SUPREME COURT COPY

No. S099439

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. REX ALLAN KREBS Defendant and Appellant.	Superior Court for the County of San Luis Obispo No. F283378

Automatic Appeal from a Judgment of Death,
Superior Court of California, County of San Luis Obispo
Hon. Barry T. LaBarbera, Presiding

APPELLANT'S REPLY BRIEF

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ARGUMENT I

THE COURT IMPROPERLY DENIED THE MOTION MADE BY THE DEFENSE PURSUANT TO *WHEELER* AND *BATSON*, REQUIRING REVERSAL

In his opening brief, Krebs raised a *Batson/Wheeler* issue as to Juror Six. (*Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.) In support of his claim, Krebs argued that religious affiliation, here Catholic, constituted a legally cognizable group for such claims. The People concede this issue of law. (RB 63.) Krebs also asserted the first stage legal issue of whether there was a prima facie case of discrimination was moot, and that the only relevant inquiry in the circumstances was the third stage inquiry of whether the prosecutor's group-neutral explanations were credible. The People also concede this legal issue. (RB 66, fn.11; RB 71.) Krebs also argued that no deference should be given to the trial court's denial of the motion because the trial court failed to make a reasoned effort to evaluate the *actual* reasons proffered by the prosecution, and instead focused on the *possible* reasons afforded by the juror's questionnaire responses. The People concede the principle of law underlying the argument. "So long as the trial court makes a sincere and reasoned effort to evaluate the *nondiscriminatory justifications offered,* its conclusions are entitled to deference on appeal." (RB 64, italics added.) However, the People factually argue deference should nevertheless be given in the circumstances presented. This factual issue is therefore discussed under its own heading below in some detail.

On the merits, Krebs argued that the prosecutor's reasons for excusing Juror Six, based exclusively on the juror's questionnaire responses, simply do not "hold up" because they mischaracterize the actual responses of the juror. (AOB 73-76.) The actual responses did not show any attitude of Juror Six which was disadvantageous to the prosecution. Additionally, Krebs supported the inference that the reasons given were pretextual by demonstrating that most other seated jurors gave responses to the cited questions which were *more* unfavorable to the prosecution than the neutral responses given by Juror Six.

The People's analysis of these issues is fundamentally flawed. Instead of attempting to demonstrate that the prosecutor's characterization of Juror Six's responses was accurate, and plausibly justified the concerns stated by the prosecutor, the People address at length the reasons appearing in the record for the removal of *other* Catholic affiliated jurors. That the prosecutor had a plausible, non-discriminatory reason to dismiss *some other* Catholic jurors does nothing to justify the dismissal of Juror Six for the stated reasons which are unsupported by the record. The People also misunderstand the validity of, and the probative value of comparing Juror Six's answers on the cited questions with those of other jurors who were allowed to be seated. Krebs will therefore address each of these issues further below.

A. No deference can be given to the trial court's denial of the motion because the judge did not evaluate the specific reasons presented and make a finding that they were credible, and further, the reasons stated were based solely on the written responses of the juror

The People acknowledge the observation of *People v Lenix* (2008) 44 Cal4th 602, 613-614 that deference is to be accorded to a trial court's determination that a proffered reason for excusing a juror is genuine only when "the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered." (RB 64; see also *People v. Silva* (2001) 25 Cal.4th 345, 386 [deference given "only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror."], cited at AOB 70-71.) Krebs has demonstrated that here, the trial did not engage in that effort at all, but instead engaged in a prohibited review of other responses which *could* have been plausibly proffered as a nondiscriminatory rationale for the excusal. (AOB 71-73.) The trial judge stated "the record obviously reflects that the questionnaire is replete with questions that would give you information for preempts on both sides. . . . I only asked for the response just for the record." (22 RT 5965-5966, AOB 67.) These comments show the court determined only that each disputed juror *might have been* rationally and lawfully be excused by either side. The court evidenced his belief that he was not required to engage in any further analysis of the stated reasons by citing his request for the prosecutor's statement of *his* reasons being merely *"just for the record."*

This court has explicitly set out what the record should show regarding the trial court's assessment of the plausibility of the stated explanations.

> It should be discernable from the record that 1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as

> any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges.

(*People v. Lenix, supra,* 44 Cal.4th 602, 625.)

The record here does not so demonstrate. The People's factual argument that the trial court did engage in a reasoned examination of each reason proffered by the prosecutor for his excusal of Juror Six is limited to one sentence: "The record belies this claim: as noted previously, the court expressly stated that there were individual reasons for each of the peremptory challenges which were directly elated to the specific juror and which made sense. (22 RT 5983.)" (RB 76.) In fact, however, the cited portion of the judge's comments does not pertain to the explanation given for Juror Six. The cited comments instead pertained to a second *Wheeler/Batson* motion made *after the first motion had been denied* and as to *other jurors*, specifically, jurors numbered 127, 141, and 201. (22 RT 5978.) "[T]he trial court's finding is reviewed on the record as it stands at the time the *Wheeler/Batson* ruling is made." (*People v. Lenix, supra,* 44 Cal.4th 602, 624.) Krebs has raised no issue on appeal with respect to the court's ruling as to these jurors, hence the People's argument fails *ab initio*.

Further, examination of the court's comments makes clear that the court did not attempt to determine the genuineness of the reasons stated in denying the second motion either. At the beginning of the comments relied upon by the People, the court states

> "In any event, I don't find that there's a reasonable inference of group bias. I base that on the answers given by the -- strike that. I don't find a reasonable inference of a group bias, but I did get reasons on the record from the prosecutor as to why the excusals were made." (22 RT 5983.)

It seems apparent from these comments that the court was only addressing the facial plausibility, if believed, of the rationale stated by the prosecutor as to three jurors challenged in the second motion. The court specifically *struck* his words indicating his finding were based on "answers given by the - ." His words show that the court was not basing his second ruling on an examination of the credibility of the prosecutor, but on his finding of no reasonable inference of group bias. The courts comments are more directed to the acceptability of the prosecutor using religious based questions in his examination, another issue which is not contested here.

Also highly relevant to the issue whether deference should be afforded to the trial court's decision is that here, this court is in equal or better position to judge the truthfulness of the reasons, compared to the trial court. (See *Snyder v. Louisiana* (2008) 552 U.S 472, 477.) Here, the prosecutor did not cite any factor which could be evaluated only by the trial judge, such as the demeanor and affect of the juror in giving her oral responses. No intangible information such as physical appearance, expressions, clothing worn, books held, etc., were cited by the prosecutor. Instead the prosecutor said he relied solely upon the written responses in the questionnaire. There is no indication in the record whatsoever that the court stopped to verify that the questionnaire responses of Juror Six did in fact signify a particular attitude towards mitigation or psychological evidence which could be plausibly viewed as detrimental by the People. The court made his ruling denying the motion immediately after the prosecutor finished his argument. (22 RT 5965.)

Additionally, this court is in a better position to determine the genuineness of the proffered explanation as to Juror Six by comparing the

answers of other seated jurors to the cited questions. In these circumstances, to give deference to a reasoning process that was not actually engaged in by the trial court amounts to the effective withdraw of all review of the issue in violation of the constitutional rights protected by *Batson*. This court must therefore engage in a denovo examination of the record to determine whether the prosecutor's stated reasons for the excusal of Juror Six were genuine or pretextual.

B. Comparative analysis of responses by other seated jurors is an especially appropriate and probative analysis when the prosecutor has chosen to rely exclusively on written responses to a questionnaire which was answered in writing by every juror

The People spend much time belaboring the potential situations where comparative juror analysis engaged upon for the first time on appeal is of little value, citing *People v Lenix*, *supra,* 44 Cal.4th 602. The People begrudgingly admit that "comparative analysis is a form of circumstantial evidence courts can use to determine the legitimacy of a party's explanation for exercising a peremptory challenge . . . ." (RB 78.) But the core holding of *Lenix*, that the analysis is *required* in the circumstances of this case, is never acknowledged:

> "Comparative juror analysis is evidence that, while subject to inherent limitations, must be considered when reviewing claims of error at *Wheeler/Batson's* third stage when the defendant relies on such evidence and the record is adequate to permit the comparisons.

(*Id.*, at 607.)

The heart of the People's argument against giving comparative analysis any probative value in this case is that the prosecutor was not asked to state why he did not excuse other jurors who gave similar answers. The People argue that the prosecutor may have judged these other seated jurors to be favorable to the prosecution based on other factors. (RB 78-79.) The People then catalogue pro-prosecution answers on unrelated topics by the jurors who had similar responses to those given by Juror Six on the psychiatric and mitigation topics cited. The argument seems to be that these prosecution-favorable responses to *other questions* shows that the prosecutor made his decision to keep these other jurors because in balance, these unrelated pro-prosecution attributes outweighed the pro-defense answers regarding the cited topics.

The argument is illogical. The argument ignores the black letter federal command that the trial prosecutor's *stated reasons* are that which must be evaluated for credibility. "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." *(Miller-El v. Dretke* (2005) 545 U.S. 231, 251 (*Miller-El II*).) The trial prosecutor did *not* state that Juror Six was excused because, despite giving middle of the road, unremarkable answers on the questionnaire regarding psychiatric issues and mitigation, her answers on other topics were such that she was judged to be more defense oriented than the other jurors retained. *If* the prosecutor made such a claim, the fact that other unchallenged jurors who gave similar answers on psychiatric and mitigation issues had in fact given pro-prosecution answers on other matters would be corroborative of the prosecutor's veracity. But that is not what occurred here. The prosecutor specifically singled out the psychiatric and mitigation related responses to the questionnaire as the *only* reasons

for excusing Juror Six. The prosecutor's response had nothing to do with other areas of inquiry or consideration. His stated explanation was that the questionnaire answers on the two topics alone persuaded him to challenge the juror. It is this explanation which must be examined for pretext. This court has recognized that the Supreme Court's opinions have "tested that explanation against the record." (*People v. Lenix* (2008) 44 Cal.4th 602, citing *Miller-El II, supra.*) Testing the prosecutor's characterizations against the actual record by examining the actual responses of the challenged juror against those not challenged is an essential part of that process.

Krebs showed that the prosecutor's contention was simply inconsistent with the record. The actual cited responses, taken by themselves, were unremarkable, and did not demonstrate any pro-defense or pro-prosecution leanings, thus casting doubt that the cited responses were the actual cause for the challenge. (AOB 73-76.) The comparison of the responses of the other seated jurors on the *same topics* also leads to the same conclusion. Most other unchallenged jurors had actual responses that were equivalent to those given by Juror Six, or even more favorable to the defense. (AOB 76-79.) Thus the comparative analysis here is especially pertinent.

If the prosecutor in his statement of reasons had referenced the same questionnaire answers, but had also gone on to state that when questioning the juror he had formed a negative opinion based on the juror's hesitation in answering, demeanor, body language, clothing, etc., then the People would have a point that comparing other jurors questionnaire responses on the same topic would have little relevance. But in a rare case like this, where the prosecutor confines his stated reasons solely to written

questionnaire responses, and the prosecutor's characterization of those responses is shown to be inaccurate, it is both logical and highly probative to turn to the written responses of unchallenged jurors to determine whether the challenged juror's responses would have seemed negative to the prosecution in comparison with the way the other jurors responded in writing to the same questions. While there are no doubt inherent limitations and circumstances where comparative juror analysis is of limited or no value, those situations are not present in this case. The comparative analysis here is highly probative on the issue of whether the prosecutor's explanations were "sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*Wheeler*, supra, 22 Cal.3d at p. 282.)

In conclusion, Krebs submits that the People have failed on appeal, as they did in the trial court, to proffer a plausible rationale, not based on group bias and which is consistent with the record, for the dismissal of Juror Six. The entire record supports the conclusion that the prosecutor had an actual group bias against Catholics. (AOB 79-81.) While the prosecutor was able to articulate plausible nondiscriminatory reasons for dismissing several other Catholic potential jurors, he was not able to do so with regard to Juror Six. The court should therefore find that the pretext is the reasonable conclusion, and find merit in Krebs' claim.

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ISSUES RELATING TO GUILT

ARGUMENT II

KREBS' VIDEOTAPED CONFESSIONS SHOULD HAVE BEEN EXCLUDED BECAUSE HOBSON FAILED TO SCRUPULOUSLY HONOR KREBS' INVOCATION OF RIGHTS AND DELIBERATELY USED "QUESTION FIRST," WARN LATER, AND OTHER TECHNIQUES INCONSISTENT WITH A FREE AND VOLUNTARY WAIVER OF KREBS' *MIRANDA* RIGHTS

Krebs presented three related arguments why his motion to suppress his confessions should have been granted. Krebs first asserted that Hobson failed to scrupulously honor Krebs' invocation, requiring suppression under *Michigan v. Mosley* (1975) 423 U.S. 96. (AOB 86-102.) Krebs replies to this issue below in section A, including subsections addressing the People's claims that, 1) Krebs was not in *Miranda* custody, 2) Krebs did not invoke his rights and, 3) that subsequent warnings rendered any previous violation irrelevant.

Krebs also asserted an alternative argument that the subsequent warnings were ineffective because Hobson deliberately used a question first, warn later technique in violation of *Missouri v. Siebert* (2004) 542 U.S. 600. (AOB 102-109.) Krebs replies to this issue in section B. Krebs additionally contended that his confessions were involuntary, and reply is made to this issue in section C. In section D, Krebs replies to the People's claim that failing to suppress the confessions was not prejudicial.

A. Hobson failed to scrupulously honor Krebs' invocation of his Fifth Amendment rights by repeated further interrogation in violation of *Michigan v. Mosley*

In his opening brief, Krebs argued that the videotaped confession of April 22nd was inadmissible because Krebs clearly invoked his *Miranda* right to cut off questioning on April 21, which his interrogator Hobson failed to scrupulously honor by continuing his interrogation on that day, as well as by uninvited interrogation the next day. (AOB 86-102.)

In response, the People assert that the trial court properly denied Krebs' claim for several reasons. First, while appearing to concede that Krebs was in *Miranda* custody on April 21st at the police station, they contest the propriety of the court's finding that Krebs was in *Miranda* custody on April 22nd when confronted again by Hobson and when the first videotaped confession was made. (RB 97-100.) Second, reversing the position taken in the trial court, the People now contend under *Berghuis v. Thompkins* (2010) 560 U.S. ____ [130 S.Ct. 2250], that Krebs did not unambiguously invoke his Fifth Amendment rights. (RB 100-103.) Third, the People argue that the continued interrogation on the 22nd was proper despite any clear invocation, because the admitted confessions were preceded by full *Miranda* warnings, and therefore admissible. (RB 103-104.)

Krebs responds to each of the People's arguments in separate subsections below.

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1. Krebs was in Miranda custody when he was being interrogated by Hobson

a.) The trial court's finding that Krebs was in *Miranda* custody on April 21st and 22nd is supported by substantial evidence and entitled to deference.

The People acknowledge the trial court's conclusion that Krebs was in *Miranda* custody when interrogated by Hobson on the 21st and 22nd, but fail to acknowledge the court's findings regarding the surrounding circumstances nor do they acknowledge the deference this court should give the court's findings.

> "Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact. When reviewing a trial court's determination that a defendant did not undergo custodial interrogation, an appellate court must 'apply a deferential substantial evidence standard' to the trial court's factual findings regarding the circumstances surrounding the interrogation, and it must independently decide whether, given those circumstances, 'a reasonable person in [the] defendant's position would have felt free to end the questioning and leave.'"

(People v. Moore (2011) 51 Cal.4th 386, 396.)

The trial court found that Krebs was in custody on the 21st and 22nd based on the following circumstances. Krebs was previously told he was a suspect in the deaths; he had been *Mirandized* to be questioned about the deaths on April 1, and reminded of those rights on April 1 and April 21; he had been transported in chains and cuffs to the police station twice for interviews about the case; and he was confronted with substantial

inculpatory evidence: his car reportedly was seen near the crime scene, blood from his truck matched a victim, and a key chain found at his residence belonged to a victim. (17 CT 4934-4935.) Based on these circumstances, the court found "A reasonable person would believe he was in custody on the homicides." (17 CT 4935.) He further found Krebs believed, as a reasonable person in the circumstances would, that his "parole hold" would be in place until the homicides were resolved. (*Ibid.*)

Substantial evidence of each of these findings is contained in the record, as detailed in Respondent's statement of facts, and the People have not raised any dispute concerning any of the trial court's explicit factual findings.

b.) Custody need not be attributable to the subject of the interrogation to make *Miranda* applicable

The People acknowledge, as they must, that Krebs was in full formal custody at all times pursuant to an arrest by his parole agent, awaiting formal charges and hearing. Implicit in their argument is the idea that for *Miranda* to apply, the suspect's custody must be officially attributable to the offense for which he was arrested. The People make their arguments without citing or attempting to distinguish *Mathis v. United States* (1968) 391 U.S. 1, which clearly established that the cause of the custody need not be related to the subject of the interrogation in order for *Miranda* to apply.

> "The Government also seeks to narrow the scope of the Miranda holding by making it applicable only to questioning one who is "in custody" in connection with the very case under investigation. There is no substance to such a

> distinction, and, in effect, it goes against the whole purpose of the Miranda decision, which was designed to give meaningful protection to Fifth Amendment rights. We find nothing in the Miranda opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody."

(*Mathis v. United States, supra*, 391 U.S. 1, 4-5.)

Mathis controls because it is undisputed that Krebs had been arrested, and was awaiting formal charges and hearing, thus he was in custody. Under *Mathis,* it matters not that he had yet to be formally arrested for the homicides. Courts have relied on *Mathis* to require a finding of custody for purposes of *Miranda* even where the subject is a sentenced prisoner where the subject is isolated from the general population and questioned about a crime occurring outside the premises. (*Simpson v. Jackson* (6th Cir. 2010) 615 F. 3d 421, 440-441.)

c.) *Maryland v. Shatzer* supports the proposition that interrogation of a prisoner, regardless of the cause of the incarceration, is inherently coercive, and thus constitutes custodial interrogation

The People attempt to find support in the recent case of *Maryland v. Shatzer* (2010) 559 U.S.___ [130 S.Ct. 1213] (*Shatzer).* None appears. First, in *Shatzer* the Court carefully limited its discussion and holding to a sentenced prisoner in state prison, going so far as to define and distinguish such incarceration from that in a local jail. (*Id.,* at p. 1221, fn. 2.) The Court also carefully limited its holding that release after interrogation into the general prison population was a release from

"custody" sufficient to attenuate a suspect's request for counsel, to "lawful imprisonment imposed upon conviction of crime" (*Id.*, at p. 1224.)

Just as importantly, the court was not addressing the question involved here: whether *interrogation* while incarcerated was custodial interrogation within the meaning of *Miranda*. "Here, we are addressing the interim period *during which a suspect was not interrogated*, but was subject to a baseline set of restraints imposed pursuant to a prior conviction." (*Ibid.*) This is a vitally important distinction. The court was addressing whether the release into a general prison population after interrogation should be considered a break in the coercive atmosphere of custodial interrogation that the *Miranda* rules were designed to ameliorate. The court held that the day to day activities of sentenced prisoners - when not being interrogated for crimes committed outside prison - were not "coercive" and therefore should be considered as a break in custody for *Miranda* purposes. This is far different than suggesting that the interrogation of an incarcerated suspect awaiting formal charges in a county jail is not inherently coercive.

If anything, the opinion in *Shatzer* shows that the court *did* consider the *interrogation* which occurred in that case as inherently coercive custodial interrogation within the meaning of *Miranda* without regard to the details of the interrogation. The court noted at the outset of section III that, "No one questions that Shatzer was in custody for *Miranda* purposes during the interviews with Detective Blankenship in 2003 and Detective Hoover in 2006." (*Shatzer,* at p.1224.) The court then concluded it's discussion in that section by holding "The 'inherently compelling pressures' of custodial interrogation ended when he returned to his normal life." (*Ibid.*) Indeed, if the Court did not consider the interrogation as

custodial, there would have been no need to determine whether the ordinary day to day *prison* life constituted a *break* from that custody. No case has yet suggested that incarceration in a county jail awaiting formal charges is not "custody" for *Miranda* purposes.

Thus the high court has not signaled in *Shatzer* any intent to retreat from the *Mathis* rule as it applies to persons incarcerated in county jail, awaiting formal charges or pending their adjudication. Instead, the Court emphasized why the circumstances attendant to pre-sentence county jail incarceration are the paradigmatic circumstances of *Miranda* "custody." Comparing the circumstances of a sentenced prisoner to one in a local jail, Justice Scalia wrote for the court:

> This is in stark contrast to the circumstances faced by the defendants in *Edwards, Roberson, and Minnick*, whose continued detention as suspects rested with those controlling their interrogation, and who confronted the uncertainties of what final charges they would face, whether they would be convicted, and what sentence they would receive.

(*Maryland v. Shatzer*, *supra*, at p.1224.)

The Supreme Court granted certiorari on January 24, 2011 in *Howes v. Fields* (6th Cir. 2010) 617 F.3d 813 to address whether the specific proposition that a sentenced prisoner is in custody when being interrogated from other prisoners concerning a crime committed outside the prison has been "clearly established" by Supreme Court precedent. The case was argued October 8, 2011. Krebs will seek to file a supplemental brief on the effect of the decision when it is released.

The People also cite the test for custodial interrogation as characterized in *Shatzer*: "whether it exerts the coercive pressure that *Miranda* was designed to guard against - the 'danger of coercion [that]

results from the *interaction* of custody and official interrogation.'" (*Shatzer, supra*, at 1224, quoting *Illinois v. Perkins* (1990) 496 U.S. 292, 297.) Yet their factual argument is unconvincing.

There is ample evidence of "interaction" between the custody and official interrogation in this case. Krebs was arrested by parole officer Zaragoza, who was working in collaboration with the agents investigating the homicides. Zaragoza even personally traveled to the prison to investigate the 8 ball key chain. (5 RT 1823-1824.) Clearly the sexual offenses and murder would constitute a violation of parole. The arrest was occasioned by and connected to the homicide investigation. Hobson requested that Krebs be specially placed while in jail. (7 RT 2231, 2307, 2408.) Hobson questioned Krebs about a number of topics, including his parole violation for possession of a BB gun, his drinking while on parole (7 RT 2228), and the suspected homicides. Krebs was removed from his cell at Hobson's request and taken to the police station on the 21st. Krebs' custody was therefore connected with the homicide investigation, and Hobson was in a position to exercise control over that custody.

Hobson's lack of compliance with Krebs' repeated requests to stop the interrogation also shows the interaction of Hobson's control over Krebs' custody and official interrogation on August 21. Hobson used his position as the officer then in control of Krebs to continue his interrogation after Krebs made it crystal clear that he wanted to discontinue the interrogation. In response to Hobson's continued efforts to persuade and command Krebs to talk[1], Krebs declared his desire clearly, stating "Take

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1

"... Rex you got to talk to me, man." (21 CT 5682) "Rex, talk to me." (21 CT 5683.) "It's not going to go away, we have to deal with it." (21 CT

me to jail" (21 CT 5688); "Nothing to say, Larry." (21 CT 5689); and "Nothing to say, Larry" (21 CT 5691). Yet Hobson continued to take advantage of his physical control over Krebs by continuing his interrogation against Krebs's expressed desire while at the station house (21 CT 5681- 5691.) Krebs could not simply leave the station on his own volition, thus cutting off the interrogation. Even when Krebs was being transported back to jail, Hobson continued the interrogation, asking Krebs to take him to the location of the bodies. (7 RT 2265.) Krebs responded once again by asking to be returned to the jail. (*Ibid.*) Hence, here there was more than simply the "danger of coercion," as Hobson actively exploited Krebs' captivity to continue to cajole Krebs into confessing.

This exploitation continued on the 22nd when Hobson, contrary to the agreement that Krebs would call if he wanted to talk further, ordered that Krebs be taken from his cell to the break room used by the custodial officers. There is no evidence in the record that Krebs was given any choice in the matter. (7 RT 2268.) A custodial officer said that he would "get" Krebs for Hobson. Hobson did not tell Krebs that his participation was voluntary. (7 RT 2309.) Instead, he told Krebs, as he did the day before, that the "situation involving Rachel and Aundria was not going to go away and he would have to deal with it." (7 RT 2310.) Hobson emphasized the "appalling" nature of the crimes; that Krebs was guilty, the only question was "why"; that unless Krebs explained what happened, Hobson would have to believe he was an "animal"; that the families needed closure; that this was no time to abandon Krebs' integrity. (7 RT

5684.) "Talk to me. Look at me." (21 CT 5685) : "I want to sit here, talk with you and work through this." (21 CT 5685) Just going back to your cell Rex, this thing is going to fester like a big sore ... ." (21 CT 5691.)

2311.)

Krebs was thus in custody for *Miranda* purposes under the articulation of the rule in *Shatzer* because Krebs was exposed to exactly the type of *interaction* between custody and official interrogation that *Miranda* was designed to guard against - the potential to wear down a captive suspect's will by depriving him of control over his being questioned in a police dominated atmosphere. The court's finding of custody is well supported by the evidence under any standard.

d.) The facts identified by the People do not support a finding of non-custodial interrogation under this court's statement of the rule

This court has stated on the issue of whether a subject is in *Miranda* custody that: "the most important considerations include (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning." (*People v. Boyer* (1989) 48 Cal.3d 247, 272.)

Using these standards, Krebs was in custody while being interrogated. He was interrogated in a police station and in a jail. The investigation had clearly focused on him after finding a victim's blood on his truck's seat. Krebs had been formally arrested. Krebs was wearing a jail uniform, and was transported in handcuffs. (7 RT 2238, 2257.) The questioning on the 21st was intensive, confrontational, and psychologically coercive. Krebs was told he had to talk about it. The interrogation on the 22nd was simply a continuation of the same tactics.

Ignoring these traditional areas of inquiry, the People marshal a

number of facts which are mostly irrelevant to the issue of custodial interrogation, and at times mis-stated. They argue Krebs knew his rights, having been advised several weeks earlier, and in years past. (RB 98.) No authority is cited in support of the argument. None exists because whether a suspect is aware of his rights is a distinct inquiry than whether he is in custody as that term is used in Miranda. The argument is also illogical. As noted by the trial court, the recitation of *Miranda* rights to one knowledgeable in the law clearly signals that the officers consider the suspect in custody, otherwise such warnings would not be necessary.

Next the People argue Krebs was not "summoned" for questioning, but without citation to the record. (RB 98.) In fact there is no evidence that Krebs was not "summoned" by correctional officers on the 22nd. (7 RT 2268.) Hobson did not tell Krebs that his participation was voluntary. (7 RT 2309) It is true that Krebs was not handcuffed during the interviews, but he was transported in handcuffs, and placed in a room alone with Hobson. (7 RT 2238, 2257.)

The People argue that Krebs must have felt un-threatened in the police station (RB 99), yet no authority is cited that a suspect must feel subjectively "threatened" to be in *Miranda* custody. None is available, since the standard for determining *Miranda* custody is an objective one. The People also suggest that the custodial officer's break room was a "non-custodial location." (RB 99.) No argument or authority is presented why a room designed for the exclusive use of custodial officers inside of a jail, where only the suspect dressed in jail garb and the interrogating officer are present, should be considered other than "custodial" police dominated surroundings.

