IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	Supreme Court No. S073316
Plaintiff and Respondent,	)	
v.	)	Orange County Superior Court No. 93WF1180
ROBERT MARK EDWARDS,	)	
Defendant-Appellant.	)	

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

QUIN DENVIR
State Bar No. 49374
Attorney at Law
1614 Orange Lane
Davis, CA 95616
Telephone: (916) 307-9108

Attorney for Appellant
Robert M. Edwards

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ROBERT MARK EDWARDS, Defendant-Appellant.	Supreme Court No. S073316 Orange County Superior Court No. 93WF1180

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

QUIN DENVIR
State Bar No. 49374
Attorney at Law
1614 Orange Lane
Davis, CA 95616
Telephone: (916) 307-9108

Attorney for Appellant
Robert M. Edwards

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont'd.)

TABLE OF CONTENTS (Cont'd.)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Cont'd.)

TABLE OF AUTHORITIES (Cont'd.)

Page

CASES (Cont'd.):

TABLE OF AUTHORITIES (Cont'd.)

TABLE OF AUTHORITIES (Cont'd.)

Page

CASES (Cont'd.):

TABLE OF AUTHORITIES (Cont'd.)

TABLE OF AUTHORITIES (Cont'd.)

TABLE OF AUTHORITIES (Cont'd.)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	Supreme Court No. S073316
Plaintiff and Respondent,	)	Orange County Superior Court No. 93WF1180
v.	)	
ROBERT MARK EDWARDS,	)	**APPELLANT'S SUPPLEMENTAL OPENING BRIEF**
Defendant-Appellant.	)	

INTRODUCTION

This supplemental brief provides additional judicial authority, record citations, and argument regarding certain issues raised in Appellant's Opening Brief and Reply Brief. As to the other issues previously raised, appellant will rely on his initial briefing. The arguments in this brief used the argument numbers from Appellant's Opening Brief.

I.

THE BATSON ERROR REQUIRES REVERSAL

Where a prosecutor uses a peremptory challenge to excuse a

minority juror on the basis of a group bias, the defendant has been denied his Sixth Amendment constitutional right to be tried by an impartial jury. Batson v. Kentucky (1986) 476 U.S. 79. Where a party claims that the other party has improperly discriminated in its use of peremptory challenges, the trial court must follow a three-step process. Batson, 476 U.S. at 96-98.

First, the court must determine whether the moving party has made a prima facie showing that the other party has exercised a peremptory challenge on the basis of race. Batson, 476 U.S. at 96-97. The prima facie showing is "minimal." St. Mary's Honor Center v. Hicks (1993) 509 U.S. 502, 506. It is met if all the facts and circumstances "raise an inference" that the challenged party has excluded a prospective juror on account of their race. Batson, 476 U.S. at 96. [1] Among the facts and circumstances to be considered is

---

1. Respondent takes the position that appellant must establish "a pattern of impermissible exclusion." RB 30. That position is simply wrong as a matter of law. The Supreme Court has made clear that a defendant is entitled to relief under Batson if he shows that even a single prospective juror was struck for discriminatory reasons. See Snyder v. Louisiana (2008) 552 U.S. 472, 128 S.Ct. 1203, 1208. "A pattern of exclusionary strikes is not necessary for finding an inference of discrimination." Fernandez v.

(continued...)

" 'the totality of the relevant facts' about a prosecutor's conduct during the trial." Miller-El v. Dretke (2005) 545 U.S. 231, 238.

If the challenging party makes the prima facie showing, the burden shifts to the other party to provide a race-neutral explanation for its challenge. Batson, 476 U.S. at 97. If a race-neutral explanation is provided, the trial court must then determine whether the moving party has established racial discrimination in the other party's use of peremptory challenges. Batson, 476 U.S. at 98. [2/]

In the present case, when the defense challenged the excusal of prospective juror Mickens, an African-American, the trial court never reached the last two steps of the Batson analysis because it found that that defense had not made the requisite prima facie showing. RT

---

1. (...continued)
Roe (9th Cir. 2002) 286 F.3d 1073, 1078; see also United States v. Esparza-Gonzalez (9th Cir. 2005) 422 F.3d 897, 904; Ali v. Hickman (9th Cir. 2009) 571 F.3d 902.

2. The Batson framework, including the "minimal" burden of raising an "inference" at the first step, "is designed to produce actual answers to suspicions and inferences that discrimination might have infected the jury selection process. [Citation] The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." Johnson v. California (2005) 545 U.S. 162, 172.

1811: 1-2. However, in making that finding, the trial court committed a serious error – it ruled that appellant could not make a prima facie showing unless he could show "a strong likelihood" that the prosecutor had excused Ms. Mickens because of her race. RT 1808: 14-18; RT 1809: 11-15. The Supreme Court has held that that is an incorrect standard to determine whether a party has made the required prima facie showing under Batson. See Johnson v. California (2005) 545 U.S. 162. All the challenging party must do to meet its burden of making a prima facie showing is to show "an inference" of discriminatory purpose. Id. at 169.

Because the trial court used the wrong standard in finding no prima facie showing, that finding is entitled to no weight. People v. Zambrano (2007) 41 Cal. 4th 1082, 1105 . Instead, this Court must make its own independent review of the record to determine whether appellant made the requisite showing of an inference of racial discrimination. Id.; Paulino v. Castro (9th Cir. 2004) 432 F.3d 1083.

In determining whether there is an inference of racial bias in the exclusion of Ms. Mickens, an African-American, it is extremely significant that there were many facts about her that would make her

appear to be a juror that the prosecution would normally want on the jury:

- she was a pharmacy technician at the Fairview Developmental Center (CT 3764)
- she was a Petty Officer 1st Class in the U.S. Naval Reserve from 1978-present, serving as an Intelligence Specialist (CT 3765)
- she was the mother of two (CT 3766)
- she was a member of Neighborhood Watch, a crime prevention group in her neighborhood (CT 3768)
- she had served on a previous jury in Orange County in an auto theft case and had reached a verdict (CT 3768)[3]

In these respects, she was very much like white Juror No. 1, who also worked for the government, [4] had served in the Armed Forces, [5] was

---

3. Since she had previously served as a juror, the prosecution in that case obviously had seen no reason to exclude her.

4. Jurors 6, 7, 11 and 12, and alternates 3 and 4 also worked for the government. CT 1977, 1991, 2047, 2061, 2103, 2117.

5. Jurors 8 and 9 also had served in the Armed Forces, CT 2006, 2020.

a father of one, [6] was a member of Neighborhood Watch, [7] but had not previously served on a jury. [8] Thus, the prosecutor's decision to strike Ms. Mickens and keep Juror No. 1 is very suspicious. [9]

This suspicion is heightened by the fact that the prosecutor "failed to engage in meaningful questioning" of the minority juror before excusing her. Fernandez v. Roe,, supra, 286 F.3d at 1079. Here, when offered the opportunity to question Ms. Mickens, the prosecutor asked a single question. The single question concerned her statement in the juror questionnaire regarding her "general feelings about the death penalty." In response Ms. Mickens had stated:

---

6. Jurors 2, 3, 4, 5, 8, 10 and 11, and alternates 1, 3, and 4 also were parents. CT 1923, 1937, 1949, 1965, 2007, 2035, 2049, 2075, 2119.

7. Jurors 3 and 10, and alternate 3 also were members of Neighborhood Watch. CT 1939, 2037.

8. Jurors 3, 4, and 10 also had previous jury service. CT 1939, 1953, 2037.

9. The Supreme Court has endorsed "side-by-side comparisons of [ ] black panelists who were struck and white panelists allowed to serve" as part of the Batson analysis. Miller-El v. Dretke, supra, 545 U.S. at 241; Crittenden v. Ayers (9th Cir. 2010) ____ F.3d ____; Boyd v. Newland (9th Cir. 2006) 467 F.3d 1139, 1149.

> "I've thought about it on a personal level without coming to a conclusion as to whether society should or should not have the death penalty. As the law now states we have it so therefore I am prepared to obey the law of the land. On a personal level I will continue to ponder."

CT 3773. The prosecutor's question was not about that part of her statement where Ms. Mickens said that she would "obey the law of the land" – or about her statement on the questionnaire that she could vote for the death penalty (CT 3775) – or about her statements to the trial judge during his voir dire that (1) she could render either penalty in the event the jury got to the penalty phase, depending upon the law, (2) after listening the past few days, she was of the opinion that she would be "able to keep an open mind relative to listening to the information that is given and following through with the instructions," and (3) she could be "objective and fair to both sides." RT 1804: 8-20. Instead, referring to her pondering whether or not society should have a death penalty, the prosecutor asked, "Have you resolved that issue in your own mind since you have been here the last few days." RT 1806: 5-11. The question went only to her personal uncertainty whether society should have a death penalty or not. The question did not explore her uncertainty in this regard and

whether it might affect her jury service. Instead, the question only inquired whether her personal uncertainty had been resolved since called as a juror. When Ms. Mickens candidly replied, "Not really," RT 1806: 13, the prosecutor immediately passed her for cause and struck her with a peremptory challenge. RT 1806: 14, 23-24. [10/] In light of Ms. Mickens' general statements accepting the death penalty as a potential punishment in this case, one would "expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike." Miller-El v. Dretke, supra, 545 U.S. at 244.

The single cursory question to Ms. Mickens must be contrasted with the prosecutor's more extensive questioning of white prospective jurors before using a peremptory challenge:

- Prospective juror Sorg (excused, RT 1460): six questions (RT 1398-99, 1409)

---

10. As shown above, this is not a case where "the excused black juror had given an answer that would expose a clear basis for the state to want to remove [her] from the pool with a peremptory challenge." Morse v. Hanks (7th Cir. 1999) 172 F.3d 983, 985.

