S095223

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. ROBERT MAURICE BLOOM, Defendant and Appellant.	(Los Angeles County Sup. Ct. No. A801380)

APPELLANT'S REPLY BRIEF

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

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DEATH PENALTY

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No. S095223

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ROBERT MAURICE BLOOM, Defendant and Appellant.	(Los Angeles County Superior Court No. A801380)

APPELLANT'S REPLY BRIEF

INTRODUCTION

As shown in the opening brief, the record on appeal contains substantial evidence that appellant suffers from a complex constellation of psychological, psychiatric, developmental, social, and cognitive deficits arising from serious mental illness and moderate-to-severe brain damage. The evidence identifying these deficits, their causes, and the difficulties they caused in appellant's life is compelling in its breadth and its depth based in part on historical records, including psychiatric, educational, and medical records predating the crimes at issue in this case; expert psychiatric opinions based upon evaluations of appellant conducted before the crimes occurred, evaluations conducted contemporaneously with appellant's first trial, and evaluations conducted thereafter, including leading up to the trial at issue here; and consistent neuropsychological testing over two separate courses of testing, showing severe brain impairment and cognitive deficits.

The appellate record includes evidence of specific brain trauma suffered by appellant in utero and/or at age two; an overwhelming consensus of approximately eight mental health experts that appellant was seriously mentally ill and cognitively impaired; appellant's history of responsiveness to antipsychotic medications indicating an underlying psychotic process; and appellant's discontinuation of antipsychotic medication leading up to and throughout the trial proceedings.

The extensive mental health evidence was critical to understanding a number of issues in this case. These included appellant's mental state at the time of the crimes; whether appellant was sane at the time of the commission of each of the homicides; whether he was competent to stand trial, waive his presence, and represent himself at the penalty phase; and the validity of the withdrawal of his pleas of not guilty by reason of insanity (hereafter "NGI") to Counts Two and Three after the jury was unable to return unanimous verdicts on that plea.

The issues revolving around questions of appellant's competence and the rationality of his understanding and decision-making were further affected by critical occurrences during the trial proceedings. These included: first, defense counsel repeatedly warned the trial court that counsel had serious concerns about appellant's competence; second, Dr. Vicary warned that, due to the nature of appellant's impairments, appellant might "snap" under the pressure of trial, affecting the rationality of his thought processes; third, defense counsel eventually had to declare a doubt that appellant was competent, finally representing to the court that appellant's ability to cooperate rationally with counsel, which had always been marginal, had significantly changed around the time appellant was absent from the courtroom during the sanity phase; fourth, the jury was unable to reach unanimous verdicts as to

sanity on Counts Two and Three, with three jurors convinced by a preponderance of evidence that appellant was insane during the commission of the homicides on those two counts; and finally, appellant irrationally withdrew his NGI plea, a decision which defense counsel refused to endorse.

After appellant was allowed to represent himself for the penalty phase, consideration of the evidence of appellant's mental illness, developmental disability, and brain damage continued to be crucial to a reasoned evaluation of appellant's peculiar behavior in preparing for the penalty phase, his bizarre, inappropriate and irrational behavior in representing himself during the penalty phase, and his refusal to cooperate with Dr. Sharma.

Despite the weight of the evidence establishing appellant's multiple mental and cognitive impairments, and their relevance to the capital prosecution, respondent is largely dismissive of the evidence, barely addressing the details of it, mischaracterizing its effect on the jury, and relying instead on the constitutionally flawed 1983 trial and 1984 competence hearing at which none of the relevant evidence was presented due to appellant's former defense counsel's inadequate representation.

In doing so, respondent repeats a number of flawed arguments. Appellant addresses these repeated arguments here, and incorporates this common reply in the relevant arguments as appropriate.

In Argument I.C.1. of respondent's brief, respondent raises a novel argument contending that appellant is due no relief on appeal from errors which resulted in prejudice to the mental health defenses because "appellant specifically repudiated the mental defense in the trial court." (RB 46.)[1] From

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[1] As in the opening brief, "CT" refers to the clerk's transcript on appeal, preceded by the volume number. "RT" refers to the reporter's (continued...)

this, repondent concludes that "Now that the veil has been lifted on appellant's trial defense strategy, and appellant has declared the mental defense a ruse, the Constitution cannot support reversal of his convictions based, effectively, on claims that his ability to mislead the jury with that defense was impermissibly restricted." (RB 47.) Respondent repeats this mantra in Arguments III (RB 74, fn. 48), IV (RB 80, fn. 51), IX (RB 144, fn. 68), X (RB 150, fn. 74) and XI (RB 153, fn. 75).

Respondent's reasoning is apparently that appellant's treatment of the mental health evidence while representing himself during the penalty phase somehow transformed *all* of the expert opinion presented, whether in testimony or declarations, into false or fabricated evidence, to be ignored in assessing appellant's claims of error. (RB 47.) However, while respondent cites various cases for the lack of protection for false or fabricated evidence, no authority is provided for the proposition that the evidence presented by defense counsel in pretrial proceedings (see, e.g., 2CT 278-401; 3CT 452-527), and to the jury at the guilt phase and sanity phase (Drs. Watson, Mills, Vicary, and Wolfson), becomes "false" or "fabricated" evidence by proclamation of a mentally ill, developmentally disabled, brain-damaged, and cognitively impaired defendant unable to recognize his own impairments and

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[1] (...continued)
transcript, preceded by the volume number. "ICPRT" refers to a separate volume of the Reporter's Transcript containing transcripts of sealed in camera proceedings. "*Marsden* RT" refers to a separate volume of the Reporter's Transcript containing transcripts of sealed proceedings pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 ("*Marsden*"). Those sealed transcripts, or portions thereof, as well as certain confidential documents contained in Volume 25 of the Clerk's Transcript which are referred to in this brief, have been unsealed for that purpose pursuant to an order of this Court filed August 11, 2010.

deficits.

The mental health evidence presented by defense counsel explained and accounted for appellant's denial and non-recognition of his mental illness, and included the conclusion that his denial of mental illness was not evidence that he was not mentally ill, but was a symptom of and a common reaction among the seriously mentally ill.

Dr. Mills testified that all the reports of the mental health experts who evaluated appellant, with the possible exception of one, contained indications that appellant denied that he was mentally ill. (26RT 3163-3164.) Yet, the overwhelming consensus of the psychologists and psychiatrists was that appellant was mentally ill, and had some significant brain damage. (See, e.g., 35RT 4399, 4434.) Dr. Vicary testified that the inability of an individual to recognize his mental illness was common among the mentally ill: "I would say that the vast majority of people that are truly seriously mentally ill will tell you that they are not. [¶] If they could tell you that they were, I mean, it would be on the way to recovery. So it is more common that they deny it than they admit it." (28RT 3448; see also 28RT 3499-3500.)

Furthermore, such a failure, or inability, to recognize or acknowledge mental illness or brain damage is consistent with and symptomatic of the nature of appellant's brain damage. Anatomical damage to the brain, especially the right hemisphere, which is where Dr. Watson concluded appellant's brain damage is primarily located (see 22RT 2732-2733, 2752, 2767), may result in a condition known as anasognosia, which prevents the patient from recognizing the problems they have as a result of that very damage to the brain.

> It is not only difficult, it is impossible for patients with certain right-hemisphere syndromes to know their own problems - a

> peculiar and specific 'anosognosia'.... And it is singularly difficult, for even the most sensitive observer, to picture the inner state, the 'situation' of such patients, for this is almost unimaginably remote from anything he himself has ever known.

(Oliver Sacks, The Man Who Mistook His Wife for a Hat (1998) p. 5; see also Backgrounder: Anosognosia (updated 5/29/2013) Treatment Advocacy Center (www.treatmentadvocacycenter.org).)

Respondent's underlying argument, that reliance on evidence that appellant personally labeled as fabricated or a trick conflicts with the truth-seeking function of the trial process, is misguided in this context. Notably, appellant's right to represent himself, which he successfully invoked for the penalty phase at which he made the statements upon which respondent now seeks to rely, has little to do with the truth-seeking function of a trial or with insuring a reliable fact-finding process and a corresponding proportional and reliable verdict. The truth-seeking trial touted by respondent is not advanced by allowing a mentally ill and cognitively impaired defendant to remove from consideration compelling and relevant evidence of his own mental illness and cognitive impairments which he cannot recognize.

Respondent advances no other basis than appellant's own statements for rejecting the reliability of the mental health evidence, and none appears in the record. Respondent relies, inter alia, on appellant's claim that he malingered in Dr. Watson's neuropsychological testing in 1999-2000.[2] (RB 46; 44RT 5353.) Appellant, of course, was unable to explain how he malingered in a way that had any effect on the validity of that testing. Appellant addressed this issue in the opening brief, demonstrating that appellant's claim of malingering

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[2] Appellant did not remember if he malingered in Dr. Watson's original testing in 1993. (44RT 5353.)

is unsupported by the record and refuted by the testimony of Drs. Watson, Mills, and Vicary. Their testimony makes it abundantly clear that even if appellant tried to malinger, he failed to undermine the validity of the testing. Not only did Dr. Watson test for malingering with negative results in his later administration of testing, but the results in the earlier and later administrations were substantially similar. Moreover, both Dr. Watson and Mills testified that the neuropsychological tests administered were extremely difficult to fake. (AOB 171-173.)

Additionally, the record demonstrates that the prosecution retained an expert neuropsychologist, Dr. Brooks, who had been provided with the raw data from all of Dr. Watson's testing of appellant, and who sat in the courtroom during Dr. Watson's testimony. Yet, the prosecution never presented any evidence that the raw data showed anything other than the results about which Dr. Watson testified in providing his conclusions and opinions to the jury. Dr. Brooks never testified, nor was any report by Dr. Brooks ever submitted to the trial court. (AOB 152-153.) The reliability and credibility of the testing and of Dr. Watson's conclusions have been demonstrated to a high degree of confidence. Appellant's attempt, unsupported by any evidence other than his own unreliable belief that he did not have any mental illness or brain damage, to undermine confidence in that testing and Dr. Watson's testimony and opinions fails resoundingly.

There are multiple bases for rejecting respondent's proposed dismissal of the expert opinion evidence in this case, not the least of which is that the expert opinion before the trial court, combined with defense counsel's repeated representations concerning appellant's mental state throughout the proceedings, culminating in counsel's declarations of doubt that appellant was competent to stand trial, and combined further with appellant's own behavior,

throughout these proceedings established a reasonable doubt of appellant's competence to stand trial. (See AOB Args. III-VIII.) A claim by a mentally ill and brain-damaged defendant that the expert mental health consensus that he is mentally ill and brain-damaged is false and fabricated is not a valid basis to overcome that substantial doubt. As this Court recognized in a slightly different context after appellant's opening brief was filed:

> The decision of a possibly incompetent defendant not to contest the issue of his or her own competence is entitled to no such credit. Indeed, such a decision ought to be considered inherently suspect, especially when, as in the instant case, the evidence before the court is in conflict regarding the defendant's mental competence. (Cf. *People v. Samuel* (1981) 29 Cal.3d 489, 495, 174 Cal.Rptr. 684, 629 P.2d 485 ["[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."]; *Bundy v. Dugger* (11th Cir. 1987) 816 F.2d 564, 566, fn. 2 ["Whether the defendant believed he was competent to stand trial is irrelevant for, if a defendant is incompetent to stand trial, his belief that he is able to do so is without import."].)

(*People v. Lightsey* (2012) 54 Cal.4th 668, 697.)

