IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. HUBER JOEL MENDOZA, Defendant and Appellant.	Calif. Supreme Court No. S143743 Stanislaus Co. Super. Ct. No. 1034046 Automatic Appeal

APPELLANT' S OPENING BRIEF

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Supreme Court

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v.	)	
HUBER JOEL MENDOZA,	)	Automatic Appeal
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APPELLANT'S OPENING BRIEF

INTRODUCTION

Appellant was unable to rationally communicate with or assist his attorneys in his defense at any stage of the case. Defense counsel repeatedly stated to the court their numerous difficulties. A jury trial was held within a year of his arrest and appellant was found competent. Appellant maintains that that the evidence was constitutionally insufficient to support the jury verdict.

Defense counsel continued to urge the court to reconsider appellant's competency to stand trial, prior to, during and after the jury trial on the guilt, sanity and penalty phases of the trial. Despite the changed circumstances, including a mid-trial breakdown by appellant leading to his absence from the courtroom during testimony, and a new report by a

psychological expert, the trial court refused to reconsider the question. Consequently, appellant's convictions and sentence of death must be reversed as a violation of his federal due process rights.

STATEMENT OF THE CASE

Information Number 1034046 was filed in Stanislaus County Superior Court on January 23, 2003, charging appellant in counts one, two, and three, respectively, with the murders of Alicia Martinez, Carlos Lopez, and Camarino Chavez, in violation of Penal Code[1] section 187; in count four with shooting at an occupied building in violation of section 246; and in count five with armed assault on Guadalupe Martinez in violation of section 245, subdivision (a)(2). A multiple murder special circumstance[2] allegation was attached to counts one, two, and three, pursuant to sections 190.2, subdivision (a)(3). Firearm enhancements were also attached to counts one through four pursuant to sections 12022.7, 12022.53(a)(b)(c)(d) and 12022.5(a)(1), and a great bodily injury enhancement was attached to count five pursuant to section 12022.7(a). (1CT 63-68.)

On November 12, 2003, defense counsel declared a doubt as to appellant's competency and requested the proceedings be suspended under section 1368. (1CT 118-19.) After two experts found appellant

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1 All further statutory citations are to the California Penal Code unless specifically stated otherwise.

2 A burglary felony murder special circumstance alleged in the information was later struck. (5RT 875-1.)

incompetent and one found him competent, the matter was set for trial. Jury trial began on December 8, 2004, and on December 15, 2004, the jury found appellant competent to stand trial. (1CT 195; 1CT 242.) On February 24, 2005, the trial court denied the defense motion for judgment notwithstanding the verdict, and refused to reinstate proceedings under section 1368. (1CT 267.)

On June 1, 2005, appellant entered a plea of not guilty by reason of insanity. (2CT 526-27.)[3]

Jury selection began on October 21, 2005. On November 1, defense counsel reiterated a doubt as to appellant's competency, which was rejected by the trial court. Testimony began that same day. (3CT 796-97.) On November 9, 2005, the jury found appellant guilty as charged and returned a true finding on the multiple murder special circumstance allegation. (3CT 804.)

On November 15, 2005, the sanity phase of the trial began and on November 30, 2005, the jury returned a verdict of sane. (4CT 890, 918.)

The penalty phase of the trial began on December 6, 2005, and on December 16, 2005, the jury returned a verdict of death. (4CT 959, 1030.) Appellant's motion for new trial was denied. (4CT 1037; 16RT 3428.) On April 25, 2005, the court denied the defense motion for reconsideration

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[3] In accordance with this plea, two doctors were appointed pursuant to sections 1026-1027. (2CT 527-28; 537; 562; 3CT 623. 632.)

and/or modification of the verdict, and sentenced appellant to death. (4CT 1084, 1095; 5CT 1382-83.)

GUILT PHASE STATEMENT OF FACTS

A. Evidence Elicited by the Prosecution.

1. Percipient witnesses.

Appellant's estranged wife **Cindi Martinez**[4] testified that appellant called her in the early morning hours of December 12, 2001 and said he had just killed her whole family; he told their oldest son Huber he was coming to their apartment. When Cindi's call to her mother went unanswered, she called 911 and reported appellant's conversation (10RT 1886, 1890, 1896-97; 4CT 1098a-d [transcript of 911 tape].)

Cindi testified that she and appellant had not been intimate for some time and had had separate bedrooms for a year. She moved into her own apartment in November of 2001, a month before the shootings, when she started a sexual relationship with Caramino Chavez, a family friend who lived at her parents' house. (10RT 1900-04.) Cindi was the primary wage earner and paid appellant $20 a day to cook, clean and watch the children; he paid for half the rent on their house. (10RT 1910, 1918-19.) The tragic

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[4] For clarity and ease of reference, and with no disrespect, appellant calls the witnesses surnamed Martinez by their first names.

shooting was totally unexpected. Appellant had never threatened or hit her and didn't use drugs or alcohol.[5] (10RT 1922.)

Cindi's younger sister **Guadalupe Martinez**, their mother and father Alicia and Jose Luis Martinez, their cousin Carlos Lopez, and family friend and Cindi's new lover Camarino Chavez, all lived in the Martinez home. (9RT 1660.) Guadalupe awoke to screams and gunshots sometime after 10:00 p.m. that night. She heard footsteps going past her bedroom, and heard appellant tell Chavez that he had messed with the wrong guy, and that he shouldn't have messed with a married woman. (9RT 1661-64.) After that Guadalupe heard more gunshots. She realized (after the fact) that she had been shot in the arm from a bullet that went through the wall of her room and screamed for her mother. Appellant called her name and asked if she was injured. He tried to convince her (in a normal tone of voice) to open the door but she was afraid. Appellant pushed the door open and asked where her parents were. Guadalupe said she didn't know. When appellant walked towards her parent's bedroom, she followed. (9R 1665-67.) Appellant tried to convince Mrs. Martinez to come out. When appellant promised not to hurt Mrs. Martinez, Guadalupe asked her mother to come out. Appellant pushed open the door and pushed Guadalupe into

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[5] Cindi was impeached with her prior statement to her mother about getting into a fight with appellant in which they pushed each other and he got her "like this" [demonstrating] across her throat. (10RT 1924-26.)

the hall to the living room. She heard her mother crying and telling appellant not to hurt her little girl. Appellant asked Mrs. Martinez how she could have allowed Cindi to see another man while she was married to him. Mrs. Martinez said she did not approve of Cindi's relationship and said she loved appellant. Appellant shot Mrs. Martinez and then looked for Mr. Martinez (who was outside). (9RT 1668-72.)

Guadalupe asked appellant to take her to the hospital. He offered to call an ambulance but when the call didn't go through he said he would take her. (9RT 1673-74.) Guadalupe and appellant left the house in appellant's van. Appellant was wearing a camouflage helmet, black boots and a vest,[6] and was carrying a gun that he put in the back of the van. He called Cindi, said he had killed her family and that she was next, then hung up. (9RT 1675-76.)

Guadalupe described appellant as seeming crazy and not like the person she had known her whole life. He was usually quiet and spent all his time with his children. (9RT 1680-82, 1686-87.) By the time they were in the van, appellant seemed "to kind of come back a little bit." He started crying and repeatedly apologized. (9RT 1687-88.) He also called his brother, said he had committed a terrible crime, and would leave the brother

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[6] The vest was bullet-resistant and similar to those used by the police. Another vest found in appellant's van was not rated to protect against handguns. (11RT 1998-99.)

$11,000 wrapped in a diaper.[7] They drove by his brother's house where appellant threw the money out the window, then drove to the hospital where Guadalupe underwent surgery on her arm.[8] (9RT 1677-79.)

Appellant approached hospital security guard **Eustaquio Martin Ramos** and said he wanted to turn himself in for having shot his mother-in-law. He tried to hand Ramos a pair of handcuffs. Ramos used his own pair of handcuffs on appellant. Appellant said his gun was in the van.[9] (10RT 1744-49.)

Jose Luis Martinez awoke at 2:50 a.m. to gunshots and shouting from Lopez. He and Mrs. Martinez went outside but when Guadalupe called her mother, Mrs. Martinez shoved Mr. Martinez down and went into the house. (10RT 1704-05.) When it was quiet, Mr. Martinez went inside

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[7] This money was the proceeds from property appellant had sold in Mexico and was kept in a box (the unused refrigerator) at appellant's home because appellant did not trust banks, the government, or his own mother. (10RT 1902-03, 1920-21.)

[8] **Dr. Donn Fassero** performed emergency surgery on Guadalupe's arm. Her bone was shattered with considerable muscle damage. A second surgery was performed to put a stabilizing plate on the bone. (10RT 1871-79; 9RT 1679.)

[9] It was stipulated that appellant's and the victims' blood tested negative for alcohol and controlled substances. The bloodstains on appellant's clothing were from his own blood: appellant had an abrasion on his right thumb when taken into custody at the hospital. (10RT 1950-51; 11RT 1994-95.)

and saw, Lopez and Chavez all dead.[10] He asked his neighbors to call the police. (10RT 1705-06.)[11]

2. Police officer testimony.

Detective Henry Dodge Hendee supervised the crime scene video that was played for the jury.[12] (10RT 1752, 1765; Exh. 1.) Mrs. Martinez' body was on the floor in living room; Carlos Lopez' body was on the kitchen floor; and Camarino Chavez' body was on the bedroom floor. (10RT 1763, 1768, 1773.)

A total of 72 casings and one unexpended cartridge were found at the scene, outside the front window, in the living room, hallway and in Chavez' bedroom. None were found in Guadalupe's bedroom.[13] (10RT

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[10] **Dr. Jennifer Rulon** conducted autopsies on all three victims. Alicia Martinez died from two gunshot wounds to the head. Carlos Lopez died of four gunshot wounds, two to the head, and two to the chest. Camarino Chavez was shot 12 times and died of multiple wounds to the head and chest. (11RT 2067, 2072-74, 2078, 2097.)

[11] Jose had three guns in a locked closet. (10RT 1706-08.) When he returned to the house, his pump action gun was leaning against door frame and the closet door was smashed and bullet-riddled. (10RT 1712-13.)

[12] Officer **Scott Muir** entered the house as part of a SWAT team. The front door was open and the front room window was broken out. Muir found three bodies in the house. (9RT 1653-59.)

[13] Twenty-nine rifle casings were found (15 outside, 11 in the living room, and three in the hallway); twenty-five 9 mm. casings were found (four in the kitchen, 13 in the hallway, seven in Chavez' bedroom, and one in the hallway bathroom; eighteen .45 caliber casings were found (one in the living room, seven in the hallway, two in Chavez' bedroom and eight in the master bedroom). (10RT 1819-21.)

1819-21.) Bullet fragments were found in the hall and laundry room, living room and backyard, and four complete bullets were found in the kitchen. (10RT 1770-72.)

An SKS 45 7.62 caliber assault rifle, a Ruger 9 mm. semiautomatic handgun, and an empty .45 caliber magazine for a Colt .45 handgun were found in the living room. (10RT 1757-65.) The guns had all been emptied of ammunition. (10RT 1811.) The Colt .45 was found in appellant's van, along with a military style vest, a flashlight, rope, handcuffs, gas mask, duct tape, a sledge hammer, and 13 family photos some of which were framed. (10RT 1841-55.)

Detectives Philip Owen and **Steven Jacobson** searched appellant's residence, a house described by Jacobson as extremely messy ("a disaster"). (11RT 2105-08.) Owen testified that 14 boxes of ammunition of various calibers were found in a refrigerator in the bedroom closet that was used as a safe. Sales receipts from authorized gun dealers dated 1994-95 were found for the three guns found at the scene and in appellant's van, along with some holsters and a gun case. (10RT 1725-34, 1737.) No firearms were found in the search of appellant's house. (11RT 2108.)

Criminalist **James Hamiel** testified as a firearms and ammunition expert. (10RT 1929-31.) The expended casings found at the scene had been fired from the guns recovered at the scene and in appellant's van.

(10RT 1035-41.) Each of the three guns was a semi-automatic and each had an average trigger pull. (10RT 1039-40, 1942.) **Detective Jon Buehler** testified that the .45 Colt had an "extended" magazine holding 15 rounds. (11RT 2001-03.)

B. Evidence Presented by the Defense.

Tuolumne Elementary School principal **Nancy Jones** first met with appellant at the school around December 10, 2002, when she heard him talking to the secretarial staff. Appellant seemed distraught and said that he didn't want to leave Angel in school as children become corrupt sometimes as they get older. He was crying and said that his son Angel would be better at home.[14] (11RT 1974-77.) The interaction was extremely unusually but Jones agreed the boy should go home with appellant; she then arranged a family intervention at appellant's home. (11RT 1978-79.)

Jones' intention at the meeting was to get help in getting the children to school every day. However, appellant always took the discussion in other directions and appellant was very upset; his sons were very loving and very attached to him. Jones was concerned that appellant was suicidal and thought there was "some strange stuff going on" with him. He seemed depressed and possibly angry. Appellant told her the world was evil and

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[14] Angel would also cry non-stop at school until he was taken home although the other two boys behaved well, and all three boys were well-groomed. (11RT 1980-81.)

that he didn't trust the government. He said he didn't want to leave his sons at school; while young they were angels, but when they grow up they become corrupt. (11RT 1182-92.)

Deputy Jaime Jimenez (working as a school resource deputy at the elementary school) also had a conversation with appellant around that time about appellant's wife separating from him. Jimenez offered to direct appellant to a support group. Appellant agreed to talk with Jimenez and school principal Nancy Jones at his (appellant's) home. (11RT 1951-58.) Appellant's wife and their three sons were also present. Jimenez's concern was the boy Angel's attendance at school. However, the discussion turned to appellant's concern with his sons knowing about his wife's new boyfriend. For some 30 to 45 minutes, appellant was emotional and crying; the children were clinging and hanging on to appellant who was hugging them back. (11RT 1961-65.)

Jones and Jimenez were both concerned that appellant might be suicidal; when asked appellant said he had felt like committing suicide since he was 24 years old. (11RT 1963-65.) When Jimenez offered to find an outside agency or support group for divorced fathers, appellant was receptive. Shortly after the meeting ended, appellant phoned Jimenez for the information. Jimenez said he would work on it and get back to him, but never did. (11RT 1965-67.) It was difficult to keep appellant focused on his son's school attendance record; he talked randomly about his marital

problems, the government, his distrust of agencies, etc. Appellant agreed the boys should leave with Cindi. (11RT 1970-72.)

SANITY PHASE STATEMENT OF FACTS

A. Evidence Presented by the Defense.

Dr. Pablo Stewart performed a psychiatric evaluation of appellant in the summer of 2003 to determine if he suffered a mental disease or defect at the time of the incident and if so, whether it contributed to his behavior. Dr. Stewart's opinion was that appellant suffered from a long-standing mood disorder with psychotic features (consistent with a major depressive disorder with psychotic features) which was chronic and persistent. (12RT 2241-42.) Psychosis, or a loss of contact with reality, is a symptom of mental illness rather than an illness itself.[15] (12RT 2258.)

Based on facts elicited in interviews with appellant, his wife,[16] and his family in Mexico, Dr. Stewart concluded that appellant met the criteria for this diagnosis as set forth in the DSM-IV [Diagnostic and Statistical

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[15] Dr. Stewart defined delusional thinking as thoughts not based in reality, and over-elaborated religious ideation is an example of a psychotic symptom, though not all religious experience is psychotic.) (12RT 2259-60.)

[16] Appellant's wife had tried repeatedly to get appellant to treatment, however appellant never believed anything was wrong with him, which is common among the mentally ill: the illness impairs the patient's ability to appreciate that he is sick. (12RT 2261.)

Manual of Mental Disorders, 4th edition],[17] i.e., he was depressed and irritable, manifested marked diminished interest, fluctuations in weight, fatigue and sleeping difficulties, feelings of guilt or worthlessness, and a diminished ability to concentrate. Appellant's symptoms included emotional tearfulness, obsessive rumination, anxiety and phobias, sexual dysfunction, and work and marital problems. Appellant had been suicidal since the age of 24 and because of his mental illness, he had become unable to work or care for himself. (12RT 2243-52.)

Appellant's condition was genetically induced and biologically mediated, i.e., an illness of the brain most likely caused by a deregulation of neurotransmitters (chemicals that make connections in the brain). (12RT 2249-52.) Although appellant's disease had a "chemical biological basis" the only way to diagnose it was through a clinical examination such as that conducted by Dr. Stewart – no blood or X-ray test is available. (12RT 2253.)

Appellant had not been medicated prior to his arrest. While in custody, he was twice medicated, but stopped taking the medications both times, which is common among mentally ill patients. (12RT 2254-56.) In clinical interviews, appellant presented with poor hygiene and depressive speech; he was sad and tearful; his thinking was exceeding psychotic,

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[17] Wikipedia, the online encyclopedia, defines the DSM-IV as a manual published by the American Psychiatric Association that includes all currently recognized mental health disorders.

paranoid, disorganized and obsessive. He was stuck on the theme about people out to corrupt children and the need to protect children. For example, if asked what he had for breakfast, or about the shooting, appellant would respond with paranoid remarks about corrupting children. (12RT 2265-70.)

Appellant was unable to appreciate the wrongfulness of his actions at the time of the shooting because he was suffering from the delusion of the need to protect children. The morning of the incident, appellant's children had been taken from him after the meeting with the school principal, so his worst delusion-based fears had been realized. According to his delusional thinking he prepared himself for a "holy battle" to make sure his children were not taken over to the dark side. In appellant's delusional mind, his action felt justified. For example, when Jones and Jimenez visited appellant's house it was tidy, but in the post-shooting police search the house was trashed. It appeared that during that time, appellant was so agitated he tore the whole place up; this action and his reported inability to sleep were consistent with his mental illness. (12RT 2271-75.)

Dr. Stewart testified that appellant's shouting at Chavez and Mrs. Martinez (as per Guadalupe's testimony) was consistent with fact that appellant went to the house to end the corrupting influence on his children. (12RT 2276-77.) Cindi had told appellant about her liaison with Chavez some time before: but it was only when appellant's oldest son reported

Cindi and Chavez hugging in front of the children that the theme of corruption started building in appellant's mind in terms of taking purposeful acts. Appellant was aware of what he was doing in that he made plans and got weapons. However, the reason he acted was based on a delusional idea of preventing his children's corruption. Appellant did not know right from wrong in any moral sense at that time. (12RT 2277-79.)

While the shooting of Chavez was a classic example of overkill implying the presence of a severe psychotic illness, appellant did not kill Guadalupe because in his eyes she was still a child and not a corrupter. (12RT 2280, 2286.) Appellant's statement to Chavez that he was "messing with the wrong man" was consistent with appellant's delusion, not inconsistent, as when he told Mrs. Martinez that she should not have allowed Cindi's affair with Chavez to occur in her house -- because in appellant's delusion that corrupted his children. (12RT 2308-09.)[18]
In the absence of his mental illness, appellant would not have acted under a belief that he needed to kill to protect his children. Appellant had no history of bad behavior. (12RT 2291.) Appellant was aware of the nature and quality of his act, i.e., he understood he was killing, but he was unable

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[18] Appellant's brother Javier Mendoza told the police that appellant suffered auditory hallucinations and that this continued in a recent phone call with his sister, and this is consistent with a major depressive disorder with psychotic features. (12RT 2288-89.)

to distinguish right from wrong because of his mental illness.[19] (12RT 2292-93.)

Dr. Wendy Weiss, a clinical and forensic psychologist, was hired by the court to evaluate appellant. (12RT 2365, 2370.) Dr. Weiss reviewed police reports and videotapes of the police interview with appellant and interviewed appellant in jail for two hours on July 19, 2005. She diagnosed appellant as suffering from depression with emerging psychotic features, disorganized thinking and paranoia at the time of the crimes. (12RT 2370-73.) His delusional and distorted thinking led him to feel justified in his behavior when he killed, under the belief that he was trying to take his children out of harm's way. He knew that this was wrong, but believed it was what he had to do to protect his children. (12RT 2384-87.) Appellant felt justified in his actions because he believed his children were being harmed or damaged. (12RT 2293.)

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[19] On cross-examination, Dr. Stewart testified that appellant understood that he was killing, but not that it was wrong. (12RT 2310-14.) The prosecutor referred to appellant's statement that the government could give him money, and the nurse's notes stating that appellant denied suicide ideation; and denied hallucination when he talked to Dr. Zimmerman. (12RT 2338-41.) The prosecutor also asked about appellant's phone call after the verdict in which he said he wasn't crazy and it was games by the attorneys. Dr. Stewart testified this was part of appellant's mental illness. (12RT 2338-41.) On redirect, Dr. Stewart pointed out that appellant said defense counsel was part of the prosecuting team that wanted to hurt his kids, i.e., an example of his delusional thinking. (12RT 2345.)

Dr. Weiss testified that although appellant's thinking was distorted, he did understand that his actions were wrong. (12RT 2395-96.) However, in her report, Dr. Weiss stated that there was insufficient data to indicate whether, as a result of a mental disease, appellant was incapable of understanding the nature and quality of his actions. (12RT 2396-97.) Dr. Weiss believed that although appellant had some elements of thought disorder and depressive disorder at the time of the killings, his mental state had deteriorated since that time as a result of the traumatic event.[20] (12RT 2411.)

Dr. Robin Schaeffer, a clinical psychologist on the staff at the Doctors Medical Center and on the faculty at U.C. Davis School of Medicine, conducted sanity and competency evaluations for the court in his

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[20] On redirect examination, Dr. Weiss stated her opinion that appellant was suffering from depression at the time of the crime and was "becoming psychotic" and operating under some delusional thought process." (12RT 2429.) She agreed that according to the December 18 progress note, appellant was locked into ideation about defending children and had "no choice but to kill." (12RT 2435.) Dr. Weiss relied on appellant's statement in the police interview (that he had a bullet resistant vest because he didn't want to kill himself, but if he did he would take people with him) as indicating that appellant went to the Martinez house with the idea that something bad was going to happen. (12RT 2420.) Giving his brother the cash after the shootings also showed that appellant understood right from wrong, i.e., that there would be serious consequences from his behavior. (12RT 2424.) Dr. Weiss was unaware of auditory hallucinations or the report about him on December 15, 2001 talking to people not visible to others. She thought that this information, which she did not have when she reached her conclusions, was more relevant to the psychotic components of appellant's major depressive disorder and not his belief in wrong or right at time of offense. (12RT 2431-33.)

private practice. In 2002, he was asked by the defense to examine appellant. (12RT 2444-50.) In addition to reviewing police reports and appellant's police interview, Dr. Schaeffer met with appellant on 26 occasions for a total of 30 hours starting in the summer of 2002 and ending a month before his testimony. (12RT 2450-51.)

Dr. Schaeffer diagnosed appellant as suffering from major depression with psychotic features at the time of the offenses, given that there was "an overwhelming abundance of evidence" that appellant met the criteria for that disease as outlined in the DSM-IV, including that appellant experienced guilt and worthlessness, depressed mood, diminished interest and pleasure, eating and sleeping disturbances, suicidal ideation, with a prominent thought disorder and paranoid delusions. (12RT 2452-56.) Appellant also met the criteria for psychotic features although he was not schizophrenic. (12RT 2456-58.) Severe depression sometimes results in psychosis because the chemical imbalance is so severe that it affects not only the patient's mood but also the chemicals that allow one to function in the realm of thought. (12RT 2459.) Appellant's psychotic delusion that his children were being adversely affected by their circumstances translated for appellant into a conviction that his children were being killed or destroyed. (12RT 2462.)

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Dr. Schaeffer concluded that appellant was capable of knowing and understanding the nature and quality of his acts.[21] However, as a result of his psychotic brain disease, appellant was incapable of distinguishing right from wrong as to the acts of the offenses. (12RT 2463.)

Appellant's mental disorder took place over five to six years during which time he became increasingly depressed and delusional and suspicious. He quit his job; he projected his fears onto his children and was overprotective to the extent he didn't want his smallest son to go to school; he became increasingly suicidal; and viewed everything, but especially his wife's affair, as a corrupting influence on his children. This culminated in his worst fears of losing his children being confirmed when his son reported that he saw his mother hugging and kissing Chavez – an act viewed by appellant as a gross immorality. (12RT 2464-70.) There was a breakdown in the ego boundaries between himself and his children. Appellant's references to his children and then "all the kids of the world and for all people" was an example of the psychotic loosening of boundaries: appellant felt a need to defend all the children in the world, and believed that his children were being destroyed and would be destroyed – that is killed – if

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[21] Appellant stated in the interview that he would face LWOP or the death penalty: this showed that he understood the nature and quality of his acts. (13RT 2511.)

he didn't take action.[22] Appellant thus had a delusional-based justification and belief that what he did was right and done to protect his sons. (13RT 2504-05.)

Dr. Schaeffer relied on testimony from principal Nancy Jones and Deputy Jimenez: Cindi told Jimenez appellant was acting so strange she had to leave the house a week before; appellant expressed repeated rambling delusions in the meeting; and asked for help as he was fearing himself. (12RT 2467-68.) Dr. Schaeffer was of the opinion that appellant was not acting in a jealous rage – if that were true there would be no reason for him to target Mrs. Martinez which he did. (12RT 2475-76.)

Appellant's acts of planning (getting weapons, etc.) were not inconsistent with him acting under a delusion: a delusional person is not incapable of rational thought; rather his rational thought is directed by his delusion. In this case appellant was fighting for his children, and in the grandiose aspect of his delusion for all the children of the world. (12RT 2477.) Under his delusional system, appellant had a moral imperative to prevent the destruction of his children. This delusional system was the result of a chemical imbalance in his brain: "too much dopamine here and

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[22] Appellant said that just before the killings he was "seeing them trying to rub their anuses, steal their dignity, their childhood." This was not an accusation of molestation but a bizarre delusion that his children were being destroyed, a delusion resulting from his mental illness. (13RT 2512-14.)

not enough serotonin there," resulting in the neurotransmitters "out of whack." (12RT 2478.) Appellant's delusional system prevented him for distinguishing wrong from right as to his acts; his delusional brain was telling him he was right to do what he did. (12RT 2481-82.)

Dr. Schaeffer pointed out that in the three hours of videotape during which appellant was interrogated by the police and also made phone calls to family members (the largest amount of data pertaining to his mental state at the time of the crime), appellant at times responded to questions rationally (consistent with the doctor's opinion that he was capable of logical reasoning and planning) but also on numerous occasions when alone, he was crying, breathing hard and fast, and talking to himself in a manner consistent with someone in a very altered state having a psychotic episode. (13RT 2498-2500.)

Moreover, appellant was experiencing auditory hallucinations, which are defined as an "extreme, profound symptom of a psychotic brain," indicative of such a biochemical alteration such that the brain cannot distinguish between what is inside and outside, resulting in experiencing one's own thoughts as a voice of someone else speaking. (13RT 2501.) This was not a psychological phenomenon but a neurological one. (13RT 2502.)

Dr. Schaeffer concluded that appellant was legally insane at the time of the crimes. Appellant believed he was justified in his behavior.[23] In spite of being able to distinguish legal from illegal, and being capable of rational thought and planning, appellant could not distinguish right from wrong because he was acting within his delusional system.[24] (13RT 2516-17.)

Psychologist **Dr. Jonathon French** was appointed by the court to evaluate appellant's sanity; he evaluated and interviewed appellant in

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[23] For example, appellant told his sister-in-law Pati that he just wanted to defend and help his children, who "were being killed." Other people "wanted to eat them" and "turn them into something they [were] not" and make them bad. His children were "being killed" and he wanted "to defend them." (13RT 2506-07.) Appellant told the detectives that he "didn't want to hurt nobody. . . . All I want is for my kids to be okay." And "If I didn't love the victims. I wouldn't have cared about them enough to kill them, to make they stop what they were doing." (13RT 2507-08.)

[24] On cross-examination of Dr. Schaeffer, the prosecutor made a point about appellant's grandiosity (telling the police he could have been a judge or the president). Dr. Schaeffer explained the statement as a feeling of worthlessness transferred into grandiosity. (13RT 2560-61.) Dr. Schaeffer agreed that the planning that went into the crimes was consistent with his (Dr. Schaeffer's) conclusion that appellant was capable of rationality; nonetheless appellant could not distinguish right from wrong – not even when he approached the security guard at hospital with handcuffs. He did know it was illegal, and he was at that moment coming out of the delusional system he'd been operating under. (13RT 2566-67, 2570-71.) However, appellant clearly did not understand right from wrong when he was inside the house calling Alicia to task and when he shot Chavez and Lopez. (13RT 2573-74.) Dr. Schaeffer testified that despite appellant being able to rationally plan he had diminished ability to think as shown by unfocused and tangential at the school meeting and in his statement to the police. (13RT 2585, see also 13RT 2566.)

October, 2005 (a month before this testimony). (13RT 2588-01, 2609.) He diagnosed appellant with major depression. (13RT 2592.)

Jail staff had reported appellant talking irrationally to people not visible on December 15, 2001, which could be consistent with auditory and visual hallucinations. (13RT 2596.) The deputy's report said appellant was hearing voices, and that appellant was trembling and had clammy hands, which sounded like he was having psychotic symptoms. (13RT 2599.) However, Dr. French saw no evidence that appellant suffered major psychiatric symptoms. (13RT 2607-08.) Dr. French saw no evidence of malingering and agreed appellant was depressed and attempted to justify his actions in terms of the danger he perceived that his children were being corrupted. (13RT 2601-03, 2606.) Appellant acknowledged that his actions had damaged his children as much as anything else, and that what he thought he was accomplishing turned out to backfire. (13RT 2608.)

Dr. French's opinion was that appellant was legally sane. (13RT 2610, 2652.) He would have diagnosed appellant as suffering from major depression; but thought that appellant's concern with the damage to his children from his wife's affair, although excessive and obsessive, could plausibly be seen as a cultural reaction (as a dishonored and cuckolded Mexican male) rather than a than a delusional one. (13RT 2615-17, 2642-44.) Dr. French believed that appellant's statement (in Spanish) about his children being eaten was a reference to a socially corrupting influence

rather than a physical threat. (13RT 2618-19.) He concluded that appellant knew right from wrong despite his long-standing serious mental illness, noting that appellant admitted spontaneously within minutes after the event that it was "wrong." (13RT 2621-22.)

Detective Craig Grogan interviewed appellant on the morning of December 12, 2001. The interview was videotaped and the videotape was played to the jury (fast-forwarding through the portions when appellant is sitting alone and silent in the interview room). (13RT 2654-55; 2659; 2662-1[25] through 2661; Exh. NN at 5CT 1162-1340].)

Appellant told the police he loved his children and was a fool; he hadn't eaten for three days. Appellant was crying and talking unintelligibly to himself. He was concerned for his children, and asked if they needed counseling: he didn't want anyone to harm or take revenge on them: they were innocent and beautiful, like the Bush children, like anyone's kids, they were angels. (5CT 1175-79.)

Appellant said he did his best to protect his children, he cried, and said he wanted to die. He considered himself "mega-intelligent" but all he wanted was help for his children and everyone's children and himself.

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[25] Volume 13RT page 2658 is followed by page 2659-1 through 2668-1, which is followed by page 2659, after which the pages follow the usual sequence.

(5CT 1182-83.)[26] He said he couldn't control what was in him, and that was why he "did the choice of being here" but also said "it's all under my control." (5CT 1190.) Appellant wanted to talk to his sons and said he hadn't slept well for quite a few days and was "kinda numb for what happened." (5CT 1198-99.) When the police arranged for a phone call, appellant told him mother that he had not bad intentions to harm anyone. "They were harming my beautiful children [] and wanted to eat them [] and turn them into something they are not, to be bad." He said he was going "to fight to the death for [his] beliefs" and for a perfect world and for his beautiful children and all the children of the world. (5CT 1209-10.) He sobbed and said he couldn't take any more pain. He wanted the best for his children: "maybe I was wrong, but I simply thought and thought and thought and I couldn't find another solution" because his children didn't deserve to have their innocence taken away. (5CT 1213-17.) He said he had no control over what happened. He realized what he had done but "I just felt like my kids needed me" and didn't deserve that. (5CT 1223.) He said Cindi had a lot of bad influence from her mother and father and she was hurting his kids so much. She was seeing another man. "I was mad with my pain as a man." (5CT 1223.)

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[26] After hearing his Miranda rights, appellant said he preferred to have a lawyer, then said he didn't need a lawyer, and that he didn't have a lawyer unless one was appointed, then he said he was spiritually strong enough to handle it. (5CT 1187.)

