No. S099439

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

v.

REX ALLAN KREBS

Defendant and Appellant.

Superior Court for the
County of San Luis Obispo
No. F283378

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

APPELLANT'S OPENING BRIEF

Neil B. Quinn
CA State Bar Number 91010
Certified Specialist, Criminal Law
State Bar of CA, Board of Legal Specialization
323 East Matilija Street, No. 110-199
Ojai, California, 93023
Telephone and Fax: (805) 646-5832
email: quinnlaw@sonic.net

Attorney for Defendant and Appellant
REX ALLAN KREBS

DEATH PENALTY

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Attorney for Defendant and Appellant
REX ALLAN KREBS

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Prologue

The evidence of guilt in this case is straightforward: a full confession. Two young women went missing. Krebs was on parole for rape. A parole search was conducted and an eightball key chain ornament was found in his house. It was similar to one missing from one of the victims. Krebs was arrested the next day on a parole violation. Investigators conducted further searches and selected Hobson, the district attorney's assistant chief investigator, to interrogate Krebs.

Krebs, in custody, cooperated initially with Hobson's questioning and denied all guilt. But Hobson was an expert and persistent interrogator. He used a soft approach in his interviews for weeks up until April 21, when he confronted Krebs with the fact that DNA testing had connected blood on Krebs' truck seat with one of the victims. Krebs then invoked his rights, which Hobson repeatedly ignored. Krebs gave in the next day to Hobson's repeated entreaties to talk about the case by making admissions and agreeing to tell Hobson the whole truth. Hobson then for the first time read Krebs his *Miranda* rights. The admissibility of the resulting detailed videotaped confessions presents the major issue relating to the guilt phase, in addition to a *Wheeler/Batson* issue.

Rex Krebs confessed to being driven to kidnap, bind and rape. He confessed to experiencing rape fantasies since he was a youth. He confessed to being unable to control these persistent and powerful urges. He confessed to the abduction and kidnap of the two victims and to raping both and sodomizing one. He confessed that he knew it was wrong, but he couldn't stop himself. He gave detailed answers to hours of questions about the crimes. He pointed out where he buried the bodies. The videotaped confessions were played for the jury. There was no attempt to

defend against guilt, and Krebs was found guilty of all charges.

The penalty phase case for the prosecution was brief - mostly evidence of his prior sexual crimes and victim impact. The defense countered with compelling evidence of a child raised in an environment of neglect, physical and emotional abuse, and sexualized violence. There was expert evidence regarding the harmful long-term psychological damage of such an upbringing. There was also considerable evidence that despite the damage done, there was still much good left in Rex Krebs. He did well in the structured environment of a children's home into which he was placed. He also did well in the structure of prison. Outwardly, he also did well on parole, holding the trust of his employer and the love of his fiance, pregnant with his child.

But there is no doubt that under the outward signs of pro-social conduct while on parole, Rex Krebs hid a terrible secret, a cancer in his psyche. A core aspect of the defense mitigation case was to show that Kreb's history of sexual offenses was the product of a compulsive type of mental illness called a paraphilia -- a mental disorder he did not choose or cause. A leading expert, Dr. Berlin, testified that Krebs had the classic features of the diagnosis, and the disorder had seriously impaired Krebs' ability and capacity to control his sexually violent impulses.

Under California law, a disorder which impairs a person's capacity to control sexually violent impulses is a statutorily established factor in mitigation against the death penalty (as well as a statutory requirement for commitment under the Sexually Violent Predator laws). The prosecution was unable to contest the strong evidence that Krebs suffered from the disorder as their own expert Dr. Park Dietz agreed with the diagnosis.

Nevertheless, in an attempt to negate the mitigating nature of this

powerful, unchosen disorder which seriously diminished Krebs' ability to control himself, the prosecution in essence cheated. They did so by intentionally presenting testimony of Dr. Dietz in rebuttal which was false and based upon a personal philosophical view of free will which was contrary as a matter of law to that expressed by our legislature in the death penalty statute and the sexually violent predator statutes. The prosecution was able to insulate their expert from attack by securing a ruling that the experts could not be questioned on any aspect of sexually violent predator proceedings. The prosecution vilified the defense experts' theories in evidence and argument as completely outside accepted psychiatric opinion. The indisputable truth which the jury never heard is that it was the People's expert who was outside of the mainstream of experts routinely *called by the People* in SVP proceedings and who routinely testify that paraphilias *do* severely impair the ability to control sexually violent behavior. Thus the People switched experts and theories for the sole purpose of gaining an advantage, in fundamental violation of their duty to justice, fairness, and the truth. These breeches of fundamental fairness are incompatible with the special need for reliability of death verdicts, and cry out for reversal of the judgment of death.

STATEMENT OF THE CASE

Appellant Rex Allan Krebs was charged in complaint number F283378, filed May 6, 1999, in San Luis Obispo County, with crimes against two women, Rachel Newhouse and Aundria Crawford. Regarding Newhouse, Krebs was charged with murder (count 1) with special circumstance of lying in wait, kidnaping, and rape, as well as kidnaping for sexual purposes (count 3), and rape (count 4), With regard to Crawford, the complaint charged murder (count 2) with special circumstances of kidnaping, and rape, and sodomy , as well as residential burglary (count 5), kidnaping for sexual purposes (count 6), two counts of forcible rape, (counts 7 and 8), and sodomy (count 9). Prior convictions of residential burglary (three counts), rape, sodomy, and assault with intent to commit rape, all dated August 31, 1987 in case number CR14372, San Luis Obispo, were alleged under the Penal Code sections[1] 667 and 667.67.1. (1 CT 1.1)

Numerous media requests to cover the arraignment were granted. (1 CT 11-25.) At the arraignment, the contract public defender firm, Maguire and Ashbaugh, was appointed. (1 CT 26.) The defendant later pled not guilty. (1 CT 46.) The People joined in a defense motion to close the preliminary hearing, but it was opposed by a newspaper. (1 CT 110, 136, 284.) The court ruled to partially close the hearing. (3 CT 760, 785)

Numerous media requests for television and still photographs were granted for the preliminary hearing. (4 CT799-818.) Krebs was held to answer on all counts and allegations except the lying in wait special

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1 All subsequent section numbers refer to the California Penal Code unless otherwise noted.

circumstance. (4 CT 830-831)

An information (4 CT 917) was filed on 9/28/1999 charging: Count 1, murder of Newhouse with special circumstances of (1) kidnaping in violation of section 209(B) and (2) rape in violation of section 261(a)(2); Count 2, murder of Crawford with special circumstances of (3) kidnaping in violation of section 209(B), (4) rape in violation of section 261(A)(2), and (5) sodomy in violation of section 286(C). Another special circumstance, (6) multiple murder was also charged . Counts 3 and 4, relating to victim Newhouse, charged kidnaping in violation of section 209(B) and rape in violation of section 261(A)(2) respectively. Counts 5 through 9 charged the following crimes against victim Crawford: Count 5 residential burglary in violation of section 459; Count 6 kidnaping for sexual purposes in violation of section 209(B); Count 7 rape in violation of section 261(A)(2); Count 8 rape in violation of section 261(A)(2); and Count 9 sodomy by force in violation of section 286(C). Prior convictions suffered August 31, 1987, in San Luis Obispo were alleged as "strikes" under sections 667(d) and (e) and 1170.12(b) and (c) for the following: 1) rape; 2) sodomy; 3) residential burglary; 4) assault with intent to commit rape; 5) residential burglary; and 6) residential burglary. Each of these prior convictions were also alleged under section 667(A) as prior convictions numbers 7 through 12 respectively. A prior prison term resulting from a conviction in Nez Perce, Idaho on 9/16/1984 for felony grand theft was alleged as prior conviction13 under section 667.5(b). (4 CT 876.) The People gave notice that the death penalty would be sought. (4 CT 916.) Krebs pled not guilty on October 12, 1999, with trial set for April 3, 2000. (4 CT 917.)

Many motions and rulings ensued, some of which are listed here. The defense filed a motion for a partial conflict of interest regarding the

prior conviction allegations. (4 CT 952.) The court granted the motion, appointing conflict counsel Paul Phillips for that limited purpose. Later, Phillips was relieved, and conflict attorney Jay Peterson was appointed for the limited purpose. (6 CT 1550.) Peterson later informed the court that he did not intend to make any motions regarding the priors. (9 CT 2301.) A motion to dismiss counts 7, 8, and 9 under Penal Code section 995 on grounds of insufficient corpus was made (4 CT 1080) and denied. (5 CT 1175.) A motion for change of venue was made (6 CT 1495) and denied after lengthy hearing. (9 CT 2358, 10 CT 2438.) Upon the filing of a writ, the Court of Appeal stayed the trial.(9 CT 2594), and after hearing, granted the writ, ordering a change of venue. (10 CT 2658.) The parties did not agree on where the trial should be moved to and the defense objected to Monterey. (14 CT 3795.) Monterey county was selected. (14 CT 3795.) The defense moved to be relieved due to a conflict based on their contract (13 CT 3632), which was denied. (13 CT 3786.) A motion to suppress Krebs's confessions was made (15 CT 4172) and denied (18 CT 4932).

Jury selection commenced on 2/14/01. (18 CT 4902.) Trial of the prior conviction allegations was bifurcated. (18 CT 5149.) Evidence commenced on the charges on 3/20/01 (18 CT 5172) and concluded on 3/28/01. (19 CT 5238.) After arguments on 3/29/01 (19 CT 5250), the jury returned verdicts on 4/2/01 of guilty on all counts and true findings on all special circumstances. (21 CT 5752, verdicts at 21 CT 5755-5769.) The jury was polled and the verdicts entered. (21 CT 5754.)

On 4/4/01, Krebs was ordered to participate in a psychiatric evaluation by Dr. Dietz for the prosecution. (22 CT 5773.) The defense sought a writ of prohibition (12 CTW 2953), which was denied. (*Id.*, at p. 3132.) Krebs admitted all the allegations of prior crimes, and the court

found them true. (22 CT 5774.)

Evidence by the People commenced in the penalty phase on 4/17/01 (22 CT 5931) and by the defense on 4/18/01. (22 CT 5953.) The defense rested on 5/2/01. (22 CT 6020.) The People rested on 5/7/01 after rebuttal evidence. (22 CT 6029.) There was no sur-rebuttal evidence and penalty arguments commenced and concluded on 5/7/01. (22 CT 6030.)

During deliberations, a juror was excused and replaced with an alternate. (22 CT 6036, 6039.) Verdicts of death for the murder of Newhouse and Crawford were returned on 5/11/01 and were entered after polling. (23 CT 6236.) The automatic motion to modify the verdict was denied on 7/5/01. (24 CT 6306.) A motion for new trial was heard and denied on 7/17/01. (24 CT 6397.)

The defendant was sentenced on 7/18/01. (24 CT 6401.) A sentence of death was fixed for Counts 1 and 2 for the murder of Newhouse and Crawford. On Counts 3 and 4, kidnaping and rape of Newhouse, a term of 25 to life, consecutive, for each count was imposed and stayed pursuant to section 654. On Counts 5, 6, 7, 8, and 9, involving victim Crawford, for residential burglary, kidnaping, rape, rape, and sodomy, a term of 25 to life for each count was imposed, consecutive, and stayed pursuant to 654. The stay on Count 6 was permanent pursuant to section 654, the stays pursuant to 654 on all other counts were permanent upon the execution of the sentence in count 1 and 2. An additional consecutive one year term was added for the Idaho prior conviction pursuant to section 667.5(b). An additional 5 years was imposed under section 667(a). An additional 5 years each for prior convictions 1 and 2, rape and sodomy, was imposed under section 667.6. The total term imposed and stayed pending imposition of the death sentence was therefore 166 years to life, with the possibility of parole.

(24 CT 6401-6402.)

A restitution fine of $10,000.00 was imposed pursuant to section 1202.4(b). A restitution fine of $10,000.00 was imposed and permanently stayed under section 1202.45. Restitution to Gail Crawford was imposed under section 1202.4(a)(3)(b) in the sum of $70,000.00, to be treated as a civil judgment pursuant to section 1202.4(I). A $300.00 fine was imposed under section 290.3, and body fluid and prints were ordered under section 296. (24 CT 6401-6402.)

STATEMENT OF APPEALABILITY

This appeal is automatic pursuant to Penal Code section 1239.

STATEMENT OF FACTS

I

GUILT PHASE EVIDENCE

A. Introductory overview [2]

The prosecution's case was based upon full confessions by Krebs to Investigator Hobson which established the details of kidnaps, the sexual acts, the manner of death, and intent. He confessed to kidnaping two college age women for sexual purposes about 4 months apart, in November 1998 and March 1999. The first, Rachel Newhouse, was assaulted and abducted from a pedestrian bridge as she walked home drunk late at night. The second victim, Aundria Crawford, was assaulted and abducted from her apartment at night after he entered through a small bathroom window. Krebs confessed to taking both victims back to a remote cabin, where he bound and sexually assaulted them. He denied intending to kill Newhouse but admitted killing Crawford intentionally after she saw his face. Both victims were buried in a remote area near his residence.

Multiple hours of videotaped confessions were played for the jury. Hobson also testified to the admissions Krebs made in numerous recorded and unrecorded interviews. Corroborating evidence included another video which depicted Mr. Krebs in police custody pointing out the locations where the bodies of the two victims would be recovered, as well as pointing out personal property belonging to Crawford around his cabin. An eight-ball key chain similar to Crawford's was found in Krebs's cabin. DNA

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[2] This section is designed only to orient the reader. Details and citations to the record follow in the sections below.

from the blood spots on the bridge matched blood stains on the jump seat from Mr. Krebs' truck, which had been removed and stored at his house. After digging where indicated by Mr. Krebs, Ms. Newhouse's body was found dressed only in a shirt and bra as he stated. Ms. Crawford's body was found dressed in a sweatshirt and sweat pants, bound with rope and plastic flex ties, with a bandanna around her face. No evidence of sexual assault or semen could be detected by examination of either victim. The cause of death in both cases was asphyxia.

The jury was also told in the guilt phase of Krebs' status as a parolee, including his convictions for rape, sodomy and burglary. The victim of this rape was called as the first witness. The defense did not call any witnesses.

B. Summary of guilt phase evidence

1. Evidence of prior rape, conviction, and parole

The first witness, a woman identified to the jury only as Shelly C. (23 RT 6087), testified that in 1987, 12 years before the charged events, she was accosted in her own bed at knife point, tied up, then raped and sodomized. (23 RT 6097-6100.) Her clothing was cut off. (23 RT 6099.) She avoided attempts to gag and blindfold her by stating she would not scream or look at him. (*Ibid.*) She was hogtied after the assault. (23 RT 6101.) The assailant fled after hearing her roommate's car, saying " Have a nice day." (23 RT 6102.) He had a strong odor of alcohol about him. (23 RT 6105.) The next witness, a police officer, John Ferdolage, testified that Krebs confessed to this crime and pled guilty. (23 RT 6111, 6114). Mr. Krebs said at the time "I want counseling, but I'm afraid of the time" and "I don't know why I did it." (23 RT 6111-6112.)

David Zaragoza, a parole officer, testified that Mr. Krebs was paroled for the 1987 residential burglary, rape and sodomy charges on 9/2/97. Krebs was on "high control" supervision with mandatory visits and drug testing. (24 RT 6454-6455.) He opined that Crawford's abduction was similar to the prior crime. He decided to visit Krebs at his home, and was suspicious when Krebs stated he had injured his ribs falling on a wood pile. (24 RT 6455-6456, 6465.)

2. Circumstances of the victims' disappearance

a. Newhouse

Nicole Tylenda was a roommate of Newhouse. (23 RT 6127.) She went running with Newhouse on 11/12/98, and first heard she was missing the next day around 6pm. (23 RT 6130, 6132.) She testified to Newhouse's plans and a series of concerned telephone calls. (23 RT 6131-6133.) Both of them used the Jennifer street bridge. (23 RT 6134.) Adrienne Gunness, another roommate, testified that Newhouse had plans to attend a fraternity party and party at Tortilla Flats in the evening of 11/12/98. (23 RT 6138.) Newhouse last called her that evening at 8:30 pm. (23 RT 6138.) Gunness was called by Tylenda at 6:00 p.m. on the 13th regarding Newhouse being missing, and she in turn called the police. (23 RT 6139-6140.) She testified that Newhouse's parents arrived early on the 14th. (23 RT 6141.) She knew that Newhouse would be drinking that evening and did not expect her home. (23 RT 6142.)

Andrea West testified she was good friends with Newhouse and described their studies. (23 RT 6160-6163.) West described the day's activities of shopping and socializing, down to the Sugar Pops and peanut butter sandwiches they ate. (23 RT 6166-6169.) She dressed with Newhouse for the parties on the evening of the 12th and went with her to the

parties. (23 RT 6169.) She identified watch and jewelry worn by Newhouse. (23 RT 6170.) They went drinking at a pre-party before going to a planned event for dancing and drinking at Tortilla Flats. (23 RT 6172-6176.) West had an argument with Newhouse in the bathroom of Tortilla Flats around 11:30 p.m. (23 RT 6179-6180.) She last saw Newhouse intoxicated around that time. (23 RT 6180.) The Jennifer Street bridge (hereafter JSB) was used to walk from Tortilla Flats to her residence. (23 RT 6181.) Newhouse's car was still in the driveway the next morning. (23 RT 6182.) West received calls the next day from Tylenda and others. (23 RT 6184.)

Kevin Lewis crossed the JSB about 12:30 am on Friday 11/13/98 and saw red drops on the steps of the stairs leading to the bridge. (23 RT 6152, 6155.) He placed a paper bag on the drops and thought it was fresh blood. (23 RT 6153-6154.) The bridge was well lit. (23 RT 6155.) He had possession of the bag when he was talked to by Officer Tushbant, but threw it away later. (23 RT 6158.) Theresa Audio , another Cal Poly student, crossed the JSB a little earlier at 11:30 and saw nothing unusual. (23 RT 6193.) The next morning about 8:30, she saw a large pool of blood at the end of the bridge right before the ramp on the side by the railroad station and reported it to the police, who were already aware of it. (23 RT 6194-6199.)

b. Crawford

Stephanie Nicolopoulous described her friendship with Aundria Crawford. (23 RT 6300-6303.) She identified videos owned by Crawford. (23 RT 6305.) She visited Crawford 3/10/99 and made plans to go to a show with her on the evening of March 11. However, Crawford failed to

return her pages on March 11, and failed to meet as planned. (23 RT 6308-6309.) Nicolopoulous called Josh Bean, Crawford's prior boyfriend, and went to Crawford's apartment trying to find her. (23 RT 6309-6311.) She had a telephone conversation with Crawford's mother the morning of March 11. (23 RT 6311-6312.) Justin Park had an hour long conversation with Nicolopoulous early in the morning on 3/10/99. (24 RT 6365.) By stipulation, the phone bill showed the call to be from 1:42 a.m. to 2:46 a.m. (27 RT 7196.) Park was first contacted by the police on March 12. (24 RT 6367.)

Crawford's mother Leslie Crawford testified she was very close to her daughter and familiar with her property. (24 RT 6423- 6424.) Crawford wore contact lenses and had an 8 ball trinket on her key chain. (24 RT 6425-6427.) Crawford also wore a Hard Rock Café logo sweat shirt for special occasions (24 RT 6427) and wore an Aztec Sun sweat shirt frequently (24 RT 6432). She identified videos and CDs belonging to Crawford as well as an earring received into evidence, Exhibit 16. (24 RT 6430-6431.) Sonja Lowrey, a friend of Crawford's, identified Exhibit 20 as a photograph of Crawford and herself at a party in 1998 when Crawford was wearing the Aztec Sun sweatshirt. (24 RT 6437.)

Officer John Paulding took a call from Crawford's mother on the night of March 12 and responded to the residence. Crawford's Mustang was parked outside and the residence was dark. (23 RT 6315-6316.) The mother called him again early the next morning, and he responded again around 5:15 a.m. (23 RT 6320.) Crawford's Mustang was parked on the street unlocked, with her purse inside, but no keys. (23 RT 6322.) The landlord arrived, they went inside, but he located no one, and saw no obvious signs of foul play. (23 RT 6324.) Crawford's mother explained to

Paulding that Crawford had missed an appointment with a friend and he took a missing persons report. (23 RT 6325.) Officer Mark Brady searched Crawford's apartment without success for dark sweats reported missing by Crawford's mother. (23 RT 6634.)

3. Investigation concerning the crimes

a. Newhouse

Police Officer Chris Staley testified he responded to the bridge in response to a report of blood at 7:45 a.m. on November 13, 1998. (23 RT 6224.) He saw the blood and made a request through dispatch that city workers come to clean up the blood. (23 RT 6225.) Another officer, Tushbant, requested that a swab of the blood be taken for another case. (23 RT 6226.) He reported back to the bridge about 5 p.m. on the 13th and took a sample after the area had been washed. (23 RT 6228.) Dispatch had received more than one call concerning the blood. (23 RT 6232.) Officer Tom Depriest photographed the bridge and collected evidence on Sunday, November 15,1998. (23 RT 6239.) He described the location of additional swabs which were taken as well as a hair collected in a bloodstain in the parking lot by Officer Bresnahan. (23 RT 6244-6246.) The area was not blocked to traffic. (23 RT 6247.)

Gil Rendon, evidence technician with the San Luis Obispo police department testified he went to the JSB on Monday, November 16, 1998 and examined the scene. (23 RT 6271.) He found traces of blood on the steps and hand rail. (23 RT 6274.) He testified to an opinion that a person was accosted at top, helped or dragged down, laid at bottom, then put in a vehicle. (23 RT 6275-6277.) A potential bloody handprint on the handrail was located, and he removed handrails. (23 RT 6278.) He also described

the barcode system for chain of custody and listed barcodes for referenced evidence. (23 RT 6279-6280.) He also took additional swabs from the scene the next day on November 16. (23 RT 6284.)

FBI Laboratory Examiner Robert Fram opined that the hair from the parking lot had the same microscopic characteristics consistent with the hair from Newhouse's hair brushes. (23 RT 6819.)

FBI agent David Kice mapped the blood stains at the JSB. (26 RT 6806-6807.) He returned to assist in searches and in exhuming the bodies from the locations described by Krebs. (26 RT 6808.) Newhouse was buried about .3 miles from Krebs's apartment. (26 RT 6877.) There was a brush pile over the burial site. (26 RT 6882.) The burial site was not discernable even with the brush removed. (*Ibid.*) They laid out a grid and dug, finding her under a layer of wire mesh. (26 RT 6882-6887.)

The autopsy was conducted by Dr. George Sterbenz. He was also present at the exhumation. (27 RT 7135.) The body was more decomposed than Crawford's. (27 RT 7138.) A sexual assault examination was done, with negative findings. Due to the decomposition, this did not rule out sexual assault. (27 RT 7138-7140.) Newhouse was wearing a blue shirt and a bra. (27 RT 7141.) Her shirt was cut up the back, her bra was clasped. (27 RT 7143.) She had two stud earrings in left ear, one in right and a bracelet inscribed "Rachel". (27 RT 7142.) The body had no other clothing. (27 RT 7144.) A possible head injury was indicated., but the organs were otherwise normal. (27 RT 7144-7145.) Cause of death was asphyxia. (27 RT 7148.)

Officer Keith Storton viewed the autopsy and described Newhouse's earrings and Quicksilver watch found on her body, along with a silver bracelet engraved "Rachel". (25 RT 6597-6598.) FBI Evidence Response

Team member David Johnson searched the cabin after Kreb's confession (25 RT 6614) and found blood drops on and below the larger sofa where Krebs indicated he raped Newhouse. (25 RT 6622, 6625.) He also located a dusty footprint on the arm of a chair. (25 RT 6625.) The cushions of the sofa were collected by Officer Mark Brady. (25 RT 6627, 6636.)

Rodney Andrus, the Assistant Laboratory Director of the California Department of Justice crime laboratory, testified to DNA test results. DNA from stains from the JSB (Jennifer Street Bridge) were consistent with the offspring of the parents of Newhouse. (25 RT 6675-6678.) Anal and vaginal swabs were negative for sperm or semen. (25 RT 6709.) DNA from the stains on the couch and from a jump seat from a truck belonging to Krebs were also consistent with the Newhouse DNA profile. (25 RT 6713.) Deborah Hobson from the FBI DNA laboratory testified that the various blood stains from the JSB were from the same source and that the child of Newhouse's parents could not be excluded as the source. (26 RT 6842-6843.) Arthur Eisenberg, a researcher at the University of North Texas, testified that using the DNA results provided to him, it was 99.999999 certain that the samples from the bridge came from a child of Newhouse's parents. (26 RT 6864-6866.)

b. Crawford

David Zaragoza visited Krebs' home on 3/17/99 because he was suspicious because of the similarities of his committing offense with the Crawford disappearance. (24 RT 6456.) Krebs said at the time he injured his ribs by falling in a woodpile. (24 RT 6465.) Zaragoza related his concerns to Officer Tushbant and members of the California Department of Justice Sexual Predator Apprehension Team (SPAT). (24 RT 6467-6468.)

He performed a parole search of Krebs residence on March 19, 1999, with the help of the SPAT agents. (24 RT 6470.) He seized wooden boxes with an eight-ball trinket and BBs. (24 RT 6472.) Krebs stated he had a BB gun at work. (*Ibid.*) Zaragoza, in the company of the SPAT agents, went to 84 Lumber, where Krebs worked, the next morning, March 20. Zaragosa arrested Krebs there for a parole violation, possession of the BB gun. (24 RT 6476-6478.) Krebs cried in the car after he was arrested. (24 RT 6479-6481.)

Deborah Wright, Krebs' neighbor and daughter of his landlord, saw Krebs and his truck on the morning of March 13, 1999 near a woodpile by the road near his house. (24 RT 6514, 6519.) She talked with him at that time for a bit. (24 RT 6521.) Krebs did not appear to be intoxicated. (24 RT 6521.) Krebs and his girlfriend Roslynn visited that weekend, Krebs was normal, joking, and happy. (24 RT 6522.) He stated he had injured his ribs soon after talking with her. (24 RT 6523.) Murial Wright was shocked to learn of Krebs' arrest, and gave permission to the police to search the premises. (24 RT 6511-6512.) Krebs rented an apartment called the barn apartment, but there was a nearby unfinished A frame cabin. (24 RT 6502-6503.)

Raymond Pitesky, a member of the FBI Evidence Response Team, found the jump seat from Kreb's truck in his storage area on April 6, 1999. (24 RT 6532, 6537.) It had stains testing positive for blood. (24 RT 6538-6539.) After Krebs' confession, flex ties were found in his room by Janice Mangan. (24 RT 6550-6551.) She testified the keys were found by others using metal detectors on the hillside where Krebs said he threw them. (25 RT 6569-6570.) Lead Detective Jerome Tushbant testified the keys fit Crawford's apartment. (25 RT 6576.) He also booked blood samples from

Crawford's parents. (25 RT 6574-6565.) He had Officer Storton inquire into the uniqueness of the 8 ball trinket, and found it was not as unique as thought. (25 RT 6581-6582.) Officer Keith Storton went through the small bathroom window of Crawford's apartment. (25 RT 6586-6588.) He determined by examination that the jump seat found in the storage area came from Kreb's truck. (25 RT 6494-6495.) He attended the autopsies and described the clothing and jewelry, ropes and flex ties on her body. (25 RT 6596-6600.) He examined and matched the ties to those found in Krebs' room. (25 RT 6601.)

Rodney Andrus testified DNA tests from Crawford's apartment were consistent with her DNA. (25 RT 6678-6680.) Special Agent David Kice testified to exhuming Crawford from the location Krebs indicated close to his house. (26 RT 6882.) The site was well hidden. (26 RT 6892.) The body was located about 2 feet down, dressed in dark fabric, with fabric around her head, and flex ties on her hands. (25 RT 6893-6894.) She was in the fetal position. (*Ibid.*)

Dr. George Sterbenz performed the autopsy. The body was dressed in a Hard Rock Café sweatshirt and dark sweat pants, with a bandanna blindfold. (27 RT 7152.) There were ropes around the neck, torso, hands and feet. (*Ibid.*) There were flex ties on the wrists, which were bound in front. (27 RT 7156.) There was a laceration to the inner cheek. (27 RT 7154.) Cause of death was asphyxia by ligature strangulation. (27 RT 7161.) A diagram, Exhibit 162, portrayed how the ropes tied could have been used to create lethal tension when the victim was hogtied. (27 RT 7167-7168.) He participated in a re-creation of the bindings on a female officer. (27 RT 7166.) He believed the ropes were cut for burial purposes. The diagram was meant to show the ligatures at burial. (27 RT 7192-7193.)

4. The confessions, videotapes, and statements

Krebs was interviewed by Larry Hobson, the assistant chief investigator employed by the District Attorney, on several occasions while he was in custody for the parole violation. After an initial period of denial, he gave complete confessions to both crimes on April 22, 1999 and several times thereafter. Videotapes of the interviews conducted on April 22 (Exhibit 151, 26 RT 7021, Transcript at 21 CT 5491) and April 27 (Exhibit 166, 26 RT 7067, Transcript at 21 CT 5694) were introduced and viewed by the jury. An additional videotape of Krebs pointing out the burial sites and other things at his house in Davis Canyon was also played for the jury, but it was without sound, and no transcript was made. (Exhibit 153) In addition, Hobson gave oral testimony summarizing the other interviews, all as detailed below.

a. Statements from introduced videotaped interviews relating to Newhouse

The details of the Newhouse crimes as described by Krebs in the transcript of the April 22, 1999 videotaped confession viewed by the jury are as follows. He had been drinking at bars in San Luis Obispo the evening of 11/12/98 when he spotted Newhouse, a stranger to him, obviously drunk and walking alone, apparently headed to a pedestrian bridge known as the Jennifer Street Bridge (hereafter JSB). (21 CT 5492-5495.) He drove to the bridge, parked, went to the top and waited. (21 CT 5497-5498.) When she attempted to pass him, he struck her in the face, she screamed, then he tackled her to the ground. (21 CT 5503-5504.) Her head hit the pavement, he struck her again, rendering her unconscious and bleeding. (21 CT 5505-5506.) He dragged her by the hair to his truck, and placed her in the back passenger portion of cab where the jump seats were.

(21 CT 5507-5509.) He bound her with rope and gagged her with her panties and rope while she was unconscious. (21 CT 5509-5511.) The panties were removed by ripping them without removing her pants. (21 CT 5514.)

Krebs had been drinking 6-7 shots of Jack Daniels whiskey earlier. (21 CT 5517-5518.) He drove out to the secluded rural location where he lived. (21 CT 5518.) Nearby his residence was an abandoned A frame cabin belonging to his landlord. (21 CT 5519.) He took Newhouse to the cabin, untied her legs and un-gagged her, but kept her hands tied. (21 CT 5520.) She was now conscious and cussing at him. (21 CT 5521.)

He raped Newhouse vaginally. (21 CT 5521-5522.) He then gagged her with her panties and hogtied her on her stomach, pulling her legs up in an L shape and tied to a rope around her neck. (21 CT 5523-5525.) He left the room and drove to his residence where he drank a shot of whiskey. (21 CT 5524-5525.) His plan was to take her back into town and let her go. (21 CT 5540).

He went back to the cabin after about 15 minutes and found her dead when he arrived. (21 CT 5526.) He panicked and walked around in circles, then carried the body out behind the cabin to a concealed location and went home. (21 CT 5527.) He returned the next morning, and drove a short distance to where he had been cutting wood, and dug a grave about 20 yards up a hill. (21 CT 5528-5532.) He waited to bury the body until later that night. (21 CT 5530.) He put the body in the back of the truck. (21 CT 5531.) He cut the rope connecting her neck and feet and placed her in the grave (21 CT 5538.) He drew a diagram indicating the location of the grave during the interview. (21 CT 5532-5533.)

Prior to burying her, he noticed blood inside the cab on the carpet

and on his jump seat and seatbelt. (21 CT 5534-5535.) After he attempted to clean the blood without success, he unbolted and took out the jump seat and cut out the spots on the carpet and seat belt. (21 CT5535-5536.) He stored the bloody jump seat at the cabin where it was later found. (21 CT 5537.) He never intended to kill Newhouse. (21 CT 5539.) He was going to take her back to town to release her. (21 CT 5540.)

In the April 27, 1999 videotaped interview, after the bodies had been recovered, Krebs clarified certain details. Krebs described raping Newhouse on the larger sofa in the cabin (21 CT 5702) while she was on her back (21 CT 5703-5704). He did not use a condom. (21 CT 5704.) He only had vaginal intercourse with her. (21 CT 5704.) He did not shock or torture her. (21 CT 5705.) Newhouse had regained consciousness, spit out the gag, and was cussing at him all the way up Davis Canyon Road. (21 CT 5706-5707.) He didn't respond other than to tell her to be quiet. (21 CT 5712.) He felt angry at her and wanted to rape her. (21 CT 5707-6708.) She was quiet after the rape. (21 CT 5709.) After the rape he was not angry and did not tie her so tight that he thought she would die. (21 CT 5709.) He may have gagged her prior to leaving the cabin after the rape. (21 CT 5711.) He did not talk to her at the cabin. (21 CT 5712.) He was planning to wash and douche her to avoid leaving DNA. (21 CT 5713-5714.) He did not use a mask or gloves. (21 CT 5730.)

b. Statements from introduced videotaped interviews relating to Crawford

In the April 22, 1999 videotaped interview, Krebs also fully confessed to raping, sodomizing, and intentionally killing Aundria Crawford on 3/11/99 as follows. He first saw Crawford by her car in front

of her apartment about a week prior to the crimes. (21 CT 5544.) He went into the back yard and peeked into the house, viewing a little of her for a few minutes and left. (21 CT 5545-5546.) He always drove his truck there, and never his Dodge Colt. (21 CT 5546.) He returned about a week later, got on the roof behind her house where he was able to see into her loft. (21 CT 5550.) He saw her take her clothes off. (21 CT 5551.) He went back a third time, and viewed her again from the roof for about 10-15 minutes. (21 CT 5553.) He had been drinking each time he went. (21 CT 5554.) He went back a fourth time and abducted her. (21 CT 5555.) It was very late, perhaps 2:00 to 3:00 a.m. after he had been drinking about a half of a fifth of Jack Daniels. (21 CT 5558-5559.) He decided to take her after drinking. (21 CT 5559.)

He gained entry through a small bathroom window. (21 CT 5560.) He stood on a railing and crawled in feet first, ending up in the bathtub area. (21 CT 5560.) He hurt his ribs going thru the window. (21 CT 5564.) He heard a noise on the other side of the door. (21 CT 5562.) It scared him and he thought of leaving, but did not think he could get out the window without making more noise. (21 CT 5564.) He waited, then opened the door to find that it was a cat, who was in another section of the bathroom. (21 CT 5564.) Soon thereafter, Crawford opened the other door. He hit her 3-4 times in the mouth, rendering her unconscious and bleeding. (21 CT 5565-5566.) She was wearing a T-shirt and underwear. (21 CT 5566.) He hogtied her hands and feet together with rope he had brought with him. (21 CT 5567-5568.) He gagged her with duct tape he brought. (*Ibid.*) He put a pillowcase from her apartment over her head. (21 CT 5569.) He was wearing panty hose over his head and had brown gloves on. (21 CT 5570.) He collected some sweats to keep her warm, and also took a VCR and

videotapes, as well as music CDs. (21 CT 5571-5573.) The VCR and videotapes were eventually disposed of by the road to his house. (21 CT 5573-5574.) The sweats remained at his house. (21 CT 5575.)

Crawford regained consciousness and he placed her in the rear cab area of the truck. (21 CT 5578.) He went back in the apartment to try to wipe up the blood using a towel. (21 CT 5579.) He took her keys, which had an eight-ball token on it. (21 CT 5580.) He later put the eight-ball in a wooden box and threw away the keys on the hillside above his house. (21 CT 5581-5582.)

He drove back and placed her in the abandoned cabin near his residence, took her inside, and left her tied on the couch. (21 CT 5585.) It was starting to get light. (21 CT 5586.) He drove to his residence, drank more Jack Daniels. (*Ibid.*) He then drove down where he had been cutting wood because he knew that Debbie Wright, his landlords daughter would be traveling by on her way to work, and he wanted her to see him. (21 CT 5587.) He talked with Ms. Wright briefly, then returned to the cabin and brought Crawford to his residence in his truck. (21 CT 5589.) They got to the residence around 8:30 a.m. She was conscious at this time. (*Ibid.*) He put her on the bed in the bedroom, leaving her hands and feet tied separately. She still had the duct tape and pillowcase over her mouth and head. (*Ibid.*) He used scissors to cut off her T shirt. (21 CT 5593.) He then pulled or tore off her panties and raped her vaginally and anally and ejaculated. (21 CT 5590-5591.)

Afterwards, he went into the kitchen and drank Yukon Jack whiskey and coffee. (*Ibid.*) He passed out on the couch and woke about an hour later. (21 CT 5592.) He then raped her again. (21 CT 5593.) He untied her feet prior to the second rape (*ibid*) and took the tape off her mouth (21 CT

5594). She was crying and pled with him to let her go. (*Ibid.*) He did not talk to her. (*Ibid.*) The second rape occurred as she was bent over a coffee table. (21 CT 5596.) He had taken the pillow case off Crawford, but put a bandana blindfold on her. (*Ibid.*) After the second rape, he led her back into the bedroom, and let her put on her black sweat pants and sweat top which he had taken from her apartment. (21 CT 5597.) He put the sweat shirt on her over her arms, as they were still tied. (21 CT 5598.) He placed her on the bed, and went and lied down on the couch and fell asleep again. (*Ibid.*)

He awoke to noise and saw Crawford coming out of bedroom with the blindfold off, but her hands still tied. (21 CT 5599.) He subdued her, then strangled her with the rope that was used to tie her feet. (*Ibid.*) She died after he pulled the rope tight from over her back, while she laid on her stomach. (21 CT 5600.) He put her body on the floor in his bedroom so he did not have to look at what he had done and got drunk. (*Ibid.*)

He then dug a grave near his house and buried her the same afternoon. (21 CT 5605.) He drew a diagram indicating the burial site. (21 CT 5601.) The ropes were still on her. (21 CT 5602.) She was wearing the sweat pants and shirt when he buried her, and he had an additional sweatshirt from Crawford's house in his closet in his residence. (21 CT 5603.) He agreed to go to the burial sites to point out the bodies. (21 CT 5606.)

In the videotaped interview by Hobson on April 27, 1999, Krebs was questioned further about the Crawford crimes. Krebs stated he gave Crawford some water to drink, and led her in to use the bathroom when requested. (21 CT 5701.) Neither a mirror nor wires found in the cabin had anything to do with the crimes. (21 CT 5705.) After Crawford saw him, he knew he would have to kill her. (21CT 5720.) The sequence of events

when he strangled her was clarified. After she saw him, he started to hogtie her as he did with Newhouse, thinking that she would strangle herself and he would not have to do it. (21 CT 5720.) As he was doing it, she flexed her legs and broke a rope. (21 CT 5721.) He killed her when she broke the rope and started to struggle. (21 CT 5722.) He had already placed a blindfold on her. (*Ibid.*) He grabbed the ends of the rope around her neck and pulled on it when the other rope broke. (21 CT 5723.) He thinks this sequence is more accurate. (*Ibid.*) He probably would have kept her longer if she had not struggled. (21 CT 5724.) The longest he would have kept her was until that night. (21 CT 5726.) He felt angry and sick when he pulled on the rope. (21 CT 5534-5535.) The killing did not provide any sexual thrill nor was it part of the fantasy. (21 CT 5735.) He denied taking a camera from Crawford's house and denied other recent crimes, prowling and burglaries. (21 CT 5746.) He was attracted to Crawford when he first saw her because she youthful and had a nice figure. (21 CT 5736.)

c. Other statements from the transcripts of the introduced videotaped interviews

The interviews of April 22nd and 27th played for the jury also touched on the motivation and fantasies involved in the crimes, as well as Krebs' prior criminal acts, and other subjects.

In the April 22nd interview, Krebs said the following. He wanted to tell his girlfriend Roslynn and his supervisor from work, Greg, about the crimes prior to her hearing about it otherwise. (21 CT 5607.) He did not injure his ribs falling on a woodpile as he had told others. (21 CT 5604.) He had not told anyone before about the crimes. (21 CT 5604.) There were no other victims. (21 CT 5605.)

During the April 27 interview, Krebs stated in regard to the Crawford crime, he was "acting out a fantasy" that he had for a number of years, starting prior to being in prison. (21 CT 5716.) Stranger rape was part of the fantasy. (21 CT 5517.) Sexual pleasure as well as dominance is involved. (21 CT 5718.) Ropes play the part of control. (*Ibid.*) He said there were no unknown rapes and that he had attempted rape with a girl under a bridge in Sandpoint. (21 CT 5726-5727.) He started having the fantasy at age 14 to 15. (21 CT 5727.) He looked at Playboy and Penthouse, but the fantasy came on its own. (21 CT 5728.)

The fantasy did not always involve a stranger. (*Ibid.*) Initially, the fantasy involved raping his mother due to his anger against her. (*Ibid.*) His offenses in 1987 were about getting back at his Mom. (21 CT 5729.) The fantasies always involved tying victims up, cutting off their clothes. (21 CT 5743.) Killing was not part of the fantasy. (21 CT 5735.) Torture was not part of the fantasy. (21 CT 5742.) He felt sick, and sorry for the victims when he saw flyers around town regarding their disappearance. (21 CT 5737.)

Asked why he confessed rather than invoking his rights, Krebs stated "Cause what I did was wrong, and it needs to be paid for." (21 CT 5743.) Confronted with the fact that he had initially denied the crimes and asked what changed on the 22nd of April, Krebs responded "Conscience". (*Ibid.*) He knew he was caught when confronted with the blood on the jump seat. (21 CT 5744.) He probably would not have confessed without the blood evidence. (21 CT 5745.)

When confronted with an allegation that an anonymous caller identified him as a person who shot somebody three times in the chest over a drug deal in Santa Barbara just prior to going to prison in 1987, Krebs

denied it was him. (21 CT 5747.) The transcript provided to the jury however had the following notation at that point in parenthesis: " (Later, KREBS admitted shooting a white male in Santa Barbara.)" (*Ibid.*) Krebs admitted using drugs in 1987. (21 CT 5747.)

d. Hobson's testimony regarding Krebs' statements

In addition to the three videotapes viewed by the jury, the People introduced the testimony of Assistant Chief Investigator Hobson regarding the statements made in these and other interviews. (26 RT 6934.)

Hobson detailed his training and expertise in interrogations and polygraph examinations. (26 RT 6935-6937.) He worked on more than 100 homicides. (26 RT 6937.) The FBI, District Attorney, Police, Department of Justice, and the Sheriff were all involved in this case. (*Ibid.*) He worked on the case since November 13, 1998. He attended briefings, and there were ten to sixty people following leads. They worked seven days a week, eight to sixteen hours day with few days off. (26 RT 6938.)

On Sunday, March 21, 1999, he was informed of Krebs' arrest and assigned to interview him. (26 RT 6939.) He and Doug Odom, the District Attorney Chief Investigator interviewed Krebs for forty five minutes in an unrecorded interview. (26 RT 6940-6941.) Krebs' demeanor was quiet, nervous, and tense. (26 RT 6942.) They talked about his living situation, girlfriend, and work. Krebs was looking forward to being a father. (26 RT 6942-6944.) Krebs couldn't recall what he was doing on Nov. 12 and 13, 1998. (26 RT 6944.) Krebs said that on March 11th, he rose early, had coffee, and split wood. (26 RT 6946.) Deborah Wright drove past. (*Ibid.*) Afterwards, he walked in the creek area, slipped on a wood pile and injured

his ribs. (*Ibid.*) Krebs had seen the fliers re the missing girls. (26 RT 6947.) He denied being at Tortilla Flats or Branch Street. (*Ibid.*) Krebs owned a 1993 Ford Ranger and a Dodge Colt. (26 RT 6948.) The eight-ball found at his house was obtained in prison and kept in a hobby box. (26 RT 6949.) Hobson did not say Crawford was missing a similar ball. (*Ibid.*) Krebs said he would help with the investigation and gave permission to search his vehicles, Davis Canyon, and house. (*Ibid.*) Krebs agreed that Hobson could come back and talk. (26 RT 6950.)

Hobson then arranged for Krebs' girlfriend Roslynn to do a recorded "cool-call" to Krebs on March 24, 1999 at 11:00 a.m. (26 RT 6951-6952.) Hobson thought it was significant in the call that Krebs did not deny the crimes and that he wanted to know what police were doing. (26 RT 6953.)

The next interview was on April 1. (*Ibid.*) Hobson did the interview alone and unrecorded. (26 RT 6954.) He told Krebs that was going to publish pictures of Krebs and his vehicles to the public. (26 RT 6956.) Krebs was confident that would be cleared. (*Ibid.*) Hobson stated Krebs made certain statements inconsistent with his previous interview. (26 RT 6957.) He now said he drove his truck to the wood pile; and that he had driven on Branch Street, where Crawford lived. (26 RT 6957-6958.) Hobson told Krebs that eight-ball was not manufactured till 1998.[3] (26 RT 6958.) Krebs was silent for a bit, then said "that's strange." (*Ibid.*) Krebs remained willing to talk again, and was willing to go to Crawford's apartment to help. (26 RT 6959.)

The next interview was on April 21. (26 RT 6966.) The results of the testing on the jump seat had just been obtained. (*Ibid.*) Hobson saw Krebs

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[3] There is no evidence in the record to suggest this is true.

at the jail, and had a short, unrecorded conversation. (26 RT 6968.) Then Krebs was taken to the Police Department where a two hour videotaped interview ensued. (26 RT 6969.) Hobson showed pictures of the victims to Krebs. (26 RT 6969.) Krebs continued his denials and repeated his story. (26 RT 6970-6971.) Krebs said he felt violated by the investigation and falsely accused. (26 RT 6971.) Hobson brought up his conviction regarding Shelly C. (26 RT 6973.) Krebs said it was wrong and he knows what he did in 1987. (26 RT 6974.) Krebs admitted to some rape fantasies while in Soledad. (*Ibid.*) Hobson asked Krebs if other people made him do those things or he made himself do those things. Krebs answered that he hated women, and had no respect, but has since lost that attitude and developed new ones. (26 RT 6975.)

Hobson confronted Krebs about the eight-ball, saying it was Crawford's, and it was found in his room. (26 RT 6977.) Krebs denied it, saying it was a different eight-ball. (*Ibid.*) Hobson then confronted Krebs by saying the blood tests on the jump seat showed the blood came from Newhouse. (26 RT 6979.) Krebs was silent. (*Ibid.*) Hobson asked for the location of girls. Krebs requested a cigarette and a half-hour alone. (*Ibid.*) Krebs said he was thinking of dying. (*Ibid.*) Krebs said he didn't want to help at the moment and did not want to talk to Hobson further. (26 RT 6980.) Krebs said he would call from jail if he wanted to talk. (26 RT 6981.)

While driving back to the jail, Krebs asked not to go straight to jail in order to smoke. (26 RT 6982.) Krebs was crying in back seat. Krebs said he was a dead man walking. (26 RT 6983.) When asked to take Hobson to the bodies, Krebs said "turn into the jail." (26 RT 6984.) Hobson inquired "if you don't call, can I come to jail? Krebs said he would

think about it. (*Ibid.*)

The next morning, on April 22, Hobson visited Krebs in the jail without any further invitation. (*Ibid.*) Krebs was put in an employee break room. (*Ibid.*) After some discussion, Krebs agreed to talk truthfully about the crimes, but he wanted to talk in another place. (26 RT 6985.) Krebs was then given *Miranda* rights, and he said he was responsible for disappearance and death of both victims. (*Ibid.*)

Krebs was then taken to the police station, where he fully confessed in a two hour videotaped interview. (26 RT 6986.) The jury was provided with the transcript of this April 22nd interview, and watched the videotape [summarized above]. (26 RT 7017-7021)

After the videotaped interview on April 22, Hobson arranged for Roslynn, Krebs' girlfriend and Greg Vieau, his employer, to come to station. Krebs was allowed to visit with them and he confessed the killings to them. (26 RT 7042.)

Krebs was then taken to Davis Canyon and videotaped. (26 RT 7043.) Exhibit 153 is the videotape of the Davis Canyon trip. (26 RT 7045.) [The videotape was played for the jury without sound or transcript. (26 RT 7045-7046.)] Krebs pointed out the burial spots. (26 RT 7044.) They also went inside his house to show various things. The video shows the coffee table in the living room where Krebs said he raped Crawford. (26 RT 7045.) Crawford's VCR , videos, and CDs were recovered in a trash bag returning from Davis Canyon. (26 RT 7045.)

Hobson took Krebs to the police station again on April 24, after the autopsies had been conducted. (26 RT 7049.) On the way, Krebs said a reporter and Roslynn had visited, and that he told the reporter that he (Krebs) was a monster and deserved death. (26 RT 7049-7050.) (The

statement to the reporter was published on April 26. (26 RT 7073.)) Hobson then interviewed and videotaped Krebs at the police station for over 2 hours on April 24. (26 RT 7050.) [This videotape was not introduced.]

Hobson testified that Krebs told him in the April 24th interview that Krebs did he did not use a blindfold when abducting Newhouse, but she could not identify him. (26 RT 7051.) Newhouse cussed at him on the drive to Davis Canyon. (*Ibid.*) He felt old feelings of hate towards women, and was mad at her, but did not want to hurt her. (26 RT 7052.) Krebs used a utility knife to cut the collar, then ripped Newhouse's shirt off. (*Ibid.*) Newhouse asked to be let go. (26 RT 7053.) Krebs put his clothes along with Newhouse's shoes and panties in a dumpster. (*Ibid.*) He used a trucker's hitch to hog tie her. (26 RT 7053-7054.) Krebs intended to let her go. He came back, found her dead, and saw that the cushion where he had raped her had blood on it, and turned it over. He put dirt on blood on floor. (26 RT 7054.) He took the body outside and covered it with leaves across a creek. (26 RT 7055.) Later in afternoon, he noticed blood on jump seat of his truck, unbolted it, and cut the carpet out. (*Ibid.*) Krebs buried Newhouse's body with wire on top to keep animals from digging it up. (26 RT 7056.) He started to feel safe when no one contacted him after Newhouse disappeared. (*Ibid.*)

Krebs also made further statements to Hobson about the Crawford crimes in the April 24th interview. Krebs said after driving by and seeing Crawford open the trunk of her car, he decided to rape her. (26 RT 7057.) He put flex ties on Crawford after she complained about her wrists hurting. (*Ibid.*) He allowed Crawford to walk up to A frame cabin. He then hog tied her on couch, and left for 5 hours. (26 RT 7058.) He came back, untied her and took her in his truck to his apartment. She had duct tape on

her mouth, and a pillow case on head. (*Ibid.*) He raped and sodomized her, then dressed her in black sweats, went into kitchen, got coffee and Jack Daniels, then passed out. (26 RT 7058-7059.) He awoke to see Crawford in the doorway, pillowcase and rope off. He attacked her at the top of stairs, and drug her into the living room. Krebs re-tied her, this is when he used flex ties. He bent her over a coffee table, and raped her a second time. (26 RT 7059.) Krebs put a bandana over her eyes. Crawford tried to convince him she had not seen him. (26 RT 7060.) Krebs tied her in the bedroom. He knew he was going to have to kill her. He began drinking again. (*Ibid.*) He went into bedroom and strangled her with rope from behind. (26 RT 7061.) He re-tied her like Newhouse, to make sure she was dead. He dug a grave and buried her face up. (*Ibid.*) Krebs said he would have released Crawford if she had not seen him. (26 RT 7062.)