Similarly, the evidence respondent seeks to remove from consideration supports appellant's argument that it was error to grant appellant's request to represent himself at the penalty phase (AOB Arg. VI) at which appellant made the statements upon which respondent now seeks to rely.

In addition, the supposed repudiation was not as clear as respondent suggests: During the penalty phase, appellant took inconsistent positions, e.g., asking to reinstate his NGI plea (see Arg. V), declaring a doubt of his own competence (44RT 5447-5448), and asking to reinstate counsel (see Arg. VI). He also had Dr. Lisak, one of the experts whose declaration defense counsel

had submitted to the trial court pretrial (2CT 340-385), on his penalty phase witness list.[3]

Appellant distanced himself from his trial lawyers' presentation at the start of and during the penalty phase of trial. Given that the jury found appellant guilty of first and second degree murder and found him sane at the time of his father's murder, such a strategy is not surprising. Respondent cites no authority for the implicit premise that acceding to the reality of the jury's findings, and conceding guilt, waives all guilt phase errors or renders them harmless.

There is no indication that appellant's purported "repudiation" of the defense mental health case was an informed, knowing, and intelligent waiver of appellate review of the guilt verdicts on all three counts and the sanity verdict on Count One. No one informed appellant that his statements might act as such a waiver or forfeiture of rights; no one even suggested the possibility. There is no indication that appellant understood such to be the case, nor that he intended any such waiver or forfeiture. To apply such a sanction at this point would be nothing less than exploitation of a mentally and cognitively impaired defendant.

Aside from the attempt to remove the mental health evidence from consideration, respondent is inconsistent throughout the brief in characterizing the defense mental health evidence. In some instances, respondent refers to the defense mental health case as "robust." (Arg. I, RB 49; Arg. II, RB 72; Arg. XI, RB 159; Argument XII, RB 169.) In other instances, respondent refers to the same evidence as "uncompelling" and "far from convincing" (Arg. II, RB

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[3] Appellant was unable to present Dr. Lisak as a penalty phase witness due to scheduling problems. (46RT 5668-5669.)

72), "did not present a close issue" and "wholly unconvincing" (Arg. III, RB 79). Respondent also attempts to sidestep the evidence by relying on appellant's "repudiation" of the mental health evidence, as discussed above.

Respondent also claims that "the jury rejected the mental defense at the guilt phase." (RB 169.) Respondent does not explain this rather extraordinary conclusion, which is not supported by the record. Unlike the first trial, the jury here was unable to reach a verdict on the charge of first degree murder as to Counts Two and Three, and only reached a unanimous verdict of second degree murder on those two counts after the prosecutor conceded and withdrew consideration of first degree murder from the deliberations. (24 CT 6213-6215.) Respondent does not explain how that constitutes a rejection of the defense mental health evidence. In fact, elsewhere, respondent acknowledges that the jury's difficulty in reaching a verdict on those two counts was centered around the determination of appellant's mental state at the time. (See RB 73.)

Respondent describes the evidence supporting appellant's NGI pleas as "appellant's highly dubious theory regarding sanity" (RB 181), without acknowledging that after deliberations focusing solely on the mental health evidence, the jury had difficulty reaching a unanimous verdict on Count One and was unable to reach a unanimous verdict on Counts Two and Three, with three jurors finding that appellant had proved by a preponderance of the evidence that he was insane at the time of those two homicides.

Respondent's attempt to dismiss the defense mental health evidence as unconvincing or uncompelling and not having presented a close case is on its face a mischaracterization of the record in this case and should be rejected by this Court at every iteration. Certainly, the jury disagreed with respondent.

At a number of points in respondent's brief, respondent benignly

dismisses various decisions, statements, or behaviors by appellant as merely "foolish," "misguided," "unwise" or "eccentric." (RB 109, 135, 140, 141, 150, 169-170.) Given the substantial mental health evidence explaining appellant's multiple impairments, such a characterization of his irrational behavior and decisions is an unwarranted trivialization of appellant's impairments and of a substantial flaw in this trial and in the trial court's inappropriate and constitutionally inadequate treatment of this impaired defendant.

Even if an apparently intelligent defendant continually making foolish, unwise decisions or statements, or behaving eccentrically, without more, might not provide reason to entertain a reasonable doubt of his competence, that is not the case here. Here, in the context of a substantial amount of expert opinion, based upon a substantial documentary record as well as expert evaluations and neuropsychological testing, that the defendant is mentally ill, brain-damaged, developmentally disabled, and cognitively impaired, the same decisions and statements may no longer reasonably be interpreted as nothing more than foolish, misguided, unwise, or eccentric. Respondent's repeated attempts to analyze specific isolated points by wrenching them out of the context of other evidence raising a doubt of appellant's competence to stand trial must be rejected at every point.

In the arguments regarding competence (RB 132, 138), withdrawal of the NGI pleas (RB 159, 165), and self-representation at penalty phase (RB 169), respondent references the trial court's "finding" that defense counsel's declaration of a doubt during sanity deliberations about whether appellant remained competent was "a strategic plan." (45RT 5393.) That "finding" is unsupported by the record, and of no help to respondent. It demonstrates the trial court's arbitrary disregard of any evidence relating to appellant's competence which conflicted with the trial court's own preconceived (and

factually flawed) notions of present mental competence or her definition of mental illness.[4]

First, neither the trial court nor respondent identifies what the "strategic plan" supposedly was or how it diminishes the credibility or importance of counsel's declaration of a doubt, especially given counsel's numerous warnings prior to that point about appellant's mental incompetence. (Cf. *Drope v. Missouri* (1975) 420 U.S. 162, 177, fn.13.)

Second, the record reveals that the trial court made that "finding" during the penalty phase, *after* defense counsel had been relieved, and without giving defense counsel an opportunity to respond.

Third, the record upon which the trial court based that finding does not support the trial court's recitation of the relevant facts. The record establishes the following:

Defense counsel's declaration of a doubt as to appellant's competence occurred when he had appellant brought into the courtroom the day that the jury began deliberations in the sanity phase. Counsel stated "I think there have been *substantial changes* in the last couple of days with Mr. Bloom and at this point I will declare a doubt." (36RT 4523 (emphasis added).)

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[4] E.g, in addressing the death qualification of a prospective juror, the trial court stated:

> I hardly think I would call [hearing voices] a substantial mental illness. I would hardly think I would call that substantial. I read that in so many psychiatric reports which are far from the issue of sanity or insanity. But I just read one today coming up on a sentencing where he hears voices and I don't think that falls under substantial. Hearing voices - there's too many that hear voices.

(10RT 1258; see also AOB 413-415.)

The trial court inquired how much time defense counsel had spent in the lockup, stating that appellant had not been present in court during the proceedings and that the court did not think defense counsel had had much time to observe appellant. Defense counsel responded:

> One, I'm observing him now. But I went in yesterday twice, I saw him this morning and I saw him right after the jury went out.
>
> And my view, again without going into great detail, my view is he was marginally competent for the entire proceedings, just the unique circumstances of this case that I didn't need him in terms of cooperation with counsel to provide me with a lot of information.
>
> We have gone through extraordinary measures to deal with Mr. Bloom. The Court is aware of many of these measures. My view is there's been a change. He - I just do not feel he's able to cooperate at this point with counsel and I believe it is due to a mental illness.

(36RT 4524.) No indication was given by anybody at the time that cast any doubt on the veracity of defense counsel's representations regarding his interactions with appellant outside the courtroom during the relevant time.

Yet during the penalty phase, after defense counsel had been dismissed, and without giving defense counsel any opportunity to respond, the trial court remarked:

> At the time that [defense counsel] raised the 1368 question towards the end of the sanity plea *just out of the blue when he had only had five or so minutes to observe Mr. Bloom*, I asked him at that time how he could have formed such an opinion since he had been with him only a few minutes. . . . so it appeared to me to be a strategic plan on behalf of the defense counsel.

(45RT 5393 (emphasis added).)

The trial court's factual recitation is diametrically at odds what defense

counsel actually told the judge. Defense counsel saw appellant four separate times (twice in the day before he declared a doubt and twice the day he declared a doubt). Further, the trial court's "facts" about the quality of counsel's interactions with appellant outside the court's presence could not have been known by the court. Nor does any basis for ignoring counsel's representation regarding those facts appear on the record.

Moreover, the trial court's characterization of counsel's declaration of a doubt as coming "just out of the blue" is inconsistent with the record given counsel's repeated warnings of concern about appellant's competence (see AOB 150-151, 178, fn. 62), as well as the trial court's own prior acknowledgment of the ability of the defense team to keep appellant calm throughout the trial proceedings (see 28RT 3498) and a possible breakdown in the attorney-client relationship (15RT 1941; see also *Marsden* RT 3037). In addition, the trial court had heard Dr. Vicary's opinion of the possibility that appellant might "snap" under the pressure of the trial proceedings. (AOB 157-158.)

The factual basis of the trial court's "finding" of a "strategic plan" is unsupported by the factual record, and affirmatively contradicted by it. The "finding" cannot be credited, and no deference is due to it, even under an abuse of discretion standard. It provides no support for respondent's arguments.

The arguments in this reply are numbered to correspond to Appellant's Opening Brief rather than to respondent's re-ordering of those arguments in respondent's brief. Appellant does not reply to those of respondent's contentions that are adequately addressed in his opening brief. The absence of a reply by appellant to any particular contention or allegation made by respondent, or a failure to reassert any particular point made in his opening

brief, does not constitute a concession, abandonment, or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

Argument Cross-Reference Table

For the Court's convenience, appellant provides this table identifying the applicable argument in respondent's brief for each of appellant's arguments:

Opening and Reply Brief Argument	**Corresponding Respondent's Brief Argument**
I	I
II	II
III	VIII
IV	XI
V	XIII
VI	XII
VII	IX
VIII	X
IX	IV
X	III
XI	V
XII	VI
XIII	VII
XIV	XIV
XV	XV
XVI	XVI
XVII	XVII
XVIII	XVIII

ARGUMENT

I.

PROCEEDING WITH APPELLANT'S RETRIAL VIOLATED HIS STATUTORY AND CONSTITUTIONAL RIGHTS

Appellant argued that his retrial in 2000 following the reversal of his 1983 convictions and death sentence on the ground of ineffective assistance of counsel violated his constitutional rights because critical evidence was lost, and inadequately examined former testimony was used against him, preventing the presentation of an effective defense, while the prosecution unfairly capitalized on the delay and loss of evidence, subverting the reliability of the retrial. (AOB 71-86.) Respondent answers (1) that it is "premature" to address ineffective assistance of appellant's current counsel (RB 45); (2) appellant waived all claims concerning his entire mental state defense by insisting in the penalty phase after he discharged counsel that the defense was a fraud perpetrated by his attorneys (RB 46-47); and (3) the trial court properly refused to dismiss the case or take any other measures to remedy the prejudice caused by his original attorneys' constitutionally deficient representation (RB 47-50). Respondent also contends the trial court properly admitted the former testimony of Christine Waller and Martin Medrano and that references to prior proceedings did not violate section 1180 or appellant's federal constitutional rights. (RB 50-54.)

A. Appellant's Claim that Trial Counsel were Precluded from Providing Effective Assistance of Counsel is Properly Raised on Direct Appeal

Respondent contends that "to the extent appellant's claim is premised on the ineffective assistance of his attorneys at the retrial – because their investigation and preparation was hampered by the prior deficient performance of appellant's attorney at the initial trial – the claim is better addressed on

habeas corpus." (RB 45.) *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-67, on which respondent relies, explains that a claim of ineffective assistance of counsel is properly raised on habeas corpus when "the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged."

