IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ERVEN R. BLACKSHER, Defendant and Appellant.	No. S076582 [Alameda Co. Super. Ct. No. 125666]

APPELLANT'S OPENING BRIEF
VOLUME I, pages 1-223

Automatic Appeal from the Judgment of the Superior Court
of the State of California, County of Alameda

The Honorable Larry J. Goodman, Judge Presiding

KATHY M. CHAVEZ
State Bar. No. 121701
P. O. Box 9006
Berkeley, CA 94709-0006
(510) 649-8602
email: kathedral@sbcglobal.net

Attorney for Appellant
By Appointment of the
Supreme Court

TOPICAL INDEX

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TOPICAL INDEX (cont'd)

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL CASES

FEDERAL CASES

FEDERAL CASES

FEDERAL CASES

FEDERAL CASES

FEDERAL CASES

FEDERAL CASES

CALIFIFORNIA CASES

CALIFORNIA CASES

CALIFORNIA CASES

CALIFORNIA CASES

CALIFORNIA CASES

CALIFORNIA CASES

CALIFORNIA CASES

CALIFORNIA CASES

CALIFORNIA CASES

CALIFORNIA CASES

CALIFORNIA CASES

FOREIGN CASES

FOREIGN CASES

DOCKETED CALIFORNIA CASES

DOCKETED CALIFORNIA CASES

TABLE OF AUTHORITIES (cont'd)

DOCKETED CALIFORNIA CASES

TABLE OF AUTHORITIES (cont'd)

CALIFORNIA STATUTES

TABLE OF AUTHORITIES (cont'd)

CALIFORNIA STATUTES

FEDERAL STATUTES

FOREIGN STATUTES

TABLE OF AUTHORITIES (cont'd)

FOREIGN STATUTES

TABLE OF AUTHORITIES (cont'd)

FOREIGN STATUTES

TABLE OF AUTHORITIES (cont'd)

FOREIGN STATUTES

CALIFORNIA CONSTITUTIONAL PROVISIONS

CALIFORNIA JURY INSTRUCTIONS

CALIFORNIA RULES OF COURT

TABLE OF AUTHORITIES (cont'd)

MISCELLANEOUS

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ERVEN R. BLACKSHER, Defendant and Appellant.	No. S076582 [Alameda Co. Super. Ct. No. 125666]

APPELLANT'S OPENING BRIEF

INTRODUCTION

Early on the morning of May 11, 1995, appellant shot and killed his sister and nephew; he took a bus to Reno, Nevada, then returned to Berkeley, California and turned himself in to the police. Appellant had suffered from mental illness since adolescence and had been institutionalized and treated numerous times over the years. At the age of 40, appellant still lived with his mother and qualified for Social Security disability insurance because of his paranoid schizophrenia.

Appellant's mental problems surfaced repeatedly during his trial. Competency proceedings were held shortly after his arrest and a doubt was declared as to his competency again after the verdicts. Whenever appellant spoke on his own behalf in court proceedings, his mental problems were

apparent. Nonetheless, the jury found appellant guilty and sane and returned a verdict of death.

Appellant's convictions must be overturned. He was tried and sentenced to death while incompetent. (See Arg. I & XXVI.) In each of the three phases of the trial, the trial court applied the evidentiary rules in an asymmetrical fashion, excluding material and admissible evidence of appellant's mental state and improperly admitting or expanding the scope of evidence the prosecution was permitted to introduce. (See Arg. VI, VII, XV, XVI, XVIII, XIX & XX.) The trial court erroneously instructed the jury at both guilt and penalty phases, and also refused to give defense requested pinpoint instructions which correctly stated the law. (See Arg. X, XI, XII, XIII, XXII, XXIII, & XXIV.) As a consequence, the jury was seriously misled as to appellant's mental state, and the verdicts are unreliable.

/

/

/

/

/

/

/

STATEMENT OF THE CASE

Amended information number 12566[1] was filed in Alameda County Superior Court on January 29, 1998, charging appellant in counts one and two with the murders of Torey Lee and Versenia Lee on May 11, 1995. (Pen. Code, § 187.) A multiple murder special circumstance was alleged pursuant to Penal Code section 190.2, subdivision (a)(3). Use of a firearm was alleged as a sentencing enhancement on both counts, pursuant to Penal Code section 12202.5. Count three charged appellant with a violation of Penal Code section 12021, possession of a firearm by a convicted felon but this charge was later dismissed. Seven prior convictions were also alleged[2] and appellant later admitted these allegations. (CT 416-22; 1223; 1495.)

Five and a half months after the original information was filed, a doubt as to appellant's competency was declared and three medical doctors were appointed to examine appellant. (CT 298.) On July 3, 1996, the trial court found appellant competent to stand trial. (CT 309.)

---

1 The original amendment charging appellant with special circumstance murder was filed in Alameda County Superior Court on October 31, 1995. (CT 230-235.)

2 These prior convictions were: possession of narcotics or sale on May 12, 1992; assault with a deadly weapon on February 1, 1985; burglary on May 14, 1982; burglary on June 18, 1976; burglary in violation of Penal Code section 459 on April 25, 1980; burglary on February 15, 1975; and burglary on February 19, 1975.

Jury selection began on March 3, 1998. (CT 609.) On April 29, 1998, the evidentiary portion of the guilt phase began. (CT 1142.) On May 21, 1998, the jury found appellant guilty of first degree murder of Torey Lee, and second degree murder of Versenia Lee, in counts one and two; the multiple murder special circumstance allegation was found true. (CT 1207; 1223-24.)

The sanity phase began on June 3, 1998, and the jury returned a verdict of sane on June 8, 1998. (CT 1417; 1428.)

On June 15, 1998, the penalty phase of the trial began. (CT 1503.) On June 25, 1998, the jury returned a verdict of death. (CT 1559.)

On November 2, 1998, defense counsel declared a doubt as to appellant's competency and Penal Code section 1368 proceedings were again initiated. (CT 1622.) On December 15, 1998, defense counsel declared a conflict of interest and requested that additional counsel be appointed. (CT 1635.) The trial court denied the motion for new counsel on January 25, 1999. (CT 1640.2.) On February 9, 1999, the trial court denied appellant's motion pursuant to Penal Code section 190.4, subdivision (e) and imposed a judgment of death. (CT 1640.4.)

This is an automatic appeal from a sentence of death.

/

/

STATEMENT OF FACTS - GUILT PHASE EVIDENCE

A. Evidence Adduced by the Prosecution.

1. The shootings on May 11, 1995.

At 7:22 a.m. on May 11, 1995, Berkeley police officer Gary Larsen was dispatched to the Blacksher home in Berkeley, California. Larsen approached the house with his weapon drawn. When he saw legs on the floor, he entered the house where he saw a woman lying in a pool of blood, and another body in the bed along the dining room wall. No one else was in the house. (RT 1741-48; 1750-51.)

Next-door neighbor John Adams was trimming his lawn at 6:30 a.m. that morning. (RT 1928.) He saw appellant back up his car from the cottage where he lived at the rear of his mother's home. Appellant stopped the car by the sidewalk and got out and walked onto the porch of his mother's house. (RT 1928-32; 1948) A few minutes after 7:00 a.m., Adams went inside his house and then went back outside. (RT 1929.) Adams heard a pop noise like a pistol that seemed to come from the Blacksher house some five to 10 minutes after appellant went inside, then another pop a minute or so later, and a woman's voice saying "ah." Adams did not see anyone else enter the house and didn't hear any cars or voices. (RT 1934-39.)

Sara Winter, who lived across the street, heard two or three loud bangs around 7:00 a.m. She looked out the window as she went downstairs. She saw appellant on the porch with his back towards her as if he was just coming out of the house and closing the door. He went down the stairs as if he had someplace to go. He did not stagger or appear uncoordinated. (RT 1980-18; 1990-99.)

Next-door neighbors Brian Burke and Teresa Gensler heard three pops or gunshots sometimes after 7:00 a.m. Burke did not hear any other noises, nor did he see anyone. Gensler heard a muffled moan, and a car pull away shortly before the police arrived. (RT 2079; 81-82; 2089-90.) 2089-92 (RT 2091-92.)

2. Appellant's statements.

Around 7:45 a.m. that morning, appellant called his sister Ruth Cole[3] to say he had heard gunshots and a lot of hollering and noise at the house. Two masked men were on the steps when appellant was in the house; he asked Ruth to call the police and to check on their mother. (RT 2200-01.) Appellant said he was calling from a friend's house and didn't want to call the police himself because they would question him. (RT 2202-05; 2423-

---

[3] Because many of the family witnesses share the last name Blacksher, appellant refers to all family witnesses by their first names after the first reference to the witness.

24.) Around the same time, appellant called his sister-in-law Frances Blacksher. He sounded nervous and said he had heard gunshots; appellant asked Frances to go to Eva's house. Frances had no way to get to the house and asked appellant why he didn't go. Appellant said he didn't want to be a witness to whatever happened. (RT 2300-01.)

3. Eva Blacksher's testimony and statements.

Eva Blacksher, appellant's mother, testified at the preliminary hearing. In her testimony, Eva was unable to say if she had a memory problem at the time of the shootings; she did not know the date, and "d[id]n't remember." She had been having memory problems for quite awhile, but didn't think she was having memory problems at the time of the shootings. When pressed, Eva admitted that she didn't understand, then said that she couldn't remember good, but Versenia "took over [her] remembrance" and took care for her. (CT 761-62.) Indeed, Versenia had been living with Eva for six years and had moved in with Eva to help because Eva couldn't remember things. (CT 762.)

Eva's testimony was as follows.[4] On May 11, 1995, she lived at 1231 Allston Way in Berkeley, California with her daughter Versenia Lee,

---

[4] The judge informed the jury that Eva Blacksher had been found incompetent to testify because of Alzheimer's and dementia. Her preliminary hearing testimony was read by a deputy district attorney. (RT 1866-67.)

Versenia's husband Sammy Lee, and Versenia's and Sammy's son Torey Lee. (CT 755.) Appellant lived in the "back house" behind the main house, but had a key to Eva's house. (CT 760; 763.)

Appellant came into the house that morning when Eva was still in bed, and asked if she had fixed his supper. Eva told him it was on the stove. Appellant left her bedroom and Eva stayed. She lay down and didn't hear anything. (CT 756; 760-61.) The next thing Eva remembered -- and she did not remember how much time had passed -- was Versenia calling her; Versenia said she heard a gun shoot and was going through the house. Eva jumped up but when she got to the door, Versenia fell to the floor bleeding. Eva stepped over Versenia's head and ran out the door. Eva did not see appellant or anyone else in the house. Eva testified she heard "last one, last shot," but also testified that she heard only one shot, and denied telling the police she heard two shots. (CT 757-59; 763.) Eva testified that Versenia called out "mother" and opened the door and came out of her room; but Eva also testified that she did not remember hearing Versenia say something before she heard a shot. (CT 764-65.)

Eva testified that after this she talked alone to the police a little bit, but she did not remember signing a two-page handwritten statement for the police. Eva could not remember if she was having memory problems when she talked to the police. (CT 758; 765.) However, Berkeley police officer

Nicolas Nielsen testified that when he arrived at the scene shortly after 7:20 a.m. Eva and a neighbor (John Adams) were standing in front of the house, and that a lot of his conversation with Eva was a three-way conversation with the neighbor John Adams. Eva was wearing night clothes and was distraught and agitated. (RT 11868-72; 1909.) According to Nielsen, Eva said her daughter and her daughter's son had just been shot and she thought both were dead. (RT 1873.) Eva said she had spoken to appellant briefly when he came to the house earlier that morning, that appellant had been arguing with his sister Versenia and that he shot her and her son Torey. When asked where appellant got the gun, Eva said she didn't see a gun, but thought appellant used a handgun which she assumed he had hidden somewhere on his person when he came into the house. (RT 1875; 1882-83; 1904.) Nielsen did not take a formal statement from either Eva or Adams. (RT 189; 1909.) Nielsen turned Eva, who remained distraught, over to Daryl Brand, a mental health worker for the city. (RT 1876; 1885.)

Adams testified that when he returned to his house, he called 911. From his window, Adams saw Eva outside in her nightgown, walking towards his house asking for help. He told her he was calling 911. Eva said "They've been shot. Beanie [Versenia] and Torey have been shot." (RT 1941-42.) It sounded as if Eva said that appellant had shot Versenia and Torey and then shot himself. (RT 1943.) Adams testified that Eva had

first said that both her children were dead, which he understood to mean that appellant shot Versenia and then shot himself; there was no mention of Torey. (RT 1971-72.) Eva did not say she saw a gun and did not say she witnessed a shooting. (RT 1976.) Adams reported to the 911 operator that appellant had a "case of mental illness over the years" and was "a crazy man." (RT 1939-40; 1957; CT 662; Exh. D.) Adams also told the police that appellant had some kind of mental illness. (RT 1946.)

Darryl Brand, city mental health counselor, arrived at the Blacksher home in an official city car between 8:00 and 9:00 a.m. that morning. Eva was dressed in a housecoat and hair rollers covered by a hat. The police asked Brand to care for Eva and her "mental health." (RT 2440-42.) Eva and Brand spent several hours together in the car. Eva was somewhat disassociated from the situation and quiet -- she was more focused on wanting to change her clothes as she was embarrassed to be outside as she was dressed. Eva had trouble with her memory and trouble concentrating. (RT 2442-44.) Family members, including Frances, James, Ruth and her husband James, came and talked to Eva; Eva's emotional state did not change much during this time. (RT 2448.) Brand did not remember telling the deputy attorney's investigator that Eva was speaking incoherently; she did say Eva was inarticulate, and more inarticulate than articulate; Eva was confused and not responding, but was not totally "blank." She was

obsessed with getting some clothes and was more concerned with that than anything else. She was not screaming. (RT 2453-54.)

Appellant's brothers James and Artis, Jr. saw Eva in the car with Brand when they arrived at the Blacksher home. They testified that Eva was upset, hysterical and screaming. Eva said appellant killed Torey and shot Versenia who fell into her (Eva's) arms. (RT 2350-53.) According to Frances Blacksher, Eva was very calm when she was in the car with the mental health worker. (RT 2301-03.) Frances testified that Eva said she was in the room when Versenia was shot. Eva said that appellant "didn't have to do that" and that he "went down the stairs just as fast as he could." (RT 2306; 2311.) Frances further testified that Eva said that Versenia fell back in her (Eva's) arms and a stream of blood was coming from her head. (RT 2311.)

Lieutenant Alan Bierce interviewed Eva Blacksher on May 11 but considered her "fragile" and didn't take a written statement. He called for a mental health worker to speak with Eva who appeared in shock. (RT 2584-85.) Bierce saw Eva early the next evening at Ruth Cole's house in Richmond and took a statement from her at that time. Ruth was present for the interview. Eva signed her name after he read it to her. (RT 2585-86; 2612.) Eva stated that appellant had been in her bedroom and then went down a short hallway into the dining room. Within a couple of seconds Eva

heard shots but no voices. From her bedroom she saw Versenia come out of her door and turn into the dining room. Versenia said something like "What's this?" or "What are you doing?" and "What's wrong with you?" and Eva heard a single shot, totaling three shots in all. Eva went into the dining room and saw Versenia standing and bleeding from her head; Versenia then slumped to the ground crying out "Mother." (RT 2588-90.) Eva did not say that Versenia died in her arms. (RT 2612.) Eva did not see appellant in the dining room when she went into that room. (RT 2604.) Eva said that appellant and Torey had some friction but she didn't know what they were bickering about; appellant didn't seem hostile or agitated when she saw him that morning. From her location, Eva couldn't see into the dining room. (RT 2600.)

4. Appellant's argument with Torey in the days before the shootings.

The Blacksher family was comprised of four older siblings, James, Ruth, Ruby, and Artis, Jr., and three younger ones, Elijah, Georgia and appellant. (RT 2216.) Appellant always lived at the family home, although he sometimes stayed in the back cottage. After their father Artis, Sr. died, appellant moved from the back house into the front bedroom of the main house. (RT 2121-22.) Eva moved out of the house for about nine months, and stayed with Versenia and her husband Sammy Lee in an apartment. In

1990, after Eva had a stroke or operation on her neck, Versenia and Sammy Lee and their son Torey Lee moved back into the family home with Eva, although Torey lived at the house off and on sometimes staying with a girlfriend or on the streets.[5] Appellant then moved into the back cottage. Versenia took care of Eva. This was the living arrangement at the time of the offenses. (RT 1830-31; 2125; 2290-93.)

James Blacksher believed that appellant was jealous of Torey because Torey was staying in the house with appellant's mother and appellant felt he had more priority. Appellant and Versenia got along well until Torey moved into the house. (RT 2358; 2369.) Eva had told James that appellant wanted Versenia and Torey to move. However, James denied that Eva said that Versenia and Torey would have to leave the house instead of appellant, although he had told the police officer that Eva told Versenia to move out and gave her keys to appellant to make copies. (RT 2370; 2385.)

Elijah Blacksher testified that appellant came to his place late one night a week or more before the shootings. Appellant was angry and wasn't

---

[5] Sammie Lee admitted that in February of 1995 he and his son Torey had an altercation over $10 and Sammie "had to" pull a knife on Torey, not to subdue him but to get his $10. (RT 1841.) Torey never worked but always had cash. (RT 1841.)

making sense, and they talked until 2:00 a.m. or later. (RT 2472-73.) Appellant said that Torey wouldn't stop messing with him and wanted to know if Elijah could get him a gun. Appellant said he was going to kill Torey because he and five or six others had threatened him and thrown rocks at his car. (RT 2474; 2482.) Appellant was also upset because Torey was dealing cocaine from Eva's house and bringing women and men to the house and disrespecting his elders. (RT 2485.) Elijah refused to discuss the gun and told appellant that Torey was "blood." Appellant cooled down somewhat, and finally calmed down and went home. (RT 2479; 2481; 2485.)

The next day Elijah called appellant and appellant visited Elijah again; appellant said Torey was still messing with him but did not mention Versenia with whom he had a good relationship[6]. (RT 2486.) Elijah told appellant to calm down and to stay away from Torey; he invited appellant to stay with him. (RT 2489.)

Frances Blacksher testified that around 10:00 p.m. on Sunday, May 7, 1995, appellant and his brother Elijah arrived at her and her husband

---

[6] Elijah was impeached with his statement to the police in which he said that appellant said he was also "having trouble" with Versenia, who was always taking sides with Torey and didn't listen to what he (appellant) had to say. (RT 2488; 2492.)

James' house. Appellant was upset and angry and paced the floor, repeating that he was going to kill Torey because appellant didn't want Torey around Eva, and that if Versenia got in the way, she would get it too because she always protected Torey. (RT 2295-98.) He mentioned a bat and said he was going to knock Torey's brains out. (RT 2299.)

James testified that appellant was "very moody" during this visit and was "constantly walking, saying what he was going to do," that he was going to kill Torey and knock him on the head with a baseball bat. James told appellant to go home and think about what he said. (RT 2342-45.) Appellant did not have a weapon, but he said he would get a gun and shoot the whole place up. James told him not to do it. (RT 2348-49; 2374.)

Elijah testified that he and appellant went to James' home because Elijah wanted James, as the oldest and head of the family, to realize how serious the matter was. However, James was "sloppy drunk" on the couch and Elijah couldn't wake him up. (RT 2493-96; 2527; 2531.) When they left, appellant said he was going on the streets to buy a gun. (RT 2499.) Elijah talked to appellant again the next day; appellant said he was going to continue to try to find a gun, and said he was going to shoot Torey as soon as he got a gun. (RT 2501-02.) Appellant wasn't making any sense. (RT 2503.)

On Monday, May 8, 1995 Sammie Lee heard Torey and appellant

arguing in the driveway outside the house. They were arguing. Torey had thrown rocks at appellant's car and appellant had tried to run Torey down. (RT 1822.) After 20 minutes, Versenia went out, and five minutes later, Sammie went out. Torey was with two friends and Versenia was trying to get Torey to stop arguing and go into the house. After about 15 minutes, Versenia managed to get Torey inside; his friends stayed outside. (RT 1823-25.)

Around midnight that night Officer Luis Mesones was dispatched to the Blacksher home. Versenia answered the door and said appellant had threatened to kill her son Torey. She signed a citizen's arrest form. (RT 2274-76.) Versenia told Mesones that appellant was schizophrenic and refused to take his medication. Versenia also reported that appellant sometimes became angry at random people and would holler at people he didn't know. She said appellant was going to bust open Torey's head and that he was incoherent and rambling. When Versenia was reporting this to the officer, appellant was in the living room staring off into space and did not acknowledge the officer's presence. Finally, appellant said that Torey had disrespected Eva by bringing his friends to the house. Mesones arrested appellant and booked him into jail. (RT 2282-83; 2286-88.)

Appellant's sister Ruth Cole testified that appellant called her at her home in Richmond from the Berkeley jail around 3:00 a.m. on Tuesday,

May 9, 1995. (RT 2132.) Appellant said he had been waiting in the front house with a baseball bat for Torey to come home; and that he was going to kill Torey. When Versenia woke and asked appellant what he was doing; he said he could come into his mother's house whenever he wanted. Appellant said that Versenia had called the police and he ended up in jail. Appellant told Ruth two or three times that he wanted to kill Torey and asked her to bail him out of jail. He sounded serious and coherent and seemed to understand her. Versenia also told Ruth that appellant said he was going to kill Torey. (RT 2137-39.)

Ruth went back to sleep but the next day went to her mother's house just as Eva and Versenia were leaving for the Berkeley courthouse to get a temporary restraining order [hereafter "TRO"]. Versenia and Eva said they had to go to Oakland and Ruth drove them there. Eva got into the car and went to the courthouse of her own free will. (RT 2141-43.) Ruth testified that Eva "knew" she was going to the courthouse to get a TRO; and Ruth knew Eva knew because Ruth and Versenia were discussing the TRO in the car on the way to the courthouse. (RT 2145-46.) According to Ruth, Eva was afraid and said they were getting a TRO because appellant had come into the house with a bat saying he was going to kill Torey. (RT 2147; 2155.) At the courthouse, Eva was beside Versenia when Versenia was talking to the court employee; Versenia read to Eva from the papers and

talked to Eva while she filled out the forms. (RT 2157-62.) The clerk stamped the papers and said the TRO (Exh. 87) would be in effect at 10:00 a.m. the next day. (RT 2173-75.)

Eva had testified that she did not remember going to the Oakland courthouse for a restraining order against appellant a day or so before the shootings. (CT 766.) She did not remember changing the locks to her house on May 10, 1995 to prevent appellant from entering. (CT 766.) She did not see two strangers in her house that morning. She did not remember Versenia having any problems with appellant. (CT 767.) She had never before seen the restraining order, but admitted that it was her signature on the last page. She could not remember signing it and did not remember telling Versenia to write anything for her in court. She denied writing that she was tired of waiting on appellant, or that if he was allowed to stay and be abusive, her caretaker Versenia would leave. (CT 767-68.) The document was not in her handwriting (other than the signature) and she claimed not to know anything about the papers: "I didn't do that. I don't know anything about it." (CT 769.)

Ruth took Versenia and Eva home and returned to her own home around 4:00 p.m. Shortly thereafter, appellant called to say he wanted to talk to her; appellant came by 15 minutes later. He said that Versenia told him that she (Ruth) and Versenia had gotten a TRO and power of attorney

over Eva. Appellant also showed Ruth the keys to Eva's and said Eva had given them to him after Versenia told him that the TRO meant couldn't come into the house.[7] (RT 2191-93.) Appellant said at least three times he was going to kill Torey for being disrespectful to Eva. Although Ruth took appellant seriously, she couldn't believe what he was saying. She told appellant that Torey was kind and gentle. Before leaving Ruth's house, appellant said he wasn't going to kill Torey, and wasn't going to get his hands dirty. (RT 2185-91; 2271.)

Willie Cole (Ruth's husband) saw appellant and Ruth in the kitchen when he returned home around 4:00 p.m. on Tuesday, May 9. (RT 2419.) Appellant said he was going to kill Torey and showed Willie where Torey had hit the rear fender of his (appellant's) car with a brick. (RT 2420-21.) Appellant said that Torey and his gang were going to get him. (RT 2429.)

On May 10, appellant came by Elijah's place in the afternoon and said his mind was made up, and that he had met someone who had a gun, and he had got money out of the bank for the gun; later that day, appellant called and said that the guy had a .357 magnum and that he was supposed

---

[7] Frances Blacksher testified that on the afternoon after getting the TRO, Versenia was upset that Eva had given the keys to the house back to appellant; Versenia had called to get an apartment which was to be ready on the first of the month. (RT 2328.)

to meet him at 7:00 and that he was going to get Torey with the gun when he saw him. Elijah tried to get appellant to come to his house; he called appellant the next morning at 6:30 a.m. When appellant said he had the gun, Elijah begged him to stay in the house until he (Elijah) got there. Appellant hung up. (RT 2506-11.) Appellant was sort of angry, but was talking strange and mumbling and wasn't making too much sense. (RT 2515.) Elijah had never seen appellant in such a state before, as he was during these conversations: he was "drooling and foaming and he just wasn't making no sense." (RT 2530.)

5. Family knowledge of appellant's troubled history or mental illness.

James Blacksher acknowledged that appellant acted unpredictably and that Artis, Jr. stopped coming to the house because of that. (RT 2399.) James believed that Eva "coddled" appellant and was "sure" that appellant was "abusing" Eva to "get what he wanted from her" and that Eva was afraid of him. (RT 2370; 2393.) According to James, appellant did not work but received Social Security disability insurance: James didn't know why or if it was because appellant was paranoid-schizophrenic; James did know appellant was supposed to take medication but did not take it. (RT 2360.) James did not know that appellant had been diagnosed as a paranoid schizophrenic, and was unaware of his hospitalization in 1989, or 1987,

when appellant thought he was a woman and could not be convinced otherwise. (RT 2362.) Appellant did not quote Scriptures to James, and James never heard him complain about hearing voices. James did not know of appellant's three-and-a-half week stay in Herrick Hospital and was not around in the early 1980's when appellant attempted suicide. (RT 2363.) He did not know about appellant complaining of seeing a little man on his bed, which ended with him being hospitalized in Walnut Creek; James never knew appellant to have any mental problems and denied telling the police that appellant was somewhat out of his mind. (RT 2364-65.) James didn't hear Ruth say "something [was] wrong with [appellant's] head" when she arrived, and he did not recall telling Officer Counts that "everyone kn[ew]" that appellant "wasn't all there" but didn't remember saying appellant was "5150" or psychotic, though he may have. (RT 2379-80.) James "might have" told appellant he was "really going crazy" when appellant was talking about shooting. (RT 2387.)

Ruth Cole testified that she was unaware that appellant had been prescribed antipsychotic drugs. Although Ruth did know that appellant had been hospitalized, she did not know if it was because of his mental problems. Ruth denied that appellant had any mental disability. (RT 2213-15; 2244-46.) Ruth did not know he had been institutionalized in Napa State Hospital or that he had been seen by doctors when he was

incarcerated. (RT 2247.) Ruth testified that appellant got along "okay" with his mother, which she defined as meaning that he would say what he wanted or didn't want, and then Eva would give him whatever he asked for and he would take it. (RT 2130.)

Sammie Lee also did not recall appellant's hospitalizations or mental problems; he never knew appellant to be on medications. (RT 1843-45; 1857.) Sammie denied that Eva and appellant were close, and could not remember telling the defense investigator that Eva was closer to appellant than she had been to her husband. (RT 1851.)

Elijah was aware of appellant's mental problems and had discussed those problems with other family members. In his statement to the police, Elijah repeatedly explained that appellant was "not all there" and begged the police not to hurt him. (RT 2517.) He told the police appellant was "like a vegetable, he just don't have good understanding." (RT 2523.) Appellant had spent 37 of his 44 years in institutions. (RT 2518.) Elijah testified that he had seen Torey selling drugs on Prince Street, and that Torey had gotten shot because he took drugs and ran off. (RT 2520-21.) Torey caused confusion in Eva's house and once, in Elijah's presence, had called Eva a bitch when she wasn't cooking fast enough for him. (RT 2522.) Elijah tried to talk to Torey and get him and appellant together, but for Torey "it was about the dope" and all he cared about was his high. (RT

2531.) Torey was walking through the house with a bat after he got out of the hospital "from his own [shooting]." (RT 2532.) When Versenia had appellant arrested, Eva said if anyone had to leave the house it would be Versenia and Torey because appellant would have a place to stay; Eva always protected appellant. (RT 2533.)

Appellant had been in Napa State Hospital, in Herrick Hospital for three weeks for mental health treatment, and in Walnut Creek Hospital for mental health treatment. (RT 2534.) Appellant "couldn't help what happened to him." (RT 2535.)

Elijah testified that he and Versenia and Georgia (the younger siblings) talked about appellant's need for help and medications; Elijah assisted appellant in getting Social Security and knew appellant was receiving medication twice a week. Sometimes appellant's mind would "come and go." (RT 2525-26.) Appellant started showing signs of mental illness when he was a child; Elijah tried to take care of him because the older siblings made fun of him: "[B]y looking at him, you think he's a whole being, but he's not a whole being." Eva knew of appellant's problems and tried to tell the others to "leave him alone" because he "ain't all there."[8] Torey and his friends taunted and pushed appellant. (RT 2528.)

---

[8] Eva was so concerned about appellant that she once had her house put in appellant's and Versenia's name but two

6. Continued Blacksher family disputes.

Ruth Cole acknowledged that she and appellant had disagreements, and that there was a continuing division in the family with respect to Eva's custody and care -- indeed at the time of trial there was a pending court action to which Ruth was a party. Ruth had placed Eva in a nursing home; her sister Georgia Hill preferred to care for Eva at home and filed suit against Ruth. (RT 2207-08; 2243; 2389; 2427.)

Since the shootings, the Blacksher family had meetings regarding how to deal with appellant, and the controversy over who would take care of Eva. Everyone in the family had police reports of this case and had seen each other's statements. They had heated disagreements. (RT 1853-54.)

Frances had been involved in family meetings at the Blacksher house with James, Artis, Sammie and Ruth; she had a lot of police reports and had reviewed reports of her and her husband's statements. (RT 2312-24.) Frances claimed she told anyone who wanted to listen about Eva saying she actually observed the shooting; she may have told the police and she also told defense investigator Hicks. (RT 2334-35.) She and Ruth talked about the incident. (RT 2332.)

---

months after Versenia's death, Ruth had their names taken off, and her name put on, which caused conflict in the family. (RT 2529; 2539.)

7. Appellant's trip to Reno.

Records from Harrah's Reno hotel showed that appellant had paid for a room and stayed in the hotel the night of May 11, 1995. (RT 2012; 2017-18.) Records from the Orient Express Travel Services showed that appellant bought a ticket for the 12:55 p.m. bus to Reno leaving from San Francisco on May 11, returning the next day. The Orient Express also made appellant's room reservation at Harrah's Hotel and sold him a ticket for $300 in chips. (RT 20300; 2036-44.) These records showed that appellant purchased the ticket but did not show whether appellant actually took the bus or stayed overnight at the hotel. (RT 2051-52.)

8. Appellant's arrest.

Berkeley police officer Martin Heist was parked in front of the police station at 2:30 a.m. on May 13, 1995. He saw appellant try to use the phone by the locked front door of the station; appellant then walked over to Heist's car. Appellant was wearing a T-shirt that said "Reno, Nevada," apparently new jeans, and carried a small paper bag with toiletries and cigarettes. (RT 2545; 2547.) Appellant gave his name and asked if the police were looking for him. Officer Heist handcuffed appellant and he was escorted into the station by other officers. (RT 2546-47; 2550.)

9. Forensic evidence.

Pathologist Dr. Paul Hermann performed an autopsy on Versenia

Lee. She died of a bullet wound to the head. That wound and a wound to her finger suggested that she had been shot from at least one to two feet away. (RT 2054-58; 2066.)

Dr. Sharon Van Meter performed an autopsy on Torey Lee which showed he had died from a bullet wound to the head. (RT 2401-03.) Torey had codeine, morphine, cocaine metabolite and methamphetamine in his blood, indicating that he had taken these drugs within the last six to 36 hours before his death; but none of these substances contributed to his death. (RT 2407; 2412-14.) Torey had a previous arm injury (shotgun pellets in the arm) some weeks to months old, consistent with having been inflicted in November of 1994. (RT 2408-09.) He had a scar on his abdomen, possibly from surgery, and another scar that crossed this long scar; the pathologist could not say if the surgical scar was associated with a stab wound. (RT 2410-11.)

