No. S099439

IN THE SUPREME COURT OF CALIFORNIA

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

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

APPELLANT'S SUPPLEMENTAL BRIEF

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INTRODUCTION

The Reply Brief in this matter was filed in November, 2011. This brief is filed pursuant to California Rule of Court 8.520(d). The new authorities are presented under the main claim headings (as presented in the AOB) to which they are most relevant

II

Krebs' videotaped confessions should have been excluded because Hobson failed to scrupulously honor Krebs' invocation of rights and deliberately used a "question first," warn later, and other techniques inconsistent with a free and voluntary waiver of his *Miranda* rights

1. *Jones v Harrington* (9th Cir. 2016) 829 F.3d 1128

Appellant argued that he unambiguously invoked his *Miranda* (*Miranda v Arizona* (1966) 384 U.S. 436) rights in a April 21 videotaped interview (AOB 86-92, ARB 24-39). In *Jones v Harrington* (9th Cir. 2016) 829 F.3d 1128 the court held that the words "I don't want to talk no more" were an unambiguous invocation of his right to silence.

> "By continuing to interrogate Jones after his invocation, the officers squarely violated *Miranda*. That means the government cannot use against Jones anything he said after his invocation. And that includes using Jones's subsequent statements to "cast retrospective doubt on the clarity of [his] initial request itself."

IV

The People committed prejudicial error by presenting evidence and theories regarding volitional impairment inconsistent with those presented by the People in civil commitment cases in violation of the Due Process Clause

A. Effect of 2014 Amendment to Penal Code Section 1473

In Re Richards (2016) 63 Cal.4th 291 (*Richards II*), relying on the 2014 amendment to Penal Code section 1473 is recent authority which refutes a central argument made by Respondent that the principles of *In Re Sakarias* (2005) 35 Cal4th 140 do not apply to this case.

Respondent argued that "the conclusive distinction, though there are several, is that the evidence which is the focus of appellant's argument is expert *opinion*, not fact..." (RB132.) Essentially, the argument was that because experts offer opinions, not facts, such testimony can never support a claim under *In Re Sakarias* (2005), *supra,* of inconsistent factual theories

Appellant responded to this claim in section IV (B)(2), pages 68-71 of the reply brief, and the arguments there stated remain valid and strengthened by *Richards II, supra.*.

The court in *Richards II*, *supra*, considered the effect of 2014 amendments to Penal code section 1473 concerning whether expert evidence can support a habeas petition on the basis of "false evidence" under the statue. The decision explains that the amendments were in response to the courts earlier 4-3 decision in the case, *In Re Richards* (2012) 55 Cal.4th 948 (*Richards I*) in which Justice Liu had dissented. The court noted portions of the Senate Committee analysis, which included:

> "Liu noted that there is no reason to treat the two types of testimony differently because, just as the truth or falsity of the

> eyewitness testimony under [Section] 1473(b) depends on the truth or falsity of the underlying facts concerning their perceptual abilities, so too does the truth or falsity of the expert's testimony depend on the underlying facts essential to the expert's inferential method and opinion." (*Richards II, supra,* at p.311)

The court then held:

> From this legislative history, it is apparent that the Legislature agreed with the dissent's conclusion in *Richards I*, supra, 55 Cal.4th 948. **The Senate committee analysis supports the notion that the Legislature intended courts to treat lay and expert opinion equally in determining whether the testimony of an expert witness at trial satisfies the false evidence language of section 1473.** (*Richards II, id, emphasis added.)*

This court's holding that both expert and lay testimony shall be treated equally in determining whether testimony is false fatally undermines Respondent's "crucial distinction" as to why *In Re Sakarias* (2005) 35 Cal4th 140) does not apply to the facts of this case

B. Effect of Proposition 83 in 2006

In November, 2006, Proposition 83 expanded the definition of "sexually violent predator" to include those who have a diagnosed mental disorder rendering them likely to engage in sexually violent behavior and have been convicted of a sexually violent offense "against *one* or more victims." (Welf. & Inst. Code, § 6600, subd. (a)(1), italics added.) Prior to Proposition 83, an SVP included only those who had been convicted of a qualifying offense "against two or more victims." This strengthening and

widening of the SVP program for preventative civil commitment evidences the firm commitment by the State to the existing program, and its judicially approved history of commitments based upon the legislative view that paraphilic disorders may impair volition, thus rendering a person dangerous beyond his control.

