IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. CHRISTOPHER CHARLES LIGHTSEY Defendant and Appellant.	Supreme Court No. S048440 [Capital Case] Kern County Superior Court No. 56801

APPELLANT'S REPLY BRIEF

Automatic Appeal

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REPLY TO RESPONDENT'S STATEMENT OF FACTS

Rather than summarizing the facts of the case as presented at trial, respondent presents a one-sided and biased recitation of the prosecution's evidence, while ignoring the defense evidence. (RB 8-54.) Consistent with this approach, respondent summarizes the prosecution guilt phase evidence in a section entitled "Statement of Facts," while totally ignoring facts developed during defense cross-examination of these prosecution witnesses. (RB 55-33.) Respondent then relegates the defense case-in-chief to a separate section entitled "defense" (RB 34-42), deceptively and subtlety arguing in this manner that only the prosecution presented actual "facts."

1. Incomplete or Omitted Impeachment of Prosecution Witnesses

Respondent's "Statement of Facts" continually highlights the prosecution theory of the case alone, without making proper reference to the extensive and damning impeachment of much of the prosecution's case. While respondent's "Statement of Facts" is replete with such examples of inaccurate or incomplete summaries of prosecution witness testimony, the following three examples of such behavior are especially relevant and telling:

a. Coroner

Respondent summarizes the testimony of Dr. Walters, the coroner in this case, to claim that he only testified that the victim was probably killed at "11:00 a.m." (RB 18.) Yet respondent completely fails to note the fact the coroner was impeached with the fact that he originally told Det. Boggs that the decedent died much earlier in the morning, while Mr. Lightsey was still in court, making it impossible for him to be the killer. (19 RT 4262-4264; see also Arg. 2.) Respondent also fails to note that Dr. Walters conceded that he had given the same pro-defense testimony under oath at Mr. Lightsey's preliminary examination as well. (19 RT 4262-4264.)

b. Daulong

Respondent's summary of court reporter Diane Daulong's testimony about Mr. Lightsey's alleged change of clothing during the morning hearing (RB 13) fails to mention that she said nothing about this until six weeks before trial, although she had been interviewed by an investigator early in the case. Respondent also buries Mr. Lorenz's clear and unimpeached recollection of Mr. Lightsey's clothing -- dark slacks and a light-colored dress shirt -- and the presence of the Volvo in which Mr. Lightsey and his mother had driven to his attorney's office in its parking place during the mid-morning, in the "defense" section of their summary. Nor does respondent even mention that the trial prosecutor Lisa Green essentially repudiated Daulong's testimony in her closing

argument and asserted that the prosecution's theory was that Lightsey killed Compton after court, not between appearances.

c. Rowland

Respondent also summarizes the testimony of jailhouse informant Robert Rowland (RB 31-32), but fails to note extensive defense impeachment evidence that Rowland was a 'career snitch' who had suspiciously managed to get confessions from numerous unrelated defendants. (24 RT 5179-5202.) Respondent also fails to summarize the fact that Rowland had been impeached with his many horrific violent felonies, both within and without of prison, and his status as a former member of the Aryan Brotherhood prison gang. (24 RT 5176-5178.)

Most importantly, respondent fails to note the fact that Rowland was impeached with the fact that he was the 'trustee tier-tender' for Mr. Lightsey's cell, with unimpeded access to Mr. Lightsey's legal papers, providing him a source of his information separate from any conversations with Mr. Lightsey. (24 RT 5205, 5211.)[1]

2. Defense Alibi Evidence

Beyond ignoring defense facts elicited during defense cross-examination of prosecution witnesses during the guilt phase, respondent goes on to summarize the "defense" evidence as if it consisted of nothing but Rita Lightsey's testimony and the extensive prosecution impeachment of her testimony. (RB 34-39) The rest of the defense case-in-chief is relegated to a few cursory pages of grossly incomplete summaries of the remaining witnesses. (RB 40-43.) Yet Rita Lightsey's testimony was only a small part of the defense case-in-chief which took up over 500 pages of reporter's transcript. (25 RT 5343-28 RT 5899.)

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[1] Nor does respondent note the fact that Rowland was considered so unreliable by the trial prosecutor that they did not even use him at the preliminary examination, apparently desperately turning to his testimony at trial only when the prosecution feared that Mr. Lightsey might otherwise be acquitted by the jury.

Instead, the defense's case focused on presenting the testimony of numerous neutral, unbiased witnesses who provided compelling evidence that Mr. Lightsey was in court during the morning when the homicide occurred, and left the courtroom at a time which would make it physically impossible for Mr. Lightsey to have been the killer. (See also Arg. 2.) During the defense's case, Mr. Robin Lorenz, another client of Dominic Eyherabide's, who had no ties to Mr. Lightsey, testified that he walked with Mr. Eyherabide, Mr. Lightsey and Rita Lightsey from Eyherabide's office to the courthouse on the morning of July 7, 1993; that his court hearing was completed around 9:30 a.m.; and that when he walked back to Eyherabide's office, he saw Mr. Lightsey's mother's Volvo still parked in the same spot where it had been when they left for court. (25 RT 5355-5357-5362.)

Mr. Lightsey's defense attorney during this hearing that morning, a well-respected local attorney, stated that he was in two hearings that morning, Mr. Lightsey's case and the capital murder matter of *People v. Emdy*. (25 RT 5392-5395; Exh. H.) The *Emdy* trial was in Department 4 of the superior court, and Mr. Lightsey's bail bond hearing was set in Department 10 of the same courthouse. Mr. Lightsey's hearing in Department 10 was called for the first time soon after 9:00. Because Mr. Eyherabide was in trial, the hearing was put over until later in the morning, on the understanding that Eyherabide would return to Department 10 during the midmorning recess in *Emdy*. (25 RT 5409-5411.) Eyherabide returned to Department 10 during a recess in the *Emdy* trial, and Mr. Lightsey's case was called for the second time. Mr. Eyherabide's notes for July 7 show that the *Emdy* trial recessed at 10:30, which would have placed the time of the second calling of Mr. Lightsey's case shortly after 10:30. (25 RT 5398, 5401.)[2] (While Mr. Lightsey was not in the courtroom then, the bailiff found him

[2] This time was confirmed by the preliminary hearing of the opposing party at the hearing, bail bondsman Brian Epps. (PX 29.) However, at Mr. Lightsey's trial, Epps changed his testimony and stated that he thought the second calling of the case had occurred between 10:15 and 10:30.

and his mother in the coffee shop, and Mr. Lightsey was present when the case was called for the third time.)

Mr. Eyherabide's notes for July 7 showed that he returned to the *Emdy* trial down the hall in Department 4 immediately after Mr. Lightsey's case was heard, and arrived there at 10:55 a.m. (25 RT 5401-5403.) Given other undisputed evidence showed that the victim in the case was killed at around 10:55 a.m. or earlier, this testimony completely cleared Mr. Lightsey of the murder. (See Arg. 2.) Yet this evidence is only briefly discussed in respondent's statement of facts, instead relegated to a few sentences in a separate "defense" section.

Supporting testimony was also provided by another attorney working in the courthouse that day Fred McAtee, who saw Mr. Lightsey in the courthouse coffee shop in the mid-morning. (25 RT 5431.) Deputy Michael Forse, the bailiff in Dept. 10, also testified that he saw Mr. Lightsey in court on the morning of July 7, and recalled going to the coffee shop to get Mr. Lightsey. (25 RT 5448-5455.) John Somers, the prosecutor in this hearing, testified that he believed Mr. Lightsey's case was probably called for the first time at around 9:05 a.m. (25 RT 5465.) Somers confirmed that Eyherabide had been in Department 10 earlier but had told Somers he needed to leave for Department 4, and when the case called for the first time that day, the court told Somers to come back at 10:30 a.m., when Eyherabide would be available. (25 RT 5467-5469.)

Somers went on to concede that he had testified at the preliminary hearing that Eyherabide came to Department 10 at around 10:45 a.m. for the second calling of the case, which would have cleared Mr. Lightsey of the murder as this was too late to give Mr. Lightsey to be retrieved from the coffee shop by Deputy Forse, have his hearing, and still leave with time to kill the decedent.[3] (25 RT 5470-5473; see also Arg. 2.)

Unlike Rita Lightsey's extensively summarized testimony, which was only

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[3] At trial, Somers changed his testimony and said he believed the case was called shortly after 10:30 a.m. (25 RT 5479-5481; see also Arg. 12.)

peripheral to the defense's case and barely mentioned in defense closing arguments, this defense evidence completely exonerated Mr. Lightsey of the homicide. Yet is barely mentioned in respondent's brief, and even where mentioned only summarized incompletely.

3. Respondent's Statement of Facts Violated Appellate Principles

Respondent's one-sided approach is wholly unacceptable and in violation of appellate procedures of review. As *People v. Johnson* (1980) 26 Cal.3d 557, 576-577 makes plain in the context of examining substantial evidence:

> "In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court 'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' (*People v. Mosher* (1969) 1 Cal.3d 379, 395; *People v. Reilly, supra,* 3 Cal.3d 421, 425.) *The court does not, however, limit its review to the evidence favorable to the respondent.* As *People v. Bassett, supra*, 69 Cal.2d 122, explained, 'our task ... is twofold. First, we must resolve the issue in the light of the whole record - i.e., the entire picture of the defendant put before the jury - and *may not limit our appraisal to isolated bits of evidence selected by the respondent.* Second, we must judge whether the evidence of each of the essential elements ... is substantial; it is not enough for the respondent simply to point to 'some' evidence supporting the finding, for 'Not every surface conflict of evidence remains substantial in the light of other facts.' (69 Cal.2d at p. 138.) (Fn. omitted.)" (*Id.* at pp. 576-677, emphasis added.)

However, respondent's recitation of the facts on appeal does not follow these principles. Rather than being a true "Statement of Facts," it was instead merely a one-sided presentation of the prosecution's theory of the case, which says more about the deficiencies of respondent's brief than any supposed merits of their case on appeal.

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ARGUMENT

I.

MR. LIGHTSEY'S CONVICTIONS AND SENTENCE OF DEATH MUST BE REVERSED BECAUSE HE WAS INCOMPETENT TO STAND TRIAL, AND BECAUSE THE COMPETENCY PROCEEDINGS IN HIS CASE WERE FATALLY TAINTED BY PROCEDURAL ERRORS.

A. Respondent's Contentions

"THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING APPELLANT MENTALLY COMPETENT TO STAND TRIAL."

B. The Trial Court Repeatedly Violated Statutory and Constitutional Rules Governing Competency Proceedings

As appellant pointed out in his opening brief (AOB 63-118), on six different occasions the various attorneys representing or advising Mr. Lightsey asked the trial court to declare a doubt of his mental competence, citing examples of his delusional thinking and his inability to cooperate with his defense attorneys and investigators. While proceedings were suspended twice for examinations by court-appointed experts, no proper competency hearing was ever held. At trial, the trial court repeatedly refused to accept the obvious fact that Mr. Lightsey was mentally incompetent, ignoring repeated incidents in which he interrupted the proceedings with delusional and tangential arguments, unconsciously impeded his counsel's attempts to defend him, and failed to maintain control of his disruptive behavior or comprehend its unsettling effect on the jury.

Individually and cumulatively, the court's errors and its failure to protect Mr. Lightsey from the consequences of his mental illness violated Mr. Lightsey's right not be tried while mentally incompetent. (*Dusky v. United States* (1960) 362 U.S. 402; *Pate v. Robinson* (1966) 383 U.S. 375, 386-387; Pen. Code, §§ 1368, 1369.)

These errors violated Mr. Lightsey's state and federal constitutional rights to a fair trial, to due process of law, and to a proportionate and reliable verdict of

death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.) The errors require per se reversal of Mr. Lightsey's verdict and judgment of death. (*Dusky v. United States, supra,* 362 U.S. 402; *Pate v. Robinson, supra,* 383 U.S. 375, 386-387; *People v. Dunkle* (2005) 36 Cal.4th 861, 885.)

C. The Court Erred in the Competency Proceedings of March, 1994 by Appointing Only One Expert and By Finding Mr. Lightsey Competent Solely on the Basis of the Report of That Expert, Even Though the Expert Had Not Conducted an Examination of Mr. Lightsey.

The first competency proceeding in Mr. Lightsey's case was jurisdictionally deficient in that the trial court appointed only one expert to evaluate Mr. Lightsey, even though he denied that he was incompetent and objected to the competency proceeding, and then based its finding on a report issued by a psychologist who never actually examined Mr. Lightsey. (AOB 66-72.)

1. The Trial Court Erred in Only Appointing One Expert

Respondent concedes that when a defendant denies that he is incompetent, two examiners must be appointed. (RB 57-63.)[4] However, respondent argues that Mr. Lightsey never advised the court that he was contesting the claim that he was competent. Yet as respondent acknowledges, and even marks in bold in its brief, Mr. Lightsey made as clear an objection as could be expected from any lay person, particularly one whose mental competence was in doubt. In response to the court's declaration of a doubt of his competence and order for an examination, he

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[4] While respondent accuses Mr. Lightsey of selectively citing passages in the record to overemphasize his irrationality, respondent begins its brief by selectively citing from the record a deceptively lucid passage from Mr. Lightsey's preliminary hearing, in support of its argument that Mr. Lightsey was competent. (RB 57, citing RT [1/24/94] 6.) Respondent fails to quote later portions of the same hearing, where Mr. Lightsey spoke in a pressured manner, rambled in long run-on sentences, and made odd comments about the "conspiracy" against him and the "think tank" he was running from his cell. (See, e.g. RT [1/24/94] 15.) As the record shows, moreover, Mr. Lightsey's mental condition continued to deteriorate through subsequent proceedings and his trial.

told the court to "**Cancel the doctor's appointment. I don't need a doctor** [i.e. due to the fact that he was not incompetent]. **I refuse**!" (RB 58, emphasis in original, citing 3 RT 791-792.)

Later in its brief, in fact, respondent expressly concedes that "as *appellant wished*, he was found competent to stand trial." (RB 62, emphasis added.) As noted in the opening brief, (AOB 69-70), all parties, including the judge at the hearing, were very well aware that Mr. Lightsey was claiming he was competent and objecting to the suspension of proceedings. The court erred in only appointing one expert examiner. (Pen. Code, § 1369.)

Perhaps recognizing the weakness of its initial tack, respondent goes on to argue that any error was harmless because the rule requiring appointment of a second expert was actually meant to protect only against false findings of *in*competence (RB 62, citing *People v. Harris* (1993) 14 Cal.App.4th 984, 996.)

In *Harris*, the defendant was found incompetent after an evaluation by a single expert. The Court of Appeal discussed the question whether appointment of a second expert is required when the defendant, but not his counsel, claims he is competent, but did not resolve the question because the expiration of the defendant's commitment made it moot. (14 Cal.App. 4th at pp. 995-996.) The language relied upon by respondent is dicta, unnecessary to the decision in the case. Moreover, the Court's statement that "the appointment of two experts . . . provides a minimum protection for the defendant against being incorrectly found incompetent to stand trial" was specific to the factual situation presented to it, i.e., that of a defendant who argued on appeal that he had been erroneously found *in*competent based on a single expert's evaluation. In context, it was clearly not intended, as respondent claims, to stand for the general principle that the statute requires appointment of experts only to ensure against incorrect findings of incompetence.

An evaluation by two experts protects against erroneous findings of competence, as well as incompetence and provides a higher degree of assurance

on the vital question whether a defendant has "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." (*Dusky v. United States, supra,* 362 U.S. 402, 402-403; see also *Pate v. Robinson, supra,* 383 U.S. 375, 378 [same]; *People v. Dunkle, supra,* 36 Cal.4th 861, 885 [same].)

It is well recognized in mental health literature that defendants suffering from major mental illness often suffer from "anosognosia," a condition which causes them to have "both a lack of awareness of having a mental disorder (and specific signs of the disorder), and a compulsion to disprove, even at the cost of one's personal safety, any evidence to the contrary." (*Insight into Schizophrenia: Anosognosia, Competency, and Civil Liberties* (2000) 11 Geo. Mason U. Civ. Rts. L.J. 25, 25; see also *Rep. of the Internal Pilot Study of Schizophrenia* (1973) World Health Org.[noting 81% of schizophrenics deny their illness]; *Flexible System Criteria in Chronic Schizophrenia* (1986) 27 Comprehensive Psychiatry 259, 259-265[noting 89% of schizophrenics deny their illness].)

California's requirement of appointment of two experts when the defendant objects to competency proceedings is a valuable safeguard to the integrity and reliability of competency determinations (*Dusky v. United States, supra,* 362 U.S. 402, 402-403; *Pate v. Robinson, supra,* 383 U.S. 375, 378; *People v. Dunkle, supra,* 36 Cal.4th 861, 885 [same]) in the all-too-common situation in which a mentally ill defendant cannot recognize his own illness and insists that he is mentally competent. At a contested hearing, where the burden is on the defense to prove the defendant's incompetence, the testimony of one expert opining that the defendant is incompetent might not meet the burden of showing incompetence against the defendant's insistence to the contrary; however, the agreement of two experts would provide a much stronger case against the defendant's contrary position.

As a final, third fallback position, respondent argues that because Mr. Lightsey refused to see Dr. Burdick, appointing a second evaluator would have

been "a futile act," and therefore any error was harmless. (RB 82.) Yet this is pure speculation. Moreover, the record is plain that when a second and third expert were later appointed, Mr. Lightsey consented to be examined by them. (2 Supp. Conf. CT 388.) Respondent also fails to cite a single case or authority that a mentally incompetent defendant's intentional efforts to sabotage competency proceedings by refusing to be examined somehow trumps constitutional and state law principles that only competent defendants may be tried. Rather, there is a fundamental interest in our judicial system in not subjecting a mentally incompetent defendant to trial and conviction. (*Dusky v. United States, supra*, 362 U.S. 402, 403-404; *People v. Dunkle, supra*, 36 Cal.4th 861, 885; *People v. Castro* (2005) 78 Cal.App.4th 1402, 1414.)

Finally, respondent also comes to the novel conclusion that because Lightsey got what he wanted out of the process, i.e., a finding that he was competent, there was no prejudice. (RB 62-63.) Respondent also argues that Mr. Lightsey invited the error by not objecting to the judge's finding that he was competent. Again, however, there is a fundamental interest in our judicial system in not subjecting a mentally incompetent defendant to trial and conviction. The fact that an incompetent defendant claims he is competent does not and cannot trump the requirements of state and federal law, because "whether a person is competent to stand trial is a jurisdictional question, and cannot be waived by the defendant . . ." (*Castro, supra*, 78 Cal.App.4th 1402, 1414.)

2. The Trial Court Abused its Discretion in Finding Mr. Lightsey Competent on the Basis of the Report of an Expert Who Did Not Conduct a Competency Evaluation.

Respondent next argues that the competency finding was supported by "substantial evidence," and must be upheld on appeal, because Dr. Burdick's report provided evidence of competence and was not controverted by any evidence from the defense. (RB 63-66.) This argument misses the point. When relevant evidence (here, the results of a second expert's evaluation) has been erroneously

excluded, the reviewing court cannot properly uphold the trial court's finding on the basis that the evidence admitted was sufficient to support it, unless the record shows that the excluded evidence would have supported the finding. Without knowing what the opinion of a second expert would have been, it does not matter whether Dr. Burdick's opinion was sufficient. (Moreover, as will be discussed *infra*, the record shows that when a second court-appointed examiner, Dr. Velosa, *was* finally appointed, he made a finding that Mr. Lightsey was *incompetent* to stand trial.)

More importantly, the supposedly "substantial evidence" of Dr. Burdick was hardly substantial in relevance terms, given that he never actually examined Mr. Lightsey, because Mr. Lightsey refused to be examined. Indeed, Dr. Burdick, on whom respondent places so much reliance, conceded that "it [was] not possible from this brief encounter to complete a formal psychiatric evaluation." (See AOB 67-70.)

The court erred in basing its decision finding Mr. Lightsey competent on only one examiner and on such insubstantial evidence.

D. Judge Kelly Erroneously Refused to Declare a Doubt of Mr. Lightsey's Competence When Confronted with Judge Felice's Error in Appointing Only One Examiner and With Additional Evidence of Mr. Lightsey's Incompetence.

As previously demonstrated, Judge Kelly, the trial judge who replaced the lower court magistrate who conducted the first flawed competency proceedings, erred in denying trial counsel's motion, on April 8, 1994, for renewed competency proceedings due to the errors in the previous hearing. (AOB 72-75) Respondent makes only a cursory response to this argument, providing a procedural summary and some general case law, but failing to address the argument on its merits. (RB 66-69.) In particular, respondent fails to respond to, or contest, Mr. Lightsey's primary argument that this was not a case of a second competency hearing request, where there is a need to show a "substantial change of circumstance." (See, e.g., *People v. Ramirez* (2006) 39 Cal.4th 398.) Rather, both at trial and on appeal, the

argument is that there was no true initial competency hearing held at all, but that the request to Judge Kelly was actually one for a *first properly constituted and conducted* competency hearing.

Moreover, assuming for the sake of argument that respondent's position is correct, there *was* a "substantial change of circumstance" in the form of Mr. Lightsey's delusional and bizarre behavior before Judge Kelly, which is amply apparent in the record. Mr. Lightsey personally advised Judge Kelly about a supposed dark conspiracy operating against him, including all three of his previous defense attorneys, and argued that the conspiracy had "contaminated" the case. (4/7/94 RT [Marsden] 12-22.) Mr. Lightsey also made strange allegations that court transcripts had been forged and portions deleted, that his attorneys were working for the district attorney, and that he was being "tortured" by the system. He accused his then attorney Ed Brown of lying under oath and working with Judge Felice to sabotage his case, along with defense investigator Purcell, and told Judge Kelly that they were "torturing" him. (4/7/94 RT [Kelly] 3-4, 615-28; 4/7/94 RT [Kelly] 50-51.) He accused his previous attorney, Stan Simrin, of holding secret meetings with the prosecution in order to sabotage his case (4/8/94 RT [Kelly] 57), and made allegations that corrupt court staff had forged the preliminary hearing transcript in his case. (4/7/94 RT [Kelly] 27-28, 41-42; 4/7/94 RT [Kelly] 55.) Mingled with these strange allegations, Mr. Lightsey proffered oddly irrelevant facts, such as his swimming skills. (4/7/94 RT [Kelly] 5.)

Even if one accepts respondent's position that a showing was required of a "substantial change in circumstances," requiring a competency hearing, the record of the hearing before Judge Kelly provides ample evidence of such a change, especially when viewed together with the fatally flawed errors in the original competency 'proceedings.' *(Ramirez, supra,* 39 Cal.4th 398.) The trial court erred in failing to initiate a proper competency hearing at this stage as well.

E. The Second Set of Competency Proceedings, Held In July of 1994, Was Jurisdictionally Defective, and the Finding of Competence

Constitutionally Deficient, Because the Trial Court Permitted Mr. Lightsey to Represent Himself After Declaring a Doubt of Mr. Lightsey's Competence Both to Assist Counsel and To Represent Himself; Because the Court Mistakenly Believed that Both Experts Who Examined Mr. Lightsey Had Found Him Competent to Stand Trial; and Because the Court Permitted Mr. Lightsey to Waive His Right to a Hearing on His Competence in Return for a Finding That He Was Competent.

In July of 1994, Judge Kelly was finally persuaded to declare a doubt of Mr. Lightsey's competence, at the behest of Mr. Lightsey's advisory counsel at the time, Ralph McKnight. However, the judge erroneously permitted Mr. Lightsey, who vehemently denied any mental illness, to represent himself during those proceedings and a subsequent hearing to determine whether he was competent to represent himself and to bargain away his right to a competency hearing in return for a judicial finding that he was competent. (See AOB 75-92.)

1. The Court Erred in Allowing Mr. Lightsey to Represent Himself During Competency Proceedings and to Waive His Right to Jury Trial While Unrepresented By Counsel

Respondent first argues that the last sentence of Penal Code section 1368, which she *concedes* requires the court to appoint counsel in a competency proceeding if the defendant does not already have counsel, means only that the court is required to appoint counsel for the limited purpose of giving the court an opinion on whether the defendant is incompetent, and not for the purpose of actually representing the defendant during the competency proceedings. (RB 75.) This is incorrect on several levels.

First, to argue that the court should appoint an attorney who has no prior relationship with the defendant for the sole purpose of giving an opinion on the defendant's competence is absurd. How would an attorney with no prior contacts with the defendant have an informed opinion one way or the other? Second, appointment of counsel to give the judge an opinion about the defendant's competence is unnecessary: the judge can declare a doubt regardless of whether the defendant's attorney agrees. Respondent's proposed interpretation of the

statute fails on both counts.

This Court has repeatedly held that statutes may not be interpreted in a way that leads to such "absurd results." (See, e.g., *People v. Valladoli* (1996) 13 Cal.4th 590, 604.) Reading the statute to require appointment of counsel to represent the defendant in competency proceedings is the only interpretation of Penal Code section 1368 that comports with rationality, practicality, and the policies favoring the integrity of criminal proceedings.

Finally, even under respondent's reading of the statute, Judge Kelly erred, because he did not appoint counsel even for the limited purpose of rendering an opinion as to Mr. Lightsey's competency. Mr. Lightsey was not represented by counsel, but was instead in pro per, *throughout* the proceedings.

Recognizing the weakness in this approach, respondent alternatively argues that Penal Code section 1404 somehow allowed the judge to ignore the statutory requirements of sections 1368 and 1369 and craft his own proceeding for determining competence.

Section 1404 states:

> "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right."

Respondent argues that in enacting this statute, "the Legislature has made plain that a defendant has no substantial right to adherence to such standard procedures." What respondent contends, in essence, is that section 1404 removes from defendants any right to have statutorily required procedures followed in their cases and permits judges to ignore procedural requirements set by the Legislature and fashion their own processes at will. (RB 76.) Put another way, respondent argues that section 1404 makes the entire set of procedural rules contained in the Penal Code optional. Hardly.

Section 1404 was part of the original 1872 Code. Cases interpreting that statute make it clear that this section was designed to codify the requirement that a party claiming error in a pleading or proceeding must show prejudice, replacing the old per se reversal requirements under the rigid 'code pleading' rules of our country's antebellum legal system. By its very words this section deals with the requirement of prejudice resulting from errors; it does not give a trial court *carte blanche* to ignore our State's procedural statutes and craft any procedures it chooses, as respondent argues. Mr. Lightsey did have a right to have the procedures laid out in Penal Code section 1369 followed. Nothing in section 1404 changes this. Moreover, as previously demonstrated (AOB 75-88), Judge Kelly's erroneous failure to appoint counsel for the competency proceedings *did* prejudice Mr. Lightsey, by depriving him of a reliable determination of his competence to stand trial and denying him his due process right not to be tried while incompetent.

Respondent next argues that, notwithstanding the clear statutory requirement and the federal case law cited by Mr. Lightsey supporting this requirement, courts do not need to appoint counsel for pro per defendants for a *second* competency hearing after a defendant has been found competent at a prior hearing. (RB 78-79, citing *Wise v. Bowersox* (8th Cir. 1998) 136 F.3d. 1197, 1203.) *Wise* does not stand for this proposition.

In *Wise*, under Missouri state law procedures which give advisory counsel rights equivalent to appointed counsel in competency proceedings, the defendant was represented at a second competency hearing by advisory counsel who was authorized to cross-"examine both of the experts who testified" and to make arguments to the court that the defendant was incompetent. (*Id.* at p. 1203.) Under these Missouri state law procedures, the Sixth Circuit found that the defendant was "well represented" in full by his advisory counsel, who was effectively serving as appointed counsel for all practical purposes. (*Ibid.*)

Unlike Missouri, however, California law requires the actual appointment of counsel during a competency hearing, even a second competency hearing.

(*People v. Robinson* (2007) 151 Cal.App.4th 606, 615 [reversing conviction due to failure to appoint counsel during second competency hearing].) In *Robinson*, the appellate court noted that both California and federal law were very plain that counsel *must* be appointed whenever a competency hearing is held in a California court, including a second competency hearing. (*Id.* at pp. 106-108, citing *Pate v. Robinson, supra*, 383 U.S. 375, 384; *People v. Tracy* (1970) 12 Cal.App.94, 102 [counsel must be appointed during sanity proceedings]; *United States v. Purnett* (2nd Cir. 1990) 910 F.2d 51, 54 [counsel must be appointed in competency proceedings]; *United States v. Zedner* (2nd Cir. 1999) 193 F.3d 562, 567 [same].)

