument that Good previously observed Wycoff was competent to stand trial *were he to proceed with counsel.* (2 CT 418.) Given the parameters of Good's appointment, Good's latter observation appears to have been shorthand for a statement that Wycoff was incompetent to stand trial *without an attorney.* While this employed an erroneous legal standard—suggesting that one can be "competent" to stand trial with an attorney, but "incompetent" to stand trial without an attorney, as the prosecutor later noted to Judge Kennedy (3 RT 593)—it did suggest Good was attempting to meet the mandate of *Edwards*, as the court requested. (See *Edwards*, *supra*, 554 U.S. at p. 175 [cautioning "against the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself"].)

Additional problems arise if one accepts Wycoff's proposition that Good intended to opine on Wycoff's competence to stand trial. If the report is construed as rendering an opinion on competence, it would be rendered logically inconsistent, since it would opine that Wycoff was both competent and incompetent to stand trial. Moreover, in his report Good found Wycoff capable of a knowing and voluntary waiver of the right to counsel, something that an incompetent person would be incapable of. "[W]hile the competence inquiry focuses on the defendant's ability to understand the proceedings, the 'knowing and voluntary' inquiry is intended to ensure the defendant actually does understand the consequences of his or her decision, and that the decision is uncoerced." (*Taylor*, *supra*, 47 Cal.4th at p. 874.) Certainly, a defendant cannot actually understand the

consequences of his decision to waive counsel if he does not have the ability to understand the proceedings.

Not only had the court not solicited guidance on the issue of competence, but Good's observations in this way bely the conclusion that Good meant to opine Wycoff was incompetent to stand trial. The court was not required to speculate that Good exceeded the parameters of his appointment and rendered such an opinion. (See *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1047 [to constitute substantial evidence of incompetence, psychologist must testify with particularity that the defendant is incompetent to stand trial]; see also *People v. Lewis* (2008) 43 Cal.4th 415, 524-526 [no substantial evidence of incompetence where, although psychologist stated defendant might suffer brain damage, report did not mention competence and object of report was to determine origins of defendant's violent behavior, not to render opinion on competence], overruled on other grounds in *People v. Black* (2014) 58 Cal.4th 912.)

Regardless, even if we assume Good intended to opine on Wycoff's competence to stand trial, his observations on this point too lacked particularity and thus failed to constitute substantial evidence of incompetence.

First, Good's competency-related observations failed to show Wycoff was "*incapable*, because of mental illness, of understanding the nature of the proceedings against him or of assisting in his defense." (*Pennington*, *supra*, 66 Cal.2d at p. 519, italics added.) Good stated Wycoff "has not shown the 'present ability to consult with his lawyer[s]'" and would "likely find fault with every new attorney" (2 CT 424), but this was not akin to stating he was incapable of assisting his defense. To the contrary, this Court has "frequently recognized the distinction" between a defendant being "mentally *unable*, rather than emotionally *unwilling*, to help with his defense," and has "made clear that an uncooperative attitude is not, in and

of itself, substantial evidence of incompetence." (*Mai*, *supra*, 57 Cal.4th at p. 1034.) In other words, that consultation with attorneys was improbable or unlikely did not mean it was impossible. (See *Godinez*, *supra*, 509 U.S. at p. 404 (conc. opn. of Kennedy, J.) ["the focus of the *Dusky* formulation is on a particular level of mental functioning, which the ability to consult counsel helps identify. The possibility that a consultation will occur is not required for the standard to serve its purpose"].)

In *Mai*, *supra*, this Court found that a defense psychologist "never declared 'with particularity' that, as the result of a mental disorder or disability, defendant was unable to understand the proceedings or assist rationally in his defense. On the contrary, she acknowledged defendant's intelligence, indicated he was 'not out of touch with reality at all,' and agreed he was 'certainly able to discuss' his legal situation. She suggested simply that the emotional instability stemming from his custodial status sometimes caused him to be 'kind of irrational,' affected his 'ability to think clearly,' and made it difficult to obtain his cooperation." (*Mai*, *supra*, 57 Cal.4th at p. 1034.) Thus, this and other alleged evidence of incompetence did not compel the court or trial counsel to declare a doubt. (*Id.* at pp. 1035-1036.)

The same is true here. Good reported that Wycoff could discuss and understand his legal situation, interacted in a generally appropriate manner, had concrete ability for abstract thought, and possessed a clear and coherent thought process. (2 CT 416-417.) Although Good perceived Wycoff had problematic relationships with counsel, this showed only that it would be difficult to obtain his cooperation. That Wycoff was incompetent to stand trial was not compelled by this observation. Even if the observation was construed as a "conclusion," it was not binding on the court due to that fact alone. (See *Lawley*, *supra*, 27 Cal.4th at p. 132 [value of expert testimony does not lie in the "mere expression of a conclusion"].)

Nor did the conclusion that Wycoff was incapable of assisting his defense logically follow from Good's various subsidiary observations. As previously explained, the "chief value of an expert's testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion . . . ." (*Lawley, supra*, 27 Cal.4th at p. 132.)

Here, Good observed Wycoff (1) could not rationally "consider telling his story with the assistance of an attorney"; (2) did not appreciate the logic of his attorneys; (3) had a "hypercritical and suspicious stance towards his attorneys"; (4) would likely find fault with any attorney; (5) and believed due to self-importance and "prideful independence" that only he could represent himself. (2 CT 424.)

None of these observations suggested Wycoff was incapable of assisting his attorneys. Preliminarily, that Wycoff could not "consider telling his story with the assistance of an attorney" is belied by the record. As Good observed, Wycoff considered—and rejected—the idea of "telling his story" with an attorney, in part because he did not want to present an insanity defense. (2 CT 424; see also 2 CT 425 ["He wants to tell his story in his own way and has concluded that he will feel much better no matter the outcome"].) Good found this imprudent, attempting to persuade Wycoff he would still be able to tell his story in the confines of an insanity defense (2 CT 424), and stating later that Wycoff's "belief that he cannot tell his story within the context of an insanity plea is irrational. Ruling out an insanity plea given his lack of alternative legal defenses illustrates the unyielding and inflexible cognitions of a paranoid state" (2 CT 426).

But this observation and its supporting factual predicates show only that Good disagreed with Wycoff's rejection of an insanity plea and with his decision to proceed pro se. Such reasoning, however, was legally erroneous. A competent person can disagree with his attorney's preference

for an insanity plea and seek to discharge his attorney. A conclusion to the contrary would require Wycoff to accept Good's opinion that he was insane in order to show he was in fact competent. This Court has rejected such a premise, explaining that "the fact that a defendant represents himself or herself cannot be the basis, in itself, 'for some type of psychological finding,' because such a rule would require a competency hearing in every case in which a defendant exercises his or her right of self-representation—a standard that neither the high court nor this court has adopted." (*Blair*, *supra*, 36 Cal.4th at pp. 718-719.)

Nor must a defendant agree to an objectively rational defense in order to be found competent. This Court has held that whether a defendant can "*conduct his own defense in a rational manner*" sets "too high a standard for competence to stand trial." (*Johnson*, *supra*, 53 Cal.4th at p. 533; see also *People v. Koontz* (2002) 27 Cal.4th 1041, 1065 [defendant's failure to attempt a persuasive case in mitigation did not suggest incompetency to stand trial].) Even if Wycoff expressed a preference for the death penalty, which he did not, that would not constitute substantial evidence of incompetence. (See, e.g., *People v. Ramos* (2004) 34 Cal.4th 494, 509 [a defendant's preference for the death penalty and overall death wish does not alone amount to substantial evidence of incompetence].)

Good's remaining observations similarly failed to show Wycoff's incompetence. Although Good noted Wycoff distrusted and was paranoid of his attorneys, he nowhere explained how this rendered Wycoff incapable of assisting his attorneys. To constitute substantial evidence of incompetence, "[a] defendant must exhibit more than bizarre, paranoid behavior . . . that has little bearing on the question of whether a defendant can assist his defense counsel." (*Ramos*, *supra*, 34 Cal.4th at p. 508.) This Court has declined to find substantial evidence of incompetence where a defendant, without more, was merely distrustful or even paranoid about his

defense team. (See *Mai*, *supra*, 57 Cal.4th at pp. 1027, 1046 [no substantial evidence of incompetence despite that psychologist testified defendant had become distrustful of defense team]; *People v. Welch* (1999) 20 Cal.4th 701, 739-740 [no substantial evidence of incompetence despite trial court's finding that defendant's paranoid distrust of the judicial system precluded him from representing himself].)

Moreover, Good's observations compelled conclusions opposite to those he rendered. For example, contrary to the observation that Wycoff could not appreciate his attorneys' intentions in declining to allow him "free reign with discovery" (2 CT 424), Wycoff explained he recognized his attorneys' concerns but simply disagreed with them (2 CT 423 [Wycoff stating, "I know [my attorneys] see it like that," but explaining he had never seen discovery seized from prisoners' cells]).

Contrary to Good's observations that Wycoff could not appreciate the logic of his attorneys in seeking an insanity defense (2 CT 424), Good reported Wycoff recognized his attorneys were trying to help him by forwarding an insanity defense (2 CT 421 ["'They're trained to do everything to win,' (But it is in the service of helping you, right?) 'Yea, it is. I don't want them helping me in that way'"]).

Good also reported that Wycoff acknowledged he might succeed in an insanity defense and that that would be a good reason to go along with his attorneys. (2 CT 422.) Wycoff insisted he did not "want [his attorneys] helping me that way" (2 CT 421), but this showed he made a personal choice about defense strategy despite recognizing its consequences, not that he failed due to mental illness to consider the benefits of an insanity plea. Wycoff elsewhere asserted his attorneys had done good work on his case and were intelligent, trained to win, just "trying to do their job," and even "brilliant" at obtaining results on his behalf. (2 CT 421-423.) This hardly showed he could not appreciate the wisdom of his attorneys.

In addition, Wycoff explained coherently that he was willing to forgo what he viewed to be a slim possibility of succeeding at an insanity defense in order to tell his own story. (2 CT 421-422, 424.) Wycoff's reasons for doing so were unpersuasive to Good, but they were not unfounded. Wycoff believed he would be found competent because he had kept jobs all his life, because he read that succeeding in an insanity defense was statistically rare, and because the jury selected for his case would be one that could impose the death penalty. "And you're a lot less likely to get an insanity with a jury like that. It will be more Republican, more conservative, believe more in punishment and not so much in insanity." (2 CT 422.)

Wycoff's rejection of an insanity plea also did not compel Good's observation that Wycoff was incapable of appreciating his attorneys' efforts to help him avoid the death penalty. (2 CT 424.) Wycoff explained coherently that he was relatively unconcerned about receiving the death penalty. He was 40 years old and, given the state's record of imposing executions, did not believe he would be executed. (2 CT 421.) He also believed he would not live long enough to be executed because he was overweight and had family history of illness. (2 CT 421.)

That Wycoff believed the murders were justified (2 CT 424) or maintained the morality of killing his sister—which Good later analogized to "the irrationality of Wycoff's decision making" (2 CT 427)—also did not compel the observation that he could not assist his attorneys. "[T]he circumstance that the crime itself was irrational does not raise a reasonable doubt as to defendant's competence; the same could be said of many murders." (*Blair*, *supra*, 36 Cal.4th at p. 719.)

Finally, we note Good derived his observations from flawed or incomplete information. (See *Bassett*, *supra*, 69 Cal.2d at p. 141 [expert evidence "is valuable only in regard to the proof of the *facts* and the validity of the *reasons* advanced for the conclusions"].) Good premised his

observation that Wycoff could not assist counsel entirely on Wycoff's relationships with counsel (2 CT 420-424), but inexplicably did not speak to Najera, Briggs, or Cook, all of whom had leading roles on Wycoff's case. Good spoke to Hutcher about Wycoff's relationship with his attorneys, but Hutcher was never the lead attorney on Wycoff's case and appeared on the case in her capacity as supervisor. (See, e.g., 1 RT 120; see also *People v. Marks* (2004) 31 Cal.4th 197, 219 ["expert testimony is only as reliable as its bases, and here they were suspect. Dr. Gudiksen's information about defendant's history was limited to that which she received from defense counsel and her meetings with defendant"], citations omitted.)

There was also no basis for Good's assumption that Wycoff "found himself unable to work with four previous attorneys . . . ." (2 CT 414.) Wycoff moved to substitute only two attorneys, Cook and Najera. Wycoff never moved to substitute his first attorney, Kotin, and maintained a cooperative relationship with Briggs and Leonida. Similarly, in recounting Wycoff's relationship with counsel, Good stated that three of Wycoff's attorneys were "dismissed." (2 CT 420.) This was inaccurate. None of Wycoff's attorneys were dismissed. To the extent Good was referring to the departure of Cook and Najera, those attorneys left Wycoff's case when they left the Alternate Defender's Office.

The flawed assumptions underlying Good's observations were fatal to the observations themselves. The only basis upon which Good observed Wycoff could not assist counsel was his "problematic relationships with counsel," a matter which does not withstand scrutiny when one considers Good assumed those problems were larger than they were—namely, that there were four attorneys with whom Wycoff did not cooperate, rather than two, and that three attorneys were dismissed, rather than none.

In sum, Good failed to opine with particularity that Wycoff was incompetent to stand trial. Apart from his flawed application of law,

Good's reasoning and the quality of his factual assumptions did not support the observations he made. Even if the report is construed as concluding that Wycoff was incompetent to stand trial, the mere expression of that conclusion in light of Good's contrary observations and reasoning did not compel Judge Bruiniers to declare a doubt.

2. Judge Bruiniers's personal observations of Wycoff supported the finding that there was no doubt as to Wycoff's competency to stand trial

Second, Judge Bruiniers was entitled to weigh against Good's report his personal observations that Wycoff could work with counsel. "A trial court's decision whether or not to hold a competence hearing is entitled to deference, because the court has the opportunity to observe the defendant during trial." (*People v. Rogers* (2006) 39 Cal.4th 826, 847; see also *Blair*, *supra*, 36 Cal.4th at p. 719 [alleged signs of incompetence did not compel court to declare a doubt, including because court had "ample opportunity to observe defendant personally"]; *People v. Panah* (2005) 35 Cal.4th 395, 433 ["Balanced against the conflicting statements of counsel were the opinions of the experts that defendant was competent and the trial court's own observation that defendant had repeatedly assisted in his defense, including bringing and arguing his first *Marsden* motion"].)

Here, Judge Bruiniers made numerous findings that Wycoff was capable but simply unwilling to cooperate with his attorneys, and that there was no doubt as to Wycoff's competence to stand trial. (1 RT 81-82 ["the issue comes down to Mr. Wycoff's distrust of Mr. Najera and his refusal to cooperate with Mr. Najera"], 82-83 ["Mr. Wycoff, the fact that you are refusing to cooperate with your counsel is your choice"], 90 ["the issue comes down to whether you are willing to cooperate with Mr. Najera and the defense," "[w]hat I have before me at the moment is a record, which at least in my view reflects simply a refusal to cooperate with Mr. Najera"],

106 ["you choose not to cooperate with [Najera] for a number of reasons"], 123 ["The Court has not seen any evidence at all that Mr. Wycoff would not be competent to stand trial in this case"], 126 ["I don't see any evidence you're not competent to stand trial"]; 2 CT 384 ["there is no apparent reason to question the defendant's capacity to stand trial under PC 1368 standards"], 412 ["The Court finds defendant is mentally competent, literate and capable of a knowing and intelligent waiver of counsel"].)

Judge Bruiniers clearly disagreed with Good's report on this basis. After reviewing Good's report, Bruiniers ruled, "[i]t does appear that Mr. Wycoff has the ability to cooperate with counsel in his own defense should he choose to do so . . . ." (1 RT 139). Judge Bruiniers later stated of Good's report that although "[t]he indications or presence of paranoia has been manifest in Mr. Wycoff's dealing with his counsel, that, nevertheless, I—it did not appear to me that those diagnostic findings were sufficient under the cases of the Indiana v. Edward case pronouncement by the Supreme Court on these issues to deny Mr. Wycoff his right under Faretta to proceed with self-representation, however, ill advised that decision might be." (1 RT 161.)

Judge Bruiniers had ample bases from which to draw this conclusion. Judge Bruiniers presided over hearings in which Wycoff's relationship with counsel was discussed and Wycoff's attorneys were heard. In contrast, Good never observed Wycoff with his attorneys and derived his observations from assumptions that were incomplete or inaccurate. (See *Marks*, *supra*, 31 Cal.4th at p. 219 [noting, in finding evidence sufficient to support jury's finding of competence, that "[t]he defense experts who considered defendant incompetent were unfamiliar with much of the evidence that tended to render defendant's behavior comprehensible"]; *People v. Danielson* (1992) 3 Cal.4th 691, 723-727 [although psychologist testified defendant was over-medicated during trial and that there were

"serious questions" as to his competence, court was not required to declare doubt; psychologist had not witnessed defendant's trial testimony, and court's observations and those of people who witnessed defendant's testimony contradicted psychologist's opinion], overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

The record elsewhere supports Judge Bruiniers's findings. Wycoff told Judge Bruiniers at various times that he made a tactical decision to stop cooperating with his attorneys to receive new representation or, eventually, to represent himself. (See 2 CT 312 [in *Marsden* to remove Najera, stating, "I will have no choise but to not talk with or vissit with this person [appointed by Najera and Hutcher], I will go straight back to my cell"], 328 ["Who ever [Najera hires], I refuse to talk to them or vissit with them because I know thay will be an extention of Hutcher and Roberto. As for Hutcher and Roberto, I refuse to work with them ever again on anything after all that's happend and its all their falt. I have absolutely no chois, but I must get them off my case, even if I have to be my own atturney to do it"], 1 RT 90, 108 ["I'm willing to represent myself to get [Najera] off my case"], 113 ["If I can't get rid of Mr. Najera, I'm going to stop seeing [Leonida], because [Najera's] the one in charge"]; 2 CT 387 [writing in *Faretta* motion, "I will not vissit with David Headley"], 388 ["I will work aginst my atturneys even if it hurts my case, I will do this to make a point, I said no!"], 389 ["I will still fight against my atturneys. The only sollution is for me to be my own lawyer"], all errors in original.)

The record before Judge Bruiniers also showed Wycoff's decision to represent himself was not unfounded, but was rather the culmination of Wycoff's attempts to work with successive attorneys. As Wycoff told the court, the decision to represent himself was based not on animus toward all attorneys, but upon his desire to have Najera removed and his distrust of the Alternate Defender's Office. (See 2 CT 327-328; 1 RT 106, 112-114, 122;

2 CT 387-389.) Even Wycoff's vow to "shun" Headley, relied on by Good (2 CT 420), was not unreasonable. Wycoff told Judge Bruiniers he initially tried to reach Headley but was unable to do so. (2 CT 386.) Briggs corroborated this, telling the court Headley had been on vacation and that he believed Headley had not yet begun work on Wycoff's case. (2 CT 353.)

The record also established that Wycoff could cooperate with his attorneys. Significantly, none of Wycoff's attorneys declared a doubt as to his competence or told the court they were unable to work with him. "Although trial counsel's failure to seek a competency hearing is not determinative, it is significant because trial counsel interacts with the defendant on a daily basis and is in the best position to evaluate whether the defendant is able to participate meaningfully in the proceedings." (*Rogers*, *supra*, 39 Cal.4th at p. 848, citations omitted.)

Indeed, Wycoff's attorneys represented that they were able to work with Wycoff. At one *Marsden* hearing, Najera told Judge Bruiniers that, despite disputes over strategy and discovery, he could still effectively represent Wycoff. (1 RT 85.) Briggs confirmed Wycoff's account that Wycoff was initially enthusiastic about working with Najera, and said Wycoff and Najera once enjoyed a cooperative attorney-client relationship. (2 CT 351; see also 2 CT 311-312; 1 RT 87-88.)

Briggs also averred that he and Wycoff had a cooperative and effective attorney-client relationship. (2 CT 352.) Briggs told Judge Bruiniers that Wycoff was "someone that I think will cooperate, at least substantially if not fully with an attorney he trusts . . . ." (1 RT 80.) Judge Bruiniers was similarly aware that Wycoff had cooperated with Kotin and Leonida. (See 1 RT 87, 106, 113; 2 CT 386.) Wycoff himself wrote: "I do trust David Briggs. I agree with most of his strategies for the trial of my case. He has been honest with me and he has worked hard on my case. I am prepared to cooperate with him and work with him to try to get the best

result possible from my case." (2 CT 357.) These facts contradicted that Wycoff was incapable of assisting his attorneys. (See *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1047 ["Notwithstanding Dr. Davis's opinion that Lewis could not assist in his defense, counsel indicated in candid discussions with the court that Lewis understood the proceedings and could help counsel in conducting a defense if he chose to do so"]; see also *Marks*, *supra*, 31 Cal.4th at p. 220 ["Defendant's statements and conduct further showed he could assist counsel in the conduct of the defense. Although he did not cooperate with the attorney who was trying to arrange defendant's conviction for noncapital murder, he cooperated with Attorney Sawyer because he trusted her. . . . Defendant thus showed he was able to cooperate with counsel but sometimes *refused* to do so, largely to achieve a substitution of counsel"].)

The record also tended to contradict Good's suggestion that Wycoff's complaints about his attorneys were the exclusive product of paranoia. Contrary to Good's suggestion that Wycoff's desire for "free reign" with discovery was the product of paranoia (2 CT 424), Najera confirmed he had withheld discovery from Wycoff for tactical reasons (1 RT 33, 36, 84). Briggs also said Wycoff's account that his lawyers were using discovery as "bait" was accurate. (1 RT 38-39.)

Similarly, Wycoff had coherent complaints about his attorneys that Good either ignored or was unaware of. Wycoff repeatedly told Judge Bruiniers he had grown tired of the delays involved in obtaining and viewing his discovery. (1 RT 28, 30, 77-78, 89; 2 CT 304, 305-308, 318-320.) This complaint was not unfounded. Wycoff explained articulately why he believed his sessions with Najera were inefficient, and explained in detail why Briggs was more efficient than Najera. (2 CT 305-308, 320; 1 RT 77-78, 88-89.) Briggs corroborated Wycoff's complaints about delays, confirming Najera and Headley had taken vacation or otherwise failed to

adequately communicate with Wycoff and that as a result progress in the case had been delayed. (2 CT 352-353.)

Contrary to Good's assessment that Wycoff's complaints about his attorneys controlling who had access to him were the product of paranoia (2 CT 424), Judge Bruiniers had information corroborating those complaints. Briggs confirmed that Najera precluded him from seeing Wycoff alone. (2 CT 352; 1 RT 82.) Briggs also confirmed Najera removed him from the case without Wycoff's consent, a step that exacerbated Wycoff's distrust of Najera. (1 RT 82.)

Judge Bruiniers also personally questioned Wycoff to determine if he understood the pitfalls of representing himself. (1 RT 104-108, 139-149.) Contrary to Good's conclusion that "[s]elf-importance and prideful independence lead Mr. Wycoff to believe that only he can represent himself" (2 CT 424), Wycoff acknowledged to Judge Bruiniers that he was not qualified to represent himself and sought to represent himself as a last resort. (1 RT 106 ["I wouldn't say I'm exactly qualified. These guys are more qualified, but I just got to get rid of Roberto. I have no problems. I have no problem with Ellen here. I have no problem with Briggs. But I'm just doing this to get rid of Roberto"], 107 ["That's right. I'm not qualified, but it has to be done"], 108 ["I'm willing to represent myself to get him off my case"].) Wycoff told Judge Bruiniers he was simply tired of attorneys, and wanted to "do things for [himself]." (1 RT 112-114; see also 1 RT 122 ["I'm being left out of my own case," "I'm done with lawyers," "[I] don't even want Briggs on the case," and "[t]his is something I got to do myself"].) Judge Bruiniers in fact denied Wycoff's initial request to represent himself because Wycoff said he would change his request if he no longer wished to represent himself. (1 RT 114.) This record showed Wycoff sought to represent himself as a last resort, not because he believed out of grandiosity that only he was capable of defending the case.

Wycoff argues Judge Bruiniers should have declared a doubt because he observed in Wycoff "evidence of grandiosity and perhaps a fairly high level of paranoia," and because the prosecutor noted "there may be some evidence of mental defects." (1 RT 124; AOB 93.) We disagree. A court's preliminary concerns about competency do not compel competency proceedings (*People v. Price* (1991) 1 Cal.4th 324, 396-397), and evidence of paranoia or mental defects without more do not constitute substantial evidence of incompetence (see, e.g., *Rogers*, *supra*, 39 Cal.4th at p. 847). Regardless, the court made these comments in the context of describing its duties under *Edwards*, and after stating it had no doubt about Wycoff's competence to stand trial. (1 RT 123-124.) Both prosecutors on the case—not to mention Wycoff's defense attorneys—also declined to express a doubt as to Wycoff's competence.

Wycoff acknowledges he was capable of communicating with Briggs, but contends their cooperation was premised on the delusion that Briggs had a private line to the jail. (AOB 94; 1 RT 78.) Not so. Wycoff articulated well-founded reasons for cooperating with Briggs, including because Briggs was efficient at delivering discovery and devoted himself to the case. (See, e.g., 2 CT 307-308, 313-314; 1 RT 77-78.) Wycoff's isolated comment about a private line did not constitute substantial evidence of incompetence. (See *Ramos*, *supra*, 34 Cal.4th at p. 508 [more is needed than paranoid behavior or strange words to establish a doubt].)

Wycoff argues Judge Bruiniers should have declared a doubt because he knew Wycoff's problems with his attorneys stemmed from a desire to present an "irrational and legally meaningless defense." (AOB 93.) Not so. As we describe later, Wycoff did not seek to present an irrational defense. Even if he did, that a defendant seeks to present an irrational defense or even no defense at all is not evidence of incompetence. (See, e.g., *Lewis*, *supra*, 43 Cal.4th at p. 525 [defendant's counterproductive behavior at trial

did not amount to substantial evidence of incompetence]; *Mai*, *supra*, 57 Cal.4th at p. 1035 [defendant's desire to dispense with mitigating evidence and invite the jury to impose death did not trigger competency proceedings].) Regardless, this argument ignores that Wycoff had multiple disagreements with his attorneys—including over efficiency and access to discovery—that did not relate to his objections to an insanity defense.

Wycoff next argues Judge Bruiniers believed the standards for assessing competency to stand trial and competency to waive counsel were the same. (AOB 95.) Since Judge Bruiniers had a doubt about his competence to waive counsel, Wycoff argues, Judge Bruiniers should also have declared a doubt as to his competence to stand trial. (AOB 96.)

