IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ANTHONY LETRICE TOWNSEL, Defendant and Appellant.	No. S022998 (Madera County Sup. Ct. No. 8926)

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of Madera

HONORABLE PAUL R. MARTIN

MICHAEL J. HERSEK
State Public Defender

C. DELAINE RENARD
State Bar No. 1699893
Deputy State Public Defender

221 Main Street, 10th Floor
San Francisco, California 94105
Telephone: (415) 904-5600
Renard@ospd.ca.gov

Attorneys for Appellant

DEATH PENALTY

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

STATE CASES

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

CONSTITUTIONS

TABLE OF AUTHORITIES

PAGE

CALIFORNIA STATUTES

TABLE OF AUTHORITIES

OTHER STATE STATUTES

JURY INSTRUCTIONS

TABLE OF AUTHORITIES

PAGE

OTHER AUTHORITIES

TABLE OF AUTHORITIES

PAGE

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ANTHONY LETRICE TOWNSEL, Defendant and Appellant.	No. S022998 (Madera County Sup. Ct. No. 8926)

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This appeal is from a final judgment of death following a jury trial and is authorized by Penal Code section 1239, subdivision (b).

STATEMENT OF THE CASE

On September 26, 1989, the Madera County District Attorney filed a complaint against appellant, Anthony Letrice Townsel, alleging three counts of violating Penal Code section 187 (murder of Mauricio Martinez, Martha Diaz, and Diaz's fetus) and adding a so-called "multiple murder" special circumstance allegation under Penal Code section 190.2, subdivision

(a)(3). (1 CT 50-51.)[1] On November 2, 1989, based upon trial counsel's representations, the municipal court declared doubt as to Mr. Townsel's competency to stand trial and suspended proceedings pursuant to Penal Code sections 1367 and 1368. (13 CT 3083, 3086.) On December 1, 1989, the issue of Mr. Townsel's competency to stand trial was submitted to the superior court based upon the results of two psychological evaluations pursuant to sections 1368 and 1369. (1 CT 49; 13 CT 3085; see also Competency Hearing Exhibits 1 [report of Dr. Charles Davis] and 2 [report of Dr. Howard Terrell].) On the same date, the court determined that Mr. Townsel was competent within the meaning of section 1367. (1 CT 49; 13 CT 3085.)

On January 16, 1991, the Madera County District Attorney filed an amended information against Mr. Townsel charging him with the following:

1) count one charged a September 23, 1989 violation of Penal Code section 187 (murder of Mauricio Martinez);

2) count two charged a second September 23, 1989 violation of Penal Code section 187 (murder of Martha Diaz);

---

[1] "CT" refers to the clerk's transcript on appeal, preceded by the volume number, as originally filed. One volume of clerk's transcript was labeled "Additional Clerk's Transcript on Appeal" and shall be referred to as "CTA." "SCT" refers to the supplemental clerk's transcript.

"RT" refers to the reporter's transcript, preceded by volume number, as originally filed. Three volumes of reporters's transcripts were labeled A through C and are referred to as "RTA," "RTB," and "RTC." "ART" refers to the augmented reporter's transcript.

All statutory references are to the Penal Code unless otherwise noted.

3) count three charged a September 22, 1989 violation of Penal Code section 246 (discharge of firearm at an inhabited dwelling);

4) count four charged a September 22, 1989 violation of Penal Code section 136.1, subdivision (c)(1) (attempt to dissuade witness from testifying).

(3 CT 618-621.)

As to count two, the information added allegations that Mr. Townsel personally used a firearm in the commission of the offense (Pen. Code, § 12022.5) and the offense resulted in the termination of a pregnancy (Pen. Code, § 12022.9), and a special circumstance allegation that the murder was committed in retaliation against a witness for giving testimony (Pen. Code, § 190.2, subd. (a)(10). (3 CT 619-620.) As to counts one and two, the information added a "multiple murder" special circumstance allegation pursuant to Penal Code section 190.2, subdivision (a)(3). (3 CT 619.)[2]

On January 17, 1991, Mr. Townsel pleaded not guilty and denied the special allegations. (5 CT 1076.) On January 29, 1991, trial commenced with jury selection. (5 CT 1078.)

On April 12, 1991, the jury acquitted Mr. Townsel of shooting at an inhabited dwelling, as charged in count three. (5 CT 1130-1132.) Otherwise, the jury found him guilty as charged and found true all of the special allegations. (5 CT 1130-1132.)

On April 17, 1991, the penalty phase of trial commenced. (5 CT 1135-1136.) On April 25, 1991, the jury returned a verdict of death. (5 CT

---

[2] A fifth count alleging a misdemeanor violation was ultimately dismissed. (3 CT 621; 3 CT 1128-1129.)

1142.)

On July 17, 1991, the trial court denied Mr. Townsel's motion for modification of the death verdict. (5 CT 1144-1148.) On September 13, 1991, the trial court denied Mr. Townsel's motion for new trial. (5 CT 1150-1151.) On the same date, the court imposed a judgment of death as to counts one and two. (5 CT 1150-1151.) The court imposed, but stayed, sentence on the remaining counts and special allegations. (5 CT 1150-1151.)

This appeal is automatic.

//

//

STATEMENT OF FACTS

A. Guilt Phase

1. The Prosecution's Case

In 1989, appellant, 21-year-old Anthony Townsel, lived with his girlfriend, Martha Diaz. (15 RT 3580; see also 16 RT 3785.) Ms. Diaz became pregnant sometime around March of that year. (11 RT 2571.) The couple had problems and eventually separated. (12 RT 2737-2738, 2740-2741.)

In September of that year, Ms. Diaz and her son from a prior relationship were staying with her sister, Teresa Martinez, Teresa's husband, Mauricio, their children, and Luis Anzaldua, in Teresa and Mauricio's Madera home. (11 RT 2564-2565, 2652.)[3] Mauricio's parents, brothers, Rene and Rolando, and sisters, Marybell and Valerie, lived in the house next door. (11 RT 2565, 2609, 2670, 2681, 2690.)

According to Teresa Martinez, on September 18, 1989, Mr. Townsel came to her house to speak with Ms. Diaz about the baby. (11 RT 2570.) Mr. Townsel and Ms. Diaz spoke through a window; according to Teresa, the conversation was not an amicable one. (11 RT 2572.)

Around the same date, Teresa's brother-in-law, Rene, was driving in his car with his girlfriend when he noticed a car following them. (11 RT 2641.) He was not sure, but thought that the driver of the other car was Mr. Townsel. (11 RT 2641.) The other car followed Rene until they reached his girlfriend's house and parked, at which point the other car drove on. (11

---

[3] In order to avoid confusion, Mr. Townsel will occasionally refer to various members of the Martinez family by their first names.

RT 2641.)

Around September 21, 1989, Mr. Townsel saw Luidivina Hernandez, a friend of his and Ms. Diaz. (12 RT 2737, 2740.) According to Ms. Hernandez, Mr. Townsel discussed "problems" he and Ms. Diaz had been having. He told her that he no longer wanted anything to do with Ms. Diaz or the baby. (12 RT 2738-2739.) Ms. Hernandez told police that Mr. Townsel also said that if he could not have Ms. Diaz, no one else could, either. (12 RT 2739.)

At about 10:00 a.m. on September 22, 1989, Teresa was in her front yard when Mr. Townsel and a companion pulled up in a brown car. (11 RT 2566-2567; 12 RT 2872.) Mr. Townsel got out of the car, handed Teresa an envelope, and angrily told her to tell Ms. Diaz that she had better stay in the house. (11 RT 2568.) After he drove away, Teresa showed her sister the envelope, which contained a letter from the Madera County Justice Court, dated September 20, 1989, advising Mr. Townsel that a complaint had been filed against him alleging a violation of Penal Code section 273.5 (battery or willful infliction of injury on spouse or co-habitant). (11 RT 2569-2570; 12 RT 2802-2804, 2806; see also 13 CT 3114 [People's Exhibit 1].)

At about 5:00 that evening, Teresa, Ms. Diaz, and Luis Anzaldua were outside when Mr. Townsel returned to the Martinez house in a gray Cadillac. (11 RT 2572-2573, 2611, 2654.) From the car, he yelled, "You little bitch. Your ass is mine after the baby is born," before driving away. (11 RT 2573-2574, 2611.)[4]

---

[4] Teresa was specifically asked, but testified that Mr. Townsel made no gestures when he made this statement. (11 RT 2573.) Her brother-in-law, Rene Martinez, who witnessed the episode from the yard

(continued...)

At about 8:00 that evening, Teresa and her family were in her house, along with Rolando Martinez and Mr. Anzaldua, when they heard gunshots outside. (11 RT 2574, 2654, 2678.) Rene and Valerie Martinez also heard the shots from the house next door. (11 RT 2612, 2690-2691.) Rene and Valerie went to the window and saw Mr. Townsel shooting a handgun in the air before getting into a gray Cadillac and driving away. (11 RT 2612, 2633, 2635, 2691-2692.) After the shooting, some of the family members collected shell casings from the street and delivered them to Madera County Sheriff's Deputy Stephen Kirkland, who had responded to the scene. (11 RT 2575, 2614, 2673, 2678, 2692, 2699; 12 RT 2755.)

At about 11:00 that night, Rene, Rolando and Mr. Anzaldua heard more gunshots outside of their houses.[5] (11 RT 2613, 2654, 2670-2671.) Rene and Rolando looked outside and saw gunshots fired from a moving gray Cadillac. (11 RT 2613, 2638-2639, 2671-2672.) Deputy Kirkland again responded to the family's second call to police that day and collected more shell casings. (11 RT 2615, 2640, 2673, 2678; 12 RT 2755.)[6] Bullet

---

[4](...continued)
next door, testified that Mr. Townsel made a gesture like firing a pistol. (11 RT 2611.) After Rene testified and at the close of the prosecution's case-in-chief, the prosecutor recalled Teresa and with a leading question specifically asked her if Mr. Towsel had made a hand gesture that simulated firing a weapon, and she agreed he had. (12 RT 2873-2874.)

[5] Teresa Martinez was not at home at the time. (11 RT 2575-2576.)

[6] According to Rene Martinez, the family collected .22 caliber casings after the first shooting and .25 caliber casings after the second. (11 RT 2614-2615.) According to Deputy Kirkland, he personally recovered .25 caliber casings after the first shooting and the family gave him .22
(continued...)

holes were later discovered in the garage door and window of Teresa and Mauricio's house. (11 RT 2615-2616; 12 RT 2825-2826.)

At about 11:30 the next morning, Mr. Anzaldua, Ms. Diaz, and her son were driving to a parade in Mr. Anzaldua's Monte Carlo. (11 RT 2656.) When they stopped at an intersection, they both noticed two people standing near a gray Cadillac parked at a corner gas station. (11 RT 2657.) Ms. Diaz seemed frightened and said, "there he is." (11 RT 2657-2658.)

Mr. Anzaldua drove off at a high rate of speed into town; the Cadillac followed them. (11 RT 2658.) As they neared the local Sheriff's station, the Cadillac crashed into a fire hydrant. (11 RT 2660.) Mr. Anzaldua parked his car at the Sheriff's station. After he and Ms. Diaz got out of the car, Mr. Anzaldua saw a tall, dark person wearing a white t-shirt and blue pants walking quickly from the area of the crash site over a bridge near the station. (11 RT 2661.) He and Ms. Diaz entered the station and told a deputy inside what had happened. (11 RT 2662.)

The deputy informed Mr. Anzaldua and Ms. Diaz that they already had someone in custody at the crash site. (11 RT 2662.) Mr. Anzaldua and Ms. Diaz went to the site and saw that sheriff's deputies had a Mexican male in custody. (11 RT 2663.) Mr. Anzaldua then drove Ms. Diaz home, parked his Monte Carlo out front, and went to Rene's house next door to visit. (11 RT 2616, 2619, 2663.)

At around 12:45 that afternoon, David Sepulveda, a neighbor of the Martinezes, noticed a gray LTD or Thunderbird park next to his fence. (12 RT 2708-2709.) A black man he later identified as Mr. Townsel got out of

---

[6](...continued)
caliber casings after the second. (12 RT 2755, 2766-2767.)

the passenger side and the car drove away. (12 RT 2708-2709.)

Teresa and Ms. Diaz were with their children in the living room of Teresa's house when they saw Mr. Townsel approaching from outside. (11 RT 2580.) Ms. Diaz grabbed her son and ran toward the back of the house. (11 RT 2580.) Teresa went to the front door to confront Mr. Townsel; when he opened the door and entered, she saw that he was carrying a gun at his side and froze. (11 RT 2581-2582.) Mr. Townsel saw Teresa but walked past her, without saying anything or pointing the gun at her, toward the back of the house. (11 RT 2581-2582, 2592-2593.) As Mr. Townsel was walking down the hallway, Teresa's husband, Mauricio, rounded a corner. When the two men "suddenly and unexpectedly bumped into each other at the corner," Mr. Townsel instantly fired his gun twice, hitting Mauricio in the chest. (11 RT 2582-2583, 2594-2596; see also People's Exhibits 3 & 4 and 11 RT 2590-2591.) Mr. Townsel continued down the hallway, stopped in a bedroom doorway and began firing inside. (11 RT 2584, 2591.) Teresa ran next door to her in-laws' house. (11 RT 2584.)

Rene, Marybell, and Valerie Martinez and Luis Anzaldua heard the gunshots from the house next door. (11 RT 2616-2617, 2664, 2693.) After Teresa ran inside, Marybell looked outside and saw Mr. Townsel exit the other house while firing a gun into the air. (11 RT 2682, 2685; see also 11 RT 2693.) According to Rene, Mr. Townsel fired his last shot directly into Luis Anzaldua's Monte Carlo. (11 RT 2619.) From his own home, Mr. Sepulveda also heard the shots; after calling 911, he saw Mr. Townsel running from the Martinez house. (12 RT 2710-2711, 2716-2717.)

Rene Martinez grabbed a rifle from his parents' bedroom and ran to the open garage door. He took aim and shot Mr. Townsel in the back of the neck as Mr. Townsel was running away. (11 RT 2585-2586, 2618-2620,

2683, 2686; 12 RT 2711, 2717; 13 RT 3074; 15 RT 3417.) Mr. Townsel fell and crawled some distance before collapsing. (11 RT 2620.)

Teresa and Rene ran back to Teresa's house and found Mauricio, shot but still alive, prone on the front porch. (11 RT 2586, 2621.) Rene ran into the house and found Martha, who had also been shot, on the bedroom floor. (11 RT 2621.) Teresa's son and Ms. Diaz's son were still in the house, but unharmed. (11 RT 2621.)

Shortly thereafter, police and medical personnel arrived on the scene and a large crowd gathered around. (11 RT 2587-2588, 2622, 2684, 2687, 2694-2695; 12 RT 2718-2720, 2724, 2812-2813, 2837, 2839.) Madera County Sheriff's Sergeant Bob Holmes was one of the first officers to arrive at the scene. (12 RT 2718-2719.) When he arrived, Mr. Townsel was lying on the ground across the street, about 70 to 80 feet from the Martinez house, with a cocked semi-automatic handgun in his hand. (12 RT 2719-2721.) Sergeant Holmes recovered the weapon and asked Mr. Townsel his name. (12 RT 2720.) Mr. Townsel identified himself, told him that he was the shooter, and that he had been shot himself. (12 RT 2720.)

Madera County Sheriff Glenn Seymour arrived shortly after Deputy Holmes and remained with Mr. Townsel as Deputy Holmes investigated the scene. (12 RT 2832, 2837.) Sheriff Seymour asked Mr. Townsel "what was going on." (12 RT 2833.) Mr. Townsel replied, "I did it. There's no one else to worry about." (12 RT 2833.)

Mr. Sepulveda approached the sheriff and Mr. Townsel and identified Mr. Townsel as the shooter, although he had not, in fact, witnessed the shooting. (12 RT 2711-2715-2716, 2833-2835.) According to Mr. Sepulveda, Mr. Townsel told him to "shut up, don't say nothing."

(12 RT 2711.) According to Sheriff Seymour, however, Mr. Townsel told Mr. Sepulveda, "Shut up or you will get it, too." (12 RT 2835.)

As Mr. Townsel lay bleeding on the ground, Teresa Martinez approached him and asked him, "why my husband?" (RT 2588, 2684-2685, 2695-2696.) Mr. Townsel replied that he was not finished yet and, bizarrely, that "Morris [was] going to come and finish the job." (11 RT 2588-2589, 2685, 2696.)[7] According to Sheriff Seymour, Mr. Townsel made a number of other statements to no one in particular as the paramedics attended to him and put him in an ambulance, including, "I was paid to do a job and I did it." (12 RT 2836.)

By the time police officers arrived on the scene, both Mauricio Martinez and Martha Diaz were dead. (12 RT 2721-2722, 2725.) Mr. Martinez had been shot twice. One bullet entered his body near his right armpit and exited without hitting any vital organs. (12 RT 2752.) A second bullet entered his upper right shoulder, moving in a downward trajectory, hitting vital organs, before exiting through the left flank. (12 RT 2755-2756.) According to the medical examiner, the trajectory of that bullet indicated that Mr. Martinez had been bent at the waist or crouched when it entered his body. (12 RT 2755.) The examiner interpreted the bent or crouched position of the body as a defensive movement, from which he opined that this must have been the second shot. (12 RT 2756-2757.) However, the medical examiner also agreed that the position of the body was also consistent with unexpectedly colliding with someone at the corner. (12 RT 2766.) The trajectory of the bullet could also be explained by a

---

[7] "Morris" was evidently a figment of Mr. Townsel's imagination, as there was never any suggestion that he or anyone else knew a "Morris."

difference in height between the victim and shooter. (12 RT 2766.) Finally, although it was impossible to determine how far the muzzle of the gun was from the body when it was fired because the actual gun used in the shooting was not submitted for testing, the medical examiner opined that it was likely less than 24 inches from the body when it was fired. (12 RT 2768-2769.)

Martha Diaz had been shot five times. (12 RT 2757.) There were bullet entry wounds to her right thigh, neck, face, and left ear. (12 RT 2758-2761.) According to the medical examiner, one fatal shot to the back of the neck occurred first, while she was standing; the only other fatal shot was to her face, which occurred next, as she fell to the floor. (12 RT 2762-2763.)

Firearms examiners determined that the .9 millimeter Taurus handgun recovered from Mr. Townsel at the crime scene had fired some of the .9 millimeter bullets and casings recovered from the scene. (12 RT 2787, 2790-2793, 2795, 2816-2819, 2821-2823.) A single bullet recovered from Ms. Diaz's body was also "probably" fired by that gun. (12 RT 2793-2794, 2814.)

2. The Defense Case

Three experts examined and tested Mr. Townsel. All three experts concluded that Mr. Townsel is mildly to moderately mentally retarded. (12 RT 2879, 2880-2881, 2885, 2888-2892; 13 RT 2985-2987, 2989-2990, 3031, 3137.)

a. Dr. Lea Christensen's evaluation and opinion that Mr. Townsel is mentally retarded

Dr. Lea Christensen, Ph.D. was a clinical psychologist with 22 years of experience in her field, which included work with the developmentally

disabled at the Central Valley Regional Center for the Developmentally Disabled and extensive training in the mental retardation field, and had consulted on prior cases for both the prosecution and the defense. (13 RT 2986, 3037-3039, 3075, 3133-3134.) Dr. Christensen evaluated Mr. Townsel on October 25 and 27, 1989, a little more than a month after the shooting. (13 RT 2987, 3051.) His attorneys requested the evaluation because they believed that he was psychotic and unable to cooperate in his defense. (13 RT 3051.)

Dr. Christensen evaluated Mr. Townsel while he was in the jail infirmary, recovering from his gunshot wound. (13 RT 2987-2988.) When she met with him, he was medicated, tired, in pain, and his head was fastened in a stationary position with a harness or halo. (13 RT 2988, 3025, 3029-3030, 3079-3081.)

Dr. Christensen performed a mental status examination and noted that Mr. Townsel was not oriented as to time, person, or place. (13 RT 2990.) He knew that it was October, but not the date, could not recall Dr. Christensen's name shortly after she had introduced herself, and did not understand that he was in jail and not in a hospital. (13 RT 2990.)

Dr. Christensen also administered the Wechsler Adult Intelligence Scale, Revised ("WAIS-R"), the Bender Motor Gestalt Test, and a Street Survival Skills Questionnaire. (13 RT 2899, 2993, 2997-2998, 3017.) The results of the WAIS-R revealed that Mr. Townsel's Verbal IQ score was 53, his Performance IQ score was 50 and his Full Scale IQ was 47. (13 RT 2992-2993, 3017.)

The Street Survival Skills Questionnaire is used to assess the "functional abilities" of people with low IQs in a variety of areas, including monetary skills (such as counting money or change), identifying and using

tools, the ability to read and calculate time, and household skills (such as using a washer and dryer). (13 RT 3019-3022, 3037.) It is utilized by regional centers for the developmentally disabled throughout the country. (13 RT 3037-3039.) Mr. Townsel was only able to answer 25 questions out of 216 on that questionnaire. (13 RT 3021.) Based upon his performance, Dr. Christensen opined that Mr. Townsel would be unable to perform complex tasks, like putting together a bicycle, without supervision. (13 RT 3065-3066.)

The Bender Gestalt is used to determine neurological damage, as an IQ indicator, and to determine how the third parietal area interacts with the occipital in the brains of children. (13 RT 3057.) The results of the Bender Gestalt test revealed a ratio IQ of 29, which is the equivalent of an average six-year-old child's ratio IQ. (13 RT 2988-3000.)

Mr. Townsel's test results indicated that he was mildly to moderately mentally retarded. (13 RT 3031.)[8] Dr. Christensen further opined that his mental retardation was familial, as opposed to injury related. (13 RT 3074-3065.)[9]

---

[8] Dr. Christensen's initial diagnosis was that Mr. Townsel was moderately to severely mentally retarded. (13 RT 3073.) However, that opinion changed in light of subsequent testing. (See Part d, below.)

[9] Although she had requested medical records from Mr. Townsel's attorneys, they were never provided to Dr. Christensen. (RT 3054-3055.) The fact that Mr. Townsel was taking anti-seizure medication when she evaluated him led Dr. Christensen to believe that he suffered from a seizure disorder, which could have been a cause of his mental retardation. (RT 3054, 3073-3074.) In terms of "familial" mental retardation, seizure disorder is a subset of familial. (RT 3075.) However, without medical records and a good family history, it was impossible to know for certain. (RT 3073-3074.)

(continued...)

Dr. Christensen explained that mental retardation affects abstract thinking, memory, and judgment. (13 RT 3032-3033.) While a mentally retarded person can form the intent to kill, he or she would have more difficulty making decisions, considering the consequences of his or her actions, making causal connections, and would be more impeded in his or her judgment than would a person of normal or average intellect. (13 RT 3032, 3044-3045, 3086, 3097, 3127-3128.) For instance, the fact that Mr. Townsel wrote a letter, while in jail, to a female inmate discussing his desire to seek revenge once released, despite being aware that his correspondence was monitored, was the kind of behavior that reflected an inability to consider consequences of his actions. (13 RT 3132.)[10] In addition, Mr. Townsel made a number of outlandish claims in that letter – such as that he had family members on death row and had served time in prison – which were simply untrue. (13 RT 3191-3192.) What this indicated to Dr. Christensen was a fantasy life, which is not unique to mentally retarded people; what it also indicated however, was the outward expression of a fantasy life as truth, which is consistent with mental retardation. (13 RT 3048-3049.)

It is possible for a subject to manipulate (or "malinger" on) the

---

[9](...continued)

[10] The letter was admitted as People's Exhibit 19 and the parties stipulated that Mr. Townsel wrote it while in jail. (14 RT 3323; 13 CT 3121-3123.) The parties further stipulated that "All mail between jail inmates at the Madera County Jail is subject to monitoring and all such mail is in fact examined. However, whether the contents of a particular letter are actually read by jail employees is left to the discretion of jail personnel." (14 RT 3329-3300.)

Bender Gestalt and Street Survival Skills Questionnaire. (13 RT 3057, 3064.) Further, older studies, conducted before practitioners began receiving specialized training in detecting malingering, indicated that it was also possible to manipulate the WAIS-R. (13 RT 3063.)

Dr. Christensen considered whether Mr. Townsel was malingering. (13 RT 3024, 3041-3042.) Based on her education, specialized training in the area of mental retardation and to detect malingering, and 22 years of experience as a psychologist in which she had administered 500 to 600 evaluations similar to the one she had conducted in this case (many of which resulted in her conclusion that the subjects were malingering), Dr. Christensen concluded that Mr. Townsel was not malingering. (13 RT 3022-3024, 3041-3042, 3092-3093.) To the contrary, it appeared that he was genuinely trying hard to answer all of the questions. (13 RT 3022-3024.)

b. Dr. Frank Powell's evaluation and opinion that Mr. Townsel is mentally retarded

Dr. Frank Powell, Ph.D., had been a psychologist for 35 years with an active clinical practice, had extensive experience administering and interpreting intelligence and other psychological tests and evaluating patients, and had testified as an expert in prior cases for both the prosecution and defense. (12 RT 2879-2880, 2883, 2959.) Dr. Powell evaluated Mr. Townsel in January of 1991. (12 RT 2881.)

Dr. Powell administered several tests to Mr. Townsel, including the WAIS-R, the Wide Range Achievement Test ("WRAT"), the Trail Making Test, the Bender Motor Gestalt Test, and the Gilmore Oral Reading Test. (12 RT 2885, 2892, 2959.) The results of the WAIS-R revealed that Mr. Townsel's Full Scale IQ was 59, which fell within less than the first

percentile of the population, meaning more than 99 percent of the population would score higher; his Performance IQ was 54, which also fell within less than the first percentile; and his Verbal IQ was 62, which fell within the first percentile. (12 RT 2888.)

The WRAT measures reading, spelling and arithmetic skills. Mr. Townsel's scores on that test fell within the first percentile of the population in reading, which was the equivalent of fourth grade reading scores; his spelling scores were the equivalent to the end of the third grade; his arithmetic scores fell within the beginning of the third grade. (12 RT 2890.) The results of the WAIS and WRAT were consistent. (12 RT 2890.)

The Gilmore Oral Reading Test measures reading skills and comprehension. For reading skills (or reading aloud), Mr. Townsel passed the fifth grade, "barely" passed the sixth, and failed the seventh grade levels. For reading comprehension, Mr. Townsel passed at the fourth grade level but failed at the fifth. (12 RT 2891.)

Based upon his evaluation, the results of the tests he administered, and his extensive experience, Dr. Powell concluded that Mr. Townsel was mildly mentally retarded. (12 RT 2891-2892, 2905, 2926-2927, 2947.) Dr. Powell explained that mentally retarded people can often hold jobs, drive cars, pass the written and driving tests for a driver's license, and perform tasks that are not particularly complex. (12 RT 2894-2895, 2938.)[11] However, retardation limits their ability to understand, comprehend and remember. (12 RT 2894-2895, 2938.)

---

[11] The parties stipulated that Mr. Townsel had a valid California Driver's license. (RT 3323.)

Like Dr. Christensen, Dr. Powell considered whether Mr. Townsel was malingering. (12 RT 2887, 2910.) Based upon his 35 years experience as a psychologist and having performed the evaluation he has performed in this case approximately 100 times before, Dr. Powell found no evidence of malingering. (12 RT 2879, 2883, 2887.) To the contrary, the results of the testing were atypical of a person who is malingering. (12 RT 2912-2916.)

c. Dr. Bradley Schuyler's evaluation and opinion that Mr. Townsel is mentally retarded

Dr. Bradley Schuyler, Ph.D., was a clinical psychologist with a specialization in neuropsychology. (13 RT 3137.) Consistent with the common practice in his field, Dr. Schulyer's associate, Dr. Ulem, administered psychological and neuropsychological tests to Mr. Townsel over the course of two full days in March 1991 and Dr. Schuyler evaluated and interpreted the results. (13 RT 3137-3139, 3161.)

Mr. Townsel was again given the WAIS-R, the results of which indicated a Full Scale IQ of 66, which is in the mild range of mental retardation. (13 RT 3147.) Mr. Townsel's reading ability was at the eighth grade level. (13 RT 3153.) His reading comprehension was at the early fourth grade level. (13 RT 3155.) His written mathematics ability was at the mid-fifth grade level; his ability to solve mathematical "word problems" was at the third grade level. (13 RT 3155.) Mr. Townsel's spelling ability was a little above the third grade level. (13 RT 3156.)

Mr. Townsel was also given a series of neuropsychological tests, including sub-tests of the Woodcock-Johnson Psychoeducational Test Battery, the Denman Memory tests, and the Wechsler Memory Scale Revised, to assess his memory function. (13 RT 3140, 3144-3146.) The

results revealed that Mr. Townsel had impaired memory for both verbal and visual information. (13 RT 3146.) The results of other tests showed that his auditory comprehension was also impaired; his ability to follow instructions, for instance, was in the second percentile. (13 RT 3152-3153.) Mr. Townsel's capacity for abstract thinking was also impaired. (13 RT 3152.)

Dr. Ulem also attempted to administer the Minnesota Multiphasic Personality Inventory ("MMPII"), which is routinely given in neuropsychological evaluations. (13 RT 3163, 3177.) However, Dr. Schuyler explained that they were concerned about the validity of the results since a fifth or sixth grade reading level is generally regarded as necessary for reliable results. (13 RT 3163.) Indeed, the validity scales on the test indicated that Mr. Townsel likely did not understand all of the questions. (13 RT 3163.) Ultimately, the results of that test did not factor into Dr. Schuyler's final conclusion. (13 RT 3164; see also 16 RT 3623.)

Based on all of the test results indicating intellectual and neuropsychological impairment, Dr. Schuyler concluded that Mr. Townsel was mildly mentally retarded. (13 RT 3164.) Mr. Townsel's neuropsychological test results were inconsistent with brain damage but "completely consistent with mental retardation." (13 RT 3164-3165.) Like Doctors Christensen and Powell, Dr. Schuyler concluded that Mr. Townsel's mental retardation was hereditary or familial. (13 RT 3172.)

Defense counsel informed Dr. Schuyler that prior examiners[12] had

---

[12] Doctors Charles Davis and Howard Terrell, psychiatrists who had evaluated Mr. Townsel for competency to stand trial due to a mental disorder other than a developmental disability such as mental retardation. (continued...)

been concerned that Mr. Townsel was malingering, so he and Dr. Ulem paid particularly close attention to that possibility. (13 RT 3159.) Like Doctors Powell and Christensen, Doctors Schuyler and Ulem rejected the possibility that Mr. Townsel was malingering insofar as the testing was concerned. (13 RT 3159-3160, 3167.) If the results of subsets of neuropsychological test batteries are inconsistent, that is an indicator that the person is malingering. However, the results of the various neuropsychological testing administered to Mr. Townsel were "highly consistent," which would be "almost impossible" if the subject were malingering. (13 RT 3159-3160.) Indeed, Dr. Schuyler did not believe that even he himself could "fake" such results. (13 RT 3178.)

Dr. Schuyler did believe that Mr. Townsel was not telling the truth when he claimed not to remember the details of the murder, since such memory loss was not supported by any clinical explanation. (13 RT 3168.) However, claiming memory loss is a very unsophisticated way of attempting to protect oneself, so it could be regarded as an immature and primitive defense mechanism, completely consistent with his impaired level of intellectual functioning. (13 RT 3168, 3179.)

Dr. Schuyler reviewed People's Exhibit 19, a letter that Mr. Townsel wrote while in jail. (Ex. 19.) That letter was not inconsistent with its author having an IQ of 66. (13 RT 3166.)

d. Explaining the Seeming Disparities in the Test Results and Expert Opinions

While Doctors Powell, Christensen, and Schuyler all determined that

---

[12](...continued)
(See Argument I, *post.*)

Mr. Townsel was mentally retarded and rejected the possibility that he was malingering, their evaluations produced some dissimilar results, the most significant being that Dr. Christensen determined that Mr. Townsel's full scale IQ was 47; Dr. Powell determined that it was 59; and Dr. Schuyler determined that it was 66. (12 RT 2888; 13 RT 2992-2993, 3164.) All of the experts offered possible explanations for the seeming disparities.

Dr. Christensen explained that most of the disparities in her test results and those administered by Dr. Powell fell within an acceptable range of disparity; the disparities in her IQ test results and Dr. Schuyler's did not fall within an acceptable range, but all could be explained by a number of factors. (13 RT 3025, 3027, 3033, 3079.) A subject can score higher or lower depending on whether he or she is having a good or bad day. (13 RT 3025.) In Mr. Townsel's case in particular, Dr. Christensen administered her tests in an infirmary setting in which there were a lot of distractions, including hospital personnel who entered and exited the room during the evaluation, poor lighting, and the facts that Mr. Townsel was in a head harness, medicated, tired, and in pain, all of which could have affected Mr. Townsel's performance on the tests. (13 RT 3025, 3029-3030, 3079-3081.) In addition, he appeared to be having auditory hallucinations, as if he were distracted by voices that only he could hear, which could also have affected his performance. (13 RT 3025-3026, 3052.) Because these distractions were not present during the evaluations performed by Doctors Powell and Schuyler, Dr. Christensen was not surprised that Mr. Townsel scored higher on their tests. (13 RT 3110; see also 12 RT 2933; 13 RT 3172.) At bottom, however, all three determined that Mr. Townsel was mentally retarded and it would be very difficult – if not impossible – for someone to be able to malinger to such a degree that he could deceive three experts. (13 RT

3112-3113.)

The fact that Mr. Townsel did score higher on IQ tests administered after her own changed Dr. Christensen's initial opinion in some respects. (13 RT 3086.) For instance, she would no longer conclude that his reasoning ability was almost non-existent, as she originally believed, but rather could conclude that he had an exceptionally limited reasoning ability. (13 RT 3086.) Furthermore, someone with an IQ of only 59 (the score produced by Dr. Powell's testing) would still have great difficulty planning or making causal connections. (RT 3086.)

Dr. Christensen would not expect that someone with an IQ of 47 (the score produced by her testing) would be able to pass the written and driving tests for a driver's license, as Mr. Townsel had done, or to write a letter like People's Exhibit 19. (13 RT 3030-3031, 3045-3046.) She would, however, expect that a person with an IQ of 59 would be able to do those things. (13 RT 3045-3047.) She would also expect that family, friends, and teachers would recognize that a person with an IQ of 59 is slow and difficult to educate. (13 RT 3085.)

Dr. Powell agreed that a subject's mental state, as well as external factors, can influence some test results. (12 RT 2925, 2935-2936.) While Dr. Powell agreed with Dr. Christensen's opinion that Mr. Townsel was mentally retarded, their opinions were slightly different – her original opinion being that Mr. Townsel was moderately to severely mentally retarded and his being that Mr. Townsel was mildly retarded. (12 RT 2946-2947.)

However, Dr. Powell explained that the differences in the test results were not indicia of malingering. (12 RT 2935.) To the contrary, a malingerer typically does worse on subsequent tests, not better, as in Mr.

Townsel's case. (12 RT 2935.) Mr. Townsel's superior performance on the tests Dr. Powell administered could have been explained or influenced by a number of factors, such as the benefit of practice in taking the same test before (also known as "practice effects"), Mr. Townsel being in a better mental state at the time of the later tests, or the absence or decrease in his pain medication at the time of the later tests. (12 RT 2935, 2956; see also 13 RT 3161.) Dr. Powell agreed with Dr. Christensen that a subject's ability to perform on the WAIS-R test could be affected adversely if he were in an infirmary, in pain, medicated, and wearing a halo to prevent his head from moving, as Mr. Townsel had been during Dr. Christensen's evaluation. (12 RT 2958.) In addition, the attitude and demeanor of the test giver can be a factor in the variance of test results. (12 RT 2955-2956.)[13]

Dr. Schuyler similarly testified that the difference in a full scale IQ of 59 (Dr. Powell's result) and 66 (Dr. Schulyer's result) is not clinically significant. (13 RT 3161.) There is always a normal or acceptable amount of variability from one test to another based on a variety of factors. Like Dr. Powell, Dr. Schuyler testified that one reason for such variance is practice effects, which could explain the fact that Mr. Townsel's scores increased with each WAIS-R administered to him, achieving his highest score on the third and final WAIS-R that Dr. Ulem had administered. (13 RT 3161.) The discrepancy between 47 (Dr. Christensen's result) and 66 (Dr. Schuyler's result) was significant, but Dr. Schuyler agreed with Doctors Christensen and Powell that it could be attributable to environmental factors that were present during Dr. Christensen's evaluation

---

[13] Neither party examined Dr. Powell regarding Dr. Schuyler's evaluations and findings, presumably because he testified before Dr. Schuyler completed his evaluation. (See RT 2979-2980.)

of Mr. Townsel in the jail infirmary but absent during Doctors Ulem and Powell's evaluations. (13 RT 3162-3163, 3169.)

Doctors Christensen, Powell, and Schuyler all reviewed and considered the earlier evaluations of two psychiatrists, Doctors Terrell and Davis. (12 RT 2936-2937; 13 RT 3043, 3067, 3160.) Dr. Davis had concluded that Mr. Townsel was malingering. (12 RT 2936-2937, 2947, 2961.) Dr. Terrell believed that Mr. Townsel was either malingering or possibly psychotic or suffering from a mental disorder, and therefore recommended that he be found incompetent. (12 RT 2958-2959, 2961.)

Neither Dr. Davis nor Dr. Terrell's opinion altered Doctors Powell, Christensen, and Schuyler's opinions. (12 RT 2937; 13 RT 3067, 3182-3183.) Doctors Christensen and Schuyler explained that Doctors Terrell and Davis, like most psychiatrists, did not administer any standard psychological tests in their evaluations. (13 RT 3043-3044, 3182-3183.) Without such tests, it is very difficult to differentiate between malingering behavior and mental retardation or dull functioning. (13 RT 3067.) Both standardized testing and the specialized training psychologists receive in administering such testing are designed to prevent and detect malingering. (12 RT 2910, 2935, 2948; 13 RT 3023, 3061-3063, 3112-3113, 3159-3160.) It would be nearly impossible for a subject to manipulate three experienced professionals and achieve results reflecting mental retardation on separately administered, standardized tests. (13 RT 3112, 3159.)

3. Rebuttal

a. Lee Coleman

Lee Coleman was a physician specializing in psychiatry who did not examine or evaluate Mr. Townsel. (14 RT 3203, 3236.) Dr. Coleman has

written books and testified before the Legislature regarding the role of psychiatry in the legal system. (14 RT 3206-3209.) He explained that any and all expert opinion regarding mental retardation or other mental defects or disorders is incredible and irrelevant to a jury's determination of the defendant's mental state at the time of a charged crime.

According to Dr. Coleman, intelligence tests are completely unreliable indicators of a person's intelligence. (14 RT 3210-3211, 3231.) The results of intelligence tests are too easily affected by various factors, including the subject's mental state, his desire to be truthful or untruthful, his level of education, and what Dr. Coleman considered to be purely subjective scoring by the administrator. (14 RT 3211-3212, 3231.) The Wechsler intelligence test, like all intelligence tests (14 RT 3211), "attempt to measure intelligence by a test. It cannot do it." (14 RT 3222.) Indeed, according Dr. Coleman, for these reasons, intelligence "tests have been totally trashed by the professional community. They're not given any credibility by the professionals." (14 RT 3231.) Certainly, the results of such tests are "completely irrelevant" (14 RT 3222) to a jury's determination of a defendant's mental state at the time of a charged crime. (14 RT 3220-3223).

Similarly, mental status exams are unreliable indicators of a person's orientation or current mental state because the evaluation is so subjective. (14 RT 3210, 3212-3213.) Personality tests like the MMPI, psychological tests, and neuropsychological tests like the Bender Gestalt, are so inherently, fundamentally unreliable that they are "completely irrelevant" and "absolutely" of no "assistance to the jury" in determining a defendant's mental state at the time of a crime. (14 RT 3214-3215, 3220-3225.) Furthermore, neuropsychological tests, just like intelligence and

psychological tests, "are not in fact able to separate brain injured people or retarded people – people who have anything wrong with their brain from people who do not." (14 RT 3225.)

In Dr. Coleman's opinion, intelligence, psychological, and neuropsychological testing is not merely flawed, or less than fail-safe, or unreliable under *certain circumstances*. To the contrary, such testing and the results thereof are *always* so inherently and fundamentally unreliable – no matter what the circumstances – that they are of no "assistance to the jury," "no help whatsoever" to the jury, "completely irrelevant" to the questions regarding mental state that a jury in a criminal case is required to decide, and therefore "should not influence" a jury's decision "one way or another." (14 RT 3215, 3221-3222-3225, 3231.) Indeed, they are so "completely unreliable" that "if listened to or given weight [by the jury] will just bring confusion . . . ." (14 RT 3254.) In other words, "under no circumstances" does intelligence testing tell anything "about [the subject's] intelligence and most certainly doesn't allow you to go from that to something like was the person planning something or any of those issues." (14 RT 3243.)

For the same reasons, expert diagnoses and "opinions based on the results of these tests" are useless and irrelevant to a jury's determination of whether the defendant harbored a particular mental state at the time of a charged crime, since there is "absolutely no correspondence between" the test results, expert opinions based thereon, and mental state issues a jury is asked to resolve. (14 RT 3215-3216, 3221-3226, 3255.) Jurors should determine a defendant's mental state at the time of a charged crime based upon his behavior *alone*, not based on diagnoses of a mental disease, defect or disorder. (14 RT 3222-3225, 3254.) For instance, given a "hypothetical"

based on the precise historical facts of this case, Dr. Coleman explained that the jurors should determine the perpetrator's mental state solely on those historical facts. If the jurors determined that the defendant harbored a particular mental state based on those historical facts, neither intelligence and other standardized testing results nor expert diagnoses of mental retardation "would add anything or subtract anything or in any way be relevant to . . . the questions which you're trying to answer about mental state. There is nothing in the bag of our tricks in the mental health trade, testing, and examinations that we have which is of any help and in my opinion should not influence the decision one way or another." (14 RT 3219-3221.)

Indeed, presumably since *all* such evidence is inherently unreliable and irrelevant under all circumstances, Dr. Coleman spent very little time reviewing the reports and testimony of the defense experts in this case. He spent approximately seven hours preparing for his testimony, about 90 percent (or about six hours, 18 minutes) of which he devoted to reviewing the police reports and the testimony of the prosecution's percipient witnesses to the crime. (14 RT 3236-3238.) With the remaining 10 percent of his time (or 42 minutes), he reviewed the reports of the three defense experts, the evaluations of Doctors Terrell and Davis, and Dr. Christensen's testimony. (14 RT 3219, 3241.) He did not review the trial testimony of the other defense experts. (14 RT 3241.)

Similarly, and presumably because he concluded that *all* expert diagnoses of mental retardation are shams and legally irrelevant in criminal trials, Dr. Coleman devoted very little of his testimony to the specific evaluations in this case. With respect to Dr. Christensen's report and opinion, Dr. Coleman did testify that the results of the intelligence testing

she administered were "completely meaningless" (14 RT 3226) for the above-described reasons, and "there's nothing that Dr. Christensen has done which is in any way reliable, helpful, or in any way touched on the questions that are being looked at here" (14 RT 3229). He did not direct any specific criticisms to the the evaluations or conclusions of Doctors Powell and Schuyler.

Dr. Coleman agreed that some people are mentally retarded and have brain injuries. (14 RT 3256.) However, determining whether someone is mentally retarded or brain damaged simply is not a matter requiring any expertise. (14 RT 3256.) Instead, it is a common sense determination that lay persons are entirely capable of making for themselves. (14 RT 3256-3257.)

b. Mr. Townsel's School Records and Performance

Through the testimony of the school records custodian and school psychologist, Leon Potter, the prosecution introduced the contents of Madera Unified School District records, including psychological evaluations others had administered to Mr. Townsel. (14 RT 3297-3300A.) The evaluations included IQ tests on which Mr. Townsel had scored 70 in 1975, 75 in 1977, and – Mr. Potter "believe[d], . . . if [he] remember[ed] correctly" – 77 in 1982. (14 RT 3297B-3297C.)

The school records also revealed that Mr. Townsel was placed in special education classes for the "educationally mentally retarded" due to exceptional circumstances. (14 RT 3297A-3297C.) According to the evaluations contained in the records, Mr. Townsel "did not qualify by standard as a mentally retarded child but he's functioning in a low borderline range academically, functioning very lowly, was having

difficulty in the classroom." (14 RT 3297C.)

According to a report of the 1975 evaluation, which had been performed by a non-testifying psychometrist, Mr. Townsel had had to repeat kindergarten and both his kindergarten and first grade teachers referred him based on his extremely slow progress and immature behavior. (14 RT 3299A.) His cognitive development, including his retention, attention span, and motor expression skills were poor, as were his communication skills. (14 RT 3299A-3299B.) Although he was seven or eight years old, the only word he could write and spell was his name. He could not read any words at all or compute any math problems. (14 RT 3299B.) At that time, it was recommended that he be placed in special education for the "educationally mentally retarded" due to exceptional circumstances. (14 RT 3299C.)[14] A neurological examination and referral to the Regional Center for the Developmentally Disabled were also recommended, but never accomplished. (14 RT 3299C.)

According to a report of the 1979 evaluation, which was prepared by a non-testifying psychologist, Mr. Townsel was re-evaluated at the request of a teacher. (14 RT 3298A.) According to the evaluator, his approach to the tests [test?] she administered was both rigid and impulsive and he responded without considering all aspects of the problem. (14 RT 3298B-3298C.) In the non-testifying psychologist's opinion, the results of the Wechsler Intelligence Scale for Children showed that he was functioning in the borderline range of intellectual ability. (RT 3298C.) His verbal score was in the second percentile, meaning 98 percent of children scored above

---

[14] This classification of "E.M.R." was more often called "educably" mentally retarded. (See, e.g., *Anderson v. Banks* (D.C. GA 1981) 520 F.Supp. 472, 477.)

him. (RT 3298C.) His performance score was in the fifth percentile, meaning 95 percent of children scored above him. (RT 3298C-3299.)

According to a report of the 1982 evaluation, prepared by another non-testifying psychologist, Mr. Townsel was again given the Wechsler Intelligence Scale for Children. His "overall score" was in the fifth percentile. (14 RT 3300-3300A.) The evaluating psychologist concluded that he fell within the borderline to dull normal range of intellectual functioning. (14 RT 3300A.) Mr. Townsel was also given the Bender Gestalt and scored in the bottom third percentile, which was significantly below average. (14 RT 3300A.)

According to Mr. Powell, IQ testing has been utilized by schools for many years. (14 RT 3300B.) At the time of the 1991 trial, all students – other than black students – who are placed in special education classes take IQ tests. (14 RT 3300B.) Also according to Mr. Potter, IQ tests were no longer being administered to black students at the time of trial "[b]ecause of the recent court case . . . about two years ago, which indicates that because of the biasness [*sic*] of the tests . . . they are not that accurate and should not be used for certifying black students for mental – as mentally retarded to go into mentally retarded classes." (14 RT 300-3301.)

Dolores Rodriguez was Mr. Townsel's special education counselor at Madera High School sometime around 1983 to 1985. (14 RT 3304-3304A.) Her duties as a special education counselor were "academic scheduling, testing, personal, vocational, and career development" and, in that capacity, she had some contact with mentally retarded people. (14 RT 3304-3304A.) In her opinion, Mr. Townsel was not retarded, but rather simply had a learning disability or handicap. (14 RT 3304A-3304B.)

Elizabeth Davis taught "resource specialist classes" designed for

children with learning disabilities at Madera High School; Mr. Townsel was a student in her U.S. history class six or seven years before trial. (14 RT 3306-3307, 3311.) While she had no records relating to Mr. Townsel, Ms. Davis independently recalled that Mr. Townsel had problems with reading and completing his assignments, but did not have problems in reasoning. (14 RT 3307-3309, 3311.) She could not recall the final grade she gave Mr. Townsel, but when told that grade was a "D," she agreed that was probably correct. (14 RT 3310-3311.) Ms. Davis had never worked with the mentally retarded as a teacher and had no training as a psychologist. (14 RT 3308-3310.) However, she had worked with the mentally retarded as a camp counselor. (14 RT 3308.) In her opinion, Mr. Townsel was not retarded. (RT 3308.)

Susan McClure was a teacher in the special education program at Madera High School. (14 RT 3318.) She believed, but was not certain, that Mr. Townsel was a student in her English class. (14 RT 3318-3320.) She could not recall what year he was her student nor could she recall the final grade she had given him. (14 RT 3320-3321.) Ms. McClure received no pscyhological training other than some coursework required to obtain her special education teaching credential. (14 RT 3322.) She did recall that although Mr. Townsel had difficulty in both reading and writing, nothing "ever indicated to [her] that Mr. Townsel may be mentally retarded." (14 RT 3319.)

c. Mr. Townsel's Ability to Perform Repetitive Tasks for One to Four Days, his Performance on a Temporary Agency Examination, and his Apparent Review of the Newspaper While in Jail

According to Michael Russell, a supervisor at Sunsweet Dryers, his business records reflected that Mr. Townsel worked for Sunsweet for one day in 1989. (14 RT 3275-3276.) However, Mr. Russell believed that Mr. Townsel had actually worked for 10 to 13 days, four of which were as a scraper operator. (14 RT 3276-3277, 3281, 3283.)

A scraper operator must load a machine with cars of trays every one minute and 15 seconds; he or she must be able to count cars and count 26 trays per car, and be able to shut off the machine when it jams, which is usually every five to eight minutes. (14 RT 3278-3279, 3285.) Mr. Russell remembered Mr. Townsel and thought that he did a very good job. (14 RT 3279-3280.)

Elena Magill of Volt Temporary Services testified that her company's business records indicated that Mr. Townsel came into their agency on June 30, 1989 seeking employment. (14 RT 3291-3292, 3293B.) He requested industrial work as he had no skills for clerical work. (14 RT 3296B.) Mr. Townsel was given an application, which was filled out and admitted as Exhibit 20-A. (14 RT 3293B-3294.)

Mr. Townsel was also given a comparison test and a math test, which were not timed tests. (14 RT 3294, 3296B.) The math test did not require the subject to make calculations but rather asked questions, provided an answer, and asked the subject if the answer was correct or incorrect. (14 RT 3294-3294B.) Although the actual test Mr. Townsel had taken was destroyed, altered scores that an employee had entered on the top of his

application indicated Mr. Townsel answered 13 out of 20 questions correctly on the comparison test and 17 out of 20 on the math test, which is considered "quite good." (14 RT 3294B-3294C.) Different scores were originally entered for Mr. Townsel's test results, but later whited-out and the new, above-described score entered. (14 RT 3295C.)

All applicants take the same test at the same time and in the same room, either in the agency office or a rented room at the library. (14 RT 3294D-3295.) Six to seven people are seated side by side and as many as 30 people may take the test at the same time. (14 RT 3296-3296A.) There is a large window in the office room through which the applicants may be monitored. (14 RT 3294D.) When 30 people take the test at the same time, mistakes in recording their scores can and do happen. (14 RT 3295C.)

Madera County Correctional Officer Paul Cohn was assigned to Mr. Townsel's jail unit for about four months during trial. (14 RT 3287-3288.) Every day, Mr. Townsel requested the local newspaper, which covered his trial, and appeared to read it. (14 RT 3289-3290.)[15]

B. Penalty Phase

1. The Prosecution's Aggravating Evidence

Marcella Lopez was Martha's Diaz's friend for over a decade and had known Mr. Townsel only a couple of months in August of 1989. (15

---

[15] According to Dr. Powell, he would not expect someone with an IQ of 59 to request a newspaper on a daily basis simply due to lack of interest and an inability to comprehend much of what he or she was reading. (12 RT 2961.) At the same time, the results of the Gilmore Oral Reading test revealed that Mr. Townsel's reading skills scores passed the fifth grade, "barely" passed the sixth, and failed the seventh grade levels. For reading comprehension, Mr. Townsel passed at the fourth grade level but failed at the fifth. (12 RT 2891.)