The *Robinson* court also expressly rejected the applicability of *Wise v. Bowersox,* and its discussion of Missouri law, to proceedings in California courts. As *Robinson* pointed out, in the second competency hearing, in *Wise,* "standby counsel, who believed defendant was incompetent, was allowed to speak and to examine the experts who testified. Both points of view on competency were well represented and there was 'a fair inquiry' into defendant's competency." (*Robinson, supra*, 151 Cal.App.4th 606, 615, citing *Wise v. Bowersox, supra*, 136 F.3d 1197, 1203.) Such aggressive advocacy by advisory or standby counsel is not allowed under California law, however, and certainly never occurred in Mr. Lightsey's case, so there was no such "fair inquiry." (*Ibid.*)

Nevertheless, attempting to graft Missouri's unique advisory counsel competency hearing procedures to California law, respondent argues that Mr. Lightsey cannot show prejudice because Lightsey had advisory counsel, and this was de facto the same as having appointed counsel under California jurisprudence. (RB 79.) Yet as *Robinson* makes plain, this is erroneous. Under both California and federal law, there is a clear difference between the roles and powers of counsel of record and advisory counsel. The U.S. Supreme Court has made plain that mere advisory counsel can neither "make or substantially interfere with any significant tactical decisions . . . or to speak instead of the defendant on any matter of importance." (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 178; see also *Frantz*

v. Hazey (9th Cir. 2008) 533 F.3d 724, 739-740 [reversing conviction where advisory counsel allowed to act as if appointed counsel]; *Robinson v. Ignacio* (9th Cir. 2004) 360 F.3d 1044, 1060, fn. 10 [noting "a standby counsel is not the equivalent of [appointed] counsel].) Under this line of case law, it is plain that advisory counsel McKnight could not overrule any of Mr. Lightsey's decisions, such as his personal choice of second expert, waiver of jury trial, and waiver of the competency hearing altogether. The record is also plain that Mr. Lightsey refused to follow any advice giving to him by advisory counsel McKnight. As McKnight later explained to the court, when he moved to withdraw shortly after this flawed competency proceeding:

> "Mr. Lightsey has gotten to the point where communications with me have broken down to recriminations, accusations and basically nothing, nothing that relates to moving forward on his case. I'm not certain, because of my perception of his mental condition that anybody is going to get a whole lot more cooperation unless they're willing to be a door mat for him.
>
> . . .
>
> "[A]lmost without exception when I seek to advise him on a legal matter, instead of a discussion concerning that legal issue or apparent comprehension of my advice, I get argument, I'm advised I'm lying to him, that my advice is not only not good but an attempt to sabotage his defense.
>
> . . .
>
> "My explanations to him of the scope and limits of my authority and purpose in the case have gone unheeded, and he simply -- if we get five minutes of productive time together in our meetings it's more than average because our communications are not as adviser to client. It's a situation of being complained to and complained of and referred to in most uncomplimentary terms as being some sort of surrogate for the prosecution."
>
> . . .
>
> I don't believe any attorney who challenges Mr. Lightsey's preconceptions of the law or ideas of how the case should be run is going to have any better result than I have had." (RT 7/28/94 122-124.)

Given this refusal by Mr. Lightsey to work with advisory counsel, McKnight could hardly be viewed as the same thing as a counsel of record, specifically authorized to ignore his client's instructions during competency proceedings.

Under California law appointed counsel in competency proceedings can make fundamental tactical decisions that, in criminal proceedings, would be reserved to the client. (See, e.g., *People v. Hill* (1967) 67 Cal.2d 105, 115, fn. 4 ["When evidence indicates that the defendant may be insane it should be assumed that he is unable to act in his own best interests. In such circumstances counsel must be free to act even contrary to the express desires of his client"]; *People v. Samuels* (1981 29 Cal.3d 489, 495 ["[I]f counsel represents a defendant as to whose competence the judge has declared a doubt sufficient to require a section 1368 hearing, he should not be compelled to entrust key decisions about fundamental matters to his client's apparently defective judgment."]; *People v. Masterson* (1994) 8 Cal.4th 965 [counsel in a competency proceeding could waive a twelve-person jury over his client's objection.].) McKnight could not do any of those things at Mr. Lightsey's hearing.

And, as the record shows, Lightsey not only disagreed with McKnight's opinion on his competence, he overruled McKnight's attempt to get a competency determination and waived a hearing on the issue in order to be found competent and "get on with the show." Having succeeded at that, he immediately fired McKnight and proceeded without advisory counsel.

Finally, respondent argues that Judge Kelly actually held a hearing and made a determination of competence based on the reports of the experts and his observations of Lightsey. (RB 81.) Yet respondent does not point to anything substantive in the record to support this assertion. Simply put, there was no true *adversarial proceeding* on Mr. Lightsey's competence because both he and the prosecutor wanted him to be found competent. Mr. Lightsey's anosognosia, itself an outgrowth of his mental illness, prevented him from recognizing his mental

impairments. (*Insight into Schizophrenia: Anosognosia, Competency, and Civil Liberties, supra*, 11 Geo. Mason U. Civ. Rts. L.J. 25.) Without appointed counsel, there was no one to advocate for the position that Mr. Lightsey was incompetent. There was therefore no true inquiry into the state of Mr. Lightsey's competency.

The very essence of our adversarial system of criminal justice demands partisan advocacy to ensure just results. (*Penson v. Ohio* (1988) 488 U.S. 75, 81; *Strickland v. Washington, supra*, 466 U.S. at p. 685 ["The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."]; *Herring v. New York* (1975) 422 U.S. 853, 862 ["The very premise of our adversary system ... is that partisan advocacy on both sides of the case will best promote the ultimate objective that the guilty be convicted and the innocent go free."].)

Finally, respondent argues any error was harmless, because attorneys Dougherty and Gillis were later appointed to represent Mr. Lightsey, and they twice requested Judge Kelly to declare a doubt of Lightsey's competence, and were twice denied. (RB 81.) This hardly reduces the prejudice of failing to appoint counsel earlier and wrongfully finding Mr. Lightsey competent.

Oddly, the point respondent appears to be making is that appointment of counsel for the competency hearing would not have made a difference because the judge made the same finding when Lightsey had counsel as when he was in pro per. The logic of this is flawed on several levels. First, it is not known what the judge would have decided had Lightsey had had counsel and a contested hearing with the presentation of evidence and witnesses during the pretrial competency proceedings. Counsel would almost certainly have insisted on the right to a trial on the issue of competency, and the judge or jurors may very well have come to a different conclusion upon hearing the testimony of the appointed experts.

Second, the two times Gillis and Dougherty asked for suspension of proceedings, the judge did *not* make the same ruling; he refused even to declare a

doubt in the face of overwhelming evidence that Lightsey could not rationally participate in the trial and the judge's own observation that he did not seem to understand the seriousness of the charges, unlike the first hearing where a doubt as to Mr. Lightsey's competence *was* declared and proceedings suspended.

Respondent also makes the argument, certainly unique if nothing else, that the error in letting the unrepresented Mr. Lightsey waive his right to jury trial was harmless, because there was no reasonable likelihood that he would have been found incompetent even with a jury trial. (RB 82-83.) Of course, respondent has no way of knowing this because no trial ever occurred and no one ever heard the full panoply of evidence that might have been presented had there been a trial. (As noted below, Judge Kelly failed to understand that Dr. Velosa had in fact found Mr. Lightsey to be incompetent to stand trial, but this would have been explained to a jury by any competent appointed counsel.) Respondent appears to base its argument on a passage in *People v. Samuel*, which respondent interprets as implying that jury verdicts in competency hearings are not entitled to the same deference on appeal as verdicts in criminal cases. In *Samuel,* this Court overturned a jury's finding that the defendant was competent, holding that the record did not show substantial evidence from which the jury could have found competence. (RB 83, citing *People v. Samuel* (1981) 29 Cal.3d 489, 505-506.) The court's discussion in that case of why the jury's findings were not necessarily entitled to the same deference as those of a criminal trial jury is arguably dicta in the context of that case, since the court based its reversal on the lack of substantial evidence, and in any event *Samuel* does not support the respondent appears to be trying to take from it, which is that Lightsey was not prejudiced by the lack of a jury trial because jury trials in competency proceedings do not mean that much.

2. Judge Kelly's Finding That Mr. Lightsey Was Competent to Stand Trial Was Deficient Because He Did Not Understand That Dr. Velosa Had Concluded that Lightsey Was Incompetent.

In a brief paragraph taking less than half a page, respondent argues, without

any truly supporting citations in support, that Judge Kelly understood that Dr. Velosa had found Lightsey incompetent on the second prong of the test and that he properly weighed the opinions of the experts and agreed with Dr. Manohara's. (RB 82.) As previously demonstrated, this is incorrect. (AOB 90-91.) In fact, Judge Kelly never even referred to Dr. Velosa's finding on the second prong of the competency test, that Mr. Lightsey was incompetent because he was unable to rationally assist his counsel. Instead, the judge said only that "Dr. Velosa, although he reflects what I would suggest to be some reservation in that regard, he does indicate that you are able to understand the nature and purpose of the proceedings" (7/28/94 RT 106.) Dr. Velosa did not just have "some reservation," he made a formal finding that Mr. Lightsey was incompetent to stand trial.

Moreover, Judge Kelly apparently never noticed that Dr. Manohara did not even include in his report – one way or the other – an opinion as to the second prong of the competency test. The trial court certainly never mentioned this total lapse by Dr. Manohara. (AOB 90-91.) Given Dr. Manohara's misgivings, articulated in his report, about Lightsey's paranoia, distrust, and difficulty in working with counsel, it appears likely that Dr. Manohara might have agreed with Dr. Velosa if this omission had been brought to his attention by either the trial court or properly appointed trial counsel for Mr. Lightsey.

The record is plain that Judge Kelly failed to notice the crucial issue in this proceeding: that Dr. Velosa, an experienced court-appointed expert, found Mr. Lightsey to be incompetent to stand trial and that Dr. Manohara (though his evaluation was less thorough and his report incomplete) did not disagree. Given Judge Kelly's basic failure to follow the most elementary principles of competency proceedings, no deference is required towards Judge Kelly's flawed rulings in this regard.

F. The Jurisdictional Defects of the Competence Proceedings Were Not Cured by the Subsequent Hearing On August 2, 1994 In Which the Court Purported to Determine Mr. Lightsey's Competence to Represent Himself.

Respondent next argues that the August 2, 1994 hearing on whether Mr. Lightsey was competent to represent himself was actually a full-blown hearing on the issue of whether Mr. Lightsey was competent to stand trial, thereby curing any errors from the earlier July 28, 1994 hearings. (RB 85-94.) In particular, respondent recites the *Godinez v. Moran* standard that equates trial competence with competence to represent oneself, and summarizes the experts' testimony at the August 2 hearing at length, as if it were a hearing on competence. (RB 85, citing *Godinez v. Moran* (1993) 509 U.S. 389, 399-400.)

However, Judge Kelly and the prosecutor at the hearing made plain that this was a hearing on Mr. Lightsey's right to continue to represent himself, and nothing else. (See AOB 95-96.) The issue of whether Mr. Lightsey was competent had already been settled in the court's mind in the previous competency proceedings. The criminal proceedings were no longer suspended; the August 2 hearing was simply one on the issue of whether the court should accept Mr. Lightsey's *Faretta* waiver and permit him to continue to represent himself.[5]

In fact, the prosecution was adamant, both at that hearing and later in trial, that the only question before the court in that hearing was the narrow one of whether Lightsey was capable of making a knowing and intelligent waiver of his right to counsel. The district attorney's position was correct: the proceedings

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[5] Moreover, the portion of *Godinez* relied on by respondent has been shown to be inapplicable to the facts of Mr. Lightsey's case, by the new 2008 U.S. Supreme Court case of *Indiana v. Edwards* (2008) 128 S.Ct. 2379. In *Edwards*, the High Court noted that, notwithstanding its previous opinion in *Godinez*, it was now holding that there was a separate "gray area" distinguishing the "minimal constitutional standard to stand trial and a somewhat higher standard that measures mental fitness" for the purposes of representing one's self at trial. (*Indiana v. Edwards, supra*, 128 S.Ct. 2379, 2385 [expressly narrowing the scope of its earlier opinion in *Godinez*].) The High Court went on to expressly rule that the *Godinez* opinion was limited to the issue of entering a guilty plea, and never meant to apply to the issue of representing one's self at trial, as was the issue in Mr. Lightsey's case. (*Ibid.*) *Godinez* is therefore inapplicable. Mr. Lightsey's hearing was focused on this limited "gray area," with the more substantial issue of Mr. Lightsey's competency already decided long before the proceedings. (*Ibid.*)

were not suspended at that point – a fact even Judge Kelly recognized; the hearing was simply an evidentiary hearing on Lightsey's *Faretta* waiver and did not implicate the question of Lightsey's competence to stand trial.

The trial judge ruled only on the narrow question of Lightsey's ability to make a knowing and intelligent waiver of counsel. The district attorney held strongly to the narrow focus of the inquiry, arguing that the only question before the court was the validity of Mr. Lightsey's waiver of counsel, not his competence to stand trial. (RT 8/2/94) 267-272.) Even later, during trial, the district attorney argued vehemently that the issue at the August 2 hearing was not Lightsey's competence, but merely his capacity to waive counsel. (29 RT 6209, 30 RT 6403.)

For respondent now to take a position on appeal contrary to the prosecution's position at trial violates the principles of judicial estoppel: the prosecution, having argued one position successfully at trial, cannot take a contrary position on appeal. As the Ninth Circuit has explained:

> "[U]nder the doctrine of judicial estoppel, the state cannot now reverse its position in order to suit its current objectives. 'Judicial estoppel, sometimes known as the doctrine of preclusion of inconsistent positions, precludes a party gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.' *Rissetto v. Plumbers & Steamfitters Local 343* (9th Cir. 1996) 94 F.3d 597, 600. 'Judicial estoppel is an equitable doctrine that is intended to protect the integrity of the judicial process by preventing a litigant from playing fast and loose with the courts.' *Wagner v. Prof'l Eng'rs in Cal. Gov't* (9th Cir. 2004) 354 F.3d 1-36, 1044. This doctrine applies to a party's legal as well as factual assertions." (*Whaley v. Belleque* (9th Cir. 2008) 520 F.2d 997, 1002.)

This Court has also expressly "recognized" the applicability of the "judicial estoppel" doctrine to criminal trials. (*People v. Williams* (2008) 43 Cal.4th 584, 622, fn. 21, citing *In re Sakarias* (2005) 35 Cal.4th 140, 155-156; *Russell v. Rolfs*

(9th Cir. 1990) 893 F.2d 1033, 1037-1039; see also *Sechrest v. Ignacio* (9th Cir. 2008) 549 F.3rd 789, 805 [barring State, on "judicial estoppel" grounds, from raising inconsistent claims in District Court and Ninth Circuit].) For the prosecution to now argue that these hearings were for the purpose of deciding Mr. Lightsey's competency, after so vociferously arguing the contrary at trial, would both violate principles of judicial estoppel and be an act of "'chutzpah' in the first degree, by any standard." (*Whaley v. Belleque, supra*, 520 F.3d 997, 1002 [reversing district court decision on collateral estoppel grounds].)

Respondent also misstates what actually occurred at this limited hearing. Specifically, respondent falsely argues that only *one* of the experts opined that Lightsey had a mental illness, apparently relying on the fact Dr. Velosa said Mr. Lightsey was suffering from a bipolar disorder. (RB 93.) However, Dr. Manohara also opined that while Mr. Lightsey did not have a "clear-cut psychotic disorder," he did have an Axis II illness, narcissistic personality disorder, and described signs and symptoms of serious mental illness: paranoid symptoms, grandiosity, and circumstantiality." Nor did Dr. Burdick find Mr. Lightsey had no mental illness. Instead, Dr. Burdick said only that in his brief interaction with Mr. Lightsey, he did not see anything obvious.

Thus, two experts said Mr. Lightsey was suffering from a mental disorder, and one said he did not see him long enough to tell one way or the other. [6]

G. The Fourth Motion by Advisory Counsel Gillis and Mr. Lightsey's Relinquishment of his Pro Per Status.

Like the five defense attorneys before him, advisory counsel James Gillis, who replaced McKnight, soon came to the conclusion that Mr. Lightsey was mentally incompetent to stand trial. On September 12, 1994, Gillis, as Ralph McKnight had before him, filed a motion to revoke Mr. Lightsey's pro per status,

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[6] Furthermore, at the August 2 hearing, both Dr. Manohara nor Dr. Velosa testified about Mr. Lightsey's various symptoms of mental illness and stated they did not consider Mr. Lightsey mentally competent to represent himself at trial. (RT (8/2/94) 134, 174, 239, 264.)

on the ground that Mr. Lightsey was not mentally competent to serve as his own attorney. (4 CT 1129.) Respondent fails to respond to Mr. Lightsey's argument that during these proceedings Judge Kelly should have declared a doubt as to Mr. Lightsey's competency and suspended proceedings. (AOB 96-98.)

Instead, respondent makes several unsupportable arguments and false assertions. (RB 83.) First, respondent argues that Judge Kelly properly found Mr. Lightsey competent on July 28, 1994, as the basis for its further argument that Judge Kelly did not have to declare a doubt unless he found changed circumstances since his last competency finding. Yet, as previously demonstrated, Mr. Lightsey never received a proper competency hearing: the proceedings before Judge Felice in March of 1994 were procedurally and factually flawed, and in July, 1994, he was permitted to waive competency proceedings.

Respondent argues, "Gillis's statements did not raise a question as to appellant's ability to understand the nature of the proceedings or assist counsel in his defense. Gillis failed to present the trial court with evidence that appellant's conduct was due to a mental disorder or developmental disability that rendered him incapable, as opposed to unwilling, to assist in his defense." (RB 85.) The record shows otherwise.

In both his sealed and unsealed declarations in support of the motion, Gillis outlined Mr. Lightsey's paranoid delusions and his belief in a grand conspiracy against him, and stated that he felt Mr. Lightsey was mentally incompetent, explaining in detail how his paranoid delusions barred him from assisting advisory counsel in conducting a proper investigation or preparing for trial. (4 CT 1130-1141.) Gillis outlined in detail Mr. Lightsey's obsessive fixation on his theories that a grand "conspiracy" was using "forged transcripts" against him, and asserted that Mr. Lightsey was therefore both "incompetent" to stand trial and unable to "knowingly and intelligently" waive counsel. (4 CT 1129-1138.) He also noted how Mr. Lightsey's "paranoid delusions" made it impossible for Mr. Lightsey to focus on his very strong alibi defense, in that he believed the transcripts that

provided him with an alibi had been forged. (4 CT 1139-1142.) Based on the strength of this evidence, Judge Kelly erred in not suspending proceedings and holding a new competency hearing.

H. The Court Erred in Refusing to Declare a Doubt of Mr. Lightsey's Competence During His Trial, Despite Obvious Indications That Mr. Lightsey Continued to Be Unable to Rationally Understand the Proceedings or Cooperate with Counsel and Despite Evidence That His Condition Was Deteriorating Over the Course of the Trial.

As previously demonstrated, Mr. Lightsey's mental state continued to deteriorate as his paranoid delusions swamped his already meager and constitutionally inadequate ability to follow the trial and cooperate with counsel. (AOB 98-113.) Twice during his trial, his attorneys asked Judge Kelly to declare a doubt of Mr. Lightsey's competence, and Judge Kelly refused to do so.

Respondent responds by again arguing that trial counsel Gillis and Dougherty had to show changed circumstances to warrant renewed competency proceedings. (RB 94.) However, as previously demonstrated, this is based on the false assumption that Judge Felice's prior finding of competence was properly made, and that proceedings before Judge Kelly were both properly conducted and dealt with the issue of competency, rather than self-representation.

Respondent's own citations to the record are practically a concession that trial counsel Gillis made repeated arguments presenting changed circumstances. (RB 95-96.) Indeed, Gillis's second written motion, filed during Mr. Lightsey's trial, elaborated even further on Mr. Lightsey's deterioration and his inability to work rationally with his attorneys; Gillis also pointed out that the July 28 competency hearing was deficient because there was no true adversarial proceeding. At the hearing, Judge Kelly admitted that he had not even read the motion (29 RT 6218), confused the hearing of August 2 with a competency hearing (*Ibid.*), and insisted that he saw no evidence that Mr. Lightsey was incompetent, until Mr. Lightsey interrupted him so many times that he called a recess to discuss gagging him. (29 RT 6225-6226.)

Respondent nevertheless argues that appellate counsel deceptively cited "snippets" from the record to overemphasize Mr. Lightsey's mental impairments, and that many of his comments could be viewed as simple "hyperbole." (RB 103.) Hardly. Mr. Lightsey's rambling and insane interruptions and distractions continued unabated through his trial. (1 RT 102, 104, 106, 118, 120-122, 139-140; 14 RT 3088-3089, 3097; 15 RT 3223-3226, 3380-3383, 3226-3228, RT 3383; 24 RT 5136-5138, 5380-5384; 26 RT 5517-5520, 5570, 5740-5741, RT 5767; 27 RT 5871, 6144.) The judge was reduced to repeatedly threatening to have Mr. Lightsey gagged or removed from counsel table or the courtroom.[7] (15 RT 3226, 3383; 24 RT 5136; 25 RT 5381-5384; 26 RT 5518-5520.)

Mr. Lightsey's two in pro per interlocutory petitions filed during trial to the Fifth District Court of Appeal are also replete with substantial and compelling indicators of Mr. Lightsey's incompetence. They include extensive and strange scribblings on the margins of documents, which to even a layman's eye would appear to be the work of a madman, with odd comments about "fraud," "conspiracy," "forged documents," and strange claims that his defense pleadings were in fact secretly drafted by Deputy District Attorney Green. (21 Supp CT 6199-22 Supp. CT 6450.) Even a cursory glance at these materials, which were before the trial court and are part of the appellate record, provide strong indicators that Mr. Lightsey was a profoundly disturbed man suffering from extensive mental impairments. Mr. Lightsey's penalty phase testimony was rambling and full of digressions into his school and work history, his medical problems, and pervasive,

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[7] Nor was the trial court the only one disturbed by the mental incompetency produced 'ramblings' of Mr. Lightsey at trial. During the course of the trial, Fifth District Court of Appeal staff, angrily responding to Mr. Lightsey's in pro per interlocutory petitions and letters, also referred to him as "rambling" and overly "emotional" in a letter drafted by Kevin Clark, Clerk of the Court of the Fifth District, to Mr. Lightsey. (21 Supp. CT 6298.) After the trial, the Presiding Judge of the Kern County Superior Court also wrote a personal letter to Mr. Lightsey criticizing him for his "rambling" statements, and returning unfiled Mr. Lightsey's 150-page tract on the alleged conspiracy against him. (21 Supp. CT 6191.)

delusional claims of perjured testimony and forged documents. It proffered further compelling evidence for the court of Mr. Lightsey's sad and often pathetic mental incompetence.

During his testimony, he often gave completely unresponsive answers to questions from his attorneys. He expounded on his belief that the district attorney's office was pursuing a vendetta against him because he had been acquitted in a high profile child molestation case and because he had been a juror in a criminal case in which the defendant had been acquitted. He listed the government officials, organizations, and individual lawyers to whom he had written, to "try to get outside intervention from the insurmountable amount of judicial fraud crimes that have taken place in my case." (30 RT 6447.)

He denied the alibi defense that had been presented at the guilt phase, claiming instead that he had never been in Department 10 on July 7, 1993, but had instead spent the entire day, morning and afternoon, in a different courtroom, and that a different prosecutor, not Somers, was in court on his case that day. (30 RT 6448.) He continued to digress into discussions of subjects well beyond the focus of his testimony, such as his swimming medals and allegations of corruption against the Kern County police in other matters. (30 RT 6473.) He testified about his belief that he and his mother were in court together all day on July 7, 1993, and accused everyone who had contradicted this, including defense witnesses, of lying. (30 RT 6488-6494.) Even Judge Kelly conceded that Mr. Lightsey's behavior constituted "bizarre conduct." (32 RT 6859-6863.)

Indeed, in the context of responding to Mr. Lightsey's denial of the right to allocution argument (Arg. 10), respondent provides extensive quotations highlighting both Mr. Lightsey's aberrational behavior and the comments on such behavior by the trial court and others. (RB 204-221.) As respondent noted, the exasperated trial court noted that Mr. Lightsey would continually "talk audibly during the proceedings. And I told you, on the defense side of this process, given this speech so many times I'm sick of hearing myself give it." (RB 204, citing 24

RT 5136.)

The court further noted that Mr. Lightsey's uncontrolled outbursts were hurting him:

> "In addition to that, I've noted that the defendant's commences to talk to counsel as the jurors are being excused and walking from the courtroom. And he stands. And he's talking with [sic] generally with Mr. Gillis, not talking with him, talking at him, I should say. I don't think Mr. Gillis is a participant in that conversation. Mr. Gillis appears to be pointing at the yellow pad every time that Mr. Lightsey chooses to make a statement, which I heard this morning several times such as he's lying being said audibly. And I'm sure, Mr. Gillis, you as well have heard that statement, have you not, sir?
>
> MR. GILLIS: Yes, your Honor. And I think I understand what the court's talking about because I somewhat inferred from the court requesting a recess that it was going to discuss this particular matter. And I have attempted to both [sic] before I walked outside the court, I've explained to Mr. Lightsey that he's gone too far. He needs to keep his mouth shut and write everything down on the pad and his is not to communicate at all to me. I can appreciate the court's indulgence so far during this trial.
>
> THE COURT: One of the things that I need to point out every time that I make this observation is directed to the defendant and *that is it can do nothing but hurt his interests*." (RB 204, citing 24 RT 5136-5137, emphasis added.)

As the respondent also conceded, the trial court expressly noted at trial that Mr. Lightsey's repeatedly made uncontrolled facial expressions, noting Mr. Lightsey "continued to make these expressions even after Mrs. Green's most recent remarks, he talked to Mr. Gillis. And I just can't understand why he continues to that in the face of what the court has advised him. *It can't help him. It can't help in his interests* in this case to be continually animated with pleasure or displeasure, whichever it may be, such as the glares that he was trying on with Mr. Rowland yesterday and expressed with this most recent witness who was in court and his nodding." (RB 204, citing 25 RT 5371-5372.)

As respondent concedes, even the trial court noted that these outbursts were

part of an *inability* of Mr. Lightsey to focus enough to control himself. As the trial court put it: "And *I guess maybe it's a memory factor*, but we just can't tolerate that. And I have suggested on past occasions, at least a half dozen times, this observation and the concern that the Court has, because I am sure that if he's successful at all in displaying any of the conduct to the jurors, who have kind of actually postured themselves to not even look at him, the Court has noted – but if he's been able to cause any influence at all on the jurors, *I'm sure it's to his detriment*." (RB 207, citing 26 RT 5517-5520, emphasis added.)

Respondent goes on in this same argument to concede that Mr. Lightsey expounded on his bizarre conspiracy theories, citing the following exchange:

> "MR. DOUGHERTY: However, the hardest part of the case was Mr. Lightsey. Mr. Lightsey does not understand what is going on. He doesn't understand what's going on.
>
> THE DEFENDANT: You came to Bakersfield, became part of the conspiracy and you took fifteen thousand dollars from my family.
>
> MR. DOUGHERTY: Mr. Pierce . . .
>
> THE COURT: Mr. Lightsey, please.
>
> MR. DOUGHERTY: Dr. Pierce was selected long before we entered the case. Mr. Gillis and I have tried to be as objective as we possibly can, not be personally involved in the case, present the case to you in absolutely the best light we can.
>
> MR. LIGHTSEY: Intentionally threw the case to suppress evidence." (RB 208-209, citing 32 RT 6853-6862.)

During sentencing, Mr. Lightsey interrupted the hearing with numerous comments and attempts to disqualify the judge and his counsel, until the judge declared a recess and had him gagged and his hands cuffed behind him. (8/15/95 RT 6964-6965.) Even gagged, Mr. Lightsey continued making noise and at one point struggled free of the gag to scream out in court. (8/15/95 RT 6965-6966 6975.)