Firearms expert Joseph Fabiny testified that both recovered bullets were fired from the same weapon, which he believed was a .38 special or a .357 magnum, although Fabiny did not have an actual weapon to use for comparison (his opinion was based on examination of the slugs). (RT 2569; 2574; 2576; 2579-82.)

B. Evidence Adduced by the Defense.

Authenticated records were received into evidence. It was stipulated

that those records indicated appellant had been eligible to receive Social Security disability insurance based on a disability of paranoid schizophrenia, that social security payments were sent to him directly, and that appellant had applied for Social Security disability insurance four times, first in September of 1979 (denied for medical reasons); in November of 1979 (approved with payments beginning February 1980 and discontinued in October of 1982 because appellant was in a public institution); in July of 1984 (denied for medical reasons) and in October of 1986 (approved in December 1986 until appellant became ineligible in January of 1996 because he was in a public institution). (RT 2624.)

Dr. Gerald Davenport, a clinical psychologist conducted a Penal Code section 1368 examination of appellant on November 29, 1984, and diagnosed appellant as a schizophrenic in remission but found him competent. (RT 2646; 2672; 2676.). Dr. Davenport also conducted a Penal Code section 1368 examination of appellant in 1996.[9] Dr. Davenport didn't formally diagnose appellant at this time, but felt that appellant was schizophrenic. (RT 2676.) Appellant was agitated and hyperactive; he

---

[9] Trial court explained to the jury a "1368" evaluation, as referred to in Dr. Davenport's testimony and told the jury this evidence was admitted only to impeach the family members who claimed no knowledge of appellant's mental history. (RT 2682-83.)

displayed bizarre verbiage and loose thinking; he denied hallucinations even while seemingly responding to internal stimuli; he also denied any mental illness, which a mentally ill person typically does; appellant was euphoric and engaged in inappropriate laughter, again as if responding to internal stimuli; all these symptoms were consistent with the behavior of a schizophrenic. (RT 2676-78.) Since appellant had been diagnosed some 10 to 15 times in the past of paranoid schizophrenic, Dr. Davenport suspected once again that he might be.[10] (RT 2679.)

Dr. Davenport's testimony was based on his review of appellant's records from his 1984 hospitalization; these records showed that appellant had been hospitalized in Napa State Hospital in 1975 for "mental health difficulties" and suicidal ideations. Appellant was hospitalized in 1977 and tentatively diagnosed as having schizophrenia and being a chronic alcoholic. He was hospitalized at Herrick Hospital in 1981 for multiple episodes of psychotic depression. (RT 2641-42.) In 1984 appellant was

---

[10] Dr. Davenport explained schizophrenia as a severe mental problem; the schizophrenic is generally out of touch with reality. A chronic paranoid person has the delusion that someone is trying to harm him. (RT 2634-36.) Cogentin and Mellaril are antipsychotic medications prescribed for a schizophrenic who is out of touch with reality; failure to take the medications increases the probability of regressing to a psychotic state. Lithium is used to calm down people who suffer from a bipolar disorder. (RT 2637-38.)

hospitalized at Highland Hospital for 36 days for a "progression of symptoms," including "religious preoccupation" which means using religion in a delusional fashion. Appellant reported that people were plotting against him, and was prescribed Mellaril and Lithium; the records indicated that appellant discontinued the medication once released, which meant chances were good he was becoming psychotic again, unless he was undergoing therapy or ongoing mental health treatment (RT 2643-44.) Appellant was also hospitalized in 1986 in Walnut Creek for two days and was diagnosed as a paranoid-schizophrenic, chronic and delusional. (RT 2645-46.)

STATEMENT OF FACTS - SANITY PHASE EVIDENCE

A. Evidence Adduced by Appellant.

Dr. William Pierce, a clinical psychologist, recounted appellant's childhood as characterized by a good relationship with his mother but a conflictual relationship with his father, who drank and physically abused him. This was confirmed by appellant's sister Georgia. (RT 3084-85.) Appellant, the youngest of eight grown siblings, was "spoiled" by his mother, which created jealousy among his brothers and sisters. (RT 3083; 3086.)

Appellant's first contact with the juvenile justice system was at the age of eight for burglary. Appellant had repeated contacts from the age of

eight to 17 years for being a runaway, for malicious mischief, extortion, burglary, theft, and robbery. Dr. Pierce testified that the beginning of an emotional disturbance is reflected in a person's conduct; indeed, the juvenile court referred appellant for a 90-day psychiatric diagnostic evaluation after his last offense. (RT 3093.) Other juvenile records from the California Youth Authority indicated that appellant had admitted suicidal thoughts; and I.Q. tests showed appellant as retarded and in the low normal range. (RT 3094-95.) As a teenager, appellant used LSD, methamphetamines and barbiturates. The impact of drug use on a person who is mentally ill may be independent of the mental illness; thus the usual practice is to make "dual" or separate diagnoses for each. (RT 3087-89.)

Appellant was married to Alicia Saenz from 1978 to 1981, and to Shirley Thompson in 1984. He had a son with Shirley Thompson in 1985, and two other sons, in 1988 and 1994 with other women. (RT 3136-37.) Appellant's employment history was meager: he had worked as a cook for a short time in 1985. (RT 3137.)

The first indication that appellant was seriously ill appeared when he was 21 in 1975. Appellant was disorganized and confused. He had been using heroin because of problems at home and became depressed. He reported to his parole officer who sent him to Highland Hospital, where he was transferred to Napa State Hospital. (RT 3095.) At Napa, appellant was

hospitalized for three days as a possible suicide, then discharged at his own request before receiving treatment. (RT 2979.)

Appellant was next hospitalized at Highland Hospital on December 28, 1977, as a referral from the mental health unit of the Santa Rita jail. Appellant had complained of hearing voices and seeing a small man on his bed. (RT 3140.) He also complained of mistreatment from his father, stating he could never forgive his father. Appellant was treated with Mellaril[11] which helped him to sleep but had no effect on his thought disorder. The records indicated that he might be having a psychotic reaction related to alcohol, and questioned whether appellant was schizophrenic because he was not grossly paranoid. (RT 3141.)

Appellant was again hospitalized at Highland Hospital from January 6 to January 12, 1978. He complained of hearing voices, seeing a little man, depression, isolation and suicidal ideation. He suffered side effects from Mellaril, had lost weight and preferred to die. It was noted that his reports were not "in any way manipulative." The diagnosis was depressive reaction, and the Mellaril prescription indicated the clinician thought there was an underlying psychosis. (RT 3141-43.)

Highland Hospital social worker Ruth Gades confirmed that

---

[11] Mellaril is a major tranquilizer and anti-psychotic medication. (RT 3106.)

appellant was admitted to the in-patient criminal justice unit for a 72-hour involuntary commitment[12] in 1978 and was discharged voluntarily. (RT 2974-76.) Appellant had indications of suicide ideation, auditory and visual hallucinations, and some possibility of organic brain syndrome. Appellant reported that his visual hallucinations, which had been intermittent for the last two years, had recently become more severe. He didn't care if he continued living. (RT 2977; 2981-82.) Appellant also stated that he had been drinking a pint of scotch a day for the two or three months before his incarceration. Gades confirmed that mentally ill people sometimes self- medicate with alcohol or drugs and that mentally ill people commonly deny their illness. (RT 2979-80.) The discharge summary indicated a diagnosis of psychotic depression with auditory and visual hallucinations and suicidal ideation. (RT 2983-84.)

Appellant's further visits to the Santa Rita psychiatric services in January and February of 1978 showed continuing depression and anxiety, with the same diagnosis of depressive reaction and alcohol abuse history. (RT 3144.) Gades saw appellant again on January 10, 1978, for head injuries and noted he had a history of head trauma. (RT 2986.)

Mental health specialist Sophie Miles saw appellant at the Fairmont

---

[12] Welf. & Inst. Code, §§ 5150, 5250.

Hospital on January 20, 1978, when appellant was in custody in the Santa Rita jail.[13] (RT 3043.) Miles described appellant as mildly depressed and anxious. (RT 3008-10.) Appellant said he hadn't used drugs or alcohol for the past two years. He was prescribed 400 mgs. of Mellaril a day and maintained on that dosage. (RT 3012-15.) He was diagnosed as depressive reaction and psychotic depressive reaction. (RT 3020; 3024; 3031.)

On appellant's visits to Highland Hospital on April 3 and April 4, 1978, he was described as depressed and suicidal; on May 31, 1978, he complained about auditory hallucinations and talked about suicide. (RT 2990-91.)

On November 30, 1979, appellant was again involuntarily committed to Highland Hospital Psychiatric Emergency Services for 72 hours and was described as "acutely psychotic." (RT 3144-45.) Appellant's paranoia had compelled him to discontinue his medication with a resulting intensification of auditory hallucinations, paranoia, and response to internal stimuli. The treating doctor suggested an injection of antipsychotic medication which indicated that appellant had had episodes of more active psychoses. The final diagnosis was residual type schizophrenia. Appellant was medicated

---

[13] Inmates were bussed in to the hospital -- not at the inmates' request but at the therapist's determination. (RT 3024-25.)

and released. (RT 3145-47.)

On March 28, 1980, appellant was again involuntarily committed to Highland Hospital and held for 12 days (not just a 72-hour hold), which meant that he was considered a danger to himself or others or gravely disabled. (RT 3149.) The records showed he was suffering from auditory hallucinations and thought-interruption showing internal preoccupation. Appellant was again diagnosed with psychotic depressive reaction and prescribed Mellaril. Appellant had a series of follow up visits at Fairmont Hospital through June 6, 1980. He was maintained on Mellaril. (RT 2987-89; 3150-51.)

Appellant was incarcerated in state prison in January of 1981; in June of 1981 he was taken to Herrick Hospital for an overdose of sleeping pills. On September 11, 1981, psychiatrist and neurologist Dr. Jeffrey Weiner, a psychiatrist and neurologist, assessed appellant for the Alameda County Forensic Mental Health. Appellant reported hearing voices, and requested antipsychotic medications, which he hadn't received since his arrest the previous month. Dr. Weiner diagnosed appellant as a major depressive with psychotic features and anti-social traits, and noted his history of multiple episodes of psychotic depression. Dr. Weiner restarted appellant on Mellaril. (RT 3055-59; 3151-53) Appellant was diagnosed with psychotic depression and was also prescribed 900 mgs. of Thorazine,

an antipsychotic, and Flurazepam, a sleep medication. (RT 3033; 3124.) Appellant continued with follow-up visits in October of 1981 and was continued on Thorazine but not Flurazepam. (RT 3036-38.) On cross-examination by the prosecutor, Miles stated that a person with acute paranoid schizophrenia who took no antipsychotic medications for seven or eight years would probably end up in the psych ward because of strange or bizarre behavior; such a person might just lash out at someone; and the person would absolutely be out of touch with reality. (RT 3041-42.)

Appellant was paroled in March of 1983. In 1984, appellant's paranoid psychopathology increased. (RT 3153-54.) On June 18, 1984, he was brought to the psychiatric emergency services by his future wife. Appellant had been unable to sleep for five days and on arrival he showed increased religious preoccupation and believed the Bible passages (such as "we shall watch you, thou unclean thing") referred directly to him. (RT 3154.) Appellant was sent home with Mellaril and returned involuntarily the next day, after having overdosed on Mellaril. Appellant was depressed and paranoid, mumbling incoherently and displaying bizarre behavior. He was discharged on June 25, 1984, after the medications were reinstituted. (RT 3155-56.)

On August 2, 1984, appellant was again involuntarily committed to psychiatric emergency services after his mother and sister-in-law called the

police because appellant was agitated, incoherent, belligerent and paranoid with loose association. He was straight-jacketed and given Mellaril and he quieted down. Despite the concern of his family, appellant was sent home. (RT 3157-58.)

On October 12, 1984, appellant's parole officer had him involuntarily committed. Appellant spent 35 days in Highland Hospital. He was described as having religious and sexual preoccupation, paranoid thoughts, bizarre behavior and auditory and visual hallucinations. (RT 3159-60.) He refused to eat or drink and believed everyone was trying to kill him. Appellant's symptoms were clearly psychotic (he was diagnosed as having bipolar disorder with psychotic features). Various different psychotropic medications were tried. Appellant had no response to Haldol but some response to Mellaril with Lithium. (RT 3161-63.)

In 1984, appellant was evaluated under Penal Code section 1368 and found competent, although one doctor diagnosed him as schizophrenic paranoid type in remission, and the other doctor noted his long-standing delusions and psychotic character. (RT 3176-77.)

In 1985, appellant was again incarcerated and was seen by mental health professionals at Vacaville. A June 1986 Board of Prison Terms evaluation diagnosed him as schizophrenic with paranoid features in remission, mixed substance abuse, and antisocial personality disorder. The

report indicated appellant's inappropriate laughter and bizarre behavior. (RT 3167.)

On October 6, 1986, appellant was once again involuntarily committed by his parole officer because of his fixed delusion that he was a woman, and intense religious preoccupation. Appellant had gone to church claiming he was a woman named Evra and had to be removed from the women's restroom. (RT 3168-69.) Appellant was admitted to Walnut Creek Hospital from October 6 to 9, 1986, where he denied having hallucinations or delusions, but insisted that there was a terrible mistake and that he was a woman. (RT 3169.)

Dr. Michael Levin, a psychiatrist, treated appellant at the Walnut Creek hospital in 1986 during appellant's 72-hour involuntary stay. (RT 3100-01.) Appellant's main complaint was that he was "a woman" although he had been raised as a man. When appellant's parole officer pointed out appellant's male genitalia, appellant insisted this was "a terrible mistake" and that he was in fact a woman. Appellant laughed inappropriately, quoted the Bible, and appeared to be responding to internal stimuli; he persisted in his delusion that he was a woman and objected to being referred to as "sir." (RT 3124-26.) Appellant was agitated and injected -- against his will -- with a potent antipsychotic medication (Haldon) in an effort to calm him down. (RT 3103-04.)

Nonetheless, appellant remained delusional during the three days of his involuntary stay, and at the end of the period he left essentially unimproved and against medical advice. Dr. Levin described appellant's impairment as severe and his prognosis poor. He was given a prescription for Mellaril in case he wanted to use it, although appellant became angry when confronted with the usefulness of medication. (RT 3105; 3126.) Dr. Levin diagnosed appellant as schizophrenic, paranoid type, chronic and delusional. (RT 3105-07.) Dr. Levin explained that schizophrenia is a severe mental illness which involved thought disturbance and an impaired ability to assess reality. The disease tends to be chronic and lifelong; the person's internal psychiatric life is more real and important to them than the outside world. Staring off into space and inappropriate laughter, for example, demonstrate that the person is responding to internal stimuli or hallucinations. (RT 3110-11.) Some people with milder symptoms are able to function depending on their medications; a schizophrenic not on medication can remain out of trouble or the public eye because he withdraws and stays to himself. (RT 3110; 3116.) People such as appellant with a major delusional type of mental illness commonly do not recognize themselves as mentally ill. (RT 3117.)

In June of 1987, appellant was once again incarcerated at Vacaville. He appeared incoherent and refused housing in a certain facility saying he

would be in jeopardy if not housed with gay inmates. (RT 3170.) Even non-professional staff people reported his bizarre behavior, inappropriate laughter, and incoherency. (RT 3171.) Appellant was continued under observation. On September 17, 1987, appellant was reported as responding to internal stimuli, engaging in tangential thinking, and suffering from probable paranoid schizophrenia. The same doctor reported that on October 8, 1987, there was no evidence of psychosis except for apparent hallucinations at times. (RT 3172.) On December 9, 1987, a doctor noted that appellant was not taking his medications but was not actively delusional. On January 4, 1988, appellant refused to take his medications and was antagonistic towards other inmates. At his last evaluation on January 21, 1988, appellant continued to deny he was mentally ill and refused medications; he was reported to have mild paranoid ideation and inappropriate laughter. (RT 3173-74.)

There were no records of psychiatric treatment or intervention after January 21, 1988. (RT 3174.) However, appellant had been approved on Social Security disability insurance from 1986 to 1996. (RT 3180.) Tracy Daniels, appellant's girlfriend, reported to Dr. Pierce that appellant was more severely disturbed when he was released from incarceration in 1994 than when he went in. At night he would wake her up saying she had more than one head, or the head of a dog. He would have episodes and would

begin to stare or say that people looked like devils, and was uncomfortable with these hallucinations. He thought he was Jesus and that his mother was the Earth Mother, and that he was the only male with male genitalia. At times she could tell when a psychotic episode was coming on; other times he would change personality quickly. (RT 3180-84.)

Officer Mesones' police report of May 8, 1995, indicated that appellant's sister described him as a schizophrenic who refused to take his medications; she also reported that appellant often became angry at random people for no apparent reason -- sufficient reason in Dr. Pierce's opinion to have had him him involuntarily committed for 72 hours. (RT 3175-76.)

Dr. Pierce conducted a psychological evaluation of appellant in June of 1995 and in 1997, at the request of defense counsel. (RT 3068-69; 3074.) The evaluation included a review of appellant's psychiatric, correctional and social security records, and interviews of family members. (RT 3075-79.) Appellant displayed a pattern of thought disorder (considered a main symptom of schizophrenia), fragmented and tangential thinking, and loose association with rambling and bizarre content. Appellant started talking about Jesus, then moved to homosexuality, the black race, the devil, and Africa, not in any logical sequence but in a rambling diatribe, characterized by "pressure speech," i.e., talking as if he was compelled to speak. (RT 3081-82.) The more appellant talked the

more incoherent his discussion became. (RT 3083.) Appellant rambled at times incoherently; his thinking was characterized by loose associations; tangential and disordered "pressured" speech interrupted his concentration; he was internally occupied; he talked about Moses, Ali Baba and the Middle East, then lapsed into other grandiose and bizarre themes. Testing showed appellant with severe thought disorder and poor reality testing, with a great potential to exhibit impulsive or emotionally laden behavior; his ability to control his vivid fantasy life was poor and it was difficult for him to separate his internal experience from external reality. Dr. Pierce's diagnostic impression was that appellant was schizophrenic, paranoid type. Dr. Pierce's review of Officer Mesones' May 8, 1995 report indicated appellant was probably having a paranoid psychotic episode at that time. (RT 3184-85.) Dr. Pierce's opinion was that it would be extremely difficult for appellant to understand the nature and quality of his act and to distinguish right from wrong when in a psychotic episode. (RT 3186-87.) A psychotic is unable to control anger, and if appellant was in a psychotic episode, it would be difficult for him to appreciate the nature and consequences of his acts. Similarly, he might not have had a clear choice because when someone is delusional, his choices are driven by the delusion. (RT 3254-55.) The experiences with appellant, as described by the people Dr. Pierce interviewed, showed signs of appellant's episodic bizarre

behavior. (RT 3255.)

In 1996, appellant was again evaluated for competency under Penal Code section 1368; one doctor found him competent, another incompetent. A third doctor was called in as a "tie-breaker," and found him competent but with a clear and chronic mental illness of schizophrenia, paranoid type. (RT 3177-78.)

It was stipulated that the following evidence from the guilt phase was admitted as evidence in the sanity phase: John Adams' and Elijah's testimony on appellant's mental state and history; the 911 tape; the incident in which appellant challenged a female stranger to fight; and Officer Mesones' testimony as to statements made to him by Versenia as to appellant's mental state and history. (RT 3259.)

B. Evidence Adduced by the Prosecution.

It was stipulated that the custodians of records for Eden Medical Center; the Alameda County Criminal Justice Mental Health Center, Highland General Hospital, and the John George Psychiatric Pavilion would testify that there were no records on appellant from May 13, 1995 to May 27, 1998. (RT 3260-61.)

1. Family testimony.

Appellant's older brother Artis Blacksher, Jr. testified that their father was a strict disciplinarian and whipped them if they didn't do as he

said; he taught them to obey the law, and did not allow any fighting in the family. (RT 3310-12.) Although Artis moved out of the family home when appellant was four or five years old, and thereafter saw appellant only on an irregular basis, Artis claimed that appellant was his mother's favorite and got away with things. After their father died, appellant moved into his mother's house. Artis tried to teach him right from wrong but appellant wouldn't listen. Artis told appellant he had to work and that he couldn't beat the system. Appellant didn't want to work and said Artis was stupid, that he was a flunky for the white boy for working, and that working wasn't his thing: appellant would laugh at Artis when Artis cleaned up his mother's yard. Appellant bought expensive clothes but wouldn't get his hands dirty. (RT 3312-16.) To Artis' knowledge appellant never needed psychiatric care; once appellant went to jail, Artis "had nothing to do with it." (RT 3322.) Until the time of the shootings, Artis thought appellant knew the difference between right and wrong. (RT 3316.) As to appellant's conflicts with Torey, Artis knew only what "they said." (RT 3323.) Artis claimed it "was a lie" that Torey brought drug friends into the house. (RT 3324.)

Appellant's older sister Ruth Cole testified that their father taught them to work and not to fight. (RT 3373-74.) She herself taught appellant to honor and obey, and tried to reinforce on him right from wrong when he

was a teenager. (RT 3376.) Appellant always said he wouldn't work for whitey and would beat the system, and that he wasn't going to work; he first got on disability in his teens. (RT 3377; 3378-79.)

Ruth's daughter was born before appellant, and Ruth and her daughter moved back into the family home for two and a half years when the daughter was two years old. (RT 3384-85.) Ruth's daughter and appellant went to the same school. Appellant's parents talked to the school counselor, but Ruth was not aware they were talking about appellant's mental condition. (RT 3387.) Ruth was unaware that appellant was diagnosed in 1978 as a paranoid schizophrenic or that he was hospitalized for mental illness. (RT 3391-92.) Ruth and appellant had corresponded since he has been in custody; appellant wrote about the Bible. (RT 3393-94.) Ruth had received some 30 letters from appellant, and she wrote him because her mother didn't write (she could write but didn't want to). Phrases from these letters containing Biblical and satanic references were read into record. (RT 3397-3403.)

Elijah Blacksher's guilt phase testimony regarding appellant's need for a gun to kill Torey, appellant's anger, and threats, and getting a gun, and refusing to follow Elijah's advice to stay away from Torey were admitted at the sanity phase pursuant to a stipulation. (RT 3404-05.)

/

2. Testimony by law enforcement officers.

James Lons booked appellant into the Berkeley jail at 2:35 a.m. on May 13, 1995. (RT 3329.) Appellant denied any illnesses, said he was not taking any medications, said he was not suicidal, and denied being under a doctor's or psychiatrist's care. (RT 3329-34.) Lons did not ask appellant whether he was prescribed any medications, only if he was taking medications currently. (RT 3342.)

Deputy sheriff Adrian Minkin testified that appellant was housed as a homosexual in the Santa Rita jail from May 15, to August 4, 1995, and again after February 24, 1996. (RT 3345; 3349-50.) In May of 1996, when Minkin reviewed appellant's background and saw no indication that he was homosexual, he reclassified appellant to mainline housing; appellant refused and was "written up." (RT 3350-51.)

Minkin interviewed appellant every 7 to 10 days when he was housed in administrative segregation. In May of 1996, appellant reported no problems. In June of 1996, appellant refused to answer. On July 11, 1996, appellant said he was homosexual and said he almost got into a fight when on the mainline because of this, he was being called names by other inmates. On August 7, 1996, appellant said he was happy where he was and joked that Minkin would be retired before appellant got out of jail. (RT 3352-54; 3365.) Appellant once complained of a bad headache but never

asked for medications or for a doctor or psychiatrist, he never threatened suicide or complained of hallucinations. (RT 3355-58.)

Appellant was still in administrative segregation at the time of trial, did not bother anyone, and said he liked it where he was. (RT 3363.) Appellant did say he had a bad temper, and a couple times he screamed at someone for no apparent reason and said he might hurt someone. (RT 3363; 3371.) Minkin noticed that appellant had an explosive temper and would have "temper tantrums" for no reason, but denied that appellant was "acting crazy". (RT 3367.) On September 30, 1996, appellant was screaming and banging his cell door against the wall for no apparent reason. (RT 3368.)

Deputy sheriff Alan Richardson spoke several times a month with appellant when he was in the Santa Rita jail from May to November of 1997. (RT 3263.) Appellant had been assaulted by other inmates and was put in administrative segregation. (RT 3273.) During the first contacts, appellant said he was fine and happy in administrative segregation. On June 26 and until October 3, 1997, appellant said he didn't want to talk and that everything was okay. On October 3, 1997, appellant was more talkative; he said he didn't like being around other people and couldn't get along with others. Appellant never asked to see a psychiatrist and did not complain of hallucinations. (RT 3266-69.) Richardson knew nothing of

appellant's mental history and didn't inquire about it. (RT 3274.) Appellant was quiet and indifferent and posed no problems for the staff; he just wanted to stay to himself. (RT 3276; 3279.)

3. Appellant's statement.

Deputy district attorney Richard Moore was called to the Berkeley police station on May 13, 1995, and after Inspector Bierce had interrogated appellant at length, Moore conducted another interrogation of appellant at 12:25 p.m. along with investigator Douglass Wright. (RT 3281-8; 3293.) Appellant agreed to talk, saying "so be it." (RT 3284-86.) The tape of that session was played to the jury. (RT 3287; Exh. 131A; Exh. 111.) Appellant said he had a "beautiful" relationship with his sister Versenia and that Torey was his favorite nephew. On the morning of May 11, 1995, appellant drove out of his driveway and greeted neighbor John Adams. He went up to the front door of his mother's house and went in and talked to his mother. He saw both Torey and Versenia in their beds. He used the bathroom and went to the front door where he saw two people with their heads covered who motioned for him to go ahead. They appeared to be men. Appellant left and got into his car and heard a noise "which appeared to be uh, a certain type of noise." Appellant did not call the police but did call his sister Ruth Cole to tell her to call the police. He went for breakfast and then took a bus to Reno. Appellant denied threatening to kill Torey

with a bat on May 8 and denied telling his sister Ruth and his brother Elijah that he was going to kill Torey. He denied looking for a gun to buy. Appellant also denied having any mental problems and stated he did not use drugs or alcohol.

Moore had no knowledge of appellant's mental history (although he questioned appellant repeatedly about his mental illness and insanity). (See Exh. 131A, Exh. 111.) Moore had read police reports before talking to appellant but none of them mentioned appellant's mental illness. (RT 3296.) Appellant was calm but became annoyed when confronted by statements of his siblings and when Moore told him the "masked men on the porch" reported by appellant didn't make much sense. (RT 3299; 3301.)

STATEMENT OF FACTS - PENALTY PHASE EVIDENCE

A. Evidence Presented by the Prosecution in Aggravation.

1. Evidence of prior acts of violence.

Appellant's older sister Ruth Cole testified that she went to her parents' home around 9:00 a.m. on January 5, 1989. She heard appellant speaking in a loud and angry voice. Their father was sitting in the breakfast room and appellant was at the kitchen sink with a butcher knife in his hand. (RT 3570-72.) Appellant was moving the knife up and down sometimes

pointing it at his father; his father was chastising appellant for not paying rent and appellant was swearing at him, saying he was going to kill him. When Ruth asked appellant to put the knife away, appellant changed his tone of voice but didn't put the knife away. Ruth started moving her father away, shielding him with her body; appellant approached behind his mother, who was shielding him. Ruth took her father to the bedroom where she called 911, but appellant continued to threaten his father. Ruth braced herself against the bedroom door because she could hear the knife hitting the door frame while appellant was telling his mother to get out of the way or he would kill her. The police arrived and appellant left the house. (RT 3573-80.)

A year later, in February of 1990, Ruth asked Artis, Jr. to meet her at their mother Eva's house because appellant had been intimidating to her when she went to the house to care for her mother. (RT 3581-82.) When Ruth arrived she heard appellant and Artis arguing in the kitchen; appellant told Artis he didn't want him in the house. (RT 3583.) Artis came into the living room, where Ruth and her mother were. Appellant appeared in the doorway with the same knife in his hand, telling Artis to get out. Artis picked up a chair and an umbrella which Ruth tossed to him. Eva told appellant to put the knife away; he did not but he didn't come any further into the room. Eva had called the police, and appellant kept the knife in his

hand the 10-15 minutes it took for the police to arrive. When the doorbell rang, appellant left. But later that day, appellant told his mother she had to decide between him or them, and Eva told Ruth and Artis to leave. (RT 3587.)

Artis Blacksher, Jr. testified that he went to his mother Eva's house in February of 1990 and appellant told him to get out; they argued and appellant came to doorway with a butcher knife. Artis grabbed a chair and an umbrella supplied by Ruth. Appellant said he was going to cut Artis because he wouldn't leave the house. Appellant was loud and boisterous and cursing. Their argument continued and someone called the police. (RT 3681-85.)

LaDonna Taylor[14] was appellant's girlfriend for about eight months in 1994-95. On Easter Sunday, 1995, appellant picked up LaDonna at the airport. LaDonna told appellant she wanted to go home but he took her to his house. She sat on the edge of the bed and he fixed her something to eat. (RT 3695-3702.) Appellant, who had been quiet, suddenly jumped on her

---

[14] LaDonna had been an addict and a prostitute and was in recovery when she met appellant; after her relationship with appellant she started using drugs again although at the time of trial she was not using drugs. She had convictions for robbery, prostitution, petty theft, fraud and forgery, and was currently on probation for the last three offenses. (RT 3711-12.)

and punched her in the face; he was angry she had gone to Los Angeles, insinuating she had an affair. (RT 3702-04.) He hit and kicked her and Torey came in and told him to leave her alone. Appellant told Torey to mind his own business and told LaDonna to take her clothes off. LaDonna was scared and wanted to go home, but appellant didn't let her. He had sex with her, then acted as if nothing had happened and took her home. LaDonna did not go to the police, but her relationship with appellant ended; she never went to his house again. (RT 3704-10.) LaDonna acknowledged that appellant behaved strangely during their relationship. As they came out of a restaurant, for example, he'd ask if she saw something with four legs while referring to a man. He also used to cuss out strangers in public. His personality would suddenly change and she could see it coming on; she tried to ignore him so as not to aggravate him when he was like this. He acted a little different and would get quiet all the time. (RT 3714-16.) LaDonna wrote to appellant and visited him in jail until around December of 1996. (RT 3718.)

In 1984, John Burbank was in a holding cell at the Berkeley court with his drug connection "Rooster" and appellant. (RT 3618-19.) Appellant was "jovial" and "normal" before going into court but when he returned to the holding cell he was tense and pacing, made remarks about "whitey" and pushed people out of his way. Appellant headed toward

Rooster, who stood up. Appellant punched Rooster, cutting his face. (RT 3618-25.)

Tracy police officer Timothy Windsor, formerly an Alameda County deputy sheriff, was dispatched to an AC transit bus disturbance on 40th and Broadway in Oakland on July 10, 1991. (RT 3634-35.) The bus driver and supervisor wanted appellant removed for creating a disturbance. Appellant was standing at the rear of the bus and was asked to get off. Appellant tried to explain about a problem he had with a woman on the bus. When appellant was again asked to get off the bus, he walked towards the front of the bus, passing some high school kids and striking one of them, Jason Bey, with his fist. Bey and three friends jumped up and went after appellant; appellant ran and Windsor followed him and took him into custody. (RT 3636-41.)

Correctional officer Darrell Carver was supervising appellant in the shower area in the mental health unit at Vacaville State Prison on January 25, 1988. As appellant was about to enter the shower area, inmate Rayford stepped in and the two exchanged words and took combative stances. Appellant said, "So you want to beat my ass," and threw a punch knocking Rayford to the floor. Carver broke up it up. Carver didn't know if this was a spur-of-the-moment incident or a carryover from another incident. (RT 3648-56.)

2. Victim impact evidence.

Ruth Cole last talked to her sister Versenia on May 10, 1995 after appellant had called from the jail. Versenia was crying and said appellant had been back in the house with the keys. Versenia said she had made a down payment on an apartment and was going to move the next week. (RT 3589.)