RT 3533-3534.) On August 31, Ms. Diaz was babysitting at Ms. Lopez's apartment. (15 RT 3534.) When Ms. Lopez returned home, Ms. Diaz was outside talking with Mr. Townsel. (15 RT 3534.) Ms. Lopez and Ms. Diaz entered the apartment together, leaving Mr. Townsel outside. (15 RT 3535.) Five to 10 minutes later, Mr. Townsel knocked at the door. Ms. Lopez answered the door and Mr. Townsel asked to speak with Ms. Diaz. (15 RT 3535, 3538.) Ms. Diaz told Ms. Lopez to tell Mr. Townsel that she did not want to talk to him. (15 RT 3535, 3538.) Mr. Townsel replied that he just wanted to ask her a question, pushed the door open and entered the apartment. (15 RT 3536.) Mr. Townsel asked to speak to Ms. Diaz in private, but she refused. (15 RT 3536.) They argued for some time before Ms. Diaz finally told him to leave or she would call the police. (15 RT 3536.) Mr. Townsel told her not to call the police because they had a warrant for his arrest. (15 RT 3536.) When Ms. Diaz picked up the phone, Mr. Townsel hit her once or twice. (15 RT 3536.) After he left, one of the women called police. (15 RT 3541.)

Sergeant Rebecca Davis was a correctional officer assigned to Mr. Townsel's jail unit. (15 RT 3542.) In May 1990, Mr. Townsel was outside of his cell with permission. (15 RT 3545.) Although he was not violating any rules, Sergeant Davis twice ordered Mr. Townsel to "lock down," go to his cell and shut the door. (15 RT 3543, 3545.) Upon her third order, he threw a lightweight plastic chair, on which he was sitting, at her. Although she was only two to three feet from him, it did not hit her. (15 RT 3544-3545.)

Frank Reiland was also a jail correctional officer in 1990. (15 RT 3548.) At about 7:00 a.m. on June 28, Mr. Townsel was agitated and Mr. Reiland opened his cell door in order calm him down. (15 RT 3548-3550.)

Mr. Townsel attempted to force his way past Mr. Reiland, out of his cell and into another secured area where two other officers were stationed. (15 RT 3549.) When Mr. Reiland pushed him back, Mr. Townsel yelled obscenities at him, kicked his knee, and punched at him, grazing Mr. Reiland's temple. (15 RT 3549.)

Beatrice Cruz (nee Torres) dated Mr. Townsel in 1985 and 1986, while he was 18 years old and she was 26. (15 RT 3560, 3564.) After they separated, Mr. Townsel appeared outside of Ms. Cruz's home on April 14, 1986. (15 RT 3560-3561, 3563.) Ms. Cruz's new boyfriend went outside, confronted Mr. Townsel, and the two men began arguing. (15 RT 3561.) Ms. Cruz approached and told Mr. Townsel to leave; he called her a bitch and hit her in the mouth. (15 RT 3561-3562.) After he left, Ms. Cruz called police, reported the incident, and Mr. Townsel was arrested. (15 RT 3562.) Some time later, Mr. Townsel called Ms. Cruz, told her she would "pay" for calling the police, threatened to "kill [her] wetback," which Ms. Cruz understood to mean her new boyfriend, and told her that they had better get out of their house. (15 RT 3563.) A complaint alleging that Mr. Townsel had violated Penal Code section 242 (misdemeanor battery) with respect to this incident, along with a minute order reflecting Mr. Townsel's guilty plea to that misdemeanor, were admitted into evidence. (15 RT 3568-3569.)

2. Mr. Townsel's Evidence in Mitigation

Mr. Townsel's mother, Catherine Townsel, testified that her son was one of five children. (15 RT 3579-3580.) The family was supported by her husband, David Townsel, who worked as a hay hauler. (15 RT 3579-3580.) They bore and raised their children in Madera. They were the only black family in the neighborhood and the children were among the few black

children in the local school. (15 RT 3583.)

Mr. Townsel was different from his siblings. (15 RT 3580.) As early as kindergarten, he was academically slow and emotionally immature. (15 RT 3580.) Initially, his mother thought that he was just lazy; however, after spending much effort working with him at home, she realized that he was simply unable to perform his school assignments. (15 RT 3581.)

Mr. Townsel's father also testified to the learning difficulties his son manifested throughout his life. (16 RT 3643.) Mr. Townsel's father worked with him on his studies, but Mr. Townsel had a hard time counting and reading. (16 RT 3643.) His father would tell Mr. Townsel that if he could correctly count change, he could keep it, but Mr. Townsel simply was unable to do so. (16 RT 3643-3644.)

Mr. Townsel's grandfather, Clefo Townsel, was a pastor who spent a lot of time with Mr. Townsel when he was growing up. (16 RT 3624-3625.) Clefo taught Sunday school where Mr. Townsel was a student. (16 RT 3636.) Mr. Townsel could not keep up with the other children in Bible study. (16 RT 3636.) When they had Bible "drill" for prizes, Mr. Townsel could not seem to grasp the questions and lagged behind. (16 RT 3627.)

Mr. Townsel's limited intellectual abilities were also apparent to school officials. His academic problems manifested at a very young age and his parents agreed to place him in special education. (15 RT 3581.) "They" even wanted to remove Mr. Townsel from home, but his mother would not allow it. (15 RT 3582.)

Mr. Townsel did not like being in special education. (15 RT 3582.) The other school children teased him about being mentally retarded. (15 RT 3582.) He disliked being called mentally retarded. (15 RT 3598.) Mr. Townsel remained in special education throughout his school years. (RT

3585, 3587, 3590.)

In addition to his intellectual limitations and resulting academic difficulties, Mr. Townsel's mother testified that he also had more behavioral problems at school than his siblings. (15 RT 3584.) With his parents' permission, Mr. Townsel's grammar school principal beat, or "paddled", the boy for disobedience. (15 RT 3584.)

When Mr. Townsel was 17 years old, Mrs. Townsel and her husband discovered that he had been skipping school and that Beatrice Cruz, a 26-year-old woman with a child, was picking him up at school and taking him to her apartment. (15 RT 3588-3590.) Mr. Townsel dropped out of high school shortly after his parents discovered the affair. (15 RT 3590.)

After Mr. Townsel dropped out of school, he worked for his father hauling hay eight to nine months out of the year. (15 RT 3591-3592; 16 RT 3644.) His father and grandfather taught Mr. Townsel how to fix things, which he seemed to enjoy. For instance, Mr. Townsel helped his grandfather repair a plow and put a new starter in a truck. (15 RT 3598; 16 RT 3627-3628, 3644.)

When he wasn't working for his father, Mr. Townsel worked various temporary jobs or drew unemployment. (15 RT 3592.) David Boyle had known Mr. Townsel for 12 years and hired Mr. Townsel on occasion for various temporary jobs, such as janitorial work, working on trucks, and laying pipes in concrete slabs. (16 RT 3617.) Mr. Townsel was always very cooperative and never had any problems with the other employees. (16 RT 3617; see also 16 RT 3644.)

According to Mr. Townsel's grandfather, they also had a good relationship. (16 RT 3625.) Mr. Townsel's siblings never complained to his grandfather about any problems with him. (16 RT 3626.) Mr. Townsel

was always respectful and his grandfather never saw him get into any fights. (16 RT 3628.) A friend and a cousin similarly testified that they never saw Mr. Townsel behave in an aggressive or hostile manner. (15 RT 3601-3602, 3604-3605.) Two of the bailiffs assigned to Mr. Townsel's trial testified that he was cooperative and never caused any problems with them or with the other transported prisoners. (15 RT 3607-3609; 16 RT 3613-3614.)

Department of Corrections Sergeant Alan Patchell was a supervisor at the jail, who had contact with Mr. Townsel on a regular basis. (16 RT 3619.) He personally had no difficulties with Mr. Townsel. (16 RT 3619.) Sergeant Patchell investigated the chair throwing incident involving Officer Davis in order to determine whether to file criminal charges. (16 RT 3620.) Sergeant Patchell determined that Mr. Townsel had not actually thrown the chair at Officer Davis. (16 RT 3621, 3623.) Instead, in a fit of pique, he simply slammed the chair down on the hard floor and it bounced up. (16 RT 3621.) Officer Davis was standing very close to Mr. Townsel, so if he had actually thrown the chair at her, it likely would have hit her. (16 RT 3621.) Although Officer Davis's report stated that she moved when Mr. Townsel threw the chair, that is not what she told Sergeant Patchell. (16 RT 3623.) For all of these reasons, Sergeant Patchell determined that Mr. Townsel had not thrown the chair at Officer Davis, as she had testified. (16 RT 3623.)

Dr. Powell was recalled and testified that Mr. Townsel's childhood school IQ testing results in the 70s were not inconsistent with Dr. Powell's test results or his opinion that Mr. Townsel was mentally retarded. (16 RT 3638.) As people age, they typically score lower on IQ testing because the tests' level of difficulty increases as more is expected of adults than

children. (16 RT 3638.) Therefore a drop from a childhood IQ score of 77 to an adult IQ score of 59 would not be particularly significant because the populations are different. (16 RT 3639-3640.)

Dr. Powell also reviewed Dr. Coleman's guilt phase testimony. (16 RT 3634.) Dr. Coleman's opinions regarding IQ testing and psychology are not widely accepted within the psychological community. (16 RT 3635.) IQ testing is widely utilized in schools, clinical work, and by employers and law enforcement. (16 RT 3634.) Furthermore, unlike psychiatrists like Dr. Coleman, psychologists receive specialized training in psychological testing or psychometrics. (16 RT 3635-3636.) Dr. Powell himself had extensive training and experience in this area, including eight graduate semesters of psychometrics. (16 RT 3636.) Dr. Coleman's criticisms did not alter Dr. Powell's opinion that Mr. Townsel is mildly mentally retarded. (16 RT 3637.)

With respect to the charged crime, Mr. Townsel's mother testified that she knew Martha Diaz well and that Ms. Diaz often visited Mrs. Townsel at her home. (15 RT 3593-3595.) Ms. Diaz and Mr. Townsel became engaged and planned to marry at the Townsel home. (15 RT 3594.) However, their relationship was a rocky one and they eventually broke off the engagement. (15 RT 3594.)

The day before Ms. Diaz was killed, she called Mrs. Townsel and told her that Mr. Townsel was shooting a gun into the air outside of her house. (15 RT 3596.) Mrs. Townsel was shocked and surprised. (15 RT 3596.) She told Ms. Diaz that something was very wrong and to call the police. (15 RT 3596.) Mrs. Townsel tried to reach her son that day without success. (15 RT 3597.)

Mrs. Townsel visited her son in jail on a regular basis. (16 RT 3641-

3642.) She and her son often discussed "the Lord" and whether he had asked the Lord to forgive him. (16 RT 3641-3642.) He told her that he was praying. (16 RT 3642.) When asked whether or not she was asking the jurors to vote to execute her son, Mr. Townsel's mother replied, "Well, it's really up to the jury what they decide . . . ." (15 RT 3599.)

3. Rebuttal

The parties stipulated that Mr. Townsel was the author of a letter, which was admitted as People's Exhibit 30.[16] (13 CT 3137; 16 RT 3647.) The prosecutor asked Dr. Powell if the contents of the letter changed his opinions in this case. Dr. Powell replied that they did not change his opinions; Mr. Townsel was mentally retarded and not malingering. (16 RT 3637, 3640.)

//

//

---

[16] The letter read:

> well I should Be ThRew wiTh TRial This week, ANd Be oN my wAy To The gAs-chAmBeR ReAl sooN, These dumP Trucks FouNd AnoTheR way To dumP, Now They use youR, IQ, I BeT ALoT oF PePole LAUgHed AT ThAT oNe. ThaT TheRe New wAy oF Bull-shiTiNg is iN courRT, AnoTheR oNe oF MadeRAs FiNesT. HA HA And which Has NoThiNg To do wiTh The Crime iTselF. (*Sic*)

INTRODUCTION

Both the defense and the prosecution presented evidence that Mr. Townsel was mentally retarded. Unfortunately, the legal significance of this evidence was mishandled from the beginning of trial through the end.

A qualified psychologist and expert in the field of mental retardation who had evaluated Mr. Townsel opined that he was incompetent to stand trial due to his mental retardation. However, statutorily mandated competency proceedings to determine if her opinion was correct were never instituted.

The mental retardation evidence was also the linchpin of Mr. Townsel's defense that he did not premeditate and deliberate or intend to kill Martha Diaz with the specific intent to prevent her from testifying as a witness against him on a battery complaint, as required for first degree murder and the multiple murder and witness killing special circumstances.

As will be demonstrated, a series of evidentiary and instructional errors effectively destroyed Mr. Townsel's defense. Virtually the entirety of the prosecution's case rebutting the evidence of Mr. Townsel's mental retardation was erroneously admitted or otherwise tainted by error. Moreover, the jurors were misinstructed that their consideration of Mr. Townsel's mental retardation defense was *limited* to the sole issue of whether he had formed express malice aforethought, or the intent to kill, and thus were precluded from considering Mr. Townsel's defense as to *any* other mental state question, including whether he premeditated and deliberated or killed with the specific intent to prevent Ms. Diaz from testifying as a witness against him.

Whether considered alone or in combination, these errors violated state law, as well as Mr. Townsel's federal constitutional rights to a fair

trial, to proof beyond a reasonable doubt and trial by jury on every element of the charges and special circumstance allegations, to a meaningful opportunity to present his defense, and to reliable jury verdicts that he was guilty of a capital offense and that the death penalty was warranted in this case. (U.S. Const., Amends. V, VI, VIII, XIV.) The judgment must be reversed.

//

//

ARGUMENT

I

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT VIOLATED MR. TOWNSEL'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND RELIABLE GUILT AND PENALTY DETERMINATIONS BY FAILING TO SUSPEND THE PROCEEDINGS AND APPOINT THE DIRECTOR OF THE REGIONAL CENTER FOR THE DEVELOPMENTALLY DISABLED TO EVALUATE HIM IN LIGHT OF SUBSTANTIAL EVIDENCE THAT MR. TOWNSEL WAS BOTH MENTALLY RETARDED AND INCOMPETENT

A. Introduction

California law provides for two related but different procedures when there exists substantial evidence raising a reasonable doubt that a criminal defendant is competent to stand trial. In the typical case, wherein the question is whether a defendant is incompetent due to a psychiatric illness or mental disorder, "the court shall appoint a psychiatrist or a licensed psychologist, and any other expert the court shall deem appropriate, to examine the defendant." (Pen. Code, § 1369, subd. (a).) However, if it is suspected that the defendant is incompetent and suffers a developmental disability, such as mental retardation, the court *must* "appoint the director of the regional center for the developmentally disabled. . . to examine the defendant." (*Ibid.*; see also Pen. Code, § 1370.1.)

Here, the trial court was presented with substantial evidence raising a reasonable doubt that Mr. Townsel was competent due to the developmental disability of mental retardation, which triggered its sua sponte duty to suspend proceedings and appoint the director of a regional center for the developmentally disabled, or his or her designee, to evaluate him. (Pen.

Code, § 1369, subd. (a).) Instead, Mr. Townsel was evaluated for competency by two psychiatrists and found to be competent based on their reports. Neither psychiatrist had any apparent expertise in assessing mental retardation nor did either in fact assess whether Mr. Townsel was mentally retarded or consider whether he was incompetent due to mental retardation. Hence, the appointment, and finding of competency based upon the reports of those psychiatrists neither satisfied the trial court's duty under Penal Code section 1369, subdivision (a) nor rendered harmless the court's error in failing to fulfill its duty. As will be demonstrated below, the court's failure to fulfill its duty under section 1369, subdivision (a) violated not only state law, but also Mr. Townsel's federal constitutional rights to due process and heightened reliability in all stages of these capital proceedings. (U.S. Const. VIII, XIV.) The judgment must be reversed.

B. The Relevant Facts

1. The Pre-Trial Competency Proceedings

On November 2, 1989, and prior to the commencement of the preliminary hearing, lead defense counsel, Linda Thompson, declared doubt regarding Mr. Townsel's competency to stand trial and assist in the preparation of his own defense based upon her own interactions with him and "an evaluation by a psychologist." (RTB 3.)[17] Pursuant to Penal Code section 1368, the municipal court suspended criminal proceedings and certified Mr. Townsel to the superior court to initiate competency proceedings. (RTB 4-5; 13 CT 3083.) On November 3, 1989, and pursuant to Penal Code section 1369, superior court judge Edward Moffat appointed two psychiatrists, Doctors Charles A. Davis and Howard Terrell, to evaluate

---

[17] Defense counsel did not tender the evaluation to the court.

Mr. Townsel and determine his competency to stand trial. (RTB 4-6; CTA 8-9; 13 CT 3084.)

On December 1, 1989, Judge Moffat held a truncated competency hearing. (1 CT 49; 11 CT 2730; 13 CT 3085.) At the commencement of the proceedings, defense counsel reiterated her belief that Mr. Townsel was not competent to aid and assist her in the preparation of his defense. (11 CT 2732.) She waived Mr. Townsel's rights to confront and cross-examine Doctors Terrell and Davis and the parties stipulated to submitting the issue of Mr. Townsel's competency based solely on their reports. (11 CT 2733; Court's Exhibits 1 & 2.)

As Doctors Davis and Terrell were not called to testify and did not submit a curriculum vitae with their reports, the only record evidence regarding their qualifications appears in their letterheads, in which they identify themselves as psychiatrists. (Courts Exhibits 1 & 2.) And as psychiatrists, their evaluations focused on whether Mr. Townsel had a "mental disorder" or a "psychotic disorder" that rendered him incompetent to stand trial. (Exhibit 1 at pp. 1, 6; Court's Exhibit 2 at p. 5; see Pen. Code §§ 1367, 1368, 1369, subd. (a) [court shall appoint psychiatrist or licensed psychologist to evaluate defendant suspected to be incompetent due to "mental disorder"]; *Dorland's Illustrated Medical Dictionary* (31st ed. 2007) at p. 1571 [psychiatry is a branch of medicine that focuses on the diagnosis, treatment, and prevention of mental disorders or illnesses]; see also *People v. Leonard* (2007) 40 Cal.4th 1370, 1389-1390.)

According to Dr. Davis's report, he reviewed the police reports and interviewed Mr. Townsel for one hour on November 17, 1989. (Court's Exhibit 2 at p. 1.) During that interview, Mr. Townsel replied to many questions about his personal information, family history, even the names of

his attorneys, with "I don't know" or "I don't remember" responses. (Court's Exhibit 2 at pp. 1-3.) He was asked to read aloud from a police report and was able to do so, but for the name "Mauricio." (Court's Exhibit 2 at p. 5.) He also recalled (correctly) that he had been shot. (Court's Exhibit 2 at p. 3.)

Based upon that one-hour interview alone, Dr. Davis's opinion was that Mr. Townsel had not "proved by a preponderance of the evidence" that he was incompetent because "he is malingering." (Court's Exhibit 2 at p. 1.) Dr. Davis's only "diagnostic impression [was] malingering. When an individual malingers to the extent that Mr. Townsel did, one does not know if there is some legitimate disorder masked by the malingering or not." (Court's Exhibit 2 at p. 5.) Because Mr. Townsel had not proved his incompetence, Dr. Davis recommended that "the Court find Mr. Townsel to be competent and that he proceed with the charges against him, with or without his cooperation." (*Ibid.*)

According to Dr. Terrell's report, he reviewed the police reports, interviewed three jail correctional officers, and conducted a 30-minute interview of Mr. Townsel on November 18, 1989. (Court's Exhibit 1 at p. 1.) According to Dr. Terrell, the correctional officers described Mr. Townsel as "somewhat peculiar" but reported that he "acted regularly" with other inmates and read (or appeared to read) a newspaper almost every day. (Court's Exhibit 1 at p. 6.) As he had during his interview with Dr. Davis, Mr. Townsel replied to most of Dr. Terrell's questions with "I don't know" or "I don't remember" responses. (Court's Exhibit 1 at pp. 2-5.)

Dr. Terrell concluded that although Mr. Townsel is "currently malingering . . . I also believe that he suffers from a concurrent mental disorder which impairs his ability to cooperate with Counsel in preparing

for a Defense." (Court's Exhibit 1 at p. 1.) More specifically, Dr. Terrell reported his diagnosis as: "Malingering. Psychotic disorder NOS VS Possible Malingering," and explained that Mr. Townsel's "poor eye contact, flat affect, and claims of auditory hallucinations could be typical of a psychotic mental disorder, such as Schizophrenia." (*Id.* at p. 6.) However, his "I don't know" responses to most questions "are not typical of Schizophrenia but are classical responses for someone who is malingering." (*Ibid.*) In conclusion, Dr. Terrell opined that it was "extremely likely" that Mr. Townsel was malingering, but a "small possibility that he also suffers from a concurrent mental disorder. If this is indeed true, I believe that this Mental Disorder is interfering with is ability to cooperate with Counsel in preparing for his defense." (*Ibid.*) Therefore, Dr. Terrell recommended that the court find Mr. Townsel to be incompetent and refer him to the Atascadero State Mental Hospital for psychiatric treatment until his competency was restored. (*Id.* at p. 7.)

Neither psychiatrist administered any tests to Mr. Townsel to determine if he was mentally retarded or otherwise appeared to have assessed or considered whether he was mentally retarded. To the contrary, the only mention of mental retardation was in Dr. Davis's report, in which he stated that "Mr. Townsel performed so poorly from the very beginning of the interview that he was asked if he was retarded." (Court's Exhibit 2 at p. 1.) When Mr. Townsel replied that he did not understand, Dr. Davis explained what retardation means, to which Mr. Townsel again replied that he did not understand. (*Ibid.*) Later in the interview, when answering questions about school, Mr. Townsel told Dr. Davis that "people used to call me retardo." (Court's Exhibit 2 at p. 3.)

Based upon the doctors' reports, the court found that Mr. Townsel

was competent to stand trial. (1 CT 49; 11 CT 2735; 13 CT 3085.)

2. Dr. Christensen's Trial Testimony that Mr. Townsel was Mentally Retarded and Incompetent

Judge Paul Martin presided over the trial. On March 19, 1991, the evidentiary phase of trial commenced with opening statements. (5 CT 1108-1109; 11 RT 2554.) On April 3, 1991, Dr. Lea Christensen, a clinical psychologist and mental retardation expert previously employed by the Central Valley Regional Center for the Developmentally Disabled, testified on Mr. Townsel's behalf. (13 RT 2985-2986, 3038-3039, 3050.) As discussed in the Statement of Facts, above, Dr. Christensen testified that she had evaluated Mr. Townsel over the course of two days in late October 1989, administered several tests utilized by regional centers, including the Wechsler Adult Intelligence Scale, Revised ("WAIS-R"), the Bender Motor Gestalt Test, and a Street Survival Skills Questionnaire, and concluded that he was mentally retarded. (13 RT 2993, 2997-2998, 3017, 3031, 3037-3039.)

Dr. Christensen's diagnosis of mental retardation was corroborated by Dr. Powell's April 1, 1991 testimony and Dr. Schuyler's April 4, 1991 testimony that they had also tested Mr. Townsel and had also concluded that he was mentally retarded. (12 RT 2891-2892, 2905, 2926-2927, 2947; 13 RT 3164-3165.) Apart from Dr. Lee Coleman's globalized attack on *all* expert mental retardation diagnoses as completely unreliable no matter what the circumstances – a psychiatrist with no apparent experience or qualifications to assess mental retardation and who never evaluated Mr. Townsel in any event – the prosecution presented no expert testimony to rebut their diagnoses. (See Argument II, *post.*) To the contrary, on April 8, 1991, the prosecution itself presented evidence from Mr. Townsel's

grammar school and high school records revealing that he had consistently scored in the bottom second to fifth percentile on intelligence testing and indeed had been placed in special education for the "educationally [*sic*] mentally retarded" throughout his school years. (14 RT 3297A-3297C, 3298A-3300A; see also Argument III-C, *post.*)

Dr. Christensen further testified that, at the request of defense counsel, she had also evaluated Mr. Townsel for the purpose of determining his *competency* to stand trial. Dr. Christensen explained that, in October 1989, defense counsel had asked her to evaluate Mr. Townsel because counsel believed that he was psychotic, counsel "couldn't make sense of him," and she was unable to secure his cooperation in preparing his defense. (13 RT 2987-2989, 3051.) Outside of the presence of the jurors, defense counsel confirmed that she had retained Dr. Christensen to perform a competency evaluation and offer recommendations regarding treatment options to enable him to cooperate. (13 RT 3103-3105.)

Dr. Christensen further testified that, based on defense counsel's representations to her, she had expected "one kind of individual" (presumably, a psychotic person, as defense counsel had suspected) and took "implements" and tests intended to evaluate a "higher functioning" person when she met with Mr. Townsel on October 25. (13 RT 2989-2991.) However, after meeting with Mr. Townsel, Dr. Christensen eventually realized that the instruments she had were inappropriate for him. She returned two days later, on October 27, with appropriate instruments, which she had utilized in making assessments for the Regional Center for the Developmentally Disabled. (13 RT 2990-2991, 3038-3040.)

Following testing with those instruments and an evaluation, Dr. Christensen concluded that Mr. Townsel was not only mentally retarded (13

RT 3031), but also *incompetent* to stand trial and assist his attorney in his defense (13 RT 3086-3087). She recommended a limited conservatorship and that Mr. Townsel be referred back to the Central Valley Regional Center for the Developmentally Disabled for placement until such time as his competency might be restored. (13 RT 3086-3089, 3104, 3106; see Pen. Code, § 1370.1.) Dr. Christensen explained that "the referral process for handling persons of lower intelligence" (13 RT 3089) or the "developmentally disabled" (13 RT 3090) is "handled differently than persons of normal intelligence . . . ." (13 RT 3089). Outside of the presence of the jury, defense counsel confirmed that Dr. Christensen had informed her that she believed that Mr. Townsel was incompetent to stand trial and made those recommendations. (13 RT 3103-3104.)[18]

Dr. Christensen further testified at trial that she stood by her opinion that Mr. Townsel was incompetent to stand trial notwithstanding the opinions of psychiatrists Terrell and Davis that he was competent and malingering. (13 RT 3086-3090.) As Dr. Christensen explained, neither had given Mr. Townsel any tests at all. (13 RT 3043-3044, 3113.) Without administering standardized testing, it is very difficult to differentiate between what appears to be malingering behavior and what is actually mild mental retardation or dull intellectual functioning. (13 RT 3043-3044, 3067, 3113.)[19]

---

[18] While this was undoubtedly the unspecified "evaluation by a psychologist" on which defense counsel originally declared her doubt regarding Mr. Townsel's competency to stand trial, she did not tender it to the court or offer it into evidence in the competency proceedings. (RTB 3.)

[19] Indeed, without the administration of standardized IQ tests, one cannot even make a diagnosis of mental retardation. As discussed in (continued...)

As will be demonstrated below, Dr. Christensen's testimony constituted, as a matter of law, substantial evidence raising a reasonable doubt that Mr. Townsel was competent to stand trial due to the developmental disability of mental retardation. This triggered the trial court's absolute, *sua sponte* duty to suspend proceedings and appoint the director of a regional center for the developmentally disabled, or his or her designee, to evaluate Mr. Townsel. (Pen. Code, § 1369, subd. (a).) The previous appointment, and finding of competency based upon the reports, of psychiatrists Davis and Terrell neither satisfied this duty nor rendered harmless the court's error in failing to fulfill its duty. The error violated state law, Mr. Townsel's federal constitutional rights to due process and heightened reliability in all stages of these capital proceedings, and demands reversal of the judgment. (U.S. Const. VIII, XIV.)

---

[19](...continued)
detail in Argument II-B, *post*, the long and generally accepted definition of mental retardation includes "'significantly subaverage intellectual functioning." (*Money v. Krall* (1982) 128 Cal.App.3d 378, 397; *Diagnostic and Statistical Manual* ("DSM")-IV-TR (4th ed. text rev. 2000) at p. 41 ("DSM"); DSM-III-R (3d ed. Rev. 1987) at pp. 28, 31-32; DSM-III (3d ed. 1980) at p. 36; DSM II (2nd ed. 1968) § 3, p. 14.) And "intellectual functioning *is defined by* the intelligence quotient (IQ or IQ equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests." (DSM-IV-TR, *supra*, at p. 41; DSM-III-R, *supra*, at pp. 28-33; DSM-III, *supra*, at pp. 36-39; DSM-II, *supra*, § 3, p. 14; American Psychological Association's *Manual of Diagnosis and Professional Practice in Mental Retardation* (1996), p. 13; *In re Hawthorne* (2005) 35 Cal.4th 40, 52-53 (conc. opn. of Chin, J., joined by Kennard, J.); *Atkins v. Virginia* (2002) 536 U.S. 304, 309, fn. 5.)

C. State Law and the Due Process Clause of the Fourteenth Amendment Guarantee that a Criminal Defendant Will Not Be Tried While Incompetent And Demand Adequate and Specific Procedures to Effectuate that Right

The due process clause of the Fourteenth Amendment to the United States Constitution and Penal Code section 1367 prohibit the state from trying or convicting a criminal defendant while incompetent. (*Drope v. Missouri* (1975) 420 U.S. 162; *Pate v. Robinson* (1966) 383 U.S. 375; *Dusky v. United States* (1960) 362 U.S. 402 (per curium).) Under the federal constitutional standard, "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." (*Drope v. Missouri*, *supra*, at p. 171; see also *Dusky v. United States*, *supra*, at p. 402 [competency demands that defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him"].) Similarly, under Penal Code section 1367, a defendant is mentally incompetent to stand trial "if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (Pen. Code, § 1367, subd. (a).)

In order to prevent the trial of an incompetent person, the "applicable legal principles are well settled":

> Both the due process clause of the Fourteenth Amendment to the United States Constitution and state law require a trial judge to suspend proceedings and conduct a competency hearing whenever the court is presented with substantial evidence of incompetence, that is, evidence that raises a

> reasonable or bona fide doubt concerning the defendant's competence to stand trial. (Pen. Code, § 1367, 1368; *Drope v. Missouri* (1975) 420 U.S. 162; *Pate v. Robinson* (1966) 383 U.S. 375; *People v. Welch* (1999) 20 Cal.4th 701, 737-738.)

(*People v. Halvorsen* (2007) 42 Cal.4th 379, 401; see also Pen. Code, § 1368, subds. (a)-(c) [trial court must suspend proceedings and initiate competency proceedings "if a doubt arises in the mind of the judge as to the mental competence of the defendant" or "[i]f counsel informs the court that he or she believes the defendant is or may be incompetent"]; *People v. Pennington* (1967) 66 Cal.2d 508, 518 [*Pate v. Robinson, supra,* transformed Penal Code Section 1368 into a constitutional requirement].)

Faced with substantial evidence of incompetence, the trial court is required to declare a doubt and initiate competency proceedings *sua sponte*. (See, e.g., *Pate v. Robinson, supra,* 383 U.S. at pp. 384-386; *People v. Koontz* (2002) 27 Cal.4th 1041, 1064, and authorities cited therein;*Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1088-1089, and authorities cited therein.) The trial court has no discretion in this regard. (See, e.g., *People v. Welch, supra,* 20 Cal.4th at p. 738, and authorities cited therein; *People v. Superior Court* (*Marks*) (1991) 1 Cal.4th 56, 69.) Furthermore, "the matter is jurisdictional, and cannot be waived by counsel" (*People v. Hale* (1988) 44 Cal.3d 531, 541, and authorities cited therein) or the defendant himself (*Pate v. Robinson*, 383 U.S. at p. 384; accord, e.g., *People v. Marks* (1988) 45 Cal.3d 1335, 1340, 1342; *In re Davis* (1973) 8 Cal.3d 798, 808). The court's duty to conduct a competency hearing arises when substantial evidence of incompetence is presented at "*any time* prior to judgment" (*People v. Rogers* (2006) 39 Cal.4th 826, 847, and authorities cited therein), even if such evidence arises after a prior finding of competency (see, e.g., *People v. Jones* (1991) 53 Cal.3d 1115, 1152-1153, and authorities cited

therein; accord, e.g., *Drope v. Missouri*, *supra*, 420 U.S. at p. 181; *Moore v. United States* (9th Cir. 1972) 464 F.2d 663, 666).

"Substantial evidence" of incompetence is judged by an objective standard. It does not mean unconflicting evidence (see, e.g., *People v. Young* (2005) 34 Cal.4th 1149, 1219; see, e.g., *People v. Welch*, *supra*, 20 Cal.4th at p. 738); it does mean persuasive evidence (*People v. Hale*, *supra*, 44 Cal.3d at p. 539; *People v. Pennington* (1967) 66 Cal.2d 508, 518; *People v. Ary* (2004) 118 Cal.App.4th 1016, 1024-1025); and it does not mean evidence sufficient to raise a *subjective* doubt regarding the defendant's competence in the mind of the trial judge (see, e.g., *People v. Jones*, *supra*, 53 Cal.3d at p. 1153; *People v. Pennington*, *supra*, at p. 518; *People v. Castro* (2000) 78 Cal.App.4th 1415, 1402). As the Ninth Circuit Court of Appeals has explained:

> Evidence is "substantial" if it raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence. The function of the trial court in applying *Pate's* substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? Its sole function is to decide whether there is *any* evidence which, *assuming its truth*, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court *sua sponte* must order an evidentiary hearing on the competency issue. It is only after the evidentiary hearing, applying the usual rules appropriate to trial, that the court decides the issue of competency of the defendant to stand trial.

(*Moore v. United States*, *supra*, 464 F.2d at p. 666, italics added.)

In this regard, this Court has consistently recognized that "[i]f a psychiatrist or qualified psychologist [citation], who has had sufficient opportunity to examine the accused states under oath with particularity that

in his [or her] professional opinion the accused is, because of mental illness [or developmental disability], incapable of understanding the purpose or nature of the proceedings being taken against him *or* is incapable of assisting in his defense or cooperating with counsel, *the substantial evidence test is satisfied.*" (*People v. Pennington, supra*, 66 Cal.2d at p. 519, italics added; accord, e.g., *People v. Young , supra*, 34 Cal.4th at p. 1217; *People v. Welch, supra*, 20 Cal.4th at p. 748; *People v. Stankewitz* (1982) 32 Cal.3d 80, 92.)

As the United States Supreme Court has explained, due process demands both: (a) that the state institute adequate procedures for determining competence; and (b) the defendant's access to those procedures. (*Medina v. California* (1992) 505 U.S. 437, 449; *Drope v. Missouri, supra*, 420 U.S. at p. 172 [federal Constitution demands that states "observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial"].) In California, the procedures to be followed when substantial evidence of incompetence arises are clearly delineated by statute.

"[T]he court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369." (Pen. Code, § 1368, subd. (b).) In the typical case wherein the defendant is suspected of having a psychiatric illness or mental disorder, section 1369, subdivision (a) provides that the "the court shall appoint a psychiatrist or a licensed psychologist, and any other expert the court shall deem appropriate, to examine the defendant."

Importantly, however, *"if it is suspected the defendant is developmentally disabled, the court shall appoint the director of the regional center for the developmentally disabled. . . to examine the*

defendant. (Pen. Code, § 1369, subd. (a), italics added.)[20] "'Developmental disability' means a disability that originates before an individual attains age 18, continues, or can be expected to continue, indefinitely and constitutes a substantial handicap for the individual . . . . [T]his term shall include *mental retardation* . . . ." (Pen. Code, § 1370.1, italics added.)

As this Court has explained, the statute's mandate that the director of the regional center for the developmentally disabled be appointed when it is suspected that the defendant is developmentally disabled "is intended to ensure that a developmentally disabled defendant's competence to stand trial is assessed by those having expertise with such disability . . . . Court-appointed psychiatrists and psychologists may not have this expertise, because their experience may pertain to mental illness rather than developmental disability." (*People v. Leonard* (2007) 40 Cal.4th 1370, 1389-1390.) Hence, where there is substantial evidence raising a suspicion that the defendant is mentally retarded and incompetent, the appointment of psychiatrists rather than the director of the regional center is clear error. (*Id.* at p. 1388; *In re L.B.* (March 16, 2010, C061010) ___ Cal.App.4th ___, 2010 D.A.R. 4058, 4059; *People v. Castro*, *supra*, 78 Cal. App.4th at pp. 1417-1418.) And while a trial court's finding of competency following a hearing will be upheld on appeal if credible and substantial evidence supports it, that rule does not apply where the proper procedures – such as the appointment of the director of the regional center – have *not* been followed. (See, e.g., *People v. Castro*, *supra*, 78 Cal.App.4th at pp. 1418-1419.)

---

[20] This requirement also applied at the time of trial.

D. Because The Trial Court Was Presented With Substantial Evidence Raising a Reasonable Doubt That Mr. Townsel Was Competent to Stand Trial Due to Mental Retardation, Its Failure to Suspend the Proceedings and Initiate Competency Proceedings By Appointing the Director of the Regional Center, or His or Her Designee, to Evaluate Mr. Townsel Violated State Law and the Eighth and Fourteenth Amendments

As discussed in part C, *ante*, this Court has consistently recognized that "[i]f a psychiatrist or qualified psychologist [citation], who has had sufficient opportunity to examine the accused states under oath and with particularity that in his [or her] professional opinion the accused is, because of mental illness [or disorder], incapable of understanding the purpose or nature of the proceedings being taken against him *or* is incapable of assisting in his defense or cooperating with counsel, the substantial evidence test is satisfied." (*People v. Pennington*, *supra*, 66 Cal.2d at p. 519.) The substantial evidence test was satisfied in this case.

Dr. Christensen was a "qualified psychologist." Indeed, she had been employed by a regional center for the developmentally disabled, where she worked with retarded people, and utilized instruments and diagnostic criteria in evaluating Mr. Townsel which that agency uses in assessing mental retardation. (13 RT 2986, 3038-3039, 3050, 3088-3090.) She had sufficient opportunity to evaluate Mr. Townsel and stated "under oath and with particularity" that Mr. Townsel was both mentally retarded and incompetent to stand trial. (13 RT 3031, 3086-3087.)

Furthermore, Dr. Christensen emphasized that the procedures for evaluating and referring the developmentally disabled are different from those for persons of average or normal intelligence. (13 RT 3089-3090.) Indeed, consistent with the statutory procedures for the director of the

regional center, or his or her designee, to follow when he or she has determined that a developmentally disabled person is incompetent to stand trial (Pen. Code, § 1370.1, subd. (b)), Dr. Christensen even recommended a limited conservatorship and that Mr. Townsel be referred back to the Central Valley Regional Center for the Developmentally Disabled for placement until his competency might be restored and counsel could obtain "his full cooperation." (13 RT 3086-3089, 3103-3104.)

In addition, before trial, defense counsel herself declared a doubt that Mr. Townsel was competent to stand trial based on his inability to cooperate in the preparation of his defense. (RTB 3; 11 CT 2732.) According to Dr. Christensen's trial testimony, defense counsel requested the competency evaluation because defense counsel believed that Mr. Townsel was not competent to aid and assist in his defense. (13 RT 2987-2989, 3051.) Defense counsel confirmed as much to the trial court. (13 RT 3103-3105; see, e.g., *Medina v. California*, *supra*, 505 U.S. at p. 450 [while counsel's opinion is not necessarily determinative, "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense"]; *Drope v. Missouri*, *supra*, 420 U.S. at p. 177 and fn. 13 ["an expressed doubt (regarding the defendant's competency) by one with 'the closest contact with the defendant,' is unquestionably a factor which should be considered" in assessing whether there is substantial evidence raising a doubt as to the defendant's competence]; *Torres v. Prunty* (9th Cir. 2000) 223 F.3d 1103, 1109.)[21]

---

[21] That defense counsel did not alert the *municipal* court or Judge Moffatt to Mr. Townsel's developmental disability, or specifically request appointment of the regional director to evaluate him, is of no

(continued...)

Assuming – as the trial court was required to do – the truth of Dr. Christensen's trial testimony, along with defense counsel's representations, that evidence constituted, as a matter of law, substantial evidence raising a reasonable doubt that Mr. Townsel was competent to stand trial due to the developmental disability of mental retardation. Hence, pursuant to section 1369, subdivision (a), this evidence triggered the trial court's absolute, *sua sponte* duty to suspend the proceedings and "appoint *the director of the regional center for the developmentally disabled*. . . to examine the defendant. (Pen. Code, § 1369, subd. (a), italics added; *People v. Leonard, supra*, 40 Cal.4th at p. 1388; *People v. Castro, supra,* 78 Cal. App.4th at pp. 1417-418; see also *People v. Jones, supra*, 53 Cal.3d at pp. 1152-1153 [duty to suspend proceedings and initiate competency proceedings when substantial evidence of incompetence is presented at *any time* prior to judgment, even if such evidence arises after a prior finding of competency];

---

[21](...continued)
moment. The *trial* court was aware of substantial evidence raising a reasonable doubt that Mr. Townsel was competent to stand trial due to mental retardation and hence had a *sua sponte* duty to suspend the criminal proceedings and initiate the proper competency proceedings demanded by Penal Code section 1369, subdivision (a). (*People v. Castro, supra*, 78 Cal.App.4th at pp. 1416, 1419, and authorities cited therein ["whether the appointment of the regional director was specifically requested at the competency hearing or not is irrelevant; when a doubt exists, the trial court must 'take the initiative in obtaining evidence on that issue'"]; accord, e.g., *Pate v. Robinson, supra*, 383 U.S. at pp. 384-386 [trial court has *sua sponte* duty to initiate appropriate competency proceedings when there is substantial evidence raising bona fide doubt as to competency]; *People v. Hale* (1988) 44 Cal.3d 531, 541, and authorities cited therein [right to competency proceedings cannot be waived by counsel or the defendant]; *People v. Jones, supra*, 53 Cal.3d at pp. 1152-1153 [court's *sua sponte* duty exists throughout trial and before judgment, and even if evidence arises after prior finding of competency].)

accord, *Drope v. Missouri*, *supra*, 420 U.S. at p. 181.)

The superior court's pre-trial appointment of two psychiatrists to evaluate Mr. Townsel for competency did not satisfy this duty. (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1388; *In re L.B.*, *supra*, ___ Cal.App.4th ___, 2010 D.A.R. at pp. 4058-4059; *People v. Castro*, *supra*, 78 Cal.App.4th at p. 1418.) Thus, the trial court committed error under state law (*People v. Leonard*, *supra*, at p. 1388; *People v. Castro*, *supra*, at pp. 1417-1418) and violated Mr. Townsel's Eighth and Fourteenth Amendment rights to due process (*Drope v. Missouri*, *supra*, 420 U.S. at p. 172; *People v. Castro*, *supra*, at pp. 1419-1420; *McGregor v. Gibson* (10th Cir. 2001) 248 F.3d 946, 954) and heightened reliability in "all stages" of this capital proceeding (see, e.g., *Monge v. California* (1998) 524 U.S. 721, 732).

E. The Judgment Must be Reversed

A trial court's failure to hold a full and proper competency hearing typically is not subject to harmless error analysis. To the contrary, a trial court's failure to hold a proper hearing in the face of substantial evidence raising a reasonable doubt regarding the defendant's competency ordinarily demands reversal of the judgment. (See, e.g., *People v. Young*, *supra*, 34 Cal.4th at pp. 1216-1217; *People v. Welch*, *supra*, 20 Cal.4th at p. 738; *People v. Pennington*, *supra*, 66 Cal.2d at p. 521; *Drope v. Missouri*, *supra*, 420 U.S. at p. 183; *Pate v. Robinson*, *supra*, 383 U.S. at pp. 386-387; *Dusky v. United States*, *supra*, 362 U.S. at p. 504.)

Two cases – *People v. Castro*, *supra*, 78 Cal.App.4th 1402 and *People v. Leonard*, *supra*, 40 Cal.4th 1370 – inform the question of remedy in this case and compel the conclusion that reversal is required.

1. *People v. Castro*

In *People v. Castro*, *supra*, 78 Cal.App.4th 1402, defense counsel declared doubt as to the defendant's competency to stand trial and moved to suspend proceedings and initiate competency proceedings by appointing the director of the regional center for the developmentally disabled to evaluate the defendant. She made that request based on a psychologist's opinion that the defendant was developmentally disabled and Department of Rehabilitation records stating that the defendant had a developmental disability classified as "most severe." (*Id.* at pp. 1410-1411.) The trial court refused to appoint the director of the regional center and instead appointed a psychiatrist to evaluate the defendant for competency. (*Id.* at p. 1411.) The psychiatrist prepared a report stating that the defendant suffered from a learning disorder but no psychiatric disorder. (*Ibid.*) Based upon the report, the trial court found that the defendant was not incompetent and reinstated the criminal proceedings. (*Ibid.*)

Following the defendant's guilty plea to second degree murder and the substitution of counsel, new counsel also declared doubt that the defendant was competent to stand trial, and moved to suspend proceedings and have the defendant reevaluated for competency (but did not specifically request appointment of the director of the regional center). (*People v. Castro*, *supra*, 78 Cal.App.4th at p. 1412.) Again, the trial court failed to appoint the director of the regional center, but appointed a second psychiatrist to reevaluate the defendant for competency. (*Ibid.*) The second psychiatrist issued a report stating that although the defendant had an unspecified learning disability, she had no "psychiatric disease" and was able to understand the nature and purposes of the proceeding against her. (*Id.* at p. 1412.) Based upon that report, the trial court again found that the

defendant was not incompetent and reinstated criminal proceedings. (*Ibid.*)

Thereafter, defense counsel moved to withdraw the defendant's guilty plea on the ground that her developmental disability rendered her unable to understand the consequences of her plea. (*People v. Castro*, *supra*, 78 Cal.App.4th at p. 1412.) In support of the motion, the defense offered a psychologist's testimony that he had administered a non-verbal intelligence test, which placed the defendant's IQ between 55 and 65. (*Ibid.*) The psychologist further testified that the defendant was not capable of cooperating with an attorney and assisting in her own defense and therefore was not competent to enter her guilty plea. (*Ibid.*)

The first court-appointed psychiatrist testified for the prosecution that, while the defendant appeared to have a learning disability, he saw no signs during his one-hour evaluation that she was mentally retarded. (*People v. Castro*, *supra*, 78 Cal.App.4th at p. 1412.) However, he did not administer a psychological or psychiatric test. (*Ibid.*) Based on this evidence, the trial court denied the defendant's motion to withdraw her plea. (*Ibid.*)

The defendant appealed her conviction on the ground that the trial court's failure to appoint the director of the regional center for the developmentally disabled violated state law and her federal constitutional right to due process, and required reversal. (*People v. Castro*, *supra*, 78 Cal.App.4th at p. 1413.) The appellate court agreed. (*Ibid.*)

The Court of Appeal held as a matter of law that original defense counsel's representation that she doubted the defendant's competence to stand trial, along with the first Department of Rehabilitation record indicating that the defendant had a developmental disability classified as "most severe," was *alone* "substantial, objective evidence, sufficient for the

court to declare a suspicion, or a doubt, that [the defendant] was developmentally disabled and to appoint the regional center to evaluate" her under the plain language of section 1369. (*People v. Castro*, *supra*, 78 Cal.App.4th at p. 1417.) Furthermore, under that statute, once "there is substantial evidence that gives rise to a suspicion that a defendant is developmentally disabled," the trial court was absolutely "*required*" to appoint the director of the regional center to evaluate the defendant and consider that evaluation before ruling on the issue of her competency. (*Id.* at p. 1418, italics in original.)

"That the trial court twice appointed psychiatrists to evaluate [the defendant's] competence to stand trial does not satisfy the requirements of the statute . . . ." (*People v. Castro*, *supra*, 78 Cal.App.4th at p. 1418.) Moreover, neither psychiatrist made "any attempt to determine [the defendant's'] intelligence or assess the level of her disability. . . . It is clear from their reports that both [psychiatrists'] examinations focused on whether she had any mental disease or illness, which is an entirely separate basis for a finding of competency than developmental disability. (§ 1367.)" (*Ibid.*)

The appellate court further held that the trial court's "failure to proceed *properly* with a competency hearing" exceeded its jurisdiction. (*People v. Castro*, *supra*, 78 Cal.App.4th at p. 1418, italics added, citing *Marks v. Superior Court* (1991) 1 Cal.4th 56.) The defendant was constitutionally entitled to access to state procedures for determining her competency before she was found competent and she was denied that right. (*Id.* at pp. 1418-1419.)

Moreover, the fact that subsequent competency proceedings were held did not "remedy the problem" because the trial court again failed to

appoint the director of the regional center to evaluate the defendant. (*People v. Castro*, *supra*, 78 Cal.App.4th at p. 1419.) Although substitute defense counsel did not specifically request appointment of the regional director, whether that was "specifically requested or not is irrelevant; when a doubt exists, the court must 'take the initiative in obtaining evidence on that issue.' (*In re Davis* (1973) 8 Cal.3d 798, 807.)" (*Ibid.*) For all of these reasons, the appellate court held that the trial court's appointment of psychiatrists rather than the director of the regional center to evaluate the defendant's competency to stand trial violated not only state law, but also the defendant's constitutional right to due process, and invalidated the ensuing conviction. (*Id.* at pp. 1419-1420, citing *Marks v. Superior Court*, *supra*, 1 Cal.4th at p. 56.)

Finally, given the inherent, well-recognized difficulties in remanding a case for a *nunc pro tunc*, or retrospective, evaluation to determine whether the defendant had been competent to enter her guilty plea at the time she entered it, the appellate court reversed outright. (*People v. Castro*, *supra*, 78 Cal.App.4th at p. 1420, citing *Drope v. Missouri*, *supra*, 420 U.S. at p. 183, *Pate v. Robinson*, *supra*, 383 U.S. at pp. 386-387, and *Dusky v. United States*, *supra*, 362 U.S. at p. 403.) While the state was free to retry the defendant, it could only do so if the trial court *sua sponte* declared a doubt as to her competency to proceed based upon a developmental disability and thereafter followed proper procedures to determine her competency to be retried. (*Ibid.*)

2. *People v. Leonard*

This Court recently considered the *Castro* decision in *People v. Leonard*, *supra*, 40 Cal.4th 1370. In *Leonard*, the trial court declared a doubt as to the defendant's competence to stand trial based upon a retained

psychiatrist's report that the defendant suffered a psychotic disorder due to chronic epilepsy (a developmental disability) and was incompetent to stand trial. (*Id.* at p. 1385.) The trial court suspended proceedings and appointed two psychiatrists to evaluate the defendant pursuant to section 1369. (*Ibid.*)

At the court trial on the issue of the defendant's competency, one of the psychiatrists testified that the defendant had a seizure disorder and an unspecified form of psychosis, which made him delusional and unable to cooperate with his attorneys. (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1385-1386.) The other psychiatrist – who had experience with patients with seizure disorders and whose report "extensively discussed defendant's epilepsy" and listed eight scholarly articles dealing with epilepsy on which he relied – believed it was possible that the defendant suffered from a complex partial seizure disorder and other disorders, including bipolar disorder and schizophrenia. (*Id.* at p. 1386, 1390-1391.) However, he concluded that the defendant was competent to stand trial. (*Id.* at p. 1386.)

The defense called a neuropsychologist who had treated many epileptic patients and "testified at length regarding the defendant's developmental disability, epilepsy." (*People v. Leonard*, *supra*, 40 Cal.4th at pp. 1386, 1390-1391.) He testified that he had administered a number of tests to the defendant, which revealed, *inter alia*, that he had "mild to moderate neuropsychological impairment," and diagnosed the defendant as having a schizoid personality, but offered no opinion as to whether he was competent to stand trial. (*Id.* at pp. 1386-1387.)

Based upon all of this evidence, the trial court found that the defendant was competent to stand trial. (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1387.) The defendant was tried and convicted of six counts of murder with special circumstances and sentenced to death. (*Id.* at p. 1376.)

The defendant appealed on the ground that the trial court erred in failing to appoint the director of the regional center for the developmentally disabled to evaluate the defendant, although the court was aware that he suffered from the developmental disability of epilepsy. (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1387.) This Court agreed. (*Id.* at p. 1388.)

In determining whether the error required reversal, this Court closely examined the decision in *People v. Castro*, *supra*. First, this Court recognized that although the complete failure to hold a competency hearing demands reversal per se of an ensuing conviction, it reasoned that the failure to appoint the director of the regional center is a "less egregious" error. (*Id.* at p. 1390.) Therefore, it requires reversal only if "the error deprived [the defendant] of a fair trial to determine his competency." (*Ibid.*) Whether such an error deprives the defendant of a fair competency proceeding depends on whether not only the letter of section 1369, subdivision (a) is violated, but also its spirit.