These actions were not "hyperbole" or isolated "snippets" of speech. They were the bizarre actions of a profoundly incompetent man struggling, unsuccessfully, to deal with the consequences of his grave mental illness.

I. These Errors Violated Mr. Lightsey's Constitutional Rights

Respondent expressly declines to make any waiver argument, fully conceding that any violations of Mr. Lightsey's constitutional rights may be addressed on the merits. As previously demonstrated (AOB 115-116), a State's trial of a mentally incompetent defendant violates due process. (U.S. Const., Amend. XIV; *Pate v. Robinson, supra*, 383 U.S. 375, 383; see also *Dusky v. United States, supra,* 362 U.S. 402, 402-403; see also *People v. Weaver* (2001) 26 Cal.4th 876, 903 [same], citing *Medina v. California* (1992) 505 U.S. 437, 448; *People v. Dunkle* (2005) 36 Cal.4th 861, 885 [same].) It also violates the constitutional due process right to a fair trial. (U.S. Const., Amends. VI and XIV; *Pate v. Robinson, supra*, 383 U.S. 375, 385.) Mr. Lightsey's judgment and sentence of death must be reversed, because his constitutional right not to be tried while incompetent was violated.

J. The Error Requires Per Se Reversal.

Respondent apparently concedes that any error would require per se reversal, as she does not in any way respond to or challenge Mr. Lightsey's arguments in this regard. This is only proper, given that due to the "difficulty of retrospectively determining an accused's competence to stand trial," a violation of the right to an "adequate hearing" on "competency to stand trial" usually requires per se reversal. (*Pate v. Robinson, supra*, 383 U.S. 375, 386-387, citing *Dusky v. United States, supra*, 362 U.S. 402, 403.) Such per se reversal is required, without attempting to resort to a *nunc pro tunc* determination, because a new competency "jury would not be able to observe the subject of their inquiry" at the time a claim of incompetency was relevant, i.e. in the instant case a new competency jury could not directly observe Mr. Lightsey's state of mind in 1993-1995. (*Pate v. Robinson, supra*, 383 U.S. 375, 387.) Similarly, new "expert witnesses would have to testify solely from information contained in the printed record," rather than doing an examination of the defendant. (*Ibid.*) Moreover, "the failure of the trial court to comply with the statutory [competency] requirements affects the

fundamental integrity of the court proceedings." (*People v. Castro, supra*, 78 Cal.App.4th 1402, 1418.)

Accordingly, these errors require reversal of Mr. Lightsey's conviction and sentence of death.

K. Conclusion

With one exception, the trial court did nothing substantial to respond to the issue of Mr. Lightsey's manifest and painfully obvious mental incompetence: to avoid having to hear anymore of the – to use the words of the court – "ramblings" of this sad example of a profoundly mentally incompetent man, the court bound and gagged him with duct tape.

This was the trial court's response to Mr. Lightsey's mental incompetence, and this is the bound, gagged, and shackled image of the man the trial court determined to be competent:

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II.

MR. LIGHTSEY'S CONVICTIONS AND SENTENCE OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT PREJUDICIALLY ERRED IN REFUSING TO ADMIT EVIDENCE OF HIS ALIBI.

A. Respondent's Contention

"APPELLANT HAS FORFEITED HIS EVIDENTIARY CLAIMS REGARDING THE ADMISSION OF THE REPORTER'S TRANSCRIPT OF THE UNRELATED CASE; THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS IN RESTRICTING THE DEFENSE COUNSEL'S CLOSING ARGUMENT BECAUSE IT WAS NOT SUPPORTED BY THE EVIDENCE."

B. The Trial Court Prejudicially Erred in Excluding the Alibi Transcript

As previously demonstrated (AOB 119-130), Mr. Lightsey had an unusually strong alibi to the charged murder, in that he was in court for a hearing regarding his bail on another case during the morning the homicide occurred. The prosecution's theory was that Mr. Lightsey murdered Compton after leaving court, assaulting Compton as he was about to take a shower before leaving for his 11:30 medical appointment. Accordingly, the question of *when* Mr. Lightsey's court hearing ended was *the crucial* disputed issue at his guilt trial. Incredibly, however, the trial court refused the defense's repeated requests to introduce the transcript of the morning's hearings into evidence, or at least to argue in closing arguments that the transcripts indicated a particular passage of time. (There were sixty pages of transcript of various hearings held prior to Mr. Lightsey's court hearing that day, and it was the defense's theory that this helped show that he was in court too long and too late in the morning to have time to commit the murder that morning.)

The court's rulings excluding this evidence and argument were erroneous and effectively gutted the efforts of Mr. Lightsey's attorneys in establishing his alibi defense, as this transcript provided crucial unbiased evidence in support of

the alibi. (*People v. Babbitt* (1988) 45 Cal.3d 660; *People v. Linder* (1971) 5 Cal.3d 342; Evid. Code, § 352.) The errors also violated Mr. Lightsey's constitutional right to raise a defense, to present evidence in support of his defense, to a fair trial with due process of law, and to a proportionate and reliable verdict of death. (*Crane v. Kentucky* (1986) 476 U.S. 683; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Gonzales v. Lytle* (10th Cir. 1999) 167 F.3d 1318; *Rosario v. Kuhlman* (2nd Cir. 1988) 839 F.2d 918; U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.) Reversal is therefore required, because the error cannot be shown to be harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18, 24.)

C. Mr. Lightsey Repeatedly Raised the Issue of Admitting the Excluded Transcript, Preserving the Issue for Appellate Review

Respondent's primary argument is that Mr. Lightsey forfeited the issue on appeal, because he did not repeatedly re-raise the issue again and again after the court denied his many requests to introduce the excluded evidence. (RB 104-119.) This is erroneous. At trial, defense counsel expressly moved to introduce the transcript into evidence before the jury. (14 RT 3144.)[8] The trial court, however, denied the motion, ruling that the evidence could not properly be used "to try to urge them to speculate on a certain time frame," making plain that the trial court understood the defense was seeking to introduce the evidence to show a particular passage of time.[9] (4 RT 3157.) During the defense case-in-chief, the defense then

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[8] This was actually the third time the issue came before the court. In their original pre-trial motion to have the full transcript of the morning calendar prepared, the defense specifically noted the importance of the transcript noting that it was necessary to "specifically establish the defendant's whereabouts on July 7, 1993, between 8:00 a.m. and 12:00 p.m.," and that the defense had "no other means by which to obtain this information." (2 Supp. Conf. CT 439.) Next, the defense again tried to move the transcript into evidence in the context of Mr. Lightsey's motion to dismiss the case pursuant to Penal Code section 995, but the court declined to rule on the issue at that stage of the proceedings. (3/22/95 RT 108-111.)

[9] While the court alternatively permitted the prosecution to introduce extracts from

again raised the issue of admitting the entire "transcript" of the morning calendar, but the trial court again refused to either directly address the issue or allow the transcript to be admitted into evidence. (27 RT 5740.) After the close of evidence, the defense raised the issue a *third*[10] time, urging the court to at least allow them to argue to the jury that they could use the length of the transcript to estimate the passage of time. (27 RT 5784-5787.) However, the court refused this request as well. (27 RT 5802-5803.) After such repeated denials, any further request would have been futile. (*People v. Brown* (2003) 31 Cal.4th 518, 553.) More importantly, California law does not demand that a defendant raise the same issue four or more times in order to preserve the issue for appeal. Respondent certainly cites no authority for this proposition.

Indeed, in other contexts, respondent concedes this point by pointing out the many times Mr. Lightsey did try to introduce the evidence and gain permission to make the argument. As respondent concedes, the trial court expressly ruled that it "disagreed" with the defense motion to introduce the entire transcript to show a passage of time. (RB 109.) Later, respondent again conceded that the trial court expressly held that "I think it's pretty clear what the position of the court is. I'm not going to allow for any argument to be made that equates numbers of pages in the transcript to amounts of time because there's no evidence to support that." (RB 118, citing 27 RT 5803.) Notwithstanding Mr. Lightsey's repeated arguments and motions to admit the evidence to show a passage of time, and these concessions from the prosecution that the court was very well aware that the defense wanted to introduce the sixty transcript pages to show the passage of a

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the morning transcript that covered the three brief hearings in Mr. Lightsey's bail case during its case-in-chief, that was of little assistance to proving Mr. Lightsey's alibi. (See, e.g., Exhs. 168 & 169 [extracts from RT of hearing].) What was important to the defense was when these three hearings occurred, not what occurred during the hearings on the morning of the homicide.

[10] This was actually the fifth time the defense raised the issue, counting the two pre-trial motions discussed, supra.

particular "amount of time," respondent still argues that Mr. Lightsey failed to advise the court of the "substance, purpose, and relevance of the excluded evidence." (RB 118.) Yet even respondent concedes that the trial court very well understood the defense's reasoning as to the "substance, purpose, and relevance of the excluded evidence," in that the court knew it was to show the passage of an "amount of time." Respondent's waiver argument is therefore without merit.

D. The Trial Court Erred in Excluding the Evidence

1. Violation of Equality of Arms Principles

As respondent also concedes, the trial court did allow the *prosecution* to argue that the page length of the transcript showed a particular passage of time, even though it barred the defense from doing the same thing. (RB 125-128.) While respondent argues this was perfectly appropriate, constitutional principles of fundamental fairness are plain that due process must be a "two-way street." (*Wardius v. Oregon* (1973) 412 U.S. 470, 475.) In *Wardius*, as in Mr. Lightsey's case, the trial court erroneously excluded evidence of the defendant's "alibi" on state law evidentiary grounds. (*Ibid.* [reversing conviction based on error in excluding alibi evidence under 'one-way' state discovery rules].)

However, as the U.S. Supreme Court has explained: the "Due Process Clause" demands that there be a "balance of forces ['equality of arms'] between the accused and his accuser." (*Id.* at p. 474.) Put another way, due process equality of arms principles demand that what is "sauce for the goose is sauce for the gander." (*United States v. Bay* (9th Cir. 1985) 762 F.2d 1314, 1315 [reversing conviction on equality of arms principles where defense denied evidentiary benefit available to prosecution]; see also *United States v. Carabello-Cruz* (1st Cir. 1995) 52 F.3d 390, 393 [reversing conviction due to unbalanced application of evidentiary rules because "what is sauce for the defendant's goose is sauce for the government's gander"].)

Respondent next argues that there was no error, or at least the error was waived, because the trial court took judicial notice of the entire transcript. (RB

121.) But the fact that the trial court, with the defense's agreement, found the transcript admissible for consideration by the judge did nothing to mitigate the court's error in barring *the jury* from considering the same evidence, and barring defense counsel from making arguments on the evidence. Rather, the court's decision that the transcript was proper for judicial notice and for the prosecution to make arguments about, but not for the jury to consider or for the defense to make arguments about profoundly shows the trial court's lack of partiality. This 'one-way' series of rulings by the court violated constitutional principles of fairness that due process must be a 'two-way street,' and the well-settled maxim that 'what is sauce for the defendant's goose is sauce for the government's gander.' (*Wardius v. Oregon, supra,* 412 U.S. 470, 475; *United States v. Bay, supra,* 762 F.2d 1314, 1315; *United States v. Carabello-Cruz, supra,* 52 F.3d 390, 393.) The court erred in excluding the transcript and the argument based on the transcript.

2. The Evidence Was Not Speculative

As previously demonstrated (AOB 123-129), the excluded evidence fell full square into common evidentiary relevance principles, and the court erred in excluding the transcript and argument based on the transcript.

While respondent argues (RB 130-131) that the trial court properly excluded the transcript as being too "speculative" under Evidence Code section 352 principles, this is incorrect. Section 352 permits courts to exclude speculative evidence where its "probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of *confusing the issues, or of misleading the jury.*" (Evid. Code, § 352, emphasis added.) "Speculative" evidence is only evidence that does not "have a tendency in reason" to "prove or disprove a disputed fact." (*People v. Babbitt (1987)* 45 Cal.3d 660, 681, citing *People v. Plane* (1979) 88 Cal.App.3d 223, 244.) As demonstrated (AOB 125-128), the transcript and its length of pages did "have a tendency in reason" to prove the "disputed fact" of how long the court hearing took, and whether Mr. Lightsey had

time to commit the charged homicide. (*Ibid.*)

Respondent claims that *Gonzales v. Lytle* nevertheless supports their argument that the exclusion of this crucial evidence was proper, claiming its facts are totally unrelated to the situation in Mr. Lightsey's trial. (RB 124, citing *Gonzales v. Lytle* (10th Cir. 1999) 167 F.3d 1318 [reversing murder conviction where alibi transcript erroneously excluded by court].) However, the exact opposite is true: that case has very similar facts, including the wrongful exclusion of a transcript providing an alibi. In *Gonzales*, the trial court erroneously excluded a "transcript" of a previously held hearing, as the court did in Mr. Lightsey's case. (*Id.* at p. 1321.) As the *Gonzales* court explained, the exclusion of the transcript [which provided an *alibi* for the defendant in the form of a witness's statement that he was with the defendant when the crime was committed] required reversal as it rendered the "trial fundamentally unfair in violation of the Fourteenth Amendment due process clause." (*Ibid.*) Similarly, the exclusion of the alibi transcript in Mr. Lightsey's case also rendered his trial 'fundamentally unfair,' requiring reversal of his conviction and sentence of death.

Alternatively, respondent argues that the *DePetris* case supports their argument on similar grounds. (RB 125, citing *DePetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057 [reversing murder conviction due to erroneous exclusion of both documentary evidence and defense argument based on that document].) Again, however, this case actually supports Mr. Lightsey's argument that his constitutional rights were violated. In *DePetris*, the Ninth Circuit held the wrongful exclusion of defense evidence on California state law ground in that case was "not mere evidentiary error," but also "unconstitutionally interfered with petitioner's due process right to raise a defense." (*Id.* at p. 1059.) As the Court explained:

> "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against a State's accusations." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294; accord *Davis v. Alaska* (1974) 415 U.S. 308,

> 317; *Washington v. Texas* (1967) 388 U.S. 14, 19.) The Supreme Court has made clear that the erroneous exclusion of critical, corroborative defense evidence may violate both the Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense. [citation]."

There, the excluded evidence was in the form of a journal that helped show the defendant did not have the state of mind necessary to convict of murder. Beyond excluding the journal, the trial court, as occurred in Mr. Lightsey's case, also barred any argument based on the excluded evidence. This required reversal because the excluded "evidence was critical to [the defendant's] ability to defend against the charge." (*Id.* at p. 1063.) Similarly, the excluded evidence and argument in Mr. Lightsey's case was "critical" to his "ability to defend against the charge" and its exclusion requires reversal of his conviction and sentence of death. (*Ibid.*)

Respondent also argues that the *Kraft* case shows that the exclusion of the entire transcript, as opposed to the admission of parts of it as occurred in Mr. Lightsey's trial, was proper. (RB 122, citing *People v. Kraft* (2000) 23 Cal.4th 978.) Again, however, that case actually supports Mr. Lightsey's argument. In *Kraft*, the defendant appealed the denial of his exclusion motion to bar prosecution documentary evidence in the form of an admittedly cryptic 'death journal,' which could only be understood by a reader by using his or her subjective interpretation. On appeal, this Court held the admission of evidence was proper, holding that evidence is <u>not</u> "speculative" simply because a document may have "required interpretation [for its significance] to be understood" by the jurors, and further held that when *part* of a document is relevant there is "no impropriety in gleaning the significance of the document as a whole." (*Id.* at pp. 1034.1035.) Similarly, the transcript in Mr. Lightsey's case was not "speculative" simply because the jurors would have "required interpretation" to estimate a passage of time, and the court could have and should have admitted the excluded transcript "document as a whole." (*Ibid.*)

Finally, respondent also claims that the constitutional bases of Mr. Lightsey's claims have been waived. However, as noted *supra*, the exclusion of Mr. Lightsey's evidence violated his fundamental, constitutional rights to due process of law, to fundamental fairness, and to the right to raise a defense. Mr. Lightsey is "not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera* (1997) 15 Cal.4th 269, 276-277; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6; *People v. Partida* (2005) 37 Cal.4th 428, 433-439.)

E. The Error Was Prejudicial.

Respondent claims any error in excluding the evidence could not have prejudiced Mr. Lightsey in that the transcript could not have assisted his defense. (RB 125.) Hardly. This transcript was a key piece of evidence going to the key issue in the case: when Mr. Lightsey left the courtroom that morning and whether he had time to commit the murder after he left the court and before Compton stepped into the shower at his home. As demonstrated, *supra*, it was the critical piece of evidence in the trial; indeed, the only absolutely unbiased evidence about when Mr. Lightsey left the courtroom.

Relating to this issue, it must first be noted that respondent's argument ignores other evidence on this timing issue. In respondent's discussion of "relevant proceedings" (RB 105), respondent restates the trial prosecution's evidence that the decedent was probably killed around 11:00 a.m. as he was entering the shower, but respondent completely ignores substantial evidence that the victim must have started getting ready to take his shower even before then. For example, respondent ignores testimony from several witnesses that it took 10 minutes to drive from the decedent's home to the clinic where he had an 11:30 medical appointment that morning, and that Mr. Compton habitually arrived 15 minutes early to his medical appointments. (See, e.g., 15 RT 3427, 3439.) Taken together, this shows he would have been planning to leave his house at 11:05, and would have started his shower long before then, and would have been accosted by

his killer closer to 10:45 at the latest. Thus, all Mr. Lightsey had to show was that if he left the courtroom at 10:40 or later, it would have been impossible for him to walk with his mother to her car, drive home with her, pick up his own car, drive to Compton's house, confront Compton, and commit the murder. The sixty pages of excluded transcripts were crucial evidence in proving this highly contested and crucial fact.

The defense also proffered evidence from court reporter Diane Daulong that the morning calendar was customarily not called until sometime between 8:45 and 8:55 a.m., testimony from his defense attorney at that hearing that showed that the morning calendar did not start until 9:00 a.m., and evidence from the court reporter that the mid-morning break indicated on the transcript always lasted at least ten minutes or longer. (23 RT 5024-5025, 5062; 25 RT 5396-5397.) This means that in order for Mr. Lightsey to have left at 10:40 a.m. — and then hurriedly walk to his car, drive his mother home, go to Mr. Compton's house, and accost, torture, and kill him before 10:45, or 11:00 at the latest – all twenty-two matters heard on the morning court calendar that day, before Mr. Lightsey left, including a lengthy mid-morning break, would have had to have been heard in 90 minutes or less.

However – due to the wrongful exclusion of this crucial evidence – the jurors never knew that there were these twenty-two hearings covering sixty pages of transcript during this key period. The error in excluding the evidence could hardly be shown to be harmless, given that the jurors may very well have believed, as common sense would dictate, that a court hearing and the pauses in between might take four or so minutes each on average. Even if the jurors believed that the Mr. Lightsey could have killed the decedent if he had left by 11:00 a.m., the jurors may very well have believed, as common sense would allow as a reasonable possibility, that a court hearing and the pauses in between might take four or five minutes each on average

It must also be recalled that in his trial testimony, prosecutor Somers

testified that the hearing in Mr. Lightsey's case did not begin until around 10:35 a.m. and conceded that he had testified at the preliminary examination that the second calling of Mr. Lightsey's case did not even start until 10:45 a.m. (25 RT 5479-5481.) Diane Daulong also testified that when Mr. Lightsey's hearings were finally held, they covered many matters that presumably would have taken some time. (23 RT 5039-5043; see also Exh. 169.) Dominic Eyherabide, Mr. Lightsey's defense counsel at the July 7 appearance testified that after Mr. Lightsey's hearing in Department 10 he went straight back to Department 4, where he was in trial, arriving there at 10:55 a.m. (RT 5401-5403.) The excluded evidence would have corroborated this evidence, and proved that Mr. Lightsey simply did not have the time to commit the homicide.

Provided with this evidence, the jury might very well have decided that the evidence left a reasonable doubt that Mr. Lightsey could have reached Mr. Compton's house in time to accost him before he entered the shower. Put another way, the "preclusion of this highly probative evidence went to the crux of the case, and the harm caused by its exclusion was not cured by the receipt of other evidence that was significantly less compelling." (*DePetris v. Kuykendall, supra,* 239 F.3d 1057, 1065.)

The exclusion of this evidence and the denial of counsel's request even to argue it deprived Mr. Lightsey of a fair trial and the right to present evidence and to defend against the charges against him. (U.S. Const., Amends. VI and XIV.) Because the error was of constitutional dimensions, reversal is required unless the prosecution can show that it was "harmless beyond a reasonable doubt." (*Rosario v. Kuhlman, supra*, 839 F.2d 918, 924 [exclusion of alibi transcript requires analysis of prejudice under *Chapman* standard], citing *Chapman v. California, supra,* 386 U.S. 18, 24). Even under the lesser standard for state law error, there is a "reasonable probability" that Mr. Lightsey would have obtained a more favorable result absent the error. (*People v. Linder, supra*, 5 Cal.3d 342, 348, citing *People v. Watson, supra,* 46 Cal.2d at p. 836). The verdict and sentence of

death must therefore be reversed.

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III.

MR. LIGHTSEY'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT PREJUDICIALLY ERRED IN PROHIBITING THE IMPEACHMENT OF KEY PROSECUTION WITNESS KAREN LEHMAN.

A. Respondent's Contention

"THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS IN EXCLUDING THE DRUG USE AND MISDEMEANOR CONVICTION IMPEACHMENT EVIDENCE OF KAREN LEHMAN."

B. The Trial Court Erred In Excluding the Impeachment Evidence

As previously demonstrated (AOB 134-146), Mr. Lightsey was wrongfully barred from impeaching the testimony of key prosecution witness Karen Lehman[11] with relevant evidence of her conviction for assault with a deadly weapon against her ex-husband, Kern County Sheriff's Deputy Vaughn Lehman, and her past and current drug use.

The court's barring of impeachment evidence of Lehman's prior conviction for assaulting her ex-husband with a deadly weapon (a crime involving moral turpitude) and her current and past drug abuse was prejudicial error. (*People v. Castro* (1985) 38 Cal.3d 301, 314; *People v. Wheeler* (1992) 4 Cal.4th 284, 294, 300, fn. 14; *People v. Anderson* (2001) 25 Cal.4th 543, 574.) These errors in precluding impeachment of Ms. Lehman also violated Mr. Lightsey's state and federal constitutional rights to raise a defense, to due process of law, and to a proportionate and reliable verdict of death. (U.S. Const., Amends. 5, 6, 8, 14; Cal.

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[11] Karen Lehman was the sister of Brian Ray, the individual initially charged with Compton's murder after being found in possession of Mr. Compton's guns. (19 RT 4070.) Lehman and Mr. Lightsey had a brief and casual sexual relationship in June and July 2003 until Mr. Lightsey reconciled with his former girlfriend, Beverly Westervelt. (19 RT 4117, 19 RT 4080-4081, 19 RT 4133-4134). After Brian Ray's arrest, Lehman contacted Detective Boggs and alleged, in an effort to exculpate her brother, that Mr. Lightsey had given Brian Ray some guns which were purported to belong to Mr. Compton. (RT 19 RT 4132.)

Const., art. 1 §§ 7, 15, 17, 28.) As the errors cannot be shown to be harmless beyond a reasonable doubt, appellant's verdict and sentence of death must be reversed. (*Chapman v. California, (1967)* 386 U.S. 18, 24.)

1. The Trial Court Erred In Barring The Impeachment Of Karen Lehman With Her Prior Penal Code Section 245(A)(1) Conviction For Assault With A Deadly Weapon

Lehman was convicted of assault with a deadly weapon (Penal Code § 245 (a)(1)) after she threw a large piece of granite at her ex-husband. Respondent concedes, as did the district attorney prosecuting Mr. Lightsey, that assault with a deadly weapon is a crime of moral turpitude, and that evidence that a witness has been convicted of assault with a deadly weapon is admissible at trial. (RB 145-146; 25 RT 5317.) Yet respondent argues that the trial court properly excluded the conviction pursuant to the balancing test of Evidence Code § 352. (RB 136, 146). To support this argument, respondent attempts to minimize the conduct for which Ms. Lehman was convicted to simply "throwing a rock at her ex-husband." (RB 136, 146).

The true seriousness of the conduct is illustrated by the fact that Lehman was charged with felony *assault with a deadly weapon.* (25 RT 538-5319.)[12] The statute for which Ms. Lehman was convicted, rather than being the de minimis offense claimed by respondent, is actually "an assault upon the person of another with a *deadly weapon or instrument* other than a firearm or by any *means of force likely to produce great bodily injury* or by any means of force likely to produce great bodily injury. . ." (Penal Code § 245(a)(1).) Lehman was not convicted of a simple assault of throwing a little rock, but rather the use of a "deadly instrument" that was "likely to produce great bodily injury" against her ex-husband.[13]

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[12] Pursuant to a plea bargain, this "wobbler" offense was pled down to misdemeanor assault with a deadly weapon, pursuant to Penal Code § 17.

[13] Further illustrative of Ms. Lehman's rage and 'readiness to do evil' is another excluded incident in which Ms. Lehman is alleged to have used a car to attempt to run over another Kern County Sheriff's Deputy. (26 RT 5691.)

Lehman's prior conviction for assaulting her ex-husband with a deadly weapon also demonstrated her "readiness to do evil" against the former men in her life; both her ex-husband Deputy Lehman and her former lover Mr. Lightsey. (*People v. Castro, supra,* 38 Cal.3d 301, 314 [noting test of admissibility of prior conviction is whether it shows moral turpitude, i.e. a willingness to do evil].) It was accordingly highly relevant to the credibility of her testimony against Mr. Lightsey at trial.

The trial court abused its discretion by not properly balancing the minimal prejudicial effect of the introduction of the conviction against its probative value as impeachment evidence. Indeed, respondent seemingly concedes this point by making no argument that the conviction was unusually prejudicial to Lehman or that there was any particularized reason for its exclusion under § 352. (RB 146.) Given that, as demonstrated *supra*, Lehman's conviction for assault with a deadly weapon was highly probative, and that the prejudice of its admission was slight, its exclusion was an abuse of discretion. (*People v. Castro, supra,* 38 Cal.3d 301, 314; *People v. Wheeler, supra,* 4 Cal.4th 284, 294, 300, fn. 14.)

2. The Trial Court Erred in Barring Evidence That Karen Lehman's Memory Was Impaired and Damaged by Drug Use.

Respondent concedes that prosecution witness Karen Lehman "may have used drugs," but argues that this fact had "no relevance" to the case. (RB 138.) As they must, respondent further concedes that a witness's "capacity to recollect" is admissible under the Evidence Code (RB 138), which holds that the "capacity [of a witness] to perceive, to recollect, or to communicate any matter about which [s]he testifies" is admissible and may be relied upon by the jury to determine the credibility of such witness. (Evidence Code § 780(c).) Because of this well-settled statutory rule, California law permits "a witness to be impeached on cross-examination" with evidence of "drug" addiction or any other matter that affects "his powers of perception, memory or narration." (*People v. Bell* (1955) 138 Cal.App.2d 7, 11-12; *see also People v. Perez* (1966) 239 Cal.App.2d 1, 7

[holding "proof of addiction alone, without further proof on how addiction affects credibility, is permissible impeachment . . ."].)

The need for such impeachment was especially crucial in Mr. Lightsey's case, given the extensive indicators that Ms. Lehman was a classically muddled methamphetamine abuser, with demonstrable memory impairments. Indeed, the effects of Ms. Lehman's extensive abuse of narcotics on her ability to perceive and remember were evidenced in her responses on cross-examination. Specifically, Lehman could not remember the following: where she was on the date of the murder of Mr. Compton (19 RT 4127); whether or not she was present when Mr. Lightsey called the bail bondsman in Lancaster (19 RT 4127); when it was that Mr. Lightsey supposedly told her he was caring for an old man (19 RT 4127); whether or not she went back to Mr. Lightsey's residence after his arrest on the bench warrant in July 1993 (19 RT 4128-4129); whether or not she told Detective Boggs about ammunition she claimed she saw at Mr. Lightsey's residence (19 RT 4132); and when she started house-sitting for Mr. Lightsey. (19 RT 4133, 19 RT 4134.) This glaring memory lapses more than justified her impeachment on the likely source of her undeniable memory problems.

