In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **HUBER JOEL MENDOZA,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S143743

Stanislaus County Superior Court, Case No. 1034046

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
WARD A. CAMPBELL
Supervising Deputy Attorney General
STEPHANIE A. MITCHELL
Deputy Attorney General
CHRISTINA HITOMI SIMPSON
Deputy Attorney General
State Bar No. 244315
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 323-1213
Fax: (916) 324-2960
Email: Christina.Simpson@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE

On January 23, 2003, the district attorney filed information number 1034046 in the Stanislaus County Superior Court, charging appellant Huber Joel Mendoza with the murder of Alicia Martinez (count I; Pen. Code, § 187),[1] the murder of Carlos Lopez (count II; § 187), the murder of Carmillo Chavez (count III; § 187); shooting at an occupied building or inhabited dwelling (count IV; § 246), and assault with a firearm on Guadalupe Martinez (count V; § 245, subd. (a)(2)). (1 CT 63-68.) As to each murder count, it was alleged that appellant acted with premeditation and that the murder was executed while appellant was committing first-degree burglary in violation of section 459 (§ 190.2, subd. (a)(17)(g)). (*Ibid.*) A multiple victim special circumstance was alleged as to counts I, II, and III (§ 190.2, subd. (a)(3)). (*Ibid.*) Firearm enhancements were alleged as to counts I through IV, pursuant to sections 12022.7, 12022.53, subdivisions (a)-(d), and 12022.5, subdivision (a)(1). (*Ibid.*) As to count V, it was alleged that appellant personally inflicted great bodily injury (§ 12022.7, subd. (a)). (*Ibid.*) Appellant was arraigned, pled not guilty, and denied the allegations. (1 CT 69.)

On November 12, 2003, defense counsel notified the court that they did not believe appellant was competent to stand trial. (1 CT 118-119.) Proceedings were suspended pursuant to section 1368. (1 CT 119.) A jury was impaneled on December 9, 2004. (1 CT 196; 2 RT 135.) On December 15, 2004, the jury found appellant competent to stand trial. (1 CT 242.)

On February 2, 2005, appellant filed a motion for judgment notwithstanding the verdict. (1 CT 245-251.) On February 16, 2005,

---

[1] Unless otherwise specified, all further statutory references are to the Penal Code.

appellant moved to reinstate section 1368 proceedings. (1 CT 263-266.) The People filed written opposition to both motions. (1 CT 252-262.) On February 24, 2005, the court heard argument and subsequently denied both motions. (1 CT 267.)

On June 1, 2005, appellant entered a plea of not guilty by reason of insanity. (2 CT 527.)

Jury selection for appellant's trial commenced on October 18, 2005. (3 CT 767.) On November 1, 2005, defense counsel moved to reopen competency proceedings. (3 CT 796.) The court denied the request. (*Ibid.*) A jury was impaneled on November 1, 2005. (*Ibid.*) Thereafter, appellant was convicted of all charges on November 9, 2005. (3 CT 804-806.) The jury found that each of the three murders were premeditated and of the first degree. (*Ibid.*)

On November 15, 2005, the sanity phase of appellant's trial began. (4 CT 890.) On December 1, 2005, the jury returned a verdict of sane. (4 CT 918; 14 RT 2994.)

On December 6, 2005, the penalty phase of appellant's trial began. (4 CT 959.) On December 16, 2005, the jury returned a death penalty verdict. (4 CT 1030.)

On March 29, 2006, the defense filed a motion for a new trial, arguing that appellant was not competent to assist counsel and that he was not afforded the opportunity to testify on his own behalf due to his incompetency. (4 CT 1040-1045.) The People filed written opposition. (4 CT 1046-1067.) The court denied the motion on April 10, 2006. (4 CT 1071.)

On April 25, 2006, after denying appellant's motions for reconsideration and modification of the verdict, the court sentenced appellant to death for the premeditated murders of Alicia Martinez, Carlos Lopez Estrada, and Carmillo Chavez (§§ 187/190.2, subd. (a)(3)). (4 CT

1084, 1088-1096.) The court imposed and stayed a term of 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)) and the midterm of five years for shooting at an occupied building or inhabited dwelling (§ 246). (*Ibid.*) The court imposed and stayed one-third the midterm of three years for assault with a firearm (§ 245, subd. (a)(2)), plus four years for the firearm-use enhancement (§ 12022.5, subd. (d)) and three years for the great bodily injury enhancement (§ 12022.7). (*Ibid.*)

This appeal is automatic from the final judgment imposing a verdict of death. (§ 1239, subd. (b).)

STATEMENT OF FACTS

A. Guilt Phase

1. Prosecution case-in chief

Appellant and Cindi Martinez[2] were married and had three children: 13-year-old Huber Jr., 10-year-old Ivan, and six-year-old Angel. (4 CT 1098D; 10 RT 1698-1699, 1900.) The family lived at 629 Romeo Avenue in Modesto. (10 RT 1900-1902.) Appellant and Cindi had separate bedrooms and were not intimate. (10 RT 1900-1902.) In the summer of 2001, Cindi started seeing Camarino or "Camillo" Chavez. (10 RT 1900, 1903-1904.) Cindi met Chavez through her brother-in-law. (*Ibid.*) In the end of November 2001, Cindi took the three boys and moved into an apartment. (10 RT 1700-1702, 1900-1902.) Cindi and Chavez's relationship became intimate shortly thereafter. (10 RT 1903-1904.)

Cindi's parents, Alicia Martinez and Jose Luis Martinez, lived at 1008 Pelham Place in Modesto. (9 RT 1659-1660; 10 RT 1696.) Cindi's

---

[2] For clarity and to avoid confusion, respondent will refer to individuals with the same last name by their first names.

teenage sister, Guadalupe Martinez, and her cousin, Carlos Estrada Lopez, also lived at the house. (*Ibid.*) Lopez was approximately 32 years old and had been staying with the Martinez family for around nine months while working as a roofer. (10 RT 1696-1697.) Family friend and Cindi's boyfriend, Chavez, also lived at the Martinez house. (9 RT 1659-1660; 10 RT 1697.) Chavez was working in construction on new homes and had moved in around August 2001. (9 RT 1684; 10 RT 1697-1698.) He was staying with the Martinez family while looking for a new place to live. (*Ibid.*)

Jose was aware that Cindi and appellant were having marital problems. (10 RT 1700.) Cindi remembered appellant visiting her parent's house on only one occasion. (10 RT 1902.) Jose recalled that appellant would not come to family events, although Huber Jr., Ivan, and Angel visited regularly. (10 RT 1699-1700.) Chavez was at the Martinez house when Cindi and the boys visited. (10 RT 1904-1905.) The boys became acquainted with Chavez and knew he was dating their mother. (*Ibid.*) Cindi thought that Chavez and her sons had a fairly good relationship. (10 RT 1905.) Cindi and the three boys spent Thanksgiving, without appellant, at her parent's house. (10 RT 1902.)

On December 12, 2001, Guadalupe was asleep in bed when she was awoken by the sound of gunshots. (9 RT 1660-1661.) Guadalupe heard a lot of gunshots and Lopez scream, "Tio," or uncle, in Spanish. (9 RT 1661-1662.) The Martinez home was single-story with three bedrooms. (10 RT 1702.) Guadalupe slept in the first bedroom off the hallway, Chavez slept in the second bedroom, Jose and Alicia slept in the master bedroom at the end of the hall, and Lopez slept on the sofa in the living room. (9 RT 1662-1663; 10 RT 1702-1704.) When Guadalupe went to bed at 10:00 or 10:30 p.m., Lopez had been asleep on the sofa in the living room. (9 RT 1660-1661.) Guadalupe continued to hear gunshots and then heard footsteps

coming down the hallway. (9 RT 1662.) Guadalupe heard appellant and Chavez arguing. (9 RT 1664.) Appellant told Chavez that he had "messed with the wrong guy," and that he "shouldn't have messed around with a married woman."[3] (*Ibid.*) Guadalupe heard "a lot of gunshots after that." (9 RT 1665.)

Meanwhile, Jose and Alicia had awoken at 2:50 a.m. (10 RT 1704.) Jose regularly woke up at 3:00 a.m. to go to work in San Jose. (9 RT 1672; 10 RT 1704.) They were still in bed when Jose heard gunshots and Lopez scream, "Uncle, Uncle." (10 RT 1705.) Alicia asked, "What's going on? What's going on?" (10 RT 1711.) Jose and Alicia got up and Jose asked her for the key to the padlock on the closet door, which was where he kept three firearms. (10 RT 1706-1708, 1712.) Alicia could not find the key to the closet. (10 RT 1706-1708.) Jose and Alicia escaped into the backyard through the sliding glass door in their bedroom. (10 RT 1705, 1709-1710.) They hid behind some trees and waited. (*Ibid.*) After approximately 20 minutes, Alicia heard Guadalupe screaming. (10 RT 1705, 1710.) Alicia pushed Jose aside, announced that she was going to bring Guadalupe out, and went back inside the house. (*Ibid.*) She never returned. (10 RT 1705.)

Guadalupe's arm felt "very warm" and she realized she had been shot. (9 RT 1665.) Guadalupe climbed underneath her bed and started screaming for her mother. (*Ibid.*) Appellant came and stood outside Guadalupe's bedroom door. (9 RT 1665-1666.) Appellant asked Guadalupe if she was okay and she replied that she had been shot. (*Ibid.*) Appellant repeatedly instructed Guadalupe to open the door, but she was afraid and kept telling him, "No." (9 RT 1666.) Appellant's tone was normal as he spoke with Guadalupe. (9 RT 1666, 1687.) Appellant eventually convinced

---

[3] Throughout the night, appellant spoke in Spanish. Guadalupe speaks Spanish and English. (9 RT 1664-1665, 1670.)

Guadalupe to open the door. (*Ibid.*) She got out from underneath her bed and tried to open the door, but it was jammed. (*Ibid.*) Appellant told Guadalupe to move aside and he then forcibly pushed the door in. (*Ibid.*)

Appellant instructed Guadalupe to get on the bed and cover herself with the blankets. (9 RT 1667.) Appellant had a gun in his hand. (9 RT 1675.) Guadalupe thought he was going to kill her and refused. (9 RT 1667.) Appellant then asked Guadalupe where her parents were and Guadalupe replied that she did not know. (*Ibid.*) Guadalupe told appellant her father had probably left for work and her mother was probably asleep. (*Ibid.*) Appellant was wearing a camouflage helmet, a light green long-sleeve shirt with a black vest on top, and black camouflage boots. (9 RT 1675.) Guadalupe recalled that appellant seemed crazy, not like the quiet man she had known during the years he had been married to Cindi. (9 RT 1680, 1687.) Appellant had not attended many family gatherings and often spent time alone during such events, but had always been nice to Guadalupe. (9 RT 1681.) Appellant spent all his time with his sons and talked about them frequently. (9 RT 1682.)

Appellant walked towards Alicia and Jose's master bedroom. (9 RT 1667.) The door was locked shut. (*Ibid.*) Guadalupe followed appellant and called out for her mother. (*Ibid.*) Appellant told Guadalupe to go back to her bedroom or into the living room. (9 RT 1667-1668.) Guadalupe refused. (9 RT 1668.) She heard her mother crying inside the bedroom. (*Ibid.*) She watched as appellant tried to convince Alicia to come out of the room. (*Ibid.*) Appellant told Guadalupe to ask Alicia to come out of the bedroom. (*Ibid.*) Appellant promised Guadalupe that he was not going to hurt Alicia. (*Ibid.*) Guadalupe then spoke to her mother and asked her to come out. (*Ibid.*)

Appellant instructed Guadalupe to go into the living room and she complied. (9 RT 1668-1669.) Appellant then pushed open the master

bedroom door and entered. (*Ibid.*) Alicia exited the master bathroom and appellant pushed her out into the hallway. (*Ibid.*) Appellant and Alicia walked into the living room. (9 RT 1670.) Alicia was crying and begged, "Don't harm my little girl. Let me go with my little girl." (*Ibid.*) Appellant asked Alicia how she could permit Cindi to see someone else while she was still married to him, and how she could let it happen in her home. (*Ibid.*) Alicia answered that she repeatedly told Cindi she did not approve of her and Chavez's relationship. (9 RT 1671.) Alicia explained to appellant that she would never approve of Cindi starting another relationship when she was still married and that she loved appellant. (*Ibid.*) Appellant responded by shooting Alicia twice in the head while Guadalupe watched. (*Ibid.*)

Appellant then asked Guadalupe where her father was at. (9 RT 1671.) Guadalupe replied that she did not know, but she thought he had already left for work. (*Ibid.*) Appellant and Guadalupe walked into her parent's bedroom and appellant began searching for Jose. (9 RT 1672.) Appellant pushed in the locked closet door. (*Ibid.*) He looked, but did not find anyone in the master bedroom. (*Ibid.*) Appellant then walked with Guadalupe back to her bedroom. (9 RT 1672-1673.) Guadalupe asked appellant if he would take her to the hospital and appellant offered to call an ambulance. (9 RT 1673.)

Appellant tried calling an ambulance on his cell phone and on the house phone, but neither worked. (9 RT 1674.) He then offered to drive Guadalupe to the hospital. (*Ibid.*) Appellant got in the driver's seat of his van, which was parked outside the house. (9 RT 1675.) Guadalupe sat in the front passenger seat. (*Ibid.*) Appellant put his gun in the back of the van and drove off. (*Ibid.*)

The first thing appellant did was call Cindi.[4] (9 RT 1676; 10 RT 1885-1886.) Appellant told Cindi that he had killed her entire family and that she was going to be next. (*Ibid.*) Cindi began yelling and screaming and appellant hung up the phone. (*Ibid.*)

Initially, Cindi thought appellant was just "playing around." (10 RT 1886.) But after she called her parent's house and no one answered, she called 911. (*Ibid.*) Cindi reported that appellant had called her and told her that he killed her mother.[5] (4 CT 1098; 9 RT 1653; 10 RT 1886, 1890.) Cindi was crying as she told the 911 operator, "I still have my three sons and he just called me and said that if I left him. . ." and "He called to see if I was here. I need to leave." (4 CT 1098.) The operator inquired, "Did he say he was on his way over there to your apartment?" and Cindi advised, "No, but he called and I answered the phone and he said, 'Keep your three sons away from there now.' And I just said, 'Why?' He said, 'I warned you.' And he goes, 'Just keep the kids away.'" (*Ibid.*)

Appellant called Cindi again and asked to speak to Huber Jr. or "Kaky." (9 RT 1676, 1689-1690; 10 RT 1895, 1917.) Huber Jr. begged appellant not to hurt Guadalupe. (*Ibid.*) After talking to Huber Jr., appellant began crying and told Guadalupe that he was sorry. (9 RT 1687, 1689-1690.)

The Ceres police came to Cindi's apartment and took her, Huber Jr., Angel, and Ivan to the police station. (10 RT 1897.) At around 6:00 a.m., Cindi was informed that a deceased female and two deceased males were found in her parent's home. (10 RT 1898.) Because of appellant's phone call, Cindi knew right away that her mother had been killed. (*Ibid.*)

---

[4] Appellant had Huber Jr.'s cell phone on the day of the shooting. (10 RT 1897.)

[5] A tape recording of the 911 call was played for the jury. (People's Exhibit No. 2; 4 CT 1098a-d; 10 RT 1890.)

Meanwhile, appellant drove to his brother Javier's house, which was not on the way to the hospital. (9 RT 1677.) When he got to Javier's house, appellant called Javier and told him he had committed a terrible crime and that he was going to leave $11,000 wrapped in a diaper. (9 RT 1677.) Appellant then threw a white diaper out the driver's window and it landed in Javier's front yard. (*Ibid.*)

Back at 1008 Pelham Place, Jose lay on the ground in the backyard about an hour, until it was quiet inside his house. (10 RT 1705, 1711.) He then got up and went into the master bedroom. (10 RT 1705, 1708.) Jose noticed that the closet door had been kicked-in and appeared to have bullet holes in it. His shotgun was leaning against the door frame outside the closet. (10 RT 1708, 1712.) Jose put on pants and walked into the hall. (10 RT 1708.) He discovered his wife lying on the living room floor, Lopez lying on the kitchen floor, and Chavez lying on the ground in his bedroom, all three in pools of blood. (10 RT 1705-1706.) He noticed a rifle lying on a table in the living room that did not belong to him. (10 RT 1713.) Jose looked for Guadalupe, but did not find her. (10 RT 1705-1706, 1714.) Jose tried to call the police from the phone in the kitchen, but was unable to do so. (10 RT 1713.) The phone had been working previously. (*Ibid.*) Jose ran to his neighbor's home to call the police. (10 RT 1706.)

Armando Perez lived with his parents and four siblings next door to the Martinez family. (9 RT 1646-1648.) The Perez family frequently socialized with the Martinez family. (9 RT 1648.) Perez was in bed about to go to sleep when he heard gunshots. (9 RT 1646-1649.) Perez left his bedroom to check on his two younger brothers, who were sleeping in the living room, to make sure no one was shooting at their home. (9 RT 1647, 1649.) Perez told his brothers to stay on the ground. Perez recalled, "[T]he gunshots were repeatedly just nonstop, and it went for a long period of time." (9 RT 1649.) The gunfire eventually ceased and the boys went back

to sleep. (*Ibid.*) They were awoken shortly thereafter by the sound of "a few rounds" of single gunshots. (*Ibid.*) Perez recalled that the gunshots went off periodically before stopping completely. (9 RT 1650.) Perez went back to sleep and was awoken by someone banging on his front door. (*Ibid.*) Perez opened the door and saw Jose, pale-faced and hysterical. (9 RT 1650-1651.) Perez remembered, "He just said my daughter is missing, my family is dead, call the cops, call the cops." (*Ibid.*) Perez called the police while his father spoke with Jose and tried to calm him down. (*Ibid.*)

Meanwhile, appellant left his brother's house and continued driving until Guadalupe's arm bone cracked and popped out of her skin. (9 RT 1678.) Guadalupe asked appellant if he was going to take her to the hospital and he replied, "Yeah." (*Ibid.*) Appellant then drove to Memorial Medical Center and parked his van. (*Ibid.*) Guadalupe got out and walked into the emergency room. (*Ibid.*) Guadalupe was admitted and rushed into surgery. (9 RT 1679; 10 RT 1872-1873, 1878.)

At around 4:00 a.m., Eustaquito Ramos, a uniformed public safety officer at Memorial Medical Center, was on patrol when the admitting clerk advised him that the suspect possibly responsible for a gunshot victim was sitting in a van in the parking lot. (10 RT 1744-1745.) Ramos looked for the man, but did not see anyone sitting in a van and did not want to approach any of the vans he saw in the parking lot because he was alone. (10 RT 1745.) While he was walking back to the hospital, appellant approached Ramos outside the ambulance bay and asked if he could speak to him. (10 RT 1745-1746, 1748.) Ramos said, "Yes," and appellant confessed, "I just shot my mother-in-law." (10 RT 1746, 1748.) Ramos asked when it happened and appellant replied that it had occurred a few minutes ago. (*Ibid.*) Ramos then asked where it happened and appellant answered that it had occurred at Hatch and Crows Landing. (*Ibid.*) Appellant announced that he wanted to turn himself in and tried to hand

Ramos a pair a non-police-issue metal handcuffs. (10 RT 1746-1747; 11 RT 1996-1997.) Ramos used his own handcuffs and placed them on appellant's wrists. (10 RT 1747.) Ramos asked appellant, "[W]hy this had happened," and appellant said he did not want to say anything else. (*Ibid.*) Ramos then escorted appellant into the paramedics room. (10 RT 1749.) Appellant was calm and cooperative. (*Ibid.*) Ramos's supervisor asked appellant where the gun was and appellant said it was in his van. (10 RT 1749-1750.)

Guadalupe suffered a gunshot wound to her right arm with an open fracture of the right humeral shaft and a puncture wound over her left extensor forearm with embedded metallic fragments. (10 RT 1879.) Orthopedic surgeon Donn Fassero performed the first surgery that night to clean out the gunshot wound. (10 RT 1875.) Dr. Fassero noted that Guadalupe's injury was a fairly significant, high velocity injury, which consisted of an open fracture of the arm bone and a second wound on the back of the arm, which was four to five inches long with a lot of metallic fragments in the damaged soft tissue. (10 RT 1873-1876.) Bone and bullet fragments and the damaged tissue were removed from the wound. The severed biceps tendon was repaired. (10 RT 1875, 1880.) During the second surgery performed by Dr. Todd Smith, a large metal plate and screws were put in Guadalupe's arm bone to stabilize the fracture. (10 RT 1878-1879, 1883.) She did not suffer damage to the radial nerve, but lacked full-function of her wrist post-operatively. (10 RT 1879, 1883.) Guadalupe was discharged from the hospital on December 17, 2001. (10 RT 1884.)

a. The Crime Scene

Modesto Police Officer Scott Muir was responding to the Martinez residence at 1008 Pelham Place to perform a security check when the shooting report came over the radio. (9 RT 1653-1654.) A number of

officers were already at the scene when Officer Muir arrived. (9 RT 1654.) The SWAT team arranged for a four man squad to enter and clear the home. (9 RT 1655.) Officer Muir led the group. (9 RT 1656.) The front door was open and the living room window next to the front door was broken. (9 RT 1657.) Officer Muir entered the home holding a ballistics shield, followed closely by three officers and with a recovery team of four to five officers behind them. (9 RT 1656.) Officer Muir looked to the right and immediately saw a body lying in a pool of blood on the living room floor. (9 RT 1658.) He kept going inside and saw another body lying in a pool of blood in the kitchen area. (*Ibid.*) The entry team cleared each of the bedrooms off the hallway. (*Ibid.*) In one of these bedrooms they located a third body, a younger Hispanic male, face down on the ground in a pool of blood. (*Ibid.*)

Detective Henry Hendee arrived at 4:50 a.m. and was appointed crime scene manager.[6] (10 RT 1751, 1753.) The Martinez residence was an approximately 1100 square foot three bedroom, single-family house located on the south side of a court off Boise Avenue. (10 RT 1751-1752, 1756.) There was an open heavy metal iron gate on the exterior of the front door, which was not damaged. (10 RT 1756.) The front door itself was a metal door painted white with the exterior portion of the doorknob missing. (*Ibid.*) The doorknob, which had a large dent on the round portion of the handle, was located in a potted plant on the front porch. (*Ibid.*) The four-foot by four-foot front living room window had been broken out and there was broken glass both inside and outside the house. (10 RT 1756-1757.) A claw hammer was found outside on the ground among 15 scattered shell

---

[6] Detective Hendee supervised the taking of a crime scene video, which was played for the jury. (People's Exhibit No. 1; 10 RT 1752, 1754, 1765.)

casings near the broken living room window. (10 RT 1802-1803.) Pieces of broken glass were located throughout the living room, in the kitchen, and down the hallway to the master bedroom. (10 RT 1759, 1769.)

There was a couch near the broken front living room window. (10 RT 1759-1760.) Some of the cushions were moved and had fallen onto the floor as if they had been stepped on or climbed over. (*Ibid.*) Detectives located a Russian SKS 45 7.62 semi-automatic assault rifle on the coffee table in front of the couch. (People's Exhibit No. 71; 10 RT 1760, 1762.) The rifle had an empty 30-round magazine clip inserted into the weapon. (10 RT 1762.) The bolt was back and the safety off, indicating that the gun had been shot dry. (*Ibid.*) Detectives found a Ruger P-89 nine-millimeter semi-automatic handgun on a chair in the middle of a pile of clothes.[7] (People's Exhibit No. 70; 10 RT 1763, 1802.) The nine-millimeter had an empty 10-round reduced capacity box magazine clip inserted into the weapon. (People's Exhibit No. 83; 10 RT 1763-1764, 1802; 11 RT 2003.) The slide on the gun was in a locked-back position, indicating it too had been fired empty. (*Ibid.*) An empty 7-round magazine for a Colt 45-caliber handgun was found with the nine-millimeter handgun. (People's Exhibit No. 82; 10 RT 1764-1765; 11 RT 2001-2002.) One bullet fragment was found in the living room. (10 RT 1771.) Alicia Martinez was found in the living room next to the hallway. (10 RT 1763.) She was deceased and lying face-down in a pool of blood with gunshot wounds. (*Ibid.*)

In the kitchen, detectives located four complete bullets and the body of Carlos Lopez, which was near the door leading to the garage. (10 RT 1768, 1798.) In the hallway, detectives found three bullet fragments, 23 shell casings, glass fragments, and fragments from damaged door locks.

---

[7] The Ruger nine-millimeter handgun was registered to appellant. (11 RT 2108-2109.) The SKS rifle was not registered to anyone. (*Ibid.*)

(10 RT 1769-1770.) In the laundry room, detectives found three bullet fragments. (10 RT 1770.) One bullet fragment was found in the backyard. (10 RT 1771.) On the floor of the hallway bathroom, detectives found a couple of picture frames containing photographs that appeared out of place. (10 RT 1823-1824.) In Guadalupe's bedroom, detectives did not locate any shell casings. (10 RT 1772, 1775.) Seven bullet fragments were collected from 17 rounds that were fired into Guadalupe's bedroom from the outside. (*Ibid.*)

In Chavez's bedroom, detectives located nine shell casings, indicating that nine rounds were fired inside the room. (10 RT 1773, 1775.) Five bullet fragments were collected from 13 rounds that were fired into Chavez's bedroom from the outside. (*Ibid.*) Chavez's body was found on the floor in his bedroom. (*Ibid.*) A 16-inch kitchen knife with a 10-inch blade was located just inside the bedroom door on the floor along the closet wall. (10 RT 1816.)

In the master bedroom, detectives located eight shell casings and one live unfired 45-caliber bullet. (10 RT 1774.) Fourteen bullet or bullet fragments were collected from the master bedroom. (10 RT 1775.) The closet door in the master bedroom had seven bullet holes; it appeared that bullets had been fired into the door handle. (10 RT 1776.) The closet door frame was split open as if it had been kicked in. (*Ibid.*) An unloaded Winchester 30/30 rifle and an unloaded Interarms rifle were inside the closet behind some clothing. (10 RT 1776-1777.) An unloaded Remington 12-gauge shotgun was found just outside the closet. (10 RT 1777-1778, 1817-1819.) A loaded Daisy BB rifle was found next to a dresser and an unloaded BB pistol was in the bathroom vanity. (10 RT 1778.)

A total of 72 shell casings and one live round, a 45-caliber bullet, were found at the scene. (10 RT 1800-1801, 1819-1821.) This included 29 expended OD green colored 7.62 by 39 rifle shell casings. (10 RT 1800,

1819.) Fifteen rifle casings were found outside in the flower bed just below the broken living room window. (10 RT 1757-1758, 1801, 1820.) Eleven rifle casings were found in the living room on the floor and in the couch cushions. (10 RT 1759, 1801, 1820.) Three rifle casings were found in the hallway. (10 RT 1770, 1801, 1820.)

Twenty-five nine-millimeter shell casings were found. (10 RT 1801, 1820.) This included four nine-millimeter casings on the kitchen floor, 13 in the hallway, seven in the Chavez's bedroom, and one in the hallway bathroom. (10 RT 1768-1773, 1801, 1820.)

Eighteen 45-caliber shell casings were found. (10 RT 1801, 1820.) This included one 45-caliber shell casing in the chair with the Ruger handgun in the living room, seven in the hallway, two in Chavez's bedroom, and eight in the master bedroom. (10 RT 1761, 1770, 1773-1774, 1801, 1821.)

The doors to each bedroom and the master bedroom closet door all had bullet holes in them. (10 RT 1779-1780.) Guadalupe's bedroom door had nine bullet holes and the handle was struck by one or more bullets. (10 RT 1780-1781.) Chavez's bedroom door also had nine bullet holes and the handle was struck by one or more bullets. (10 RT 1783.) Two of the holes had black powder indicating the gun was fired at very close range to the door. (10 RT 1784.) The master bedroom door had bullet holes and the lock was significantly damaged from a bullet being fired into it; a bullet was lodged into the top of the door handle. (10 RT 1785-1786.) The master bedroom door was fractured, as if it had been kicked in, and the door frame was splintered and fractured. (10 RT 1786.) The master closet door had bullet holes and was also damaged from being fired on and kicked in. (10 RT 1787-1788.)

Detectives were able to trace the trajectory of 59 of the 72 fired rounds. (People's Exhibit No. 89; 10 RT 1792.) A large number of rounds

were fired from either outside the broken living room window or inside the living room. (10 RT 1794.) Detective Hendee opined these were the first rounds fired. (*Ibid.*) The path of bullets went throughout the house. (10 RT 1794-1795.) Some of the rounds were very high-powered and went through a number of walls. (10 RT 1795.)

Detective Ron Reid assisted Detective Hendee in the collection of evidence.[8] (10 RT 1837.) Detective Reid brought the police department's mobile command post, a large trailer with interview rooms, to the scene and parked it on the corner of Boise Avenue and Pelham Place. (10 RT 1838.) Detective Reid checked the landline telephone inside the Martinez house and determined that the phone had dial tone, but nothing happened when he hit redial. (10 RT 1839, 1864.) He did not try and use the phone to place a call. (*Ibid.*)

b. Police Investigation

At around 10:00 a.m. on December 12, 2001, Officer Lance Nicolai examined appellant in an interview room at the Modesto police station to determine whether appellant was under the influence of alcohol or drugs. (10 RT 1716-1718.) Appellant did not make any unusual motions or body movements, responded appropriately to questions, and appeared to understand what Officer Nicolai was saying and was able to follow his directions. (10 RT 1722.) Officer Nicolai concluded that based on his observations, appellant was not under the influence of alcohol or drugs. (10 RT 1722-1723.) Appellant subsequently tested negative for drugs or alcohol. (11 RT 1950-1951.)

---

[8] Approximately 194 items of evidence were collected from the home (some items contained multiple pieces of evidence). (People's Exhibit No. 90; 10 RT 1797, 1834.)

Appellant had a small abrasion at the base of his right thumb, near the webbing of his hand. (11 RT 1994.) Appellant also had bloodstains on his clothing, which contained his own blood. (11 RT 1951.)

Forensic pathologist, Dr. Jennifer Rulon, performed autopsies on each of the three victims: Alicia Martinez, Carlos Lopez, and Camarino Chavez.[9] (11 RT 2009, 2067.) Bullets or bullet fragments were taken from each of their bodies. (11 RT 2011-2019.) Alicia died from two gunshot wounds to the head. (11 RT 2072-2074.) The recovered bullet showed that Alicia had been shot by at least one 45-caliber bullet that traveled from the back side of her head above her right ear, through her brain, and landed underneath the skin above her right eyebrow. (11 RT 2015-2016, 2018, 2068.) The other bullet had entered near the corner of her mouth, fractured her jaw on the left side, and exited through her left cheek. (11 RT 2068.)

Lopez died from four gunshot wounds, two to the head and two to the chest. (11 RT 2078.) Lopez also had evidence of being grazed from back to front by a bullet on the right side of his neck. (11 RT 2072-2073.) Lopez was shot with at least three nine-millimeter rounds. (11 RT 2017-2018.) One bullet entered the top of his head at a steeply downward direction and penetrated his brain. (11 RT 2073.) A second bullet entered Lopez's face through his left jaw and traveled upward through the left front of his brain, causing numerous fractures of the skull. (11 RT 2074.) A third bullet entered the front of Lopez's neck just above the collarbone, entered his chest, and perforated his heart. (*Ibid.*) A fourth bullet entered

---

[9] The parties stipulated to the identity of the victims. The deceased female in the living room, Alicia Martinez; the deceased male in the kitchen, Carlos Lopez; and the deceased male in bedroom number two, Camarino Chavez. (11 RT 1951.) It was also stipulated that all three victims tested negative for drugs or alcohol. (*Ibid.*)

the front of Lopez's chest in front of his right armpit and pierced the right lung, struck the spine, and stopped. (*Ibid.*)

Chavez was shot 12 times and died of multiple gunshot wounds to the head and chest. (11 RT 2078, 2097.) Chavez was shot with both 45-caliber and nine-millimeter rounds. (11 RT 2018-2020.) One bullet entered Chavez's left temple between his left eye and ear, perforated his brain, and ended in the right sinus cavity. (11 RT 2078-2079, 2081.) This wound showed evidence of close-range firing. (*Ibid.*) A second bullet entered just behind Chavez's left ear, entered his brain, but did not go very far, moving left to right. (11 RT 2081-2082.) A third bullet entered along Chavez's right jaw line, went through the bottom of his mouth, fractured his jaw on the left side, and partially remained in the tissue of his left cheek. (11 RT 2082.) Part of the bullet or a broken piece of bone exited through the left side of Chavez's face. (11 RT 2082-2083.) A fourth bullet entered the back of Chavez's head behind his right ear and went an inch under his skin. (11 RT 2083.) The irregular, ragged appearance of the entrance wound and shallow depth of the injury indicated that the bullet likely hit something else before hitting Chavez. (*Ibid.*) A fifth bullet entered through the front of Chavez's right armpit, went through soft tissue into his chest, and exited above the right collarbone. (11 RT 2084.) A sixth bullet entered the left side of Chavez's back behind his left armpit, went through his left chest hitting his lung and heart, and remaining in the skin between his nipples. (11 RT 2085.) This wound showed evidence of close-range firing. (*Ibid.*) A seventh bullet entered the right side of Chavez's back chest near the armpit, went through his chest, hit his right lung, and remained in the skin on the left side of his back. (11 RT 2085-2086.) An eighth bullet entered Chavez's right arm, went through the elbow, and exited. (11 RT 2086.) This wound showed evidence of close-range firing. (*Ibid.*) A ninth bullet entered Chavez's right arm, went through his wrist, and exited. (11 RT

2086-2087.) A tenth bullet entered the back of Chavez's left elbow and remained in the upper part of his left arm. (11 RT 2087.) An eleventh bullet entered the left front of Chavez's abdomen, did not travel far, and stayed within the skin. (*Ibid.*) A hole in Chavez's belt and clothing suggested the bullet went through those items before entering the abdomen. (*Ibid.*) A twelfth bullet entered the back of Chavez's right thigh near his knee and exited. (11 RT 2088.) Chavez also had a graze wound to the anterior right thigh. (*Ibid.*) Chavez was wearing a necklace with "Cynthia" on it when he died. (11 RT 2104.)

On December 17, 2001, Detective Reid searched appellant's maroon-colored 1986 Dodge Caravan, which had been stored at the police station. (10 RT 1839, 1906.) The van had two bucket seats in the front, one for the driver and one for a passenger. (10 RT 1849.) There were no seats in the back, which was being used as cargo space. (10 RT 1855.) A camouflage military-style helmet was found sitting upright on the front passenger floorboard. (10 RT 1842-1844.) A magazine was visible sticking out from underneath the helmet. (*Ibid.*) The magazine was inserted into an unloaded Colt 45-caliber semi-automatic handgun.[10] (People's Exhibit No. 58; 10 RT 1845-1846, 1936-1937.) The magazine was an extended clip that held 14 cartridges and therefore stuck out from the base of the gun. (People's Exhibit No. 58A; 10 RT 1846; 11 RT 2001.) A large set of keys were found partially concealed underneath the driver's seat on the floorboard. (10 RT 1846-1847.)

A military-style ballistic vest (People's Exhibit No. 60A) and an empty nine-millimeter magazine (People's Exhibit No. 100) were found on the floorboard in between the passenger and driver's seats. (10 RT 1847-1849, 1851.) The nine-millimeter magazine was high-capacity and held

---

[10] The Colt 45 handgun was registered to Cindi. (11 RT 2109.)

around 15 rounds. (11 RT 2003.) The vest was a civilian-contract-made military-issue flak fragmentation vest designed to stop fragmentation and projectiles from grenades. (11 RT 1999.) An expended Federal 45-caliber shell casing fell out when Detective Reid opened the front Velcro flap on the vest, which was consistent with numerous Federal 45-caliber shell casings that had been found at the Martinez home. (10 RT 1849-1851.) A small amount of blood was found on the passenger side near where the top of the seat belt buckle attaches to the vehicle. (10 RT 1862.) A smear of blood was found on the steering wheel and on the inside grip area of the handgun. (*Ibid.*)

A second ballistic vest with "Atlanta Police" on it was located in the rear cargo area behind the two front seats. (People's Exhibit No. 96A; 10 RT 1852; 11 RT 1997-1998.) The vest, a Kevlar bullet-resistant vest, was similar to the vests issued to police officers and designed to stop handgun rounds. (*Ibid.*) A black Maglite flashlight, white nylon rope, and a set of black handcuffs were found in the pocket behind the passenger seat. (10 RT 1853-1854.) A black gas mask was found in the cargo area behind the driver's seat. (10 RT 1854-1855.) Two stacks of 13 photographs, some in frames, were found in the cargo area behind the passenger seat near the sliding door. (10 RT 1855-1856.) They were childhood photos of Huber Jr., Ivan, and Angel over the years, which had been up on the wall or displayed in appellant's house. (10 RT 1856, 1866, 1910, 1914-1917.) One of the photos was of Our Lady of Guadalupe, which appellant had up in his bedroom. (10 RT 1868, 1910-1911, 1916.) An empty brown suede handgun case was found behind the passenger seat. (10 RT 1859.) A sledgehammer was found further back in the cargo area. (10 RT 1857-1858.) A roll of duct tape was found in the left front pocket of a black leather jacket in the back of the cargo area. (10 RT 1860.)

On December 12, 2001, investigators searched appellant's residence at 629 Romeo Avenue in Modesto. (10 RT 1725; 11 RT 2105-2106.) The inside of the house was "a disaster." (11 RT 2108.) A refrigerator was located in a closet in the front bedroom. (10 RT 1728, 1741.) The refrigerator was apparently being used as a safe, as it was not plugged in and contained locking hasps on the top and bottom portions. (*Ibid.*) The locks were removed and the fridge was unlocked when the home was searched. (10 RT 1728-1729, 1741.) No money was found inside the refrigerator. (10 RT 1739.)

A Craftsman toolbox containing 14 boxes of various kinds of ammunition and gun-related receipts and documents was located inside the top, freezer portion. (10 RT 1728-1731.) A sales receipt for a Russian SKS rifle from December 10, 1994 was located in the box. (10 RT 1731.) The receipt indicated that the gun was sold to appellant and paid in full. (10 RT 1731-1732.) A receipt for an SKS magazine from February 4, 1995, was also located. (10 RT 1733.) A sales receipt for a Ruger P-89 nine-millimeter handgun from February 8, 1995 was also located in the box. (10 RT 1732.) The receipt indicated that the gun was sold to appellant and paid in full. (*Ibid.*) Sales receipts for a Colt 45 handgun and magazine were located in the box. (10 RT 1732-1733.) The Colt 45 was sold to Cindi on February 19, 1994. (*Ibid.*) The Colt 45 magazine was sold to appellant. (*Ibid.*) Manuals for the SKS rifle and the Ruger nine-millimeter were also located. (10 RT 1733.)

Appellant's expired passport was found in the front bedroom. (10 RT 1740-1741.) It was not located with any other documentation or paperwork. (*Ibid.*) Several gun rugs, a couple of gun holsters, an SKS magazine with a gun case, and a large box of shotgun ammunition were located in the home. (10 RT 1733-1734.) A bayonet similar to the type normally affixed to an SKS assault rifle was located in a kitchen drawer.

(10 RT 1735; 11 RT 2020-2021.) The bayonet appeared to have been sawed off. (10 RT 1736; 11 RT 2021.)

Cindi met appellant when she was 15 years old when her family was vacationing in Mexico. (10 RT 1926-1928.) Cindi's family and appellant's family were from the same town in Mexico. (*Ibid.*) Appellant subsequently moved to the United States and married Cindi when she was 16 years old. (*Ibid.*) Cindi and appellant were married 13 or 14 years before the shooting. (10 RT 1921-1924.) Appellant and Cindi argued, but there was no history of threats. (*Ibid.*) Cindi recalled one incident wherein she and appellant pushed each other during a fight and appellant choked Cindi around the neck with his hands. (10 RT 1924-1925.) Cindi opined that her marriage to appellant stopped working in 1995 or 1996, around the time appellant stopped working. (10 RT 1909-1910, 1918.) Cindi continued working and supported the family with her income. (*Ibid.*) Appellant took care of the home and the children. (10 RT 1918-1919.) After she moved out, Cindi agreed to pay appellant to watch the children. (10 RT 1910.)