The People finally argue "there was no undue pressure exerted

against appellant" after confronting Krebs with the blood and key chain evidence. Their factual support for this argument is that Krebs "repeatedly said that he was still willing to assist Hobson in the investigation . . . . " (RB 99.) Omitted from the argument is the crucial fact that while Krebs stated he was willing to assist the investigation in the early stages prior to April 21, that changed dramatically and immediately on April 21st when he was confronted with the evidence against him. From that point, Krebs gave every indication he did not want to further assist Hobson nor incriminate himself. While this argument may have some small bearing on the custody issue prior to the interview turning confrontational on the 21st, it has no merit after that point. Hobson's subsequent conduct certainly did constitute substantial and continuous pressure on Krebs to confess. (21 CT 5681- 5691; see fn. 1, page 17 above)

e.) The cases cited by the People are easily distinguishable from the present circumstances

The People cite *People v. Holloway* (1990) 50 Cal.3d 1098, 1112-1115) in support of their contention that Krebs was not in *Miranda* custody. *Holloway* distinguished the circumstances from those in *People v. Boyer*, *supra,* 48 Cal.3d 2. The *Holloway* court noted that the officers were not coercive in their request for an interview; "attention had not focused on the subject"; no *Miranda* warnings were given because Holloway was not considered a suspect; and the "questioning was not aggressive or accusatory." (*Id.,* at p. 1115) The situation herein is directly to the contrary without question on the last three points. As to the nature of the request for the interview, the opinion discloses that the officers

simply requested the suspect to come to the station for an interview; the officers gave him the option of driving himself, or having a friend drive him; the suspect voluntarily agreed to go with the officers. The suspect had not been arrested nor did the officers think they had probable cause to arrest him. " (*Id.,* at p. 1113.) Given these facts, *Holloway* is simply inapposite.

The People next cite *People v. Fradiue* (2000) 80 Cal. App.4th 15, 20. (RB 99.) The trial court here rightly found that the instant circumstances are completely different than in that case. (17 CT 4935.) The distinguishing circumstances include: Fradiue was a sentenced prisoner held in state prison; the interrogation concerned a crime (possession of heroin) that was committed on the premises, and also constituted a prison infraction; the interrogator was a prison official whose assigned duties included assisting the prisoner assemble his defense to the disciplinary charges; the prisoner knew he had the right to reject the employee and request that another be appointed; Fradieu remained in his cell while being questioned; Fradieu's cell mate was also present in the cell; the employee spoke to Fradieu thru the closed cell door; there was only a single, non-confrontational question concerning whether the heroin found belonged to the prisoner. The difference between the situations needs no further elaboration.

The court in *Fradiue* relied in large part on *Cervantes v. Walker* (9th Cir. 1978) 589 F.2d 424, which is also the last case upon which the People rely. While the result in *Cervantes* is not objectionable, the purported test for use in a prison setting formulated by that court is contrary to *Miranda* and *Mathis, supra.* The *Cervantes* court, finding the *Mathis* holding illogical when applied in a prison setting, formulated its

own test: "whether some extra degree of restraint was imposed upon the inmate to force him to participate in the interrogation." This test is inconsistent with *Mathis,* and wrongly focuses on requiring more restraint than associated with an ordinary arrest. The concerns of the *Cervantes* court are better addressed by the approach taken in *Simpson v. Jackson, supra,* 615 F. 3d 421, 441, as discussed above. The *Cervantes* case involved both an alleged crime - possession of marijuana - while in custody, and the "on scene" questioning of the suspect immediately after the contraband was found.

The test was more fully articulated by the *Cervantes* court as follows: "the language used to summon the individual, the physical surroundings of the interrogation, the extent to which he is confronted with evidence of his guilt, and the additional pressure exerted to detain him must be considered to determine whether a reasonable person would believe there had been a restriction of his freedom over and above that in his normal prisoner setting." (*Cervantes* at p. 428.) In light of the *Cervantes* court's acceptance that the questioning there was simply "a spontaneous reaction to the discovery" of the substance, the newly fashioned test was unnecessary. The court also recognized that the circumstances present in *Mathis*, also present here, would satisfy their newly devised test. "The questioning of Mathis by a government agent, not himself a member of the prison staff, on a matter not under investigation within the prison itself may be said to have constituted an additional imposition on his limited freedom of movement, thus requiring *Miranda* warnings." (*Ibid.*)

Thus, even by the *Cervantes* test, Krebs was subjected to custodial interrogation. Krebs was summoned by a custodial officer, and taken to an

isolated section of the jail, and put in a room alone with the investigating officer, who had control over Krebs' detention. Krebs had been confronted with highly probative evidence of guilt, and was told there was no question he was guilty. He was cajoled to confess. The "extra restraint" need be nothing more than an investigating officer interrogating the prisoner who has been isolated from his normal circumstances about a crime which occurred outside the premises. That assuredly occurred here.

2. Krebs unambiguously invoked his right to discontinue questioning on April 21, no later than when Hobson understood Krebs' repetition of his statement, "Nothing to say, Larry," as an invocation of his right to remain silent

In the opening brief, it was argued that Krebs had invoked his Fifth Amendment right to remain silent far earlier in the April 21st interview than the People had conceded in their moving papers. (AOB 87.) Krebs based his argument upon a detailed examination of the circumstances of the interrogation, including Krebs' silence when confronted with the key evidence against him; his requests to be left alone for a period; his request to be taken back to the jail; and his repeated statements that he had "nothing to say" in response to Hobson's repeated entreaties to talk about the case. (AOB 86-94.) Krebs relied on cases[2] which established the then current

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The cases cited were (*People v. Randall* (1970) 1 Cal.3d 948, 956; *People v. Burton* (1971) 6 Cal.3d 375, 382; *People v. Crittenden* (1994) 9 Cal.4th 83, 129; *People v. Neal* (2003) 31 Cal.4th 63, 73; *People v. Savala* (1970) 10 Cal.App.3d 958, 962.

law: a suspect may invoke his right to cut off questioning by indicating in "in any manner," including silence, that he does not wish to discuss the case freely and completely with police at that time. (AOB 87.) Krebs also argued that even if Krebs' earlier words and conduct were ambiguous, Hobson was allowed to continue questioning only to clarify the request.[3] (AOB 89.)

The timing of the earlier invocations, and Hobson's continued interrogation despite them, were also discussed in support of Krebs' argument that, as in *People v. Peracchi* (2001) 86 Cal.App.4th 353, Hobson failed to "scrupulously honor" and "fully respect" Krebs' invocation of his right to remain silent. (AOB 96-102.)

In their reply, the People now seek to repudiate their previous concession made in the trial court, stated repeatedly in their papers and in oral argument, and now argue that Krebs *never* clearly invoked his right to remain silent. (RB 100-103.) Their argument is premised upon an characterization of Krebs' statements that directly conflicts with Hobson's testimony at the preliminary hearing and at the motion to suppress and the People's position at the suppression hearing. As shown below in subsection (a), the People have forfeited the right to raise this contention on appeal.

The People also seek the benefit of the recently decided case of *Berghuis v. Thompkins, supra*, 560 U.S. ____ [130 S.Ct. 2250]. This case, which defines a rule to guide police officers in the field and protect them against the consequences of misunderstanding an ambiguous invocation of *Miranda* rights, does not assist the People because, unlike in that case, Hobson *did* understand Krebs' repetition of, "Nothing to say, Larry," as an

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[3] *People v. Box* (2000) 23 Cal.4th 1153,1194

invocation of his right to remain silent.

In any event, Krebs shows in subsection (b), that under any standard and even under the authority cited by the People, there was a clear invocation of the Krebs right to cut off questioning in this case.

a.) The People forfeited the right to argue that Krebs did not invoke his *Miranda* right to cut off questioning on August 21 because they conceded below that he invoked and Hobson testified that Krebs invoked, therefore the defense did not have a fair opportunity to create a full record on the issue.

The People now argue Krebs did not unambiguously assert his right to remain silent. (RB 102.) The People acknowledge in a footnote the concession to the contrary below, but fail to discuss whether they have preserved the issue for appeal. To examine the question of forfeiture or waiver, it is first necessary to clearly detail the record and the People's position in the trial court.

The defense first moved to suppress the confessions as involuntary and a violation of *Miranda* at the preliminary examination, held before the eventual trial judge. (2 PHRT 419[4].) During that hearing, Hobson was asked: "Isn't it true that during that interview Mr. Krebs invoked his right to remain silent?" He answered: "Yes, he did." (2 PHRT 346.) Hobson

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The transcript of the preliminary hearing is in two volumes, including pages 1 through 474. It is cited as the PHRT to distinguish it from the remaining volumes of the reporter's transcript, which commence again with Volume 1 at page 475.

stated in response to defense questioning that some of Krebs' *previous* statements were ambiguous in this regard:

Q: Okay. During that 16 minute period you were the only one talking; isn't that true?
A: Yes.
Q: And he stopped several times for maybe not as long as 16 minutes, but for maybe 8 minutes, nine minutes at a time; isn't that true?
A: That's true.
Q And at the conclusion of those periods of time he said that he wanted you to stop beating on him; isn't that true?
A: I remember that statement and I didn't understand what he meant by that.
Q: He also told you that he wanted you to take him back to the jail?
A: Yes.
Q: Okay. Yet you continued to question him?
A: Well, at that point I didn't form the opinion that he had invoked his right to remain silent, because those statements to me were somewhat ambiguous, those two statements.

(2 PHRT 347-348.)

Hobson thus made clear that he only found ambiguity in Krebs' earlier requests to stop beating on him and to take him back to jail. The prosecutor later in the same hearing also elicited testimony on the same issues:

Q Now, you indicated that in the April 21st interview you had with the defendant that you said became an interrogation towards the end when you began confronting the defendant with evidence, that at some point you determine that the defendant had invoked his right to silence; is that right?
A: Yes.
Q: And was there anything that - strike that. Let me ask

you this, sir: Did he ever indicate that he didn't ever want to talk to you?

A: No.

Q: Was there anything about his answers or his prior behavior that indicated that - that you found confusing or ambiguous?

A: Yes.

Q: What's that?

A: Every time that I ever talked to Rex Krebs prior to confronting him with the physical evidence, he'd always been extremely cooperative, wanted to do whatever he could to prove that he was not involved, in fact, do anything short of taking another polygraph. Once he was confronted with the blood on the jump seat, he became somewhat silent, and it was difficult to talk with him other than an occasional response from him.

(2 PHRT 390-391.)

The defense filed their written motion to suppress the confessions as involuntary and obtained in violation of *Miranda,* with citations to the preliminary hearing record, on January 8, 2001. (15 CT 4172.) The People's written opposition, filed January 24, 2001, contained the following passage in the statement of facts concerning the April 21 interview:

> After approximately one hour of a non-confrontational conversation, Hobson disclosed to the defendant evidence connecting him to the Crawford and Newhouse crimes. Subsequent questioning lasted less than one hour. Although the nature and timing are in dispute, the **People concede that defendant invoked his right to silence near the very end of this conversation** on April 21, 1999.
>
> **After defendant made his invocation clear**, Hobson ended the discussion and agreed to return the defendant to the San Luis Obispo County jail.

(16 CT 4383, emphasis added.)

The People thus conceded that Krebs' invocation was **clear.** Later in the opposition, in a section entitled "ii. Defendant's Invocation," the People again conceded a clear invocation. "The People acknowledge that, during the meeting on April 21, 1999, defendant invoked his right to silence. A close and careful examination of the video taped interview on April 21, 1999, reveals substantial equivocation on the part of the defendant **until the end of the interview.**" (16 CT 4392, emphasis added.) In the remainder of the section, they cited cases in support of their contention that the *earlier* silence and statements were so equivocal that they did not constitute an invocation of *Miranda* rights. (16 CT 4392-4393.)

In the next section of the opposition, entitled "iii. Defendant's Invocation was Both Successful and Scrupulously Honored," the People again concede the invocation, albeit while attempting to minimize it's effect. ". . . the defendant did not confess or make any incriminating statements [on April 21] after his invocation." (16 CT 4393.) The next page contains another concession of the invocation; ". . . defendant successfully invoked his right to silence at the police station . . .." (16 CT 4394.) The People concluded their section with an argument to the effect that Hobson had "substantially complied with the notion of 'scrupulously' honoring an invocation." (*Ibid.*)

At the hearing of the motion to exclude the statements from trial, the defense examined Hobson on the issue, specifically referencing his preliminary hearing testimony. Hobson again testified that Krebs had invoked his right to remain silent "when he told me the second time, 'I've got nothing to say,' that would be on page 81 at line 18." (7 RT 2302.) The concession was confirmed again a short while later. (7 RT 2305.)

At the argument of the motion, the defense referenced both Hobson's

testimony regarding invocation and the People's concession, arguing that the fact of invocation sets the case apart because at the point, "the rules change." (8 RT 2474.) Later, distinguishing *Oregon v Elstad* (1985) 470 U. S. 298, the defense again relied on the conceded invocation: "Here we do have an invocation of the right to remain silent and that changes everything." (8 RT 2477.)

The court's written decision did not explicitly resolve *when* Krebs invoked his rights, but appeared to accept the concession of the People and Hobson's understanding. "Hobson had recognized that defendant had invoked his right to remain silent." (17 CT 4933.)

Normally, a party must dispute a factual question in the trial court in order to raise the issue on appeal. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1251; *Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th 906, 920.) Even purely legal issues may be forfeited by the People by failing to raise the issue below. (*People v. Tillman* (2000) 22 Cal.4th 300, 303.) In a Fourth Amendment context, it is clear the People cannot justify the legality of police conduct by reference to new theories on appeal.

> All parties faced the obligation of presenting all their testimony and arguments relative to the question of the admissibility of the evidence at that time. If the People had other theories to support their contention that the evidence was not the product of illegal police conduct, the proper place to argue those theories was on the trial level at the suppression hearing. The People offered no such argument at that hearing and may not do so for the first time on appeal.

(*Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640.)

Here, whether defendant invoked his Fifth Amendment rights under *Miranda* is a question of fact (*People v. Clark* (1993) 5 Cal.4th 950, 990), to be resolved on the basis of the totality of the circumstances (*People v.*

Musselwhite (1998) 17 Cal.4th 1216, 1238). The People conceded below that Krebs invoked his rights towards the end of the interview on April 21st. They may not now urge to the contrary.

An additional reason barring the People from revisiting the issue of whether Krebs invoked his right to silence on the 21st is that the People presented no evidence that Hobson subjectively thought that Krebs' second "Nothing to say, Larry" was anything other than a clear invocation of his Fifth Amendment right to cut off questioning. While the test of whether the subject clearly invoked his right to remain silent is an objective one[5], the People cannot now urge that a reasonable officer would have understood the words in context to be ambiguous or equivocal because the undisputed evidence establishes that the actual interrogating officer, Hobson, did understand the words to be a invocation of the right to silence. (*People v. Miller* (1972) 7 Cal.3d 219, 226-227 ["the People cannot meet the objective criterion of probable cause for an arrest on a charge of stolen property, because they have failed initially to demonstrate, by an exposition of the officers' beliefs, that those officers suspected the defendant to be guilty of that crime"].)

While *Miller* concerns a Fourth Amendment violation, the principles apply with equal force to *Miranda* violations under the Fifth Amendment, since in both cases, it is the officer in the field whose conduct is meant to be shaped by the exclusionary rule. "A requirement of an unambiguous invocation of Miranda rights results in an objective inquiry that avoids difficulties of proof and . . . provides guidance to officers on how to proceed in the face of ambiguity." (*Berghuis v. Thompkins, supra,* 130

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[5] *People v. Williams* (2010) 49 Cal.4th 405, 428.

S.Ct. at p. 2260.) "Compliance with the fundamental guarantees of the Fourth Amendment is not a game to be won by inventive counsel, but a practical, day-to-day responsibility of law enforcement personnel." (*People v. Superior Court* (1972) 7 Cal.3d 186, 199.)

Because Hobson understood Krebs' words as an unambiguous invocation of his right to silence, and the People conceded the issue below, the issue is forfeited as one "invented for the consumption of reviewing courts." (*Ibid.*) The "ingenious imagination of counsel for the People" cannot be now used to justify the action of the officer who acted on a contrary understanding. (*Guevara v. Superior Court (People)* (1970) 7 Cal.App.3d 531, 535.) This court must therefore accept as true the trial court's finding that Krebs did invoke his right to cut off questioning on April 21st.

b. Krebs invoked his *Miranda* rights unambiguously under *Berghuis v. Thompkins*

Even if the issue is not forfeited, the People fail to demonstrate that the trial court erred in concluding that Krebs did successfully invoke his right of silence. The cases they rely on, including *Berghuis v. Thompkins, supra,* 130 S.Ct. 2250, are factually distinguishable.

In *Berghuis*, the suspect failed to state that he wanted to cut off questioning. "At no point during the interrogation did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney." (*Id.*, at p. 2256.) The Court of Appeal had found his silence in the face of questioning to be an invocation. However, the Supreme court found his silence merely ambiguous, and therefor

insufficient to require the officers to cease questioning. The Court did reaffirm that a suspect invokes "his right to cut off questioning" by saying either "he wanted to remain silent or that he did not want to talk with the police." (*Id.,* at p. 2260.) Here, Krebs said both: "Take me to jail, " followed by the repeated statement, "Nothing to say, Larry." (21 CT 5688-5689.)

The People appear to concede that these statements, by themselves, were not unambiguous. "[Krebs] ultimately said he did not want to say anything more." (RB 100.) However, the People then unpersuasively argue that the Krebs statements were ambiguous because in response to Hobson's continued questions, Krebs "left the possibility open" of further questioning the next day. (RB 102.) This argument is foreclosed by *Smith v. Illinois* (1984) 469 U.S. 91 and *Anderson v. Terhune* (9th Cir. 2008) 516 F.3d 781, 791, cited in the opening brief, which mandate that questioning must immediately cease once the right to remain silent is invoked, and that any subsequent statements by the defendant in response to continued interrogation cannot be used to cast ambiguity on the earlier invocation. The People neither mention these cases, nor explain how Krebs' responses to further questioning could render his previous statements ambiguous. This contention is further discussed in subsection (c), below.

The People also argue that Krebs' statements were properly understood as simply frustration or alternatively, a refusal to answer a specific question. (RB102.) In support of their argument, they cite four cases, discussed here in turn.

People v. Rundle (2008) 43 Cal.4th 76, 115-116 concerned markedly different facts. Although he did not do so in the trial court, the appellant there asserted on appeal that he had invoked his right to cut off questioning

by stating to Placer County officers that he had a headache and wished to return to jail. The trial court found there was no invocation of the right against self-incrimination. This court found the issue waived, but without merit in any event. The decision noted first that Rundle had already confessed to murder and provided a map of where the body was located, thus his later statements did not evidence an intent to not incriminate himself. Here, the situation is the opposite. Krebs was willing to talk until he was confronted. Then, not wanting to incriminate himself, he stopped responding to Hobson. Krebs eventually told him to take him back to jail, and that he had "nothing to say". Thus Krebs' conduct and words evidence an unwillingness to incriminate himself, while Rundle's conduct and statements did not. This court found it significant that "Defendant had not expressed any reluctance to speak further about the murder before asking to stop the interview because he had a headache." The situation here again is the opposite. Here, Krebs initially consented to be interviewed, but always maintained his innocence. He sought to cut off the questioning, however, when he was confronted with strong evidence against him. Hobson clearly understood the change, and specifically questioned Krebs about the reason for it, even though it was abundantly clear: Krebs did not want to incriminate himself. The court in *Rundle* also noted that the defendant himself testified that he always intended to cooperate with the authorities, and closed by noting that the motion filed in the trial court never even suggested that the defendant had invoked his *Miranda* rights after waiving them. *Rundle* thus does not assist the People here, where the defense raised the issue and the People explicitly conceded the issue in the trial court.

The People next cite *People v.Stitely* (2005) 35 Cal4th 514, 535, a case cited by *Rundle, supra.* Here too, the facts differ. In *Stitely*, the

defendant made the alleged invocation after the officer suggested the defendant had fought with the victim:

> DEFENDANT: "Okay. I'll tell you. I think it's about time for me to stop talking."
> COFFEY: "You can stop talking. You can stop talking."
> DEFENDANT: "Okay."
> COFFEY: "It's up to you. Nobody ever forces you to talk. I told you that. I read you all that (untranslatable)."

(People v Stitely, supra, at p 534.)

This court found that a reasonable officer would have understood the comment as one that "expressed apparent frustration, but did not end the interview." The court held that the comment was ambiguous. The court also relied on the fact that the officer used a cautious approach, and reminded the defendant that he could stop talking, even though they were not required to. The defense did not contest this interpretation; they only asserted that the defendant's subsequent "Okay" was a clarifying invocation of his rights. The difference in Krebs' words here, and the officer's response to them is stark. Krebs immediately changed his demeanor and refused to answer Hobson's questions for a long period once the interview became confrontational. Hobson tried to keep Krebs talking, urging him to help by resolving the case. Krebs would have none of it, sitting mostly in silence for an extended period before finally invoking by saying "take me to jail" and "nothing to say" repeatedly in response to Hobson's efforts to keep him talking. Far from the "cautious approach" used by the officers in *Stitely*, here Hobson used the bulldozer approach: you need to talk to me now, because you are going to have to talk to me sooner or later. In no way can Krebs' conduct and statements be passed off as a passing frustration or anything other than a request to end the interview.

In *People v. Jennings* (1988) 46 Cal.3d 963, 977-988, another case relied on by the People, the trial court found that a passing outburst made to one of three investigating officers was only momentary frustration with that particular officer, and was not an invocation of the right to remain silent. The words used were :

> "I'll tell you something right now. You're scaring the living shit out of me. I'm not going to talk. You have got the shit scared out of me," and, "I'm not saying shit to you no more, man. You, nothing personal man, but I don't like you. You're scaring the living shit out of me. ... That's it. I shut up."

(*Ibid.*)

Significantly, the court observed that the words themselves appeared to invoke his rights. "Were we to base our decision solely on the reporter's transcript of those portions of the interview on which appellant relies, his claim that he invoked his right to silence would appear meritorious." (*Id.*, at 978.) Only by observing the tape could the court conclude that the defendant was addressing only one of the three officers in the interview. The defendant had indicated he trusted the other two officers, and by his demeanor, gave no indication he wanted to terminate the interview. Indeed, with similar words addressed the next day to the "trusted" officers, the trial court ruled that Jennings had invoked his right to silence, and suppressed the statements made thereafter. [6] The situation is obviously different here, as Krebs long silence and his repeated indication that he wanted to terminate the interrogation and be taken back to the jail cannot by any stretch be considered a "momentary" frustration. The Court noted

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"This is getting us nowhere. I don't want to talk no more, Don." (*Jennings, supra,* at p. 977, fn. 5.) This statement is indistinguishable from Krebs' repeated, "Nothing to say, Larry."

its deference to the trial court's ruling after watching the video. Here, Hobson understood Krebs' words - in context and considering his affect - as a clear invocation, and the People and the trial court concurred.

The next case cited by the People is *In re Joe R.* (1980) 27 Cal.3d 496. There, the suspect gave an exculpatory version of events for a considerable period before being confronted in a direct manner and accused of telling lies about the offense. The trial court accepted the prosecutor's explanation that the words, "That's all I have got to say," were not meant as a request to terminate the interview, but were used only in the sense of "That's my story and I'm sticking to it." Here, of course, neither the officer nor the prosecutor tendered such an explanation, both believing that the repeated use of the phrase "nothing to say, Larry" was intended as an invocation in the circumstances. The reason appears obvious. Here, unlike *Joe R.*, Krebs clearly signaled that he wanted the interview to end by asking to be taken back to the jail. Thereafter he made his request even more clear by *repeating* in reply to Hobson's cajoling to stay and talk about the crimes, "Nothing to say, Larry."

Subsequent to *In Re Joe R.*, the court in *People v. Carey* (1986) 183 Cal.App.3d 99, emphasized how the *repetition* of a statement can emphasize its clarity and meaning. "We similarly ask, how many times must a defendant exclaim, "I ain't got nothin' to say" to invoke his privilege to remain silent?" (*Id.*, at p. 105.) The similarity of Krebs words here, "Nothing to say," coupled with his repetition of the phrase in a context evidencing a desire to terminate the interrogation make the decision in *People v. Carey* far more relevant than *In re Joe R.*, which concerned only a single response in a context otherwise showing a willingness to continue the interview. Nothing except the "creative imagination" of new counsel on

appeal suggests that Krebs intended anything other than to terminate the interview by his repetition of the phrase.

The last case cited by the People is *People v. Manzo* (2011) 192 Cal.App.4th 366, 381-382 (review granted 5/16/11 on other grounds). The holding of this recent case, decided after *Berghuis, supra,* supports Krebs' contention that his silence and words together constituted an unambiguous invocation of his right to remain silent. In *Manzo*, the suspect, when read his rights and asked if he understood, was silent for a short period, and then stated he was "doing what my right," followed by an emphatic, "I'm doing my right." The court of appeal held that this was an unambiguous invocation under *Berghuis* and other settled law. Significantly, the *Manzo* court relied, as Krebs did, on the holding of *People v. Crittenden, supra,* 9 Cal.4th at p. 129.): "no particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent [citation], and the suspect may invoke this right by any words or conduct reasonably inconsistent with a present willingness to discuss the case freely and completely." (*Ibid.)* Taking note of the holding of *Berghuis* , the court characterized the current state of the law:

> A suspect's assertion of the constitutional right to remain silent cannot be conditioned on the use of certain technical words or, in colloquial terms, use of the "Queen's English," or other similar formalities. Rather, if the words used and conduct displayed by a suspect unambiguously show his or her intent to invoke the Fifth Amendment right to remain silent, then all interrogation must cease"

(*People v. Manzo, supra,* 192 Cal.App.4th 366,382-383.)

The importance of *Manzo* to Krebs' position is that it recognizes, even after *Berghuis,* that an unambiguous invocation can be made by words evaluated in the context of the suspect's conduct, such as silence, and that

no particular magic words need be uttered. The appellate court did not find the words ambiguous in context for failing to recite that he "invoked" his rights: "Because Manzo's use of the word "doing" in this context had the same meaning as "invoking," his statement to police can only be reasonably construed as "I'm [invoking] my right [to remain silent]."

The *Manzo* court's approach is consistent with, and mandated by *Berghuis,* where the court said an unambiguous invocation occurs when a suspect states: "he wanted to remain silent or that he did not want to talk with the police." Just as "I'm doing my right" can only be reasonably construed that the suspect was stating that he was invoking his right to silence, Krebs' statements of "take me to jail" and "nothing to say" in reply to Hobson's repeated exhortations to confess, considered with his previous refusals and requests for breaks can only be reasonably construed as stating that he did not want to talk with the police.

c. Krebs' failure to state that he would never talk to the police did not render his invocation ambiguous

The People make a repeated argument that Krebs' invocation on the 21st was ambiguous within the meaning of *Berghuis* because he "left open the possibility" that he might consent to further interrogation the next day. (RB 100, 101, 103) The People ignore the crucial distinction between the fact of invocation and the subsequent question of waiver or whether the invocation was scrupulously honored and whether the suspect subsequently initiated further conversation.

> Where nothing about the request for counsel or the circumstances leading up to the request would render it

> ambiguous, all questioning must cease. In these circumstances, an accused's subsequent statements are relevant only to the question whether the accused waived the right he had invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together

(*Smith v. Illinois, supra*, 469 U.S. 91, 98.)

To the extent the People's argument of ambiguity relies on statements made by Krebs in response to his questioning after the second "nothing to say, Larry" response, it must therefore fail as noted above in subsection (a) under *Smith v. Illinois, supra*, 469 U.S. 91 and *Anderson v. Terhune* (9th Cir. 2008) 516 F.3d 781, 791, cited in the opening brief. They mandate that all questioning must immediately cease once the right to remain silent is invoked, and that any subsequent statements by the defendant in response to continued interrogation cannot be used to find a waiver or cast ambiguity on the earlier invocation. After referencing the above quoted passage of *Smith v Illinois, supra,* the court in *People v. Carey* (1986) 183 Cal.App.3d 99 held, "This holding is apposite to an invocation of the Fifth Amendment privilege and renders appellant's subsequent willingness to answer specific questions irrelevant on the issue of invocation." (*Id.,* at p. 106.)