The detectives were unable to get appellant to describe the events specifically but appellant talked about his duty towards his sons. He said the facts spoke for themselves. (5CT 1239-40.) Appellant said he had to do something to keep "those people from harming" his children. He referred to the nephew who lived in the Martinez home and said "he was always seeing weird things that he didn't like and knew they were hurting [his] kids." (5CT 1244.) Appellant referred to the abuse he got from his father but said that was past; people spit on him but he tried to let it go. He always tried to take responsibility for his acts, and took the responsibility to protect his sons. (5CT 1246.) He didn't want to hurt anyone; he just wanted to defend his children. (5CT 1258.) Appellant said Mr. Martinez never supported his marriage, and thought the family including Chavez was dealing drugs. (5CT 1254-55.) His children said they saw Cindi hugging and kissing Chavez and that hurt them so much. (5CT 1258.)

Appellant said he went over to the Martinez house with gun thinking that the men, particularly Chavez, would attack him; he took firearms because he would "fight to the death" for his children. (5CT 1269.) He had a rifle and two handguns in the van, also two bullet-proof vests and a helmet he bought years ago at a surplus store. (5CT 1291-92.) Appellant did not recall the events inside the house because he just "lost [his] mind" but he said he took responsibility for what happened. (5CT 1271.) Appellant said he knocked at the window but no one answered, then a voice

said "get the fuck out." He thought he threw something through the window but wasn't sure. He just lost his mind at that moment and wanted to get inside so they had to talk to him. They did not let him in the door and he went through the window. (5CT 1273-74.) He saw a knife and grabbed it, he felt threatened but also heard Guadalupe scream and he took her to the hospital because he loved her. He felt that someone tried to grab his rifle at first but he couldn't recall: "an army guy [] or a SWAT Team guy." (5CT 1275-76.) Appellant said he needed to talk to José or Alicia and he thought that was when he hit the window with a hammer to gain entry and then just started shooting. Appellant lost control of himself but he was desperate because he needed for them to stop what they were doing. (5CT 1297.) He talked to himself and came to the point that if he had to defend himself or kill someone he would kill as much as he could and they could kill him because he didn't feel like staying in this world. He was blind and just pointed and shot as the guy went back down the hallway. Guadalupe screamed at him and he told her she didn't understand, he loved his kids and why did they let him live in their house, hurting his kids. (5CT 1298-99.) Appellant went to the next door and that guy was real scared; appellant didn't know if he had a gun and tried to open the door; he shot at the handle and then the guy was on the floor and he kept shooting. The first one that fell probably had the knife. (5CT 1300-01.)

Appellant heard Alicia screaming and confronted her, asking who she did that to her own grandchildren. He got more upset and shot the door handle of her bedroom; she was locked in the bathroom and opened it up and tried to run; appellant got more upset and shot her. (5CT 1301-02.) Appellant said he should have talked to them; they should have talked to him; he should not have used a firearm but he just kept doing it because they were making him upset by not talking to him. (5CT 1304.)

Appellant thought if the police came they could kill him; he took Guadalupe to the hospital and turned himself in to a security guard. (5CT 1310.)

Appellant said he just cared for everyone's children, especially his own. He complained that Cindi talked about black magic even in front of the children, and put weird things on his food; she burned a lot of candles and once put rotten eggs on his boots. (5CT 1323-24.) Appellant said his brother Albertico had been in a mental hospital for two weeks in 1991. (5CT 134-35.) His main concern was for his children. (5CT 1338.)

Also played for the jury was a tape recording of the December 12, 2001 phone call between appellant (in custody) and his oldest son Huber. (13RT 2665-66; Exh. OO at 5CT 1341-51].) Appellant told his oldest son "it had to be done" and he "wanted to protect him." He didn't want anyone to take his sons' innocence. (5CT 1341-43.) He assured his sons that they

were not guilty of anything and that they would find happiness, telling them to help people as much as they could. (5CT 1346-50.)

B. Evidence Presented by the Prosecution.

Psychologist **Dr. Philip Trompetter** was retained by the prosecution immediately upon appellant's arrest. From a separate room, Dr. Trompetter had observed much of appellant's December 12, 2001 police interview. (13RT 2668-69.) Based on these observations, Dr. Trompetter was of the opinion that appellant appeared depressed, distrustful and suspicious, but did not show evidence of psychotic features (such as delusions, hallucinations or disorganized thinking). Appellant appeared emotionally distraught and was apparently hyperventilating and possibly praying, but did not seem psychotic. Dr. Trompetter saw no indication of audio hallucinations or delusions of persecution. (13RT 2671-73.) However, he acknowledged reviewing documents from jail staff reporting that on December 15 and December 17, 2001, appellant was talking irrationally to people not visible to the staff.[27] Dr. Trompetter agreed that those reports appeared to be evidence of hallucinations experienced by appellant in the days after the interview observed by the doctor. (13RT 2693-95.)

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[27] The nurse's notes from December 14, 2001 indicated no evidence that appellant was experiencing delusions or hallucinations. (13RT 2697.)

The next day Dr. Trompetter had contact with appellant and asked him about his prior psychiatric history; appellant said he wasn't feeling well and the interview was terminated. Appellant did deny experiencing hallucinations and suicidal ideation, saying he was "mentally strong" and had never been hospitalized for psychiatric problems. (13RT 2675-77.)

Dr. Trompetter did not consider appellant's rambling about the evils of government, etc. as delusional, and appellant's distrust and cynicism and suspicion of the negative influences on his children did not strike Dr. Trompetter as bizarre or absurd. (13RT 2683-85.) Dr. Trompetter did not hear appellant's remark about his children being eaten. If he had, he would have wanted more information; the statement sounds delusional. (13RT 2688.)

Deputy Don Ewoldt was assigned to appellant's unit at the jail. Although appellant spoke "broken English," the deputy could understand him. Appellant was not a typical inmate, but was able to understand instructions. He was interested in soccer but was quiet and kept to himself. Several times appellant asked for phone or recreation time when he had already had his quota for the day – this was typical inmate behavior. (13RT 2708-14.)

Detective Jon Buehler took part in appellant's December 12, 2001 interrogation. (13RT 2715.) Buehler explained that when he told appellant he "must have been crazy" to commit the crimes, he was not espousing that

view but trying to build rapport with appellant. (13RT 2717-19.) When Buehler told appellant he had made several "good decisions" following the shooting, such as taking Guadalupe to the hospital and turning himself in, he was telling the truth; but Buehler also made the statement in an attempt to build rapport with appellant. (13RT 2721-22.) Buehler told appellant he was "not a monster," by which he meant that although the crime was monstrous, he saw a difference in appellant's offenses (why he did it) and other multiple murders. Appellant was cooperative but depressed and crying. (13RT 2725-26.)

Criminal investigator **Froylan Mariscal** reviewed some of appellant's Spanish-speaking phone calls on the jail computer system. (13RT 2732.) Appellant often spoke to his children about scores of soccer games. (13RT 2735.)

Police department clerk and interpreter **Beverly Valdivia** listened to the tape recording of a July 28, 2004 phone conversation between appellant and his sister-in-law Pati and made various corrections on a transcript that had been prepared by someone else.[28] The tape recording was played for the jury. (13RT 2739-41; Exh. 141-A.) Appellant said "many bad things" were being done to his children; he said nothing was going to be fixed with

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[28] She testified to various changes she made to the transcript: for example, when appellant asked to send someone to the jail with cigarettes, this had been translated as "that I send someone to burn down the jail." (13RT 2742-50; 2754-56.)

hatred. He said he had made mistakes, he wanted to fix things up and wanted to pay whatever came his way, but that he could not accept that his innocent children would pay. He talked about Cindi's relationship with Chavez and that his sons told him that they were hut a lot when the man and their mother hugged and kissed. They told him that what their mother was doing was not right. Cindi told him she knew he would take care of their children because she was never going to see them again. He said he did "nothing wrong." When Pati accused him of taking the lives of three innocent persons he said "I did not take it. The way I see it, we all took it." When Pati said she knew he wasn't crazy, appellant agreed he was not; she said his attorneys said he was, appellant said that was the attorneys and the DA's game; that they agreed, and were "playing with that." He called the legal process a "farce."[29] (4CT 1099-1116.)

Valdivia transcribed a November 9, 2005 phone call between appellant, and his sister and his sons that took place shortly after the guilty verdict. It was played for the jury. (13RT 2752, 2757, 2763; Exh. 142A.)

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[29] When Pati insisted no one was "taking it out" against his children he said "God is going to . . . understand this. You not only are taking it [out] against my children, but also with your own children. Because one of these days, they are going to find out about all of this . . . . As I do not want to do it either, nor the community, nor the famous people of California, nor the world's People the community, nor society, the government the judges. Everything is a farce; all is a farce, hypocrisy." (4CT 1107.) When Pati said he or his attorneys were saying he was crazy, appellant insisted, "I am not crazy!" and "that is the attorney's and the district attorneys and of all of us's game" that we agreed to play. (4CT 1110-11.)

Appellant said he had been found guilty and they were "just a bunch of racists" and now he would get the death penalty for sure. He said his attorneys were just playing a game so everyone would think they are supposedly doing things like they are supposed to be done. It was a "bunch of shit." (5CT 1118.) Appellant said that his attorneys referred to the recent guilty verdict saying they had found he premeditated and that the case would now go to the jury for penalty phase; appellant said it was all a farce. He said "you saw how I told the district attorney, to shut his mouth about the lies that, that, what are they trying to do telling all their lies and, anyway what they are after, they are getting. They're not going to put him in jail if they find out he is telling lies. They're not going to put [Guadalupe or Jose Martinez or Cindi] in jail, because they were telling lies. Then why, why continue?" (5CT 1120.) He said they promote hatred and already have everything planned out, they drink the same cup of coffee; they are afraid of him because they are cowards, and he is also afraid, but when God who is big and powerful arrives, then we will come to blows of the chest. (5CT 1121.) Appellant said the law only protected "the pieces of shit, the cowards." (5CT 1122.) He said that whether he died and the others lived, or vice versa, they would be fine for the greatness of God. "The more we fight with him, we are going to be fine." (5CT 1126.) He told his sons he loved them; he told Hubert Jr. that it was certain he would get the death penalty because "everything is all planned out." (5CT 1127.) He told his

son to serve God who was big and taking care of them all. "He wants us to serve him right or wrong or not serve him at all and if we are going to do wrong, do wrong completely from side to side." (5CT 1128.) He said he didn't want Hubert or his brothers to get into the games of those people, or they would put them in jail.) He said even if his sons pleaded they would still give him the death penalty and he didn't want them to plead. Only God was the owner of his life. (5CT 1130-31.) He asked his son Ivan to forgive those persons that wanted something bad for him, to forgive their mother and to forgive him for the harm he did to him. (5CT 1135.) He said he would rather Ivan didn't go to court because it was all a circus, and just acting, and he didn't want him to plead for his life, but just to have faith in God and they would be fine. (5CT 1135-36.) Appellant told his sister that the public felt safe and that justice was served because he was convicted, but now women to men and men to women could continue to "do tragedies to innocent children because at the end the law will protect them, and, and, serves justice." (5CT 1150.)

C. Evidence Presented by the Defense in Rebuttal.

Dr. Robin Schaeffer testified that his diagnosis of appellant matched that of Dr. Weiss: appellant suffered from major depressive disorder with psychotic features. The psychotic features manifested as auditory hallucinations reported by the jail staff a few days after the incident, and appellant's delusions. (14RT 2778-79.) Dr. Schaeffer also

agreed with Dr. Weiss that appellant's repeated shifts in conversation from his children to "all the children of the world," i.e., excessive abstraction, was an example of his psychotic thought disorder; and that appellant's psychotic tangentiality (repeatedly drifting off topic) was an indicia of independent psychosis. He also agreed with Dr. Weiss that appellant's belief that someone was trying to harm his children was the basis of appellant's psychosis, and that this same "ideation and preoccupation of paranoid thinking existed at the time of the crime." (14RT 2781.) Similarly, Dr. Schaeffer agreed with Dr. Weiss's report that appellant suffered from a delusion-based belief that the killings were justified and necessary to protect his children. This delusion was the product of appellant's psychotic mental illness. Dr. Schaeffer disagreed with Dr. Weiss only as to whether appellant could distinguish right from wrong at the time of the crime. Dr. Schaeffer believed that appellant was not capable of making that distinction. (Dr. Weiss opined that appellant realized his behavior was wrong in that it would land him in jail.) Dr. Schaeffer explained that even while appellant had a delusion-based belief that he was doing the right thing, he also realized that under someone else's eyes his behavior might be considered wrong, which is why he said he had done something bad. Appellant's mental illness prevented him from distinguishing right from wrong under his own delusional system, and was thus insane. (14RT 2782-84.)

Dr. Schaeffer disagreed with Dr. French's conclusion that appellant's inability to distinguish right from wrong at the time of the offenses was due to him being in a highly aroused state rather than mental illness (Dr. French believed that a real mental illness would persist over time). Dr. Schaeffer explained that in his clinical experience (as opposed to Dr. French's mostly forensic experience) delusional symptoms of psychotic disorders do come and go, and this is supported by published research and scientific studies. Delusions, like fevers, can rise and fall. (14RT 2788-89, 2799.) A thought disorder or psychosis renders one unable to distinguish between the very abstract and the very concrete, which is why psychotics talk in metaphor. When appellant talked about his children being destroyed, he believed, in delusional system, that his children "were being quite literally destroyed, in danger of being destroyed." (14RT 2797.)

Dr. Pablo Stewart, referring to Dr. French's testimony that appellant had "character illogical inadequacy," said that he had never heard of such a term in psychiatry. As to Dr. French's testimony that appellant was psychologically weak (see 13RT 2640), Dr. Stewart testified that such "weakness" had nothing to do with appellant's diagnosis or the offenses. Depression is a biological condition like diabetes or high blood pressure; it is a genetic influence condition involving neurotransmitter imbalance, and it just so happens that its symptoms are behavioral in nature. (14RT 2826-29.)

Dr. French was wrong in stating that a "real" mental disorder would persist: while major depressive disorder with psychotic features does persist over time, its presentation is not constant, but waxes and wanes (as it did with appellant when he took Guadalupe to the hospital and she testified that he seemed to "come back a little bit" from acting crazy; the auditory hallucinations reported on December 17 also showed the waxing and waning qualities.) (14RT 2829-33.)

Dr. Stewart pointed out that he and Drs. Weiss and Schaeffer all considered appellant to be psychotic. He believed that had Dr. French seen appellant over an extended period of time, his opinion would change. (14RT 2833-34.) The number one symptom of major depressive disorder according to the DSM-IV is tearfulness and brooding obsessive ruminations, which has been constantly present with appellant during interviews with Dr. Stewart and in the courtroom as well. Dr. French ascribed this depression to the consequences of the homicide, but appellant had similar symptoms for years prior to the homicides: he was disheveled, he couldn't work, etc. (14RT 2835-36.)

Dr. Stewart also questioned Dr. French's comments about a possible "cultural" basis as motive for the homicides, as appellant had known about his wife's affair for months before the shootings according to what his wife told Detective Grogan, and although appellant was angry he was actually nicer to her after she told him about the affair. (14RT 2839-40.)

Dr. Stewart's firm opinion was that appellant did not know right from wrong at the time of the offenses because of psychotic symptoms from his chronic his mental illness. (14RT 2841-42, 2862.)

Joaquin Santi Banez from Morelia, Mexico, met appellant when appellant was 11 years old and Banez was the 17-year-old teacher in his town. Banez married appellant's sister. When appellant visited Banez and his wife in Morelia in 1998, he was alone, unshaved, ungroomed and dirty, whereas before he had always been very clean and well-groomed. He walked up and down, was depressed, and was not eating or sleeping. He "was absent" and seemed like a different person from the one he had been before. (14RT 2802-07.)

Jail nurse **Joan Lenard** testified to put jail records into evidence: they were generated on November 3, 2005 and delivered sealed to the court under subpoena. (4RT 2817, 2882-87.)

PENALTY PHASE STATEMENT OF FACTS

A. Evidence of Aggravating Factors.[30]

Patricia Gonzalez was Alicia and Jose Martinez's daughter, and appellant's sister-in-law, Lopez's cousin and Chavez's friend. Chavez moved into Alicia and Jose Martinez's house after getting into an argument

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[30] At penalty phase, the prosecution relied most heavily on the circumstances of the crime as set out at the guilt phase; appellant had no prior history of crimes or acts of violence.

with Patricia's brother-in-law. Chavez was good with children and a caring person. (15RT 3021-23, 3031.) Alicia was active in church and a great role model. Patricia and her son Israel missed everything about Alicia. It was hard without her. (15RT 3024-27.) Alicia was known for her "very forgiving nature." (15RT 3034.) Patricia moved into the family home with her husband and children at the request of Jose and Guadalupe, because Jose was working and Guadalupe couldn't stay alone in the house. (15RT 3028-29.)

Jose Martinez was married to Alicia and worked at the same company as Lopez. After Lopez died, Jose had to change jobs and made less money. (15RT 3036-37.) He had nightmares about what happened and missed his wife every day. He didn't celebrate Christmas at all anymore. (15RT 3039.) He placed crucifixes in the house to mark the spots where the three died. (15RT 3032.)

Maria Pulido was the oldest daughter of Jose and Alicia. Her cousin Carlos was friendly and always willing to help. (15RT 3045-46, 3051-52.) Maria was very close to her mother and they talked every day. Alicia had a special ring set aside for the quinceanera (15-year-old birthday party) of Maria's daughter and the daughter cried at her party because she missed her grandmother. (15RT 3046-48.) Alicia was friendly with everyone and generous. (15RT 3050.) Alicia's death has affected all of Maria's children. Her father Jose is depressed. The family used to get

together on December 12 because that is the day of the Lady of Guadalupe, Guadalupe's patron saint. Now they go to church and remember the deaths. (15RT 3065-67.)

Guadalupe Martinez testified that December 12 (her birthday) used to be a happy day but since the shootings, she didn't even like going out on that day. (15RT 3066-67.) She had had two surgeries on her arm. She recalled the pain of seeing her mother killed before her eyes. She had to go to counseling; she didn't like being or sleeping alone. She wanted her father to sell the house but they asked Patricia and her family to move in so she didn't have to sleep alone. At school, everyone stared at her and she had to go to private school. She was sad that her mother would not be present for her wedding (set for January 7) and when her baby was born. (15RT 3070-75.) Lopez was a happy and helpful person. (15RT 3070.)

B. Evidence Presented in Mitigation.

Joaquin Santi Banez, appellant's brother-in-law, met appellant in his hometown in Mexico when appellant was eleven years old. As a boy appellant was optimistic and playful and curious. (15RT 3083-85.) After appellant went to the United States, he sent them money. When he visited, he was playful with Banez' children and gave them toys. He had a special gift with children. The man who killed the victims was not the man Banez knew. (15RT 3086-89.)

Jorge Mendoza, appellant's older brother, lives in Mexico and works as a city planner. (15RT 3090-91.) Growing up the Mendoza brothers were poor and didn't have a lot to eat but appellant was happy and always gave to others. (15RT 3093-94.) The boys worked with their father on someone else's land, but they earned little and had little food. (15RT 3095-96.) Appellant was very good to his mother, his brothers and his children. (15RT 3098-3100 ["I would never have wanted to be in this situation. I can't go any longer."].)

Elva Mendoza Novoa, appellant's older sister, is an elementary school teacher in her hometown in Mexico. As the oldest daughter, she was like a mother and sister to appellant. As a child appellant helped her take care of the younger children. They all worked in the fields and were poor but happy. Appellant never complained and always said they had to struggle to help their parents to progress. He was charitable and supportive. (15RT 3152-57 ["that's why I can't believe this."].) Throughout his life, appellant was good to everyone, with children and the disabled. (15RT 3160-61.) Elva remained close to the Martinez family in Mexico and asked for their forgiveness. (15RT 3154, 3161.)

Rocio Mendoza is appellant's younger sister. (15RT 3163.) Appellant helped her come to the United States; they worked in the fields. (15RT 3164-66.) Appellant helped her and counseled her and provided her emotional support when she had problems. (15RT 3169.) She knew

appellant was sick and distrusting of everyone before the killings, but the damage he created was not the way he was all of his life. (15RT 3172.)

Blanca Santi Banez is appellant's younger sister. (15RT 3174.) Appellant was an excellent brother. He went to the United States to help out his family who lived in a one-room house where they cooked over a fire, had no electricity, and used an outdoor toilet. Appellant sent money home to his mother. (15RT 3177-80.) Appellant last visited her and her family in Mexico in 1998. He brought toys and clothes for her children. She noticed that he was very mistrusting and wouldn't accept any of her meals. She knew something was wrong; appellant was a different person. When he left he did so around 3:00 or 4:00 a.m. in secret and without explanation. He was pale and hadn't eaten. (15RT 3183-85.) Appellant had always been a wonderful person; she asked the Martinez family to forgive him. (15RT 3186.)

Griselda Mendoza Novoa, appellant's older sister, testified that appellant was a playful and charitable boy. As a young man, he always walked away from a fight. He was interested in education and wanted to go forward. He studied for a while at the seminary. (15RT 3189-93.) When she last saw appellant on his 1998 visit to Mexico, he was no longer the little brother she had known. He paced, did not eat, hit his head, and looked like he was running from someone. She was troubled and hurt to see him; she lost a great brother in 1998. (15RT 3192-96.) She and her

children and nieces and nephews visited appellant in jail; they prayed and sang songs. She testified that appellant was no longer "Hubercito" but was very ill; she asked the Martinez family for forgiveness. (15RT 3197-98.)

Elsa Mireya Vivanco is appellant's younger sister. She testified that appellant counseled and provided her with emotional support, for example, when her infant baby died after 17 days. Her daughter Liliana also had a special relationship with appellant that has continued; although appellant is incarcerated the daughter talks and sings on the phone. (15RT 3203-08.) Appellant sent money from the United States for her to go to school and then helped her come to the United States. He taught her to drive, to get amnesty and then to become a citizen. It was all thanks to appellant and to this country. (15RT 3209-16.) Appellant was ill before this tragedy and was not the same brother anymore. He separated himself from everyone. She lost a great brother. (15RT 3215-17.)

Huber Mendoza, Jr., appellant's oldest son, was 16 years old at the time he testified. (15RT 3105-06.) He remembered when he was in first grade, and didn't like going to school, appellant would go with him and stay with him all day until he got used to it. Appellant helped him and other children with English. Appellant did the same with his little brother Angel. Appellant coached the boys in soccer and taught them teamwork. Huber Jr. tried to help his father keep track of his favorite soccer team when they talk on the phone. He and his dad and uncles went fishing and camping. His

father loves animals. (15RT 3105-13.) When Huber Jr. got to junior high school his father advocated for him to go to a different school when he saw that there were lots of gang members in his school. He still talks to his father on the phone. His father encourages them to do well in school and to be good. Huber Jr. wrote a letter trying to advocate for his father whom he wants to remain with them and share things with them. (15RT 3114-17.)

Ivan Mendoza was 14 years old at the time of trial. His dad coached him in soccer; his favorite thing was to play soccer in the park with his dad. He taught Ivan to be a team player, to be nice to people and respect them, to work hard in school and help people who need it. (16RT 3316-20.) Ivan wanted to testify although his father told him many times not to do it unless he wanted to. He wrote a letter to the prosecutor talking about how much he loved and missed his dad, and how he wanted and needed him to be in his life. (16RT 3319-23.) He also missed his grandma Alicia. (16RT 3324.)

Dr. Rodney Erwin, a psychiatrist, interviewed appellant's sons for several hours each, and also talked to their mother Cindi and to appellant. (15RT 3118-20.) Each of the boys was very attached to appellant who was the primary child caregiver after Angel was born. He got them ready for school, was involved in their school activities, coached soccer, fixed their meals and was their primary emotional attachment. He had a sincere devotion for and love of his children. Even when he was depressed and

moving into delusional paranoia, appellant was there to care for his sons and take them to school. (15RT 3121-22.)

Each of the three boys is an interesting child who has been able to overcome his difficulties and become a solid young man at school and socially and in the family: this reflects on appellant's love and commitment to them and his ability as a parent. (15RT 3124.) Huber Jr. has stepped into his father's role helping his younger brothers with schoolwork: he incorporated the parental values displayed by appellant. Angel is creative and has a sense of humor that came from the way he and father laughed and joked together. (15RT 3125.) As primary caregiver appellant instilled in his sons real strengths and character traits; they have taken on mature rules in their family. It is absolutely important for the boys to maintain their relationship with their father whom they continue to love. (15RT 3129.) At the same time they are very protective of their mother. (15RT 3137.) Their psychological need for their father will continue throughout their lives; even more important because of their attachment to him, and because of their estrangement due to this enormous crime. (15RT 3143.) Huber Jr. was involved in some fighting at school. (15RT 3138.) Appellant told Huber Jr. that fighting was not the answer and that he had to stop; based on this advice Huber Jr. quit fighting. (15RT 3140, 3145-46.)

Vivian Sweatman works for the sheriff's department in court security. She was present for a 2002 visit between appellant and his

children. Appellant was loving and tried to calm down the children, the oldest of whom especially was very emotional. Appellant apologized to Huber Jr. and told him he now had to be the man in the family. Appellant asked his sons about school and their lives and tried to make sure they were okay. (15RT 3199-3201.)

Daniel Vazquez, former warden of San Quentin Prison and correctional consultant for both prosecution and defense, testified that an LWOP sentence meant that the prisoner would automatically be held in the maximum level of security. (16RT 3255-65.) He had reviewed police reports, interviewed appellant for three hours, and assessed him. In county jail, appellant had been "a model inmate" for more than four years in custody awaiting trial in this case. Based on Mr. Vazquez' extensive experience classifying thousands of inmates, he did not believe appellant would pose any danger to staff or other inmates. He had no gang connections, was not criminally sophisticated, had no previous arrests, and had a spotless record in county jail. (16RT 3267-69.) Mr. Vazquez had reviewed transcripts of the November 10, 2005 phone call appellant made to his sister in which he rambled and "vented a little bit" but nothing in that conversation changed his opinion that appellant posed no risk of future dangerousness. (16RT 3269-73.) The fact that appellant said that if he jumped up in courtroom he would be shot did not change Vasquez's opinion: "talking and doing are two different things." (16RT 3278-79.)

The fact that appellant turned himself in is "very different, very unusual behavior" for offenders. (16RT 3283.) Mr. Vazquez pointed out that appellant had been in court for months unshackled, which indicates he has no real potential for any further violence. (16RT 3290-91.) Moreover, the fear of losing visitation privileges with his beloved children lessened any chance that appellant would be violent. (16RT 3292-93.)

Dr. Pablo Stewart testified that he respected the jury sanity verdict but his opinion remained: but for appellant's mental illness with delusions, in which he was trying to protect his children from evil, these crimes would not have occurred. Appellant had been suicidal and severely depressed since the age of 24.[31] His Mexican relatives described him as preoccupied and on guard. (16RT 3295-3300.)

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[31] Appellant's statement in a phone conversation about a "bullet to the brain" the night of the crime spoke to his suicidality and underlying mental disorder, i.e., wanting the police to shoot him. (16RT 3295.)

ARGUMENT – COMPETENCY TRIAL

I. THE EVIDENCE PRESENTED TO THE JURY WAS INSUFFICIENT TO SUSTAIN THE VERDICT OF COMPETENCY, IN VIOLATION OF FEDERAL DUE PROCESS, THUS REQUIRING REVERSAL OF APPELLANT'S SUBSEQUENT CONVICTIONS

A. Introduction and Summary of Argument.

On November 12, 2003, defense counsel declared a doubt as to appellant's competency and requested the proceedings be suspended under Penal Code section 1368. (1CT 118-19.) After two experts found appellant incompetent and one found him competent, the matter was set for trial. Jury trial on the question of competence only began on December 8, 2004, and on December 15, 2004, the jury found appellant competent to stand trial. (1CT 195, 242.) On February 24, 2005, the trial court denied the defense motion for judgment notwithstanding the verdict, stating that Dr. Cavanaugh's opinion as to appellant's competency was supported by taped phone calls between appellant and his family, which showed that appellant could carry on a rational discussion and pursue rational objectives he believed appropriate. (5RT 760.)

However, the constitutionally-based competency standard requires more than the ability to carry on a rational discussion with family members. Moreover, Dr. Cavanaugh gave no opinion as to appellant's present competency, and testified only that appellant could think rationally about issues relating to the case and could cooperate. (4RT 494-96.) He gave no

opinion as to appellant's ability to make the critical decisions essential to a fair trial, such as whether to testify, and whether and how to put on a defense.

The test for competency is "well settled." (Cooper v. Oklahoma (1996) 517 U.S. 348, 354.) A defendant must (1) be rational, (2) have a rational as well as factual understanding of the proceedings against him, (3) have sufficient ability to consult with his lawyer with a reasonable degree of rational understanding, and (4) be able to assist in his defense. (Ibid., Dusky v. United States (1960) 362 U.S. 402, 402.)[32]

Cooper quoted Justice Kennedy's concurring opinion in Riggins v. Nevada (1992) 504 U.S. 127, 139-40 as to the significance of the right, emphasizing that competency is "'rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.'" (517 U.S. at 354.)

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[32] A competency hearing, although arising in the context of a criminal trial, is governed generally by rules applicable to civil proceedings. The defendant is presumed competent unless the contrary is proven by a preponderance of the evidence. (People v. Lawley (2002) 27 Cal.4th 102, 131; Medina v. California (1992) 505 U.S. 437, 449 [a state may presume competency and require the defendant to prove his incompetence by a preponderance of the evidence].)

Appellant contends that the strong evidentiary showing of his present incompetency, which was unrefuted by the prosecution, mandates a reversal of his convictions. It is a fundamental canon of criminal law, and a foundation of state and federal due process, that "[a] person cannot be tried or adjudged to punishment while such person is mentally incompetent." (People v. Samuel (1981) 29 Cal.3d 489, 494, citing Pen. Code, § 1367.) The United States Supreme Court has "repeatedly and consistently recognized that the criminal trial of an incompetent defendant violates due process." (Cooper v. Oklahoma, 517 U.S. at 354 [internal quotation marks omitted]; see also Indiana v. Edwards (2008) 554 U.S. 164, 169-70 [the competency requirement is rooted in the federal constitution].)

Indiana v. Edwards, citing to Godinez v. Moran (1993) 509 U.S. 389 and Drope, stressed that the standard "focuses directly upon a defendant's 'present ability to consult with his lawyer,'" and his ability to "'assist counsel in preparing his defense.'" (554 U.S. at 169-70.) Godinez held that competence to stand trial and competence to enter a guilty plea are measured by the same standard: there is no "higher" standard of competence that applies to a defendant entering a guilty plea than to a defendant who stands trial. (509 U.S. at 399.) Both types of defendants have to decide whether to plead guilty or go to trial, and to take or waive the right to testify and to call or cross-examine witnesses. The defendant

who decides to stand trial faces "still other strategic choices: in consultation with his attorney, he maybe be called upon to decide, among other things, whether (and how) to put on the defense and whether to raise one or more affirmative defenses." (Id. at 398; see also Cooper, 517 U.S. at 354 [accord].)

When the trial court denied appellant's motion for judgment notwithstanding the verdict, it made no finding that the evidence was sufficient to show that appellant was able to consult with and assist counsel in his defense with a reasonable degree of rational understanding, as is required under the federal constitution. Appellant contends that, as shown below, there was no such evidence.

B. Summary of Facts Adduced by Appellant at the Competency Trial.

1. Expert attorney testimony that competency required the criminal defendant to be able to make important decisions such as whether to testify, and to assist in penalty phase preparation.

Attorney **Robert Wildman**, an experienced criminal defense attorney who had tried three capital cases, testified that unless a client had a factual and rational understanding of the charges and procedures, he was unable to assist counsel in preparing the defense and making the necessary high level executive decisions. To be competent, the client must be able (1) to decide whether or not to testify, (2) to assist in the cross-examination,

(3) to communicate in a rational manner with counsel, and (4) to cooperate in providing social history at the penalty phase. (3RT 308-17.)

2. Court-appointed expert Dr. Zimmerman testified that appellant was seriously depressed and incompetent to stand trial at the time of his November 2003 interview.

Dr. Gary Zimmerman was appointed by the court to assess appellant's competency and interviewed him at the jail on November 29, 2003.[33] At the beginning of the interview, appellant was able to answer questions precisely, but then tended to wander and often concentrated "on the injustice he felt was being done to him" – i.e., separating him from his family. Appellant thought he should be released to be with his children. He was depressed, helpless, and hopeless and said it would probably be a good idea if he were killed. Appellant showed a "deep indifference to the proceedings against him" and was only able to "hold it together for a short period of time." (3RT 338-41.)