We disagree. Judge Bruiniers did not express a doubt as to Wycoff's competence to represent himself. (See 1 RT 126 ["You may well be competent to waive your right to counsel and to represent yourself"], 138 [finding Good's report did not "rise[] to the level that would preclude Mr. Wycoff from electing to represent himself "].) Judge Bruiniers also did not believe the standards for assessing competence to stand trial were the same as those governing competence to represent one's self. To the contrary, Judge Bruiniers recognized "there are different standards that the Court must apply," although until recently there was "some indication" the standards were the same, which was precisely the reason he appointed Good. (1 RT 123, 126; see also 2 CT 384 ["while there is no apparent reason to question the defendant's capacity to stand trial under PC 1368 standards, the Court must be satisfied, under the standards set forth in [*Edwards*] . . . that the defendant does not suffer from any mental illness that would render him incompetent to conduct trial proceedings pro se"].) There is no evidence Judge Bruiniers equated the standards.

In sum, Judge Bruiniers's observations of Wycoff and his attorneys supported his findings that Wycoff was capable but simply unwilling to

cooperate with his attorneys and that there was no doubt as to his competency to stand trial. Judge Bruiniers was not required to accept Good's inconclusive observations, and was entitled to weigh against them his own observations. Either independently or cumulatively, the evidence before Judge Bruiniers did not compel competency proceedings. (See *Lewis*, *supra*, 43 Cal.4th at p. 526 ["there was no substantial evidence that defendant's lack of cooperation stemmed from inability rather than unwillingness, and the trial court's comments suggest that it found defendant's problem to be of the latter type rather than the former"].)

3. The parties were heard on the issue of competency

Finally, Judge Bruiniers permitted Wycoff and his attorney to be heard on the issue of competence. (1 RT 136-150.) At the outset of the hearing on Good's report, the court told counsel that Good concluded Wycoff's waiver would not be intelligent because his "reasoning process is not rational but instead reflects the irrational thinking of a paranoid man suffering from severe[] mental illness," and that there was a "differential diagnosis and that is quote, 'between paranoid schizophrenia and delusional disorder.'" (1 RT 137-138.) The court invited counsel to review the report before being heard on the issue, but counsel declined, choosing to submit on the court's analysis. (1 RT 138-139.)

Although Wycoff claims he was constitutionally deprived of a hearing, this procedure was proper. This Court has held that no "precedent[] precludes a defense attorney from waiving a jury, forgoing the right to present live witnesses, and submitting the competency determination on the psychiatric reports filed with the court. The statutory references to a 'hearing' (§ 1368, subd. (b)) or a 'trial' (§ 1369) simply mean that a determination of competency must be made by the court (or a jury if one is not waived), not, as defendant contends, that there must be 'a court or jury trial, at which the criminal defendant's rights of confrontation, cross

examination, compulsory process and to present evidence are honored by the court and counsel.'" (*Weaver*, *supra*, 26 Cal.4th at p. 904; see also *Taylor*, *supra*, 47 Cal.4th at p. 861-862 [court's procedures were adequate where court held a hearing on competence, defendant waived a jury trial, and both parties submitted the question of competence to the court without further evidence or argument].) Wycoff fails to explain why a formal adversarial hearing or additional process was needed to protect his due process rights, particularly where, as here, neither the court nor defense counsel expressed a doubt as to Wycoff's competence.

Wycoff claims later in his brief that Judge Bruiniers's procedure was constitutionally inadequate because at the hearing on November 14, 2008 Judge Bruiniers did not address Good's competency findings, and counsel did not yet have Good's report. (AOB 119.)

We disagree. By finding Wycoff competent to represent himself under *Edwards*, Judge Bruiniers necessarily found Wycoff competent to stand trial. (See *Edwards*, *supra*, 53 Cal.4th at p. 178 [permitting "[s]tates to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves"]; see also *Taylor*, *supra*, 47 Cal.4th at p. 877 [competency to stand trial "assumes the defendant will be defending through counsel"].) Judge Bruiniers also made findings that Wycoff was competent to stand trial, including by finding Good's diagnosis did not "rise[] to the level that would preclude Mr. Wycoff from electing to represent himself should he so choose to so" and stating "it does appear that Mr. Wycoff has the ability to cooperate with counsel in his own defense should he choose to do so." (1 RT 138-139.) The minute order of the hearing stated, "The Court finds defendant is mentally competent, literate and capable of a knowing and intelligent waiver of counsel." (2 CT 412.)

In addition, defense counsel received a copy of Good's report only one week after the hearing, on November 21, 2008, while the Alternate Defender was still attorney of record. (2 CT 434; 1 RT 161.) Although the role of the Alternate Defender's Office was subsequently limited, the office was not relieved from the case until January 15, 2009. (1 RT 187, 201, 205.) Had defense counsel determined the report to be evidence of incompetence, he could have revisited his decision to submit on the report. That counsel did not demonstrates he maintained his decision to submit on the report—i.e., that he agreed with the court's conclusion that Wycoff was competent to stand trial. Wycoff cannot obtain a reversal due to procedural error on these grounds.

D. Judge Kennedy Did Not Abuse His Discretion by Failing to Sue Sponte Initiate Competency Proceedings Prior to Trial

Wycoff contends that Judge Kennedy, like Judge Bruiniers, erred by failing to sua sponte initiate competency proceedings on the basis of Good's report. (AOB 97-99.) Wycoff argues that Judge Kennedy had additional evidence of Wycoff's incompetence prior to trial because he reviewed Dr. Tucker's report. (AOB 98.)[20] The claim lacks merit. Good's report did not present substantial evidence of incompetence, and Judge Kennedy, like Judge Bruiniers, was entitled to weigh his personal observations against Good's report.

First, as previously explained, Good's report did not present substantial evidence of incompetence to stand trial. (See *Lewis and Oliver*, *supra*, 39 Cal.4th at p. 1048; *Weaver*, *supra*, 26 Cal.4th at pp. 953-954.) Moreover, in addition to reviewing the report independently, Judge

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[20] This allegation is somewhat inaccurate. Judge Bruiniers was aware of Dr. Tucker's report and its diagnostic findings because Good mentioned them in his report. (2 CT 416.)

Kennedy reviewed the transcript of the hearing in which Judge Bruiniers assessed Good's report. Judge Kennedy heard from the prosecutor, who suspected Good confused the applicable competence standard and in doing so appeared to reach contradictory conclusions about Wycoff's competence. (3 RT 591-596, 598-600.) Judge Kennedy did not abuse his discretion by declining to sua sponte declare a doubt on this record.

Tucker's report does not change this result. Tucker's report did not purport to address Wycoff's competence at the time of trial. (2 CT 377-379.) As Tucker wrote, he evaluated Wycoff to determine only whether he "suffers from any psychiatric condition(s) which may have contributed to the commission of the alleged offenses." (2 CT 377.) Although Tucker concluded Wycoff had Asperger's, schizophrenia, and ADHD (2 CT 377-379), he never related these diagnoses to Wycoff's ability to understand the proceedings or assist counsel. The report was also rendered on September 19, 2008, almost a year before Wycoff's trial began. (2 CT 377; 4 CT 733.) This was insufficient to raise a doubt as to Wycoff's present competence. (See, e.g., *Rogers*, *supra*, 39 Cal.4th at pp. 848-849 [although psychologists testified defendant had possible multiple personality disorder, no expert related the disorder to the defendant's inability to understand the trial or assist counsel]; *Young*, *supra*, 34 Cal.4th at pp. 1217 [psychologist "did not relate his findings in terms of the defendant's competency to stand trial"]; *Deere*, *supra*, 41 Cal.3d at p. 358 [evidence that "does not disclose a *present* inability because of mental [illness] to participate rationally in the trial is not deemed 'substantial' evidence requiring a competence hearing"], emphasis added.)

Second, Wycoff neglects to acknowledge that, like Judge Bruiniers, Judge Kennedy's observations of Wycoff contradicted any finding of doubt as to his competence. Having presided over the case for almost three months—during which the entire time Wycoff represented himself—Judge

Kennedy had the benefit of significant personal interaction with Wycoff before ruling there was no doubt as to his competence. (See 3 CT 679; 2 RT 322; 3 RT 590.) Judge Kennedy expressly based his finding on these personal observations, stating,

> I can tell you that from our interactions over the last several months I don't—haven't seen any reason to question either of those premises [regarding Wycoff's competence to stand trial and represent himself] . . . .

(3 RT 599-600.) After reviewing the reports of Good and Tucker, Judge Kennedy ruled:

> [I] do not have any doubt about Mr. Wycoff's competency to stand trial.
>
> My view is that Mr. Wycoff clearly understands the nature and purpose of these proceedings, the roles of the respective participants and the fact that this is a matter of utmost seriousness in that it is a potential death penalty case, but he fully understands that is and [is] capable of understanding all of the issues that I have discussed. He is capable of presenting a defense and mitigation evidence if the matter gets to a penalty phase.

(3 RT 601-604; see also *Ramos*, *supra*, 34 Cal.4th at p. 509 [affirming trial court's decision not to declare a doubt where court "specifically stated that in its discretion and under all the evidence, including, but not limited to, observations of defendant's demeanor, it had 'no reason whatsoever to question [defendant's] competence to enter into [the guilty plea]'"].)

Finally, after presiding over the trial and sentencing, Judge Kennedy stated that "in the time we spent on this case over the last several months, and the many days and hours that we have been in court," "Mr. Wycoff has at all times demonstrated that he is competent to stand trial and has been competent to stand trial and to waive his right to counsel. [¶] In other words, Mr. Wycoff, I believe that Judge Bruiniers made the correct decision allowing you to represent yourself." (21 RT 4788-4789.)

This finding was amply supported by the record. When the prosecutor presented the issue to Judge Kennedy, Judge Kennedy was aware Wycoff had already brought a partially successful motion to suppress in front of Judge Bruiniers. (2 RT 333.) Judge Kennedy also observed Wycoff take an active role in pretrial proceedings, including in pretrial motions and trial discussions. (See *Koontz*, *supra*, 27 Cal.4th at p. 1065 [no substantial evidence of incompetence in part because court observed defendant take an active role in pretrial proceedings]; see also *Mai*, *supra*, 57 Cal.4th at p. 1035 [no substantial evidence of incompetence where court noted "defendant had calmly, but actively, participated in the extended process of jury selection, reviewing questionnaires and juror lists, making notes, and assisting counsel in the exercise of peremptory challenges," and "appeared capable of speaking up when he felt the need to consult with his lawyers . . . and, at one point, he asked pertinent questions about the court's authority over the conditions of his confinement"]; *Panah*, *supra*, 35 Cal.4th at p. 433 [no substantial evidence of incompetence where, in addition to other evidence, court observed defendant repeatedly assist in his defense, including by bringing and arguing his first *Marsden* motion].)

In relevant part, Wycoff moved for a special master to supervise evidence review and for return of suppressed evidence. (2 RT 404-406, 415; 3 CT 685-689.) When the prosecutor moved to amend the information, Wycoff objected to inclusion of a firearm enhancement that had been dismissed. (2 RT 461.) When asked about Briggs's role as advisory counsel, Wycoff intelligently told the court he desired to represent himself but would need advice from Briggs. (2 RT 356.) Wycoff sought to review the evidence against him, suggesting he understood his role in representing himself and was building a defense. Wycoff explained his requirements for viewing evidence and cooperated with the prosecutor and court to arrive at a procedure to do so. (2 RT 424-431.)

Wycoff's coherent participation continued into jury selection. Wycoff suggested edits to the proposed juror questionnaires, many of which the court and prosecutor agreed with. (2 RT 341-371.) Some proposed edits were nuanced. For example, Wycoff suggested that the court ask jurors both whether they owned a firearm and whether their family members owned firearms (2 RT 342), requested that jurors be allowed to explain "yes" or "no" answers (2 RT 343), and proposed a more open-ended question about the burden of proof with which Judge Kennedy agreed. (2 RT 346-347).[21]

Wycoff also requested juror questions aimed at selecting a jury that might acquit him or decline to impose the death penalty. For example, Wycoff proposed questions to identify potential jurors who disliked truck drivers or obese people, explaining the jury would hear evidence about his life and might dislike him for his profession or characteristics. (3 CT 673-674; 2 RT 373-376.) In apparent anticipation of Laurel and Eric's opposition to the death penalty, Wycoff proposed questioning jurors about whether they would vote for the death penalty if they learned the victims' family was opposed to the death penalty. (2 RT 486-487.)

Wycoff further proposed questions aimed at selecting a jury that would sympathize with his belief that the murders were justified, including questions about medicating children, whether jurors would vote guilty if they concluded the decedents were bad people, whether the jurors believed people "should have the right to take the law into their own hands," and whether a person should have the right to kill to prevent destruction of their

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[21] In discussing the questionnaires, Briggs often spoke for Wycoff. However, Briggs explained that Wycoff wanted the changes and that he simply helped Wycoff with the language. (2 RT 341, 352.)

home, destruction of their family, emotional distress, financial problems, or loss of reputation. (3 CT 673-674; 2 RT 390-391.)

Similarly, Wycoff proposed keeping a question about jurors' view of mental-health professionals. (2 CT 673; 2 RT 439-440.) Wycoff explained he was considering calling a mental-health professional to corroborate his belief that the murders were justified. Even if he eventually chose not to call a mental-health professional, Wycoff explained he intended to produce evidence that the children were in therapy, which would tend to corroborate his theory that Julie and Paul were poor parents. (2 RT 439-440, 471, 501-502, 535-536.)

Wycoff suggests later in his brief that his proposed juror questions were symptoms of mental illness. (AOB 121-124.) We disagree. Wycoff's proposed questions displayed an understanding of the proceedings and his defense. And Wycoff understood that a mental-health professional could corroborate his belief that the murders were justified, a factor which could be mitigating. (See §§ 190.3, subds. (d), (f), (h), and (k) [in determining penalty, trier of fact may consider whether offense was committed under influence of extreme mental or emotional disturbance, whether offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct, whether at the time of the offense the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was impaired as a result of mental disease or defect, and whether any other circumstance extenuates the gravity of the crime even though it is not a legal excuse for the crime].)

Wycoff also did not blindly believe his defense strategy would succeed. Wycoff acknowledged his questions did not relate to the legal requirements of self defense (2 RT 391), but explained his questions were consistent with the type of jurors he desired. Wycoff asked the court, "I

think I know where you are going to be coming from [regarding the questions' legal relevance], but don't you think our laws are a little bit wrong?" (2 RT 386.) Wycoff said he hoped for a jury "where people are going to have to think for themselves and not rely on the law and do things for themselves." (2 RT 388.) "[I]'d like to have a jury that believes that you have a right to get rid of evil people, you know, especially if they are on your back, you know, trying to destroy you, trying to ruin you, you know." (2 RT 389.) Wycoff also told Good his chances of an acquittal were "very slim, 1%." (2 CT 419.)

Regardless, Wycoff's belief that justifying the murders might result in an acquittal or life without parole was not unfounded. The prosecutor agreed that Wycoff's proposed questions and justification for the murders were relevant in the penalty phase. (See 2 RT 384-385; 16 RT 3407.) As to the possibility of an acquittal, Wycoff's questions illustrate that he chose a strategy of jury nullification. Although an experienced attorney may not have openly declared this strategy in court, such a strategy is hardly extraordinary. (See *People v. Williams* (2001) 25 Cal.4th 441, 461 [noting jury nullification issues arise "when defendants, as a matter of conscience, choose to violate laws as a means of protest, or to violate laws they view as unjust," and that "[i]t is striking that the debate over juror nullification remains vigorous after more than a hundred years"].)

Wycoff also understood his role in preparing a defense and at various times explained his efforts to do so. Wycoff was engaged in contacting potential witnesses on the jail pro-per line, and discussed with Judge Kennedy problems he was having in doing so. (2 RT 444-449.) Discussing scheduling, Wycoff told the court he was having trouble finding witnesses for the guilt and penalty phases but anticipated he would have some. (2 RT 483-484.) Wycoff ultimately submitted a witness list that included Michael

Lawson, who eventually testified on his behalf in the penalty phase, and Dr. Tucker. (3 CT 722; 2 RT 533.)

In addition, Wycoff submitted coherent motions in limine. (2 RT 546.) The motions requested exclusion of inflammatory evidence, that witnesses be precluded from referring to excluded evidence, that irrelevant literature and video seized be excluded, and that Wycoff's objections be construed as objections under federal law. (3 CT 723-724.) Of the final request, Wycoff explained, "[b]ecause I'm representing myself—well, when—I'd like to request that when objections are made it involves the United States Constitution, as well as California law." (2 RT 550-551.)

Importantly, Briggs never expressed a doubt as to Wycoff's competence. In fact, in discussing the mechanics of his role as advisory counsel, Briggs advocated that Wycoff be responsible for addressing the court, witnesses, and jurors. (2 RT 352.) Briggs explained that "the decisions in this case are his and they are not mine." (2 RT 353; see also *Blair*, *supra*, 36 Cal.4th at p. 716 [in finding no substantial evidence of incompetence, noting "defendant's advisory counsel did not advise Judge Nelson that defendant's competence might be in issue"].)

Thus, the evidence amply supported Judge Kennedy's finding that there was no doubt as to Wycoff's competence. Like Judge Bruiniers, Judge Kennedy was entitled to weigh his observations of Wycoff against Good's report. That both judges observed Wycoff closely and came to the opinion that there was no doubt as to his competency—and despite Good's report—only further contradicts Wycoff's argument that the evidence of his incompetence was "overwhelming." (AOB 99).

E. Judge Kennedy Did Not Abuse His Discretion by Failing to Sua Sponte Initiate Competency Proceedings Based on the Trial and Post-Trial Proceedings

Wycoff next asserts Judge Kennedy erred by failing to sua sponte initiate competency proceedings based on Wycoff's behavior during trial and post-trial proceedings. (AOB 100-109.) In support of this claim, Wycoff lists examples of his "irrational behavior" (AOB 101) and "delusions, grandiosity, and paranoia" (AOB 102), which he argues were "symptoms of [his] severe mental illness and were indicative of [his] incompetence to stand trial." (AOB 100-101.) Wycoff alleges that "[s]ingularly or collectively" this evidence compelled the court to order a competency hearing. (AOB 101.) We disagree.

Preliminarily, even if we assume Wycoff's recitation of symptoms is accurate, "symptoms of severe mental illness" without more are insufficient to establish substantial evidence of incompetence. As explained earlier, although "[e]vidence of incompetence may emanate from several sources, including the defendant's demeanor, irrational behavior, and prior mental evaluations," "to be entitled to a competency hearing, 'a defendant must exhibit more than . . . a preexisting psychiatric condition that has little bearing on the question . . . whether the defendant can assist his defense counsel." (*Rogers*, *supra*, 39 Cal.4th at p. 847.) Like Good's report, Wycoff's argument fails to connect his alleged delusional or irrational behavior to any inability to understand the proceedings or assist his defense.

Regardless, Wycoff's decisions during trial showed he understood the proceedings and how to convey his defense. Wycoff's arguments to the contrary lack merit.

Wycoff first states there was substantial evidence of incompetence before Judge Kennedy because during trial he conceded the elements of the offense and thus his defense was "no defense at all." (AOB 101-102.) We

disagree. As previously explained, Wycoff made an informed decision to try to persuade the jury the murders were necessary. The approach was well suited the penalty phase, where evidence that Wycoff was not an inherently dangerous person and killed only out of perceived duress could well have resulted in life in prison. Even in the guilt phase, Wycoff's strategy of jury nullification was not absurd, and was made with recognition that his chance of acquittal was slim.

Nor was Judge Kennedy required to initiate competency proceedings because Wycoff insisted he was morally compelled to kill the victims, said he was proud of killing the victims, and said he would do so again. (AOB 101-102.) These statements were logically connected to Wycoff's attempt to persuade the jury the murders were necessary. That the statements were self-defeating or admitted the offense did not show incompetence.

This Court rejected a similar claim in *Ramos*. There, the defendant gave a pretrial interview to a reporter implying he would kill again if crossed. (*Ramos*, *supra*, 34 Cal.4th at p. 510.) On appeal, the defendant argued that a psychologist's testimony during the penalty phase—which relied in part on the defendant's interview with the reporter—should have alerted the trial court "'that defendant's pursuit of a death sentence was the product of mental illness and not a rational choice.'" (*Ibid.*) The defendant argued that the psychologist's testimony made clear the defendant's paranoid personality disorder "precluded [the defendant] from assisting in his defense, since any rational defense would have to concede that the homicides were unjustified and inevitably suggest that there was something wrong with defendant's view that when lines are crossed or rules are violated, the threatened consequences must be meted out. In effect, [defendant's] desire to receive the death penalty is perfectly in keeping with his mental illness. To defend himself and defend his life would be to admit that what he did was wrong." (*Ibid.*) This Court disagreed: "The evidence

defendant presented at the penalty trial did indicate that defendant lived by his own set of rules and acted without regard for the lives of others. That defendant lived by his own code of conduct neither indicates he was mentally incompetent and could not understand the penalty proceedings, nor presents any new evidence or changed circumstance that would require the court to suspend the proceedings." (*Id.* at p. 511.)

Similarly, in *Mai*, this Court declined to find substantial evidence of incompetence where the defendant stated his intent to dispense with mitigating evidence, present no argument, and invite the jury to impose death. (*Mai*, *supra*, 57 Cal.4th at p. 1035.) "Defendant made clear he understood the consequences of his decision, and he expressed his reasons coherently, even eloquently, to the jury. He explained he was motivated by reluctance to beg in court for sympathy or pity, by his personal code of 'two eyes for every eye,' and by his belief that, as 'part of the game,' the time had come to pay in full for his murder of Officer Burt. These well-stated moral sentiments in no way belied a mental ability to understand the proceedings and to assist in defending them." (*Ibid.*)

Here, as in *Ramos* and *Mai*, that Wycoff believed the murders were justified and asserted he would commit them again showed that he lived by his own code of conduct, not that he was incapable of assisting his defense. Indeed, as in *Mai*, evidence introduced by both Wycoff and the prosecution illustrated Wycoff's often "well-stated moral sentiments," pursuant to which he acknowledged murder was wrong but insisted he killed Julie and Paul in his view of self defense. (See 19 RT 4167 ["Julie and Paul didn't need that extra little money, they were millionaires. And yet, you know, that little bit of money, that house that would have financially destroyed me"], 4168 ["[W]hat they were doing to me they were killing me. To them taking my house and destroying me financially . . . that would be killing somebody"], 4169 ["Julie and Paul were . . . about to kill me in their own

way"]; 20 RT 4378 ["Well, I would be a hypocrite if I didn't [believe in the death penalty] because I executed the death penalty on two people that were thieves"], 4380-4381 [stating he was unlike murderers on death row who should be killed for their crimes, and unlike a "lower echelon of people like rapists and molesters and things"]; 17 RT 3777 ["I'm not a murderer, I am a killer. Murder is wrong. Murder is bad; it's illegal, and you know it's wrong"]; 9 CT 2135 ["I made a moral choice and I don't think there's nothing sick about making a uh, moral decision"], 2216 ["just because something's illegal, doesn't mean it's wrong. The thing is, these were two very, very bad, evil people"], 2231 ["the fact that something is illegal doesn't make it wrong. My sister was stealing from my family"]; 18 RT 4016 ["I am a peaceful person who helps people and does not like to hurt people. I killed two people who like to hurt people and were doing it more and more"].)

Wycoff's arguments to the contrary omit portions of the record that show Wycoff chose a coherent defense strategy. Indeed, as described below, Wycoff was dedicated to his defense and made sound decisions in executing it.

In the guilt phase, Wycoff presented to the jury a sympathetic picture of himself as someone who cared for his dying father, supported himself, and sought to maintain control of a single asset—his childhood home. (16 RT 3421-3442, 3444-3463.) Wycoff described Julie's attempts to steal his inheritance with specificity, explaining she put the house in trust without his knowledge and that she was seeking to do the same to Aunt Lu. (16 RT 3433-3434, 3444-3455, 3456.) Wycoff sought favor from the jury by expressing that he killed Julie and Paul as a last resort, and by explaining he intended to do good after the murders, including by retrieving Aunt Lu from the nursing home. (16 RT 3461-3462; see *Benson v. Terhune* (9th Cir. 2002) 304 F.3d 874, 885 [testifying in one's own defense is "the

quintessential act of participating in one's own trial"]; *Rogers*, *supra*, 39 Cal.4th at pp. 849 [noting "[d]efendant testified coherently and articulately"]; *Koontz*, *supra*, 27 Cal.4th at p. 1064 [noting defendant "testified on his own behalf," even if "his rambling, marginally relevant speeches . . . may constitute some form of mental illness"].)

Wycoff maintained his defense on cross-examination. For example, Wycoff resisted the prosecutor's attempts to paint him as jealous of Julie, explaining that his issues with her were primarily financial, not triggered by past wrongs. He insisted he would not have killed Julie and Paul over simple slights. (16 RT 3489, 3550-3552, 3565, 3572-3573.) Wycoff also resisted the prosecutor's attempt to paint him as someone who acted out of a desire for control or revenge. Wycoff admitted he liked to be in control but said he would have let Julie control things if she had made fair and just decisions. (16 RT 3575-3576.) Pushing back on the prosecutor, Wycoff insisted he did not always find a way to get what he wants. He said he usually submits to authority, but this time "the persons in charge were very wrong." (16 RT 3578-3579.)

Wycoff recognized that credibility was important to his case. When asked about the ease with which he confessed to the police, Wycoff said, "[I]f I can do something like this, it shouldn't be too hard to talk about something like this." (16 RT 3557.) Wycoff said he spoke to the newspaper about the murders because he realized he had been caught, believed there would be speculation, and wanted to set the story straight. (16 RT 3566.)

Wycoff similarly attempted to rehabilitate his credibility on redirect. Since the prosecutor impeached him with the fact that he lied to police about carrying a gun during the murders, Wycoff explained on redirect that he lied to avoid being misconstrued as suicidal. (16 RT 3608-3610.)

Wycoff testified, "[S]ince I've gotten caught, I've been open and honest about everything, except for one thing, the gun." (16 RT 3608.)

Wycoff also presented a coherent case in mitigation during the penalty phase. There, Wycoff sought to humanize himself by portraying himself as a fun-loving person who enjoyed the company of friends and family, enjoyed nature, and was a productive worker who would be wasted on death row. (See, e.g., 19 RT 4149, 4159-4161, 4177-4201, 4220-4229, 4231-4240.) Wycoff also called two friends who testified that Wycoff went out of his way to help them in a dangerous situation, perhaps saving one of their lives. (19 RT 4204-4219.) Finally, Wycoff emphasized that he would not have hurt Julie and Paul's children. (19 RT 4155, 4240-4241.) Such an approach was logical and clearly calculated to avoid the death penalty.