While respondent is correct in asserting that this evidence of Lehman's inability to perceive or remember was admitted at trial, the trial court prohibited any cross-examination which would have linked such cognitive deficiencies to Lehman's drug use. The defense intended to impeach Lehman with her past and current drug addiction to demonstrate that her inability to remember these events were not mere lapses of memory common to reliable witnesses but instead were cognitive limitations attributable to long term drug abuse.

As respondent concedes (RB 147), the jury was instructed as to the credibility of witnesses (CALJIC 2.20; VII CT 2127-2128; 28 RT 6098-6100) and discrepancies in testimony (CALJIC 2.21.1; VII CT 2129; 28 RT 6100), with standard jury instructions which instruct that misrecollections are common. Rather than supporting respondent's argument, this actually highlights the need for

impeachment of Lehman with her rampant drug use to show that these were not just the 'common' misrecollections of any witness. The improper exclusion of cross-examination on Lehman's current and past drug abuse prevented the jury from understanding that her inability to perceive and remember was more than mere misrecollections, but was instead the result of something far more disturbing and relevant to her credibility: memory damage from drug abuse. If they had been informed of these facts, the jurors may very well have rejected her testimony.

Respondent argues that such evidence was nevertheless inadmissible. (RB 140, citing *People v. Barnett* (1998) 17 Cal.4th 1044, 536; see also *People v. (Lester) Wilson* (2008) 44 Cal.4th 758.) This is incorrect. Mr. Lightsey's case is highly distinguishable from the *Wilson-Barnett* line of cases. In *Wilson*, as in Mr. Lightsey's case, the trial court barred cross-examination on the issue of a prosecution witness' methamphetamine usage. However, in *Wilson* "neither [party] suggested" that the prosecution's witness "was a habitual user" of methamphetamines, making the witness' drug use of little relevance. (*Wilson, supra*, 44 Cal.4th at p. 794.) Nor were there any "suggestions in the record" in the *Wilson* case that as a result of "drug use" the witness "misperceived or misrecollected." (*Ibid.*)

In Mr. Lightsey's case, in contrast, the defense argued that Lehman was a habitual drug user with memory problems, and – going further – offered to call witnesses to prove it. (19 RT 4140.) There were also ample indications in the record, in the form of the half a dozen or so gaps in Lehman's memory discussed above, suggesting that Lehman's memory may have been damaged by drug use. Mr. Lightsey's case is therefore highly distinguishable.

Similarly, in *Wilson* the trial court expressly proposed that trial counsel bring up the issue via a formal section 402 evidentiary hearing with proper expert witness testimony on the issue of drug abuse's damage to memory. (*Wilson, supra*, 44 Cal.4th at pp. 791-792.) But *Wilson*'s counsel declined this offer, thereby waiving the issue on appeal. Here, in contrast, the trial court expressly

forbade Mr. Lightsey from bringing witnesses to testify about the effects of Lehman's drug abuse. Indeed, the court angrily threatened trial counsel for being "out of line" in even suggesting that the cross-examination might be proper. (AOB 137, citing 19 RT 4148, 4150.) Going further, the trial court expressly ruled that "I don't think it's proper to ask a witness the questions you have asked this witness regarding drug usage or have you used drugs today," and left no doubt that any future attempts to admit the evidence would be pointless. (19 RT 4148.) (Unlike the situation in *Wilson*.) Given the trial court's ruling that trial counsel was "out of line" in even trying to proffer the evidence, any further attempt to offer additional proof in the form of lay and expert witnesses would have been "futile." (*People v. Brown* (2003) 31 Cal.4th 518, 533.) There was no waiver of the issue.

Relying on *United States v. Vgeri* (9th Cir. 1995) 51 F.3d 876, respondent next argues that the trial court did not err in barring evidence that Lehman's memory was impaired and damaged by drug use. Specifically, respondent quotes *Vgeri, supra,* to argue that there is no need for an addict informer jury instruction where "the defense adequately *cross-examines* the witness about the addiction." (RB 141; citing *Vgeri, supra,* 51 F.3d 876, 881, emphasis added.) This authority and argument actually supports Mr. Lightsey's claim, because in his case the defense was wrongfully precluded from *cross-examining* Lehman with regard to the effects of drug abuse on her ability to perceive and remember. Mr. Lightsey wasn't seeking an addict instruction, as in *Vgeri*, he was instead seeking the right to impeach Ms. Lehman on *cross-examination* – as recommended by the court in *Vgeri* – with plainly relevant and admissible evidence on her memory impairments, and their likely cause. (Evidence Code § 780(c); *People v. Bell* (1955) 138 Cal.App.2d 7, 11-12.)

The trial court abused its discretion in barring impeachment on Lehman's drug use and its affect on her ability to perceive and remember, as such evidence was highly relevant evidence as to her ability to recall. As the error was

prejudicial under both the federal and state standard of review, Mr. Lightsey's conviction and judgment of death must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d at p. 836.)

C. There Was No Waiver of the Violation of Mr. Lightsey's Constitutional Rights.

As previously demonstrated (AOB 144-145), this erroneous limitation of Mr. Lightsey's attempted impeachment and cross-examination of Ms. Lehman at trial violated his federal constitutional rights to present a defense, to due process of law, and to a reliable and proportional sentence of death. (*Ibid.*, citing *Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 5; *Pointer v. United States* (1965) 38-U.S. 400, 405; *United States v. Fajardo, supra*, 787 F.2d 1523, 1527-1528.)

Respondent concedes that Mr. Lightsey repeatedly objected to the exclusion of the impeachment evidence at trial on state law grounds, but alleges that Mr. Lightsey waived his right to appeal the violations of his constitutional rights as a result of the exclusion of the impeachment evidence regarding Ms. Lehman's drug abuse. (RB 142.) As will be demonstrated, this is incorrect. (Preliminarily, however, it should be noted that respondent apparently does not make this waiver argument regarding constitutional violations occurring from the exclusion of the evidence of assault with a deadly weapon.)

Assuming *arguendo* that Mr. Lightsey did not timely object to the exclusion of evidence as a violation of his constitutional rights, some errors may be raised on appeal without a timely trial court objection. (Pen Code, §1469; see also *People v. Partida* (2005) 37 Cal. 4th 428.) Moreover, the fact that the *right* to raise an issue on appeal may have been forfeited by failure to raise it below does not preclude the appellate court from considering the issue and granting relief. (See *People v. Smith* (2003) 31 Cal.4th 1207, 1215; *People v. Johnson* (2004) 119 Cal.App.4th 976, 984.)

The reasoning given for "[t]raditional objection and waiver principles" is that they "encourage development of the record and a proper exercise of the

discretion in the trial court." (*People v. Welch* (1993) 5 Cal.4th 228, 236.) However, not every claim of error requires an objection in the trial court to be reviewable on appeal. "A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera* (1997) 15 Cal.4th 269, 276.) As Mr. Lightsey's fundamental, constitutional rights were violated, there was no waiver. (*Ibid.*)

D. The Error Was Prejudicial Requiring Reversal.

Respondent incorrectly claims that there was no prejudice in excluding impeachment of Lehman as the "evidence against Appellant was overwhelming." (RB 144.) In fact, the defense evidence presented at trial indicated that Mr. Lightsey had a strong alibi (he was in court at the time of the murder); there was no forensic evidence linking Mr. Lightsey to the murder; and no witnesses placed Mr. Lightsey at Mr. Compton's residence on the date of the murder.

Given the dearth of evidence implicating Mr. Lightsey in the death of William Compton, the prosecution relied heavily on the testimony of informers, including Lehman. This was conceded by the prosecution at trial, who argued in closing that "Karen Lehman's testimony" was a "critical" piece of the prosecution's case. (28 RT 6042.) Lehman was a key witness in placing the firearms in Mr. Lightsey's possession after the murders (19 RT 4079, 4108-4112), and Lehman purported to link Mr. Lightsey to Mr. Compton with the alleged comment that he was caring for an old man. (19 RT 4091-4094, 4128-4129.) Lehman also testified as to Mr. Lightsey's secretive behavior with regard to the guns which could be interpreted as evidence of "consciousness of guilt." (19 RT 4092-4096.)

The error on barring this impeachment evidence of this "critical" prosecution witness therefore cannot be shown to be harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18, 24). Even under the lesser standard for state law error, there is a reasonable probability that Mr. Lightsey would have obtained a more favorable result absent the error. (*People v. Watson,*

supra, 46 Cal.2d at 836.) Mr. Lightsey's conviction and sentence of death must therefore be reversed.

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IV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND PREVENTED APPELLANT FROM PRESENTING HIS THEORY OF THE CASE, BY EXCLUDING ADMISSIBLE, RELEVANT, AND EXCULPATORY EVIDENCE.

A. Respondent's Contention

"THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS IN EXCLUDING THE HEARSAY EVIDENCE OF APPELLANT'S STATEMENT TO BEVERLY WESTERVELT AND DUTLER DAUWALDER."

B. The Trial Court Erred in Excluding This Evidence

At trial, the primary prosecution evidence introduced against Mr. Lightsey was his post-homicide possession of weapons belonging to Mr. Compton. Mr. Lightsey sought to counter this with statements made to an acquaintance, Dut Dauwalder, and to his girlfriend Beverly Westervelt that he had bought the weapons from a third party. It was the defense theory that this third party was the one responsible for the murder. (See AOB 147, citing 21 RT 4611, 27 RT 5720-5723, 28 RT 5954; 7 CT 2085.) These two statements were statements against Mr. Lightsey's interest, as they constituted an admission of being a felon in possession of firearms. They were also – *at the time made* – reliable, in that Mr. Lightsey had no reason to make the admissions, as when they were made, he was (a) not a suspect in the Compton homicide and (b) had no need to discuss the weapons at all.

The trial court erred in excluding these two statements on hearsay grounds, because their admission was mandated by Mr. Lightsey's constitutional right to present a defense, which bars the "mechanistic" application of state hearsay rules. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302; see also *Green v. Georgia* (1979) 442 U.S. 95; *Washington v. Texas* (1967) 388 U.S. 14, 18-19; *In re Martin* (1987) 44 Cal.3d 1, 29; *People v. Cudjo* (1993) 6 Cal.4th 585, 638 (dis. opn. of

Kennard, J.).) As the error cannot be shown to be harmless beyond a reasonable doubt, appellant's verdict and sentence of death must be reversed. (*Chapman v. California, supra*, 386 U.S. 18, 24.)

1. Respondent's Argument

The thrust of respondent's argument is two-fold. First, respondent sets up a 'straw man' argument that the evidence was properly excluded under state law hearsay rules as Mr. Lightsey was 'available' to testify in lieu of the hearsay statements, and Mr. Lightsey could have corrected any error in excluding the evidence by simply testifying directly a trial. Second, respondent argues the evidence was too unreliable to come in even under federal constitutional 'right to raise a defense' principles. (RB 148.) Respondent is incorrect on both points.

Notably, respondent fails to respond to Mr. Lightsey's primary argument, that for *relevance purposes*, any testimonial statements at trial would be of little value as they would be viewed by the jurors as only the self-serving testimony of an already-charged defendant facing execution.[14] (AOB 150-152.) What gave these statements relevance, made them reliable, and made them of crucial importance for the defense, is that *when they were made* Mr. Lightsey had no need to make the statements against his interest at all, as he was not a suspect in the case, and did not have any other motive to manufacture a reason for possessing the weapons, because he volunteered them at a point when neither Westervelt nor Dauwalder were aware of the guns existence. In contrast, any testimony by him at trial would have been of little value, or at least certainly of far less relevance and of far less credibility. (*Ibid.*)

In this sense, Mr. Lightsey was "unavailable" to alternatively testify at trial, as his trial testimony could not have served as a vehicle to replace the excluded hearsay statements. His case is therefore distinguishable from the *Elliot* case cited

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[14] Indeed, respondent concedes this point in another context, pointing out that the jurors "rejected" Mr. Lightsey's trial testimony on these points during the penalty phase. (RB 156.)

by respondent. (RB 152, citing *People v. Elliott* (2005) 37 Cal.4th 453, 483.) In *Elliot*, the statements at issue were made long *after* the defendant had become a suspect in the charged murder and were obviously self-serving "exculpatory" statements designed to free him from his "prosecution for first degree murder." (*Elliot, supra*, 37 Cal.4th 453, 483.) Put another way, they were basically "exculpatory" in that they were offered to explain and mitigate the *already filed* charges for first degree murder, rather than true statements against penal interest. They were therefore properly excluded as being unreliable. (*Ibid.*)

However, as even respondent concedes, the two statements at issue here were made long before Mr. Lightsey became a suspect to the homicide, and before he had any motive to create an alibi. (RB 152.)[15] As respondent further argues, one of the statements was made to Dut Dauwalder, someone who "was not a close acquaintance of appellant," but was instead merely his "real estate broker."[16] (RB 157.) Given this lack of a close connection and the virtual impossibility of Mr. Dauwalder ever knowing about the guns unless Mr. Lightsey informed him, these statements were reliable as statements against Mr. Lightsey's interests as they exposed him to prosecution for being a felon in possession of firearms, without any need to do so.

2. The Constitutional Right to Raise a Defense Was Violated By the Exclusion of the Two Statements

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[15] Twisting this around, respondent argues the statements were unreliable, because they "were not made shortly after the murder was committed." (RB 157.) But this supports Mr. Lightsey's claim of innocence, as it helps show that he did not know about the murder shortly after it was committed, because he didn't commit it. If he had, and was making the statements to manufacture an alibi, he would have made them right away. Instead, defense evidence showed that he made the statements only after he bought the weapons from a third party.

[16] It should be noted that this is not fully correct. While the evidence introduced showed that Mr. Dauwalder and Mr. Lightsey were not close friends, as noted by respondent, Dauwalder was more than just Mr. Lightsey's real estate broker, had known him for sometime, and had even rented Mr. Lightsey a cottage to stay in when he was forced out of his own home.

More to the point, even if properly excluded under state law principles, the barring of this evidence violated Mr. Lightsey's constitutional due process rights to raise a defense. (U.S. Const., Amends. VI and XIV; *Chambers v. Mississippi* (1973) 390 U.S. 284; *Crane v. Kentucky* (1986) 476 U.S. 683; *Chia v. Cambria* (9th Cir. 2004) 360 F.3d 997, 1004 [reversal required where right to raise a defense violated through exclusion of hearsay declaration under California hearsay rules]; *Tinsley v. Borg* (9th Cir. 1990) 895 F.2d 520, 530.)

Respondent first argues that Chia *v. Cambra*, which articulates the U.S. Supreme Court's ruling in *Chambers*, has been overturned and is wrongly cited by Mr. Lightsey. (RB 155, fn. 20, citing *Chia v. Cambra* (9th Cir. 2002) 281 F.3d 1032, 1037.) Mr. Lightsey never cited this 2002 case cited by respondent. Instead, he cited the 2004 case of *Chia v. Cambria* (9th Cir. 2004) 360 F.3d 997, 1004, which has never been overturned and is final. (See AOB 152-154.) Moreover, the federal 'right to raise a defense' principle discussed in *Chia* is well-settled and is not in dispute. (*Tinsley v. Borg, supra,* 895 F.2d 520, 530; *Chambers v. Mississippi, supra,* 390 U.S. 284; *Crane v. Kentucky, supra,* 476 U.S. 683.)

As previously demonstrated, the statements were therefore admissible under federal constitutional due process principles. The State may not arbitrarily deny a defendant the ability to present testimony that is "relevant and material, and . . . vital to the defense." (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867, citing *Washington v. Texas, supra*, 388 U.S. at p. 16.) Accordingly, a State may not apply a rule of evidence "mechanistically to defeat the ends of justice." (*Chambers v. Mississippi, supra*, 410 U.S. at p. 302; see also *Green v. Georgia, supra,* 442 U.S. 95 [exclusion of reliable hearsay mitigating evidence violates due process]).

As noted in the *Lucas* case relied upon by respondent (RB 152), it is also constitutional error to exclude "crucial evidence" introduced by a defendant. (*People v. Lucas* (1995) 12 Cal.4th 415, 464, citing *Chambers v. Mississippi,*

supra, 410 U.S. 284 [but finding no error as same evidence introduced through other sources].) Here, the evidence that Mr. Lightsey had told two unrelated people *before his arrest* where he had bought the stolen guns was "crucial" to his defense and potentially fatal to the prosecution's attempt to prove him guilty. Without them, Mr. Lightsey, even through his own testimony, could not effectively explain his possession of the weapons that indisputably came from the decedent in this case. Due to the wrongful exclusion, all the defense could do was "chip[] away at the fringes" of the prosecution's theory of the case, without providing the defense's theory of the case. (*Chambers v. Mississippi, supra*, 410 U.S. 284, 294.)[17]

Accordingly, this "crucial evidence" was clearly probative on the central issue in the case – whether appellant committed the crime – and did not come in through other sources. (*Lucas, supra,* 12 Cal.4th 415, 464.) In addition, the jury could have evaluated the proposed evidence, as both Ms. Westervelt and Mr. Dauwalder were available for cross-examination as to the circumstances and attendant reliability of the making of the two statements by Mr. Lightsey. Moreover, the two statements were factually statements against Mr. Lightsey's

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[17] As previously demonstrated (AOB 159-160), Mr. Lightsey did introduce evidence at trial about the third party he had bought the weapons from, even if the court excluded evidence about the purchase of weapons. Specifically, the defense introduced evidence from multiple witnesses about an individual named "Jerry" who hung out at Mr. Lightsey's mother's neighbor John Ruby's house, and testimony that this Ruby's house was a drug house was full of dangerous criminals who might plausibly be linked to the murder of Mr. Compton. Evidence was also introduced that even the investigating officer knew about the dangerousness of the people at the John Ruby house, and that it was filled with dangerous transients.

Multiple witnesses also testified that Mr. Lightsey had a custom and practice of making such second-hand purchases of guns using sums of cash he kept on hand. (RB 160.) But without the two excluded statements showing Mr. Lightsey's purchase of the guns, the jury could not have understood the connection between Mr. Compton's weapons, and the evidence introduced by the defense regarding the John Ruby house and its denizens, and Mr. Lightsey's habit of keeping cash on hand to make purchases from third parties.

interest (in that they exposed him to possible prosecution for being a felon in possession of a firearm), and there were plainly strong, historically recognized indicators of reliability for these statements, even though they may have not precisely fit into California's evidentiary scheme, because such statements necessarily bear "persuasive assurances of trustworthiness." (*Chambers v. Mississippi, supra*, 410 U.S. 284, 302 [reversing murder conviction].) As the *Traylor* case relied upon by respondent (RB 151) makes plain, it is a "principle of experience" that a "statement asserting a fact distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect, and is thus sufficiently sanctioned, though oath and cross-examination are wanting." (*People v. Traylor* (1972) 23 Cal.App.3d 323, 331 [citation omitted].)

Given all these unique circumstances, the "ends of justice" mandated the admission of the evidence in the interests of maintaining Mr. Lightsey's right to raise a defense. (*Chambers v. Mississippi, supra*, 410 U.S. at p. 302 [due process violation to exclude hearsay evidence that "bore persuasive assurances of trustworthiness" and fell within a recognized exception to the hearsay rule]; see also *State v. Brown* (Tenn. 2000) 29 S.W.3d 427, 433 [*Chambers* and *Green v. Georgia* hold that "the constitutional right to present a defense . . . trump[s] the rule against hearsay"].)

Nor were these constitutional claims waived at trial, as claimed by respondent. (RB 153, 157.) This violation of law went to the deprivation of Mr. Lightsey's fundamental constitutional rights to a fair trial, a fair and impartial jury, and a reliable penalty determination under the federal and state constitutions. As such he is not precluded from raising his claim on appeal. (*People v. Vera* (1997) 15 Cal.4th 269, 276-277 [holding a "defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights."]; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6; *People v. Partida* (2005) 37 Cal.4th 428, 433-439.)

C. The Error Was Prejudicial

Respondent concedes that the federal "harmless beyond a reasonable doubt" standard governs this issue. (RB 156, citing *Chapman v. California, supra*, 386 U.S. at p. 24.) Respondent argues that any error was harmless, because "appellant testified during the penalty phase that he purchased the victim's guns out of the trunk of a car across the street from his mother's house," as also noted in the two excluded Dauwalder and Westervelt statements, but the "jury rejected appellant's testimony and sentenced him to death." (RB 156.) Yet as discussed *supra*, this rejection by the jury of Mr. Lightsey's testimony *at trial* actually supports his argument that the exclusion of the two *pre-trial* statements was prejudicial, as the excluded pre-arrest statements had a persuasive power that could not be duplicated by the trial testimony of Mr. Lightsey alone.

But for the exclusion of the evidence of Mr. Lightsey's statements, the jury might have had a reasonable doubt as to his guilt and found him not guilty. Apart from Mr. Lightsey's possession of Mr. Compton's weapons, the prosecution's case that Mr. Lightsey was Compton's killer was extremely weak. The district attorney was trying to pin Compton's murder on a defendant who had indisputably been in court for most of the morning on which the killing had occurred. The prosecution was reduced to arguing that Mr. Lightsey had rushed from court to his mother's house, and then to Mr. Compton's house in time to accost him before 11 in the morning, stab him forty-three times, find over twenty guns, video cameras, and other small items and load them into his car, and drive to his own home in time to make a telephone call to a bail bondsman at 11:50. Evidence that Mr. Lightsey had told friends before his arrest where he had bought the stolen guns was potentially fatal to the prosecution's attempt to prove him guilty.

The trial court's violation of appellant's due process right to present a defense, and his Fifth, Eighth and Fourteenth Amendment rights to a fair and reliable trial on both guilt and punishment, requires this Court to reverse both the guilt and penalty verdicts unless the violation "was harmless beyond a reasonable doubt." (*Chapman v. California, supra,* 386 U.S. 18, 24*; In re Ruzicka* (1991) 230

Cal.App.3d 595, 601.) Given the importance of the improperly excluded evidence to the basic theory of the defense, it cannot be reasonably concluded that the verdicts in this case were "surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Mr. Lightsey's conviction and sentence of death must therefore be reversed.

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V.

MR. LIGHTSEY'S CONVICTION MUST BE REVERSED BECAUSE THE PROSECUTOR VIOLATED THE TRIAL COURT'S ORDER NOT TO MENTION MR. LIGHTSEY'S STATUS AS A PRISONER, THEREBY CAUSING MATERIAL PREJUDICE TO MR. LIGHTSEY BEFORE THE TRIER OF FACT.

A. Respondent's Contention

"NO PROSECUTORIAL MISCONDUCT OCCURRED; THE TRIAL COURT DID NOT ABUSE ITS DISCRETION AND DID NOT VIOLATE APPELLANT'S RIGHTS IN DENYING APPELLANT'S MOTION FOR MISTRIAL."

B. The Trial Court Erred in Failing to Grant a Mistrial as Requested by Defense Counsel.

The trial court granted a defense motion in limine to bar the prosecutor from mentioning that Mr. Lightsey was incarcerated in State Prison. (1 RT 108; 7 CT 1881.) The court's ruling specified that the parties could mention that Mr. Lightsey was in "custody," but not that he was in *prison*. (1 RT 108; 7 CT 1881). On two separate occasions, the prosecutor defied the court's ruling and elicited testimony from two separate witnesses that Mr. Lightsey was housed at "Wasco" a well-known California State Prison, and that he was housed within a "protective housing unit" for "high profile" defendants within the prison. (20 RT 4491; 21 RT 5182). Notwithstanding the prosecutor's prejudicial violations of the trial court's order, the trial court denied two motions for mistrial based upon the acts of misconduct. (20 RT 4497, 4518).

The prosecutor's misconduct and the trial court's failure to provide an effective remedy violated Mr. Lightsey's state and federal constitutional rights to raise a defense, to due process of law, and to a proportionate and reliable verdict of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal.Const., art. 1, §§ 7, 15, 17, and 28; *Darden v. Wainwright* (1986) 477 U.S. 168, 181-182.) The error also breached his federal constitutional due process liberty interest under the state

prosecutorial misconduct rules. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346.) As the errors cannot be shown to be harmless beyond a reasonable doubt, appellant's verdict and sentence of death must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

1. Respondent's Concessions

Respondent concedes that trial counsel specifically moved for a mistrial based on allegations that the prosecutor used the deceptive tactic of "[implying] that Mr. Lightsey had a felony conviction," through her questions to Westerveldt, in an attempt to "impeach[] Mr. Lightsey without him having to take the stand," notwithstanding the trial court's clear order not to elicit such evidence. (RB 160, citing 21 RT 4518-4519.) Yet respondent nevertheless claims that the prosecutor's actions were perfectly appropriate. (RB 160-166.)

This is incorrect.

It is well-settled that the "State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime." (*Michelson v. United States* (1948) 335 U.S. 469, 475). In *People v. Robinson* (1995) 31 Cal.App.4th 494, 504-505, the court of appeal held that the prosecutor's elicitation of testimony from a prosecution witness about defendant's "felony conviction" and that he was "in custody" was in violation of the trial court's order, was prejudicial, and required reversal of defendant's convictions. (See also *People v. Bouzas* (1991) 53 Cal.3d 467, 480-81 [holding reversible error to allow the prosecutor to present evidence of a defendant's prior conviction].) Respondent's argument that Mr. Lightsey's statutory and constitutional rights were not violated as a result of the prosecutor's misconduct is therefore incorrect.

2. There Was No Waiver

Respondent next questions whether filing a motion for mistrial preserved Mr. Lightsey's claim of prosecutorial misconduct. (RB 163.) Yet trial counsel twice requested a mistrial following the acts of misconduct by the prosecutor in

admitting previously excluded evidence. (20 RT 4497, 4518.) These motions fully preserved his claims on appeal. (See *People v. Hardy* (1992) 2 Cal.4th 86, 157 [holding that a timely motion for mistrial out of the presence of the jury preserves the issue for appeal].)

3. The Prosecutor Committed Misconduct

Respondent next argues that the trial court properly ruled that there was no misconduct in eliciting testimony that Mr. Lightsey was incarcerated in "Wasco," i.e. Wasco State Prison, because there's a "lot of things in Wasco. There's a lot of places in Wasco." (RB 164, citing 21 RT 4497.) This argument was disingenuous to say the least. "Wasco" is well-known to residents of the Central Valley. (See, e.g., *Kruse v. Superior Court* (2008) 162 Cal.App.4th 1364, 1368 [even 5th District court of appeal refers to Wasco State Prison merely as "Wasco"].) There is certainly no other facility in Wasco where people are kept in custody other than Wasco State Prison, the context in which the "Wasco" statements were made. It is therefore highly likely that residents of Kern County, including Mr. Lightsey's jurors, understand that the county jail in *Bakersfield* houses the pretrial detainees while the only custodial facility in *Wasco* is a State Prison for convicted felons. By eliciting testimony from multiple witnesses that Mr. Lightsey was incarcerated at Wasco, the jurors were therefore informed that he was a convicted felon, something of which they were not previously aware.

Respondent next argues that there was no harm in eliciting testimony that Mr. Lightsey was housed in a prison Secured Housing Unit with testifying informant Robert Rowland. (RB 166.) Specifically, respondent argues that this Court has previously held that "in certain circumstances a jury will inevitably learn that a defendant is in custody for the current charged offense, for example where the jury is presented with the testimony of a jailhouse informant." (RB 166, citing *People v. Bradford* (1997) 15 Cal.4th 1229, 1336.) However, this assertion actually bolsters appellant's argument.

As noted in *Bradford*, the issue of being in pre-trial custody is not the key

issue: it is often the case the jurors that jurors become aware a capital murder defendant is in pretrial custody. (*Ibid.*) Rather, the issue the issue is the difference between pre-trial custody, which does not imply a felony conviction, and custody in state prisons, which necessarily include a prior felony conviction. Here, the comments elicited by the prosecutor were improper in that the jurors not only learned that Mr. Lightsey was *in custody* on the current offense, but that he was in a *state prison* on a previous felony conviction. Mr. Lightsey's case is therefore highly distinguishable from *Bradford,* and the prosecutor's deceptive misconduct in eliciting Mr. Lightsey's felon status therefore constituted an "egregious" violation of Mr. Lightsey's right to due process. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.)

