IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF

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

Honorable John W. Kennedy, Presiding

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff/Respondent,	)	Automatic Appeal
	)	No. S178669
v.	)	
EDWARD MATTHEW WYCOFF,	)	
Defendant/Appellant.	)	

APPELLANT'S REPLY BRIEF

INTRODUCTION

In this brief, appellant Edward Wycoff does not reply to each and every one of Respondent's arguments, but replies only when further discussion may, in his view, be helpful to the Court. That appellant has not addressed any particular argument or allegation made by Respondent, or reasserted any specific point made in his Opening Brief on appeal, does not constitute a concession, abandonment or waiver of that point, but rather reflects appellant's view that the issue has been adequately presented and the position of the parties fully joined. *People v. Hill* (1992) 3 Cal. 4th 959, 995, fn. 3.

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I.

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

A. Competency to Stand Trial

1. Judge Bruiniers Erred When He Failed To Conduct a Hearing Into Wycoff's Competency to Stand Trial

Two things are not in dispute. First, on October 2, 2008, after recognizing that Wycoff showed "evidence of grandiosity and perhaps a fairly high level of paranoia," Judge Bruiniers appointed Dr. Good to examine Wycoff. Second, Dr. Good examined Wycoff and submitted to Judge Bruiniers a 15-page report. That report concluded that "Mr. Wycoff is most probably suffering from Paranoid Schizophrenia..." Dr. Good specifically concluded that Wycoff has "not shown the present ability to consult with his lawyers" and "I find him incompetent to stand trial."

Despite these undisputed facts, Respondent contends that Dr. Good failed to opine with particularity that Wycoff was incompetent to stand trial, that Judge Bruinier's personal observations of Wycoff outweighed Dr. Good's professional opinion, and that Judge Bruinier's actually held a hearing on Wycoff's competency because "the parties were heard on the issue." Respondent's contentions are hollow and distort the record.

2. Respondent Fails To Adequately Address Dr. Good's Report

Respondent repeatedly asserts that Dr. Good "did not opine with particularity that Wycoff was incompetent to stand trial." (RB, pp. 37, 61.) To this Respondent adds that "it is not clear that Good intended to or did opine as to Wycoff's competence to stand trial at all" because "Good rendered only one opinion - that Wycoff could not represent himself because he could not intelligently waive counsel." (RB, p. 64.) Later, Respondent asserts that "Good stated that the only opinion he would render was whether Wycoff could validly waive counsel and represent himself." (RB, p. 65.) All of these assertions are entirely erroneous. Dr. Good's report unequivocally and expressly stated in **bold** print, "**I find him incompetent to stand trial.**" (2CT 424.)

After describing his "Evaluation Procedures" (2CT 413), Dr. Good described the "Background Information" he gathered concerning Wycoff. (CT 414-416.) This background information included Wycoff's psychiatric history. Dr. Good then described his "Mental Status Examination" of Wycoff. (2CT416-417.) Next, Dr. Good set forth his "Diagnostic Formulation." (2CT 417-418.) This concluded with a "differential diagnosis...between Paranoid Schizophrenia and Delusional Disorder. Both are psychotic conditions, and either would constitute a 'severe mental illness.'" Dr. Good concluded "with a reasonable degree of psychological certainty, Mr. Wycoff is most probably suffering from Paranoid Schizophrenia. This diagnosis is based on the presence of paranoid and grandiose delusions, negative symptoms of flattened affect, and long

standing interpersonal alienation." (2CT 418.)

After reaching a diagnosis of Paranoid Schizophrenia, Dr. Good's report then expressly addressed the issue of "Competency to Stand Trial" and Wycoff's "Problematic Relationship With Counsel" for seven pages. (2CT 418-424.) This part of Dr. Good's report included an extended discussion of Wycoff's relationship with each of the five attorneys appointed to represent him. This discussion ended with Dr. Good's report explicitly stating in **bold print**, "Mr. Wycoff has not shown the 'present ability to consult with his lawyers(s)...Because of his grandiosity, Mr. Wycoff is not able to rationally consider 'telling his story' with the assistance of an attorney. On this ground I find him incompetent to stand trial." (2CT 424.)

Contrary to Respondent's assertion, without question Dr. Good intended to and did state an expert opinion that Wycoff was not competent to stand trial. Dr. Good explained his opinion in detail and set forth many concrete particulars.

Additionally, Dr. Good placed his statements and opinions about Wycoff's competency within a precise legal framework. For instance, Dr. Good stated *in quotation* that Wycoff had a "rational as well as factual understanding of the proceedings against him." He questioned, however, whether Wycoff had the "present ability to consult with his lawyer with a reasonable degree of rational understanding." (2CT 420.) Dr. Good concluded that Wycoff did not have the "present ability to consult with his attorney(s)." Again, the quotation marks are Dr. Good's. (2CT 424.) The quotations contained in Dr.

Good's report were taken directly from *Indiana v. Edwards* (2008) 554 U.S. 164, 169. *Edwards*, quoting *Dusky v. United States* (1960) 362 U.S. 402, stated that the "mental competence standard" asks "both (1) whether the defendant has a rational as well as factual understanding of the proceedings against him and (2) whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Indiana v. Edwards, supra,* 554 U.S. at 170; internal quotations deleted. In short, Dr. Good's opinion not only expressly addressed the question of Wycoff's competency to stand trial, it did so by quoting from the competency standard set forth in both *Edwards* and *Dusky.*

Respondent's argument, in part, appears to be that Dr. Good was appointed by the trial court only to evaluate Wycoff's competency to waive counsel, therefore he could not or did not render an opinion on competency to stand trial. After asserting that Dr. Good did not render an opinion on competency to stand trial, Respondent asserts without any evidence, "This limited opinion made sense given the parameters of Good's appointment." (RB, p. 64.) Respondent then asserts that "Good stated that the only opinion he would render was whether Wycoff could validly waive counsel and represent himself." (RB, p. 65.) Again, Respondent's assertions are contradicted by the record.

As pointed out above, Dr. Good unequivocally and expressly stated that Wycoff was not competent to stand trial. (2CT 424.) Seven pages of Dr. Good's 15-page report explained the basis for that opinion.

In essence, Respondent's assertion is that Dr. Good was only appointed by the court to render an opinion on Wycoff's competency to waive counsel, therefore Dr. Good's opinion on any other issue was somehow invalid and the trial court was therefore free to ignore it. Respondent is wrong for two reasons.

The standard for competency to stand trial is the same as the standard for competency to waive counsel. "The competency defendant needed was the competency to waive the right to counsel, and to determine this, a trial court applies the same standard that it uses to determine if a defendant is competent to stand trial." *People v. Weber* (2013) 217 Cal.App.4th 1041, 1051, citing *Godinez v. Moran* (1993) 509 U.S. 389, 399-401. Therefore, if there is substantial evidence that a defendant is incompetent to waive counsel, there must also be substantial evidence that the same defendant is incompetent to stand trial.[1] If, as Respondent erroneously asserts, Dr. Good had *only* rendered an opinion that Wycoff was not competent to waive counsel, since the standards are the same, that alone would constitute "substantial evidence" that Wycoff was not competent to stand trial.

Secondly, the source of the "substantial evidence" is irrelevant. If the trial court had ordered Dr. Good to examine Wycoff's feet, and after such an examination Dr. Good

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[1] Since Judge Bruiniers thought it necessary to appoint Dr. Good to determine whether Wycoff could competently waive counsel, as a matter of law, he must have had the same question about Wycoff's competence to stand trial. Judge Bruiniers' failure to express such a doubt about Wycoff's competence to stand trial reflects the court's failure to properly understand the applicable standards.

reported that Wycoff's behavior was indicative of severe mental illness, such evidence would trigger the necessity for a hearing into Wycoff's competency. *People v. Rogers* (2006) 39 Cal.4th 826, 847: "Evidence of incompetence may emanate from several sources, including the defendant's demeanor, irrational behavior, and prior mental evaluations." See also *People v. Mai* (2014) 57 Cal.4th 986, 1033. This Court has repeatedly held that a competency hearing is necessary "whenever the court is presented with evidence of incompetence..." *People v. Sattiewhite* (2014) 59 Cal.4th 446, 464, quoting *People v. Rogers, supra,* 39 Cal.4th at 847. It does not matter who presented the evidence, how the evidence was presented, or why the evidence was presented. In this case the evidence was presented by a forensic psychologist appointed by the court.

Respondent next asserts that Dr. Good rendered an opinion "that Wycoff was both competent and incompetent to stand trial." (RB 66.) Respondent reaches this nonsensical conclusion by severely distorting Dr. Good's report.

As discussed above, *Edwards*, *Dusky*, and numerous opinions of this Court, including *People v. Mai, supra,* 57 Cal.4th at 1032, have stated that there are two prongs to the standard for competency to stand trial. The trial court must ask "both (1) whether the defendant has a rational as well as factual understanding of the proceedings against him and (2) whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." If the defendant fails *either* prong, he is incompetent. Dr. Good expressly stated that Wycoff "has a 'rational as well as

factual understanding of the proceedings against him..'" (2CT 420.) That is, Dr. Good found that Wycoff was competent under the first prong of the *Dusky* standard.

Dr. Good's report does address Wycoff's competency under the first prong with some specificity. For instance, Dr. Good reported that Wycoff "was able to state and explain the different pleas a person can enter in court" and that Wycoff "understands that defendants do not always have to testify in their own cases." (2CT 418.) Respondent also discusses at length Dr. Good's use of the Competency Assessment Instrument - Revised. (RB, pp. 50-51.) However, what Dr. Good actually said about the CAI-R was that it showed that Wycoff "has a factual understanding of the proceedings and intellectually understands the relationship between attorney and client." (2CT 418.) That is, the CAI-R showed that Wycoff was competent under the first prong of the *Dusky* standard.

However, Dr. Good unequivocally found that Wycoff was not competent under the second prong of the *Dusky* standard. Respondent calls this "logically inconsistent." To Respondent, Dr. Good's conclusion that Wycoff was competent under the first prong, but incompetent under the second prong of the *Dusky* standard, means that Dr. Good "would opine that Wycoff was both competent and incompetent to stand trial." (RB, p. 66.) Respondent's assertion is both erroneous and illogical.

Dusky requires <u>both</u>; that the defendant have a rational understanding of the proceedings against him <u>and</u> the ability to consult with his lawyer with a reasonable

degree of rational understanding. There is nothing logically inconsistent with a finding that Wycoff had a rational understanding of the proceedings against him, but did not have the ability to consult with his lawyer with a reasonable degree of rational understanding. Respondent simply misstates, misapplies, and misunderstands the *Dusky* standard.

Dr. Good's report made it abundantly clear that Wycoff did not have the competency to consult with his lawyer with a reasonable degree of rational understanding. Indeed, Dr. Good's report discussed Wycoff's "Problematic Relationships with Counsel" for five pages. Among other things, Dr. Good noted that Wycoff did not want to consider an insanity defense because he believed that he was "too competent, too sane." Yet he wanted "to pick a jury that believed in vigilante justice." (2CT 422.) Wycoff told Dr. Good, "I need to handle my case myself. I need to know what people are thinking about me." (2CT 421.) While he recognized that his attorneys were "trying to do their job. They got in the way of doing things. I just don't want to do it that way. I want to know what's going on...I need to know what my friends and business associates are saying..." (2CT 423.) Later, Wycoff stated to Dr. Good that "My attorneys are the enemy. I consider them the bad guys. I can't deal with them. I cannot feed them, let them have the spotlight, the limelight, that comes with being in the news." (Id.)

Dr. Good concluded that Wycoff's beliefs about his attorneys "is a function of his paranoid mental disorder." Dr. Good expressly stated, "As a result of his hypercritical and suspicious stance toward his attorneys, Mr. Wycoff has not shown the 'present ability

to consult with his lawyer(s).'" Therefore, Dr. Good found Wycoff incompetent to stand trial. (2CT 428.) In short, Dr. Good found Wycoff not competent under the second prong of the *Dusky* standard.

Respondent's fall-back position is that "even if we assume Good intended to opine on Wycoff's competency to stand trial, his observations on this point too lacked particularity and thus failed to constitute substantial evidence of incompetence." (RB, p. 67.) Respondent cites *People v. Mai, supra,* 57 Cal.4th 986 to support this proposition.

In *Mai*, the defense psychologist never said the defendant was incompetent. Instead, the psychologist "acknowledged defendant's intelligence, indicated he was 'not out of touch with reality at all,' and agreed he was 'certainly able to discuss' his legal situation." Indeed, the psychologist believed that the defendant suffered from "emotional instability stemming from his custodial status sometimes caused him to be 'kind of irrational...'" *Id.*, at 1034. The trial court in *Mai* also concluded that the conditions of the defendant's confinement, virtual solitary confinement in federal custody, "were seriously affecting his mental and emotional state." *Id.*, at 1035.

This case is not *Mai*. In *Mai* no one, including the defense psychologist, believed the defendant was incompetent. Instead, everyone, including the defense psychologist, defense counsel, and the trial court, recognized that the defendant was "kind of irrational" at times because of the harsh conditions of his confinement. Wycoff, on the other hand, was examined by the court's psychologist and found to be incompetent in a lengthy and

detailed report. The two cases are nothing alike.

Moreover, Respondent's truncated discussion of Dr. Good's report fails to even address many of the things Dr. Good actually said about Wycoff. (RB, p. 50-51.)

For instance, Respondent fails to notice that Dr. Good described Wycoff's psychiatric history in some detail. Dr. Good noted in particular that Wycoff made two suicide attempts in the 1980s, that Wycoff was treated by a psychiatrist two or three times for school behavior problems, that Wycoff was placed on anti-psychotic medication when he was 17 or 18, and that in 2001 Wycoff was diagnosed as suffering from a major depression and prescribed anti-depressants.