On May 11, 1995, appellant called Ruth to say he heard screaming and gunshots at the house and asked Ruth to go check on their mother. (RT 3950.) When Ruth learned Torey and Versenia had been killed, she was devastated. She went inside the house and saw blood everywhere. The funeral costs were around $8000 and she had to get new carpeting in the house. (RT 3590-92.) Her mother would wring her hands and cry and say how much she missed Versenia and Torey, and started calling Ruth by Versenia's name. Ruth took her mother to the cemetery where the mother would cry and say "Why did he have to do it?" (RT 3593.) Ruth wrote letters to appellant in custody, and wrote letters for her mother as well. Neither Ruth nor her mother ever lost their love and affection for appellant. (RT 3599.) Ruth denied causing her mother to change her will to name herself as beneficiary (as opposed to appellant and Versenia). (RT 3603.) Ruth also denied that appellant was violent, saying he was gentle. She denied that her father beat appellant although when her father was drinking

"anything might happen." (RT 3604.) Ruth also denied knowledge of an incident in which her father shot at appellant with a .22 rifle on April 17, 1987, in a dispute in which the father put appellant out of the house. Ruth denied that appellant went to live with her in Richmond because of a dispute with his father. (RT 3605.)

After Versenia and Torey Lee were killed, husband and father Sammie Lee couldn't think right and was performing badly on his job. He stayed with Ruth Cole because he didn't want to go back to Eva's house; he started drinking very heavily because he lost his job. After a week or two, Sammie returned to the house on Allston where he still lived at the time of trial. (RT 3669-72.) When appellant lived in the back house, he didn't interact much with Versenia, Sammie and Torey in the front house except to eat; appellant was the favorite baby boy. (RT 3673-74.)

On May 11, 1995, James and Artis went to their mother's house after Frances called to say something had happened. Artis saw his mother who said Versenia and Torey were dead. At the time, Artis didn't accept it and felt like he had been run over by a train. He went looking for appellant that day "to hurt him." (RT 3685-88.)

/

/

/

B. Evidence Presented by the Defense in Mitigation.

1. Appellant's background: testimony by family members.

Appellant's sister Georgia Hill testified that when she and appellant were in elementary school, they lived with their parents on Channing Street in a house that Ruth had helped her parents buy because Ruth had good credit. After Ruth married, she forced Georgia, appellant and their parents to move into a small apartment so that Ruth and her husband Willie Cole could move into the house; this caused friction and division in the family. The parents and four younger children kids lived in the small apartment until Elijah gave them the money to buy the house on Allston Way. (RT 3737-39.) Their father was an alcoholic who worked all week and would be drunk all weekend and spend all his money. (RT 3754.) He was abusive and would come home after drinking and throw knives at the wall and beat up on their mother. He went out with other women and they were all afraid of him. (RT 3755-57.)

Appellant was born with abnormalities and needed surgery; as a young child he was obese and teased by the other kids. (RT 3742.) The older and younger siblings were divided; the older ones were always jealous of Georgia and had a hatred of appellant stemming from jealousy because he was their mother's youngest and favorite. (RT 3745-46.) Older

brothers Artis and James treated appellant as if they hated him, and were jealous because appellant didn't work and his mother favored him. (RT 3747.) The older siblings, Ruth, James (an alcoholic) and Artis seldom visited the family home. (RT 3740-41.) Appellant had medical and mental problems and deserved proper medical attention; her older siblings wanted to kill appellant even before these offenses. (RT 3764.)

Georgia was aware of appellant's mental problems. She went to Herrick Hospital and learned that appellant had tried to commit suicide. When appellant lived with her in Lafayette, she had to take him to the psych ward because he thought he was "Era" (a woman) and not a man. Georgia had taken appellant to church where he went into the ladies' rest room. He also saw things and would say he saw horns, or say, "your head is on backwards." (RT 3749.) Mental illness runs in the family (an aunt committed suicide and a cousin tried to; another niece has mental illness). (RT 3751-52.) Georgia said that she had discussed appellant's hospitalizations with Ruth, Elijah and Artis and they were certainly aware of his mental problems. (RT 3751-52.)

Appellant and Versenia loved each other and were very close; they exchanged gifts at Christmas and were supportive of each other. After their cousin Floyd was killed by the Berkeley police in appellant's presence, appellant's behavior began to change. He started striking at

things that weren't there, laughing out loud for no reason, and speaking on his own interpretation of the Bible. (RT 3752-54.) Appellant was very involved with his youngest son and spent time with him -- his girlfriend LaDonna Taylor was jealous of his relationship with his son. (RT 3758-59.)

At the time of trial, Georgia and Ruth were in a custody battle over their mother. Georgia testified that Ruth placed Eva in a rest home against her mother's will. Her mother's leg had gangrene and Ruth instructed the hospital to stuff her gangrenous foot into a shoe, leading Georgia to file complaints with the state health ombudsman so that Eva's leg could be amputated. Georgia had to intervene on her mother's behalf many times because of the abuse and neglect in the nursing home where Ruth institutionalized her. (RT 3759-62.) Appellant advised Georgia to come to an agreement with Ruth and not to argue. Georgia visited appellant along with other relatives and loved appellant very much. (RT 3763-64.)

Appellant's brother Elijah Blacksher confirmed that his parents' house was put in Ruth's name because of her credit rating, and that when Ruth married Willie Cole, Ruth surprised the family by giving them 30 days to move out of their house so she could move in. (RT 3798-3800.) This caused hurt and shock and the family moved to an apartment until he gave his mother money to buy the house on Allston Way. (RT 3799-3800.)

The family took care of Ruth's baby Letha and raised her up with appellant, although Ruth didn't live at the Allston Way house at that time; she lived in Oakland and rarely came to Berkeley even to see her daughter. (RT 3804-06.) Their father was an alcoholic; he sometimes disappeared for weeks. He was abusive to Eva and slapped her around or pulled a knife of her when he was drunk and she wouldn't give him any money. Their father worked but didn't always bring his paycheck home; sometimes he hung out on the "ho stroll." (RT 3807.) Appellant was a baby when their father was abusing their mother. He was abusive to Elijah too and if Elijah showed a sign that he was going to try to fight him, the father would pull a blade: "Pops was known for cutting people" and once cut up their Uncle Bob for no apparent reason. (RT 3808-09.) They were all scared of their father, who would beat Elijah if he didn't give him money to spend on drink and prostitutes down on 7th Street. Their father once pulled a knife on Artis and once chased James with a brick for two to three hours after James confronted his father about messing with his (James') woman. (RT 3810-11.) Appellant would try to fight his father when his father beat his mother. (RT 3829.)

Ruth Cole testified that their mother Eva always protected appellant because she said something was wrong with him but the others didn't want to accept that. Their father's sister's children had mental problems. One

aunt killed herself; another cousin tried to commit suicide; other uncles and aunts and cousins were "like" appellant in that you wouldn't know where their minds were at. Elijah attributed this to cousins marrying cousins on the cotton plantation where the family worked in Arkansas, and no other women (other than relatives) were available. (RT 3814-16.) When appellant was in school he would sometimes get lost or wind up in the girls' bathroom and the teachers or Elijah would have to get him out. Eva was illiterate (like Elijah) -- neither could read or write. (RT 3817.) Appellant tried teamsters' work and used to be a cook but the kitchen caught on fire a couple of times because appellant didn't take the pan off the stove. When it caught fire, appellant just looked at it and laughed, so he got fired. At the teamsters, appellant couldn't do the work; he would just walk off or wind up where he wasn't supposed to be. Appellant always talked to himself and still does. (RT 3819.)

Elijah testified that Ruth Cole had a store with her daughter Letha and her husband Willie Cole but Letha said Ruth was messing with the money and they sold the store; also Willie Cole was selling cocaine out of that store, which was how Torey got turned on to cocaine, because they worked for Willie and he paid them with coke. (RT 3822-23.) Sister Ruby had come from Texas three or four times trying to deal with appellant's situation, but Ruth and James and Artis would go over and say crazy things

to her so she left. (RT 3824-25.) The family is divided into two groups with respect to their attitude towards appellant, with Ruth, Artis and James on one side, and Elijah and Georgia on the other. Versenia was aligned with Elijah and Georgia. (RT 3825.) The whole family has talked together about appellant's disability, but the older ones would say there was nothing wrong with him. Their mother Eva would tell them appellant was sick, and if they couldn't leave him alone they shouldn't come back. Eva put the family home in appellant's name because she knew he wasn't capable of holding a job. Appellant would get lost all the time, winding up in the women's bathroom. (RT 3826-27.) His mind would wander, and all of a sudden it was as if he was talking to someone else. (RT 3828.)

Elijah testified that appellant pulled a knife on Artis only after Artis pulled a knife on him: both appellant and Artis had told Elijah this. Artis wanted to kill appellant and Artis also told Elijah he was going to kill appellant. (RT 3830.) Elijah didn't believe that appellant killed Versenia because they were so close. He did not think appellant should be given the death penalty because that would not bring Versenia and Torey back and would just be "one less Blacksher." (RT 3831.) There was a contract out on Torey's life because he got some cocaine that he didn't pay for. (RT 3832.)

Appellant was "not all there" and loved his sister Versenia. (RT

3833.) Ruth and Artis and James have lied because they don't like appellant, and Ruth would end up with money and property if appellant was put to death: Ruth "is about money" and has "something" on Artis. (RT 3834-35.) Appellant was generous and loving with Elijah's family and took his oldest son in the car riding and brought him clothes. (RT 3842-43.)

Appellant's brother-in-law Ronald Hill (Georgia's husband) knew appellant for 22 years. Ronald visited the Blacksher home once a week or more; in his experience, appellant had "never been all there mentally." The entire family mentioned appellant's mental problems. Ronald had seen appellant many times, talking about Biblical references to women, talking about Satan and saying people were talking to him; appellant would talk to himself and laugh to himself in a way that wasn't normal. The older siblings didn't like appellant and said he was spoiled and got away with things; the younger siblings were more compassionate about his condition and treated him like a brother. Appellant's mother was a kind person who loved and cared for him with compassion. (RT 3875-79.) The family, including Ruth and their mother, often referred to appellant as having "mental problems," or "not all there." (RT 3880-81.) Other family members, including cousins, have mental problems (one cousin is a street person). Ruth at times didn't appear "all there" and Artis had chemical dependency problems; there was a lot of alcoholism in the family (James

and Frances and Willie Cole all drank excessively) and "some incest." (RT 3882-83; 3887-88.)

Appellant and Versenia got along well. Ronald found it hard to believe appellant had done this and didn't think he would have done it if he hadn't been provoked. (RT 3881.) Ronald explained that there were supposedly contracts out on Torey's life and that he was in trouble with a gang of drugdealers who had tried to kill him a month before. (RT 3884.) Ronald told the jury that he wasn't even personally sure appellant committed the crimes; but that appellant was not mentally all there and for that reason alone shouldn't receive the death penalty; and the family had enough tragedy. (RT 3883-84.)

Ronald testified that appellant was always respectful to his parents, and that he had only seen appellant get angry when he was provoked. (RT 3887-88.) Appellant often stayed to himself but would get upset if anyone disrespected his mother. (RT 3889.)

Robert Ruffin, a retired stevedore, became friends with Versenia. (RT 3775.) They got married on April 12, 1992, and separated after three months. (RT 3776-77.) They had a "part-time marriage" because Versenia had to stay home and take care of her mother, appellant, and her ex-husband. Ruffin visited the Blacksher home many times during and after their marriage until Versenia's death. (RT 3777.) He said that appellant

had a "split personality" – sometimes you could have a conversation with him and sometimes not. Appellant would sit in the backyard talking to himself. Versenia could quiet him down. (RT 3779-80.) Appellant was generous and once gave Ruffin a beautiful sweater, and was the only one in the family who gave him a wedding present. (RT 3779.)

Ruffin said the whole family was never together (they couldn't stand to be together) although Versenia and appellant got along. (RT 3780.) Appellant and his mother were crazy about each other. (RT 3782.)

2. Testimony by family friends.

Clarence Burrell, an ex-correctional officer at San Quentin, met Georgia in the early 1990's, and met appellant through Georgia. Clarence would talk with appellant in the back house; appellant had a "60's look" and seemed to be living in the past. His conversation was a little offbeat; they'd be talking about one subject and suddenly appellant would switch gears without finishing the first subject. Appellant once remarked that either the world was crazy or he was crazy. (RT 3766-70.)

Alisa Nelson, a government analyst in the state department of alcohol and drug programs, had known appellant's family for 13 years. She met appellant at Georgia Hill's house. He seemed nice at first, then in conversations she noticed his eyes would shift and dart back and forth and his conversation would change abruptly to something totally different.

Alisa realized appellant had a mental disorder; he would pace and start communicating but not directly to her. Appellant once became verbally abusive and his eyes were piercing and glaring. Alisa knew he had this split in his personality because he didn't normally behave that way. An indication that he was going through this change was when his eyes started shifting. He would talk about the Bible and quote things she knew weren't correct. (RT 3783-88.) Appellant was happy and proud when his son was born. (RT 3789.) Alisa was against the death penalty, and said that the Blacksher family had seen enough tragedy. She wanted the jury to consider that appellant had a mental disability and had a son. (RT 3792.)

Patricia White-Brown, the mother of appellant's girlfriend Tracy Daniels, had visited with appellant at her home and at his. Appellant was always respectful and treated Tracy very well. Tracy was taking drugs then and wouldn't listen to her parents (she was 25) and for a year appellant worked hard with Tracy trying to help her with her problem and letting her parents know what was going on. (RT 3890-93.) Patricia knew appellant as a good father and a kind person. (RT 3894.)

Neighbor Diane Marks testified that appellant used to watch passers by and talk to people. He was kind and respectful and helped her by taking care of her dog and doing yard work. Eva said that appellant had to take medications or he might become angry. (RT 3729; 3731-34.)

ARGUMENT

GLOBAL ISSUES

I. APPELLANT WAS TRIED WHILE INCOMPETENT TO STAND TRIAL IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS WHICH REQUIRES REVERSAL OF HIS CONVICTIONS AND SENTENCE OF DEATH

Appellant was tried while incompetent and thus his convictions and death sentence must be reversed. At the pretrial inquiry into appellant's competency one doctor found appellant competent and another found him incompetent. The trial court failed to exercise its discretion and instead appointed a third doctor and concluded that the best out of three would decide appellant's fate. Alternatively, the trial court abused its discretion in finding appellant competent on the basis of incomplete and deficient examinations.

A. Procedural History.

On April 19, 1996, defense counsel raised a question as to appellant's competency and the trial court suspended the proceedings and appointed Dr. Davenport and Dr. Fort to examine appellant. (Apr. 16, 1996 RT 1; CT 298.) Dr. Davenport filed a four-page report finding appellant incompetent (CT 313-16); Dr. Fort filed a one-page report finding that appellant was competent (CT 317).

On May 23, 1996, the trial court noted that the competency evaluations submitted by these two doctors were "at opposite ends of the opinion scale," and appointed a third doctor, Dr. Fred Rosenthal, to conduct another evaluation of appellant. (May 23, 1996 RT 1.)

Dr. Rosenthal filed a three-page report finding appellant "clearly had a serious mental disorder" but concluding that he was "sufficiently in contact with reality to be considered mentally competent to stand trial." (CT 319-20.) At proceedings on July 3, 1996, the matter of competency was "submitted on the report" of Dr. Rosenthal. No evidence was adduced. (CT 310; see also Engrossed Settled Statement.) The trial court found appellant competent "based upon the contents of the report," and proceedings against appellant were reinstituted. (CT 310.)

B. The Competency Evaluations.

1. Dr. Fort's conclusion of competency.

Dr. Joel Fort produced his one-page report on May 15, 1996. (CT 317.) Dr. Fort stated that he had "examined" appellant although he did not provide any details of the examination, not even its length. Dr. Fort claimed to have reviewed "extensive background information" which he requested from the defense and prosecution, but this background information was not described, apart from a later reference to "accounts of numerous witnesses (in the documents I read)." (Ibid.)

Dr. Fort did describe the charges against appellant and noted "[t]here [was] a history of mental illness (one report says 'schizophrenia') dating back to the 1970s . . . ." Dr. Fort also noted appellant's background as including a previous use of alcohol and drugs, and his "[n]umerous arrests and imprisonments, unemployment, and living with his mother." (Ibid.)

Dr. Fort talked to appellant, which apparently consisted of having appellant read and "approve" a lengthy motion and summarize the testimony of three witnesses. Dr. Fort described appellant as cooperative, talkative, oriented and of average intelligence and memory with no signs of hallucinations or delusions, with one exception, which Dr. Fort described as a "circumscribed delusion," i.e., appellant stated "I don't exist anymore; I died in 1984 and someone else took control." (Ibid.)

Dr. Fort concluded that appellant demonstrated "full understanding of the charges; who his lawyers were and what their role is; when he is next due in Court and for what purpose; the Judge's role and rulings so far" and concluded that appellant was "mentally competent and fit to stand trial." (Ibid.) Notably, Dr. Fort did not address the question whether appellant was able to communicate with counsel and assist in his defense.

2. Dr. Gerald Davenport's conclusion of incompetency.

Dr. Davenport interviewed appellant at the Santa Rita Jail on May 10, 1996. The interview lasted at least one hour and 15 minutes, because

Dr. Davenport reported that once appellant began to talk, "he talked non-stop for approximately an hour and fifteen minutes." (CT 313.)

Dr. Davenport began his four-page report by referring to the California Penal Code and formulated this question: whether appellant was "mentally incompetent for purpose of this chapter if, as a result of a mental disorder, he is unable to assist counsel in the conduct of a defense in a rational manner." (Ibid.)

Dr. Davenport described appellant's presentation in detail, noting that his attitude was "somewhat guarded and suspicious," becoming "more cooperative" but remaining suspicious. His motor activity was agitated and hyperactive; he moved around a great deal; his eyes darted back and forward; and he tried to raise his chained hands. Appellant had "severe mood swings," presenting as both expansive and constricted; appellant was euphoric and laughing wildly and inappropriately on the one hand, and on the other, appellant acted anxious and depressed. (CT 314-15.)

Dr. Davenport described appellant's thought processes in detail as well: he "perseverated a great deal, was excessive, and at times his verbiage was bizarre. His thought process was not intact. He showed signs of tangential thinking as well as loosening of associations." (CT 314.) Dr. Davenport observed that appellant was clearly responding to internal stimuli even though he denied hallucinations; and although appellant denied

having delusions, he presented "a great deal of information which suggests that he has delusions of persecution." (Ibid.) Appellant's short-term and long-term memory were negatively impacted and he presented as functioning at the lower end of average intelligence. Although appellant "could occasionally think in abstract fashion," he quickly became "overly involved in his thought process" and would lose focus and his verbiage would become bizarre. (Ibid.) Dr. Davenport noted that appellant had extremely poor judgment and no personal or interpersonal insight. (Ibid.)

Dr. Davenport found appellant's presentation during the interview so severe that he questioned whether appellant might have been malingering. As a consequence, Dr. Davenport contacted defense counsel to request copies of available mental health records. Dr. Davenport found that these records showed many symptoms identical to those he had observed (tangential thinking, inappropriate smiling, wild laughter, impaired insight and judgment). Dr. Davenport noted that appellant's mental health problems extended back to 1975, that he had been involuntarily committed in 1985, that he had been hospitalized for psychological problems many times, that he had been treated with antipsychotic medications, and that he was diagnosed as a chronic and delusional paranoid schizophrenic. (CT 314-15.)

Dr. Davenport emphasized appellant's "severely emotionally

disturbed" range of functioning, his confusion, paranoia, wild laughter followed by depression, and his grandiosity. (CT 315.) Dr. Davenport concluded that although appellant understood the charges against him and knew the basic roles of the participants in the court proceedings, this was "the extent of his competence." (Ibid.)

Dr. Davenport concluded that appellant was not competent because he was not capable of aiding his lawyers in an appropriate fashion. Dr. Davenport also noted that while the records showed that appellant suffered severe psychological problems there had been very little intervention over time. Dr. Davenport strongly suspected that if appellant were psychologically treated and medicated he could eventually be found competent. (CT 315-16.)

3. Dr. Fred Rosenthal's conclusion of competency.

Dr. Rosenthal interviewed appellant on July 21, 1996, at the Santa Rita Jail. Dr. Rosenthal did not note the length of the "psychiatric evaluation" he undertook, nor did he refer to his review of any documents in his three-page report. (CT 318-20.) Dr. Rosenthal's recounting of appellant's history or psychiatric treatment and hospitalizations was, as best can be gleaned from Dr. Rosenthal's report, taken entirely from appellant himself. (Ibid. ["Mr. Blacksher stated . . . ." "It was evident that Mr. Blacksher has a long psychiatric history . . . ." "Mr. Blacksher also

reported that he had made suicide attempts . . ." "Mr. Blacksher became rambling and gave confusing details but he made reference to a more recent suicide attempt when he was hospitalized. . . ." "Mr. Blacksher reported past psychiatric hospitalizations . . . "].)

Dr. Rosenthal described appellant as cooperative but with flat affect. He noted that while appellant "seemed" to be fairly rational, he became rambling and indicated paranoid thoughts and ideas "in his discussions of his legal situation." (CT 319.) Dr. Rosenthal also observed that appellant's attitude about his "current problems" was "somewhat distorted" although appellant "seemed to maintain his hold on reality to some extent." (Ibid.) Dr. Rosenthal described appellant as oriented and with apparently intact memory. (Ibid.)

Dr. Rosenthal concluded that appellant "clearly had a chronic mental illness" which was apparent not only from the available history but from appellant's descriptions of his symptoms and his presentation during the interview. Dr. Rosenthal diagnosed appellant's illness as schizophrenia, paranoid type. (CT 320.)

Despite what Dr. Rosenthal described as appellant's clear "serious mental disorder," Dr. Rosenthal concluded that appellant had the "ability to understand his charges and stated he was willing to cooperate with his attorney." (Ibid.) However, in discussing with appellant his legal situation,

Dr. Rosenthal noted that appellant could "become somewhat unrealistic about his case and then will take a more paranoid stance about his [paranoid beliefs]," a paranoia which escalated when pushed to consider his case more reasonably. Dr. Rosenthal then contradicted himself, stating that appellant "was able to discuss the elements of his legal situation in a coherent manner." (Ibid.) Finally, Dr. Rosenthal pointed out that appellant "agreed that he would work with his attorney" and concluded that he was "sufficiently in contact with reality to be considered mentally competent to stand trial" despite his "serious mental disorder." (Ibid.)

C. The Conviction of a Person While Legally Incompetent Violates Federal Due Process.

The conviction of a person while legally incompetent is a violation of federal substantive due process and requires reversal. (Pate v. Robinson (1966) 383 U.S. 375, 378; Medina v. California (1992) 505 U.S. 437, 453; People v. Pennington (1967) 66 Cal.2d 508, 511.) In Riggins v. Nevada (1975) 504 .S. 127, 139-40, Justice Kennedy described the fundamental nature of the right of competency:

> "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." (139-40, conc.)

Penal Code section 1367 provides that a mentally incompetent

person cannot be tried or adjudged to punishment. Mental incompetence is defined as

> "if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings **or** to assist counsel in the conduct of a defense in a rational manner." (Pen. Code, § 1367, subd. (a).)

This statutory definition is compelled under the federal due process clause.

In Dusky v. United States (1960) 362 U.S. 408, the Court stated that to be competent to stand trial, the accused must (1) be rational; (2) have a sufficient ability to consult with counsel with a reasonable degree of rational understanding; and (3) have a rational and factual understanding of the proceedings. In Drope v. Missouri (1975) 420 U.S. 162, 171, the High Court added a fourth prong to the competency requirement: the accused must have the ability to assist counsel in preparing his defense. (See also Medina v. California, supra, 505 U.S. at 452 [the defendant's inability to assist counsel can be, in and of itself, probative evidence of incompetency].)

In reviewing the history of the United States Supreme Court cases recognizing a due process right to competency at trial, Rohan v. Woodford (9th Cir. 2003) 334 F.3d 803 observed that the "rationale for the requirement has shifted somewhat."

> "Capacity for rational communication once mattered because it meant the ability to defend oneself [] while it now means

> the ability to assist counsel in one's defense . . . ." (Ibid.; internal citations omitted.)

Thus, a competency determination must be based not only on an assessment of the defendant's situational awareness, i.e., his understanding of the charges against him and the basic procedures; the determination must also be based on an evaluation of the **defendant's ability to communicate with counsel in order to assist in his defense.** This requirement has been repeatedly emphasized by the United States Supreme Court. Cooper v. Oklahoma (1996) 517 U.S 348 held that

> "Because [the incompetent criminal defendant] lacks the ability to communicate effectively with counsel, [the defendant] may not be able to exercise other 'rights deemed essential to a fair trial.' After making the 'profound' choice whether the plead guilty, the defendant who proceeds to trial will ordinarily have to decide whether to waive his 'privilege against compulsory self-incrimination' by taking the witness stand; if the option is available, he may have to decide whether to waive his 'right to trial by jury'' and in consultation with counsel, he may have to decide whether to waive his 'right to confront [his] accusers' by declining to cross-examine witnesses for the prosecution. With the assistance of counsel, the defendant is also called upon to make myriad smaller decisions concerning the course of his defense. The importance of the rights and decisions demonstrates that an erroneous determination of competence threatens a 'fundamental component of our criminal justice system' -- the basic fairness of the trial itself." (Id. at 364; internal citations omitted.)

Thus, as observed by Rohan v. Woodford, supra, 334 F.3d at 809, the defendant's "capacity to communicate remains a cornerstone of due process

at trial," and effective assistance of counsel "depends in substantial measure on the [defendant's] ability to communicate with him." (Id. at 813.)

D. Legal Principles Governing the Trial Court's Exercise of Discretion.

Appellant contends first that the trial court failed to exercise its discretion at the competency hearing. The exercise of judicial discretion means the exercise of discriminatory judgment within the bounds of reason; it implies the absence of arbitrary determination or capricious disposition. (People v. Giminez (1975) 14 Cal.3d 68, 72.) Judicial discretion is defined as "the sound judgment of the court, to be exercised according to the rules of law." (Lent v. Tilson (1887) 2 Cal. 404, 422.) To exercise discretion, the trial court must know and consider all material facts and all legal principles essential to an informed, intelligent and just decision. (In re Cortez (1971) 6 Cal.3d 78, 85; see also Bailey v. Taaffe (1866) 29 Cal. 422, 424 [judicial discretion must be guided and controlled in its exercise by fixed legal principles; it is not a mental discretion, but a legal discretion].)

E. The Trial Court Failed to Exercise the Required Legal Discretion in Ruling that Appellant Was Competent to Stand Trial.

The trial court blatantly disregarded the principles governing the

exercise of its legal discretion. When faced with the first two competency evaluations "at opposite ends of the opinion scale," the trial court did not consider the material facts and legal principles. Instead, it ordered a third "tie-breaker" evaluation by another doctor, and then found appellant was competent based on a quantitative toting up of the psychological evaluations, i.e., two out of three meant appellant was "competent." In effect, the trial relinquished its duty to exercise judicial discretion to a "majority vote" by the three appointed experts, thus nullifying its own obligation to make a decision under fixed legal principles.

The psychiatric experts were appointed to evaluate appellant's mental state, but they are not legal practitioners. Medina v. California, supra, 505 U.S. at 451 recognized that "the subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations," because "psychiatric diagnosis . . . is to a large extent based on medical 'impression's drawn from subjective analysis and filtered through the experience of the diagnostician.'" In light of these realities and the fact that psychiatrists' diagnoses and conclusions will inevitably vary in terms of the quantity and quality of the information relied upon and their own experiences, the true exercise of **judicial** discretion cannot consist of simply counting up the "best out of three" of the reports of the experts.

The United States Supreme Court has repeatedly reiterated that the

competency determination is a bedrock principle of due process which is **fundamental** to the other constitutional rights accorded a criminal defendant. The High Court has likewise set out a four-prong test for determining competency and has emphasized the importance of the defendant's ability to communicate rationally with counsel in order to assist in the defense. The trial court's decision to go with "two out of three" failed utterly to take into consideration the constitutional importance of the competency determination, and failed as well to consider the underlying requirements necessary for a finding of competency.

This failure to exercise discretion is obvious from a cursory review of the already cursory competency evaluations provided by the three doctors. For example, Dr. Fort did not even address the critically important prong of appellant's ability to assist counsel. Dr. Fort stated that appellant understood the charges against him, who his lawyers were, when he was due in court, and what the judge's role was, and from that concluded that appellant was "competent and fit to stand trial." Missing from this formula is any inquiry into the most critical question whether appellant had the ability to consult with counsel with a reasonable degree of rational understanding and **assist** in the defense.[15]

---

[15] As Justices Kennard and George observed in People v. Danks (2004) 32 Cal.4th 269, 322 in their concurring and

This is particularly troubling since Dr. Fort also reported appellant's statement that he had died in 1984 and "someone else took control." Although Dr. Fort described this as a "circumscribed" delusion, the delusion certainly calls into question appellant's ability to rationally assist counsel in his defense. The fact that Dr. Fort was able to have appellant read and "approve" a "lengthy" (but undescribed) motion and summarize witness testimony may reflect that appellant had some ability to process and remember information given to him. However, it does not address appellant's ability to provide any assistance at all to counsel or to make the profound and myriad other smaller decisions as required under the Supreme Court precedent.

Dr. Rosenthal, who also reluctantly found appellant competent

---

> dissenting opinion involving a mentally ill defendant: "If defendant's doctors are right, defendant's mental deficiencies are comparable in severity to mental retardation. In Atkins v. Virginia (2002) 536 U.S. 304, the United States Supreme Court held that to execute the mentally retarded is cruel and unusual punishment, reasoning that retarded persons 'have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.' (Id. at p. 318.) **The same mental capacities are impaired in a person suffering from paranoid schizophrenia, and the impairment may be equally grave.**" (Emphasis supplied.)

despite his clear "chronic mental illness," reported that appellant understood the charges against him and "stated he was willing to cooperate with his attorney" and "agreed that he would work with his attorney." In contrast to Dr. Fort, Dr. Rosenthal at least comprehended that the ability to assist counsel in the defense was a critical component of the competency test. However, appellant's stated willingness or "agreement" to work with his attorney is not the same as his **ability** to assist the defense. (Compare People v. Medina (1995) 11 Cal.4th 694, 734 [the defendant's unwillingness to assist in his defense did not necessarily bear on his competency to do so].) Indeed, Dr. Rosenthal pointed out that appellant became more paranoid and "unrealistic about his case" when pushed to consider the charges reasonably.

In sum, an exercise of discretion by the trial court requires a consideration of the material facts and guiding legal principles; that is, it requires a judicial determination above and beyond the psychiatric ones. This requires, at a minimum, that the trial court consider whether the experts evaluated appellant's ability under all four prongs of the competency test, including the critically important ability to assist in the defense. Dr. Fort did not even recognize this requirement. Dr. Rosenthal misapplied the requirement as a "willingness" to work with defense counsel and made no finding as to appellant's ability to do so.

The trial court failed to consider the facts and conclusions in these two reports in light of the guiding legal principles, and thus failed to exercise its legal discretion when it deemed appellant competent. The trial court relinquished the duty to exercise discretion, and took the path of least resistance by opting for a tie-breaker report from a third doctor and then ruled on the grounds of two-out-of-three. This quantitative ruling was not an exercise of legal discretion.

Where the trial court has failed to exercise its discretion in the competency determination, there is in effect no legal finding as to competency. Consequently, the entire judgment must be reversed, just as in the case where the trial court failed to conduct a competency hearing. (See e.g., People v. Marks (1988) 45 Cal.3d 1335, 1337.) The Marks court held that a sub silentio disposition of competency proceedings without a full hearing rendered the subsequent trial proceedings void for lack of jurisdiction. (Id. at 1334.) So also does a "finding of competency" reached without an exercise of judicial discretion. This Court must be assured that the accused is "not put to trial until he is able to understand his predicament and rationally assist his attorney in presenting his defense." (People v. Samuel (1981) 29 Cal.3d 489, 506.) Because there is no such assurance here, appellant's entire judgment must be set aside.

/

F. The Trial Court Abused Its Discretion in Finding Appellant Competent to Stand Trial.

Assuming arguendo this Court finds that the trial court did exercise its discretion in ruling appellant competent, the trial court's decision was an abuse of discretion.

The defendant has the burden of proving incompetence; however, the federal due process clause requires only that he establish his incompetency by a preponderance of the evidence. (Medina v. California, supra, 505 U.S. at 439, 452.) Review of a trial court's finding of competency is under the substantial evidence standard of review. (People v. Marshall (1997) 15 Cal.4th 1, 31; People v. Smith (2003) 110 Cal.App.4th 492, 506.) This standard accords some deference to the trial court's ruling; however, this it does not mean that **any** evidence will be sufficient to support a verdict. Substantial evidence must be "reasonable, credible, and of solid value." (People v. Samuel, supra, 29 Cal.3d at 505.) Moreover, although on appeal the record is viewed in the light most favorable to the judgment, the reviewing court cannot ignore evidence merely because it is favorable to the defense: "upon judicial review *all the evidence* is to be considered." (Jackson v. Virginia (1979) 443 U.S. 307, 319; emphasis in original.)