Respondent alternatively relies on the fact that the trial court partially based its denial of the mistrial motion on the grounds that defense counsel Dougherty later brought out the fact that Rowland had spent many years in and out of prison. (28 RT 6105-6106.) Yet the fact that Rowland had *previously* been in prison, as brought out by defense counsel during his impeachment of Rowland with his priors and membership in the Aryan Brotherhood, did not indicate that he was in prison when he was *later* with Mr. Lightsey. Quite the contrary, their time together could have just as easily have been while both in pre-trial custody, rather than in prison on a felony conviction. Indeed, that was the whole point of the trial court's ruling to allow testimony that Mr. Lightsey was in custody, but not that he was a felon in prison.

C. The Error Was Prejudicial, Requiring Reversal

By disregarding the court's order and disclosing extremely prejudicial information about Mr. Lightsey's custody and prison status, the prosecution also violated Mr. Lightsey's rights to a fundamentally fair trial with due process of law, and a reliable and proportional verdict of death. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) The admission of this highly

prejudicial evidence violated Mr. Lightsey's state and federal constitutional rights to raise a defense, to due process of law, and to a proportionate and reliable verdict of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.)

Given the severity of the prejudice of branding Mr. Lightsey as a felon, and the strength of the defense's case, the error cannot be shown to be harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18, 24). Even under the lesser standard for state law error, there is a "reasonable probability" that Mr. Lightsey would have obtained a more favorable result absent the error. (*People v. Watson, supra,* 46 Cal.2d at p. 836). Mr. Lightsey's verdict and sentence of death must accordingly be reversed.

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VI.

THE TRIAL COURT PREJUDICALLY ERRED IN FAILING TO PROPERLY INSTRUCT THE JURY REGARDING MR. LIGHTSEY'S ALIBI DEFENSE.

A. Respondent's Assertions

"THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY WITH APPELLANT'S ALIBI INSTRUCTION."

B. The Trial Court Erred in Failing to Instruct the Jury With the Requested Instruction

Mr. Lightsey had an unusually strong alibi for the charged murder based upon the "physical impossibility" of his "guilt" as he was at a location other than the scene of the crime [the Kern County Superior Court] at the relevant time." (*Noble v. Kelly* (2nd Cir. 2001) 246 F.3d 93, 98, citing *Black's Law Dictionary,* 72 (7th ed. 1999).) However, the trial court effectively gutted Mr. Lightsey's alibi defense when it refused to fully instruct the jury on the law with regard to Mr. Lightsey's alibi. (28 RT 6073.) Specifically, the trial court refused to give a pinpoint instruction articulating that the defense did not have to prove its alibi by either a preponderance of the evidence standard or a beyond a reasonable doubt standard. (28 RT 6072-6073.) As was previously demonstrated (AOB 167-172), the instruction rejected by the trial court would have clarified the standard alibi instruction (CALJIC 4.50) by more completely instructing the jury that the prosecution bears the ultimate burden of persuasion. (*See People v. Adrian* (1982) 135 Cal.App.3d 335, 337.)

1. Respondent's Concessions

Respondent concedes that the requested instruction was an accurate statement of the law. (RB 170, *citing People v. Lee Sare Bo* (1887) 72 Cal. 623 and *People v. Mar Gin Suie* (1909) 11 Cal.App. 42.) However, respondent fails to respond to Mr. Lightsey's argument that the instruction was necessary under the unique circumstances of the case.

As previously demonstrated, the clarification of the standard jury instruction was made particularly necessary by Mr. Lightsey's mental incompetency, which led him to challenge the accuracy of his own alibi being proffered by defense counsel. (See AOB 131, fn. 42.) In repeated outbursts from the defendant's chair during the guilt phase, Mr. Lightsey insisted on denying that his alibi defense was true, instead claiming that he had not been in the court proceedings as claimed in his guilt phase defense, but had instead been in a *different* court all day.

These unique circumstances muddied the evidentiary picture of Mr. Lightsey's otherwise unusually strong alibi to the charged murder, and the supplementary instruction was therefore needed to clarify the burden of proof as to his alibi. Specifically, evidence was introduced by the defense that Mr. Lightsey was in court on another case and on the record during the same morning the homicide occurred in the case at bar. The evidence presented at trial indicated that the murder at issue in this case occurred prior to 10:45 a.m. At the time of the murder, the evidence introduced by the defense showed that Mr. Lightsey was either with his attorney at the Kern County Superior Court or walking with his mother out of the courthouse. (Even the prosecution conceded that Mr. Lightsey was until court until at or just before 10:30, but argued he rushed to the decedent's home -- using the remaining the extra minutes available by not leaving at 11:00 a.m. [as shown by the defense evidence] -- to kill the decedent, ransack his home, steal his dozens of guns, and rush back home in time to make a phone call at 11:50.)

The proposed special jury instruction was appropriate because it clarified the burden on the prosecution as it related to Mr. Lightsey's alibi defense. While the alibi instruction given by the court (CALJIC 4.50) notes that a defendant can assert an alibi defense where he "has introduced evidence for the purpose" of proving such an alibi, it is silent as to whether the defense has any burden of proof when "introducing" such evidence. (*See* CALJIC 4.50.) Instead, CALJIC 4.50

only generally instructs that a defendant must only raise a reasonable doubt as to his guilt when presenting an alibi defense.

But, at least under the unique circumstances of Mr. Lightsey's case, CALJIC 4.50 is confusing as to what standard, if any, applies to the burden of proof on a defendant in proffering evidence of an alibi, given Mr. Lightsey's confusing outbursts in this regard. The proposed defense instruction would accordingly have served to "'pinpoint' the crux" of Mr. Lightsey's "alibi" defense, and more completely instructed the jury that the prosecution bears the ultimate burden of persuasion with regard to the alibi (*People v. Adrian* (1982) 135 Cal.App.3d 335, 337), even under the unique circumstances of Mr. Lightsey's case. The trial court therefore erred in refusing the instruction.

C. The Error Was Prejudicial, Requiring Reversal

Respondent alternatively argues that the failure to instruct was harmless, making the startling claim that Mr. Lightsey's alibi defense was "weak." (RB 173.) This is incorrect. The evidence presented at trial presented a strong alibi for Mr. Lightsey, in the form of transcripts and multiple witnesses showing that at the time of the murders he was in the Kern County Superior Court, and not at the residence of the victim. Except for a few key moments, the evidence of this alibi was essentially undisputed: that Mr. Compton had been seen alive at 7:45 a.m. on July 7, 1993 and had missed an 11:30 medical appointment that day about fifteen minutes' drive from his house; that Mr. Lightsey was with his attorney or in the courthouse from about 8 a.m. until at least 10:35 a.m.; and that Mr. Lightsey made a long-distance telephone call from his home at around 11:50 a.m. Even the prosecution evidence tended to show that Mr. Compton was probably killed well before Mr. Lightsey left the courthouse. Evidence was presented that Mr. Compton had failed to answer telephone calls from about 8:00 in the morning on, and that his body, when examined by paramedics shortly after 2:00 that afternoon, was in full rigor mortis. (15 RT 3340, 3400, 3403, 3411-3412, 3428.)

Additional evidence was presented that Mr. Compton usually arrived at his

medical appointments about fifteen minutes early and that he was preparing to take a shower just before he was killed -- evidence which implied that he had been assaulted some time before 10:45 that morning. (16 RT 3662-3664.) The prosecution further conceded that the murderer must have completed the crime and left with Mr. Compton's home with his 17 guns by "11:30" a.m., because a neighbor named came back home at 11:30 and hadn't seen Mr. Lightsey or his car or any other suspicious activity at Compton's home. (28 RT 5926.) The only defense evidence that was disputed was whether Mr. Lightsey was in court until closer to 11:00, rather than 10:30, and had spent perhaps fifteen minutes after that walking with his mother to her car and driving back to her house where his car was parked, making it physically impossible to commit the murder. In sum, the record contained strong evidence in support of Mr. Lightsey's alibi. However, this evidence may have been rejected by the jury due to the confusing burden of proof as to the alibi, especially given Mr. Lightsey's outbursts. (28 RT 6144, 6198; see also AOB 100-102, 131, fn. 42.)

Because the refusal of the requested pinpoint instruction unconstitutionally deprived Mr. Lightsey of his constitutional right to due process and to raise a defense, reversal is required because the error cannot be shown to be "harmless beyond a reasonable doubt." (*Rosario v. Kuhlman* (2nd Cir. 1988) 839 F.2d 918, 924 [exclusion of alibi transcript requires analysis of prejudice under *Chapman* standard], citing *Chapman v. California, supra,* 386 U.S. 18, 24). Even under the lesser standard for state law error, there is a "reasonable probability" that Mr. Lightsey would have obtained a more favorable result absent the error. (*People v. Linder*, supra, 5 Cal.3d 342, 348, citing *People v. Watson, supra*, 46 Cal.2d at p. 836). Mr. Lightsey's verdict and sentence of death must therefore be reversed.

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VII.

MR. LIGHTSEY'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT PREJUDICALLY ERRED IN FAILING TO INSTRUCT THE JURORS TO DISREGARD THE FACT THAT HE WAS VISIBLY SHACKLED THROUGHOUT HIS GUILT PHASE PROCEEDINGS.

A. Respondent's Contention

"THE TRIAL COURT PROPERLY DID NOT INSTRUCT THE JURY SUA SPONTE TO DISREGARD APPELLANT'S SHACKLES BECAUSE THE SHACKLES WERE NOT VISIBLE TO THE JURY." (RB 175.)

B. The Shackles Were Visible to the Jury During Trial Requiring Instruction Pursuant to CALJIC 1.04.

The record is clear that Mr. Lightsey was visibly shackled, with up to three deputy sheriffs standing behind him at the counsel table, throughout his trial, and the trial court therefore prejudicially erred in failing to sua sponte give the jurors an instruction, such as CALJIC 1.04, not to consider Mr. Lightsey's shackles during their deliberations. (*People v. Duran* (1976) 16 Cal.3d 282, 291-92; *People v. McDaniel* (2008) 159 Cal.App. 736, 743 [accord].) This error violated Mr. Lightsey's federal constitutional rights to a fair trial with due process of law, and to a proportionate and reliable verdict of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.) It also breached his federal constitutional state law "liberty interest" under California law to receive proper jury instructions. (U.S. Const., Amends. 5, 14; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) As the error in failing to instruct was prejudicial, Mr. Lightsey's conviction must be reversed. (*People v. Duran, supra,* 16 Cal.3d 282.)

1. Concessions by respondent

Respondent apparently concedes that Mr. Lightsey's shackles may have been visible during "pretrial proceedings," noting some of the citations made by Mr. Lightsey in his AOB relate to pretrial proceedings, but argues they were not visible in the presence of the jury itself. (RB 179). This apparent concession was necessary but insufficient: the evidence adduced during the pretrial proceedings is

plain that Mr. Lightsey's shackles were obvious and visible. Mr. Lightsey was "shackled to a bolt in the floor." (6 RT 1166-1167.) Mr. Lightsey was "hand-cuffed" and had waist "shackles" bolted to the floor. (4/7/94 RT 13 [discussing scope of shackling]; 3/23/95 RT 116-118 [linking of cuffs to shackles prevented Mr. Lightsey from being able to get into his notebook, write notes to his attorney]; 8/2/94 RT 215 [linking of cuffs to shackles kept Mr. Lightsey from picking up pleadings to examine]; 4/5/95 RT 347 [linking of cuffs to shackles stopped Mr. Lightsey from handling photos; 3/23/95 RT 115].) The system of shackles and cuffs was sufficiently bulky that they made "noise" so loud that it was "interrupting the Court with" Mr. Lightsey's "chains." (1 RT 116.) As the Court noted when discussing options for Mr. Lightsey's crime scene view, whenever Mr. Lightsey moved he was literally "dragging chains." (3 RT 640-641.)

During trial, this visible shackling was only adjusted in one respect. Mr. Lightsey's arms were freed by unlinking his handcuffs from his waist shackles, but in all other respects he remained shackled to a bolt in the floor and maintained his handcuffs, waist shackles and leg shackles. (4/13/95 RT 540-541.) Mr. Lightsey's shackles, visible during pre-trial proceedings, were also visible and audible during trial proceedings before the jury, as evidenced by references at various points to the fact that the Mr. Lightsey's waist chains would be visible if he stood up in the courtroom (1 RT 102-103); instances in which Mr. Lightsey did stand up when the jurors entered the courtroom (1 RT 189; 2 RT 348; 20 RT 4279-4280 [unable to stand up in courtroom]; 14 RT 3161 [same];) and comments by counsel and court personnel on the presence of the chains. (1 RT 102-103 [discussion of "muffling" sound of "other" chains with duct tape]; 4/13/95 RT 540-541 [Lightsey in waist chain].)

Respondent further concedes in another context that neither the prosecutor nor the court disputed trial counsel's argument that Mr. Lightsey was visibly shackled in the presence of the jury. As respondents themselves noted in their brief, the trial prosecutor did not contest trial counsel's comments that Mr.

Lightsey was visibly "shackled to a bolt in the floor. That takes care of the fact [for the jury] that he is in custody of the Department of Corrections." (RB 178, citing 6 RT 1177.) (Trial counsel's comment on Mr. Lightsey's shackles came in response to the prosecutor's objection to Mr. Lightsey, as a "convicted inmate of the State Department of Corrections," from greeting prospective jurors.) (6 RT 1165.) Neither the court nor the prosecutor suggested that Mr. Lightsey's shackles were not visible to the jury in response to this assertion. Where "neither the trial court nor the prosecutor disputed [an appellant's] statement" at trial that his shackles were visible, the appellate court may properly infer that such an appellant was visibly shackled. (*People v. Soukomlane* (2008) 162 Cal.App.4th 214, 230 [reversing conviction due to prejudice of visible shackling].) In addition, it was undisputed that up to three sheriff's deputies were routinely stationed behind Mr. Lightsey as he sat at the counsel table. (4/13/95 RT 540; 17RT 3087).[18]

California law is clear that when physical "visible restraints" are imposed, the "court shall instruct the jury *sua sponte* that such restraints shall have no bearing on the determination of the defendant's guilt." (*People v. Duran, supra,* 16 Cal.3d 282, 291-292; *People v. Mar* (2002) 28 Cal.4th 1201, 1217 ; *see also People v. George* (1994) 30 Cal.App.4th 262, 272-73; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 255; *People v. Jackson, supra,* 14 Cal.App.4th 1818, 1825-26 [accord; CALJIC 1.04 [same].) The trial court erred in failing to give such an instruction.

2. There was no waiver

Respondent next claims that Mr. Lightsey "forfeited his right" to raise the claim of instructional error, specifically the federal constitutional claims, as there was no objection to the court's failure to instruct at trial. (RB 180.) This assertion

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[18] All these obvious restraints were imposed in spite of the fact that even the jail deputy who testified in favor of shackling Mr. Lightsey admitted that he was not violent, but just "unruly" and a "confrontational big mouth." (4/13/95 RT 520-521.)

is incorrect, because "the appellate court may [] review any instruction given, refused, or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (Cal. Penal Code § 1259; see also *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [holding a "defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights."]; *People v. Flood* (1998) 18 Cal.4th 470, 482 fn.7 [holding that defendant's failure to object to an instruction does not preclude appellate review for constitutional error.]; *People v. Graham* (1969) 71 Cal.2d 303, 317-319.) Accordingly, it is well-settled that a defendant's right to raise a claim that the trial court failed to instruct the jury *sua sponte* is not forfeited for failure to make a timely objection. (*See People v. Avila* (2006) 38 Cal.4th 527 fn. 22.)

Here, the record was plain that Mr. Lightsey was in fact shackled throughout the pretrial and trial proceedings and that such shackles were visible and audible to the jury who was sitting in judgment over Mr. Lightsey. The failure of the trial court to instruct the jury to disregard the shackles when making a determination as to Mr. Lightsey's guilt "deprived [Mr. Lightsey] due process of law under the Fourteenth Amendment to the United States Constitution" and denied Mr. Lightsey a "fair and impartial jury." (*People v. Jacla* (1978) 77 Cal.App.3d 878, 888; *People v. Givan* (1992) 4 Cal.App.4th 1107, 1117, citing U.S. Const. Amend. VI; Cal Const., art. I, § 16.)

C. The Error Was Prejudicial, Requiring Reversal

This Court has previously articulated "that it is manifest that the shackling of a criminal defendant will prejudice him in the minds of the jurors. When a defendant is charged with any crime, and particularly if he is accused of a violent crime, his appearance before the jury in shackles is likely to lead the jurors to infer that he is a violent person disposed to commit crimes of the type alleged." (*People v. Duran* (1976) 16 Cal.3d 282, 290.) More recently the courts of appeal have stressed that the jurors' perceptions of a defendant's credibility are "vulnerable to

the impact of seeing [a defendant] in shackles." (*People v. Soukomlane, supra,* 162 Cal.App.4th 214, 232-33.)

Even where the jurors are already made aware that a defendant is a "prison inmate," as occurred in Mr. Lightsey's case, a shackled defendant is still prejudiced as a result of the "jurors' visual, psychological, and emotional response to seeing a defendant so physically restrained and differentiated from everyone else and the natural tendency to wonder whether the defendant is a violent and dangerous person and worry about safety." (*People v. McDaniel, supra,* 159 Cal.App.4th 736, 746.) Even the former Saddam Hussein regime in Iraq, hardly known as a paragon of due process, had a per ser bar against a defendant ever appearing at trial in "restraints or handcuffs," much less shackles, due to the well-known prejudice of such shackling. (Iraqi Criminal Procedure Code, Section 156 [Law 23 of 1971].)

Given this inherent and grave prejudice of Mr. Lightsey's visible shackling, the trial court's error in failing to admonish the jury cannot be shown to be harmless beyond a reasonable doubt. (*People v. Jacla, supra,* 77 Cal.App.3d 878, 891, citing *Chapman v. California, supra,* 386 U.S. 18, 24; *People v. Duran, supra*, 16 Cal.3d 282, 296, fn. 15 [same].) But for the trial court's error, the jurors might have found Mr. Lightsey not guilty. Accordingly, Mr. Lightsey's conviction and sentence of death must be reversed.

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VIII.

THE TRIAL COURT'S RULINGS LIMITING THE SCOPE OF THE DEFENSE MENTAL HEALTH EXPERT'S TESTIMONY DURING THE PENALTY PHASE VIOLATED MR. LIGHTSEY'S RIGHTS UNDER THE FEDERAL AND STATE CONSTITUTIONS AND REQUIRE THE REVERSAL OF HIS JUDGMENT OF DEATH

A. Respondent's Contention

"THE TRIAL COURT DID NOT RESTRICT THE DEFENSE COUNSEL'S EXAMINATION OF PSYCHOLOGIST WILLIAM PIERCE." (RB 182.)

B. Relevant Proceedings

1. Testimony From Mr. Lightsey About The Court-Ordered Psychiatric Examinations And His Father

During defense counsel's direct examination, counsel asked Mr. Lightsey whether he had served as his own attorney, and Mr. Lightsey replied that he "was forced [into] pro per status." (30 RT 6395.) The prosecutor objected, and the trial court questioned the relevance of counsel's inquiry. (30 RT 6395.) Mr. Dougherty explained that he planned to segue from Mr. Lightsey self-representation to "the psychiatric reports as a matter of mitigation." (30 RT 6395.) [19] The trial court ruled that Mr. Lightsey could only answer "yes or no" to the question about whether he had represented himself. (30 RT 6395.)

After additional questions, Mr. Lightsey testified that he was represented by Attorney Stanley Simrin who asked to be relieved in February 1994. (30 RT 6396-6400.) After Simrin was relieved and Mr. Lightsey asked to represent himself, the court instituted competency proceedings pursuant to Penal Code

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[19] The trial court appointed three psychiatrists in 1994 to examine Mr. Lightsey and determine if was competent to waive his right to counsel and represent himself. Each of these psychiatrists prepared reports documenting their examinations, and all three testified for the prosecution at Mr. Lightsey's competency hearing in August 1994. (RT 8-2-1994, 14-143.)

section 1368. (30 RT 6400-6401.) The prosecutor objected that any testimony about the Section 1368 proceedings was irrelevant, the trial court sustained the objection, and it ruled there was to be no more mention of these proceedings. (30 RT 6401.)

Defense counsel, Mr. Dougherty, agreed, and asked Mr. Lightsey if he was examined by court-appointed psychiatrists before being allowed to represent himself. (30 RT 6401.) After the court commented that the question "ties into the psychiatric evaluation," the prosecutor asked to discuss this topic outside of the jury's presence, and the court excused the jury. (30 RT 6402, 6403.)

During the ensuing hearing, the prosecutor argued that although the defense had wide latitude to introduce evidence in mitigation of punishment, the Section 1368 proceedings and the related psychiatric examinations were irrelevant to the jury's penalty determination and hence inadmissible. (30 RT 6403-6405.) After the prosecutor's argument, the court asked Mr. Dougherty to explain why the psychiatric reports prepared pursuant to Section 1368 were relevant to the jury's penalty determination. (30 RT 6406.) According to counsel, these reports were relevant to the jury's penalty determination pursuant to CALJIC No. 8.85(d) – in deciding penalty, the jury can consider whether the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. (30 RT 6407.) Defense counsel further explained that all the doctors' "analysis and reports" should be considered in determining the penalty, and he planned to "lay the foundation through the witness [Mr. Lightsey] and then take that matter through Dr. Pierce when he testifies." (30 RT 6407.) When the court replied that it did not see the relevance of the 1994 psychiatric reports to whether Mr. Lightsey suffered from "extreme mental or emotional disturbance at the time of the offense [in 1993]," counsel explained that one of the doctors concluded in his report that Mr. Lightsey "had a psychotic deficiency." (30 RT 6407.)

Mr. Dougherty said he did not intend to call that doctor as a witness or introduce his conclusion about Mr. Lightsey during the penalty phase. (30 RT

6408.) Instead, counsel wanted to establish through Mr. Lightsey's testimony that he was examined by three different psychiatrists at the court's request, and then elicit testimony from Dr. Pierce that one of the doctor's concluded that Mr. Lightsey "had bipolar disorder manic type." (30 RT 6408.)

Based on the decision in *People v. Nicolaus* (1991) 54 Cal.3d 551, the prosecutor argued that the doctors' conclusions about Mr. Lightsey would be inadmissible hearsay and Dr. Pierce's testimony should be limited to testifying that he reviewed the reports in arriving at his own opinion about Mr. Lightsey. (30 RT 6408-6409.) Mr. Dougherty said he did not plan to elicit testimony from Dr. Pierce about the contents of the psychiatrists' reports, but only wanted to establish whether Dr. Pierce reviewed the reports as part of the material he considered in arriving at his opinion about Mr. Lightsey. (30 RT 6410.) According to counsel, Dr. Pierce was entitled to testify about the bases for his opinion and he wanted to establish through Mr. Lightsey's testimony that he was examined by three separate psychiatrists about

> "whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform to his conduct to the requirements of the law was impaired as a result of mental disease or defect or the effects of intoxication."

(30 RT 6410-6411.)

In response, the trial court ruled as follows:

> "I don't have any problem with your making an inquiry as to whether or not he was evaluated by those doctors. And if at some point in time you're going to call Dr. Pierce to come in here and testify that, amongst other things, in addition to his education, in addition to his experience, he's going to rely upon the reference to the reports previously made by Dr. Velosa, Dr. Burdick and Dr. Manohara and stops at that, I don't have any particular problem with that and I don't think the People do.
>
> "Am I correct, Mrs. Green [the prosecutor]?

"MS. GREEN: Yes, your Honor.

"THE COURT: So that's the way we're going to play the game, by those strict rules."

(30 RT 6413.)

When counsel questioned Mr. Lightsey about his examination by Dr. Burdick [one of the three psychiatrists who examined him], Mr. Lightsey testified that he did not recall talking with Dr. Burdick beyond "trying to tell him that –" (30 RT 6417.) The court interrupted by saying "I'm not going to allow you to get in the substance of that interview." (30 RT 6417.) When counsel asked if Mr. Lightsey gave the doctor the opportunity to interview him, and Mr. Lightsey answered "Not really. I simply told him – " (30 RT 6418.) The court again interrupted by ruling that the question could only be answered "Yes or no." (30 RT 6418.) Mr. Lightsey answered "No," and counsel asked "Why?" (30 RT 6418.) Mr. Lightsey answered that the Section 1368 proceedings were illegal and instituted for purposes of facilitating the fraudulent transcripts of the preliminary examination, and the court directed counsel to ask a different question. (30 RT 6418.)

Mr. Dougherty turned to questioning Mr. Lightsey about his interview with Dr. Manohara [another of the three psychiatrists who examined Mr. Lightsey]. (30 RT 6418-6419.) Mr. Lightsey testified that Dr. Manohara interviewed him for about 45 minutes, they mostly discussed "eastern religion" during the interview, and Mr. Lightsey tried to be cooperative but the doctor twisted his words and used "flowery sociology words." (30 RT 6420.) Because the court believed Mr. Lightsey's answer exceeded the scope of counsel's questioning, it directed counsel to ask his next question. (30 RT 6419-6420.)

Counsel then asked if Mr. Lightsey remembered talking with Dr. Velosa at the Tulare County jail on two occasions in July 1994. (30 RT 6420.) Mr. Lightsey said he did not remember, but added that the doctor "Didn't even type his report right. That's why I made that comment. Yes, that's the psychologist." (30

RT 6420.) Mr. Lightsey agreed he was examined by Dr. Velosa pursuant to the court's order for a psychiatric examination, and the court ruled several times that Mr. Lightsey's answers went beyond the questions asked and it struck one of those answers as exceeding the allowed scope of counsel's questions. (30 RT 6420-6422.) [20]

Defense counsel also questioned Mr. Lightsey about his mother's and father's separation, and his father's illness, hospitalization, and hunger strike. (30 RT 6422-6423.) After Mr. Lightsey testified that his father began reading the Bible and went on a hunger strike, he commented that the prosecutor was out to ruin his family through fraud and solicitation of perjury. (30 RT 6423.) The court struck Mr. Lightsey's comment about the prosecutor, and counsel questioned Mr. Lightsey about his father's physical disability, his hunger strike after reading the Bible, and his head injury and consequent equilibrium problems after being hit in the head with a baseball. (30 RT 6423-6425.)

2. Testimony From Richard Lightsey, Mr. Lightsey's Youngest Brother, About Their Father

Richard Lightsey is Mr. Lightsey's youngest brother, and he testified at trial about their father's physical attack against their mother in 1969 or 1970, his father's move to a separate room in the house after the attack, his father's fast with bread and water, and his father's 100-pound weight loss and medical hospitalization. (31 RT 6661-6664.) Their father was a "strict" disciplinarian when Richard was young, but he became increasingly less involved in disciplining his children as Richard was growing up. (31 RT 6664.)

Richard and his mother moved out of the house when Richard was in high school. When Richard returned to his father's home one night, he overheard his father crying in his nearby room and asking for mercy. (31 RT 6665.) Richard's father killed himself in June 1978, and Richard saw appellant crying hysterically

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[20] The struck Mr. Lightsey's answer that he thought Dr, Manohara "was being manipulative," and ruled the answer was limited to "yes." (30 RT 6422.)

and banging on the garage wall with his hands and head when he arrived at the house just after his father's suicide. (31 RT 6666.)

3. Testimony From Dr. William Pierce About The Psychiatric Reports And Mr. Lightsey's Father

In 1994, Ralph McKnight, Mr. Lightsey's advisory counsel, contacted Dr. Pierce and asked him to help create a psychosocial profile for Mr. Lightsey, and Dr. Pierce met with Mr. Lightsey at Tehachapi State Prison twice in October 1994. (31 RT 6680-6694.) In preparation for his interview and examination, Dr. Pierce reviewed police and coroner's reports, transcripts of the preliminary examination and another hearing in July 1994, the defense investigator's background report, and three psychiatric reports prepared done by Drs. Burdick, Manohara, and Velosa. (31 RT 6694.) Based on his interviews with Mr. Lightsey and family members and the materials identified above, Dr. Pierce concluded that

> "Mr. Lightsey was suffering from a severe emotional disturbance. I diagnosed him having a paranoid delusional disorder and a narcissistic personality disorder with depressive features. His delusional paranoid disorder is what we call the persecutory type."

(31 RT 6695.)

