IN THE SUPREME COURT OF THE STATE OF CALIFORNIA



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



# APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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| ROBERT MARK EDWARDS, | ) | |
| Defendant-Appellant. | ) | **APPELLANT'S SUPPLEMENTAL REPLY BRIEF** |

## I

## THE BATSON ERROR REQUIRES REVERSAL

In response to respondent's supplemental briefing (RSB 3-12), appellant would offer the following:

1. As respondent concedes (RSB 7), because the trial court applied the wrong standard at the first step of the Batson analysis, this Court must independently review the record to determine whether it supports an inference of discrimination in excusing Ms. Mickens. R In this regard,

> "At the prima facie stage of a Batson challenge, the burden of proof required of the defendant

> is small, especially because proceeding to the second step of the Batson test puts only a slight burden on the government . . . the government need only disclose its (nondiscriminatory) purpose for striking the potential juror."

United States v. Collins (9th Cir. 2009) 551 F.3d 910, 920.

> "A single inference of discrimination based on 'all [the] relevant circumstances' and the 'totality of relevant facts' is sufficient to move the Batson inquiry to step 2."

Id. The exclusion of a single juror can establish a prima facie case of discrimination. Id., 919-923.

2. Appellant has shown that the difference in the way the prosecutor dealt with Ms. Mickens, an African-American, on voir dire compared to the way he dealt with prospective jurors who were white raises an inference of racial discrimination. ASOB 6-11. In People v. Wheeler (1978) 22 Cal.3d 258, 261, this Court made clear that one consideration in determining whether there is an inference of discrimination is "the failure of the opponent to engage [minority] jurors in more than desultory voir dire."

In this case, it is clear that the prosecutor "failed to engage in meaningful questioning" of Ms. Mickens before dismissing her.

Fernandez v. Roe (9th Cir. 2002) 286 F.3d 1073, 1079. His desultory voir dire of her consisted of one rhetorical question. After singling out her questionnaire statement that she would continue to ponder whether society should or should not have a death penalty, he asked: "Have you resolved that issue in your own mind since you have been here the last few days," to which she replied, "Not really." RT 1896: 11-13.

Appellant has shown that this single cursory question to Ms. Mickens stands in stark contrast to the prosecutor's more extensive questioning of white prospective jurors before he dismissed them with a peremptory challenge. ASOB 8-9. Appellant has also shown the contrast between the prosecution's single superficial question to Ms. Mickens and his probing voir dire of three white prospective jurors who expressed reservations about the death penalty in their questionnaires yet the prosecutor accepted as jurors once he inquired further. ASOB 10-11.

Respondent's only answer is that "this type of comparative juror analysis is inappropriate in this case . . . [because] this is a first stage' Wheeler/Batson case." RSB 10. Respondent is wrong.

What appellant has offered in this respect is not comparative juror analysis. "Comparative juror analysis involves comparing the characteristics of a struck juror with the characteristics of other potential jurors, particularly those jurors whom the prosecutor did not strike." United States v. Collins, supra, 551 F.3d at 921. Appellant's comparative analysis is not of the characteristics of prospective jurors, but of the "prosecutor's questions and statements during voir dire," a factor which the Supreme Court has made clear is one of the "relevant circumstances" to be considered in deciding whether there is a prima facie case of discrimination. See Batson v. Kentucky (1986) 476 U.S. 79, 97. This differential treatment of white and black jurors by the prosecutor during voir dire, in itself, raises an inference of discrimination and establishes a prima facie case. Compare Miller-El v. Dretke (2005) 545 U.S. 231, 244 ("[W]e expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike") with People v. Kelly (2007) 42 Cal.4th 763, 780 (no inference of bias where, inter alia, "the prosecutor's questioning of the prospective juror was probing, not desultory").

Thus, asked about her general feelings about the death penalty white 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. Although her reservations about the death penalty were greater than Ms. Mickens', the prosecutor did not just ask her a cursory question and then challenge her, as with Ms. Mickens. Instead, after noting that the juror was "kind of struggling" with the death penalty, he asked her eighteen questions and accepted her on the jury. RT 1722-1725.