Cindi was aware that appellant owned guns and kept them in the toolbox in the refrigerator in his bedroom closet. (10 RT 1898-1899.) Appellant also kept all the ammunition for the guns in the toolbox. (10 RT 1900.) Cindi recognized the military helmet, gas mask, flashlight, and bullet-proof vests as appearing to be those she had seen around the house belonging to appellant. (10 RT 1906, 1911-1913.) She did not recognize the handcuffs. (10 RT 1912.) Cindi identified the Colt 45 as belonging to her and the Ruger nine-millimeter and SKS assault rifle as belonging to appellant. (10 RT 1899, 1907-1908.) Appellant hunted frequently. (10 RT 1912.) Appellant kept approximately $10,000 cash in the toolbox with the guns and ammunition. (10 RT 1902-1903.) Appellant was keeping the money for the children. (10 RT 1920.) He did not put it in a bank because

he did not trust banks. (10 RT 1921.) According to Cindi, appellant was very suspicious of people and that this tendency increased over the years they were married. (10 RT 1921, 1923.) Appellant also disliked police officers and talked to his sons about his mistrust of police officers. (10 RT 1923.) The shooting was unexpected. (10 RT 1922.)

Criminalist James Hamiel testified as an expert in firearms and ammunition. (10 RT 1929-1931.) Hamiel received and examined the firearms and related evidence in this case. (10 RT 1932.) Hamiel tested the trigger pull on appellant's Ruger P-89 nine-millimeter semi-automatic handgun. It required seven pounds of force to fire in single-action or 13 pounds of force to fire in double-action. (10 RT 1934-1935.) Twenty-five expended cartridge cases and 14 expended bullets or bullet fragments from the scene were identified as being fired from appellant's nine-millimeter handgun. (10 RT 1935-1936.) The trigger pull on the Colt 45-caliber semi-automatic pistol from appellant's van required approximately four and a half pounds of pressure to fire the weapon. (10 RT 1937-1938.) Nineteen expended cartridge cases and 12 expended bullets or bullet fragments from the scene were identified as being fired from the Colt 45. (10 RT 1938.) The trigger pull on the SKS semi-automatic assault rifle required approximately seven pounds of pressure to fire the weapon. (10 RT 1940.) Twenty four expended cartridge cases and two expended bullet fragments from the scene were identified as being fired from appellant's SKS rifle. (*Ibid.*) All three weapons were semi-automatic, meaning that the trigger had to be pulled once and then let go for every bullet fired. (10 RT 1942.) All three weapons functioned normally. (10 RT 1935, 1938, 1940.)

Homicide detective Jon Buehler also testified as a firearms expert. (11 RT 1999.) All the bullets from this case were hollow point bullets, which are designed to expand upon impact to create a bigger hole and cause more tissue damage. (11 RT 2008-2009.) The rifle bullets were a "very

devastating" Soviet-designed round for battle cartridges. (*Ibid.*) Hollow point pullets are often more expensive than target practice ammunition and are not generally used by hunters. (11 RT 2026.)

2. Defense Case

On December 10, 2001, two days before the shooting, Principal Nancy Jones was in her office at Tuolumne Elementary School when she overheard appellant talking in a raised voice to her secretary in an attempt to take Angel out of school. (11 RT 1974-1976, 1987.) Angel was in kindergarten or the first grade and had recently been crying uncontrollably at school, which resulted in him being sent home on prior occasions. (11 RT 1979-1980.) Angel's attendance had become an issue and Jones went out to speak to appellant to try and convince him to leave Angel at school. (11 RT 1977.) Jones told appellant that Angel would be better off in school, but appellant disagreed and replied that Angel was better off at home with him. (*Ibid.*) Appellant became more upset and began to cry, telling Jones, "I don't want to leave him in school. When they're young, they're like angels, but when they grow up, they become corrupt." (11 RT 1977, 1992.) Jones could see that appellant was very upset and decided to let Angel go home with appellant, but planned on making further contact with him. (11 RT 1978.) It was unusual for a father to cry in the school office and Jones opined that appellant was depressed based on his crying. (*Ibid.*)

Jones spoke with school resource deputy Jaime Jimenez about Angel's attendance problems and her concern for the Martinez children, advising, "Let's try to do some kind of family intervention." (11 RT 1978.) Jiminez called appellant in an effort to get appellant to bring Angel to school. (11 RT 1954-1955.) Appellant discussed his marital separation and problems he had with his wife. (11 RT 1955.) Appellant also discussed his distrust of the government, of police officers, and of the

school district, which he felt were all corrupt. (11 RT 1967.) Appellant stated that these agencies were "all talk and no action." (11 RT 1968.) Appellant expressed his belief that he had a right to keep Angel out of school if Angel did not want to go. (11 RT 1967-1968.) Jiminez explained the laws regarding school attendance for children. (11 RT 1968.) Jiminez remembered that appellant "just didn't believe that he had to obey them." (*Ibid.*)

Jiminez offered to get appellant into counseling for divorced parents or refer him to a support group. (11 RT 1956.) Appellant was initially against the idea and thought that he did not need help. (*Ibid.*) Jiminez offered to meet with appellant if he wanted to talk further. (11 RT 1956-1957.) Shortly after the conversation ended, appellant called Jiminez and asked if Jiminez could meet with him, his wife, and their kids at his house. (11 RT 1957.) Jiminez agreed to meet with the Martinez family with principal Jones. (11 RT 1957, 1981.)

At 10:30 a.m. on December 11, 2001, the day before the shooting, Jimenez and Jones went to appellant's home and met with him, Cindi, Huber Jr., Ivan, and Angel. (11 RT 1958, 1981.) The house was tidy and the boys looked well-groomed and presentable, as they regularly did. (11 RT 1958-1959, 1980-1981.) Jiminez's and Jones's primary concern was Angel's school attendance, but other topics arose during the meeting. (11 RT 1960, 1982.) Appellant stood up while everyone else sat down. (11 RT 1986.) Appellant discussed his marital status and his wife not living in the same house. (11 RT 1960.) Jiminez recalled that appellant was "concerned about his kids, you know, knowing her boyfriend." (*Ibid.*) Appellant was emotional, but could hold a conversation. (11 RT 1961.) Jones described appellant's demeanor as soft-spoken, but emotional and agitated. (11 RT 1987, 1989.) Jones recalled that appellant was "very upset" that his wife was not living at home. (11 RT 1982.)

Cindi openly discussed the fact that she and appellant had not really had a marriage for years and that they had slept in separate bedrooms. (11 RT 1988.) Appellant insisted that Cindi needed to move back home even though he did not love her anymore. (11 RT 1969, 1988.) Appellant mentioned that Cindi's parents did not like him because he did not love Cindi the way he loved a former girlfriend. (11 RT 1969.) Appellant's focus was on getting Cindi to move back home. (11 RT 1969, 1982, 1988-1989.) Appellant thought that if Cindi moved back home, everything would be alright. (11 RT 1982, 1984, 1988.) Jones could tell appellant was angry by his intense demeanor. (11 RT 1989.)

Jones thought that appellant was both depressed and angry. (11 RT 1985-1986.) She thought he was depressed because he admitted thinking about hurting himself and indicated that he had thought about it for a long time. (11 RT 1963, 1984.) Appellant expressed that he had not gone through with suicide because he wanted to raise his children. (11 RT 1963.) The boys tried to comfort appellant when he began crying during the meeting. (11 RT 1962-1964, 1983, 1987.) The boys appeared close to their father and were loving toward him. (11 RT 1962, 1983.) Jiminez offered to look into a support group for divorced dads and appellant was receptive to that suggestion. (11 RT 1964.)

Jones and Jiminez were concerned for the children's safety and encouraged appellant to let the children leave with Cindi. (11 RT 1970, 1982, 1984-1985.) At the end of the meeting, appellant agreed to send Angel back to school and planned on calling Jiminez to arrange for counseling. (11 RT 1972, 1983, 1985.) Angel and Huber Jr. left with Cindi, while Ivan returned to school with Jones and Jiminez. (11 RT 1970, 1985.) Shortly thereafter, appellant called Jiminez asking for the counseling and support group information. (11 RT 1965.) Jiminez told

appellant that he was working on it and would get back to him. (11 RT 1966.)

At the conclusion of the guilt phase, the jury found appellant guilty of three counts of first degree premeditated murder (§§ 187, 190.2, subd. (a)(3)), shooting at an occupied building or inhabited dwelling (§ 246), and assault with a firearm (§ 245, subd. (a)(2)). (11 RT 2211-2214.) Thereafter, the sanity phase commenced.

B. Sanity Phase

1. Defense Case

a. Dr. Pablo Stewart

Psychiatrist Dr. Pablo Stewart opined that appellant was aware of the nature and quality of his act, i.e., he understood that he was killing, but he was unable to distinguish right from wrong because of his mental illness. (12 RT 2271, 2292-2293, 2310-2314.) Dr. Stewart was initially contacted by the defense to examine appellant in the summer of 2003 to determine whether appellant was suffering from a mental disease or defect at or around the time of the murders. (12 RT 2241.) Dr. Stewart first examined appellant on September 25, 2003. (12 RT 2299.) Dr. Stewart diagnosed appellant as suffering from a chronic mood disorder with psychotic features, consistent with major depressive disorder with psychotic features. (12 RT 2242, 2257, 2271.)

Dr. Stewart observed a number of symptoms in appellant that led him to this diagnosis, including: a depressed and irritable mood; diminished interest or pleasure from usual activities; fluctuations in weight; insomnia or hypersomnia; fatigue; feelings of worthlessness or guilt; diminished ability to concentrate; and recurring thoughts of suicide. (12 RT 2244-2245.) It is common for people with major depressive disorder to experience emotional tearfulness, irritability, brooding obsessive

rumination, anxiety, phobias, less satisfying social interactions, marital and work problems, and suicide. (12 RT 2249-2250.) Major depressive disorder is a "very common condition." (12 RT 2251.) Depression is a "biologically mediated condition," which means it is a "brain illness that has contributions by one's environment." (12 RT 2252.)

Psychosis is medically defined as thoughts or behaviors that are not based in reality and is a symptom of mental illness. (12 RT 2257-2258.) Psychosis can be demonstrated by auditory and visual hallucinations, delusional thinking, ideas of reference, over-elaborated religious ideation, and disorganized thinking. (12 RT 2258-2260.) These psychotic symptoms can be associated with a severe form of major depression. (12 RT 2260.)

Based on information he received from interviews with appellant, Cindi, and appellant's family, Dr. Stewart learned that appellant became very depressed before Angel was born and quit working around 1995, shortly after Angel's birth. (12 RT 2248.) Cindi had tried to get appellant into treatment, but appellant did not think anything was wrong with him. (12 RT 2261.) Dr. Stewart explained that it is common for people with mental illness, especially those with psychosis, to be unable to appreciate that they are sick due to the nature of the illness. (*Ibid.*)

Medication is effective in treating depression in over fifty percent of people, but appellant had never been treated with medication prior to the murders. (12 RT 2254.) While incarcerated, appellant had two trials of medications. (12 RT 2254, 2285.) In 2002, he was placed on Prozac and had a "good response" to the medication, but stopped taking it. (*Ibid.*) Appellant was given the antidepressant Remeron from the end of 2002 until September 2003, and again had a good response, but stopped taking the medication on his own accord. (12 RT 2256, 2285, 2355.) Dr. Stewart noted that this is very common for mentally ill patients to stop taking their

medications; when the medication starts working the patient feels better and thinks they no longer need the drugs. (12 RT 2254.) Dr. Stewart observed that the fact jail staff placed appellant on medication and that he responded well to the antidepressant drugs helped confirm the presence of mental illness. (12 RT 2257, 2351.)

In his interviews with Dr. Stewart at the jail, appellant presented with very poor hygiene and depressive speech. (12 RT 2265.) At their first interview on September 25, 2003, appellant asked Dr. Stewart whether he was there to give him the lethal injection. (12 RT 2266-2267.) Appellant was "both irritable and very, very sad and tearful simultaneously." (12 RT 2267.) Appellant maintained this demeanor over the course of multiple interviews. (12 RT 2267-2268.) Appellant's thinking was "exceedingly psychotic" in that he was paranoid, disorganized, and had obsessive rumination. (12 RT 2268.) Appellant was "stuck on a variety of themes about how people were out to corrupt him, the world is out to corrupt, the government is against him, a variety of people are out to get him, paranoia theme of how we need to protect children." (*Ibid.*) Dr. Stewart noted that appellant's religious beliefs could be part of his mental illness. (12 RT 2269-2270.) Dr. Stewart opined that over the nine visits he had with appellant over two years, appellant never appreciated the severity of his mental condition. (12 RT 2261.)

After the initial interview on September 25, 2003, Dr. Stewart told jail staff that appellant was at acute risk of self-harm and should be placed in a safety cell. (12 RT 2316-2317, 2349-2350, 2355.) Appellant was taken to the safety center and a nurse examined him the following day. (*Ibid.*) Appellant adamantly denied being suicidal. (12 RT 2318.) Appellant informed the nurse that he had told his attorney he was suicidal in the past and that he needed to keep his mouth shut. (12 RT 2319.) Appellant made

good eye contact and was animated. (*Ibid.*) Appellant was assessed a zero risk for self-harm and returned to his cell. (*Ibid.*)

When Dr. Stewart brought up the facts of the case, appellant changed the subject and "got stuck in these other themes of corruption and protecting children and how God is the only judge and who are you to judge and all these other sorts of things." (12 RT 2270-2271.) Dr. Stewart recalled that when he discussed the meeting appellant had with the school officials and his family, appellant would "digress into how they were all out to get me, they were all doing this and they were all going to corrupt my children." (12 RT 2270.)

Dr. Stewart opined that at the time of the murders appellant was unable to appreciate the wrongfulness of his actions because he was suffering from a delusional need to protect his children from being corrupted. (12 RT 2271-222.) Appellant exhibited delusional thinking when he spoke to school officials on December 10, 2001, in an attempt to remove Angel from school. (12 RT 2282, 2348.) The morning of December 11, 2001, appellant's children left with their mother and the school officials. In appellant's delusional mind, his children were taken from him and his worst fears were realized. (12 RT 2271-2273, 2347-2348.) The following day, December 12, was the Our Lady of Guadalupe feast day, a prominent Catholic holiday in Mexico. (12 RT 2273-2274.) Appellant prepared himself for a "holy battle" to save his children from being corrupted and "taken over to the dark side." (*Ibid.*)

Appellant's actions were not those of an enraged, jealous man. (12 RT 2277, 2309-2312.) Cindi had told appellant she was seeing Chavez months prior and according to Cindi's police interview, she and appellant were "civil" about the affair. (*Ibid.*) It was only after Huber Jr. told appellant during the meeting with Jones and Jimenez that he saw Cindi and

Chavez hugging in front of the kids that appellant's delusional thinking about corruption of children took over. (*Ibid.*)

Appellant knew he was arming himself with weapons to shoot people and gear to protect himself, but his actions were based on a delusional desire to prevent his children from being corrupted. (12 RT 2278, 2283-2284, 2290-2291, 2296-2298.) Appellant planned out his attack; his planning activities were not inconsistent with a person operating under the influence of a delusional thought process. (*Ibid.*) He knew and understood the nature and quality of his acts, but was unable to distinguish right from wrong due to his delusional thinking, which was caused by his mental illness. (12 RT 2278-2279, 2290-2293, 2298.)

Appellant shouted at Chavez and Alicia during the shooting. Dr. Stewart explained that this was consistent with his opinion that appellant went to the Martinez home to end the corrupting influence on his children. (12 RT 2277, 2308-2309.) Dr. Stewart thought that the overkill was the result of appellant's mental illness, not him being in a jealous rage. (12 RT 2280, 2312.) Dr. Stewart believed that appellant did not kill Guadalupe because she was still a child and not part of the corrupting influence on his children. (12 RT 2286.) Appellant's behaviors were motivated by the delusional thoughts he was having at the time of the murders. (12 RT 2290.) At some point after the murders, appellant began to understand right from wrong. (12 RT 2293-2294, 2323.) Dr. Stewart acknowledged that appellant's statements during his phone conversation with Huber Jr. on the drive to the hospital showed appellant was "starting to appreciate right from wrong." (12 RT 2294.)

In the police interview, appellant denied ever having any delusions or hallucinations. (12 RT 2315.) Appellant showed disorganized thinking, a psychotic symptom, in his police interview. (12 RT 2260.) Appellant reported that he had not eaten in three days and had not slept well for a long

period of time; these are both symptoms consistent with his mental illness. (12 RT 2275.) Appellant's brother Javier reported to police that one time in late November or early December, appellant told him that he heard a voice telling him he was a coward. (12 RT 2288, 2303.) Experiencing auditory hallucinations is consistent with a diagnosis of major depressive disorder or persistent mood disorder with psychotic features. (*Ibid.*)

Appellant was referred to safety cell placement on December 12, 2001. (12 RT 2319-2320.) Appellant told the jail nurse that his in-laws were helping his wife to separate from him, that his children reported to him that she was kissing another man, and that he always had a problem with his in-laws because they did not think he was good enough for them. (12 RT 2321.) Appellant denied suicidal ideation. (12 RT 2316, 2321.) The nurse determined that appellant was a minimal suicide risk. (12 RT 2322.) When seen again on December 18, 2001, appellant stated that he did not trust the government and that they made a mistake in prosecuting him because he was just defending his children. (12 RT 2322-2323.) Appellant insisted that he had no choice and he would do it again. (*Ibid.*)

While in jail, appellant called his sister-in-law Patricia and told her, "I am not crazy," and, "that this is the attorneys and the District Attorneys and all of us's [*sic*] game, use because we agreed, we're playing with that, I am telling you." (12 RT 2339-2341.) Dr. Stewart opined that these statements were part of appellant's paranoid, persecutory delusions. (12 RT 2339, 2341.)

After the jury found him guilty of all charges, appellant called his relatives and advised them, "They found me guilty of everything, like six or seven charges. Premediatated, everything," and,

> Then with all that, not that they found me guilty of all that, now it's sure for death penalty, and like I tell you, they're not going to doubt it. They're not going to doubt themselves at all in giving it to me, and that - - that according to them I was sick

> when all that happened. It's like I tell you, it's just a bunch of shit on their part. It's just another story that they are, according to them, helping me and all that. All the attorneys and everyone is in agreement.

(12 RT 2342.) Dr. Stewart maintained, "[T]his is reflective of ongoing persecutory paranoia and delusions." (*Ibid.*) Dr. Stewart noted that at times appellant would include his defense attorneys as part of the people who were against him and who were going to harm his children, which was an example of his delusional thinking. (12 RT 2345.)

Dr. Stewart concluded, "I feel very confident in this case of the presence of persistent mood conditions, psychotic symptoms with [appellant] and that on the night, the early morning of this very terrible tragedy he was operating under the effects of this delusion," "And that he was aware of his actions, he was aware of what he was doing but he wasn't aware of right or wrong at the time of the murders." (12 RT 2353.)

b. Dr. Wendy Weiss

Dr. Wendy Weiss, a clinical and forensic psychologist, was appointed by the court to evaluate appellant for a sanity determination. (12 RT 2369-2370, 2402.) Dr. Weiss concluded that appellant was legally sane at the time of the murders. (12 RT 2395, 2402.)

On July 19, 2005, Dr. Weiss interviewed appellant at the jail safety center for two hours. (12 RT 2371.) During the interview, appellant appeared to be very depressed, demonstrated disorganized thinking, and expressed paranoid and persecutory perceptions. (12 RT 2371, 2383.) Appellant exhibited delusional thinking regarding people harming or trying to harm his children. (12 RT 2383-2384.) Appellant recalled that he had been angry at Officer Jiminez because he felt they were taking his children away and remarked, "You have to go over my dead body to get kids away from me." (12 RT 2419.) Appellant told Dr. Weiss, "I was insane. Would

a sane person try to hurt somebody?" and explained, "I thought I was in danger and my kids were in danger." (*Ibid.*)

Appellant showed insight into his mental health history and ongoing mental health issues. (12 RT 2407-2408, 2417-2418.) Appellant reported that he stopped working five or six years before the murders because he was "falling into a big depression," but had never received mental health treatment. (12 RT 2407-2408.) During the interview, appellant denied auditory hallucinations. (12 RT 2417.) Appellant reported being suicidal for a number of years. (12 RT 2409.) Dr. Weiss observed that appellant had both admitted and denied suicidal desires in the past, which was probably reflective of his disorganized thought process and psychiatric instability. (*Ibid.*) Appellant did not want to talk about the facts of the murders as it was an emotionally upsetting topic for him. (12 RT 2403-2404.) Dr. Weiss asked appellant if he had ever served in the military and appellant replied that he had a "fascination about it." (12 RT 2406-2407.)

Dr. Weiss diagnosed appellant as having major depressive disorder with psychotic features at the time of the interview.[11] (12 RT 2373, 2411.) This illness may or may not be genetically influenced and it is hypothesized that a particular event or stress can have a permanent impact on brain chemicals. (12 RT 2375.) Psychosis is "not necessarily a complete loss of contact with reality, but it is a thought disturbance or thought disorder in which an individual's thinking is not clear, it's not necessarily based in reality, and they may be distorting or misinterpreting their environment." (12 RT 2377.) A psychotic individual often cannot perceive that they are ill and frequently deny having mental illness. (12 RT 2378.) Appellant

---

[11] In reaching her diagnosis, Dr. Weiss reviewed a videotape of appellant's police interview and 950 pages of documents including police reports, autopsy reports, mental health reports, jail medical records, witness interviews, and interviews of appellant. (12 RT 2371, 2379.)

exhibited psychotic delusions, primarily having to do with his religious preoccupation, but also dealing with his belief that the government was treating him unfairly and that his children were being mistreated by his in-laws. (12 RT 2417.)

As for appellant's mental state at the time of the murders, Dr. Weiss opined that appellant had depression with emerging psychotic features, explaining, "I think that he was very depressed at the time. I think that he was having some distorted thinking at that time, perhaps not the overtly paranoid persecutory thinking and not the preoccupation with religious beliefs, but was certainly depressed and certainly not completely clear about his understanding of his environment." (12 RT 2384.) Appellant was not completely removed from reality, but his thoughts were distorted due to his delusional thinking. (12 RT 2388, 2429.) Appellant's mental state was deteriorating in the period leading up to the murders, and deteriorated significantly afterward as a result of the traumatic event. (12 RT 2411-2412.)

Dr. Weiss diagnosed appellant with having emerging psychotic features based in part on his delusional thinking about his children being in danger, fears they were being treated poorly or being harmed by Cindi and her family, and his needing to protect them. (12 RT 2385.) Appellant's thinking on the day preceding the murders was "somewhat disorganized" and he had "distorted perceptions, paranoid perceptions." (12 RT 2385-2386.) Although appellant knew his behavior was wrong at the time of the murders, he delusionally believed that he was justified because he was trying to take his children out of harm's way, harm that was coming from his wife's affair. (12 RT 2386-2387, 2392-2393, 2400.) Appellant felt that he had no choice and admitted to jail staff on December 18, 2001, that he would engage in the same behavior again if faced with the same situation. (12 RT 2412-2413.)

Appellant's discussion of his children as representative of all children around the time of the murders was reflective of his inability to make boundary distinctions and indicative of his deteriorating mental state. (12 RT 2390.) Appellant was deeply emotionally involved and connected to his children, to an unnatural degree, which was partially a result of his deteriorating mental state. (12 RT 2390-2391.) Appellant's disorganized thinking and psychotic tangentiality, or drifting off topic during a discussion, in conversations with school officials on December 11, 2001, and with detectives after the murders, was also a symptom of his deteriorating mental state. (12 RT 2391-2392.)

Dr. Weiss concluded that appellant was legally sane at the time of the murders. (12 RT 2395, 2402.) Appellant was "distraught and upset" and "was experiencing distorted perceptions of reality," but he had an appreciation of his behavior and "understood that his behavior was wrong, that morally it was wrong to kill people and that legally there were going to be consequences from his behavior." (12 RT 2395-2396.)

Dr. Weiss explained the reason for this conclusion. The statements appellant made in phone calls to relatives immediately after the murders showed appellant knew his behavior was wrong. (12 RT 2397-2398, 2421.) Appellant called his brother and told him that he was tired of life and his wife was making him look dumb and offending him. (12 RT 2422.) Dr. Weiss found this fact important "because it was an explanation of his behavior of why he did this." (*Ibid.*) Appellant admitted that he had done something stupid and regretted it when he talked on the phone to his son, which showed "that obviously he knew at that point he's talking to his son he's done something wrong." (*Ibid.*) That appellant spoke to Guadalupe in a normal tone of voice in the middle of the shooting spree "suggests that in that moment, or in those moments, his mental state was not significantly different than it was shortly thereafter when he made telephone calls and

acknowledged his behavior being wrong." (12 RT 2406.) That he prepared for the financial well being of his children by putting a large amount of cash in a diaper and throwing it in his brother's yard further showed appellant understood that his behavior would have serious consequences. (12 RT 2423-2424.) It also showed appellant's ability to think rationally and was reflective of his level of understanding of his behavior. (12 RT 2424.) Additionally, when questioned by police on December 12, 2001, appellant told detectives, "The vest is because I say to myself, okay, I love myself, I don't want to kill myself; but if I'm going to die, I'm going to take so many people with me, that much as I can." (12 RT 2421.) Dr. Weiss explained that this statement showed appellant went to the Martinez home "with some idea that something bad was going to happen, that he needed to protect himself." (12 RT 2421-2422.)

On December 12, 2001, appellant was placed in the safety cell after Cindi contacted the jail with concerns that appellant was a possible danger to himself. (12 RT 2438.) The jail nurse noted that appellant's mood and affect were pleasant and cooperative. He remained on topic and goal-directed. He exhibited no bizarre or disorganized behavior and was assessed to be a minimal suicide risk. (12 RT 2410.) On December 18, 2001, the nurse reported that appellant was suspicious and appeared preoccupied with religious themes with some sense of entitlement. (12 RT 2416-2417, 2435-2436.) Appellant verbalized a lack of trust in the government and was adamant that he had been defending his kids and that he had no choice but to kill. (*Ibid.*) That appellant reported having auditory hallucinations in jail in the days following the murders did not change Dr. Weiss's opinion on appellants' mental state at the time of the shooting. (12 RT 2433.)

Dr. Weiss concluded that there was no information to suggest that appellant lacked the ability to understand or appreciate the consequences, or

lacked an ability to understand the wrongfulness of his behavior, or to suggest that he lacked an understanding of the nature and quality of his acts. (12 RT 2425.) Appellant was legally sane at the time of the murders. (12 RT 2402.)

c. Dr. Robin Schaeffer

Clinical psychologist Dr. Robin Schaeffer was retained by the defense in the summer of 2002, to examine appellant's mental health. (12 RT 2451.) Dr. Schaeffer opined that appellant was legally insane at the time of the murders. (13 RT 2516-2518.)

Dr. Schaeffer saw appellant for the first time on July 18, 2002, and on 25 subsequent visits with the most recent being on October 13, 2005. (12 RT 2451-2452.) Dr. Schaeffer also interviewed appellant's family and reviewed various documents including reports by other mental health professionals, police reports and interviews, interviews between appellant and a defense investigator, and preliminary hearing transcripts. (12 RT 2452.) Dr. Schaeffer diagnosed appellant with having severe major depression with psychotic features, both hallucinations and delusions, at the time of the murders.[12] (12 RT 2453; 13 RT 2517.)

Appellant met the majority of the nine DSM-IV criteria for major depressive disorder. (12 RT 2454.) His mood was very depressed. (*Ibid.*) He showed marked diminished interest and pleasure from usual activities. He withdrew from work and usual activities to focus on himself and his children without much distinction between the two. (*Ibid.*) He had weight fluctuations. Cindi told Dr. Schaeffer that appellant would not eat and lost 40 pounds during the years he was depressed. (12 RT 2455.) He had

---

[12] Dr. Schaffer received a jail report that appellant had auditory hallucinations on two occasions shortly after the murders. (13 RT 2517.) Dr. Schaffer never saw any indication of auditory hallucinations during any of his 26 visits with appellant. (12 RT 2519.)

sleeping disturbances. Cindi reported to Dr. Schaffer that for months appellant slept 10 to 11 hours during the day and was up at night. (*Ibid.*) He had suicidal ideation. Cindi told Dr. Schaffer that appellant always used to talk about killing himself because he was "sick and tired of how people used to live here." (*Ibid.*) Appellant admitted suicidal thoughts when he spoke with principal Jones and Deputy Jiminez on December 11, 2001. (12 RT 2455-2456.) Appellant suffered from "a very prominent thought disorder," or paranoid delusional disturbance. (12 RT 2456.) Cindi told Dr. Schaeffer that appellant did not trust anyone, even his own mother. (*Ibid.*)

In regards to whether appellant was legally sane, Dr. Schaeffer concluded that appellant was capable of knowing and understanding the nature and quality of his acts, but as a result of mental illness, specifically his psychotic delusions, he was incapable of distinguishing right from wrong as to the acts in the offense. (12 RT 2463; 13 RT 2511, 2515-2518.) Dr. Schaeffer explained that appellant was capable of distinguishing right from wrong outside the bounds of his delusional belief system, but not capable of doing so within his delusional belief system, and the shooting occurred within the bounds of the delusional system. (13 RT 2518.) Thus, appellant was legally insane at the time of the murders. (13 RT 2516-2518.)

Appellant had a psychotic delusion that his children were being killed or destroyed. (12 RT 2462.) Dr. Schaeffer explained, "He was incapable of distinguishing right from wrong because his delusions gave him the absolute one hundred percent certain conviction that his children were being destroyed and that he had to act in the manner he did in order to protect his children." (12 RT 2463-2464.) Although he suffered from severe mental illness, appellant was rational, knew what he was doing, and was able to plan. (12 RT 2476; 13 RT 2517, 2562-2563, 2567.) The

incredibly large amount of weapons, ammunition, and armor reflect the grandiose aspect of appellant's delusions. (12 RT 2476-2477.) Appellant was capable of knowing and did know that his acts were illegal. However, he was "incapable of distinguishing right from wrong as to his acts because of the delusions." (12 RT 2464, 2477-2481.)

Over the five to six years preceding the murders, appellant became increasingly depressed and delusional. (12 RT 2464.) Dr. Schaeffer observed, "He began to project onto the children his concerns, his fears. He began to not really see them as separate from himself." (12 RT 2465.) Appellant was extremely overprotective of his children and thought, "Everything was a corrupting influence on his kids," but, "He was particularly, of course, associating the corruption with his wife's affair with her lover." (*Ibid.*) Appellant believed that exposure of his children to something so openly immoral as his wife's affair was "literally death to the children, killing their hearts, killing their souls, in his words killing their innocence, their aliveness." (12 RT 2469.) Appellant's worst fears were realized when he learned his children saw his wife hugging and kissing another man at their grandparent's house. The children being exposed to the affair was "what really triggered the worst in Mr. Mendoza at that time," not merely the fact Cindi was having an affair. (12 RT 2470, 2474-2475; 13 RT 2529, 2539-2540.)

Dr. Schaeffer believed there were indicators of appellant's deteriorated mental state at the meeting with Deputy Jiminez and Principal Jones. (12 RT 2467.) Cindi told Deputy Jiminez that she and appellant had recently separated and appellant helped her move out. (12 RT 2467; 13 RT 2536-2537.) Cindi reported that the relationship had been bad for five years, but she moved out because appellant was acting very strange. (*Ibid.*) Appellant's delusions were expressed in repetitive and rambling statements during the meeting. (12 RT 2467.) Appellant showed tangential thinking;

he could not stay on topic or focus, an indication of psychosis. (12 RT 2467-2468; 13 RT 2513.) Dr. Schaeffer believed that appellant asked for help from the school officials because "at this point even he was getting scared about himself. He was getting that bad." (12 RT 2468.)

Appellant's mental state after his arrest for the murders was consistent with someone having a psychotic episode. (12 RT 2500.) However, at times appellant responded to the detectives' questions in a rational manner, consistent with someone capable of logical reasoning and planning. (*Ibid.*) In the police interview, appellant expressed regret, but maintained his delusional justification that he did the right thing to protect his children. (13 RT 2510.) Appellant called Huber Jr. from the interrogation room and told him, "It's not your fault what's happening. I don't feel proud of what I did, but, uh, I'm just trying to do the best for you, my son." (13 RT 2511.) Dr. Schaeffer explained that appellant's phone call showed he "knows what he did, he knows where he is, he understands the nature and quality of his acts." (*Ibid.*) There were reports that appellant was having auditory hallucinations in the days following the murders. This was consistent with Dr. Schaffer's opinion that appellant was psychotic. (13 RT 2502-2503.)

Dr. Schaffer opined that appellant believed, due to a psychotic delusion, that his kids would be destroyed or killed if he did not act and that his actions were justified to protect his children. (13 RT 2504-2505, 2514-2516.) Appellant's references to children in general or "all the kids of the world" was an example of his psychotic loosening of boundaries. (13 RT 2503-2504, 2509.) Cindi told detectives that she, appellant, and her mother were very close and it was incomprehensible that appellant killed her mother. (13 RT 2585-2586.) Dr. Schaeffer suggested this showed appellant was not thinking rationally because he killed someone he loved. (*Ibid.*)

Over the three years Dr. Schaffer met with appellant, appellant expressed some degree of regret and acknowledgement that he had done a "bad thing," but at the same time, "for years afterwards, he [appellant] was still under the delusional belief that it was right and imperative, that he had done that to protect his children from being destroyed." (13 RT 2572-2573.) Dr. Schaffer maintained that he did not believe appellant was capable of understanding right from wrong with respect to his actions in committing the murders because those actions took place within appellant's delusional belief system. (13 RT 2573-2576.) Appellant was legally insane at the time of the murders. (13 RT 2515-2518.)

d. Dr. Jonathan French

The trial court appointed psychologist Dr. Jonathan French to perform a sanity evaluation on appellant. (13 RT 2589-2590.) On October 14, 2005, Dr. French met with appellant at the jail safety center for about three hours. (13 RT 2591.) Before the interview, Dr. French reviewed the transcripts, medical reports, tapes, and other records from the case. (13 RT 2590.) Dr. French diagnosed appellant with major depression and opined that appellant was legally sane at the time of the murders. (13 RT 2592, 2610, 2652.) Dr. French did not see any evidence of psychosis in appellant's history or during their interview. (13 RT 2615, 2647.) He did not find appellant to be delusional. (13 RT 2647.) Dr. French concluded, "He had his own reasons for doing this. While they were exaggerated, obsessive, depressed they were not, in my opinion, the product of a psychotic mental state." (*Ibid.*)

Prior to 2001, appellant had no criminal history, no mental health records, and no contacts with any official agencies. The only available information was anecdotal evidence from people who knew appellant and appellant's own statements about his mental health. (12 RT 2593.) This evidence was inconsistent. Cindi reported appellant having eating,

sleeping, and hygiene problems and that he had become socially withdrawn, was prone to depression, and was occasionally suicidal. (*Ibid.*) On the other hand, appellant's brother and mother reported that he was normal. (13 RT 2593-2594, 2637.) The majority of people personally acquainted with appellant did not characterize his behavior as psychotic. (13 RT 2636-2637.)

Dr. French opined that there was probably a cultural explanation for the statements and acts other mental health professionals found to be delusional. (13 RT 2615.) Dr. French reviewed the report of the anthropologists hired by the defense who went to appellant's hometown of Coalcoman, Mexico to study appellant's social and cultural background. Appellant's statements about respect, honor, and being a coward and his beliefs about his children being harmed or corrupted were possibly attributable to his cultural background. (13 RT 2594-2595, 2615.) Family honor is very important in the community where appellant and his family are from in Mexico. (13 RT 2615-2616.) It is highly offensive to a man's honor, and by extension his family's honor, if someone commits a heinous act and there is nothing more heinous than a man's wife having a sexual liaison with another man. (*Ibid.*) The anthropologists reported that it was common where appellant was from in rural Mexico for a man to kill both his wife and her lover if they were caught having an affair. (*Ibid.*) Under this cultural framework, the husband would suffer intense shame and humiliation in front of his peers and "if [he] were to bump off the guy who was doing this, no one was going to say very much about it." (13 RT 2616.) A number of people from appellant's hometown now live in the Modesto area. (*Ibid.*) Appellant frequently discussed this theme of shame and humiliation in prior interviews and statements. (13 RT 2616-2617.)

Appellant over-identified with his children and "had a hard time keeping his own fears and issues separate from what he perceived in his

children." (13 RT 2601.) Appellant was projecting his own fears and weaknesses onto his children. (12 RT 2602.) He was very worried that his children were being corrupted, particularly by his wife's affair and that his children were being exposed to it at their grandparent's home. (*Ibid.*) Dr. French acknowledged that appellant's concern with the harm being done to his children was excessive and probably obsessive, "But in this cultural framework, it certainly would not have been considered out of line in Mexico." (13 RT 2616.) Appellant was troubled by the emotionally, socially corrupting influence of his wife's affair. (13 RT 2617-2618.) The children viewing their mother being physically affectionate with another man in front of them at his in-law's house "was certainly more than Mr. Mendoza could stand, and to the extent that he was projecting that onto his children, more than he believed they could stand, as well." (13 RT 2618.) Dr. French observed, "[T]here is a cultural container there that in my opinion removes his obsessions and his behavior from the notion of delusions and psychosis into an understandable, if extreme, example of a cultural norm." (13 RT 2617.)

Dr. French had seen similar conduct in severe protracted custody disputes. (13 RT 2619-2620.) The interaction between appellant, Cindi and their children during the visit with Deputy Jiminez and Principal Jones showed appellant engaging in this kind of behavior. (13 RT 2620.) Dr. French explained, "The father is upset, the kids are upset and they will try to say something to make the parent feel better. And if they tell the parent what they think they want to hear, they end up validating what the parent imagines is making them upset to begin with which is often the behavior that gets attributed to the other parent. So you get a vicious circle here." (*Ibid.*)

Dr. French opined that appellant knew and understood the nature of his actions consistently throughout the events leading up to the murders.

(13 RT 2621.) Dr. French observed, "I don't think there's much question about that at all. He knew what he was doing. The issue of right and wrong is probably a little tougher to tease out." (*Ibid.*) Dr. French cited to the phone calls appellant made immediately after the murders and his statements during the shooting in support of his opinion that appellant was able to distinguish right from wrong when committing the crimes. (13 RT 2621.) In the phone call to Huber Jr., appellant characterized his actions as having been "bad" and "stupid," which showed he knew very quickly that what he had done was wrong. (13 RT 2621-2622.) Dr. French explained,

> Well, my point is this: If you have long-standing serious mental illness, major depression with psychotic features which kept you from appreciating the wrongfulness of your conduct, then what sense does it make for him to spontaneously admit a few minutes after you shot three people to death and all of a sudden you admit it's wrong? As a concept, that's disingenuous.
>
> ¶. . .
>
> I'm sure everyone in this courtroom has had at least one experience in life when something incredibly sudden and dangerous was about to happen to him, somebody crosses the lane and they're coming right at you or you're a kid and in high school and you get in a fist fight, or breaking up with your best boyfriend, whatever it is where you are so upset and so full of adrenaline that all you can think of is that one tiny little situation. You're not thinking of anything else, not thinking of the consequences of what you're doing, just totally focused on that. But that subsides pretty quickly.
>
> In my opinion that's still within the framework of normative human behavior. So if someone says, well, at the moment he pulled the trigger he wasn't thinking about doing right or wrong, hey, that could well be the truth. But if that goes away in a minute or two, I would argue that that not appreciating it at the very second it happened was not the product of mental disorder. It was the product of physiological arousal.

> If it was a real mental disorder that was causing the inability to differentiate between right and wrong, it would persist for a while. It just doesn't go away when it's convenient.

(13 RT 2622-2623.)

In the meeting with Deputy Jiminez and Principal Jones, appellant was concerned about his children, but his "chief source of agony was the fact that his wife had left and he was hoping that she would come back, and that's what he was asking of these people." (13 RT 2638.) At the end of the meeting, appellant's children were not taken from him. There was a general agreement of all parties, including appellant, that the children would leave and return to school. (13 RT 2638.) In fact, appellant asked that they leave so he could have some time alone and planned on seeing Huber Jr. after he got done with school. (13 RT 2638-2639.)