Dr. Pierce believed that Mr. Lightsey was surprised to see him, and very cautious and guarded at first. (31 RT 6695-6696.) Dr. Pierce explained that he was not there to discuss the circumstances of Mr. Compton's death, but to gather information about Mr. Lightsey's background and history and develop a psychological and social profile. (31 RT 6696.) Mr. Lightsey relaxed some during the interview, but did not stay on subject and came across as

> "overly verbose, using a lot of words, pressured speech, just a -- a push to get the words out.
>
> "His thinking can be described as what we call fragmented thinking. He would jump from one topic to another topic.
>
> "He had what we describe as loose associations. He would say

> something that would remind him of something else, and he would go off and talk about that without any transition, and that's called what we call tangential thinking.
>
> "I frequently had to bring him back to the original topic that we were discussing in order to kind of make some sense out of what we were talking about.
>
> "So in this regard the interviews were very lengthy and you to had to take -- I had to take my time and listen to a lot of, what I thought, extraneous and irrelevant topics in order to focus on and get information that I needed, but he certainly came across as disordered thinking when I talked to him in the -- right at the beginning."

(31 RT 6696-6697.)

Dr. Pierce characterized Mr. Lightsey as having "labile affect," because he was unable to control and modulate his affect very well [he switched from being very angry to very sad in a very short amount of time]." (31 RT 6697.) According to Dr. Pierce, Mr. Lightsey further exhibited labile affect by discussing his feeling of persecution, and invoked the wrath of God and that God would avenge and protect him and his family from the terrible wrongs being done to them. (31 RT 6697-6698.) Mr. Lightsey was unable to control his emotions at times because of the persecution he felt was being unfairly wrought on him and his family. (31 RT 6698-6699.) Though Mr. Lightsey was insistent and emphatic about the conspiracy against him, he also exhibited a sense of hopelessness and despair that he was unable to control. (31 RT 6699.)

Dr. Pierce attempted to perform some psychological tests on Mr. Lightsey, but he refused to take the tests during their first interview because he felt there was nothing wrong with him and the tests were unnecessary. (31 RT 6702.) Given Mr. Lightsey's reluctance, the doctor believed he should gather additional background information, and told Mr. Lightsey it was necessary that he be tested later. (31 RT 6702.)

Mr. Lightsey agreed to talk with the doctor about his childhood. (31 RT 6703.) He enthusiastically reported having had a "completely happy family,"

growing up in a loving and nurturing home, and all of the siblings had good and warm relationship's with each other. (31 RT 6703.) Mr. Lightsey was the third of six children, all of the children attended Catholic schools, his family had the largest house on the block, they had a pool table, dogs and animals in the backyard, and his father was an electrician who had his own business. (31 RT 6703.)

Dr. Pierce interviewed Mr. Lightsey's brothers Richard and Joe and his mother Rita. (31 RT 6703-6704.) Based on those and other information from family members, the doctor believed it was very significant that Mr. Lightsey characterized his family as close knit and loving whereas the other information he obtained was very different. (31 RT 6704.) Rita Lightsey reported that Mr. Lightsey was not an easy child to raise, he was somewhat hyperactive, and he had problems that her other children did not have. (31 RT 6704.) Mr. Lightsey was very close to his father, who often took Mr. Lightsey's side whenever Rita had difficulty with him. (31 RT 6704.) Mr. Lightsey also had medical problems [hypothyroidism] that was successfully treated with medication. (31 RT 6704.)

During Dr. Pierce's interview with Rita, Mr. Lightsey's mother, they talked mostly about Mr. Lightsey's relationship with his father. (31 RT 6704.) Mr. Lightsey's father was a strong disciplinarian who used physical punishment [whipping with a belt that was akin to child abuse] to discipline his children, and he whipped Mr. Lightsey more than his other children while also being protective of him. (31 RT 6705, 6706.) Rita was afraid to comment about Mr. Lightsey's father's behavior because she was afraid he might react violently against her. (31 RT 6705.) Dr. Pierce verified the information from Rita about Mr. Lightsey's father's violent conduct with other family members who reported a lot of tension in the family because of the father's conduct. (31 RT 6705.)

Dr. Pierce talked with Mr. Lightsey about Rita, whom he described as a perfect mother, and akin to the "Virgin Mary." (31 RT 6706-6707.) Mr. Lightsey also described his father in glowing terms by saying he was a very clever, original,

creative and friendly man who had a successful business as an electrician, and his relationship with his father was very positive. (31 RT 6707.) Although Mr. Lightsey described the relationships between his parents, between his parents and their children, and between the children themselves as warm and nurturing and like an all-American family, the information Dr. Pierce obtained from Rita and Mr. Lightsey's siblings was very different than what Mr. Lightsey reported. (31 RT 6707-6708.)

As Mr. Lightsey grew older, the relationship between his parents became more strained and they separated. (31 RT 6710.) Mr. Lightsey seemed to be very affected by his parent's breakup – he was arrested for selling marijuana while attending City College in Bakersfield. (31 RT 6710-6711.) Mr. Lightsey reported that his father approved of him selling drugs, but that caused additional conflict with other family members who were opposed to selling drugs. (31 RT 6711.)

Around the time of Mr. Lightsey's arrest, his father was hospitalized and had back surgery. (31 RT 6712.) While in the hospital, Mr. Lightsey's father reported having a vision that he was not going to die, he did not have to be buried, and he had special powers and abilities like playing the piano well [in reality, he could not play the piano at all]. (31 RT 6712.) After he was released from the hospital, Mr. Lightsey's father began drinking a great deal and heavily using his pain medication, reading the Bible more, and became even more violent towards his family [once, he chased his family around the house with a knife]. (31 RT 6712-6713.) The police were called to the Lightsey home on two occasions, and Mr. Lightsey's father was hospitalized each time in Ward B at Kern County Hospital – the hospital's psychiatric ward. (31 RT 6713.)

Mr. Dougherty tried to question Dr. Pierce about the relevance of Mr. Lightsey's father's conduct to his diagnosis of Mr. Lightsey's mental disorder by asking if he had an opinion about the father's conduct at the time. The prosecutor objected to the relevance of this inquiry, and the trial court sustained the objection. (31 RT 6714.) Dr. Pierce questioned Mr. Lightsey about the effect of his father's

conduct on him, and Mr. Lightsey said he did not think his father's conduct was at all "bizarre." (31 RT 6714.) Instead, Mr. Lightsey seemed proud of his father's conduct by saying that he had "engaged in spiritual flushing and related this behavior to some grandiose spirituality that his father was experiencing." (31 RT 6714.) Dr. Pierce was surprised by Mr. Lightsey's characterization because he felt his father's conduct was "psychotic." (31 RT 6714.)

Mr. Lightsey was again arrested for selling marijuana in 1974 or 1975, and went to jail. (31 RT 6715-6716.) After he was released from jail, Mr. Lightsey did well for a number of years by staying out of the criminal justice system and attending college at California State University-Bakersfield. (31 RT 6716.)

On June 11, 1978, Mr. Lightsey's father committed suicide by shooting himself in the head. (31 RT 6716.) Mr. Lightsey discovered his father's body in the bedroom, and became very upset and went to pieces [banging his head and fists on the garage door and crying out that his father never said goodbye to him]. (31 RT 6716-6717.) Other than his conduct immediately after finding his father's body, Mr. Lightsey seemed not to have much of a response to his father's death. (31 RT 6717-6718.) Mr. Lightsey's reported lack of further response to his father's death surprised Dr. Pierce who would have suspected that Mr. Lightsey would have had "a great reaction to the loss of his father." (31 RT 6718.) Dr. Pierce believed that Mr. Lightsey's reaction was "clinically significant, because it suggested the development of a defensive system psychologically to defend one's self against the pain and the loss of this tragedy." (31 RT 6718-6719.)

Mr. Dougherty also asked Dr. Pierce if he made any "psychiatric evaluations" after his interviews with Mr. Lightsey and reading the reports he was provided. (31 RT 6721.) Dr. Pierce replied that he did not, but he read "other psychiatric evaluations, reports that were done by other psychiatrists that I read subsequent to my coming to an opinion, and he was evaluated by these psychiatrists July 1994 for a couple of reasons. One –" (31 RT 6721-6722.) Before Dr. Pierce could complete his answer, the prosecutor objected and said the

court and parties had earlier reached an agreement about Dr. Pierce's testimony about the psychiatrists' reports and evaluations. (31 RT 6722.)

Mr. Dougherty replied that he "recall[ed] laying a foundation and that the doctor was going to explain that he read these psychiatric evaluations as part of the foundation for arriving at his conclusion." (31 RT 6722.) The court agreed, and ruled "That was to be a general reference, as you'll recall. We seem to getting into the detail of what the other psychiatrists -- not the other -- the psychiatrists --," and sustained the prosecutor's objection. (31 RT 6722.)

Dr. Pierce testified that he reached "a professional opinion as to Mr. Lightsey's personality" after interviewing family members and reviewing the psychiatric reports and other material. (31 RT 6722-6723.) According to Dr. Pierce, Mr. Lightsey suffers from a "delusional paranoid disorder, persecutory type, and narcissistic personality with depressive features" and further explained that

> "In psychiatric diagnosis, we diagnose according to what we call axes. Axis one diagnosis, what we call the -- what's happening now, what a -- predominant symptoms that the person is showing now.
>
> "His axis one diagnosis was delusional paranoid disorder, persecutory type.
>
> "Now, this type of paranoid disorder is characterized by delusions.
>
> "A delusion is a false belief that a person has and that a person acts upon. Even in the face of contravening, contradicting evidence in his environment and by other people, the person still acts as if this was true. It's not a belief. It's a false belief, and it's a committed false belief.
>
> "The persecutory type refers to a person believes that people are out to get him, that people are out to harass them that, that people are out to harm them. In his case the system was out to either destroy him and his family, and this is the predominant symptom that you see.
>
> "Now, what makes this a severe psychiatric disorder is that the person is consumed by this delusion, that everything gets fitted into

this false belief system, and they act as if it's true. So that one's logic is disrupted, one's ability to test reality in a proper way is disrupted, because you're fitting everything into this false belief. That's his access one diagnosis.

"His axis two diagnosis which is – you diagnose long-standing either personality disorders or character disorders long term, over long period of time, maladjustments on axis two, and my diagnosis was narcissistic personality disorder with depressive features.

. . .

"A narcissistic -- first of all, personality -- we all have a personality style.

"Now, a style is not a disorder. When a particular personality style becomes so maladapted that it interferes with social, occupational or other types of every day functioning, we call that a personality disorder. It becomes a diagnosable psychiatric symptom. So we're talking about a personality disorder.

"A person who comes across as extremely taken by themselves, having a grandiose sense of self-importance, looking out for themselves, some people might say, well, that's -- he's just a selfish person, a person that is -- gets extremely upset whenever they're criticized by anybody else, person who feels that they're entitled to some special treatment or that they have some special talents that should be regarded. This type of personality style, that when it's maladapted, develops into a narcissistic personality disorder.

"The reason I included depressive features with this is because one of the things that came across -- as I said before, this kind of underlining sense of despair and sadness that seemed to pop out every now and then.

"One of the ways I explain a narcissistic personality disorder is like this. People have what we call an ideal self, a sense of what you would really like to be. And you have a real self.

"Narcissistic personalities have over-grandiose, over-ideal self-imaging, how special they are. The difference between the reality of their real self and that ideal self when you look at it usually is depression, because you just can't own up on that. There has to be some feelings owned up on that. That's why I added into this the

depressive features as to axis two."

(31 RT 6723-6726.)

Mr. Dougherty asked Dr. Pierce whether he found "certain important issues in Mr. Lightsey's personality development" and the doctor answered

> "Yes. I think it's important to note that the type of family situation that Mr. Lightsey grew up in, in my opinion, helped contribute to the development of his psychiatric and psychological and emotional disturbance. Clearly there was a clear identification with the father. There was a traumatic suicide. There was the minimization and denial of this.
>
> "In my opinion when he began not to react in an expectable way from the loss of trauma, he was already beginning to build a world of denial where he could live in this world where that pain could not get to him.
>
> "He distorted the reality of finding his father shot to death in the head. Having that tremendous loss, how in the world can you go back to acting if nothing happened if you do something in your head that denies the reality of that, that distorts the reality of that, that makes you live in a false system and somewhat of a fantasy world about that.
>
> "To me that was clinically important in how this developed over the years and got to the point where we could diagnose it as a delusional paranoid disorder.
>
> "The child abuse, the physical abuse that a child goes through, particularly in this case, forces a kid to form what we call a very ambivalent relationship to the father, one where you want to try to please him and avoid the punishment and his wrath and, two, trying to minimize again -- distort the reality of the negative aspects of the father.
>
> "So what you get with this that supports this is a description of his father in all glowing terms, omitting any of the physical abuse, any of the negative things about his father, any of the psychotic behavior that he had to witness.
>
> "All things about his father are okay. That's a distortion and denial of reality. And in a sense that's what a paranoid disturbance does. It

distorts and denies reality, and the person acts as if their reality is different than what most other people see.

"So the development of this has to do with the development of his personality and the things that went on in his early life, his adolescent life and certainly his young adult life."

(31 RT 6726-6728.)

After earlier describing Mr. Lightsey's father's behavior as "psychotic," Dr. Pierce testified that the father's behavior "affected everybody in the family." (31 RT 6728.) Specifically as to Mr. Lightsey, his father's conduct affected the development of his personality by

"minimiz[ing] the consequences of his behavior [selling drugs]. And this – these incarcerations play into the fact, from his point of view, the fact that here's another indication that the system's out to wrongly get me, the system's out to destroy me, the system's out to destroy my family, also. So that he takes these, these incidences, and he puts it into the delusional framework and uses it as justification for why the system is against him. He uses it to support his false belief."

(31 RT 6728-6729.)

After testifying about Mr. Lightsey's difficulty communicating and inability to stay focused as symptomatic of his "thought disorder . . . a basic ingredient in psychosis" and "a severe symptom in emotional disturbances," Dr. Pierce addressed Mr. Lightsey's "disorganized thinking" as follows:

"And one topic had to do when he had to discuss his father's suicide. He became loose, in my opinion, loose and tangential and fragmented and indicating kind of a clear conflict over his father's death as he became more loose in his conversation.

"And also when he – when he was asked about his reaction to his father's death, where he tried to, in a sense, minimize it and then come back and say he did have some reaction. His associations become loose there and some way almost symbolic and almost wishful feeling as he talked about going hunting, fishing and the grand relationship that he had with his father.

> "If you look at those, just those excerpts, you can see that he loses distance from the original question. He goes off on a tangent. His associations become loose. And it's the same type of thought disorder as described before."

(31 RT 6732-6733.)

Mr. Dougherty asked Dr. Pierce how long he thought Mr. Lightsey suffered from the mental and emotional disturbances identified, and the doctor replied

> "I think he's suffered from them for years. In my opinion, I think it's typical for these kinds of disturbances to -- particularly paranoid delusional disturbance in late adolescence or early adulthood – I think circumstances around his father's death and how he handled that are clinically indicative to me that this disturbance was beginning to develop at that time, and I think it just consistently developed more and more over the years."

(31 RT 6733-6734.)

In addition, Dr. Pierce believed Mr. Lightsey's childhood and growing up in a dysfunctional family affected him as follows:

> "The difficulties between the mother and the father, the child of physical abuse, the -- certainly the trauma over the father's psychotic break and how that impacted the family and finally the trauma of the suicide I think are all important features in milestones in his personality development."

(31 RT 6734-6735.)

4. The reports from Drs. Burdick, Manohara, and Velosa [21]

Dr. Burdick did not perform a psychiatric evaluation, because Mr. Lightsey refused to speak with him without a court reporter present to transcribe the proceeding, but he believed from his brief meeting that Mr. Lightsey did not behave in a peculiar manner, he was in control of his mental faculties, he demonstrated no psychiatric illness, his conduct while in custody was deliberately

[21] In the interest of brevity, Mr. Lightsey will not again detail the contents of the doctors' reports. (See Opening Brief at pp. 196-202.) Instead, he will summarize the salient points and their impact on the instant claim.

disruptive, and he was capable of cooperating with counsel in a rational way. (2 Conf. CT 398.)

Dr. Manohara performed a psychiatric evaluation, and concluded that Mr. Lightsey, while he displayed symptoms of mental illness which, in the doctor's opinion made him incompetent to represent himself, did not have a clear cut psychotic or diagnosable mental disorder. Instead, the doctor believed Mr. Lightsey exhibited a personality disorder, and rationalized his behavior to a high degree to justify his personal deficits and/or irresponsible behavior. Mr. Lightsey described his childhood very favorably, he refused to discuss his father's death, and he denied any family history of mental illness. Mr. Lightsey seemed to lack empathy, and had a sense of personal exaggeration and entitlement. Dr. Manohara concluded that Mr. Lightsey's personality characteristics and conduct during the interview rendered him incompetent to represent himself. (2 Conf. CT 392-395.)

Dr. Velosa also performed a psychiatric evaluation, in which he spent more time with Mr. Lightsey than had Dr. Manohara. He concluded that Mr. Lightsey suffered from a psychiatric disorder [bipolar disorder (manic type) or a paranoid disorder] that impaired his thinking process. Mr. Lightsey's psychotic symptoms were profound and caused him to experience paranoid thinking, persecutory delusions, and a false belief that there was a conspiracy against him. (2 Conf. CT 400-403.)

C. The Trial Court's Rulings Restricted Defense Counsel's Examination Of Dr. Pierce In A Way That Violated Mr. Lightsey's Federal And State Constitutional Rights To Due Process And A Reliable Penalty Determination Under The Fifth, Sixth, Eighth And Fourteenth Amendments To The United States Constitution And Article I, Sections 1, 7, And 15 Of The State Constitution

Respondent concludes that the trial court did not restrict defense counsel's examination of Dr. Pierce because (1) "counsel never requested the trial court to make a ruling;" (2) "counsel did not request permission to examine Pierce regarding the information he considered in forming his opinion;" (3) "counsel

never requested permission to examine Pierce regarding the conduct and symptoms of appellant's father." (RB 187-188.) Respondent is mistaken.

1. Defense Counsel Did Not Waive The Instant Claim Concerning The Trial Court's Limits On Dr. Pierce's Testimony

As detailed above, the prosecutor objected when defense counsel questioned Mr. Lightsey about the three psychiatric examinations that were ordered after Mr. Lightsey said he wanted to waive his right to counsel and represent himself. Defense counsel explained that he questioned Mr. Lightsey about the examinations because he wanted to segue from the examinations to the doctors' reports "as a matter of mitigation." (30 RT 6395.) The prosecutor again objected and the court ruled that there would be no more references to the Section 1368 proceedings. (30 RT 6401.) During the in limine conference requested by the prosecutor, defense counsel said one of the doctors [Dr. Velosa] concluded that Mr. Lightsey suffered from a "psychotic deficiency" and he wanted to "bring out through Dr. Pierce, that he [Mr. Lightsey] had bipolar disorder manic type." (30 RT 6408.) The prosecutor objected that the psychiatric reports were inadmissible under *People v. Nicolaus* (1991) 54 Cal.3d 551, and defense counsel replied that the reports were admissible and relevant under "the *Drew* decision" [22] and CALJIC No. 8.85 because the examinations involved

> "whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform to his conduct to the requirements of the law was impaired as a result of mental disease or defect or the effects of intoxication."

(30 RT 6411.) The court ruled that defense counsel could not question Mr.

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[22] It appears counsel was referring to *People v. Drew* (1978) 22 Cal.3d 333, overruled in *People v. Skinner* (1985) 39 Cal.3d 765, 768-769. According to the Skinner court, the test for insanity adopted in Drew was abrogated in June 1982 by the electorate's passage of Proposition 8 [a return to the M'Naghten standard for purposes of determining insanity.].

Lightsey and/or Dr. Pierce about the contents of the respective reports. (30 RT 6413.)

As established above, defense counsel repeatedly expressed his intention to elicit evidence in mitigation [the three psychiatrists' reports] that he believed were relevant to the jury's penalty decision pursuant to Penal Code section 190.3(d), and specifically Dr. Velosa's opinion that Mr. Lightsey suffered from a psychotic disorder [bipolar manic type disorder]. The trial court repeatedly sustained the prosecutor's objections, and its strict rule was that defense counsel could only elicit that Mr. Lightsey was examined by three psychiatrists at the court's request, but not what the psychiatrists said in their respective reports about Mr. Lightsey.

Respondent cites *People v. Rowland* (1992) 4 Cal.4th 238,265, fn. 4, and *People v. Raley* (1992) 2 Cal.4th 870, 892, and concludes that defense counsel waived the instant claim by failing to seek a ruling from the trial court about the admission of the psychiatric reports, and to object to the "alleged" ruling restricting Dr. Pierce's testimony. (RB 188.) Respondent's reliance is misplaced.

In *Rowland*, this Court addressed Evidence Code section 353 and held that three factors must exist before an issue is deemed preserved for appellate review: (1) a specific legal ground for exclusion [or admission] is advanced at trial and subsequently raised on appeal; (2) the motion to exclude [or admit] is directed to a particular, identifiable body of evidence; and (3) the motion to exclude [or admit] is timely and allows the trial court to determine the evidentiary question in its appropriate context. (*People v. Rowland, supra,* 4 Cal.4th at p. 264, fn. 3.)

Mr. Lightsey satisfies all three factors because defense counsel's legal ground for admission of the psychiatric reports was the relevance of the reports [at least Dr. Velosa's report] to a recognized factor under Section 190.3(d); the motion to admit the evidence was directed to specific evidence [Dr. Velosa's identification of Mr. Lightsey as suffering from a psychotic disorder - bipolar manic disorder]; and the attempt to admit the evidence was timely and allowed the trial court to determine the evidentiary question in an appropriate context.

Because defense counsel's attempts to admit the evidence at issue satisfy the factors detailed in *Rowland* and Evidence Code section 353, defense counsel protected the record on appeal and preserved the instant claim for appellate review. (See *People v. Brown* (2003) 31 Cal.4th 518, 546-547.)

In addition to satisfying the requirements of Evidence Code section 353, the record establishes that the trial court's repeated rulings that defense counsel could not elicit the evidence at issue were unequivocal, and it would have been futile for counsel to make any additional objections to the court's strict rules not to allow the evidence at issue to be admitted into evidence. (See 30 RT 6399-6414; 31 RT 6721-6722.) Under the circumstances and in light of the trial court's repeated rulings excluding the evidence at issue, it would have been futile for counsel to make any further requests to admit the evidence or object to the trial court's rulings. (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

Beyond the above, defense counsel preserved the constitutional grounds being claimed on appeal by specifying that the evidence sought to be admitted was based on Mr. Lightsey's right to have the jury consider all relevant evidence in determining penalty under a recognized factor. (30 RT 6406-6407.) As such, defense counsel's requests to admit the evidence at issue were sufficient to alert the trial court of the nature of the anticipated evidence on which admission was sought; defense counsel's requests afforded the prosecution the opportunity to argue that although defendants have the constitutional right to introduce a broad range of evidence in mitigation, the instant request was irrelevant and inadmissible as incompetent hearsay; and the trial court was fairly informed that the evidence should be admitted as part of Mr. Lightsey's right to have the jury consider all relevant evidence in mitigation. (See *People v. Partida* (2005) 37 Cal.4th 428, 435.)

In *People v. Ashmus* (1991) 54 Cal.3d 932, 1001-1002, disapproved on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117, the Court recognized that the defendant was correct by arguing that the cruel and unusual

punishments clause of the Eighth Amendment [and the due process clause of the Fourteenth Amendment] and the United States Supreme Court's decisions in *Lockett v. Ohio* (1978) 438 U.S. 586, 604, *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110, and *Skipper v. South Carolina* (1986) 476 U.S. 1, 4, provide, as fundamentals right[s] under the Federal Constitution, that the sentencer in a capital case may not be precluded from considering relevant evidence offered as a basis for a sentence less than death. During his argument in support of the admission of the doctors' reports, especially the one from Dr. Velosa, defense counsel argued the evidence should be admitted because it was relevant evidence offered in mitigation of punishment that should be considered by the jury in determining penalty. (30 RT 6403-6413.) Under the circumstances, it was readily apparent to the court and prosecutor that Mr. Dougherty sought to introduce the evidence at issue based on Mr. Lightsey's fundamental federal and state constitutional rights to have the jury consider all relevant evidence proffered for a sentence less than death. As such, defense counsel preserved the instant claim that the trial court's refusal to admit the evidence at issue violated Mr. Lightsey's rights under the Eighth and Fourteenth Amendments to the United States Constitution and their analogous California counterparts.

Based on the decision in *People v. Partida, supra,* 37 Cal.4th at p. 435, Mr. Lightsey is entitled to argue that the trial court's erroneous denial of counsel's attempts to admit the evidence at issue not only violated his rights under the Eighth Amendment, but also rendered the penalty phase of his trial fundamentally unfair in violation of the due process clause of the Fourteenth Amendment. Because defense counsel's attempt to introduce the evidence at issue was grounded in his federal constitutional right to have the jury consider all relevant evidence proffered in mitigation for a sentence less than death, the refusal rendered his trial fundamentally unfair, and defense counsel's efforts fairly informed the trial court of the analysis it was being asked to undertake, Respondent is mistaken that Mr. Lightsey waived his federal constitutional claims under the Eighth and Fourteenth

Amendments to the United States Constitution. (RB 188.)

2. The Trial Court Erred By Preventing The Defense From Introducing Relevant Evidence Proffered For A Sentence Less Than Death In Violation Of Mr. Lightsey's Rights Under The Federal And State Constitutions

Respondent concludes that even if defense counsel did not waive the instant claim, there is no error because the psychiatrists' reports and Dr. Pierce's testimony about them and Mr. Lightsey's father were properly excluded as inadmissible hearsay. (RB 188-189.) Again, Respondent is mistaken.

Respondent spends several pages detailing general principles of law regarding a capital defendant's right to present and have the jury consider all relevant mitigating evidence, the trial courts' traditional discretion concerning the admission of evidence, the importance and need for foundational prerequisites, and the proper nature and scope of expert testimony. (RB 189-191.) Contrary to Respondent's argument, the trial court erred by excluding the evidence under those same principles of law.

Expert testimony, like all other evidence, must be relevant and competent regarding a material issue. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 390.) According to the Court of Appeal in *Bowker*, a case cited in *People v. Nicolaus, supra,* 54 Cal.3d at p. 583, in support of its holding,

> "Evidence Code section 801 prescribes two specific preconditions to the admissibility of expert opinion testimony. The testimony must be of assistance to the trier of fact and must be reliable. [Citation.]"

(*People v. Bowker, supra,* 203 Cal.App.3d at p. 390.)

During the hearing to determine whether Mr. Lightsey was competent to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806, the prosecution called Drs. Burdick, Manohara, and Velosa as its witnesses and moved to admit their reports into evidence. (RT 8-2-1994, 14-143.) Although the prosecutor argued that the doctors' focused on whether Mr. Lightsey was competent to stand trial, he also argued that their opinions and conclusions about

Mr. Lightsey were sufficiently reliable and relevant to the question now before the court – whether Mr. Lightsey had the capacity to intelligently and knowingly waive his right to counsel. (RT 8-2-1994, 147-148.) According to the prosecutor, it was "quite clear" that Drs. Manohara and Velosa were correct in deciding that Mr. Lightsey had the requisite capacity and ability to make that waiver. (RT 8-2-1994, 147-149.) [23]

Even though the prosecutor noted that Drs. Manohara and Velosa disagreed about the specific nature of Mr. Lightsey's mental disorder, he did not dispute the doctors' conclusions that Mr. Lightsey indeed "suffers from mental disorders" and urged the court to consider their opinions and make its own "determination" about the nature of the disorder. (RT 8-2-1994, 148-150.) [24] Also, the prosecutor argued that all the doctors' accurately and correctly recognized that Mr. Lightsey sufficiently understood the charges against him, the possible consequences of those charges, and the relevant defense[s] to those charges. (RT 8-2-1994, 149.) Further, the prosecutor posed many, many objections during Mr. Lightsey's cross-examination of the doctors and concluded that the examination of the doctors was sufficient to present the court with reliable evidence to decide whether Mr. Lightsey was competent to waive counsel. (RT 8-2-1994, 48-143, 147-151.) Finally, even the trial court recognized that all three psychiatrists were reliable and accurate regarding their assessments of Mr. Lightsey and his abilities. (RT 8-2-1994, 159.)