- Prospective juror Davis (excused, RT 1484): ten questions plus
  a dialogue in response to the juror's question (RT 1398, 1410-14)

- Prospective juror Mittle-Reeder (excused), RT 1543: seven questions (RT 1379, 1402-03)

- Prospective juror Henry (excused, RT 1644): ten questions (RT 1549-55)

- Prospective juror Genevay (excused, RT 1679): nineteen questions (RT 1537-43)

- Prospective juror Renzi (excused, RT 1752): four questions (RT 1744-45)

- Prospective juror Major (excused, RT 1846): five questions (RT 1822-23) [11/]

---

11. With four white prospective jurors, the prosecutor asked no questions before excusing them. In each instance, there were valid reasons established by their answers on the juror questionnaire or during voir dire by the trial court for the prosecution to want to excuse them from service. Burke (excused, RT 1497): she had stated in her questionnaire that "I don't like to believe in the death penalty. My religion is against it . . . . The criminal should remain in custody for the length of time the victim is hurt. If the victim is killed, the criminal should stay in jail for life." CT 3549. Arnett (excused, RT 1579): he was 78 years old (CT 3273), and his son was an attorney with one of the largest firms in Orange County. RT 1488. Hutchinson (excused, RT 1803): she stated, "In the penalty phase, I think I would have a problem convicting somebody or voting for the death penalty...To actually vote for someone to, you know, for the death penalty, I don't know if I could do it." RT 1800. Rankin (excused, RT 1909): he stated, "I think most of the time it would be

(continued...)

The prosecutor's treatment of this African-American juror must also be contrasted with his voir dire of white jurors who expressed some uncertainty about the death penalty. In the case of three white jurors who made statements raising questions about their willingness to impose a death sentence, the prosecutor did not ask one question and then excuse the juror, as with Ms. Mickens. Rather, he asked a number of questions to probe their feelings on the subject and ultimately allowed them to serve.

For example, on the question of general feelings about the death penalty, Juror No. 3 stated:

> "It would be a very hard thing to have to think about. The circumstances would play a large part in dealing with this. It would be difficult to know how I would feel."

CT 1944. Rather than asking a single question and then exercising a peremptory (as with Ms. Mickens), the prosecutor questioned this white juror at length (RT 1722-25) and accepted the juror.

---

11. (...continued)
very difficult for me to vote for the death penalty. I don't think it would be impossible, but it would be very difficult for me I think in most circumstances." RT 1906. He agreed that he had a strong feeling opposed to the death penalty. RT 1906.

Similarly, to the same question as to general feelings about the death penalty, Juror No. 2 stated:

> "I'm not sure. I don't believe it is right to take a life; however, some crimes are so heinous that I do believe the criminal should not be allowed to live."

CT 1930. Rather than asking a single question and then exercising a peremptory (as with Ms. Mickens), the prosecutor questioned this white juror at length (RT 1446-48) and accepted the juror.

Finally, on the questions of general feelings about the death penalty, Juror No. 9 stated:

> "I believe the death penalty is appropriate but only in very special circumstances. The crime would have to be something on the order of the Charles Manson murders. I would look very carefully at the mental state of the defendant and possible motives.

CT 2028. Rather then asking a single question and then exercising a peremptory (as with Ms. Mickens), the prosecutor questioned this white juror at length (RT 1793-96) and accepted the juror.

Thus, the prosecutor's treatment of Ms. Mickens stands in stark contrast to his treatment of these white jurors. The Supreme Court has made clear that the burden on the challenging party at the first step of the Batson process is "minimal." St. Mary's Honor Center v.

Hicks, supra, 509 U.S. at 506. The defendant need only show that the facts and circumstances of the case, including the prosecutor's conduct, raise an "inference" of racial bias in the case of a peremptory challenge. Batson, 476 U.S. at 96. The facts and circumstances of appellant's case clearly raise an inference that Ms. Mickens was excused by the prosecutor because of her race.

Because of the fundamental nature of the constitutional rights of which appellant was deprived, the trial court's erroneous denial of the Wheeler/Batson motion is reversible per se. See People v. Wheeler (1978) 22 Cal.3d at 283 ("[N]o inquiry as to the sufficiency of the evidence to show guilt is indulged and a conviction by a jury so selected must be set aside."].)

Appellant recognizes that this Court has held that where the trial court erroneously denies a Wheeler/Batson motion at the first step of the Batson analysis, the remedy may be to remand the matter for a hearing at which the trial court can conduct the second and third steps of the Batson analysis. People v. Johnson (2006) 38 Cal.4th 1103-1104. Remand would not be an appropriate remedy in this case, however, because of the amount of time that will have passed

between appellant's trial in September 1996 and the time this case is decided. Penal Code section 1260 provides that an appellate court "may, if proper, remand the case to the trial court for such further proceedings as may be just under the circumstances." Remand is appropriate "if there is any reasonable possibility that the parties can fairly litigate and the trial court can fairly resolve the unresolved issue on remand. . . ." People v. Braxton (2004) 34 Cal.4th 798, 819. Here, no such reasonable possibility exists, due primarily to the lapse of time.

The time lapse in this case is considerably longer than the time periods for which limited remand was deemed appropriate in People v Johnson, supra, 38 Cal.4th at 1103-1104, making a reliable hearing on the facts impossible as a practical matter.

In People v. Johnson, supra, this Court remanded the matter where the lapse since jury selection had taken place was between 7 and 8 years. Id., 1101. Of the federal cases cited by the Johnson Court in which remand was ordered, none involved a time lapse as long as that involved here. Id., 1100-1101; Batson v. Kentucky, supra, 476 U.S. at 100 [trial was 2 years prior to reversal of the

judgment]; Williams v. Runnel (9th Cir. 2006) 432 F.3d 1102 [trial was held in March 1998, and remand was ordered in January 2006]; Paulino v. Castro (9th Cir. 2004) 371 F.3d 1083 [remand ordered 5 years after the state appellate court decision and a longer time after trial]; Fernandez v. Roe (9th Cir. 2002) 286 F.3d 1073 [remand was ordered about 7 years after trial]; United States v. Tindle (4th Cir. 1986) 808 F.2d 319 [remand after less than 4 years].)

In cases prior to People v. Johnson, supra, in which this Court considered and rejected remand, time lapses shorter than involved here were considered too long to allow a realistic chance of a meaningful hearing on remand. People v. Snow (1987) 44 Cal.3d 216, 226-227 [voir dire began approximately six years before reversal of judgment]; People v. Hall (1983) 35 Cal.3d 161, 170-171 [trial was less than 4 years before reversal of judgment]; People v. Allen (1979) 23 Cal.3d 286, 295, fn. 4 [trial held less than 3 years before reversal of judgment].)

Thus, the Batson error requires reversal.

II.

THE JURY VENIRE WAS IRREPARABLY TAINTED BY THE REMARKS OF PROSPECTIVE JUROR BERTHOUD

Prospective juror Berthoud gave a lengthy statement about his experience as a prison guard at a California Youth Authority facility, concluding that defendants sentenced to life imprisonment remained a threat, to guards and fellow inmates. He related an incident where a prisoner serving a life sentence beat a guard to death. RT 1700-01. After the trial court made some comments about Berthoud's statements regarding his CYA experiences, it asked if any juror had any questions about Berthoud's statements, and apparently no one responded. RT 1736: 24-26. The court then asked if any juror wished to comment on Berthoud's statements, and juror Dale responded that she did. RT 1737: 1-11. The court told her that it would talk to her in private. RT 1737: 12-13.

Respondent claims: "The trial court questioned her in private, and it does not appear to have been reported." RB 35. There is no foundation for the claim that she was, in fact, questioned in private. To the contrary, the absence of any reporter's transcript of private

questioning of the juror is proof that no questioning occurred. Penal Code section 190.9 requires that all proceedings in a capital case, including those in chambers, be "conducted on the record with a court reporter present" and that the reporter prepare and certify a transcript. The trial judge was an experienced judge and held many hearings in this case outside the presence of the jury, always with a reporter present and a transcript prepared. The absence of a transcript of any questioning of Juror Dale indicates that there was no such proceeding. Thus, the record does not support respondent's claim that the trial court insured that Juror Dale was not tainted by Berthoud's remarks.

III.

THE CLAIMED SIMILARITIES BETWEEN THE DEEBLE MURDER AND THE DELBECQ MURDER DID NOT JUSTIFY ADMISSION OF EVIDENCE OF THE LATTER MURDER IN HAWAII; THE ADMISSION OF THE EVIDENCE VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW

The prosecution of appellant for the murder of Ms. Deeble was totally dependent on the admission of evidence of the murder of Ms. Delbecq in Hawaii. Both the trial court and the prosecutor could not have made it clearer that, absent evidence of the Hawaii crimes,

"there is no case," "the case is over, finished." RT 145: 13-19, 1199: 1-9. The admissibility of that evidence turned on the claimed similarities between the two incidents. As we now show, respondent's and the prosecutor's claims of striking similarities is overblown, i.e., the similarities are either non-existent, common and generic to many crimes, or insufficiently established.

The prosecutor argued that there were 15 similarities between the crimes that were relevant to show a signature-like pattern. See CT 529-30; RB 43. The trial court properly found that two were irrelevant, i.e., that the crimes occurred on Monday night and that both women had the initials, M.E.D. RT 1187-88, 1200. A third, that the women were both realtors, was equally irrelevant, since it had no link to the crimes.

Of the remaining claimed similarities, five were very generic and common to burglaries and residential robberies: that the premises were ransacked and jewelry was missing; that there was no forced entry, the perpetrator having entered by removing a window screen; and that both women lived in first floor apartments.

Three other claimed similarities were generic and common to many homicides: that the women lived alone, were middle-aged or elderly, and were killed in their bedrooms.

Of the remaining four similarities claimed by the prosecutor, one was that "both women were bound at the wrist and ankles with telephone cords." RB 43. In fact, the evidence was that Ms. Deeble was found with both hands tied behind her back with a piece of cloth and a piece of telephone wire (RT 2011, 2054) and there were abrasions on her ankle that might have been a ligature mark. RT 2070. In contrast, Ms. Delbecq was not found bound in any way, although there were ligature-type marks on her wrists and ankles.

The next claimed similarity was that "the victims suffered beatings to the face that resulted in fractured noses." RB 43. In Ms. Deeble's case, there was only evidence of a single blow to the bridge of the nose (RT 2130), and the prosecution and defense pathologists differed on whether she had suffered a fracture. [12/] In Ms. Delbecq's

---

12. Dr. Fukumoto testified that Dr. Richards found a crescent in the area of the bridge of the nose that was consistent to Richards as a fracture of the bridge of the nose (RT 2130-31); yet Dr. Wolfe testified that the X -rays failed to confirm the claimed fracture. (continued...)

case, in contrast, there was evidence of a very severe beating all over the body (with bruising to the back side and top of her head and scalp, bruises and scrapes to her nose, bruising to the front and side of her neck, and bruises to her left shoulder and both breasts. RT 2293-94), and her nose was clearly fractured and her jaw abraided. RT 2298.