Respondent also fails to mention that Dr. Good described the findings of the county jail's mental health unit. These findings were made just after Wycoff's arrest. According to Dr. Good's report, Dr. Hanlin of the jail staff described Wycoff as having a "flat affect" and as having "grandiose thoughts about being justified in harming bad people." Dr. Hanlin "diagnosed a Delusional disorder with mixed schizoid, paranoid, and anti-social personality traits." Dr. Hanlin believed that Wycoff "might benefit from anti-psychotic medication," but Wycoff refused any such medication. (2CT 415-416.)

Respondent also fails to mentions that Dr. Good reported that Wycoff had been examined by psychiatrist Dr. Douglas Tucker six times beginning in February 2006. Dr. Tucker "diagnosed Mr. Wycoff as suffering from Asperger's Disorder (a pervasive development disorder characterized by severe and sustained impairment in social

interaction and stereotyped behavior), Paranoid Schizophrenia (a psychosis involving delusions and negative symptoms of flat affect), and Attention Deficit Hyperactivity Disorder (a disorder of inattention, hyper activity and impulsivity)." (2CT 416.)

This Court has always found "prior mental health evaluations" important indicators of incompetence. *People v. Rogers, supra,* 39 Cal.4th at 847, citing *Drope v. Missouri* (1975) 420 U.S. 162, 180. See also *People v. Sattiewhite, supra,* 59 Cal.4th at 464. Respondent simply ignores Wycoff's mental history and prior psychiatric evaluations.

Also missing from Respondent's discussion of Dr. Good's report is Dr. Good's diagnosis. Dr. Good concluded that Wycoff's mental illness was "between Paranoid Schizophrenia and Delusional Disorder." Dr. Good concluded that "Mr. Wycoff is most probably suffering from Paranoid Schizophrenia. The diagnosis is based on the presence of paranoid and grandiose delusions, negative symptoms of flattened affect, and long standing interpersonal alienation." (2CT 418.)

Instead of actually addressing what Dr. Good reported, Respondent critiques Dr. Good's report based on Respondent's own personal opinion. For instance, Respondent claims that Dr. Good's opinion about Wycoff did not "logically follow from Good's various subsidiary observations." (RB, p. 69.) Respondent states, "Moreover, Good's observations compelled conclusions opposite to those he rendered." (RB, p. 71.) However, Respondent provides no proof of her own expertise or her ability to critique the

observations and opinion of a trained psychologist.

Respondent's argument is also irrelevant. The issue before this Court is whether there was sufficient evidence before the trial court that Wycoff was incompetent. In essence, Respondent's assertion is that Dr. Good, or more precisely Dr. Good's report, lacked credibility. Because his "observations compelled conclusions opposite to those he rendered," Respondent contends, this Court should reject Dr. Good's opinion as lacking credibility. If Dr. Good's report lacked credibility, it did not provide substantial evidence of Wycoff's incompetency. Yet, Respondent does not contend that Dr. Good was unqualified. Nor did the trial court make any finding that Dr. Good or Dr. Good's report lacked credibility. Respondent wants this Court to make a finding that Dr. Good's opinion was not credible based solely on Respondent's own non-expert opinion.

Even if they were to be taken seriously, Respondent's assertions about Dr. Good's report and the opinions stated in his report are erroneous. For instance, Respondent contends that Dr. Good's "conclusion that Wycoff was incapable of assisting his defense" did not "logically follow from Good's various observations." (RB, p. 69.) Similarly, Respondent asserts that none of Dr. Good's "observations suggested Wycoff was incapable of assisting his attorneys." (Id.) Respondent focuses on Dr. Good's "observation" that Wycoff "could not rationally 'consider telling his story with the assistance of an attorney.'" (Id.)

Respondent contends that this "observation," in reality the professional opinion of

a forensic psychologist, "is belied by the record." (RB, p. 69.) Respondent correctly noted that Wycoff "did not want to present an insanity defense." Respondent contends, however, that "Good disagreed with Wycoff's rejection of an insanity plea." Respondent further asserts that Dr. Good was actually "attempting to persuade Wycoff he would still be able to tell his story in the confines of an insanity defense." (Id.) Respondent contends that Dr. Good's "reasoning" was "legally erroneous" because a competent person can disagree with his attorney's preference for an insanity plea. (RB, pp. 69-70.) In short, Respondent concludes a defendant need not "agree to an objectively rational defense in order to be found competent." (RB, p. 70.)

Respondent's contentions are utter nonsense. There is no evidence that Dr. Good tried to "persuade" Wycoff of anything. Dr. Good did not "disagree" with Wycoff's rejection of an insanity defense. Dr. Good did not find Wycoff incompetent because Wycoff rejected an insanity defense even though his attorneys believed it was his best, and possibly only, defense. Dr. Good did not conclude that Wycoff was incompetent because he refused to agree to present "an objectively reasonable defense" presented by his attorneys.

Wycoff made clear to Dr. Good, "Insanity is not an option." (2CT 424.) However, contrary to Respondent's assertion, Dr. Good did not find Wycoff incompetent because Wycoff refused to present the "objectively rational defense" of insanity with the assistance of counsel. Dr. Good found Wycoff incompetent because Wycoff's "failure to

appreciate the logic and wisdom of his attorneys is a function of his paranoid state." (2CT 424.)

Dr. Good correctly understood that Wycoff *could* "tell his story" as part of an insanity defense presented by counsel. Dr. Good correctly understood that Wycoff's "story" was indicative of his mental illness and incompetency. Dr. Good recognized that telling Wycoff's "story" and an insanity defense presented by counsel were not mutually exclusive. Nevertheless, Wycoff rejected presenting an insanity defense and rejected representation by counsel. Why Wycoff did so, Dr. Good concluded, was evidence of mental illness and incompetence.

As early as April 22, 2008, Wycoff's then attorney, Najera, informed the court that Wycoff "would not cooperate with neuro psyche evaluation." (1RT 85.) Wycoff would not cooperate with any psychological evaluation because Wycoff believed that an insanity defense "would undermine the righteousness of what he had been doing" and that he "believed that his actions [killing the victims] were right." (Id.)

When Dr. Good examined Wycoff six months later, he found that Wycoff's beliefs remained unchanged. Wycoff told Dr. Good, "If I go for insanity I'm saying I was wrong, it was crazy to kill Julie and Paul... I know it was the right thing to do. To go for insanity, would be going against myself." (2CT 424.)

What Dr. Good recognized was that Wycoff could "tell his story" - that he was justified in murdering Julie and Paul Rogers - as part of an insanity defense because

Wycoff's "story" itself was indicative of Wycoff's paranoid schizophrenia. But doing so, Wycoff believed, was "going against myself." Wycoff told Dr. Good, "What I'm accused of was the right thing to do." (2CT 421.) Wycoff explained he wanted to tell his "story" without an insanity defense because, "I want to be taken seriously. My attorneys are not taking me seriously. The way they are locking me away. They don't want people to known I'm sane." (2CT 422.) As a result, Wycoff told Dr. Good, "My attorneys are the enemy. I consider them the bad guys. I can't deal with them." (2CT 423.)

Dr. Good correctly concluded that Wycoff was "not able to rationally consider 'telling his story' with the assistance of an attorney" because Wycoff believed the murders were justified and an insanity defense would be an admission that "I was wrong, it was crazy to kill Julie and Paul." Dr. Good expressly found Wycoff's belief that the murders were justified was irrational. ("The...irrationality in deciding that it was morally right to kill his sister and brother in law to prevent them from stealing his inheritance, and in deciding that killing them would prevent further psychological harm to their children..." 2CT 427.) Dr. Good also found that Wycoff could not admit he "was wrong, it was crazy to kill Julie and Paul" because that would be "an acknowledgment that he was mentally disturbed, a notion that he rejects in total. He is in complete denial of his mental illness." (2CT 426.)

Contrary to Respondent's contentions, Dr. Good's opinion was not based upon a "legally erroneous" observation that Wycoff refused to agree to an objectively reasonable

defense. Dr. Good's opinion was based on the clear evidence that Wycoff's "reasoning process is not rational and instead reflects the irrational thinking of a paranoid man suffering from severe mental illness." (2CT 427.)

Respondent makes several other assertions about Dr. Good's report that are equally erroneous. For instance, Respondent contends that Wycoff's delusional belief that the murders were justified was merely a "circumstance of the crime." Even if this "circumstance of the crime" was "irrational" it "does not raise a reasonable doubt as to the defendant's competence." (RB, p. 72.)

Wycoff's belief that "it was morally right to kill his sister and brother in law to prevent them from stealing his inheritance, and in deciding that killing them would prevent further psychological harm to their children" (2CT 427) was not a mere "circumstance of the crime." Wycoff's belief was a delusion. It was also his entire explanation, or defense, for the murders. It was Wycoff's "story" that he believed had to be told.

Respondent also makes the astonishingly erroneous assertion that there "was no basis for Good's assumption" that Wycoff was unable to work with his attorneys. (RB, p. 73.) Wycoff told Judge Bruiniers on April 22, 2008, that he did "not intend to talk to these people or cooperate with these people. I still don't." (1RT 76.) On September 22, 2008, Wycoff wrote a letter to Judge Bruiniers that stated, "...I will still fight against my attorneys. The only sollution (sic) is for me to be my own lawyer." (2CT 389.) On

October 2, 2008, Wycoff told Judge Bruiniers that he was "done with lawyers...I mean, I can't, I can't work with these people." (1RT 122.) To Dr. Good, Wycoff "said this about the group of attorneys that represented him: 'I don't like them. They don't like me...They've done me wrong so much...My attorneys are the enemy. I consider them the bad guys. I can't deal with them...'" (2CT 423.) Wycoff "attributes malicious motives to his attorneys." (2CT 426.) Wycoff also told Dr. Good that "if Najera and Headly had gotten off my case, given me my respect, my reports, my discovery," he would not have done the "bad things" he promised to do. Wycoff told Dr. Good that when he believed the "prosecutor was going to drop the death penalty," he wrote a letter to the press and his "my letter to the press got back to the DA and they reinstated the death penalty." (2CT 426.) In short, as long as Wycoff was represented by counsel, he intended to do everything he could to undermine that representation.

Respondent asserts as a final fall-back argument that "an expert's opinion without more does not necessarily constitute substantial evidence of incompetence." (RB, p. 61.) Respondent never explains what "without more" actually means. In any event, Respondent replies upon three cases to support this assertion.

First, Respondent relies upon *People v. Lewis* (2006) 39 Cal.4th 970, 1046-1047. In *Lewis*, a Dr. Davis wrote a report "opining that Lewis could not assist in his defense." However, "the trial court and counsel each opined that Lewis was both manipulative and competent." *Id.*, at 1046. Dr. Davis later testified that "Lewis was malingering." *Id.*

"Dr. Davis acknowledged that he did not consider Lewis's psychiatric history in the army or in jail." *Id.*, at 1048. "Moreover, Dr. Davis conceded that this conclusion regarding Lewis's competence was tentative and not definitive." *Id.* The trial court found "Dr. Davis to be less than credible and I have no confidence in his opinion." *Id.*, at 1047. Finally, as even Respondent notes, two other experts found Lewis competent. "E. Eugene Kunzman, M.D., a psychiatrist, and Dr. Malony opined that Lewis was malingering and competent for trial purposes." *Id.*, at 1046.

Next, Respondent relies upon *People v. Sattiewhite, supra,* 59 Cal. 4th at 466-467. (RB, pp. 62-63.) No expert opinion on the issue of competency was at issue in *Sattiewhite*. Instead, during the penalty phase of trial defense counsel introduced evidence that "suggested" Sattiewhite "had brain damage and mental disabilities as a result of car accidents his mother was involved in just before his birth." *Id.*, at 466. However, there was no evidence that these disabilities effected Sattiewhite's competency. Further, these disabilities described "a long-standing condition" which existed well before trial. A mental health expert's pretrial report found that Sattiewhite was competent. Thus, that "pretrial report remains the most persuasive evidence of the defendant's competence." *Id.* at 467.

Finally, Respondent relies upon *People v. Weaver* (2001) 26 Cal.4th 876, 953-954. (RB, p. 63.) In *Weaver*, a psychiatrist, Dr. Owre, had examined the defendant several years prior to the offense and "observed no evidence of schizophrenia at that time." *Id.*,

at 953. However, during his in-court testimony at the penalty phase of Weaver's trial, Dr. Owre testified "that seeing defendant across the courtroom, it appeared that defendant was out of touch with reality, that he was suffering from chronic undifferentiated schizophrenia, and that he appeared to be hallucinating." *Id.* Dr. Owre admitted that his opinion was "not from any actual examination or testing of defendant..." *Id.* The trial court wondered how an expert "can render an opinion like that on the witness stand." *Id.* Finally, the court noted that the trial court had already conducted an inquiry into Weaver's competency. Two psychiatrists were appointed and examined Weaver. Thereafter, the "parties submitted the matter, and the trial court found defendant legally competent." *Id.*, at 954.

After addressing *Lewis*, *Sattiewhite*, and *Weaver*, Respondent asserts, "The same is true here." (RB, p. 64.) Respondent is wrong. None of these cases support Respondent's position that an expert's opinion "without more" does not necessarily constitute substantial evidence of incompetence. In any event, none of these opinions even closely resembles the situation here.

In *Lewis*, Dr. Davis stated that his opinion was "tentative and not definitive," while two other experts found the defendant competent. In *Sattiewhite*, the mental health expert found the defendant competent. In *Weaver*, the psychiatrist believed he saw evidence of the defendant's schizophrenia when he observed him in the courtroom. The psychiatrist admitted that this observation was not from any actual examination or testing.

