SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. TOMMY ADRIAN TRUJEQUE, Defendant and Appellant.	(Los Angeles County Superior Court No. VA048531-01)

SUPREME COURT
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Deputy

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ARGUMENT XIII PAGES 225-250 OF APPELLANT'S OPENING BRIEF

Appeal from the Judgement of the Superior Court of the State of California for the County of Los Angeles

HONORABLE PATRICK COUWENBERG, JUDGE

MICHAEL J. HERSEK
State Public Defender

CHRISTINA A. SPAULDING
State Bar No. 228631
Deputy State Public Defender
221 Main Street, 10th Floor
San Francisco, CA 94105
Telephone: (415) 904-5600
Spaulding@ospd.ca.gov

Attorneys for Appellant

DEATH PENALTY

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XIII.

THE TRIAL COURT IMPROPERLY PREVENTED THE DEFENSE FROM PRESENTING APPELLANT'S JUVENILE PROBATION REPORTS AND SCHOOL RECORDS AS EVIDENCE IN MITIGATION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION

The trial court improperly limited the defense mitigation case by excluding as unreliable hearsay appellant's juvenile probation reports and crucial portions of his school records, both of which had been prepared by and relied upon by the State of California in managing appellant's care and education from the age of nine. While the court ultimately read portions of the probation reports to the jury, it excluded the earliest reports that described how appellant became a ward of the state and contained the medical and social history information on which the juvenile authorities relied in deciding to place appellant in an institutional setting as a nine-year-old boy. The court also redacted appellant's school records to eliminate the sections containing appellant's medical information, thus excluding references to his childhood history of seizures, his diagnosis of brain damage, and the medications he was prescribed. The court also prevented a defense mental health expert who had worked for the social service agency that tested appellant as a child from testifying about the agency or how it conducted its evaluations. These restrictions violated appellant's rights to due process, to present mitigating evidence, and to a reliable sentencing determination, guaranteed by the state and federal constitutions. (U.S. Const., 5th, 8th & 14th Amends.; Cal. Const., art. I, §§

15, 16 & 17.)

A. Relevant Facts

1. Juvenile Probation Reports

Appellant was first taken into state custody as a nine-year-old boy in 1962 and spent most of the remainder of his childhood in various residential state institutions. Appellant's juvenile case file contains numerous probation reports, juvenile court petitions, court orders, and other documents spanning nine years of state supervision. The juvenile file was made part of the record below, as CT Supplemental IV, which remains sealed. These reports documented appellant's early medical history of brain damage and seizures, poor impulse control, and hyperactivity.

For example, the nine-page Probation Officer's Report and Social Study for Disposition Hearing, dated April 27, 1962, by Helen K. Matkin, was the first assessment of appellant upon his entry to the juvenile justice system. (1 CT Supp. IV 24-32.) The report noted appellant was in custody at juvenile hall for stealing from and vandalizing a car on March 16, 1962. (1 CT Supp. IV 24-25.) Appellant had two previous contacts with police for petty theft, beginning in December 1961 when appellant was eight. (1 CT Supp. IV 26.) Appellant's father, to whom he was close, had recently been incarcerated, and appellant had begun acting out at that time. (1 CT Supp. IV 24, 27.) Appellant had run away from home and his mother had reported him missing. (1 CT Supp. IV 25.) He had not been in school for two months, having been "excluded" for misbehavior. (1 CT Supp. IV 27, 29.) Appellant's mother asked that he be taken into state custody and placed outside the home because she could no longer supervise him. (1 CT Supp IV 27.)

The report included the history, related by appellant's mother, that he

had been hit on the head with a shoe at the age of two and a half, developed a high fever and had several seizures, requiring hospitalization for three days. (1 CT Supp. IV 28.) Appellant had been referred to the PTA Child Guidance Clinic at the age of six because of his "'constant' misbehavior" at school. (1 CT Supp. IV 29-30.) The Chief Psychiatrist at the clinic, Brooks Fry, found appellant to be "a seriously disturbed child," with poor judgment, poor control of his aggressive impulses, and a low tolerance for frustration. (1 CT Supp. IV 30.) He also noted that appellant's "body movements were poorly co-ordinated and that he moved around with a 'shuffle.'" (*Ibid.*) "Psychological testing indicated normal intelligence but there were strong indications of organic impairment. Difficulties in perception, poor hand-eye coordination, marked perseverative tendencies, and so forth, were all suggestive of organic brain damage." (*Ibid.*) Dr. Fry's diagnostic impression in May 1959 was that appellant had "chronic brain syndrome of an unknown cause with behavioral reaction as well as personality trait disturbance with passive aggressive personality." (*Ibid.*) He recommended further neurological evaluation. (*Ibid.*)

A report from Children's Hospital regarding an electro-encephalogramic[1] examination administered at age seven, "show[ed] disturbance in bi-temporal area, consistent with psychomotor behavior problem." (1 CT Supp. IV 31.) Medication was prescribed by a psychiatrist at the PTA Child Guidance Clinic, but appellant's mother did

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[1]Electroencephalography (EEG), which measures electrical activity in the brain, is used to diagnose epilepsy and, before the advent of more sophisticated imaging techniques, was "a first-line method for the diagnosis of tumors, stroke and other focal brain disorders." (See <http://en.wikipedia.org/wiki/Electroencephalography >[as of March 15, 2012].)