A careful review of all the evidence leads inexorably to the

conclusion that appellant was incompetent to stand trial. The trial court's finding of competency was not supported by substantial evidence, and was, therefore, an abuse of discretion.

1. The deficiencies in the reports of Dr. Fort and Dr. Rosenthal.

None of the experts provided information as to the length of their interviews (except Dr. Davenport, who noted that appellant spent at least 1.5 hours in continuous narrative). None of the doctors identified the documentation they reviewed. Dr. Fort claimed to have "extensive background information" which was apparently information about the offenses, although he did refer to a report of appellant's schizophrenia. Only Dr. Davenport, who found appellant incompetent, asked for mental health records after the interview. Dr. Rosenthal did not refer to any documentation at all.

None of the experts conducted any type of standardized testing of appellant's competency. Indeed, the reports do not indicate what devices, procedures, or protocols were used by the experts in reaching their decisions, other than a short conversation with appellant.

None of the experts conducted any collateral interviews with people who had interacted with appellant either as a friend, family member, or as an attorney. Although appellant's ability to **assist** the defense was the

most crucial question for the trial court, this question was not addressed by either Dr. Fort or Dr. Rosenthal, or the trial court. As set out above, Dr. Fort did not even address the question of appellant's ability to assist in the defense, and Dr. Rosenthal satisfied himself by extracting from appellant an agreement to work with his attorney.

The truth is that most psychologists do not know the ABA or State Bar standards for criminal defense, nor do they know what a lawyer would normally need to discuss with the client in terms of the nature of proof, the available defenses, and the myriad practical problems in presenting a defense. The experts' lack of knowledge in this sphere was painfully obvious here. However, the trial court is aware of the intricacies and necessities of presenting a defense, and it was an abuse of discretion for the trial court to ignore this glaring inadequacy in the experts' reports. United States v. Duhon (W.D.La. 2000) 104 F.Supp. 663, referring to the appointment of a criminal defense attorney as well as a psychological expert to develop facts regarding the defendant's competency, explained:

> "It has been observed that a multi-disciplinary approach is often critical in resolving competency issues, particularly where, as here, the focus is on a defendant's ability to assist counsel. **In such a case, 'one of the most evident issues is whether the assessing professional, usually a psychiatrist or a psychologist, really knows what would normally go into the defense of the case.'**" (Id. at 669; emphasis provided.)

2. The contradictions in the reports of Dr. Fort and Dr. Rosenthal.

Appellant has already noted that Dr. Fort failed to even address the critical question of appellant's ability to assist in his defense. However, Dr. Fort also described appellant as having a circumscribed delusion, i.e., appellant's belief that he died in 1984 and that "someone else took control." Dr. Fort did not explain how a delusion that appellant had been controlled by someone else for many years was "circumscribed." Despite this delusion, Dr. Fort simply concluded that appellant was mentally competent to stand trial. He did not explain how an accused who believed that he was under external control could be described as having a "rational understanding" of the proceedings.

Dr. Fort elicited from appellant nothing except his rudimentary understanding of the charges against him and the roles of the attorneys and judge, and appellant's ability to read a motion and summarize testimony. This shows perhaps that appellant could understand the words spoken to him and could summarize what he had read. It does not come close, however, to a showing that appellant (who believed he was under external control) had a rational understanding of the proceedings sufficient to consult with and assist counsel in his defense.

Dr. Rosenthal's examination of appellant was somewhat more

complete than that of Dr. Fort. Dr. Rosenthal described appellant as seeming to be fairly rational, but noted that he became rambling and paranoid in discussions of his legal situation; that his attitude towards his charges was "somewhat distorted" and his hold on reality was limited. Dr. Rosenthal concluded that appellant had a serious and chronic mental illness, i.e., paranoid schizophrenia.

Although Dr. Rosenthal ultimately concluded that appellant was able "to discuss the elements of his legal situation in a coherent manner"[16] and was competent to stand trial, this conclusion is belied by earlier portions of his own report. For example, although Dr. Rosenthal said appellant had the ability to understand the charges against him, appellant became "somewhat unrealistic" about his case. Moreover, when pushed to consider the case "more reasonably," appellant became more paranoid. This is not a depiction of someone who is able to rationally assist counsel in the defense of his case. To assist in his defense, an accused must have more than an understanding of the charges against him; he must be able to able to interact rationally with his attorneys. The fact that Dr. Rosenthal had to "push" to

---

[16] Dr. Rosenthal's reference to the "elements of his legal situation" demonstrates the problem with relying solely on psychologists unfamiliar with the nuts and bolts of criminal defense. It is unclear what Dr. Rosenthal means by "elements" but it is unlikely he means the elements of the crime, and the defenses to them.

get appellant to consider the case "more reasonably" is a blatant red flag warning. However, when the result of that pushing is an increase in paranoia, the warning becomes a manifest, full-blown problem. Such a person cannot rationally assist in his defense if any detailed discussion of the case incites more paranoia.

Finally, as noted above, Dr. Rosenthal satisfied himself as to appellant's competency by obtaining from appellant an "agreement" to work with his attorneys. Although this may pass some unknown and unspecified psychological standard, it does not pass legal muster because the question is whether appellant was **capable of assisting**, not whether he was would "agree" to assist. Dr. Rosenthal may not have known or discerned the difference, but the trial court should have done so. In any case, Dr. Rosenthal's conclusion that appellant was competent because he agreed to work with his attorney was dramatically belied by Dr. Rosenthal's own short experience with appellant, in which any "pushing" into a rational discussion of the case resulted in increasing paranoia on appellant's part.

3. Dr. Fort's conclusions refuted by other evidence.

Dr. Fort claimed that his review of appellant's history of mental illness showed no hospitalizations or treatment "since sometime in the 1980s." (CT 317.) Appellant had in fact been treated and hospitalized throughout the 1970s and 1980s, often involuntarily, until 1986. In 1987

and 1988 he was incarcerated and medicated in Vacaville where he was medicated. Appellant had been on Social Security disability insurance due the disability of paranoid schizophrenia throughout the 1980s and 1990s until the time of his incarceration for the instant offenses. (RT 2624-25; Exh. GG.)

Had Dr. Fort talked to any collateral witnesses, he would have learned that appellant was more severely disturbed when he was released from incarceration in 1994 than when he went into custody, and suffered severe hallucinations. (See RT 3180-84.) Had Dr. Fort reviewed the police reports, he would also have learned that appellant's sister described appellant shortly before the offenses as a schizophrenic who refused to take his medication. (See RT 2282-83; 2286-88.) In short, Dr. Fort would have learned that appellant was never normal, that he was a 40-year-old man still living with and dependent on his mother and on Social Security disability insurance, that most people who knew him considered him mentally ill, and that he had qualified for Social Security because of his disability of paranoid schizophrenia.

Dr. Fort referred to the witnesses' accounts in the documents he read as representing "very strong evidence." The strength of the evidence against the defendant is in no way a matter of concern in the competency determination. Yet of the eight short paragraphs in Dr. Fort's report, two of

those paragraphs relate only to the evidence against appellant. While a reference to the facts of the case would not necessarily be amiss, in Dr. Fort's report the evidence against appellant is the principal focus.

Dr. Fort also stated -- although no tests were conducted -- that appellant was of "average intelligence" and memory. This is also incorrect.[17]

Dr. Fort claimed that appellant showed no signs of hallucinations or delusions with one "possible exception unrelated to the crimes and not affecting his general state," i.e., appellant's "circumscribed delusion" that he died in 1984 and "someone else took control." Appellant questions whether a delusion that the person is dead and in external control can be dismissed as either "circumscribed," or "unrelated to the crimes," or "not affecting his general state." Appellant's delusional belief in the death of his ego is very relevant to his ability to assist in his defense; it defies logic to describe such a radical and absolute delusion as not affecting his "general state."

4. Dr. Fort's fraud problem.

Finally, as to Dr. Fort, it must be noted that in 1982 he was accused

---

[17] See Exh. VV. Appellant's records from CYA indicated that he was retarded and in the low-normal range. (RT 3094-95.)

and found guilty of a violation of Business and Professions Code sections 2361 and 2411, knowingly assisting others in making or signing a certificate or document related to the practice of medicine which falsely representing the existence or nonexistence of a state of facts. (See Fort v. Board of Medical Quality Assurance (1982) 136 Cal.App.3d 12.)

Dr. Fort was the founder of "Fort Help" which offered psychiatric help without cost to mentally and emotionally disturbed persons. The help consisted of counseling by nonprofessional lay people, such as rehabilitated substance abusers. The operation was financed through Medi-Cal and Dr. Fort agreed that unauthorized and nonprofessional staffers could use his name in certifying to Medi-Cal that he had personally rendered services which in fact had been performed only by nonprofessional staff members. Dr. Fort did not himself participate or involve himself with the Medi-Cal patients but occupied himself with his outside psychiatric practice. (Id. at 17.) From 1974 to 1976, Fort Help collected some $160,000 for services falsely claimed to have been rendered by Dr. Fort. Dr. Fort was put on probation for one year but permitted to continue practicing his profession.

Although it is not clear whether the trial court was aware of Dr. Fort's fraud conviction at the time of the competency hearing (it was discussed on the record prior to the sanity proceedings, see RT 3517-19), appellant contends that it is evidence which this Court can consider in

judicial review of the trial court's competency determination. However, even without reference to Dr. Fort's previous professional misconduct, his report to the trial court is rife with contradictions and deficiencies. It provides no solid substantial evidence upon which a finding of competency can be based.

5. Dr. Davenport's report of incompetency.

Dr. Davenport's analysis of appellant's capacity to understand and to assist in his defense was superior to those of Dr. Fort and Dr. Rosenthal for the following reasons: (1) Dr. Davenport was the only expert who described appellant's presentation in any detail, from his suspicious attitude, his hyperactive motor activity, his wild mood swings, and his thought processes; (2) Dr. Davenport was the only expert who requested and received further documentation and verified that that documentation corroborated his findings.

Most importantly, Dr. Davenport was the only expert who focused on the critical question of appellant's actual ability to assist in his defense, and who recognized that appellant's apparent ability to understand the charges against him was not coterminous with, and did not guarantee, an ability to assist in his defense. (See Duhon, supra, 104 F.Supp. at 674 [the defendant's "basic ability to understand strategy" and knowledge that "his attorney was on his side" are not legally sufficient to support a finding of

competency]. The other doctors reached conclusions; but only Dr. Davenport provided a detailed observational basis for his conclusions. In this sense, Dr. Davenport's report was the only one that could be internally verified.

These distinctions between Dr. Davenport's and the other doctors' assessments of appellant were obvious from the face of the reports. Had the trial court scrutinized these reports, instead of just looking for a two-to-one score, it could only have concluded that appellant was incompetent to stand trial.

G. Conclusion.

As set out above, if this Court finds that the trial court failed to exercise its judicial discretion in ruling on appellant's competency, the entire judgment must be reversed as void of jurisdiction.

Review for abuse of discretion requires this Court to consider all the evidence and the trial court's determination can only be upheld if it is supported by substantial, solid and credible evidence. Appellant has shown, repeatedly, that the reports of Dr. Fort and Dr. Rosenthal (concluding appellant was competent) were deficient in a wide variety of ways, and that considering the totality of the evidence, those reports provided no substantial evidence in support of the trial court's finding of competency.

Because there is no valid legal finding that appellant was competent, his convictions and judgment are in violation of federal due process and must be overturned. (Pate v. Robinson, supra, 383 U.S. at 378; Medina v. California, supra, 505 U.S. at 453.)

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

II. THE TRIAL COURT CONDUCTED NUMEROUS PROCEEDINGS IN APPELLANT'S ABSENCE AND WITHOUT HIS PERSONAL WAIVER THEREBY VIOLATING APPELLANT'S STATUTORY AND SIXTH AND FOURTEENTH AMENDMENT RIGHT TO BE PRESENT AT THE PROCEEDINGS AGAINST HIM, HIS RIGHT TO CONFRONTATION, AND HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL

A. Introduction to Argument.

Appellant was absent for 17 court appearances from August 17, 1995 through June 24, 1998. These proceedings ranged from record correction matters to the trial court rulings on discovery matters, hardship excusals, a Batson-Wheeler motion, jury instructions, and the excusal of a deliberating juror.

Appellant has a state statutory and a federal constitutional right to be present at every critical stage of the trial. Although this Court has held that a capital defendant can personally waive his right to presence, appellant did not personally waive his right to presence at any of these proceedings. The repeated violations of appellant's right to presence denied him due process and a fair trial.

B. Summary of Relevant Facts.

On August 17, 1995, a hearing was held in municipal court regarding records appellant had subpoenaed from the probation department. The court held an *in camera* review to determine which documents appellant

was entitled to for mitigation purposes. (August 17, 1995 RT 19-25.) At the hearing, defense counsel acknowledged that he had not requested that appellant be brought to court and that appellant was "not even aware of the proceedings." Defense counsel suggested that appellant

> "would not be entitled to be present anyhow, so because of that we certainly believe he would be entitled to that, but in any event we certainly waive his presence if in fact that is the issue." (August 17, 1995 RT 28.)

On October 2, 1995, at a hearing scheduled for a motion, appellant was not present because of a "mixup." Defense counsel stated that it was clear that appellant should "be present at all proceedings." The hearing was continued. (Oct. 2, 1995 RT 29.)

In superior court, appellant was not present for a hearing on September 5, 1997. The trial court offered to recess until appellant was "found." Defense counsel did not consider this necessary. Instead, the matter was rescheduled for January 5, 1998, for a time waiver. (Sept. 5, 1997 RT 1.)

On January 5, 1998, appellant was not present. Defense counsel stated that he did not know if he could waive appellant's right to presence. The prosecutor suggested that there was no need to waive appellant's right to presence and that defense counsel could withdraw the time waiver on appellant's behalf outside his presence. Defense counsel stated that he

would "make sure that [appellant had] withdrawn his time waiver and demands a speedy trial as of today." (Jan. 5, 1998 RT at 3.)

Hearing on pretrial motions began on February 23 and 26, 1998, with appellant present. (RT 3-24.) On February 26, 1998, when appellant's absence the following day was under discussion, appellant stated:

> "You hold it. Hold it. Hold it. No, this is pertaining to me and him . . . . I was asked was I coherent about what is going on here. I made a statement that it appeared to me that the actual release date for me would be prepared by my two counsel, meaning that these are the steps for a trial which will declare that I am innocent and will bring about a release date. Mr. Broome [defense counsel] made a statement about the integrity of my soundness and thoughts. I understand his point. My physical state of being is proper. I am just as sound as Truman and Ike." (RT 24.)

On February 27, 1998, appellant was absent from proceedings at which the trial court noted that the final draft of the jury questionnaire had been prepared, after having met off the record with counsel on discovery matters. (RT 25-27.)

On March 6, 1998, the trial court conducted record correction. Appellant was not present. (RT 193.) On March 9, 1998, the trial court dealt with discovery matters, including appellant's mental health records and the defense request for discovery on Eva Blacksher's out-of-court statements. Appellant was not present. Defense counsel purported to

waive appellant's right to presence. (RT 195-98.)

On March 18, 1998, appellant was initially present for a hearing on Eva Blacksher's competency. (RT 339.) Shortly thereafter, at 11:00 a.m., defense counsel "stipulated" that appellant need not be present for the reading of stipulated juror hardship excusals. (RT 350.) Thereafter, in appellant's absence, defense counsel submitted the matter of Eva Blacksher's competency. The trial court stated the appellant should be present and that it would be dealt with on the record in the afternoon. (RT 351-52.) A recess was taken until 2:00 p.m. (RT 353.) The record does not show that appellant was present. After dealing with hardship excusals, the trial court made its ruling that Eva Blacksher was incompetent and dealt with discovery issues. (RT 354-75.)

On March 19, 1998, appellant was present at the morning session. (RT 378.) However, defense counsel again purported to waive appellant's presence for the afternoon session. (RT 407.) During that session, at which the prosecutor was also absent, defense counsel and the court went through a list of exhibits to reconcile the court's rulings with the list that had been filed with the trial court. (RT 407; 410-14.)

On March 20, March 27, and April 10, 1998, defense counsel once more purported to waive appellant's right to presence for record correction proceedings. (RT 415; 637; 1292.)

On April 14, 1998, during jury selection, defense counsel made a Batson-Wheeler motion and the trial court made its ruling in chambers.[18] (RT 1358.) Appellant was not present in chambers when the trial court ruled that the defense had failed to make out a prima facie case of discriminatory use of the peremptory challenge. (RT 1359.) Later, in open court and in appellant's presence, the trial court restated its ruling. (RT 1365.)

On April 17, 1998, record correction proceedings took place in appellant's absence. (RT 1369.)

On May 11, 1998, a hearing was held at which guilt phase jury instructions were discussed. Defense counsel purported to waive appellant's right to presence. (RT 2553.) During these proceedings, defense counsel objected to several instructions and withdrew a request for other instructions, and the trial court made its final rulings on the instructions. (RT 2554-64.) Record correction also took place. (RT 2565.)

On June 18, 1998, at the penalty phase jury instruction conference, defense counsel again purported to "excuse" appellant's right to presence. (RT 3847.) During these proceedings, the trial court refused a number of defense requests for jury instructions. (RT 3847-49.) The trial court also

---

[18] See Arg. III, below, pages 107-113.

overruled a number of defense objections regarding the scope of the prosecutor's argument in aggravation and his use of visual aids in argument. (RT 3850-71.) Finally, defense counsel withdrew appellant's right of allocution. (RT 3872.)

Finally, on June 24, 1998, during penalty phase deliberations, defense counsel purported to waive appellant's right to presence during proceedings at which juror number 10 was excused because he had a prepaid golf tournament and an alternate juror was substituted in. (RT 4010-11.) Shortly thereafter, the jury returned a death verdict. (RT 4015.)

C. Summary of Relevant Legal Principles.

Under the Sixth Amendment right of confrontation and the Fourteenth Amendment right to due process, a criminal defendant has the right to be present at every critical stage of the trial. (Illinois v. Allen (1970) 397 U.S. 337, 338; United States v.Gagnon (1985) 470 U.S. 522, 526.) Under the federal due process clause, the defendant has a right to be present even when he is not actually confronting the witnesses or evidence against him, whenever his presence has some reasonably substantial relation to his opportunity to defend. (Kentucky v. Stincer (1987) 482 U.S. 730, 736.) Although the defendant's right to be present at every stage of his trial is rooted in the confrontation clause, the right is also protected by the due process clause in some situations where the defendant is not actually

confronting a witness or evidence against him. (Ellsworth v. Levenhagen (7th Cir. 2001) 248 F.3d 634, 640, citing Gagnon, supra, 470 U.S. at 526.)

There is a similar right under the California Constitution and statutes. (Calif. Const., art. I, § 15; Pen. Code, § 977 [defendant must be present at arraignment, when evidence is taken, and at sentencing; and at all other proceedings unless he signs a written waiver form, approved by his counsel, and filed in court, or is disruptive]; Pen. Code, § 1043 [absence of defendant after trial has commenced shall not prevent continuing trial in non-capital case].) Penal Code sections 977 and 1043, read together, permit a capital defendant to be absent under only two conditions, neither of which applies in this case: (1) when the defendant is removed for disruptive behavior under section 1043, subd.(b)(1); and (2) when the defendant voluntarily waives his rights under section 977, subd.(b)(1). However, the voluntary waiver exception of section 977, subdivision (b)(1) does not permit a defendant to be absent during the taking of evidence, and the broad section 1043, subdivision (b)(2) exception does not apply to capital defendants. (See People v. Jackson (1996) 13 Cal.4th 1164, 1210 [finding error where the trial court permitted a disruptive capital defendant to be absent during taking of evidence].)

/

/

D. Appellant Was Absent During Proceedings Which Bore a Reasonable and Substantial Relation to His Opportunity to Defend.

This Court has interpreted the above-cited principles as requiring that a capital defendant be personally present at proceedings which bear a "reasonable, substantial relation to his [] opportunity to defend the charges against him." (People v. Hovey (1988) 44 Cal.3d 543, 585.) Thus, this Court has held that a capital defendant has no constitutional right to be present at readback of testimony to the jury, People v. Horton (1995) 11 Cal.4th 1068, 1120; at informal conferences on jury proceedings, People v. Morris (1991) 53 Cal.3d 152, 210; at bench or chambers conferences regarding jury hardship excusals, jury instructions, discussions regarding the use of the defendant's out-of-court statement, and other routine matters on which the defendant's presence would not have had any impact, People v. Holt (1997) 15 Cal.4th 619, 706-08; at bench conferences related to housekeeping, evidentiary and instructional matters, People v. Waidla (2000) 22 Cal.4th 690; or at a jury instruction conference, People v. Dennis (1998) 17 Cal.4th 468, 538.[19]

Appellant, however, was absent not only from such routine

---

[19] But see Turner v. Marshall (9th Cir. 1995) 63 F.3d 807, 814 [readback of testimony outside presence of defendant was error]; accord Hegler v. Borg (9th Cir. 1995) 50 F.3d 1472, 1477.

proceedings such as record correction, hardship excusals and jury instruction conferences, i.e., proceedings requiring the attorney's expertise but not substantially related to the opportunity to defend. Appellant was also absent at proceedings during which the trial court determined what types of mitigation records he was entitled to, discovery requests regarding Eva Blacksher's extrajudicial statements, rulings on evidence, a Batson-Wheeler motion, the excusal of a deliberating juror, and the purported waiver of appellant's right of allocution. All of these proceedings bore a substantial relationship to appellant's opportunity to defend.

The most blatant example is defense counsel's withdrawal of appellant's right of allocution in appellant's absence. Boardman v. Estelle (9th Cir. 1992) 957 F.2d 1523 reversed and remanded a case where the trial court refused to allow the defendant his right of allocution, holding that "due process requires criminal defendants be permitted to allocute." (Id. at 1524, 1525 ["the right to speak is of Constitutional dimension"]; see also United States v. Behrens (1963) 375 U.S. 162 [allocution is a right "ancient in the law" and an "elementary right"]; McGautha v. California (1971) 402 U.S. 183, 217 [allocution is a right of "immemorial origin"].) The "withdrawal" of this federal constitutional right in appellant's absence bore a clear and important relation to his ability to defend against his ultimate death sentence.

Of equal importance was the Batson-Wheeler motion and ruling in appellant's absence. Again, a federal constitutional right was at issue, and thus bore directly on appellant's right to defend himself before a constitutionally chosen jury.

While appellant's absence at other proceedings, such as record corrections and jury instruction conferences might not, standing alone, be considered under this Court's precedents to bear a sufficiently substantial relation to appellant's right to defend, appellant records all his absences and the surrounding circumstances because they show the cavalier attitude of counsel and court to appellant's right to presence. Appellant's incompetency meant as a practical matter that it was easier for court and counsel when he was not present because he could **not** assist in his defense. Thus, the attitude of both counsel and court are some evidence that as a practical matter appellant was **unable** to assist in his defense, and his mental illness made it more convenient to proceed without him. (See Arg. I, above [appellant was tried while incompetent].) Finally, the sheer number of proceedings which took place in appellant's absence also had a cumulative impact on appellant's right to defend himself.

E. Appellant Did Not Waive His Right to Presence.

This Court has held that a capital defendant may **personally** waive

the right to be present, even at critical stages of the proceedings against him. (See e.g., People v. Mayfield (1997) 14 Cal.4th 668, 738 [defendant's voluntary and intelligent waiver of right to presence at jury was statutory error]; People v. Price (1991) 1 Cal.4th 324, 405 [defendant personally waived right to presence rather than be present in chains]; People v. Robertson (1989) 48 Cal.3d 18, 59-62 [defendant filed a written waiver of his right to presence at sentence reduction hearing]; People v. Breaux (1991) 1 Cal.4th 281, 307 [defendant personally waived right to presence]; People v. Medina (1990) 50 Cal.3d 870, 902 [defendant personally waived right to presence]; People v. Lang (1989) 49 Cal.3d 991, 1026 [defendant personally waived right to presence at jury view]; People v. Sully (1991) 53 Cal.3d 1195, 1238-40 [defendant three times personally waived right to presence].)[20]

However, because the right to presence is a fundamental constitutional right, a waiver of that right to presence must be voluntary, knowing and intelligent. (Johnson v. Zerbst (1938) 403 U.S. 458, 464;

---

[20] In People v. Horton (1995) 11 Cal.4th 1068, 1120-21, defense counsel stipulated to the reading back of testimony in the absence of court or counsel. This Court did not address the question whether counsel could waive the defendant's right of presence, but found that the defendant did not have a right to be personally present at the readback.

Amaya-Ruiz v. Stewart (9th Cir. 1997) 121 F.3d 486, 496; Campbell v. Wood (9th Cir. 1994) 18 F.3d 662, 672-73 [defendant personally signed written waiver of right to presence].) Pennie v. State (Ga. 1999) 520 S.E.2d 448 held that an attorney's purported waiver of the defendant's right to presence at a proceeding during which the trial court, in presence of counsel, communicated with a juror regarding spectator contact, was not valid; the defendant was not present, did not personally waive her right, and the attorney's purported waiver was made without her knowledge or consent.

In this case, none of the supposed waivers of the right to presence was made by appellant himself.[21] Rather, defense counsel purported to waive or "excuse" appellant's right to presence. Such purported waivers by proxy of a federal constitutional right are invalid.

F. The Violations of Appellant's Right to Presence Were Prejudicial.

Because a federal constitutional right is at issue, review for prejudice is under the standard set forth in Chapman v. California (1967) 386 U.S. 18, 24. Appellant contends that under this standard, his convictions must

---

[21] On February 26, 1998, when appellant was present for the discussion about his proposed absence the following day, he personally made a statement on the record that demonstrated his inability to understand the proceedings or to assist counsel. (See Feb. 26, 1998 RT at 24.)

be reversed, because he was absent at critical stages of his trial during which matters of constitutional dimension were decided, most notably the Batson-Wheeler motion and the withdrawal of his right to allocution.

This Court, however, has stated that the "burden is on defendant to demonstrate that his absence prejudiced his case or denied him a fair and impartial trial." (People v. Hovey, supra, 44 Cal.3d at 585; People v. Horton, supra, 11 Cal.4th at 1121.) Even under this lesser standard, reversal of appellant's penalty phase verdict is required, because withdrawal of his right of allocution by appellant's attorney in his absence denied appellant his due process right to speak at sentencing. As noted in Boardman v. Estelle, supra, 957 F.2d at 1524, "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."

This Court must therefore reverse appellant's convictions and remand for proceedings in conformity with his federal constitutional rights.

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

III. THE PROSECUTOR'S PEREMPTORY CHALLENGE OF TWO AFRICAN-AMERICAN PROSPECTIVE JURORS VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHT TO EQUAL PROTECTION AND HIS STATE CONSTITUTIONAL RIGHT TO A TRIAL BY A JURY CHOSEN FORM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY AND REQUIRES REVERSAL OF HIS CONVICTIONS

A. Summary of Proceedings Below.

The prosecutor used his third and fourth peremptory challenges on African-American prospective jurors Ms. P and Ms. W. (RT 1357.) Defense counsel challenged the dismissal of these two jurors on the grounds there was a strong likelihood the two women were excluded on the basis of race, in violation of the Sixth and Fourteenth Amendments under Batson v. Kentucky (1986) 476 U.S. 79 and People v. Wheeler (1978) 22 Cal.3d 258. (RT 1358-59.)

The trial court stated that the defense had excused "one black" and the prosecutor had excused "two blacks" and that no prima facie case had been made. (RT 1359.) Because the trial court's ruling was made in chambers, the trial court later reiterated its ruling in open court. (RT 1365-66.)

B. Summary of Applicable Law.

People v. Wheeler (1978) 22 Cal.3d 258 established that the use of a peremptory challenge to remove a prospective juror solely on the basis of a

presumed group bias violates the defendant's right to trial by a jury drawn from a representative cross-section of the community. (Cal.Const., art. I, sec. 16.) Group bias is a presumption that certain jurors are biased because they are members of an identifiable racial, ethnic or gender group. (People v. Crittenden (1994) 9 Cal.4th 83, 115.)

The United States Supreme Court has held that a peremptory challenge based on race or gender violates both the defendant's and the prospective juror's rights to equal protection under the Fourteenth Amendment. (J.E.B. v. Alabama ex rel. T.B. (1994) 511 U.S. 127 [party may not strike juror on basis of gender]; Batson v. Kentucky (1986) 476 U.S. 79, 97 [prosecutor may not strike juror on basis of race].)

The procedures for assessing the constitutionality of a prosecutor's peremptory challenges are similar under Wheeler and Batson. First, the defendant must establish a prima facie case of the discriminatory use of the peremptory challenge by showing that the "relevant circumstances raise an inference" that the prosecutor's use of the peremptory challenge was based on group bias.[22] (Batson v. Kentucky, supra, 476 U.S. at 96; J.E.B., supra,

---

[22] The defense need not raise an inference of a "pattern" of discrimination against multiple members of a cognizable group, because the exclusion of even one juror on the basis of group bias violates both the federal and state constitutions. (J.E.B., supra, 511 U.S. at 142, fn. 13; People v. Christopher (1992) 1 Cal.App.4th 666, 671.)

511 U.S. at 144.) Once this showing is made, the burden shifts to the prosecution to come forward with a neutral explanation related to the particular case on trial. If the prosecutor's explanations are facially neutral, the trial court must evaluate the credibility of the prosecutor's explanations for the strikes. (Wheeler, supra, 22 Cal.3d at 280-82; Batson, supra, 476 U.S. at 96-98; Purkett v. Elem (1995) 514 U.S. 765; J.E.B., supra, 511 U.S. at 144-145.)

Under the federal constitution, the party challenging the discriminatory use of a peremptory challenge need only raise a reasonable inference to establish a prima facie case. As the United States Supreme Court stated in Texas Dept. of Community Affairs v. Burdine (1981) 450 U.S. 248, 254-54 [defining prima facie for purposes of employment discrimination], the burden "of establishing a *prima facie* case of disparate treatment *is not onerous*." Batson explicitly adopted the Burdine inference standard for assessing a prima facie case. (476 U.S. at 98, fn. 21.)

However, at the time of appellant's trial in 1998, the California test for determining whether a prima facie case had been made was not the federal reasonable inference standard, but rather, whether there was a "strong likelihood" that the peremptory challenges were based on group bias -- a standard that inflated the constitutional burden on the defense to establish a prima facie case.

Although this Court has since brought the California standard into accord with the federal standard,[23] at the time of appellant's Batson-Wheeler motion, the courts of this state, including appellant's trial court, were laboring under a misapprehension which overstated the amount of proof a party needed to establish a prima facie case. Until this Court's decision in Box, there was a solid line of authority from this Court and the Courts of Appeal sharply distinguishing the federal "inference" standard from the California "strong likelihood" standard, holding that the "strong likelihood" standard presented a higher threshold for proving a prima facie case of discrimination. For example, in People v. Sanders (1990) 51 Cal.3d 471, 500-01, this Court denied the defendant's claim of a prima facie case where the prosecutor had challenged all four Hispanic prospective jurors, saying that while removal of all members of a group "may give rise to an inference of impropriety," the defendant still failed to meet the "strong likelihood" test. In People v. Howard (1992) 1 Cal.4th 1132, 1154-56, where the prospector challenged two African-American prospective jurors,

---

[23] After the time of appellant's trial, this Court has held that the "strong likelihood" test set out in previous cases is identical to the "inference" of discrimination required under Batson. (See e.g., People v. Box (2000) 23 Cal.4th 1153, 1188, fn. 7 and People v. Johnson (2003) 30 Cal.4th 1302 [reiterating that the state and federal standards are the same].)

this Court held that the inference of impropriety raised did not rise to the level of a "strong likelihood" of discrimination. (See also People v. Crittenden (1994) 9 Cal.4th 83, 117-19.)

Indeed, the "strong likelihood" test in use in California was held by the federal courts to violate federal constitutional law because it set the threshold for finding a prima facie case **higher** than that required under Batson, i.e., whether there is an "inference" of group bias. (See e.g., Fernandez v. Roe (9th Cir. 2002) 286 F.3d 1073, 1078.) The "strong likelihood" test improperly relaxed the trial court's scrutiny of possible discrimination and undercut the purpose of Batson. (Cooperwood v. Cambra (9th Cir. 2001) 245 F.3d 1042, 1046; Wade v. Terhune (9th Cir. 2000) 202 F.3d 1190, 1195-96.)

