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 REPLY BRIEF

Automatic Appeal from t he Judgment of the Superior Court
of the State of California, County of Alameda
The Honorable Larry J. Goodman, Judge Presiding

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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

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

Appellant contends that the trial court failed to exercise its judicial discretion when, faced with contradictory competency evaluations by two doctors, it simply appointed a third doctor, and then simply ruled appellant competent based on the third report.

Respondent insists that the trial court *necessarily* exercised its legal

discretion because the issue was "submitted" on the report of Dr. Rosenthal, and the trial court stated that it would find appellant competent "[b]ased on the contents of the report." (RB, pp. 66-67 ["It is therefore clear from the court's ruling that its competency finding was based on a reasoned consideration of the substance of Dr. Rosenthal's report."].)

Appellant disagrees. Judicial discretion requires the exercise of *legal principles*. (See AOB, p. 75.) The exercise of judicial discretion in determining competency thus requires the judge to determine whether the medical expert or experts examining the defendant evaluated his ability under the *legal test* for competency. The trial court's adoption of Dr. Rosenthal's report, without assessing whether that report evaluated appellant's ability under the legal test for competency, including all four prongs of that test, was not an exercise of *judicial discretion.* Had the trial court exercised judicial discretion, it would have realized that although Dr. Rosenthal found appellant **willing** to work with his attorneys, he did not properly consider whether appellant was **able** to do so, which is a prerequisite of competency under the legal standard.

Respondent makes much of the fact that counsel "submitted" the

matter of competency on Dr. Rosenthal's report.[1] (RB, p. 66.) However, this doesn't prove – or even suggest – that the trial court exercised its discretion. Counsel's submission of the matter does not absolve the trial court from its duty to exercise judicial discretion.

Respondent also argues that the trial court's appointment of a third expert following the contradictory results of the first two competency evaluations shows that the trial court took "seriously" its duty to exercise its discretion. (RB, p. 67.) Appellant's point, which respondent does not squarely address, is that the exercise of judicial discretion in a competency hearing requires a judicial determination above and beyond the psychiatric ones. This the trial court did not do.

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

Respondent argues first that Dr. Rosenthal's report provided "substantial evidence" to support the trial court's finding of competency; and also argues that Dr. Fort's report similarly provided substantial

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[1] Respondent argues that issues with respect to the competency evaluations by the other two doctors are not properly before this Court. See section 4, pp. 9-12, below.

evidence in support of the court's finding.[2] Appellant will address each contention in turn.

1. Dr. Rosenthal's report.

Respondent first argues that Dr. Rosenthal provided substantial evidence of appellant's "rational understanding of the proceedings against him." (RB, p. 69.) Respondent notes that Dr. Rosenthal reported that appellant "appeared rational and in touch with reality" during his interview. (RB, p. 69.) In fact, Dr. Rosenthal actually stated that appellant "seemed to be *fairly* rational" but became "somewhat rambling" and had "paranoid thoughts and ideas in his discussions of his legal situation." Dr. Rosenthal also reported that appellant had a "somewhat distorted" attitude towards his current situation and only "seemed to maintain his hold on reality *to some extent*." (Vol. II, CT 319; emphasis supplied.) Furthermore, although Dr. Rosenthal stated that appellant "was able to discuss his situation in a fairly reasonable manner" appellant could also become "somewhat unrealistic

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[2] Respondent cites People v. Lawley (2002) 27 Cal.4th 102, 135 for the proposition that a "single expert report supported trial court's finding of competency." (RB, p. 67.) The number of reports is not the question. What matters is whether the trial court exercised its judicial discretion in assessing competency. In contrast to this case, the competency evaluation in Lawley showed that the defendant was able to cooperate with defense counsel.

about his case" and took a "more paranoid stance," a paranoia that "escalates if he is pushed to consider his case more reasonably." (Vol. II, CT 320.)

Appellant contends that "having a rational understanding" means just that. If appellant had only a partial "hold on reality" which degenerated into "paranoid thoughts and ideas" of his legal situation, and if appellant held a "somewhat distorted" attitude about his current problems, that is not substantial evidence that he had a rational understanding of the proceedings against him. This is particularly so where appellant's paranoia increased the more he was "pushed" to be reasonable.

Respondent also claims that Dr. Rosenthal provided substantial evidence of appellant's ability to assist counsel in a rational manner, relying on the doctor's report of appellant's "stated willingness to work with his attorney." (RB, pp. 69-70.) Appellant addressed this point in his Opening Brief, and respondent does not refute the argument made there. (See AOB, pp. 85-86.) First, a person who is "somewhat unrealistic" about his case, and who becomes more paranoid when encouraged to consider his case "more reasonably" is not someone who can *rationally* assist counsel in his defense.

Secondly, as respondent acknowledges, Dr. Rosenthal concluded that

appellant could assist his attorneys because he was able to extract from appellant an "agreement" to work with counsel. The "agreement" of someone who is unrealistic about his case, who degenerates into paranoia when pushed into being reasonable, and who seems to maintain his hold on reality only to "some extent" is **not** substantial evidence sufficient to meet the legal standard of the fourth prong of the competency test, i.e., an ability to assist counsel in preparing his defense. As pointed out in the Opening Brief, the legal standard is not whether appellant could be made to agree to assist counsel, the legal standard is whether appellant was *capable* of assisting.[3]

2. The deficiencies in Dr. Rosenthal's report.

Citing People v. Weaver (2001) 26 Cal.4th 876, 904, respondent argues that appellant should not be allowed to "attack" any of the "alleged deficiencies in Dr. Rosenthal's report" because defense counsel submitted the matter on the report without objecting to the report or any portions of it. Weaver is inapposite because it does not deal with the question presented by this case, i.e., whether substantial evidence supports a finding of

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[3] The trial court's failure to recognize this shows that it did not exercise its judicial discretion. See Part A, above, pp. 1-3, above.

competency.[4] The question in Weaver was whether due process guarantees allowed counsel to submit the competency question on the psychiatric evaluations without a full-blown hearing and this Court held that it did. The Court then noted:

> "To the extent defendant attempts to impugn the validity of the appointed experts' conclusions on grounds they failed to consider the effect of defendant's medication on his competency, the time to raise such a challenge has long since passed." (Ibid.)

However, in this case, the Court must assess whether substantial evidence of "reasonable, credible, and of solid value" supports the trial court's finding of competency. To determine whether Dr. Rosenthal's report represents reasonable evidence of solid value, the Court must necessarily evaluate the deficiencies in that report.

Respondent's fallback position is that Dr. Rosenthal's conversation with, and observations of, appellant provided a sufficient basis upon which to render an opinion as to appellant's competency so that "any alleged deficiencies in his report did not undermine the validity" of his findings. (RB, p. 71.)

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[4] Respondent's specious waiver argument is akin to arguing that a failure to object to evidence on hearsay grounds would prevent an argument on appeal that the evidence was constitutionally insufficient to support the verdict.

Appellant does not contend that the failure to conduct standardized tests or collateral interviews in and of itself renders Dr. Rosenthal's report insufficient. On the other hand, the internal contradictions in Dr. Rosenthal's report do highlight that the report is neither reasonable nor solid evidence. (See AOB, pp. 85-86.) For example, although Dr. Rosenthal described appellant as only "fairly" rational, and rambling and paranoid in discussing his legal situation, with a limited hold on reality, he concluded that appellant was able to discuss "the elements of his legal situation in a coherent manner" and was thus competent. (Vol. II, CT 318-20.) The description negates the conclusion. As this Court observed in Lawley, the

> "chief value of an expert's testimony . . . rests upon the *material* from which his opinion is fashioned and the *reasoning* by which he progresses from his material to his conclusion." (Lawley, supra, 27 Cal.4th at 132.)

Most notable is Dr. Rosenthal's failure to consider whether appellant was **able** (not just willing) to assist in his defense. Respondent argues that Dr. Rosenthal did address this question because he "found appellant cooperative, able to discuss his case in a rational manner, and willing to work with his attorney." (RB, p. 71.) Appellant has already addressed appellant's supposed rationality (he had a limited hold on reality).

Respondent blithely argues that appellant's "mental illness during the interview was neither unusual nor proof that he did not meet the legal standard of competency." (RB, p. 71.) Whether or not this is correct, the salient point is that appellant's apparent spirit of cooperation and willingness to work with counsel is **not** the same as his **ability** to do so. Dr. Rosenthal failed to consider this most important part of the test of legal competency, and for that reason, his report does not provide substantial evidence in support of the trial court's finding.

3. Dr. Fort's and Dr. Davenport's reports.

Respondent maintains that because defense counsel submitted the matter based on Dr. Rosenthal's competency report, issues relating to the other two reports are immaterial. Nonetheless, "in the interests of completeness," respondent addresses those reports. (RB, pp. 71-71.)

In his Opening Brief, appellant discussed both reports in detail and has thus already addressed the arguments made here by respondent. (See AOB, pp. 82-91.) Consequently, appellant will reply briefly to respondent's arguments, and refers the Court to his Opening Brief for the full discussion.

First, respondent claims that because Dr. Fort found appellant cooperative and able to understand the charges against him, he necessarily "addressed appellant's ability to assist in his defense." (RB, p. 72.)

Respondent made the same argument with respect to Dr. Rosenthal's report. Appellant repeats that the finding that appellant was cooperative and understood the charges against him is **not** the same as his **ability** to assist in his defense. If these factors were identical, the United States Supreme Court would not have found it necessary in Drope v. Missouri (1975) 420 U.S. 162, 171 to add as a fourth prong to the competency test the ability of the accused to assist counsel in preparing his defense. (See AOB, pp. 73-74.)

Next, respondent asserts that the weaknesses in Dr. Fort's report "do not undermine his finding of competency." (RB, p. 73.) Respondent repeats that although appellant was suffering from a delusion that he had died and been taken over by someone was a delusion that "did not affect appellant's general mental state." (RB, p. 73.) Appellant does not believe that such a delusion, i.e., that appellant was dead and under the control of someone else, can ever be legitimately described as unrelated to his "general mental state." Dr. Fort's insistence to the contrary only further highlights the deficiencies in his report. (See AOB, pp. 86-88.)

Respondent asserts that it was proper for Dr. Fort to take into account his determination that the evidence against appellant was "very strong." (RB, p. 73.) Respondent does not explain why Dr. Fort's personal

conclusion as to guilt and innocence was "entirely proper," nor does he cite any legal authority in support of his assertion. Appellant contends that there is no such authority and repeats that it is troubling that Dr. Fort spent over half of his short report in reciting the "facts" which he found to be "very strong evidence" against appellant. (See AOB, pp. 87-88.)

As to Dr. Fort's conviction for fraud, respondent asserts that it "has no relevance" to his abilities or impartiality. (RB, p. 74.) Appellant disagrees entirely. Dr. Fort's conviction for fraud is certainly relevant to assessing his personal credibility and thus the reliability of his report. (See AOB, pp. 88-89.)

Respondent argues that the trial court could reasonably have placed less stock in Dr. Davenport's report because Dr. Davenport himself "was not entirely convinced that appellant was not faking his symptoms." (RB, p. 75.) Respondent's comment is taken out of context. Dr. Davenport did question the severity of appellant's symptoms as possibly indicating malingering. As a consequence, Dr. Davenport contacted appellant's attorney to inquire about the existence of mental health records. Dr. Davenport then reviewed those records and determined that appellant "had a history of severe psychological problems" with "very little intervention over time." (Vol. II, CT 314-15.) Dr. Davenport did **not** conclude that

appellant was malingering. To the contrary, he assessed appellant's symptoms as severe and then "questioned" whether malingering was a possibility. He then researched that possibility and concluded that appellant was indeed severely mentally ill. This sequence shows Dr. Davenport's thoroughness. (See AOB, pp. 90-91.)

4. Conclusion

Respondent concludes by stating that the trial court was "free to weigh the evidence before it" and that "its competency finding was supported by substantial evidence." (RB, p. 75.) Appellant agrees with the first statement but not the second. Respondent cites several cases in which this Court found sufficient evidence to support a competency hearing. However, all three cases are distinguishable. In People v. Lawley, supra, 27 Cal.4th at 134-35, there was evidence of the defendant's ability to assist in his defense, in contrast to this case. In People v. Frye (1998) 18 Cal.4th 894, 1003-04, the evidence of the defendant's competency included lengthy interviews, review of the medical records, and the administration of a standardized test evaluating the defendant's capabilities. More importantly, there was evidence that the defendant was able to assist in his defense. People v. Marshall (1997) 15 Cal.4th 1, 31-32 also involved evidence that the defendant was capable of assisting in his defense.

In conclusion, if this Court finds that the trial court failed to exercise its judicial discretion (Part A, pp. 1-3, above), appellant's judgment must be reversed as void of jurisdiction. If this Court finds that the trial court abused its discretion in finding appellant competent (Part P, pp. 3-12, above), his convictions and judgment are in violation of federal due process and must be overturned. (Pate v. Robinson (9166) 383 U.S. 375; Medina v. California (1992) 505 U.S. 437.)

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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 criminal defendant has a federal constitutional right to be personally present at all proceedings against him when his presence has some reasonably substantial relation to his opportunity to defend. (Kentucky v. Stincer (1987) 482 U.S. 522, 526.)

Respondent argues that appellant had no right to be personally present at any of the 17 proceedings which took place in his absence because (1) on each of those occasions "defense counsel were present" and "able to represent appellant's interests;" and (2) on some of those occasions, defense counsel expressly waived appellant's presence. (RB, p. 81.)

Respondent relies on People v. Cleveland (2004) 32 Cal.4th 704, 741 for the proposition that defense counsel's waiver of the defendant's presence "'strongly indicates that [his] presence did not, in fact, bear [] a substantial relation' to the fullness of his opportunity to defend." (RB, p. 81.) Appellant submits that this reasoning is flawed. The judiciary, not defense counsel, must determine whether presence bears a substantial

relationship to the defendant's ability to defend. Furthermore, to the extent Cleveland suggests that counsel can waive the defendant's right of presence, it contradicts long-standing federal principles requiring the waiver of a fundamental constitutional right to be voluntary, knowing and intelligent, and thus, by necessity, personal. (See Johnson v. Zerbst (1938) 403 U.S.458, 464; see AOB, pp. 103-04.)

As to the proceedings on June 18, 1998, at which defense counsel purported to excuse appellant's right to presence and then withdrew appellant's right of allocution (Vol. 17, RT 3847, 3872), respondent argues that appellant had no right of presence because he had no right of allocution, i.e., this Court has held that the right to allocution does not exist in California death penalty trials. (RB, p. 84, citing People v. Cleveland, supra, 32 Cal.4th at 765-66.)

Nonetheless, the Ninth Circuit Court of Appeal has declared that the right of the defendant to personally address the court is "an essential element of criminal defense" of federal constitutional dimension. (Boardman v. Estelle (9th Cir. 1992) 957 F.2d 1523, 1524-26; see also McGautha v. California (1971) 402 U.S. 183, 217.) Appellant thus reiterates that he had a federal constitutional right to allocution, a right which defense counsel could not waive on his behalf. Moreover,

appellant's right of allocution necessarily bore a clear and important relation to his ability to defendant against the death penalty. "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." (Green v. United States (1961) 365 U.S. 301, 304; see also United States v. Adams (3rd 2001) 252 F.3d 276, 280.)

As to appellant's absence for the in chambers ruling on the defense Batson-Wheeler motion, respondent argues (1) that appellant's right to presence was not violated because he "ultimately" heard the court's ruling when it was later reiterated in his presence; respondent also argues (2) that appellant has not shown that his presence "would have aided defense counsel during the in chambers discussion on the motion." (RB, p. 84.)

If respondent is correct on the first point, then all proceedings except the taking of evidence could be done in the defendant's absence, and the defendant would only need be present for a summary of the rulings made in his absence. Appellant does not believe this is the rule. Certainly rulings made by the trial court as to the racial discrimination in selecting the jury is a matter which bears a substantial relation to appellant's ability to defend and to receive a fair trial.

As to the second point, appellant notes that in addressing the merits of the Batson-Wheeler ruling made by the trial court, respondent maintains that defense counsel failed to establish a prima facie case of discrimination in support of the motion: Defense counsel's

> "entire showing consisted of a recitation of the names of the two Black prospective jurors removed by the prosecutor, an allegation of a strong likelihood the jurors were excluded

> because of their race, and citations to the general legal principles governing his motion. [Defense counsel] failed to set forth any circumstances which supported his motion . . . ." (RB, p. 90.)

Appellant contends that had he been present at this important proceeding, defense counsel would have been prompted to make the necessary showing, either by appellant himself, or because of appellant's presence.

In Argument I, above, respondent argues that appellant was competent to stand trial. If that is so, then there can be no principled argument that appellant's presence was unnecessary because he was unable to assist defense counsel in any meaningful way. Presence at the proceedings against one has been considered of critical importance for centuries. It is a fundamental principle of fairness in our system of jurisprudence that one should be present for proceedings in which one's life is at stake. Presence is also important for more mundane procedural reasons. From the defendant's own knowledge, experience and perspective may emerge factors or reasons relevant to the proceedings or decision that defense counsel could not or would not have thought of or considered in the defendant's absence.

In sum, defense counsel's purported waivers of appellant's presence are invalid, and appellant's repeated absences from significant proceedings requires reversal of his conviction.

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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

Respondent argues that appellant failed to establish a prima facie case of the prosecutor's discriminatory use of the peremptory challenge. (RB, pp. 89-90.)

In Johnson v. California (2005) 545 U.S.162 [125 S.Ct. 2410], the United States Supreme Court overruled People v. Johnson (2003) 30 Cal.4th 1302, and held that the defendant makes out a prima facie case of discrimination under Batson where the facts give rise to an inference of discriminatory purpose. (Johnson v. California, supra, 125 S.Ct. at 2416.) The defendant does not have to show that "it is more likely than not" that the peremptory challenges were based on impermissible group bias, as People v. Johnson had held. (Id. at 2416.) Rather, the first step of Batson is satisfied where there is evidence sufficient to permit an inference that discrimination has occurred. (Id. at 2417.)

Respondent suggests in a footnote that the "precise standard" used by the trial court does not matter because "the facts presented do not give rise to any reasonable inference of discriminatory purpose" under the standard set forth by the United States Supreme Court in Johnson v. California, supra. (RB, p. 89, fn. 12.) Yet even while citing to the High Court's "reasonable inference" standard, respondent argues in reliance on the rejected "strong likelihood" test, citing People v. Howard (1992) 1

Cal.4th 1132, 1154 for the proposition that "'the trial court [] must determine [] whether there is a "strong likelihood" that prospective jurors have been challenged because of their group association rather than because of any specific bias.'" (RB, p. 90.)

Appellant submits that the trial court did the same, i.e., it ruled in reliance on the improper strong likelihood test rather than the reasonable inference test. In the first place, at the time of appellant's trial, the "strong likelihood" of discrimination was the apparent standard for determining a prima facie case under the precedents of this Court. (See AOB, p. 110.) Respondent does not deny this. Furthermore, the trial court made clear that it would not find a prima facie case based only on statistical disparity,[5] whereas under the reasonable inference test, "a defendant can make a prima facie showing based on a statistical disparity alone." (Williams v. Runnel (9th Cir. 2006) 432 F.3d 1102, 1107 [finding an inference of bias where the prosecutor excused four out of seven Hispanics and two African Americans].)

Appellant made such a statistic-based prima facie showing. The prosecutor used two out of four peremptory challenges – a full 50% – on

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[5] The stated basis for the trial court's ruling was that although the prosecutor had excused "two blacks," the defense had excused "one black," and there were two blacks remaining in the jury box. (Vol. 6, RT 1359.) As to the "one black" excused by the defense, Justice Mosk's statement in Wheeler applies: "A party does not sustain his burden of justification by attempting to cast a different burden on his opponent." (People v. Wheeler (1978) 22 Cal.3d 258, 283, fn. 30.)

African-American jurors. (See e.g., Turner v. Marshall (9th Cir. 1995) 63 F.3d 807, 812, overruled on other grounds in Tolbert v. Page (9th Cir. 1999) 182 F.3d 677, 681 [prima facie showing of discrimination where the prosecutor used peremptory challenges to exclude five out of a possible nine African-Americans]; Paulino v. Castro (9th Cir. 2004) 371 F.3d 1083, 1090 [prosecutor's use of five out of six peremptory challenges to strike African-Americans raised an inference of bias].) Paulino v. Castro was cited with approval by the United States Supreme Court in Johnson v. California, supra, 125 S.Ct. at 2418.

Respondent also speculates at some length as to possible reasons the prosecutor might have had for challenging the two African-American jurors. (RB, pp. 91-94.) This speculation is improper since the prosecutor himself stated no reasons for his peremptory challenges. In People v. Wheeler, supra, after finding that the trial court erred in failing to find a prima facie case of discriminatory intent, this Court explained that because "the prosecutor declined to give any [] reason [to] justify the peremptory challenge], we shall not speculate on whether he could have done so." (22 Cal.3d at 283, fn. 30.) More recently, in Miller-El v. Dretke (2005) 545 U.S 231, [125 S.Ct. 2317], the United States Supreme Court agreed that an appellate court's "substitution of a reason for eliminating [a juror] does nothing to satisfy the prosecutor's burden of stating racially neutral explanations for their own actions." People v. Fuentes (1991) 54 Cal.3d 707, 720 agreed that speculation as to why the prosecutor exercised a peremptory challenge against a minority juror was futile, because, "the trial court must determine not only that a valid reason existed but that the reason

actually prompted the prosecutor's exercise of the particular peremptory challenge."[6]

The point is made explicitly and emphatically in Williams v. Runnel, supra, a case which, like this one, involved the trial court's erroneous ruling as to the prima facie case. After finding that the statistical disparity made out a prima facie case, Williams v. Runnel addressed the question whether the inference of bias could be dispelled by other relevant circumstances, noting that under Batson, "all relevant circumstances" must be considered, including whether a prosecutor's voir dire supported or refused an inference of discriminatory purpose. Williams v. Runnel looked to the United States Supreme Court opinion in Johnson v. California:

> "Johnson, while not constricting what circumstances a court may consider in reviewing a Batson claim, did clarify the equation into which the circumstances are factored. The Court emphasized that a defendant need only show an inference of discriminatory purpose and could not be required to show that a challenge was more likely than not the product of purposeful discrimination. **The Johnson Court further**

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[6] Wheeler addressed a situation procedurally identical to the case at bar, i.e., the trial court had erroneously failed to find a prima facie case and the prosecutor had not supplied any justifications for his challenges. Miller-El and Fuentes involved cases addressing the second prong of Batson, i.e., the trial court has impliedly or expressly found a prima facie case of discrimination, so that the prosecution has the burden of justifying its peremptory challenges. Appellant submits that logically the rule should be the same under either posture – because the question is why the prosecutor **actually** challenged a minority juror the court should not speculate at either stage of the Batson procedure as to why the prosecutor might have challenged the juror. This is certainly the holding of Williams v. Runnels, supra, as discussed above.

> **noted [] that it does not matter that the prosecutor might have had good reasons. What matters is the real reason [potential jurors' were stricken.**" (432 F.3d at 1107-08, quoting Johnson v. California, supra; internal quotations and citations omitted; emphasis supplied.)

Accordingly, Williams v. Runnel held that "to rebut an inference of discriminatory purpose based on statistical disparity, the 'other relevant circumstances' must do more than indicate that the record would support race-neutral reasons for the questioned challenges." (Id. at 1108.)

The entirety of respondent's argument in rebuttal of appellant's statistically-based prima facie case is speculation based "that the record [in this case] would support race-neutral reasons" for the prosecutor's peremptory challenges of the African-American jurors. Under Miller-El v. Dretke, Johnson v. California, and Williams v. Runnel, this speculation does not and cannot dispel the inference of racially motivated challenges. This Court should soundly reject the suggestion that the prosecutor might have had non-race based reasons for challenging the two African-American jurors because it does not matter what the prosecutor might have done.