In this regard and as previously discussed, this Court recognized that, among the purposes section 1369 is intended to achieve:

> appointment of the director of the regional center for the developmentally disabled is intended to ensure that a developmentally disabled defendant's competence to stand trial is assessed by those having expertise with such disability. In the words of the California Department of Developmental Services (DDS), the state agency that oversees the regional centers: "A valid assessment of a criminal defendant's ability to stand trial requires a [ ] comprehensive, individualized examination of the defendant's ability to function in a court proceeding. A reliable assessment is achieved through thorough examinations of each individual by experts experienced in developmental disabilities." A regional center, the DDS explains, is "the primary agency to provide expert advice relating to the assessment, needs, and abilities of a

criminal defendant with developmental disabilities." (*People v. Leonard, supra*, 40 Cal.4th at pp. 1389-1390.) The appointment of a psychiatrist or psychologist rather than the director of the regional center may defeat this purpose, and the due process guarantees section 1369 is intended to protect, since "[c]ourt-appointed psychiatrists and psychologists may not have this expertise, because their experience may pertain to mental illness rather than developmental disability." (*People v. Leonard, supra*, at p. 1390, italics added.)

In *Castro*, this Court reasoned, that purpose was *in fact* thwarted because "the two psychiatrists who evaluated the defendant's competence made no 'attempt to determine [the defendant's] intelligence level or assess the extent of her developmental disability.' (*Castro, supra*, 78 Cal.App.4th at p. 1418.)" (*People v. Leonard, supra*, 40 Cal.4th at p. 1390.) In other words, both the letter and the spirit of section 1369 were violated in *Castro*. Therefore, its *result* – finding a deprivation of due process demanding reversal – was not incorrect. It was only to the extent on which the *Castro* court may have relied on a *per se* rule that a violation of section 1369 always and "*necessarily* requires reversal of any ensuing conviction" that this Court disapproved that decision. (*Id.* at pp. 1389, 1391 & fn. 3, italics in original.)

This Court then distinguished at length the facts of the case before it from those before the *Castro* court:

> Unlike *Castro* . . . the trial court's competency determination [here] was based on evidence from experts who were familiar with defendant's developmental disability and who considered it in evaluating his competence. . . . . The court-appointed psychiatrist who testified that defendant was competent to stand trial, was a professor at the University of California at Davis Medical School and a diplomate of the

> American Board of Psychiatry and Neurology. Even though he did not specialize in epileptic patients, he had observed patients who had seizures similar to those of defendant. Similarly, . . . the neuropsychologist who testified for the defense, had treated many epileptic patients, although his primary area of expertise pertained to head injuries, not epilepsy.
>
> Unlike the court-appointed psychiatrists in *Castro* . . ., neither of whom evaluated the developmental disability of the defendant in that case, [three of the court-appointed experts] testified at length about defendant's developmental disability, epilepsy. In addition, the report [of the psychiatrist who determined defendant was competent] extensively discussed defendant's epilepsy, and an appendix to his report listed eight articles in scholarly journals that [he] used as references in preparing his report, all of which dealt with epilepsy.

(*People v. Leonard*, *supra*, 40 Cal.4th at pp. 1390-1391.)

In other words and in stark contrast to *Castro*, although the letter of section 1369 was violated in *Leonard*, its spirit was not because the *Leonard* "defendant was evaluated by doctors who possessed the[] qualifications [the psychiatrists lacked in *Castro*], and their testimony provided a basis for the trial court's ruling that defendant was competent to stand trial. Thus, the court's failure to appoint the director of the regional center to examine defendant did not prejudice defendant." (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1391.) For the same reasons, this Court held, the trial court's error did not violate the Fourteenth Amendment's guarantee to "'procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial'" (citing *Drope v. Missouri*, *supra*, 420 U.S. at p. 172), or the Eighth Amendment guarantee to heightened reliability in all stages of a capital proceeding. (*Id.* at p. 1391.)

3. Because Both the Letter and the Spirit of Section 1369 Were Violated in this Case, *People v. Castro* and *People v. Leonard* Compel the Conclusion That The Error Was Not Harmless But Rather Violated Mr. Townsel's Rights to Due Process and Heightened Reliability in All Stages of this Capital Proceeding and Demands Reversal of the Judgment

Hence, from *Leonard* and *Castro*, as well as from well established principles announced by this Court and the United States Supreme Court, the following rules emerge: 1) where there is substantial evidence raising a reasonable suspicion that the defendant is developmentally disabled and incompetent to stand trial, a court's failure to appoint the director of the regional center, or his or her designee, to evaluate the defendant is *always* erroneous under state law, even if the court appoints psychiatrists or psychologists to evaluate the defendant for competency; 2) where the court-appointed psychiatrists or psychologists are not qualified to assess, do not assess, or do not consider, whether the defendant is developmentally disabled in evaluating his or her competence to stand trial, the error also violates due process and demands reversal; but 3) where the appointed psychiatrists or psychologists are qualified to assess whether the defendant is developmentally disabled, consider the defendant's developmental disability in evaluating his or her competency to stand trial, and the trial court properly considers the developmental disability in ruling on the question of competency, the error is one of state law only and is harmless.

Applying those rules here, and as discussed in the preceding section, the trial court's failure to appoint the regional director, or his or her designee, to evaluate Mr. Townsel in the face of substantial evidence that he was mentally retarded and incompetent to stand trial was clear error, on which the earlier appointment of, and competency evaluations by, Doctors

Terrell and Davis had no impact. (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1388; *People v. Castro*, *supra*, 78 Cal.App.4th at pp. 1417-1418.) Just as in *Castro*, and in stark contrast to the facts in *Leonard*, "the two psychiatrists who evaluated [Mr. Townsel's] competence made no 'attempt to determine [his] intelligence level or assess the extent of [his] developmental disability.' (*Castro*, *supra*, 78 Cal.App.4th at p. 1418.)" (*People v. Leonard*, *supra*, at p. 1390.) To the contrary, "[i]t is clear from their reports that both [psychiatrists'] examinations focused on whether [Mr. Townsel] had any mental disease or illness, which is an entirely separate basis for a finding of competency than developmental disability. (§ 1367.)" (*People v. Castro*, *supra*, at p. 1418.) Unlike *Leonard*, "the trial court's competency determination was [*not*] based on evidence from experts . . . who considered [whether Mr. Townsel was retarded] in evaluating his competence." (*People v. Leonard*, *supra*, at pp. 1390-1391.) And unlike *Leonard*, the record is devoid of any evidence that Doctors Davis and Terrell had any experience at all with the mentally retarded, much less qualifications sufficient for them to make a mental retardation diagnosis *and* appropriately consider that diagnosis in assessing competency. (*Ibid*; see also *In re L.B.*, *supra*, ___ Cal.App.4th ___, 2010 D.A.R. at pp. 4059-4060 [trial court committed error in appointing psychiatrist rather than director of regional center to evaluate defendant for mental retardation and competency; although qualified psychiatrist did diagnose defendant as mentally retarded and testified to opinion that he was incompetent, unlike *Leonard* the error was nevertheless prejudicial because the trial court found defendant to be competent based upon a misunderstanding of the relationship between defendant's degree of mental retardation and competency, a misunderstanding that likely would have been avoided had

the director of the regional center been appointed and testified].)

Indeed, this case presents a particularly striking example of why the Legislature has demanded that appropriately qualified experts evaluate potentially disabled persons for incompetency by mandating appointment of, and evaluation by, the director of the regional center for the developmentally disabled or his or her designee. Doctors Terrell and Davis concluded that Mr. Townsel was malingering, or lying, because he responded, "I didn't know" or "I don't remember" to most questions. (Court's Exhibits 1 and 2.) But as Dr. Christensen testified, what may appear to be malingering behavior to an evaluator without mental retardation expertise, or to an evaluator who has not tested the subject for mental retardation, may actually be evidence of mental retardation. (RT 3043-3044, 3067, 3113.) Indeed, even if Mr. Townsel was not being truthful when he responded "I don't know" or "I don't remember" to most of Doctors Terrell and Davis's questions, that was not necessarily inconsistent with, or otherwise preclude, a determination that he was mentally retarded and incompetent. According to the doctors themselves, the "fact" that he was malingering did not necessarily mean that he was competent; rather, because he was malingering, they could not reliably determine, *based solely on their subjective impressions of their brief, personal interviews with Mr. Townsel*, if he was incompetent due to a psychiatric or mental disorder. (Court's Exhibits 1 & 2.)

However, malingering by lying during a personal interview is a world apart from malingering by "faking" mental retardation in the context of a competency evaluation, which would necessarily include falsely manipulating the results of standardized tests required for a clinical determination of whether or not someone is mentally retarded. (See

footnote 18, *ante*.) As the defense experts who had diagnosed Mr. Townsel as mentally retarded testified, it would be nearly impossible to "fake" consistent results on several different standardized tests and successfully manipulate three experienced professionals administering those tests and evaluating their results into making erroneous diagnoses of mental retardation. (12 RT 2935, 3067, 3112-3113, 3159-3160.) Thus, if Mr. Townsel was lying about his knowledge of his family history or the facts of the crimes to Doctors Davis and Terrell (as they believed), but also mentally retarded, that begged the critical question: was his avoidance behavior evidence of a competent defendant *unwilling* to cooperate or evidence of a mentally retarded, incompetent defendant *unable* to cooperate? Only a qualified expert could answer that question.

In sum, the trial court's failure to appoint the director of the regional center, or his or her designee, to evaluate Mr. Townsel violated not only state law, but also Mr. Townsel's Fourteenth Amendment right to due process and Eighth Amendment right to heightened reliability in all stages of his capital proceedings. (*People v. Castro*, *supra*, 78 Cal.App.4th at pp. 1419-1420; *Drope v. Missuori*, *supra*, 420 U.S. at pp. 172, 183; *Pate v. Robinson*, *supra*, 383 U.S. at pp. 386-387; *Dusky v. United States*, *supra*, 362 U.S. at p. 402.) And, just as in *Castro*, the judgment must be reversed outright.

4. Remand is Inappropriate in this Case; The Judgment Must Be Reversed Outright

As discussed above, when a trial court fails to hold a full and proper competency hearing, the ensuing due process violation ordinarily demands reversal of the judgment. This is so, the United States Supreme Court has repeatedly explained, because a limited remand for a retrospective

determination of the defendant's competency to stand trial years earlier would usually be meaningless and inappropriate. The fact-finder at the retrospective competency hearing "would not be able to observe the subject of their inquiry [i.e., the defendant *at the time of his trial*], and expert witnesses would have to testify solely from information contained in the printed record. That [the defendant's] hearing would be held . . . years after the fact aggravates these difficulties." (*Pate v. Robinson*, *supra*, 383 U.S. at p. 387 [reversing outright, rather than remanding, six years after the fact]; accord, *Dusky v. United States*, *supra*, 362 U.S. at p. 403 [observing the "difficulties of retrospectively determining the petitioner's competency as of more than a year ago," Court reversed outright]; *Drope v. Missouri*, *supra*, 420 U.S. at p. 183 [given "inherent difficulties of . . . a *nunc pro tunc* determination [of competency] under the most favorable circumstance," retrospective determination would be inadequate when seven years had elapsed since trial].)

While this Court has observed that the United States Supreme Court in *Drope* recognized "the *possibility* of a constitutionally adequate posttrial or even postappeal evaluation of the defendant's pretrial competence" (*Marks v. Superior Court*, *supra*, 1 Cal.4th at p. 67, citing *Drope v. Missouri*, *supra*), retrospective competency hearings are "strongly disfavored" (*Weisberg v. State* (8th Cir. 1994) 29 F.3d 1271, 1278). It is only in the "rare" and "highly unusual" case, in which there is extensive record evidence, including qualified expert opinions, on which a reliable retrospective competency determination might be possible, that remand is appropriate. (*People v. Ary* (2004) 118 Cal.App.4th 1016, 1028-1030, cited without approval or disapproval in *People v. Young*, *supra*, 34 Cal.4th at p. 1217, fn. 16 [while reliable retrospective competency determinations are

often impossible, under "highly unusual" circumstances of case wherein there were two pretrial proceedings on defendant's competence to waive *Miranda* rights at which "extensive expert testimony and evidence was proffered regarding defendant's mental retardation and ability to function in the legal arena," which were held only four and five years earlier, a reliable retrospective determination *might* be possible].)

Indeed, in *Drope* itself, the High Court held that a reliable retrospective competency determination would be impossible and inappropriate "[g]iven the inherent difficulties of such a *nunc pro tunc* determination under the most favorable circumstances." (*Drope v. Missouri*, *supra*, 420 U.S. at p. 183.) Of course, as the *Pate* Court recognized, these "inherent difficulties" are most acute when a substantial period of time has passed since the trial. (See, e.g., *Pate v. Robinson*, *supra*, 383 U.S. 375, 387 [six years]; see also, *Drope v. Missouri*, *supra*, 420 U.S. 162, 183 [seven years]; *Dusky v. United States*, *supra*, 362 U.S. at p. 403 [more than a year]; *People v. Pennington* (1967) 66 Cal.2d 508, 511 [two years]; see also, e.g., *McGregor v. Gibson*, *supra*, 248 F.3d at p. 963 [more than 11 years]; *United States v. Day* (8th Cir. 1991) 949 F.2d 973, 982 & fn. 9 ["to require a . . . court to decide whether a defendant was competent during proceedings that took place years earlier would be an exercise in futility"].) In fact, in every case in which this Court and the United States Supreme Court have found error in the failure to hold a competency hearing, complete reversal has been ordered. (*Drope v. Missouri*, *supra*, 420 U.S. 162, 183; *Pate v. Robinson*, *supra*, 383 U.S., at pp. 386-387; *Dusky v. United States,* 362 U.S.at p. 403; *People v. Marks*, 45 Cal.3d at p. 1344; *People v. Hale*, 44 Cal.3d at p. 541; *People v. Stankewitz*, 32 Cal.3d at p. 94; *People v. Pennington*, *supra*, 66 Cal.2d at p. 521.)

Furthermore, because this is a capital case, state law and the Eighth and Fourteenth Amendments demand a heightened degree of reliability in all stages of the proceedings. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at p. 732 ["'we have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding'"]; accord, *Ford v. Wainwright* (1986) 477 U.S. 399, 411 [same – applying heightened scrutiny standard to determination of competency to be executed]; *Spaziano v. Florida* (1984) 486 U.S. 447, 456; *People v. Coffman* (2004) 34 Cal.4th 1, 44 [pre-trial rulings]; *Beck* v. *Alabama* (1980) 447 U.S. 625, 637-638 [guilt phase]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340 [penalty phase].) Thus, the question is not merely whether a retrospective competency determination is possible, but whether a *highly reliable* determination that Mr. Townsel was competent to stand trial over 20 years ago is possible. The answer is no.

As of this writing, over 20 years have passed since the original competency proceedings and Dr. Christensen's competency evaluation and nearly 19 years have passed since Dr. Christensen's trial testimony. More years will pass before this appeal is resolved and any retrospective competency hearing could be held. This is a *far* greater passage of time than those that the Supreme Court held were too great to allow for a reliable retrospective competency determination in *Drope*, *Pate*, and *Dusky*, *supra*.

Moreover, any retrospective competency determination must be limited to evidence in the trial record or that existed at the time of trial. (See, e.g., *Pate v. Robinson*, *supra*, 383 U.S. at p. 387 [at any retrospective competency hearing, "expert witnesses would have to testify solely from information contained in the printed record"]; *People v. Ary*, *supra*, 118

Cal.App.4th at p. 1028 [retrospective competency determination is limited to record evidence and defendant's behavior and mental state at time of trial; since the record is generally deficient in this regard, meaningful retrospective competency determinations are usually impossible]; *People v. Robinson* (2007) 151 Cal.App.4th 606, 617-618, citing *United States v. Collins* (10th Cir. 2005) 430 F.3d 1260, 1267; *McGregor v. Gibson*, *supra*, 248 F.3d at pp. 962-963; *Silverstein v. Henderson* (2nd Cir. 1983) 706 F.2d 361, 369; *Odle v. Woodford*, *supra*, 238 F.3d at pp. 1089-1090.) Thus, where – as here – the court has failed to appoint the director of the regional center (or, as in *Leonard*, another qualified expert) to make the appropriate competency evaluation, there simply is not an adequate record on which a highly reliable and meaningful retrospective determination that the defendant was competent to stand trial can be made. (*People v. Castro*, *supra*, 78 Cal.App.4th at p. 1420.)

In this case, only one qualified expert – Dr. Christensen – evaluated Mr. Townsel for both mental retardation and competency. That qualified expert concluded that he was both retarded and incompetent. Furthermore, the face of the record reveals defense counsel's impressions of Mr. Townsel – she believed that he was unable to cooperate in the preparation of his defense and that he was incompetent. (See, e.g., *Odle v. Woodford*, *supra*, 238 F.3d at pp. 1089-1090 [trial counsel's statements in record regarding interactions with defendant and competency relevant to retrospective competency determination].)

As to the reports of Doctors Davis and Terrell, neither concluded that Mr. Townsel was *competent* to stand trial; rather, they concluded that they could not reliably determine that he was *in*competent *due to a psychiatric disorder* because they believed he was malingering. (Court's

Exhibits 1 & 2.) This is significant since the prosecution would bear the burden of proving at any restrospective competency proceeding that Mr. Townsel was, in fact, competent to stand trial 20 years ago. (See, e.g., *James v. Singletary* (11th Cir. 1992) 957 F.2d 1562, 1570-1571 ["*Pate*, in essence, established a rebuttable presumption of incompetency upon a showing by [the appellant] that the state trial court failed to hold a competency hearing on its own initiative despite information raising a bona fide doubt as to the [appellant's] competency. According to *Pate*, the state could rebut this presumption by proving that the [appellant] in fact had been competent at the time of trial"]; accord, *Watts v. Singletary* (11th Cir. 1996) 87 F.3d 1282, 1287 & fn. 6.)

In any event, since neither Dr. Terrell nor Dr. Davis administered any testing for mental retardation or considered mental retardation in their evaluations, their opinions would be irrelevant to any retrospective competency determination in this case. (See, e.g., *People v. Castro*, *supra*, 78 Cal.App.4th at p. 1412, 1419-1420; *Moran v. Godinez* (9th Cir. 1992) 972 F.2d 263, 267-268, disapproved on another ground in *Godinez v. Moran* (1993) 509 U.S. 389, 396-400[22] [no retrospective competency determination possible where only contemporaneous psychiatric report in record considered issue of competency under incorrect legal standard]; see also *Dusky v. United States*, *supra*, 362 U.S. at p. 403 ["in view of the

---

[22] While the United States Supreme Court overruled *Godinez* to the extent that it had held that different standards of competency apply to competency to stand trial and competency to plead guilty (*Godinez v. Moran* (1993) 509 U.S. 389, 396-400), *Godinez* nevertheless continues to stand for the proposition that when a prior evaluation assessed competency under the wrong standard, it cannot form the basis for a reliable retrospective competency determination under the correct standard.

doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency of more than a year ago" Court reversed outright rather than ordering remand].) Even if their testimony might be relevant, Dr. Davis has died and thus would be unavailable to testify at a retrospective competency hearing.[23] While Dr. Terrell would presumably be available to testify, he only met with Mr. Townsel once, for half an hour, over 20 years ago. (Court's Exhibit 1 at p. 1.) It strains credulity to imagine that Dr. Terrell's memory of a thirty-minute interview nearly 20 years ago would add any information that is not contained in his report and, thus, no information that would be of any value to a retrospective determination into whether Mr. Townsel was incompetent due to mental retardation at the time of trial.

Similarly, while Doctors Powell and Schuyler assessed and evaluated Mr. Townsel for mental retardation, there is no indication that they assessed or considered whether he was also incompetent due to his mental retardation.[24] Thus, they, too, would have to rely on their memories of Mr.

---

[23] A motion to take judicial notice, with supporting documentation, that Dr. Davis is deceased accompanies this brief. (Evid. Code §§ 452, subd. (h), 459.)

[24] Indeed, had they assessed or considered that question, the prosecutor would surely have elicited their conclusions. The prosecutor extensively cross-examined all three experts regarding any seeming inconsistencies between their opinions and those of Doctors Terrell and Davis (RT 2958, 2960-2961, 3052-3053, 3067, 3181-3182) and specifically cross-examined Dr. Christensen at length regarding her opinion that Mr. Townsel was incompetent despite Doctors Terrell and Davis's seemingly contrary opinions and the lower court's seemingly contrary finding of competency based upon their evaluations (RT 3086-3089). If Dr. Powell

(continued...)

Townsel over 20 years ago and their relevance to an issue that they did not consider at that time.

If, as the United States Supreme Court has repeatedly recognized, reliable retrospective competency determinations are extraordinarily difficult even under the "most favorable circumstances" (*Drope v. Missouri*, *supra*, 420 U.S. at p. 183), the circumstances here make a *highly* reliable determination, consistent with Mr. Townsel's Eighth and Fourteenth Amendment rights, that Mr. Townsel was *competent* to stand trial 20 years ago impossible. (See, e.g., e.g., *McGregor v. Gibson*, *supra*, 248 F.3d at pp. 962-963 [reliable retrospective determination of competency impossible where there was a lack of contemporaneous medical evidence regarding the critical competency issue, psychiatrists who testified at original competency hearing provided very "limited" testimony, and witnesses would have to rely on their memories of defendant more than 11 years earlier].) Thus, just as in *Castro*, the judgment must be reversed outright.

Of course, the state is free to retry Mr. Townsel *if he is competent* to be retried. (See *Drope v. Missouri*, *supra*, 420 U.S. at p. 183.) Hence, this Court should reverse with directions that if the state elects to retry him, the

---

[24](...continued)
or Dr. Schuyler had considered the question and concluded, like Dr. Christensen, that Mr. Townsel was not competent to stand trial, the prosecutor would no doubt have subjected them to the same cross-examination as he had of Dr. Christensen. Conversely, had they concluded that Mr. Townsel was competent to stand trial, the prosecutor would no doubt have confronted Dr. Christensen with their conclusions in order to undermine her own. That the prosecution engaged in no such cross-examination demonstrates that neither Dr. Powell nor Dr. Schuyler considered or assessed whether Mr. Townsel was incompetent to stand trial.

trial court must suspend criminal proceedings, appoint the director of the regional center to perform a competency evaluation, and consider that evaluation in assessing Mr. Townsel's current competence to be retried. (See *People v. Castro*, *supra*, 78 Cal.App.4th at p. 1420.)

Finally, should the Court determine that a limited remand is appropriate, it must do so with directions to the trial court to *first* determine whether the trial "'record contains sufficient information upon which to base a reasonable psychiatric judgment'" of defendant's competence to stand trial. (*People v. Ary*, *supra*, 118 Cal.App.4th at p. 1028 [remanding with directions to the trial court to determine if the trial record contained sufficient evidence on which to base a reliable, retrospective competency determination]; accord, e.g., *People v. Kaplan* (2007) 149 Cal.App.4th 372, 386-387 [remanding with same directions where record contained four-year-old competency evaluations].) Furthermore, the prosecution shall carry the burden of proving that a retrospective competency determination would not only be feasible, but – consistent with the Eighth Amendment – highly reliable. (*Ibid.*; cf. *Ford v. Wainwright*, *supra*, 479 U.S. at p. 411 [Eighth Amendment demands heightened reliability in procedure to determine competency to be executed].)[25] If such a determination is not possible, then the judgment must be reversed.

If the prosecution carries its burden of proving the feasibility of a

---

[25] Since the *only* mental health professional who was qualified to assess mental retardation, who did assess mental retardation, and who specifically considered the issue of Mr. Townsel's competence to stand trial was Dr. Christensen, if the trial court determines that her testimony provides a sufficient basis for a retrospective competency determination, it seems that the competency hearing would ineluctably result in a finding of incompetence and a retrial warranted in any event.

highly reliable retrospective determination of Mr. Townsel's competency, the prosecution shall carry the further burden of proving that Mr. Townsel was, in fact, competent to stand trial 20 years ago. As one court has explained, the United States Supreme Court in "*Pate*, [*supra*,] in essence, established a rebuttable presumption of incompetency upon a showing by a habeas petitioner [or appellant] that the state trial court failed to hold a competency hearing on its own initiative despite information raising a bona fide doubt as to petitioner's [or appellant's] competency. According to *Pate*, the state could rebut this presumption by proving that the petitioner had, in fact, been competent at the time of trial." (*James v. Singletary*, *supra*, 957 F.2d at pp. 1570-1571; accord, e.g., *Watts v. Singletary*, *supra*, 87 F.3d at p. 1287 & fn. 6; *United States ex rel. Lewis v. Lane* (7th Cir. 1987) 822 F.2d 703, 706; compare Pen. Code, §§ 1368, 1369 subd. (f) [for competency hearings held "*during the pendency of an action and prior to judgment*," burden on defendant to prove incompetency by preponderance] and *Medina v. California* (1992) 505 U.S. 437, 447 [placing burden of proof on defendant to prove *present* incompetency by preponderance at contemporaneous competency hearing does not violate due process].)[26]

Indeed, a remand for a retrospective competency determination is, in essence, a remand to determine whether the due process violation arising from the trial court's failure to hold a contemporaneous competency hearing was harmless. In other words, if the retrospective competency hearing

---

[26] This Court has recently granted review in order to resolve whether the prosecution bears the burden of proving retrospective competency upon remand for the erroneous failure to hold a competency hearing. (*People v. Ary* (2009) 173 Cal.App.4th 80, rev. granted July 29, 2009 (S173309.)

results in a finding that the defendant was competent at the time of trial, then the court's due process violation in failing to hold a contemporaneous competency hearing is harmless. (See, e.g., *James v. Singletary*, *supra*, at pp. 1570-1571 & fns. 11 & 12, citing *Pate v. Robinson*, *supra*, 383 U.S. at p. 387; see also, e.g., *Odle v. Woodford*, *supra*, 238 F.3d at pp. 1089-1090 [remanding for a retrospective competency determination allows state to "cure" the federal constitutional violation resulting from failure to hold contemporaneous hearing].) Since the state bears the burden of proving federal constitutional errors harmless beyond a reasonable doubt, then it necessarily follows that the state bears the burden of proving the defendant's competency at the time of trial at a retrospective hearing. (*Chapman v. California* (1967) 386 U.S. 18, 24.) If the prosecution fails to carry its burden, the judgment must be reversed.

//

//

EVIDENTIARY ERRORS UNDERCUTTING
MR. TOWNSEL'S DEFENSE

II

THE TRIAL COURT VIOLATED STATE LAW, AS WELL AS MR. TOWNSEL'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BY PERMITTING LEE COLEMAN TO PRESENT HIS UNQUALIFIED AND LEGALLY INCORRECT "EXPERT" OPINION THAT ALL EXPERT DIAGNOSES OF MENTAL RETARDATION, ALONG WITH ALL RELATED INTELLIGENCE TESTING, IS SO INHERENTLY UNRELIABLE AS A CLASS THAT IT IS LEGALLY IRRELEVANT AND SHOULD BE COMPLETELY DISREGARDED BY JURORS

A. Introduction

Mr. Townsel's defense to the charges and special circumstance allegations was that he did not premeditate and deliberate the killings, as required for first degree murder (Pen. Code, §§ 187, 189), or kill Ms. Diaz with the specific intent to prevent her from testifying against him in a possible future criminal proceeding arising from her prior spousal battery complaint, as required for the so-called "witness killing" special circumstance allegation and dissuading a witness charge (Pen. Code, §§ 190.2, subd. (a)(10), 136.1, subds. (a)(1) and (c)(1)). The core of this defense was the evidence that he was mentally retarded. In support of his defense, he presented the testimony of three expert witnesses – Doctors Christensen, Powell, and Schuyler.

All three defense experts testified that they had evaluated Mr. Townsel and administered intelligence and other standardized tests commonly used to diagnose mental retardation.[27] (12 RT 2885-2888, 2899;

---

[27] Those tests included the Weschler Adult Intelligence Scale, (continued...)

13 RT 2993, 2997-2998 3017, 3147.) While the intelligence testing produced somewhat different results, all three experts were in agreement that Mr. Townsel was at least mildly mentally retarded. (12 RT 2879, 2880-2881, 2885, 2888-2892; 13 RT 2985-2987, 2989-2990, 3031, 3137.)

None of the defense experts offered any opinion as to whether Mr. Townsel was capable of forming, or whether he actually formed, the mental states required for the murder and dissuading a witness charges or the witness killing special circumstance allegation. Instead, Doctors Christensen and Powell testified generally that mental retardation affects abstract thinking, memory, ability to understand, and judgment. (12 RT 2894-2895, 2938; 13 RT 3032-3033.) Dr. Christensen further explained that, while a mentally retarded person can form the intent to kill, he or she would have more difficulty making decisions, considering the consequences of his or her actions, making causal connections, and would be more impeded in his or her judgment than would a person of normal or average intellect. (13 RT 3032, 3044-3045, 3086, 3097, 3127-3128.)

---

[27](...continued)

Revised ("WAIS-R"), which measures intelligence, and the Street Survival Skills Questionnaire and portions of the Woodcock-Johnson Psychoeducational Test Battery, which are used to measure and assess adaptive skills and functioning. (12 RT 2885-2888, 2899; 13 RT 2993, 2997-2998, 3017, 3019-3022, 3037-3039, 3147; see, e.g., *Atkins v. Virginia* (2002) 536 U.S. 304, 309, fn. 5 [Wechsler Intelligence Scale is the "standard instrument in the United States for assessing intellectual functioning"]; *State v. Hill* (Oh. App. 2008) 894 N.E.2d 108, 189 [describing Street Survival Skills and Woodcock-Johnson as adaptive behavior tests]; accord, *Hall v. State* (Tex. Crim. App. 2004) 160 S.W.3d 24, 30-31.)

In rebuttal and over defense objections, the prosecution was permitted to present the testimony of a so-called expert, Lee Coleman – a psychiatrist who never personally interviewed or evaluated Mr. Townsel and who had no apparent or proven special training, experience, or education in diagnosing mental retardation or administering and interpreting associated testing. As will be demonstrated below, the admission of Dr. Coleman's testimony in this case was erroneous for at least three reasons.

First, Dr. Coleman was unqualified to testify as an expert on the subject of mental retardation and related testing of intelligence and other functions. (Part B, *post.*) Second, his testimony improperly told the jurors to resolve questions of law. (Part C, *post.*) Third, his testimony told the jurors to resolve questions of law in a manner contrary to the law. (Part D, *post.*) Finally, compounding the prejudicial effect of his testimony was an instruction that erroneously told the jurors that they could do just what Dr. Coleman told them to do: completely disregard the mental retardation evidence as legally irrelevant and refuse to consider it in assessing Mr. Townsel's mental state at the time of the crimes. (Part E, *post.*)

As will further be demonstrated below, the erroneous admission of Dr. Coleman's testimony and provision of the jury instruction violated not only state law, but also Mr. Townsel's state and federal constitutional rights to a fair trial, a meaningful opportunity to present his defense, proof beyond a reasonable doubt and trial by jury on every element of the charged offenses and special circumstance allegations, and reliable jury verdicts that he was guilty of a capital offense. (U.S. Const., Amends. V, VI, VIII, XIV; Ca. Const. art. I, §§ 7, 15, 16, 17.) The judgment must be reversed. (Part F, *post*).

B. The Trial Court Erred in Ruling That Lee Coleman Was Qualified To Testify As An Expert On The Subjects Of Mental Retardation and Associated Intelligence And Psychological Testing

1. Introduction

Following the defense case-in-chief, defense counsel informed the court that the prosecution intended to call Lee Coleman on rebuttal. By way of an offer of proof, the prosecution explained that Dr. Coleman was a psychiatrist who would testify that the intelligence and other standardized testing administered to Mr. Townsel are "not relevant" (14 RT 3199) and "he would specifically be commenting on the [defense] doctors' reports and their testimony" that Mr. Townsel was mentally retarded (14 RT 3197).

Defense counsel made several in limine objections to Dr. Coleman's anticipated testimony and his lack of qualifications to testify as an expert regarding the issues in this case. Based upon their own review of his writings and his testimony in other cases, defense counsel objected that any expertise Dr. Coleman had related to subject matter that simply was not relevant in this case, such as the reliability of personality tests like the MMPI and the reliability of expert opinions going to whether a person actually formed, or had the capacity to form, a particular mental state at the time of the charged crime. (14 RT 3195-3202; see also Pen. Code, §§ 28, subd. (a) [1981 statute abolishing "diminished capacity defense"] and 29 [prohibiting in guilt phase of criminal trial expert opinion testimony as to whether "the defendant had, or did not have, the required mental states"].) Furthermore, his status as a psychiatrist was not sufficient to qualify him to testify as an expert on the subject matter at issue in this case. (14 RT 3200-3201.) Defense counsel reminded the court that the defense experts were

all psychologists, not psychiatrists like Dr. Coleman, that they had testified regarding the differences between psychiatrists and psychologists, and that there was no indication that Dr. Coleman had any expertise with regard to the particular kinds of mental retardation or psychological evaluations at issue in this case. (14 RT 3200-3201.)

The trial court summarily overruled all of counsel's objections without requiring the prosecutor to present any offer of proof – even a CV or resume – regarding Dr. Coleman's expertise on the subjects on which he proposed to testify. (14 RT 3201.) The court admitted Dr. Coleman's "expert" testimony without limitation.

Thereafter, Dr. Coleman testified before the jurors that he was a medical doctor specializing in psychiatry. (14 RT 3203.) He received his medical degree in 1964 and trained at a medical center in psychiatry from 1965 to 1969. (14 RT 3203.) In the 1970s, he had developed "some interest of the role of psychiatry in the legal system" and familiarized himself with a "separate body of literature of people investigating" whether unspecified psychiatric or psychological techniques "work in the legal system, in the same way as when they work with patients." (14 RT 3204-3205.) In addition, in his capacity as an expert witness, he had reviewed "the actual use of these [unspecified] methods in the context of real life cases" against which he would "try to compare the methods and conclusions that are being put forth in cases with what we know in the professional literature of the actual ability of those techniques to do what is alleged that they can do." (14 RT 3205.)

Furthermore, Dr. Coleman represented that he had testified before numerous legislative bodies: 1) in favor of "narrowing down" the indeterminate sentencing laws "because of the role psychiatry played in that

process"; 2) "to tighten up procedures in gaining consent for shock treatments"; and 3) in favor of "changing the laws regarding what are called diminished capacity." (14 RT 3207.) He published a book in 1984 critical of the role of psychiatry in the legal system (*Rein of Error, Psychiatry in Law)* and had written 38 articles which "all deal in one way or another with some aspect of psychiatry's role in the law and related social issues." (14 RT 3208.)

Furthermore, Dr. Coleman had testified in "courts regarding [his] opinions . . . many times." (14 RT 3209.) 90 percent of Dr. Coleman's "practice" was devoted to such "legal work." Only a very small percentage was devoted to actual clinical practice. (14 RT 3266.)

Dr. Coleman testified to absolutely no special training, education, experience, or knowledge in the field of *mental retardation* – whether in assessing, diagnosing, studying, or treating people who are mentally retarded. Nor did he testify with any specificity regarding his training, education, or experience regarding the administration or interpretation of intelligence and other tests associated with assessing or diagnosing mental retardation.

Based on the foregoing, and in addition to their in limine objections to the lack of expertise, or foundation, for Dr. Coleman's testimony regarding mental retardation and associated testing, defense counsel interposed numerous, repeated foundational objections throughout his testimony regarding those subjects, even asking the court to approach the bench at one point. (RT 3210-3211, 3215, 3219-3224.) The court overruled those objections and denied defense counsel's request to present argument at bench. (RT 3210-3211, 3215, 3219-3224.) In so doing, the court erred.

2. An Expert Witness Must be Impartial and Have Special Knowledge, Skill, Experience, Training or Education Sufficient to Qualify Him as an Expert on the Specific Subject to Which His Testimony Relates

Evidence Code section 720, subdivision (a) provides:

> A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

Upon objection by the opponent, the proponent of expert testimony – as the party offering the evidence and bearing the burden of proving its admissibility – bears the burden of proving the expert's qualifications. (See, e.g., *Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 219 ["the party offering the expert must demonstrate that the expert's knowledge of the subject is sufficient . . . ."]; Evid. Code, § 405.) The preliminary fact determination of whether a person qualifies as an expert and can give an expert opinion is exclusively for the judge to make. (Evid. Code, § 405.)

"The expert's qualifications must relate to the *particular* subject upon which he is giving expert testimony. Qualifications on a *related* subject matter are insufficient." (*People v. Hogan* (1982) 31 Cal.3d 815, 852, italics added; accord, e.g., *Miller v. Los Angeles Flood Control District* (1973) 8 Cal.3d 689, 701; *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 66-67.) In *California Shoppers, Inc.*, for instance, the trial court permitted a "highly qualified trial attorney" with considerable experience in trying insurance cases to testify as an expert on insurance company practices. (*California Shoppers, Inc. v. Royal Globe Ins. Co.*, *supra*, 175 Cal.App.3d at p. 66.) The appellate court held that the

trial court erred in permitting the attorney to testify as an expert because:

> no foundation whatsoever was laid to demonstrate that [the attorney] had any special knowledge, skill, experience, training or education such as would qualify him as an expert on insurance company practices. It is no answer that certain of his professional efforts are aimed at discovering insurance company derelictions of duty, and then taking them to task. . . . . Indeed, as [the attorney] candidly admitted, he had never been employed by an insurance company nor even retained as counsel by an insurance company.

(*Ibid.*; accord, e.g., *Miller v. Los Angeles Flood Control District, supra*, 8 Cal.3d at p. 701 [mechanical engineer with training in hydraulics, hydrology, and evaluating flooding characteristics in hillside areas was not qualified to testify as to the standard of care for the design of a hillside residence].)

Furthermore, as this Court has explained, when a witness proposes to testify as an expert on a relevant professional community's general acceptance of certain theories, techniques, or methodologies, he must be qualified to do so. (*People v. Brown* (1985) 40 Cal.3d 512, 530.) And, in order to so qualify, he must be "'impartial', that is, not so personally invested in establishing the technique's acceptance [or non-acceptance] that he might not be objective about disagreements within the relevant [expert] community." (*Id.* at pp. 530-533 [while witnesses were "competent and well-credentialed forensic technicians, . . . their identification with law enforcement, their career interests in acceptance of the tests, and their lack of formal training and background in the applicable scientific disciplines made them unqualified to state the view of the relevant community of impartial scientists"].) Impartiality is particularly critical "where the sole (or crucial) witness has a significant financial or professional interest in

promoting a new technique [or debunking an established technique] or lacks theoretical training" and purports "to speak for all concerned . . . . " (*People v. Reilly* (1987) 196 Cal.App.3d 1127, 1139; accord, *People v. Kelly* (1976) 17 Cal.3d 24, 38-40.)

Pursuant to these provisions, this Court has held that where the defense presents expert testimony on a particular subject, "the prosecution also may call, in rebuttal, an expert of *comparable background* to challenge the defense expert methods." (*People v. Stoll* (1989) 49 Cal.3d 1136, 1159, italics added; accord, *People v. Smithey* (1999) 20 Cal.4th 936, 967.) Trial "courts have an obligation to contain expert testimony within the area of professed expertise, and to require adequate foundation for the opinion." (*Korsack v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523.)

Finally, the erroneous admission of expert testimony is not simply a violation of state law. Where the erroneously admitted testimony is crucial to the prosecution in an otherwise weak case, its admission may deprive the defendant of his or her federal due process right to a fair trial. (See, e.g., *Ege v. Yukins* (6th Cir. 2007) 485 F.3d 364, 375-378, and authorities cited therein [erroneous admission of expert testimony violated defendant's right to fair trial under *Chambers v. Mississippi* (1973) 410 U.S. 284 and state court's contrary conclusion was unreasonable application of clearly established Supreme Court precedent]; *Leverett v. Spears* (11th Cir. 1989) 877 F.2d 921, 925 [whether erroneous admission of evidence violates due process turns on "whether the evidence is 'material in the sense of a crucial, critical highly significant factor'"]; *Collins v. Scully* (2nd Cir. 1985) 755 F.2d 16, 18-19 [same]; *Nettles v. Wainwright* (5th Cir. 1982) 677 F.2d 410, 414-415 [same]; see also, e.g., *Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 ["An important element of a fair trial is that a jury only consider

relevant and competent evidence bearing on the issue of guilt or innocence"].) This is just such a case.

3. In the Face of Defense Counsel's Objection, The Trial Court Erred in Failing to Require the Prosecution to Prove Dr. Coleman's Expertise Regarding the Subject Matter on Which He Proposed to Testify

Here, the court clearly erred under the plain meaning of Evidence Code section 720, subdivision (a) by summarily overruling defense counsel's objections to Dr. Coleman's lack of qualifications without requiring the prosecution to demonstrate his expertise on the subject matters of diagnosing mental retardation and related intelligence, psychological, and neuropsychological testing before he testified. The only exception to the statute's requirement that the proponent of expert testimony prove the witness's qualifications upon the opponent's objection – i.e, the parties' *consent* to receive the witness's testimony conditionally, subject to the necessary foundation being supplied later – did not apply here. (Evid. Code, § 720, Law Rev. Com. Comment; Evid. Code, § 320; 3 Witkin, Cal. Evid. 4th (2000), Burden of Proof and Presumptions, § 189 [upon objection to a so-called expert's qualifications and in the absence of a stipulation, "the foundation must be laid"].) Furthermore, Dr. Coleman's subsequent testimony regarding his qualifications was woefully insufficient to establish his qualification to testify as an expert in the field of mental retardation.

4. Dr. Coleman's Status as a Psychiatrist and Professional Debunker of Forensic Psychiatry Was Insufficient to Qualify Him As An Expert On The Subjects Of Mental Retardation And Related Intelligence and Other Testing

a. A Medical Degree and Specialty in Psychiatry Does Not Alone Qualify a Witness to Testify As an Expert in the Related Field of Mental Retardation and Associated Testing

As discussed in the introduction, Dr. Coleman testified that he was a medical doctor who specialized in psychiatry and earned his living as a professional debunker of psychiatric evidence in the courtroom. He testified to no specialized training, education, experience, or knowledge in the field of *mental retardation* – whether in assessing, diagnosing, studying, or treating people who are mentally retarded.

Psychiatry is a branch of medicine that focuses on the diagnosis, treatment, and prevention of mental illnesses or disorders. (See, e.g., *Stedman's Medical Dictionary* (2nd. ed. 1990) at p. 1284; *Dorland's Illustrated Medical Dictionary* (31st ed. 2007) at p. 1571.) Mental retardation is not a mental illness or mental disorder; it is a developmental disability. (See, e.g., *Heller v. Doe by Doe* (1993) 509 U.S. 312, 321-322, and authorities cited therein; *Cramer v. Gillermina R.* (1981) 125 Cal.App.3d 380, 387-388, and authorities cited therein; American Association on Mental Retardation, *Mental Retardation: Definition, Classification and Systems of Supports* (10th ed. 2002) (hereinafter "AAMR" and "AAMR Manual")[28] at p. 48 [mental retardation "is not a

---

[28] The AAMR was formerly known as the American

(continued...)

medical disorder, although it may be coded in a medical classification of diseases, nor is it a mental disorder, although it may be coded in a classification of psychiatric disorders"].)

Thus, it is well recognized that a psychiatrist is not qualified as an expert on the subject of mental retardation and associated intelligence and other testing used to diagnose mental retardation simply by virtue of his medical degree and specialty in psychiatry. (See, e.g., Bonnie, Richard, *The American Psychiatric Association's Resource Document on Mental Retardation and Capital Sentencing: Implementing Atkins v. Virginia* (2004) 32 J. Am. Acad. Psychiatry & Law 304, 307-308.)[29] To the contrary, a qualified expert is a "psychiatrist or clinical psychologist who is qualified

---

[28](...continued)
Association on Mental Deficiency and is currently known as the American Association on Intellectual and Developmental Disabilities ["AAIDD"].) It is the oldest and largest interdisciplinary organization of professionals and other persons who work exclusively in the field of intellectual disabilities and is considered the definitive voice of the mental retardation expert community. (See, e.g., *Atkins v. Virginia*, *supra*, 536 U.S. 304, 309, fn. 3; DSM-IV-TR, *supra*, at p. 49; DSM-III, *supra*, at p. 36; DSM-II, *supra*, § 3, p. 14.)

[29] As discussed more fully in Part D-2, *post*, California has long relied upon the AAMR (currently AAIDD) definition, which has also been adopted by the American Psychiatric Association's Diagnostic and Statistical Manual, in enacting and interpreting legislation relating to mental retardation. In addition, the United States Supreme Court has recently adopted that definition in its landmark *Atkins* decision recognizing that the Eighth Amendment prohibits the execution of mentally retarded people. (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 309, fns. 3 & 5 [adopting AAMR and DSM definitions of mental retardation for Eighth Amendment purposes].) It is therefore logical to turn to those organizations' standards for the qualifications of a witness to testify as an expert on mental retardation and associated psychological, intelligence, and neuropsychological testing.

by training and experience to make a diagnosis of mental retardation." (*Ibid.*, italics added.) And a qualified expert on the intelligence testing necessary for a diagnosis of mental retardation is a "mental health professional skilled in the administration, scoring and interpretation of" those tests. (*Ibid.*; see also, e.g., AAMR Manual (10th ed) at p. 95 [guidelines for mental retardation diagnosis assume "a high level of clinical expertise and experience" in professionals] and p. 51 [the assessment of intellectual functioning, achieved through the use of standardized intelligence tests "is a task that requires specialized professional training"]; American Psychological Association, *Manual of Diagnosis and Professional Practice in Mental Retardation* (1996) at p. 38.)

Because psychiatrists focus on mental illness and other issues, most have no special expertise relating to mental retardation. Ruth Luckasson was the "lead author of the definition of mental retardation adopted by" the AAMR, which was in turn adopted by the American Psychiatric Association in its *Diagnostic and Statistical Manual* ("DSM") (*State v. M.J. K* (N.J. 2004) 849 A.2d 1105, 1112), by the United States Supreme Court and our own Legislature, as well as the lead author of Ninth (1992) and Tenth (2002) editions of the AAMR's *Mental Retardation: Definition, Classification and Systems of Supports.* (See, e.g., *Atkins v. Virginia* (2002) 536 U.S. 304, 309, fn. 3; Pen. Code, §§ 1002.10, 1376; *Money v. Krall* (1982) 128 Cal.App.3d 378, 397.) As Luckasson has explained:

> Although some psychiatrists and a somewhat larger number of psychologists work with people who are mentally retarded, most members of these professions have no experience and little training in the area of mental retardation. . . . [M]ental retardation differs sufficiently from other forms of mental disability that training in mental illness cannot, without more, qualify a physician to provide useful information about a

> mentally retarded person. Similarly, typical medical school training and the attainment of the academic degree of M.D. cannot, without more, qualify a physician to give expert testimony about mental retardation.

(James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants* (1985) 53 Geo. Wash. L. Rev. 414, 415, 487, & fn. 6, cited for other points in *Atkins v. Virginia, supra*, 536 U.S. at p. 318, fn. 24 and *Penry v. Lynaugh* (1980) 492 U.S. 302, 308, fn. 1; accord, e.g., D. Keyes, et al., *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant* (1998) 22 Mental & Physical Disability L. Rep. 529, 535.)

Indeed, during the time frame in which Dr. Coleman received his medical and psychiatric training, the psychiatric community recognized its own lack of training, experience, and education in the specific mental retardation field. In 1961, the president of the American Psychiatric Association observed: "Psychiatrists as a group are disinterested in mental retardation. Many have no more accurate knowledge about the retarded than the layman does." (Dr. W. Barton, "The President's Page: The Psychiatrist's Responsibility for Mental Retardation," 118 *Am. J. of Psychiatry* (1961) 362; see also Dr. G. Dybwad[30], "Psychiatry's Role in Mental Retardation," *Diminished People: Problems and Care of the Mentally Retarded* (1970) 123, 124 ["a profession's commitment to a human problem and its solution can be measured by the extent and quality of its research operations in that field, by the volume of relevant papers in

---

[30] Dr. Dybwad was a consultant to the World Health Organization and to the President's Committee on Mental Retardation. (See Herr, "The New Clients: Legal Services for Mentally Retarded Persons" (1979) 31 *Stan. L. Rev.* 553, fn. 49.)

the journals maintained or largely supported by the profession, and by the attention given to the particular subject in the course of the profession's academic training program. On all of these three counts the factual evidence clearly points to a lack of interest in or commitment to mental retardation on the part of the psychiatric profession"]; Dr. Norma R. Bernstein, "Mental Retardation," *The Harvard Guide to Modern Psychiatry* (1978) 551 ["Psychiatrists generally are not interested in and do not use the broad range of knowledge or treatment techniques available when confronted with [mentally retarded] patients"].)

Our own Legislature and this Court have recognized that a medical degree and specialty in psychiatry do not alone establish expertise in the field of mental retardation. As discussed in Argument I, *ante*, when a defendant is suspected to be incompetent to stand trial due to a mental disease or illness, the trial court may appoint a "psychiatrist or licensed psychologist" to evaluate the defendant. (Pen. Code, § 1369, subd. (a).) However, if the defendant's putative incompetence is suspected to be due to a developmental disability, such as mental retardation (Pen. Code, § 1370.1), the Legislature *requires* the appointment of the "director of the regional center for the developmentally disabled . . . to examine the defendant." (Pen. Code, § 1369, subd. (a).) As this Court has recognized, this requirement is intended:

> to ensure that a developmentally disabled defendant's competence to stand trial is assessed by those having expertise with such disability. . . . Court-appointed psychiatrists and psychologists may not have this expertise, because their experience may pertain to mental illness rather than developmental disability.

(*People v. Leonard*, *supra*, 40 Cal.4th at pp. 1389-1390; cf. *State v. M.J. K*

(2004) 849 A.2d 1105, 1115-1116 [trial court abused its discretion in rejecting qualified experts' opinions that defendant was mentally retarded and incompetent and accepting contrary opinion of clinical psychologist that defendant was not retarded and incompetent because, *inter alia*, although psychologist had performed many competency evaluations, "her experience in evaluating mentally retarded individuals, like defendant, was minimal"].)

A number of other states specifically require that a psychiatrist have *specialized* education, experience, or training in the field of diagnosing or assessing mental retardation and in the administration and interpretation of intelligence and other tests necessary to make a diagnosis of mental retardation before he or she is qualified to offer an opinion on the subject in the courtroom. (See, e.g., *Chase v. State* (Miss. 2004) 873 So.2d 1013, 1029; Va. Code Ann., § 19.2-264.3:1.2(A); Az. Rev. St. Code, § 13-703.02, subd. (K)(2); D.C. St. § 7-103.03, subd. (21)(B).)

Similarly, the fact that a witness is a psychiatrist alone is insufficient to qualify him or her to testify as an expert in the related, but distinct and specialized field of neuropsychology. As Dr. Schuyler explained, "neuropsychology is an area directly related to assessing brain function utilizing [a] large number of different tests that have been designed to look at different skills and abilities that we know to parts of brain control. Through the use of the large number of tests we can determine what areas of the brain are functioning normally and which areas of the brain are not." (13 RT 3137; see also, *Stedman's Medical Dictionary*, *supra*, at p. 1213 [neuropsychology is "'a specialty of psychology concerned with the study of relationships between the brain and behavior, including the use of psychological tests and assessment techniques to diagnose special cognitive

and behavioral deficits and to prescribe rehabilitation strategies for their remediation"]; Russ, et al., 2 *Attorneys Medical Advisor* (2008) § 23:6 ["neuropsychology is the study of brain-behavior relationships . . . the neuropsychological field is a composite which integrates at least some portions of psychology, neurology, neuropsychiatry, statistics, and physiology"]; see also *In re Hawthorne*, *supra*, 35 Cal.4th at p. 51 [qualified clinical neuropsychologist may render expert opinion regarding mental retardation].)