The People's characterization of the facts, that Krebs left the possibility of renewed interrogation open, is also misleading. Krebs did not state nor imply that he was leaving open any possibility of further interrogation at the time he was telling Hobson he had nothing to say and wanted to go back to the jail. (20 CT 5689-5691.) What occurred is that Hobson, having finally agreed to terminate the interview, raised the subject of the procedure to be followed *if Krebs changed* his mind. In response to

Hobson's exposition of the inevitability of conviction ending in "What you were thinking is important to me," Krebs states "Nothing to say, Larry," for the first time. Hobson responds "Its not going to go away Rex. " (20 CT5689.) Hobson then makes another lengthy statement concerning the investigation, ending with a question of where the bodies were. Krebs responds only by saying "Nothing to say, Larry." for the second time. (20 CT 5691.) This is the point which Hobson testified he understood as an invocation of his *Miranda* rights. But Hobson does not terminate questioning. After some questions about what has changed, he asks "If I take you back out there, you think about it, will you call me? Krebs remains silent. Hobson handcuffs Krebs, then asks "Is that fair? You call me when you're ready. Day or night, I'll come. Is that fair?" Krebs ignores the question again but asks "How long before you prefer your charges?" Hobson shortly afterwards asks again "But after you think about it, will you call me? Krebs says only "I'll think about it." (20 CT 5692.) Hobson raises the question a fourth time in response, ending by stating his understanding, "Okay. I'll take you back, you can think about it. If you want to talk, get ahold of the jailer whether it's day or night. I'll come out. Is that fair?" Krebs indicates his agreement, "More, more than fair" (*Ibid.*)

This sequence shows that Krebs himself did not show any equivocation or uncertainty about his desire to terminate the interrogation. Indeed Krebs pointedly ignored Hobson's question on the issue of potential of renewed questioning when first asked, and remained silent. When Hobson persisted on the issue after handcuffing Krebs, Krebs again ignores the suggestion and instead asks when charges would be filed. Only after the third time Hobson asks to be called does Krebs respond with the non-committal "I'll think about it." No doubt sensing that was as far as he could

get at that point, Hobson's last statement conveys that he would wait for Krebs to call before resuming the interrogation, and Krebs indicated his assent. Thus this is not a situation where the suspect made an equivocal request, but instead a situation where the officer attempts to insert uncertainty where none exists.

The People argue, "Appellant simply did not make a final, definitive assertion of his right to remain silent, as required by *Berghuis*, and thus Hobson did nothing wrong in returning the next day." (RB103.) Nothing in *Berghuis* requires a "final, definitive" assertion of the right to remain silent. Indeed none could ever be made since it is clear that no invocation is ever "final" because the suspect may subsequently change his mind and rescind his invocation by initiating contact. What is required is an unambiguous invocation of his Fifth Amendment rights.

A suspect has the right under *Miranda* and the Fifth Amendment to control "the time at which questioning occurs, the subjects discussed, and the duration of the interrogation." (*Michigan v. Mosley* (1975) 423 U.S. 96 at 103-104, cited at AOB 86.) "The fundamental purpose of the Court's decision in *Miranda* was "to assure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process." (*Connecticut v. Barrett* (1987) 479 U.S. 523, 52, citing *Miranda* at p. 469.)

There is no requirement that a suspect be certain or express certainty that he will *never* speak to the police in order to invoke his right to invoke his Fifth Amendment right to exert such control. Indeed, such a requirement would be utterly inconsistent with the right of a suspect to control the timing, subjects, and duration of questioning. A suspect who states "I don't want to talk to the police," invokes his right to silence, and the interrogation

must immediately cease. (*Berghuis, supra.)* That statement does not contain any information about the reasons for not wanting to talk or whether the subject may change his mind, but it cannot be gainsaid that this is an unambiguous invocation. Interrogation must cease. In the context of invoking the right to counsel, the Court stated in *Davis v. United States* (1994) 512 U.S. 452, "a statement either is such an assertion of the right to counsel or it is not." (*Id.*, at p 459.) In *Berghuis*, the court extended the *Davis* rule to invocations of the right of silence. So the question in this context is simply whether the statement is an assertion of the right to control the duration of the questioning. That the suspect may be undecided about whether to exercise his right to initiate further conversation is irrelevant.

3. The failure to scrupulously honor Krebs' invocation requires suppression of his confessions pursuant to *Michigan v. Mosley*

At pages 93 to 102 of the AOB, Krebs detailed Hobson's actions in disobedience of Krebs' invocation, and demonstrated, by a detailed analysis of the factors identified in *Michigan v Mosley, supra,* 423 U.S. 96 (*Mosley*), why consideration all the circumstances showed that Krebs' invocation of his right to silence was not scrupulously honored. In their reply, the People make no attempt to analyze the cited factors or critique Krebs' analysis. In a short section in their brief (RB 103-104) they simply rely on the previously discussed contention that Krebs never unambiguously invoked his right to silence. This court should treat such an approach as a concession that if Krebs did in fact invoke his rights, the invocation was not "scrupulously honored." Their main argument seems to be that because

Krebs was eventually given *Miranda* warnings on the 22nd, the warned confessions were therefore admissible pursuant to *Oregon v Elstad* (1985) 470 U.S. 298. They go so far as to say that the events of April 21st are actually "irrelevant" to whether Krebs confession on the 22nd should be admissible. (RB 103.)

Krebs has adequately briefed why the factors articulated in *Mosley* require a finding that Hobson did not "scrupulously honor" Krebs' invocation, and reference is made to that portion, AOB 93-102, without further elaboration here in light of the People's failure to address that analysis. Hobson's interrogation of Krebs was a textbook example of an officer "persisting in repeated efforts to wear down his resistance and make him change his mind." (*Michigan v. Mosley, supra,* 423 U.S. at 105-106.) Hobson's persistence extended over two days - he returned uninvited to continue exactly where he left off the previous afternoon.

As to the People's contention that what occurred on the 21st is irrelevant because Krebs was advised on the 22nd prior to his confession, it is wrong. The fact that a suspect has invoked his *Miranda* rights is always highly relevant to the question of whether a subsequent confession is admitted.

The failure of the police to follow the procedures specified in *Miranda* will result in the suppression of a confession brought about by the improper police actions "even though the statement may, in fact, be wholly voluntary." (*Michigan v. Mosley, supra*, 423 U.S. at p. 100.) *Miranda* was quite clear that interrogation must cease upon invocation of the right to silence. (*Miranda,* 384 U.S. at 473-474.) *Mosley* makes clear that the failure to honor the invocation requires suppression, without regard to whether the ensuing confession is actually "voluntary" or not. "To permit

the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of Miranda by allowing repeated rounds of questioning to undermine the will of the person being questioned." (*Michigan v. Mosley, supra,* at p. 102.) *Mosley*'s holding is abundantly clear: where the police fail to "scrupulously honor" the "right to cut off questioning", a subsequent confession, even if made after further warnings, is inadmissible. The People's attempt to brush off as irrelevant the game changing invocation that was conceded in the trial court fails. Once an invocation is found, an ensuing confession must be suppressed unless the police have scrupulously honored the invocation.

The People's argument that the events of the 21st are moot because of the warnings given on the 22nd suggests that *Oregon v. Elstad, supra,* 470 U.S. 298 (*Elstad),* overruled *Mosley.* It did no such thing because the cases concern different factual settings. *Mosley* deals with the admissibility of a warned confession obtained by a failure to honor an invocation. In *Elstad,* there is no invocation, and the case concerns the distinct situation of a warned confession following voluntary, but unwarned questioning resulting in admissions. Thus *Elstad* does not assist the People where the police obtain the warned confession by failing to honor an invocation because that situation is controlled by *Mosley.* While *Elstad* is relevant to Krebs' distinct claim under *Missouri v Siebert, supra* considered in the next section, *Elstad* does not concern the effect of ignoring an invocation, which continues to be controlled by *Mosley.* Here, the interrogator demonstrably did not "scrupulously honor" the invocation, and the subsequent confessions must be suppressed for that reason alone.

B. The *Miranda* warnings on the 22nd were also ineffective because Hobson deliberately used a 'question first," warn later technique in violation of *Missouri v. Siebert.*

Krebs argued additionally at AOB 102-109 that under *Missouri v. Siebert, supra,* 542 U.S. 600 and *Oregon v Elstad, supra,* 470 U.S. 298, the warned confessions on the 22nd were also inadmissible because Hobson used "deliberately coercive or improper tactics in obtaining the initial statement." (*Elstad* at p. 314, AOB 104.) The People attempt to narrow the holding of *Siebert* in contravention of recent case law and assert several factual distinctions. Their contentions are discussed in turn.

Plaintiff first attempt to narrow *Siebert*'s application to cases where there is proof of a written police protocol calling for the question first, warn later technique. No authority is cited for this particular proposition. *Siebert* simply addresses the explicit exception for cases involving "improper tactics" that the majority in *Elstad* exempted from the rule that *inadvertent,* technical violations of Miranda would not invalidate a subsequent warned confession. But the *Elstad* court was very careful to exclude from the ambit of its holding those cases where *other,* more serious improprieties and *Miranda* violations existed, such as when the police have used deliberately coercive or improper tactics. *(Oregon v Elstad,* supra at 308, 309, 312, fn 3, 314, 317.)

The core holding of *Siebert* is that *deliberately* withholding *Miranda* warnings until "beachhead" admissions have been made is one type of coercive conduct which requires suppression of an ensuing warned confession even though the latter confession is "voluntary." There is no requirement that the technique be done pursuant to a written protocol or

official policy. The court in *Thompson v Runnel* (9th Cir, 2010) 621 F.3rd 1007 found to the contrary.

> *Williams* [*United States v. Williams* (9th Cir.2006) 435 F.3d 1148] made clear, however, that courts must consider circumstantial, as well as direct, evidence that the withholding of warnings is deliberate, because "`the intent of the officer will rarely be ... candidly admitted.'" 435 F.3d at 1158-59 (quoting *Seibert*, 542 U.S. at 617, 124 S.Ct. 2601 (plurality opinion)). "Once a law enforcement officer has detained a suspect and subjects him to interrogation... the most plausible reason for ... delay is an illegitimate one, which is the interrogator's desire to weaken the warning's effectiveness." *Williams*, 435 F.3d at 1159. It was legal error for the district court to conclude that the absence of departmental policy or outright admissions of deliberate intent ends the inquiry under *Seibert*.

(*Thompson v Runnel, supra*, 621 F.3d at p. 1017, fn 9.)

Krebs has demonstrated in the AOB at pages 105-107 that the undisputed facts show beyond any doubt that the failure to warn was not inadvertent, but was part of a well designed plan by an expert interrogator fully trained in psychological techniques to gain admissions and a promise to fully confess prior to administering the warnings. The circumstantial evidence is overwhelming. Hobson's extensive credentials as an instructor in interrogation techniques (AOB 105-106) render any other attempted explanation unreasonable. Nothing in the trial court's ruling suggests that he made a finding that Hobson's conduct was inadvertent. The People do not even attempt to dispute this analysis, nor do they point to any facts in the record from which it might be reasonably argued that Hobson's behavior was inadvertent or other than the result of a purposeful design. As such, they have forfeited any right to dispute the issue.

The People also argue that a "full" confession was not gained prior to the warnings. Neither *Siebert* nor *Elstad* requires that the unwarned admissions constitute a "full confession" in order for the court to suppress a subsequent warned "voluntary" confession. However, in response to repeated references to the murder victims and the families need for closure, Krebs said that he was an animal and that nothing could excuse what he did. In context, this was the equivalent of a full confession of murder, with just the details to be filled in. While the People argue that Krebs is incorrect when he asserts that Hobson "deliberately used a two step strategy, and took no curative measures", they marshal no facts to demonstrate otherwise. (RB 105.) They also reassert the argument that Krebs was not in custody as to homicides when he confessed. This meritless argument is discussed previously in subsection A(1) above.

The People assert that Hobson "conscientiously reminded Krebs of his rights on the 21st and 22nd, and that when Krebs "chose to exercise his rights his decision was honored." (RB 106.) The People are certainly correct that Hobson's conduct in the interrogations, and his conduct in response to Krebs' interrogation is a highly relevant factor in whether a subsequent warning is sufficient to render a subsequent confession admissible. Their mistake is their characterization of the facts. Hobson honored the invocation only in the breach. He first continued questioning: "What changed?" (20 CT 5691.) When that didn't work, he attempted to extract a promise that Krebs would call him from the jail if he changed his mind. (20 CT 5692.) While Krebs was being taken back to the jail, Hobson reopened the interrogation by asking "What are you thinking." (7 RT 2264-2265.) When they arrived at the jail, Hobson asked him again to take him to the bodies. Krebs instead asks to be taken to the jail. (7 RT 2265.)

Hobson then again attempts to get Krebs to agree to think about talking to him tomorrow, and to call if he does. Krebs is again non-committal. (7 RT 2266-2267.) Hobson shows up at the jail uninvited the next morning and begins coercing Krebs to talk, without providing any warnings. (7 RT 2268-2270.) Krebs finally succumbs, stating he was an animal and that nothing excused what he did. (7 RT 2270.)

The People conclude based on the above arguments that *"Siebert* affords no basis for disturbing the trial court's ruling". Significantly, they fail to address Krebs' argument that the trial court erred by disregarding the effect of Hobson's repeated unwarned interrogation subsequent to Krebs' invocation on the question of whether the subsequent warned confession was admissible. The trial court factually found that Krebs was in custody; Hobson was therefore required to re-administer warnings on the 22nd prior to any attempt to interview Krebs. The court therefore correctly suppressed Krebs unwarned admissions of being an animal, and having no excuse for his conduct.

The trial court erred, however, in interpreting *Elstad* as to require admission of the warned confession because *Elstad* plainly does not apply by its own terms to cases of "deliberately coercive or improper tactics." (*Oregon v. Elstad, supra*, at p 314.) The trial court inexplicably found the invocation on the 21st to be irrelevant, and analyzed the events of the 22nd, much as the People now attempt to do, as if Krebs was simply the victim of an inadvertent failure to give timely warnings. Under the clear law at the time, as later reinforced in *Siebert*, Hobson's repeated interrogation after invocation and failure to scrupulously honor the invocation by waiting for Krebs' call prior to visiting him were coercive tactics designed to wear down the will of the suspect, constituting the "deliberate coercive or

improper tactics" which require the suppression of confessions gained by exploitation of those tactics, whether or not warnings preceded subsequent "voluntary" confessions. As Justice Kennedy's concurrence phrased it , "The *Miranda* rule would be frustrated were we to allow police to undermine its meaning and effect." (*Missouri v. Seibert, supra* at p. 621.) If officers could ignore invocations of *Miranda* rights and interrogate until the suspect breaks and confesses, yet be assured that the confession will be admitted if they then administer warnings to the broken subject and continue the questioning, the rule of *Miranda* will not only be frustrated, it will be eviscerated.

C. Krebs waiver and confessions on April 22nd were involuntary and should have been excluded.

The People argue that Krebs factual contentions here have been forfeited by failing to raise them in the trial court, and even if considered, are insufficient to overcome the trial court's finding that the statements were voluntary.

1. The issue concerning the involuntariness of the confessions was preserved

The People concede that Krebs raised the issue of the voluntariness of the confession in his written motion and in oral argument. (RB 107.) Clearly the People understood below that the voluntary nature of the April 22nd confessions and those that followed were disputed. Indeed the first ten pages of the Peoples opposition is devoted exclusively to the law and facts relating to the that issue. (17 CT 4384-4394.) The trial court was fully

aware of the issue, as he had ruled in the preliminary hearing that the warned confession "voluntary." (2 PHRT 419-420) The trial court's written opinion after the in limine motion also clearly shows that the court reiterated its finding based on the totality of the circumstances. (CT 4936-4937.) Krebs therefore did all that was required to preserve his objection on appeal.

The People's real argument is that the defense failed in the trial court to highlight in argument certain evidence which the defense now asserts the court should consider in examining the "circumstances surrounding the giving of a confession." (*Dickerson v. United States* (2000) 530 U.S. 428, 434, AOB 109.) The People's argument confuses the raising of an issue with the evidence cited to support the issue.

It is not necessary, nor even possible, to detail every bit of evidence in the moving papers in advance of the hearing to raise an issue, especially when the issue is one that is based on the "totality of the circumstances." Nor is it necessary to specifically argue every piece of testimony that is conceivably relevant to an issue properly raised in order preserve the issue on appeal. The People's hyper-technical approach would require arguments as long as the hearing, referencing every conceivable fact. Certainly the People would not agree to have such a stringent 'gotcha' rule applied to itself.

Here, all the factors underlying the forfeiture rule indicate the rule does not apply. The People recognized they had the burden to show that the statements were voluntary, and therefore had ample opportunity to produce all relevant evidence on the issue. The trial court considered all the evidence, so there is no bar to this court considering all the circumstances in its denovo review. "On appeal, the determination of a trial court as to the

ultimate issue of the voluntariness of a confession is reviewed independently in light of the record in its entirety, including 'all the surrounding circumstances-both the characteristics of the accused and the details of the interrogation' (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226.)" (*People v. Benson* (1990) 52 Cal.3d 754.) It would be inconsistent with the state and federal established rules of review if the court did not consider the totality of the evidence available to the trial court.

The contentions are also preserved under the rule of *People v. Partida* (2005) 37 Cal.4th 428. Neither the People nor the trial court was misled. There was a "specifically grounded objection to a defined body of evidence" - the confession was involuntary based on the evidence at the hearing. *(People v. Morris* (1991) 53 Cal.3d 152, 187.) Defense counsel argued at the hearing :

> "That's what investigator Hobson was doing. Creating circumstances calculated to undermine the suspect's ability to exercise his free will, so that when he gave those first admissions on the morning of the 22nd, they were the result of coercion. (8 RT 2478.)

This court therefore must consider the entire record of the hearing on the motion to determine de novo whether the waiver and confession was voluntary. Krebs has addressed certain evidence in distinct subsections only to promote careful analysis of all the evidence bearing on the ultimate question of voluntariness. There is no forfeiture in the circumstances.

2. Krebs' statements were involuntary notwithstanding his subsequent statement that they were voluntary

On the merits, the People again assert that Krebs never asserted his right to remain silent. If this were true, Krebs' contention that his waiver and confession on the 22nd were involuntary would be drained of some of its force. However, Krebs has demonstrated that the People properly conceded below that Krebs did clearly assert his rights, and the People's attempted retreat from this position is neither authorized or supported. The People also maintain here that Hobson's questioning was "professional" and "within the limits of the law." (RB107.) If this were true, Hobson would have immediately ceased his interrogation on the 21st and not returned uninvited for further interrogation the next day.

The People then discuss the Hobson's interrogation practices . They argue the practices are lawful by assigning them a benign characterization and considering them individually, as opposed to a further element in a web of practices designed to overcome Krebs' obvious initial resistance to incriminating himself. Krebs has adequately briefed the facts and law in this regard, and no further response appears necessary in light of their discussion.

The People also argue that Krebs admitted to Hobson that all his statements were voluntary. (RB110.) While Hobson did get Krebs to say this *after* he had broken down his resistence, Krebs also complained on the videotape that Hobson was "beating on him." (21 CT 5686.) Krebs' later statement to Hobson that his conversations were voluntary is no more determinative than a "waiver" of *Miranda* rights after the police fail to honor a suspect's invocation of rights and continue the interrogation.

D. The error in admitting Krebs' confessions requires reversal

The People concede that Krebs' confessions "were undoubtedly the strongest evidence in the case," yet argue, unpersuasively, that any error in admitting them was harmless beyond a reasonable doubt.

They cite the "confessions" to his employer, his girlfriend and the reporter, but these admissions did not have any of the gruesome detail and information about the specific sexual crimes charged or the issue of premeditation and manner of death. There is no doubt that the physical evidence, including that derived from his confessions, such as the bodies themselves, would connect the defendant with the homicides, but the exact nature of the crimes would have been open to speculation. Indeed, in the next section regarding the corpus issue as to rape and sodomy of Crawford, the People concede that "the evidence pertaining to Crawford's clothing may not unequivocally prove she was raped and sodomized" (RB 116.)

The People fail to acknowledge the special prejudice presumed from a detailed confession, nor do they demonstrate that the confessions were "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*People v. Neal* (2003) 31 Cal.4th 63, 87, citing *Yates v. Evatt* (1991) 500 U.S. 391, 403; AOB 122.)

III

INSUFFICIENT EVIDENCE ASIDE FROM KREBS' CONFESSIONS EXISTS TO SUPPORT THE CONVICTIONS OF RAPE AND SODOMY OF CRAWFORD

Krebs argued that his convictions for rape and sodomy of Crawford were unsupported because no corroborating evidence of such crimes was

produced apart from his own confessions and admissions. Krebs conceded that the corpus delicti rule as to rape was satisfied as to Newhouse, due to her unclothed body, but argued that Crawford was fully clothed, and no other independent evidence supported an inference of the *charged* sexual conduct.

The People appear to concede that there is no independent evidence of the sexual penetration of the type required for rape or sodomy, but respond with two arguments, one legal, the other factual. They first argue the legal proposition that under *People v. Jones* (2011) 51 Cal.4th 346, it is no longer necessary for the People to introduce independent evidence of *each element* of the charged crime, as long required by case law and CALJIC 2.72. Under their proposed rule, the corpus requirement of a charged crime may be satisfied by independent evidence which corroborates *some type of wrongdoing*, rather than the *wrongdoing required by the elements of the specific charge.* They then argue that the independent evidence, including evidence of Krebs' sexual offenses against other victims, was sufficient to permit "an inference of criminal conduct" and his "propensity to commit forcible sex offenses" sufficient to satisfy their proposed legal rule. Since Krebs has anticipated the People's main factual arguments, the reply will focus on the People's legal argument.

Krebs reasserts, contrary to the People's legal argument, that the corpus delicti of a *charged crime* is not met by independent evidence establishing *some* "injury, loss, or harm." Instead, it requires independent evidence of the injury, loss, or harm which constitutes the *charged offense.* "[S]o long as there is some indication that the *charged crime* actually happened, we are satisfied that the accused is not admitting to a crime that never occurred." (*People v. Jennings* (1991) 53 Cal.3d 334, 368.) "The

corpus includes *every element of the offense* necessary to show 'the fact of injury, loss, or harm, and the existence of a criminal agency as its cause.' (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168.)" (*People v. Miranda* (2008) 161 Cal.App.4th 98, 101, italics added.)

The court in *Jennings* refrained from holding that the undisputable evidence of a forcible assault and murder of a woman was sufficient to establish the corpus delicti of rape. To hold that the corpus rule is satisfied by evidence of *any* wrongdoing rather the *charged* wrongdoing would be to deviate from long settled law. (See CALJIC 2.72; *People v. Howard* (2010) 51 Cal.4th 15, 37 ["The principles set out in CALJIC No. 2.72 are long-established ones."] "Defendant's assertion that there was insufficient evidence of penetration is misplaced; there need only be slight evidence of that element of rape, and such may be inferred from the above-mentioned circumstantial evidence." (*People v. Wright* (1990) 52 Cal.3d 367, 405.)

The holding in *Jennings, supra,* 53 Cal.3d 334, is best understood as other than a dramatic change in the law which allows evidence establishing the corpus delicti of one crime to fulfill the corpus requirement as to a distinct crime with distinct elements. Indeed the court in *Jennings* made separate analysis of the evidence supporting the robbery and rape charges relating to Olga Cannon, which would not be necessary if this were the case. Instead, the *Jennings* court simply applied the existing law which admittedly only requires "slight" evidence in corroboration, and determined that the independent circumstances, including most prominently the nakedness of the body from the waist down, constituted "some" evidence of rape sufficient to satisfy the corpus rule.

Krebs therefore asks this court to disavow the People's underlying legal proposition that the corpus delicti rule no longer requires even slight

or circumstantial independent evidence of "*every element of the offense* necessary to show "the fact of injury, loss, or harm, and the existence of a criminal agency as its cause." (*People v. Miranda\, supra*, 161 Cal.App.4th 98, 101.)

Using the traditional legal analysis, there is less independent evidence here of sexual penetration than in the case of *Jennings,* which described the evidence as admittedly "thin." The independent evidence of actual sodomy here is even more lacking.

ISSUES RELATING TO PENALTY

IV

THE PEOPLE COMMITTED PREJUDICIAL ERROR BY PRESENTING EVIDENCE AND THEORIES REGARDING VOLITIONAL IMPAIRMENT INCONSISTENT WITH THOSE PRESENTED BY THE PEOPLE IN CIVIL COMMITMENT CASES

A. Krebs' Due Process and Eighth Amendment claims based on use of inconsistent theories are not forfeited and are cognizable on appeal

The People argue that Krebs has waived his *In re Sakarias*/Due Process claim (*In re Sakarias* (2005) 35 Cal.4th 140), citing cases that predate *People v Partida, supra,* 37 Cal.4th 428. The People *do not* claim that Krebs forfeited the intertwined claim presented in Argument VI concerning the exclusion of all evidence regarding SVP proceedings,

conceding that issue was properly raised in the trial court.

The People fail to note any of the numerous exceptions to the forfeiture rule. An appellate court may note errors not raised by the parties if justice requires it. (*Silber v. United States* (1962) 370 U.S. 717, 718.) Regarding claims of prosecutorial misconduct, "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Furthermore, an exception to the forfeiture rule applies where the state of the law at the time of trial would not have supported the objection in the view of competent and reasonable attorneys. (*People v. Black* (2007) 41 Cal.4th 799.) "If a question of law only is presented on the facts appearing in the record the change in theory may be permitted." (*Panopulos v. Maderis* (1956) 47 Cal.2d 33, 341, *People v. Koontz* (2002) 27 Cal.4th 1041, 1075, fn 4.) California courts allow a party to raise constitutional objections not raised below when the asserted error fundamentally affects the verdict or "important issues of public policy are at issue." (*Hale v. Morgan* (1978) 22 Cal.3d 388.) A matter normally not reviewable upon direct appeal, but which is shown by the appeal record to be vulnerable to habeas corpus proceedings based upon constitutional grounds may be considered upon direct appeal. (*People v. Norwood* (1972) 26 Cal.App.3d 148, 154.) Furthermore, in *People v. Morrison* (2004) 34 Cal.4th 698, 716-717, the court reached the merits regarding a claim of a similar nature by assuming without deciding that it was not forfeited by the failure of trial counsel to raise the same objection. The issue there pertained to the prosecution's duty to correct misleading testimony where the defense knew or should have known of the misleading nature of the evidence.

Examination of the circumstances here shows that each of these rules suggests that the issue addressed here is cognizable on appeal, even though not raised below, as will be further discussed below. However, most importantly, the People fail to note that under *In re Sakarias* itself, the issue is not forfeited. In *People v. Sakarias* (2000) 22 Cal.4th 596, the court did not did not find that the matter was forfeited because of trial counsel's failure to object on the same grounds even though the People asserted the issue was waived for failure to object below.[7] Further, in *In re Sakarias,* this court rejected the contention of the Attorney General that the claim of inconsistent arguments was waived for failure to object on that basis in the trial court by issuing the order to show cause.[8]

This court has never ruled that a similar claim is waived for failure to object in similar circumstances. (Compare *People v. Williams* (2008) 43 Cal.4th 584, 625, noting previous decisions ruling that the specific claim involved there required assertion in the trial court.)

The policies underlying the exceptions to the waiver rule apply here. The exception for fundamental justice applies. The issue here involves a fundamental issues of fairness: can the People seek death by attacking the soundness of a theory of volitional impairment that the People uniformly and consistently embrace in all SVP and similar cases? It is also apparent

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See Respondents brief, *People v. Sakarias,* No. S024349, page 90.

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The People raised the contention in the Respondent's Informal Response to the Petition for Writ of Habeas Corpus, S082299, filed April 5, 2000, at pages 29 and 59. By thereafter issuing the order to show cause, this court determined that there was no procedural bar on such a ground. (*People v. Romero* (1994) 8 Cal. 4th 728, 737.)

that an objection to Dietz's testimony on the ground that it was inconsistent with the testimony presented by the People in SVP cases was futile and would have been rejected. The court ruled that whether Dr. Berlin's view that paraphilias impair volition has "been adopted by our government in our specific state" was not even *admissible*. (35 RT 9039.) In the light of such a ruling, it would have been futile to further urge the governmental "adoption" of Berlin's views was of such significance that it actually barred contrary evidence being presented by the People.