This Court must reverse appellant's convictions where, as here, trial court erroneously found that no prima facie case has been made. Wheeler, supra, 22 Cal.3d at 283 & fn. 3, held that the defendants had met their prima facie burden, and that the trial court erred in ruling that the prosecutor need not respond to the allegation of bias. Wheeler held this error prejudicial per se, and refused to speculate as to whether the prosecution could have given reasonable justifications for his peremptory challenges. (Ibid.)

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

A. Respondent's Waiver Argument Is Unsupported by the Record in that Defense Counsel Explicitly Objected at Trial to the Admission of Eva's Hearsay Statements on Both State and Federal Constitutional Grounds.

Respondent first makes a wholly unsupportable argument that appellant has "waived" [sic: forfeited][7] his claim with respect to Eva's statements to Inspector Bierce because defense counsel supposedly failed to object to the introduction of this evidence "on either state or federal law grounds." (RB, pp. 104-05.)

The argument is easily refuted by reference to the record. On February 24, 1998, defense counsel objected to the admission at trial of "statements made by Eva Blacksher." (Vol. III, CT 552.) On March 11,

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[7] Respondent generally argues that appellant "waived" a particular claim when he means that appellant "forfeited" the claim. This usage is common although incorrect. (See People v. Simon (2001) 25 Cal.4th 1082, 1097, fn. 7 [distinguishing between forfeiture and waiver].) For purposes of consistency, appellant will use the term waiver, as respondent has done.

1998, expressly citing appellant's federal constitutional rights, including his right of confrontation, defense counsel objected once again to the admission of the "hearsay statements of Eva Blacksher," referencing statements made by Eva to Inspector Bierce at the scene and later in the day, and the next day. (Vol. III, CT 634-35, 636, 638.)

Indeed, according to respondent's own recitation of the facts relevant to this claim, when the prosecutor argued the admissibility of "Eva's statement to Inspector Bierce," the "defense argued that the statements were inadmissible hearsay, and that their admission would violate appellant's right to confrontation." (RB, p. 98.) Respondent also notes that in appellant's opposition to the prosecutor's motion to introduce Eva's hearsay statements, defense counsel "attached a police report by Inspector Bierce memorializing his conversation with Eva on the day of the murders," among other documents. (RB, p. 97.)

Respondent apparently makes this spurious waiver argument because he is forced to concede that Eva Blacksher's statement to Inspector Bierce was "testimonial" and thus inadmissible under Crawford v. Washington (2004) 541 U.S. 36. (See RB, p. 119 ["it appears that Eva's statement to Inspector Bierce the day after the murders was testimonial"].) Faced with a claim that is favorable to appellant on the merits, respondent retreats to an

argument that the claim is waived, and thus excuses himself from addressing the merits. Respondent's tactic is doomed because his factual premise is directly contradicted by the record: defense counsel expressly objected to the admission of this particular evidence as inadmissible under the Evidence Code and as a violation of his federal constitutional right to confrontation. If respondent is correct, and waiver can be found where defense counsel objects to evidence on both state and federal grounds, and explicitly references the objected-to evidence, then no claim can ever be preserved for appeal.

B. Eva's Statement to James and Frances Blacksher Are Testimonial Under Crawford v. Washington.

1. Statements made to private persons are testimonial if an objective witness would reasonably believe those statements would be used at trial.

Respondent asserts that statements made by Eva at the scene to James and Frances Blacksher do not come under Crawford because they were nontestimonial. (RB, p. 120.) The argument is flawed because respondent uses the wrong test for determining what is testimonial: respondent argues that Eva's statements were not made under circumstances "would have led **her [Eva] to believe** such statements would be used later at trial." (RB, p. 121; emphasis provided.) The highlighted language shows

that respondent is (incorrectly) using a subjective test, i.e., what Eva would have believed. Crawford itself describes a possible testimonial statement as one in which "the circumstances would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[8] (Crawford, supra, 541 U.S. at 51.)

Respondent makes much of appellant's description of Eva as "surrounded by police officers" at the time she made her statements to James and Frances, accusing appellant of inaccuracy, and then going to some length to describe Eva as being alone in a patrol car with Brand who was a "counselor" rather than a police officer, etc. Respondent concludes by asserting that "[b]ased on this evidence, there is no support for appellant's contention that Eva was surrounded by police officers when she spoke with Frances and James." (RB, pp. 120-21.)

The dispositive question, however, is not whether or not Eva was "surrounded by police officers," but whether an **objective witness** in Eva's circumstances would reasonably have believed that her statement would be

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[8] Crawford described three possible formulations of the "testimonial" hearsay without expressly endorsing any. At issue here is the third formulation, whether an objective witness would reasonably believe the statement would be available for use at a later trial.

used later at trial. Eva's statements were made while she was in an "official" police car and had been kept in a police car for a number of hours. (Vol. 11, RT 2442-44; Vol. 10, RT 2375.) This official vehicle carried lettering on the side and was equipped with antennas and a police radio. (Vol. 11, RT 2441.) Darryl Brand, a counselor with the city mental health mobile crisis team that responded to police calls, was at the scene and present with Eva in the official car when her statements were made. (Vol. 11, RT 2440, 2447.) Officers Larsen, Queen, Neilsen and Counts were at the scene. (Vol. 7, RT 1741, 1745, 1869; Vol. 10, RT 2379.) Inspector Bierce was at the scene. (Vol. 8, RT 1899.) Police identification technician Michael O'Shea was also present. (Vol. 7, RT 1763, 1769.) Channel 7 television crew were present and taping. (Vol. 11, RT 2458.)

In sum, at least six police officials plus the city worker were at the scene and Eva had been held inside an official car for several hours. Although the police may not have been in the immediate vicinity of Eva at the time she made her statements, it is still fair to say that Eva was "surrounded" by police and police activity at the time of her statements, and was effectively being held in police care and custody. An objective witness, making a statement in an official car, equipped with police equipment, at the scene of a double homicide and in the presence and

custody of a person asked by the police to keep her in the car, would reasonably believe that her statements would be used at trial.

Respondent points out that Eva's statements were "in the backseat of an unmarked police vehicle;" that although Brand was present in the vehicle when Eva's statements were made, she "did not listen in [] and there is no indication that Eva believed Brand was listening in;" and that nothing indicated that Brand was acting as a police officer. (RB, p. 121.)

Respondent missteps by arguing Eva's **subjective** point of view: Crawford makes clear that this Court must consider the perspective of an "objective witness." Irrespective of whether Eva believed Brand was acting in an official police capacity, and irrespective of whether Eva believed Brand was listening in, an **objective witness** would reasonably be led to believe that her statement would be used at trial where it was made in an official vehicle, in the presence of a city official, at the scene of a homicide.

Furthermore, whether or not Brand was actually acting as a "police officer" or a city counselor does not matter. A statement made by the declarant to a private person can still be testimonial within the meaning of Crawford. People v. Cervantes (2004) 118 Cal.App.4th 162, 173-74 assumed that statements to private persons could qualify as "testimonial"

and found the third formulation in Crawford[9] as determinative, i.e., the circumstances under which the statement was made. Addressing a statement made by a codefendant to a neighbor in the process of seeking medical help, the Cervantes court observed that the declarant focused on getting medical care rather than making an accusation and found the statement non-testimonial for this reason, but not because it was made to a private person.

Similarly, People v. Sisivath (2004) 118 Cal.App.4th 1396 specifically rejected an argument by the Attorney General that a videotaped statement could not be "testimonial" because it was given to a layperson rather than a government employee. (Id. at 1402.) Again, the appellate court focused on the third formulation from Crawford, the reasonable expectation of an objective observer. Using this test, Sisivath found a statement made to "forensic interview specialist" to be testimonial in nature.

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[9] Crawford provided three possible "formulations" of the "core class of 'testimonial' statements" – (1) ex parte in-court testimony; (2) statements in formalized testimonial materials; and (3) "'statements that 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.'" (Crawford, supra, 541 U.S. at 51-52.)

In sum, because an objective witness in Eva's position would reasonably expect that her statements would be used at a later trial when they were made to private persons while in an official police vehicle at the scene of a homicide. Consequently, Eva's statements to James and Frances were testimonial under Crawford.

2. Statements made to police officers at the scene of a homicide are testimonial irrespective of whether the police officer considers his questions as a formal interrogation.

Although Eva's statements to Officer Neilsen[10] were made to a police officer, respondent argues that they should be considered "nontestimonial" because (1) Eva was distraught during the 15 minutes she talked to Officer Neilsen;[11] and (2) Neilsen did not intend to take a "formal

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[10] Respondent doesn't address Eva's statements to Inspector Bierce and elsewhere concedes that those statements are testimonial under Crawford. (RB, p. 119.) Respondent does argue that appellant "waived" his claim as to the statements made to Inspector Bierce, which appellant has shown to be entirely wrong. (See above, ARB, Arg. IV, Part A, pp. 23-25.) In light of respondent's concession and his inaccurate waiver argument, this Court must conclude that Eva's statement to Bierce was testimonial – it was the result of a formal police interrogation and thus manifestly testimonial under Crawford. (541 U.S. at 53 [the term testimonial covers "police interrogations"].)

[11] Respondent relies on People v. Corella (2004) 122 Cal.App.4th 461 for the proposition that a spontaneous

statement" from Eva at the scene, but intended only to "gather basic information."[12] (RB, pp. 122-23.)

The premise of both arguments is that testimonial statements under Crawford should be limited to statements produced by formal police interrogation.[13] The problem with this approach is that it misses the larger point of Crawford which requires analysis under the objective witness

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statement to the police at the scene is nontestimonial. (RB, p. 122.) Corella dealt mostly with statements made in a 911 call, but also held that follow-up statements made to a responding police officer were not testimonial on the grounds that Crawford requires a "relatively formal investigation where a trial is contemplated." (Id. at 468.) Appellant disagrees. Crawford refers to "police interrogations" **not** "formal" police interrogations. (Crawford, supra, 541 U.S. at 53.)

[12] Respondent here relies on People v. Morgan (2005) 125 Cal.App.4th 935 which held that statements made to a police officer pretending to be a drug associate were not testimonial. This makes sense in terms of Crawford's focus on the objective witness. Statements made to someone the declarant believed was a partner in crime are not testimonial because an objective witness would not reasonably expect such statements to be used at trial.

[13] This Court has granted review in a number of cases on the question of what constitutes a testimonial statement under Crawford. (See e.g., People v. Cage, rev. granted Oct. 13, 2004, S127344; People v. Adams, rev. granted Oct. 13, 2004, S127373; People v. Lee, rev. granted Mar. 16, 2005, S130570; People v. Ochoa, rev. granted Nov. 17, 2004, S128417; People v. Kilday, rev. granted Jan. 19, 2005, S129567.

formulation. Statements made to the authorities by persons who should reasonably expect that the statement would be used at trial are precisely the type of accusatory statements the Confrontation Clause was designed to address – regardless of the "formality" of the setting or the "intent" of the police officer. United States v. Cromer (6th Cir. 2004) 389 F.3d 662, 673-74 discussed the agreement among several other federal circuits that the focus is on whether the declarant has made an accusatory statement. Cromer quoted an article by Professor Richard Friedman also cited approvingly in Crawford. (See Friedman, Confrontation: The Search for Basic Principles, 86 Geo.L.J. 1011 (1998) ["A statement made knowingly to the authorities that describes criminal activity is almost always 'testimonial.'"].)[14]

Appellant contends that the rule more in line with the letter and spirit of Crawford is that set forth in People v. Price (2004) 120 Cal.App.4th 224 [victim's statement to the police at the scene was testimonial]. (See also Spencer v. State (Tex.App. 2005) 162 S.W.3d 877, 881 [because excited

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[14] The United States Supreme Court has granted certiorari on the question whether an oral accusation made to a police officer at the scene of an alleged crime is testimonial under Crawford. See Hammon v. State (Ind. 2005) 829 N.E.2d 444, *cert. granted*, Hammon v. Indiana (05-5705).

utterances can be made both spontaneously **and** in response to questioning, court declines to find that excited utterances can never be testimonial]; Commonwealth v. Gonsalves (Mass. 2005) 883 N.E.2d 549 [statements made in response to police questioning at the scene of a crime are "per se testimonial" except where necessary to secure a volatile scene or obtain medical care].)

In sum, Eva's statements at the scene to James and Frances Blacksher and to Officer Nielsen, and to Inspector Bierce (as respondent concedes), are testimonial under Crawford and admissible at trial only if appellant had a prior opportunity to cross-examine Eva who was unavailable at the time of trial.

3. Appellant had no opportunity to cross-examine Eva regarding her extrajudicial statements, and their admission thus violated his federal right of confrontation.

Respondent acknowledges that at the preliminary hearing Eva could no longer remember the details of the day in question, and that she did not remember signing or even seeing the statement to Inspector Bierce that bore her signature. (RB, p. 127.) Nonetheless, respondent argues that the cross-examination of Eva at the preliminary hearing was sufficient for Sixth Amendment purposes because "[a]n ineffective cross-examination due to

failed memory does not constitute a Confrontation Clause violation." (RB, p. 127.)

Respondent relies on United States v. Owens (1988) 484 U.S. 554, a case discussed and distinguished at length by appellant in his Opening Brief. Respondent does not address appellant's arguments. Rather than repeat them here, appellant refers this Court to his Opening Brief. (See AOB, pp. 132-34.) In short, the basic problem was not that Eva was suffering a discrete memory deficit or having a problem remembering all the details, as respondent implies. Rather, as shown from the preliminary hearing transcript, Eva was encumbered by a dementia so profound she could not remember if she could remember (Vol. I, CT 109) and was unable to understand the questions posed to her (Vol. I, CT 106).

The "opportunity" to cross-examine someone who cannot understand the cross-examination does not comport with the Sixth Amendment right of confrontation.

C. The Admission of Eva's Testimonial Hearsay Statements Prejudiced Appellant's Defense.

Respondent repeats the evidence introduced by the prosecution at trial and then concludes that because of this "compelling evidence" of guilt, the erroneous admission of Eva's hearsay statements was harmless. (RB, p.

131.) However, because the admission of Eva's hearsay violated appellant's federal rights of confrontation, the prejudice must be assessed under Chapman v. California (1967) 386 U.S. 18, 24. Under Chapman, the appellate court cannot just look at the evidence properly admitted; rather, the focus must be on the impact of the erroneously admitted evidence vis-a-vis the other evidence at trial. Yates v. Evatt (1991) 500 U.S. 391 explained that the Chapman test requires reversal if there is a reasonable possibility that the evidence complained of might have contributed to the conviction. (Id. at 403.) To say that an error did not contribute to the verdict means that the error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." (Ibid.)

As demonstrated in the Opening Brief, under this test, the erroneous admission of Eva's hearsay was clearly prejudicial to appellant, that is, there is a reasonable probability that it contributed to the verdict. First, the prosecutor not only relied on Eva's hearsay in closing argument, but highlighted that hearsay, arguing it had a heightened reliability vis-a-vis her former testimony. Secondly, the defense theory of the case depended heavily on Eva's former testimony, and the admission of Eva's hearsay was detrimental to that defense. (See AOB, pp. 150-51.)

In sum, it is not enough to conclude, as does respondent, that there

was other evidence of appellant's guilt. The Court must look at how the erroneously admitted evidence impacted the jury's verdict. Here, that impact is clear: the prosecutor was explicit in emphasizing the hearsay as more reliable than Eva's sworn testimony. The error was prejudicial.

D. Eva's Extrajudicial Statements Were Inadmissible Under State Law As Well As Under Crawford.

Appellant contends that all Eva's hearsay statements were admitted in violation of his federal confrontation rights. However, because the trial court admitted the statements under state hearsay exceptions, appellant shows that the rulings on state law were also in error.

1. Eva's extrajudicial statements were not reliable.

Respondent argues that Eva's extrajudicial statements fell within the firmly rooted spontaneous statement exception and were thus "presumptively reliable" under Sixth Amendment jurisprudence. (RB, p. 125; see e.g., Idaho v. Wright (1990) 497 U.S. 805, 815.) To the extent a statement is **truly spontaneous** or contemporaneous to the event described, it may not pose a confrontation problem. (Idaho v. Wright, supra, 497 U.S. at 820.) However, to the extent that this Court construes the California statute to define the exception broadly, so that a spontaneous statement exception need not really be spontaneous, see e.g, People v. Brown (2003)

31 Cal.4th 518, 541; or so that a spontaneous statement can be made in response to questioning, see e.g., People v. Farmer (1989) 47 Cal.3d 888, 903-04, a confrontation problem arises. Crawford implied that a spontaneous statement was excepted from Sixth Amendment protection only to the extent that such a statement was made "'immediately upon the hurt received and before [the declarant] had time to devise or contrive any thing for her own advantage.'" (Crawford, supra, 541 U.S. at 58, fn. 8.)

Respondent argues that the focus for testing reliability is not on the declarant's mental state at the time the statements were made, but on whether the statements themselves bear particularized guarantees of trustworthiness. Respondent contends that Eva's hearsay statements were reliable because she repeated the same account to different people and because her statement was somewhat corroborated by other evidence. (RB, p. 125.)

Appellant disagrees. Eva's extrajudicial statements were not consistent with each other. (See AOB, pp. 116-18 [pointing out inconsistencies].) Moreover, respondent cites no authority for his assertion that the focus on reliability is on the statement itself to the exclusion of the declarant's mental state. In fact, the actual state of the law is contrary to respondent's claim.

Idaho v. Wright (1990) 497 U.S. 805 expressly held that the "'particularized guarantees of trustworthiness'" of a hearsay statement "must be shown from the **totality of the circumstances**" and that the relevant circumstances include "those that surround the making of the statement and that render the declarant particularly worthy of belief." (Id. at 819; emphasis supplied.) Thus, the declarant's mental state, including whether the declarant had a motive to invent the statement, and the possibility of fabrication, are relevant circumstances. (Id. at 826.) However, "the use of corroborating evidence to support a hearsay statement's 'particularized guarantees of trustworthiness'" is **not** a relevant circumstance in determining reliability. Concluding that a statement is reliable because of corroboration "would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial," which is at odds with the Sixth Amendment. (Id. at 823.) Thus, this Court must reject as inapposite respondent's argument that Eva's hearsay should be deemed "reliable" because it was "corroborated by other evidence." (RB, p. 125.)

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2. Eva's statements were not admissible under the spontaneous statement hearsay exception because the prosecution failed to establish that Eva perceived the events narrated in her extrajudicial statements.

Respondent argues that "the facts available to the trial court at the time it made its ruling" show that Eva did perceive the events she described. (RB, p. 106.) That is, although there was no direct evidence of such perception, respondent asserts that it "could be inferred" from the prosecution's offer of proof that Eva witnessed the events before and after the shooting of Torey and that she was present when Versenia was shot. (RB, pp. 107-08.)

First of all, the prosecution's "offer of proof" included only the following statements made by Eva: "Erven shot [Versenia] and Torey. He may have shot himself, too." "Erven came into the house and argued with his sister. He shot her and her son. . . . . I think they are dead. I think he used a handgun. It was concealed." "Erven shot Torey and [Versenia]. Why, why, why? He didn't have to do this. She fell into my arms. I laid her down on the floor." (Vol. III, CT 555-56.)

The other evidence known to the trial court at the time of the ruling was proffered by appellant and included Eva's statements to Officer Bierce. Eva said that she heard a shot, then went into the dining room and saw that

Versenia had been shot and saw her fall to the floor. She did not see appellant fire a gun. (Vol. III, CT 655, 658, 661.)

In short, the prosecution's proffer did **not** establish that Eva perceived the event she purported to describe in her out-of-court statements; and the facts known to the trial court at the time of the ruling thus establish that Eva **did not perceive** the shooting. Respondent states that the fact that Eva told Bierce she did not see the shooting, and that she told Adams she thought appellant shot himself do not "prove" that she did not perceive the shootings. (RB, p. 111.) Appellant disagrees: surely a statement that she did not see the shooting "proves" it. But respondent misses the point. Appellant did not have to prove that Eva did not perceive the events she purported to narrate. Rather it was the prosecution, as the proponent of the evidence, that had the burden of proving that Eva **did** perceive the shooting, or that she had perceived sufficiently to make a statement of her belief.[15]

Respondent next argues that in any case it is not required that the declarant "have actually seen the event described, rather than having

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[15] The proponent of the evidence has the burden of producing evidence as to the existence of a preliminary fact, which is accomplished by a showing sufficient to sustain a finding. (Evid. Code, § 403, subd.(a); People v. Sanders (1995) 11 Cal.4th 475, 514.)

acquired knowledge of the event from the surrounding circumstances through the use of his or her senses." (RB p. 108.) In this context, respondent attempts to distinguish the facts here from the case on which appellant relies, People v. Phillips (2000) 22 Cal.4th 226 [exclusion of hearsay where the evidence supported a finding that the declarant could have been repeating what he heard from someone else]. (See AOB, p. 135.)

Respondent asserts that there is no possibility Eva could have been repeating what she heard from someone else since she was inside the house at the time, and thus, "unlike the declarant in Phillips, Eva's statements were based on her own personal observations." (RB, pp. 108-09.) Respondent sets up a false dichotomy, as if the only two possible scenarios are that (1) Eva described what she perceived; and (2) Eva repeated what someone else said. In truth, people make statements – from outright lies to assumptions to statements meant to accommodate their listeners' expectations. That there was no evidence that Eva might have repeated what someone else said does not translate into evidence that she **saw** the events she described.

Respondent argues that this case is like People v. Brown (2003) 31 Cal.4th 518, in which the evidence showed that the hearsay declarant was in the car directly behind the victim's truck and he had a clear view of the

scene. But this is also incorrect, since here, unlike Brown, the evidence did **not** indicate that Eva had a clear view of what she later narrated.

According to respondent, even if Eva's statements "did not unquestionably carry the inference that she spoke from personal experience . . . neither do her statements purport to be a repetition of something she heard from someone else." (RB, pp. 109-10.) As stated above, this does not resolve the issue. The lack of evidence that Eva was repeating something she heard is not evidence that Eva saw what she described.

Finally, respondent likens the facts here to those in People v. Riva (2003) 112 Cal.App.4th 981, which held that a spontaneous statement could include an impression or belief where the declarant had sufficient information to form that belief, i.e., where the declarant saw a gun aimed at him, ducked, and then heard a bullet whiz, he still perceived the killer's target for purposes of the spontaneous statement hearsay exception. (RB, p. 110.) Respondent concludes that Eva also possessed "sufficient information" to state her belief that appellant shot Torey and Versenia. (RB, p. 110.) The analogy is inept. Here, there was no evidence that Eva ever even saw appellant with a gun – the prosecutor's offer of proof is that Eva said "I think he used a handgun. It was concealed." (CT 555.)

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3. Eva's statements were not admissible as a spontaneous statement hearsay exception because the prosecution failed to establish that her statements were made spontaneously.

Respondent argues that Eva's statements to Neilsen and James and Frances Blacksher[16] were spontaneous despite the lapse of time between the events Eva purported perceived and the statements she uttered. (RB, pp. 111-13.) As pointed out in the Opening Brief, if a spontaneous statement is one without deliberation, People v. Farmer (1989) 47 Cal.3d 888, 903; and if deliberation can be formed with "great rapidity," see e.g., People v. Sanchez (1995) 12 Cal.4th 1, 34; then a spontaneous undeliberated statement cannot be one that took place hours after the event purportedly perceived. (AOB, pp. 137-38.) Respondent fails to address this argument.

Respondent also fails to address the significance of Eva's fragile mental state, encumbered by dementia, even though the declarant's mental state is the crucial element in determining whether a statement is sufficiently reliable to be admitted as a spontaneous statement. (See AOB, p. 138, citing People v. Brown (2003) 31 Cal.4th 518, 542.)