Here, Dr. Coleman testified only to his qualifications as a medical doctor who specialized in psychiatry. He did not testify that he had any special training, education, or experience in diagnosing or treating mental retardation or even that he had ever had any contact whatsoever with the mentally retarded. He did not testify that he had ever testified or qualified as an expert on mental retardation or related testing of intellectual functioning. Nor did he offer any testimony at all regarding the specific training, education, or experience he had in administering or interpreting intelligence or other tests designed to measure intellectual functioning.

Clearly, Dr. Coleman was not qualified to testify as an expert on the subject of mental retardation or associated intelligence and other testing utilized to diagnose mental retardation. The trial court erred in permitting him to testify as an expert on those subjects.

b. Coleman's Testimony Regarding His Familiarity, or Lack Thereof, with Various Tests Demonstrated that He was Not Qualified to Testify on the Subject of Intelligence and Related, Standardized Psychological Tests that Measure Intellectual Functioning

Dr. Coleman did testify that he made "90 percent" of his living from examining *some* test results in his role as a professional debunker of psychiatric testimony in the courtroom. (14 RT 3266.) The entirety of his testimony in this regard was that: 1) he had "looked at hundreds of MMPI results" (14 RT 3231-3232); 2) he was "more familiar with personality testing" than IQ testing (14 RT 3243-3244); 3) he was not "as familiar" with the Gilmore Oral Reading test as he was with unspecified other tests (14 RT 3225); 4) he was simply "familiar" with the Bender-Gestalt (14 RT 3223); and 5) without reference to his own personal experience or the formal education he had received in the 1960s, "testing is the major part of *psychologist's* [*sic*] training," including administering and theory and "so forth," while psychiatrists get "some exposure to psychological testing methods but not nearly as much as a psychologist. And psychiatrists don't normally administer psychological tests, although they are routinely expected to be able to know of the testing and integrate the test findings in their overall picture of things, but not the actual testing of the person themselves" (14 RT 3252-3253). Thus, the *only* psychiatric testing with which Dr. Coleman testified that had any appreciable degree of familiarity was the MMPI, which – as defense counsel argued below and Dr. Coleman himself admitted on cross-examination – was irrelevant because *none* of the defense experts relied upon in concluding that Mr. Townsel was mentally retarded. (14 RT 3196, 3198, 3221-3222, 3263.) Dr. Coleman's testimony

in this regard established that he was simply unqualified to testify as an expert regarding intelligence or other testing of intellectual functioning.

c. There is No Evidence That Coleman Has Ever Qualified or Testified as an Expert in the Field of Mental Retardation

As this Court is aware, Dr. Coleman has testified many times as an expert witness in this state. (See, e.g., *People v. Ledesma* (2006) 39 Cal.4th 641, 714, collecting cases.) However, appellant's research has failed to uncover a single published or unpublished decision in this state or any other jurisdiction in which Dr. Coleman was qualified to testify as an expert regarding mental retardation and associated intelligence testing.

In support of the admissibility of Dr. Coleman's expert testimony, the prosecutor cited *People v. Prince* (1988) 203 Cal.App.3d 848 and *People v. Turner* (1990) 50 Cal.3d 668. (14 RT 3197, 3199-3200.) Neither demonstrated that Dr. Coleman was qualified to provide relevant expert testimony in *this* case.

In *Prince*, *supra*, Dr. Coleman testified as a psychiatric expert in a competency hearing. His qualifications were summarized as follows: "for the past 14 years Dr. Coleman had been examining the issue of the reliability by the tools and methods used by *psychiatrists* in trying to form legal opinions about someone's *competence to stand trial.* The trial court thereupon found Coleman qualified to testify as an expert *in that area.*" (*People v. Prince*, *supra*, 203 Cal.App.3d at p. 857, italics added.) In *Turner*, the only discussion of Dr. Coleman's testimony was as follows: "The People called forensic psychiatrist to testify that psychological tests and opinions are useless in the courtroom." (*People v. Turner*, *supra*, 50 Cal.3d at p. 686.) The opinion did not state his qualifications, whether he

had testified regarding mental retardation and associated intelligence and other testing, and indeed did not even hold that Dr. Coleman was qualified to testify as an expert at all.

d. Coleman Did Not Have a Background "Comparable" to the Defense Experts Whose Testimony He Sought to Rebut

Certainly, Dr. Coleman's background as a medical doctor specializing in psychiatry and a hired gun who criticized the use of psychiatric testimony in legal settings was *not* a background "comparable" to those of the defense experts. (*People v. Stoll*, *supra*, 49 Cal.3d at p. 1159; accord, *People v. Smithey*, *supra*, 20 Cal.4th at p. 967.) Dr. Christensen was a clinical psychologist who had worked with the developmentally disabled at the Central Valley Regional Center. (14 RT 2986, 3037-3039, 3050; see Pen. Code, § 1369, subd. (a) [when defendant is suspected to be incompetent due to a developmental disability, she must be evaluated by the director of the regional center or his or her designee, not simply a "psychiatrist"]; see also *People v. Leonard*, *supra*, 40 Cal.4th at pp. 1389-1390 [section 1369 reflects legislative recognition that the director of the regional center, or his or her designee – as opposed to a psychiatrist – is a qualified mental retardation expert].) She had had extensive, specialized training and experience in the mental retardation field. (13 RT 3075.) She had performed "500 to 600" evaluations like the one she conducted of Mr. Townsel. (13 RT 3024-3025.) Similarly, Dr. Powell had extensive experience administering and interpreting intelligence and other psychological tests and had performed about 100 evaluations like the one in this case. (12 RT 2879-2883; see also 16 RT 3636-3637.) And Dr. Schuyler was a *neuropsychologist*, an area of psychology with which Dr.

Coleman did not profess any special training or experience. (13 RT 3137.)

e. Coleman Was Not Sufficiently "Impartial" to Testify as An Expert Regarding the Consensus within the Relevant Professional Community And In fact Misrepresented the Consensus within that Community

Furthermore, in testifying that intelligence testing is not generally accepted within the professional community as a real or fundamentally reliable measure of intelligence (14 RT 3231, 3255), it was abundantly clear that Dr. Coleman was *not* "'impartial', that is, not so personally invested in establishing the technique's acceptance [or non-acceptance] that he might not be objective about disagreements within the relevant [expert] community." (*People v. Brown*, *supra*, 40 Cal.3d at p. 530.) A full 90 percent of Coleman's "practice" was devoted to the "legal work" of debunking the role of psychiatry and psychology in the courtroom. (14 RT 3266.) His lack of impartiality is born out by his own testimony.

According to Dr. Coleman, intelligence "tests have been totally trashed by the professional community. They're not given any credibility by the professionals." (14 RT 3231.) Indeed, according to Dr. Coleman, it was possible that a majority of the professional community shared his view that all intelligence testing under all circumstances is *completely* and totally unreliable. (14 RT 3255.) This was simply untrue.

At the time that Dr. Coleman testified (and through today), the "long" and "generally accepted" clinical definition of mental retardation in the professional mental retardation community included "'significantly subaverage intellectual functioning." (*Money v. Krall*, *supra*, 128 Cal.App.3d at p. 397; DSM-III-R (3d ed. Rev. 1987) at pp. 28, 31-32; DSM-III-R (3d ed. 1980) at p. 36; DSM II (2nd ed. 1968) § 3, p. 14; see

also *Atkins v. Virginia*, *supra*, 536 U.S. at p. 309, fn. 3.) "Intellectual functioning is a phenomenon measured, and thus defined by, *intelligence tests*." (Luckasson, *Mentally Retarded*, *supra*, 53 Geo. Wash. L. Rev. at p. 422, italics added.)

To be sure, intelligence testing does not always produce precise results for a variety of reasons. (See generally AAMR Manual (10th ed. 2002), *supra*, at pp. 51-66.) Thus, IQ scores are considered to have a five-point measurement error. (*In re Hawthorne*, *supra*, 35 Cal.4th at pp. 48-49, and authorities cited therein; AAMR Manual (10th ed. 2002), *supra*, at pp. 56-59.) However, as the AAMR has explained, "[a]lthough reliance on general functioning IQ has been heatedly contested by *some* researchers . . ., it remains, nonetheless, the measure of human intelligence that continues to garner the most support within the scientific community." (AAMR Manual (10th ed. 2002), *supra*, at p. 51, italics added; see also AAMR Manual (9th ed. 1992), *supra*, at p. 25.)

Thus, under the clinical definition of mental retardation, "general intellectual functioning *is defined by* the intelligence quotient (IQ or IQ equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests," such as the Wechsler Intelligence Scales given in this case. (DSM-IV-TR, *supra*, at p. 41; DSM-IV-TR at p. xxxiii [DSM's diagnostic criteria and classification reflect consensus in field]; DSM-III-R, *supra*, at pp. 28-33; DSM-III, *supra*, at pp. 36-39; DSM-II, *supra*, § 3, p. 14; see also American Psychological Association's *Manual of Diagnosis and Professional Practice in Mental Retardation* (1996), p. 13; *Atkins v. Virginia*, *supra*, 536 U.S. at p. 309, fn. 5 [describing "subaverage intellectual functioning" in terms of IQ scores and noting that Wechsler Intelligence Scale is the "standard instrument in

the United States for assessing intellectual functioning"].)[31]

Hence, it is abundantly clear that standardized intelligence testing has long been generally accepted not only as a reliable (accounting for error rates) measure of intelligence, but as "the *only* way to address the intellectual aspect of mental retardation in a normative way." (AAMR Manual (9th ed. 1992), *supra*, at p. 25; see also DSM-II, *supra*, § 3, p. 14.) In other words, assuming proper procedures are followed in a particular case, intelligence testing is not only sufficiently reliable, but *required* to make a finding or diagnosis of mental retardation.

The falsity of Dr. Coleman's testimony to the contrary that intelligence testing is not generally accepted within the relevant professional community as a reliable measure of intelligence, and is not relevant to determining whether a person is mentally retarded, could only be attributable to one of two explanations: 1) he simply did not have sufficient knowledge, training, or experience in the field of mental retardation, and the required associated standardized testing of intellectual functioning, to know that his testimony was false; or 2) because his bread and butter was debunking psychological and psychiatric testimony and related testing, he was "so personally invested in establishing the technique's [non]acceptance that he [could] not be objective about []agreements within the relevant [professional] community." (*People v. Brown*, *supra*, 40 Cal.3d at p. 530.)

---

[31] In fact, while the clinical (and legal) definitions of mental retardation have evolved over the years, particularly with respect to adaptive skills and functioning, at least since the early part of the 20th century, they have all incorporated intelligence testing as the means by which to measure intellectual functioning. (AAMR Manual (10th ed. 2002), *supra*, at pp. 19-20, 24-25; Luckasson, *Mentally Retarded*, *supra*, 53 Geo. Wash. L. Rev. at p. 493, n. 44; DSM II, *supra*, § 3, at p. 14.)

Either explanation establishes that Dr. Coleman was not qualified to testify as an expert voice of the relevant expert community. (*Ibid.*) While Dr. Coleman may (or may not) have been a "competent and well-credentialed" psychiatrist, his "career interests in" debunking all forms of psychological and psychiatric evidence in a forensic setting and his apparent "lack of formal training and background in the applicable . . . disciplines" of mental retardation diagnosis and associated testing "made [him] unqualified to state the view of the relevant community of impartial" professionals. (*People v. Brown*, *supra*, 40 Cal.3d at p. 533; accord, e.g., *People v. Reilly*, *supra*, 196 Cal.App.3d at p. 1139 [impartiality particularly critical "where the sole (or crucial) witness has a significant financial or professional interest in promoting a new technique [or debunking an established technique] or lacks theoretical training" and purports "to speak for all concerned . . . ."].)

For all of these reasons, the trial court erred in overruling defense counsel's objections and permitting Dr. Coleman to testify as an expert witness in this case. As will be demonstrated in Part F, below, the error violated not only state law, but also Mr. Townsel's federal constitutional rights to a fair trial, proof beyond a reasonable doubt and trial by jury on every element of the charges, a meaningful opportunity to present his defense, and reliable jury determinations that he was guilty of a capital offense. (U.S. Const., Amends. V, VI, VIII, XIV.)

C. The Trial Court Erred in Permitting Coleman to Testify Regarding, and thereby Submitting to the Jury, Questions of *Law* Vital to Mr. Townsel's Defense

1. Procedural History

a. Defense Counsel's In Limine Objection and the Trial Court's Ruling

Among defense counsel's in limine objections to Dr. Coleman's testimony was that, based on their review of his writings and his testimony in other cases, they anticipated that:

> he is proposed to testify . . . that psychiatric and psychological professions [*sic*] have absolutely no training by which they can render opinions within the courtroom setting. And we believe that argument would be more appropriate in a *Kelly-Frye*[32] scenario not appropriate as rebuttal. Basically arguing that psychological experts have absolutely no expertise which qualifies them as experts to testify in a proceeding. We argue that since those persons have, in fact, been qualified as experts and allowed to present their expert testimony, that Dr. Coleman coming in and saying that has absolutely no place within the courtroom setting and should be totally disregarded by the jury[,] that would be inappropriate an opinion to render by Dr. Coleman.

(14 RT 3196-3197; see also 14 RT 3198.)

The prosecutor confirmed that Dr. Coleman would be testifying that the intelligence and other standardized tests administered to Mr. Townsel were "not relevant." He explained, "Dr. Coleman's testimony would be to explain to the jury the tests are not relevant which were administered by the doctors, why they're not relevant. . . . And especially be asked questions

---

[32] *People v. Kelly* (1976) 17 Cal.3d 124 and *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, superceded as stated in *Daubert v. Merrill-Dow Pharmaceuticals* (1993) 509 U.S. 579, 587.

about the other doctors and the results they got, what relevance they have and the basis for the opinions of Dr. Christensen, Dr. Powell, and Dr. Schuyler . . . ." (14 RT 1399; see also 14 RT 1397-1398.) As previously noted, in support of the admissibility of Dr. Coleman's testimony, the prosecutor cited *People v. Prince*, *supra*, 203 Cal.App.3d 848 and *People v. Turner*, *supra*, 50 Cal.3d 668. (14 RT 3199.)

In response, defense counsel reiterated that such testimony would be improper:

> the Court makes the rulings on what is relevant and what is not relevant, and is not for the expert to say what is relevant. That's what he is saying, what's relevant testimony and what's not relevant testimony.
> The Court has already admitted the testimony of the psychologists. There was no objection to those. The prosecutor made no effort to convince the Court that their testimony was without foundation and should not be admitted.

(14 RT 3200.) As previously noted, the trial court summarily overruled all of defense counsel's objections and admitted Dr. Coleman's testimony without limitation. (14 RT 3201.)

b. Coleman's Testimony that All Expert Diagnoses of Mental Retardation, and All Related Intelligence and Other Tests, Are – as a Class – Completely Unreliable and Irrelevant in all Criminal Trials

Contrary to the prosecutor's offer of proof, Dr. Coleman did not limit his testimony to specific criticisms of the defense evidence in this case. Coleman candidly admitted that he did not even review all of the relevant expert testimony and spent only about 42 minutes in total reviewing the reports of all three defense experts, the competency evaluations of Doctors Terrell and Davis, *and* Dr. Christensen's trial

testimony. (14 RT 3219, 3241.) He did very briefly criticize Dr. Christensen's opinion as "a good illustration of why those kinds of opinions should not be relied upon" since "there's nothing that Dr. Christensen has done which is in any way reliable, helpful, or in any way touches on the questions that are being looked into here" and her conclusions were "nothing more than a personal opinion without supporting evidence." (14 RT 3229-3330.) Apart from that brief criticism as an example of his attack on *all* expert diagnoses of mental retardation, Dr. Coleman did not direct any specific criticisms to the evaluations or conclusions of Doctors Powell and Schuyler.

Instead, and over repeated defense objections, Dr. Coleman broadly testified that *all* tests and standards by which psychologists and other qualified professionals diagnose mental retardation are *always and under all circumstances* so inherently, fundamentally and "completely unreliable" as to be of "absolutely" no "assistance to the jury," "no help whatsoever" to a jury in determining a defendant's mental state, and thus are "completely irrelevant" in a criminal case. (14 RT 3210-3211, 3214-3215, 3221-3225, 3231, 3234.) Indeed, such evidence is so "completely unreliable" that, "if listened to or given weight [by the jury it] will just bring confusion instead of something reliable like the evidence of the person's behavior." (14 RT 3254.) Certainly, in a criminal case, "under no circumstances" does intelligence testing tell the jurors anything "about [the subject's] intelligence and most certainly doesn't allow you to go from that to something like was the person planning something or any of those issues." (14 RT 3243.)

For the same reasons, Dr. Coleman further testified, expert diagnoses of mental retardation and "opinions based on the results of these tests" are

useless and irrelevant to a jury's determination of whether the defendant harbored a particular mental state at the time of a charged crime, since there is "absolutely no correspondence between" the test results, expert opinions based thereon, and the mental state issues a jury must resolve in a criminal trial. (14 RT 3215-3216, 3221-3226, 3255.) Neither intelligence and other standardized testing results nor expert diagnoses of mental retardation "would add anything or subtract anything or in any way be relevant to . . . the questions which you're trying to answer about mental state. There is nothing in the bag of our tricks in the mental health trade, testing, and examinations that we have which is of any help and in my opinion should not influence the decision one way or another." (14 RT 3219-3221; see also 14 RT 3256.) In other words, as a class, *all* so-called "expert" diagnoses of mental retardation are a farce. Determining whether someone is mentally retarded requires no expertise, according to Dr. Coleman; to the contrary, determining whether someone is mentally retarded is simply a matter of common sense that lay persons are entirely capable of making based solely on their observations of a person's behavior. (14 RT 3256-3257.)

Thus, Dr. Coleman's testimony was *categorically* that *all* evidence of IQ and other standardized measurements of intellectual functioning, and *all* expert diagnoses of mental retardation, are completely *irrelevant* to the issues the jury must resolve in a criminal case. Of course, since such evidence formed the core of Mr. Townsel's defense, what the prosecutor – through Dr. Coleman – told the jurors was that Mr. Townsel's very defense was irrelevant and should be disregarded without any consideration at all. out of hand. And by admitting Dr. Coleman's testimony and through its instructions (see Part E, *post*) the trial court told the jurors that they could do just that.

As will be demonstrated below, Dr. Coleman's attack on the reliability and relevance of an *entire class of evidence* – i.e., *all* intelligence testing and *all* expert diagnoses of mental retardation under *all* circumstances – was, by definition, an attack on the *admissibility* of such evidence, questions of law exclusively for the court. Indeed, as Mr. Townsel will demonstrate in Part D, *post*, our Legislature has definitely resolved these questions of law in a manner directly contrary to Dr. Coleman's testimony. As Mr. Townsel will establish, by admitting Dr. Coleman's testimony over defense counsel's objections and thereby submitting to the jurors questions of law and permitting the jurors to resolve those questions in a manner inconsistent with the law, the trial court violated state law, as well as Mr. Townsel's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

2. Questions of Law May Not be Submitted to the Jury and Experts are Prohibited From Offering Their Opinions on Issues of Law

The legal relevance and admissibility of evidence are questions of law for the trial court to decide; issues going to the weight to be given admitted evidence are questions of fact for the jury to decide. (Evid. Code, §§ 210, 310, 312, subds. (a)(b); see, e.g., *People v. Jiminez* (1978) 28 Cal.3d 595, 605-607, overruled on another ground in *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17; *People v. Pizarro* (2003) 110 Cal.App.4th 530, 556 & fn. 28, and authorities cited therein; *People v. Farmer* (1989) 47 Cal.3d 888, 913; *People v. Brown* (2001) 91 Cal.App.4th 623, 647.) The legal relevance and admissibility of expert opinion testimony is a question of law for the trial court to decide.

"Evidence Code section 801 prescribes two specific preconditions to

the admissibility of expert opinion testimony. The testimony must be of assistance to the trier of fact and must be reliable." (*People* v. *Bowker* (1988) 203 Cal.App.3d 385, 390.)[33] These preliminary fact determinations, including whether the expert is qualified to render an opinion, whether his or her proposed testimony is "related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact," and whether the matter on which his or her opinion rests is sufficiently reliable to warrant the opinion's admission and consideration by the jury, are questions of law to be determined exclusively by the court. (Evid. Code, § 405 [preliminary fact determinations to be determined exclusively by judge] and Comment ["Section 405 deals with evidentiary rules designed to withhold evidence from the jury because it is too unreliable to be evaluated properly or because public policy requires its exclusion"]; see also, e.g., *People* v. *Kelly*, *supra*, 17 Cal.3d at p. 39; *Stephen v. Ford Motor Company* (2005) 134 Cal.App.4th 1363, 1373-1374;

---

[33] Specifically, Evidence Code section 801 provides in relevant part:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such opinion as is:
>
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact;
>
> (b) Based on matter . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

People v. Pizarro, *supra*, 110 Cal.App.4th at p. 556 & fn. 28.)

While the opponent is free to attack the *weight* that the jurors should give expert opinion testimony, issues of law going to the legal relevance and admissibility of that testimony may not be submitted to the jury.

It is improper to ask or allow the jury to decide a question of law. (See, e.g., *Fairbanks v. Hughson* (1881) 58 Cal. 314 [because qualification of expert is question of law, it was error to submit issue to jury]; *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1184; *People v. Moore* (1996) 44 Cal.App.4th 1323, 1332; *People v. Babbitt* (1988) 45 Cal.3d 660, 699-700.) For instance, telling a jury that all forensic psychiatric testimony is incredible or unreliable is improper because it is "directed not to . . . the weight to be given [a particular] expert's testimony, but rather challenge[s] the entire system of permitting psychiatric testimony on behalf of criminal defendants," an issue of law for the courts and legislature. (*People v. Babbitt*, *supra*, at pp. 699-700 [prosecutor's argument].) Similarly, while telling a jury that properly admitted and constitutionally relevant evidence is not factually supported or is entitled to little weight is proper, telling the juror to disregard that evidence as irrelevant to their decision is improper. (*People v. Robertson* (1982) 33 Cal.3d 21, 57-58 [prosecutor's argument].)

Pursuant to these principles, it has long and well been settled that an expert's opinion on a question of law is inadmissible. (*Summers v. A.L. Gilbert Co.*, *supra*, 69 Cal.App.4th at pp. 1178-1182, and authorities cited therein; accord, e.g., *WRI Opportunity Loans II LLC v. Cooper* (2007) 154 Cal.App.4th 525, 532 & Fn. 3, and authorities cited therein; *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 67; *Ferreira v. Workmen's Comp. Appeals Bd.* (1974) 38 Cal.App.3d 120, 124.) The law does not "authorize an 'expert' to testify to legal conclusions in the

guise of expert opinion. . . . 'The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion.' (*Downer v. Bramet* (1984) 152 Cal.App.3d 837.)'" (*Summers v. A.L. Gilbert Co.*, *supra*, at pp. 1178-1179, and authorities cited therein; see also, e.g., *Nieves-Villanueva v. Soto-Rivera* (1st Cir. 1997) 133 F.3d 92, 99-100, and federal authorities cited therein [same prohibition under federal law].) Nor does the law permit an expert to define crimes, defenses, or statutory or other legal terms. (See, e.g., *People v. Carroll* (1889) 80 Cal. 153, 158; *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1179; *In re Brian J.* (2007) 150 Cal.App.4th 97, 120-121; *People v. Torres* (1995) 33 Cal.App.4th 37, 45-46, and authorities cited therein.) Under these principles, the trial court erred in admitting Dr. Coleman's testimony over defense counsel's objections.

3. The Trial Court Erred in Admitting Dr. Coleman's Testimony

As defense counsel argued below, by admitting the testimony of the defense experts in this case, the trial court impliedly found the necessary foundational facts that they were qualified to testify as experts in this case, that they were qualified to diagnose mental retardation, that expert diagnoses of mental retardation are sufficiently reliable as a class to be admitted and considered by the jury, that the subject matter of their testimony was one calling for expertise, and that the bases for their opinions – including intelligence, psychological, and neuropsychological testing – was of a type that may reasonably be relied upon by experts in the field. (Evid. Code, §§ 402, subd. (c), 710, 801.)

The prosecutor did not object to the admissibility of the defense experts' testimony. Having made no such objection, pursuant to the

authorities discussed in Part 2, *ante*, the prosecutor was limited to challenging the *weight* to be given the defense experts' testimony as a question of fact for the jurors to resolve.

However, as defense counsel objected below (14 RT 3196-3198, 3200), Dr. Coleman's testimony exceeded the scope of factual issues going to the the weight to be given the defense experts' opinions in this particular case and offered opinions on questions of law. By definition, Dr. Coleman's attack on the reliability of an *entire class of evidence* – i.e., that *all* intelligence testing and *all* expert diagnoses of mental retardation are *always* "completely unreliable" and therefore should not be "listened to or given weight" by the jury (14 RT 3254; see also 14 RT 3211-3212, 3219, 3222, 3231) – was an attack on the *admissibility* of such evidence, a question of law exclusively for the court (and, as discussed in the next section, a question of law that has been resolved by our Legislature). (See Evid. Code, § 405 & Comment; *People v. Pizarro* (*Pizarro II*), *supra*, 110 Cal.App.4th at p. 556 & fn. 28 [the fundamental validity or reliability of methodology in general is preliminary fact determination for judge to exclusively decide under section 405]; *People v. Farmer*, *supra*, 47 Cal.3d at p. 913 ["fundamental validity of []scientific methodology" is issue of admissibility to be resolved by court, whereas case-specific factors such as "careless testing affects the weight of the evidence and not its admissibility]; *People v. Brown*, *supra*, 91 Cal.App.4th at p. 647 [the reliability or scientific acceptance of certain procedures goes to admissibility, to be determined by court; criticisms regarding application of those procedures in particular case go to weight, to be assigned by jury].) Similarly, by definition Dr. Coleman's attack on this entire class of evidence as "completely irrelevant," not in "any way be relevant to . . . the

questions which you're trying to answer about mental state" as a juror in a criminal trial (14 RT 3214-3215, 3221-3225, 3231) was an attack on the *legal* relevance and thus admissibility of that evidence, another question of law exclusively for the court (and, as discussed in the next section, a question of law that has been resolved by our Legislature). (See, e.g., *People v. Babbitt*, *supra*, 45 Cal.3d at pp. 699-700; *People v. Robertson*, *supra*, 33 Cal.3d at p. 57-58.) Pursuant to the authorities discussed in 2, *ante*, it was grossly improper for the trial court to admit this testimony and, in so doing, submitting to the jurors questions of law.

The court's error was not limited to permitting Dr. Coleman to testify regarding, and permitting the jurors to decide, questions of law. (See, e.g., *People v. Torres*, *supra*, 33 Cal.App.4th at p. 46 [expert opinion on question of law is inadmissible regardless of whether opinion is correct].) As will be demonstrated in the next section, the court committed egregious error in permitting Dr. Coleman to testify regarding his opinions of the law that were *contrary* to the law and allowing the jurors to resolve questions of law vital to Mr. Townsel's defense in a manner inconsistent with the law. (See, e.g., *California Shoppers, Inc. v. Royal Globe Ins. Co.*, *supra*, 175 Cal.App.3d at pp. 66-67 [testimony of purported expert regarding issues of law, which contained some incomplete and other erroneous statements of law, was erroneously admitted and required reversal].)

D. The Court Erred in Admitting Dr. Coleman's Legally Incorrect Opinions Regarding the Law and thereby Permitting the Jury to Resolve Questions of Law in a Manner Inconsistent with the Law

Contrary to Dr. Coleman's testimony, expert diagnoses of mental retardation and the results of related intelligence testing are not only legally

relevant in a criminal case, but under California law, a defendant is *required* to present such evidence to support a claim of mental retardation. And under California law and the federal Constitution, jurors *must* consider such evidence in determining whether the defendant harbored premeditation and deliberation or any other specific intent element of a charged crime or special circumstance allegation rendering the defendant eligible for the death penalty.

//

//

1. Under State Law and the Federal Constitution, A Defendant is Entitled to Present And Have the Jury Consider Evidence of Mental Retardation In Determining Whether The State Has Proved Beyond a Reasonable Doubt that He Harbored the Specific Intent Elements of Charged Crimes and Special Circumstance Allegations

The death penalty is a different kind of punishment from any other. (See, e.g., *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349, 357.) In light of this qualitative difference, the Supreme Court has repeatedly recognized that the Eighth Amendment demands a "heightened 'need for reliability'" in *all* phases of a capital trial. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 340; accord *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.)

Furthermore, all criminal defendants are entitled to a fair trial, to proof beyond a reasonable doubt and trial by jury on all elements of the charged offense, and to a meaningful opportunity to present a complete defense under the Fifth, Sixth, and Fourteenth Amendments. (See, e.g., *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *California v. Trombetta* (1984) 467 U.S. 479, 485; *In re Winship* (1970) 397 U.S. 358, 364.) While a state is free to define elements and defenses, once it does so, these federal constitutional rights apply and entitle a criminal defendant "to present all relevant evidence of significant probative value in his favor." (*People v. Marshall* (1996) 13 Cal.4th 799, 836; accord, *Holmes v. South Carolina* (2006) 547 U.S. 319, 324-331; *Crane v. Kentucky*, *supra*, 476 U.S. 683, 690; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679-680; *Davis v. Alaska* (1974) 415 U.S. 308; *Patterson v. New York* (1977) 432 U.S. 211 & fn. 12; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; *Washington v. Texas* (1967) 388 U.S. 14, 23.)

As a necessarily corollary to this principle, while the jury may assign whatever weight to the evidence it deems appropriate (see Evid. Code, § 312), the Constitution demands that the jury consider legally relevant, competent evidence admitted in an accused's defense. (See, e.g., *Martin v. Ohio* (1987) 480 U.S. 228, 233-234 [instruction that jury could not consider self-defense evidence in determining whether there was a reasonable doubt about the State's case would violate constitution under *In re Winship* (1970) 397 U.S. 358]; *Cool v. United States* (*per curium*) (1972) 409 U.S. 100, 103 [jury instruction allowing consideration of defense witness testimony only if jury was convinced of its truth beyond reasonable doubt "impermissibly obstructs exercise of" the right to present evidence in one's defense and "has the effect of substantially reducing the Government's burden of proof" in violation of *Winship*, *supra*]; *Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 [important element of fair trial is that jury "consider relevant and competent evidence bearing on the issue of guilt or innocence"]; *United States v. Sayetsitty* (9th Cir. 1997) 107 F.3d 1405, 1413-1414, and authorities cited therein [when a particular defense is permitted under state law, a defendant has a due process right to "have the jury consider it in order to determine whether the government has proved all elements of the offense"]; *Jackson v. Edwards* (2nd Cir. 2005) 404 F.3d 612, 628; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-741; *Dowd v. Glenn* (1942) 54 Cal.App.2d 748, 754.) In short, "if a crime requires a particular mental state," a defendant is constitutionally entitled to present and have the jury consider evidence offered "to prove he did not entertain that state." (*People v. Bobo* (1990) 229 Cal.App.3d 1417, 1442.)

Under California law, first degree murder, of which Mr. Townsel was convicted in counts one and two, requires as an element premeditation

and deliberation. (Pen. Code, §§ 187, 189.) Dissuading a witness (Pen. Code, § 136.1, subds. (a)(1) and (c)(1)), of which appellant was convicted in count four, requires as an element the specific intent to dissuade or prevent a witness from testifying. Similarly, the so-called "witness killing" special circumstance (Pen. Code, § 190.2, subd. (a)(10)) allegation that the jurors found true requires as an element the specific intent to kill in order to prevent a witness from testifying. (See, e.g., *People v. Young* (2005) 34 Cal.4th 1149, 1210; *People v. Weidert* (1985) 39 Cal.3d 836, 853-854; *People v. Brenner* (1992) 5 Cal.App.4th 335, 339; *People v. Lyons* (1991) 235 Cal.App.3d 1456, 1460-1462; *People v. Ford* (1983) 145 Cal.App.3d 985, 989-990.)[34]

Also under California law, evidence of a mental disease, defect, or disorder is relevant and admissible at the guilt phase of a criminal trial on the issue of whether the defendant "actually formed a specific intent," or premeditated and deliberated, when such intent is an element of the charged crime or special circumstance allegation. (Pen. Code, § 28, subd. (a); *People v. Williams* (1997) 16 Cal.4th 635, 677; *People v. Aguilar* (1990) 218 Cal.App.3d 1556, 1569 (1990); *People v. Jackson* (1984) 152 Cal.App.3d 961, 968, 970.) Although it is technically a developmental disability (see Pen. Code, § 1370.1), mental retardation is considered a "mental defect" or disorder within the meaning of Penal Code section 28.

---

[34] Alternatively, Penal Code section 190.2, subdivision (a)(10) can be violated by intentionally killing a crime witness "in retaliation for his or her testimony in any criminal or juvenile proceeding." Although the information charged this method of violating section 190.2, the jurors were not instructed on this method presumably because Ms. Diaz had not testified against Mr. Townsel in any criminal or juvenile proceeding. (CT 819; 14 RT 3368.)

(See, e.g., *People v. Smithey*, *supra*, 20 Cal.4th at pp. 958-959; see also, e.g., *People v. Robertson* (1982) 33 Cal.3d 21, 50-60.)

Thus, under California law, evidence of mental retardation is relevant and admissible on the issue of whether the prosecution has proved beyond a reasonable doubt the element of premeditation and deliberation required for first degree murder under section 189 and the specific intent elements required for dissuading a witness under section 136.1, subdivisions (a)(1) and (c)(1) and the "witness killing" special circumstance under section 190.2, subdivision (a)(10). Indeed, as the United States Supreme Court has observed, evidence of mental retardation is highly relevant to the element of premeditation and deliberation: "there is abundant evidence that" mentally retarded people "often act on impulse rather than pursuant to a premeditated plan" and that the "cold calculus" that constitutes deliberation "is at the opposite end of the spectrum from behavior of mentally retarded offenders." (*Atkins v. Virginia*, *supra*, 536 U.S. at pp. 318-320.)

California having so defined the charged crimes and permitting evidence of mental retardation to be tendered as a defense to the specific intent elements of those crimes, the federal constitution entitles the defendant to present, and have the jury consider, such evidence in his defense. Hence, the constitution entitles defendants to present the testimony of a qualified psychiatric or psychological expert "to assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense." (*Ake v. Oklahoma* (1985) 470 U.S. 68, 81; accord, *People v. San Nicolas* (2004) 34 Cal.4th 614, 661-661 ["the Sixth and Fourteenth Amendments to the United States Constitution . . .

guarantee a defendant the right to present the testimony of [psychiatric or psychological] experts at trial"].) Indeed, a defendant is not only entitled to present such evidence. Under California law, he is *required* to present such evidence in order to support a claim of mental retardation as a defense to the specific intent elements of charged crimes and special circumstance allegations.

2. A Claim of Mental Retardation *Must* Be Supported by Proof of Subaverage Intellectual Functioning, as Measured by Standardized Intelligence Tests, and Diagnosis by a Qualified Expert

As discussed in part B-4-e, *ante*, the "long" and "generally accepted" clinical definition of mental retardation in the professional mental retardation community includes "'significantly subaverage intellectual functioning." (*Money v. Krall*, *supra*, 128 Cal.App.3d at p. 397; DSM-III-R (3d ed. Rev. 1987) at pp. 28, 31-32; DSM-III-R (3d ed. 1980) at p. 36; DSM II (2nd ed. 1968) § 3, p. 14; AAMR (9th ed. 1992), *supra*, at p. 5.) And "general intellectual functioning *is defined by* the intelligence quotient (IQ or IQ equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests," such as the Wechsler Intelligence Scales given in this case. (DSM-IV-TR, *supra*, at p. 41; see also part B-4-e, *ante*, and authorities cited therein].)

California law has long defined "mental retardation" in these clinical terms. (*Money v. Krall*, *supra*, 128 Cal.App.3d at p. 397 ["mental retardation" under Welfare & Institutions Code, § 6500]; accord, *In re Krall* (1984) 151 Cal.App.3d 792, 795-796; Pen. Code, § 1001.20, subd. (a) (enacted 1980); Pen. Code, § 1376 (enacted 2003); see also *Atkins v. Virginia* (2002) 536 U.S. 304, 308-309 & fn. 3 [adopting same definition in holding that the Eighth Amendment forbids the execution of mentally

retarded persons]; see also Sen. Com. on Public Safety, bill analysis of Sen. Bill No. 3 (2003-2004) Reg. Sess. [enactment of Pen. Code § 1376 intended to comply with *Atkins v. Virgnia* and adopt definition of mental retardation already codified in Pen. Code, § 1001.20 as consistent with *Atkins*].)

Thus, the clinical *and* legal definitions of mental retardation necessarily incorporate scores from standardized intelligence testing. The Wechsler Intelligence Scale, which was utilized in this case, is the "standard instrument in the United States for assessing intellectual functioning." (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 309, fn. 5.)

In addition, California law has long *required* a diagnosis and opinion by a qualified expert to support a claim of mental retardation. (*In re Krall*, *supra*, 151 Cal. App.3d at p. 797, and authorities cited therein [discussing long "[l]egislative recognition of the *necessity* for expert diagnosis and opinion upon a hearing to determine whether a person is mentally retarded[, which] is found in several code sections"]; *People v. Moore* (2002) 96 Cal.App.4th 1105, 1116-1117 ["expert . . . testimony is *necessary* to establish a defendant suffered from a mental disease, mental defect, or mental disorder"]; see also Pen. Code, § 1376, subd. (b)(1) [claim of mental retardation for Eighth Amendment purposes must be supported by opinion of qualified expert]; *In re Hawthorne* (2005) 35 Cal.4th 40, 47-48; Pen. Code, §§ 1369, subd. (a), 1370.1) While a lay person may testify to evidence *relevant* to the fact finder's determination of whether a defendant is mentally retarded, such as his performance in school or his social skills, whether the defendant is or is not retarded simply is not a proper subject of lay opinion testimony. (*In re Krall*, *supra*, 151 Cal.App.3d at pp. 796-797.)

In sum, a defendant is not only *permitted* to present intelligence test scores and expert diagnoses of mental retardation in order to support a

claim of mental retardation and a defense that he did not harbor a particular mental state due to mental retardation. A defendant *must* present such evidence in order to support that defense. Once a defendant does so, pursuant to the authorities discussed in part 1, *ante*, state law and the federal constitution demand that the jury consider it in assessing whether the defendant harbored the specific intent elements of the charged crimes and special circumstance allegations.

3. The Admission of Dr. Coleman's Legally Incorrect Opinion on Questions of Law Violated State Law, As Well as Mr. Townsel's Fifth, Sixth, Eighth, and Fourteenth Amendment Rights

Here, and as discussed in part C-1-b, *ante*, Dr. Coleman testified that all expert diagnoses of mental retardation, along with all intelligence testing, is "completely unreliable," "completely irrelevant" to "the questions which [the jury is] trying to answer about mental state in a criminal case, and therefore should not be "listened to or given weight" by the jurors in resolving those questions. (14 RT 3214-3216, 3219-3226, 3231, 3241, 3254-3255.) According to Dr. Coleman, determining whether someone is mentally retarded is simply a matter of commonsense that any layperson can (and should) make based solely on their observations of a person's behavior. (14 RT 3256-3257.)

Dr. Coleman's testimony that IQ testing and expert diagnoses were completely unreliable and irrelevant to determining whether a person is mentally retarded was plainly inconsistent with state law and indeed the very definition of mental retardation. Because the jurors received no instructions on the definition of mental retardation, they had no way of knowing that Dr. Coleman's testimony was inconsistent with the law they were to apply in this case. Furthermore, and pursuant to the principles

discussed in part D-1, *ante*, Dr. Coleman's repeated, emphatic testimony that the jurors not even consider such "completely irrelevant" evidence in determining whether Mr. Townsel harbored the required mental states for the charged crimes and special circumstance allegations was equally inconsistent with Mr. Townsel's state and federal constitutional rights to present and have the jury consider that evidence in his defense. The admission of this testimony therefore violated not only state law, but also Mr. Townsel's rights to a fair trial, to proof beyond a reasonable doubt and trial by jury on every element of the charged offenses and special circumstance allegations, a meaningful opportunity to present his defense, and reliable jury determinations that he was guilty of a capital offense. (U.S. Const., Amends. V, VI, VIII, XIV.)

Indeed, this Court has implicitly recognized the impropriety of the kind of testimony Dr. Coleman provided in this case. In *People v. Babbitt* (1988) 45 Cal.3d 660, for instance, Dr. Coleman testified regarding the general unreliability of psychiatric diagnoses and clinical interviews to form expert opinions about a person's prior mental state. In stark contrast to this case, he did not testify that such evidence was irrelevant to the jury's tasks in a criminal trial. To the contrary, when asked if the thrust of his testimony was to say, "wait, don't consider this [psychiatric and psychological testimony] at all because it's unreliable," Dr. Coleman replied that was not the import of his testimony: "that would be trying to change the law, because the law requires [the jury] to listen to it, to consider it, and in each expert's case to decide how much weight they want to give it. I am arguing as my opinion based on all the things I've said in terms of my background that it does not really--shouldn't be given any weight, that after being considered, it shouldn't be given any weight." (*Id.* at pp. 698-699.)

The prosecutor in *Babbit*, however, relied on Coleman's testimony to argue that "the very process" of allowing psychiatric testimony in a criminal courtroom was a "social cancer" that should "be removed." (*People v. Babbitt*, *supra*, 45 Cal.3d at pp. 699-700.) Following conviction, the defendant appealed, arguing, *inter alia*, that the prosecutor's remarks were misconduct in that they "constituted an attack not against the specific testimony elicited about defendant, but against the entire process of permitting psychiatrists to testify on a defendant's behalf, and, as such, were a call to the jury to 'legislate judicial reform.'" (*Id.* at p. 700.)

This Court agreed that the prosecutor's remarks were improper because they were "directed not to evidence of defendant's mental state at the time of the offenses nor to the weight to be given the [defense] expert's testimony, but rather challenged the entire system of permitting psychiatric testimony on behalf of criminal defendants. The remarks thus went beyond the evidence and beyond any legitimate inference in the case. The law permits a defendant to assert a psychiatric defense and to have witnesses testify in his behalf. The courtroom is not the proper forum to challenge the propriety of this system." (*People v. Babbitt*, *supra*, 45 Cal.3d at p. 700.)

Similarly, in *People v. Danielson* (1992) 3 Cal.4th 691, Dr. Coleman testified to the unreliability of certain psychiatric diagnoses, particularly when made to predict someone's future conduct, in order to rebut defense expert testimony predicting the defendant's future ability to function well in prison. (*Id.* at p. 728.) Importantly, this Court observed, "[o]n several occasions, Dr. Coleman stressed that he is not suggesting that courts should bar psychiatrists from the courtroom, because he acknowledged that current law allows them to testify. But, according to Dr. Coleman, in evaluating the credibility of psychiatric testimony, the court and jury should be permitted

to take into account its considerable shortcomings." (*Id.* at pp. 728-729.) Following his conviction, the defendant appealed, arguing, *inter alia*, that Dr. Coleman's testimony should have been excluded as an improper "generalized attack on the propriety of forensic psychiatric testimony," which was "irrelevant to the issues once the court had determined that [the defense experts] were competent and qualified to testify as experts," and was "contrary to state and federal law recognizing that psychiatric opinions may be helpful to the court and jury." (*Id.* at p. 729.)

This Court first held that the issue had been forfeited by defense counsel's failure to object to the admissibility of Coleman's testimony at trial. (*People v. Danielson*, *supra*, 3 Cal.4th at p. 729.) In any event, the Court held that Dr. Coleman's testimony was not improper precisely *because* he "freely conceded that he was not suggesting that courts should bar psychiatrists from the courtroom, because present law allows them to testify and permits the jury to consider their opinions[,] [h]is criticism of forensic psychiatry, and specifically the opinions of [the defense experts] went more to the weight of those opinions rather than their admissibility." (*Id.* at p. 730.) Thus, this Court seemed implicitly to acknowledge – as it had in *Babbitt* – that if Dr. Coleman had "suggested that courts should bar psychiatrists from the courtroom" or disregard their testimony, his testimony would have been improper.

In *People v. Ledesma*, *supra*, 39 Cal.4th 641, this Court again rejected challenges to Dr. Coleman's testimony rebutting a diminished capacity defense because the trial court "agreed that his testimony should be directed to the expert testimony in this case and sustained objections when Dr. Coleman appeared to be giving a general opinion concerning psychological evidence not specifically related to the present case." (*Id.* at

pp. 713-714.) Similarly, in *People v. Smithey*, *supra*, 20 Cal.4th 936, this Court held that Coleman's testimony was not improper "because he did not suggest that courts should bar psychiatrists from the courtroom [and] [t]hus his criticism of forensic psychiatry and of the opinions of the defense experts in this case went to the weight of those opinions rather than their admissibility. . . . Dr. Coleman did not ask the jury to completely disregard psychiatric opinion," but rather testified that "if the jury determined that [the relevant psychiatric] methods are reliable in light of all of the psychiatric testimony, the jury must give the opinions of the defense experts whatever weight they deserved." (*Id.* at pp. 965-966.)

Here, in stark contrast to the above cases, Dr. Coleman did not tell the jury that the law not only allows but *requires* a defendant to present expert testimony and related intelligence test results to support a claim of mental retardation, that such evidence *is* legally relevant to determining issues of mental state in a criminal trial, that the law requires jurors to consider that evidence in resolving questions of mental state, or that he (Dr. Coleman) was not asking the jurors to disregard the law. Further, and as previously discussed – apart from some brief criticisms of Dr. Christensen's opinion as simply illustrative of the problems with all such opinions – did he in any way limit his testimony to the specific defense evidence presented in this particular case. Nor did the trial court limit Dr. Coleman's testimony "to the expert testimony in this case and sustain[] objections when Dr. Coleman appeared to be giving a general opinion concerning psychological evidence not specifically related to the present case." (*People v. Ledesma*, *supra*, 39 Cal.4th at pp. 713-714.)

To the contrary, Dr. Coleman repeatedly, emphatically, and over numerous objections gave the very type of testimony that this Court has

acknowledged crosses the line into impropriety: a global attack on *all* expert diagnoses of mental retardation and associated intelligence testing, and their legal relevance in *all* criminal cases. Just as the prosecutor's remarks in *Babbitt* were improper, so too was Dr. Coleman's testimony improper because it was "directed not to evidence of defendant's mental state at the time of the offenses nor to the weight to be given the [defense] experts' testimony, but rather challenged the entire system of permitting" expert diagnoses and intelligence test results to support a claim of mental retardation and guaranteeing that the jury will consider such evidence in determining whether the prosecution has proved every element of the crimes beyond a reasonable doubt. (*People v. Babbitt*, *supra*, 45 Cal.3d at p. 700.)

Indeed, if the prosecutor's remarks in *Babbitt* "went beyond the evidence and beyond any legitimate inference" because "the law *permits* a defendant to assert a psychiatric defense and to have witnesses testify in his behalf," a fortiori, Dr. Coleman's testimony was egregiously improper because the law *requires* a mental retardation claim to be supported by, and thus *requires* the jury to consider, the very evidence he told the jurors to disregard as legally irrelevant. "The courtroom is not the proper forum to challenge the propriety of this system." (*People v. Babbitt*, *supra*, at p. 699.) For all of these reasons, the trial court's admission of Dr. Coleman's testimony violated state law, as well as Mr. Townsel's federal constitutional rights to a fair trial, proof beyond a reasonable doubt and trial by jury on every element of the charged offenses and special circumstance allegations, a meaningful opportunity to present his defense, and reliable juror determinations that he was guilty of a capital offense.

E. The Trial Court Compounded The Erroneous Admission of Dr. Coleman's Testimony By Instructing the Jury that it Could Refuse to Consider the Evidence of Mr. Townsel's Mental Retardation in Assessing Whether He Harbored the Mental States Required for the Charged Murders

The only instruction the jurors were given to guide their consideration of Mr. Townsel's mental retardation evidence was CALJIC No. 3.32. That instruction told the jurors:

> Evidence has been received regarding a mental defect or mental disorder of the defendant, Anthony Townsel at the time of the crime charged in Counts I and II. *You may consider such evidence* solely for the purpose of determining whether or not the defendant Anthony Townsel actually formed the mental state which is an element of the crime charged in Counts I and II, to wit Murder.

(3 CT 796, italics added; 14 RT 3357; CALJIC No. 3.32 (1988 ed.).)

As discussed in Part D-1, *ante*, it is a fundamental tenet of the federal constitutional rights to a fair trial, to proof beyond a reasonable doubt and trial by jury on all elements of an offense, to a meaningful opportunity to present a defense, and to reliable verdicts in a capital case, that the jury consider legally relevant and properly admitted evidence that a defendant offers to rebut or raise reasonable doubt regarding an element of the charged offense. As further discussed in Part D-1, *ante*, contrary to those fundamental rights, Dr. Coleman told the jurors that they should reject as legally irrelevant what was in fact highly relevant and properly admitted evidence that Mr. Townsel was mentally retarded. By admitting this testimony over repeated defense objections, the trial court implicitly conveyed to the jurors that what Dr. Coleman told them to do was entirely appropriate. (See, e.g., *People v. Hill* (1992) 3 Cal.4th 959, 1009 ["the

court's very act of overruling the objection put the court's imprimatur on the (remarks) and thus tended to mislead the jury"]; *People v. Evans* (1994) 25 Cal.App.4th 358, 368 [by "overruling a defense objection," the trial court "thus convey[s] to the jury the unmistakable impression that" the objected-to matter is "legitimate"]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 339 [by overruling objection, court "strongly impl(ied) that the" misstatement of law "was correct"].)

Furthermore, based upon the unique facts of this case, the trial court made this explicit by instructing the jury with the permissive language of CALJIC No. 3.32. By informing the jurors that their consideration of Mr. Townsel's mental retardation evidence was permissive ("You *may* consider") rather than mandatory ("you *must* consider"), the court put its imprimatur on Dr. Coleman's testimony: the jurors could completely ignore, or refuse to consider, as legally irrelevant the evidence that Mr. Townsel was mentally retarded in determining whether he possessed the "mental state which is an element of the crime charged in Counts I and II, to wit Murder."

To be sure, this Court has rejected other challenges to CALJIC No. 3.32. (See, e.g., *People v. Smithey, supra*, 20 Cal.4th 936, 988; *People v. Musslewhite* (1998) 17 Cal.4h 1216, 1247; *People v. Jones* (1991) 53 Cal.3d 1115, 1145.) However, even assuming arguendo that the instruction is generally correct and not misleading in most cases, it is not necessarily correct in all cases. Even instructions that "are not crucially erroneous, deficient or misleading on their face, may become so under certain circumstances," such as when they are combined with other erroneous or misleading statements of the law. (*People v. Brown* (1988) 45 Cal.3d 1247, 1255; accord, *People v. Claire* (1992) 2 Cal.4th 629, 663; *People v.*

Edelbacher (1989) 47 Cal.3d 983, 1035 & fn.16; *People v. Roder* (1983) 33 Cal.3d 491, 503-504; *Gall v. Parker* (6th Cir. 2000) 231 F.3d 265, 329-330, superceded by statute on other grounds, as recognized in *Blowing v. Parker* (6th Cir. 2003) 344 F.3d 487, 501, fn. 3.) And even where a court is ordinarily not obligated to give or modify a particular instruction, "the court is obligated to give an express instruction on the matter if there is a reasonable likelihood that, in the absence of such an advisement, the jury will labor under a misconception . . . ." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1261, conc. opns. of Mosk, J., joined by Kennard, J.; *People v. Livaditis* (1992) 2 Cal.4th 759, 784 [even if court is ordinarily not required to instruct on particular legal principle, it must do so if there is a reasonable likelihood that the jury will be misled by "the court or the parties . . . improper contrary suggestion"].)

Where it is reasonably likely that the interplay of even "individually proper instructions" and other errors "produced a distorted meaning" of the law, error has occurred under state law. (*People v. Brown, supra*, 45 Cal.3d at pp. 1255-1256; accord, e.g., *People v. Claire*, *supra*, 2 Cal.4th at p. 663.) Where it is reasonably likely that the jury was misled to believe that it could not consider constitutionally relevant evidence (*Boyde v. California* (1990) 494 U.S. 370, 380), or that it applied the instructions in any other way that offends the Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 71-72), the error is also one of federal constitutional dimension.