C. Effect of 2014 Amendment to California Rule of Court 9.4

Rule 9.4 of the California Rules of Court, as amended effective May 23, 2014, adds the following language to the oath prescribed by the Business and Professions Code for the admission of new attorneys to practice: "As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity." As the court in *People v Shazier* (2014) 60 Cal.4th 109 observed, “This "civility oath" serves as an important reminder to lawyers of their general ethical responsibilities in the pursuit of all their professional affairs, including litigation.” (*id.,* at p. *)* The now explicit requirement of “integrity” reinforces the fundamental requirement that prosecutors must prosecute fairly in search of the truth.

D. Subsequent SVP cases continue to support Appellant’s claim that the People’s positions taken here are inconsistent, irreconcilable, and unjustifiable when compared to the positions taken routinely and consistently by the People in SVP commitment trials.

Throughout argument IV, Appellant cited numerous cases from the extensive SVP jurisprudence to demonstrate various aspects of the claim that the positions taken by the People herein are truly inconsistent and irreconcilable with the evidence adduced and positions they routinely argued in SVP trials. Review of the SVP decisions from 2011 continue to sustain Appellant’s claim. Appellant will review some of these subsequent

cases and identify their relevance to the issues presented.

1. *People v. McKee* (2012) 207 Cal.App.4th 1325

Appellant cited cases in the AOB demonstrating that a paraphilia was the most common qualifying diagnosis argued by prosecutors which "prevents him from controlling sexually violent behavior". (See cases collected AOB, pp 141-144 and footnote 13.) In *People v. McKee* (2012) 207 Cal.App.4th 1325 the court considered an equal protection claim and reviewed testimony regarding the characteristics of those committed under various civil commitment programs which affirmatively demonstrates that a paraphilia is by far the most common qualifying disorder upon which prosecutors rely to demonstrate volitional impairment in SVP proceedings. The court found that

> "In comparison, nearly 90 percent of SVP's are diagnosed with pedophilia or other paraphilias. In the years 2005 through 2010, less than 2 percent of SVP's were diagnosed with major mental illnesses." "Dr. David Fennell, a psychiatrist and chief of forensics at Atascadero State Hospital, testified that about 90 percent of MDO and NGI patients suffer from a psychotic mental disorder. In comparison, only 1 to 3 percent of SVP's suffer from a psychosis, but 66 percent of SVP's suffer from pedophilia and 33 percent have another paraphilia.

The court found from the testimony that the SVP detainees "bear a substantially greater risk to society" because of their mental disorders, justifying disparate treatment.

2. *People v. Shazier* (2014) 60 Cal.4th 109

Appellant also cited cases demonstrating that while there are indeed qualified psychological evaluators who give testimony on the subject of

volitional impairment which is closer to that of Dr. Deitz, such evaluators are uniformly called by the defense, and such views are a distinct minority if held at all among state panel evaluators. It was shown that Dr. Donaldson was a frequent defense witness and one court had gone so far as to find that Dr. Donaldson's views *were inconsistent* with the legal concept of lacking control or volitional impairment under the law. *(*See AOB 149-153.)

The recent decision of *People v. Shazier* (2014) 60 Cal.4th 109 presents even more detail about Dr. Donaldson's status as an evaluator whose minority views were in conflict with other experts called by the prosecution.

In *People v. Shazier*, *id.,* two panel experts testified for the People, diagnosing Shazier with a paraphilia NOS. Dr. Donaldson testified for the defense. "Dr. Donaldson confirmed that he had been terminated from the contract panel because he was then "outside the mainstream" of professional opinion, and that he had since testified "hundreds of times," solely on the defense side. ..."