The futility of such an objection is further supported by the state of the law at the time. Krebs' counsel should not be faulted for failing to raise the issue when the state's cases up to that point had uniformly rejected similar claims. (*People v. Hoover* (1986) 187 Cal.App.3d 1074, 1083 ["no rule of misconduct or due process binds a prosecutor to a theory asserted in closing argument in a related prosecution"]; *People v. Watts* (1999) 76 Cal.App.4th 1250 [rejecting estoppel/due process claim based on previous conviction of another for personally using gun].) *In re Sakarias,* decided several years after the trial, is the first California case to hold explicitly that inconsistent positions taken by the People can violate Due Process even where the prosecution does not know either version is false, and even if the inconsistent theories are in fact based on the differing evidence in the trials. Counsel should not be faulted for believing that the best they could do was to attempt to counter the People's evidence by eliciting evidence before the jury concerning the state's adoption of Berlin's views.

Related to the futility rule is the concept that counsel cannot be expected to assert authority which does not yet exist. "The [waiver] rule, however, does not apply when, as here, the authority supporting the complaint postdates the conduct complained of. (*See People v. Lucero*

(1988) 44 Cal.3d 1006, 1031, fn. 15.)" *(People v. Gordon* (1990) 50 Cal.3d 1223, 1266.) Here, *In re Sakarias* is the specific authority supporting Krebs claim. Indeed, when the People address the merits of the claim at RB 106-107, the entire discussion pertains to the scope of *In re Sakarias*, which they assert is too narrow to apply to this case. Clearly the People admit of no other conceivable supporting authority which predates the trial of this case. The waiver rule should therefore not apply to this case, which was tried before *In re Sakarias* was decided.

The issue here is also based on undisputed facts, and thus is a pure question of law. The People do not dispute in their brief that the People have adopted in SVP cases the theory that a paraphilia impairs volitional capacity. Nor could they dispute this fact, given the law of our state and the published cases where the People have won commitments by proving precisely this fact beyond a reasonable doubt. The only dispute here is one of law: may the People nevertheless dispute their adopted theory by evidence and argument in a criminal case to seek the death penalty?

Furthermore, the issue is one of general importance, because it involves the adoption of a theory that has relevance to a large number of cases, rather than the type of inconsistent positions taken concerning specific facts in co-defendant trials. The claim is also intertwined with the issue raised by the People's capitalization on the specifically false aspects of Dietz' testimony, which was not found to be waived in *People v. Morrison, supra*, 34 Cal.4th 698, 716-717, and discussed in Argument V.

For all of the above reasons, the court should find that Krebs has not forfeited his argument that the penalty trial was rendered fundamentally unfair and unreliable by the Peoples' reliance on evidence and theories regarding paraphilias and volition, and the test thereof, which stand in

irreconcilable conflict with the theories on the same issue which have been adopted by our state and presented by the People in numerous and ongoing SVP prosecutions. This court has the power to entertain the claim on the merits. At the time of the trial, the state law did not support the claim. Given the nature of the claim, the fact that this court has not previously held that such a claim is waived on appeal for failing to raise it below, and the primary fact that this court did not find the matter to be waived for failure to raise it in the trial court in *People v. Sakarias* and *In Re Sakarias,* it would be unfair to hold that Krebs' claim is forfeited.

B. The principles announced in *In re Sakarias* support relief here under the Due Process Clause and the Eighth Amendment

The People contend that Krebs' Due Process/Eighth Amendment claim is meritless. (RB 128 - 134.) However, they do not cite a single authority in their discussion of the law other than *In re Sakarias.* Neither do the People make any attempt to distinguish even a single case out of the more than a score that Krebs cited in his brief on the issue in addressing the anticipated arguments that the People now make. Neither do the People make any principled attempt to engage in moral reasoning to affirmatively explain why it fair, or necessary, to allow the State to seek the death penalty by contesting, and indeed ridiculing, the theory of volitional control which comprises the very essence and foundation of the State's involuntary commitment policies, jurisprudence, and practices. Finally, the People never even mention Krebs' argument that his Eighth amendment right to a reliable penalty verdict was also violated by their evidence and argument on the issue of volitional impairment by a paraphilia which was diametrically

opposed to that adopted by the People in civil commitment cases. (AOB 136-137.)

Instead, the People base their defense of this morally indefensible practice by five related arguments, all based simply on distinguishing *In re Sakarias*. Their defense essentially boils down only to saying, this court has not yet said *specifically* that the People can't switch positions in this *particular* context. They argue nothing in the Evidence Code prohibited the evidence, and the prosecutor merely argued based on the evidence admitted. The People contend, in essence, that *In re Sakarias* must limited to its specific facts, arguing that Krebs "misunderstands the limited scope" of the ruling. (RB 130.) They argue the "conclusive distinction" here is that the switch in this case is one of opinion rather than fact. (RB 132.) They then address other claimed significant distinctions: the switch in theories here did not occur in the same case; Krebs was not committed as an SVP, therefore SVP proceedings are irrelevant; the facts here were not manipulated as in *In re Sakarias*; and finally, they argue the prosecutor was not guilty of intentional "bad faith."

Krebs will address each of the People's contentions below, with some preliminary comment. This claim is a *moral* claim. It invokes the fundamental promise of a *fair* trial and *fair* play by the State in search of the *truth*. In very plain English, Krebs accuses the People of talking out of both sides of their mouth as it suits their needs. Here it was done in pursuit of a judgment of death. One need not be a lawyer versed in fine points of constitutional law to recognize such conduct as reprehensible. This court in *In re Sakarias* addressed the "unseemly at best" problem of an unjustified switch in positions in the context of co-defendant trials. (*Id.*, at p. 159.) However, the court's finding of a Due Process violation was premised on

the broader and more fundamental principle that the Due Process clause requires that "the government prosecute *fairly* in a search for *truth*." (*Smith v. Groose* (8th Cir. 2000) 205 F.3d 1045, 1053, emphasis added.) Certainly this fundamental principle applies in all factual permutations. Thus any argument that merely seeks to point out the differences between this case and the situation in *In Re Sakarias,* but fails to demonstrate that the government's conduct here was both fair and in service of the truth must also fail.

The question this court confronted in *In re Sakarias* was, how much inconsistency (or one might say hypocrisy) is our system of justice willing to tolerate when there appears no real justification for taking the opposite positions other than the mere desire to win in each case? Krebs recognizes that a certain amount of inconsistency is a necessary and tolerable component of jury trials in an adversary system. As many authorities have pointed out in various settings, inconsistencies, such as inconsistent verdicts, are often the necessary byproduct of other rights and principles deemed necessary to a just system as a whole. But just because inconsistency is tolerated in some circumstances as a necessary by-product of a just system does not mitigate its universally understood corrosive effect on justice when it is *not justified.* Indeed, inconsistency uncoupled from rational justification is the essence of an *arbitrary* decision, which has long been held to be inconsistent with the fundamental notions of fairness and reliability guaranteed by the Due Process Clause and the Eighth Amendment. When the only justification for the People's switch in positions that can be plausibly proffered is simply the desire to win in each case, condemnation by the court is richly justified.

The People's dismissive approach fails to forthrightly address *why* a

prosecutor in a death penalty case *must be,* or even *should be* able to argue that a paraphilia *never* impairs volition while his fellow prosecutor down the hall is arguing that a person's paraphilia so impaired his volition that he must be indefinitely civilly committed, especially where both prosecutors know that if their inconsistent arguments are successful, the same attorney for the People will defend both verdicts on appeal before this court with equal vigor. To tolerate such a practice can only engender cynicism and distrust of the courts in addition to working the obvious injustice on the defendant who is injured by the state's duplicity.

Recent authority reinforces these principles. In *Stumpf v. Houk* (6th Cir., 2011), No.01-3613, filed August 11, 2011, the court considered the effect of inconsistent arguments on the decision to impose the death penalty after remand for that purpose in *Bradshaw v. Stumpf* (2005) 545 U.S. 175. In reaching its decision that the state's inconsistent argument bearing on the culpability of co-defendants violated the Due Process Clause, the court first reviewed the Supreme Court cases establishing a heightened need for reliable decision making in death penalty cases. (*Stumpf v. Houk, supra,* slip opinion, p. 11.) The court found that "it would amount to nothing short of complete abdication of our sworn responsibilities to ensure the reliability of capital sentencing" to presume that the inconsistent argument did not affect the sentencer. (*Id.*, at p. 13.) The court reiterated the values underpinning its decision:

> If we are to take seriously the responsibility of ensuring reliable sentencing determinations in capital cases, we cannot allow the prosecution to play so fast and loose with the facts and with its theories. To allow a prosecutor to advance irreconcilable theories without adequate explanation undermines confidence in the fairness and reliability of the trial and the punishment imposed and thus infringes upon the

petitioner's right to due process.
(*Stumpf v. Houk*, *supra,* at p. 15.)

It is significant that the court in *Stumpf v. Houk, supra,* cited this court's decision in *In re Sakarias* in support of these conclusions. (*Ibid.*) Both cases are based on fundamental principles of honor, truth, and fairness which are required in every case where liberty is at stake, and even more so when the consequence is death. These encompassing principles are vital to the very notion of justice, and cannot be so confined and limited as the People argue.

With these comments in mind, Krebs will address the specific legal and factual contentions of the People.

1. The holding of *In Re Sakarias* sets out a principled approach to the often difficult problem of inconsistent evidence and arguments by the People, and is not properly understood as limited to the specific facts of the case

In making their argument that Krebs fails to perceive the "limited scope" of the holding in *In Re Sakarias*, thus rending Krebs' argument "fatally flawed," the People argue the case is limited to its facts. (RB 131.) Thus they argue the case has no application except where a prosecutor argues in separate criminal trials inconsistent factual theories, such as which defendant dealt the fatal blow. Thus while the People accurately summarize the stark inconsistency in the People's theories which form Krebs' claim, they argue that no relief is available because the situation here is different than in *In re Sakarias*. (RB 131.) There is no doubt that the situation is different, but the differences are not important in light of the principles

recognized in *In Re Sakarias*.

To reach the fact specific questions involved in that case, the court first addressed and resolved much broader questions concerning the propriety of inconsistent positions. First addressed was the People's contention, "the use of inconsistent arguments at separate trials 'is permissible provided a prosecutor does not argue something that the prosecutor knows to be false.'" (*In re Sakarias, supra,* 35 Cal.4th 140, 155.) The court *rejected* the proposition, and instead formulated a test of "bad faith" which explicitly does not require actual knowledge that either theory is wrong.

> ". . . we hold that the People's use of irreconcilable theories of guilt or culpability, unjustified by a good faith justification for the inconsistency, is fundamentally unfair, for it necessarily creates the potential for--and, where prejudicial, actually achieves--a false conviction or increased punishment on a false factual basis for one of the accuseds."

(*Id,* at p. 159-160.)

Thus an important component of the *In re Sakarias* holding is that Due Process may be violated by inconsistent argument, even where both theories may be arguably true. Further the court's formulation made clear that inconsistent theories which relate only to sentencing by increasing culpability may also violate Due Process. And in reaching its conclusion that the presentation and reliance of inconsistent theories violated the Due Process clause, this court relied broadly on the broad "due process requirement that the government prosecute fairly in a search for truth." *(Id.,* at p. 160.)

Far from a limited holding applicable only to the peculiar facts of the case, the court set out broad principles with specific tests to be applied

to future claims of inconsistent theories. Krebs demonstrates below that claimed dissimilarities between the facts here and in *In Re Sakarias* do not preclude relief, and in fact, the present circumstances make an even more compelling case for relief than in *In re Sakarias.* The specific claimed dissimilarities are further addressed below.

2. The claimed distinction that In re Sakaris only prohibits inconsistent factual theories while allowing inconsistent expert opinion is inaccurate and immaterial

The People claim that the present case is just a simple matter of expert witnesses disagreeing and that Krebs misunderstands what a "fact" is. (RB 132.) They are wrong in stating that the People did not assert inconsistent *factual theories* even if they relied on expert *opinion* in both situations. More importantly, the decision in *In Re Sakarias* shows that inconsistent theories based upon expert opinion can still violate Due Process. And nothing in the decision or logic indicates that the inconsistency must concern evidentiary facts, rather than ultimate facts. By any measure, because volitional impairment by a paraphilia is routinely proved beyond a reasonable doubt by the People in SVP cases, it is untenable to argue that the question does not arise to the level of a "factual theory."

In support of the argument that this case involves evidence of opinions only, and not facts, the People carefully argue, "Neither expert testified, definitively, that he was correct as a factual matter and that the other was wrong." (RB 132.) They do not reference or explain Dietz's testimony referring to Dr. Berlin's views: "That's not an accepted medical

or psychological view." (38 RT 9844.) Whether a particular theory is generally accepted by experts in the field is a factual determination based on expert testimony. (See *People v. Leahy* (1994) 8 Cal.4th 587, 602 [scientific consensus comparable to "nose count" of relevant experts].) Expert psychologists may offer both opinions as well as to testify as to facts within their special knowledge, such as the literature in the field. (*People v. McDonald* (1984) 37 Cal.3d 351, 366.) Dietz here was clearly (and falsely) testifying to the alleged fact of non-acceptance. Dietz also testified factually about the general acceptance in his field of the appropriate test for impaired volition: ""Well, that's the usual test in my field at looking at whether someone could conform their conduct to the requirements of the law, would they have done it had there been a policeman right there." (38 RT 9841.)

Neither do the People explain how the following testimony of Dietz is anything other than an assertion of fact. "It doesn't affect how they think. It doesn't affect their emotions. It doesn't affect the capacity control themselves." (38 RT 9840.) This was a straight forward assertion of fact, unqualified by any words indicating uncertainty or an opinion. The idea that the evidence presented by the People through Dr. Dietz was not offered as factual and reliable is also belied by the People's comments in argument that Dr. Berlin was called because the defense could not find anyone in California, or even west of the Rockies who share his beliefs. (39 RT 10036.)

Just because experts may be found to disagree about a theory does not mean the theory is not factual. Among the ultimate facts that a jury must find in a SVP case is whether a mental disorder has caused serious volitional impairment. (*In re Howard N.* (2005) 35 Cal.4th 117, 131.)

This *fact,* although based on expert opinion, must be proved beyond a reasonable doubt. In Krebs' case, the same factual issue was presented. The effect of a disorder on a person is a factual issue, even though there may be differing expert opinions on the issue. "The question whether the disability is partially due to the normal progress of the disease presents an issue of fact which the board must resolve on the basis of expert medical opinion." (*Zemke v. Workmen's Comp. App. Bd.* (1968) 68 Cal.2d 794, 798.) Thus the People's characterization of the inconsistency as simply one of opinion is unpersuasive.

Moreover, the idea that the People may switch theories whenever they want so long as the subject matter is one upon which competent experts may disagree is simply contrary to *In Re Sakararis*. A central premise of the decision in *In Re Sakarias* is the idea that even where there is competent evidence to support taking either side of a disputed proposition, an unjustified *switch* in the position that the People have *previously chosen to rely on* may constitute a violation of Due Process.

The logical conclusion of the People's argument is disturbing and utterly inconsistent with *In re Sakarias.* Consider a case where the People call Expert A to give an opinion of time of death based on insect larva analysis, and the defense responds with Expert B, who testifies that Expert A has used assumptions which have not gained general acceptance of the experts in the field, and further, that using the correct analysis, the death must have occurred a day earlier, when the defendant had an alibi. The People argue vigorously that Expert A was reliable and used correct assumptions, while discrediting Expert B and the validity of his analysis. Do the People really contend that it would be legally and morally proper, in a subsequent trial of a co-defendant, where the defense calls Expert A to

give the same testimony as he did in the first trial, for the People to call Expert B in rebuttal, and then argue that it is Expert A who is unreliable? Would such an unjustified switch be consistent with *fair* play and a search for the *truth*? In the absence of an unusual circumstance which might justify such a switch, the People's unjustified switch in theories is exactly what is rightly condemned by *In Re Sakarias*, regardless of whether reasonable experts may differ as to the correct analysis.

Merely characterizing the matter as one of opinion does not insulate the People from an examination of the justification for their switch. Indeed, in the facts of *In Re Sakarias* itself, expert opinion from the pathologist was part of the evidence manipulated by the prosecutor to suit his changing theories. The real questions are whether the positions taken are truly inconsistent, and the presence or absence of justifying circumstances. It is a question of fair play in search of the truth or not. That the position is one that some experts may debate is immaterial.

3. The People's adoption and ongoing reliance upon the theory that paraphilias impair volition in civil commitment cases is relevant to determine whether the People here have prosecuted fairly and in a search for the truth

The People argue that because the facts in *In re Sakarias* concerned inconsistent positions taken in trials of co-defendants, inconsistent positions taken in other circumstances cannot violate the Due Process clause. They go so far as to make the remarkable assertion, "What occurs in another civil proceeding which has nothing to do with appellant cannot possibly violate

appellant's due process rights pursuant to *In re Sakarias,* regardless of the evidence in issue." (RB 133.) Krebs suggests this view is correct only if the lodestars of honor, truth and fair play are no longer relevant to the question of Due Process violations. The People make no attempt to support the assertion with logic or authority.

The People's narrow reading of *In re Sakarias* ignores a principle case relied upon by the court. This court cited *United States v. Kattar* (1st Cir. 1988) 840 F.2d 118, 127 several times and relied upon it to state: "A criminal prosecutor's function 'is not merely to prosecute crimes, but also to make certain that the truth is *honored* to the fullest extent possible during the course of the criminal prosecution and trial.'" (*In re Sakarias,* at p. 161, emphasis added). The decision in *In re Sakarias* also quoted from *Kattar* concerning the disturbing notion of a prosecution "changing its stripes" depending on the "strategic necessities of the *separate litigations*." (*In re Sakarias*, supra at p 159, emphasis added.) Examination of *Kattar* shows that the litigations in which the People took inconsistent positions were indeed "separate", and related only by the fact that in each the Attorney General took contrary positions on the same factual issue. In *Kattar,* a criminal case, the inconsistency that the court found most direct and disturbing was from an Attorney General's brief filed in a separate *civil proceeding to which the defendant was not a party.* (*Kattar* at 126.) The Attorney General asserted in the prior civil case that a church organization was engaged in blatantly illegal conduct, including physical retaliation, under a specific high level "Fair Game" policy. (*Kattar* at p 126.) In *Kattar*, the defendant sought to establish the organization's policy of retaliation to assist in his defense of duress. The Attorney General, however introduced evidence and argument in opposition, contradicting

their prior position. The court made clear that such conduct was wrong:

> Thus, it is disturbing to see the Justice Department change the color of its stripes to such a significant degree, portraying an organization, individual, or series of events variously as virtuous and honorable or as corrupt and perfidious, depending on the strategic necessities of the separate litigations. Having previously acknowledged the Church's illegal practices and maintenance of the Fair Game Policy, the prosecution should not have attempted in this case to describe the Church as a righteous organization without any designs to unfairly discredit its enemies, in order that the defendant's actions would seem more egregious. The government, of course, was free to argue that the Church's activities were immaterial to the events in question, but it should not have pretended that those activities were mere blights on an otherwise spotless history.

(*Id.*, at 127-128)

It may be true that successive trials of co-defendants on the same set of facts are the most likely source of prosecutorial inconsistency. Where trials are truly unrelated in all ways, there is less opportunity for the People to present truly inconsistent theories, since the issues will be typically be different. However, this does not imply that where there is a true inconsistency outside of the co-defendant context, as in *Kattar,* that it cannot possibly harm a criminal defendant. Here, Krebs' trial and SVP trials were related in at least one very important way - both involved the question of whether a paraphilia impairs volition. If the People's position in the SVP context is truthful, then the position presented by Dietz and argued by the People below was untruthful. The mere existence of truly inconsistent theories harms the criminal defendant by infecting the trial with unfairness and potentially false evidence, regardless of whether the inconsistency stems from positions taken in a co-defendant's case or, as

here, other cases posing the exact same issue.

An additional circumstance, not present in *Kattar* or *In re Sakarias*, supports the conclusion that the inconsistent positions violated Krebs due process rights. Here, the state has done more than simply taken an inconsistent position in a single previous proceeding. The state and the People *continue* to prosecute SVP and other civil commitment actions, *continue* to routinely call experts who profess that paraphilias impair volitional capacity, *continue* to argue to juries that paraphilias impair volitional capacity, and *continue* to defend on appeal the indefinite civil commitment of persons upon such a theory. The state has adopted as official policy that which Dietz and the prosecutor vigorously denied here. "[I]mplicit in the statutory language linking dangerousness to a 'mental . . . deficiency, disorder, or abnormality' is a certain legislative understanding that a person afflicted with such a condition may lack a degree of responsibility or control over his actions." (*In re Howard N., supra,* 35 Cal. 4th 117, 132-133.) Here, the prosecutor did not simply contradict his own prior argument on the issue, he contradicted the consistent and ongoing position of the People used successfully to confine hundreds of person with paraphilias. Thus this case presents an even more compelling case of fundamental unfairness than in a typical case of switching arguments as to which co-defendant is most culpable.

4. The evidence here was manipulated through the choice of the prosecutor's expert and by the successful efforts to exclude all reference to SVP proceedings, which amounts to bad faith as defined in In re Sakarias

The People assert that "there is no instance of 'facts' being manipulated or withheld by the prosecution, as was the case in *Sakarias.*" (RB 133.) The argument distorts the record and misapprehends the holding of this court explaining that "bad faith" in this context can be established by selective 'cherry picking' of the evidence.

This court made clear that bad faith is this context does not require any showing that the prosecutor knew the evidence was false. Bad faith in this context is simply the unjustified reliance upon inconsistent and irreconcilable positions. (*In re Sakarias* at p. 159.) The court also recognized that in some circumstances, differences in the evidence in the two trials may justify the inconsistency. However, this court cautioned that where the inconsistency is the product of intentional strategy by the People, it does not justify the inconsistency, but rather constitutes a blatant due process violation. "To the contrary, such manipulation of the evidence for the purpose of pursuing inconsistent theories establishes the prosecutor's bad faith. . . .[C]ases in which a prosecutor's use of inconsistent theories in successive trials reflects a deliberate change in the evidence presented are particularly clear violations." (*In re Sakarias*, at p. 162.)

Whether called "manipulation" of evidence (*Ibid.)*, a "deliberate change in the evidence" (*Ibid.)*, a "deliberate strategic choice " (*Ibid.)* or "cherry-picked facts" (*Ibid,* fn. 6, quoting *Stumpf v. Mitchell* (6th Cir. 2004) 367 F.3d 594, 620 (dis. opn. of Boggs, C. J.)), the rule is clear. Where the circumstances demonstrate that the People made decisions to introduce and exclude evidence to facilitate the argument of inconsistent positions, "bad faith" is manifest. Given this clear holding and the circumstances, the People's argument that no "bad faith" is shown because the prosecutor did not "manipulate" Dietz to testify in a certain way is wrongheaded. (RB

133.)

The People argue that this is a case of "simply allowing a qualified expert to express his opinion through testimony at trial." (RB 133-134.) The People overlook that Dietz was not appointed by the court, neither was he selected by a lottery. The People made an *intentional decision* to select him. The record clearly establishes that the prosecutor was aware of the criteria for SVP commitments and of Dietz's opinions regarding the nature of volitional impairment well before trial. Dietz is so well known he was featured in a New Yorker magazine profile, which noted his well known proclivity to find criminal defendants responsible for their actions. (24 CT 5005.) His curriculum vitae lists the numerous "selected notable cases" which have made him a public figure. (22 CT 5788.) He testified to his opinions at a pre-trial hearing. Despite the availability of many local experts due to the presence of the State Hospital at Atascadero, where SVP committees were held, the People spent large sums to procure Dr. Dietz's testimony.[9] Dietz was not "simply allowed" to testify to his opinions, as might be argued if he were a percipient witness. The record amply establishes that Dietz was "deliberately" selected by the prosecution to aid in their theory that Krebs' paraphilic disorder could not impair his volition. "[C]ases in which a prosecutor's use of inconsistent theories in successive trials reflects a deliberate change in the evidence presented are particularly clear violations." (*In re Sakarias,* supra, at p. 162.)

The People took further intentional action to "manipulate" the evidence to support the inconsistent theories by objecting on Evidence

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Dietz's hourly fee was $500 per hour, with an estimated total fee to his firm of $35,000. (RT 9852-9853.)

Code section 352 grounds to *any* reference to the SVP program and operation. As argued in the AOB, and not even responded to by the People, this allowed them to avoid revealing to the trier of fact the blatant inconsistent positions that the People took in those cases, and allowed them to present the utterly false notion that it was not an accepted view among knowledgeable experts that paraphilic disorders can cause serious volitional impairment. Simply put, it is the People's strategic decisions, rather than any other cause, that are responsible for the differing evidence. This is the hallmark of "bad faith."

Thus the People did in fact deliberately manipulate or "cherry-pick" the evidence in Krebs' trial. But even if it could somehow be said that the seeking out and hiring of Dietz, and eliciting his testimony specifically in rebuttal to Dr. Berlin was not "deliberate," the People offer absolutely no argument on why the change in theories was justified. This court in *Sakarias* did not limit Due Process violations in this context to cases showing of manipulation of evidence. Instead, this court held that "bad faith" is shown where the inconsistent switch in positions is *unjustified.*

> "With the issue more squarely before us here, we hold that the People's use of irreconcilable theories of guilt or culpability, unjustified by a good faith justification for the inconsistency, is fundamentally unfair, for it necessarily creates the potential for--and, where prejudicial, actually achieves--a false conviction or increased punishment on a false factual basis for one of the accuseds."

(*In re Sakarias,* at p. 159-160.)

The People simply fail to explain why it was justified to switch positions in this case from the one routinely taken in SVP cases. At best they seem to make an implied argument that the prosecutor was "justified"

to argue theories inconsistent with that relied on by the People in SVP theories because their argument was supported by the evidence. (RB 133-134.) This "bootstrap" argument was clearly rejected in *Sakarias*. As discussed above, this court unequivocally rejected the idea that a mere change in evidence justifies the switch, where *the People's strategic decisions were responsible for the changes.*

Ample reasons to find the change *unjustified* in this case were discussed in the AOB (159-162). The People do not do not discuss the *justice* of seeking death of a criminal defendant by presenting argument and evidence contrary to the "legislative understanding" lying at the foundation of the SVP program. (*In re Howard N.*, supra, 35 Cal. 4th 117, 132-133.)

5. The error was not harmless under the Due Process Clause and the Eighth Amendment

The People argue in section D that any error in the taking of inconsistent positions was harmless. (RB 134.) They distort the facts to make their arguments. They also make a concession which, considered under the appropriate test for prejudice, effectively establishes prejudice. They fail, however, to acknowledge that under *In re Sakarias*, the test for prejudice is a two part test where the first prong examines if the inconsistent theory was probably false, followed by application of the *Chapman* test. In failing to acknowledge the first prong, the People avoid and fail to respond to the detailed analysis of the question which Krebs set out in the opening brief, pp 162-170. Krebs will first address the arguments made by the People, and then address the significance of the issues left unaddressed.

First the People insist that Krebs has failed to assert at trial or on appeal that Berlin relied upon the theory or practice of the SVP scheme in coming to his conclusions about the nature of paraphilic disorders and their effect on volition. (RB 134.) The People ignore the fact that Dr. Berlin specifically cited to the SVP program in California and similar programs around the country in his report, and typically cites such programs in court room testimony. The prosecutor noted Berlin's references to the SVP program in his report and moved to exclude any reference to the program. (AOB 175, RT 8967) The prosecutor disclosed that he had reviewed other transcripts of Berlin's testimony, and the subject of SVP programs was "an issue he likes to bring up." (*Ibid.*) The defense at trial asserted that Berlin needed to discuss the SVP program to "circumstantially buttress the fact that there is volitional impairment." (35 RT 8969, AOB 175.) The defense later argued that Dr. Berlin should be allowed to discuss the program because "it's relevant to the basis for his opinions." (35 RT 9039, AOB 177.) Without doubt, Krebs has asserted at trial and on appeal that the SVP program and practices support Berlin's opinions on the effect of paraphilic disorders.