Wycoff's case in mitigation also directly responded to the prosecution's best evidence in aggravation. Wycoff spent considerable time explaining that his booking statement—in which he said he should receive the death penalty—was taken out of context and that he did not believe he should receive the death penalty. (19 RT 4157-4158, 4243-4247.) Wycoff attempted to persuade the jury he did not intentionally cut Julie's intestines (19 RT 4160), a fact which undermined his insistence that the murders were conducted out of necessity, not out of hatred or revenge. Wycoff elsewhere attempted to downplay other aggravating evidence, explaining that his letter to Armanini was intended as a joke, and that he was not bigoted against homosexuals, as suggested by one of his letters. (19 RT 4162-4164, 4170-4173.) Wycoff also emphasized that Eric said he should not receive the death penalty. (19 RT 4154-4155, 4173.)

Outside of the coherence of his defense and case in mitigation, Wycoff made sound procedural and evidentiary decisions that showed he understood the proceedings and could assist his defense. (See *People v. Hayes* (1999) 21 Cal.4th 1211, 1282 [noting the defendant made several

motions that, although denied, "demonstrate beyond any doubt that he was fully aware of the nature of the proceedings and able to assist counsel"]; *Panah*, *supra*, 35 Cal.4th at p. 433 [noting the trial court observed defendant repeatedly assist his defense]; *Koontz*, *supra*, 27 Cal.4th at p. 1064 [noting the defendant put on evidence, cross-examined witnesses, and testified on his own behalf].)

Wycoff made intelligent choices during jury selection, opposing dismissal of jurors that were favorable to him and challenging jurors that were not. For example, Wycoff opposed dismissing a juror who he believed could not discipline her children, stating, "If she can't discipline her own kids, she's not going to want to discipline me and vote for death. [¶] So keep her definitely." (3 RT 694.) Wycoff challenged a juror who it seemed previously sat on a jury that convicted a woman for murdering her husband. (5 RT 1161-1162.) Consistent with his own defense, Wycoff explained: "[I] followed the Polk trial, and I think [the defendant in that case] had a good reason to kill her husband. He was abusive, and I admire people that take the law into their own hands. [¶] And that [juror] was on the Polk trial, and I didn't like the fact that Polk was found guilty and sentenced to all those years." (5 RT 1162.) Wycoff also opposed dismissal of or challenged jurors who favored the death penalty. (See, e.g., 6 RT 1387 [challenging juror who was "too much for the death penalty"], 1494; 7 RT 1579-1580 [opposing prosecutor's challenge of juror who was moderately against the death penalty]; 8 RT 1766 [opposing challenge of juror who said, "I don't think I could choose death"].)

Wycoff made sound objections throughout the guilt phase. He objected to the prosecutor's voir dire, stating, "I'm objecting to Mr. Peterson telling the jury what the testimony is going to be. He's telling the—telling the jury that Laurel and Eric, telling them what they're going to say and telling them about me choosing what clothes to wear and what

weapons to use." (8 RT 1872.) Later, Wycoff objected to admission of several autopsy photos on the basis that they were cumulative or prejudicial. (13 RT 2706-2733.) He expressed himself coherently, stating in regard to one photo, "you can also clearly see wounds where there were sutures but the sutures had been removed. And you can clearly see those wounds on the edge of the major wounds. It just makes the wound look larger, more severe." (13 RT 2710.) He objected to the entirety of his confession being played because it was irrelevant, prompting the prosecutor to agree to edit the video. (14 RT 3057-3060.)

Elsewhere, Wycoff engaged in courtroom discussions, asked logical questions about the trial, and moved to admit evidence. For example, he asked questions about the procedure for voir dire (12 RT 2626), asked whether, although the prosecutor previewed small photos, he intended to enlarge them (13 RT 2686-2687 ["I can see this man trying to sneak in these little squares trying to—and then when you blow it up it, you know, looks really bad. I don't want him to try that on me"]), and advocated based on jurors' questions that he be able to explain Briggs's role to the jury (13 RT 2734-3736).

Wycoff successfully petitioned the court to compel the appearance of a witness, Rosemary Swart, after describing that she would corroborate that Julie was attempting to sell his house. (13 RT 2752-2756.) He later moved to admit the testimony of Swart and another witness, Margit Roos, stating they would corroborate Julie's actions prior to the murder. (15 RT 3316-3319.) Regarding the relevance of the testimony, Wycoff explained, "I wanted to try and prove Mr. Peterson wrong when he says I was motivated by hatred as a motive." (15 RT 3321.) The court agreed, at least in part, allowing Wycoff to present testimony relevant to his state of mind at the time of the murders. (15 RT 3324-3325.) Wycoff began preparing for the

penalty phase during the guilt phase of the trial, asking Briggs to assist him in editing his videotape evidence. (15 RT 3359-3360.)

Consistent with his defense, Wycoff introduced in opening argument his belief that the murders were necessary. He said, "The evidence in this case will show a lot of things like what happened that night. I don't think the evidence will say why. The evidence won't explain why it had to happen. I hope that I will get that opportunity and I hope it comes across well." (13 RT 2869.) He explained that he and Julie had agreed the house would be his after his father died, and that "[t]here was money enough for everyone to be happy and live a nice life." (13 RT 2870.)

Wycoff cross-examined prosecution witnesses throughout the guilt phase, sometimes successfully. (See *Koontz*, *supra*, 27 Cal.4th at p. 1065 [in finding no substantial evidence of incompetence, noting defendant "questioned witnesses concerning the facts of the case and the character of the victim, although his shaky grasp of the concept of legal relevancy did not well serve his cause"].)

From Officer Purdy, Wycoff solicited Paul's dying statement that it did not matter why Wycoff killed him. Wycoff later used this statement to argue Paul knew he had wronged Wycoff. (See 13 RT 2918-2919; 16 RT 3469.) Wycoff cross-examined Eric on the murder weapon, eliciting from Eric an admission that he had initially been wrong about the weapon. (14 RT 2990-2992.) Wycoff cross-examined Sergeant Horgan on his failure to conduct DNA testing on various blood found at the scene (14 RT 3095-3098) and on the fact that the wound on Paul's foot might not have been a defensive wound (14 RT 3101-3102). The cross-examination prompted the prosecutor to rehabilitate Horgan about the investigation. (14 RT 3102-3104.) Wycoff later cross-examined Officer Tang about the failure to recover more of the night-vision goggles. (15 RT 3168-3169.)

Wycoff made sound objections to the prosecutor's questioning of witnesses, and many of his objections were sustained. (See 13 RT 2933 [court sustaining Wycoff's hearsay objection], 2947 [Wycoff objecting that question called for speculation, and court subsequently limiting witness's testimony]; 14 RT 3038 [court sustaining Wycoff's objections based on hearsay and confrontation], 3066 [Wycoff objecting based on speculation], 3069-3070 [Wycoff moving to strike based on lack of foundation, and court agreeing], 3081 [prosecutor rephrasing question after Wycoff objected as leading]; 3082 [Wycoff objecting to admission of images of his gun on basis that no gun was used in the crimes], 3085-3086 [Wycoff objecting to admission of gun based on relevance]; 15 RT 3214 [court appearing to agree with Wycoff's objection that question was leading].) In one instance, Wycoff objected to the prosecutor's request to cross-examine with him evidence that he owned guns. Wycoff reminded the court that Judge Bruiniers suppressed the evidence, and argued the evidence was irrelevant to the issue upon which the prosecutor sought its admission. (16 RT 3614-3616.) The court ruled the evidence inadmissible. (16 RT 3616-3619.)

Similarly, Wycoff requested jury instructions that were in his best interest. He requested the instructions on self defense, explaining: "[T]hey fought the war financially and at a family level and I fought it at a different level, the only level I could fight it at. It was a war." (16 RT 3631.) Through Briggs, Wycoff requested instructions on provocation and evidence of mental disease for the limited purpose of determining mental state. (16 RT 3653-3654.) Although Wycoff did not receive the instructions on self defense or provocation (16 RT 3631; 17 RT 3665-3674), that he advocated for them illustrated he could assist his defense.

Wycoff's active participation continued into the penalty phase. When Wycoff objected to admission of two jail calls, the prosecutor agreed not to play them. (17 RT 3829.) Wycoff objected to admission of his booking

statements and to admission of evidence that he possessed brass knuckles and "sap gloves."[22] (17 RT 3834-3835.) Wycoff argued, "There is no evidence that I beat my sister in the face with sap gloves or brass knuckles. There is no evidence of that." (17 RT 3850.) The court initially excluded evidence of the brass knuckles and sap gloves. (18 RT 3871-3876.)

During the prosecutor's case in aggravation, Wycoff cross-examined Detective Wentworth about the context of his booking statement. Wycoff attempted to show the statement was taken out of context and that relevant dialogue had been omitted from the taped audio. (18 RT 3928-3231.)

Wycoff also cross-examined all but one victim impact witness, sometimes eliciting points directly supporting his case in mitigation. For example, Wycoff successfully elicited from Kent that Alex was in a wilderness program due to legal problems, that both of Julie's sons were in legal trouble due to their involvement in an anti-war rally, and that a judge had ordered the sons separated. (19 RT 4107-4109.) These facts corroborated Wycoff's assessment that Julie's children were troubled due to her alleged bad parenting, and undermined Kent's testimony suggesting that the children were in therapy as a result of the murders. (19 RT 4103.)

Similarly, Wycoff elicited on cross-examination of Eric that Eric did not believe Wycoff should receive the death penalty, that although Eric testified he "recently" straightened up his life, his life was "messed up" before the murders, and that Eric had gone to juvenile hall three months before the murders. (19 RT 4127-4129.) Wycoff also elicited from Laurel that she was in therapy before her parents' murder. (19 RT 4139-4140.)

Wycoff made logical evidentiary decisions during the penalty phase. Wycoff requested that the prosecutor play more of certain jail calls to provide context for the calls presented against him in aggravation. (18 RT

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[22] Sap gloves are gloves with lead in the knuckles. (17 RT 3835.)

3955-3957.) As previously explained, he also introduced the testimony of two witnesses who painted him as caring and even heroic. Wycoff intelligently directed both witnesses' testimony. (19 RT 4204-4219.)

Wycoff also introduced tapes that showed him affably engaging with friends and family and being a resourceful worker, qualities that any defendant would reasonably emphasize in his plea for life in prison. Wycoff said to the court of the tapes, "[T]hey show . . . I got family, . . . they show me interacting with people, working, playing, doing funny things, it shows I am a real person . . . ." (19 RT 4149.) To the jury, Wycoff said, "America needs a man like me to protect its explosive supply and be out on the road, not be behind bars." (19 RT 4173.) "I will now show videos of myself over the last 19 years. . . . . [Y]ou could see I work, I have had accidents, I have had, you know, I have interacted with family, I have, you know, you see me working, doing my job. I—I have, you know, done a lot of things in life, and you can catch some of those moments that show . . . that I'm a real person, that I shouldn't be behind bars, I should be out there doing stuff . . . ." (19 RT 4173.)

Finally, Wycoff advocated for himself prior to cross-examination in the penalty phase. He objected to the prosecutor's introduction of videotapes on cross-examination, pointing out that the prosecutor could not authenticate them and that there were no transcripts. (20 RT 4358.) He also objected that the prosecutor failed to inform him of the nature of the tapes, stating at one point, "We may need a 402 hearing. Because if Peterson decides to play a video to the jury, he can't unplay it because it's already been played. And I object to it, if he plays a video that's not admissible you know." (19 RT 4256; see also 20 RT 4358.) The objection prompted the court to permit Wycoff the opportunity to object before being cross-examined with video evidence. (19 RT 4256; 20 RT 4363-4364.)

Despite this record showing the coherence of his defense and participation in the trial, Wycoff delineates a host of reasons there was substantial evidence of incompetence before Judge Kennedy. (AOB 101-109.) None have merit.

First, Wycoff's reference to "fans" in the courtroom was not evidence of incompetence. (AOB 102.) The record supports that there was media attention in the trial (see 1 CT 142-143, 161-162, 165-167; 5 CT 1309-1310; 13 RT 2741, 2783; 15 RT 3253; 19 RT 4158, 4280) and that Wycoff was interested in fame, which he would have preferred over his current "infamy" (16 RT 3567, 19 RT 4281; 20 RT 4400). Wycoff's desire for attention, however, was not evidence that he did not understand the proceedings or could not assist counsel. To the extent Wycoff suggests the belief that he had "fans" was delusional (AOB 102), the record shows Wycoff did not harbor such a belief. At sentencing, Wycoff stated, "not one person, not one single person approached me for an autograph in this whole trial. No one in the jail, no one here in the audience, no one approached Briggs or I for an autograph, and I'm very disappointed in this audience and everyone." (21 RT 4688.) In other words, Wycoff may have wanted "fans," but he recognized he did not obtain them.

Nor was Wycoff's closing argument in the guilt phase evidence of incompetence. (AOB 102.) Wycoff's demonstration of stabbing motions with a pen and what appeared to be a cereal box was designed to rebut the prosecutor's suggestion that Wycoff intended the gruesomeness of the murders. (17 RT 3781-3782.) Wycoff explained while making the argument:

> Peterson was standing up here saying with the knife again, 'One, two, three, four, five, six, seven, eight, nine.' It didn't happen like that. I mean, that was a fight. That was a random bunch of stuff that happened. There was no one, two, three, four, and then go to the next

person one, two, three, all the way up to umpteen times. That didn't happen.

(17 RT 3781; see also *Marks*, 31 Cal.4th at pp. 220-221 [defendant's courtroom outbursts reflected his attempt to provide advice to counsel, and even his "most conspicuous outburst during trial amply proves his ability to understand the proceedings and assist counsel"]; *Lewis*, *supra*, 43 Cal.4th at pp. 523-526 [defendant's interruption of prosecution witness's testimony with statements suggesting he had been involved in an uncharged murder, including "'This bitch guilty of murder. She is just as guilty of murder just like me,'" did not demonstrate incompetence but "indicated the depth of his understanding of the proceedings and his ability to assist counsel," since they could be understood as an effort to impeach the testimony].)

Wycoff's statement that he was a "cereal" rather than "serial" killer (17 RT 3782-3783) also responded to the evidence. The prosecutor had admitted a jail call and letter in which Wycoff asserted his morals kept him from being a serial killer. (9 CT 2191-2192; 18 RT 3997.) Wycoff did not want to be construed as someone who was sadistic or enjoyed killing, and believed if he could persuade people of this they would not impose the death penalty. (9 CT 2136-2137, 2191; 18 RT 3997.)

As Wycoff acknowledges, the "cereal killer" comment was also intended to make the jury laugh. (AOB 102.) After making the comment Wycoff said, "That was a joke. [¶] You know, I don't know why people didn't laugh at that. (17 RT 3783.) "[I] guess there's too many short people in this courtroom, too many short people and bigots. It should have been funny." (17 RT 3783.)[23] "[I] guess that was the end of it. You know, I just wanted to end it at a positive note." (17 RT 3783.)

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[23] Wycoff's reference to people who did not laugh at his jokes as "short people" appeared to relate to another joke in which he observed that (continued...)

That Wycoff had a macabre or strange sense of humor, however, was not evidence of incompetence. To the contrary, the record shows Wycoff often tried to use humor to attempt to entertain and ingratiate himself to the jury, or to explain away conduct he believed the jury would find strange. Wycoff's humor was thus logically related to his defense. Moreover, far from showing delusion, Wycoff recognized his jokes generally did not have their desired effect. (See 2 RT 555 [Wycoff telling the court he wanted to entertain the jury]; 13 RT 2768 [Wycoff stating he wanted to "throw in a few jokes" in opening argument]; 18 RT 3910 [Wycoff telling the jury during opening argument in the penalty phase, "And you know, my jokes . . . I don't know why people didn't laugh"]; 19 RT 4153 ["Last week when I gave my testimony that was a joke. I'm not really a serial killer, or that other kind of cereal killer, that was a joke. I—from the way things are going, I think I should explain right now that that was just, you know, me being funny. I'm not really a serial killer . . . that was just prop"]; 4172-4173 [Wycoff explaining the letter to Armanini was intended as a joke], 4184, 4227 [Wycoff explaining that some of his videos were intended as a joke], 4242 [Wycoff testifying of his videos, "I came in here and I brightened it up, I started doing jokes and started showing you what kind of a person I am, and it brightened up and later in the day some of you—I actually finally got some of you . . . to laugh"]; 21 RT 4554 ["I'm trying to better everyone. Trying to make everyone happy. I tell these wonderful jokes, and I'm a good person for that, see"]; see also 20 RT 4522-4523 [prosecutor arguing that Wycoff made jokes during trial but "it isn't because he doesn't have control. He knows how to conduct himself

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(...continued)
"short people . . . don't quite understand humor. It just goes over their heads you know." (21 RT 4557.)

appropriately. He chooses not to"]; 21 RT 4572-4573 [prosecutor arguing, "You have seen Wycoff make jokes or attempted jokes, and many of them aren't funny and . . . are disgusting or repulsive, and your temptation may be to think, he has got some mental difficulty . . . . And don't be confused or swayed by that, because Mr. Wycoff makes choices regarding all of those things. He is in full control of his mental facilities, and he knows what he does, and he knows what he is saying"].)

Wycoff next states he made two alleged threats to the jury that constituted evidence of incompetence. (AOB 103, 106.) In the first alleged threat, Wycoff stated during opening argument in the penalty phase that the jury needed to "revote and take that decision [finding him guilty] back because it was wrong." (18 RT 3909; AOB 103.) In the second, Wycoff stated during his first closing argument in the penalty phase, "[W]hatever you decide in this trial, whatever your verdict is, remember when you deliver your verdict, I'm going to be looking right at you. I'm going to be staring you down. So make sure you deliver the right verdict." (21 RT 4570; AOB 106.)

Neither statement constituted evidence of incompetence. First, both alleged threats related to the proceedings. Wycoff made the statements after the jury found him guilty and before the jury was going to render a penalty verdict. His comments can be construed as reminding the jury of the consequences of their decision and that he would be personally affected by their penalty determination.

Moreover, Wycoff neglects to acknowledge that the trial court found the first alleged threat was intentionally engineered to obtain a mistrial, not to be evidence of incompetence. The court told Wycoff he had conducted a "serious breach of proper courtroom behavior, in my opinion, and I will not allow it to happen again." (18 RT 3944.) "[Y]ou cannot engineer a mistrial, meaning get rid of this jury, by threatening them. [¶] They may not take it

kindly, and it may come back to haunt you but that will be a product of your own making and it will not result in your benefit to you." (18 RT 3944.) The prosecutor reiterated this observation later when arguing that questioning the jurors about Wycoff's conduct would assist Wycoff "in his goal of a mistrial . . . ." (18 RT 3983.)

> [A]s the Court has seen Mr. Wycoff can conduct himself professionally and responsibly whenever he wants to when he does things he—from all appearances he gives it quite a bit of thought and plans it and then says what he plans on saying. I don't think that was a–even from the context that it appears spontaneous, it appeared to be something he planned on saying. So he gave quite a bit of thought to it, similar to his incident regarding the cereal box.

(18 RT 3982-3983.)

In addition, after both alleged threats—and the entirety of the trial and sentencing—Judge Kennedy again placed on the record that in his view "Mr. Wycoff has at all times demonstrated that he is competent to stand trial . . . ." (21 RT 4789.) Thus, here the "trial court's day-to-day observation of defendant's demeanor and conduct, including his episodes of disruptive behavior, did not cause the court to doubt his competence—a fact the court felt obliged to place on the record not once, but twice. Under these circumstances, the court did not err by taking no action to determine whether defendant was competent." (*Mai*, *supra*, 57 Cal.4th at p. 1036.)

Regardless, threatening or menacing outbursts alone are not evidence of incompetence. In *Mai*, the defendant told the court, "'Play fucking games and we will play fucking games'" (*Mai*, *supra*, 57 Cal.4th at p. 1026), interrupted the court in front of the jury to call the victim's family "'smart asses'" (*id.* at p. 1030), interrupted a witness to state, "'Shut the fuck up, I think you are full of shit. If I fucking hit [her] with a fist, I would have knocked her fucking ass on the floor'" (*id.* at p. 1031) and, "'I should have killed your fucking ass is what I should have done, waste my

goddamn time,'" and interrupted another witness to state his testimony regarding a carjacking was "'bullshit'" and that if he had been one of the carjackers "he would have 'wasted [the witness's] fucking ass'" (*ibid*).

This Court held the defendant's "'self-defeating' outbursts" did not constitute evidence that should have persuaded defense counsel to seek a competency hearing. (*Mai*, *supra*, 57 Cal.4th at p. 1034.) "These episodes demonstrated that defendant was often angry and resentful. But, as noted above, disruptive behavior is not substantial evidence of incompetence unless, by its particular nature, it casts doubt on the defendant's ability to assist in his or her defense." (*Id.* at pp. 1034, citations omitted.)

The Court noted the "defendant's anger and resentment were often connected in an understandable way to the trial proceedings," that defendant elsewhere "appeared capable of speaking up when he felt the need to consult with his lawyers" and "asked pertinent questions," and that the trial court made clear "that its observations of defendant did not indicate incompetence." (*Mai*, *supra*, 57 Cal.4th at p. 1035.) "In sum, certain of defendant's behavior, as disclosed by the record, was rude, disruptive, and even menacing, but this behavior afforded no substantial grounds upon which unconflicted counsel should and likely would have pursued a claim of incompetence." (*Ibid.*) The Court extended this rationale to reject the defendant's alternate argument that the court should have declared a doubt and initiated competency proceedings. (*Id.* at p. 1036; see also *Lewis*, *supra*, 43 Cal.4th at pp. 525-526 [finding the defendant's alleged "irrational and counterproductive" outbursts at trial "did not demonstrate incompetence" but instead "indicated the depth of his understanding of the proceedings and his ability to assist counsel"].)

Here, as in *Mai*, Wycoff's alleged threats showed at worse that he was angry, resentful, or menacing, not that he could not understand the proceedings or assist his defense. As in *Mai*, the alleged threats were also

related to the proceedings in that Wycoff was responding to the jury's verdict and attempting to persuade the jury to grant him life without parole. (See also *Marks*, *supra*, 31 Cal.4th at p. 220 ["although defendant's outbursts did not comport with courtroom protocol, they did reflect his attempt to provide advice to counsel"]; *Ramos*, *supra*, 34 Cal.4th at p. 509 ["although defendant's prior violent acts and other bizarre behavior would lead us to agree he has violent propensities . . . they do not raise doubts that he was incapable of assisting in his own defense"].) Moreover, as in *Mai*, here the trial court made clear it did not find Wycoff's behavior to be evidence of incompetence, both after the first alleged threat (18 RT 3944) and after sentencing (21 RT 4789). (See *Mai*, *supra*, 57 Cal.4th at p. 1036.)

Wycoff's remaining claims similarly fail to link the alleged evidence of incompetence with any inability on Wycoff's part to understand the proceedings or assist his defense.

Wycoff's letter to Armanini adopting references from The Shining did not show he was incompetent. (AOB 104.) To the extent Wycoff argues the letter itself was evidence of his incompetence, he is mistaken. Wycoff began writing the letter on August 1, 2006 and completed it on September 11, 2006 (18 RT 4013, 4040), almost three years before the start of trial (4 CT 733). Even if the letter was construed as evidence of past mental illness, Wycoff fails to explain how it had any bearing on his ability to understand the present prosecution. (See *Deere*, *supra*, 41 Cal.3d at p. 358; *Blair*, *supra*, 36 Cal.4th at p. 714 ["even a history of serious mental illness does not necessarily constitute substantial evidence of incompetence"; that defendant had previously been found insane did not compel a doubt about his capacity to understand the current proceedings].)

To the extent Wycoff argues the letter's admission at trial was evidence of his incompetence, this argument neglects the record. Although Wycoff did not object to the letter's introduction, his treatment of the letter

showed his competence. Wycoff confronted the letter on direct examination, acknowledging that it "probably may have seemed strange" (19 RT 4170) or "may have seemed weird, it may have seemed crazy," but stating it "was all a joke" (19 RT 4171) or an "inside joke" (19 RT 4170). Recognizing a contrary conclusion would undermine his case in mitigation, he emphasized he did not plan the murders according to The Shining, but only realized the similarities in jail. (19 RT 4171-4173.)

Wycoff next suggests there was substantial evidence of his incompetence because he discussed his first two public defenders "even though neither of those lawyers ever appeared before the jury," while explaining "'what fags and gays and queers are to me,'" and described his lawyers as "'faggots' who are also molesters and rapists." (AOB 105; see also 19 RT 4162-4164.)

This argument neglects the record. It was the prosecutor—not Wycoff—who introduced via the Armanini letter that Wycoff was once represented by the public defender. (18 RT 4025-4026.) It was also in this context that the prosecutor—not Wycoff—introduced evidence that Wycoff referred to one of his attorneys as a "faggot." (18 RT 4026.)

Moreover, Wycoff's treatment of this evidence only showed his competence. Recognizing that the evidence undermined the image he sought to convey of himself in his case in mitigation, Wycoff attempted during direct testimony to persuade the jury he was not prejudiced against homosexuals: "And I talked a lot about fags, gays and queers [in the letter]. And—well, maybe I should clear that up. I think I should explain what fags and gays and queers are to me. [¶] You know, for instance, a gay person, you know, there is a lot of people in this world that are gay. And that's not necessarily a bad thing." (19 RT 4162.) He explained that by "faggot" he meant "molesters" and "rapists." (19 RT 4163.) "[Y]ou got to be a rotten person with bad morals, you know, and that's what I am talking

about here, that's what that faggot is." (19 RT 4164.) Far from showing incompetence, this testimony showed Wycoff recognized the import of the prosecutor's evidence in aggravation and attempted to minimize it.

Wycoff argues that his failure to object to admission of the Armanini letters should have alerted the court to his incompetence. (AOB 102-103.) We disagree. The letters tended to corroborate Wycoff's belief that the murders were necessary, so it was not unreasonable for Wycoff to decline to object to their admission. (See, e.g., 18 RT 4001 [Wycoff writing to Armanini that he was the victim and that Julie was victimizing Aunt Lu], 4004, 4016 [Wycoff writing to Armanini, "I am a peaceful person who helps people and does not like to hurt people. I killed two people who like to hurt people and were doing it more and more"].) Indeed, the court specifically found after reviewing the letters "that there's a substantial tactical reason for Mr. Wycoff's lack of objection or desire to have the full letter in." (18 RT 3877.) Wycoff also recognized that the second of the letters could hurt his case, and asked that an intervening letter be introduced for context. (18 RT 4007-4008.) As previously explained, Wycoff also attempted to minimize the more sinister aspects of that letter during his direct testimony.