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[23] Dr. Burdick did not render an opinion about whether Mr. Lightsey had the capacity to make an intelligent and knowing waiver of the right to counsel, but did conclude that Mr. Lightsey "is in control of his faculties" and capable of communicating with and rationally cooperating with counsel. (RT 8-2-1994, 73-76.)

[24] The prosecutor did mention in passing that "[t]here is a dispute as to whether or not he [Mr. Lightsey] suffers from some type of mental disorder." (RT 8-2-1994, 149.) Though Dr. Burdick testified that Mr. Lightsey did not exhibit any "psychiatric illness" during their brief encounter, the doctor admitted that his opinion was far from certain because he did not "complete [or conduct] a formal psychiatric evaluation." (2 Conf. CT 398; RT 8-2-1994, 72-75.)

In *Green v. Georgia* (1979) 442 U.S. 95, 96, the capital defendant was prevented at his trial from introducing evidence from his codefendant's separate trial that had been elicited and used by the prosecution to establish that the codefendant alone had murdered the victim. After the prosecution succeeded in excluding this evidence on state-law based hearsay grounds, defendant was convicted and sentenced to death. The Supreme Court reversed the penalty judgment and held

> "Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, [Citation.], and substantial reasons existed to assume its reliability. Moore made his statement spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence. The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it. Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it. [Fn omitted.] In these unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.' [Citation.]. [Fn. omitted.] Because the exclusion of Pasby's testimony denied petitioner a fair trial on the issue of punishment, the sentence is vacated and the case is remanded for further proceedings not inconsistent with this opinion."

(*Green v. Georgia, supra*, 442 U.S. at p. 97.)

In *People v. Weaver* (2001) 26 Cal.4th 876, 980-981, the defense's mental health expert testified he developed a diagnostic tool called the "Vietnam Era Stress Inventory (VESI)" that he believed helped diagnose whether an individual suffered from war-induced post traumatic stress disorder. The expert administered the VESI to the defendant and tape recorded his responses. The trial court excluded the videotapes as unreliable because the defendant made them to support his claim of insanity and there was no basis from which to conclude with any

degree of certainty that his statements on the tapes were true. The Supreme Court affirmed the trial court's ruling and agreed the tapes were self-serving and unreliable because the prosecution was unable to test the statements' truth through cross-examination. In rejecting the defendant's claim that the trial court's exclusion of the tapes violated his rights to due process and a reliable penalty determination, the *Weaver* court held that *Green v. Georgia* does not negate the state's rules of evidence by allowing capital defendants to introduce all evidence offered for a sentence less than death.

In Mr. Lightsey's case, the prosecution called all three doctors as its witnesses in pretrial proceedings on Mr. Lightsey's competence to represent himself and moved to admit their reports into evidence. The prosecution had an unlimited opportunity to question the doctors during their lengthy testimony and object to anything they wrote or said that it believed was objectionable or improper, and the prosecution urged the trial court – indeed, the same judge later who presided over Mr. Lightsey's trial – to consider the evidence from the doctors in deciding whether Mr. Lightsey was competent to waive counsel. Finally, the trial court relied in significant part on the doctors' testimony and reports in deciding that Mr. Lightsey was competent to waive counsel and represent himself. Under the circumstances, the trial court abused its discretion by excluding the doctors' reports and thereby violated not only the rules governing the scope of expert testimony, but also Mr. Lightsey's federal and state constitutional rights to due process and to have his sentencing jury consider all relevant evidence he proffered for a sentence less than death. (*People v. Bowker, supra,* 203 Cal.App.3d at p. 390; *Skipper v. South Carolina, supra,* 476 U.S. at p. 4; *Green v. Georgia, supra*, 442 U.S. at p. 97.)

In his Opening Brief, Mr. Lightsey detailed the reasons why his father's conduct was highly relevant to the question of whether it was relevant mitigating evidence. (Opening Brief at pp. 207-209.) Although Dr. Pierce was allowed to testify in some detail about Mr. Lightsey's father's conduct, including labeling it

"psychotic," the trial court prevented Dr. Pierce from rendering an opinion about how and why Mr. Lightsey's father's conduct contributed to Mr. Lightsey's profound mental disorder. (31 RT 6713-6714.)

Given the recognized genetic and environmental causes of serious mental illness and Dr. Pierce's belief that Mr. Lightsey was greatly affected by his father's behavior, Dr. Pierce's more detailed opinion testimony about Mr. Lightsey's father's symptomatic behavior and mental illness at the time of his involuntary psychiatric commitment would have been very relevant evidence as to Mr. Lightsey's own mental illness. (30 RT 6406-6407; 31 RT 6713-6714.) (See also *Eddings v. Oklahoma, supra,* 455 U.S. at pp. 115-116, discussing the relevance and importance of parental conduct, behavior, and mental health to the development and existence of mitigation evidence during the penalty phase.) Accordingly, the trial court abused its discretion and evidenced its fundamental misunderstanding of the defense's right to present mitigating evidence by sustaining the prosecutor's relevancy objection to Dr. Pierce's expert opinion testimony about Mr. Lightsey's father's psychiatric commitment. (See *People v. Hart* (1999) 20 Cal.4th 546, 637-638, *In re Gay* (1998) 19 Cal.4th 771, 816, and *Eddings v. Oklahoma, supra,* 455 U.S. at pp. 115-116)

D. The Trial Court's Rulings Limiting Dr. Pierce's Testimony Were Prejudicial And Require The Reversal Of Mr. Lightsey's Judgment Of Death

The erroneous limitation on Dr. Pierce's testimony violated Mr. Lightsey's federal and state constitutional rights to due process and a reliable penalty determination under the Eighth and Fourteenth Amendments to the United States Constitution and the analogous provisions of the California Constitution which require that his right to present the jury with all relevant evidence proffered as a basis for a sentence less than death be as unrestricted as possible. (See *Skipper v. South Carolina, supra,* 476 U.S. at p. 4; *Ake v. Oklahoma, supra,* 470 U.S. at pp. 76, 77, 80-81.)

The importance of mental health expert opinion testimony in Mr. Lightsey's case was manifest. Major mental illness is well recognized as a basis for finding diminished culpability and reduced ability to assist effectively in one's own defense that militate against the death penalty. (See 31 RT 6866; *Ford v. Wainwright, supra,* 477 U.S. 413, 417; *People v. Danks, supra,* 32 Cal.4th at pp. 321-322; *Williams v. Cain* (W.D.La., 1996) 942 F.Supp. 1088, 1094-1095.) [25] In Mr. Lightsey's case, such evidence also would have explained and mitigated his bizarre and self-defeating behavior before the judge and jury.

The trial court instructed the jury about expert opinion testimony during the penalty as follows:

> "A person is qualified to testify as an expert if he has special knowledge, skill, experience, or education sufficient to qualify him as an expert on the subject to which his testimony relates.
>
> "A duly qualified expert may give an opinion on questions in controversy at a trial.
>
> "To assist you in deciding such questions, you may consider the opinion with the reasons given for it, if any, by the expert who gives the opinion.
>
> "You may also consider the qualifications and credibility of the expert.
>
> "You are not bound to accept an expert opinion as conclusive. But should give it the weight to which you think you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable."

(32 RT 6912-6913.)

Given the instruction on expert opinion testimony that told the jury essentially that Dr. Pierce's opinion testimony was only as good as the information

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[25] The record is replete with instances of Mr. Lightsey's acting out and interfering with his counsel's ability to defend him. (See for example 26 RT 5518-5520; 30 RT 6398, 6399, 6409, 6432, 6438, 6445, 6449; 31 RT 6556-6558; 32 RT 6821, 6833, 6856-6862, 6865-6866, 6967-6969.)

upon which it was based, it was necessary and critical to Mr. Lightsey's penalty defense that the jury be allowed to consider Dr. Pierce's opinion and the reasons for it without unreasonable limitation.

In her penalty phase argument, the prosecutor exploited the exclusion of evidence, attacking Dr. Pierce's competence, credibility, and ethics. (RT 6838-6840.) The prosecutor argued that Dr. Pierce was nothing more than a well-paid, hired gun who testifies only for the defense in capital and other first degree murder cases. (RT 6838-6839.) Consistent with her other challenges to Dr. Pierce's competency and ethics, the prosecutor also argued that Dr. Pierce's refusal to agree with her suggestion that Mr. Lightsey suffered from an antisocial personality disorder was only because he did not want to testify in a way harmful to Mr. Lightsey. (RT 6840.)

Here, Drs. Manohara and Velosa had evaluated Mr. Lightsey's competency to stand trial and represent himself. (2 Conf. CT 392, 400.) [26] Mr. Lightsey provided them with information about his case , his deep-seated belief that he was falsely accused of murder, and he was being misrepresented by a series of different counsel. (2 Conf. CT 392, 402.) Both doctors recognized the stream of manic and pressured thinking that caused Mr. Lightsey to ramble on and avoid answering the questions put to him. (2 Conf. CT 393, 402.) Mr. Lightsey provided both doctors with his alibi theory and conspiracy allegations, and both doctors noted Mr. Lightsey's exaggerated sense of self-importance and believed his grasp on reality was tenuous at best. (2 Conf. CT 393-394, 402-404, 405.) Though the doctors may not have identified the specific personality disorders afflicting Mr. Lightsey, they agreed that Mr. Lightsey was severely mentally disturbed, they agreed that he lacked insight into his mental health problems, and they believed that it would be highly problematic to defend him because of his

[26] Dr. Burdick's opinion about Mr. Lightsey cannot reasonably be construed as the product of an evaluation, since Mr. Lightsey refused to speak with him for more than a minute or two.

profound mental illness. (See 2 Conf. CT 395, 405.)

The reports from Drs. Manohara and Velosa supported Dr. Pierce's diagnosis and, given the nature of the instruction to the jury and the prosecutor's argument, it was necessary to Mr. Lightsey's defense that the jury hear the details from the reports supporting Dr. Pierce's opinion testimony. As emphasized in cases like *Atkins v. Virginia, People v. Danks* [Justice Kennard's concurring and dissenting opinion], and *Williams v. Cain,* the reports from Drs. Manohara and Velosa were highly relevant because they supported and buttressed Dr. Pierce's opinion that Mr. Lightsey's mental illness and lack of insight into his own personality disorders and inability to assist with his defense rendered him less culpable and less deserving of the death penalty. Because the reports from Drs. Manohara and Velosa were relevant and reliable evidence and Dr. Pierce's opinion about Mr. Lightsey's father's conduct at the time of his psychiatric commitment would have heightened the overall reliability and weight of Dr. Pierce's opinion testimony, the erroneous exclusion of that evidence was not harmless beyond a reasonable doubt and Mr. Lightsey's judgment of death must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Fudge* (1994) 7 Cal.4th 1075, 1117; *Skipper v. South Carolina, supra,* 476 U.S. at pp. 7-9.)

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IX.

MR. LIGHTSEY'S SENTENCE OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT PREJUDICALLY ERRED IN ALLOWING THE JURY TO CONSIDER AN INVALID AND UNCONSTITUTIONAL 'FACTOR (B)' AGGRAVATOR DURING ITS PENALTY PHASE DELIBERATIONS.

A. Respondent's Contentions

"THE TRIAL COURT PROPERLY INSTRUCTED THE PENALTY PHASE JURY THAT IT COULD CONSIDER APPELLANT'S CONDUCT DURING HIS ALTERCATION WITH KERN COUNTY SHERIFF'S DETENTION OFFICER CRISTOBAL JUAREZ AN AGGRAVATING FACTOR UNDER SECTION 190.3, SUBDIVISION (b)." (RB 193.)

B. The Trial Court Erred in Allowing Consideration of Appellant's Nonviolent Encounter with a Jail Officer

Under California's capital sentencing scheme, a sentence of death must be based on only valid aggravators. (Pen. Code, § 190.3.) In Mr. Lightsey's case, the jury used an invalid aggravator to sentence him to death, requiring reversal of his sentence. Specifically, the prosecution argued in aggravation that merely clenching one's fists at one's side could constitute both the crime of resisting arrest under Penal Code section 148 and an implied threat of violence. The trial court agreed and instructed the jury that such a fist-clenching during a search of his cell during pretrial detention could appropriately be used to sentence Mr. Lightsey to death as "the use or attempted use of force or violence or the express or implied threat to use force or violence." (Pen. Code, § 190.3(b).)

As previously demonstrated (AOB 213-225), such behavior did not qualify as a violent act aggravator. (*People v. Quiroga* (1993) 16 Cal.App.4th 961, 966; *Houston v. Hill* (1987) 482 U.S. 451, 461; *Duran v. City of Douglas, Ariz.* (9th Cir. 1990) 1372, 1378.) The trial court therefore prejudicially erred in allowing consideration of this conduct as aggravation (*People v. Boyd* (1985) 38 Cal.3d

762, 772-777), thereby violating Mr. Lightsey's federal constitutional rights to a fair trial with due process of law, and to a proportionate and reliable verdict of death (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28), and his due process right to be sentenced by the state in accordance with the law that permits only valid section 190.3 aggravators to be used to sentence him to death. (U.S. Const., Amends. 5, 14; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

1. Mr. Lightsey's Actions Did Not Indicate a Threat of Violence

To counter this argument, respondent first attempts to rely on three cases allegedly standing for the proposition that clenched fists at one's side alone can serve as a valid factor (b) aggravator. (RB 198, citing *Mathews v. Workmen's Compensation Appeals Board* (1972) 6 Cal.3d 719, 727; *People v. Hughes* (2002) 27 Cal.4th 287, 383; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 589.) However, none of the three cited cases actually stand for this proposition.

Respondent primarily relies on a thirty-six year old civil case involving a principal of workers compensation law, apparently finding no criminal cases to support her position. (*Mathews v. Workmen's Compensation Appeals Board, supra,* 6 Cal.3d 719, 727.) However, even *Mathews* does not stand for the proposition that merely standing with one's fists clenched at one's side could reasonable convey a threat of violence. Instead, in *Mathews* this Court found that (a) *charging towards* another person at a full run, (b) *immediately after* an "altercation" involving an abusive round of cursing and implied verbal threats, (c) *and* clenching one's fists at one's side while charging towards the one with whom the altercation had just occurred -- *together* -- might reasonably convey a potential threat of violence. (*Id.* at p. 178 [holding such acts could reasonably lead to a finding that a person initiated a fight between two workers].) Thus, *Mathews* is plainly distinguishable from the case at bar, even assuming this civil workers compensation law case was applicable.

The other two cases cited by respondent are even more inapplicable. In

Hughes, the challenged factor (b) aggravator was possessing what was determined to be a 'shank' or prison-made weapon while incarcerated, which Mr. Lightsey concedes would reasonably convey a threat of potential violence. (*Hughes, supra*, 27 Cal.4th at p. 383.) Similarly, in *Tuilaepa*, the challenged factor (b) aggravator was contraband razors hidden in an inmate's cell, which Mr. Lightsey concedes would reasonably convey a threat of potential violence. (*Tuilaepa, supra*, 4 Cal.4th at p. 589.) Yet Mr. Lightsey was not accused of smuggling weapons into prison, as alleged in *Hughes* and *Tuilaepa*. Instead, he merely stood motionlessly with his fists clenched at his sides, never raised them, never charged anyone at a run, as occurred in the *Mathews* case, and therefore never made a threat of violence. None of the three cases cited by respondent support their argument to the contrary.

Respondent next purports to rely on the *Monterroso* case, where an inmate flew into an "absolute rage, shook the cell door, and screamed repeatedly that he was going to kill the deputy with a shank the next chance he got," which Mr. Lightsey fully agrees would be a valid threat of violence. (RB 201, citing *People v. Monterroso* (2004) 34 Cal.4th 743, 775.) But Mr. Lightsey never made such verbal threats to "kill" Officer Juarez "with a shank the next chance he got," but instead stood motionless with only his fists clenched at his side. While respondent emphasizes that Mr. Lightsey was standing close to Juarez during this exchange, this was only due to the fact that they were both inside Mr. Lightsey's small cell. There was certainly no evidence introduced that Mr. Lightsey moved towards Officer Juarez in a confrontational manner. Instead, all Mr. Lightsey did was respond to Juarez' order to get out of his bed and stand beside it.

As this Court has recently made plain in two recent cases, what is necessary to show a threat of violence in a detention context for factor (b) purposes is an *actual threat*, such as telling an officer "that he knew or could find out where they lived, and that [the appellant] would kill them" or "threaten[ing] to kill [the officer's] wife and burn down his house." (*People v. Harris* (2008) 43 Cal.4th 1269, 1311 [rejecting appellant's argument that such verbal threats did not

constitute a threat of violence].) Mere misconduct while detained, even if illegal, is not a valid factor (b) aggravator unless it contains "actual or threatened violence" against a "person." (*People v. Lewis* (2008) 43 Cal.4th 415, 527 [holding that illegally punching hole through wall in cell only threat to property, and therefore assuming that improperly admitted as factor (b) evidence].)

What is instead needed are "*violent* episodes of resistance. [citation]." (*People v. Livaditis* (1992) 2 Cal.4th 759, 775, emphasis added.) As Mr. Lightsey's passive actions was hardly such a violent episode of resistance it could therefore not serve as a valid 'factor (b)' aggravator. (*Id.* at p. 776.) In short, because there was no threat of violence by Mr. Lightsey, this was an invalid factor (b) aggravator and its admission an abuse of the trial court's discretion. (*People v. Livaditis, supra,* 2 Cal.4th 759, 775.)

2. Mr. Lightsey Did Not Violate Penal Code Section 148

It must also be recalled that in order to use an unadjudicated prior act in aggravation under factor (b), it must be *both* an act of violence or implied threat of violence *and* a violation of criminal law. (*People v. Boyd, supra*, 38 Cal.3d 762, 772 [factor (b) aggravators must constitute "criminal activity."]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1259 [same].) Respondent nevertheless argues that Mr. Lightsey's actions constituted such a violation of the penal statute of resistance to arrest, relying on the case of *In re Muhammad C.* (2002) 95 Cal.App.4th 1325. (RB 199.)

Yet *In re Muhammed C.* is plainly distinguishable from Mr. Lightsey's case. In Muhammed, the defendant "willfully delayed" the officers in the process of arresting a third party by (a) disobeying "five orders" from "three" different officers, (b) by affirmatively refusing to obey the officers orders by extending "his right hand out to the back, raising his palm towards the officers" in a gesture of defiance, and (c) by pulling "his arm out of [the officers] grasp" when they physically tried to stop the defendant from his contacts with the third party being arrested. (*Id.* at pp. 1328-1330.) Mr. Lightsey's actions were therefore plainly

distinguishable from this much more direct and obstructive conduct: he did disobey five orders from three separate officer, nor did he pull his arm away from the grasp of officers trying to get him to desist in his actions.

No criminal violation of section 148 occurred via Mr. Lightsey's mere failure to respond to Deputy Juarez's commands with alacrity or enthusiasm. (*People v. Quiroga, supra,* 16 Cal.App.4th 961, 966.)[27] Mr. Lightsey's acts in the instant case could therefore not be used as a valid aggravator, because even if Mr. Lightsey's acts could somehow be construed as an implied threat of violence, which they cannot, a "threat of violence which is not in itself a violation of a penal code is not admissible under factor (b)." (*People v. Pensinger, supra,* 52 Cal.3d 1210, 1259.)

3. The Trial Court Erred In Instructing That the Conduct Was a Valid Factor (b) Aggravator

Alternatively, respondent argues that even if admitting the evidence was erroneous, "the jury was instructed not to consider the evidence regarding the threat to Officer Juarez unless it found the prosecution had proven all the elements of the violation of section 148 beyond a reasonable doubt." (RB 203.) This is misleading and incorrect.[28]

As this Court has recently made plain, whether conduct involves the "threat of force or violence" is a "*legal* issue to be decided by the court," and the jury's

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[27] To hold otherwise in a published California Supreme Court opinion, as respondent proposes, would improperly ignore decades of this Court's rulings, and substantially expand the reach of Penal Code sections 69 and 148 in not just this case, but in all cases, by criminalizing even such minor behavior.

[28] Moreover, even correct instructions cannot cure insufficiency of evidence. In the penalty phase of a capital case, this issue of sufficiency takes on an additional complexity because (1) the jury makes no explicit factual finding as to the aggravator, and (2) there is no requirement that any two jurors agree on whether the aggravator has been proven, as long as (3) each juror finds, on his or her own, enough aggravation to outweigh the mitigation and warrant that juror's individual decision that death is the appropriate penalty. It is impossible to determine in Mr. Lightsey's appeal whether any juror found this aggravator true or was influenced by it in voting for death.

role is merely to adduce if the alleged facts occurred. (*People v. Howard* (2008) 42 Cal.4th 1000, 1027-1028 [holding trial court properly made legal decision that possession of a weapon in jail, if factually found to be true by jury, constituted a valid factor (b) aggravator], emphasis added.) In Mr. Lightsey's case, the facts of his clenching of fists by his side were not in major dispute, making the jury's finding inevitable. It was the trial court's erroneous instruction that such *facts* could properly be considered a "threat of force or violence" that was erroneous, and this was not rendered harmless by the *factual* finding by the jury. (*Ibid.*)

C. The Error Violated Mr. Lightsey's Constitutional Rights To A Fair Trial, Due Process, And A Reliable and Proportionate Verdict.

As previously demonstrated, the improper use of this invalid aggravator caused the jury to unconstitutionally add this incident to "death's side of the scale," thereby rendering the penalty determination unreliable and disproportionate, as well as violating Mr. Lightsey's rights to due process of law. (AOB 220-222, citing *Stringer v. Black* (1992) 503 U.S. 222, 232; see also *California v. Brown* (1987) 479 U.S. 538, 543 [discussing heightened need for reliability in capital cases]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [same].) Given this heightened need for reliability in capital cases and the jury's use of an invalid aggravator to sentence Mr. Lightsey to death, the death verdict is simply too uncertain to be allowed to stand. (*Woodson v. North Carolina, supra,* 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358.)

Respondent argues that this violation of Mr. Lightsey's constitutional rights has been waived. (RB 203.) However, the violation of law went to the deprivation of his fundamental constitutional rights to a fair trial, a fair and impartial jury, and a reliable penalty determination under the federal and state constitutions. As such he is not precluded from raising his claim on appeal. (*People v. Vera* (1997) 15 Cal.4th 269, 276-277 [holding a "defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights."]; see also *People v. Cole*

(2004) 33 Cal.4th 1158, 1195, fn. 6; *People v. Partida* (2005) 37 Cal.4th 428, 433-439.)

D. The Error Requires Reversal

1. Standard of Review

Finally, respondent fails to respond at all to the Mr. Lightsey's reliance in his AOB of the United States Supreme Court rule that "[a]n invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (AOB 220-225, citing *Brown v. Sanders* (2006) 546 U.S. 212, 220, emphasis in original.)

Respondent therefore appears to concede, as they must, that there no "other sentencing factors" which would have enabled the jury "to give aggravating weight to the same facts and circumstances" of the fist-clenching incident. (*Ibid.*) Mr. Lightsey's sentence of death must therefore be reversed even without a showing of prejudice.

2. The Error Was Not Harmless

As previously demonstrated (AOB 222- 225), even if the old harmless error rule had not been overturned by *Brown v. Sanders*, the erroneous admission of the invalid factor (b) could hardly be shown to be harmless beyond a reasonable doubt. (*Stringer v. Black, supra*, 503 U.S. 222, 230; *Chapman v. California, supra*, 38 U.S. 18, 24.)

The prosecution made this incident one of the centerpieces of both her opening statement and closing arguments in favor of sentencing appellant to death. During opening statements, she stressed that Mr. Lightsey was worthy of death because he had "threatened" a correctional officer while awaiting trial. (29 RT 6235.) During closing arguments she argued that "when Lightsey squared up to Officer Juarez, clenched his hand at his sides as Officer Juarez demonstrated, then

that is an implied threat to use force or violence, and you can consider that as a factor in aggravation." (32 RT 6836-6837.) Beyond arguing that this act of "violence" made Mr. Lightsey worthy of death, she also hammered home the theme that it made him a severe "danger to correctional officers," because it showed his was someone who was "willing to fight with a correctional officer." (32 RT 6849; see also 32 RT 6850)

Such a "heavy emphasis" on an invalid aggravator during "closing arguments" is one of the main tools to analyze the prejudice of the admission of such an invalid aggravator. (*People v. Walker, supra*, 47 Cal.3d 605, 640 [error harmless where no emphasis on invalid aggravator during closing arguments]; see also *People v. Lewis, supra*, 43 Cal.4th 415, 527 [error harmless where only "played a very small role in the prosecutor's closing argument"].) Here the prosecution's heavy emphasis on the invalid aggravator during closing arguments was extremely prejudicial. (*Lewis, supra*, 43 Cal.4th 415, 527.)

Mr. Lightsey's sentence of death must therefore be reversed, as the use of this invalid aggravator cannot be shown to be harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 38 U.S. 18, 24.) Even under California's lesser standard, the prosecution's reliance on this invalid aggravator as one of the primary arguments for death makes plain that there was a "reasonable possibility" that the jury would have returned a life sentence absent the error. (*People v. Brown* (1988) 46 Cal.3d 432, 447.)

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X.

THE TRIAL COURT'S DENIAL OF MR. LIGHTSEY'S REQUEST TO ADDRESS THE JURY BEFORE HIS PENALTY VERDICT WAS ANNOUNCED VIOLATED HIS CONSTITUTIONAL AND STATUTORY RIGHTS TO ALLOCUTION AND REQUIRES THE REVERSAL OF HIS JUDGMENT OF DEATH

A. Respondent's Contention

"The trial court properly refused to allow appellant to address the jury before the penalty verdict was announced." (RB 203.)

B. Criminal Defendants In California Now Have The Constitutional and Statutory Rights To Make A Personal Statement In Mitigation, But Only If The Defendant Makes The Statement Under Oath And Is Subject To Cross-Examination

In his Opening Brief, Mr. Lightsey cited the Court of Appeals' decisions in *In re Shannon B.* (1994) 22 Cal.App.4th 1235, 1242-1246, and *People v. Evans* (2006) 135 Cal.App.4th 1178, 1182-1186, in support of his argument that the trial court in Mr. Lightsey's case erred by denying his right to allocution before the jury. (Opening Brief at p. 236.) Respondent noted that this Court granted review in *Evans*. (RB 218, fn. 23.) Since the filing of Respondent's Brief in November 2007, this Court decided *Evans* and disapproved the decision in *Shannon B.*

In *People v. Evans* (2008) 44 Cal.4th 590, this Court said

> "In legal parlance, the term 'allocution' has traditionally meant the *trial court's inquiry of a defendant* as to whether there is any reason why judgment should not be pronounced. (Citations.) In recent years, the word 'allocution' been often used for *a mitigating statement made by a defendant in response to the court's inquiry.* (Citation.) Here, we apply the term's traditional meaning."

(*Id.*, at p. 592, fn. 2, original italics.) The issue in *Evans* was whether a criminal defendant in California has the right under Penal Code section 1200 to make an unsworn personal statement in mitigation of punishment.

The lower court in *Evans* held that Section 1200 limits a defendant's ability

to make a statement to the matters enumerated in Section 1201 [judgment should not be imposed because the defendant is insane, the trial court should grant a motion in arrest of judgment, or the court should order a new trial]. (*Id.*, at p. 594.) According to this Court, "California law [through Penal Code section 1204] gives a defendant the right to make a personal statement in mitigation of punishment but only while under oath and subject to cross-examination by the prosecutor." (*Id.*, at pp. 592-593.)

The *Evans* court also addressed the decision in *In re Shannon B., supra,* 22 Cal.4th 1235, that held Penal Code sections 1200 and 1201 together give defendants not only the right to assert insanity or grounds in arrest of judgment or for a new trial, "'but also the right to make a personal statement and present information in mitigation of punishment.' (Citation.)" (*People v. Evans, supra,* 44 Cal.4th at p. 597.) After recognizing the goal of statutory construction is to implement the Legislature's intent, the Court held that Section 1200 does not by its express language provide such a right, and disapproved the decision in *Shannon B.* on that basis. (*Id.*, at p. 598, fn. 5.) Instead, this Court held that Section 1204 satisfies a defendant's rights to due process under the Fourteenth Amendment to the United States Constitution by allowing him to be heard during sentencing at a meaningful time and in a meaningful manner "to make a *sworn* personal statement in mitigation that *is subject to cross-examination* by the prosecution." (*Id.*, at p. 600, original italics.)