The People next assert "there is no way the jury would have been able to use such evidence to resolve the differences of the two doctors' opinions. . . ." (RB 134.) The People ignore the fact that Dietz told the jury that Berlin's views are not generally accepted in the profession and that their representative below told the jury that the defense was required to hire an expert from the East coast because no one "west of the Rockies" could be found. (39 RT 10036, AOB 135.) The jury, if informed of the People's reliance on experts with views identical to Dr. Berlin in SVP cases, would have understood that Dr. Berlin's view are shared by the mainstream

experts upon which the People routinely rely in court proceedings. The evidence was highly probative to resolve the conflicting opinions of the experts

The People next argue that the jury may have found Dietz more credible than Berlin. (RB 135.) Krebs agrees that this is a reasonable likelihood, since the jury had no factual basis before it from which to infer that Dietz's testimony was false, due in part to *the exclusion of the SVP evidence*. The jury, stripped of the factual context which demonstrates the actual falsehoods in Dietz' testimony, may have found him convincing. He certainly has a reputation for being convincing on the witness stand. (See New Yorker profile, 19 CT 5003.) But if the jury *was* swayed by Dietz's testimony contradicting Berlin, that circumstance merely establishes prejudice under the test in *Chapman.* Krebs fully discussed the standard for prejudice set forth in *Sakarias,* which incorporates *Chapman,* and why that standard is met here in the AOB, pages 162-169. Yet the People fail to discuss or even acknowledge the two part inquiry set forth in *Sakarias*. That test requires inquiry into whether the inconsistent theory was "probably false", and whether there was a "reasonable likelihood the prosecutor's use of the tainted factual theory affected the penalty verdict. (*In re Sakarias,* at p. 165.) The prosecutor's concession establishes the second prong. The failure to address the first prong is addressed after discussion of the remainder of the People's affirmative arguments.

The People next argue that it is also a "reasonable conclusion" that the jury rejected Berlin's testimony based on matters other than Dietz's testimony. (RB 135.) This argument stands the *Chapman* standard on its head. It matters not whether the jury *could* have rejected Berlin's testimony even if Deitz had not testified. The proper inquiry instead is whether the

People can demonstrate beyond a reasonable doubt that Dietz's testimony and the People's argument *did not contribute* to the death verdict. If the jury accepted Dietz's version as argued by the People over Berlin's testimony, that question has to be answered in the negative in light of the request for read back of the testimony of the experts on the specific issue of volitional impairment.

The People next argue that the facts of the case, irrespective of the expert opinion by either side, "fail to support a conclusion that appellant's disorder - and nothing else - compelled him to act criminally." (RB 136-137.) This argument again ignores the proper standard of prejudice, and misconceives the fundamental nature of mitigation and the moral nature of the jury's decision in a death case. The argument echos a fundamental untruth contained in Dietz' testimony: that in order for a mental disorder to be of mitigating value, it must be so severe so as to produce an absolute inability to control dangerous behavior at all times. The defense never attempted to absolve Krebs of all blame. The mitigation case was not based on attempt to show that the paraphilic disorder "and nothing else" was the absolute and total cause of the crimes. Instead, as discussed in Krebs' opening brief, Krebs sought in the trial court to establish only that his crimes, for which he must bear responsibility, were *mitigated* because Krebs' ability to control his dangerous behavior was seriously impaired by a mental disorder which he did not choose or cause. (AOB 169.)

The People lastly argue essentially that evidence of sexual sadism is a two edged sword, therefore evidence that Krebs was volitionally impaired would not have made a difference in the verdict. "The alleged lack of volitional control may have diminished appellant's blameworthiness for his crime as much as it indicated how great a predatory danger appellant posed

to the community." (RB137.) This is a remarkable argument. Essentially the People are arguing that volitional impairment which causes dangerous behavior has no mitigation value. As a statutory matter, the People's argument is inconsistent with California's factor (h) as a factor in mitigation.[10] From a case law perspective, this court has held that factor (h) can *only* be mitigating. (*People v. Whitt* (1990) 51 Cal.3d 620, 654.) From a moral standpoint, moreover, the People's argument is also bankrupt. By their logic, a *higher* degree of volitional impairment, which produces a higher degree of dangerousness would require that a jury assign it *less* mitigating value than if there was only slight impairment caused by the disorder. The argument simply does not assist the People under the *Champman* (*Chapman v. California* (1967) 386 U.S.18) standard because it presumes that the jury would *not* contain any jurors who share the moral outlook articulated by the Court in *Atkins v. Virginia* (2002) 536 U.S. 304, generally that a person with a mental disorder that significantly impairs his ability to control his violent impulses does not possess the "extreme" culpability that justifies the imposition of the death penalty.

Perhaps the most glaring omission from the Peoples brief regarding prejudice is the complete failure to engage in any discussion of whether the three aspects of Dietz' testimony identified by Krebs as inconsistent and irreconcilable need to be shown to be "probably false" under the *In re Sakarias* test for prejudice, and if so, whether these theories, versus the ones promoted in SVP cases, are probably false.

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The Court in *Penry v. Lynaugh* (1989) 492 U.S. 302, 337, fn.2 noted that "virtually all" of the states which list factors in mitigation include a factor that corresponds to California's factor (h).

The court in *In Re Sakarias* noted that in some cases it may be difficult to establish which of two inconsistent positions is probably false, and declined to set out a test for prejudice in those areas. Krebs argued that this should be considered a case where the "probably false" test need not be satisfied, arguing that the "longstanding and continuing election to seek commitments under a theory that a paraphilia causes volitional impairment" estopped the People from denying the truth of the theory citing *People v. Felix* (2008) 169 Cal.App.4th 607, 614; *Russell v. Rolfs* (9th Cir. 1990) 893 F.2d 1033, 1037-1039. (AOB 163-164.) Krebs further argued that the judicial adoption of the theory, such as in *People v. Starr* (2003) 106 Cal.App.4th 1202, 1205-1206 and *Kansas v. Hendricks* (1997) 521 U.S. 346, 360, as well as the legislative adoption of the theory through the SVP laws is an appropriate substitute for a factual inquiry. (*Ibid.*) The People utterly fail to address these arguments. Neither do they discuss the probable truth or falsity of the theory that a paraphilia causes volitional impairment. This is a rather glaring omission considering the crux of Krebs' claim is that the People failed to *honor the truth* in their zeal to obtain a death verdict. Indeed the whole tenor of the People's discussion seems to be something to the effect: the question of whether a mental disorder that causes deviant urges impairs a person's ability to resist those deviant urges is a difficult and abstract issue on which there is no real right or wrong answer, *so we are free to change our positions on the general issue as it suits our needs in any specific litigation.* While the first portion of the foregoing statement may be arguably correct, the second part of the proposition does not follow from the first.

It seems apparent why the People are reluctant to directly address which of the inconsistent theories are probably false. If they actually

engage in any direct comparison of the positions taken by the People in SVP cases with the position of Dr. Dietz that a paraphilia has no effect on volitional control, they run the risk of undercutting hundreds of commitments under the SVP laws, and the positions taken on appeal defending those commitments. And by studiously avoiding the fact that Dietz testified that the opposing view was not an accepted view in his profession, the People avoid confronting the fact that Dietz did more than to simply state his opinion. The People's abstention is proof they cannot successfully defend the People's evidence and argument in this case in a manner consistent with honoring the truth.

In sum, prejudice is shown for the reasons set out in the AOB 162-170. The request for read back of testimony of the experts specifically on the issue of "volitional control in relation to sexual sadism" is a clear indicator that the subject was one that materially affected the jury's verdict.

Argument V

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT BY FAILING TO CORRECT TESTIMONY WHICH HE SHOULD HAVE KNOWN WAS FALSE OR MISLEADING AND EXPLOITING THE FALSE IMPRESSION LEFT BY THE TESTIMONY OF DR. PARK DIETZ, IN VIOLATION OF THE DUE PROCESS CLAUSE

Krebs argued that specified portions of Dietz' testimony was false *or misleading*, and the People capitalized on the misleading nature of the testimony in argument, resulting in a distinct violation of the Due Process

clause. (AOB 170-173.) Krebs relied on the false/misleading nature of three aspects of Dietz testimony as set out in Argument IV, as well as an additional false statement to the effect that a paraphilia is not a mental disease within the meaning of 190.3(h). The People again respond that the argument is waived, meritless and harmless.

A. The claim is not forfeited.

The People cite two cases in support of their claim that the argument is forfeited. Neither case concerns a claim that the People presented evidence which they should have known was false or misleading, as raised here. Instead, *People v Morales* (2001) 25 Cal.4th 34, 43-44, and *People v. Bell* (1989) 49 Cal.3d 502, 538-539 both concern ordinary prosecutorial misconduct in argument. The People ignore the fact that a prosecutor's presentation of, and/or the failing to correct, false testimony is distinct type of error which may ordinarily be raised on review despite a failure to raise the issue at the time of trial.

The claim Krebs presents here is nearly always supported, as here, by citation to the leading case, *Napue v. Illinois* (1959) 360 U.S. 264, 269. Examination of this court's recent cases which have cited *Napue* uniformly show that this court will consider a claim made under that case and its progeny without an objection raised on that basis in the trial court. In *People v. Vines* (2011) 51 Cal.4th 830, 873 and *People v. Morrison* (2004) 34 Cal.4th 698, 717, the merits were reached despite the lack of objection in the trial court. In *People v. Seaton* (2001) 26 Cal.4th 598, objection was not raised before the judgment. In *People v. Kraft* (2000) 23 Cal.4th 978, 1062, and *People v. Sakarias* (2000) 22 Cal.4th 596, there was no objection

in the trial court, yet the court found that merits of related claims should be reached by a petition for writ of habeas corpus to allow for consideration of extra-record material.

The very nature of a claim that the prosecution has relied on false material evidence or failed to correct false material evidence explains why such a claim is not required to be presented to the trial court. Often, the falsity of the evidence is not revealed in the record of the trial. Indeed Penal Code section 1473 (b)(1) provides authority to attack a conviction where "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration." Under the section, there is no requirement to show that the falsity of the evidence was known to the prosecutor, nor any requirement that an objection must have been raised at trial to the evidence. This court has held that when a claim of false evidence is raised on appeal rather than on habeas corpus, the same standards apply.

> [T]he question of the state's knowing use of perjured testimony to secure a conviction normally arises in habeas corpus proceedings rather than on appeal. Where the alleged perjury appears from the record on appeal, however, we see no reason why the test applied in a habeas corpus proceeding should not be used to determine on appeal whether there has been a denial of due process.

(*People v. Gordon* (1973) 10 Cal.3d 460, 471, fn. 7)

Here, the claim is closely related to the due process claim made under *In re Sakarias* presented in Argument IV, and all the exceptions to the waiver rule and reasons to find no waiver listed *infra* at pages 57 to 61 apply with equal force here. This is not a case where trial counsel sat on their hands. They attempted to exclude Dr. Dietz's testimony in whole.

They vigorously sought to introduce evidence relating to SVP cases to support the accurate and truthful testimony of their expert Dr. Berlin to counter Dr. Dietz's falsehoods. (See Argument VI, below.) The People have conceded that Krebs has not waived the claim that the exclusion of such evidence was prejudicial error. The essence of the claim made here, that the SVP law and practices show that the prosecution's expert evidence regarding volitional impairment was false, was presented to the trial court in seeking admittance of evidence and soundly rebuffed. After that ruling, adding any constitutional gloss to the effect of the ruling or objecting to the evidence on misconduct grounds would have been useless.

The only purpose of applying a waiver rule here would be to temporarily protect an advantage the People gained by the presentation of false testimony until the matter can be raised on a petition for habeas corpus. Because the record here, aided by the numerous published decisions relating to volitional impairment, provides an incontrovertible factual basis to show the falsity of the cited evidence, the court should hear the claim on appeal.

B. Expert testimony may be false and misleading, contrary to the People's contention

The People avoid the true thrust of Krebs' claim by casting each of the four points of testimony upon which Krebs bases his claim as mere opinion, rather than factual assertions. The only support for this assumption appears to be the erroneous belief that all expert testimony concerns statements of opinion, rather than fact. The People cite *Tschirky v. Superior Court* (1981) 124 Cal.App.3d 534, 539 for the proposition, in a libel

context, that an opinion cannot be wrong. However, that case also demonstrates that an authoritative statement from an expert may be taken as factual. "If it is one of fact or **one meant to convince the audience it is factual**, then it may be within the definition of libel." (*Ibid.,* emphasis added.) Justice Puglia commented in a concurring opinion that, "The distinction frequently is a difficult one, and what constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole." (*Id.,* at p. 540.)

The People fail to address the specific testimonial assertions raised by Krebs to demonstrate that they are mere statements of opinion. They cite *In re Andrews* (2002) 28 Cal.4th 1234, 157-1258, yet that case only confirms the generic and uncontested proposition that the prosecution may call an expert to counter evidence offered by a defense expert. They cite *People v. Henderson* (1963) 60 Cal.2d 482, 489 to suggest that psychiatric opinion is admissible regarding volitional control. However, the experts there testified that due to the defendant's mental state, he was not capable of acting with premeditation and deliberation. It is ironic that the People would cite a case from this court's diminished capacity jurisprudence, considering that the Legislature has outlawed such testimony for that purpose. Their failure to cite any of the cases from recent decades concerning volitional impairment is telling. Most of these cases deal with the SVP program, and the People have crafted their entire reply without a discussion of, or even a citation to such cases regarding this issue.

The closest the People get to discussing the specific evidence cited by Krebs is the statement, "Labeling this kind of testimony as 'false' is elusive because it involved the question of 'free will to conform to the

law'." (RB 141.) But Krebs did not complain that all of Dietz's testimony was false. Krebs raised four areas that were actually false or misleading. (See AOB 138-140, 171-172.) Krebs provides the following chart which contrasts Dietz's false and misleading factual statements versus the truth.

Dietz Testimony	Truth	Reference
A paraphilia does not ever impair volition (38 RT 9840.)	A paraphilia may seriously impair volition and the State routinely proves such impairment beyond a reasonable doubt	AOB 141-147
The view that a paraphilia impairs volition is unaccepted by psychologists. (38 RT 9844-9845)	The California Department of Mental Health trains psychologists that a paraphilia may seriously impair volition. That view is accepted by numerous psychologists who routinely testify for the State	AOB 166-167, *People v. Starr*, supra, 106 Cal.App.4th 1202, 1206
The "policeman at elbow" test is the appropriate test for volitional impairment (38 RT 9841.)	A subject may suffer from volitional impairment without meeting the policeman at the elbow test because that test sets a far higher standard than mere *impairment* of volition	AOB 148-149, 156-166
The paraphilic disorder of sexual sadism is not a mental disease or defect under factor (h) (38 RT 9847, 9848)	Under factor (h), a paraphilic disorder qualifies as a matter of law as the type of mental disease or defect which may impair the capacity to conform one's behavior to the law.	AOB 153-155, 173

In examining these specific statements of Dietz, they have far more in common with fact, rather than opinion. His statements are unequivocal,

and are not qualified by any implication that they are his mere opinions, or that many other reputable experts hold contrary views. While the People argue that Dietz testified that Berlin's views were "worthy" of consideration (RB132), this slight concession was made on cross examination only after being confronted with an affidavit in a prior case. (38 RT 9858-9862.) Dietz did *not* withdraw or modify his statement that Berlin's views were not accepted in the medical and psychological fields. The implication was that while Dr. Berlin was legally free to try to persuade juries with his views, they did not persuade any of his professional colleagues. Dietz's testimony was certainly phrased and presented to "convince the audience it is factual." (*Tschirky v. Superior Court*, supra, 124 Cal.App.3d 534, 539.) At a minimum, the testimony was highly misleading as to the state of expert knowledge and the law regarding the ability of a paraphilia to impair volition, within the meaning of the law.

As to the fourth category, the People argue that the DSM conclusively shows that paraphilias are not considered mental diseases, without even attempting to meet the arguments laid out in the AOB at 153-155. The DSM specifically disclaims any particular congruence between the disorders listed in the book and legal categories. (DSMIV-TR, p. xxxiii.) What the People miss is that the defense evidence was focused on showing that Krebs had a mental disorder that qualified as a "mental disease or defect" within the meaning of factor (h). Dietz's testimony would have been understood by any reasonable juror as stating that, as a clear cut matter of definition, the paraphilia of sexual sadism *could not* qualify as such a "mental defect or disorder." His testimony was highly misleading because it falsely told the jury that Kreb's disorder did not fall withing the definition of a "mental defect or disorder" as used in the instructions.

In a footnote, the People cite a case noted by Krebs in the AOB, *Jacobs v. Fire Exchange* (1995) 36 Cal.App.. 4th 1258, 1284-1285. (RB 142.) Judging from the portion quoted and emphasized, the People are understood to be arguing that Dietz's testimony about mental diseases only being those which "grossly and demonstrably impair a person's perception or understanding of reality" is correct. But the portion cited only proves the misleading nature of Dietz's testimony. The portion quoted concerns those mental problems which qualify to support a finding of not guilty by reason of *insanity*. Thus Dietz was falsely and misleadingly advising the jury as if the case involved the question of whether Krebs was legally insane. By conflating the concepts of mental disorders which would qualify for an insanity finding with those that would qualify as a factor in mitigation, Dietz simply gave the jury the wrong factual information and standards, and falsely placed the weight of the psychiatric profession behind him.

The People omit any argument attempting to demonstrate that Dietz's testimony (to the effect that psychiatric and psychological experts to do accept the theory that a paraphilia affects volition) was either simply a matter of opinion, or that it was not false. They cannot do so, as demonstrated in the AOB and above. (AOB 166-167.) Dietz's pronouncement was a serious factual misrepresentation which had the added effect of undermining Dr. Berlin's testimony in all respects. If Dr. Berlin belonged to an outcast group whose views on the subject were "not an accepted medical or psychological view", but akin to a lay "fad," then the jury would be highly justified in rejecting the totality of Dr. Berlin's testimony. Thus by this single falsehood, the People were able to impeach the foundation of Krebs' mental health mitigation.

C. The misconduct was prejudicial

The People also urge any error was harmless, arguing sexual sadism is unsympathetic generally, thus any untrue testimony by Dietz could not have rendered the sentence unreliable. There is no doubt that sexual sadism is generally conceived by the public unsympathetically, to say the least. Evidence relating to the paraphilic disorder of sexual sadism is admittedly a two edged sword. However, Krebs would have been unsympathetically portrayed as a sexual sadist even if he had not introduced any mental health evidence that he suffered from a paraphilia. The crucial aspect of his mental health mitigation was to show that he suffered from this mental condition, which he did not choose, nor cause, and that the condition was one which reduced his moral culpability because the mental condition impaired his ability to resist acting on deviant urges which were the product of the unwanted disorder. The unfair and untruthful testimony by Dietz, if credited, would have gutted the latter showing which was the essential, central component of the mitigating aspect of Dr. Berlins' testimony. The result was that a two edged sword was reduced to a single edge - one that only cut against the defendant. By the unfair and untruthful impeachment of Dr. Berlin through the use of false and misleading testimony, Krebs was denied his right to a fair trial and reliable penalty determination within the meaning of the Due Process Clause and the Eighth amendment.

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Argument VI

THE COURT IMPROPERLY EXCLUDED ALL EVIDENCE OF SVP PROCEEDINGS, THEREBY EXCLUDING RELEVANT MITIGATING EVIDENCE OF VOLITIONAL IMPAIRMENT AND INSTITUTIONAL FAILURE, IN VIOLATION OF THE EIGHTH AMENDMENT

In Argument VI (A), Krebs laid out the record in detail concerning his attempts to elicit evidence of the SVP program to show that the state had adopted Dr. Berlin's views in its execution of the SVP program, including his multiple proffers of relevance and the ultimate ruling excluding any evidence of the SVP program. (AOB 170-179.) Krebs then demonstrated in section VI (B) why the evidence was indeed highly relevant and its exclusion violated Krebs' constitutional right to present mitigating evidence. (AOB 179-182)

The People do not argue the claim was forfeited or otherwise inadequately presented and preserved. Neither do they find fault with Krebs' detailed presentation of the record relating to the issue. Importantly, they do not argue that the evidence was actually irrelevant to any mitigating factor, merely arguing the evidence had "at best marginal probative value." (RB 145.) Instead, they argue that the exclusion of the evidence was justified under the court's broad authority to exclude evidence under Evidence Code section 352 as unduly time consuming. They also argue in summary fashion that the error has harmless because Krebs suffered "no discernable prejudice." The issues are addressed in turn.

A. The constitutional right to admit evidence relevant to mitigation limits the discretion of a court to exclude relevant evidence in the penalty phase

The People acknowledge that the exclusion of relevant mitigating evidence at the penalty phase is a constitutional violation. (RB143-144, AOB 179-180.) But in discussing Evidence Code section 352 at RB 143, they appear to argue that the court nevertheless has discretion to exclude relevant mitigating evidence in a penalty phase. The argument has no merit. Each of the five cases cited at RB 143 concerns the application of Evidence Code section 352 to guilt phase evidence, not penalty phase evidence. Neither section 352 nor the cited guilt phase holdings regarding its normal application are determinative to the question of excluding relevant mitigating evidence proffered by the defense in the penalty phase. The operation of Evidence Code section 352 is limited by the defendant's constitutional rights to present relevant mitigating evidence. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1313; *People v. Marlow* (2004) 34 Cal.4th 131, 152; *People v. Frye* (1998) 18 Cal.4th 894, 1015-1016; *People v. Brown* (2003) 31 Cal.4th 518, 577; *Rupe v. Wood* (9th Cir. 1996) 93 F. 3d 1434, 1439-1441, cert. denied, 519 U.S. 1142; *Mak v. Blodgett* (9th Cir. 1992) 970 F. 2d 614, 623-624.)

B. The trial court abused its discretion in excluding the proffered SVP evidence because the evidence was highly relevant to the establishment of the disputed mitigating fact that Krebs' ability to control his dangerous behavior was impaired by a non-psychotic mental illness and could have been presented briefly.

In addressing the probative value of the excluded evidence, the People fail to address the most central and compelling theory of relevance concerning the evidence relating to the SVP program. As made clear in the AOB, the defense repeatedly argued that in addition to the issue of failure of the parole authorities to offer appropriate treatment, the evidence was central to support Dr. Berlin's testimony that the nature of Kreb's paraphilic disorder impaired his ability to control his behavior. (35 RT 8967-8968.) The defense explicitly argued that the SVP program was "circumstantial evidence" showing volitional impairment. (35 RT 8969.) The defense noted that the issue was expected to be disputed by Dietz. "Clearly the issue in this case, with special -- especially with Dr. Dietz and Dr. Berlin, is the issue of volitional impairment by his disorder." " (35 RT 8967-8968.) "And it also, I think, is impeachment of what I believe is Dr. Dietz' position that there is no volitional impairment." (35 RT 8969.) The defense later, responding to the People's objection, argued again forcefully and at length that evidence of the SVP program was relevant because it supported Berlin's views about volitional impairment, and the jury was entitled to know "the truth." (35 RT 9039, 9043.)

In countering the relevance of these proffers, the People first make the argument that Krebs has failed to assert that Berlin relied upon the SVP program to conclude that sexual sadism was treatable. (RB 145.) Yet the defense sought permission for Dr. Berlin to refer to the program and explain it by asking him, "Is there support for his opinion somewhere?" (35 RT 9048.) The court specifically ruled the question could not be asked. (35 RT 9056.) If the People are attempting to distinguish between reliance on a fact to form an opinion versus a fact which merely *supports* an opinion, the distinction is untenable. Both are relevant, and an expert must be permitted

to explain the facts which support his testimony. The defense clearly asserted that Dr. Berlin found support for his views in the SVP program. (35 RT 9039, 9043.) The prosecutor himself noted that Berlin typically discusses the subject in his testimony, and Berlin had included several paragraphs on the subject in his written report regarding Krebs, which had been furnished to the prosecution. (35 RT 8967.)

The People then make additional argument concerning whether the SVP program tends to show that paraphilic disorders are treatable. (RB 145-146.) But these arguments miss the point. While the trial court did seem to focus his remarks on the relevance the SVP program to whether a paraphilia was treatable, this was only one aspect of the defense proffer. The most crucial aspect was the relevance to show support for the defense theory of volitional impairment to be presented by Dr. Berlin - that Kreb's paraphilic disorder seriously and substantially impaired his capacity to conform his behavior to the law. Beyond a shadow of doubt, whether Kreb's ability to control the sexually violent urges characteristic of his disorder was impaired by a mental disorder was relevant statutory mitigating evidence. (Penal Code section 190.3(h).)

The heart of the People's justifications for the exclusion of the evidence is that it would have been complex and time consuming. While they suggest the program would have been required to be explained "in great detail," they do not offer any explanation why this is so. There was no need to explain all the nuances of procedure relating to SVP cases to explain how the existence and operation of the program supported Berlin's views. The most relevant facts about the program are without dispute and could have been quickly elicited :

The SVP law in California has been in place since 1996.

Similar programs exist in many other states. The underlying premise of the law is that some sexual offenders have a mental disorder which causes them to be unable to control their behavior to the degree that they are likely to commit violent sexual offenses. The law requires that persons with certain types of sexually violent convictions to be evaluated by psychologists when their prison sentence ends to determine if the person has a qualifying mental disorder, and whether, as a result of the disorder, the person is dangerous or likely to commit future offenses. If the evaluations are positive, a petition is filed by the district attorney to detain and treat the person in a state hospital. If contested, there is a trial at which the People must prove beyond a reasonable doubt that the person has been convicted twice of certain specified sexual offenses; that the person has a qualifying mental disorder; and the disorder makes the person dangerous. Supreme court decisions make clear that the disorder must be proved to be one that seriously impairs the volition of the subject, so that he is dangerous beyond his control. The typical mental disorder involved in a SVP case is called a paraphilia, which has already been discussed. Thus in hundreds of SVP cases around the state, and thousands nationwide, psychologists give testimony that a paraphilia, such as sexual sadism, impairs volitional control. The state maintains a panel of expert evaluators who accept this view. There are hundreds of persons who have been committed under these laws, and many more are pending trial.

The jury would have thus been quickly informed that Dr. Berlin's view that paraphilic sexual sadism was a mental disorder which makes it difficult to control sexually violent behavior is one that has been adopted by official state policy and ongoing practices and shared by numerous experts employed by the state in proceedings where the exact issue is necessary to prove. Some cross-examination on the issue could be expected, but there is no reason why it should be lengthy, since the above information is self evident to anyone with familiarity with SVP proceedings. If the prosecution had dared to cross-examine Dr. Berlin in an attempt to show that the SVP program provided no support for his views, it would necessarily have been short and ineffectual. Dr. Berlin would have easily demonstrated how the program supports his views, and contradicts Dietz, by answers in the following vein:

> There are some psychologists who take a contrary view, but I have never encountered one testifying for the People in a SVP case. Their experts uniformly testify that paraphilias impair volition for reasons similar to what I have explained. There may be disagreements about whether a person has a paraphilia, or about the degree of impairment or dangerousness, but the state experts uniformly share my view that the disorder affects the ability to control one's self. One can read the numerous legal opinions which describe the facts which state-paid psychologists have testified show volitional impairment, and which have been upheld on appeal. The facts relating to Krebs, as I have described them here, make a far more compelling case for volitional impairment than those often found sufficient in the court cases. Krebs did not

qualify for the SVP program, to my understanding, because of a technicality relating to his prior convictions - one of his convictions was for attempt rather than a completed rape. However there is no doubt in my mind whatsoever that Krebs has the type of volitionally impairing mental disorder that would otherwise qualify him for commitment under the SVP program. And I am confident that any evaluator on the state SVP panel would concur with my views in this regard. I am well aware that Dr. Dietz holds a contrary view, but his view, if accepted, would mean that the vast majority of persons committed under SVP laws would have to be freed. Dr. Dietz is entitled to his views, but it must be recognized that they are contrary to those adopted by the People and all the experts they hire in SVP cases to prove that the subject's paraphilia has impaired his volitional control.