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[16] Respondent makes no attempt to argue that Eva's statements to Inspector Bierce were "spontaneous," on the ground that the statements to Bierce were not admitted as spontaneous statements but as impeachment of Eva's preliminary hearing testimony. (See RB, p. 105, fn. 15.)

4. Eva's extrajudicial statements were not admissible to impeach her preliminary hearing testimony.

Respondent concedes that Eva's hearsay statements were not admissible to impeach her preliminary hearing testimony under Evidence Code section 1294, as appellant argued in his Opening Brief. (See AOB, pp. 142-44; RB, pp. 113-14.) Nonetheless, respondent argues that Eva's statements were admissible for impeachment under Evidence Code section 1202. (RB, p. 114.) This is incorrect. According to the Law Revision Commission's Comment to section 1202 and People v. Beyea (1974) 38 Cal.App.3d 176, 192-94, prior inconsistent statements are admissible to impeach a hearsay declarant's statement only by the party **against whom** the evidence is admitted. (See also Witkin, California Evidence (3d Ed. 2000) Vol. 3, pp. 445-46; see AOB, pp. 158-60.) Because the prosecution introduced Eva's preliminary hearing testimony under the former testimony hearsay exception, **appellant** (the party against whom that hearsay was admitted) could have impeached those statements with prior inconsistent statements, but respondent could not.[17] (See Arg. V, below, pp. 47-57.)

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[17] Respondent focuses on an argument made in the Opening Brief that Eva's hearsay statements were inadmissible to impeach her former testimony under Evidence Code section 1202 because they were made before rather than

Respondent argues specifically that Eva's hearsay statements to Inspector Bierce were admissible to impeach her former testimony: respondent is keen to find an exception to Eva's hearsay to Inspector Bierce because he has conceded that the Bierce statement is testimonial under Crawford. (See RB, p. 119.)

However, irrespective of the question of the timing of impeachment under section 1202, Eva's extrajudicial statements to Bierce (and to the others) were inadmissible to impeach her former testimony, because section 1202 allows for the admission of such impeachment only by the party **against whom** the former testimony hearsay was admitted. The prosecution introduced Eva's former testimony; consequently, the prosecution the party against whom the testimony was admitted and the prosecution was thus not permitted to impeach that former testimony.

5. Conclusion.

In sum, the trial court erred under state law as well as under the federal constitutional principles of confrontation in admitting Eva's

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after her preliminary hearing testimony. Respondent is correct in stating that the cases relied on in the Opening Brief at page 142 were superseded by statute. (RB, pp. 114-16.) However, as set out in the Opening Brief in Arg. V, p. 159, and in the above paragraph, Eva's hearsay is still inadmissible under Evidence Code section 1202.

extrajudicial statements. The prejudice from this error is addressed above under Part C , pages 34-36.

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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. Defense Counsel's Objection to This Evidence Fairly Apprised the Trial Court of the Nature of the Issue and Thus Preserved the Issue for Appeal.

Even though, as respondent concedes, defense counsel objected to the admission of Eva's extrajudicial statements for impeachment purposes, and both the prosecutor and the trial court addressed this evidence focusing on whether it was improper impeachment evidence, respondent argues that appellant has waived this claim because counsel did not specify Evidence Code section 1235. (RB, p. 139.) Respondent relies on People v. Williams (1997) 16 Cal.4th 153, 250, in which this Court held that a relevancy objection did not preserve an argument on appeal that the evidence was more prejudicial than probative under Evidence Code section 352. Here, however, defense counsel objected at trial on the same grounds as argued on appeal, i.e., that the evidence was improper impeachment. In People v. Partida (2005) 37 Cal.4th 428, 434, this Court warned that the requirement of a specific objection "must be interpreted reasonably, not formalistically."

Partida quoted the language in Williams that an objection "'must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought . . . .'" (Partida, supra, 37 Cal.4th at 435.) Partida concludes that where the objection at trial was for the same reason as that advanced on appeal, the error is preserved. (Ibid.) Partida expressly held that a defense objection at trial preserved an issue for appeal even though the trial objection did not cite the applicable case law. (Ibid.)

Respondent attempts to inflate the waiver doctrine to the point where no claim is preserved unless at trial defense counsel not only objected on the same grounds, but cited the same statute, case law, and made the same arguments as made on appeal. In Partida, this Court rejected such an expansive use of the doctrine.

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

Respondent agrees that Eva's hearsay statements were not admissible to impeach her former testimony under Evidence Code section 1235, but argues that they were admissible under Evidence Code section 1202. (RB, pp. 139-40.) However, as appellant pointed out in his Opening Brief, and above in Argument IV, prior inconsistent statements are

admissible under section 1202 only by the party against whom the evidence is admitted. Consequently, in this case **only appellant** could impeach Eva's former testimony with her prior inconsistent statements. (See AOB, p. 159; see above Arg. IV, Part D, section 4, pp. 44-45.)

People v. Beyea (1974) 38 Cal.App.3d 176, 194, upon which appellant relies, so holds. Respondent acknowledges this holding but argues that this case is "distinguishable" from Beyea. (RB, pp. 140-41.) Respondent is wrong.

Respondent urges this Court to except this case from the rule in Beyea because even though the prosecutor was the party introducing Eva's former testimony, the testimony actually favored the defense, so "[i]n effect, it was the prosecution, not appellant, who was really the party 'against whom' Eva's preliminary hearing testimony was admitted," and the prosecution was entitled to impeach that former testimony under section 1202. (RB, p. 141.) Under respondent's interpretation, the prosecution introduced Eva's former testimony **against itself** and was thus entitled to impeach that testimony. Such an interpretation renders Evidence Code section 1202 essentially meaningless and should be rejected for that reason. (People v. Johnson (2002) 28 Cal.4th 240, 246-47.)

Respondent's reliance on People v. Ross (1979) 92 Cal.App.3d 391

and People v. Marquez (1979) 88 Cal.App.3d 993 is misleading. Neither case involved a prosecutor being allowed to impeach hearsay he himself introduced – both cases involved the prosecution's impeachment of hearsay statements **introduced by the defendant**. (Ross, supra, 92 Cal.App.3d at 406; Marquez, supra, 88 Cal.App.3d at 998.) Thus both cases stand for the proposition asserted by appellant, that impeachment of hearsay evidence can be done only by the party against whom the hearsay was admitted.

Secondly, it is not correct that Eva's former testimony did not favor the prosecution and that the prosecution "sought to discredit that testimony in its entirety." (RB, p. 141.) Eva's former testimony included the information that appellant had a key to Eva's house, an important piece of the prosecution's case. (Vol. III, CT 760, 763; Vol. 12, RT 2704.) Eva stated in her former testimony that appellant came into the house that morning and talked to her – another fact that the prosecution relied on and did not try to discredit. (Vol III, CT 757; Vol. 12, RT 2704.) Eva also stated in her former testimony that Versenia called her and said she heard a gun shoot, and the prosecution relied on this fact and did not try to discredit it. (Vol. III, CT 757-59; Vol. 12, RT 2695, 2710-11.) In sum, just as in Beyea, supra, 38 Cal.App.3d at 192-93, the prosecutor used Eva's hearsay statements to shore up its case without trying to destroy the credibility of

her former testimony.

Finally, respondent argues that because inconsistent statements are admissible only for impeachment purposes under Evidence Code section 1202, and the trial court so instructed the jury, the admission of Eva's statements to Ruth were not in violation of section 1202. (RB, pp. 141-42.) This argument makes no sense. The trial court's instruction to the jury does not justify the admission of statements under section 1202. The admission of Eva's hearsay to Ruth violated section 1202 because section 1202 allows for the admission of prior inconsistent statements only by the party against whom the former testimony hearsay was admitted, that is, by appellant. Because Eva's hearsay to Ruth was introduced by the prosecution, it was in violation of section 1202.

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

Appellant contends that Eva's state of mind the day before the killings was not in issue, and thus her hearsay statements to Ruth are not admissible under the state of mind exception set out in Evidence Code section 1250. (Abo, pp. 160-61.) Respondent acknowledges that hearsay is admissible under this section only if the declarant's state of mind is "factually relevant," but contends that Eva's conduct and state of mind that

day were relevant to show Eva's "fear" of appellant and to assist the jury in assessing Eva's credibility. (RB, pp. 142-43.)

However, the case cited by respondent does not support his position: respondent cites to People v. Ruiz (1988) 44 Cal.3d 589, 608 for the proposition that "**a victim's out-of-court statements of fear** are admissible under section 1250 only when the victim's conduct in conformity with that fear is in dispute." (Emphasis supplied.) Ruiz held that evidence of the victims' expressions of fear of the defendant were **not admissible** under section 1250 because neither their states of mind nor their conduct prior to their deaths were an issue in the case which might have been resolved by the challenged evidence. (Ibid.) Eva was **not** a victim and her conduct the day before the shootings was not a material issue.

Respondent's alternative argument is that Eva's conduct the day before the shootings should be deemed a material issue in the case because at the preliminary hearing she was a "reluctant" witness against appellant insofar as she denied being afraid of him; and that evidence that she was afraid of him "assisted the jury in assessing her credibility." (RB, p. 143.)

This argument is flawed both logically and legally. The argument requires the Court to make a credibility determination – to **assume** that Eva was lying at the preliminary hearing when she said she was not afraid of

appellant, and to further assume that this that this lie made her a "reluctant" witness. Then a leap of logic must be made to conclude that because Eva was "reluctant," her state of mind at the time she made a statement contrary to her preliminary hearing testimony is a material issue in the case because it would "assist" the jury in determining credibility. If respondent's theory is correct, then any witness' state of mind or conduct at any time before or after the time of the offense is a "material issue" because any statement made any time by that witness would "assist" in determining the witness' credibility. In effect, such a theory would completely eradicate the prohibition against hearsay because any extrajudicial statement on any issue could be argued as relevant to bias or credibility.

The case law, however, has forbidden such a wholesale eradication of the rules of evidence under the guise of "impeachment" or to show bias. People v. Lavergne (1971) 4 Cal.3d 735, 741 held it improper to elicit otherwise irrelevant testimony on cross-examination merely for the purpose of impeaching the witness where that impeachment has no bearing on the question of the defendant's guilt or innocence. People v. Lo Cigno (1961) 193 Cal.App.2d 360, 379, declared it "an invariable rule that the testimony of a witness elicited on cross-examination cannot be impeached by contrary evidence unless the testimony sought to be contradicted was relevant and

material as proof of a fact in issue." People v. Matlock (1970) 11 Cal.App.3d 453 reversed a conviction where the prosecutor asked the defendant if he "enjoyed" beating people, and then was allowed to cross-examine him extensively about his misdemeanor battery convictions on the theory that the defendant had "opened the gates" by denying that he enjoyed beating people. (Id. at 456.)

Respondent's argument exemplifies the tactics held inadmissible in these cases. Respondent argues that hearsay evidence that Eva feared appellant was "material" and admissible because Eva testified at the preliminary hearing that she was not afraid. The mere existence of contradictory evidence on the question of fear does not make the question of Eva's fear of appellant into a material issue, however. Under LoCigno Eva's testimony could not be impeached by contrary evidence unless her fear of appellant was relevant in the first place. Of course it was not, but respondent argues (incorrectly) that hearsay as to Eva's fear is a material issue relevant to guilt or innocence.

Respondent also argues that hearsay evidence of Eva's fear of appellant was relevant to prove her conduct in conformity with that fear, i.e., her participation in the restraining order process. (RB, pp. 143-44.) However, the evidence of the restraining order was not itself relevant to any

issue in the case and appellant objected to it on that basis; and the trial court ruled Eva's hearsay regarding the restraining order admissible "only [] for impeaching the previously read testimony of Eva Blacksher." (Vol. 9, RT 2172.) In essence, respondent argues that if hearsay evidence tends to prove conduct in conformity with a state of mind, otherwise irrelevant evidence about that conduct becomes relevant by virtue of the fact that it can be proven! Such is not the law and respondent provides no authority in support of his arguments.

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

Respondent first argues that appellant has waived any claim that Ruth's testimony was improper lay opinion evidence because appellant did not object on that ground below. (RB, p. 144.) Defense counsel repeatedly objected to this testimony as improperly calling for a conclusion and as speculation as to what Eva knew or thought. (Vol. 9, RT 2142, 2145, 2146, 2150-51.) Lay opinion testimony is inadmissible because it is an improper speculation. Thus, these objections fairly informed the trial court and the prosecutor as to the basis on which the defense wanted the evidence excluded, and allowed the prosecutor to respond and the trial court to make a fully informed ruling. (People v. Partida, supra, 37 Cal.4th at 435.)

Next, respondent argues that Ruth did not testify as to her opinion about the truth of Eva's statements, but rather that Ruth's testimony was based on her own perceptions. (RB, pp. 144-45.) This is incorrect. Ruth testified to what Eva "knew;" Ruth testified that Eva was "afraid" because of an event which Ruth herself did not witness; and Ruth testified to why Versenia was reading to Eva – all of which were necessarily opinions and not observations. (See AOB, pp. 154-55.)

E. The Erroneous Admission of Ruth's Testimony Prejudiced the Defense.

Respondent argues that the admission of Eva's hearsay to Ruth does not violate appellant's Sixth Amendment right to confrontation under Crawford v. Washington because Eva made her statements "while no governmental officials were present" so that the statements should be considered nontestimonial. (RB, p. 145.) The test under Crawford is not to whom the statements are made but rather whether an objective witness would reasonably believe the statement would be available for use at a later trial. (Crawford, supra, 541 U.S. at 51-52.)

As set out above, see Arg. IV, Part B, section 1, pp. 25-30, statements made to a private person can be testimonial. (People v. Cervantes, supra, 118 Cal.App.4th at 173-74; People v. Sisivath, supra, 118

Cal.App.4th at 1402.) The only relevant question is whether an objective witness would reasonably expect that statements made while in the process of seeking and obtaining a temporary restraining order could be used in trial. Appellant submits that the answer is yes.

As to prejudice, respondent argues that Eva's hearsay introduced through Ruth's testimony was harmless because the jury had already heard Ruth's own version of these events. (RB, pp. 145-46.) Under Chapman v. California, supra, 386 U.S. at 18, this Court must look at the impact of the erroneously admitted evidence vis-a-vis the other evidence at trial. Yates v. Evatt, supra, 500 U.S. at 403. Appellant has explained at length in the Opening Brief the actual and powerful prejudicial impact of this hearsay testimony: the hearsay portrayed appellant as extremely dangerous, unfairly augmented Ruth's credibility at the same time, and tended to support the credibility of other hearsay by Eva as opposed to her former testimony. (See AOB, pp. 162-64.) Respondent does not address or counter any of these arguments.

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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

A. This Claim Is Properly Before This Court.

Relying on People v. Morrison (2004) 34 Cal.4th 698, 724, respondent argues that appellant has waived this issue on appeal because defense counsel did not cite any hearsay exception or nonhearsay purpose for the proffered evidence. (RB, pp. 149-50.). However, Evidence Code section 354 provides that appellate review of a claim of erroneously excluded evidence is proper if "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means." Appellant's offer of proof was sufficient to preserve this issue for appeal. As set forth below, the evidence was admissible.

B. The Trial Court Applied the Evidentiary Rules Unevenly Thereby Violating Appellant's Federal Due Process Rights.

Respondent argues that the trial court excluded only inadmissible hearsay and did not entirely preclude the defense from presenting evidence of appellant's mental state, citing to evidence that the defense did manage

to introduce on this point. (RB, pp. 150-51.)

Even assuming that appellant was able to introduce some evidence of his mental state, respondent's argument does not address the larger problem presented by this claim, i.e., that the trial court indulged in an asymmetrical application of the rules of evidence, thus denying appellant his federal constitutional due process rights. (See AOB, pp. 171-72.) For example, if the trial court correctly refused to allow the defense to elicit testimony from James as to whether appellant acted paranoid around Torey (sustaining the prosecutor's objection of conclusion), then how could the trial court overruled the defense objection of conclusion and permit the prosecution to elicit testimony from Ruth that Eva was afraid? In his briefing, respondent argues that Ruth was only testifying to her own perceptions. (See RB, p. 145.) Yet when defense counsel tried to elicit from James his own perceptions as to how appellant acted around Torey, the trial court refused to allow it.

And if respondent is correct that Eva's former testimony could be impeached with Ruth's testimony that Eva said she was afraid of appellant (see RB, p. 143), then the trial court should also have allowed testimony from Sammy Lee that other members referred to appellant as "crazy" to impeach those relatives' testimony that they were unaware of appellant's

mental problems. These examples and those cited by appellant in his Opening Brief (see AOB, pp. 166-68) highlight the unavoidable fact that the trial court treated the parties differently and this asymmetrical application of the rules of evidence violated appellant's federal due process rights.

For this reason, and because the trial court did improperly exclude defense evidence, the resulting prejudice must be reviewed under Chapman v. California, supra, 386 U.S. at 18. Appellant explained in his Opening Brief how the trial court's ruling distorted the truth-finding function of the jury. Respondent does not address this point. Appellant thus refers this Court to the discussion in his Opening Brief. (AOB, pp. 173-74.)

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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. Defense Counsel's Objection Preserved This Claim for Appeal.

Respondent reiterates the argument that appellant has failed to preserve his claim for appeal because counsel did not object at trial on the "same ground" raised on appeal. (RB, p. 157.) Respondent is incorrect. Defense counsel's first objection at trial to the prosecutor's improper cross-examination was on **relevancy** grounds. The objection was overruled. (Vol. 12, RT 2649.) On appeal, appellant argues that the trial court "erred in allowing the prosecution to introduce irrelevant but highly prejudicial evidence on cross-examination of Dr. Davenport." (AOB, pp. 179-81.) This is the **same** ground as the trial objection and appellant's claim is thus properly preserved on appeal: it fairly informed the trial court and the prosecutor as to the basis on which the defense wanted the evidence excluded, and allowed the prosecutor to respond and the trial court to make a fully informed ruling. (People v. Partida, supra, 37 Cal.4th at 435.)

While appellant also frames the claim on appeal in terms of the

prosecutor's cross-examination going beyond the scope of the trial court's initial ruling, this is just another formulation of irrelevancy. As appellant pointed out in his Opening Brief, the trial court itself stated that the details of appellant's history of mental illness (the subject of the prosecutor's improper cross-examination) were ruled inadmissible **because** there were "[n[o]t relevant to an issue we were trying to accomplish." (Vol. 12, RT 2798-99; see AOB, p. 180.)

Respondent next points out that appellant's subsequent objections were on grounds other than relevancy, and that but for one, they were all overruled. (RB, pp. 157-58.) This is correct, but since defense counsel's objection on relevancy had already been (incorrectly) overruled, he cannot be faulted for further objections on other grounds.[18]

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[18] Respondent also argues that appellant's failure to object should not be excused based on a claim of futility because "this was not a case such as People v. Hill (1998) 17 Cal.4th 800, 820-22, in which the trial court was hostile towards defense objections. (RB, p. 158.) Appellant disagrees. During this spate of objections, the trial court chastised defense counsel in the presence of the jury for objecting to the prosecutor's hypothetical as "skirting on misconduct." The court then told the jury that it was "improper" for the defense to use the word "misconduct." (Vol. 12, RT 2655.) Where defense counsel is publicly scolded for objecting to prosecutorial misconduct on the basis of "misconduct," it is fair to say that the trial court treated defense counsel's objections in a hostile manner.

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

Respondent argues that "the prosecutor's questions on cross-examination did not exceed the scope of direct examination." (RB, p. 158.) However, cross-examination beyond the scope of direct examination is not appellant's claim. Appellant argues in the Opening Brief that the trial court erred in allowing the prosecutor to exceed the scope of the court's own earlier ruling that evidence of appellant's hospitalizations were admissible only for the limited purpose of impeaching family members, a ruling made on relevancy grounds. (Vol. 12, RT 2633 [instruction to jury]; Vol. 12, RT 2798-99 [trial court reiteration of its ruling on the grounds of relevancy].) Consequently, respondent's arguments based on the permissible scope of cross-examination are immaterial.

Respondent also argues that the objectionable testimony was relevant because by exploring the details of appellant's history of mental illness the prosecutor "was able to argue that the details were more consistent with malingering than mental illness." (RB, p. 159.) Moreover, according to respondent, the prosecutor's questioning as to appellant's demeanor during examination by Dr. Davenport was within the scope of permissible cross-

examination and was intended to show that if appellant did not appear mentally ill to Dr. Davenport, "then it would be reasonable for family members not to realize he was mentally ill." (Ibid.)

Respondent is correct as to the use to which the prosecutor was able to put the objectionable testimony (respondent notes that "such evidence tended to undermine the defense's position.") (RB, p. 159.) However, respondent ignores the salient point that the trial court had already ruled that Dr. Davenport's testimony was admissible solely to impeach the testimony of certain of appellant's relatives who claimed no knowledge of appellant's mental illness. (Vol. 12, RT 2633 [limiting instruction], 2798-99 [trial court reiterates that the details of appellant's mental history were not relevant].)

Dr. Davenport's testimony that appellant stayed in Napa Hospital for only a few days in 1975, Dr. Davenport's own lack of independent knowledge of appellant's stay in Napa, Dr. Davenport's response to hypothetical questions as to whether earlier diagnoses of appellant were in doubt, and Dr. Davenport's opinion as to malingering, and his own descriptions of appellant's mental status and his conclusion as to appellant's competency in 1996 (the subject of appellant's repeated objections) was **not relevant** to the question whether appellant's relatives knew or did not know

cof his mental illness. Only the bare facts of appellant's hospitalizations and diagnosis were relevant on this point, as the trial court itself had ruled and later agreed. (Vol. 12, RT 2798-99.)

In a footnote, respondent contends that appellant's Fifth Amendment rights under Estelle v. Smith (1981) 451 U.S. 454 were not violated because appellant "was the party responsible for calling Dr. Davenport to the stand and inquiring into the substance of the competency examination." (RB, p. 160, fn. 29.) Respondent is wrong. Defense counsel did not inquire into **statements made by appellant during his competency examination**, and those are the statements protected under Estelle v. Smith and the Fifth Amendment. The prosecutor questioned Dr. Davenport at length about appellant's statements during the competency examination. (See Vol. 12, 2658-64.)

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

Respondent argues that the objectionable evidence was not sufficiently prejudicial as to deny appellant his federal due process rights because the prosecution presented "overwhelming evidence" that appellant intended to kill and acted with premeditation. (RB, p. 160.)

However, as stated above, this is not the test for prejudice from a

federal constitutional error as set forth in Chapman v. California, supra, 386 U.S. at 24. Yates v. Evatt, supra, 500 U.S. at 403 explained that the Chapman test requires reversal if there is a reasonable possibility that the evidence complained of might have contributed to the conviction. To say that an error did not contribute to the verdict means that the error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." (Ibid.)

Thus, to assess the prejudicial impact of the error here, this Court cannot just look at the other evidence presented by the prosecution. Rather, the focus must be on the impact of the erroneously admitted evidence vis-a-vis the other evidence at trial. Appellant analyzed the prejudice according to this test in the Opening Brief, and refers the Court to that discussion. (See AOB, pp.181-84.)

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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. Appellant's Claim Is Properly Before This Court as an Issue of Pure Law.

Respondent argues that defense counsel's failure to object to the court's comments or to request an admonition to the jury means that the claim is waived on appeal. (RB, p. 162.) Appellant contends that because of the importance of the claim, it should be addressed by this Court on the merits. The claim is purely one of law and does not turn upon any factual determination below, and thus is reviewable on appeal despite the absence of objection. (People v. Brown (1996) 42 Cal.App.4th 461, 471 [reviewing court can decide pure question of law based on undisputed facts]; People v. Truer (1985) 168 Cal.App.3d 437, 441 [reviewing a prosecution claim for the first time on appeal]; People v. Vera (1997) 15 Cal.4th 269, 276 [defendant not precluded from raising for first time on appeal a claim asserting the deprivation of fundamental constitutional rights]; Ward v. Taggert (1959) 51 Cal.2d 736, 742 [reviewing court can address claim raised for first time on appeal where there is a clear factual record upon

which to base a decision].)