Krebs stated in the April 24th interview that when he was arrested by the parole officer, he thought it was for the murders, that's why he was emotional and crying. (*Ibid.*) Krebs discussed the eight-ball in detail. Eight stands for eight letters in "I love you", and is also an Egyptian infinity symbol. (26 RT 7063.) Crawford's face was puffy from being punched. (*Ibid.*) Krebs injured his knuckles when he punched Newhouse on bridge. (26 RT 7064.) Krebs drove into town after burial of Crawford. He bought some flowers for Roslynn because he had missed an appointment with her. (*Ibid.*)

Hobson interviewed Krebs again the next day, April 25, taking him out of the jail to a private location. (27 RT 7073.) Investigator Hanley was with him. (*Ibid.*) They talked about Kreb's childhood for about 45 minutes to determine which witnesses they should interview in Idaho. (27 RT 7074.) Hobson later that day went to a location Krebs had specified and

found additional music CDs belonging to Crawford that Krebs had discarded in Davis Canyon. (27 RT 7075.)

The next day, April 26, Hobson again took Krebs from the jail to a private location, where they further discussed Krebs' relatives. (27 RT 7075.) Hobson also advised Krebs that attorneys may come to visit him. Krebs said he did not want to talk to any attorneys. (27 RT 7076.)

Hobson next interviewed Krebs on April 27 in an approximate 45 minute videotape, which was played for the jury. (Exhibit 166, 26 RT 7066.) [The transcript is summarized above.] Prior to the videotaped interview, they took Krebs to give blood and hair samples. (27 RT 7077.)

After the samples were given, Krebs directed Hobson while driving the actual route he took in relation to the Newhouse abduction. (27 RT 7077.) Krebs explained his actions at various points along the route, which Hobson related to the jury over objections that the testimony was duplicative of the recording. (27 RT 7077-7085.) After the drive on the 27th, the taped interview which was previously played for the jury was conducted. (27 RT 7085.)

Hobson again interviewed Krebs the next day on April 28. (*Ibid.*) Krebs was taken from the jail to a park, where they talked about hunting and insignificant things. (27 RT 7085.)

Hobson interviewed Krebs again on April 30, 1999, taking him again to a park. They talked about Kreb's relatives in Idaho and Hobson's planned trip to interview them. (27 RT 7085.)

After Hobson's return from Idaho, he interviewed Krebs on May 6. (27 RT 7086.) He gave Krebs some photos that his father wanted him to have. (*Ibid.*) They talked about other potential evidence. Krebs denied, then admitted taking a 35 millimeter camera which was later recovered

from his kitchen. (27 RT 7087.) Krebs said he had knife in the truck with Newhouse, and a knife in a sheath with Crawford. (*Ibid.*) This was the last interview, and Krebs was arraigned later that day. (*Ibid.*)

On cross-examination, Hobson said Krebs was silent for 15 minutes while Hobson tried to get him to talk during the April 21 interview. (27 RT 7088.) Hobson tried various methods to get Krebs to talk - saying families needed closure and appealing to Krebs honesty and integrity. (27 RT 7089.) Hobson told Krebs that his crying upon arrest showed he was a person who cared. (*Ibid.*) Hobson told Krebs he knew it was a situation beyond Krebs' control. (*Ibid.*)

Krebs was on 15 minute watch in the jail because he was suicidal. (*Ibid.*) Hobson did not know about Crawford's sweatshirt until Krebs mentioned it. (27 RT 7014.) Hobson confronted Krebs with the jump seat blood tests on April 21 by saying:

> "I know you care. There were tears. I'm not wrong about this, Rex. Where there's tears, that tells me – tells me somebody cares. People don't fake tears. If you didn't give a shit, there wouldn't have been tears. So the tears tell me a lot. "It doesn't make it right, but it tells me what ever happened has bothered you a great deal, and it shows me that you care, that you're not a cold-blooded killer." (27 RT 7112-7113.)

There was no defense evidence in the guilt phase.

II

PENALTY PHASE EVIDENCE

A. People's case in chief

1. Prior felony convictions and violent acts

Records of a prior felony conviction of grand theft in Idaho (Exhibit 231) were admitted, as well as records establishing prior 1987 felony convictions relating to Shelley C. for residential burglary, rape, and sodomy and Anishka C. for residential burglary and attempted rape. (29 RT 7788.) (Shelley C. testified in the guilt phase.)

Anishka C. was called to describe awakening in her bed with Krebs on top of her holding a screwdriver. (29 RT 7801.) He said "I don't want anything. I just want you." (29 RT 7802.) Her daughter was in the room and Anishka told her to get under the bed. (29 RT 7803.) She testified to a struggle, during which she got a buck knife from him, and Krebs bit her finger causing permanent injury. (29 RT 7802-7805.) She escaped and Krebs fled. (29 RT 7805) A replica knife and pictures were received in evidence. (29 RT7802, 7807-7809, 7821-7822) The arresting officer gave further foundation for these items. (29 RT 7811-7823.) A second officer testified that Krebs confessed to the entry and struggle when arrested, but maintained he entered to steal a stereo. (29 RT 7826.)

Another prior victim, Jennifer E., testified to an assault in 1984 in Sandpoint, Idaho when Krebs was 18 and she was 12. (37 RT 9647- 9660.) [She was called out of order after the defense case. (37RT 9644.)] Jennifer E. and her friends had been drinking. (37 RT 9648.) She was not interested in kissing Krebs or having sex with him. (37 RT 9650.) Rex tried to kiss her, she resisted, they struggled, he hit and choked her, she ran and reported the matter to the police. (37 RT 9649- 9653.) She was hit in the jaw with a

closed fist several times, which injured her lip. (37 RT 9651.) She had several bruises to her head. (*Ibid.*) She got away when they went down an embankment. (37 RT 9652.) Her pants were undone, and she zipped them up and went to the police station. (*Ibid.*) Rex was the most drunk of everyone. (37 RT 9658.) Toward the end of the struggle Rex stopped and said he was sorry. (37 RT 9659.)

2. Victim impact evidence

Victim impact evidence relating to Rachel Newhouse was given by two witnesses. (29 RT 7829-7836, 7837-7849.) Her aunt, Patricia Turner, said her niece was model student athlete who was balanced and perfect. (29 RT 7832.) She described a heavy effect on the family, including Rachel's sister who needed counseling and medication. (29 RT 7833-7836.) The victim's mother, Montel Newhouse, described her daughter as a model child and a hard working, bright student. (29 RT 7838.) She was active and enjoyed outdoor activities such as soccer and cross-country in which she had placed third in the state. (29 RT 7839.) Her daughter's plans included a degree, job, marriage, and children. (29 RT 7839-7841.) She experienced unmeasurable anxiety in the months her daughter was missing. (29 RT 7845.) She testified that the pain of loss was undescribable. (29 RT 7847.) Family pictures were introduced. (29 RT 7848-7849.)

Jody Crawford, grandmother of victim Aundria Crawford testified she was very close to Aundria, an only child. (29 RT 7851.) Aundria's father left the family shortly after her birth, and she helped raise her. (29 RT 7851-7852.) Aundria was a good student until her senior year of high school. (29 RT 7852.) She had plans of marriage, children, and having a horse ranch. (29 RT 7855.) Jody Crawford described her continuous

efforts to find Crawford. (29 RT 7857-7859.) Aundria's mother Gail and other family members were heavily affected. (29 RT 7860.) Gail was unable to work and moved to Washington to live with her mother. (*Ibid.*)

Gail Crawford testified that she and her daughter were very close, like best friends. (29 RT 7862.) She knew all her secrets, and had gone to every ballet class for 9 years. (29 RT 7863.) Aundria had high plans for her future involving marriage, children, career, and a horse ranch. (29 RT 7866.) Gail Crawford, who lived in Fresno, came to the San Luis Obispo area after the disappearance and spent weeks searching for her daughter. (29 RT 7868-7869.) She testified the loss of her only child is like losing her whole family. (29 RT 7869.)

B. Defense case in chief

1. Overview of defense penalty case [4]

The defense produced numerous witnesses relating to the extremely violent, abusive atmosphere in which Rex Krebs was raised in rural Idaho. His father Allan Krebs[5] physically and mentally abused Rex and other family members. Women in the household were physically abused and called sexually demeaning names. The atmosphere was sexualized, abusive and domineering towards women. Rex's mother, Connie, was raped and beaten by Allan Krebs in the presence of Rex and the other children. Connie eventually divorced Allan Krebs and moved to Nevada with her

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[4] This section is designed only to orient the reader. Details and citations to the record follow in the sections below.

[5] The first name of Appellant's father appears with various spellings in the transcripts, but "Allan" appears to be the correct one. (22 CT 5914-5917)

children and Bob Jackson, who she married. Mr. Jackson, a heavy drinker, was also physically and mentally abusive to Rex and his siblings. He molested Marcia, Rex's older sister, and engaged in violent acts. Jackson demanded that Rex be returned to his father, and his mother consented. Connie Ridley, Rex's mother and Allan Krebs' first wife, drank heavily from the time Rex was in school. She was abused by Allan Krebs and neglectful as a parent. She later came to regret her decision to send Rex back to his father.

Other witnesses described Rex's positive adjustment and growth in a children's home in which Rex was placed and described him as a model ward. His conduct was good in the structured settings of prison where he was a supervisor of other inmates and on a peacekeeping council. Many other witnesses who knew and cared for Rex Krebs testified to their knowledge of Rex as a hardworking man who had much to offer others, and who had a renewed interest in the Bible. The mother of his child gave testimony explaining his worth and ability to help others. A Catholic nun testified to his interest in religious counseling.

Three expert witnesses gave testimony which helped explain the significance of his exposure to violence, abuse, and other risk factors, and described the psychiatric disorders which afflicted him.

A medical doctor and prominent researcher/clinician specializing in sexual disorders, Dr. Fred Berlin, examined Krebs. He diagnosed Krebs with sexual sadism, a type of compulsive sexual disorder, known as a paraphilia. The main features of the disorder are intense, recurrent erotic urges and fantasies involving the humiliation or suffering of another. Dr. Berlin stressed that the diagnosis is not made on the basis of behavior alone, and that the disorder impairs volitional capacity - the ability of the person to

control oneself- and the disorder cannot be treated by willpower alone. The impaired volition is similar to that of an addict being unable to resist using drugs. Cognitive distortions in the form of minimization and rationalization often accompany the disorder. The effect of the disorder on Krebs constituted an extreme emotional disturbance. Kreb's capacity to conform to the law was impaired as a result of the disorder. Dr. Berlin also opined that the diagnosis of Antisocial Personality Disorder was not appropriate for Krebs, given the ability of Krebs to form positive relationships and other factors.

Dr. True, a psychiatrist employed with the parole department who evaluated and monitored Mr. Krebs on parole thought that his background indicated he was at significant risk to reoffend, but he did not have enough resources to adequately treat him. He thought that Kreb's childhood experiences were so damaging that he diagnosed him with post-traumatic stress disorder.

Dr. Craig Haney, a social psychologist, gave testimony concerning the research and literature on the harmful lifelong effects of childhood and adolescent maltreatment. He also reviewed documents and independently interviewed many witnesses to construct a social history which correlated Rex's experience with factors well-known to cause psychological damage. He also rendered an opinion based on his research and Kreb's record that he would make a positive adjustment to a LWOP sentence.

2. Summary of defense penalty evidence

a. Childhood abuse and family circumstances

Lecia Dotson, Rex Krebs' older sister testified to physical, sexual,

and psychological abuse by Rex's early childhood caregivers.[6] (30 RT 7915-7956.) Lecia was born in 1963, when her mother Connie Ridley was 16 and unwed. Rex was born 3 years later, followed by Marcia in 1970, who was mentally impaired, and Tracy in 1971. (30 RT 7915, 7916.)

Connie married Rex's father, Allan Krebs, after Rex was born. (30 RT 7920.) Rex always liked animals. (30 RT 7918.) Connie and Allan Krebs had a violent relationship. Lecia saw her mother with a black eye, a swollen face, and her arm black and blue. (30 RT 7921.) Both she and Rex were frightened by the violence (*ibid*), which included a beating and rape of Connie by Allan in the presence of the children after Connie had split from Allan. (30 RT 7922.) Connie and her new boyfriend, Bob Jackson, moved to Nevada after violence erupted between Allan and Jackson. (30 RT 7923.) In Nevada, Jackson also became violent with Connie and the children. (30 RT 7929.) Jackson molested Lecia (30 RT 7930), he shot a rifle at a TV over her head, and he called her "worthless bitch" and "whore." (30 RT 7935.) Jackson was also cruel to Rex, calling him "little bastard" and making him wear soiled underwear on his head, and a diaper to school (30 RT 7930, 7972). Connie and Jackson drank excessively. (30 RT 7936.) Allan Krebs came to their door in Nevada, and Jackson pointed a rifle at him. (30 RT 7934.) Allan then grabbed Rex, who was crying and frightened, and used him as a shield. (*Ibid.*)

Jackson eventually demanded that "the little bastard" Rex go back to live with his father Allan Krebs. (30 RT 7944.) Connie gave into this,

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First names only will be used in this section as appropriate for clarity and consistent with the testimony of the witnesses.

which upset Rex, who wanted to stay with his mother. (*Ibid.*) Lecia eventually found a refuge by living with her grandmother during high school, and obtained a lot of counseling to deal with the childhood abuse. (30 RT 7948-7951.) Lecia didn't see Rex much as he got older. Allan called her a whore and a bitch even after she was married. (30 RT 7947-7948.) She testified she does not want Rex to die, and that he has things to offer others, although she agreed his upbringing was no excuse for his crimes. (30 RT 7952.)

Tracy Sammons, Rex's youngest sister, corroborated Bob Jackson's abuse. He drank a lot and did things like urinating on their bed and making them sit in it if they wet the bed. (30 RT 7959.) She moved in with Allan Krebs in the 7th grade. Allan was abusive verbally, calling her "bitch" and "cunt." (30 RT 7962.) He was also violent, knocking holes in walls. (30 RT 7967.) She saw him hitting Rex, age 16 or 17, by the hearth, with blood all over Rex's face and the hearth. (30 RT 7963.) Rex liked horses and animals, and took care of them when they were younger. (30 RT 7968-7969.) His mother did not include Rex in family gatherings. (30 RT 7972.) She thought Rex would be able to help others in prison. (30 RT 7973.)

Rex's aunt, Patricia Miller, was married to Art Krebs, and lived near Allan and his family when Rex was born. (30 RT 7980-7983.) She saw Rex with an injury as a child, and was concerned that Allan was abusing him, but did not do anything about it. (30 RT 7987-7988.) Allan threatened to kill her. (30 RT 7988.)

Arleta Howell, Connie's mother and Rex's grandmother, (30 RT 7991) testified to Allan Krebs' temper and abuse. When Rex was just a baby, Allan got mad, grabbed the baby, and threw him. (30 RT 7995-7996.) She saw Connie's back covered with bruises; Connie said Allan used his

boots on her. (30 RT 7997.) The children told her of seeing Allan beating Connie on the bed. (30 RT 7999.) Rex was heartbroken when he was sent back to live with Allan. (30 RT 8002.) She saw Rex cry out in pain when lightly touched on the seat of his pants. (30 RT 8004.)

Gene Howell was Rex's uncle, brother of Connie. (30 RT 8033.) He was present on the day when Connie's divorce was final, and Allan came and beat Connie in her bedroom. (30 RT 8036.) Her eyes were blackened and swollen shut, her throat was black and blue. (*Ibid.*) When Rex was 8 or 9, he patted Rex on the fanny and he screamed. (30 RT 8038-8039.) He inspected the area and saw bruising and cuts from a bad beating. (*Ibid.*) Allan wanted the other family members to stay away, and Gene was afraid to visit. (30 RT 8042.)

Sandra Von Rossum was Rex's aunt, Connie's sister. (30 RT 8046.) She testified to Allan's "yelling, screaming, vulgar language, physical and mental abuse." (30 RT 8047.) She saw Connie with a black eye when Connie lived with Allan. (30 RT 8049.) Connie drank with Bob Jackson in Nevada while Rex lived there. (30 RT 8049-8050.) While visiting, she heard Rex crying and moaning "leave me alone." (30 RT 8051.) Jackson called Rex a no-good little bastard and worthless. (*Ibid.*) Rex was sent back to live with Allan when Jackson demanded it. (30 RT 8055.)

George Van Rossum, Rex's uncle by marriage, grew up with Allan Krebs. (30 RT 8063.) Allan had a violent reputation. (30 RT 8067.) Allan treated Connie poorly, did not respect women, was domineering and bruising. (30 RT 8068.) He called Rex "little son of a bitch". (*Ibid.*) Connie was a poor mother who let the children go hungry, put up with beatings and let the children be abused. (30 RT 8070.)

Ramona Fancher, Rex's aunt by marriage to Allan Kreb's brother,

lived near Allan and Rex near Sandpoint. (30 RT 8071-8073.) Allan was mean, yelled, and had a bad temper. (30 RT 8075.) Rex was fun, helpful, and had a sense of humor. (30 RT 8075-8076.) He loved animals, had a pet rooster, and nursed a bird back to health. (30 RT 8077.) She saw Rex with bumps and bruises. (30 RT 8076.) Allan was poor role model, and Connie drank and had poor reputation as a mother. (30 RT 8078-8079.)

Dorothy Thompson was the principal of Northside Bonner County School. (30 RT 8082.) She knew Rex was lonesome and desired adult company at the elementary school. (30 RT 8087.) Rex ran away from home and she located him. (30 RT 8089.) He did not want to go back. (*Ibid.*) Rex didn't get in trouble for fighting more than other boys. (30 RT 8090.)

Dean Poelstra, an elementary schoolmate of Rex testified that Rex got teased and picked on. (30 RT 8098.) When Rex was missing, Allan hunted for him with dogs. (30 RT 8101.) He saw Rex with a black eye. (30 RT 8102.) Allan Krebs had a reputation for violence. (30 RT 8103.)

Debbie Rodgers, another elementary schoolmate of Rex's lived near Rex, but was told not to go there. (30 RT 8111.) Allan had reputation for violence. (30 RT 8114.) Rex was a loner, shunned by most of the other kids, such as at a square dance. (30 RT 8112-8113.) His parents were not involved in school events. (30 RT 8115.) She saw Rex with a black eye and scrapes. (30 RT 8116.)

Rex's seventh grade teacher, Robert Libbey (31 RT 8140) noted his demeanor was consistent with an abused child, and didn't pass his grade due to lack of homework. (31 RT 8144.) Another teacher, Michael Keough said Rex would choose corporal punishment over having his parents called in. (31 RT 8152.) He saw Rex show up on a Monday with

bruises but dismissed it, thinking he had gotten into a fight. (31 RT 8153.)

Sharon Braunstein, a cook at Northside Elementary and a neighbor, testified Rex seemed special, was a loner, and was treated gruffly by Allan. (31 RT 8162-64.) The Krebs household was rundown, the interior was filthy and horrendous. (31 RT 8164-8165.) She was concerned about the conditions. (31 RT 8165.)

Janice Grabenstein married Allan Krebs in 1982 when Rex was about 17. (31 RT 8163-8164.) When she moved into the household, it was filthy. (31 RT 8195.) Rex was there for 6-12 months. (31 RT 8196.) Allan was physically abusive of Rex. (31 RT 8197.) He struck Rex while Rex was cooking pasta (*ibid*), and bloodied his face when he suspected marijuana use. (31 RT 8198.) Allan also slapped and kicked Marcia, giving as an example when she fell off a horse. (31 RT 8202.) Allan called Janice names: cunt, whore, bitch, retarded. (31 RT 8101.) Allan abused alcohol and speed. (31 RT 8205, 8206.) Rex was helpful and gentle with horses and animals. (31 RT 8207.)

Debra Howerton, the daughter of Janice Grabenstein (31 RT 8213) testified to Allan's abusive behavior to females. He called the girls by names such as cunt, bitch and rectum. (31 RT 8217.) He used sticks to discipline. (31 RT 8217-8218.) He struck them in the face for twisting hair. (31 RT 8220.) Debra wore braces then, but Allan punched her in the face while emptying a vacuum. (31 RT 8218-8219.) Tracy was treated better, but she was also slapped and choked for not being were she was supposed to be. (31 RT 8221-8222.) She heard Rex getting hit while calling for her mother to help. (31 RT 8223.) Allan called Rex names such as bastard and asshole. (31 RT 8224.)

Rex's mother, Connie Ridley, confirmed the abusive nature of Allan

Krebs. She was slugged and kicked. (31 RT 8245.) Allan was punching her in the stomach because he thought she was pregnant. (31 RT 8246.) Allan beat up Bob Jackson badly in front of Rex in Sandpoint. (31 RT 8247.) Allan made Rex wear his soiled underwear on his head once when he had pooped in his pants. (31 RT 8248.) Rex failed the second grade, but she had no memory of contact with the school. (31 RT 8249.) She was drinking a lot during that period. (*Ibid.*) She tried to get Rex counseling after an incident when he went into a house with mask, but Allan stopped it. (31 RT 8254, 8255.) Upon release from prison, Rex moved to Grover City with Connie and John Hollister, her new husband, and got a job, car and girlfriend. (31 RT 8257-8258.) As a child, Rex was good, and loved animals. (31 RT 8258.) She knew of his arrest in Oceano for rape and attempted rape. (31 RT 8259.) She now regrets giving Rex to his father. (31 RT 8260.)

John Hollister corroborated that Rex did well when he moved in with them. (33 RT 8627-8629, 8633.) Calvin Howell, Connie's brother, also lived with them in Grover City. (33 RT 8627.) He testified Rex was not rude or domineering to women, and had a nice girlfriend. (33 RT 8630.) He was shocked to learn of sex offense arrests in 1987, since he had everything going for him. (33 RT 8633.)

Dr. Fred Marienu, a physician, testified from records that he saw Rex, age 15, in the emergency room, bleeding from left ear and right cheek with multiple older bruises. (32 RT 8354.) His pupils were restricted, and he was concerned about a concussion. (32 RT 8356.) The statements by Allan Krebs regarding the circumstances were suspicious, and the doctor made a child abuse report. (32 RT 8370-71.)

Philip Robinson, the Bonner County District Attorney, knew Allan

Krebs. (32 RT 8377.) Allan had a bad reputation for seeking out confrontations, excessive violence, and for controlling and dominating women with violence. (32 RT 8331-32.)

b. Children's Home adjustment

Scott Mosher, a social worker from Children's Home, South House, testified that Rex was very needy, fearful of his father, and in need of nurturing when entering South House. (32 RT 8393.) He did well, and was a model resident. (32 RT 8395.) Rex did have an anger/impulse issue - which he worked on well. (32 RT 8394.) Rex got certificates and awards, and progressed to Cedar House, a group home. (32 RT 8403-8404.) Rex exhibited remorse when he did something wrong, and had an ability to develop positive relationships. (32 RT 8438-8439.)

Sally Gabby, a counselor and program head at Cedar House (32 RT 8443) testified Rex came into Cedar House in 1982, and left after doing well in 1983 (32 RT 8447-8466). He took welding and got a GED (32 RT 8464, 8466). Upon discharge, he had positive relationships, no problem with authority, and demonstrated maturity. (32 RT 8465.) He had some isolated problems of temper, but worked to bring it under control. (*Ibid.*) Ms. Gabby felt good about him, wanted more people in program like Rex. (32 RT 8466.)

Frederick Diesel, an art instructor from Children's Home South House (32 RT 8480-8481) saw Rex go from a meek, scared kid to a positive role model, who was supportive of other kids. (32 RT 8498.) Rex did well on the GED and was neither predatory nor exploitative (32 RT 8497, 8489-8490). He saw Rex daily and made reports (32 RT8488, 8493).

Jeff Circa was a lay counselor at the Cedar House program. (36 RT

9299.) Rex was one of the kids he oversaw, and he had a lot of contact with him. (36 RT 9202.) Initially Rex had some anger and other issues. (36 RT 9205.) He progressed and improved himself substantially. (36 RT 9206.) He wanted to be a role model for the other kids. (36 RT 9207.) He developed empathy for staff and other kids. (36 RT 9209.) He was not a bully or predatory in any way. (*Ibid.*) Rex was responsible about work and concerned about his sisters. (36 RT 9212-9313) He was having some difficulty with his father. (36 RT 9213.) Overall, Rex was one of the prime representatives of the program. (36 RT 9214.) Rex was in the program from age 16 to 17. (36 RT 9215.) He never confided about having abnormal sexual fantasies. (36 RT 9219.)

c. Prison history and adjustment

John Schrader, the Idaho probation officer who wrote the report in Rex's auto theft case, recommended probation and counseling rather than further jail time or the prison sentence which was imposed. (33 RT 8593.) Daniel Werline, a correctional officer from Cottonwood Prison in Idaho, testified that Rex was in the "rider" program for 120 days of evaluation at Cottonwood, a minimum security facility. (33 RT 8603.) Werline gave Rex a positive evaluation, but recommended extension for immaturity. (33 RT 9608.) Rex was polite, respectful, worked with women, and he would not have minded Rex as a neighbor. (33 RT 9607-9609.)

Poley Greenwood was a Soledad Prison textile superintendent (32 RT 8519.) Rex was a valuable employee in the position of the "double A lead man," supervising other inmates in textile factory, earning 75 cents per hour at Soledad from 1992-1997 (32 RT 8522-8523, 8526.) Laura Pullano, a correctional officer at Soledad Prison, testified Rex was a model prisoner

in 1992-1993 at North Dorm. (33 RT 8653,8667.) Rex was on the MAC (Men's Advisory Council) council, got along well with prisoners and had no problems with female staff (33 RT 8662, 8665). Persons convicted of rape like Krebs need to lie about their offenses in prison. (33 RT 8666.) Michael Cisneros, another correctional officer at Soledad Prison, testified that he talked with Rex often while supervising North Dorm. (33 RT 8676.) Rex was on the MAC, and not in a gang. (33 RT 8681, 8683.) He was a double A lead man, went to AA meetings, and overall was an excellent inmate. (33 RT 8685-8686.) It is normal for inmates to lie about sex offenses in prison. (33 RT 8692.) Rex didn't cause trouble when he got angry. (33 RT 8693.) Concepcion Aguilar, a female correctional officer at Soledad, saw Krebs in North Dorm every day in 1996-1998. (33 RT 8695-9696.) He was her porter/janitor. (33 RT 8697.) He exhibited appropriate behavior with her and other females. (33 RT 8699.) She told investigators 2 years ago that she recalled that Krebs had an eightball trinket in his locker in prison. (33 RT 8701.)

Utifiti Taueetia (Poppa T) was a prison inmate and MAC member with Krebs at Soledad. (34 RT 8909, 8911.) The purpose of the council was to solve problems, and keep the peace between various factions. (34 RT 8913.) Taueetia gave Rex a Bible when he left prison. (34 RT 8914.)

d. Relationships and employment

Adonia Krug, Rex's early girlfriend, was 11 when she first met Rex, and he was 3 years older. (32 RT 8500.) She had a romantic, non-sexual relationship with him. (33 RT 8568.) Rex broke off the relationship when he discovered her age. (32 RT 8502.) They kept in touch thereafter. (32 RT 8502-8503.) Rex was a shoulder to cry on, and he made her feel good about

herself. (32 RT 8504.) Rex stayed with them after getting out of Cottonwood. (32 RT 8507.) She wrote about 10 letters to Rex after finding out he was in jail on current offenses. (32 RT 8510.) Portions of the letters containing poems and lyrics from the movie "Titanic" were read to jury. (33 RT 8569-8671.) She still cares for him, but not romantically. (33 RT 8576.) She felt Rex should live because he has goodness in him, and helped her with Bible. (33 RT 8578.) Diana Scheyt, Adonia's mother, testified she thought Rex was a positive influence on her daughter, and allowed the relationship as friends to continue. (33 RT 8584-8585.) Rex needed love. (33 RT 8587.) Scheyt continues to write him. (33 RT 8586.) Rex has responded positively regarding his relationship with the Lord. (33 RT 8587.)

Melissa Copeland was a recent friend of Rex. He fought to protect her honor at Outlaws Bar in August 1998. (33 RT 8704,8709.) He was not involved in the initial altercation. (33 RT 8706.) Rex was knocked out, and had a bloody face. (33 RT 8707.) Rex was never rude or sexually inappropriate to her or other women. (33 RT 8708.) Jamie Prisco was another recent friend who witnessed the Outlaws Bar incident. (33 RT 8711.) Rex stayed with her 2 days while recovering from the disorientation and other effects of the injury. (33 RT 8715.) She never saw him angry; he didn't start fights. (33 RT 8718.) On cross-examination, it was elicited that Rex had brought his father over after the first girl was killed. (33 RT 8719.) Rex seemed normal, upbeat, not remorseful. (33 RT 8721.) Krebs told her he was on parole several weeks after meeting her. (33 RT 8722.) She considered him a friend until she learned of the murders. (33 RT 8723.)

Daniel Thompson was a friend of Rex who worked as a bouncer at

the Outlaws bar. (33 RT 8725-8726.) Rex got him a job at the 84 Lumber lumberyard where Rex worked, and Rex drove him to work. (33 RT 8727.) In the Outlaws incident, Rex was knocked out cold, convulsing and choking on his tongue. (33 RT 8728.) He thought highly of Rex prior to the incident. (37 RT 8737.) He seemed different afterwards and they drifted apart. (33 RT 8732.)

Gregory Vieau, Rex's supervisor at 84 Lumber, testified that Rex was a excellent worker who got promotions. (34 RT 8781.) He viewed Rex as a great guy; a friend who helped him out; a person who could be trusted and relied upon. (34 RT 8783-8786, 8795.) Rex had a chance to hide the BB gun, and told him he was going to violated for it, but instead asked where it was, and put it where it was available. (34 RT 8793-8794.) Posters of the missing girls were on the 84 Lumber front door. (34 RT 8800.)

Roslynn Moore, Rex's girlfriend at the time of the crimes testified the relationship went well at first, although she did not like that he would drink, because of his parole conditions. (34 RT 8864.) The relationship was on and off for a period. (34 RT 8865.) It started again after the Outlaws incident. (34 RT 8867.) Rex was polite and appropriate sexually. (34 RT 8864, 8866.) She discovered she was pregnant in January 1999. (34 RT 8867.) Rex was excited at first, but later he wanted an abortion, saying he did not have a conscience. (34 RT 8868.) She did not believe him, and thought he would be good father. (34 RT 8884.) Their son Shane was born in August 1999. (34 RT 8872.) She felt Rex had done horrible crimes, but his life was worth something. He could help others. (34 RT 8874.) She left town after Rex confessed, and later re-established contact. (34 RT 8872-8874.) His father came to town in Feb 1999. (34 RT 8879.) The visit

seemed like a reconciliation, with a lot of apologizing. (34 RT 8882.) She did not remember any incident where Rex threatened to kill her and her family. (34 RT 8881.)

e. Parole and jail conduct

Parole Agent David Zaragoza testified that the conditions which required Rex to go to the POC to see Dr. True were more for monitoring than psychotherapy. (34 RT 8809.) Rex told him that Roslynn was pregnant, and they were going to marry. (34 RT 8815.) Rex never had the odor of alcohol on his breath. He was seen 52 times, 22 times at his residence. (34 RT 8817-8818.) Debra Austin, was Rex's prior parole agent .(34 RT 8824.) She testified Krebs was forced to move a couple of times due to concerns about his history, and ended up in Davis Canyon. (34 RT 8827-8829.) He failed to report the Outlaws Bar incident. (34 RT 8832.) Weekly report and curfew conditions were dropped in May 1998. (34 RT 8830.) The San Luis Obispo Jail commander, William Hammock testified that Rex was placed on suicide watch the day after he confessed (34 RT 8834, 8837). Rex was generally compliant. A chicken bone, some medication and a drinking straw or "blow gun" were found in his cell early on. (34 RT 8844.) Fresno Bee reporter Michael Krikorian interviewed Rex in jail shortly after he had confessed to the crimes. (35 RT 8981.) Krebs was tormented when he told Krikorian that he was a monster, wanted the death penalty and was sorry for the families. (35 RT 8983.) Rex wanted to keep his girlfriend out of it, calling her sweet and nice. (35 RT 8985.)

Sister Miriam Larkin was a professor and spiritual counselor (37 RT 9622-9623.) She visited Krebs weekly after his arrest. (37 RT 9627.)

Krebs said he prayed for Newhouse and Crawford. (37 RT 9630.) She saw a religious and spiritual development in him. (37 RT 9632.) Krebs did not blame others for what he had done. (35 RT 9634.) Krebs was sorry for his crimes, and had a constructive attitude towards fellow inmates and desire to help them. (35 RT 9635.)

f. Expert testimony

I. Dr. Fred Berlin

Dr. Fred Berlin was an associate professor at John Hopkins University School of Medicine, licensed to practice psychiatry and medicine, and a board certified forensic psychiatrist. He directed the National Institute for the Prevention and Treatment of Sexual Trauma. His primary area of research and practice was sexual disorders. [7] (35 RT 8980-8989.) Dr. Berlin interviewed Krebs and reviewed case information to determine whether his behavior might be due to a true psychiatric condition. (35 RT 8997.) Dr. Berlin diagnosed Krebs as having Sexual Sadism (35 RT 9001), a mental disorder in the category of paraphilias recognized in the DSM. (35 RT 9006.) The main features of the disorder are recurrent, intense erotic fantasies and urges to have sex in a coercive and sadistic fashion involving the humiliation or suffering of another. (35 RT 9007, 9009.) The person with the disorder has the urge to enact the fantasy. (35 RT 9007.) The urges are recurrent, intense, and preoccupying. (35 RT 9014.) The diagnosis is not based on behavior alone. It is an abnormality of the mind, making it difficult to resist acting on the urges. (35 RT 9013, 9015.) The disorder impairs the ability of a person to be in full control of

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[7] Dr. Berlin's curriculum vitae was admitted as Exhibit 582. (38 RT 9714.)

himself. (35 RT 9016.)

Dr. Berlin relied in part on Krebs' history. Krebs went into a neighbor's house when 12 or 13 years of age and masturbated. (35 RT 9017.) At age 14, he made obscene phone calls to an aunt. (*Ibid.*) At age 18, he attempted to force sex on a young lady by a bridge. (35 RT 9018.) At age 21, when he had the availability of a consenting partner, he nonetheless committed sexual assaults on two women which involved binding. (35 RT 9018-9019.) After being punished by prison and released, the two current victims were sexually assaulted in a ritualistic way. (35 RT 9019.) The disorder would drive him to do something similar again, despite Krebs' efforts to resist. (35 RT 9021.) Krebs said he had been having rape fantasies since he was about 15 years old. (35 RT 9022, 9024.)

A person with the disorder of sexual sadism has two types of mental impairment. (35 RT 9024.) They tend to rationalize and minimize, a type of cognitive impairment. They also have impaired volition. (*Ibid.*) The volitional impairment is similar to a heroin addiction. (35 RT 9025.) In a medical context, a doctor would advise such a patient that it is foolish to think one could control the urges without treatment or by willpower alone. (35 RT 9020.) Medication may help control the disorder and restore the capacity for self control. (35 RT 9026.) Krebs' behavior was irrational, and much more like a kleptomaniac than a serial bank robber. (35 RT 9027.) The disorder is chronic, but the person may be able to defer acting on the urges for a time. (35 RT 9028, 9036, 9578.) Physical and sexual abuse in childhood increases the likelihood of the disorder. (35 RT 9071.) The fantasies and urges characteristic of the disorder are involuntary. (35 RT 9073.)

Krebs' crimes appeared ritualistic, motivated and planned pursuant

to a preexisting pathological fantasy. (35 RT 9001, 9093.) There is no doubt that Krebs suffers from this paraphilic disorder. (35 RT 9031.) Evidence of planning the sexual crimes and covering them up does not indicate he could control his paraphilic urges. (35 RT 9031-9032.) Clinical experience shows people with paraphilias, like heroin addicts, are driven to do the things they do. (35 RT 9033.)

The disorder constitutes an extreme emotional disturbance in Krebs' mental make up. (35 RT 9073-9074.) He was under duress in the sense that the disorder was driving him to commit the offenses. (35 RT 9075.) He did have the capacity to recognize right from wrong. (*Ibid.*) The capacity of Mr. Krebs to conform his conduct to the requirements of law was impaired as a result of the mental disease or defect or as a result of the effects of intoxication because he was volitionally impaired as a result of the sexual sadism disorder. (35 RT 9076.) The current crimes were clearly a consequence of having the sexual disorder. (35 RT 9076.)

Dr. Berlin considered and rejected an additional diagnosis of antisocial personality disorder (35 RT 9064.) While Krebs committed many antisocial acts, his makeup was more complicated and included many positive factors, which contradicted the ASP diagnosis. (35 RT 9066.) Dr. Berlin concluded Krebs had a severe sexual disorder which caused him not to be in control of himself without treatment. (35 RT 9068.)

On cross-examination, Dr. Berlin agreed that Krebs probably would have discontinued his attacks and fled if a policeman would have appeared. (35 RT 9124.) However, he would have remained driven to eventually enact the fantasy despite the ability to temporarily defer the urge. (35 RT 9125.) Dr. Berlin opined that Krebs was experiencing a pathological sense of sexual excitement and anticipation all through the offenses (35 RT 9118)

but that the actual attacks to subdue the victims were simply a means to an end which he could not control. (35 RT 9115.) Krebs told himself after the Newhouse crimes that he would never rape again, but his fantasies and urges continued and he did. (35 RT 9542.) Krebs said he was able to blank out his feelings at the time, but later was disgusted with himself. (35 RT 9544.) The violence of the initial abduction was also the means to the end of gratifying uncontrolled paraphilic urges. (35 RT 9546.) Krebs described his internal struggle like fighting "a family of people in his head pushing him to do it and being overpowered." (35 RT 9571, 9604.) The statement by Krebs about the fight in his head was in the midst of a long interview and was the essence of what one expects to see in one who is driven by abnormal sexual cravings. (35 RT 9605.) Dr. Berlin opined that the murder was not part of the rape fantasy. (35 RT 9577) While in jail, Krebs had some upsetting fantasies about Crawford while masturbating. (35 RT 9580.) Krebs cried in Dr. Berlin's presence while relating how this disturbed him. (*Ibid.*)

Krebs did not decide to have sexual sadism, he discovered himself to be afflicted with it. (35 RT 9614.)

ii. Dr. Craig Haney

Dr. Craig Haney, a psychologist and chair of the Department of Psychology at the University of California at Santa Cruz, testified to Krebs' social history and its significance. (35 RT 9132.) A social history focuses on psychologically significant factors which research shows can have long-term effects. (35 RT 9151- 9154.) An analysis of the effects requires examination of several factors: risk factors, stressors, coping mechanisms, vulnerability, and protective factors. (35 RT 9155-9156.) This model is a

well-accepted model used medically; by law enforcement; and others, and is based on empirical research. (35 RT 9157-9158.)

Dr. Haney acquired school records, institutional records, mental health records. (35 RT 9145.) He interviewed many witness who also testified. (35 RT 9146.) Krebs lived a traumatically damaging life. (35 RT 9148.) These experiences create problems which do not go away on their own. (35 RT 9149.)

Dr. Haney noted the risk factors of poverty, instability, neglect, verbal emotional maltreatment, exposure to violence, and negative role models that were present in Krebs' early developmental period, ages 0- nine years. (35 RT 9163-9173, 36 RT 9239-9241.) The profoundly negative effects of these factors include low self esteem, impulsivity, lashing out at others, and cycles of violence. (35 RT 9173-9175.) In Krebs' case, the negative role model factor as severe and chronic. (36 RT 9241.) Additional risk factors were present in Krebs' life from ages 9 through 15, including abandonment, poverty, neglect, instability, emotional maltreatment, and exposure to violence and physical abuse. (36 RT 9243-9251.) Krebs' father Allan hit Rex with a gun, breaking the handle off, which Allan saved as a trophy. (36 RT 9252.) Allan Krebs modeled violence and inappropriate sexuality towards women. (36 RT 9255.)

The consequences of this environment would include difficulties with interpersonal trust, chronic self esteem problems, emotional problems, anger management, disordered sexual relations, internal disorganization, delinquency, immaturity. (36 RT 9258-9261.)

Dr. Haney noted Krebs had been institutionalized for most of his life since he was 15, only being in free world for about 40 months. (36 RT 9264.) Krebs did not receive psychotherapy at the children's home. (36 RT

9271.) His father stopped the counseling started when Krebs was 13. They were many other lost opportunities for counseling. (36 RT 9274-9283.)

Dr. Haney also reviewed the testimony from prison employees as well as Krebs' entire prison record from California. (36 RT 9289-9291.) He is familiar with the prison system from his research. (36 RT 9284-9287.) He opined that Krebs would make an excellent positive adjustment to the maximum security, highly structured environment of prisoners sentenced to life imprisonment without the possibility of parole. (36 RT 9292.) Krebs functions well in an environment with a high degree of structure. (36 RT 9336.) Krebs had no gang affiliations or serious disciplinary writeups. (36 RT 9244.) Other factors predicting good adjustment were his participation in the Mens Advisory Council, his age, and his renewed religious faith. (36 RT 9245, 9248.)

Dr. Haney said Krebs was a fairly reliable historian. (36 RT 9366.) Krebs may have exaggerated length of his disciplinary segregation in Idaho prison by saying he was the "hole kid." (36 RT 9377.) However, he does extensive cross-referencing, and never relies simply on his subjects' statements, as they may both embellish as well as minimize. (36 RT 9378, 9383.)

iii. Dr. Randal True

Dr. True was a psychiatrist employed by the parole division. (36 RT 9409.) He staffed the parole outpatient clinic. (36 RT 9411.) He would see parolees from once a month to once every three months for monitoring. (36 RT 9413-9414.) He does an intake evaluation of about an hour. (36 RT 9415-9146.) He evaluated Krebs knowing his history as a rapist. (36 RT

9421.) Krebs would have been placed in long-term therapy if he had those resources available. (36 RT 9423.) He diagnosed Krebs during the intake evaluation with alcoholism, polydrug abuse and cannabis abuse as well as post-traumatic stress disorder secondary to sexual assault upon him and abuse by his parents. (36 RT 9428.) Dr. True assessed Krebs' functioning by use of a model which addresses the effects of various systems on a person's functioning, nicknamed the "mod-squad six" model. (36 RT 9418-9419, 37 RT 9471.) He noted developmental problems in childhood of sexual and physical abuse. (37 RT 9471.) In terms of social development, Krebs seemed to be doing well with peers and friends. He appeared to be eager to do well. (37 RT 9472.) Dr. True explained the effect of trauma in childhood as different than adults, and they tend to re-enact their trauma in adulthood. (37 RT 9474.) In his opinion, Krebs was not provided adequate mental health treatment by the parole department. (37 RT 9477.)

C. Prosecution rebuttal evidence

1. Lay witnesses

An Idaho police officer, Andrew Anderson, who investigated the Jennifer E. case in 1984 testified that Jennifer had abrasions and marks to her face and neck. (37 RT 9661.) She was heavily intoxicated and had trouble speaking. (37 RT 9665, 9670.) She came back the next day and gave a written statement. (37 RT 9666.) Krebs admitted to drinking by a bridge with the victim and kissing her but denied physical violence. (37 RT 9668-9669.)

A defense investigator, Janice Maher, was called for impeachment. (37 RT 9673.) A witness, Sandy Von Rossum, had said to her that Connie Ridley said she could not handle Rex, and that is why she was sent to live

with his father. (37 RT 9674.) Arleta Howell had not remembered bruises on Rex when he was a child, but did so remember in subsequent interviews. (37 RT 9675.) Michael Kehoe said Rex was strong, but did not do a lot of intimidating because other children stayed away from him. (*Ibid.*)

Marjorie Howard, a civilian worker at the textile program at Soledad testified that Krebs had a bad temper. (37 RT 9744.) She did not like his attitude, and demoted him. (37 RT 9646.)

Wayne Nunes rented a room to Krebs in 1997. (37 RT 9756.) Krebs told him he had been in prison for date rape and burglary, and had been strung out on drugs. (37 RT 9657.) Krebs threatened to kill his own girlfriend Roslynn and her family during an argument in which Roslynn threatened to turn him into his parole agent. (37 RT 9759.) Krebs and Roslynn made up afterwards and continued their relationship. (37 RT 9761.)

Liesl Turner, a previous girlfriend of Krebs, testified.[8] She met Krebs when she was 17 or 18 in high school. (37 RT 9905.) She eventually lived with Krebs, but moved out after about two months because Krebs told her that he had committed a crime to get into prison to enable him to murder the person who killed and raped a previous girlfriend. (37 RT 9908.) She testified Krebs said he did murder the person. (37 RT 9909.) Krebs did not get mad at her, and she did not feel in danger when having sex with him, although he asked to have anal sex and tie her up. (37 RT 9920-9921.) She moved out after finding a letter which showed he was having an affair. (37 RT 9921.) After moving out, she continued dating him, and they went

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Ms. Turner's first name is misspelled as "Liesel" and Liesle" in portions of the transcript.

to her high school prom together. (37 RT 9927.)

The last witness called was Larry Hobson again. He testified that he interviewed Allan Krebs in May of 1999 at the Bonner County Jail. Allan Krebs gave him 24 photographs to show to Rex Krebs. He showed them to Rex on May 6, 1999, the morning he was arraigned. Rex stated the photos were taken by his father when he visited in early February of 1999 and spent several days with him. Hobson kept one of the photographs and had it blown up. The picture, exhibit 171, depicts Rex Krebs shirtless and flexing in a "muscleman" pose in his living room near the coffee table. The picture was admitted into evidence over objection.

2. Expert Witness Dr. Park Dietz

Dr. Park Dietz detailed his credentials and his famous cases. (38 RT 9762-9782.) Dr. Dietz listened to the testimony of Dr. Berlin and Dr. Haney and reviewed materials concerning the case (38 RT 9771, 9782-9786.) He attempted to interview Krebs, but was refused. (38 RT 9784.) Dr. Dietz agreed that Krebs suffered from the paraphilia sexual sadism. (38 RT 9787.) He also diagnosed him with a personality disorder, Antisocial Personalty Disorder (ASPD). Krebs may have alcoholism. (38 RT 9788.) He uses the criteria in the DSM to make a diagnosis. (38 RT 9789, 9790.)

With regard to ASPD , Dr. Dietz explained his views regarding the evolution of the concept from "moral imbecile" through "sociopath," "psychopath," and the current defined diagnosis. (38 RT 9789.) Presently, the DSM says the condition is either present or not, depending on specific criteria. (*Ibid.*) Dr. Dietz explained the criterial he used for finding ASPD in Krebs' case. (38 RT 9791-9798.)

Krebs is an adult, the first criterion. (38 RT 9791.) The second

criterion is the presence of a conduct disorder prior to age 15. (38 RT 9792.) Dr. Dietz noted the testimony of the defense investigator which suggested that he had bullied children, that Krebs had broken into a house with a knife and ski mask, and that Krebs was sent to a psychologist when 11 or 12 for lying and stealing. (*Ibid.*) He noted Krebs' many examples of antisocial behavior after the age of 15. (38 RT 9793.) He described lies told by Krebs with regard to his various arrests and his lies to Dr. True. (38 RT 9794.) Dr. Dietz also asserted that Krebs lied about why he confessed, and that he had lied in denying shooting a Santa Barbara man in the chest in a drug deal. (38 RT 9796.) Dr. Dietz then described aggressive acts committed by Krebs, citing the shooting of the man in Santa Barbara, his sexual assault victims and an altercation in prison. (38 RT 9796-9797.) Dr. Dietz then described Krebs' acts showing reckless disregard for the safety of himself or others, citing examples of Krebs putting an object on railroad tracks, driving drunk with Newhouse in his truck, leaving her hog-tied, and driving drunk with Crawford. (38 RT 9797.) Because Krebs met all the criteria, he had the diagnosis of antisocial personality disorder. (38 RT 9798.)

Regarding the paraphilia of sexual sadism, Dr. Dietz agreed with Dr. Berlin that people do not choose their sexual deviations, and that they discover what they have typically around puberty. (38 RT 9800, 9803.) However, unlike Dr. Berlin, he characterized fantasies as "voluntarily invoked imaginations." (38 RT 9799.) He opined that just a tiny group of sexual sadists commit violent crimes to fulfill their desires. (38 RT 9809.) He disagreed with Dr. Berlin regarding the nature and effects of the sexual sadism disorder. (38 RT 9812.) He opined that sexual sadism is not a mental disease, drawing a distinction between mental disorders and mental

diseases. (38 RT 9839.) He stated, "I only call diseases those conditions that cause a person to have a profoundly entirely different view of reality than any normal human being." (38 RT 9840.) He stated regarding sexual sadism, "It doesn't affect how they think. It doesn't affect their emotions. It doesn't affect the capacity to control themselves. It only affects what it is that turns them on sexually." (*Ibid.*)

He characterized the "policeman at the elbow test" as the "usual test in his field" in looking at whether someone could conform their conduct to the law. (38 RT 9841.) He stated, "It's long been used in the field of forensic psychiatry as a way of looking at whether someone has volitional control, do they have the free will to conform to the law." (38 RT 9840.)

When asked whether Dr. Berlin's view - that the urges and fantasies can become like a compulsion - is generally held, Dr. Dietz stated that it was not an accepted medical or psychological view, but that it was a recent fad with lay Christian counselors. (38 RT 9844-9845.)