Similarly, white Juror No. 2 had more reservations about the death penalty than Ms. Mickens. Asked her feelings about the death penalty on the questionnaire, she responded: "I'm not sure. I don't believe it's 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 a perfunctory question (as with Ms. Mickens), the prosecutor, after eliciting that Juror No. 2 was not "comfortable about all this," lectured the juror about the responsibility of being a juror and got her to say she "could struggle with this, wrestle with it and do

[her] best to come up with a fair decision." RT 1446-1447. Once the juror stated that if the death penalty was appropriate, she would impose it and if life without parole was appropriate, she would impose it, the prosecutor accepted her as a juror. RT 1447-1448.

Finally, Juror No. 9 had divided feelings about the death penalty: "I believe the death penalty is appropriate but only in very special circumstances. The crime would have to be on the order of the Charles Manson murders." CT 2028. Rather than a superficial question and a quick peremptory challenge, as with Ms. Mickens, the prosecutor asked the juror four questions about the death penalty and accepted the juror once he stated that this was a case where he could at least entertain the possibility of applying the death penalty. RT 1793-1794.

3. Appellant has offered a separate comparative juror analysis to show that Ms. Mickens shared many of the favorable characteristics of white jurors who served on the jury. ASOB 4-6. Appellant urges the Court to give this due weight on the question of whether there was a prima facie case of discrimination, for two reasons.

First, other courts have found that comparative juror analysis is

appropriate at the first step of the Batson analysis. See Crittenden v. Ayers (9th Cir. 1010) 624 F.3d 943, 955; Boyd v. Newland (9th Cir. 2006) 467 F.3d 1139, 1149. These holdings are in accord with the Batson directive that "all relevant circumstances" and "the totality of the relevant facts" be considered in determining whether there is an inference of discrimination. See Batson, 476 U.S. at 96, 94.

Second, this Court's decision to the contrary was grounded on the fact that use of comparative juror analysis at the first step "is inconsistent with the deference reviewing courts necessarily give trial courts." People v. Johnson (2003) 30 Cal.4th 1302, 1324, overruled on other grounds in Johnson v. California (2005) 545 U.S. 162. However true in some cases, it is clearly not applicable here, where the trial court finding of no prima facie case is entitled to no deference (because it was made under the wrong standard) and where the Court must make its own determination on the issue.

4. Respondent talks about Ms. Mickens' "equivocation about the death penalty." RSB 10. To the contrary, Ms. Mickens did not equivocate, but rather candidly and clearly stated her feelings about the death penalty: (1) "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," but (2) "As the law now states we have it, therefore I am prepared to obey the law of the land." CT 3773.

Respondent also talks about Ms. Mickens' "reservations about the death penalty." RSB 10. To the contrary, Ms. Mickens was very clear in her juror questionnaire that she could vote for the death penalty (CT 3775) and in 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 evidence and the law," (2) after listening to everything in 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," (3) she could be "objective and fair to both sides," and (4) she "could render either penalty in the event the jury gets to the penalty phase, depending upon the evidence and the law." RT 1804: 8-20.

5. Two cases relied upon by respondent (RSB 11-12) are clearly inapposite. In People v. Taylor (2010) 48 Cal.4th 574, 609, the Court

merely found no trial court error in failing to ask follow-up questions regarding racial bias where nothing in the jurors' responses to four questions on the questionnaire regarding race suggested that further inquiry was necessary. In People v. Avila (2006) 38 Cal.4th 491, 531, the Court held that certain jurors were properly excused based on their questionnaires alone where each said that "he or she is unwilling to temporarily set aside his or her beliefs and follow the law."

6. Appellant has urged that, due to the great lapse in time, the conviction and sentence should be reversed, rather than remanding the case for the trial judge to undertake the second and third steps of the Batson analysis. ASOB 12-14. Respondent disagrees. RSB 12. However, there is no realistic chance of a meaningful Batson hearing on remand, not only because of the passage of almost 15 years since the trial, but also because the trial judge, John Ryan, is retired and the prosecutor, David Brent, is no longer with the Orange County District Attorney's Office. [1/]

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1. State Bar records show his official address as 11229 Stanwick Avenue, Las Vegas, Nevada 89138.