The next claimed similarity was that "both victims were strangled." RB 43. However, the strangulations could not have been more different. Ms. Deeble died from ligature strangulation, which was carefully planned and distinctive in its relative (what respondent terms "elaborate" (RB 122)) complexity – the victim was face-down towards the floor with her hands tied behind her back and with her neck in a makeshift noose hanging from a dresser drawer. RT 2011, 2045, 2054. In contrast, Ms. Delbecq died from a violent manual strangulation, which left substantial bruising to the front and sides of her neck, incise- type abrasions over the voice box, and fingernail marks on the neck, and which had resulted in a fracture of the hyoid bone and the small bone right above the voice box. RT 2294-96.

---

12. (...continued)
RT 2478.

Another similarity, not claimed by the prosecutor or relied upon by the trial judge but noted by respondent, was that "both women also suffered from incise wounds or wounds caused by a sharpened instrument." RB 51. In Ms. Deeble's case, there was a single injury, and it was a matter of great dispute between the prosecution expert and the defense expert as to its cause. Dr. Fukumoto testified that there was an incisional type cut to the left ear drum that was caused by a sharp or pointed instrument. RT 2127-29. Dr. Wolfe disagreed and testified that the injury to the left ear drum was characteristic of a ligature strangulation and did not indicate use of a sharp instrument. RT 2479-86. In Ms. Delbecq's case, in contrast, the evidence was undisputed she had been repeatedly attacked with a sharpened or pointed instrument. The Hawaii coroner testified that he found an incise wound caused by a sharpened instrument to the left side of her jaw, abrasions and scrapes caused by a sharpened instrument on her neck, on her chest, and on both of her breasts, and scrapes and bruises over both nipples. RT 2293, 2294. In addition, there was a puncture-type wound to the left lower chest caused by a pointed object. RT 2294-95.

The final claimed similarity in both cases is the sexual assault. In Ms. Deeble's case, the evidence of any assault was skimpy at best. There were some minor injuries to the labia, the vagina, and the rectum, i.e., bruises on the labia and shallow lacerations that were not deep within the vaginal vault and rectum, but rather just inside the openings. RT 2155-2157. There was a stain on her leg that appeared to be dried semen (RT 2070), and Dr. Wolff testified that the injuries to the vagina and rectum were "extremely minor." RT 2492. [13/] In his opinion, the minor injury could have been caused by insertion of a penis or a finger and was consistent with consensual sex. RT 2493-95, 2514. In contrast, the evidence was conclusive that Ms. Delbecq had been sexually attacked in an extremely violent manner. The Hawaii coroner found there were many injuries to her genital area such as abrasions and scraping of the skin consistent with having been caused by finger nails and bruising to the entrance of the vaginal cavity. RT 2295. In addition, there were extreme injuries to the

---

13. He described the injury as "small areas of removal of the vaginal mucosa with a small amount of hemorrhage in the areas of removal." RT 2492. He defined "small areas" as "microscopic." RT 2492.

vaginal and rectal areas. There were tears through the vaginal cavity, actually entering into the rectal cavity. RT 2295. One perforation of the vaginal wall was in the rectal area approximately two inches into the vaginal cavity, and the other in the abdomen and approximately three-four inches into the vaginal cavity. RT 2295, 2301-2302. It was clear that she had been sexually penetrated with a foreign object, because a metal hair mousse cannister was actually discovered in the latter perforation. RT 2295, 2301-02. Medical literature establishes that in 60% of women who have consensual sex, there can be microscopic injury to the vagina. RT 2495.

In contrast, whether there had been such a penetration in the case of Ms. Deeble – what the prosecution termed "the most signature aspect of this whole case" (RT 1190) – was a matter of great dispute. A can of hair mousse was found on top of the bed, among the covers (RT 2014), and a small white cap was found on the floor, which the police thought might fit the cannister. RT 2046-47. [14] A small amount of residue was found underneath the ridge on the mousse can. RT 2046. A presumptive test of that residue for blood resulted in a

---

14. It was never established that the cap did fit the cannister.

positive reaction. RT 2046-47. Such a test is not specific for blood. RT 2061. It is meant to be a quick test to rule out negatives. RT 2062. The test is not always accurate, because substances other than blood can react positively and the test can't distinguish between human blood and animal blood. RT 2061-62. That residue may have been sent to the Serology Laboratory for more definitive testing, but, if so, the results were never produced. RT 2062-63. [15]

Moreover, the state of the vaginal area did not support the theory that there had been a penetration with the can. Dr. Richards made no mention of finding blood in either the vagina or the rectum. RT 2145, 2157. [16] Dr. Wolff testified that any blood found was of a microscopic quantity invisible to the naked eye and was inconsistent with being the source of any blood on the mousse can. RT 2496-97.

Thus, the claimed similarities between the two homicides are overblown, at best. Many are generic, common to many crimes. As

---

15. There was also a substance that appeared to a police officer to be blood on the inside of the cap, but that substance was not tested. RT 2046-47, 2062.

16. If he saw any blood, he would have mentioned it. RT 2157.

to the cause of death, Ms. Deeble was strangled by use of a well-planned and "elaborate' ligature; in contrast, Ms. Delbecq was manually strangled in a very violent manner, causing bruises and abrasions and fingernail marks on her neck and breaking two bones, one above the voice box and the hyoid bone. As to physical assault, Ms. Deeble suffered a single blow to the nose that may or may not have caused a fracture; in contrast, Ms. Delbecq was severely beaten in many areas, and there clearly was a fracture of the nose. Moreover, it was a matter of great dispute whether Ms. Deeble had suffered a single wound to her ear from a sharp instrument, whereas it was undisputed that Ms. Delbecq had been attacked with such an instrument in many areas of the body, including her jaw, neck, chest, beasts, and nipples. Finally, as to a sexual assault – the critical key to the prosecution case – the forensic evidence did not support the theory that Ms. Deeble had been sexually assaulted, as opposed to consensual sex, whereas it was undisputed that Ms. Delbecq had been violently sexually assaulted, including penetration with a mousse can, leaving many forensically-validated injuries.

In order to warrant admission of other crimes evidence to prove

identity, the patterns and characteristics of the crimes must be "so unusual and distinctive as to be like a signature." People v. Kipp (1998) 18 Cal.4th 349, 370; People v. Ewoldt (1994) 7 Cal.4th 380, 403. In this case, the "signature" standard cannot be met because, as in People v. Alcala (1984) 36 Cal.3d 604, 632, "the alleged similarities break down under examination. Nor can the evidence be admitted to show a common scheme or plan, where the identity of the perpetrator is in dispute and the similarities between the crimes are not sufficiently distinctive to establish identity. People v. Ewoldt, supra, 7 Cal.4th at 405-406. Thus, the admission of the evidence of the Hawaii murder – what the prosecution described as "the heart of the case" (RT 1190) – over defense objections under Evidence Code sections 1101(a) and 352 was clearly erroneous and resulted in a trial that was so fundamentally unfair as to violate appellant's right to due process of law. E.g., Estelle v. McGuire (1991) 502 U.S. 62, 75; see also Henry v. Estelle (9th Cir. 1993) 993 F.2d 1242; McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378; Panzavecchio v. Wainwright (5th Cir. 1981) 658 F.2d 337. The error requires reversal.

THE TRIAL COURT'S ERROR IN ADMITTING EVIDENCE OF APPELLANT'S 1994 HAWAII CONVICTIONS FOR THE MURDER OF MURIEL DELBECQ AND BURGLARY OF HER HOUSE REQUIRES REVERSAL

A. The Facts

Appellant had several prior felony convictions that could have potentially been used for impeachment when he took the stand. Four were theft-related and thus very probative on the issue of honesty and veracity – convictions for auto theft and for receiving stolen property in 1988, for auto burglary in 1984, and for robbery in 1994. RT 2609. The rest were not theft-related and did not go to honesty and veracity, but qualified for impeachment only because they were crimes of moral turpitude: a 1987 conviction of ex-felon with a gun, and five other 1994 convictions arising out of the Delbecq case in Hawaii, for murder, kidnaping, burglary, and sexual assault (2 counts).

Defense counsel did not make a motion in limine to limit impeachment of appellant with his prior convictions, should he take the stand. RT 2606. The stated reason was that counsel was under the mistaken impression that the court's ruling on a Penal Code

section 995 motion precluded the prosecution from using evidence of appellant's Hawaii convictions for impeachment. RT 2605.[17] After appellant testified, the prosecutor's very first question on cross-examination was "Mr. Edwards, on March 10th of 1994, you were convicted of the murder of Muriel Delbecq in the state of Hawaii . . . ." RT 2605: 88-10. Defense counsel objected and moved to strike, [18] and a bench conference was held, where counsel sought to exclude the evidence of the Hawaii convictions. RT 2605: 11-17.

In deciding what convictions would be admitted under People v. Castro (1985) 38 Cal.3d 301, the trial court selected only one theft-related conviction involving honesty and integrity (the 1984 auto burglary) and allowed two other convictions involving only moral turpitude (the 1994 murder and burglary). In selecting the latter two, it prejudicially chose the convictions most similar to the present charge of murder with a special circumstance of commission during a

---

17. In that ruling, the Court dismissed a prior murder special circumstance allegation involving the Hawaii murder on the basis of insufficient evidence presented at the preliminary hearing.

18. The court never ruled on the motion to strike, leaving before the jury the stated fact that the 1994 conviction was for the murder of Ms. Delbecq.

burglary. Instead, the court should have chosen the three other theft-related convictions, or the kidnaping conviction, all of which were dissimilar to the present charges.

When the prosecutor continued his questioning on the subject after the break to rule on the defense motion, the court let the prosecutor establish that the murder and burglary convictions were from 1994 and from the State of Hawaii (RT 2616: 4-12), thus solidifying the fact that they involved Ms. Delbecq. [19/] Thus, there could be no doubt in the jurors' minds that appellant had been found guilty of the murder and burglary of Ms. Delbecq -- either by a jury like themselves or by his own guilty plea. Moreover, the prosecution's theory was that, due to the similarities between the crimes, the perpetrator of the Hawaii crimes had to be the perpetrator of the present offenses. Thus, evidence that appellant was guilty of the Hawaii crimes was the de facto equivalent of a directed verdict on the present charges, relieving the prosecution of its burden of proof and rendering the trial so fundamentally unfair as to deny appellant

---

19. The prosecutor had previously told the jury in his opening statement that appellant had been arrested for the Delbecq murder. RT 1961.

due process of law under the state and federal constitutions.