When asked specifically about the factors in mitigation which Dr. Berlin testified to, Dr. Dietz said that neither alcoholism, antisocial personality disorder, nor sexual sadism qualifies as an extreme mental or emotional disturbance. (38 RT 9846.) Neither does the sexual sadism disorder constitute duress because it is not an external force. (38 RT 9847.) Dr. Dietz was asked whether Krebs was impaired in his capacity to appreciate his criminality or conform his behavior to the requirements of the law. (38 RT 9847-9848.) Dr. Dietz gave a two-part answer. First, he replied that none of Krebs' conditions constitute a mental disease or defect. "Nobody has thought that he is mentally retarded, so he doesn't have the condition of a mental disease or defect." (38 RT 9848.) He also explained that Krebs did have volitional control. (*Ibid.*)

Dr. Dietz cited several factors in support of this second opinion. Krebs violated only once per year (38 RT 9848); did not rape when sober (*ibid*); and he made a knowing decision to put others at risk by drinking (38 RT 9849), lying to Dr. True, cruising, and carrying a rape kit (*Ibid*). He also decided to stop resisting. "His decision to stop resisting, to stop trying to conform his conduct, is a choice, a bad choice, he made, rather than his not having the ability to control himself." (38 RT 9850.)

Dr. Dietz confirmed that his view that "there's no impairment of volitional control by sexual sadism." (38 RT 9855.) He agreed that sexual sadism could be treated to reduce dangerousness. (38 RT 9856.) In a previous case, Dr. Dietz wrote that "The possibility of sexual sadism should have most certainly been explored by defense counsel because it is a mental disorder for which specific treatments are available, behavior therapy and androgenic medication, that can reduce or eliminate dangerousness." (38 RT 9859-9860.) In that case, Dr. Dietz went on to recommend a sexual sadism evaluation because it opens the door to irresistible impulse testimony from some experts and because it is arguably the basis for a finding of extreme emotional distress where the offender feels impelled by strong sexual urges to commit the offense. (38 RT 9860.) Dr. Dietz acknowledged that sexual sadism can be argued to affect impulse control because Dr. Berlin holds that view, but he disagrees. (38 RT 9862.)

ARGUMENT

ISSUES RELATING TO JURY SELECTION

I

The court improperly denied the motion made by the defense pursuant to *Wheeler* and *Batson*, requiring reversal

The defense brought a motion under *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) upon the grounds that the prosecution had excused several jurors, including juror Number 6, because they were Catholic. The court asked for an explanation from the prosecutor, which was given. The court then denied the motion. The defense later renewed the motion after several more Catholics were excused by the prosecution. The court again asked for explanations, which were given, and the court thereafter denied the renewed motion.

A. Overview of voir dire process

After hardships and an introductory session where a questionnaire was filled out, jurors were individually voir dired over a number of days. Those who were not excused in this process were ordered to return on March 19, when peremptory challenges were exercised and the jury seated. Of the 152 jurors who were actually subject to individual voir dire, 72 were excused for cause or by stipulation during that process, leaving a pool of 80 eligible jurors from which to select 12 jurors and 8 alternate jurors.

Each side used all 20 peremptory challenges for the regular jury. The defense used all 8 allotted challenges during the selection of the alternates. The prosecution used 4 challenges during the selection of the

alternates.

B. The motions and rulings

The defense made motion under *Wheeler* and *Batson* that the prosecution had improperly used their peremptory challenges to remove jurors who were members of a cognizable group, namely Catholics. (22 RT 5950.) They identified the jurors as Number 6, 122, 126, and possibly 49. (*Ibid.*) (All prospective jurors were given a number, and these numbers were used in lieu of their names in all proceedings and on their questionnaires, hence jurors will be referenced by such numbers herein.)

The defense noted that pursuant to *People v. Box* (2000) 23 Cal.4th 1153, the standard to establish a prima facie case was a "strong likelihood," which was the same as a "reasonable inference." (22 RT 5951.) The court inquired whether Catholics were a cognizable class, and the defense argued they were, citing the *Wheeler* decision and *People v. Martin* (1998) 64 Cal.App.4th 378. (22 RT 5954.) The court took a recess to consider the matter.

The court did not expressly rule on whether Catholics were a cognizable group for *Wheeler/ Batson* purposes. (22 RT 5957.) The defense noted that while Krebs was not baptized Catholic, he had received religious counseling from a Catholic nun, and identified with the religion. (22 RT 5959.) Without expressly denying the motion, the court then asked the prosecutor to explain his reasons for three jurors:

> "Okay. And then there's some question as to whether in the case law the record assumes that the finding has been made of a reasonable inference if you ask for a justification from the other party. And on this record I don't think I can make a finding that there's a reasonable inference although there does

seem to be at least the beginnings of a trend. But with three jurors -- I know there are a lot of Catholics on this panel, just in my memory. I don't know which numbers they are, but I know there are a lot. So, in any event, with that caveat, I'll ask the prosecutor to state what his reasons were for those three jurors." (22 RT 5959.)

Upon inquiry by the prosecutor, the court clarified that no explanation was required for juror Number 49. (*Ibid.*) The court later noted that he did not find any evidence in the record that Number 49 was Catholic. (22 RT 5977.) The prosecutor then, without objection, gave explanations for his challenges to jurors Number 6 (22 RT 5960), Number 122 (22 RT 5960-5961) and Number 126 (22 RT 5961-5962). Each of the reasons stated was facially not based on religion.

The defense then argued that the prosecutor had focused on the Catholicism of the challenged jurors during questioning. (22 RT 5962.) They also argued that the People had exercised 3 peremptory challenges (or 4, including juror Number 49) to exclude Catholics out of only twelve total peremptory challenges exercised to that point total. (22 RT 5963.)

The prosecution argued that the questioning was relevant because of the publicity generated by the Catholic Church's stance against the death penalty, and that all the prosecution and defense attorneys involved in the case were Catholic. (22 RT 5964.) The prosecution also represented that there were several Catholics now on the panel which they did not intend to challenge and they had no motivation to exclude Catholics. (59 RT 5965.)

The court then ruled in the following fashion:

"Actually went a lot further than you needed to, but on the basis of this record, I can't find a reasonable inference, as I indicated earlier, based on just three jurors. My feeling was they were probably about 20 in the field of 83. Ms.

> Ashbaugh's indicating that there are 18. But, in any event, it appears that there certainly are secular reasons for excusing each of the jurors, and it clearly -- in the process that we've gone through, the record obviously reflects that the questionnaire is replete with questions that would give you information for preempts on both sides. And it's to be expected that those bits of information are going to be used for preempts. And as long as the preempts are based in secular reasoning, even if they're religious-based, even if the reasons for those perceived inability to -- inabilities to be fair from either side, as long as there -- there is an individual basis in respect to that particular juror as opposed to an entire group bias, then the -- the showing, then, would not be made for a group bias exercise of peremptory challenges. But, as I say, in this case I don't at this point even find a reasonable inference. I only asked for the response just for the record." (22 RT 5965-5966.)

After further peremptory challenges, the defense renewed the *Batson/Wheeler* motion, citing the challenges by the prosecution of jurors Number 127, Number 141, and Number 201, who each stated they were Catholic. (22 RT 5972, 5973, 5976- 5978.) The prosecution noted that the defense had excused 4 jurors who identified themselves as Catholic: Number 159, Number 222, Number 125 and Number 62.

The prosecutor then stated his reasons for the challenged jurors Number 127, Number 141, and Number 201. (22 RT 5959-5980.) The reasons were facially not based on religion. In response, the defense again noted the distinct pattern of questioning Catholics. (22 RT 5981.) In response to the court's question, the defense agreed that the defense had excused jurors numbered 159, 22, 125, and 62, who identified themselves with the Catholic Church either in their questionnaire or their voir dire answers. (22 RT 5982.)

The court then denied the renewed motion, stating the following:

"In any event, I don't find that there's a reasonable inference of group bias. I base that on the answers given by the -- strike that.

I don't find a reasonable inference of a group bias, but I did get reasons on the record from the prosecutor as to why the excusals were made. And, therefore, even if I found a reasonable inference, it's clear to me that there are individual reasons for the peremptory challenges of each person that was excused. Those reasons make sense. They are directly related to the individual jurors concerned. Clearly the questions regarding the Catholic religion did result in information which was used to exercise intelligent preempts, which is allowable under the law. And the fact that there are three -- strike that, two jurors still on the panel who are Catholics is of some weight, except that all the challenges have been exhausted. So I'm not sure about the weight of that particular piece of information.

I suppose it's arguable that challenges could have been executed or used by the plaintiff to excuse those two as opposed to two other jurors, but, again, that's kind of a stretch. So I'm not really considering that there's two left on the panel. But, in any event, the motion is denied and the venire will remain." (22 RT 5983-5984.)

C. Legal standards

"Both the United States and the California Constitutions prohibit the exercise of peremptory challenges solely because of group bias. (*Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258.)" (*People v. Johnson* (2006) 38 Cal.4th 1096, 1098.) "Prospective jurors may not be excluded from jury service based solely on the presumption that they are biased because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds." *(People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122, citing *People*

v. Johnson (1989) 47 Cal.3d 1194, 1215 and *Wheeler*, *supra*, 22 Cal.3d at p. 276.)

This court assumed without deciding in *In re Freeman* (2006) 38 Cal.4th 630, 643 that "*Batson*, like *Wheeler*, applies to peremptory challenges based upon bias against religious groups ..." , based in part on *Miller-El v. Dretke* (2005) 545 U.S. 231 (conc. opn. of Breyer, J.). The court again accepted a religious group as a cognizable group in *People v. Richardson* (2008) 43 Cal.4th 959, 984.

> "'We have previously stated that religious membership constitutes an identifiable group under *Wheeler*.' (*In re Freeman* (2006) 38 Cal.4th 630, 643.) 'Such a practice [religious-based excusals] also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution.' (*People v. Bell* (2007) 40 Cal.4th 582, 596.)" (*People v. Richardson* (2008) 43 Cal.4th 959, 984.)

The rules on review vary depending on the stage of a *Batson/ Wheeler* claim. Here, the court expressed some skepticism of whether the first stage prima facie case had been made, but nevertheless requested that the prosecutor state his reasons on the record, which the prosecutor did without objection, and the court ruled on the ultimate question. Thus, under recent cases, whether a prima facie case was established is moot.

> "As we have both the prosecutor's actual reasons and the trial court's evaluation of those reasons, this case is similar to *People v. Lenix* (2008) 44 Cal.4th 602 (*Lenix*), where 'the trial court requested the prosecutor's reasons for the peremptory challenges and ruled on the ultimate question of intentional discrimination. Thus, the question of whether defendant established a prima facie case is moot.' (*Id.*, at p. 613, fn. 8.)" (*People v. Mills* (2010) 48 Cal.4th 158, 174.)

The United States Supreme Court has also come to the same conclusion: "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." (*Hernandez v. New York* (1991) 500 U.S. 352, 359.)

Thus, the question to be addressed on review in this case is the third stage question: were the prosecutor's stated reasons for the challenge to the juror genuine or pretextual? "At the third stage of the *Wheeler/Batson* inquiry, the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible." *(People v. Lenix* (2008) 44 Cal.4th 602, 613, citations and internal quotations omitted.) "When an advocate's peremptory strike is challenged, the trial court must determine whether the advocate allowed his or her calculus to be infected by racial bias and then lied to the court in an attempt to get away with it." (*Id., at* 612.) It is also important to note that a *Batson/Wheeler* claim does not require any showing of any particular animus against the group, but simply that the juror was excused "on the basis of 'group bias', i.e., the *assumption* that a member of a particular group will, because of such membership, harbor particular attitudes or biases." *(People v. Stanley* (2006) 39 Cal. 4th 913, 939-940, emphasis in original.)

Ordinarily, the trial court's determination is treated with deference on appeal, but only if the record shows that the trial court made a "sincere and reasoned effort to evaluate the nondiscriminatory justifications offered." (*People v. Lenix, supra*, 44 Cal.4th at p. 614; see also *People v. Silva* (2001) 25 Cal.4th 345, 386 [deference given "only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as

applied to each challenged juror, citing *People v. Fuentes* (1991) 54 Cal.3d 707, 720 and *People v. Jackson* (1996) 13 Cal.4th 1164, 1197-1198].)

Deference is particularly inappropriate here where the prosecutor did not rely on the demeanor, tone of voice and inflections, body language, hairstyle, or any other factor which the trial court would have a better opportunity to evaluate than a court on review. The high court in *Snyder v. Louisiana* (2008) 552 U.S __, 128 S.Ct. 1203, recently demonstrated that deference is not appropriate in many cases. "[D]eference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike. Here, however, the record does not show that the trial judge actually made a determination concerning Mr. Brooks' demeanor." (*Id.*, at 128 S.Ct. 1209.)

Where a single juror is excused by a prosecutor because of group bias, a conviction and sentence to death cannot stand. (*People v. Avila* (2006) 38 Cal.4th 491, 549.) The trial court's erroneous denial of the *Wheeler/Batson* motion at the third stage is reversible per se. (See *Wheeler*, *supra*, 22 Ca1.3d at p. 283.)

D. The trial court failed to review the prosecutor's stated reasons

Here, the trial court failed to make an attempt "to evaluate each stated reason as applied to each challenged juror." *(People v. Silva, supra*, 25 Cal.4th at 386.) In ruling on the motion, the court first made comments which suggest that he was not basing his ruling on an actual evaluation of the credibility of each proffered explanation. "I can't find a reasonable inference on the basis of just three jurors." (22 RT 5965.) Then the court made comments which show that he misperceived his role. Rather than to use all the available evidence to evaluate the credibility of reasons actually

given, the court noted his impression that based upon a lengthy questionnaire "the questionnaire is replete with questions that *would* give you information for preempts on both sides. " (22 RT 5966, emphasis added.) The court concluded his ruling with the comment "But, as I say, in this case I don't at this point even find a reasonable inference. I only asked for the response just for the record." (*Ibid.*) Nowhere in his ruling does the court even mention any of the actual reasons given by the prosecutor for any of the three challenged jurors, let alone juror number 6. What the court seemed to do was to find that because there were, in the court's opinion, sufficient secular reasons which could be found in the record to support the peremptory challenge to each of the jurors, then the motion should be denied.

The court's focus on explanations that *could have* been offered was error, as was made explicitly clear in *Miller-El v. Dretke* (2005) 545 U.S. 231, 251.

> But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge or an appeals court can imagine a reason that might not have been shown up as false. The Court of Appeals' and the dissent's substitution of a reason for eliminating Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions. (*Ibid.*)

The trial court's inquiry into the credibility of the actual stated justifications was simply inadequate. "But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or

both, more is required of the trial court than a global finding that the reasons appear sufficient." (*People v. Silva* , *supra*, 25 Cal.4th at 386.) Here, the court did not even make a global finding that "*the* reasons" were legitimate, but instead denied the motion by implying that some - unstated- sufficient reasons existed. The court thus failed to make "a sincere and reasoned attempt to evaluate *each* stated reason as applied to *each* challenged juror. (*People v. Fuentes*, *supra*, 54 Cal.3d at 720.) Accordingly, this court should not accord the court's ruling in this regard any deference.

E. The prosecutor's reasons are pretextual and not supported by the record

In defense of his peremptory challenge to the juror number 6, the prosecutor gave the following explanation.

> "Number 6 had strong psychiatric issues, and in the questions around number 110 and following puts faith in psychiatric testing, thinks psychology and psychiatry is very useful, and believes it can explain a lot about a person, which, of course, concerns us since the defense has hired one of the top psychologists in the country, Dr. Fred Berlin. The juror -- question 129 focuses on issues that the defense has indicated they intend to raise and thinks that they're important. The -- the juror indicates that childhood abuse, which we know will be offered in this case, is an important factor. Brutal parents, which we know will be offered by the defense, is an important factor. Alcoholism is an important fact. That will be offered by the defense. And this juror thought that those things were important as well." (22 RT 5960.)

Krebs asserts that the "reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion,

indicating the very discrimination the explanations were meant to deny." (*Miller-El v. Dretke* (2005) 545 U.S. 231, 265.)

Each of the prosecutor's stated reasons relied solely on the juror's answers on the questionnaire. Thus, this is not a case where demeanor, facial expressions, or tone of voice were relied upon by the prosecution. Neither did the prosecutor attempt to rely on anything the juror said orally in voir dire. The juror clearly identified herself as attending the Catholic Church in her questionnaire. (1 CTPJ 100.)[9]

The prosecutor's first stated reason concerned the juror's answers to questions 110 and following regarding the role of psychiatry. It was stated that these answers showed the juror "puts faith in psychiatric testing, thinks psychology and psychiatry is very useful, and believes it can explain a lot about a person ..." (22 RT 5960.) The juror's actual responses show a juror with little actual knowledge or opinion regarding the usefulness of psychiatry in criminal cases. First, her "NO" answers to questions 110 and 111 show that she had no personal experience with psychiatry, having no close friends or relatives suffering from brain damage or mental impairment, or who were treated by a psychiatrist or any type of counselor. (1 CTPJ 113.) In response to question 112, the juror answered "YES" to the question "Are you familiar with psychological testing?" However, she answered "not sure" to the first sub-part of the question asking "Which tests?" In response to the second subpart "How do you feel about these tests?" the juror wrote, "It determines what is the true feelings of that person."

9

CTPJ designates the Clerk's Transcript re Potential Juror Questionnaires, consisting of 28 volumes containing the questionnaires from potential jurors not seated.

In response to question 112, asking "Do you feel that psychology has a role to play in the criminal justice system," juror Number 6 answered "NO OPINION." (1 CTPJ 114.) In answer to question 114, she stated "NO" to the question "Have you ever studied psychiatry, psychology, or any related subjects?" In the first subpart, she responded "I'm curious to know" to the question "Do you have an interest in the psychology of the criminal mind?" In response to the second sub-part asking "Have you read articles or watched information and/or entertainment programs relating to this subject," she wrote "yes." The third sub-part asked "What are your general opinions about this subject?" The juror wrote "I think it can explain a lot about a person." (*Ibid.*)

Thus, the actual responses show a juror with no personal experience with psychiatry, who thinks, based on some articles or entertainment programs, that psychology can explain a lot about a person. Tellingly, she also has "no opinion" about the role of psychology in criminal cases. It is difficult to understand what the prosecutor finds undesirable in these responses. She did not in any way indicate any knowledge of or leaning towards any particular psychiatric theory which might be disadvantageous towards the prosecutor's desired verdicts. The only hint the prosecutor gives as to why this neutral response was deemed unfavorable was that it "concerns us since the defense has hired one of the top psychologists in the country, Dr. Fred Berlin." (22 RT 5960.)

The prosecutor's explanation is unconvincing. It gives no clue as to why the prosecutor felt that this juror would view Dr. Berlin's testimony more favorably than Dr. Dietz'. The juror did not evidence any familiarity with the specific psychiatric diagnoses or theories relevant to the trial. A juror who thinks that psychiatry "can explain a lot about a person" would be

very receptive to Dr. Dietz' explanation that Krebs is a remorseless psychopath who acted criminally because he did not have a conscience. The only "psychological testing" even mentioned in the case was the "Hare Psychopathy Checklist," which Dr. Berlin did not feel was useful in the situation, and did not use. (35 RT 9130.) In sum, while this first stated reason is indeed neutral concerning Catholicism, it is also neutral as to whether she would be receptive or not to either the prosecution or defense case. It does not support a decision to excuse the juror on the basis stated by the prosecutor.

A comparison of the other seated jurors confirms that the prosecution's stated concerns were pretextual. The most pertinent question to the prosecutor's stated concern was number 112 - "Do you feel that psychology has a role to play in the criminal justice system." A "Yes" answer to this question would indicate a juror receptive to psychiatric explanations in the trial which the prosecution claimed to fear. However out of the 20 sworn jurors, 12 (60 percent) answered "Yes", while 7 (35 percent) answered "no opinion", the same as juror Number 6. One juror answered by circling both "No Opinion" and "No." [10] The response of juror Number 6 is thus more favorable to the prosecution under the terms they stated than most of the seated jurors. Her response does not support a finding that the prosecutor's reasons were genuine.

In addition, many of the sworn jurors gave explanations to question 112 or responses to question 113 which indicated a receptive attitude towards psychiatry similar to that of juror Number 6. Question 113 asked

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The questionnaires from the 20 seated jurors are contained in two volumes labeled Clerks Transcript re Sworn Juror Questionnaires (CTSJ)

"What is your opinion about the use of psychology or psychiatry to explain human behavior?" Juror Number 6 had answered " I think its very useful," as the prosecutor noted in his statement of reasons. (1 CTPJ 114.) However, many seated jurors gave similar responses.

Juror Number 134 answered "Yes" to question 112, with the explanation "necessary and helpful to understand" and answered "very helpful" to question 113 (1 CTSJ 116.) Juror Number 238 answered "Yes" to question 112, with the explanation "understanding human beings" and answered question 113 "helpful". (1 CTSJ 296.) Juror Number 253 answered "Yes" to question 112 with the explanation "state of mind plays directly on his actions" and answered question 113 succinctly "What other field?" (1 CTSJ 236.) Juror Number 277 answered question 112 "Yes" with the explanation "can find out where someone is coming from" and answered question 113 "very interesting." (2 CTSJ 416.) Juror Number 265 answered question 112 "Yes" with the explanation " some need it and some need medicine too" and answered question 113 "within reason, we are all shaped by our psychology- that is why we go to psychologists and psychiatrists to help us understand and change." (2 CTSJ 386.) Juror Number 332 answered "Yes" to question 112 with the explanation "I think in many cases it may help to learn about this aspect. I can't say whether should be used in trial or not." The same juror answered question 113 "I think it can be used as an aid to understanding, even possibly predicting some behaviors. Don't know much about it." (2 CTSJ 506.) Juror Number 334 answered "Yes" to question 112 with no explanation, and answered question 113 "reasonable- depending on what is presented." (2 CTSJ 536.) Juror Number 338 answered question 112 "Yes" with the explanation "perhaps to explain motivational factors behind the crime; and to introduce

mitigating circumstances" and answered question 113 "see above." (2 CTSJ 566.)

The fact that so many seated jurors had attitudes towards psychiatry that were more receptive or just as receptive to psychiatrists as that of juror Number 6 is further evidence that the prosecutor's first stated reason is a pretext.

The second stated reason by the prosecutor for the challenge was based on the juror's response to question 129, which asks the following in a somewhat leading way: "Is there any type of information regarding a defendant's background or character that would be important to you when choosing between life without parole and death (e.g. work record, childhood abuse, brutal parents, alcoholism, former good deeds, illnesses, etc.)" (1 CTPJ 116.) The prosecutor explained that juror Number 6's written response - "childhood abuse, brutal parents, alcoholism, illnesses" - indicated that the juror felt that the factors which the defense was intending to present were "important." (22 RT 5960.) "And this juror thought that those things were important as well." (*Ibid.*)

This justification also rings hollow, especially when other responses to the question by sitting jurors are examined. It should be noted first that by listing 6 distinct mitigating factors and asking what type of information would be "important" the question naturally invites jurors to select from among the listed factors. Juror Number 6 did so, omitting "former good deeds." She did not write the word "important" herself. The prosecutor's assertion that the juror felt "those things were important as well" is therefore suspect. The previous question, number 128, covers the same subject in a non-leading way. Question number 128 states "What types of evidence would you consider important in choosing between life without

parole or death?" Juror Number 6 answered question 128 "If they did it without conscience." (1 CTPJ 116.) It is telling that no other potential mitigating factors are mentioned in this answer to a non-leading question.

Many other un-challenged jurors who were seated responded in similar fashion as juror Number 6 did to question 129. Juror Number 20 responded "All above important." (1 CTSJ 178.) Juror Number 75 responded "Yes, if background had role in crime, like brutal parents." (1 CTSJ 58.) Juror Number 176 responded " Yes, early environment and social conditioning may have impact." (1 CTSJ 148.) Juror Number 248 responded "possibly." (1 CTSJ 88.) Juror Number 253 responded simply "yes." (1 CTSJ 238.) Juror Number 285 responded "possibly some of the above." (2 CTSJ 448.) Juror Number 296 responded "perhaps all." (2 CTSJ 477.) Juror Number 334 responded "depends on the evidence." (2 CTSJ 538.) Juror Number 338 also simply responded "yes". (2 CTSJ 568.) Juror Number 346 responded "childhood abuse, brutal parents, mental illness." (2 CTSJ 598.)

The prosecutor chose to give only two reasons based entirely on the questionnaire responses. "[A] prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." (*Miller-El v. Dretke*, *supra*, 545 U.S. at 251.) Upon examination, the reasons fail.

F. The prosecutor's admissions and the pretextual explanation supports the inference of impermissible group bias

The prosecutor admitted to believing that being a member of the Catholic Church may shape a person's attitude towards the death penalty. The prosecutor explained his careful questioning of Catholic jurors by

noting "where you have a person who's a member of an organization, and they perceive the official position of the organization they belong to, particularly a religious organization, is against an issue that's raised in a criminal trial, it's certainly an area of inquiry that needs to be explored."

In other words, the prosecutor was saying that Catholics could be assumed to share certain anti-death penalty attitudes. The defense did not share such an assumption as evidenced by the fact that the defense exercised peremptory challenges against four Catholic jurors, Number 62, Number125, Number 159, and Number 222. (22 RT 5982.) Two of these jurors, Number 62 and Number 222, were unsuccessfully challenged for cause. (11 RT 3308-3309, 16 RT 4492-4493.) Juror Number 159, who was a career probation office employee and who had a close family member murdered within the last five years, exhibited classic characteristics giving the defense reason to exercise a peremptory challenge. (14 RT 4089-4091.) The defense also made a challenge for cause which was denied against Catholic juror Number 20, who ended up being seated and returning a verdict. (9 RT 2952-2954.) However, that the defense did not indulge in impermissible group bias is irrelevant to whether the prosecutor did.

It is not contended that merely being concerned about the alleged tendency of Catholics to harbor anti-death penalty bias is unlawful. Neither is it contended that merely asking questions of Catholic jurors based on that concern is necessarily unlawful. The point at which it becomes unlawful is when, in the absence of actual information gleaned from those questions which justify a peremptory challenge, the lingering *assumption* of bias remains, and is acted upon by challenging a juror because of it. That is what must have happened here. The following passage from *Snyder v. Louisiana, supra*, 552 U.S. __, 128 S.Ct. 1203 is instructive.

"As previously noted, the question presented at the third stage of the *Batson* inquiry is 'whether the defendant has shown purposeful discrimination.' *Miller-El v. Dretke*, 545 U.S., at 277. The prosecution's proffer of this pretextual explanation naturally gives rise to an inference of discriminatory intent. See *id.*, at 252 (noting the "pretextual significance" of a 'stated reason [that] does not hold up'); *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam) ('At [the third] stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination'); *Hernandez,* 500 U.S., at 365 (plurality opinion) ('In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed'). Cf. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 511 (1993) ('[R]ejection of the defendant's proffered [nondiscriminatory] reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination')." (*Snyder v. Louisiana*, *supra*, 128 S.Ct. 1203, 1212.)

The prosecution's self professed assumption that Catholic jurors may have anti-death penalty leanings is the natural explanation for the prosecution's inability to cite any plausible justification for the excuse of juror Number 6. The evidence is thus sufficient for this court to find that Krebs has met his burden on appeal. The judgment of conviction should therefore be reversed.

ISSUES RELATING TO GUILT

II

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

A. Introduction

The district attorney's assistant chief investigator (Hobson) interviewed Krebs in custody on March 21, April 1, and April 21, 1999, without ever specifically advising Krebs of his *Miranda* rights *(Miranda v. Arizona* (1966) 384 U.S. 436), or securing an explicit waiver thereof. In the first two interviews, Krebs maintained his innocence. On April 21, after reminding Krebs of his rights and questioning him further, Hobson disclosed his conviction that Krebs was guilty, and described the incriminating evidence. Krebs immediately fell silent, and refused to respond for about 16 minutes to any of Hobson's questioning. Hobson began a series of unanswered monologues designed to get Krebs to talk. Krebs then explicitly told Hobson he wished to discontinue the questioning on six distinct occasions, yet Hobson continued each time to attempt to persuade Krebs to talk, ignoring Krebs' invocation of his rights. Eventually Krebs was returned to his cell, but Hobson returned uninvited the next morning and picked up where he had left off persuading Krebs he should talk. His efforts were successful, and Krebs then made important unwarned admissions and agreed to tell Hobson the whole truth. Immediately upon garnering this promise, Hobson then for the first time explicitly advised Krebs of his *Miranda* rights. Krebs shortly thereafter gave a complete

videotaped confession, and continued to cooperate with Hobson's interrogations in the following days.

Krebs contends in section A, infra, as he did in the trial court (see motion at 16 CT 4176), that Hobson's eventual explicit advisement of rights under the *Miranda* decision was ineffective because he failed to "scrupulously honor" Krebs' previous invocation of his rights under the rule of *Miranda* and *Michigan v. Mosley* (1975) 423 U.S. 96.

Krebs also contends in section B, infra, as he did in the trial court (16 CT 4180), that the eventual advisement of rights was ineffective because it followed substantial unwarned admissions, notwithstanding the rule of *Oregon v. Elstad* (1985) 470 U. S. 298. Here, because Hobson's "question first," warn later technique was deliberate, the exception to *Elstad's* rule contained in *Missouri v. Siebert* (2004) 542 U.S. 600 applies to invalidate the tardy warning, requiring exclusion of Krebs' confessions.

Krebs also contends in section C, infra, that under the totality of the circumstances the state has failed to show a knowing and voluntary waiver of his Fifth Amendment rights. The relevant circumstances include: Hobson's initial failure to warn; his "softening up" Krebs during multiple interviews; his failure to secure an express waiver; his conduct in lying to Krebs about the nature of the incriminating evidence; suggesting that the death penalty may not apply depending on why Krebs committed the acts, and that it would be a mitigating circumstance if he abducted the victims to satisfy a fantasy that he could not control; and Hobson's repeated continuing questioning in the face of explicit invocations.

B. Factual Background

Krebs was arrested on March 20, 1999, for a parole violation. Hobson had the defendant transported in custody on March 21, 1999 to the

police department interrogation room, where he questioned Krebs about the case for about an hour. (7 RT 2228.) Questions included where he was on the night the girls went missing and his knowledge of the eightball found at his house. (7 RT 2228.) Krebs was not given his *Miranda* rights during this interview. (7 RT 2301.)

Ten days later, on April 1, 1999, Hobson again had Krebs transported in custody to the police station interview room. Hobson again did not give Krebs his *Miranda* rights nor remind him of them. (7 RT 2301-2302.) Instead, Hobson attempted to convince Krebs to take a polygraph test concerning the case to be administered by a FBI agent which Hobson had arranged to be standing by. (7 RT 2248.) Krebs refused to participate. (7 RT 2232.) Hobson immediately thereafter spent about a half hour attempting to convince Krebs to participate in the polygraph interview before Krebs agreed. (7 RT 2248-2249.) Krebs was then turned over to the FBI agent in another interview room. (7 RT 2251.) The FBI agent then read Krebs his *Miranda* rights and had Krebs sign forms consenting to the polygraph and waiving his *Miranda* rights. (18 CT 4836-4837, 7 RT 2233.) Although the polygraph form said the examination would not be monitored or recorded, Hobson monitored the examination from an adjoining room by means of closed-circuit television. (7 RT 2250.) The FBI agent did a pretest interview that lasted about an hour, then began the polygraph test procedure. After about five minutes, Krebs was cautioned by the examiner about his breath, and Krebs terminated the procedure. (7 RT 2250-2251.)

Immediately afterwards, Hobson again interviewed Krebs in an interview room. Hobson reminded Krebs of the rights read by the polygrapher. Hobson did not ask if Krebs was willing to waive those rights. (7 RT 2302.) Krebs was then questioned for approximately one half hour

concerning the case, including questions on the same topics covered in the March 21st interview. (7 RT 2252.)

Twenty days later, on April 21st, Hobson visited Krebs in jail, without advising Krebs of his *Miranda* rights, and asked him if he was willing to talk and cooperate with the investigation. (7 RT 2236.) Krebs agreed, and Hobson took him to an interview room at the police department where a videotaped interview was conducted. (7 RT 2254.)

At the commencement of the videotaped interview, Hobson said, "Okay, where did we leave off? Remember last time, uh during the polygraph, the FBI gave you your *Miranda* rights. You still know those rights, right?" Krebs answered "Uh-huh." Hobson replied, "you probably know them better than I do. Okay, um those are the rights that still apply here." (7 RT 2237, 2239, 2264; 21 CT 5611 [transcript].) Hobson did not personally enumerate the *Miranda* rights on that occasion, nor did he ask Krebs if he was willing to waive those rights, because in his opinion Krebs was not in custody relating to the investigation. (7 RT 2256, 2262)

Krebs was then questioned extensively about the case. As will be detailed in the following argument, Krebs was cooperative until confronted with alleged evidence against him; he then went silent. (21 CT 5675-5681[transcript].) Krebs then explicitly invoked his right to curtail questioning several times, as detailed below, which was not "scrupulously honored" by Hobson.

The defense brought a pretrial motion to exclude the admissions made on April 21st and 22nd and subsequent statements (16 CT 4172), which was opposed in writing by the People (17 CT 4380). After full hearing, the court issued a written decision. (17 CT 4932.) The decision indicates the court did not resolve the issue of whether Hobson had

"scrupulously honor[ed] defendant's request to cease questioning" on April 21st because the defendant did not make an admission at that point or anytime on April 21st. (18 CT 4933.) However, the court found that Hobson "was trying to keep defendant talking." (*Ibid.*) The court further found that Hobson "stumbled in his attempt to honor defendant's request to end the interrogation" when Hobson asked the defendant to take him to where the victims were buried as they were traveling back to the jail after his invocation. (18 CT 4933-4934.)

Regarding Krebs' unwarned admissions made to Hobson the next morning, April 22nd, at the jail, the court found that Krebs was in custody for *Miranda* purposes and should have been reminded or advised of his rights, and the two admissions were therefore excluded from the People's case in chief. (18 CT 4935.) As to the admissions and confessions made following the warnings, the court found that "[t]he practice of not obtaining an express waiver can be problematic," but found that the confession was voluntary under the totality of circumstances. (18 CT 4936.)

C. Hobson failed to scrupulously honor Krebs' invocation of his Fifth Amendment rights by repeated further interrogation and visits in violation of *Michigan v. Mosley*

A person in custody has a right under the *Miranda* decision *(Miranda v. Arizona, supra*, 384 U.S. 436) to "cut off questioning," thus controlling "the time at which questioning occurs, the subjects discussed, and the duration of the interrogation." *(Michigan v. Mosley* (1975) 423 U.S. 96 at 103-104.) The *Mosley* court found that the intention of the *Miranda* decision was to implement "fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will

be scrupulously honored. . . .." (*Id.*, at p. 103.) The holding of *Mosley* is simple: "admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored'." (*Id.*, at p. 104.) Here, it was not.

It was conceded by the People below that Krebs had invoked his right of silence in the April 21st videotaped interview. (17 CT 4392.) Hobson testified he understood the defendant to invoke at page 81 of the interview [21 CT 5691], when Krebs said for the second time, "Nothing to say, Larry." (7 RT 2303.) Krebs had, however, invoked his right to cease questioning long before this. "[I]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *(Miranda v. Arizona, supra*, 384 U.S. at pages 473-474.) "Any words or conduct which 'reasonably appears inconsistent with a present willingness on the part of the suspect to discuss his case freely and completely with police at that time [fn. omitted]' (*People v. Randall* [(1970)], *supra*, 1 Cal.3d 948, 956) must be held to amount to an invocation of the Fifth Amendment privilege." (*People v. Burton* (1971) 6 Cal.3d 375, 382. See also *People v. Crittenden* (1994) 9 Cal.4th 83, 129.) "I am not saying nothing now" is an effective invocation of the right to remain silent. *(People v. Neal* (2003) 31 Cal.4th 63, 73.) Remaining silent in the face of accusatory questioning, even after an express waiver, is conduct which invokes the Fifth amendment protections. (*People v. Savala* (1970) 10 Cal.App.3d 958, 962.)

Here, Krebs clearly signaled his unwillingness to "discuss the case freely and completely" soon after Hobson said that Newhouse's blood was on Krebs' car seat. (21 CT 5675.) He shook his head "no" to Hobson's

entreaty: "But you're the only one that can tell that story." (21 CT5676, lines1-2.) The defendant fell silent for an extended period, which Hobson admitted to be about fifteen minutes. (21 CT 5675- 5681, 7 RT 2303.) During the period of silence, Hobson doggedly attempted to persuade Krebs to talk by using various techniques. "Right now we only have one side of the story. I don't want to have to go in and appear before a jury and depict you as a cold blooded murderer. I'd rather go in and appear before a jury and tell what Rex Krebs said and what happened based on his degree of truth, honesty, and integrity, because I'm sure this is something that was way beyond your control." (21 CT 5676 [transcript p. 66].) "A guy that sheds the tear is the one that shows me he cares. He's sorry it happened.... But it was something that was way beyond his control that got out of hand." (21 CT 5677 [transcript p. 67].) "I've been fair and honest with you. I would ask that you be truthful and honest with me." (21 CT 5678 [transcript p. 68].) When Krebs failed to respond to this comment after a long pause, Hobson questioned, "What are you thinking, Rex?" After Krebs continued to remain silent, Hobson commanded him "Rex, look at me, Rex. I'm not making it up. Its not easy to take that first step. You owe it to yourself too." Krebs still did not respond. (21 CT 5678 [transcript p. 68].)

After further entreaties to talk without success, Hobson stated, "The other reason I need to hear the story Rex is so I can go back and talk to my boss, the District Attorney, to see how we are going to handle this case." After more non-response, Hobson touched Krebs on the shoulder, saying, "Can you help me find them? (Long pause) Rex, can you help?" (21 CT 5679, [transcript p 69].) Hobson continued his persuasion, then asked, "Talk to me, tell me what you're thinking (pause) Will you take a ride with

me Rex? Will you take a ride and show me?" (21 CT 5680 [transcript p. 70].) Finally Krebs broke his silence by asking "Can you get me a cigarette and a half hour to think about it?" in response to Hobson's repeated request, "Will you show me? (21 CT 5681 [transcript p. 71].)

The foregoing establishes that Krebs invoked his Fifth Amendment rights to discontinue questioning by a lengthy silence of about 15 minutes (21 RT 2303) in the face of repeated questioning. Even if Krebs' silence could be considered ambiguous, Hobson would be allowed to continue questioning *only* for the purpose of clarifying whether Krebs was in fact invoking his right to terminate questioning. *(People v. Box* (2000) 23 Cal.4th 1153,1194.) The police may not persist "in repeated efforts to wear down his resistance and make him change his mind." *(Michigan v. Mosley* (1975) 423 U.S. 96, 105-106 .) Here, Hobson himself characterized his conduct during Krebs' extended silence in the face of accusatory questioning as an effort to "persuade" Krebs to answer his questions. (7 RT 2303, 2305) The record is clear that this is so. The court found that he "was trying to keep defendant talking." (18 CT 4933.) Hobson's efforts to persuade are therefore inconsistent with "scrupulously" honoring Krebs' *Miranda* rights.

That Krebs had invoked his right to silence by remaining silent is made expressly clear by the comment Krebs made upon breaking his silence. He ignored Hobson's question "Will you show me," and instead expressly asked for a break in the questioning: "Can you get me a cigarette and a half hour to think about it?" (21 CT 5681 [transcript p. 71].) This is the first express, explicit, unambiguous request that questioning be discontinued for a period. Instead of honoring that request, Hobson engages in "repeated efforts to wear down his resistance and make him

change his mind." (*Michigan v. Mosley* (1975) 423 U.S. 96, 105-106.) Hobson immediately told Krebs that "The half hour isn't going to make anything better. ... What we need to do now is work through this thing ..." (21 CT 5681, lines 7-8.) Hobson then continued his questions and exhortations for 38 lines of transcript. (21 CT 5691-5682.) During this monologue, Hobson repeated he wants Krebs to ride with him, that a half hour isn't going to help. He asked Krebs to be honest, and said he has been honest with Krebs. He praised Krebs as an honest and very truthful person. (21 CT 5681.) He promised that if Krebs will talk, Hobson will "work with you through this." He implored, "Is there only two women that you're responsible for? ... Rex you got to talk to me, man." (21 CT5682 [transcript p 72].) None of these statements are an effort to determine *if* Krebs wants to continue or discontinue the interview. He asked what Krebs is thinking several times. Krebs responded only by saying, "dying." (21 CT 5682.) Hobson responded, "We don't know if dying is an aspect of this case or not until you tell me what happened." (*Ibid.*) Hobson asked about the case. "Where'd you meet Aundria at?" Krebs remained silent. After a long pause, Hobson again commanded, "Rex, talk to me." (21 CT 5683.) "It's not going to go away, we have to deal with it." (21 CT 5684.)

Finally, Hobson said, "Let's take that first step, all right," while touching Krebs on the knee. He then said, while lifting Krebs' chin with his hand, "Talk to me. Look at me". Although Krebs does not respond, Hobson continued questioning. "Can you tell me where I can find them?" Krebs responded, "Put me down in a holding cell and let me think, all right?" Instead of complying with this request, Hobson touched Krebs on the shoulder, saying "Rex, Rex I don't want to put you down by yourself. I want to sit here, talk with you and work through this." (21 CT 5685

[transcript p.75].) Thus Hobson again ignored a second explicit, direct, unequivocal request that questioning be discontinued. He failed to scrupulously honor the request and instead engages in "repeated efforts to wear down his resistance and make him change his mind." (*Michigan v. Mosley* (*supra*) 423 U.S. 96, 105-106.) Hobson's repeated physical touchings of Krebs, while not painful, were clearly designed to control and persuade Krebs to continue to talk about the case.

Krebs even explicitly voiced his perception that Hobson was "beating" on him to make him talk. When Hobson answered, "I'm not beating on you," Krebs replied, "Yeah you are. Then I'm not gonna say nothing. I know me." (21 CT 5686.) Krebs then agreed to be left alone for ten minutes, but Hobson returned after only five minutes. (21 CT 5687.) When asked if ten minutes would help, Krebs said "No." Hobson continued his entreaties, ending by saying, "But you can tell me why." After a long pause, Krebs replied simply, "Take me to jail." Hobson said, "You don't want to help me?" to which Krebs answered, "Not right now." (21 CT 5688 [transcript p. 78].)

Thus Krebs explicitly invoked by asking for the third time that questioning be discontinued, yet Hobson again ignored this invocation and continued his efforts to persuade Krebs to talk for most of the following page. Hobson stated, "Going back to jail isn't going to solve anything. ... The family needs your help." He stated there is no doubt of Krebs' guilt, but "the issue is why ... We have to deal with it and deal with it now. ... The sooner you talk about it, the sooner you'll feel better." Hobson then stated, "What you were thinking is important to me." Krebs' reply was short and to the point: "Nothing to say, Larry." (21 CT 5689 [transcript p 80].) Even though this statement clearly confirms that Krebs had invoked

his rights for the fourth time, Hobson again ignored this invocation and launched into another lengthy monologue designed to persuade Krebs to talk. Hobson talked about all the efforts being expended to locate the bodies and the need for closure. He talked about the evidence against Krebs: the eightball, the DNA on the seat and the ID of his car in the neighborhood. He repeated that why it happened is important. He talked about the abuse Krebs suffered as a child, and asks "Did you ever tell Roslynn about that?" (21 CT 5690.) Krebs only responds, "Little bit." Hobson resumed his persuasion. "Well I feel privileged that uh, you told me about it. Just going back to your cell Rex, this thing is going to fester like a big sore ... All you have to do is take that step. Get the ball rolling. And you and I will sit down and work through this." (21 CT 5961.) Hobson again mentioned the search efforts, but Krebs remained silent during a long pause, then Hobson continued "Can you help me, Rex?" Hobson then switched back to the "why" question, "Help me understand why ... I just need to understand the why part." Krebs again remained silent during an even longer pause, so Hobson returned to the issue of where the bodies are, "Can you tell me where? So that I can get these guys off the street, get back home to their families and get back on a normal schedule." (*Ibid.*) Krebs says yet again "Nothing to say, Larry", thus explicitly invoking his rights for the fifth time. (CT 5691 [transcript p. 81].)

While Hobson testified that he thought that this was the first time that Krebs had invoked his rights (7 RT 2302-2303), he did not explain why the other five similar express requests to terminate questioning were not invocations or were somehow ambiguous.

Even after Hobson personally understood Krebs to have invoked his rights to remain silent, he failed to scrupulously honor Krebs' request to

rights to remain silent, he failed to scrupulously honor Krebs' request to discontinue questioning. Hobson immediately continued to engage and question him: "What changed Rex? What'd I do to cause the sudden change? Something I said? Something I did? Can you tell me that?" (CT 5691 [transcript p, 81].) This was essentially a question as to *why* Krebs had invoked his rights, which is irrelevant to the issue of *whether* Krebs had invoked his rights. (*People v. Peracchi* (2001) 86 Cal.App.4th 353, 361; *Anderson v. Smith* (2d Cir. 1984) 751 F.2d 96, 105.) This line of questioning was simply a continuation of Hobson's "repeated efforts to wear down [Krebs'] resistance and make him change his mind" (*Michigan v. Mosley, supra*, 423 U.S. at page 104) that started after Krebs' implied invocation by silence and continued through his previous five express invocations.

Hobson continued his efforts to wear Krebs down and change his mind. He commanded, "Rex. Let me make a comment, look at me." (21 CT 5691.) When Krebs complied, Hobson stated, "*If* I take you back out there [the jail], you think about it, will you call me? Is that fair? You call me when you're ready. Day or night, I'll come, is that fair?" (21 CT 5692.) By this statement, Hobson appears to be conditioning his compliance with Krebs' request to discontinue questioning upon Krebs' promise to later call him. Krebs did not answer the question, but instead asked when charges will be filed. (*Ibid.*)

Hobson continued to try to get Krebs to agree to call him from jail. Krebs replied only, "I'll think about it." (21CT 5692 [transcript p. 82].) The questioning concluded only when Krebs agreed to contact Hobson from the jail if Krebs wanted to talk further with him. "If you want to talk, get a hold of the jailer whether its day or night. I'll come out. Is that fair?" Krebs

answers, "More, more than fair." (21 CT5692 [transcript p. 82].) However, once again Hobson did not honor this arrangement: he came back the next day without a call from Krebs.

Neither did Hobson honor the fifth express invocation that day. As Krebs was being taken back to the jail personally by Hobson, Krebs asked for a cigarette and was provided one. (7 RT 2264-2265.) As Krebs smoked in Hobson's car, Hobson heard him crying and asked him what he was thinking. Krebs responded "Dying." He later heard Krebs mumble words to the effect "I'm a dead man walking." (*Ibid.*) At the entrance to the jail facility, Hobson again disregarded the previous invocations and asked Krebs the pivotal question - would he take him to the location of the bodies. (7 RT 2265.) Krebs declined, requesting yet again to be taken to jail, his sixth express invocation. (*Ibid.*) The trial court recognized and found that Hobson at this point had failed to scrupulously honor Krebs' invocation by asking him to take Hobson to the bodies. "Hobson stumbled in his attempt to honor defendant's request to cease the interrogation," citing *Michigan v. Mosley* (1975) 423 U.S.96. (18 CT 4933-4934.)

As Krebs was finally being walked into the jail, Hobson again advised Krebs that if he changed his mind and wanted to talk to Hobson, that he should contact Hobson and he would return at any time of the day or night. (7 RT 2266-2267.) Hobson asked if Krebs consented to Hobson visiting and talking to him again the next day. Krebs replied "I'll think about that later." (7 RT 2267.) Hobson continued to press Krebs to agree to talk with him, ending the conversation about 2:30 p.m. by urging Krebs to contact him that night, or allow Hobson to visit early the next day, to which Krebs replied he would "deal with that tomorrow" (7 RT 2267), or "maybe I'll deal with that tomorrow." (7 RT 2282) Thus Krebs never

consented to Hobson talking to him the next day, but was informed that Hobson would come to him *if* Krebs contacted Hobson.

Hobson did return the next morning, April 22nd , around 9:45 a.m., without invitation or contact from Krebs. (7 RT 2268.) He did not advise or remind Krebs of his *Miranda* rights. (7 RT 2270.) In an unrecorded interview, Hobson again tried to get Krebs to change his mind and talk.

Hobson reverted to familiar themes. He advised that the situation was not going to go away and that Krebs needed to tell his side of the story. (7 RT 2270.) He told Krebs that "it was no longer a question of if he did it, but rather why he did it." (7 RT 2310.) He told Krebs that the "investigation painted an appalling picture of what happened and the facts strongly indicate that these were heartless, cold blooded acts of rape and murder." (*Ibid.*) He suggested to Krebs that it might have been cold blooded, or Krebs might have "merely gave into his fantasies or they escalated to a point where something went wrong and he lost control." (*Ibid.*) Hobson told Krebs that Hobson "wanted to believe that he wasn't an animal and that this was not a series of carefully planned out acts, but in order for [Hobson] to believe those things [Hobson] needed him to talk to [Hobson] and tell what happened." (7 RT 2311.) He told Krebs that the families needed closure, and that "this was not the time to throw truth and honesty out the window." (*Ibid.*)

Eventually Hobson's expert and psychologically powerful efforts bore fruit, and Krebs made admissions that he was an animal who did not deserve to live, and that nothing could justify what he did. (7 RT 2271.) Hobson continued his persuasion, suggesting the crimes were "totally out of character." He appealed to Krebs, citing the families' need for closure and Krebs' honesty and integrity. (7 RT 2271.) Krebs finally succumbed, and

agreed to tell "the truth", but stated he wanted to go elsewhere. (7 RT 2272.) The trial court rejected the People's contention that the defendant was not in custody for *Miranda* purposes at this time, and found that Krebs should have been advised of or reminded of his *Miranda* rights at that time, citing *Stansbury v. California* (1994) 511 U.S. 318, and excluded these admissions from the People's case in chief. (18 CT 4935.)

Immediately after Krebs made his admissions and agreed to tell the truth, for the very first time, Hobson read Krebs his *Miranda* rights. He did not, however, ask for an express waiver. (7 RT 2273.) Krebs then admitted in response to questioning that he was responsible for the deaths of the victims. (7 RT 2274.) Krebs was then taken to the police station, where Hobson again read Krebs his *Miranda* rights, again failing to ask for a waiver, and the videotaped confession of April 22nd was made. (7 RT 2275-2276, 21 CT 5492.)