Additionally, the court had previously appointed two psychiatrists to determine competency after which the court found the defendant competent.

Here the court appointed a psychologist who found Wycoff incompetent. That psychologist, Dr. Good, noted that Dr. Hanlin conducted a mental status examination of Wycoff at the county jail and diagnosed Wycoff with "a Delusional disorder with mixed schizoid, paranoid and anti-social personality traits." (2CT 415-416.) Dr. Good also noted that a psychiatrist, Dr. Tucker, had examined Wycoff prior to trial and diagnosed Wycoff with Paranoid Schizophrenia. (2CT 416.)

Dr. Good's opinion was not tentative. Three different experts examined Wycoff while he was awaiting trial, Drs. Good, Hanlin, and Tucker, and all three diagnosed Wycoff as suffering from a major mental illness with varying degrees of paranoia and schizophrenia. No psychologist or psychiatrist ever rendered an opinion that Wycoff was not mentally ill. Cases of this Court too numerous to list have held that the opinion of a qualified mental health expert who has examined the defendant and found him incompetent constitutes "substantial evidence" requiring a competency hearing. *People v. Lewis, supra,* 39 Cal.4th at 834, citing *People v. Pennington* (1967) 66 Cal.2d 508, 519, and *People v Welch* (1999) 20 Cal. 4th 701, 738. See also *People v. Sattiewhite, supra,* 59 Cal.4th at 465, *People v. Mai, supra,* 57 Cal.4th at 1032-1033, and *People v. Stankewitz* (1982) 32 Cal.3rd 80, 92. Here there were three such experts. This evidence clearly required the court to conduct a hearing into Wycoff's competency.

3. Judge Bruinier's Personal Observations Did Not Support a Finding that Wycoff was Competent

Respondent devotes many pages to the assertion that Judge Bruinier's personal observations of Wycoff supported a finding that Wycoff was competent. (RB, pp. 74-82.) Such an assertion is both misleading and erroneous.

The issue is whether there was sufficient evidence before the court to require a competency hearing. Such evidence can emanate from many sources. The judge's personal observations are only one such source. Thus, Respondent's real assertion is that Judge Bruiner's personal observations, whatever they may have been, somehow nullified the substantial evidence before the court that Wycoff was incompetent.

The crux of Respondent's assertion is that Judge Bruiniers personally observed "that Wycoff could work with counsel." (RB, p. 74.) Respondent asserts, "The record also established that Wycoff could cooperate with his attorneys." (RB, p. 77.) These observations were "contrary to Good's assessment" and "tended to contradict Good's suggestion that Wycoff's complaints about his attorneys were the exclusive product of paranoia." (RB, pp. 78, 79.) Respondent contends that Wycoff "had coherent complaints about his attorneys that Good either ignored or was unaware of." (RB, p. 78.) Respondent's assertions are erroneous. The record demonstrates the exact opposite.

In his *Marsden* letter dated March 7, 2008, Wycoff said a great deal about his attorneys. (2CT 303-328.) He repeatedly called his attorneys liars. (2CT 303, 306, 308,

309, 310, 311, 315, 318, 319, 322, 323, 327.) Of Najera in particular, Wycoff said he was "scamming time and money from the taxpayers." (2CT 308.) Najera "is such a dirtbag that he is willing to make me crazy." (2CT 309.) Najera was a "con artist," and "evil man" and "hostal to me [Wycoff] personally." (2CT 312, 313, 324.) While Wycoff said, "I just hate everybody," he also believed that Najera "certainly does hate me..." (2CT 325.)

Wycoff advanced a multitude of reasons for his dislike and distrust of Najera. At one point in his letter Wycoff told Judge Bruiniers that Najera hated him because Wycoff "express hatred for persons of Mexican decent, homosexuals, liberals and socialists." (2CT 324.) Wycoff concluded, "Roberto [Najera] certainly dose hate me, thirfor he must be removed from my case." (2CT 325.) Wycoff also believed that Najera had "no respect for me because they have never ever put money on my books even when I asked for it." (2CT 322.)

Wycoff's reasons for hating his attorneys were less than clear. In his *Marsden* letter he wrote:

> In my case I allegibaly killed 2 greedy, scummey, lieing, monnipulative atturneys. Well that is almost exactly what Roberto and Hutcher are and now this evil man Roberto is about to become the source of anything about me. I know that this evil man will use all this information on me to do evil. I am a good man and I

can't allow that.

(2CT 313.)

Wycoff explained that his attorneys "know that they have done me wrong, thay know that thay deserve to have the crap beet out of them for how thay handled me, my case, my family, and thangs I don't even know about. Cence thay know that thay deserve to be punnished..." (2CT 326.)

It is on this record that Respondent contends Wycoff could work with counsel and could cooperate with his attorneys. Wycoff's own words demonstrate that the opposite was true.

At the hearing on Wycoff's *Marsden* motion, Najera confirmed that Wycoff would not and could not cooperate with counsel. Najera told Judge Bruiniers that Wycoff "has voiced displeasure about every attorney that has represented him, including Mr. Briggs...this is something that will happen regardless with Mr. Wycoff, that he has a great deal of trouble trusting anyone, whether it be an attorney or just a person out in the community." (1RT 83.) Najera explained that Wycoff does not trust anyone and that wasn't going to change. (1RT 86.)

The same issue arose on June 19, 2008. At that hearing Wycoff asked Judge Bruiniers if he could represent himself. He said that Najera was "secretly, um, pursuing an insanity defense, and he's not telling me about - - he's trying to keep that a secret from

me.." Wycoff indicated that he was "sick of his [Najera's] games..." (1RT 112.) He expressly told Judge Bruiniers, "I'm through with lawyers." (1RT 113.) Wycoff explained, "I need to do things for myself." (1RT 114.)

Things came to a head at the next hearing, October 2, 2008. At this hearing Wycoff told Judge Bruiniers:

> ...the lawyers are manipulative. I've has so much trouble with them, their lies and not taking the case in the direction I want it to go. And I'm not, I'm not being a part, not a part of my case...And you know, it's just the last three Public Defenders have been the same...I'm done with lawyers. I don't even want to do a *Marsden* anymore...But I don't even want Briggs on the case...this is something I got to do myself. I mean, I can't, I can't work with these people.
>
> (1RT 122.)

Almost immediately after Wycoff's statement, Judge Bruiniers said the following:

But the Court has observed in the appearances here Mr. Wycoff is certainly evidence of grandiosity and a fairly high level of paranoia. Whether those are simply personality disorders or whether they rise to the level of preventing Mr.

Wycoff from being competent to waive counsel and represent himself at trial, *I cannot determine without expert advice*.

(1RT 124; emphasis added.)

In short, Judge Bruiniers expressly stated that based on his personal observations of Wycoff he questioned Wycoff's competency and could not determine whether Wycoff was competent "*without expert advice*." Judge Bruiniers then said he was "prepared to appoint the psychiatrist...If he tells me he thinks you're not (competent), then we have a hearing on that issue." (1RT 126.) Judge Bruiniers appointed Dr. Good in order to obtain the "expert advice" he needed. (1RT 127.) In turn, that expert found Wycoff not competent. However, Judge Bruiniers failed to hold the hearing he promised if the expert his appointed believed that Wycoff was not competent.

Contrary to Respondent's assertions, what the record reflects is that Wycoff could not cooperate with any attorney. Judge Bruiniers recognized that this was due to Wycoff's grandiosity and paranoia. Judge Bruiniers said he could not determine whether Wycoff's grandiosity and paranoia were "simply personality disorders" or were evidence of mental illness and incompetence. He expressly stated he could not make that determination "without expert advice." The expert advice he obtained, Dr. Good's report, expressly told Judge Bruiniers that these were not "simply personality disorders," but were "the irrational thinking of a paranoid man suffering from severe mental illness" who

was not competent to stand trial. (1CT 427.) Respondent's assertion that Judge Bruiner's observations of Wycoff "supported his findings that Wycoff was capable but simply unwilling to cooperate with his attorneys and that there was no doubt as to his competency to stand trial," (RB 81-82), is simply not true.

Finally, Respondent asserts that Judge Bruiniers "did not believe the standards for assessing competence to stand trial were the same as those governing competence to represent one's self." (RB, p. 81.) Judge Briuniers said on the record, "And there is some indication in the Supreme Court cases that it is the same standard. In other words, whether you are competent to represent yourself was an issue that was judged by the same standard as whether you are competent to stand trial." (1RT 126.) Respondent's assertion that there "is no evidence Judge Bruiniers equated the standards" is simply not true.

4. No Hearing Was Held

Respondent makes the somewhat strange assertion that the "parties were heard on the issue of competency" and that the "procedure" used by Judge Bruiniers "was proper." (RB, p. 82.) Without saying so, Respondent asserts that, assuming there was substantial evidence of Wycoff's incompetence, the hearing conducted by Judge Bruiniers on November 14, 2008, met the due process requirement of a hearing to determine competency. It didn't. If Respondent actually believed that was the case, she would have

said as much. Her vague claim that "the parties were heard on the issue of competency" plainly indicates that even Respondent does not believe that Judge Bruiniers actually held the necessary hearing.

A hearing to determine competency is described in detail in Penal Code sections 1368 and 1369. None of the procedures required by those sections were followed by Judge Bruiniers.

For instance, section 1368(c) states that when the court orders a hearing into the competency of a defendant "all proceedings in the criminal prosecution shall be suspended." That did not happen. Section 1369 provides that a "trial" on the issue of competence may proceed "by court or jury." No trial occurred. The possibility of a jury trial was never considered by Judge Bruiniers or anyone else. Section 1369 also states that the court must appoint two mental health experts to examine the defendant. That did not happen.

Finally, Respondent's assertion that "the parties were heard on the issue of competency" is utter nonsense. Counsel for Wycoff was not permitted to see Dr. Good's report at the time of the alleged "hearing." Counsel for Wycoff expressly took no position on the issue of competency. He stated, "I personally have no dog in this fight so." (1RT 138.) The prosecutor similarly was not permitted to review Dr. Good's report and stated that he had no "standing" to object to the report. He also took no position on the issue of competency. Such a proceeding does not comport with the requirements of

due process.

5. Judge Kennedy Failed to Conduct a Hearing into Wycoff's Competency

Respondent contends that Wycoff's Opening Brief was "somewhat inaccurate" by suggesting that Judge Kennedy "had additional evidence" of Wycoff's mental illness because he reviewed Dr. Tucker's report, implying that Judge Bruiniers had not. (RB, p. 84.) In his Opening Brief Wycoff extensively addressed Dr. Good's report and noted that Dr. Good discussed the findings of both Dr. Tucker and Dr. Hanlin. (AOB, p. 73.) Judge Bruiniers did not review Dr. Tucker's report. (See AOB, p. 98.) Judge Bruiniers only knew what Dr. Good's report said about Dr. Tucker's opinions and diagnosis. Therefore, it is entirely accurate to state that Judge Kennedy "had additional evidence" that Judge Bruiniers did not have. Judge Kennedy had Dr. Tucker's entire report.

Respondent argues that the additional evidence presented in Dr. Tucker's report added nothing. (RB, p. 85.) Dr. Tucker examined Wycoff six times beginning in February 2006. (Wycoff was arrested on January 31, 2006.) Dr. Tucker expressly found that Wycoff "meets DSM-IV-TR diagnostic criteria for 295.30 Schizophrenia, Paranoid Type, with evidence of paranoid delusions and negative symptoms at least since January 2006, which have led to marked social dysfunction and impairment in his ability to communicate and collaborate with others." Dr. Tucker specifically noted that Wycoff "suffered from paranoid delusions regarding family members (including the victims in

this case), jail personnel, *his attorneys* and others." (Emphasis added.) Dr. Tucker added that Wycoff symptoms "included magical thinking and overvalued ideas, beliefs in a 'spirit world,' demonic possession" and more. (2CT 378.)

Of course, Dr. Good had also found that "Mr. Wycoff is most probably suffering from Paranoid Schizophrenia" and noted "the presence of paranoid and grandiose delusions, negative symptoms of flattened affect, and long standing interpersonal alienation." (2CT 418.) Dr. Good had also noted that Dr. Hanlin of the county jail staff, who examined Wycoff in February 2006, diagnosed Wycoff as having "a Delusional disorder with mixed schizoid, paranoid, and anti-social personality traits." (2CT 415-416.)

In short, three mental health experts found that Wycoff was severely mentally ill. Each found that Wycoff was delusional, paranoid, and schizophrenic. One, Dr. Good, the mental health expert appointed by the court, expressly stated that Wycoff was not competent to stand trial. Despite all of this evidence, Respondent contends there was no evidence "that raises a reasonable or bona fide doubt concerning the defendant's competency to stand trial." *People v. Rogers*, *supra*, 39 Cal. 4th at 847. Under Respondent's standard no amount of evidence would ever raise a bona fide doubt about a defendant's competency.

In any event, Respondent contends that Judge Kennedy's "observations of Wycoff contradicted any finding of doubt as to his competence." (RB, p. 85.) In other words,

Respondent contends that Judge Kennedy's "observations of Wycoff" contradicted the opinions of the three mental health experts. Even if true, which it's not, Respondent does not explain why the opinions of the three mental health experts did not raised a doubt about Wycoff's competency.

Respondent contends that Judge Kennedy "presided over the case for almost three months" before the hearing on September 10, 2009, when the issue of competency was raised by the prosecutor. Actually, during that "almost three months" period only five hearings took place. That is, Judge Kennedy had only five opportunities to observe Wycoff and reach a conclusion contradicting the opinions of the three mental health experts.