B. The Law

While a prior conviction for conduct involving moral turpitude that has some bearing on the veracity of a witness in a criminal proceeding may be admissible to impeach, admission is subject to exercise of the trial court's discretion under Evidence Code section 352. E.g., People v. Harris (2005) 37 Cal. 4th 310, 337. The court must exclude evidence of the prior conviction when its probative value on credibility is substantially outweighed by the risk of undue prejudice. E.g., People v. Mendoza (2000) 78 Cal. App. 4th 918, 925.

On the probative value side, an important factor is the degree to which the prior conviction reflects on the issue of honesty or veracity. Id. "If a court determines that a prior conviction involves truthfulness it must consider the degree of probative value it has on that issue..." People v. Woodward (1979) 23 Cal.3d 329, 336. "No one denies that different felonies have different degrees of probative value on the issue of credibility." People v. Rollo (1977) 20 Cal.3d 109, 118. As the late Chief Justice Burger has pointed out, "In common human experience acts of deceit, fraud, cheating, or stealing, for example, are

universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence ... generally have little or no direct bearing on honesty and veracity." Gordon v. United States (D.C. Cir. 1967) 383 F.2d 936, 940. In appellant's case, his murder conviction – although involving moral turpitude – had no direct bearing on his honesty or integrity, and thus its probative value on his credibility was limited. [20] His burglary conviction was similarly limited in probative value, because (as the trial court conceded) the court did not know whether it was for entry with intent to commit larceny, a theft-related crime, or with intent to commit some other crime, both of which constitute burglary under California Penal Code section 459. [21]

On the prejudicial effect side, an equally important factor is whether the prior conviction is for the same or similar conduct as the

---

20. Cf. People v. Woodard, supra, 23 Cal. 3d at 340: "The voluntary manslaughter conviction established the commission of a violent act, which may, at the most, have indicated a character for violence...It cannot be inferred from the commission of a violent act that he was also disposed to falsify."

21. On the other hand, the 1984 burglary conviction admitted for impeachment was for auto theft. RT 2610: 13-14.

charged offenses. When the prior convictions involve the same crimes charged against the defendant, the risk of undue prejudice is substantial. As Chief Justice Burger pointed out, "Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe if he did it before' he probably did so this time.' " Id. Moreover, "[t]he exclusion of a similar prior conviction is especially warranted when the defendant has also suffered a prior conviction or convictions for conduct dissimilar to that for which he is on trial, as the dissimilar crimes are available as grounds of impeachment and exclusion of the similar one is the wiser path." People v. Rist (1976) 16 Cal. 2d 211, 219; emphasis in original. In Rist, this Court held it was error in a robbery prosecution to admit a prior robbery conviction where a prior forgery conviction was available for impeachment, whereas in People v. Hinton (2006) 37 Cal. 4th 839, the Court held it was not error in a murder prosecution to admit prior convictions for murder and attempted murder, "[i]nasmuch as defendant had no other prior felony convictions available for impeachment." Id., at 888.

A separate consideration on the prejudice side of the analysis is whether admission of the prior conviction risks a confusion of the issues. People v. Antick (1975) 15 Cal. 3d 79, 92. The concern is that, "[d]espite limiting instructions, the jury is likely to consider this evidence for the improper purpose of determining whether the accused is the type of person who would engage in criminal activity." Id. "This is particularly likely where the prior conviction is for the same crime as that which forms the charges against the defendant." Id.

It is against this established legal framework that the Court must measure the trial court's ruling on impeachment of appellant. After appellant had testified on direct and was offered to the prosecutor for cross-examination, the first question was whether he had been convicted on March 10, 1994 of "the murder of Muriel Delbecq in Hawaii." RT 2605: 8-10. When defense counsel objected, the trial court noted the absence of a prior in limine motion and then stated:

> "If I was asked to prohibit the prosecutor from impeaching Mr. Edwards under Castro, et al., I would have denied the motion. It is a crime of moral turpitude, the worst type of moral

> turpitude. Highly relevant on credibility. I don't know how I say, okay, Mr. Brent [the prosecutor], you can't use it."

RT 2607: 8-13. When defense counsel pointed out the availability of other prior convictions besides the murder for purposes of impeachment, the court responded, "I am dealing with the last objection [to the murder conviction] first, and then we will take on - - do you want to be heard any further on the last objection." RT 2607: 23-25. When defense counsel then argued that once the jury heard that appellant had been convicted of the Hawaii crimes, "they are going to assume once a guy has done a crime like this, he has – must have done the one here too," RT 2608: 5-8, the trial court's response was:

> "I must be missing something here. I don't follow the logic of your argument . . . And if requested to impeach, I would have admitted it. There is just no question in my mind I would have permitted impeachment with this felony. Would you like to be heard on what other felonies did you have in mind."

RT 2608: 16-23. The court then ruled the 1994 burglary admissible:

> "I think that the prosecutor for impeachment purposes should be permitted to get into the fact that he was also convicted of a burglary related to the homicide because that bears heavily on credibility grounds, even though it is a much less serious crime than murder. It is moral

> turpitude. And I am assuming the burglary was with intent to commit theft or robbery as well as anything else. So that is a very heavy factor in determining admissibility.

RT 2612: 22-2613: 4. Finally, the court ruled the 1984 auto burglary admissible, and the rest of appellant's convictions inadmissible. RT 2613: 15-2614: 21. The trial court's rulings were riddled with errors.

First, as to the murder conviction, the court failed to engage in the weighing process required under Evidence Code section 352 before ruling the conviction admissible for impeachment purposes. Without any consideration of the other relevant factors, the court jumped to the flat-out position of "It's a crime of moral turpitude, the worst kind of moral turpitude. Highly relevant on credibility. I don't know how I could say, okay, Mr. Brent, you can't use it." RT 2607: 10-13. Having done so, the court closed its mind on the subject and never wavered from that position. The court's clear failure to perform the weighing process and to consider all the factors before ruling whether the conviction was admissible is a substantial error.

Second, although the court stated that the murder conviction was highly relevant on credibility, it ignored the critical fact that the

probative value of such a violent crime conviction is limited because the offense does not involve prevarication or dishonesty. Contrary to the trial court's ruling, the fact that murder may involve "the worst type of moral turpitude" (RT 2607) does not make the conviction "highly relevant on credibility." Id.

Third, the court ignored the fact that appellant's murder conviction and the present murder charge against him were identical, not just similar..

Fourth, the court failed to consider the availability for impeachment of other felony convictions that were dissimilar to the murder charge and were more probative on the issue of appellant's credibility. There was appellant's 1988 conviction for auto theft, his 1988 conviction for receiving stolen property, and his 1994 conviction for robbery. Each of these theft-related crimes bears directly on the issue of veracity, unlike the crime of murder. Indeed, the trial court appeared to be unaware that the law required it to consider the availability of other prior convictions for impeachment when ruling on the admissibility of the murder conviction. When defense counsel pointed out that the prosecutor had "a whole list" of

prior convictions available, the court refused to consider the other convictions as alternatives to the murder conviction, stating "I am dealing with the last objection, and then we will take on - - do you want to be heard any further on the last objection?" RT 2607: 23-25.

Finally, the court failed to consider the risk of confusion of the issues. The jury was instructed that it could not consider that appellant had committed the Hawaii crimes unless convinced that the evidence regarding those crimes established appellant's culpability by a preponderance of the evidence. CT 936. On the other hand, the admission of evidence of the Hawaii prior conviction showed that he had either been found guilty of that crime beyond a reasonable doubt, or had knowingly and voluntarily pleaded guilty to the crime. Rather than recognize the extreme risk of prejudice and confusion of the jury raised by this dichotomy, the trial court stated that "[t]he only negative or meaning in the defense favor on the murder is that it is an identical crime, but that is offset by the fact that they have already heard the 1101(B) evidence. The test is the same." RT 2613: 20-23 (emphasis added). The court was wrong. While the jury was instructed that it could not consider the Hawaii crimes evidence

unless proved by a preponderance of the evidence, admission of the evidence of the Hawaii convictions made that analysis unnecessary, since the convictions conclusively established his guilt of those crimes.

As to the 1994 burglary conviction, the court also committed a number of errors. First, it failed to consider whether a third prior conviction was necessary for impeachment. Second, it failed to consider the similarity of that burglary conviction to the allegation that appellant had committed the present murder during the commission of a burglary. Third, it failed to consider the availability of other prior convictions that were dissimilar to the burglary special circumstance and were even more probative on credibility because they were theft-related.[22/]

The trial court's erroneous admission of the 1994 murder and burglary convictions could not be more prejudicial. In any case

---

22. In fact, the court admitted that it did not even know whether the burglary was for entering with intent to only commit a non-theft crime. Its decision to admit evidence of the conviction was based on its "assuming, a dual purpose; maybe the purpose of going in was to steal and then a second intent arising. Those are things I don't have any information of." RT 2614: 9-13.

where a defendant is charged with murder during the course of a burglary, the prejudicial effect of allowing impeachment with a prior murder conviction and a prior burglary conviction is enormous because any juror would be hard pressed not to conclude that the defendant had a propensity for such crimes – "if he did it before, he must have done it again." In this case the prejudicial effect was multiplied by the importance of the evidence of the Hawaii convictions to the prosecutor's theory of the case.

The prosecutor's theory was that the murder of Ms. Deeble was so similar to that of Ms. Delbecq that the perpetrator had to be the same person. In pretrial proceedings, both the trial court and the prosecutor had agreed that, without evidence of the Hawaii crimes, "there is no case" (RT 145: 13-19); "the case is over, finished" (RT 1199: 1-9); "there is going to be an acquittal" (RT 1942: 6-11). In closing argument, the prosecutor rested his entire case on that theory, telling the jurors that they had to answer two questions:

> "Number one is did Mr. Mark Edwards kill Muriel Delbecq in Hawaii? That is a simple question to answer. And, if he did, does that give you enough information to conclude he also killed Marjorie Deeble? And obviously, I submit to you it does.

RT 2913: 14-22. The reason why question number one, whether appellant murdered Ms. Delbecq, turned out to be "a simple question to answer" was the erroneous admission of appellant's 1994 convictions of murder and burglary in Hawaii.