Appellant had mixed motives in committing the murders. (13 RT 2643-2644.) He felt that the people he murdered were a psychological threat to his children, but "the thrust of the remarks that he made immediately before, during and immediately after the shootings have less to do with the welfare of the children and more to do with the anger and rage that he felt towards his wife's family." (*Ibid.*) Appellant never indicated that he felt his children were physically threatened. (13 RT 2619.) Dr. French concluded, "I am not of the opinion that his preoccupation with his children's emotional welfare prior to the homicides was delusional." (13 RT 2642.) He continued,

> It may have been obsessive, it may have been extreme at some points, but it wasn't based upon a complete misreading of reality.
>
> The fact is that their mother was having an affair with another man. The fact is that this affair was proceeding to some degree in front of the children over at the in-laws' home. And from what I understand of the cultural mores of rural Mexico,

that is probably about as big an insult as a man could possibly endure.

(*Ibid.*)

Appellant's demeanor in the interview with detectives on December 12, 2001, was "quite calm and focused." (13 RT 2612, 2646.) Although appellant became emotional and distraught at times, for most of the interview he was polite, focused, answered questions, and showed no evidence of a psychotic disorder. (*Ibid.*) Appellant told detectives, "I've seen generations going down this little black hole because their parents couldn't take care of them. It's not because they're bad, it's because they're being most of the time at work." "So I just trying to do the best around my kids." (13 RT 2613-2614.) Dr. French found nothing delusional about these statements; appellant showed appropriate concern for his children and children in general. (*Ibid.*)

The reports between jail deputies and nurses were inconsistent. On December 12, 2001, at 7:00 p.m., appellant told Sergeant Blake that he wanted to hurt himself and was placed in a safety cell. (13 RT 2625-2626.) But at 9:40 p.m., when a nurse examined him, appellant denied suicidal ideation, exhibited no bizarre or disorganized behavior, and had goal-directed, on-topic speech content. (13 RT 2626-2627.) Appellant's discussion with the nurse was consistent with what he had said in prior interviews with detectives: that his in-laws were helping his wife separate from him and moved the man she was seeing into their home; that his wife moved out 10 days prior; that his children reported seeing her kissing another man; that he always had problems with his in-laws; and that he had considered shooting his wife. (13 RT 2627-2629.) The nurse found appellant to be a minimal suicide risk and released him from the safety cell. (13 RT 2629.)

Appellant's brother Javier reported that a week before the shooting appellant said he "heard a voice calling him a coward." (13 RT 2594.) Dr. French could not say whether this was an auditory hallucination without further information about the context of the statement, i.e. whether this voice was out loud or in appellant's head. (*Ibid.*) Similarly, on December 15, 2001, jail deputies reported that appellant was "upset and talking irrationally," "made references and statements to individuals that were not visible," "was concerned about his children and wanted to protect them," and "had demons inside of him, or previously had demons inside of him." (13 RT 2596, 2631.) Dr. French observed that this could be evidence of hallucinations, but could not say for sure without further questioning to determine the meaning of appellant's statements. (*Ibid.*) Dr. French explained,

> [P]eople, especially in highly pressured situations, like being recently incarcerated for crimes of this magnitude, can say all kinds of things, and if you don't know how to question them carefully to get a better understanding of what they're actually meaning by this, all we have are the deputy's characterizations of that. He may have had a delusional thought about that or it may have been sort of a - - an odd way of characterizing what had happened to him.

(13 RT 2597.) A clearer example of hallucinations would be the report from December 17, 2001, wherein appellant told jail deputies that "he was hearing voices and that he felt persons unknown to him were . . . trying to hurt him." (13 RT 2599.) Appellant's exhibition of psychotic symptoms on December 17 did not change Dr. French's opinion that appellant was not psychotic because the following day appellant was "well groomed, appropriately centered, pleasant, [and] cooperative," indicating, "[T]his stuff seems to get turned on and off pretty quickly, and that's a little off to me." (13 RT 2600.)

Dr. French did not believe appellant's asking Dr. Stewart at their first interview if he was going to give him the lethal injection was an indication of psychosis. (13 RT 2624.) Appellant had met with Dr. Schaeffer the day before and had told Dr. Schaeffer that he wanted to get it over with, that he wanted to die. (*Ibid.*) It was possible that appellant concluded his request was being honored when Dr. Stewart visited him for the first time the following day. (13 RT 2625.)

Appellant had a very strong moral view of things. (13 RT 2604.) In several mental health evaluations following the shooting, appellant acknowledged he "did the worst possible thing" and that he took solace in religion, even though Cindi reported that appellant did not really believe in God. (13 RT 2605, 2641.) When Cindi visited appellant in jail on December 20, 2001, she advised him, "You should say you're sick so they don't send you to prison." (13 RT 2640.) Appellant told Cindi, "My love, you're strong. You're a very strong person, much stronger than me." (13 RT 2639-2640.) Dr. French concluded that appellant was depressed, had a lot of "character illogical inadequacy," and "was just not a very [psychologically] strong guy." (13 RT 2640.)

Dr. French did not see any evidence of malingering. (13 RT 2606.) Appellant cried several times in the interview when he acknowledged "that in the end it was his own actions that had damaged his children as much as anything else." (13 RT 2608.) During their interview, appellant expressed heartfelt emotions and, "It was in a way taking some responsibility for what he had done." (13 RT 2608-2609.)

e. Appellant's Interview with Detectives Craig Grogan and Jon Buehler

Appellant was interviewed at the Modesto Police Department on the morning of December 12, 2001.[13] (Defense Exhibit NN; 5 CT 1162-1340; 13 RT 2654-2658, 2662-1 through 2661.) At the beginning of the interview, appellant asked the detectives to contact his children because he was concerned about them. (5 CT 1174-1178, 1188.) Appellant acknowledged, "I love 'em to death and I was a fool." (5 CT 1175.) When asked if he needed food, appellant stated that he had not eaten for three days. (*Ibid.*) Appellant was tested for signs of intoxication and indicated, "I haven't slept well for quite a few days," and, "I'm kinda numb for [*sic*] what happened." (5 CT 1198-1199.)

Appellant talked about his children and expressed concern for their wellbeing. (5 CT 1174-1179, 1182, 1188, 1197, 1222.) "[I] asked for help for them for since [*sic*] a long time and, and nobody ever helped me. I just doing my best for them." (5 CT 1179.) "Well it probably could be wrong, but in your eyes, but I'm just doing the best for them. I don't want anybody to harm or take revenge on them or their mother, they're innocents, they're beautiful just like your kids or anybody kids." (*Ibid.*) "The reason I'm all like this is because I can feel the pain in my kids. And [it's] . . . just not right, they don't deserve this." "I caused a lot to them, but I didn't mean to, I didn't want to. All I wanna do is the best for them, for all the kids." (5 CT 1187.) Appellant thought his kids were "needing counseling" and indicated, "They have been sick to their stomach for a long time, and especially the last 10 days." (5 CT 1178.) Appellant asked to talk to his

---

[13] A videotape of the interview was played for the jury. (13 RT 2659-1 through 2668-1.)

kids and was given a cell phone to call them. (5 CT 1177-1178, 1188-1190, 1195, 1209.)

Appellant talked on the phone to his mother and insisted, "[I] don't have bad intentions Mother, to do any harm to anybody, but, I simply don't want anyone to do harm to me, Mother. They were harming [my] beautiful children Mother." (5 CT 1209.) "[T]hey wanted to eat them, they want[ed] to turn them into something they are not, to be bad and I don't want that, Mother. That is not going to happen. I already told you, I'm going to fight to the death . . . for my beliefs . . . for a perfect world." (*Ibid.*) "I just want the best, for my children, for the children of all the world, and, and, for all the people that I love and that love me, Mother. That is all I want. And I am going to fight until I have to, until I get that, Mother." (5 CT 1211.) "Mother, it's just that sometimes I think things like that, have to happen for something good to come out." (5 CT 1212.) "I couldn't take any more pain than what I had already endured. . . . And like I said, as long as we are cowards, we are going to take more pain." (5 CT 1213.) "Please forgive me, forgive me for all the harm that I have done to you. I didn't, that was never my intention." (5 CT 1218.) "[L]ike I say, simply, I was wrong, I was wrong. I'm not proud of what I did . . . I am going to fight [whatever], for the well being of my children, Mother." (*Ibid.*)

Appellant also spoke to his other relatives indicating, "[F]orgive me Alex, um, I have never wanted to harm anybody. I simply, do not want anybody to do harm to me. And, __, but as for my children, I will not take it." (5 CT 1215.) Appellant spoke to his sister Rocio Mendoza and explained, "I, simply want the best for my children, maybe I wrong, but, I simply thought and thought and thought and thought. And I couldn't find another solution, Rocio. I simply don't want them to take away the innocence of my blessed children. They don't deserve that." (5 CT 1217.)

Appellant was crying during parts of the interview and on the phone with his mother and sons. (5 CT 1177, 1182, 1211-1212, 1216, 1219, 1229, 1232, 1235-1236, 1241.) He was also talking to himself. (5 CT 1179, 1196, 1198, 1222, 1339.) Appellant insisted, "[I]'m strong and ah, spiritually I'm strong, I'm strong enough to handle it all." (5 CT 1187.) "I love you, I love myself, I love my kids, I love everybody's kids. I love everybody, I just don't feel love from a lotta people," "That's why probably did what I did, or that's probably what happened, things like that. I don't know. But I can't control what is in me." (5 CT 1190.) "[I]'m not crazy, but I just want to get, I just want to do the best I can to, to live in a better world." (5 CT 1197.)

Detective Grogan asked appellant what he was thinking when he went into the Martinez house and appellant replied, "[I]t was like thinking and not thinking, because I didn't feel good about it, I never felt good about it. . . . I asked for help. I asked for the welfare department for help a long time ago, 6 years ago. 7 years ago I did and they, the person that I ah talked to they would say I can't help you." (5 CT 1234.) "[S]ometimes we hurt people that we're not supposed to hurt. . . . the kids . . . kill their own parents, some parents kill their own children." (*Ibid.*) "[I] never went with the intention of hurtin' nobody. I just wanted to make it stop . . . for people to help me, especially my kids and, and I hurt." (5 CT 1235.) "I just felt like I had to do something to stop the way, to keep those people from harming my kids." (5 CT 1241.) "I love them to death. . . . I tried to do the best for them." (5 CT 1228.)

When asked about Guadalupe being injured, appellant began crying and admitted, "Basically I'm guilty," and explained that he did not see her, "Things happened through the door or whatever," "I wouldn't shoot her, I wouldn't do harm to her," "I loved her and she was, she did care for my kids." (5 CT 1235.) "I took her to the hospital, because I love her. I love

my wife, I love my kids. Please understand that." (5 CT 1275.) Detective Buehler asked, "[W]ere any of these people this morning that were shot, ah did they threaten you at all this morning?" Appellant answered, "Ah, they're like, I always felt like it." (5 CT 1238.) Appellant explained that he felt threatened "psychologically" "mentally" from "the three of them." (5 CT 1239, 1275-1276.) He thought someone might have tried to grab the rifle, but could not recall for certain "because like I said, I, I'm not prepared for that." (5 CT 1276.)

Appellant discussed numerous problems with his in-laws and their involvement in his separation from his wife. Appellant and Cindi got married in 1987 in Nevada and in Mexico after she "ran away" with him. (5 CT 1226.) Appellant tried to have a good relationship with Cindi's family, but her father never supported their marriage. (5 CT 1230, 1254.) Appellant believed that his father-in-law never respected him and that his in-laws were a bad influence on Cindi and his children. (5 CT 1223, 1228, 1245, 1248.) "[I] was always seeing weird things, seeing lots weird things that I didn't like. And, and those real weird things to me, I knew that they were hurting my, my kids. . . . I didn't have the right to stop them from seeing their grandparents." (5 CT 1244.) "[F]rom 6 years ago and then after that little by little I would see things. I always was seeing things that wouldn't be right and it wouldn't seem right, but ah we would talk and then . . . try to workin' [*sic*] ah things out for my kids." (5 CT 1262.) "[I] always confront her and, and she would say no. . . . She will have an attitude with me, . . . and she will try to step on my feelings as much as, as she could in front of my kids." (5 CT 1258.)

A month before the shooting, Cindi told appellant she was having an affair, but did not say with whom. (5 CT 1229, 1261.) Then two weeks before the shooting, appellant's sons told him that Cindi was seeing Chavez, the man living at her parent's house, and that the affair had been

going on for eight to ten months. (5 CT 1257-1259, 1262.) Appellant recalled, "[S]he was arrogant with an attitude she would say, you know what I'm happy." (5 CT 1262.) Appellant had never met Chavez. (5 CT 1257.) Cindi moved out 10 days ago. (5 CT 1243, 1259.) Appellant wanted to continue working on keeping the marriage together for the children. (5 CT 1245, 1249-1250.)

Appellant believed that Cindi's parents were encouraging Cindi to leave him for Chavez. (5 CT 1256.) Appellant discussed how Cindi's parents let Chavez live in their home and remarked, "I mean that's not cold?" (5 CT 1224.) He was hurt and scared that his sons saw Cindi and Chavez hugging and kissing in front of them. (5 CT 1258.) Appellant explained, "[It's] not that she was seeing another man. I was mad with my pain as a man, if you can understand," "[Y]ou have a lotta [*sic*] pain. But I was, I had to ah go through it. And I couldn't go through this ah, and she was hurting my kids so much." (5 CT 1223-1224.) Appellant thought his sons were hurt by neighborhood kids asking about their mother's affair. (5 CT 1258.)

Appellant indicated that the main reason the shooting happened was because Cindi's family was introducing another man into their lives, which could be really bad for their children. (5 CT 1264.) Appellant thought, "They were taking my kids away, together with my wife." (5 CT 1241.) Appellant talked to Cindi and told her "please don't do that to your kids," but she told appellant, "I love this other man. He, he makes me feel like a woman, you never made me feel love." (*Ibid.*) Appellant told Cindi that he made a lot of mistakes, but that he tried his best and, "If [you're] thinking about the kids how can you take them to that house, in your own parent's house," "I mean that's wrong." (*Ibid.*) Appellant felt that he was harming his children by letting them see what he was going through. (5 CT 1242.) Appellant felt that Cindi was being selfish for introducing another man into

their lives. (5 CT 1243.) He explained, "I always ask her, but just gemme [*sic*] a little time. . . . I said man, we can work things out and . . . I know you love . . . your kids." (*Ibid.*)

Appellant expressed remorse and knowledge that what he did was wrong. "[I] feel like I'm protecting them even though its [*sic*] seems otherwise." (5 CT 1182.) "I did my best to protect them and not just the poor little kids in the world are better. . . . bad apple and good apple. . . I keep lying to myself, I'm the good apple 'cause probably I'm not." (5 CT 1182.) "We all need help . . . everybody needs help and sometimes, sometimes we just assume that we're perfect or that we just don't need any help and we just keep going till something makes me sick." (5 CT 1263.) "[T]he cowards that let things gonna happen." (5 CT 1245.) "[I] was one of the cowards. . . . and I never wanted to be a coward." (5 CT 1246.) "[I]'m trying to take responsibility for my acts and at the same time I take responsibility to protect my kids." (5 CT 1247.) "I mean probably did the wrong thing and I'm gonna, you know, before that was a little hope. I probably you know cut the line and everything is gone," "I probably did that, but in, way inside I felt like I'm doing the best for them, but I still feel I'm doing the best for them, because I want them to be okay." (5 CT 1285.) "[I]'m probably gonna be in jail for the rest of my life. I probably get the death penalty." (5 CT 1287.)

Appellant decided to go over to the Martinez home that morning to "try and talk to them for the last time." (5 CT 1264.) Appellant thought his wife's family always ignored him. (5 CT 1265.) Detective Buehler asked, "[D]id you think that they were gonna pay attention to you this morning when you went over there?" (5 CT 1268.) Appellant replied, "Well I just wanted to try," "at the same time I was feeling like ah they probably wouldn't do it, just like my wife." (*Ibid.*) Appellant brought firearms with him because he thought that Chavez and his father-in-law could attack him.

(5 CT 1269-1270.) Appellant knew his father-in-law kept firearms in the home. (5 CT 1271, 1297-1298.) "[L]ike I said I will fight to the death for my kids." (5 CT 1269.) When asked whether he moved the shotgun, appellant acknowledged, "I don't recall things . . . because I just lose my mind and, and at the same time like I said, I take responsibility for things that, that happened." (5 CT 1271.) Appellant knocked on the window until a man yelled, "Get the fuck outta here." (5 CT 1273-1274.) "I just lost my mind at that moment and I just wanna get inside and say hey you men have to talk to me or what's going on." (5 CT 1274.) "This didn't start this morning, this start [a] long time ago." (5 CT 1284.)

> I mean when you carry one problem you, can especially if you don't face it, or you have no ways to fix, to fix it, ah that problem is never gonna go away. [It's] gonna keep adding and adding and adding and [it's] gonna be at the point where you cannot handle it the problem.

(*Ibid.*)

Detective Buehler inquired, "Did you think that maybe you were gonna hurt yourself over there?" (5 CT 1265.) Appellant answered, "I've had thought that before." (5 CT 1266.) Appellant admitted thinking about suicide for "a long time," but explained, "I felt like that my kids needed me sir. That's why I haven't killed myself because my kids don't deserve that," "I don't want the kids to be hurt, especially from me, because I can control that." (5 CT 1223, 1266.)

Appellant recalled what happened during the shooting. He used the hammer to break out the front window, then entered and started shooting. (5 CT 1297.)

> And then when, when felt [*sic*] the first shot he just run away and I didn't know exactly where, like I said I just lost control of myself and I felt like turning and I shouldn't do that, I shouldn't go in there for them __ with firearms, I understand that, but I was just, I was desperate and then I wanted to talk to them and, and that I needed for them to stop what we're [*sic*]

> doing, because I, from bottom of my heart I knew that they wouldn't stop at all, but I still wanted to talk to them and they wouldn't listen, I will do whatever it took.

(*Ibid.*) Appellant explained that he wore a bulletproof vest because he knew his father-in-law had guns in the house and, "I say to myself okay, I love myself. I don't wanna kill myself, but if I'm gonna die, I'm gonna take at least so many people with me." (5 CT 1297-1298.)

> [I] talk to myself a lot, I just said if I come to a point that I have to ... defend myself or ... just do something that probably look not good on me, but do something that is not go back again, like kill somebody I will just kill as much as I can and then they can kill me. Because I don't feel like staying this, this world. It was worse for my kids you know, let things happening . . . and then not still like those things and confronted those things, can't fix, and teaching them that, that other, otherwise. So when this guy run I started shootin' like how you call it, random way?

(5 CT 1298.) "But I didn't want, I was so blind that I, my head, my head was like this, feel like __ ah I said well what's the point and ah I have been pushin' myself to get to this point, well let's go to the end." (*Ibid.*)

Appellant talked about how he accidentally shot Guadalupe. (5 CT 1299-1300.) During the shooting, appellant asked Guadalupe, "I love my kids, why are you letting these things happen. You're, you're too young to know this, but why are you letting these things happen. You know this guy is hurting my kids with my wife. Why are [you] letting this guy live in your own house, how come you didn't tell me . . ." and Guadalupe answered, "I had nothing to do with that." (5 CT 1299.) When he found out that he had shot Guadalupe, appellant apologized, "[Y]ou know that I'm real sorry, please forgive me. I never wanted to hurt you." (5 CT 1306.) Appellant then went next door where Chavez was holding the bedroom door closed. (5 RT 1300.) Appellant shot at the handle, pushed the door in, and then shot Chavez repeatedly as he lay on the floor. (*Ibid.*) Appellant remembered, "I went back over here and I told him why is this

happening, why are you letting things happen like this." (5 CT 1301.) "[H]ow can you respect me and, and he said no, no, he just didn't tell me nothing, he's, he just, I shot him one more time I think." (*Ibid.*)

Appellant heard Alicia screaming in the master bedroom and confronted her demanding, "[H]ow you did that to your own [grandkids], why. And she said I never did nothing I, I talked to her and, and he wouldn't listen, she wouldn't listen to me and I, and I told her well, you should get this guy outta [*sic*] here, so that you knew that they were living like this, get him outta [*sic*] the home." (5 CT 1301.) Alicia insisted that she had wanted to talk to appellant a long time ago. (*Ibid.*) "[A]t that time I got more upset and shot the door on the handle." (5 CT 1301-1302.) Appellant had Alicia come out of the bathroom where she was hiding and continued to talk to her. (5 CT 1302.) "[I] got more upset and that's when I shot her." (*Ibid.*) Appellant admitted, "[W]hen I first started the first ah shot and I said well what's going on over here, . . . I mean they shoulda [*sic*] talked to me." (5 CT 1304.) "They should have talked to me and I shoulda [*sic*] ah, ah, never used a firearm, so just go away or, but I just kept doing it. I just kept doing it, because they were mak[ing] me upset, because they wouldn't talk to me." (*Ibid.*) "[I] think she was so scared . . . but she wanted, I guess to talk to me at that point, but I told her why, why these things happen." (5 CT 1305.)

Appellant brought his own handcuffs to turn himself in at the hospital because he "didn't wanna make a threat to nobody no more." (5 CT 1310.) "[T]he last thing I want [is] somebody to kill me." (*Ibid.*) Appellant thought Cindi put "weird things" in his food. (5 CT 1323.) "[I] would confront [her] and she would say no, you're crazy, you're, I'm not putting stuff in food." (5 CT 1323-1324.) Appellant was never prescribed psychiatric medication for stress, anxiety, or depression and had never been hospitalized in a psychiatric hospital. (5 CT 1331.) "I asked for it and I

never got help from the welfare department." (5 CT 1332.) Appellant denied ever hearing voices. (*Ibid.*) Appellant's brother Albertico had been in a mental hospital for two weeks in 1991. (5 CT 1334-1335.)

When asked whether he thought God would forgive him for anything that he had done wrong, appellant replied, "I think he, he will, but I probably, probably wrong," "I'm not sure." (5 CT 1231.) "I'm believing in God, even though I'm not a church person, even though I don't have a . . . special religion or whatever. I'm Catholic, my, I was raise[d] Catholic." (5 CT 1272.) "My father-in-law is Catholic, he used to go to church a lot and that was confused [*sic*] to me . . . he will be one person at church and a completely different person afterwards, outside." (*Ibid.*) "And that, it was what my kids were picking up and I didn't want that to happen." (*Ibid.*) Appellant boasted, "I'm just not the person that you will just drag anywhere you want." (*Ibid.*)

Appellant maintained that despite shooting Alicia, Chavez, and Lopez, he did not want to hurt anyone. (5 CT 1285.) "I just want to defend the kids . . . I didn't wanna hurt nobody." (5 CT 1248.) "[I] know I did the wrong thing." (5 CT 1309.) Appellant was not scared of what would happen to him, but afraid it will harm his children. (5 CT 1326.) Appellant opined, "[N]obody is clean. And, and the, but the worst thing [is] that most of us won't take responsibility." (*Ibid.*) At the end of the interview, appellant asked to see his children and admitted, "[I]'m not proud of what, of what happened." (5 CT 1336.)

f. Appellant's Phone Call to Huber Jr. on December 12, 2001

On December 12, 2001, appellant called his son Huber Jr. from jail.[14]

---

[14] The parties stipulated that Defendant's Exhibit OO was a true and accurate translation of the telephone call between appellant and Huber Jr. (continued...)

(13 RT 2666.) Huber Jr. was crying and asked, "Dad, why did you do it?" (5 CT 1341.) Appellant answered, "I know my son, I'm not proud of it. I'm not proud of it my son, but, it was something that it had to be done. I want to protect you." (*Ibid.*) Appellant acknowledged, "[I] don't feel . . proud of what I did. But uh, I just trying to do the best for you my son." (5 CT 1343.) "I don't want uh, anybody to take your innocence." (*Ibid.*) Appellant instructed Huber Jr., "Respect everybody and make, make them respect you, okay?" "Remember that, you have to be strong and, and, never do a mess to anybody, but just, they just gotta' [*sic*] do the same to you, okay?" (5 CT 1345.) Appellant told Huber Jr. to tell Cindi that appellant loves her very much. (5 CT 1346.) Appellant insisted, "[Y]our mother loves you very much but, she was just uh, getting bad influence." (5 CT 1348.) "[I]'m going to do even the impossible, to find happiness for all of you," "No, not just for you guys, but for all children of the world." (5 CT 1349.)

2. Prosecution's Evidence

Clinical psychologist Philip S. Trompetter was retained by the district attorney's office to watch Detective Grogan and Detective Buehler's interview to assess appellant's mental state. (13 RT 2668.) Dr. Trompetter watched the interview on a video monitor in a separate room from approximately 9:00 a.m. to 1:00 p.m. (13 RT 2668-2669.) Dr. Trompetter opined that, while appellant appeared to be depressed, he did not see any evidence of psychotic features: no evidence of disorganized thinking, expressed delusions, or hallucinations. (13 RT 2671, 2678.) Appellant was emotional, but Dr. Trompetter "did not see any signs of a major mental

---

(...continued)
on December 12, 2001. (13 RT 2665.) A tape of the conversation was played for the jury. (Defense Exhibit OO; 5 CT 1341-1351; 13 RT 2666.)

illness other than perhaps a depression." (*Ibid.*) Appellant made a number of comments that suggested he was suspicious and distrustful and he appeared to be very distraught, sad, and upset. (13 RT 2672.) Several times appellant appeared to be hyperventilating or praying, while at other times he was very calm. (13 RT 2673.) Dr. Trompetter noted, "[I]t didn't strike me as unusual that someone, given the circumstances of what had occurred in the preceding 12 hours and I guess for weeks and perhaps months before that, would have been emotionally distraught, and that's the way I interpreted what I was seeing." (*Ibid.*)

The following day, Dr. Trompetter went to the jail to interview appellant. (13 RT 2675-2676.) Appellant initially agreed to talk and stated that he never had hallucinations. (*Ibid.*) Appellant denied suicidal thoughts. (13 RT 2677.) Dr. Trompetter asked appellant if he had ever been psychiatrically hospitalized and appellant replied that he was "mentally strong." (*Ibid.*) After a couple of questions, appellant said he was not feeling well and asked to continue the conversation the next day. (13 RT 2676.)

Dr. Tropetter agreed that the subsequent jail reports from December 15, 2001, and December 17, 2001, appeared to be evidence of appellant having hallucinations. (13 RT 2693-2695.) It was possible that appellant was not having hallucinations on December 12, but was having them three to five days later. (*Ibid.*) However, notes from jail psychiatric nurse Sean Ryan on December 14 and 18 reported no psychotic markers, no evidence of delusions or hallucinations. (13 RT 2696-2699.) Dr. Trompetter noted that while mental states can vary over time, "Usually you don't see changes from hour to hour." (13 RT 2680.) "[M]ajor depression, typically, if diagnosed, it has to last from at least two weeks. . . . Usually don't see people, unless they've just been medicated, resolve some symptoms within hours." (13 RT 2680-2681.) Dr. Trompetter further observed, "[W]hen

someone is in an active phase of a psychotic disorder, [and] they are not being treated for it, you generally do not see a resolution or a remission of those psychotic symptoms quickly." (13 RT 2681.)

Deputy Sheriff Don Ewoldt was assigned to the jail unit where appellant was housed. (13 RT 2708.) Deputy Ewoldt had 25 to 40 eight to ten hour shifts in appellant's cell block with ample opportunity to observe and communicate with him. (13 RT 2708-2709.) Deputy Ewoldt encountered no problems communicating with appellant, who usually spoke Spanish to Spanish speakers and "broken English" to non-Spanish speakers. (13 RT 2710.) Appellant was generally quiet, had no problems interacting with fellow inmates, and needed no clarification on instructions. (13 RT 2710, 2714.) Appellant showed an interest in soccer when it was on television. (13 RT 2710.) On several occasions, appellant used the call button in his cell to request a phone call or recreation time and lied when asked if he had already received such benefits, which is common inmate behavior. (13 RT 2712, 2714.)

a. Appellant's Jail Phone Calls

Froylan Mariscal, an investigator with the district attorney's office, reviewed approximately seven or eight of appellant's jail phone calls.[15] (13 RT 2732-2735.) Mariscal took several phone numbers for relatives or people associated with the case and searched for calls appellant placed to those numbers. (13 RT 2733, 2736-2737.) Appellant spoke frequently to his children and often talked about soccer scores. (13 RT 2735.)

[15] The calls were in Spanish, which Mariscal speaks fluently. (13 RT 2733-2734.)

On July 28, 2004, appellant called and spoke with his sister-in-law Pati.[16] (People's Exhibit Nos. 141 and 141A; 4 CT 1099-1116; 13 RT 2738-2750, 2754-2757.) Appellant told Pati, "[T]here are many bad things being done against my children" and asked her to take care of his sons. (4 CT 1100.) Appellant was hoping to talk to his children. (4 CT 1113.) Appellant admitted, "I made so many mistakes; even then I wanted to fix things up. With all my good intentions to fix things up. But I never knew how, [t]hat is [okay]. I want to pay and I would like to accept [whatever] comes my way." (4 CT 1101.) Appellant did not want to see his children suffer for the wrongs he committed. (*Ibid.*) Pati replied that appellant's children were being well taken care of. (4 CT 1100-1101.) Appellant said that his children were not talking to him and opined that Cindi was trying to keep him from talking to them. (4 CT 1102.) Appellant offered to forgive Cindi's family. (4 CT 1102-1103.)

Appellant talked about Cindi's relationship with Chavez and insisted they were not separated at the time. (4 CT 1103.) Pati explained to appellant that Chavez was going to leave because he knew Cindi "had many problems" with appellant. (4 CT 1105.) Appellant thought Cindi and Chavez were living together and having a sexual relationship. (*Ibid.*) Pati replied that it was not happening at her parent's house and appellant retorted, "They, why did my children tell me that they were hurt a lot when they would hug, and kiss." (*Ibid.*) Appellant continued,

---

[16] Beverly Valdivia, a clerk and interpreter with the Modesto Police Department, listened to the tape recording of this phone call and made numerous corrections to the transcript that had been prepared by someone else. (13 RT 2738-2750, 2754-2757.) A tape recording of the phone call was played for the jury. (People's Exhibit No. 141; 4 CT 1099-1116; 13 RT 2741-2757.)

> Because they used to tell me, 'Daddy we do not feel ok with mammy, we want to be with her because she needs us, because, because what she is doing is not right.'
>
> And, when I could not take it [anymore], was precisely that day. When, in front of my children, Cindy told me 'Huber you are a good father, protect my children, take care of them, I know you are going to do it, because I am never going to see them again.'

(4 CT 1106.) Appellant insisted, "I did nothing wrong." (*Ibid.*) Appellant recalled that he tried to talk to Alicia and Jose, but they always avoided him. (*Ibid.*) Appellant explained that the way he sees it, he did not take the lives of three innocent people. (4 CT 1107.) He opined, "The way I see it, we all took it. And, it looks like we are never going; no one is going to accept it." (*Ibid.*) Appellant acknowledged, "I did not have any right to hurt [anybody]," but insisted that other people did not have the right to harm him either. (4 CT 1108.)

Pati told appellant, "The only person who is lying, trying to say that he is crazy . . ." (4 CT 1110.) Appellant interrupted, "I am not crazy!" Pati replied, "It is you, your attorneys that is what you are. The only thing." (*Ibid.*) Appellant answered, "Well, that is the attorney's and the district attorneys and of all of us's game . . . Us . . . because we agreed. We are playing with that. I am telling you." (4 CT 1110-1111.) Pati told appellant that she knows he is sane and, "I knew you, I talked to you before, I talked to you after and I know that you are in your 7 [*sic*] senses," and that he was now hurt because he could not see his children. (4 CT 1111.) Appellant agreed, "I know, I know." (*Ibid.*) Pati insisted that appellant was always welcome at her parent's home, but appellant replied, "Yes, . . . to be humiliated," "So they could laugh at me (to be the laughing stock)." (4 CT 1112.)

Appellant opined, "[I]f there is so many people to judge me and condemn me . . . and execute me . . . what is going to happen is going to happen . . . why were these same people not there to protect my children? Why not?" (4 CT 1114.) Pati inquired, "Protect them from what?" (*Ibid.*) Appellant explained, "Pati, my children were being killed; they were robbing [*sic*] their dignity, that smile that you were talking about, that childhood." (*Ibid.*) "[W]hat I wanted was to help my children, I still want to help them, right not. . . . No one here decides who dies, nor how to die, neither when to die. Only God." (*Ibid.*)

On November 9, 2005, the day after the jury found appellant guilty of murder in this case, he called and spoke with his sister Rocio, his brother Albertico or "Tico," and his sons Huber Jr., Ivan, and Angel.[17] (People's Exhibit Nos. 142 and 142A; 5 CT 1117-1161; 13 RT 2757-2758, 2762-2763.) Appellant discussed the jury verdict and informed Rocio, "[J]ust like I expected, everything turned out, they found me guilty of everything and . . . and, like 6 or 7 charges and, according to them, maliciously, and that I premeditated everything and . . . just a bunch of racists." (5 CT 1118.) Appellant continued,

> Then with all that . . . now that they found me guilty of all that, now it's sure for the death penalty and like I tell you . . . they're not going to doubt it. They're not going to . . . doubt themselves at all in giving it to me and . . . that, that according to them I was sick when all that happened . . . it's like I tell you, it's just a bunch of shit on their part, it's just a story that, they

---

[17] Valdivia transcribed this phone call. (13 RT 2757-2758.) A tape recording of the phone call was played for the jury. (People's Exhibit No. 142; 5 CT 1117-1161; 13 RT 2763.) The court gave the jury a cautionary instruction that, "It contains apparently some statements by the defendant which are critical of counsel and the Court and even you. You are not to consider that for any purpose in determining your verdict as to whether the defendant is or is not legally sane in this case." (13 RT 2762.)

> they are according to them helping me and all of that. All the attorneys and in [*sic*] everyone is in agreement.
>
> [¶.] . . [¶]
>
> They are all in agreement and like I tell you, they know that's how it happened, I was sick and all that . . . and they don't want to simply admit it, they are just playing a game so that . . . so you guys will think, I think, that we all think they are supposedly doing things like they are supposed to be done.

(*Ibid.*) Appellant maintained, "Now it's going to the jury now the, the penalty phase to, to see if I was sick or not at the time that this all happened, that like I tell you, it's all a farce now." (5 CT 1119.)

Appellant asked Rocio whether she saw "Chele" and observed, "Well, on one hand maybe it's, it's better that this happens because like I tell you, if, if, they didn't give me the death penalty and all of that, he, he, might go look for you guys and, and he might do you harm . . . Because like I tell you, those cowards . . . pay." (5 CT 1120.) "Me, on my part, I'm scared and that's why I'm, I am desperate I think and that's why, that's why I tell them idiotic things." (5 CT 1121.) Rocio talked about a video and CD that the district attorney had and appellant explained, "Yes, but that's for the next show, when, that supposedly my attorneys saying that I was sick and, and the one that I wasn't and, and that's like I tell you, it's just a show, nothing else." (5 CT 1125.)

Appellant then spoke with Huber Jr. and asked whether Cindi told him "that they found [him] guilty of all the charges," and, "with that, that's make it more certain that they are going to give me the death penalty." (5 CT 1127.) Appellant told Huber Jr., "[S]ometimes I can't contain myself or nothing and like I tell you, thank God I am put away here . . . God is big and, and, if I can't contain myself, he will contain me here because I am locked up or however it is and, on that side like I tell you, that is fine and God is taking care of all of us." (5 CT 1128.) "[T]he only thing I want is

for you guys, to forgive, my son, yes?" (5 CT 1129.) Appellant inquired, "[D]o believe that you guys will be able to forgive, the three of you and be in peace?" Huber Jr. replied, "Yes." (*Ibid.*) Appellant instructed his son not to plead to the jury because they were going to give him the death penalty regardless and "they are not the owners of my life, my son, the only ones, the only owner of my life is God." (5 CT 1131.) Appellant asked Huber Jr. for forgiveness and admitted, "I am wrong my son because I have hurt you guys a lot . . . I know that it has been without trying to do it but at the same time, I'm wrong and I don't know how . . . to ask you guys for forgiveness." (5 CT 1143.)

Appellant asked his son Ivan whether Cindi told him "that they found me guilty of everything," and advised, "Yes? Oh, okay, my son. And the most definite thing is that they are going to ask for the death penalty and they are not going to believe that I was sick when, when this all happened . . . I was sick when all that happened because I don't know that I was going to bring harm to you guys. That is 100% for sure." (5 CT 1134.) Appellant continued, "They are saying that I planned everything and who know[s] what, then me, my son, all I want is for you guys to be in peace and don't pay attention to anything, simply ask God and trust in God that everything will come out good no matter what you guys see or hear." (*Ibid.*) Appellant insisted, "Because everything is planned out my son but like I tell you, because of them, they have been planning for the last four years, because like I tell you it's like the hypocrite that says, you don't have the right to kill anyone but we have the right to kill and we are going to kill him by condemning him to the death penalty and who knows what else." (*Ibid.*) Appellant instructed Ivan, "I don't want you to go there to plead with those people to save me and stuff, because it's not going to be like that my son, they are, they are going to do what they want to do, they are just

playing a show . . . don't fall into their game my son, you have faith in God and we're going to be fine no matter what happens." (5 CT 1135-1136.)

Appellant talked to Rocio about the trial and observed, "[T]he words of so much education and so much intimidation . . . they're just a bunch of, of arrogant, stupid, blind people that, just cowards. Just like I was a coward and I continue to be a coward when, when I fall into their game." (5 CT 1147.) Appellant suggested,

> God already knows it I tell you and, and, to him, like I tell you, we are all the same and we are all his sons. We be what we are, and do what we do, because here like I tell you, we see ourselves as we want. For example, if I was O.J. Simpson or if I was President Bush, I could kill for example . . . maybe a million people and, and, with my fame and power that I have, they would find me innocent because I did it accidentally, I made a mistake. It was something that didn't . . . . well it was an accident. And the judgment is that they find me not guilty because of that. But because I'm not like that . . . um, then being a nobody, then I'm a monster.

(*Ibid.*) Rocio asked, "Are they paying those men or what?" and appellant explained that everyone who works is paying for them through taxes. (5 CT 1149.) Appellant observed, "Later, it's going to come out in the newspaper that, they spent so many millions of dollars in my trial and all of that . . . but that, they were well spent because justice was served." (*Ibid.*) He continued, "[S]o, justice was served and, and the public now feels safe, they can now walk at night and, without any doubt, and they can uh, continue to deceive, women to men and men to women, and, do tragedies to innocent children because at the end the law will protect them and, and serves justice." (5 CT 1150.)

Finally, appellant spoke with his brother Tico and informed him, "They found me guilty of all the charges. And they're . . . going to try to screw me," "everything they are doing is just a show . . . to justify their

actions." (5 CT 1152.) Appellant then discussed the verdict and the upcoming sanity and penalty phases of the trial:

> MENDOZA: Right now, according to them, they found my guilty of about 6 or 7 charges. . .
>
> TICO: Yes.
>
> MENDOZA: That supposedly, premeditated, malicious, I planned everything and that they have already found me guilty and ... and with that they can give me the death penalty. Now the next part comes that, where they are going to say, my attorneys and the doctors[,] that I was sick, that, that was what happened, otherwise nothing like that would have happened.
>
> TICO: Clearly.
>
> MENDOZA: And, and, and, that, them over there not. Then, like I tell you, but for sure is that they are going to find. . . that I was fine and all that, because you can see them there how the racists are, the jurors and all of them, they wash their hands with each other.
>
> TICO: That's right, they're all bought.
>
> MENDOZA: Yes, yes. Then for the, after that, if they find that according to them I was okay. They will follow with the next one where I will get the sentence and . . . the most sure thing is that they will give me the death penalty or they will simply give me life in prison because . . . the good hearts over there of Cynthia and, her family are going to tell them, we forgive him the life because, because we are concerned for his children and blah, blah, blah and the usual story. . . .

(5 CT 1153.) Appellant concluded, "They talk about premeditation and who is premeditating? Who has been planning my death for the last four years? And they say that [it] is not right and they are killing, legally. They are the licensed assassins." (5 CT 1157.)