In Dr. Zimmerman's opinion, at the time of this interview appellant was incompetent to stand trial. (3RT 353, 357.) Appellant was significantly depressed and "seriously impaired" mentally. Because of his

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[33] Dr. Zimmerman's evaluation included the standard clinical interview, inquiry into appellant's past contacts with the law, checking symptoms of mental illness, and observation of the client's responses to determine his understanding of the charges and his ability to assist in the defense. (3RT 332-37.)

serious depression, he did not care what happened to him and he was unable to rationally evaluate and thus assist in his defense. (3RT 338-43.)

3. After hours of interviews over the course of more than a year, and in reliance on a reliable competence-related structured interview format, psychiatrist Dr. Stewart testified that at the time of the competency trial, appellant suffered from a deteriorating mental illness and was incompetent to stand trial.

Dr. Pablo Stewart, chief psychiatrist at the Haight Ashbury Clinic, had done hundreds of competency evaluations, both formal and informal. (3RT 366-70.) He reviewed appellant's mail, his medical and mental health records, and police reports. He interviewed appellant twice before submitting his report on appellant's competency on November 2, 2003. Dr. Stewart also interviewed appellant on February 12, April 27, July 20, and November 12, 2004. Dr. Stewart's last interview with appellant was less than a month before his testimony. (3RT 371-72.)

After hours of evaluations and interviews (including an interview with appellant's wife – who had unsuccessfully tried many times in the past to get appellant into treatment), Dr. Stewart was able to state that appellant suffered from a long-standing mood disorder that caused him to have psychotic symptoms, i.e., his reality was altered by reason of mental disease and defect. Dr. Stewart testified that appellant's condition had endured over time and his psychotic symptoms had become worse. (3RT 373-74; 435.) In the last interview, appellant was unable to answer specific

question about the charges he faced. Even after Dr. Stewart told him the charges and asked if he understood, appellant said, "Other people killed people, so who is holding them responsible." Appellant said he couldn't answer the question "because he was dead." (3RT 375.) These answers were consistent with the mental disease/defect Dr. Stewart noted in his original report and led Dr. Stewart to conclude that at the present time appellant was totally disconnected from an understanding of the charges against him. (3RT 376.)

Dr. Stewart performed the MacArthur Competency Assessment Tool -- Criminal Adjudication. In November of 2003, appellant tested "significantly impaired" on all three areas tested (ability to realistically consider defense, ability to plan legal strategies, and ability to perceive likely outcome). The testing showed that his impairment did not stem from any informed decision on his part. (3RT 379, 439.)

Dr. Stewart testified that appellant went through drastic mood fluctuations and was unable to give focused answers. His thinking quickly deteriorated into delusional paranoid thinking with a lot of religious content.[34] Dr. Stewart considered appellant unable to participate in his

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[34] Dr. Stewart testified that appellant's religious preoccupation and "over-elaborated self-referential relationship with God" was not his only symptom of mental illness: he had other non-religious based delusions, including paranoia about the government, the process and fairness of the legal system, and looseness of associations. Appellant's interest in soccer scores (talking about scores with his sons on the jail tape recordings) was

defense, which was due to his severe mood disorder with psychotic features. (3RT 381-85.)

Dr. Stewart's opinion was that appellant had a mental illness that since the 1990's had been getting progressively worse. By 1995 he was unable to keep a job. He had sleeping and eating problems, was suicidal and unable to care for his own hygiene. Due to appellant's depression with psychotic features, appellant was unable (1) to help in choosing jurors, (2) to evaluate testimony of witnesses, (3) to provide insight to his attorneys into what led up to and surrounded the events in question, (4) to assist in gathering and presenting mitigation evidence, (5) to evaluate whether or not to testify, and/or (6) to evaluate possible plea offers. (3RT 395-97.)

Appellant had on two occasions been prescribed anti-depressants by jail mental health staff: first a hefty dose of Prozac (which appellant stopped taking because he thought his improvement was due to reasons other than the medication) and later Remeron for a short period of time. Because mental illness prevents a patient from appreciating his illness, truly depressed patients commonly stop taking medications and deny suffering from any mental illness, especially when the mental illness develops into psychotic symptoms. (3RT 412-14.) Dr. Stewart testified that appellant's

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not inconsistent with mental illness. Dr. Stewart made the point that the ability to engage in daily chit-chat did not negate mental illness by saying that even psychotics know when food is bad. (3RT 386-89.)

depression had descended into psychosis rendering him unable to understand the nature of the charges against him and to assist his attorneys in his defense. (3RT 416.)

4. Dr. Schaeffer, who had interviewed appellant only four days before testifying, relied on the transcript of that interview to show that appellant had a consistent psychotic thought disorder and was incompetent to stand trial.

Dr. Robin Schaeffer, who in his private practice routinely conducted competency and sanity evaluations for the court, assessed appellant for competency on December 4, 2004 (four days prior to this testimony). (3RT 448-51.) In the interview, appellant showed a consistent psychotic thought disorder characterized by shifting levels of abstraction, including generalizing when specificity was required; loose associations (rambling); paranoid distrust; delusional grandiosity; suicidal impulses; and a sense of the trial as unreal and not important.[35] Dr. Schaeffer's opinion was that appellant was unable to testify in a rational manner and was unable to rationally assist his attorneys; and was thus incompetent to stand trial.

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[35] Appellant repeatedly talked about "not just me, everyone" which showed a loosening and blurring of differentiation, indicative of a psychotic thought disorder. He also blurred the difference in the roles of judge, jury and attorneys, problematic in terms of competency. (4RT 602, 609.) Appellant failed to take advantage of many opportunities provided by Dr. Schaeffer to come back from rambling content. In response to specific questions appellant frequently rambled about religious matters that impaired his ability to give rational response. (4RT 603-04.)

(3RT 453-54; Exh. B [transcript of Schaeffer interview played for jury at 3RT 457]; see Clerk's Supplemental Transcript[36] at 106-117.)

Dr. Schaeffer pointed out the portions of appellant's taped interview that he relied on to reach his conclusions. (4RT 599.) Although Dr. Schaeffer gave appellant repeated opportunities to give coherent, rational, discrete and specific answers to questions, appellant repeatedly shifted to abstractions. These abstract thoughts, together with appellant's sense of unreality, impaired his ability (1) to decide whether to testify, (2) to waive a jury trial, (3) to enter into plea bargaining, (4) to assist in cross examination, (5) to assist in broad outlines of a defense, and/or (6) to assist with preparation of mitigation materials. (4RT 600, 608, 612-16.)

Appellant repeatedly demonstrated that he was not able to engage with his attorneys and manifested a tremendous ambivalence with respect to the need to trust and work with his attorneys. (4RT 605-06.) He repeatedly referred to his paranoid distrust of people even though he struggled with this because God told him to trust. (4RT 600 [he did not "trust people at all"].) Appellant said he had "no other trial [] than the one from God." (4RT 606.) This sense of unreality was a symptom of appellant's psychotic disorder. Appellant's inability to cooperate with counsel was not due to his religious beliefs but rather due to the way his

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[36] There are two Supplemental Clerk's Transcripts, one labeled Clerk's Supplemental Transcript [hereafter CST], Volume I of I; the other labeled Supplemental Clerk's Transcript on Appeal [hereafter SCT] Volume I of I.

disordered mind used those religious beliefs. That is, appellant's mental illness (and not his religious beliefs) prevented him from being able to work with his attorneys although appellant expressed his inability in religious terms.[37] It was not the religious content of appellant's statement per se that made them irrational, but the fact that his physiologically-based thought disorder rendered him unable to give specific answers or any answers other than his religious expressions. (4RT 606-07, 609, 633-34.) Dr. Schaeffer concluded that appellant's inability to "stay [on] track mentally" rendered him unable to consult with or assist defense counsel. (4RT 634.)

Appellant's sense of unreality also resulted in a diminished sense of agency, i.e., his inability to do anything, manifested by his repeated statements that "everything is going to be fine." (4RT 609.) Appellant's thought disorder prevented him from experiencing the actual reality of the trial and legal process. (4RT 633.)

Dr. Schaeffer testified that although appellant was oriented as to time and place, and could make some answers and give some assistance, his ability did not rise to the level required for competency because of the

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[37] Appellant did not expressly refuse to cooperate with counsel. In fact God told him he had to. But in Dr. Schaeffer's opinion, appellant's state of mind, as demonstrated in this interview, rendered him unable to rationally assist counsel. (4RT 611.) For example, although appellant said he did not commit a murder (not uncommon for a criminal defendant) he immediately launched into a long abstract rambling to conclude that it was not a real trial and there was no difference between himself and any other person. (4RT 611.)

irrational and limited nature of his responses. (4RT 616, 619.) His brain repeatedly threw him into abstractions and ramblings. (4RT 632.) A medical condition (imbalance of neurotransmitters) underlay appellant's disorder. (4RT 635.) His disorder could not be overcome by an act of will. (4RT 642.)

C. Evidence Presented by the Prosecution.

Dr. Gary Cavanaugh was retained by the prosecution to evaluate appellant's competency. Dr. Cavanaugh's evaluation of appellant consisted of nothing more than a 1.5 hour taped interview with appellant on February 12, 2004, 10 months prior to his testimony. (4RT 491-93; see Exh. 7, CST at 56-84.) Dr. Cavanaugh saw no substantial evidence of a major mental illness (only an apparent personality disorder) or delusional thinking. Dr. Cavanaugh testified that appellant showed he could think rationally about issues relating to the case although there were things he did not want to talk about. Dr. Cavanaugh's opinion was that appellant was competent to stand trial; he found no evidence appellant was unable to understand or cooperate. (4RT 494-96.) Dr. Cavanaugh did not administer any tests commonly used for assessing competency. (4RT 504-04.) He felt he had enough information to render an opinion without such testing. (4RT 506.)

Dr. Cavanaugh stated that he had reviewed a letter from the prosecutor regarding prior evaluations, including Dr. Stewart's report and jail records showing that appellant had been diagnosed with and treated for

depression. Nonetheless, Dr. Cavanaugh concluded that at the time of his interview (10 months previous) appellant was in remission and showed no signs of depression. (4RT 497-99, 561-62.) Dr. Cavanaugh had no opinion about appellant's current competency.[38] (4RT 527.)

Psychologist **Dr. Philip S. Trompetter** observed appellant at the police station around 4:30 a.m. the night of the triple homicides, December 12, 2001. At approximately 9:00 a.m. that day, he observed appellant (from another room) when the detectives interviewed appellant. (4RT 580-81.) Dr. Trompetter saw no sign of psychotic behavior or evidence of disorganized thinking or hallucinations. Appellant made many religious references but none were delusional; he made some paranoid comments but they were not psychotic. He appeared to understand the questions posed to

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[38] Dr. Stewart reviewed Dr. Cavanaugh's taped interview of appellant (Exh. 7 at Clerk's Supplemental Transcript 56-84) upon which Dr. Cavanaugh based his evaluation. Dr. Stewart testified that Dr. Cavanaugh's questions implied he hadn't done preliminary work, such as familiarizing himself with the facts of the case: e.g., Dr. Cavanaugh asked appellant how he and his wife were getting along and if there were "any problems" in the marriage (a question that presumably would not be asked by someone who knew the basic facts of a case in which the defendant was charged with killing his wife's mother). (3RT 399-400.) Dr. Cavanaugh saw appellant only once on February 12, 2004. Dr Stewart testified that more than one interview was necessary to evaluate competency. (3RT 401-05.) Moreover, Dr. Stewart was of the opinion that appellant's condition had worsened since the March 2004 date of Dr. Cavanaugh's report for the prosecution. (3RT 405.)

him.[39] (4RT 583-86.) Dr. Trompetter had not seen or observed appellant since 2001 and had no opinion as to his competency. (4RT 587.)

Court interpreter **Diana Moreno** listened to and translated tape recordings of some 10 to12 phone calls made between appellant and his wife Cindi, appellant and his sister-in-law Pati, and appellant and his sons, all made from the jail in 2004. (4RT 465-66; see Exh. 2 at CST at 4-32.) The tapes were played for the jury who followed along with transcripts translated into English. (See e.g. 4RT 472, 482.)

In a June 1, 2004 phone call with his wife (Exh. 4, CST at 27-33), appellant asked that she leave his children alone and that she take them to his mother. He said "I do not want them around that son of a bitch [referring to Jesus, Cindi's new boyfriend]." (4RT 474-75.) Appellant asked Cindi to take their children to his mother and to put them in a safe place. He said he prayed to keep his sons separate from her and Jesus, the son of a bitch who had the children "under threat" and "tormented with fright." (CST at 27-30.) He asked Cindi why she hurt the children so much. Appellant agreed not to call his sons anymore on the cell phone that Jesus paid for. (Id. at 33.)

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[39] This interview was taped and transcribed. (See 5CT 1162-1340.) The transcript shows, inter alia, that appellant was crying and talking unintelligibly to himself, and that in the phone call to his mother he said "they" were harming his children and wanted to eat them. (5CT 1175-79, 1209-10.)

In a phone call with his sister-in-law Pati (Exh. 4, CST 34-50), appellant complained that "many bad things" were being done to his children; he said nothing was going to be fixed with hatred. He said he had made mistakes and he wanted to fix things up and pay whatever came his way, but that he could not accept that his innocent children would pay. (CST at 35.) He complained that Cindi used tricks to keep his sons from talking to him. (Id. at 37.) He talked about Cindi's relationship with Chavez and said that his sons told him that they were hurt a lot when the man and their mother hugged and kissed. They told him that what their mother was doing was not right. Appellant said that Cindi told him – in front of the children -- to take care of them because she was never going to see them again. Appellant said that he did "nothing wrong." (Id. at 40-41.) He said he sought God but couldn't find him and that he wanted God to take him, to give him death, then everyone would be in peace. (Id. at 37.)

When Pati accused him of taking the lives of three innocent persons he said "I did not take it. The way I see it, we all took it." He called the legal process a "farce."[40] (Id. at 42.) Appellant insisted to Pati that he was

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[40] When Pati insisted no one was "taking it out" against his children appellant said "God is going to . . . understand this. You not only are taking it [out] against my children, but also with your own children. Because one of these days, they are going to find out about all of this . . . . As I do not want to do it either, nor the community, nor the famous people of California, nor the world's People the community, nor society, the government the judges. Everything is a farce; all is a farce, hypocrisy." (CST at 42.) When Pati said he or his attorneys were saying he was crazy,

not crazy. Pati said his attorneys were saying that. Appellant said "that is the attorney's and the district attorneys and of all of us's game . . . because we agreed. We are playing with that." (Id. at 45-46.)

In phone conversations with his sons (Exh. 2, CST 4-32), appellant said he loved and missed them, asked if they ate, and said it was better to love people. (Id. at 4-5, 9-12, 14.) He told one son that he had talked to Cindi's new boyfriend Jesus, who said he was supporting the three boys; appellant said not to trust Jesus and warned his son "not to be with those people" who were trying "to harm" him and trying to separate him (his son) from appellant. He said not to trust Jesus. (Id. at 14-16.)

When talking to his son Ivan appellant asked him to excuse him "for all the bad times that I made you go through" and said he loved him very much. (4RT 480-81; CST at 24.) He told him to be God's child and to talk to God. He said he didn't want Cindi to intervene in his relationship with his sons but that he had nothing against Cindi and that Ivan should not feel anger against his mother or her family. He told him to give his mother a kiss, to tell he her loved her. He told his Ivan he loved him very much. (CST at 11, 22.)

Deputy **Calvin Watson, Jr.** had brief conversations with appellant when passing by appellant's cell. His last contact with appellant was seven

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appellant insisted, "I am not crazy!" and "that is the attorney's and the district attorneys and of all of us's game" that we agreed to play. (Id. at 45.)

months to a year prior to his testimony at the competency trial. At that time, appellant was able to communicate enough to ask for a cell change, or to respond to simple questions by saying "fine." Watson's longest conversation with appellant was about two minutes. (4RT 486-89.)

Debbie Mandujamo, a psychiatric nurse working in the county jail, testified that her last professional contact with appellant was September 26, 2003 (over a year before her testimony), at which time appellant was not taking medications. She had no recollection of difficulty communicating with appellant. (4RT 648-53.)

D. The Defense Presented Overwhelming and Substantial Evidence of Appellant's Incompetency That Was Neither Undermined Nor Contradicted by the Prosecution's Evidence.

On an appellate claim of insufficient evidence to support a verdict of competency, the reviewing court determines whether substantial evidence, viewed in the light most favorable to the verdict, supports the finding. The verdict is "not absolute" and "suspicion" is not substantial evidence, i.e., evidence that is reasonable, credible and of solid value. (Samuel, 29 Cal.3d at 493.)

Where the evidence at the competency trial overwhelmingly demonstrates incompetence and is devoid of substantial evidence to the contrary, the effect is the same as if the defendant had been denied his constitutional right to a proper hearing on competency, and the error is reversible per se, requiring that the subsequent convictions also be set

aside. (Id. at 493-94.) As explained in Cooper v. Oklahoma, 517 U.S. at 364, the consequences of an erroneous determination of competence are dire for the defendant and threaten "the basic fairness of the trial itself." Because such a defendant lacks the ability to communicate effectively with counsel, he may be unable to exercise the other rights deemed essential to a fair trial. (Ibid.)

The evidence in this case was insufficient to support the competency verdict. First, the trial court failed to consider the federal requirements of competency. (Section 1, below.) Secondly, appellant presented a wealth of expert testimony as to his present inability to assist in his defense which was unrefuted by the prosecution's presentation. (Section 2, below). Three experts, including the court-appointed expert, testified that appellant was seriously impaired, significantly depressed, and unable to rationally evaluate or assist in his defense. Two of these experts had interviewed and assessed appellant within the previous month, and one within the last week: Dr. Pablo Stewart testified that appellant's condition was deteriorating and that it had worsened since the time of Dr. Cavanaugh's report for the prosecution. Specifically, the defense experts testified that appellant was unable (1) to decide whether to waive a jury trial; (2) to help in choosing jurors; (3) to evaluate testimony of witnesses and assist in cross-examination; (4) to provide insight to his attorneys into what led up to and surrounded the events in question and assist in outlining a defense; (5) to

assist in gathering and presenting mitigation evidence; (6) to evaluate whether or not to testify; and/or (7) to evaluate possible plea offers. (3RT 395-97; 4RT 600, 608, 612-16.)

On the other hand, the prosecution's experts did not testify as to appellant's present competency.[41] Nor did any of the evidence presented by the prosecution refute or even address the critical point of competency as defined by the United States Supreme Court, i.e., that competency requires the ability to decide whether to plead guilty or go to trial, to take or waive the right to testify and to call or cross-examine witnesses, to assist counsel in whether (and how) to put on the defense and whether to raise one or more affirmative defenses. (Godinez, 509 U.S. at 398; see also Cooper, 517 U.S. at 354 [accord].)

1. The trial court denied appellant's motion using the wrong standard and failed to assess the federal constitutional requirements for competency.

The trial court denied appellant's motion for judgment notwithstanding the verdict on the grounds that "evidence from Dr. Cavanaugh's opinion" was supported by "evidence from the phone calls and other evidence indicating that [appellant] had [the] capacity to carry on rational discussions, did not appear to be so depressed that he was unable to

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[41] Dr. Trompetter had no opinion as to appellant's competency. Dr. Cavanaugh had no opinion as to appellant's current competency, although he believed that appellant was competent to stand trial 10 months earlier.

rationally think or rationally pursue objectives which he believed were appropriate." (5RT 760.)

While the taped phone calls and testimony from jail staff showed that appellant was able (at least months before) to converse at a basic level about daily matters, they also showed appellant's inability to engage in reasonable rational discussion about his case and to assist in his defense, as testified to by the defense experts.

The trial court found only that the prosecution's evidence demonstrated appellant's capacity to carry on "rational discussions and to rationally pursue objectives he believed appropriate." Competency to stand trial requires more than the ability to discuss and pursue some objectives in a rational manner. As repeatedly emphasized by the United States Supreme Court, competency requires a present ability to make essential decisions critical to a fair trial, including whether to plead guilty or go to trial, to take or waive the right to testify and to call or cross-examine witnesses, and to assist counsel in whether (and how) to put on the defense and whether to raise one or more affirmative defenses. (Godinez, 509 U.S. at 398; see also Cooper, 517 U.S. at 354 [accord].) The trial court erred by failing to apply the federal constitutional standard in assessing the sufficiency of the evidence of appellant's competence.

As shown below, Dr. Cavanaugh's opinion that appellant was competent was shown – through Dr. Cavanaugh's own trial testimony and

his taped interview with appellant -- to be based on an inadequate foundation. Furthermore Dr. Cavanaugh's testimony was so compromised by his own admitted failure to conduct follow-up questions with appellant or others that it rendered his opinion insubstantial and of less than solid value.

2. The prosecution failed utterly to refute the impressive array of evidence presented by the defense that appellant was not competent to stand trial under the federal constitutional requirements.

Appellant proved by a preponderance of the evidence that he was unable to consult with counsel with a reasonable degree of rational understanding, and to assist in his defense, because of his neurologically based mental disorder. Nothing in the prosecution's case addressed appellant's inability to rationally assist counsel. Therefore, the jury's verdict finding him competent was contrary to the evidence and should have been set aside. The federal constitution requires that a defendant cannot stand trial unless he is able to communicate with his attorneys and assist in making critical decisions essential to a fair trial, including deciding whether to testify and assisting in cross-examination.

In Samuel, 28 Cal.3d at 498, this Court found the evidence insufficient to support the jury's verdict of competence where the defense presented an "impressive array" of evidence demonstrating present

incompetence and the prosecution offered no expert testimony and only two lay witnesses, neither of whom contradicted the defense testimony.

Appellant contends that a careful analysis of the prosecution's evidence shows that the same result must be reached here.

(a) Dr. Cavanaugh's opinion that appellant was competent was not only stale, it was compromised by faulty techniques and was without adequate foundation as shown by the transcript of Dr. Cavanaugh's interview with appellant.

Dr. Cavanaugh testified to his opinion that 10 months earlier appellant was competent to stand trial, but the prosecution presented no evidence contradicting Dr. Stewart's testimony that appellant's condition was deteriorating and that a month before trial he had been unable to answer questions about the charges he faced. Moreover, cross-examination of Dr. Cavanaugh and the tape recording of his interview with appellant showed that his opinion was compromised by his admittedly faulty techniques and without adequate foundation.

For example, Dr. Cavanaugh stated his opinion that appellant had a basic understanding of the players in the proceedings and a capacity to assist his attorneys, based on appellant's ability during the interview to *sometimes* respond appropriately to questions about what a trial and judge were. (4RT 519-21.) However, Dr. Cavanaugh agreed that appellant's answers about how an attorney should defend (he said "it doesn't really

matter what [the lawyers] do" and that "we're all just doing the wrong thing" and "we don't acknowledge God," and that he would just leave it in God's hands) did not express a good understanding of an attorney's function. (4RT 554-56.)

For example, when Dr. Cavanaugh gave appellant some "rough examples" of defenses, he felt appellant was "able to grasp the[ir] nature" but noted that appellant "rapidly moved into his idea that this is neither here nor there. We have nothing to prove for God is what he said." (4RT 505.) Although Dr. Cavanaugh stated that "at the time" he saw him (months earlier) he felt appellant was able to assist counsel in conducting the defense, this opinion was based on "the fact that he was able to respond logically and rationally to questions which didn't pertain to the trial," such as questions regarding his past history. Dr. Cavanaugh also said that appellant handled without too much difficulty hypothetical questions regarding what he would do if he were an attorney. (4RT 521.) In fact, what appellant said in response to questions from Dr. Cavanaugh was that if he were an attorney he would say "I'm just going to leave it in God's hands." (Exh. 7, 1 Clerk's Supplemental Transcript 79-80.) When Dr. Cavanaugh posed specific questions about defending cases, appellant said as a lawyer he would "just tell the truth," and that he really didn't "understand that the poor guy who's being charged and they saw at that time and he's telling his lawyer that this other people that they call the

victim that he's the one who tried to rob money from him . . .they all have to prove, I guess, what really happened, and that's that's here and now. Like I said, we've got nothing to prove against God" and then continued in this religious vein. (Id. at 82-83.)

Dr. Cavanaugh testified that appellant understood his attorneys' role: appellant said they represented him, but also said that the most important thing they had done was to arrange contact visits for him and his children. Appellant also understood that the prosecutor was "against him." Yet appellant stated, "I don't understand the system or what is happening, all they do up there, I really don't." (4RT 542-43.) When Dr. Cavanaugh asked appellant what the judge did, appellant responded, "I guess he is monitoring what's going on. I really don't understand." Dr. Cavanaugh prompted him by saying, "Who, uh, who sentences?" Appellant responded that God did. (1CST 71; 4RT 543-44.) When Dr. Cavanaugh tried to focus appellant on punishment in the temporal plane, by asking what jails were for, appellant said, "That's just victims too. People has different perspectives from my... perspective is that just to punish somebody that you're not supposed to be punishing. If you want to punish somebody it'll be yourself and you do not even know how to help even." When Dr. Cavanaugh asked if people who did bad things needed punishment, appellant ranted about God and peace:

"They don't have a right to do that just as the people don't have the right to judge, to prosecute, to put people in jail, to keep them in jail... just the same thing. Exactly, nobody has the right to invade the space of some else business, but themselves and it's just completely wrong in every way you see it. Like I said, just because there's a lot of people who's robbing, people who's taking lives of other people... just because of uh, people is sending people to prison, people is judging and sentencing and punishing and taking the lives of people who's supposed to be... committed a crime, that doesn't mean that we are right. That's why we are suffering ourselves. Instead of that we could just trust God and pray and thank Him for all the good things He gives us and be at peace with Him. And when we find peace with our brothers and we don't need t o worry about all those things... because we worry so much about all those things and that's why they happen." (1CST 72.)

Dr. Cavanaugh asked appellant why he needed to enter a plea of not guilty if it was not right for people to judge. Appellant responded:

"'Cuz that's what they told me to say, but, uh, I don't need to prove nothing to no people. God is the one who is going to do whatever He wants to do with me and He's doing it. Just like the way He's doing it to everybody. We think we can go up above him, we won't, and that's when we pay the consequences, and whatever I did against Him, I'm real remorseful and He is the one who knows me and that's what I care for. I want to please Him, I don't need to please nobody else. He wants me to please you. I will do it. I just want to do it in a certain way because I wouldn't be talkin' to you at all. God just keeps letting me know that I need to do certain stuff... so you can know... learn about Him. 'Cuz, I just... most of us will say that we know about Him, but it's just in our [] conscious mind or something. I don't know, but we really don't know about Him. We need to learn about Him." (1CST 72-73.)

Cavanaugh agreed that appellant's statements did not show much understanding of the different pleas in a criminal proceeding. (4RT 545-47.)

Dr. Cavanaugh also agreed that appellant failed to respond to the question about the jury's role. Appellant's nonsensical description of the jury was: "a person is being tried and what happened and they are to decide if that person, something that is completely wrong, that is, this guy is who decides and they translate it all being wrong. Nobody can help it, that is like assuming again." (4RT 558.)

Dr. Cavanaugh admitted that at almost every point at which he talked to appellant about things a competent client needed to be able to do, appellant went off into religious rants. (4RT 572.) Dr. Cavanaugh had to "redirect" appellant on a number of occasions and appellant sometimes gave long-winded answers on religious themes that had almost nothing to do with the question posed. (4RT 524-25.) When Dr. Cavanaugh asked if appellant could tell him what happened, or what people said happened, appellant responded:

> "I don't know... I don't know ... I don't know what they say that happened. I don't want to talk about what happened... I'm forgiving about that and then I'll find the peace... so I don't need to remember things that ... what happened to a lot of people and what happened to me. I don't want to hurt anybody and I'm praying for all those people who try and hurt me because, like I said, it's not, it's not in my heart for God to kill someone. If He allows it, I mean, I'm going to be fine... still, so, I don't want anybody to hurt themselves. Like I said, I have no control over it. There is nothing I can do but pray. Pray for them. Pray for everybody and pray for me. I'm not worrying about all those things that they want to do up there, um, it's just that they are gonna be allowed to do whatever's fair. They can go." (1CST 69; 4RT 540.)

Despite Dr. Cavanaugh's repeated questions about the facts underlying the charges, appellant never gave a direct answer, and instead talked about finding peace, praising God, and said he didn't understand what murder meant:

> "Dr. Cavanaugh: And, it says that you are charged with murder. Is that your understanding?
>
> Mendoza: That's what I did understand before but, right now, the more I think about that is that I didn't do nothing. If we are all suffering about the situations where we put ourselves into it, it is because we, ourselves put into our, into that. We're sorry because of our bad deeds. [] And now because someone else did something for us. And, all we have to do is trust God and have faith and have the confidence, and pretty soon we are gonna be OK. And that is for everybody.
>
> Dr. Cavanaugh: OK... can you tell me, just, not relating to you or your charges, but in general, what does murder meant?
>
> Mendoza: There is nothing I can say that will help. Like I said, we don't need to worry about all these things. We're just wasting our time. One real simple thing we can do is praise God and thank Him for all the good things that He gives us. We don't do that. We worry about so many other things that's why we're in trouble.
>
> Dr. Cavanaugh: OK, I understand that, but [] what does murder mean?
>
> Mendoza: I don't understand what murder means, so, whatever peace means in our land, or what they mean." (1CST 70; 4RT 541.)

In short, Dr. Cavanaugh himself was unable to discuss with appellant in any rational way even the most basic facts of the case, which corroborated the defense experts' opinions that appellant was unable to consult with defense counsel or assist in his defense in a reasonable rational

manner, as is required under United States Supreme Court precedent. (Godinez, 509 U.S. at 398; Cooper, 517 U.S. at 354; see also ABA Criminal Justice Standards on Mental Health (1989) Standard 7-4.1 [competency to stand trial requires not only a basic understanding of the adversary system, but also an ability to rationally communicate to counsel pertinent information and otherwise assist in the defense].)

People v. Lawley, 27 Cal.4th at 132 explained that the chief value of an expert's opinion rests upon the material from which his opinion is fashioned, and the reasoning by which he progresses from his material to his conclusion, and not in the "mere expression of conclusion." Lawley described expert evidence as an "argument" which has value only in regard to the proof of the *facts* and the validity of the *reasons* advanced for the conclusions. (Ibid., citing People v. Bassett (1968) 69 Cal.2d 122, 141.) Dr. Cavanaugh's opinion that appellant was competent (10 months earlier) lacked both factual proof (because of his failure to follow-up or investigate) and valid reasons (because of his use of speculation or conjecture).

For example, Dr. Cavanaugh concluded that appellant's preoccupation with religion was "authentic" rather than "delusional," i.e., appellant had "overvalued" religious ideas not delusions. Dr. Cavanaugh thus opined that these ideas would not interfere with appellant's ability to cooperate with counsel because religious ideas were "less firm than

delusions," which tended to be more "unreasonable." Dr. Cavanaugh acknowledged that delusions *could* interfere with the ability to cooperate, and acknowledged that the distinction between delusions and "overvalued ideas" was a matter of degree, and that the person's culture was one of the exclusion factors in deciding what is a delusion (so that religiosity might not be a delusion if it is culturally based). (4RT 574-75.) However, Dr. Cavanaugh conducted no investigation into appellant's culture. Nor did he consult with family or friends to see if appellant's religious preoccupation was recent or not. (4RT 575.)

Since Dr. Cavanaugh could cite no facts in support of his conclusion that appellant did not have delusions (which could interfere with his ability to consult with counsel), and because he did not attempt to obtain the facts required to distinguish between delusions and overvalued ideas, his conclusion that appellant was not delusional was without substantial evidentiary value. His opinion on this point was "the mere expression of a conclusion." (Lawley, 27 Cal.4th at 132; People v. Moore (2011) 51 Cal.4th 386, 405 [proper expert opinion cannot be based on mere conjecture or speculation].) Because Dr. Cavanaugh did not bother to investigate the facts required to distinguish between delusions and preoccupations, his opinion that appellant was not delusional was mere "argument" unsupported by facts, and thus of insignificant evidentiary value. (Lawley, 27 Cal.4th at 132.)

Dr. Cavanaugh's lack of preparation, inadequate foundation, and consequent lapses in reasoning are demonstrated by his failure to ask follow-up questions and his non sequiturs. When appellant said some people didn't like him and that he was rejecting God and they were rejecting God too, Dr. Cavanaugh's follow-up non sequitur question was "How tall are you?" Dr. Cavanaugh did not ask appellant why he thought people didn't like him but agreed that having information about appellant's thoughts on this issue would be important in assessing whether a person has paranoid ideation. (4RT 532.)