The *Shazier* opinion shows that the prosecutors relied on experts whose views paralleled that of the defense here. The court characterized a portion of the prosecution evidence as follows: "Two prosecution experts testified that defendant's conduct, which persisted despite punitive sanctions and attempts at supervision, demonstrated a **compulsive focus** on the sexual exploitation of postpubescent minor males, indicated an incurable mental disorder, and **evidenced a difficulty in controlling behavior** making it likely he would reoffend if free and unsupervised in the community. " (*People v Shazier, supra,* p. 151, emphasis added)

3. Paraphilia NOS cases

Recent cases also continue to demonstrate that while there now may be increased expert criticism regarding a diagnosis of "paraphilia NOS", based on changes occurring in the fifth edition of the DSM the prosecution still obtains commitments through testimony that such a diagnosis is appropriate, and meets the statutory requirements. (*People v. Johnson* (2015) 235 Cal.App.4th 80; see also *People v. Roa* (2017) 11 Cal.App.5th 428 (paraphilia with nonconsenting women, sexual sadism, antisocial personality disorder, substance abuse, lack of volitional control over his urge to humiliate women) and *People v. McCloud* (2013) 213 Cal.App.4th 1076, (paraphilia NOS affected his volitional capacity and predisposed him to commit sexually violent acts, difficulty controlling his behavior was evidenced by the fact that he had committed rapes in the past, had been sanctioned with long term imprisonment, and had nevertheless reoffended shortly after his release).)

4. *People v. Burroughs* (2016) 6 Cal.App.5th 378

In *People v. Burroughs* (2016) 6 Cal.App.5th 378 prosecutors won a commitment by presenting panel experts who opined that the diagnosis of antisocial personality disorder alone was sufficient to meet the SVP criteria in the circumstances of the case. The court described the testimony of one expert, Weber;

> "Initially, he felt ASPD alone was not sufficient to qualify someone as an SVP. Over time, however, as he evaluated more people with ASPD, he came to believe that an ASPD diagnosis could support a conclusion of SVP if the person lacked a paraphilia but nonetheless had a high sex drive and took what he or she wanted sexually. North stated that there had been a

"trend of change in opinion" toward this view, but it was not yet "universally accepted." *(People v. Burroughs* (2016) , *supra* at p. 392.)

V

The prosecutor committed prejudicial misconduct by failing to correct testimony which it should have known was false or misleading and exploited the false impression left by the testimony of Dr. Park Dietz in violation of Due Process.

The recent cases of *In Re Richards* (2012) 55 Cal.4th 948 (*Richards I* and *In Re Richards* (2016) 63 Cal.4th 291 9 (*Richards II*), discussed above in section IV are also highly relevant to the arguments made by Respondent concerning this assertion of error.

Respondent argued here "Appellant is focusing on opinion testimony, which by its very definition cannot be false" (RB 140.)

Appellant replied to these arguments in section V(B.) of the reply at pages 87 to 91, demonstrating that the cited cases did not support respondent's position, and clearly specifying in a chart appearing at page 89 the four separate instances where Dr. Dietz made purportedly authoritative, factual, yet false assertions in his testimony.

Richards I and Richards II defeat any argument that an expert's testimony and ultimate "opinions" cannot be deemed false under the law. Appellant asserts that the four assertions identified in this claim are indeed "objectively untrue" based upon the law and published cases of which this court must take notice. There can now be no colorable argument that Dr. Dietz's assertions to the jury are somehow exempt from being found false or

misleading.

VII

The exclusion of all reference to SVP cases violated the appellant's right to full and fair cross examination under the Sixth Amendment

In *People v. Superior Court (Smith)* (2018) 6 Cal.5th 457, the court considered access to confidential medical records in SVP proceedings. The court noted that cross-examination of an expert is important to achieve a just result:

> "A key way in which one party counters an opposing expert's opinion is to uncover and challenge the expert about the bases for his or her opinion. This is particularly true for a mental health professional's assessment of whether an individual qualifies as an SVP." (*Id.,* p.472, citations omitted.)