The argument in this appeal, however, is not that current trial counsel failed to represent appellant effectively at his retrial but that they were *prevented* from doing so by the rulings of the trial court. (*People v. Sixto* (1993) 17 Cal.App.4th 374 [appellant's claim was not that his current trial counsel was ineffective but rather that the trial court "fail[ed] to rectify counsel's inability to make up for the deficient performance" of prior counsel].) Trial counsel explained below the problem they faced – the loss of critical evidence because of the previous attorneys' ineffectiveness – and asked the trial court to dismiss the case or at least to take remedial measures, such as limiting the maximum offense, precluding the death penalty, or other steps to ensure that appellant could have the fair trial and reliable result denied him by the transgressions of his original trial counsel, and to ensure that those original transgressions did not have a continuing prejudicial effect on his ability to attain justice. (AOB 72-73.)

Because both the error – the trial court's refusal to dismiss the case or take any remedial measures whatsoever – and the resulting prejudice – the loss of crucial evidence and the prosecution's exploitation of that loss to bolster its case – are clear in the appellate record, the issue is properly raised on direct appeal.

B. The Trial Court's Refusal to Take Any Steps to Stem the Prejudice from Original Counsel's Ineffective Representation Deprived Appellant of Due Process, Effective Assistance of Counsel, and a Fair Trial

1. Appellant's Purported Repudiation of the Mental Defense Below was Symptomatic of his Mental Illness, and Did Not Constitute a Waiver of His Rights to Present a Defense and to a Fair Trial

As discussed more fully in the Introduction, *ante*, appellant's denial that he is mentally ill is, in fact, symptomatic of his mental illness and cognitive impairments and further evidence of his incompetence to stand trial. Nothing about his denial of his impairments justifies withholding appellate relief for errors prejudicial to the defense presentation of compelling mental health evidence unquestionably relevant to appellant's mens rea defense and to his pleas of NGI.

2. The Trial Court Improperly Denied Appellant's Motion to Dismiss or for Curative Measures

Relying on *People v. McDowell* (2012) 54 Cal.4th 395, 413, respondent argues there is no legal authority for dismissing a case due to delay that "is primarily attributable to the appellate process and defendant's collateral attack on his conviction and sentence." (RB 48.)

As an initial matter, *McDowell* is distinguishable because this Court found that McDowell did "not argue a due process violation separate from his speedy right (sic) claim." (*McDowell, supra*, 54 Cal.4th at p. 413, fn. 17.) The court rejected the speedy trial claim, holding that the defendant's speedy trial right was not triggered until his petition for habeas corpus was granted. (*Id.* at p. 415.) Concluding that the delay of ten months between the issuance of

a writ ordering a new penalty trial and McDowell's first penalty retrial was not "presumptively prejudicial," the Court never reached the other factors in the speedy trial analysis, including prejudice to the defendant's ability to present a defense. (*Ibid.*) Thus, while *McDowell* held there was no speedy trial violation in that case, it did not rule out the claim appellant presents here – that his due process right to present a defense and his Sixth and Fourteenth Amendment rights to a fair trial were violated by the trial court's failure to take any steps whatsoever to remedy the impact of the loss of material defense evidence due to the constitutional error in appellant's first trial.

Respondent further argues that no other remedial measures were required under *People v. Sixto* (1993) 17 Cal.App.4th 374, because, in this case, as in *Sixto*, "appellant's retrial counsel . . . were able to present 'significant new evidence not presented at the first trial.'" (RB 49, quoting *Sixto*, *supra*, 17 Cal.App.4th at p. 396.) Although the testimony of Drs. Naham and Kling was lost due to the "'deliberate pace' of the appellate and collateral review process," respondent reasons, it was "replaced by the opinions of numerous expert witnesses." (RB 49, quoting *McDowell*, *supra*, 54 Cal.4th at p. 413.)

This ignores that the prosecution sought systematically to discredit the testimony of the other defense experts on the ground that they had examined appellant many years after the crime. (See AOB 78-80, citing 32RT 4106-4108 [prosecution arguing tests were of "little value" and should be disregarded because they "were given much too late"].) In cross-examination and argument, the prosecution exploited the delay in appellant's case to attack the validity of his defense on retrial. (AOB 78-80.) As a result, appellant was prejudiced not only by the loss of exculpatory evidence during the "ordinary deliberate pace" (RB 49), of the appellate and collateral review process but

also by the prosecution turning the absence of that evidence into an offensive weapon, which it used against appellant to secure convictions and a death sentence.

The prosecution thus benefitted not once but twice from the delay and loss of defense evidence – first, because the defense case was weakened by the loss of compelling, contemporaneous evidence concerning appellant's mental state and second, because the prosecution capitalized on that the absence of a more contemporaneous psychological examination by positing via cross-examination and argument that it necessarily fatally undermined the validity of the entire defense.

Even if dismissal was not required based solely on the loss of material, exculpatory evidence, due process at a minimum precluded the prosecution from benefitting in this manner from the constitutional errors at appellant's first trial.

Respondent argues that loss-of-evidence cases such as *California v. Trombetta* (1984) 467 U.S. 479, are inapplicable here because the evidence in this case was not lost as a result of bad-faith government misconduct. (RB 48.) So-called loss-of-evidence cases deal not only with bad faith misconduct by the government, however, but also with good faith conflicts between competing government objectives: prosecuting a criminal defendant while also enforcing immigration laws (*United States v. Valenzuela–Bernal* (1982) 458 U.S. 858, 869-870, 873-874); protecting the identity of confidential informants (*Roviaro v. United States* (1957) 353 U.S. 53, 60-61); protecting the confidentiality of reports prepared by government witnesses (*Jencks v. United States* (1957) 353 U.S. 657, 671-672); or protecting classified information from disclosure (*United States v. Moussaoui* (4th Cir. 2004) 382 F.3d 453, 474, *United States v. Fernandez* (4th Cir. 1990) 913 F.2d 148, 154).

In all such "cases falling into 'what might loosely be called the area of

constitutionally guaranteed access to evidence,' [citation] the Supreme Court has held that the defendant's right to a trial that comports with the Fifth and Sixth Amendments prevails" over competing government interests. (*United States v. Moussaoui*, *supra*, 382 F.3d at p. 474, quoting *Arizona v. Youngblood* (1988) 488 U.S. 51, 55.) The trial court must therefore order disclosure or other remedies necessary to protect the defendant's constitutional rights to present a defense and to a fair trial, and if the government refuses to comply, the case may be dismissed. (*Id.* at p. 476.)

The court of appeal in *Sixto* thus correctly held that, in a case like this, where evidence has been lost due to the ineffectiveness of prior counsel, it similarly may be necessary for the trial court to take additional curative measures to safeguard the defendant's federal constitutional rights to present a defense and to a fair trial. (*People v. Sixto*, *supra*, 17 Cal.App.4th at pp. 381, 399, citing *Crane v. Kentucky* (1986) 476 U.S. 683, 690 and *Valenzuela-Bernal*, *supra*, 458 U.S. at p. 872.) While the court of appeal ultimately found no error in the trial court's denial of remedial measures in *Sixto*, that ruling turned on the specific measures the defendant requested. (*Id.* at pp. 400-402.) Signficantly, the trial court in *Sixto* offered to take steps to prevent the prosecution from unfairly benefitting from the ineffectiveness of Sixto's original counsel and the resulting loss of evidence. (*Id.* at pp. 391, 402.) The defendant's original attorneys had failed to test a sample of Sixto's blood for alcohol, and the sample was subsequently lost; original counsel had also failed to perform a time-sensitive test on the defendant that might have disclosed the presence of PCP. The trial court proposed to bar the prosecution from arguing that the defense should have run its own tests to support an intoxication defense and to instruct the jury that it should not hold the loss of evidence against the defense. (*Id.* at pp. 391-392.) Sixto rejected these measures,

demanding alternative instructions that the trial court and court of appeal found too argumentative. (*Id.* at pp. 399-402.)

In this case, the trial court refused to take *any* remedial measures and gave the prosecution carte blanche to exploit the delay and resulting loss of evidence to its advantage. As a result, appellant was denied his right to present a defense and his right to a fair trial and sentencing.

Respondent relegates to a footnote any further discussion of the curative measures short of dismissal that the defense sought to safeguard appellant's right to a fair trial. (RB 50, fn. 33.) Respondent contends that the instruction appellant requested, directing the jury not to consider the passage of time between the murders and the experts' examinations of appellant "would simply have been argumentative and misleading, since the passage of time was unquestionably relevant to a fair assessment of the experts' opinions." (*Ibid.*)

To the contrary, the instruction requested was necessary to prevent the prosecution from unfairly benefitting from the loss of evidence due to original counsel's ineffectiveness. The remedial instruction was made critical by the prosecution's injection of the issue into the case. Without the affirmative cross-examination and affirmative argument by the prosecution, the risk of harm would have been greatly reduced.

The high court has held that similar prosecution tactics violate due process. In *Simmons v. South Carolina* (1994) 512 U.S. 154, 157, the prosecutors argued that the defendant posed a future danger to society, suggesting that he might someday be released from prison. In fact, the prosecution knew that Simmons would not be eligible for parole, but nevertheless vigorously opposed defense requests to so instruct the jury. (*Id.* at pp. 158-159.) The high court concluded "[t]he State thus succeeded in securing a death sentence on the ground, at least in part, of petitioner's future

dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole. We think it is clear that the State denied petitioner due process." (*Id.* at p. 161.)

Similarly, in this case, the prosecution attacked the validity of the mental state defense on the ground that the defense experts had examined appellant too long after the fact, and their conclusions were therefore invalid. (AOB 78-89.) The prosecution knew full well that the only reason competent contemporaneous evaluations were not available was due to the ineffectiveness of appellant's original court-appointed counsel. The prosecution also knew, from the habeas corpus proceedings, that the defense experts who were no longer available would have testified, once properly prepared, "that Bloom suffers from a mental disease which affected his ability to appreciate the nature of his acts at the time of the murders." (*Bloom v. Calderon* (9th Cir. 1997) 132 F.3d 1267, 1274.)

Moreover, in the absence of a corrective instruction, the jury was invited instead to assume that any more contemporaneous information about appellant's mental state was not presented because it was unfavorable to the defense. As in *Simmons*, the prosecution was therefore allowed to exploit the jury's lack of information, distorting the truth-seeking function of the trial.

This Court stressed in *McDowell* that the appellate process is for the defendant's benefit – "a constitutional safeguard based on the desire of state and federal courts to explore any argument that possibly could save defendant's life." (*McDowell, supra*, 54 Cal.4th at p. 416.) The appellate and collateral review process can hardly be said to operate for a capital defendant's benefit if this Court, as respondent urges, gives the state license simply to perpetuate at a new trial the prejudice from constitutional errors that led to

reversal in the first instance. (See *Bloom v. Calderon, supra*, 132 F.3d at p. 1278 [appellant was prejudiced at his first trial by his attorneys' failure to provide critical materials to and prepare defense mental health experts, and by the prosecution's ability to thus turn the evidence against him.].)