Nor did Wycoff's decision not to object to evidence that he owned a grenade launcher show incompetence. (AOB 103.) Wycoff said he was not objecting to the evidence in the people's case in aggravation because he recognized the prosecutor "has already got me" and believed the evidence would earn him respect from other inmates in custody. (17 RT 3840.) Regardless, the evidence was excluded, and Wycoff later objected to its admission in rebuttal, arguing that it was not sufficiently probative of his bad character. (18 RT 3876; 19 RT 4251.)

Similarly, that Wycoff opposed Eric's request to testify that he opposed imposition of the death penalty "because it would further

exacerbate the pain of losing his mother and father" (AOB 103-104) was not evidence of incompetence. Wycoff told the court he opposed the request because he was angry that Eric's attorney snubbed him. (18 RT 4059-4062; 20 RT 4434-4435.) Wycoff recognized the testimony was in his best interests but said he was vindictive: "[I] want to fight this case, but I'm a vindictive man. I return evil for evil." (18 RT 4061-4062.) This showed Wycoff was angry and resentful, not that he did not understand the proceedings. Regardless, Wycoff ultimately elicited testimony from Eric that he opposed imposition of the death penalty, and Wycoff emphasized this testimony on direct examination. (19 RT 4127, 4154-4155.)

Wycoff lists a number of instances where he claims his testimony or argument during the penalty phase constituted substantial evidence of incompetence. (AOB 105-106.) None have merit.

Wycoff's testimony that he "helped" by murdering the victims, that if he had been evil he would have killed Eric and Laurel, that his morals prevented him from being a serial killer, that he did not belong in prison, that he would "call the shots" or be "king" in prison, that America needed him on the road and not behind bars, that he was going to "Prisonyland," that his tapes showed he was a genius who knew how to fix things, that he did not deserve to be punished and was a hero, that the murders could have been a masterpiece if he had not been caught, and that he was a righteous man (AOB 105-107), were all consistent with Wycoff's attempt to persuade the jury that he acted out of perceived self defense and necessity. That the jury did not find these assertions warranted leniency was not substantial evidence that Wycoff lacked the ability to assist his defense.

Wycoff's behavior during sentencing also did not present evidence of incompetence. (AOB 107-109.) Wycoff's plea that the court should set him free and that he would "be a happy person in society again" (AOB 107; 21 RT 4640) logically responded to the proceedings, as did his insistence

that he was mentally stable, was a righteous, trustworthy, and wonderful person, and that Julie was a "mosquito" he "brushed" from his life. (AOB 107-109; 21 RT 4690.) While these statements showed Wycoff had no remorse and continued to believe the murders were justified, this only supported that Wycoff abided by a moral code of his own making. The law does not demand that a defendant feign remorse to be found competent.

The other statements Wycoff lists did not show incompetence. Wycoff welcomed people to his "birthday party" (AOB 107; 21 RT 4683) because sentencing took place on his birthday (21 RT 4634). That Wycoff appeared to find this humorous is perhaps macabre, but it did not compel a hearing into his competence. Wycoff's comments that for killing someone he would get free room and board, healthcare, and education (AOB 109; 21 RT 4709-4710) simply reflected his views—expressed throughout trial—that he had imposed the death penalty on his victims without costing the tax-payers money, unlike the state of California. (See 18 RT 3880-3881; 19 RT 4176; 20 RT 4378-4379.) Doing so did not show Wycoff was incompetent, particularly because Wycoff likely realized that feigning remorse at this point would be ineffectual.

Finally, Wycoff argues that there was substantial evidence of incompetence because during sentencing he was "rambling" (AOB 107) and read poetry about the murders (AOB 108-109; 21 RT 4695). This argument neglects the record. The record shows Wycoff pursued a strategy to "keep talking" in order to delay sentencing past the lunch hour. (See 21 RT 4696-4697, 4681 ["Maybe if I could read enough stuff, I can get to lunch, and I don't have to worry about this heavy sentence until sometime after lunch. [¶] So maybe I should read a whole bunch of stuff. It might be just a little bit to my advantage"], 4696-4697 ["can I at least keep talking so we can come back after lunch and do the sentencing? I mean, my God, why do we gotta do this so quick?"], 4699-4700 [the court stating, "it's

clear to me that it's your intent to keep talking to get through the lunch hour and be back at 1:30"].) Having realized he would receive the death penalty, Wycoff's attempt to delay its imposition was not illogical. Regarding his poetry, that Wycoff continued to believe the murders were justified and showed no remorse did not suggest he was incompetent.

Regardless, we note again that despite Wycoff's behavior at sentencing, Judge Kennedy made a point to place on the record that Wycoff "at all times demonstrated that he is competent to stand trial and has been competent to stand trial and to waive his right to counsel." (21 RT 4789.) Significantly, Briggs also never expressed a doubt as to Wycoff's competency. (See *Blair*, *supra*, 36 Cal.4th at p. 716 [noting defendant's advisory counsel did not advise the court that competence might be "in issue"].) Although Briggs disagreed with Judge Kennedy's findings, he did so on the basis of "evidence to which the Court has not been privy, that I am not at liberty to disclose" (21 RT 4793), not on the basis of Wycoff's behavior during or after trial. Wycoff's participation in the trial and other behavior before Judge Kennedy supported the finding that there was no doubt as to his competence. Wycoff's claim should be rejected.

F. If the Trial Court Erred, the Remedy Is a Retrospective Competency Hearing

Wycoff asserts the court's alleged error in failing to conduct a competency hearing is reversible per se. (AOB 90-91, 98-99.) We disagree. Even if we assume the court erred, the proper remedy is a retrospective competency hearing. "[T]he weight of the relevant authority suggests retrospective competency hearings may, in certain circumstances, be permissible." (*People v. Ary* (2004) 118 Cal.App.4th 1016, 1025.) The Supreme Court in *Drope* indicated that a retrospective competency hearing is permissible, although "inherent[ly] difficult[]." (*Drope*, *supra*, 420 U.S. at p. 183.) In *Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, the Ninth

Circuit stated that a "state court can nonetheless cure its failure to hold a competency hearing at the time of trial by conducting one retroactively. We have said that retrospective competency hearings may be held when the record contains sufficient information upon which to base a reasonable psychiatric judgment." (*Id.* at p. 1089.)

California Courts of Appeal have followed suit. In *Ary*, *supra*, the Court of Appeal found the trial court committed reversible error by failing to order a competency hearing and remanded for the trial court to determine whether the error might be curable by a retrospective competency hearing. (*Ary*, *supra*, 118 Cal.App.4th at pp. 1025-1029.) The court stated: "While it is certainly the case that the trial court's error in failing to hold a competency hearing when one is warranted is not subject to harmless error review, this does not mean that the procedural due process violation can never be cured retrospectively, under appropriate circumstances, as the United States Supreme Court has suggested." (*Id.* at p. 1028.) Likewise, the Court of Appeal in *People v. Kaplan* (2007) 149 Cal.App.4th 372 remanded the matter to the trial court "to decide whether a retrospective competency hearing should be held to determine defendant's competency at the time of trial," in light of the lower court's error in failing to conduct a second competency hearing. (*Id.* at pp. 387, 390.)

Although this Court has not squarely decided the issue, it has acknowledged the holdings in *Ary* and *Kaplan*. (See *People v. Lightsey* (2012) 54 Cal.4th 668, 706 [acknowledging both]; *People v. Young* (2005) 34 Cal.4th 1149, 1217, fn. 16 [acknowledging *Ary*].) In a related context, in *Lightsey* the Court found the trial court's error in allowing a defendant to represent himself during mental competency proceedings required only a limited reversal of the competence finding and remand for the trial court to determine whether a retrospective competency hearing was feasible. (*Lightsey*, *supra*, at pp. 702-710.)

When the case is "remanded to the trial court for a retrospective competency hearing to determine whether the procedural error can be cured, the trial court must first decide whether a retrospective determination is indeed feasible." (*People v. Ary* (2011) 51 Cal.4th 510, 520; see also *id.* at pp. 516-517 [accepting as law of the case Court of Appeal's ruling that limited remand procedure was permissible].) The factors "[r]elevant to determining feasibility of a postjudgment hearing on a defendant's mental competence when tried are . . . : (1) the passage of time, (2) the availability of contemporaneous medical evidence, including medical records and prior competency determinations, (3) any statements by the defendant in the trial record, and (4) the availability of individuals and trial witnesses, both experts and non-experts, who were in a position to interact with [the] defendant before and during trial." (*Id.* at p. 520, fn. 3, citations omitted.)

Here, a retrospective competency is feasible. Wycoff's trial concluded in November 2009. (5 CT 1503-1505; 21 RT 4627-4628.) Medical personnel had contact with Wycoff near the period of his claimed incompetence and produced written reports. Two judges and multiple attorneys also had considerable contact with Wycoff during the period of claimed incompetence. Given the recentness of appellant's trial, some or all of those individuals are likely to be available to testify in a retrospective competency hearing. (See *Kaplan*, *supra*, 149 Cal.App.4th at p. 389 [noting that two doctors who evaluated defendant at beginning of trial might be available to testify in retrospective hearing].)

Wycoff also testified extensively at trial, and the lengthy trial record provides extensive evidence from which a trier of fact could determine his competence. Thus, the present case, unlike those in which there is little evidence of the defendant's mental state at the time of trial, lends itself easily to a retrospective competency hearing. That determination, however,

is for the trial court to make. (*Ary, supra*, 51 Cal.4th at p. 520.) If the trial court erred, the matter should be remanded so it may do so.

We note that a retrospective hearing rather than straight reversal would also be appropriate in a case like this where there is no separate claim the defendant was actually tried while incompetent. (AOB 88, fn. 8.) While a failure to provide due process procedural rights such as a hearing is certainly significant, and must be amenable to a remedy,[24] where a defendant suggests only that competence was called into question—not that it would have been found—reversal of the conviction would be an undue windfall. Moreover, where the alleged error is solely in the failure to conduct a hearing, for which the defendant himself does not contend the outcome is a foregone conclusion, setting aside a judgment without first determining whether competence is actually at issue is a waste of judicial resources. In contrast, if and only if a retrospective hearing results in a finding of incompetence will there be a need to redo the trial. If this Court finds a competency hearing should have been held, the case should thus be remanded to determine whether a retrospective hearing is feasible, not simply reversed.

II. THE COURT PROPERLY DETERMINED WYCOFF WAS COMPETENT TO REPRESENT HIMSELF AND WAIVE COUNSEL

Wycoff argues the trial court violated his Sixth and Fourteenth Amendment rights by failing to conduct a hearing into his competence to represent himself and waive the right to counsel. (AOB 110-124.)[25] Wycoff defines competence to waive counsel as the ability to knowingly, voluntarily, and intelligently waive counsel. (AOB 113.) He defines competence to represent one's self as the "the ability to carry out the basic

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[24] As set forth above, respondent does not concede this occurred.

[25] Wycoff makes this argument in Section III, subsection D of his brief. (AOB 110-124.)

tasks needed to present one's own defense without the help of counsel." (AOB 114, citing *Johnson*, *supra*, 53 Cal.4th at p. 530.)

Citing *Johnson*, *supra*, 53 Cal.4th at p. 530, and *Edwards*, *supra*, 554 U.S. at p. 178, Wycoff states that "a trial court permitting a defendant to waive his right to counsel and to represent himself must conduct a hearing into that defendant's competency if there is substantial evidence that the defendant cannot knowingly, voluntarily, or intelligently waive his right to counsel or if there is evidence that the defendant suffers from mental illness 'to the point where they are not competent to conduct trial proceedings by themselves.'" (AOB 114.) Citing *U.S. v. Keen* (9th Cir. 1997) 104 F.3d 1111 and *U.S. v. Arlt* (9th Cir. 1994) 41 F.3d 516, Wycoff argues the failure to do so renders reversal automatic. (AOB 115.)

We disagree. The principles Wycoff invokes for this argument govern a trial court's duty to initiate competency proceedings when there is substantial evidence of incompetence to strand trial under the due process clause and California law. There is no equivalent constitutional or statutory requirement mandating that the court *hold a hearing* into a defendant's waiver of counsel or capacity to represent himself. Regardless, the court adequately determined Wycoff validly waived the right to counsel and was capable of representing himself. Even if the court did not, the latter does not support a claim of federal constitutional error.

Preliminarily, we note that in his argument Wycoff refers interchangeably to the trial court's alleged duty to conduct a hearing into his knowing and voluntary waiver of counsel and alleged duty to conduct a hearing into his capacity to exercise his Sixth Amendment right to self-representation. (See AOB 115-124.) The confusion works to Wycoff's benefit, since the approach conflates the *Edwards* standard permitting courts to deny defendants self-representation with the trial court's constitutional obligation to ensure a defendant's waiver of counsel is

knowing and voluntary. Since the matters are distinct, we discuss them separately below.

A. The Court Was Not Constitutionally Required to Conduct a Hearing Into Wycoff's Waiver of Counsel

First, Wycoff's argument that the court prejudicially erred by failing to conduct a hearing into his competence to waive counsel is confused. Although a trial court is required to conduct a hearing if there is substantial evidence of incompetence, there is no analogous requirement governing a court's inquiry into a defendant's knowing and voluntary waiver of counsel. To the contrary, in order to validly waive counsel, a defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." (*Faretta*, *supra*, 422 U.S. at p. 835, citations omitted.) "No particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation; the test is whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." (*Koontz*, *supra*, 27 Cal.4th at p. 1070.) "On appeal, [this Court] examines[] de novo the whole record—not merely the transcript of the hearing on the *Faretta* motion itself—to determine the validity of the defendant's waiver of the right to counsel." (*Ibid.*)

It is also well settled that the analyses are distinct. The requirement that a defendant waive counsel knowingly and voluntarily "is not a *competence* standard; while the competence inquiry focuses on the defendant's *ability* to understand the proceedings, the 'knowing and voluntary' inquiry is intended to ensure the defendant actually does understand the consequences of his or her decision, and that the decision is uncoerced." (*Taylor*, *supra*, 47 Cal.4th at p. 874.)

Wycoff cites multiple cases he suggests stand for the proposition that a trial court must hold a hearing when presented with substantial evidence that the defendant cannot validly waive counsel. (AOB 111-115.) Not so. The cases Wycoff cites hold only that the court must conduct a hearing into trial competency when presented with evidence that the defendant is incompetent to stand trial. (See *U.S. v. Washington* (8th Cir. 2010) 596 F.3d 926, 941 ["while a defendant must be competent in order to proceed pro se, *Edwards* does not require that a trial judge: (1) conduct an inquiry into the competency of every defendant who requests to proceed pro se, or (2) hold a hearing prior to making a competency determination"]; *Godinez*, *supra*, 509 U.S. at p. 401, fn. 13 [a court need only conduct a competency determination prior to a defendant's waiver of counsel when the court has reason to doubt the defendant's trial competence]; *Johnson*, *supra*, 53 Cal.4th at p. 530 ["A trial court need not routinely inquire into the mental competence of a defendant seeking self-representation. It needs to do so only if it is considering denying self-representation due to doubts about the defendant's mental competence"]; *Harding v. Lewis* (9th Cir. 1987) 834 F.2d 853, 856 [trial court must conduct hearing when there "when there is substantial evidence of incompetence"]; *Westbrook v. Arizona*, 384 U.S. 150, 151 [remanding case to determine whether trial court satisfied its protecting duty as explained in *Pate*, *supra*, 383 U.S. 375, which discussed competence to stand trial]; *Cuffle v. Goldsmith* (9th Cir. 1987) 906 F.2d 385, 392 [finding reversible error where trial judge failed to hold hearing despite "'substantial evidence of incompetence'"].)

To the extent these cases apply, they apply only to Wycoff's argument that the court should have initiated competency proceedings under section 1368 and the Fourteenth Amendment, raised in section I, subsection C of Wycoff's brief. The cases do not support the claim that Wycoff had a

separate procedural due process right to a hearing into his competence to waive counsel.

Nor do Wycoff's cases support his claim that the alleged failure to conduct a hearing into competence to waive counsel results in structural error subject to automatic reversal. (AOB 114-115.) In *Keen*, the Ninth Circuit reversed a conviction because the district court's colloquy failed to adequately explain the dangers and disadvantages of self-representation, and the record as a whole did not otherwise reveal a knowing and intelligent waiver. (*Keen*, *supra*, 104 F.3d at pp. 1114-1116, 1120.) And in *Arlt*, the Ninth Circuit held that the district court's improper denial of the defendant's timely, clear, unequivocal, and informed request to represent himself constituted per-se prejudicial error. (*Arlt*, *supra*, 41 F.3d at p. 524.) Neither case is applicable here. Wycoff does not allege that his waiver of counsel was actually invalid or that the court's colloquy was inadequate, nor does he allege a violation of his Sixth Amendment right to represent himself.

Regardless, and although Wycoff does not raise the claim, the record demonstrates that Wycoff's waiver of counsel was knowing, voluntary, and intelligent. Wycoff wrote to the court asking for the right to represent himself and advocated for that right in court. (2 CT 386-369; 1 RT 119-125) Judge Bruiniers permitted Wycoff time to consider the decision. (1 RT 107-108.) He questioned Wycoff extensively about his rights and the consequences of representing himself and at various times reiterated the consequences of self-representation, particularly in a capital case against an experienced adversary. Wycoff was engaged in the court's questioning and indicated he understood the consequences of waiving counsel and proceeding pro se. (1 RT 104-108, 111-117, 119-123, 139-149.) Wycoff signed an admonition and advisement of rights. (2 CT 390-393; 1 RT 119.)

Throughout the proceedings, Wycoff reiterated that he was pleased with his decision to represent himself. (2 RT 597; 3 RT 597; 13 RT 2734; 21 RT 4796.) Other evidence in the record showed Wycoff was familiar with the case, understood the consequences of his desired defense, and acknowledged the difficulties of representing himself. (See 2 CT 419, 421-424; 1 RT 106, 114; 3 RT 597-598; 13 RT 2734; 21 RT 4709-4710.) These facts support the court's finding that Wycoff's waiver of counsel was knowing, voluntary and intelligent. (See *Blair*, *supra*, 36 Cal.4th at p. 709 ["the record as a whole reflects that defendant was familiar both with the facts and the difficulties of his particular case and with the risks he faced in representing himself against an experienced prosecutor in a capital case"]; *Taylor*, *supra*, 47 Cal.4th at p. 879 ["The record clearly shows defendant chose self representation with his eyes open to the risks and disadvantages it entailed, the nature and seriousness of the charges he faced, and his right to continue being represented by appointed counsel throughout trial"].)

Contrary to Wycoff's argument (AOB 118-121), nothing in Good's report contradicted the evidence supporting that Wycoff's waiver of counsel was knowing and voluntary. Good found Wycoff's waiver voluntary. (2 CT 425.) Good also found the waiver was knowing because

> Wycoff is alert, conscious and **knows** that he is making a request to act as his own counsel in representing himself against the charges. Cognitively, he has a basic understanding of some trial tasks such as making motions, participating in *voir dire*, and questioning witnesses. He has enough communication skill to address the Court and jury although some arguments are likely to sound absurd. He claims to understand the risks of representing himself. For example, Mr. Wycoff recalled that his attorneys have warned that his ability to appeal any conviction will be significantly reduced if he represents himself, because he could not argue ineffective assistance of counsel. Despite the potential to receive the death penalty, Mr. Wycoff claims to have considered the risk and downplays the chance that the system would get around to executing him. He wants to tell his story in his

> own way and has concluded that he will feel much better no matter the outcome.

(2 CT 425.) Good's observations elsewhere supported that Wycoff understood the consequence of representing himself. (See 2 CT 418-424.)

Good's conclusion that Wycoff's waiver of counsel was not intelligent—"if what we mean by intelligent is the product of a rational reasoning process" (2 CT 425)—employed an erroneous legal standard. There is no requirement that the decision to represent one's self be objectively rational; to the contrary, cases have repeatedly acknowledged that such a decision is almost always to the defendant's detriment. (See *Faretta*, *supra*, 422 U.S. at p. 834; *Taylor*, *supra*, 47 Cal.4th at p. 865; see also *Blair*, *supra*, 36 Cal.4th at pp. 718-719 ["we agree with the trial judge that the fact that a defendant represents himself or herself cannot be the basis, in itself, 'for some type of psychological finding,' because such a rule would require a competency hearing in every case in which a defendant exercises his or her right of self-representation—a standard that neither the high court nor this court has adopted"].)

Instead, "the 'knowing and voluntary' inquiry is intended to ensure the defendant actually *does* understand the consequences of his or her decision, and that the decision is uncoerced." (*Taylor*, *supra*, 47 Cal.4th at p. 874, citations omitted.) Good answered both of those questions in the affirmative.

Moreover, Good's conclusion that Wycoff could not intelligently waive counsel was derived from flawed reasoning. Good based his conclusion on Wycoff's alleged misperception of his attorneys' motives (2 CT 425), but failed to articulate how this showed Wycoff could not appreciate the risks and disadvantages of self-representation (2 CT 425-427). Good's opinion that Wycoff did not appreciate the risks of undermining his defense by, for example, "talking too much to outsiders"

(2 CT 426) also employed a legally erroneous standard. Similar to trial competency, self-defeating defense strategies do not show a defendant does not "know[] what he is doing" or that "his choice is [not] made with eyes open." (*Faretta*, *supra*, 422 U.S. at p. 835.) "The trial court may [also] not determine a defendant's competency to waive counsel by evaluating his ability to present a defense." (*Koontz*, *supra*, 27 Cal.4th at p. 1070.)

Good's observations also did not support that Wycoff misunderstood the risks involved or the precariousness of his predicament. (2 CT 425.) Wycoff explained to Good that he understood he would likely be found guilty and considered the risk he would be executed. (2 CT 419, 421-424, 426-427.) Finally, Wycoff's opposition to an insanity defense and professed lack of concern over the death penalty (2 CT 426) did not show he failed to understand the consequences of representing himself. Wycoff articulated that his chances of acquittal were slim, appreciated that an insanity defense could result in an acquittal, and had logical reasons for believing the state would not execute him. (2 CT 419, 421-422, 424-426.)

As discussed previously, Good's conclusions to the contrary relied primarily on Good's own opinion that Wycoff should be content to admit he was insane as a matter of case strategy. Good stated an insanity defense was "an acknowledgement that [Wycoff] is mentally disturbed," and thus concluded Wycoff's "belief that he cannot tell his story within the context of an insanity plea is irrational. Ruling out an insanity plea given his lack of alternative legal defenses illustrates the unyielding and inflexible cognitions of a paranoid state." (2 CT 426.) But Wycoff's refusal to admit the murders were irrational was insufficient to deprive him of his Sixth Amendment right to self-representation. Nor was Good's opinion of the relative prudence of Wycoff's desired defense relevant to the finding of a valid waiver. (See *Koontz*, *supra*, 27 Cal.4th at p. 1070 [court cannot

determine competency to waive counsel by evaluating defendant's ability to present a defense].)

Judge Bruiniers properly rejected Good's conclusion on this basis, stating "the defendant fully understands the implications of waiving his right to be represented by counsel and has voluntarily and rationally done so, and . . . has been fully advised and aware of the pitfalls, dangers, and consequences of acting as his own attorney." (1 RT 150.) Judge Kennedy similarly rejected Good's conclusion, finding despite Good's report that Wycoff was "competent to make the decision whether to represent himself or not; that he has chosen to do so, and that that choice is knowing, voluntary and intelligent within the meaning of [*Faretta*] and [*Edwards*]. [¶] That doesn't mean that it is necessarily the wisest choice. You have been told many times that people are discouraged from representing themselves, but that is not the issue. The issue is whether you understand the downside risks and the rights that you have and with full understanding of those have made your decision to represent yourself." (3 RT 603.)

The case is similar to *Taylor*. There, the defendant argued that a psychologist's report should have alerted the court that the defendant's waiver of counsel was not knowing and intelligent. (*Taylor*, *supra*, 47 Cal.4th at p. 878.) The psychologist had reported

> 'no acute psychotic thought disorders' from his examination, but found defendant seemed somewhat grandiose at times,' particularly as to courtroom 'strategies,' and presented with 'an exaggerated degree of self-importance' and entitlement, displaying a 'rather narcissistic perspective.' Defendant had 'inflated ideas about his own accomplishments' and an 'almost . . . delusional conviction regarding the nature of his insight.' He 'seems to believe that his needs are special, particularly within the courtroom situation. In part, this may explain his reason for doubting his own attorney or even trying to represent himself.'

(*Id.* at p. 860.) The psychologist also observed the defendant may have difficulty rationally cooperating with counsel "due to his tendency to become somewhat defensive and distrusting," and "would have some difficulty" representing himself without an attorney. (*Id.* at p. 861.) An earlier judge had denied the defendant's *Faretta* motion, noting the defendant gave him "quizzical looks" and delayed answering during the colloquy, causing the judge to doubt he had the ability to represent himself. (*Id.* at p. 865.)

The Court found that "[n]either [the earlier judge's] remarks nor [the psychologist's] report required [the second judge] to find defendant's choice was not knowing and intelligent." (*Taylor*, *supra*, 47 Cal.4th at p. 879.) The second judge made no indication that the defendant had not understood his advisements. Although the psychologist found the defendant had low intelligence, difficulty in abstract thinking, and would experience difficulty representing himself, "[n]othing in [the report] should have convinced [the judge] that, contrary to his own impressions during his lengthy colloquy with defendant, defendant did not understand the contours of his choice to represent himself." (*Ibid*; see also *Koontz*, *supra*, 27 Cal.4th at pp. 1070, 1073 [rejecting arguments that "mental illness rendered [defendant] unable to make a knowing and voluntary waiver of his right counsel because he could not appreciate how an attorney might be of assistance in his defense," and "that [the defendant's] asserted mental illness rendered him unfit to comprehend the risks of self-representation"].)

This case presents even better facts for a finding of a valid waiver. Wycoff was engaged, involved, and calculating in court. Although Good concluded Wycoff irrationally rejected an insanity defense and thus his waiver would not be intelligent, nothing about that conclusion or its bases contradicted the court's findings that Wycoff understood his choice to

represent himself. Indeed, two judges reviewed Good's report and determined it did not cast doubt on whether Wycoff's waiver was valid.[26]

Wycoff argues the court had a "protecting duty" to conduct a hearing into his competency to waive counsel. (AOB 112, 119.) He claims the appointment of Good did not satisfy this duty because Judge Bruiniers "completely ignored Dr. Good's opinion," and because "neither defense counsel nor the prosecutor were permitted to actually see or review any part of Dr. Good's report." (AOB 119.)