3. Defense Rebuttal

a. Dr. Robin Schaeffer

The defense recalled Dr. Schaeffer in rebuttal. He diagnosed appellant as suffering from major depressive disorder with psychotic features. (14 RT 2779.) This diagnosis was consistent with jail reports that appellant appeared to be having hallucinations in the days following the murders. (*Ibid.*) The diagnosis was also consistent with appellant's courtroom behavior, having his head down in his lap and crying during portions of the trial. (*Ibid.*) Appellant showed symptoms of a psychotic thought disorder in which he becomes excessively abstract. (14 RT 2780.) Appellant is very emeshed with his children, which is an example of psychotic loosening of boundaries. (14 RT 2780-2781.) Appellant showed psychotic tangentiality, which is an indicia of independent psychosis. (14 RT 2781.) Appellant's paranoid belief that someone was trying to harm his children was the basis of his psychosis. (*Ibid.*) Appellant delusionally believed that the killings were justified and necessary to protect his children. (14 RT 2782-2783.) Dr. Schaeffer opined that appellant could not distinguish between right and wrong as to his acts at the time of the crimes due to his mental illness. (14 RT 2783-2784.) Appellant realized that "in the eyes of the law killing is wrong," but was incapable of distinguishing right from wrong under his own delusional system. (*Ibid.*)

Dr. Schaeffer's reasoning in determining whether appellant was insane differs from Dr. French's reasoning in two ways: first, Dr. Schaeffer disagreed with Dr. French's belief that appellant's concerns for his children did not show appellant was delusional; and second, 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. (14 RT 2786-2789.) Appellant's

belief that he needed to protect his children was delusional in the context of what he felt he had to do to protect them. (14 RT 2786-2787.) Dr. Schaeffer explained that in his experience, delusional symptoms of psychotic disorders come and go and vary in severity over time. (14 RT 2788-2790, 2799.) This opinion is supported by scientific experimental studies. (*Ibid.*) Jail deputies might have observed appellant experiencing auditory hallucinations whereas the nurses did not because deputies see inmates more frequently and mental states vary over time. (14 RT 2790-2791.)

Dr. Schaeffer forensically evaluated appellant over 26 meetings, but did not treat him. (14 RT 2795.) On March 29, 2005, Dr. Schaeffer asked appellant why he killed these victims and appellant replied that he did it out of rage, fear, and despair. (14 RT 2794.) Appellant believed that his children would be physically harmed or destroyed. (14 RT 2795-2797.) Appellant's psychosis was emerging more and more at the time of the murders, but started beforehand. (14 RT 2798-2799.)

Appellant's brother-in-law Joaquin Santi Bañez lives in Morelia, Michoacan, Mexico. (14 RT 2802-2803.) Bañez first met appellant in 1975 when appellant was 11 years old and they both lived in Coalcoman, Michoacan, Mexico. (14 RT 2803.) Bañez is six years older than appellant and was teaching elementary school. He was like an older brother to appellant. (14 RT 2803-2804.) Bañez last saw appellant in 1998 in Morelia when appellant visited his home. (14 RT 2804-2805.) Appellant had poor personal hygiene and was not eating or sleeping, which was very different than how he used to behave. (14 RT 2805-2807.) Appellant did not want to play with Bañez's children or help people; he seemed like a different person. (*Ibid.*) Bañez thought that appellant was "very depressed and quiet." (14 RT 2806.) Appellant did not trust anyone and seemed very withdrawn. (14 RT 2807.)

b. Dr. Pablo Stewart

The defense also recalled Dr. Stewart in rebuttal. He pointed out similarities and differences between his reports and/or testimony and that of Dr. French, Dr. Weiss, Dr. Trompetter, and Dr. Schaeffer. (14 RT 2826-2842, 2856-2862.) Dr. Stewart had never heard of the term "character illogical inadequacy" used by Dr. French. (14 RT 2826-2827) Dr. Stewart testified that any psychological weakness on appellant's part had nothing to do with his diagnosis or the offenses. (14 RT 2827-2829.) While major depressive disorder with psychotic features persists over time, its presentation varies over time. (14 RT 2829-2830.) The disease's inconsistent presentation was seen when Guadalupe saw appellant appear to return to the person she had known before on the car ride to the hospital. (14 RT 2830.) The auditory hallucinations seen by jail deputies and not jail nurses, also showed the "waxing and waning" qualities of appellant's psychotic features. (14 RT 2831-2832.) Over the numerous meetings Dr. Stewart had with appellant, appellant's mental condition varied. "At times on given days, he did look a little better . . . If we would have a superficial conversation, he appeared relatively intact . . . but then if you got a little deeper or came back and saw him at another time, then he was a lot worse." (14 RT 2833.) Dr. Stewart believed that Dr. French's opinion on whether appellant was psychotic would have changed if he had seen appellant over an extended period of time. (14 RT 2834.)

Dr. Stewart saw appellant exhibiting signs of a major depressive disorder, including obsessive ruminations, tearfulness, and brooding during interviews and in the courtroom. (14 RT 2835.) Based on reports from his relatives, Dr. Stewart believed appellant exhibited similar symptoms of depression for years before the murders. (14 RT 2836.) At their first meeting, appellant asked Dr. Stewart whether he was going to perform the lethal injection after counsel had already explained why Dr. Stewart was

there to see him. (14 RT 2837.) Dr. Stewart thought this was a product of appellant's mental illness. (14 RT 2838.) One feature of psychosis is the inability to think abstractly, which is something appellant was unable to do throughout the years Dr. Stewart meet with him. (14 RT 2858.) Dr. Stewart firmly believed that appellant did not appreciate the difference between right and wrong at the time of the crimes because he was suffering from major depressive disorder with psychotic features. (14 RT 2841, 2862.)

Dr. Stewart opined that "sometime after the shooting, maybe around the time where he got the phone call from the son or in that general area, that he started to appreciate what he had done and what occurred." (14 RT 2864.) Dr. Stewart was not sure whether appellant knew what he had done was wrong when he got into his van and called Cindi to tell her that he had just killed her mother. (*Ibid.*) The prosecutor asked whether appellant was able to distinguish right from wrong when he told Huber Jr. on the phone, "I just did something stupid." Dr. Stewart acknowledged, "Well, again, based on the phrase that you just said, it appears to me that he's starting to appreciate that stuff." (*Ibid.*)

At the conclusion of the sanity phase, the jury found that appellant was sane at the time of the murder. (14 RT 2994.) Thereafter, the penalty phase commenced.

C. Penalty Phase

1. Evidence in Aggravation

Alicia and Jose Martinez had six children (from oldest to youngest): Maria Pulido, Cindi Menzoda, Patricia "Pati" Gonzalez, Jose Martinez Jr., Vanessa, and Guadalupe. (15 RT 3021, 3045.) The family frequently got together for holidays, barbeques, or "for any little thing." (15 RT 3064.) Alicia was very active in Saint Jude's Catholic Church in Ceres. (15 RT

3024, 3033, 3048.) She went to weekly services and participated in charitable programs, including sponsoring an impoverished child in Mexico. (15 RT 3024-3025, 3048-3049.) Alicia visited ill church members so they could participate in the sacrament at home when they were unable to come to church. (15 RT 3049-3050.)

Patricia thought her mother was a great role model and misses everything about her. (15 RT 3025.) Patricia was working two jobs in December 2001 and Alicia was watching her three-year-old son Israel every day. (*Ibid.*) Alicia and Israel had a special bond. (*Ibid.*) Israel stopped talking for over a year and had to go into speech therapy after his grandma was murdered. (15 RT 3026.) Israel frequently had dreams about Alicia. (15 RT 3027.) Jose asked Patricia and her family to move into the house on Pelham after it was repaired because he had to go to work and Guadalupe could not be alone at the house. (15 RT 3028-3029, 3074.) Patricia moved in to help drive Guadalupe to therapy. (*Ibid.*) Patricia's family continues to reside at the home with Jose and Guadalupe. (15 RT 3029.) Patricia visits Alicia's grave every weekend. (15 RT 3030.)

Maria was married with three daughters. (15 RT 3046.) They visited Alicia and Jose's house almost every weekend, sometimes twice a week. (*Ibid.*) Maria was close with her mother and they used to talk on the phone daily. (15 RT 3046-3047.) Alicia was close to Maria's three daughters, especially the oldest, Jessica, who was Alicia's oldest grandchild. (15 RT 3047, 3056.) Alicia and Jessica had been planning Jessica's quincinera when Alicia was murdered. (*Ibid.*) Alicia had promised to buy a special ring for her granddaughter. (15 RT 3048.) After she was murdered, Maria and her husband bought the ring and Jessica cried when they gave it to her because she missed her grandma being at her quincinera. (*Ibid.*) Jessica was "really upset and angry," but "she's doing better as the years go by." (15 RT 3056.) Maria's youngest daughter Melissa frequently asked where

her grandma was and why God took her grandma. (15 RT 3055.) Maria recalled, "And she's always asking, 'Well, how come I can't be like the other kids? How come I can't have a grandma?'" (15 RT 3056.) Maria misses her mother. (15 RT 3047.) Before she died, Alicia urged Maria to attend church every Sunday, but Maria often failed to do so. (15 RT 3053.) After her mother's death, Maria has tried to attend church services every Sunday with her daughters. (15 RT 3054.)

Guadalupe remembered that her mother liked singing and used to talk to her plants to make them grow. (15 RT 3068.) She had a number of pets, birds, dogs, and cats, and took care of them. (15 RT 3038, 3068.) Alicia's favorite dog died shortly after she was murdered. (15 RT 3069.) Alicia loved to cook and was always offering food to visitors. (15 RT 3050, 3069.) She woke up early to make lunch for Jose before he left for work. (15 RT 3069.) Alicia regularly sent money and clothes to her disabled sister Clemencia in Mexico. (15 RT 3050-3051.) Guadalupe's favorite memory of her mother was her quincinera on October 7, 2000. (15 RT 3070.) Guadalupe misses everything about her mother. (15 RT 3082.)

Immediately after the murders, Guadalupe felt a lot of pain, both from being shot and from watching her mother get killed right in front of her. (15 RT 3072.) When she was released from the hospital, Guadalupe went to live with her sister Vanessa while her home was repaired. (15 RT 3073.) It was difficult for Guadalupe to go back home. (*Ibid.*) She recalled, "Every time I was there everything kept on going through my head again, everything that happened. . . . I would just sit there and cry. I didn't like being there." (15 RT 3074.) After the murders, Guadalupe did not like being along or sleeping by herself. (15 RT 3072, 3075.) She slept with Patricia and her husband for about a year after the murders. (*Ibid.*) She attended counseling. (*Ibid.*) Guadalupe never went back to her high school "because everyone knew what had happened." (15 RT 3073.) She

remembered, "I thought everybody would stare and look at me so I didn't want to go back. So I had to start going to a private school." (*Ibid.*) Guadalupe is sad that her mother will not be there for her wedding or when her baby is born. (15 RT 3075.)

Jose and Alicia were married for 33 years. (15 RT 3036.) Alicia took care of the family. She enjoyed cooking and animals. (15 RT 3038.) They used to be active in church together, but Jose has not attended services regularly since Alicia was murdered. (15 RT 3037-3038, 3068.) Jose attended the special mass held on the anniversary of Alicia's death to honor her memory. (15 RT 3039.) Jose no longer celebrates Christmas. (*Ibid.*) In 2002, Jose and Guadalupe went to Mexico for Christmas to "get away from everything for a little bit." (15 RT 3055, 3076.) Jose has nightmares about what happened. (15 RT 3039.) Jose misses Alicia every day. (*Ibid.*) Maria observed that her father's demeanor changed after Alicia was murdered. (15 RT 3057.) He was "really depressed" and "very quiet." (*Ibid.*) Jose hung three foot-long crosses in the house, one where each body was found. (15 RT 3059-3060, 3076-3077.) Jose continues to see Cindi's and appellant's sons. (15 RT 3041.) Jose loves his grandchildren; they do not talk about appellant. (*Ibid.*)

Patricia met Chavez through her brother-in-law, who moved with Chavez to Modesto for work. (15 RT 3022.) Chavez lived with Patricia's brother-in-law until they got into an argument wherein Chavez intervened to protect Patricia's mother-in-law from being hit by her brother-in-law. (*Ibid.*) Afterwards, Chavez moved into the Martinez house. (15 RT 3023.) Patricia saw Chavez at her parent's house and noticed that he was good with children. (*Ibid.*) Patricia trusted Chavez with her children and saw that he and Cindi's sons seemed to enjoy each other's company. (15 RT 3024.) Patricia never saw anything to suggest that Chavez was involved in drugs. (15 RT 3023.) Chavez was a caring person. (15 RT 3031.)

Guadalupe recalled that Chavez was "really nice" and "always very helpful." (15 RT 3070.) Guadalupe also thought Chavez was good with kids. (15 RT 3079.)

Maria recalled that her cousin Carlos Lopez was "a really nice, friendly person always willing to help everyone else." (15 RT 3045.) Lopez was always helping out around the house and he loved children. (15 RT 3052, 3070, 3080.) Lopez gave Alicia money to help her out. (15 RT 3060.) Guadalupe recalled that Lopez used to drive Alicia to run errands because she could not drive. (15 RT 3070.) Lopez worked with Jose. (15 RT 3032, 3036.) Lopez and Jose were very close and often spent time together. (*Ibid.*) Jose and Lopez went to Mexico together on vacation. (15 RT 3037.) After Lopez's death, Jose had to change jobs and took a $20 per hour pay cut. (*Ibid.*)

Each year, on December 12, the family gathers and goes to a special mass to honor Alicia, Lopez, and Chavez on the anniversary of their deaths. (15 RT 3056, 3064, 3067.) The family visits the cemetery and says a rosary. (*Ibid.*) December 12 is also a religious holiday that celebrates Saint Guadalupe. (15 RT 3064-3066.) Guadalupe was named after the saint and used to celebrate the day with food and presents. (*Ibid.*) After the murders, Guadalupe no longer celebrates the day of her saint. (15 RT 3067.) She acknowledged, "I really don't like going out that day," "The only place we go is to church." (*Ibid.*)

2. Evidence in Mitigation

Joaquin Santi Bañez, appellant's brother-in-law, recalled that as a young boy appellant was very optimistic and curious about places outside the small Mexican village where he was from. (15 RT 3083-3086.) Bañez and appellant were both interested in soccer and appellant would follow Bañez when he went to soccer training camps. (15 RT 3084.) Appellant sang and played guitar. (15 RT 3085.) After appellant moved to the United

States, he kept in contact with Bañez through telephone and letters. (15 RT 3086.) Appellant wrote letters and sent money when Bañez had a drinking problem. (15 RT 3087.) Appellant returned to Mexico to visit Bañez, his sister, and their four children. (15 RT 3086-3087.) Appellant brought gifts for the children and was very playful with them. (15 RT 3088.) Bañez's children love appellant. (*Ibid.*) He believes appellant has a special gift with children. (15 RT 3089.) Appellant is important to Bañez. (*Ibid.*) Bañez opined, "This is not Huber, the one I knew. It's not him." (*Ibid.*)

Blanca Santi Bañez, Joaquin Bañez's wife and appellant's older sister, grew up with appellant in Mexico. (15 RT 3173-3174.) The family was very close and Blanca had many good memories from their childhood. (15 RT 3174.) All of the children worked in the fields and lived together with their parents in a small one-room house. (15 RT 3174-3175, 3179.) The house did not have heating or electricity, but had running water. (15 RT 3179-3180.) The family used an outdoor toilet and cooking was done over a fire. (*Ibid.*) Appellant was always an excellent brother. (15 RT 3177.) Appellant and Blanca used to milk a cow and appellant consoled Blanca when she tripped one time and spilled her glass of milk. (15 RT 3176-3177.) Appellant never caused problems at school and wanted to help get his family out of poverty by getting an education and working hard. (15 RT 3177-3179.) After appellant moved to the United States, he began working and sent money back to Mexico to help his family. (15 RT 3177.) Appellant last visited the Bañez family in 1998, bringing toys and clothes for the children. (15 RT 3183, 3185.) Blanca recalled that appellant was acting unusual. (15 RT 3182-3184.) He was very mistrusting and seemed unhappy. (15 RT 3184.) Blanca remembered, "I noticed something, something different about him. And I knew that something was wrong," "[I] would ask him what was going on, and he would say nothing. But I did know that there was something wrong with him." (*Ibid.*) Appellant looked

"Very pale. Very pensive. Like he wasn't eating." (15 RT 3185.) Appellant left abruptly in the middle of the night, in secret and without explanation. (15 RT 3184-3185.) Blanca loves appellant and emphasized, "My brother has been a great person; and in the name of all my family, forgive my brother, the Martinez family. This has also been a great sorrow for all of us." (15 RT 3186.)

Appellant's other siblings also testified. From Mexico, his older brother Jorge Mendoza and his older sisters Elva Maricela Mendoza Novoa and Griselda Margarita Mendoza Novoa. (15 RT 3090-3091, 3152-3153, 3189-3190.) From Modesto, his younger sisters Rocio Mendoza and Elsa Mireya Vivanco. (15 RT 3163-3164, 3203.)

Jorge Mendoza, appellant's older brother, still lives in Coalcoman, Michoacan, Mexico, the town where appellant grew up. (15 RT 3090.) Jorge knows the Martinez family and sees Alicia's sister Clemencia regularly. (15 RT 3091.) The families have a history together and there are multiple "compadre" relationships between various relatives. (15 RT 3091-3092.) Jorge explained, "In Mexico we call compadre if we take a child to baptism or as a confirmation and the godfather acquires the responsibility as a father." (*Ibid.*) Appellant was always happy as a child and loved sports. (15 RT 3093.) The family was poor, but appellant was generous and always wanted to give even what he did not have. (*Ibid.*) Appellant and his brothers all worked in the fields to help their father support the family. (15 RT 3096.) Appellant helped take care of Jorge's children when Jorge went away for work. (15 RT 3097.) Appellant aspired to immigrate to the United States and to help his siblings move there as well. (15 RT 3098.) After he immigrated to the United States, appellant kept in contact with Jorge by telephone. (*Ibid.*) Jorge thought appellant was "A very responsible father, always close to his children." (15 RT 3098-3099.) When asked how he felt about his brother, Jorge replied, "I feel, right now,

at this moment, bad. I would never have wanted to be in this situation. I can't go any longer." (15 RT 3099.) He concluded, "My brother was always and will always be the best for his children, for my brothers, for my mother. And I know that he loves his wife's family, Cynthia's." (15 RT 3100.)

Elva Maricela Mendoza Novoa, appellant's older sister, also lives in Coalcoman. (15 RT 3152-3153.) Elva is an elementary school teacher and has two children. (15 RT 3153.) As the oldest daughter, Elva was responsible for taking care of her younger siblings. (15 RT 3154.) Elva was like both a sister and a mother to appellant, who was seven years younger than her. (15 RT 3153-3154.) The Mendoza and Martinez families have a close association in Coalcoman; they lived near each other and helped each other. (15 RT 3154.) Appellant used to help Alicia's sister Clemencia by bringing her things and taking care of her. (15 RT 3155.) Appellant helped others who "were older or needier than him," and was "very charitable with the children." (15 RT 3157.) Growing up, the Mendoza kids all worked to help support the family. They were very poor, but very happy. (15 RT 2156.) Elva recalled that appellant never complained about being poor, but "would just say that we needed to fight, to go forward to help our parents to progress." (15 RT 3157.) After appellant immigrated to the United States, he urged his siblings to immigrate as well so they could all be together. (15 RT 3158.) He kept in contact with Elva and told her that with sacrifice the children could get an education, which was necessary for them to go forward. (*Ibid.*) Appellant is very important to Elva. (15 RT 3159.) When asked "How do you feel about your brother?" Elva replied, "I'm sad and at the same time I'm happy because I can see him, and I would like to be with him and with his family forever." (*Ibid.*) Elva went with her sisters and their children to visit appellant in jail. (15 RT 3160.) She opined, "It seems impossible for

me to see him where he is at because throughout his life he was so good with everyone, with children, with disabled people." (15 RT 3160-3161.)

Griselda Margarita Mendoza Novoa, appellant's other older sister, lives in Coalcoman and teaches elementary school like Elva. (15 RT 3189-3190.) Clemencia is one of Griselda's "comadres" and lives next door. (15 RT 3190.) As a child, appellant was very playful and charitable to everyone. (15 RT 3192.) The family lived in a very small humble house, but were "very united." (15 RT 3191-3192.) Appellant never liked violence; he would walk away from a fight. (15 RT 3192.) Appellant wanted to study and become educated to "go forward." (15 RT 3193.) He never complained. He began seminary, but was unable to continue due to lack of resources. (*Ibid.*) Appellant was an altar boy. (*Ibid.*) Griselda visited appellant in the United States several times and thought he was a good father. (15 RT 3193-3194.) Griselda's children always loved appellant very much. (15 RT 3194.) The last time Griselda saw appellant was when he visited in 1998. (15 RT 3195.) "But it wasn't him anymore. He was no longer my little brother that I knew from before." (*Ibid.*) Griselda recalled, "He would always be looking around like he was running from someone. You would offer him a meal, he didn't want to. At night, he would pace around. He would hit his head, and his lips were pale. During the time that he was in Mexico, he didn't eat anything." (*Ibid.*) Griselda visited appellant in jail with her sisters and their children. (15 RT 3196.) Appellant talked to the children and told them that no matter what happened, he loves them very much. (15 RT 3196-3197.) They sang a song and prayed. (15 RT 3197.) Griselda loves appellant, asked the Martinez family for forgiveness and insisted that appellant was "very ill" "when this tragedy happened." (15 RT 3197-3198.)

Rocio Mendoza and Elsa Mireya Vivanco, appellant's younger sisters, were born in Coalcoman, but immigrated to the United States in 1985

(Elsa) and 1988 (Rocio) with appellant's help. (15 RT 3163-3164, 3203, 3209.) Before leaving Mexico, Elsa was in college and appellant sent her money to help pay for classes and a typewriter. (15 RT 3208-3209.) He sent money for the rest of the family as well. (15 RT 3169, 3210.) Appellant went to Mexico, picked up his sisters, and helped them get jobs. (15 RT 3165, 3209-3210.) They all worked in the fields. (15 RT 3165.) When Rocio accidentally fell and broke her arm, appellant took her to the hospital and assisted the other man who had been injured. (15 RT 3166-3167.) Appellant helped Elsa get her immigration papers and taught her to drive. (15 RT 3216.)

Rocio and Elsa both live in Modesto with their families. (15 RT 3164-3166, 3203-3204.) Appellant liked to participate in family parties, especially with the children. (15 RT 3168, 3215.) He was always playing with the children. (*Ibid.*) Elsa emphasized, "[H]e always made time for them. Not just for his own children, but for all the children that would be there." (15 RT 3215.) Although in their culture men generally eat first, appellant would wait and help serve, saying that the children should go first. (*Ibid.*) When Rocio was having marital problems, appellant provided counseling and emotional support. (15 RT 3169.) When Elsa had a baby with Down's Syndrome that died shortly after birth, appellant was supportive and helpful. (15 RT 3205-3206.) Elsa recalled, "He listened. He was very understanding. I received the best advice from him. He was always supportive of me, especially when I lost my baby." (15 RT 3205.)

On the night of the crimes, Rocio heard appellant tell their mother about committing the murders over the phone. She was totally stunned. (15 RT 3166-3170.) Rocio knew that appellant was sick because "he was distrusting of every person including us." (15 RT 3172.) Rocio maintained, "I just know that it's not my brother that created this damage. It wasn't him knowing him the way he was all of his life." (*Ibid.*)

Appellant had a special relationship with Elsa's daughter Liliana. (15 RT 3207.) After appellant was incarcerated, Liliana began collecting stickers and placing them under her bed to remember the days gone by without her uncle. (*Ibid.*) Liliana asks to hear appellant sing the Barney song when he calls. (15 RT 32073-3208.) Elsa knew appellant was ill because "he separated from everyone. He wasn't calling anymore." (15 RT 3217.) Elsa observed, "He's not the same brother that I grew up with or lived with. I wouldn't expect this of any of my brothers, but least of all him." (15 RT 3216-3217.) Appellant is important to Elsa, her husband, and their children. (15 RT 3217.)

Appellant's sons Huber Jr. and Ivan testified. Huber Jr. was 16 years old and in high school at the time of trial. (15 RT 3106.) When Huber Jr. was in first grade he did not want to go to school, so appellant went and stayed with him at school all day until he felt comfortable going alone. (15 RT 3107.) Appellant assisted bilingual students who were struggling at school. (*Ibid.*) When Angel did not want to go to school, Huber Jr. went to school with Angel as appellant had done with him. (15 RT 3108.) Appellant took care of his three sons and made sure they got ready and went to school. (15 RT 3108-3109.) Appellant took his sons to the park to play soccer and on fishing and camping trips. (15 RT 3109-3112.) Appellant coached Huber Jr.'s soccer team when he was nine years old. (15 RT 3109.) Appellant taught Huber Jr. to be a team player. (15 RT 3110.) Appellant loved animals and had birds, dogs, and fishes. (15 RT 3113.) Appellant was active in Huber Jr.'s life and made sure he was not associating with "bad" kids. (15 RT 3114.) Appellant made sure Huber Jr. attended a different junior high school than the one in their neighborhood to keep him away from gangs. (15 RT 3114-3115.) Huber Jr. misses appellant being with the family. (15 RT 3117.) Appellant always loved

and cared for his sons. (*Ibid.*) Huber Jr. loves his father and wants to continue to be able to talk on the phone and visit him. (15 RT 3115-3116.)

Ivan was 14 years old and in the ninth grade at the time of trial. (16 RT 3317.) Ivan's favorite things to do with his father were to play sports and go fishing and camping. (16 RT 3317, 3321.) Ivan used to play soccer with appellant at the park. (16 RT 3317-3318.) Appellant coached Ivan's team when he was in the second grade. (16 RT 3318.) He taught Ivan "be a teammate, don't be a ball hog." (*Ibid.*) Appellant used to help Ivan in school. (16 RT 3320.) He helped with homework, got Ivan ready for school, urged him to do well, and told him to help people that needed help. (*Ibid.*) The three boys and Cindi live in the house on Romeo. (16 RT 3320.) Ivan is getting good grades in school and helped Angel by going to class with him. (16 RT 3320-3321.) The boys went camping with Cindi last summer. (16 RT 3322.) Ivan talks to appellant on the phone. (16 RT 3318.) Appellant and Ivan tell each other "I love you." (*Ibid.*) Ivan wanted to testify even though his father told him not to do it unless he wanted to. (16 RT 3319.) Ivan 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. (16 RT 3323.) Ivan was able to see appellant's family recently, which was important and something he would like to continue. (16 RT 3323-3324.) Ivan misses his grandmother. (16 RT 3323-3325.) They had a special relationship. (16 RT 3324.) Ivan wore a shirt to court with a photo of his grandmother on the back and the words "In memory of Alicia Martinez." (16 RT 3324-3325.)

In December 2002, Vivian Sweatman was working as a court security officer when appellant was given an authorized visit with his children inside one of the jury rooms. (15 RT 3198-3199.) Sweatman was present along with Dr. Schaeffer. (*Ibid.*) Appellant and the boys were emotional and appellant tried to assure them that everything was going to be okay.

(15 RT 3200.) Appellant was very loving to his sons. (*Ibid.*) He told Huber Jr. that he was sorry and that he needed to be the man now and look out for his brothers. (*Ibid.*) Appellant asked his sons about school and their lives. (*Ibid.*) Appellant held and kissed his boys as they talked to each other. (15 RT 3201.)

Dr. Rodney Erwin, a psychiatrist, was retained by the defense to interview appellant's sons. (15 RT 3120.) Dr. Erwin interviewed Huber Jr., Ivan, and Angel separately for several hours each and talked with Cindi and appellant. (*Ibid.*) Appellant was the primary caregiver at home after Angel was born. (15 RT 3121.) The boys were all very attached to him in different ways. (*Ibid.*) Appellant took the kids to school, was involved in academic activities, coached their soccer teams, cooked their meals, and was their "primary attachment figure." (*Ibid.*) Appellant was very supportive and concerned for his children's well being. (*Ibid.*) Appellant's mental illness did not negatively affect his ability to care for his children. (15 RT 3122.) Dr. Erwin observed, "And in speaking with the children, I was struck by the fact that none of them noticed that something was wrong with their father, even when things were seriously starting to deteriorate." (15 RT 3123.) Dr. Erwin thought this was because appellant "loved them so much and was so committed to them that he channeled every effort he could to continue to provide for them." (15 RT 3124.)

Each of the boys were able to overcome difficulties resulting from their father's crimes and to succeed in school and social/familial relationships. (15 RT 3124.) When Huber Jr. got into trouble for fighting at school, appellant told him that fighting was not the answer and he had to "love everybody." (15 RT 3138, 3140.) Huber Jr. stopped fighting after talking to his dad. (15 RT 3146.) Huber Jr. assumed appellant's parental role with Angel after appellant was incarcerated. (15 RT 3124-3125.) Dr. Erwin believed this "really shows how the really important parental values

that [appellant] displayed towards his kids have really been incorporated in Huber Jr., in Ivan." (15 RT 3125.) Dr. Erwin believed that the boys' resiliency is based on their strong sense of being part of a family and that appellant "has instilled in them some real strengths and character traits that have helped in pulling them through this in terms of feeling love but also in terms of their commitment to their family." (15 RT 3126-3127.) He opined that it is absolutely important for the boys to maintain a relationship with appellant. (15 RT 3129.) The boys continued to love their father and want him in their lives despite everything that has happened.[18] (*Ibid.*) Although they have a loving and supportive mother and family, to lose their father would be yet another tremendous loss. (*Ibid.*) Psychologically, the boys will continue to need their father throughout their lives. (15 RT 3143.)

Daniel Vasquez, a correctional consultant and former warden of San Quentin Prison, was retained by the defense to interview and assess appellant. (16 RT 3256-3263, 3267.) Vasquez discussed the California correctional system in terms of levels of confinement in the various facilities. (16 RT 3263-3264.) An inmate sentenced to life without the possibility of parole (hereafter "LWOP") is not able to change his classification based on good behavior and are automatically placed in a maximum custody institution. (16 RT 3265-3266.) After reviewing police

---

[18] On cross-examination, Dr. Erwin acknowledged that although the boys know their father killed three people, he did not believe they are aware of the details of the crimes and may believe their father killed their grandma accidentally. (15 RT 3136-3137, 3142.) In letters to the court, the boys recognize the enormity of the crimes their father committed and still express their love for him and their need for him in their lives. (15 RT 3143.) The boys are very protective of their mother. (15 RT 3137.) They miss their grandma, especially Ivan who was very close with Alicia. (15 RT 3138-3139.)

reports of the crime and interviewing appellant, Vasquez opined that appellant did not pose any danger to staff or other inmates if housed at a California Department of Corrections facility. (16 RT 3267-3268.) Appellant had been a "model inmate" over the four years he had been housed in the Stanislaus County Jail. (16 RT 3267.) Appellant had no other criminal record, no prior incarcerations, does not belong to any gangs, and is not criminally sophisticated. (16 RT 3268.)

Vasquez reviewed transcripts of appellant's call on November 19, 2003, to Huber Jr. and post-verdict jail call on November 10, 2005, to Rocio and his sons. (16 RT 3269, 3276-3277.) The calls did not change his opinion that appellant posed no risk of future dangerousness. (16 RT 3270-3276.) Appellant had "a minor rule infraction" a month prior for making an alcoholic beverage in his cell with his cellmate. (16 RT 3277.) Nothing about the incident changed Vasquez's opinion on the issue of future dangerousness. (16 RT 3277-3278.) Appellant's expressed animosity towards law enforcement and interrogation statement, "I will shoot as much as I can and then they can shoot me," also did not change Vasquez's opinion. (16 RT 3282-3283.) Appellant had no incidents over the four years of courtroom proceedings, which indicated he "has no real potential for any further violence against staff or inmates." (16 RT 3290-3291.) The fear of losing visitation privileges with his children also lessened any chance of future violence. (16 RT 3293.)

Dr. Stewart reiterated his opinion that, although he respected the jury's finding of sanity, he still believes the crimes would not have occurred but for appellant's mental illness. (16 RT 3295-3397.) Appellant lacked criminal history. Dr. Stewart maintained, "[H]e seemed to be a pretty good guy until this stuff started, his mental illness started affecting him." (16 RT 3297.)

ARGUMENT – COMPETENCY TRIAL

I. THE JURY'S FINDING APPELLANT COMPETENT TO STAND TRIAL IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Appellant contends that the evidence presented to the jury was insufficient to sustain the verdict of competency, thereby violating his federal constitutional right to due process and requiring reversal of his subsequent convictions. Appellant further contends that international jurisprudence on competency to stand trial supports his claim that the evidence was insufficient to support the verdict. (AOB 48-94.) This contention is without merit. The jury's finding of competency is supported by substantial evidence. As such, appellant's subsequent trial did not violate his constitutional rights or international law.

A. Factual Background – Competency Trial

On November 20, 2002, defense counsel moved for a continuance and declared,

> The defense has retained an expert to evaluate the defendant's mental and emotional condition. It was feared, because of certain information received by counsel for defendant, that defendant may be suffering from serious depression and may become suicidal. Defendant's expert recently recommended to defense counsel that defendant be given certain psycho tropic medication. This information was recently passed on [to] the custodial personnel.

(1 CT 14.) Counsel voiced concern that appellant might not be mentally sound or have the ability to cooperate with and assist counsel during the preliminary examination. (1 CT 14-15.)

On November 26, 2002, the court ordered jail staff to facilitate giving appellant any prescribed medication. (1 CT 18; 1 RT 36-38.)

On August 28, 2003, defense counsel requested a continuance and acknowledged having "significant difficulties in dealing with Mr.

Mendoza." (2 RT 40.) Counsel advised, "We've never made a - - raised a competency issue because we're able to get through that." (*Ibid.*) Counsel's request contained a declaration by psychiatrist Dr. Pablo Stewart, who had been retained by the defense to render an opinion regarding appellant's mental health. (1 CT 82.)

On November 12, 2003, defense counsel notified the court that they believed appellant was incompetent to stand trial. (1 CT 118-119; 2 RT 58.) Counsel filed a declaration advising,

> We believe Mr. Mendoza is mentally incompetent. We base this opinion on interaction with Mr. Mendoza during the numerous contacts we've had, jointly and individually, with him, as well as from information received from persons employed to assist us in this case.
>
> We believe Mr. Mendoza suffers from a long standing mental illness which includes a psychotic component involving paranoia which substantially impairs his ability to assist counsel in his defense.

(1 CT 118; 2 RT 58-59.) Counsel notified the court that they had appellant examined by Dr. Stewart and psychologist Dr. Robin Schaeffer who both concluded that appellant was not competent to stand trial. (2 RT 63-66.) Counsel opined, "The deterioration of Mr. Mendoza over the last several months has been profound. I think part of it has been due to the change of - - and then Mr. Mendoza declining to take the changed medications." (2 RT 63-64.) The court suspended proceedings pursuant to section 1368 and appointed Dr. Gary Zimmerman to examine appellant. (2 RT 66-67.)

Dr. Zimmerman examined appellant and filed a report on December 2, 2003, finding appellant not competent to stand trial. (Supp. Exhibits CT 1-3; 2 RT 85.)[19] The prosecution's expert, Dr. Gary Cavanaugh, examined

---

[19] "Supp. Exhibits CT" refers to the Clerk's Supplemental Transcript Exhibits filed in this Court in November 2010, 1 volume, 139 (continued...)

appellant and filed a report on March 30, 2004, finding appellant competent. (I CT 147; Supp. Exhibits CT 4-12; 2 RT 101.) The matter was set for trial. (1 CT 146; 2 RT 101-103.)

A jury was impaneled on December 9, 2004. (1 CT 196; 3 RT 288.)

The Defense Case

Robert Wildman, an experienced criminal defense attorney, testified as an expert on attorney-client relations. (3 RT 308-310, 323.) Mr. Wildman discussed why it is important to have a competent client. (*Ibid.*) A defendant is unable to assist counsel in preparing his defense if he does not have a factual and rational understanding of the charges and procedures. (3 RT 309-310.) The defendant must be able to discuss the facts of the case and make decisions, such as whether to take the stand and testify in his or her defense. (3 RT 310-311.) It is important for the defendant to communicate with counsel during the trial to assist in cross-examining witnesses. (3 RT 311-312.) In capital cases, the defendant also needs to be able to tell counsel about his or her social history to help prepare a mitigating case at the penalty phase. (3 RT 314-315.) A defendant needs to be present in the courtroom to help make numerous decisions and to communicate with counsel to help counsel make decisions. (3 RT 316-319.) Mr. Wildman never met with or represented appellant. (3 RT 323.)

Dr. Gary Zimmerman, a psychologist, was appointed by the court to examine appellant. (3 RT 338.) Dr. Zimmerman performs around 30 section 1368 competency evaluations annually, which typically involve an hour-long clinical interview at the jail, plus inquiry into the person's background, medical records, and criminal history. (3 RT 336-337.) Dr.

(...continued)
pages. "Supp. CT" refers to the Clerk's Supplemental Transcript filed in this Court in January 2011, 1 volume, 119 pages.

Zimmerman evaluates two main areas: (1) a defendant's understanding of the nature and object of the proceedings against them, and (2) a defendant's ability to cooperate with their attorney in preparation and presentation of the defense. (3 RT 337.)

Dr. Zimmerman interviewed appellant on November 29, 2003, and concluded appellant was not competent to stand trial. (3 RT 338, 353.) Unlike in most cases, Dr. Zimmerman did not have any background information or discovery before making his opinion regarding appellant's competency. (3 RT 339.) He advised that while this caused minor problems, it did not impede his ability to make an opinion on appellant's competency. (*Ibid.*)

During the interview, appellant was capable of answering questions precisely at first, but, "Longer answers he tended to wander away from the questions. He was often concentrating on the injustice that he felt was being done to him." (3 RT 340.) Dr. Zimmerman continued,

> He appeared to know who I was and why I was there after I had told him so. He complained -- he appeared to be depressed when I talked with him. He appeared to have --appeared to be demonstrating symptoms of helplessness and hopelessness which are characteristics of depression. He mentioned it probably would be a good idea if he were killed – I'll have to review my report. It's been a year since I've talked to him, of course.
>
> My conclusion was he showed a deep indifference to the proceedings against him at this point.

(*Ibid.*) Dr. Zimmerman explained that although appellant seemed normal at first and was "able to hold it together for a short period of time," "when the responses were longer, he would wander towards the things that he was more obsessed about and that it was his - - the injustice that he was being separated from his family." (3 RT 341.) Dr. Zimmerman opined that appellant was aware he was facing the death penalty, but appeared to be

indifferent to the outcome. (*Ibid.*) Dr. Zimmerman concluded that appellant could not realistically evaluate trial testimony and was not able to assist counsel in the preparation and presentation of the defense. (3 RT 341-342.) He based this conclusion on the fact that appellant appeared significantly depressed. (3 RT 342.) Dr. Zimmerman explained, "If you're severely depressed, you not only don't want to do things, but you can't do things." (3 RT 343.) Dr. Zimmerman found appellant's depression made him unwilling or unable to "rationally work with his attorney in the presentation and preparation of the defense," and was therefore not competent. (3 RT 361, 364.)

On cross-examination, Dr. Zimmerman acknowledged that indifference is not necessarily incompetence. (3 RT 344.) At the time of the interview, appellant was exhibiting feelings of hopelessness and helplessness, symptoms of major depression. (3 RT 345.) Appellant was able to state that he was charged with murder and knew he was facing the death penalty. (3 RT 349, 352, 359.) Appellant refused to discuss the facts of the case, which is not unusual for criminal defendants. (3 RT 346-347, 352.) Appellant was able to name his attorney and stated that he was able to discuss the case with his attorney. (3 RT 352-353, 357-358.) He was a reasonably reliable informant, his personal hygiene was unremarkable, and he was well oriented to person, place, and time. (3 RT 346, 349.) Appellant showed no obvious signs of a thought disorder. (3 RT 348.) Dr. Zimmerman recalled, "There was some paranoid trend to his thinking but nothing that I could say was frankly delusional." (*Ibid.*)

Dr. Pablo Stewart, a psychiatrist, was retained by the defense to examine appellant. Dr. Stewart reviewed appellant's legal and medical history, interviewed him on September 25, 2003, and October 10, 2003, and filed a report on November 2, 2003. (3 RT 371.) Dr. Stewart diagnosed appellant as suffering from a "long-standing mood disorder" that "caused

him to have psychotic symptoms." (3 RT 373-374, 416.) When Dr. Stewart first met appellant in September 2003, appellant asked Dr. Stewart whether he was going to give him the lethal injection and insisted, "I need you to give me the lethal injection, that's what I hope you're here for." (3 RT 381, 437.) In November 2003, Dr. Stewart performed the MacArthur Competency Assessment Tool Criminal Adjudication ("MacCAT-CA") test on appellant. (3 RT 376-377.) Appellant tested significantly impaired in the three areas tested: ability to realistically consider defenses, ability to plan legal strategies with one's attorney, and ability to perceive a likely outcome in one's case. (3 RT 378-379.)