At a minimum, the trial court should have precluded imposition of the death penalty. (1CT 103; 3CT 449.) While this remedy would not make appellant whole, it is consistent with the goal of achieving reliability in the procedures resulting in a death verdict. The same due process principles that in some cases compel dismissal of an entire criminal action when the defense is denied access to critical evidence apply with even greater force in the capital sentencing context where the defendant must be afforded a fair opportunity to respond to the prosecution's case for death (*Simmons v. South Carolina, supra*, 512 U.S. at 168-69; *Skipper v. South Carolina* (1986) 476 U.S. 1, 5 n.1; *Green v. Georgia* (1979) 442 U.S. 95, 97; *Gardner v. Florida* (1977) 430 U.S. 349, 362), and where the "provision of 'accurate sentencing information [is] an indispensable prerequisite'" under the Eighth Amendment "to a reasoned determination of whether a defendant shall live or die.'" (*Simmons v. South Carolina, supra,* 512 U.S. at p. 172 (conc. opn. of Souter, J.), quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 190 (1976) (joint opn. of Stewart, Powell, and Stevens, JJ.).)

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" a death sentence is vanishingly small when the alternative is life without possibility of parole, and the defendant has been deprived, by constitutional error in his first trial, of critical mitigating evidence without which the new jurors cannot make

an informed or reliable sentencing decision.[5] (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.].) "Justice" is particularly ill-served by the state's relentless pursuit of the death penalty in this case in light of the other compelling mitigating circumstances, including appellant's serious neurological and organic damage, his mental illness, and particularly his years of abuse and victimization at the hands of Bloom, Sr.

C. The Unavailability of Key Lay Witnesses Undermined the Presentation of a Defense, Caused the Jury to Consider Misleading and Unreliable Information, and Prevented a Fair Retrial

Respondent acknowledges that appellant may properly raise the due process violation that resulted from the erroneous admission of former testimony discussed in Argument II, below. (RB 50-51.) The issue is addressed in that section.

D. Repeated References to Appellant's Prior Trial Prevented a Fair Retrial

Respondent argues first that appellant failed to renewed his objection under section 1180 during the trial itself and therefore forfeited the claim. (RB

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[5] Respondent tries to diminish the significance of the lost evidence by arguing that "both Dr. Naham and Dr. Kling had, at least at one point, diagnosed appellant with antisocial personality disorder – a diagnosis that would have been highly damaging to the defense and favorable to the prosecution." (RB 50.) Dr. Kling acknowledged that his prior diagnosis was false, inaccurate and not medically sound in that they were based on inadequate and incomplete social and medical history information. (*Bloom v. Calderon, supra*, 132 F.3d at pp. 1274-1275.) Dr. Naham was, of course, unavailable to explain the erroneous nature of that prior diagnosis.

51.) Second, respondent maintains that the repeated references to a prior trial did not violate either section 1180 or appellant's constitutional right to a fair retrial because there was no direct reference to the actual, prior verdict and that the indirect references "did not pose an unacceptable risk that the jury would draw any prejudicial inference against appellant." (RB 53, citing *People v. Kessler* (1963) 221 Cal.App.2d 187.) Respondent is incorrect.

As an initial matter, respondent construes section 1180 too narrowly. Section 1180 provides in full that "[t]he granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict or finding cannot be used or referred to, either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the accusatory pleading." It therefore does not merely prohibit explicit references to the former verdict, but requires a retrial to be conducted on a clean slate.

A clean slate is particularly necessary where, as here, the defendant's convictions were reversed because of error – such as the ineffective assistance of trial counsel – that fundamentally undermined the reliability of the previous proceedings and the resulting verdicts. For the jurors to put any stock in the prior proceedings reinfects the new trial with the same unreliability and constitutional error.

Respondent attempts to distinguish *People v. Kessler*, *supra*, 221 Cal.App.2d at p. 192, arguing that it applies only where the prejudicial information "was not necessary to the prosecution's case." (RB 52.) Although the *Kessler* court commended the attorney general in that case for admitting that the trial prosecutor had acted improperly by calling the defendant's probation officer when he was not a necessary witness, the court did not create a gaping loophole in section 1180, as respondent suggests.

Rather, *Kessler* distinguished *People v. Solis* (1961) 193 Cal.App.2d 68, 76, in which the court had disapproved calling a probation officer as a witness, but did not find reversible error where the defendant's prior conviction for narcotics possession was admitted to impeach his claim that he was unfamiliar with narcotics. The *Solis* court contrasted *People v. Spencer* (1956) 140 Cal.App.2d 97, 105, in which the defendant's prior narcotics conviction was not admissible as impeachment, because the defendant did not dispute that he knew what heroin was.

Notably, Solis's conviction was reversed on another ground: the prosecution had called Solis's wife to testify, knowing that the defense would invoke marital privilege. Observing that the jurors could not help but infer that the wife's testimony would have been incriminating, the court of appeal held "[t]he conclusion that [Solis] did not receive a fair trial is inescapable." (*People v. Solis*, *supra*, 193 Cal.App.2d at p. 78.)

The court in *Kessler*, citing section 1180, similarly concluded that the prosecution's "indirect method of using and referring to defendant's former trial; implying prior criminality . . . could not have failed to prejudice defendant in the eyes of the jury. Unquestionably, it denied him a fair trial." (*People v. Kessler*, *supra*, 221 Cal.App.2d at p. 192.)

The prosecution in this case made repeated, gratuitous references to the prior proceedings, including arguing that they had been more accurate, thus inviting the jury to infer that appellant had not only been previously convicted of the same offenses but that he had benefitted from an unjustified reversal. (AOB 84-85.)

It is widely recognized that jurors' exposure to "information that the defendant was convicted of the same charge at an earlier trial . . . inherently poses a substantial risk of prejudice to a defendant." (*United States v. Attell*

(5th Cir. 1981) 655 F.2d 703, 705 [jurors exposed to publicity disclosing prior conviction].) Indeed, it is difficult "to think of anything more damning to an accused than information that a jury had previously convicted him for the crime charged." (*Ibid.*, quoting *United States v. Williams* (5th Cir. 1978) 568 F.2d 464, 471.) The prejudice is compounded if the jury is left to speculate "that the defendant had 'got off on a technicality.'" (*United States v. Attell, supra,* 655F.2d at p. 705, quoting *United States v. Williams*, *supra*, 568 F.2d at p.470; see also *People v. Purvis* (1963) 60 Cal.2d 323, 339 [risk that jurors may have seen sheriff's comments during retrial revealing that two prior juries had imposed "the extreme penalty" on defendant and the "sentences were reversed on technicalities" required reversal].) Respondent's contention that the prosecution's references "did not pose an unacceptable risk that the jury would draw any prejudicial inference against appellant" (RB 53), is thus contrary to both common sense and the law. Moreover, the harm here from the trial court's refusal to craft a remedy and prosecutorial cross-examination and argument, when considered cumulatively with other errors that undercut appellant's mens rea defense and mental health evidence (see, e.g., Arguments II, IX-XIII) removes any doubt that the errors were prejudicial.

Finally, contrary to respondent's claim, trial counsel did not forfeit their objections (RB 51), but invoked section 1180 repeatedly, attempting to limit the prosecution's prejudicial references to the previous trial. (AOB 84-85.) The fact that it was so difficult to prevent improper references by the prosecution, and that the defense was hamstrung in its efforts to explain the complicated procedural context of the case by the prosecution's insistence that any effort to do so would open the door all manner of prejudicial information relating to the previous trial (AOB 86), underscores the broader point that it was impossible for appellant to receive a fair retrial.

II.

ADMISSION OF THE PRIOR TESTIMONY OF MARTIN MEDRANO AND CHRISTINE WALLER CONSTITUTED PREJUDICIAL ERROR AND REQUIRES REVERSAL OF THE ENTIRE JUDGMENT

Martin Medrano and Christine Waller were key prosecution witnesses at appellant's first trial. (AOB 87-90.) By the time of the retrial neither was available to testify. (AOB 87; RB 54.) Yet, despite the fact that appellant had been granted a new trial because of his counsel's ineffectiveness at the first trial, and despite the fact that appellant had been mentally incompetent at his first trial, the trial court ruled that the testimony of Medrano and Waller from the first trial could be read to the jury at appellant's second trial. (RB 54.)

Respondent believes that the fact appellant had ineffective counsel at his first trial does not affect the use of this testimony at his second trial. (RB 55-61.) Respondent also believes that the testimony could be read to appellant's jury at the second trial regardless of the fact he may have been incompetent when the testimony was initially adduced. (RB 61-70.) Finally, respondent asserts that even if the testimony was improperly placed before the jury at the second trial, such an error was harmless. (RB 70-74.) All these assertions are incorrect. Admission of this evidence violated appellant's rights to confrontation, due process, a fair trial, and a reliable adjudication of guilt, sanity, and penalty. (AOB 87-127.)

A. The Prior Testimony Should Have Been Excluded Because of the Ineffective Assistance of Counsel at the First Trial

As a general matter, both the Evidence Code and the federal Constitution permit the admission of a witness's prior testimony if the witness is unavailable and the defendant had an opportunity to examine that witness

with the same motive and interest which exists at the current proceeding. (Evid. Code, § 1291, subd. (a); *Crawford v. Washington* (2004) 541 U.S. 36, 57.) Respondent believes that these principles are unaffected by the fact that the prior testimony elicited in this case was obtained while the defendant was represented by an attorney who was subsequently found to be ineffective. (RB 55-61.) Respondent bases this belief upon misguided factual and legal conclusions. An examination of both the facts in this case and the law that applies to this type of situation yields a conclusion at odds with that set forth by respondent.

Initially, it is important to place the issue in its proper perspective. Respondent describes appellant's claim as being that he had no "adequate" opportunity to cross-examine Medrano and Waller at the first trial. (RB 55.) The issue, however, is whether appellant had a "meaningful" opportunity for effective cross-examination at the prior proceeding. (*People v. Brock* (1985) 38 Cal.3d 180, 190; *People v. Cloyd* (1997) 54 Cal.App.4th 1402, 1409; see *People v. Gonzales* (2012) 54 Cal.4th 1234, 1262 [defendant not denied "meaningful opportunity to cross-examine" at prior hearing]; compare Merriam Webster's Collegiate Dictionary (10th ed. 1994) p. 14 [adequate defined as barely sufficient] with p. 720 [meaningful defined as being of significance].) The difference between "adequate" and "meaningful" reflects whether we mean to pay only lip service to the right of confrontation or actually to respect the place it has in ensuring due process of law. There is no dispute that appellant was afforded some opportunity to cross-examine Waller and Medrano at the previous trial, but the reality is that due to prior trial counsel's ineffective representation appellant had no meaningful opportunity for effective cross-examination. Consequently, the prior testimony should not have been admitted at the present trial.

Respondent believes that the law dictates a disregard for the quality of the representation at the prior proceeding unless the court making the finding of ineffectiveness bases that finding explicitly on an examination of the witness whose testimony is being admitted at the current proceeding. (RB 55-56.) This is a crabbed reading of both the holding by the Ninth Circuit in this particular case and an inaccurate reading of the law applicable to this issue.

It is true, as respondent asserts, that the Ninth Circuit found counsel at the first trial ineffective for inadequately preparing the key psychiatric witness. (RB 56.) This is not, though, the only observation about counsel's performance that the Ninth Circuit made. In support of its opinion, the court quoted favorably the testimony of a law student involved in preparation of the defense and the declaration of a potential fact witness. The law student testified, among other things, that counsel was rarely available, would disappear for hours at a time to play Pac-Man at a bowling alley, and that everyone at the firm was concerned about his lack of preparation. (*Bloom v. Calderon* (9th Cir. 1997) 132 F.3d 1267, 1271.) She also testified that counsel never discussed a theory of defense with her, despite the fact that she told him she needed to discuss the theory of defense in order to aid in preparing the key psychiatric witness. (*Id.* at pp. 1271-1272.) Finally, the court noted the declaration of a social worker who was a percipient observer of appellant's mental instability and its manifestations who said she constantly tried to contact trial counsel but he never responded to her entreaties. (*Id.* at pp. 1276-1277.)