The conduct of Hobson on April 21st and 22nd violated the heart of *Miranda*'s protection, as summarized by the court in *People v. Peracchi* :

> "Once Peracchi invoked his right to remain silent, the officer was required to cease questioning. As the court stated in *Miranda*: 'Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; **any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.** Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.' [*Miranda v. Arizona*, *supra*, 384 U.S. at pages 473-474]" (*People v. Peracchi* (2001) 86 Cal.App.4th 353, 361, emphasis added.)

The trial court failed to identify the correct rule that applies under *Miranda* and *Michigan v. Mosley* where the police continue or renew interrogation after a suspect invokes his right to remain silent. The trial court found that: "The latter questioning need not be, as the defendant herein argues, a different officer, different cases, or after a certain length of time. ... The sole issue on April 22 at 9:45 am is whether defendant's unwarned participation was voluntary," citing Justice White's *concurring* opinion in *Mosley.* (18 CT 4938.) By focusing on this test, the court failed to determine under *Michigan v. Mosley* whether the invocation of the previous day was "scrupulously honored," (see ruling at 18 CT 4933) and failed to analyze the relevant factors. "A court abuses its discretion when it rests its decision on an inaccurate view of the law." *(United States v. Jones* 1141 (9th Cir. 2007) 472 F.3d 1136.) The trial court's reliance on Justice White's opinion is ironic because the concurrence correctly interpreted the majority opinion as establishing a rule that "some custodial confessions will be suppressed even though they follow an informed and voluntary waiver of the defendant's rights." While Justice White advocated a rule which focused on whether the statements made in response to interrogation following invocation were "voluntary," the majority opinion instead held that such statements were inadmissable unless the invocation was "scrupulously honored." Thus under the majority opinion in *Mosley,* a factual determination of "voluntariness" is insufficient to admit statements where an invocation is not "scrupulously honored" (see *United States v. Barone* (1st Cir. 1992) 968 F.2d 1378 1383), just as "voluntary" custodial statements are not admissible where *Miranda* advisements are not given in the first instance.

The *Mosley* opinion identified at page 105 several factors leading to

its conclusion that the "right to cut off questioning" was "fully respected" in that case. (*Mosley* at p. 105.) The court cited: 1) a full initial advisement and explicit waiver of *Miranda* rights; 2) immediate cessation of questioning upon mid-interrogation invocation; 3) no attempt by that officer to resume questioning; 4) no attempt to persuade the suspect to reconsider his invocation; 5) an interval of time between resumed questioning; 6) the resumed questioning was by another police officer; 7) the resumed questioning was at another location; 8) the resumed questioning concerned a crime (murder) unrelated to the crimes involved in the initial questioning (robberies); 9) full and complete *Miranda* warnings were given at the outset of the renewed questioning; 10) the suspect was given a full and fair opportunity to exercise his rights; 11) the resumed questioning did not "undercut" the previous decision not to talk about the robberies; 12) the subsequent questioning was "consistent" with the suspect's desire not to talk about the robberies.

Citing these factors, the *Mosley* court distinguished the case from one which would require exclusion because the invocation was not scrupulously honored: "This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." (*Id.*, at p 105-106.) Here, there is clear and uncontradicted evidence that Hobson both repeatedly refused to cut off questioning, and engaged in repeated efforts to wear down Krebs' resistence.

Analysis of the 12 factors cited by the *Mosley* court point the opposite way in this case: 1) Hobson *never* explicitly advised Krebs of his *Miranda* rights prior to the resumed questioning on April 22, and *never*

secured an explicit waiver during any of the interrogations. 2) Hobson did not immediately cease questioning upon invocation, but doggedly attempted to get Krebs to change his mind. 3) Even after discontinuing questioning, Hobson attempted to resume questioning on the 21st by asking Krebs what he was thinking and to take him to the bodies. 4) Hobson attempted to persuade Krebs numerous times to talk with him after Krebs made clear he wished to discontinue questioning. 5) While there was an interval of time between Krebs' invocation on the 21st and Hobson's resumption of questioning on the 22nd, Krebs had agreed to notify Hobson if Krebs wished to talk to him, and Hobson's visit the next morning was in violation of that agreement. 6) The resumed questioning on the 22nd was by the same officer - Hobson. 7) The questioning was at a slightly different location, but, 8) concerned the same crime and revisited familiar themes used in the previous questioning designed to elicit a confession. 9) Hobson did not give any *Miranda* warnings on the 22nd as he resumed questioning. 10) Rather than giving Krebs a full and fair opportunity to stand on his right not to make a statement, Hobson returned uninvited On the 22nd in violation of the agreement and immediately engaged in coercive behavior by advising Krebs that the situation was not going to go away and that Krebs needed to tell his side of the story. 11) Hobson "undercut" Krebs' previous invocations by coming again to interview him in violation of the agreement that Krebs would contact Hobson if he wanted to talk, and by immediately attempting to persuade him to talk using tactics similar to those used by Hobson when he previously ignored Krebs' express invocations. 12) Hobson's questioning on the 22nd was inconsistent with Krebs' position on the 21st that he did not want to continue talking to Hobson about the case, and would contact him *if* he was ready to talk.

In the context of the facts of this case, Hobson's visit to Krebs on the 22nd is simply a continuation of the improper attempts to break Krebs down and persuade him to talk that Hobson had repeatedly engaged in after Krebs first impliedly invoked his rights by going silent for over 15 minutes on April 21st. In addition, Hobson had engaged in similar behavior to persuade Krebs to consent to interrogation even prior to April 21st. When on March 21st Hobson initially interviewed Krebs in the police station about the crimes, Hobson did not advise or remind the defendant of his *Miranda* rights. On April 1st, Hobson again interviewed Krebs without an advisement of rights, and requested that he submit to a polygraph examination regarding the crimes. When Krebs expressly refused to submit to the test, thus invoking his rights, Hobson admittedly *ignored* this invocation and immediately spent a half hour in an unrecorded interview attempting to convince Krebs to change his mind. (7 RT 2248-2249.) Hobson's persuasion bore fruit, and Krebs succumbed and agreed to submit to the examination. Thus Hobson's conduct demonstrated a consistent pattern of disrespect of Krebs' rights under the *Miranda* decision.

The court in *People v. Montano* (1991) 226 Cal.App.3d 914, 935 recognized that "Disrespect of the right is indicative of coercion." The observations of the court in *Montano* apply here:

> "It soon became apparent to him that his attempts to halt the questioning, using the right he was told was his, were a waste of time because the officers were not going to respect his invocation of that right. Again and again defendant told the officers that he did not wish to speak to them, to no avail. Each time defendant stated he did not wish to speak further, the officers ostensibly agreed to talk about other matters, but they soon resumed questioning him about aspects of the incident. The officers' conduct conveyed the unmistakable message that defendant's rights were meaningless." (*People v.*

Montano, supra at p. 936.)

All the above circumstances show that Krebs' *Miranda* rights were sought to be avoided, evaded, diminished and eviscerated, as opposed to being "scrupulously honored." Krebs never expressly waived his *Miranda* rights on April 21st. Any waiver which may have been implied by his responding to questions with exonerating statements during the first 65 pages of the interview was assuredly terminated and invalidated by his 16 minutes of silence. (CT 5676- 5681.) This silence was an implied invocation of his *Miranda* rights, requiring cessation of questioning. (*People v. Savala, supra*, 10 Cal.App.3d 958, 962.) Yet, questioning continued and Krebs explicitly invoked his rights five times before Hobson decided that Krebs had invoked his right to remain silent. Hobson failed to scrupulously honor even this invocation, and instead deliberately questioned Krebs in a manner directed to convince Krebs to change his mind. While these efforts were not immediately successful, and Krebs was eventually returned to jail when it became clear that continuing to "pound" on Krebs that day was not working, they bore fruit the next morning when Hobson appeared uninvited at the jail and continued exactly where he left off - attempting to persuade Krebs to talk despite Krebs' clear invocations without giving a fresh advisement. Hobson revisited powerful themes: an appeal to Kreb's conscience; the suggestion that the matter (and Hobson) would not go away; the families' need for closure; and the familiar suggestion that it was important - and would likely be beneficial to Krebs - that Krebs explain *why* he had done what he did. *All* this was done without advising Krebs of his rights, without securing a waiver, and after multiple empress invocations of his rights had been continually ignored.

"*Smith* [*Smith v. Illinois* (1984) 469 U.S. 91] mandates that all questioning must immediately cease once the right to remain silent is invoked, and that any subsequent statements by the defendant in response to continued interrogation cannot be used to find a waiver or cast ambiguity on the earlier invocation." (*Anderson v. Terhune* (9th Cir. 2008) 516 F.3d 781, 791.)

On these facts, there can be no doubt that Krebs' invocation of his *Miranda* rights was not "scrupulously honored," and the trial court therefore erred in admitting Krebs' subsequent warned statements made on the 22nd and thereafter in violation of *Miranda* and *Michigan v. Mosley.*

D. The *Miranda* warnings on the 22nd were ineffective because Hobson deliberately used a "question first," warn later technique in violation of *Missouri v. Siebert*

In *Missouri v. Siebert* (2004) 542 U.S. 600, (hereafter *Siebert)* Justice Souter authored the opinion of the Court, joined by three other justices. The plurality opinion found that where the suspect was interrogated first without *Miranda* advisements and then advised of his rights only after significant admissions were made, the "question first" technique could render subsequent *Miranda* warnings ineffective, thus requiring exclusion of statements made after the ineffective warnings, without any requirement that the statements be found to be involuntary. (*Id.,* at p. 617, fn.8.) "Because the question-first tactic effectively threatens to thwart *Miranda's* purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, Siebert's post-warning statements are inadmissible." (*Id.*, at p. 617.)

Justice Kennedy authored a concurring opinion where he agreed with "much in the careful and convincing opinion for the plurality." (*Id.*, at p. 620.) He wrote:

> "[t]he police used a two-step questioning technique based on a deliberate violation of *Miranda*. The *Miranda* warning was withheld to obscure both the practical and legal significance of the admonition when finally given. ... The strategy is based on the assumption that *Miranda* warnings will tend to mean less when recited mid-interrogation, after inculpatory statements have already been obtained. ... The technique used in this case distorts the meaning of *Miranda* and furthers no legitimate countervailing interest. The *Miranda* rule would be frustrated were we to allow police to undermine its meaning and effect." (*Siebert, supra*, 542 U.S. 600, 620-621.)

Justice Kennedy's concurrence differed from the plurality opinion only insofar as it called for a narrower test to exclude second stage statements in the "question first" situation.

> "The admissibility of post-warning statements should continue to be governed by the principles of *Elstad* [(1995) 470 U.S. 298] unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, post-warning statements that are related to the substance of pre-warning statements must be excluded unless curative measures are taken before the post-warning statement is made." (*Id.*, at p. 622.)

The court in *United States v. Williams* (9th Cir. 2006) 435 F.3d 1148, 1157-1158 analyzed the actual holding of the *Siebert* case :

> "[B]oth the plurality and Justice Kennedy agree that where law enforcement officers deliberately employ a two-step interrogation to obtain a confession and where separations of time and circumstance and additional curative warnings are absent or fail to apprise a reasonable person in the suspect's shoes of his rights, the trial court should suppress the confession. [fn omitted] This narrower test — that excludes

confessions made after a deliberate, objectively ineffective midstream warning — represents *Siebert's* holding." (*Ibid.*)

The court in *People v. Rios* (2009) 179 Cal.App.4th 491 relied upon *United States v. Williams*, *supra*, 435 F.3d 1148 and agreed with its conclusion, quoted immediately above. (*People v. Rios, supra*, at p. 505.) Under the *Rios/Williams* view of the holding in *Siebert*, the rule of *Oregon v. Elstad* (1985) 470 U.S. 298 (hereafter *Elstad)* no longer controls where there is a finding that the officer used the question first technique deliberately. *Williams* also noted that *Siebert* overruled the 9th circuit en banc decision of *United States v. Orso* (9th Cir. 2001) 266 F.3d 1030, 1040, which held that the rule of *Elstad* was that if "the prior statement was voluntary in the sense that it was not coerced in violation of the [F]ifth [A]mendment, though obtained in technical violation of the *Miranda* requirements, the court should suppress the statement given after the *Miranda* warning only if the court finds that the subsequent statement was not voluntarily made."

The holding of *Siebert*, as narrowed by Justice Kennedy's concurring opinion, does not overrule *Elstad* but instead simply limits the reach of the decision, by giving teeth and meaning to the statement in *Elstad* that "[w]e must conclude that, *absent deliberately coercive or improper tactics in obtaining the initial statement*, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." (470 U.S. at 314, emphasis added.) Other courts had previously taken the same view: "The conduct of the police in this case is precisely what the Supreme Court had in mind in *Oregon v. Elstad*, 470 U.S. 298 (1985) when it exempted 'deliberately coercive or improper tactics in obtaining the initial statement' from the ordinary rule that subsequent statements are not to be

measured by a 'tainted fruit' standard, but by whether they are voluntary. *Id.*, at 314." (*Pope v. Zenon* (9th Cir. 1995) 69 F.3d 1018,1024.) Indeed, Justice Kennedy's concurrence in *Siebert* stated that the

> "admissibility of post-warning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, post-warning statements that are related to the substance of pre-warning statements must be excluded unless curative measures are taken before the post-warning statement is made." (*Siebert, at p.* 622.)

In the instant case, it will be seen that Hobson deliberately used a two step strategy, and took no curative measures. Therefore, the *Miranda* warnings he administered on the morning of April 22, 1999, after extensive unwarned interrogation and substantial admissions, were ineffective as a matter of law, and required that the subsequent confessions be excluded.

The evidence is clear that Hobson was a highly trained expert interrogator. Hobson was the assistant chief investigator for the district attorney's office, and supervised eight other investigators. (26 RT 6934.) He had 30 years in law enforcement. (26 RT 6935.) He sought special training to improve his interrogation techniques, and attended the "Backster's School of Lie Detection" [*sic*] (26 RT 6935) , "an eight-week intensive polygraph curriculum involving physiology, psychology and also interview and interrogation techniques." (Ibid.) He is a certified polygraph examiner, and has done polygraphs for the district attorney and other law enforcement agencies since 1984. (26 RT 6936.) He has attended "literally dozens" of schools and trainings held around the country for further training involving interviews and interrogations, including a six-week course at the FBI in 1989, and the basic and advanced courses at the

"Reed [*sic*] Institute of Interviews and Interrogations, which teaches a course in behavioral analysis in Chicago, Illinois. " (26 RT 6936.) Hobson lectured in China regarding interrogations and was on the staff for the Police Academy at Hancock College teaching interrogations. (26 RT 6937.) He instructed an interrogations course for various agencies three to four times a year. (*Ibid.*) He had worked on more than 100 homicides. He was involved in the investigations of the instant crimes "from the very first day." (26 RT 6938.)

The evidence is also clear that Hobson's action in failing to advise Krebs of his *Miranda* rights was a deliberate decision. Hobson had never read or enumerated Krebs his rights in any of his previous interviews. Hobson went to the jail on April 22nd to interview Krebs knowing that Krebs had refused to cooperate once the questioning had turned accusatory the previous day. Hobson had already engaged in extensive, repeated attempts to persuade Krebs to continue to talk, as detailed above in section A. On the morning of April 22nd, Hobson questioned Krebs for 15 minutes without reading Krebs his *Miranda* rights or even referring to them. (7 RT 2272.) This was not by accident. The topics were "beachhead" type questions designed to get Krebs to make admissions.[11] The questioning began with how Krebs slept. (7 RT 2270.) Hobson then said the situation was not going to go away, that they needed to talk about it. (*Ibid.*) Hobson

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The lead opinion in *Siebert* references the term "beachheading" as used in police interrogation manuals as a practice useful to secure admissions "outside *Miranda*." (*Missouri v. Siebert* (2004) 542 U.S. 600, 610, fn. 2.) Other cases note the term is used in manuals authored in part by J. Reid to describe a first admission which "once obtained, will give them enormous 'tactical advantages' (*Colorado v. Spring* (1987) 479 U.S. 564, 580, (Marshall, J. dissenting).)

said it was necessary to get Krebs' side of the story because the other evidence showed a terrible situation and Krebs' story might be different. (*Ibid.*) Krebs responded that Hobson was wrong and that he, Krebs, was an animal. (7 RT 2271.) This was the "beachhead" Hobson had worked for. Hobson suggested it might have been something out of control or out of character. Krebs responded there was no justification. Hobson then appealed to Krebs sense of fairness and integrity to give closure to the victims. (*Ibid.*) Hobson said, "Now is the time to tell me the truth." (7 RT 2272.) Krebs then wanted to know if it could be over in a week, and shortly thereafter asked what Hobson wanted him to say, to which Hobson replied the truth. (7 RT 2273.) Krebs then agreed to do so, and requested to be taken elsewhere to talk. At this point, Hobson then read Krebs the *Miranda* rights from a DOJ issued card. (*Ibid.*)

There is simply no other reasonable explanation for Hobson's conduct other than it was deliberate. He had the *Miranda* rights card with him, but he failed to use it to advise Krebs at the beginning of the interview. The interrogation, continuing from the previous day, "was systematic, exhaustive, and managed with psychological skill." (*Siebert*, at p. 616). Hobson waited until Krebs had admitted that the "situation" was not different than the "terrible" one shown by the evidence; that he was an animal; and that he had no justification. Importantly, Hobson waited until Krebs promised to tell the truth about his involvement. (7 RT 2313.) Hobson also explicitly read Krebs his rights on each of the next three interviews with him after the 22nd, showing the deliberateness of his decision to first question Krebs unwarned on the morning of the 22nd. (RT 2313-2314.)

Even Hobson's explanation for the timing of the admonition shows

deliberateness. Hobson testified, "I told Rex before I transported him back to the police department I wanted to make sure he understood exactly what we were going to be doing and the questions that I was going to be asking him so we didn't spend another two hours of wasted time." (7 RT 2273.) He then immediately read Krebs his rights and asked only two questions - was Krebs responsible for the disappearance of the victims and the death of the victims. (7 RT 2274.) Hobson's explanation amounted to nothing more than that he simply that he wanted to make sure that Krebs would be willing to repeat his admissions and give further details after being advised of his *Miranda* rights. He did not state that he previously "forgot" to read Krebs his rights. His immediate reading of the rights once he gained the admissions and agreement to tell the whole truth shows Hobson's awareness that the Krebs' previous statements up to that point were without *Miranda* warnings and that further interrogation without an advisement would be a "waste of time" because they would be inadmissible. Hobson's status as an expert and instructor in interrogation techniques coupled with the timing of the admonition leaves no other reasonable explanation other than that the "talk first, warn later" technique was deliberately used.

Hobson's interrogation on April 22nd was clearly a continuation of the process of confrontation and persuasion that had started on the 21st when Krebs initially fell silent. Hobson never advised Krebs that his unwarned admissions were not admissible. The themes of his unwarned interrogation on the 22nd - the appeals to Krebs' integrity, asking for closure for the families, suggesting that his story would be mitigation - all mirrored the themes Hobson used the day before in cajoling him to continue talking. Immediately after Krebs agreed to tell the truth, the *Miranda* warnings were given, and Krebs then immediately, at the same location, reiterated what he

had in essence just admitted: he was responsible for the disappearance and death of the victims.

The core of *Siebert's* holding is that a deliberate two stage process "effectively threatens to thwart *Miranda's* purpose of reducing the risk that a coerced confession would be admitted." (*Siebert,* at p. 617.) Here, Hobson's actions on the 21st and 22nd included deliberate disregard of an invocation of rights, and a deliberate decision to refrain from an explicit advisement of those rights until Krebs had been persuaded by these deliberate actions to confess. Hobson's conduct thus came within the core rationale of the *Siebert* decision, and Krebs' subsequent warned confessions should have been excluded.

E. Krebs' waiver and confessions on April 22nd were involuntary and should have been excluded

The trial court found that the warned confessions on the 22nd were voluntary. In fact, Krebs' decision to waive his *Miranda* rights was the product of tactics designed to overcome Krebs' decision not to incriminate himself. These tactics included repeated questioning after invocation, lies and misrepresentations concerning the evidence, implied promises of leniency and benefits, verbal commands to talk, physical touching, and an approach of "softening-up" Krebs prior to advising him of his rights.

1. Legal standards

To determine the voluntariness of a confession, courts examine "'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession." (*Dickerson v. United States* (2000) 530 U.S. 428, 434.) The test for whether a confession is voluntary is

"whether the confession was extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence." (*Hutto v. Ross* (1976) 429 U.S. 28, 30, citations and internal quotes omitted; see also *People v. Neal* (2003) 31 Cal.4th 63, 80.) "[C]onvictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand." (*Rogers v. Richmond* (1971) 365 U.S. 534, 540.) Coercion is indicated where the "police resorted to physical or psychological pressure to elicit statements from defendant." (*People v. Cruz* (2008) 44 Cal.4th 636, 669.) "[C]oercion also includes "the brainwashing that comes from repeated suggestion and prolonged interrogation...." (*People v. Hogan* (1982) 31 Cal.3d 815, 842 , citing *People v. Andersen* (1980) 101 Cal.App.3d 563, 574.) The State bears the burden of proving the voluntariness of a confession by a preponderance of the evidence. (*People v. Dykes* (2009) 46 Cal.4th 731, 753.)

The *Miranda* court made clear that waivers following certain police tactics would not be deemed voluntary:

> "Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to

existing methods of interrogation." (*Miranda v. Arizona*, *supra*, 384 U.S. 436, 476.)

This court in *People v. Honeycutt* (1977) 20 Cal.3d 150, cited the above passage in finding that a "conversation-warning-interrogation sequence" (*Id.*, at p. 160) rendered a *Miranda* waiver involuntary where the officer, by engaging in conversation and "clever softening-up of a defendant," elicited an agreement to cooperate *prior* to giving *Miranda* warnings. (*Ibid.*)

The question posed to determine the voluntariness of a statement is whether the conduct of "law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined -- a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth." (*Id.*, at p. 544.) Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the "totality of [the] circumstances." (*Withrow v. Williams* (1993) 507 U.S. 680, 688-689;see also *People v. Neal* (2003) 31 Cal.4th 63, 80.) In reviewing the trial court's determinations of voluntariness, the reviewing court applies an independent standard of review, doing so "in light of the record in its entirety, including all the surrounding circumstances--both the characteristics of the accused and the details of the encounter." (*People v. Neal* (2003) 31 Cal.4th 63, 80, citations and quotations omitted.)

Because Krebs did not make an explicit waiver of his *Miranda* rights with regard to his admissions and confessions on April 21st and 22nd, the People must rely on an implied waiver. (*People v. Whitson* (1998) 17 Cal.4th 229, 247-248.) However, "courts must presume that a defendant

did not waive his rights; the prosecution's burden is great..." (*North Carolina v. Butler* (1979) 441 U.S. 369, 373.)

2. Krebs freely decided not to incriminate himself

Krebs' conduct over the course of the interrogation shows that his willingness to talk to the police was conditional and limited, and did not extend to knowingly incriminating himself. So long as Krebs thought the investigation had not focused on him, and Hobson did not confront Krebs' exculpatory statements, Krebs was willing to make exculpatory statements. Krebs started this pattern by agreeing to talk to Hobson on March 21, 1999, but then refusing to take a polygraph test- an inherently confrontive examination- on April 1st until Hobson spent a half hour overcoming his refusal. Krebs relented, but then terminated the procedure when the examiner confronted him by advising him he was holding his breath. Krebs then agreed to talk further with Hobson on April 1st, and continued to be cooperative on April 21st, prior to the confrontive portion of the interview. But on April 21st, when Hobson disclosed his professed certain knowledge that Krebs was involved in both crimes, Krebs was no longer willing to cooperate. The inescapable implication of the sequence of events is that Krebs, left to his own decision, did not want to inculpate himself.

3. Hobson attempted to wear Krebs down by repeatedly ignoring invocations of the right to remain silent

Hobson clearly understood from the beginning that Krebs did not want to incriminate himself. Rather than to accept this "freely self-determined" decision, Hobson set about to change it and conducted a sophisticated psychological campaign of coercive tactics designed to

overcome Krebs' will.

An important element of Hobson's campaign was his continuing to attempt to convince Krebs to talk on April 21st after repeated invocations of Krebs' right to remain silent, as detailed in part A of this argument. Hobson's conduct constituted a clear and deliberate violation of the *Miranda* decision. This court has found that repeatedly ignoring a suspect's request to terminate questioning is an important factor in showing the involuntary nature of a subsequent decision to confess. (*People v. Neal* (*supra*) 31 Cal.4th 63 at p. 81.) In *Neal*, this court found that the "circumstance that weighs most heavily against the voluntariness of defendant's initiation of the second interview, and against the voluntariness of his two subsequent confessions" was the officer's repeated questioning in the face of invocations. (*Id.*, at p. 81-82.) Hobson's intentional and coercive conduct in this regard was made more powerful by other improper tactics that synergistically worked to overcome Kreb's decision to cease cooperation.

First, Hobson sought to enhance the inevitability of Kreb's conviction by lying and misrepresenting the strength of the evidence the had against him. Second, Hobson falsely gave the illusion that Krebs would benefit from incriminating himself. Third, Hobson falsely stated that Krebs was required to talk with him, undercutting any *Miranda* warnings. Fourth, Hobson used a "softening-up" technique prior to ever reading Krebs his rights. Each of these will be discussed in turn.

4. Hobson misrepresented the evidence

In the interview of April 1, Hobson told Krebs that the eightball found at his home, which Krebs had previously said he found in prison in

1996, was "tested" and found to have been manufactured in 1998. (26 RT 6958.) On April 21, Hobson displayed the same eightball to Krebs and said "this one belongs to Aundria. We've established that." (21 CT 5672.) In fact, no evidence of such facts existed. To the contrary, the lead detective on the case, Tushbant, testified that "it wasn't as unique as we thought." (25 RT 6582.) Concepcion Aguilar, a prison worker, testified that she told district attorney investigators about two years earlier that she had seen Krebs with an eightball in prison. (33 RT 8701.) Parole agent Zaragoza testified that he personally traveled to prison with a detective to investigate Krebs's statements that he had obtained the eightball in prison. (5 RT 1823-1824.) The prosecutor presented no other evidence concerning any "testing" of the eightball or any other evidence tending to establish it as the one belonging to Crawford other than Krebs' eventual admissions.

Hobson also misrepresented the evidence that Krebs's vehicle had been seen in Crawford's neighborhood. "We know it was parked in the neighborhood on 8 different, 8-15 different nights, all the way up to the point where she disappeared." (21 CT 5673.) "Um, what I'm telling you is the truth. We have three witnesses that will testify to that." (21 CT 5674.) No such witnesses were ever called, despite the requirement that Krebs' confession be corroborated.

Hobson sought to maximize the psychological effect of his lies by repeatedly insisting that he could be trusted, and would not mislead Krebs. "I wouldn't lie to you Rex." (21 CT 5672.) "I'm not ... going to tell you something that is not true. ... What I utter to you will be the truth. I don't, I don't lie to you." (21 CT 5673-5674.) "That's why I'm not sitting here telling you something that isn't true." (21 CT 5678.) "If we didn't have that stuff, Rex, I wouldn't tell you we did. ... I'm telling you the truth." (*Ibid.*)

"I've been honest with you. I'll continue to be honest with you." (21 CT 5681.)

5. Hobson misrepresented the circumstances and falsely implied benefits from confessing

Hobson sought to create the false impression that a confession by Krebs would benefit him, and it would genuinely make a positive difference in the way the case was prosecuted. These efforts were particularly pronounced after Krebs fell silent after being confronted on April 21st. (21 CT 5675.) "The other reason I need to hear the story, Rex is so I can go back and talk to my boss, the district attorney, to see how we are going to handle this case. Right now, without knowing the circumstances, I don't know how to handle it." (21 CT 5679.) "Well, first of all Rex, we don't know if dying is an aspect of this case or not until you tell me what happened." (21 CT 5682.) "What matters is why you did it. That matters to me... that matters to the prosecutors." (21 CT 5688.) "Let's get this thing over with, Rex. We can put this thing to bed today." (21 CT 5689.) By these statements, Hobson falsely told Krebs that the authorities would give him favorable consideration if Krebs confessed.

6. Hobson physically touched Krebs and told him that talking to Hobson was required

Hobson's themes included the inevitability and need for Krebs to talk to him about the crimes. "Can we talk about it? Its not going to go away." (21 CT 5679.) Hobson also took the express, and forbidden, step of telling Krebs on several occasions that Krebs was *required* to tell him all he knew about the case. "I can't make it go away. We have to deal with it."

(21 CT 5681.) "Rex, you got to talk to me man." (21 CT 5682.) "[I]t's something that we have to go over. It's something we have to deal with." (21 CT 5682.) "Rex, talk to me." (21 CT 5683.) "It's not going away Rex, its here to stay. We have to deal with it." (21 CT 5684.) "Talk to me. Look at me." (21 CT 5685.) "[I]ts not going to go away. We have to deal with it and deal with it now." (21 CT 5689.) "It's not going to go away, Rex" [in response to Krebs saying "Nothing to say, Larry."] (21 CT 5689.) This conduct by Hobson occurred after Krebs had clearly signaled his unwillingness to be questioned further. The mere act of questioning after invocation undercuts the voluntariness of any ensuing answers. "Intentionally continuing to interrogate defendant in deliberate violation of *Miranda*, Martin manifested his determination to extract an uncounseled statement of some sort." (*People v. Neal* (2003) 31 Cal.4th 63, 82.) Here, Hobson went even further, and repeatedly directed Krebs to talk to him, clearly undercutting any purported choice that Krebs had concerning the matter.

Hobson also used physical touching in an effort to coerce Krebs to talk to him. Hobson touched Krebs on the shoulder in the middle of his prolonged exhortation to make Krebs talk to him as he was saying, "Rex, can you help? I know you care. There was tears. I'm not wrong about this Rex." (21 CT 5679.) Continuing his entreaties, Hobson touched Krebs' hands saying "It was out of control, right? Rex, look at me. It got out of control? Rex, tell me what you're thinking, tell me what's going thru your head." (21 CT 5680.) After still more attempts to convince Krebs to talk, Hobson touched Krebs on his knee, saying, "Let's take the first step, all tight?" (21 CT 5685.) When Krebs did not respond, Hobson lifted Krebs' chin to force Krebs to look at him, saying, "Talk to me. Look at me. Its

not easy, I know that. I wouldn't be sitting here working with this if I didn't know you." (21 CT 5685.) After Krebs requested to be placed in a holding cell to think, Hobson immediately touched Krebs on his shoulder and says "Rex, Rex, I don't want to put you down by yourself. I want to sit here, talk with you and work through this." (*Ibid.*)

The physical touchings here were not designed to cause pain and seed fear, as in a more crude technique using a rubber hose. However, the touchings were nevertheless psychologically powerful, intended to coerce, and were part of a carefully managed interrogation specifically designed to overcome Krebs' manifest desire not to incriminate himself. The touchings were part and parcel of Hobson's attempts to ingratiate himself with Krebs, to establish a pose of purported care and respect for Krebs' humanity and feelings, and to induce a confession by establishing a false sense of rapport, intimacy, and caring. Torture induces confessions through fear. The suspect is told that he can make the pain stop by confessing. In the more sophisticated approach that Hobson undertook consistent with his training in modern interrogation techniques, Hobson tried to make Krebs believe that he could make his pain stop by confessing. Hobson held himself out as a friend, and mostly touched Krebs as a friend would, giving comfort and encouragement that he should talk. At other times he touched as an authority figure, much like a parent demanding attention and obedience, lifting the child's chin and saying, "Talk to me. Look at me." (21 CT 5685.) Either way the act is psychologically powerful. The point is that Hobson's deliberate touchings constituted coercion. "Coercion is indicated where the "police resorted to physical or psychological pressure to elicit statements from defendant." (*People v. Cruz* (*supra*) 44 Cal.4th 636, 669.) Here, the psychological pressure was both psychological and physical.

7. Hobson softened-up Krebs prior to securing a waiver

In *People v. Honeycutt* (1977) 20 Cal.3d 150 the court held:

> "It must be remembered that the purpose of *Miranda* is to preclude police interrogation unless and until a suspect has voluntarily waived his rights or has his attorney present. When the waiver results from a clever softening-up of a defendant through disparagement of the victim and ingratiating conversation, the subsequent decision to waive without a *Miranda* warning must be deemed to be involuntary for the same reason that an incriminating statement made under police interrogation without a *Miranda* warning is deemed to be involuntary." (*Id.,* at p. 160-161)

The officer in *Honeycutt* did the same thing as Hobson did here. He talked to the suspect in a "clever softening-up" (*id.*, at p. 160) of the suspect without advising him of his rights. In *Honeycutt,* the officer did not initially advise the suspect of his rights, but spent 30 minutes talking about mutual friends, and the victim. The court framed the question: "However, Detective Williams had, prior to explaining the *Miranda* rights, already succeeded in persuading defendant to waive such rights. Thus the critical question is what effect failure to give a timely *Miranda* warning has on the voluntariness of a decision to waive which is induced prior to the *Miranda* admonitions." (*Id.*, at p. 159.)

The court's answer in *Honeycutt* is clear. The waiver, obtained without a warning, is deemed involuntary and thus ineffective, requiring exclusion of the warned confession. *Honeycutt* has never been overruled by this court, although it has been distinguished on its facts. (See *People v. Michaels* (2002) 28 Cal.4th 486, 511.) While the rule in *Honeycutt* is similar to the rule in *Siebert, supra,* 542 U.S. 600, it focuses on the fact that the police actually secure a wavier by getting the suspect to *agree* to talk, as

opposed to merely gaining unwarned admissions through a "question first" technique. Here, Hobson did both. Even disregarding the multiple attempts to ingratiate himself and convince Krebs to talk on the 21st, his conduct on the 22nd clearly fell afoul of the *Honeycutt* rule.

Hobson arrived on the 22nd and "worked" on Krebs without advising him of his rights. Hobson advised Krebs the situation was not going to go away, that he needed to tell his side of the story. (7 RT 2270.) He told Krebs that "it was no longer a question of if he did it, but rather why he did it." (7 RT 2310.) He told Krebs that the "investigation painted an appalling picture of what happened and the facts strongly indicate that these were heartless, cold blooded acts of rape and murder." (*Ibid.*) He suggested to Krebs that it might have been cold blooded, or Krebs might have "merely gave into his fantasies or they escalated to a point where something went wrong and he lost control." (*Ibid.*) Hobson told Krebs that Hobson "wanted to believe that he wasn't an animal and that this was not a series of carefully planned out acts, but in order for [him] to believe those things [he] needed [Krebs] to talk to [him] and tell what happened." (7 RT 2311.) He told Krebs that the families' needed closure, that "this was not the time to throw truth and honesty out the window." (*Ibid.*)

Eventually his efforts bore fruit, and Krebs made admissions that he was an animal who did not deserve to live, and that nothing could justify what he did. (7 RT 2271.) Hobson continued his persuasion, suggesting the crimes were "totally out of character." He appealed to Krebs, citing the families need for closure and Krebs' honesty, integrity. (7 RT 2271.) Krebs finally succumbed, and *agreed* to tell "the truth," but wanted to go elsewhere. (7 RT 2272.)

Thus Hobson succeeded, as did the officer in *Honeycutt,* in getting

the suspect to agree to waive his *Miranda* rights by extensive "clever softening-up." This factor weighs heavily in favor of a finding of involuntariness.

8. Krebs' personal characteristics are neutral

It is conceded that Krebs was not inexperienced, being a convicted felon, and was not immature or mentally deficient, yet these factors are not necessary to show that Krebs' will was not freely exercised. While the immaturity, inexperience, or mental weakness of a suspect is certainly a factor in assessing whether *Miranda* rights have been freely and voluntarily waived, those factors have never been a prerequisite to show involuntariness. *Miranda* expressly holds that "no amount of circumstantial evidence that the person may have been aware" of his rights will suffice. *(Miranda v. Arizona, supra*, 384 U.S. at pp. 471-472.) Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the "totality of [the] circumstances." (*Withrow v. Williams* (1993) 507 U.S. 680, 688-689.)

9. The totality of the circumstances show that psychological pressure from improper tactics wore Krebs' will down

This case contrasts sharply with the record in cases where the court has found a voluntary waiver, such as *People v. Cruz* (2008) 44 Cal.4th 636:

> "The record is devoid of any suggestion that the police resorted to physical or psychological pressure to elicit statements from defendant. To the contrary, defendant's willingness to speak with the officers is readily apparent from his responses. He was not worn down by improper interrogation tactics, lengthy questioning, or trickery or

deceit." (*Id.*, at p. 669.)

Here, Krebs' *unwillingness* to incriminate himself was readily apparent from his initial responses - and lack of them - when initially confronted with the evidence against him. He was then worn down by a cleverly designed and effective interrogation which combined multiple improper interrogation tactics, lengthy questioning and misrepresentations. These facts preclude a finding that Krebs voluntarily waived his rights and incriminated himself, therefore the court erred in admitting the statements of the defendant.

D. The error in admitting Krebs' confessions requires reversal.

Erroneous denial of a motion to suppress confessions is subject to harmless error analysis under the beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18. (*People v. Neal* (2003) 31 Cal.4th 63,86.) However, "error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot ... be conceived of as harmless." (*Chapman, supra*, 386 U.S. at p. 24.) "Confessions often operate as a kind of evidentiary bombshell which shatters the defense." *(People v. Cahill* (1993) 5 Cal.4th 478, 503.) "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most . . . damaging evidence that can be admitted against him." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 296, internal quotation marks omitted.)

Here, the People admitted full videotaped confessions of April 22nd and April 27th, as well as a video taken on April 22nd of Krebs pointing out various areas near his home, including the grave sites. There were no

independent witnesses, and the forensic evidence was not particularly strong. There was little to corroborate the sexual crimes other than Krebs' previous crimes. This is not a case where it can be said that the confessions were "'unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' (*Yates v. Evatt* [(1991)], *supra*, 500 U.S. [391] at p. 403.)" *(People v. Neal* (2003) 31 Cal.4th 63, 87.)

Neither can it be said that the confession of April 27th rendered the introduction of the April 22nd confessions non-prejudicial. "Previous decisions have acknowledged that where - as a result of improper police conduct - an accused confesses, and subsequently makes another confession, it may be presumed the subsequent confession is the product of the first because of the psychological or practical disadvantages of having 'let the cat out of the bag by confessing.'" (*People v. Sims* (1993) 5 Cal.4th 405, 444-445, citing *People v. Johnson* (1969) 70 Cal.2d 541, 547.) The prosecution bears the burden of establishing a break in the causative chain between the first confession and the subsequent confession. (*People v. Sims*, *supra* at p. 445.) The degree of attenuation that suffices to dissipate the taint "requires at least an intervening independent act by the defendant or a third party" to break the causal chain in such a way that the second confession is not in fact obtained by exploitation of the illegality." (*Ibid*; see also *People v. McWhorter* (2009) 47 Cal.4th 318, 360.)

Here, the April 27th confession is inadmissible as the product of the confessions of April 22nd. While Krebs was properly advised of his rights on April 27th, 5 days after April 22nd, he did not initiate the interview. The same officer conducted the interview concerning the same crimes, explicitly referring back to Krebs' answers from April 22nd numerous times. (CT 5700, 5713, 5723, 5724, 5736, 5743.) There was no independent

intervening act sufficient to purge the taint of the original misconduct. Therefore under California and federal law, the subsequent confession must be excluded. (*People v. Johnson* (1969) 70 Cal.2d 541, 547; *Wong Sun v. United States* (1963) 371 U.S. 471, 487-488.)

III

Insufficient evidence aside from Krebs' admissions exists to support the convictions of rape and sodomy of Crawford

The *corpus delicti* rule "essentially precludes conviction based solely on a defendant's out-of-court statements." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1178.) The rule thus "requires corroboration of the defendant's extrajudicial utterances insofar as they indicate a crime was committed, and forces the People to supply, as part of their burden of proof in every criminal prosecution, some evidence of the corpus delicti aside from, or in addition to, such statements." (*Ibid.*) Additionally, under California law, "one cannot be convicted when there is no proof a crime occurred other than his or her own earlier utterances indicating a predisposition or purpose to commit it." (*Id.*, at p 1171.)

The amount of corroboration is "a slight or *prima facie* showing." (*People v. Alcala* (1984) 36 Cal.3d 604, 624-625.) However, as applied to charged crimes, it must tend to corroborate *the charged crime*. Corroboration is "some indication that the *charged crime* actually happened..." (*People v. Jennings* (1991) 53 Cal.3d 334, 368, emphasis added.) "The crime for which there must be a *corpus delicti* is the same as the crime that must be proven." (*People v. Valencia* (2008) 43 Cal.4th 268, 296.) "The elements of the *corpus delicti* are (1) the injury, loss or harm,

and (2) the criminal agency that has caused the injury, loss or harm." (*Jones v. Superior Court (People)* (1979) 96 Cal.App.3d 390, 394; *People v. Gutierrez* (2002) 28 Cal.4th 1083.) The corpus delicti of rape requires some proof of penetration, which may be circumstantial. (*People v. Minkowski* (1962) 204 Cal.App.2d 832; *People v. Wright* (1990) 52 Cal.3d 367, 405.) The jury was instructed in accordance with this long established rule: "No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any confession or admission made by him outside of this trial." (27 RT 7248.) The trial court refused to modify the CALJIC instruction to remove the requirement that *each element* of the charged crime must be proved independently of the defendant's admissions. (25 RT 6742-6747.)

The defense moved to exclude Krebs' confession on the basis that the corpus delicti had not been shown during trial, and the prosecution conceded it had not at that time, because the medical examiner had not testified. (26 RT 6932.)

While there was eventually admitted sufficient independent evidence of rape against Newhouse since her body was naked from the waist down when found, there was never any independent evidence of rape or sodomy of Crawford. Crawford's body was fully clothed in sweat pants and a sweatshirt. There was evidence of wounds to her head, but none to her genital or anal areas.

The People argued to the jury that the fact that the women "were taken at night" was corroborative of a sexual offense. (27 RT 7282.) Also cited was testimony that Crawford normally slept in a T shirt and panties and that she was found dressed in a sweatshirt which she didn't usually wear. (*Ibid.*) However, these facts add nothing sexual. They do not tend to

indicate that sexual acts were accomplished after her kidnaping.

This case is similar to *People v. Jennings* (1991) 53 Cal.3d 334, where a young women was found dead and partially decomposed in an irrigation canal with a fractured jaw. However the crucial distinction is that Crawford was clothed whereas the victim in *People v. Jennings* (*ibid*) was not. The court characterized the evidence as "minimal" and said that when the "body of a young woman is found unclothed in a remote locale, an inference arises that some sexual activity occurred." (*Id.*, at p. 367.)

The court found that the finding of a body *unclothed, or partially clothed* in a remote area was some evidence of a sexual assault in two other cases, *People v. Robbins* (1988) 45 Cal.3d 867 and *People v. Jones* (1998) 17 Cal.4th 279. The court summarized the circumstances in all three cases: "In all three cases, independent evidence of a certain element of a sexual crime was lacking: penetration necessary for rape in *Jennings*, a touching of a child with lewd intent in *Robbins,* oral-genital or oral-anal contact in this case." (*Id.*, at p. 303.)

This court has never held that independent evidence of a murder of a young woman *by itself* is sufficient corroboration for a particular sexual assault against the same victim. Here, while there is ample corroboration that Crawford was bound and murdered, there is no evidence corroborating that she was in fact sexually assaulted. Hence the convictions in counts 7, 8, and 9 for rape and sodomy must be reversed.

ISSUES RELATING TO PENALTY

IV

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

A. Introduction

The State's evidence and theory was fundamentally unfair because it violated the state's law, public policy and judicial approval that paraphilias are a type of mental disorder that may, within the meaning of the law, impair volition to the degree that a person is unable to control himself. The distinction between volitional impairment versus free will in the abstract is subtle. However, our legislature and the courts have defined practical, factual and definite standards to determine whether, because of a diagnosed mental disorder, a person's volitional capacity is impaired to the degree that he is unable to control sexually violent impulses. These standards are found in the laws creating Sexually Violent Predator (SVP) civil commitments, and in the legion court cases, both state and federal, construing such commitments and the type of evidence which is sufficient to prove the existence of impaired volitional capacity beyond a reasonable doubt. Experts using these standards routinely testify in SVP and related cases for the People that a diagnosed mental disorder known as a paraphilia, characterized by recurrent intense urges to commit aberrant sexual acts may by itself, or in connection with other non-psychotic types of personality disorders, seriously impair a person's volitional capacity to the degree that he is dangerous and subject to commitment. The People have defended such commitments on appeal, and courts have approved and upheld such

commitments time and again.

Impairment of volitional capacity by mental illness is also a statutorily defined factor in mitigation under section 190.3(h): "Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication." (Section 190.3 (h).) There appears no principled distinction between the quality and meaning of the concept of volitional impairment caused by a mental illness as used in civil commitment law and statutory mitigation. While the degree of impairment in SVP cases must rise to a certain standard of dangerousness, there is no threshold degree specified in the language or judicial construction of factor (h). Therefore, as a matter of law, evidence which would be sufficient to establish the SVP element of impaired volitional capacity due to a diagnosed mental disorder must of necessity also establish the existence of the mitigating factor that the "capacity of the defendant to ... conform his conduct to the requirements of law was impaired as a result of mental disease or defect" under section 190.3 (h).

The People here found themselves in a dilemma because of the undisputed facts: Krebs suffered from a paraphilia for years; had the characteristic intense fantasies and urges since puberty; struggled unsuccessfully - described like a fight in his head - to refrain from acting on them; and the paraphilic urges resulted in four sexual assault victims in the few years he was not in prison while an adult. Clearly and as a matter of law, these facts would be sufficient to establish volitional impairment under SVP law and cases. Any number of local experts with experience in SVP cases and sexual disorders would have been available to so testify,

consistent with their testimony presented in SVP cases.

However, acknowledging the existence of volitional impairment caused by an unchosen mental disorder would have severely undercut the People's case for death. To avoid doing so, the People intentionally selected an expert with a personal philosophy about free will and the nature of volitional impairment which is inconsistent with that established in SVP law and inconsistent with the testimony of the multitude of experts called by the People in SVP and related proceedings. In contrast to the accepted paradigm of People's experts in SVP proceedings, Dr. Dietz presented a dramatically different and fundamentally inconsistent theory. In his view, a paraphilia *never* impairs volition, and neither does the co-existence of an antisocial personality disorder. In his view, a person is not volitionally impaired unless he is so disordered that he would be driven to rape even if a policeman were at his elbow, and arrest and punishment were certain. In his view, contrary to the defense expert and testimony of People's experts in SVP cases, the ability to resist and defer acting on the urges for a period shows there is no volitional impairment. The People capitalized on Dr. Dietz' testimony, treating it as reliable fact from the nation's leading psychiatrist and ridiculing Dr. Berlin's testimony (which was completely consistent with that offered repeatedly by the People in SVP cases) as a ridiculous theory held by an outcast, unaccepted by his peers. The People insulated their about-face in theories from cross-examination by successfully objecting to any mention of SVP proceedings in cross-examination or the defense case.

By intentionally presenting and relying on a theory in direct contradiction to the theory used by the People in most published SVP cases, and by deceptively mis-characterizing the defense theory, which was

consistent with the People's theory in SVP cases, as unaccepted, marginal and ridiculous, the People failed to honor the truth. This conduct violated Krebs' rights to Due Process under the California and United States Constitutions and the Eighth Amendment.

B. Summary of relevant facts

1. Defense Case - Dr. Fred Berlin

The defense presented strong evidence in the penalty phase that Krebs suffered from an unwanted, unchosen, recognized mental disorder of a compulsive nature characterized by intense recurrent urges and fantasies to rape and sexually control and humiliate women, resulting in impaired volitional control such that his ability to conform his behavior to the law was impaired, within the meaning of 190.3 (h).

The defense called Dr. Fred Berlin, director of the National Institute for the Prevention and Treatment of Sexual Trauma in Massachusetts. His primary area of research and practice was sexual disorders. (35 RT 8980-8989.) Dr. Berlin was a leading researcher in the field, as evidenced by his curriculum vitae, and conceded by the prosecutor - when the jury was not present.[12]

Dr. Berlin testified Krebs was diagnosed with Sexual Sadism (35 RT 9001), a mental disorder in the category of paraphilias, recognized in the latest edition of the DSM. (35 RT 9006.) The main features of the disorder are recurrent, intense erotic fantasies and urges about having sex in a coercive and sadistic fashion involving the humiliation or suffering of

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The prosecutor characterized Dr. Berlin as "one of the top psychologists in the country" in a pretrial statement to the court. (22 RT 5960.)

another. (35 RT 9007, 9009.) The person with the disorder has the urge to enact the fantasy. (35 RT 9007.) The urges are recurrent, intense, and preoccupying. (35 RT 9014.) The diagnosis is not based on behavior alone; it is an abnormality of mental make up. (35 RT 9013.) It is difficult to resist acting on the urges. (35 RT 9015.) The disorder impairs the ability of a person to be in full control of himself. (35 RT 9016.) A person with the disorder has two types of mental impairment. (35 RT 9024.) They tend to rationalize and minimize; a type of cognitive impairment, and they have impairment of volition. (*Ibid.*) The volitional impairment is similar to a heroin addiction. (35 RT 9025.) From a medical viewpoint, a doctor must advise such a patient that it is foolish to think one could control the urges without treatment, by willpower alone. (35 RT 9020.) Medication may help control the disorder and restore the capacity for self-control. (35 RT 9026.) The disorder is chronic, but the person may be able to defer acting on the urges for a time. (35 RT 9028, 9036, 9578.) Physical and sexual abuse in childhood increases the likelihood of the disorder. (35 RT 9071.) The fantasies and urges characteristic of the disorder do not occur through choice or volition. (35 RT 9073.)

Krebs' crimes appeared ritualistic, motivated and planned, pursuant to a preexisting pathological fantasy. (35 RT 9001, 9093.) Dr. Berlin was very certain Krebs suffered from this paraphilic disorder. (35 RT 9031.) The disorder constituted an extreme emotional disturbance in his mental make up. (35 RT 9073-9074.) Krebs was under duress in the sense that the disorder was driving him to commit the offenses. (35 RT 9075.) The capacity of Krebs to conform his conduct to the requirements of law was impaired as a result of the sexual sadism disorder. (35 RT 9076.)