## II

## THE JURY VENIRE WAS IRREPARABLY TAINTED BY THE REMARKS OF PROSPECTIVE JUROR RANDY B.

In response to respondent's supplemental briefing (RSB 13-19), appellant would offer the following:

1. Respondent claims that the Court should presume that the trial court did, in fact, speak to juror Jacqueline D. in private, citing Evidence Code section 664, "It is presumed that official duty has been regularly performed." RSB 18. To the contrary, what the Court should presume is that, if the trial court had spoken to the juror, the court would have regularly performed its official duty to have a reporter present and a transcript prepared. See Penal Code section 190.9. The absence of a transcript is proof that there was no further questioning of the juror. [2/]

2. Respondent also states that "[t]here is nothing in the record to

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2. Respondent hypothesizes that the defense may have waived the presence of a reporter while the juror was being further questioned. RSB 18. There is nothing to support such a scenario. Indeed, it would have been unprofessional for defense counsel in a capital case to agree that a significant event in jury selection would go unreported and thus would be unavailable to the Court on automatic appeal.

indicate that Jacqueline D. heard the comments by Randy B. or were [sic] affected by them." RSB 19. To the contrary, her statement before being cut-off by the trial court was "I just wanted to comment he actually ----." RT 1737: 8-9. The phrasing of her statement shows that she both heard the other juror's comments and was sufficiently affected by them to wish to comment to the trial court.

3. Finally, respondent faults appellant for not accepting the trial court's offer to conduct limited questioning of the prospective jurors about Randy B.'s comments. RSB 17-18. The reason was that defense counsel agreed with the trial court that such questioning would only further taint the jury venire:

> "Trial Court: I would be afraid about bringing attention to it.
>
> Defense Counsel: That is our concern, too.
>
> Trial Court: So that is a big concern." RT 1715: 22-25.

## III

## THE CLAIMED SIMILARITIES BETWEEN THE DEEBLE AND DELBECQ MURDERS DID NOT JUSTIFY ADMISSION OF EVIDENCE OF THE LATTER MURDER IN HAWAII

In response to respondent's supplemental briefing (RSB 19-

27), appellant would offer the following:

1. Respondent, like the prosecutor, views the supposed use of a mousse can to sexually penetrate the victim as an "extreme similarity" between the two crimes. RSB 23. However, the lynchpin of this argument is that Ms. Deeble was penetrated with a mousse can because a mousse can found in the apartment tested presumptively for blood. [3/] If the supposed blood on the can came from a penetration of Ms. Deeble, there should have been blood in her vagina or rectum. However, Dr. Richards made no mention of finding blood in either area while performing the autopsy, and Dr. Fukumoto testified that Dr Richards he would have reported it if he had found blood. RT 2145, 2157. The only expert to testify on the subject, Dr. Wolff, stated 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 2496-2497.

Thus, the supposed similarity that was the crux of the prosecution case is unsupported by the record.

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3. The test is not specific for blood and is not always accurate, because substances other than blood can react positively. RT 2061-2062.

2. Although neither the prosecutor nor the trial court even mentioned it, respondent places great reliance on the supposed fact that "both women suffered incise wounds or wounds caused by a sharpened instrument." RSB 25. It is true that the evidence was undisputed that Ms. Delbecq had multiple wounds caused by a repeated attack with a sharpened or pointed instrument. See ASOB 20. However, Ms. Deeble did not have "wounds," as claimed by respondent. There was a single injury to the left ear drum, as to which the experts differed. Dr. Fukumoto testified that it was an incisional type cut that was caused by a sharp or pointed instrument. RT 2127-2129. Dr. Wolff disagreed and testified that the injury was a tearing of the ear drum membrane, common to ligature strangulation. RT 2479-2480. The tear is due to an engorgement of the blood vessels in the ear, caused by the pressure of the strangulation on the jugular veins and resulting in a rupture of smaller vessels, such as those in the ear. RT 2479.