Here, the combined effect of the permissive language of CALJIC No. 3.32 and Dr. Coleman's testimony created a reasonable likelihood that the jurors were misled to believe that they could refuse to consider constitutionally relevant defense evidence. Pursuant to the authorities discussed in Part D, *ante*, that likelihood violated state law, as well as Mr.

Townsel's rights to a fair trial, a meaningful opportunity to present his defense, proof beyond a reasonable doubt and trial by jury on all elements of the crimes and special circumstance allegations, and reliable jury verdicts that he was guilty of a capital offense. (See, e.g., *Estelle v. McGuire*, *supra*, 502 U.S. at pp. 71-72; *Boyde v. California*, *supra*, 494 U.S. at p. 380; *People v. Claire*, *supra*, 2 Cal.4th at p. 663; *People v. Brown, supra*, 45 Cal.3d at p. 1255-1256.)[35]

F. As Respondent Will be Unable to Prove that the Admission of Dr. Coleman's Testimony, Compounded by CALJIC No. 3.32, Was Harmless Beyond a Reasonable Doubt, the Judgment Must be Reversed

As demonstrates above, admission of Dr. Coleman's testimony violated Mr. Townsel's federal constitutional rights. Violations of the federal Constitution require reversal unless the state can prove the errors harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; accord, *Sullivan v. Luisiana* (1993) 508 U.S. 275, 279; *Yates v. Evatt* (1991) 500 U.S. 391, 404.) In making this determination, the reviewing court's inquiry is not "whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered" based upon the strength of the evidence. (*Sullivan v. Luisiana*, *supra*, 508 U.S. at p. 279.) Rather, the reviewing court must determine "whether the guilty verdict actually rendered in *this trial* was surely unattributable to the error." (*Ibid.*)

Under this standard, respondent cannot carry its burden of proving beyond a reasonable doubt that the admission of Dr. Coleman's testimony, compounded by the court's instructional error, was harmless. The judgment

---

[35] As discussed in Argument V-D, *post*, the instructional error was not waived, forfeited, or invited.

must be reversed.

1. Respondent Cannot Prove Beyond a Reasonable Doubt That the Jurors Were Persuaded By and Properly Considered Mr. Townsel's Evidence of Mental Retardation, Such That the Verdict Was Surely Unattributable to the Errors

Dr. Coleman's testimony that the kind of evidence Mr. Townsel had presented was not, in fact, evidence of mental retardation, was not relevant to the jurors' assessment of Mr. Townsel's mental state at the time of the crimes, and thus should be completely disregarded, struck straight to the heart of Mr. Townsel's only viable defense. In this regard, it is well recognized that errors which undercut an accused's sole defense are usually prejudicial under any standard. (See, e.g., *Francis v. Franklin* (1985) 471 U.S. 307, 325-326; *People v. Ireland* (1969) 70 Cal.2d 522, 532; *People v. Roe* (1922) 189 Cal. 548, 565-566; *People v. Hayes* (1985) 172 Cal.App.3d 517, 525; *People v. Galloway* (1979) 100 Cal.App.3d 551, 561; *Luna v. Cambra* (9th Cir. 2002) 306 F.3d 954, 962; *United States v. Lawrence* (9th Cir. 1999) 189 F.3d 838, 842, *United States v. Flynt* (9th Cir. 1985) 756 F.2d 1352, 1361; *United States v. Arroyave* (9th Cir. 1972) 465 F.2d 962, 963.)

Similarly, it is well settled that the erroneous admission of evidence renders a trial fundamentally unfair in violation of due process when it is "crucial, critical, or significant," such as when it "remove[s] a reasonable doubt that would have existed on the record without it." (*Collins v. Scully* (2nd Cir. 1985) 755 F.2d 16, 18-19; accord, e.g., *Ege v. Yukins* (6th Cir. 2007) 485 F.3d 364, 375-378; *Leverett v. Spears* (11th Cir. 1989) 877 F.2d 921, 925; *Love v. Young* (7th Cir. 1986) 781 F.2d 1307, 1312; *Bailey v. Procunier* (5th Cir. 1984) 744 F.2d 1166, 1169.) This is just such a case.

"Even the most casual observer of the legal scene is aware of the crucial and often determinative weight an expert's opinion may carry." (*People v. Bowker, supra,* 203 Cal.App.3d at p. 390; accord, e.g., *People v. Lucero* (1988) 44 Cal.3d 1006, 1029 [an "expert's authority and experience may persuade the jurors to a conclusion they would not make on their own"].) To be sure, in this case three experts testified for the defense and one – Dr. Coleman – testified for the prosecution. However, in stark contrast to the defense experts, Dr. Coleman was billed as a highly regarded "expert" not only in the broad area of mental health, but on the critical relationship between mental health and *the law* and, more particularly, mental health evidence and its relevance to issues of mental state that a jury is required to decide in criminal trials. Indeed, he had published books, testified before legislative bodies, and been instrumental in effecting changes in the law regarding mental health evidence. (14 RT 3206-3209.) Hence, his testimony that the mental retardation evidence in this case was not only clinically irrelevant, but also *legally* irrelevant to the issues the jury had to decide, no doubt carried tremendous weight. Opinions on the law from such putative legal experts are well recognized as being extraordinarily prejudicial. (See, e.g., *Specht v. Jensen* (10th Cir. 1988) 853 F.2d 805, 808-809; *Summers v. A.L. Gilbert Co., supra,* 69 Cal.App.4th at pp. 1185-1190.)

Indeed, in his summation, the prosecutor pointedly argued that if legislators accepted and relied on Dr. Coleman's expertise and opinions in effecting changes in the law, surely these jurors should accept his expertise and opinion that no test or expert mental retardation diagnosis is ever reliable or relevant to a juror's assessment of the defendant's mental state at the time of the charged crime:

> Now [defense counsel] would have you believe that Dr. Coleman came in here and gave his personal opinion that was it [*sic*] based upon no studies or anything. But, as Dr. Coleman testified, his opinions are based on 15 years of study in this area. And he's written a book as he stated. And legislature – legislators both federally and in the state rely on Dr. Coleman. And Dr. Coleman said there is no test that is relevant or reliable in determining the intent of an individual at the time this individual committed crimes.

(15 RT 3457.) Of course, as this and other courts consistently recognize, a prosecutor's reliance on erroneously admitted evidence is a compelling indication of its prejudicial impact on the jurors. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 586; *People v. Hernandez* (2003) 30 Cal.4th 835, 877; *People v. Quartermain* (1997) 16 Cal.4th 600, 622; *People v. Woodard* (1979) 23 Cal.3d 329, 341; *People v. Powell* (1967) 67 Cal.2d 32, 56-57; *Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1131; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 444 ["The likely damage is best understood by taking the word of the prosecutor . . . during closing arguments . . ."].)

The court's instructions only exacerbated the effect of Dr. Coleman's testimony. As discussed in Part F, *ante*, the court effectively instructed the jurors that they could do just what Dr. Coleman told them to do: refuse to even consider mental retardation evidence in the form of expert diagnosis and associated testing as "completely unreliable" and legally irrelevant to the mental state issues they were to resolve. Thus, the instructions permitted the jurors to ignore the evidence, Dr. Coleman's testimony and the prosecutor's argument encouraged them to do so, and Dr. Coleman's star billing as a nationally renowned "expert" instrumental in shaping the law made it likely that the jurors would do so. Certainly, respondent cannot

prove otherwise beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Finally, in the absence of Dr. Coleman's testimony, respondent cannot prove beyond a reasonable doubt that at least one juror would not have been persuaded by the evidence that Mr. Townsel was retarded. Respondent may argue to the contrary that the prosecution's other evidence rebutting the defense experts' opinions that Mr. Townsel was retarded was so strong that the jurors would have rejected their opinions even absent Dr. Coleman's testimony. Any such argument would be wholly without merit.

The evidence of Mr. Townsel's mental retardation consisted of the unanimous opinions of three experts. The state's *properly* admitted rebuttal evidence paled in comparison. In an effort to rebut the defense experts' opinions, the prosecutor presented evidence from Mr. Townsel's school records, testimony from two of his previous school teachers and a counselor, and anectodal evidence, such as that Mr. Townsel had a driver's license, read – or appeared to read – newspapers covering his trial, and had a temporary job in which he performed repetitive tasks under supervision.

As to the school records, the *facts* they recorded – Mr. Townsel's low IQ scores and his placement in special education and "educationally mentally retarded" classes – were properly admitted. (14 RT 3297A-3297C, 3298A-3300A.) Rather than contradicting Mr. Townsel's claim of mental retardation, this rebuttal evidence supported it. As discussed in Argument III-C, *post*, the *conclusions* and opinion contained in the school records – i.e., that Mr. Townsel "did not qualify by standard as a mentally retarded child" (14 RT 3297C) but rather simply had a "learning handicap" (14 RT 3297A, 3297C-3298) – was improperly admitted. (See *People v. Archer* (2000) 82 Cal.App.4th 1380, 1390-1397 [in evaluating prejudice

from error, "we must consider only evidence that was properly admitted"]; see also Argument VI, *post*, addressing cumulative prejudice from errors].)

With respect to the testimony of Mr. Townsel's former school teachers and counselor, their impressions of his behavior and conduct were also properly admitted. That is, Ms. Davis's recollection that Mr. Townsel had problems with reading and completing his assignments, but did not have problems in reasoning, was admissible, as was her agreement that she had probably given him a grade of "D." (14 RT 3307-3311.) Similarly, Ms. McClure's testimony that Mr. Townsel had difficulty reading and writing and that she could not recall him turning in many homework assignments was properly admitted. (14 RT 3319, 3322.) As to Ms. Rodriguez, she provided little evidence regarding her recollection or observations of Mr. Townsel apart from her memory that he was already in a special education program when he entered Madera High School, and that he remained in a special education program for "learning handicapped" students "with problem[s] either in reading, language development, math," which attempted to "teach them how to compensate for their disability." (14 RT 3304A-3304D.) Like the school records evidence, this testimony did little, if anything, to undermine the evidence of Mr. Townsel's mental retardation; to the contrary, much of it was consistent with that evidence. As will be discussed in Argument III-C, *post*, the teachers' and counselor's opinions that Mr. Townsel was not retarded were erroneously admitted.

The prosecution also presented evidence that Mr. Townsel had worked for a short period of time as a scraper operator under supervision, which required him to engage in the repetitive tasks of counting and loading cars with 26 trays every minute and 15 seconds and shutting off the machine when it jammed. (14 RT 3276-3280, 3281-3283, 3285.)

Similarly, the prosecutor presented evidence that Mr. Townsel had a California Driver's License and, while in jail, requested a daily local newspaper that often covered his case, which he *appeared* to read. (14 RT 3287-3290, 3323.)

However, as Dr. Christensen testified, someone with an IQ at or near Mr. Townsel's would be capable of performing repetitive tasks under supervision and passing the written and driving tests for a driver's license. (13 RT 3045-3047, 3065, 3122.) Dr. Powell similarly testified that mentally retarded people can often hold jobs, drive cars, pass the written and driving tests required for a driver's license, and perform tasks that are not particularly complex. (12 RT 2894-2895, 2938.) Indeed, this view is well accepted within the professional community of mental retardation experts. (See *State v. White* (Ohio 2008) 885 N.E.2d 905, 914 [citing and relying on mental retardation expert's testimony that "a mildly mentally retarded individual can qualify for a driver's license and that licensed driver status is not a good criterion for distinguishing between people who are and are not retarded"]; see also DSM IV-TR at p. 43 [by adulthood, those classified as mildly mentally retarded "usually achieve social and vocational skills adequate for minimum self-support, but they may need supervision, guidance, and assistance, especially when under unusual social or economic stress"]; AAMR Manual (10th ed. 2002), *supra*, at p. 41 ["adaptive skills limitations often coexist with strengths in other adaptive skills areas"].)

With respect to requesting the newspaper, even assuming Mr. Townsel read it, the defense experts testified that it would not necessarily be inconsistent with mental retardation. Mr. Townsel's scores on the Gilmore Oral Reading test revealed that Mr. Townsel's reading skills scores passed the fifth grade and "barely" passed the sixth grade while his reading

comprehension scores passed at the fourth grade level but failed at the fifth. (12 RT 2891.) According to Dr. Powell, he would not expect someone with Mr. Townsel's IQ to read a daily newspaper, only because such a person would generally have a *lack of interest* and an inability to *comprehend* (not *read*) many of the stories. (12 RT 2961.) Of course, as the officer who provided the newspaper to Mr. Townsel testified, there were often stories about Mr. Townsel in the newspaper, which would obviously be of great interest to him. (14 RT 3289.) And because the officer never questioned Mr. Townsel about what he had purportedly read, there was no evidence regarding the degree to which he had comprehended what he appeared to read. (14 RT 3290.) Furthermore, Dr. Christensen testified that even a person with an IQ of 47 (which she acknowledged was no doubt lower than his true intelligence quotient due to the circumstances of the first test that produced it), may engage in daily reading of certain things in the newspaper, even if he or she cannot comprehend most of it. (13 RT 3077.) And it would not be unusual for a person with an IQ of 67 (which was closer to his true intelligence quotient) to read or attempt to read a newspaper. (13 RT 3123.) In fact, newspaper reading is emphasized in some special education classes. (13 RT 3123.)

Importantly, the expert testimony that Mr. Townsel's abilities – or seeming abilities – in these areas were *not* inconsistent with mental retardation was left entirely unrebutted. Likely because Dr. Coleman had no expertise in the mental retardation field, the prosecutor *never even asked* him – his only "expert" – if Mr. Townsel's demonstrated abilities were inconsistent with being mentally retarded. From the prosecutor's failure to elicit Dr. Coleman's testimony on this subject, it is reasonable to infer that it would have been adverse to the prosecutor's theory. (See, e.g., *People v.*

Ford (1988) 45 Cal.3d 431, 442-443 [where party has power to present material evidence and fails to do so, it is reasonable to infer that the evidence would be adverse to that party]; accord, e.g., *United States v. Taylor* (9th Cir. 1995) 52 F.3d 207, 211.)

The prosecutor also presented an *altered* record indicating that Mr. Townsel applied to a temporary services agency for industrial work, took a "comparison" test on which he had answered 13 out of 20 questions correctly and a math test on which he had answered 17 out of 20 questions correctly, which is considered "quite good." (14 RT 3294B-3294C, 3296B.)

However, the tests were not timed and the math test did not require the test taker to make calculations but rather asked questions, provided an answer, and asked the taker if the answer was correct or incorrect. (14 RT 3294-3294B, 3296B.) Even more importantly, the evidence raised serious questions about the accuracy of the scores entered in the altered record.

All applicants take the same test at the same time and in the same room, either in the agency office or a rented room at the library. (14 RT 3294D-3295.) Six to seven people are seated side by side and as many as 30 people may take the test at the same time. (14 RT 3296-3296A.) There is a large window in the office room through which the applicants *might* be monitored. (14 RT 3294D.) When 30 people take the test at the same time, mistakes in recording their scores can happen. (14 RT 3295C.)

In fact, a mistake was made in entering Mr. Townsel's scores; different scores were originally entered for Mr. Townsel's test results, but later whited-out and different scores, which were offered at trial, were entered. (14 RT 3295C.) Because the agency retains only the final scores and not the subject's completed answer sheets, the answer sheet that Mr.

Townsel filled out was not admitted into evidence. (14 RT 3295A.) The custodian of records who testified regarding the test scores was not the person who administered or scored the tests and could not testify with any certainty whether the originally entered scores or the subsequently entered scores were the correct ones. (14 RT 3295C, 3296.)

In fact, the scores attributed to Mr. Townsel were inconsistent with the prosecution's *own* evidence that Mr. Townsel was at least learning disabled, placed in special education classes throughout his school years, and consistently tested in the bottom second to fifth percentile or lower throughout his school years. (14 RT 3298C-3300A.) It is difficult to reconcile math scores that are "quite good" with the prosecution's own evidence of Mr. Townsel's limited intellectual abilities.

At bottom, the altered record and the anecdotal evidence that Mr. Townsel could engage in repetitive tasks, had a valid California Driver's License, appeared to read a newspaper did little to undermine the unanimous opinions of three *experts* that Mr. Townsel was mildly mentally retarded notwithstanding his abilities in those areas. Absent Dr. Coleman's erroneously admitted testimony, aggravated by the trial court's instructions, respondent simply cannot prove that at least one juror would not have been persuaded by the defense experts' opinions that Mr. Townsel was mentally retarded and considered his mental retardation in determining whether the prosecution had proved beyond a reasonable doubt "the mental state which is an element of the crime charged in Counts I and II, to wit Murder." (3 CT 796; 14 RT 3357.) Nor can respondent prove beyond a reasonable doubt that one such persuaded juror would not have harbored reasonable doubt that Mr. Townsel premeditated and deliberated the killings due to his

mental retardation. (*Chapman v. California, supra*, 386 U.S. at p. 24.)[36]

2. Respondent Cannot Prove Beyond a Reasonable Doubt That the First Degree Murder Verdicts Were Surely Unattributable to the Errors

As the defense experts explained, mental retardation affects abstract thinking, memory, and judgment. (13 RT 3032-3033.) While a mentally retarded person can form the intent to kill, he or she would have more difficulty planning, making decisions, considering the consequences of his or her actions, making causal connections, and would be more impeded in his or her judgment than would a person of normal or average intellect. (13 RT 3032, 3044-3045, 3086, 3097, 3127-3128.) Consistent with this testimony, the United States Supreme Court has recently recognized that mildly mentally retarded people are impaired "in areas of reasoning, judgment, and impulse control[,]" "there is abundant evidence that"

---

[36] As discussed in detail in Argument V, *post*, given the closeness of the evidence to prove that Mr. Townsel specifically intended to kill Ms. Diaz in order to prevent her from testifying against him as a witness in a criminal proceeding, as required for the "witness killing" special circumstance (Pen. Code, § 190.2, subd. (a)(10)) and the dissuading a witness charge (Pen. Code, § 136.1, subds. (a)(1) and (c)(1)), it is also likely that if one juror were persuaded that Mr. Townsel was mentally retarded, he or she would also have had reasonable doubt regarding that mental state element. Unfortunately, however, as discussed in Argument V, *post*, the trial court erroneously instructed the jurors that they could not consider the mental retardation evidence in determining whether the prosecution had proved that element of the special circumstance allegation and dissuading a witness charge beyond a reasonable doubt. Because the jurors were instructed that they could *only* consider the mental retardation evidence in assessing whether Mr. Townsel possessed the "mental state which is an element of the crime charged in *Counts I and II*, to wit *Murder*" (3 CT 796, italics added; RT 3357), this argument only addresses the prejudice from the errors in the jurors' assessment of that discrete question.

mentally retarded people "often act on impulse rather than pursuant to a premeditated plan" and the "cold calculus" that constitutes deliberation "is at the opposite end of the spectrum of mentally retarded offenders." (*Atkins v. Virginia*, *supra*, 536 U.S. at pp. 306, 318-320.) Indeed, mental retardation is sufficiently inconsistent with premeditation and deliberation that its omission from a jury's consideration in assessing whether that mental state has been proved is frequently deemed prejudicial, even under the "reasonable probability" standard. (See, e.g., *Williams v. Taylor* (2000) 529 U.S. 362, 396 [had counsel investigated and presented evidence of defendant's borderline mental retardation, reasonable probability result would have been different, since such evidence was "consistent with the view that (petitioner's) behavior was a compulsive reaction rather than the product of cold-blooded premeditation"]; *Jacobs v. Horn* (3rd Cir. 2005) 395 F.3d 92, 105 [had counsel investigated and presented evidence of defendant's mental retardation and cognitive impairments, reasonable probability jury would have had reasonable doubt that defendant harbored *mens rea* elements of first degree murder].)[37]

Certainly, the evidence of premeditation and deliberation was close.

---

[37] The above-cited cases address the prejudice prong of an ineffective assistance of counsel claim, which requires reversal if there is a "reasonable probability," or a probability sufficient to undermine confidence in the outcome, that the result would have been different in the absence of defense counsel's unprofessional errors. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) This Court has equated this standard with the *Watson* "reasonable probability" standard of prejudice for state law errors, which is a far less exacting than the *Chapman* standard of prejudice for federal constitutional violations. (See, e.g., *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050; *People v. Bell* (1989) 49 Cal.3d 502, 558-559, dis. opn. of Mosk, J.; *People v. Rich* (1988) 45 Cal.3d 1036, 1096.)

This was not such a carefully planned execution which in itself demonstrated the cold calculus of deliberation and careful weighing and consideration of the consequences.

To the contrary, the evidence clearly demonstrated Mr. Townsel became increasingly irrational and angry over a combination of circumstances – his acrimonious break up with Ms. Diaz (12 RT 2737-2738, 2740-2741, 2738-2739), an argument they had a few days before the crimes (11 RT 2572), his discovery a day before the crimes that she had made a police report against him for battery (11 RT 2568-2570; 12 RT 2802-2804, 2806; see also 13 CT 3114 [People's Exhibit 1]), his jealousy, and his particular jealousy over seeing her with another man about an hour before the crimes. (11 RT 2656-2658; 12 RT 2739). It is true that the defense failed to present substantial evidence that this combination of circumstances was sufficient to incite a reason-obscuring passion in the ordinary, *reasonable* (i.e., not retarded) person. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1044 [voluntary manslaughter in heat of passion has subjective and objective components: 1) the defendant must actually, subjectively have killed in the heat of a reason-obscuring passion; and 2) the heat of passion must be "reasonable," meaning that a reasonable person would also be provoked to a state of passion under the circumstances]; accord, e.g., *People v. Wickersham* (1982) 32 Cal.3d 307, 326-327.)

It is equally true, however, that the evidence was compelling that this combination of circumstances, combined with Mr. Townsel's mental retardation, in fact ignited in *Mr. Townsel* a *subjective* state of increasing rage or passion. (See, e.g., *People v. Breverman* (1998) 19 Cal.4th 142, 163 [the "passion" that is inconsistent with premeditation is a shorthand reference to "hot blood," "hot anger," or any other "'violent, intense, high-

wrought, or enthusiastic emotion'"]; accord, *People v. Steger* (1976) 16 Cal.3d 39, 547; *People v. Bender* (1945) 27 Cal.2d 164, 178-179, 184-186; *People v. Taylor* (1961) 197 Cal.App.2d 372, 380.) Even if *unreasonable* or completely irrational, this mental state is inconsistent with premeditation and deliberation and, hence, an intentional killing committed in such a state is second degree murder. (*People* v. *Wickersham*, *supra*, 32 Cal.3d at p. 329]; *People v. Valentine* (1946) 28 Cal.2d 121, 132; *People v. Padilla* (2002) 103 Cal.App.4th 675, 679; *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 251.)

According to Teresa Martinez, Mr. Townsel and Ms. Diaz had an argument on September 18. (11 RT 2572.) According to Luidivina Hernandez, she spoke with Mr. Townsel on or about September 21. He recounted "problems" he had been having with Ms. Diaz, was troubled and angry about their breakup, and was concerned that Ms. Diaz would become involved with another man. (12 RT 2737-2739.) On September 22, Mr. Townsel received the notification that Ms. Diaz had reported to police that he had assaulted her; according to Ms. Martinez, when he showed up with the notification that afternoon, Mr. Townsel was very angry. (11 RT 2566-2570; 12 RT 2802-2804, 2806; see also 13 CT 3114 [People's Exhibit 1].)

A few hours later, and in front of witnesses, Mr. Townsel drove by Ms. Diaz's house and yelled, "You little bitch. Your ass is mine after the baby is born," before driving away. (11 RT 2573-2574, 2611.) Only three hours later, and while both Martinez houses were filled with potential witnesses, he again drove by the house, this time firing a handgun into the air. (11 RT 2612, 2633, 2635, 2691-2692.) Although a rational, cool-headed person of normal intelligence would know that his conduct would

be reported to police (as it was), consider the consequences of engaging in any further, similar conduct, and attempt to control himself out of an interest in self-preservation at the very least, Mr. Townsel's recklessness and apparent rage only continued to escalate. Only two hours later, he drove by the Martinez house yet again, fired a handgun again, but this time actually fired at the house. (11 RT 2613, 2615-2616, 2638-2639, 2654, 2670-2672; 12 RT 2825-2826; cf. *Atkins v. Virginia*, *supra*, 536 U.S. at pp. 319-320 [mentally retarded persons are less likely to process the information necessary to consider the consequences of their actions and control their conduct based on that information].)

At about 11:30 the following morning, Mr. Townsel unexpectedly saw Ms. Diaz in a car with another man, Luis Anzaldua. (11 RT 2658.) This was apparently the final trigger; Mr. Townsel chased the car in his own car at a high rate of speed until he crashed his car. He walked away from the wreckage as police arrived and took custody of his companion and as Ms. Diaz and Mr. Anzaldua escaped into a nearby police station. (11 RT 2658-2663.) Again, although any rational, cool-headed person of normal intelligence would know that he would be reported to the police at the scene and control his conduct based on that knowledge, Mr. Townsel was undeterred. An hour later and in broad daylight, he walked across the yard and into Ms. Diaz's house, while armed, and in front of witnesses. (11 RT 2580-2581; 12 RT 2708-2709.)

When Mr. Townsel entered Ms. Diaz's house, it was clear that his rage was directed at what he perceived to be its source – Ms. Diaz. When he entered the house with the gun, Teresa Martinez went to the door and tried to stop him, but he walked passed her without making any attempt to harm her. It was only when Mauricio Martinez rounded a blind corner and

"unexpectedly" bumped into Mr. Townsel that Mr. Townsel *immediately* fired his weapon and shot him. (11 RT 2582-2583, 2594-2596; see also People's Exhibits 3 & 4 and 11 RT 2591, 2594.) When he reached Ms. Diaz in the back bedroom, he shot her *five times,* in a clear act of overkill. He left her son, who was – tragically – in the room when his mother was killed, physically unharmed. (11 RT 2621; 12 RT 2757-2761.) As horrific as that act was, it simply was not so consistent with cold, calculated premeditation and deliberation that that element was a foregone conclusion even if the jurors had found that Mr. Townsel was mentally retarded. This act, and all that came before it, was at least as consistent with an explosion of impulsive, irrational, and childish rage. (See, e.g., *People v. Alcala* (1984) 36 Cal.3d 604, 626 [multiple wounds or acts of violence consistent with impassioned "explosion" of violence]; *People v. Anderson* (1968) 70 Cal.2d 15, 25 [same – evidence insufficient to prove premeditation where, inter alia victim stabbed 60 times]; *People v. Jiminez* (1950) 95 Cal.App.2d 840, 842-843 [evidence insufficient to prove premeditation where, inter alia, victim stabbed eight times]; *People v. Birreuta* (1984) 162 Cal.App.3d 454, 462, n. 6 [evidence supported finding of unpremeditated killings in hot anger where, inter alia, defendant shot one victim six times and other four times].)

Even Mr. Townsel's post-crime statements were bizarre and irrational. Lying shot and bleeding on the ground, surrounded by police officers, he told Theresa Martinez that he was not finished yet and that "Morris was going to come and finish the job." (11 RT 2588-2589, 2685, 2696.) Moments later, he said to no one in particular, "I was paid to do a job and I did it." (12 RT 2836.) These statements, which had no basis in reality, were certainly consistent with those of an irrational, mentally

deficient man.

Of course, when circumstantial evidence – such as that offered to prove Mr. Townsel's mental state at the time of the crimes – is reasonably susceptible of two interpretations, one of which favors guilt and the other favors innocence, the proof beyond a reasonable doubt and presumption of innocence standard requires jurors to apply the latter interpretation. (See, e.g., *People v. Bean* (1988) 46 Cal.3d 919, 932-933; *People v. Wiley* (1976) 18 Cal.3d 162, 174-175; *People v. Gould* (1960) 54 Cal.2d 621, 629; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49; *United States v. Vasquez-Chan* (9th Cir. 1992) 978 F.2d 546, 549; see also 3 Witkin Cal. Evid.4th (2000) Presentation, § 142, p. 202; CT 771 [CALJIC No. 2.02]; 14 RT 3347.) Given that the evidence was *at least* as consistent with an explosion of unpremeditated and irrational rage as it was with premeditation, it was clearly close. (See, e.g., *People v. Gonzalez* (1967) 66 Cal.2d 482, 493-495 [in close case, "'any substantial error tending to discredit the defense, or to corroborate the prosecution, must be considered prejudicial'"].)

It may be true that the jurors in this case concluded that these circumstances would not incite an unreasonable rage or passion (inconsistent with premeditation and deliberation) in a man of *ordinary intelligence*. Nevertheless, it is reasonably probable that if they had been persuaded that Mr. Townsel was mentally retarded, and properly considered that evidence in assessing premeditation and deliberation (both of which were reasonable probabilities in the absence of the errors), at least one juror would have had reasonable doubts that this *mentally retarded* man premeditated and deliberated under the same circumstances. (Cf. *People v. Padilla, supra,* 103 Cal.App.4th 675 at p. 679 [defendant's unique, subjective mental deficiency or illness, such as hallucinations, are highly

relevant to whether he killed in state of *subjective*, but objectively unreasonable, "passion" inconsistent with premeditation; trial court's erroneous exclusion of such evidence was prejudicial error]; *In re Thomas C.* (1986) 183 Cal.App.3d 786, 794, 796-798 & fn. 3 [trier of fact properly found that defendant killed in state of subjective passion based on his clinical depression, which "precluded the kind of reflective process" required for deliberation, combined with circumstances leading to homicide, and thus returned verdict of second degree murder]; *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1208-1209 [because California law recognizes that a killing committed in a subjective, though unreasonable, state of passion is unpremeditated second degree murder, it was reasonably probable that result would have been different had jurors heard evidence that defendant was mentally ill and brain damaged, which likely influenced his perception of events leading to homicide]; see also *Atkins v. Virginia*, *supra*, 536 U.S. at pp. 318-320.)

At bottom, the evidence going to the elements of premeditation and deliberation simply was not so strong as to make the verdicts a foregone conclusion notwithstanding whether the jurors were persuaded that Mr. Townsel was mentally retarded and properly considered that evidence in assessing his mental state. Under any standard, it is reasonably probable that the result of the trial would have been more favorable in the absence of the errors. The murder convictions must be reversed.[38]

//

//

---

[38] See footnote 36, *ante*.

III

THE TRIAL COURT VIOLATED STATE LAW AND MR. TOWNSEL'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BY ADMITTING THE OPINIONS OF UNQUALIFIED LAY WITNESSES, AS WELL AS HEARSAY DECLARANTS, THAT MR. TOWNSEL WAS NOT MENTALLY RETARDED IN HIS DEVELOPMENTAL YEARS

A. Introduction

On rebuttal, the prosecution was permitted to present the opinions of three lay witnesses – two of Mr. Townsel's former school teachers and a former "counselor" – that they did not believe that he was mentally retarded in his developmental years. As will be demonstrated below, the trial court erred in admitting those opinions because the question of whether someone is mentally retarded is a subject matter requiring expertise and the witnesses were not qualified to testify as experts in this regard.

In addition, the prosecutor was permitted to present the opinions, contained in Mr. Townsel's school records, that he was not mentally retarded but rather simply "learning disabled." As will be demonstrated below, the trial court erred in admitting these opinions because they were hearsay that did not fall within any exception to the hearsay rule.

The erroneous admission of this evidence, particularly when combined with Dr. Coleman's erroneously admitted testimony, was prejudicial and violated Mr. Townsel's state and federal constitutional rights to a fair trial, a meaningful opportunity to present his defense, trial by jury and proof beyond a reasonable doubt on every element of the charged crimes, and reliable jury verdicts that he was guilty of a capital offense. (U.S. Const., Amend. V, VI, VIII, XIV; Ca. Const. art. I, §§ 7, 15, 16, 17.) The judgment must be reversed.

B. The Trial Court Erred in Admitting the Opinions of Unqualified Lay Witnesses that Mr. Townsel Was Not Mentally Retarded in the Developmental Stage

1. The Testimony and the Trial Court's Rulings

On cross-examination of Dr. Christensen, the prosecutor asked her if "friends and teachers of the defendant would be able to recognize" his mental retardation. (13 RT 3084.) She replied that "we would expect that family and friends would know him to be slow, harder to educate, not always quick to acquire new information and not always high functioning in general compared to age peers." (13 RT 3085.)

On cross-examination of Dr. Powell, the prosecutor similarly inquired, if Mr. Townsel's "mental retardation [would] be noticeable in [*sic*] friends and family?" Dr. Powell replied, "I would think so." The prosecutor continued, "would it be noticeable to teachers and counselors?" Dr. Powell replied "should be." (12 RT 2947.)

Finally, and as previously discussed, Dr. Coleman testified that determining whether a person is mentally retarded does not require any expertise. A lay person is just as qualified, if not more so, to determine if someone is mentally retarded. (14 RT 3215-3216, 3221-3226, 3255-3257.)

The prosecution then called three lay witnesses – Mr. Townsel's former school counselor Dolores Rodriguez and former school teachers Elizabeth Davis and Susan McClure – and asked them if they ever considered Mr. Townsel to be retarded. (14 RT 3304B, 3308, 3319.) None were trained psychologists and none had any specialized experience, education, or training in diagnosing mental retardation. Over defense counsel's objections that there was no foundation to show that the witnesses had the expertise necessary to offer an opinion regarding Mr. Townsel's

mental retardation, all three witnesses testified that they would not categorize Mr. Townsel as mentally retarded. (14 RT 3304B, 3308, 3319.) The trial court erred in admitting this evidence.

2. The Counselor and Teachers' Lay Opinions That Mr. Townsel was Not Mentally Retarded Were Inadmissible Because the Existence or Non-Existence of Mental Retardation is A Subject Matter Beyond Common Experience and They Were Not Qualified Experts on that Subject

As discussed at length in Argument II-D-2, *ante*, and contrary to Dr. Coleman's testimony, determining whether a person is mentally retarded *is* a matter beyond the common experience of lay persons and *requires* expertise. Lay witness opinion testimony is generally admissible if it is based on the witness's own perceptions and involves subject matter that requires no particular scientific knowledge or other specialized training or experience. (Evid. Code, § 800; see, e.g., *People v. Williams* (1988) 48 Cal.3d 883, 915; *People v. Chapple* (2006) 138 Cal.App.4th 540, 547; *People v. Allen* (1976) 65 Cal.App.3d 426, 436.) For instance, a lay "witness may give his opinion on the question of identity, or his judgment of size, weight, quantity, distance, and time – matters of opinion open to all men and women of ordinary information." (*People v. Helm* (1907) 152 Cal. 532, 547.) However, it is well-settled that "matters beyond common experience are not proper subjects of lay opinion testimony." (*People v. Williams* (1992) 3 Cal.App.4th 1326, 1332-1333; accord, e.g., *People v. Leahy* (1994) 8 Cal.4th 587, 608-609.)

Pursuant to these principles, lay persons may properly testify regarding their perceptions of a person's behavior, such as his or her performance in school, the person's seeming ability or inability to follow directions or instructions, test results and the like, in order to bolster or

undermine a claim of mental retardation. Lay witnesses may not, however, offer their opinions or conclusions that a person is or is not mentally retarded. (See, e.g., *In re Krall*, *supra*, 151 Cal.App.3d at p. 797 [whether a person is mentally retarded is not a proper subject of lay opinion]; *People v. Moore*, *supra*, 96 Cal.App.4th at pp. 1116-1117 [whether a defendant suffers from a mental disease, defect, or disorder within meaning of section 28 requires expert opinion and is not a proper subject of lay opinion]; Witkin, Cal. Evid. 4th (2000) Opinion, § 24, p. 554 [mental retardation improper subject of lay opinion].) Indeed, retarded people may seem to lay persons to be "normal" in some areas despite significant limitations in others. (*State v. White* (Ohio 2008) 885 N.E.2d 905, 914-915 [trial court abused its discretion in rejecting testimony of two experts that defendant was mentally retarded based on lay witness testimony that he appeared to function normally in some areas].)

Pursuant to these principles, the witnesses properly testified to their observations and recollections that Mr. Townsel had problems with reading and completing his assignments, had "probably" received a final grade of "D," but did not have seem to have problems in reasoning. (14 RT 3307-3309, 3310-3311.) However, their further testimony that, in their lay opinions, Mr. Townsel was *not* mentally retarded was improper and inadmissible.

Nor was their testimony in this regard admissible as expert opinion. As discussed and pursuant to the authorities cited in Argument II-B, *ante*, just as psychiatrists with no specialized training in assessing or diagnosing mental retardation are not qualified to offer an opinion as to whether a person is mentally retarded , school teachers are unqualified to testify as such experts in the absence of such specialized training, education, or

experience.

All three witnesses testified that they had some role – as a counselor or a teacher – in Madera High School's special education program. (14 RT 3297A-3297C, 3304A-3304B, 3317-3318.) However, according to the prosecution's own evidence, Madera High School's special education program was not reserved for the mentally retarded. It was a program of "resource specialist classes," for students with a variety of problems, including "learning problems, reading problems" (14 RT 3306-3307, 3311), and students who were "emotionally disturbed or educationally disturbed" (14 RT 3304B).

Indeed, Ms. Davis, one of the special education teachers, testified that she had never worked with mentally retarded people in a "school situation." (14 RT 3308.) Her only contact with the mentally retarded was when she worked "as a camp counselor at one time and I had mentally retarded children at my camp site." (14 RT 3308.) Nor did she have any training as a psychologist. (14 RT 3308-3310.) Pursuant to the authorities cited in Argument II-B, *ante*, these qualifications were plainly insufficient for Ms. Davis to testify to an expert opinion that Mr. Townsel was not mentally retarded.

Similarly, Dolores Rodriguez's sole credentials were as a counselor in Madera High School's special education program whose duties were "academic scheduling, testing, personal, vocational, and career development." (14 RT 3304.) Apparently, she had no college degree, certification, or other specialized training to be a "counselor." (See 14 RT 3303C-33056.) In her capacity as a school "counselor," she had some unspecified contact with mentally retarded people. (14 RT 3304-3304B.) However, she testified to no specialized training, education or experience in

diagnosing or assessing people for mental retardation. Nor did she ever assess or diagnose Mr. Townsel for mental retardation or otherwise test him. (14 RT 3304D.) To the contrary, her contact with him was limited to academic scheduling, such as "a program change or registering for the following year," based on *others*' testing and evaluations. (14 RT 3304C-3304D.) Indeed, even her knowledge of the school's special education program was limited. Mr. Potter – the school records custodian and psychologist – testified at length that students placed in "educably mentally retarded classes" are not necessarily mentally retarded if they are placed there under "exceptional circumstances." (14 RT 3297C, 3299C.) If this were true and, if Ms. Rodriguez had anything more than the most rudimentary knowledge of the special education programs at the school, she should have been familiar with this "exceptional circumstances" category. However, she testified that she was "unaware of" any special category of "exceptional circumstances." (14 RT 3304D.) At bottom, Ms. Rodriguez's qualifications were plainly insufficient for her to offer an expert opinion that Mr. Townsel was or was not mentally retarded. (14 RT 3304B.)

Susan McClure was a teacher in the special education program at Madera High School. (14 RT 3318.) She received no psychological training other than some course work required to obtain her teaching credential in special education (14 RT 3322) – special education being a program of "resource specialist classes," for students with a variety of problems, including "learning problems, reading problems" (14 RT 3306-3307, 3311) or who were "emotionally disturbed or educationally disturbed" (14 RT 3304B). Again, these qualifications were insufficient to permit her to testify to an expert opinion that Mr. Townsel was not mentally retarded. Thus, the trial court erred in admitting this evidence.

C. The Trial Court Erred in Admitting Hearsay Opinions that Mr. Townsel Was Not Mentally Retarded in the Developmental Stage

Leon Potter was the custodian of records at Madera High School who testified to the contents of Mr. Townsel's school records. (14 RT 3297.) He testified that the records indicated that intelligence and psychological testing had been administered to Mr. Townsel on three occasions, the IQ scores he had achieved, and his placement in special education classes. (14 RT 3297A-3297C, 3298C-3299, 3300A.) Over defense counsel's "continuing" objection on hearsay and lack of foundation grounds (14 RT 3297A), Mr. Potter further testified that the records indicated that Mr. Townsel was evaluated and enrolled in classes for the mentally retarded. (14 RT 3297A, 3297C.) However, according to Mr. Potter, the records indicated that Mr. Townsel "did not qualify by standard as a mentally retarded child but he's functioning in a low borderline range academically, functioning very lowly, was having difficulty in the classroom." (14 RT 3297C.) In other words, according to Mr. Potter, the records indicated that he merely had a "learning handicap" or disability. (14 RT 3297A.) Under such circumstances, a child can be placed in classes for the mentally retarded under "exceptional circumstances" with parental consent even though the child is not mentally retarded, which is what the records indicated happened in Mr. Townsel's case. (14 RT 3297C-3298.) The court overruled defense counsel's objections without explanation and did not require the prosecutor to explain why the contents of the records were not hearsay or fell within an exception to the hearsay rule. (14 RT 3297A.) As will be demonstrated below, the court erred in admitting this evidence.

By statute, California defines hearsay as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter asserted" and prohibits its admission unless it qualifies under a statutory exception to the general rule of exclusion. (Evid. Code, § 1200.) Upon a hearsay objection by the opposing party, the proponent must demonstrate that the evidence is non-hearsay or bears the burden of proving that it meets the foundational requirements for a statutory exception to the hearsay rule. (See, e.g., *People v. Hovarter* (2008) 44 Cal.4th 983, 1011; *People v. Morrison* (2004) 34 Cal.4th 698, 724; *People v. Livaditis* (1992) 2 Cal.4th 759, 778-779, and authorities cited therein.)

Here, the trial court summarily overruled defense counsel's objections without requiring the prosecutor to articulate any exception to the hearsay rule or lay any foundational showing that the evidence fell within an exception. Pursuant to the foregoing authorities, the court clearly erred.

Since the evidence contained in the school records – the statements or opinions of evaluators or school officials that Mr. Townsel was not retarded – was clearly offered for its truth, the trial court presumably concluded that it was admissible under the so-called business records exception to the hearsay rule codified in Evidence Code section 1271 or the official or public records exception codified in section 1280. The court was incorrect.

Evidence Code section 1271 provides:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

(a) The writing was made in the regular course of a business;
(b) The writing was made at or near the time of the act, condition, or event;
(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Similarly, Evidence Code section 1280 provides:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:
>
> (a) The writing was made by and within the scope of duty of a public employee;
> (b) The writing was made at or near the time of the act, condition, or event; and
> (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

As this Court has explicitly held, opinions and conclusions are *not* "acts, conditions, or events" within the meaning of the above statutes. (*People v. Reyes* (1974) 12 Cal.3d 486.) In *Reyes*, this Court held that a psychiatric evaluation containing a psychiatrist's opinion that the patient suffered from sexual psychopathology was not admissible under section 1271 because it was "an opinion, not an act, condition or event" under that statute:

> "In order for a record to be competent evidence under that section, it must be a record of an act, condition, or event; *a conclusion is not an act, condition, or event*. . . . Whether a conclusion is based upon observations of an act, condition or

> event, or upon sound reason or whether the person forming it was qualified to form it and testify to it *can only be established by an examination of that party under oath.*" [Citations.]

(*People v. Reyes*, *supra*, 12 Cal.3d at p. 503, italics added; accord, e.g., *People v. Campos* (1995) 32 CA4th 304, 308-309 [conclusions in probation report were hearsay, not admissible as business or official record, because conclusions are not acts, events, or conditions].)

Here, some of the evidence contained in the school records was arguably admissible under the official and business records exceptions. The facts that Mr. Townsel was given standardized intelligence tests, the scores he received on those tests, and his placement in special education classes were arguably all "acts, conditions, or events" within the meaning of those statutes.

However, the alleged third party *opinions* and *conclusions* that Mr. Townsel was *not* mentally retarded, but rather merely "learning handicapped" or of "low intellectual functioning" were *not*. (*People v. Reyes*, *supra*, 12 Cal.3d at p. 502.) A diagnosis that a person is or is not mentally retarded involves more than fixed scores on an IQ test. As this Court has recognized, mental retardation "is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence." (*In re Hawthorne*, *supra*, 35 Cal.4th at p. 49; accord, *People v. Superior Court* (*Vidal*) (2007) 40 Cal.4th 999, 1012.)

Indeed, that the opinions of non-testifying third parties that Mr. Townsel was not retarded considered something other than IQ scores is

demonstrated by the fact that two of the three IQ scores to which Mr. Potter testified – a full scale of 70 in 1975 and a full scale of 75 in 1979 – *did* fall within the mentally retarded range. (See, e.g., *Atkins v. Virginia*, *supra*, 536 U.S. 309 & fn. 5 ["it is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual functioning prong of the mental retardation definition"]; accord, *In re Hawthorne*, *supra*, 35 Cal.4th at p. 48; DSM-IV-TR at p. 42 [because there is a measurement error of approximately 5 points in assessing IQ – e.g., "a Wechsler IQ of 70 is considered to represent a range of 65 to 75" – "it is possible to diagnose mental retardation in individuals with IQ between 70 and 75"].) Even the (alleged) IQ score of 77 in 1982[39] was not necessarily inconsistent with Mr. Townsel being retarded, as Dr. Powell testified at the penalty phase (16 RT 3638-3640), and as both the mental retardation expert community and this Court have recognized. (*People v. Superior Court* (*Vidal*), *supra*, 40 Cal.4th at pp. 1004 ["that [a defendant's] Full Scale Intelligence Quotient on Wechsler IQ tests has generally been above the range considered to be mental retardation does not, as a matter of law, dictate a finding that he is not mentally retarded"; and citing expert testimony to the same effect, under generally accepted clinical standards]; *In re Hawthorne*, *supra*, 35 Cal.4th at pp. 48-49 [there is no fixed cutoff IQ score for mental retardation].)

A diagnosis of mental retardation requires specialized expertise, consideration of adaptive skills or functioning, frequently the clinical

---

[39] Because there was no objection to the testimony regarding these scores as false, Mr. Townsel accepts for purposes of this appeal *only* the scores to which Powell testified. He shall reserve for habeas corpus his discussion of the falsity of the scores to which Powell testified.

judgment of a qualified expert, and often calls for expert interpretation of the IQ test scores themselves in light of other evidence. (See, e.g., *People v. Superior Court (Vidal)*, *supra*, at pp. 1001-1007, 1011-1013; AAMR Manual (10th ed. 2002), *supra*, at pp. 49-96; DSM-IV-TR at pp. 41-43.) In other words, a determination that someone is or is not mentally retarded is a complex one, requiring specialized expertise, and is clearly the kind of opinion or conclusion for which the questions of whether it is "based upon observations of an act, condition or event, or upon sound reason or whether the person forming it was qualified to form it and testify to it *can only be established by an examination of that party under oath.*" [Citations.]" (*People v. Reyes*, *supra*, 12 Cal.3d at p. 503, italics added.) Thus, the trial court erred in admitting this evidence.

Furthermore, the error violated Mr. Townsel's federal constitutional rights. Mr. Townsel tendered the evidence of his mental retardation as the core of his defense and in order to raise a reasonable doubt on the elements of premeditation and deliberation and killing with the specific intent to prevent Ms. Diaz from testifying as a witness in a possible, future criminal proceeding. The prosecution presented the evidence in order to remove that doubt. Hence, the court's erroneous admission of the evidence tended to reduce the prosecution's burden of proving Mr. Townsel's guilt beyond a reasonable doubt, to deprive Mr. Townsel of a meaningful opportunity to present his defense, and to reliable jury verdicts that he was guilty of a capital offense, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Finally, as discussed in Argument II-F-1, *ante*, the erroneous admission of evidence renders a trial fundamentally unfair in violation of due process when it is "crucial, critical, or significant," such as when it

"remove[s] a reasonable doubt that would have existed on the record without it." (*Collins v. Scully* (2nd Cir. 1985) 755 F.2d 16, 18-19; accord, e.g., *Ege v. Yukins* (6th Cir. 2007) 485 F.3d 364, 375-378; *Leverett v. Spears* (11th Cir. 1989) 877 F.2d 921, 925; *Love v. Young* (7th Cir. 1986) 781 F.2d 1307, 1312; *Bailey v. Procunier* (5th Cir. 1984) 744 F.2d 1166, 1169; see also, e.g., *Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 ["An important element of a fair trial is that a jury only consider relevant and competent evidence bearing on the issue of guilt or innocence"].) As will be demonstrated below, this is just such a case.

D. Because Respondent Cannot Prove Beyond a Reasonable Doubt that the Verdicts Were Surely Unattributable to the Errors, the Murder Convictions, Special Circumstances, and Death Judgment Must be Reversed

As discussed in Argument II-F, *ante*, violations of the federal Constitution demand reversal unless the state can prove the errors harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; accord, *Sullivan v. Luisiana* (1993) 508 U.S. 275, 279; *Yates v. Evatt* (1991) 500 U.S. 391, 404.) Violations of state law require reversal if the appellant can demonstrate a reasonably probability that the result of the trial would have been different in their absence. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Importantly, because unanimous verdicts are required in criminal cases (see, e.g., *People v. Wheeler* (1978) 22 Cal.3d 258, 265), if it is reasonably probable that even a single juror would have voted differently, the state law standard is satisfied. (See, e.g., *Wiggins v. Smith* (2003) 539 U.S. 510, 537 [under "reasonable probability" standard of *Strickland v. Washington*]; *People v. Bowers* (2001) 87 Cal.App.4th 722, 735; see also

People v. Holloway (1990) 50 Cal.3d 1098, 1112 [because verdict must be unanimous, juror misconduct is prejudicial if even a single juror was improperly influenced].) This Court has made "clear that a 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, italics in original; accord, e.g., *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050, and authorities cited therein.) Under either the federal constitutional or state law standard, reversal of the murder convictions, special circumstances, and death judgment is required.

As discussed in Argument II-F, *ante*, Mr. Townsel presented the unanimous opinions of three experts that he was mentally retarded in order to raise a reasonable doubt that he premeditated and deliberated the killings. As further discussed in Argument II-F, the prosecution's case for premeditation and deliberation was close.

Like Dr. Coleman's testimony, the erroneously admitted opinions of Mr. Townsel's former school teachers, counselor, and unidentified hearsay declarants that Mr. Townsel was not mentally retarded as a child struck straight to the heart of Mr. Townsel's defense. As discussed in Argument II-F, *ante*, it is well recognized that errors which undercut an accused's sole defense are usually prejudicial under any standard.

The evidence was particularly harmful in this case. Jurors are presumed to be intelligent people (see, e.g., *People v. Sanchez* (2001) 26 Cal.4th 834, 852) and those intelligent people surely would have appreciated that mental retardation is not something that springs fully formed in adulthood. Since Mr. Townsel was not – according to the erroneously admitted evidence – mentally retarded in his youth, that clearly

undermined his adulthood claim of mental retardation, just as the prosecution intended. Indeed, the erroneously admitted evidence clearly suggested that Mr. Townsel's claim of mental retardation was a farce and a sham, made too conveniently for the first time when he faced murder charges.

To be sure, in the typical case involving the erroneous admission of lay opinion testimony in the face of strong expert opinion testimony to the contrary, it might be arguable that the error was harmless because reasonable jurors would not believe lay opinion testimony over that of qualified experts. But this was not the typical case.

Although the teachers' and counselor's opinions that Mr. Townsel was not retarded were improper, inadmissible, and thus entitled to no weight as a matter of law, they undoubtedly carried substantial weight in the eyes of these jurors. Dr. Coleman explicitly testified that – in stark contrast to the "completely unreliable" opinions of so-called "experts" that a person is mentally retarded – the opinions of lay people that a person is or is not retarded, which are based on their observations of that person's behavior – such as the teachers and counselor who interacted with Mr. Townsel at school – are highly reliable. (14 RT 3222-3225, 3254.) Indeed, according to Dr. Coleman, such opinions constitute the *only* meaningful and reliable evidence of mental retardation. (14 RT 3222-3225, 3254, 3256-3257.)