We disagree. First, there is no support for the assertion that, after obtaining a knowing and voluntary waiver, the court has an additional "protecting duty" to guard a defendant from exercising his Sixth Amendment right. Wycoff's use of the phrase "protecting duty" is derived from the Ninth Circuit decisions of *Cuffle*, *supra*, 906 F.2d 385, and *Westbrook*, *supra*, 384 U.S. 150. (AOB 112.) Even if those decisions were binding on this court, which they are not (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 352), those cases discussed either competence to stand trial or the knowing and voluntary waiver standard. They do not establish that more was needed to ensure the validity of Wycoff's waiver of counsel. (See *Cuffle*, *supra*, 906 F.2d at pp. 392 [court erred by failing to conduct inquiry because there was "'substantial evidence of incompetence'"]; *Westbrook*, *supra*, 384 U.S. at pp. 150-151 [remanding matter because trial court had "protecting duty" to determine "'whether there is an intelligent and competent waiver by the accused'" and there was "no hearing or inquiry into the issue of [the defendant's] competence to waive his constitutional right to the assistance of counsel"].)

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[26] Again, we note Wycoff nowhere claims his waiver was actually invalid or that the court's questioning was insufficient. Instead, Wycoff asserts he is entitled to a per-se reversal because the court failed to hold a hearing on the issue. (See AOB 115-124.)

Nor did Judge Bruiniers "completely ignore[] Dr. Good's opinion or "deny[] counsel access to the report." (AOB 119.) Judge Bruiniers informed the parties of Good's diagnostic findings, told them Good found Wycoff's waiver was not intelligent, and explained Good found Wycoff's "reasoning process is not rational but instead reflects the irrational thinking of a paranoid man suffering from severe mental illness." (1 RT 137-138.) Far from "denying" counsel access to the report, Judge Bruiniers permitted the parties time to review the report, but they declined. (1 RT 138-139.)[27]

Finally, it is not accurate that "no hearing of any kind was held." (AOB 119.) Judge Bruiniers held a hearing to review Good's report and determine how to proceed with Wycoff's *Faretta* motion. At that time, Judge Bruiniers engaged in a lengthy colloquy during which he satisfied himself that Wycoff's waiver of counsel was knowing and intelligent. (1 RT 139-149.) Judge Bruiniers subsequently found Wycoff competent to stand trial and that his waiver of counsel was knowing, voluntary and intelligent. (1 RT 149-150; 2 CT 412.) No more of an inquiry was needed, even under the holdings of *Cuffle* and *Westbrook.*

B. The Court Properly Found Wycoff Capable of Representing Himself

In the same argument, Wycoff contends Judge Bruiniers and Judge Kennedy committed per-se reversible error by failing to conduct a hearing into his competence to represent himself. (AOB 115-124.)

The claim lacks merit. Here again, Wycoff confuses the standards relating to a defendant's competence to stand trial with those governing the court's discretion to deny defendants the right to self-representation under *Edwards*. Although a defendant has a constitutional right not to be tried

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[27] As previously explained, it was defense counsel who requested that the report be kept confidential. The parties also received the redacted report a week later, while Headley was still counsel of record.

while incompetent, *Edwards* "did not hold . . . that due process mandates a higher standard of mental competence for self-representation than for trial with counsel." (*Taylor*, *supra*, 47 Cal.4th at p. 878.) Nor did *Edwards* confer upon gray-area defendants the right to counsel. "The *Edwards* court held only that states *may*, without running afoul of *Faretta*, impose a higher standard . . . ." (*Taylor*, *supra*, at pp. 877-878.) "Because the *Edwards* rule is permissive, not mandatory, [this Court] held that *Edwards* 'does not support a claim of federal constitutional error in a case like the present one, in which defendant's request to represent himself was granted.'" (*Johnson*, *supra*, 53 Cal.4th at p. 527.)

In short, here the court was under no constitutional duty to ensure Wycoff could represent himself other than to ensure he was competent to stand trial and validly waived counsel. "'*Edwards* did not alter the principle that the federal constitution is not violated when a trial court permits a mentally ill defendant to represent himself at trial, even if he lacks the mental capacity to conduct the trial proceedings himself, if he is competent to stand trial and his waiver of counsel is voluntary, knowing and intelligent.'" (*Taylor*, *supra*, 47 Cal.4th at p. 878; see also *Johnson*, *supra*, 53 Cal.4th at p. 530 ["when it doubts the defendant's mental competence for self-representation, [the trial court] *may* order a psychological or psychiatric examination to inquire into *that* question"], first set of italics added.)

Regardless, neither judge had reason to doubt Wycoff's competence to represent himself. The ability to represent one's self contemplates only the ability "to carry out the basic tasks needed to present one's own defense without the help of counsel." (AOB 114; *Johnson*, *supra*, 53 Cal.4th at p. 530.) This Court has held that trial courts should "minimize the risk of improperly denying self-representation to a competent defendant," and "apply this standard cautiously . . . . Self-representation by defendants who

wish it and validly waive counsel remains the norm and may not be denied lightly." (*Id.* at pp. 530-531.)

Both judges followed this mandate. Good explicitly found Wycoff could carry out trial tasks, communicate with the court, and present his defense. (2 CT 418-420, 425.) Although Good read *Edwards* (2 CT 414), he failed to recite or apply its holding that self-representation may be denied only where a defendant is unable to carry out the basic tasks needed to present his own defense without the help of counsel. (*Edwards*, *supra*, 554 U.S. at pp. 175-176.) Good observed that Wycoff had "problematic relationships with counsel" (2 CT 420-424), irrational objections to his attorneys' strategies, impaired judgment, and minimized his predicament (2 CT 425), but neither *Edwards* nor its progeny recognized these as limitations on the right to self-representation. Indeed, it appears Good read *Edwards* in the precise way this Court warned *Edwards* should not be read—to be granting additional constitutional rights to the accused. (See *Taylor*, *supra*, 47 Cal.4th at p. 878; *Johnson*, *supra*, 53 Cal.4th at p. 527.)

Similarly, and contrary to Good's observation that Wycoff's chosen defense was irrational (2 CT 426), a defendant need not commit to pursuing a defense at all in order to enjoy his Sixth Amendment right to self-representation. Thus, as Judge Kennedy ruled, Wycoff was competent to represent himself, which "doesn't mean that it is necessarily the wisest choice. You have been told many times that people are discouraged from representing themselves, but that is not the issue." (3 RT 603.)

Wycoff argues Judge Bruiniers should have recognized his "defense was, as Dr. Good noted, a product of his mental illness" because Wycoff wrote in a *Marsden* motion that his attorneys were evil and deserved to "have the crap beet out of them," refused to cooperate with his attorneys, and believed he could explain the murders. (AOB 117-119.) But this evidence showed Wycoff hated Najera, used threatening and hyperbolic

language, and believed the murders were necessary, not that he did not understand his right to counsel or was incapable of conducting trial tasks.

Nor did the evidence before Judge Kennedy suggest Wycoff could not represent himself. Wycoff's proposed juror questions, insistence that the murders were justified, and hope that the jury might acquit him (AOB 121-124) showed he could develop a defense and conduct trial tasks. Wycoff's desire not to discuss his mental diagnoses and to see his van and grenade launcher did not bear on his ability to conduct trial tasks. (AOB 123-124.) None of this undermined Judge Kennedy's conclusion that Wycoff was competent to elect self-representation, capable of presenting a defense and case in mitigation, and validly waived counsel. Even if Wycoff could premise a claim of federal constitutional error upon the court's granting of his *Faretta* motion without further inquiry, the claim would fail.

C. The Court Was Aware of Its Discretion to Deny Wycoff Self-Representation

Wycoff argues that Judge Bruiniers and Judge Kennedy believed the standards for finding a defendant competent to stand trial and for denying a defendant the right to represent himself were the same. Thus, he argues, both judges abused their discretion by permitting him to represent himself because they were not aware they had discretion to deny him the right to do so under *Edwards*. (AOB 125-131.)[28]

Wycoff is mistaken. Both judges recognized that the standard governing trial competency was different than circumstances under which trial courts are permitted though not required to deny competent defendants the right to represent themselves under *Edwards*. Judge Bruiniers stated explicitly that *Edwards* posited a "separate and distinct standard" than

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[28] Wycoff makes this argument in Section III, subsection E of his brief.

"whether the defendant is competent to stand trial," and that after *Edwards* "[t]here are different legal standards to apply," whereas until recently there was "some indication in the Supreme Court cases that it was the same standard." (1 RT 123, 125-126.) Indeed, Judge Bruiniers stated that absent *Edwards* he would simply read Wycoff the requisite waivers, whereas given *Edwards* he decided to appoint Good. (1 RT 122-124.) If Judge Bruiniers believed the standards for denying a defendant self-representation were the same as those relating to competency to stand trial, his decision to appoint Good would have been inexplicable. Similarly, Judge Kennedy's rulings explicitly differentiated between Wycoff's competence to stand trial and his ability to represent himself. (3 RT 601-604.)

Judge Bruiniers's statement that he was "compelled to [grant Wycoff's request] under the requirements of *Faretta*, and I do not think that the *Edwards* case changes that result in at least under these circumstances" (AOB 129; 1 RT 149, italics added), does not assist Wycoff. This comment indicated simply that nothing in Good's report convinced the court that Wycoff should not represent himself, and this only demonstrated the court understood the law. Nothing in Good's report indicated Wycoff could not perform trial tasks as a result of mental illness, which is the only limitation on the Sixth Amendment that *Edwards* recognized. Accordingly, the court correctly stated it was compelled to grant the motion. (See *Johnson*, *supra*, 53 Cal.4th at p. 530 [a court "may not deny self-representation merely because it believes the matter could be tried more efficiently, or even more fairly, with attorneys on both sides. Rather, it may deny self-representation only in those situations where *Edwards* permits it"].)

Wycoff argues Judge Kennedy also applied the wrong standard, as evidenced by the fact he told jurors Wycoff had an "absolute right" to represent himself. (AOB 129-130.) This confuses the record. Judge Kennedy told jurors Wycoff had an "absolute right to represent himself"

with the consent of the parties, after the parties requested that the jury be given a "description of [Wycoff's] self-representation." (2 RT 557-558, 512.) Judge Kennedy explicitly stated of the language:

> Absolute is not—it's not literally absolute in the sense that there are circumstances under which Mr. Wycoff would not be permitted to represent himself, but the question is communicating to the jury not to hold that against Mr. Wycoff is the point of this. And absolute may be a little more effective in communicating that. So I am willing to go with it even though it is not absolutely technically correct . . . .

(2 RT 558.) This evidence shows that Judge Kennedy, like Judge Bruiniers, knew the law and properly applied it. There is no reason this Court should presume otherwise. (See *People v. Braxton* (2004) 34 Cal.4th 798, 814 [trial court is presumed to know the law].)

III. THE TRIAL COURT PROPERLY PERMITTED WYCOFF TO REPRESENT HIMSELF AT THE PENALTY PHASE

Wycoff contends the court committed per-se prejudicial error by failing to appoint him counsel at the penalty phase. (AOB 181-186.) Wycoff argues there is no right to self-representation at the penalty phase and that, because his case in mitigation was a "farce" resulting in an unreliable penalty determination, the court should have appointed him counsel. (AOB 181, 186.) Wycoff acknowledges this Court has rejected this argument (AOB 182, citing *Blair*, *supra*, 36 Cal.4th at pp. 736-740; *Koontz*, *supra*, 27 Cal.4th at pp. 1073-1074; *People v. Bradford* (1997) 15 Cal.4th 1229, 1364), but suggests *Edwards* mandates a different result because it held the right to self-representation was not absolute (AOB 186).[29] We disagree.

"The right to self-representation recognized in *Faretta* is not limited to the conduct of a defense during the guilt phase of the trial, but extends to

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[29] Wycoff makes this argument in Section VIII of his brief.

the penalty phase in a capital case. Notwithstanding the state's significant interest in a reliable penalty determination, a determination best made by a fully informed sentencer, a defendant's fundamental constitutional right to control his defense governs. The defendant has the right to present no defense and to take the stand and both confess guilt and request imposition of the death penalty. It follows that the state's interest in ensuring a reliable penalty determination may not be urged as a basis for denying a capital defendant his fundamental right to control his defense by representing himself at all stages of the trial." (*Bradford*, *supra*, 15 Cal.4th at pp. 1364-1365, citations omitted.)

This remains the law, even after *Edwards*. This Court rejected a similar claim in *Taylor*. There, relying in part on *Bradford*, *Blair*, and *Koontz*, this Court found "that neither the fact defendant faced the death penalty nor the asserted ineptness of his defense efforts warranted denying or revoking his in propria persona status." (*Taylor*, *supra*, 47 Cal.4th at p 865.) "We have explained that the autonomy interest motivating the decision in *Faretta*—the principle that for the state to force a lawyer on a defendant would impinge on that respect for the individual which is the lifeblood of the law—applies at a capital penalty trial as well as in a trial of guilt. This is true even when self-representation at the penalty phase permits the defendant to preclude any investigation and presentation of mitigating evidence." (*Taylor*, *supra*, at p. 865, citations and punctuation omitted.) "'Under these circumstances, we are not free to hold that the government's interest in ensuring the fairness and integrity of defendant's trial outweighed defendant's right to self-representation.'" (*Id.* at p. 866, citing *Blair*, *supra*, 36 Cal.4th at pp. 739-740; see also *id.* at p. 740 ["The high court, however, has adhered to the principles of *Faretta* even with the understanding that self-representation more often than not results in detriment to the defendant, if not outright unfairness"].) Wycoff's claim

that the court should have appointed counsel at the penalty phase in the interest of a reliable penalty determination must be rejected.[30]

IV. THE PROSECUTOR DID NOT COMMIT MISCONDUCT

Wycoff contends the prosecutor committed systematic misconduct by presenting or failing to correct evidence suggesting Wycoff lacked a mental disease or defect. Specifically, Wycoff claims the prosecutor falsely asserted during voir dire that Wycoff was not mentally ill, failed to correct Wycoff's testimony during the guilt phase that doctors said he was "fine," and misled the jury by arguing in the penalty phase that Wycoff had no mental disease or defect. (AOB 132-148.)

The argument should be rejected. First, Wycoff failed to object to the alleged misconduct below, so the claims are forfeited. Regardless, each claim fails on the merits. The prosecutor did not make false factual assertions during voir dire, did not fail to correct Wycoff's false testimony during the guilt phase, and did not mislead the jury by arguing Wycoff did not have a mental disease or defect.

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[30] For the same reason, this Court should reject Wycoff's undeveloped argument, posited throughout his brief, that the trial court's alleged procedural errors relating to competency resulted in an unreliable penalty determination or the "heightened level of reliability necessary in capital proceedings." (See AOB 91, 99, 131.) "Putting aside for the moment the question whether defendant's self-representation actually denied him a fundamentally fair trial, we question defendant's legal premise. Defendant in effect would have us hold that the right to a fair trial can trump the right of self-representation in particular cases." (*Blair*, *supra*, 36 Cal.4th at p. 739.) Regardless, none of Wycoff's contentions of unfairness have merit. "As we have explained, defendant knowingly and intelligently waived his right to the assistance of counsel [and] the trial court did not err in declining to declare a doubt concerning defendant's competence to stand trial or to waive counsel at either the guilt or the penalty phase . . . . In sum, permitting defendant to represent himself did not result in a fundamentally unfair trial." (*Id.* at p. 740.)

A. Applicable Law

Wycoff appears to bring his misconduct claims under both state and federal law. (See AOB 148.) "When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury. Misconduct that does not constitute a federal constitutional violation warrants reversal only if it is reasonably probable the trial outcome was affected." (*People v. Shazier* (2014) 60 Cal.4th 109, 127, citations omitted.)

"As a prerequisite for advancing a claim of prosecutorial misconduct," a defendant must "have objected to the alleged misconduct and requested an admonition 'unless an objection would have been futile or an admonition ineffective.'" (*Shazier, supra*, 60 Cal.4th at p. 127.) "This rule applies to asserted prosecutorial misconduct committed during voir dire." (*People v. Medina* (1995) 11 Cal.4th 694, 740.) "A defendant claiming that one of these exceptions applies must find support for his or her claim in the record. The ritual incantation that an exception applies is not enough." (*Panah, supra*, 35 Cal.4th at p. 462, citations omitted.)

B. The Claims Are Forfeited

Here, Wycoff failed to object to any of the alleged instances of misconduct. Nor did Wycoff ask the court to admonish the jury to disregard the statements to which he now objects. Accordingly, Wycoff forfeited his misconduct claims. (See *Shazier, supra*, 60 Cal.4th at p. 127.)

Wycoff acknowledges he did not object to the alleged misconduct (AOB 141) but states he failed to do so because in his "delusional state" he believed the prosecutor's false assertions to be true (AOB 141).

This argument fails. First, the argument at its core merely reasserts Wycoff's earlier argument that he should not have been allowed to represent himself. Having been permitted to do so, Wycoff is not absolved of his duty to object. It is well settled that "the fact that defendant rejected the services of a court appointed attorney cannot vitiate the rule that requires timely objection. A defendant who chooses to represent himself assumes the responsibilities inherent in the role which he has undertaken." (*People v. Robinson* (1965) 62 Cal.2d 889, 894; see also *People v. Redmond* (1969) 71 Cal.2d 745, 758 ["[A pro per defendant] is not entitled to special privileges not given an attorney, and the judge ordinarily is not required to assist or advise him on matters of law, evidence or trial practice"]; *People v. Bloom* (1989) 48 Cal.3d 1194, 1226-1227 [pro per defendants may not claim inadequate representation or ineffective assistance of counsel].)

Even so, the argument is confused. Wycoff does not argue on appeal that he was actually incompetent, only that the court committed procedural error by allowing him to represent himself without a hearing. (AOB 88, fn. 8.) There was never a finding that Wycoff was "delusional" at trial, and Wycoff's record of sound objections supports the contrary conclusion. The claims are forfeited.

C. The Prosecutor Did Not Present False Evidence During Jury Selection

Even if the claims were preserved, they fail on the merits. Wycoff first claims the prosecutor committed misconduct by telling jurors during voir dire that he did not have a mental illness, had never shown signs of mental illness, and did not have a history of mental illness. (AOB 135-141.)

Wycoff characterizes the prosecutor's questions as presenting false "factual assertion[s]" that the prosecutor knew were false. (AOB 141.)

We disagree. "Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct." (*People v. Hill* (1998) 17 Cal.4th 800, 823.) "[T]o prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. In conducting this inquiry, we do not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*Shazier*, *supra*, 60 Cal.4th at p. 144, citations omitted.)

Here, Wycoff's claim fails because it confuses the record. In the examples of misconduct Wycoff cites, the prosecutor asked jurors whether they would automatically accept a psychologist's opinion as true or whether they were capable of weighing the credibility of that testimony using a variety of factors. None of the factors were introduced as factual assertions true of Wycoff, and all were described in terms of what the evidence might show. (See 5 RT 1242-1244; 6 RT 1353, 1357; 7 RT 1635; 8 RT 1733-1734; 9 RT 2063; 10 RT 2232; 11 RT 2337, 2421; 12 RT 2589-2590.)

For example, Wycoff states "the prosecutor resumed his pattern of asking potential jurors questions about Wycoff's lack of 'mental illness'" (AOB 138), but the record Wycoff cites for this assertion shows only that the prosecutor asked jurors if they would automatically decide Wycoff was not guilty if they found he had a mental challenge (6 RT 1353), or whether they would consider that along with other facts to determine whether he premeditated the murders (6 RT 1357-1358).

Contrary to Wycoff's contention that the prosecutor told jurors "no one else saw 'these symptoms or any problems from Mr. Wycoff in 38

years'" (AOB 139), the portion of the record Wycoff cites for this assertion shows the prosecutor stated:

> But do you understand when you evaluate their testimony you can compare what they say to the other facts that you know in the case?
>
> Other facts might be was Mr. Wycoff ever hospitalized in 38 years? Was Mr. Wycoff ever institutionalized in 38 years? Was—did anybody else see these symptoms or any problems from Mr. Wycoff in 38 years? Did they examine Mr. Wycoff three years after the crime—after the crime was committed? Is a psychiatrist or psychologist being paid 400 dollars an hour to work on the case?

(7 RT 1635.)

Similarly, contrary to Wycoff's assertion that the prosecutor "repeated his questions to potential jurors concerning false and nonexistent evidence that 'for 38 years' Wycoff exhibited no signs of mental illness" (AOB 139), the prosecutor in the cited portion of the record asked:

> If you did hear from the mental health professional, would you gauge their testimony and evaluate their testimony as it compares to all of the other evidence in the case? [¶] . . . [¶] And would you consider whether or not if that mental health professional were to testify, would you consider what other people say about Mr. Wycoff's mental state, perhaps relatives or people that have seen him for years and years and years? [¶] . . . [¶] Let's say a mental health professional renders an opinion. Do you think that other people that have been around Mr. Wycoff for 38 years might provide some information regarding his mental state also, do you see how they could? [¶] . . . [¶] In other words, they might come in and say I never saw any problem, so that might have some relevance, right? [¶] . . . [¶] Whether he has been institutionalized or not? [¶] . . . [¶] Whether he has been in the hospital before?

(8 RT 1732-1733.)

None of these or the other cited portions of the record demonstrate the prosecutor misrepresented facts to the jury. To the contrary, throughout voir dire the prosecutor informed the jury either explicitly or through questioning that he was not certain mental-health testimony would be

presented at all. (See, e.g., 5 RT 1132 ["[I] don't know if there is going to be mental health testimony in this case or not"], 1139-1140; 11 RT 2346 ["let's say we have the guilt phase and there's no testimony from any mental health professional"], 2420 ["Do you understand that we do not know what all of the evidence might be in the case, and you may or may not hear from a mental health expert[?]"], 2432 ["There could be testimony from a mental health professional but maybe not"]; 7 RT 1553 [mental-health testimony "could occur, but it might not occur"], 1556-1557 ["you may not hear any evidence, expert testimony about mental disease or defect"], 1634, 1648; 8 RT 1728 ["the Court has told you, or will tell you that you may or may not hear from all witnesses or all evidence that could exist in the case"], 1738, 1827; 9 RT 2043 ["we don't know for sure" if mental-health testimony will be presented], 2029 ["there may be mental health testimony. I don't know for sure, but there might be"], 2037 [reminding jury no evidence of mental health had been presented], 2038 ["we don't know exactly what all of the evidence is going to be that is presented to you"], 2040; 10 RT 2237-2238.) It is unreasonable to infer the jury drew the most rather than least damaging meaning from this questioning. (See *Shazier*, *supra*, 60 Cal.4th at p. 144.)

Regardless, the prosecutor reasonably anticipated presenting evidence from lay people to rebut a suggestion that Wycoff was mentally unsound at the time of the murders. Wycoff's friends, including Langner and Lawson, expressed shock that Wycoff was capable of the murders (see 8 CT 2120-2121; 9 CT 2137, 2192, 2247), and the prosecutor included Langner and Lawson on his witness list (3 CT 728). Consistent with the prosecutor's questions, the record also indicated Wycoff had never been hospitalized or institutionalized. (8 CT 2061; 2 CT 415-416.)

Wycoff makes too much of the prosecutor's alleged misrepresentation that a mental-health expert examined Wycoff "three years" after the crime.

(AOB 139, citing 7 RT 1635.) The only mental-health expert on Wycoff's witness list was Dr. Tucker (2 RT 501, 533; 5 RT 1172; 10 CT 2305.) Although Tucker interviewed Wycoff six times between February 2006 and March 2008, he rendered his report nearly three years after the murder. (2 CT 377.) Given that Wycoff's mental state was relevant to his intent to commit the murders (5 CT 1390, 1392; §§ 20, 28) and to several mitigating factors in the penalty phase (6 CT 1530-1531; §§ 190.3, subds. (d), (f), (h), and (k)), the prosecutor was entitled to ask whether the jurors could weigh this anticipated evidence, including based on the proximity of a psychological report to the time of the crimes. (See Code Civil Proc., § 223 [examination of jurors shall be conducted in aid of exercise of challenges for cause]; *People v. Pinholster* (1992) 1 Cal.4th 865, 915 ["we have cautioned that the trial court may limit voir dire couched in terms of the facts expected to be proved"]; *People v. Ledesma* (2006) 39 Cal.4th 641, 671 ["'A prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of the aggravating or mitigating circumstances, is subject . . . to challenge for cause'"]; *People v. Noguera* (1992) 4 Cal.4th 599, 645 [it was not improper for prosecutor to ask jury if they would consider imposing the death penalty if defendant was 18 or 19 at time of murder and only one victim was killed, because it was directly relevant to whether the juror is subject to challenge for cause].)

Wycoff suggests the prosecutor's questioning was improper because Wycoff did not disclose that he would produce mental-health evidence or call a mental-health professional as a witness. (AOB 135-136, and fn. 10.) Not so. Wycoff said prior to jury selection that he was considering calling "one of the guys that did some testing on me. I might have him come in and say, yeah, he believes he did the right thing. Yeah, he believes it was a good thing to do. I might have him say that." (2 RT 501.) Wycoff added

Tucker to his witness list prior to voir dire. (2 RT 533, 536; see also 10 CT 2305 [example of witness list given to potential jurors, which included Tucker].) During voir dire, Briggs said Wycoff was still contemplating calling Tucker. (5 RT 1172.)

Indeed, the parties agreed to include mental-health related questions in the jury questionnaires because Wycoff said he was considering introducing such evidence. (2 RT 500-503.) Wycoff specifically advocated that certain of such questions be left in the questionnaires on this basis. (2 RT 502.) With Wycoff's consent, the questionnaires included such questions as whether the jurors believed people with certain mental illnesses do not have control over their behavior, whether they believed in some circumstances mental illness can reduce a person's responsibility for their actions, to what extent they trusted the judgment of mental-health professionals, to what extent they would trust a mental-health professional's testimony concerning a defendant's mental state, and whether they had reservations about psychological testimony. (10 CT 2291-2292.) Having consented to questions about mental illness and the weight jurors would give psychological testimony, Wycoff cannot complain now that the prosecutor also asked questions on the subject.

Finally, Wycoff cannot show prejudice under either state or federal law. "[I]t is unlikely that errors or misconduct occurring during voir dire questioning will unduly influence the jury's verdict in the case. Any such errors or misconduct 'prior to the presentation of argument or evidence, obviously reach the jury panel at a much less critical phase of the proceedings . . . .'" (*Medina*, *supra*, 11 Cal.4th at p. 741.)