Dr. Berlin considered and rejected an additional diagnosis of

antisocial personality disorder, which entails disregard for the rights of others and irresponsibility which is pervasive in nature. (35 RT 9064.) He felt that, while Krebs committed many antisocial acts, his make up was more complicated, with many positive factors, and did not justify the ASPD diagnosis. (35 RT 9066.) Regardless of his personality classification, Krebs had a severe sexual disorder which caused him not to be able to control of himself without treatment. (35 RT 9068.)

Dr. Berlin agreed that Krebs probably would have discontinued his attacks and fled if a policeman had appeared but he would have remained driven to eventually enact the fantasy. (35 RT 9025, 9124.) Krebs was experiencing a pathological sense of sexual excitement and anticipation all through the offenses. (35 RT 9118.) The attacks to subdue the victims were simply a means to an end - the compulsion to commit the paraphilic rape. (35 RT 9115, 37 RT 9546.) While Krebs knew what he was doing was wrong, that does not show volitional control. (37 RT 9528.) Krebs was not fully in touch with the terror of the victims. (37 RT 9541.) Krebs described a blanking out of his feelings at the time of the assaults. He had no problem killing Aundria, but later was disgusted with himself. (35 RT 9544.) The violence of the initial abduction was also the means to the end. (35 RT 9546.) Krebs related he struggled to resist offending, describing it "more like fight a family of people in his head pushing him to do it and being overpowered." (35 RT 9571, 9604.) Dr. Berlin believed that murder was not part of the rape fantasy. (35 RT 9577) While in jail, Krebs had some upsetting fantasies about Crawford while masturbating. (35 RT 9580.) Krebs cried while relating how this disturbed him. (*Ibid.*)

The statements by Krebs about the fight in his head were volunteered during a long interview. His description was very consistent with what one

expects to see in a man who is driven by abnormal compulsive sexual cravings. (35 RT 9605.) Krebs did not decide to have sexual sadism, he discovered himself to be afflicted with it. (35 RT 9614.)

2. Prosecution rebuttal - Dr. Park Dietz

While Dr. Dietz agreed that Krebs had the paraphilic disorder of sexual sadism, he opined that no paraphilic disorder, by its nature, could impair anyone's ability to control their behavior and neither did antisocial personality disorder. Consequently, Krebs did not suffer from any mitigating mental disorder, even though he was afflicted with the unchosen paraphilia of sexual sadism.

Dr. Dietz reviewed materials concerning the case. (38 RT 9782.) He attempted to interview Krebs, but was refused. (38 RT 9784.) He agreed that Krebs suffered from sexual sadism (38 RT 9787), and also diagnosed him with a personality disorder, Antisocial Personalty Disorder. He used the criteria in the DSM to make the diagnosis. (38 RT 9789, 9790.)

Dr. Dietz agreed that people do not choose their sexual deviations, but rather discover they have them, typically around puberty (38 RT 9800, 9803.) Nonetheless, Dr. Dietz characterized fantasies as "voluntarily invoked imaginations." (38 RT 9799.) He opined that just a tiny group of sexual sadists commit violent crimes to fulfill their desires. (38 RT 9809.) He disagreed with Dr. Berlin regarding the nature and effects of the sexual sadism disorder. (38 RT 9812.) He opined that sexual sadism is not a mental disease, drawing a distinction between mental disorders and mental diseases: "I only call diseases those conditions that cause a person to have a profoundly entirely different view of reality than any normal human being." (38 RT 9839-9840.) Sexual sadism "doesn't affect how they think. It

doesn't affect their emotions. It doesn't affect the capacity to control themselves. It only affects what it is that turns them on sexually." (38 RT 9840.)

Dr. Dietz characterized the "policeman at the elbow test" as the "usual test in his field" to determine whether someone could conform their conduct to the law. (38 RT 9841.) He stated the "test" has "long been used in the field of forensic psychiatry as a way of looking at whether someone has volitional control, do they have the free will to conform to the law." (38 RT 9840.)

Dr. Dietz ridiculed Dr. Berlin's view that the urges and fantasies can become like a compulsion. (38 RT 9844.) Dr. Dietz stated that such an opinion was not an accepted medical or psychological view, but that it was a recent fad with lay Christian counselors:

> "But there is a group of people who are not in my field who come at it from a Christian counseling point of view who have become very fond of the idea of this being an addiction that begins with masturbation, exposure to pornography, obscene phone calls. And if one doesn't find some spiritual relief or additional aid, it can degenerate into horrible kinds of behavior such as this. **That's not an accepted medical or psychological view**. It's a fad that's been around the last ten or fifteen years." (38 RT 9844-9845, emphasis added.)

When asked specifically about the factors in mitigation which Dr. Berlin testified to, Dr. Dietz said that neither alcoholism, antisocial personality disorder nor sexual sadism qualifies as an extreme mental or emotional disturbance. (38 RT 9846.) Neither does the disorder constitute duress because it is not an external force. (38 RT 9847.) When asked whether Krebs was impaired in his capacity to appreciate his criminality or conform his behavior to the requirements of the law, Dr. Dietz gave a two-

part answer. First, he replied that none of Krebs' conditions constitute a mental disease or defect: "Nobody has thought that he is mentally retarded, so he doesn't have the condition of a mental disease or defect." (38 RT 9848.) He then explained : "But even if he did, I think we have evidence that his volitional control was there, that is, that he did have the capacity to conform his conduct to the requirements of the law."

Dr. Dietz cited several factors in support of this opinion. Krebs violated only once per year; did not rape when sober; made a knowing decision to put others at risk by drinking; lied to Dr. True; cruised; and carried a rape kit. (38 RT 9848-9849.) He also decided to stop resisting. (38 RT 9850.) "His decision to stop resisting, to stop trying to conform his conduct, is a choice, a bad choice, he made, rather than his not having the ability to control himself." (*Ibid.*)

Dr. Dietz confirmed that his view is that "there's no impairment of volitional control by sexual sadism" and "someone with sexual sadism is not impelled to commit offenses." (38 RT 9855-9856.) He agreed that sexual sadism could be treated to reduce dangerousness. (38 RT 9856.) When confronted with a prior affidavit, Dr. Dietz conceded that he had opined in a previous case that an evaluation for sexual sadism should be done because "it opens the door to irresistible impulse testimony from some experts, and because it is arguably the basis for a finding of extreme emotional distress where the offender feels impelled by strong sexual urges to commit the offense." (38 RT 9860.) He made clear, however, that he disagrees with any expert who would present such views. (38 RT 9862.)

3. Closing Argument

The prosecutor called the defense penalty case a "pathetic blame

game." (39 RT 10028.) He argued that Dr. Berlin was called because the defense could not find anyone in California, or even west of the Rockies. (39 RT 10036.) He questioned whether some of the defense was "orchestrated" and later flatly stated that it was. (39 RT 10036, 10040.) He cited the interview with Krebs by Dr. Berlin which Dr. Haney attended as unprofessional and further questioned, "Why did they do that? Was it to get all the ducks in a row? Was it to try to sell together this ridiculous concept of sexual compulsion?" (*Ibid.*)

He summarized the defense case regarding volitional impairment and Dr. Dietz' testimony as follows:

> "He just has to kidnap two coeds in San Luis Obispo, rape, and strangle them to death. That's the defense. He has bad thoughts. He just can't help himself. Of course, Dr. Dietz refuted that and said that Rex Krebs makes his choices. But you know you don't need an MD to know that. You may not have needed to hear from the most respected forensic psychiatrist in the United States. Park Dietz, he knows that the defendant makes his choices. You should know that as well." (39 RT 10037.)

Referring to the testimony of both defense experts, he argued, "I know you people can see through some of this nonsense." (39 RT 10040.) Near the end of his argument, he referenced Dr. Dietz again for this closing point:

> "By imposing the death penalty, we will be punishing a man who has victimized absolutely innocent people over and over and over again, who has been caught, who has been punished, who has suffered adverse consequences that should have convinced him not to do these things. Yet he has persisted because in his core, deep, deep down, as Dr. Dietz said, his personality is without morals." (39 RT 10044.)

C. The People's unjustified use of inconsistent theories violates Due Process under state and federal constitutions and the Eighth Amendment

The Due Process clause of the federal constitution requires that "the government prosecute fairly in a search for truth." (*Smith v. Groose* (8th Cir. 2000) 205 F.3d 1045, 1053.)

This court in *In re Sakarias* (2005) 35 Cal.4th 140 held that it was a Due Process violation of the California and federal constitutions when the People present inconsistent and irreconcilable theories in separate trials in the absence of a good faith justification.

> "Because it undermines the reliability of the convictions or sentences, the prosecution's use of inconsistent and irreconcilable theories has also been criticized as inconsistent with the principles of public prosecution and the integrity of the criminal trial system. A criminal prosecutor's function 'is not merely to prosecute crimes, but also to make certain that the truth is honored to the fullest extent possible during the course of the criminal prosecution and trial.' *(United States v. Kattar* (1st Cir. 1988) 840 F.2d 118, 127.)" *(In re Sakarias* (2005) 35 Cal.4th 140, 159.)

This court's holding was clear:

> "[W]e hold that the People's use of irreconcilable theories of guilt or culpability, unjustified by a good faith justification for the inconsistency, is fundamentally unfair, for it necessarily creates the potential for--and, where prejudicial, actually achieves--a false conviction or increased punishment on a false factual basis for one of the accuseds. 'The criminal trial should be viewed not as an adversarial sporting contest, but as a quest for truth.' (*United States v. Kattar*, *supra*, 840 F.2d at p. 127.)" *(In re Sakarias* (2005) 35 Cal.4th 140, 159, 160.)

In its analysis finding lack of a good faith justification, this court

noted that a prosecutor is not free to selectively present evidence in separate trials to support a theory of enhanced culpability in each trial when the theories themselves are irreconcilable. "[C]ases in which a prosecutor's use of inconsistent theories in successive trials reflects a deliberate change in the evidence presented are particularly clear violations. ..." *(In re Sakarias, supra*, 35 Cal.4th 140, 162.)

The United States Supreme Court has also expressed concern that the Eighth Amendment and the Due Process clause could be violated when the State takes inconsistent positions for tactical advantages in a capital sentencing proceeding. (See *Bradshaw v. Stumpf* (2005) 545 U.S. 175, [remanded for consideration of effect of inconsistent positions on death penalty] and the opinion of Justice Stevens dissenting from a denial of certiorari in *Jacobs v. Scott* (1995) 513 U.S. 1067 [use of confession later repudiated by prosecutor is denial of Due Process].)

Because of the qualitative distinction between death and the punishments involved in other criminal cases, the Eighth Amendment requires that the process leading to the imposition of a death sentence be reliable and subject to greater scrutiny than in other criminal cases. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 329.) For this reason, the People must be required to hew to a higher standard in presenting their case for death than might be required in other cases. Unreliability is inherent in inconsistent positions. Inconsistent positions taken to secure a judgment of death therefore violate the Eighth Amendment in addition to the Due Process Clause.

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D. Three distinct theories were presented in rebuttal by the People relating to impairment of volition and paraphilias

1. Theory that paraphilia does not impair volition

Through Dr. Dietz, the People presented the theory that while Krebs had long been afflicted with the officially recognized paraphilic mental disorder of sexual sadism as defined in the latest edition of the DSM, and while conceding that the hallmarks of the disorder are intense, recurring urges and fantasies regarding the rape and sexual humiliation of women, Krebs was at all times without any volitional impairment. In Dr. Dietz' world view, the presence of an unwanted, un-chosen disorder such as sexual sadism, with its accompanying fantasies and urges, *always* leaves the person with the completely unimpaired free choice to act on the urges or refrain from doing so. "It doesn't affect how they think. It doesn't affect their emotions. **It doesn't affect the capacity control themselves**. It only affects what it is that turns them on sexually." (38 RT 9840.) With this evidentiary basis, the People ridiculed and disparaged Dr. Berlin in argument: "Was it to try to sell together this ridiculous concept of sexual compulsion?" (39 RT 10036.)

The People's theory was that a person like Krebs, who is afflicted with the diagnosed mental disorder sexual sadism, who suffers from the unwanted urges to commit criminal sexual acts, who complains of being unable to fight off the urges, and who has acted on such fantasies and urges time and again despite incarceration and adverse consequences, nevertheless does not suffer from any volitional impairment as a result of the disorder, for the simple reason that there no such thing as the "ridiculous concept of sexual compulsion." (37 RT 9571, 9604; 39 RT 10036.)

The People's theory was not specific to the facts of the case. In their view, the particular manifestations and severity of the disorder was irrelevant to the question of volitional impairment because *no* non-psychotic person suffering from a paraphilia - even those with additional personality disorders - suffers from any volitional impairment from the disorder and thus remains in complete control of his offending.

2. Theory that the view that a paraphilia does impair volition is unaccepted

To impeach Dr. Berlin, the People also advanced the theory that his view that a paraphilia is like a compulsion was not accepted by any mainstream professionals. When asked by the prosecutor whether Dr. Berlin's view that the sexual urges and fantasies can become like a compulsion is widely held in the profession, Dr. Dietz stated that it was not and described a similar view held by lay Christian counselors as a "fad," and said it was not an "accepted medical or psychological view." (38 RT 9844-9845.) The prosecutor capitalized on this testimony in argument by calling Dr. Dietz "the most respected forensic psychiatrist in the United States" while arguing Dr. Berlin's position was so extreme, that no one west of the Rockies could be found who shared his views. (39 RT 10036, 10040).

3. Theory that the "policeman at elbow" test is the appropriate test for volitional impairment

To impeach Dr. Berlin's testimony that Kreb's volitional control was severely impaired by his paraphiliac disorder even though he could temporarily defer acting on the urges, the People adduced evidence that the

appropriate test for volitional impairment was the "policeman at the elbow" test. "Well, that's the usual test in my field at looking at whether someone could conform their conduct to the requirements of the law, would they have done it had there been a policeman right there." (38 RT 9841.) He stated, "it's long been used in the field of forensic psychiatry as a way of looking at whether someone has volitional control, do they have the free will to conform to the law." (38 RT 9840.) Dr. Dietz applied this test to Mr. Krebs to support his opinion of no volitional impairment. "If there had been a policeman there, he wouldn't have done it." (38 RT 9841.)

E. The People's theories regarding volitional impairment here are inconsistent with those presented by the People in SVP and civil commitment cases

In the world of Sexually Violent Predator Act (SVP) commitments, the concept of a compulsion to commit sexually violent acts caused by a paraphilic disorder is not so ridiculous to the People as they argued here. Prosecutors representing the People in commitment cases portray such a view as an accepted medical and psychological view, rather than a "fad" of Christian lay counselors.

Dr. Berlin's views, disavowed and ridiculed by the People in the Krebs trial, are accepted as psychiatric fact by the People, and argued proven beyond a reasonable doubt by the People in each successful SVP commitment. Long before Krebs' crimes and trial, the People of the state of California had legislatively determined that there were, contrary to Dr. Dietz' view, a group of persons who, while not insane, psychotic or mentally retarded, nevertheless suffered from a mental disorder with compulsive aspects which impaired their ability to refrain from committing

violent sexual acts, and hence were dangerous and subject to civil commitment. In the uncodified section of the bill enacting the Sexually Violent Predator Act, the legislature found as follows:

> "The Legislature further finds and declares that while these individuals have been duly punished for their criminal acts, they are, if adjudicated sexually violent predators, a continuing threat to society. The continuing danger posed by these individuals and the continuing basis for their judicial commitment is a currently diagnosed mental disorder which predisposes them to engage in sexually violent criminal behavior. It is the intent of the Legislature that these individuals be committed and treated for their disorders only as long as the disorders persist and not for any punitive purposes." (Stats. 1995, chs. 762 & 763, § 1).

The People's theory in this case, that paraphiliacs categorically suffer no volitional impairment resulting from the disorder, is attractive when one desires to characterize a defendant as evil rather than afflicted with a mental disorder which shapes his actions. This theory, however, is utterly at odds and irreconcilably inconsistent with the theory of the People as presented in hundreds of SVP commitment trials under W&I 6600 *et seq* and other civil commitments. In each SVP commitment, the People must take the position, and prove beyond a reasonable doubt, that the subject "suffers from a diagnosed mental disorder which prevents him from controlling sexually violent behavior, and which 'makes' him dangerous and 'likely' to reoffend." (*Hubbart v. Superior Court (People)* (1999) 19 Cal.4th 1138, 1156; hereafter *Hubbart.)* As stated in the *Hubbart* decision, the statutory language of the SVP Act fulfilled the requirement of *Kansas v. Hendricks* (1997) 521 U.S. 346, 357 that a constitutional civil commitment scheme must require a mental condition that causes volitional

impairment. (*Hubbart, supra,* at p. 1156.)

The People, acting through district attorneys in various counties in trial courts, and the Attorney General on appeal, have consistently taken the position contrary to Dr. Dietz that the various types of paraphilias listed in the DSM[13] are in fact a type of diagnosed mental disorder which may impair volition, rendering a subject unable to control sexually violent behavior.

Indeed, in *Hubbart, supra*, 19 Cal.4th 1138 at p. 1150, this court summarized the diagnosis which the state relied upon:

> "Both experts concluded that Hubbart suffered from a diagnosable mental disorder, as set forth in the 'DSM-IV.' [fn. omitted] Dr. Nelson gave a 'definite diagnosis of [Axis I] 302.9, Paraphilia Not Otherwise Specified, Bondage, Rape and Sodomy of Adult Women, Severe.' Dr. Phenix concurred with a diagnosis of 'Axis I 302.9 Paraphilia, not otherwise specified with rape, sodomy and klismaphilia toward adult women, severe. [¶] Axis II 301.9 Personality Disorder, not otherwise specified with antisocial traits.' Both experts described 'paraphilia' as recurrent and intense sexual fantasies and behaviors involving the humiliation and forcible

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"The Diagnostic and Statistical Manual of the American Psychiatric Association (4th ed. 1994) (DSM IV) lists paraphilias as sexual dysfunctions and describes their general characteristics: "[R]ecurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons, that occur over a period of at least 6 months" which "cause clinically significant distress or impairment in social, occupational, or other important areas of functioning." (DSM IV, pp. 522-523.) "Paraphiliac imagery may be acted out with a nonconsenting partner in a way that may be injurious to the partner (as in Sexual Sadism or Pedophilia)" rendering "[t]he individual ... subject to arrest and incarceration." (DSM IV, p. 523.) The DSM IV lists nine categories of paraphilia, including the two diagnosed here: sexual sadism and paraphilia NOS, the residual category. (DSM IV, p. 523.)" (*People v. Roberge* (2003) 29 Cal.4th 979,984, fn. 1.)

> sexual penetration of persons against their will. Hubbart's condition had apparently existed for over 20 years (since age 21), and was accompanied by significant disruption in other areas of social functioning." (*Hubbart, supra*, 19 Cal.4th 1138 at p. 1150)

A typical SVP case where the People relied on a diagnosis of sexual sadism and antisocial personality disorder - the identical diagnoses given to Krebs by Dr. Dietz - as the requisite volition impairing disorders is *People v. Leonard* (2000) 78 Cal.App.4th 776. There the People called four different psychologists who agreed on the diagnosis.

The People have also proceeded on the theory that a paraphilia may cause volitional impairment outside the SVP context in the Mentally Disordered Prisoners Act (MDPA) proceedings. (Penal Code section 2960 *et seq.*) In *People v. Williams* (1999) 77 Cal.App.4th 436, the People called Dr. William Waters, chair of the psychiatry department at Atascadero State Hospital (located in San Luis Obispo County, where Krebs' crimes occurred) who explained, "paraphilia is a sexual disorder that affects judgment and behavior, in that one's intense urges cause him or her to act out sexual desires." Another expert called by the People agreed, and the court noted,"[b]oth expert witnesses testified that defendant suffers from paraphilia, a serious, incurable mental disorder, which is characterized by the obsessive, repetitive, and driven nature of his criminal sexual violence." (*Id.*, at p. 778.)

The People have also relied simply on a paraphilic disorder even in the absence of other personality disorders, such as in *People v. Superior Court (Howard)* (1999) 70 Cal.App.4th 136, where pedophilia was the sole diagnosis of three State examiners in a case seeking commitment under

W&I section 1800. Reliance by the People's experts on a diagnosis of paraphilia as a volition impairing disorder is pervasive in published cases. In the great majority of published cases regarding SVP trials, the primary diagnosed mental disorder is a type of paraphilia. "Paraphilia NOS is a common diagnosis in SVP proceedings. (See *People v. Felix* (2008) 169 Cal.App.4th 607, 616.)" (*People v. O'Shell* (2009) 172 Cal.App.4th 1296, 1302, fn. 5.) (A list of published SVP cases and related cases where state experts relied on a diagnosis of a type of paraphilia appears below.)[13]

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In each of the following published cases, the People's expert or experts relied on a paraphilia as a required mental disorder.
People v. Glenn (2009) 178 Cal.App.4th 778 (rev. granted)
People v. McRoberts (2009) 178 Cal.App.4th 1249
People v. Johndrow (2009) 175 Cal.App.4th 71 (rev. granted)
People v. O'Shell (2009) 172 Cal.App.4th 1296
People v. Force (2009) 170 Cal.App.4th 797
People v. Castillo (2009) 170 Cal.App.4th 1156
People v. Allen (2008) 44 Cal.4th 843
People v. Felix (2008) 169 Cal.App.4th 607
People v. Superior Court (George) (2008) 164 Cal.App.4th 183
In re Lemanuel C. (2007) 41 Cal.4th 33
Cuccia v. Superior Court (People) (2007) 153 Cal.App.4th 347
People v. Whaley (2007) 152 Cal.App.4th 968
People v. Dixon (2007) 148 Cal.App.4th 414
People v. Buffington (2007) 152 Cal.App.4th 446
In re Brian J. (2007) 150 Cal.App.4th 97
People v. Marchman (2006) 145 Cal.App.4th 79
People v. Shazier (2006) 139 Cal.App.4th 294 (rev. granted)
People v. Lopez (2006) 146 Cal.App.4th 1263
People v. Rasmuson (2006) 145 Cal.App.4th 1487
People v. Fisher (2006) 136 Cal.App.4th 76
People v. Green (2006) 135 Cal.App.4th 1315
In re Anthony C. (2006) 138 Cal.App.4th 1493
People v. Fulcher (2006) 136 Cal.App.4th 41
People v. Fraser (2006) 138 Cal.App.4th 1430

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In re Howard N. (2005) 35 Cal.4th 117
People v. Evans (2005) 132 Cal.App.4th 950
People v. Munoz (2005) 129 Cal.App.4th 421
People v. Angulo (2005) 129 Cal.App.4th 1349
People v. Garcia (2005) 127 Cal.App.4th 558 (MDO)
People v. Dodd (2005) 133 Cal.App.4th 156 (MDO)
In re Michael H. (2005) 128 Cal.App.4th 1074
People v. Sumahit (2005) 128 Cal.App.4th 347
People v. Calhoun (2004) 118 Cal.App.4th 519
People v. Sheek (2004) 122 Cal.App.4th 1606 (MDO)
In re Luis C. (2004) 116 Cal.App.4th 1397 (1800)
People v. Calderon (2004) 124 Cal.App.4th 80
People v. Lopez (2004) 123 Cal.App.4th 1306
People v. Roberge (2003) 29 Cal.4th 979
People v. Williams (2003) 31 Cal.4th 757
Turner v. Superior Court (People) (2003) 105 Cal.App.4th 1046
People v. Whitlock (2003) 113 Cal.App.4th 456
People v. Grassini (2003) 113 Cal.App.4th 765
People v. Starr (2003) 106 Cal.App.4th 1202
Cooley v. Superior Court (Marentez) (2002) 29 Cal.4th 228
People v. Hurtado (2002) 28 Cal.4th 1179
People v. Superior Court (Ghilotti) (2002) 27 Cal.4th 888
People v. Burris (2002) 102 Cal.App.4th 1096
People v. Carmony (2002) 99 Cal.App.4th 317
Albertson v. Superior Court (People) (2001) 25 Cal.4th 796
People v. Martinez (2001) 88 Cal.App.4th 465
People v. Hubbart (2001) 88 Cal.App.4th 1202
People v. Hardacre (2001) 90 Cal.App.4th 1392
People v. Turner (2000) 78 Cal.App.4th 1131
People v. Leonard (2000) 78 Cal.App.4th 776
Hubbart v. Superior Court (People) (1999) 19 Cal.4th 1138
People v. Williams (1999) 77 Cal.App.4th 436
People v. Poe (1999) 74 Cal.App.4th 826
People v. Chambless (1999) 74 Cal.App.4th 773
People v. Ward (1999) 71 Cal.App.4th 368
People v. Rains (1999) 75 Cal.App.4th 1165
People v. Fernandez (1999) 70 Cal.App.4th 117

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Furthermore, pedophilia, a type of paraphilia, has been judicially held to be a "severe" mental disorder within the meaning of the Mentally Disordered Offender (MDO) law in *People v. Starr* (2003) 106 Cal.App.4th 1202:

> "But California courts have consistently classified pedophilia as a mental disorder in other statutory commitment proceedings. (*People v. Mercer* (1999) 70 Cal.App.4th 463, 466 [pedophilia a 'mental disorder' under Sexually Violent Predator Act (SVPA)]; *People v. McCune* (1995) 37 Cal.App.4th 686, 692 [state hospital commitment under § 1026.5 proper for the "mental disorder" of pedophilia]; *People v. Sherman* (1985) 167 Cal.App.3d 10, 15 ['Appellant's mental disorder that brings him under the purview of the MDSO [mentally disordered sex offenders] statutes is pedophilia']; *People v. Lamport* (1985) 165 Cal.App.3d 716, 718 [pedophilia a 'mental disorder' which predisposes the defendant to engage in sex with minors].) Courts from other states have also concluded that pedophilia is a mental disorder. *(In re Commitment of Zanelli* (1998) 223 Wis.2d 545, 551 [589 N.W.2d 687, 691]; *In re Pugh* (1993) 68 Wash.App. 687, 693 [845 P.2d 1034, 1037-1038].)"
>
> "Starr argues that Simon and other experts have concluded that pedophilia is not a mental disorder. But that is neither the prevailing view of the profession nor would it prevent the Legislature from defining it as a mental disorder. *(Kansas v. Hendricks* (1997) 521 U.S. 346, 360 ; American Psychiatric

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[13](...continued)
People v. Superior Court (Howard) (1999) 70 Cal.App.4th 136
People v. Mercer (1999) 70 Cal.App.4th 463
People v. Butler (1998) 68 Cal.App.4th 421
People v. McCune (1995) 37 Cal.App.4th 686
People v. Sherman (1985) 167 Cal.App.3d 10
People v. Lamport (1985) 165 Cal.App.3d 716

> Assn. Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) Pedophilia, § 302.2, pp. 527-528 (DSM-IV).) In *Kansas v. Hendricks*, the United States Supreme Court stated that pedophilia is 'a condition the psychiatric profession itself classifies as a serious mental disorder.' (*Kansas*, at p. 360 [117 S.Ct. at p. 2081].) The court acknowledged other views. It stated, 'We recognize, of course, that psychiatric professionals are not in complete harmony in casting pedophilia, or paraphilias in general, as "mental illnesses." ... These disagreements, however, do not tie the State's hands in setting the bounds of its civil commitment laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting statutes. [Citation.]' (*Id.*, at p. 360, fn. 3.)" (*People v. Starr* (2003) 106 Cal.App.4th 1202, 1205-1206.)

In *People v. Williams* (2003) 31 Cal.4th 757, 760, this court again confirmed that the SVP Act required evidence of volitional impairment - as distinguished from the complete absence of volition - caused by a mental illness. "Adhering closely to the reasoning of *Hendricks*, *supra*, 521 U.S. 346, we explained that 'civil commitment is permissible as long as the triggering condition consists of "a volitional impairment rendering [the person] dangerous beyond their control." [Citation.]' (*Hubbart, supra*, 19 Cal.4th 1138, 1156.)" (*People v. Williams*, *supra,* 31 Cal.4th 757, 768.) The court found the evidence sufficient, noting "[b]oth expert witnesses testified that defendant suffers from paraphilia, a serious, incurable mental disorder, which is characterized by the obsessive, repetitive, and driven nature of his criminal sexual violence." (*Id.*, at p. 778.) The court summarized one of the expert's testimony:

> "Dr. Sheppard testified as follows: Defendant suffers from 'paraphilia, not otherwise specified' (paraphilia NOS)--a mental disorder characterized by intense and recurrent

> fantasies, urges, and behaviors about sex with nonconsenting persons, which symptoms persist for six months or more and cause significant dysfunction or personal distress. Paraphilic rape is 'that obsessive driven rape uncontrollable for the most part that [persons with this disorder]--you know, feel driven to commit.'" (*People v. Williams* (2003) 31 Cal.4th 757, 760.)

The People and Dr. Dietz also contravened the law and theory presented by the People in SVP cases when maintaining that the test in "looking at whether someone could conform their conduct to the requirements of the law" was the so-called "policeman at the elbow" test. (38 RT 9841.) Our statutes are clear that only a degree of impairment is necessary for SVP commitments. (*People v. Williams* (2003) 31 Cal.4th 757, 753; *Kansas v. Crane* (2002) 534 U.S. 407.) SVP commitment requires only serious difficulty in controlling violent behavior, not total or complete lack of control. (*Ibid.*) The same is true under factor (h). (*People v. Babbitt* (1988) 45 Cal.3d 660, 720-721 [insanity requires lack of substantial capacity, factor (h) only requires "impaired capacity."] See also *People v. Marshall* (1996) 13 Cal.4th 799, 857 ["For a particular sentencing factor, such as section 190.3, factor (h), to apply on the record of the case, the evidence supporting it need not suffice to establish a complete defense to the crime; rather, there need be in the record only some evidence relevant to the factor"].)

Dr. Dietz' "policeman at the elbow" test is completely inappropriate in both contexts because it requires the almost complete absence of volition rather than mere impairment. Clearly a person can fail the "policeman at the elbow" test by refraining from committing a crime when a policeman is present, yet still be volitionally impaired, within the meaning both SVP law and factor (h). (See Comments, Model Penal Code, Tent. Draft No. 4, p.

158 (1955), American Law Institute as reported in *Wade v. United States* (9th Cir, 1970) 426 F.2d 64,77 (Trask, J, dissenting) ["policeman at elbow" test inadequate].)

F. The People's theory regarding volitional impairment at trial is irreconcilable with that presented by the People in SVP and related cases

The inconsistency between the People's positions in SVP and other commitment cases and that taken at Krebs' trial is striking. There is no principled way to reconcile the two positions.

1. The relevant facts of the case do not justify the inconsistent theories

This is not an instance where the facts of the individual cases could account for the inconsistency in theories. While it is certainly conceivable that the People might have properly called an expert to testify that Krebs did not suffer from a paraphilia, and that he was merely an "opportunistic rapist" and that his claims of disturbing, intense pathological sexual fantasies and urges of rape since puberty were false, they did not do so. (See *People v. Roberge* (2003) 29 Cal.4th 979, 983 [Defense called Dr. Donaldson who stated that the subject did not suffer from a paraphilia].) The factual basis upon which Dr. Berlin made his diagnosis was essentially uncontested. In fact, Dr. Dietz agreed with the diagnosis of sexual sadism for Krebs and its definition from the DSM. (38 RT 9787, 9789, 9790). He agreed that Krebs' disorder was not chosen, and that he would experience the urge (recurrently and intensely by definition) to commit sexual offenses to gratify his abnormal desires. (38 RT 9800, 9804.) Dr. Dietz simply took

an exceedingly narrow view of the meaning of impaired volition and the type of mental disorders which can be said to impair volition - one in contradiction to SVP law and expert opinion presented in such cases by the People. In Dr. Dietz' view, sexual disorder compulsion does not exist. "It doesn't affect the capacity to control themselves." (38 RT 9840.) Dr. Dietz did not quarrel with Dr. Berlin factually, he differed philosophically.

In fact, it appears that the heart of Dr. Dietz' disagreement with the testimony routinely presented by the People in SVP cases is not a psychiatric or medical opinion at all. It represents a particular philosophical view, coupled with an untenable understanding of the concept of volitional impairment as that term is used in modern law. While some psychologists do testify more in accordance with Dr. Dietz's view in SVP trials, they do so only for the defense. In *People v. Buffington* (2007) 152 Cal.App.4th 446, the majority and dissenting opinions discuss in detail the testimony of Dr. Donaldson in that case and his cross-examination about opinions he rendered in other SVP cases. The dissent notes that his testimony revealed that he disagreed with the State experts regarding SVP qualification in ninety percent of the 254 case he participated in. (*Id.*, at p. 458.)

In *People v. Burris* (2002) 102 Cal.App.4th 1096, Dr. Donaldson's testimony as it relates to volitional impairment was discussed at length and the court found that his understanding of the concept was legally flawed. As stated in the opinion, Dr. Donaldson testified that he was on the State SVP panel for about three months; however, he had been terminated because "[his] views were not consistent with other people's views," and he now worked exclusively for the defense. (*Id.*, p. 1103.) The court then summarized his testimony regarding volitional impairment:

"Dr. Donaldson disagreed, however, that defendant had a

'mental disorder' within the meaning of Welfare and Institutions Code section 6600. The definition of 'mental disorder' required an inability to control behavior.

"Dr. Donaldson defined volitional control as the ability to make a choice. A person is volitionally impaired when a 'driving force' overcomes his or her ability to make choices. 'Most people who are compelled to behavior ... go through some sort of concern afterwards. ... [T]hey look pretty tormented about it.' Such a person would feel remorse. The fact that a person repeats criminal behavior after being punished does not show volitional impairment; it shows only 'risk-taking behavior.'

"According to Dr. Donaldson, defendant was not unable to control his behavior. Rather, defendant chose not to control himself. 'He acts out whenever he wants to. ... He has a strong sense of entitlement. He is angry. A lot of his crimes involve ... a lot of anger and aggression.' He was impulsive, but not compulsive. The fact that he had no qualms about his behavior meant that his volition was not impaired. An antisocial personality disorder was the antithesis of a volitional impairment." (*People v. Burris*, *supra*, 102 Cal.App.4th 1096, 1103.)

The court rejected the appellant's claim, which paralleled Dr. Donaldson's views. The court held otherwise: "Certainly a person who does not want to rape, feels remorse after raping, yet continues to rape anyway, 'lacks control.' But a person who does want to rape, feels no remorse after raping, and continues to rape despite having been criminally punished for prior rapes, also 'lacks control.'" (*Id.*, at p. 1107.)

The court then commented on the proposed distinction:

"Defendant's proposed distinction between these two types of offenders poses certain practical problems. It depends almost entirely on expert witnesses' opinions regarding the offender's expressed subjective feelings. Thus, it is peculiarly subject to

> manipulation and mistake. It can be reduced to a philosophical debate about free will: Is an offender who expresses no remorse acting out of his own free will, whereas one who does express remorse is acting out of compulsion? (And what does this even mean, given that the mental disorder causing the compulsion is a part of the offender, not some outside force?) Or are both offenders acting out of their own free will, with the only real difference being in their subsequent feelings about their acts? An expert's testimony that there is (or is not) a distinction between these two types of offenders is likely to be dictated, not by the expert's evaluation of the particular offender in light of his or her education, training, and experience, but by his or her preexisting position on this philosophical issue." (*Id.*, at p. 1108.)

Dr. Dietz' testimony was even more extreme than Dr. Donaldson's. Dr. Donaldson would concede impaired volitional control where the mental disorder drives the person to do the act, and the offender feels remorse afterwards. Krebs would qualify even under this conceptualization, given his struggle to control his urges and his shame and remorse concerning his desires and offenses. Dr. Dietz does not even concede that. He simply posits that all persons have free will, in the absence of a type of disorder which gives them a fundamental different perception of reality (which would likely render them legally insane). The *Burris* court's observation applies to Dr. Dietz: his testimony was "dictated, not by the expert's evaluation of the particular offender in light of his or her education, training, and experience, but by his or her preexisting position on this philosophical issue." (*Ibid.*) Dr. Dietz himself appeared to admit as much at the motion in limine: "There's no doubt that my opinions about volition and about sexual sadism would affect my testimony. Whether they ought to be characterized as personal opinions or professional opinions, I leave for

others to decide." (28 RT 7580.)

There was nothing about the facts of this case regarding Krebs which accounted for the People switching positions from that taken in SVP cases except for the simple fact that taking the same position here would have benefitted the appellant rather than the People.

2. The relevant legal standards involved are the same, and do not justify the inconsistent theories

Neither can it be said that the discrepancy is due to differing legal standards involved in this case versus SVP and similar cases.

No court has construed the pertinent language of Penal Code section 190.3(h), "the capacity of the defendant... to conform his conduct to the requirements of law was impaired as a result of mental disease or defect...," as excluding paraphilic disorders. Indeed, the few courts that have construed the phrase have made clear that the terms mental disease or mental defect have no talismanic meaning.

In *People v. Weaver* (2001) 26 Cal.4th 876, 969, the court, considering the phrase "mental disease or mental defect" in relation to the sanity phase instruction under the *Drew* - ALI (*People v. Drew* (1978) 22 Cal.3d 333) formulation, held:

> "In this case, the language of the special instruction ('The terms "mental disease" or "mental defect" does not include an abnormality manifested *only* by repeated criminal [conduct]' (italics added)) clearly implies that where evidence of more than mere criminal conduct is present, such evidence can be considered as proof of a mental disease or defect. Here there was ample evidence presented to the jury at the sanity phase of the voices defendant said he heard in his head, his posttraumatic stress as a result of service in Vietnam, and other psychological problems. The jury would reasonably

> have understood that such evidence, if credited, coupled with the evidence of repeated antisocial behavior, could comprise evidence of insanity." (*People v. Weaver* (2001) 26 Cal.4th 876, 969.)

Previously, in *People v. Fields* (1983) 35 Cal.3d 329, the court had held:

> "Before explaining our reasons for approving the court's instruction based on subdivision 2, it is important to note what that subdivision does and does not do. Although it was designed to deny an insanity defense to psychopaths and sociopaths (see *People v. Drew*, *supra*, 22 Cal.3d 333, 345, fn. 8; Model Pen. Code, § 4.01(2), com. (Tent. Draft No. 4, 1955)), it does not have that precise effect. What it does is prevent consideration of a mental illness if that illness is manifested only by a series of criminal or antisocial acts. If that illness manifests itself in some other way as well, then it can be considered as a 'mental disease' under the ALI test, and instances of criminal or antisocial conduct can be ascribed to that disease or cited as evidence of its severity. (Thus Dr. Markham may have been mistaken when, in response to a question excluding consideration of 'an abnormality manifested only by repeated or otherwise antisocial conduct,' he stated that 'by definition, you are excluding the antisocial personality.')" (*People v. Fields* (1983) 35 Cal.3d 329, 369-370.)

Thus in *Fields (ibid.)* the court equated "mental disease or defect" with "mental illness." In *Weaver* the court held that "posttraumatic stress" and "other psychological problems" could constitute a "mental disease or defect." Further, such other psychological problems are referred to in the instruction as "an abnormality" thus indicating that any mental abnormality *other* than one manifested *only* by repeated criminal conduct could furnish the basis of insanity. As this court has noted, the language of factor (h) is very similar to that of impairment of capacity prong of the insanity test

adopted in *People v. Drew* (1978) 22 Cal.3d 333, (*People v. Berryman* (1993) 6 Cal.4th 1048, 1094), and there is every reason to give the terms "mental disease or mental defect" a less restrictive construction in the mitigation context. The court in *In re Ramon M.* (1978) 22 Cal.3d 419, 427-428, noted that, as used in the ALI test, the term "disease" was used to connote a changeable mental condition, while "defect" a mental condition that was not subject to change. When used in the alternative, the phrase "mental disease or defect" would therefore include all types of mental conditions which contribute to volitional impairment. This construction is consistent with SVP law and in stark contradiction with the People's theory and evidence in this case.

Nowhere has this court suggested in its lengthy diminished capacity jurisprudence that the term "mental disease or defect" had a more restrictive meaning then simply an inclusive term to signify any type of mental disorder, condition, or abnormality which might produce the requisite effect. Thus in *People v. Saille* (1991) 54 Cal.3d 1103, the court discussed the genesis of the diminished capacity defense, and the resulting hearings which culminated in the passage of Penal Code section 28, prohibiting "evidence of mental illness" to prove diminished capacity. (*Id.*, at p. 1111)

In *People v. Williams* (2006) 40 Cal.4th 287, 325-326, the court held that a defense- proposed instruction relating to factor (h) which used the term "mental illness" and gave an expansive meaning to the term, and was not a necessary clarification of the statutory language of factor (h). The court did not suggest that the instruction incorrectly stated the law.

In the SVP context, it has been repeatedly made clear that the descriptive label given the necessary mental condition causing volitional impairment is not important. (*People v. Williams* (2003) 31 Cal.4th 757,

766.) The essence of the required mental condition is a diminishment in the volitional capacity to control sexually violent impulses. Factor (h) in the context of this case points to the exact same condition. If one has a mental disorder that so impairs his self control so as to render him dangerous and subject to civil commitment under the SVP law, by definition and as a matter of law, that person also demonstrates the impairment of volitional control specified in factor (h). The inconsistent theories cannot be reconciled on the basis that significantly different standards control the proceedings in this respect.

3. That different prosecutors representing the People may be involved in SVP cases does not justify the inconsistency.

In the facts of *In re Sakarias* (2005) 35 Cal.4th 140, the inconsistent theories were presented by the same individual prosecutor. However, this coincidence was not central to the court's holding. Indeed, although discussing the individual prosecutor's actions, the court consistently generalized to "the People" when discussing the legal principles attendant to the case (i.e., the headings such as appearing at page 161: *The People unjustifiably used inconsistent and irreconcilable theories to obtain a death sentence against Sakarias,* and the statement appearing at page 163, "The People, therefore, deprived Sakarias of due process by unjustifiably using inconsistent and irreconcilable factual theories to obtain a death sentence against him.") The court's holding at page 167 is equally clear: "[W]e hold that the People's use of irreconcilable theories of guilt or culpability, unjustified by a good faith justification for the inconsistency, is fundamentally unfair . . ."

That the same prosecutor is not shown by the record to be also

involved in SVP and related cases does not justify the inconsistency for several reasons. First, the record shows that the prosecutor was aware of SVP law and had researched it in connection with request by the Department of Corrections early in the proceedings for information to evaluate Krebs under the SVP law. (1 RT 23-24.)

The prosecutor went to some lengths to exclude any evidence concerning the SVP program. He successfully objected to evidence of whether Krebs was evaluated under the SVP program upon his release from prison in 1997. (34 RT 8806.) He argued that Dr. Berlin should not be allowed to discuss the program. (35 RT 8967) The defense countered that evidence relating to the program was important to impeach the expected testimony of Dr. Dietz.

> "As to the SVP Program, it's the same thing. The State of California has recognized that mental disorders can cause people to be sexual predators, and dangerous, and that treatment is needed. And it's the same thing. It's circumstantial evidence of his knowledge of what's being done to treat people. And it's also circumstantial evidence that the government is on notice that people such as Mr. Krebs need treatment, and it goes to the institutional failure issue. And it also, I think, is impeachment of what I believe is Dr. Dietz's position that there is no volitional impairment." (35 RT 8969.)

The prosecutor then objected when Dr. Berlin was asked on direct examination: "[A]s a consequence of your work, are you aware of any legislation that supports your contention that sexual sadism is a disorder that causes danger unless treated?" (35 RT 9037.) Outside the presence of the jury, the defense again argued the relevance of the evidence:

> "[T]he public policy of this state is reflected in that statute, and the public policy of this state is that there are certain

> mental disorders that effect a person sexually, that effect [*sic*] their volitional control. And I think that's the underpinnings of what this doctor is saying. Is wait a minute, the volitional control of these people is effected. As a matter of public policy the State of California agrees with him. If the jury is to know the truth, I think they should know that. That that position is reflected in our own statutes." (35 RT 9043.)

Additionally, the record shows that the prosecutor was familiar with Dr. Berlin's work and status as a leading authority in the treatment of sexual disorders. The prosecutor characterized Dr. Berlin as "one of the top psychologists in the country" in a pretrial statement to the court. (22 RT 5960.)

Based on this record, it cannot be claimed that the prosecutor was unaware that the public policy in this state at the time of the trial as embodied in the SVP laws enacted as an emergency measure in 1996, contemplated the existence of "certain mental disorders that effect a person sexually, that effect their volitional control" as argued by defense counsel. In addition, the opinion in *Hubbart v. Superior Court (People)* (1999) 19 Cal.4th 1138 was issued January 21, 1999, months before Krebs' arrest, and two years before his trial.

Even if the individual prosecutor was unaware of the testimony and theories presented by the People in SVP cases, that fact should not excuse the error. In other contexts, this court has made clear that actual bad faith is not necessary to establish misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 822; see also *People v. Hoyos* (2007) 41 Cal.4th 872, 917 [*Brady v. Maryland* (1963) 373 U.S. 83, 87 violation does not require showing of bad faith or actual knowledge by prosecutor] and *People v. Zambrano* (2007) 41 Cal.4th 1082 [evidence in possession of the prosecuting and

investigating agencies must be disclosed, regardless of individual prosecutor's knowledge under *Kyles v. Whitley* (1995) 514 U.S. 419, 437].) The court in *Giglio v. United States* (1972) 405 U.S. 150, 154, held, "The prosecutor's office is an entity and as such it is the spokesman for the Government." The pertinent inquiry therefore is whether the *People*, not individual prosecutors, have unjustifiably switched positions.

4. There is no justification possible for the inconsistent theories

This court taught in *In re Sakarias* (2005) 35 Cal.4th 140,161, that inconsistent theories presented in good faith would not violate Due Process. But the term "good faith" in this context refers to the justification for the inconsistent theories, not an individual prosecutor's state of mind. The court indicated that the absence of a good faith justification for the inconsistency would indicate bad faith in this context:

> "[W]e hold that the People's use of irreconcilable theories of guilt or culpability, unjustified by a good faith justification for the inconsistency, is fundamentally unfair, for it necessarily creates the potential for--and, where prejudicial, actually achieves--a false conviction or increased punishment on a false factual basis for one of the accuseds." (*Id.*, p. 160.)

The court acknowledged that when new evidence comes to light, it may justify a good faith presentation of an inconsistent theory. (*Id.*, at p. 162.) However, the court cautioned that "cases in which a prosecutor's use of inconsistent theories in successive trials reflects a deliberate change in the evidence presented are particularly clear violations . . ." (*Ibid.*) The court held that

> "[W]here, as here, a prosecutor who seeks convictions or death sentences against two individuals through inconsistent

> and irreconcilable factual theories deliberately omits in one trial evidence used in the other, so as to make possible the argument of the inconsistent theories, the prosecutor's manipulation of evidence does show that the inconsistent theories were not pursued in good faith." (*Id.*, p. 163.)

This case is such a case where the People deliberately sought out a psychiatrist to present evidence that 1) the paraphilia sexual sadism, by its nature, cannot and does not affect the volitional control of persons afflicted with it; 2) the view that urges associated with a paraphilic disorder such as sexual sadism do impair a person's ability to control his behavior is not an accepted psychiatric or medical view, and 3) that a person is not volitionally impaired if he is able to refrain from acting on a criminal urge when a police officer is present.

This testimony is so flatly contradictory with the testimony presented by the People's experts in SVP and related cases that it must be attributed to an intentional manipulation of the evidence to gain the death penalty by unfairly negating a substantial factor in mitigation presented by the defense. Even if the individual prosecutor's actual knowledge of the inconsistent evidence was an element of "bad faith," the People must be deemed to have such knowledge given the highly publicized and controversial nature of the SVP law when enacted, the widespread use of the law throughout the state to commit persons under its provisions, and the multitude of published decisions prior to the conclusion of trial in this case[14] which addressed in

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The following is a list of 32 published cases directly relating to SVP petitions published prior to July of 2001: *Albertson v. Superior Court (People)* (2001) 25 Cal.4th 796, *Hubbart v. Superior Court (People)* (1999) 19 Cal.4th 1138, *Cooley v. Superior Court (Edwards)* (2001) 89

(continued...)

depth the volitional impairment requirements of the law, and which contained descriptions of the State's psychiatric testimony concerning paraphilias. The selection of Dr. Dietz as the People's expert rather than one of the many experts employed by the People in SVP and related cases was clearly intentional. The People successfully objected to any evidence relating to SVP proceedings. The People well knew that Dr. Dietz would testify as he did as evidenced by his testimony at a pretrial hearing that sexual sadism does not impair volitional capacity. (28 RT 7585.) He also admitted at the hearing that, "There's no doubt that my opinions about volition and about sexual sadism would affect my testimony. Whether they ought to be characterized as personal opinions or professional opinions, I

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[14](...continued)
Cal.App.4th 785, *People v. Martinez* (2001) 88 Cal.App.4th 465, *People v. Hubbart* (2001) 88 Cal.App.4th 1202, *Leake v. Superior Court (People)* (2001) 87 Cal.App.4th 675, *People v. Superior Court (Preciado)* (2001) 87 Cal.App.4th 1122, *People v. Superior Court (Gary)* (2000) 85 Cal.App.4th 207, *People v. Talhelm* (2000) 85 Cal.App.4th 400, *Garcetti v. Superior Court (Blake)* (2000) 85 Cal.App.4th 1113, *People v. Superior Court (Butler)* (2000) 83 Cal.App.4th 951, *People v. Clark* (2000) 82 Cal.App.4th 1072, *People v. Wakefield* (2000) 81 Cal.App.4th 893, *Peters v. Superior Court (People)* (2000) 79 Cal.App.4th 84, *People v. Green* (2000) 79 Cal.App.4th 921, *People v. Leonard* (2000) 78 Cal.App.4th 776, *People v. Turner* (2000) 78 Cal.App.4th 1131, *Butler v. Superior Court (People)* (2000) 78 Cal.App.4th 1171, *Sporich v. Superior Court (People)* (2000) 77 Cal.App.4th 422, *People v. Superior Court (Perez)* (1999) 75 Cal.App.4th 394, *People v. Chambless* (1999) 74 Cal.App.4th 773, *People v. Poe* (1999) 74 Cal.App.4th 826, *In re Kirk* (1999) 74 Cal.App.4th 1066, *People v. Buffington* (1999) 74 Cal.App.4th 1149, *People v. Hedge* (1999) 72 Cal.App.4th 1466, *People v. Ward* (1999) 71 Cal.App.4th 368, *People v. Superior Court (Howard)* (1999) 70 Cal.App.4th 136, *People v. West* (1999) 70 Cal.App.4th 248, *People v. Mercer* (1999) 70 Cal.App.4th 463, *People v. Butler* (1998) 68 Cal.App.4th 421, *Garcetti v. Superior Court (Lyles)* (1998) 68 Cal.App.4th 1105, *Terhune v. Superior Court (Whitley)* (1998) 65 Cal.App.4th 864, *In re Parker* (1998) 60 Cal.App.4th 1453.

leave for others to decide." (28 RT 7580.)