Consistent with Dr. Coleman's testimony, the prosecutor argued that the teachers' and counselor's opinions that Mr. Townsel was not mentally retarded trumped the defense experts' contrary opinions. As he argued:

> [T]he People's rebuttal witnesses showed the opposite of what the defense psychologists stated. You heard testimony from two teachers and the defendant's counselor who knew him when he was in high school. Two of those individuals

> had worked with mentally retarded people in the past. And all three of those individuals, although they stated the defendant had learning problems, he had problems with reading and mathematics. It took him a little longer. They did not in any way consider the defendant mentally retarded.

(14 RT 3391-3392.)

Of course, the prosecutor's remarks that "two of those individuals had worked with mentally retarded people in the past" was more than a little misleading. Neither had "worked" with the mentally retarded in any professional capacity or in the sense of treating or teaching the mentally retarded. To the contrary, and as previously discussed, Ms. Davis explicitly testified that she had never worked with mentally retarded people in a "school situation." (14 RT 3308.) Her only contact with the mentally retarded was when she worked "as a camp counselor at one time and I had mentally retarded children at my camp site." (14 RT 3308.) Similarly, Ms. Rodriguez – the school "counselor" who apparently had no higher education, degree, or certification and who was unfamiliar with the classifications in the special education program – simply testified that, along with the other students she "counseled" at the high school, she counseled some mentally retarded students. (14 RT 3304-3304B.)

Nevertheless, in his rebuttal argument, the prosecutor again emphasized that Ms. Davis and Ms. Rodriguez's opinions that Mr. Townsel was not mentally retarded were entitled to great weight since they "had quite a bit of dealing with mentally retarded people." (15 RT 3455.) Obviously, the erroneously admitted evidence, which figured prominently in the prosecution's rebuttal case and jury summation, was important to the prosecution. "There is no reason why [this Court] should treat this evidence as any less crucial than the prosecutor – and so presumably the jury –

treated it." (*People v. Powell* (1967) 67 Cal.2d 32, 56-57, internal quotation marks omitted.) In other words, the evidence was "crucial, critical, or significant" and, given the closeness of the prosecution's case, "removed a reasonable doubt that would have existed on the record without it." (*Collins v. Scully*, *supra*, 755 F.2d at pp. 18-19.) Hence, admission of the evidence rendered the trial fundamentally unfair in violation of Mr. Townsel's state and federal constitutional rights to due process. (*Ibid.*; accord, e.g., *Ege v. Yukins*, *supra*, 485 F.3d at pp. 375-378; *Leverett v. Spears*, *supra*, 877 F.2d at p. 925; *Love v. Young*, *supra*, 781 F.2d at p. 1312; *Bailey v. Procunier*, *supra*, 744 F.2d at p. 1169.)

For all of these reasons, respondent cannot prove beyond a reasonable doubt that the jury's verdicts were surely unattributable to the federal constitutional violations. (*Sullivan v. Luisiana,* supra, 508 U.S. at p. 279; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Under the state law standard, there exists a reasonable probability – or a "reasonable chance" – that the erroneously admitted evidence swayed the jurors to reject Mr. Townsel's claim of mental retardation and that, absent the evidence, at least one juror would have voted differently. (See *Richardson v. Superior Court*, *supra*, 43 Cal.4th at p. 1050, and authorities cited therein; see also, e.g., *Wiggins v. Smith* (2003) 539 U.S. 510, 537 [under "reasonable probability" standard, prejudice is established if it is reasonably probable that at least one juror would have voted differently]; *People v. Bowers* (2001) 87 Cal.App.4th 722, 735 [same, applying *Watson*].) At the very least, the cumulative effect of these and the court's other errors undercutting Mr. Townsel's defense was prejudicial. (See Argument VI, *post.*) The murder

convictions, special circumstances, and death judgment must be reversed.[40]

//

//

[40] See footnote 36, *ante*.

IV

THE TRIAL COURT VIOLATED STATE LAW AND MR. TOWNSEL'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY OVERRULING MR. TOWNSEL'S OBJECTIONS TO A SERIES OF IMPROPER QUESTIONS THE PROSECUTOR ASKED DR. CHRISTENSEN

A. Introduction

Over defense objections, the trial court permitted the prosecutor to cross-examine Dr. Christensen regarding irrelevant matters. Moreover, the prosecutor's questions suggested facts harmful to Mr. Townsel which were not in evidence, and were asked without a good faith belief that Dr. Christensen could answer the questions in the affirmative or that the prosecutor could or would otherwise prove those facts. As will be demonstrated below, the trial court erred under state law in overruling defense counsel's objections.

As will further be demonstrated below, the prosecutor's improper cross-examination was grossly misleading, highly inflammatory, and tended to undermine all of the defense experts' evaluations and opinions that Mr. Townsel was mentally retarded, which was the core of his defense. Hence, the error also tended to reduce the prosecution's burden of proving Mr. Townsel's guilt beyond a reasonable doubt, to deprive Mr. Townsel of a meaningful opportunity to present his defense, and violated his rights to a fair trial and reliable jury verdicts that he was guilty of a capital offense, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Given the significance of the experts' opinions that Mr. Townsel was mentally retarded to his defense, along with the closeness of the prosecution's case to prove premeditation and deliberation, the murder convictions, special circumstances, and death judgment must be

reversed.[41]

B. The Trial Court Erred in Overruling Mr. Townsel's Relevance Objections to the Prosecutor's Cross-Examination of Dr. Christensen Regarding Her Opinion That Mr. Townsel Was Not Competent to Stand Trial Due to the Developmental Disability of Mental Retardation

1. The Prosecutor's Cross-Examination and Defense Counsel's Objections

As discussed in Argument I, *ante*, the lower court appointed two psychiatrists – Doctors Terrell and Davis – to evaluate Mr. Townsel for competency based upon a mental disorder other than the developmental disability of mental retardation and they found him to be competent. As further discussed in Argument I, *ante*, Dr. Christensen's trial testimony, corroborated by the testimony of Doctors Powell and Schuyler, amounted to substantial evidence that Mr. Townsel was mentally retarded and incompetent to stand trial due to his mental retardation. Based upon this evidence, the trial court erred in failing to appoint the director of the regional center, or his or her designee, to evaluate him for competency. (Pen. Code, §§ 1369, subd. (a), 1370.1.)

At trial the prosecutor cross-examined Dr. Christensen at length regarding her evaluation in order to impeach her credibility and undermine her opinion that Mr. Townsel was mentally retarded. Effectively offering his own testimony, the prosecutor pointedly asked Dr. Christensen, "you believe that [Mr. Townsel was incompetent] even though the Superior Court, upon the reports of two psychiatrists found him to be competent?" (13 RT 3087.) Over defense counsel's objection that the question was

---

[41] See footnote 36, *ante*.

"irrelevant," Dr. Christensen agreed that she was of the opinion that Mr. Townsel was incompetent. (13 RT 3087-3088.)

As further mentioned in Argument I, *ante*, Dr. Christensen also recommended that Mr. Townsel be referred to the Central Valley Regional Center for the Developmentally Disabled for placement. (13 RT 3086-3089, 3103-3014.) Again, over defense counsel's repeated relevance objections, the prosecutor subjected Dr. Christensen to a scathing cross-examination regarding this recommendation, characterizing it as inappropriately recommending that Mr. Townsel be "placed back in society":

> [The prosecutor]: I believe you also mentioned that the defendant should be referred to the Central Valley Regional Center for placement?
>
> [Dr. Christensen]: Correct.
>
> Q: And basically, if I understand it correctly, you felt that the defendant should be placed back in society and monitored very closely?
>
> [Defense Counsel]: Objection. Irrelevant.
>
> The Court: Overruled.
>
> [Dr. Christensen]: It would be a fairly huge assumption for someone to interpret that statement and saying I'm meaning place him back into society. What I was talking about there was the referral process for handling persons of lower intelligence *and how they're handled differently than persons of normal intelligence*, and I was trying to let Miss Thompson at this point know avenues she could get to that she could – where she could get free services that are already available to Mr. Townsel, and which could assist her in preparing her case.

[The prosecutor]: You stated regional center oversees . . . housing and work programs that are specifically designed for the developmentally disabled criminal offender; is that correct? . . .

A: Correct.

Q: I believe you also recommended a limited conservatorship for the defendant; isn't that correct?

A: Correct.

Q: And that was to focus on controlling social contacts and residence and providing mandatory adult level supervision; is that correct?

A: Correct.

Q: Doesn't that mean that you recommend that he be placed back out into society?

[Defense counsel]: Objection. Irrelevant.

The Court: Overruled.

The Witness: I recommended – if I were to recommend that he be placed out in society I would have recommended that directly. I wouldn't have done it so obtusely.

[The prosecutor]: What does that mean then?

A: It means I think he's eligible for this program. And I think referral to the program would mean that the people in the program would be able to assist in deciding the proper way of treating him. It is a program that when you have somebody who's developmentally disabled, that, you find punishments or living situations, or work situations, or other types of situations where you can protect them, and enable them to live at their highest level without getting into trouble, without getting hurt. I wasn't saying anything about returning him to

society.

(13 RT 3088-3090, italics added.)

As will be demonstrated below, the prosecutor's line of cross-examination was irrelevant to any issue in this case, including the reliability of Dr. Christensen's opinion that Mr. Townsel was mentally retarded or to her overall credibility as a whole. The trial court erred in overruling Mr. Townsel's objections and permitting the cross-examination.

2. The Prosecutor's Cross-Examination Was Irrelevant to Dr. Christensens's Opinion that Mr. Townsel was Mentally Retarded or to Undermine her Credibility

Of course, "[a] wide latitude is permitted in the cross-examination of an expert witness in all matters tending to test his credibility so that the jury may determine the weight to be given the testimony . . . ." (*People v. Tallman* (1945) 27 Cal.2d 209, 214-215; Evid. Code, § 721, subd. (a).) Nevertheless, this principle is subject to the rule that "[n]o evidence is admissible except relevant evidence." (Evid. Code, § 350.)

Evidence Code section 210 defines "relevant evidence" as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence." (*People v. Benavides* (2005) 35 Cal.4th 69, 90.)

The prosecutor's cross-examination clearly went to irrelevant matter. While it was certainly true that – as the prosecutor put it – Dr. Christensen concluded that Mr. Townsel was incompetent although "the Superior Court, upon the reports of two psychiatrists found him to be competent" (13 RT

3087), the lower court's competency finding had no relevance to Dr. Christensen's opinion that Mr. Townsel was not competent. This is so because Dr. Christensen concluded that Mr. Townsel was incompetent *due to the developmental disability of mental retardation* while the court found that Mr. Townsel was competent based on the reports of two psychiatrists who evaluated him for competency due to a mental disorder, *other than a developmental disability such as mental retardation.* As our Legislature and this Court have recognized, the distinction is critical. A psychiatrist's opinion that a defendant is not incompetent due to a mental illness or disorder other than a developmental disability simply has no bearing on whether a defendant is incompetent due to a developmental disability. (Pen. Code, §§ 1369, subd. (a), 1370.1; *People v. Leonard* (2007) 40 Cal.4th 1370, 1389-1391; see also *People v. Castro* (2000) 78 Cal.App.4th 1415, 1418-1420; Argument I, *ante.*) Thus, the lower court's finding that Mr. Townsel was not incompetent due to a psychiatric or mental disorder other than mental retardation simply had no "tendency in reason to prove or disprove any disputed fact that [wa]s of consequence to the determination of the action" (Evid. Code, § 210) and in no way undermined Dr. Christensen's opinion that Mr. Townsel was not competent or that he was mentally retarded or her credibility as a whole. The court erred in overruling defense counsel's relevance objection to this line of inquiry.

The prosecutor's cross-examination regarding Dr. Christensen's recommendation that Mr. Townsel be referred to the Central Valley Regional Center for the Developmentally Disabled for placement was similarly irrelevant. Dr. Christensen's recommendation in this regard was consistent with the statutory provisions that *should* have been followed in this case. (Pen. Code, §§ 1369, subd. (a), 1370.1.) At the time of Dr.

Christensen's evaluation, Penal Code section 1370.1 provided in relevant part:

> (a) . . . . (1) . . . . If the defendant is found mentally incompetent and is developmentally disabled, the trial or judgment shall be suspended until the defendant becomes mentally competent, and the court shall consider a recommendation for placement, which recommendation shall be made to the court by the director of a regional center or designee, and that (A) in the meantime, the defendant be delivered by the sheriff or other person designated by the court to a state hospital for the care and treatment of the developmentally disabled or any other available residential facility approved by the director of a regional center for the developmentally disabled . . . as will promote the defendant's speedy attainment of mental competence, or be placed on outpatient status pursuant to the provisions of Section 1370.4 and Title 15 (commencing with Section 1600) of Part 2, and (B) upon becoming competent, the defendant be returned to the committing court pursuant to the procedures set forth in paragraph (2) of subdivision (a) of Section 1372 or by another person designated by the court. The court shall transmit a copy of its order to the regional center director or designee and to the Director of Developmental Services. . . .
>
> (2) Prior to making such order directing the defendant be confined in a state hospital or other residential facility or be placed on outpatient status, the court shall order the regional center director or designee to evaluate the defendant and to submit to the court within 15 judicial days of such order a written recommendation as to whether the defendant should be committed to a state hospital or to any other available residential facility approved by the regional center director. No person shall be admitted to a state hospital or other residential facility or accepted for outpatient status under Section 1370.4 without having been evaluated by the regional center director or designee.
> If the defendant is committed or transferred to a state hospital pursuant to this section, the court may, upon receiving the written recommendation of the medical director of the state

> hospital and the regional center director that the defendant be transferred to a residential facility approved by the regional center director, order the defendant transferred to such facility. If the defendant is committed or transferred to a residential facility approved by the regional center director, the court may, upon receiving the written recommendation of the regional center director, transfer the defendant to a state hospital or to another residential facility approved by the regional center director.

(Pen. Code, § 1370.1, subd. (a); see also Welf. & Inst. Code, § 6500, et seq.)

The prosecutor examined Dr. Christensen regarding this recommendation in order to attack her credibility, the implication being that the recommendation was inappropriate and inconsistent with the law. (See 13 RT 3088, 3103-3105.) However, because her recommendation *was precisely the kind of recommendation that would have been made had the court followed the proper procedures* (see Argument I, *ante*), it simply had no "tendency in reason" to undermine Dr. Christensen's overall credibility. Hence, the trial court erred in overruling defense counsel's relevance objections to this line of inquiry.

C. The Trial Court Erred in Overruling Defense Counsel's Objections to the Prosecutor's Improper Cross-Examination of Dr. Christensen Suggesting Facts Harmful to Mr. Townsel, but of Which She Had No Knowledge and Which the Prosecutor Did Not Otherwise Offer to Prove

1. The Prosecutor's Cross-Examination and Mr. Townsel's Objections

Also on cross-examination of Dr. Christensen, the prosecutor asked her about her testimony in a previous case that "jail inmates have been passing around information about tests ever since the 1860s . . . ." (13 RT 3093.) He also elicited that she had "interviewed at least four people who

were charged with murder" in Madera County. (13 RT 3093-3094.) The prosecutor then stated that "they were all in jail around in the same time; isn't that correct.?" (13 RT 3094.) Defense counsel objected that "around the same time" was vague; the trial court overruled the objection because "she's an expert" and "[s]he can answer if she knows." (13 RT 3094.) Dr. Christensen replied that she did not know – "I think there's some overlap, but I'm not really sure." (13 RT 3094.)

Nevertheless, the prosecutor continued, stating "you testified in Mr. Coleman's trial in May of 19[90]; isn't that correct?" (13 RT 3094.) And "the defendant was also in custody during that time since he was arrested in September of 1989; isn't that correct?" (13 RT 3094-3095.) Dr. Christensen agreed that both of the prosecutor's statements were true, but again explained that she did not know if the two men were in custody at the same time and place: "yes. But I don't know when Mr. Coleman was transferred out of county. So I don't know. I don't know when Mr. Townsel was referred to the main population out of the infirmary." (13 RT 3095.)

The prosecutor pressed on, stating "you were also subpoenaed to testify in the Michael Pizarro case in May of 1990?" Dr. Christensen agreed that this was true. (13 RT 3095.) The prosecutor stated, "Mr. Tex's case is still going on," to which Dr. Christensen again replied that she did not know. (13 RT 3095.)

The prosecutor concluded by stating, "So it is possible that the defendant could receive information on how to fake tests in the jail; isn't that correct?" (13 RT 3095.) The court overruled defense counsel's objection that the query "calls for speculation." (13 RT 3095.) Defense counsel pressed that Dr. Christensen "is not an expert as to what is

transpiring in the jail and would have no way of knowing and assumes foundational facts which she has no knowledge of." (13 RT 3095.) Although Dr. Christensen had already testified that she did *not* know if the men were in custody at the same time and place, and thus did not know if they had the ability to communicate about "faking" tests, the trial court again overruled the objection, admonishing Dr. Christensen, "you may answer if you can." (13 RT 3095.) Of course, as Dr. Christensen had already testified, she replied that she could not answer because she had no knowledge of the place or conditions of the men's confinement: "I don't know. I don't know – see, I don't know where he is. I don't know enough to know – I know that it has happened in history. I don't know how – I don't know where he is to know if he's had any contact with any of them." (13 RT 3096.)

The trial court erred in overruling defense counsel's objections to the prosecutor's questions insinuating that Mr. Townsel had had the opportunity to confer with the other defendants Dr. Christensen had evaluated, which made it "possible that the defendant could receive information on how to fake tests in the jail . . . ." (13 RT 3095.)

2. The Prosecutor's Questions Suggesting the Existence of Facts Harmful to Mr. Townsel, but not in Evidence, Were Improper Because He had No Basis for a Good Faith Belief that they Would be Answered in the Affirmative or that the Facts Suggested Therein Could or Would be Proved

It is, of course, misconduct for a prosecutor to suggest the existence of facts known to her that are not in evidence. (See, e.g., *People v. Bell* (1989) 49 Cal.3d 502, 539; *People v. Bolton* (1979) 23 Cal.3d 208, 212; *People v. Kirkes* (1952) 39 Cal.2d 719, 724.) The vice in such conduct is

that it tends to make the prosecutor her "own witness – offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, 'although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.' (citations omitted)." (*People v. Bolton, supra*, 23 Cal.3d at p. 213.) Indeed, as this Court has recognized, "juries very properly regard the prosecuting attorney as unprejudiced, impartial and nonpartisan, and statements made by him are apt to have great influence." (*People v. Perez* (1962) 58 Cal.2d 229, 247.)

In this regard, and as this Court has also recognized, it is well established that it is "'improper to ask questions which clearly suggest[] the existence of facts which would have been harmful to defendant, in the absence of a good faith belief by the prosecutor that the questions would be answered in the affirmative, or with a belief on his part that the facts could be proved, and a purpose to prove them, if their existence should be denied.' [Citation]." (*People v. Perez, supra*, 58 Cal.2d at p. 241; accord, e.g., *People v. Young* (2005) 34 Cal.4th 1149, 1186; *People v. Bolden* (2002) 29 Cal.4th 515, 562, and authorities cited therein.) In other words, the prosecutor may not interrogate witnesses "solely for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given." (*People v. Wagner* (1975) 13 Cal.3d 612, 619; accord, *People v. Young, supra*, at p. 1186; *People v. Visciotti* (1992) 2 Cal.4th 1, 52.)

Here, the prosecutor had no reason on which to base a good faith belief that Dr. Christensen – an independent psychologist – would have any knowledge of the housing practices of the county jail, whether Mr. Townsel

and other defendants she had evaluated had ever been incarcerated in the same location at the county jail at the same time, or whether Mr. Townsel had had any contact with those defendants. (See, e.g., *People v. Perez*, *supra*, 58 Cal.2d at p. 241.) Nor did Dr. Christensen have any such knowledge, as she testified. (RT 3094-3096.) Certainly, once Dr. Christensen made it clear that she had no such knowledge, the questioning on this topic should have ceased, just as defense counsel objected below. (RT 3094-3095; see, e.g., *People v. Perez*, *supra*, at p. 241.) Therefore, the court erred in overruling counsel's objection and permitting the prosecutor to effectively testify by stating that Mr. Townsel had had an opportunity to confer with those defendants and thus had opportunity to learn how to "fake" the results of his own psychological evaluations. (13 RT 3095.)

Furthermore, in asking the "questions," the prosecutor clearly implied that he had personal knowledge of those facts to which the jurors were not privy. (See, e.g., *People v. Wagner*, *supra*, 13 Cal.3d at p. 619 ["By their very nature the questions suggested to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question"].) Certainly, and as defense counsel further objected below, the questions improperly invited the jurors to speculate – based on no evidence at all – that Mr. Townsel had had the opportunity to confer with the other defendants before his evaluations and from them somehow learned how to "fake" his test results. (See, e.g., *People v. Loker* (2008) 44 Cal.4th 691, 708 [cross-examination which invites jurors to speculate about matters not in evidence is improper].)

Furthermore, the prosecutor made no offer to prove, never presented any evidence to prove, and never suggested to the trial court that he had any

good faith belief that Mr. Townsel had had any opportunity to confer with the other defendants Dr. Christensen had evaluated before his own evaluations. (See, e.g., *People v. Wagner*, *supra*, 13 Cal.3d at pp. 616-619 [prosecutor committed misconduct when he failed to make an offer of proof or introduce any evidence to substantiate the implications from his questions that defendant had committed other crimes]; *People v. Evans* (1952) 39 Cal.2d 242, 247-249 [same when prosecutor – without any evidentiary support – asked questions insinuating defendant had committed another crime].) Nor can any such knowledge be presumed. Of course, at the time of Dr. Christensen's evaluation and as she emphasized, Mr. Townsel was in the jail infirmary and there was no suggestion – even from the prosecutor – that the other defendants were *ever* in the infirmary. (13 RT 2987-2988, 30995.) As to Mr. Townsel's opportunity to confer with the other defendants before his evaluations by Doctors Powell and Schuyler, there was no evidence, and no offer to prove, that the men were on the same jail tier at the same time, that they were classified in the same way, or that they were permitted the same time outside of their cells with other inmates. Absent any basis from which to conclude that the prosecutor not only had a good faith belief that Mr. Townsel had had an opportunity to confer with those defendants, but *also* that Dr. Christensen had knowledge of such facts, or that the prosecutor otherwise intended to prove the inflammatory "facts" to which he referred, his questions were grossly improper. (See, e.g., *People v. Young*, *supra*, 34 Cal.4th at p. 1186; *People v. Perez*, *supra*, 58 Cal.2d at p. 241.)

For all of these reasons, the trial court erred in overruling defense counsel's objections to this line of questioning. As will be demonstrated below, the error violated not only state law, but also Mr. Townsel's federal

constitutional rights to a fair trial, to proof beyond a reasonable doubt and trial by jury on every element of the offenses, to a meaningful opportunity to present his defense, and to reliable jury verdicts that he was guilty of a capital offense. (U.S. Const., Amends. V, VI, XIII, XIV.)

D. The Errors Were Prejudicial, Violated Mr. Townsel's State and Federal Constitutional Rights, and Demand Reversal of The Murder Convictions, Special Circumstances, and Death Judgment

As discussed in Argument III-D, *ante*, violations of state law require reversal if the appellant can demonstrate a reasonably probability that the result of the trial would have been different in their absence. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see also *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 [a 'probability' in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility"].) Similarly, where an appellant demonstrates that there is a "reasonably probability" that a state court's rulings "'affected the outcome of the trial – i.e., that absent the alleged impropriety, the verdict probably would have been different," he has established that the errors violated his federal due process right to a fair trial. (*Anderson v. Goeke* (8th Cir. 1995) 44 F.3d 675, 679, and authorities cited therein; accord, e.g., *United States v. Avila* (7th Cir. 2009) 557 F.3d 809, 821-822, and authorities cited therein; *Kirkpatrick v. Blackburn* (5th Cir. 1985) 777 F.2d 272, 278-279 & fn. 9, and authorities cited therein; see also, e.g., *Kyles v. Whitley* (1995) 514 U.S. 419, 434, and authorities cited therein [violation of right to fair trial is demonstrated by a reasonable probability that the outcome of the proceeding would have been different in the absence of error].)

Here, as discussed in Argument II-F, *ante*, which is incorporated by

reference herein, the case for premeditation and deliberation was a close one. As this Court has recognized, in a close case, "'any substantial error tending to discredit the defense, or to corroborate the prosecution, must be considered prejudicial.' [Citation.]" (*People v. Gonzalez* (1967) 66 Cal.2d 482, 493-495.) This is just such a case.

The effect of the court's errors in overruling defense counsel's objections to the prosecutor's cross-examination regarding the lower court's competency determination was not merely to put before the jury irrelevant matter; the effect of the prosecutor's cross-examination was grossly misleading. The prosecutor's pointed remark (disguised as a question) that Dr. Christensen believed that Mr. Townsel was incompetent due to mental retardation "even though the Superior Court, upon the reports of two psychiatrists found him to be competent" (13 RT 3087) clearly but incorrectly implied that the competency questions the lower court and Dr. Christensen considered were one and the same. (See Argument I, *ante.*) In other words, the prosecutor's statement clearly but incorrectly implied that the lower court had made a factual and legal finding contrary to Dr. Christensen's opinion that Mr. Townsel was incompetent due to mental retardation. Given the influence on a jury of a court's views of the evidence and rulings (see, e.g., *People v. Sturm* (2006) 37 Cal.4th 1218, 1233), this fallacy surely and substantially diminished the reliability of Dr. Christensen's opinions and her credibility as an expert in the eyes of the jurors, just as the prosecutor intended, and in so doing "discredited" Mr. Townsel's defense. (*People v. Gonzalez*, *supra*, 66 Cal.2d at pp. 493-495.)

Similarly, the prosecutor's cross-examination clearly implied that Dr. Christensen's recommendation that Mr. Townsel be referred to the regional center was bizarre, dangerous, and inconsistent with the law and accepted

practices. This, too, was grossly misleading because Dr. Christensen's evaluation and recommendations were precisely the kind that should have been made had the appropriate procedures been followed in this case. This misleading line of questioning also diminished Dr. Christensen's credibility in the eyes of the jurors.

Certainly, the prosecutor's exchange with Dr. Christensen regarding her recommendations was a heated one. The prosecutor's repeated mischaracterization of Dr. Christensen's recommendation as an inappropriate one to "place[]" Mr. Townsel "back out into society" apparently, and understandably, provoked Dr. Christensen's ire, of which the prosecutor made effective use in his summation:

> Looking at the credibility of the three psychologists a little bit more closely, and specifically Dr. Christensen. One of the things that you can look at in determining the credibility of a witness is any bias they have and their demeanor while testifying. Dr. Christensen was clearly biased towards the defense. You could see that when she was under cross-examination. You could see the way she acted toward the prosecution. She was very antagonistic, argumentative toward the prosecution. You could see her facial expressions when asked a question by the prosecution.

(14 RT 3396.) Thus, the prosecutor engaged in the improper cross-examination in order to undermine Dr. Christensen's credibility and made use of it as such in his summation. In this regard, and as discussed in Argument II-F-1, *ante*, a prosecutor's exploitation of an evidentiary error in summation is a well recognized indication of prejudice. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 586; *People v. Hernandez* (2003) 30 Cal.4th 835, 877; *People v. Quartermain* (1997) 16 Cal.4th 600, 622; *People v. Woodard* (1979) 23 Cal.3d 329, 341; *People v. Powell* (1967) 67 Cal.2d 32, 56-57.)

With respect to the prosecutor's improper cross-examination of Dr. Christensen regarding Mr. Townsel's (alleged) opportunity to confer with the other defendants she had evaluated and thereby learn how to "fake" the results of his own evaluations, "[t]he impropriety of the prosecutor's conduct . . . was not cured by the fact that his questions elicited negative answers. By their very nature the questions suggested to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question." (*People v. Wagner*, *supra*, 13 Cal.3d at p. 619; accord, e.g., *People v. Pitts* (1990) 223 Cal.App.3d 606, 734.) As previously noted, the prejudicial effect of a prosecutor's reference to alleged facts not in evidence is well recognized. (*People v. Wagner*, *supra*, at p. 619; see also, e.g., *People v. Bolton*, *supra*, 23 Cal.3d at p. 213 [such statements, though "worthless as a matter of law," can be "dynamite" for jurors]; *United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323 ["Evidence matters; closing argument matters; statements from the prosecutor matter a great deal."].)

Furthermore, the prosecutor's injection of the extrajudicial (and unproved) "evidence" that Mr. Townsel *had* had an opportunity to learn how to "fake" the results of his evaluations tended to undermine *all* of the experts' evaluations and conclusions that he was mentally retarded. As discussed in Argument II-F, *ante*, which is incorporated by reference herein, the experts' opinions effectively *were* Mr. Townsel's defense. The errors thus struck straight to the heart of, and discredited, his defense. (See, e.g., *People v. Ireland* (1969) 70 Cal.2d 522, 532 [error that "strikes directly at the heart of the defense" prejudicial under *Watson* standard]; accord, *People v. Minifie* (1996) 13 Cal.4th 1055, 1071; *People v. Gonzalez*, *supra*, 66 Cal.2d at pp. 493-495 [in close case, error "tending to discredit the defense .

. . must be considered prejudicial"]; see also *King v. United States* (D.C. 1967) 372 F.2d 383, 395 [where prosecutor makes false representations regarding "nerve center issue(s)," the "prejudice digs in and holds on"].)

On this record, there is a "reasonable probability" or "reasonable chance" that at least one juror would have voted differently in the absence of the errors. (*People v. Watson, supra*, 46 Cal.2d at p. 836; *College Hospital Inc. v. Superior Court, supra*, 8 Cal.4th at p. 715.) Hence, the errors also violated Mr. Townsel's federal constitutional right to a fair trial (see, e.g., *United States v. Avila, supra*, 557 F.3d at pp. 821-822 *Anderson v. Goeke, supra*, 44 F.3d at p. 679; *Kirkpatrick v. Blackburn, supra*, 777 F.2d at pp. 278-279 & fn. 9), as well as his rights to proof beyond a reasonable doubt and trial by jury on every element of the offenses, to a meaningful opportunity to present his defense, and to reliable jury verdicts that he was guilty of a capital offense. (U.S. Const., Amends. V, VI, XIII, XIV.) The murder convictions, special circumstances, and death judgment must be reversed.[42]

//

//

---

[42] See footnote 36, *ante*.

INSTRUCTIONAL ERRORS UNDERMINING MR. TOWNSEL'S DEFENSE

V

THE TRIAL COURT COMMITTED A SERIES OF INSTRUCTIONAL ERRORS CONCERNING MR. TOWNSEL'S ONLY VIABLE DEFENSE, THE CUMULATIVE EFFECT OF WHICH VIOLATED STATE LAW, HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND REQUIRES REVERSAL OF THE JUDGMENT

A. Introduction

As previously discussed, Mr. Townsel's defense was that, due to his mental retardation, he did not premeditate and deliberate, as required for first degree murder, or kill Ms. Diaz with the specific intent to prevent her from testifying against him in a future criminal proceeding arising from the prior battery complaint, as required for the dissuading a witness charge and the "witness-killing" special circumstance allegation. Unfortunately, the trial court provided an instruction limiting the jurors' consideration of Mr. Townsel's mental retardation to the sole issue of whether he formed the intent to kill, or express malice, as required for murder. Thus, the jurors were precluded from considering Mr. Townsel's defense in resolving the critical questions on which his very life depended. As will be demonstrated, the errors violated not only state law, but also Mr. Townsel's federal constitutional rights to a fair trial, to proof beyond a reasonable doubt and trial by jury on every element of the offenses, to a meaningful opportunity to present his defense, and to reliable jury verdicts that he was guilty of a capital offense. (U.S. Const., Amends. V, VI, XIII, XIV.) The judgment must be reversed.

B. The Trial Court's Provision of CALJIC No. 3.32 Limited the Jurors' Consideration of the Mental Retardation Evidence to the Issue of Whether Mr. Townsel Harbored the Mental State Required for the Charged *Murders* and Thus Affirmatively Prohibited Their Consideration of the Evidence to the Issue of Whether He Harbored the Mental State Required for the Dissuading a Witness Charge and "Witness-Killing" Special Circumstance Allegation, In Violation of State Law and the Federal Constitution

As discussed in Argument II-D, *ante*, the state and federal constitutional guarantees to a fair trial, proof beyond a reasonable doubt and trial by jury on all elements of an offense, a meaningful opportunity to present a defense, and reliable jury verdicts in a capital case require not only that a defendant be permitted to present evidence that may raise a reasonable doubt on an element of the offense. They also demand that the jury consider such evidence. (U.S. Const., Amend. V, VI, VII, XIV; Calif. Const., art. I, §§ 7, 15, 16 17.) Since special circumstances rendering a defendant eligible for the death penalty operate as "'the functional equivalent of an element of a greater offense'" (*Ring v. Arizona* (2002) 536 U.S. 584, 609, quoting *Apprendi v. New Jersey* (2000) 530 U.S. 466, 494), these guarantees apply equally to the elements of special circumstance allegations. (*Ibid.*; see also Pen. Code, § 190.4, subd. (a) [special circumstances must be proved beyond a reasonable doubt and found true by trier of fact].)

Consistent with these guarantees, a defendant is entitled to complete and accurate instructions on factually supported theories of defense. (See, e.g., *Clark v. Brown* (9th Cir. 2006) 450 F.3d 898, 916, cert. denied *Ayers v. Clark* (2006) 549 U.S. 1027 [court's failure to instruct on factually supported defense to special circumstance allegation violated defendant's

Fourteenth Amendment right to a meaningful opportunity to present a complete defense and demanded reversal]; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-740 [trial court's refusal to instruct on factually supported lesser-included offense requested by defense violated Sixth and Fourteenth Amendment rights to instructions on defense theory of case]; *United States v. Mason* (9th Cir. 1990) 902 F.2d 1434, 1438 ["A defendant is entitled to have the judge instruct the jury on his theory of defense, provided that it is supported by law and has some foundation in the evidence"]; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-1099 [refusal to instruct on entrapment defense violated defendant's right to due process], cert. denied 540 U.S. 963 (2003); *United States v. Sayetsitty* (9th Cir. 1997) 107 F.3d 1405, 1414 ["a defendant has a constitutional right to have the jury consider defenses permitted under applicable law to negate an element of the offense"]; *Bashor v. Riley* (9th Cir. 1984) 730 F.2d 1228, 1240 [same].)

Permitting or instructing jurors to disregard such a defense theory runs afoul of these guarantees. (See, e.g., *Martin v. Ohio* (1987) 480 U.S. 228, 233-234 [a jury instruction that defense evidence "could not be considered in determining whether there was a reasonable doubt about the State's case . . . would relieve the State of its burden and plainly run afoul of *Winship's* mandate"]; *Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 [important element of fair trial is that jury "consider relevant and competent evidence bearing on the issue of guilt or innocence"]; *Jackson v. Edwards* (2nd Cir. 2005) 404 F.3d 612, 628 ["'on the basis of the evidence presented, (petitioner) had a clear right under (state) law to have the jury consider his defense, and the trial in which he was denied that right was egregiously at odds with the standards of due process propounded by the

Supreme Court in *Cupp v. Naughten* (1973) 414 U.S. 141, 147)'"]; *United States v. Sayetsitty* (9th Cir. 1997) 107 F.3d 1405, 1413-1414, and authorities cited therein ["when the defense is permitted by law," a defendant has a due process right to "have the jury consider it in order to determine whether the government has proved all elements of the offense"].)

As discussed in Argument II-D, *ante*, evidence of a mental disease or defect – such as mental retardation – is relevant and admissible to raise a reasonable doubt that the defendant premeditated and deliberated or formed any other specific intent required by the charges. (Pen. Code, § 28.) As discussed in Argument II-E, *ante*, the trial court attempted to instruct the jury on this principle with CALJIC No. 3.32 as follows:

> Evidence has been received regarding a mental defect or mental disorder of the defendant, Anthony Townsel at the time of the crime charged in *Counts I and II*. You may consider such evidence *solely* for the purpose of determining whether or not the defendant Anthony Townsel actually formed the mental state which is an element of the crime charged in *Counts I and II, to wit Murder*.

(3 CT 796, italics added; 14 RT 3357; CALJIC No. 3.32 (5th ed. 1988).)

The trial court omitted the dissuading a witness charge (Pen. Code, § 136.1, subds. (a)(1) and (c)(1)) and the "witness killing" special circumstance (Pen. Code, § 190.2, subd. (a)(10)) from the list of crimes for which the jury could consider the evidence. This was clear error since both Penal Code sections 136.1, subdivisions (a)(1) and (c)(1) and 190.2, subdivision (a)(1) include as an element the specific intent to dissuade or prevent a witness from testifying, to which evidence of a mental defect or disorder is relevant and admissible under section 28, subdivision (a).

(*People v. Young* (2005) 34 Cal.4th 1149, 1210; *People v. Weidert* (1985) 39 Cal.3d 836, 853-854; *People v. Brenner* (1992) 5 Cal.App.4th 335, 339; *People v. Lyons* (1991) 235 Cal.App.3d 1456, 1460-1462; *People v. Ford* (1983) 145 Cal.App.3d 985, 989-990.)

The instructional error went beyond a mere omission, however. On its very face, CALJIC No. 3.32 is a *limiting* instruction. (*People v. Leever* (1985) 173 Cal.App.3d 854, 866.) The explicit language of the instruction told the jurors that the "*sole*" purpose for which they could consider the evidence of mental retardation was whether Mr. Townsel possessed the "mental state" for the charged *murders alone*. (3 CT 796; 14 RT 3357.) This Court "presume[s] that jurors follow limiting instructions" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1115) and has applied that presumption to CALJIC No. 3.32 (*People v. Coffman* (2004) 34 Cal.4th 1, 83 [jurors provided with CALJIC No. 3.32, limiting their consideration of mental disorder evidence to specific issue, are presumed to have limited their consideration of evidence to that issue and no others]). Hence, the instruction *affirmatively* and erroneously directed the jurors that they were precluded from considering the evidence on any other issue, such as the mental state elements of the dissuading a witness charge and witness killing special circumstances, and it must be presumed that they followed the instruction. (See also, e.g., *People v. Snow* (2003) 30 Cal.4th 43, 98 [where instruction stated that it applied to "crime charged," lay jurors would not have applied it to "special circumstance"].)

The error violated not only state law. By completely precluding the jurors' consideration of Mr. Townsel's defense to the dissuading a witness charge and witness killing special circumstance allegation, it also violated Mr. Townsel's federal constitutional rights to a fair trial, a meaningful

opportunity to present a complete defense, to reliable jury verdicts that he was guilty of a capital offense, and lessened the prosecution's burden of proving his guilt of the dissuading a witness charge and "witness-killing" special circumstance allegation beyond a reasonable doubt. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at p. 732, and authorities cited therein; *Martin v. Ohio*, *supra*, 480 U.S. at pp. 233-234; *Crane v. Kentucky*, *supra*, 476 U.S. at p. 690; *California v. Trombetta*, *supra*, 467 U.S. at p. 485; *Beck* v. *Alabama*, *supra*, 447 U.S. at pp. 637-638; *In re Winship*, *supra*, 397 U.S. at p. 364; *Clark v. Brown*, *supra*, 450 F.3d at p. 916, and authorities cited therein.)[43]

C. It Is Reasonably Likely That the Jurors Understood That They Were Limited to Considering the Mental Retardation Evidence on the Sole Element of Malice Aforethought and Thus Precluded from Considering it on the Separate and Additional Element of Premeditation and Deliberation, in Violation of State Law and the Federal Constitution

1. Introduction

As previously discussed, based on Doctors Powell, Christensen and

---

[43] As noted in Argument II-E, *ante*, this Court has rejected *other* challenges to CALJIC No. 3.32 – namely, that the mere failure to describe the mental states to which the mental defect or disorder evidence could be considered was erroneous and violated various constitutional guarantees. (See, e.g., *People v. Smithey*, *supra*, 20 Cal.4th 936, 988; *People v. Musslewhite*, *supra*, 17 Cal.4h 1216, 1247; *People v. Jones*, *supra*, 53 Cal.3d 1115, 1145.) In none of those cases did the defendant raise the claim that Mr. Townsel raises here: the manner in which the instruction was provided in this case affirmatively prohibited the jurors from considering the mental defect evidence in assessing the mental state elements of crimes omitted from the instruction. Hence, they are inapposite.

Schuyler's testing and opinions that Mr. Townsel was mentally retarded and Doctors Powell and Christensen's testimony that mental retardation impedes one's judgment, memory, and ability to understand, make decisions, consider the consequences of his or her actions, and make causal connections (12 RT 2894-2895, 2938; 13 RT 3032-3033, 3044-3045, 3086, 3097, 3127-3128), Mr. Townsel's primary defense to the murder charges was that he did not premeditate and deliberate the killings due to his mental retardation (combined with the circumstances of the crimes). However, Dr. Christensen also testified that mental retardation would not prevent someone from forming express malice, since even a three year old can form the intent to kill. (13 RT 3097, 3127-3128.) Thus, the evidence that Mr. Townsel did not premeditate and deliberate due to his mental retardation did not only form the basis for his primary defense; it was his only *viable* defense. In short, based on the evidence and the law (discussed in the preceding sections) the critical question at trial was *not* whether Mr. Townsel intended to kill the victims, or harbored express malice, but rather whether he committed those killings with premeditation and deliberation.

Unfortunately, and as will be demonstrated below, it is reasonably likely that the jurors were misled to believe just the opposite. That is, based on the record as a whole, it is reasonably likely that the jurors believed that they were permitted to consider the evidence of Mr. Townsel's mental retardation *solely* on the question of whether he intended to kill, or harbored express malice, and that they were prohibited from considering that evidence on any other questions, including whether the killings, though intentional, were committed without premeditation and deliberation. This reasonable likelihood violated not only state law, but also Mr. Townsel's rights to a fair trial, proof beyond a reasonable doubt and trial by jury on

every element of the charged offenses, a meaningful opportunity to present his defense, and reliable jury verdicts that he was guilty of a capital offense. (U.S. Const., Amends. V, VI, VIII, XIV.)

2. The Governing Legal Principles

This Court has repeatedly held that once a trial court undertakes to instruct jurors on a legal principle, it has a sua sponte obligation to provide a complete and accurate instruction on that principle. (See, e.g., *People v. Castillo* (1997) 16 Cal.4th 1009, 1015 [although no sua sponte duty to instruct on voluntary intoxication, once trial court does so, it has obligation to do so correctly; if instructions were misleading to the extent that they caused jury to believe it could not consider such evidence on the issue of premeditation, it would amount to trial court error even in absence of request or objection]; *People v. Montiel* (1993) 5 Cal.4th 877, 942; *People v. Cummings* (1993) 4 Cal.4th 1233, 1337; *People v. Saille* (1991) 54 Cal.3d 1103, 1119; *People v. Malone* (1988) 47 Cal.3d 1, 49.) A complete and accurate instruction is one of the "the general principles of law governing the case, [which] are . . . principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.]'" (*People v. Wickersham* (1982) 32 Cal.3d 307, 323, overruled on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) In other words, jury instructions must be both correct in law and "responsive to the evidence." (*People v. Hesbon* (1968) 264 Cal.App.2d 846, 855; see also *People v. Lang* (1989) 49 Cal.3d 991, 1024.)

As discussed in Argument II-E, *ante*, even instructions that "are not crucially erroneous, deficient or misleading on their face, may become so under certain circumstances." (*People v. Brown* (1988) 45 Cal.3d 1247,

1255; accord, *People v. Claire* (1992) 2 Cal.4th 629, 663; *People v. Edelbacher, supra*, 47 Cal.3d at p. 1035 & fn. 16; *Gall v. Parker* (6th Cir. 2000) 231 F.3d 265, 329-330, superseded by statute on other grounds, as recognized in *Blowing v. Parker* (6th Cir. 2003) 344 F.3d 487, 501, fn. 3.) Where it is reasonably likely that the jurors misunderstood the applicable legal principles, error has occurred under state law. (*People v. Brown, supra*, at pp. 1255-1256; *People v. Claire*, *supra*, at p. 663.) Where it is reasonably likely that the jurors were misled to believe that they could not consider constitutionally relevant evidence (*Boyde v. California* (1990) 494 U.S. 370, 380), or that they applied the instructions in some other way that violated the federal Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 71-72), the error is also one of federal constitutional dimension (*ibid*). An assessment of whether it is reasonably likely that an instruction misled the jurors turns on the record as a whole, including other instructions and the arguments of counsel. (*Id.*, at p. 72; *Cupp v. Naughten* (1973) 414 U.S. 141, 147; *Taylor v. Kentucky* (1978) 436 U.S. 478, 486-490 & fn. 14 [where instructions were omitted that are not ordinarily necessary to jury's understanding of law, but where prosecutor gave potentially misleading argument, the combination of the instructional omission and argument made it likely that the jurors were misled and violated the defendant's right to due process]; *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1035 & fn.16 [likely jurors misled by combination of potentially ambiguous instruction and potentially misleading prosecutorial argument]; *People v. Crandell* (1988) 46 Cal.3d 833, 882-885 [same]; *People v. Roder* (1983) 33 Cal.3d 491, 503-504 & fn. 13 [combination of ambiguous instruction, trial court's comments, and prosecutor's argument].)

3. The Instructions and the Information

Mr. Townsel was charged in Counts I and II with "murder" in violation of Penal Code section 187. (3 CT 618-619; see also 10 RT 2449-2550.) The jurors found Mr. Townsel guilty as charged and "fixed[ed] the degree as First Degree Murder" under Penal Code section 189. (3 CT 868, 871.) The definition of "murder" under Penal Code section 187 requires a single mental state element: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." The jurors were instructed accordingly with CALJIC No. 8.10. (3 CT 798, italics added; 14 RT 3358.)[44] First degree murder with premeditation and deliberation is codified in Penal Code section 189 and requires *two* mental state elements:

---

[44] The court's provision of CALJIC No. 8.10 read as follows:

> CALJIC 8.10
> MURDER – DEFINED
> PENAL CODE, § 187 . . . .
>
> Defendant is accused in Counts I and II of the information of having committed the crime of murder, a violation of Penal Code section 187.
>
> Every person who unlawfully kills a human being with malice aforethought is guilty of the crime of murder in violation of Section 187 of the Penal Code.
>
> In order to prove such crime, each of the following elements must be proved:
>
> 1. A human being was killed.
> 2. The killing was unlawful, and
> 3. The killing was done with malice aforethought.
>
> A killing is unlawful if it [was] neither justifiable nor excusable. (3 CT 8.10; RT 3358-3359.)

1) express malice aforethought (or the intent to kill); *and* 2) premeditation and deliberation. (See, e.g., *People v. Stanley* (1995) 10 Cal.4th 764, 794.) The jurors were also instructed accordingly with CALJIC No. 8.20. (3 CT 800; 14 RT 3359.)[45]

---

[45] The court's provision of CALJIC No. 8.20 read as follows:

CALJIC 8.20
DELIBERATE AND PREMEDITATED MURDER . . . .

All murder which is perpetrated by any kind of willful, deliberate and premeditated killing with express malice aforethought is murder of the first degree.

The word "willful," as used in this instruction, means intentional.

The word "deliberate" means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.

The word "premeditated" means considered beforehand.

If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

To constitute a deliberate and premeditated killing, the slayer

(continued...)

The only instruction the jurors were given to guide their consideration of the mental retardation evidence was CALJIC No. 3.32. (3 CT 796; 14 RT 3357.) At the time of trial, CALJIC No. 3.32 provided as follows:

> Evidence has been received regarding a [mental disease] [mental defect] [or] [mental disorder] of the defendant [_____] at the time of the offense charged [in Count[s] ___]. You may consider such evidence solely for the purpose of determining whether or not the defendant [_____] actually formed the mental state which is an element of the crime charged [in Count[s] ____], to-wit _____.

(CALJIC No. 3.32 (5th ed. 1988).) The Use Note to the instruction quite clearly provided that the "[j]udge should fill in [the] last blank spaces to spell out [the] specific mental state or intent required in the specific count." (*Ibid.*)

However, the trial court inexplicably ignored the directive of the Use Note and simply instructed the jurors that they could consider the mental retardation evidence "*solely* for the purpose of determining whether or not the defendant Anthony Townsel actually formed the mental state [singular] which is an element [singular] of the crime charged in Counts I and II, to wit Murder." (3 CT 796, italics added; 14 RT 3357.) Thus, the jurors were not told on what specific "mental state [singular] which is an element [singular]" of the charged murders they were permitted to consider the

---

[45](...continued)
must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, [he] [she] decides to and does kill. (3 CT 800-8013 CT 800-801; RT 3359-3360.)

defense evidence of mental retardation. The question presented here is to what "*mental state* which is an element of the crime charged in Counts I and II, to wit Murder" the jurors would have understood this instruction to refer.

In answering this question, it is important to emphasize that while jurors are presumed to be intelligent people who apply logic and common sense to their reading of instructions (see, e.g., *People v. Sanchez* (2001) 26 Cal.4th 834, 852), they are "not experts in legal principles; to function effectively, and justly, they must be accurately instructed on the law" (*Carter* v. *Kentucky* (1981) 450 U.S. 288, 302). "Most jurors encounter the arcane language of instructions infrequently – maybe once in a lifetime – and it is therefore important to give them instructions that do not require scholastic glossators to impart meaning. [Citation.]" (*United States v. Ramsey* (7th Cir. 1986) 785 F.2d 184, 190). "It is always necessary for the judge to put the thought in language that those who see the inside of a court only once in a lifetime can understand." (*United States v. Burke* (7th Cir. 1985) 781 F.2d 1234, 1240; accord, e.g., *Bollenbach v. United States* (1946) 326 U.S. 607, 612 [court must provide a "lucid statement of the relevant legal criteria" for lay jurors].)

A lay juror reading the court's provision of CALJIC No. 3.32 referring to the "mental state which is an element of the crime *charged in* Counts I and II, to wit Murder" (3 CT 796, italics added) would look to the "charges" themselves in the charging document, any instructions describing the charges, or the "crime charged in Counts I and II," and any instructions defining the "mental state [singular] which is an element [singular] of the

crime charged in Counts I and II" (3 CT 796).[46]

According to the charging document in this case – which was read to the jurors – the "crime charged in Counts I and II" (3 CT 796) was a "violation of Section 187(a) of the Penal Code of the State of California, in that said defendant(s) did willfully, unlawfully, and with malice aforethought murder Maurcio Martinez Jr. . . . . [and] Martha Diaz, [] human being[s]." (3 CT 618-619; 10 RT 2449-2550.) Thus, the charging document described a *single* mental state element of malice aforethought required under section 187; it did not refer to or describe any additional mental states required for the charges, such as premeditation and deliberation. In this regard, the language of the charging document was consistent with the trial court's provision of CALJIC No. 3.32, which referred to the "crimes charged in Count I and II, to wit Murder," and to a *single* "mental *state* that is *an element*" of murder.

Consistent with the language of the charging document was the court's provision of CALJIC No. 8.10, which told the jurors that the "Defendant is accused in Counts I and II of the information of having committed the crime of murder in violation of Penal Code Section 187." (3 CT 798, italics added; 14 RT 3358.) None of the other instructions indicated that Mr. Townsel was "charged" or "accused" "in Counts I and II" of *first* degree murder or premeditated and deliberate murder. Furthermore, just as CALJIC No. 3.32 referred to a *single* "mental *state* that is *an element* of the crimes charged in Counts I and II, to wit Murder" and just as the charging document described a *single* mental state element for the murders in violation of section 187 charged in Counts I and II – "malice

---

[46] Hereafter, all references to CALJIC No. 3.32 refer to the trial court's provision of that instruction in this case.

aforethought" (3 CT 618-610) – CALJIC No. 8.10 also described a *single* mental state element for the murders in violation of section 187 charged in Counts I and II – again, "malice aforethought." (3 CT 798; 10 RT 2258; see also 3 CT 799 [describing malice aforethought as a "mental state"] and 14 RT 3358-3359.) Thus, reading the instructions and information as a whole, it is clear that the jurors would have understood that CALJIC No. 3.32's reference to the "crime charged in Counts I and II, to wit Murder" was murder in violation of section 187, and its reference to a *single* "mental *state* that is *an element*" of murder in violation of section 187 was to malice aforethought, as set forth in the charging document and CALJIC No. 8.10.