Dr. Stewart reported that he asked appellant who the judge, jury, prosecutor, and defense attorney were and appellant responded: "the Judge explains to the jury what the law is," "the jury are people of different background without prejudice to me," "[the prosecutor is] another fake one up there who says he's protecting People," and "what I think about the law is that you have to look at it from a different perspective. Lawyers don't protect innocent kids." (3 RT 431.)

Dr. Stewart met with appellant four times after filing his report: February 12, 2004, April 27, 2004, July 20, 2004, and November 12, 2004. (3 RT 372.) He observed that after spending additional time with appellant, "[I]t's clear to me that this mood condition is enduring, so it has continued. And his psychotic symptoms, if any, have become worse." (3 RT 374.) Dr. Stewart concluded that appellant's mental illness began in the 1990's and had been getting progressively worse. (3 RT 390.) Although appellant told Dr. Stewart that he stopped working in 1995 to stay home and take care of his children, Dr. Stewart believed appellant stopped working because of his paranoia. (3 RT 392.)

During the interviews, appellant had significant mood fluctuations; at times he was angry, other times he cried uncontrollably. (3 RT 381-382.)

Appellant had difficulty answering questions. He started off seemingly on point, but if allowed to continue he quickly deteriorated into delusional-based thinking. (3 RT 383.) Dr. Stewart opined that although appellant's initial responses seemed connected to the questions, "if you can step back and look at the entire situation" you could see that his responses were actually the result of mental illness. (3 RT 383-384.)

During the April 27, 2004, interview, appellant remained delusional about the crime and stated, "[E]verything is in God's hands," and that he was unwilling to participate in "masquerading, be fake." (3 RT 427-428.) Appellant told Dr. Stewart that the judge should release him and let him and his kids go to Mexico and live there. (3 RT 428.) Dr. Stewart opined that this belief showed appellant was not rational and competent. (*Ibid.*)

During the November 12, 2004, interview, Dr. Stewart asked appellant about the charges against him and appellant was unable to answer the question and began rambling about other matters. (3 RT 375.) Although appellant was aware of the severity of the charges and the possible penalties in 2003, as of November 2004 he was "totally disconnected from his charges." (3 RT 376, 422.) When asked about his case, appellant answered, "[I]t's all a circus," "[W]e are all playing a game," "[W]e only follow our own interests," "They want to keep me away from my kids," "They want to prosecute me. They want to put me to death." (3 RT 432-433.) When asked about the charges, appellant insisted, "I didn't kill no people." (3 RT 433.) Dr. Stewart asked what happened and appellant replied, "Ask them what happened." (*Ibid.*) Dr. Stewart reminded appellant that three people had died and appellant retorted, "Well, I'm dead too because I can't answer." (*Ibid.*) Appellant insisted, "What case? Only God has a case," and "[T]here is no judge except God." (3 RT 426, 433.) Dr. Stewart acknowledged that the belief there is no judge other than God can be culturally based, but explained that "in this particular case

it was one of the many factors." (3 RT 427, 438.) Appellant did not know or care about what the prosecutor and defense attorneys did, insisting, "I only want to be with my kids." (3 RT 433-434.)

Appellant had no documented history of mental illness. (3 RT 420.) Appellant's wife told Dr. Stewart that she knew something was wrong and tried to get him to seek help, but he refused. (3 RT 435.) Jail medical records showed that appellant had been prescribed medication twice for depression. (3 RT 411, 420-421, 436-437.) Appellant was given Prozac and "he got better," but then "felt that his improvement, his clinical improvement was due to reasons other than the medication so he stopped it and he returned back to his pretreatment condition." (3 RT 412.) Appellant later took Remeron for a brief period, but again stopped taking it. (*Ibid.*) People with mental illness commonly deny it, which is part of the illness. (3 RT 412-413.) In June 2003, jail staff reported appellant being "severely depressed." (3 RT 436.)

Appellant's delusions dealt mainly with religion, but he also had delusions about the government, the police, and the legal system. (3 RT 385-386, 388, 423-424.) Religious delusions are common among people with mental illness. (3 RT 386.) Dr. Stewart opined that appellant had "an over-elaborated self-referential relationship with God," which was "a delusion that's a reflection of his mental illness." (3 RT 386-387.) Dr. Stewart agreed that a person turning over his fate to God does not necessarily make him incompetent, but explained that appellant's religious preoccupation was only one piece of his mental illness. (3 RT 387-388.) A person with mental illness can be involved in their family life, follow sports, and be aware of, or complain about, jail conditions. (3 RT 388-389.) Dr. Stewart spoke to appellant in Spanish to see if he preferred to communicate in his primary language, but appellant "preferred all the time to speak with [him] in English." (3 RT 398.)

Dr. Stewart opined that, as a result of mental illness, appellant was unable to participate in the legal process. (3 RT 385.) Dr. Stewart believed that due to his mental illness appellant was unable to evaluate witness testimony, help in jury selection, give insight into events preceding and following the murders, assist in gathering and presenting mitigation evidence, evaluate whether or not to testify, and evaluate possible plea offers. (3 RT 395-397.) Appellant's depression had "descended into psychosis" because it had gone untreated for so long. (3 RT 415.) Appellant's mental illness prevented him from understanding the nature of the charges against him or to cooperate with his attorneys to assist in his defense. (*Ibid.*)

Dr. Robin Schaeffer, a psychologist in private practice, was retained by the defense. (3 RT 448-451.) Dr. Schaffer most recently examined appellant on December 4, 2004, at defense counsel's request, to assess appellant's competency to stand trial.[20] (3 RT 451.) Dr. Schaeffer asked appellant a number of questions regarding his current understanding of the nature and purpose of the proceedings. Appellant was aware that he was going to court to have a hearing on his competency to stand trial. (Supp. CT 106-107.) The questioning continued:

> [Dr. Schaeffer]: Do you feel like you're mentally competent to stand trial now?
>
> [Appellant]: I don't know what you guys talk about, mental competent – or what is it about. All that big fuss that they do up there. Because like I said, there's no other trial coming to me, than the one from God.
>
> [Dr. Schaeffer]: Wait – isn't there also the trial in the criminal case against you, the trial for murder?

---

[20] A tape recording of the interview was played for the jury. (Defense Exhibit B; Supp. CT 106-117; 3 RT 457.)

[Appellant]: That's what they say so – but I mean, to me it's like a circus. There is no place on earth, or anywhere, here, where we can say that we are God. And that's what we play every day. Everybody. Me, them, we're playing God every day. And that is not right.

[Dr. Schaeffer]: Is it not right to have the trial then?

[Appellant]: It's not right to have a trial, it's not right to go to war, it's not right to have violence, it's not right to hate –

[Dr. Schaeffer]: But there is going to be a trial, probably. If there is a trial, is it right for you to try to defend yourself?

[Appellant]: Yeah, I guess – because that's what I did in the first place. . . .

(Supp. CT 107.) Appellant explained his religious beliefs led him to conclude that he did not commit murder because the people that died were born again in a spiritual way. (Supp. CT 108.) Dr. Schaeffer asked, "Do you know what you were doing that day?" and appellant acknowledged, "I guess I do." (*Ibid.*) Dr. Schaeffer inquired, "[T]he State of California now is charging you with murder – do you understand that?" and appellant replied, "In a way, yes. In a way." (Supp. CT 109.) He then went on to explain how he wants to "take responsibility for what's been happening," but wanted everyone else to take responsibility for wrongs they have committed as well. (*Ibid.*)

At times, appellant did not trust his attorneys. (Supp. CT 106-107, 110.) Dr. Schaeffer asked, "[W]ho is on your side in the courtroom?" Appellant replied, "God," and, "I guess Kent Faulkner and Mr. Spiering." (Supp. CT 112.) Appellant wanted his attorneys to argue in court that he is innocent. (*Ibid.*) Dr. Schaeffer inquired, "Are you able to tell your lawyers what happened that day?" Appellant answered, "I think so, yeah." (Supp. CT 109.)

Dr. Schaeffer asked appellant what a criminal trial is and appellant answered, "That probably there is people that wants to, what is it, prosecute me?" and "What is it exactly? I don't know. They're trying to find me accountable for something they say I did." (Supp. CT 110.) Appellant understood the death penalty means "they want to kill me," but insisted, "That if God wants it to be like that, it is going to be like that. If He doesn't want it, it's not going to be like that. It doesn't matter what they say, or what they do." (*Ibid.*) Dr. Schaeffer questioned, "Does it matter what your lawyer says or does?" and appellant acknowledged, "It does matter what everybody does, but it has to be approved by God." (*Ibid.*) Appellant explained that he believes there should not be a trial because the "real" trial before God is coming. (Supp. CT 111.) When asked what he would like the outcome of the current trial to be, appellant answered, "That I wish all could be forgiven, including myself – that we all can be together and be for those kids, innocent kids in the world, so we can help them for real, not with just words," and, "That I want to be found innocent. . . ." (*Ibid.*)

Dr. Schaeffer asked appellant about trial proceedings:

> [Dr. Schaeffer]: Who is against you in the courtroom?
>
> [Appellant]: Evil.
>
> [Dr. Schaeffer]: Who?
>
> [Appellant]: Satan.
>
> [Dr. Schaeffer]: Who else?
>
> [Appellant]: There are people who I don't want to name because, to me they're God's sons. They're making the wrong choices because they don't understand what they're doing.
>
> [Dr. Schaeffer]: Who are you talking about?

[Appellant]: I guess I'm thinking about the DA, the judge, the so-called jury or whatever they call it.

[Dr. Schaeffer]: What do you mean "so-called jury?"

[Appellant]: Like I said, there is no jury here. There is no people who's able to point at me and say that I did something, and it has to be like that. Nobody can point to me. Nobody. Only God.

[Dr. Schaeffer]: Under the law, a jury has the obligation to listen to what the prosecutor says, what the DA says – to listen to what the defense attorney says – to consider the evidence that's presented on both sides – and then to make a judgment.

[Appellant]: But under which law? Their law? Not God's law. It's not under God's law. So it doesn't count at all. If they think it does, I mean, like I said -

[Dr. Schaeffer]: It could count, though, in terms of whether or not you're executed, or whether or not you go to prison for a long time. It could count that way, couldn't it?

[Appellant]: I guess, but like I said, anything will happen if God allows it. And I have no problems with God. So whatever is coming from Him, I just have to accept it.

[Dr. Schaeffer]: Do you want to work hard to convince the jury that you're not responsible for the murders?

[Appellant]: I guess. I guess that's what I need to do. I just – that's what we all need to do, to be there for our kids. To be there with God.

(Supp. CT 112-113.)

Dr. Schaeffer also asked appellant about his understanding of plea bargaining. (Supp. CT 116-117.) Appellant indicated that he would ask God for help in determining if accepting the plea was the right thing for him to do. (*Ibid.*) Questioning continued:

[Dr. Schaeffer]: Okay. What details would you want to know about the plea bargain, before you could decide if you could accept it?

[Appellant]: I guess, for how long I'm going to be here. The most important thing is for how long we're going to keep hurting ourselves, because I don't want people to hurt themselves, because, like I said, what's the point of being with somebody if we're doing all these things that we think is right to do, we're just hurting ourselves, and I don't want people to hurt themselves, I don't want myself hurting myself or hurting others. Just because I want to live. Just because I want my kids to be all right, or just because - - I want to do the right thing for God.

[Dr. Schaeffer]: Could it make a difference if the District Attorney was saying, in return for pleading guilty to murder, you would serve, say, 20 years – would that be a difference compared to if the DA said, "No, you'd have to serve 30 years," or you'd have to serve 40 years, or you'd have to serve 50 years – would those number of years make a difference to you?

[Appellant]: I guess. It does.

[Dr. Schaeffer]: Which would be the best for you?

[Appellant]: Not twenty years, but one, two, three years. Because I want to be with my kids. . . .

(Supp. CT 117 .)

Dr. Schaeffer opined that appellant was not able to rationally assist counsel in his defense, and therefore, not competent under section 1368. (3 RT 454.) Dr. Schaeffer concluded that appellant suffered from a psychotic thought disorder, which manifested itself in a number of ways, including: "shifting levels of abstraction," "loose association," "a paranoid level of distrust," "delusional grandiosity," and suicidal impulses. (*Ibid.*) As a result of his mental illness, appellant had a sense of the trial "not really mattering." (*Ibid.*) He was unable to respond to questions in a rational manner. (*Ibid.*) Appellant's mental illness was due to a brain disorder. (4 RT 642.)

During the December 4, 2004, interview, appellant exhibited "paranoid trends" involving generalized distrust of people. (4 RT 600.)

Dr. Schaeffer asked appellant questions to see if he could give rational, non-abstract responses. (*Ibid.*) Appellant showed "shifting levels of abstraction," meaning when asked a specific question, appellant gave a general answer. (4 RT 601.) Appellant also showed "loose associations," meaning when asked a question about a particular topic, appellant quickly moved to a different topic, then a different topic, in a rambling fashion. (*Ibid.*) Appellant demonstrated "loosing of differentiation," meaning he lacked a clear distinction between himself and others, between the roles of other people. (4 RT 602.) Dr. Schaeffer did not find appellant incompetent based on that he has "a lot of religious concerns," but "when his belief is that the actual trial he's facing is not a trial and he expresses it in religious terms, that's a big, big problem." (4 RT 604, 606.) Appellant's preoccupation with abstract thoughts impaired his ability to give rational responses. (4 RT 604.) Dr. Schaeffer opined that appellant "shows repeated evidence of not really being able to engage with his attorney." (4 RT 606.) Appellant showed tremendous ambivalence in whether he trusts his attorney. (4 RT 605.) Dr. Schaeffer explained, "[H]e senses this whole legal situation that he's facing with lawyers and having to come to court is essentially unreal. And because of that there's nothing he needs to do, nothing he can do." (4 RT 609.)

Appellant showed a diminished sense of agency and "loosening of differentiation." (4 RT 609.) Dr. Schaeffer explained, "Agency means I'm a person in the world, I can do things. . . . He has a diminished, in my clinical opinion, a sense of agency, a sense of ability to do anything which manifests itself by his repeated expression of everything is going to be fine, like that." (*Ibid.*) Loosing of differentiation is where a person speaks of themselves and others in an irrational manner. (*Ibid.*)

Although appellant did not refuse to cooperate with counsel, "he can't rationally assist counsel in this state of mind that he demonstrated in this

interview." (4 RT 611.) Appellant's mental illness and his resulting psychosis would impair his ability to make executive decisions that are routinely made by competent defendants in the courtroom. (4 RT 613-614.) These decisions would include whether to testify, whether to waive the right to a jury trial, ability to understand and appreciate plea bargaining, ability to assist counsel in cross-examining witnesses, ability to work with counsel to create a broad outline of the defense case, and ability to provide personal and family history to develop a case in mitigation. (4 RT 614-615.) Dr. Schaeffer emphasized,

> [H]e was able to answer each question and that's why I wanted to emphasize that when I say he can't assist counsel, I don't mean he can't assist counsel at all. He can give some assistance. He can give some answer.
>
> But I don't believe he can assist counsel to the extent required for a defendant to be mentally competent because of the irrational and limited nature of the answers to the questions.

(4 RT 616.)

The Prosecution's Case

On May 30, 2004, and June 1, 2004, appellant called his family from jail.[21] (Supp. CT 4-13.) Appellant spoke to his sons, asked how they were doing, and told them that he loved them. (Supp. CT 4-6.) Appellant asked his sons about whether they had gotten the house painted and inquired, "[A]ren't you going to paint it?" (Supp. CT 6.) Appellant's son replied, "Not any more." (*Ibid.*) Appellant told his son, "May God bless you," and

---

[21] A tape recording of the phone calls was played for the jury. (People's Exhibit 2; Supp. CT 3-33; 4 RT 473-480.) Diana Moreno, a judiciary interpreter, transcribed and translated appellant's jail phone calls. (People's Exhibit Nos. 1 and 2; 4 RT 465-466.) Portions of the telephone calls quoted in this brief are taken verbatim from the transcripts prepared at trial. Any grammatical or spelling errors included in the quotations are from the original.

his son replied, "Same to you." (*Ibid.*) Appellant urged, "Pray to God a lot Ok?" and then hung up after saying goodbye. (Supp. CT 6-7.)

A few minutes later, appellant called back and inquired, "I just hang up on you. Do you want to tell me something?" (Supp. CT 9.) Appellant asked Huber Jr. whether he had eaten and emphasized, "Please, Pray a lot with momy, Ok?" (*Ibid.*) Appellant then spoke with Ivan and asked how he was doing and told him that he loved him. (Supp. CT 10-12.) Appellant repeatedly prayed, "May God bless you." (*Ibid.*)

On June 1, 2004, appellant talked to his sons about going to Jesus's house. (Supp. CT 14-16.) Appellant instructed, "[D]o not be going to his house or to . . . his sister in law's house, or those places, my son," and, "Do not be taken by . . . because he buys your mother little things, little presents . . ." (Supp. CT 14.) Appellant expressed anger towards Jesus and urged,

> Listen son, I just talked with that . . . that Jesus. He says that he supports you and that the phone is on his name, and that it is why I should not be bothering no one, and all of that. I do not need to be listening to his nonsense. I told him to go and fuck his mother.
>
> Soon things are going to be fucked up for him He does not have to go around pulling this kind of shit
>
> Son, I told him to stay away from you guys, if you want to be with him . . . very well, I have to respect that.
>
> I am only telling you to take care, not to be with those people. I am telling you, the only thing that they are going to do is harm you.
>
> Because the only thing that they are doing . . . is for their convenience, ok my love?

(Supp. CT 15.) Appellant begged, "Forgive me for telling you all this mi son, but I only want to protect you, ok my son?" and, "Pray to God, he is the only one that be able to help me, my love, OK?" (Supp. CT 15-16.)

Appellant then called Cindi and confronted her about trying to keep their sons from talking to him. (Supp. CT 18-25.) Cindi retorted, "Threaten me. Are you threatening me?" (Supp. CT 18.) Appellant demanded to talk to their sons and told Cindi not to intervene. (Supp. CT 18-20.) Cindi explained that she did not pay for the cell phone and questioned, "[W]hat is the reason that you are calling and threatening other people that are helping your children?" (Supp. CT 19.) Appellant insisted, "I do not want help for my children. The only thing that they are doing is harm? As always. . . ." (*Ibid.*) Appellant asked why his sons do not visit him and Cindi replied that they do not want to visit. (Supp. CT 20.)

Appellant then spoke to Ivan and instructed him not to accept money, clothes, food, or other items from people "only because it is convenient." (Supp. CT 21.) Appellant told Ivan not to worry about those things because God was going to give them to him somehow. (*Ibid.*) Appellant advised Ivan not to be afraid and not to let anyone prevent them from speaking. (Supp. CT 21-23.) Appellant told Huber Jr., "[J]ust have faith in God Ok my love," and, "As I told you a wild a go, do not thrust those people. That because they are paying the phone. . . . that according to what he told me he is supporting you. . . . do not ask them for a penny, son." (Supp. CT 24.) Appellant told Angel not to be afraid of anything and warned, "Do not sell yourself, son – that for outings, nothing is it ok?" (Supp. CT 25.)

Appellant spoke to Cindi again asked her to take their sons to appellant's mother's house. (Supp. CT 27.) When Cindi refused, appellant threatened, "I do not want them (the children) around that son of a bitch," and, "I am telling you, for the last time. If you do not put your children in a safe place . . . And no . . . I am going to do what ever it take to make sure that you and him get fucked up. I am telling you now. And I am not playing." (Supp. CT 27-28.) Appellant maintained, "[W]hy do you have [them] around all that shit? Like you have always have him. If you want

shit for yourself? Take as much as you want. But live my children alone." (Supp. CT 29.) Appellant was upset that he called one of his sons on his cell phone and Jesus told him that they could not speak because Jesus pays for the phone. (Supp. CT 29-30.) Cindi proposed appellant have his mother buy the kids a cell phone and pay for it so he could call them whenever he wanted. (Supp. CT 32-33.)

On July 28, 2004, appellant called his sister-in-law Pati's house in an attempt to talk to his children.[22] (Supp. CT 34.) Appellant insisted that "many bad things" were being done to his children. (Supp. CT 35.) Pati explained that nothing bad was happening to the children and that they were being well cared for. (*Ibid.*) Appellant admitted, "I made so many mistakes; even then I wanted to fix things up. With all my good intentions to fix things up. But I never knew how, [t]hat is. I want to pay and I would like to accept [whatever] comes my way." (Supp. CT 36.) Appellant discussed Cindi and Chavez's relationship and how he had heard from his sons that it hurt them when they saw Cindi and Chavez hug and kiss. (Supp. CT 36-37.)

When Pati told appellant it was not right to take the lives of three innocent people appellant replied, "I did not take it. I am telling you. The way I see it," "I did not take it. The way I see it, we all took it. And, it looks like we are never going; no one is going to accept it." (Supp. CT 42.) Appellant insisted, "God is going to . . . understand this." (*Ibid.*) He continued, "[I] did not started this. If we asks our selves, who started it?

---

[22] A tape recording of this call was played for the jury. (People's Exhibit 3; Supp. CT 34-51; 4 RT 482-484.) This phone call was also played at trial. (13 RT 2738-2757.) It is discussed under the Statement of Facts, *supra*. Portions of the telephone calls quoted in this brief are taken verbatim from the transcripts prepared at trial. Any grammatical or spelling errors included in the quotations are from the original.

You started it. Because you knew exactly what was going on, and you could do, have done . . . . Maybe all you had to do was very little, and maybe that would it had be enough so that every-thing would turn out peacefully. (Supp. CT 43.)

Pati accused appellant of "lying, trying to say that he is crazy." (Supp. CT 45.) Appellant replied, "I am not crazy!" (*Ibid.*) Pati inquired, "It is you, your attorneys that is what you are. The only thing." (*Ibid.*) Appellant explained, "Well, that is the attorney's and the district attorneys and of all of us's game . . . Us . . . because we agreed. We are playing with that. I am telling you." (Supp. CT 45-46.)

Sheriff's Deputy Calvin R. Watson Jr., a custodial deputy at the Stanislaus County Jail had contact with appellant as an inmate. (4 RT 486.) Most of the contacts were brief, a couple of minutes or less, in the elevators or when Deputy Watson passed by appellant's cell. (4 RT 487.) Deputy Watson was assigned to classification and in charge of cell moves or cellmate transfers. (4 RT 487-488.) Appellant had asked Deputy Watson for a cell change or for a "cellee." (*Ibid.*) They had brief conversations in English during which appellant was able to communicate his needs and was responsive to Deputy Watson's questions. (*Ibid.*) The last time Deputy Watson spoke to appellant was seven months to a year ago. (*Ibid.*)

Dr. Gary Cavanaugh, a psychiatrist, was retained by the prosecution and performed a competency evaluation on appellant on February 12, 2004.[23] (4 RT 490, 493.) The interview lasted around an hour and a half.[24]

---

[23] The parties stipulated that Dr. Cavanaugh was authorized only one examination of appellant. (4 RT 570.)

[24] The interview was tape recorded, but the quality of the recording was poor and difficult to understand. (4 RT 493, 509, 517-518.) A small portion of the tape was played for the jury. (People's Exhibit No. 6; 4 RT (continued...)

(4 RT 493.) Beforehand, Dr. Cavanaugh had reviewed police reports and evidence from the case, jail mental health records, recordings from recent phone conversations, and the prior mental health evaluations by Dr. Stewart, Dr. Schaeffer, and Dr. Zimmerman. (4 RT 497.) Dr. Cavanaugh opined that as of February 12, 2004, appellant was competent to stand trial. (4 RT 494, 508, 521.)

Dr. Cavanaugh explained the basis for his opinion:

> At the time of my interview with Mr. Mendoza I did not see substantial evidence of major mental illness. I did see what appeared to be manifestation of a disorder personality [*sic*].
>
> And, also, Mr. Mendoza showed evidence that he could think logically and rationally about a number of issues not relating to this case. He also was able to describe in a rational way a response to questions about hypothetical cases about -- hypothetical questions about another case.
>
> He was logical and rational. I didn't see any evidence that he was -- that he was not able to understand nor cooperate.

(4 RT 494.) Dr. Cavanaugh did not see any evidence of delusional thinking. (4 RT 496.) Appellant was somewhat cooperative. He was pleasant and responsive, but there were questions he refused to answer, matters that he would not talk about. (*Ibid.*) Appellant refused to talk about his history, stating that he only wanted to think about positive things, not negative ones. (*Ibid.*) Dr. Cavanaugh came to a provisional diagnosis, based on prior medical records, that appellant most likely suffered from a major depressive disorder possibly with a history of psychotic features, which was currently in substantial or complete remission. (4 RT 498-499.) Appellant "did not show many, if any, signs of depression" and "when

---

(...continued)
513, 517.) A transcript of the recording was provided. (People's Exhibit No. 7; Supp. CT 56-84; 4 RT 512-513.)

going through the symptom list he did not provide any symptoms of major depression. He as well was not at that time being treated." (*Ibid.*)

Dr. Cavanaugh observed that appellant exhibited narcissistic traits or self-centered behavior. (4 RT 500-501.) Dr. Cavanaugh noticed appellant's preoccupation with religion, but did not think it was delusional. (4 RT 501.) He opined, "I though Mr. Mendoza was an individual who had a belief in God that he held very strongly," and explained, "[I]t's not uncommon for criminal Defendants, particularly those that are charged with serious crimes, to find religion." (4 RT 501-502.) Dr. Cavanaugh felt that appellant's beliefs were legitimate and authentic. (4 RT 502.) He classified appellant's religious beliefs as "overvalued ideas" or unreasonable sometimes irrational ideas that are not as fixed as delusions (a fixed false belief that does not relate to a person's culture and is not modifiable by reason). (*Ibid.*)

Appellant was able to understand the nature of different defenses that Dr. Cavanaugh explained to him. (4 RT 505, 519.) Appellant could describe, in a rough fashion, how an attorney might help a defendant and what must be done to prove a defense. (*Ibid.*) Appellant moved rapidly from answering a question into his religious beliefs. (*Ibid.*) This interfered with Dr. Cavanaugh's ability to get responses, but appellant would usually answer the question when it was asked again or in a different way. (*Ibid.*) Appellant had a very good memory and was "cognitively intact." (*Ibid.*) Appellant was able to rationally respond to questions about the nature and purpose of the proceedings, about orientation, and about his ability to make abstract determinations. (4 RT 519.) Dr. Cavanaugh believed appellant had a basic understanding of each of the players in the court proceedings, was able to assist his attorneys in conducting his defense, and was able to respond logically and rationally to questions that did not pertain to the trial. (4 RT 521.) At times, appellant "would interject statements about his view

of the world and his religion, but if [Dr. Cavanuagh] persisted or asked the question in a slightly different way, he usually would respond." (4 RT 519-520.) Appellant went off in religious or philosophical directions. (4 RT 520.) Dr. Cavanaugh explained, "He would talk in a very philosophical way at times about how he saw the world." (*Ibid.*)

During the interview, Dr. Cavanaugh asked appellant about the current charges he was facing. (4 RT 540-541.) Appellant did not answer the question and Dr. Cavanaugh reminded appellant that he was charged with murder. (4 RT 541.) Appellant then answered,

> That's what I understood before, but right now the more I think about that is that I didn't do nothing. If we are all suffering about all the situations where we put ourselves, that is because we ourselves put into our [*sic*], into that, we're sorry because of our bad deeds.

(*Ibid.*) When asked what "murder" means, appellant replied, "There's nothing I can say that will help. We're wasting our time. All we can do is praise God and thank him for the good things he gives us." (4 RT 542.) Dr. Cavanaugh interpreted appellant's hearing the inner voice of God not as a hallucination, but as a religious belief that God is guiding his life. (4 RT 565.)

Dr. Cavanaugh read the recent interviews by Dr. Stewart on November 12, 2004, and Dr. Schaeffer on December 4, 2004, which did not change his opinion as to appellant's competency on February 12, 2004. (4 RT 507.) On cross-examination, Dr. Cavanaugh clarified that he had not seen or spoken to appellant since February 2004, and had no opinion as to appellant's current competency. (4 RT 526.) The following exchange occurred:

> Q [Defense Counsel]: Okay. And when you -- your report, the conclusions that are in your report are your conclusions from February; right?

A: [Dr. Cavanaugh]: That's correct.

Q: And on a number of occasions on direct examination you told the jury and the Court that basically your conclusions are the conclusions that you made on February 12th?

A: That's correct.

Q: And don't really have any -- are only worth what they were worth on that date; right?

A: They're of most value considering the date, yes.

Q: Okay. And that it's hard for you to have any sort of present evaluation of Mr. Mendoza's competency, isn't it?

A: Well, I have not evaluated Mr. Mendoza since February.

Q: Okay.

A: And therefore I don't have a current opinion about his competence.

(4 RT 526-527.)

Dr. Phillip S. Trompetter, a clinical and forensic psychologist, watched the police interview on December 12, 2001, at the prosecution's request, to observe appellant. (4 RT 578-581.) Dr. Trompetter watched and listened to the interview between appellant and Detectives Grogan and Buehler on TV monitors in a separate room. (4 RT 581.) Dr. Trompetter watched from when the interview began around 9:00 a.m. until appellant invoked his rights ten to fifteen minutes later. (4 RT 582-583.) He continued watching when the interview resumed at around 11:15 or 11:30 a.m. after appellant decided to talk to detectives, until 1:15 p.m. (4 RT 583.) Dr. Trompetter did not see appellant exhibit any psychotic behavior. (*Ibid.*) Appellant's responses were organized and on point. His comments were responsive to the detective's questions. (*Ibid.*) Appellant expressed no delusional beliefs and showed no signs of hallucinations. (4 RT 584.)

Dr. Trompetter observed, "He's a very religious man and, I believe, made many religious references but didn't make any religious delusional references." (*Ibid.*) Appellant appeared to understand the detective's questions and respond appropriately. (4 RT 586.) Dr. Trompetter saw some paranoid characteristics, recalling, "I think he made some comments that I thought were paranoid - - not paranoid psychotic but paranoid in the sense that he struck me as a very skeptical, distrustful cynical man." (*Ibid.*) Dr. Trompetter was never asked to form an opinion regarding appellant's competency. (4 RT 587.)

Debbie Mandujamo, a psychiatric nurse at the jail, had contact with appellant as an inmate from June 4, 2002, until September 26, 2003. (4 RT 650.) Nurse Mandujamo never had any difficulty communicating with appellant. (4 RT 653.) Appellant was able to respond to nurse Mandujamo's questions and give her the information she needed. (*Ibid.*) The last time appellant was seen by anyone from the California Forensic Medial Group ("CFMG"), which provides mental health treatment to inmates, was on September 26, 2003. (4 RT 651.) Appellant was not taking medication for any mental health condition. (4 RT 651-652.)

Jury Verdict, Defense Motion for Judgment Notwithstanding The Verdict

Following the presentation of evidence, defense counsel moved for a directed verdict. (1 CT 200; 4 RT 655-657.) Counsel urged that the defense presented overwhelming evidence that appellant was not presently competent and concluded, "So I think the vast majority of the evidence, if not all the evidence before the Court at this point, is that Mr. Mendoza is in fact not competent, presently not competent, supported by adequate competent testimony from Dr. Schaeffer and Dr. Stewart, leaving out the - - Dr. Zimmerman's testimony, because it is also remote in time." (4 RT 656.) The prosecutor responded that appellant is presumed competent and

that he has the burden of proving otherwise, pointing out, "The jury could easily consider the credibility of the various expert witnesses and decide that Dr. Cavanaugh or Dr. Trompetter or the phone calls that they listened to are more credible, are more indicative of the defendant's competency, and make a decision as to whether the defendant has actually met his burden or not." (4 RT 656-657.)

The court denied the motion, ruling as follows:

> Well, the testimony of the defense experts is certainly more recent than the prosecution's. However, I feel that there is sufficient circumstantial evidence on which the jury could find that, notwithstanding their testimony, that the defendant is in fact competent, should they choose to disbelieve or disregard the evidence by Dr. Stewart or Dr. Schaeffer or both of them, as they are free to do under the law.
>
> So under the circumstances, the motion for directed verdict is denied.

(1 CT 200; 4 RT 658.)

On December 15, 2004, the jury found appellant competent to stand trial. (1 CT 242; 4 RT 733-735.) Criminal proceedings were reinstated. (5 RT 739.)

On February 2, 2005, appellant filed a motion for judgment notwithstanding the verdict. (1 CT 245-251.) On February 16, 2005, appellant moved to reinstate section 1368 proceedings. (1 CT 263-266.) The People filed written opposition to both motions. (1 CT 252-262.) At the hearing on February 24, 2005, defense counsel argued,

> [T]he verdict certainly appeared to be supported only by inferential evidence. And in the case cited whenever a jury verdict is supported by only inferential evidence and the other side is direct evidence, the direct evidence trumps the inferential evidence.
>
> In this case the Court will recall that the only evidence offered by the People were some stale medical evaluations,

some anecdotal evidence and some taped – taped conversations that occurred three or four months prior to the trial and a couple of lay witnesses who testified to the Defendant's demeanor. All of this evidence is relevant evidence, but it's relevant in the context of circumstantial/inferential evidence.

The Defense presented direct testimony that the Defendant was not competent, not presently competent. There was nobody testifying for the People who was able to make that assertion.

So I think under the standard of Tech versus General Mills, a JNOV should be granted.

(5 RT 758-759.) The prosecutor argued in response,

Your Honor, in support of the People's opposition, the motion for JNOV is made pursuant to Section 629; and as the People's opposition lays out, the law requires that there be no substantial evidence in support of the verdict and does not allow the judge to reweigh the evidence or the credibility of witnesses.

Even the 1959 case Tech versus General Mills that the Defendant cites, specifically says if there is any substantial evidence before it in support -- in the first instance in support of plaintiff's case, that the verdict must be supported.

And here we have a jury finding that the Defendant is competent. There is substantial evidence in support of that verdict, and the judgment should not be overturned.

(5 RT 759.) Defense counsel maintained that substantial evidence did not support the jury's verdict. (5 RT 760.) The court denied the motion for judgment notwithstanding the verdict, ruling as follows:

The Court did hear the case, did hear the evidence and did note that there was evidence from Dr. Cavanaugh's opinion which was supported by evidence from the phone calls and other evidence indicating that the Defendant had capacity to carry on rational discussions, did not appear to be so depressed that he was unable to rationally think or rationally pursue objectives which he believed were appropriate to himself and to his situation.

> So under the circumstances the Court finds that there was substantial evidence to support the jury's verdict. The Court is not allowed to reweigh that evidence. The motion for judgment notwithstanding the verdict is denied.

(*Ibid.*; 1 CT 267.)

B. Substantial Evidence Supports the Jury's Competency Finding

"Under California law, a person is incompetent to stand trial 'if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.' (§ 1367, subd. (a).)" (*People v. Young* (2005) 34 Cal.4th 1149, 1216; see also *People v. Koontz* (2002) 27 Cal.4th 1041, 1063; *People v. Garcia* (2008) 159 Cal.App.4th 163, 170.) The federal standard of incompetence is as follows: "A defendant is incompetent to stand trial if he or she lacks a "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and . . . a rational as well as a factual understanding of the proceedings against him.'" (*Dusky v. United States* (1964) 362 U.S. 402, 402 (per curiam); see also *Godinez v. Moran* (1993) 509 U.S. 389, 399-400; § 1367; *People v. Stewart* (2004) 33 Cal.4th 425, 513.)" (*People v. Rogers* (2006) 39 Cal.4th 826, 846-847; see also *People v. Taylor* (2009) 47 Cal.4th 850, 861.) "A defendant is presumed competent unless the contrary is proven by a preponderance of the evidence." (*People v. Dunkle* (2005) 36 Cal.4th 861, 885; *People v. Lawley* (2002) 27 Cal.4th 102, 131; § 1369, subd. (f).)

On appeal, a finding on the issue of a defendant's competence to stand trial "cannot be disturbed if there is any substantial and credible evidence in the record to support the finding." (*People v. Castro* (2000) 78 Cal.App.4th 1402, 1418.) The court on appeal views the evidence in the light most favorable to the verdict to determine if it supports the trial court's finding.

(*People v. Dunkle*, *supra*, 36 Cal.4th at p. 885; *People v. Marshall* (1997) 15 Cal.4th 1, 31.) "'Evidence is substantial if it is reasonable, credible and of solid value.' [Citation.]" (*People v. Lawley*, *supra*, 27 Cal.4th at p. 131.) "'In addition, a reviewing court generally gives great deference to a trial court's decision'" on the defendant's competence to stand trial. (*People v. Kaplan* (2007) 149 Cal.App.4th 372, 382-383, quoting *Marshall*, at p. 33.)

Here, the jury's finding that appellant did not suffer from a mental disorder that prevented him from having a rational as well as factual understanding of the proceedings against him or cooperating and rationally assisting in his defense is supported by substantial evidence. On the basis of a clinical interview, a mental status examination, and a review of appellant's mental health records and the reports of other doctors, the prosecution's expert, Dr. Cavanaugh, found that appellant was competent to stand trial. (4 RT 493-494, 508, 521.) Dr. Cavanaugh's conclusion was bolstered by the testimony of jail staff, who had the opportunity to observe and interact with appellant on a regular basis and noticed none of the signs and symptoms of depression or psychosis described by the defense experts. (4 RT 486-488, 650-653.) The prosecution also presented the testimony of Dr. Trompetter, who observed appellant shortly after the shootings and found no evidence of psychosis. (4 RT 583-587.) Furthermore, the prosecution presented tape recordings of several phone calls appellant made in jail in 2004 to his family wherein he showed no defects in his ability to understand the nature and purpose of the proceedings, to comprehend his own status and condition in reference to the proceedings, and to assist counsel in his defense. (Supp. CT 3-51.) This evidence was sufficient to support the jury's competency verdict.

Appellant initially contends that the trial court denied his motion for judgment notwithstanding the verdict using the "wrong standard" and failed to consider the federal constitutional requirements for competency. (AOB

66-68.) This contention is without merit. The federal standard for measuring competence is whether the defendant has a "'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding,'" and has "'a rational as well as factual understanding of the proceedings against him.'" (*Godinez v. Moran, supra*, 509 U.S. at pp. 396, 397-402.) This standard was laid out in the jury instructions given by the court. (1 CT 236, 4 RT 698.) Before ruling on the motion for judgment notwithstanding the verdict, the court emphasized, "The Court did hear the case, did hear the evidence . . ." (5 RT 760.) The court then went on to discuss Dr. Cavanaugh's opinion, which the court ruled "was supported by evidence from the phone calls and other evidence indicating that the Defendant had capacity to carry on rational discussions, did not appear to be so depressed that he was unable to rationally think or rationally pursue objectives which he believed were appropriate to himself and to his situation." (*Ibid.*) There is nothing to support appellant's contention that the court failed to consider the federal requirements of competency in denying the motion.

Next, appellant claims that the prosecution failed to refute the defense evidence of incompetency under federal constitutional requirements. (AOB 68-83.) Specifically, he alleges that Dr. Cavanaugh's opinion was stale, was compromised by "faulty techniques," and was given without adequate foundation. (AOB 69-81.) Appellant also claims that the taped jail phone conversations between him and family were not relevant to his competency (AOB 81-82) and that the testimony from jail staff regarding their conversations with appellant failed to refute the evidence of his legal competency (AOB 82). Finally, appellant alleges Dr. Trompetter's testimony was irrelevant and thereby did not support Dr. Cavanaugh's opinion because Dr. Trompetter gave no opinion as to appellant's

competency. (AOB 82-83.) These contentions, too, are without merit. Therefore, reversal is not warranted.