The first such hearing took place on July 6, 2009. (2RT 332-336.) During this hearing Wycoff made only two statements. He said "Good morning" to the court at the beginning of the hearing (2RT 332) and "Friday at 1:30" at the very end of the hearing when the court scheduled the next hearing date. (2RT 336). Briggs conducted the entire hearing.

A hearing took place on July 10, 2009, "for reviewing the proposed jury questionnaire." (2RT 340.) Again, for the most part, Briggs conducted this hearing. Wycoff said very little until the end of the hearing. The hearing began with a discussion of the questionnaire that was drafted by the court and the attorneys, including Briggs. Wycoff said little. He said "good morning, (2RT 340), then virtually nothing for the next

sixteen pages of Reporter's Transcript. (He said, "I like types." (2RT 342); "No, I don't object." (2RT 346); "I don't object. That's right." (2RT 349); and "I've got nothing to say about that." (2RT 354).)

Wycoff spoke again when the prosecutor complained that Briggs was doing all the talking even though Wycoff was self-represented. (2RT 355-356.) Wycoff responded, I have had a lot of problems with the public defender, and I - - I just had to go pro per. I had to represent myself...but I also need advice." (2RT 356.) Judge Kennedy then decided that he would look to Wycoff first, on "practical type questions," but ask Briggs to do the talking on "technical legal issues." (2RT 358.) After that exchange, Wycoff again said virtually nothing until the court addressed questions for the questionnaire that Wycoff himself had proposed. (2RT 370.)

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

Another question Wycoff wanted the jurors to answer concerned truck drivers.

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

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

Wycoff also wanted a question which asked potential jurors if they believed "people should have the right to take the law into their own hands." (2RT 388.) After discussing a Romanian dictator, Wycoff explained that he would "like to have a jury that believes that you have a right to get rid of evil people...especially if they are on your back, you know, trying to destroy you, trying to ruin you, you know." (2RT 389.) The prosecutor then explained to the court that Wycoff "thinks he did a good thing in killing them." (2RT 392.)

After ruling against Wycoff's proposed questions, Wycoff again said virtually nothing.

At the end of the hearing, Briggs raised a discovery issue. He wanted Wycoff to

inspect and review the physical evidence. However, Briggs was concerned that during such an inspection Wycoff would make "comments on the evidence" that could later be used against him at trial. Briggs pointed out that "when Judge Bruiniers granted Mr. Wycoff's motion to represent himself, he did acknowledge that Mr. Wycoff had been diagnosed with attention deficit disorder and schizophrenia and asked for..." Wycoff then stopped Briggs in mid-sentence and told him, "Don't bring that out." (2RT 400-401.)

The next hearing took place on August 5, 2009. At this time the physical evidence was brought to the courtroom so that Wycoff could inspect it. Again, Wycoff said virtually nothing. The review of the evidence took place off the record.

After inspecting the evidence, Wycoff raised several questions. Wycoff said he wanted to see his van, which was obviously not in the courtroom, because he wanted to know if it was being properly maintained, "if the tires are still inflated," and "whether the batteries are being kept charged." (3RT 429-430.) The court asked Wycoff if he actually needed to see the van "for purposes of preparing for trial." Wycoff said, "No." He just wanted to see his van. (2RT 430.)

Wycoff also said he wanted to see his grenade launcher because it "makes me look like more of a man to own something like that...a nice republican jury would, you know, look at that grenade launcher and they would be proud, you know." Again, Wycoff admitted that he "don't need to see the grenade launcher" to prepare for trial, but "it's nice to bring it out and wave it around." (2RT 431.)

Towards the end of the hearing the court asked Wycoff about questions on the juror questionnaire concerning the "opinions of psychologists and so forth." (2RT 438.) Wycoff said he thought he wanted those questions to remain in the questionnaire because "Julie and Paul and the kids were involved with a lot of therapy and psychiatrists and, you know, it's just them talking about how screwed up they were, but as for me I don't intend to present anything that makes me look crazy, no, I'm not going to make myself look crazy." (2RT 439.) The remainder of the hearing concerned Wycoff's use of the jail's telephone and discovery related issues.

A lengthy hearing was held on August 27, 2009. (2RT 468-526.) For most of the hearing, Wycoff said very little.

At one point during the hearing the court asked Wycoff "how long your case would be." Wycoff responded that he was "having a lot of trouble finding witnesses for the penalty phase." (2RT 484.) For the guilt phase he similarly said, "I don't have a lot of witnesses for my side." (2RT 484.)

Further on in the hearing, Wycoff raised the issue of compact discs he was not permitted to review as part of the discovery provided by the prosecutor because they contained pornography. (2RT 491.) Apparently Briggs was permitted to watch the discs in order to determine if they contained any relevant information. Wycoff thought it "was beautiful" that the court "effectively paid Briggs $100 - - 100 and something dollars an hour to watch pornography." (2RT 492.)

Wycoff then told the court he needed a flu shot. Wycoff added, "And if possible I would like Mr. Peterson [the prosecutor] to be present because I'd like him to see that there is other things you can do with a needle besides injectecution (sic)." (2RT 493.)

After a further discussion of Wycoff's telephone calls from jail, the court again turned to the juror questionnaire. Again the court asked Wycoff if he intended to introduce mental health evidence. Wycoff said, "I don't intend to." (2RT 501.) After that Wycoff again raised the question of a flu shot and his telephone calls from the jail. (2RT 517-518.)

At a hearing September 8, 2009 "for motions in limine," Wycoff complained that the prosecutor disagreed with all of Wycoff's proposed juror questions, but Wycoff "hardly disagreed with any of yours." (2RT 532.) That ended the discussion of the juror questionnaire. Wycoff said very little for much of the hearing. At one point, the court raised a question about a motion that Briggs had written but Wycoff "crossed it out." (2RT 554.) Wycoff explained that after reading what Briggs had written, he decided that "this case is special" and "unlike any other case." Wycoff didn't want the case to be "boring." So he thought, "you know, it might be good, it might be more entertaining if Mr. Peterson and I are allowed to slander each other and fight a little bit in court, and you know, disrespect each other a little bit." (2RT 555.) For the rest of the hearing, Wycoff commented on the poor quality of the discovery. For instance, Wycoff said, "There was one DVD that didn't work." (2RT 562.) He also complained that one page was missing

from a newspaper article he got about his case. "It was three pages of Sacramento Bee, I didn't get page three." (2RT 566.) He also complained about not getting a flu shot. (2RT 567.) Finally, Wycoff wanted to make sure all of his guns, which had been seized by the police, were returned to Briggs. (2RT 580.) Two days later, on September 10, 2009, four days prior to trial, the prosecutor told Judge Kennedy that he had "a doctor's report that says his waiver is not intelligent."

Respondent contends that Judge Kennedy's observations of Wycoff prior to September 10, 2009, "contradicted any finding of doubt as to his competence." (RB, p. 85.) The exact opposite is true. Wycoff's behavior in court further confirmed the opinions of Drs. Good, Tucker and Hanlin that Wycoff was severely mentally ill.

Wycoff wanted to select jurors who liked "to kill extreme leftists because they hate them." Wycoff wanted to select jurors who believe that you have a right to take revenge, or take things into your own hands, when someone was trying to take your house. He said he would "like to have a jury that believes that you have a right to get rid of evil people..." (2RT 389.) After inspecting the physical evidence, Wycoff was concerned with whether his van was being maintained by the police even though that issue had nothing to do with his trial. Wycoff wanted to "wave...around" his grenade launcher in front of the jury because "a nice republican jury would, you know, look at that grenade launcher and they would be proud." (2RT 431.)

Respondent contends that this behavior "displayed an understanding of the

proceedings and his defense." (RB, p. 89.) Respondent also contends that "Wycoff's questions illustrate that he choose a strategy of jury nullification." (RB, p. 90.)

There is nothing in the record or any place else indicating that Wycoff had any idea what "jury nullification" meant. Respondent points to the following statement as an example of Wycoff's "strategy of jury nullification." Wycoff explained:

> And somewhere between when our system goes and then another system comes in there is going to be a gray area there where there is not going to be any laws, and it has happened several of thousands of times throughout history, a gray area there were people are going to have to think for themselves and not rely on the law and do things for themselves. And, you know, that's - - well as for the jury, you know, I just hoping to get a jury that - - that feels that Edward, good man, you - - you took care of what needed to be done, what needed to be done, good man, not guilty. That's the kind of jury I want. And that's the kind of question that will get me that kind of jury.
>
> (2RT 388.)

After the prosecutor pointed out, "It's illegal, not a legal principle," Wycoff responded, "I'd like a jury that believes that you have a right to get rid of evil people, you know, especially if they are on your back...You know, you got the right to do that, or at

least you should have the right to do that." (2RT 389.)

Wycoff was not expressing "a strategy of jury nullification." Wycoff was expressing his desire for a jury that believed, like he did, that someone had, or should have, a right to kill anyone they believed was "evil." Wycoff wanted a jury that would declare him a "good man" for killing his sister and brother-in-law. Wycoff wanted a jury that would recognize that he did "what needed to be done" when he killed the victims. This was not a rational strategy of any kind. It was not indicia of competency. This was a delusion.

Respondent also fails to take into account that Wycoff expressed this idea as soon as he was arrested. He told the police the day he was arrested, the same day as the murders, that he had to kill Julie and Paul because they were "evil." He told the police that he "stopped an evil person in this world that had too much power" and he was "kind of happy" for doing so. (8CT 2074.)

In other words, under Respondent's theory, if Wycoff was pursing a "strategy of jury nullification" he was doing so from the moment he was arrested, if not earlier. Nothing supports such a claim. Nothing even remotely suggests that Wycoff decided as soon as he was arrested to pursue of "strategy of jury nullification" as a legal defense.

Nor did the prosecutor or the trial court believe that Wycoff was pursuing a "strategy of jury nullification." If the court believed that this was Wycoff's strategy it could have precluded all of Wycoff's defense and his arguments to the jury. *United*

States v. Blixt (9th Cir. 2008 548 F.3rd 882, 890; *United States v. Sepulveda* (1st Cir. 1993) 15 F.3rd 1161, 1190: "A trial judge, therefore, may block defense attorneys' attempts to serenade a jury with the siren song of nullification..." It didn't.

Wycoff's in-court behavior prior to the hearing on September 10, 2009, did not contradict the opinions of the three mental health experts that Wycoff was severely mentally ill. Wycoff's behavior supported those opinions. Wycoff's behavior demonstrated that he was paranoid and delusional in exactly the manner Drs. Good, Tucker and Hanlin had described.

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

In his Opening Brief, Wycoff set forth a long list of his irrational and bizarre behavior before, during, and after trial which should have caused the court to question his competency. Respondent contends that a recitation of "'symptoms of severe mental illness' *without more* are insufficient to establish substantial evidence of mental illness." (RB, p. 92, emphasis added.) Once again, Respondent never explains what "without more" actually means.

In any event, Wycoff never argued that the manifestation of his mental illness during trial *alone* triggered the necessity for a hearing. Instead, Wycoff pointed out that his conduct during trial "reflected exactly what Dr. Good described as the symptoms of

Wycoff's severe mental illness and were indicative of Wycoff's incompetence to stand trial." (AOB, pp. 100-101.) In other words, because Judge Kennedy had reviewed the reports of Drs. Good and Tucker, he should have recognized that Wycoff's irrational, paranoid, and delusional behavior during trial was indicative of mental illness and incompetency. These were not symptoms "without more." Wycoff's behavior during trial was exactly what Drs. Good and Tucker said was indicative of paranoid schizophrenia. Respondent's entire analysis misses this point.

In any event, Respondent's discussion of the long list of Wycoff's irrational behavior distorts the record beyond all recognition. For instance, Respondent claims that Wycoff's defense, that he had a right to kill his sister and brother-in-law "was an informed decision to try to persuade the jury the murders were necessary." (RB, p. 93.) Further, Respondent claims that Wycoff's statements that "he was morally compelled to kill the victims, said he was proud of killing the victims, and said he would do so again...were logically connected to Wycoff's attempt to persuade the jury the murders were necessary." (Id.)

Respondent never explains how Wycoff's statements that he was morally compelled to kill the victims constituted a legal defense. Even the prosecutor recognized prior to trial that Wycoff's statements "don't even really go to a defense, maybe an explanation for why he did some things, but they don't go to a defense in this case." (2RT 373.)

Curiously, Respondent discusses at length *People v. Ramos* (2005) 34 Cal.4th 494, 410 to support her argument. (RB, pp. 93-94.) However, *Ramos* expressly stated: "For example, if a psychiatrist or psychologist 'who has had a sufficient opportunity to examine the accused, states under oath with particularity that in his professional opinion the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken against him or is incapable of assisting in his defense or cooperating with counsel, the substantial evidence test is satisfied.'" *Id.,* at 507-508, quoting *People v. Pennington, supra,* 66 Cal. 2nd at 519; emphasis added. That is exactly what happened here. As ordered by the court, Dr. Good examined Wycoff and found him to be incompetent to stand trial. *That* was substantial evidence of incompetence.

Ramos went on to state that without the opinion of a mental health expert who has examined the defendant it was not enough to merely present "a litany of facts, none of which actually related to his competence." "In other words, a defendant must exhibit more than bizarre, paranoid behavior, strange words, or a preexisting psychiatric condition that has little bearing on the question of whether the defendant can assist his defense counsel." *People v. Ramos, supra,* 34 Cal.4th at 508.