C. The Trial Court Erred in Finding No Prima Facie Case.

At the time of appellant's Batson-Wheeler motion, the prosecutor had used two of his four peremptory challenges against African-American prospective jurors. The trial court denied the motion, stating only that the ground that the defense had also used a peremptory challenge against one African-American juror -- a matter wholly irrelevant to any test for determining whether a prima facie case had been established. (RT 1359.)

The trial court's ruling was in clear violation of the relevant standards, because using two out of four peremptory challenges against a

cognizable minority group does amount to a prima facie case of discriminatory use of the challenge under the reasonable inference test. In Fernandez v. Roe, supra, 286 F.3d at 1078, where the prosecutor struck four out of seven Hispanics, the Ninth Circuit found that such a rate was sufficient to raise an inference of exclusion based on race sufficient to trigger an inquiry into the prosecutor's motives.

Furthermore, the questionnaires and voir dire examination of Ms. W and Ms. P show that they were either neutral or in favor of the death penalty and that they could be impartial jurors. (See RT 1058-66; RT 1282-91; CT 6272-6307; CT 11909-44.) These two excluded African-American women were no less likely to impose the death penalty than were several seated jurors. This is reflected in the fact that the prosecutor spent no longer examining Ms. P and Ms. W than he did the jurors who were seated. (See People v. Reynoso (2003) 31 Cal.4th 903 [desultory voir dire is relevant to the determination whether the prosecutor acted with discriminatory intent in challenging a minority juror].)

In sum, the trial court erred in ruling that appellant had failed to make out a prima facie case where the prosecutor had used two out of his four peremptory challenges against members of a cognizable minority solely because defense counsel had challenged a member of the same minority. "The exclusion by peremptory challenge of a single juror on the

basis of race or ethnicity is an error of constitutional magnitude requiring reversal." (People v. Silva (2001) 25 Cal.4th 345, 386.) This Court must reverse.

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

GUILT PHASE EVIDENTIARY ISSUES

IV. EVA BLACKSHER'S EXTRAJUDICIAL TESTIMONIAL STATEMENTS WERE ERRONEOUSLY ADMITTED IN VIOLATION OF APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONTATION, TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS

Appellant's mother, Eva Blacksher [hereafter "Eva"],[24] the only witness inside the house at the time of the shootings, was found incompetent to testify at hearing held on March 18, 1998. The trial court ruled that Eva was therefore "unavailable" as a witness and that her preliminary hearing testimony was admissible as former testimony under Evidence Code section 1290. (RT 369.) Thereafter, the trial court admitted a number of Eva's out-of-court statements, including testimonial statements, into evidence, on the grounds that they were either prior inconsistent statements impeaching her preliminary hearing testimony, or spontaneous statements.

None of Eva's out-of-court statements was admissible. Eva's testimonial statements were inadmissible under Crawford v. Washington (2004) ___ U.S. ___ [124 S.Ct. 1354, 158 L.Ed.2d 177] [admission of "testimonial" out-of-court statements violates the Confrontation Clause].)

---

[24] Because many of the witnesses shared the surname Blacksher, after the first reference, appellant refers to all family witnesses by their first names.

To the extent any of Eva's extrajudicial statements were not testimonial in nature, they were inadmissible under the spontaneous statement hearsay exception, and inadmissible to impeach her former testimony, because former testimony cannot be impeached by prior inconsistent statements.

The admission of testimony relating Eva's out-of-court statements violated appellant's federal constitutional rights to confrontation, due process and a fair trial, under the Fifth, Sixth, and Fourteenth Amendments.

A. Procedural History.

On February 24, 1998, the prosecutor filed a motion arguing that Eva Blacksher's out-of-court statements to the police, a mental health worker called to care for Eva, her neighbor John Adams, and to her relatives, including statements to her son and daughter-in-law James and Frances Blacksher, were admissible as spontaneous statements under Evidence Code section 1240. (CT 552-86.) Although the prosecutor acknowledged that Eva had severe memory problems at the time she made the statements, the prosecutor argued that her statements were sufficiently reliable to be admitted under the hearsay exception. (CT 577-78; 1658-60.)

On March 11, 1998, the defense filed a motion in opposition, arguing that the admission of Eva's extrajudicial statements would deprive appellant of his federal rights to confrontation, due process and a fair trial; that there was insufficient foundation that Eva perceived the events

described in her statements; and that her statements were inadmissible as improper opinions and under Evidence Code section 352. (CT 634-50; RT 1661-62.)

The trial court denied appellant's motion, ruling *inter alia* that the statements were admissible under the spontaneous statement exception to the hearsay rule.

B. Eva's Out-of-Court Statements Were Improperly Admitted Into Evidence.

According to neighbor John Adams, the first person to talk to Eva shortly after the shootings, Eva said, "They've been shot. Beanie [Versenia] and Torey have been shot." (RT 1941-42.) It sounded to Adams as if Eva said that appellant had shot Versenia and Torey and then shot himself. (RT 1943.) However, Adams also testified that Eva had first said that both her children were dead, which Adams understood to mean that appellant shot Versenia and then shot himself; there was no mention of Torey. (RT 1971-72.) Eva did not say she saw a gun and did not say she witnessed a shooting. (RT 1976.)

Officer Nicolas Nielsen interviewed Eva shortly after he arrived at the scene at 7:20 a.m. According to Nielsen, Eva said her daughter and her

daughter's son had just been shot and she thought both were dead.[25] Eva said she had spoken to appellant briefly when he came to the house earlier that morning, that appellant had been arguing with his sister Versenia and that he shot her and her son Torey. When asked where appellant got the gun, Eva said she didn't see a gun, but thought appellant used a handgun which she assumed he had hidden somewhere on his person when he came into the house. (RT 1873-75; 1882-83; 1904; 1910.)

Lieutenant Alan Bierce interviewed Eva on May 11 but considered her "fragile" and didn't take a written statement. (RT 2584-85.) Bierce saw Eva early the next evening at Ruth Cole's house in Richmond and took a formal statement from her at that time. Ruth was present for the interview. Eva signed her name after Bierce read the statement to her. (RT 2585-86; 2612.) Eva stated that appellant had been in her bedroom then went down a short hallway into the dining room; within a couple of seconds Eva heard shots but no voices. Eva, still in her bedroom, saw Versenia come out of her door and turn into the dining room; Versenia said something like "What's this?" or "What are you doing?" and "What's

---

[25] Appellant made a "continuing objection" to testimony of Eva's extrajudicial statements. (RT 1874.) However, this continuing objection was not strictly necessary, as appellant had objected to the admission of Eva's statements on both constitutional and statutory grounds in the limine motion. (CT 634-50.)

wrong with you?" Eva heard a single shot, totaling three shots in all. Eva went into the dining room and saw Versenia standing and bleeding from her head, then slump to the ground crying out "Mother." (RT 2588-90.) Eva did not say that Versenia died in her arms. (RT 2612.) Eva did not see appellant in the dining room when she went into that room. (RT 2604.) Eva said that appellant and Torey had some friction but she didn't know what they were bickering about; appellant didn't seem hostile or agitated when she saw him that morning. From her location, Eva couldn't see into the dining room. (RT 2600.)

Frances Blacksher arrived at the scene sometime after 8:00 or 9:00 a.m. when Eva was in a car with the mental health worker. According to Frances, Eva said that she was in the room when Versenia was shot but only heard Torey being shot. (RT 2331-32.) Frances testified that Eva said that appellant shot Versenia in the head and that Versenia, blood streaming from her head, then fell into Eva's arms. Eva said appellant "did not have to shoot" Versenia and Torey, that appellant shot Versenia in the head and shot Torey when he was sleeping, and that afterwards appellant "went down the street just as fast as he could that way." (RT 2306-07.)

James Blacksher also testified over defense hearsay objections. James arrived at Allston Street with his brother Artis Jr. when Eva was in the car with the mental health worker. (RT 2351.) James testified that Eva

said that appellant killed Torey and shot Versenia. Eva said that after Versenia was shot, she fell into Eva's arms saying "Mama." (RT 2353.)

C. Eva's Extrajudicial Statements Were Testimonial In Nature and Thus Inadmissible Under Crawford v. Washington.

In Crawford v. Washington (2004) ___ U.S. ___ [124 S.Ct. 1354, 158 L.Ed.2d 177], the United States Supreme Court "dramatically altered the landscape for courts considering"[26] Confrontation Clause issues. Crawford rejected the view that the Confrontation Clause applied only to in-court testimony and that its application to out-of-court statements introduced at trial depended upon the state statutory rules of evidence. After conducting an exhaustive historical analysis of the Confrontation Clause, the Supreme Court concluded that "testimonial" statements or hearsay were a "core concern" of the Sixth Amendment, and that such testimonial statements were inadmissible against the defendant, whether or not the court had deemed such statements "reliable." Crawford thus overruled the rule of Ohio v. Roberts (1980) 448 U.S. 56 to the extent Roberts held that the Confrontation Clause did not bar admission of an unavailable witness' statement against a criminal defendant if the statement fell within a firmly established hearsay exception and bore adequate

---

[26] United States v. Saner & Vogel (S.D.Ind. 2004) 313 F.Supp.896.

"indicia of reliability." Crawford concluded that the "reliability" standard set forth in Roberts was too "amorphous" to prevent the improper admission of "core testimonial statements that the Confrontation Clause plainly meant to exclude." (Crawford, supra, 124 S.Ct. at 1371.)

> "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" (Id. at 1370.)

Crawford held that out-of-court testimonial statements are constitutionally admissible only where the declarant is unavailable and there was a prior opportunity for cross-examination.[27] (Id. at 1369.)

Crawford specified three core classes of testimonial statements,[28] including (1) ex parte in-court testimony or its functional equivalent; (2) extrajudicial statements contained in formalized materials; and (3) statements made under circumstances which would lead an objective

---

[27] In Crawford, the defendant's wife did not testify because of the state marital privilege. The trial court admitted her statements to the police. The Supreme Court reversed because although the wife was unavailable as a witness at trial, the defendant did not have a prior opportunity to cross-examine her regarding her statements. (Id. at 1367-74.)

[28] Apart from these three definitions, Crawford did not comprehensively distinguish "testimonial" statements from "nontestimonial," instead leaving the matter for another day. (Id. at 1374.)

witness reasonably to believe that the statement would be available for use at a later trial. (Id. at 1364.)

Significantly for this case, Crawford emphasized that "statements taken by police officers in the course of interrogations are [] testimonial under even a narrow standard." (Id. at 1364.)

> "Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (Id. at 1374.)

Crawford pointed out that its use of the term police "interrogation" was intended in its colloquial, rather than any technical legal, sense[29] -- thus a formal statement to a police officer performing investigative functions is testimonial. (Id. at 1365, fn. 4.)

Eva's statements to Officers Nielsen and Bierce were clearly testimonial under this standard. Both statements were the result of police "interrogation" in the colloquial sense, an interrogation undertaken as part of the police investigation, and in the case of Bierce, resulting in a formal

---

[29] As explained in United States v. Saner & Vogel, supra: "In other words, courts should not interpret 'interrogation' in this context by the same strict standards that govern the term in the Miranda context, where police questioning is not interrogation unless it takes place in a custodial setting. [] If the Court wanted to limit Crawford to statements given in the custodial setting, it could have simply borrowed the familiar definition of interrogation from the Miranda context." (Id. at 890.)

written statement. Thus, under Crawford, Eva's statements to the police would be admissible only if Eva was unavailable and appellant had a prior opportunity to cross-examine her regarding those statements. Although Eva was unavailable as a witness at appellant's trial, appellant did not have a prior opportunity to cross-examine Eva regarding her statements to the police. Neither Officer Bierce nor Officer Nielsen testified at the preliminary hearing. (CT 85-86.) Although Eva herself testified at the preliminary hearing, she did not testify to any statements she made to the police. Consequently, Officers Bierce and Nielsen's testimony as to Eva's out-of-court statements was inadmissible and violative of appellant's confrontation rights.

Eva's hearsay statements to Frances and James Blacksher were also testimonial in nature and thus inadmissible. As explained above, Crawford v. Washington did not set out definitive guidelines for determining whether statements are testimonial or not. The Supreme Court did provide some guidance, however, by contrasting "formal statement[s] to government officers" (testimonial) from "casual remark[s] to an acquaintance," which are not testimonial. (Crawford, supra, 124 S.Ct. at 1364.) The statements made by Eva to both Frances and James were not "casual remarks." At the time her statements were made, Eva was still at the scene of the killings, surrounded by police officers who had put her in the care of a City of

Berkeley mental health worker. Eva's statements to Frances and James thus fit the third formulation for testimonial statements in Crawford: they 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 . . ." (Ibid.)[30]

Since Eva's statements were testimonial in nature, they are inadmissible under Crawford unless Eva was unavailable and appellant had a prior opportunity to cross-examine. Eva was unavailable at trial, but appellant had no prior motive or opportunity to cross-examine Eva regarding the statements. Neither Frances nor James testified at the preliminary hearing and there was no testimony at that hearing that Eva had made any statements to either of them. The admission of Eva's hearsay through Frances and James at appellant's trial thus violated appellant's constitutional rights of confrontation as set out in Crawford.

/

---

[30] Although the trial court admitted these statements under the spontaneous statement hearsay exception (which appellant addresses immediately below), Crawford calls into question the admissibility of "spontaneous statements" made by a child victim to a police officer under the spontaneous declaration hearsay exception, describing the holding as "arguably in tension" with rule declared in Crawford requiring a prior opportunity for cross-examination when the proffered statement is testimony in nature. (Id. at 1368, fn. 8.)

D. Appellant Did Not Have a Prior Opportunity to Cross-Examine Eva Regarding Her Out-of-Court Statements.

As stated above, Eva did testify at the preliminary hearing. However, because at that time Eva was suffering from dementia and had serious memory problems,[31] appellant was unable to effectively cross-examine her.

1. Eva's preliminary hearing testimony.

The summary of Eva's preliminary hearing testimony in the Statement of Facts, above, excludes the numerous repetitions, contradictions, non-sequiturs and non-sensical answers in her testimony, and thus fails to convey the magnitude of Eva's impairment. Appellant here provides a more expanded review of Eva's testimony which, although lengthy, is necessary to show the scope and extent of Eva's impairment at the time of her preliminary hearing testimony, and thus appellant's inability to effectively cross-examine her regarding the out-of-court statements she allegedly made at the scene and the following day.

In her preliminary hearing testimony, Eva Blacksher was unable to say if she had a memory problem at the time of the shootings; she did not

---

[31] The prosecutor himself acknowledged that Eva's "memory problems began some years before May 11, 1995." (CT 559, fn. 1.) The preliminary hearing took place on October of 1995.

know the date, and "d[id]n't remember." She had been having memory problems for quite awhile, but didn't think she was having memory problems at the time of the shootings. When pressed, Eva admitted that she didn't understand, then said that she couldn't remember good, but Versenia "took over [her] remembrance" and took care for her. (CT 761-62.) Indeed, Versenia had been living with Eva for six years and had moved in with Eva to help because Eva couldn't remember things. (CT 762.) Eva did not even know her own son (appellant) was at the preliminary hearing until he called her attention to him. (CT 103.)

When asked if appellant came to Eva's house on the morning of May 11, 1995, Eva testified: "I don't know, forgot what date it was. I forgot what date. I don't know what the date was." (CT 97-98.) The prosecutor prompted Eva: "On the day that something happened to Versenia, did Erven come into the house?" Eva answered "yea." When asked if that was "earlier in the morning," Eva did not "know what time. It was." (CT 98.) Eva said she was in bed. When asked if she talked to Erven, Eva answered, "Well, let me see. One word with him." She explained that appellant asked if she fixed his supper and "I know that is all I told him. That is all." (CT 98.) When the prosecutor asked "Then did he leave your room then?" Eva answered "no, no. He didn't leave my room." The prosecutor prompted Eva again: "Did he leave? Did Erven leave your room?" Eva

then responded "Oh yes. Yes. Yes." (CT 98.) When asked if after a few minutes she remembered hearing something, Eva said: "No, not no few minutes. Didn't hear anything because I laid down." (CT 98.) When asked what the next thing she remembered was, Eva said "I didn't remember -- un-huh. That is all I remember." (CT 99.) The prosecutor repeated the question about the next thing Eva remembered. Finally, Eva testified that Versenia called her, said she heard a gun shoot and that she was going through the house. Eva jumped up to "catch hold of her" and when she got to the door, "she done fell and that is all I know." Eva stepped over her head and ran out the door." (CT 99.) When asked if she saw if Versenia was bleeding, Eva answered yes. When asked if she heard the gun shot, Eva said she "heard last one, last shot. I heard that one. I didn't hear the first one." (CT 99.) When asked if she heard Versenia say something before she heard the shot, Eva said "No, I didn't. No." -- even though Eva had just testified that she heard Versenia call out to say she had heard a gun shoot. (CT 100.) When asked if she remembered talking to the police after this happened, Eva answered "Yes?" The prosecutor prodded Eva once again: "Right. Did you talk to the police afterwards?" Eva then answered, "Yes, just a little bit, not much, because I." (CT 100.) When asked if she heard Versenia say "what is wrong with you, what are you doing?" Eva answered, "Did I hear him saying that? No." The prosecutor

insisted: "did you tell the police that you heard her say that?" Eva answered, "No I didn't say that. No, no, no, no. I didn't hear that." (CT 100.) When the prosecutor showed Eva a copy of the police report, Eva recognized the signature as her handwriting. When asked if she remembered signing it for the police, Eva responded, "No. No. No." The prosecutor repeated, "You don't remember?" Eva again said, "No. No. I don't remember." Eva said she did not see appellant or his car. When asked how much time passed from first seeing appellant that morning to when she heard Versenia calling her, Eva asked "What time was?" and when the question was repeated, Eva said she didn't know. When asked if it was less than 30 minutes, she said "I don't know. I can't say. I don't know." (CT 101.) The prosecutor provided a hint: "Would you say it was minutes?" Eva answered, "I don't know. I can't say. I don't know. I forgot. I don't remember." (CT 101-102.) When asked if she knew what time she first saw appellant that morning, Eva responded that she didn't know: "I didn't look at the time. I don't know." (CT 102.)

When asked if she remembered telling the police she heard two shots that morning, Eva repeated "Do I remember telling the police?" The prosecutor repeated the question. Eva said, "No. I ain't told the police that." She did not remember reading the police report. When asked if she saw any other people in the house after Versenia fell, she answered, "No.

No. No. No. I didn't see nobody, uh-uh." When asked if she saw appellant in court, Eva responded, "I haven't seen Erven today. Is he here?" (CT 102.) The prosecutor repeated, "Do you see him anywhere in the courtroom?" Eva asked, "Is he here today?" At that point, appellant said "I'm right here, Mom." Eva then responded, "That's my baby. Hi, honey." (CT 103.)

On cross examination, defense counsel asked Eva how she was doing. She responded, "Oh, I'm trying to make it. Hard on me, but I'm trying to make it." (CT 103.) When asked how long appellant had lived in the back house behind her house Eva said "I don't know. I done forgot." She did not remember but said about four years. When asked how long appellant was in her room when he asked her about supper, Eva said "Just one, went on out." (CT 104.) When asked if she sometimes had a memory loss at that time, if she couldn't remember things too good, Eva asked "Did I what?" (CT 104.) When the question was repeated, Eva said "I can't remember." (CT 105.) When asked if she remembered when Versenia was shot somewhere around May, Eva said "I don't know what date it was." When asked if she didn't remember at all, she said "No. No. Worried me, I don't remember." (CT 105.) When asked if she had been having memory problems for a long time, Eva asked "With who?" When the question was repeated, she said, "Well, yes. Well, you must understand I am an old lady,

yes. Do you want me? I will tell you. I am 81 years old. I can't remember things." When asked if she had been having memory problems for quite a few years, Eva said "Yea, quite a while." When asked if she was having memory problems when this happened, she said she didn't think so. When asked if she could remember then, Eva asked "How, how you say it?" (CT 105.) When counsel repeated the question whether she was having memory problems when something happened to Versenia, Eva said "You mean -- I don't understand." (CT 106.) The question was asked again, and she responded, "Was I having problems with." Counsel prompted, "Remembering things?" Eva answered, "With my baby, with my son?" (CT 106.) The question was repeated once more and Eva answered: "Do I remember? Well, no, not too much, because I had Versenia there with me. She took care of me. She took over my remembrance. I couldn't remember good. She always took care for me." (CT 106.) Versenia had lived with her for six years, and had moved in to help Eva because she couldn't remember things. (CT 106.)

Eva then repeated that she heard just one shot and that Versenia called "mother" when she opened her door. "I says what is it? I was in my room. Then she come on through. That is all I know. . . . Yes, just didn't talk to her no more. I didn't talk to her no more cause she was up in heaven . . . . Right when I got in there she was gone. She was gone." (CT 108.)

Eva said she talked to the police officer outside, and that she was upset. She couldn't remember if she was having problems remembering things then. When asked if she "couldn't remember everything right then," Eva responded, "No. No. I didn't see something to remember. I don't know." (CT 109.) She said she talked to the police officer alone. When asked if the officer was asking her questions, she said, "I don't know who he talked to. I don't know." (CT 110.)

On redirect examination, Eva said she didn't remember "at all" going to the courthouse with Versenia the day before. (CT 110.) When asked if she put on a form that she was afraid of what appellant might do, Eva answered, "No. I don't remember all these things. I told you I can't remember like I used to. I done got up in the age and I can't remember." She then asked, "What you saying I was come up here?" (CT 111.) When asked if it was possible that she did go to court but just doesn't remember, Eva said, "I don't know anything about it." (CT 111.) When asked if she remembered changing the locks to her house, she asked "What?" and when the question was repeated, she said, "I don't remember that. I know anything about that. I don't remember that. (CT 111-12.) When asked if she remembered signing the temporary restraining order, Eva said, "No. I don't know how I signed that, but it's signed here or where was it signed? It say where I was?" (CT 113.) The prosecutor told her it was signed on

May 9, 1994, and asked if that helped her to remember signing it. Eva answered, "No, I can't remember that. I get a certain age you don't understand that, or when you are young at least, I don't know." (CT 113.)

2. Appellant did not have an opportunity for effective cross-examination of Eva at the preliminary hearing.

The Sixth Amendment guarantees not just the right to cross-examination but to **effective** cross-examination. (Delaware v. Van Arsdall (1986) 475 U.S. 673, 679.) Cross-examination has frequently been defined in the courts as the "greatest legal engine ever invented for the discovery of truth." (See e.g., California v. Green (1970) 399 U.S. 149, 158, quoting 5 Wigmore § 1367.) Effective cross-examination means a cross-examination sufficient to "affor[d] the trier of fact a satisfactory basis for evaluation the truth of [a] prior statement." (California v. Green, supra, 399 U.S. at 161.)

The summary of Eva's preliminary hearing testimony demonstrates that appellant was deprived of that guarantee. Defense counsel's attempt to cross-examine resulted in a series of non sequiturs, questions by Eva reflecting her incomprehension, and statements that she did not know or did not remember. Eva's dementia rendered appellant wholly unable to test, much less discover, the truth of her alleged prior statements.

Although Eva was physically present at the preliminary hearing, she

was psychologically or mentally absent, and was essentially unavailable for cross-examination, just as she was later declared unavailable to testify at trial because of her Alzheimer's based incompetency. It is both legally and psychologically incorrect to categorize Eva as available for cross-examination at the trial but not at the preliminary hearing. Although Eva's dementia may have been more advanced at the time of the trial, it was sufficiently advanced at the time of the preliminary hearing so that appellant was unable to cross-examine her in any meaningful way, as the summary of her testimony, as summarized above, clearly demonstrates.

In United States v. Owens (1988) 484 U.S. 554, the United States Supreme Court considered whether the defendant was denied his right to confrontation when the complaining witness, who had earlier described an attack on him and identified the defendant from photographs, later suffered severe memory loss regarding the attack as a result of the injuries he had sustained. The witness testified at trial and described the attack; he also testified that he clearly remembered identifying the defendant, although at the time of trial, because of his memory loss, he could no longer remember seeing his assailant. The Owens court held that the defendant had not been denied his right of confrontation, relying on Delaware v. Fensterer (1985) 474 U.S. 15 [no confrontation clause violation when an expert testified as to his opinion that a hair had been forcibly removed but not recollect the

which of the three available methods he had used to reach that conclusion].) In both Delaware v. Fensterer and Owens, the witness was able to testify to his belief (the expert's opinion and the witness' identification) although memory problems precluded each from testifying to the reasons or bases for that belief. Thus, there was no confrontation violation. (Owens, supra, 484 U.S. at 559-60.)

The present case is easily distinguishable because, unlike the witnesses at issue in Fensterer and Owens, Eva's problem was not a discrete, isolated memory deficit but rather an all-encompassing dementia which rendered her unable to even remember if she could remember (CT 109) and unable to understand the questions posed to her (CT 106). In Owens, the witness testified at the time he made his prior statements, he was certain that his memory was accurate. (Owens, supra, 484 U.S. at 565, dis.opn., Brennan and Marshall, JJ.) Similarly, in Fensterer, the witness testified to his current belief in his opinions. (Fensterer, supra, 474 U.S. at 16-17.) By contrast, Eva could barely string words into a sentence at the time of her testimony. Under these circumstances, it was impossible to test or discover the truth of Eva's alleged hearsay statements.

In sum, Eva's dementia prevented appellant from effectively cross-examining her at the preliminary hearing. Consequently, the admission of her hearsay statements at trial deprived appellant of his federal

constitutional rights of confrontation under Crawford v. Washington.

E. Eva's Out-of-Court Statements Were Not Admissible Under the Spontaneous Utterance Exception to the Hearsay Rule.

As argued above, under Crawford all the testimony regarding Eva's hearsay statements was inadmissible. Because the trial court admitted Eva's hearsay under the spontaneous statement hearsay exception, appellant analyzes this ruling and shows it to be erroneous. Nonetheless, because all of Eva's hearsay statements are inadmissible under Crawford, this analysis is unnecessary because, as set out above, Eva was unavailable at the preliminary hearing in any realistic psychological sense and was thus unavailable for purposes of cross-examination.

An analysis of Eva's hearsay statements under the rules of evidence demonstrates that they were inadmissible even under the statutory framework. An extrajudicial statement comes within the spontaneous statement exception to the hearsay rule if it "purports to narrate, describe or explain an act, condition, or event perceived by the declarant," and it was "made spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240.) The proponent of hearsay evidence must produce evidence of the existence of these preliminary facts. (Evid. Code, §§ 403, 405; see People v. Anthony O. (1992) 5 Cal.App.4th 428, 433-34.) Proof of the preliminary facts is

required in order to demonstrate the reliability of the hearsay. (People v. Tewksbury (1976) 15 Cal.3d 953, 966.)

1. The prosecution failed to establish that Eva perceived the events she narrated.

A hearsay statement, even if it is otherwise spontaneous, is admissible only if it relates to an event the declarant personally perceived. (People v. Phillips (2000) 22 Cal.4th 226, 234 [the trial court acted within its discretion in excluding a defense offered hearsay statement where the evidence supported a finding that the declarant could have been repeating something he heard from someone else].)

As in Phillips, the proponent of Eva's hearsay (in this case the prosecution) did not establish that Eva **saw** appellant shoot and kill the victims. In fact, the evidence established that Eva did not see the shootings. None of the witnesses testifying to Eva's hearsay statements could state that Eva had claimed to have perceived the shootings. Neighbor John Adams and Officer Bierce were the first people to talk to Eva after the shootings. Eva did not state to either of them that she had **seen** the shootings. To the contrary: Eva reported to Bierce that she did **not** witness the shootings; Eva's statement to Adams that appellant had shot himself also proves that Eva did not witness the shootings. (RT 1943.)

Likewise, the prosecution never established that either James or Frances[32] had claimed that Eva reported having perceived the event, although both stated that Eva said that appellant had shot the victims. (CT 555-56 [prosecution's motion]; RT 2306-07; 2353 [trial testimony].) Eva told Officer Nielsen that she did not see a gun; she did not tell Adams that she had witnessed the shootings; she told Bierce she was in her bedroom when she heard the shots and did not see appellant when she left her bedroom and entered the dining room where Versenia was. Even Frances, who later testified that Eva said Versenia fell into her arms testified that Eva said she did not see Torey being shot. (RT 2331.)

In short, the prosecution failed to prove that Eva perceived the events she later purportedly described. Where, as here, there is no evidence that a declarant actually perceived the event about which she spoke, Evidence Code section 1240 precludes admission of evidence of the declarant's out-of-court statement. The trial court erred in admitting testimony as to Eva's statements under the spontaneous statement hearsay

---

[32] At trial, Frances reported for the first time that Eva said that appellant had shot Versenia and that Versenia fell into Eva's arms, and that appellant had shot Torey while he was asleep, thus implying that Eva had perceived these events. However, the other witnesses contradict Frances and Frances' expanded version of Eva's statement was not disclosed to the defense nor was it before the trial court at the time of the court's ruling. (RT 2306-08.)

exception.

2. Eva's statements were not spontaneous.

A spontaneous narration is one "undertaken without **deliberation** or reflection." (People v. Farmer (1989) 47 Cal.3d 888, 903 [emphasis supplied], overruled on another point in People v. Waidla (2000) 22 Cal.4th 690, 724, fn. 6.) The statements made by Eva to James, Frances and the police officers were long after the shootings, an hour or more in the case of James and Frances, and in the case of Officer Bierce, the next afternoon.

Although this Court has held that "spontaneous" statements can be made even hours after the event witnessed, see e.g., People v. Brown (2003) 31 Cal.4th 518, 541, this Court has also held that premeditation and deliberation for purposes of first degree murder can be formed with "great rapidity." (See e.g., People v. Sanchez (1995) 12 Cal.4th 1, 34 [during an altercation]; People v. Bloyd (1987) 43 Cal.3d 333, 376 [in a "very short period of time"]; People v. Velasquez (1980) 26 Cal.3d 425, 435 [in a "brief period" of time during which the victim was restrained prior to being shot]; People v. Jackson (1989) 49 Cal.3d 1170, 1200 [premeditation during time it took defendant to follow retreating police officer to patrol car].)

If a spontaneous statement is one without deliberation, and deliberation can be formed with "great rapidity" -- indeed within seconds or minutes in the above-cited case law -- then a spontaneous undeliberated

statement cannot be one that took place hours after the event.

3. Eva's mental state.

The **mental state** of the speaker is the crucial element in determining whether a declaration is sufficiently reliable to be admissible as a spontaneous statement.

> "'The nature of the utterance -- how long it was made after the startling incident and whether the speaker blurted it out, for example -- may be important, but solely as an indicator of the mental state of the declarant." (People v. Brown (2003) 31 Cal.4th 518, 542, quoting Farmer, supra, 47 Cal.3d. at 903-04.)

Ultimately, however, "each fact pattern must be considered on its own merits." (Farmer, supra, 47 Cal.3d at 904.)

Eva was variously described as hysterical, calm, fragile and confused at the time she made her purported statements. (RT 1941; 2096; 2331; 2584.) The particular facts of this case present a more unusual circumstance -- at the time of the events in question, Eva was seriously impaired by dementia. (See Part D, pp. 124-34 above.) This factor thus also weighs against the admission of Eva's hearsay statements as spontaneous statements.

4. Eva's hearsay statements were inadmissible as unreliable.

Eva was deemed incompetent after a hearing in March of 1998.

/

However, the trial court ruled that the declarant's lack of competency as a witness did not preclude admission of her extrajudicial statements under the spontaneous statement exception. (RT 1664.) Appellant acknowledges this principle of law.[33] Nonetheless, while a hearsay declarant need not be competent as a witness, she must be reliable. (Idaho v. Wright (1990)497 U.S. 805, 815.)

All the cases relied upon by the trial court for the principle that a declarant need not be a competent witness involved children.[34] People v. Anthony O. (1992) 5 Cal.App.4th 428, 436 recited this principle referring to People v. Orduno (1978) 80 Cal.App.3d 738, 746 and In re Damon H. (1985) 165 Cal.App.3d 471. Orduno involved a three-year-old declarant who had been found incompetent at a prior hearing; Damon H. involved the statements of a two-year-and-nine-month-old child. People v. Daily (1996) 49 Cal.App.4th 543, 552 involved the statement of a six-year-old; In re Daniel Z. (1992) 10 Cal.App.4th 1009, 1022 involved statements by a three-year-old and a four-year-old; and People v. Butler (1967) 249

---

[33] See In re Cindy L. (1997) 17 Cal.4th 15, 37.