B. The Trial Court's Differential and Disrespectful Treatment of Counsel Prejudiced Appellant's Defense.

Respondent argues that the trial court properly rebuked defense counsel "for engaging in inappropriate behavior." (RB, p. 163.) Respondent addresses each instance in turn, arguing that the trial court's rebuke was "mild," "innocuous," "perhaps gratuitous but hardly prejudicial," or an "appropriate reproach." (RB, pp. 164-68.)

Appellant disagrees in the particulars, and addresses them below. However, it is important to note that respondent misses the general sense of this claim. It is **not**, as respondent has characterized it, whether the trial court "properly reprimanded defense counsel during trial." (See RB, p. 162.) Rather, it is that the trial court gave **differential treatment** to defense counsel and the prosecutor, and that its disrespectful treatment of the defense created the impression it had allied itself with the prosecution, to appellant's detriment. (See AOB, p. 186.) Thus, respondent's attempts to show that in the context of each instance the trial court was "justified" in rebuking defense counsel do not really address or answer the basic question at issue, i.e., the trial court's differential treatment of counsel.

Respondent suggests that it was permissible for the trial court to say

to defense counsel "we don't throw the rules of evidence out just because you're on cross-examination." (RB, p. 164.) Appellant disagrees, since the court's remarks suggest that defense counsel was attempting to operate outside the rules. But the salient point is that the court made these type of sarcastic remarks only to defense counsel, never to the prosecutor.

Next, the trial court chastised defense counsel when she told the witness that the questions would not be restricted to the "script," referring to the transcript. Respondent faults defense counsel for insinuating that the prosecutor's examination of this witness was "scripted," which justified the court's rebuke. (RB, p. 164.) There was no such insinuation by defense counsel, however, since the reference to the "script" was to the typed transcript the witness had been referring to, and not an insinuation that the prosecutor's examination had been rehearsed or "scripted." But once again, the overarching point is that the trial court confined its barbed remarks of this kind solely to defense counsel.

This is clearly shown in the incident in which the court strongly reprimanded defense counsel for objecting to the prosecutor's hypothetical question which was not based on the facts. The court chided defense counsel and then told the jury it was "improper" for defense counsel to use the work "misconduct" in reference to the prosecutor's conduct. (Vol. 12,

RT 2655.) In fact, the prosecutor's hypothetical was not based on the facts in evidence and the trial court later corrected the facts of the hypothetical for the jury. (Vol. 12, RT 2689.) Respondent tries to justify the court's conduct here by depicting saying defense counsel made a "hostile attack on the prosecutor" – but this is absurd. Defense counsel has an **obligation** to make "an assignment of misconduct" in order to preserve a claim of prosecutorial misconduct for appeal. (People v. Samayoa (1997) 15 Cal.4th 795, 841.) Moreover, defense counsel is supposed to ask the trial court to admonish the jury about the misconduct. (People v. Prieto (2003) 30 Cal.4th 226, 260-61.) Respondent has elsewhere in his brief pointed out defense counsel's obligations to make such objections, yet here he suggests that compliance with that duty is improper!

The trial court's differential treatment is also highlighted in the incident where defense counsel properly questioned Elijah about police officers who were present in court to make sure he didn't leave. Such a question was clearly admissible as relevant to his bias and attitude towards testifying.[19] (CALJIC No. 2.20 ["attitude of the witness [] toward the

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[19] A criminal defendant establishes a violation of his right to confrontation "by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of

giving of testimony" is relevant factor in assessing witness's credibility].) Respondent argues – incorrectly and without citation to authority – that the matter of police supervision of a witness was not a proper consideration for the jury and that the trial court therefore correctly "reproached" defense counsel, when it stated, "Please don't make me have to admonish you in front of the jury again." (Vol. 11, RT 2518-19.) Because defense counsel's questioning was entirely proper, the trial court's reproach was not only baseless, it bordered on the contemptuous.

Finally, as to the trial court's sarcastic remark to defense counsel ("Nice try, but . . ."), respondent argues that it was innocuous "especially when considered in light of defense counsel's comeback ("I have to keep trying judge."). (RB, pp. 167-68.) Appellant disagrees. Defense counsel's attempt to make the best of a bad situation does not annul the pernicious effect of the trial court's remarks, especially where, as here, those remarks were part of an extended course of conduct.

In sum, considered together, the many instances in which the judge gave the jury the appearance that he was aligning himself with the

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> the witness, and thereby, 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." (Delaware v. Van Arsdall (1986) 475 U.S. 673, 680.)

prosecution and against the defense amounted to misconduct and a violation of federal due process. (In re Murchison (1956) 349 U.S. 133, 136.)

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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

A. Defense Counsel Objected at Trial to the Inflammatory Photographs and the Claim Is Thus Properly Before This Court.

With respect to the autopsy photographs of Versenia Lee, Exhibits 61 through 65, respondent (incorrectly) contends that the defense "offered no objection to exhibit 61," and objected only to Exhibit 64. (RB, p. 170.) Appellant contends that both Exhibits 61 and 64 were admitted over defense objection.

Respondent cites People v. Morris (1991) 53 Cal.3d 152, 190, overruled on another point by People v. Stansbury (1995) 9 Cal.4th 824, 830, fn. 1, and argues that because appellant did not offer any specific objections (to Exhibits 57, 58 or 61) at the time the trial court considered them, he has waived the issue on appeal. (RB, p. 173.) Respondent's specific point is that appellant's "motion in limine" failed to satisfy this requirement. (Ibid.)

Defense counsel filed an in limine motion objecting to the admission of these photographs on statutory and federal constitutional grounds. (Vol. III, CT 618-26.) Contrary to respondent's implication, at the time the trial

court was considering the admission of the Versenia Lee photographs, defense counsel reiterated an objection to them "as a group." (Vol. 2, RT 400-01.) Then, at the time the trial court was considering the admission of the Versenia Lee photographs (Exhibits 61 through 65), defense counsel repeated an objection to these photographs "as a group." (RT 400-01.)

As to the autopsy photographs of Torey Lee, Exhibits 57 and 58, defense counsel did not offer further specific objections at the time the trial court was considering their admission. However, the court had already stated at the beginning of the proceedings that it was dealing with "the 352 evaluation of the proposed stack of photographs," and asked the parties to advocate for the picture or argue prejudice as the court went through the stack. (Vol. 2, RT 378-79.) Therefore, the underlying purpose of Morris was served and the trial judge was fully able to "determine the evidentiary question in its appropriate context." (Morris, supra, 53 Cal.3d at 190; People v. Lucas (1995) 12 Cal.4th 415, 466 [defense challenge to the evidence was sufficiently understood by trial court and thus preserved for appeal].)

Respondent's reliance on People v. Rodrigues (1994) 8 Cal.4th 1060, 1172 is misplaced. (RB, p. 172.) In that case, the defense requested an Evidence Code section 402 hearing and objected to aggravating evidence

that the defendant had started a fire in prison, asserting the ground of insufficient evidence of his identity as the perpetrator. On appeal, he raised a completely different claim, i.e., that the conduct did not constitute arson, which had not been raised at the section 402 hearing. Rodrigues made a vague reference to the fact that the defendant "may have raised this issue" earlier, but there is nothing in Rodrigues indicating where or how the issue "might" have been raised. Here, by contrast, we have an express written motion raising the issue and an oral reiteration of the objection. Consequently, Rodrigues does not apply.[20]

Respondent also misstates the record when he asserts that appellant has waived any federal constitutional objections since he "did not raise any constitutional objections [] in either his in limine motion or during the section 352 hearing." (RB, p. 173.) Appellant's in limine motion **specifically** objects to the photographs of Versenia and Torey Lee "on the grounds that the introduction of such evidence would violate defendant's

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[20] Respondent also argues that appellant is estopped on appeal from challenging the admission of Exhibit 56 because at trial he requested it be admitted. (RB, p. 173.) However, appellant does not claim on appeal that it was error to admit Exhibit 56 – appellant objects to the admission of Exhibits 57 and 58 (Torey Lee) and Exhibits 61 and 64 (Versenia Lee).

rights to a fair trial, due process of law, and evidence of heightened reliability as guaranteed by the Fourth, Fifth, Sixth Eighth, and Fourteenth Amendments to the United States Constitution . . . . " (Vol. III, CT 618-19.)

In sum, respondent's waiver arguments are unsupported by the record and the case law, and should be summarily rejected.

B. The Irrelevant and Inflammatory Photographs Violated Appellant's Federal Due Process Rights.

As to the merits, respondent contends that the photographs tended to "clarify" the coroner's testimony by showing "the nature of location of the victims' wounds" and were therefore "relevant" to the question whether appellant acted with malice, deliberation and premeditation. (RB, p. 174.) Respondent relies on People v. Smithey (1999) 20 Cal.4th 936, 974 in which this Court found that victim photographs were relevant even though they established the same point as other evidence because the photographs served to corroborate that testimony of several witnesses who had described the scene. (RB, p. 175.)

Respondent asserts that this Court has "repeatedly rejected the argument that victim photographs must be excluded simply because they are cumulative of other evidence in the case." (RB, p. 175, citing Smithey.)

Smithey also holds, however, that under Evidence Code section 352 a trial court's ruling on evidence can be upheld only if the probative value of the challenged evidence outweighs its undue prejudice.

Appellant reiterates that in this case the undue prejudice greatly outweighed the probative value of the photographs, in contrast to the case in Smithey. Respondent asserts that the photographs were "relevant" to the question whether appellant acted with malice, deliberation and premeditation because they show that Torey was shot in the back and that Versenia tried to shield herself. (RB, p. 175.) However, there was no need for either clarification or corroboration of testimony by the autopsy surgeons who testified as to the precise location and nature of the fatal wounds.

Moreover, and in contrast to Smithey, where the photographs were not close-ups or wounds or of such a nature as to inflame a jury, id. at 974, the objectionable photographs of Versenia Lee (Exhibits 61 and 64) and Torey Lee (Exhibits 57 and 58) were close-ups of wounds, and unduly prejudicial for that reason.

Respondent argues once again that appellant "cannot raise a federal due process claim on appeal" because he "did not object on federal constitutional grounds below." (RB, p. 176.) This is an incorrect summary

of the record, which shows that appellant did indeed object on federal constitutional grounds. (See Vol. III, CT 618-19.)

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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. People v. Coddington.

Respondent first argues that the presumption of sanity instruction given in this case was a "correct statement of law," according to this Court's decision in People v. Coddington (2000) 23 Cal.4th 529, overruled on another ground by Price v. Superior Court (2001) 25 Cal.4th 1049, 1069, fn. 13. (RB, pp. 179-80.)

Appellant acknowledged in his Opening Brief that Coddington rejected an argument similar to that made here. (See AOB, p. 196.) Nonetheless, appellant maintains that the presumption of sanity instruction violated appellant's federal constitutional rights under the Sixth and Fourteenth Amendments. Appellant addresses this argument further immediately below.

Respondent also argues, in passing, that appellant's claim should be

deemed waived, because at one point defense counsel stated he had "no problem" with the presumption of sanity instruction. (RB, p. 180, citing to Vol. 12, RT 2797.) It is correct that the defense failed to object to this instruction and did not seek modification of it. However, this does not preclude appellate review. Under Penal Code sections 1259 and 1469, an appellate court can review a question of law involved in any jury instruction given "even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (Pen. Code, §§ 1259, 1469; see also People v. Croy (1985) 41 Cal.3d 1, 12, fn. 6.)

Respondent further argues that even if the instruction was invalid, it did not prejudice appellant, because the jury was instructed (1) it could consider appellant's mental defect or disorder in determining his specific intent (CALJIC No. 3.32) and (2) that the prosecution had the burden of proof on every element. (RB, p. 180.) Instructing the jury pursuant to CALJIC No. 3.32 did not cure the harm from the presumption of sanity instruction. (Patterson v. Gomez (9th Cir. 2000) 223 F.3d 959 964-65 [finding reversible error where the presumption of sanity instruction was given even though a variation of CALJIC No. 3.32 was also given].) The problem is that the erroneous presumption prevents the jury from giving effect to the principles stated in CALJIC No. 3.32. Nor does an instruction

that the prosecution carries the burden of proof vitiate the prejudice from the presumption of sanity instruction. To the contrary, the presumption instruction improperly and unconstitutionally lowers the prosecution's actual burden of proof. The issue is not who must carry the burden of proof, but what must be proved to meet the burden.

Respondent also argues that the closing arguments somehow cancel out the prejudice from the erroneous instruction. (RB, p. 180.) However, the reviewing court must presume that the jurors follow and rely on the judge's instructions and not the arguments of counsel. (People v. Morales (2001) 25 Cal.4th 34, 47; see also Kelly v. South Carolina (2002) 534 U.S. 246 [argument of counsel insufficient to cure ambiguity in jury instruction].)

Finally, respondent argues that the error could not have been prejudicial because of the "overwhelming evidence" that appellant "knew what he was doing." (RB, p. 181.) Respondent relies on a selective and incorrect recitation of the facts to support this argument. For example, respondent argues that "no one noticed anything unusual about appellant," RB, p. 181, ignoring Elijah's testimony that prior to the charged offense appellant was "drooling and foaming and he just wasn't making no sense." (Vol. 11, RT 2530.)

Respondent's argument is actually a factual determination that appellant's acts were "based on reality, not delusion." (RB, p. 181.) This factual determination was one the jury (not respondent) should have made; the erroneous instruction prevented them from doing so. The erroneous instruction to presume sanity thus resulted in an unreliable guilt phase determination.

B. Patterson v. Gomez.

Respondent argues that Patterson v. Gomez, supra, 223 F.3d 959, upon which appellant relies, is not binding authority and in any case is "distinguishable on its facts." (RB, p. 182.) Appellant relies not just on the Ninth Circuit case of Patterson v. Gomez, but also on Francis v. Franklin (1985) 471 U.S. 307, the United States Supreme Court opinion on which Patterson v. Gomez is based. (See AOB, p. 196.)

Respondent's attempt to distinguish the facts here from those in Patterson v. Gomez is unpersuasive. (See RB, p. 184.) The record clearly shows that here, as in Patterson v. Gomez, the prosecutor relied on the presumption in arguing the case to the jury. (Vol. 12, RT 2700.) Moreover, in both cases, the defendant's mental state was the primary issue at guilt phase. (See Patterson, supra, 223 F.3d at 967.) Thus, as argued in the Opening Brief, the instructional error violated appellant's federal

constitutional rights to due process, and requires reversal of his convictions. (See AOB, pp. 198-200.)

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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

The trial court instructed the jury that an intent to kill was a necessary element of voluntary manslaughter. Respondent concedes that this instruction was erroneous under People v. Lasko (2000) 23 Cal.4th 101, 109 [intent to kill is not a necessary element of voluntary manslaughter], but argues that the error was harmless. (RB, p. 186.)

A. The Instructional Error Was Prejudicial.

Respondent first argues that, as in Lasko, appellant's jury was instructed with CALJIC No. 8.50, distinguishing between murder and manslaughter, thus "ma[king] it clear" that the difference between the two offenses depended on "malice and not on the intent to kill." (RB, p. 187.) Respondent's argument is flawed. CALJIC No. 8.50 tells the jury that in a heat-of-passion killing, malice is absent "even if an intent to kill exists," thus making the point that the heat of passion negates malice. In this sense, CALJIC No. 8.50 presumes that intent to kill is present in a heat-of-passion killing and explains the negation of malice in that context. Whether or not CALJIC No. 8.60 adequately distinguishes between manslaughter and murder, the problem remains: the trial court incorrectly defined voluntary

manslaughter. Nothing in CALJIC No. 8.50 corrects that defect because the instruction fails to state or imply that intent to kill is not a necessary element of voluntary manslaughter.

Lasko noted that where the erroneous voluntary manslaughter instruction **and** an involuntary manslaughter instruction are given, a verdict of second degree murder would render the instructional error harmless, because if the jury believed that the defendant acted in the heat of passion but without intent to kill, it could return an involuntary manslaughter verdict. (Id. at 111-12.) The Lasko reasoning does not apply here because appellant's jury was not instructed on involuntary manslaughter.

Respondent grudgingly acknowledges that the involuntary manslaughter instruction in Lasko "provided additional evidence that the jury did not believe the defendant killed in the heat of passion," but insists that the absence of that instruction in this case "does not preclude a finding of harmlessness." (RB, p. 187.) Respondent suggests that because the jury "necessarily found that appellant did not act in the heat of passion by convicting him of second degree murder" of Versenia, the Lasko error should be found harmless. (RB, p. 188.)

Respondent fails to see the larger picture: all the homicide verdicts available to the jury in this case required an intent to kill. The jury was not

instructed with either unintentional second degree murder, with unintentional voluntary manslaughter (or involuntary manslaughter). With respect to unintentional murder, the jury was thus faced with an untenable all or nothing choice. The instructional error was prejudicial because it left the jury unable to give any significance to the facts showing that the killing of Versenia was unintentional.

Next, respondent asserts that the error is harmless because "the evidence strongly suggested an intent to kill" Versenia. (RB, p. 188.) Respondent refers to appellant's "comments to various family members" "suggest[ing]" he was angry with Versenia. (RB, p. 188.) However, respondent provides no record citation for these supposed "suggestions." In fact, only one witness testified that appellant referred to an intent to kill Versenia, and this witness's testimony was undercut by the other relatives' failure to confirm it and evidence that appellant and Versenia had a good and loving relationship. (Vol. 10, RT 2358, 2369; Vol. III, CT 767.) The evidence specifically relied on by respondent is evidence as to what **Versenia did or said** (and not what appellant did or said), and thus at most "suggests" a motive to kill, but does not suggest evidence of appellant's intent to kill Versenia.

Respondent also argues that the trial court was mistaken when it

found substantial evidence supporting a voluntary manslaughter instruction, and thus any error in an unwarranted instruction must be harmless. (RB, pp. 189-90.) It is respondent, not the trial court, who is mistaken. Respondent says that "[c]ontrary to the court's belief, there was no evidence of yelling between appellant and Versenia . . ." (RB, p. 189.) In fact, Officer Neilsen testified that Eva said that appellant had been arguing with Versenia that morning prior to the shooting. (See Vol. 7, RT 1875.)

In sum, the conceded Lasko error must be found prejudicial and appellant's second degree murder conviction must be reversed.

B. The Instructional Error Violated Appellant's Federal Constitutional Rights.

Finally, respondent contends that no federal constitutional error occurred because the principles of Beck v. Alabama (1980) 447 U.S. 625 are inapplicable where as here the jury had a "noncapital third option between the capital charge and acquittal." (RB, p. 190.) However, appellant does not base his federal claim on the principles in Beck. Rather, the bases of appellant's federal claims are that the instructional error deprived him of his federal constitutional right to correct instructions on the defense theory of the case under Conde v. Henry (9th Cir. 1999) 198 F.3d

734, 739-40; that the instructional error deprived appellant of federal due process under Boyde v. California (1990) 494 U.S. 370 , 380 because it led the jury to misunderstand the applicable law; and that the error deprived appellant of federal due process under Hicks v. Oklahoma (1980) 447 U.S. 343, in that it deprived him of a state-conferred right.

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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

The trial court violated appellant's federal constitutional rights by refusing to give the pinpoint instructions requested by appellant regarding the consideration of the hearsay statements by Eva introduced into evidence.

A. This Claim Is Properly Before the Court.

Respondent first claims that appellant stipulated to the modified instruction and thus may not challenge that instruction on appeal. (RB, p. 192.) Respondent relies on People v. Jones (2003) 29 Cal.4th 1229, 1258, a case in which the defense expressly agreed to jury instruction modifications and thus could not challenge them on appeal. This case presents quite a different scenario.

The transcript cited by respondent as proof that appellant agreed to the modified instruction shows that: (1) lead defense counsel repeated his request for the special instruction; (2) the trial court responded that its ruling was that the special instruction "was covered" by a CALJIC

instruction; and (3) the court took the special instructions and the instruction on Evidence Code section 1240 and fashioned an instruction to which one of the defense attorneys gave approval. (Vol. 13, RT 2901.)

Lead counsel's reiteration of his request for the instruction vitiated any "approval" given the modified instruction by second counsel. In addition, second counsel's "approval" was given only **after** the trial court ruled that "the special instruction was covered" by the CALJIC instruction and thus did not operate as a waiver; it merely showed defense counsel proceeding in accordance with an adverse ruling and trying to make the best of a bad situation. It is well established that submitting to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not constitute waiver of the error. (Mary M. v. City of Los Angeles (1991) 54 Cal.3d 202, 212, quoting People v. Calio (1986) 42 Cal.3d 639, 643, quoting Leibman v. Curtis (1955) 139 Cal.App.2d 222, 225; see also People v. Woods (1991) 226 Cal.App.3d 1027, 1051, fn. 1.)

Moreover, the appellate courts should consider an issue on appeal even if it was only marginally preserved when the question of its preservation is close and difficult. (People v. Bruner (1995) 9 Cal.4th 1178, 1183, fn. 5.)

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B. The Trial Court Improperly Refused to Give the Defense-Requested Instructions.

1. Evidence Code section 403 obligated the trial court to give the defense-requested instruction.

Respondent argues that the trial court had "no duty" in this case to instruct the jury in accordance with Evidence Code section 403, subdivision (c)(1) because provision applies "only to the personal knowledge of a *testifying* witness," which, according to respondent, Eva was not. (RB, p. 196, emphasis provided.)

Assuming for the sake of argument that the statute does indeed apply only to the personal knowledge of testifying witnesses, this does not exclude Eva from its purview because **Eva was indeed a "testifying witness."** Eva testified at the preliminary hearing, and that testimony was read to the jury at the trial, prefaced with this instruction by the court: "This testimony, or what you're hearing, is to be considered by you **as testimony as if Ms. Blacksher were here giving this testimony in court**." (Vol. 7, RT 1867; emphasis supplied.)

2. The instruction given was in violation of Evidence Code section 405.

Respondent maintains that the instruction did not violate Section 405, subdivision (b)(1) because "it did not explicitly inform the jury that it had already determined" to be true the fact that Eva had perceived the event her statements purportedly described. (RB, p. 197.) It is correct that the challenged instruction did not "explicitly" make this statement. However, the instruction did explicitly say that Eva's statements "were admitted as spontaneous statements" and that such statements are "admissible" only if

Eva "perceived" the act or event the statement purported to narrate. Jurors are not simpletons. They would necessarily have understood from these two statements that the court "admitted" Eva's statements because it found Eva "perceived" the event described. The jurors certainly would not conclude that the trial court admitted statements after having found that Eva did not perceive the events, or that it could not determine whether or not Eva perceived the events. (See e.g., Francis v. Franklin (1985) 471 U.S. 307, 324-35, fn. 9 [court must presume that jurors "attend closely to the particulars of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them"]; accord People v. Delgado (1993) 5 Cal.4th 312, 331; People v. Billings (1981) 124 Cal.App.3d 422, 427-28 [jurors are presumed to be intelligent].)

C. The Trial Court's Refusal to Give the Requested Instructions Amounted to Federal Constitutional Error Requiring Reversal of Appellant's Convictions.

Respondent asserts that no federal constitutional error resulted from the trial court's refusal to give the defense-requested instructions because the requested instructions "did not properly pinpoint a theory of the defense," but rather "highlighted specific evidence." (RB, p. 199.) Respondent adds that the instructions were "merely duplicative" of the "more general instructions on reasonable doubt." (Ibid.)