Here, Wycoff engaged in a stream of bizarre and paranoid behavior which exactly reflected the diagnoses of Drs. Good, Tucker, and Hanlin. For instance, Dr. Good noted in his report that Dr. Hanlin examined Wycoff on February 6, 2006, a week after the

murders and Wycoff's arrest. At that time, "Dr. Hanlin performed a psychosocial history and mental status examination, finding Mr. Wycoff to evidence flat affect *and to have grandiose thoughts about being justified in harming bad people*." (2CT 415; emphasis added.) What Respondent calls Wycoff's "informed decision to try to persuade the jury the murders were necessary" (RB, p. 93), Dr. Hanlin found to be grandiose delusions and diagnosed Wycoff as having "a Delusional disorder." (2CT 415-416.)

In any event, in *Ramos* a defense psychiatrist testified that the defendant had a "paranoid personality disorder" which "differs from a true psychosis because the sufferer never loses touch with reality." *Id.*, at 510. The psychiatrist testified that this personality disorder "did not render him mentally incompetent." *Id.*, at 510-511; emphasis added. *Ramos* is the exact opposite of the situation here.

Respondent goes on to make the extraordinary claim that "Wycoff chose a coherent strategy. Indeed, as described below, Wycoff was dedicated to his defense and made sound decisions in executing it." (RB, p. 95.) Again, however, this claim is based upon the assertion that Wycoff's "defense" was that "the murders were necessary." (RB, p. 93.)

What exactly does it mean to claim that Wycoff's defense was that "the murders were necessary"? Wycoff testified that "Julie knew what she was doing to me was wrong... she knew that I had a right to come after her." (16RT 3473.) She knew that Wycoff was being wronged and she "knew that I [Wycoff] had the right to punish her."

That meant, according to Wycoff, that she knew he had the right to kill her and Paul. (16RT 3589.) He did, in fact, kill Julie and Paul. He planned the killings for months and freely admitted he intended to kill both of them. He was proud of killing them. He felt no remorse. On the contrary, Wycoff was "proud of myself." He "did what had to be done...There is nothing to feel bad about here." (16RT 3591.)

In his closing argument, Wycoff told the jury that when Julie and Paul "made their intentions clear to me not only do I have the right to destroy Julie and Paul, but it was expected...Everything that happened is Julie and Paul's fault. They brought death on to themselves. They have no one to blame but them." (17RT 3776.)

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

In short, Julie and Paul knew they had wronged Wycoff and that he "had the right to kill her and Paul." Their murders were their own fault. "They brought death on to themselves." Wycoff was proud of killing them and felt no remorse for doing so. Instead, he was proud of himself for killing them and, as a result, he deserved to be rewarded with a "nice beautiful, peaceful life." Indeed, Wycoff asserted that "people," such as the jurors, should look up to him and appreciate him for killing Julie and Paul.

Wycoff's "defense" was based entirely on a delusion; that he was "justified in

harming bad people." (2CT 415.) Respondent's attempt to create something else out of Wycoff's "defense" is nonsensical.

Respondent contends that Wycoff "presented to the jury a sympathetic picture of himself." (RB, p. 95.) The record clearly shows that he presented himself as a remorseless killer who expected to be rewarded for killing his family.

Respondent also contends that Wycoff "presented a coherent case in mitigation." (RB, p. 97.) In his narrative to the jury Wycoff said that he "played judge, jury and executioner" and was "much more efficient" than a trial. (19RT 4166.) He remarked that what "Julie and Paul were doing to me, that's killing somebody." Julie and Paul "were destroying me in their way. I destroyed them in my way. I destroyed them the only way I could destroy them." (19RT 4168.) Wycoff told the jury: "The world out there could really use a man like me. They need a man like me to protect America's explosive supply and stuff. America needs a man like me out on the road, not behind bars." (19RT 4173.)

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

what I did to Julie and Paul justice served." (19RT 4267.) "The people of El Cerrito should thank me and be happy with me as a person for removing two crooks, two rip-off artists from their city." (19RT 4271.)

A "coherent case in mitigation" does not include telling the jury that he "played judge, jury, and executioner." Nor does it involved blaming the victims for their own murder. Nor does a "coherent case in mitigation" include telling the jury that the murderer has no remorse, was actually proud of the murders, and would do it again. Finally, a "coherent case in mitigation" does not include the claim that the murderer was a "hero," that justice was served, and that the murderer deserved a reward.

Respondent makes a series of claims that Wycoff "made sound procedural and evidentiary decisions," "sound objections," and "asked logical questions." (RB, pp. 97, 98, 99.) Even if true, such claims are irrelevant.

Most of Respondent's claims distort the record. For instance, Respondent claims that "Wycoff submitted coherent motions in limine. (2RT 546.) Not true. Briggs told the court, "I don't think it's any secret that I have written the motions for Wycoff." (2RT 352.) Indeed, all of Wycoff's motions are captioned, "EDWARD MATHEW WYCOFF, c/o DAVID J. BRIGGS, Attorney at Law." (3CT 504, 673, 680, 686, 688, 700.)

Respondent claims that Wycoff "requested jury instructions that were in his best interest." (RB, p. 101.) As an example, Respondent claims that Wycoff requested a self-defense instruction by stating that "...it was war. You know, I was at war, you know.

Umm, they fought the war financially and at a family level and I fought it at a different level, the only level I could fight it at." (16RT 3631.) The court obviously rejected any contention that Wycoff's "war" justified a self-defense instruction. The court stated, "...the evidence in this case does not permit an instruction on self-defense..." (Id.) Requesting jury instructions for which there was no evidence does not indicate competency.

In any event, Dr. Good stated that Wycoff had a rational and factual understanding of the proceedings against him. (2CT 420.) Dr. Good found that Wycoff was competent under the first prong of the *Dusky* standard. Therefore, claims that Wycoff made "sound objections" or asked logical questions on cross-examination are irrelevant. Such claims do not address the second prong of the *Dusky* standard; whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding. Under the second prong, even if it were true that Wycoff made "sound objections," such a behavior was irrelevant.

B. The Trial Court(s) Committed Reversible Error When It failed to Conduct a Hearing Into Wycoff's Competency to Waive His Right to Counsel

Respondent contends that no court "must hold a hearing when presented with substantial evidence that the defendant cannot validly waive counsel." (RB, p. 121.)

While that contention is certainly not true, it is also not the issue Wycoff actually raised. Wycoff expressly argued that the "trial court committed reversible error when it failed to conduct a hearing into Wycoff's *competency* to waive his right to counsel." (AOB, p. 110; emphasis added.)

Respondent next contends that the cases cited by Wycoff "hold only that the court must conduct a hearing into *trial competency* when presented with evidence that the defendant is *incompetent to stand trial.*" (RB, p. 121; emphasis added.) Respondent then cites to numerous cases such as *United States v. Washington* (8th Cir. 2010) 596 F.3rd 926, 941, *Harding v. Lewis* (9th Cir. 1987) 834 F. 2d 853, 856, *Cuffle v. Goldsmith* (9th Cir. 1987) 906 F.2d 385, 392, and *People v. Johnson* (2012) 53 Cal.4th 519, 530 to support her claim. Respondent is both wrong and entirely misses the issue raised.

Wycoff quoted *People v. Johnson, supra,* 53 Cal.4th at 530. In *Johnson* this Court stated that a "trial court need not routinely inquire into the mental competence of a defendant seeking self-representation. It needs to do so only if it is considering denying self-representation due to doubts about the defendant's mental competence." (AOB, p. 111.) This quote was merely a restatement of *Godinez v. Moran, supra,* 509 U.S. at 401 fn. 13, where the court stated that a trial court is not required to make a competency determination "in every case in which a defendant seeks to plead guilty or waive his right to counsel." Only when a court has "doubts about the defendant's mental competence" must it conduct such an inquiry.

United States v. Washington, supra, 596 F.3rd at 940 stated: "Before allowing a defendant to waive his right to counsel, a court must be satisfied that the defendant is competent to do so." *Harding v. Lewis, supra,* 834 F.2d. at 856 stated: "Due process requires that a state court initiate a hearing on the defendant's competence to waive counsel whenever it has or should have a good faith doubt about the defendant's ability to understand the nature and consequences of the waiver, or to participate intelligently in the proceedings and to make a reasoned choice among alternatives presented." *Cuffle v. Goldsmith, supra,* 906 F.2d at 392, quoting *Westbrook v. Arizona* (1966) 384 U.S. 150, stated: "Under these circumstances, the trial court had a 'protecting duty' to conduct an inquiry into the issue of his competence to waive his right to counsel and proceed as his own attorney." "This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 244.

All of these cases, and more, clearly stand for the proposition that a trial court must conduct a hearing into a defendant's competency to waive his right to counsel, or to self-represent, whenever it has "doubts about the defendant's mental competence." *People v. Johnson, supra,* 53 Cal.4th at 530.

In *Harding v. Lewis, supra,* 834 F.2d at 856, which was cited by Respondent, the court expressly stated: A "good faith" doubt of a defendant's competence to waive his right to counsel and to represent himself exists "when there is substantial evidence of

incompetence...Evidence of incompetence includes, but is not limited to, a history of irrational behavior, medical opinion, and the defendant's behavior at trial."

Respondent claims that all of these cases address a court's concern over the defendant's competent to stand trial and proceedings under section 1368. (RB, p. 121.) Not true. As the quotations set forth above amply demonstrate, these cases are specifically concerned with "a defendant's competence to waive his right to counsel and represent himself" and not competency to stand trial.

Respondent misunderstands the difference between a claim that there was substantial evidence that the defendant was not competent to waive his right to counsel and a claim that the court's colloquy with and admonitions to the defendant were inadequate to ensure a valid waiver of their right to counsel. For example, Respondent cites to and quotes from *People v. Koontz* (2002) 27 Cal.4th 1041, 1070. However, this section of *Koontz* concerned the "asserted inadequacy of admonitions regarding risks of self-representation." Respondent quotes the portion of *Koontz* in which this Court stated, "No particular form of words is required in admonishing a defendant who seeks to waive counsel and seek self-representation..." *Id.* This has nothing to do with mental competency to waive the right to counsel.

"However, where a substantial question of a defendant's mental capacity has arisen in a criminal proceeding, it is illogical to suggest that his waiver can be examined by reference to those criteria we examine in cases where the defendant is presumed

competent, since in the latter cases no inquiry into the defendant's mental capacity to make the wavier is made." *Sieling v. Eyman* (9th Cir. 1973) 478 F.2d 211, 214. *Sieling* made clear that "the objective evidence in the record" including "the defendant's statements or responses made in open court...fails to completely resolve the question of whether the defendant can properly be said to have a 'rational, as well as factual, understanding.'" *Id.*, quoting *Dusky v. United States, supra,* 362 U.S. at 402. See also *People v. Koontz, supra,* 27 Cal.4th at 1071; purpose of admonitions is "not to create a threshold of competency to waive counsel."

That is, when a defendant's competency to waive his right to counsel has been called into question, the court's admonitions and the defendant's responses do not settle that question. *Westbrook v. Arizona, spura,* 384 U.S. 1320.

In any event, Respondent continues this irrelevant analysis by arguing that the court "questioned Wycoff extensively about his rights and the consequences of self-representation, particularly in a capital case against an experienced adversary. Wycoff was engaged in the court's questioning and indicated he understood the consequences of waiving counsel and proceeding pro se." (RB, p. 122.) Again, this analysis is about the adequacy of the court's admonitions, not Wycoff's competency. Additionally, the record does not support Respondent's assertion.

Respondent cites 1RT 107. There Wycoff insisted, "I'm not qualified but it has to be done" because he had to get Najera off his case. Wycoff stated, "And I'm willing to

represent myself to get him off my case."

Respondent cites 1RT 112. There again Wycoff said he wanted to represent himself in order to get Najera off his case. "I'm sick of his games, his not bringing me down to court, and putting off the court hearing, you know, little things, just little things that have been going on." Wycoff then said, "I also need to do things myself...I need to see what's out there, that's going on." (1RT 113.) Wycoff repeated that he needed to "do things myself." (1RT 114.) The court responded to Wycoff's statements by saying, "I think that this is nothing more than gamesmanship, Mr. Wycoff." (1RT 115.) What Respondent calls evidence of Wycoff's competency, the trial court called gamesmanship.

Respondent also cites 1RT 119 to 123 to support her assertion. However, during this hearing Wycoff said virtually nothing. At 1RT 122, Wycoff repeated what he said earlier. Wycoff stated that "lawyers are manipulative...their lies and not taking the case in the direction I want it to go...I'm done with lawyers." He added, "I mean, I can't, I can't work with these people." (1RT 122.) Again, Respondent fails to explain how Wycoff's inability to cooperate with court appointed counsel demonstrates his competency.

Finally, Respondent cites 1RT 139-149. This concerns the court's actual admonishments to Wycoff about self-representation. For the most part, Wycoff responds to the court's questions with one-word answers. For instance, the only statement made by Wycoff at 1RT 140 is "no." Wycoff says "yeah" or "yes" three times at 1RT 142. At 1RT 143-144, Wycoff says "yeah" or "yes" nine more times. From 1RT 145 to 149,

Wycoff said almost nothing. When the court asked Wycoff if he understood "the elements of the crimes," Wycoff replied "The elements?" He followed that by saying, "I think so." When asked about general and specific intent crimes, Wycoff replied, "Specific." (1RT 145.) At 1RT 146, Wycoff said "yeah" once and "yes" once.

When the court asked Wycoff if he understood that it would "be almost impossible"for a self-represented defendant to "negotiate any disposition," Wycoff responded, "What was that one again?" After that Wycoff said "yeah," "yes," or "no" to the court's questions. Finally, after the court explained that a self-represented defendant cannot raise ineffective assistance of counsel on appeal, Wycoff responded, "Yeah. My attorney explained that one to me. Yes." (1RT 149.)