Thus, evidence that appellant was guilty of the Hawaii crimes was the de facto equivalent of a directed verdict on the present charges (United States v. Gaudin (1995) 515 U.S. 506, 514; Sullivan v. Louisiana (1993) 508 U.S. 275, 277), and improperly relieved the prosecution of its burden of proof. (In re Winship (1970) 397 U.S. 358, 364; Sandstrom v. Montana (1979) 442 U.S. 510, 513). The admission of the evidence rendered appellant's trial so fundamentally unfair as to violate his right to due process of law under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Estelle v. McGuire (1991) 502 U.S. 62; Colley v. Sumner (9th Cir. 1986) 784 F.2d 984, 990; Terranova v. Kinchloe (9th Cir. 1988) 852 F.2d 424, 428-29; People v. Valentine (1986) 42 Cal.3d 170, 177.

Thus, the error in admitting evidence of the Hawaii convictions requires reversal.

VB.

THE TRIAL COURT'S ERRONEOUS EXCLUSION OF TESTIMONY OF TWO DEFENSE WITNESSES REGARDING APPELLANT'S PREVIOUS ALCOHOLIC BLACKOUTS REQUIRES REVERSAL

A. The Facts

Vincent Portello testified that one evening in 1991 or 1992, he, appellant, and appellant's girlfriend were out drinking heavily. As appellant drove to get more alcohol, the girlfriend began to hit him and threaten him with a screwdriver, and appellant lost control of the car. RT 2713-2715. Portello testified that the following day he mentioned the incident to appellant, and then was asked whether appellant had stated he had no recall of the incident. RT 2715-16. The prosecution's hearsay objection was sustained. RT 2716.

Janice Hunt testified that on an evening in 1992, she asked appellant, who had been drinking heavily, to buy some groceries. The next morning she found the groceries, including some refrigerated items, in the car appellant had driven to the store. RT 2644-45. When she was asked what appellant said when she confronted him with that fact later that day, the prosecution's hearsay objection was

sustained by the trial court. RT 2647.

B. The Law

Defense counsel proffered that each witness would have testified that in response appellant had stated that he had no memory of the previous night's events, and argued that these responses were admissible under Evidence Code section 1250(a). RT 2716, 2545. That section provides that a statement of the declarant's then-existing state of mind is not inadmissible as hearsay when offered to prove the declarant's state of mind at that time when it is an issue in the action. Respondent does not dispute that the excluded evidence was a statement of appellant's state of mind at the time it was made, i.e., a lack of memory of the previous night's happenings. Respondent does not dispute that defendant's lack of memory at that time, evidencing an alcoholic blackout, was circumstantial evidence corroborating appellant's testimony that he had no memory of the Deeble or Delbecq killings and, if he was involved in those killings, he had been in an alcoholic blackout at the time. Rather, respondent claims the evidence was inadmissible under Evidence Code section 1250(b), which prohibits a statement of memory to prove the fact remembered.

RB 79. The argument is meritless.

Section 1250(b) would prohibit admission of a statement "I remember my girlfriend hitting me and my losing control of the car" to prove the fact remembered, i.e., that the girlfriend had hit him and he had lost control of the car. It does not prohibit admission of a statement "I cannot remember my girlfriend hitting me or my losing control of the car" because the statement is not offered to prove that the girlfriend did (or did not) hit him or that he did (or did not) lose control of the car. Thus, the trial court erred in excluding the defense evidence.

Moreover, the error was highly prejudicial. The prosecutor urged the jury to dismiss appellant's testimony that he had suffered a blackout regarding Ms. Deeble's death:

> And so the only words, you have, the only person that knows whether or not that (sic) he had a blackout was Mr. Edwards. And you are back to the same issue, why do you believe Mr. Edwards?

RT 2944.

If the trial court had not erred, the answer, of course, would be that he should be believed because two witnesses confirmed that he had a

history of alcoholic blackouts. That testimony was highly credible, since at the times that appellant had stated he didn't remember the previous night's events, he had no reason to prevaricate or feign a lack of memory.

Thus, the court's erroneous exclusion of critical defense evidence requires reversal.

VI.

THE USE OF HEARSAY EVIDENCE REGARDING THE AUTOPSY FINDINGS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AND REQUIRES REVERSAL OF THE CONVICTIONS, SPECIAL CIRCUMSTANCES FINDINGS, AND DEATH SENTENCE

The autopsy of Ms. Deeble was conducted by Dr. Richards. RT 2122. By the time of appellant's trial, Dr. Richards had retired. RT 2122. Instead of calling Dr. Richards to testify as to his autopsy findings, the prosecutor elected to call Dr. Fukumoto, a pathologist and member of the same medical group as Dr. Richards. RT 2121. The purpose of calling Dr. Fukumoto was, in the prosecutor's words, "to go through with you some of Dr. Richards' specific findings." RT 2124. He then had Dr. Fukumoto devote the bulk of his testimony on

direct, re-direct, and re-re-direct examination to telling the jury what Dr. Richards had set out in his written autopsy report. RT 2126-39, 2159-61, 2163-64. As we now show, this hearsay evidence violated appellant's constitutional right to confront witnesses and requires reversal.

A. The Court Must Decide The Merits Of Appellant's Confrontation Claim

Defense counsel did not object to Dr. Fukumoto's testimony regarding Dr. Richards' findings. However, that is not a procedural bar, and the Court must decide the constitutional issue on the merits. The Court has made clear that

> "[t]hough challenges to procedures or to the admission of evidence normally are forfeited unless timely raised in the trial court, 'this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change.' "

People v. Black (2007) 41 Cal. 4th 799, 810-11, quoting People v. Turner (1990) 50 Cal. 3d 668, 703; see also People v. Chavez (1980) 26 Cal. 3d 334, 350, fn. 5 (counsel's failure to object to admission of hearsay statements did not forfeit a claim of error under the Confrontation Clause, because a number of appellate court cases had

upheld the admissibility of such statements in the face of similar challenges).

Appellant's trial was held in 1996. In 1992, this Court had held that the testimony of a pathologist regarding the contents of an autopsy report prepared by another pathologist, who had since passed away, did not violate the Confrontation Clause because it was admitted "under a firmly rooted exception to the hearsay rule that carries sufficient indicia of reliability to satisfy the requirements of the confrontation clause." People v. Clark (1992) 3 Cal. 4th 41, 158, see also People v. Beeler (1995) 9 Cal. 4th 953, 979 (testimony of Dr. Fukumoto, the prosecution witness in this case, regarding the autopsy findings of another pathologist did not violate the confrontation clause).

In 2004, the Supreme Court issued its decision in Crawford v. Washington (2004) 541 U.S. 36. As this Court has recognized, Crawford "abandoned" the indicia-of-reliability standard used by this Court in Clark. See People v. Geier (2007) 41 Cal. 4th 555, 597. Because of this wholesale change in the law, a series of Court of Appeal decisions have held that a Crawford claim is not waived or

forfeited by the failure to make a Sixth Amendment objection in the trial court. See People v. Johnson (2004) 121 Cal. App. 4th 1409, 1411, fn. 2 ("the failure to object was excusable, since governing law at the time of the hearing afforded scant grounds for objection"); People v. Butler (2005) 127 Cal. App. 4th 49, 54, fn. 1 (same); People v. Saffold (2005) 127 Cal. App. 4th 979, 984 ("any objection would be unavailing under pre-Crawford law"); People v. Thomas (2005) 130 Cal. App. 4th 1202, 1208 (same).

Thus, the Court should decide the merits of appellant's claim.

B. Dr. Fukumoto's Testimony Violated The Confrontation Clause

The Sixth Amendment, made applicable to the states by the Fourteenth Amendment (Pointer v. Texas (1965) 380 U.S. 400, 401, provides: "In all criminal prosecutions, the accused shall enjoy the right . .. to be confronted with the witnesses against him." The right of confrontation has been construed to include not only the right to face-to-face confrontation, but also the right to meaningful and effective cross-examination. Davis v. Alaska (1974) 415 U.S. 308, 315-316.

Even prior to Crawford, supra, 541 U.S. 36, United States Supreme Court decisions suggested that the Confrontation Clause requires the prosecution to present the findings of its forensic examiners through live testimony at trial. See California v. Trombetta (1984) 467 U.S. 479, 490 ["defendant retains the right to cross-examine the law enforcement officer who administered the Intoxilyzer test, and to attempt to raise doubts in the mind of the fact-finder whether the test was properly administered"]; Diaz v. United States (1912) 223 U.S. 442, 450 [autopsy report and other pretrial statements, characterized as "testimony," "could not have been admitted without the consent of the accused . . . because the accused was entitled to meet the witnesses face to face"].

For a few decades preceding Crawford, however, an out-of-court statement could be admitted over a Confrontation Clause objection if the witness was unavailable to testify and the statement carried with it adequate "indicia of reliability." Ohio v. Roberts (1980) 448 U.S. 56, 66. In order to meet this test, the evidence had to either "fall within a firmly rooted hearsay exception" or "have particular guarantees of trustworthiness." Ibid.

Following Crawford, however, the fact that evidence falls within a firmly rooted hearsay exception or has guarantees of trustworthiness is not germane to the Confrontation Clause analysis. Crawford expressly overruled Ohio v. Roberts and divorced the law of hearsay from its Confrontation Clause jurisprudence.

In Crawford, the Supreme Court affirmed that the Sixth Amendment guaranteed a defendant's right to confront those "who 'bear testimony against him.'" and that a witness' testimony against a criminal defendant is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. 541 U.S. at 51, 54.

In the controlling case of Melendez-Diaz v. Massachusetts (2009) ____ U.S. ____, 129 S.Ct. 2527, the High Court faced the issue whether a defendant is denied his right to confrontation when, rather than calling a laboratory analyst to testify to the tests that were performed and the results of those tests, the State elected to rely on a certificate of the analyst stating that the test results showed that the substance submitted contained cocaine. The Court held

"under our decision in Crawford the analysts' affidavits were

> testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "'be confronted with'" the analysts at trial. Crawford, supra, at 54."

129 S.Ct. at 2532.

The Court stated that the certificates came under Crawford, for two reasons. First, they were clearly affirmations of fact:

> "The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine – the precise testimony the analysts would be expected to provide if called at trial. The 'certificates' are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.' Davis v. Washington, 547 U.S. 813, 830 (2006) (emphasis deleted)."

Second, the certificates were "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" Id., at 2536, quoting Crawford, at 52.