However, the cases relied on by respondent, People v. Earp (1999) 20 Cal.4th 826, 886, People v. Hughes (2002) 27 Cal.4th 287, 361 are distinguishable. In both Earp and Hughes, defense-requested instructions were deemed improper argumentative instructions because they directed the jury to find the defendant not guilty (or to enter a not true finding on a

special circumstance) upon making a particular finding as to the evidence.

Finally, respondent argues that any error in refusing the defense-requested instructions should be deemed harmless because the trial court instructed the jury that whether Eva perceived the events described was a matter for the jury to decide. (RB, p. 200.) Appellant disagrees. In assessing prejudice, this Court must consider not only the trial court's refusal to give the defense-requested instruction, but the fact that the instruction the court gave in lieu of the requested instruction was patently wrong. Because of the instructional errors, this Court cannot reliably determine whether the jury made any finding on the question whether Eva actually observed the events she purportedly described in her extrajudicial statements, which constituted the principal evidence in the prosecution's case. Reversal of appellant's convictions is therefore required.

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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

Appellant was entitled to his requested pinpoint instruction regarding the mental state evidence. Respondent argues that the general instructions on murder and specific intent, including CALJIC No. 3.32, were sufficient and that no error occurred. (RB, p. 202.) Anticipating such an argument, appellant explained in the Opening Brief why CALJIC No. 3.32 was inadequate (it didn't state the key point that mental state evidence can be sufficient to raise a reasonable doubt). (See AOB, pp. 218-20.) However, respondent argues that the claim should be waived because appellant "did not make this same argument below in support of his pinpoint instruction." (RB, p. 203.)

Respondent cites no legal authority for his unstated premise that even where the defense requests an instruction, the trial court's erroneous refusal to give the instruction should be deemed "waived" unless trial counsel made precisely the "same argument" to the trial court as appellate counsel has made on appeal. There is no such authority. Penal Code section 1259 expressly provides that an appellate court can review "any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." Section 1259 does not provide that a refused instruction can be reviewed on appeal only if the "same argument" was made at trial as made on appeal.

Indeed, if appellant were precluded on appeal -- at risk of waiver -- from any further analysis or more extended argument than that made by defense counsel at trial, appellate practice would be restricted to a routine reiteration of the trial dialogue. The essence and the richness, as well as the wider utility, of appellate analysis and judicial review is to dig deeper, to explore further, and to make more comparisons or analogies, than are feasible when counsel approach the bench for a short colloquy during a jury trial. Respondent's attempt to raise the specter of waiver with every appellate word or comparison that differs in the slightest from, or expands beyond, what happened at trial would diminish judicial review and impoverish appellate practice, and would serve only to impose the rigidities of a pleading practice on what should be a search for justice and due process.

In short, because appellant's substantial rights were affected by the court's refusal to give the requested instruction, the claim is properly before this Court. Appellant's rights were impaired by the trial court's refusal to give an indisputably correct jury instruction relating to the principal issue for the jury's resolution, i.e., appellant's mental state. In the Opening Brief, appellant explained that the requested instruction was necessary because of the conflicting instructions given to the jury regarding their consideration of mental state evidence. (See AOB, pp. 218-20.)

Respondent contends that it was "clear" from the instructions that the jury could consider evidence of appellant's mental state at the time of the offense on the question of intent, and that it was only the evidence "relating appellant's history of mental illness" that was to be considered solely for

impeachment purposes. (RB, pp. 203-04.) Although in retrospect and upon reflection, respondent may be able to neatly package the two types of evidence, in a theoretical way, so as to properly apply the conflicting jury instructions, the fact and practice was different. Testimony given by Dr. Davenport was in various respects the same as testimony given by family members which was relevant to appellant's mental state at the time of the offense.

For example, James Blacksher testified that appellant acted unpredictably. (Vol. 10, RT 2399.) He knew that appellant was supposed to take his medication but did not take it. James did not know if appellant got Social Security disability insurance because he was paranoid-schizophrenic. (Vol. 10, RT 2360.) Dr. Davenport also testified that appellant had been diagnosed in the past as schizophrenic and that he believed appellant was schizophrenic when he saw him in 1996. (Vol. 12, 2646, 2672, 2676.) Elijah Blacksher was aware of appellant's mental problems and had repeatedly told the police that appellant was "not all there." (Vol. 11, RT 2517.) Elijah testified that appellant had spent 37 of his 44 years in institutions. (Vol. 11, RT 2518.) Elijah said appellant "couldn't help what happened to him." (Vol. 11, RT 2535.) His mind would "come and go." (Vol. 11, RT 2525-26.) He had started showing signs of mental illness as a child; he was "not a whole being." (Vol. 11, RT 2428.)

When appellant told Elijah he had a gun, appellant was talking strange and mumbling; he was "drooling and foaming at the mouth and he just wasn't making no sense." (Vol. 11, RT 2515, 2530.) Dr. Davenport

testified that when he examined appellant in 1996, he was agitated and hyperactive, displayed bizarre verbiage and loose thinking, and seemed to respond to internal stimuli. (Vol. 12, RT 2676-78.) This intertwining testimony shows that the conflicting jury instructions would have been confusing to the jury, thus necessitating the instruction requested by appellant.[21]

Respondent also argues that any confusion in the instructions was cured by defense counsel's argument. (RB, p. 204.) The opposite is true. In the portions of defense counsel's argument cited by respondent, defense counsel thoroughly mixed up the two "different" types of mental state evidence so neatly separated by respondent. In any case, argument by counsel is insufficient to cure ambiguities in the jury instructions. (See e.g., Kelly v. South Carolina, supra, 534 U.S. 246.)

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[21] Appellant notes that his mental state prior to and after the time of the offenses is circumstantial evidence of his mental state at the time of the offenses. In this sense, the trial court's instructions were even more confusing in that they suggested that any historical evidence of appellant's mental illness was irrelevant to the question of his actual formation of intent at the time of the offenses

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

Respondent simply asserts as an *ipse dixit* that any and all errors were harmless individually and collectively. (RB, p. 206.) Because respondent does not otherwise address appellant's cumulative prejudice, appellant has nothing to which to respond. In his opening brief, appellant set out the specific cumulative prejudice and refers the Court to that argument. (See AOB, pp. 222-23.)

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SANITY PHASE ISSUES

XV. THE TRIAL COURT'S ERRONEOUS ADMISSION OF IRRELEVANT AND PREJUDICIAL TESTIMONY VIOLATED APPELLANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR TRIAL

A. Speculative Testimony by Witness Gades Was Erroneously Admitted.

Appellant contends that the trial court erred in permitting the prosecution to elicit testimony from defense lay witness Gades that she had since changed her mind about her 1980 diagnosis of appellant and that at the present time she "would question the validity" of her earlier diagnosis. (See Vol. 14, RT 2993.) Appellant argues that this evidence was inadmissible as irrelevant because (1) Gades was not testifying as an expert, so her opinion as to what she "would have done" 20 years after the fact was irrelevant; (2) her lay testimony amounted to an impermissible opinion as to the credibility of appellant's statement to her. (See AOB, pp. 226-28.)

Appellant emphasizes with some precision the scope of his claim because respondent does not address the arguments made by appellant, but instead raises strawman arguments to attack. None of respondent's arguments takes aim at appellant's actual claim.

First, respondent argues that the challenged portions of Gades' testimony were admissible because the prosecution is entitled to challenge the accuracy of information relied upon by a defense expert witness in reaching his opinion. (See RB, p. 210, citing People v. Seaton (2001) 26 Cal.4th 598, 681 and People v. Coddington, supra, 23 Cal.4th at 613.) This argument is inapposite because **Gades was not an expert witness**. She was not called upon by the defense in this case to give an opinion, but only

to testify to information on appellant's medical chart in 1978.

Respondent does acknowledge that Gades was not offered as an expert witness, but insists that because her testimony was "in many respects" like that of an expert, it was permissible for the prosecutor to "challenge the bases" for the diagnosis she made of appellant in 1978. (RB, p. 211.) Even if this were correct, it is not what the prosecutor did, and therein lies the crux of appellant's argument. Rather than challenge or cross-examine on the bases of Gades' 1978 diagnosis,[22] the prosecutor elicited from Gades testimony about **how she would have or might have diagnosed appellant in 1998**. It is this latter-day opinion by Gades, calling into question an earlier diagnosis (which she did not specifically remember). In sum, Gades was testifying to an opinion she would have had in 1998 and not as to the bases for her 1978 diagnosis. Her speculative opinion about a hypothetical situation was flatly irrelevant and inadmissible.

Respondent further argues that Gades' responses were relevant to the question whether appellant was mentally ill or was malingering. (RB, p. 211.) This is not so. Gades' responses were relevant only to her own state of mind 20 years after the fact, a state of mind that did not tend to prove anything about appellant's state of mind 20 years earlier.

Appellant points out, in his opening brief, how Gades' 1998 opinion was thus analogous to criminal profile evidence, because Gades, who did not recall appellant or her diagnosis in 1978, testified that in 1998 her

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[22] Indeed, it was not possible to cross-examine the bases of Gades' 1978 diagnosis because she testified that she did not specifically remember appellant "physically" and only "vaguely" recalled the situation. (Vol. 14, RT 2975.)

opinion would have been different **because of all the malingering clients she had seen in the criminal justice system in the 20-year interim.** In short, her 1998 opinion was not based in any way on appellant but on the conduct of **other inmates**. Respondent argues that this is not so because Gades did "not testify about the profile of an 'inmate-patient' or her opinion on whether appellant fit such a profile." (RB, pp. 211-12.) Respondent is wrong – this is precisely what she did.

Gades testified to a newly revised opinion as to appellant's probable malingering in 1978, an opinion at odds with her actual diagnosis in 1978, and an opinion based **not at all** on appellant's conduct or statements, but based solely on the conduct and statements of other inmate-patients Gades had contact with during the intervening 20 years. In effect, Gades testified that because her 1978 diagnosis of appellant did not fit her later-acquired "profile" of an inmate-patient, she would not have had the same diagnosis if she had seen appellant in 1998.

Secondly, Gades' opinion as to how she would have evaluated or diagnosed appellant had she treated him in 1998 rather than in 1978 amounted to improper lay opinion testimony as to the lack of credibility in the statements made to her by appellant. (See People v. Melton (1988) 44 Cal.3d 713, 744.) Respondent does not address this argument, even obliquely. Appellant maintains that the failure to address this question should be deemed to concede that appellant is correct, and Gades' testimony was improper opinion testimony. (Cf. People v. Adams (1983) 143 Cal.App.3d 970, 992 [the failure to address prejudice "must be viewed as a concession that if error occurred, reversal is required."].)

B. The Erroneously Admitted Evidence Violated Appellant's Federal Constitutional Rights and Prejudiced His Defense.

1. The record does not support respondent's argument of harmlessness based on the supposedly compelling evidence of appellant's sanity.

Respondent contends that any error in permitting Gades' testimony should be deemed harmless because of the "compelling evidence" to rebut appellant's claim of insanity. (RB, pp. 212-13.) Respondent's citations to the record do not, however, support his argument that the evidence against appellant was "compelling."

In the first place, the so-called "compelling evidence" referred to by respondent is actually the **absence** of evidence that appellant sought psychiatric treatment or displayed psychiatric symptoms while in jail on this charge. (Vol. 15, RT 3358, Vol. 14, RT 3260-61.) Then again, respondent also cites evidence that appellant did make such complaints during earlier incarcerations, although respondent describes these complaints as "manipulative" (Vol. 15, RT 3350-53) – even though there was testimony at trial that appellant was not manipulative (Vol. 14, RT 3141-43). Clearly, under respondent's analysis, it would be impossible to present substantial evidence of appellant's insanity through testimony about his conduct while incarcerated: evidence that appellant sought psychiatric assistance or displayed symptoms of psychosis is described by respondent as evidence that appellant was manipulative or malingering; where evidence that appellant did not seek psychiatric assistance, respondent describes as amounting to a "compelling" showing that he was sane.

Apart from appellant's own statements and the testimony of one brother, the evidence relied on by respondent as "compelling evidence" of appellant's sanity is in effect the absence of evidence: e.g., appellant did not have medications in his possession and after his arrest denied being under psychiatric care. However, appellant's denials are, if anything, compelling evidence of his insanity, not the contrary. (See Vol. 12, RT 2676-78 [evidence that a mentally ill person typically denies being mentally ill].)

As to the testimony by one of appellant's brothers to which respondent refers, it was contradicted not only by the testimony of his other siblings,[23] but by the medical records themselves, which showed that appellant had repeatedly been diagnosed as mentally ill, suicidal, had reported visual and auditory hallucinations, and had been prescribed antipsychotic medications, etc.

In sum, it is simply not true that the record contains "compelling evidence" of appellant's sanity. Instead, there was strong and compelling evidence that appellant suffered a lifelong affliction with mental illness.

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[23] See Vol. 10, RT 2399 [appellant acted unpredictably]; Vol. 10, RT 2360 [appellant was supposed to but did not take medication]; Vol. 11, RT 2517 [appellant had mental problems and was not "all there" and these problems were discussed in the family]; Vol. 11, RT 2518, 2534, 2535 [appellant had been repeatedly institutionalized];, Vol. 11, RT 2525-26 [appellant's mind would "come and go"]; Vol. 11, RT 2528 [appellant started showing signs of mental illness as a child and his mother who knew of his problems tried to protect him].

2. Respondent's other arguments in favor of harmlessness are also flawed.

Respondent (mistakenly) asserts that appellant, in arguing prejudice, "appears to acknowledge the relevance of [the objectionable] evidence." (RB, p. 213.) Respondent refers to the fact that appellant argued prejudice based on the fact that the error "went to the heart of the issue before the jury." (See AOB, p. 229.) According to respondent, evidence going to "the heart of the issue" is necessarily "relevant;" on the other hand, such "relevant" and "damaging" evidence is not necessarily prejudicial. (RB, pp. 213-14.)

First, respondent is wrong in suggesting that appellant acknowledges the relevancy of testimony by Ms. Gades about how she would have diagnosed appellant 20 years after the fact. Respondent is also wrong in arguing that the challenged testimony was not prejudicial. The testimony was speculative, hypothetical (and she was not an expert witness) and based not on her experience with appellant but on her experience with other inmate-patients. The evidence was not relevant, because her after-the-fact opinion did not tend to prove anything about appellant. Nonetheless, the evidence was highly prejudicial, because it allowed the prosecutor to argue that appellant was a malingerer, as Gades' testimony suggested (even though it was not based on appellant's conduct or statements).

The erroneously admitted evidence struck an unfair blow to the sanity phase defense, and was prejudicial for that reason. In his opening brief, appellant cited People v. Lindsey (1988) 205 Cal.App.3d 212 for that proposition. Respondent inaccurately describes appellant's reliance on

Lindsey, stating that "contrary to appellant's contentions, [Lindsey] does not stand for the proposition that evidence must be excluded if it strikes at the heart of the defense." (RB, p. 214.) Of course, appellant never advanced such a contention. Rather, appellant contends that the evidence should have been excluded (not because it struck at the heart of the defense) **because it was irrelevant,** and the trial court has no discretion to admit irrelevant evidence. Once it is determined that the evidence should have been excluded as irrelevant, the question is whether its admission prejudiced appellant. And where such erroneously admitted evidence strikes a live nerve in, or a fatal blow to, the defense, then that is certainly a factor in assessing prejudice. Lindsey says as much, and appellant relies on it for this entirely proper purpose.

Finally, as to respondent's argument that appellant has "waived" any claim based on federal constitutional grounds (RB, p. 214), appellant notes that defense counsel filed a motion prior to trial requesting that all objections at trial, including objections made to evidence and to prosecutorial misconduct, be deemed made on both state and federal grounds. (Vol. II, CT 432-33.) The trial court granted the motion and later reiterated the ruling. (Vol. 1, RT 11, RT 243.) Appellant has thus indisputably preserved the federal basis of this claim.

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XVI. THE TRIAL COURT APPLIED THE EVIDENTIARY RULES UNEVENLY AS TO APPELLANT AND ALLOWED THE PROSECUTOR TO EXPLOIT HIS DISCOVERY VIOLATION THUS DEPRIVING APPELLANT OF HIS FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL AT THE SANITY PHASE

A. The Trial Court's Uneven Application of the Rules of Evidence Violated Appellant's Federal Due Process Rights.

1. Respondent's spurious waiver argument should be rejected.

Respondent first (mistakenly) states that appellant did not object below on federal constitutional grounds, and then argues that for this reason appellant's federal claim should be deemed waived. (RB, p. 219.)

Respondent is wrong on the facts. As set out above, defense counsel filed a motion prior to trial requesting that all objections at trial, including objections made to evidence and to prosecutorial misconduct, be deemed made on both state and federal grounds. (Vol. II, CT 432-33.) The trial court granted the motion and later reiterated the ruling. (Vol. 1, RT 11, RT 243.) Appellant has thus indisputably preserved the federal basis of this claim.

Next, respondent argues that appellant has failed to show that the trial court's inconsistent evidentiary rulings violated federal due process because one case cited by appellant, Gray v. Klauser (9th Cir. 2002) 282 F.3d 643, was vacated by the United States Supreme Court, and thus "has no precedential value." (RB, p. 219.) Gray v. Klauser was remanded for further consideration on grounds other than that relied on by appellant. (See Klauser v. Gray (2002) 537 U.S. 1041.) In any case, respondent fails to mention that appellant also relied on several United States Supreme

Court cases which also hold that inconsistent treatment of the defense and prosecution violates federal due process. (See AOB, pp. 233 and 235, citing Webb v. Texas (1972) 409 U.S. 95 [deprivation of federal due process where the trial court admonished the defense witness as to the consequences of perjury but did not so admonish the prosecution witnesses]; Wardius v. Oregon (1973) 412 U.S. 470, 474, fn. 6 [trial rules providing nonreciprocal benefits to the state violate the defendant's federal due process rights to a fair trial].) Thus, contrary to respondent's suggestion, appellant has firmly established that inconsistent treatment of the parties by the trial court amounts to a federal due process violation.

2. The trial court inconsistently applied the rules of evidence.

Finally, addressing the merits, respondent argues that there was no inconsistent application of the rules of evidence in this case because the prosecutor's questioning (allowed by the court) did not elicit speculative testimony from Dr. Pierce whereas defense questioning (disallowed by the court) did call for speculation. (RB, p. 220.) According to respondent, the prosecutor was merely and properly asking Dr. Pierce "whether there was any psychiatric explanation" for appellant's "rational" behavior at the time of the killings. (RB, p. 220.) By thus recharacterizing the prosecutor's questions, respondent is able to describe them as an attempt to elicit an expert opinion rather than speculation. However, what the prosecutor **actually** asked Dr. Pierce was to explain how appellant "would have acted" had he been in a psychotic state; and why appellant "would have" done the things he did after having "committ[ed] two murders." (Vol. 14, RT 3199-3203.)

The sought-after testimony was not an expert opinion because an expert opinion is based on facts and information. Speculative matters are not a proper basis for expert opinion testimony. (See Evid. Code, § 801, Law. Rev. Com'n Comment.) Under Evidence Code section 801, subdivision (b), an expert may give an opinion based on matters personally known or made known to him, if such matters are reasonably relied upon by experts in the field. The prosecutor did not seek such an opinion however, but instead asked Dr. Pierce to describe a wholly speculative scenario, i.e., how appellant "would have acted" had he been psychotic, and why he would have done the things he did afterwards.

In sum, respondent reinterprets the prosecutor's questions and then rationalizes why the prosecutor might have posed such question. This Court must, however, look to the actual record, rather than the record as portrayed and interpreted by respondent. The actual record indisputably shows that what the prosecutor did was elicit wholly speculative testimony from Dr. Pierce. Consequently, the trial court did make asymmetrical rulings in violation of appellant's federal due process rights.

B. The Prosecutor Exploited His Own Discovery Violation to Appellant's Detriment.

Respondent first contends that defense counsel never moved to exclude appellant's statement to the deputy district attorney as a sanction for the late disclosure (midtrial) of this statement to the defense. (RB, p. 223.) This seems to be an attempt to confuse the issue. Appellant is not claiming that the trial court erred in admitting that statement or in not excluding the statement as a discovery sanction. Rather, appellant argues that the trial court erred in permitting the prosecutor to exploit the discovery

violation when he challenged the strength and credibility of Dr. Pierce's testimony by asking him whether he had listened to the late-disclosed taped statement. (See AOB, pp. 235-37.) Defense counsel did object on precisely this ground. (Vol. 14, RT 3256.) This Court must therefore reject respondent's attempt to create the illusion of waiver where none exists.

Respondent argues that the questioning of Dr. Pierce was proper because the prosecutor eventually (during guilt phase) disclosed appellant's statement to the defense prior to the time of Dr. Pierce's sanity-phase testimony. The question posed here, however, is one of fundamental fairness. Where the prosecutor in a capital case fails to disclose a significant piece of evidence – the defendant's statement – until the trial has already begun, it is not fair to allow the prosecutor to exploit his own non-compliance to undermine the sanity phase defense expert's failure to review the late-disclosed evidence.

The discovery rules are in place because late discovery hampers the ability to prepare and present a defense (or a prosecution). The prosecutor knew well that defense counsel in a capital case would have to prepare his sanity-phase presentation long before the beginning of guilt phase, and that such preparation would include consultation with experts; and that for consultation with experts and presentation of expert testimony, the defense would need all relevant information (especially appellant's statements) prior to that consultation. Consequently, where it is the prosecutor's discovery violation that has prevented the defense from a thorough consultation with its expert, it is blatantly unfair to allow the prosecutor to attack the expert for failing to review material which the prosecutor had not timely disclosed.

Thus, as in Brown v. Borg (9th Cir. 1991) 951 F.2d 1011, and under

fundamental principles of fairness and due process, the prosecutor should not have been allowed to profit from his own failure to comply with the law. Respondent points out (as did appellant in the Opening Brief) that Brown involves prosecutorial exploitation of withheld evidence, rather than prosecutorial exploitation of untimely-disclosed evidence.[24] The distinction is illusory because the late disclosure of evidence in a complicated capital case was tantamount to a complete failure to disclose, particularly in the situation at issue here, where the significance of the undisclosed evidence was whether the defense expert had reviewed it, and the prosecutor knew that such review would have been impossible. The practicalities of a three-stage capital trial, with sanity phase hard on the heels of guilt phase, require defense counsel to prepare for all three phases before trial begins. This is because daily trial practice leaves no time for consulting experts; and also because expert opinion on mental state matters is significant to all three stages, guilt, sanity and penalty.

Finally, respondent asserts, without further explanation, that any errors in the sanity phase were harmless because of the "overwhelming evidence" of appellant's sanity. (RB, p. 224.) Appellant assumes that

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[24] Contrary to respondent's assertion, however, the underlying rationale of Brown applies notwithstanding this minor factual distinction. Respondent seizes "upon those facts, the pertinence of which go only to the circumstances of the case but are not material to its holding," and thus concludes that the case is distinguishable. (People v. Harris (1992) 3 Cal.App.4th 661, 666.) Harris explains that the circumstantial facts do not render its legal holding distinguishable: "[t]he Palsgraf rule, for example, is not limited to train stations." (Ibid.)

respondent means the evidence he described as "compelling" in the previous argument. (RB, pp. 212-13.) Respondent's claim that the sanity phase evidence was compelling or overwhelming cannot withstand scrutiny, as appellant showed in the previous argument. (See Arg. XV, Part B, pp. 102-05, above.) Consequently, the sanity phase errors were highly likely to have resulted in an unfavorable verdict and must be considered prejudicial.