Thus, the very existence of this supposed similarity was a matter of great dispute between the experts. Moreover, there is no great similarity between a violent attack with a sharp instrument

resulting in an incise wound to the jaw; abrasions and scrapes on the neck, chest and both breasts; scrapes and bruises over both nipples; and a puncture wound to the chest, as in the Delbecq case (see RT 2298-2295), and a single slight cut to the ear drum of disputed origin, as in the Deeble case.

3. Respondent also claims that "both victims suffered beatings to the face that resulted in fractured noses." RSB 20. It is true that in Ms. Delbecq's case there was evidence of a severe beating all over the body, with a fractured nose, an abrasion of the jaw, 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 breasts, and bruises on her left shoulder and both breasts. RT 2293-2294, 2298. In contrast, in Ms. Deeble's case, there was evidence of only a single blow to the bridge of the nose. RT 2130. Dr. Fukumoto testified that Dr. Richards found a crescent in the area that Richards thought was consistent with a fracture (RT 2130-2131); Dr. Wolff testified that x-rays failed to confirm the claimed fracture. RT 2478.

Again, a single blow to Ms. Deeble is dissimilar from the extended violent beating of Ms. Delbecq.

4. Finally, respondent points out that both women died from strangulation. RSB 19. However, other than the generic word "strangulation," the crimes had no similarities in the cause of death. Ms. Delbecq was violently strangled with the assailant's hands, resulting in substantial bruising to the front and sides of her neck, incise-type abrasions over the voice box, fingernail marks on the neck, and a fracture of the hyoid bone and the small bone above the voice box. RT 2294-2296. In contrast, Ms. Deeble died from a carefully planned and complex ligature strangulation, with her neck in a noose hanging from a dresser drawer and her body face-down to the floor with her hands tied behind her back. RT 2011, 2045, 2054.

Again, the causes of death in each case were very dissimilar.

5. Respondent does not claim that, if the trial court erred in admitting evidence of the Hawaii murder, the error was harmless. Nor could it since the prosecutor termed that evidence "the heart of the case." RT 1190.

## IV

## THE TRIAL COURT'S ERRONEOUS ADMISSION OF EVIDENCE OF APPELLANT'S 1994 HAWAII CONVICTIONS FOR THE MURDER OF MURIEL DELBECQ AND THE BURGLARY OF HER HOUSE REQUIRES REVERSAL

In response to respondent's supplemental briefing (RSB 27-35), appellant would offer the following:

1. Respondent appears to take the position that, as long as a prior conviction involves moral turpitude, it is per se admissible. California law is to the contrary. Moral turpitude is a necessary but not a sufficient condition for admission. If the prior does not involve moral turpitude, it is inadmissible from the outset; if it does involve moral turpitude, it is only admissible if it survives analysis under Evidence Code section 352. Among the factors relevant to a Section 352 analysis are (a) the degree to which the prior reflects on honesty or veracity; (b) the degree to which the prior is identical to the charged crime; and (c)the availability of more probative and less prejudicial prior convictions that could be admitted for impeachment.

Appellant's 1994 murder conviction failed on all three counts. First, while the crime of murder may or may not be "the worst kind of

moral turpitude" (as the trial court proclaimed), it is not particularly probative on the issue of the defendant's credibility – the question under Section 352 – and certainly not as probative as a crime involving dishonesty. Second, the 1994 murder conviction was identical to the charged murder of Ms. Deeble. Finally, there were four other convictions – auto theft and receiving stolen property in 1998, auto burglary in 1984, and robbery in 1994 – that were theft-related and thus more probative on the issue of credibility, but were dissimilar to the charged crimes and thus less prejudicial.

The record shows that the trial court failed to perform a Section 352 analysis and to consider these factors before ruling the murder conviction admissible. When defense counsel objected to the question regarding that conviction, the court held a bench conference and, after pointing out that the defense had not filed an in limine motion to exclude the conviction, immediately ruled

> "If I was asked to prohibit the prosecution 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 could say, okay, Mr. Brent [the prosecutor], you can't use it."