At the same time, the court's provision of CALJIC No. 3.32 did not refer to first degree or premeditated and deliberate murder. The language of the charging document did not refer to first degree murder or premeditated and deliberate murder. The jurors were not otherwise instructed that Mr. Townsel was "*charged* in Counts I and II" with first degree murder or premeditated and deliberate murder. And first degree, premeditated and deliberate murder requires *two* mental state *elements* (express malice *and* premeditation and deliberation), which is *inconsistent* with CALJIC No. 3.32's reference to a *single* mental state *element* of murder under section 187. Hence, it is reasonably likely that the jurors did *not* understand that they were permitted to consider the mental retardation evidence not only in determining whether he harbored the mental state of malice, but also in determining whether he harbored the additional mental state element of premeditation and deliberation. To the contrary, as previously discussed, because CALJIC No. 3.32 is a limiting instruction on its face, it is reasonably likely that the jurors believed that they were *prohibited* from considering the mental retardation on *any* question other than malice

aforethought and thus were prohibited from considering the evidence on the question of premeditation and deliberation.

One final instruction renders this conclusion indisputable. The trial court modified CALJIC No. 8.45 (Involuntary Manslaughter – Defined) to specifically instruct the jurors: "If you find that the defendant committed an unlawful killing, but due to a mental defect or mental impairment, you find that he was unable to form malice aforethought or an intent to kill, you must find the defendant guilty of involuntary manslaughter. (3 CT 810; 14 RT 3364-3365; see also 2 CT 2340 [correcting word "voluntary" on line 16 of 14 RT 3365 to read "involuntary"].) The court did ***not*** provide a similar instruction advising the jurors that if they found that Mr. Townsel committed an unlawful killing *with* malice aforethought, but due to a mental defect or mental impairment they found that he was unable to form *premeditation and deliberation*, they had to find him guilty of *second degree murder*.

In assessing how the jurors would have interpreted this instruction, it is axiomatic that lay jurors apply logic and common sense to their reading of instructions. (See, e.g., *Boyde v. California*, *supra*, 494 U.S. at p. 381; *People v. Coddington* (2000) 23 Cal.4th 529, 594.) The maxim *expressio unius est exclusio alterius*, or the expression of one thing is the exclusion of another, is "a product of logic and common sense" (*Alcaraz v. Block* (9th Cir. 1984) 746 F.2d 593, 607-608; accord, e.g., *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 522) and a "deductive concept commonly understood" (*People v. Castillo*, *supra*, 16 Cal.4th at p. 1020, conc. opn. of Brown, J.). The maxim holds that where specific items are listed, it is assumed that the omission of items similar in kind is intentional and the omitted items are therefore excluded. (*Ibid.*) Courts consistently apply the

maxim in resolving how lay jurors would understand a particular instruction, whether explicitly (see, e.g., *People v. Castillo*, *supra*, at p. 1020; *People v. Watson* (1899) 125 Cal. 342, 344) or implicitly (see, e.g., *Hitchcock v. Dugger* (1987) 481 U.S. 393, 397 [instruction specifying factors jurors "may" consider necessarily implied that it "may not" consider factors that were not mentioned]; *People v. Dewberry* (1959) 51 Cal.2d 548, 557 [instruction that doubts between greater and lesser offenses are to be resolved in favor of lesser and specified first and second degree murder but did not mention second degree and manslaughter left "clearly erroneous implication" that rule did not apply to omitted choice]; *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [instruction on circumstantial evidence specifically directed to intent element of one charge created reasonable probability that jurors understood omission of second charge to be intentional and thus that circumstantial evidence rules did not apply to second charge].)

Applying this maxim here, jurors applying their common sense and logic would have understood that since they were specifically instructed on the effect of a finding that Mr. Townsel did not harbor *malice* due to his mental retardation, the omission of a similar instruction on the effect of a finding that Mr. Townsel did not harbor *premeditation and deliberation* was intentional. In other words, and consistent with the other instructions and the language of the charging document, the jurors would have understood that they were not given a similar instruction on the effect of a finding that Mr. Townsel harbored malice but did not harbor premeditation and deliberation due to his mental retardation because they simply were not *permitted* to make any such finding. (See, e.g., *People v. Dewberry*, *supra*, 51 Cal.2d at p. 557.)

In sum, based on the instructions as a whole and the language of the charging document, it is reasonably likely that the jurors understood that CALJIC No. 3.32's reference to the "mental state that is an element of the crime charged in Counts I and II, to wit Murder" was to malice aforethought and *only* to malice aforethought.[47] And because the instruction explicitly told the jurors that they were permitted to consider the mental retardation evidence "*solely*" on the question of whether Mr. Townsel had formed that mental state, the instruction affirmatively told the jurors that they were *precluded* from considering that evidence in assessing whether he harbored any other mental states, including premeditation and deliberation. (3 CT 796, italics added; 14 RT 3357; see also *People v. Coffman, supra*, 34 Cal.4th at p. 83 [jurors provided with CALJIC No. 3.32, limiting their consideration of mental disorder evidence to specific mental state, are presumed to have limited their consideration of evidence to that mental state and no other mental states].)[48] This reasonable likelihood

---

[47] The trial court also instructed the jury with CALJIC Nos. 3.31 and 3.31.5, but again did so in general terms, advising the jury that the crimes charged in counts I, II, and IV required a concurrence of act and "mental state" or "specific intent" and that "mental states" and "the specific intent required is included in the definitions of the crimes charged." (CT 794-795; 14 RT 3356-3357.)

[48] As mentioned in footnote 46, *ante*, this Court has rejected *other* challenges to CALJIC No. 3.32. In *People v. Smithey, supra*, 20 Cal.4th 936, for instance, the appellant argued that the trial court erred in failing to specify that premeditation and deliberation was a mental state to which to jurors could consider his mental defect evidence. In contrast to the instruction in this case, the instruction there referred, inter alia, in the plural to the "mental states" which were "elements" of the relevant crimes and explained that those mental state elements were described in the other instructions defining the crimes. (*Id.* at pp. 985-986 & fn. 15.) Concluding (continued...)

violated state law, as well as Mr. Townsel's federal constitutional rights to a fair trial, a meaningful opportunity to present his defense, reliable jury verdicts that he was guilty of a capital offense, and lessened the prosecution's burden of proving his guilt of first degree murder beyond a reasonable doubt. (U.S. Const., Amends. V, VI, VIII, XIV.)

If there remains any doubt that it is reasonably likely that the jurors believed that they could consider the mental retardation evidence solely on the question of whether Mr. Townsel harbored malice aforethought and not to any other issue, it is surely removed by the arguments of counsel. (See, e.g., *Estelle v. McGuire*, *supra*, 502 U.S. at pp. 71-72; *Boyde v. California*, *supra*, 494 U.S. at p. 380; *People v. Brown*, *supra*, 45 Cal.3d at p. 1255.)

4. The Arguments of Counsel

Rather than correcting the instruction's misleading impression that the mental retardation defense could only be considered on the issue of whether Mr. Townsel formed the intent to kill (or express malice), the prosecutor's argument only fortified it. In discussing the issues to which the jurors could consider the mental retardation evidence, the prosecutor focused almost exclusively on *intent to kill*, or express malice, *not* premeditation and deliberation. The prosecutor told the jurors:

---

[48](...continued)
that this instruction necessarily referred to all of the mental state elements described in the other instructions, including premeditation and deliberation, this Court rejected the appellant's argument. (*Ibid.*) Mr. Townsel's challenge is not only that the trial court erroneously failed to explain that premeditation and deliberation was a mental state element to which the mental retardation evidence should be considered, but that the unique language of the instruction provided in this case, read in light of the information and other instructions, effectively precluded the jurors' consideration of the evidence on that element.

> Now the defense in this case has presented evidence regarding the defendant's *ability to form the intent to kill*. There is one thing lacking about the defense evidence in this case. There has been no evidence presented to you to show that just because an individual has a low I.Q. . . . that means there is no *intent to kill* or that there is a *lack of malice* simply because of the – of a low I.Q. . . . Also no evidence has been presented to you that simply because a person is mentally retarded he cannot form *the intent to kill or form malice aforethought*. . . . In fact in this case the evidence would show just the opposite.

(14 RT 3390, italics added.)

Thereafter, the prosecutor highlighted the evidence which, in his view, "show[ed] just the opposite" – i.e., that Mr. Townsel did *intend to kill* despite his intellectual deficits. For instance, the prosecutor argued that the defense experts conceded that someone with Mr. Townsel's IQ could obtain a driver's license and write the letters that had been introduced into evidence, which proved that Mr. Townsel "had the ability to form the intent to kill" and "could form the intent to kill." (14 RT 3394-3395, italics added.) According to the prosecutor, Mr. Townsel "stated things in [a] letter which do show a capacity to form the *intent to kill*," and highlighted those statements which, in the prosecutor's view, "show that [Mr. Townsel] has the *capability to kill*" and were written "by someone who can obviously *form the intent to kill.*" (14 RT 3395, italics added.) Furthermore, the prosecutor argued that the " testimony of the defendant's own psychologist[, Dr. Schuyler]. . . shows the defendant *has the ability to form intent*." (14 RT 3395, italics added.) Hence, the prosecutor's argument as a whole only buttressed the instruction's misleading impression: with regard to the evidence of Mr. Townsel's mental retardation and its relationship to the elements of the offenses, the *only* question for the jurors to resolve was whether his mental retardation prevented him from forming the intent to

kill, or express malice.

Only *once* did the prosecutor refer to the mental retardation evidence while discussing the issue of premeditation, but he did so only vaguely and briefly. In contrast to his repeated remarks that Mr. Townsel's intellectual deficits did not affect his ability to form the intent to kill or express malice, the prosecutor very briefly mentioned, "it is not reasonable to believe that the defendant did not premeditate these murders, that he did not intend to kill, and that he is so mentally retarded that he does not have the capacity to form this intent." (14 RT 3404.) This brief and isolated statement simply did not correct the combined, misleading effect of the instruction and the prosecutor's argument as a whole and alert the jurors that they could and should consider Mr. Townsel's mental retardation evidence in determining whether the prosecution had proved beyond a reasonable doubt the mental state element of premeditation and deliberation. (Cf. *People v. Davenport* (1995) 11 Cal.4th 1171, 1222 [prosecutor's "isolated, brief" references to improper matter not likely to influence jury].)

It is true that in their own summation, defense counsel argued that Mr. Townsel did not premeditate and deliberate due to his mental retardation. (15 RT 3414, 3419-3420.) However, defense counsel's summation could not cure or nullify the misleading effect of the instructions and prosecutor's argument for two reasons.

First, the trial court specifically instructed the jurors with CALJIC No. 1.00 that they were to accept the law as stated in the instructions and "if anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions." (3 CT 761; 14 RT 3342-3343.) Of course, as discussed in part 2, *ante*, the court's instructions were that the mental

retardation evidence could only be considered on the question of whether Mr. Townsel intended to kill or formed express malice. Hence, defense counsel's arguments "conflict[ed] with [the court's] instructions on the law," and were therefore to be disregarded. For this reason, it is well recognized that when jurors are provided with CALJIC No. 1.00 or a similar admonition, the arguments of counsel cannot "cure" an instructional error. (*People v. Vann* (1974) 12 Cal.3d 220, 227 & fn. 6; accord, *People v. James* (2000) 81 Cal.App.4th 1343, 1364 & fn. 10; see also *Taylor v. Kentucky*, *supra*, 436 U.S. at pp. 487-489 [defense counsel's correct argument did not nullify combined misleading effect of instructional omission and prosecutor's argument]; *People v. Edelbacher*, *supra*, 47 Cal.3d at pp. 1039 [even defense counsel's "thorough and forceful explication" of the correct law did not correct misleading impression left by instruction and prosecutor's argument].)

Furthermore, as the United States Supreme Court has explained:

> Arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.

(*Boyde v. California, supra*, 494 U.S. at p. 384; accord, *Carter v. Kentucky* (1981) 450 U.S. 288, 304.) This is particularly true when the argument comes from defense counsel rather than the prosecutor. As one court has put it with this Court's approval: "Defense counsel and the prosecuting officials do not stand as equals before the jury. Defense counsel are known to be advocates for the defense. The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they

say to the jury is necessarily weighted with that prestige." (*People v. Talle* (1952) 111 Cal.App.2d 650, 677, cited with approval in *People v. Thomas* (1992) 2 Cal.4th 489, 529; accord, e.g., *United States v. LaPage* (9th Cir. 2001) 231 F.3d 488, 492 [in contrast to the prosecutor, "the jury understands defense counsel's duty of advocacy and frequently listens to defense counsel with skepticism"].)

In any event, even if the arguments of defense counsel can, as a theoretical matter, correct misimpressions created by the combined effect of instructions and prosecutorial argument even when the jurors are instructed with CALJIC No. 1.00, the arguments of these defense attorneys did not. While lead defense counsel did argue that Mr. Townsel's mental retardation prevented him from premeditating and deliberating, she never even mentioned CALJIC No. 3.32 – the *only* instruction guiding the jurors' consideration of the mental retardation evidence – much less explain the governing legal principles – i.e., that the law provides that mental retardation may negate or raise reasonable doubt on the element of premeditation and deliberation and demands that jurors consider such evidence in assessing whether the prosecution has proved that element beyond a reasonable doubt.

Furthermore, defense counsel only added to the confusion by also arguing that Mr. Townsel did not form express malice, or the intent to kill due to his mental retardation: "We are arguing not only that [Mr. Townsel is] incapable of doing this intellectual balancing act that the law requires in order for you to find that the killing was first degree murder, *we are also arguing that because of his low level of intellectual functioning he also is incapable of harboring express or implied malice aforethought.*" (15 RT 3413, italics added.) The problem with this argument is that the defense

presented no evidence that Mr. Townsel's mental retardation would impact his ability to form express malice/intent to kill (or implied malice); to the contrary, Dr. Christensen, Mr. Townsel's own expert witness, herself testified that mental retardation alone would *not* prevent a person from forming the intent to kill. (13 RT 3097.) One hallmark of accurate factfinding and reliable verdicts is that the jurors focus on the vital factual and legal issues presented by the case. (See, e.g., *Shannon v. United States* (1994) 512 U.S. 573, 579; *United States v. Layton* (9th Cir. 1985) 767 F.2d 549, 556; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 467.) Rather than directing the jurors' focus to the vital question presented by the evidence and demanded under the law – whether Mr. Townsel's mental retardation raised reasonable doubt that he premeditated and deliberated – defense counsel's argument only added to the confusion and beclouded the principal issue before the jury. (See, e.g., *People v. Crandell, supra*, 46 Cal.3d at p. 885 [because counsel did not present a "defense argument which directed the jurors' attention to" the critical evidence or "properly explained the" governing law, the arguments of counsel did not clarify an ambiguous instruction the prosecutor exploited in summation and hence it was reasonably likely the jury was misled]; *People v. Brady* (1987) 190 Cal.App.3d 124, 137 [because defense counsel did not clearly identify the critical issue for the jury to resolve, the arguments of counsel did not clarify ambiguity in instructions].)

Finally, following defense counsel's argument, the prosecutor's rebuttal argument again focused solely on the question of whether Mr. Townsel's mental retardation prevented him from forming the *intent to kill*:

> One thing Ms. Thompson [defense counsel] mentioned several times during her argument to you was that these are

> not the acts of an intelligent person. The problem with that is there's no requirement that *the intent to kill* be done by an intelligent person. In fact, the testimony of Dr. Christensen herself was that even a mental retarded [*sic*] person can form the *intent to kill*. And Ms. Thompson would have you believe that it requires a certain amount of intelligence which the defendant does not have.

(15 RT 3456, italics added.) The prosecutor continued that the evidence highlighted by defense counsel in their summation simply did not mean "the defendant had not formed the intent to kill," did not "show a lack of intent to kill," and did "not mean that [Mr. Townsel] did not form the intent to kill." (15 RT 3456.) Thus, the final argument that the jurors heard came from a "government official[,] . . . clothed with the dignity and prestige of [his] office" (*People v. Talle*, *supra*, 111 Cal.App.2d at p. 677) and reinforced the misleading nature of CALJIC No. 3.32.

In sum, reading CALJIC No. 3.32 in light of the other instructions, it was (at the very least) susceptible of a lay reading that the *only* issue on which the jurors could consider the mental retardation evidence was whether Mr. Townsel intended to kill, or formed express malice. And the prosecutor's argument focusing almost exclusively on whether Mr. Townsel's intellectual deficits prevented him from forming the intent to kill made that reading reasonably likely. (See, e.g., *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1035 & fn. 16 [likely jurors misled by combination of potentially ambiguous instruction and potentially misleading prosecutorial argument]; *People v. Crandell*, *supra*, 46 Cal.3d at pp. 882-885; *People v. Roder*, *supra*, 33 Cal.3d at pp. 503-504, and fn. 13; see also *Taylor v. Kentucky*, *supra*, 436 U.S. at pp. 486-490 & fn. 14.) This reasonable likelihood violated state law, as well as Mr. Townsel's federal constitutional rights to a fair trial, to proof beyond a reasonable doubt and

trial by jury on every element of the offenses, to a meaningful opportunity to present his defense, and to reliable guilt phase determinations that he was guilty of a capital offense. (*Estelle v. McGuire*, *supra*, 502 U.S. at pp. 71-72; see also Argument II-D, *ante*, and authorities cited therein.)[49]

D. The Instructional Errors Were Not Waived, Forfeited, or Invited

In *People v. Ervin* (2000) 22 Cal.4th 48, this Court held that, based upon its decision in *People v. Saille*, *supra*, 54 Cal.3d 1103, CALJIC No. 3.32 is a pinpoint instruction that must be requested by the defense; in so doing, this Court disapproved prior law mandating provision of the instruction sua sponte. (*People v. Ervin*, *supra*, at pp. 90-91, disapproving *People v. Aguilar* (1990) 218 Cal.App.3d 1556, 1568-1569 and *People v. Leever* (1985) 173 Cal.App.3d 853, 865-866.) Based upon that decision, respondent may argue that the trial court had no independent duty to provide a complete and accurate instruction regarding the jury's

---

[49] As discussed in footnote 45, *ante*, this Court has rejected other challenges to CALJIC No. 3.32 for failing to specify the mental states to which mental defect evidence is relevant. (See, e.g., *People v. Smithey*, *supra*, 20 Cal.4th 936, 988; *People v. Musslewhite*, *supra*, 17 Cal.4h 1216, 1247; *People v. Jones, supra,* 53 Cal.3d 1115, 1145.) In none of those cases did the defendant raise the claim that Mr. Townsel raises here: the manner in which the instruction was provided in this case, combined with the prosecutor's argument, created a reasonable likelihood that the jurors believed they were precluded from considering the mental defect evidence in assessing a mental state not included in the instruction. As both this Court and the United States Supreme Court have recognized, even otherwise generally correct instructions may become impermissibly misleading in light of the evidence and the prosecutor's argument. (See, e.g., *Taylor v. Kentucky*, *supra*, 436 U.S. at pp. 486-490; *People v. Brown*, *supra*, 45 Cal.3d at p. 1255.) Hence, those cases holding that CALJIC No. 3.32 is *generally* adequate and correct have no application here.

consideration of the mental retardation evidence in this case and thus defense counsel's failure to object or request amplification forfeited Mr. Townsel's right to challenge the instructional error on appeal. In addition, because the clerk's transcript indicates that most of the instructions, including CALJIC No. 3.32, were requested by both the prosecution and the defense (3 CT 796), and because the trial court stated on the record that all counsel agreed to the instructions provided (14 RT 3337), respondent may argue that defense counsel invited any error. Such arguments would be without merit for at least five reasons.

First, both *Saille* and *Ervin* were decided after trial in this case. While this Court has held that retroactive application of *Saille* does not violate ex post facto principles (see *People v. Hughes* (2002) 27 Cal.4th 287, 342), this Court has consistently held that fundamental fairness precludes applying an objection requirement to a particular case when existing law at the time of trial provided that no such objection was required. (See, e.g., *People v. Collins* (1986) 42 Cal.3d 378, 384-385, 388 [declining, on fundamental fairness grounds, to apply waiver rule that did not exist at time of trial]; *People v. Welch* (1993) 5 Cal.4th 228, 237-238 ["defendant should not be penalized for failing to object where existing law overwhelmingly said no such objection was required"]; *People v. Weaver* (2001) 26 Cal.4th 876, 910-911; see also, *People v. Stanfill* (1999) 76 Cal.App.4th 1137, 1151-1152.) As this Court acknowledged in *Ervin*, *supra*, the law that existed at the time of Mr. Townsel's trial imposed on trial courts a *sua sponte* duty to provide CALJIC No. 3.32 (and its predecessor) when supported by the evidence. In other words, there was no requirement that counsel request a complete and accurate version of CALJIC No. 3.32 (or object to an incomplete or inaccurate version) in order

to preserve any error on appeal. Hence, it would be fundamentally unfair to fault Mr. Townsel for his trial counsel's failure to request a complete instruction, or to object to the incomplete and affirmatively misleading instruction, when the law at the time overwhelmingly said that no such request or objection was required.

Second and in any event, as discussed in Part C-2, *ante*, it is black letter law in this state that even where an instruction may not be required *sua sponte*, once the court undertakes to instruct on a particular principle, it must do so accurately and completely. (See, e.g., *People v. Castillo*, *supra*, 16 Cal.4th at p. 1015; *People v. Montiel*, *supra*, 5 Cal.4th at p. 942; *People v. Cummings*, *supra*, 4 Cal.4th 1233, 1337; *People v. Saille* (1991) 54 Cal.3d 1103, 1119; *People v. Malone*, *supra*, 47 Cal.3d at p. 49.) Here, the court failed to do so.

Third, while counsel may be required to request amplification or clarification of "*an instruction correct in law and responsive to the evidence*" or risk waiving his client's right to challenge the instructional omission on appeal (*People v. Lang* (1989) 49 Cal.3d 991, 1024, italics added), that rule has no application where the defendant challenges the instruction as incorrect (see, e.g., *People v. Smithey*, *supra*, 20 Cal.4th at p. 976, fn. 7 [rejecting Attorney General's argument that failure to request amplification of instruction amounted to waiver because the defendant's challenge was that the instruction itself was incorrect]; *People v. Barker* (2001) 91 Cal.App.4th 1166, 1173 ["Although (appellant) did not object to the giving of the instruction below, because his 'claim . . . is [essentially] that the instruction is not "correct in law" and that it violated his right to due process of law[,] the claim . . . is not of the type that must be preserved by objection'"]; *People v. Hallock* (1989) 208 Cal.App.3d 595, 610 ["when

an instruction given by the court is correct as far as it goes, and the only valid objection to it is that defendant desires more complete or explicit instructions, he must request them, otherwise no error occurs. This rule cannot apply here, however, since the instruction given by the court was *not* correct"]). Here, the instruction was plainly incorrect in affirmatively and erroneously *prohibiting* the jurors from considering Mr. Townsel's defense evidence in determining whether the prosecution had carried its burden of proving premeditation and deliberation and the specific intent elements of the dissuading a witness charge and the witness killing special circumstance allegation beyond a reasonable doubt.

Fourth, because Mr. Townsel contends that the instructional errors violated his state and federal constitutional rights, or "substantial" rights, they are reviewable notwithstanding the absence of an objection or request below. (Pen. Code, § 1259; *People v. Coffman* (2004) 34 Cal.4th 1, 104, fn. 34 [and authorities cited therein – rejecting Attorney General's argument that appellants waived right to challenge instructional errors affecting their substantial rights by failing to object at trial]; *People v. Smithey*, *supra*, 20 Cal.4th at p. 976, fn. 7 [rejecting Attorney General's waiver argument where defendant's claim was that instruction violated his right to due process of law, which "is not of the type that must be preserved by objection"].)

Fifth and finally, the invited error doctrine is inapplicable. While the clerk's transcript indicates that defense counsel and the prosecutor requested CALJIC No. 3.32 – along with most of the other instructions – and the trial court stated that all counsel agreed on the instructions provided (14 RT 3337), defense counsel expressed no tactical reason for requesting or acquiescing in CALJIC No. 3.32 as provided. It is black letter law in this

state that "the invited error doctrine is inapplicable [when] it does not appear that counsel *both* '"intentionally caused the court to err' and clearly did so for tactical reasons." (*People v. Dunkle* (2005) 36 Cal.4th 861, 923; accord, e.g., *People v. Wilson* (2008) 43 Cal.4th 1, 16 [invited error doctrine inapplicable where counsel agreed to omission of instruction as unnecessary but "did not 'express[] a deliberate tactical purpose" in doing so]; *People v. Moon* (2005) 37 Cal.4th 1, 27, and authorities cited therein ["[t]he invited error doctrine will not preclude appellate review if the record fails to show that counsel had a tactical reason for requesting or acquiescing" in an instructional error]; *People v. Valdez* (2004) 32 Cal.4th 73, 115, and authorities cited therein ["invited error . . . will only be found if counsel expresses a deliberate tactical purpose in resisting or acceding to the complained-of instruction"]; *People v. Beardslee* (1991) 53 Cal.3d 68, 88 [counsel's request for erroneous instruction did not invite error]; *In re Mosher* (1969) 1 Cal.3d 379, 393 [counsel did not invite error "by merely acceding to erroneous instruction by neglect or mistake" in absence of expression of deliberate tactical purpose].) For all of these reasons, the instructional errors are reviewable on appeal.

E. The Judgment Must be Reversed

Because the instructional errors violated Mr. Townsel's federal constitutional rights, they demand reversal unless respondent can prove them harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; accord, *Sullivan v. Luisiana* (1993) 508 U.S. 275, 279; *Yates v. Evatt* (1991) 500 U.S. 391, 404.) That is, respondent must prove beyond a reasonable doubt that "the guilty verdict actually rendered in this trial was surely unattributable to the error[s]." (*Sullivan v. Luisiana*, *supra*, at p. 279.) Respondent will be unable to carry its burden.

Even under the state law test for harmless error (*People v. Watson* (1956) 46 Cal.2d 818, 836), where "the defendant has been wrongfully denied the opportunity to fully present his only defense, it is difficult to deny the reasonable probability of a result more favorable to the defendant" absent the errors. (*People v. Thurmond* (1985) 175 Cal.App.3d 865, 873-874.) Under any standard, reversal is required.

1. Respondent Cannot Prove that the Instruction Prohibiting the Jurors From Considering Mr. Townsel's Defense In Determining Whether the State had Proved that He Formed the Specific Intent Element of the Witness Killing Special Circumstance Allegation or Dissuading a Witness Charge was Harmless Beyond a Reasonable Doubt

The mental retardation evidence was the core of Mr. Townsel's defense and highly relevant to the jury's assessment of whether he killed Ms. Diaz with the specific intent to prevent her from testifying against him as a witness in a possible future criminal proceeding on the prior battery complaint, as required under both sections 136.1 and 190.2, subdivision (a)(1). As discussed in detail in Arguments II-F and III-D, *ante*, which are incorporated by reference herein, the prosecution's *properly admitted* evidence attempting to rebut Mr. Townsel's mental retardation evidence was weak. As previously noted, because the court's provision of CALJIC No. 3.32 told the jurors that they could *only* consider Mr. Townsel's mental retardation evidence on whether he possessed the requisite "mental state" for the *murders* charged in counts one and two, it must be presumed that they followed that instruction and did not consider the evidence in determining whether Mr. Townsel harbored that intent. (See, e.g., *People v. Coffman*, *supra*, 34 Cal.4th at p. 83; see also, e.g., *Francis v. Franklin*, *supra*, 471 U.S. 307, 324, n. 9 [it must be presumed that jurors follow the

instructions; rejecting suggestion that "would have the degree of attention a juror is presumed to pay to particular instructions vary with whether a presumption of attentiveness would help or harm the criminal defendant"]; *United States v. Span* (9th Cir. 1996) 75 F.3d 1383, 1390.) Respondent cannot prove beyond a reasonable doubt that the jurors' true finding on the witness killing special circumstance, and guilty verdict on the dissuading a witness charge, were "surely unattributable" to that error. (*Sullivan v. Luisiana, supra*, 508 U.S. at p. 279.)

To be sure, the prosecution's evidence tended to show that Ms. Diaz's police report against Mr. Townsel for battery was one of the circumstances that enraged him and led to the killings. One method of violating Penal Code section 190.2, subdivision (a) (10) is to commit an intentional killing against a crime witness "in retaliation for his or her testimony in any criminal or juvenile proceeding." While there may have been evidence supporting the "retaliation" element, Ms. Diaz had *not* provided "testimony" in a "criminal or juvenile proceeding," but rather had merely made a report to police. (See, e.g., *People v. Belton* (1979) 23 Cal.3d 516, 524, and authorities cited therein ["'Testimony' is generally described in both statutory and decisional law as oral statements made by a person under oath and in a court proceeding"]; *People v. Fernandez* (2003) 106 Cal.App.4th 943, 949-951 [making a report is not giving "testimony"].) Hence, although this method of violating section 190.2, subdivision (a)(10) was alleged in the information, it did not apply based on the evidence and the jurors ultimately were *not* instructed on it.

Instead, the jurors were instructed on the alternative method of violating section 190.2, subdivision (a)(10) – killing for the specific "purpose of *preventing* [Ms. Diaz's] testimony in a criminal proceeding."

(3 CT 819, italics added; 14 RT 3368.) The evidence that Mr. Townsel killed Ms. Diaz for the specific purpose of *preventing* her from testifying against him as a witness in a possible, future criminal proceeding arising from the battery complaint was extremely close.

Mr. Townsel's alleged concern about witnesses testifying against him in a criminal proceeding as relatively minor as a trial for battery is wholly inconsistent with his killing Ms. Diaz under circumstances in which there plainly were witnesses to the killing who would – and did – testify against him in the most serious criminal proceeding there is – a murder trial.

In the hours before the killing, Mr. Townsel repeatedly appeared at Ms. Diaz's home, making threats to Ms. Diaz's safety and firing guns, in front of *numerous* witnesses. (11 RT 2572-2574, 2611-2613, 2615-2617, 2633-2635, 2638-2639, 2654, 2670-2672, 2678, 2690-2692; 12 RT 2825-2826.) He chased Ms. Diaz and Mr. Anzaldua to a *sheriff's station* and fled when he crashed his car – circumstances which would lead any reasonable person to believe that his actions would be reported to the sheriff. (11 RT 2658-2662.) Indeed he committed the killing itself in front of many witnesses.

He arrived at Ms. Diaz's home in broad daylight – while both her house and that of her in-laws next door were obviously occupied with people who by this time undoubtedly knew him and whose cars were parked outside – and crossed their yards while armed with a gun. (11 RT 2580-2582, 2592-2593, 2619.) When he entered the house, Teresa Martinez went to the door and tried to stop him, but he walked passed her without making any attempt to harm her – conduct wholly inconsistent with that of a man who set out to eliminate potential witnesses against him. (11 RT 2581-2582, 2592-2593.) It was only when Mauricio Martinez rounded a blind

corner and "suddenly and unexpectedly bumped into" Mr. Townsel that Mr. Townsel *immediately* fired his weapon and shot him. (11 RT 2582-2583, 2594-2596; see also People's Exhibits 3 & 4 and 11 RT 2591, 2594.) According to Rene, Teresa, and Marybell Martinez, immediately after the killings, Mr. Townsel *walked* out of the house and through the yard while firing his weapon. (11 RT 2586, 2619, 2682, 2686.) Even after Rene shot Mr. Townsel, he made several statements to several witnesses admitting his culpability for the crimes. (11 RT 2588-2589, 2682, 2685, 2696; 12 RT 2720, 2833, 2836.)

In short, Mr. Townsel's course of conduct as a whole was wildly inconsistent with that of a man even remotely concerned about, much less intent upon preventing, witnesses testifying against him in *any* criminal proceedings. Indeed, had the jurors understood that they should consider Mr. Townsel's mental retardation evidence in determining whether he harbored that necessary mental state, respondent cannot prove that the jurors would not have had reasonable doubt that he even *understood* that Ms. Diaz's "testimony" might be given or required in any "criminal proceeding" arising from her battery complaint. At the very least, when considered in light of the mental retardation evidence, the circumstantial evidence of Mr. Townsel's intent in killing Ms. Diaz was just as consistent with an "innocent" explanation (i.e., that he did *not* kill her in order to prevent her testimony as a witness in a possible, future criminal proceeding) as it was with a "guilty" explanation. (See, e.g., *People v. Bean* (1988) 46 Cal.3d 919, 932-933 [where circumstantial evidence is equally susceptible of innocent and guilty interpretations, proof beyond a reasonable doubt and presumption of innocence standard requires jurors to accept former interpretation]; accord, *People v. Wiley* (1976) 18 Cal.3d 162, 174-175;

People v. Gould (1960) 54 Cal.2d 621, 629; *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49.)

Given the closeness of the evidence to prove that Mr. Townsel killed Ms. Diaz specifically in order to prevent her possible testimony against him in a possible, future criminal proceeding arising from the prior battery complaint, the court's erroneous instruction prohibiting the jurors from considering Mr. Townsel's mental retardation in determining whether the prosecution had proved that element beyond a reasonable doubt cannot be deemed harmless under any standard. The witness-killing special circumstance must be set aside and the dissuading a witness conviction must be reversed.

2. Respondent Cannot Prove that the Reasonable Likelihood that the Jurors Believed they Were Prohibited from Considering Mr. Townsel's Mental Retardation Defense in Determining Whether the State had Proved that He Premeditated and Deliberated was Harmless Beyond a Reasonable Doubt

Similarly, for all of the reasons discussed in Argument II-D, *ante*, which is incorporated by reference herein, respondent cannot prove beyond a reasonable doubt that the jury's first degree, premeditated murder verdicts, and corresponding true finding on the remaining "multiple murder" special circumstance (Pen. Code, § 190.2, subd. (a)(3)), were "surely unattributable" to the instruction erroneously prohibiting the jurors from considering Mr. Townsel's mental retardation defense in determining whether the state proved beyond a reasonable doubt that he premeditated and deliberated the killings. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279.) Alternatively, there exists a reasonable probability – or a "reasonable

chance" – that at least one juror would have had reasonable doubt that Mr. Townsel premeditated and deliberated the killings in the absence of the error. (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050, and authorities cited therein; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

For all of the foregoing reasons, the entire judgment must be reversed.

//

//

VI

THE CUMULATIVE EFFECT OF THE ABOVE ERRORS UNDERCUTTING MR. TOWNSEL'S MENTAL RETARDATION-BASED DEFENSE WAS PREJUDICIAL AND VIOLATED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, PROOF BEYOND A REASONABLE DOUBT AND TRIAL BY JURY ON EVERY ELEMENT OF THE CHARGED OFFENSES, A MEANINGFUL OPPORTUNITY TO PRESENT HIS DEFENSE, RELIABLE JURY VERDICTS THAT HE WAS GUILTY OF A CAPITAL OFFENSE, AND A RELIABLE DEATH JUDGMENT

Even if no one of the errors discussed in the preceding arguments was sufficiently prejudicial to demand reversal, their cumulative effect was prejudicial, violating Mr. Townsel's federal constitutional rights to a fair trial, to proof beyond a reasonable doubt and trial by jury on every element of the charges, to a meaningful opportunity to present his defense, and to reliable jury verdicts that he was guilty of a capital offense. Accordingly, the entire judgment must be reversed.

Even assuming arguendo that the cumulative effect of the errors was not sufficiently prejudicial in the guilt phase to demand reversal of the convictions and special circumstance allegations, its effect on the penalty phase was prejudicial, violating Mr. Townsel's state and federal constitutional rights to a fair penalty trial and a reliable death verdict. Accordingly, the death judgment must be reversed.

A. The Cumulative Effect of the Errors Demands Reversal of the Entire Judgment

It is well settled that "the aggregate prejudicial effect of" a series of errors may be "greater than the sum of the prejudice of each error standing alone." (*People v. Hill* (1993) 17 Cal.4th 800, 845, and authorities cited therein.) Thus, errors that might be harmless in isolation may be prejudicial

in combination. (*Ibid.*) Where errors of federal constitutional magnitude combine with non-constitutional errors, the *Chapman* harmless beyond a reasonable doubt standard applies. (*United States v. Rivera* (10th Cir. 1990) 900 F.2d 1462, 1470, fn. 6; *People v. Archer* (2000) 82 Cal.App.4th 1380, 1390-1397; *People v. Williams* (1971) 22 Cal.App.3d 58-59.) Finally, it is an equally well-settled point of state and federal constitutional law that the cumulative effect of a series of any errors may so infect a trial with unfairness as to make the resulting conviction a denial of due process. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 15 [in close case, combined effect of instructional omission and prosecutor's argument violated due process guarantee to fundamental fairness]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 290, 302-303 & fn. 3 [cumulative effect of state court rulings denied defendant "a trial in accord with traditional and fundamental standards of due process"]; *Parles v. Runnells* (9th Cir. 2007) 505 F.3d 922, 927-928, 933-934, and authorities cited therein [cumulative effect of state law errors violated due process right to fair trial]; *People v. Hill* (1993) 17 Cal.4th 800, 844-847.) For instance, "when the combined effect of individually harmless errors renders a criminal defense 'far less persuasive than it might (otherwise) have been,' the resulting conviction violates due process." (*Parles v. Runnells*, *supra*, at p. 927, quoting *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 294, 302-303.) This is just such a case.

As discussed at length in Arguments II-IV, *ante*, Mr. Townsel presented the unanimous opinions of three experts that he was mentally retarded while the prosecution's evidence to prove premeditation and deliberation and the specific intent to kill Ms. Diaz in order to prevent her testimony as a witness in a future criminal proceeding was far from

overwhelming. Hence, Mr. Townsel's defense – that he did not harbor those mental states due to his mental retardation combined with the circumstances leading to the crimes – should have been a compelling one.

The prosecution mounted a two-pronged attack on Mr. Townsel's mental retardation defense: (1) Mr. Townsel was malingering, or faking, his mental retardation; and (2) even if he was not malingering, the intelligence and other test scores and expert opinions that Mr. Townsel was mentally retarded were completely unreliable and irrelevant to the issues the jurors were to decide in this case.

The second prong of the prosecutor's attack was based entirely on Dr. Coleman's erroneously admitted testimony. (Argument II, *ante*.) As discussed at length in Argument II-F, *ante*, which is incorporated by reference herein, Dr. Coleman's testimony that Mr. Townsel's evidence of mental retardation was not, in fact, evidence of mental retardation and was completely irrelevant to the jury question of whether he harbored the mental states required for the charged crimes, was enormously prejudicial.

The first prong of the prosecutor's attack was based on: (1) the prosecution's lay opinion and hearsay evidence that Mr. Townsel was (allegedly) evaluated but not found or considered to be mentally retarded before he was charged with these crimes (Argument III, *ante*); (2) anectodal evidence, such as that Mr. Townsel had a driver's license, read – or appeared to read – newspapers covering his trial, and had a temporary job in which he performed repetitive tasks under supervision; and (3) the prosecutor's cross-examination of the defense experts with other evidence seemingly undermining their opinions.

As discussed in Argument III, *ante*, which is incorporated by reference herein, the first category of evidence – the lay opinion and

hearsay evidence – was erroneously admitted and extremely prejudicial. As discussed in Argument II-F, *ante*, the category of anectodal evidence regarding the tasks of which Mr. Townsel was capable did little, if anything to undermine the unanimous expert opinions that Mr. Townsel was mentally retarded. Indeed, the experts testified that a person's ability to engage in such tasks simply is not inconsistent with mental retardation. The prosecutor presented no evidence (even from his putative "expert," Dr. Coleman) to contradict their testimony in this regard. And as discussed in Argument IV, *ante*, the third method by which the prosecution mounted its "malingering" attack on Mr. Townsel's defense was through its cross-examination of the defense experts, which was also tainted by error.

Thus, virtually the entirety of the prosecutor's two-pronged attack on Mr. Townsel's mental retardation evidence and the defense on which it was based was erroneously admitted, irrelevant, or grossly misleading. It is well recognized that the erroneous admission of evidence violates due process when it is "crucial, critical, or significant," such as when it "remove[s] a reasonable doubt that would have existed on the record without it." (*Collins v. Scully* (2nd Cir. 1985) 755 F.2d 16, 18-19; accord, e.g., *Ege v. Yukins* (6th Cir. 2007) 485 F.3d 364, 375-378; *Leverett v. Spears* (11th Cir. 1989) 877 F.2d 921, 925; *Love v. Young* (7th Cir. 1986) 781 F.2d 1307, 1312; *Bailey v. Procunier* (5th Cir. 1984) 744 F.2d 1166, 1169.) For all of the reasons discussed in Arguments II-F, III-D, IV-D, and V-E, *ante*, this is just such a case.

Ultimately, whatever anemic value was left to Mr. Townsel's mental retardation evidence after the prosecutor's attack on it with erroneously admitted evidence and misleading cross-examination was completely lost through the court's provision of CALJIC No. 3.32. As discussed in

Argument II-E, *ante*, the court's use of the permissive language in the instruction – "you *may* consider" Mr. Townsel's mental retardation evidence – puts its imprimatur on Dr. Coleman's testimony that the jurors were free to refuse to even consider (and, according to Dr. Coleman, *should* refuse to even consider) the evidence in assessing whether Mr. Townsel possessed *any* of the mental state element of the crimes. And, as discussed in Argument V, *ante*, the instruction's language expressly limiting any *possible* consideration of that evidence to the "*sole*[]" issue of whether Mr. Townsel harbored malice aforethought prohibited the jurors from considering it on the questions of whether Mr. Townsel committed the killings with premeditation and deliberation and with the specific intent to prevent Ms. Diaz from testifying against him as a witness in a criminal proceeding arising from the prior battery complaint. Given the damage wrought to the defense evidence through the court's evidentiary errors and the fact that there not only was no evidence that mental retardation would interfere with forming express malice, or the intent to kill, but in fact affirmative defense evidence to the contrary that mental retardation would *not* prevent someone from forming express malice, the jurors understandably did not have reasonable doubt that regarding that mental state. However, in the absence of the cumulative effect of the errors, and under any standard, it is reasonably probable that at least one juror would have had such doubt over whether Mr. Townsel premeditated and deliberated the killings and killed Ms. Diaz with the specific intent of preventing her testimony as a witness in a criminal proceeding.

"When the combined effect of individually harmless errors renders a criminal defense 'far less persuasive than it might (otherwise) have been,' the resulting conviction violates due process." (*Parles v. Runnells*, *supra*,

505 F.3d at p. 927, quoting *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 294, 302-303; see also *People v. Quartermain* (1997) 16 Cal.4th 600, 623 [error that "struck at the heart of" the defense prejudicial]; accord, e.g., *Francis v. Franklin* (1985) 471 U.S. 307, 325-326; *People v. Ireland* (1969) 70 Cal.2d 522, 532; *Luna v. Cambra* (9th Cir. 2002) 306 F.3d 954, 962.) This is just such a case. The cumulative effect of the errors gutting Mr. Townsel's defense was prejudicial and deprived him of his state and federal constitutional rights to a fair trial, proof beyond a reasonable doubt and trial by jury on every element of the offenses, a meaningful opportunity to present his defense, and reliable jury determinations that he was guilty of a capital offense. (U.S. Const. Amends. V, VI, VIII, XIV; Ca. Const. art. I, §§ 7, 15, 16, 17; see also Argument II-D, *ante*, and authorities cited therein.) The entire judgment must be reversed.

B. The Cumulative Effect of the Guilt Phase Errors Had a Profound Prejudicial Impact on the Penalty Phase And Requires Reversal of the Death Judgment

Violations of the federal constitution at the guilt and penalty phases of a capital trial are governed by the same standard of review: reversal is required unless the state can prove the errors harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; accord, *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Yates v. Evatt* (1991) 500 U.S. 391, 404.) Violations of state law affecting the penalty phase of a capital trial require reversal of the ensuing death judgment if there is "reasonable *possibility* the error affected the verdict." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 961, citing *People v. Brown* (1988) 46 Cal.3d 432, 447-448, italics in original.) The "reasonable possibility" standard is not only "more exacting" than the *Watson* "reasonable probability" standard (*People v.*

Brown, *supra*, at p. 447); it is "the same in substance and effect" as the harmless beyond a reasonable doubt standard applied to violations of the federal Constitution. (*People v. Gonzalez*, *supra*, at p. 961, quoting from *People v. Ashmus* (1991) 54 Cal.3d 932, 990.)

Just as the cumulative effect of errors may be prejudicial in the guilt phase of a capital trial, so too may the cumulative effect of errors be prejudicial in the penalty phase. (See, e.g., *People v. Sturm* (2006) 37 Cal.4th 1218, 1243-1244; *People v. Hernandez* (2003) 30 Cal.4th 835, 877-878.) Furthermore, errors that are harmless at the guilt phase may nevertheless have a prejudicial effect on the penalty phase. (See, e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 301-302 [erroneous introduction of evidence at guilt phase had prejudicial effect on sentencing phase of capital murder trial]; *United States v. McCullough* (10th Cir. 1996) 76 F.3d 1087, 1101-1102 [erroneously admitted confession harmless in guilt phase but prejudicial in penalty phase]; *People v. Brown*, *supra*, 46 Cal.3d 432 at p. 466; *People v. Hamilton* (1963) 60 Cal.2d 105, 136; U.S. Const., Amends. V, VIII, XIV.) As the Ninth Circuit has explained, "when the combined effect of individually harmless errors renders a criminal defense 'far less persuasive than it might (otherwise) have been,' the resulting conviction violates due process." (*Parles v. Runnells* (9th Cir. 2007) 505 F.3d 922, 927-928, 933-934, quoting *Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 294, 302-303.) It necessarily follows that when the combined effect of guilt phase errors renders a penalty phase "defense," or case for life, "'far less persuasive than it might otherwise have been,'" the resulting death verdict violates due process and the Eighth Amendment guarantee to heightened reliability in death judgments. (See, e.g., *Ford v. Wainwright* (1986) 477 U.S. 399, 411.)

Here, assuming arguendo that the cumulative effect of the errors discussed in Arguments I-V, *ante*, do not warrant reversal of the convictions and special circumstances, the errors nevertheless had an enormously prejudicial impact on the jurors' assessment of the appropriate penalty in this case. As discussed in Argument II, *ante*, the Fourteenth Amendment due process guarantee to a fair trial applies equally to the guilt and the penalty phases of a capital murder trial. (See, e.g., *Gardner v. Florida* (1977) 430 U.S. 349, 357.) Furthermore, because the death penalty is a different kind of punishment from any other (see, e.g., *Woodson v. North Carolina* (1976) 428 U.S. 280, 305), the Supreme Court has repeatedly recognized that the Eighth Amendment demands a "heightened 'need for reliability'" in death verdicts. (See, e.g., *Ford v. Wainwright*, *supra*, 477 U.S. at p. 411; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

Pursuant to these provisions, a capital defendant is entitled to present, and have the jury consider, any constitutionally relevant mitigating evidence in assessing whether he should live or die. (See, e.g., *Eddings* v. *Oklahoma* (1982) 455 U.S. 104, 114-115; see also Pen. Code, § 190.3 [mandating factors to be considered in making penalty decision]; *Lockett v. Ohio*, *supra*, 438 U.S. at pp. 604-608.) Evidence of mental retardation or low intellectual functioning is constitutionally relevant mitigating evidence. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 317-318, 322-323; *People v. Smithey* (1999) 20 Cal.4th 936, 1005 [while not explicitly stated, Penal Code section 190.3, factors (h) and (k) generally require consideration of

mental retardation in mitigation].)[50]

As discussed in the previous arguments, the cumulative effect of Dr. Coleman's erroneously admitted testimony, the lay and hearsay opinion evidence that Mr. Townsel was not mentally retarded in his developmental years, and the prosecutor's improper cross-examination of Dr. Christensen, and the prosecutor's misleading use of Doctors Davis and Terrell's legally irrelevant competency evaluations undermined Mr. Townsel's evidence of mental retardation at the guilt phase. In the penalty phase, the jurors were instructed to determine "what the facts are from the evidence received during the *entire trial* unless you are instructed otherwise." (3 CT 887; 16 RT 3657, italics added.) In other words, the jurors were instructed to consider the erroneously admitted guilt phase evidence undermining Mr. Townsel's claim of mental retardation in determining whether he should live or die. For all of the reasons discussed in Arguments II-F, III-D, IV-D, V-E, and Part A, *ante*, the cumulative effect of the guilt phase errors created a reasonably possibility that the jurors gave no mitigating weight to Mr. Townsel's mental retardation evidence or even the evidence of his low IQ. Indeed, any doubt that the erroneously admitted evidence and improper

---

[50] Of course, it is now settled that the Eighth Amendment, as interpreted by the United States Supreme Court in *Atkins v. Virginia*, *supra*, 536 U.S. 304, prohibits the execution of a mentally retarded person. Because *Atkins* was decided after his conviction and imposition of sentence, the issue of whether Mr. Townsel is mentally retarded for Eighth Amendment purposes is more appropriately raised on habeas corpus. (See *In re Hawthorne* (2005) 35 Cal.4th 40, 49.) Nevertheless, although it was not settled at the time of trial that execution of the mentally retarded is prohibited by the Eighth Amendment, it was clear that Mr. Townsel enjoyed the right to have the jury consider evidence of his mental retardation and low intellectual functioning in deciding whether he should live or die.

cross-examination in the guilt phase had a prejudicial impact on the penalty phase is resolved by the prosecutor's penalty phase summation.

The prosecutor did concede in the penalty phase – unlike the guilt phase – that the jurors should "consider" the evidence of Mr. Townsel's "IQ" under factor (k). (16 RT 3693.)[51] However, based upon the guilt phase evidence, the prosecutor argued that Mr. Townsel's "IQ" evidence was entitled to no weight because "It's the people's position that the defendant has faked his IQ with the doctors" (16 RT 3693), that he was a "malingerer" (16 RT 3694), that Mr. Townsel was not mentally retarded during his developmental years, and thus his claim of mental retardation was made too conveniently for the first time as an adult facing capital murder charges (16 RT 3694). In other words, Mr. Townsel was simply trying to "manufacture his own sympathy." (16 RT 3700; see also 16 RT 3694-3696.)

Furthermore, as discussed in Arguments II-F, III-D, IV-D, V-E, and Part A, *ante*, it is reasonably possible that in the absence of the guilt phase errors, at least one juror would have been persuaded by the unanimous opinions of the three defense experts that Mr. Townsel was mentally retarded. The prosecution presented no additional expert testimony or other

---

[51] Penal Code section 190.3, factor (k). The jurors were instructed to consider "if applicable" – "(k) any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (CT 918-920; 16 RT 3673.)

evidence at the penalty phase to rebut those opinions.[52]

However, Mr. Townsel did present additional evidence at the penalty phase that was consistent with his claim of mental retardation. Mr. Townsel's mother testified that as early as kindergarten, he was emotionally immature and academically slow. (15 RT 3580.) After spending much effort working with him at home, she came to understand that he was

---

[52] In an apparent effort to undermine Mr. Townsel's mental retardation evidence, the prosecutor did present a letter, which the parties stipulated Mr. Townsel wrote while in jail, which stated, inter alia, "These dumP Trucks FouNd AnoTheR way To dumP, Now They use youR, IQ, I BeT ALoT oF PePole LAUgHed AT ThAT oNe. ThaT TheRe New wAy oF Bull-shiTiNg is iN courRT, AnoTheR oNe oF MadeRAs FiNesT. HA HA And which Has NoThiNg To do wiTh The Crime iTselF. [*Sic*]." (CT 3137 [Ex. 30]; RT 3647.) Nevertheless, in his penalty phase summation, the prosecutor relied on the letter as further undermining the evidence of Mr. Townsel's mental retardation: "And as the defendant stated, also the People couldn't have put it any better, which has nothing to do with the crime itself, the defendant knows that IQ is not very relevant. He knows it was just a game. Therefore, although you can consider his low IQ in this case it's the People's position it does not get much weight." (RT 3694-3695.)