not administer it consistently. (1 CT Supp. IV 31.) Dr. Ernest Giraldi, the family doctor, recommended "a placement in a closed setting preferably a home for boys where medical and psychiatric counselling would be available...." (*Ibid.*)

Appellant's "family history indicates material deprivation and frequent separation and reconciliation of the parents." (1 CT Supp. IV 31.) While appellant's mother "appears sincere in her desire to help" him "it is apparent that she is no longer able to cope with [his] behavior." (*Ibid.*)

The report concluded that, "according to the reports from the school, the Parent-Teachers Child Guidance Clinic, Children's Hospital, and Dr. Ernest Giraldi," appellant's "deviant behavior seems to result from a brain injury received when he was two and a half years old." (1 CT Supp. IV 32.) The probation officer therefore recommended that appellant be declared a ward of the court and committed to the custody of the probation officer for suitable placement. (1 CT Supp. IV 32)

A two-page report dated May 22, 1962, by Helene Kaplan, stated that she was having difficulty referring appellant to available facilities because of the previously-reported "strong indications of brain damage." (1 CT Supp. IV 36.) This report recommended that the "Probation Department Psychiatric Clinic be directed to accomplish a clinical study of the minor," noting that further neurological evaluation was required to obtain an appropriate placement. (1 CT Supp. IV 37.) Dr. Howard Ross of the Probation Department Psychiatric Clinic thereafter issued a report dated May 31, 1962, in which appellant was diagnosed as having an "[e]motionally unstable personality, with presumptive organic brain damage; manifested by rebellious antisocial behavior, hyperactivity and incoordination, and attention-seeking." (1 CT Supp. IV 38.) Dr. Ross

concluded that appellant was "in need of close supervision from firm, consistent and non-hostile adults. A closed setting with maximum opportunity to relate to adult supervisors is recommended. Medical treatment facilities should be readily available, since continual review of the childs' medical and psychiatric status will be necessary, along with supervision of any drug therapy indicated." (1 CT Supp. IV 38.) A June 1, 1962 Probation Officer's Report and Court Order for Specific Placement, also by Helene Kaplan, noting appellant's serious emotional and behavior problems, recommended appellant be placed at Sycamores institution in Pasadena. (1 CT Supp. IV 39.) The recommendation was approved by a juvenile court judge and the minute order entered on June 8, 1962. (*Ibid.*)

Defense counsel sought to admit these juvenile probation reports into evidence, relying on Evidence Code sections 1271 and 1280–the business records and public records exceptions to the hearsay rule–and also on *Green v. Georgia* (1979) 442 U.S. 95 (*Green*).[2] (8 RT 2149-2152, 9 RT 2434, 10 RT 2725-2728.) The prosecution objected to any of the contents of the probation reports being introduced into evidence. (8 RT 2155, 10 RT 2736.)

First, defense counsel attempted to lay a foundation for the reports' admissibility by questioning one of appellant's juvenile probation officers, Kurt Kocourek, who was assigned to appellant's case in 1965, when

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[2]During a hearing on the admissibility of appellant's 1969 confession to the Rothenberg murder, defense counsel asked the trial court to take judicial notice of the entire juvenile court file for the purposes of that hearing and also explained that he intended to ask the court to admit the juvenile probation reports into evidence for the jury's consideration as mitigating evidence. (8 RT 2022-2026, 2149-2152.)

appellant was 12 years old.[3] (9 RT 2414.) Kocourek testified that, within the scope of his employment, he had prepared 11 reports about appellant, and the dates, statements, and observations contained in the reports were fresh in his mind when he wrote them. (9 RT 2417-2418.) Kocourek explained that to prepare a report he generally would meet with the youngster and his parents, review the file and speak to the police and the victims, if applicable. He would then discuss placement options with his supervisor, the parents, and the youngster.[4] (9 RT 2419.)

The prosecution objected to Kocourek testifying to the contents of the reports, citing as an example a report mentioning appellant's abnormal EEG results, on the grounds that it was inadmissible hearsay. (9 RT 2424.) The prosecutor also objected to Kocourek testifying about any of the probation reports from 1962 to 1965, before Kocourek was assigned to appellant's case, or to any of the portions of Kocourek's own reports which

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[3]At the time of trial, Kocourek was Administrative Assistant to the Chief Probation Officer for the federal district court, Central District of California. (9 RT 2414.)

[4]Defense counsel also called Henry Ikemoto, who was appellant's juvenile probation officer before Kocourek, in 1964 and 1965, to testify outside the presence of the jury about how he had prepared his reports and to lay the foundation for their admission into evidence. (10 RT 2534-2563.) Even after reviewing the old files, Mr. Ikemoto did not specifically recall appellant. (10 RT 2537.) Mr. Ikemoto testified that the purpose of the reports was to maintain a true and accurate picture of what was happening with the juvenile, and the reports were detailed because they were relied on by others. (10 RT 2554.) In compiling the reports, consistent with department policy, Mr. Ikemoto relied on his own observations and spoke to the social workers, teachers, and other staff of the institution where appellant was living. He also referred to prior probation reports, for appellant's history, and reports from the psychiatrist treating appellant. (10 RT 2537, 2544-2547, 2550-2560.)

discussed appellant's history in the juvenile justice system from 1962 to 1965 and which were drawn from previous reports. (*Ibid.*)

Defense counsel pointed out that Helen Matkin, the deputy probation officer who prepared the April 1962 report, when appellant was first taken into custody, was deceased (9 RT 2435; 1 CT Supp. IV 24-32), and Helene Kaplan, the deputy probation officer who authored the May and June 1962 reports could not be found.[5] (9 RT 2435-2436; 1 CT Supp. IV 36, 39-40.) The Sycamores itself, and its records, no longer existed. (9 RT 2433.) Thus, the probation reports were virtually the only source of information about appellant's initial placement in state custody. Defense counsel also argued that the contents of the reports were relevant for Kocourek to explain the information on which he had relied to recommend a placement for appellant. (9 RT 2425.)