The Ninth Circuit's reliance upon the above in its opinion indicates a broader view of trial counsel's ineffectiveness than simply one restricted to a lack of preparation pertaining to a single expert witness. The Ninth Circuit may have focused on the significance of the ineffectiveness as it pertained to

this key witness, but the ineffective assistance chronicled and highlighted by the court paints a much broader picture of incompetent representation than respondent credits. Respondent's narrow reading of the Ninth Circuit's opinion causes it to pose the case improperly as one where trial counsel has been found ineffective because of an isolated inadequacy in his conduct of the trial, whereas the fair import of the Ninth Circuit's opinion is that it believed trial counsel at the first trial generally was ineffective and focused the basis for reversal on the most salient factor in that ineffectiveness. This is an important distinction to bear in mind as one analyzes the cases respondent believes support its position.

Respondent views *Mancusi v. Stubbs* (1972) 408 U.S. 204 (*Mancusi*) as mandating rejection of appellant's claim. (RB 55-57.) It does not. Respondent views *Mancusi* more broadly than is appropriate and glosses over significant facts that actually support appellant's claim. Initially, it is of great significance that the ineffectiveness finding which resulted in setting aside the initial 1954 conviction which lay at the heart of the case was not based upon a finding that trial counsel was actually ineffective in conducting the trial at issue, but was the product of a per se rule of ineffectiveness based upon the short time that existed between appointment of counsel and the start of the trial. (*Mancusi, supra*, 408 U.S. at p. 214.) As the high court itself noted, had the habeas court which set aside the conviction reviewed it after the high court's ruling in *Chambers v. Maroney* (1970) 399 U.S. 42, which disapproved such per se findings, it might have addressed actual ineffectiveness. (*Ibid.*) The import of this is that *Mancusi* is not a case where ineffectiveness was based on actual performance, whereas here it was. This is a significant difference which respondent does not credit.

Another significant difference between *Mancusi* and this case is that in

addition to there never having been a finding of actual ineffective performance, there was a specific finding of *effective* performance in *Mancusi*. In reviewing the second trial in state court–the trial where the prior testimony of one of the victims was introduced–the state supreme court expressly found the cross-examination of the victim at the prior trial to be constitutionally sufficient. (*Mancusi*, *supra*, 408 U.S. at p. 214.) In other words, not only was there no finding of actual ineffectiveness in *Mancusi*, there was a specific finding of effectiveness in cross-examination as it related to the exact prior testimony the state was seeking to admit. That is a far cry from a case where the Ninth Circuit made general observations of the actual ineffectiveness of trial counsel and no court has addressed the adequacy of the examination at issue. *Mancusi* simply does not foreclose appellant's claim.

Respondent next proffers that *Mancusi* requires a demonstration of what cross-examination would have taken place aside from that which did occur, and which demonstrates the first examination was ineffective, before a court can consider making a finding that the former testimony would be inadmissible. Respondent argues that the mere fact that one attorney would cross-examine in a different manner than another attorney is not, in and of itself, a basis for barring the former testimony. (RB 58-61.) Respondent makes more of the first assertion than is warranted by the factual setting of *Mancusi,* and while appellant does not disagree with the second proposition–as a general matter of law–it is not relevant to the situation existing here.

Respondent's approach to *Mancusi* decontextualizes and separates its holding from its facts. As discussed above, in *Mancusi* the Tennessee Supreme Court already had found that the cross-examination of the unavailable witness was constitutionally sufficient. (*Mancusi*, *supra*, 408 U.S. at p. 214.) The Second Circuit drew a different conclusion and found the

examination to be inadequate. (*Id.* at p. 215.) Consequently, what the United States Supreme Court was addressing in the context of whether to grant relief under this particular set of circumstances was simply whether the Second Circuit's finding was correct. In other words, the parts of the opinion upon which respondent relies were not addressing whether a defendant carries a burden of demonstration of inadequacy in this regard, but whether the Second Circuit's finding was supportable in light of the facts that the federal district court had granted relief because of a per se rule and the Tennessee Supreme Court had previously found the examination sufficient. Here, the Ninth Circuit found ineffectiveness in actual performance. This separates appellant's case from the approach taken by the Supreme Court in *Mancusi*.

Even if one were to believe that appellant did bear some burden in showing how the examination at the second trial would have been different and more productive than that at the first trial, that burden has been met here. In *Mancusi*, the Supreme Court found that "counsel at the retrial did not in his proffer show any new and significantly material line of cross-examination that was not at least touched upon in the first trial." (*Mancusi*, 408 U.S. at p. 215.) In fact, the Supreme Court found that the questions which were proferred as ones that should have been asked at the first trial were all questions that had been "adverted to in the earlier cross-examination." (*Id.* at p. 215.) As appellant has demonstrated (AOB 91-95, 101), such is not the case here. Thus, even if appellant bears this burden, he has met it.

Finally, respondent's approach to appellant's use of *People v. Ledesma* (2006) 39 Cal.4th 641 reveals respondent's failure to consider this issue in the context of the purpose to be served by the confrontation clause and Evidence Code section 1291. (See RB 58, fn. 36.) Respondent believes appellant is urging upon this Court a rule that prior testimony is only admissible at a retrial

resulting from a finding of ineffective assistance at the first trial when the witness at issue is present for the retrial and subject to examination. (RB 58, fn. 36.) That is an incorrect reading of appellant's argument.

Appellant agrees with respondent that *Ledesma* held that the propriety of admitting prior testimony at a retrial where counsel was held ineffective at the first trial depends on the circumstances of both the prior and the present trial. (RB 58, fn. 36.) More particularly, the *Ledesma* court found that "decisions that have addressed such issues have examined the circumstances surrounding the prior testimony and how it was used in the subsequent trial, to determine whether the evidence at issue is attributable to counsel's ineffective assistance and whether its use denied the defendant a fair trial in the subsequent proceedings." (*People v. Ledesma*, *supra*, 39 Cal.4th at pp. 686-687.) The *Ledesma* court then listed as examples a string of cases that illustrated the principle it was setting forth. An examination of both the *Ledesma* holding itself, as well as these cases, reveals principles that support appellant's view.

Regardless of respondent's protestations, the essence of the holding in *Ledesma* is that the confrontation clause is not violated or a defendant denied a fair trial when the prior testimony of defense witnesses is used to impeach them when they testify at the retrial. A fair trial is not compromised by the prior ineffectiveness of defense counsel because the witnesses were available to explain away any inconsistencies between their prior testimony and their present testimony. Appellant does not assert that it is a requirement that the witnesses be available for examination in all cases before a prior statement may be admitted, but it certainly was a consideration in *Ledesma*. (AOB 96-98.) Here, the witnesses were prosecution witnesses–as opposed to *Ledesma* where they were defense witnesses– and were not available for examination;

this is a significant difference.

Examining the fact patterns of the cases *Ledesma* cites shows a similar support for appellant's position. Two of the four cases which this Court found exemplary of the principle it was espousing involved holdings that permitted the state to use the prior testimony for impeachment only rather than for substantive purposes as well as impeachment. Both of these cases held that the state could only use the prior testimony of the defendant for impeachment purposes if the defendant elected to testify. (See *People v. Duncan* (Ill.App. 1988) 527 N.E.2d 1060, 1062; *Ibn-Tamas v. United States* (D.C. 1979) 407 A.2d 626, 646.) Tellingly, this Court also cited as representative of its thinking a case where the reviewing court reversed a conviction because the trial court permitted the state to use as direct evidence an admission of guilt obtained at a prior hearing where the defendant had been represented by an attorney suffering from a conflict of interest. (See *People v. Karlin* (1964) 231 Cal.App.2d 227, 232.) The final case cited by the *Ledesma* Court, *People v. Sixto* (1993) 17 Cal.App.4th 374, merely illustrates that a finding of ineffectiveness of counsel at a prior trial calls for a careful analysis of the actual effect of that ruling and requires the trial court to tailor a curative remedy appropriate to the facts of the case. While noting "the unusual circumstances of this case," both the *Sixto* trial court and the reviewing court did, in fact, recognize the appropriateness of some curative measure, albeit not the specific measures requested by the defendant in that case. (*Id.* at pp. 385-404 [remedies sought by counsel revolved around complex issue of how to treat destruction of evidence arguably resulting from prior counsel's

ineffectiveness].)[6]

Consideration of the philosophy espoused in *Ledesma*, as well as the cases that the Court found illustrative of that philosophy, supports appellant's contention that the proper remedy in this case was to bar the state from using the direct testimony of Medrano and Waller in its case-in-chief. *Karlin* was the only case cited by the *Ledesma* Court as exemplary of its philosophy which involved the use of prior testimony as direct evidence by the state, and the *Karlin* court reversed that conviction. The view espoused by the People that such a remedy here is inappropriate because the Ninth Circuit did not feel the need to specifically address the ineffectiveness of prior counsel during the examination of these two witnesses (while noting that he seemed to spend more time playing video games than preparing the defense and never articulated to anyone involved in the case–co-workers or witnesses he called–any theory of the defense) is neither reasonable nor what this Court should accept as a worthy approach to the law. The ineffectiveness of prior trial counsel must bar the state from profiting by being able to use the prior testimony of Medrano and Walter when appellant did not have a meaningful opportunity to confront them at the first trial.

B. The Prior Testimony Was Inadmissable Because Appellant Was Incompetent at the Time of the Previous Trial

Appellant objected to the admission of the prior testimony of Medrano and Waller on the basis that he was incompetent at the time the testimony was adduced. (AOB 111-112.) There are two separate junctures during the evolution of this prosecution that need to be considered as they relate to a determination of this issue. The first point of consideration is the

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[6] See Arg. I, *ante*.

determination following the penalty phase of his first trial where–while being represented by counsel later found to be ineffective–there was a finding that appellant was competent to proceed with the remainder of the legal proceedings. The second point of consideration relates to the extensive evidence developed in support of the federal habeas corpus petition which eventually resulted in the reversal of the prior judgment, which evidence led several experts to conclude after they had been able to review the extant evidence pertaining to the issue–that appellant was actually incompetent during the course of the proceedings at his first trial. (AOB 105-111; see, e.g., 2CT 278-291 (Declaration of Wm. Vicary, J.D, M.D.); 2CT 293-322 (Declaration of I. Hyman Weiland, M.D., Ph.D.); 2CT 327-338 (Declaration of Julian Kivovitz MD. JD.); 2CT 340-385 (Declaration of David Lisak, Ph.D.); 2CT 387-401 (Declaration of Donald W. Verin, M.D.).)

Based upon the extensive evidence developed in federal habeas proceedings, appellant argued at the time of his retrial that such evidence showed he had been incompetent at the time the Medrano and Waller testimony was adduced, and therefore it could not be admitted against him. He also requested a hearing on the issue of his prior competence as it related to admission of this testimony. The trial court, without directly addressing the substance of these claims, admitted the prior testimony and did not afford appellant the requested hearing. (AOB 111-113.)

Respondent asserts that the trial court's ruling was correct, and the fact that appellant may have been incompetent when the prior testimony of these witnesses was adduced is not a sufficient reason to have barred its use at the retrial. (RB 65-70.) To a certain extent, respondent misperceives the concern at issue, but ultimately respondent is simply wrong in its belief that the incompetence of the defendant at the time the former testimony is adduced

does not prevent its use at a later proceeding.