After asking how tall he was, Dr. Cavanaugh asked if appellant ever heard voices, which prompted a rant from appellant:

> "Like I said, I don't wanna talk no more about my personal life and if you guys are tryin' to say that I'm crazy, I'm not crazy. If you think that I'm crazy, well just everybody's crazy, because the reason we all got problems because we don't trust God, and all you guys are doing out there . . . it's just ... it's wrong. Everybody out there is trying to do something that they think is right by people, judging people, condemning people, sentencing people and all of it is wrong because it's not in our hands to do that. All we have to do is praise God. Praise God because, all the good things that we have that will really help is from them... from Him, not those of us." (1CST 63.)

When Dr. Cavanaugh tried to explain that he was trying to determine whether he could or couldn't cooperate with his attorney, appellant said that

> "this whole process is just wasting our time [] all this recording and going to court [is] just wasting of time. We don't, we don't even know if we are gonna be alive tomorrow, none of us do, so the best thing we can do is praise God and thank Him for all the good things that He gives us everyday. . . [] like I said, we all, most of the time, are doing stuff that we are not supposed to do. And then all the

> people are doing is hurting people and the most important thing is hurting themselves. We don't know that, that's why we keep on doing it. But, um, I myself, I'm there with um... but I'm doing that, but I don't want to be doing that. I want to have a really good relationship with God, and I want everybody to have a real good relationship with Him. And how is that []? All we have to do is not to worry about anything up there, but praise Him and thank Him... thanking Him for everything He does for us. It is His good things that He does for us. And, I'm talking about... I don't need to worry about tomorrow, not even what's going to happen later, but what is going on right now. And, right now, I know that I'm in peace and believe it or not, you're in peace because you're not trying tot do anything l to me... and, in the eyes of God and just that... it's not because of you, but it's the Law of God and we're all gonna be OK pretty soon. Even though we're trying to ... our best, to do the opposite." (1CST 63-64.)

Dr. Cavanaugh was unable to focus appellant on the questions asked. Appellant talked about God at a high level of abstraction rather than giving the concrete answer Dr. Cavanaugh sought. Despite several attempts Dr. Cavanaugh was unable to direct appellant back to the court process. Appellant finally said the voices he had heard his whole life and recently more frequently were "inner voices that are from God." Although Dr. Cavanaugh did not consider these voices as hallucinatory, he also did not ask any questions about the voices, when they came, or whether they issued commands. (4RT 533-36, 565, 573.)

When Dr. Cavanaugh asked appellant what kind of penalty he faced, appellant said he didn't know and didn't worry about it. (4RT 546-47.) When told it was a death penalty case, appellant said,

> "I hear that's what they thinking, but I can tell you they're completely wrong... it's going to happen what God wants. Yeah, because

> whatever happened up there in my case, it ain't happening to someone... I really don't understand it, why it happens, but you have to ask Him... and we'll find peace ourselves, asking Him for that peace that we want in our minds and in our hearts, or we'll never find it." (4RT 547; 1CST 73.)

Dr. Cavanaugh was unfamiliar with the concept of mitigation in a capital case. (4RT 528.) Because Dr. Cavanaugh was himself ignorant of the meaning of mitigation in a capital trial, his opinion that appellant was able to consult with and assist counsel at the penalty phase of that trial was necessarily without foundation and cannot be deemed "substantial evidence" in support of the competency verdict. If Dr. Cavanaugh did not know what types of things appellant would be called upon to discuss or assist in for preparation and presentation of mitigating evidence, Dr. Cavanaugh obviously could not determine that appellant was capable of doing the (to Dr. Cavanaugh) unknown.

The federal constitution requires that to consult with counsel and assist in his defense, the defendant must be able to give specific information to counsel, and must be able to focus on questions posed by defense counsel. Appellant was not able to do this with Dr. Cavanaugh. Thus, the facts of the interview do not support the doctor's opinion, and his opinion is without solid evidentiary value. Dr. Cavanaugh was shown to have conducted a wholly perfunctory interview with appellant. He admitted not asking important follow-up questions, failing to investigate by questioning appellant's family members as to his religious ideation. Indeed,

as Dr. Stewart pointed out, Dr. Cavanaugh apparently had not even bothered to inform himself about the facts of the case as illustrated by the fact that he asked appellant how his marriage was going, and if he had any problems there. (CST 59; 3RT 399-400.)

Dr. Cavanaugh's own testimony (and the tape recording of his interview with appellant) show that appellant was in fact unable to assist counsel since (1) appellant did not express a good understanding of an attorney's function; (2) when Dr. Cavanaugh talked to him about things a competent client would need to do, appellant ranted about religion; (3) despite repeated attempts by Dr. Cavanaugh to ask appellant about the underlying facts of the case, appellant never gave a direct answer and talked about peace and God; and (4) appellant was unable to focus on the questions asked. Appellant was unable to discuss the proceedings, the parties, the facts of the case or his defense in a reasonable, rational manner. Because the facts upon which Dr. Cavanaugh relied for his opinion (the taped interview) did not support his conclusion his expert opinion was mere argument and insufficient to support the verdict.[42]

In sum, Dr. Cavanaugh's testimony was a "mere expression of conclusion," Lawley, 27 Cal.4th at 132, rather than an opinion based on

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[42] Dr. Cavanaugh never testified that appellant was malingering or feigning. Rather, Dr. Cavanaugh testified that based on the facts of the interview he conducted, appellant was competent to stand trial. However, as shown here, the facts of that interview do not support his opinion.

facts and valid reasoning, and thus did not amount (either standing alone or with the other bits of evidence presented by the prosecution) as substantial and solid evidence sufficient to support the jury verdict of competency.[43]

(b) The taped phone conversations between appellant and family members showed nothing about his legal competency.

In the taped conversations with his family members, appellant was able to talk to his sons: he told them to be good, to pray to God, and that he loved and missed them. He talked to his wife Cindi and sister-in-law Pati about his sons and the threats they had faced from Cindi's former boyfriend (victim Chavez) and her new boyfriend Jesus. As Samuel pointed out, such testimony "revealed little if anything about [appellant's] competence to stand trial" because an ability to communicate as to routine tasks or matters bears "little relation" to the question of competency. (29 Cal.4th at 502; see also American Bar Association, ABA Manual on Criminal Justice Mental Health Standards (1989) 7-4.1 [ability to assist counsel is substantially different from an ability to understand trial proceedings].)

On the other hand, these conversations confirmed appellant's paranoid and religious ideation, and his inability to talk coherently about the facts of the case: he repeatedly expressed his fear that his children were

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[43] Even the trial court seemed to think that Dr. Cavanaugh's testimony was insufficient standing alone when it stated that his opinion was "supported" by the phone calls and "other evidence" indicating appellant was capable of some rational discussion. (5RT 760.)

being harmed, he told Pati he had done nothing wrong, that they had all taken lives, that he even wished his children's deaths so they would be in peace and that this was "coming from God." (CST at 40-49.)

(c) Testimony from jail staff as to trivial conversations with appellant failed to refute the strong evidence of his legal competency.

Psychiatric nurse Mandujamo testified that when she last saw appellant two years ago she "recalled" no difficulty speaking with him. Deputy Watson had brief conversations with appellant when passing by his cell seven months to a year prior to trial. The conversations consisted of appellant saying he was "fine" or asking for a cell change. Testimony that appellant was able to engage in short banal conversation or make requests regarding his living conditions show only that appellant was sometimes able to conduct a rational discussion about everyday matters. As in Samuel, this testimony bore little or no relation to appellant's present competency. (29 Cal.4th at 502.)

(d) Dr. Trompetter gave no opinion as to appellant's competency at the time of his arrest or any other time.

Dr. Trompetter gave no opinion at all as to appellant's competency past or present. He had never interviewed appellant, and at the time of trial it had been three years since his single "observation" of appellant during the police interview following his arrest. Dr. Trompetter acknowledged that

appellant made paranoid comments and religious references during this interview. Dr. Trompetter's testimony was devoid of any fact relevant to the test for competency, past or present. Specifically, he gave no testimony in support of Dr. Cavanaugh's (outdated and unfounded) opinion that appellant was capable of rationally consulting with and assisting counsel.

D. The Insufficient Evidence of Competency In This Case Requires Reversal.

This Court has distinguished Samuel in several recent cases. However, analysis of these cases demonstrates that they are distinguishable from the case at bar, which is much more closely aligned with Samuel. In People v. Marks (2003) 31 Cal.4th 197, 219 -- in contrast to Samuel and the case at bar -- the defense evidence of incompetency "was not compelling." The reliability of the expert testimony presented by the defense was called into question in cross-examination. Moreover, the defense experts who testified that the defendant was incompetent were unfamiliar with the evidence that tended to render the defendant's behavior comprehensible rather than paranoid. Finally, in contrast to Samuel and the case at bar, the prosecution in Marks produced "abundant evidence" that the defendant was competent, in particular statements and conduct by the defendant showing that when he wanted he was well able to assist in his defense (his outbursts showed his understanding) and refused to cooperate only in his attempt to obtain substitution of counsel. (Id. at 269-70.)

The evidence in this case is the converse of that in Marks: here the defense produced "abundant evidence" of appellant's incompetency; appellant made no in-court statements or that showed he was able to assist in his defense; the prosecution presented no expert evidence that appellant was competent at the time of trial; and the reliability of the expert testimony provided by the prosecution was shown to be based on an inadequate foundation and did not in any way undermine or contradict the evidence of incompetency presented by the defense.

People v. Hill (1998) 18 Cal.4th 894, 1003-05 overruled on other grounds in People v. Doolin (2009) 45 Cal.4th 390, rejected a claim of insufficient evidence of competency where two of the three court-appointed experts who testified found appellant competent after standardized testing and/or lengthy interviews with the defendant; furthermore, a deputy who had seen appellant every day during the trial observed no significant changes in his behavior or ability to communicate.

Clearly, where there is solid and credible expert testimony as to the defendant's present competency, as in Hill, a claim of insufficiency will founder. But in this case the experts who conducted testing and/or lengthy interviews with appellant found him incompetent; the expert who considered appellant competent in the past (Dr. Cavanaugh) had done no testing, conducted only a 1.5 hour interview, and did no preparation (as

evinced by his question re marriage) or follow-up (such as checking culture before determining religious fixation was authentic rather than delusional).

People v. Marshall (1997) 15 Cal.4th 1 involved expert witnesses whose opinions that the defendant was incompetent were based "primarily on their interviews with defendant," but both had "reservations regarding their expressed views of defendant's incompetence." (Id. at 32.) One doctor said his opinion of incompetency lacked a level of reasonable medical certainty, and the other said it was possible that the defendant could cooperate with counsel if he wanted to. Moreover, the court had before it evidence of the defendant's conduct while he was representing himself that supported a finding of mental competency. (Ibid.) Here, by contrast, the three defense experts were definitive in their opinions, and the prosecution's experts were inconclusive.

People v. Stanley (1995) 10 Cal.4th 764, 809 also distinguished the facts in that case from the "virtually one-sided showing of incompetence" in Samuel. In Stanley, defense counsel testified that the defendant had been competent to assist in the defense until a disagreement about the use of tape-recordings at penalty phase. The defense medical expert testified that he believed the defendant to be incompetent, although one test he administered marginally supported a finding of competency and the second marginally supported a finding of incompetency. Testimony by a jailer and inmate supported a finding of competency. Two court-appointed experts

presented by the prosecution found the defendant competent after hour-long interviews. (Id. at 809-11.)

Here by contrast, the defense presentation was overwhelming and unequivocal, the prosecution's experts either gave no opinion (Dr. Trompetter), or gave an unfounded and outdated opinion (Dr. Cavanaugh), and the jailhouse witness testimony bore little or no relation to competency.

E. International Jurisprudence on Competency to Stand Trial Fully Supports Appellant's Claim that the Evidence Against Him Was Insufficient to Support the Verdict.

The United States Supreme Court has long referred to international legal norms and the practices of other nations when determining the contours of due process requirements. (See, e.g., Lawrence v. Texas (2003) 539 U.S. 558, 573 [citing ruling by the European Court of Human Rights as indicative of "values we share with a wider civilization" embodied in Due Process Clause requirements].) [44]

Nowhere in law is this confluence between domestic and international practice more evident than in the prohibition against trying individuals who are not mentally competent to assist in their own defense. As the Supreme Court has repeatedly acknowledged, "[t]he rule that a

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[44] See also Rochin v. California (1952) 342 U.S. 165, 169 [Due Process Clause obliges courts to ascertain whether laws offend "those canons of decency and fairness which express the notions of justice of English-speaking peoples"]; Fisher v. United States (1946) 328 U.S. 463, 488 (Frankfurter, J., dissenting) [when reviewing fairness of death sentence in case raising mental responsibility issues, Court "should be guided, as was the [British] Privy Council...by broad considerations of justice"].

criminal defendant who is incompetent should not be required to stand trial has deep roots in our common-law heritage." (Medina v. California (1992) 505 U.S. 437, 446; accord Drope v. Missouri (1975) 420 U. S. 162, 171 [accepting longstanding "common-law prohibition" against trying the mentally incompetent]; Cooper v. Oklahoma, 517 U.S. at 356-359 [relying on extensive survey of historical and contemporary English common law practice in determining that incompetency is established by a "preponderance of the evidence" standard].)

To be sure, the Court's longstanding referral "to the laws of other countries and to international authorities" is not dispositive; however, these international sources are "instructive for its interpretation" of constitutional issues. (Roper v. Simmons (2005) 543 U.S. 551, 575; cf. People v. Cook (2006) 39 Cal.4th 566, 620 [where defendant has established "that he was denied due process [or] a fair and impartial trial," the court is not precluded "from reaching his international law claims based on those allegations"].) Moreover, international jurisprudence supports the merits of appellant's claim that he was incompetent to stand trial and sheds significant light on the legal factors that this Court is now called upon to consider.

In the United States, the test for a defendant's competency to stand trial has long been "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the

proceedings against him." (Dusky v. United States (1960) 362 U.S. 402.) A one-page *per curiam* order that is bereft of any guidance on the meaning or application of these requirements, the Dusky holding

> "has been criticized for both its brevity and ambiguity by mental health professionals and legal scholars alike. Despite these concerns, the *Dusky* standard, or some variation of it, has been adopted by every state in the United States . . . ."

(Gianni Pirelli et. al., A Meta-Analytic Review of Competency to Stand Trial Research, 17 Psychology, Public Policy, and Law 1, 2 (2011).) However, the high courts of other common-law jurisdictions have provided substantially more detailed guidance on the criteria and content required for competency determinations. For example, courts in Australia uniformly apply what has become known as the "Presser rules" when evaluating a defendant's fitness to stand trial, as announced in R. v. Presser [1958] VicRP 9 VR 45 at 48.[45] Under Presser, an accused must

> *"be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceedings, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in Court in a general sense, though he need not, of course, understand all the formalities. He needs to be able to understand the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this by letting his counsel know what his version of the facts is and, if necessary, telling the Court*

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45 Available at <http://www.austlii.edu.au/ cases/vic/VicRp/1958/9.html>

> *what it is. He need not have the mental capacity to make an able defence: but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any."*

These detailed criteria are viewed as "the minimum standards with which an accused must comply before he or she can be tried without unfairness or injustice." (Kesavarajah v. R [1994]181 CLR 230 at 245 (Austl).)[46] Incompetency to stand trial is established if a preponderance of the evidence shows that the defendant fails to meet *any one* of these requirements. (See R v. Miller [No. 2] [2000] SASC 152 (Supreme Court of South Australia),[47] at para. 43 [finding defendant incompetent to stand trial on the sole basis that "the accused is unable to understand the charge" and without reliance on the other presented criteria for unfitness, such as inability to exercise procedural rights].)[48]

Drawing on common law precedents dating back to 1836, the Court of Appeals for England and Wales determined that the appropriate test for competency to stand trial requires an evaluation of six primary factors: "(1)

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[46] Available at http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1994/41.html?query=titleKesavarajahandR or http://www.austlii.edu.au/au/cases/cth/HCA/1994.41.html

[47] Available at <http://www.austlii.edu.au/au/cases/sa/SASC/2000/152.html>

[48] Available at <http://www.austlii.edu.au/au/cases/sa/SASC/2000/152.html>

understanding the charges; (2) deciding whether to plead guilty or not; (3) exercising his right to challenge jurors; (4) instructing solicitors and counsel; (5) following the course of the proceedings; (6) giving evidence in his own defence." (R. v. John M [2003] EWCA Crim 3452, at para. 20.)[49] The appellate court found that the trial judge correctly instructed the jury that "it was sufficient for the defence to persuade them on the balance of probabilities that *any one of those six things* was beyond the appellant's capabilities." (Ibid.; emphasis added.) Elaborating on the fourth component, the court approved of a jury instruction explaining that instructing counsel

> "means that the defendant must be able to convey intelligibly to his lawyers the case which he wishes them to advance on his behalf and the matters which he wishes them to put forward in his defence. It involves being able (a) to understand the lawyers' questions, (b) to apply his mind to answering them, and (c) to convey intelligibly to the lawyers the answers which he wishes to give." (Id. at para. 21.)

Statutory embodiments of competency requirements in other common-law jurisdictions are also instructive: under Canadian law, for example, "unfit to stand trial" is defined as "unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to (a) understand the nature or object of the

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[49] Available at <http://www.bailii.org/ew/cases/EWCA/Crim/2003/3452.html>

proceedings, (b) understand the possible consequences of the proceedings, or (c) communicate with counsel." (Criminal Code, R.S.C. s. 2. (1985) (Can.); cf. California Pen. Code §1367 (a) [incompetence defined only as "unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner"].).

Elsewhere in the Western world, the European Court of Human Rights has held that effective participation in trial proceedings presupposes that an accused (i) "has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed"; (ii) is "able to understand the general thrust of what is said in court"; (iii) is "able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence." (S.C. v. the United Kingdom, no. 60958/00, para. 29, ECHR 2004-IV.)[50]

For their part, international criminal tribunals have elaborated on the elements required for the defendant's "rational and factual understanding" of the proceedings:

> "[T]he Defendant in the present case must have both a rational and a factual understanding of the specific charges against him, the process of a trial, the roles of the participants and the consequences of a conviction. This also means that he

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50 Available at < www.menschenrechte.ac.at/orig/04 3/S/C/ GB.pdf>

> must have both a rational and a factual understanding of the role of his lawyer in defending him. Additionally, he must have a present ability to consult with his lawyer and. . . . to assist in the preparation of his defense with a reasonable degree of rational understanding."

(Special Panels on Serious Crimes (East Timor), Deputy General Prosecutor for Serious Crimes v. Joseph Nahak, Case No. 01A/2004, Findings and Order on Defendant Nahak's Competence to Stand Trial, 1 March 2005, paras. 55 and 156 [hereinafter "Nahak Judgment"]).[51] "A failure to have adequate capacity as to *any one of these elements of competency* would be fatal to a defendant's fitness to stand trial." (Id. at para. 135; emphasis added).

In a similar vein, the International Criminal Tribunal for the former Yugoslavia (ICTY) recently reviewed the "non-exhaustive list of rights which are essential for determination of an accused's fitness to stand trial" by citing a case in which the defendant's indictment for war crimes had been dismissed

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[51] Established under United Nations authority, the Special Panels on Serious Crimes (SPDS) heard cases of alleged genocide, war crimes and crimes against humanity perpetrated in East Timor. The Nahak Judgment of the SPDS is available at <http://www.wcl.american.edu/warcrimes/wcro_docs/collections/spscet/SPSC,_East_Timor_-_Judgmts,_Indmts_&_Docs/Nahak,_Josep_(Barros,_S_et_al)/Nahak%2C%5FJ%2D%5FFindings%5Fand%5FOrder%5Fon%2Epdf.>

> "on the basis that his mental disorder rendered him incapable of participating in the criminal procedure, i.e. of understanding the indictment, pleading about his guilt, presenting his case, carefully following the course of the hearing, suggesting evidence, examining witnesses, cooperating with his counsel and actively participating in the proceedings using all the rights he has as the accused."

(ICTY, Prosecutor v. Pavle Strugar (Appeal Judgment), IT-01-42-A (17 July 2008), paras. 54 and 55 [hereinafter "Strugar Judgment].)[52]

In short, the competency standard applied in comparative common-law and international jurisprudence is broadly consistent with (but often substantially more detailed than) "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense . . . ." (Drope v. Missouri, 420 U.S. at 171.) These additional sources provide important guidance on the range of factors that the trial court should have considered.

F. Conclusion.

In conclusion, the defense far exceeded its burden to prove incompetency by a preponderance of the evidence. The jury's verdict was not supported by the evidence. It was not reasonable for the jury to reject the wealth of evidence presented by the defense. Reversal of appellant's subsequent convictions is thus required in order to ensure that appellant is

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[52] Available at <http://www.unhcr.org/refworld/docid/48ad43072.html> [accessed 22 October 2011].

not convicted and sentenced to death until he is able to rationally consult with his counsel and assist in his defense. As Samuel explained, although the reviewing court should give deference to the trier of fact, the jury's discretion is not absolute, particularly in the context of a competency trial, where neither the prosecution nor the defense has a constitutional right to a jury trial, and reversing the competency finding does not necessarily affect the question of guilt or penalty. More importantly, in Samuel as in this case, almost all the experts were either medical experts or employees of public institution and could not reasonably be suspected of falsification, and there was no real conflict in the facts, only the conclusions to be drawn from the facts. Thus, the jurors did not have to determine which version of the facts to believe, but had before them only the question of what to conclude from the undisputed facts. (Id. at 505-06.)

Under state, federal and international law, the overwhelming and unrefuted evidence demonstrated that appellant was incompetent to stand trial. His due process rights were violated and his convictions must be reversed.

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II. AFTER THE COMPETENCY JURY VERDICT AND BEFORE, DURING, AND AFTER THE GUILT/SANITY/PENALTY TRIAL, THE DEFENSE REPEATEDLY SHOWED SUBSTANTIAL CHANGED CIRCUMSTANCES AS EVIDENCE OF APPELLANT'S PRESENT INCOMPETENCY, SUCH THAT THE TRIAL COURT'S REFUSAL TO REINSTATE PROCEEDINGS WAS AN ABUSE OF DISCRETION, UNSUPPORTED BY THE FACTS, AND THE RESULTANT DUE PROCESS VIOLATION REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS

A. Introduction and Summary of Argument.

After the jury verdict of competency a year before the guilt/sanity/penalty trial, appellant repeatedly showed a substantial change of circumstances sufficient to warrant suspension of the proceedings for a further hearing on his present competency. The trial court's refusal to reinstate proceedings under section 1368 was unsupported by the facts, and as such was an abuse of discretion and a violation of appellant's federal due process rights, requiring a reversal of appellant's convictions. (People v. Ary (2011) 51 Cal.4th 510, 517-18.)

B. Summary of Proceedings Below.

On January 19, 2005, at a hearing on appellant's motion to represent himself, appellant said he understood the charges against him. When asked if he had legal training, he answered, "No, but this is my life and the life of my kids. So there is no one out there who cares about them. And I do care so I'm going to do everything I can to protect them." (5RT 756-47.) When the judge asked if he knew what defenses were available to him, appellant said, "Whatever is available is up there. And God is helping me, so I'm

going to be able to do it because this is all a lie. And the People is there to protect the so-called innocent victims. And how come they weren't there to protect my kids that were really innocent?" (5RT 747.) When asked what kind of expert witnesses he would be able to call, appellant said, "Somebody who doesn't lie. It doesn't matter who. Somebody who tells the truth." (5RT 747.) When the judge asked him if he could read and write in English, appellant said, "I'll do my best. But like I said, this is my life and this is the life of my kids and there is people who corrupted them and they can take their bodies and minds, yours as well as mine, but they're not going to take their spirit and it's not going to happen." (5RT 748.) Based on the proposition that competency to represent oneself required a different standard than competency to stand trial, the judge stated that he did not believe appellant was competent to represent himself because of his statements that he would put the matter in God's hands and that God would assist him.[53] (5RT 749-50.)

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[53] At the next hearing date, the trial court reversed this ruling, stating that it was based on an incorrect assumption of the law that the two standards were different; and then denied the Faretta motion as untimely. (5RT 761-64.) In 2008, the United State Supreme Court concluded the two standards were different: Indiana v. Edwards, 554 U.S. at 178 held that the federal constitution permitted a trial court to insist on representation by counsel for those deemed competent to stand trial under Dusky but "who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."

On October 14, 2005, almost one year after the jury found appellant competent, and shortly before trial on the guilt phase, defense counsel requested reinstatement of section 1368 proceedings on the ground that appellant's major mental illness was currently in an active stage -- a changed circumstance. Counsel pointed out that competency focused on the present time; that appellant was unable to cooperate in the defense; that he could not understand his rights, including the right to testify; that he wanted the death penalty; and that he was a suicide risk. (5RT 929-30.) In a closed hearing,[54] defense counsel repeated that appellant's mental condition had deteriorated since the time of the competency verdict. They explained that they could not discuss the case with appellant because he would speak only about his children, the guilt of others, and the hypocrisy of the system. He could not follow directions. He was unable to testify in a relevant manner. When counsel set up a meeting between appellant and a priest, appellant wanted the priest to confess to him. He had expressed a desire for the death penalty, and had threatened suicide. The court stated its impression that there was no change in circumstances justifying ordering new competency evaluations. (5RT 941-42.)

During jury selection two weeks later on November 1, 2005, defense counsel reiterated their belief that appellant was incompetent to stand trial,

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[54] The in camera proceedings at RT 941-44 on October 14, 2005 were sealed. This Court granted appellant's Motion to Unseal and made them part of the record available to respondent.

stating that he was uninvolved and did not respond to their solicitation of feedback. The trial court declared there was "no change of status" since the last time the matter was taken up at the start of jury selection. (9RT 1603.)

On November 3, 2005, appellant was so obviously unhinged during that the trial court expressed its "concern" about having Cindi on the stand "under these circumstances in the presence of the jury." (10RT 1888.) The court suggested Cindi leave during the playing of the 911 tape. However, Cindi wanted to remain. Appellant then waived his presence for the playing of the tape, and remained out of court for the remainder of Cindi's testimony and the testimony of the witness who followed her. (10RT 1889-90, 1894.) In an in camera conference after the tape recording was played, defense counsel described appellant as on the edge of a complete mental meltdown, saying appellant had "decompensated to a point that I haven't seen him before," and noted that he had been sobbing heavily, apparently hadn't been sleeping, and looked terrible – a changed circumstance. The trial court had suggested that appellant be "excused" during Cindi's testimony as a "compromise solution," after which they could "reassess" the situation. (RT 1892-93;[55] 10RT 1947 [trial court summarizes in camera proceeding on the record].)

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[55] The in camera proceedings at RT 1892-93 on November 3, 2005 were sealed. This Court granted appellant's Motion to Unseal these pages and made them part of the record available to respondent.

On November 4, 2005, defense counsel stated that when appellant left the courtroom during and remained absent after his wife's testimony on the day before, appellant had cried almost the entire time. When he was in court he was crying and continued crying "this morning" (Friday, November 4), which counsel attributed to his mental disease or defect." Counsel reported that appellant's condition affected both their ability to represent him and his ability to adequately participate in his defense. The trial court responded, "Thank you. See you Tuesday." (11RT 2060-61.)

On November 9, 2005, during the prosecutor's closing argument at guilt phase, appellant blurted out, "It's a lie," when the prosecutor said appellant promised Guadalupe he wouldn't hurt her mother; and shortly thereafter, engaged in another outburst, saying, "I didn't plan to kill my family." (11RT 2171, 2173.) On November 9, 2005, defense counsel again declared a doubt as to appellant's competency, noting that appellant had been consistently crying and sobbing throughout the proceedings. The court declared that appellant's conduct was "not different from that during the course of the case." (11RT 2217-18.)

On November 29, 2005, at the end of the sanity phase, the Mexican government filed an amicus brief asking the court to re-examine appellant's competency. (4CT 909-16.) Mexico noted that appellant's crying during proceedings, and his mental state rendered him periodically unable to follow in-court testimony, which in turn compromised defense counsel's

ability to confer with him in an informed and useful way. Counsel could not communicate with appellant on any substantive issues, and could not obtain assistance from him to allow preparation for adequate cross-examination. Counsel could not discuss trial strategy with appellant in any useful way. (4CT 911-12.)

Mexico informed the court that Dr. Weiss, the court's appointed section 1026 expert, was of the opinion that appellant was suffering from major depression with psychotic features, and that his condition had deteriorated since the time of the charged offenses -- a changed circumstance. (4CT 913.) Dr. Weiss's report was prepared **after** the competency verdict. (See RT 834 [June 9, 2005 hearing for setting time for Dr. Weiss to examine appellant pursuant to section 1026]; 2CT 526, 535 [Dr. Weiss was appointed pursuant to section 1026, after appellant entered a not-guilty-by-reason-of-insanity plea on June 1, 2005].)

Mexico argued that appellant's inability to communicate with his lawyers during trial, his inability to respond to their advice, and his inability to focus on or understand the proceedings amounted to a significant change in circumstances since the time of the competency verdict a year before. (4CT 193.) Specifically, appellant was unable to make informed and rational decisions, based on the evidence and his attorneys' strategic concerns, as to whether or not to testify, to offer one or more defenses, and whether to present specific evidence and arguments in mitigation. (4CT

914.) Citing both federal constitutional and international law, the Mexican Government requested a further competency hearing prior to the penalty phase in appellant's capital trial. (4CT 915.)

On December 1, 2005 (after the sanity verdict was returned) the defense moved to foreclose the death penalty based on Atkins v. Virginia (2002) 536 U.S. 304. (See Arg. V, pp. 142-155, below.) The trial court denied the motion, stating that Atkins didn't apply, that appellant's competency had already been litigated, and that there was no evidence to indicate appellant didn't understand or was unable to assist counsel. (14RT 2950-52.) Defense counsel observed that the Atkins motion was distinct from competency, and offered to present witnesses on the competency question, stating that they had never considered appellant competent and his demeanor and participation in the trial up to the present had indicated he was not competent. (14RT 2952.) The trial court said that the Atkins factors did not apply and there were no other facts to justify granting the motion, taking into consideration the prior competency verdict and the court's own observations since that time. Defense counsel specifically asked to present further evidence on competency, arguing that they should be allowed to do that if the court were relying on its observations. The court denied the motion to reopen the 1368 proceedings on the basis that there was no new substantial evidence to justify it. The court refused to

revisit the issue, stating that the matter had repeatedly been raised and ruled upon. (14RT 2953-54, 2988-89, 15RT 3399.)

On December 15, 2005, after the penalty phase jury retired to deliberate, defense counsel asserted that appellant was not competent and had not been competent throughout the trial, as borne out by his blurting out of statements during the prosecutor's closing penalty phase argument ("leave my kids alone motherfucker" and "do whatever you want, but not my kids . . . They're talking about killing somebody and they want to kill me." (16RT 3360.) The trial court stated that appellant's competency level had "been the same throughout" and that it had already ruled on the Mexican government's amicus brief as to appellant's competency. (16RT 3398-99.)

At the hearing on the new trial motion on April 10, 2006, the defense argued once again that appellant was not competent to assist counsel and that he was not afforded an opportunity to testify on his own behalf. Defense counsel reported that appellant had talked to counsel about testifying but that in their opinion he was not competent to testify and so did not offer him the opportunity. (4CT 1037-45; 16RT 3422-23, 3418-28.)

The judge said he had observed appellant from beginning to end after the competency verdict and that appellant was "basically the same." The judge reasoned (1) that jail tapes showed appellant apparently able to calmly and rationally discuss what was occurring; (2) that if defense

counsel decided appellant would not make a suitable witness, that was trial strategy; (3) that if they failed to tell appellant he had a right to testify (and they might not have) they did everything else competent counsel would do when deciding whether he should testify; and (4) that consequently, appellant was not deprived of his Fifth Amendment right. The court found no changed circumstances and denied the motion for new trial. (16RT 3426-28.).

At the sentencing hearing on April 25, 2006, defense counsel asked the court to reweigh the question of appellant's competency. (16RT 3433-35.) After Cindi Martinez and her sister Pati Gonzalez made statements, appellant addressed the court. Appellant said that nothing he said would take their pain away, "that only God can take the pain away. And in order to learn about God, your kids, look at your kids. Remember when you talk to your mother, he was in her and in you and all of us." He insisted he had never wanted to hurt anyone, that he just "wanted the pain to stop, the pain that my kids were going through, because, you know, you knew from the beginning what you were doing [and that it] was wrong for you doing that [] because there's a difference between me and you being murderers. You become a murderer for what you're doing." He expressed his sorrow for what he had done but said he just wanted "to be there for my kids." (16RT 3446.) He said "the main thing [he] wanted" was for them to pay attention to God and listen to his voice, and insisted that they were still "damaging

[his sons] with what [they were] doing" but couldn't see if because they were blind from the hate and pain they had. "But God is so merciful that He [and only He could] change all that." (16RT 3447.)