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XVII. THE CUMULATIVE PREJUDICIAL IMPACT OF THE ERRORS AT THE SANITY 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

Respondent simply asserts as an *ipse dixit* that any and all errors were harmless individually and collectively. (RB, p. 206.) Because respondent does not otherwise address appellant's cumulative prejudice, appellant has nothing to which to respond. In his opening brief, appellant set out the specific cumulative prejudice and refers the Court to that argument. (See AOB, pp. 239-40; see also ARB, above, Arg. XV, Part B, pp. 102-05.)

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PENALTY PHASE

EVIDENTIARY ISSUES AT PENALTY PHASE

XVIII. THE PROSECUTOR COMMITTED MISCONDUCT AND VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND A RELIABLE SENTENCING DETERMINATION BY TELLING THE JURORS IN OPENING STATEMENT THAT AN EXPERT WOULD TESTIFY AGAINST APPELLANT EVEN THOUGH THE TRIAL COURT HAD NOT MADE A FINAL RULING REGARDING THAT EXPERT'S TESTIMONY; AND BY DECLINING TO CALL THE EXPERT AFTER THE TRIAL COURT MADE ITS RULING, SO AS TO AVOID HAVING THE EXPERT IMPEACHED

A. Failure to Object Does Not Constitute Waiver Where There Was No Opportunity to Lodge an Objection.

Respondent first argues that appellant has waived this claim because his attorney failed to object or to request an admonition when the prosecutor asserted in opening statement what Dr. Fort would testify to. (RB, pp. 228-29.) Although the usual rule is that an objection is necessary to preserve such a claim for appeal, the courts recognize an exception to the rule where there was no opportunity to object. (See e.g., People v. Remiro (1979(89 Cal.App.3d 809, 823; People v. Brooks (1979) 88 Cal.App.3d 180, 186 [failure to object does not waive claim for appeal where under the circumstances the defendant had neither opportunity nor need to object when the trial court held a hearing on the issue].)

When the prosecutor made the opening statement to the jury, the prosecutor stated his positive intention to present Dr. Fort's testimony. Thus, there would have been no basis on which defense counsel could have objected, since they could not have known that the prosecutor, once having told the jury the substance of Dr. Fort's proposed testimony, would then

recant on his stated intention to call Dr. Fort as a witness.

B. The Prosecutorial Misconduct.

Respondent argues that when the prosecutor told the jury in opening statement that Dr. Fort would give his opinion that appellant did not suffer from paranoid schizophrenia, the prosecutor was properly relying on a supposed tentative ruling by the trial court that Dr. Fort's testimony would be admissible. This argument depends entirely on the assumption that the trial court made such a tentative ruling, i.e., if a tentative ruling was made, respondent suggests it was proper for the prosecutor to rely on it; if no such ruling was made, there is no justification for the prosecutor's action.

As appellant pointed in the opening brief, the record contains no indication of any tentative ruling by the trial court. This Court cannot therefore presume that such a ruling was made because such a presumption necessitates a further presumption that the trial court made its supposed tentative ruling in an unreported session in blatant violation of the requirement that all death penalty proceedings be conducted on the record. (See AOB, p. 245, citing Pen. Code, § 190.9, subd.(a)(1).)

Respondent advances the argument that despite the statutory requirement, and despite the absence of any record of the supposed tentative ruling, the trial court's reference to its tentative ruling amounts to "clear and unambiguous" evidence and thus a "sufficient record" for resolution of this claim. (RB, p. 230.) In effect, respondent insists that this Court should both assume that the trial judge violated the law and then rely on the judge's demonstrably false memory (to shield the prosecutor's conduct.)

It is correct that the trial judge made an on-the-record reference to a "tentative ruling" admitting Dr. Fort's testimony. The record, however,

shows that the judge was mistaken: On the morning of June 15, 1998, defense counsel stated an intention to raise some issues regarding the witnesses who were going to be called, suggesting that "[t]hose who are in the afternoon []we can probably do [] this afternoon." (Vol. 16, RT 3543.) Defense counsel then specified the witnesses Jason Bey, Cindy Payan, John Burbank, and Dr. Fort and specifically iterated a relevancy objection to Dr. Fort's testimony. (Ibid.)

The judge asked which witnesses would be testifying during the morning session, and the prosecutor specified four witnesses, none of them the witnesses just referred to by defense counsel as ones he had issues with. (Vol. 16, RT 3543-44.) Defense counsel agreed that the specified witnesses could testify "without dealing with these other issues," i.e., the objections raised as to Bey, Payan, Burbank, and Dr. Fort. (Vol. 16, RT 3544.) The trial judge then discussed a jury instruction and called for opening statements. (Ibid.) The prosecutor then made his objectionable opening statement referring to Dr. Fort's proposed testimony. (Vol. 16, RT 3557-58.)

What is important to note is that prior to this proceeding, the only defense objections raised with respect to Dr. Fort had to do with discovery of his written materials or raw notes and documentation of his false representations with respect to the practice of medicine. (Vol. 15, RT 3516-19.) This was on June 11, 1998. The next court proceeding was the June 15, 1998 proceeding at which defense counsel raised the relevancy objection for the first time, as stated above. Consequently, there was no time or opportunity for the trial judge to have made any tentative ruling between the time that defense counsel first raised the relevancy objection to

Dr. Fort (Vol. 16, RT 3543) and the prosecutor's opening statement which took place **immediately thereafter** (Vol. 16, RT 3557). The only intervening events between defense counsel's objection and the prosecutor's opening statement were (1) the trial court's instructions to the jury; and (2) defense counsel's opening statement to the jury. All these proceedings were on record without recess. (Vol. 16, RT 3543-57.)

This Court must, therefore, decline respondent's suggestion to assume that the trial court made a tentative ruling as to the relevancy of Dr. Fort's testimony where the record so clearly establishes that no such ruling was made.

C. The Misconduct Was Prejudicial.

Respondent argues that the prosecutor's statement to the jury should not be considered prejudicial since the jury had already found appellant sane; because the trial court instructed the jury "to disregard the prosecutor's remarks about Dr. Fort;" and because of the supposed strength of other penalty phase testimony. (RB, pp. 230-31.)

First, the trial court did **not** instruct the jury to disregard what the prosecutor said Dr. Fort would say. Instead, the court told the jury not to "speculate" about as to what he "might" have said or why the prosecutor did not call him. But the court did not tell the jury to disregard what the prosecutor had already said and did not strike those remarks. (See Vol. 16, RT 3720.)

Secondly, respondent's argument for harmlessness misses the larger point. The jury's receipt of Dr. Fort's supposed testimony through the voice of the prosecutor resulted in a death sentence on the basis of unreliable and untested information, rendering appellant's sentence in violation of the

Eighth Amendment. (Gardner v. Florida (1977) 430 U.S. 349, 362; see AOB, pp. 247-48.)

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XIX. THE TRIAL COURT'S ERRONEOUS ADMISSION OF VICTIM IMPACT EVIDENCE OUTSIDE THE CONSTITUTIONAL AND STATUTORY LIMITATIONS VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND A RELIABLE SENTENCING DETERMINATION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

A. Respondent's Waiver Argument Is Unsupported by the Record.

Respondent agrees that appellant has preserved for appeal his arguments that (1) victim impact evidence must be limited to facts or circumstances known to appellant at the time of the crime; and (2) victim impact evidence must be limited to a single witness; but contends that appellant has waived his claim that only family members personally present at scene or immediately after can testify to impact. (RB, pp. 234-35.)

Respondent is mistaken. In his written motion, appellant objected to **all victim impact evidence** in this case on the grounds that the close familial relationship between appellant the deceased heightened the risk of prejudice and the unreliability of the sentence. (Vol. VI, CT 1491-94.) The trial court denied that motion. (Vol. 15, RT 3512.) Where the defendant raises an evidentiary issue in an in limine motion and the court rules on it, the issue is preserved for appeal without necessity of renewing the objection during trial. (People v. Morris (1991) 53 Cal.3d 152, 189.)

Furthermore, appellant's in limine objections were based on Payne v. Tennessee (1991) 501 U.S. 808 and People v. Edwards (1991) 54 Cal.3d 787, which upheld the admission of victim impact evidence to the extent it described the impact on a family member present during or immediately following a capital crime. (See Vol. VI, CT 1485-88.) These in limine arguments preserved appellant's claims herein that only family members

personally present at scene or immediately after could provide victim impact evidence. (See People v. Scott (1978) 21 Cal.3d 284, 290 ["An objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide . . . [and] the record shows that the court understood the issue presented"].)

Respondent also seems to argue that **even though appellant made the argument in his in limine motion** he has waived the claim that the admission of unduly inflammatory or prejudicial victim impact evidence would violate due process. (RB, p. 235.) The case cited by respondent, People v. Roldan (2005) 35 Cal.4th 646, 732, stands for the proposition that a claim is waived where the defendant **failed to object** on a specific ground. Respondent argues that despite appellant's specific in limine objection his claim should be waived because he did not object again when the evidence was introduced. (RB, p. 235.) However, under Morris, supra, 51 Cal.3d at 189, such reiteration is not required.

In sum, each and every one of respondent's waiver arguments is spurious, and this Court must address the merits of appellant's claims.

B. The Trial Court Erred in Admitting Improper Aggravating Evidence.

Respondent contends that testimony by Ruth that she had to pay most of the funeral costs herself, Artis' testimony about his anger, and Sammy's testimony about losing his job were all proper because they "concerned the immediate effects of the murders" under the reasoning of People v. Wilson (2005) 36 Cal.4th 309, 357. (RB, p. 236.) Wilson describes as an "immediate effect of the murder" a comment made by a witness **immediately** upon hearing that someone had killed her brother for money.

Wilson does not stand for a broader rule that victim impact evidence encompasses any adverse feeling or event experienced by the witness after the time of the crime. Nor does People v. Panah (2005) 35 Cal.4th 395, 495, also cited by respondent, stand for such a proposition. In Panah, evidence as to the residual and lasting impact experienced by the victim's brother was held not to constitute error because the jury was instructed to consider such evidence only if the harm was "directly caused" by the defendant's act. No such curative instruction was given in this case. (See Vol. VI, CT 1586-1609.)

Respondent does not address appellant's argument that the victim impact evidence should have been limited to a single witness. Appellant thus refers this Court to his Opening Brief. (See AOB, p. 254.)

C. The Improper Aggravating Evidence Prejudiced Appellant.

Respondent argues only that there was no error in admitting the challenged victim impact evidence, and does not address the prejudicial impact of such evidence. (RB, p. 236.) Appellant contends that, as in People v. Adams, supra, 143 Cal.App.3d at 992, the failure to address prejudice "must be viewed as a concession that if error occurred, reversal is required."

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XX. THE TRIAL COURT VIOLATED APPELLANT'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO PRESENT A DEFENSE, TO DUE PROCESS, AND TO A RELIABLE SENTENCING DETERMINATION BY ERRONEOUSLY EXCLUDING ADMISSIBLE EVIDENCE IN MITIGATION AND BY UNEVENLY APPLYING THE RULES OF EVIDENCE

A. The Improper Restriction of Georgia Hill's Testimony.

The trial court struck testimony by appellant's sister Georgia Hill that their other siblings did not understand appellant's mental health problems and hated him because of them. Respondent first argues that appellant has waived his claims with respect to the restriction of mitigation testimony by Georgia because appellant did not "argue the admissibility" of the evidence at the time the trial court sustained the prosecutor's objections. (RB, p. 239.) However, Evidence Code section 354 provides that appellate review of a claim of erroneously excluded evidence is proper if "[t]he substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means." The statute does not require, as respondent suggests, further "argument" by defense counsel. Where the question is relevant on its face and the substance or content of the answer is known, the statute is satisfied. (People v. Whitt (1990) 51 Cal.3d 620, 648.) Here, the questions put to Georgia were relevant and because she answered the questions before the trial court struck those answers, the substance of the testimony was also known.

Respondent's reliance on People v. Morrison (2004) 34 Cal.4th 698 is misplaced. In that case, the defense made an offer of proof based largely on hearsay and then made no attempt to establish a hearsay exception or nonhearsay purpose for the testimony. Accordingly, this Court held that the

offer of proof was properly excluded as inadequate. In this case, as set forth immediately below, the questions put to Georgia were relevant on their face, and the substance of the answers was also known. Nothing further is required to preserve the claims for appeal.

As to the merits, respondent asserts as an *ipse dixit* that the questions to Georgia either asked her to speculate or to give an unqualified medical conclusion. (RB, p. 239.) Respondent is mistaken. The questions posed to Georgia regarding her siblings' attitudes towards appellant were relevant to show their bias. The animosity among the siblings and their attitude towards and/or knowledge regarding appellant's mental illness was a major theme at penalty phase. (See AOB, pp. 259-60.)[25]

Respondent concludes that the excluded evidence did not prevent appellant from presenting other evidence to rebut the prosecution witnesses' testimony that they were unaware of appellant's mental illness, and thus did not violate his Sixth Amendment right to present a defense and no harm

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[25] Respondent does not address appellant's argument that the trial court ruling also violated federal due process by unevenly applying the rules of evidence, except to refer in a footnote to an earlier argument. (RB, p. 239, fn. 41.) Appellant replied to this argument at ARB, Arg. VI, Part B, pp. 59-61 and refers the Court to that reply. However, appellant must point out here an uneven application of the rules of evidence by respondent himself. He argues here that it was **proper to exclude** Georgia's testimony about what she "thought" her older siblings did not understand about appellant. (RB, p. 239.) However, in the previous argument, respondent argued that it was proper to allow another sister, Ruth, to testify about what her dead mother Eva thought about the murders. (RB, p. 236.) Respondent's own argument illustrates the uneven application of the rules which infested this case.

occurred. (RB, pp. 239-40.) Appellant disagrees. As set out in the Opening Brief, the excluded evidence went to the central issue at penalty phase, i.e., whether appellant was mentally ill and the scope and duration of his illness. Moreover, the prosecutor relied heavily on testimony from appellant's siblings which would have been impeached by the excluded testimony. (See AOB, pp. 263-64.)

B. The Improper Restriction of Sammie Lee's Testimony.

The trial court sustained the prosecutor's objection to defense cross-examination of appellant's brother-in-law Sammie Lee as to whether the family had seen enough death. (Vol. 16, RT 3680.) Respondent again raises an argument that this claim was "waived" because defense counsel failed to "argue" the admissibility of testimony that the trial court excluded. (RB, p. 240.) However, no such "argument" was required because the restriction on Sammie Lee's testimony took place on cross-examination by the defense. (Evid. Code, § 354, subd. (c).)

As to the merits, respondent contends that the excluded testimony was not proper victim impact testimony because "it did not relate to the specific harm caused by appellant or to the impact of the murders on the family." (RB, p. 241.) Appellant disagrees. Sammie Lee, as a victim, would have testified as a victim and family member that the impact of the crimes was the sense that the family had seen enough death. Respondent seems to say that because the evidence was favorable to appellant it could not be victim-impact evidence, but provides no legal authority for such a view.

Respondent also argues that the trial court's ruling was not an

uneven application of the rules of victim-impact evidence vis-a-vis testimony by Artis admitted by the trial court, i.e., that the impact of the deaths on Artis was that he went looking for appellant to hurt him.[26] Respondent's argument is a classic *ipse dixit*, i.e., he says that Artis' testimony was "proper victim impact evidence," but that Sammie's was not. (RB, pp. 241-42.) What respondent apparently means is that Artis' testimony could be viewed as favorable to the prosecution whereas Sammie's was more likely to be viewed as favorable to the defense. Yet Artis' testimony and Sammie's proposed testimony both dealt with the impact on them, as family members, of the deaths of their relatives. As such, the testimony of both was admissible. Respondent implies, but fails to prove by citation to authority, that victim-impact testimony must be adverse to appellant in order to be admissible.

Next, respondent states that Sammie's proposed testimony was not "proper mitigation evidence" under People v. Smith (2005) 35 Cal.4th 334, 366-67. Smith, however, held that it was **error** to exclude testimony by a family member "who has a significant relationship with a defendant" that he or she wants the defendant to live because such testimony is indirect evidence of the defendant's character, and thus admissible. Sammie had such a relationship with appellant and his testimony was thus admissible as indirect evidence that appellant's character was such that he deserved to live.

Finally, respondent argues that the exclusion of this one piece of evidence could not be considered prejudicial since appellant was allowed to

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[26] See Vol. 16, RT 3685-88.

cross-examine Sammie on other matters. (RB, p. 242.) Even if the restriction of appellant's defense as to this one matter is not deemed prejudicial standing alone, appellant contends that it must be considered in assessing the cumulative prejudicial impact of the various penalty phase errors. (See Arg. XXVIII.)

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PROSECUTORIAL MISCONDUCT AT GUILT, SANITY AND PENALTY PHASES

XXI. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN VIOLATION OF APPELLANT'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

A. Prosecutorial Misconduct at Guilt Phase Opening and Closing Argument.

1. The prosecutor improperly argued the substance of appellant's statements made to a doctor during a competency examination.

Respondent argues that appellant has waived his claim that the prosecutor committed misconduct by arguing the substance of statements made by appellant during a competency examination because defense counsel's objection was "insufficient." (RB, p. 244.) Respondent refers to the first objection made by defense counsel, which was sustained. Defense counsel made a subsequent objection which was overruled. (See Vol. 12, RT 2758.) Appellant submits that these objections were sufficient to preserve the issue for appeal because they fairly apprised the trial court of the issue to be decided. (People v. Partida, supra, 37 Cal.4th at 435; People v. Scott, supra, 21 Cal.3d at 290.) The issue is also reviewable because it is one of pure law. (People v. Brown, supra, 42 Cal.App.4th at 471 [reviewing court can decide pure question of law based on undisputed facts]. Moreover, it is reviewable because it presents a constitutional issue. (People v. Blanco (1992) 10 Cal.App.4th 1167, 1173 [reviewing a constitutional claim on appeal where it had been characterized only as an evidentiary objection in the trial court].)

As to the merits, respondent argues that the prosecutor properly cross-examined Dr. Davenport as to the contents of appellant's competency

examination, and because defense counsel failed to object to that cross-examination, evidence of the substance of the competency examination was properly admitted and thus a proper subject for prosecutorial argument. (RB, pp. 245, 247.) Respondent is correct in stating that the prosecutor elicited on cross-examination of Dr. Davenport statements made by appellant during the competency examination. But such cross-examination was improper under both state and federal law. (Estelle v. Smith (1981) 451 U.S. 454; Tarantino v. Superior Court (1975) 48 Cal.App.3d 465.) Defense counsel did object when the prosecutor argued this evidence to the jury. His failure to object earlier should not be seen as abrogating his later objection during the prosecutor's jury argument and respondent cites no authority for such a conclusion. (See RB, pp. 245-46.)

Respondent suggests that since defense counsel called Dr. Davenport and inquired "into the substance of the competency examination" he cannot complain of any violation of his rights. (See RB, p. 246, fn. 42.) This is incorrect. Defense counsel did not inquire into **statements made by appellant during his competency examination**, and these are precisely the statements protected under Estelle v. Smith and Tarantino and the Fifth Amendment.[27]

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[27] Respondent's footnoted citation to Estelle v. Smith is extremely misleading. Respondent suggests that the case holds that when a defendant introduces "psychiatric testimony" he may not invoke his right to remain silent and deprive the prosecution of "the only effective means it has of controverting his proof . . . ." (RB, p. 246, fn. 42.) The portion of Estelle v. Smith quoted by respondent is a description of the rule pertaining to the sanity phase of a trial: "When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the

The first time the prosecutor referred to appellant's statements to Dr. Davenport, he combined those remarks with a reference to appellant's statements about "masked men." (See Vol. 12, RT 2730.) Respondent goes to some lengths to show that the "masked men" remarks referred not "to statements appellant made to Dr. Davenport [during the competency examination], but rather to statements appellant made to family members . . . ." (RB, p. 246.) The fact that the prosecutor made a proper reference in this argument does not purge the improper reference. Appellant is not objecting to the "masked men" remarks but to the prosecutor's remarks identified as statements appellant made to Dr. Davenport. Respondent apparently prefers to defend the "masked men" argument (see RB, p. 246) but the objectionable and objected-to argument is that referring to appellant's privileged statements made to Dr. Davenport in the competency examination.

In any case, defense counsel objected to the prosecutor's first argument (combining the "masked men" remarks with appellant's statement to Dr. Davenport) and the objection was sustained. The prosecutor then repeated his argument relying expressly on statements made by appellant to Dr. Davenport in the competency examination, and that objection was overruled. (Vol. 12, RT 2758-59 ["among other things we know, is that **one of the things [appellant] told Doctor Davenport was that he**

> only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist." (Estelle v. Smith, supra, 451 U.S. at 465.)

vehemently denied the charges"; emphasis provided].)

In sum, the prosecutor expressly relied, in argument to the jury, on appellant's privileged statement to Dr. Davenport, and this was misconduct. Respondent suggests that there was no prejudice from this misconduct, on the grounds that the jury would not have construed those remarks as an attack on Dr. Davenport's testimony since the objectionable remarks were not part of a discussion of Dr. Davenport's credibility. (RB, p. 247.) This is absolutely not true. The prosecutor was indeed attacking Dr. Davenport's credibility, and used appellant's privileged statement in urging the jury to "tell Doctor Davenport the truth of what [appellant] did that day." (Vol. 12, RT 2759.)

2. The prosecutor improperly argued outside the evidence with respect to Eva Blacksher.

Respondent begins by making his usual waiver argument, saying that defense counsel did not object to the prosecutor's remarks at Vol. 12, RT 2735, although he did interject objections Vol. 12, RT 2736, 2737, 2738 and 2739. Respondent complains that defense counsel's objections were not on the same ground as that raised on appeal. (RB, p. 249.) Respondent's spurious waiver arguments should be summarily dismissed. Defense counsel made four objections to this misconduct and asserted that it was improper and "not testified to by the witness," i.e., the prosecutor was arguing outside the evidence. As stated above, where the objections fairly

apprise the trial court of the issue to be decided, they are sufficient to preserve the issue for appeal. (People v. Scott, supra, 21 Cal.3d at 290; see also People v. Williams (1988) 44 Cal.3d 883, 906-07.)

As to the merits, respondent argues that the prosecutor did not argue that Eva's memory problems were caused by the crimes, and that instead the prosecutor only argued that Eva was biased as a mother, which was based on testimony of other witnesses that appellant was her favorite son. (RB, p. 250.) Appellant submits that the record speaks for itself. The prosecutor claimed that the reason Eva testified that she "didn't really see and hear too much" was because she was "torn in this matter." (Vol. 12, RT 2738-39.) The prosecutor tried to explain away the inconsistencies in Eva's testimony by stating it was because of what appellant "put on her that morning." (Vol. 12, RT 2739-40.) This was not an argument based on a bias for the favorite son; rather, it was an attempt to cast blame on appellant for the insufficiencies in Eva's testimony by suggesting – without any evidence in support – that Eva's memory failed, that her normalcy deteriorated, because she was "blown away by this." (Vol. 12, RT 2736.)

3. The prosecutor argued outside the record with respect to appellant's mental illness.

Respondent's argument that no misconduct occurred relies on

respondent's spin on the prosecutor's remarks. (RB, pp. 251-52.) Respondent points out that after defense counsel's objection,[28] the prosecutor "clarified his earlier remarks" by stating that although some witnesses might have said appellant "manifested certain traits," he didn't think "those traits go to a mental illness." (RB, p. 251; Vol. 12, RT 2754.) According to respondent, the prosecutor was thus not arguing facts outside the record, but rather was "arguing his interpretation of the testimony of appellant's family members." (RB, p. 252.) Respondent's argument is to no avail because even the "clarification" made by the prosecutor is contrary to the record. Family members testified not only as to specific traits manifested by appellant, but also that appellant had been mentally ill from the time he was a child. (See e.g., Vol. 11, RT 2528.) The prosecutor thus argued outside the record and committed misconduct.