C. By Enacting Sections 1200 And 1204 And Thereafter Modifying Section 1204, The Legislature Intended That Evidence Offered In Aggravation And Mitigation Be Made Through Testimony Under Oath And Subject To Cross-Examination But Did Not Intend By Those Provisions To Require That A Defendant's Personal Statement In Mitigation Be Subject To Such Requirements

In *Evans,* the Court discussed the Legislature's enactment of Section 1200 in 1872 when the prevailing legal practice in England, the United States, and California "was that in response to the trial court's inquiry whether there was any

legal cause why judgment should not pronounced, the defendant could make a personal statement asking for lesser punishment." (*People v. Evans, supra,* 44 Cal.4th at p. 597.) Contrary to this Court's conclusion. The Legislature's enactment of Section 1204 did not evidence an intent that a defendant's personal statement offered in mitigation be subject to oath and cross-examination.[29]

It is well-settled that the goal of statutory construction is to implement the intent of the Legislature that enacted the statute, and such construction presumes the Legislature meant what it said, and the plain meaning of the statute controls. (*People v. Evans, supra,* 44 Cal.4th at p. 597.) Further, when the Legislature enacted Section 1200 and 1204, it was "presumed to be aware of '"judicial decisions already in existence, and to have enacted or amended a statute in light thereof. [Citation.]" ' [Citation.]" (*People v. Giordano* (2007) 42 Cal.4th 644, 659.) Moreover, when the Legislature uses a term well-understood by the common law, courts must presume that the Legislature intended the common law meaning. (*People v. Newby* (2008) 167 Cal.App.4th 1341, 1346-1347, citing *People v. Ogen* (1985) 168 Cal.App.3d 611, 622.) As noted by the Court of Appeal in *C.R. v. Tenet Healthcare Corp.* (2009) __ Cal.App.4th ___ [2009 WL 19130]

> "Our Supreme Court has explained: '"As a general rule, "[u]nless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules. [Citation.] 'A statute will be construed in light of common law decisions, unless its language'" 'clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter....' [Citations.]" [Citation.]' (Citation.) Accordingly, '"[t]here is a presumption that a statute does not, by implication, repeal the common law. [Citation.] Repeal by implication is

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[29] Moreover, there is no evidence in the appellate record that Mr. Lightsey would not have agreed to make his allocution under oath and subject to subsequent cross-examination if these conditions had been offered to him. Indeed, Mr. Lightsey had already testified under oath at the penalty phase, and it is plain from the record that he believed he was telling the truth and had no fear of cross-examination. Instead, the trial court refused to let Mr. Lightsey address the jury directly under any terms.

recognized only where there is no rational basis for harmonizing two potentially conflicting laws." (Citations.)'"

(2009 WL 19130 at p. 10.)

Section 1204 was also enacted in 1872, and currently provides as follows:

"The circumstances [in aggravation and mitigation of punishment] shall be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section. This section shall not be construed to prohibit the filing of a written report by a defendant or defendant's counsel on behalf of a defendant if such a report presents a study of his background and personality and suggests a rehabilitation program. If such a report is submitted, the prosecution or probation officer shall be permitted to reply to or to evaluate the program."

(West's Ann. Cal. Pen. Code § 1204.) In *Evans*, this Court concluded that Section 1204 requires the court to receive evidence either in aggravation or mitigation of punishment only through the testimony of witnesses examined in court, and the Legislature intended that a defendant's right to make a statement in mitigation of punishment be made under oath and subject to cross-examination. Mr. Lightsey respectfully disagrees.

The Legislature modified Section 1204 in 1971 in pertinent part as follows:

"This section shall not be construed to prohibit the filing of a written report by a defendant or defendant's counsel on behalf of a defendant if such a report presents a study of his background and personality and suggests a rehabilitation program. If such a report is submitted, the prosecution or probation officer shall be permitted to reply to or to evaluate the program." (West's Ann. Cal. Pen. Code § 1204.)

(West's Ann. Cal. Pen. Code § 1204, Amended by Stats. 1971, c. 1080, p. 2052, § 1.) By providing the defendant may submit a written report regarding his or her appropriate punishment without expressly requiring it be under oath or the report's

preparer being subject cross-examination, the Legislature intended in Section 1204 that defendants be allowed to offer reasons in mitigation of punishment without the requirement of oath or cross-examination but subject to the prosecution's right to reply and rebut those reasons.

When enacting Section 1200 in 1872, the Legislature included the phrase "any legal cause to show why sentence judgment should not be pronounced" in the statute, and in 1872 this phrase meant that defendant had the right to make a personal statement in support of mitigation without any requirement it be under oath or subject to cross-examination. (See *People v. Evans, supra,* 44 Cal.4th at p. 597.) When the Legislature enacted Section 1204 in 1872 and modified it in 1971, the statute's language did not suggest the Legislature intended it to alter or abrogate the common law's "legal practice" of allowing a defendant the right to offer a personal statement in support of mitigation without requiring the statement be under oath or subject to cross-examination. Instead, there is a rational basis for harmonizing Sections 1200 and 1204 – the Legislature intended by these statutes to treat a defendant's personal statement concerning reasons for mitigation of punishment differently from "evidence" offered in support of aggravation or mitigation of punishment. Because it is presumed that a statute does not by implication repeal the common law and the above harmonization is consistent with the common law and the Legislature's intent to treat a defendant's personal statement offered in mitigation differently from evidence offered in aggravation or mitigation, this Court's determination that the Legislature intended to allow a defendant to make a personal statement but only on oath and subject to cross-examination is incorrect.

In *Crawford v. Washington* (2004) 541 U.S. 36, the United States Supreme Court extensively discussed the common law in the context of the right to confrontation. According to the high court, the Sixth Amendment demands what the common law required in the context of the right to confrontation and cross-examination. The same rationale should apply here to defendant's right to make a

personal statement without being subject or oath or cross-examination. The common law right to be heard through a personal statement in mitigation of punishment at a meaningful time and in a meaningful way requires, in the context of the Fourteenth Amendment's due process clause, that a defendant be allowed to make his personal statement free of the constraints that the statement be made under oath and subject to cross-examination. As sagely noted by the district court in *United States v. Chong* (D.Hawaii 1999) 104 F.Supp.2d 1232, 1236, "the fear of cross-examination might compel capital defendants to forego addressing the jury and offering pleas for mercy, expressions of remorse, or some explanation that might warrant a sentence other than death."

This concern finds further support in the concurring and dissenting opinion in *State v. Colon* (2004) 272 Conn. 106, [864 A.2d 666, 842-846], where Justice Katz relied on the rationale in *Chong* to "conclude that the common-law right of allocution entitles a capital defendant personally to address the sentencing jury and plead for mercy without subjecting himself to cross-examination." In addition, Justice Katz correctly observed that the purposes of capital sentencing schemes are furthered by the right to allocution because it protects the defendant's interest in "receiving individualized consideration when faced with the death penalty. [Fn. omitted.]" (*Id.*, at pp. 845-846.) Finally, Justice Katz noted, consistent with Section 1204, that the right to allocution is not unlimited because it should involve only a plea for mercy based on facts already in evidence and uncontested by the prosecution, combined with a limiting instruction to preserve the reliability and accuracy of the capital sentencing proceeding. (*Id.*, at p. 846, fn. 6.)

D. Prejudice

Mr. Lightsey's penalty jury deliberated only briefly before announcing they had reached a verdict of death. Though Mr. Lightsey testified under oath at the penalty phase of his trial and was subject to cross-examination, an inspection of the entire record establishes that he struggled throughout his trial to address the

jury, but his attempts to do so were consistently thwarted by the court, counsel, and/or the bailiff. Dr. Pierce concluded that Mr. Lightsey was seriously mentally ill and opined that he did not deserve the death penalty for that reason. Because Mr. Lightsey was prevented from addressing the jury in allocution, the jury was denied the opportunity to see first hand the nature and extent of his mental illness when he addressed them in a personal statement in deciding whether to give effect to the doctor's opinion he should not be put to death.

It takes no stretch of the imagination to conclude that Mr. Lightsey's allocution would have involved his claims that he did not commit the crimes against Mr. Compton and he was being "railroaded" by the criminal justice system in Kern County, the same things he tried to express many times throughout his trial but was prevented from fully articulating. As such, Mr. Lightsey's allocution would have consisted of information considered and rejected by the jury that found him guilty of the charged offenses and not matters contested by the prosecution at this stage of the proceedings.

In its brief [RB 204-216], respondent detailed Mr. Lightsey's conduct throughout his portions of trial and the trial court's attempts to restrain his comments and behavior. Dr. Pierce believed that Mr. Lightsey was seriously mentally ill and not deserving of the death penalty, and his conduct throughout the trial, including when the verdicts were read ,graphically illustrated the extreme nature of Mr. Lightsey's mental illness. The trial court's instruction to the jury to ignore Mr. Lightsey's behavior when the verdict was read (8 CT 2307; 32 RT 6926) could reasonably have persuaded the jury to ignore his conduct throughout his trial and thereby ignore evidence establishing the extreme nature of his mental illness. For this reason, he trial court's refusal to allow allocution is not harmless under the federal or state standards of review and requires that his judgment of death be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

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XI.

MR. LIGHTSEY'S SENTENCE OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT PREJUDICALLY ERRED IN FAILING TO INSTRUCT THE JURORS TO DISREGARD THE FACT THAT HE WAS VISIBLY SHACKLED THROUGHOUT HIS PENALTY PHASE PROCEEDINGS.

A. Respondent's Contention

"THE TRIAL COURT PROPERLY DID NOT INSTRUCT THE JURY SUA SPONTE TO DISREGARD APPELLANT'S SHACKLES BECAUSE THE SHACKLES WERE NOT VISIBLE TO THE JURY." (RB 221.)

B. The Shackles Were Visible to the Jury During the Penalty Phase, Requiring Instruction Pursuant to CALJIC 1.04.

As previously demonstrated in Argument 7, Mr. Lightsey was visibly shackled throughout his guilt phase proceedings. These same procedures of using visible restraints and shackles were used during the penalty phase as well. The prejudice resulting from the trial court's error in failing to instruct the jurors to disregard the fact that Mr. Lightsey was visibly shackled was amplified due to the fact that Mr. Lightsey testified during the penalty phase, something that did not occur during the guilt phase. (29 RT 6338 – 30 RT 6522.)

As previously demonstrated, from the pre-trial proceedings through the penalty phase, Mr. Lightsey was "hand-cuffed" and had waist "shackles" bolted to the floor (4/7/94 RT 13; 3/23/95 RT 116-118; 8/2/94 RT 215; 4/5/95 RT 347; 3/23/95 RT 115; 6 RT 1166-1167.) The system of shackles and cuffs was so cumbersome that they made "noise" so loud that it was "interrupting the Court with" Mr. Lightsey's "chains." (1 RT 116.)

Respondent argues that this system of shackling was not visible during the penalty phase. (RB 221-222.) Yet the trial court stated on the record during the penalty phase of trial that Mr. Lightsey continued to have on him this same system of "*shackles* that he had been in during the proceedings here in the courtroom" as

in the guilt phase of the trial. (33 RT 6941, emphasis added.) Based upon the aforementioned facts, the jurors undoubtedly heard and saw Mr. Lightsey's shackles during the penalty phase, as they had earlier seen and heard them during the guilt phase. (See Arg. 7.)

The trial court was therefore required to "instruct the jury *sua sponte* that such restraints shall have no bearing on the determination of defendant's guilt." (*People v. Duran, supra,* 16 Cal.3d 282, 291-292; *People v. Mar* (2002) 28 Cal.4th 1201, 1217 [accord]; see also *People v. George* (1994) 30 Cal.App.4th 262, 272-273; *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1825-1826; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 255; CALJIC 1.04; ABA Standards (1968) Trial by Jury, § 4.1(c).)

This trial court duty to instruct the jury pertaining to a defendant's restraints is equally applicable in the penalty phase. (See *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 739 [shackling rules apply to penalty phase of trial]; *People v. Givan* (1992) 4 Cal.App.4th 1107, 1117 [*Duran* rule applies to bifurcated enhancement proceedings], citing *Solomon v. Superior Court* (1981) 122 Cal.App.3d 532, 535; *Deck v. Missouri* (2005) 544 U.S. 622 [125 S.Ct. 2007, 2015-2016] [same]; *Comer v. Schriro* (9th Cir. 2007) 480 F.3d 960, 990-992 [same].) The trial court's error in failing to admonish the jury therefore violated Mr. Lightsey's state and federal constitutional rights to a fair trial, to due process of law, and to a proportionate and reliable verdict of death, requiring reversal of his verdict and sentence of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17, and 28).

C. The Error Was Prejudicial, Requiring Reversal

As previously demonstrated in appellant's opening brief, it is well settled that "the shackling of a criminal defendant will prejudice him in the minds of the jurors ... his appearance before the jury in shackles is likely to lead the jurors to infer that he is a violent person disposed to commit crimes of the type alleged." (*People v. Duran* (1976) 16 Cal.3d 282, 290.) This is especially plain given that Mr. Lightsey testified during the penalty phase, and such shackles are especially

visible when an appellant has "testified." (*People v. McDaniel, supra,* 159 Cal.App.4th 736, 746.) Put another way, the jurors perceptions of a testifying defendant are highly "vulnerable to the impact of seeing him in shackles" and negatively impact their "percep[tion]" of "his credibility." (*People v. Soukomlane, supra,* 162 Cal.App.4th at pp. 232-233.)

Accordingly, the error in failing to admonish the jury to disregard Mr. Lightsey's shackles cannot be shown to be harmless beyond a reasonable doubt. (*Comer v. Schriro, supra,* 480 F.3d 960, 992; *People v. Soukomlane, supra,* 162 Cal.App.4th 214, 232-233; *People v. Jacla, supra,* 77 Cal.App.3d 878, 891, *citing Chapman v. California, supra,* 386 U.S. 18, 24; *People v. Duran, supra,* 16 Cal.3d 282, 296, fn. 15[same].) But for the trial court's error, especially considering the substantial mitigating evidence introduced on behalf of Mr. Lightsey, the jurors might well have returned a verdict of life without parole.

Mr. Lightsey's sentence of death must be reversed.

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XII.

THE TRIAL COURT'S FAILURE TO RULE ON TWO OF THE GROUNDS RAISED IN MR. LIGHTSEY'S MOTION FOR NEW TRIAL REQUIRES THAT HIS CASE BE REMANDED TO THE TRIAL COURT FOR RENEWED HEARINGS ON THIS MOTION.

A. Respondent's Contention

"THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR NEW TRIAL." (RB 222.)

B. The Trial Court Erred By Failing To Rule On Two Of The Grounds Raised In Mr. Lightsey's Motion For New Trial.

Respondent first contends that Mr. Lightsey's argument on this claim was based on the fact that "the trial court did not state its reasons for denying the motion and the grounds of prosecutorial misconduct and error of law." (RB 224.) This is incorrect. Instead, in his opening brief Mr. Lightsey demonstrated that the trial court failed to even reach the merits of, much less grant or deny, the following issues raised in the motion: (a) "the testifying District Attorney was guilty of prejudicial misconduct before the jury" and that (b) the court "erred in the decision of a question of law" by denying appellant's section 995 motion. (AOB 247, citing 8 CT 2357.)

This failure to rule was erroneous, not subject to an abuse of discretion analysis as no discretion was ever exercised, and requires reversal of appellant's guilt phase convictions and sentence of death, and the remanding of the case to the trial court for consideration of the two unadjudicated issues. The error violated Mr. Lightsey's state and federal constitutional rights to due process of law and a proportionate and reliable verdict of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.)

1. The Trial Court Erred in Failing to Rule on Appellant's New Trial Motion Allegations Regarding Prosecutorial Misconduct

Perhaps recognizing the weakness of its preliminary argument, respondent then alternatively concedes that the trial court may have failed to rule on the new

trial motion, but argues such failure was proper. (RB 225.) Specifically, respondent alleges that the type of prosecutorial misconduct alleged (Mr. Lightsey's original prosecutor in the case perjuring himself as a witness during trial) is not envisaged in the provisions of section 1181, subdivision (5). (*Ibid.*) However, respondent cites no cases in support of this assertion, presumably conceding there are no such cases available to support this argument. Moreover, as previously demonstrated, the cases cited by the trial counsel in support of this assertion were completely inapplicable and provided no support for this contention. (AOB 250, noting inapplicability of *People v. French* (1939) 12 Cal.2d 720; *People v. Zirbes* (1936) 6 Cal.2d 425; *People v. Glenn* (1950) 96 Cal.App.2d 859.)

More to the point, it is well-settled that even if such misconduct is not included in the statutory grounds listed in section 1181, "the statute should not be read to limit the constitutional duty of trial courts to ensure that defendants be accorded due process of law." (*People v. Fosselman* (1983) 33 Cal.3d 572, 582 [IAC can be raised via motion for new trial, even though not a statutory ground for such relief].) As California's legislature "has no power, of course, to limit this constitutional obligation by statute," a trial court can and should consider any grounds raised via a motion for new trial that involves a violation of the due process right to a "fair trial." (*Ibid.*) The trial court therefore erred in failing to even consider or rule upon Mr. Lightsey's claim of prosecutorial misconduct.

2. The Trial Court Erred in Failing To Rule on Appellant's New Trial Motion Regarding the Denial of His Section 995 Motion

Respondent next argues that the trial court properly failed to rule on Mr. Lightsey's second ignored claim from his motion for new trial. (RB 226-227.) Relying on *People v. Superior Court (Edmonds)* (1971) 4 Cal.3d 605, respondent argues that the issue of the denial of a "section 995 motion" cannot be raised via "a new trial motion," but instead can only be raised "pretrial by writ." (RB 226.) Yet *Edmonds* did not deal with section 995 motions at all, instead dealing solely

with search and seizure issues related to section 1538.5. (*Edmonds, supra*, 4 Cal.3d at pp. 610-612.) Moreover, as he noted in his appeal, Mr. Lightsey *did* raise this issue by interlocutory writ, before *again* raising it in both this appeal from his judgment and in his motion for new trial. (AOB 252, citing 1 Supp. CT 45; 22 Supp. CT 6455-6788.)

Respondent next cites a series of inapplicable or distinguishable cases holding that the denial a motion for new trial is not an appealable order, as such new trial motion denials can only be heard as part of appeals from judgment. (RB 225-226, citing *People v. Duncan* (1942) 50 Cal.App.2d 184, *People v. Johnston* (1940) 37 Cal.App.2d 606.) However, respondent misses the point that Mr. Lightsey *is* raising this issue as part of his appeal from the *final judgment*, *not* as a separate appeal of the order denying the new trial motion.

Beyond this fact, the cases cited by respondent in many aspects affirmatively support Mr. Lightsey's argument that the denial of a non-statutory demurrer to the indictment (or, implicitly, a statutory motion to set aside the indictment) can be heard via a post-trial motion. In *Duncan*, for example, the appellate court held that "objections which may be presented by demurrer before plea, may further be made available *after verdict by motion* in arrest of judgment" and denied the appeal *only* on the grounds that is was appeal from an order denying a new trial motion, but conceded it could have heard the issue "on appeal from the final judgment" as Mr. Lightsey appeals here. (*Duncan, supra,* 50 Cal.App.2d 184, 186, emphasis added.) Similarly, in *Johnston*, the court held that both the denial of a "demurrer" and the denial of a "motion for new trial" could be heard on appeal from a verdict, though not from a mere order of probation. (*Johnston, supra*, 37 Cal.App.2d 606, 609.)

To the extent respondent relies on *People v. Turner* (1870) 39 Cal.3d 370, which arguably does stand for the proposition that an attack on the indictment cannot be the subject of a motion for new trial, it must be noted that the holding on the case actually dealt with juror misconduct, making any other finding mere dicta.

(*Turner, supra*, 39 Cal.3d 370, 373-374.) Indeed, the concurring opinion in this case expressly noted that anything unrelated to the actual ruling on jury misconduct was nothing more than "obiter dictum." (*Id.* at p. 778 [conc. opn. Rhodes, J.].)

More to the point, *Turner* is an almost 140-year-old case from the era of form pleading, predates the existence of either section 995 or section 1181, and was issued during a period in the history of California law when defects in the raising of the indictment required per se reversal of a judgment. It is wholly inapplicable to the modern legal regime where such procedures have been institutionalized by sections 995 and 1181 and defects in the raising of the indictment are only grounds for reversal where actual prejudice is shown. (*People v. Pompa-Ortiz, supra*, 27 Cal.3d 519.) Indeed, modern jurisprudence is plain that denials of pre-trial motions may be properly raised as the grounds for a motion for new trial. (*People v. Sherrod, supra*, 59 Cal.App.4th 1168, 1175 [denial of pre-trial motion for continuance proper grounds of motion for new trial].)

The trial court's failure to rule on this portion of the new trial motion was therefore erroneous, not subject to an abuse of discretion analysis as no discretion was ever exercised, and requires reversal of appellant's guilt phase convictions and sentence of death, and the remanding of the case to the trial court for consideration of the two unadjudicated issues.

C. The Error Both Denied Appellant a Fair Trial and Otherwise Caused Him Prejudice.

Finally, respondent argues that any error was harmless, as Mr. Lightsey has not made a "claim on appeal that the evidence was insufficient to support the guilty verdicts." (RB 228.) Yet, as respondent concedes in another portion of their brief, the *actual* standard of review on appeal is whether the error caused the defendant to be "deprived of due process" or where he "suffers prejudice." (RB 227, citing *People v. Pompa-Ortiz, supra*, 27 Cal.3d 519, 529.)

Here, both errors were extremely prejudicial, constituting a denial of the

right to due process and a fair trial. Unique to the facts of Mr. Lightsey's case, it was prejudicially impossible for Mr. Lightsey to absolve the errors from the preliminary examination through testimony at trial, because that preliminary examination was the *last time* that Deputy District Attorney Somers backed Mr. Lightsey's alibi defense. As previously demonstrated (Arg. 2), Mr. Lightsey had a very strong alibi -- which would have cleared him of the murder -- if Somers had remained consistent to his testimony from the preliminary examination. Given Somers perjurious change of testimony before the jurors during trial, however, Mr. Lightsey was prejudiced by not being able to later rely on the original truthful pro-defense testimony by Mr. Somers given in the preliminary examination. At a minimum, Mr. Lightsey was therefore denied a fair trial. (*People v. Sherrod*, supra, 59 Cal.App.4th 1168, 1175.)

D. Conclusion

The trial court prejudicially erred in failing to rule on two of the grounds raised in Mr. Lightsey's motion for new trial. This misconduct violated Mr. Lightsey's state and federal constitutional rights to an impartial jury, due process of law, and a reliable and proportional sentence of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.) Accordingly, the judgment and sentence must be reversed and the cause remanded to the superior court with directions to vacate the order denying the motion for new trial and to reconsider the motion. (*People v. Fosselman, supra,* 33 Cal.3d 572, 584.)

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XIII.

THE AUTOMATIC APPEAL PROCESS IN CALIFORNIA IS TOO TAINTED BY POLITICAL CONSIDERATIONS TO ENSURE MR. LIGHTSEY'S CONSTITUTIONAL RIGHTS ARE RESPECTED, REQUIRING PER SE REVERSAL OF HIS SENTENCE OF DEATH.

A. Respondent's Contention

"THE APPELLATE REVIEW PROCESS IS NOT IMPERMISSABILY INFLUENCED BY POLITICAL CONSIDERATIONS IN CAPITAL CASES." (RB 228.)

B. The Politicization Of The Automatic Appeal Process In California Requires Reversal of Mr. Lightsey's Convictions

Because this issue has been fully briefed by the parties [Respondent's Brief at p. 228; Opening Brief at pp. 263-275], Mr. Lightsey submits this claim on the basis of his argument presented in his Opening Brief, except to note one additional source of support for the argument published since the filing of his appeal.

A detailed academic study of the role of public opinion in states like California that have judicial retention elections has concretely proven that such elections inevitably lead to higher rates of death row affirmances. (Brace & Boyea *"State Public Opinion, the Death Penalty and the Practice of Electing Judges"* (2009) *American Journal of Political Sciences*, Vol. 52, No. 2, pp. 360-371.)

In their comprehensive research, Professors Brace & Boyea factored out all other possible influences and showed through their work that capital review systems such as the one used in California are prone to improper influences inconsistent with proper principles of due process. (*Ibid.*) Given the flawed nature of the capital review procedure in Mr. Lightsey's case, his sentence of death must be reversed due to this structural defect.

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XIV.

MR. LIGHTSEY'S VERDICT AND SENTENCE OF DEATH MUST BE REVERSED BECAUSE THEY WERE OBTAINED IN VIOLATION OF INTERNATIONAL LAW.

A. Respondent's Contention

"APPELLANT WAS NOT DENIED HIS INTERNATIONAL RIGHTS." (RB 228.)

B. Mr. Lightsey's Rights Under International Law Were Violated

Because this issue has been fully briefed by the parties [Respondent's Brief at pp. 228-229; Opening Brief at pp. 276-294], Mr. Lightsey submits this claim on the basis of his argument presented in his Opening Brief.

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XV.

THE CAPITAL SENTENCING STRUCTURE IN CALIFORNIA, BOTH GENERALLY AND AS APPLIED TO THE SPECIFICS OF MR. LIGHTSEY'S CASE, VIOLATES APPELLANT'S RIGHTS UNDER THE UNITED STATES CONSTUTION TO TRIAL BY JURY, DUE PROCESS OF LAW, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND A RELIABLE VERDICT, REQUIRING REVERSAL OF HIS SENTENCE OF DEATH.

A. Respondent's Contention

"CAPITAL SENTENCING DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS." (RB 229.)

B. California's Death Penalty Statute Violates the U.S. Constitution

Because this issue has been fully briefed by the parties [Respondent's Brief at pp. 229-239; Opening Brief at pp. 295-351], Mr. Lightsey submits this claim on the basis of his argument presented in his Opening Brief.

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XVI.

CUMULATIVE ERROR

A. Respondent's Contention

"THERE IS NO CUMULATIVE EFFECT OF ERRORS" (RB 238.)

B. The Cumulative Error In Mr. Lightsey's Case Requires The Reversal Of The Entire Judgment Against Him

Because this issue has been fully briefed by the parties [Respondent's Brief at pp. 238-239; Opening Brief at pp. 352-353], Mr. Lightsey submits this claim on the basis of the argument from his Opening Brief.

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CONCLUSION

Respondent's brief failed to overcome the arguments raised by Mr. Lightsey regarding the many errors that improperly and unconstitutionally thwarted him from presenting his unusually strong alibi defense and raising the issues related to the lack of reliable evidence directly linking him to the crime. But for these errors, Mr. Lightsey had a very real chance of being found innocent during the guilt phase of his trial.

Respondent's brief also failed to rebut Mr. Lightsey's arguments that the penalty phase of his trial was equally distorted by a series of constitutional and state law errors that denied him the opportunity of presenting a powerful case in mitigation based on his mental impairments, his mitigating social history, and a very real case of lingering doubt.

As previously demonstrated in his Opening Brief, Mr. Lightsey's convictions and judgment of death therefore cannot stand and must be reversed.

Dated: February 28, 2009

Respectfully submitted,

LAW OFFICES OF E. MICHAEL LINSCHEID

Erik N. Larson

DECLARATION OF SERVICE

Case Name: **People v. Christopher Charles Lightsey**
Case Number: **CSC Case No. S048440**

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 345 Franklin Street, San Francisco, CA 94102.

On March 4, 2009, I served the attached

APPELLANT'S REPLY BRIEF

by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and having said envelope(s) deposited in a United States Postal Service mailbox at San Francisco, with postage thereon fully prepaid.

Clerk of the Court (for Hon. Kelly)
Kern County Superior Court
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 4, 2009, at San Francisco, California

E. Michael Lynch

DECLARANT

WORD COUNT CERTIFICATION

Pursuant to California Rules of Court, I hereby certify that this reply brief is composed in 13-point times new roman font and consists of 40,071 words.

Erik N. Larson