Under Melendez-Diaz, it is clear that testimony regarding Dr. Richards' autopsy report is testimonial. The report was clearly made under circumstances which would lead an objective witness to believe that the statement would be available for use at a later trial. Coroners

and deputy coroners whose primary duty is to conduct inquests and investigations into violent deaths are designated as peace officers under California law. Penal Code section 830.35(c). The purpose of an autopsy is to determine the circumstances, manner, and cause of violent, sudden or unusual deaths. Gov. Code sec. 27491 [23]; Dixon v. Superior Court (2009) 170 Cal.App.4th 1271, 1277 ("It is through the coroner and autopsy investigatory reports that the coroner 'inquire[s] into and determine[s] the circumstances, manner, and cause' of criminally related deaths.") The findings resulting from the

---

23. Government Code section 27491 provides, in pertinent part:

> "It shall be the duty of the coroner to inquire into and determine the circumstances, manner, and cause of all violent, sudden or unusual death; . . . known or suspected homicide . . .; . . . deaths due to . . . strangulation . . .; death in whole or in part occasioned by criminal means; . . . deaths under such circumstances as to afford a reasonable ground to suspect that the death was caused by the criminal act of another . . . . Inquiry pursuant to this section does not include those investigatory functions usually performed by other law enforcement agencies."

autopsy must be "reduced to writing" or otherwise permanently preserved. Gov. Code sec. 27491.4. Upon determining that there are reasonable grounds to suspect that a death "has been occasioned by the act of another by criminal means," the coroner must "immediately notify the law enforcement agency having jurisdiction over the criminal investigation." Gov. Code sec.27491.1. Officially inquiring into and determining the circumstances, manner and cause of a criminally related death is certainly part of a law enforcement investigation. Dixon, supra, 170 Cal.App.4th at 1277. As this Court observed in Mar Shee v. Maryland Assurance Corp. (1922) 190 Cal. 1, 4, the primary purpose of a coroner's inquest "is to provide a means for prompt securing of information for use of those who are charged with the detection and prosecution of crime."

These circumstances, coupled with the fact that Dr. Richards' report was prepared in the midst of a homicide investigation and a homicide detective who was investigating the death was present at the autopsy (Government Code section 27491), establish that the autopsy report was testimonial. As with the certificates at issue in Melendez-Diaz, the autopsy report constitutes a "solemn declaration or

affirmation made for the purposes of establishing or proving some fact," namely the 'circumstances, manner and cause' of Ms. Deeble's death. Moreover, it plainly was "made under circumstances which would lead an objective witness reasonably to believe that would be available for use at a later trial." Melendez-Diaz, supra, 129 S.Ct. at 2536. [24/]

---

24. Following Melendez-Diaz, a number of appellate courts have found autopsy reports prepared in cases of suspected homicide to be testimonial statements. For example, in Wood v. State (Tex..App. 2009) 299 S.W.3d 200, a Texas appellate court held that while not all autopsy reports are categorically testimonial, where the autopsy was conducted in a suspected homicide and homicide detectives were present during the autopsy, the pathologist preparing the report would understand that the report containing her findings and opinions would be used prosecutorially. The autopsy report thus "was a testimonial statement and [the pathologist who authored the report] was a witness within the meaning of the Confrontation Clause." Id., at 210; see also Martinez v. State, 2010 Tex.App.LEXIS 2124 *15 [agreeing with Wood].

The North Carolina Supreme Court found that the United States Supreme Court in Melendez-Diaz "squarely rejected" the argument that an autopsy report was not "testimonial," and held that evidence of forensic analyses performed by a non-testifying forensic pathologist and a non-testifying forensic dentist violated the defendant's right to confrontation. State v. Locklear (2009) 363 N.C. 438, 452 [681 S.E.2d 293]; see also State v. Johnson (Minn.App. 2008) 756 N.W.2d 883, 890 [pre-Melendez-Diaz case holding that autopsy report prepared during pendency of homicide investigation was testimonial]; State v. Bell (Mo.App. 2009) 274 S.W.3d 592, 595

(continued...)

Moreover, the fact that Dr. Fukumoto was available for cross-examination did not satisfy defendant's right of confrontation. Where, as here, an expert bases his testimony on statements by another and discloses those statements to the jury, Crawford requires that the defendant have the opportunity to confront the individual who issued the statements. Substituted cross-examination is not constitutionally adequate. (See Minookin, Expert Evidence and the Confrontation Clause After Crawford v Washington (2007), 15 J.L. & Poly at 791, 834 ["Crawford's language simply does not permit cross-examination of a surrogate when the evidence in question is testimonial."] Moreover, "any expert's opinion is only as good as the truthfulness of the information on which it is based." People v. Ramirez (2007) 153 Cal.App.4th 1422, 1427. "[I]f the [expert's] opinion is only as good as the facts upon which it is based, and if those facts consist of testimonial hearsay statements that were not subject to cross-examination, then it is difficult to imagine how the defendant is expected to 'demonstrate the underlying information [is]

---

24. (...continued)
[same].

incorrect or unreliable."].) Seaman, Triangular Testimonial Hearsay, The Constitutional Boundaries of Expert Opinion Testimony (2008) 96 Geo. L.J.) 827, 847-848 As the court observed in Melendez-Diaz, the prosecution's failure to call the lab analysts as witnesses prevented the defense from exploring the possibility that the analysts lacked proper training or had poor judgment and from testing their "honesty, proficiency, and methodology." 129 S.Ct. at 2538. The same is true here. The prosecution's failure to call Dr. Richards as a witness prevented the defense from exploring the possibility that he lacked proper training or had poor judgment and from testing his honesty, proficiency, and methodology.

Thus, Dr. Fukumoto's testimony regarding the facts set forth in Dr. Richard's autopsy reports violated appellant's rights under the Sixth and Fourteenth Amendments, as did Dr. Fukumoto's testimony regarding his own opinions based on the autopsy report. As to the latter, it is no answer that the facts from the autopsy were not offered for the truth of the matter stated, but only as the basis for Dr. Fukumoto's opinions. The jury was never instructed that the autopsy facts were admitted for a limited purpose and could not be considered

for the truth of the matter stated. Indeed, the jurors were told that, in evaluating the opinion of an expert like Dr. Fukumoto, they were to consider "the facts and other matters upon which it was based." CT 940. In other words, the jury was told, in effect, that the expert's opinions were dependent upon the accuracy of Dr. Richard's autopsy findings and they should consider whether those findings were accurate.

C. The Constitutional Violation Requires Reversal Of The Conviction, Special Circumstance Findings, And Death Sentence

The confrontation violation requires reversal, unless the prosecution can show "beyond a reasonable doubt that the error complained of did not contribute to the verdicts obtained." Chapman v. California (1967) 386 U.S. 18, 24. Dr. Richards' autopsy findings played a key role in the guilt trial and clearly contributed to the verdicts.

In the guilt phase, Dr. Fukumoto testified at length during direct examination about Dr. Richards' report of the autopsy of Ms. Deeble. He testified that Dr. Richards made the following findings in his autopsy report:

1. There was bleeding in the whites of the eyes. RT 2126-27

2. There were injuries to the ears – the internal exam showed extensive hemorrhage in the middle ears; tearing was noted in the right ear drum; a break in the left ear drum, which Dr. Richards described as incisional in type, was caused by a sharp instrument or an instrument with a point. RT 2127.

3. There were two scratch-like lacerations on the right ankle, which Dr. Richards described as going from bottom to up and as being caused by wires coming together and causing the injury. RT 2129-30.

4. There was a finding of marked engorgement; marked blood vessel statis or presence of blood in the neck, upper neck and face area. RT 2130.

5. There was a crescent in the area of the bridge of the nose which Dr. Richards said was consistent with fracturing of the nose. RT 2130-31.

6. There was an abraided laceration in the left chin area. RT 2131.

7. The internal examination showed numerous petechia, pinpoint hemorrhaging in the scalp and muscle tissue. RT 2132.

8. The subarachnoid fluid was bloody throughout; there was some layering of blood on the dura; and some blood clot on the inner surface of the dura. RT 2133.

9. There was no broken hyoid or other bone in the neck. RT 2133.

10. There was fresh bleeding in the tissues close to the tail of the pancreas. RT 2135.

11. There was food untouched by digestion. RT 2136.

12. There were bruises on the labia and on the vaginal vault; there was hemorrhage and laceration in the area of the posterior fourchette. RT 2137.

13. The anus was dilated.

14. There were mucosal lacerations of the rectum, including tearing of the inner covering of the rectum within the dilated anus. RT 2137.

15. The cause of death was asphyxiation due to ligature strangulation. RT 2139.

On redirect, Dr. Fukumoto again testified to the findings from Dr.. Richards' report of the autopsy, including the following:

1. There was no tissue response in the area of the vagina. RT 2159.

2. Dr. Richards said there "is" a fracture of the nose, not "may be." RT 2160.

3. An area extending from the mouth over to the left cheek appeared to have a residue of adhesive tape. RT 2160.

In his closing argument in the guilt phase, the prosecutor placed great reliance on Dr. Fukumoto's testimony regarding Dr. Richards' findings. First, he reminded the jury that Dr. Richards

found microscopic injuries to the rectal and vaginal areas. RT 2905. Then, in his argument to show the claimed similarities between the two murders, the very crux of the prosecution case, he relied on numerous findings by Dr. Richards:

a) ligature marks on Marjorie Deeble's ankles. RT 2921.

b) a sharp instrument was used to cut her ear ("Dr. Richards says . . . in speaking of the eardrums on the left ear on the left side, the tearing is sharp, that is, incisional in its aspect"). RT 2923.

c) her nose was fractured. RT 2924-25; see also RT 2935.

d) her head was swollen. RT 2925.

e) there were injuries to her pancreas. RT 2925. [25] ("Remember the pancreas is that organ that is deep in. It takes severe beating to injure it.")

f) the cause of her death was strangulation. RT 2925-26.

g) her eyes had petechial hemorrhaging. RT 2928.

h) her ear drums exploded. RT 2928.

i) "the injuries that were visible to Dr. Richards' eyes." RT 2934.

j) there was residue on her face. RT 2935-36; see also RT 3097.