The trial court insisted that even if the reports were highly relevant to appellant's case in mitigation, that did not make them reliable enough to be admissible. (9 RT 2436.) The court ultimately relented to the extent of allowing Kocourek to testify that appellant had been made a ward of the court and placed at The Sycamores – a home for relatively young children – in June 1962. (9 RT 2438.) The issue of the admissibility of the reports themselves was deferred. (9 RT 2425.)

After the prosecutor objected successfully to defense counsel eliciting any information about appellant's abnormal EEG results as a child and other childhood diagnoses referenced in Kocourek's reports (9 RT 2424), and also prevented the jury from hearing the contents of the earlier

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[5]Defense counsel said that Saburo Toyama, a deputy probation officer who filed two reports in appellant's case in 1966 was also deceased. (9 RT 2435; 1 CT Supp. IV 78-82, 89-96.)

probation reports, he proceeded on cross-examination to elicit information from a report dated May 11, 1967 that "the latest tests together with neurological examination noted minimum brain dysfunction." (10 RT 2461.) Kocourek testified that he believed earlier tests had shown appellant had a more severe brain lesion whereas Dr. Cherkas, a psychiatrist who had examined appellant in 1966, had concluded that appellant later exhibited "relatively minor brain dysfunction." (10 RT 2460.) From this, Kocourek concluded that appellant's may have had emotional as well as neurological problems. (10 RT 2459-2460.) Defense counsel objected that it was not fair for the prosecution to be allowed to question Kocourek on the same topic the defense had been precluded from inquiring about on direct examination, and either the entire report should come in or none. The objection was overruled. (10 RT 2461-2462.)

The defense called Dr. Cherkas as a witness and tried to ask him about the May 22, 1962 probation report by Helene Kaplan that concerned appellant's initial placement in state custody. (1 CT Supp. IV 36-38; 10 RT 2480-2482.) The probation report referenced a report by Brooks Fry, Chief Psychiatrist of the Los Angeles City School Guidance Center, which had treated appellant before he became a ward of the state; Dr. Cherkas had worked at the agency under Dr. Fry. (10 RT 2481-2482, 2484.) Defense counsel attempted to ask what type of evaluation the Guidance Center conducted, arguing that Dr. Cherkas should be allowed to explain the evaluation since he had relied on the resulting report. (10 RT 2484.) The prosecutor objected, and the judge agreed, that the defense could only ask Dr. Cherkas whether he had formed an opinion, after reviewing certain documents, but he could not otherwise testify about the contents of the reports on which he relied. (10 RT 2486-2487, 2489.)

When the trial court subsequently asked the prosecutor to identify which parts of the reports he found objectionable, the prosecutor insisted that none of the reports were admissible under Evidence Code section 1280, because they were not sufficiently reliable. (10 RT 2736-2741.) Ultimately, in lieu of admitting the reports themselves into evidence, the trial court agreed to read portions of them to the jury. (11 RT 2796, 2833-2860.) The judge read only from reports prepared by Kocourek and Ikemoto and specifically excluded the portions of those reports that referenced appellant's early diagnosis with brain damage. (11 RT 2805-2808, 2810-2812, 2814, 2817-2821.) The court did not read or otherwise allow into evidence any of the reports from 1962 to 1964, including the April, May, and June 1962 reports concerning appellant's initial assessment and placement in state custody, and the portions of later reports which recited appellant's history from this period.

For example, from a report dated December 24, 1965, by Kocourek, the court read the following, omitting the bracketed information:

> The mother noted that minor is under the periodic supervision of her personal doctor and that he continues under medication (dilantin) for his history [of brain damage,] which in turn, appears to have predisposed this youngster to hyperactivity.

(11 RT 2846; 1 CT Supp. IV. 73-74.) From a report dated November 22, 1966, also by Kocourek, the trial court read as follows:

> It is noted that a clinical re-evaluation had been requested by this officer upon minor's latest difficulties, leading to his detention at juvenile hall. That study was read by the probation officer and the original should be available to the court; it is dated November 16, 1966. The examiner notes in his recommendations that the minor should be returned to the home of his mother under probationary supervision and

under proper medical supervision [as there is a history of brain damage.] Unfortunately the examiner did not react upon the request by this writer to have an electroencephalograph and neurological study performed.

Should the minor be released home at this court hearing this writer will arrange for such a neurological study as the latest electroencephalograph and neurological studies date back to 1962. Minor continued under tranquilizers (dilantin) which are reportedly both to alleviate his hyperactivity and to prevent seizures [as there appears to be a lesion of the brain.]

(RT 2852; CT Supp. IV. 126-127.)