Indeed, the prosecutor's insistence on arguing outside the record on this point is demonstrated by his repeating, a few pages later, that "[t]he

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[28] Respondent also claims that the trial court "sustained" defense counsel's objection and noted that "Yeah, there were some people who said yes." (RB, p. 251-52; see Vol. 12, RT 2754.) Appellant does not believe that this "yeah" constitutes sustaining an objection. If defense counsel is required to specifically state objections and grounds, the trial court must also be obligated to make a clear ruling, i.e., either sustaining or overruling an objection. "Yeah" is insufficient.

bottom line is, the family doesn't know about this medical history . . . ." (Vol. 12, RT 2758.) Respondent argues that appellant has waived his claim that this argument was misconduct because he did not raise "this specific objection" in the trial court. (RB, p. 253.) Appellant disagrees. Defense counsel had once objected on this specific ground (Vol. 12, RT 2754) and the trial court was thus aware of the nature of the objection, so that the issue is preserved for appeal. (People v. Scott, supra, 21 Cal.3d at 290; see also People v. Williams, supra, 44 Cal.3d at 906-07.)

Respondent also maintains that "there [was] no reasonable probability the jury believed the prosecutor was arguing that all of appellant's family members [] denied his mental illness." (RB, p. 253.) Appellant disagrees. The jury certainly did believe that the prosecutor was making this argument because that is precisely what the prosecutor said not once but twice.

Respondent concludes that the prosecutorial misconduct was not prejudicial because it was "cured" by defense counsel's argument pointing to Elijah's testimony about appellant's mental health problems. (RB, p. 253.) Appellant contends that this Court must consider the cumulative prejudicial impact of the various instances of prosecutorial misconduct, as well as the cumulative prejudicial impact of all the errors in this case.

(People v. Holt (1984) 37 Cal.3d 436, 458-59; Taylor v. Kentucky (1978) 436 U.S. 478, 487, fn. 15.)

4. The prosecutor improperly argued what appellant wanted and knew.

Respondent argues that appellant has waived his claim as to misconduct in the argument regarding what appellant wanted and knew about the special circumstance because defense counsel's objection was to "what the defense might argue." (RB, p. 255.) Respondent slices the point too thin. The prosecutor's argument as to what "the defense might argue" was part and parcel of his argument in the preceding sentence as to what appellant wanted and knew and made no sense without it. The defense objection fairly informed both the prosecutor and the court as to the basis of his objection; accordingly, it was sufficient to preserve this issue for appeal. (People v. Partida, supra, 37 Cal.4th at 435.)

As to the merits, respondent asserts that the prosecutor's remarks did not constitute argument outside the record because he "was merely pointing out that appellant's overarching goal [] was to avoid the death penalty," which would have been clear to the jury in any case. (RB, p. 255.) Appellant repeats that there was **no evidence** as to what appellant knew or wanted; nor was it necessarily "clear" to the jury that appellant's personal goal was to avoid the death penalty. The prosecutor is not allowed to argue

appellant's desires, goals, or knowledge, without evidentiary support, simply because respondent assumes that appellant's personal thoughts and feelings must have been obvious. (If they were so clear and obvious, the prosecutor would not have considered it necessary to make the argument.)

5. The prosecutor's misconduct with respect to the evidence of appellant's Social Security records.

Respondent argues that the prosecutor's argument was based on a stipulation and therefore proper. The stipulation with respect to appellant's Social Security records was that he received payments "based on a disability of paranoid schizophrenia" but that there was "information available concerning his medical condition." (Vol. 12, RT 2624.) The prosecutor's argument mischaracterized this stipulation by insinuating that the lack of information on appellant's **medical** condition meant that there was no evidence in the Social Security records as to appellant's mental disability of paranoid schizophrenia. As the trial court stated, this argument "confused the hell out of everybody." (Vol. 12, RT 2757-58.)

The prosecutor committed further misconduct by stating his opinion that the Social Security records "unsettled" the jurors. Respondent argues that this remark was not misconduct because defense counsel interjected an objection which prevented the prosecutor from finishing his remarks. (RB, p. 258.) This is absurd. A prosecutor is not permitted to commit

misconduct as long as he does not finish his sentence. What the prosecutor did say was his opinion as to the jury's emotional response to the introduction of evidence, and such opinion is improper argument and misconduct. (People v. Nolan (1982) 126 Cal.App.3d 623, 640.)

6. The prosecutor's misconduct violated appellant's federal constitutional rights and was prejudicial.

As stated in the Opening Brief, the prosecutor's misconduct violated appellant's federal constitutional rights to due process and to confrontation. Considered cumulatively, these instances of misconduct prejudiced appellant's defense because each instance of misconduct was aimed at the principal factual question at guilt phase, i.e., appellant's intent.

B. Prosecutorial Misconduct at Sanity Phase Closing Argument.

1. Improper argument about evidence not presented.

The prosecutor argued to the jury that he did not present the testimony of two experts as promised in his opening statement because the jurors were falling asleep during the presentation of the defense expert's testimony and if he put on any more psychiatric testimony the jurors would kill him. (Vol. 15, RT 3457-58.) Respondent argues that the prosecutor was "simply explaining" why he did not present the promised expert psychiatric testimony, i.e. he did not want to bore the jurors. (RB, p. 259.)

However, such "explanations" are misconduct. (See People v. Boyette (2002) 29 Cal.4th 381, 452 [misconduct to suggest in closing argument that there was evidence that was not presented just to save the jury time].) Respondent argues that Boyette is distinguishable. (RB, p. 260.) Respondent does not explain why it should be permissible to tell the jury there was evidence not presented so as to avoid boredom but impermissible to say there was evidence not presented so as to avoid waste of time. In truth, there is no principled distinction between the two situations and both are misconduct.

Respondent argues that if prosecutor's argument did constitute misconduct, it should be deemed harmless because it was brief and because the court instructed the jury that statements by attorneys are not evidence. (RB, p. 260.) This Court must, however, consider the cumulative prejudicial impact of the various instances of prosecutorial misconduct, and the various errors at sanity phase. (People v. Holt, supra, 37 Cal.3d at 458-59; Taylor v. Kentucky, supra, 436 U.S. at 487, fn. 15.)

2. Improper argument outside the record.

Respondent argues that the prosecutor did not argue facts outside the record by arguing that appellant's "hook into Social Security was his mother's disability of some kind;" that his "mom got him in" and that was

"not paranoid schizophrenia." (RB, p. 261; Vol. 15; RT 3458-59.) Ruth did testify that appellant's mother received Social Security disability benefits, and that appellant received Social Security disability "along with her" but she did not testify that appellant's payments were derivative of his mother's or that he did not receive payments because of paranoid schizophrenia.

The prosecutor's argument was not only outside the record, it was an egregious misstatement of record on the most critical issue in this case. (United States v. Mastrangelo (3d Cir. 1999) 172 F.3d 288, 296-98 [reversible error for prosecutor to make statements in closing argument that are not supported by the evidence].) The **stipulated facts** were that appellant did receive Social Security because of his paranoid schizophrenia disability. (See Vol. 12, RT 2624.) The prosecutor's argument to the contrary thus implied his own private knowledge which the defense was unable to cross-examine and which undercut what was some of the most powerful evidence at both sanity and penalty phase, i.e., a formal government finding that appellant had long suffered from schizophrenia, the most contested issue in the case. This misconduct was extremely prejudicial to appellant. As the United States Supreme Court stated in Donnelly v. Christoforo (1974) 416 U.S. 637, 646, prosecutorial

misrepresentation of the facts "may profoundly impress a jury and may have a significant impact on the jury's deliberations."

3. Improper expressions of personal belief.

Respondent first argues that defense counsel's failure to object to the prosecutor's argument to the jury that the defense expert "looked ridiculous and didn't make any sense to you" operates as a waiver of this claim. (RB, p. 262.) Appellant explained in the Opening Brief that the instances of misconduct complained of here are preserved for appeal because the trial court told defense counsel to keep objections to a minimum, and because the trial court had overruled a number of defense counsel's valid objections, making further objections by defense counsel futile. (See AOB, p. 277, fn. 66 and cases cited therein, including People v. Hill (1998) 17 Cal.4th 800, 820-21.)

As to the merits, respondent argues that the prosecutor's argument about the defense expert was a proper inference drawn from the evidence – although respondent fails to state what "evidence" that might be. (RB, p. 262.) In fact, there was **no evidence** that the doctor looked ridiculous to the jury or that he didn't make sense to the jury. The prosecutor was expressing his own (improper) opinion, and committed misconduct.

Next, respondent states that it was proper for the prosecutor to argue

that appellant couldn't tell the jury anything because he was in "denial," and then referring to appellant's "glares" and "looks" and laughter, which the prosecutor "knew" the jury heard and saw. Respondent depicts the prosecutor's statements as "imploring [the] jurors not to let appellant's behavior [] affect their evaluation" of the testimony, and then argues that there is no misconduct when the prosecutor urges the jury to disregard the defendant's demeanor. (RB, pp. 264-65.) The case law cited for this last principle is inapposite here because the prosecutor did not "implore" the jurors to disregard appellant's behavior – far from it, the prosecutor stated he was "glad" the jurors saw appellant laugh. (Vol. 15, RT 3478.) The bottom line is that there was no evidence that the jurors saw what the prosecutor (improperly) told them he saw, which is clear misconduct. (See United States v. Smith (9th Cir. 1992) 962 F.2d 923, 933-34 [improper vouching when the prosecutor indicates outside information supports his position and places his personal assurances behind his theory of the case]; United States v. Edward (9th Cir. 1998) 154 F.3d 915 [prosecutor cannot testify to his own personal knowledge].)

4. The prosecutor violated appellant's constitutional right of confrontation.

Respondent is also wrong in claiming that all the prosecutor did was express "his own personal observations of jurors, whom he saw watching

appellant as he engaged in inappropriate behavior." (RB, p. 265.) The prosecutor stated that he "knew" the jurors heard and saw appellant laughing. The prosecutor went beyond expressing his personal belief (itself improper) because he submitted new "facts" to the jury, i.e., that he saw appellant's "glares" because "as a prosecutor" he had "the opportunity" to sit closer. (Vol. 15, RT 3478.) The prosecutor was basically testifying to appellant's behavior as observed by him. Similarly, the prosecutor offered his testimony that the doctor "looked ridiculous" to the jurors. The prosecutor offered his own percipient "testimony," which appellant was unable to confront or cross-examine. The prosecutor's misconduct thus violated appellant's Sixth Amendment rights to confront the witnesses against him and to present a defense. (United States v. Molina-Guevara (3d Cir. 1996) 96 F.3d 698 [prosecutor violated defendant's confrontation rights by providing "testimony" to the jury].)

5. The prejudicial impact of the misconduct.

The prosecutorial misconduct violated appellant's federal constitutional rights to confrontation and due process, and the misconduct must be assessed for prejudice under Chapman v. California, supra, 386 U.S. at 18. Respondent does not address the prejudicial impact of the prosecutorial misconduct at sanity phase, except to assert, without further

discussion, that either no misconduct occurred or it was sufficiently minor so that no prejudice arose from it. (See RB, p. 277.) Because appellant has specifically addressed the particular prejudice from misconduct at the sanity phase, he refers this Court to his discussion in the Opening Brief. (See AOB, pp. 278-79.)

C. Prosecutorial Misconduct at Penalty Phase Closing Argument.

1. Improper argument on lack of remorse.

Respondent first makes his standard waiver argument. Despite counsel's objection at trial, respondent contends the claim is waived because he did not object on the same grounds as argued on appeal, i.e., that the prosecutor improperly relied on appellant's courtroom demeanor in arguing lack of remorse. (RB, p. 266.) The objection at trial was sufficient to preserve this claim on appeal – defense counsel objected that the lack of remorse argument was improper, an adequate basis for the trial court's ruling. On appeal, appellant shows that the argument was improper **because** it was based on appellant's demeanor and on evidence as to what appellant had for breakfast, neither of which properly show lack of remorse. Respondent's vision of the waiver doctrine is exceedingly expansive and would prevent any legal analysis on appeal beyond the necessarily succinct arguments made at trial. This is not the rule. This Court has made clear that

if an objection affords the trial court a sufficient basis upon which to make an informed ruling, there is no waiver. (People v. Partida, supra, 37 Cal.4th at 435.)

As to the merits, respondent argues first that the jurors were entitled to rely on their observations of appellant in making the sentencing determination. (RB, p. 266.) However, the authorities relied upon by respondent are inapplicable. People v. Heishman (1988) 45 Cal.3d 147, 197 held that the prosecutor properly argued lack of remorse where the defendant himself had put his remorse in issue through the testimony of his sister and a chaplain. Appellant did not present affirmative evidence of his remorse, and thus Heishman does not justify the argument made by the prosecutor here. People v. Navarette (2003) 30 Cal.4th 458, 519 found that the prosecutor's references to the defendant's demeanor were in the context of responding to the defense plea for sympathy and pity and did not suggest that absence of remorse was an aggravating factor. The prosecutor's argument in this case was explicit in arguing that appellant's demeanor should be considered as aggravating when he said that appellant couldn't look the jury in the eye, that he had no emotion and was thus not a person "where sympathy is worthwhile." (Vol. 17, RT 3938.)

As to the prosecutor's argument that the jury should consider the size

of the breakfast appellant ate after the killings as aggravating evidence, respondent relies on People v. Crittenden (1994) 9 Cal.4th 83, 147, which supports appellant's claim, and People v. Pollock (2004) 32 Cal.4th 1153, 1185, which is inapplicable.

Crittenden held that the prosecutor cannot argue absence of remorse by referring to the defendant's failure to testify, but that it was proper to refer to the defendant's callous behavior after the crime. Respondent makes the absurd argument that eating after the crimes showed appellant's "callousness," but this is a far cry from the facts in Crittenden in which the defendant "partied" after the crimes and made other callous and obscene remarks about the victim. The only callousness involved in appellant's breakfast meal was that supplied by the prosecutor speaking to the jury in appellant's voice: "They can drop dead. I won't care. I have to eat." (Vol. 17, RT 3942.) In short, the prosecutor supplied the callousness by improperly referring to appellant's failure to testify.

Nor does the Pollock case support respondent's argument. Pollock held that conduct or statements made at the scene or in fleeing the scene are properly considered by the jury, but the prosecutor's argument here referred to appellant's breakfast, which was not a circumstance of the crime.

Respondent argues that the prosecutor's remarks made in appellant's

supposed voice (Vol. 17, RT 3941-42 ["They can bleed to death. They can die .... They can drop dead, I won't care. I am hungry and I have to eat something ...."]) did not improperly call attention to appellant's failure to testify. (RB, pp. 267-68.) Rather, respondent describes this argument as mere "imagined musings by appellant" to make the point that appellant was more concerned about himself than the victims. (RB, p. 268.) Respondent supports this argument by conflating the holdings of two cases, People v. Cummings (1993) 4 Cal.4th 1233 and People v. Combs (2004) 34 Cal.4th 821.

Combs involved penalty phase argument, but the prosecutor's remarks at issue there involved an argument based on the defendant's actual statement to the police that the killing "wasn't worth it just for the car." Consequently there was no improper focus on the defendant's failure to testify. (Combs, supra, 34 Cal.4th at 867.) Cummings involved guilt phase argument in which the prosecutor argued non-specified "imagined statements" by the defendant which this Court described as "sarcastic hyperbole identifying what the prosecutor believed to be the weakness in the defense explanation of the events." (Cummings, supra, 34 Cal.4th at 867.) However, unlike Cummings, the prosecutor's remarks here did not focus on a perceived weakness of the defense theory of the case nor were

they "sarcastic hyperbole." Rather, those remarks were intended to represent **actual and unexaggerated statements** the prosecutor believed appellant would have had to make had he testified.

In sum, as set forth in the Opening Brief, the prosecutor improperly commented on appellant's lack of remorse by relying on his own assertions as to appellant's demeanor and by referring to appellant's failure to testify.

2. Improper argument on absence of mitigation.

Respondent argues that the prosecutor did not improperly argue the absence of mitigating evidence in general, but instead "discussed the specific evidence before the jury in arguing the absence of mitigating factors." (RB, p. 270, citing Vol. 17, RT 3929-44, 3953-54.)

What the prosecutor actually did was to present to the jury a blank chart which he described as the "mitigation" which he said meant that "the defense has no case." (Vol. 17, RT 3935, 3937.) Respondent's argument is apparently intended to show that the prosecutor referred to defense evidence that appellant had mental problems. (Vol. 17, RT 3929.) The problem, however, is that the prosecutor argued that this evidence was **not** mitigating, because he followed up his reference to the defense evidence by asserting that there was "no mitigation" in this case.

As pointed out in the Opening Brief, this Court has considered

proper argument on the absence of mitigation which points to an actual lack of a specific kind of mitigation. (See AOB, p. 284.) The prosecutor in this case did not argue that appellant failed to provide evidence under a specific mitigating factor, which would have been proper. (Ibid.) Rather, he argued that the specific mitigating evidence appellant did present was **not** mitigating, and thus amounted to arguing facts outside the evidence and improper vouching. (See AOB, p. 285.)

3. Improper paralipsis argument on double counting.

Respondent contends that when the prosecutor told the jury it could not double-count even though he argued appellant's prior conviction as a prior conviction and as a pattern of escalating violence, it was not double-counting but simply an attempt to "clear up any confusion that may have resulted from his argument, i.e., that he was referring to two separate offenses." (RB, p. 271.) Respondent's spin on the argument is unsupported by the record. The prosecutor was arguing appellant's "pattern of violence escalating to this violence" and then refer to a single prior felony conviction already discussed. Appellant had only a single prior conviction for violent conduct and thus the prosecutor was obviously not "referring to two separate offenses."

Appellant reiterates that under People v. Wrest (1992) 3 Cal.4th

1099, 1005, 1107, it is improper to use the rhetorical device of saying one thing (do not double count) but suggesting the opposite (use the prior conviction once again to show a pattern of escalating violence). Indeed, this rhetorical device was somewhat of a pattern for the prosecutor, who used it again in arguing Artis' testimony, indicating that the prosecutor intended to persuade the jury to double count.

4. Other misconduct.

The prosecutor also made an arguments based on (1) his own humility and restraint, wholly irrelevant matters, and (2) deterrence, both of which were improper. Respondent repeats his waiver argument. (RB, p. 274.) As set out in the Opening Brief, the instances of misconduct complained of here are preserved for appeal because the trial court told defense counsel to keep objections to a minimum, and because the trial court had overruled a number of defense counsel's valid objections, making further objections by defense counsel futile. (See AOB, p. 277, fn. 66 and cases cited therein.)

Respondent argues that the prosecutor's argument based on his own supposed personal qualities was "proper" as part of a broader discussion emphasizing the gravity of the jurors' decision. (RB, p. 274.) However, the argument quoted by respondent himself fails to support this assertion: the

challenged remarks were part of a broader argument that appellant was "absolutely evil" and "totally cold and heartless." (See RB, p. 273, quoting Vol. 17, RT 3909-10.) The prosecutor thus improperly injected his own personality and experience into the case as a reason for imposing the sentence of death.

Respondent argues that the prosecutor's argument that appellant's crimes wounded all of society for which the death penalty was a cathartic restoring of order was not an argument for deterrence, presumably because the prosecutor prefaced his improper argument for deterrence with the same rhetorical device of paralipsis, i.e., stating that the death penalty was not a deterrent, and then arguing that imposing the death penalty on appellant would be a deterrent.

5. The prosecutorial misconduct requires reversal of appellant's death sentence.

Respondent does not address the prejudicial impact of the prosecutorial misconduct at penalty phase, except to assert as an *ipse dixit* that either no misconduct occurred or it was sufficiently minor so that no prejudice arose from it. (See RB, p. 277.) Because appellant has specifically addressed the particular prejudice from misconduct at the penalty phase, he refers this Court to his discussion in the Opening Brief. (See AOB, pp. 287-88.)

INSTRUCTIONAL ERRORS AT PENALTY PHASE

XXII. BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE PRINCIPLES APPLICABLE TO AN ASSESSMENT OF HE CREDIBILITY OF WITNESSES, APPELLANT WAS DEPRIVED OF HIS FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A RELIABLE SENTENCING DETERMINATION

Respondent implicitly acknowledges that the trial court erred in failing to instruct the jury on principles of law applicable to assessment of witness credibility (he does not argue that such instructional omissions were proper). Nonetheless, respondent urges that "any alleged instructional error here was harmless." (RB, p. 278.) Respondent relies on People v. Carter (2003) 30 Cal.4th 1166, in which the trial court also failed to give evidentiary instructions and told the jury to disregard the earlier instructions. This Court found the error harmless because the defendant only "speculate[d]" as to the effect of the omitted instructions and failed "to demonstrate that the omission of the evidentiary instructions [] resulted in prejudice." (Id. at 1220-21.) Carter explained that the defendant had failed to show that the instructions, as given, were reasonably likely to have precluded the jury from considering any constitutionally relevant mitigating evidence. (Ibid, citing Buchanan v. Angelone (1998) 522 U.S. 269, 276-78.)

Under the reasoning of Carter, this Court must find the instructional

omission prejudicial, because appellant is able to demonstrate prejudice. For example, as set out in the Opening Brief, LaDonna Taylor testified as a penalty phase witness for the prosecution that appellant had raped her. Taylor herself had convictions for robbery, prostitution, theft, fraud and forgery. (See Vol. 16, RT 3711-12.) Because the jurors were told to disregard the earlier instructions which would have let them consider Taylor's convictions in evaluating her credibility, Taylor's testimony in aggravation was in effect (and improperly) unimpeached testimony in aggravation. The impeachment of aggravating evidence is the functional equivalent of mitigating evidence, and thus, the trial court's instructional error precluded the jury from considering relevant mitigating evidence, i.e., the impeachment of Taylor.

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XXIII. THE TRIAL COURT VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A RELIABLE SENTENCING DETERMINATION UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY REFUSING TO INSTRUCT THE JURY NOT TO DOUBLE COUNT THE SPECIAL CIRCUMSTANCE IN REACHING A DETERMINATION OF THE APPROPRIATE PENALTY

The trial court refused the defense request to instruct the jury not to consider the special circumstance as an aggravating factor if it had already considered in aggravation the facts of the special circumstance. (Vol. VI, CT 1519; Vol. 15, RT 3487.)

Respondent does not argue that the trial court properly refused appellant's request to instruct the jurors not to double count aggravating factors. Instead, he argues that under People v. Young (2005) 34 Cal.4th 1149, 1225-26, People v. Barnett (1998) 17 Cal.4th 1044, 1180, and People v. Ayala (2000) 24 Cal.4th 243, 289-90, reversal is unwarranted in the absence of any misleading argument by the prosecutor. (RB, p. 282.)

However, in this case the prosecutor's argument **was** misleading as to the double-counting of the double murder special circumstance, and the circumstances of the crime. For example, after quoting from factor (a) the "factors in aggravation [as] the circumstances of the crimes [] and the existence of the multiple murder special circumstance," the prosecutor argued the "internal features of these crimes" including appellant's "intent

to kill" and premeditation. (Vol. 17, RT 3923-24.) According to the prosecutor, the "worst" of this was Torey's "vulnerability." (Vol. 17, RT 2923-25.) The prosecutor then said that **"another** substantial factor" against appellant was the "extreme vulnerability of Versenia." (Vol. 17, RT 3924-25.) Next, the prosecutor argued the aggravating effect of murdering "members of your own family." (Vol. 17, 3928.)

In this way, the prosecutor suggested that the circumstances of the crime, including the victims' vulnerability, should be considered in addition to the murders of family members, i.e., the multiple murder special circumstance. Consequently, the trial court's refusal to give appellant's requested instruction must be deemed prejudicial.