Neither is it a justification of the inconsistent positions to argue that where there is a legitimate difference of opinion between experts on a psychiatric issue, that the State is free to intentionally switch between the positions as needed to bolster its case in individual cases. This is nothing more than the intentional manipulation of evidence condemned as evidence of bad faith by this court in *Sakarias.* There is certainly evidence of differing views concerning the nature of a paraphilia in judicial opinions. (See the concurring and dissenting opinion of Justice Breyer in *Kansas v. Hendricks* (1997) 521 U.S. 346, 375.) As Justice Breyer noted, that dispute may well allow a State to adopt *one* of the conflicting views - but not both as it suits them in individual cases. "But the very presence and vigor of this debate is important. The Constitution permits a State to follow one reasonable professional view, while rejecting another." (*Ibid.*) The mere presence of competing views does not justify the inconsistency. Because this State has followed one "professional view," it must "reject" the other.

G. The error was prejudicial and requires reversal

In *In re Sakarias, supra*, 35 Cal.4th 140,161, the court assessed prejudice by examining whether the inconsistent theory was 1) probably false as to the appellant, and 2) whether it was reasonably probable whether the false theory could have affected the verdict.

Where the inconsistent theory is probably false as to appellant, he is entitled to relief if prejudice can be shown under the *Chapman (Chapman v. California* (1967) 386 U.S. 18) standard of harmless beyond a reasonable doubt, which is equivalent to the "reasonable likelihood" standard which

applies to the knowing presentation of false evidence. *(In re Sakarias, supra*, 35 Cal.4th 140, 165.) Under this test if the probably false inconsistent theory was "potentially material to the penalty decision, it deprived [appellant] of a fair penalty trial and entitles him to relief." (*Ibid.*)

> "Because the prosecutor intentionally used an inconsistent and probably false theory to obtain a death sentence against Sakarias, we agree with the parties that Sakarias is entitled to relief if he can show a reasonable likelihood the prosecutor's use of the tainted factual theory affected the penalty verdict. (Accord, *United States v. Kattar*, *supra*, 840 F.2d at p. 128; Prosecutorial Inconsistency, *supra*, 89 Cal. L.Rev. at p. 1471.)" (*In re Sakarias, supra*, 35 Cal.4th 140, 165.)

1. No evidentiary showing of probable falsity is required, since the People are prevented from asserting the truth of the theories used here by judicial estoppel and legislative and judicial determinations.

Despite the standard used in the circumstances of that case, the *Sakarias* court explicitly left open the question of the proper standard of prejudice when it is difficult to determine which theory is false. "We need not decide here what result obtains when the likely truth of the prosecutor's inconsistent theories cannot be determined, for the case at bench is not one of ambiguous or inconclusive evidence." (*In re Sakarias* (2005) 35 Cal.4th 140, 164.)

In the unique circumstances of this case, the court should use the *Chapman* standard, without the requirement of an evidentiary showing of probable falsity for the reason that the People continue to pursue SVP commitments on a continuing basis, using the same theory which they ridiculed and negated at trial here. Literally hundreds of persons are now

confined under such commitments based upon the theory in whole or part that a paraphilia causes volitional impairment and as many are pending trial. The People must be deemed to have irrevocably adopted as true the views of its numerous experts whose testimony is summarized in scores of published cases. It is wholly inconsistent with the duty that "the government prosecute fairly in a search for truth" (*Smith v. Groose* (8th Cir. 2000) 205 F.3d 1045, 1053) to allow the People to seek death by negating and ridiculing the very theory that they have adopted in commitment cases. By the longstanding and continuing election to seek commitments under a theory that a paraphilia causes volitional impairment, the People are estopped from arguing here that Dr. Dietz' theories are not false. "Judicial estoppel applies when a party is successful in asserting a position in a judicial proceeding: the party will be estopped from taking a completely inconsistent position in a subsequent judicial proceeding." *(People v. Felix* (2008) 169 Cal.App.4th 607, 614; *Russell v. Rolfs* (9th Cir. 1990) 893 F.2d 1033, 1037-1039.)

Another reason not to require a showing of evidentiary falsity is that the theory that a paraphilia impairs volitional control as presented by the State in SVP trials has been judicially approved (*People v. Starr* (2003) 106 Cal.App.4th 1202, 1205-1206; *Kansas v. Hendricks* (1997) 521 U.S. 346, 360) and is implicit in the legislature's intent in the enacting the SVP laws. In such circumstances, absent in a case where the inconsistent theories relate to which defendant delivered the lethal blow, the legislative determination and judicial approval act as a substitute for proof of factual falsity.

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2. The People's theories are probably false

Even if probable falsity is required, it can be shown here based on the record and matters which the court must judicially notice - decisions and law under Evidence Code section 451(a).

Dr. Dietz' testimony to the effect that a person is not volitionally impaired if he is able to refrain from acting on a criminal urge when a police officer is present, and that the "policeman at the elbow" test is the usual standard in the psychiatric field to test for volitional impairment is clearly false. As a matter of law, the degree of impairment of volition caused by a mental disease, defect, or disorder to constitute a mitigating factor under section 190.3(h) is less than would be required to show insanity under the *Drew*/ALI standard. (See *People v. Haskett* (1990) 52 Cal.3d 210, 232-233 [noting that while the tests are similar, the language of factor (h) lacks the term " substantial," therefore is satisfied by a lower degree of impairment]; see also *People v. Babbitt* (1988) 45 Cal.3d 660 [noting that the factor (h) language only requires a showing of "impairment"].) Justice Kennard noted in her dissenting opinion in *People v. Jones* (1997) 15 Cal.4th 119:

> "An impairment is simply a diminution or lessening; thus, section 190.3, factor (h) directs the sentencer to consider in mitigation any lessening, due to mental disease or defect, of the defendant's capacity to appreciate the criminality of his acts or to conform his conduct to legal requirements. Obviously, evidence of mental illness falling short of legal insanity must be considered in mitigation if it had such an effect on the defendant's capacities, for factor (h) otherwise would be nugatory." (*Id.*, at p. 202.)

Dr. Dietz' testimony falsely put the weight of the psychiatric profession behind an incorrect test of volitional *impairment*. Dietz' test

may have some relevance if the question is whether a subject is acting unconsciously or as an automaton (*People v. Gorshen* (1959) 51 Cal.2d 716,723) but Dr. Berlin never posited such an extreme impairment, and it is not required to establish the statutory factor in mitigation. Dr. Berlin clearly stated that an afflicted person typically retains the ability to defer acting immediately on the urges, just as the People's experts testify in SVP cases. Dr. Dietz used his false test to further falsely suggest that Krebs showed no volitional impairment because "he conforms his conduct to the requirements of the law 364 days a year" and only rapes once a year. (38 RT 9848.) The People heavily relied on Dr. Dietz' false standard in argument. The prosecutor argued:

> "That's the defense. He has bad thoughts. He just can't help himself. Of course, Dr. Dietz refuted that and said that Rex Krebs makes his choices. But you know you don't need an MD to know that. You may not have needed to hear from the most respected forensic psychiatrist in the United States. Park Dietz, he knows that the defendant makes his choices. You should know that as well." (39 RT 10037.)

Dr. Dietz also asserted that Dr. Berlin's view - that urges associated with a paraphilic disorder such as sexual sadism impair a person's ability to control his behavior - is not an "accepted psychiatric or medical view," clearly implying that his contrary view *was the accepted and prevailing* opinion. This assertion was rejected in *People v. Starr, supra*, 106 Cal.App.4th 1202, 1206, "Notwithstanding any medical disagreement about pedophilia as a mental illness, it is at least a condition which grossly impairs behavior and falls within the broad statutory definition." If Dr. Dietz' assertion were true, then the People's experts in numerous SVP and related cases are espousing opinions not accepted in the psychiatric

profession. Similarly, Dr. Dietz' categorical statement that paraphilias are not the type of disorder that can impair volition is routinely refuted by People's experts in SVP and related cases. In *People v. Starr, supra,* 106 Cal.App.4th 1202, the court held that pedophilia, a type of paraphilia, is under the law a "severe" mental disorder. The court held "the definition of 'severe mental disorder' is broad and only requires that the disorder be either 'an illness or disease or condition' which 'grossly impairs behavior.' (§ 2962, subd. (a).)" (*Id.*, at 1206.) The position taken by the People here was flatly to the contrary, ridiculing the idea that Krebs was in any way impelled to rape despite the conceded paraphilia. "He just can't help himself. Of course, Dr. Dietz refuted that . . ." (39 RT 10037.)

That some psychological professionals may take the position that a paraphilia does not affect volitional control does not make their position true within the meaning of the law. Which view one holds is to a large degree dictated by the understanding and use of the terms involved. (See *People v. Burris, supra*, 102 Cal.App.4th 1096, 1103.) However, this was a criminal trial, not a philosophical or medical debate, and the People must be bound by the definitions that the law has imposed. Appellant asserts that the legislature and courts have made a determination regarding SVP law that a paraphilia, with evidence that the subject has in fact repeatedly failed to control his sexually violent impulses, is sufficient to constitute volitional impairment by reason of a diagnosable mental disorder within the meaning of the law. There is no reason to allow the meaning of the concept of volitional impairment to differ in the mitigation context versus the civil commitment context. Even if the prosecutor may disagree with the legislature's determination regarding the nature of volitional impairment and how it is shown, he may not oppose it in a court of law. "The law

permits a defendant to assert a psychiatric defense and to have expert witnesses testify in his behalf. The courtroom is not the proper forum to challenge the propriety of this system." (*People v. Babbitt* (1988) 45 Cal.3d 660, 700.) It is therefore appropriate to deem Dr. Dietz' testimony contradicting the implied legislative determination and express judicial determinations as "false" under the test for prejudice.

3. Prejudice is present, as the issue of volitional impairment was crucial to the mitigation case, and directly affected the verdict

This was a close case as to penalty. The jury received the case at 4:59 pm on Monday, May 7, 2001 (22 CT 6030), deliberated from 9:08 to 4:48 with breaks and no questions on May 8 (*Id.*, p.6034), and from 9:00 to 4:38 with one question on May 9, at which time the court convened the jury, and asked if they were close to a verdict and wanted to stay. The jury declined to stay. (*Id.*, p. 6037.) A juror was excused that evening and replaced by an alternate the next morning (39 RT 10204) and the jury was instructed to begin its deliberations anew. (39 RT 10205.) The jury continued its deliberations on May 10 from 8:38 to 1:23, at which time they submitted a request for read back of "the testimony by Dr. Berlin and Dr. Dietz regarding volitional control in regard to sexual sadism." (22 CT 6040-6041.) The reporter entered the jury room to read back the testimony at 2:30 and the left at the request of the jury at 3:30. She later reentered at 3:55 to continue reading the testimony, and she left, along with the jury, at 4:45. (*Id.*, at p. 6040). The next morning, May 11, the jury returned at 8:35 and the reporter continued read back of the doctor's testimony at 8:53, leaving for breaks during which the jury evidently continued to deliberate until read

back was concluded at 3:45. (23 CT 6236-6237.) At 5:24 Friday evening, the jury took its final recess, began deliberating again at 5:35, and at 6:50 advised they had reached a verdict. (*Id.*, at p. 6237.)

The lengthy deliberations (roughly 20 hours with normal breaks) prior to requesting read back reflects a close case. (Compare 10 hours over 3 days found significant in *In re Sakarias, supra*, 35 Cal.4th 140, 167.) The request for read back of testimony of the experts specifically on the issue of "volitional control in relation to sexual sadism" is a clear indicator that the subject was one that materially affected their verdict. The verdict was returned about three hours after the reading was concluded.

The thrust of the mitigation case presented was that Rex Krebs was an essentially good kid who was influenced and damaged *in ways he did not choose, and had little control over* by the extensive emotional and physical abuse he suffered and witnessed as a child. The defense produced ample evidence of positive traits, including apparent good adjustment in the structured settings of the Children's Home, but also confronted the decidedly negative facts of his multiple sexual assaults by attempting to produce as a mitigating factor testimony from a nationally recognized expert in sexual disorders that Krebs suffered from a mental disorder characterized by fantasies and urges he did not choose *and the disorder made it difficult, if not impossible to resist acting on the urges.*

The People's strategy cut the heart out of the credibility and mitigating value of this latter evidence by Dr. Dietz' insistence that the mental disorder left free will fully intact, and that the contrary view was not an accepted one. The People capitalized on this evidence by falsely inferring that Dr. Berlin's views had no adherents west of the Rockies, when in fact his views are shared by the many state evaluators testifying for

the People in published SVP and related cases. After summing up the defense case and Dr. Dietz' testimony - "He just can't help himself. Of course, Dr. Dietz refuted that ..." (RT 10037), - the People argued for three pages of transcript on the issue of "choice," repeating the word "choice" or "choices" 16 times from page 10037 through 10039. In the same space, the prosecutor also used the word "decision" or "decisions" 20 times. This argument was emphasized with four projected slides relating to appellant's "choices." (See Declaration of Larry Hobson, 24 CT 6381, and stipulation as to accuracy at 40 RT 10363.) With the emphasis both sides placed on the issue, it is little wonder that after reaching no decision after three full days of deliberations, the jury asked for read back of the experts' testimony regarding volition and sexual sadism. The inconsistent theories were clearly material and prejudicial. The judgement of death must be reversed.

V

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

The prosecution's theories were based on false or misleading evidence which the People failed to correct, constituting a separate violation of the Due Process Clause of the California and United States Constitutions.

> "[T]he prosecution has the duty to correct the testimony of its own witnesses that it knows, or should know, is false or misleading. This obligation applies to testimony whose false or misleading character would be evident in light of information known to the police involved in the criminal prosecution, and applies even if the false or misleading

testimony goes only to witness credibility. Due process also bars a prosecutor's knowing presentation of false or misleading argument. As we recently summarized, a prosecutor's knowing use of false evidence or argument to obtain a criminal conviction or sentence deprives the defendant of due process." (*People v. Morrison* (2004) 34 Cal.4th 698, 716-717, citations and internal quotations deleted.)

The obligation to correct misleading testimony is imposed by the Due Process Clause of the federal constitution, and is present even if the matter goes only to witness credibility. *(Napue v. Illinois* (1959) 360 U.S. 264, 269; cf. *Giglio v. United States* (1972) 405 U.S. 150, 153-154.) To constitute a violation of due process , the testimony need not be so clearly false as to constitute perjured testimony. It is sufficient if a false impression created by a prosecution witness is uncorrected and capitalized on in argument by the prosecutor. *(People v. Dickey* (2005) 35 Cal.4th 884, 909.) "We conclude the prosecutor did knowingly fail to correct a false impression-indeed, knowingly exploited the false impression in his argument to the jury . . . " (*Ibid.*)

This claim relies on the same evidence as discussed in the preceding argument, namely Dr. Dietz' testimony to the effect that : A) a paraphilia does not impair volition; B) Dr. Berlin's view that it does is unaccepted; C) the "policeman at elbow" test is the appropriate test for volitional impairment; plus the additional evidence discussed below. Appellant incorporates the arguments made in the preceding section (Argument IV) as to the false and misleading nature of Dr. Dietz' testimony and the prosecutor's false and misleading use of the testimony.

Additional false and misleading testimony by Dr. Dietz was his

testimony suggesting that sexual sadism was not a "mental disease" as used in the statutory factor in mitigation, thus Krebs *by definition* was not impaired by a "mental disease or defect." [15] When asked with specific reference to mitigating factors whether Krebs was "impaired in his capacity to appreciate his criminality or conform his behavior to the requirements of the law" (38 RT 9847), Dr. Dietz answered, in part, that none of Mr. Krebs' conditions constituted a mental disease or defect. "Nobody has thought that he is mentally retarded, so he doesn't have the condition of a mental disease or defect." (38 RT 9848.) He then referred to his earlier testimony on the subject. (*Ibid.*) This testimony falsely and misleadingly suggested that the term "mental disease or defect" was a medical term of art and that the disorder of sexual sadism did not qualify as such. Earlier, Dr. Dietz had described his views:

> "Well, first of all, I don't regard sexual sadism as mental disease. I make a distinction between mental disease on the one hand and mental disorder as a larger group of conditions on the other hand. There are many, many mental disorders, ranging from not serious to very serious, ranging from things that deprive a human being from control over his own perception of reality to things that leave the person entirely in control of their behavior and their perception of reality. Quite a range of different mental disorders. But only a few of all the things in that volume, the DSM, deserve to be called mental diseases, and those are the conditions that cause a human being to have a perception of reality that is fundamentally different from what any other person can ever experience, that is, I only call diseases those conditions that cause a person to have a profoundly entirely different view of reality than a normal human being." (38 RT 9839-9840.)

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This did not constitute a necessarily inconsistent position with SVP proceedings, since that particular phrase is not used in the statutes defining SVP commitments.

The combined effect of this testimony was to mislead the jury into thinking that in order to qualify under the statutory mitigating factor, the "mental disease" had to be of such a nature to "cause a person to have a profoundly entirely different view of reality than a normal human being." Dr. Dietz thus improperly limited the potential mental disorders capable of qualifying to "only a few of the things in that volume, the DSM." From the description given - causing a "profoundly entirely different view of reality"- a reasonable juror would have understood that only severe psychotic type disorders would qualify. This testimony falsely and misleadingly suggested that only severely psychotic or severely retarded persons could have the requisite "mental disease or defect" to establish volitional impairment under the statutory mitigating factor (h).

Appellant incorporates the argument and authorities given above in Argument IV, sections F (2) and G (2), including *People v. Weaver* (2001) 26 Cal.4th 876, 969; *People v. Fields* (1983) 35 Cal.3d 329, 369-370; and *People v. Williams* (2006) 40 Cal.4th 287, 325-326, as to why Dr. Dietz' characterization of the meaning of the term "mental disease or defect" is false and misleading.

Due to the constitutional violation, reversal is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . ." (*Napue v. Illinois* (1959) 360 U.S. 264, 271.) The closeness of the case and the prejudicial impact of the testimony from Dr. Dietz has also been discussed above in Argument IV, section G (3) and is incorporated herein. The judgment of death must therefore be reversed.

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VI

The court improperly excluded all evidence regarding SVP proceedings, thereby excluding relevant mitigating evidence of volitional impairment and institutional failure, in violation of the Eighth Amendment

A. The court made a blanket ruling excluding all examination about SVP proceedings applicable to all witnesses

In the penalty opening statement, the defense indicated an intention to produce evidence that the SVP program was in place when Krebs was released from prison in 1988. (29 RT 7782.) Afterwards, in a closed session, the court indicated skepticism that the evidence was admissible. (29 RT 7879.) The defense explained it was offered regarding institutional failure and the nature of the mental illness: "The SVP program clearly, clearly puts the prison system and the parole system on notice that people such as Mr. Krebs that have committed the acts that he has are potentially sexually violent predators. That it's a treatable mental illness -- treatable mental disorder and that certain care and treatment and conditions of parole should be administered." (29 RT 7880-7881.) The defense noted that the prison file showed that he had been screened, but one of his offenses was an attempt, and therefore did not qualify. (29 RT 7881.) The court continued to be skeptical of the admission of evidence and said it could be argued in open session. (29 RT 7882.)

Later, during the examination of Krebs' recent parole officer, Zaragoza, regarding Krebs' conditions, supervision, treatment, and performance on parole, the court sustained the prosecutor's objections to the questions: "At this time in 1997, were you familiar with a civil

commitment program designed for people who may have committed offenses such as Mr. Krebs'?," and "At the time that you began your -- began your contact with Mr. Krebs, are you aware if he'd been screened for any civil treatment programs?." (29 RT 8806.)

On a subsequent day, the prosecutor made a oral motion in limine to exclude any reference to the SVP program in Dr. Berlin's testimony. He noted that the doctor included several paragraphs in his report "talking about the emergence of legislation around the country, including California, basically talking about the SVP Program and how the defendant should have been a good candidate in the SVP Program." (35 RT 8967.) Noting that his review of transcripts of Dr. Berlin's testimony in other cases showed that Dr. Berlin brings the matter up in his testimony, the prosecutor objected that "any reference to the SVP Program would be totally inappropriate in this case." (*Ibid.*) The defense responded noting that the issue of volitional impairment was a key point: "Clearly the issue in this case, with special -- especially with Dr. Dietz and Dr. Berlin, is the issue of volitional impairment by his disorder. Dr. Berlin is well-versed in the issues of volitional impairment with sexual sadism. And the two issues that the prosecution has raised are usual [*sic*] to circumstantially buttress the fact that there is volitional impairment." (35 RT 8967-8968.) Asserting that Dr. Berlin would state there is a drug treatment for the volitional impairment of sexual sadism, he argued that evidence is "circumstantial evidence that this is a treatable disease, and that there is, in fact, volitional impairment." (35 RT 8969.)

Regarding the SVP program, the defense argued, "it's also circumstantial evidence that the government is on notice that people such as Mr. Krebs need treatment, and it goes to the institutional failure issue. And

it also, I think, is impeachment of what I believe is Dr. Dietz' position that there is no volitional impairment." (35 RT 8969.) The court remained skeptical. "I don't think anything having to do with SVP is relevant." (35 RT 8970.) A short while later, the court made a definitive ruling: " I will not allow any information on SVP at all. I have already said that. If you want to have a separate hearing, we will have one. I don't see how that has anything to do with this case." (35 RT 8974.) The court then accepted further argument, with the defense restating its position regarding the institutional failure issue, and arguing:

> "[T]his mental disorder that lead [*sic*] to this lack of volitional control was treatable, and these people need to be treated, and that's the essence of the SVP Program. And that notice, for whatever reason, has not flowed over into other areas. In other words, parole conditions or prison treatment. And that, to me, is the essence of the institutional failure." (35 RT 8975.)

The defense continued, arguing that the evidence of the existence of the SVP program was "crucial." (35 RT 8975.) After some further discussion, the court stated he wanted to review the cases relative to institutional failure. (35 RT 8978.)

During Dr. Berlin's examination, the defense asked, "Dr. Berlin, as a consequence of your work, are you aware of any legislation that supports your contention that sexual sadism is a disorder that causes danger unless treated?" The prosecutor objected on relevance grounds, and the court sustained the objection and struck the partial answer after excusing the jury. (35 RT 9037.)

The prosecutor argued the evidence should be excluded since the records show that Krebs was excluded from the SVP program because he

didn't meet the prior conviction criteria because one of his priors was a "220." (35 RT 9038.) The defense argued that the relevance of the specific question was to support Dr. Berlin's views. (35 RT 9039.) The defense continued:

> "What I think it gives the jury is a fair perspective on the validity of Dr. Berlin's views. That yes, in fact, not only does he believe that strongly, but these are views that have been adopted by our government in our specific state where we sit. And I think that is important for the jury to know. Because it's relevant to the basis for his opinions, and it supports his opinions. (*Ibid.*)

The court again expressed his scepticism of the defense theories. (35 RT 9042.) The defense clarified one aspect of their proffer:

> "I don't know if I will get into this on the cross-examination of the prosecution's witnesses, but the public policy of this state is reflected in that statute, and the public policy of this state is that there are certain mental disorders that effect a person sexually, that effect their volitional control. And I think that's the underpinnings of what this doctor is saying. Is wait a minute, the volitional control of these people is effected [*sic*]. As a matter of public policy the State of California agrees with him. If the jury is to know the truth, I think they should know that. That that position is reflected in our own statutes." (35 RT 9043.)

The defense also made an offer that Dr. True would testify that the CDC was on notice that Krebs needed treatment, and had issued a subpoena to the correctional counselor at CDC who had done the SVP screening of Krebs. (35 RT 9042-9043.) Dr. True was available to testify to the structure of the 290 and SVP programs. (35 RT 9046.) Just prior to the lunch break the defense sought permission for Dr. Berlin to refer to the program and explain it by asking him, "Is there support for his opinion somewhere?" (35

RT 9048.)

Upon return, the court explained his ruling excluding the evidence. He found that Krebs was not eligible for the program based on his prior convictions. [16] (35 RT 9052.) He found the evidence was not relevant under any mitigating factor, including factor (k). (35 RT 9053.) The court then specifically excluded evidence from the correctional counselor, and stated "I'm going to exclude and not allow any further questions of Dr. Berlin as to whether the State has accepted his view of the treatablity of sexual sadism," finding the probative value "very limited." (35 RT 9053.) The court explained its ruling, then concluded with these remarks:

> "The State passes statutes for lots of reasons, one of which is what they think is fair and constitutional, one of which is money, the economics of including more people. And, of course, the constitutionality has to do with how much they've narrowed the field in terms of who may be included in the statute. And one of the reasons that various SVP statutes were declared constitutional is because they're very narrow and because only a few people are affected and not the general population of those who might commit crimes." (35 RT 9056.)

The court added, addressing McLenahan, the defense attorney who was examining Dr. Berlin, "And, Mr. McLennan, I'm not going to let you ask your question." (*Ibid.*) The court clarified the order pertained to all witnesses, and indicated a conditional willingness to "revisit it if you can come up with a reason to do so." (35 RT 9057.)

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Under the statute then in effect, a conviction for assault to commit rape did not count as a qualifying conviction, thus the determination appears correct. Under subsequent amendments, however, Krebs' convictions would have qualified.

The defense abided by the ruling, and no further mention of the SVP program was made until, on cross-examination by the People, Dr. True made a brief reference to " high risk SVP" in reference to explaining Krebs' treatment level on parole. (37 RT 9484-9485.) On re-direct examination, the defense attempted to inquire regarding his use of the term "high risk SVP," but the court sustained the prosecutor's objection to the question. (37 RT 9513.) Following an attempt to re-frame the question, the court instructed the defense to "Move on to another subject, Mr. McLennan." (37 RT 9514.)

B. The court's ruling violated the Eighth Amendment because the evidence was relevant, material, and mitigating, requiring reversal

The Eighth Amendment guarantees that a defendant may produce relevant mitigating evidence. (*Eddings v. Oklahoma* (1982) 455 U.S. 104.)

The jury must be allowed to consider "as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S. 586.)

"'Relevant mitigating evidence' is evidence which tends logically to prove or disprove some fact or circumstance which a fact finder could reasonably deem to have mitigating value." (*Tennard v. Dretke* (2004) 542 U.S. 274, 284, citations omitted.) In *Tennard* the court noted that prior decisions have established that the meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding than in any other context, and thus the general evidentiary standard – "any tendency to make the existence of any fact that is of

consequence to the determination of the action more probable or less probable than it would be without the evidence" – is the appropriate constitutional standard. (*Ibid.*)

"Once this low threshold for relevance is met, the 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence" (*Id.*, at p. 286, citations omitted.)

Here, the defense offered mitigating evidence that the defendant was afflicted with an un-chosen, recognized mental disorder which caused him to have recurrent, intense cravings to violently humiliate and sexually assault women against their will. The evidence showed the crimes against both victims were motivated by the urge to enact the pathological fantasies which the appellant secretly held. The State did not contest this evidence, and its expert agreed with this aspect of the defense case. However, unless the jury understood that the disorder also typically impairs the ability of the person to refrain from acting on the urges, the evidence of the existence of the pathological fantasies and urges might be viewed by the jury as having little or no mitigating effect, and in fact might tend to view the motivating urges as aggravating .[17] Therefore any evidence suggesting that the disorder was generally accepted to (or did in fact) impair the ability of the person to refrain from acting on the urges was material and important -- a "fact that is of consequence to the determination of the action" (*Tennard v. Dretke, supra*, 542 U.S. 274, 284) -- to the defense mitigation case under both factor (h) and the catchall factor (k). Under both factors, the existence

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In *People v. Smith* (2005) 35 Cal.4th 334, and *People v. Davis* (2009) 46 Cal.4th 539, the prosecution introduced evidence in the guilt phase over the objection of the defense that the defendant's crimes appeared to be consistent with those of a paraphilic sadist.

of a volition impairing disorder was central to establishing that the moral culpability of the appellant was less than "extreme." (*Atkins v. Virginia* (2002) 536 U.S. 304, 312.)

The excluded evidence regarding the SVP program was therefore relevant and material because it logically tended to support Dr. Berlin's testimony and prove that a paraphilia, and more specifically sexual sadism, was generally accepted by state experts, jurists and prosecuting attorneys nationwide to be the type of disorder that is capable of impairing volitional control. The defense clearly offered the testimony on this basis. (RT 8967-8968, 9037, 9039, 9043, 9048.) The probative value of the testimony was high, especially because the court was aware that the State's expert, Dr. Dietz, would testify that the disorder does not affect volitional control.

The evidence relating to SVP proceedings was also relevant on the issue of institutional failure. This court has recognized that evidence which suggests that the failure of persons or institutions charged with the care and treatment of a defendant to provide support and treatment is relevant mitigating evidence. "The proffered evidence was relevant and admissible insofar as it suggested that defendant had sought and/or been denied treatment which might have controlled the same dangerous personality disorder that purportedly contributed to the instant crimes. The jury could reasonably view such fact as bearing on defendant's moral culpability." (*People v. Mickle* (1991) 54 Cal.3d 140, 193.)

The defense presented evidence that the appellant received no treatment in prison for his disorder, although he indicated a desire for treatment (36 RT 9282), and the treatment he received on parole was inadequate. (36 RT 9423-9424, 9477.) As explained in the defense argument to admit evidence of the SVP proceedings, the existence of the

SVP program placed the prison and parole authorities on notice that persons with a record similar to appellant's may be dangerous beyond their control because of a mental disorder, and that the disorder may be treatable. (29 RT 7880-7881, 8974.) Had the court not sustained the prosecutor's objection to questions attempting to elicit that the Parole Agent Zaragoza was aware of SVP program (34 RT 8806), the defense would have been able to contrast the State's ability to confine for treatment persons under the SVP program versus the lack of a comprehensive parole treatment program for those persons, like appellant, who have the same mental disorder that renders them unable to control their sexual offending.

For these reasons, the court's finding that the evidence was "not relevant" to any mitigating factor and that the probative value of the excluded evidence was "very limited" was constitutional error. (35 RT 9053.) Because the excluded mitigation evidence was crucial to credibly establishing volitional impairment, it was prejudicial and requires reversal as discussed above in Argument IV, section G(3).

VII

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

The Sixth Amendment right to confrontation includes the right to engage in traditional effective cross-examination. *(Davis v. Alaska* (1974) 415 U.S. 308.) In *Kentucky v. Stincer* (1987) 482 U.S. 730, 739, the Court characterized the holding in *Davis v. Alaska*, *supra*, as the "Confrontation Clause was violated because the defendant was denied the right 'to expose to the jury the facts from which jurors . . . could appropriately draw

inferences relating to the reliability of the witness.' [citing *Davis v. Alaska, supra,* at p. 318.]" (*Kentucky v. Stincer*, *supra*, 482 U.S. 730, 739.)

Here, after extended argument by the defense that Dr. Berlin's testimony concerning the SVP program was essential to support and corroborate his views that paraphilias impair volition, and with full notice that the State intended to present the testimony of Dr. Dietz taking the opposite view, the court nevertheless excluded questions to Dr. Berlin about the SVP program, and then clarified that his order applied to all witnesses: "It would have to do with any witness at this point." (RT 9056-9057.)

This ruling prevented the defense from confronting Dr. Dietz with the existence of numerous SVP commitments wherein State experts opine that a paraphilia impairs volition- either by itself , or in conjunction with a non-psychotic type personality disorder. Dr. Dietz was thus free to cast his view on volition as the widely held, accepted view, while indicating that Dr. Berlin's view was shared only by lay Christian counselors without fear of being confronted by the truth that Dr. Berlin's views are widely accepted and used by the State in numerous SVP commitment cases, in this state, and across the nation.

The situation is analogous to that described in *Davis v. Alaska, supra* 415 U.S. 308, 314):

> "The witness was, in effect, asserting, under protection of the trial court's ruling, a right to give a questionably truthful answer to a cross-examiner pursuing a relevant line of inquiry; it is doubtful whether the bold . . . answer would have been given by [the witness] absent a belief that he was shielded from traditional cross-examination." (*Ibid.)*

Had the defense not been precluded from mentioning SVP proceedings, it is unlikely that Dr. Dietz would have been so "bold" in his

characterization of Dr Berlin's views. Neither could the prosecutor have argued that no one west of the Rockies shared Dr. Berlin's views. The appellant was denied the opportunity for effective cross-examination because he was denied the right "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." (*Id.,* at p. 318.)

The error in excluding evidence of SVP proceedings was prejudicial under the *Chapman* standard . (*Chapman v. California* (1967) 386 U.S. 18.) As the defense argued, the evidence regarding the SVP program was "crucial" on the issues of volitional impairment and treatablity. (RT 8975.) Because the exclusion of the evidence violated the constitutional imperatives to admit mitigating evidence *(Tennard v. Dretke* (2004) 542 U.S. 274, 284), and the right to full cross-examination (*Davis v. Alaska* (1974) 415 U.S. 308), the error requires reversal unless it can be shown that the error was harmless beyond a reasonable doubt.

The exclusion of the SVP evidence prejudiced the appellant in several ways. The importance of the issue of volitional impairment in the State's rebuttal case and argument, and the jury's request for read back on the issue after 2 full days of deliberations has been discussed above in Argument IV, section G (3), and is incorporated herein. By excluding the evidence of the SVP program, the court removed a strong evidentiary basis for the defense to argue against the credibility of Dr. Dietz' assertions that Dr. Berlin's views regarding volitional impairment were not generally accepted.

The nature of the defense theory and the excluded evidence also demonstrates prejudice. The defense presented evidence that the appellant had pathologically deviant fantasies and urges to humiliate and rape

women. This type of evidence is a "two-edged sword" in the sense that it could be taken to prove only that the appellant is "evil" and "sadistic," rather than mitigating. To establish the mitigating aspect of the evidence, it is necessary to show both that the fantasies and urges were caused by a mental disorder that he did not choose to have, but more importantly, that his ability to choose to refrain from acting on the urges was also impaired by the un-chosen disorder. The court's ruling blunted the defenses's ability to show impaired volition due to an un-chosen mental disorder. This allowed the State to ridicule the defense theory of volitional impairment while embracing the defense evidence that longstanding sadistic rape fantasies and urges fueled the offenses. The error therefore cannot be said to be harmless beyond a reasonable doubt.

VIII

The death penalty is excessive under the Eighth Amendment for persons whose moral culpability is reduced by the existence of a mental disorder which reduces their volitional control to the degree that they are subject to lawful civil preventative detention

The Eighth Amendment forbids death as a punishment for crime when that punishment is "excessive." "The Eighth Amendment succinctly prohibits 'excessive' sanctions." (*Atkins v. Virginia* (2002) 536 U.S. 304, 311.) The imposition of the death penalty is limited by a proportionality requirement that "punishment for crime should be graduated and proportioned to the offense." (*Ibid.*, quoting *Weems v. United States* (1910) 217 U.S. 349, 367.) The proportionality requirement entails a consideration of personal responsibility and moral culpability. "[H]is

punishment must be tailored to his personal responsibility and moral guilt." (*Atkins, supra*, at p. 313, quoting *Edmund v. Florida* (1982) 458 U.S. 782, 801.)

Because of the unique nature of the death penalty, "capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose *extreme culpability* makes them the most deserving of execution." *(Kennedy v. Louisiana* (2008) 554 U.S. __, 128 S.Ct. 2641, 2650, internal quotes and cites omitted, emphasis added.) In considering whether a particular class of offenders has the "extreme culpability" that renders them eligible for the death penalty, the court looks to "evolving standards of decency that mark the progress of a maturing society." (*Atkins v. Virginia, supra,* 536 U.S. 304, 312.)

In *Atkins*, the Court concluded that the Eighth Amendment now precludes the execution of mentally retarded persons. The Court's reasoning relied heavily upon an assessment of the diminished moral responsibility of a mentally retarded offender. The Court held that such individuals "[b]ecause of their impairments, . . . have diminished capacities" and noted "their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." (*Id.,* at p. 318.) Among the "diminished capacities" of mentally retarded persons noted by the Court was the capacity "to control impulses." (*Ibid.*) The Court noted it was these "cognitive and behavioral impairments that make these defendants less morally culpable." (*Id.*, at p. 320.)

The Court has followed *Atkins* in *Roper v. Simmons* (2005) 543 U.S. 551[death penalty excessive for juveniles] and recently in *Kennedy v. Louisiana, supra*, 128 S.Ct. 2641 [death penalty excessive for child rape]. In each of the three cases, the Court examined the "evolving standards" as

manifested in the laws of the various states. "[T]he Court has been guided by objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions." (*Kennedy v. Louisiana, supra,* 128 S.Ct. 2641, 2650.)

The *Kennedy* court also noted that capital punishment which does not fulfill a social purpose is excessive:

> "Our decision is consistent with the justifications offered for the death penalty. *Gregg* instructs that capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes. See *id.*, at 173, 183, 187 (joint opinion of Stewart, Powell, and STEVENS, JJ.); see also *Coker*, 433 U. S., at 592 (plurality opinion) ('A punishment might fail the test on either ground')." (*Id.*, at p. 2661.)

There has been a recent trend by state legislatures to view sexually violent offenders' crimes as the product of a non-psychotic mental disorder which nevertheless impairs their volitional control. At least 21 states have enacted sexually violent predator laws. (*Id.,* at p. 2670, Alito, J., dissenting, fn. 4.) California's SVP laws, enacted in 1996, are part of a growing national trend of state lawmakers finding that the traditional deterrence of criminal sanctions is insufficient for a small group of persons who have a mental disorder the makes it difficult, if not impossible, to refrain from sexually violent offending. "[I]mplicit in the statutory language linking dangerousness to a 'mental . . . deficiency, disorder, or abnormality' is a certain legislative understanding that a person afflicted with such a condition may lack a degree of responsibility or control over his actions." (*In re Howard N.* (2005) 35 Cal. 4th 117, 132-133.)

"[A] sex offender who lacks a qualifying mental disorder cannot be committed no matter how high his or her risk of reoffense". *(People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 921, fn.1.) The United States Supreme Court has also recognized that persons are subject to involuntary civil commitment because of their volitional impairment, not because of their dangerousness: "Accordingly, States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety." *(Kansas v. Hendricks* (1997) 521 U.S. 346, 357.) "These added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." (*Id.*, at p. 358.)

If a person is so mentally disturbed to the degree that he has serious difficulty in controlling his behavior, and thus can be constitutionally deprived of his freedom by an indefinite civil commitment, then by definition, that person is not as "morally culpable" as an offender who is not so impaired, and he is not within the class of offenders whose "extreme culpability" renders him subject to the death penalty. Our Supreme Court decisions stress that a person who is volitionally impaired by a mental disorder is unlikely to be deterred by the consequences of behavior, and thus unamenable to one of the primary goals of criminal laws.

> "Those persons committed under the Act are, by definition, suffering from a 'mental abnormality' or a 'personality disorder' that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement. *(Kansas v. Hendricks* (1997) 521 U.S. 346, 362-363.)

The court in *Kennedy* held: "It is an established principle that

decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment." (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. 2641, 2658.) It is inconsistent with this moderation or restraint to allow the execution of persons who are shown to have a disorder which, considering its nature, effects and severity, the State itself characterizes as depriving the person of his capacity to follow the law, rendering him dangerous beyond his control.

That some juries may well seek to punish such an offender by death despite the presence of a mental illness impairing self-control does not establish a higher degree of culpability. Instead, allowing a jury to emotionally respond to the horrific details of a sexually violent case and return a death verdict in spite of clear evidence that the person is volitionally impaired as defined by the State to the degree that he can be incarcerated indefinitely is exactly the type of arbitrary result condemned by Eighth Amendment jurisprudence. "In this context, which involves a crime that in many cases will overwhelm a decent person's judgment, we have no confidence that the imposition of the death penalty would not be so arbitrary as to be 'freakish'". (*Kennedy v. Louisiana, supra*, 128 S.Ct. 2641, 2661, citing *Furman v. Georgia* (1972) 408 U.S. 238.)

A. The undisputed evidence establishes Krebs' affliction with a mental disorder seriously impairing his ability to control his behavior to the degree that he was likely to commit sexually violent acts

The evidence that Krebs suffered from an mental disorder that rendered him unable to control his sexually violent urges was strong and essentially uncontested. Krebs began having sexually violent fantasies near

puberty (38 RT 9824 [age 15]), consistent with the usual manifestation of the disorder (38 RT 9803). He had acted on the urges at an early age, entering a house with a knife and masturbating. (37 RT 9565) He committed an assault by choking a young female during an apparent attempt at rape at age 18. (21 CT 5727, 37 RT 9647-9660.) He was convicted of rape and attempted rape of two females, Shelley C. And Anishka C., in 1987 after spending only months out of custody as an adult. (23 RT 6087-6105, 29 RT 7792-7810.) When released from prison for these offenses in 1997, he was only out of custody for about two years before he committed the sexual offenses involved in this case.

Both the defense and People's experts agreed that he was afflicted with the paraphilia sexual sadism. Dr. True, the parole psychologist, thought that Krebs was a "high risk" sexually violent predator. (37 RT 9484.) Strong evidence that the disorder continued up until the time of trial was the tearful admission that Krebs had masturbated in his jail cell thinking of the victims in this case, as he awaited trial. (37 RT 9580.)

The People did not attempt to dispute that Krebs' pathological urges played a role in his sexually violent offending. Instead they merely offered Dr. Dietz' view that the defendant had a choice whether to give in to his urges, thus he did not suffer from volitional impairment. (38 RT 9848-9850.) This testimony misconstrues the meaning of volitional impairment relating to the commission of sexual offenses as explained in controlling case law. There was no evidence to suggest that Krebs was not volitionally impaired and thus subject to indefinite civil commitment, as those requirements have been construed by the courts.

Because the undisputed evidence establishes that Krebs suffered from a mental disorder that impaired his volitional control to the degree that

he was a substantial danger to others and subject to indefinite civil commitment, a sentence to death for acts related to his disorder violates the Eighth Amendment because the impairment of volitional control lessens his culpability.

IX.

The jury was prevented from considering the impairment of control due to mental disease or defect under section 190.3 (h) by the failure to give proper instruction in light of the State's expert testimony, requiring reversal

Section 190.3 requires jurors to consider listed factors, if relevant. Factor (h) is described, in relevant part, as follows: "Whether or not at the time of the offense the capacity of the defendant to . . . conform his conduct to the requirements of the law was impaired as a result of mental disease or defect or the effects of intoxication." Instruction regarding applicable statutory factors is mandatory under California law. "The statute impliedly requires instruction on any factor applicable on the record of the case. . ." *(People v. Marshall* (1996) 13 Cal.4th 799, 857.) Here, the court failed to adequately instruct on the issue.

The quoted portion of factor (h) became applicable when the defense presented the testimony of Dr. Berlin, who testified that appellant was in fact impaired in his capacity to conform his behavior to the requirements of the law by reason of the mental disorder of sexual sadism. (35 RT 9076.)

In their penalty rebuttal case, the People presented the testimony of Dr. Dietz, who testified, after agreeing that appellant had the recognized mental disorder of sexual sadism, that:

"Well, first of all, I don't regard sexual sadism as a mental

> disease. I make a distinction between mental disease on the one hand and mental disorder as a larger group of conditions on the other hand." (38 RT 9839.)
>
> . . .
>
> "I don't think that the conditions that anyone has described Mr. Krebs as having are a mental disease or defect. And I think I've already stated my basis for that, that these are not mental diseases that profoundly affect one's view of reality, and they certainly aren't mental defects which we usually use to refer to mental retardation. Nobody has thought that he is mentally retarded, so he doesn't have the condition of a mental disease or defect." (38 RT 9847.)

Thus the People presented evidence that none of the disorders diagnosed by any of the expert witnesses qualified as a "mental disease or defect." Given the testimony, according to Dr. Dietz, neither sexual sadism (Dr. Dietz at 38 RT 9787 and Dr. Berlin at 35 RT 9003), antisocial personality disorder (Dr. Dietz at 38 RT 9788), alcoholism (Dr. Berlin at 35 RT 9003), nor post traumatic stress disorder (Dr. True at 36 RT 9428) qualifies as a "mental disease or defect."

The testimony of Dr. Dietz raised the question of the legal definition of the term "mental disease or defect" as used in factor (h). The court, however failed to give any instruction defining the term "mental disease or defect"

The court instructed the jury with language tracking the statute:

> "You shall consider, take into account and be guided by the following factors, if applicable: . . . Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication." (39 RT 10150-10151.)

The court also rejected defense special instruction No. 2 which read:

> "The mental impairment referred to in these instructions is not limited to evidence which excuses the crime or reduces defendant's culpability, but includes any degree of mental defect, diseases or intoxication which the jury determines is of a nature that death should not be imposed." (23 CT 6113.)

In light of the ambiguity of the term "mental disease or defect" and the testimony, the court had a sua sponte duty to clarify the meaning of the term. "An instruction in the language of a statute is proper only if the jury would have no difficulty in understanding the statute without guidance from the court." (*People v. Howard* (1988) 44 Cal.3d 375, 408, citing *People v. Failla* (1966) 64 Cal.2d 560, 565.) The proper legal understanding of the term is set out in *In re Ramon M.* (1978) 22 Cal.3d 419, 427-428 :

> The ALI test refers to incapacity resulting from "mental disease or defect." (Italics added.) This phrase stems from the opinion of Judge Bazelon of the District of Columbia Circuit in *Durham v. United States*, *supra*, 214 F.2d 862. He defined those terms as follows: "We use 'disease' in the sense of a condition which is considered capable of either improving or deteriorating. We use 'defect' in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease." (214 F.2d, at p. 875.)

This court has approved giving an instruction further clarifying the term "mental disease or defect" in the sanity phase as follows: "The terms 'mental disease' or 'mental defect' does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." (*People v. Weaver* (2001) 26 Cal.4th 876, 968.) The appellant there argued that the clarifying instruction was incomplete, and should have included the

addition: "[i]f that illness manifests itself in some other way as well, then it can be considered as a 'mental disease' . . . and instances of criminal or antisocial conduct can be ascribed to that disease or cited as evidence of its severity." (*Ibid.*) The court disagreed, holding the instruction given "clearly implies that where evidence of more than mere criminal conduct is present, such evidence can be considered as proof of a mental disease or defect." (*Id.*, at p. 969.) The court noted that the jury "would have reasonably understood that the evidence received at trial which included hearing voices, "posttraumatic stress" and "other psychological problems" could, if credited, comprise insanity. (*Ibid.*)

The discussion in *Weaver* and *In re Ramon M.* leaves no doubt that the term "mental disease or defect" does not have the technical or limited usage stated by Dr. Dietz, but instead is intended to include mental conditions which are either temporary or permanent, and includes mental conditions such as "abnormality," "illness," or "other psychological problems." A recognized mental disorder such as sexual sadism clearly, as a matter of law, is a "mental disease or defect" under this authority. However, the testimony of Dr. Dietz stated that a mental disease referred only to conditions which "profoundly affect one's view of reality" - presumably meaning psychotic type disorders. (38 RT 9847.) He further restricted the scope of the term by maintaining that "defect" referred to mental retardation. This testimony presented by the People capitalized on the inherent ambiguity of the legal meaning of the term "mental disease or defect." The jury would have "difficulty in understanding the statute without guidance from the court" (*People v. Howard* (1988) 44 Cal.3d 375, 408), especially in light of the testimony. Therefore the court erred in failing to define or clarify the terms.

A reasonable juror, having in mind the instructions and Dr. Dietz' testimony and the prosecutor's argument describing him as "the most respected forensic psychiatrist in the United States" (39 RT 10037) would be reasonably likely to interpret the phrase "mental disease or defect" in a restrictive manner as suggested. The average juror would be expected to defer to a psychiatrist on the definition of "mental disease or defect" and in the absence of such testimony, might well employ an idiosyncratic or restrictive meaning inconsistent with the law unless otherwise instructed.

The failure of the defense to request a specific clarifying instruction on the issue does not waive the issue. The term "mental disease or defect" has a special meaning in the law (*In re Ramon M.*, *supra*, 22 Cal.3d 419) and it does not have a plain and unambiguous meaning. The court in *People v. Robertson* (1982) 33 Cal.3d 21 noted that "mild mental retardation, [is] a condition that would generally be viewed as a 'mental defect' rather than a 'mental disease.'" (*Id.*, at p. 59.)

The rules governing a trial court's obligation to give jury instructions without request by either party are well established.

> "'Even in the absence of a request, a trial court must instruct on general principles of law that are ... necessary to the jury's understanding of the case.' (*People v. Mayfield* (1997) 14 Cal.4th 668, 773; *People v. Prettyman* (1996) 14 Cal.4th 248, 264.) That obligation comes into play when a statutory term 'does not have a plain, unambiguous meaning,' has a 'particular and restricted meaning' (*People v. Mayfield*, *supra*, at p. 773), or has a technical meaning peculiar to the law or an area of law (see *People v. Howard* (1988) 44 Cal.3d 375, 408)." (*People v. Roberge* (2003) 29 Cal.4th 979, 988.)

The court in *People v. Clark* (1993) Cal.4th 950 assumed without deciding that "unconscious" has a sufficiently legal, technical meaning to

require a sua sponte instruction. "A trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part." (*Kelly v. South Carolina* (2002) 534 U.S. 246, 256.)

"If a jury instruction is ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction. (*Estelle v. McQuire* (1991) 502 U.S.62 at p. 72 & fn 4. . .)" (*People v. Smithey* (1999) 20 Cal.4th 936, 963.) To establish error based on the giving of an ambiguous and misleading instruction, "a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, ..." (*Boyde v. California* (1990) 494 U.S. 370, 380.) The impact of a challenged jury instruction must be evaluated within the context of the entire trial. (*United States v. Dixon* (9th Cir. 2000) 201 F.3d 1223, 1230.)