From a report dated February 14, 1967 by Kocourek the court read as follows:

Unfortunately, minor's situation is further complicated by the contrast the minor's natural father presents. Having served considerable time for narcotics addiction in various California state penitentiaries, the father continues on parole to agent Kornbroot, [who characterized his parolee's condition as little better than hopeless because of the many problems that continue to beset Mr. Trujeque.]

. . . .

This rather large, 14-year-old youngster has had a history of placement for the past three years. [Brain damage has been repeatedly diagnosed, and this would appear to explain the impulsive character of minor's pattern of acting out.] Minor's situation is further complicated by his alleged conflict with the father figure in the home, a man who has lived in an extramarital union with his mother for the past nine years in the common home.

(11 RT 2856; 1 CT Supp. IV 138-139.) The trial judge explained that he was excluding the sentence "brain damage has been repeatedly diagnosed, and this would appear to explain the impulsive character of minor's pattern of acting out," because this was not what Dr. Cherkas had testified to. (11 RT 2819.)

Having omitted most references to appellant's history of brain damage, the Court read from the report dated May 11, 1967: "There is some evidence that this impulsivity may have largely been based at one time upon a brain syndrome but latest evidence, a 1966 electroencephalogram and neurological examination seems to point to a rather minimal dysfunction; thus his lack of impulse control may by now be of a largely emotional character." (11 RT 2858.)

2. School Records

The trial judge similarly allowed only a redacted version of appellant's school records to be admitted into evidence. (Compare Defense Exhibits U and V for Identification with Defense Exhibits U-1 and V-1, admitted into evidence at 11 RT 3036, 5 CT 1087.) Defense counsel sought to introduce appellant's school records from the Los Angeles and Pasadena Unified School Districts to corroborate other evidence concerning appellant's childhood, including his medical history of seizures, his diagnosis of brain damage, his hyperactivity, the medication he had been prescribed, and referrals for psychological services. (See Def. Exs. U and V for Identification.)

Defense counsel argued that the school records, like the probation reports, were public records that were regularly relied on by the schools and by juvenile justice authorities. (11 RT 2867-2868.)

Defense counsel specifically sought to admit a "Progress Record" from the Pasadena Unified School District, which included an October 1, 1963 notation of a request for psychological adjustment services, a November 12, 1963 notation that appellant was being given medication prescribed by a psychiatrist, and a February 1964 note that appellant had been at Sycamores the past month, out of school. (11 RT 2864; Def. Ex.

V.) A June 1964 notation stated appellant had "many complaints – stomach, head etc. Overweight complains constantly." (11 RT 2864; Def. Ex. V.) A November 13, 1964 notation stated "See M.D. notes (On medication of Mellaril, 60 mg daily for restlessness & anxiety.)" (11 RT 2864-2865; Def. Ex. V.)

The defense also asked to admit appellant's records from the Los Angeles Unified School District, including a card labeled "Personal History," which contained a section for physician's or nurse's notes. A notation dated February 1959 referenced appellant's history of high fevers with convulsions and emotional instability; "child guidance" was requested. (11 RT 2871; Def Ex. U-2.[6]) A May 1960 entry noted that appellant "states he takes 'pills' 3x daily," and an October 1960 entry noted appellant was "hyperactive" and on medication; a half-day session of school was recommended. The notation cited a "phone call from Miss St. John @ PTA Guidance Clinic – EEG suggests motor brain damage." (11 RT 2871-2873; Def Ex. U-2.) As of October 1961, at age eight, appellant was still attending only a half-day session of school because of his hyperactivity. (Def. Ex. U-2)

As with the probation reports, the trial court ruled that these portions of the school records were not sufficiently reliable – unless the defense could produce their original authors – to be admitted into evidence.[7] (11

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[6]The excluded portion of the Los Angeles school records was marked Defense Exhibit U-2 for identification only; the remainder of the records was marked Defense Exhibit U-1 and admitted into evidence. (11 RT 3035-3036.)

[7]Trial counsel pointed out "this is no different than that Dr. Carpenter coming in and reading a report, an autopsy report, and telling this jury what happened at the autopsy years ago. And that's what happened in

RT 2868-2870, 2874.) The court also reasoned that there was already sufficient evidence before the jury that appellant had psychological problems and was on medication. (11 RT 2870.)

B. The Probation Reports and School Records Contained Relevant Mitigating Evidence and Were Erroneously Excluded

As discussed in Argument IV, *supra*, the Supreme Court has emphasized repeatedly that the Eighth Amendment requires the admissibility of mitigating evidence in capital cases to be construed "in the most expansive terms." (*Tennard v. Dretke* (2004) 542 U.S. 274, 284.) The defendant need meet only a "'low threshold for relevance,' which is satisfied by 'evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" (*Smith v. Texas* (2004) 543 U.S. 37, 44, quoting *Tennard v. Dretke, supra,* 542 U.S. at pp. 284-285 and *McKoy v. North Carolina* (1990) 494 U.S. 433, 440.) "Thus, a State cannot bar 'the consideration of ... evidence if the sentencer could reasonably find that it warrants a sentence less than death.'" (*Tennard v. Dretke, supra,* 542 U.S. at p. 285, quoting *McKoy v. North Carolina, supra*, 494 U.S. at p. 440

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this trial." (11 RT 2873.) The trial court disagreed, asserting "there is a big difference" because in the case of the autopsy report, "we know that person" who wrote the report "worked as a coroner." (*Ibid.*) But, defense counsel noted, "there was no evidence that that coroner was competent." (11 RT 2874.) The propriety of Dr. Carpenter's testimony is addressed separately in Argument VIII, *supra*. The more salient difference between the two situations is that the state, unlike a criminal defendant, does not have confrontation rights. And, as defense counsel also argued, the Supreme Court has held that hearsay rules must not be "applied mechanistically" to prevent a capital defendant from presenting critical mitigating evidence. (11 RT 2872; *Green v. Georgia, supra,* 442 U.S. at p. 96.)