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XXIV. THE TRIAL COURT'S ERRONEOUS FAILURE TO GIVE CORRECT INSTRUCTIONS OUTLINING THE DEFENSE THEORY OF THE PENALTY PHASE VIOLATED HIS SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE AND HIS EIGHTH AMENDMENT RIGHT TO A RELIABLE SENTENCING DETERMINATION

A. Respondent's Spurious Waiver Argument.

Respondent begins with his makeshift argument that appellant has "waived" his claims because he "cites cases and makes arguments" that weren't cited and made below. (RB, p. 285.) Respondent cites no authority for his radical suggestion and the notion is ridiculous. In the first place, myriad cases reach the merits of a claim that the trial court failed to give an instruction requested by the defendant. (See e.g., People v. Wright (1988) 45 Cal.3d 1126, 1140 [error for trial court to refuse a defense request for an instruction related to the facts of the case which is a correct statement of law].) Secondly, Penal Code section 1259 expressly contradicts respondent's argument in providing that an appellate court can review "any instruction given, refused or modified, **even though no objection was made thereto** in the lower court, if the substantial rights of the defendant were affected thereby." (Emphasis supplied.)

Defense counsel requested a specific jury instruction at trial which was refused. In the course of his analysis on appeal, appellant has explained and elaborated on the reasons why defense counsel's request

should have been granted, with citation to authority. These elaborations do not transform appellant's claim on appeal into something different from his request at trial. And of course, these analyses do not amount to "waiver" of the arguments made at trial.

As explained at length above, Arg. XIII, page 95, if appellant were precluded on appeal -- at risk of waiver -- from any analysis beyond what defense counsel said at trial, appellate practice would be restricted to a routine reiteration of the trial dialogue, which would serve only to impose the rigidities of a pleading practice on what should be a search for justice and due process.

B. The Trial Court Erred in Refusing to Instruct the Jury to Consider Any Evidence of Appellant's Mental Disturbance, Even If It Was Not "Extreme."

Respondent argues that in People v. Turner (1994) 8 Cal.4th 137, 208, this Court rejected the argument made by appellant, in holding that the factor (k) instruction allows consideration of non-extreme mental or emotional conditions. (RB, p. 286.) Turner did not consider the arguments raised by appellant here. Appellant explains in the Opening Brief the error in the presumption that jurors will understand factor (k) to allow consideration of less-than-extreme mental or emotional disturbance. (See AOB, pp. 306-09.) Respondent fails to address these arguments.

C. The Trial Court Erred in Refusing to Instruct the Jury to Consider Whether Appellant Was Impaired.

Respondent argues that factor (k) also sufficed to inform the jury it could consider any mental impairment which may have affected appellant's capacity to appreciate the criminality of his conduct, whether or not that impairment caused appellant to commit the crimes or whether it constituted a defense. (RB, p. 286.) Respondent relies on People v. Vieira (2005) 35 Cal.4th 264, 298-99 which held that factor (k) was adequate to inform the jury it could take account of any extenuating circumstances and that there was "no need to further instruct the jury on specific mitigating circumstances." However, Vieira, like Turner, did not consider the arguments made here. Accordingly, appellant reiterates the fallacy of the presumption on which Turner and Vieira are based, i.e., that the jurors would understand the factor (k) instruction to permit consideration of non-extreme mental disturbance, or a mental impairment not amounting to a defense.

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XXV. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

The issues raised in Argument XXV are adequately briefed in Appellant's Opening Brief at pages 311-391. Respondent argues that this Court has rejected similar attacks on the constitutionality of the death penalty statute, and to the extent respondent is correct, appellant respectfully requests that the Court reconsider its prior rulings.

One issue, however, must be considered in light of recent decisions by the United States Supreme Court. Blakely v. Washington (2005) 542 U.S. 296, cited in the Opening Brief, and Brown v. Sanders (2006) ___ U.S. ___ [126 S.Ct. 884], decided after the filing of the Opening Brief, support appellant's contention that the aggravating factors necessary for the imposition of a death sentence must be found true by the jury unanimously, and beyond a reasonable doubt. (AOB, pp. 328-52.) This Court's effort to distinguish Ring v. Arizona (2002) 536 U.S. 584 and Blakely (see People v. Prieto (2003) 30 Cal.4th 226, 271, and People v. Morrison (2004) 34 Cal.4th 698, 741) should be re-examined.

The Blakely Court held that the trial court's finding of an aggravating factor violated the rule of Apprendi v. New Jersey (2000) 530 U.S. 466, entitling a defendant to a jury determination of any fact exposing

a defendant to greater punishment than the "maximum" otherwise allowable for the underlying offense. In Blakely, the Court held that, where state law establishes a presumptive sentence for a particular offense and authorizes a greater term only if certain additional facts are found (beyond those inherent in the plea or jury verdict), the Sixth and Fourteenth Amendments entitle the defendant to jury determination of those additional facts by proof beyond a reasonable doubt. (Blakely, supra, 124 S.Ct. at 2537.)

It is true that a California sentencer's findings of aggravating circumstances may involve a mix of factual and normative elements. (See People v. Brown (2004) 32 Cal.4th 382, 401.) But Blakely makes clear that this does not make such findings any less subject to the Sixth and Fourteenth Amendment protections applied in Apprendi and Ring.

In Blakely, the state of Washington argued that Apprendi and Ring should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own — a finding which must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The High Court rejected the state's contention, finding Ring and Apprendi fully applicable even where the sentencer is authorized to make this sort of

mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (Blakely, supra, 124 S.Ct. at 2538.)

In United States v. Booker (2005) 543 U.S. 220 [160 L.Ed.2d 621] the nine justices split into two majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional, because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. Booker reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." (160 L.Ed.2d at p. 650.)[29]

In Brown v. Sanders, supra, 128 S.Ct. 284, the High Court clarified

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[29] In Booker, the Court held that the Federal Sentencing Guidelines could be construed as advisory only, and that under an advisory sentencing system there is no requirement of a jury verdict on sentencing factors. Under California's death penalty scheme, the jury's penalty phase verdict is not advisory. If the verdict is for life without parole, the trial court has no further sentencing discretion. If the verdict is for the death penalty, the trial court must impose the death penalty unless the jury's implied finding that aggravating circumstances outweighs mitigating circumstances is "contrary to law or the evidence presented." (Penal Code § 190.4 (e).)

the role of aggravating circumstances in California's death penalty scheme:

> "Our cases have frequently employed the terms 'aggravating circumstance' or 'aggravating factor' to refer to those statutory factors which determine death eligibility in satisfaction of Furman's narrowing requirement. See, e.g., Tuilaepa v. California, 512 U.S., at 972, 114 S.Ct. 2630. This terminology becomes confusing when, as in this case, a State employs the term 'aggravating circumstance' to refer to factors that play a different role, determining which defendants *eligible* for the death penalty will actually *receive* that penalty. See Cal. Penal Code Ann. § 190.3."

(Brown v. Sanders, supra, fn. 2; emphasis in original.)

There can now be no question that one or more aggravating circumstances above and beyond any findings that make one eligible for death must be found by a California jury before it can consider whether or not to impose a death sentence. (See CALJIC 8.88.) As Justice Scalia, the author of Sanders, concluded in Ring: "wherever factors [required for a death sentence] exist, they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution in criminal cases: they must be found by the jury beyond a reasonable doubt." (Ring, supra, 536 U.S. at 612.) This Court should re-examine its decisions regarding the applicability of Ring v. Arizona to California's death penalty scheme.

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PENALTY PHASE - POST-VERDICT ISSUES

XXVI. APPELLANT'S JUDGMENT OF DEATH IS IN VIOLATION OF STATE AND FEDERAL DUE PROCESS BECAUSE THE TRIAL COURT SENTENCED APPELLANT WITHOUT MAKING A DETERMINATION AS TO HIS COMPETENCY DESPITE SUBSTANTIAL NEW EVIDENCE OF APPELLANT'S LACK OF UNDERSTANDING OF THE PROCEEDINGS AND HIS INABILITY TO ASSIST IN HIS DEFENSE

A. Appellant's Claim Is Properly Before This Court.

Respondent first submits that appellant has failed to preserve his claim for appeal because he did not raise "any concerns with regard to the court's jurisdiction to sentence him." (RB, p. 294.) Respondent's automatic resort to the waiver doctrine is without merit whatsoever.

In the first place, *jurisdictional issues* can be raised at any time. (Summers v. Superior Court (1959) 53 Cal.2d 295, 298; People v. Williams (1999) 77 Cal.App.4th 436, 446-47 [an act beyond a court's jurisdiction is null and void, and a claim based on lack of jurisdiction may be raised for the first time on appeal].) Whether a person is competent is a *jurisdictional question* and cannot be waived (or forfeited) by either the defendant or counsel. (People v. Pennington (1967) 66 Cal.2d 508, 521.)

Respondent states that defense counsel did not "raise[] any concerns

[] with regard to the court's jurisdiction to sentence him."[30] (RB, p. 294.) But defense counsel did indeed express a concern with respect to appellant's competency to be sentenced, and it is this incompetency which results in a lack of jurisdiction. (Vol. 20, RT 4029.) Thus, assuming arguendo a specific objection is required, defense counsel's request for a competency evaluation manifestly preserved this claim as People v. Partida, supra, 37 Cal.4th 428 makes clear.

In Partida, this Court noted the relationship between an objection on a particular ground and the legal consequences thereof.

> "If the trial objection fairly informs the court of the analysis it is asked to undertake, no purpose is served by formalistically requiring the party also to state every possible legal consequence or error merely to preserve a claim on appeal that error in overruling the objection had that legal consequence." (Id. at 437.)

Thus, in Partida, a defendant who objected under Evidence Code section 352 grounds was permitted to argue on appeal that the error had the additional legal consequence of violating his due process rights. Here, by analogy, sentencing an incompetent defendant has the legal consequence of

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[30] Respondent seems to suggest that appellant has forfeited this claim because defense counsel failed to submit pleadings despite the court's invitation to do so. (RB, p. 294.) There is no requirement that an attorney must submit written pleadings in order to preserve a claim for appeal and respondent cites none.

depriving the trial court of its jurisdiction. Consequently, because defense counsel expressed concern as to appellant's competency to be sentenced, his jurisdictional claim is preserved for appeal.

B. The Trial Court Failed to Carry Out Its Obligation to Hold a Hearing and Make a Determination as to Appellant's Competency to be Sentenced.

Respondent argues that even though the trial court "suspended proceedings and appointed two experts in response to defense counsel's concern," the record does not show that the court "expressed a doubt" as to appellant's competency or that the court intended to initiate "formal competency proceedings." (RB, p. 295.)

Respondent's argument displays an ignorance of the relevant statutory provisions. Under section 1368, subdivision (a) – the provision respondent cites in his brief – the trial judge must state on the record any doubt that arises in his mind as to the defendant's competency, and then

> "recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant and to form an opinion as to the mental competence of the defendant at that point in time."

On the other hand, **if counsel informs the court that he or she believes the defendant is or may be mentally incompetent**, then

> "the court shall order that the question of the defendant's mental competence is to be determined in a hearing," and "all

> proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined." (Pen. Code, § 1369, subd. (b) & (c).)

Because in this case, defense counsel expressed their doubt as to appellant's competency, the court was bound by statute to order a hearing and to suspend proceedings under subdivisions (b) and (c). This is precisely what the trial court did. The fact that the trial court did not "express a doubt" under subdivision (a) is beside the point. The court and defense counsel were proceeding under subdivisions (b) and (c).

The cases cited by respondent both involve situations in which the trial court expressed a concern about the defendant's mental state rather than a situation where defense counsel stated a belief in the defendant's competency. In People v. Danielson (1992) 3 Cal.4th 691, at the *prosecutor's suggestion*, the trial court made an initial inquiry to determine the possible effect of the defendant's medications on his competency and defense counsel "consented" to the procedure. (Id. at 724.) This Court held that such an initial inquiry did not require a formal competency hearing. (Id. at 728.) Similarly, in People v. Price (1991) 1 Cal.4th 324, the trial court – again on the *prosecutor's suggestion* – noted that after he complained heatedly about his attorney's representation, defendant appeared extremely upset but that it was "unclear" whether there was a

section 1368 problem. (Id. at 395-96.) This Court rejected the notion that the trial court's expression of concern should be deemed an expression of doubt sufficient to trigger proceedings under section 1368, subdivision (a). (Id. at 396-97.)

In short, Danielson and Price refer to the trial judge's expression of concern about the defendant's competency, and whether such concerns amount to expressions of doubt by the trial judge within the meaning of section 1368, subdivision (a). The cases, and respondent's arguments, are inapposite here because this case involves a statement by defense counsel under section 1368, subdivision (b), which requires the trial court to order a hearing and suspend proceedings. The trial court certainly understood this because at this stage, it followed the subdivision (b) provision exactly.

Respondent next argues that because defense counsel did not file pleadings or present evidence to substantiate their belief[31] in appellant's incompetency, the trial court "rightly considered the matter settled." (RB, p. 295.) Respondent does not support this assertion with any legal

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[31] Respondent refers to defense counsel's "belief" in appellant's incompetency. This is correct and shows that the proceedings were pursuant to counsel's beliefs as expressed to the trial court, and were under subdivision (b) rather than pursuant to the judge's expression of concern under subdivision (a).

authority, because there is none. It matters not at all whether the trial court "considered" this problem "settled." The trial court had a legal obligation to follow the statutory procedures to make an express finding as to appellant's competency. As stated in People v. Marks (1988) 45 Cal.3d 1335, 1337,

> "once a trial court has ordered a competency hearing . . . the court lacks jurisdiction to conduct further proceedings on the charges against the defendant until the court has determined whether he is competent. This determination is mandated by the federal constitutional requirements of due process and by unambiguous California statutes."

C. Substantial New Evidence Required the Trial Court to Hold a Further Competency Hearing.

Next, respondent argues that since appellant had been found competent prior to trial, the court was under no obligation to hold a further competency hearing. (RB, pp. 295-96.) As set out in the Opening Brief, when the trial court is presented with substantial change of circumstances or with new evidence casting doubt on the validity of the first competency finding, the trial court must suspend proceedings for a second competency hearing. (People v. Jones (1997) 15 Cal.4th 119, 149-50.)

Appellant maintains that his own remarks at the hearing on December 7, 1988 amounted to such a change of circumstances and new evidence, requiring a hearing. (See AOB, p. 399-401.) However, even if

those remarks did not require suspension of the proceedings, the trial court here **did suspend the proceedings**. Once this was done, the court was obligated to express a finding as to appellant's competency. (See Part B, above.)

Respondent asserts, as an *ipse dixit*, that appellant's remarks demonstrated "an understanding" of the defense strategy, the evidence against him, and the prosecutor's argument; an ability to work with his attorneys; and a comprehension of the significance of his pleas and the phases of the trial; and thus did not amount to new evidence of appellant's incompetency. (RB, p. 296.) Appellant disagrees – the language and syntax used by appellant show that although his command of vocabulary was intact, his ability to communicate sensibly and to understand what happened was not.

Respondent argues that appellant's remarks show his "firm grasp of the evidence against him" and "knowledge of the court's pretrial evidentiary rulings." (RB, p. 296.) In fact, the contrary is true. Appellant stated his "understanding" that at the preliminary hearing "Sara Winters, the police report and restraining order, could not enter this courtroom," whereas Sara Winters testified at the preliminary hearing, her testimony was considered by the magistrate, and the magistrate did not exclude the

restraining order. (Vol. I, CT 166-70, 207-09, 223.)

Respondent also argues that appellant demonstrated an "understanding" of the prosecutor's argument that he was a malinger. (RB, p. 296.) What appellant said was that "malingering" means "malign, which means injurious, which means defamed, which leads to a word called denigrate. Denigrate means liable. Liable means malingering. Malingering means slander. It means a negro, nigger, black." (Vol. 20, RT 4037.) None of appellant's references to the malingering argument even hint at a proper understanding of the term as it was actually used by the prosecutor:

> "William Tingle [the prosecutor], what did you say to me? What did you call me? The actual term is anyone who uses that word malign is injurious because the word means what it means. . . . The tone of his voice in this building was malicious and to blacken my character as a person. It is a racial statement according to George and his brother Albert who are the actual profound of the Webster dictionary." (Vol. 20, RT 4038.)

Finally, respondent argues that appellant's remarks demonstrated "an understanding of the defense strategy at trial," "an ability to work with his attorneys," and a "comprehension of the interplay between his pleas and the different phases of trial." (RB, p. 296.) In fact, appellant stated his understanding that "the actual term of the sanity phases that the pleas would be considered as my permission to guilt" and that "if I would have been informed by [defense counsel] that I had to admit to two counts of murder

of my nephew and sister, no, there would have been no sanity trial." (Vol. 20, RT 4035.)

In sum, a reading of appellant's monologue shows beyond dispute that he did not understand and was unable to assist his defense attorneys.

Respondent concedes that some of appellant's comments are "bizarre" but argues that such comments alone do not warrant holding a second competency hearing. (RB, p. 296.) Respondent cites People v. Marshall, supra, 15 Cal.4th at 33, for this principle but fails to state the rest of the test, the portion most relevant to appellant. Marshall relied on People v. Danielson, supra, 3 Cal.4th at 727, quoting People v. Deere (1985) 41 Cal.3d 353, 358, and Deere holds that "more" is required to raise a doubt as to competency than "mere bizarre actions or statements, **with little reference to his ability to assist in his own defense.**"[32] (Emphasis supplied.)

Had appellant only made a number of bizarre but irrelevant statements in front of the trial judge, respondent might be right in asserting that mere bizarre conduct or statements are not enough to raise a doubt as to his competency. However, appellant's bizarre statements related

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[32] This is the principle relied on by appellant in the Opening Brief with a citation to People v. Medina (1995) 11 Cal.4th. 694, 734. (See AOB, p. 401.)

specifically to his inability to assist in his defense and his lack of understanding of the proceedings and his part in them. The trial court thus erred in not holding another competency hearing.

D. Conclusion.

In conclusion, the trial court's failure to make a finding as to appellant's competency rendered the judgment and sentence of death without jurisdiction. That sentence must be vacated and appellant must be remanded for a competency hearing; he cannot be sentenced until and unless he is found competent.

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XXVII. THE TRIAL COURT DEPRIVED APPELLANT OF HIS FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO EFFECTIVE ASSISTANCE OF COUNSEL BY REFUSING TO FIND A CONFLICT AND BY REFUSING TO APPOINT AN ADDITIONAL ATTORNEY ON THE QUESTION OF APPELLANT'S COMPETENCY TO BE SENTENCED

Appellant claims that the trial court erred when it (1) first failed to find a conflict between appellant and counsel; and (2) then refused to appoint an additional attorney on the question of competency.

Respondent argues that appellant's "reliance" on People v. Stanley (1995) 10 Cal.4th 764 is "misplaced." (RB, p. 298.) However, appellant addresses Stanley to show that the trial court erred when it held that there was no conflict and no need for appointment of another counsel because Stanley was "dispositive" on that point. (See AOB, pp. 402-03 [trial court declares that "Stanley was in no way dispositive of the conflict asserted by defense counsel . . . ."].)

Appellant does contend that Stanley recognizes that a difference in opinion between defendant and counsel as to competency creates a conflict. In Stanley, the defendant argued that the appointment of a third attorney to represent the defendant's position that he was competent, where his original counsel believed him incompetent, was a conflict. Stanley held that the appointment of new counsel worked to "resolve a **conflict**, not create on." (Stanley, 10 Cal.4th at 806; see AOB, pp. 402-03.) Respondent argues that

nothing in Stanley requires the appointment of separate counsel (RB, p. 298) but Stanley does suggest that disagreement between counsel and client as to competency is a conflict.

Respondent relies on People v. Jernigan (2003) 110 Cal.App.4th 131 for the proposition that counsel's and client's positions as to competency do not create a conflict. (RB, p. 298.) In Jernigan, the trial court had declared a doubt as to the defendant's competency sufficient to require a hearing. The Court of Appeal held that under such circumstances, the attorney necessarily plays a greater role and thus must be allowed to do what he believes in the best interests of his client. (Id. at 136-37; see also People v. Masterson (1994) 8 Cal.4th 965.)

Appellant contends that neither Jernigan nor Masterson applies to the unusual facts here, in which the trial court suspended proceedings but then never held a hearing and never made any finding. Jernigan finds no conflict because the counsel's interest was "in seeking to prove that defendant [was] incompetent," and was thus advocating for his client's best interests so that there was no actual conflict. (Id. at 136-37.) Here, counsel sought appointment of new counsel but did not seek to prove appellant was incompetent. The premise of Jernigan – that present counsel was advocating for his client's best interest – is not present in this case.

Appellant's alternative argument is that the trial court should have instituted the procedure set forth in People v. Bolden (1979) 99 Cal.App.3d 375 and used in Stanley, supra, in which counsel presents evidence of incompetence while the defendant is allowed to testify to the contrary.

Respondent argues that this claim is either forfeited or unsupported because appellant did not request the procedure or express the desire to testify to his competency. (RB, p. 299.) Appellant disagrees. When given the opportunity, at the hearing on December 7, 1998, appellant made a lengthy statement on his own behalf. (Vol. 20, RT 4034-39.) Although appellant's statement is rambling, confused and nonsensical, he was asserting, as best he could given his disabilities, a desire to testify.

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XXVIII. APPELLANT'S SENTENCE OF DEATH IS IN VIOLATION OF THE EIGHTH AMENDMENT REQUIREMENT OF A RELIABLE SENTENCING DETERMINATION IN A CAPITAL CASE

Appellant contends that his death sentence is unconstitutionally unreliable because appellant was incompetent before and during the trial, because the prosecution relied on evidence that was clearly violative of appellant's confrontation rights under Crawford v. Washington, supra, 541 U.S. 36, and because the trial court acted and ruled in an asymmetrical fashion with respect to the prosecution and defense. Finally, there were errors in the jury instructions and prosecutorial misconduct. A verdict of death under these circumstances cannot be deemed reliable and must be reversed.

Respondent argues generally that any errors, individually or collectively, did not deprive appellant of his constitutional right to a reliable sentencing determination, but he does not address this claim with any specificity. (RB, p. 300.)

This Court must, however, give due consideration to the cumulative prejudicial impact of the myriad errors in this case, particularly as to their effect on the unreliability of appellant's sentence of death. (People v. Holt, supra, 37 Cal.3d at 458-59 [considering cumulative prejudicial impact of errors]; Taylor v. Kentucky, supra, 436 U.S. at 487, fn. 15 [cumulative

effect of errors violated federal due process],)

CONCLUSION

Wherefore, for the foregoing reasons, appellant respectfully requests that this Court reverse his convictions and his sentence of death, and remand for a fair trial.

DATED: June 8, 2006

Respectfully submitted,

KATHY M. CHAVEZ
Attorney for Appellant
Erven Blacksher

CERTIFICATION PURSUANT TO
CALIFORNIA RULES OF COURT, RULE 36(B)(1)(a)

I, Kathy M. Chavez, attorney for Erven Blacksher, certify that this Appellant's Reply Brief does not exceed 95,200 words pursuant to California Rules of Court, Rule 36(B)(1)(a). According to the WordPerfect word processing program on which it was produced, the number of words contained herein is 36,784, and the font is Times New Roman 13.

Executed under penalty of perjury this 8th day of June, 2006, in Berkeley, California.

KATHY M. CHAVEZ

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 REPLY 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:

Attorney General
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CAP – ATTN: Michael Snedeker
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Clerk of Court, Alameda Co. Super. Ct.
ATTN: The Hon. Larry J. Goodman
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Oakland, CA 94612

Erven Blacksher
P-28500
San Quentin, CA 94974

I declare under penalty of perjury that service was effected on June __, 2006 at Berkeley, CA and that this declaration was executed on June __, 2006 at Berkeley, CA.

KATHY M. CHAVEZ
(Typed Name)

_____
(Signature)