Appellant has previously discussed the importance of the evidence regarding factor (h) evidence, including the lengthy deliberations preceding a request for read back of the testimony of the experts on the issue, in section IV (G) (3). The appellant had a right under state law for the jury to consider the statutory mitigating factors under proper instructions. Because the state law error occurred in the penalty phase, the court must use the *Brown* standard (*People v. Brown* (1988) 46 Cal.3d 432, 447-448) which this court has held equivalent to the *Chapman* (*Chapman v. California* (1967) 386 U.S. 18, 24) standard requiring reversal unless the error is harmless beyond a reasonable doubt. (*People v. Hamilton* (2009) 45 Cal.4th 863, 918.) Because the jury likely was misled about the nature of a statutory mitigating factor which the defense was relying upon, the error cannot be deemed harmless, and the judgment of death must be reversed.

X

The court erred under California law and *Skipper v. North Carolina* in limiting mitigating evidence from persons with a substantial relationship with Krebs

The parties discussed on the record the extent and conditions under which friends and family could render opinions that Krebs should not be executed, and the impact that would have on their lives, but no ruling was made. (28 RT 7534-7539.) Later, after reading *People v. Ochoa* (1998) 19 Cal. 4th 353, the court stated that while family members could testify that Krebs should not be executed because of some positive trait, they could not express an opinion that he should not be executed because of a negative experience, such as a bad childhood. (28 RT 7563.) The court would allow evidence of loving relationships between Krebs and the family members. (*Ibid.*)

The defense then included the issue in motions in limine filed on April 13, 2001. (22 CT 5840-5842.) The court summarized his ruling as follows: "If you can lay a foundation that the person has some relationship which is significant and that they, therefore, have a knowledge of Mr. Krebs' character and background, they can testify to -- to why he shouldn't executed." (29 RT 7721.)

However, during the second defense witness, Tracy Sammons (Krebs' sister), the court overruled an objection to a question concerning what positive qualities of Krebs indicated he should not be executed, but then sustained an objection to the question, "Do you want your brother to die?" (30 RT 7973.) After the conclusion of the testimony, the court again discussed his ruling with the parties. The prosecutor argued the question could only be asked concerning a positive characteristic of the defendant

which the witness valued, and would be lost by execution. (30 RT 7977.) He further argued the last question whether the witness wanted her brother to die was "outrageous." (30 RT 9778.) The court said he saw the prosecutor's point and asked the defense to be "more specific" in asking the question. (*Ibid.*)

Subsequently, the court ruled that Scott Mosher, a counselor at the Children's Home who knew Krebs from working with him from 1981 to 1983 could not testify to a belief that Krebs should not be executed based upon the positive traits he saw in Krebs during that period. (32 RT 8416-8417.) Afterwards, in an effort to have the court reconsider his ruling, the defense cited *People v. Heishman* (1988) 45 Cal.3d 147, 194, concerning a similar question put to a defendant's former wife. The defense argued the evidence was "crucial" because the People would argue that Krebs is an animal, and always had been an animal, and evidence from persons who knew him at this period in his life was important. (32 RT 8426.) The defense made an offer of proof that they wished to call "three other people from this time period who are willing to come in and say they had a relationship with the defendant; that his character and humanity was evident to them and that they believe based on the traits of character and humanity that they saw in him at this young man age from 15 to 17 or 18, that he doesn't deserve the death penalty." (*Ibid.*) The names of the witnesses were Fred Diesel and Adonia Krug and her mother, Diana Scheyt. (32 RT 8427.) As to Mr. Diesel, the offer was that he would testify that he had a two year relationship with Krebs, saw him daily, and saw his character traits and his humanity which he believes do not warrant the death penalty. (32 RT 8427.) The court ruled the evidence was irrelevant. "What does it have to do with anything if he thinks, having last seen Mr. Krebs in

1983, that he doesn't think he should be executed?" (32 RT 8428.) The defense cited the Eighth Amendment, but the court did not change its ruling. (32 RT 8430.)

Prior to the conclusion of the testimony of one of the named witnesses, Adonia, Krug, the parties revisited the issue. The prosecutor stated "our position is that *Ochoa* modified *Mickle* and the cases *Mickle* relied upon." (32 RT 8516.) The defense subsequently argued, "if they're going to say I don't want him executed because it affects me, then *Ochoa* applies. If they say I don't want him executed because he's a human being and he has humanity and good character traits, then I think *Mickel* [*sic*] and *Heisman* [*sic*] are the guiding rules, and they say I can say do you think he should be executed." (33 RT 8548-8549). The court again stated his understanding of the rule stated in *Ochoa*, that the witness "can testify that defendant should not be executed because, as a result of that relationship, they think he has something to offer, some good qualities which, in effect, they could take advantage of, such as a family member." (33 RT 8549.) The court made clear his ruling that the opinion was relevant only if it affected an ongoing relationship: "only relevant if that person has a relationship with the defendant and, as a result of that relationship, they know that the defendant's good qualities would – would affect them because they would be able to take advantage of them." (*Ibid.*) The court found that the witness Adonia Krug did have the continuing relationship, and authorized the defense to ask the question. (33 RT 8553.)

Thus the court excluded the testimony of Scott Mosher, Fred Diesel, and Diana Scheyt (Krug) that they did not believe that Krebs should be executed based on a substantial relationship with Krebs when he was a teenager. The defense raised the issue in the motion for new trial, citing the

previously mentioned cases and *Skipper v. South Carolina* (1986) 576 U.S. 1. (24 CT 6317- 6320.)

The court's interpretation of *People v. Ochoa* was error. The trial court ruled that testimony that Krebs should not be executed was not relevant absent a continuing relationship where the witness could "take advantage" of "good qualities" of the defendant. (33 RT 8549.) This interpretation wrongly interprets the relevance of the evidence as going to the impact of the execution upon the friend or family member. In fact, this court has held that the correct rule is the opposite: "evidence that a family member or friend wants the defendant to live is admissible to the extent it relates to the defendant's character, but not if it merely relates to the impact of the execution on the witness." (*People v. Smith* (2005) 35 Cal.4th 334, 367.)

Each of the witnesses had a "significant relationship" under the test discussed in *Smith,* "Janice Foster's three-year tutorial relationship with defendant qualifies." (*People v. Smith , supra*, 35 Cal.4th 334, 367.) Both Scott Mosher (32 RT 8392)and Fred Diesel (32 RT 8483) saw Krebs almost every day through their roles at the Children's Home. Krebs was there for over two years, from 1981 to 1983. (32 RT 8417-8418.) Diana Scheyt not only got to know Krebs while he resided at the Children's Home, but also visited with him in jail and prison, and began to correspond with him after his arrest for the instant offenses. The court's ruling was therefore error under *People v. Smith , supra*, 35 Cal.4th 334, 367.) The ruling also violated the federal constitutional right under the Eight Amendment to present relevant mitigating evidence to the jury. (*Skipper v. South Carolina* (1986) 476 U.S. 1.)

Because mitigating evidence was erroneously excluded, the

Chapman standard applies, where reversal is required "unless the state proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*People v. Lucero* (1988) 44 Cal.3d 1006, 1032, quoting *Chapman v. California* (1967) 386 U.S. 18, 24; see *People v. Brown* (2003) 31 Cal.4th 518, 576.)

While the defense was able to elicit testimony regarding the exceptional and positive qualities that Krebs showed as he adjusted to the stable nurturing environment of the Children's Home, the error in excluding the testimony was nevertheless prejudicial, especially considering how the prosecutor treated the evidence from this period in argument. He characterized evidence concerning Krebs' achievement certificates earned there as "absolutely insulting to your intelligence." (39 RT 10042.) The prosecutor also savaged Dr. Haney, saying, "He doesn't want to explain behavior, he wants to evoke your sympathy. That's what he wants to do. That's what he got paid to do." (39 RT 10041.) He characterized the defense mitigation as the "abuse excuse." (39 RT 10040.) He called Krebs an "animal" in closing arguments in both phases. (39 RT 7284, 10053.) He argued "his personality is without morals" (39 RT 10044) and that Krebs has no conscience (39 RT 10056, 10057, 10057).

The foundation of the prosecutor's penalty case was reliance on Dr. Dietz' theory that Krebs simply acted badly because "as Dr. Dietz said, his personality was without morals." (39 RT 10044.) The excluded defense evidence was important to meet this theme of an unredeemable animal, without conscience or morals. The bare evidence of positive, human, moral actions that Krebs was capable of while in the Children's Home was certainly of some use in rebutting the DA theme. However, the jury's decision is essentially a moral one itself. By excluding the ultimate

affirmation of humanity - that Krebs should live - the jury was deprived of uniquely relevant information that bore directly upon the weight which the jury should give to the positive acts and adjustment during Krebs' adolescent years. It is one thing for a witness to describe that Krebs earned a certificate regarding a basketball team. It is far more compelling for the jury to hear a witness tell them about that achievement, and many others, and go on to state that even though the witness knows what Krebs has been convicted of, he is of the opinion that he should not be executed because the witness knows that Krebs did in fact have redeeming, positive, human, and moral qualities that were evident and so substantial that it becomes wrong, in the witness's view, to put the person to death.

This case was close as to penalty. It is certainly within reason that a juror struggling with the moral issue presented may have found a witness's testimony, based on Krebs' humanity shown in younger years, that Krebs deserved to live, persuasive, and a reason to reject the prosecution themes. The judgment of death should therefore be reversed.

XI

The court prejudicially erred in admitting evidence in penalty rebuttal concerning Krebs' statements to a former girlfriend that he had murdered a person in prison

The prosecutor offered the testimony of Liesl Turner, who was the girlfriend of Krebs for a short time in 1987, as rebuttal evidence in the penalty phase. The prosecutor gave an offer of proof that included that she would testify to being afraid of Krebs because he told her he had committed a crime in order to be sent to prison so that he could murder a man who had raped and killed a previous girlfriend, and was never caught for the murder.

(34 RT 8918.) The defense objected to her testimony as improper rebuttal. (34 RT 8921.) The court initially indicated that the proffered testimony would be allowed, except for the statement about killing somebody. (34 RT 8922.) After considering arguments on the further defense objection that the evidence was not relevant and should be excluded under Evidence Code section 352, the court made a ruling allowing some of the proffered testimony, while excluding "the statement about his going to prison to kill somebody." (34 RT 8926.) The defense requested an Evidence Code section 402 hearing regarding the remaining testimony, which the court denied. (34 RT 8927, 8929). The court reiterated that he would not allow questioning regarding the purported killing in prison:

> "I'm not going to allow the question on the killing of the rapist, or whatever that was, and I'm not going to allow the questions on the temper unless it's connected to her, and not these statements of denials on his '87 crimes. Those areas are excluded, but the other information that he gave, I think, is fair rebuttal." (34 RT 8929.)

The defense subsequently filed a motion on April 30, 2001 seeking to further limit the testimony. (22 CT 6001.) In the motion, the court's rulings were noted, and the motion referenced the specific portions of a report of the witness's statement upon which the prosecution's proffer was made, which were admissible and inadmissible under the court's rulings. At the hearing of this motion, the court discussed his understanding of the proffered evidence which included the following description of the evidence regarding killing of the rapist: "He went on to tell her Lisa had been raped and murdered, and he had committed grand theft auto so he could be put in prison so he could kill the guy that killed Lisa. Defendant told Turner he followed through with this plan and was never caught for

that murder." (37 RT 9453.) The prosecution argued the evidence was not character evidence, but was offered to rebut evidence from other family members that he had a girlfriend in 1987 and they were happy and had a nice relationship. (37 RT 9455- 9457.) The court stated he would make a ruling later in the day. (37 RT 9464.)

In its final ruling, the court changed his previous ruling and found that evidence that she was fearful and the relationship was not such a good one was proper to rebut the defense evidence of a good relationship and further that it was admissible as character evidence rebuttal. (37 RT 9728-9729.) The court found why she left him was admissible, and the statement about being arrested so he could kill the person who raped his girlfriend was part and parcel of why she was fearful. (37 RT 9730.) The court specifically cautioned that the witness would not be allowed to speculate that Krebs actually had murdered a man in Idaho. (*Ibid.*)

During Turner's testimony, she related that Krebs said that he had committed a crime so that he could get in jail so he could kill the person that had raped and murdered a girl whose picture he had in his house, and this made her afraid of him. (38 RT 9908.) She stated Krebs said he murdered the person. (38 RT 9909.) At bench, there was further discussion and objection to the testimony, and the court professed being surprised that she testified that Krebs said he actually killed the man. (38 RT 9911-9913, 9917.) However, the court allowed the evidence to remain, with a limiting instruction. (38 RT 9916.) The jury was advised that evidence was to be admitted for a limited purpose:

> "There's a statement which this witness will testify to, and I want to let you know now, you'll be instructed again on this later, that sometimes statements are admissible just to show why someone reacted to those statements. It's not admitted to

> show that what's in the statement is true. And, specifically, it has to do with this next statement that the witness is going to testify to. There's not going to be any evidence that what Mr. Krebs said is, in fact, true, in fact, occurred. The reason the statement is admissible is just to show why Ms. Turner reacted to it." (38 RT 9918.)

The witness then repeated the story in greater detail. (38 RT 9919-9920.) The jury was subsequently instructed through a standard instruction that certain evidence was admitted only for a limited purpose. (23 CT 6135, 39 RT 10144.)

The relevance of the testimony by Liesl Turner as offered by the prosecution was to rebut the "impression" of a "nice relationship" with the witness created by the defense. (37 RT 9457.) The prosecution specifically disclaimed admission of the testimony as character evidence. (37 RT 9458.) The court admitted her testimony on the proffered basis, and also stated it was admissible as character evidence rebuttal. (37 RT 9728.) The court explained, "because the defendant offered directly -- I shouldn't say direct, but directly evidence that the relationship with Liesl was one which was consensual and a good relationship, and the prosecutor proposes to prove that, in fact, it was not such a relationship and, in fact, she was fearful of the defendant, it, therefore, is proper rebuttal." (*Ibid.*)

The court's ruling that the evidence was proper rebuttal to defense evidence that the relationship was "consensual and a good relationship" was in error. The defense did not present any evidence of why the relationship ended, who broke it off, or the nature of their intimate relations which the testimony might have been relevant to rebut. The only two defense witnesses who mentioned the relationship were Calvin Howell , Krebs' stepbrother, and John Hollister, his step father. Both witnesses lived with

Krebs in Oceano in 1987. Mr. Howell knew that Krebs had a girlfriend at the time, thought that she was nice, but he did not spend time with them socially. (33 RT 8645.) When asked "How would you describe their relationship," he answered "It was good, as far as I know." (*Ibid.*) He was not asked any other questions on direct regarding the nature of the relationship, and no questions about it were asked on cross-examination. Mr. Hollister also remembered Ms. Turner as a nice girl, and stated there were a "few times" when he and his wife were together with them. (33 RT 8630.) He was asked, "How would you describe Rex' relationship with Liesl, what you were able to observe of it?" (*Ibid.*) He answered: "A good relationship. It was very -- I guess, for a good word, infatuated with her, wanted to impress her." (33 RT 8631.) He then describe an effort by Krebs to impress her with a candlelight dinner when they first started dating. (*Ibid.*) She stayed overnight a few times, and while the relationship was going on, he saw them together about 3 to 4 times a week. (*Ibid.*)

The only characterization of the relationship by either witness was clearly only one based on appearances during the time the relationship lasted. Ms. Turner's testimony did not rebut this testimony by tending to suggest that the relationship was not "good" as long as it lasted. She did not state that the relationship was tumultuous, acrimonious, argumentative, abusive, assaultive, or any other condition inconsistent with the testimony of how their relationship appeared. Ms. Turner testified she met Krebs while working at Wendy's in her senior year of high school and eventually moved in with him. (38 RT 9905.) She described the nature of the relationship at first. "He was really nice, very romantic, you know, wrote love letters and poems, more poems than love letters. But it was, you know, nice." (38 RT 9907.) She confirmed the testimony regarding the

candlelight dinner and stated they were engaged for a time, living together for two months or less. (*Ibid.*)

After this testimony consistent with the defense evidence, the prosecutor moved to a subject that was not touched upon in the defense testimony – Turner's alleged secret "fear" of the defendant based upon the story (which made no sense to her (38 RT 9925)) that Krebs had committed a crime in order to be put in prison so that he could avenge the rape and murder of a former girlfriend by killing the offender, and in fact had killed him. (38 RT 9908-9909.) The "fear" did not encroach on other aspects of the relationship. Asked if she was afraid when she refused to engage in sex as he desired, she answered, "No, not really. I mean, I wasn't afraid that it made him mad. He never seemed to get mad." (38 RT 9921.) She saw a couple of "outbursts" at work and saw him get upset with his mother, but she never testified to any anger or temper directed at her. (*Ibid.*) There was no indication that this story caused arguments or discord between them. To the contrary, she gave this explanation about why she broke up with him: "I had been wanting to for a while, but I was afraid to. I wanted to get out of the relationship just 'cause I didn't feel safe. But I used -- he -- and I ended up finding that he had a letter from somebody that he had met at a bar, and I used that -- obviously showing that they were having an affair, and I used that to end the relationship." (*Ibid.*) Thus, the actual precipitating event leading her to leave the relationship was her suspicion he was having an affair. Cross-examination disclosed that she moved out shortly after her stepmother made an overture to her that she could return to live in her father's house. (38 RT 9926-9927.) Even after moving out, she maintained contact with him, he gave her rides to work and school, and she attended the senior prom with him. (38 RT 9927.) All this testimony is completely

consistent with the defense testimony that Krebs had, for a period of time, a nice girlfriend whom he was eager to impress.

Turner's testimony was perhaps relevant to why the relationship did not last, but that issue was not relevant to rebut the brief facts, undisputed in her testimony, about the relationship mentioned in the defense case: they did have a "nice" relationship at first; Krebs was eager to impress her; and to all appearances the relationship was good. The fact that she decided to change her plan of getting married after living with the defendant for a while was simply irrelevant.

Testimony by someone who has a substantial relationship with the defendant that she "fears" the defendant is not relevant in the penalty phase. "A sister's 'fear' of her brother is neither a proper aggravating factor, nor proper rebuttal to her mitigating 'background' evidence." (*People v. Medina* (1995) 11 Cal.4th 694, 769.)

"[T]he scope of rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 792, fn. 24.) "The scope of proper rebuttal is determined by the breadth and generality of the direct evidence." (*People v. Coker* (2008) 44 Cal.4th 691, 709.) The brief, narrow reference to the fact that the defendant had a nice girlfriend that he was anxious to impress did not justify the introduction of her subjective feelings about the defendant, and why she ultimately chose to terminate the relationship as a guise to introduce damaging statements about still another killing.

The lack of probative value of the testimony in rebuttal was highlighted by the court's instruction that the evidence was received for a limited purpose: "There's not going to be any evidence that what Mr. Krebs

said is, in fact, true, in fact, occurred. The reason the statement is admissible is just to show why Ms. Turner reacted to it." (RT 9918.) This limiting instruction precluded the jury from legally using the evidence except to show Turner's state of mind. But *her state of mind* was not in issue. The evidence simply went to her subjective "fear" of the defendant, which was improper rebuttal.

Even if the evidence was marginally relevant, it should have been excluded under Evidence Code section 352. The "prejudice" referred to in Evidence Code section 352 is "evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*People v. Crittenden* (1994) 9 Cal.4th 83, 134.) The actual probative value of the evidence was very minimal. The evidence, if the jury followed the limiting instruction, did not allow them to conclude that Krebs intentionally got sent to prison and killed a man there. Yet the potential for prejudice was high. The admonition by the court did not say that Krebs' statement that he had killed a man in prison was *not* true. They were simply told they would have no evidence that it *was* true. This left the jury with another admission by Krebs regarding a violent assault about which they were told was relevant to "show why Ms. Turner reacted to it." The thrust of the evidence was that Turner was properly in "fear" of Krebs because he admitted he was a ruthless, vengeful, and violent person capable of a plotted and premeditated murder. It is virtually impossible for a reasonable juror to assimilate this evidence without engaging in the forbidden use of the evidence - that he did in fact plot and engage in murder. A strong emotional bias against the defendant was inevitable even if a juror concluded that the story was nothing more than an attempt to place the fact of his prior prison term in a better light.

Even so, the unlikely and gruesome nature of the story would leave any juror thinking that a guy who would tell such a story to impress his girl was a "creep."

"State law error occurring during the penalty phase will be considered prejudicial when there is a reasonable possibility such an error affected a verdict. Our state reasonable possibility standard is the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24 ." (*People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn.11, citations omitted.)

The testimony was especially prejudicial given that the testimony immediately followed Dr. Dietz testimony where he asserted that Krebs had lied when he denied the accusation that he had shot a man in Santa Barbara. It defies human nature to think that the jury would not be affected improperly and adversely by evidence of two admissions of violent assaults. There is a reasonable possibility that the evidence affected the jury's moral weighing of the defendant's record and character and therefore the judgment of death should be reversed.

XII

The court prejudicially erred by admitting in rebuttal a posed picture of Krebs, shirtless and flexing, Exhibit 171

In their penalty case, the People offered exhibit 171, a picture of Krebs with his shirt off, taken in his living room. He is smiling, posed in a "flexing" position with his arms out to his side and bent upwards. The proffer of relevance varied. At first the People represented it was taken in 1998. (28 RT 7521.) It was later represented as taken in February 1999 and was offered as "relevant in contrast to the way the defendant has displayed

himself in court before this jury. We think it's relevant that the jury should see how he looked when he assaulted and killed these two girls." (29 RT 7622, 7645.) An additional theory was offered: "I'm allowed to put on facts and circumstances of the crime that either weren't put on during the guilt phase or may be put on for other reasons." (29 RT 7645-7646.) The prosecutor also offered his assessment that the picture showed Krebs as "menacing, cut, buffed out without his shirt on, when he killed these two girls, as opposed to the way he looks now, sitting around in a coat and tie in court, growing all his hair back so he doesn't look so menacing." (29 RT 7646.) The court denied admissibility in the prosecution penalty case in chief, but left the door open to admission of the exhibit in rebuttal. (29 RT 7647.)

In their rebuttal case, the People again offered the picture, now focusing upon the theory it was rebuttal to the defense showing of remorse. (37 RT 9686.) The court found that a reasonable inference from the picture is that any remorse started only when he was arrested. (38 RT 9821.) The defense noted that the picture was not inconsistent with their evidence, since the evidence of remorse through letters written by the defendant only dealt with the period after his arrest. (38 RT 9822.) The court agreed that the defense evidence of remorse was from after the arrest. (38 RT 9823.) However, the court found that the picture was admissible:

> "This evidence is evidence that he certainly -- at the time he was walking past those posters. And while he was knowledgeable, presumably, that everybody was looking for Rachel Newhouse, he's taking a picture in that fashion showing, to me, a -- I mean, a reasonable inference would be that he is showing power there, showing, I guess, disregard for other people, is the only way I can put it. That's what I think it could mean. The jury could see it that way. I don't

find it overly prejudicial in the sense that I don't think that's an unfair inference to draw." (38 RT 9824)

The defense subsequently raised an objection to the evidence under the Eighth Amendment, citing *People v. Crittendon* (1994) 9 Cal.4th 83, as well as relevance and Evidence Code section 352. (39 RT 9953.) The court did not change his ruling. (*Ibid.*)

The prosecution laid the foundation for the photograph through the testimony of investigator Hobson, their last witness. Krebs' father had given him 24 pictures in May of 1999. (39 RT 10021.) Hobson showed them to Krebs on May 6, 1999. (39 RT 10022.) Krebs said the photographs were taken by his father during a visit in the early part of February, 1999. (39 RT 10022.) Hobson kept one photograph, and gave the rest to Krebs' attorney. (39 RT 10023.) He had the picture blown-up for the court and he recognized the area shown in the picture as the living room, near the couch and the coffee table. (39 RT 10024.) The blown up picture was admitted over the previously made objections. (39 RT 10025.)

The picture was heavily used in argument. It was projected for display during argument on a large screen, about 8 feet by 10 feet. (39 RT 10086.) The picture was so displayed for 17 minutes, 25 seconds out of the 61 minutes 30 seconds of argument, or over one-quarter of the time according to a declaration which was stipulated to be accurate. (40 RT 10363, 24 CT 6381.) The average time for other slides was less than one minute. (24 CT 6381.) The prosecutor explicitly referred to the photograph at least twice during his argument.

"And he was so sorry. He was so remorseful for what he did to Rachel Newhouse. This is his look of remorse in February of 1999. Look how sad he looks there. February 1999, dad's

out visiting, having a good time, take a few photos, hit a few bars. He is so remorseful about what he did to Rachel, while Rachel Newhouse's body was rotting in the ground near his house, while everybody -- while every day he drove by the hole that he dumped her in when he went to work, while every day he saw the missing girl posters at work posted on the doors, while Rachel's friends and Rachel's family still look for her and still held onto hope, this is the remorse that he felt as he stands there with this macho bravado, posing over the coffee table where in a few weeks he's going to rape Aundria Crawford. Same table. Standing there, feet from the bedroom door that she tried to run out of where he strangled the life out of Aundria with a piece of rope. That's the remorse he felt. He has no heart." (39 RT 10050-10051.)

In addition, the prosecutor argued "his personality is without morals" (39 RT 10044) and that Krebs has no conscience (39 RT 10056, 10057, 10057).

The defense raised the issue of the admission and use of exhibit 171 again in the motion for new trial. (24 CT 6322-6328.) Addressing the use of the photograph, the court noted, "they did use the photo effectively in argument. What I said -- after Mr. Maguire said that half -- it was used half the time, it probably seemed like it was used half the time. It was effective. It was effective argument." (24 RT 10361.)

A. The picture was not competent evidence to rebut mitigating defense evidence that the defendant confessed because he had a conscience and felt remorse for his crimes

"Relevant evidence, defined in Evidence Code section 210 as evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action, tends logically, naturally, and by reasonable inference to establish material facts

such as identity, intent, or motive. The trial court has broad discretion in determining the relevance of evidence but lacks discretion to admit irrelevant evidence." (*People v. Crittendon* (1994) 9 Cal.4th 83, 134, quotations and citations omitted.)

A photograph is not relevant absent a foundation that it accurately depicts what it purports to represent. "No photograph or film has any value in the absence of a proper foundation. It is necessary to know when it was taken and that it is accurate and truly represents what it purports to show. It becomes probative only upon the assumption that it is relevant and accurate." *(People v. Bowley* (1963) 59 Cal.2d 855, 862.) Here, the problem is that there was no foundational evidence whatsoever that the photograph "truly represents" (*ibid.*) what the prosecutor purported it showed - that Krebs lacked a conscience. It was improper rebuttal because it did not tend to rebut or detract from the defense evidence that Krebs did have a conscience, as testified to by Dr. Berlin, and as shown by his decision to give a full confession and point out the bodies, and his letters to his family.

"Remorse" is a complex, changing state of mind, and is not something that can be proved to be present or absent merely by a picture of a person's body. Neither is having a "conscience." A court would correctly find that a photograph of a defendant in his home which showed him crying was not relevant to show remorse for a particular crime absent some testimony of the circumstances sufficient to support an inference that the crying was directly related to the crime. A picture of the defendant smiling is no more relevant to show lack of remorse concerning a crime absent some foundational testimony that links the smile to thoughts of the crime. This court has also recognized that demeanor evidence, being

changeable according to the thoughts, emotions and circumstances is only of value as some circumstantial evidence of the defendant's state of mind or remorse *at that time.* "Defendant's demeanor (see Evid. Code, § 780, subd. (a)), if evidence at all, only showed that he currently regretted his conduct." *(People v. Jones* (1998) 17 Cal.4th 279, 307.)

The defense argued logically that Krebs confessed and showed remorse through his confessions, letters to his family, and his statement to the reporter and that this evidence was of mitigating value. (39 RT 10141.) No photograph taken months after the crime and months before the arrest could prove whether this argument was true or untrue. The picture did not tend to support the prosecution argument that Krebs confessed only because he knew he was caught. (39 RT 10054-10057.) (Of course remorse and the instinct for self preservation are not inconsistent, hence it is perfectly reasonable that a remorseful person would fail to confess. The argument also fails to address the question of whether he was remorseful *when* he confessed.) Nothing about the picture allows us to infer whether Krebs would confess immediately when questioned about the crimes, or whether his objective displays of remorse and acts of contrition in evidence were manufactured. As the defense argued, the act of posing and smiling for the camera are common human acts in our culture, and are not evidence of lack of remorse regarding a particular crime absent evidence, at a minimum, that the crime was being discussed or was in the subject's mind when the picture was taken. There was simply no foundational evidence that the smile and the pose had any connection to the crime.

The court found that the picture showed Krebs as "showing power there, showing, I guess, disregard for other people." (RT 9824.) If the posed picture was relevant evidence on this basis to rebut evidence that

Krebs had a conscience and acted in a remorseful fashion when confessing to the charged crimes and pointing out the bodies, then by this standard, any photograph - *or any other evidence*- depicting the defendant engaged in base, antisocial, self gratifying acts would also be admissible to rebut the specific evidence of contrition introduced by the defense.[18] It was actually the prosecution in the guilt phase who introduced the evidence that Krebs confessed and pointed out the bodies after first denying the charges. This rationale runs afoul of the rule that penalty phase rebuttal evidence "must relate directly to a particular incident or character trait defendant offers in his own behalf." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 792, fn. 24.)

Showing "power" or "disregard for other people" does not directly relate to the presence or absence of remorse. It is certainly not inconsistent that a person could evidence a disregard for others by his actions , yet also feel remorseful. Indeed, remorse would be an unknown feeling to someone who never did wrong. Furthermore the court is simply wrong that the photograph is competent evidence of an actual "disregard for other people." It would be the rankest speculation to infer that by flexing and smiling for a camera, the subject is showing a "disregard for other people." Certainly our current governor would not agree. The picture should have been refused admission as irrelevant to any character trait offered by the defense.

B. The court failed to weigh the probative value of the exhibit against its prejudicial impact

Even if the picture is found to have some marginal relevance, it

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It was actually the prosecution in the guilt phase who introduced the evidence that Krebs confessed and pointed out the bodies after first denying the charges.

should have been excluded under a proper application of Evidence Code section 352. "When an objection to evidence is raised under Evidence Code section 352, the trial court is required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption. Unless these dangers 'substantially outweigh' probative value, the objection must be overruled. On appeal, the ruling is reviewed for abuse of discretion." (*People v. Cudjo* (1993) 6 Cal.4th 585, 609, citations omitted.) Under the rule of *People v. Green* (1980) 27 Cal.3d 1, 25, "the record must affirmatively show that the trial judge did affirmatively weigh prejudice against probative value." (*Ibid.*, see also *People v. Carter* (2005) 36 Cal.4th 1114, 1170.)

Here, the record does not show that the court weighed the probative value of the evidence against the prejudicial effect, but instead stated for the record an improper understanding of the application of Section 352 .

> "So, in any event, on the 352 issue, as I said earlier today, I think 352 is different in the penalty phase than it is in the guilt phase. And I think the penalty phase, you go to the cases which deal with the victim impact evidence. And obviously some issues presented -- or, some evidence presented in the penalty phase are emotional or are prejudicial and, in some cases, overly so. Ultimately the court's direction has been that you need to discern whether it would divert the jury's attention from their duty in the penalty trial and whether it would do so in a way that is unfair. The real test for rebuttal evidence simply is it proper rebuttal. And the only -- my judgment is the only way to -- for 352 to exclude it at that point would be if it would unfairly -- be unfair in the sense that it would divert the jury's attention from their ultimate duty." (37 RT 9820-9821.)

The trial court's reference to "the cases which deal with the victim impact evidence" indicates inappropriate reliance on such cases such as

People v. Davenport (1995) 11 Cal.4th 1171, where this court stated that trial courts "lacked discretion to exclude evidence expressly made admissible under factor (a)" (*Id.*, at p. 1206), although it retained "its inherent discretion to exclude evidence admissible under factor (a) based on the form of the evidence, i.e., that a particular photograph or piece of clothing was inaccurate or cumulative." (*Ibid.*) However, the picture of the defendant taken months after the first murder was not a "circumstance of the offense" under factor (a) of section 190.3. Thus the court erred by failing to weigh prejudice against probative value as required due to an erroneous interpretation of case law. The court expressly recognized that the evidence was only admissible as purported rebuttal, and stated, "The real test for rebuttal evidence simply is it proper rebuttal." (38 RT 9821.) This statement reflects that the court did not undertake the required balancing of the *degree* of relevance against the potential for prejudice.

For the reasons stated above, the evidence had extremely limited probative value if it had any relevance at all. Being capable of participation in normal social conventions is hardly relevant to whether one has any conscience or remorse concerning a crime committed months before. But even if such is deemed relevant, the evidence was also cumulative on the issue, as the jury already had an abundance of evidence that the defendant was capable of acting normally in various social situations. The jury had already heard from his landlord's daughter, Debra Wright, that Krebs and his girlfriend Ros had visited a "couple of days" after March 12, when Crawford disappeared, and that Krebs at the time seemed "happy," in a "good mood," and "joking around." (24 RT 6522.) The jury also had evidence that Krebs maintained appearances at work and did not give any hint to his girlfriend prior to his confession that he had

committed the crimes. The jury also had evidence that Krebs had initially failed to confess, and had made false statements and alibis to both his parole agent and investigator Hobson. All this evidence was far more probative on the issue of whether Krebs was able to disguise his involvement in the crimes by acting as if nothing had happened because it covered a significant period of time and a variety of situations, and did not depend on speculation. The photograph, being evidence only of a split second in time, and taken under unknown circumstances, was therefore cumulative to show that Krebs was capable of acting as if nothing had happened during the period between the crimes. However, the prejudicial and emotional impact of the evidence was great, as discussed in the next section, and the court therefore abused his discretion by failing to exclude the picture.

C. The picture was unduly prejudicial under California law and its admission deprived Krebs of a reliable determination of penalty in violation of the Eighth Amendment

The Eighth Amendment of the United States Constitution requires a moral response rather than an emotional response to the evidence concerning imposition of the death penalty. (*Saffle v. Parks* (1990) 494 U.S. 484, 492-493.) Furthermore, the Constitution requires special reliability in death penalty determinations. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584 ["fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment . . ."].)

The admission of the picture violated the constitutional requirements

by allowing the State to argue for death by an emotional appeal based upon the physical appearance of the defendant in circumstances that had little or nothing to do with the crimes or his moral culpability.

How could a single picture be prejudicial? A starting point is to consider why the prosecution fought to have it admitted over strenuous and dogged defense objections. The prosecutor initially offered the picture in their penalty case in chief, stating it was "relevant in contrast to the way the defendant has displayed himself in court before this jury." (29 RT 7622.) The prosecutor offered his assessment that the picture depicts Krebs as: "menacing, cut, buffed out without his shirt on, when he killed these two girls, as opposed to the way he looks now, sitting around in a coat and tie in court, growing all his hair back so he doesn't look so menacing." (29 RT 7647.) This is at the core of what the prosecutor wanted - to persuade the jury by means of an image that Krebs was powerful and menacing, in a word, dangerous.

When this theory was rebuffed, the prosecution had to come up with another proffer, and said it was necessary to rebut defense evidence of remorse when confronted with the evidence of his crimes. It has already been shown that, as the defense argued at the time, the logical relevance of the picture on this issue was slim to none. But the prosecution wanted the jury to be left with the image of a powerful, menacing, dangerous man and to emotionally translate that image into evidence that Krebs also was remorseless and conscienceless (39 RT 10047, 10057) and, as the prosecutor stated to the jury, an "animal" (39 RT 7284, 7760, 10053) and "evil personified" (22 RT 6033).

The prosecution well knew the power of an image to arouse emotion and persuade. They were not content to argue for death based upon his

record and his offenses. They wanted an image that would bolster their theme of a dangerous animalistic monster. The images previously admitted did not suit their purposes. They had videos of Krebs during his taped confessions, but these images clearly showed a penitent, anguished, and remorseful person. The prosecution could not risk that the jury would have those images in their mind when considering the central theme of the Dr. Dietz/prosecution view of Krebs: "in his core, deep, deep down, as Dr. Dietz said, his personality is without morals." (39 RT 10044.) So Exhibit 171 was used to inflame and distract the jury from the meaningful evidence of remorse and conscience.

The prosecution realized that the image was their most potent weapon. They were allowed, over objection, to blow up pictures in evidence to about 10 feet square by projection during final argument. (RT7120-7121.) They displayed the Exhibit 171 over *twenty-three times* longer than the average length that other slides were displayed. [19] (24 CT 6381.) With the image displayed, and citing it as evidence, the prosecutor twice ridiculed the defense evidence indicating that Krebs was troubled by his crimes. "This is his look of remorse in February of 1999. Look how sad he looks there." (39 RT 10050.) "This is the remorse that he felt as he stands there with this macho bravado, posing over the coffee table where in a few weeks he's going to rape Aundria Crawford . . ." That's the remorse he felt. He has no heart." (39 RT 10051.) While the logic was defective

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The stipulated declaration at 24 CT 6381 states the total time for closing argument was 61 minutes, 30 seconds. Exhibit 171 was displayed for 17 minutes, 30 seconds. The other 55 slides were displayed therefore for a total of 44 minutes, yielding an average display time per slide of 46.45 seconds. The 17 minute 30 second display of Exhibit 171 was therefore 23.78 times longer than the average time for display of other slides.

and weak, it was an effective, emotional argument based on image, not fact, appealing to passion and prejudice. The trial court recognized the powerful nature of the way the photograph was used: "[T]hey did use the photo effectively in argument. What I said -- after Mr. Maguire said that half -- it was used half the time, it probably seemed like it was used half the time. It was effective. It was effective argument." (40 RT 10361.)

An effective argument by definition is one that is capable of convincing open minds of its correctness. The court's observation alone indicates a reasonable possibility that the error in admitting the image was prejudicial. "State law error occurring during the penalty phase will be considered prejudicial when there is a reasonable possibility such an error affected a verdict. Our state reasonable possibility standard is the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24 ." (*People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn.11, citations omitted.)

XIII

The prosecutor committed prejudicial misconduct by presenting false and misleading evidence that Krebs lied about shooting a man three times in the chest

On the day of Dr. Dietz' testimony, the defense was given copies of slides that he intended to use during his testimony. (38 RT 9734.) One slide, under the heading of "Deceitfulness" referenced whether or not Krebs shot a man in Santa Barbara. (*Ibid.*) The next slide, under the heading of "Antisocial Behavior" listed Krebs as having "shot a man in Santa Barbara." (38 RT 9735.) The defense objected to any testimony which referenced such an allegation, noting that the only evidence of such an

incident was in a videotape of an interview by Hobson where Hobson asked about such an allegation, and Krebs denied it. (38 RT 9735.)

The People maintained that although Krebs denied the shooting on the video, after the video was turned off, he admitted shooting a man in the leg over a drug deal in Santa Barbara, and that the admission was contained in a report furnished to the defense. (38 RT 9736.) The defense denied having received a report of such an admission, and objected to the evidence upon grounds of lack of corpus and as "unreliable, unsubstantiated, and not dealing with facts that have been evidence at this trial" as well as Evidence Code section 352 grounds. (38 RT 9735-9736.) The court overruled the objections, unless it were shown that the defense had not received the report.

The videotape in question was Exhibit 166, depicting the April 27, 1999, interview of Krebs by Hobson, which was played for the jury in the guilt phase. A transcript furnished to the jury as Court's Exhibit 4 (also marked as People's Exhibit 167) shows the following exchange at the end of the interview (21 CT 5747):

"Hobson:	... Just before you went to prison in 87, somebody called Crime Stoppers, San Luis Obispo, here, and identified you as shooting somebody in the chest in Santa Barbara three times over a drug deal. Wasn't you?
Krebs	Shot somebody in the chest three times, no . Wasn't me. (Later, KREBS admitted shooting a white male in Santa Barbara.) [*sic*]
Hobson:	You were using drugs at the time though, right?
Krebs:	Yes I was.
Hobson:	Was there any problems with your drug connections, ripoffs, anything that somebody would call up and accuse you of doing that for?
Krebs:	No.

Hobson: No reason? Somebody just picked your name and called up and laid it off on you?
Krebs: Back in 87?
Hobson: Were you hanging out with anybody in 1987? Male friends?
Krebs: Hung out with a lot of people." (*Ibid.*)

Thus the admitted videotape shows Hobson confronting Krebs with an anonymous accusation of shooting a man in the chest three times in Santa Barbara, but also shows that Krebs denied that accusation completely. However, the transcript inexplicably also contained the anonymous notation "Later, KREBS admitted shooting a white male in Santa Barbara." This admission was explained outside the presence of the jury by the prosecutor as an admission of shooting a man in the leg (not chest) relating to a drug deal in Santa Barbara. (38 RT 9736.) The admission was allegedly contained in a report furnished to the defense, but neither the report or its contents is otherwise disclosed in the record.

During Dr. Dietz' testimony, to illustrate Krebs' deceitfulness, he stated that Krebs had at first denied shooting a man three times in the chest, then later admitted it .

> "He was asked about whether he had shot a man in Santa Barbara, because there had been an anonymous tip back in 1987 that Rex Krebs had shot a man in a drug deal. When he was first asked about this by Investigator Hobson, Mr. Krebs said no, he hadn't done it. He denied it. After the videotape was shut off, he subsequently admitted to Investigator Hobson that he had been the guy that shot a man in the leg in Santa Barbara in 1987." (38 RT 9795.)

Dr. Dietz also referenced this incident as an example of assaultive behavior: "His shooting a man in Santa Barbara in 1987, which he admitted

to Investigator Hobson." (38 RT 9796-9797.)

Dr. Dietz portrayed Krebs' denial of shooting a man 3 times in Santa Barbara as false to support an argument that Krebs was deceitful. First, he referenced Hobson confronting Krebs with the anonymous tip that Krebs had shot a man in a drug deal in Santa Barbara, and noted that Krebs at first denied it. (37 RT 9795.) The jury, having viewed the videotape, Exhibit 166, with the assistance of the transcript would have clearly known this testimony referred to the evidence at the end of the April 27 videotape, Exhibit 166, when Hobson confronted Krebs with the anonymous accusation that Krebs had shot a man three times in the chest in Santa Barbara and Krebs states, "Shot somebody in the chest three times, no . Wasn't me." (21 CT 5747.)

The cited evidence was not relevant on the issue of deceitfulness - the point which Dr. Dietz was making (37 RT 9794) - unless there was reason to believe that Krebs' denial was false - that he had in fact shot a man three times in the chest in 1987. By invoking this example, Dr. Dietz clearly accused Krebs of being deceitful in this regard, and even if he had not specified the source of his belief, the jury would have been justified in believing that Dr. Dietz had found a substantial, credible basis on which to determine that Krebs was indeed responsible for shooting a man three times in the chest in 1987. After all, Dr. Dietz had recently testified as to his high standards as a "government expert" in relaying information to juries. "[I]t's fair to say that in my role as a government expert in a capital sentencing I think it's my duty to not bring into it things that are questionable." (38 RT 9869.) "If I knew that something was in doubt, I would want to reject it, yes." (38 RT 9870.) If a jury were to credit Dr. Dietz simply as a responsible "government expert," let alone "the most

respected forensic psychiatrist in the United States" (39 RT 10037), it could conclude that Krebs had in fact shot a man three times in the chest in 1987.

Dr. Dietz further reinforced the impression that he, as an impartial government expert, had sufficient reliable information to conclude that Krebs was being deceitful when he denied shooting a man three times in the chest when Dr. Dietz included in his list of aggressive, violent acts committed by Krebs "his shooting a man in Santa Barbara in 1987, which he admitted to Investigator Hobson." (38 RT 9796-9797.)

Dr. Dietz did not clear up this false impression, although he might have created some confusion for a sharp-eared listener. "After the videotape was shut off, he subsequently admitted to Investigator Hobson that he had been the guy that shot a man in the leg in Santa Barbara in 1987." (38 RT 9795) By stating that Krebs admitted "he had been *the* guy," Dr. Dietz implied that Krebs was the one responsible for the described incident that he had been confronted with - "shooting a man in the chest 3 times." A listener would not infer that Dr. Dietz was saying that Krebs had admitted to an unrelated shooting - as that would not support the main point that Dr. Dietz was then making - that Krebs was deceitful when he denied being the person who shot a man three times in the chest. It is true that the remainder of the sentence casts some confusion into the matter. Dr. Dietz concludes with the phrase: "that shot a man in the leg in Santa Barbara in 1987." The only word in this phrase that does not describe the incident that Krebs had been confronted with is "leg," while everything else - "shot a man," "Santa Barbara," and "1987" coincide with the described shooting in the chest. There was no attempt to reconcile the discrepancy, and a reasonable juror might have thought it was just a minor missspeak by Dr.

Dietz. No other evidence before the jury indicated that there had been another "leg" shooting in any way. The clear import of the point that Dr. Dietz was making was that Krebs had lied about the described shooting in the chest incident. The jury never heard about any other.

The prosecution has a constitutional duty to correct false or misleading testimony. *(People v. Morrison* (2004) 34 Cal.4th 698, 716-717.) Because the prosecution allowed Dr. Dietz to create a false impression that Krebs had shot a man in the chest three times and failed to correct this misimpression, constitutional error occurred. Reversal is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . ." (*Napue v. Illinois* (1959) 360 U.S. 264, 271.)

The jury was *not* instructed at the time of Dr. Dietz' testimony with a limiting instruction that the jury could not consider his testimony as proof of the matters stated. No such instruction limiting instruction was given in the final instructions either. The jury was instructed that, "Testimony by one witness which you believe concerning any fact is sufficient for proof of that fact." (23 CT 6139, RT 10146.) Thus if the jury placed full confidence in Dr. Dietz, as urged by the prosecution, they may have found beyond a reasonable doubt that Krebs had shot a man three times in the chest in 1987. The jury was also instructed that they could consider this rebuttal evidence as aggravation. "Evidence has been presented by the prosecution as rebuttal to evidence presented by the defense in mitigation. You cannot consider such rebuttal evidence as an aggravating factor *unless the evidence is specifically within one or more of the factors in aggravation that have been given to you in these instructions.*" (23 CT 6153, 39 RT 10153, emphasis added.) Thus the jury as instructed may have considered the evidence

Krebs shot a man in Santa Barbara as an aggravating incident of criminal activity which involved the use of force. (22 CT 6149, 39 RT 10151.)

The error requires reversal because all other evidence of violent acts committed as an adult which were in evidence were related to Krebs' paraphilic urges to rape and control women. Krebs' predisposition towards sexual violence against women would be controlled in a prison setting. Evidence of lethal violence related to drug dealing is a distinct category of violence that the jury could infer would not be controlled in a prison setting, leading the jury to conclude that a death sentence was warranted to preclude future violence within prison. Because this was a close case as to penalty, it cannot be said the error was harmless, and reversal is required.

XIV

The prosecutor committed prejudicial misconduct by falsely suggesting that Krebs had been convicted of sexual assault in Idaho in 1984

In the penalty opening statement, the prosecutor detailed Krebs' conviction of an sexual assault on a fourth victim, saying, "unbelievably, there is another victim of Krebs' violence in addition to Shelley C., Rachel, and Andrea. Her name is Anishka C." (29 RT 7756.) He said nothing about a fifth victim. However, he subsequently improperly insinuated, knowing it to be false, that Krebs had been convicted of sexual assault with regard to a fifth victim in Idaho when Krebs was 18.

During the cross-examination of Connie Ridley, Krebs' mother, the prosecutor suggested there was another incident where the defendant hurt somebody in Sandpoint, Idaho, in 1984. (31 RT 8306.) He suggested it occurred in March, when Krebs was 18, just before he went to prison, and

mentioned a girl's name, Jennifer Egan Beevey. (*Ibid.*) The witness responded that Krebs was drunk and tried to "get it on" with her, but she did not "remember any of the particulars." (*Ibid.*) The prosecutor then falsely suggested, "Well he got convicted of sexual assault; isn't that right?" An objection was sustained. (*Ibid.*)

The prosecutor pressed further. He elicited that she had been interviewed by investigators Hobson and Hanley, and then asked, "And that's when you told them that he was convicted of a sexual assault while in Sandpoint and was sent to the Cottonwood facility?" (32 RT 8308.) An objection as to improper impeachment was overruled, and the witness responded in the affirmative, but she again clarified: "I knew nothing of any of the particulars, nothing." (32 RT 8308-8309.)

The prosecutor knew quite well that Krebs was not convicted for sexual assault in that incident, and he was not sent to Cottonwood Prison for that incident. (31 RT 8287.) Nevertheless, he continued to insinuate in front of the jury in cross-examination that Krebs was convicted of yet another sexual assault besides the ones detailed in the guilt phase and the penalty opening statement.

During the recross-examination of Adonia Krug, the prosecutor again stated: "There's been evidence in this case from the defendant's mother that the defendant was convicted in Sandpoint Idaho of a sexual assault in 1984. Did you know about that?" (33 RT 8579.) The witness responded that she had heard a rumor. (*Ibid.*)

In the cross-examination of an Idaho probation officer, the prosecutor stated, "We had some testimony from the defendant's mother that in 1984 in Sandpoint, Idaho, the defendant was convicted of sexual assault. Did you know about that?" (33 RT 8599.) The witness stated he

did not know about a sexual assault conviction in 1984. (*Ibid.*)

During the cross-examination of Daniel Thompson, the prosecutor again asked, "And we have some evidence in this case that there was a -- his mother indicated he was convicted of a sexual assault in Idaho in 1984. Did you know about that?" The witness said he did not. (33 RT 8740.)

"A prosecutor commits misconduct under state law if he or she uses 'deceptive or reprehensible methods' in an attempt to persuade the jury." (*People v. Hill* (1998) 17 Cal.4th 800, 845.) "Under well-established principles of due process, the prosecution cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents, even if the false evidence was not intentionally submitted." (*People v. Seaton* (2001) 26 Cal.4th 598, 647; see also *Napue v. Illinois* (1959) 360 U.S. 264.) The prosecutor well knew that Krebs was convicted only of misdemeanor battery in connection to the incident involving Jenny E. in Sandpoint in 1984. (29 RT 7749-7750.) The People had presented no evidence of the Jenny E. incident up to that point. They had filed a declaration to the effect that she was unavailable due to mental health issues, and the court had ruled that her statements contained in the report to the police were not admissible. (29 RT 7747-7750.)

The prosecutor elicited the erroneous information from Krebs' mother is spite of her repeated insistence that she did not know the "particulars" of the situation and the defense objections. (31 RT 8306, 8309.) The defense had previously sought to limit cross-examination of defense witnesses regarding the Jenny E. incident, and the court had ruled that they could not be asked questions calling for hearsay. (31 RT 8189-8190.) Clearly, the evidence of what he was convicted of was relevant, if at all, only to her knowledge of Krebs' record of hurting people other than in

the last few years, not for the truth of the matter. (31 RT 8283, 8285.)