Both the trial court and respondent have analyzed this issue from a faulty perspective: both have adopted the view that appellant's incompetence at the time of the prior trial and the admission of the former testimony of Medrano and Waller are "two separate issues."[7] (RB 65.) This is wrong. They are both inextricably linked subparts of the only issue under consideration here: Whether appellant has been denied his right of confrontation at the instant trial where the state is permitted to introduce former testimony adduced at a time when appellant was incompetent. The answer to this single issue is that a meaningful opportunity for cross-examination is not given to a defendant when that defendant is incompetent. Therefore, a transcript of testimony adduced under those circumstances may not be used as a substitute for live testimony at a future proceeding.

The fundamental flaw in the approach taken by the trial court and respondent is the attempt to draw a bright line between a defendant's incompetence during the time of an examination of a witness and a consideration of the effectiveness of that cross-examination. In respondent's view, the fact of import is the attorney's competence at the prior proceeding and the fact the defendant may have been incompetent at the prior proceeding is irrelevant. (RB 66-67.) Because of that view, respondent believes the opinion in *Stevenson v. Superior Court* (1979) 91 Cal.App.3d 92, which held

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[7] This misconception is reflected best by footnote 43 on page 66 of the Respondent's Brief. There, respondent is correct in saying that appellant was not seeking to relitigate his competency in itself, but was opposing admission of the former testimony. Respondent goes astray, however, by implying that because the latter issue was relitigated at the instant trial the competency issue seemingly disappears. (RB 66, fn. 43.) In order to effectively resolve the admissibility issue, the competency issue had to be addressed.

that former testimony could not be admitted at a subsequent trial where the defendant was incompetent at the time the testimony was adduced, to be incorrectly decided. (RB 66; see AOB 111-113.)

Initially, respondent takes the *Stevenson* court to task for failing to consider *Mancusi v. Stubbs*, *supra*, when rendering its opinion. (RB 66.) According to respondent, the opinion in *Stevenson* should not be followed because it did not attempt to reconcile its conclusion with the idea that there is no absolute bar to the use of prior testimony from a proceeding where counsel was ineffective. (*Ibid.*) This is not a valid basis for distinction because the principle being addressed in *Stevenson* is a different principle than the one respondent wants to address. The point being made by the *Stevenson* court is that there cannot exist a meaningful opportunity to confront a witness when the defendant is incompetent at the time of the examination. (*Stevenson v. Superior Court*, *supra*, 91 Cal.App.3d at p. 930.) Because of its focal point, there was no need for the *Stevenson* court to address *Stubbs*. Consequently, urging that the opinion be disregarded because of a failure to do something it had no reason to do is illogical.[8]

Respondent's assertion that "there is no principled basis upon which to

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[8] The same reasoning applies to the observation by the court in *People v. Jones* (1998) 66 Cal.App.4th 760, 768 that *Stevenson* can be questioned because the defendant there was not required to demonstrate how his assistance would have improved the cross-examination. (RB 67.) The *Jones* opinion is also curious because it holds that if a trial court refuses to appoint counsel for a defendant and forces him to represent himself at the first proceeding, the testimony of witnesses who subsequently became unavailable would not have been admissible at the second proceeding, but not because the defendant's right to counsel would have been violated, but because the assistance of counsel tends to promote effective cross-examination. (*Id.* at p. 766.) Certainly, the same principle must operate to dictate that having a competent defendant promotes effective cross-examination.

distinguish prior testimony elicited at a proceeding during which the defendant was incompetent from testimony elicited at a proceeding during which counsel provided ineffective representation" is simply wrong. (RB 67.) If this proposition were true, then a case could be tried from beginning to end with an incompetent defendant and there would seemingly be no violation of the law as long as the incompetent defendant had the effective assistance of counsel. Yet, that is not the law. It is not the law because competence to stand trial is a bedrock principle of our jurisprudence totally apart from the concept of a defendant having the effective assistance of counsel. (See *Pate v. Robinson* (1966) 383 U.S. 375, 385 [violation of federal due process to try incompetent defendant].) For that reason, it is perfectly logical to draw a distinction–when determining whether there was a meaningful opportunity for cross-examination–between instances of incompetence of the defendant and ineffective assistance of trial counsel. That is what the *Stevenson* court did and it was correct to do so.

Respondent's ultimate view is that appellant was competent at the first trial so there was no need to relitigate the competency issue before admitting the former testimony.[9] (RB 67-68.) Had appellant been seeking to relitigate the issue of his previous competency to stand trial, this viewpoint would have some currency. But that is not what was taking place. The prosecution, as the proponent of the previous testimony, was seeking its admission under Evidence Code section 1291. One of the burdens the prosecution bore was to

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[9] Respondent also posits that retrospective competency determinations can be difficult, so the trial court could be excused from engaging in one. (RB 68.) The trial court never said it thought a retrospective competency determination would be difficult in this particular case, so there is no reason to deny relief on the basis one could not have been undertaken.

show that appellant had a meaningful opportunity to cross-examine these witnesses at the prior proceeding. (*People v. Morrison* (2004) 34 Cal.4th 698, 724 [proponent of evidence has burden of establishing foundational requirements for its admissibility and evidence is properly excluded when party fails to do so]; see also *People v. Diaz* (1992) 3 Cal.4th 495, 534-535 [proponent of evidence who claims business records exception has burden to establish trustworthiness].) This joined the issue of whether appellant was competent at the time these two witnesses were examined, not whether he was competent at the later date of his sentencing. Appellant does not dispute that if no issue had been raised regarding his competency at the time of the examination of the witnesses, the state could have proceeded with the assumption that he was competent. But, because appellant did raise this question–a question legitimately raised by the new (post-1983 trial) evidence and opinions developed in habeas proceedings–it was before the trial court as a component of making its evidentiary ruling. It was error for the trial court to simply dismiss this question and not consider it. Because of that, the trial court's evidentiary ruling admitting the former testimony was made on an improper basis, did not take into account all the factors necessary to satisfy the admission requirements of Evidence Code section 1291, and was erroneous. (See AOB 121-122.)

C. Appellant Was Prejudiced by Admission of this Testimony

The testimony of these witnesses was an essential component of proving the state's case and undermining appellant's defense. As fully set forth previously, Waller's testimony was essential to supporting the state's premeditation theory and to showing that appellant did not suffer from any mental impairments that would prevent premeditation and deliberation. Her

testimony also undermined defense evidence regarding the abuse inflicted by Bloom, Sr. More particularly, the state was able to use omissions from Waller's testimony to undercut the diagnosis of Asperger's syndrome; the theory was that because of her relationship with appellant, Waller would have supplied such evidence if it really had existed. (AOB 122-123.) Medrano's testimony was also important for establishing premeditation and deliberation. (AOB 123-124.)

Respondent believes that there was ample evidence apart from that of Medrano and Waller to show premeditation and deliberation. (RB 71-72.) Respondent also asserts that the testimony did not hamper presentation of appellant's mental-state defense, which respondent simultaneously describes as both "robust" and "far from convincing."[10] (RB 72.) Finally, respondent asserts this was not a particularly close case, so the introduction of this evidence had little effect on the jury's verdicts. (RB 73.)

Appellant's point regarding prejudice, which is not really rebutted by respondent, is that the testimony of these particular witnesses was utilized as a continuing thread throughout the state's case from guilt through penalty phase, which is not true of other pieces of evidence utilized by the state. The prejudice is not so much that without this testimony there would have been a total absence of evidence to show premeditation and deliberation, or that there was no other evidence that could be used to inferentially undermine the mental-state defense, but more that the testimony from these witnesses was the cornerstone that supported the foundation of the state's case.

Waller was a particularly unique witness in this regard. She was clearly an important and pivotal person to appellant and the jury would naturally pay

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[10] See Introduction, *ante*.

close attention to her testimony. Consequently, the ability of the state to stress, e.g., that she gave no testimony that appellant recited lists of English kings–an absence that the prosecutor considered significant in undermining the Asperger's diagnosis–was pivotal in attacking the mental-state defense. As perhaps the person closest to appellant, Waller would have been seen by the jury as the person most likely to have been privy to this knowledge, and the lack of this evidence was utilized by the prosecutor, who argued that if the evidence was true then Waller would certainly have mentioned it. (30RT 3884.) There is no comparable testimony from any other witness that would have permitted such a devastating argument.

As to whether this was a close case, appellant stands by the argument in his opening brief. (AOB 125-126.) Respondent does not think that a close case is indicated by the fact it took the jury four days of deliberations and a request for readback and further jury instructions before it found appellant guilty of first degree murder as to Bloom, Sr. (RB 73; see AOB 125.) This is a difficult position to credit given the relatively straightforward facts and focused mens rea determinations to be made by the jury.

Ultimately, the question for resolution is not whether there was any other evidence to support the state and impeach the defense or whether four days of deliberation constitutes a close case; the ultimate question is whether the state has proven beyond a reasonable doubt that this evidence, considered separtely or in combination with the other errors undermining appellant's guilt and sanity phase mental defenses, including the errors set forth in Arguments I, IX-XIII, did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.) It has not. Reversal is required.

III.

THE TRIAL COURT VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS BY FAILING TO SUSPEND THE CRIMINAL PROCEEDINGS AND INITIATE COMPETENCE PROCEEDINGS

A. Introduction

In the opening brief, appellant demonstrated that there was substantial evidence raising a bona fide, reasonable doubt both whether appellant had a rational understanding of the proceedings and whether he was rationally able to assist defense counsel. The evidence raising that doubt included but was not limited to: expert declarations opining that appellant was incompetent at his prior trial; evidence of specific brain trauma in utero and/or at age two; consistent results in Dr. Watson's neuropsychological testing over two separate courses of testing, demonstrating severe brain impairment and cognitive deficits; an overwhelming consensus of approximately eight mental health experts that appellant was seriously mentally ill and cognitively impaired; defense counsel's repeated warnings to the trial court that counsel had serious concerns about appellant's competence; evidence concerning appellant's history of antipsychotic medication; Dr. Vicary's opinion that appellant might "snap" under the pressure of trial; defense counsel's eventual declaration of a doubt about appellant's competence; defense counsel's representation that appellant's behavior had changed recently, including during the period that appellant absented himself from the courtroom during the sanity phase; the fact that the jury was unable to reach unanimous verdicts as to sanity on Counts Two and Three, with three jurors having been convinced by a preponderance of evidence that appellant was insane during the commission of the homicides on those two counts; the irrational bases for appellant's withdrawal of his NGI plea; defense counsel's refusal to consent to the withdrawal of the NGI plea;

appellant's peculiar behavior in preparing for his penalty phase; his bizarre, inappropriate and irrational behavior in representing himself during the penalty phase; his refusal to cooperate with Dr. Sharma; and his requests to reinstate his NGI plea and to reinstate defense counsel to represent him.

Appellant demonstrated that even if a piece of this evidence raising a doubt as to appellant's incompetence considered in isolation might be considered insufficient to have required the trial court to suspend proceedings and hold a competence hearing, the cumulative weight of these factors, especially as the evidence mounted through the course of the proceedings, leaves no reasonable conclusion other than that an objective doubt as to appellant's competence existed. Suspension of proceedings, appointment of the regional center or other qualified experts, followed by an appropriate hearing to determine whether he was competent, were required by statute and by federal constitutional mandates. On this record, under the specific facts before the trial court, the failure of the trial court to take those steps deprived appellant of due process and a fair trial, and requires reversal of the entire judgment.

Respondent does not address most of the specific arguments and authorities set forth in the opening brief. Indeed, respondent generally posits different inferences from parts of the record than those drawn by appellant from the entire record. However, those different inferences at most suggest that there was a conflict in the evidence regarding appellant's competence, which bolsters rather than defeats appellant's claim that a doubt should have been declared.