[ellipses in original].)

The trial judge agreed with defense counsel that appellant's "mental history and family history is as relevant as it gets" in the penalty phase of a capital trial. (11 RT 2803.) Thus, it was undisputed that the information the defense sought to introduce through the juvenile probation reports and school records – appellant's childhood medical history of seizures, the abnormal EEG results, his diagnosis of brain damage, and the circumstances of his placement in state custody at the age of nine – was highly relevant mitigating evidence. The evidence was excluded solely because the prosecutor argued and the trial judge agreed that the probation reports and school records were unreliable hearsay and could not be admitted into evidence if defense counsel could not produce the original authors of the reports.

1. The Excluded Portions of the Probation and School Records Should Have Been Admitted under Evidence Code Section 1271 or 1280

Defense counsel argued, first, that the probation and school records were admissible under Evidence Code section 1271,[8] the business records

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[8]Evidence Code section 1271 provides:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
>
> (a) The writing was made in the regular course of a business;
>
> (b) The writing was made at or near the time of the act, condition, or event;
>
> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

exception to the hearsay rule, or Evidence Code section 1280, the public records exception to the hearsay rule.[9] (8 RT 2149-2150, 10 RT 2725-2728.)

The same showing of trustworthiness is required for both the business and public records exceptions. (*People v. Beeler* (1995) 9 Cal.4th 953, 980 (*Beeler*) [citing Cal. Law Revision Com., Deering's Ann. Evid. Code (1965 ed.) § 1280, p. 438].) In *Beeler*, this Court held that an autopsy report was properly admitted under the business records exception because the "trustworthiness" required by Evidence Code section 1271 or 1280 was satisfied when another pathologist in the office testified "regarding the autopsy procedures of the office and further testified that standard operating procedures were followed in the ... autopsy and in the documentation of the

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(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

[9]Evidence Code section 1280 provides:

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:

(a) The writing was made by and within the scope of duty of a public employee.

(b) The writing was made at or near the time of the act, condition, or event.

(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

autopsy." (*Beeler, supra*, 9 Cal.4th at p. 979.)[10] The trustworthiness of the report was not undermined by the acknowledged fact that the pathologist who had actually performed the autopsy "had caused 'quite a bit of consternation' in a prior murder case by basing his conclusion regarding the cause of death on a police report rather than on medical evidence." (*Ibid.*)

The court further held that the autopsy report did not contain medical opinion inadmissible under Evidence Code section 1271 because the pathologist's determination of the cause of death was more akin to observing a fractured femur than to a "subjective psychiatric opinion." (*Beeler, supra*, 9 Cal.4th at pp. 980-981, citing *People v. Reyes* (1974) 12 Cal.3d 486, 503 and *People v. Terrell* (1955) 138 Cal.App.2d 35, 57.)

Probation reports, while hearsay, are recognized as highly reliable: "In every felony proceeding in the State of California, a probation report is required and must be read and considered by the sentencing judge. (Pen. Code, § 1203, subds. (b) & (g).) The Legislature does not require trial court judges to read and consider 'unreliable' documents as a prerequisite to the imposition of sentence." (*People v. Miller* (1994) 25 Cal.App.4th 913, 918.) Thus, a mental health expert may rely on a probation report in forming an opinion.[11] (*Ibid.*).

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[10]As noted in Argument VIII, *supra*, *Beeler*'s confrontation clause analysis has been effectively overruled by *Crawford v. Washington, Melendez-Diaz v. Massachusetts,* and *Bullcoming v. New Mexico, supra*. It would nevertheless remain viable insofar as it is interpreting state hearsay law.

[11]The reports themselves, however, have generally not been found admissible. (See *People v. Reed* (1996) 13 Cal.4th 217, 230 [narration of 'reported' events in probation report were hearsay and inadmissible]; *People v. Martin* (2005) 127 Cal.App.4th 970, 976-77 [probation report is reliable document on which expert may rely but report itself is hearsay and

Further, "because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter ... upon which it is based,'" the expert must be allowed, when testifying, to "describe the material that forms the basis of the opinion," including otherwise inadmissible but reliable hearsay, so that the jury is able to evaluate and give proper weight to the expert's conclusions. (*People v. Gardeley* (1996) 14 Cal.4th 605, 612, 618 [detective testifying as expert on gang activity could reveal that his opinion was based in part on hearsay statements of co-defendants where cautionary instruction was given that statements were not to be considered for their truth], citing *People v. Shattuck* (1895) 109 Cal. 673, 678 [medical expert could testify to patient's complaints in order "to give a clinical history of the case to understand the significance of her symptoms"] and *People v. Wash* (1993) 6 Cal.4th 215, 251 [prosecution could elicit out-of-court statements relied upon by the defense expert].)