RT 2607: 8-13. When defense counsel tried to argue that there were other prior convictions that were more probative and less prejudicial, the trial court cut him off: "I am dealing with the last objection [to the murder conviction] first, and then we'll take on – do you want to be heard further on the last objection?" RT 2607: 23-25.

Respondent cites a remark that the trial judge made much later in the bench conference, when he ruled appellant's misdemeanor convictions inadmissible, as evidence that he had conducted a Section 352 analysis weighing prejudicial effect versus probative value before ruling the murder conviction admissible. RSB 35. The record shows otherwise. As soon as he heard the defense objection to the murder charge, he took the position that the murder charge was admissible because it was "the worst type of moral turpitude" and that he didn't know how he could say the prosecutor couldn't use it for impeachment. RT 2607: 8-13. Consistent with that position, he refused to even consider whether other convictions were more probative and less prejudicial, a key consideration under Section 352. RT 2607: 23-25.

2. As to the burglary conviction, Penal Code section 459 covers

two kinds of entry, one with an intent to commit grand or petit larceny, and one with intent to commit any other felony. The former involves dishonesty and is thus more probative on the issue of credibility, the other does not and is less probative on that issue. The trial court admitted that, as to appellant's 1994 burglary conviction, "[t]hose are things I don't have any information of." RT 2614: 9-13. Nevertheless, the court "assumed" the burglary was "with intent to commit theft or robbery as well as anything else" and then ruled that "that is a very heavy factor in determining admissibility." RT 2613: 1-4. Assuming a fact of which you admit you have no information and then treating it as a heavy factor in making a judicial decision is a blatant abuse of discretion.

In admitting the 1994 burglary prior, the trial court committed other errors. First, it failed to consider whether it was unduly prejudicial to admit the 1994 burglary, in addition to the 1994 murder and the 1984 auto burglary. Second, it failed to weigh the fact that the burglary (like the murder) was identical to one of the present charges made against Mr. Edwards. Finally, as with the murder conviction, it failed to weigh the fact that there were numerous other

felony convictions (some involving theft and some just moral turpitude) that were dissimilar from the charges in the case: 1987 conviction of ex-felon with a gun; 1988 convictions for auto theft and receiving stolen property; and 1994 convictions for robbery, kidnaping, and sexual assault.

Respondent defends the court's admission of the 1994 murder and burglary convictions on the bases that multiple convictions are more probative than one, more recent convictions have more probative value than remote ones, and convictions separated by time are more probative. RSB 33-34. However, all of these considerations could have been satisfied if, in addition to the 1984 auto burglary, the trial court had admitted the 1988 convictions for auto theft and receiving stolen property and the 1994 convictions for robbery and/or kidnaping and/or sexual assault, instead of the murder and burglary convictions that were identical to the charges against appellant.

3. Respondent places great reliance on People v. Hinton (2006) 37 Cal.4th 839, where the trial court held prior convictions for murder, attempted murder, and assault with a firearm admissible for impeachment in a murder case. RSB 32-33. Respondent overlooks

the key point that "inasmuch as defendant had no other prior felony convictions," exclusion of the challenged convictions in that case "would have given defendant a 'false aura of veracity.'" Id. at 888.

4. Appellant has shown why the trial court's error in admitting the 1994 murder and burglary convictions requires reversal. ASOB 37-39. Respondent offers no rebuttal.