Thus the presentation of the evidence relating to the SVP program by the defense would not have taken a long time in comparison to the overall testimony of Dr. Berlin and the lengthy cross-examination of Dr. Berlin on other issues.[11] Exclusion of the evidence on the basis of undue consumption of time was thus error. (*People v. Quartermain*, 16 Cal. 4th 600, 624.) This is nothing like a situation where a 'trial within a trial' would have been required to fully present the evidence. Given that the evidence

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The direct and re-direct examination of Dr Berlin totaled 108 pages of transcript (RT 89-9037, 9061-9071, 931-934, 9581-9615.) The cross-examination and recross-examination totaled 122 pages. (RT 9071-9131, 9518-9571, 9576-9580, 9615-9620.)

was clearly relevant and that the evidence would not have been unduly consumptive of time, the trial court abused his discretion under Evidence Code section 352 in excluding the evidence. Given the Due Process and Eighth Amendment requirements requiring admission of relevant mitigating evidence in the penalty phase, especially where the prosecution has presented opposing evidence, the exclusion also undoubtedly violated Krebs' constitutional rights. (See *Skipper v. South Carolina* (1986) 476 U.S. 1, 5, fn. 1 and the cases cited at AOB 179-182.) The People are in no position to urge that the issue of whether Berlin's views were an accepted psychiatric or psychological view had minimal probative value, having elicited evidence on the topic from their own expert, and having capitalized on the issue in final argument.

C. The error is prejudicial since whether volition is impaired by paraphilic sexual sadism was hotly contested in evidence and argument, related directly to a statutory factor in mitigation, and was inquired about during deliberations by the jury

Krebs has demonstrated why it was crucial to the success of the defense mitigation theory to establish that Krebs' sadistic urges and actions were the result of a mental disorder which he did not choose, and could not control. (AOB 168-170.)[12] Otherwise the two edged sword of Krebs' disorder would only cut against him. But if the SVP evidence had been

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The full testimony of Dr. Berlin relevant to the issue of volitional impairment by paraphilic sexual sadism is detailed with citations at AOB 129-32. Dietz's testimony is detailed at AOB 132- 134. Closing argument on the issue is set out at AOB 134-135, 168-170.

admitted, and swayed the jury to accept Berlin's views, the unchosen, powerful disorder becomes strong mitigation that reduces culpability. Krebs also demonstrated that the testimony about "volitional control in relation to sexual sadism" was actually important to jury's decision by carefully detailing the lengthy jury deliberations, followed by a request for read back of the experts' testimony regarding the topic. (*Ibid.*) Krebs has also noted that the prosecutor took full advantage of the exclusion of the evidence in argument, ridiculing Berlin's theories as unaccepted, and making Krebs' ability to make decisions the focus of his argument, using words like "choice" and "decision" 36 times in just three pages of transcript. (*Ibid.*) He extolled the credibility of Dietz as "the most respected forensic psychiatrist in the United States." (39 RT 10037.) Thus, while he had no burden to do so, Krebs has demonstrated prejudice.

The People impliedly concede the burden is theirs to establish beyond a reasonable doubt that the exclusion of the evidence could not have affected the verdict by citing *People v. Fudge* (1994) 7 Cal.4th 1075, which held the test articulated in *Chapman v. California*, supra, 386 U.S. 18 is the appropriate test in the circumstances. (RB 147.) That test requires the *state* to establish "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id.*, at p. 24 ["constitutional error . . . casts on someone other than the person prejudiced by it a burden to show that it was harmless"]; see also *Satterwhite v. Texas* (1988) 486 U.S. 249, 258 [state has burden of showing absence of prejudice under *Chapman*].)

However, the People fail to address the appropriate burden and all the circumstances that Krebs marshaled. Instead, the People simply suggest that the jury would be "unlikely" to find significant mitigating value in light of the other aggravating evidence. (RB 147.) Of course this argument is

inadequate as a matter of law, since the People have the burden to establish beyond a reasonable doubt that the error did not contribute to the verdict. Proof only that the excluded evidence was *unlikely* to have affected the verdict is clearly not proof beyond a reasonable doubt that it did not."[T]he appropriate inquiry is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*People v. Quartermain, supra,* 16 Cal. 4th 600, 621, citing *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

The excluded evidence strongly contradicted Dietz' testimony that Berlin's view on volitional impairment was unaccepted. It was therefore highly probative on the issue of whose views the jury should accept, Dietz or Berlin. Having relied heavily on Dietz in argument and urged the jury to accept his views as the country's preeminent psychiatrist, the People cannot dispute that the jury may have been swayed by the evidence and argument to conclude that Berlin's theory simply was not credible. Indeed, it is difficult to understand how the jury could *not* reject Berlin's testimony if it accepted the testimony of Dietz that Berlin's theory was not accepted within the profession. Evidence that scores of State paid experts subscribe to his views, and that prosecutors routinely argue the validity of the views, would have been strong evidence corroborating Berlin and discrediting Dietz. Error in excluding corroborative evidence of the defendant's defense is prejudicial even though the defense is established by other evidence. (*Washington v. Texas* (1967) 388 U.S. 14, 19; see also *Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) Exclusion of such corroborating evidence supporting the credibility of a key witness is highly prejudicial, and a cause for reversal even under the more demanding standard of *Brecht*

v. Abrahamson (1993) 507 U.S. 619, 638. (*DePetris v. Kuykendall* (9th Cir. 2001) 239 F. 3d 1057, 1061.)

The prominence of Dietz in the People's presentation is much like that of Dr. Grigson in *Satterwhite v. Texas, supra,* 486 U.S. 249. There, the Court first noted that the presence of other sufficient aggravating evidence to support the verdict is not determinative. "The question, however, is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Id.*, at p. 258-259, citing *Chapman* supra, at p. 24.) The Court noted the record included abundant evidence of dangerousness, including evidence of four prior violent crimes, the testimony of eight police officers, an in-law who had been shot by Satterwhite, and a county psychologist, who testified that the defendant was a threat because of his inability to feel empathy or guilt. Yet the court found that the constitutional error in introducing the testimony of Dr. Grigson was still sufficient to establish prejudice under the *Chapman* standard. The court noted that Dr. Grigson was the state's final witness; that his "testimony stands out both because of his qualifications as a medical doctor specializing in psychiatry and because of the powerful content of his message." He testified "unequivocally" regarding future dangerousness, explaining the defendant had "a lack of conscience." The Court also cited the prosecutor's argument which "highlighted Dr. Grigson's credentials and conclusions." (*Id.,* at p. 260.)

> "Doctor James Grigson, Dallas psychiatrist and medical doctor. And he tells you that, on a range from 1 to 10, he's ten plus. Severe sociopath. Extremely dangerous. A continuing

threat to our society. Can it be cured? Well, it's not a disease. It's not an illness. That's his personality. That's John T. Satterwhite." (*Ibid.*)

The parallels between the state's reliance on Dr. Grigson's testimony in *Satterwhite* and Dr. Dietz in this case are remarkable. Dietz's testimony was likewise unequivocal that Krebs was a sociopath who had no conscience or feelings for others, and the People relied on his alleged expertise and his prominence heavily in argument. Krebs has shown a substantial likelihood that the excluded evidence would have swayed the jury in the credibility contest between Dietz and Berlin, especially considering their request for read back on the issue. The People fail to meet their stringent burden to demonstrate beyond a reasonable doubt that the error did not contribute to the verdict obtained. Reversal of the judgment of death on this issue alone is required.

Argument VII

THE EXCLUSION OF ALL REFERENCE TO SVP CASES VIOLATED THE APPELLANT'S RIGHT TO FULL AND FAIR CROSS-EXAMINATION UNDER THE SIXTH AMENDMENT

In his opening brief Krebs argued that the same ruling addressed in Argument VI also prohibited him from engaging in full and effective cross-examination of Dietz, in violation of the Confrontation Clause of the Sixth Amendment. (AOB 182-185.) Krebs focused his argument concerning the impact of the ruling on the fact that it protected Dietz from inquiry

contradicting his characterization of Berlin's views of volitional impairment by paraphilic sexual sadism as a lay "fad" and unaccepted by the psychiatric and psychological professions. The People argue the exclusion of the evidence was proper because it "would not have had any significant impact on Dr. Dietz's credibility." (RB 149.) Yet their entire argument is devoid of any discussion of why evidence that numerous experts employed by the State do in fact share Dr. Berlin's views, and testify in accordance to them in court, would not severely impeach the credibility of Dietz given his testimony that Berlin's views are not accepted by the psychiatric and psychological profession. Instead the People again offer argument which amounts to not much more than saying Dietz is entitled to his views. While he may be, the unaddressed error here is the ruling that prevented the defense from questioning Dietz concerning facts that are incontestably true and incontestably inconsistent with specified portions of his testimony which were central to the credibility contest between the experts. The People also argue summarily that the claim is forfeited.

A. Krebs Confrontation Clause rights were violated because the defense was prohibited from questioning Dietz about facts which are plainly inconsistent with his testimony that Berlin's view of volitional impairment by paraphilic disorders is a lay fad, unaccepted by experts.

The People correctly state that a trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the Confrontation Clause unless a reasonable jury might have received a

significantly different impression of the witness's credibility had the excluded cross-examination been permitted, citing *People v Quartermain* (1997) 16 Cal.4th 600, 623-624 and *Delaware v Van Arsdall* (1986) 475. U.S. 673, 680. However, the Court in *Delaware* also stated "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." (*Id.*, at p. 624.) Thus in assessing a limit on the right to cross examination, the court must focus on the *potential* damage of the prohibited line of questioning. As discussed above in Argument VI, the potential damage to Dietz's credibility was severe, and its exclusion thus also violates the Confrontation Clause.

Here, Krebs was prohibited with confronting Dietz with any aspect of the SVP program. The "damaging potential" of the prohibited line of inquiry here is not merely a collateral matter that is material only to the witness's credibility, as in *Quartermain* and *Delaware v Van Arsdall*. Here, the prohibited inquiry was also directly relevant to an important part of Dietz's testimony - that there is no impairment of volition by paraphilic disorders, and that a contrary view is not accepted within the medical or psychological community. This testimony was of, course, highly relevant to the ultimate mitigating fact of whether Krebs' uncontested paraphilic disorder impaired his capacity to control his deviant urges.

The "damaging potential" of the prohibited inquiry would have been severe and several fold. First, the jury would have realized, at a minimum, that a significant number of local experts trained and familiar with the precise issue do in fact agree with Berlins's view that paraphilic disorders impair volition, and often testify to the same effect. Second, the jury could have concluded that Dietz is uninformed and out of touch with modern

knowledge concerning the disorders, rather than a much touted expert's expert if Dietz had attempted to parry the questions by stating his ignorance of the operation of the SVP program and the testimony given by state evaluators in the proceedings. Third, Dietz's overall credibility would have been greatly diminished as one who, at best, overstates the facts or, more likely, one who has intentionally misrepresented the state of the art of medical and psychological knowledge regarding the effect of a paraphilic disorder. Fourth, the jury may have come to the opposite of the position argued by the People, and seen Dietz rather than Berlin as the "hired gun" who was sought out precisely because he happens to hold an outcast, unaccepted view of the fundamental issue contrary to the mainstream of experts in the field.

This case is completely unlike *People v Quartermain*, relied upon by the People. There, the matter excluded was the witness's bribery of judges in other cases. While obviously relevant to credibility, the matter was not directly related to any issue in the action. This court found that if allowed, the inquiry would not have given the jury a "significantly different impression" of the credibility of the witness only because of abundant other impeaching evidence received. There was evidence that the witness admitted to committing perjury on many occasions in other cases, that he had bribed others in other cases, that he had been convicted of over 100 counts of mail fraud as well as conspiracy to manufacture methamphetamine, that he was heavily involved in the drug trade, making over 20 million dollars in it, and, finally, that he was allowed to keep millions of it in return for the plea agreement reached with the prosecutors. With such significant, indeed devastating, impeachment, it is no wonder that this court held that the additional information concerning the bribing

of judges would not have substantially further blackened the tar pot.

Here, the People do not suggest that Dr. Dietz was impeached at all. It is true that the defense did *attempt* to impeach Dr. Dietz by confronting him with his affidavit in another case where Dietz had declared that the defendant should have been examined for sexual sadism because it opens the door to "some experts" - meaning Dr. Berlin - to testify concerning irresistible impulse and because it is treatable by therapy and medication to reduce or eliminate dangerousness. (38 RT 9859-9860.) However, Dietz smoothly countered "that's exactly what we hoped at the time." (38 RT 9860.) He later made clear he no longer believes that treatment could eliminate dangerousness. (38 RT 9862.) Thus even in the attempted impeachment, Dietz was able to suggest that Dr. Berlin was the sole proponent of the theory that sexual sadism entails an impairment of the capacity to resist the urges central to the disorder. The jury received absolutely no information that the People had for years, and on a continuing basis, retained experts and presented their testimony in California courts, as their colleagues have across the nation, that paraphilic disorders do in fact impair volition. Here, the excluded questions would have most certainly provided a "significantly different impression" about the credibility of Dietz's broad proclamations on direct examination that sexual sadism does not, by definition and nature, impair a persons volition.

The People make other unavailing arguments while avoiding the real issue. They argue that Dietz would not have changed his opinion if confronted with the SVP program. (RB 149.) It is the jury's reaction to the prohibited cross-examination, rather than whether Dietz would have changed his opinions, which is the appropriate inquiry. The People also argue that Dietz supported his opinion both by "psychiatric opinion" and by

Krebs' behavior. (*Ibid.*) The point is irrelevant. So did Dr. Berlin. The question for the jury posed by these conflicting opinions is which set of conflicting assertions was most credible and reliable? The excluded cross-examination could have easily changed the jury's perception of these important witnesses. The matter was evidently close enough to them that they asked for read back of the testimony of both experts on the issue. More than simply leaving a significantly different impression of Dietz, the excluded examination would have likely caused the jury to reject Dietz's view in favor of Berlin's.

B. The Confrontation Clause claim is not forfeited

The People argue that there must be an offer of proof and a timely and specific objection to evaluate a claim based on improper limitation of cross-examination, and therefore the claim is forfeited. They cite *People v. Waidla* (2000) 22 Cal4th 690, 726, fn. 8. The case is inapposite because it does not involve a claim of improper denial of cross-examination, but concerns the alleged improper *admission* of evidence. Such a claim is governed by Evidence Code section 353, which requires a timely and specific objection in most cases. However, when the claim is that evidence was improperly *excluded*, Evidence Code section 354 controls. Under that section, there is no requirement of a timely and specific objection. Evidence sought by questions upon cross-examination are explicitly excluded from any requirement of an offer of proof. All that is required in other situations is that the court is made aware of the substance, purpose, and relevance of the excluded evidence, either by the questions asked, an offer of proof or, "any other means." Krebs may therefore claim on appeal

he was prevented from exposing on cross-examination how the SVP program disproved important aspects of Dietz testimony, even without a detailed offer of proof.

In any event, Krebs did make a detailed proffer in response to the prosecutor's motion to exclude any reference to the SVP Program under Evidence Code section 352. (See AOB 174-179 for a full description of the defense proffers and court rulings.) "To preserve for appeal an alleged error in excluding evidence, a party must make an offer of proof informing the trial court of the 'purpose, and relevance of the excluded evidence.' (Evid. Code, § 354, subd. (a))." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1145.) During the argument opposing the exclusion of the evidence, defense counsel noted the contrast between Dietz and Berlin on the issue of volitional impairment. (35 RT 8967.) The court had already heard testimony from Dietz concerning the issue during the motion to Dietz to examine Krebs. (28 RT 7585-7586.) The defense then explicitly argued the evidence was relevant to impeach the credibility of Dietz's testimony, arguing the SVP related evidence was "impeachment of what I believe is Dr. Dietz' position that there is no volitional impairment." (35 RT 8969.) The court ruled in response " I will not allow any information on SVP at all." (35 RT 8974.)

When the matter was raised again by objection during Berlin's testimony, defense counsel advised the court of his potential reference to the SVP program on cross-examination. (35 RT 9043.) The court repeated his ruling, finding an undue consumption of time to educate the jury regarding the SVP program. (35 RT 9054.) The prosecutor inquired about the scope of the ruling regarding other witnesses. The court replied simply "It would have to do with any witness at this point." Thus the court twice

made a firm ruling prohibiting all reference to the SVP program, and made clear that the ruling applied to all witnesses. The defense clearly stated sufficient grounds to show that the broad ruling was in error.

"It is well settled that compliance with the requirement of Evidence Code section 354 is excused when 'the trial judge ... indicates that he will not receive evidence on a certain subject ....' (3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, § 2044, pp. 2002-2003, collecting cases." (*People v. Whitt, supra,* 51 Cal.3d 620, 668, dissenting opinion of Mosk, J.) The trial court had full notice as to the substance and relevance of proposed evidence concerning the SVP program both in supporting Berlin, and impeaching Dietz before he made his order precluding the asking of questions relating to the SVP program applicable to all witnesses. Krebs' claim that this ruling is error is therefore cognizable upon appeal. It is correct that Krebs did not specifically assert that the effect of the courts ruling would be a violation of his Sixth Amendment right to confront and cross-examine witnesses. However, "[a]s a general matter, no useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal." (*People v. Yeoman* (2003) 31 Cal.4th 93, 118; see also *People v. Wallace* (2008) 44 Cal.4th 1032, 1050, fn. 4; *People v. Partida* (2005) 37 Cal.4th 428, 435-437; and *People v. Gamache* (2010) 48 Cal.4th 347, 367, fn. 6.)

Both the United States Constitution and California law afford the defendant the same fundamental right to engage in broad cross-examination

which is not restricted to the subject matter of the direct examination. "The rule restricting cross-examination to the scope of the direct ... cannot reasonably be applied to cross-examination designed to impeach the witness [citations] There, the trial judge is expected to allow a wide-ranging inquiry as to any factor which could reasonably lead the witness to present less than reliable testimony." (*In re Anthony P.* (1985) 167 Cal.App.3d 502, 507; see also Evidence Code section 780.)

> It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. [Citations omitted.] To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial."

(Alford v. United States (1931) 282 U.S. 687, 692.)

The trial court committed error under both state law and under federal constitutional law when he extended his ruling prohibiting reference to the SVP program to all witnesses despite the fact that the defense asserted the evidence would tend to impeach Dietz. The trial court made his ruling after the defense had fully proffered the theories of relevance to impeach Dietz as offered here. Krebs has thus preserved his right to have this court review the ruling for error under state law as well as federal law, since the latter claim in theses circumstances does no more than to argue that the effect of the erroneous ruling was to violate his constitutional right to full and fair cross-examination under the

Confrontation clause. (*People v. Partida, supra,* 37 Cal.4th 428, 435-437.)

ARGUMENT VIII

THE DEATH PENALTY IS EXCESSIVE UNDER THE EIGHTH AMENDMENT FOR PERSONS LIKE KREBS WHOSE MORAL CULPABILITY IS REDUCED BY THE EXISTENCE OF A MENTAL DISORDER WHICH REDUCES THEIR VOLITIONAL CONTROL TO THE DEGREE THAT THEY ARE SUBJECT TO LAWFUL CIVIL PREVENTATIVE DETENTION

In Argument VIII, Krebs argued that the death penalty is excessive under the Eighth Amendment for persons whose moral culpability is reduced by the existence of a mental disorder which reduces their volitional control to the degree that they are subject to lawful civil preventative detention. Krebs argued that a mental condition which is of such severity and effect that it is deemed to have such a substantial effect upon the subject's ability to control his violent behavior so as to allow involuntary civil commitment under the law must be included in the category of culpability reducing mental conditions, such as mental retardation, which prevent, as a matter of law, the imposition of the death penalty.

The People rightly characterize Krebs' argument as an extension of the reasoning contained in *Atkins v. Virginia, supra* 536 U.S. 304. They respond first that because Krebs was never tried under SVP laws, he cannot claim any benefit under the proposed extension. However, this argument is inconsistent with *Atkins* itself. In *Atkins*, the defense produced expert evidence that the defendant was "mildly mentally retarded." (*Id.*, at p. 308.)

The evidence was rebutted by a state witness who testified the defendant had normal intelligence and an antisocial personality. " (*Id.*, at p. 310.) Atkins argued to the Virginia Supreme court that he was mentally retarded, and therefore could not be executed. The Virginia Supreme court affirmed the death sentence in a divided opinion. The dissenters argued, "it is indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way." (*Ibid.*)

The Supreme court reversed for further proceedings not inconsistent with its opinion. The opinion firmly established that "mental retardation" was a condition that made those afflicted with it less responsible, and therefore less morally culpable for their actions. "[T]he lesser culpability of the mentally retarded offender surely does not merit that form of retribution. . .." (*Id.*, at p 319.) The court held that under evolving standards, including the recent actions of state legislatures, death was not a "suitable punishment" for such persons. Thus the defendant himself in *Atkins* was able to secure a reversal of the judgement of death even though he had not been previously adjudicated as mentally retarded, and even though the state presented expert evidence that he was not. Krebs is similarly entitled both to raise the issue here, and secure a reversal of the judgement of death if his claim is accepted.

Krebs is not arguing that the rule of *Atkins* be extended only to those who are actually tried and committed as sexually violent predators. Krebs argues that he must be allowed to present his claim as a categorical defense

to the death penalty, just as those who are mentally retarded or legally insane have the right. (*Ford v. Wainwright* (1986) 477 US 399.) He argues that the severity and effect of his paraphilic disorder rendered him so unable to control his violent sexual impulses that he meets the level of volitional impairment required for civil commitment, and that he is therefore ineligible for the death penalty because his reduced culpability is less than "extreme."

The People argue that the evidence established that Krebs was able to control his behavior, citing the alleged "overwhelming" evidence to that effect presented by the People. Yet the argument misses the point. At the time of Krebs' trial, there was no mechanism to assert a categorical defense to the death penalty based either on mental retardation or impaired volitional control. Krebs argues that similar to Atkins himself, he must be afforded an opportunity to avoid the death penalty by showing that he suffers from a mental disorder that so substantially impairs his volition that it "makes it difficult, if not impossible, for the person to control his dangerous behavior" and therefore subject to potential civil commitment. (*Kansas v. Hendricks* (1997), 521 US 346, 358.) The fact that the prosecution presented contrary evidence is of no import, just as it was of no import in *Atkins*. The People simply misread *Atkins* when they assert that this case is different because the disqualifying mental condition was "established" there. (RB 152.) The evidence in *Atkins* was conflicting, but the trier of fact had no mechanism to resolve the factual issues. The same is true here. Under the law in effect at the time, there was no procedure which *required* the trier of fact to resolve the question.

The People conclude their argument stating "it has hardly been established that appellant had no control over his behavior. And contrary to

appellant's insistence, the SVP statute would not, as a matter of undisputed science, prove otherwise." Two aspects of this assertion deserve comment.

First, the People again use the same sleight of hand that Dietz used in his testimony to conflate the standard of serious volitional impairment with the impossible to meet standard of complete lack of ability to control behavior. Both this court and the high Court have been very clear that proof of lack of volitional control does not entail a showing of complete or total lack of control. In *Kansas v. Crane* (2002) 534 US 407, 411-412. the Court noted that amici on both sides had agreed that an absolutist test - like the policeman at the elbow test promoted by Dietz - was unworkable. The court held that a volitional impairment test was nevertheless required to prevent civil commitments of persons "more properly dealt with exclusively through criminal proceedings" (*Id.*, at 412.) The court then held that it was not utilizing a technical or absolute definition of the term:

> And we recognize that in cases where lack of control is at issue, "inability to control behavior" will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.

(*Kansas v Crane, supra,* 534 U.S. at p. 413.)

Thus while Krebs can concede that the evidence establishes that he had *some* ability to control his violent sexual urges, that emphatically does not, Dietz's assertions to the contrary, tend to show that he did not have "serious difficulty in controlling behavior." Such difficulty is indeed

established by the evidence in this case notwithstanding Krebs' ability to plan and defer acting on his urges. The People offer no principled argument why the same *degree* and *nature* of lack of control which is used by the State to establish that a person is subject to indefinite civil commitment, when established, should not preclude imposition of the death penalty.

The other aspect of the People's final contention is its suggestion that the SVP statute "as a matter of undisputed science" does not establish appellant's lack of control. Krebs has never made nor implied such an assertion. Krebs freely recognizes, as did the court in *Crane,* that the distinction between those who may be confined because they have a mental disorder that renders them dangerous beyond their control and "typical recidivists" is difficult, and hard to define with scientific certainty. Yet the difficulty in drawing the line does not detract from the significance of the distinction. "Mental retardation" is surely a significant category, despite the difficulty in drawing the line. The same is surely true for legal insanity.

Krebs does not contend that California's legislative decision to enact the SVP program, and the definition and standards used there to define persons with serious difficulty in controlling behavior means that other standards or views are inherently wrong. But what the program's existence does signify is that California has drawn what it finds to be the appropriate dividing line between persons who, while legally sane under the current legal definition, lack control over their behavior due to a mental disorder and those who are not so impaired by a mental disorder. As to the former group, the State has decreed that recidivists who are dangerous because of such lack of control are not entitled to the protections of the criminal system of justice to avoid confinement. The state has made a *finding* that persons

with the described mental disorders are so unable to voluntarily control their behavior that the retribution and deterrence objectives underlying the criminal system do not apply. (*Kansas v. Hendricks, supra* at 366.) If a person subject to the SVP laws is deemed to be so different than the typical criminal recidivist because of his mental disorder that he is unamenable to being deterred because of his compulsions, how can the state at the same time argue that such a person is in the narrow class of offenders whose extreme culpability renders him appropriate for the most extreme punishment?

The SVP laws of the various states thus do not reflect evolving scientific certainty about the nature of free will and moral culpability. Indeed the issue may not be amenable to scientific certainty. Instead, the SVP laws, within the framework set by our high Court, represent an evolving consensus that paraphilic disorders are properly dealt with in our law as mental disorders that seriously affect the ability of a person to control their own behavior. Once this evolving consensus is recognized, then any rationale for seeking the death penalty for persons so afflicted disappears. In light of this nation's, and this state's, legal treatment of persons like Krebs', the People may indefinitely confine Krebs, but they may not execute him.

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Argument IX

THE JURY WAS PREVENTED FROM CONSIDERING THE IMPAIRMENT OF CONTROL DUE TO MENTAL DISEASE OR DEFECT UNDER SECTION 190.3(h) BY THE FAILURE TO GIVE PROPER INSTRUCTION IN LIGHT OF THE STATE'S EXPERT TESTIMONY, REQUIRING REVERSAL

Krebs argued that the terms "mental disease or defect" as used in factor (h) "does not have a plain, unambiguous meaning," thus the court had a sua sponte obligation to provide a definition of the term to the jury, especially in light of Dietz's restrictive definition of the term. The People now assert that the claim is forfeited and harmless.

The People acknowledge by their citation to *People v. Estrada* (1995) 11 Cal.4th 568, 574, that the trial court has the sua sponte duty to further define and clarify statutory terms used in an instruction "when their statutory definition differs from the meaning that *might* be ascribed to the same terms in common parlance." (*Ibid,* emphasis added, citing *People v. Richie* (1994) 28 Cal.App.4th 1347, 1360.)

However, the People argue that the defense failed to request a clarifying instruction and therefore forfeited the claim on appeal. But if the court failed to fulfill its sua sponte duty to correctly define an ambiguous statutory term, then failure to request clarification does not bar raising the instructional issue error on appeal. (*People v. Wilson* (2008) 43 Cal.4th 1, 13, fn 3 [claim based on failure of court to instruct sua sponte "required no trial court action by the defendant to preserve it]; Penal Code section 1259.) Thus the determinative issue is whether the jury, in light of the evidence,

may have accepted Dietz' testimony and wrongly ascribed a restrictive meaning to the statutory phrase "mental disease or defect," and therefore concluded that Krebs' paraphilic disorder did not qualify under factor (h).