By repeating the false information to three defense witnesses ostensibly to see if they had heard of such a "conviction," the prosecutor committed prejudicial misconduct. "It was improper to ask questions which clearly suggested 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." (*People v. Lo Cigno* (1961) 193 Cal.App.2d 360, 388; see also *People v. Mooc* (2001) 26 Cal.4th 1216, 1234.) The prosecutor could not have had a good faith belief that the witness would answer yes, since the conviction for sexual assault did not exist, and the prosecutor certainly was not prepared to prove that there was such a conviction, as there was none.

The misconduct was prejudicial. Although the People did eventually call Jenny E. in their case in chief out of order due to her previous unavailablity, there was no evidence as to the nature of the conviction other than the prosecutor's insinuation that it was for sexual assault. The prosecutor argued the incident was in fact an attempted rape. "But Jenny was the first. As he became an adult, 12-year-old Jenny, he gets her drunk. I suggest he tries to rape her. And when she resisted, he pummeled her face with his fists." (39 RT10046.) The false insinuation of conviction of attempted rape thus would have supported the prosecutor's theory that Krebs had committed attempted rape against Jenny E. The misconduct was further prejudicial because the jury may have taken the insinuation of a actual conviction for sexual assault in 1984 to refer to yet another conviction besides the one involving Jenny E. "State law error occurring

during the penalty phase will be considered prejudicial when there is a reasonable possibility such an error affected a verdict. Our state reasonable possibility standard is the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24 ." (*People v. Jones* (2003) 29 Cal.4th 1229, 1264, fn.11, citations omitted.)

XV

The prosecutor committed prejudicial misconduct in opening and closing statements in the penalty phase

The prosecutor improperly used his opening statement in the penalty phase to go beyond a statement of the anticipated evidence in aggravation to argue themes which would become central to his final argument : 1) the defense attorneys and their experts should not be trusted, while Dr. Dietz should be, and 2) the presentation of evidence of an abusive childhood is not legitimate mitigating evidence, but a dishonorable "blame game."

In his closing penalty statement, the prosecutor repeated these themes, and committed misconduct by improperly attempting to support these themes by injecting his personal beliefs and other matter outside of the record, misstating the evidence, and disparaging counsel and the defense experts.

A. Opening Statement

During the penalty opening statement, the prosecutor referred to Krebs as an "animal." "Until finally this animal bites her on the fingers..." (29 RT 7760.) The device of calling a defendant an animal has been condemned by the United States Supreme Court. *(Darden v. Wainwright*

(1986) 477 U.S. 168.) The prosecutor was improperly argumentative. "And now they want in this proceeding for you to give him a break. That's absolutely amazing." (29 RT 7762.) Two objections to an argumentative discussion of the 190.3 factors were sustained shortly afterwards. (29 RT 7763.)

The prosecutor continued with an argumentative attack on defense counsel going far beyond a description of the anticipated evidence: "And remember that outrageous comment made a few weeks ago, made by Ms. Ashbaugh in her closing argument, about how her gracious client had helped the police and by so doing he was the one who helped bring closure to the Newhouses and how her client was the one who helped bring closure to the Crawfords? Well, unfortunately, you are going to see firsthand what so many others know so well. She doesn't understand this." (29 RT 7765 - 7766.)

The prosecutor continued to disparage the motives of defense counsel and the legitimacy of the mitigating evidence they would produce. "The evidence you will be presented with from these defense attorneys will try to blame everybody but their client. They'll call it an explanation, but it's really a blame game. " (29 RT 7766-7767) The defense experts also came under argumentative attack. Referring to Dr. Haney's expected testimony regarding risk factors in Krebs' upbringing, he called it "social study babble" and misleadingly argued, "Professor Haney's claim to fame is he testified for the defense in the trailside killer case up north in Marin County, Terry Carpenter case." (29 RT 7768.) Turning his attention to Dr. Berlin, he similarly argued misleadingly, "His claim to fame is he testified for Jeffrey Dahmer in Wisconsin. Dr. Berlin said Jeffrey Dahmer was insane. It didn't work in Wisconsin." (29 RT 7768.) In fact, as Dr. Berlin

subsequently testified, he did not testify that Dahmer was insane. (35 RT 9087-9088.) The prosecutor argued Dr. Berlin was unbelievable. "We feel you're going to have a hard time believing this doctor because he travels around the country . . . what he says is sexual sadists like Rex Krebs basically have a compulsion." (*Ibid.*) After describing with thinly veiled contempt Dr. Berlin's view of the nature of a compulsion, he further disparaged the defense experts. "[T]o show you how absolutely ridiculous the defendant's psychology team is, we will present Dr. Park Dietz." (*Ibid.*)[20]

A defense objection at this point "on grounds previously stated" was overruled. (29 RT 7769.) The prosecutor then continued with his description of Dr. Dietz, arguing that he was "probably the most distinguished forensic scientist in the United States, if not maybe the world. . . . And he calls Dr. Berlin's theory nonsense." (29 RT 7769.)

While defense counsel did not object to most of the above improper statements, the statements are clearly relevant in assessing the prejudice caused by other misconduct reasserting the same themes in penalty argument. Furthermore, the claims are not waived because an admonition would not have cured the harm, since the underlying message - that he was on the side of justice, while the defense would stoop to anything to avoid justice - would have lingered in the jury's mind despite any admonition. (*People v. Bandhauer* (1967) 66 Cal.2d 524.)

Furthermore, this court has as a matter of practice regularly invoked

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The prosecutor's assessment of Dr. Berlin differed in his pretrial statement to the court where he said "the defense has hired one of the top psychologists in the country, Dr. Fred Berlin." (22 RT 5960.)

its constitutional jurisdiction to review claims of prosecutorial misconduct, even in the absence of objection and request for admonition. *(People v. Wash* (1993) 6 Cal.4th 215, 276, (dissn. opn. By Mosk, J.).) Defense counsel did object to the argumentative disparagement of their experts, but it was overruled. Thus objection should be excused to other comments made in the same vein.

B. Closing Argument

1. Statement of Personal Belief

In the penalty closing argument the prosecutor continued to exceed the bounds of proper statements to the jury. The prosecutor initially made reference to himself and members of the prosecution team who had been working on the case for over two years, and improperly referred to their extra-record opinions about Krebs. "You realize now what so many of us have realized for a long time. You realize now you have been in the presence of one of the most cruel, calculating, and brutal individuals on the planet, Rex Allan Krebs." (39 RT 10024.) This statement amounts to telling the jury that the large law enforcement team as detailed in the guilt phase, with their great experience in dealing with murderers and serious criminals, collectively found that Krebs was one of the worst "on the planet."

A similar statement by the prosecutor in *People v. Bandhauer* (1967) 66 Cal.2d 524, 529-530, was strongly condemned: "During the many many years that I have been prosecutor, I have seen some pretty depraved character [*sic*]. Usually they are kind of old because it takes a little while to become this depraved. But it has seldom been my misfortune to see a more deprave [*sic*] character than this one." The court found that the statement

"was testimonial. It was not related to the evidence in the case and was not subject to cross-examination. It presented to the jury an external standard by which to fix the penalty based on the prosecutor's long experience."

The *Bandhauer* court found the error was not waived for failure to object, stating that when the prosecutor made such statement, "[i]t was then too late to cure the error by admonition, and any effort of the prosecutor to cure the error by formally retracting what he obviously believed would only have compounded it. Under these circumstances defendant is not precluded from raising the issue for the first time on appeal." (*Ibid.*) The *Bandhauer* court also found the error prejudicial and reversed the death verdict. The court in *People v. Medina* (1995) 11 Cal.4th 694, relied in part on *Bandhauer* in holding "prosecutors should not purport to rely on their outside experience or personal beliefs based on facts not in evidence when they argue to the jury." (*Id.*, at p. 758.)

2. Facts not in evidence

The prosecutor continued to refer to matters outside the record. "Mr. McLennan, the defense attorney, seeks out Dr. Berlin from across the country. Can't find somebody in California. Can't even find somebody west of the Rockies. Gets Dr. Berlin from across the country to travel to California." (RT 10036.) This statement that defense counsel could find no person in California or west of the Rockies with views similar to Dr. Berlin's is not only an allegation unsupported by any evidence in the record, but it is also a demonstrable falsehood. Indeed, even a cursory review of reported cases shows an abundance of civil commitment cases where the opinion shows the names of qualified experts who share Dr. Berlin's opinion that paraphilias impair volition. (See fn. 14, page 162, above.)

Given that Atascadero State Hospital is located in San Luis Obispo County, where the crimes occurred, it is inconceivable that the prosecutor could have made this argument in good faith. This court has strongly condemned the prosecutor's reference to facts not in evidence. (*People v. Hill* (1998) 17 Cal.4th 800, 828.) "We have explained that such practice is clearly . . . misconduct, because such statements tend to make the prosecutor his 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." (*Ibid.*, citations and quotations omitted.)

This misconduct was especially prejudicial because it tended to support the theme of the prosecution that Dr. Berlin was a hired gun who espoused untenable views which were not shared by *any* reputable professionals who worked in this state. There was no express evidence as to why the defense chose to call Dr. Berlin rather than a local professional. Yet the prosecutor implied that the prosecutor well knew that no one "west of the Rockies" shared Dr. Berlin's views, forcing the defense to use him. This was egregious misconduct in light of the facts. The court in *Hill* characterized an attempt to argue bias inferred from a family relationship based on nothing more than the same last name as an "outrageous fabrication." The same is more than true here, especially since Dr. Berlin's actual status as a leading expert provides the obvious rationale for the use of an out-of-state expert. The prejudice in such a outlandish fabrication, as acknowledged by this court in *Hill, (supra)* is that a typical juror, who can be expected to have a high regard for the prosecutor, would be assume that the prosecutor would not make such a stark and outrageous claim unless it

were true, based on some knowledge of the prosecutor which had not been shared with them. As in *People v. Bandhauer* (*supra*) 66 Cal.2d 524, 529-530, no admonishment could have cured this prejudice, hence it is preserved for appeal.

Additional argument based on facts not in the record included that the prosecutor called Park Dietz "the most respected forensic psychiatrist in the United States" even though there was no evidence on that subject. (39 RT 10037.) The prosecutor further argued without basis that the defense attorneys wanted the jury to believe that Krebs was someone who acted without thinking, "Does that sound like someone who acts without thinking, as these defense attorneys want you to believe?" (39 RT 10052.) Another argument with no factual basis urged that Dr. Haney was paid not for his expertise and to explain behavior, but simply to "evoke sympathy." (39 RT 10041.)

3. Disparagement of counsel and mitigation

The prosecutor ridiculed the very concept that an abusive childhood could be mitigating and disparaged defense counsel for presenting such evidence, calling it "the pathetic blame-game defense that has been thrown at you in the past two or three weeks." (39 RT 10028.) He implied that defense counsel improperly colluded with witnesses to present their testimony. "You think a lot of this defense was orchestrated?" (39 RT 10035.) "Was some of this defense orchestrated?" (39 RT 10036.) After noting that Dr. Haney once sat in on Dr. Berlin's interview of Krebs, the prosecutor argued without any evidence that this was not only unprofessional, but represented an improper attempt to orchestrate their testimony. "Why did they do that? Was it to get all the ducks in a row?

Was it to try to sell together this ridiculous concept of sexual compulsion?" (39 RT 10036.) After referring to the defense mitigation cases as the "abuse excuse," the theme was repeated. "You can see how some of this is so orchestrated." (39 RT 10040.)

The prosecutor continued to argue the theme that evidence of mental and physical childhood abuse was not mitigating, being simply an improper attempt to evade responsibility. "The defense is trying to deflect that responsibility. They want to lay some kind of a guilt trip on you for what their client truly deserves." (39 RT 10035.) The prosecutor argued outside the record that the prosecution team itself called the defense case "the abuse excuse," and falsely implied that it had been tried in the Menendez penalty phase, and the jury had properly rejected it there. "He travels around the country selling the -- we call it the 'abuse excuse.' That's what it should be called, the 'abuse excuse.' Same defense they used with the Menendez brothers down in LA, the two rich kids down there who shot their parents. Abuse excuse. It didn't work in West LA, and it's not going to work up here." (39 RT 10040.)

A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel. (*People v. Hill* (1998) 17 Cal.4th 800, 832.) "It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense" or to otherwise denigrate defense counsel. (*People v. Bemore* (2000) 22 Cal.4th 809, 846; see also *People v. Welch* (1999) 20 Cal.4th 701, 753.) In *People v. Woods* (2006) 146 Cal.App.4th 106, the court held that the prosecutor's accusation in argument that defense witnesses were recently "conjured up" constituted misconduct of this type, as it was either false or based on matters outside the record. (See also *People v. Herring* (1993) 20 Cal.App.4th1066,

1075-1076 [prosecutor's "uncalled for aspersions on defense counsel's character and integrity," in claiming that defense counsel has to tell his people what to say and "does not want you to hear the truth" were improper and "directed the jury's attention to irrelevant matters"].)

A prosecutor's argument is evaluated for misconduct by considering how the statement would, or could, have been understood by a reasonable juror in the context of the entire argument. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) It is hard to see how the prosecutor's statements taken in context could be interpreted in any way other than one which impugned the integrity of counsel, their motives, and their witnesses. The rhetorical device of making the accusations in the form of a question did not change the intended and obvious meaning. ("Was it to get all the ducks in a row? You think a lot of this defense was orchestrated?) The entire argument clearly expressed the contempt that the prosecutor had for the defense and their expert witnesses.

The very activity which is constitutionally demanded in a penalty phase - investigating the background of the defendant, interviewing witnesses, and making informed decisions regarding which witnesses to call to establish mitigating factors, became nefarious, disreputable, and improperly motivated in the argument of the prosecutor. Nothing in the record supports the malice the prosecutor evidenced. His argument was the essence of misconduct - an attempt to persuade by deceptive or reprehensible means. (*People v. Hill, supra*, 17 Cal4th 800, 822.)

4. Misstatement of the evidence

The prosecutor also misstated the testimony of Dr. Haney in the course of impugning his motives. "Although prosecutors have wide

latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct." (*People v. Hill* (1998) 17 Cal.4th 800, 823.)

> "Because you can see through this. You can see how some of this is so orchestrated. Professor Haney, a polished, refined presenter, his goal is not to present a balanced, accurate picture. A couple of examples, some information that the defendant had been in the hole so long, he was in the hole for, like, 90 days at a stretch. He called him the 'Hole Boy.' But the reality is, when you look at the records, he went into iso or something like that, what, two, three, four days? Is that an exaggeration?" (39 RT 10040.)

In fact, Dr. Haney never called the defendant the "Hole Boy" and it was the prosecutor who elicited the information that Krebs referred to himself as the "Hole Kid." (36 RT 9377.) Nothing in the cross-examination of Dr. Haney on this issue (36 RT 9370-9379) remotely justified this inaccurate attack on Dr. Haney's credibility.

5. Appealing to passion and prejudice

Near the end of the closing argument, the prosecutor explicitly appealed to the passion of the jury. "Justice, ladies and gentlemen, is not served until the citizens of our community, jurors and citizens alike, are as outraged by what Rex Krebs did as the families of his victims." This argument expressly invited jurors to become inflamed with outrage, in violation of the constitutional requirement that the "jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason. (*Gardner v. Florida* (1977) 430 U.S. 349, 358 ." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.)

XVI

The court prejudicially erred by ordering Krebs to submit to a psychiatric exam by Dr. Dietz

Having given notice that they would be calling Dr. Berlin in the penalty phase, the defense filed a motion to preclude a court-ordered psychiatric examination of the defendant by Dr. Park Dietz. (24 CT 4998.) The People filed a motion in opposition, requesting such an order. (24 CT 5132.) After hearing the testimony of Dr. Dietz in a motion in limine prior to the commencement of the penalty phase, the court made an order that Krebs submit to a psychiatric examination by Dr. Dietz. (28 RT 7605.) The court specified that counsel was not to be inside the room, and could not object to questions and if they wished to stop the examination, it would be "subject to presentation in court." (*Ibid.*)

The court explicitly rejected a defense argument that the examination constituted discovery which was prohibited under Penal Code section 1054 et seq. "I think Mr. McLennan initially argued that 1054 was the sole basis for discovery and that, therefore, this is discovery and so it's not allowable." (28 RT 7602.) "So as far as it being discovery, which is not authorized by 1054, I reject that argument also." (28 RT 7604.)

Defense counsel subsequently advised the court that Krebs was going to follow their advice and refuse to participate in the interview since it appeared that "Dr. Dietz' opinions are basically already formulated." The defense acknowledged that the court would allow the refusal to be brought out in the testimony of Dr. Dietz and possibly instruct jury on the issue. (28 RT 7607-7608.)

While the prosecution requested that an instruction be given to the jury, and the court initially indicated it would give an instruction, the court

never gave an instruction, having concerns over the proper language. (29 RT 7902, 37 RT 9574, 38 RT 9935-9938, 39 RT 9997.) The court, however, approved of the prosecutor's announced intention to comment on Krebs' refusal in final argument. (39 RT 9997.)

In argument, during a discussion of the "choices" which Krebs made, the prosecutor made the following argument, noting the court order and implying Dr. Berlin counseled Krebs to disobey it.

> "And the defendant will spend days talking to Dr. Berlin, spend a lot of time talking to Professor Haney, but when the Court orders the defendant to talk to Dr. Dietz, Dr. Berlin actually talked to the defendant about the defendant talking to Dr. Dietz. Thereafter the defendant refused. Where's the fairness in that? Who's looking for the truth?" (39 RT 10041.)

The court should have sustained the objection of the defense on the grounds that the court-ordered forensic mental examination was a form of prosecutorial discovery which was barred by Penal Code section 1054 et seq. (*Verdin v. Superior Court (People)* (2008) 43 Cal.4th 1096.) "What the People cannot do, because it is neither authorized by statute nor mandated by the United States Constitution, is have the trial court order petitioner to grant their retained expert access for the purpose of a psychiatric examination." (*Id.*, at p. 1116.)

The error was prejudicial because the jury was informed of the court order, and the prosecutor argued it showed that neither Krebs nor the defense experts were seeking the truth. This prejudice should be deemed to be substantial in light of the prosecution's venomous treatment of the defense experts in examination and argument. While it is possible that the jury may have seen through some of the other baseless remarks impugning

the integrity of the defense experts, the argument regarding the refusal of the court-ordered examination played on the jury's likely feeling that the side who violates a direct court order does not have integrity, and probably does have something to hide.

The illegal order and the prosecutor's argument capitalizing on it amounted to a violation of several constitutional provisions in addition to a violation of state law. By ordering that the examination take place outside counsel's presence, the court ordered a violation of Krebs' Sixth Amendment right to the assistance of counsel. (*Powell v. Texas* (1989) 492 U.S. 680; *Rhode Island v. Innis* (1980) 446 U.S. 291, 297, 299, 301.) By ordering that the defendant answer the questions of a prosecutorial agent, it violated Krebs' right against self-incrimination under the Fifth Amendment. (*Doe v. United States* (1988) 487 U.S. 201, 210-211.) The prosecutor's comment on the defendant's silence also violated this right. (*Griffin v. California* (1965) 380 U.S. 609.)

The constitutional errors are reviewed under the *Chapman* standard requiring reversal of the judgment of death unless the State shows that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 27.) Statelaw errors in the penalty phase are reviewed under the standard articulated in *People v. Brown* (1988) 46 Cal.3d 432, 447-448, which is the same in substance and effect as the *Chapman* standard. (*People v. Prince* (2007) 40 Cal.4th 1179, 1299.) Under these standards, especially combined with other penalty errors, it cannot be said that the error was harmless, and the judgment of death should be reversed.

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XVII

The instructions concerning factor (h) labeled volitional control as aggravating and were vague in violation the Eighth Amendment, requiring reversal

A. The instructions advised the jury that it was an aggravating circumstance if the defendant was unimpaired in his capacity to control his behavior by a mental disorder or intoxication

The court's written instructions to the jury at the submission of the penalty case were augmented by instructions and explanations it gave during the jury selection process. The court instructed the jury venire during jury selection in small groups concerning aggravation and mitigation. During this process, the court explicitly advised many of the jurors who eventually rendered a verdict that *each* of the listed factors could be aggravating or mitigating, and that the jurors would be required to make this determination themselves. Of the 12 jurors who rendered the penalty verdict, 4 were clearly told that the listed factors could be either mitigating or aggravating. (11 RT 3317-3318 [Juror 75]; 16 RT 4380 [Juror 207]; 17 RT 4652 [Juror 238]; 18 RT 4930 [Juror 265].) The court's explanation to Juror 75 at 11 RT 3317 was typical: "Again, each of those factors, it's up to you to decide if any of them are present. It's also up to you to decide whether they're aggravating or mitigating. In other words, the Court isn't going to tell you that a certain factor is aggravating or mitigating. It's completely up to you." The explanation given to the remaining jurors was consistent with this advice, although not explicit. (9 RT 2902 [Juror 20]; RT 3444 [Juror 90]; 13 RT 3852 [Jurors 134, 137]; 15 RT 4170 [Juror 176]; 16 RT 4380 [Juror 207]; 17 RT 4790 [Jurors 255, 253]; 18 RT 5003 [Juror

277].) None of the jurors who sat were told that certain factors (other than factor (k)) were mitigating factors only.

In the written instructions submitted to the jury, the court followed the pattern CALJIC instruction 8.85, although factors (e) and (j) were omitted and bullet points substituted for the letters. Thus the jury was instructed in part:

> "In determining which penalty is to be imposed on defendant, you shall consider all the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors: . . .
>
> Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. . . .
>
> Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect or the effects of intoxication. . . ." (22 CT 6149.)

The jury was also given CALJIC 8.88 which stated in part:

> ". . . you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is *any* fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. . . .
>
> You are free to assign whatever moral or sympathetic value you deem appropriate to *each and all* of the various factors you are permitted to consider. ..." (22 CT 6162,

emphasis added.)

The written instructions are straightforward in telling the jurors that it was mandatory to "consider, take into account, and be guided by" all the listed factors. The written instruction then advises the jury that an aggravating factor is *any* fact, condition, or event attending the commission of a crime which increases its guilt or enormity. The phrase "attending the commission of the crime" would reasonably be construed to relate also to facts concerning the character and record of the defendant, since the listed factors include those relating solely to the defendant's character and record, such as his age and felony convictions. Thus the written instructions would reasonably be interpreted by the jury to mean, consistent with the explanations given by the court in voir dire, that they *must consider* each of the listed factors, and further that they may assign aggravating weight to *"each and all"* listed factors. No other interpretation seems feasible.

The language of the written instruction regarding factor (h) tracked the statutory language. The use of the phrase "whether or not" fit with the instructions given elsewhere that *any listed factor* could be considered as aggravation, since many circumstances might reasonably be labeled aggravating if absent, but mitigating if present. It is also clear, however, that as a matter of law and common sense, the presence of a mental disorder which impairs volitional control is always mitigating. This court has so held on a number of occasions. (*People v. Montiel* (1993) 5 Cal.4th 877, 944; *People v. Maury* (2003) 30 Cal.4th 342, 444; *People v. Whitt* (1990) 51 Cal.3d 620, 654; *People v. Jackson* (1980) 28 Cal.3d 264, 316.) A rational juror confronted with general instructions that clearly say each listed factor may be considered as mitigating or aggravating and with the

"whether or not" language preceding a description of an impairment which can only be mitigating would of necessity therefore conclude that the *absence* of volitional impairment from mental disorder or intoxication *must* be aggravating. Otherwise the court's instruction that each circumstance could be aggravating or mitigating would be contradicted.

A contrary conclusion would require the jurors to disregard the plain language of the court and the instructions that each of the specific factors could be aggravating or mitigating. The "whether or not" language informs the jury that they must "consider" and "be guided by" the presence or absence of the described circumstance, not just by the presence of the described circumstance. To be "guided by" the absence of a circumstance which is mitigating only, one must label and "weigh" the absence of the circumstance as aggravating. Otherwise, the juror would be ignoring the command to be guided by each of the listed factors, in contravention of the instruction which stated "You must accept and follow the law that I shall state to you." (22 CT 6148.)

For these reasons, appellant asserts that the instructions in this case did in fact attach the aggravating label to the absence of the mental disease , mental defect or intoxication which impaired the defendant's ability to control his criminal behavior or prevented him from recognizing that it was criminal. The simple way of stating this is that the instructions told the jury that it was an aggravating factor if the defendant fully understood that killing was wrong, yet made a volitional, conscious decision to kill nevertheless. Thus, legal sanity was described as aggravating.

These instructions run afoul of *Zant v. Stephens* (1983) 462 U.S. 862, 885. There the Court cautioned that when the law attaches an "aggravating label" to factors that are constitutionally impermissible, a

resulting death sentence be must be reversed. It is constitutionally impermissible to label a defendant's sound mind and exercise of free will as an aggravating factor that weighs in favor of death because it places "bias in favor of the death penalty." (*Stringer v. Black* (1992) 503 U.S. 222, 236.)

The court clarified the application of this rule in "weighing" and "non-weighing" states in *Brown v. Sanders* (2006) 546 U.S. 212. There the court held: "an invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (*Id.*, at p. 220.) No other sentencing factor under California law enables the sentencer to give *aggravating weight* to the defendant's knowledge of right and wrong and a full capacity to exercise free will, hence under *Brown,* reversal is required.

B. The instructions relating to factor (h) were vague in violation of the Eighth Amendment and California law

This court has not addressed a specific challenge to factor (h) where the instructions labeled the absence of the described impairment as aggravating nor performed a specific vagueness analysis of whether the language in factor (h) meets the state law standard of focusing on specific, provable and commonly understandable facts. (Compare *People v. Griffin* (2004) 33 Cal.4th 536, 588 [factor (h) did not preclude mitigating evidence]; *People v. Taylor* (2001) 26 Cal.4th 1155, 1179 [same]; *People v. Crew* (2003) 31 Cal.4th 822, 860 [same]; *People v. Hughes* (2002) 27 Cal.4th 287, 404 [same]; *People v. Cook* (2006) 39 Cal.4th 566, 617-618 [citing *People v. Griffin* without analysis as to factor (h)]; *People v. Boyette*

(2002) 29 Cal.4th 381[facial challenge to 190.3, "impaired" does not limit factor (h) to evidence establishing a full defense].) Appellant contends that as applied in this case, the instructions relating to factor (h) were neither specific, provable, nor commonly understandable.

This court has held that California sentencing factors do not have to perform a constitutionally required narrowing function (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 477), however such factors and instructions must focus the jury on "specific, provable, and commonly understandable facts." *(People v. Montiel* (1993) 5 Cal.4th 877, 946; *People v. Noguera* (1992) 4 Cal.4th 599.) Relying on *People v. Tuilaepa* (1992) 4 Cal.4th 569, 595, this court has further specified: "these factors must meet the dual standards of 'specificity' and of 'relevance.' They must be defined in terms sufficiently clear and specific that jurors can understand their meaning, and they must direct the sentencer to evidence relevant to and appropriate for the penalty determination." *(People v. Bacigalupo* (1993) 6 Cal.4th 457, 477.)

The factor (h) instruction contains two key terms which are potentially vague. The first is the phrase "mental disease or defect". The second is the concept of volitional capacity impairment conveyed by the phrase "capacity . . . to conform his conduct to the requirements of the law was impaired." The instruction also links the phrases by requiring that the latter be "the result of" the former. Taken as a whole, the instructions do not focus the jury on specific, provable and commonly understandable facts.

The phrase "as a result of mental disease or defect" is ambiguous and vague, especially in light of Dr. Dietz' testimony (discussed above in Argument IX). The phrase appears to be a term of medical art, hence one not "commonly understandable." Dr. Dietz testified that the term mental

disease referred only to conditions which "profoundly affect one's view of reality"- presumably meaning psychotic type disorders and described mental defect as referring to mental retardation. (38 RT 9847.) While it seems clear that the legal meaning of the phrase does not have a restricted, technical meaning, and is construed to include any mental disorder, condition, or abnormality without limitation (see Argument VI above), the jury instruction gives no guidance to the jury concerning the meaning of a mental disease or defect. A lay juror hearing the evidence in this case that the defendant was afflicted with a paraphilia, a personality disorder, and post-traumatic stress disorder, could well have found that none of these conditions constituted the "mental disease or defect" of the type described by Dr. Dietz and the instructions, hence the absence of a "mental disease or defect." Thus the phrase is not "specific"or "commonly understandable." While the phrase has been construed by this court, the jury was not informed of the clarifying construction.

The instruction further states that the "capacity . . . to conform his conduct to the requirements of the law was impaired . . . *as a result* of mental disease or defect." While this clause may be understandable and provable when the mental impairment at issue in the evidence is a psychotic disorder or severe mental retardation, the meaning of the phase is elusive outside those confines.

The testimony in this case aptly illustrates the problem. When a person "gives in" to an impulse, urge, craving or desire which is associated with a mental illness, and commits a crime, is the act of "giving in" or acting on the urge properly considered an act of free will, or is it properly considered an act evidencing an impaired capacity to control one's behavior? The answer to this question is neither provable nor commonly

understandable. What does the instruction mean by the *capacity* to conform his conduct to the requirements of the law? These questions are not new to the law, of course, since the volitional capacity test in factor (h) uses language borrowed from the short lived ALI insanity test. (*People v. Drew* (1978) 22 Cal.3d 333.) Although the volitional capacity prong of the criminal insanity test was removed by an initiative in 1982[21] courts still had to wrestle with the difficulty of conceptualization and application inherent in the test as it applied in the civil law context.

Thus in *Jacobs v. Fire Ins. Exchange* (1995) 36 Cal.App.4th 1258, the court undertook a review of the cases and authorities discussing the test in the context of whether it was relevant to the determination of a "wilful act" under civil law and cited many authorities to the effect that the standard was unworkable. The following passage from *Jacobs* provides ample support for the proposition that the impaired volitional capacity test - without further definition or elaboration - is neither "provable" or "commonly understandable," and is hence vague under the Eighth Amendment.

> "The inherent methodological difficulties with an irresistible impulse test, which were recognized in *People v. Hoin* [(1882) 62 Cal. 120, 123], continue in modern times. Thus, in 1983 the American Psychiatric Association issued its Statement on the Insanity Defense, stating in part: 'Many psychiatrists ... believe that psychiatric information relevant to determining whether a defendant understood the nature of his act, and whether he appreciated its wrongfulness, is more reliable and has a stronger scientific basis than, for example, does psychiatric information relevant to whether a defendant was able to control his behavior. The line between an irresistible impulse and an impulse not resisted is probably no

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See *People v. Skinner* (1985) 39 Cal.3d 765, 769.

sharper than that between twilight and dusk.... The concept of volition is the subject of some disagreement among psychiatrists. Many psychiatrists therefore believe that psychiatric testimony (particularly of a conclusory nature) about volition is more likely to produce confusion for jurors than is psychiatric testimony relevant to a defendant's appreciation or understanding...'

...

"However, in 1984 the federal Insanity Defense Reform Act was enacted, eliminating the volitional component from the federal test of insanity....The legislative history of the Insanity Defense Reform Act, reflecting the results of extensive congressional hearings, is illuminative. (Sen.Rep. No. 225, 98th Cong., 2d Sess., p. 222 (1983), reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3404-3413; see *United States v. Frisbee* (N.D.Cal. 1985) 623 F.Supp. 1217, 1220-1221.) It shows various authorities suggest there is no objective basis for distinguishing between defendants who are undeterrable and those who are merely undeterred, or between the impulse that was irresistible and the impulse not resisted:

'Conceptually, there is some appeal to a defense predicated on lack of power to avoid criminal conduct. If one conceives the major purpose of the insanity defense to be the exclusion of the nondeterrables from criminal responsibility, a control test seems designed to meet that objective. Furthermore, notions of retributive punishment seem particularly inappropriate with respect to one powerless to do otherwise than he did.

A st[r]ong criticism of the control test, however, is associated with a determinism which seems dominant in the thinking of many expert witnesses....'

'Such a view is consistent with a conclusion that all criminal conduct is evidence of lack of power to conform behavior to the requirements of law. The control tests and volitional standards thus acutely raise the problem of what is meant by lack of power to avoid conduct or to conform to the requirements of law which leads to the most fundamental objection to the control tests-their lack of determinate meaning.'

'Richard J. Bonnie, Professor of Law and Director of the

Institute of Law, Psychiatry and Public Policy at the University of Virginia, while accepting the moral predicate for a control test, explained the fundamental difficulty involved:

"Unfortunately, however, there is no scientific basis for measuring a person's capacity for self-control or for calibrating the impairment of such capacity. There is, in short, no objective basis for distinguishing between offenders who were undeterrable and those who were merely undeterred, between the impulse that was irresistible and the impulse not resisted, or between substantial impairment of capacity and some lesser impairment. Whatever the precise terms of the volitional test, the question is unanswerable-or can be answered only by 'moral guesses.' To ask it at all, in my opinion, invites fabricated claims, undermines equal administration of the penal law, and compromises its deterrent effect."

'Professor [David] Robinson [of George Washington University] states the same idea as follows:

"No test is available to distinguish between those who cannot and those who will not conform to legal requirements. The result is an invitation to semantic jousting, metaphysical speculation and intuitive moral judgments masked as factual determinations."

'Similarly, The Royal Commission on Capital Punishment stated:

"Most lawyers have consistently maintained that the concept of an 'irresistible' or 'uncontrollable' impulse is a dangerous one, since it is impracticable to distinguish between those impulses which are the product of mental disease and those which are the product of ordinary passion, or, where mental disease exists, between impulses that may be genuinely irresistible and those which are merely not resisted.'" (1984 U.S. Code Cong. & Admin. News at pp. 3408-3409, original italics, fns. omitted.)

"The federal legislative history also cites the American Psychiatric Association Statement on the Insanity Defense, that the 'line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk.' (1984 U.S. Code Cong. & Admin. News at p.

3410.)" (*Jacobs v. Fire Ins. Exchange* (1995) 36 Cal.App.4th 1258,1284-1287.)

The United States Supreme Court has stated in *Stringer v. Black* (1992) 503 U.S. 222, 235, that "if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which, as a practical matter, fail to guide the sentencer's discretion." The court further held in *Stringer :*

> "A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is, in a sense, worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. (Ibid.)

In *Espinosa v. Florida* (1992) 505 U.S. 1079, the Court, citing *Stringer*, gave a definition of vagueness in this context:

> "Our cases further establish that an aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." (*Id.*, at p. 1081.)

The instructions in this case failed to give "sufficient guidance" to whether the defendant had a full capacity to conform his behavior to the requirements of the law by controlling his sexually violent impulses. The experts cited in *Jacobs v. Fire Ins. Exchange supra*, 36 Cal.App.4th 1258, 1286, were correct: "there is, in short, no objective basis for distinguishing between offenders who were undeterrable and those who were merely undeterred, between the impulse that was irresistible and the impulse not resisted, or between substantial impairment of capacity and some lesser

impairment." (*Ibid.*) The instructions invited "caprice" (*Jones v. United States* (1999) 527 U.S. 373, 400) in the form of " semantic jousting" and "metaphysical speculation" (*Jacobs, supra*, at p. 1287.) Because the instructions added this improper element to the weighing process and no other instruction properly allowed the jury to consider evidence relevant to the factor in aggravation, reversal of the penalty is required. (*Brown v. Sanders, supra*, 546 U.S. 212, 220.)

XVIII

PREVIOUSLY ADJUDICATED CONSTITUTIONAL ISSUES

Appellant raises the following claims, which have been previously rejected by this court. The claims are presented in summary fashion pursuant to *People v. Schmeck* (2005) 37 Cal.4th 240, 303-305. In light of the evolving law and the absence of other adequate safeguards in the California death penalty law, the Court is requested to reconsider its rejection of each of the below listed claims, and reverse the penalty of death.

A. The death penalty law does not adequately narrow the class of death eligible defendants

This court has often rejected the claim that the California death penalty law violates the Eighth amendment because it fails to adequately narrow the pool of death eligible murderers. (*People v. Bennett* (2009) 45 Cal.4th 577, 630; *People v. Crittenden* (1994) 9 Cal.4th 83, 154-155.) Recently, this court explained its reasoning, adopting the analysis of Justice Kennard's concurring opinion in *People v. Jurado* (2006) 38 Cal.4th 72, 146. (*People v. Beames* (2007) 40 Cal.4th 907, 934.)

> "Because the special circumstances listed in section 190.2 apply only to a subclass of murderers, not to all murderers (*Tuilaepa v. California* (1994) 512 U.S. 967, 971-972), there is no merit to defendant's contention, based on a statistical analysis examining appeals from murder convictions, that our death penalty law is impermissibly broad." (*People v. Beames* (*supra*) 40 Cal.4th 907, 934, concurring opinion of Kennard.)

This court should reconsider its rejection of this claim because the constitution requires more than simply narrowing the pool of murderers by *any* degree. Instead, to survive constitutional challenge, the legislative narrowing factors must "genuinely narrow the class of persons eligible for the death penalty, and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 877.) The death eligible pool must be a "demonstrably smaller and more blameworthy" class of murderers. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363.) Death penalty statutes must "be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion." (*California v. Brown* (1987) 479 U.S. 538, citing *Gregg v. Georgia* (1976) 428 U.S. 153 and *Furman v. Georgia* (1972) 408 U.S. 238.)

Here, the appellant brought a motion raising the failure to narrow claim which included a statistical showing. (See Points and Authorities at 8 CT 1905-1915 and Declaration of Steven Shatz at 14 CT 3592- 3630.) It is conceded that some murderers are not death eligible under California law. However, the narrowing factors are too numerous and too broadly construed to "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." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 427.) Professor Shatz's

declaration notes that the special circumstances are present in 84 percent of first degree murders, thus they fail to significantly narrow the pool from a numerical standpoint. (CT 3608-3610.) Neither do the special circumstances rationally distinguish the death eligible pool morally. Of particular relevance here, the omission of a requirement of any intent to kill in the felony murder special circumstances is inconsistent with an adequate narrowing scheme.

The United States Supreme Court has recently reaffirmed the principle that the death penalty must be constitutionally reserved for the most blameworthy crimes. "Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose *extreme culpability* makes them the most deserving of execution." *(Kennedy v. Louisana, supra,* 128 S.Ct. 2641, 2650, internal quotes and citations omitted, emphasis added; see also *Atkins v. Virginia* (2002) 536 U.S. 304, and *Roper v. Simmons* (2005) 543 U.S. 551.)

This Court should therefore find that the special circumstances are 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 U.S. Constitution and prevailing international law and treaties.

B. The jury was not instructed that they may impose a sentence of death only if they are persuaded beyond a reasonable doubt that the aggravating factors exist and outweigh the mitigating factors and that death is the appropriate penalty

Notwithstanding the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Ring v. Arizona* (2002) 536 U.S. 584; *Blakely v. Washington* (2004) 542 U.S. 296; and *Cunningham v. California*

(2007) 549 U.S. 270, this court continues to hold that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." *(People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; *People v. Mendoza* (2007) 42 Cal.4th 686, 707; *People v. Hawthorne* (2009) 46 Cal.4th 67, 104.) The absence of such requirements in combination with the other features of the California death penalty law violates these constitutional requirements.

C. The jury was not required to make any written findings regarding the presence of aggravating factors, in violation of the Sixth, Eighth and Fourteenth Amendments

This court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Such findings are otherwise considered by this court to be an element of Due Process so fundamental that they are even required at parole suitability hearings. Defendants sentenced under the determinate sentence law have greater protections in this regard than capital defendants, in violation of the Equal Protection Clause. However, this court has ruled to the contrary in *People v. Kelly* (2007) 42 Cal.4th 763, 801.

D. Section 190.3, factor (a) is unconstitutionally overbroad, arbitrary, capricious, and vague as construed and applied

This court has rejected repeated claims that the construction and use of the section 190.3, factor (a), circumstances of the crime, leads to the capricious, arbitrary, and inconsistent imposition of the death penalty in

violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*People v. Kelly, supra*, 42 Cal.4th at p. 800; *People v. Jenkins* (2000) 22 Cal.4th 900, 1050-1053.)

E. Intercase proportionality review is required to prevent the arbitrary and capricious imposition of the penalty given other aspects of the California system

In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." This court has rejected the claim that California's system requires such review. (*People v. Marshall* (1990) 50 Cal.3d 907, 946-947; *People v. Combs* (2004) 34 Cal.4th 821, 868; *People v. Griffin* (2004) 33 Cal.4th 536, 596.)

F. Unadjudicated criminal activity was admitted without constitutional protections

Use of unadjudicated criminal activity by the jury as an aggravating circumstance under 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; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the jury heard evidence that Krebs had shot a man in Santa Barbara over a drug deal. There was no instruction that the jury had to be unanimous with regard to finding that

Krebs had engaged in such conduct. This court has rejected this claim in *People v. Box* (2000) 23 Cal.4th 1153, 1217, and *People v. Avila* (2009) 46 Cal.4th 680, 724.

G. The failure to instruct that certain statutory mitigating factors could not be used in aggravation violated the Eighth Amendment

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.) The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an affirmative answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death. (*People v. Morrison* (2004) 34 Cal.4th 698, 730; *People v. Avila* (2009) 46 Cal.4th 680,724.)

H. California death penalty law gives excessive discretion to prosecutors, allowing irrelevant and invidious factors to influence the death eligible pool of murderers

California's 58 counties have elected district attorneys who have unfettered discretion to seek the death penalty. The only restriction is that they must be able to prove any special circumstance, which as noted above, include the majority of murders. This court has rejected the argument that this system allows invidious and arbitrary factors to unconstitutionally affect California's death penalty scheme. (*People v. Maury* (2003) 30 Cal.4th 342, 438.) However, irrelevant and invidious factors such as the prominence of the victim, pressure from victims' families, the availability of county funds, the notoriety of the offense or offender, the reaction of the public, and the future electability of the district attorney, all combine with the lack of any statewide standards controlling the exercise of prosecutorial discretion to create a constitutionally unacceptable, arbitrary, and capricious scheme in violation of the Eighth Amendment and Due Process Clause of the United States Constitution and international law.

I. Death qualification and peremptory challenges of the jury under California law results in a jury biased towards guilt and death, and which is not a true cross section of the community

This court has sanctioned a number of practices which have the potential to deprive a defendant facing the death penalty of a fair and impartial jury which represents a fair cross section of the community in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. Death qualification of guilt phase jurors has been sanctioned even if it results in a more guilt prone jury. *(People v. Jackson* (1996) 13 Cal.4th 1164,

1198-1199.) Peremptory challenges by prosecutors can be lawfully used to eliminate any juror who would lean towards a life sentence in any particular case. (*People v. Pinholster* (1992) 1 Cal.4th 865, 912.) A motion to prohibit such peremptory challenges was brought and overruled. (10 CT 2478, 4 RT 1466-1480.) Trial judges are given wide discretion to disqualify a juror for cause if a juror's answers are "ambiguous" and this court reviews the excusal for cause of pro-life jurors with great deference. (*People v. Riggs* (2008) 44 Cal.4th 248, 282.)

It is an anomaly that prosecutors may openly cull the jury of all those who lean away from the death penalty and even dismiss those who would believe strongly in such fundamental principles as the presumption of innocence. Justice Breyer's concurring opinion in *Miller-El v. Dretke* (2005) 545 U.S. 231, 266, provides new impetus to re-examine these accepted practices. Appellant asserts that these approved practices violate the Fifth, Sixth, Eighth, and Fourteenth Amendments and international law and prejudiced him in this case.

J. Victim impact evidence promotes arbitrary death verdicts in violation of the Eighth Amendment

This court, as noted in *People v. Carrington* (2009) 47 Cal.4th 145, 197, has previously rejected arguments that victim-impact evidence must be confined to what is provided by a single witness (*People v. Zamudio* (2008) 43 Cal.4th 327, 364), that victim-impact witnesses must have witnessed the crime (*People v. Brown* (2004) 33 Cal.4th 382, 398), and that such evidence is limited to matters within the defendant's knowledge (*People v. Pollock* (2004) 32 Cal.4th 1153, 1183). This court has also concluded that construing section 190.3, factor (a) to include victim-impact evidence does

not render the statute unconstitutionally vague or overbroad. (*People v. Pollock, supra*, 32 Cal.4th at p. 1183.)

While some form of victim impact consideration may be appropriate in certain limited contexts, the unrestricted and non-statutory use of victim impact evidence promotes arbitrary comparisons of the value of life, and violates the Fifth, Sixth, Eighth, and Fourteenth Amendments and international law.

K. California death penalty law violates the International Covenant on Civil and Political Rights and prevailing civilized norms

Clearly, the use of the death penalty in ordinary criminal cases such as this one has been almost universally outlawed in western civilization. These prevailing international norms are persuasive, but do not have the force of law. However, the International Covenant on Civil and Political Rights (hereafter "Covenant") which the United States ratified in 1992, does.

The Constitution and "all treaties made" are the "supreme" law of the land. (U.S. Constitution, Art. IV, sec. 2.) Treaties, as the supreme law of the land, may be given effect without enabling legislation. (*Asakura v. Seattle* (1924) 265 U.S. 332.)

The International Covenant on Civil and Political Rights (hereafter "Covenant") was adopted by th United Nations General Assembly on December 16, 1966. The senate consented to the ratification on April 2, 1992, and on June 8, 1992, the United States ratified the treaty, effective September 8, 1992. The Covenant grants the citizens of signatory states several rights. Under Article 2, paragraph 1, each state ensures to all individuals within its jurisdiction all of the rights recognized in the

Covenant. Under Article 2, paragraph 2, each state must take necessary steps to give effect to the rights recognized in the covenant. Article 2, Paragraph 3 guarantees that the rights and freedoms recognized in the Covenant shall have an effective remedy, even if the violation has been committed by persons acting in an official capacity, and that any person claiming such a remedy shall have his right thereto determined by competent authorities.

Article 6, paragraph 1, provides that all human beings have the inherent right to life, and that no one shall be arbitrarily deprived of his life. Article 6, paragraph 2 provides that a sentence of death may be imposed "only for the most serious of crimes" and "not contrary to the provisions of the present covenant." Article 7 prohibits cruel, inhuman or degrading punishment. Article 14 provides for a "fair and public hearing" by a "competent, independent, and impartial tribunal" of all criminal charges.

The Covenant thus provides an independent source of rights capable of being raised as a legal defense to the imposition of the death penalty. Similar to the Fifth, Sixth, Eighth and Fourteenth Amendments, the Covenant protects against arbitrary or unfair sentences of death due to overbroad qualifying crimes, unrestrained prosecutorial discretion; voir dire procedures and review standards which result in a unfair pro-death jury; elected judges required to make pro-death decisions to be elected; introduction of victim impact evidence; and each of the other aspects of the California death penalty law which contribute to the arbitrary and capricious imposition of the death penalty.

Appellant brought a motion to strike the special circumstances based on violation of the Covenant and the Eighth Amendment. (See Memorandum of Authority at 8 CT 1859-1928; Reply Brief at 11 CT 2751.)

A motion based in part on the Covenant was also brought for disclosure by the court of promises and statements made in connection with the appointment and campaign process concerning the imposition of the death penalty. (10 CT 2478.) The motion was denied. (4 RT 1461.)

This court has repeatedly denied any claim based upon the Covenant. (*People v. Carrington* (2009) 47 Cal.4th 145, 198-199; *People v. Hawthorne* (2009) 46 Cal.4th 67,105; *People v. Butler* (2009) 46 Cal.4th 847, 885.) The court is invited to reconsider its position in light of the continuing evolution of our concepts of justice and decency.

L. The broken system of death penalty adjudication in California which causes excessive pre-execution delay and where actual execution is a rare occurrence despite numerous death sentences, violates the Eighth Amendment

A prolonged wait for execution is itself cruel treatment precluding subsequent execution under the Eighth Amendment and international law. However, this court has repeatedly held that "the delay inherent in the automatic appeal process 'is not a basis for finding that either the death penalty itself or the process leading to it is cruel and unusual punishment'". (*People v. Bennett* (2009) 45 Cal.4th 577, 630; see also *People v. Frye* (1998) 18 Cal.4th 894, 1030-1031, and *People v. Ochoa* (2001) 26 Cal.4th 398, 463.) A factor which suggests the court should revisit the issue is the fact that California has for years sentenced far more persons to death than it executes. California has executed only 13 persons since 1978. (California Department of Corrections and Rehabilitation http://www.cdcr.ca.gov/reports_research/Inmates _Executed.html.) However California has sentenced over 820 persons to death since 1978.

(California Commission on the Fair Administration of Justice, Report and Recommendations on the Administration of the Death Penalty in California, page 20, http://www.ccfaj.org/rr-dp- official.html). With over 680 persons on California's death row, the actual imposition of the death penalty by California is now certainly nothing other than "freakish" and arbitrary. The recognition by responsible commentators that the system is broken or "deadlocked" is an additional reason to revisit the issue. (Arthur L. Alarcon, Remedies for California's Death Row Deadlock, 80 U.S.C.L. Rev. 697 (2007).)

CERTIFICATE OF WORD COUNT

I certify that the foregoing brief, exclusive of tables, consists of 78,858 words, as reflected in the word count feature of the Word Perfect program.

Respectfully Submitted,

Neil B. Quinn
Attorney for Appellant Rex Allan Krebs

DECLARATION OF SERVICE

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

I am over the age of 18 years and not a party to the within action or proceeding. I am counsel for the defendant. My business address is 323 East Matilija, # 110-199, Ojai California.

On the date indicated below, I served and filed the document named below pertaining to the above entitled action by depositing the sealed envelopes with the United States Postal Service with postage fully prepaid.

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Supreme Court of California
Clerk of the Court, Automatic Appeals
350 Mc Allister St., First Floor
San Francisco, CA, 94102

Attorney General of California
Attn: Keith Borjon, Deputy Attorney General
300 S. Spring Street, Suite 500
Los Angeles, CA 90013

District Attorney of San Luis Obispo
Attn: Timothy S. Covello
1055 Monterey Street, Room 450
San Luis Obispo, CA 93408

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Rex A. Krebs
D-69844 3EB-64
C.S.P. San Quentin
San Quentin, CA 94974

Clerk of the Superior Court of
San Luis Obispo
attn. Hon. Barry T. LaBarbera
1050 Monterey Street, Rm. 220
San Luis Obispo, CA 93408

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

Date: May 28, 2010 By _____
Neil B. Quinn