Here, since the prosecutor never made factual assertions to the jury, false or otherwise, there is no reasonable likelihood the jury understood or applied the complained-of comments as assertions of fact that Wycoff did not have a mental illness. (See *Shazier*, *supra*, 60 Cal.4th at p. 144.) The

jury was also instructed that statements made by the attorneys were not evidence. (5 CT 1364; 6 CT 1515.)

Moreover, Wycoff himself sought to convince the jurors at trial that he was mentally sound. Wycoff told the jurors in opening argument: "my mental condition is this: I do have ADD, Attention Deficit Disorder, and—but I'm not stupid." (13 RT 2868.) He explained he had done average on IQ tests, was very good at some things but bad at others, and was a failure in school. Despite that, "I persevered. And not only did I become a truck driver, but I became a truck driver that hauls explosives. Now, that's quite an accomplishment. [¶] But all my strengths and weaknesses total up to a person with ADD and average intelligence." (13 RT 2868-2869.) Wycoff testified on cross-examination that he was not psychotic or schizophrenic the night of the murders, nor was he hearing voices or doing drugs. (16 RT 3477, 3562.) At the time of the murders, the last time he had seen a psychiatrist was in 2004, to try Strattera for ADD. (16 RT 3562-3563.) The last time he felt depressed was 2004. (16 RT 3563.) Wycoff's statements to police after the murders reiterated that he was not taking any medication or psychotropic medication at the time of the offense (8 CT 2057-2058), that the only thing condition he was ever formally diagnosed with was ADD (8 CT 2060-2061), that he had depression-like symptoms in 2003 and saw a psychiatrist a few times in 2004 (8 CT 2058-2059), and that he had not had depression-like slumps since 2004 (8 CT 2061).

Accordingly, the record contained overwhelming evidence that Wycoff was sound of mind at the time of the murders. Based on this, it is not reasonably probable that the jury would have reached a different verdict absent the alleged improper voir dire. Nor can it be said that the prosecutor's voir dire—in light of Wycoff's own testimony and the other evidence at trial—rendered the trial fundamentally unfair. (See *Shazier*, *supra*, 60 Cal.4th at p. 127.)

D. The Prosecutor Did Not Present False Evidence by Failing to Impeach Wycoff's Testimony in the Guilt Phase

Wycoff next argues the prosecutor committed misconduct by failing to correct his own "false" testimony during the guilt phase that "[t]he psychiatrists I talk to say I'm fine." (AOB 141-144.) The testimony occurred during the following cross-examination:

> Q. And when you got there in the house, you intended to kill them, correct?
>
> A. Yes.
>
> Q. I mean, you weren't psychotic that night, were you?
>
> A. No.
>
> Q. You weren't schizophrenic that night?
>
> A. No.
>
> Q. You weren't hearing voices?
>
> A. No. The psychiatrists I talk to say I'm fine.

(16 RT 3477.)

The claim fails. First, Wycoff acknowledges he introduced the alleged false testimony. (AOB 142.) Even if we assume the statement that "[t]he psychiatrists I talk to say I'm fine" was false, Wycoff identifies no legal theory which would require that a prosecutor correct a defendant's false testimony. Although under due process "the prosecution has the duty to correct the testimony of its own witnesses that it knows, or should know, is false or misleading" (*People v. Morrison* (2004) 34 Cal.4th 698, 716; see also *Napue v. People of State of Ill.* (1959) 360 U.S. 264, 269), this duty does not extend to evidence introduced by a defendant. To do so effectively contends that a defendant has a constitutional right to be impeached by the state. There is no basis for such an assertion, not to

mention that such a rule would appear to abrogate a defendant's Sixth Amendment right to govern his own defense.

Assuming for the sake of argument that *Napue* applies, the claim fails because Wycoff's testimony was not demonstrably "false." Wycoff's statement that "[t]he psychiatrists I talk to say I'm fine" was made in reference to the prosecutor's question about whether he was hearing voices at the time of the offense. (16 RT 3477.) Neither Good nor Tucker said Wycoff was hearing voices, at the time of the offense or otherwise. (See 2 CT 413-418, 377-378.) Nor did Good's reference to a jail-psychologist's conclusion that Wycoff had a "[d]elusional disorder with mixed schizoid, paranoid and anti-social personality traits" (2 CT 415-416; AOB 142) constitute evidence that Wycoff was hearing voices at the time of the offenses. Even if *Napue* were applicable, Wycoff could not demonstrate the prosecutor knowingly presented false testimony on this record. (See *Cash v. Maxwell* (2012) 132 S.Ct. 611, 615 ["[H]aving stretched the facts, the Ninth Circuit also stretches the Constitution, holding that the use of [a prosecution witness's] false testimony violated the Fourteenth Amendment's Due Process Clause, whether or not the prosecution knew of its falsity. We have never held that, and are unlikely ever to do so. All we have held is that a conviction obtained through use of false evidence, *known to be such by representatives of the State*, must fall under the Fourteenth Amendment"], citations omitted.)

Wycoff argues: "Having Wycoff testify falsely that the mental health experts who had examined him found him to be 'fine,' the prosecutor *was able to put evidence before the jury* that Wycoff did not suffer from any mental illness." (AOB 142, italics added.) In support of this, Wycoff cites his testimony during cross-examination that he went to a psychiatrist in 2004 to get Strattera for ADD and that he was somewhat depressed in 2004. (AOB 143). Wycoff claims this testimony was "false" because "Good had

expressly noted: 'By 2001 [Wycoff] was diagnosed by Dr. Straussman as suffering from Major Depression and prescribed anti-depressants Effexor and Lexapro. A year later he was placed on Strattera.'" (AOB 143.)

We disagree. Preliminarily, Wycoff fails to explain what about his testimony was "false," or why it was important. Wycoff testified that the last time he saw a psychiatrist and the last time he "used even Strattera" was 2004. (16 RT 3562-3564.) Good's report did not contradict this. Good stated Wycoff was placed on Strattera in 2002, not that he did not also use Strattera in 2004. (2 CT 415.) There is also no evidence in the record regarding the purpose of Strattera or its import on Wycoff's defense, except Wycoff's uncontradicted assertion that it was for ADD but that he thought it would help with depression. (16 RT 3562-3563; 8 CT 2059.)

To the extent Wycoff argues he was permitted to suggest he first *tried* Strattera in 2004 as opposed to 2002, as Good reported, that cannot be the basis for a credible claim that the prosecutor committed misconduct. In his confession to police, Wycoff suggested he first tried Strattera in 2004 but saw a "Dr. Strussman" for depression-like symptoms in 2003. (8 CT 2058-2059.) Good reported that Wycoff was diagnosed by a "Dr. Straussman" in 2001 and placed on Strattera in 2002. (2 CT 415.) This suggests, however, only that Wycoff or Good confused the date Wycoff first used Strattera. It had no bearing on the prosecutor's line of questioning, nor demonstrates that Wycoff's testimony was "false." (See *Morrison*, *supra*, 34 Cal.4th at pp. 717-718 [where prosecution witness's testimony "was not physically impossible or demonstrably false," "we cannot say the prosecutor misled the jury or violated defendant's due process rights"]; *People v. Vines* (2011) 51 Cal.4th 830, 874-875 ["Mere inconsistencies between a witness's testimony and her prior statements do not prove the falsity of the testimony. On this record, we cannot know whether [a witness] lied in her testimony or in her statement to [another witness] or, indeed, whether it was [the other

witness] whose statement was false or mistaken. Defendant therefore fails to establish that the prosecutor presented false testimony or failed to correct such testimony"], citations omitted.) Indeed, here the alleged inconsistency only inured to Wycoff's benefit, since it suggested he tried Strattera in 2004, closer to the time of the murders than Good reported.

Similarly, Wycoff's minimization of his depression cannot be the basis for a credible assertion that the prosecutor knew that testimony to be false. The prosecutor asked whether Wycoff was depressed in 2004 (16 RT 3563) and stated as much without qualification in closing argument (17 RT 3719 ["The last time he took medication for depression was 2004. And he thought this Strattera, which he was taking for ADD, might help him with that"], 3787 ["Last time he had depression was two years ago"[31]].) In other words, Wycoff may have minimized his depression during cross-examination, but the prosecutor did not.

Regardless, Wycoff fails to explain how the prosecutor placed any of the offending testimony into evidence, or how it was "enabled" by Wycoff's testimony that psychiatrists said he was "fine." The record shows that Wycoff, not the prosecutor, initiated the minimization of his depression and his statements regarding Strattera. (See 16 RT 3562-3564.)

As further evidence of misconduct, Wycoff cites the prosecutor's argument in the guilt phase that the only evidence of mental disease in the case was ADD and depression. (AOB 143-144.) Wycoff states this argument "was both false and misleading. As the prosecutor well knew,

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[31] The prosecutor's statement that Wycoff last had depression "two years ago" appears to refer to Wycoff's statement to police in 2006 that he last had depression in 2004. (8 CT 2059-2060; 16 RT 3562 ["Matter of fact, the last time you saw a doctor I think you said to police was like 2004, correct?"].)

there was far more to Wycoff's mental illness than ADD and a depression 'two years ago.'" (AOB 144.)

This argument fails. To the extent Wycoff asserts the argument itself was false evidence, it was not. (See *People v. Perez* (1992) 2 Cal.4th 1117, 1126 [noting the prosecutor's argument is not evidence].)

To the extent Wycoff asserts the argument intentionally misled the jury, that also fails. The only evidence of mental disease or defect introduced at trial was that Wycoff suffered from ADD and depression. Accordingly, the prosecutor properly made that argument to the jury. (17 RT 3719; see also *People v. Gamache* (2010) 48 Cal.4th 347, 371 [prosecutor's argument may be vigorous as long as it amounts to fair comment on the evidence].) The prosecutor's argument that Wycoff "[h]asn't been seeing a doctor. Hasn't been taking medication. Last time he had depression was two years ago" (17 RT 3787-3788; AOB 143) was also consistent with the evidence admitted, not to mention Good's report, which said Wycoff was diagnosed with depression in 2001 and placed on Strattera a year later. (See 2 CT 414-416).[32]

Wycoff's argument that the prosecutor was under a constitutional duty to introduce that "there was far more to [his] mental illness than ADD and depression 'two years ago'" (AOB 144) lacks specificity. Wycoff nowhere explains what evidence the prosecutor was under a constitutional duty to introduce. Good and Tucker did not opine on Wycoff's sanity at the time of the offenses, and the prosecutor was not required to litigate Wycoff's

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[32] To the extent Wycoff believes this argument was "false" because it neglected to mention that Wycoff had consulted more recently with Good and Tucker, that claim fails. The prosecutor's argument and questioning referred to Wycoff's mental state at the time of the offenses. Wycoff's consultation with psychologists for the purpose of a mitigation presentation or a confidential advisory report to the court also did not mean he had been "seeing a doctor." (17 RT 3787.)

present competence to the jury. Indeed, had the prosecutor referred to the reports of Good and Tucker, he would have been referring to matters not in evidence.

Finally, it is not reasonably probable that the jury would have reached a different verdict had the prosecutor impeached Wycoff with Good's differential diagnosis that Wycoff was probably schizophrenic. (See *Shazier*, *supra*, 60 Cal.4th at p. 127.) The evidence that Wycoff premeditated the murders and conducted them while sound of mind was overwhelming, including because Wycoff stated as much after the murders, asserted as much in his letters and calls, and reiterated as much at trial. Impeaching Wycoff's assertion that he "was fine" would only have made him look not credible, a matter the jury was not likely to credit in his favor.

For the same reason, it cannot be said that the failure to correct Wycoff's testimony rendered the trial fundamentally unfair. (See *Shazier*, *supra*, 60 Cal.4th at p. 127.) Such an argument implies only that Wycoff should not have represented himself, since he himself introduced the testimony which he claims the prosecutor failed to correct. But Wycoff was properly permitted to represent himself, and he made a deliberate decision not to introduce additional evidence of his mental state. The prosecutor was not required to present through impeachment mitigating information on Wycoff's behalf. (See *Blair*, *supra*, 36 Cal.4th at p. 739 ["The high court, however, has adhered to the principles of *Faretta* even with the understanding that self-representation more often than not results in detriment to the defendant, if not outright unfairness"].)

On this point, Wycoff's argument that he "did not raise his mental state and did not present any mental state evidence" (AOB 147) is mistaken. In the guilt phase, Wycoff requested and received CALJIC No. 3.32, permitting the jury to consider evidence of mental disease for the limited purpose of determining whether Wycoff formed the requisite intent. (5 CT

1392; 16 RT 3653 [Briggs requesting the instruction not as a "defense," but because there was "actually fairly extensive [evidence] on this. Mr. Wycoff testified about having ADD and he was cross-examined about depression"].)

With Wycoff's consent, the jury was also instructed in the penalty phase that it could consider whether Wycoff committed the offense while under the influence of extreme mental or emotional disturbance, whether at the time of the offense Wycoff's capacity to appreciate the criminality of the offense or conform his conduct to the law was impaired as a result of mental disease or defect, and whether any other circumstance extenuated the gravity of the crime, including "any sympathetic or other aspect of the defendant's character . . . ." (5 CT 1530-1531 [CALJIC No. 8.85]; 19 RT 4331-4332.) Indeed, in denying Wycoff's motion for modification of the verdict, the court noted that evidence of Wycoff's "mental limitations," including that he was a poor student and suffered from ADD, was substantially mitigating. (21 RT 4650.) Wycoff chose not to admit Good's diagnosis, but this did not mean he presented no evidence of mental defects. The jury could have, but did not, find Wycoff's mental characteristics warranted life without parole in the penalty phase or precluded a finding of premeditation in the guilt phase. Since Wycoff cannot demonstrate error or prejudice, his claims of misconduct should be rejected.

E. The Prosecutor Did Not Commit Misconduct During Argument in the Penalty Phase

Wycoff contends the prosecutor committed misconduct by arguing during closing in the penalty phase that there was no evidence Wycoff was under the influence of an extreme mental or emotional disturbance at the time of the offenses, that Wycoff's "mental 'capacity is not impaired,'" that Wycoff "'knew exactly what he was doing,'" and that Wycoff had "no such mental disease or defect but was instead 'crazy like a fox.'" (AOB 146.)

Wycoff argues the prosecutor knew these statements were false because he "knew Wycoff was schizophrenic and delusional." (AOB 146.)

We disagree. Good's report was rendered in 2008 (2 CT 413), and there was no evidence admitted at trial that Wycoff was schizophrenic, psychotic, or hearing voices at the time of the murders. The prosecutor was thus entitled to argue, as he did, that despite Wycoff's ADD and depression, the evidence showed he was in complete control of his faculties. (20 RT 4514-4517, 4525.)

The prosecutor also did not "[know] Wycoff was schizophrenic and delusional." (AOB 146.) Good's report did not constitute incontrovertible evidence that Wycoff was schizophrenic and delusional; to the contrary, Good's diagnosis was differential, and the court itself did not find the report constituted evidence of incompetence or insanity. (2 CT 418; 21 RT 4788-4789.) Regardless, Wycoff's argument suggests the prosecutor committed reversible misconduct by failing to argue matters not in evidence or by failing to impeach Wycoff, albeit for Wycoff's own good. As previously explained, there is no basis for such a claim.

Finally, Wycoff cannot show prejudice under state or federal law as a result of this alleged error. (See *Shazier*, *supra*, 60 Cal.4th at p. 127.) As explained, Wycoff testified that he was sound of mind when he committed the offenses. It is not reasonably probable that the jury would have reached a different verdict in the guilt or penalty phases had the prosecutor failed to argue that Wycoff was sound of mind, nor was the prosecutor's alleged misconduct so egregious that it rendered the trial fundamentally unfair.

V. THE PROSECUTOR PROPERLY NOTICED THE VICTIM IMPACT EVIDENCE

Wycoff contends the prosecutor's notice of victim impact evidence was insufficient because it did not include the names of the four victim impact witnesses who testified. (AOB 149-153.) We disagree. Wycoff

forfeited the claim by failing to object below. The claim is also meritless. The prosecutor informed Wycoff prior to jury selection that he intended to present victim impact evidence. The prosecutor provided the identity of two witnesses prior to jury selection, and provided the identity of the remaining two prior to the penalty phase. Since the prosecutor afforded Wycoff a reasonable opportunity to prepare a defense to the evidence (*People v. Tully* (2012) 54 Cal.4th 952, 1033), no more was required.

A. Background

On August 27, 2009, 18 days before the September 14, 2009 start of jury selection, the prosecutor orally informed the court and Wycoff that he intended to present victim impact evidence under section 190.3. (2 RT 521; 4 CT 733.) That day, the parties discussed scheduling. (2 RT 481-484, 487-489.) Regarding whether to schedule a break between the guilt and penalty phases, Briggs said: "As far as Mr. Wycoff is concerned we can just keep going, no—no reason to delay things." (2 RT 488.)

On September 1, 2009, the prosecutor filed a written notice stating his intent to introduce victim impact evidence. (3 CT 718.) On September 8, 2009, the prosecutor filed a supplemental notice of intent to produce penalty phase evidence, along with a list of possible witnesses. The list included Eric and Laurel. (3 CT 726-728.)

After the jury began deliberations in the guilt phase on Monday, October 26, 2009, the court asked Wycoff and Briggs how much time they needed to prepare for the penalty phase. (17 RT 3803.) Briggs said they were prepared to start Wednesday or Thursday morning. He added, "I don't think Mr. Wycoff is interested in delaying things much longer than that, and I don't think Mr. Peterson is either. Probably better for everybody if we just proceed as quick as we can." (17 RT 3803.)

The jury returned verdicts the next day, on Tuesday, October 27, 2009. (17 RT 3808.) That day, the parties met to discuss the People's intended

penalty phase evidence and any defense objections to it. (17 RT 3827, 3829.) The prosecutor said he would begin victim impact evidence on Wednesday or Thursday morning. Briggs asked, "Could we get an indication who those parties are?" The prosecutor said the witnesses may include Eric, Laurel, Bowman, and one or more of Paul's brothers. (17 RT 3832.) Wycoff did not object or request more information or a continuance. He objected to admission of other proposed evidence, including to admission of his booking statements and to evidence he possessed brass knuckles and sap gloves. (17 RT 3829, 3834-3835.)

The penalty phase began October 28, 2009. (5 CT 1479.) Before he testified, Eric, through his attorney, provided the parties with a motion and declaration describing some of his desired testimony. The scope of Eric's victim impact testimony was litigated on October 29, 30, and November 2, 2009, in Wycoff's presence and occasionally with his input. (5 CT 1483-1487, 1494-1500; 18 RT 3967-3979, 4049-4082; 19 RT 4087-4091.)

That Laurel would be giving victim impact testimony "similar to what Eric has indicated he would like to say" was discussed on October 29, 2009, also in Wycoff's presence. (18 RT 3979.) Laurel's testimony was discussed again on November 2, 2009, when Briggs acknowledged he "earlier received a written statement by Laurel Rogers." (19 RT 4093.) Eric and Laurel testified on November 2, 2009. (19 RT 4119-4140.)

Kent Rogers testified on November 2, 2009. (19 RT 4097-4109.) Prior to Kent's testimony, the prosecutor gave Wycoff a statement that Kent drafted and asked that Kent be permitted to read the statement. Wycoff objected, stating he wanted to "go question and answer." (19 RT 4092-4095.) After reviewing the statement, Wycoff, through Briggs, moved unsuccessfully to exclude Kent's proposed testimony on the financial impact of the murders. (19 RT 4094-4095.)

Doug Bowman testified on November 2, 2009. (19 RT 4109-4117.) Wycoff knew Bowman and previously contacted him to discuss his defense and Eric's opposition to the death penalty. (3 RT 619-620.)

B. Applicable Law

In a capital case, the prosecution may present evidence in aggravation only if it has given the defendant "notice of the evidence to be introduced . . . within a reasonable period of time as determined by the court, prior to trial." (§ 190.3.) "[P]rior to trial" means "either before the case is called to trial or before the start of jury selection." (*People v. Stitely* (2005) 35 Cal.4th 514, 562, citations omitted.)

"To be sufficient as to content, the notice must afford the defendant a reasonable opportunity to prepare a defense to the allegation." (*Tully, supra*, 54 Cal.4th at p. 1033, internal punctuation and citations omitted.) "The purpose of the statute is met where the defendant has a reasonable chance to defend against the charge." (*Stitely, supra*, 35 Cal.4th at p. 562.) The notice need not be in writing. (*People v. Turner* (1990) 50 Cal.3d 668, 708, fn. 24.) The trial court retains discretion to determine what type of notice is adequate. (*People v. Roberts* (1992) 2 Cal.4th 271, 330.) A defendant's failure to object to the notice forfeits the claim on appeal. (E.g., *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1235.)

C. The Claim Is Forfeited

Preliminarily, Wycoff's claim is forfeited. Wycoff did not object below to the prosecutor's notice of victim impact evidence, or to introduction of the evidence at all. The omission is particularly fatal here because the parties discussed the evidence after the witnesses had been identified, Wycoff received statements by three of the witnesses prior to their testimony, and Wycoff objected to other proposed aggravating evidence. (See *Hajek and Vo, supra*, 58 Cal.4th at p. 1235 [claim forfeited

where defendant did not object to evidence, either when he received prosecutor's notice or later when he sought to restrict the evidence]; *People v. Arias* (1996) 13 Cal.4th 92, 166 [claim waived where defendant never raised notice objection]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1153 [claim barred where defense counsel "did not object on notice grounds when [witness] took the stand and gave his testimony, even though counsel knew [the witness] would be testifying . . . and that [the witness's] name had not been included on the prosecutor's penalty phase witness list"].)

D. The Notice Was Sufficient

Even if the claim was preserved, it fails on the merits. Regarding Eric and Laurel, Wycoff was informed prior to jury selection that they were potential witnesses. The prosecutor was not required to provide separate pretrial notice that Eric and Laurel might testify at the penalty phase. (See *People v. Wilson* (2005) 36 Cal.4th 309, 350 ["[t]he prosecution informed [defendant], as early as voir dire, that it intended to call Torregano as a witness. The prosecution was not required to provide *separate* pretrial notice that it intended to call Torregano at the penalty phase"].)

The prosecutor's August 27, 2009 notice was also sufficient as to Kent and Bowman. This Court has found sufficient compliance with section 190.3 where the prosecution informed the defense of the nature of the evidence it intended to produce and the intent to produce witnesses not yet identified. (See *Stitely*, *supra*, 35 Cal.4th at pp. 562-563; *Rodrigues*, *supra*, 8 Cal.4th at p. 1153; *People v. Wright* (1990) 52 Cal.3d 367, 423, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.) Here, the prosecutor informed Wycoff that he would be calling victim impact witnesses well in advance of trial, and informed Wycoff of Bowman and Kent's identities before they testified. Since the notice was sufficient to afford Wycoff a reasonable opportunity to prepare a defense, no more was required. (See *Tully*, *supra*, 54 Cal.4th at p. 1033.)

Wycoff argues that general notice of victim impact evidence is insufficient under section 190.3. (AOB 152-153.) We disagree. The cases Wycoff relies on for this argument reviewed notice of intent to present other crimes evidence, not victim impact evidence. And none held that a section 190.3 notice must include the identity of potential witnesses. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1015-1016 [general notice of intent to present evidence regarding "any incident reports and disciplinary matters, involving force or violence" sufficient where defense had reports regarding unadjudicated sodomy]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1359-1360 [general notice of intent to use prior sexual assault cured by later reports detailing assault]; *People v. Yeoman* (2003) 31 Cal.4th 93, 134 [general notice of intent to present evidence of child molestation and underlying circumstances sufficient where defendant had child molestation reports]; *People v. Jennings* (1991) 53 Cal.3d 334, 354-355, 391 [counsel was not ineffective for failing to object to "general notice" of other crimes evidence where counsel received all relevant reports].)

Even if we assume the prosecutor's notice was unreasonable, any error was harmless. "In the absence of any indication that the delay in notice had in some fashion affected the manner in which defense counsel handled the prior proceedings, the appropriate remedy for a violation would ordinarily be to grant a continuance as needed to allow defendant to develop a response." (*Rodrigues*, *supra*, 8 Cal.4th at p. 1153, citations omitted.) This Court has found harmless error where the defendant failed to request a continuance or demonstrate how the delay adversely affected the proceedings. (*Cunningham*, *supra*, 25 Cal.4th at p. 1016 [finding "no reasonable possibility the defendant suffered prejudice" where defendant had not "shown he would have dealt with the witness differently had he received earlier notice that the witness would be called"]); *People v. McDowell* (2012) 54 Cal.4th 395, 422 ["any deficiency in the notice was

harmless because defendant failed to request a continuance to meet the evidence, decided not to conduct an Evidence Code section 402 hearing . . . , and has not explained how he could have rebutted or impeached the prosecution witnesses had he received notice earlier"].)

Here, Wycoff fails to show how the notice adversely affected the proceedings or how he would have developed a different response with earlier notice of the witnesses' identities. To the contrary, the record shows Wycoff would not have done anything differently. Rather than request a continuance before the penalty phase, after learning of the guilty verdicts Wycoff requested that "we just proceed as quick as we can." (17 RT 3803.) Contrary to Wycoff's argument that he "had no way of preparing for the testimony of the majority of the prosecution's penalty phase witnesses" (AOB 153), Wycoff received statements by Laurel, Kent, and Eric prior to their testimony. Wycoff did not request a continuance after reviewing those statements, or after learning that Bowman was a witness. Instead, he cross-examined Eric, Laurel, and Kent, successfully eliciting details corroborating his defense that the murders were justified and, in Eric's case, that Eric opposed imposition of the death penalty. (19 RT 4107-4109, 4127-4129, 4139-4140.) Wycoff's claim that the prosecutor's notice was insufficient should be rejected.

VI. THE COURT PROPERLY ADMITTED REBUTTAL EVIDENCE OF WYCOFF'S BAD CHARACTER, AND THE PROSECUTOR PROPERLY CROSS-EXAMINED WYCOFF

Wycoff contends the court erred by admitting rebuttal evidence in the penalty phase of his bad character—namely, that he owned a grenade launcher, owned brass knuckles, and killed cats. (AOB 158, 163-166.) Wycoff also contends the court erred by permitting the prosecutor to introduce a host of other bad-character evidence, including evidence that he destroyed various property and lied to his employers. (AOB 159-160, 167.)

We disagree. Preliminarily, Wycoff appears to confuse the introduction of this evidence below. The evidence that Wycoff owned a grenade launcher, owned brass knuckles, and killed cats was admitted in rebuttal. The other evidence to which Wycoff objects was introduced or adduced by the prosecutor during cross-examination. Since the analysis is distinct, we discuss the issues separately, in turn.