As defense counsel correctly argued below, the excluded portions of the probation reports and school records should have been admissible under the logic of *Beeler, supra*. Similarly, under Evidence Code sections 801 and 802, Dr. Cherkas should have been allowed to explain and describe the materials on which he relied.

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is not independently admissible]; *People v. Campos* (1995) 32 Cal.App.4th 304, 309-310 [while probation report sufficiently reliable for expert to rely on it in an MDO hearing, report itself was not admissible]; But see *In re James H.* (1981) 121 Cal.App.3d 268, 271 ["Since the probation report is a business record, and, as such, admissible into evidence as an exception to the hearsay rule (Evid.Code, §§ 1270, 1271) the 'jurisdictional facts' portion of the report" could be considered by juvenile court in determining its jurisdiction].)

Two of appellant's former probation officers, Mr. Kocourek and Mr. Ikemoto, both testified that the reports were prepared in the normal course of business and described the procedures juvenile probation officers followed to prepare a report. (See *Beeler, supra*, 9 Cal.4th at 979 [another pathologist from coroner's office testified about autopsy procedures].) The excluded reports from April and May 1962, on their faces, comport with those procedures concerning the gathering and relating of information about a minor whose treatment and placement are to be determined by the juvenile court. The April and May reports carefully identified the sources of the information quoted and summarized. (Compare 11 RT 2824-2826 [trial court refused to admit information from reports where source is not identified].) And, unlike in *Beeler*, there was no suggestion of wrongdoing on the part of the probation officers who prepared the reports or those who provided the information contained in it. (*Beeler, supra*, 9 Cal.4th at 979.)

As defense counsel argued, the probation reports' reference to a diagnosis of brain damage based on psychological tests and an EEG exam is indistinguishable from an autopsy report's conclusions concerning cause of death, based on a pathologist's observations during an autopsy. (11 RT 2805; *Beeler, supra,* 9 Cal.4th at p. 980-981.) Indeed, here, the diagnostic information was also relevant for the non-hearsay purpose of showing why appellant was difficult to place – that is, whether or not the diagnosis was accurate, it affected how the juvenile justice system treated him.

Defense counsel also correctly pointed out, citing *People v. Miller, supra*, 25 Cal.App.4th at p. 917, that probation reports are relied on by the courts in virtually every criminal case in the state and were relied on by the State of California in determining appellant's fate as a nine-year-old boy and his treatment throughout his youth. (11 RT 2801-2802.) Finally, as

defense counsel argued, the excluded portions of the probation reports corroborate the school records and vice versa. (11 RT 2803, 2819, 2827.)

The court also erred by improperly precluding Dr. Cherkas from answering questions about the agency that first evaluated and treated appellant from the age of six, given that Dr. Cherkas had first-hand knowledge from working at the agency, and considered its report in his own later assessment of appellant. Dr. Cherkas should have been allowed to "describe the material that form[ed] the basis of [his] opinion," including how it was produced and why he found it reliable. (*People v. Gardeley*, *supra,* 14 Cal.4th at p. 618.)

This Court has given trial courts broad discretion to balance "an expert's need to consider extrajudicial matters," against "*an accused's interest in avoiding substantive use of unreliable hearsay*," by issuing a limiting instruction or, if the potential for unfair prejudice outweighs probative value, by exclusion. (*People v. Montiel* (1993) 5 Cal.4th 877, 919 [italics added].) In this case, all the interests to be balanced should have militated in favor of admitting the evidence. There was no danger of prejudice to the accused, who asked for the evidence to be admitted, and as discussed further below, the prosecution could not fairly claim that the hearsay at issue was unreliable.

2. The Probation and School Reports Were Relevant and Reliable Mitigating Evidence That Should Have Been Admitted Notwithstanding State Hearsay Rules

Even if the reports were not admissible under the business or public records exceptions to the hearsay rule, insofar as they summarize reports by others involved in appellant's care, their exclusion violated due process and the Eighth Amendment right to present mitigating evidence.

The Supreme Court has made clear that "[r]eliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay rule." (*Sears v. Upton* (2010) ___ U.S. ___, 130 S.Ct. 3259, 3263 & fn.6, citing *Green v. Georgia, supra,* 442 U.S. at p. 97 and *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.)

In *Green v. Georgia, supra,* the trial court excluded on hearsay grounds at the penalty phase the co-defendant's admission that he had killed the victim after ordering Green away on an errand. (*Green v. Georgia, supra*, 442 U.S. at p. 96.) The Court explained that "substantial reasons existed to assume [the] reliability" of the excluded statement, including that it was spontaneous and against the declarant's interest. (*Id.* at p. 97.) "Perhaps [the] most important" reason, the Court emphasized, however, was that "the State considered the testimony sufficiently reliable to use it against Moore [the co-defendant], and to base a sentence of death upon it." (*Ibid.*) "In these unique circumstances," the Court ruled that it violated due process to apply "the hearsay rule . . . mechanistically to defeat the ends of justice" by preventing Green from introducing the very same evidence in mitigation at his penalty trial. (*Ibid.,* quoting *Chambers v. Mississippi, supra*, 410 U.S. at p. 302.)