The People cite only *People v. Lawley* (2002) 27 Cal.4th 102, 165 in support of the argument that words used in factor (h) have a common, unambiguous meaning. The citation is puzzling given that the instruction given there was substantially modified from the statutory language:

> "[I]n determining which penalty is to be imposed on Dennis Lawley, you should consider, take into account and be guided by all of the mitigating factors you deem to be applicable, including but not limited to any aspect of his mental condition. Any mental or psychiatric disability that you find is currently present in Mr. Lawley or you find was present at the time of the commission of the offenses charged in this case, may be considered by you as a circumstance in mitigation. [¶] Evidence of the existence of any such mental or psychiatric disability may never be considered by you as a circumstance in aggravation."

(*Id.*, at 165-166.)

The jury was thus expressly told in *Lawley* that "any aspect of his mental condition" could be mitigating, including "any mental or psychiatric disability", and further that such disability could never be considered as aggravating. No such instruction was given here. Neither was there any testimony adduced in *Lawley* stating that a paraphilic disorder is not a "mental disease or defect." Whether there is a reasonable likelihood that the jury understood the instruction contrary to the law is determined from the entire record, including the evidence and argument of counsel. (*People v. Fiu* (2008) 165 Cal.App.4th 360, 370.)

The People make no argument that the scope of the terms "mental disease or defect" is so clear and universally understood that a lay juror

would undoubtedly reject the testimony of "the most respected forensic psychiatrist in the United States" to find that the terms included paraphilic disorders and post traumatic stress disorder. (39 RT 10037, AOB 195.) Neither do they dispute that Dietz expressly and clearly testified to a restrictive meaning of the terms, as set forth in the opening brief. (AOB 191-192 ["I don't think that the conditions that anyone has described Mr. Krebs as having are a mental disease or defect. (38 RT 9847).] If the jury accepted Dietz as the most respected *forensic* psychiatrist, how could they not accept his testimony concerning what the terms "mental disease or defect," as used in the instructions, meant? Indeed, the People still expressly urge that Dietz's restrictive definition of the term "mental disease" to exclude paraphilic sexual sadism is *correct.* Yet the People utterly fail to respond to the authority from the opening brief that most assuredly establishes that the terms are not intended to have a narrow application, but instead refer, as the jury was correctly instructed in *Lawley, supra*, that "any aspect of his mental condition" may be mitigating under factor (h) if it impairs volition. (AOB 173, 192-194 [*People v. Weaver* (2001) 26 Cal.4th 876, 969; *People v. Fields* (1983) 35 Cal.3d 329, 369-370; *People v. Williams* (2006) 40 Cal.4th 287, 325-326; *In re Ramon M.* (1978) 22 Cal.3d 419, 427-428].)

The People next suggest that Dietz's testimony would not have caused the jury to disregard Dr. Berlin's testimony. Yet that was the exact purpose of presenting Dr. Dietz. After touting Dr. Dietz' credentials, and ridiculing Dr. Berlin, The People should not be heard to suggest on appeal that their actions could not have had their intended and natural effect on the jury. The People also weakly argue that the prosecutor never expressly asked the jury to disregard the "irresistible impulse" testimony of Dr.

Berlin, but merely ridiculed it. [13] (RB 155.) Either way, the prosecutor asked the jury to accept Dr. Dietz views over that of Dr. Berlin. They cannot now claim that it is unlikely that the jury did as asked.

The People finally argue that the existence of factor (k) cures all error in instructing on factor (h) since the jury could consider evidence of the defendant's mental disorder under the factor (k). *People v. Leonard* (2007) 40 Cal.4th 1370, 1429 is mis-cited in support of this proposition, as the case does not address the issue or mention factor (k) at all. In any event, the argument ignores the nature of the error and the circumstances. Krebs' had a statutory right that his jury "have the exercise of its sentencing discretion informed" by an accurate instruction of the law concerning his impaired volitional capacity caused by his paraphilic disorder. (*People v. Marshall* (1996) 13 Cal.4th 799, 857.) Instead, the jury received an instruction which required them to find that the specified factor was *not present* if they accepted Dietz's definition of the words "mental disease or defect." Dietz was quite clear that a paraphilia and post traumatic stress disorder did not meet the definition of a "mental disease or defect." Thus the effect of the error in the instruction was to erroneously tell the jury that the State of California had determined, as a matter of law, that a paraphilia

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The People make a continuing reference to "Dr. Berlins irresistible impulse testimony." (RB 155.) Dr. Berlin offered no such testimony and did not use the phrase at all. Instead, it was Dietz who used the phrase in a prior affidavit, and when confronted on cross- examination, stated that the affidavit referenced Berlin's supposed willingness to give such testimony. (RT 9856-9860.) Dr. Berlin's testimony did not concern the legislatively rejected and abstract notion of an "irresistible impulse." Instead, Dr. Berlin testified, congruent with the judicial decisions, legislative policy, and the People's experts in SVP cases, that the nature of a paraphilic disorder was to impair the ability of the subject to control his behavior.

does not impair volition, and thus could not be mitigating on that basis. This left the jury the sole option to consider his sadistic urges only as aggravating, as the People here urge that the jury was permitted to do under *People v. Smith* (2005) 35 Cal.4th 334, 354-356. (RB 156.)

The language of factor (k) does not suggest that evidence which the jury is directed to find aggravating should be nevertheless be found as mitigating. "Any *other* circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." (Penal Code section 190.3 (k)). The use of the word "other" would be mere surplusage if it was not understood to refer to evidence *other* than that listed in categories (a) through (j). The prosecution argued that jury's job was to decide which of the listed factors were *present.* "Your task, as the judge will explain, is to look at the list of aggravating and mitigating circumstances, the ones he has selected, and you will decide which are present." (39 RT 10028.) When the prosecutor initially discussed factor (h), he noted a disagreement between Dietz and Berlin. (39 RT 10031.) He later ridiculed Dr. Berlin, but never suggested that the jury could consider the evidence of paraphilic volitional impairment under factor (k). Neither did the defense argument suggest that the jury should consider evidence of paraphilic volitional impairment under factor (k) rather than factor (h). When discussing whether Krebs had a "mental disease" as specified in factor (h), the defense attempted to counter Dietz's contrary testimony by suggesting that he was "splitting hairs," and merely asked the jury to accept the testimony of Dr. Berlin establishing the volitional impairment under factor (h). (39 RT 10116-10117) It is therefore highly improbable that the jury would have understood that they could consider evidence which was specifically addressed to factor (h) under the factor (k)

instruction. Unlike the situation in *Boyde v. California* (1990) 494 US 370, the scope of factor (k) is insufficient considering that factor (h) as worded arguably expressly excluded consideration of the mitigating value of the evidence. The Court there distinguished the situation from other cases finding prejudicial error "where we have found broad descriptions of the evidence to be considered insufficient to cure statutes or instructions which clearly directed the sentencer to disregard evidence." (*Id.*, at 384.)

The error here was prejudicial because there is a reasonable likelihood that the jury understood the instructions to mean that the State was "guiding" them by the use of restrictive language denoting mental disorders in factor (h) that paraphilic urges do not impair the ability to control behavior, as stated by Dietz, and do not therefore have any mitigating value. If the jury had been properly instructed that a paraphilic disorder is in fact the type of mental disease or defect which may impair volition, the jury's entire view of the case, and of the validity of Dietz's views upon which the People's case rested may have been different. Because the case was close, as previously discussed, and the jury focused on the testimony of the two experts regarding volitional impairment, it cannot be said beyond a reasonable doubt that the error was harmless.

Argument X

THE COURT ERRED UNDER CALIFORNIA LAW AND *SKIPPER V. NORTH CAROLINA* IN LIMITING MITIGATING EVIDENCE FROM PERSONS WITH A SUBSTANTIAL RELATIONSHIP WITH KREBS

Krebs argued the exclusion of proffered testimony by Children's

Home workers who had a substantial relationship with Krebs to the effect that Krebs should live was prejudicial error. The People describe the applicable law consistently with Krebs, citing the same cases and controlling rule. They then argue the trial court did not err, and any error was harmless. The first argument is demonstrably wrong, the second unpersuasive.

In asserting that the trial court did not err in excluding the questions from the Children's Home witnesses Mosher, Deibel, Cirka, and Gabby, the People rely primarily on the alleged cumulative nature of the evidence.[14] However, the court clearly abused his discretion, as demonstrated in the AOB, because he misunderstood the applicable law to require that the witness have an ongoing relationship with Krebs, so that his execution would harm the witness. (AOB 199-200.) The court's understanding was without a doubt inconsistent with this court's clear statement of the rule. "[E]vidence that a family member or friend wants the defendant to live is admissible to the extent it relates to the defendant's character, but not if it merely relates to the impact of the execution on the witness." (*People v. Smith* (2005) 35 Cal.4th 334, 367.) "A court abuses its discretion when it rests its decision on an inaccurate view of the law." (*United States v. Jones* (9th Cir. 2007) 472 F.3d 1136, 1141.) Furthermore, the court never suggested that the evidence was being excluded upon a finding that it was

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In the AOB it was stated that the identity of the witnesses affected by the ruling were only Scott Mosher, Fred Diesel, and Diana Scheyt (Krug) (AOB 199.) As the respondent correctly observes, the defense offer of proof referred in addition to Jeffrey Cirka, and Sally Gabby, and the ruling hence affected all four Children's Home witnesses. (RB 160, fn 35, 161, 24 CT 6317-6320.) Krebs also notes that Frederick Deibel's name throughout his opening brief was misspelled as "Deisel."

cumulative or time consuming. Instead, he excluded it in the mistaken view that it was not relevant under his view of the law. (33 RT 8553.) Since the People concur that *Smith, supra,* sets out the applicable rule, the only question then is one of prejudice.

In arguing any error was harmless under the *Chapman* standard, the People note that the excluded testimony was only indirect evidence of the Appellant's character. This may be true, as limited by this court's precedent. However, just because evidence is indirect or circumstantial does not mean that it is not powerful. The law clearly does not favor one form of evidence over another. (CALCRIM No. 223 [circumstantial evidence may be as reliable as direct evidence].)

The People's citation to other cases where this court has found the exclusion of similar evidence in other circumstance to be un-prejudicial is not determinative. (RB 165.) The question must be examined in light of the entire record. Here the defense cited a number of factors which disclose that possibility that the error affected the verdict and will not be repeated here. (AOB 201-202.) The court's ruling affected four witnesses, not just one. It is not unreasonable that the jury may have been swayed in their moral decision by hearing that four credible, unrelated witnesses from a specific period in Krebs's youth when he was institutionalized left the witnesses with the unanimous opinion that Krebs' character and qualitites demonstrated over those years Krebs' life was worth sparing, despite his commission of his crimes. The case as to penalty was close, and there is at least some reasonable possibility that the error contributed to the verdict.

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ARGUMENT XI

THE COURT PREJUDICIALLY ERRED IN ADMITTING EVIDENCE IN PENALTY REBUTTAL CONCERNING KREBS' STATEMENTS TO A FORMER GIRLFRIEND THAT HE HAD MURDERED A PERSON IN PRISON

Krebs argued that the testimony by a former girlfriend, Turner, that he admitted to murdering a man in prison was not proper rebuttal, highly prejudicial, and should have been excluded. The People argue that the evidence was brief and relevant to why the girlfriend ended the relationship. They argue that why she ended the relationship is relevant because the defense elicited evidence that Krebs had a "nice" relationship with the girl. They also assert any error in the ruling was harmless.

Krebs will first note what the People do not argue. They do not contest the rule that rebuttal evidence must be specifically limited to the incident or trait that the defense puts in issue, as explained in *People v. Rodrigues* (1986) 42 Cal.3d 730, 792 and *People v. Loker* (2008) 44 Cal.4th 691, 709.[15] They do not make any argument that the evidence was admissible as relevant to Krebs' character. Neither have the People explained why the evidence was more probative than prejudicial. Nor have the People attempted to dispute the fact that the Turner's assessment of the relationship was in fact corroborative of the characterization that the relationship was nice. (AOB 206-207)[16]

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[15] *People v. Loker* was misspelled as *People v. Coker* at all times in the AOB.

[16] Krebs cited such testimony by Turner as: "He was really nice, very romantic, you know, wrote love letters and poems, more poems than love

In light of the People's concessions and omissions, it seems patent that the whole point of calling Turner was not to rebut evidence that she was enamored of Krebs for a time and had a "nice" relationship for a while. Nor were the People content with simply getting before the jury through Turner that she broke up with him after she found messages indicating an affair. The real objective was to place Krebs' admissions to yet another murder before the jury. The People's lack of discussion of Evidence Code section 352 suggests they cannot support the court's ruling on that basis.

Indeed, it appears that the trial court himself did not consider the evidence was more probative than prejudicial. Instead, it appears the court either forgot or misunderstood that the proffer of evidence by the prosecution during the motion to exclude the evidence included the proposed testimony fact that Krebs said he had actually killed a man in prison, rather that just the far fetched idea that he committed a crime to go to prison to revenge a prior girlfriend's rape. The court's ruling specifically cautioned that the witness would not be allowed to speculate that Krebs actually had murdered a man in Idaho. (37 RT 9730.) Yet the court professed surprise when the witness testified, consistent with the proffer, that Krebs had told her that he had actually succeeded in the murder. (38 RT 9911-9913.) By excluding evidence of Turner's state of mind (her belief that Krebs succeeded in the murder) the court must have judged that her state of mind on the issue was either irrelevant or more prejudicial than

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letters. But it was, you know, nice." (38 RT 9907.) She confirmed that Krebs prepared a candlelight dinner for her, that they were engaged to be married, and lived together. "He never seemed to get mad." (38 RT 9921.) Turner also testified to visiting with Krebs after they broke up, and even attended the senior prom with him afterwards. (38 RT 9927.)

probative. The limiting instruction, however, limited the testimony that Krebs told Tuner he murdered a man in prison solely to Turner's state of mind. Yet the court had already excluded evidence of her state of mind. It thus appears that the court was just trying to make the best of an error caused by a failure to appreciate the nature of the proffered evidence.

The People argue that the defense reliance upon *People v. Medina* (1995) 11 Cal.4th 694 is misplaced. But their sole attempt to distinguish the very similar facts of that case is to suggest that here, the evidence did rebut defense mitigation. But the same could be said in *Medina*. There, the sister testified to "generally mitigating penalty phase evidence regarding defendant's family background and childhood" (*Id., at* 769.) That the sister was afraid of him after he made scary statements could just as easily be argued to be "relevant" to impeach the mitigating family background evidence presented by that witness.

The People argue the evidence was "brief." (RB 168) The brevity of the evidence does not reduce the prejudicial impact. The evidence was a complete compact confession to murder. It defies imagination to say that it was not capable of turning some jurors who were struggling with the death penalty. The confession had special relevance because Krebs' other crimes were sexually related, and Krebs had put on much evidence as to his good conduct in prison. The confession would have made it difficult, if not impossible for the jurors to accept that evidence. The evidence is even more prejudicial considering that the jury received evidence of yet still another uncharged murder, as discussed in Argument XIII. The jury would have likely felt that important evidence of Krebs' murderous nature, completely apart from any paraphilic diminution of volition, was being kept from them for technical, legal reasons. The People fail to establish beyond a

reasonable doubt that the unwarranted admission of this evidence could not have affected the verdict.

Argument XII

THE COURT PREJUDICIALLY ERRED BY ADMITTING IN REBUTTAL A POSED PICTURE OF KREBS, SHIRTLESS AND FLEXING, EXHIBIT 171

Krebs argued that a posed photograph of Krebs, shirtless and flexing, was inadmissible due to lack of foundation and relevance in penalty rebuttal. He further argued that any marginal relevance was substantially outweighed because of the prejudicial impact of the photograph, and it should have been excluded under Evidence Code section 352. Krebs demonstrated that the trial court misapprehended its duty to weigh the probative value of the evidence against the potential for prejudice, thus abusing his discretion in ruling on the objection. The error was argued to be prejudicial under state law and the Eighth Amendment.

The People contend the photograph was relevant to establish lack of remorse after the first murder. They also contend that the trial court did properly perform the weighing required by Evidence code section 352, but curiously contend without elaboration that the defendant's objection under section 352 was insufficient to preserve the issue on appeal. And, of course, contention is made that any error could not have been prejudicial.

A. The error is not forfeited

The People acknowledge that counsel objected to the photograph on

grounds that it did not show lack of remorse without further foundation and on section 352 grounds. (RB 172.) Thus the cursory waiver argument at RB 174 is difficult to comprehend. If the People are urging that trial counsel had an additional duty to advise the court of their dissatisfaction with the reasons expressed by the court for overruling the objection, they fail to cite any authority for this novel argument. The citation to *People v. Anderson* (1990) 52 Cal.3d 453, 477 does not help their cause, since there, the defense had failed to expressly object upon section 352 grounds, and the court held that where the defense does so object, the trial court has a duty to "make an express ruling weighing relevance and prejudice under Evidence Code section 352." Here, therefore, the issue is preserved for appeal.

B. The trial court's erroneous view that the law limited his discretion to exclude prosecution proffered evidence in the penalty phase under section 352 establishes that he abused his discretion.

Once an objection is made under section 352, the trial court's legal duty is clear. "When an objection to evidence is raised under Evidence Code section 352, the trial court is required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption." (*People v. Cudjo* (1993) 6 Cal.4th 585, 609, citations omitted.) When weighing probative value against prejudice, the task requires assessing the degree of relevance, materiality, and necessity.

> The evidence is probative if it is material, relevant, and necessary. How much 'probative value' proffered evidence has depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the

> importance of the issue to the case (degree of materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity).

(*People v. Thompson* (1980) 27 Cal.3d 303, 318, fn. 20, citations and quotations omitted.)

Here, the trial court did not conduct the required weighing process because he believed that case law restricted his ability to exclude evidence under section 352 when it was proffered by the People in the penalty phase. The court clearly stated his erroneous understanding:

> The real test for rebuttal evidence simply is it proper rebuttal. And the only -- my judgment is the only way to -- for 352 to exclude it at that point would be if it would unfairly -- be unfair in the sense that it would divert the jury's attention from their ultimate duty." (37 RT 9820-9821.)

The court's articulated understanding does not allow for the exclusion of evidence under the mere statutory standard set out in section 352. Evidence which has a small degree of relevance and necessity, but a large potential for prejudice should be excluded under the statute. However, the *degree* of relevance and necessity and materiality - the probative weight of the evidence - has no role under the trial court's interpretation of the law. "The real test for rebuttal evidence simply is it proper rebuttal." (37 RT 8920.)

The People argue that the trial court need not expressly weigh prejudice against probative value, citing *People v. Riel* (2000) 22 Cal.4th 1153, 1187 and *People v. Waidla* (2000) 22 Cal 4th 690, 724, fn. 6. However, this court still requires the record as a whole demonstrate that the trial court engaged in the appropriate weighing process. (*People v. Carter* (2005) 36 Cal.4th 1114, 1170.) Here, the record affirmatively demonstrates

a flawed understanding of the weighing process, and thus affirmatively demonstrates an abuse of discretion.

C. The photograph simply was not relevant to show lack of remorse at any relevant time without further foundation as to the circumstances when the picture was taken

Krebs demonstrated in the AOB why the picture was not relevant without further foundation as to the circumstances under which it was taken. The People conceded that remorse cannot be proved conclusively by a photograph. (RB 173.) However, they argue that the photograph was relevant because it *tended* to show remorse. The contention is unsupported. It amounts to nothing more than an invitation to the jury to reason based on stereotypes and physical appearance. The People cite absolutely no authority that a posed photograph taken in unknown circumstances months after a crime could logically demonstrate a lack of remorse concerning the crime. The People's shifting explanations of the purpose in admitting the photograph and their ultimate use of the photograph are far more probative of the actual value of the photograph - to inflame the jury by an image, and to deflect the jury's attention from the other truly probative evidence relating to the subject of Krebs' ability to feel remorse.

D. Admission of the photograph was not harmless

The People predictably argue the photograph could not have been prejudicial. Yet they fail to explain why the prosecution doggedly sought its introduction, why Hobson selected that lone photograph from all the

others to seize; why he had it blown up, and why the photograph was displayed on a huge screen for 23 times the time other slides were displayed. Neither do the People address the trial court's observation relating to the display of the photograph "It was an effective argument." . (40 RT 10362.) It was effective for reasons unrelated to logic and reason. It was effective by reaching into that place, which the law well understands resides in all jurors, where emotions and instinctual response overwhelm reason and intellect. The picture was effective in creating the emotional prejudice intended.

Argument XIII

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT BY PRESENTING FALSE AND MISLEADING EVIDENCE THAT KREBS LIED ABOUT SHOOTING A MAN THREE TIMES IN THE CHEST

In the opening brief, Krebs argued that his constitutional right to Due Process was violated by the prosecution's solicitation of false and misleading testimony from Dietz that Krebs had lied in an interview by Hobson by initially denying that he had shot a man three times in the chest in 1987, then admitting it when the recorder was off. The People now argue the testimony was not false or misleading, and in any event, could not have been prejudicial. They do not argue that the issue is forfeited.

A. Krebs did not lie when he denied shooting a person three times in the chest, contrary to the assertion of Dietz

The People attempt to show that the testimony of Dietz was not false or misleading by miscasting the import of the evidence. The prosecution introduced in the guilt phase a videotape wherein Hobson asks Krebs if he shot a person three times in the chest in Santa Barbara in 1997. Krebs responds, "Shot somebody in the chest three times, no. Wasn't me." In the penalty phase, the prosecution elicited testimony from Dietz detailing numerous specific instances of *lies* allegedly told by Krebs. Dietz had listed the specific lies on a chart for use with the jury, designed to show that Krebs was deceitful, which in turn was one diagnostic criteria for antisocial personality disorder. Dietz testified that one of the many specific instances of "deceitfulness as indicated by repeated lying" occurred when Krebs denied being the one who shot a man 3 times in the chest. (38 RT 9794, 9796.)

The truth is that Krebs responded truthfully to Hobson when he said "Shot somebody in the chest three times, no. Wasn't me." The theory of the People is that Dietz properly characterized Krebs' initial statement as false because Krebs denied "the shooting itself." (RB179.) This argument denies the facts. There was nothing false at all in Krebs denying that he was not the person who shot a person three times in the chest. Krebs could not have been more clear - nor more truthful - when he replied to Hobson, "Shot a man three times in the chest, no. Wasn't me." Dietz's testimony, which characterized this statement as false, was itself false. The error of the People's argument is underscored by their admission that "Dr. Dietz specifically testified that appellant *had lied* about shooting a man in the leg" in Santa Barbara in 1987" (RB179, emphasis added.) While it may be true that Krebs, after the recorded interview on the 27th, admitted shooting a white male in Santa Barbara , it is simply *false* that Krebs *lied* about

shooting a man in the chest or the leg. Krebs truthfully denied shooting a person in the chest three times, and later, evidently on further questioning after the recorder was off, admitted to shooting a white male in Santa Barbara.[17] A person is not lying when he denies shooting a man three times in the chest even if he had shot a man somewhere else.

The whole point of the line of questioning was to show specific instances of Krebs' lies. Dietz's testimony could not be understood in any manner other than that Krebs' statement to Hobson denying shooting a man three times in the chest was false. Krebs' statement to Hobson on the issue simply was not false, and it was wrong for the prosecution to knowingly elicit testimony which wrongly characterized the statement as false.

The People suggest that the defense could have cleared up the evidence by engaging in cross-examination on the issue. (RB 179.) The defense has no constitutional duty to correct the false testimony of the prosecution witnesses. That duty falls on the People. (*United States v. LaPage* (9th Cir. 2000) 231 F.3d 488, 492; *Napue v. Illinois, supra,* 360 U.S. 264, 269; see *People v. Morrison* (2004) 34 Cal.4th 698, 716-717.) Furthermore, any attempt at cross-examination would have been counter-productive. The defense had already objected to the evidence as without foundation and more prejudicial than probative. They claimed not to have received any report showing the admission of shooting a man at all. To

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The only evidence in the record that Krebs admitted to shooting someone is in the unexplained notation contained in the transcript: "(Later, KREBS admitted shooting a white male in Santa Barbara.)" Since the transcript was not "technically" evidence (22 RT 6067) the information that Krebs admitted shooting a man was first introduced as evidence in the penalty phase through Dr. Dietz.

cross-examine an opposing expert on the issue could only bring further attention to the issue, and could well have resulted in further prejudicial details which were otherwise inadmissible.

B. The error in presenting the false and misleading testimony was prejudicial

The People briefly argue that there is no reasonable possibility that Krebs was prejudiced by the receipt of the evidence. (RB180.) In response to Krebs' argument that the prejudicial impact of the error was heightened by the failure to give a limiting instruction, they contend only that the court would likely have given a limiting instruction *if* either side had asked for one, and the court had no sua sponte duty to given an instruction. (RB179.) These contentions are unavailing. Whether or not the failure to give a limiting instruction was additional error cognizable on appeal is besides the point, since it is undisputed that under the instructions actually given, the jury was instructed that they could use Dietz's testimony as affirmative aggravation in the form of violent criminal acts.

The People fail to explain why the jury could not have been swayed by evidence suggesting that Krebs was a violent drug dealer who committed violent acts totally unrelated to any impaired volitional control caused by his paraphilia. The People fail to demonstrate that no juror could have used the import of Dietz' testimony - that Krebs had shot a man in the chest three times in a drug deal - to conclude that even apart from his paraphilic disorder, Krebs had a callous disregard for life which independently made him deserving of the death penalty despite his lessened control over his sexually related offending. Certainly it cannot be said that such a juror

would be motived by mere "arbitrariness, whimsy, [or] caprice" in reaching such a conclusion. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) The potential for prejudice in this regard is further heightened by the interaction of this testimony with the evidence that Krebs had killed a man in prison, discussed in Argument XI. Because there is a reasonable possibility that some jurors decision could have been affected by false and misleading evidence that Krebs shot a man in the chest three times, the judgment must be reversed.

Argument XIV

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT BY FALSELY SUGGESTING THAT KREBS WAS CONVICTED OF SEXUAL ASSAULT IN IDAHO

Krebs argued that the prosecutor improperly and falsely suggested to several witnesses that Krebs was convicted of sexual assault when he was 18. In fact Krebs entered a plea of misdemeanor assault to the charge, and the victim of the crime, Jennifer E., was unavailable at the time for testimony. The impropriety appears to have been motivated by the prosecutor's frustration over being unable to introduce evidence of the crime due to the misdemeanor nature of the conviction and the unavailability of the victim at the time of the misconduct.

The People argue that the claim is waived because the defense failed to object at the time, and that any error was not prejudicial, given that the victim later became available, and testified concerning the incident. The People also argue that it was not misconduct for the prosecutor to reference

the mistaken testimony of Krebs' mother that the incident resulted in a conviction of sexual assault as if it were true on the grounds that the mistaken testimony was properly received, and heard by the jury. (RB 185.)

The claim is appropriately considered by this court even though no precise objection of misconduct was made below because the defense did make appropriate objections and gained a ruling that the prosecutor could not elicit hearsay from Krebs' mother, and further objected when the prosecutor inappropriately attempted to "impeach" her with her statement as to her hearsay understanding of the nature of the conviction. (See AOB 228-230, 31 RT 8189-8190, 32 RT 8308-8309.) Once the court overruled the objection, it is true that the jury did hear the answer. Thus any further objection would have been futile, since, as the People now argue, the prosecutor merely referenced testimony previously heard by the jury. Thus the claim is preserved.

On the merits, the People confuse the type of misconduct which occurs when a prosecutor insinuates certain facts in his questions without having proof of those facts from the more egregious situation where the prosecutor insinuates certain facts in his questions *knowing that the insinuation is false.* The latter is what occurred here. The prosecutor intentionally capitalized on the objectionable hearsay mistaken testimony of a witness by insinuating that the damaging testimony was true, *even though the prosecutor knew that it was false.* Thus the situation is different than the rule expressed in *People v. Earp* (1999) 20 Cal 4th 826, 859-860, upon which the People rely. (*Napue v. Illinois, supra,* 360 U.S. 264, 269; *People v. Morrison* (2004) 34 Cal.4th 698, 716-717.)

As to prejudice, the prejudicial impact was somewhat lessened by the unexpected recovery of Jennifer E. which resulted in her giving

testimony about the incident. However, the court should consider the cumulative effect of this error in combination with the other errors in the penalty phase. It should also consider this conduct in assessing the good faith of the prosecutor as discussed in Argument XV.