As to the claim regarding rebuttal evidence, Wycoff argues the court erred for two reasons: because Wycoff did not introduce good-character evidence in the first place, and because the prosecutor's rebuttal evidence of his bad character was impermissibly broad. (AOB 162, 166.) The first of these claims is forfeited. Wycoff admitted below that he introduced good-character evidence, and objected to the rebuttal evidence only on the grounds that it did not properly rebut the evidence he admitted. Regardless, the evidence was properly admitted to rebut Wycoff's broad claims of good character, and was not impermissibly broad.

As to the prosecutor's alleged introduction of other bad-character evidence, this claim is forfeited. Wycoff failed to object to this evidence below. Although Wycoff does not contend the prosecutor's cross-examination was improper, such a claim would in any event fail. The prosecutor properly elicited the evidence to impeach Wycoff's credibility and undermine his representations that he was a good employee who did not needlessly destroy things. The claim should be rejected.

A. Background

Police found brass knuckles and a grenade launcher in their search of Wycoff's home. (Supplemental CT 13-16.) Prior to the penalty phase, the court ruled Wycoff's possession of these weapons was inadmissible as evidence of criminal activity involving the use of force or violence or implied threat of force or violence (§ 190.3, subd. (b)). (18 RT 3872-3876.) After Wycoff's direct-examination in the penalty phase, in which Wycoff

made sweeping statements regarding his good morals, the prosecutor moved to admit the evidence to rebut Wycoff's claims of good character. Wycoff objected, arguing possession of the weapons did not show bad character. He said, "[J]ust because it's illegal, doesn't mean it's wrong," "And just because I got brass knuckles, grenade launchers and stuff doesn't mean I'm a bad person. [¶] I mean, sure, you know, I talked about I'm a good and moral person, but you know, what does having brass knuckles and grenade launchers have to do with that?" (19 RT 4249-4251.)

The court found the evidence admissible in rebuttal. It ruled that a different analysis had been raised

> by the rebuttal evidence in response to the general testimony by Mr. Wycoff that he is a person of good character, a moral person. The question is whether possession of these items rebuts that testimony. [¶] And the general presentation by Mr. Wycoff of his character are both through the testimony and through the videos that he has presented. [¶] I do believe that possession of these items does rebut the very broad testimony Mr. Wycoff gave in the sense that possession of these items in my view does involve moral turpitude because of the nature of these items are designed for harming people. They are extraordinary types of weapons that I referred to earlier that are generally considered to be possessed only for violent purposes. [¶] . . . [¶] But I think the analysis for purposes of rebuttal to a very broad claim of being a morally upstanding person of good character that Mr. Wycoff has described himself has opened the relevance of weapons that are designed to harm people and are generally possessed and used for that purpose. [¶] I think that does broaden the analysis, so I will allow the cross-examination on those issues.

(19 RT 4252-4253.) "[M]r. Wycoff will be permitted to explain what he would use to be legitimate moral uses of these weapons, but I think the analysis for purposes of whether it's relevant on rebuttal to Mr. Wycoff's testimony on direct is whether the People can reasonably argue from this evidence that its possession and use does reflect bad character or lack of morality." (19 RT 4254.)

The prosecutor also sought to admit in rebuttal homemade tapes of Wycoff discussing killing cats, "to refute Mr. Wycoff's characterization of himself as good and moral because he's committed these crimes."[33] (19 RT 4256-4258.) Wycoff objected that the evidence did not show bad character and could be argued in a way that was inflammatory. (19 RT 4257-4260.) The prosecutor argued the evidence was admissible to rebut Wycoff's claims of good moral character, and to give the jury a more accurate impression of Wycoff other than that he was "a moral person or a guy that just makes funny videotapes and jokes around . . . ." (19 RT 4261-4262.) The evidence also showed that Wycoff's representations—including that he was a good man and did not like to destroy things—were "inaccurate and deceitful." (19 RT 4264.)

The court found the evidence admissible in rebuttal because it was "clearly responsive to Mr. Wycoff's claims of good morality and the other general character evidence that he presented, which was extremely broad." (19 RT 4264.) "[M]r. Wycoff has given us a video of mantra of his life and upbringing showing many aspect[s] of his good character and he has testified to that effect." (19 RT 4265.) The court said later, "[T]he general nature of Mr. Wycoff's testimony about his character as a moral and good person, his contributions to society from his work and other aspects of his life, his general upbringing and life history and his challenges with ADHD have opened the door to the broad rebuttal evidence." (20 RT 4338.)

B. Applicable Law

"The decision to admit rebuttal evidence rests largely within the discretion of the trial court and will not be disturbed on appeal in the

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[33] These videotapes were also seized during the search of Wycoff's home. (See Supplemental CT 14.)

absence of demonstrated abuse of that discretion." (*Young*, *supra*, 34 Cal.4th at p. 1198; see also § 1093, subd. (d).)

"When a defendant places his character at issue during the penalty phase, the prosecution is entitled to respond with character evidence of its own." (*People v. Loker* (2008) 44 Cal.4th 691, 709.) "The theory for permitting such rebuttal evidence and argument is not that it proves a statutory aggravating factor, but that it *undermines* defendant's claim that his good character weighs in favor of mercy." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 791.)

> The scope of proper rebuttal is determined by the breadth and generality of the direct evidence. If the testimony is 'not limited to any singular incident, personality trait, or aspect of [the defendant's] background,' but 'paint[s] an overall picture of an honest, intelligent, well-behaved, and sociable person incompatible with a violent or antisocial character,' rebuttal evidence of similarly broad scope is warranted.

(*Loker*, *supra*, at p. 709.) "Once the defendant's 'general character [is] in issue, the prosecutor [is] entitled to rebut with evidence or argument suggesting a more balanced picture of his personality.'" (*Ibid.*)

C. The Court Properly Admitted the Rebuttal Evidence

1. Wycoff presented broad good-character evidence

Wycoff first argues the trial court abused its discretion by admitting the rebuttal evidence because Wycoff did not present evidence of good character. (AOB 162-166.)

This claim is forfeited. Wycoff objected below that the proposed rebuttal evidence was not probative of bad character, not that he did not introduce good-character evidence. (19 RT 4249-4251, 4257-4260.) Indeed, Wycoff admitted he had introduced good-character evidence, stating, "I mean, sure, you know, I talked about I'm a good and moral person, but you know, what does having brass knuckles and grenade

launchers have to do with that?" (19 RT 4251.) Having failed to object on the basis he now claims was error, the claim is forfeited. (See § 353, subd. (b); *People v. Cordova* (2015) 62 Cal.4th 104, 194 Cal.Rptr.3d 40, 72 [defendant's failure to object to evidence as improper rebuttal forfeited claim]; *People v. Thornton* (2007) 41 Cal.4th 391, 457 [objection to rebuttal evidence on unrelated evidentiary grounds rather than misconduct did not preserve issue on appeal]; *People v. Partida* (2005) 37 Cal.4th 428, 435 [objection must notify court of basis on which exclusion is sought].)

Wycoff relies on a passage taken out of context to suggest he objected to the evidence below. (AOB 159, citing 19 RT 4255-4257.) We disagree. In the exchange Wycoff cites, Wycoff objected to being surprised by video evidence in cross-examination. This prompted the prosecutor to state he planned to introduce tapes relating to Wycoff killing cats, and prompted the court to grant Wycoff the opportunity to object before being cross-examined with other evidence. (19 RT 4255-4257; 20 RT 4358, 4360, 4363-4364.) This objection did not preserve the issues Wycoff raises here. (See, e.g., § 353, subd. (b).)

Even if the claim was preserved, it fails. During his case in mitigation Wycoff broadly depicted himself as a well-behaved, non-violent person with good morals. During his direct testimony in the penalty phase, Wycoff said that he was not a bad or evil man (19 RT 4155-4156, 4240-4241); that he was a "good person" (19 RT 4156); that he wanted to "do good" (19 RT 4156); that he did not like to kill but only did so when necessary (19 RT 4271); that he was "the greatest" (19 RT 4189); that he was "not a bad man. I mean, I don't like to destroy things" (19 RT 4241); that he was "a good man" (19 RT 4241); that he was a "wonderful person" (19 RT 4241); that the world could use a man like him (19 RT 4173); that he came in and "brightened" up the room (19 RT 4242); that he was "a wonderful guy" (19 RT 4243); that he had good morals (19 RT 4156); and

that he did not "deserve to be punished. I deserve [a] reward. I'm the hero for this, you know" (19 RT 4247).

Wycoff also spent considerable time on direct-examination explaining his moral principles. Pursuant to his good morals, Wycoff claimed he murdered Julie and Paul only out of necessity and purposefully avoided harming Julie and Paul's children or unnecessarily destroying their property. Wycoff also attempted to persuade the jury that he had a number of generally redeeming qualities. His evidence and testimony suggested he did not like to destroy things, abhorred vandalism and respected the environment, abhorred sexual offenders and murderers, cared for children and the community, was a loving and protective family member, was a good friend, and was a productive and intelligent employee who would be productive in prison. (See, e.g., 19 RT 4155, 4160-4161, 4163-4164, 4166-4169, 4189, 4195 [Wycoff explaining he was an intelligent man who belonged "out there fixing things"], 4240 ["if I was a bad man, . . . I could have just leveled off that house," "[I] could have cooked up a bunch of this . . . but I'm not a bad man"], 4241 ["there were kids in the house . . . [I] could have leveled that whole property," but "[I] choose not to do that, I'm a good man"], 4197 ["There you see that I'm a genius. I know how to fix things"], 4271 ["The people of El Cerrito should thank me and be happy with me as a person for removing two crooks, two rip-off artists from their city"]; see also Def. Exhs. H [Wycoff stating he was one of the "good drivers"], C [Wycoff appreciating a solar eclipse with friends], F [Wycoff explaining he innovated to combat inclement weather as a truck driver], H [Wycoff and friends lighting rockets], E [Wycoff and his family during Christmas], K [Wycoff removing graffiti from his truck], L [Wycoff appreciating the beauty of Mt. Evans], M, R [Wycoff appreciating a view of

Lake Tahoe], U [Wycoff showcasing his generosity toward his family during Christmas], W [Wycoff deploring graffiti on Mount Butte].)[34]

After completing his presentation of videotapes, Wycoff told the jury he brightened the mood by making them laugh. This showed the kind of person he was. He was funny and entertaining. (19 RT 4242-4423.) Wycoff also presented the testimony of two witnesses who portrayed him as selfless and caring. (19 RT 4204-4219.) The court thus properly found that the "general nature of Mr. Wycoff's testimony about his character as a moral and good person, his contributions to society from his work and other aspects of his life, . . . have opened the door to the broad rebuttal evidence." (20 RT 4338; see *People v. Mitcham* (2007) 1 Cal.4th 1027, 1072 [rebuttal evidence of defendant's acts of delinquency, including incidents of violence, properly rebutted general picture of the defendant as a well-behaved youth; "defendant's good character evidence was not limited to any singular incident, personality trait, or aspect of his background. The defense evidence painted an overall picture of an honest, intelligent, well-behaved, and sociable person incompatible with a violent or antisocial character. The breadth and generality of this good character evidence warranted rebuttal evidence of the scope offered"].)

Wycoff contends he did not present good-character evidence because no reasonable juror could have perceived his assertions of good morals to be anything other than a delusion. (AOB 162-166.) We disagree. We are aware of no case, and Wycoff provides none, which holds that good-character evidence is insulated from rebuttal due to hindsight speculation that such evidence was unpersuasive. As in previous sections, this

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[34] Wycoff states that "[m]any of the videotapes [that he played in the penalty phase] had no sound" (AOB 156), but all had sound. (See Def. Exhs. B through Z.)

argument also appears to simply revisit Wycoff's earlier argument that he should not have been permitted to represent himself. But Wycoff was properly permitted to do so, and Wycoff himself does not contend on appeal he was incompetent. (AOB 88, fn. 8.)

Regardless, Wycoff's analysis is flawed. To argue that his good-character evidence was delusional, Wycoff relies primarily on assertions he made during cross-examination *justifying* the rebuttal evidence after it was already admitted—for example, that he testified he killed cats only to protect wildlife and stole from employers only because they deserved it. (AOB 163-165.) But this argument confuses the good-character evidence at issue with Wycoff's explanations of the rebuttal evidence. It was Wycoff's initial claims of good morals, made generally and on direct-examination, that opened the door to the rebuttal evidence. Wycoff's attempts to explain away the evidence on cross-examination cannot be the basis for asserting on appeal that it should not have been permitted in the first place.

2. The rebuttal evidence properly responded to Wycoff's good-character evidence

As to Wycoff's second claim that the prosecutor's rebuttal evidence was impermissibly broad (AOB 166-167), that claim is preserved because Wycoff raised this objection below. Nonetheless, the claim fails. The rebuttal evidence properly responded to Wycoff's broad portrayal of himself as a man of good morals.

First, Wycoff's possession of brass knuckles and a grenade launcher suggested he had a violent character, contrary to his depiction of himself as a man who abstained from unnecessary destruction and resorted to violence as a last resort. (See *People v. Hinton* (2006) 37 Cal.4th 839, 902 ["Evidence of weapons possession, as well as evidence of violent conduct,

'would reasonably implicate a violent character'"]; see also *Mitcham, supra*, 1 Cal.4th at p. 1072].)

Second, the tapes of Wycoff discussing killing cats were properly admitted. In the first tape, Wycoff admitted shooting a cat twice and beating it to death. He also admitted the cat belonged to his friend and neighbor, that he planned to frame another neighbor for the cat's death, that he returned to the scene to cover up the evidence, and that he had killed at least 17 cats. (People's Exh. 73.) In the second video, Wycoff lied to his friend about killing his cats and suggested that another neighbor was responsible. (People's Exh. 74.) This evidence rebutted Wycoff's claims that he did not like to destroy things and suggestion that, outside of the murders, he abstained from violence. (See *People v. Visciotti* (1992) 2 Cal.4th 1, 68 [evidence of prior assaultive behavior properly rebutted defendant's attempt to persuade jury that his violent acts were uncharacteristic and that he normally treated people with concern and respect]; *Cordova, supra*, 194 Cal.Rptr.3d at pp. 72-73 [prior sex offenses admissible to paint a more balanced picture of defendant where defendant presented substantial and wide-ranging evidence of good character, including that he was "always a nice, kind person"].)

In addition, evidence that Wycoff lied to his friend, contrived to frame a neighbor, and destroyed evidence tended to show Wycoff was lying and deceitful. It also tended to show that—though Wycoff claimed to believe his actions were justified—he recognized his actions were not justified.

Finally, that Wycoff documented his killing of cats rebutted the impression he gave the jury that he was someone who simply enjoyed innovating and making tapes to make people laugh. The prosecutor was entitled present a picture of Wycoff other than that he was humorous and otherwise harmless. (See *Rodriguez, supra*, 42 Cal.3d at p. 791 [where defendant offered substantial evidence and argument that he was a kind,

loving, contributive member of his community, regarded with affection by neighbors and family, prosecutor was entitled to rebut with evidence or argument suggesting a more balanced picture of his personality]; *Thornton*, *supra*, 41 Cal.4th at pp. 457-458 ["in light of the defense presentation [that defendant was a victim of substandard upbringing, had psychological difficulties, and had always been and still was a nice person], the prosecutor was entitled to introduce in rebuttal that defendant was cruel and callous toward others in varied situations, suggesting that intrinsic evil rather than external circumstances out of defendant's control predominated in governing his behavior or was the sole cause of it"].)

Even if the court abused its discretion, there is no reasonable possibility that admission of the evidence affected the verdict. (See *Loker*, *supra*, 44 Cal.4th at p. 726; *People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn. 11 [state law error occurring during the penalty phase is prejudicial when there is a reasonable possibility the error affected the verdict].) Wycoff's possession of brass knuckles and a grenade launcher formed a negligible part of his cross-examination. (See 20 RT 4416-4417.) The evidence that Wycoff killed cats, though probative of Wycoff's violence, was minor compared to other evidence of Wycoff's violence. In any event, that Wycoff believed in killing animals who killed "off the good things" was already in evidence. (9 CT 2226.) Wycoff cannot show reversible error on this record. (See *Medina*, *supra*, 11 Cal.4th at p. 770 [rebuttal testimony was "too minor to have resulted in prejudice. As previously indicated, the jury was well aware of defendant's violent tendencies"].)

D. The Prosecutor Properly Cross-Examined Wycoff

As part of the same argument, Wycoff contends the court erred by admitting in rebuttal evidence that he: destroyed a gate, destroyed a no-parking sign, embezzled ammonium nitrate from his employers, drove a car across a soccer field, lied to obtain trucking jobs, falsified log books, stole

fire extinguishers from his employers, said he wanted to kill someone who vandalized his trailer, threated his lawyers with violence, once took firearms into Canada, and possessed book about violence and evading law enforcement. (AOB 159-160, 167.)

We disagree. First, Wycoff suggests the evidence was admitted by the court in rebuttal. It was not. The court's ruling on rebuttal evidence—and the parties' discussion of that evidence—was limited to evidence that Wycoff possessed a grenade launcher, possessed brass knuckles, and admitted to killing cats. (19 RT 4256-4260, 4264-4265; 20 RT 4338.)

In contrast, the other evidence to which Wycoff objects (AOB 159-160, 167) was adduced by the prosecutor during cross-examination (see 19 RT 4283, 4286, 4318, 4307, 4309, 4291, 4319; 20 RT 4418-4422, 4366-4367, 4371-4372, 4406), and was never addressed by the parties below. Wycoff nowhere contends the prosecutor's cross-examination was improper, and never objected in the trial court on that basis. Wycoff's failure to make such a challenge, thereby establishing a record below, forfeited the issue. (See *Thornton, supra*, 41 Cal.4th at p. 457; *People v. Farnam* (2002) 28 Cal.4th 107, 187 [although defendant preserved section 190.3 claims as to prosecutor's cross-examination, he "forfeited review of the permissible scope of cross-examination because he failed to interpose a timely objection to the prosecutor's questions"].) Wycoff cannot leverage the court's ruling on rebuttal evidence to contend that an unrelated alleged error now inures to his benefit.

Nonetheless, the claim fails on the merits. "A prosecutor is permitted wide scope in the cross-examination of a criminal defendant who elects to take the stand." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1147; see also *People v. Wilson* (2005) 36 Cal.4th 309, 335.)

> A defendant cannot, by testifying to a state of things inconsistent with the evidence presented by the prosecution, thereby limit cross-

> examination to the precise facts concerning which he testifies. Rather, when a defendant testifies, the prosecutor 'may fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them.'

People v. Hawthorne (2009) 46 Cal.4th 67, 100, internal citations omitted, overruled on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637; see also § 773, subd. (a).) "[A] proper attack on a witness's credibility does not consist solely of berating the witness; it requires presenting or eliciting additional evidence which bears on the witness's credibility." (*People v. Zambrano* (2004) 124 Cal.App.4th 228, 240.)

Accordingly, here the prosecutor adduced evidence to undermine Wycoff's factual representations on direct-examination and impeach his credibility. As previously demonstrated, in his videos and testimony Wycoff conveyed that he was a skilled and resourceful truck driver, was a good employee, and disliked the needless destruction of property. Accordingly, the prosecutor asked Wycoff if ammonium nitrate to which he referred in his videos was stolen from his employers, to which he volunteered, "No. I embezzled it." (19 RT 4283.) The prosecutor also adduced admissions that Wycoff destroyed a sign in Florida (19 RT 4318), stole fire extinguishers from his employers (19 RT 4306), damaged a soccer field by driving across it (19 RT 4308-4309), had been suspended for falsifying log books (19 RT 4286, 4318), took firearms in and out of Canada in his truck despite knowing it was illegal (20 RT 4366-4377), and bragged that he lied about his driving record to obtain employment (19 RT 4291-4292). The prosecutor further introduced a tape in which Wycoff admitted he destroyed a gate, a fact that contradicted Wycoff's

representation that he deplored vandalism and destruction. (20 RT 4370-4372; People's Exh. 76.)[35]

Some of the evidence to which Wycoff objects was volunteered by Wycoff during questioning on unrelated subjects. For example, the prosecutor did not introduce evidence that Wycoff wanted to kill someone who vandalized his truck. (AOB 160.) Instead, Wycoff volunteered this fact in the context of explaining other evidence—specifically, in describing why he sought to frame a neighbor for the cat killing. (19 RT 4319 [Wycoff explaining that he wanted to get revenge against his neighbor, Lee, because he believed Lee had been vandalizing his trailer, and offering "[s]omebody almost got killed" for vandalizing his trailer].)

Similarly, it was Wycoff, not the prosecutor, who introduced that Wycoff had threatened his attorneys with violence. (20 RT 4405-4406 ["Q. You threatened several of your attorneys, correct? [¶] A. Well, sure. I mean, when I found out they were not good, you know, I told them 'Hey, get off my case.' . . . [¶] And you know, I had to start getting violent with them and started playing games jerking them around"].) It was also Wycoff, not the prosecutor, who introduced that Wycoff "embezzled" employers' property. (19 RT 4283.)

Regardless, all of the evidence was properly adduced. Wycoff's response to the prosecutor's questioning introduced facts showing he maintained employment through fraud, lied to his employers, stole from employers, and destroyed things, thereby undermining his representations

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[35] The prosecutor's questioning indicates he learned of these facts from Wycoff's homemade tapes or from records obtained from Wycoff's home. Wycoff does not dispute the accuracy of these facts and does not contend the prosecutor lacked a good faith belief that the conduct took place. (See *Loker*, *supra*, 44 Cal.4th at p. 709 ["The prosecution need only have a good faith belief that the conduct or incidents about which it inquires actually took place"].)

that he was a productive employee who did not like destruction. That Wycoff threatened his attorneys and possessed books relating to destruction, violence, and evading law enforcement (20 RT 4417-4420) also impeached his assertions and suggestions that he was a good person who did not needlessly resort to violence. Whether adduced as cross-examination or in rebuttal, this were proper. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1204 [cross-examination introducing defendant's disciplinary violations in custody proper to impeach his testimony that, apart from one other incident, he had no problems in jail]; *People v. Brown* (2003) 31 Cal.4th 518, 579 [testimony of witnesses properly admitted as rebuttal of mitigating evidence that defendant was a hardworking person]; *People v. Fierro* (1991) 1 Cal.4th 173, 239 [cross-examination of character witnesses regarding defendant's failure to financially support family admissible for impeachment and rebuttal, where witnesses testified defendant was a loving, supportive family member]; *Visciotti*, *supra*, 2 Cal.4th at p. 68.)

Wycoff suggests that the evidence adduced was impermissibly broad because it simply proved he was "evil" and did not relate to a particular character trait. (AOB 167.) We disagree. Even if characterized as rebuttal evidence, the evidence directly undermined Wycoff's alleged "character as a moral and good person, his contributions to society from his work and other aspects of his life" (20 RT 4338), and his claims, as the prosecutor pointed out, that he was "'[n]ot a bad man. Good man. Moral man. Don't like to destroy things[.]" (19 RT 4264.) Regardless, although this Court has "cautioned . . . that 'the scope of rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf[,'] here defendant's good character evidence was not limited to any singular incident, personality trait, or aspect of his background." (*Mitcham*, *supra*, 1 Cal.4th at p. 1072, internal citations omitted.)

Contrary to Wycoff's suggestion (AOB 167), it was also not improper for the jury to consider rebuttal evidence unrelated to a specific aggravating factor. (See *Mitcham*, *supra*, 1 Cal.4th at pp. 1072-1073 [rebuttal evidence need not relate to any specific aggravating factor].) To the extent Wycoff suggests the jury was misguided about the purpose of the rebuttal evidence (AOB 167), an issue he did not raise below, that claim is forfeited and also fails. The jury was properly instructed that the evidence was admitted on the issue of character and was not admissible as evidence of an aggravating circumstance. (20 RT 4472; 6 CT 1510.)

Finally, there is no reasonable possibility the alleged error affected the verdict. (*Loker*, *supra*, 44 Cal.4th at p. 726.) At least some of the tapes Wycoff admitted on his own behalf already suggested he destroyed property or lied to his employers. (See, e.g., Def. Exhs. K [taking torch to trailer to cover graffiti], N [removing branch from trailer so load fell out], O, P [manipulating truck filter so transmission fluid erupted], S ["it said break light, so I broke it"], T [opening truck doors despite admitting he knew the load would fall out, and stating he liked trucking because it was dangerous], X [stating of accident that it "was pretty cool," and telling bystander he had a good driving record but "shouldn't have overloaded" the truck].) That Wycoff threatened his attorneys was also already in evidence. (18 RT 3996-3997, 4007-4008.) The jury would not have reached a different penalty determination had the prosecutor abstained from eliciting more detail about this conduct. The claim should be rejected.

VII. WYCOFF WAS NOT UNCONSTITUTIONALLY DEPRIVED OF ERIC ROGERS'S TESTIMONY AT THE PENALTY PHASE

Wycoff contends the court erred by precluding Eric from testifying at the penalty phase that (1) Wycoff should not be executed because he was mentally unwell, and that (2) Eric did not want Wycoff executed because it would further exacerbate Eric's pain. (AOB 174-175.) We disagree.

First, Wycoff does not have standing to bring these claims because it was Eric, not Wycoff, who made these requests below, under the Victims' Bill of Rights Act of 2008, also known as Marsy's Law. (Cal. Cons., art. I, § 28, subd. (b)(8).) Second, Wycoff is estopped from appealing the court's ruling because he failed to join Eric's request and later objected to them.

Regardless, the claims fail on the merits. The first claim—that the court erred by precluding Eric from testifying that Wycoff was mentally unwell—misapprehends the record. Rather than precluding Eric from so testifying, the court permitted Eric to testify that Wycoff should not be executed because he was mentally unwell.

As to the second claim—that the court erred by precluding Eric from testifying that Wycoff should not be executed because it would exacerbate Eric's pain—that ruling was sound. The court properly precluded Eric from so testifying because the proposed testimony sought to improperly introduce Eric and his parents' opposition to the death penalty.

A. Background

Prior to the introduction of victim impact evidence, Eric, through his attorney Ted Cassman, asserted an independent right to testify under Marsy's Law. (18 RT 3967; 5 CT 1483-1486.) Eric sought to testify that he, Julie, and Paul were opposed to the death penalty and that imposition of the death penalty would exacerbate his pain. (18 RT 3973, 4064-4067; 5 CT 1486.) Imposition of the death penalty would exacerbate Eric's pain because it would bring appeals rather than finality, and was a "sanction imposed on a member of [Eric's] family that is abhorrent to his parents and what he believes." (18 RT 4070.) Eric also sought to testify that the death penalty was inappropriate due to certain of Wycoff's characteristics. (18 RT 4068-4069, 4074; 19 RT 4087-4088.)