As the prosecutor pointed out during defense counsel's motion for a directed verdict, which the court denied, the jury could find the defense experts not credible and reject their opinions. (4 RT 656-657; see *People v. Marshall, supra*, 15 Cal.4th at p. 31.) While the prosecution's experts did not offer an opinion regarding appellant's present competency, they did provide evidence regarding his competency over the time he was incarcerated that was relevant to the question of his present competency to stand trial. The jury was not required to accept the opinions of Dr. Stewart and Dr. Schaeffer, two experts that were both retained by the defense. "Of course, the jury is not required to accept at face value a unanimity of expert opinion: 'To hold otherwise would be in effect to substitute a trial by "experts" for a trial by jury. . . .'" (*Marshall*, at p. 31, citing *People v. Samuel* (1981) 29 Cal.3d 489, 498, quoting *People v. Wolff* (1964) 61 Cal.2d 795, 811.)

The jury was instructed, "You're the sole judges of the believability of a witness and the weight to be given to the testimony of each witness," and, "You're not required to decide any issue of fact in accordance with the testimony of a number of witnesses which does not convince you as against the testimony of a lesser number or other evidence which you find more convincing." (4 RT 693-694.) The jury was advised on evaluating expert witness testimony,

> Witnesses who have special knowledge, skill, experience, training or education in a particular subject have testified as to certain opinions. This type of witness is referred to as an expert witness. In determining what weight to give any opinion expressed by an expert witness, you should consider the qualifications and believability of the witness, the facts or materials upon which each opinion is based, and the reasons for each opinion. An opinion is only as good as the facts and the

reasons on which it is based. If you find that any fact has not been proved or has been disproved, you must consider that in determining the value of the opinion. Likewise, you must consider the strengths and weaknesses of the reason on which it is based.

You're not bound by an opinion. Give each opinion the weight you find it deserves. You may disregard an opinion if you find it to be unreasonable.

In resolving any conflict that may exist in the testimony of expert witnesses you should weigh the opinion of one expert against that of another. In doing this, you should consider the qualifications and believability of each witness, the reasons for each opinion, and the matter on which it is based.

In considering what weight to give the expert's opinion regarding competence to stand trial, one of the factors you may consider is the recency of the evaluation of the defendant.

(4 RT 695-696.)

Here, the jury apparently found Dr. Stewart's and Dr. Schaeffer's testimony unbelievable. As in *Marshall*, all of the doctors based their opinions regarding appellant's competence to stand trial primarily on their interviews with appellant. But, a psychiatric nurse and deputy sheriff from the jail both had no difficulty communicating with appellant. (4 RT 650-653.) Nurse Mandujamo had contact with appellant as an inmate for over a year, from June 2002 to September 2003, and appellant was able to respond to her questions and give information that was needed. (*Ibid.*) Appellant was not treated for any mental health issues from September 2003 until the competency trial in December 2004, and was not taking any psychiatric medications. (4 RT 651-652.) Deputy Sheriff Watson saw appellant only briefly, but appellant was able to request cell moves or cellmate transfers with no difficulty communicating. (4 RT 486-488.) Additionally, Dr. Trompetter did not see any psychotic behavior when he watched appellant talk with detectives for hours the morning after the shooting. (4 RT 583-

586.) Appellant appeared to understand the detective's questions and respond appropriately. (4 RT 586.) Appellant's responses were organized; he showed no signs of hallucinations or delusions. (4 RT 583-584.)

Although Dr. Stewart testified that appellant's condition was deteriorating and that he was no longer able to state the charges against him (3 RT 376, 415, 422), the jury was not require to accept this testimony. The phone calls appellant made to his family from jail proved that he was capable of rational thought. (Supp. CT 4-50.) Pati accused appellant of "lying, trying to say that he is crazy." (Supp. CT 45.) Appellant insisted, "I am not crazy!" (*Ibid.*) He explained, "Well, that is the attorney's and the district attorneys and of all of us's [*sic*] game . . . because we agreed. We are playing with that. I am telling you." (Supp. CT 45-46.) The phone calls showed appellant was able to communicate. He was direct, responsive, capable of expressing his thoughts and engaging in normal conversation.

Dr. Cavanaugh opined that appellant was competent to stand trial. (4 RT 494, 508, 521.) He made clear that his opinion was as to appellant's competency on the date of the interview, February 12, 2004. (4 RT 526-527.) Dr. Cavanaugh saw manifestation of a personality disorder, but no evidence of major mental illness, no psychotic behavior. (4 RT 494-496.) Dr. Cavanaugh concluded that appellant was able to assist his attorneys in conducting his defense, and could respond logically and rationally to questions. (4 RT 521.) Appellant was able to understand the nature of different defenses. (4 RT 505, 519.) He could describe, in a rough fashion, how an attorney might help a defendant and what must be done to prove a defense. (*Ibid.*) He had a very good memory and was "cognitively intact." (*Ibid.*) He was able to rationally respond to questions about the nature and purpose of the proceedings, about orientation, and about his ability to make abstract determinations. (4 RT 519.) He showed a basic understanding of

each of the players in the court proceedings. (4 RT 520-521.) Dr. Cavanaugh recalled that at times appellant "would interject statements about his view of the world and his religion, but if I persisted or asked the question in a slightly different way, he usually would respond." (4 RT 519-520.) Dr. Cavanaugh explained, "He would talk in a very philosophical way at times about how he saw the world." (4 RT 520.) Dr. Cavanaugh opined that appellant's religious beliefs were not delusional. (4 RT 501-502.) He explained,

> I interpreted that it was not a hallucination. Many people who are quite religious, particularly those who are fundamentalistic (*sic*) religious speak of God talking to them or guiding their life, and it appeared to me that that's the context that Mr. Mendoza was describing this [hearing the inner voice of God].

(4 RT 565.)

Dr. Cavanaugh acknowledged during cross-examination that he did not follow-up each of appellant's responses with further questioning to get a more precise answer and that he generally starts with yes/no questions then moves to open-ended questions if the responses are affirmative. (4 RT 538.) Dr. Cavanaugh explained that he sometimes will go back to a topic if the interviewee does not respond or he is "not getting any place." (4 RT 566-567.) This is hardly a "faulty technique." Appellant spoke in religious overtones only when asked direct negative questions about the crime or the criminal proceedings against him. (4 RT 567.) Dr. Cavanaugh felt that appellant may have been evading answering rather than unable to answer, but cautioned, "[T]hat's only the way it looks. I couldn't tell actually what was in his mind." (4 RT 539, 567.)

Before interviewing appellant, Dr. Cavanaugh reviewed a lot of documentation, including: the court's order, a letter from the prosecutor outlining the circumstances of the evaluation, a letter from defense counsel

expressing concerns about the evaluation, three prior mental health evaluations by Dr. Schaeffer, Dr. Stewart and Dr. Zimmerman, photos, jail mental health records, the post-arrest interrogation video and transcript, recordings and transcripts from recent telephone conversations by appellant, and police reports from the crime. (4 RT 497.) Dr. Cavanaugh was clearly prepared for the interview.

Appellant faults Dr. Cavanaugh for not investigating his culture and for not consulting with his family or friends to see if appellant's religious preoccupation was recent or not. (AOB 76.) But Dr. Cavanaugh was authorized only one competency examination of appellant. (4 RT 565, 570.) In-depth follow-up interviews with family members and lengthy follow-up questions would not necessarily go into a section 1368 evaluation. (4 RT 565-566.) Dr. Cavanaugh did not feel the need to do that in this case to render an opinion. (4 RT 566.) Moreover, it is highly unlikely the defense would have permitted the prosecution's mental health expert to repeatedly examine appellant following the one court-authorized interview in February. Finally, Dr. Cavanaugh reviewed more recent reports from Drs. Stewart and Schaeffer and they did not change his opinion that appellant was competent. (4 RT 507-508.)

Dr. Zimmerman's testimony also supported the jury's verdict. Appellant was able to answer questions precisely before he moved on to other topics. (3 RT 340-341.) Appellant was aware he was charged with murder and was facing the death penalty. (3 RT 341, 349. 352, 359.) Appellant was able to name his attorney and confirmed that he could discuss the case with his attorney. (3 RT 352-353, 357-358.) Appellant was a reasonably reliable informant, his personal hygiene was unremarkable, and he was well oriented to person, place, and time. (3 RT 346, 349.) Appellant showed no obvious signs of a thought disorder. (3

RT 348.) He refused to discuss the facts of the case, but that was not unusual for a criminal defendant. (3 RT 346-347, 352.)

Appellant's most recent interview, which was with Dr. Schaeffer on December 4, 2004, lent further support for the jury's verdict. (3 RT 451.) Appellant was aware of the pending competency trial and that he was charged with murder. (Supp. CT 106-107, 109.) That appellant did not believe he murdered anyone because he rationalized that they were "in a better place" with God and spiritually reborn (Supp. CT 108), does not negate appellant's knowledge and understanding about the criminal proceedings against him. Appellant repeatedly showed awareness and understanding of the criminal proceedings and ability to assist his attorneys when and if he decided to do so. (Supp. CT 109, 110, 112-113.) Appellant could name his attorneys and stated that he wanted them to argue that he was innocent. (Supp. CT 112.) Appellant advised that he was able to tell his attorneys what happened on the day of the shooting. (Supp. CT 109.) It was only when asked pointed questions about the crime or the subsequent proceedings that appellant would give long-winded or abstract answers. Appellant frequently answered questions succinctly and then moved on to what he wanted to discuss, which was primarily his religious beliefs and his children. That appellant chose to leave things in God's hands did not make him incompetent.

Finally, *People v. Samuel*, *supra*, 29 Cal.3d 489, does not help appellant. In that case, "five court-appointed psychiatrists, three psychologists, a medical doctor, a nurse, and three psychiatric technicians testified on [defendant's] behalf. In addition, four psychiatric reports were admitted into evidence. Without exception, each witness and every report concluded that throughout the period during which the declarant observed the defendant, the latter was incompetent to stand trial." (*Id.* at pp. 497-498.) Unlike the prosecution in *Samuel*, the prosecution here offered two

expert witnesses, Dr. Cavanaugh and Dr. Trompetter, testimony of a deputy sheriffs' and a jail nurse's observations, and jail phone calls showing ability to consult with an attorney and rational and factual understanding of the proceedings. The evidence that appellant was incompetent to stand trial was not "persuasive and virtually uncontradicted" (*id.* at p. 506) and the jury could reasonably reject the defense experts' opinions and conclude that appellant was competent to stand trial.

In sum, the prosecution presented sufficient evidence refuting appellant's claimed incompetency to support the jury's verdict. Dr. Cavanaugh concluded that appellant's deep religious beliefs were strong non-psychotic feelings, not of delusional proportions. Dr. Cavanaugh's opinion that appellant was competent to stand trial is supported by the phone calls, testimony of the jail psychiatric nurse and sheriff's deputy, Dr. Trompetter's observations, and the interviews and testimony of Drs. Zimmerman and Schaeffer. Substantial evidence showed appellant could cooperate with counsel if and when he chose to do so, and proved appellant could understand the nature of the proceedings against him. (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1385-1386; *People v. Halvorsen* (2007) 42 Cal.4th 379, 403; *People v. Marks* (2003) 31 Cal.4th 197, 215–222.) Since the prosecution presented ample evidence refuting appellant's claimed incompetency, the jury's finding is supported by substantial evidence and reversal is not warranted.

C. International Jurisprudence

Appellant further alleges that international jurisprudence on competency to stand trial supports his claim that the evidence against him was insufficient to support the jury's finding of competency. (AOB 86-93.) Since the jury found appellant competent to stand trial and that verdict is supported by substantial evidence, as discussed *supra*, appellant's trial and conviction does not violate international law prohibiting trial of

incompetent persons. Moreover, the competency standard applied in "comparative common law and international jurisprudence" does not apply in this case and should not have been considered by the trial court. The trial court correctly interpreted and applied California law, which does not violate the United States Constitution.

II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN FINDING NO SUBSTANTIAL CHANGED CIRCUMSTANCES WARRANTED REOPENING SECTION 1368 COMPETENCY PROCEEDINGS

Appellant contends that he was tried while incompetent in violation of his federal due process rights, and thereby his convictions must be reversed. He maintains that substantial changed circumstances supported defense counsel's repeated requests to reopen section 1368 proceedings following the competency verdict on December 15, 2004. Appellant claims that the trial court failed to exercise its discretion in finding him competent, or alternatively, the court abused its discretion in making such a finding. (AOB 95-121.) As discussed in Argument I, *supra*, appellant was found competent following a jury trial and that finding is supported by substantial evidence. The trial court considered and denied defense counsel's requests to reopen proceedings. The court properly exercised its discretion in finding no substantial changed circumstances warranted suspending proceeding and reinstating section 1368 proceedings. Appellant's due process rights were not violated.

A. Relevant Proceedings Below

On December 15, 2004, a jury found appellant competent to stand trial. (1 CT 242; 4 RT 733-735.) Criminal proceedings were reinstated. (5 RT 739.) On January 19, 2005, appellant moved to represent himself. (5 RT 745-747.) Appellant showed, as he had previously, an ability to answer the court's questions, but preferred to discuss the alleged injustices being

done to him and his children. (5 RT 746-748.) The court denied the request finding that appellant was not competent to represent himself (5 RT 749-750) and also finding that the request was not timely (5 RT 761-765).

On March 17, 2005, appellant made a *Marsden*[25] motion to have new attorneys appointed to represent him. (5 RT 769.) Appellant explained the basis of his request,

> There is no trust between us. They haven't even gotten me the discovery of the police. They don't talk to me about the case. They don't visit me. When they do, they just talk about silly things, about how I'm doing in jail. They know it's miserable down there and little things that they help me - - I don't know much about this, but I probably would help them. I can see that now. There were jurors - -

(5 RT 770.) The court inquired, "What?" Appellant continued, "The jurors that came in the competency trial, there were policemen, police supervisors and police wives, and they didn't object to that. I mean, it is a setup to mess me up." (*Ibid.*) The court asked what appellant felt his attorneys had not done that they should have in representing him. Appellant answered that his attorneys had not talked to him about the case. (*Ibid.*) Defense counsel believed appellant's lack of trust was due to his mental illness not their performance. (*Ibid.*) Mr. Spiering acknowledged, "What we consider the case has to do a lot with his mental condition. And the kinds of conversations we have don't center around the activities [of] December 12th, 2001. I will say that, but I don't think that's where the meat of this case is." (5 RT 773-774.) Appellant insisted, "I'm not crazy. They said I'm crazy. I'm not crazy. I certainly was crazy when all these things happened because if I loved my kids so much, I wouldn't do something so much to hurt my kids. And the most people what [*sic*] I hurt was innocent people, especially my kids. . . ." (5 RT 776.) The court denied the motion

---

[25] *People v. Marsden* (1970) 2 Cal.3d 118, 123.

finding, "If there has been a breakdown, I don't think that the breakdown is irretrievable and that any deterioration of the relationship has been occasioned by Mr. Mendoza's attitude toward this matter. I don't see any reason why he could not be adequately represented by his attorneys if he wants to be." (5 RT 778.)

On October 14, 2005, shortly before trial on the guilt phase began, defense counsel requested the court reinstate section 1368 proceedings on the ground that appellant's major mental illness was "in an active stage at the present time." (5 RT 929.) Counsel expressed their belief that appellant was not competent, explaining,

> We think that perhaps when we were looking at this case in the past -- and maybe it's our fault and not Mr. – not the fault of how the case was litigated, but we were looking at it in terms of how Mr. Mendoza would be able to help us for trial as opposed to get through trial.
>
> And I think that at the present time that the likelihood of Mr. Mendoza successfully getting through this trial is very low. The possibility of him understanding and waiving certain rights including the right to testify, the possibility of him testifying competently and proceeding before the Court does not exist and Mr. Mendoza despite the findings of the jury in December of last year is not competent for trial.

(5 RT 930.) After other matters were discussed, defense counsel continued,

> To follow up on the competency issue that I raised at the beginning of this hearing here today, would make a declaration that Mr. Mendoza is not now competent to stand trial and ask for a hearing on that. We'd also ask if the Court wants that -- there are some things that we would like to bring to the Court's attention under seal in that regard because we believe that it would reveal attorney-client communications and otherwise compromise perhaps Mr. Mendoza's very life in exposing some of the things that we have to say to -- not under seal.

(5 RT 937.) The prosecutor argued that defense counsel had not presented substantial new evidence to support reopening competency proceedings. (9

RT 938.) Defense counsel responded that: (1) "there doesn't seem to be any case authority as to what changed circumstances are and how they're defined," and (2) the level of proof of changed circumstances should diminish as the time between the competency finding and the motion expands. (*Ibid.*)

In a closed hearing, defense counsel argued,

> In this matter we've represented Mr. Mendoza for three and a half years or so. We got the case in mid 2002. Over this time he's displayed various symptoms of major mental illness. In the time since the finding of competency by the jury in December of 2004, Mr. Mendoza has further deteriorated his competence for trial in those standards.
>
> Several examples of this come to fore in the past months as we worked up towards trial. They also affect certain rights of his in the course of the trial.
>
> Some examples of the kinds of thinking that has been driven by his major mental illness, our legion [*sic*] - - every time we go see him his concentration on his children, his family and the guilt of others and hypocrisy of the system, none of this makes it easy for us to work with him as we prepare for trial and I think would make it impossible for him to testify relevantly in any proceeding before the Court whether it be in a penalty phase or guilty or not guilty by reason of insanity phase of the trial.
>
> Several examples of this are we've told him again and again his inability to - - strike that. His inability to follow directions of counsel is shown to us all the time. His conversations with various family members are almost always inappropriate. Some of that was brought before the court in the 1368 proceedings, but others of it has continued through this day and actively and detrimentally affect our ability to put on a penalty phase.
>
> Here just in the last ten days, week, he's left messages with his family members that have resulted in them turning off of the defense in some ways and telling us that family members, his children specifically, who were going to meet with us refuse to do so because of the kinds of messages that he left. Again - - and these messages were not mean spirited messages towards a

specific person as we understand, because we didn't hear them but, you know, were things that were driven by his mental illness and the guilt of others, the kinds of problems that he has.

Also several months ago in response to Mr. Mendoza's request to see a priest, I had the pastor from the Catholic church that I attend, Father Illo, come out and meet with him and attempt to sort of try to work spiritually through some of these things. As the Court is well aware there's a large component of religiosity throughout any of Mr. Mendoza's talks and so forth and statements.

So I was with Father Illo for part of the time that he was meeting with Mr. Mendoza and rather than have an appropriate meeting with the priest and the priest - - this is a guy I know from, you know, a little bit and is a fairly sensitive person and speaks English and Spanish, came up to him and, you know, talked to him about forgiveness, remorse and things like that. And the level of distraction by his mental illness is that Mr. Mendoza wanted the priest to confess to him first.

And following that I left the room and left the two of them together for sometime [*sic*]. This was obviously since I was present not privileged information, outside that privilege.

He's recently in the last week when we've been visiting him expressed a desire to remain shackled, not dressed out for trial, expressed a preference for the death penalty. You know, it's not like this guy is suddenly schizophrenic or suddenly has a different mental illness, but it's worse.

I think all of that in expressing his preference for the death penalty is going to make - - he's not competent for trial. And for us to proceed to trial, I think, is - - puts him at risk of suicide. I know that looking through the medical records - - and the Court heard this testimony in the 1368 proceeding - - there's been at least once and maybe twice he was put in isolation for suicidal ideation and so forth. He would have to do something to himself, and as far as I know he hasn't made anything more than the threats of suicide. I don't know of any particular hurt that he's done to himself.

(5 RT 941-944.)

Thereafter, the court denied the request to reopen section 1368 proceedings, finding as follows:

> After having heard the statements of counsel the reasons for their concern, it's the Court's impression that these matters are not substantially different from concerns which counsel have expressed earlier and the behaviors are not substantively different. Substantively different than the behavior the Defendant has displayed at various times.
>
> Therefore, the Court does not find the change in circumstances which would justify a new examination of the Defendant's current competency.

(5 RT 945.)

During jury selection, on November 1, 2005, defense counsel reiterated their belief that appellant was not competent to stand trial. (3 CT 796; 9 RT 1603.) Counsel argued,

> The Court can observe in the course of the jury selection that Mr. Mendoza is completely uninvolved in this case. I've solicited information, feedback and concern before and during each of the panels that have been bought in. We've gotten no response from Mr. Mendoza. I believe, based upon consultation with experts and my long history with Mr. Mendoza, that this is because of mental disease, defect, or disorder, and he remains incompetent to stand trial in this matter.

(*Ibid.*) The court denied the request finding, "I don't believe that there is any indication of a change of status in Mr. Mendoza since the last hearing on the matter, so – and we actually took this matter up earlier on at the start of the jury selection." (*Ibid.*)

Two days later, during the presentation of evidence in the guilt phase, defense counsel raised a concern about Cindi being present during the playing of her 911 call and averred, "Foundationally, I just am quite concerned about the disability of my client at this time as we've put on the record time and again." (10 RT 1887-1888.) Cindi wanted to remain in the courtroom while the 911 tape played. (10 RT 1889.) Defense counsel then

inquired, "May my client be excused for this? He's heard it once." (*Ibid.*) Appellant waived his presence for playing of the tape and left the courtroom. (*Ibid.*)

After the tape played, the court held in camera proceedings with defense counsel. Defense counsel reported,

> I spent five or ten minutes with Mr. Mendoza while the tape was being played in the courtroom, and he's probably right on the edge of just complete melt down [*sic*] mentally. He expressed a strong desire to not be in the courtroom anymore. I'm not sure, you know, what would happen if he is, obviously. But he's certainly decompensated to a point that I haven't seen him before. He's certainly not going to help himself in any way.

(10 RT 1892.) The court responded,

> I saw him when he came back in and he looked alert and okay.
>
> Well, we can do a couple of different things, I suppose. One thing would be to - - you know, it may be his wife that is triggering all of this and, you know, if he's absent from her testimony, the rest of her testimony, then maybe he can return to the courtroom thereafter and, you know, be able to handle the relatively dry, you know, kinds of things that are coming after that.

(*Ibid.*) The court suggested, alternatively, "Otherwise, we can just try to have him come back in and just hear it. But, apparently, that's not his desire." (10 RT 1893.) Defense counsel decided to have appellant remain out of the courtroom during the remainder of Cindi's testimony. (*Ibid.*) Defense counsel reminded,

> As the Court may recall from the prelim two and a half years ago, it was very difficult then when she took the stand. And during the doctor's testimony prior to Ms. Martinez taking the stand he was sobbing very heavily. He sobbed quite a bit during the trial, but this was much heavier than he has in the past. And he doesn't look like he's been sleeping. He looks terrible.

(*Ibid.*) The Court replied, "Well, let's give that a try and we'll see - - see where we go from there." (*Ibid.*)

Back in open court, the court advised,

> We were talking with counsel and heard that Mr. Mendoza is not doing very well. And in order to stave off more -- other consequences, I suggested that perhaps he could remain out of the courtroom while Cindi finishes testifying. And they seemed to think that then we can reassess where he is after that.

(10 RT 1894.) The prosecutor inquired, "[Y]ou're saying 'not doing well.' In terms of physically ill at this point?" (*Ibid.*) The Court answered, "Well, emotionally." (*Ibid.*) The prosecutor responded, "We've been putting in a lot of evidence here so I have no objection," and proceedings resumed. (*Ibid.*)

The following day, Friday November 4, 2005, defense counsel put on the record the following:

> In the course of the proceedings heretofore Mr. Mendoza has sat quietly for the most part next to me during testimony. On Tuesday and Wednesday morning he cried almost the entire time, had his hand over his face a good part of the time.
>
> When he wasn't crying -- it seemed like that was Wednesday afternoon, he had his hands over his face. And Thursday it was pretty well recorded on the record his attitude and demeanor sitting there quietly crying. That continued this morning.
>
> I think that was a result of his mental disease or defect and it affects our ability to adequately represent him and for his adequate participation in the trial.

(11 RT 2060-2061.)

During guilt phase closing arguments on November 9, 2005, appellant had two outbursts. He announced, "It's a lie," when the prosecutor said appellant promised Guadalupe he would not hurt her mother, and interrupted, "I didn't plan to kill my family," when the prosecutor discussed

the meaning of malice aforethought. (11 RT 2171, 2173.) After the jury returned the verdict finding appellant guilty of three counts of first degree premeditated murder (§§ 187, 190.2, subd. (a)(3); 11 RT 2211-2214), defense counsel again declared a doubt as to appellant's competency, maintaining, "His demeanor and activities and actions during the course of the trial over the past several days continue to be consistent with a person who is unable to assist counsel in presenting a defense or to relevantly participate in the proceedings." (11 RT 2217-2218.) Defense counsel noted that appellant had been "consistently sobbing and crying throughout the proceedings." (11 RT 2218.) The court ruled, "Court has observed Mr. Mendoza's behavior, does not find it different in kind from the behavior he has previously exhibited during the course of this case." (*Ibid.*)

During the sanity phase on November 29, 2005, the Mexican Consulate, which had been involved in the case since November 2002[26], filed a letter brief asking the court "to appear in the Court as *amicus curiae* on behalf of Mr. Mendoza for the purposes of raising the Mexican Government's concern about ongoing reports from counsel for Mr. Mendoza regarding their client's present competence to stand trial." (1 CT 16a; 2 CT 357, 377; 4 CT 909-916.) Mexico requested the court reconsider the competency issue based on reports from defense counsel. (4 CT 910-916.) Mexico argued there had been a change in circumstances since the jury's competency verdict that justified revisiting the issue. (4 CT 913.) Mexico cited Dr. Weiss's opinion that appellant's condition had deteriorated since the time of the crimes.[27] (*Ibid.*) Mexico requested a

---

[26] Appellant met with Cuauhtemoc Vargas of the Mexican Consulate on November 13, 2002. (2 CT 357, 377.)

[27] Dr. Weiss performed a sanity evaluation on appellant at the trial court's request. (12 RT 2369-2370, 2402.) She interviewed appellant at the jail on July 19, 2005, after the competency trial in December 2004 and (continued...)

competency hearing be held prior to the penalty phase. (4 CT 915.)

On December 1, 2005, while the jury was deliberating in the sanity phase, the court considered the defense's motion to foreclose penalty trial, or in the alternative, for an order prohibiting imposition of a death sentence as cruel and unusual punishment under the Eighth Amendment and the Supreme Court's decision in *Atkins v. Virginia* (2002) 536 U.S. 304, based on appellant's mental illness. (See Argument V; 3 CT 624-637; 14 RT 2950.) In denying the motion, the court held, "The defendant was found competent to stand trial, and I don't think that evidence in this case indicates that he does not understand what's going on, is not able to assist counsel, so the motion is denied." (14 RT 2952.) The following exchange then occurred:

> MR. SPIERING: Judge, this was not styled as a competence motion. If the Court wishes to take up the issues of competence at this time, we would like to have the opportunity to call witnesses, and if the Court's finding is intended to reflect anything other than the stated prior decision of the jury, I think that it is incumbent upon the defense to recall our witnesses, because we do not believe that he has ever been competent to stand trial, and certainly his attitude, demeanor, and participation in the trial up to this point indicates that he is not, has never been competent to stand trial during these proceedings as they have started in October and continue through to this day.
>
> THE COURT: Okay. All right. Well, I was merely stating that if that's the basis, in other words, the *Atkins* factors I don't believe apply in the case, and I don't believe that any other factors apply which will justify refusing the imposition of the death penalty should the jury so indicate. So that's just the ruling on the motion.

(...continued)
before the murder trial in October to December 2005. (12 RT 2371.) She never provided an opinion on appellant's competency to stand trial, nor was she asked to examine him for such a purpose.

MR. SPIERING: So the Court is relying upon the prior judgment on competency and not revisiting that issue at this point? That's what the Court's position has been in previous times that we've brought this up out of the presence of the jury; is that correct?

THE COURT: Yeah, it has been, and the Court's observations since that time, as well. Okay.

MR. SPIERING: Well, Judge, I again would request leave of the Court to present further evidence in that regard if you're going to make a finding based upon your observations of him in court, whether it be in camera and outside the presence of the prosecution, or through the presentation of further forensic psychological and psychiatric evidence. I think if the Court is going to make that sort of finding based upon that limited evidence, we ought to be able to put on further evidence.

MS. REES: Your Honor, I think that the Court has repeatedly stated there is no new or substantial evidence that the defendant is not competent. A jury previously found that he was competent. There has been an in camera proceeding and the Court has continued to find there is no substantial evidence, substantial new evidence before it that the defendant remains competent, and I don't think we need to revisit the 1368. That's not an issue here.

Atkins does not apply. This defendant is not in any way cognitively impaired, and there's no legal basis for the denial of the imposition should the -- of the death penalty should the jury decide that.

THE COURT: Okay, motion to reopen the question of 1368 is denied. The Court finds no new substantial evidence to justify it.

(14 RT 2952-2954.)

The court also addressed the letter brief submitted by the Mexican government, and permitted it to be filed. (14 RT 2988-2989.) The court ruled,

The brief is received, duly noted, and as I indicated previously, the thrust of it is to urge the Court to reconsider the

> issue of Mr. Mendoza's competence to stand trial, a matter which has been litigated and which the Court declines to revisit at this time.

(14 RT 2989.)

The penalty phase commenced on December 6, 2005. During penalty phase closing argument, the prosecutor emphasized, "Huber Mendoza made several choices that day and he made a conscious decision about what his relationship was going to be like with his boys after he committed those crimes." (16 RT 3360.) In response to the prosecutor's argument, appellant threatened, "Leave my kids alone, motherfucker, okay? Leave my kids alone, motherfucker." (*Ibid.*) The court advised, "Mr. Mendoza, quiet, please, or you'll be removed from the courtroom." (*Ibid.*) Appellant retorted, "Do whatever you want, but not my kids, okay? This is not -- this is wrong. They're talking about killing somebody, and they want to kill me." (*Ibid.*) Defense counsel asked for a minute and the court took a brief recess. (*Ibid.*) Appellant then apologized, "I'm so sorry for what I said to the Court and to the jury," and argument resumed. (*Ibid.*)

On December 15, 2005, after the jury retired to deliberate in the penalty phase, defense counsel raised the issue of appellant's competency once again. (16 RT 3398.) Defense counsel insisted, "I still don't think he's competent. I don't think he's been competent throughout the penalty phase. I think that was borne out by his statements yesterday in [the prosecutor's] concluding comments," and, "I just don't think he was ever able to assist counsel in a meaningful way and make a decision about testifying that are required [*sic*]." (*Ibid.*) The prosecutor responded, "Your Honor, I don't think there's been any change in circumstance. We've litigated this. I believe the Defendant is competent." (*Ibid.*) The court answered, "I agree. I don't think there's been a change of circumstance. I

think Mr. Mendoza's competence level has been the same throughout." (*Ibid.*)

On March 29, 2006, the defense filed a motion for a new trial arguing that appellant was not competent to assist counsel during the trial and he was not afforded the opportunity to testify on his own behalf. (4 CT 1040-1045.) Defense counsel filed a declaration that they believed throughout the trial that appellant was not competent to assist counsel. (4 CT 1037-1039.)

On April 10, 2006, defense counsel argued appellant was not competent to assist counsel and his right to testify was violated by his inability to testify due to mental illness. (16 RT 3418-3424.) The prosecutor responded that appellant was found competent, the defense did not present evidence of changed circumstances, and appellant's decision not to testify was a strategic trial tactic. (16 RT 3424-3426.) The prosecutor argued, "We don't believe that Mr. Mendoza was in fact disconnected from the proceedings. At times his mood was congruent with the testimony being offered. . . . He was talking to his counsel . . . wasn't sitting there with his head down crying." (16 RT 3426.) The prosecutor also pointed out that after the guilt phase verdict appellant called his family and discussed the outcome, clearly showing that he knew what was going on. (*Ibid.*) The court denied the motion, finding as follows:

> With regard to the motion for new trial on the ground of incompetence, this is not a moot matter, this is not -- this was considered by the Court at the time. There were several motions over the course of this trial made by the defense to once again recess the proceedings and reinstitute 1368 proceedings post the verdict of competence which was in November of 2004, apparently.
>
> And the Defendant during the entire period of this case -- the Court had an opportunity to examine the Defendant and his conduct throughout the case from the beginning to end, and it was the Court's observation that it was basically the same. I

think that -- it was my observation that he was more disturbed during the course of the trial proceedings than he had been in some of the earlier hearings. But that was in the Court's opinion understandable in view of the type of testimony that was presented and the type of events that were occurring during the course of the trial.

Further, the Court notes that at phases of the trial first before the competency hearing and at the competency hearing there were tapes of the defendant's jail conversations played in which the defendant appeared to be able to calmly and rationally discuss what was occurring. He understood what was occurring.

It also appeared to be the case after the verdict -- after the guilty verdict and before the sanity phase of the trial took place these conversations did not in the opinion of the Court appear to reflect the degree of depression or moroseness that the Defendant displayed during courtroom proceedings where he frequently and most often sat with his head down not observing the trial, the proceedings as the record will reflect he is doing now.

It was the Court's -- it was and is the Court's opinion that there were no changed circumstances between the time of the competency verdict in this case and the time of the trial or during the trial proceedings. The motion for new trial on that ground is denied.

It also appears to the Court that defendant was represented by able, experienced and zealous counsel who zealously advocated for him at all stages of this trial. They discussed with him the conceivable testimony. They decided that he would not make a suitable witness, and they put that strategy into work by not calling him as a witness. They did that as a trial strategy.

And I think it's clear that if they did not sit down with him and say, now, Mr. Mendoza, you have a right to testify in this case and do you want to testify and do you want to overrule us and testify in this case -- they may not have done that, but they've done everything else that competent counsel would do when making a decision as to whether you should testify. And I am quite confident that he was not deprived to testify in this case.

The motion for new trial is denied.

(16 RT 3426-3428.)

At sentencing on April 25, 2006, defense counsel made a final attempt to get the court to change its ruling. (16 RT 3447.) The court held, "That motion has previously been made and ruled on. The ruling remains as previously." (*Ibid.*)

B. Analysis

"'When a competency hearing has already been held and defendant has been found competent to stand trial, . . . a trial court need not suspend proceedings to conduct a second competency hearing unless it "is presented with a substantial change of circumstances or with new evidence" casting a serious doubt on the validity of that finding. [Citations.]'" (*People v. Kelly* (1992) 1 Cal.4th 495, 542–543; see also *People v. Jones* (1991) 53 Cal.3d 1115, 1153.) More is required than just bizarre actions or statements by the defendant to raise a doubt of competency. (*People v. Danielson* (1992) 3 Cal.4th 691, 727, quoting *People v. Deere* (1985) 41 Cal.3d 353, 358.) In addition, a reviewing court generally gives great deference to a trial court's decision whether to hold a competency hearing. This Court has acknowledged, "'An appellate court is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper.'" (*Danielson*, at p. 727, quoting *People v. Merkouris* (1959) 52 Cal.2d 672, 679.)

Appellant claims that the trial court abused its discretion in refusing to hold a second competency hearing based on: (1) appellant's demeanor and behavior in the courtroom; (2) the statements and reports by Dr. Weiss; and (3) the statements and declarations of defense counsel. (AOB 105-113.) None of these grounds presented a substantial change in circumstances or

new evidence casting a serious doubt on the validity of the jury's competency verdict.

Appellant's outbursts and crying during the trial were not changed circumstances. On May 21, 2002, appellant had an outburst while the court and counsel were discussing setting the preliminary hearing. (1 RT 20.) Appellant interjected, "I just want some - - I deserve to be punished but not my sons, please." (*Ibid.*) The court advised appellant not to say anything more and talk to his attorneys. Appellant retorted, "I already told him that we don't want any media for my kids, they're traumatizing them." (*Ibid.*) The court responded, "I'm going to go ahead and conclude - - there is a disturbance in the courtroom. Conclude this proceeding right now." (*Ibid.*) Appellant announced, "If everybody is here – I just want to protect my kids." (*Ibid.*) The court ruled, "We're done," and adjourned proceedings for the day. (*Ibid.*) On May 29, 2002, defense counsel requested a continuance and filed a declaration stating, "Based upon the behavior exhibited by the defendant during our contacts with him and in open court, we have serious concerns about the competency of the defendant." (1 CT 7-11.)

Appellant was frequently tearful and emotional prior to the trial in this case and when he was outside of court. Evidence was presented that appellant cried when he spoke to principal Jones at his son's school and when principal Jones and Deputy Jiminez visited appellant and his family at their home. (11 RT 1962-1964, 1977-1978, 1983, 1987, 1992.) Appellant was crying and talking to himself during his interview with detectives immediately following the murders. (5 CT 1177, 1179, 1182, 1196, 1198, 1211-1212, 1216, 1219, 1222, 1229, 1232, 1235-1236, 1239, 1241.) Dr. Schaeffer observed that "there were many times when Mr. Mendoza was responding in a very rational manner to the questions that were asked, which is consistent with what I testified before, that before the

offense, he was certainly capable of logical reasoning and planning," but, "At the same time, there were numerous observations when he was in the room by himself, sounds like Mr. Mendoza is crying, breathing very hard and fast, and talking to himself." (13 RT 2500.) On May 27, 2002, appellant was reported to have been crying and giving away his belongings to other inmates. (12 RT 2429.) When Dr. Stewart met with appellant for the first time on September 25, 2003, appellant was "both irritable and very, very sad and tearful simultaneously." (12 RT 2266-2267.) Dr. Stewart opined that appellant maintained this demeanor over the course of multiple interviews. (12 RT 2267-2268.) Appellant also cried several times during his interview with Dr. French on October 14, 2005. (13 RT 2608.) Dr. French could not say for certain why appellant was crying, but observed,

> I couldn't be certain, but the timing of his tears had to do with when he would -- he acknowledged, for example, that in the end it was his own actions that had damaged his children as much as anything else, which was a hell of an admission for someone like him to make, all things considered. It was in a way taking some responsibility for what he had done.
>
> I mean, my God, you look at a guy who is facing what he may be facing and the very thing which at the time he thought he was accomplishing turned out to backfire. He became the agent of his own children's damage. For a guy in his situation to be able to acknowledge something like that, man, I don't know that I could do it.
>
> So there was some real heartfelt emotional reality at times during this interview, and I -- it was entirely appropriate that he would have cried at such moments.

(13 RT 2608-2609.)

Appellant clearly showed a tendency to cry and become emotional when discussing the facts of the murders or the pending charges against him. In denying the defense's motion for a new trial based on appellant's

incompetency, the court held that after observing appellant throughout the proceedings it found appellant was "basically the same." The court ruled, "I think that -- it was my observation that he was more disturbed during the course of the trial proceedings than he had been in some of the earlier hearings. But that was in the Court's opinion understandable in view of the type of testimony that was presented and the type of events that were occurring during the course of the trial." (16 RT 3426-3428.) As the trial court properly found, appellant's crying and outbursts during the trial were logically connected to the emotionally upsetting nature of the testimony and proceedings, not a sign of worsening mental illness. Appellant's outbursts and sobbing during the trial did not show incompetence. (See *People v. Medina* (1995) 11 Cal.4th 694, 735 ["[d]efendant's cursing and disruptive actions displayed an unwillingness to assist in his defense, but did not necessarily bear on his competence to do so . . ."].)

Dr. Weiss performed a sanity evaluation on appellant at the trial court's request. (12 RT 2369-2370, 2402.) She never provided an opinion on appellant's competency to stand trial, nor was she asked to examine him for such a purpose. Dr. Weiss interviewed appellant at the jail on July 19, 2005, after the competency trial in December 2004 and before the murder trial in October to December 2005. (12 RT 2371.) As he had in prior interviews with Drs. Stewart, Schaeffer, and Cavanaugh, appellant appeared to be depressed and discussed his religious beliefs and his children frequently. (12 RT 2383-2384.) During her testimony at the sanity phase, Dr. Weiss opined that appellant's mental state had deteriorated since the time of the murders due to the traumatic event. (12 RT 2411-2412.) She did not opine that appellant's condition had worsened from the time of the competency trial.

None of the information Dr. Weiss provided was new evidence or, to the extent it might be considered new, was information that could possibly

cause a serious doubt about the validity of the original competency determination. Thus, her testimony during the sanity phase did not raise a reasonable doubt about appellant's competence and her testimony did "not comprise substantial evidence of incompetence necessitating a hearing." (*People v. Weaver* (2001) 26 Cal.4th 876, 954; see also *People v. Kelly*, *supra*, 1 Cal.4th at p. 543 ["There was no evidence of a change of circumstances, much less a substantial change. The substance of the defense testimony relied upon on appeal was generally included in the facts defense counsel recited when they expressed their doubts as to competency in the first place. The testimony defendant now cites did not specifically address defendant's present competency, and gave no reason to doubt, and certainly no reason to seriously doubt, the continuing validity of the unanimous expert opinion and the court finding that did specifically address the subject"]; *People v. Leonard*, *supra*, 40 Cal.4th at p. 1416.)