## VB
## THE TRIAL COURT'S ERROR IN EXCLUDING TESTIMONY OF TWO DEFENSE WITNESSES REGARDING APPELLANT'S PREVIOUS ALCOHOLIC BLACKOUTS REQUIRES REVERSAL

In response to respondent's supplemental briefing on the issue (RSB 37-43), appellant would offer the following:

1. Respondent persists in claiming that the excluded statements by appellant to the two defense witnesses were inadmissible under Evidence Code section 1250, subdivision (b), because each was "a statement of memory to prove the fact remembered or believed." RSB 40-42. As appellant has shown (ASOB 42-42), the claim is meritless. Simply put, neither excluded statement ("I don't remember my girlfriend hitting me and my losing control of the car last night" and "I don't remember having left groceries, including refrigerated

items, in the car last night") is a "statement of memory . . . to prove the fact remembered or believed," within the meaning of Section 1250, subdivision (b). They do not prove a fact remembered; they prove a lack of memory of a fact, proven by other evidence. They are clearly admissible under Section 1250, subdivision (a), because they are statements of appellant's state of mind on the two occasions, and his state of mind at those times, an alcoholic blackout, was relevant to corroborate his testimony that he suffered an alcoholic blackout regarding the night of Ms. Deeble's death.

2. Respondent also claims that the erroneous exclusion of the testimony of the two witnesses regarding appellant's statements was cured by other testimony by one of the witnesses, Janice Hunt. RSB 42-43. However, although Ms. Hunt was allowed to testify that she remembered occasions when appellant became so intoxicated he actually had alcoholic blackouts (RT 2639: 14-17), she was precluded from providing any details, such as how often (RT 2639: 18-21) or any specific time when he had a blackout (RT 2639: 22-25), or even whether she remembered any time appellant would not remember something that had happened the day before or the evening before

when he had been drinking. RT 2639: 26 - 2640: 6. All she could testify to was that once he didn't remember where he had parked his truck the night before [4] and that on another occasion she had found groceries he had bought the night before, including refrigerated items, in the car he was driving and that he had been surprised. [5] She was not allowed to testify to his statement at the time that would have explained his surprise, i.e., that he had no memory of the previous night's events due to drinking. RT 2646: 2-9.

## VI

## THE USE OF HEARSAY EVIDENCE REGARDING THE FINDINGS OF THE AUTOPSY SURGEON VIOLATED THE CONFRONTATION CLAUSE AND REQUIRES REVERSAL OF THE CONVICTION, SPECIAL CIRCUMSTANCES FINDINGS, AND DEATH SENTENCE

In response to respondent's supplemental briefing (RSB 43-60), appellant would offer the following:

1. The issue whether testimony regarding the findings of an

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4. See RT 2640: 7 - 2641: 6, 2641: 11-21, 2641: 26 - 2642: 23. The prosecutor's three objections to additional details were sustained. RT 2640: 21-25, RT 2641: 7-10, RT 2641: 22-25.

5. RT 2642: 24 - 2646: 20.

autopsy report by someone other than the performing surgeon violates the Confrontation Clause is pending before this Court in People v. Dungo, S176886, and will likely be resolved before the Court's decision in this case. Accordingly, appellant will not brief the issue at great length, but rather ask that the defense briefing in Dungo be incorporated in this case. [6] However, some reply to respondent's supplemental briefing seems appropriate.

Respondent claims that testimony regarding the findings made by Dr. Richards during his autopsy of Ms. Deeble "does not fall within any of the descriptions of testimonial evidence provided by Crawford." RSB 50. To the contrary, while the Supreme Court did not "spell out a comprehensive definition of 'testimonial,'" it did make clear that it definitely encompasses "statements that were made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for use at a later trial." Crawford v. Washington (2004) 541 U.S. 36, 52, 68. The statements in Dr. Richards' autopsy report were made by a peace

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6. If the Court would like additional briefing on the issue in this case, appellant is ready to provide it.

officer under California law (Penal Code section 830.35(c), employed by the Sheriff-Coroner of Orange County, in the course of a criminal investigation of the death of a woman found with her hands tied behind her back and hanging with a noose around her neck. An "objective witness" to those statements in the autopsy report would certainly "reasonably believe that the statement[s] would be available for use at a later trial." Id.