As in *Green*, the excluded evidence in this case "was highly relevant to a critical issue in the punishment phase of the trial." (*Green v. Georgia, supra,* 442 U.S. at p. 97.) Moreover, the probation and school reports share the most important indicia of reliability cited in *Green* – the fact that the *state itself* had previously deemed the evidence reliable enough to use it for its own purposes. (*Ibid.*) The excluded evidence in this case consisted of information compiled by the State of California, on which the State relied in

deciding how appellant should be treated and where he should be placed while in the care of the state's juvenile justice system. For the State to claim subsequently that such evidence was too unreliable to be introduced by the defendant as evidence in mitigation of a death sentence offends due process.

The due process violation was all the more egregious, because the state, which insisted that the only reliable, admissible evidence would be testimony by witnesses "who recalled all these incidents" (10 RT 2738), was itself responsible for a 12-and-a half-year delay in prosecuting appellant for Facundo's murder, during which time witnesses died, memories faded, and documents were destroyed. (See 4 CT 1016-1048 [Defendant's Motion to Dismiss Because of Denial of Right to Due Process, noting deaths of Drs. William Cooper and Ackley of Children's Hospital, Brooks Frye of the PTA Child Guidance Center and Robert Kagan of The Sycamores and destruction of Children's Hospital records]; 9 RT 2433 [The Sycamores and its records no longer existed], 9 RT 2435 [noting death of probation officer Helen Matkin].) Due process required that the state and not appellant bear the cost of the delay.

At a minimum, as argued above, the defense should have been allowed to present the probation reports and school records in mitigation, notwithstanding the hearsay rule. Alternatively, as the defense proposed, the state should have been precluded from seeking the death penalty, rather than the defense being compelled to present a truncated case in mitigation. (4 CT 1016-1034 [Defendant's Motion to Dismiss Because of Denial of Right to Due Process, citing *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 505-507 and *United States v. Marion* (1971) 404 U.S. 307[, 324]]; see also *Jencks v. United States* (1957) 353 U.S. 657, 671 ["since the

Government which prosecutes an accused also has the duty to see that justice is done," criminal case should be dismissed rather than allowing government to rely on evidentiary privileges "to deprive the accused of anything which might be material to his defense"]; *United States v. Fernandez* (4th Cir. 1990) 913 F.2d 148, 154, 164 [affirming dismissal of indictment where government was simultaneously prosecuting defendant and attempting to restrict his use of classified information necessary to defend himself].)

If the government's interest "in a criminal prosecution ... 'is not that it shall win a case, but that justice shall be done'" (*Jencks v. United States, supra,* 353 U.S. at p. 668 [ellipses in original], quoting *Berger v. United States* (1935) 295 U.S. 78, 88]), then the state's interest in "winning" is necessarily less compelling where it already has obtained a conviction that will require the defendant to serve a life sentence without possibility of parole and the only additional prize is a death sentence, while the state's interest in justice being done is necessarily greater in light of the Eighth Amendment's requirement of heightened reliability. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-38, fn. 13 [greater reliability required in capital cases], citing *Gardner v. Florida*, 430 U.S. 349, 357-358 (opn. of Stevens, J.); accord *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [plur. opn.]; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304-05 [plur. opn.].)

3. The Trial Court's Erroneous Exclusion of Mitigating Evidence was not Harmless Beyond a Reasonable Doubt

Because the effect of the trial court's erroneous ruling was to exclude relevant mitigating evidence from the penalty phase in violation of the Eighth Amendment, it is respondent's burden under *Chapman v. California* (1967) 386 U.S. 18, 24, to prove beyond a reasonable doubt that

the errors did not contribute to appellant's convictions or sentence of death. (See *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 249 (*Abdul-Kabir*), quoting *Hitchcock v. Dugger* (1987) 481 U.S. 383, 398-399 [absent state's showing of harmlessness, exclusion of mitigating evidence renders death sentence invalid].)

The court's ruling kept from the jury the state's own initial assessment of appellant when he was taken into state custody at the age of nine, including: that appellant had begun to act out, run away from home, and get into trouble with the law at the age of eight, following his father's incarceration; that appellant had not attended school for two months at the time of his arrest, having been excluded for misbehavior; that as a toddler appellant had been hospitalized for several days with seizures; he was referred for psychiatric care at the age of six and testing at that time indicated organic brain damage; that an EEG examination at the age of seven showed abnormalities consistent with psychomotor behavior problems; and his own mother finally asked the state to take custody of him and place him outside the home when he was nine. (1 CT Supp IV 24-38.) This information from the probation reports was corroborated by the excluded portions of the school records which documented the medical history information provided to the school. (Def. Exs. V, U-2.)

This is precisely the type of evidence the Supreme Court has held repeatedly to be mitigating. (See, e.g., *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112-114 [Eighth Amendment violated where sentencing judge did not consider evidence of defendant's troubled youth]; *Hitchcock v. Dugger, supra*, 481 U.S. at pp. 397-399 [Eighth Amendment violated where "advisory jury was instructed not to consider, and the sentencing judge refused to consider nonstatutory mitigating circumstances" including family

history of poverty and deprivation]; *Smith v. Texas* (2004) 543 U.S. 37, 45 [instructions improperly prevented jury from giving effect to mitigating evidence of defendant's troubled childhood]; *Wiggins v. Smith* (2003) 539 U.S. 510, 535 [trial counsel constitutionally ineffective in failing to investigate client's social history]; *Williams v. Taylor* (2000) 529 U.S. 362, 395-396 [trial counsel constitutionally ineffective in failing to investigate and uncover mitigating evidence of defendant's family history of parental alcoholism, abuse and neglect].)