The trial court, which observed appellant throughout the months preceding the trial and during all stages of the guilt, sanity, and penalty phases, consistently found that appellant's condition had not changed since the section 1368 competency proceedings. Shortly before the guilt phase began, defense counsel argued that competency proceedings should be reinstated because appellant's mental illness was in an "active stage." (5 RT 929.) Counsel urged that appellant's condition had worsened since the competency trial, but the court disagreed, finding, "[T]hese matters are not substantially different from concerns which counsel have expressed earlier and the behaviors are not substantively different. Substantively different than the behavior the defendant has displayed at various times." (5 RT 945.) A few weeks later during jury selection defense counsel raised the issue again and the court once more found, "I don't believe that there is any indication of a change of status in Mr. Mendoza since the last hearing on the matter. . . ." (9 RT 1603.) Then following closing argument in the guilt

phase, defense counsel raised the competency issue and the court yet again ruled, "Court has observed Mr. Mendoza's behavior, does not find it different in kind from the behavior he has previously exhibited during the course of this case." (11 RT 2218.)

In denying the defense's motion to foreclose penalty trial or prohibiting imposition of a death sentence, the court found no evidence that appellant "does not understand what's going on, is not able to assist counsel," and explained that it found appellant competent based both on the jury verdict and on the court's observations of appellant since that time. (14 RT 2952-2954.) The court found "no new substantial evidence to justify" reopening section 1368 proceedings. (*Ibid.*) After the jury retired to deliberate in the penalty phase, the court refused to reopen competency proceedings, ruling, "I don't think there's been a change of circumstance. I think Mr. Mendoza's competence level has been the same throughout." (16 RT 3398.)

In arguing for a new trial, defense counsel anticipated the competency issue would be raised on appeal as a basis for reversal. Counsel admitted trying to "sell the concept of an LWOP" to the prosecution prior to trial. "Because we felt if this case goes up on appeal, that there's a handful of bases for the appellate court to send it back that the defendant was not competent. And we felt that was something the People should consider. . . ." (16 RT 3422.) Throughout all phases of the trial, defense counsel repeatedly raised the competency issue and the court continuously found no change of circumstances. "A trial court's decision whether or not to hold a competence hearing is entitled to deference, because the court has the opportunity to observe the defendant during trial." (*People v. Rogers, supra*, 39 Cal.4th at p. 847.)

In arguing to have new attorneys appointed to represent him at the March 17, 2005, *Marsden* hearing, appellant showed ability to converse

with the court and explained the basis of his request. (5 RT 770-776.) Appellant acknowledged, "I don't know much about this, but I probably would help them [his attorneys]," and discussed his complaints involving jury selection. (5 RT 770.) Appellant complained that his attorneys did not talk to him and insisted, "I'm not crazy. They said I'm crazy. I'm not crazy, I certainly was crazy when all these things happened because if I loved my kids so much, I wouldn't do something so much to hurt my kids." (5 RT 776.) Appellant's discussion with the court showed, consistent with the jury's competency finding, that appellant was capable of understanding the nature and purpose of the proceedings, could comprehend his own status and condition in reference to the proceedings, and was able to assist counsel in his defense if he chose to do so.

The trial court was also aware of appellant's recent phone calls following the guilt phase verdict during which appellant showed awareness of the proceedings and the possible implications the jury's findings could have on him. (5 CT 1117-1161; 12 RT 2342; 13 RT 2757-2763.) Appellant discussed the jury's verdict with his sister and advised her, "just like I expected, everything turned out, they found me guilty of everything and . . . and, like 6 or 7 charges and, according to them, maliciously, and that I premeditated everything and . . . just a bunch of racists." (5 CT 1118.) Appellant talked about his insanity plea insisting that "it's just a bunch of shit on their part, it's just a story that, that they they [*sic*] are according to them helping me and all of that." (*Ibid.*) Appellant told his sister, "Now it's going to the jury now the, the penalty phase to, to see if I was sick or not at the time that this all happened, that like I tell you, it's all a farce now." (5 CT 1119.) Appellant demonstrated, much as he had in prior phone calls to his family, an ability to communicate and rationalize, which the defense attorneys insisted he was incapable of doing. (See 4 CT 1099-1116; 5 CT 1117-1161.)

The record clearly demonstrates that the trial court never doubted appellant's mental competence to stand trial, and thus properly declined to suspend proceedings pursuant to section 1368. Appellant was not entitled to a second competency hearing simply because defense counsel disagreed with the jury's verdict. (*People v. Huggins* (2006) 38 Cal.4th 175, 220, [second competency hearing was not required where first competency finding was based on thorough inquiry, and defense expert in subsequent informal inquiry merely disagreed with result].)

In sum, there was no substantial evidence that appellant's mental condition following the competency trial substantially changed causing him to be unable to understand the proceedings or assist his attorneys. Consequently, the trial court had no obligation to suspend proceedings and have a second competency hearing. Appellant's claim to the contrary fails. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1107-1112; *People v. Frye* (1998) 18 Cal.4th 894, 952, overruled on other ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Alvarez* (1996) 14 Cal.4th 155, 211-212.) Since appellant was competent to stand trial, his resulting convictions do not violate international law. (See Arg I. C.)

III. THE TRIAL COURT'S ERROR IN ACCEPTING APPELLANT'S WAIVER OF HIS STATUTORY RIGHT TO BE PERSONAL PRESENCE DURING EVIDENTIARY PORTIONS OF THE GUILT PHASE WAS HARMLESS; APPELLANT'S WAIVER OF HIS CONSTITUTIONAL RIGHT TO PRESENCE THROUGH COUNSEL DOES NOT ESTABLISH HIS INCOMPETENCE

Appellant contends that he was not competent to waive his statutory or constitutional rights to presence throughout all phases of the trial and sentencing. He alleges, assuming arguendo this Court rejects his arguments as to competency, his absence from evidentiary portions of the guilt phase, without an informed and express personal waiver of his right to presence, requires reversal of his convictions. (AOB 122-136.) This claim

is without merit. The waiver of appellant's presence through counsel does not establish his incompetence. Although the trial court erred under sections 977 and 1043 by permitting appellant to be absent during evidentiary portions of the guilt phase, the error in accepting appellant's waiver was harmless. Thus, reversal is unwarranted.

A. Constitutional Right to be Present

"A criminal defendant's right to be personally present at trial is guaranteed under the federal Constitution by the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment. It is also required by section 15 of article I of the California Constitution and by sections 977 and 1043." (*People v. Concepcion* (2008) 45 Cal.4th 77, 81.) "Under the Sixth Amendment, a defendant has the right to be personally present at any proceeding in which his appearance is necessary to prevent 'interference with [his] opportunity for effective cross-examination.'" (*People v. Butler* (2009) 46 Cal.4th 847, 861, quoting *Kentucky v. Stincer* (1987) 482 U.S. 730, 744–745, fn. 17.) "Due process guarantees the right to be present at any 'stage . . . that is critical to [the] outcome' and where the defendant's 'presence would contribute to the fairness of the procedure.'" (*Butler*, at p. 861, quoting *Stincer*, at p. 745.)

> 'The state constitutional right to be present at trial is generally coextensive with the federal due process right. [Citations.]' Neither the state nor the federal Constitution, nor the statutory requirements of sections 977 and 1043, require the defendant's personal appearance at proceedings where his presence bears no reasonable, substantial relation to his opportunity to defend the charges against him. [Citations.]

(*Butler*, at p. 861, quoting *People v. Harris* (2008) 43 Cal.4th 1269, 1306; see also *People v. Price* (1991) 1 Cal.4th 324, 405.) "Defendant has the burden of demonstrating that his absence prejudiced his case or denied him

a fair trial." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1357; see also *People v. Jennings* (2010) 50 Cal.4th 616, 682.)

Here, the record reflects that appellant was voluntarily absent from the courtroom during the playing of Cindi's 911 call, the remainder of Cindi's testimony, and ballistics expert James Hamiel's testimony. Appellant personally and expressly waived his right to be during the playing of Cindi's 911 call and left the courtroom. (10 RT 1889-1890.) After the tape was played, the court asked counsel, "Mr. Spiering, do you wish to return your client to the courtroom." (10 RT 1890.) Defense counsel spoke with appellant and then requested in camera proceedings to discuss the matter. (10 RT 1890-1891.)

Counsel met in camera with the court to discuss appellant's absence from proceedings. (10 RT 1892-1893.) Defense counsel reported that appellant "expressed a strong desire to not be in the courtroom anymore." (10 RT 1892.) The court suggested, "One thing would be to - - you know, it may be his wife that is triggering all of this and, you know, if he's absent from her testimony, the rest of her testimony, then maybe he can return to the courtroom thereafter and, you know, be able to handle the relatively dry, you know, kinds of things that are coming after that." (*Ibid.*) Alternatively, the court offered, "Otherwise, we can just try to have him come back in and just hear it. But, apparently, that's not his desire." (10 RT 1893.) The court informed the jury that appellant had "elected to continue his absence from the courtroom for the duration of the testimony of at least this next witness. You're not to consider that for any purpose or hold it against him." (10 RT 1895.) Appellant remained absent during the remainder of Cindi's testimony and that of ballistics expert James Hamiel. (10 RT 1895-1944.)

In chambers following Hamiel's testimony, the court put on the record that "it was decided that Mr. Mendoza was not in very good shape to

continue listening to the testimony." (10 RT 1947.) The prosecutor inquired, "And I was indicating that it was some of - - that Mr. Mendoza didn't rejoin us for the testimony of Mr. Hamiel, and that was waived?" (*Ibid.*) Defense counsel replied, "Yes, we continue to our waiver of our client's presence for ballistics evidence that was put on here late this afternoon." (*Ibid.*) The following morning, appellant was present in court when proceedings resumed. (11 RT 1950.)

There was nothing improper about the trial court's acceptance of appellant's conduct as voluntary waiver of his presence. (See, e.g., *People v. Weaver, supra*, 26 Cal.4th at pp. 965–967; *People v. Price*, *supra*, 1 Cal.4th at p. 405.) Moreover, waiver of appellant's right to be present through counsel does not prove appellant's incompetence. Appellant personally waived his presence on multiple occasions throughout the trial. (5 RT 946-947; 10 RT 1889; 11 RT 2033; 13 RT 2766-2767; 15 RT 3233.) He demonstrated an ability to talk to his attorneys and request to be present when he wanted to do so. When going over jury instructions, defense counsel initially waived appellant's presence, but after discussing the matter with him, advise the court, "Mr. Mendoza would like to join us." (14 RT 2867.) Nothing in the record suggests that he was unable to understand and waive his right to be present. Accordingly, appellant validly waived his state and federal constitutional rights to be present at evidentiary portions of the guilt phase.

B. Statutory Right to Personal Presence

Section 977, subdivision (b)(1), provides in pertinent part:

> In all cases in which a felony is charged, the accused shall be present . . . during those portions of the trial when evidence is taken before the trier of fact. . . . The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present.

Section 1043, subdivision (b), states:

> The absence of the defendant in a felony case after the trial has commenced in his presence shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases: [¶] (1) Any case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom. [¶] (2) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent.

This Court has held that,

> [W]hen read together, sections 977 and 1043 permit a capital defendant to be absent from the courtroom only on two occasions: (1) when he has been removed by the court for disruptive behavior under section 1043, subdivision (b)(1), and (2) when he voluntarily waives his rights pursuant to section 977, subdivision (b)(1). However, section 977, subdivision (b)(1), the subdivision that authorizes waiver for felony defendants, expressly provides for situations in which the defendant cannot waive his right to be present, including during the taking of evidence before the trier of fact. Section 1043, subdivision (b)(2), further makes clear that its broad "voluntary" exception to the requirement that felony defendants be present at trial does not apply to capital defendants.

(*People v. Jackson* (1996) 13 Cal.4th 1164, 1210; accord, *People v. Frye*, *supra*, 18 Cal.4th at p. 1010.) Thus, the trial court erred under sections 977 and 1043 by permitting a nondisruptive capital defendant to be absent during the taking of evidence at the penalty phase. (*Jackson*, at p. 1210.)

However, the trial court's error in accepting appellant's waiver was harmless. (*People v. Brown* (1988)46 Cal.3d 432, 447-448.) While "[i]t may be that if personal presence truly bears a substantial relation to a defendant's opportunity to defend against the charges, counsel's waiver would not forfeit the claim," the very fact that counsel did not think appellant's presence was necessary "strongly indicates that [his] presence

did not, in fact, bear [] a substantial relation" to the fullness of his opportunity to defend. (*People v. Cleveland* (2004) 32 Cal.4th 704, 741.) On every occasion where appellant was absent, defense counsel were present and fully able to represent appellant's interests. On all of the occasions where appellant chose to be absent, defense counsel expressly waived appellant's presence. (6 RT 871-1; 10 RT 1891; 11 RT 2033, 2165; 12 RT 2220, 2362, 2441, 2485; 13 RT 2489, 2662; 14 RT 2800, 2936-2937; 15 RT 3043, 3102, 3148, 3340.)

Further, appellant's attendance would not have assisted the defense or otherwise altered the outcome of his trial. (See *People v. Benavides* (2005) 35 Cal.4th 69, 89 [failure to show that defendant's presence would have served any purpose]; *People v. Bradford, supra*, 15 Cal.4th at pp. 1357-1358 [defendant failed to show his attendance at hearings would have assisted the defense or altered the outcome of trial]; *People v. Johnson* (1993) 6 Cal.4th 1, 19 [no showing defendant's presence would have assisted his defense in any way]; see also *United States v. Gagnon* (1985) 470 U.S. 522, 526-527 [the central inquiry in determining whether due process principles entitled a defendant to appear at a hearing is whether the defendant's presence reasonably could have assisted his defense of the charges against him].)

In all of the complained-of proceedings during the trial, appellant's presence was not necessary for effective cross-examination or to contribute to the fairness of the procedure. His absence did not deprive him of the full opportunity to defend against the charges. Appellant's presence was not necessary to prevent interference with his opportunity for effective cross-examination of Cindi or Hamiel. Defense counsel had been representing appellant for years and were very familiar with the facts of the case. Appellant fails to show that his presence during the playing of the 911 call, the remainder of Cindi's testimony, or Hamiel's ballistics testimony would

have served any purpose. (See *People v. Benavides*, *supra*, 35 Cal.4th at p. 89 [failure to show that defendant's presence would have served any purpose]; *People v. Johnson*, *supra*, 6 Cal.4th at p. 19 [no showing defendant's presence would have assisted his defense in any way].) Appellant fails to meet his burden of showing how any of his absences affected his ability to defend himself or otherwise prejudiced his case. His claim is accordingly without merit and should be denied.

IV. THE PROSECUTOR DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT IN THE GUILT PHASE

Appellant claims that the prosecutor erred in closing argument in the guilt phase by referring to facts not in evidence and vouching for the strength of the prosecution's case, thereby violating his state and federal constitutional rights to confrontation, due process, and a fair trial. (AOB 136-141.) Appellant has failed to establish misconduct based on either of these grounds.

A. Relevant Proceedings Below

During closing argument in the guilt phase, the prosecutor went through photo exhibits from the crime scene and a diagram of the bullet trajectories. (11 RT 2177-2178.) The prosecutor argued,

> And this is an overhead view, schematic drawing of the trajectories of the bullets that they were able to trace throughout the house. And it shows the cluster of shots in all of the rooms. The house was a shooting gallery, folks. And those folks were like ducks in a barrel.
>
> Unlike so many other cases where - - murder cases where there's an argument - -

(11 RT 2178.) Defense counsel objected based on lack of foundation. (*Ibid.*) The court overruled the objection. (*Ibid.*) The prosecutor continued,

If you can envision a case where somebody gets in an argument with another person and tempers flare, somebody pulls a gun, shots are fired, one, two, maybe three shots, and when the smoke clears, somebody is dead, and there's questions and there's responses: Well, I thought he had a gun. Well, I was just trying to scare him. Well, I didn't know it was loaded.

Those are cases where there's a question as to whether or not there was an intent to kill, a question of malice aforethought.

In this case, the amount of evidence that goes toward malice aforethought, manifestation of intent to kill, is absolutely overwhelming.

(11 RT 2178-2179.)

Later, in final argument, the prosecutor urged,

Everybody who commits murder has a particular reason: Greed, lust, anger, jealousy, revenge. Everybody before they commit murder has to have a reason. And when that reason finally hits and ripens to the point where that person comes to grips with what they're going to do and they decide to do it and take action, it is an ugly emotion. It is an ugly state of mind.

But nobody who goes out and intentionally takes a life does it when they're all right in the head.

(11 RT 2200.)

B. The Prosecutor Did Not Refer to Matters Not In Evidence or Vouch For the Strength of the Prosecution's Case

Appellant argues that the prosecutor's argument at 11 RT 2178-2179 and 11 RT 2200, constituted error in that he referred to matters not in evidence and the argument amounted to "vouching for the strength of the prosecution's case." (AOB 137.) Appellant urges that the prosecutor suggested to the jury that the case was worse than other murders because the shootings were not preceded by an argument and also suggested that the jury need not consider appellant's mental state because all murders have something wrong with them. (AOB 138.) Appellant is mistaken.

> A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.

(*People v. Ayala* (2000) 23 Cal.4th 225, 283-284, citations omitted; see also *People v. Carter* (2005) 36 Cal.4th 1215, 1263.) "[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*Id.* at p. 284.)

This Court has held that, "In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*People v. Frye, supra*, 18 Cal.4th at p. 970, overruled on other grounds in *People v. Doolin, supra*, 45 Cal.4th at p. 420.) "[W]e may not reverse the judgment if it is not reasonably probable that a result more favorable to the defendant would have been reached in its absence. [Citation.]" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.) A trial court's ruling regarding alleged prosecutorial misconduct is reviewed for an abuse of discretion. (*People v. Alvarez, supra*, 14 Cal.4th at p. 213.)

> It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature. A prosecutor may vigorously argue his case and is not limited to Chesterfieldian politeness, and he may use appropriate epithets.

(*People v. Williams* (1997) 16 Cal.4th 153, 221, citations omitted.)

To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the impropriety. (*People v. Fuiava* (2012) 53 Cal.4th 622, 680; *People v. Cole*, *supra*, 33 Cal.4th at p. 1201; *People v. Hill* (1998) 17 Cal.4th 800, 820.) However, "the absence of a request for a curative admonition does not forfeit the issue for appeal if 'the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.' [Citations.]" (*Hill*, at pp. 820-821.)

Here, defense counsel objected based on lack of foundation, but did not request an admonishment or claim prosecutorial error. (11 RT 2178.) Accordingly, the claim is forfeited. In response to appellant's claim that further objection would have been futile and he was thereby excused from making further objection or requesting an admonition (AOB 137), the record does not support this assertion. Defense counsel had previously objected that the prosecutor's argument misstated the evidence and the trial court instructed the prosecutor to rephrase his argument. (11 RT 2176.) Requesting an admonition or objecting based on prosecutorial error or stating facts not in evidence would have assured that the jury would not misinterpret the prosecutor's comments in the complained-of manner. "There is no reason to suspect the trial court was predisposed to overrule objections to the prosecutor's deeds (i.e., that an objection would have been futile), or that corrective actions, such as appropriately strong admonitions, would not have been able to cure any prejudicial effect on the jury had defendant requested them." (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 680.) This is especially true where, as here, the objection overruled by the court was lack of foundation, not prosecutorial error. Despite this forfeiture,

respondent will address the merits in the event this Court concludes the lack of foundation objection was sufficient to preserve the claim on appeal.

A prosecutor commits misconduct by referring during argument to facts outside the record. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026; *People v. Hill*, *supra*, 17 Cal.4th at p. 828.) A prosecutor, however, has wide latitude during argument so long as the argument is a fair comment on the evidence, which includes reasonable inferences or deductions drawn therefrom. (*People v. Bonilla* (2007) 41 Cal.4th 313, 336-337.) Thus, a prosecutor "'may state matters not in evidence that are common knowledge, or are illustrations drawn from common experience, history, or literature.' [Citation.]" (*Cunningham*, at p. 1026, citing *People v. Sandoval* (1992) 4 Cal.4th 155, 193.) In addition, the prosecution has broad discretion to state its views regarding reasonable inferences that may or may not be drawn from the evidence. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1052.)

Here, the prosecutor's argument was a fair comment on the evidence and attempt to distinguish this case from cases where there was no malice aforethought or intent to kill. The prosecutor was entitled to argue that the facts of the case, 72 shots fired by three weapons throughout the inside of a home where four people had been asleep in the middle of the night, proved intent to kill and malice aforethought. The prosecutor was permitted to distinguish this factual situation from a case where a couple of shots are fired following an argument. (11 RT 2177-2179.) The prosecutor did not "suggest[] to the jury that appellant's case was worse than other murders because the shootings were not preceded by an argument." (AOB 138.)

The prosecutor was also not "vouching" for a witness. (See, e.g., *People v. Williams*, *supra*, 16 Cal.4th at p. 257 [impermissible vouching may occur where the prosecutor places the prestige of the government behind a witness through personal assurances of the witness's veracity or

suggests that information not presented to the jury supports the witness's testimony].) Rather, the prosecutor's statements were a fair comment on the evidence actually presented at trial. The prosecutor was entitled to argue that the evidence supported a finding of the requisite mental state. There was no misconduct.

The prosecutor's discussion about how murderers are not "all right in the head" was a fair comment on the evidence and not a suggestion that the jury need not consider appellant's mental state. (11 RT 2200.) The prosecutor's comparison of reasons why people commit murder was based on common knowledge and experience. Moreover, this argument came after and in response to defense counsel's argument that appellant acted out of heat of passion. (11 RT 2192-2200.) Defense counsel urged, "You must carefully examine the evidence and decide whether Mr. Mendoza considering his - - the evidence we know about his history and his behavior in the days leading up to this event truly deliberated and premeditated these shootings." (11 RT 2200.) The prosecutor's comments were in response to this argument and a fair claim based on the evidence.

Even assuming *arguendo* there was misconduct, there is no reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (See *People v. Morales* (2001) 25 Cal.4th 34, 44.) The court instructed the jury, "Keep in mind that what the attorneys say in their argument is not evidence. It's their summation and what they believe the law and the facts are and how the facts that they believe that's been shown of the evidence applies to the law." (11 RT 2167.) The court further advised, "If anything said by them in their argument that conflicts with my instructions, you're to follow my instructions." (*Ibid.*) The court also instructed the jury to consider appellant's mental state in determining his guilt and whether he acted with

malice aforethought. (11 RT 2144.) The court stated,

> In the crimes and allegations charged in Count I through III, the lesser crime of second degree murder or manslaughter, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless the specific intent exists, the crime to which it relates is not committed. The specific intent required is included in the definitions of the crimes set forth elsewhere in these instructions.
>
> The allegation of personally and intentionally discharging a firearm with great bodily injury requires the specific intent to discharge the firearm.
>
> In the crimes charged in Count I through III, and the lesser crimes thereto, namely murder in the second degree, there must exist a union or joint operation of act or conduct and a certain mental state in the mind of the perpetrator. Unless the mental state exists, the crime to which it relates is not committed. The mental state in the crime of murder is malice aforethought. The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crimes charged in Count I through III or the crime of second degree murder or manslaughter, which are lesser-included offenses, or find the allegations of intentionally discharged a firearm causing great bodily injury to be true unless the proved circumstances are not only, one, consistent with the theory that the defendant had the required specific intent or mental state, but, two, cannot be reconciled with any other rational conclusion.
>
> Also, if the evidence as to any specific intent or mental state permits two reasonable interpretations, one of which points to the existence of specific intent or mental state and the other to its absence, you must adopt that interpretation which points to its absence.
>
> If, on the other hand, one interpretation of the evidence as to the specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(11 RT 2158-2159.) The court's instructions thoroughly advised the jury to consider appellant's mental state in determining his guilt.

On appeal, the court assumes that the jury followed these instructions. (*People v. Morales*, *supra*, 25 Cal.4th at p. 47.) It is not reasonably likely that the jury construed or applied any of the complained-of remarks in an objectionable fashion. Any misconduct that occurred could not have contributed to the verdict and was harmless in light of the overwhelming evidence of appellant's guilt, as discussed in Argument I, *supra*. It is not reasonably probable that a result more favorable to appellant would have occurred absent the alleged misconduct. (*People v. Friend* (2009) 47 Cal.4th 1, 30; *People v. Welch* (1999) 20 Cal.4th 701, 752-753.) Reversal is not warranted.

ARGUMENT – PENALTY TRIAL

V. APPELLANT'S DEATH SENTENCE DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT OR VIOLATE DUE PROCESS

Appellant contends that his death sentence constitutes cruel and/or unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, section 17 of the California Constitution because he suffers from a severe mental illness and was suffering from this illness at the time of the murders and at trial. Appellant attempts to distinguish this Court's recent decision in *People v. Castaneda* (2011) 51 Cal.4th 1292, 1345, finding that the United States Supreme Court's decisions in *Atkins v. Virginia, supra*, 536 U.S. at p. 304, and *Roper v. Simmons* (2005) 543 U.S. 551, do not bar imposition of the death penalty on a defendant suffering from mental illness. Appellant insists that his mental illness, unlike the defendant with antisocial personality disorder in *Castendeda*, is analogous to mental retardation or infancy, and thus his

death sentence is grossly disproportionate to his personal responsibility and moral guilt. (AOB 142-156.) This claim is meritless. Appellant is not mentally retarded, thus *Atkins* does not apply. The Supreme Court's reasoning in excluding minors and mentally retarded persons from application of the death penalty does not apply to a person with mental illness. There is no statutory or legal authority for appellant's proposition that the death penalty is unconstitutional when applied to the mentally ill. Appellant's death sentence was proportionate to the seriousness of the crimes, the premeditated first degree murders of three people.

A. Relevant Proceedings Below

On October 5, 2005, appellant filed a motion to foreclose penalty trial, or in the alternative, for an order prohibiting the imposition of a death sentence as cruel and unusual punishment under the Eighth Amendment. (3 CT 624-637.) Appellant argued that because he had been diagnosed as being mentally ill he could not be executed under *Atkins v. Virginia*, *supra*, 536 U.S. at p. 304. (3 CT 624-631.) As he argues on appeal, appellant urged that imposition of a death sentence would be cruel and unusual punishment because a death sentence is grossly disproportionate to his personal moral culpability and would not serve the interests of retribution or deterrence. (3 CT 631-633.)

On October 11, 2005, the People filed written opposition. (3 CT 648-652.) The People argued that it was within the discretion of the district attorney to seek the death penalty and that appellant's motion was premature. (3 CT 648-650.) The People further argued that appellant's "attempt to place mentally ill defendants within the category of individuals not eligible for the death penalty, outstretches the current state of the law." (3 CT 651.) The People urged that existing provisions of California law protect defendants who are suffering from mental illness to reduce their culpability for a crime. (*Ibid.*)

The trial court continued ruling on the motion until after the guilt phase. (3 CT 747.) After reading the briefing and hearing argument, the court concluded, "*Atkins* does not by its terms apply to this situation." (14 RT 2952.) The court continued, "There's no evidence of mental retardation in this case, although there is evidence of mental illness." (*Ibid.*) The court noted the prior finding that appellant was competent to stand trial and ruled, "The defendant was found competent to stand trial, and I don't think that evidence in this case indicates that he does not understand what's going on, is not able to assist counsel, so the motion is denied." (*Ibid.*) The court further held, "[T]he *Atkins* factors I don't believe apply in the case, and I don't believe that any other factors apply which will justify refusing the imposition of the death penalty should the jury so indicate." (14 RT 2952-2953.) The court also denied the defense request to reopen competency proceedings finding "no new substantial evidence to justify it." (14 RT 2954.)

B. Appellant's Death Sentence Is Constitutional

The Eighth Amendment prohibits imposition of a sentence that is "grossly disproportionate" to the severity of the crime. (*Ewing v. California* (2003) 538 U.S. 11, 20-21) The Eighth Amendment does not require strict proportionality between the offense and the resulting sentence and does not mandate comparative analysis within or between jurisdictions. (*Ewing*, at p. 23.) Rather, it forbids only extreme and grossly disproportionate sentences. (*Ibid.*) This Court has rejected the contention that capital punishment per se violates the Eighth Amendment's prohibition against cruel and unusual punishment (*People v. Staten* (2000) 24 Cal.4th 434, 462), and has found that *Atkins* and *Roper* did not alter the conclusion that capital punishment is not per se unconstitutional. (*People v. Moon* (2005) 37 Cal.4th 1, 47-48.)

In *Roper v. Simmons*, *supra*, 543 U.S. 551, the United States Supreme Court held that the Constitution precludes the execution of persons 17 years or younger at the time of their crime. In *Atkins v. Virginia*, *supra*, 536 U.S. 304, the Court held that execution of a mentally retarded defendant is cruel and unusual punishment under the Eighth Amendment. (*People v. Hoyos* (2007) 41 Cal.4th 872, 927.) However, as this Court has noted,

> *Atkins* did not give a precise definition of mental retardation, and it left to the states the task of creating procedures to determine whether individuals facing execution are mentally retarded. [Citation.] Thereafter, the California Legislature enacted section 1376, which establishes procedures for the determination of mental retardation in preconviction capital cases, and which defines mental retardation as "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18." (*Id.*, subd. (a).)

(*People v. Leonard*, *supra*, 40 Cal.4th at p. 1428.) There are three essential features to the definition of mental retardation: (1) significantly subaverage general intellectual functioning, (2) with concurrent deficits in adaptive behavior, (3) manifested during the developmental period. (*Atkins*, at pp. 308, fn. 3, 318; *State v. Lott* (Ohio 2002) 779 N.E.2d 1011, 1014; *State v. Williams* (La. 2002) 831 So.2d 835, 853-854 and fns. 22, 23.) Thus, a finding of mental retardation requires not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.

Appellant is not mentally retarded, nor does he exhibit any of the essential features of mental retardation. He has never been diagnosed as mentally retarded. There has been no showing that his IQ is anything less than average. (See Supp. Exhibits CT 1-57.) The record reveals that appellant has exhibited a number of adaptive skills that militate against a finding that he is similarly situated to someone with mental retardation.

Appellant had been taking care of his three minor sons while his wife worked. (10 RT 1918-1919; 15 RT 3108-3112, 3121, 3317-3320.) Appellant took his kids to school, was involved in their academic activities, coached their soccer teams, cooked their meals, and was their "primary attachment figure." (*Ibid.*) When school officials visited appellant's home the day before the shooting, they found it to be tidy. The boys were well-groomed and presentable. (11 RT 1958-1959, 1980-1981.) Appellant participated in family events. (15 RT 3168, 3215.) According to his siblings, appellant was normal as a child and young adult. (15 RT 3083-3088, 3093-3098, 3155-3157, 3173-3179, 3191-3194.) It was not until around 1998, long after he had passed the developmental period, that they noticed he had changed. (15 RT 3182-3185, 3195.) Appellant's mental illness was not a lifelong condition. Thus, appellant did not meet the definition of mental retardation under section 1376.

Appellant contends that the rationales underlying *Atkins* and *Roper* apply equally to the execution of a criminal who is severely mentally ill. In *People v. Castaneda*, *supra*, 51 Cal.4th at pp. 1344-1345, this Court rejected the defendant's claim that his antisocial personality disorder was analogous to mental retardation or juvenile status for purposes of death-penalty eligibility under *Atkins* and *Roper*. As in *Castaneda*, appellant has not shown that his depression is analogous to either mental retardation or juvenile status.

"To decide whether evolving standards of decency dictate that death is an excessive punishment, the high court looks first to objective evidence." (*People v. Castaneda*, *supra*, 51 Cal.4th at p. 1344, citing *Atkins v. Virginia, supra*, 536 U.S. at p. 313.) "[I]t is not the burden of [a state], however, to establish a national consensus approving what their citizens have voted to do; rather, it is the heavy burden of [the defendant] to

establish a national consensus against it." (*State v. Wilson* (S.C. 1992) 413 S.E.2d 19, 20-26, internal quotations omitted.)

Appellant fails to satisfy his burden of showing that a national legislative consensus has developed against the execution of mentally ill individuals, as was the case in *Atkins* with mentally retarded individuals. (*Atkins v. Virginia, supra*, 536 U.S. at pp. 314-317.) Other federal and state courts have consistently declined to extend *Atkins* to the mentally ill. (See, e.g., *Joshua v. Adams* (9th Cir. 2007) 231 Fed. Appx. 592, 593; *Shislnday v. Quarterman* (5th Cir. 2007) 511 F.3d 514, 521; *In re Neville* (5th Cir. 2006) 440 F.3d 220, 221; *Mays v. State* (Tex. 2010) 318 S.W.3d 368, 379-380; *Commonwealth v. Baumhammers* (Pa. 2008) 960 A.2d 59, 96-97; *Lawrence v. State* (Fla. 2007) 969 So.2d 294, 300 fn. 9; *State v. Ketterer* (Ohio 2006) 855 N.E.2d 48, 105; *Matheny v. State* (Ind. 2005) 833 N.E.2d 454, 458; *State v. Johnson* (Mo. 2006) 207 S.W.3d 24, 51; *Lewis v. State* (Ga. 2005) 620 S.E.2d 778, 764; *State v. Hancock* (Ohio 2006) 840 N.E.2d 1032, 1059-1060.) Appellant provides no basis for this Court to conclude otherwise.

Appellant has not established the existence of a national consensus that the execution of mentally ill offenders is inconsistent with "evolving standards of decency." (*State v. Hancock, supra*, 840 N.E.2d at p. 1059, citing *Trop v. Dulles* (1958) 356 U.S. 86, 101 (plurality opinion); see also *State v. Wilson, supra*, 413 S.E.2d at pp. 23-27 [death sentence for a person acting under an "irresistible impulse" to commit an offense due to mental illness does not constitute cruel and unusual punishment].) Not every mental illness is comparable to mentally retarded and/or juvenile offenders with respect to reasoning, judgment, and impulse control. "Mental illnesses come in many forms; different illnesses may affect a defendant's moral responsibility or ability to be deterred in different ways and to different degrees." (*State v. Hancock*, at p. 1059.)

Appellant's mental illness was not akin to mental retardation or being a minor. Dr. Stewart, Dr. Schaeffer, and Dr. Weiss diagnosed appellant with major depressive disorder with psychotic features. (12 RT 2242, 2372, 2453.) Dr. French diagnosed appellant with major depression. (13 RT 2592, 2610, 2652.) According to Dr. Stewart, appellant responded well when treated with medication. (12 RT 2254-2257, 2285, 2351-2355.) Mental illnesses are generally treatable, whereas with mental retardation some degree of intellectual impairment can be expected to be permanent. (See 12 RT 2252-2257.) Mental retardation and infancy, unlike appellant's illness, are not treatable with medication.

Mental illnesses are medical conditions that disrupt a person's thinking, feeling, mood, ability to relate to others, and daily functioning that have nothing to do with intelligence. Appellant was born January 19, 1964, and was long past the age of majority when the murders occurred in December 2001. (Supp. Exhibits CT 79.) Unlike minors, appellant was not vulnerable to influence or susceptible to immature and irresponsible behavior. According to his family and doctors, appellant was a caring and responsible father of three boys. (15 RT 3089, 3098-3099, 3160-3161, 3107-3117, 3121-3125, 3317-3325.) The doctors who examined appellant found no evidence of subaverage intellectual functioning. Dr. Stewart found that appellant was aware of the nature and quality of his acts and agreed that appellant planned out his attack. (12 RT 2271, 2278, 2283-2284, 2290-2298, 2310-2314.) Appellant's siblings recalled how appellant was very interested in his education and wanted them and their children to get a good education. (15 RT 3158, 3177, 3193.) Dr. Schaeffer and Dr. Stewart discussed how appellant's mental illness waxed and waned over time. (14 RT 2789-2790, 2829-2834, 2846.) Dr. Weiss diagnosed appellant with having emerging psychotic features. (12 RT 2385.) In

contrast, mental retardation and infancy are conditions that do not become more or less severe over time.

Capital defendants are permitted to present evidence of mental illness or impairment in mitigation. (§ 190.3, subd. (h).) This provides the individualized determination that the Eighth Amendment requires in capital cases. (*State v. Hancock, supra*, 840 N.E.2d at p. 1059.) Additionally, the issue of malingering, which has received considerable attention in the clinical literature regarding mental illness, has not proven to be a practical problem in the assessment of individuals who may have mental retardation because mental retardation begins in childhood. (See, e.g., Richard Rogers & Daniel W. Shuman, *Conducting Insanity Evaluations* 90-120 (2d ed. 2000). Permitting establishment of a new, ill-defined category of capital murderers who would be exempt from the death penalty without an individualized balance of aggravating and mitigating factors specific to that case would constitute a significant and unwarranted extension of *Atkins* and *Roper*.

In sum, appellant requests this Court to analogize a finding of mental retardation with that of mental illness, and thereby find the death penalty to be cruel and unusual punishment in violation of the Eighth Amendment. There is no statutory or case authority for this proposition. A jury found appellant competent to stand trial (1 CT 242; 4 RT 733-735) and the court continued to find him competent at all stages of the trial proceedings (3 CT 796; 4 CT 1071; 5 RT 945; 9 RT 1603; 11 RT 2218; 14 RT 2952-2954, 2988-2989; 16 RT 3398, 3426-3428, 3447). Appellant was convicted of three counts of first degree premeditated murder (§ 187). He was also convicted of assault with a firearm (§ 245, subd. (a)(2)) and shooting at an inhabited dwelling (§ 246). (3 CT 804-806.) The jury found him sane and rejected the defense's argument that a death sentence was not warranted due to appellant's mental illness. (4 CT 918, 1030; 14 RT 2994.)

Appellant was not "categorically less culpable than the average criminal." (*Atkins*, 536 U.S. at p. 316.)

Appellant summarily contends that his death sentence constitutes cruel or unusual punishment under article I, section 17 of the California Constitution. (AOB 143.) Whereas the federal Constitution prohibits cruel "and" unusual punishment, California affords greater protection to criminal defendants by prohibiting cruel "or" unusual punishment. (*In re Lynch* (1972) 8 Cal.3d 410, 424.) Under the California Constitution, punishment is disproportionate if it "shocks the conscience" and offends fundamental notions of human dignity, considering the offender's history and the seriousness of his offenses. (*People v. Dillon* (1983) 34 Cal.3d 441, 478; *In re Lynch*, at p. 424.) The burden is on the appellant to establish that his sentence is disproportionate. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196-1197.) A reviewing court determines whether a particular penalty given "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity" thereby violating the prohibition against cruel or unusual punishment under article I, section 17 of the California Constitution. (*People v. Cole*, *supra*, 33 Cal.4th at p. 1235.) To do so, the reviewing court examines the circumstances of the offense, including the defendant's motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, the consequences of the defendant's acts, the defendant's age, prior criminality and mental capabilities. (*Ibid.*)

Here, the circumstances of the offense, the extent of appellant's involvement, the manner in which the crime was committed and the consequences of appellant's acts, establish that imposition of the death judgment was not cruel or unusual. Appellant meticulously planned out the middle of the night home-invasion murder of his estranged wife's relatives. He wore protective clothing and brought three firearms along with loads of

extra ammunition. (9 RT 1675; 10 RT 1760-1764, 1842-1852.) He collected approximately $10,000 cash from his at-home safe and delivered it to his brother before turning himself in at the hospital. (9 RT 1677; 10 RT 1728-1729, 1739-1741.) Appellant encountered his wife's cousin, Lopez, upon breaking into the home and shot him four times, twice in the head and twice in the chest. (11 RT 2072-2078.) Appellant then located his wife's new lover, Chavez, and was overheard yelling that he had "messed with the wrong guy" and that he "shouldn't have messed around with a married woman." (9 RT 1664.) Appellant then shot Chavez 12 times, in his head, chest, arms, abdomen, and leg, using two different guns. (11 RT 2018-2020, 2078-2097.) Next, appellant used his 16-year-old sister-in-law to lure his mother-in-law out of hiding. (9 RT 1667-1670.) Appellant furiously demanded to know how she could let his wife see someone else while she was still married to him. (9 RT 1670.) When Alicia failed to provide a satisfactory response, appellant shot her twice in the head in front of her teenage daughter. (9 RT 1671; 11 RT 2072-2074.) After driving away, appellant proceeded to call his wife and boast that he had killed her entire family and threatened that she was going to be next. (9 RT 1676; 10 RT 1885-1886.) Appellant fired 72 bullets through doors, walls, and bodies. He shot dry three firearms. (10 RT 1762-1765, 1800-1802, 1819-1821; 11 RT 2001-2003.) He used hollow point bullets designed to expand upon impact to create a bigger hole and cause more tissue damage. (11 RT 2008-2009.) Three people were murdered. (9 RT 1658; 11 RT 2009-2088.) Appellant's death sentence is neither extreme nor disproportionate in light of the gravity of his current offenses. Accordingly, it does not violate the United States or California Constitutions.