Respondent claims that these "facts support the court's finding that Wycoff waiver of counsel was knowing, voluntary and intelligent." (RB, p. 123.) They don't. Wycoff's one-word answers do not establish anything.[2] When Wycoff did speak it was mostly to call his lawyers liars and to state he had to get rid of them because he needed to "see what's out there, that's going on." Wycoff's responses to the court's questions reflected his paranoia, not his competency.

The issue actually raised by Wycoff was whether there was "substantial evidence indicating that Wycoff was not mentally competent to waive his right to counsel and to

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[2] See *People v. Taylor* (2009) 47 Cal.4th 850, 876: during court's colloquy "defendant did not simply reply to the court passively or monosyllabically." Here, however, Wycoff did.

conduct the trial proceedings himself." (AOB, p. 115.) Respondent never addresses this issue directly.

Finally, Respondent again attacks Dr. Good's report. Respondent claims that "nothing in Good's report contradicted the evidence supporting that Wycoff's waiver of counsel was knowing and voluntary." (RB, p. 123.) Once again, Respondent misstates the record. Dr. Good found that Wycoff's "waiver is **voluntary**" and that he "is alert and **knows** that he is making a request to act as his own counsel..." (2CT 425; emphasis in original.) That is, Dr. Good found that Wycoff could knowingly and voluntarily waive his right to counsel. What Dr. Good said was that Wycoff's "waiver of counsel, however, is not **intelligent**..." (Id; emphasis in original.)

When Respondent attacks Dr. Good's opinion that Wycoff's waiver was not intelligent she again claims that his opinion "was derived from flawed reasoning." (RB, p. 124.) As discussed above, Respondent substitutes her own opinion for that of the court appointed expert. For instance, Respondent contends that "Dr. Good's conclusions to the contrary relied primarily on Good's own opinion that Wycoff should be content to admit he was insane as a matter of case strategy." (RB, p. 125, citing 2CT 426.) Dr. Good said no such thing.

Dr. Good said that Wycoff "complained that his attorneys were actively pursuing an insanity defense, an option he adamantly opposes. To him, it is an active acknowledgment that he is mentally disturbed, a notion that he rejects in total. He is in

complete denial of his mental illness." (2CT 426.) Dr. Good also recognized that Wycoff believed that an insanity defense would be an admission that it was wrong to kill the victims while Wycoff believed it was the right thing to do. Wycoff told Dr. Good, "To go for insanity, would be going against myself." (2CT 424.) That is why Dr. Good concluded that Wycoff's decision making to waive counsel is quite the same as his irrationality in deciding it was morally right to kill his sister and brother in law. (2CT 427.)

Respondent claims Wycoff's case is "similar to *Taylor*." (RB, p. 126.) It is not. In *People v. Taylor, supra,* 47 Cal.3rd at 860, the court appointed psychologists found that "Defendant's cognitive functioning is intact...Diagnostically, the defendant does not appear to suffer from any severe psychological disorder at the present time." They also found that the defendant had "no acute psychotic thought disorders" although he "seemed somewhat grandiose at times." On *that* record the court found that the defendant was competent to waive his right to counsel.

Here, however, three different mental health experts found that Wycoff was severely mentally ill. There is no comparison. No one in *Taylor* believed the defendant was psychotic while *every* mental health expert to examine Wycoff found him psychotic. Respondent's claim that "[t]his case presents even better facts for a finding of a valid waiver" is incomprehensible.

Respondent contends that "Judge Bruiniers permitted the parties time to review the

report, but they declined." (RB, p. 129.) Respondent fails to point out that Judge Bruiniers only offered to provide redacted copies of Dr. Good's report to counsel. (1RT 138.) The redacted version of the report is contained in the record on appeal. (2CT 397-411.) The redacted version deleted nearly all of the "background information" about Wycoff including all of pages 2CT 399 and 400. (2CT 398-400.) The redacted version deleted all of Dr. Good's discussion of his "mental status examination" of Wycoff. (2CT 400-401.) The redacted version of the report deleted all of Dr. Good's "diagnostic formulation" except for the final paragraph. (2CT 401-402.) The redacted version deleted most of page 2CT 403 and part of page 2CT 404. The redacted version deleted all of the report's discussion of Wycoff "problematic relationship with counsel" except for the first and last paragraphs. (2CT 404-409.) This deletion included all of pages 2CT 405, 406, 407, and 408, except for the last paragraph on page 408. The redacted version deleted most of Dr. Good's discussion of Wycoff's competency to waive counsel except for part of page 2CT 409, part of a paragraph on 410, and half of one paragraph on page 411. In short, the redacted version of Dr. Good's report which Judge Bruiniers offered to counsel for review contained very little. The vast majority of the report was redacted by the court. Further, as even Respondent acknowledges, defense counsel did not receive the redacted report until "a week later." (RB, p. 129, fn. 27.)

Finally, Respondent contends that Judge Bruiniers "held a hearing." (RB, p. 129.) Yet, Respondent never describes the "hearing" that supposedly was held. At the

"hearing" none of the parties, including Wycoff himself, had access to Dr. Good's report. The court had access to the report, but rejected everything that Dr. Good said about Wycoff. Respondent fails to explain how any of this actually constitutes a hearing.

Although it is not clear, Respondent appears to contend that Judge Kennedy also committed no error when he failed to conduct a hearing into Wycoff's competency to waive his right to counsel. (RB, pp. 129-132.) Respondent fails to even address the fact that Judge Kennedy had not only Dr. Good's report, but also Dr. Tucker's report. Respondent argues that none of "the evidence before Judge Kennedy suggested Wycoff could not represent himself." (RB, pp. 132.)

As discussed above, Dr. Tucker examined Wycoff six times and expressly found that he suffered from Schizophrenia, Paranoid Type, with evidence of paranoid delusions. (2CT 378.) When added to Dr. Good's conclusion that Wycoff suffered from Paranoid Schizophrenia and Delusional disorder and could not intelligently waive his right to counsel (2CT 418), there was more than substantial evidence to question Wycoff's competency to waive counsel.

C. Both Judge Bruiniers and Judge Kennedy Failed to Understand Their Discretion Under *Indiana v. Edwards*

Wycoff argued that neither Judge Bruiniers nor Judge Kennedy recognized that they had the discretion to impose the "higher standard" set for in *Indiana v. Edwards*,

supra, 544 U.S. 164. Both judges thought *Faretta's* right to self representation was "absolute."

Respondent contends that both judges "recognized that the standard governing trial competency was different than circumstances under which trial courts are permitted though not required to deny competent defendants the right to represent themselves under *Edwards*." (RB, p. 132.)

Judge Bruiniers expressly stated that he "will grant [Wycoff's] motion for self-representation only because the Court is at least in my view *compelled* to do so under the requirements of *Faretta*, and I do not think that the *Edwards* case changes that result in at least under these circumstances." (1RT 149; emphasis added.) In short, Judge Bruiniers expressly stated that he did not think *Edwards* changed the *Faretta* standard.

Judge Kennedy expressly stated that under *Faretta*, "Mr. Wycoff has an *absolute* right to represent himself." (2RT 512; emphasis added.) Judge Kennedy then stated at the hearing on September 10, 2009, that he agreed with Judge Bruiners. (3RT 603.)

Both judges were aware of *Edwards*. Both mentioned *Edwards* on the record. Yet, Respondent cannot and does not point to a single place in the record where either Judge Bruiniers or Judge Kennedy recognized that Wycoff was a gray-area defendant and that under *Edwards* he did not have an absolute right to self-representation, therefore the court had the discretion to impose a "higher standard" for finding competency to waive counsel.

Both judges adopted an absolutist view of the right to self-representation. The absolutist view was rejected in *Edwards*. Neither judge recognized that it had the discretion under *Edwards* to reject self-representation of a gray-area defendant like Wycoff.

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II.

THE PROSECUTOR COMMITTED SYSTEMATIC MISCONDUCT THROUGHOUT THE TRIAL PROCEEDINGS

A. Wycoff's Failure to Object

Respondent correctly argues that "Wycoff failed to object to any of the alleged instances of misconduct." (RB, p. 137.) In any other case, that might support the assertion that Wycoff forfeited any misconduct claim. That would even be the case if the defendant was self-represented. However, Respondent's assertion completely ignores the essential truth of this case.

As described almost *ad nauseam* in his Opening Brief and above, both the court and the prosecutor knew prior to trial that Drs. Good, Tucker, and Hanlin had all found Wycoff to be severely mentally ill, variously described as paranoid schizophrenia with delusions. Throughout trial, Wycoff exhibited behavior that was the product of his mental illness. His "defense" was that he had the right to kill his sister and brother-in-law and that he "deserve[d] to be on a beautiful tropical island" for doing so. (18RT 4016-4017.) Dr. Good had also informed the court and the prosecutor prior to trial that Wycoff did not believe he was mentally ill and "is in complete denial of his mental illness." (2CT 417.)

Respondent asserts that there "was never a finding that Wycoff was 'delusional' at trial, and Wycoff's record of sound objections supports the contrary conclusion." (RB, p.

138.) Respondent's assertion requires this Court to decide whether it wants to engage in a legal fiction or actually address the truth of Wycoff's case.

The only time a "finding" regarding Wycoff's delusions was at issue was when Wycoff sought self-representation. Once Wycoff was permitted self-representation, his mental illness, that is his delusions, made sure the issue of his mental illness and delusions was not going to be raised. On September 10, 2009, when his competency was raised by Mark Peterson, the new prosecutor in the case, Wycoff objected to any further inquiry into the matter. (3RT 598: "...I just don't want to go back to the way things were before - - before Judge Bruiniers granted me the right to represent myself.") He said that "these shrinkchiatrists and skrinkcologists are always messing things up, these court things." (3RT 599.) In short, no "finding" was made concerning Wycoff's delusions because Wycoff's delusions prevented the issue from being raised.

Therefore, Respondent's logic is circular. The misconduct at issue here was the prosecutor's false claims that Wycoff was not and never had been mentally ill, was never treated for mental illness, and never showed any symptoms of mental illness. The truth was that Wycoff was mentally ill and that a symptom of his mental illness was the "complete denial of his mental illness." (2CT 426.) In order for Wycoff to object, it would have been necessary for him to recognize that he was mentally ill and that the prosecutor's statements to the contrary were false. He was not mentally capable of performing such a feat.

Respondent's argument is that Wycoff himself should have objected to the prosecutor's repeated assertions that Wycoff was not mentally ill. Put another way, Respondent's assertion is that Wycoff should have objected and asserted that he was mentally ill. Yet, Respondent contends that Wycoff was not mentally ill.

Either this Court can accept Respondent's position and pretend that Wycoff was rational and therefore rationally assumed "the responsibilities inherent in the role [self-representation] he had undertaken" (RB, p. 138), or address the reality of this case; Wycoff was not mentally capable of objecting to the prosecutor's assertions that he was not mentally ill.

B. The Prosecutor's Misconduct During Jury Selection

Respondent ignores the basic facts. On July 10, 2009, the prosecutor himself stated that he had no reason to believe that Wycoff - acting as his own attorney and in denial of his own mental illness - was going to introduce any mental state evidence or testimony. (2RT 365.) On August 27, 2009, less than three weeks before jury selection, the prosecutor again stated that Wycoff was not going to introduce any mental state evidence. Wycoff then told the court, "I don't intend to." (2RT 501.) Under Penal Code sections 1054.3 and 1054.7, Wycoff was required to disclose his expert witnesses and their reports to the prosecutor thirty days prior to trial. He made no such disclosures. There was, therefore, no reason to believe Wycoff intended to introduce mental state

evidence and every reason to believe he would not introduce mental state evidence. In fact, no such evidence was introduced at trial.

So why did the prosecutor feel compelled to discuss "facts" about mental state evidence at every phase of the trial? Respondent never addresses this question. However, the prosecutor did. He stated, before jury selection even commenced, that despite a complete absence of mental state evidence at trial he was concerned the jurors "are going to go hey this guy has got some mental illness." (2RT 500.) The prosecutor repeated his concern during voir dire itself when he told potential jurors that he believed "despite not hearing from any psychiatrist or psychologist, after hearing the evidence about Mr. Wycoff, you may decide yourself without any expert testimony he seems a little off to me. He seems like he maybe has some mental challenges or difficulties." (6RT 1353.) That is, the prosecutor believed, and rightly so, that even if no mental state evidence was presented at trial Wycoff's behavior in the courtroom would lead even a layperson to conclude that Wycoff was mentally ill. Therefore, at every stage of trial the prosecutor falsely asserted to the jurors that there was no evidence that Wycoff was mentally ill and, to the contrary, that there was evidence, which did not exist and was never produced, that Wycoff was not mentally ill. That was misconduct.

Respondent claims instead that it just never happened. Respondent contends that Wycoff "confuses the record." (RB, p. 139.) Respondent contends that all the prosecutor did was "ask jurors whether they would automatically accept a psychologist's opinion as

true or whether they were capable of weighing the credibility of that testimony using a variety of factors." (RB, p. 139.)