In Davis v. Washington (2006) 547 U.S. 813, the Supreme Court ruled that statements made in response to police interrogation were testimonial if "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Id., at 822. Here, the primary purpose of the recordation of the findings made during the autopsy of an obvious homicide victim, initiated by law enforcement and with a homicide investigator present, was to establish past events relevant to a later criminal prosecution of the perpetrator. In Wood v. State (Tex..App. 2009) 299 S.W.2d, 200, the court held that, even if all autopsy reports may not be categorically testimonial under the Sixth Amendment, a report of an autopsy in a suspected homicide with homicide

investigators present was testimonial and the author of the autopsy report was a witness within the meaning of the Confrontation Clause. See also State v. Johnson (Minn.App. 2008) 756 N.W.2d 883, 890 (autopsy report prepared during pending of homicide investigation was testimonial).

2. Respondent attempts to justify the admission of the autopsy findings by Dr. Richards on the basis that Dr. Fukumoto, as an expert, could rely upon them in formulating his opinions. RSB 55-60. The attempt fails for two reasons.

First, the jury was never instructed that the autopsy findings were admitted for a limited purpose and could not be considered for the truth of the matter stated. In fact, they 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" – without limitation. See CT 940.

Second, the great bulk of Dr. Fukumoto's testimony was not about his opinions, but about the findings of Dr. Richards. At the very outset of the direct examination of Dr. Fukumoto, the prosecutor made clear why the doctor had been called to testify: "I would like to

go through with you some of Dr. Richards' specific findings, and I wanted to ask you some questions as well." RT 2124: 4-6. He then had Dr. Fukumoto devote most of his testimony on direct, re-direct, and re-re-direct examination to telling the jury what Dr. Richards had written in his report regarding the findings he made at the autopsy. RT 2126: 39, 2159-61, 2163-64. In his supplemental opening brief, appellant has set forth eighteen different findings from Dr. Richards' autopsy report that Dr. Fukumoto testified to in the guilt phase. See ASOB 55-57.

In the second penalty phase, the prosecutor again called Dr. Fukumoto to testify as to "some of Dr. Richards' findings." RT 5185. In his supplemental opening brief, appellant has set forth sixteen findings from Dr. Richards' autopsy report that Dr. Fukumoto testified to at that phase of the trial. See ASOB 60-61.

It is this testimony regarding the hearsay statements of Dr. Richards that violated appellant's right of confrontation. See Commonwealth v. Durand (Mass. 2010) 457 Mass. 574, 931 N.E.2d 950 (conviction reversed because substitute medical examiner testified not only as to his opinions but also as to the factual findings

of the autopsy surgeon in his report).

3. Respondent argues that the error in admitting Dr. Fukumoto's testimony as to the hearsay statements of Dr. Richards is harmless because the jury was told they were not bound to accept an expert opinion as conclusive and could disregard an opinion if they found it unreasonable. RSB 60. The argument is meritless, since the instruction in question was directed to expert opinions and had nothing to do with the testimony regarding the autopsy findings.

In addition, appellant has shown how the hearsay testimony regarding Dr. Richard's findings was key to the prosecution's closing argument in the guilt phase. ASOB 57-59. On two occasions, the prosecutor specifically pointed to Dr. Richards' findings to defeat the testimony of the defense expert, Dr. Wolff. See ASOB 59-60. In addition, appellant has shown that the hearsay testimony regarding Dr. Richards' findings was equally key to the prosecutor's closing argument in the second penalty phase that resulted in a death sentence. ASOB 61-62.

Respondent has failed to meet its burden of proving beyond a reasonable doubt that the constitutional violation in admitting the

hearsay testimony regarding the autopsy findings did not contribute to the guilty verdict and the death sentence. Chapman v. California (1967) 386 U.S. 18.

## VIC

### THE ADMISSION OF SERGEANT JESSEN'S TESTIMONY REGARDING INFORMATION HE HAD RECEIVED FROM LAB PERSONNEL VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS OF CONFRONTATION AND REQUIRES REVERSAL

In response to respondent's supplemental briefing (RSB 61-69), appellant would offer the following. Respondent claims that Jessen was only testifying regarding his state of mind. That claim distorts the reality of his testimony.

It must be remembered that the prosecutor's first question on the subject was

> "is it not true that these people had been eliminated by DNA from providing the samples at the Deeble residence, and Mr. Edwards had not been eliminated?"