Defense counsel made a final argument as to competency, stating that there was no legal cause to go forward because of appellant's incompetency. The trial court denied the motion and sentenced appellant to death. (16RT 3447-48.)

C. Even After a Verdict of Competency, the Federal Constitution Requires the Trial Court to Reinstate Section 1368 Proceedings When Presented with a Substantial Change of Circumstances.

The defendant's right to be competent during trial extends to all proceedings before (and even after) his conviction. (United States v. Duncan (9th Cir. 2011) 643 F.3d 1242, 1248, citing Indiana v. Edwards, 554 U.S. at 170; see also People v. Lawley, 27 Cal.4th at 136 [at any time prior to judgment federal due process requires another full competency hearing where the court has been presented with substantial evidence of the defendant's present incompetency].) Even where the defendant has already been held competent to stand trial, the court must suspend proceedings to conduct a second competency hearing when it is presented with a substantial change of circumstances or with new evidence casting a serious doubt on the validity of the previous finding. (Ibid.)

The standard for assessing substantial evidence of a change in circumstances resembles the standard applicable to the requirement for a first competency hearing, because it reflects the same constitutional and statutory requirements. (People v. Kaplan (2007) 149 Cal.App.4th 372, 384-85, applying the analysis in People v. Frye (1998) 18 Cal.4th 894, 1005 and People v. Weaver (2001) 26 Cal.4th 876, 953.) Duncan explained that evidence is "substantial" if it raises a reasonable doubt about the defendant's competency to stand trial. (643 F.3d at1249, fn. 2.) This Court has repeatedly stated that a competency hearing is required whenever there is evidence that "raises a reasonable doubt about the defendant's competence to stand trial." (People v. Koontz (2002) 27 Cal.4th 1041; People v. Welch (1999) 20 Cal.4th 701, 738.)

D. Appellant's Demeanor, the Statements and Reports by A Medical Expert and Defense Counsel Were Sufficient To Raise a Reasonable Doubt as to Appellant's Present Competency Such That the Trial Court Abused Its Discretion by Refusing To Reinstate Competency Proceeding Where There Was No Evidence to Support The Trial Court's Ruling.

Appellant contends that after the initial competency verdict, he presented the court with substantial evidence of a change in circumstances sufficient to raise a reasonable doubt as to his current competency. The trial court ignored the new evidence of appellant's competency and insisted, despite the facts to the contrary, that nothing had changed. This was an abuse of discretion – there were no facts to support the trial court's finding

of no changed circumstances, and an abundance of specific evidence that the circumstances had changed. Consequently, the trial court's refusal to suspend proceedings for a determination as to appellant's current competency deprived appellant of his due process rights and requires reversal of his convictions. (People v. Ary, 51 Cal.4th at 517-18.)

The first salient point is that defendant's competency to stand trial is determined at the present time, and almost a year had passed since the jury finding that appellant was competent. Although a prior finding of competency can be taken into consideration when assessing whether another competency hearing is required, the prior verdict is not binding.

A trial court "must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." (Maxwell v. Roe (9th Cir. 2010) 606 F.3d 561, 574, citing Drope, 420 U.S. at 181.) At the time of trial in Maxwell, the initial competency determination was 13 months old and based on reports 18 months old. Maxwell held that where the trial court was aware of the defendant's subsequent strange behavior, his attempted suicide, his mental health history and his refusal to take prescribed drugs, the court erred by failing to hold another competency hearing, as this evidence was sufficient to raise a reasonable doubt as to his competency. (Id. at 576; see also Torres v. Prunty (9th Cir. 2000) 223 F.3d 1103, 1110 [a previous competency determination did not obviate need for a hearing where the

defendant believed his attorney was conspiring against him and repeatedly disrupted the trial].)

The facts here clearly should have raised a reasonable doubt as to appellant's competency: Dr. Weiss had reported that appellant's mental condition had deteriorated since the time of the competency verdict a year earlier and since the time of the offense, and that his disease had psychotic features. At the end of the guilt trial in November of 2005, a year after the jury found appellant to be competent, defense counsel reported to the court that appellant would not respond to their questions and that, as a result of his mental disease, he had been crying almost continuously throughout the testimony, which prevented him from participating in his defense and prevented them from representing him effectively. This was a significant change in circumstances. (11RT 2217-18.) Appellant's uncontrollable sobbing and his later outbursts and other in-court statements were also significant changes.

Although the trial court stated that appellant's behavior was "not different in kind from that previously exhibited during the course of the case" (11RT 2218), this was demonstrably incorrect. Appellant may have been crying throughout the "course of the case" if by "course of the case" the trial court meant the course of the jury trial on guilt. However, the proper basis for evaluating change in circumstances should have been appellant's behavior during the guilt trial compared to the evidence at the

competency trial one year before. The expert testimony at the earlier competency trial indicated that appellant was depressed and paranoid, and could not rationally evaluate or assist in the defense; and also that appellant could not rationally think about issues and assist in his defense. However, there was no earlier indication that appellant had been immobilized by continuous sobbing. Nor was there any indication that appellant was so distressed during the competency proceedings that he left the courtroom during testimony. Moreover, the fact that the trial court itself expressed its "concern" for witness Cindi Martinez testifying while appellant remained (sobbing) in the courtroom strongly suggests recognition of a significant change of circumstance.

People v. Dunkle (2005) 36 Cal.4th 861, 903[56] held that a general assertion by counsel that the defendant's condition had deteriorated since the first competency hearing, without any explanation of how it had done so, did not require a second competency hearing. Here, by contrast, counsel's assertion, the report by Dr. Weiss, and appellant's own behavior dramatically demonstrated both the deterioration in his condition and how that prevented appellant from assisting in his defense. Appellant left the courtroom during important testimony by his wife and continued crying for days. A defendant overcome by sobbing cannot meaningful confront or

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[56] See also People v. Jones (1991) 53 Cal.3d 1115, 1153-54 and People v. Kelly (1992) 1 Cal.4th 495, 542-43 [accord].

listen to witnesses, evaluate or assist the defense in cross-examination, or to assist in counsel in making "myriad smaller decisions concerning the course of his defense." (Cooper, 517 U.S. at 364.)

Defense counsel also reported to the court that they could not discuss the case with appellant, that he was unable to follow directions, and that he unable to testify in a relevant manner, i.e., counsel provided a specific explanation of how appellant's mental condition had deteriorated in terms of his competency to stand trial. Against these specific assertions by defense counsel that they could not rationally discuss the case with appellant, the trial court relied on the tapes of appellant's conversations with family as indicating that he could talk rationally and calmly about what was occurring. This Court has held that such ordinary kinds of quotidian behavior bear little relation to the question whether appellant was able to communicate rationally regarding legal matters. (People v. Samuel, 29 Cal.3d at 503.) The fact that appellant knew he had been found guilty and faced the death penalty, or that he thought the proceedings were racist and the attorneys liars, is hardly an indication supporting the trial court's finding that appellant could talk rationally and that nothing had changed. (5CT 1118-50.)

Similarly, the record belies the trial court's claim that it had observed appellant to be unchanged in his demeanor and behavior. Although appellant had earlier been quiet in court, during the guilt/sanity/penalty trial

he had outbursts and a breakdown, and spent days sobbing in court. When Cindi was on the stand appellant had the breakdown reported by defense counsel. The trial court's own actions at this time, i.e., "suggesting" (in appellant's absence) the "compromise solution" that appellant continue to absent himself from the courtroom during Cindi's testimony, indicate the gravity of the change of circumstance that had just occurred. However, instead of acknowledging the evidence of the changed circumstances, the trial court offered the radical "solution" that all parties should agree that appellant should abdicate his statutory and constitutional rights to be present at testimony against him. The problem is that the "solution" was proposed and carried out by the court, defense counsel and the prosecutor. The critically important person, appellant himself, was not part of the discussion or the agreement. That the trial court proposed and was willing to accept such an irregular "agreement" is indicative of the drastic change in circumstances that had just occurred.

The demonstrable and unrefuted fact that appellant was so overcome by his depressive mental state that he left the courtroom during his wife's testimony, and when in the courtroom could only sit there and cry, together with counsel's and Dr. Weiss's report, show a dramatic change in circumstances, akin to the facts in People v. Kaplan (2007) 149 Cal.App.4th 372. Kaplan held that a second competency hearing was mandated where a report showed that the defendant, although previously

found competent, was no longer able to assist in the defense because of changes in his medications. (Id. at 384.) The same result is required here. (See Marks, 31 Cal.4th at 220-21 [no error in trial court's refusal to suspend proceedings for further examination of defendant's competency because of defendant's outbursts during trial where the outbursts proved the defendant's ability to understand and assist counsel rather than the opposite].)

Moreover, in addition to appellant's weeping during the guilt trial, he made statements both in and out of court that showed in dramatic fashion his inability to interact in a rational manner with counsel or to assist in his defense. When answering the judge's questions about representing himself, appellant discussed the trial as if its purpose were to "protect" the life of his children, stated that he would call on God's assistance, and that the only qualification for an expert witness was someone "who doesn't lie. It doesn't matter who." These statements troubled the trial court sufficiently to initially deem appellant incompetent to represent himself, and appellant contends that such a finding (although later reversed) at least should have raised a reasonable doubt as to appellant's competency. At closing penalty phase argument, appellant yelled out to the prosecution to "leave his kids alone," and at the sentencing hearing appellant ranted on about God and the pain his children were going through. All of these statements were sufficient to raise a reasonable doubt as to appellant's current competency.

(See People v. Melissakis (1976) 56 Cal.3d 52,60-61 [the trial court erred by not conducting a second hearing into the defendant's competency where his testimony at trial demonstrated a material change of circumstances, i.e., his delusional state that could have made it impossible to fully understand his situation and to assist counsel in presenting a rational defense.)

Furthermore, defense counsel made explicit both prior to and after trial that appellant was unable to follow directions, discuss the case, or testify in a relevant manner, and a doctor had reported the deterioration of appellant's condition since the competency verdict. The United States Supreme Court has repeatedly recognized the importance of considering counsel's judgment about the defendant's state of mind. (See Cooper, 517 U.S. at 352, fn.1; Medina, 505 U.S. at 450.) The trial court, however, repeated ignored counsel's judgment.

The multiple instances in which appellant's statements and conduct showed his deteriorated mental state, and reports by counsel and Dr. Weiss should have raised a reasonable doubt in the trial court's mind as to appellant's competency. Instead, the trial court repeatedly insisted that based on its own observations that "nothing had changed" – despite the lack of evidence to support the court's ruling and the ample evidence to the contrary. The court's ruling was unsupported by the facts and amounted to an abuse of discretion.

Although a trial court may appropriately take into account its own observations in determining whether the defendant's mental state has significantly changed during the course of trial, Lawley, 27 Cal.4th at 136, appellant submits that such observations have to be supported by facts. For example, Lawley upheld the trial court's refusal to initiate a second competency hearing based on its observations that the defendant had been ably representing himself and had demonstrated no mental illness in doing so. By contrast, in this case, the trial court mechanically and repeatedly insisted that appellant had been "the same throughout" even though that was not correct, as shown above. The trial court's failure to hold a second competency hearing requires this Court to reverse appellant's convictions.

E. International Jurisprudence Confirms that Any Significant Change in Circumstances Mandates a New Competency Assessment at Any Stage of Trial.

The United States Supreme Court has emphasized that a trial court's duty to ensure a defendant's competence continues throughout the trial proceedings. (See Drope v. Missouri, 420 U.S. at 181 ["Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial"].) Trial courts have therefore been exhorted to remain alert to signs suggesting that a defendant may be impaired, such as odd demeanor in the courtroom, irrational behavior, or past medical evidence of mental illness, and to take

action to protect a defendant's rights at the time that new questions regarding competence arise. (Id. at 180.)

High courts in other common law jurisdictions have been no less insistent on the ongoing need to reconsider a defendant's competency at any stage of the trial process. The High Court of Australia thus reversed a conviction where the trial judge refused to conduct a new competency evaluation near the end of the trial, despite evidence that the defendant's mental state had deteriorated:

> "although the charge to the jury was almost complete, we do not consider that the appellant's fitness to be tried became an immaterial consideration.... [I]t was still necessary that the appellant should understand the nature of the charges and the proceedings, understand the substantial effect of the evidence and follow the course of the rest of the proceedings. For example, it could not be said that the appellant was fit to be tried if he were unable to understand the nature of the jury's finding and the effect of a conviction. . . . Notwithstanding that the trial was drawing to its close, the possibility remained that the appellant might be called upon to participate in the proceedings to protect his own interests. . . . Consequently, at this late stage of the trial, a serious question as to the appellant's fitness to be tried again arose, requiring the determination of a jury."

(Kesavarajah v. R [1994], 181 CLR 230, at 246-248 (Austl.).[57] The new evidence that the trial court had failed to act on included the defendant's irrational and irrelevant submission to the judge; that submission, "coming on top of all the material which had accumulated since [the proceedings

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[57] Available at http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1994/41.html?query=titleKesavarajahandR.

commenced] relating to the appellant's condition, was enough to indicate that the appellant's unstable psychotic condition might well have become the subject of a 'flare-up' or 'florid outbreak'. . . rendering him unfit to be tried." (Ibid.)

Applying the requirements of the Malaysian statute on competency to stand trial, that nation's High Court ruled:

> "[T]he inquiry by the court as to the fitness of the accused person ought to be determined forthwith when it comes to the knowledge of the court, and ought not to be postponed until after the close of the prosecution's case. It is the duty of the court either at the commencement of the trial, or at any stage during the course of the trial, when the question of fitness to stand trial is raised, to determine that issue immediately."

(Public Prosecutor v. Misbah Bin Saat [1997] 3 MLJ 495, p. 504.)[58] A similar provision in Canadian law requires that "[w]here the court has reasonable grounds, at any stage of the proceedings before a verdict is rendered, to believe that the accused is unfit to stand trial, the court may direct, of its own motion or on application of the accused or the prosecutor, that the issue of fitness of the accused be tried." (Criminal Code, R.S.C. s. 672.23(1) (1985) (Can.); cf. American Bar Association, ABA Criminal Justice Mental Health Standards (1989), Standard 7-4.4 (a) ["Whenever, at any stage of the proceedings, a good faith doubt is raised as to the defendant's competence to stand trial, the court should order an evaluation

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[58] Quoted in ICTY, Prosecutor v. Pavle Strugar (Appeal Judgment), IT-01-42-A (17 July 2008), para. 34, n. 90.

and conduct a hearing into the competence of the defendant to stand trial."].)

In short, unless the defendant's submissions in support of his inability to stand trial "are frivolous or manifestly without merit, the immediate resolution by the [court] of any question of fitness would appear to be essential. . . . Correspondingly, the prejudice to the accused resulting from continuing the trial while he or she is unfit to stand would amount to a miscarriage of justice." (Strugar Judgment, at para. 34; emphasis added). Because Strugar has been widely followed by other courts, "it may be viewed as the seminal decision on the issue of fitness before international tribunals." (Phillip L. Weiner, Fitness Hearings in War Crimes Cases: From Nuremberg to the Hague, 30 B.C. Int'l & Comp. L. Rev. 185, 197 (2007).)

A wide range of factors may constitute a change of circumstances requiring a new competency determination, including the defendant's conduct and demeanor during court proceedings:

> "In reviewing the facts bearing on a defendant's competence to stand trial, a court may consider its observations of the defendant's demeanor and behavior in the courtroom, his interaction with defense counsel, reports of psychiatric examinations, as well as testimony by psychiatric witnesses and lay testimony concerning the defendant's conduct and mental condition. Each appearance of the Defendant before the Court has been marked by eccentric, irrational and, at times, disruptive behavior on his part . . . . It was clear to this Court that in large part the Defendant had no meaningful

> appreciation for what was transpiring in court and no understanding of the nature and object of the proceedings."

(Nahak Decision, at paras. 120, 141.)

Reports by mental health experts are another significant factor for judicial consideration, particularly when they contain information bearing on the defendant's "relevant capacities at the time of trial and not merely medical diagnoses of his mental or somatic disorders". (Strugar Judgment, at para. 59.) Accordingly, expert opinions "that are relevant to material issues should be given due consideration," Nahak Judgment at para. 120, although a diagnosis of a specific mental disorder "is not a prerequisite for finding a person unfit for trial." (Id. at para. 145.)[59]

The significance given in international jurisprudence to properly-focused competency evaluations by mental health experts supports the data from the United States. In a recent study of 192 cases containing judicial findings on competency, "the overall level of agreement between the judicial finding and the psychiatrist's finding was 92 percent. In cases where the judicial finding was "not competent" the psychiatrist and the

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[59] See also R v. Miller [No. 2], at para. 39 [accepting expert evidence providing an "assessment of the accused's capacities" to be "convincing as to the accused's true lack of comprehension concerning the charge"; Kesavarajah v. R, at para. 34 [faulting the trial court for failing to give weight to an expert's assessment that "the appellant was psychotic, that his condition was unstable...and that this was a matter of concern because he might become unfit in the near future within the timeframe of the trial"].

court agreed 94 percent of the time."[60] Evidence of a psychotic disorder was highly influential, in that "62 percent of persons receiving a diagnosis with psychosis were deemed not competent while only 37 percent of non-psychotic defendants were deemed to be not competent."[61] This is not an extreme finding: a recent analytical review of 68 studies of competency determinations spanning the past four decades determined that "defendants diagnosed with a Psychotic Disorder were approximately eight times more likely to be found incompetent than defendants without a Psychotic Disorder diagnosis. . . ." (Gianni Pirelli et. al., A Meta-Analytic Review of Competency to Stand Trial Research, 17 Psychology, Public Policy, and Law 1 (2011).)

1. A defendant's capacity to carry out basic daily tasks or to acquiesce to defense counsel's decisions is insufficient to establish competency.

In its decision to deny a re-evaluation of competency following trial, the trial court placed great weight on appellant's recorded ability to converse with his family members prior to trial. (16RT 3426-28.) International jurisprudence supports the conclusion that the trial court erred, in this instance by confusing the defendant's capacity many months earlier

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60 James J. Adams, MD, Competency To Stand Trial Evaluations In New Hampshire: Who is evaluated? What are the findings? New Hampshire Bar Journal (Winter 2006), posted at http://www.nhbar.org/publications/display-journal-issue.asp?id=319.

61 Ibid.

to conduct rational conversations with family members with the entirely different capacity to participate meaningfully in his own defense.

Confronting a similar situation, the Nahak Court concluded:

> "The test of competence to lead one's daily life without aid or interference is different from the test of competence to stand trial. The conclusion that a particular defendant can function at a basic level day to day does not address his capacity to understand the charges against him, to understand the nature and to object of court proceedings or to consult with his attorney and to assist in the preparation of his defense, Consequently, it is not possible to substitute one form of competence for the other."

(Nahak Judgment, at para. 134.)

The trial court also denied appellant's request to re-open the competency proceedings based on a belief that defense counsel did everything else competent counsel would do when deciding whether he should testify and that consequently, appellant was not deprived of his Fifth Amendment right to testify. (16RT 3426-28.) Once again, however, Nahak is instructive:

> "Even the minimum standard of competence requires that a defendant be able to cooperate with counsel, to inform his attorney concerning the facts of his case and to assist in the preparation of his own defense. Absent the capacity to make rational decisions at trial, a defendant who is simply yielding to the process is likely to do nothing more than accept the decisions of counsel as being the easiest available alternative . . . .
>
> Moreover, the mere fact that a defendant has the theoretical ability to say yes or no to his attorney does not mean that he has the capacity to make intelligent decisions concerning his own defense. Accordingly, a lawyer's presence in a case,

> even where he or she serves the best interests of the client, is not a substitute for a defendant being able to instruct his counsel and to actively assist in his own defense. A defendant, who is unable to do more than agree with his attorney because he does not have the capacity to do otherwise, cannot be described as competent, even though represented by counsel."

(Nahak Judgment, at paras. 131-132.) The Supreme Court of South Australia reached the same conclusion, accepting evidence that

> "[t]he accused is capable of exercising a choice as to whether to give evidence by saying yes or no. However, he does not have the capacity to grasp any of the rationale behind making such a decision. The accused would be likely to follow the advice of his solicitor because he is suggestible and it would be the easiest option for him."

(R v. Miller (No 2) [2000] SASC 152, at para. 30.)

2. A failure to ensure competency undermines the integrity of the criminal justice process.

The Nahak Court paid special attention to the wider implications of an inadequate or inaccurate determination of competency:

> "Finally, there is another rationale supporting the need to ensure that a defendant is competent to stand trial. This consideration goes to the integrity of the trial itself and the purposes that such a proceeding serves. A trial is not only the defendant's day in court; it is also the occasion upon which society applies its laws to one of its members. In that context, not only is the defendant entitled to a fair trial, but so too is society, which must be assured that the process it uses to try an accused comports with standards of fairness and accuracy. In circumstances where a defendant cannot comprehend the nature of the proceedings against him, cannot rationally consult with his attorney or cannot assist in the preparation of his defense, the results of the trial are unlikely to be either fair or accurate. Society has an interest in ensuring that the

> conviction of a defendant is not the result of his helplessness at trial."

(Nahak Judgment, para. 48.)

Finally, the incarceration of a defendant who was not competent prior to or during trial profoundly undermines the principles of rehabilitation, deterrence and retribution on which the State's power to punish must ultimately rest:

> "Moreover, in the event a defendant in those circumstances were to be convicted, his inability to understand the proceedings would undermine any sentence that might be imposed, as underlying sentencing policies such as rehabilitation or retribution would not likely achieve their purpose in his ease. Consequently, there is a social value associated with ensuring a defendant's competence to stand trial that goes beyond the personal interests of the defendant himself." (Ibid.)

International law thus bolsters appellant's claim based on state and federal constitutional law that the trial court erred in failing to reinstitute competency proceedings.

F. Conclusion.

The trial court's refusal to reinstitute competency proceedings despite the wealth of evidence of a substantial change in circumstances deprived appellant of his federal due process rights and mandates reversal of his convictions.

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ARGUMENT – GUILT, SANITY AND PENALTY TRIAL

III. APPELLANT'S ABSENCE FROM EVIDENTIARY PORTIONS OF THE GUILT PHASE OF HIS TRIAL, WITHOUT VALID WAIVERS OF HIS RIGHT TO BE PRESENT, VIOLATED HIS STATUTORY AND CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO PRESENCE AND DUE PROCESS

A. Introduction and Summary of Argument.

Appellant maintains that he was incompetent throughout all phases of the trial and sentencing, and was thus also incompetent to waive his right to presence. Assuming arguendo, this Court rejects appellant's arguments as to competency, appellant contends that his absence from evidentiary portions of the trial, without an informed and express personal waiver of his right to presence, requires reversal of his convictions. The repeated purported "waivers" of his presence, by defense counsel and the prosecutor, and "suggestions" by the trial court that appellant's presence be waived, amounted to a de facto recognition by the prosecutor, defense counsel, and the trial court, that appellant was not competent.

Appellant has statutory and constitutional rights to be present at every critical stage of the trial. Although People v. Davis (2005) 36 Cal.4th 510, 531 held that a capital defendant can personally waive his right to presence, as long as his waiver is voluntary, knowing and intelligent under the standard set forth in Johnson v. Zerbst (1938) 304 U.S. 458, 464, appellant did not expressly waive his statutory or federal constitutional

rights to presence at his trial.

B. Summary of Relevant Facts.

Appellant contends that his absence during **evidentiary portions** of the guilt trial, based on purported waivers of his right to presence by defense counsel, some made after the fact, amount to federal constitutional error. In this summary, appellant also chronicles numerous "waivers" by defense counsel (and even the prosecutor)[62] of appellant's right to be present at other non-evidentiary proceedings in the guilt, sanity and penalty phases of the trial, in order to show the repeated, cursory and almost automatic nature of the purported waivers.

The number of "waivers" of appellant's presence, and the manner in which they were obtained, show that all the trial players, including the court itself, did not believe appellant was currently competent. As shown below, actions speak louder than words.

1. Guilt trial.

On October 14, 2005 (during jury selection for guilt trial) the trial court suggested litigating the jury questionnaire outside of appellant's presence. After stating that appellant was not competent to waive his right to presence himself, counsel waived his presence on his behalf. (5RT 928-

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[62] The prosecutor had neither a right to appellant's presence nor authority to waive his presence. The fact that the prosecutor agreed to "waive" appellant's presence is an indication that the prosecution doubted appellant's competence.

30.) In an argument as to appellant's incompetency made in chambers, counsel again waived his presence. (5RT 941-44.)[63] Back in open court, with appellant present, defense counsel said that he "didn't have any problem" with appellant not being present for discussions on the jury questionnaire, but he was "not sure that [he could] waive his presence on his behalf . . . based on [their] position, he's not competent to do the waive[r] himself." (5RT 946.) After a short discussion with counsel, and on-the-record prompting by counsel ("so you can spend more time with Dr. French") appellant agreed (by stating "yes") to waive his presence for further proceedings. (5RT 946-47.) Appellant was excused and the jury questionnaire was discussed in his absence. (5RT 948-965.)

On October 18, 2005, the first day of trial, appellant was not dressed properly. There was a short (one-page) proceeding regarding a motion that would be addressed after jury selection. Defense counsel waived appellant's presence for this discussion, after the fact; appellant then appeared and jury selection proceedings began. (6RT 870-1 to 871-1.)

On November 1, 2005, the day testimony began, Cindi Martinez testified about the 911 call she made. When the prosecutor said she planned to play the tape recording, defense counsel requested that the tape be played after Cindi had finished testifying as they had stipulated to her

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[63] The in camera proceedings at RT 941-44 on October 14, 2005 were sealed. This Court granted appellant's Motion to Unseal these pages and made them part of the record available to respondent.

voice and the contents of the tape. Defense counsel was "quite concerned about the disability" of appellant, who was sobbing heavily in the courtroom. (See 10RT 1891-92, 1947.) Although the prosecutor agreed to the procedure, Cindi wanted to remain in court. Counsel then asked if appellant could be excused. The court asked appellant, "Do you waive your presence...?" The reporter transcribed "yeah" for appellant and defense counsel reported, "He said softly yes." The tape was then played in appellant's absence. (10RT 1886-90.) After the tape was played, defense counsel asked to go into chambers without the prosecutor, and "waived Mr. Mendoza's presence for that." Counsel reported that appellant did not want to be present *while the tape was being played.* The court suggested as a "compromise" that appellant absent himself during Cindi's testimony and that he could possibly return to court after Cindi's testimony for other "drier" testimony. (10RT 1892-93.)[64] Appellant was not present for this agreement to "waive" his presence.

Back in open court, the prosecutor said she was "okay" with appellant "waiving his presence," and the trial court told the jury that appellant had elected to continue his absence for the duration of the testimony of at least "this next witness," i.e., Cindi. (10RT 1894-95.)

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[64] The in camera proceedings at RT 1892-93 on November 3, 2005 were sealed. This Court granted appellant's Motion to Unseal these pages and made them part of the record available to respondent.

However, appellant was not returned to the courtroom after Cindi's 911 tape testimony for the remainder of Cindi's testimony. Cindi testified in his absence. (10RT 1895-1928.) The next witness, ballistics expert James Hamiel, also testified in appellant's absence. (10RT 1928-1944.)

In chambers after Hamiel's testimony, defense attorney said that "it was decided that [appellant] was not in very good shape [to stay for Cindi's testimony]" and the prosecutor noted appellant did not return for Hamiel's testimony. Defense counsel said, "We continue our waiver of our client's presence for the ballistics evidence that was put on here late this afternoon." (10RT 1947.) However, there was no personal waiver – either contemporaneous or after-the-fact -- by appellant of his presence for Cindi's testimony apart from the 911 tape or for Mr. Hamiel's testimony.

On November 9, 2005, defense counsel waived appellant's presence for a discussion on the assault weapon jury instruction. The prosecutor agreed that the enhancement was not charged (or at least not correctly) and the trial court struck it. (11RT 2164-66.)

2. Sanity trial.

On November 15, 2005, defense counsel waived appellant's presence for a "brief pretrial matter" (discussion of a specially requested jury instruction, discovery matters, and a defense request for an Evidence Code section 402 hearing). (12RT 2220-23.) On November 16, 2005, defense counsel again waived appellant's presence at a discussion in chambers

regarding a letter in which juror number nine asked to be released from service because of marital problems. Counsel stipulated to the juror's excusal and he was replaced with an alternate juror. (12RT 2361-64.) Later that day, counsel waived appellant's presence for another conference in chambers at which the parties addressed the prosecution's objection to Defense Exhibit M [a chart prepared by defense] that the trial court ruled was admissible unless contrary authority was provided. (12RT 2441-43.) The following day, November 17, 2005, defense counsel and the prosecutor[65] waived the defendant's presence for their discussions on the revised Exhibit M and after discussion the court ruled that the chart could be used but was not admissible in evidence. They also discussed the existence of reports by jail staff regarding appellant's auditory hallucinations. (12RT 2489-95.)

On November 18, 2005, outside the presence of the jury, the parties discussed upcoming witnesses. Defense counsel waived appellant's presence. (13RT 2662.)

3. Penalty trial.

On December 6, 2005 (first day of testimony at penalty trial) defense counsel "waived appellant's presence" and "acknowledged his absence" during discussion outside the presence of the jury regarding photos the

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[65] As noted above, in fn. 62, p. 123, the prosecutor has no authority to "waive" the defendant's presence. That she did so in this case suggests that she did not consider appellant competent.

prosecutor intended to introduce. Defense counsel agreed to the introduction of five selected photos. (15RT 3043-44.) On December 7, defense counsel waived appellant's presence at beginning of the day during discussion of witness scheduling and co-counsel's absence to attend his father's surgery. Defense counsel also reported that one of the "regular deputy attorneys" said there was a loud conversation from someone she thought was a deputy (but not the regular bailiff or Jerry Waymire) about the death penalty and the victims not getting a chance: this was outside the presence of the jury but counsel wanted to make sure it didn't happen again. The court said "alright" and jury and appellant were then brought in. (15RT 3102-04.)

On December 13, 2005, defense counsel waived appellant's presence at the beginning of the day for proceedings outside the presence of the jury in which the trial court overruled the prosecutor's objection to testimony by Vivian Sweatman, deferred ruling on the prosecutor's objection to letters from appellant's sons, and limited the number of photos of appellant's sons that the defense could introduce. (15RT 3147-51.)

On December 14, 2005, after the jury was instructed, appellant and the jury left the courtroom. (15RT 3335.) Defense counsel then objected to the prosecutor having the magazine in the gun during argument; the prosecutor eventually agreed not to touch or wave the gun around but would leave it on the table. The jury and appellant returned to the

courtroom and defense counsel said they "retroactively" waived appellant's presence for the prior proceeding. (15 RT 3340.)

C. Appellant Did Not Waive His Statutory And Constitutional Rights To Be Present During the Taking of Testimony.

Under the Sixth Amendment right of confrontation and the Fourteenth Amendment right to due process, a criminal defendant has the right to be present at every critical stage of the trial. (Illinois v. Allen (1970) 397 U.S. 337, 338.) Although rooted in the Confrontation Clause, the right is protected by the Due Process Clause in some situations when a witness is not actually being confronted by a witness, if his presence has some reasonably substantial relation to his opportunity to defend. (United States v. Gagnon (1985) 470 U.S. 522, 526.)

The right to presence is also protected under the California Constitution, art. I, section 15, and Penal Code sections 977 [requiring a felony defendant to be present during taking of evidence unless he signs a written waiver] and 1043 [permitting voluntary absence for a non-capital felony defendant, and also excepting removal for disruptive behavior]. The latter two statutes, read together, permit a defendant to be absent under only two conditions, neither of which applies here: when the defendant is removed for disruptive behavior under section 1043, subd. (b)(1); or when the defendant voluntarily waives his right under section 977, subd. (b)(1). However, the voluntary waiver exception of section 977 does not permit a

defendant to be absent during the taking of evidence, and the exception in section 1043 does not apply to capital defendants. (People v. Young (2005) 34 Cal.4th 1149, 1214.)