---

25. He termed Items c) - e) above "significant similarities." RT 2925.

Finally, in order to prove its theory of torture-murder and the torture special circumstance, the prosecution placed its primary reliance on the claim that appellant had sexually penetrated Ms. Deeble with the mousse can and had penetrated her ear with a sharp or pointed object. The defense expert, Dr. Wolff, had testified that the evidence did not support either of the claimed penetrations. The prosecutor relied on Dr. Richards' autopsy findings to defeat the defense expert's testimony. As to the sexual penetration, he stated:

> "They avoided those mousse cans like the plague. They have a doctor talking about how the microscopic injuries to Mrs. Deeble would not have left any blood."
>
> When asked then what about the injuries that were visible to Dr. Richards' eyes? Well, there weren't any of those.
>
> Dr. Richards is wrong. That is the best they can do on this.

RT 2933: 22 - 2934: 4. As to the injuries to the ear, he stated:

> "Now, the defense puts on a witness to say that they could have been tearing or it could have been a sharp instrument. We can't know which.
>
> "Well, the autopsy surgeon who did the autopsy, who is experienced in violent death autopsies, says it is not. He talks about other injuries to the ear being tearing. He differentiates between

> the two. But he said the one injury was from a sharp instrument. Okay, again, you are going to have to determine who you believe on that."

RT 2923: 22 - 2924: 5.

After the first penalty jury resulted in a mistrial, there was a second penalty trial, where Dr. Richards' autopsy findings again played a prominent role and the prosecution again relied on Dr. Fukumoto to testify as to "some of Dr. Richards' findings." RT 5185: 23-24. Dr. Fukumoto testified as to the following findings by Dr. Richards from the Deeble autopsy:

1. There was extensive bleeding in the areas of the eyes and face. RT 5188.

2. There were petechial hemorrhages in the eyes and facial areas and inside the brain. RT 5188.

3. There was perforation of both eardrums; the left was a torn eardrum, where the pressure was so great it broke, it actually tore; the right had a sharp break which Dr. Richards described as incisional, meaning caused by a sharp instrument. RT 5189.

4. There were ligature marks down around the ankles. RT 5191.

5. There were ligature marks on the wrists. RT 5191.

6. There was a scratch or mark on one of the ankles that was caused by a wire or a ligature itself. RT 5191-92.

7. There was evidence of blunt force trauma resulting in the swelling of the face, bleeding around the eyes, and a broken nose. RT 5192.

8. There was marked engorgement of the facial area. RT 5193.

9. There was bleeding inside the muscle area of the skull, inside the skull, a subarachnoid hemorrhage and an area of subdural hemorrhage. RT 5193.

10. The hyoid bone was not broken. RT 5194.

11. There was bleeding in the area of the pancreas. RT 5194-95.

12. There was dilation of the anus. RT 5195.

13. There was bruising of the vaginal wall with small lacerations. RT 5195.

14. There were small lacerations of the mucous membrane covering the anus and rectum. RT 5195.

15. The cause of death was asphyxiation due to a ligature strangulation. RT 5196.

16. There was a substance Dr. Richards described as consistent with adhesive tape in the area of the mouth. RT 5197.

In his closing argument seeking the death penalty, the prosecutor relied on the following of Dr. Richards' findings in urging the jury to sentence appellant to death: (a) one eardrum exploding,

(b) a sharp object rammed into the other eardrum, causing an incisional cut, (c) tape residue in the mouth area, (d) petechial hemorrhaging, (e) damage to the head, (f) fractured nose, (g) damage in the area of the pancreas, and (h) damage to the vaginal and anal areas. RT 6414-15.

The Supreme Court has ruled that, in determining prejudice from a confrontation clause violation, among the factors for the Court to consider are "the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecutor's case." Delaware v. Van Arsdall (1986) 475 U.S. 673, 684. In this case, in both the guilt phase and the second penalty phase, (a) the testimony regarding the autopsy findings was absolutely essential to the prosecution case; (b) the testimony was in no way cumulative to any other properly admitted evidence; (c) in the guilt phase there was testimony from the defense expert, Dr. Wolff, contradicting several important findings; (d) there was no cross-examination of Dr. Richards about his findings; and (e)

the prosecution case on guilt was weak, totally dependent on the other crimes evidence, while the case on penalty was evenly balanced. Thus, the critical Sixth Amendment violation requires reversal of the convictions, special circumstance findings, and death sentence.

VI C.

THE ADMISSION OF HEARSAY EVIDENCE OF A STATEMENT BY LABORATORY PERSONNEL THAT A LIST OF POSSIBLE SUSPECTS HAD BEEN ELIMINATED AS DONORS OF SEMEN AND FLUIDS AT THE DEEBLE CRIME SCENE VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS OF CONFRONTATION AND REQUIRES REVERSAL

The defense established that seven possible suspects in the Deeble murder had been required to provide hair samples for comparison with hair found at the Deeble crime scene. RT 2800. The samples had proved to be inadequate, but no new samples were provided or analyzed. RT 2800-2801. In an attempt to justify that failure, the prosecutor had Sergeant Janssen testify that laboratory personnel had told him that this list of people had been eliminated as donors of semen and fluids at the Deeble crime scene. RT 2838. The admission of this hearsay evidence violated appellant's Sixth

Amendment right of confrontation, as delineated in Crawford v. Washington (2004) 541 U.S. 36. [26]

Respondent attempts to justify admission of the evidence under Evidence Code section 1250. RB 115-117. The attempt fails, for two reasons. First, Section 1250 only provides for admission of "a statement of the declarant's then existing state of mind." The statement at issue here – laboratory personnel had stated that the list of people had been eliminated as donors of semen and fluids at the scene – has nothing to do with the state of mind of the declarants, i.e., the laboratory personnel. [27] Second, regardless of the admissibility under the Evidence Code, use of the hearsay evidence violates the Sixth Amendment if the defendant is not allowed to confront the witness.

---

26. Although defense counsel objected to the evidence on several grounds, they did not object on Sixth Amendment confrontation grounds. However, because the Crawford decision was a wholesale change in the law, counsel's failure to object does not forfeit appellant's Crawford claim, and the Court must reach the merits of the claim. See pp.31-33, supra.

27. Nor is the state of mind of the laboratory personnel "an issue in the action" or "offered to prove or explain [their] acts or conduct," as separately required under Section 1250.

Respondent also notes that the trial court instructed the jury that "these questions of this officer is being offered for a limited purpose, and the limited purpose is this officer's state of mind." RT 2837. However, the instruction does not cure the error. It only refers to the limited "purpose" of "these questions" and places no limitation on the jury's use of the evidence in response to the questions, i.e., the hearsay evidence that the suspects had been eliminated. It certainly does not tell the jurors that they may not consider the lab personnel hearsay statements for the truth of the matter stated, the crux of a confrontation clause violation.

The Sixth Amendment violation requires reversal, because the prosecution cannot prove beyond a reasonable doubt that the error did not contribute to the guilty verdicts. Chapman v. California (1967) 386 U.S. 18. Just prior to this testimony, the prosecutor had asked Sergeant Janssen whether "it is not true that these people had been eliminated by DNA from providing the samples at the Deeble residence of semen and fluids, and Mr. Edwards had not been eliminated, correct?" RT 2820. The defense objection was sustained, the evidence stricken, and the jury instructed not to "assume or think

about" DNA. When the prosecution was then allowed to introduce the hearsay evidence that laboratory personnel had stated that the suspects "were eliminated as donors of semen and fluid at the crime scene," it is hard to believe that any juror would not conclude that it was DNA testing that had eliminated them, particularly when the prosecutor referred to other people being eliminated in his closing argument. See RT 2913. Thus, the Sixth Amendment violation was highly prejudicial because it led the jury to believe – incorrectly – that DNA analysis, which the average layperson considers foolproof, had eliminated all suspects other than appellant in the Deeble murder. Reversal is required.

XVIII A.

THE TRIAL COURT'S ERRONEOUS REFUSAL TO GIVE A LINGERING DOUBT INSTRUCTION REQUIRES REVERSAL OF THE DEATH SENTENCE

A. The Facts

In the first penalty phase, where the jury hung 9-3, the defense had submitted a lingering doubt instruction. The trial court stated that "lingering doubt would be relevant," because "the lingering doubt cases talk about jurors being able to require a higher degree of proof

than proof beyond a reasonable doubt." RT 3979. Instead of the requested defense instruction, however, the trial judge gave "a proposed instruction on lingering doubt that I put together" (RT 3988-89), explaining "what [defense counsel] want the court to do is tell the jury that they can apply a higher standard in this phase" (RT 3993). [28] Accordingly, the first penalty phase jury was instructed as follows:

> "Although the jury has found the defendant guilty of murder in the first degree and found the special circumstances of torture burglary to be true by proof beyond a reasonable doubt, the jury may demand a greater degree of guilt for the imposition of the death penalty.
>
> "It is appropriate to consider in mitigation any lingering doubt you may have concerning the defendant's guilt. Lingering or residual doubt is defined as that state of mind between a reasonable doubt and beyond all possible doubt."

RT 4192. In closing argument the prosecutor stated:

> "You are also told something that is sort of interesting. You are allowed to consider a concept known as lingering or possible doubt. In other words, maybe he

---

28. When the prosecutor argued that the court was not required to give a lingering doubt instruction (RT 3991), the court replied "[i]t is not error to give this instruction," to which the prosecutor agreed: RT 3992: lns. 6-8.

> really didn't do it. You are allowed to consider that as a factor in mitigation. I don't know if the defense is going to argue that. That is the law. That is part of it. You are going to determine what applies or not; what doesn't."

RT 4021.

The second penalty phase was far different. Defense counsel requested that the trial court give the following instruction authorizing the jury to consider any lingering doubt regarding appellant's guilt as a possible mitigating factor:

> "Although the defendant has been found guilty of murder in the first degree, and the special circumstances of torture and burglary have been found to be true, by proof beyond a reasonable doubt, the jury may demand a greater degree of certainty of guilt for the imposition of the death penalty. It is appropriate to consider in mitigation any lingering doubt you may have concerning the defendant's guilt. Lingering or residual doubt is defined as that state of mind between beyond a reasonable doubt and beyond all possible doubt."

The instruction is virtually identical to the instruction given by the trial court in the first penalty phase and to instructions approved by this Court in People v. Arias (1996) 13 Cal.4th 92, 183; People v. Snow (2003) 30 Cal.4th 43, 125; and People v. Harrison (2005) 35

Cal.4th 208, 256. This time the trial judge did an about-face and refused to give the instruction. The court stated:

> "The theory is adequately covered by factor (k). The Court is not going to give it. All of the recent cases, although they haven't disapproved of the instruction, nothing clearly says it's not [sic] necessary to be in. So the court is not giving the defense special instruction."