However, the prosecutor showed the letter to Dr. Powell during his penalty phase cross-examination and asked him if it changed his opinion that Mr. Townsel was mentally retarded. (RT 3640.) Dr. Powell testified that it did not. (RT 3640.) Indeed, because of the stigma associated with mental retardation, it is typical for mentally retarded persons to deny their disability, a phenomenon often referred to as the "cloak of competence." (See, e.g., Robert B. Edgerton, *The Cloak of Competence* (rev. ed. 1993) [of studied individuals, stigma of being labeled mentally retarded leads many to don a "cloak of competence" to conceal their disability]; *United States v. Davis* (D. Md. 2009) 611 F.Supp.2d 472, 494 [citing expert testimony regarding the "'cloak of competence,' which is the powerful tendency of mildly mentally retarded people to mask or compensate for their deficits"].) The prosecutor presented no evidence to rebut Dr. Powell's testimony or to support any inference that the letter demonstrated that Mr. Townsel was not retarded.

simply unable to perform his school assignments. (15 RT 3581.) His academic problems manifested at a very young age and she agreed to place him in special education, where he remained throughout his school years. (15 RT 3581, 3585, 3587, 3590.) Other children teased him about being mentally retarded, which hurt him. (15 RT 3582, 3598.)

Mr. Townsel's father, David Townsel, also testified to the learning difficulties his son manifested throughout his life. (16 RT 3643.) Mr. Townsel's father helped him with his school work, but Mr. Townsel had a hard time counting and reading. (16 RT 3643.) His father would tell Mr. Townsel that if he could correctly count change, he could keep it, but Mr. Townsel simply was unable to do so. (16 RT 3643-3644.)

Mr. Townsel's grandfather, Clefo Townsel, was a pastor who taught Sunday school where Mr. Townsel was a student. (16 RT 3636.) According to his grandfather, Mr. Townsel could not keep up with the other children in Bible study. (16 RT 3636.) When they had Bible "drill" for prizes, Mr. Townsel could not seem to grasp the questions and lagged behind. (16 RT 3627.)

Mr. Townsel eventually dropped out of school. (15 RT 3591.) Thereafter, he was employed only sporadically in menial jobs, such as hauling hay with his father, janitorial work, working on trucks, and laying pipes. (15 RT 3591-3592, 3167.)

Furthermore, Dr. Powell was recalled at the penalty phase and testified that he had reviewed Dr. Coleman's testimony and criticisms, but they did not alter his opinion that Mr. Townsel was mentally retarded. (16RT 3634, 3637.) Dr. Coleman's opinions regarding IQ testing and psychology are not widely accepted within the psychological community. (16 RT 3635.) Unlike psychiatrists like Dr. Coleman, psychologists receive

specialized training in psychological testing or psychometrics. (16 RT 3635-3636.) Dr. Powell himself had extensive training and experience in this area, including eight graduate semesters of psychometrics. (16 RT 3636.)

Moreover, Dr. Powell explained that Mr. Townsel's childhood IQ scores in the 70s were not clinically inconsistent with the IQ score of 59 produced by his own testing of Mr. Townsel, nor were they inconsistent with mental retardation. (16 RT 3638.) As people age, they typically score lower on IQ testing because the tests' level of difficulty increases as more is expected of adults than children. (16 RT 3638.) Therefore a drop from a childhood IQ score of 77 to an adult IQ score of 59 would not be particularly significant because the populations are different. (16 RT 3639-3640.) In light of this additional evidence presented at the penalty phase, it is reasonably possible that at least one penalty phase juror would have been persuaded that Mr. Townsel was retarded in the absence of the guilt phase errors.

Finally, it is reasonably possible that jurors persuaded that Mr. Townsel was mentally retarded would have voted to spare his life. Any conclusion that Mr. Townsel was mentally retarded would have been highly relevant and influential in the penalty phase for at least three reasons.

First, there is no question that it qualified as a "sympathetic or other aspect of defendant's character or record [that the defendant offers] as a basis for a sentence less than death." (CT 918-920; Pen. Code, § 190.3, factor (k).) Indeed, it is well recognized that mental retardation or other intellectual impairment "is exactly the kind of evidence that garners the most sympathy from jurors" in the penalty phase of a capital case. (*Smith v. Mullin* (10th Cir. 2004) 379 F.3d 919, 942-943, and authorities cited therein

[citing empirical evidence that mental retardation and illness evidence is the most persuasive mitigation].) Evidence of mental retardation or cognitive impairment carries particular mitigating weight where, as here, the underlying crime is premeditated murder but was committed under circumstances suggestive of a "crime of passion." (See *Porter v. McCollum* (2009) 558 U.S. ___, 130 S.Ct. 447, 454-455 [where defendant shot and murdered paramour and another man under circumstances state court characterized as "'consistent with . . . a crime of passion,' even though premeditated to a heightened degree," Supreme Court held it was reasonably probable the penalty verdict would have been different had the jurors heard and considered, inter alia, mitigating evidence of defendant's "cognitive defects"].)

Second, even assuming that jurors who were persuaded that Mr. Townsel was mentally retarded would nevertheless have found that the prosecution had proved the mental state elements of the crimes beyond a reasonable doubt, for all of the reasons discussed in Arguments II-F, III-D, IV-D, V-E, and Part A, *ante*, it is beyond dispute that any rational juror persuaded that Mr. Townsel was mentally retarded would have had *lingering* doubts that Mr. Townsel premeditated and deliberated the killings or killed Ms. Diaz with the specific intent to prevent her testimony as a witness in a criminal proceeding arising from the battery charge. As the United States Supreme Court recently observed:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses and to understand the reactions of others.

> There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan . . . . Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

(*Atkins v. Virginia*, *supra*, 536 U.S. at p. 318.)

Under Penal Code section 190.3, subdivision (a), jurors can consider and give effect to their lingering doubts over the defendant's guilt in deciding whether he should live or die. (See, e.g., *People v. Earp* (1990) 20 Cal.4th 826, 903; *People v. Hawkins* (1995) 10 Cal. 4th 920, 966-967; *People v. Cox* (1991) 53 Cal.3d 618, 676; *People v. Kaurish* (1990) 52 Cal.3d 648, 706; *People v. Terry* (1964) 61 Cal.2d 137, 147; see also *Oregon v. Guzek* (2006) 546 U.S. 517, 523-524, and authorities cited therein [while there is no federal constitutional right to present new evidence for jury to consider lingering doubt over "whether" defendant committed crimes, evidence going to how, why, or the manner in which the defendant committed crimes is constitutionally relevant evidence under the Eighth and Fourteenth Amendments]; accord, *In re Hardy* (2007) 41 Cal.4th 977, 1031 & fn. 17.) And it is well recognized that lingering doubt has a "'powerful mitigating effect.'" (*Tarver v. Hopper* (11th Cir. 1999) 169 F.3d 710, 715-716 [citing results of comprehensive studies]; accord, *Lockhart v. McCree* (1986) 476 U.S. 162, 181; see also, e.g., *Jackson v. Calderon* (9th Cir. 2000) 211 F.3d 1148, 1164, cert. denied (1995) 531 U.S. 1072 [emphasizing closeness of case on question of premeditation in guilt phase in concluding penalty phase error prejudicial]; *Cargle v. Mullin* (10th Cir. 2003) 317 F.3d 1196, 1222 [same].)

Third, a conclusion that Mr. Townsel was mentally retarded would not only have carried tremendous mitigating weight; it would also have

served to substantially diminish the weight of the aggravating evidence. (See, e.g., *Middleton v. Dugger* (11th Cir. 1988) 849 F.2d 491, 495 [evidence of brain injury, low IQ, and "psychiatric evidence" ""not only can act in mitigation, it could also significantly weaken the aggravating factors'"]; accord, e.g., *Smith v. Mullin, supra*, 379 F.3d at pp. 942-943; *Caro v. Woodford* (9th Cir. 2002) 280 F.3d 1247, 1257; *Simmons v. Luebbers* (8th Cir. 2002) 299 F.3d 229, 935-939; *In re Gay* (1998) 19 Cal.4th 771, 807.) In this regard, apart from the circumstances of the crimes, the prosecution's aggravating evidence consisted of four incidents of violent criminal conduct under factor (b).

Ms. Diaz's friend, Marcella Lopez, testified that roughly three weeks before the killings, Ms. Diaz and Mr. Townsel had an argument at Ms. Lopez's home. (15 RT 3534-3536, 3538.) They argued for some time before Ms. Diaz told him to leave or she would call the police. (15 RT 3536.) When Ms. Diaz picked up the phone, Mr. Townsel hit her once or twice. (15 RT 3536.) While this incident was admitted and presented to the jurors under factor (b) (4 CT 908; 15 RT 3501-3503), it was also a "circumstance of the crimes" under factor (a) because it resulted in the battery complaint that formed an integral part of the witness-killing special circumstance allegation and dissuading a witness charge. (13 CT 3114 [People's Exhibit 1]; 13 CT 3116 [People's Exhibit 13].)

In addition, Beatrice Cruz testified that she had started dating Mr. Townsel when he was 18 years old and she was 26 and they were together for two years. (15 RT 3560, 3564.) According to Mr. Townsel's mother, however, Mr. Townsel was a 17-year-old child, still in high school, when Ms. Cruz began "dating him." Ms. Cruz would pick him up at school for "dates" when he was supposed to be in classes. (15 RT 3587-3590.) After

they broke up, Mr. Townsel went to Ms. Cruz's home and had a heated argument with her new boyfriend. (15 RT 3561.) When Ms. Cruz told Mr. Townsel to leave and attempted to intervene, Mr. Townsel punched her. (15 RT 3561-3562.) Ms. Cruz telephoned the police and Mr. Townsel was later arrested. (15 RT 3562.) Some days thereafter, Mr. Townsel telephoned her, telling her she would "pay" for calling the police and "you better get out of that house, something is going to happen to you because I'm going to kill your wetback." (15 RT 3563.)

Correctional Officer Frank Reiland testified that on June 28, 1990, he opened Mr. Townsel' cell door because Mr. Townsel was agitated. (15 RT 3548-3550.) Mr. Townsel attempted to leave his cell and enter into another secured area in which two other officers were stationed. (15 RT 3549.) When Mr. Reiland pushed him back, Mr. Townsel yelled obscenities at him, kicked his knee, and punched at him but only grazed Mr. Reiland's temple. (15 RT 3549.)

Correctional Officer Rebecca Davis testified that in May 1990, Mr. Townsel was outside of his cell with permission. (15 RT 3542, 3545.) Although he was not violating any rules, Sergeant Davis twice ordered Mr. Townsel to go to his cell and shut the door. (15 RT 3543, 3545.) Upon her third order, Mr. Townsel threw a lightweight plastic chair at her. Although she was only two to three feet from him, it did not hit her. (15 RT 3544-3545.)

Ms. Davis's own supervisor contradicted her testimony. Correctional Sergeant and supervisor Alan Patchell investigated the incident in order to determine whether to file criminal charges. (16 RT 3620.) His investigation led him to conclude that Mr. Townsel had not actually thrown the chair at Officer Davis. (16 RT 3621, 3623.) Instead, in a fit of pique,

he simply slammed the chair down on the hard floor and it bounced up. (16 RT 3621.) Officer Davis was standing very close to Mr. Townsel, so if he had actually thrown the chair at her, it likely would have hit her. (16 RT 3621.) Although her report stated that she had moved when Mr. Townsel threw the chair, that is not what she told Sergeant Patchell. (16 RT 3623.)

Finally, it is true that the fact that Ms. Diaz was pregnant when she was killed otherwise bore considerable aggravating weight.

Without a finding that he was mentally retarded, the picture of Mr. Townsel that emerged from the guilt and penalty phase evidence was that of a cold-hearted and callous bully who resorted to violence when he did not get his way, just as the prosecutor argued in his penalty phase summation. (See, e.g., 16 RT 3701.) Viewed through the prism of his mental retardation, however, the picture that would have emerged was that of an emotionally and intellectually stunted young man prone to reckless, impulsive acts without considering their consequences.

In other words, the jurors heard evidence that Mr. Townsel committed a "shocking crime" and of his "impulsiveness and lack of emotional control," but a finding that he was mentally retarded would have provided them "an *explanation*" for these "outbursts of violence" and this otherwise respectful (16 RT 3628, 3644) and good natured (15 RT 3601-3602) person's commission of "such a shocking crime." (*Smith v. Mullin*, *supra*, 379 F.3d at pp. 942-943 [reasonably probable that if the jurors had heard and found defendant was mentally retarded and brain damaged, they would have returned different penalty verdict because evidence was not only mitigating, but cast aggravating evidence in different light]; accord, e.g., *Caro v. Woodford*, *supra*, 280 F.3d at p. 257 [reasonably probable that if jurors had heard and found that defendant was brain damaged, they would

have returned different penalty verdict even in face of seemingly strong aggravating evidence, since brain damage evidence could have explained, and reduced defendant's moral culpability for, all of the aggravating evidence]; *Simmons v. Luebbers*, *supra*, 299 F.3d at p. 936 ["the jury was already aware of" the defendant's violent conduct and "was allowed to conclude that [his] violent behavior was simply the result of his wicked and aggressive nature;" had jury heard and been persuaded by mental health evidence, it would have provided alternative explanation for conduct, thus diminishing its aggravating weight].)

Indeed, convincing evidence of mental retardation is so relevant and important to a jury's penalty decision that a jury's failure to hear or consider it almost always demands reversal, no matter what the aggravating evidence. (See, e.g., *Williams v. Taylor* (2000) 529 U.S. 362, 396, maj. opn., and p. 419, dis. opn. of Reqnquist, J. [even in face of aggravating evidence that defendant had "savagely beaten an elderly woman, stolen two cars, set fire to a home, stabbed a man during a robbery, and confessed to choking two inmates and breaking a prisoner's jaw," majority held reasonably probable that evidence and finding that defendant was, among other things, mentally retarded in pre-*Atkins* penalty phase trial would have resulted in a different verdict]; *Rompilla v. Beard* (2005) 545 U.S. 374, 392-393, maj. opn., and p. 402, dis. opn. of Kennedy, J. [despite evidence that murder was committed by torture and that defendant had significant history of felony convictions, including "brutal[]" prior rape of a woman by knife point during which he slashed her, reasonable probability penalty verdict would have been different had jurors heard and considered evidence, inter alia, that defendant was brain damaged and had an IQ within mentally retarded range]; *Dickerson v. Bagley* (6th Cir. 2006) 453 F.3d 690,

691, 698-699 & fn. 1 [despite evidence that defendant murdered two people and had physically assaulted his paramour on prior occasions, reasonable possibility of different penalty verdict had sentencer heard and considered evidence that defendant "functioned at an intellectual level little above the retarded level"]; *Smith v. Mullin*, *supra*, 379 F.3d at pp. 924, 942-943 [although the "State's case in favor of the death penalty was strong" where defendant killed one woman and four children, reasonable probability of different penalty verdict had jury heard and considered, inter alia, evidence of defendant's mental retardation and brain damage]; *Cunningham v. Zant* (11th Cir. 1991) 928 F.2d 1006, 1019 and *Cunningham v. State* (Ga. 1981) 284 S.E.2d 390, 395-396 [despite jury findings that defendant tortured victim before killing him for purposes of robbery, reasonable probability of different penalty verdict had jury heard and considered, inter alia, evidence that defendant was mentally retarded]; *Middleton v. Dugger*, *supra*, 849 F.2d at pp. 494-495 and *Middleton v. State* (Fla. 1982) 426 So.2d 548, 553 [despite evidence that defendant killed woman who had taken him into her home for a "pecuniary motive," had committed a prior armed felony, was on parole at the time of the crime, reasonable probability that penalty verdict would have been different had jury heard and considered, inter alia, evidence of defendant's low IQ and mental illness].)

For all of these reasons, as well as those discussed in Arguments II-F, III-D, IV-D, V-E, and Part A, *ante*, it is reasonably possible that the guilt phase errors caused the jurors to reject Mr. Townsel's claim of mental retardation and that at least one juror would have been persuaded in their absence. It is also reasonably possible that a juror persuaded that Mr. Townsel was mentally retarded would have voted to spare his life. Because death judgments must be unanimous, this reasonable possibility demands

reversal of this death judgment. (See, e.g., *Wiggins v. Smith*, *supra*, 539 U.S. at p. 537.)

//

//

VII
THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF MR. TOWSEL'S ALLEGED USE OF RACIST SLURS AGAINST LATINOS, WHICH IN COMBINATION WITH THE GUILT PHASE ERRORS WAS PREJUDICIAL, VIOLATED MR. TOWNSEL'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR PENALTY TRIAL AND A RELIABLE DEATH VERDICT AND DEMANDS REVERSAL OF THE DEATH JUDGMENT

A. Introduction

Prior to trial, the prosecutor notified the court and defense counsel that he intended to present evidence at the penalty phase that Mr. Townsel committed a battery upon Beatriz Cruz (née Torres) on April 14, 1996, in violation of Penal Code section 242, and that he attempted to dissuade her from testifying against him as a witness on April 17, 1996, in violation of section 136.1, subdivision (c)(1). (3 CT 607-608; 15 RT 3491-3493, 3499.) The prosecution offered this evidence under section 190.3, factor (b), which permits the introduction of "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence" in aggravation. (3 CT 607-608, 616-617, 622-624.)

With regard to the alleged violation of section 136.1, subdivision (c)(1), the prosecutor specified that he intended to present evidence that after Mr. Townsel was arrested for the battery, he telephoned Ms. Cruz and told her that "'she was going to pay." (3 CT 878; 15 RT 3495.) In a second call, Mr. Townsel threatened her, "'you better get out of the house because something is going to happen to you!'" (3 CT 878; 15 RT 3495.) In the same phone call Mr. Townsel also threatened Ms. Cruz, "I'm going to kill

your wetback," a racist slur that referred to her Latino boyfriend. (3 CT 878; 15 RT 3495.)

Defense counsel moved to exclude the evidence of Mr. Townsel's threats to Ms. Cruz on two grounds. First, they were non violent and at most amounted to mere misdemeanor activity and hence did not qualify as the kind of "criminal activity" contemplated by section 190.3, factor (b). (3 CT 633; 15 RT 3491-3493.) Second, the probative value of the evidence was outweighed by its potential for prejudice under Evidence Code section 352 and indeed its admission would violate Mr. Townsel's rights under the Eighth Amendment. (3 CT 633-635; 15 RT 3500 .)

The trial court overruled counsel's objections. Specifically, the court ruled, "[v]ery well, then, the prosecution will be allowed to introduce evidence of the threatening a witness in the person of Beatrice Torres [née Cruz]. And the court is accepting the offer of proof as preliminary showing and there will not be any testimony beyond that." (15 RT 3500.)

Thereafter, and as discussed above, Ms. Cruz testified at the penalty phase that after she and Mr. Townsel broke up, Mr. Townsel and her new, Latino, boyfriend became embroiled in a heated argument. (15 RT 3561.) When Ms. Cruz attempted to intervene, Mr. Townsel punched her. (15 RT 3561-3562.) Ms. Cruz telephoned the police, who arrested Mr. Townsel. (15 3562.) Some days later, Mr. Townsel telephoned Ms. Cruz, told her that she would "pay" for calling the police, and threatened, "you better get out of that house, something is going to happen to you because I'm going to kill your wetback." (15 RT 3563.) Ms. Cruz explained that Mr. Townsel "calls [her boyfriend] a wetback" because "he's from Mexico." (15 RT 3563.) The prosecutor specifically highlighted Mr. Townsel's offensive reference to Ms. Cruz's boyfriend as a "wetback" in his penalty phase

summation. (15 RT 3689.)

As will be demonstrated, the probative value of Mr. Townsel's threat to kill Ms. Cruz's "wetback" was substantially outweighed by its potential for prejudice in the penalty phase of this capital murder trial. The court therefore abused its discretion in failing to exclude it under Evidence Code section 352. The effect of the court's error injected otherwise inadmissible and extraordinarily inflammatory evidence suggestive of Mr. Townsel's racism against Latinos, a minority group to which the two victims in this case belonged. The cumulative effect of this error, along with the guilt phase errors discussed in Arguments I through V, *ante*, was prejudicial, deprived Mr. Townsel of his state and federal constitutional rights to a fair penalty trial and a reliable death verdict, and demands reversal of the death judgment. (U.S. Const., Amends. V, VIII, XIV; Ca. Const. art. I, §§ 7, 15, 16, 17.)

B. The Trial Court Abused its Discretion in Admitting the Evidence of Mr. Townsel's Alleged Slur Against Latinos, the Probative Value of Which Was Substantially Outweighed by its Potential For Undue Prejudice

Under Evidence Code section 352, a trial court may exclude in its discretion otherwise relevant evidence "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Upon objection by the opponent of the evidence under section 352, the court must carefully balance and weigh the probative value of the evidence against its potential for prejudice, confusion, or misleading the jury. (See, e.g., *People v. Wright* (1985) 39 Cal.3d 576, 582-583, and authorities cited therein.)

In assessing the probative value of evidence, the trial court should

consider, inter alia, whether the issue on which it is offered is disputed, whether it is cumulative of other evidence going to prove the same issue, and whether it is necessary or important to prove that issue. (See, e.g., *People v. Wright, supra,* 39 Cal.3d at p. 585; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905; *People v. Thompson* (1980) 27 Cal.3d 303, 318 & fn. 20; *People v. Avitia* (2005) 127 Cal.App.4th 185, 193-194; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 342; *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1495; *In re Wing Y.* (1977) 67 Cal.App.3d 69, 77-79.) In assessing the evidence's danger for undue prejudice, the court should consider, inter alia, whether it tends to invoke an emotional or other bias against the defendant and whether there is a danger that the jurors will consider the evidence for improper purposes or "in some manner unrelated to the issue on which it was admissible." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1016; see also *People v. Guerra* (2006) 37 Cal.4th 1067, 1114; *People v. Lenart* (2004) 32 Cal.4th 1107, 1125; *People v. Filson* (1994) 22 Cal. App.4th 1841, 1851, disapproved on other grounds in *People v. Martinez* (1995) 11 Cal.4th 1841, 1851; *People v. Hoze* (1987) 195 Cal.App.3d 949, 955.) Where the evidence carries a substantial danger of prejudicing the jury and otherwise carries minimal probative value, any doubt should be resolved in favor of exclusion under section 352. (See, e.g., *People v. Balcom* (1994) 7 Cal.4th 414, 423; *People v. Ewoldt* (1994) 7 Cal.4th 380, 406; *People v. Thompson, supra,* 27 Cal.3d at p. 318; *People v. Cardenas, supra,* 31 Cal.3d at pp. 904-905; *People v. Avitia, supra,* 127 Cal.App.4th at pp. 193-194.)

Of course, the failure to exercise discretion is "itself an abuse of discretion." (*In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 515, and authorities cited therein.) In order to demonstrate that the trial court

actually exercised its discretion in admitting evidence over an objection under section 352 and in order to facilitate appellate review of the ruling, the "record must affirmatively show that the trial judge did in fact weigh prejudice against probative value [which] has been reiterated by both the courts [citations] and the writers [citation]." (*People v. Green* (1980) 27 Cal.3d 1, 25, disapproved on another ground in *People v. Guiton* (1993) 4 Cal.4th 116, 1128-1129; accord, e.g., *People v. Zapien* (1993) 4 Cal.4th 929, 960, and authorities cited therein; *People v. Wright*, supra, 39 Cal.3d at pp. 582-583; *People v. Leonard* (1983) 34 Cal.3d 183, 188.) While this Court has held that an express statement by the trial judge that he or she has weighed the probative value of the evidence against its potential for prejudice is not necessary, the record must otherwise provide affirmative evidence from which the reviewing court can infer that the trial court did so. (See, e.g., *People v. Crittenden* (1994) 9 Cal.4th 83, 135-136; *People v. Corella* (2004) 122 Cal.App.4th 461, 472). Reviewing courts will not presume from a silent record that the trial court discharged its statutory obligation under section 352. (See, e.g., *People v. Green*, *supra*, 27 Cal.3d at pp. 24-25.)

Here, in their moving papers, defense counsel argued that the threats to Ms. Cruz should be excluded because they could be "characterized as a non-violent or non-criminal act." (3 CT 633.) At most they amounted to "a minimally egregious misdemeanor charge," was the kind of evidence that presented "'problems of prejudice, consumption of time, and diversion of effort,'" and thus was not the kind of aggravating evidence contemplated by section 190.3 or permissible under the Eighth and Fourteenth Amendments. (3 CT 633-635, quoting from *People v. Boyd* (1985) 38 Cal.3d 762, 774.) At the in limine hearing on the motion to exclude the evidence, the parties

focused on those issues, as well as whether the prosecution's offer of proof – without an evidentiary hearing – was sufficient to demonstrate the admissibility of the evidence. (15 RT 3490-3499.) At the close of argument, defense counsel also objected, "well, we are also arguing under 352 that such evidence is extremely prejudicial and its probative value is highly outweighed." (15 RT 3500.) Neither the court nor the prosecutor responded to that objection. (See 15 RT 3500.) Instead, immediately following that final objection, the trial simply ruled that all of the threats to Ms. Cruz (néeTorres) would be admitted. (15 RT 3500.) The court did not mention prejudice or issues related to prejudice arising from the evidence of Mr. Townsel's racist remark, the probative value of that evidence or issues related to probative value, Evidence Code section 352, or otherwise provide *any* indication that it had weighed the probative value of the evidence of Mr. Townsel's use of an offensive slur against its potential for undue prejudice. (15 RT 3500.) On this record, there is no affirmative evidence from which this Court may infer that the trial court actually engaged in the weighing process and determined that the probative value of the evidence of Mr. Townsel's reference to Ms. Cruz's Latino boyfiend as a "wetback" was not substantially outweighed by its potential for undue prejudice. Hence, the court abused its discretion in admitting that evidence. (See, e.g., *People v. Wright*, *supra*, 39 Cal.3d at pp. 582-583; *People v. Leonard*, *supra*, 34 Cal.3d at p. 188; *People v. Green*, *supra*, 27 Cal.3d at pp. 25-26.) In any event, even if the trial court did engage in the weighing process and conclude that the probative value of the evidence was *not* substantially outweighed by its potential for undue prejudice, its ruling constituted an abuse of discretion.

The evidence carried a tremendous danger of undue prejudice.

Obviously, Mr. Townsel's reference to Ms. Cruz's "wetback" portrayed him as a racist against Latinos. Evidence of a defendant's racism is highly likely to inflame a jury's passion against him. (See, e.g., *Dawson v. Delaware* (1992) 503 U.S. 159, 165-167 [racist beliefs are "morally reprehensible" and suggestive of bad character]; *Dawson v. State* (Del. 1992) 608 A.2d 1201, 1204-1205 [on remand from *Dawson v. Delaware*, *supra*, state supreme court held erroneous admission of evidence of defendant's racist beliefs was prejudicial at penalty phase of capital murder trial and demanded reversal]; *Burns v. 20th Century Ins. Co.* (1992) 9 Cal.App.4th 1666, 1675 [evidence suggestive of defendant's anti-Semitism was "inflammatory"].) Furthermore, evidence of racism, in and of itself, is not proper aggravating evidence under section 190.3. (Compare *People v. Monterroso* (2004) 34 Cal.4th 743, 773-774, 783 [given evidence of racial remarks during commission of crimes, evidence of defendant's racist tattoos admissible under section 190.3, factor (a) to support prosecution's theory that defendant's racist beliefs partially motivated charged crimes].) Indeed, the United States Supreme Court has held that such evidence is "totally without relevance" to the jury's decision in the penalty phase of a capital murder trial absent evidence that racism motivated the charged crimes. (*Dawson v. Delaware*, *supra*, 503 U.S. at pp. 165-167 [defendant's membership in Aryan Brotherhood prison gang, which entertains racist beliefs, was "totally without relevance" to sentencing phase of capital case in absence of evidence connecting racist views to charged murder]; cf. *Beam v. Paskett* (9th Cir. 1993) 3 F.3d 1301, 1308-1310 [character evidence of nonviolent sexual conduct, which included that defendant engaged in homosexuality and "abnormal sexual relations," was constitutionally irrelevant to sentencing decision where there was no

evidence connecting sexual history to charged crime or future dangerousness].) A juror's consideration of, and reliance on, irrelevant evidence in rendering his or her death verdict violates both the Eighth Amendment and the due process clause of the Fourteenth Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 885; accord *Johnson v. Mississippi* (1988) 486 U.S. 578, 585-586; see also *Gregg v. Georgia* (1976) 428 U.S. 153, 192 [Eighth and Fourteenth Amendments demand that aggravation be "particularly relevant to the sentencing decision"].)

Here, of course, there was no evidence at all to suggest that racism played any role in the charged crimes. Nor did the prosecution argue that the evidence of Mr. Townsel's racism in the form of his use of the term "wetback" had any relevance at all to the circumstances of the charged crimes. At the same time, while there was no actual evidence that racism played any role in the charged crimes, and the prosecution never offered to prove as much, the evidence of Mr. Townsel's slur against Latinos created the danger that the jurors would unfairly and improperly speculate that racism had played a role in the charged murders because the victims were Latinos. (See, e.g., *People v. Bush* (1978) 84 C.A.3d 294, 307 [evidence that merely points to a possible ground of suspicion could encourage jurors to engage in improper speculation and should be excluded]; cf. *Clark v. Martinez* (8th Cir. 2002) 295 F.3d 809, 814 [upholding trial court's exclusion of officer's prior act of force along with racist epithets in African-American's action against officer for assault, battery, and excessive force; while neither hostile nor racist intent was element of excessive force complaint, the jurors might use it to conclude that the officer's actions were motivated by race and therefore trial court was "well within its discretion" in concluding probative value was substantially outweighed by its danger of

unfair prejudice]; *Burns v. 20th Century Ins. Co.*, *supra*, 9 Cal.App.4th at pp. 1673-1675 [where no evidence of discrimination in particular case or company policy of discrimination, evidence of purportedly anti-Semitic conduct involving former company president was properly excluded; trial court well within discretion in ruling that "prejudicial effect of the inflammatory evidence . . . outweighed its tenuous probative value"].) Thus, the evidence not only carried the danger that it would inflame the jurors' passion and invoke a strong emotional bias against Mr. Townsel (see, e.g., *Dawson v. Delaware*, *supra*, 503 U.S. at pp. 165-167; *Dawson v. State*, *supra*, 608 A.2d at pp. 1204-1205; *Burns v. 20th Century Ins. Co.*, *supra*, 9 Cal.App.4th at p. 1675); it carried a particularly grave danger that the jurors would improperly use it to add aggravating weight to the circumstances of the crimes under factor (a). In other words, the potential for "undue prejudice" to Mr. Townsel and the case for his very life was great. (See, e.g., *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1016 [potential for undue prejudice when there is a danger that jurors will use the evidence "in some manner unrelated to the issue on which it was admissible"].)

At the same time, the evidence had minimal probative value. Under the prosecution's theory, Mr. Townsel's alleged threats to Ms. Cruz after she had him arrested for battery were relevant and admissible to prove that Mr. Townsel was attempting to dissuade her testifying against him as a witness in a possible future criminal proceeding, in violation of Penal Code section 136, subdivision (c)(1). (3 CT 878; 15 RT 3495.) According to the prosecution's offer of proof, Mr. Townsel telephoned Ms. Cruz and threatened that she was "going to pay." (3 CT 878; 15 RT 3495.) In a second call, Mr. Townsel made two threats: first, "'you better get out of the

house because something is going to happen to you[;]'" second, referring to her Latino boyfriend, he was going to "kill [her] wetback." (3 CT 878; 15 RT 3495.) Under the circumstances, the second threat was simply cumulative of the first threat going to prove the same issue – i.e., that Mr. Townsel attempted to dissuade Ms. Cruz from testifying against him in a possible, future criminal proceeding by threatening her. (See, e.g., *People v. Cardenas*, *supra*, 31 Cal.3d at pp. 904-905 [evidence carries minimal probative value if it is cumulative of other evidence on same issue]; *People v. Avitia*, *supra*, 127 Cal.App.4th at pp. 193-194.)

Indeed, the second threat was unnecessary to prove the prosecution's theory. (See, e.g., *People v. Wright*, *supra,* 39 Cal.3d at p. 585 [evidence carries minimal probative value if it is unnecessary to prove issue on which it is offered]; *People v. Thompson*, *supra*, 27 Cal.3d at p. 318 & fn. 20.) Particularly given that both threats to Ms. Cruz occurred in the same conversation, the jury would either believe Ms. Cruz's testimony that Mr. Townsel threatened her and conclude that he was thereby attempting to dissuade her from testifying in violation of section 136.1, subdivision (c)(1), or disbelieve her testimony that he had threatened her or conclude that even if he had, he was not attempting to dissuade her from testifying in violation of that statute. In other words, Mr. Townsel's threat that he was going to "kill [her] wetback" did not make it any more likely that the jurors would believe that Mr. Townsel had threatened Ms. Diaz or that he was thereby attempting to dissuade her from testifying as a witness against him in a future criminal proceeding.

Hence, the evidence was cumulative and unnecessary, rendering its probative value minimal at best, while its potential for undue prejudice was great. As this Court has observed, "'[T]he prosecution has no right to

present cumulative evidence which creates a substantial danger of undue prejudice to the defendant.' [Citation.]" (*People v. Cardenas*, *supra*, 31 Cal.3d at p. 905; accord, e.g., *People v. Avitia*, *supra*, 127 Cal.App.4th at p. 194.) The trial court abused its discretion in failing to exclude the evidence.

Finally, even if the probative value of Mr. Townsel's threat to kill Ms. Cruz's boyfriend was not substantially outweighed by its potential for undue prejudice, his reference to her boyfriend as a "wetback" carried no legitimate probative value at all. In other words, even if the threat to the boyfriend were necessary, it sufficed to show that Mr. Townsel made a threat to kill her *boyfriend*; it was entirely unnecessary, yet grossly inflammatory, to introduce the evidence that Mr. Townsel used the racist slur "*wetback*" to refer to Ms. Cruz's boyfriend because he was Mexican. (15 RT 3495, 3563.) Hence, the trial court abused its discretion in failing to exclude that evidence.

In sum, the evidence of Mr. Townsel's racism against Latinos bore minimal probative value, which was substantially outweighed by its danger of undue prejudice to Mr. Townsel in these capital proceedings. As this Court has held, evidence is substantially more prejudicial than probative and must be excluded under section 352 if it poses an "intolerable risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1114.) This was just such a case.

C. The Cumulative Effect of the Foregoing Error and the Guilt Phase Errors Was Prejudicial, Violated Mr. Townsel's State and Federal Constitutional Rights to a Fair Penalty Trial and a Highly Reliable Penalty Verdict, and Demands Reversal of the Death Judgment

As discussed in Argument VI-B, *ante*, which is incorporated by reference herein, the cumulative effect of the guilt phase errors decimating

Mr. Townsel's mental retardation defense rendered his penalty phase "defense," or his case for life, "far less persuasive than it might [otherwise] have been." (*Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 294, 302-303; see also, e.g., *Parles v. Runnells*, *supra*, 505 F.3d at p. 927.) At the same time, the erroneously admitted evidence of Mr. Townsel's racist remarks against Latinos rendered the prosecution's case for death *more* persuasive than it should otherwise have been.

As previously discussed, the evidence injected otherwise irrelevant, inadmissible and inflammatory evidence of bad, "morally reprehensible" character. (*Dawson v. Delaware*, *supra*, 503 U.S. at pp. 165-167.) It also raised the specter that the underlying crimes against the Latino victims were at least partially motivated by his "reprehensible" racist beliefs despite the absence of any evidence to prove as much. The damning effect of such speculation is patent. Society's especial condemnation of racially motivated crimes is well reflected by the severity of the punishment it metes out for such crimes. (See, e.g., Pen. Code, § 190.2, subd. (a)(16) [killing intentionally committed because of the victim's race carries mandatory sentence of life without parole or death]; *United States v. Bass* (1971) 404 U.S. 336, 347 [the severity of a "punishment . . . represents the moral condemnation of the community" against the crime].)

Furthermore, the prosecutor's summation specifically highlighted the evidence of Mr. Townsel's racism. In arguing that Mr. Townsel violated section 136, subdivision (c)(1), the prosecutor did not merely refer to the threats to Ms. Cruz and her boyfriend, which would be expected if the evidence had truly been offered only to prove a violation of that statute. Instead, the prosecutor specifically quoted Mr. Townsel's reference to Ms. Cruz's boyfriend as a "*wetback.*" (16 RT 3689.) Given that this racist

remark was legally irrelevant to proving the elements of section 136.1, subdivision (c)(1), there was no need for the prosecutor to quote it. The fact that he did so demonstrates that he treated this racist remark as important aggravating evidence in and of itself, that it is likely that the jurors likewise regarded it as important to their penalty decision, and thus is a compelling indication of prejudice. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 586 [erroneously admitted aggravating evidence prejudicial due in large part to prosecutor's argument urging jurors to give weight to that evidence in favor of death verdict, which made it likely that the jurors did just that]; *People v. Powell* (1967) 67 Cal.2d 32, 56-57 [erroneously admitted evidence prejudicial due in large part to prosecutor's closing argument relying on it, which demonstrated that the prosecution and "'so presumably the jury'" treated it as important evidence]; accord *People v. Hernandez* (2003) 30 Cal.4th 835, 877 [error prejudicial due in large part to prosecutor's reliance on it in summation]; *People v. Quartermain* (1997) 16 Cal.4th 600, 622; *People v. Woodard* (1979) 23 Cal.3d 329, 341; *Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1131.)

In sum, because the cumulative effect of the guilt phase errors made Mr. Townsel's case for life "far less persuasive than it might (otherwise) have been" (*Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 294, 302-303), while the erroneously admitted penalty phase evidence of Mr. Townsel's racism toward Latinos made the prosecution's case for death more persuasive than it might otherwise have been, the cumulative effect of the errors was prejudicial and violated Mr. Townsel's state and federal constitutional rights to a fair penalty trial and a highly reliable death verdict. (*Ibid.*; see also, e.g., *People v. Sturm*, *supra*, 37 Cal.4th at pp. 1243-1244.) The death judgment must be reversed.

VIII

MR. TOWNSEL REQUESTS THAT THIS COURT CONDUCT AN INDEPENDENT REVIEW OF THE PERSONNEL FILES THE TRIAL COURT REVIEWED IN RULING ON HIS *PITCHESS* MOTION AND DETERMINE WHETHER THE TRIAL COURT ERRONEOUSLY WITHHELD DISCOVERABLE EVIDENCE FROM THEM; IF THE TRIAL COURT DID ERR, THE EVIDENCE MUST NOW BE DISCLOSED AND MR. TOWNSEL MUST BE GIVEN AN OPPORTUNITY TO DEMONSTRATE PREJUDICE FROM THE ERROR

A. The Relevant Proceedings

As previously discussed, Correctional Officer Frank Reiland testified at the penalty phase that on June 28, 1990, Mr. Townsel was agitated while in his jail cell. (15 RT 3548-3550.) When Mr. Reiland opened the cell door, Mr. Townsel attempted to exit the cell into another secured area where two other officers were stationed. (15 RT 3549.) When Mr. Reiland pushed him back into his cell, Mr. Townsel yelled obscenities at him, kicked his knee, and punched at him, grazing Mr. Reiland's temple. (15 RT 3549.) This evidence was offered and admitted as aggravating evidence under Penal Code section 190.3, factor (b). (3 CT 607-609; 622-624; 15 RT 3504-3505.)

Prior to the commencement of the penalty phase, defense counsel moved for discovery of "any and all complaints filed or reports made against Officer . . . Reiland of the Madera Department of Corrections for excessive or unreasonable force or harassment including copies of any investigative reports thereof." (2 CT 498-499.) Defense counsel made the motion pursuant to, inter alia, *Pitchess v. Superior Court* (1974) 11 Cal.3d

531. (2 CT 499-502.)[53] In support of the motion, defense counsel Litman submitted a sworn declaration attesting, inter alia, that he had a reasonable belief that the District Attorney of Madera County and/or the Madera Department of Corrections maintained the requested records and that they were material, relevant, and necessary for the preparation of Mr. Townsel's defense because:

> the defense expects to show that if in fact the defendant used force against the officer[], such force was in defense of his person against acts of excessive and illegal force used by the police [sic] officer against him. The material sought may contain complaints of a like nature made by other individuals against [this] officer[]. Such information would be used by the defense to locate and call witnesses to testify that this officer has a character trait, habit, and custom for engaging in excessive and illegal force or harassment.

(2 CT 503-505; see also 2 CT 501-502, citing, inter alia, Evid. Code, § 1103.)

On the same date, the trial court stated that it had conducted an in camera review of Officer Reiland's report file, which contained reports written by him, his pre-employment background file, and his personnel file. (15 RT 3519.) The court determined that one report written by Mr. Reiland "appears to be significant to this case" and provided a copy to counsel for both parties. (15 RT 3519.) Upon defense counsel's query, the court agreed that it had determined that there was no other "evidence of any complaints against Officer Reiland for excessive use of force or

---

[53] The motion also requested discovery of the same records relating to Officer Rivera. However, apparently because Officer Rivera did not testify at trial and no incident relating to him was otherwise introduced, the trial court limited its consideration of the motion to Officer Reiland's files without objection from defense counsel.

harassment" and therefore ruled that no other material in the files was discoverable. (15 RT 3519-3520.)

On December 30, 1997, following the death verdict and during the pendency of record correction proceedings, the court issued the following order: "the court orders Officer Reilland's [sic] personnel file, as it existed at the time of the *Pitchess* Motion in the instant case when it was examined by the trial court, be made part of the sealed record on appeal and provided solely to the California Supreme Court." (7 CT 1648-1656.)

B. The Governing Legal Principles

On a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the personnel records of a peace officer. (Evid. Code, § 1043.) Good cause for discovery exists when the defendant shows both materiality to the subject matter of the pending litigation and a reasonable belief that the state or agency has the type of information sought. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016; *Pitchess v. Superior Court*, *supra*, 11 Cal.3d at pp. 536-538.) Once good cause is shown, Evidence Code section 1045 requires the trial court to examine the material in camera to determine its relevance to the case. (See also, e.g., *People v. Mooc* (2001) 26 Cal.4th 1216, 1226-1227.) The court must order discovery of "records of complaints, or investigations of complaints, or discipline imposed as a result of such investigations, concerning an event or transaction in which the peace officer participated, or which he perceived and pertaining to the manner in which he performed his duties, provided such information is relevant to the subject matter involved in the pending litigation." (Evid. Code, § 1045, subd. (a).)

A trial court's ruling on a so-called "*Pitchess* motion" is subject to appellate review. In order to permit such review, "the trial court should . . .

make a record of what documents it examined before ruling on the *Pitchess* motion. . . . If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. . . ." (*People v. Mooc*, *supra*, 26 Cal.4th at pp. 1228-1229.) Upon review of the trial court's ruling, the appellate court must conduct its own examination of the materials examined by the trial court and determine whether the ruling was erroneous. (*Id.* at p. 1229.) If the reviewing court determines that discoverable evidence was erroneously withheld, the evidence must be disclosed to the defendant, who must be given an opportunity to demonstrate prejudice from the error. (See, e.g., *People v. Gaines* (2009) 46 Cal.4th 172, 176, 182-183; *People v. Hustead* (1999) 74 Cal.App.4th 410, 423.)

C. This Court Must Conduct its Own Review of the Personnel Files The Trial Court Reviewed and Ordered Included on the Record on Appeal and Determine if Any Discoverable Material was Erroneously Withheld; if Discoverable Material Was Erroneously Withheld, it Must be Disclosed Now and Mr. Townsel Must be Given an Opportunity to Demonstrate Prejudice from the Error

Here, according to the trial court, it reviewed Officer Reiland's personnel records for discoverable material, thereby implicitly ruling that Mr. Townsel had shown good cause for discovery of the requested material. (15 RT 3519.) The court ruled that only one document was discoverable and thereby refused to order disclosure of any other material in the files. (15 RT 3519-3520.) According to the court's post judgment order, the files it reviewed have been included in the sealed record on appeal and transmitted to this Court. (7 CT 1648-1656.)

Pursuant to the authorities discussed in Part B, *ante*, Mr. Townsel requests that this Court conduct its own review of the files that the trial

court reviewed in ruling on his *Pitchess* motion. If this Court determines that the trial court erred in failing to order disclosure of relevant, material information, that information must now be disclosed to Mr. Townsel, who must be given an opportunity to demonstrate prejudice from the error.

//

//

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

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, Mr. Townsel briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, Mr. Townsel requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offenses charged against Mr. Townsel, Penal Code section 190.2 contained 19 special circumstances (one of which – murder while engaged in felony under subdivision (a)(17) – contained nine qualifying felonies).

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Section 190.3(a) Violated Mr. Townsel's Constitutional Rights

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 4 CT 918-920; 16 RT 3672-3673.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing. In this case, for instance, the prosecutor argued as aggravating the manner in which the victims were killed – being shot to death – that Mr. Townsel had "27 hours" to think about what he was doing, that he "disregarded the safety" of the witnesses to the killing (whom he made no attempt to harm), and indeed argued that Mr. Townsel's motive to "kill[] for his own personal and immediate needs" was "far worse" than "that of a terrorist from the PLO who came to this country who killed two individuals . . . to bring attention to the atrocities which were committed against his fellow Palestinians . . . ." (16 RT 3686-3687, 3701-3702, 3734, 3738.)

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital

sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Mr. Townsel is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Mr. Townsel urges the court to reconsider this holding.

C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

1. Mr. Townsel's Death Sentence is Unconstitutional Because It is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, Mr. Townsel's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case

outweighed the mitigating factors before determining whether or not to impose a death sentence.

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, and *Ring v. Arizona* (2002) 530 U.S. 584, 604, now require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, Mr. Townsel's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. Because these additional findings were required before the jury could impose the death sentence, *Ring, Apprendi, Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Mr. Townsel is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings. (*People v. Griffin* (2004) 33 Cal.4th 536, 595.) The Court has rejected the argument that *Apprendi, Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Mr. Townsel urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set

forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, Mr. Townsel contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This court has previously rejected Mr. Townsel's claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Mr. Townsel requests that the Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and Mr. Townsel is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, Mr. Townsel's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that

life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (4 CT 918-920, 935-936; 16 RT 3672-3673, 3746-3747), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Mr. Townsel is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Mr. Townsel's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra.* (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.)

Mr. Townsel asserts that *Prieto* was incorrectly decided, and applicaiton of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are

entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Mr. Townsel asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Mr. Townsel's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required, an instruction the prosecutor emphasized in his closing argument. (4 CT 908-909 [CALJIC No. 8.87, modified]; 16 RT 3667, 3689.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death

sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Here, the prosecution presented extensive evidence of Mr. Townsel's alleged prior criminal activity under factor (b) (15 RT 3533-3545, 3548-3550, 2560-3564, 3568-3569) and substantially relied on this evidence in his closing argument (16 RT 3689-3690, 3735-3737).

The United States Supreme Court's recent decisions in *Cunningham v. California* (2007) 549 U.S. 270, *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Mr. Townsel is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused The Penalty Determination To Turn On An Impermissibly Vague And Ambiguous Standard

The question of whether to impose the death penalty upon Mr. Townsel hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (4 CT 924.) The phrase "so substantial" is an impermissibly broad phrase that

does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed To Inform The Jury That The Central Determination Is Whether Death Is The Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens, supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Mr. Townsel urges this Court to reconsider that ruling.

6. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence Of Life Without The Possibility Of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) The court refused Mr. Townsel's request to instruct the jurors that if they found that any mitigating circumstance outweighed the aggravating circumstances, they were *required* to return a verdict of life without parole. (2 SCT 296-297; 11 CT 2653.) Instead, the court instructed the jury with CALJIC No. 8.88, which does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. (4 CT 935-936; 16 RT 3746-3747.) By failing to conform to the mandate of Penal Code section 190.3, the instruction violated Mr. Townsel's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Mr. Townsel submits that this holding conflicts with numerous cases disapproving instructions that emphasize the

prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) ___ U.S. ___ [127 S.Ct. 1706, 1712-1724; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina, supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Mr. Townsel's jury was told in the guilt phase that unanimity was required in order to acquit Mr. Townsel of any charge or

special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of Mr. Townsel's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The Penalty Jury Should Be Instructed On The Presumption Of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated Mr. Townsel's right to due process of law (U.S. Const. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th Amends.), and his right to the equal protection of the laws. (U.S. Const. 14th Amend.)

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require That the Jury Make Written Findings Violates Mr. Townsel's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), Mr. Townsel's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived Mr. Townsel of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions.

(*People v. Cook* (2006) 39 Cal.4th 566, 619.) Mr. Townsel urges the court to reconsider its decisions on the necessity of written findings.

E. The Instruction Limiting the Jurors' Consideration of Mitigating Factor (D) to Evidence That Mr. Townsel Was Acting under the Influence of "Extreme" Mental or Emotional Disturbance Violated His Constitutional Rights

As discussed in Argument II, *ante*, there was substantial evidence that Mr. Townsel committed the killings out of rage and jealousy and suffered from substantial intellectual deficits. Given that evidence, Mr. Townsel requested a modification to the standard version of CALJIC No. 8.85 to instruct the jurors that, under factor (d), they could consider as a mitigating factor any evidence that he had acted under the influence of "a mental or emotional disturbance . . . ." (2 SCT 295.) The court refused the request (16 RT 3653-3654) and instead instructed the jurors with the standard language of CALJIC No. 8.85 (as well as Penal Code section 190.3, subdivision (d)) that they could consider as a mitigating factor evidence that Mr. Townsel was acting "under the influence of *extreme* mental or emotional disturbance." (4 CT 918-920, italics added.) The prosecutor relied on this instruction to argue that the evidence did not show that Mr. Townsel had acted under the influence of "*extreme*" mental or emotional disturbance, so mitigating factor (d) was inapplicable. (16 RT 3691.) Thus, if the jurors were persuaded that Mr. Townsel acted under the influence of a "mental or emotional disturbance," but not that it was "extreme," then both the court and the prosecutor told them that mitigating factor (d) was inapplicable. Hence, the use and reliance of the restrictive adjective "extreme" acted as a barrier to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v.*

Maryland (1988) 486 U.S. 367, 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Mr. Townsel is aware that the Court has rejected challenges to this restrictive adjective (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

F. The Prohibition Against Inter-case Proportionality Review Guarantees Arbitrary and Disproportionate Impositions of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, Mr. Townsel urges the court to reconsider its failure to require inter-case proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence,

and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Mr. Townsel acknowledges that the court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the court to reconsider.

H. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms

This court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook* (2006) 39 Cal.4th 566, 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the U.S. Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), Mr. Townsel urges the court to reconsider its previous decisions.

CONCLUSION

For all of the foregoing reasons, the judgment must be reversed.

DATED: May 13, 2010

Respectfully submitted,

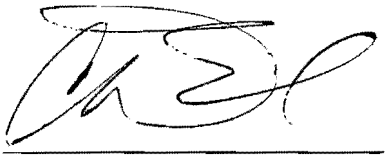
MICHAEL J. HERSEK
State Public Defender

C. DELAINE RENARD
Deputy State Public Defender
Attorneys for Appellant

CERTIFICATE OF COUNSEL
Cal. Rules of Court, rule 8.630

I, C. Delaine Renard, am the Deputy State Public Defender assigned to represent appellant, Anthony Letrice Townsel, in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 79,054 words in length.

Dated: May 13, 2010



C. DELAINE RENARD
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Anthony Letrice Townsel*

Superior Court No. 8926
Supreme Court No. S022998

I, KECIA BAILEY, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105, that I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing the same in an envelope addressed (respectively) as follows:

Luis Vasquez
Deputy Attorney General
Office of the Attorney General
2550 Mariposa Mall, Room 5090
Fresno, CA 93721

Mr. Anthony Letrice Townsel
P.O. Box H-10300
San Quentin State Prison
San Quentin, CA 94974

Madera County Superior Court
Clerk of the Court
209 West Yosemite Avenue
Madera, CA 93637

Each said envelope was then, on May 13, 2010 sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 13, 2010 at San Francisco, California.

DECLARANT