[34] The one exception in People v. Arias (1996) 13 Cal.4th 92. However, Arias is not on point. It held that a spontaneous statement is not rendered inadmissible because the declarant failed to mention or recall it on a later or calmer occasion. The issue of the witness' mental ability was not in issue.

Cal.App.2d 799, 803 involved the statement of a five-year-old. (See also People v. Trimble (1992) 5 Cal.App.4th 1225, 1233, fn. 4 [statement by a two-year-old].)

The point made in those cases was that a spontaneous statement could be reliable even though the declarant was not competent to testify: competency as a witness is a concept distinct from the reliability of a statement. A witness is competent if he is capable of expressing himself so as to be understood and capable of understanding the duty to tell the truth. (Evid. Code, § 701.) Thus a child who may not understand the abstract concepts of truth and falsity, or who may not yet be capable of full linguistic expression, may be incompetent as a witness yet reliable as a declarant.[35] That does not mean, however, that an incompetent declarant's

---

[35] This point was made in Conner v. State (Fla. 1999) 748 So.2d 950, 959. Conner found unconstitutional a statute allowing for admission of hearsay statements by elderly persons. Conner observed that a child witness might be unavailable to testify because of an inability to understand the abstract concept of taking an oath. The hearsay statement of such a child might be more reliable than the child's sworn testimony, due to stress and a child's susceptibility to leading questions. People v. Watson (2003) 114 Cal.App.4th 142 upheld the newly enacted California hearsay exception for victims of elder abuse against a constitutional challenge, even though that statute did not list relevant factors to assess trustworthiness. Watson noted that California courts can rely on factors drawn from case law addressing the trustworthiness of hearsay in other circumstances, and found the hearsay

statement is necessarily reliable. In fact, the evidence with respect to Eva shows again and again that she was not reliable.

Moreover, if the declarant is suffering from dementia the underlying rationale of the spontaneous statement exception does not apply. That theory is that a statement made under the stress of excitement, with no opportunity to contrive or reflect, is particularly likely to be truthful, indeed more trustworthy than a statement made by the same person on the stand. (People v. Hughey (1987) 194 Cal. App. 3d 1383, 1392-1393.) If the person making the statement is mentally impaired, especially in her ability to remember, statements made under the stress of excitement are no more likely to be trustworthy than any other statement. Indeed, those suffering from Alzheimer's type dementia are susceptible to influences rendering their statements unreliable: confabulation, repeating what is fed to them.[36]

Sherley v. Seabold (6th Cir. 1991) 929 F.2d 272 held that the defendant's federal right to confront the witnesses against him was violated

---

insufficiently reliable under the facts. (Id. at 156-57.)

[36] Confabulation was defined as early as 1980 in the DSM-III as "fabrication of facts or events in response to questions about situations that are not recalled because of memory impairment." Research on confabulation as a symptom of dementia has been going on for decades. (See e.g., Clinical Neuropsychology (4th Ed.) Heilman & Valenstein (2003 Oxford University Press).)

where the victim's hearsay statements identifying her attacker were admitted, because the victim had suffered memory loss prior to the crime, her condition worsened after the crime, and she was sometimes incoherent and described the crime inconsistently. The same must be said of Eva Blacksher: she testified at the preliminary hearing that she had suffered memory loss prior to the time of the crime, her hearsay statements describing the events were inconsistent, and other witnesses at the time described her as confused and so fragile that a mental health worker was called in to care for her.

Eva's mental state at the time she made her hearsay statements was insufficiently reliable to allow her statements into evidence, as shown by testimony describing her condition at the time, by her own contradictory and confused hearsay statements, and by her preliminary hearing testimony shortly thereafter. The admission of these statements, which did not even meet the foundational requirements of the spontaneous hearsay declaration, clearly violated appellant's confrontation rights.

F. Eva's Hearsay Statements Were Inadmissible to Impeach Her Preliminary Hearing Testimony.

Nor were Eva's out-of-court statements admissible as prior inconsistent statements to impeach her preliminary hearing testimony, admitted at trial under the former testimony exception to the hearsay rule.

Evidence Code section 1294 allows a party to impeach former testimony with either a videotaped statement introduced at a preliminary hearing, or by the preliminary hearing transcript containing the prior inconsistent statement. However, Eva's prior inconsistent statements as testified to at trial by John Adams, and Frances and James Blacksher were not admitted at the preliminary hearing,[37] and thus they were not admissible at trial under this section.

Evidence Code section 1202 provides that a statement by a declarant inconsistent with a statement made by the declarant received in evidence as hearsay evidence may be admissible for attacking the credibility of the declarant even though the declarant did not have an opportunity to explain or deny the inconsistent statement. However, when hearsay evidence in the form of former testimony has been admitted, the California courts permit a party to impeach the hearsay declarant with evidence of an inconsistent

---

[37] At the preliminary hearing, Frances Blacksher did not testify to any hearsay statements made by Eva on the day of the killings. (See CT 117-37.) James Blacksher did not testify at all at the preliminary hearing. John Adams testified at the preliminary hearing that after the shootings Eva was mumbling, that he couldn't tell exactly what she said, and that she "said something about someone being shot" or "something about he shot, or something like that, someone had shot someone." (CT 142-43.) He also testified that Eva said repeatedly "they being shot." (CT 145.)

statement made by the hearsay declarant only if the inconsistent statement was made **after** the former testimony was given. (People v. Collup (1946) 27 Cal.2d 829.) Former testimony may not be impeached by an inconsistent statement made **prior to** the former testimony unless the party seeking to impeach either did not know of the inconsistent statement at the time the former testimony was given or unless he had provided the declarant with an opportunity to explain or deny the inconsistent statement. (People v. Greenwell (1937) 20 Cal.App.2d 266, as limited by People v. Collup, supra; see Evid. Code, § 1202, Law Revision Commission Comment.)

Because Eva's out-of-court statements were made prior to, rather than after, her former testimony was given, those statements were not admissible to impeach her former testimony under Evidence Code section 1202.

G. Eva's Statements Were Inadmissible as Improper Lay Opinion.

Eva's statements were inadmissible on the basis that they constituted improper opinion. Lay opinion testimony is admissible only if it is rationally based on the witness' perception. (Evid. Code, § 800.) As shown above, Eva did not perceive what she described; and she was not rational.

People v. Miron (1989) 210 Cal.App.3d 580 is instructive, because it demonstrates that opinions or conclusions, i.e., interpretations of events not based on personal knowledge, are properly excluded under Evidence Code section 1240. Miron upheld a trial court's exclusion of a hearsay statement by an eyewitness made just after a shooting, in which she stated that the victim "was trying to kill us." (Id. at 583.) The defendant sought to introduce the testimony as a spontaneous statement, but the appellate court found that the declaration was improper lay opinion evidence. Citing Evidence Code section 800, the court noted that the statement would have been inadmissible had the eyewitness made it during her own testimony, because lay witness opinion testimony must be "rationally based on the witness's perception and helpful to a clear understanding of his or her testimony." (Id. at 583.) Miron concluded that

> "the opinion rule excludes admission of a spontaneous statement of inadmissible opinion, and such opinions or conclusions should be excluded even where the statement as a whole meets the requirements of Evidence Code section 1240." (Id. at 584, citing Catlin v. Union Oil Co. (1916) 31 Cal.App.597, 610.)

In Miron, the declarant did actually perceive an event, but her statement was an opinion regarding another person's intent. Here, the prosecution failed to establish that Eva perceived the event, and her statements were impermissible opinions or conclusions. As in Miron, had Eva been

available at trial and asked "Who did this?" she would not have been able to answer that appellant had done it, because she did not witness the shootings and thus did not have the required personal knowledge. Eva's hearsay opinion statements were inadmissible, just as the declarant's statement in Miron was.

Miron also addressed People v. Farmer, supra, 47 Cal.3d 888, in which this Court found that a homicide victim's statement that he thought his assailant had entered his house to steal his roommate's drugs was admissible as a spontaneous utterance. Miron explained that Farmer did not address either the admissibility of opinion testimony or the precedent establishing that opinions were inadmissible, but found that the statements regarding drug dealing were admissible because they helped "explain an event perceived by the declarant." (Id. at 905.)

The crucial difference between Farmer and the facts of this case is that here the prosecution failed to establish that Eva **perceived the event in question**. While there was no doubt in Farmer that the declarant was conscious and perceived his attack and was even able to describe the perpetrator, the facts here show that Eva was not in the room and did not see appellant when the shootings occurred. Consequently, her hearsay statements were inadmissible under Evidence Code section 1240.

H. The Admission of Eva's Hearsay Statements and Opinions Violated Appellant's Constitutional Rights to Confrontation, Due Process and a Fair Trial.

Appellant objected to the admission of Eva's hearsay statements as violative of his federal constitutional rights to confrontation, to due process and to a fair trial. (CT 644; 648.) Admission of hearsay testimony abrogates the defendant's Sixth Amendment rights where the defendant is unable to cross-examine the hearsay declarant. (Crawford v. Washington, supra.) The denial of the fundamental right to cross-examine witnesses calls into question the ultimate "integrity of the fact-finding process." (Chambers v. Mississippi (1973) 410 U.S. 284, 295.) The literal right to confront a witness "forms the core of the values furthered by the Confrontation Clause." (California v. Green, supra, 399 U.S. at 157.)

As demonstrated above, Eva's statements were not properly admitted under any firmly-rooted exceptions to the hearsay rule; thus, they are presumptively barred by the confrontation clause unless the prosecution can show that the statements bore particularized guarantees of trustworthiness to establish admissibility. (Idaho v. Wright, supra, 497 U.S. at 816-21.) The prosecution must show from the totality of the circumstances "that surround the making of the statement" that the statement was trustworthy, and neither the prosecution nor the courts may consider corroborating

evidence of the truth of the statement admitted at trial. (Id. at 819.)

Moreover, the confrontation clause excludes hearsay evidence against a criminal defendant which does not fall within a firmly rooted hearsay exception "absent a showing of particularized guarantees of trustworthiness." (Idaho v. Wright, supra, 497 U.S. at 817.) The spontaneous statement has been held to be a firmly rooted exception, White v. Illinois (1992) 502 U.S. 346, 355, fn. 8; People v. Dennis (1998) 17 Cal.4th 468, 529, but the prosecution failed to establish that Eva's statements came within the parameters of the spontaneous statement exception. Consequently, the statements necessarily fall outside the "firmly rooted hearsay exception" rule, and their admission violated appellant's right of confrontation. (See e.g., Bains v. Cambra (9th Cir. 2000) 204 F.3d 964, 973-74 [evidence improperly admitted under California hearsay exceptions for state of mind and coconspirators' statements violated the defendant's federal constitutional right of confrontation].)

Furthermore, even assuming arguendo that Eva's statements came within a state hearsay exception, the admission of such evidence may still violate the Sixth Amendment right of confrontation. (Dutton v. Evans (1970) 400 U.S. 74.) Such a Sixth Amendment violation occurred in this case. In Lilly v. Virginia (1999) 527 U.S. 116 the United States Supreme Court held that the admission of an accomplice's confession incriminating

the defendant violated the confrontation clause, even though it was properly admitted under the state hearsay exception for declarations against penal interest. This was because neither the accomplice's words nor the setting of the interrogation "provide[d] any basis for concluding [that the statement was] so reliable that there was no need to subject them to adversarial testing in a trial setting." (Id. at 136.) A fortiori, because the record provides a firm basis for a finding that Eva's statements were unreliable, their admission was in violation of appellant's federal confrontation rights.

Moreover, where a state evidentiary ruling infringes upon a specific federal constitutional guarantee, or deprives the defendant of the fundamentally fair trial, [as the admission of Eva's statements did here,] the ruling also violates the defendant's federal constitutional rights to due process. (Walters v. Maass (9th Cir. 1995) 45 F.3d 1355, 1357.) In short, "state evidentiary rules may countenance processes that do not comport with fundamental fairness. The issue . . . is whether the state proceedings satisfied due process." (Jamal v. VanDeKamp (9th Cir. 1991) 926 F.2d 918, 919.) Here, Eva's statements did not comport with fundamental fairness or the specific guarantees of the confrontation clause, because, in light of Eva's extraordinary history of memory problems, the statements were inherently unreliable.

/

I. The Erroneous Admission of Eva's Hearsay Statements Prejudiced Appellant's Defense.

Because the erroneous admission of Eva's hearsay statements amounts to a federal constitutional violation, review for prejudice is under Chapman v. California, supra, 386 U.S. at 24, requiring reversal unless the prosecution can show beyond a reasonable doubt that the error was harmless. This showing cannot be made, given the many objective indicia of prejudice from this error.

The prosecutor relied on Eva's hearsay statements in closing argument. (RT 2739-44.) Indeed, the prosecutor insinuated that Eva's hearsay statements had a **heightened** reliability compared to her former testimony, which the prosecutor argued was unworthy of belief because Eva wanted to "protect her son" and thus wouldn't "own up" to what she "saw." (RT 2725; 2742; 2750.) The prosecutor argued that Eva's hearsay statement to Officer Bierce was the "best" description of what Eva actually saw. (RT 2745.) The prosecutor also used Eva's hearsay statements as a basis for his argument that appellant was guilty of intentional murder with respect to Versenia. (RT 2747.)

The prosecutor's reliance in closing argument on erroneously admitted evidence is a strong indication of prejudice. (See e.g., People v. Guzman (1988) 45 Cal.3d 915, 963, overruled on other grounds in Price v.

Superior Court (2001) 25 Cal.4th 1046 [prosecutor's reliance on improperly admitted evidence exacerbated prejudice from error]; People v. Younger (2000) 84 Cal.App.4th 1360, 1385 [prosecutor's reliance on error in closing argument exacerbated prejudicial impact of error]; Depetris v. Kuykendall (9th Cir. 2001) 239 F.3d 1057, 1063 [prosecutor's reliance on error in closing argument is indicative of prejudice].)

On the other hand, the defense argument to the jury on the existence of reasonable doubt relied heavily on Eva's former testimony. (See RT 2772-84.) The improper admission of Eva's inconsistent prior statements weakened that defense, and was prejudicial for that reason. (See e.g., People v. Vargas (1973) 9 Cal.3d 470, 481 and People v. Lindsey (1988) 205 Cal.App.3d 112, 117 [error that strikes a "live nerve" in the defense is prejudicial].)

Finally, even if the prejudice from this error is deemed insufficient, standing alone, to require reversal of appellant's convictions, this Court must consider the cumulative prejudicial impact of this and other constitutional errors. (Taylor v. Kentucky (1978) 436 U.S. 478, 487, and fn. 15 [cumulative effect of errors may violate due process]; United States v. Frederick (9th Cir. 1995) 78 F.3d 1370, 1381 [reversing for cumulative error, because "[w]here [] there considering the cumulative prejudicial impact of various errors]; are a number of errors at trial, 'a balkanized,

issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial."]; People v. Holt (1984) 37 Cal.3d 436 [considering the cumulative prejudicial impact of the various errors].)

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

V. EVA BLACKSHER'S EXTRAJUDICIAL STATEMENTS WERE ERRONEOUSLY ADMITTED AS PRIOR INCONSISTENT STATEMENTS AND THUS VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONTATION, TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS, AND TO A RELIABLE SENTENCING DETERMINATION UNDER THE EIGHTH AMENDMENT

A. Summary of Relevant Facts.

Ruth Cole testified at length to what Eva thought, said, did and knew on May 9, 1995, when Ruth accompanied Eva and Versenia to the Oakland courthouse to get a temporary restraining order [TRO]. Defense counsel objected to this testimony except for testimony by Ruth as to her own actions. The trial court overruled this objection, saying that because Ruth's testimony "explain[ed Eva's] conduct" it was not hearsay. (RT 2142.) The trial court's apparent reference was to Evidence Code section 1250, which allows evidence of a statement as to a declarant's then existing state of mind if it is offered to prove or explain acts or conduct of the declarant.

Ruth then testified that Eva got into Ruth's car and into the courthouse of "her own free will." Defense counsel's objections of "conclusion" were overruled. (RT 2142.) Ruth testified that at the Berkeley courthouse "they told us we would have to go to Oakland." Defense counsel's hearsay objection was overruled on the ground it was "offered to explain subsequent conduct." (RT 2143.) Ruth testified, over

further conclusion and speculation objections, that Eva "knew" she was going with Versenia to get a restraining order. The trial court then ruled that Ruth's testimony was admissible to "impeach" Eva's former testimony "and to explain her conduct." (RT 2145.) When the prosecutor asked Ruth to repeat what Eva "was actually saying," defense counsel interposed another hearsay objection. (RT 2146-47.) The trial court again overruled the objection, citing Evidence Code section 1235 [prior inconsistent statement] and "state of mind" [Evid. Code, § 1250]. (RT 2147.)

Ruth testified that Eva was afraid because appellant had a baseball bat in the house the previous night. (RT 2147.) Defense counsel lodged another hearsay objection. In chambers, the prosecutor stated he was offering the testimony to impeach Eva's preliminary hearing testimony. Defense counsel raised the additional objection of speculation and conclusion as to Ruth's testimony about what Eva knew or thought. (RT 2151.) The trial court ruled that under Evidence Code section 1250 Ruth could testify to statements of Eva to "explain her conduct, to explain her intent." (RT 2151.) Defense counsel pointed out that Ruth had not been testifying to Eva's statements but to her (Ruth's) own conclusions about what Eva thought or felt. (RT 2152-54.) The trial court ruled that Ruth could testify to "anything else" to "explain[] what Eva Blacksher did, what Eva Blacksher felt, what Eva Blacksher thought." (RT 2152.)

Back in front of the jury, the prosecutor then elicited testimony from Ruth that Eva said they were going to get a restraining order because appellant had a baseball bat and said he was going to kill Torey, and that Eva said she was afraid. (RT 2155.) Over another "conclusion" objection, Ruth testified that at the courthouse Versenia was reading the papers so that Eva "could hear what she was saying." (RT 2160.)

After a review of Ruth's testimony, the trial court noted that appellant's objections involved for the most part statements by Eva, and reiterated its ruling that these statements were "inconsistent" with Eva's preliminary hearing testimony and thus could be "used for impeachment or substantive evidence" under Evidence Code section 770 and 1235. (RT 2163-68.) The trial court also ruled that Ruth's testimony recounting Eva's out-of-court statements were admissible to show Eva's then-existing state of mind under Evidence Code section 1250, or for the "nonhearsay" purpose of explaining her conduct, which was all "relevant because it's inconsistent with her [preliminary hearing] testimony." (RT 2163.)

Defense counsel made a further objection under Evidence Code section 352 and requested a limiting instruction that Ruth's testimony was solely for the purpose of impeaching Eva. (RT 2169.) The prosecutor objected. At that point the trial court questioned "what is her then-state of mind or intent relevant for if not [] to impeach what she said at the

[preliminary hearing]?" (RT 2170.) The prosecutor argued that Eva's statements showed her "fear" of appellant. The trial court questioned that theory: "What is Eva Blacksher's fear of the defendant relevant for? What's the relevancy of the fact that Eva Blacksher was afraid of the defendant? Doesn't go to his intent, doesn't go to his planning . . . ." (RT 2170.) The prosecutor's only answer was that the statements did "impeach her." The trial court agreed that the only "relevancy" of Eva's supposed fear of appellant was to impeach her prior testimony and then instructed the jury that Ruth's testimony as to Eva's statements were "admissible only as inconsistent statements for impeaching the previously read testimony of Eva Blacksher." (RT 2170-72.)

B. Eva's Extrajudicial Statements Were Inadmissible and Violative of Appellant's Federal Constitutional Right to Confrontation.

Because Eva was not available for cross-examination at the preliminary hearing (see Arg. IV, Part D, pp. 124-134, above), none of Eva's extrajudicial statements to Ruth Cole were admissible against appellant. (Crawford v. Washington, supra, 124 S.Ct. 1354.) This Court must take a pragmatic look at the prosecutor's extensive use of Eva's hearsay statements in this trial. First, the prosecutor presented Eva's preliminary hearing testimony, which appellant was unable to effectively cross-examine. Then, because Eva's preliminary hearing testimony did not

support the prosecution's case, the prosecutor presented hearsay statement after hearsay statement, supposedly to impeach that testimony. Because appellant had no opportunity to cross-examine the original testimony, his confrontation rights were violated by the admission of the hearsay testimony.

In any case, in addition to the constitutional violation inherent in this use of hearsay, the admission of Ruth's testimony as to Eva's hearsay also violated the statutory framework, as set out in the following arguments.

C. Eva's Extrajudicial Statements Were Inadmissible to Impeach Her Former Testimony.

As the trial court correctly concluded, Eva's "fear" of appellant and reasons for getting a TRO were not relevant to any issue in the case, apart from the fact that these statements "impeached" Eva's former testimony. However, the trial court erred in ruling that the statements were admissible under the prior inconsistent exception to the hearsay rule because former testimony **cannot** be impeached by its proponent with prior inconsistent statements. Evidence Code section 770 provides that a prior inconsistent statement made by a **witness** is inadmissible unless the witness, while testifying, was given an opportunity to explain or deny the statement, or the witness has not been excused from giving further testimony. Eva was not a

witness at appellant's trial. The trial court's ruling that she was incompetent excused her -- indeed forbade her -- from giving further testimony.

Evidence Code section 1235 provides an exception for prior inconsistent statements made by a **witness**, which Eva was not. That section 1235 was intended to apply only to witnesses is clear from the Law Revision Commission Comment::

> "Section 1235 admits inconsistent statements of **witnesses** because the dangers against which the hearsay rule is designed to protect are largely nonexistent. **The declarant is in court** and may be examined and cross-examined in regard to his statements and their subject matter. . . . The trier of fact **has the declarant before it and can observe his demeanor** and the nature of his testimony as he denies or tries to explain away the inconsistency." (Evid. Code, § 1235, Law Revision Commission Comment; emphasis provided.)

People v. Beyea (1974) 38 Cal.App.3d 176, 192-94 found error where the prosecution was allowed to impeach former testimony with prior inconsistent hearsay. Beyea emphasized that only the party against whom such testimony is offered can introduce prior inconsistent statements. This Court made the same ruling in People v. Williams (1976) 16 Cal.3d 663, 667 [Evidence Code § 1235 does not allow for admission of prior inconsistent statements of a witness who was not available at trial]. (See also People v. Rice (1981) 126 Cal.App.3d 477.)

In this case it was the prosecutor who sought a finding that Eva was incompetent and then introduced into evidence Eva's former preliminary hearing testimony. The prosecution was thus precluded from impeaching Eva's preliminary hearing testimony with Ruth's testimony of Eva's prior inconsistent statements. Evidence Code section 1202 provides that a hearsay declarant's credibility may be impeached with a prior inconsistent statement even though the declarant did not have an opportunity to explain or deny the impeaching statement. In contrast to impeachment of a witness, the inconsistent statement of a hearsay declarant is not substantive evidence. However, according to the Law Revision Commission's Comment, it is only the party **against whom** the evidence is admitted who has the right to impeach under this section. (Evid. Code, § 1202, Law Revision Commission Comment; see also Witkin, California Evidence (3d Ed. 2000) Vol. 3, pp. 445-46.) Because the prosecution was the party introducing Eva's former testimony, it was only appellant who had the right to impeach that testimony with Eva's inconsistent statements. (See e.g., Beyea, supra, 38 Cal.App.3d at 194.)

The relevant statutes and case law make it unmistakably clear that he trial court erred in ruling Ruth's testimony as to Eva's statements

admissible under the prior inconsistent hearsay exception.[38]

D. Eva's Hearsay Statements Were Not Admissible Under the State of Mind Exception to the Hearsay Rule.

Although the trial court at one point stated that Eva's out-of-court statements to Ruth were admissible under the "state of mind" hearsay exception to "explain her conduct," the court later backtracked on that ruling and determined correctly that Eva's state of mind was not relevant to any material issue in the case. (RT 2170-72.) The trial court ruled that Eva's prior statements were "relevant" only insofar as they tended to impeach her preliminary hearing testimony.[39]

---

[38] Evidence Code section 1202 provides that evidence of an inconsistent statement made by a hearsay declarant may be admissible to attack the credibility of the declarant. Thus People v. Collup, supra, 27 Cal.2d 829 allowed impeachment of a hearsay declarant with evidence of an inconsistent statement made **after** the declarant's former testimony was given. However, former testimony may not be impeached by evidence of an inconsistent statement made **prior** to the former testimony unless the declarant was given an opportunity to explain or deny that statement at the time of the former testify. (People v. Greenwell, supra, 20 Cal.App.2d 266.) Thus, Eva's prior hearsay statements were not admissible even for the purposes of attacking her credibility.

[39] Assuming this relevancy determination is correct, the analysis does not stop there. Hearsay evidence that is "relevant" cannot be admitted unless it also comes within a hearsay exception, and does not violate the defendant's confrontation rights. Eva's statements as testified to by

The then-existing state of mind exception to the hearsay rules allows for admission of a statement of the declarant's then-existing state of mind when the declarant's state of mind "is itself an issue in the action," Evid. Code, § 1250, subd.(a)(1); or when the evidence "is offered to prove or explain acts of conduct of the declarant," Evid. Code § 1250, subd.(a)(2).

Eva's state of mind the day before the killings when she went to the courthouse was not an issue, and thus her hearsay statements were inadmissible under subdivision (a)(1). As explained in People v. Hernandez (2003) 30 Cal.4th 835, 872-73, a prerequisite to this hearsay exception is that the declarant's mental state or conduct be factually relevant. Thus even hearsay statements as to the victim's fear of the defendant is inadmissible under the state of mind exception unless the victim's fear is directly relevant to an element of the offense. (Ibid.)

E. Ruth's Testimony Was Improper Lay Opinion Testimony as to the Veracity of Eva's Statements.

Because Eva's state of mind was not relevant, and because Eva's prior testimony could not be impeached, Ruth's testimony amounted to improper lay opinion testimony as to the veracity of Eva's statements. Testimony by a lay witness as to credibility is irrelevant. (People v.

Ruth fail both tests.

Melton (1988) 44 Cal.3d 713, 744 [holding that lay opinion testimony regarding the veracity of particular statements by another is inadmissible, because the fact finder, not the witnesses, must draw the ultimate inferences from the evidence]; see also People v. Sergill (1982) 138 Cal.App.3d 34, 39-40 [condemning as inadmissible and irrelevant police officer testimony as to the veracity of another witness's testimony]. Assessing credibility "is an exclusive function of the jury." (People v. Lemus (1988) 203 Cal.App.3d 470, 477.) If a witness' opinion as to the veracity of another's statements is irrelevant, then a witness' opinion as to the mendacity or inaccuracy of another's statements is also irrelevant.

F. The Admission of Ruth's Testimony as to Eva's Hearsay Statements Was Prejudicial.

Because the admission of this testimony violated appellant's federal constitutional rights of confrontation, due process and a fair trial, as set forth above in Argument IV, Part H, pp. 147-149, and incorporated by reference here, review for prejudice is under the Chapman v. California, supra, 386 U.S. at 24 standard.

The trial court's ruling allowed Ruth to testify as a proxy for Eva, which had a highly prejudicial effect. First, the jury was improperly allowed to consider Ruth's testimony as to what Eva said and thought (that she feared appellant), thus presenting a picture of appellant as so dangerous

that his own mother feared him. Secondly, Ruth's testimony as to what Eva "knew" and why she "knew" it, suggested to the jury that Eva (who had been found incompetent to testify) was in control of her faculties at the time of the events, even though her preliminary hearing testimony and other evidence suggested otherwise. As argued above, this had the effect of vouching for Eva's credibility or overall reliability, particularly with respect to her out-of-court statements, upon which the prosecution put so much reliance.

Finally, because Ruth was allowed to augment her own testimony with the thoughts, knowledge and words of her mother, Ruth managed to buttress her own credibility. Ruth was thus rendered a more powerful witness against appellant than she would otherwise and properly should have been. In addition to her testimony regarding the TRO, Ruth also categorically denied that appellant had any mental illness, and her testimony in this respect was highly likely to have been more persuasive to the jury solely by dint of the fact that Ruth was allowed to testify as to what her mother knew and thought about appellant. The sum total of these effects was to show appellant as a feared and premeditated killer, rather than as a severely mentally ill person not fully responsible for his actions, the critical factual issue for the jury's resolution. (See e.g., People v. Vargas, supra, 9 Cal.3d at 481; People v. Lindsey, supra, 205 Cal.App.3d at

117 [error that strikes a "live nerve" in the defense is prejudicial].)

The erroneous admission of Ruth Cole's testimony was also prejudicial for the same reasons set forth above in Argument IV, Part I, pp. 150-152, and incorporated by reference here. For example, the prosecutor relied on Ruth Cole's hearsay testimony in arguing to the jury (see RT 2720-21), which is an indication of prejudice. (See People v. Vargas, supra, 9 Cal.3d at 481.)

Finally, even assuming arguendo the prejudice from this error is not sufficiently prejudicial, standing alone, to warrant reversal, this Court must assess the cumulative prejudice from this and the other constitutional errors in appellant's trial. The cumulative prejudicial effect of errors may itself be a violation of federal due process. (Taylor v. Kentucky, supra, 436 U.S. at 487, and fn. 15; see also United States v. Frederick, supra, 78 F.3d at 1381 [reversing for cumulative error]; People v. Holt, supra, 37 Cal.3d 436 [considering the cumulative prejudicial impact of the various errors].)

/

/

/

/

/

/

VI. THE TRIAL COURT VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TO PRESENT A DEFENSE BY UNFAIRLY RESTRICTING THE DEFENSE FROM REBUTTING THE PROSECUTION'S EVIDENCE WITH RESPECT TO APPELLANT'S MENTAL STATE

The central factual issue for the jury's determination was appellant's intent and this issue obviously caused the jurors more than the usual concern. The jury requested further instructions distinguishing "in layman terms" first and second degree murder (CT 1828) and returned a verdict of second degree murder with respect to Versenia. Consequently, the trial court's restriction of defense evidence on appellant's mental state was prejudicial.

A. Summary of Proceedings Below.

Ruth Cole testified that she was unaware of appellant having been prescribed antipsychotic drugs. Ruth knew that appellant had been hospitalized but testified that she didn't know if this hospitalization was for mental problems. Indeed, Ruth categorically denied that appellant had any mental disability. (RT 2213-15; 2244-46.) Sammie Lee's testimony was similar: he did not recall appellant being hospitalized, being medicated, or having mental problems. (RT 1843-45; 1857.) James Blacksher testified that he did not know if appellant was supposed to take medication, that appellant had been diagnosed as a paranoid schizophrenic, or that appellant

had been hospitalized. (RT 2360; 2362-63.) James also categorically denied that appellant had mental problems and denied telling the police that appellant was somewhat out of his mind or "not all there.". (RT 2364-65.) The only concession made by James was that he might have told appellant he was "going crazy" when appellant was talking about shooting Torey. (RT 2387.) Of appellant's family members who testified, only Elijah Blacksher testified to appellant's long history of mental illness. (RT 2517, 2523, 2525-26.)

Despite this mass of testimony by prosecution witnesses denying appellant's mental health problems, appellant was repeatedly precluded from introducing evidence to rebut it. The trial court sustained the prosecution's hearsay objection when defense counsel asked Sammie Lee if other members of the family referred to appellant as "crazy." (RT 1857.) The trial court sustained another hearsay objection when defense counsel asked Officer Nielsen if neighbor John Adams mentioned appellant's mental problems; however, Nielsen did eventually testify that he had no conversation with dispatch officers regarding appellant's mental condition. The trial court also excluded as "irrelevant" the officer's personal knowledge of appellant's mental condition based on prior contacts with appellant. (RT 1913-14.) When Adams testified that Eva mentioned appellant's mental problems, the trial court granted the prosecutor's motion

to strike. (RT 1957.)