This Court has interpreted these statutes as providing that while a trial cannot be held despite voluntary absence by a capital defendant, the capital defendant may waive his presence at least as to the proceedings not specifically listed in section 977, subd.(b) [mandating the defendant's presence at arraignment, preliminary hearing, during the taking of evidence, and sentencing]. (See e.g., People v. Edwards (1991) 54 Cal.3d 787, 811 [no error where the trial court acceded to the defendant's wish to absent himself from jury selection]; People v. Holt (1997) 15 Cal.4th 619, 706-08 [neither the statutory nor constitutional right to presence extended to in-chambers or bench discussions outside the presence of the jury]; People v. Rogers (2006) 39 Cal 4th 826, 855-56 [no error where capital defendant was absent during unreported in chambers conferences regarding juror hardship excusals]; People v. Kelly (2007) 42 Cal.4th 763, 781-82 [legal matters discussed]; People v. Rundle (2008) 43 Cal.4th 76, 133-37, 178[66] [finding statutory error where the defendant was absent during testimony even though he had made a voluntary and informed waiver of his right to presence; but no error where the defendant was absent from in camera

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[66] Overruled in part on other grounds in People v. Doolin, 45 Cal.4th at 421, fn. 22.

hearings regarding a juror's alleged misconduct]; People v. Castaneda (2011) 51 Cal.4th 1292, 1342-43 [defendant had no right to be present for discussion of penalty phase jury instructions]; People v. Blacksher (2011) 52 Cal.4th 769, 800 [no error where the defendant was absent from discussions on jury selection and jury instructions].)

However, section 977 requires the capital defendant's presence at the taking of evidence and the constitutional provisions require the capital defendant's presence at proceedings where his presence has some reasonably substantial relation to his opportunity to defend. People v. Young, 34 Cal.4th at 1214 found error where the trial court permitted a non-disruptive capital defendant to absent himself during the taking of penalty phase evidence, even though the defendant had personally waived his presence after having informed counsel that he would just as soon not hear the testimony of certain witnesses. People v. Davis (2006) 36 Cal.4th 510, 531-32 found federal constitutional error where defense counsel purported to waive the defendant's presence at a pretrial hearing during which the contents of jailhouse tape recordings were discussed and the admission of excerpts of those recordings were agreed upon. Davis observed that this Court had not addressed the question whether defense counsel could waive the defendant's presence for him although some federal courts had allowed waiver by counsel where there was evidence that the defendant consented, and that he understood the right he was waiving

and the consequences thereof. (Id. at 532.) Following the rationale of the federal case law, Davis held that neither the defendant nor counsel on his supposed behalf had validly waived the right to presence, where the record showed only that counsel represented to the court that he had discussed the hearing with the defendant, and that the defendant would waive his presence: there was no evidence that defense counsel informed the defendant of his right to presence, or that the defendant understood that by absenting himself he would be unable to contribute to the discussion of the recordings. (Ibid.)

Under these precedents, the taking of testimony by Cindi Martinez and James Hamiel, in appellant's absence, was likewise error, and deprived appellant of his statutory rights and his Sixth and Fourteenth Amendment rights to due process and confrontation. As to testimony by Cindi Martinez, the record shows that appellant did not make a personal waiver of his presence for any of Cindi's testimony except that relating to the 911 tape. Appellant left the courtroom and testimony by Cindi beyond that relating to the 911 tape and by criminalist Hamiel was adduced in his absence. (10RT 1886-90.)

Defense counsel's unsworn statement that appellant waived his presence is **not** a valid substitute for a personal waiver of the constitutional right to be present, which requires, as noted in Davis, evidence that the defendant had been informed of his right and understood the consequences

of a waiver. A criminal defendant's fundamental right to be present at trial and to confront adverse witnesses is a personal right that must be expressly waived and thus cannot be relinquished by the action or inaction of counsel.[67] People v. Collins (2001) 26 Cal.4th 297, 308, relying on *inter alia* Johnson v. Zerbst, 304 U.S. at 464-65, explained that in order to protect against the inappropriate incursion on a defendant's exercise or waiver of a fundamental constitutional right, the federal constitution has long been construed as requiring procedural safeguards, such as a personal and express waiver. Thus, it cannot be said that defendant waived his right to be present for Cindi's testimony apart from that concerning the 911 tape.

The taking of further testimony by James Hamiel in appellant's absence also violated his statutory and federal rights to presence. Appellant made no personal waiver, audible or inaudible, of his right to be present for Hamiel's testimony. Instead, the matter was simply decided by the prosecutor and defense counsel, who agreed that appellant's previous "waiver" should be continued because appellant was not in "very good shape." Although not a word was heard from appellant during this time, the trial court informed the jury (even though there is nothing in the record to support the claim) that appellant had "elected" to continue his absence for

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[67] Although it has been held that a defendant can impliedly waive his right to presence, these cases involve disruptive behavior, escape during trial, or failure to return to trial while on bail. (See People v. Concepcion (2008) 45 Cal.4th 77, 81-82 and cases cited therein.)

the duration of the testimony of at least "this next witness." (10RT 1894-95.) In fact, it was only appellant's counsel who "waived" appellant's presence for the testimony of Hamiel (as they had done for Cindi's testimony) and with respect to Hamiel's testimony, counsel made their "waiver" for appellant only after the fact. (10RT 1947.)

D. The Violation of Appellant's Statutory and and Constitutional Rights Requires Reversal of His Convictions.

Because the error is of federal constitutional dimension, review for prejudice should be under the Chapman v. California (1967) 386 U.S. 18 standard, requiring reversal unless the prosecution can show the error to be harmless beyond a reasonable doubt.

The error in Young, 34 Cal.4th at 1214, was deemed harmless[68] because the jurors were admonished not to speculate about defendant's absence, not to infer anything from it, nor allow it to affect their deliberations in any manner. Young also concluded that the defendant's absence from the cross-examination of his own expert, regarding

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[68] Because the defendant in Young was absent for proceedings at penalty phase only, and because the Court found only statutory error (having found that the defendant made a valid waiver of his constitutional rights), the Court reviewed for prejudice under the standard set forth in People v. Brown (1988) 46 Cal.3d 432, 447-48, i.e., whether there was a reasonable possibility the error would have affected the penalty phase verdict.

defendant's neuropsychological assessment, and the entire testimony of his former schoolteachers, was not likely to alter the penalty verdict.[69] (Ibid.)

Here, the trial court informed the jury only that appellant had "elected" to be absent "at least" for the remainder of Cindi's testimony, and made no announcement at all concerning appellant's absence for Hamiel's testimony. (10RT 1895.) The trial court failed to admonish the jury not to speculate or infer anything from appellant's absence. Consequently, this Court cannot rely on any admonitions as curing the error, as was done in Young.[70]

Appellant's absence during Cindi's and Hamiel's testimony cannot be considered as harmless beyond a reasonable doubt. Cindi testified to her relationship with appellant and his relationship with their children, her relationship with Carmino Chavez, and the weapons, bullet-proof vests, and

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[69] But see People v. Gutierrez (2003) 29 Cal.4th 1196, 1206-09 [where the defendant refused to leave his cell to be present at trial, the trial could properly proceed in his absence notwithstanding the requirement of section 977 that the defendant be present when evidence was taken before the trier of fact]. This is akin to the implied waiver through disruptive behavior. See fn. 67, p. 133, above.

[70] This Court also held the defendant's absence to be harmless error in People v. Davis, 36 Cal.4th 532-33, because the attorneys in that case had access to the jail tapes before the hearing and had ample opportunity to discuss their contents with the defendant and seek his assistance in deciphering them, so that his presence at the hearing would have added little to his attorney's ability to argue the admissibility of the tapes. The same is not true for live witnesses whose testimony is not static as is a tape recording.

helmets. Appellant's presence for this testimony would have been extremely helpful in cross-examination of Cindi as appellant was the only person with knowledge relating to the matters testified to by Cindi.

As to Hamiel, the prosecutor considered the ballistics evidence as "particularly probative" in assisting the jury as to whether the weapons could fire off the number of rounds within the time frames provided by the eyewitness, thus proving first degree murder. (3CT 752-54.) Defense counsel had objected to the ballistics testimony and renewed those objections during and after ballistics testimony by the detective and Hamiel. Hamiel testified that each of the three guns had an "average" trigger pull. (10RT 1039-42.) Had appellant been present, if he was competent, then he should have been able to assist counsel in formulating questions on cross-examination as to trigger pull, which was relevant to determining the degree of homicide.

IV. THE PROSECUTOR ERRED IN CLOSING ARGUMENT AT GUILT PHASE BY REFERRING TO FACTS NOT IN EVIDENCE AND VOUCHING, THUS VIOLATING APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONTATION, DUE PROCESS AND A FAIR TRIAL

A. Introduction.

The prosecutor argued to the jury in closing argument at guilt phase that the facts in this case were "like a shooting gallery . . . unlike so many other murder cases where there's an argument." The trial court overruled

defense counsel's "lack of foundation" objection. (11RT 2178.)[71] The prosecutor then elaborated, asking the jurors to envision a case in which there was an argument and tempers flared and a gun was fired and the killer said, "I thought he had a gun. Well, I was just trying to scare him. Well, I didn't know the gun was loaded." The prosecutor contrasted those cases as presenting a question as to intent to kill or malice. (11RT 2178-79.)

The prosecutor also argued that although appellant had "some [mental] problems," the problems were not sufficient to reduce his culpability from first degree to second degree murder because no killer is "all right in his head." (11RT 2200.)

Appellant contends that these remarks constituted prosecutorial error[72] in that they referred to matters not in evidence, and amounted to vouching for the strength of the prosecution's case, rendering the guilt trial fundamentally unfair in violation of both state law and appellant's federal rights to confrontation and due process.

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[71] Although defense counsel did not object to this further argument, his initial objection had been overruled, and further objection would have been futile. A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. (People v. Arias (1996) 13 Cal. 4th 92, 159.)

[72] People v. Hill, 17 Cal.4th at 822-23 & fn. 1 explained that prosecutorial "misconduct" is a misnomer; prosecutorial error is the more apt description. Bad faith is not a prerequisite for gaining appellate relief based on the prosecutor's actions because the injury to the defendant occurs whether the conduct was committed inadvertently or intentionally.

B. The Prosecutor Erred by Arguing Matters Outside The Evidence and Suggesting to the Jury that Appellant's Case Was Worse than Other Murders Because the Shootings Were Not Preceded by an Argument, and by Suggesting that the Jury Need Not Consider Appellant's Mental State Because All Murderers Have Something Wrong With Them.

A prosecutor's conduct violates the federal constitution when it so infects the trial with unfairness as to deny the defendant due process. (Donnelly v. DeChristoforo (1974) 416 U.S. 637, 642-43; People v. Hill, 17 Cal.4th at 819.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair nonetheless violates state law if it involves the use of deceptive or reprehensible methods to attempt to persuade the jury. (Ibid.)

Although a prosecutor is given wide latitude during argument, proper argument must be a fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom; the prosecutor may also refer to matters not in evidence if they are common knowledge or are illustrations drawn from common experience, history or literature.[73] (People v. Wharton (1991) 53 Cal.3d 522, 567-68.)

However, when the prosecutor suggests that information not presented to the jury supports his case, the comment crosses the line into

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[73] Nonetheless, this Court has warned that prosecutors should generally refrain from comparing defendant to historic or fictional villains, especially when wholly inappropriate or unlinked to the evidence. (People v. Jones (1997) 15 Cal.4th 119, 180.)

impermissible vouching for the strength of its case. (People v. Williams (1997) 16 Cal.4th 153, 256; Hill, 17 Cal.4th at 828 [prosecutorial statements of facts not in evidence "make the prosecutor his own witness – offering unsworn testimony not subject to cross-examination"].) A prosecutor may not suggest the existence of "'facts'" outside of the record by arguing matters not in evidence. (People v. Benson (1990) 52 Cal.3d 754, 794-95.)

United States v. Kerr (9th Cir. 1992) 981 F.2d 1050, 1053 explained that a prosecutor "has no business telling the jury his individual impressions of the evidence. Because he is the sovereign's representative, the jury may be misled into thinking his conclusions have been validated by the government's investigatory apparatus."

Yet this is precisely what happened here. The challenged remarks are not "fair comment" on the evidence. Obviously, there was no evidence in this case as to other homicide cases in which an argument preceded or provoked the killing, and there was no evidence as to the mental state of other killers – such evidence would have been excluded as completely irrelevant to appellant's individual culpability. Nonetheless, the prosecutor injected his own opinion and impressions of appellant's culpability compared to "other killers" and "other murder cases" in an attempt to persuade the jury that appellant's mental state and provocation defenses should be rejected in favor of a first degree murder verdict.

The prosecutor's remarks were not based on "common knowledge" or "common experience, history or literature." The comparison was not to Hitler, or Charles Manson, or the Menendez brothers, cases which could be considered common knowledge, and reference to which might have been permissible. (Wharton, 53 Cal.3d at 567-68; see e.g. People v. Jones, 15 Cal.4th at 180 [proper for the prosecutor to use well-known examples of irrational murders to illustrate a point]; People v. Jablonski (2006) 37 Cal.4th 774, 836-37 [accord].) Rather, the prosecutor's reference was to "other killers" and "other murders" in general – information the jury would understand as being within *the prosecutor's professional experience and knowledge* (but not their own) – and thus both highly persuasive to the jury and prejudicial to appellant.

C. The Prosecutorial Error Struck at the Heart of the Defense Case and Was Thus Prejudicial.

A claim of prosecutorial error based on prosecutorial argument to the jury is reviewed for prejudice by considering how the statement would, or could, have been understood by a reasonable juror in the context of the entire argument. (People v. Dykes (2009) 46 Cal.4th 731, 771-72; United States v. Rudberg (9th Cir. 1997) 122 F.3d 1199, 1205-06.) Here, the error must be deemed prejudicial because a reasonable juror would have understood the improper argument as confirmation by the experienced prosecutor that appellant should be deemed guilty of first degree murder –

not only based on the evidence but also based on the prosecutor's implied personal promises or guarantees that (1) appellant's mental state should be disregarded because "all killers" have something wrong with them, and (2) appellant's culpability should not be reduced because there was no argument like in "other murders." (Compare People v. Benson, 52 Cal.3d at 793 [no misconduct exists if a juror would not have understood the statement as something harmful to the defendant].)

In short, the error is prejudicial because it went to the heart of the case. People v. Herring (1993) 10 Cal.App.4th 1066, 1073-77 reversed a conviction where the prosecutor erred by telling the jury that he represented "victims" while defense counsel represented "murderers and rapists" whom he had to tell what to say: the comment went to the heart of the defense because the main issue in the case was credibility. In this case, the defense evidence of appellant's mental problems and heat of passion supported a verdict of second degree murder. (See 11RT 2191-92; 2192-99.) The prosecutor's improper argument told the jury that (based on his implied personal knowledge and experience of other killers and other murders) that these defenses should be rejected in favor of a first degree murder verdict. Error striking at the heart of the defense is considered prejudicial. (See e.g., People v. Herring, 10 Cal.App.4th at 1077; People v. Lindsey (1988) 205 Cal.App.3d 112, 117; People v. Vargas (1973) 9 Cal.3d 470, 481.)

ARGUMENT -- PENALTY TRIAL

V. APPELLANT'S SENTENCE OF DEATH VIOLATES THE EIGHTH AMENDMENT PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND DUE PROCESS BECAUSE APPELLANT WAS SERIOUSLY MENTALLY ILL AT THE TIME OF THE OFFENSES AND AT TRIAL

A. Introduction and Summary.

All the psychiatrists and psychologists who examined appellant agreed that appellant suffered from a major mental illness. Drs. Stewart and Schaeffer, defense experts, and Drs. Weiss and French, appointed by the court, testified that appellant suffered from major depression with psychotic features. Dr. French, also appointed by the court, testified that appellant suffered from major depression but did not observe any major psychiatric or psychotic symptoms. Appellant had also been prescribed psychiatric medications by jail psychiatric staff.

Defense counsel argued that because appellant clearly suffered from a significant mental disease or disorder, the trial court should eliminate the death penalty. (3CT 624.) The issue was first raised prior to trial; and then, pursuant to the court's suggestion, after the sanity phase. (6RT 920-22.)

Thus, on December 1, 2005, prior to the penalty phase, defense counsel argued that the trial court should eliminate or limit the death penalty under evolving standards of decency, citing Atkins v. Virginia (2002) 536 U.S. 304 [Eighth Amendment prohibits the execution of

mentally retarded persons] and Roper v. Simmons (2005) 543 U.S. 551 [Eighth Amendment prohibits the execution of defendants under the age of 18 at the time of the crime]. The trial court ruled that Atkins didn't apply.[74] (14RT 2952-54.)

Appellant contends that his death sentence violates the Eighth and Fourteenth Amendments and Article 1, section 17 of the California Constitution, for the reasons set forth below.

B. The Most Extreme Sentence of Death Is Grossly Disproportionate to Appellant's Personal Responsibility And Moral Guilt Because He Was Severely Mentally Ill.

A capital sentence violates the Eighth Amendment when it is "grossly out of proportion to the severity of the crime" or "so totally without penological justification that it results in the gratuitous infliction of suffering." (Gregg v. Georgia (1976) 428 U.S. 153, 173, 183.) Determination of the proportionality of a capital sentence cannot be based solely upon the magnitude of harm resulting from the offense. "[F]or purposes of imposing the death penalty . . . punishment must be tailored to [a defendant's] personal responsibility and moral guilt." (Enmund v. Florida (1982) 458 U.S. 782, 801; see also California v. Brown (1987) 479 U.S. 538, 545 (O'Connor, J. concurring) ["punishment should be directly related

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[74] The court first denied the motion on the ground that competency had already been litigated. (14RT 2950-52.) Defense counsel clarified for the trial court that the Atkins issue was distinct from the matter of appellant's competency. (14RT 2952.)

to the personal culpability of the criminal defendant"].) Thus, in considering claims that the Eighth Amendment prohibits imposition of the death penalty on particular categories of convicted murderers, the United States Supreme Court has long focused on the offenders' moral culpability and their degree of personal responsibility for the harm resulting from the offense.

As set out above, Atkins, 536 U.S. at 320 held that the Eighth Amendment prohibited execution of mentally retarded persons, because their reduced cognitive functioning rendered them less culpable than the average offender. Roper v. Simmons, 543 U.S. at 553 held that the execution of juveniles was also prohibited because their vulnerability and comparative lack of control rendered them less morally reprehensible than an adult offender.

Atkins relied upon three rationales in reaching its conclusion: (1) the evolving standards of decency marking the progress of a maturing; (2) the Court's independent determination that execution of such persons would not further the policies of deterrence or retribution; and (3) the fact that the nature of the impairment leads to an unacceptable risk of wrongful executions. (536 U.S. at 312-20.) The same rationales support a conclusion that the Eighth Amendment prohibits execution of a severely mentally ill person.

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1. Execution of a severely mentally ill person such as appellant does not serve the policies of deterrence or retribution.

In Atkins the High Court held that the Eighth Amendment prohibited imposition of the death penalty on mentally retarded offenders because they were "categorically less culpable than the average criminal." (536 U.S. at 316.) Atkins concluded that because mentally retarded persons have "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others," their execution does not "measurably contribute[]" to either the retributive or the deterrence goal of capital punishment." (Id. at 318-20.) Moreover, a moral and civilized society diminishes itself if its system of justice does not afford meaningful recognition and consideration of such limitations. (Id. at 311.)

Atkins held that the reduced culpability of mentally retarded offenders made retribution less justified; similarly a person of diminished capacity would not likely be deterred by the threat of execution. Deterrence is also less justified because a person of diminished capacity is not likely to be deterred by the threat of execution. (Id. at 349.) Roper v. Simmons also held that neither retribution nor deterrence was an effective rationale for imposition of the death penalty on juvenile offenders. (543 U.S. at 571-72.)

Appellant contends that the rationale of Atkins applies equally to a

severely mentally ill offender such as himself. Other courts around the country have recognized the substantial overlap between mental retardation and other mental impairments with parallel implications. (Bryan v. Mullin (10th Cir. 2003) 335 F.3d 1207, 1237, Henry, J. concurring and dissenting [logic of Atkins is just as applicable to other severe mental deficiencies]; State v. Nelson (N.J. 2002) 803 A.2d 1, Zazzali, J. concurring [history of defendant's mental illness and the nexus between that illness and the crime committed should make her level of culpability insufficient to impose the death penalty for the same reasons as in Atkins]; People v. Danks (2004) 32 Cal.4th 269, 322, Moreno, J. concurring and dissenting [the diminished capacities of the mentally ill are so similar to those with mental retardation, as recognized in Atkins, that they should weigh against the imposition of the death penalty]; Corcoran v. State (Ind. 2002) 774 N.E.2d 495, 502-503, Rucker, J. dissenting [citing Atkins and the evolving standards of decency rationale as a rationale for a categorical prohibition of the use of the death penalty for the significantly mentally ill].)

Under the rationale of Atkins and Simmons, a death sentence imposed on a severely mentally ill offender such as appellant is disproportionate to his moral culpability and lacks moral justification under a policy of deterrence or retribution. Mental illness is a medical disease. The record in this case shows that appellant's mental illness had a neurobiological chemical base and was beyond his voluntary control, just as is mental

retardation (or youthful immaturity). (See 12RT 2478, 14RT 2826-29 [appellant's depression was a bio-chemical condition, i.e., neurotransmitter imbalance]). Thus, appellant should be deemed ineligible for the death sentence for the same reasons that a mentally retarded or juvenile offender is ineligible for a death sentence.

Unless the death penalty "measurably contributes" to either deterrence or retribution, it is "nothing more than the purposeless and needless infliction of pain and suffering," and thus unconstitutional. (Enmund v. Florida, 458 U.S. at 798.)

Whether a defendant possesses the "degree of culpability associated with the death penalty," Penry v. Lynaugh (1989) 492 U.S. 302, 338, cannot be resolved by reliance on statutory definitions of crimes. For example, although states are empowered to make an aider and abettor equally culpable with the actor, and to enact felony murder statutes, minor participation in a felony resulting in death does not amount to sufficient moral culpability to justify imposition of a capital sentence on retributive grounds. (Enmund, 458 U.S. at 798-801.) By the same reasoning, while California can make those who act without sufficient mental capacity to conform their acts to the law equally culpable as those who are unimpaired, in order to justify imposition of the death sentence on the first group of offenders, the state must be able to explain how the death sentence "measurably contribute[s] to the retributive end of ensuring that the

criminal gets his just deserts." (Id. at 801.) Appellant contends that imposition of the death sentence on the severely mentally ill cannot contribute to retribution, and amounts only to the "exacting of mindless vengeance." (Ford v. Wainwright (1986) 477 U.S. 399, 410.)

2. Evolving standards of decency.

Review of a death sentence under evolving standards of decency should be informed by objective factors, such as legislation, to the extent possible. (Atkins, 536 U.S. at 312.) However, such factors are not dispositive, and the High Court made it clear that the overarching rationale of Atkins was the Court's own "independent evaluation." "[I]n the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." (Id., quoting Coker v. Georgia (1977) 433 U.S. 584, 597.) Atkins also relied on the professional consensus of organizations with germane expertise that opposed the imposition of the death penalty on mentally retarded offenders. (Id. at 316, fn. 21.)

The case law cited immediately above in section 1, pp. 145-46, shows an emerging consensus against imposing a death sentence on a severely mentally ill offender. Moreover, studies have shown that over the last decade a large majority of the public agreed that major depression was due to neurobiological causes. (See, Pescocolido et al., "A Disease Like Any Other? A Decade of Change in Public Reactions to Schizophrenia,

Depression, and Alcohol Dependence," Am.J.Psychiatry (2010) 167: 1321-1330.) In a Gallup poll conducted in May of 2002, approximately 75% of Americans responded that they opposed the death penalty when asked whether they favored or opposed it for the "mentally ill." (See American Bar Association Section of Individual Rights and Responsibilities, Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States, 63 Ohio St.L.J. 487, 529 (2002).)

Thus, as with mental retardation, the mentally ill offender is seen by a large majority of the population as being subject to forces (neurobiological) beyond his voluntary control.

Finally, professional psychiatric and psychological organizations oppose imposition of the death penalty on the severely mentally ill for all the reasons discussed herein. (National Alliance on Mental Illness, report released July 6, 2009, entitled Double Tragedies.)[75] The American Psychological Association in a 2000 resolution called upon each capital punishment jurisdiction in this county not to carry out the death penalty based in part on procedural and other problems with mentally ill defendants until the jurisdiction implemented policies and procedures that could be shown through psychological and social science research to ameliorate

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[75] See www.nami.org/doubletragedies

those deficiencies.[76] The American Psychiatric Association described its members as "uniformly troubled by the execution of people whose offenses were linked to serious mental disorders or whose mental disorders prevented a fair adjudication, and identified specific circumstances under which a severe mental disorder at the time of the offense should preclude a death sentence, including the situation in which at the time of the offense, the offender had a severe mental disorder that significantly impaired his capacity to appreciate the nature, consequences or wrongfulness of his conduct, to exercise rational judgment in relation to his conduct, or to conform his conduct to the requirements of the law – a standard broader than that encompassed by the law in California regarding sanity and mitigation based on extreme mental or emotional disturbance.[77]

The year after the decision in Atkins, the American Bar Association (ABA) Section of Individual Rights and Responsibilities (IRR) established a Task Force on Mental Disability and the Death Penalty, comprised of

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[76] See <www.apa.org/about/governance/council/policy/death-penalty.aspx>

[77] Amnesty International's Report of January 2006 quoted the former president of American Psychiatric Association who said that "the mentally ill suffer from many of the same limitations that [as stated in Justice Stevens' opinion in Atkins] 'do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.'" www.amnesty.org/en/library/asset/AMR51/003/2006, p. 10, fn. 23, quoting Alan A. Stone, M.D., Supreme Court decision raises ethical questions for psychiatry. Psychiatric Times, Vol. XIX; Issue 9, September 2002.

lawyers, mental health practitioners and academics, to consider Atkins might apply to people with other types of impaired mental conditions. After two years of deliberations, the ABA adopted the task force recommendation and resolution – the same as that previously adopted by both the American Psychological Association and the American Psychiatric Association – on the application of capital punishment to severely mentally ill offenders.[78] The ABA believes that these recommendations, which previously had been adopted by both the American Psychological Association and the American Psychiatric Association, should be adopted by all capital jurisdictions. (Tabak, Ronald J., A More Rational Approach to a Disturbing Subject -- Mental Disability and Capital Punishment, 25 St. Louis U.Pub.L.Rev. 283 (2006).)

Finally, the United States Supreme Court has deemed the laws of other countries and international authorities as instructive for interpreting the Eighth Amendment's prohibition of cruel and unusual punishments. (See e.g., Roper v. Simmons 543 U.S. at 576.) The execution of those with severe mental illness is prohibited by international law, and by virtually every country in the world. (See U.N. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (1984); the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (1997) [calling for governments that continue to use the death penalty against

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[78] See 30 Mental & Physical Disability L. Rep. 668 (Sept.–Oct. 2006).

minors and the mentally ill to bring their legislation into conformity with international legal standards]; U.N. Commission of Human Rights (2000) [urging all states with a death penalty not to impose it on any person suffering from a mental disorder].)

3. Execution of the mentally ill: heightened risks of unjustified executions.

Atkins cited the enhanced risk faced by the mentally retarded "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," as a further justification to categorically exclude such defendants from capital sentencing eligibility. (Atkins, 536 U.S. at 320.) A similarly enhanced risk exists for mentally ill defendants who, like appellant, have a significantly reduced ability to meaningfully assist defense counsel. Appellant suffered both delusions and hallucinations, which (1) reduced his ability to accurately observe and report to counsel, (2) caused him to mistrust counsel and impaired his ability to cooperate with counsel. Thus, appellant faced an enhanced risk of having the death sentence imposed, despite the factors that should have called for a lesser sentence, because he was unable to assist counsel with respect to the accuracy of aggravating factors or the existence of mitigating factors. Moreover, his mental illness made him unable to conform his conduct to the requirements of courtroom procedure and decorum: he sobbed; he swore; he had outbursts. For these same reasons, his attorneys did not

believe he would make a good witness, even though his testimony otherwise could have been helpful.

As noted in Atkins, appellant's demeanor probably created "an unwarranted impression of lack of remorse." (Id. at 321.) Severe mental illness enhances the likelihood that the jury will find aggravation while at the same time increasing the likelihood the jury will reject mitigation, thus creating a heightened risk of unjustified death sentences. (Slobogin, Beyond Atkins: A Symposium on the Implications of Atkins v. Virginia, 33 N.M.L.Rev. 293 (2006).)

4. This Court's decision in Castaneda is distinguishable on the facts.

Finally, appellant notes that in People v. Castaneda (2011) 51 Cal.4th 1292, this Court rejected the argument that the Eighth Amendment as interpreted in Atkins and Roper v. Simmons should bar imposition of the death penalty for a defendant suffering from antisocial personality disorder.[79] Castaneda held that the defendant had failed to show that antisocial personality order was analogous to mental retardation (as in

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[79] The DMS-IV defines antisocial personality disorder as "a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years," as indicated by three or more of the following traits: a failure to conform to social norms and lawful behavior, deception, impulsiveness, irritability and aggressiveness, reckless disregard for the safety of self or others, consistent irresponsibility, or lack of remorse. (See http://en.wikipedia.org/wiki/Antisocial_personality_disorder.)

Atkins) or juvenile status (as in Roper v. Simmons) because (1) there was no objective evidence that society viewed as inappropriate the execution of persons with antisocial personality disorder; (2) the expert evidence in the case showed that persons with antisocial personality disorder were aware of their actions and were able to choose not to commit crimes, so that the disorder did not diminish their personal culpability; (3) the justifications of retribution and deterrence were served by application of the death penalty to such individuals; and (4) the ability of such individuals to charm and manipulate others enhanced rather than diminished their capacity to avoid wrongful conviction and execution. (Id. at 1345.)

None of these factors applies to appellant. Whatever the current societal beliefs about antisocial personality disorder, society does not consider execution appropriate for the mentally ill. (Ford v. Wainwright (1986) 477 U.S. 399, 409-10 [the Eighth Amendment prohibits execution of a person who is insane]; Panetti v. Quarterman (2007) 551 U.S. 930 [remanding for further proceedings to determine if the defendant's mental illness rendered him incompetent to be executed]; see also pp. 145-52, above as to evolving standards of decency in the case law and society.)

Most of the expert evidence in this case showed that appellant was unable to appreciate the wrongfulness of his actions because of his delusional mental illness: Dr. Stewart and Dr. Schaeffer both testified that

appellant's mental illness was biochemical and that he was unable to appreciate the wrongfulness of his actions. (12RT 2249-53, 2265-70, 2463, 2478.) Dr. Weiss did not consider appellant legally insane but testified that appellant's delusional thinking caused him to believe his acts were necessary to protect his children. (12RT 2384-87.)[80]

Finally, appellant's severe mental illness did not include the ability to charm anyone. Thus, in contrast to the defendant in Castaneda, execution of a severely mentally ill person such as appellant does not serve the policies of retribution or deterrence.

5. Summary.

The evidence in this case showed overwhelmingly that appellant suffered from a genetically induced mental illness, caused by a deregulation of neurotransmitters in the brain. His illness had a "chemical biological basis." He had been suicidal for the six years preceding the offenses, and had been unable to work or care for himself since the age of 31. (12RT 2243-52.) In other words, he displayed the same social and occupational dysfunction (inability to hold employment, impaired social relationships, isolation) as shown by individuals suffering mental retardation. Appellant was paranoid and obsessed with protecting his children from what he

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[80] Dr. French testified that appellant did know right from wrong at the time of the offenses. (13RT 2621-22.)

viewed as corrupting influences. His depression had psychotic and delusional features (according to the court-appointed psychologist) that led him to feel justified in his actions, which he believed necessary to protect his children. (12RT 2370-73; 2384-87; see also 12RT 2452-58; 2462.)

In sum, appellant is a hostage of his neurobiological processes as much as is an immature juvenile or a mentally retarded offender. Just as they cannot choose to have more advanced cognitive functioning, appellant could not, by force of will, choose to disregard the chemical imbalance in his brain that caused him to believe that his actions were necessary to protect his children. Such a person, notwithstanding his crimes, is deserving of less than the most severe punishment of death.

VI. IMPOSITION OF THE DEATH PENALTY ON A SEVERELY MENTALLY ILL OFFENDER SUCH AS APPELLANT VIOLATES THE FEDERAL CONSTITUTIONAL EQUAL PROTECTION CLAUSE AND REQUIRES REVERSAL OF APPELLANT'S SENTENCE

As set out immediately above, in Atkins the United States Supreme Court held that mentally retarded offenders were categorically protected from the death penalty under the Eighth Amendment. Roper v. Simmons, 543 U.S. 551 held that juvenile offenders were categorically protected as well. Appellant contends that imposition of the death sentence on him despite his disability of severe mental illness, where minors and the mentally retarded are categorically removed from death penalty eligibility,

violates the Fourteenth Amendment guarantee of equal protection under the law as well as arbitrary within the meaning of the Eighth Amendment.

Juveniles, the mentally retarded, and the severely mentally ill are uniformly less culpable than other offenders. Similarly, the goals of deterrence and retribution are less applicable across those three groups. To treat one of those three legally indistinguishable groups differently for purposes of punishment violates the Fourteenth Amendment's Equal Protection Clause.