RT 2820. After a defense objection and a sidebar conference, he eliminated the reference to DNA:

> "isn't it true that as a result of scientific testimony that this group of names the defense had mentioned

> as persons who had supplied inadequate samples that I asked you about before were eliminated as the donors of the various semen and fluids at the crime scene?"

RT 2837. After a defense objection, the trial court told the prosecutor to rephrase his question. All he did was add "in your mind":

> "Isn't it true that in your mind, based upon information you had received from other people, lab personnel, that the list of people that the defense has mentioned who had provided inadequate samples were eliminated as donors of semen and fluids at the scene?"

RT 2838. There is no meaningful distinction between a witness' testimony that lab personnel told me"X" and the witness' testimony that "based on information I received from lab personnel, in my mind "X" was true." In either case, the essence of the testimony is that lab personnel stated "X". In either case the defendant is denied his right to confrontation unless the lab personnel, the declarants, are made available for cross-examination.

Looking at the prosecutor's sequence of questions, it is clear that a juror would conclude that lab personnel had stated to Jessen that DNA testing had eliminated the other persons, but not Mr. Edwards. Thus, Jessen's testimony violated appellant's right of

confrontation and requires reversal.

## XVIIIA

## THE TRIAL COURT'S ERROR IN REFUSING IN THE SECOND PENALTY PHASE TO GIVE THE LINGERING DOUBT INSTRUCTION GIVEN IN THE FIRST PENALTY PHASE REQUIRES REVERSAL OF THE DEATH SENTENCE

In response to respondent's supplemental briefing (RSB 69-72), appellant would offer the following points:

1. Respondent states that there is no state or federal constitutional right to such an instruction. RSB 71. However, as appellant has shown, there is a state statutory right to such an instruction (see ASOB 72-73) and, furthermore, denial of the state-created right to such an instruction violated appellant's federal constitutional rights under both the federal due process clause and the federal ban on cruel and unusual punishment (see ASOB 77). Respondent fails to offer a counter-argument, and the showing stands both unrebutted and compelling.

2. Respondent also argues that the concept of lingering doubt was adequately encompassed in other instructions. RSB 71. Appellant has shown the fatal defects in that argument. See ASOB 73-77.

Respondent fails to offer a counter-argument, and the showing stands both unrebutted and compelling.

3. Respondent claims that "the particular instruction proposed by Edwards was argumentative and speculative in that it invited the jury to consider the possibility evidence exists which exculpates Edwards but was, for some reason, not presented." RSB 72. A mere reading of the proposed instruction – which was identical to the instruction given to the first penalty phase jury [7] – shows that respondent's argument is unfounded and without merit:

> "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."

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7. See RT 4192. It is also almost identical 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.

CT 1594, 1596, 1629.

4. Finally, respondent argues that the error in refusing to give the instruction was harmless, pointing out that defense counsel could nevertheless argue the point. RSB 72. However, as evidenced in this case, argument by counsel is no substitute for a formal instruction given the jurors by the court. In the first penalty phase, where the lingering doubt instruction was given by the judge and defense counsel's argument on the issue was moored to this clear statement of the applicable law, three jurors voted against the death sentence; in the second penalty phase, where the defense argument stood unsupported, all twelve jurors agreed to sentence appellant to death.

## CONCLUSION

For the above-stated reasons, the Court should reverse Mr. Edwards' conviction and sentence.

Dated: April 11, 20110 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 6,663 words, which is more 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: April 11, 2011

Signed: _____

Print Name: Quin Denvir

Attorney for: Robert Mark Edwards

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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|---|---|
| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ROBERT MARK EDWARDS,<br><br>Defendant-Appellant. | Supreme Court<br><br>No. S073316<br><br>Orange County Superior Court No. 93WF1180<br><br>**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 REPLY 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:

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I, the undersigned, declare under penalty of perjury that the foregoing is true and correct. Executed this ~~11~~ 12th day of April, 2011, at Rocklin, California.

Jean Krom

JEAN KROM