RT 6277.

In spite of its previous statement (in a different context) that it would not change a ruling "unless you can show me where I made a mistake" (RT 4361: 10-14), the court never explained why it had decided to exercise to give the instruction in the first penalty phase , only to turn around and refuse it in the second penalty phase. The court never even hinted at any changed circumstances calling for this huge about-face.

Citing the court's reference to factor (k), defense counsel then requested that the factor (k) instructions be modified to list lingering doubt as something that could be considered under that factor. RT 6277: 12 - 6278: 19. The court refused the modification, telling defense counsel that they could argue that point. RT 6277: 18 - 6278:

2. Counsel aptly responded, "But, judge, I can tell them anything. You know that. They're not going to believe me." RT 6278: 3-4.

With the change in the penalty phase instructions came a change in the prosecution closing argument. Instead of conceding lingering doubt as a valid potential factor in mitigation, as he had in the first trial (RT 4021), the prosecutor called any argument to that effect shameful: "shame on them." RT 6359: 14-15.

The court's refusal to give the lingering doubt instruction was error, requiring reversal of the death sentence,

B. The Law

It is well-established that California state law authorizes the defendant in a capital case to present to the sentencing jury evidence raising a lingering or residual doubt as to his guilt. In People v. Terry (1964) 61 Cal.2d 137, the Court held that the California death penalty statute in effect at that time, which authorized the presentation in the penalty phase of evidence as to "the circumstances surrounding the crime . . . and of any facts in . . . mitigation of the penalty," entitled the defendant to present evidence raising a lingering doubt as to his guilt in a penalty retrial. As Justice Tobriner explained,

> "Indeed, the nature of the jury's function in fixing punishment underscores the importance of permitting the defendant the opportunity of presenting his claim of innocence. The jury's task, like the historian's, must be to discover and evaluate events that have faded into the past, and no human mind can perform that function with certainty. Judges and juries must time and again reach decisions that are not free from doubt; only the most fatuous would claim the adjudication of guilt to be infallible. The lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment. Even were it desirable to insulate the psychological reactions of the jurors as to each trial, no legal dictum could compel such decision, and, in any event, no statute designs it."

Id., at 146.

The present California death penalty statute is even broader in its authorization of evidence at the penalty phase than that at issue in Terry. Penal Code section 190.3 permits the defendant to present evidence "as to any matter relevant to aggravation, mitigation and sentence including but not limited to, the nature and circumstances of the present offense . . . and the defendant's character, background, history, mental condition, and physical condition. Thus in People v.

Gay (2008) 42 Cal.4th 1195, this Court held that "evidence creating a lingering doubt as to the defendant's guilt of the offense is admissible at a penalty retrial under Penal Code 190.3." Id., at 1221. "Terry did not purport to base its holding or analysis on any constitutional right, state or federal; rather, it was our death penalty statute that authorized the admission of evidence of innocence at a penalty retrial – and, although the statute has since been revised, the rule 'obtains to this day.' " Id. at 1220, emphasis omitted.

This Court has also held that, just as there is no federal or state constitutional requirement that the defendant be allowed to present evidence of lingering doubt, there is no federal or state requirement that the jury be instructed that it may consider lingering doubts as a matter in mitigation of sentence. People v. Cox (1991) 53 Cal.3d 618, 675-78. However, the Court has held that such a lingering doubt instruction is required under state statutory law: "As a matter of statutory mandate, the court must charge the jury on any points pertinent to the issue, if requested." Id., at 678, fn.20, citing Penal Code sections 1093, subd. (f) and 1127. "Thus, [the trial court] may be required to give a properly formulated instruction when warranted

by the evidence." Id.; emphasis supplied.

Here, in refusing the defense's lingering doubt instruction, the trial court stated that the subject was adequately covered by CALJIC No. 8.85, because it authorizes the jury to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspects of a defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." In People v. Price (1991) 1 Cal.4th 324, 488, the Court held that this instruction was sufficient to encompass the notion of residual doubt about a capital defendant's guilt. In People v. Musselwhite (1998) 17 Cal.4th 1216, the Court declined to reconsider the Price holding where "the defendant provides no explanation why the factor (k)–derived instruction that was given to the jury failed to convey the notion of residual doubt in his case." Id., at 1273.

Appellant would like to now offer that explanation. Turning first to the phrase allowing evidence of "sympathetic aspects of a defendant's character or record," both the United States Supreme

Court and this Court have specifically held that lingering doubt is not encompassed within the terms "defendant's character" or "defendant's record." See Franklin v. Lynaugh (1988) 487 U.S. 164, 174; People v. Cox, supra, 53 Cal.3d at 725 (holding that a capital defendant's federal constitutional right to have the penalty phase jury consider, as a mitigating factor, "any aspect of a defendant's character or record or any circumstance of the offense" (Lockett v. Ohio (1978) 438 U.S. 586, 605), did not include lingering or residual doubt as to guilt). "Such lingering doubts are not over any aspects of petitioner's 'character,' 'record,' or a 'circumstance of the offense.' " Cox, 53 Cal.3d at 725, quoting Franklin, 487 U.S. at 174.

The conclusions of the High Court and of this Court in this regard comport with the plain meaning of the words "character" and "record." If the highest court of the nation and the highest court of this state both come to the conclusion that the plain meaning of these words does not include lingering doubt, how can we expect a lay juror to conclude otherwise? Thus, the language of CALJIC 8.85 regarding the defendant's "character or record" does not adequately advise the jury that it may consider any lingering or residual doubt as to the

capital defendant's guilt as a matter in mitigation.

The questions then becomes whether a jury would understand that CALJIC 8.85's authorization to consider as mitigation "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" includes lingering doubt about the defendant's guilt. The clear answer is "no." "Extenuate" is defined as "to lessen or try to lessen the seriousness or extent of by making partial excuses." Merriam-Webster's Online Dictionary. The identity of the perpetrator has no relationship to "the gravity of the crime," and thus lingering doubts as to that identity do not in any way extenuate the crime's gravity. Therefore, the Court should reconsider the Price holding and should rule that CALJIC 8.85 does not adequately instruct the jury that it may consider residual or lingering doubt as a matter in mitigation.

A lingering doubt instruction is even more critical when the jury deciding penalty is not the jury that decided guilt. The guilt phase jury, as a necessary part of their deliberations, will have analyzed the evidence as to guilt and will have measured it against the standard of proof beyond a reasonable doubt. In so doing, the jurors

will have evaluated the evidence's strengths and weaknesses to see if it raised any doubt as to the defendant's guilt. The jurors will then have adjudged these doubts to determine, in the words of the standard reasonable-doubt instruction, whether these doubts were "reasonable doubts" or only "possible doubts." Thus, the guilt phase jury will enter the penalty phase having searched the evidence for possible, i.e., residual or lingering, doubts about guilt and with those doubts in mind.

By contrast, a jury sitting in a penalty re-trial will never feel a need to evaluate the evidence for possible doubts, unless instructed by the trial judge that such doubts could legitimately be considered a factor in mitigation of penalty. Instead, the retrial jury will only be presented evidence regarding guilt and then instructed that, based upon that evidence, the defendant has already been found guilty of first degree murder with special circumstances. They will not be told to — and will see no need to — evaluate the strength of that evidence to determine whether it left a lingering or residual doubt about guilt. Absent instruction by the court, they will not consider whether the evidence left them with a lingering doubt, defined in the jury

instruction given in the first penalty phase, as "that state of mind between beyond a reasonable doubt and beyond all possible doubt." Absent instruction by the court, the retrial jury will never consider lingering doubt, and the defendant will have been denied a factor in mitigation of penalty long established in California law.

Thus, the trial court's rejection of the defense lingering doubt instruction violated California law. Moreover, because of this state-created liberty interest, denial of the instruction denied defendant his Fourteenth Amendment right to due process of law. E.g., Hicks v. Oklahoma (1980) 447 U.S. 343. Since the state authorizes the use of lingering doubt as a factor in mitigation of sentence, appellant has a right under both the due process clause and the cruel and unusual punishment clause to have the jury instructed that it may consider lingering doubt in determining penalty. E.g. Lockett v. Ohio, supra, 438 U.S. 586.

Finally, the error was highly prejudicial and requires reversal of the death sentence. When the instruction was given in the first penalty phase, the jury did not return a death verdict, with three jurors voting for life. If the instruction had been given in the second penalty

trial, it is reasonably likely that once again there would not have been a death verdict. Cf., People v. Brooks (1979) 88 Cal.App.3d 180, 185. Thus, the denial of the instruction contributed to the death verdict returned. Chapman v. California (1967) 386 U.S. 18. In this regard, the prosecutor exacerbated the innate prejudice arising from the absence of an instruction authorizing the jury to consider lingering doubt as a matter in mitigation. When defense counsel tried to raise this mitigating factor in closing argument without the support of a jury instruction on the subject, the prosecutor termed the argument shameful: "shame on them." RT 6359.

The error requires reversal of the death sentence.

Dated: August 30, 2010

Respectfully submitted,

QUIN DENVIR
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief is produced using 14-point Roman type including footnotes and contains approximately 15,988 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: August 30, 2010

Signed: _____

Print Name: Quin Denvir

Attorney for: Robert Mark Edwards

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ROBERT MARK EDWARDS, Defendant-Appellant.	)	Supreme Court No. S073316 Orange County Superior Court No. 93WF1180 **PROOF OF SERVICE**

I am a citizen of the United States over the age of eighteen years and not a party to the within above-entitled action. On the below named date, I served the following **APPELLANT'S SUPPLEMENTAL OPENING BRIEF** on the parties in said action as follows:

XXX (By REGULAR MAIL) by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at Rocklin, California, addressed as follows:

Arlene Aquintey Sevidal
Deputy Attorney General
P.O. Box 85266
San Diego, CA 92186-5266
Attorney for Respondent

Robert Mark Edwards
P-11700
San Quentin State Prison
San Quentin, CA 94974

California Appellate Project
520 South Grand Avenue
Los Angeles, CA 90071-2671

Orange County Superior Court
700 Civic Center Drive
Santa Ana, CA 92701

Michael Lawrence
Habeas Corpus Resource Center
303 2nd Street, Ste. 400 South
San Francisco, CA 94107

I, the undersigned, declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of August, 2010, at Rocklin, California.

JEAN KROM