Although Adams eventually testified that Eva had mentioned appellant's mental problems, the trial court sustained the prosecutor's hearsay objections as to whether other family members mentioned this. (RT 1976.) Ruth Cole admitted she had seen the police reports in this case, including Officer Mesones' report on appellant's arrest. However, the trial court sustained the prosecutor's hearsay objection when defense counsel asked if Ruth saw that Mesones had described appellant as "schizophrenic and paranoid." (RT 2244.) When defense counsel asked James whether appellant acted more difficult when he didn't take his medications, James said he "was told this." The trial court sustained a hearsay objection and struck the evidence. (RT 2361.) Finally, when defense counsel asked James whether appellant acted paranoid with Torey in the house or said everyone was against him, the trial court sustained the prosecutor's objection of "medical conclusion." (RT 2398.)

The prosecution, however, was permitted to introduce -- over defense objection -- evidence regarding appellant's supposedly "normal" (albeit antisocial) state of mind during the weeks, months and years preceding the offenses. For example, James testified he was "sure" appellant was "abusing" Eva to "get what he wanted from her." (RT 2393.) James also testified that appellant was "jealous" of Torey because Torey

stayed in the main house with Eva and appellant "felt" Torey was given a higher priority than he was. (RT 2369.) James also testified that Eva "coddled" appellant, and that Eva was "afraid" of appellant. (RT 2369-70; 2386-87; 2393-94.) Ruth Cole testified that appellant got along "okay" with Eva, which she defined as meaning that he would say what he wanted or didn't want, and Eva would give him whatever he wanted and he would take it. (RT 2130.)

B. The Trial Court Improperly Excluded the Defense Evidence.

Both the state and federal constitutions require the admission of relevant evidence in criminal cases. The state constitution is explicit on the point. Article 1, section 28(d) of the California Constitution provides that "relevant evidence shall not be excluded in any criminal trial . . . ." Under federal law, a defendant is constitutionally entitled to introduce relevant evidence tending to raise a reasonable doubt about his guilt. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process of Confrontation Clauses of the Sixth Amendment, the Constitution guarantees 'a meaningful opportunity to present a complete defense.'" (Crane v. Kentucky (1986) 476 U.S. 683, 690; Chambers v. Mississippi, supra, 410 U.S. 284 [exclusion of evidence vital to a defendant's defense constituted a denial of due process].)

As set out above, the prosecution was permitted to elicit evidence

that appellant had no mental disability; and that family members were unaware of him being diagnosed as mentally ill, hospitalized for mental illness, or prescribed medication. Yet the defense was repeatedly blocked from countering this evidence with testimony that the family considered appellant mentally ill, that they discussed or referred to his mental health problems, and that appellant behaved in conformity with a diagnosis of mental illness. The constitutional right to present a defense includes the right to present relevant evidence which counters the prosecution's case. Indeed, the United States Supreme Court has emphasized that the defendant's right to rebut the prosecution's evidence is the "core requirement" and the "hallmark" of due process. (Simmons v. South Carolina (1994) 512 U.S. 154, 174 [Ginsburg, J. and O'Connor, J., concurring].)

The evidence the defense was precluded from eliciting was manifestly relevant. The key factual question before the jury was appellant's mental state, specifically whether he actually formed an intent to kill and acted with premeditation. Evidence that appellant habitually or frequently acted paranoid or in such a manner that his closest relatives and the police considered him a schizophrenic paranoiac or "crazy" was circumstantial evidence that appellant did not harbor the mental state required for first degree murder. (See People v. Jennings (1991) 53 Cal.3d

334, 364 [mental state can be inferred from circumstantial evidence]; Hovey v. Superior Court (1980) 28 Cal.3d 1, 24 ["jurors in criminal cases are often called upon to infer mental states from behaviors"].)[40] Indeed, this Court has made clear that in determining the mental state with which a defendant acted, "a defendant is entitled to have a jury take into consideration all the elements in the case which might be expected to operate on his mind . . . ." (People v. Smith (1907) 151 Cal. 619, 628.) Moreover, the excluded defense evidence was also admissible for the nonhearsay purpose of explaining the family members' biases, see People v. DeLaPlane (1979) 88 Cal.App.3d 223,236-37, and to explain their conduct, e.g., why they stayed away from Eva's house.

The trial court also excluded as "irrelevant" the officer's personal knowledge of appellant's mental condition based on prior contacts with appellant. (RT 1913-14.) Finally, when defense counsel asked James whether appellant acted paranoid with Torey in the house or said everyone was against him, the trial court sustained the prosecutor's objection of "medical conclusion." (RT 2398.)

Even assuming arguendo that some of the excluded evidence was hearsay, it was still admissible to rebut the prosecution's evidence. The

---

[40] Hovey was superseded by statute on other grounds as stated in People v. Navarette (2003) 30 Cal.4th 458.

United States Supreme Court has consistently held that state evidentiary rules may not be invoked to deny a defendant a right to a fair trial. (See e.g., Rock v. Arkansas (1987) 483 U.S. 44 [state law restriction on defendant's right to testify not justified]; Chambers v. Mississippi, supra, 410 U.S. at 301 [federal due process prevents the state from applying its hearsay rules mechanistically to defeat the ends of justice].)[41] Where there is a conflict between state rules of evidence and the defendant's federal constitutional rights, the defendant's interests must be weighed against the state interest in the rules of evidence. (Chambers, supra, 410 U.S. at 295; accord Green v. Georgia (1979) 442 U.S. 95, 97; Washington v. Texas (1967) 388 U.S. 14, 19-23.)

Furthermore, the exclusion of the defense evidence violated appellant's federal due process rights because of the trial court's asymmetrical application of the evidentiary rules, i.e., permitting the prosecution to produce circumstantial evidence of appellant's state of mind in the time preceding the shootings while precluding the defense from doing so. The Ninth Circuit, in reliance on established United States Supreme

---

[41] Similarly, the discretionary exclusion of evidence under Evidence Code section 352 "must bow to the due process right of a defendant to a fair trial and to his right to present all evidence of significant probative value to his defense." (People v. Babbitt (1988) 45 Cal.3d 660, 684; see also People v. Quartermain (1997) 16 Cal.4th 600, 623-24.)

Court case law, has declared this type of asymmetrical application of evidentiary standards to be unconstitutional. (Gray v. Klauser (9th Cir. 2002) 282 F.3d 633,[42] citing Green v. Georgia, supra, 442 U.S. 95 and Webb v. Texas (1972) 409 U.S. 95; see also Wardius v. Oregon (1973) 412 U.S. 470, 474, fn. 6 [state trial rules providing nonreciprocal benefits to the prosecution which interfere with the right to a fair trial violate the defendant's due process rights under the Fourteenth Amendment].)

> "In allowing the prosecution, but not the defense, to use Rule 803(24) to admit hearsay evidence of similar import and character, the trial court violated the constitutional prohibition against arbitrary application of evidentiary standards to defendants." (Gray v. Klauser, supra, 282 F.3d at 641.)

Gray v. Klauser was explicit in holding that a judge may not "without justification impose stricter evidentiary standards on a defendant desiring to present a witness' testimony than it does on the prosecution." (Id. at 644.) Yet this is precisely what the trial court did in this case.

C. The Trial Court's Exclusion of Defense Evidence Was Prejudicial.

Because the exclusion of defense testimony violated appellant's Sixth and Fourteenth Amendment rights to present a defense and to due process, review for prejudice is under the Chapman v. California, supra,

---

[42] Gray v. Klauser was remanded on other grounds in Klauser v. Gray (2002) 537 U.S. 1041.

386 U.S. at 24 standard, requiring reversal unless the prosecution can show harmlessness beyond a reasonable doubt.

The trial court's uneven application of the evidentiary rules prevented appellant from presenting evidence on the critical issue in this case, i.e., his mental state as shown by his history of mental illness and his customary "crazy" behavior; and simultaneously prevented appellant from challenging the bias of those family members who tried to portray appellant as psychologically normal, albeit "coddled" and temperamental. The excluded evidence was crucial to the defense theory of the case, which included attacking the credibility of those family members who repeatedly emphasized in their testimony for the prosecution that appellant was mentally stable.

The trial court's exclusion of the defense evidence thus distorted the truth-finding function of the jury, and unfairly weighted the scale against appellant by its uneven application of the evidentiary rules. The question before the jury was whether appellant actually formed an intent to kill and acted with premeditation, or whether he consistently and abnormally brooded over perceived slights, honestly but unreasonably thinking he was in danger, i.e. a state of mind sufficient to raise a reasonable doubt as to whether appellant actually harbored the mental state for first degree murder. The trial court's ruling impinged on the ability of the defense to present a

complete defense, and was therefore prejudicial. Exclusion of evidence going to the heart of the defense is considered prejudicial. (See e.g., People v. Vargas, supra, 9 Cal.3d at 481; People v. Lindsey, supra, 205 Cal.App.3d at 117 [error that strikes a "live nerve" in the defense is prejudicial].)

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

VII. THE TRIAL COURT ERRED BY IMPROPERLY ALLOWING THE PROSECUTOR TO EXPAND THE SCOPE OF DR. DAVENPORT'S GUILT PHASE TESTIMONY TO INCLUDE THE SUBSTANCE AND DETAILS OF APPELLANT'S COMPETENCY EXAMINATION, THEREBY VIOLATING APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL

A. Summary of Proceedings Below.

Immediately before Dr. Davenport testified as a defense witness, the trial court instructed the jury not to consider his testimony as evidence "that the defendant actually had any mental illness or mental state on the date that the crimes charged were to committed," and not to consider it "to show or negate the capacity of the defendant to form [the mental states] required for the commission of the crimes charged." The jury was instructed to limit its consideration of Dr. Davenport's testimony to "impeachment of the testimony of family member witnesses who have testified to a lack of knowledge that [appellant] suffered from a mental illness." (RT 2633.)

Pursuant to the trial court's ruling, defense counsel elicited from Dr. Davenport a brief history of appellant's hospitalizations and diagnoses. (RT 2639-45.) The prosecutor, however, was undeterred by the trial court's restrictive ruling and immediately began his cross-examination by badgering Dr. Davenport about the details of appellant's hospitalizations. For example, the prosecutor asked "Isn't it true that [appellant] actually

turned himself in to Napa in 1975?" and that he "stayed at Napa for only two or three days in 1975?" and that he left Napa "voluntarily" "after refusing to talk to medical personnel?" (RT 2648.) Defense counsel objected to this line of questioning on relevancy grounds; the trial court overruled the objection. (RT 2649 ["THE COURT: Go ahead."] The prosecutor continued cross-examining Dr. Davenport, attacking him for his lack of "independent knowledge of the circumstances" of appellant's stay at Napa. (RT 2650.)

Over defense objections, the prosecutor next proposed to Dr. Davenport a hypothetical question, leading to Dr. Davenport's testimony that, if there was no evidence that appellant had received mental health treatment from 1986 to 1994, it would be unusual, given the records of appellant's severe mental disorder and need for medications, for appellant to maintain eight years without manifesting acute symptoms of paranoid schizophrenia (absent therapy or self-medication); and that the absence of evidence that appellant presented as psychotic or engaged in inappropriate behavior during that eight-year period would "cast some doubt" on appellant's earlier diagnoses. (RT 2654-56.) Over further objections, the prosecutor adduced evidence from Dr. Davenport that he had no evidence that appellant withdrew into schizophrenia as a way of defending himself, and that the 1984 records showed that appellant had consciously decided to

forgo medications against his physician's advice. (RT 2657.)

Finally, the prosecutor questioned Dr. Davenport at length about the concept of malingering, and elicited testimony from Dr. Davenport regarding the substance of, and conclusions in, Dr. Davenport's 1996 competency evaluation of appellant,[43] i.e., that appellant denied having visual or auditory hallucinations, that he denied being delusional or having homicidal or suicidal ideations, that he was oriented as to person, place and time, that he understood the charges against him while vehemently denying responsibility, and that he did not manifest any overt signs of psychosis or mental disorder; and that Dr. Davenport had concluded that appellant was competent to stand trial, that he was of average intelligence and capable of rational thought. (RT 2658-64.)[44]

---

[43] On direct examination, the defense elicited testimony only that Dr. Davenport had conducted a Penal Code section 1368 examination of appellant in 1996. (RT 2639.)

[44] Although defense counsel did not object at this point; counsel's previous objections had all been overruled. Outside the presence of the jury, defense counsel stated that he was "objecting as long as [he] could and kept getting overruled." (RT 2671.) An error is not waived by failure to object if an objection would have been futile. (See People v. Hill (1998) 17 Cal.4th 800, 820-21; People v. Chavez (1980) 26 Cal.3d 334, 350, fn. 5; Estelle v. Smith (1981) 451 U.S. 454, 468 [recognizing futility rule in federal habeas proceeding] Rupe v. Wood (9th Cir. 1996) 93 F.3d 1434, 1440 [failure to make offer of proof excused where it would be redundant or futile].)

At that point, the prosecutor requested an in chambers conference and asked that the court recess and order Dr. Davenport back on Monday. In chambers, the trial court chastised the prosecutor: "I don't know why we are going [sic] with all this stuff . . . . We are getting way beyond." The defense counsel noted that they had "agreed" not to go into the competency proceeding. (RT 2665.)[45]

On redirect examination, defense counsel elicited evidence that Dr. Davenport had diagnosed appellant in 1984 as a paranoid-schizophrenic in remission; and that since appellant had been diagnosed some 10 to 15 times in the past as a paranoid-schizophrenic, Dr. Davenport suspected that he might be. (RT 2672-79.) The trial court then reread the instruction limiting Dr. Davenport's testimony to impeachment of appellant's relatives who claimed to be unaware of appellant's mental problems. (RT 2682.)

Immediately before closing arguments to the jury, the trial court told the jury that appellant had been treated for mental health problems on June 25, November 4 and December 17 of 1986; on September 17, 1987, on

---

[45] However, the trial court reasoned that since Dr. Davenport's testimony was admitted to impeach the family members' claimed lack of knowledge of appellant's mental illness, this cross-examination "raised enough that you could argue that he was perfectly normal to this doctor so, of course, family members might not know he was crazy." (RT 2666.)

March 12, 1993, and on May 8, 1995; and that these six entries were not alluded to in the prosecutor's hypothetical. (RT 2690.)

B. The Trial Court Erred in Allowing the Prosecution to Introduce Irrelevant but Highly Prejudicial Evidence on Cross-Examination of Dr. Davenport.

Because the trial court had restricted Dr. Davenport's testimony to impeachment of witnesses who denied knowledge of appellant's mental illness, the only relevance of Dr. Davenport's testimony was to show that appellant had suffered numerous bouts of mental illness and had been repeatedly hospitalized, events about which family members could be expected to know. However, the details of appellant's hospitalizations, the diagnoses and Dr. Davenport's "doubts" about them, the testimony on malingering, and the substance of Dr. Davenport's competency evaluation

were all irrelevant and inadmissible against appellant.[46] Indeed, the trial court made precisely this point later: when defense counsel noted that they had complied with the court's ruling and had not elicited testimony from Dr. Davenport as to appellant's symptoms and diagnoses, but wanted to use a chart in closing argument showing the details of appellant's history of mental illness and treatment, the trial court reiterated that the details of appellant's history were "**n[o]t relevant** to an issue we were trying to accomplish." (RT 2798-99; emphasis supplied.) This is correct: Dr. Davenport's testimony was admitted only to impeach the family members who claimed to be unaware of appellant's history. This impeachment was accomplished by showing that appellant did have such a history. Yet the prosecutor was allowed to go, as the trial court itself observed, "way beyond" that purpose.

---

[46] See also Estelle v. Smith, supra, 451 U.S. 454 [testimony at penalty phase by the doctor who had examined the defendant for competency violated the defendant's Fifth Amendment right because the defendant had not been warned prior to the competency examination of his right to silence and the potential use of his statements against him]. California has a judicially declared use immunity for statements made by the defendant at a competency hearing, which immunity protects the defendant's Fifth Amendment rights. (Tarantino v. Superior Court (1975) 48 Cal.App.3d 465, 469.) People v. Yeoman (2003) 31 Cal.4th 93, 117 held that where the state and federal bases for a claim articulated the same standard, the defendant did not waive the federal basis by failing to state it.

The trial court has no discretion to admit irrelevant evidence. (People v. Crittenden (1994) 9 Cal.4th 83, 132; People v. Babbitt (1988) 45 Cal.3d 660, 681.) Admission of evidence against a criminal defendant that raises no permissible inferences, but which is highly prejudicial, violates federal due process. (Estelle v. McGuire (1991) 502 U.S. 62 [state law errors that render a trial fundamentally unfair violate federal due process]; McKinney v. Rees (9th Cir. 1994) 993 F.2d 1378 [admission of irrelevant and inflammatory evidence violated federal due process]; Lesko v. Owens (3rd Cir.1989) 881 F.2d 44, 52 [constitutional error in admitting evidence whose inflammatory nature "plainly exceeds its evidentiary worth"].) The admission of irrelevant testimony from Dr. Davenport on cross-examination raised no permissible inferences because the details elicited did not accomplish the purpose of impeaching the family's knowledge of appellant's hospitalizations.

C. The Trial Court's Erroneous Rulings Prejudiced Appellant's Defense.

The testimony erroneously elicited from Dr. Davenport by the prosecutor was highly prejudicial under Chapman v. California, supra, 386 U.S. at 24, the standard for review of constitutional error such as that which occurred here. The trial court's rulings allowed the prosecutor to paint an unfair portrait of appellant as a malingerer who was faking the symptoms of

mental illness -- even though the trial court's ruling had restricted the defense to presenting only the bare-bones evidence of appellant's mental health history to impeach family members.

Appellant anticipates that respondent will argue that the trial court "cured" any prejudice from this error by reading to the jury the list of dates that appellant was treated for mental problems which were not included in the prosecutor's hypothetical, and by the defense redirect examination in which Dr. Davenport described appellant's symptoms in 1996 and testified that although he did not give appellant a diagnosis, he felt he was schizophrenic. (RT 2676-80.)

However, viewing Dr. Davenport's testimony from the jury's perspective, it can be shown that neither the court's instruction nor the defense's redirect examination had a curative effect.[47] The prosecutor -- who cavalierly ignored the limitation on Dr. Davenport's testimony -- was

---

[47] The case law is replete with opinions rejecting the notion that standard jury instructions are sufficient to obliterate prejudice. (See e.g., United States v. Kerr (9th Cir. 1992) 981 F.2d 1050; United States v. Simtob (9th Cir. 1990) 901 F.2d 799; Goldsmith v. Witkowski (4th Cir. 1992) 981 F.2d 697; People v. Laursen (1968) 264 Cal.App.2d 932, 939; People v. Perez (1962) 58 Cal.2d 229, 247; People v. Bracamonte (1981) 119 Cal.App.3d 644, 650, quoting Krulewitch v. United States (1949) 336 U.S. 440, 453 ["'The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.'"].).

allowed carte blanche in his cross examination; he repeatedly posed inaccurate hypotheticals and selectively directed questions with the goal of showing that appellant was not mentally disturbed, was at best a malingerer, and had a premeditated intent to kill. Appellant's redirect examination, which attempted to correct some of the facts of the prosecutor's improper questioning, had the appearance of a devious or furtive last-ditch effort to rehabilitate his witness -- and this is particularly so because the trial court scolded defense counsel for (correctly) pointing out that the prosecutor was skirting misconduct in his cross-examination of Dr. Davenport.[48] Moreover, the limiting instruction was given immediately before and immediately after the defense examination of Dr. Davenport, whereas no such instruction was given before or after the prosecution's examination. The effect on the jury, therefore, was that the testimony elicited by the prosecution as to appellant's supposed malingering stood alone, whereas the testimony elicited by appellant was sandwiched by the restrictive limiting instructions.

Nor did the trial court's correction of the prosecutor's inaccurate hypothetical have any affirmative curative effect. First, the antiseptic reading of a list of dates had none of the visceral impact of the prosecutor's

---

[48] See Argument VIII, below, pp. 186-190.

improperly elicited testimony. Secondly, when the defense attempted to use a chart in closing argument which amplified the dates of appellant's treatment by noting the diagnoses and symptoms, the trial court refused to permit the use of the chart. (RT 2802-07.) Yet the prosecutor was allowed to elicit testimony as to those kinds of details to appellant's detriment.

Once again (see Arg. VI, above), the trial court's erroneous ruling resulted in an tilted playing field. The prosecutor was allowed to elicit testimony from a defense witness pointing to appellant's supposed malingering, even though the defense was not allowed to present evidence from that same witness for any substantive purpose. Because this disparity was related to the critical issue at trial, i.e., appellant's mental state at the time of the offenses, the error is prejudicial under the Chapman standard.

Moreover, the manner in which Dr. Davenport's testimony was admitted goes a long way to explaining the jury verdict finding that appellant had actually formed the required mental states in the charged offenses, despite the evidence of appellant's chronic and severe mental illness. The prosecutor maneuvered to expand the evidentiary record beyond the trial court's restricted ruling; and then used the improperly elicited testimony as a springboard to argue that appellant was manipulative and malingering rather than mentally ill, and that he was therefore guilty of premeditated murder.

Finally, even if the prejudice from this error is deemed insufficient, standing alone, to require reversal of appellant's convictions, this Court must consider the cumulative prejudicial impact of this and other constitutional errors. (Taylor v. Kentucky (1978) 436 U.S. 478, 487, and fn. 15 [cumulative effect of errors may violate due process].)

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

VIII. THE TRIAL COURT VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY CREATING THE IMPRESSION IT HAD ALLIED ITSELF WITH THE PROSECUTION BY GIVING DIFFERENTIAL AND DISRESPECTFUL TREATMENT TO DEFENSE COUNSEL

A fair trial in a fair tribunal is a basic requirement of due process and a biased judge is "constitutionally unacceptable." (In re Murchison (1956) 349 U.S. 133, 136.) A trial court commits misconduct and violates federal constitutional guarantees of due process if its behavior discredits the cause of the defense or creates the impression that it is allying itself with the prosecution such that it renders the trial fundamentally unfair. (See Duckett v. Godinez (9th Cir. 1995) 67 F.3d 734, 740]; People v. Fudge (1994) 7 Cal.4th 1075, 1107; People v. Santana (2000) 80 Cal.App.4th 1194, 1206 [trial court's adversarial intervention in the trial required reversal of judgment].)

Although a trial court may exercise reasonable control over a trial and assist the jury in understanding the evidence, a judge must always remain fair and impartial and "'be ever mindful of the sensitive role [the court] plays in a jury trial [to] avoid even the appearance of advocacy or partiality.'" (Duckett v. Godinez, supra, 67 F.3d at 739, quoting Kennedy v. Los Angeles Police Dep't (9th Cir. 1989) 901 F.2d 702, 709; see also Fudge, supra, 7 Cal.4th at 1108.)

The trial judge in this case injected himself into the case giving the jury the appearance that he was aligning himself with the prosecution and against the defense, as shown in the following examples.

Defense counsel, in cross-examination of Ruth Cole about the phone call appellant made to her on May 9, asking her to bail him out of jail, asked Ruth if she "knew [appellant] was going to be released" from custody. The prosecutor objected as calling for speculation and the trial court sustained the objection, sarcastically remarking to defense counsel that "we don't throw out the rules of evidence just because you're on cross." (RT 2224.) This was done in the presence of the jury.

Defense counsel, in cross-examination of Elijah Blacksher, explained that they were "not going to be restricted to the script," a reference to the transcript of Elijah's taped statement to the police, which the prosecutor had been using in his direct examination. When the prosecution objected to the comment, the trial court chastised defense counsel, stating "that was uncalled for." (RT 2516.) This was done in the presence of the jury.

Defense counsel then asked Elijah whether "all the family knew" that appellant was "not all there." (RT 2517.) The trial court sustained this objection twice; when counsel asked if Eva had talked to Elijah about appellant being "not all there," the prosecutor objected on hearsay grounds.

(RT 2517-18.) The trial court overruled this objection, stating "Going back to the script now [counsel]?" (RT 2518.) This was done in the presence of the jury.

Defense counsel then elicited testimony from Elijah that it was painful for him to testify. Counsel asked if police officers were present to make sure Elijah did not leave. (RT 2518.) The prosecutor objected, without stating any grounds. The trial court sustained the objection, stating "Please don't make me have to admonish you in front of the jury again." (RT 2519.) This was done in the presence of the jury.

The trial court's attitude to the prosecutor was in stark contrast to its treatment of defense counsel. For example, the prosecutor examined Dr. Davenport in blatant disregard of the trial court's limiting instruction (see Arg. VII, above) and posed a hypothetical based on demonstrably inaccurate and misleading facts (and which had to be later corrected by the trial court). Defense counsel objected that the hypothetical had "to be founded in truth," noting that it was "skirting on misconduct to set up that hypothetical." (RT 2655.) The prosecutor insisted that he was "prepared to prove" the facts of the hypothetical (even though, as shown, it was incorrect). The trial court ignored (at least in front of the jury) the fact that the prosecutor was going "way beyond" the court's own ruling in his cross-examination of Dr. Davenport, and instead reprimanded **defense counsel**,

stating,

> "[Counsel], I don't know how many times I have to ask you not to do that. ¶ Ladies and gentlemen of the jury, it is improper for the defense team to use that kind of language regarding misconduct in an attempt to persuade you one way or the other about [the prosecutor's] conduct." (RT 2654-55.)

Finally, the trial court sustained the prosecutor's hearsay objections when defense counsel asked the officer if Elijah had said that appellant complained about Torey bringing drugs into the house; and that appellant told him that on May 11, Torey had brought some of his friends to the house "to quote put [appellant] in his place;" and that Elijah and appellant talked about Torey having orgies in the house. (RT 2613-14.) Elijah had testified for the prosecution that appellant complained about Torey dealing drugs in the house; that Torey had brought five or six "dudes" to the house and they threatened him; and that Torey had brought women and men to Eva's house and put Eva in the back bedroom. (RT 2482; 2485.) The testimony sought by defense counsel was therefore admissible under the prior inconsistent statement exception. However, the trial court repeatedly sustained the prosecutor's hearsay objections, saying to defense counsel "nice try, but –," lecturing defense counsel, and cutting defense counsel off when he tried to explain that Elijah's testimony on these points was different. (RT 2613-14.)

The differential and disrespectful treatment accorded by the trial

judge to defense counsel made it clear to the jurors that the judge viewed appellant's representatives, if not appellant himself, with disdain and disbelief, and thus palpably conveyed to the jurors the impression that he considered appellant guilty and his defense contrived. The trial court's treatment of defense counsel indicated not only bias against them, but vicariously a bias against appellant as well, thereby depriving appellant of his federal constitutional rights to due process and a fair trial.

Under Chapman, supra, 386 U.S. at 24, the judicial bias displayed before the jury must be deemed reversible error, because the prosecution cannot show beyond a reasonable doubt that the impression of bias was harmless. The judge is manifestly the key figure in any trial and the ultimate authority symbol: the person from whom the jury receives not only its instructions but also less explicit but potent other information. The factual question before the jury in this case was appellant's mental state, which by the end of the trial had crystallized into the question whether appellant genuinely suffered severe mental illness or whether he was a manipulative malingerer. The trial court's treatment of defense counsel tipped the scale against appellant on this question and was thus prejudicial error.

/

/

IX. THE TRIAL COURT'S ADMISSION OF IRRELEVANT AND INFLAMMATORY AUTOPSY PHOTOS VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL

Appellant filed a motion objecting, on statutory and federal constitutional grounds, to the admission of photographs of the victims' bodies at the scene and at the autopsies, as irrelevant, cumulative and prejudicial, and offering to stipulate to the victims' identities and the causes of their death. (CT 618-26.)

Appellant repeated an objection to the autopsy photos of Versenia Lee, Exhibits 61-65. (RT 400-01.) Exhibits 61 and 64, showing the entry wound and a defensive wound to the hand were admitted over defense objection. (RT 402-03.) Autopsy photographs of Torey Lee were also admitted over appellant's objection. (RT 402-03.)

Other photographs of the victims' bodies inside the house were also admitted. (RT 387-99.) All the exhibits, including photographs, were sent into the jury room. (CR 1329.)

People v. Marsh (1985) 175 Cal.App.3d 987 noted:

> "Autopsy photographs have been described as 'particularly horrible,' and where their viewing is of no particular value to the jury, it can be determined the only purpose of exhibiting them is to inflame the jury's emotions against the defendant.'" (Id. at 998, quoting People v. Burns (1952) 109 Cal.App.2d 524, 541.)

In People v. Marsh, supra, the defense objected on Evidence Code

section 352 grounds to the introduction of autopsy photographs which graphically depicted the victims' head injuries. The prosecutor argued that the photographs were relevant to show the force used to inflict the fatal blows. On appeal, the court held that even though the cause of death was the central issue in the case, the autopsy surgeon's testimony was sufficient to make the prosecution's point. Marsh held that because the photographs more prejudicial than probative their admission into evidence was error.

> "Here, the jury was not enlightened one additional whit by viewing these seven gory autopsy photographs. The oral testimony of the autopsy surgeon describing his findings comprehensively advised the jury of his observations and why he concluded there were multiple fatal impact sites which could not have been caused by a fall . . . . There was no expert medical testimony contradicting the autopsy surgeon's conclusions and various other medical witnesses testified to the cause of death without referring to the autopsy photographs." (Id. at 998.)

Similarly, in People v. Smith (1973) 33 Cal.App.3d 51, the court of appeal held that the trial court erred in admitting three color photographs and the murder victims, noting that photographs "have a sharp emotional effect, exciting a mixture of horror, pity and revulsion." (Id. at 69.) As in Marsh, the Smith court noted that there was ample other evidence, including the testimony of the coroner regarding the nature and location of the wounds which needed no clarification or amplification. Smith insisted that such photographs must be viewed in terms of an "evidentiary mosaic"

rather than as isolated evidence. (Ibid.)

The same is true in this case. Two autopsy surgeons testified with particularity as to the location and nature of the gunshot wounds suffered by both Versenia and Torey. (RT 2054-62; 2401-06.) Their detailed testimony needed no amplification or clarification through photographs. Moreover, other photographs of the victims' bodies inside the house were admitted into evidence. (RT 397-99.) Finally, in contrast to Marsh, in this case the cause of death was not the subject of any dispute whatsoever: Versenia had been shot in the head and hand and died from the wound to the head. (RT 2056.) Torey died of a bullet wound to the head. (RT 2403.)

The autopsy photographs thus did not "enlighten" appellant's jury "one additional whit." Because they had no non-cumulative probative value, their only purpose was to inflame the jury's horror, pity and revulsion. As such, it was error for the trial court to admit them.

Appellant objected to the admission of the photographs on federal constitutional grounds. (CT 618-19.) Admission of evidence against a criminal defendant that raises no permissible inferences, but which is highly prejudicial, violates federal due process. (Estelle v. McGuire, supra, 502 U.S. 62 [state law errors that render a trial fundamentally unfair violate federal due process]; McKinney v. Rees, supra, 993 F.2d 1378 [admission of irrelevant and inflammatory evidence violated federal due process];

Lesko v. Owens, supra, 881 F.2d at 52 [constitutional error in admitting evidence whose inflammatory nature "plainly exceeds its evidentiary worth"].)

Review for prejudice is thus under Chapman v. California, supra, 386 U.S. at 24, requiring reversal unless the prosecution shows the error harmless beyond a reasonable doubt. As particular indicia of prejudice, this Court must consider that the photographs were sent to the jury during its deliberations and thus were likely to have influenced the jurors.

Even if the error in admitting autopsy photographs is not deemed prejudicial, standing alone, this Court must consider its cumulative prejudicial impact in conjunction with the other trial errors. (People v. Holt (1984) 37 Cal.3d 436.) As stated in United States v. Frederick, supra, 78 F.3d 1370, 1381, "[w]here [] there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial."].)

/

/

/

/

/

GUILT PHASE JURY INSTRUCTION ISSUES

X. THE TRIAL COURT ERRED IN INSTRUCTING THE GUILT PHASE JURY WITH THE PRESUMPTION OF SANITY INSTRUCTION BECAUSE THAT INSTRUCTION ERRONEOUSLY LED THE JURY TO BELIEVE IT COULD NOT USE EVIDENCE OF APPELLANT'S MENTAL DISEASE TO FIND THAT HE DID NOT ACTUALLY HAVE THE REQUISITE MENTAL STATE FOR MURDER, THUS UNCONSTITUTIONALLY LOWERING THE PROSECUTION'S BURDEN OF PROOF UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

A. Summary of Relevant Facts and Introduction to Argument.

During closing argument by the defense, the prosecutor objected to defense counsel's use of chart setting out appellant's history of treatment for mental illness. (RT 2793-96.) At this point, the trial judge stated that he intended to instruct the jury with CALJIC No. 10.26, the presumption of sanity, because he didn't "want the jury to be confused as to diminished actuality or lack of actual intent versus lack of capacity to form intent." (RT 2797.)