Nor does respondent adequately address the various indications in the record that the trial court applied legally erroneous standards in assessing the evidence and ruling on the question, employed a personal, and fallacious,

belief regarding the credibility and probative value of the opinions of the mental health experts who had examined, tested, and evaluated appellant over the years, and arbitrarily disregarded evidence relevant to the question of appellant's competence. Appellant demonstrated that, as a result, even if the evidence did not amount to "substantial evidence" requiring suspension of the proceedings, the trial court abused its discretion in not ordering further evaluation of appellant's competence in a reasonable exercise of caution.

Respondent dismisses the overwhelming evidence of appellant's long standing mental illness, brain damage, developmental disability, and social and cognitive impairments without providing any reasoned basis for doing so, or for the trial court's continuing disregard of that evidence.

Respondent trivializes the substantial evidence raising a doubt of appellant's competence, substituting hollow characterizations of the record for any meaningful review or detailed analysis of the substantial and complex combination of evidence supporting that doubt. Appellant's statements must be analyzed in the context in which he made them. Instead, respondent removes all context and characterizes appellant's behavior devoid of context in an attempt to make it appear rational.

Respondent provides no legal authority to support the assertion that the evidence relevant to appellant's competence legally precludes either a finding of incompetence or a reasonable doubt as to his competence or that any specific evidence necessarily negates such a finding or doubt. Respondent's factual analysis does not support a conclusion that the record evidence relevant to appellant's competence, standing alone or in combination with the other evidence in the record, is inconsistent with, and precludes, either a finding of incompetence or a reasonable doubt as to his competence. Respondent does not address the cumulative effect of the evidence on the question of appellant's

competence.

Respondent also relies upon a repeated assertion that nothing related the mental health evidence or the other facts presented related to appellant's ability to understand the proceedings rationally or to rationally assist defense counsel. (RB 135-137.) As demonstrated in the opening brief, that is untrue. Defense counsel regularly linked the evidence of appellant's mental health deficits and dysfunctions to his ability to assist defense counsel rationally. (See AOB 150-151.)

B. Because There Was Substantial Evidence That Appellant Was Incompetent to Comprehend the Proceedings or Assist Counsel Rationally, the Court Erred in Failing to Order a Competence Hearing Pursuant to Penal Code Sections 1367 et seq.

1. There was substantial evidence to raise a doubt as to appellant's competence prior to the guilt verdicts

Respondent misconstrues an important legal principle applicable to review of the record in this case, stating that the trial court's decision not to hold a competency hearing in this case "is entitled to deference because of the court's opportunity to observe the defendant during trial. (*People v. Rogers* (2006) 39 Cal.4th 826, 847.) The decision is therefore reviewed for abuse of discretion. ([*People v.*] *Ramos, supra*, 34 Cal.4th at p. 507.)" (RB 134.)

Rogers is in direct conflict in this regard with the controlling federal constitutional law in this area. While in *Rogers*, this Court cites *Drope v. Missouri* (1975) 420 U.S. 162, 181, in support of deference to the trial court, in fact, nothing in *Drope* supports such a rule. It is clear that the question of whether there is "substantial evidence" raising a doubt as to the competence of the defendant is an objective question, not subject to any deference to the trial court, nor does the trial court have any discretion to refuse to suspend

proceedings and conduct a competency proceeding where substantial evidence exists. (See AOB 134-138.)

The analysis upon which respondent relies applies if the evidence raising a doubt of competence does not amount to "substantial evidence," in which case the decision is reviewed for abused of discretion. (*People v. Welch* (1999) 20 Cal.4th 701, 742.) However, no deference is due to the trial court's contrary view when the evidence raising a doubt is substantial. (AOB 135, 170.) Nor can the trial court's "opportunity to observe the defendant during trial" overcome substantial evidence raising a doubt of the defendant's competence, some of which frequently occurs, as in this case, outside the court's presence. (AOB 156, 169-170.) No deference is due to the trial court's determinations if they are based upon an erroneous legal standard, for reliance upon an erroneous legal standard constitutes an abuse of discretion in and of itself, as does the arbitrary disregard of relevant evidence. (*In re Cortez* (1971) 6 Cal.3d 78, 85-86; *Schlumpf v. Superior Court* (1978) 79 Cal.App.3d 892, 901.) Respondent fails to address these authorities.

As stated above, respondent's position generally suggests that there is at most a conflict in the evidence regarding appellant's competence. As demonstrated in the opening brief, "substantial evidence" of incompetence is judged by an objective standard. It does not require that the evidence be without conflict. (See, e.g., *People v. Young* (2005) 34 Cal.4th 1149, 1219; *People v. Welch*, *supra*, 20 Cal.4th at p. 738.) Nor must the evidence be sufficient to raise a *subjective* doubt regarding the defendant's competence in the mind of the trial judge. (See, e.g., *People v. Jones* (1991) 53 Cal.3d 1115, 1153 ["substantial evidence" is measured by an objective standard and, hence, cannot be defeated by the trial court's own observations of the defendant or the judge's subjective belief that he appears competent]; accord, e.g., *Pennington*,

supra, 66 Cal.2d at p. 518; *People v. Castro* (2000) 78 Cal.App.4th 1415, 1402.) Respondent fails to address these authorities.

Respondent argues that the multiple psychological and psychiatric declarations relating appellant's psychiatric, neurological, developmental and/or cognitive dysfunctions and deficits, and his consequent incompetence at the time of the first trial, are insufficient, by themselves, to raise a doubt as to appellant's competence at the time of the proceedings in this case. (RB 136-137.) Assuming arguendo that the evidence is insufficient, standing alone, to raise a doubt, respondent does not establish that the evidence is inconsistent with a doubt about appellant's competence. Even under respondent's analysis, these mental health evaluations cannot be disregarded as irrelevant to the trial court's assessment of the objective evidence raising a doubt as to appellant's competence. At a minimum, when viewed with appellant's behavior during the retrial, the cumulative picture meets the statutory and constitutional evidentiary foundation.

"[I]n considering the indicia of petitioner's incompetence separately, the state courts gave insufficient attention to the *aggregate* of those indicia . . ." (*Drope*, *supra*, 420 U.S. at pp. 179-180 (emphasis added).)

> We need not address the Court of Appeals' conclusion that an attempt to commit suicide does not create a reasonable doubt of competence to stand trial as a matter of law. As was true of the psychiatric evaluation, petitioner's attempt to commit suicide 'did not stand alone.' *Moore v. United States*, 464 F.2d 663, 666 (CA9 1972). We conclude that when considered together with the information available prior to trial and the testimony of petitioner's wife at trial, the information concerning petitioner's suicide attempt created a sufficient doubt of his competence to stand trial to require further inquiry on the question.

(*Id.* at p. 180.)

Respondent heavily relies on a characterization of appellant's

arguments in court as "cogent." (See, e.g., RB 110, 111, 112, 119, 129, 139, 142.) Respondent does not identify specific "cogent" arguments, however, instead giving unexplained cites to selected transcript pages. Respondent does not address the context or the remainder of those proceedings, which are not "cogent," and in fact support a doubt of appellant's competence. Moreover, even if a portion of appellant's arguments might be considered "cogent," or even rationally based, such a circumstance presents only a conflict with the other evidence of appellant's irrational understanding, decisions, and behavior in those same cited portions of the record, and must be read in light of all appellant's statements.

For example, respondent states that "during [early stages of pretrial] proceedings, appellant made cogent arguments on a variety of legal issues. (See, e.g. 2RT 21-35, 49-52, 91-111, 142-152.)" (RB 110.)

Among the "cogent arguments" appellant made during the cited proceedings was his allegation of a conspiracy by a former appellate lawyer to "sabotage" his case, with defense trial counsel following the appellate lawyer's instructions and "pursuing his agenda." (*Marsden* RT 92-93, 98-106, 668.) Appellant's rejection of his mental defense, upon which respondent repeatedly relies, stems in part from his "cogent argument" that the defense was part of that conspiratorial "agenda." (See, *Marsden* RT 92-93.)

Another of appellant's "cogent arguments" made during the proceedings cited by respondent concern allegations of poisoned ants on the cookies he was served in jail. (*Marsden* RT 108-109; AOB 145.) Another was an allegation that Judge Hoff had been "executing a personal agenda" against appellant in his rulings on this case. (*Marsden* RT 527-539; AOB 145-146.) Another was a complaint that defense counsel refused to subpoena Justice Stanley Mosk and the three Ninth Circuit judges on the panel which

granted relief in *Bloom v. Calderon* to explain the basis of their rulings. (*Marsden* RT 101-102.) Respondent fails to explain how these are "cogent arguments" displaying a rational understanding of the proceedings and an ability to consult with counsel rationally in the presentation of the defense.

Respondent asserts that appellant "continued to challenge his attorneys' strategy, making cogent arguments about the issues in his case. (See, e.g., 3RT 498-509; 4RT 666-671; 7RT 781, 822-925.)" (RB 111.)[11] At the first cited hearing, the challenges to the defense strategy and the "cogent arguments" respondent references include objections to any mental defense because of appellant's stated beliefs that (1) "I'm not crazy," and (2) the prosecution had no evidence that he killed his stepmother and stepsister. (*Marsden* 501-503.) Setting aside questions regarding the reliability of the former assertion,[12] on

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[11] Appellant assumes that respondent intended the last citation in the string to be to *Marsden* RT 822-*825*, which comprise the entirety of a *Marsden* hearing held on September 18, 2000, during voir dire. The following 100 pages consist of voir dire proceedings in which appellant did not address the trial court, and appear to be included in the citation through a typographical error.

[12] As this Court recently recognized in a slightly different context:

> The decision of a possibly incompetent defendant not to contest the issue of his or her own competence is entitled to no such credit. Indeed, such a decision ought to be considered inherently suspect, especially when, as in the instant case, the evidence before the court is in conflict regarding the defendant's mental competence. (Cf. *People v. Samuel* (1981) 29 Cal.3d 489, 495, 174 Cal.Rptr. 684, 629 P.2d 485 ["[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."]; *Bundy v. Dugger* (11th Cir.1987) 816 F.2d 564, 566, fn. 2 ["Whether the

(continued...)

this record the latter assertion cannot be characterized reasonably as a "cogent argument"; rather, it reflects an irrational understanding of the prosecution's evidence and of its probative force. Rather than address the irrationality evident in appellant's statements, respondent irresponsibly characterizes those statements as "cogent arguments," in the expectation or hope that this Court will ignore the actual record evidence.

For example, among the "cogent arguments" appellant made in the same hearing, but not included in the pages cited by respondent, were appellant's repeated references to Tonya Deetz, one of his defense counsel, as "my consigliere" (*Marsden* RT 529, 532-533, 535), his directions to his "consigliere" to take various unrealistic steps to uncover and disclose to the public Judge Hoff's execution of "a personal agenda" against appellant (*Marsden* RT 527-535), and his request to have Judge Hoff sanction Deetz $27,000, which he asked the judge to then suspend because Deetz had two babies at home "that she has to feed, clothe and put through college, so I don't want [her babies] to suffer because of a mistake in judgment made by their mother." (*Marsden* RT 535.) On the other hand, appellant asked that his other defense counsel, Seymour Applebaum, be fined one-million dollars

> and, unlike Tonya – unlike Tonya – I wanted this Court to collect the fine. Seymour can write a check today or Seymour can go to the bank Tuesday, because the banks are closed on Monday. Seymour can go to the bank on Tuesday, September 5th and withdraw the million dollars from his savings account to pay the fine.