If the differentiation of a similarly situated group is based on an "irrational prejudice," it may violate the Equal Protection Clause of the Fourteenth Amendment. (City of Cleburne v. Cleburne Living Center (1985) 473 U.S. 432, 450;[81] see also ABA Manual, p. 5 [the stigma attached to mental illness is like racism or sexism and is defined as an "irrational prejudice" due to a person's mental disability, based on stereotype, myth and de-individualization that affects both jurisprudence and lawyering practices].)

The severely mentally ill are similarly situated to the mentally retarded and juveniles in that they are less culpable and the imposition of the death penalty on them is less likely to promote the goals of deterrence and retribution for the reasons articulated by the Court in Atkins and

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[81] City of Cleburne held that a municipal permit requirement violated equal protection because it rested on "an irrational prejudice" of the mentally retarded.

Simmons and as discussed in detail above, in Argument V.

Atkins considered mentally retarded persons ineligible for the death penalty because of their "diminished capacities to understand and process information . . . ." (536 U.S. at 318-20.)

A brief description of the symptoms suffered by appellant (addressed above in the Statement of Facts, Sanity Trial, pp. 12-29, and incorporated by reference here) makes it clear that he also had a diminished ability to understand and process information, to communicate, to engage in logical reasoning, to control his impulses, and to understand the reactions of others. If anything, appellant's delusions, paranoia, and impaired thought process represent a greater dysfunction than that experienced by most mildly retarded persons (the only mentally retarded people likely to commit capital crimes) and by virtually any non-mentally ill teenager. (See Slobogin, Beyond Atkins: A Symposium on the Implications of Atkins v. Virginia, 33 N.M.L.Rev. 293, 304 (2006).)

It is true that the California statutory scheme, including sanity proceedings and the mitigating factors at penalty trial, to a certain extent recognize and protect the mentally ill. However, just as juveniles and the mentally retarded have ended up on death row despite mitigating factors, many people who were mentally ill at the time of their crime are sentenced to death. "The insanity defense is rarely successful, even (or especially) in

murder cases." (Id. at 305.) Despite that mental impairments are explicitly recognized as potential mitigation in capital sentencing statutes, research suggests that presentation of such evidence often acts as an aggravating factor: sentencing juries and judges apparently focus more on the perceived dangerousness of the mentally ill than on their diminished culpability and deterrability. (Ibid.) These facts show an "irrational prejudice" against people with mental illness that is not justified by any legitimate state interest.

Consequently, imposition of the death penalty on appellant, who is seriously mentally ill and suffered from a major mental illness at the time of the offenses, violated his federal constitutional guarantee of equal protection under the law.

VII. THE PROCESS USED IN CALIFORNIA FOR DEATH QUALIFICATION OF JURIES IS UNCONSTITUTIONAL AND WAS UNCONSTITUTIONAL IN THIS CASE

The death-qualification procedure used in California to select juries in capital cases is unconstitutional. As will be demonstrated below, the death-qualification process produces juries which are both more likely to convict and more likely to vote for death and also disproportionately remove women, members of racial minorities and religious people from juries. Therefore, the use of the death-qualification procedure in California violates the rights of a capital defendant to equal protection and due process as well as the right to a reliable death penalty adjudication, in derogation of

the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article I of the California Constitution, sections 7,15,16 and 17.

As the United States Supreme Court has explained: "A 'death qualified' jury is one from which prospective jurors have been excluded for cause in light of their inability to set aside their views about the death penalty that would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and oath." (Buchanan v. Kentucky (1987) 483 U.S. 402, 408, fn. 6 [internal citations and quotations omitted).) If a juror's ability to perform his or her duties is substantially impaired under this standard, he or she is subject to dismissal for cause. (People v. Ashmus (1991) 54 Cal. 3d 932, 961-962 citing Wainwright v. Witt (1985) 469 U.S. 412, 424 and Adams v. Texas (1980) 448 U.S. 38, 45.) This Court has held that the only question that a trial court needs to resolve during the death-qualification process is "whether any prospective juror has such conscientious or religious scruples about capital punishment, in the abstract, that his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (People v. Mattson (1990) 50 Cal. 3d 826, 845.)

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A. Current Empirical Studies Prove That the Death Qualification Process is Unconstitutional.

In Hovey v. Superior Court (1980) 28 Cal.3d 1, and People v. Fields (1983) 35 Cal.3d 329, this Court began to examine the vast body of research concerning the problems caused by death-qualification procedure. Based on the statistical evidence presented, this Court concluded that California's death-qualification jury selection process did not violate the Sixth Amendment right to an impartial guilt phase jury. Similarly, in Lockhart v. McCree (1986) 476 U.S. 162, 165, the United States Supreme rejected a claim that death qualification violated a defendant's Sixth and Fourteenth Amendment rights to have guilt or innocence determined by an impartial jury selected from a representative cross-section of the community. (Id. at 167.)

However, the concerns about statistical evidence stated in Hovey and Fields have since been resolved, and new evidence establishes that the factual basis on which Lockhart rests is no longer valid, and that this decision was based on faulty science and improper logic. The questions raised in these cases must be reevaluated in light of the new evidence.

1. The statistical research since Hovey.

Hovey generally accepted the vast research condemning the death-qualification process, although it found one flaw in the scientific data then available. The "Hovey problem" was that the studies presented in that case

did not take into account the fact that California also excluded automatic death penalty jurors via "life-qualification." (Hovey, 28 Cal.3d at 18-19.) As set forth immediately below, this problem has been solved, and this Court should now acknowledge that fact.

After Hovey, a study was conducted that specifically addressed the "Hovey problem." (Kadane, Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure (1984) 78 J. American Statistical Assn. 544.) The article reviewed two studies presented in Hovey, the 1984 Fitzgerald and Ellsworth study and the 1984 Cowan, Thompson, and Ellsworth study. (Id. at .545-546.) The conclusion was that excluding the "always or never" group, i.e., the automatic death and automatic life jurors, results in a "distinct and substantial anti-defense bias" at the guilt phase. (Id. at 551.) Professor Kadane conducted additional research using data unavailable at the time Hovey was decided. (See Kadane, After Hovey: A Note on Taking Account of the Automatic Death Penalty Jurors (1984) 8 Law & Human Behavior 115 (hereafter "Kadane, After Hovey").) This study proved that "the procedure of death qualification biases the jury pool against the defense." (Id. at 119.) More recent studies have reached the same result. (See, e.g., Seltzer et al., The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example (1986) 29 How. LJ. 571, 604 [hereafter "Seltzer et al."]; see also Luginbuhl & Middendorf, Death Penalty Beliefs and Jurors' Responses to Aggravating

and Mitigating Circumstances in Capital Trials (1988) 12 Law & Human Behavior 263.)

A more recent study updated the past research on death qualification based on numerous changes in society and the law, including the increase in support for the death penalty and the Supreme Court's decision in Morgan v. Illinois (1992) 504 U.S. 719, which required "life qualification," or the removal of the automatic death jurors. (See Haney, et al., "Modern" Death Qualification: New Data on Its Biasing Effects (1994) 18 Law & Human Behavior 619, 619-622 [hereafter "Haney"].) The Haney study was "likely the most detailed statewide survey on Californians' death penalty attitudes ever done." (Id. at 623, 625.) It found that "[d]eath-qualified juries remain significantly different from those that sit in any other kind of criminal case." (Id. at 631.)

These studies are the type of research that this Court sought in the Hovey opinion, and they establish that death qualification of jurors serving in capital cases, even when "life qualification" also occurs, violates the Sixth and Fourteenth Amendments and article I, sections 7, 15, 16 and 17 of the California Constitution.

2. The factual basis of Lockhart is no longer sound.

Lockhart has been repeatedly criticized for its analysis of both the data and the law related to death qualification. (See, e.g., Smith, Due Process Education for the Jury: Overcoming the Bias of Death Qualified

Juries (1989) 18 Sw. U. L. Rev. 493, 528 [hereafter "Smith"] [the analyses in Lockhart were "characterized by unstated premises, fallacious argumentation and assumptions that are unexplained or undefended"]; Thompson, Death Qualification After Wainwright v. Witt and Lockhart v. McCree (1989) 13 Law & Human Behavior 185, 202 [hereafter "Thompson"][Lockhart is "poorly reasoned and unconvincing both in its analysis of the social science evidence and its analysis of the legal issue of jury impartiality"]; Byrne, Lockhart v. McCree: Conviction-Proneness and the Constitutionality of Death-Qualified Juries (1986) 36 Cath. U. L. Rev. 287, 318 [hereafter "Byrne"] [Lockhart was a "fragmented judicial analysis," representing an "uncommon situation where the Court allows financial considerations to outweigh an individual's fundamental constitutional right to an impartial and representative jury"].)
(See also Moar, Death Qualified Juries in Capital Cases: The Supreme Court's Decision in Lockhart v. McCree (1988) 19 Colum. Hum. Rts. L. Rev. 369, 374 [hereafter "Moar"] [detailing criticism of the Court's analysis of the scientific data].)

Because the "constitutional facts" upon which Lockhart was based are no longer correct, the Supreme Court's holding should not be considered controlling under the federal Constitution. (United States v. Carolene Products (1938) 304 U.S. 144, 153.) This Court needs to review the new data and reevaluate this issue.

Moreover, Lockhart does not control the issues raised under the California Constitution. (Raven v. Deukmejian (1990) 52 Ca1.3d 336, 352-354.) This Court should continue the path it began in Hovey and find the death qualification process unconstitutional under the California Constitution.

a. Misinterpretation of the scientific data.

Despite that the studies presented in Lockhart were carried out in a "manner appropriate and acceptable to social or behavioral scientists," the United States Supreme Court categorically dismissed them. (Smith, 18 Sw. U. L. Rev. at p. 537.) When the Supreme Court found a supposed flaw in a study, or a group of studies, it dismissed the study or studies "from further consideration, never considering that alternative hypotheses left open by shortcomings in studies of one type might be ruled out by studies of another type." (Thompson, 13 Law & Human Behavior at 195.) The Court dismissed any study that it deemed less than definitive. (Ibid.) Professor Thompson also observed: "The Court's adamant refusal to acknowledge the strength of the evidence before it casts grave doubts upon its ultimate holding in Lockhart." (Ibid.) The Supreme Court "erred in its rejection of the empirical evidence."

In Lockhart, the Supreme Court was presented with over fifteen years of scholarly research on death-qualification procedures, using a "wide variety of stimuli, subjects, methodologies, and statistical

analyses." (Moar, 19 Colum. Hum. Rts.L. Rev. at pp. 386-387.) From both a scientific and a legal perspective, "[g]iven the seriousness of the constitutional issues involved [] and the extent and unanimity of the empirical evidence, it is hard to justify [the Court's] superficial analysis and rejection of the social science research." (Id. at 387.) The Lockhart decision "ignored the evidence which indicates that a death-qualified jury, composed of individuals with pro-prosecution attitudes, is more likely to decide against criminal defendants than a typical jury which sits in all noncapital cases." (Byrne, 36 Cath. U. L. Rev. at p. 315.) In deciding the issue now presented here, the Court should not rely upon the analysis of the statistics found in the Lockhart decision.

b. Incorrect legal observations.

Witherspoon v. Illinois (1968) 391 U.S. 510 had all but accepted that, once the "fragmentary" scientific data on the effect of death qualification on guilt phase was solidified, the Court would act to protect impartial guilt phase juries. "It seemed only inadequate proof of 'death-qualified' juror bias caused the Court to uphold Witherspoon's guilty verdict." (Smith, 18 Sw.U.L.Rev. at 518.) This Court should follow not the the faulty Lockhart decision but rather the path laid out by Hovey, both in construing and applying the federal and state Constitutions properly. "The Court's holding in Lockhart infers [sic] that the Constitution does not guarantee the capital defendant an 'impartial jury' in the true meaning of the

phrase, but merely a jury that is capable of imposing the death penalty if requested to do so by the prosecution." (Peters, Constitutional Law: Does "Death Qualification" Spell Death for the Capital Defendant's Constitutional Right to an Impartial Jury? (1987) 26 Washburn LJ. 382, 395.) This is not the meaning of impartiality, under either the federal or the state Constitutions, discussed in Hovey, nor is it the proper one.

c. The scientific evidence.

Empirical studies of actual jurors from actual capital cases show that many capital jurors who had been death-qualified under Witt, and "who had decided a real capital defendant's fate, approached their task believing that the death penalty is the only appropriate penalty for many of the kinds of murder commonly tried as capital offenses." (Bowers, W. & Foglia, W., Still Singularly Agonizing: The Law's Failure to Purge Arbitrariness from Capital Sentencing (2003) 39 Crim. Law. Bull. 51, 62 [hereafter "Bowers & Foglia"].)

In 1990, a group of researchers, under the leadership of Professor William J. Bowers, and funded by the Law and Social Sciences Program of the National Science Foundation, formed the Capital Jury Project ("CJP"). One of its purposes was to generate a comprehensive and detailed understanding of how capital jurors actually make their life or death decisions. (See Bowers, W., The Capital Jury Project: Rationale, Design, and Preview of Early Findings, (1995) 70 Ind. L. J. 1043.)

The work of the CJP has addressed many of the specific problems noted in Lockhart. First, it studied 1201 actual jurors who participated in 354 actual cases. Second, the CJP studied how their decisions were influenced by their peers during jury deliberations. Third, as a result of studying actual jurors, this research data is not "contaminated" by the influence of the so-called nullifiers [automatic life jurors] because they were all excused during the death-qualification process at voir dire. (Rozelle, "The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation" (Fall 2006) 38 Ariz. St. L. J. 769, 784.) The CJP study confirms what the earlier studies described in Lockhart showed: the death-qualification process results in juries more prone to convict and to choose the death penalty; that it produced skewed juries, particularly in the following ways: (1) there are more automatic death penalty jurors; (2) many of these jurors don't understand the nature of mitigation evidence; and (3) such jurors tend to decide prematurely both to convict and to choose the death sentence. (Id. at 785, 787-93.)

B. Data Regarding the Impact of Death Qualification on Jurors' Race, Gender, and Religion.

Lockhart did not address whether death qualification had a negative impact on the racial, gender, and religious composition of juries. This Court acknowledged in People v.

Fields, that this issue is of constitutional dimension and required more research. Such research is now available, and it compels a finding that the death-qualification process has an adverse effect on the inclusion of important classes of people in capital juries.

Numerous studies have shown that "proportionately more blacks than whites and more women than men are against the death penalty." (Moar, 19 Colum. Hum. Rts. L. Rev. at 386.) Death qualification "tends to eliminate proportionately more blacks than whites and more women than men from capital juries," adversely affecting two distinctive groups under a fair cross-section analysis. (Id. at 388; see also Seltzer et al., 29 How. LJ. at p. 604 [death qualification results in juries that under-represent blacks],; Luginbuhl & Middendorf, 12 Law & Hum. Behav. at 269 [there is a significant correlation between attitudes about the death penalty and the gender, race, age, and educational backgrounds of jurors].)

C. Prosecutorial Misuse of Death Qualification.

Research has shown that a "prosecutor can increase the chances of getting a conviction by putting the defendant's life at issue." (Thompson, 13 Law & Human Behavior at 199.) Some prosecutors have acknowledged that death qualification skews the jury and that they use this unconstitutional practice to their advantage in obtaining conviction-prone juries. (See Garvey, The Overproduction of Death (2000) 100 Colum. L.

Rev. 2030, 2097 & fus.163 and 164 [hereafter "Garvey"]; see also Rosenburg, Deadliest D.A. (1995) N.Y. Times Magazine (July 16, 1995) p. 42 [quoting "various former and current Pennsylvania prosecutors explaining the Philadelphia District Attorney's practice of seeking the death penalty in nearly all murder cases as self-consciously designed to give prosecutors 'a permanent thumb on the scale' enabling them to 'use everything you can' to win, including ... "'everyone who's ever prosecuted a murder case wants a death-qualified jury,' because of the 'perception... that minorities tend to say much more often that they are opposed to the death penalty,' so that '[a] lot of Latinos and blacks will be [stricken from capital juries as a result of] these [death qualification] questions.'"

Lockhart declined to consider the prosecutorial motives underlying death qualification because the petitioner had not argued that death qualification was instituted as a means "for the State to arbitrarily skew the composition of capital-case juries." (476 U.S. at 176.) But the Lockhart dissent predicted that "[t]he State's mere announcement that it intends to seek the death penalty if the defendant is found guilty of a capital offense will, under today's decision, give the prosecution license to empanel a jury especially likely to return that very verdict." (476 U.S. at 185 [dis. opn of Marshall, J., Brennan, J., & Stevens, J.].)

The prosecutor's use of death qualification in this case violated appellant's Sixth, Eighth and Fourteenth Amendment rights and his rights

under article I, sections 7, 15, 16, and 17 of the California Constitution.

D. Death Qualification in California Violates the Eighth Amendment.

In California, the death-qualification process skews juries making them more conviction-prone and more likely to vote for a death sentence. Non-capital defendants do not face such skewed juries. This result is unacceptable under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article I, sections 7,15, 16 and 17 of the California Constitution.

The Eighth Amendment requires "heightened reliability" in capital cases because "death is different." The penalty of death is qualitatively different from a sentence of imprisonment, however long. (Woodson v. North Carolina (1976) 428 U.S. 280, 305.) Since death qualification results in a jury more likely to choose a death sentence, it cannot survive the "heightened reliability" requirement mandated by the Eighth Amendment. The Supreme Court has recognized the same principle when it comes to guilt determinations. In California, instead of the "utmost care" and "heightened reliability," capital defendants face juries which are not allowed in any other type of case: capital defendants are tried by juries at both the guilt and penalty phases that are far less "impartial" than juries provided to defendants in any other kind of criminal case. Accordingly, the death-qualification process violates the "heightened reliability" requirement

of the Eighth Amendment because it is utterly "cruel and unusual" to put a human being on trial for his life while also forcing him to face a jury that is prone to convict and condemn him to die because many if not all of the jurors who would have been open to the defense evidence had been excluded. Since appellant faced such a death-qualified jury, his convictions, the special circumstance finding against him, and his death penalty must be reversed.

E. The Death-Qualification Process is Unconstitutional.

Even if this Court does not condemn death qualification in principle, the process of death qualification in California courts is nevertheless unconstitutional. The Supreme Court did not reach this issue in Lockhart. In Hovey, this Court reviewed the evidence on this issue and generally accepted it, although the decision only addressed some of the problems presented by the evidence. In Fields, this Court improperly allowed more specific death-qualification voir dire, which exacerbated the problems of the process.

"The voir dire phase of the trial represents the 'jurors' first introduction to the substantive factual and legal issues in a case.' The influence of the voir dire process may persist through the whole course of the trial proceedings." (Powers v. Ohio (1991) 499 U.S. 400, 412, quoting Gomez v. United States (1989) 490 U.S. 858, 874.) As detailed in Hovey

and in recent studies, death-qualification voir dire persuades jurors to adopt pro-conviction and pro-death views. The result is that potential jurors who do not share such pro-prosecution attitudes on guilt and penalty are removed from the panel.

The death qualification in this case influenced the deliberative process and the mind set of the jurors concerning their responsibilities and duties. The use of death-qualification voir dire in California violates the Sixth, Eighth and Fourteenth Amendments and article I, sections 7,15,16 and 17 of the California Constitution. Any verdict reached by a jury chosen in this manner cannot stand since the use of a jury whose views are skewed and biased constitutes a structural error.

F. Death Qualification Violates the Right to a Jury Trial.

Taylor v. Louisiana (1975) 419 U.S. 522, 530-531 identified three purposes underlying the Sixth Amendment right to a jury trial, and death qualification defeats all three. First, "the purpose of a jury is to guard against the exercise of arbitrary power--to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." (Ibid.) Death qualification makes the "common sense judgment of the community" unavailable. The evidence now shows that a death-qualified jury fails to represent the judgment of the excluded community members. Death qualification also

removes the constitutionally required "hedge against the overzealous or mistaken prosecutor" or "biased response of a judge." (Ibid.) Evidence shows that prosecutors intentionally use the death qualification process to remove potential jurors so that there is no "hedge" to prevent their overzealousness. (See, e.g., Garvey, 100 Colum.L.Rev at 2097 and fn. 163.)

The second purpose of the jury trial is to preserve public confidence. "Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. (Ibid.) Death qualification fails to preserve confidence in the system and discourages community participation. (See, e.g., Moller, Death-Qualified Juries Are the 'Conscience of the Community'? L.A. Daily Journal, (May 31, 1988) p. 4, Col. 3 [noting the "Orwellian doublespeak" of referring to a death-qualified jury as the "conscience of the community"];"(Smith, supra, 18 Sw. V.L.Rev. at p. 499 ["the irony of trusting the life or death decision to that segment of the population least likely to show mercy is apparent"]; Liptak, Facing a Jury of (Some of) One's Peers, New York Times (July 20, 2003), Section 4.)

The third purpose is to implement the belief that "sharing in the administration of justice is a phase of civic responsibility." (Taylor v. Louisiana, 419 U.S. at 532.) The exclusion of a segment of the

community from jury duty sends a message that the administration of justice is not a responsibility shared equally by all citizens.

Finally, because the death-qualification process undermines the purposes of the Sixth Amendment right to a jury trial, excluding individuals with views against the death penalty from petit juries also violates the fair cross-section requirement and the Equal Protection Clause. "We think it obvious that the concept of "distinctiveness" must be linked to the [three] purposes oft he fair cross-section requirement." (Lockhart v. McCree, 476 U.S. at 175.) For these reasons, death qualification violates the Sixth and Fourteenth Amendments of the United States Constitution as well as article I, sections 7,15,16 and 17 of the California Constitution.

G. The Prosecutor's Use of Death Qualification via Peremptory Challenges was Unconstitutional.

In the instant case, the prosecutor's use of peremptory challenges to systematically exclude jurors with reservations about capital punishment denied appellant his constitutional rights. After all jurors who declared they could not impose a death sentence were excused, various prospective jurors remained who had reservations about the death penalty, but who were not excludable for cause under Witherspoon and Witt. These prospective jurors stated that they could vote for the death penalty in an appropriate case. (Gray v. Mississippi (1987) 481 U.S. 648, 667-668.)

However, when these jurors were called to the jury box, the

prosecutor systematically used a peremptory challenge to exclude those who were hesitant or conflicted about imposition of the death penalty. For example, the prosecutor used a peremptory challenge to strike Gloria Coady from the jury. (9RT 1608.) In voir dire, Ms. Cody stated that she had a "hard time" wrestling with the responsibility of deciding the death penalty but had indicated she was neutral on the merits of it and would be able to impose the death penalty for multiple murder. (7RT 1063.)

Similarly, the prosecutor used a peremptory challenge to strike prospective juror Terry Murphy. (9RT 1611.) Mr. Murphy said in voir dire that he mistakenly stated in his questionnaire that he could not impose the death sentence. He clarified that, after hearing from the judge, he could vote to impose the death penalty if the evidence warranted it. (7RT 1110, 1150-51.)

The prosecutor also used a peremptory challenge to excuse Roberto Mendoza, one of the few Hispanics on the panel. (9RT 1612.) Mr. Mendoza stated that he was "conflicted" on the death penalty and would have to hear the evidence. Mr. Mendoza had stated both that he could never impose the death penalty but also that he would impose the death penalty for first degree murder. (9RT 466, 1471.)

As the above examples demonstrate, the prosecutor's actions in this case denied appellant his federal and state constitutional rights to due

process, equal protection, an impartial jury, a jury drawn from a fair cross-section of the community and a reliable determination of guilt and sentence under the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution and related provisions of article I, sections 7,15,16 and 17 of the California Constitution.

The peremptory exclusion of these jurors prejudiced appellant's rights at the guilt phase for the same reasons as did the "death qualification" of the jury. Unlike death qualification done by for-cause challenges, which excludes from the jury only those whom the trial judge determines would not be able to follow their oath at the penalty phase, the elimination of these jurors through peremptory challenge involves the exclusion of persons whose ability to follow their oath and instructions at the penalty phase is unaffected by their reservations about capital punishment. Even assuming their exclusion was harmless at the guilt phase, reversal of the death judgment is required nonetheless. (See, e.g., Gregg v. Georgia, 428 U.S. at 188; Lockett v. Ohio (I988) 438 U.S. 586, 604.) The prosecution "stacked the deck" in favor of death by exercising its peremptory challenges to remove these jurors. The exclusion of these jurors resulted in a "jury uncommonly willing to condemn a man to die." (Witherspoon v. Illinois, 391 U.S. at 521, 523.)

The prosecutor shares responsibility with the trial judge to preserve a defendant's right to a representative jury and should exercise peremptory

challenges only for legitimate purposes. Since the State is forbidden from excusing a class of jurors for cause based on their death penalty skepticism, those views are not a proper basis for a peremptory challenge. The State has no legitimate interest in the removal of jurors who can follow their oaths, but who may also be skeptical about the death penalty. A jury stripped of the significant community viewpoint that these prospective jurors provide is not ideally suited to the purpose and functioning of a jury in a criminal trial. (Ballew v. Georgia (1978) 435 U.S. 223, 239-242.) Even if these jurors do not constitute a cognizable class for purposes of analysis of the Sixth Amendment's representative cross-section of the community issue (Lockhart v. McCree, 476 U.S. at 174-77), they constitute a distinct group for purposes of ensuring both the reliability of a capital sentencing decision and the need for the jury to reflect the various views of the wider community. (Witherspoon, 391 U.S. at 519.)

In Gray v. Mississippi, the Supreme Court held the wrongful exclusion for cause of a prospective juror who was a death penalty skeptic constituted reversible error. The plurality opinion emphasized the potential prejudice to a capital defendant when death penalty skeptics are systematically excluded from a jury by peremptory challenges. (481 U.S. at 667-68.) The systematic, peremptory exclusion of death penalty skeptics in appellant's case requires reversal of the penalty verdict.

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H. Errors in Death Qualifying the Penalty Jury Requires Reversal of the Guilt Verdicts as Well.

Witherspoon v. Illinois identified three separate problems regarding death qualification. First, death qualification can be so extreme as to make the jury biased at the penalty phase. Second, death qualification that is so extreme may also make the jury biased at the guilt phase. Third, even death qualification that is not so extreme biases the jury at the guilt phase. (391 U.S. 510.)

The first issue is the one that formed the basis for the limits on death qualification in Witherspoon. The second and third issues were left open for further studies. However, it appears that courts have erroneously compounded these issues. (See, e.g., Hovey v. Superior Court, 28 Cal.3d at 11-12 [summarizing Witherspoon and discussing the two issues as if they were identical]; see also People v. Fields, 35 Cal.3d at 344.)

This melding of issues is incorrect. The second issue is whether death qualification that did not meet the proper standard for removal of penalty phase jurors was improper at the guilt phase. (Witherspoon, 391 U.S. at 516-18.) Witherspoon held that because the evidence on this second issue was not yet developed, it only would reverse the penalty phase. (Id. at 516-18, 522, fn. 21.) The third issue is whether, assuming the State properly death-qualified the jury for purposes of the penalty phase, it was proper for such death qualification to also exclude potential jurors from the

guilt phase. (Id. at 521, fn. 19.) This was the issue involving the "guilt phase includables" discussed in Lockhart and Hovey.

This Court has routinely asserted that Witherspoon error as to the penalty phase jury requires the reversal of the penalty but not the guilt verdicts. (See, e.g., People v. Ashmus, 54 Cal.3d at 962.) The United States Supreme Court has not addressed this issue. This Court should alter its position on this point and find that error resulting from the death qualification of the jury also requires reversal of any convictions resulting from the guilt phase.

Since the evidence shows that a death-qualified jury is conviction prone and different from a typical jury, this Court should reconsider the conclusion that Witherspoon error requires only penalty reversal. The State's only conceivable legitimate interest in death qualification is at the penalty phase. If it committed error in achieving this interest, then it has no interest in death-qualifying the guilt phase jury. Since the prosecution did death-qualify the jury in this case, appellant improperly faced a biased guilt phase jury. Moreover, an error resulting in a biased jury cannot be harmless. When this Court finds error as to the penalty phase jury's death qualification, it must also reverse appellant's guilt phase convictions.

I. Conclusion.

The death-qualification process in California is irrational and unconstitutional. It prevents citizens from performing as jurors in capital

cases based on their "moral and normative" beliefs despite the fact that the law specifically requires capital jurors to make "moral and normative" decisions. These citizens' voices are eliminated from the data that the courts rely on to determine whether a particular punishment offends evolving standards of decency under the Eighth Amendment. To make matters worse, California allows some case-specific death qualification; one of the effects of this process is to remove jurors who would be highly favorable to specific mitigation evidence in violation of the Eighth Amendment.

The death-qualification procedure in California also violates the equal protection and due process clauses of the Fourteenth Amendment. To their detriment, capital defendants receive vastly different juries at the guilt phase in comparison with other defendants. In addition, since death qualification results in juries which are more likely to convict and to choose the death sentence, capital defendants' guilt and penalty determinations are not made with the heightened reliability required by the Eighth Amendment.

A vast amount of scientific data demonstrates that death-qualified juries are far more conviction-prone and death-prone than any other juries. The data shows that the death-qualification process disproportionately removes minorities, women, and religious people from sitting on capital juries in violation of the Sixth and Fourteenth Amendments. Moreover, as

was true in this case, prosecutors regularly use the death-qualification process to achieve these results. The very process of death qualification skews capital juries to such a degree that they can no longer be said to be impartial and fully representative of the community.

All of these errors were present in the instant case. From beginning to end, death qualification violated appellant's rights. In this case, the process accomplished was what was expressly prohibited by the Supreme Court:

> "In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die. It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.' It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." (Lockhart v. McCree, 476 U.S. at 179, quoting Witherspoon v. Illinois, 391 U.S. at 520-521 [footnotes and internal citations omitted].)

Thus, death qualification in general and as applied in this particular case violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution. Since this error is comparable to other constitutional errors in the jury selection, it requires reversal of defendant's convictions and death sentence without inquiry into prejudice. (See, e.g., Davis v. Georgia (1976) 429 U.S. 122, 123 [improper challenges for cause]; People v. Stewart (2004) 33 Ca1.4th 425, 454; Turner v. Murray

(1986) 476 U.S. 28, 37 [failure to question prospective jurors about race in a capital case involving interracial violence].) Appellant's convictions and death sentence accordingly must be reversed.

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

In People v. Schmeck (2005) 37 Cal.3d 240, a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (Id. at 303.) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (Id. at 303, fn. 22.) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (Id. at 304.) Appellant Mendoza has no wish to unnecessarily lengthen this brief. Accordingly, pursuant to Schmeck and in accordance with this Court's own practice in

decisions filed since then,[82] appellant identifies the following systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them:

1. Factor (a): Section 190.3, subdivision (a), permitting a jury to sentence a defendant to death based on the "circumstances of the crime," is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death, is vague and standardless, and violates appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, to equal protection, to a reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. The jury in this case was instructed in accord with this provision. (4CT 1011-12.) In addition, the jury was not required to be unanimous as to which "circumstances of the crime" amounting to an aggravating circumstance had been established, nor was the jury required to find that such an aggravating circumstance had been established beyond a reasonable

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[82] See, e.g., People v. Taylor (2010) 48 Cal.4th 574, 143-44 and People v. McWhorter (2009) 47 Cal.4th 318, 377-379. See also, e.g., People v. Collins (2010) 49 Cal.4th 175, 259-61; People v. Thompson (2010) 49 Cal.4th 79; People v. D'Arcy (2010) 48 Cal.4th 257, 307-309; People v. Mills (2010) 48 Cal.4th 158, 213-215; People v. Ervine (2009) 47 Cal.4th 745, 810-811; People v. Carrington (2009) 47 Cal.4th 145, 198-199; People v. Martinez (2010) 47 Cal.4th 911, 967-968.

doubt, thus violating Ring v. Arizona, 536 U.S. 584 and its progeny[83] and appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (Ring, 536 U.S. at. 609.) This Court has repeatedly rejected these arguments. (See, e.g., People v. Collins, 49 Cal.4th at 259-61; People v. Mills, 48 Cal.4th at 213-14; People v. Martinez, 47 Cal.4th at 967 ; People v. Ervine, 47 Cal.4th at 810; People v. McWhorter, 47 Cal.4th at 378; People v. Mendoza (2000) 24 Cal.4th 130, 190; People v. Schmeck, 37 Cal.4th at 304-05.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

2. Factor (b): During the penalty phase, the jury was instructed it could consider criminal acts that involved the express or implied use of violence. (4CT 1011.) The only evidence in support of this instruction was testimony at the guilt phase that appellant had pushed his wife in a fight and the jury was authorized to consider such acts at the penalty phase pursuant to section 190.3, subdivision (b). The jurors were not told that they could not rely on this factor (b) evidence unless they unanimously agreed beyond a reasonable doubt that the conduct had occurred. In light of

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[83] Ring v. Arizona (2002) 536 U.S. 584, Blakely v. Washington (2004) 542 U.S. 296, United States v. Booker (2005) 543 U.S. 220, Cunningham v. California (2007) 549 U.S. 270.

the Supreme Court decision in Ring v. Arizona, 536 U.S. 584 and its progeny,[84] the trial court's failure violated appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (Ring, 536 U.S. at 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable, non-arbitrary penalty phase determination and to freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., People v. Collins, 49 Cal.4th 259-61; People v. D'Arcy, 48 Cal.4th at 308; People v. Martinez, 47 Cal.4th at 967-68; People v. Lewis (2006) 39 Cal.4th 970, 1068.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

In addition, allowing a jury that has already convicted the defendant of first degree murder to decide if the defendant has committed other criminal activity violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to an unbiased decision maker, to due process, to equal protection, to a reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment.