First, that is not what happened and is itself a distortion of the record. But more importantly, even under Respondent's formulation the prosecutor committed misconduct. Under Respondent's formulation, the jurors were being asked whether they could weigh a psychologist's opinion "using a variety of *factors*" which the prosecutor knew did not exist. Why was the prosecutor asking questions about "a psychologist's opinion" when no such expert testified or was expected to testify? Additionally, the prosecutor sometimes used the word "factor," but more often he used the word *fact*. He told the jurors "when you evaluate their testimony [the non-existent mental health experts] you can compare what they say to *the other facts that you know in the case*. *Other facts* might be was Mr. Wycoff ever hospitalized in 38 years...did anybody else see these symptoms or any problems from Mr. Wycoff in 38 years...You understand you can consider all those things? Prospective Juror No. 102: Yes." (7RT 1635; emphasis added.) The prosecutor used a ruse - there may be testimony from mental health experts when he knew no such testimony would be introduced - to inform jurors of *facts* which he also knew did not exist. In so doing the prosecutor knew that Wycoff would not object because Wycoff also wanted the jurors to believe he was not mentally ill. Respondent admits this fact; "Wycoff himself sought to convince the jurors at trial he was mentally sound." (RB, p. 144.)

Respondent assumes the jurors were stupid. Every panel of potential jurors, meaning all the trial jurors themselves, heard from the prosecutor that *if* there is mental health testimony that Wycoff was mentally ill, they could "compare" that testimony against "facts," such as whether anyone saw "these symptoms or any other problems from Mr. Wycoff in 38 years" or that the mental health experts did not "examine Mr. Wycoff [until] three years after the crime – the crime was committed." None of these so-called "facts" were true. Yet, what the jurors heard from the prosecutor was the following; if they saw any indication during trial that Wycoff was mentally ill, they should consider that a clever ruse by Wycoff because there was no indication of mental illness before Wycoff killed his sister and brother-in-law.

Respondent contends that the record shows that Wycoff actually intended to call Dr. Tucker. Therefore, according to Respondent, the prosecutor's statements about mental health experts were proper. (RB, p. 142.) Even if Wycoff intended to call Dr. Tucker, which he didn't, that fact would not permit the prosecutor to describe non-existent facts to the jury. In any event, Respondent distorts the record. What Wycoff actually said was that he might call Dr. Tucker and "have him come in and say, yeah, he [Wycoff] believes he did the right thing. Yeah, he believes it was a good thing to do. I might have him say that. But I can't think of anything else I would have him come in and say." (2RT 501.) In other words, if Wycoff did call Dr. Tucker it was not to present testimony that Wycoff was mentally ill or that Wycoff's actions were delusional, but

instead to present testimony that Wycoff honestly believed he had a moral right to kill the victims. Such testimony, even if it had been presented, would not have opened the door to the prosecutor's discussion of non-existent facts indicating that Wycoff was not mentally ill. The prosecutor's discussion of the non-existing facts was framed by the prosecutor as evidence intended to rebut testimony that Wycoff was mentally ill.

Respondent asserts that Wycoff "agreed to include mental-health related questions in the jury questionnaire because Wycoff said he was considering introducing such evidence." (RB 143.) Again, Respondent distorts the record.

Respondent cites to 2RT pages 500-503 to support this assertion. The questions on the jury questionnaire then under discussion concerned mental state *defenses*. The prosecutor stated that Wycoff "indicates that he is not going to" present any such evidence. However, the prosecutor went on to say that he believed that even without such defense evidence, the jurors might conclude that Wycoff was mentally ill. The prosecutor said:

> ...I think there may be some jurors in listing to Mr. Wycoff, either handling his own defense or testifying or other evidence comes in as to his motives, which *the People* will be introducing some evidence as to his motives, may in their own [jurors] minds decide that he has a mental illness because of his motive for why he did these crimes. In other words, they may not have any psychiatric testimony, but they are still going to go hey this guy has got some mental illness.

(2RT 500; emphasis added.)

Here, once again, the prosecutor explained that he wanted the jurors to conclude that Wycoff was not mentally ill even though the defense would not and did not make any claim that he *was* mentally ill. Further, the jurors might conclude Wycoff was mentally ill because of evidence introduced by *the People*. So, the prosecutor reasoned, he wanted to discuss non-existent "facts" about Wycoff's mental health with the jurors so they would not conclude, based on the prosecutor's own evidence, that Wycoff was mentally ill. Yet, according to Respondent, all of this was Wycoff's fault.

C. The Prosecutor's Misconduct During the Guilt Phase

The prosecutor solicited testimony from Wycoff during cross-examination at the guilt phase that the prosecutor knew was false. Respondent contends that there is "no legal theory" by which such false testimony constituted error.[3] (RB, p. 145.) In support of this assertion Respondent cites to *People v. Morrison* (2004) 34 Cal.4th 698, 716, *Napue v. Illinois* (1959) 360 U.S. 264, 269, and *Cash v. Maxwell* (2012) 132 S.Ct. 611, 615. (RB, pp. 145-146.

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[3] Respondent contends that Wycoff "introduced the alleged false testimony." (RB, p. 145.) In fact, the false testimony was the result of questions asked by the prosecutor on cross-examination. Therefore, the prosecutor "introduced the alleged false testimony."

Morrison only stated that under due process "the prosecution has the duty to correct the testimony of its own witnesses that it knows, or should know, is false or misleading." *Morrison* did not address the issue here; where the prosecution elicits false testimony from a defense witness.

Cash is a statement in denial of certiorari, not an opinion.

Napue, written in 1959, is quite clear. "First, it is established that a conviction obtained through use of false evidence, know to be such by a representative of the State, must fall under the Fourteenth Amendment. (Citations.) The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois, supra,* 360 U.S. at 268. Under *Napue* it does not matter who solicited the false evidence or whether it came from a defense witness or a prosecution witness. Due process is violated if false testimony is introduced at trial, the prosecution knew or should have known that it was false, and the false testimony was material. See e.g. *United States v. Houston* (9th Cir. 2011) 648 F.3rd 806, 814. Here, the prosecutor elicited testimony from a defense witness which he knew was false, made no attempt to correct the false testimony, and that testimony was material. Under *Napue* this was a clear violation of due process.

Next, Respondent contends that the testimony "was not demonstrably 'false.'" (RB, p. 146.) In response to a direct question by the prosecutor, Wycoff said on the night he killed the victims he was not psychotic, not schizophrenic, and not hearing voices. In

fact, Wycoff stated, "The psychiatrists I talk to say I'm fine." (16RT 3477.) That statement was "demonstrably false" and the prosecutor knew it. All three mental health experts who examined Wycoff, Drs. Good, Tucker, and Hanlin, found him severely mentally ill. A true statement would have been that every expert who had examined Wycoff found him to be severely mentally ill.

The prosecutor did not correct this false statement. He did not do so because the false statement corroborated the prosecutor's false statements during voir dire that "there has never been a history of mental health problems for Mr. Wycoff." (5RT 1244.) The prosecutor wanted to counter the possibility that despite the total lack of mental state evidence, the jurors "are still going to go hey this guy has got some mental illness." (2RT 500.)

Without directly saying so, Respondent contends that the false statements the prosecutor failed to correct are not material. (RB, p. 150.) Respondent contends that the question of materiality is just an argument "that Wycoff should not have represented himself." (RB, p. 150-151.) The two issues have nothing to do with each other.

Materiality must not be determined in isolation. The prosecutor's misconduct at issue here permeated the entire trial. It started during voir dire, continued through the guilt phase, and did not end until closing arguments at the penalty phase. It was not an isolated incident. As such, "reversal is virtually automatic." *United States v. Houston, supra,* 648 F.3rd at 814.

It should also be noted that Respondent contends mental state evidence was presented at trial. (RB, p. 150.) Respondent then cites a number of jury instructions to support this assertion. Respondent never cites to or describes any *evidence* to support this assertion because there was none. Indeed, two pages later in her brief Respondent correctly asserted that "there was no evidence admitted at trial that Wycoff was schizophrenic, psychotic, or hearing voices at the time of the murders." (RB, p. 152.)

D. The Prosecutor's Misconduct During the Penalty Phase

In his penalty phase argument, the prosecutor told the jury that Wycoff was not under the influence of any mental or emotional disturbance and that his mental capacity was not impaired. Instead, the prosecutor argued Wycoff knew exactly what he was doing. He suffered from no mental illness or defect, but was "crazy like a fox." (20RT 4525.)

The reports of Drs. Good and Tucker are part of the record of this case and were so at the time of the prosecutor's argument. Dr. Good in particular said that Wycoff's reasoning process is not rational and instead reflects the irrational thinking of a paranoid man suffering from severe mental illness...[and] is quite the same as his irrationality in deciding it was morally right to kill his sister and brother in law..." (2CT 427.)

Respondent's argument is that the prosecutor's statements were not false or misleading because there was "no evidence admitted at trial" establishing their truth or

falsehood. (RB, p. 152.) In other words, for Respondent whether a statement is true or false is determined, not by reality, but solely by the evidence admitted at trial.

For example, under Respondent's logic a prosecutor could argue to a jury in a murder case that there was no known cause of death, because no cause of death evidence was introduced at trial, while at the same time holding in his hand an autopsy report stating that the victim died of natural causes. The prosecutor's argument is false, regardless of what evidence was admitted, because he knew what the coroner found.

Here, the prosecutor knew that three mental health experts found Wycoff mentally ill. Yet, he argued that Wycoff had no mental illness, no mental disease, and no mental defect, but was instead cunning, rational, and "crazy like a fox." Under no definition of the word "true" was the prosecutor's argument truthful.

E. Wycoff Was Prejudiced

Respondent contends that the prosecutor's misconduct did not prejudice Wycoff. (RB, p. 152.) The prosecutor's misconduct was systematic and permeated the entire trial, from voir dire to the closing arguments at the penalty phase. The misconduct was intentionally designed to convince the jury that Wycoff had no mental illness.

At the guilt phase the jury was instructed that it could consider evidence of mental disease, defect or disorder in determining whether Wycoff committed first or second degree murder. (17RT 3695-3696; 5CT 1392.) The jury was instructed that it could

consider this evidence "for the purpose of determining whether the defendant actually formed the required specific intent, premeditated, deliberated, or harbored malice aforethought..." (17RT 3696.) The prosecutor's misconduct was designed specifically so that the jury would not question whether Wycoff could form the necessary mental state for first degree murder. Instead of being delusional, the prosecutor wanted the jury to think that Wycoff was "crazy like a fox." Without the prosecutor's misconduct and with Wycoff's delusional defense and bizarre courtroom behavior, the jury could have determined that Wycoff could not form the necessary mental state for first degree murder.

The prejudice at the penalty phase was even more pronounced. The prosecutor expressly argued that there was no evidence that Wycoff was under the influence of an extreme mental or emotional disturbance, that Wycoff's mental capacity was not impaired, and that Wycoff suffered from no mental disease or defect. He knew these statements were false. However, he effectively prevented the jury from considering evidence under mitigating factors (d) and (h).

Wycoff's penalty phase defense was that he was a "wonderful person" and a "hero" who should be rewarded for killing the victims. He felt no remorse and would do it again. In this context, the only real mitigating factors the jury had available for consideration were (d) and (h). However, the prosecutor's misconduct effectively eliminated any consideration of those mitigating factors. As a result, Wycoff was denied any chance at a reliable penalty determination.

III.

THE PROSECUTOR'S NOTICE OF AGGRAVATING EVIDENCE WAS PREJUDICIALLY INSUFFICIENT

Respondent concedes the following facts. Prior to October 27, 2009, the only notice Wycoff was given concerning the prosecutor's intent to introduce "victim impact evidence" at the penalty phase was written notice that stated, "Victim impact evidence" and nothing else. The jury returned its guilt verdicts on October 27, 2009. That same day, October 27th, Briggs asked the prosecutor who he intended to call as penalty phase witnesses. The prosecutor responded, "Eric, Laurel, Bowman, and one or more of Paul's brothers...The penalty phase began on October 28, 2009." (RB, p. 153-154.)

In short, Respondent concedes that the afternoon before the penalty phase started, Wycoff was orally informed that "Eric, Laurel, Bowman, and one or more of Paul's brothers" would testify as victim impact witnesses. No other notice was given. In fact, the prosecutor called Kent Rogers, Douglas Bowman, Eric Rogers, and Laurel Rogers as victim impact witnesses.

Respondent contends this constituted adequate notice. For example, Respondent contends that the "prosecutor's August 27, 2009 notice was sufficient as to Kent and Bowman." (RB, p. 156.) What the prosecutor said on August 27, 2009, was this: "Regarding any evidence in aggravation, I don't believe that we have any at this point that we will be presenting." (2RT 520.) He then added, "I probably will be filing a 190.3

[notice], but as to those two areas because there will be victim impact...but I will file the 190.3 at the very least related to victim impact." (2RT 521.) The written notices filed by the prosecutor on September 1 and September 8, 2009, simply stated, "Victim impact evidence."

That was it. No other notice was given. Kent Rogers was not identified until the day he testified. Douglas Bowman was Paul Roger's friend. Nothing in the record indicates that Wycoff knew who "Bowman" was or his relationship to any of the victims.

Respondent utterly fails to explain how this constituted sufficient notice "of the evidence *actually to be used* at the penalty phase." *Matthews v. Superior Court* (1989) 209 Cal.App. 3rd 155, 158; emphasis added. Nor does Respondent explain how this was adequate notice so that Wycoff would "have a reasonable opportunity to prepare a defense at the penalty phase." *People v. Hart* (1999) 20 Cal.4th 546, 639. Informing Wycoff the afternoon before the penalty phase commenced that "one or more of Paul's brothers" may or may not testify is not adequate notice. If it is, then the notice requirement of Penal Code section 190.3 is absolutely meaningless.

Respondent contends that even if the notice was unreasonable, "any error was harmless." (RB, p. 157.) More particularly, Respondent contends that Wycoff fails to show "how he would have developed a different response with earlier notice of the witnesses' identities." (RB, p. 158.)