In *Abdul-Kabir v. Quarterman, supra*, the mitigating evidence to which the jury was not able to give full effect because of Texas' erroneous jury instructions included that, when the defendant was a boy, his father was arrested for robbery and deserted the family, and the defendant's mother placed him in a children's home while retaining custody of his sister. (*Abdul-Kabir v. Quarterman, supra,* 550 U.S. at pp. 239-240.) Similar to this case, in which Dr. Cherkas testified that appellant's experience of parental rejection and his upbringing in an institutional setting had interfered with his emotional development and resulted in intermittent explosive disorder, anti-social tendencies and a lack of empathy (RT 2506, 2511-1512), Abdul-Kabir had presented expert testimony that he had "'real problems with impulse control' apparently resulting from 'central nervous damage'" and a "'painful' background" of parental rejection, the results of which were akin to a "manufacturing process" that had "botched the raw material horribly." (*Abdul-Kabir v. Quarterman, supra*, 550 U.S. at p. 240.)

Here, as in Abdul-Kabir's case, future dangerousness was the dominant theme of the prosecution's argument for the death penalty. (See Argument X, *supra.*) In *Abdul-Kabir*, the Supreme Court explained that, in

a case in which future dangerousness is the focal point, "the strength of [the defendant's] mitigating evidence was not its potential to contest his immediate dangerousness" but rather "its tendency to prove that his violent propensities were caused by factors beyond his control—namely, neurological damage and childhood neglect and abandonment." (*Abdul-Kabir v. Quarterman, supra*, 550 U.S. at p. 241.)[12] The purpose of the evidence, in other words, was "not [to] contradict the State's claim that [Abdul-Kabir] was a dangerous person, but instead ... to provide an explanation for his behavior that might reduce his moral culpability." (*Ibid.*)

Precisely the same was true here. The trial court's erroneous ruling withheld from the jury the earliest social and medical history information collected by the State of California about appellant. This information established how early in his life appellant's problems – both neurological and psychological – became apparent and how these problems in turn dictated his placement in an institution, with the ensuing consequences for his emotional and psychological development. Precisely because these reports discussed appellant's *early* childhood, they underscored the extent

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[12]The issue in *Abdul-Kabir* and similar Texas cases was whether "a juror considering [the defendant's] evidence of childhood neglect and abandonment and possible neurological damage or ... evidence of mental illness, substance abuse, and a troubled childhood could feel compelled to provide a 'yes' answer to the [future dangerousness special] question, finding himself without a means for giving meaningful effect to the mitigating qualities of such evidence." (*Abdul-Kabir v. Quarterman, supra*, 550 U.S. at p. 262.) The Court concluded "there is a reasonable likelihood" that the Texas special issues "would preclude that juror from giving meaningful consideration to such mitigating evidence" so that reversal was required. (*Ibid.*)

to which appellant was shaped by factors beyond his control.

The trial court's ruling limited Kocourek and Cherkas to testifying about appellant essentially from the age of 12 on. And the court omitted from the reports it did read references to appellant's early medical history. This undermined and distorted Kocourek's testimony. He testified that "it was a matter of record" that appellant had brain damage, going back as young as three and a half, as reflected in early psychiatric reports. (10 RT 2428.) He also testified that the results of EEG examinations and the resulting assessment of the extent of appellant's brain damage had changed over time and that later tests suggested the damage, or the effects of the damage, were now minimal. (10 RT 2460.) By excluding the early reports and later references to them, the court eliminated the "record" Kocourek referred to, while including excerpts from later reports that minimized appellant's brain damage. The effect was to materially distort appellant's medical history.

Just as the jury's inability to give effect to the mitigating evidence presented in *Abdul-Kabir* required reversal of the death sentence (*Abdul-Kabir v. Quarterman, supra*, 550 U.S. at p. 264), the exclusion of the mitigating evidence at issue in this case requires reversal. "[T]here is a reasonable probability that at least one juror would have struck a different balance," between the aggravating and mitigating circumstances if they had been allowed to consider the excluded evidence.[13] (*Wiggins v. Smith, supra,* 539 U.S. at p. 537.)

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[13]Abdul-Kabir, like appellant, had pled guilty to a prior murder committed when he was 16. (*Abdul-Kabir v. Quarterman, supra*, 550 U.S. at p. 239.)

DECLARATION OF SERVICE

Re: People v. Tommy Adrian Trujeque No. S083594

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. I served a true copy of the attached:

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OF APPELLANT'S OPENING BRIEF
(FILED UNDER SEAL)

on each of the following, by placing same in an envelope addressed respectively as follows:

STACY S. SCHWARTZ
Deputy Attorney General
Attorney General's Office
300 South Spring St.
Los Angeles, CA 90013

Los Angeles Superior Court
Attn: ADDIE LOVELACE
Death Penalty Coordinator
210 West Temple St., Room M-3
Los Angeles, CA 90012

SUSAN GARVEY
Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, CA 94107

TOMMY A. TRUJEQUE
P.O. Box D-94497
San Quentin State Prison
San Quentin, CA 94974
(to be hand delivered on 03/26/12)

Each said envelope was then, on March 23, 2012, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

Signed on March 23, 2012, at San Francisco, California.

DECLARANT