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[84] See cases cited above in previous footnote.

This Court has repeatedly rejected these arguments. (See, e.g., People v. Hawthorne (1992) 4 Cal.4th 43, 77.) The Court's decisions in this vein should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

3. Factor (i): The trial judge's instructions permitted the jury to rely on defendant's age in deciding if he would live or die without providing any guidance as to when this factor could come into play. (4CT 1012.) This aggravating factor was unconstitutionally vague in violation of due process and the Eighth Amendment right to a reliable, non-arbitrary penalty determination and requires a new penalty phase. This Court has repeatedly rejected this argument. (See, e.g., People v. Mills, 48 Cal.4th at 213; People v. Ray (1996) 13 Cal.4th 313, 358.) These decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

4. Inapplicable, vague, limited and burdenless factors: At the penalty phase, the trial court instructed the jury in accord with standard instruction CALJIC 8.85. (4CT 1011-13.) This instruction was constitutionally flawed in the following ways: (1) it failed to delete inapplicable sentencing factors, (2) it contained vague and ill-defined factors, particularly factors (a) and (k), (3) it limited factors (d) and (g) by adjectives such as "extreme" or "substantial," and (4) it failed to specify a burden of proof as to either mitigation or aggravation. These errors, taken

singly or in combination, violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., People v. Thompson, 49 Cal.4th at 143-44; People v. Taylor, 48 Cal.4th at 661-63; People v. D'Arcy, 48 Cal.4th at 308; People v. Mills, 48 Cal.4th at 214 ; People v. Martinez, 47 Cal.4th at 968; People v. Schmeck, 37 Cal.4th at 304-305; People v. Ray, 13 Cal.4th at 358-359.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

5. Failure to Narrow: California's capital punishment scheme, as construed by this Court in People v. Bacigalupo (1993) 6 Cal.4th 457, 475-477, and as applied, violates the Eighth Amendment by failing to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not. This Court has repeatedly rejected this argument. (See, e.g., People v. D'Arcy, 48 Cal.4th at 308; People v. Mills, 48 Cal.4th at 213 ; People v. Martinez, 47 Cal.4th at 967; People v. Schmeck, 37 Cal.4th at 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

6. Burden of proof and persuasion: Under California law, a defendant convicted of first-degree special-circumstance murder cannot receive a death sentence unless a penalty-phase jury subsequently (1) finds that aggravating circumstances exist, (2) finds that the aggravating circumstances outweigh the mitigating circumstances, and (3) finds that death is the appropriate sentence. The jury in this case was not told that these three decisions had to be made beyond a reasonable doubt, an omission that violated the Supreme Court decisions in Ring v. Arizona, 536 U.S. 584 and its progeny. Nor was the jury given any burden of proof or persuasion at all. These were errors that violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to a jury trial, to equal protection, to a reliable and non-arbitrary determination of the appropriateness of the death penalty, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., People v. Collins, 49 Cal.4th at 259-61; People v. Taylor, 48 Cal.4th at 259-61; People v. D'Arcy, 48 Cal.4th at 308; People v. Mills, 48 Cal.4th at 213; People v. Martinez, 47 Cal.4th at 967; People v. Ervine, 47 Cal.4th at 810-811; People v. McWhorter, 47 Cal.4th at 379; People v. Schmeck, 37 Cal.4th at 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

7. Written findings: The California death penalty scheme fails to

require written findings by the jury as to the aggravating and mitigating factors found and relied on, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., People v. Collins, 49 Cal.4th at 259-61; People v. Thompson, 49 Cal.4th at 143-44; People v. Taylor, 48 Cal.4th at 661-63; People v. D'Arcy, 48 Cal.4th at 308; People v. Mills, 48 Cal.4th at 213; People v. Martinez, 47 Cal.4th at 967.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

8. Mandatory life sentence: The instructions fail to inform the jury that if it determines mitigation outweighs aggravation, it must return a sentence of life without parole. This omission results in a violation of appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process of law, equal protection, a reliable, non-arbitrary determination of the appropriateness of a death sentence, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., People v. McWhorter, 47 Cal.4th at 379; People v. Carrington, 47 Cal.4th at 199.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal

Constitution.

9. Vague standard for decision-making: The instruction that jurors may impose a death sentence only if the aggravating factors are "so substantial" in comparison to the mitigating circumstances that death is warranted (4CT 1026-28) creates an unconstitutionally vague standard, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, equal protection, a reliable, non-arbitrary determination of the appropriateness of a death sentence, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (People v. Carrington, 47 Cal.4th at 199; People v. Catlin (2001) 26 Cal.4th 81, 174; People v. Mendoza, 24 Cal.4th at 190.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

12. Intercase proportionality review: The California death penalty scheme fails to require intercase proportionality review, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., People v. Collins, 49 Cal.4th 259-61; People v. Thompson, 49 Cal.4th at 143-44; People v. Taylor, 48 Cal.4th at 661-63; People v. D'Arcy, 48 Cal.4th at 308-09; People v. Mills, 48 Cal.4th

at 214; People v. Martinez, 47 Cal.4th at 968.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

13. Disparate sentence review: The California death penalty scheme fails to afford capital defendants with the same kind of disparate sentence review as is afforded felons under the determinate sentence law, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of he fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., People v. Collins, 49 Cal.4th at 259-61; People v. Mills, 48 Cal.4th at 214; People v. Martinez, 47 Cal.4th at 968; People v. Ervine, 47 Cal.4th at 811.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

14. International law: The California death penalty scheme, by virtue of its procedural deficiencies and its use of capital punishment as a regular punishment for substantial numbers of crimes, violates international norms of human decency and international law — including the International Covenant of Civil and Political Rights — and thereby violates the Eighth Amendment and the Supremacy Clause as well, and consequently appellant's death sentence must be reversed. This Court has

repeatedly rejected these arguments. (See, e.g., People v. Collins, 49 Cal.4th at 259-61; People v. Taylor, 48 Cal.4th at 661-63; People v. D'Arcy, 48 Cal.4th at 308; People v. Mills, 48 Cal.4th at 213; People v. Martinez, 47 Cal.4th at 968; People v. Carrington, 47 Cal.4th at 198-199; People v. Schmeck, 37 Cal.4th at 305.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of federal law and the Constitution.

15. Cruel and unusual punishment: The death penalty violates the Eighth Amendment's proscription against cruel and unusual punishment. This Court has repeatedly rejected this argument. (See, e.g., People v. Thompson, 49 Cal.4th at 143-44; People v. Taylor, 48 Cal.4th at 661-63; People v. McWhorter, 47 Cal.4th at 379.) Those decisions should be reconsidered because they are inconsistent with the aforementioned provision of the federal Constitution.

16. Cumulative deficiencies: Finally, the Eighth and Fourteenth Amendments are violated when one considers the preceding defects in combination and appraises their cumulative impact on the functioning of California's capital sentencing scheme. As the United States Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (Kansas v. Marsh (2006) 548 U.S. 163, 179, fn. 6; see also Pulley v. Harris (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every

constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].) Viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment. To the extent respondent hereafter contends that any of these issues is not properly preserved, on the grounds that, despite Schmeck and the other cases cited herein, appellant has not presented them in sufficient detail, appellant will seek leave to file a supplemental brief more fully discussing these issues.

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POST-CONVICTION REVIEW FOR TREATY VIOLATIONS

IX. POST-CONVICTION REVIEW IS THE PROPER FORUM IN WHICH TO ADDRESS THE VIOLATION OF APPELLANT'S CONSULAR TREATY RIGHTS

A. Appellant's Consular Treaty Rights Were Violated and His Consulate Was Thereby Denied Its Right to Assist Him Throughout the Formative Stages of His Case.

Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 [hereinafter, "Vienna Convention" or "VCCR"] requires all law enforcement officers to notify a detained foreign national, without delay, of his right to communicate with and contact his consulate. At the detainee's request, the authorities must also notify consular officials – again, without delay – of his incarceration. Furthermore, Article 36 grants consular officers the right of access to their detained nationals, to visit and converse with them and to arrange for their legal representation. Finally, Article 36(2) requires that local laws and regulations "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Some 172 nations are parties to the VCCR, including Mexico and the United States;[85] accordingly, California authorities were under a binding obligation to inform Mr. Mendoza of his

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[85] Within the United States, the VCCR "has continuously been in effect since 1969." (Breard v. Greene (1998) 523 U.S. 371, 376.)

right to consular communication and notification promptly upon his arrest in 2001.[86]

Well prior to appellant's arrest, the U.S. Department of State had circulated a comprehensive booklet on consular notification and access obligations to all major U.S. police departments,[87] as well as a wallet-sized card designed to be carried by arresting officers that summarized Article 36 obligations. As of March 2000, "the Department had distributed approximately 44,000 booklets and over 300,000 cards to arresting officers, prosecutors, and judicial authorities in every state. . . ."[1] (LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. Reports, Counter-Memorial Submitted by the United States of America (27 March 2000) at para. 20.)[88] The same

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[86] The United States takes the view that the duty to inform a known foreign national of the right to consular contact should occur at the time of his initial detention. (See U.S. Department of State, Consular Notification and Access (3rd ed., Sept. 2010) at 21 [advising U.S. police departments that "[i]f the identity and foreign nationality of a person are confirmed during a custodial interrogation that precedes booking, consular information should be provided at that time" and that if "it appears that the person is probably a foreign national, you should provide consular information and treat the person like a foreign national until and unless you confirm that he or she is instead a U.S. citizen."].)

[87] U.S. Department of State, Consular Notification and Access: Instructions for Federal, State, and other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials To Assist Them (Released January 1998). Available at: http://web.archive.org/web/20011210191723/ http:// travel.state.gov/consul_notify.html /

[88] Available at http://www.icj-cij.org/docket/files/104/8554.pdf.

comprehensive instructions were also available on-line at the time of appellant's arrest in December of 2001.[89] These instructions advise arresting officers to be alert to "indicators [that] could be a basis for asking the person whether he/she is a foreign national" such as a detainee's "claim to have been born outside the United States" in order "to determine whether any consular notification obligations apply."[90]

Appellant's booking form clearly identifies his place of birth as Mexico; moreover, during the initial stage of his interrogation, he was asked "how long he had lived in the United States" and informed the police that he had learned English "back in Mexico." (2CT 284). Furthermore, the investigating officers were aware from the time of his arrest that appellant had previously been deported from the United States. (5RT 785). Despite these obvious indications of foreign nationality, the police made no further inquiries regarding appellant's nationality and no advisement of consular rights was ever provided to him.

On May 5, 2005, defense counsel filed a Motion to Preclude the Death Penalty and/or Other Sanctions based on a violation of the VCCR.

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[89] Available at http://web.archive.org/web/20011210191723/ http://travel.state.gov/consul_notify.html [archived copy of *Consular Notification and Access*, captured on December 10, 2001].

[90] U.S. Department of State, Consular Notification and Access, Part III: Detailed Instructions, at http://web.archive.org/web/20011210030250/ http://travel.state.gov/notification3.html.

(2CT 283-345). An opposition was filed on May 18, 2005. (2CT 365-491). At the hearing on May 23, 2005, the trial court found that a violation of Article 36 obligations (as enacted by Penal Code section 834(c)) had taken place, but that the violation was "not purposeful" because "the officers involved were unaware of the provisions. . . ." (5RT 797.) The court also stated that the question of the appropriate remedy for the violation "[wa]s certainly open" but that there was no California case law or Supreme Court precedent to indicate that the death penalty should be precluded as a sanction. (Id.) Despite appellant's declaration stating that he would have requested consular notification and would not have discussed the case with the police if he had been advised of his right to speak with a Mexican consular representative (2CT 344), the trial court denied the requested preclusion of the death penalty or other sanctions on the grounds that appellant's sworn statement was "speculation." (5RT 798).

The Mexican Consulate did not become aware of appellant's detention until November 8, 2002 — 11 months after his arrest — and then only because it was contacted by a defense investigator, rather than by law enforcement authorities. Among other services, the Mexican Government responded to this tardy notification by providing the defense with access to legal resources through its Capital Legal Assistance Program. (See 4CT 909-16 [Letter Brief on behalf of the Government of Mexico].)

By the time of Mexico's delayed consular involvement, the prosecution had already decided to seek the death penalty against appellant. Subsequent consular efforts to assist in appellant's defense were severely hampered by his deteriorating mental state. As the Mexican Government informed the trial court, defense counsel had repeatedly raised their concern with Mexico's legal representatives that appellant was "unable to assist them in the preparation and presentation of a defense" and "[d]uring a number of communications spread over several months, counsel for appellant expressed concern about their client's emotional state, current mental state and competency to stand trial." (Id. at 910-911.) Furthermore, due to appellant's increasingly severe mental illness, "counsel ha[d] largely been unable to communicate with Mr. Mendoza on any substantive issues" and were "unable, in any specific way, to discuss trial strategy." (Id. at 911.) On December 1, 2005, the trial court allowed Mexico's amicus brief to be filed — and then summarily denied the reconsideration of appellant's competency that the defense and Mexico had requested. (14RT 2954.)

Three significant facts emerge from this record. First, the arresting authorities were aware of appellant's probable foreign nationality from the earliest stages of his detention, yet never complied with their binding information and notification obligations under Article 36(1) of the VCCR. Second, the trial court found that Article 36 obligations had been violated,

yet declined to apply any form of pre-trial remedies for the violation.[91] Lastly, once appellant's consulate finally learned of his arrest and prosecution, Mexico expended extraordinary efforts to assist in his defense and to protect his right to due process — just as Mexico would have done from the outset of his case, but for the protracted Vienna Convention violation perpetrated by the police and condoned by the trial court.

B. The Scope of Remedies Potentially Available for the Article 36 Violation Is Dependent on a Showing of Prejudice.

Like the United States Supreme Court, this Court "continue[s] to adhere" to the approach of "assuming, without deciding, that article 36 confers individual rights on foreign nationals." (In re Martinez (2009) 46 Cal.4th 945, 957 fn. 3; cf. Medellin v. Texas (2008) 552 U.S. 491, 506 fn. 4 [same].) It follows, therefore, that a wide range of judicial remedies could be available for a timely post-conviction claim asserting a prejudicial Article 36 violation — precisely as many other courts have long recognized. (See e.g., Deitz v. Money (6th Cir. 2004) 391 F.3d 804 [remanding non-capital case to determine, *inter alia*, if trial attorney's

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[91] See, e.g., Sanchez-Llamas v. Oregon (2006) 548 U.S. 331, 350 [recognizing that if a defendant "raises an Article 36 violation at trial, a court can make appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance"]; see also Osagiede v. United States (7th Cir. 2008) 543 F.3d 399, 408 n. 4 ["Neither do we consider the "appropriate accommodations" remedy suggested in Sanchez-Llamas to be a new rule of criminal procedure: it is simply an application of common sense"].)

failure to "notify Deitz of his right to contact the Mexican consulate...deprived him of the effective assistance of counsel]"); Valdez v. State (Okla.Crim.App.2002) 46 P.3d 703, 710 [finding trial counsel prejudicially ineffective for failing to "inform Petitioner he could have obtained financial, legal and investigative assistance from his consulate" based on "the significance and importance of the factual evidence {since} discovered with the assistance of the Mexican Consulate"]; United States v. Rangel-Gonzalez (9th Cir. 1980) 617 F.2d 529, 532-533 [recognizing right conferred under Article 36 "is a personal one" and dismissing indictment for illegal re-entry, where INS failed to comply with consular advisement requirements and defendant demonstrated prejudice]; see also Commonwealth v. Gautreaux (Mass. 2011) 458 Mass. 741, 751-752 [challenge to conviction resulting from Article 36 violation may be made in post-conviction motion for new trial; to demonstrate prejudice, "the defendant must establish that his consulate would have assisted him in a way that likely would have favorably affected the outcome of his case"].)

Thus, with the sole exception of denying suppression as an available remedy for an Article 36 violation, see Sanchez-Llamas v. Oregon, 548 U.S. at 350, a broad range of judicial relief may be applicable to a properly-preserved and prejudicial breach of Article 36 obligations.[92] The threshold

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[92] Even in the context of suppression, however, the U.S. Supreme Court has recognized that an Article 36 violation can be considered as a

requirement common to the rulings recognizing the availability of such remedies is the need to demonstrate actual prejudice: in other words, "some showing that the violation had an effect on the trial." (Breard v. Greene, 523 U.S. at 377.) Where, as here, disposition of a VCCR claim necessarily relies on consideration of "[w]hether defendant can establish prejudice based on facts outside of the record" the issue becomes "a matter for a habeas corpus petition" and the Article 36 claim "is appropriately raised in such a petition." (People v. Mendoza (2007) 42 Cal.4th 686, 711.) Additionally, no factual findings on the question of prejudice should be made without the opportunity for an evidentiary hearing. Accordingly, this Court should defer any resolution of the matter on direct appeal.

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relevant factor in the totality of the circumstances. (See id. [defendant can raise an Article 36 claim "as part of a broader challenge to the voluntariness of his statements to police"]; accord State v. Morales-Mulato (Minn. App. 2008) 744 N.W.2d 679 [suppression not an appropriate remedy for Article 36 violation, but may be considered in assessing whether custodial statement was voluntary, knowing, and intelligent].) While the U.S. Supreme Court has not yet ruled on the availability of other sanctions such as preclusion of the death penalty for a prejudicial Article 36 violation, it has nonetheless clearly signaled that post-conviction review is the proper forum for consideration of a non-defaulted claim. (See, e.g., Breard v. Greene, 523 U.S. at 376-78 [recognizing federal habeas statute provides authority to consider a Vienna Convention violation and alternatively addressing merits of defaulted claim of prejudice].)

C. Any Prejudice Arising from the VCCR Violation in This Case Can Only Be Determined and Addressed in Post-Conviction Proceedings.

In assessing whether or not appellant was prejudiced by the VCCR violation, the trial court focused on factors related solely to the suppression of his custodial statement. (See 5RT 797 [noting that "the defendant had been in the United States for quite some period of time, did speak English reasonably well" and "was advised of his constitutional right [sic] in the Miranda decision"].) However, the defense motion was *not* confined to the issue of appellant's interrogation; instead, it urged the trial court to consider the possible prejudice arising from the treaty violation during the entire time period from his arrest to the eventual contact with his consulate nearly a year later:

> "The lack of consular notification was particularly prejudicial in this case because *Mr. Mendoza was denied the assistance of his own consulate until many months after the prosecution's decision to seek death. Thus, he was deprived of the assistance of his consular officers during one of the most critical time periods of his case*. Consular officials were not able, because they were not notified, to assist with development of mitigation or other persuasive reasons why death should not be sought. For this reason, preclusion of the death penalty would be an appropriate remedy."

(2CT 297; emphasis added).

The trial court did not address these broader implications of the Article 36 violation in its limited ruling, finding only that "[w]e don't have any idea what would have actually happened back at that time, had he been

so advised." (5RT 798). The trial court also left open the possibility that other sanctions might apply, "express[ing] no opinion as to whether or not defendant might have a right to enforce his rights" by other means such as a "civil suit against the officers in this matter." (Ibid.)

The trial court thus did not examine the full impact of the VCCR violation throughout the crucial early stages of appellant's case, just as the defense motion implied but failed to establish specific instances of prejudice. This Court has indicated that the appropriate test for prejudice for Article 36 claims is whether "the alleged violation denied defendant any benefit he would have otherwise received had the consulate been properly notified" along with evidence that he "did not obtain that assistance from other sources." (Mendoza, 42 Cal.4th at 711.) While there are indications here of some potential avenues for a prejudice inquiry, it is not possible from the incomplete record in this case to determine what effect the protracted treaty violation may have had on the subsequent proceedings. In these circumstances, post-conviction review provides the only appropriate forum in which to address appellant's claim that he was prejudiced by the failure to advise him of his right to seek consular assistance and by the resulting 11-month delay in consular involvement in his capital case. (See People v. Cruz (2008) 44 Cal.4th 636, 689 n. 7 [Vienna Convention claim involving "matters outside this appellate record" is "properly raised on habeas corpus and will be addressed and resolved in that proceeding"]; In

re Martinez, 46 Cal.4th at 957 [noting that, in response to "petitioner's first habeas corpus petition assert[ing] a violation of his Vienna Convention rights" this Court "reviewed and considered that claim, including, of course, whether petitioner was prejudiced by any violation of his article 36 rights"].)

Other courts have also determined that post-conviction review is the appropriate venue for the consideration of Article 36 claims. In his concurrence in Medellín v. Texas, Justice Stevens noted that the "the Oklahoma Court of Criminal Appeals . . . ordered an evidentiary hearing" on whether a death-sentenced Mexican national "had been prejudiced by the lack of consular notification." (Medellín v. Texas (2008) 552 U.S. 491, 506, fn.) Like the Oklahoma Court of Criminal Appeals, this Court possesses the inherent authority to remand appellant's case for an evidentiary hearing in habeas proceedings to determine if he was "prejudiced by the State's violation of his Vienna Convention rights". (Torres v. State (Okla. Crim.App. 2005) 120 P.3d 1184, 1186.)

Appellant anticipates that habeas corpus counsel (who is not yet appointed) will likely provide additional supporting and dispositive facts concerning this issue. As in Torres, there is thus a significant likelihood that further investigation in preparation for a possible evidentiary hearing in this case would reveal the full extent to which the Mexican Consulate's earlier involvement "would have focused on obtaining a sentence of less

than death" or, in the circumstances of this case, would also have "assisted in the guilt phase of the trial." (Id. at 1188.)

Under this Court's established jurisprudence, "issues that could be raised on appeal must initially be so presented," so that "an unjustified failure to present an issue on appeal will generally preclude its consideration in a post-conviction petition for a writ of habeas corpus." (In re Harris (1993) 5 Cal.4th 813, 829 [citing In re Dixon (1953) 41 Cal. 2d 756, 759]; see also Sanchez-Llamas, 548 U.S. 331 at 360 [Article 36 claims may be subjected to state procedural default rules].) In light of these procedural requirements and the inadequacy of the existing factual record regarding prejudice, appellant hereby preserves his entitlement to post-conviction development and consideration of the effects of the lengthy pre-trial VCCR violation, and to any remedies that this Court may then see fit to impose.

D. Appellant Is Entitled to Comprehensive "Review And Reconsideration of the VCCR

1. The requirements of the Avena Judgment of the International Court of Justice apply with full force to appellant's case.

As recognized in Avena and Other Mexican Nationals (Mexico v. U.S.) 2004 I.C.J. 12 (Judg. of Mar. 31) ("Avena"), the International Court of Justice "concluded that the United States had violated the Vienna Convention rights of 51 Mexican nationals then on death row. . . by failing

to comply with Vienna Convention, article 36's consular notification requirement" and "directed the courts of the United States to review the convictions and sentences of those Mexican nationals to determine whether, as a result of the violation, they suffered actual prejudice." (In re Martinez, 46 Cal.4th at 949.) Although appellant had not yet been sentenced and was thus not among the 51 individuals whose claims were specifically addressed by the ICJ, it is nonetheless clear that the remedial requirements of Avena apply to his case with full force.

The operative and binding findings of Avena consist of the 11 subsections of paragraph 153 in the ICJ Judgment. Most notably, the ICJ found that the "appropriate reparation" is that the United States "provide, by means of its own choosing, review and reconsideration" in the cases of the Mexican nationals referred to in the decision. (Avena, para. 153(9).) Significantly, however, should the United States' efforts to provide "guarantees and assurances of non-repetition"[93] of such past violations prove unsuccessful, the ICJ unanimously found that the identical remedy must also apply to future cases:

> "[S]hould Mexican nationals nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 *(b)*, of the Convention having been respected, the United States of America shall provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the

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[93] Id., para. 153(10).

> violation of the rights set forth in the Convention, taking account of paragraphs 138 to 141 of this Judgment."

(Id., para. 153(11).) It is indisputable that appellant is a Mexican national whose Article 36 rights were not respected and that he was subsequently sentenced to the most severe of all penalties. He therefore remains entitled to receive the comprehensive judicial "review and reconsideration" of his conviction and sentence mandated under Avena, in a manner that will "guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account...". (Id. at para. 138.) Finally, this review must examine the claim on its own terms and not require that it qualify also as a violation of some other procedural or constitutional right. The required review must examine the violation "irrespective of the due process rights under United States constitutional law" by considering the claim "as treaty rights which the United States has undertaken to comply with in relation to the individual concerned," so that "full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration." (Id. at para. 138.)

2. Ongoing efforts to implement the Avena judgment domestically counsel for preservation of appellant's claim.

Appellant recognizes that the current state of U.S. law does not offer a mechanism by which to seek enforcement of the Avena Judgment in U.S.

courts, but hereby preserves his entitlement to "review and reconsideration" in light of the ongoing efforts to enshrine that requirement in federal law. Medellín v. Texas, 552 U.S. at 506 concluded that "the Avena judgment is not automatically binding domestic law." However, both the majority and the dissent in Medellín emphasized the compelling nature of the interests at stake in finding a means by which the Avena Judgment could be honored. As Chief Justice Roberts explained for the Court, "In this case, the President seeks to vindicate United States interests in ensuring the reciprocal observance of the Vienna Convention, protecting relations with foreign governments, and demonstrating commitment to the role of international law. These interests are plainly compelling." (Medellin, 552 U.S. at 524.) The Court also unanimously recognized the binding nature of the Avena Judgment, finding it undisputed that compliance with the decision "constitutes an international law obligation on the part of the United States." (Id. at 504.)

The Justices were also in unanimous agreement on one crucial issue: Congress possesses the clear constitutional authority to implement the requirements of Avena. (See id. at 525 ["responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress"]; id. at 535, fn. 3 (Stevens, J., concurring) [discussing "Congress' implementation options" for ICJ decisions]; id. at

566 (Breyer, J., dissenting) [majority's holdings "encumber Congress" with the task of post-ratification legislation].)

Developments since Medellín establish that a concerted effort is under way by the Executive and Legislative Branches to ensure that the U.S. meets its obligations to comply with Avena. On June 14, 2011, U.S. Senator Patrick Leahy introduced the Consular Notification Compliance Act (S. 1194), which would grant a right to the judicial process required under Avena. The new legislation has the full support of "the Obama Administration, including the Department of Justice, the Department of State, the Department of Defense and the Department of Homeland Security." (See 157 Cong. Rec. S3779-80 (daily ed. June 14, 2011) [statement of Sen. Leahy].) This universal support from the affected divisions of the Executive Branch distinguishes the legislation from previous congressional efforts to comply with binding Avena requirements and greatly enhances the chances of passage.

The proposed law specifically authorizes federal courts to review the merits of a petition claiming a violation of "Article 36(1)(b) or (c) of the Vienna Convention on Consular Relations. . . *filed by a person convicted and sentenced to death* by any federal or state court *prior to the date of enactment of this Act.*" (Consular Notification Compliance Act, 112th Cong. (1st Sess. 2011), § 4(a)(1); emphasis added.) Appellant was sentenced to death well prior to enactment of the Act, and the required

literal reading of statutory language makes this provision applicable to his case. (See, e.g., Connecticut Nat'l Bank v. Germain (1992) 503 U.S. 249, 253-254 [in "interpreting a statute a court should always turn to one cardinal canon before all others" and the courts "must presume that a legislature says in a statute what it means and means in a statute what it says there"].) Under the proposed law, the petition raising an Article 36 violation "*shall be part of the first Federal habeas corpus application* or motion for Federal collateral relief under chapter 153 of title 28, United States Code, filed by an individual. . . ." (Consular Notification Compliance Act, §4(a)(5); emphasis added.)

In a letter to the bill's sponsor that was published in the Congressional Record, the U.S. Attorney-General and the Secretary of State emphasized that passage of the Act will:

> "finally satisfy U.S. obligations under the judgment of the International Court of Justice (ICJ) in [Avena]. As we expressed in April 2010 letters to the Senate Judiciary Committee, this Administration believes that legislation is an optimal way to give domestic legal effect to the Avena judgment and to comply with the U.S. Supreme Court's decision in Medellin v. Texas, 552 U.S. 491 (2008).

(See 157 Cong. Rec. S4216 (daily ed. June 29, 2011).

The plain intent of the legislation is to meet the requirements of Avena through unencumbered review and reconsideration in a federal *habeas corpus* proceeding, by ensuring that a petition raising a violation of Article 36 shall not "be considered a second or successive habeas corpus

application or subjected to any bars to relief based on pre-enactment proceedings. . .". (Consular Notification Compliance Act, §4(a)(5).) The legislation further meets Avena requirements by providing that the federal court "may conduct an evidentiary hearing if necessary to supplement the record and, upon a finding of actual prejudice, shall order a new trial or sentencing proceeding." (Id. at § 4(a)(3).)

On July 27, 2011, the full Senate Committee on the Judiciary held a hearing on the Consular Notification Compliance Act, under the title of "Fulfilling Our Treaty Obligations and Protecting Americans Abroad." Senators heard testimony from the State Department's Under Secretary for Management, who emphasized that passage of the legislation is "a matter of great urgency" and that "failure to act is not an option."[94] Similarly, the Deputy Assistant Attorney General and Counselor for International Affairs of the U.S. Department of Justice testified that passage of the bill "is critical to the law enforcement interests of the United States" and "strongly urge[d] passage of this bill because it protects American citizens abroad while preserving our interests in maintaining critical law enforcement

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[94] U.S. Senate Committee on the Judiciary, Testimony of Patrick Kennedy, at http://judiciary.senate.gov/pdf/11-7-27%20Kennedy%20Testimony.pdf

cooperation with foreign allies and seeing justice done in capital cases."[95] Efforts are ongoing to pass this crucially important legislation during the current Congressional session.

These provisions of a bill enjoying the full support of the Administration provides ample reason to believe that review and reconsideration of Article 36 violations will be provided to appellant in federal habeas proceedings, should his case proceed to that stage. However, it is certainly possible that the bill will be amended during the legislative approval process: it is not inconceivable that its ultimate scope may be limited to those cases where defendants had previously raised their right to "review and reconsideration" in a timely manner. Appellant therefore respectfully preserves his entitlement to comprehensive "review and reconsideration" of the Article 36 violation in his case, at a later date and in a manner fully consistent with the dictates of the Avena Judgment.

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95 U.S. Senate Committee on the Judiciary, Testimony of Bruce Swartz, at http://judiciary.senate.gov/pdf/11-7-27%20Swartz%20Testimony.pdf

CONCLUSION

Wherefore, for the foregoing reasons, appellant respectfully requests that this Court reverse his convictions and his sentence of death, and remand for a fair trial if and when appellant is found competent to stand trial.

DATED: November ___, 2011

Respectfully submitted,

KATHY R. MORENO
Attorney for Appellant
Huber Mendoza

CERTIFICATE PURSUANT TO RULE OF COURT 8.630(b)

I, Kathy R. Moreno, attorney for Huber Mendoza, certify that this Appellant's Opening Brief does not exceed 102,000 words pursuant to California Rule of Court, rule 8.630(b). According to the Word word-processing program on which it was produced, the number of words contained herein is 47,755 and the font is Times New Roman 13.

I hereby declare, under penalty of perjury, that the above is true and correct, this 23 day of November, 2011, in Berkeley, CA.

Kathy R. Moreno

KATHY R. MORENO

CERTIFICATE OF SERVICE

I, Kathy Moreno, certify that I am over 18 years of age and not a party to this action. I have my business address at P.O. Box 9006, Berkeley, CA 94709-0006. I have made service of the foregoing APPELLANT'S OPENING BRIEF by depositing in the United States mail on November ___, 2011, a true and full copy thereof, to the following:

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I hereby declare that the above is true and correct.
Signed under penalty of perjury this __day of November, 2011,
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KATHY MORENO