Here is what Respondent is actually saying. Conceding that the prosecutor

ambushed Wycoff by failing to give him adequate notice of the witnesses he intended to call, Wycoff must demonstrate *on this record* what he would have done had he been given adequate notice. The purpose of the notice requirement is to provide the defendant "a reasonable opportunity to prepare." *Id.* It cannot be known what Wycoff would have learned or what evidence he would have presented if he was given "a reasonable opportunity to prepare" because he was given *no* opportunity to prepare let alone a reasonable one.

More particularly, Respondent is arguing that Wycoff should point to some fact or evidence *in the record on appeal* that Wycoff would have utilize or introduced if he had received reasonable notice that Kent Rogers was going to testify as a victim impact witness. No such fact or evidence could ever exist in the record on appeal because Wycoff was given no opportunity to obtain such evidence. Acceptance of Respondent's argument creates a standard that can never be met.

IV.

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

Respondent contends that during his penalty phase defense "Wycoff broadly depicted himself as a well-behaved, non-violent person with good morals" and that he was a "good person." (RB, p. 163.) Nothing could be further from the truth.

Wycoff began his opening statement at the penalty phase by threatening the jury "for the wrong decision that was made yesterday [when they returned their guilt verdicts] when do I get to beat the amoral tar out of these lumpers"? (18RT 3906-3907.) He then blamed his sister and brother-in-law for making him kill them adding that their "own children wanted to kill them, not just me." (18RT 3907.) Wycoff told the jury that "the jury and everyone should appreciate that I played judge, jury and executioner in this case." When members of the jury began shaking their heads "no," Wycoff responded, "Don't shake your head no." The prosecutor objected "to Mr. Wycoff pointing to individuals in the jury." (18RT 3908.) Wycoff went on to say that he "tried to take care of things properly" and "I leveled justice. I leveled justice myself and took care of it properly." (Id.)

After the jury left the courtroom the court admonished Wycoff not "to make threatening comments to the jury or to address them directly as individuals...So I will not permit any further comments directly to the jury and certainly not any threats to the jury."

(18RT 3911.)

Wycoff began his testimony at the penalty phase by saying he did "a good job" and a "good thing." What he meant was that he did a "good job" and a "good thing" by killing his sister and brother-in-law. "I did a good job in getting rid of the parents, it was a good thing to do, it helped a lot." (19RT 4155.) Wycoff added that if he was not "good," if instead he was a "bad man or an evil man" he would have "killed the kids" too. "...[I]f I was really an evil man I would have killed the kids right there, but I didn't do that, see. So I am a good person for that." (19RT 4155-4156.) In short, what Respondent calls Wycoff's "case in mitigation," that he was a good man, is based on the claim that Wycoff was a good man for killing the victims, but not killing Eric and Laurel Rogers.

Respondent then presents a series of quotations that Respondent contends show that Wycoff "did not like to destroy things, abhorred vandalism and respected the environment, abhorred sexual offenders and murders, cared for children and the community, was a loving and protective family member, was a good friend, and was a protective and intelligent employee who would be productive in prison." (RB, p. 164.) Respondent's assertions are a distortion of the record.

Wycoff repeatedly claimed that he was "not a bad or evil man," but instead a "good man" and "a wonderful person" because he killed his sister and brother-in-law and did not kill their children. "Some people think I'm a bad man or an evil man, but you

know, if I was an evil man I would have killed the kids...if I was really an evil man I would have killed the kids right there, but I didn't do that, see. *So I am a good person for that.* (19RT 4155-4156; emphasis added.)

While Respondent claims that Wycoff "depicted himself as a well-behaved, non-violent person with good morals," what Wycoff actually said was that "I am a hero for all of this, see." (19RT 4158.) He came to this conclusion by asserting that "I can do stuff like this...but what proves that I'm a real man is that if I have to do something like this [kill the victims] I will do it. And when Julie and Paul were stealing from me and messing up my family, I did do it [kill them]...And that's something to be happy about. Not a gift that was wasted." (19RT 4156.)

Respondent asserts that Wycoff claimed he "was a loving and protective family member." (RB 164.) What Wycoff actually said was that, "I killed my own family...They had to be bad for me to kill my own family. I mean, they had to be bad, you know, for a man like me *with all I got going* to kill my own family...you killed your own family like that's supposed to be bad. Well, who in the hell am I supposed to kill?" (19RT 4160; emphasis added.)

Wycoff went on to ask, "How do I save the family." (19RT 4167.) He answered his own question by saying, "There was one way, and only one way to do that. And that's the way I did it, see." "Julie and Paul were destroying me in their way. I destroyed them in my way. I destroyed them the only way I could destroy them." (19RT 4168.)

Respondent asserts that Wycoff claimed he "was a productive and intelligent employee who would be productive in prison." (RB, p. 164.) What Wycoff actually said was, "I'm the kind of guy who likes to, you know take control, do things my way...when a guy like me goes to prison he rules. I'm a shot caller. The - - in prison the murderers rule...me being a double killer, you know, I, you know, really rule, you know, so I got a good thing going to prison, I call the shots, I tell people what to do...tell other people what to do like, you know the petty thieves, the robbers, the rapists, the - - I'm king of all of that ...And that's a good thing. It will make them not want to come back to prison anymore..." (19RT 4161.) In other words, Wycoff's belief that he will "rule" the prison as a shot caller is what Respondent calls being "productive in prison."

Respondent asserts that Wycoff "abhorred sexual offenders and murderers." (RB, p. 164.) As discussed above, Wycoff actually said that murderers "rule." The subject of "sexual offenders" only came up during Wycoff's discussion of his appointed attorneys whom he called "faggots" with "bad morals." Wycoff said that being gay was "not necessarily a bad thing." (19RT 4162.) But "then you have queers" who are "basically that gay that is in the closet." "They are kind of sneaky, kind of deviate, kind of do bad things." (19RT 4163.) Then Wycoff said, "you have the faggot...They are molesters. They are rapists...I was talking about faggots and queers a little bit. The worst component of being gay." (19RT 4163.) Wycoff went to explain to the jury that his previous attorneys were "faggots." He explained that "you got to be a rotten person with bad

morals...that's what a faggot is. And that's the kind of people that were representing me as I was saying in that letter the other day, that's the kind of person both of my first two public defenders were." (19RT 4164.) In short, while Respondent claims that Wycoff presented good character evidence because he "abhorred sexual offenders, " what Wycoff *actually* said was that his previous attorneys were "faggots," "molesters," and "rapists" with "bad morals."

Finally, if the point had not already been made clear, Respondent cites as Wycoff's evidence of good character his assertion that the people of El Cerrito should "be happy with me as a person for removing two crooks, two rip-off artists from their city." (RB, p. 164.) According to Respondent, Wycoff asserted as evidence of his good character that he removed two crooks from the streets of El Cerrito. Again, what Wycoff actually said was far different. What Wycoff *actually* said was that the people of El Cerrito "should thank me" for killing his sister and brother-in-law. "The people of El Cerrito should thank me and be happy for me as a person for removing two crooks, two rip-off artists from their city...you know, I'm the victim, not the criminal here. I don't like to kill, but when I have to kill, *I will kill.* Sometimes it's something that needs to be done, and I will do it." (19RT 4271; emphasis added.)

What Respondent actually asserts is that Wycoff introduced what he *thought* or *believed* was evidence of his good character. But no reasonable juror would have thought what Wycoff presented was evidence of good character. What Wycoff introduced was

not evidence of good character, but further evidence of his paranoid delusions.

Wycoff does not disagree with the general rule that by "introducing evidence of good character" a defendant places his or her character in issue thus opening the door to prosecution evidence tending to rebut that specific asserted aspect of the defendant's character." *People v. Mitcham* (1992) 1 Cal.4th 1027,1072. Respondent quotes *Mitcham* as saying, "defendant's good character evidence was not limited to any singular incident, personality trait or aspect of his back ground. The defense evidence painted *an overall picture of an honest, intelligent, well-behaved, and sociable person incompatible with a violent or antisocial character.*" (RB, p. 165; emphasis added.) The so-called good character evidence Wycoff produced did not paint a picture of someone who was honest, intelligent, well-behaved, or sociable. Wycoff readily admitted he killed members of his own family and that when he feels it is necessary he will do so again. He told the jury that he was "a good man," a good person, and a "wonderful person" for killing his family members. No matter how badly Respondent distorts the record, such evidence can never be construed as "good character" evidence. Such evidence did not open the door to bad character evidence in rebuttal.

Respondent contends that the trial court's ruling on rebuttal evidence was limited to Wycoff's possession of a grenade launcher, brass knuckles, and killing cats. All of the other evidence admitted during the prosecutor's cross-examination of Wycoff was never addressed by the parties and was not subject to the court's ruling that Wycoff opened the

door to "bad character" evidence in rebuttal by presenting "good character" evidence in mitigation. (RB, p. 169.) But if the "bad character" evidence introduced by the prosecutor was not admissible as rebuttal to Wycoff's so-called good character evidence, how was it admissible at all? Respondent never explains. In fact, all of the bad character evidence introduced by the prosecutor was admissible, if at all, only as rebuttal evidence.

Penal Code section 190.3 bars the introduction of "other criminal activity" which did not involve the use of force or violence and requires notice "prior to trial." The prosecutor introduced evidence that Wycoff illegally carried firearms into Canada, destroyed a gate and a parking sign, embezzled property, stole fire extinguishers, falsified trucking log books, destroyed a soccer field, lied to get trucking jobs, and killed cats. Respondent does not argue that this evidence was properly admitted under section 190.3 as "other criminal activity" involving the use of force or violence. The prosecutor at trial also made no such argument. In fact, the prosecutor expressly stated that he would not "argue any of this evidence as a criminal activity." (19RT 4260.) Any such argument would fail because falsifying trucking log books, for instance, does not involve force or violence. The trial court agreed that none of the evidence "struck me as qualifying as a 190.3(b) crime of violence..." (20RT 4340.) Therefore, even if Respondent were to advance such an argument now, it is both forfeited and erroneous.

The only theory of admissibility applicable here is the statutory language of section 190.3 which provides: "Evidence may be introduced without such notice in rebuttal to

evidence introduced by the defendant in mitigation." So the actual issue is whether the "bad character" evidence presented by the prosecutor was beyond the scope of permissible rebuttal evidence. To this question Respondent says only that "as rebuttal evidence, the evidence directly undermined Wycoff's alleged character as a moral and good person..." (RB, p. 172.)

Not once does Respondent try to tie the vast amount of bad character evidence introduced by the prosecutor to a "particular character trait concerning which the defendant has presented evidence." *People v. Mitcham, supra*, 1 Cal. 3rd at 1972. For instance, what particular character trait "concerning which defendant has presented evidence" was rebutted by evidence that Wycoff falsified log books, lied to get jobs, stole fire extinguishers, destroyed a parking sign, and killed 17 cats? Respondent appears to argue that Wycoff's statement that he was a "good" or "moral" man opened the door to evidence of virtually every arguably "bad" act Wycoff ever committed in his life. Indeed, the court ruled that it would permit "the board admissibility of rebuttal evidence." (19RT 4265; 20RT 4338.) No case has ever held that a defendant's claim that he is "good" or "moral" or any other such broad term opened the door to virtually unlimited rebuttal evidence.

Finally, Respondent claims any error was harmless. (RB, p. 173.) However, almost the entirety of the prosecutor's final closing argument concerned this bad character evidence. The prosecutor addressed "the incident with Marshall Field, he [Wycoff] got

mad at his employer and so he put a bottle of urine on their front steps." (21RT 4560.) The prosecutor addressed killing cats. (21RT 4562.) The prosecutor expressly argued that this evidence "came in to rebut Mr. Wycoff's statement that he's a good moral person." (Id.) The prosecutor addressed Wycoff's "prison situation" where he would be "the shot-caller" and "would love to destroy some more property." (21RT 4567-4568.) The prosecutor addressed Wycoff's statement that he "could be a serial killer... but his morals keep him in check." (21RT 4572.) This evidence lead the prosecutor to argue that Wycoff was "evil." The prosecutor argued, "because the things he has talked about, the things he believes, the attitudes he holds, and the things he did are repulsive and wrong and evil." (21RT 4575.) Arguably, Wycoff's bad character was the central theme of the prosecutor's final argument. It was not just that Wycoff deserved to be executed because he killed the victims, but because Wycoff's character "repulsed you, it sickened you, but that is Mr. Wycoff." (Id.)

It took the jury only an hour and five to ten minutes to return two death verdicts. Their haste indicated that they too found Wycoff repulsive and sickening, just as the prosecutor intended when he presented his rebuttal evidence. The error in admitting that evidence was prejudicial.

V.

CONCLUSION

Wycoff's trial was an embarrassment to the criminal justice system of the State of California. It is unfathomable in a capital case that a court permitted Wycoff to proceed to trial, represent himself, argue to a jury that he had a right and a duty to kill his sister and brother in law, and should be rewarded for doing so.

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

Dated: February 2, 2107 Respectfully submitted

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EDWARD MATHEW WYCOFF

CERTIFICATE OF COUNSEL

RULE 8.630(b)(1)

I, David A. Nickerson, am court appointed counsel for Appellant Edward Wycoff in this automatic appeal. I conducted a word count of this reply brief using my office computer's Word Perfect software. On the basis of that computer-generated word count, I certify that this brief is 20,654 words (less than 47,600 words) in length excluding the tables and certificates.

Dated: February 2, 2017

_____

DAVID A. NICKERSON

PROOF OF SERVICE BY MAIL

I declare that I am over the age of eighteen years and not a party to the within-entitled action. My business address is 32 Bridgegate Drive, San Rafael, California, 94903. On February 3, 2017, I served the attached:

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

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

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on February 3, 2017, at San Rafael, California.

_____
DAVID NICKERSON