Argument XV

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN OPENING AND CLOSING STATEMENTS IN THE PENALTY PHASE

In argument XV, Krebs detailed numerous improprieties in the prosecution's opening and closing statements in the penalty phase. Krebs acknowledged that the defense failed to specifically object at the time of the improper statements, but asserted that objection was excused because an admonition would not have excused the harm, citing *People v Bandhauer* (1967) 66 Cal.2nd 524.

Predictably, the People now assert the claims are waived, meritless, and could not have caused prejudice.

A. The claims are not waived because no admonition could have cured the harm caused under *People v. Bandhauer*

The People fail to expressly acknowledge the well established rule that a claim of misconduct is not waived by failing to object where a timely objection and admonition would not have cured the harm, suggesting it is only "appellant's proposed rule." (RB 189.) They do not mention *People v. Bandhauer, supra,* 66 Cal.2d 524, on the issue of forfeiture. (AOB 234.)

Yet the analysis of the *Bandhauer* opinion finding that a timely objection could not have cured the harm should control the result here.

In *Bandhauer*, the type of misconduct that occurred involved many of the same themes as the misconduct which occurred here. There, the prosecutor invoked his personal integrity, experience, alleged impartiality and position to make an argument outside of the evidence concerning the depraved nature of the defendant. (*Id.* at 529-530.) Here, the cited misconduct was in much the same vein but went further to extend to disparagement outside of the evidence of defense counsel and defense experts as well. The prosecutor's remarks were calculated to cloak the defense with sinister motives and unscrupulous methods, drawing not on the evidence, but the prosecutor's own implied knowledge, integrity, experience, and belief in the righteousness of his cause.

The *Bandhauer* opinion recognized that a prosecutor who asserts facts not based on the evidence, but who instead draws on his own integrity, righteousness, and beliefs to make disparaging assertions about the defense "obviously" projects a belief in his statements likely to persuade the jury *regardless* of any admonition from the court. Krebs agrees. There can be no question when the record is examined as a whole that it would be apparent to any reasonable juror listening to the opening and closing statements that the prosecutor had nothing but contempt and disdain for the defense's motives, actions, and experts. It is precisely the prosecutor's apparent sincerity, conviction, and knowledge supporting the statements which makes it impossible to "un-ring"the prosecutor's scathing remarks. An attempt by the court to tell the jurors to disregard what the prosecutor so impassionedly said can only "compound" the error by drawing further attention to it. (*Bandhauer* at p.530.)

The rule requiring a timely objection and its exceptions must be construed with an eye towards the purpose of the rule: "the trial court should be given an opportunity to correct the abuse and thus, if possible, prevent by suitable instructions the harmful effect upon the minds of the jury." (*People v. Green* (1980) 27 Cal.3d 1, 27.) When the reason for the rule fails, so should the rule. (See Civil Code, § 3510, *People v. Stanley* (1995) 10 Cal.4th 764, 801.) While some types of misconduct in opening and closing statements may require defense counsel to alert the court to the error so that it can take action, the type of misconduct raised by Krebs (*i.e.*; 1) statements of personal belief; 2) reference to facts not in evidence; 3) disparagement of counsel and mitigation; 4) misstatement of the evidence; and 5) appealing to passion and prejudice) are errors that should be plain and self evident to the trial court without any action by the defense counsel. The arguments are either proper based on the record or not, and the trial court is in equal position as counsel to know the record. Indeed, the trial court is in far better position than defense counsel to know whether any particular statement by a prosecutor in opening statement is likely to be deemed improper by the court. The court clearly has the power to control the arguments of counsel in the absence of an objection. (Penal Code section 1044, *People v. Modesto* (1967) 66 Cal.2d 695, 708; *People v. Nails* (1963) 214 Cal.App.2d 689, 693.) Thus this court should make clear that where the impropriety of the argument would be as clear to the court as it would to counsel, a failure to object does not waive the error, as the court had the full opportunity, and statutory duty, to correct the error. The court's failure to act can logically only be attributed to a determination that either the argument was proper, or even if improper, was not prejudicial. In such instances, the court should be deemed to have overruled the appropriate

objection, thus preserving the issue on appeal. The sound administration of justice is not well served by the opposite rule. The court on review is well situated to evaluate the potential for prejudice by considering the entire record on appeal, including subsequent argument and jury questions.

B. The prosecutor committed reprehensible misconduct by telling the jury that Dr. Berlin was called by the defense because no one west of the Rockies shares his beliefs

Responding to the merits of each claimed category of misconduct, the People argue all the statements of the prosecutor were proper. Typically the argument is made that the statements were somehow "proper comment" or a "permissible inference" based on the evidence, or that a jury would have understood the comments as being based on the evidence. The People cite cases in which allegedly similar remarks in allegedly similar circumstances were found to be proper.

It is unlikely to be helpful to this court to engage in a lengthy analysis of each of the cited cases to demonstrate that the remarks and context in the present case are closer to the cases cited by the defense rather than the prosecution. Therefore, Krebs will not reply in detail to each of the prosecutor's arguments, and instead stands on the argument and cases cited in the opening brief. However one particular claim bears further reply.

In refuting Krebs' claim that the comments accusing defense counsel of using Dr. Berlin because there was no one west of the Rockies who shared his view that a paraphilia impairs volition, the People argue that this was a "permissible inference from the evidence." (RB 195.) Tellingly, the People do not state what that evidence was. They then argue, without

explanation, that the statement was not a deceptive method employed to persuade the jury, and did not "infect the sentencing proceeding with unfairness." The arguments are without merit.

First, it is both "reprehensible" and "deceptive" to falsely argue outside the record to the jury that no western experts share Dr. Berlin's views, especially in light of the fact that California cases are replete with examples of California experts who do share his views.

Second, this misconduct did "infect" the penalty phase with unfairness. In this case, the credibility of the experts, and their competing views as to the effect of a paraphilic disorder upon the ability of the afflicted person to control his urges were the defining issues in the penalty phase. The jury manifested their understanding of the importance of the issues by asking for read back *only* of the testimony of the conflicting experts on the precise issue. The false argument by the prosecutor concerning the uniqueness of Dr. Berlin's views, if credited, not only could have, but *should have* caused a reasonable juror to reject the credibility of Dr. Berlin. The statement was made by an impassioned prosecutor who had previously stated in opening that Dr. Berlin was not credible because he "traveled around the country" testifying to a "ridiculous" theory of volitional impairment which would be soundly refuted by the nation's "most respected" psychiatrist, Dr. Dietz. (29 RT 7768-7769.) These statements by the prosecutor clearly foreshadowed the prosecutor's closing theme that the defense was so unethical and desperate to find an expert to excuse Krebs' behavior that it resorted to using a mercenary, isolated East Coast expert because he was the only one who would testify to the "ridiculous" theory of volitional impairment.

Rational jurors would be expected to credit the statements of the

prosecutor, because they concerned a subject about which a juror would presume that the prosecutor had special knowledge.

For all these reasons, an objection and admonition would have been fruitless and compounded the error. Consider even a full admonition such as: " Counsels arguments are not evidence, but they must be based on the evidence. There is no evidence in the record which supports the suggestion in the prosecutor's argument concerning the motivations of defense counsel in selecting Dr. Berlin. Therefore you must disregard any such suggestion in the prosecutor's argument and not let it affect your deliberations in any way." [18] This admonition simply underscores that the prosecutor has impugned the defense and the defense expert based on matters known to the prosecutor, but outside of the admitted evidence. A juror who holds the position of a public prosecutor in high esteem could not fail to be prejudiced against the defense as a result of the argument, notwithstanding the admonition. The error is thus cognizable on appeal, meritorious, and prejudicial. It was truly a miscarriage of justice for jury to have been so improperly misled regarding a key matter that related directly to the crux of the defense case in mitigation, and the credibility of the opposing experts.

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The likelihood of securing such a full admonition is not substantial. Defense counsel weighing whether an objection would be likely to cause more harm than good would more likely anticipate that a prompt objection would garner only a response such as: "The jury is reminded that the arguments of counsel are not evidence. Proceed." Such a typical response would cause even more damage to the defense.

Argument XVI

THE COURT PREJUDICIALLY ERRED BY ORDERING KREBS TO SUBMIT TO A PSYCHIATRIC EXAM BY DR. DIETZ.

The People now concede that the trial court committed state law error, under the authority of *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, in ordering Krebs to submit to a psychiatric evaluation by Dr. Dietz. The People raise no contention that the error was forfeited, or that a subsequent change to Penal Code section 1054.3(b) should operate retroactively. Nor do the People make any argument that the court could have made an equivalent order under other authority. The sole contention is that the error could not have prejudiced Krebs.

The People argue that Krebs suffered no prejudice for the same reasons why the defendant in *People v. Wallace* (2008) 44 Cal.4th 1032 was held to suffer no prejudice. The case is easily distinguishable. While the defendant there also refused to be interviewed, and the jury was made aware of such fact through the testimony of one of the People's experts, there is no indication, as here, that the prosecutor compounded the error in argument by implicating the defense experts in orchestrating the refusal. Nor is there any indication, as here, that the prosecutor's reference in the argument to the refusal was tied to a larger and comprehensive effort by the prosecutor to portray the defense experts as unethical and unfair.

Furthermore, the prosecution in *Wallace* called an additional expert who did not rely on the refusal to criticize the findings of the defense experts, whereas here, the People did not call a second expert, so the primary factor cited by court showing the absence of prejudice there is

inapplicable here.

By conceding the error in making the order to submit to the examination, the People impliedly agree that it was further error for the jury here to be advised that Krebs had disobeyed the court order to submit to an examination by Dietz after cooperating with Berlin.[19] These errors caused a prejudicial chain of events. The prosecutor was allowed to comment on the disobedience. He took the opportunity created by the error to find support for a baseless attack on the good faith and credibility of the defense experts. The prosecutor implied that Dr. Berlin counseled Krebs not to speak to Dietz. The charge was made by the prosecutor to support his theme that Dr. Berlin was an outcast, disreputable, 'hired gun' who had no interest in being "fair." It is not unreasonable that the prosecutor's comments occasioned by the errors would have been persuasive to some reasonable jurors who were wrestling with how to evaluate the starkly conflicting positions of Berlin and Dietz.

Although the People acknowledge the correct *Brown/Chapman*[20] standard for prejudice in the penalty phase, even if the error is deemed only

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The People fail to demonstrate why the comments on Krebs' refusal do not constitute constitutional error under *Griffin v. California* (1965) 380 U.S. 609 and other cases cited at AOB 244. However, this court has held that the analysis for prejudice and reversal for penalty phase error is the same whether under the federal or state standard. See fn. 20, below.

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"For prosecutorial misconduct at the penalty phase, we apply the reasonable possibility standard of prejudice first articulated in *People v. Brown*, supra, 46 Cal.3d at page 448, and which, as we have later explained, is the "same in substance and effect" as the beyond-a-reasonable-doubt test for prejudice articulated in *Chapman v. California* (1967) 386 U.S. 18." (*People v. Wallace* (2008) 44 Cal.4th 1032, 1092.)

one of state law, they fail to engage in the required analysis under that standard. Reversal is required under this test "unless the state proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*People v. Lucero* (1988) 44 Cal.3d 1006, 1032, quoting *Chapman v. California* (1967) 386 U.S. 18, 24; see *People v. Brown* (2003) 31 Cal.4th 518, 576.) "[E]rror in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot ... be conceived of as harmless." *(Chapman, supra,* 386 U.S. at p. 24.)

Because a death sentence must be unanimous, an error which tips just one juror towards a death verdict is prejudicial as a matter of law. The brutality of the crimes themselves cannot logically support a finding that no juror would vote for life in an errorless penalty trial. A juror's task is to morally weigh the evidence pointing towards life as well as death. It is well established by this court's death penalty cases that juries are often unable to agree that death is the appropriate punishment, even where the facts of the murder are horrendous. In the cases published by this court in 2010 alone, there were at least four cases where the first penalty jury was hung, resulting in a mistrial. The facts of the murders in each were, without a doubt, properly characterized as aggravating. One case involved the burglary/rape/killing of an 80 year old woman; a second involved throwing gas on a woman and burning her to death; a third involved the killings of six prostitutes, some of whom were found bound, gagged, and buried; the last involved the intentional shooting murder of two police officers.[21] That

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See, respectively, *People v. Taylor* (2010) 48 Cal.4th 574; *People v. D'Arcy* (2010) 48 Cal.4th 257; *People v. Solomon* (2010) 49 Cal.4th 792; *People v. Russell* (2010) 50 Cal.4th 1228.

each of these cases resulted in a hung penalty jury when first tried shows that jurors may still be persuaded to vote for life despite very aggravated crimes.

A proper analysis under the *Brown/Chapman* standard requires a factual examination of the how the error *might* have affected a reasonable juror. Objective evidence of the actual jury's focus on an issue cannot be ignored. Here, the prosecutor expressly focused on the contrast between the defense experts' lack of credibility versus the sterling credentials of Dietz, "the most respected forensic psychiatrist in the United States." (39 RT 10037.) There can be no doubt that the prosecutor leveled many charges about the defense experts' credibility. The prosecutor noted in his argument the conflict in testimony between Dietz and Berlin on multiple subjects. (39 RT 10030 [conflicting testimony regarding extreme emotional disturbance]; 39 RT 10031 [disagreement on psychological factor].) He accused Berlin of improperly collaborating with Dr. Haney "to sell together this ridiculous concept of sexual compulsion." (39 RT 10036.) After a lengthy exposition of Dietz's view that all of Krebs' actions were due to his "choices" rather than any compulsion, the prosecutor again disparaged the defense experts: "Who does Dr. Berlin and Professor Haney think they're talking to in here? I know you people can see through some of this nonsense." (39 RT 10040.) The prosecutor used the term "orchestrated" several times to describe the defense evidence. (39 RT 10035, 10036, 10040.)

The jury's request for read back of the testimony of the two experts is consistent with the jury accepting the prosecutor's invitation to focus on the alleged ridiculous, conniving nature of the defense presentation. As argued in the opening brief, some jurors may have seen through the prosecutor's largely unsupported derogatory comments about Berlin to

some degree - but some may have been swayed by them. (AOB 233-234.) Yet, as a consequence of the erroneous rulings, the prosecutor was able to bolster his disparagement by reference to the intentional, premeditated disobedience to the court's order. The prosecutor referenced Krebs' refusal after talking to Berlin to ask rhetorically, "Where's the fairness in that? Who's looking for the truth?" (39 RT 10041.) One cannot say it was not an effective argument, nor that it did not have the obviously desired effect.

A juror, evaluating such evidence and argument in all the circumstances could reasonably conclude that the defense counsel and the defense experts worked in tandem to deny Dietz the "fair" opportunity to interview Krebs. Such a conclusion would warrant the further conclusion that the defense - and their experts- were interested in protecting Krebs and afraid of a full, balanced assessment. It is therefore reasonable that at least one juror who was undecided concerning the proper weight to give the defense expert testimony was swayed against them, and in favor of Dietz. Given the centrality of the experts' testimony in the penalty phase evidence and argument, anything that could have adversely affected a juror's evaluation of the defense experts may have reasonably tipped the scales on the ultimate question. The error is therefore one which reasonably may have affected the penalty verdict, and the judgment of death must be set aside.

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Argument XVII

THE INSTRUCTIONS CONCERNING FACTOR (h) LABELED VOLITIONAL CONTROL AS AGGRAVATING AND WERE VAGUE IN VIOLATION THE EIGHTH AMENDMENT, REQUIRING REVERSAL

Krebs raised two aspects of the instructions relating to factor (h) which violated his constitutional rights. Krebs first argued in section (A) that the instructions advised the jury that it was an aggravating circumstance if the Krebs was unimpaired in his capacity to control his behavior by a mental disorder or intoxication. This argument was specifically based on the *combination* of the court's *oral and written* instructions. Krebs also argued in section (B) that the instructions relating to factor (h) were vague, in violation of the requirements of state law and the Eighth Amendment. Krebs identified two phrases in the instruction which did not meet the constitutional standard determined by this court, arguing the two phrases in factor (h) were "neither specific, provable, nor commonly understandable." (AOB 250.)

The People respond by misstating the claims, and citing inapposite authority to falsely suggest that this court has previously rejected the claims. It has not, as will be demonstrated. The People do not argue that any error was invited or that the error is forfeited, thus they themselves have forfeited the right to avoid reversal on that basis.

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A. The instructions advised the jury that it was an aggravating circumstance if the defendant was unimpaired by a mental disorder or intoxication in his capacity to control his behavior

The People first miscast the argument as one that the oral and written instructions only "gave the jury *the discretion* to conclude that the absence of impairment in appellant's capacity to control his behavior was aggravating," as if the instructions were merely *silent* on the issue. In fact, Krebs demonstrated that the combination of the oral and written instructions *directed* the jury to consider the absence of impairment in Krebs' capacity to control his behavior as aggravating. (AOB 248.) The distinction is important because Krebs argued the instructions thus offended the federal prohibition against state instructions which attach an "*aggravating label*" to a constitutionally impermissible factor. (AOB 248-249; *Zant v. Stephens* (1983) 462 U.S. 862, 885; *Stringer v. Black* (1992) 503 U.S. 222, 236.)

The People cite *People v. Sapp* (2003) 31 Cal.4th 240, 315 as authority that Krebs' claim has been adversely settled against him. The court in *Sapp* did *not* consider a claim that the *combination* of the court's *oral and written* instructions told the jurors that the absence of the mitigating factor was aggravating. Furthermore, in *Sapp*, the jury was expressly instructed to the contrary. "The absence of a mitigating factor is not and cannot be considered by you as an aggravating factor." (*Id.*, at p. 316.) No such instruction was given here. The court in *Sapp* did not give any further reasoning to deny the claim, other than to describe it as a variant of the claim rejected in *People v. Dennis* (1998) 17 Cal.4th 468, 552 and *People v. Benson* (1990) 52 Cal.3d 754, 802-803. But the court in *Dennis*

merely summarily denied the claim that the court should have identified aggravating and mitigating factors. The court in *Benson* addressed the matter more fully. It recognized that *Zant v. Stephens, supra*, 462 U.S. 862 prohibited a state's instructions from attaching the aggravating label to impermissible factors, and analyzed whether the *written instructions as given in that case* violated the rule. The court held that under the instructions given, "a reasonable juror would readily have identified which circumstances were 'aggravating' and which 'mitigating.'" (*People v. Benson, supra,* 52 Cal.3d 754, 802.) However, in that case, there was no instruction by the court, as here, that *each and every* factor could be aggravating. The *Benson* court in fact assumed that the jury would readily infer the opposite - that some of the factors could only be mitigating. (*Ibid.*)

Thus the court in *Benson* had no occasion to discuss or reject the argument made here - that by expressly telling the jurors that each factor could be aggravating, and instructing them that each factor must be weighed and considered, the instructions required jurors to attach aggravating weight to a factor if it was not mitigating. Indeed, *Benson* supports Krebs' claim. Implicit in the court's reasoning was the acceptance of the proposition that if the instructions had told the jurors that each factor could be aggravating, then the instructions would violate *Zant v. Stephens, supra,* 462 U.S. 862. The court merely analyzed the content of the instructions and found that no juror would have so understood the instructions. Here, of course, the trial court *expressly* told the jury that each factor could be *aggravating*. (AOB 245.) Not only has this court not rejected Krebs' claim, it has endorsed its reasoning.

The People next attempt to argue that any error "is of no moment" because the jury could have considered evidence of sexual sadism and

intoxication as aggravating under factor (a), citing *People v. Smith* (2005) 35 Cal 4th 334, 354-356. The argument fails in two ways. First, the argument is focused on the wrong evidence. Krebs complains that the jury was directed that having full, unimpaired, sober volitional capacity was aggravating. It is one thing to say that the jury could consider Krebs' mental state, intoxication and motives as part of the circumstances of the crime, and give the jury the discretion to find the totality of the circumstances of the crime as aggravating. It is quite another thing to say that being sober or not having a volition impairing mental illness may be considered by the jury as aggravating. This court has firmly held to the contrary in *People v. Kaurish* (1990) 52 Cal.3d 648, 717.

> As we stated in *People v. Davenport, supra,* 41 Cal.3d 247, 289, the fact that while committing the crime the defendant did not have a mental impairment within the meaning of section 190.3, factor (h), does not constitute an aggravation of that crime. The absence of mental impairment and lack of intoxication is not "a circumstance above and beyond the essential constituents of a crime which increases its guilt or enormity or adds to its injurious consequences." (41 Cal.3d at p. 289.)

(*People v. Kaurish* (1990) 52 Cal.3d 648, 717)

This court has cited *Kaurish* with approval on this point in *People v. Nakahara* (2003) 30 Cal.4th 705, 725 .

People v. Smith, supra, 35 Cal 4th 334, is also inapposite because the question there was the admissibility of evidence and argument rather than the question of instructions which misinformed the jury that the absence of impairment should be weighed as aggravating. The court in *Smith* cited with apparent approval its decisions, including *Benson,* where this court found that no reasonable juror could find that an extreme emotional

disturbance was aggravating. (*People v. Smith, supra,* 35 Cal.4th at 353.) The fact that a jury may properly learn and consider that the defendant was sober and unimpaired during the crime does not in any way justify the giving of an instruction which treats such having normal faculties as aggravating.

The People have thus failed to demonstrate that the absence of impaired volition and intoxication may be properly considered as aggravating, hence the error in the instructions labeling such as aggravating requires reversal under *Brown v. Sanders* (2006) 546 U.S. 212. (AOB 249.)

B. The instructions relating to factor (h) were vague in violation of the Eighth Amendment and California law

The People rely on *People v. Lawley* (2002) 27 Cal.4th 102 to assert that factor (h) is not vague in the manner claimed by Krebs. However, *Lawley* does not so hold. In *Lawley*, the appellant failed to make any specific claim that factor (h) was unconstitutionally vague. The claim there was only a generic one urging that all the factors (save for factor (d), to which specific objections were raised) were vague. The court noted that the appellant failed to "present any specific argument or authority for the assertion," and summarily rejected the claim. (*Id.,* at p. 168.) Thus the *Lawley* court never addressed the specific claim made by Krebs, and cannot have rejected it. Neither do the People refute that this court has held that the Eighth Amendment requires statutory sentencing factors to be "be defined in terms sufficiently clear and specific that jurors can understand their meaning, and they must direct the sentencer to evidence relevant to and appropriate for the penalty determination." (*People v. Bacigalupo*

(1993) 6 Cal.4th 457, 477.)

The People, without offering any argument on the merits of the claim, argue that even if the factor is vague, it "is of no consequence" because the jury could consider all forms of mental disorders as mitigation under factor (k), citing *People v. Leonard* (2007) 40 Cal 4th 1370, 1429. The argument is unresponsive to the claim. Krebs does not here claim that the jury was precluded from the consideration of mitigating evidence by reason of the vague language in factor (h). Instead Krebs complains that vague language in a statutory factor in aggravation violates the Eighth Amendment because vague sentencing factors lend themselves to arbitrary and unfair outcomes. "[S]entencing factors should not inject into the individualized sentencing determination the possibility of 'randomness' or 'bias in favor of the death penalty'. (*People v. Bacigalupo, supra,* 6 Cal.4th 457, 477, citing *Stringer v Black, supra,* 503 U.S. 222.). The Supreme Court has held:

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face."

(*Walton v. Arizona* (1990) 497 U.S. 639, 653.)

The People argue that "difficulty of conceptualization and application" does not render a factor vague, citing *People v. Jenkins* (2000) 22 Cal.4th 900, 1052. Yet that opinion pertains simply to difficulty of *application* concerning the age factor, not whether the factor was *conceptually* unclear or vague. Certainly one can not argue that the "age of the defendant" was a vague phase without a commonly understandable meaning. The cited discussion in *Jenkins* concerned two factors which

simply directed the jury to consider a commonly understandable set of facts: the "circumstances of the offense" in factor (a); and the "age of the defendant" in factor (i). *Jenkins* simply noted that the fact the individual juror may place different values on the age of the defendant does not mean that the factor itself is vague, and held the same reasoning applies to factor (a).

The factors discussed in *Jenkins* are those that our high court has termed 'non-propositional' factors. That is, they did not require the jury to answer any question or weigh any matter by a particular standard. Instead, factor (a) and factor (i) simply direct the sentencer to a fact or group of facts that is logically relevant to the sentencing determination. The court's opinion in *Tuilaepa v. California* (1994) 512 U.S. 967 made clear that a stricter standard is applied to a propositional factor, such as factor (h):

> We have held, under certain sentencing schemes, a vague propositional factor used in the sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process prohibited by *Furman v. Georgia*, 408 U.S. 238 (1972). See *Stringer v. Black*, 503 U.S. 222 (1992). Those concerns are mitigated when a factor does not require a yes or a no answer to a specific question, but instead only points the sentencer to a subject matter. See Cal. Penal Code §§ 190.3(a), (k) (West 1988). Both types of factors (and the distinction between the two is not always clear) have their utility. For purposes of vagueness analysis, however, in examining the propositional content of a factor, our concern is that the factor have some "common sense core of meaning . . . that criminal juries should be capable of understanding." *Jurek* [*Jurek v. Texas* (1976) 428 U.S. 262] supra, at 279. (White, J., concurring in judgment).

(*Tuilaepa v. California, supra,* 512 U.S. 967, 974-975.)

The People argue further by reference to *Jenkins* that "competing

arguments by adversary parties bring perspective to a problem." (RB 206.) Yet those comments only apply to consideration of non-propositional factors that simply tell the jury to consider a certain type of evidence, but do not tell them how to consider it. The issue is very different when the jury in a weighing state, such as California, uses a vague propositional standard that purports to ask a question which is to be determined individually from the evidence based on a vague or unworkable standard. It is for this reason that a factor which directs a jury to answer whether a crime was "especially heinous, atrocious, or cruel" is unconstitutionally vague. (*Maynard v. Cartwright* (1988) 486 U.S. 356.)

Thus none of the People's arguments excuse the giving of an instruction regarding factor (h) in the statutory language. The only explanation of the factor given to the jury by the court was its erroneous advice that each factor must be considered, as aggravation or mitigation. It has been amply demonstrated in the opening brief that the concept of volitional impairment is not commonly understood, and has no common sense core of meaning to an ordinary layperson. (See AOB 252-256.) Because of the defective instructions, the jury was left with no useable standard to guide its "determination of the presence or absence of the factor." (*Espinosa v. Florida* (1992) 505 U.S. 1079, 1081, AOB 255.) This lack of guidance created a bias in favor of death by allowing and directing the jury to assign aggravating weight to the absence of impairment. Because the jury could not, under clear California precedent, consider the absence of impairment as aggravating under any other factor, the judgment of death must be reversed. (*Brown v. Sanders*, *supra,* 546 U.S. 212, 220.)

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Argument XVIII

PREVIOUSLY ADJUDICATED CONSTITUTIONAL ISSUES

In this argument, Krebs raised (pursuant to *People v. Schmeck* (2005) 37 Cal.4th 240, 303-305) a number of contentions which this court has previously rejected. The People predictably agree that the contentions have been previously rejected but disagree that the issues should be revisited. No further argument is likely to assist the court, and the matters are submitted on the previous briefing.

CERTIFICATE OF WORD COUNT

I certify that the foregoing brief, exclusive of cover ,tables, and certificates consists of 45,369 words, as reflected in the word count feature of the Word Perfect program.

Respectfully Submitted,

Neil B. Quinn
Attorney for Appellant Rex Allan Krebs

DECLARATION OF SERVICE

People v Rex Allan Krebs — San Luis Obispo Superior Court
No. F 283378
Supreme Court Case No. **S099439**

I am over the age of 18 years and not a party to the within action or proceeding. I am counsel for the defendant. My business address is 323 East Matilija, # 110-199, Ojai California.

On the date indicated below, I served and filed the document named below pertaining to the above entitled action by depositing the sealed envelopes with the United States Postal Service with postage fully prepaid.

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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 the date appearing next to my signature.

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