Cassman and the prosecutor litigated the scope of Eric's testimony over three days. (18 RT 3967-3979, 4049-4082; 19 RT 4087-4090.) The

prosecutor argued Eric did not have an independent right to testify at the trial under Marsy's Law, could not testify about the impact the death penalty would have on him, and could not testify that he, Julie, and Paul were opposed to the death penalty. However, the prosecutor agreed the law permitted Eric to testify that Wycoff should not receive the death penalty due to his characteristics, including because he had childlike qualities, was immature, or had other mental issues. (18 RT 3967, 3974, 4051-4058, 4072-4074, 4077-4078.)

Wycoff initially chose not to take a position. He recognized Eric's proposed testimony was beneficial for him, stating, "[I] want to fight this case" (18 RT 4061), but explained he was angry because Cassman had snubbed him (18 RT 4059-4064, 4078, 4081-4082).

In a written order issued November 2, 2009, the court ruled Julie and Paul's beliefs about capital punishment were inadmissible. However, Wycoff could elicit from any relative, witness who knows him, or witness with whom he had a substantial relationship evidence relating to Wycoff's background or character, including whether Wycoff should be sentenced to life without parole if that opinion was based on or reflected on Wycoff's character. (5 CT 1494-1498.) Wycoff could elicit Eric's opinion that he should not receive the death penalty because of his characteristics, including his childlike characteristics or immaturity. Eric could not testify that he was generally opposed to the death penalty. (19 RT 4087-4089.)

In relevant part, on direct-examination Eric described Paul as "liberal," "forgiving," and someone who "let things slide." (19 RT 4120.) He described Julie as "compassionate, liberal," and "incredibly patient and forgiving." (19 RT 4120-4121.)

> [S]omething that is really important in describing both of them is that they didn't believe in like bad people, like we struggled growing up, we got in a lot of trouble and they never thought that we were bad, just that our actions maybe needed adjusting, and they were not

> vengeful. They wouldn't react out of anger, they didn't—I feel like if they were alive today they would have something to say to all of us.

(19 RT 4121.) Eric said the last image he had of his father was "[d]edicated and forgiving, forgiving." (19 RT 4122.) The last image he had of his mother included that she was "compassionate" and "very forgiving as well." (19 RT 4122.)

In the following exchange, Wycoff elicited on cross-examination Eric's opinion that Wycoff should not receive the death penalty:

> Q. Eric, there are two punishments that need to be decided upon. Which punishment do you think I should get?
>
> A. I think you should get life without the possibility of parole. I think it would be wrong for you to get the death penalty, you specifically, because you're mentally childish. You're very immature for your age. [¶] I know people who have known you for a long time, and they say you haven't changed much since you were about nine years old. [¶] People have witnessed you in the courtroom behaving like a child—
>
> MR. PETERSON: Objection, your Honor, to the narrative at this point.
>
> THE COURT: I think the question has been answered. [¶] Your next question, Mr. Wycoff.

(19 RT 4127.) Wycoff did not elicit from Eric additional information about his mental characteristics or ask any further questions about why he should not receive the death penalty. (19 RT 4128-4129.)

Wycoff subsequently testified that Eric was a "good man" and stated he should not receive the death penalty. (19 RT 4154.) Wycoff attempted to rebut Eric's evaluation that he was immature (19 RT 4155), but said, "[E]ric's wishes should [be] honored. I mean, it takes a real man to go against what everyone else wants." (19 RT 4173).

Cassman reasserted Eric's independent right to testify near the conclusion of the penalty phase. (20 RT 4428.) Cassman asked the court to reconsider its rulings preventing Eric from testifying about Julie and Paul's opposition to the death penalty, about Eric's own opposition to the death penalty, and about the "the additional pain and suffering that the imposition of the death penalty would inflict upon [Eric] knowing that it was contrary to his parents' wishes and to his own wishes." (20 RT 4429.)

Cassman also complained that Wycoff failed to elicit enough evidence about his mitigating characteristics. (20 RT 4429-4430.) Independent of direct-examination, Cassman requested that Eric be permitted to explain further that Wycoff's characteristics warranted life without parole:

> We believe [Eric's] testimony was cut short in this matter in a way that a trained attorney for the defense might have avoided. [¶] As I recall, Eric started to describe Mr. Wycoff's behavior here in court and an objection was interposed by the prosecution, which may have been quite appropriate as to that specific issue, but Eric had other things to say, which were not then elicited on behalf of the defense. And we believe that in these unique circumstances here with a pro se defendant that—that his right to be heard was frustrated and tarnished.

(20 RT 4430.) If given the opportunity, Cassman said Eric would testify that Wycoff was not mentally well and was emotionally unstable, that Eric did not believe Wycoff was evil or bad, that Eric remembered Wycoff to be a caring person, and that Eric "believes it all just gets twisted up inside his uncle's mind and comes out wrong." (20 RT 4430.)

Finally, Cassman requested that Eric be permitted to testify that the majority of his family opposed the death penalty and that only one member of the family desired that Wycoff receive the death penalty. Cassman said this would rebut Wycoff's testimony that "the rest of Eric's family disagreed with Eric's position on the death penalty." (20 RT 4431.)

Having previously taken no position, Wycoff now objected to Cassman's request, explaining that Cassman had continued to snub him. (20 RT 4433-4435.)

The court reaffirmed its rulings, finding that Eric's proposed testimony sought to introduce inadmissible evidence. (20 RT 4437-4439.) The court ruled that Marsy's Law did not confer upon Eric an independent right to testify; in any event, Marsy's Law did not abrogate the protections of the Eighth Amendment barring admission of the victim's family members' opinions about the defendant and the appropriate punishment. (20 RT 4437-4439; see *Booth v. Maryland* (1987) 482 U.S. 496, overruled on other grounds in *Payne v. Tennessee* (1991) 501 U.S. 817, 830, fn. 2.)

The court held that the bulk of Eric's proposed testimony had already been admitted. (20 RT 4439.) Nonetheless, in regards to the additional testimony of Wycoff's mental characteristics proposed by Cassman, the court ruled Wycoff could still elicit additional mitigating evidence if he chose. However, the court said it could not legally force Wycoff to present mitigating evidence or order the evidence presented over Wycoff's opposition. (20 RT 4439-4440.)

B. Wycoff Does Not Have Standing to Assert an Alleged Violation of a Victim's Rights Under Marsy's Law

First, Wycoff does not have standing to appeal the alleged errors. Eric's requests below were made pursuant to Marsy's Law, which conferred only upon victims of crime additional constitutional rights.

Specifically, Marsy's Law grants *victims* the right "[t]o be heard, upon request, at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the *victim* is at issue." (Cal. Const., Art. I, § 28, subd. (b)(8), italics added.) Moreover, Marsy's Law conferred only upon victims the ability to enforce these rights,

stating that "A *victim*, the retained attorney of a *victim*, a lawful representative of the *victim*, or the prosecuting attorney upon request of the *victim*, may enforce the rights enumerated in subdivision (b) in any trial or appellate court with jurisdiction over the case as a matter of right." (Cal. Const., Art. I, § 28, subd. (c)(1), italics added; see also *id.*, subds. (a)(1) [stating the finding that, "The rights of victims of crime and their families in criminal prosecutions are a subject of grave statewide concern"], and (a)(3) [stating the finding that, "The rights of victims pervade the criminal justice system. These rights include personally held and enforceable rights described in paragraphs (1) through (17) of subdivision (b)"].)

Being neither a victim of a crime nor a victim's representative, Wycoff cannot challenge the erroneous denial of a victim's right to be heard under Marsy's Law. (See also § 1237, subd. (b) [defendant can appeal from any order affecting the substantial rights of the party].)

C. Wycoff Is Estopped from Bringing the Claims

Second, even if there was error, Wycoff is estopped from bringing his claims because he submitted to and then objected to the testimony below, thus joining the prosecutor's objection and consenting to the court's rulings. (See *People v. Rodriguez* (1994) 8 Cal.4th 1060, 1133-1134 [counsel's failure to object and affirmative consent to instructions barred appellate review]; *People v. Davis* (2005) 36 Cal.4th 510, 539 [defendant's express agreement to instruction barred him from challenging instruction on appeal]; *People v. Gonzalez* (2011) 51 Cal.4th 894, 938 ["many of the instructions with which defendant now quibbles were not objected to below, or were requested by defense counsel"].)

Wycoff attempts to avoid this result by arguing that "in his own delusional way, [he] objected," because "Wycoff did not object to Eric's testimony, he only objected to Eric's attorney." (AOB 175-176.)

Not so. Wycoff's decision to submit to and then object to Eric's testimony was deliberate, and made with full understanding of its consequences. As he told the court, "[I] want to fight this case, but I'm a vindictive man." (18 RT 4061.) Wycoff also explained he found Cassman's representation to be false: "Well, I just heard Mr. Cassman's spiel, and, you know, all of this lovey-dovey talk, I don't believe in an eye for an eye and all of this. And Julie and Paul did not believe in peace and all of that stuff. That was just a façade, a front. [¶] Submitted. Just submitted." (18 RT 4078.) Regarding his choice to object, Wycoff later repeated that he was a "vindictive man." (20 RT 4434.) Although Wycoff's decision was not based on legal relevancy, he stated as much. The choice to object was deliberate, not delusional.[36]

In a second attempt to preserve the claims, Wycoff suggests the court is to blame for inducing Wycoff's "delusional objection" by sustaining the prosecutor's objection during Wycoff's cross-examination of Eric. (19 RT 4127-4129; AOB 176 ["Had the court not erred in the first instance, Wycoff's delusional objection would never have occurred"].) This claim lacks merit. The court said of the prosecutor's objection during Wycoff's cross-examination: "I think the question has been answered. [¶] Your next question, Mr. Wycoff." (19 RT 4127.) How this comment induced Wycoff's subsequent "delusional objection" is unclear.

Regardless, this Court may not overlook Wycoff's objection because Wycoff now claims his objection was delusional. As previously explained, Wycoff's attempts to circumvent the rules of forfeiture in this manner

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[36] Indeed, Wycoff later attempted to rebut Eric's testimony that he was childish and immature. (19 RT 4155.) It is thus clear Wycoff did not want to elicit any further evidence of his mental characteristics, and that he deliberately did not ask further questions on the subject even after the court permitted him to do so.

merely reassert his earlier argument that he should not have been permitted to represent himself. Wycoff, however, does not allege on appeal that he was actually incompetent. (See AOB 88, fn. 8.) We know of no case absolving a self-represented defendant from the rules of forfeiture or estoppel due to hindsight argument that an objection or lack thereof was unfounded. The claims are barred.

D. The Court Did Not Preclude Eric from Testifying About Wycoff's Mitigating Mental Characteristics

Even if the claims were cognizable, they fail on the merits. First, Wycoff's argument that the court erred by preventing Eric from testifying that he should not receive the death penalty because he was not mentally well, because he was mentally childish, and because he was not evil (AOB 174-175) is inaccurate. The court never precluded Eric from testifying about Wycoff's mitigating characteristics. To the contrary, the court ruled—initially and after Cassman's later offer of proof—that Eric could testify about Wycoff's mitigating characteristics, including about why his mental characteristics warranted life without parole. (19 RT 4087-4089; 20 RT 4439-4440; 5 CT 1498.) Eric did testify about these characteristics, stating it would be wrong for Wycoff to receive the death penalty because he was mentally childish and immature, and adding that people who had known Wycoff said he had not changed much since childhood. (19 RT 4127.) Although Wycoff did not elicit further information on the subject, that was his choice.

Wycoff recognizes the court "expressly stated [in its written order] that Wycoff could elicit testimony from any family member the opinion that Wycoff should be sentenced to life without parole if that opinion was based upon Wycoff's background or character" (AOB 174), but argues the court's error lies in "inexplicably" "preventing[] this testimony by cutting-off Eric's cross-examination" during cross-examination (AOB 174-175).

We disagree. In the exchange to which Wycoff refers, duplicated above (19 RT 4127), the court did not preclude Wycoff from introducing additional evidence of mental state. Instead, the court told Wycoff to ask another question after the prosecutor objected on the basis of "narrative." There is no basis for Wycoff's allegation that the court precluded further testimony on the subject, especially because the court also later ruled Wycoff could elicit additional evidence on the subject. (See *Tully*, *supra*, 54 Cal.4th at pp. 1014-1015 [court did not sustain objection to "narrative" by responding, "All right. The answer up to this point can remain. Next question"]; see also Evid. Code, § 765, subd. (a) [court shall exercise reasonable control over mode of interrogation]; *People v. Allen* (1986) 42 Cal.3d 1222, 1270 [court did not "preclude" counsel from questioning witness on subject where court invited counsel to explain relevance of such evidence and said it would permit cross-examination on the subject].)

Regardless, Wycoff forfeited this claim. Where, like here, there is no evidence to suggest the court knew it was overlooking a question's probable relevance on cross-examination, counsel must make an offer of proof as to the relevance of the testimony to preserve the issue on appeal. (Evid. Code, § 354; *Allen*, *supra*, 42 Cal.3d at p. 1270, fn. 31 [counsel must make offer of proof as to question's relevance if it is clear trial court overlooked the probable relevance, even where objection is sustained to question on cross-examination]; see also *People v. Burton* (1961) 55 Cal.2d 328, 344 [same, abrogated on other grounds in *People v. Brown* (1994) 8 Cal.4th 746, 755].) Since Wycoff did not do so, his claim is forfeited.

E. The Court Did Not Err by Precluding Eric from Testifying That Imposition of the Death Penalty Would Exacerbate His Pain

Wycoff also contends the court erred by precluding Eric from testifying that imposition of the death penalty would exacerbate his pain and suffering. (AOB 174-18.)

We disagree. Even if the issue was cognizable, the court's ruling was proper. Eric sought to testify that imposition of the death penalty would exacerbate his pain specifically because he and his parents opposed the death penalty. (18 RT 4070 [Cassman explaining that the death penalty would exacerbate Eric's pain because it is a "sanction imposed on a member of [Eric's] family that is abhorrent to his parents and what he believes"]; 20 RT 4429 [Cassman requesting that Eric be allowed to testify about "the additional pain and suffering that the imposition of the death penalty would inflict upon him knowing that it was contrary to his parents' wishes and to his own wishes"].)

It is well settled, however, that "'the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment.'" (*Payne*, *supra*, 501 U.S. at p. 830, fn. 2 [citing and leaving intact the holding to the same effect of *Booth*, *supra*, 482 U.S. 496].) Thus, this Court has found that evidence of a victim's opposition to the death penalty is properly excluded. (See *People v. Lancaster* (2007) 41 Cal.4th 50, 98 [affirming ruling barring victim's friend from testifying about victim's opposition to the death penalty; "[victim's] opposition to the death penalty as a matter of principle, if indeed it could have been established, was not evidence of defendant's character" (internal citations omitted)]; *People v. Smith* (2003) 30 Cal.4th 581, 622-623 [affirming ruling barring one of the defendant's victims from testifying that she opposed death penalty].)

Wycoff variously states that the court prevented Eric from testifying that he should not be executed because of his mental characteristics and that Wycoff's acts caused him pain and tragedy. (See AOB 176-178.) This is inaccurate. The court precluded Eric from testifying that imposition of the death penalty would exacerbate his pain, not from testifying that Wycoff should not be executed or that Wycoff's acts caused him pain.

Finally, Wycoff argues the court should have permitted Eric to testify that his family opposed the death penalty in order to rebut Wycoff's alleged misrepresentations on the subject. (AOB 178, 180.) But this claim makes too much of Wycoff's alleged misrepresentations. Wycoff testified that Eric's opinion "went against the opinions of his family and a lot of other people" (20 RT 4154), not that everyone in the Rogers family desired imposition of the death penalty. Wycoff's testimony was also not necessarily inaccurate. The record supports that at least one person in Eric's family desired imposition of the death penalty. (20 RT 4431.) Regardless, the testimony was improper. (See *Payne*, *supra*, 501 U.S. at p. 830, fn. 2.) The court did not err by excluding the testimony.

F. Wycoff Was Not Prejudiced

Even if we assume the court erred, Wycoff was not prejudiced. Eric testified that Wycoff should not receive the death penalty because he was mentally childish and immature. (19 RT 4127.) Although the jury did not hear testimony that Julie and Paul opposed the death penalty, Eric emphasized that his parents were "forgiving," "liberal," "not vengeful," and did not "react out of anger." (19 RT 4120-4122.) He went so far as to testify: "I feel like if they were alive today they would have something to say to all of us." (19 RT 4120-4122.) Regardless, Eric's own opposition to the death penalty—and the suggested opposition of his parents to the death penalty—was already in evidence. (See 8 CT 2193 [Wycoff stating in

admitted jail call that Eric was opposed to the death penalty and that Paul was also "in some ways a real humanitarian" and liberal].)

The jury was thus aware that Eric opposed the death penalty, that he did so based on Wycoff's mitigating mental characteristics, and that his parents likely opposed the death penalty. (See 20 RT 4439 [court stating that the bulk Eric's proposed testimony had already been admitted].) It is thus not reasonably possible that the jury would have returned a different penalty verdict but for the assumed error. (See *People v. Ervin* (2000) 22 Cal.4th 48, 103 [defendant was not prejudiced by exclusion of chaplain's opinion that imposing the death penalty was inappropriate; "in light of the whole record, it is not reasonably possible that the jury would have returned a different penalty verdict but for the assumed error"]; *People v. Mickle* (1991) 54 Cal.3d 140, 194 [although court erroneously sustained prosecutor's objection when witness was asked whether defendant should be sentenced to death, no prejudice occurred because "despite the court's ruling, the jury was fully informed that the Baileys believed defendant's life should be spared"].) Since Wycoff fails to show error or prejudice, his claims should be rejected.

VIII. THERE WAS NO CUMULATIVE ERROR

Wycoff contends that numerous errors in the guilt and penalty phases require that the death judgment be reversed. He also argues: "It is particularly true that an error at the guilt phase of trial, while not requiring the reversal at that stage of trial, may have an impact on the jury's penalty determination." (AOB 187.)[37]

We disagree. Wycoff fails to demonstrate how the alleged guilt phase errors individually or cumulatively affected the guilt verdict. Moreover, Wycoff fails to demonstrate error or prejudice in either phase of the trial, so

[37] Wycoff makes this argument in Section IX of his brief.

there is no reasonable possibility that a different penalty verdict would have been reached absent the alleged errors. The claim must be rejected. (See *Rogers*, *supra*, 39 Cal.4th at p. 911 [where guilt phase errors did not cumulatively affect guilt phase result, and each penalty phase error was harmless individually, "[w]hen considered cumulatively with the guilt phase errors, we likewise find no reasonable possibility that a different penalty verdict would have been rendered absent these errors. The errors therefore were harmless beyond a reasonable doubt"]; *Gamache*, *supra*, 48 Cal.4th at p. 379 [rejecting argument that cumulative effect of guilt phase errors required reversal of penalty phase verdict; single guilt phase error had no impact on guilt verdict, "[n]or has Gamache shown how it possibly could have affected the penalty phase verdict"].)

IX. CALIFORNIA'S DEATH PENALTY LAW IS CONSTITUTIONAL

Wycoff asserts a number of challenges to California's death penalty statute and accompanying jury instructions, though he acknowledges these claims have been consistently rejected. (AOB 188-196.)[38] We briefly address the claims below. As to each, we assert that Wycoff provides no reasoned basis for reconsidering or distinguishing this Court's decisions rejecting his claims.

A. Section 190.3, Subdivision (a), Is Not Arbitrary or Capricious

Wycoff contends section 190.3, subdivision (a), fails to guide the jury's deliberations, resulting in arbitrary and capricious imposition of the death penalty. (AOB 189-190.) He also contends his Sixth Amendment right to a jury was violated because the jury was not required to unanimously find a single aggravating factor true, nor find any true beyond a reasonable doubt. This Court has rejected such claims. (See, e.g., *People*

[38] Wycoff makes these arguments in Section X of his brief.

v. Collins (2010) 49 Cal.4th 175, 259-261 [and cases cited therein]; *People v. Mills* (2010) 48 Cal.4th 158, 213-214.)

B. Section 190.3, Subdivision (i), Is Not Unconstitutionally Vague

Wycoff contends section 190.3, subdivision (i), is unconstitutionally vague and arbitrary because it allows the jury to rely on his age without further guidance. (AOB 190.) Wycoff provides no reasoned basis for reconsidering the cases rejecting this claim. (See, e.g., *Tuilaepa v. California* (1994) 512 U.S. 967, 977; *Mills*, *supra*, 48 Cal.4th at p. 214.)

C. CALJIC 8.85 Is Constitutional

Wycoff asserts that CALJIC No. 8.85 violated his constitutional rights because it contained inapplicable sentencing factors, contains vague and burdenless factors, and uses qualifying adjectives such as "extreme" and "substantial." (AOB 190-191.) These claims have been rejected by this Court. (See, e.g., *People v. Bramit* (2009) 46 Cal.4th 1221, 1249; *People v. Cook* (2006) 39 Cal.4th 566, 618; *People v. Moon* (2005) 37 Cal.4th 1, 41-42; *People v. Schmeck* (2005) 37 Cal.4th 240, 304-305, abrogated on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

D. California's Capital Punishment Scheme Is Not Impermissibly Broad

Wycoff argues that California's capital punishment scheme is constitutionally defective because it fails to properly narrow the class of death-eligible defendants. This Court has repeatedly rejected such claims. (See, e.g., *Mills*, *supra*, 48 Cal.4th at p. 214; *People v. Beames* (2007) 40 Cal.4th 907, 933-934; *People v. Stanley* (2006) 39 Cal.4th 913, 968 [and cases cited therein].)

E. The Death Penalty Statute and Accompanying Jury Instructions Need Not Allocate a Burden of Proof

Wycoff argues that federal law requires that aggravating factors be found beyond a reasonable doubt, that aggravating factors be found to outweigh mitigating factors beyond a reasonable doubt, and that the jury find beyond a reasonable doubt that death is the appropriate penalty. (AOB 191-192.) This Court has repeatedly rejected these claims. (See, e.g., *Mills*, *supra*, 48 Cal.4th at p. 214; *People v. Sapp* (2003) 31 Cal.4th 240, 317.)

F. No Written Findings Were Necessary

Wycoff asserts that the California death penalty law violates the Sixth, Eighth, and Fourteenth Amendments because it does not require written findings regarding sentencing. (AOB 192-193.) This claim has previously been rejected by this Court. (See, e.g., *Mills*, *supra*, 48 Cal.4th at p. 214.)

G. The Jury Need Not Be Instructed to Return a Verdict of Life Without the Possibility of Parole If Mitigation Outweighs Aggravation

Wycoff contends his constitutional rights were violated because the trial court failed to instruct the jury that if it determines mitigation outweighs aggravation, it must return a sentence of life imprisonment without the possibility of parole. (AOB 193.) This claim has been rejected by this Court. (*People v. Carrington* (2009) 47 Cal.4th 145, 199.)

H. CALJIC No. 8.88 is Not Unconstitutionally Vague

Wycoff argues that CALJIC No. 8.88, which instructs that to return a death verdict, each juror "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" (18 RT 3887), is unconstitutionally vague because of the phrase "so substantial." (AOB 193-194.) This Court has repeatedly rejected such claims. (See, e.g., *People v. Chatman* (2006) 38 Cal.4th 344, 409 [and cases cited therein].)

I. There Is No Constitutional Requirement of Intercase Proportionality

Wycoff asserts that California's capital sentencing statute is unconstitutional because it does not require intercase proportionality review. (AOB 194.) This claim has previously been rejected by this Court. (See, e.g., *Mills*, *supra*, 48 Cal.4th at p. 214.)

J. There Is No Constitutional Right to Disparate Sentence Review

Wycoff contends California's death penalty scheme is unconstitutional because it fails to afford capital defendants with the disparate sentence review afforded to noncapital defendants. (AOB 194-195.) This Court has rejected this argument. (See, e.g., *Mills*, *supra*, 48 Cal.4th at p. 213; *People v. Martinez* (2010) 47 Cal.4th 911, 967-968.)

K. California's Use of the Death Penalty Does Not Violate International Law

Wycoff contends California's use of the death penalty violates international norms of human decency and law. (AOB 195.) This Court has rejected such claims. (See, e.g., *Mills*, *supra*, 48 Cal.4th at p. 215.)

L. The Death Penalty Does Not Constitute Cruel and Unusual Punishment

Wycoff contends the death penalty violates the Eighth Amendment's proscription against cruel and unusual punishment. (AOB 195.) This Court has previously rejected this argument. (See, e.g., *Moon*, *supra*, 37 Cal.4th 1, 47-48 [and cases cited therein].)

M. There Are No Deficiencies to Cumulate

Wycoff contends his Eighth and Fourteenth Amendment rights were violated due to the cumulative impact of the preceding defects. However, as previously described, each of Wycoff's allegations of constitutional error lack merit. As such, there is no error to cumulate.

CONCLUSION

Accordingly, the People respectfully request that the judgment be affirmed.

Dated: March 4, 2016

Respectfully submitted,

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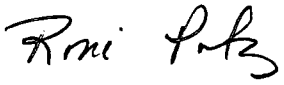

RONI DINA POMERANTZ
Deputy Attorney General
Attorneys for Respondent

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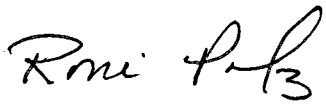
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 59,684 words.

Dated: March 4, 2016

KAMALA D. HARRIS
Attorney General of California



RONI DINA POMERANTZ
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Edward Matthew Wycoff**
No.: **S178669**

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. 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 with postage thereon fully prepaid that same day in the ordinary course of business.

On March 4, 2016, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

David A. Nickerson
Attorney at Law
Law Office of David A. Nickerson
32 Bridgegate Drive
San Rafael, CA 94903

The Honorable Mark Peterson
District Attorney
Contra Costa County District Attorney's Office
900 Ward Street
Martinez, CA 94553

The Honorable John W. Kennedy
Judge
Contra Costa County Superior Court
A. F. Bray Building
1020 Ward Street
Department 8
Martinez, CA 94553

California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105-3647

David Briggs
5924 Caminito Deporte
San Diego, CA 92108

Edward Wycoff
AB-7007
San Quentin State Prison
San Quentin, CA. 94974

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 March 4, 2016, at San Francisco, California.

T Pham
Declarant

Signature

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