The trial court then instructed the jury that "[i]n the guilt trial or phase of this case, the defendant is conclusively presumed to have been sane at the time of the offenses [] are alleged to have been committed." (RT 2850; CT 1269.) No definition of "sanity" was given to the jury. Immediately following the presumption of sanity instruction, the jury was instructed that evidence of a mental disease should be considered only for

the purpose of determining whether appellant formed the required mental state. (RT 2850-51; CT 1270.)

Appellant contends that the presumption of sanity argument, without a definition of sanity, erroneously led the jury to believe it could not consider that evidence of appellant's mental disability precluded him from forming the requisite intent at the time of the crimes, thus unconstitutionally lowering the prosecution's burden of proof.

B. Summary of Applicable Law.

In People v. Coddington (2000) 23 Cal.4th 529, 584-85, this Court rejected an argument that the presumption of sanity instruction undermined the mental state defense. However, Patterson v. Gomez (9th Cir. 2000) 223 F.3d 959, 964-67 held that a presumption of sanity instruction given at guilt phase was unconstitutional under clearly established federal law as determined by the United States Supreme Court in Francis v. Franklin (1985) 471 U.S. 307. Francis held that an instruction setting out a rebuttable presumption that the acts of a person of sound mind are presumed to be the product of a person's will, and that a person is presumed to intend the natural and probable consequences of his acts were unconstitutional. This was because the jury could have understood the instructions as creating a mandatory presumption shifting the burden of persuasion to the defendant on the issue of intent. (Francis, supra, 471 U.S.

at 309, 325.)

Patterson v. Gomez, supra, 223 F.3d at 965 explained:

> "The problem with the [presumption of sanity] instruction [] is that it tells the jury to presume a mental condition that -- depending on its definition -- is crucial to the state's proof beyond a reasonable doubt of an essential element of the crime. Under California law, a criminal defendant is allowed to introduce evidence of the existence of a mental disease, defect, or disorder as a way of showing that he did not have the specific intent for the crime . . . . If the jury is required to presume the non-existence of the very mental disease, defect, or disorder that prevented the defendant from forming the required mental state for [the crime], that presumption impermissibly shifts the burden of proof for a crucial element of the case from the state to the defendant. Whether the jury was required to presume the non-existence of a mental disease, defect, or disorder depends on the definition of sanity that a reasonable jury could have had in mind."

Patterson contrasted the legal definition of "sanity" under California law with the commonly understood ordinary definition, which includes "proceeding from a sound mind," "rational," and "able to anticipate and appraise the effects of one's own actions." (Id. at 966.) The Ninth Circuit then explained that

> "if a jury is instructed that a defendant must be presumed 'sane' -- that is, 'rational' and 'mentally sound,' and 'able to anticipate and appraise the effect of [his] actions -- a reasonable juror could well conclude that he or she must presume that the defendant had no [] mental disease, defect or disorder. If a juror so concludes, he or she presumes a crucial element of the state's proof that the defendant was guilty of the [requisite intent for the crimes]." Ibid.

The trial court in Patterson did not explain to the jury that the presumption

of sanity was the analytical basis for the bifurcated trial; nor did the court provide the definition of insanity that the jury was told to presume; nor did the court warn the jury that the presumption of "sanity" was used in a different sense than the conventional definition the jurors likely had in mind. (Ibid.) Consequently, the presumption of sanity instruction violated the Fourteenth Amendment guarantee of due process. (Id. at 966-67; see also Stark v. Hickman (N.D. Cal. 2003) ___ F. Supp. ___ [2003 U.S.Dist. LEXIS 18821][finding constitutional error where the trial court instructed the guilt phase jury that the defendant was presumed sane].)

C. The Unconstitutional Presumption of Sanity Instruction Was Prejudicial to Appellant's Defense.

Review for prejudice of a federal constitutional error is under Chapman v. California, supra, 386 U.S. at 24, requiring reversal unless the prosecution can show the error to be harmless beyond a reasonable doubt. The prosecution cannot meet this burden.

Patterson noted that because the defendant's mental state was the primary issue in the guilt phase,

> "any presumption that would have relieved the state of its burden to prove a crucial element of such mental state **necessarily played an important role in the jury's ultimate determination of guilt.**" (Patterson, supra, 223 F.3d at 967; emphasis supplied.)

The same is true in this case.

Moreover, as in Patterson, the prosecutor in this case relied on the unconstitutional presumption of sanity instruction in argument to the jury, and argued the presumption of sanity not in terms of the legal standard, but in its common definition:

> "He knew exactly what he was doing at all times and he is sane. **He is sane. Everybody was told that at the outset.** ¶ And right here, as we sit here and look back in May of 1995, [] one thing nobody can disagree about is Erven Blacksher was sane. ¶ **Sanity is mental health. It is having the ability to make judgments, be they good judgments or bad judgments, but it is the ability to make them, to act and consider things in a rational, reasonable manner, and then act accordingly**. He was sane, and he remains sane, and he will be sane for the rest of his life." (RT 2700; emphasis supplied.)

By arguing that appellant was necessarily "sane," and that "sane" meant he had the ability to act in a "rational, reasonable manner," the prosecutor contributed to the prejudicial impact of the erroneous instruction in the manner described by the Patterson court. That is, because the trial court instructed the jury to presume that appellant was sane (without defining sanity), and because the prosecutor argued that the presumption of sanity meant that appellant was "rational" and able to act accordingly, the jury would have concluded that they had to "presume that [appellant] had [] no mental disease, defect, or disorder," thus presuming "a crucial element of the state's proof." (Patterson, supra, 223 F.2d at 965.)

Appellant's murder verdicts are thus unreliable and unconstitutional and this Court must reverse.

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

XI. THE TRIAL COURT VIOLATED APPELLANT'S FEDERAL DUE PROCESS RIGHTS BY ERRONEOUSLY INSTRUCTING THE JURY THAT VOLUNTARY MANSLAUGHTER REQUIRED THE ELEMENT OF AN INTENT TO KILL

A. The Trial Court Erroneously Instructed the Jury as to the Elements of Voluntary Manslaughter.

The trial court instructed the jury on voluntary manslaughter as a lesser-included offense to the murder charges in counts one and two. (CT 1279-83; 1298 [CALJIC No. 17.10].) The trial court defined the elements of voluntary manslaughter as the (1) unlawful (2) killing of a human being (3) done with the intent to kill. (CT 1279.) The trial court also instructed with CALJIC No. 3.31, advising the jury that voluntary manslaughter requires a "specific intent" and CALJIC No. 8.50 which referred to the "intent to kill" element of voluntary manslaughter. (CT 1279; 1284 ; RT 2854; 2857.) These instructions were incorrect.

People v. Lasko (2000) 23 Cal.4th 101 held that a specific intent to kill is not a necessary element of the crime of voluntary manslaughter, noting that it "cannot be, and is not, the law" that a person who kills another in a heat of passion and with conscious disregard for life but with the intent merely to injure and not the intent to kill should be guilty of a greater offense than one who kills intentionally in the heat of passion. Rather, "a killer who acts in a sudden quarrel or heat of passion lacks

malice and is therefore not guilty of murder, irrespective of the presence or absence of an intent to kill." (Id. at 109.) The instructions given in this case directly contradicted Lasko and were clearly erroneous.

The Lasko court relied on older precedent to interpret the voluntary manslaughter statute, and applied its holding to the case at hand. (Lasko, supra, 23 Cal.4th at 111-13.) Subsequent cases confirm that the Lasko repudiation of the intent-to-kill element of voluntary manslaughter is completely retroactive, and applies to all cases, including those in which the offense occurred before the date of the Lasko decision. (People v. Johnson (2002) 98 Cal.App.4th 566, 577 [error to instruct on the intent to kill element of heat of passion manslaughter regardless of the date of the offense]; People v. Crowe (2001) 87 Cal.App.4th 86, 94-95 [accord].)

Consequently, it is indisputable that the trial court erred in instructing appellant's jury that voluntary manslaughter required an intent to kill.

B. The Instructional Error Was Prejudicial.

In Lasko, this Court assessed the prejudice from the erroneous instruction under the standard for state error. Appellant contends that in this case the spurious intent-to-kill element appended to the voluntary manslaughter instruction erroneously limited the circumstances under which the jury could have found appellant guilty of heat of passion

voluntary manslaughter. As such, the error diluted the prosecution's burden of proof to overcome heat of passion by proof beyond a reasonable doubt, in violation of Mullaney v. Wilbur (1975) 421 U.S. 684.

Furthermore, the error deprived appellant of his federal constitutional right to correct instructions on the defense theory of the case. (Conde v. Henry (9th Cir. 1999) 198 F.3d 734, 739-40.) The challenged instruction clearly led the jury in this case to misunderstand the applicable law, and was also violative of federal due process for that reason. (Boyde v. California (1990) 494 U.S. 370, 380 [an erroneous or ambiguous jury instruction violates due process when there is a reasonable likelihood that the jury misunderstood the law applicable to the case]; (People v. Kelly (1992) 1 Cal.4th 495, 525-526 [accord].)

Finally, because the state law is that voluntary manslaughter does not require an intent to kill, the trial court's erroneous instruction violated appellant's federal due process under Hicks v. Oklahoma (1980) 447 U.S. 343 [deprivation of state-conferred right violates federal due process].)

Because federal constitutional error is at issue, reversal is required unless the prosecution can show the error harmless beyond a reasonable doubt. (Chapman v. California (1967) 386 U.S. 18, 24.) However, even under the lesser standard for reviewing prejudice from state errors, People v. Watson (1956) 46 Cal.2d 818, the instructional error requires reversal at

least of appellant's second degree murder conviction for killing Versenia.

The evidence was weak as to appellant's intent to kill Versenia. The great majority of the prosecution's evidence as to intent to kill was focused solely on his alleged intent to kill Torey with whom appellant had been feuding.[49] Although appellant told various people of his intent to kill Torey, only a single witness (Frances Blacksher) testified that appellant had a similar intent with respect to Versenia; Frances testified that appellant, while talking about how he was going to kill Torey, also said that if Versenia got in the way, she would get it too because she always protected Torey. (RT 2295-98.) This evidence was undercut, however, by the failure of any other witness to confirm it, evidence that appellant and Versenia had a good relationship, and Versenia's own statements that appellant suffered from mental illness. (CT 767; RT 2282-83; 2286-88; 2525-26.)

In addition to the weakness of the evidence of intent to kill Versenia, this Court should consider the ambiguity of the record as to the manner and timing of the two deaths. The only witness inside the house at the time of shootings was Eva Blacksher who was in her bedroom. Eva testified that she heard more than one "last" shot, but also testified she only heard one

---

[49] Even the evidence of intent to kill with respect to Torey was compromised however by evidence of appellant's paranoia and disturbed mental state.

shot. (CT 757-59; 763.) Eva testified that Versenia called out "mother" and opened the door and came out of her room; but Eva also testified that she did not remember hearing Versenia say something before she heard a shot. (CT 764-65.) Again, only Frances testified that Eva said she had been present when Versenia was shot, a hearsay statement contradicted by Eva's own testimony.[50] (RT 2307; 2311; see CT 756-59.) There was thus no record evidence to refute that appellant killed Versenia unintentionally when she came into the room.

Given the murkiness of the evidence regarding the shootings and the weakness of the evidence of intent to kill Versenia, the jury should have been given the option of finding that the killing of Versenia was qualitatively different from the killing of Torey. Indeed, the jury did return a second degree murder verdict with respect to Versenia. However, all of the homicide instructions given required an intent to kill. The jury was not instructed with either unintentional second degree murder, or the correct elements of voluntary manslaughter. Thus, the jury was faced with an

---

[50] In any case, Eva's hearsay statements were in violation of Crawford v. Washington, supra, 124 S.Ct. 1354. (See Arg. IV & V, above.)

untenable "all or nothing" choice with respect to unintentional murder.[51]

The bottom line is that appellant was entitled to an instruction correctly stating the elements of voluntary manslaughter without an intent to kill. His jury should have been given the opportunity to give meaning to the record facts that appellant had no reason or motive to kill Versenia and that her killing was therefore unintentional. The trial court's failure to correctly instruct the jury requires this Court to reverse his conviction for the second degree murder of Versenia.

/

/

/

/

/

/

/

/

/

/

---

[51] The jury did request clarification in "laymen's terms" regarding the components that distinguished first and second degree murder, suggesting that the jurors were grappling with this issue. (CT 1328.)

XII. THE TRIAL COURT VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL, TO PRESENT A DEFENSE, AND TO A RELIABLE SENTENCING DETERMINATION BY REFUSING TO GIVE APPELLANT'S REQUESTED PINPOINT INSTRUCTIONS REGARDING THE JURY'S CONSIDERATION OF EVA'S HEARSAY EVIDENCE

A. Appellant Was Entitled to Requested Pinpoint Instructions Outlining the Defense Theory of the Case.

Appellant has a state and federal constitutional right to requested instructions, as defense pinpoint instructions and as instructions on the defense theory of the case. It is settled that in a criminal case, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence, i.e., those principles closely and openly connected with the facts before the court which are necessary for the jury's understanding of the case. (People v. Birks (1998) 19 Cal.4th 108, 118; see also People v. Montoya (1994) 7 Cal.4th 1027, 1050 [sua sponte duty applies to theories which the evidence strongly illuminates].)

Moreover, the defendant has the right to "'direct attention to evidence from . . . which a reasonable doubt could be engendered.' [Citation]." (People v. Hall (1980) 28 Cal.3d 143, 159; People v. Sears (1970) 2 Cal.3d 180, 190.) Hence, the defendant may obtain a pinpoint

instruction which relates "his [evidentiary theory] to an element of the offense." (People v. Saille (1991) 54 Cal.3d 1103, 1120; see also, People v. Wharton (1991) 53 Cal.3d 522, 571; People v. Wright (1988) 45 Cal.3d 1126, 1136-37, 1144-54 [pinpoint instruction proper if it is predicated upon defendant's theory].)

Similarly, the federal constitution guarantees criminal defendants a right to present a defense, and therefore a right to a requested instruction on the defense theory of the case, under the Sixth Amendment rights to trial by jury and compulsory process, and the Fourteenth Amendment right to due process. (Mathews v. United States (1988) 485 U.S. 58, 63 ["As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor"].)[52]

---

[52] See also United States v. Dove (2nd Cir. 1990) 916 F.2d 41, 47 ["[A] criminal defendant is entitled to instructions relating to his theory of defense, for which there is some foundation in proof, no matter how tenuous the defense may appear to the trial court."]; United States v. Hicks (4th Cir. 1984) 748 F.2d 854, 857-58 [rights to trial by jury and due process abridged by failure to give requested instruction on defense theory of the case]; United States v. Mason (9th Cir. 1990) 902 F.2d 1434 [defendants have right to instructions on specific theory of their defense]; Richmond v. Embry (10th Cir. 1997) 122 F.3d 866, 871 [the right to present defense evidence arises under the Sixth Amendment right to compulsory process and the Fourteenth Amendment right to due process].)

Refusal to give an instruction on the defense theory infringes the defendant's Sixth Amendment and Fourteenth Amendment guarantees because it prevents the jury from considering defense evidence and from making findings of fact necessary to establish guilt. (See e.g., United States v. Escobar de Bright (9th Cir. 1984) 742 F.2d 1196, 1198.) The refusal to give an instruction on the defense theory effectively strips a defendant of the ability to present a defense:

> "Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt. . . will entitle the defendant to a judgment of acquittal." (Id. at 1201-02; accord Conde v. Henry (9th Cir. 1999) 198 F.3d 734, 739-741.)

B. The Trial Court Improperly Refused to Give the Defense-Requested Instruction Relating to Testimony About Eva's Hearsay Statements.

Appellant requested that the trial court give the following pinpoint instructions:

> "The prosecution has the burden of proving by a preponderance of the evidence the existence of the preliminary fact that Mrs. Eva Blacksher was able to perceive the shooting of either Versenia Blacksher or Torey Blacksher [sic]. If, and only if, the prosecution meets this burden may you consider any of the statements offered into evidence in which Mrs. Blacksher is alleged to have made implicating Erven Blacksher in the shooting of either [victim] in your deliberations. However, you may not rely upon such evidence, in whole or in part, to convict the defendant unless the prosecution has proven the existence of the preliminary fact beyond a reasonable doubt." (CT 1202-03.)

> "The prosecution has the burden of proving by a preponderance of the evidence the existence of the preliminary fact that Mrs. Eva Blacksher actually made any statements implicating Erven Blacksher in the shooting of either [victim]. If, and only if, the prosecution meets this burden may you consider any of such statements offered into evidence in your deliberations. However, you may not rely upon such evidence, in whole or in part, to convict the defendant unless the prosecution has proven the existence of the preliminary fact beyond a reasonable doubt." (CT 1203-04.)

The trial court refused to give the instructions as requested (RT 2901) and gave instead a severely modified version as follows:

> "Evidence of statements attributed to Mrs. Eva Blacksher on the date of the crimes were admitted as spontaneous statements. ¶ Spontaneous statements are admissible if the statement: ¶ (1) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and ¶ (2) Was made spontaneously while the declarant was under the stress of excitement caused by such perception. ¶ Whether the declarant perceived the events described in the statements and the weight to which these statements are entitled is a matter for you to decide." (CT 1250; RT 2843.)

The trial court erred in refusing to give the defense requested instruction; moreover, the instruction the trial court gave was erroneous.

Evidence Code section 403 provides that when the proponent of evidence has the burden of producing evidence as to the existence of a preliminary fact, such as personal knowledge, the trial court must make a finding that the evidence is sufficient to sustain a finding of the existence of the preliminary fact; if the trial court makes that finding, the court,

> "[m]ay, and **on request shall**, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist." (Evid. Code, § 403, subd.(a)(c)(1); emphasis supplied.)

Thus, when the admissibility of hearsay depends upon a determination of personal knowledge, the trial court's finding is not final. Rather,

> "the judge's function on questions of this sort is merely to determine whether there is evidence sufficient to permit a jury to decide the question." (Evid. Code, § 403; Comment--Assembly Committee on Judiciary.)
>
> "If the judge finally determined the existence or nonexistence of the preliminary fact, he would deprive a party of a jury decision on a question that the party has a right to have decided by the jury." (Ibid.)

Whether Eva was able to perceive the shooting of either Versenia or Torey was such a preliminary determination as to Eva's personal knowledge, on which appellant had a right to a jury determination. (See People v. Kronemyer (1987) 189 Cal.App.3d 314, 351; People v. Humphries (1986) 185 Cal.App.3d 1315, 1334.) The legislative comment prepared contemporaneously with the enactment of Evidence Code section 403 makes clear that section 403 applies to the question of personal observation. (Comment--Assembly Committee on Judiciary, 29 West's Ann. (1966 Ed.) at pp. 267-68.)

On the other hand, Evidence Code section 405 deals with preliminary facts other than those of relevancy and personal knowledge,

such as the requisite standards of a hearsay exception. Thus, under section 405, the judge makes a final determination on the question whether a proffered statement was spontaneous. (See Kronemyer, supra, 189 Cal.App.3d at 352.) However, when the judge makes that determination, section 405 requires that "[t]he jury shall **not** be informed of the court's determination as to the existence or nonexistence of the preliminary fact." (Evid. Code, § 405, subd.(b)(1); see also § 405, Comment--Assembly Committee on Judiciary.)

The evidence on Eva's hearsay statements involved disputed facts as to both kinds of determinations, i.e., whether Eva had personal knowledge or perceived the events she purportedly described, and whether Eva made the statement spontaneously. Under the statute, the trial court's determination on the former was preliminary; thus the jury had to make the final determination and appellant was entitled to such an instruction. The court's determination on the latter was final, and the jury was not to be informed of the court's decision.

Because appellant had a right for a jury finding on the questions whether Eva perceived the events she supposedly described and actually made the statements, and because he had a right to a jury finding beyond a reasonable doubt on every essential fact necessary to establish his guilt, appellant was entitled to the requested instructions to that effect; and the

trial erred in refusing to give them.

The instruction actually given by the trial court was in flagrant violation of Evidence Code section 405, which forbids telling the jury that the trial court had made a determination that the statements made by Eva were spontaneous. The instruction as given also informed the jury that the trial court had admitted Eva's "spontaneous statements" upon finding that they narrated an event perceived by Eva -- a fact which is a question for the jury to determine. Although the instruction as given stated that in the last sentence that whether "the declarant perceived the events described" was a matter for the jury, this admonition was undermined by the first sentence of the instruction, which explicitly informed the jury that the statements were admitted **because** they were spontaneous and "purport[ed] to narrate, describe or explain an act, condition or event **perceived by the declarant**." (RT 2843; emphasis supplied.)

In other words, the jury told the jury that it had determined as a matter of law that Eva had perceived the events and thus admitted the statements; no reasonable juror would have concluded otherwise after having been so informed. And yet appellant was entitled to just such a jury finding, by proof beyond a reasonable doubt. This is precisely why section 405 forbids the trial court from informing the jury of its determination as to

spontaneity. But the trial court's instruction went even beyond the statutory violation of section 405 (which forbids instruction on the matter of the spontaneity finding), and instructed the jury that it had also made a finding on the question of Eva's personal knowledge (under section 403). Section 403 provides that the trial court **shall** upon request instruct the jury to determine whether the preliminary fact (personal knowledge) exists and to disregard it unless the jury so finds. (Evid. Code, § 403, subd.(c)(1).)

Although appellant is unaware of any California case regarding the standard of proof applicable to a jury finding of the preliminary fact under Evidence Code section 403,[53] in a criminal case the defendant must be proven guilty beyond a reasonable doubt. (Mullaney v. Wilbur (1975) 421 U.S. 684.) The reasonable doubt standard applies to "each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt." (People v. Watson (1956) 46 Cal.2d 818, 831.) It is error for the trial court to mislead the jury into thinking that it was not necessary that each fact essential to complete a chain of circumstances establishing guilt need not be proved beyond a reasonable doubt. (People v. Carter (1957) 48 Cal.2d 737, 758-61.)

---

[53] But see People v. McClellan (1969) 71 Cal.2d 793, 804 [other crimes evidence need only be proved by a preponderance of the evidence].

C. The Trial Court's Refusal to Give the Correct Defense-Requested Instruction Was Prejudicial to Appellant's Defense.

Because the refusal of a defense-requested pinpoint instruction implicates the defendant's Sixth and Fourteenth Amendment rights to present a defense and to due process, review for prejudice is under Chapman v. California, supra, 386 U.S. at 24, requiring reversal unless the prosecution can show harmlessness beyond a reasonable doubt.

Appellant was entitled to have his guilt determined by the jury upon a standard of proof beyond a reasonable doubt. The trial court's refusal to give the requested instruction, and its giving of an incorrect instruction, undermined that right. (In re Winship (1970) 397 U.S. 358; Sandstrom v. Montana (1979) 442 U.S. 510.) As a result of these instructional errors, there is no guarantee that the jury made any finding on the question whether Eva actually perceived the events she purportedly described, much less a finding beyond a reasonable doubt. Reversal of appellant's convictions is therefore required.

/

/

/

/

/

XIII. THE TRIAL COURT VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL, TO PRESENT A DEFENSE, AND TO A RELIABLE SENTENCING DETERMINATION BY REFUSING TO GIVE APPELLANT'S REQUESTED PINPOINT INSTRUCTIONS REGARDING THE SIGNIFICANCE OF THE MENTAL STATE EVIDENCE

A. Introduction to Argument.

As set out in the preceding argument (Arg., XII, Part B, pp. 209-214) and incorporated by reference here, appellant was entitled to pinpoint instructions on his theory of the case. The trial court violated appellant's federal constitutional rights to due process and to present a defense by refusing to give his requested pinpoint instruction regarding the significance of the mental state evidence.

B. The Trial Court Improperly Refused to Give the Defense-Requested Instruction Relating to the Mental State Evidence.

Appellant requested the following pinpoint instruction regarding the jury's consideration of mental state evidence:

> "In considering whether the crimes charged herein are of the first or second degree, you must consider the affect [sic] of the defendant's mental state at the time of the commission of the crimes. If you find from the evidence introduced at this trial that the defendant suffered from a [mental disease] [mental defect] [or] [mental disorder] and you are not convinced beyond a reasonable doubt that the defendant did not act while under the influence of that [mental disease] [mental defect] [or] [mental disorder], you must give the defendant the benefit of that doubt as to that [mental disease]

> [mental defect] [or] [mental disorder], that the [mental disease] [mental defect] [or] [mental disorder] negated the specific intent required for first degree murder and that the murders charged herein are of the second degree." (CT 1204.)

The trial court refused to give this instruction (RT 2901) on the ground that the matter was "covered" by CALJIC No. 3.32, which it did give to the jury, as follows:

> "You have received evidence regarding a mental disease, mental defect or mental disorder of the defendant at the time of the commission of the crime[s] charged in Counts 1 and 2 or the lesser crimes thereto, namely second degree murder and voluntary manslaughter. You should consider this evidence solely for the purpose of determining whether the defendant actually formed the required specific intent, premeditated and deliberated or harbored malice aforethought which are elements of the crime[s] charged in Counts 1 and 2 namely first degree murder; formed the required specific intent or harbored malice aforethought which are elements of the lesser crime of second degree murder; or formed the required specific intent which is an element of the lesser crime of voluntary manslaughter." (CT 1270; RT 2850-51.)

Appellant's mental illness was the core of the defense theory of the case. He was thus entitled to an instruction which pinpointed that defense and which was a correct statement of law. (People v. Birks, supra, 19 Cal.4th at 118.) The requested instruction was undeniably a correct statement of law. (See People v. Saille (1991) 54 Cal.3d 1103, 1120 [the defendant has the duty to request a pinpoint instruction relating to the evidence sufficient to raise a reasonable doubt as to the mental state

element of the crime].)

C. The Trial Court's Refusal to Give the Correct Defense-Requested Instruction Was Prejudicial to Appellant's Defense.

As set out above (Arg. XII, Part C, p. 215) and incorporated by reference here, review for prejudice is under Chapman v. California, supra, 386 U.S. at 24.

Appellant anticipates an argument from respondent that any error from refusing the requested instruction was "cured" by the giving of CALJIC No. 3.32, as set forth above. This is incorrect. First, the instruction as given did not state the key point, which is that the mental state evidence could be sufficient to raise a reasonable doubt as to first degree murder. This was particularly important in this case, because the jury had twice been explicitly instructed during the evidentiary phase that the mental state evidence was admissible **solely to impeach** the family members who denied knowledge of appellant's extensive history of mental illness. (RT 2633.)

The instruction at the close of the evidence thus directly contradicted what the jurors had been instructed earlier. Given this conflict, i.e., that the jurors had earlier been told that the mental state testimony presented by the defense was admissible only to impeach, it was of paramount importance that the instruction on mental state evidence be framed in terms of raising a

reasonable doubt as to the prosecution's burden of proof. In Francis v. Franklin (1985) 471 U.S. 307, the jury was given conflicting instructions on the specific intent element of a murder charge: the jury was told it could presume that the defendant had the intent to act as he did, and was also told that the prosecution had the burden of proof on the elements. The United States Supreme Court found reversible error, because a reasonable juror could have resolved the contradiction by choosing the presumption and ignoring the prohibition of presumption: nothing in the contradictory instructions made it clear that one carried more weight than the other.

> "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." (Id., at p. 322, fn. omitted.)

The defense-requested instruction was required in this case to make it clear to the jurors that the evidence of appellant's mental illness was sufficient to raise a reasonable doubt as to first degree murder. As in Francis v. Franklin, supra, this Court has no way of knowing which of the two contradictory instructions the jurors might have followed, i.e., that the mental state evidence provided by Dr. Davenport was admissible only for impeachment purposes, or whether the mental state evidence could be considered only for the purpose of determining whether appellant had the required specific intent and mental state required for first degree murder.

The defense-requested instruction would have resolved the conflict by instructing the jurors that the mental state evidence, if credited, was sufficient to raise a reasonable doubt as to appellant's guilt. The trial court's refusal to give the instruction was thus highly prejudicial to appellant's guilt-phase defense.

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

XIV. THE CUMULATIVE PREJUDICIAL IMPACT OF THE MULTIPLE EVIDENTIARY AND INSTRUCTIONAL ERRORS IN THE GUILT PHASE OF APPELLANT'S TRIAL VIOLATED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS RIGHTS TO DUE PROCESS, A FAIR TRIAL BY AN IMPARTIAL JURY AND A RELIABLE AND INDIVIDUALIZED SENTENCING DETERMINATION

The evidentiary and instructional errors which riddled appellant's guilt phase trial resulted in convictions which are constitutionally unreliable in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the federal constitution. (Taylor v. Kentucky, supra, 436 U.S. at 487, fn. 15.; Beck v. Alabama (1980) 447 U.S. 625 [Eighth Amendment also requires heightened reliability in guilt determination in capital cases].)

This Court must consider the cumulative prejudicial impact of the evidentiary and instructional errors at the guilt phase, all of which are of federal constitutional magnitude.[54] (People v. Holt, supra, 37 Cal.3d at 458-59 [considering the cumulative prejudicial impact of various errors]; Taylor v. Kentucky, supra, 436 U.S. at 487, fn. 15 [cumulative effect of errors violated federal due process]; Cupp v. Naughten (1973) 414 U.S.

---

[54] Even state law errors that might not be so prejudicial as to deprive the defendant of due process when considered alone, may cumulatively produce a fundamentally unfair trial in violation of the federal constitution. (See People v. Hill (1998) 17 Cal.4th 800, 844-45.)

141, 146-49 [errors must be assessed in context of overall trial to determine if constitutional violation occurred].)

United States v. Frederick, supra, 78 F.3d 1370 reversed a conviction after considering the cumulative prejudicial impact of several errors, announcing that "[w]here [] there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial." (Id. at 1381; see also Walker v. Engle (6th Cir. 1983) 703 F.2d 959, 964; United States v. Tory (9th Cir. 1995) 52 F.3d 207, 211.)

The most damaging evidence introduced against appellant at trial was testimony recounting Eva's out-of-court statements in violation of his right to confrontation. The prejudicial impact of the trial court's erroneous rulings was compounded by the trial court's refusal to give correct defense-requested pinpoint instructions regarding Eva's statements.

The crucial factual question for the jury to determine centered on appellant's mental state. However, the trial court's errors in excluding defense evidence on this point, while improperly allowing the prosecutor to stack the deck against appellant with irrelevant and inflammatory evidence on the same point, misled the jury in their fact-finding function. The prejudice from these erroneous rulings was magnified, and the jury further misled, by the trial court's erroneous instruction to presume that appellant

was sane.

Finally, the prosecutor committed misconduct in arguing to the jury at guilt phase. (See Arg. XXI, Part A, pp. 266-274, below.)

The result of these errors was a jury determination that appellant killed intentionally, and, with respect to Torey, with premeditation and deliberation. However, had the jury been allowed to hear defense evidence of appellant's mental impairments, and had the jury not been exposed to inadmissible hearsay, irrelevant testimony as to appellant's mental state, and prosecutorial misconduct, and had the jury not been improperly instructed to presume that appellant was sane, it is not reasonably likely that the jurors would have reached the same verdict. A cumulative prejudice analysis shows that the guilt verdicts were unreliable and must be reversed.

/

/

/

/

/

/

/

/

/

CERTIFICATE OF SERVICE

Re: People v. Erven Blacksher

I, Kathy M. Chavez, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at P. O. Box 9006 Berkeley, California 94709-0006. I served the attached

APPELLANT'S OPENING BRIEF

on the following individuals/entities by placing a true and correct copy of the document in a sealed envelope with postage thereon fully prepaid, in the United States mail at Berkeley, California, addressed as follows:

CAP – ATTN: Michael Snedeker
101 Second St., Ste. 600
San Francisco, CA 94105

District Attorney, Alameda County
1225 Fallon Street
Oakland, CA 94612

Attorney General
455 Golden Gate Ave.
San Francisco, CA 94102

Clerk of Court, Alameda County Superior Court
ATTN: The Hon. Larry J. Goodman
1225 Fallon Street
Oakland, CA 94612

Erven Blacksher
P-28500
San Quentin, CA 94974

I declare under penalty of perjury that service was effected on September __, 2004 at Berkeley, CA and that this declaration was executed on September __, 2004 at Berkeley, CA.

KATHY M. CHAVEZ
(Typed Name)

_____
(Signature)