To the extent that appellant relies on *Panetti v. Quarterman* (2007) 551 U.S. 930 and *Ford v. Wainwright* (1986) 477 U.S. 399, to suggest that

he is incompetent to be executed (see AOB 154), such a claim is premature. The determination of whether a defendant is mentally competent to be executed is not determined until the defendant's execution date has been set. (*People v. Leonard* , *supra*, 40 Cal.4th at p. 1430, citing § 3700.5.)

VI. IMPOSITION OF THE DEATH PENALTY ON APPELLANT DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE BECAUSE APPELLANT WAS NOT MENTALLY RETARDED NOR A MINOR

Appellant contends that imposition of the death penalty on him, a person suffering from major mental illness, violated his federal constitutional right to equal protection under the federal Constitution. He reasons that the United States Supreme Court decisions in *Atkins v. Virginia*, *supra,* 536 U.S. 304, and *Roper v. Simmons*, *supra*, 543 U.S. 551, categorically protecting mentally retarded persons and minors from imposition of the death penalty, but allowing imposition of a death sentence on persons suffering severe mental illness, violates the Fourteenth Amendment's guarantee of equal protection. Appellant basis this claim on his argument that like juveniles and mentally retarded persons, persons with severe mental illness are "uniformly less culpable than other offenders" and "the goals of deterrence and retribution are less applicable across those three groups." (AOB 156-159.) This contention is likewise without merit.

As discussed in Argument V, *supra*, mental illness is not akin to mental retardation. Mental retardation is an intellectual disability whereas mental illness can be a treatable medical condition. Likewise, mental illness is not akin to being a minor, which is a finite age limitation for persons under age 18. In addition to the grounds discussed in Argument V, appellant's interview with detectives and phone calls to his relatives show that he did not have an intellectual disability equivalent to mental retardation or infancy. (See 4 CT 2741-2757; 5 CT 1117-1161, 1162-1340, 1341-1351.) Since defendants with mental illness are not similarly situated

to defendants with mental retardation or defendants who are minors, imposition of the death penalty on defendants with mental illness does not violate the Equal Protection Clause of the Fourteenth Amendment. (See *People v. Castaneda*, *supra*, 51 Cal.4th at pp. 1343-45.)

VII. CALIFORNIA'S DEATH-QUALIFICATION PROCESS FOR JURY VOIR DIRE IS CONSTITUTIONAL

Appellant claims that the process used in California for death qualification of juries is unconstitutional and was unconstitutional in this case. Specifically, he alleges the death-qualification process produces juries that 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." Appellant urges this Court to reconsider its decisions in *Hovey v. Superior Court* (1980) 28 Cal.3d 1, and *People v. Fields* (1983) 35 Cal.3d 329. He further claims that the United States Supreme Court's decision in *Lockhart v. McCree* (1986) 476 U.S. 162, is not controlling because the factual basis on which it rests is no longer sound. Accordingly, he claims his rights to equal protection, due process, and a reliable death penalty adjudication under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution were violated. (AOB 159-183.) Appellant did not preserve the claims he now asserts on appeal regarding jury selection due to his failure to object in the trial court. He has therefore forfeited the claims. Even assuming *arguendo* the claims are not forfeited, they are without merit.

Preliminarily, appellant failed to object to the *Hovey* death-qualification voir dire on any grounds, and thus has failed to preserve his constitutional claims for appeal. (*People v. Gurule* (2002) 28 Cal.4th 557, 597, citing *People v. Avena* (1996) 13 Cal.4th 394, 413; *People v. Howard* (1992) 1 Cal.4th 1132, 1157; *People v. Mickey* (1991) 54 Cal.3d 612, 663.)

Moreover, even if appellant had properly preserved his claim on appeal, his contentions have no merit.

As appellant acknowledges, the United States Supreme Court and this Court have rejected constitutional attacks on death qualifications in *Lockhart v. McCree*, *supra*, 476 U.S. at pp. 182-183, *Hovey v. Superior Court*, *supra*, 28 Cal.3d 1, and *People v. Fields*, *supra*, 35 Cal.3d 329. (See also *People v. Gurule*, *supra*, 28 Cal.4th at p. 597; *People v. Jackson*, *supra*, 13 Cal.4th 1164.) "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 [their] oath."'" (*Buchanan v. Kentucky* (1987) 483 U.S. 402, 408, fn. 6; quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 424; *Adams v. Texas* (1980) 448 U.S. 38, 45.) As this Court explained in *People v. Cash* (2002) 28 Cal.4th 703:

> Prospective jurors may be excused for cause when their views on capital punishment would prevent or substantially impair the performance of their duties as jurors. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841].) "The real question is '"whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror"'" (*People v. Ochoa* (2001) 26 Cal.4th 398, 431 . . . , quoting *People v. Bradford* (1997) 15 Cal.4th 1229,1318. . . , quoting in turn *People v. Hill* (1992) 3 Cal.4th 959, 1003 . . . .) Because the qualification standard operates in the same manner whether a prospective juror's views are for or against the death penalty (*Morgan v. Illinois* (1992) 504 U.S. 719, 726-728 [112 S.Ct. 2222, 2228-2229, 119 L.Ed.2d 492]), it is equally true that the "real question" is whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of life without parole in the case before the juror.

(*Cash*, at pp. 719-720.)

In *Lockhart v. McCree*, *supra*, 476 U.S. 162, the defendant offered social-science studies suggesting that juries from which jurors who were opposed to the death penalty were excluded were more "conviction prone" than other juries. (*Id.* at p. 167.) While the Court questioned the validity of these studies, it nevertheless adopted them for the purpose of the decision. (*Id.* at pp. 168-173.) The Court held that even assuming arguendo a death-qualified jury was conviction prone, it did not violate the fair cross-section requirement because the petit jury was involved and not the jury venire. Even if the fair cross-section requirement were applied to a petit jury, a group of people sharing a fixed opposition to the death penalty was not a cognizable group within the meaning of the Fourteenth Amendment. (*Id.* at pp. 173-178.) Finally, the Court focused on the jury actually impaneled in *Lockhart* and found there was nothing to suggest that any particular juror was partial. (*Id.* at p. 184; cf. *Buchanan v. Kentucky*, *supra*, 483 U.S. at p. 408, fn. 6 [the Court found that the use of a death-qualified jury for a joint trial in which the death penalty was sought only against one defendant did not violate the Sixth Amendment right to an impartial jury].)

Appellant launches into a vigorous attack on *Lockhart*, claiming that current empirical studies and "scientific evidence" shows that death-qualified juries are indeed conviction prone and death prone. (AOB 163-168.) Appellant asserts that since the "constitutional facts" upon which the *Lockhart* decision rests are "no longer correct," the decision "should not be considered controlling under the federal Constitution." (AOB 164.) However, this Court "may not depart from the high court ruling as to the United States Constitution." (*People v. Steele* (2002) 27 Cal.4th 1230, 1243.)

Appellant's contention that the "factual basis" for the United States Supreme Court's decision in *Lockhart* is "no longer sound" is equally flawed. Appellant claims "statistical research" conducted since *Hovey v.*

Superior Court, *supra*, 28 Cal.3d 1, shows that "the procedure of death qualification biases the jury pool against the defense," and thus demonstrates the jury selection process in California is unconstitutional. Appellant maintains that "empirical studies of actual jurors from actual capital cases" show that the death-qualification process "produces skewed juries" because there are "more automatic death penalty jurors," "many of these jurors don't understand the nature of mitigation evidence," and "such jurors tend to decide prematurely both to convict and to choose the death sentence." (AOB 163-168.) Appellant is incorrect.

In *People v. Cummings* (1993) 4 Cal.4th 1233, 1279, this Court held that death qualification does not violate a defendant's Fourteenth Amendment right to a fair trial, and in *People v. Carrera* (1989) 49 Cal.3d 291, 333, held that death qualification does not violate a defendant's Sixth Amendment right to a fair and impartial jury. (Accord, *People v. Gurule*, *supra*, 28 Cal.4th at p. 597.) Nor does death qualification "improperly discriminate against racial minorities" (*People v. Johnson* (1989) 47 Cal.3d 1194, 1214-1215), or "produce a conviction-prone or death-penalty-prone jury" (*People v. Carrera*, *supra*, 49 Cal.3d at p. 331). Moreover, "[T]he prosecutor's use of peremptory challenges does not exacerbate the alleged problem." (*Gurule*, at p. 597.)

Furthermore, in *People v. Jackson*, *supra*, 13 Cal.4th 1164, this Court considered the "social science evidence" the defendant there offered to show "that death-qualified juries are more prone to convict than those not thus qualified," and concluded that such evidence does not support a constitutional prohibition of death qualification. (*Id.* at pp. 1198-1199; *People v. Lenart* (2004) 32 Cal.4th 1107, 1120; see also *People v. Catlin* (2001) 26 Cal.4th 81, 112 [state constitutional right to impartial jury not violated by exclusion of persons opposed to death penalty].) Appellant

presents no basis for this Court to reconsider its prior rulings rejecting this claim. (See *People v. Steele*, *supra*, 27 Cal.4th at p. 1243.)

Similarly, appellant's constitutional claims under the Eighth and Fourteenth Amendments against California's current system of death qualification as a whole, guised in an equal protection claim, should fail. "[T]he first prerequisite to such a claim is a showing that 'the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.'" (*People v. Massie* (1998) 19 Cal.4th 550, 571, quoting *People v. Andrews* (1989) 49 Cal.3d 200, 223, and *In re Eric J.* (1979) 25 Cal.3d 522, 530, italics omitted.) Death qualifications in voir dire apply to individuals who, like appellant, are facing capital punishment. Individual defendants facing a potential death sentence and noncapital individual defendants are not similarly situated. Appellant fails to identify any other similarly situated group that is affected differently. The state does not have the same purpose in qualifying a juror in a capital voir dire than it has in qualifying a juror when death qualification is irrelevant.

The United States Supreme Court has "rejected the view that individuals who can be characterized as a group 'defined solely in terms of shared attitudes' toward imposing the death penalty are a 'distinctive group' for fair cross-section claims under the federal Constitution." (*People v. Lenart*, *supra*, 32 Cal.4th at pp. 1120-1121, citing *Lockhart v. McCree, supra,* 476 U.S. at p. 174.) This Court has also rejected this claim under the state Constitution. (*Id.* at p. 1121, citing *People v. Jackson*, *supra*, 13 Cal.4th at p. 1198; *People v. Ashmus* (1991) 54 Cal.3d 932, 956.) As in those cases, appellant offers no persuasive reason for this Court to reconsider this holding.

Appellant also claims death qualification violates the right to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution and their California equivalents. (AOB 173-175.) In *People*

v. Catlin, *supra*, 26 Cal.4th at p. 112, this Court held that death qualification does not violate the state constitutional right to an impartial jury, and in *People v. Stanley* (1995) 10 Cal.4th 764, 797-798, it held that death qualification does not violate a capital defendant's right to an impartial or representative jury. Appellant presents no good reason for this Court to reconsider its ruling as to the California Constitution.

Appellant claims that the prosecutor used his peremptory challenges to systematically exclude prospective jurors who professed skepticism about the death penalty, but were not excludable for cause on that basis. He further claims that as a result he was denied due process, equal protection, the right to an impartial jury, the right to a jury drawn from a fair cross-section of the community, and the right to a reliable determination of guilt and sentence under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their California equivalents. (AOB 175-178.) This Court has repeatedly rejected substantially similar contentions. (*People v. Jackson*, *supra,* 13 Cal.4th at p. 1200; *People v. Marshall* (1990) 50 Cal.3d 907, 927.) Appellant has provided no grounds for this Court to reconsider its prior rulings.

Appellant has failed to demonstrate that the jury which actually heard his case was anything other than fair and impartial. The death qualification in this case was not so "extreme" as to create a jury biased in either the guilt or penalty phases. Appellant cites to no evidence that the jurors in this case acted on anything other than their "moral and normative" beliefs in reaching the sentencing decision. (AOB 180-182.) The death-qualification procedure employed in California generally, and in this case specifically, does not violate either the United States or the California Constitutions. This Court has decided the issues raised in this argument contrary to appellant's contentions and he has not presented any persuasive reason to revisit or overturn those precedents. Accordingly, appellant's claim should

be denied.

VIII. CALIFORNIA'S DEATH PENALTY LAW DOES NOT VIOLATE THE FEDERAL CONSTITUTION

Appellant raises several claims regarding the constitutionality of the death penalty law as interpreted by this Court and as applied at his trial. He maintains that many features of the death penalty law violate the state and federal Constitutions. (AOB 183-194.) As he himself concedes, these claims have been raised and rejected in prior capital appeals before this Court. Because appellant fails to raise anything new or significant which would cause this Court to depart from its earlier holdings, his claims should likewise be denied.

Factor (a)

In ground 1, appellant claims that 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 [his] Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, to equal protection, to a reliable and non-arbitrary determinations [*sic*] of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment." (AOB 184.) On the contrary, "[s]ection 190.2, which sets forth the circumstances in which the penalty of death may be imposed, is not impermissibly broad in violation of the Eighth Amendment." (*People v. Farley* (2009) 46 Cal.4th 1053, 1133; see also *People v. Mills* (2010) 48 Cal.4th 158, 213.) "Nor is section 190.3, factor (a) applied in an unconstitutionally arbitrary or capricious manner merely because prosecutors in different cases may argue that seemingly disparate circumstances, or circumstances present in almost any murder, are aggravating under factor (a)." (*People v. Carrington* (2009) 47 Cal.4th

145, 200.) Instead, "'each case is judged on its facts, each defendant on the particulars of his [or her] offense.'" (*Ibid.*, quoting *People v. Brown* (2004) 33 Cal.4th 382, 401, alteration in original.) Appellant offers no reason for this Court to reconsider the above cited cases.

Appellant claims that he was entitled to have the jurors unanimously find which circumstances of the crime amounting to an aggravating circumstance had been established, and find that such an aggravating circumstance had been established beyond a reasonable doubt. (AOB 184-185.) This Court has previously held that there is no requirement that the jury be instructed during the penalty phase regarding the burden of proof for finding aggravating and mitigating circumstances in reaching a penalty determination, aside from other crimes evidence, or that no burden of proof applied. (*People v. Clark* (2011) 52 Cal.4th 769, 849; *People v. Lewis* (2009) 46 Cal.4th 1255, 1319; *People v. Burney* (2009) 47 Cal.4th 203, 268; *People v. Morgan* (2007) 42 Cal.4th 593, 626; *People v. Panah* (2005) 35 Cal.4th 395, 499; *People v. Brown*, *supra*, 33 Cal.4th at p. 401.)

Moreover, the Eighth and Fourteenth Amendments do not require the jury to unanimously find the existence of aggravating factors or that aggravating factors outweigh mitigating factors beyond a reasonable doubt. (*People v. Nelson* (2011) 51 Cal.4th 198, 225; *People v. Hoyos*, *supra*, 41 Cal.4th at p. 926.) This Court has also consistently rejected the claim that the pattern instructions are defective because they fail to mandate juror unanimity concerning aggravating factors. (See, e.g., *People v. Russell* (2010) 50 Cal.4th 1228, 1271-1272; *People v. Bramit* (2009) 46 Cal.4th 1221, 1249-1250; *People v. Burney*, *supra*, 47 Cal.4th at pp. 267-268.) This Court has repeatedly rejected such claims and appellant has not distinguished his case from those previously decided. Appellant's claim should likewise be rejected.

Factor (b)

In ground 2, appellant alleges that his federal constitutional rights were violated because the court failed to instruct the jury that they could not consider other criminal acts involving express or implied use of violence pursuant to section 190.3, subdivision (b), unless they unanimously agreed beyond a reasonable doubt that the conduct had occurred. (AOB 185-186.) The jury may properly consider unadjudicated criminal activity at the penalty phase and need not make a unanimous finding on each instance of such activity. (*People v. Mills*, *supra*, 48 Cal.4th at p. 214; *People v. D'Arcy* (2010) 48 Cal.4th 257, 308.) Insofar as appellant contends that *Ring*[28] compels a different conclusion (see AOB 186), he is mistaken. This Court has found that *Ring* "do[es] not affect California's death penalty law." (*People v. Smith* (2003) 30 Cal.4th 581, 642.)

As appellant concedes, this Court has also rejected his argument that allowing a jury that has already convicted the defendant of first degree murder to decide if the defendant has committed other criminal activity violates the Fifth, Sixth, Eighth and Fourteenth Amendment rights to an unbiased decision maker, to due process, to equal protection, to a reliable and non-arbitrary determination of the appropriateness of the death penalty, and freedom from cruel and unusual punishment. (AOB 186-187, citing *People v. Hawthorne* (1992) 4 Cal.4th 43, 77.) Appellant has not distinguished his case from those previously decided, and thus his claim should likewise be rejected.

Factor (i)

In ground 3, appellant alleges that the court's instructions permitted the jury to rely on his age in deciding penalty without providing any

---

[28] *Ring v. Arizona* (2002) 536 U.S. 584.

guidance as to when this factor could come into play. He claims the 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. (AOB 187.) As appellant concedes, this claim has been repeatedly rejected by this Court. (*People v. Mills*, *supra*, 48 Cal.4th at p. 214, citing *Tuilaepa v. California* (1994) 512 U.S. 967 [consideration of age is not unconstitutional] and *People v. Smithey* (1999) 20 Cal.4th 936, 1005 [same].) Appellant has not distinguished his case from those previously decided, and thus his claim should likewise be rejected.

Inapplicable, vague, limited and burdenless factors

In ground 4, appellant claims that the standard jury instruction, CALJIC No. 8.85, was constitutionally flawed in that: (1) it failed to delete inapplicable sentencing factors, (2) it contained vague and ill-defined factors, particularly (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. He argues these errors, taken singly or in combination, violated his 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. (AOB 187-188.) This Court has repeatedly rejected this claim. (*People v. Thompson* (2010) 49 Cal.4th 79, 143-144; *People v. Taylor* (2010) 48 Cal.4th 574, 661-663; *People v. Mills*, *supra*, 48 Cal.4th at p. 214; *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308.) Appellant has not distinguished his case from those previously decided, and thus his claim should likewise be rejected.

Failure to narrow

In ground 5, appellant argues that California's death penalty law fails to provide a "meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not" in violation of the Eighth Amendment to the United States Constitution. (AOB 188.) This claim has also been rejected in numerous decisions and appellant gives this Court no reason to reconsider them. (See, e.g., *People v. Farley*, *supra*, 46 Cal.4th at p. 1133 ["[s]ection 190.2, which sets forth the circumstances in which the penalty of death may be imposed, is not impermissibly broad in violation of the Eighth Amendment."]; *People v. Mills*, *supra*, 48 Cal.4th at p. 213; *People v. D'Arcy*, *supra,* 48 Cal.4th at p. 308.)

Burden of proof and persuasion

In ground 6, appellant argues that before relying on an aggravating factor in support of a death sentence, the jury was required to find the aggravating factor to be true beyond a reasonable doubt. (AOB 189.) Appellant further contends that the jury was not given any instruction on burden of proof or persuasion in violation of his 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. (AOB 189.) He is incorrect. (*People v. McKinnon* (2011) 52 Cal.4th 610, 697, citing *People v. Blair* (2005) 36 Cal.4th 686, 753 ["neither the cruel and unusual punishment clause of the Eighth Amendment, nor the due process clause of the Fourteenth Amendment, requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty."].)

California's death penalty statute and instructions set forth the appropriate burden of proof. As discussed, this Court has determined on many occasions that section 190.3 and the pattern instructions are not constitutionally defective because they fail to require the state to prove beyond a reasonable doubt that an aggravating factor exists, and that aggravating factors outweigh mitigating factors. There is no requirement, under the Eighth Amendment to the federal Constitution, to instruct on a higher standard of proof of guilt at the penalty phase of a capital trial. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1277 [noting that this Court has routinely rejected similar arguments]; see also *People v. Thompson* (2010) 49 Cal.4th 79, 143-144; *People v. Riel* (2000) 22 Cal.4th 1153, 1182.)

> [U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole.' [Citation].

(*People v. Ward* (2005) 36 Cal.4th 186, 221-222, quoting *People v. Prieto*, (2003) 30 Cal.4th 226, 263.) As this Court explained in *Prieto*, "in the penalty phase, the jury merely weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.'" (*Prieto*, at p. 263 [quoting *Tuilaepa v. California*, *supra*, 512 U.S. at p. 972].) "The jury need not be instructed that there is no burden of proof." (*People v. Brady* (2010) 50 Cal.4th 547, 590; *People v. Gamache* (2010) 48 Cal.4th 347, 407 [accord].) Appellant gives this Court no reason to reconsider its previous holdings.

Written findings

In ground 7, appellant asserts that the California death penalty law violates his 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, because it does not require that the jury base a death sentence on written findings regarding aggravating factors. (AOB 189-190.) Contrary to his assertion, "[t]he law does not deprive defendant of meaningful appellate review and federal due process and Eighth Amendment rights by failing to require written or other specific findings by the jury on the aggravating factors it applies." (*People v. Dunkle*, *supra*, 36 Cal.4th at p. 939, overruled on another ground in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22; accord *People v. Foster* (2010) 50 Cal.4th 1301, 1365-1366; *People v. Gemache*, *supra*, 48 Cal.4th at p. 406.) Nor does the absence of such findings violate equal protection (*People v. Parson* (2008) 44 Cal.4th 332, 370) or a defendant's right to trial by jury (*People v. Avila* (2008) 46 Cal.4th 680, 724). "Nothing in the federal Constitution requires the penalty phase jury to make written findings of the factors it finds in aggravation and mitigation[.]" (*People v. Nelson*, *supra*, 51 Cal.4th at p. 225.) Appellant offers no reason for this Court to reconsider its previous decisions.

Mandatory life sentence

In ground 8, appellant claims the court's instructions failed to inform the jury that if it determined mitigation outweighed aggravation, it must return a sentence of life without parole, in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, to equal protection, a reliable non-arbitrary determination of the appropriateness of a death sentence, and freedom from cruel and unusual punishment. (AOB 190.) This Court has repeatedly held that instructions are not unconstitutional for failing to advise the jury that if the mitigating circumstances outweigh those in aggravation, it is required to return a sentence of life without the possibility of parole. (*People v. McWhorter*

(2009) 47 Cal.4th 318, 379; *People v. Carrington*, *supra*, 47 Cal.4th at p. 199.)

Vague standard for decision-making

In ground 9, appellant alleges that 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 creates an unconstitutionally vague standard in violation of his 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. (AOB 191.) This claim has been previously rejected by this Court and should be rejected here. (*People v. Carrington*, *supra*, 47 Cal.4th at p. 199; *People v. Smith*, *supra*, 30 Cal.4th at p. 642.) The instruction's use of the phrase "so substantial" in connection with the mitigating circumstances did not suggest the jury was powerless to return a life sentence even if it found the mitigating factors outweighed the aggravating ones. (*People v. Boyette* (2002) 29 Cal.4th 381, 465.) Appellant's claim should likewise be rejected.

Intercase proportionality review

In ground 12,[29] appellant claims that the failure to conduct intercase proportionality review violates his 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. (AOB 191-192.) This Court has repeatedly rejected this contention and should do so again here. (*People v. Mills*, *supra*, 48

---

[29] There are no grounds 10 or 11 in appellant's opening brief. (AOB 191.)

Cal.4th at p. 214; *People v. D'Arcy*, *supra*, 48 Cal.4th at 308; *People v. Foster*, *supra*, 50 Cal.4th at p. 1368.)

Disparate sentence review

In ground 13, appellant alleges that California's death penalty statute fails to afford capital defendants the same kind of disparate sentence review that is afforded defendants under the determinate sentence law, in violation of his 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. As appellant concedes, this Court has repeatedly rejected this argument. (*People v. Romero* (2008) 44 Cal.4th 386, 429; accord, *People v. Mills*, *supra*, 48 Cal.4th at p. 214; *People v. Williams* (2010) 49 Cal.4th 405, 470 ["Neither the equal protection clause nor the due process clause requires that the same disparate-sentence review be applied to noncapital and capital cases."].) Appellant has not distinguished his case from those previously decided, and thus his claim should likewise be rejected.

International law

In ground 14, appellant claims that California's death penalty scheme is procedurally deficient and uses capital punishment as a "regular punishment for substantial numbers of crimes," thereby violating international norms of human decency and international law, including the International Covenant of Civil and Political Rights. Accordingly, the statute violates the Eighth Amendment and the Supremacy Clause and appellant's death sentence must be reversed. (AOB 192-193.) This Court has repeatedly rejected similar arguments and should do so again here. International law does not require California to eliminate capital punishment. (*People v. Blacksher* (2011) 52 Cal.4th 769, 849 [rejecting claim "again"]; *People v. Martinez* (2010) 47 Cal.4th 911, 968; *People v.*

D'Arcy, *supra*, 48 Cal.4th at 309; *People v. Doolin*, *supra*, 45 Cal.4th at p. 456.) Furthermore, California does not impose the death penalty as regular punishment in California for numerous offenses. (*Ibid.*) Instead,

> [T]he death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions different from those applying to 'regular punishment' for felonies. (E.g., Cal. Const., art. VI, § 11; §§ 190.1-190.9, 1239, subd. (b).)

(*Doolin*, at p. 456, quoting *People v. Demetrulias* (2006) 39 Cal.4th 1, 44.) Thus, California's death penalty law does not violate international law or the federal Constitution. International law does not prohibit a sentence of death where, as here, it was rendered in accordance with state and federal constitutional and statutory requirements. (*Blacksher*, at p. 849; *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 334; *People v. Hamilton* (2009) 45 Cal.4th 863, 961; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1322; accord *People v. Mungia* (2008) 44 Cal.4th 1101, 1143; *People v. Panah*, *supra*, 35 Cal.4th at p. 500; *People v. Ward*, *supra*, 36 Cal.4th at p. 222) Appellant does not present any reason to revisit these holdings.

Cruel and unusual punishment

In ground 15, appellant argues that the death penalty violates the Eighth Amendment to the United States Constitution's proscription against cruel and unusual punishment. (AOB 193.) However, as he acknowledges, this Court, citing the United States Supreme Court, has consistently ruled otherwise. (*People v. Thompson*, *supra*, 49 Cal.4th at pp. 143-144; *People v. McWhorter*, *supra*, 47 Cal.4th at p. 379; *People v. Guerra* (2006) 37 Cal.4th 1067, 1164.) Despite this Court's aforementioned opinions rejecting this argument, appellant invites the Court to revisit the issue because purportedly "they are inconsistent with the aforementioned

provision of the federal Constitution." (AOB 193.) Appellant offers no basis for this Court to revisit its prior rulings rejecting his assertion of error.

Cumulative deficiencies

Finally, in ground 16, appellant reasserts three of his aforementioned challenges for purposes of arguing that the cumulative impact of the perceived defects violated his federal constitutional rights. (AOB 193-194.) This claim must fail because this Court has found that individually rejected claims "are no more compelling or prejudicial when considered together[.]" (See *People v. Garcia* (2011) 52 Cal.4th 706, 765 [discussing cumulative impact of numerous claimed error at defendant's penalty trial].)

In sum, appellant has failed to show that California's death penalty statute, as interpreted by this Court and applied at appellant's trial, violates the United States or California Constitutions. His claim is without merit and must be denied.

ARGUMENT – TREATY RIGHTS

IX. NO REVERSAL IS WARRANTED BASED ON A VIOLATION OF THE VIENNA CONVENTION; POST-CONVICTION REVIEW IS NOT THE PROPER FORUM IN WHICH TO ADDRESS APPELLANT'S CLAIM THAT HIS CONSULAR TREATY RIGHTS WERE VIOLATED

Appellant contends that his consular treaty rights under Article 36 of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 (hereafter "Vienna Convention" or "VCCR") were violated and his consulate was thereby denied its right to assist him throughout the "formative stages" of his case, resulting in prejudice. Appellant maintains that post-conviction review in this Court is the proper forum to address this claim. (AOB 195-213.) Appellant is mistaken. The record clearly establishes that the consular notification violation did not prejudice appellant. Thus, the claim may be denied on direct appeal.

A. Background

On December 12, 2001, appellant brutally shot and killed three people and assaulted a fourth person with a firearm. That same day, appellant was interviewed by detectives and placed under arrest. (5 CT 1162-1340; 13 RT 2654-2658, 2662-1 through 2661.) On December 14, 2001, the Stanislaus County District Attorney filed a complaint charging appellant with the murder of Alicia Martinez, Carlos Lopez, and Carmillo Chavez (§§ 187/190.2, subds. (a)(3) and (a)(17)(G)) and the attempted murder of Guadalupe Martinez (§§ 664/187). (1 CT 1-3.) Before arraignment, defense counsel indicated that the prosecutor told him that "they are potentially seeking the death penalty because of the number of deaths." (1 RT 3.) Appellant was arraigned, pled not guilty, and denied all allegations. (1 CT 4-5; 1 RT 9, 14-16.)

Eleven months following appellant's arrest, on November 12, 2002, the General Consulate of Mexico sent the trial court a letter regarding appellant's confinement on murder charges. (1 CT 16a.) The consul general voiced concern regarding appellant's rights under the Vienna Convention and requested "an explanation for not complying with the aforementioned regulations." (*Ibid.*) At that point, the court had not yet held the preliminary examination. (1 RT 34.) The prosecutor noted that the consular representative had recently visited appellant in jail. (1 RT 35-36.)

Four and a half years later, on May 9, 2005, appellant filed a motion to preclude the death penalty on the grounds that his rights under Article 36 of the Vienna Convention had been violated. (2 CT 283-345.) Appellant alleged that he was not promptly advised of his right to contact the Mexican Consulate in violation of Article 36. (2 CT 284.) And as a result, his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, his right to due process and equal protection

under the California Constitution, his rights pursuant to international law and section 834, subdivision (c), were violated. (2 CT 283.)

The prosecution filed written opposition on May 18, 2005. (2 CT 356-491.) The prosecution acknowledged that "the defendant was not timely notified that he had the right to communicate with a member of the Mexican Consulate upon his arrest and booking," but urged that "as soon as the People were made aware that the Mexican Consulate was looking into this matter in November 2002, steps were immediately taken to ensure that the defendant had access to a consulate official." (2 CT 357.) Appellant met with Cuauhtemoc Vargas of the Mexican Consulate on November 13, 2002. (2 CT 357, 377.) The prosecution conceded that the detectives overlooked appellant's Mexican nationality, explaining,

> The defendant spoke fluent English and advised the detectives that he had been in the United States for 15 years. He had a record of deportation in 1986, but had re-entered the country that same year and had remained in the United States since that time. The detectives did not consider a 15 year old deportation record as current information of the defendant's immigration status. He married Cindy Mendoza in Reno, Nevada in 1987. They had three children, all United States citizens. He had a valid California driver's license. He had been employed by several companies in Stanislaus County . . . He had also obtained his GED through a local high school.

(2 CT 357.)

On May 23, 2005, the trial court heard argument and subsequently denied the motion. (2 CT 492; 5 RT 796-798.) The court found that the treaty applied as incorporated in section 834, but noted, "the United States has withdrawn from the enforcement arm of that treaty." (5 RT 796.) The court continued:

> The court notes for the record that according to Penal Code 834(c), in the most recent 2005 edition of the Penal Code, Mexico is not one of the countries listed in that section, if

anybody had read that section up to that time which I don't think anybody had.

So the question basically – so basically the Court finds there was a violation of the provisions of 834(c) insofar as the defendant was a foreign national, and the authorities did not contact the consul of his country of origin within – well, I think the Penal Code section says when a person is in custody for more than two hours, shall advise he has a right to communicate. And also I believe it says without delay to notify the consulate. So, in that respect there is a violation of that.

The Court also finds the violation was not purposeful. It appears the officers involved were unaware of the provisions of the 834.

The question as to whether or not or what the appropriate remedy is for that is certainly open. There is no, certainly no California case or United States Supreme Court case which indicates the case should be dismissed for that failure, or that the remedy proposed in this case, which is preclusion from seeking the death penalty, should be imposed and is a sanction.

The Court also notes the defendant had been in the United States for quite some period of time, did speak English reasonably well, was advised of his constitutional right in the Miranda decision; therefore, even with the defendant's affidavit which was submitted in accordance with the motion that indicates had he been advised, that he would have talked with counsel, would not have discussed the matter any further without counsel, I can't say that would necessarily have been the case. That is merely speculation. We don't have any idea what would have actually happened back at that time, had he been so advised.

(5 RT 796-798.) The court found preclusion of death penalty was not the appropriate remedy in this case and denied the motion. (5 RT 798.)

On November 29, 2005, the Mexican Consulate filed a letter brief, asking to appear in court as amicus curiae on behalf of appellant "for the purposes of raising the Mexican Government's concern about ongoing reports from counsel for Mr. Mendoza regarding their client's present

competence to stand trial." (4 CT 909-916.) The Mexican Consulate urged the court to reconsider the issue of appellant's competency to stand trial. (*Ibid.*)

In denying the defense request to foreclose the penalty trial the court held, "The defendant was found competent to stand trial, and I don't think that evidence in this case indicates that he does not understand what's going on, is not able to assist counsel." (14 RT 2952.) The court heard defense counsel's argument to reopen section 1368 proceedings, but declined to reconsider appellant's competency, concluding, "The Court finds no new substantial evidence to justify it." (14 RT 2954.)

The court permitted the amicus brief to be filed and noted, "[I]t covers an area which has been repeatedly raised and ruled on by the Court in this proceeding." (14 RT 2988-2989.) The court ruled, "The brief is received, duly noted, and as I indicated previously, the thrust of it is to urge the Court to reconsider the issue of Mr. Mendoza's competence to stand trial, a matter which has been litigated and which the Court declines to revisit at this time." (14 RT 2989.)

B. Argument

Article 36, paragraph 1(b), of the Vienna Convention, provides that when a national of one country is detained by authorities in another, the authorities must notify the consulate of his country without delay if the detainee requests notification. (*People v. Mendoza* (2007) 42 Cal.4th 686, 709.) Without deciding whether the Vienna Convention creates judicially enforceable rights, the United States Supreme Court held that suppression of a defendant's statement is not an appropriate remedy for a violation of the convention. (*Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 349.)

> The violation of the right to consular notification . . . is at best remotely connected to the gathering of evidence. Article 36 has nothing whatsoever to do with searches or interrogations. Indeed, Article 36 does not guarantee defendants any assistance

> at all. The provision secures only a right of foreign nationals to have their consulate informed of their arrest or detention—not to have their consulate intervene, or to have law enforcement authorities cease their investigation pending any such notice or intervention. In most circumstances, there is likely to be little connection between an Article 36 violation and evidence or statements obtained by police.

(*Ibid.*) This Court has assumed for purposes of reviewing claims asserting a denial of consular notification rights that a defendant has individually enforceable rights under Article 36 of the Vienna Convention. (*In re Martinez* (2009) 46 Cal.4th 945, 957, fn. 3; *People v. Cook* (2006) 39 Cal.4th 566, 600.)

It is incumbent upon a defendant to demonstrate prejudice from the failure of authorities to notify a defendant of his right to consular notification. (*Breard v. Greene* (1998) 523 U.S. 371, 377; see also *United States v. Minjares-Alvarez* (10th Cir. 2001) 264 F.3d 980, 988 [Mexican national was not prejudiced by consular notification failure where the Mexican national was raised primarily in the United States, understood his constitutional rights, and was generally familiar with the United States' criminal processes]; *United States v. Esparza-Ponce* (9th Cir. 1999) 193 F.3d 1133, 1138-1139 [For an alien to obtain relief for a violation of the right under the Vienna Convention to have the consular post-contacted after being arrested, an alien must show that denial of that right resulted in prejudice].) Where a defendant shows what assistance the consulate claims it would have provided, it is incumbent upon the defendant to show that he did not obtain that same assistance from other sources. (*People v. Mendoza, supra*, 42 Cal.4th at p. 711.)

Here, there is no link between the Article 36 violation and appellant's confession or the prosecution's decision to seek the death penalty. Appellant was arrested after taking Guadalupe to the hospital and telling a security guard that he had "just shot [his] mother-in-law." (10 RT 1744-

1748.) At the beginning of the interview, detectives asked appellant whether he had any problems communicating in English and appellant replied, "[U]p to this point don't have any problems." (5 CT 1184.) Detective Grogran told appellant to tell him if he was having any problems and they could get a translator. (*Ibid.*) Appellant was read his *Miranda* rights, indicated that he understood those rights, and then freely discussed shooting and killing his estranged wife's mother, cousin, and new lover. (5 CT 1162-1340.)

Before arraignment, defense counsel indicated that the prosecutor told him that "they are potentially seeking the death penalty because of the number of deaths." (1 RT 3.) The complaint filed on December 14, 2001, charged a special allegation pursuant to section 190.2, subdivision (a)(3), for the killing of multiple victims. (1 CT 1-3.) The prosecution's decision to seek the death penalty was based on the circumstances of the crime, that appellant had shot and killed three people, facts which were unaffected by who was representing or assisting appellant in his defense. There was nothing a consular official could have done that appellant's attorneys did not do in his defense. Appellant fails to establish that if there had been timely notification in December 2002, his consulate would have assisted him in a way that likely would have favorably affected the outcome of his case.

Moreover, there is also no link between the consular notification violation and the jury's finding appellant competent to stand trial, or the trial court's decision not to reconsider the jury's finding because of unchanged circumstances. The consular representative met with appellant on November 13, 2002, which was almost two months before the preliminary examination on January 9, 2003, and over two years before the competency hearing in December 2004. (1 CT 19-62, 196-242; 2 CT 357, 377; 1 RT 34-36.) Appellant's trial on the underlying charges did not start

until October 2005, almost three years after appellant met with his consular representative in November 2002. (3 CT 767.) The violation was identified and remedied very early in this case. Appellant received consular assistance in planning and presenting his defense at the competency hearing and thereafter. During the trial, the court received and considered a letter brief from the Mexican consulate on appellant's behalf urging the court to reconsider the competency finding. (4 CT 909-916; 14 RT 2988-2989.) Appellant received the benefit of consular notification in preparation and presentation of his defense. (See *Sanchez-Llamas v. Oregon*, *supra*, 548 U.S. at p. 350.)

The record clearly shows that the consular notification violation did not prejudice appellant. Therefore, post-conviction review is not warranted. There is no evidence that the consular convention violation prejudiced appellant's competency or criminal trial defense and thus no remedy is warranted.

CONCLUSION

For the foregoing reasons, respondent respectfully asks this Court to affirm appellant's judgment of conviction and the penalty of death.

Dated: June 14, 2012

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
WARD A. CAMPBELL
Supervising Deputy Attorney General
STEPHANIE A. MITCHELL
Deputy Attorney General

CHRISTINA HITOMI SIMPSON
Deputy Attorney General
Attorneys for Plaintiff

CHS:wf
SA2006301807
10881977.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 61,399 words.

Dated: June 14, 2012

KAMALA D. HARRIS
Attorney General of California

CHRISTINA HITOMI SIMPSON
Deputy Attorney General
Attorneys for Plaintiff

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Mendoza**

No.: **S143743**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 15, 2012, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

Kathy Moreno
Attorney at Law
P.O. Box 9006
Berkeley, CA 94709-0006
Attorney for appellant

Clerk of the Court
Stanislaus County Superior Court
800 11th Street, Room 221
P.O. Box 1098
Modesto, CA 95354

The Honorable Birgit Fladager
District Attorney
Stanislaus County District Attorney's Office
832 12th Street, Suite 300
Modesto, CA 95354

California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105

Fifth Appellate District
Court of Appeal of the State of California
2424 Ventura Street
Fresno, CA 93721

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 15, 2012, at Sacramento, California.

_____
Signature

SA2006301807
31473293.doc