The court concluded by offering the following observation, which is relevant as a guiding principle to this and other claims made herein, "Our society uses trials to advance the search for truth." *(People v. Superior Court (Smith)* (2018) , *supra,* at p. 473. *)*

XVII Previously Adjudicated Issues

1. Claim L. (Broken system/delay)

Among the twelve previously adjudicated claims raised in the AOB was claim L, wherein Appellant cited excessive delay, the rare occurrence of executions compared to death sentences rendered since 1978, and an article by Hon. Arthur L. Alarcon arguing that the system was broken or "deadlocked." in support of the claim.

Developments since that time further document the constitutionally unacceptable and broken nature of our death penalty system. One obvious matter, is that there has been an delay of over *nine years* between the filing of the AOB and the scheduling of the case for oral argument.

2. *Jones* cases

.Additionally Judge Cormac J. Carney of the United States District Court filed an opinion in 2014 that found the California system for the administration of the death penalty to be arbitrary, capricious, and unconstitutional, noting that the California system amounts to one that no rational jury or legislature could ever impose, "life in prison, with the remote possibility of death". *Jones v Chappell* (2014) 31 F.Supp.3d 1050, 1062 rev. sub nom. *Jones v Davis* (9th Cir. 2015) 806 F.3d 538. The opinion in *Jones v Chappell* is significant, although overruled, because it sets forth compelling factual and legal arguments and the considered opinion of a respected jurist rendered after a full hearing. The Ninth Circuit did not find the lower opinion wrong on the merits, but overturned the judgment based on the fact that the claim was presented in a habeas petition in violation of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). The court noted in its conclusion that while *Teague* barred relief, "Many agree with Petitioner that California's capital punishment system is dysfunctional and that the delay between sentencing and execution in California is extraordinary." *(Jones v Davis* (9th Cir. 2015), supra, p. 553.)

3. Executive Moratorium

An additional major development is the fact that the Governor of California, Gavin Newsome, filed an executive order on March 19, 2019 with the following orders:

"1. An executive moratorium on the death penalty shall be instituted in

the form of a reprieve for all people sentenced to death in California. This moratorium does not provide for the release of any person from prison or otherwise alter any current conviction or sentence.

2. California's lethal injection protocol shall be repealed.

3. The Death Chamber at San Quentin shall be immediately closed in light of the foregoing."

The order included the following recitals and findings:

"WHEREAS, California's death penalty system is unfair, unjust, wasteful, protracted and does not make our state safer. ...

WHEREAS, death sentences are unevenly and unfairly applied to people of color, people with mental disabilities, and people who cannot afford costly legal representation. ...

WHEREAS, since 1978, California has spent $5 billion on a death penalty system that has executed 13 people.

WHEREAS, no person has been executed since 2006 because California's execution protocols have not been lawful. Yet today, 25 California death row inmates have exhausted all of their state and federal appeals and could be eligible for an execution date.

(https://www.gov.ca.gov/wp-content/uploads/2019/03/3.13.19-EO-N-09-19.pdf)

These extraordinary findings and orders should by themselves be more than ample reason for this court to re-examine the holdings previously denying these claims. Given these new developments, this court should give an opportunity to both parties to fully develop the current circumstances and arguments in supplemental briefing to be filed after oral arguments in this case.

CERTIFICATE OF WORD COUNT

I certify that the foregoing, exclusive of tables and cover consists of 2764 words, as reflected in the word count feature of the Word Perfect program.

August 19, 2019

Respectfully Submitted,
(deemed signed by electronic filing)
Neil B. Quinn
Attorney on Appeal for Rex Allan Krebs

DECLARATION OF SERVICE

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

I am over the age of 18 years and not a party to the within action or proceeding. I am counsel for the defendant. My business address is 300 Douglas Street, Ojai California, 93023-1953

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on the date appearing next to my signature.

Date: August 19, 2019 By _____
Neil B. Quinn

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Supreme Court of California

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