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[12] (...continued)
defendant believed he was competent to stand trial is irrelevant for, if a defendant is incompetent to stand trial, his belief that he is able to do so is without import."].)

(*People v. Lightsey* (2012) 54 Cal.4th 668, 697; see also Introduction, *ante*.)

(*Marsden* RT 535-536.) Respondent does not directly address *any* of the actual events of this hearing, or even attempt to explain how the full context of these events supports a conclusion that appellant's understanding of the proceedings, or of the judicial system itself, was rational.

Other evidence respondent lumps into "cogent arguments" without comment or explanation includes appellant's announcement on the first day of trial that Deetz had "submitted and tended [sic] her resignation as consigliere to the principality of Israel. [¶] I gave this matter careful deliberation over the weekend and informed Mrs. Deetz that I have decided to accept her resignation as consigliere to the principality of Israel." (*Marsden* RT 666.) Appellant stated that Deetz had "chosen to abandon and betray me," and "allowed herself to be corrupted" by the conspiracy which appellant claimed existed between prior appellate counsel and Applebaum. (*Marsden* RT 667.) Appellant noted that Applebaum is Jewish and appellant likes him "on a personal level, but his association with [prior appellate counsel] has corrupted his soul and tainted his judgment on my case." (*Marsden* RT 668.) While these arguments may be expressive, characterizing them as "cogent" is an unacceptable misrepresentation of the record.

Respondent refers to appellant's statements in a *Marsden* hearing on the day opening statements were to be given, again insisting on his own competence and opposing defense counsel's intent to present a mental defense, "explain[ing] that he had suggested 'several viable defenses as an alternative to their mental defense' but counsel had rejected his proposals." (RB 111, citing *Marsden* RT 1929-1934.) Respondent fails to address appellant's stated basis for those supposed "viable defenses," i.e., that the prosecution's evidence that he had killed his stepmother and stepsister "is flimsy, inconsequential and weak." (*Marsden* RT 1931-1933.) Respondent again fails to explain how

such a belief under these circumstances supports a conclusion that appellant's understanding of the proceedings, of the evidence, and of the decisions he faced in these proceedings were rational.

According to respondent:

> [t]hroughout the guilt phase, appellant continued to challenge his attorneys' handling of the mental defense. He also continued to raise the issue of his self-representation at the penalty phase, attempting to discuss discovery and other procedural issues, but the court deferred those matters as premature. Again, appellant's arguments were substantial, articulate, and cogent.

(RB 112, citing 15RT 1951-1952; 17RT 2043-2064, 2225-2231; 21RT 2685-2693; 24RT 3031-3037; 28RT 3614-3622; 29RT 3697-3701.) If respondent means, in using the word "substantial," that appellant was long-winded, then the description is correct. Those arguments were articulate only in the sense that appellant was able to read into the record sometimes lengthy, multi-"article"[13] prepared speeches (see, e.g., 15RT 1935-1940; see also 17RT 2048-2053 [appellant notes his motion is 90 percent written and 10 percent oral]) which were linguistically understandable for the most part. But these characteristics do not render appellant's statements and/or the positions he took in those proceedings either "cogent" or indicative of competence within the meaning of *Drope* and *Dusky*.[14]

Respondent's record citations also include – although ignored by respondent – statements by defense counsel of concerns about appellant's ongoing competence (15RT 1951-1952); appellant's comment that he and

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[13] The written materials which appellant read into the record were sometimes separated into "articles," identified as such as appellant read the document into the record. (See, e.g., 15RT 1936-1938; 40RT 4750-4751; 41RT 4820-4821.)

[14] *Dusky v. United States* (1960) 362 U.S. 402.

defense counsel Deetz are "barely on speaking terms with each other;" his description of her as "a woman scorned" because he had made his motion to represent himself at penalty against her advice (*Marsden* RT 2057, 2059); appellant's reference to that motion as a "judicial coup," and his comments that:

> . . . I executed my coup last Thursday, October 5th. And Mrs. Deetz has a problem with that and she is just going to have to get over it. [¶] The only reason, the only reason I am sitting next to this femme fatale is to give myself a tactical advantage during the guilt phase and sanity phase of my trial.

(*Marsden* RT 2056-2057.)

Respondent references RB Argument XIII.A., addressing the denial of appellant's motion to reinstate his NGI plea (AOB Arg. V), in support of the assertion that it is "obvious that appellant very well understood the proceedings against him and was more than sufficiently able to consult with his attorneys." (RB 135.) However, respondent's Argument XIII has no subsection A., nor any subsections at all. (RB 178-181.) Nor is there anything specific in respondent's Argument XIII which supports a conclusion that appellant was "sufficiently able to consult with his attorneys." The only relevant point made in respondent's Argument XIII is one which appellant has acknowledged in the opening brief – that appellant had a basic *factual* understanding of the general nature of court proceedings, i.e., that he was on trial for murder and was facing the death penalty and that his lawyers would proffer several mens rea defenses.

In Argument XIII and in this argument respondent ignores that, regardless of whether or not appellant had a basic factual understanding of the proceedings, there is substantial evidence in this record raising a reasonable doubt that appellant had a *rational* understanding of the proceedings sufficient to make *rational* judgments and decisions, as necessary to the *rational* conduct

of his case and the *rational* cooperation with counsel in the conduct of that case. Appellant's lack of understanding about the role of the sanity phase in the prosecution's attempt to have him sentenced to death provides substantial evidence that raises a doubt of competence. The same is true of the evidence that appellant had various psychiatric, psychological, neurological, cognitive and/or developmental deficits and dysfunctions that were substantially relevant to his case and substantially interfering with his judgment and his ability to cooperate rationally with and assist counsel. Respondent's only real response is simply to dismiss that evidence summarily.

For the proposition that appellant's understanding of the proceedings and ability to consult with counsel were adequate, respondent also cites *People v. Ramos* (2004) 34 Cal.4th 494, 507. (RB 135) However, *Ramos* makes appellant's point quite clearly:

> To be competent to stand trial, defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "*a rational as well as factual understanding of the proceedings* against him." ([*People v.*] *Welch, supra*, 20 Cal.4th at p. 737, 85 Cal.Rptr.2d 203, 976 P.2d 754, quoting *Dusky v. United States* (1960) 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824.)

(34 Cal.4th at p. 507 (emphasis added).) Controlling constitutional principles recognize a distinction between a *factual* understanding of the proceedings and a *rational* understanding of the proceedings. Neither the trial court nor respondent appears cognizant of that distinction or its importance in this case. Even if appellant appeared to have a factual understanding of the general nature of the criminal proceedings, the evidence raises a reasonable, bona fide doubt that his understanding was a rational one, unencumbered by the various psychiatric, psychological, neurological, cognitive and/or developmental deficits and dysfunctions which had afflicted him, some for his entire life.

The facts of *Ramos* provide no support for respondent in the present case. As recited by this Court, the relevant evidence presented by Ramos's attorney prior to his pleading guilty to all charges and admitting the special circumstances was as follows:

> [C]ounsel told the court that defendant wanted to receive the death penalty and that after the entry of his guilty plea, defendant would seek to have the penalty imposed. Counsel informed the court that if he did not consent to defendant's proposed plea, defendant had threatened to remove him as counsel. As evidence of defendant's incompetence, counsel introduced evidence of his prior criminal activity and his erratic behavior while incarcerated, including his attacks on [a deputy] at the Martinez Detention Facility, and his apparent hoarding of medication for an alleged planned future suicide attempt.

(34 Cal.4th at p. 508.) This Court also indicated that the defendant had a history of psychiatric treatment. (34 Cal.4th at p. 509.) That evidence bears little relation to the substantial evidence raising a doubt of appellant's competence in the record in this case.

Similarly, respondent relies upon *People v. Hayes* (1999) 21 Cal.4th 1211, 1282 to support the position that "nothing in the record suggests that at any time during these proceedings appellant was unable to understand the nature of the proceedings or to assist counsel in conducting the defense in a rational manner." (RB 135.) In *Hayes*, this Court did not describe the facts assertedly supporting the claim of a doubt of incompetence, merely characterizing the facts as "a litany of facts, none of which actually related to his competence at the time of sentencing to understand the nature of the proceeding or to rationally assist his counsel at that proceeding." (21 Cal.4th at pp. 1280-1281.) The same cannot be said of the showing in appellant's case of the substantial evidence raising a doubt of appellant's competence. As set forth in the opening brief, there is a direct nexus btween appellant's mental

health and behavior and defense counsel's concerns and to the substantial doubts concerning the rationality of appellant's understanding of the proceedings, of the decisions and judgments he had to make in those proceedings, and concerning his ability to assist counsel rationally.

In *Hayes*, defense counsel never expressed a doubt as to the defendant's competence. (21 Cal.4th at p. 1282.) Defense counsel here *did* express a doubt as to appellant's competence eventually, and before that declaration made many representations which put the trial court on notice that substantial doubt existed concerning appellant's ability to assist counsel rationally. (See AOB 150-151.)

In *Hayes*, this Court also relied upon that defendant's actions as cocounsel during the penalty trial, and his "presentation of several presentence motions and arguments in support thereof demonstrate beyond any doubt that he was fully aware of the nature of the proceedings and able to assist counsel." (21 Cal.4th at p. 1282.) Nothing in the Court's opinion suggests that defendant's performance in that case revealed any of the distorted understandings of the proceedings and the irrational decisionmaking as displayed by appellant. Every case must be evaluated on its own specific facts:

> The import of our decision in *Pate v. Robinson* is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts.

(*Drope v. v. Missouri*, *supra*, 420 U.S. at p. 180.)

Respondent argues that "appellant's 'odd' and allegedly 'paranoid' behavior cannot support his incompetency claim" (RB 136), again citing *People v. Ramos*, *supra*, 34 Cal.4th at p. 508; *People v. Lewis* (2008) 43 Cal.4th 415, 524; *People v. Rogers* (2006) 39 Cal.4th 826, 847; and *People v. Ramirez* (2006) 39 Cal.4th 398, 467. That assertion is incorrect. (See *Drope*, *supra*, 420 U.S. at p. 180 [irrational behavior is not only relevant in determining whether further inquiry is required, but standing alone may, in some circumstances, be sufficient].) Moreover, appellant has never relied solely on appellant's behavior, but on the cumulative effect of all of the evidence, behavioral and otherwise, in the record which raises a doubt as to his competence. Respondent's compartmentalizing of the evidence into discrete categories and argument that each standing alone is insufficient to raise a doubt of appellant's competence misses the mark and is legally flawed; this Court must consider the "aggregate of those indicia" of incompetence. (*Drope*, *supra*, 420 U.S. at p. 180.)

Respondent attempts to dismiss the obvious irrationality of and cognitive deficits inherent in appellant's decisions and behavior as merely "misguided," "unwise," "foolish," or "eccentric." (See, e.g., RB 135 ["it is obvious that appellant behaved eccentrically"].) Perhaps standing alone, analyzed in isolation, bereft of appellant's mental health history and brain damage, such characterizations might be superficially reasonable. However, those matters do not stand alone. They must be reviewed through the lens of appellant's psychiatric, psychological, neurological, developmental and/or cognitive deficits and dysfunctions which underlay his behavior and motivated

his ability to make rational decisions.[15] Seen in this light, labels such as "unwise" or "misguided" smacks of analysis by adjective rather than a reasoned determination based on the evidence.

People v. Medina (1995) 11 Cal.4th 694, 735, also cited by respondent (RB 135), determined only that continued cursing and other disruptive conduct, leading to the removal from the courtroom of a defendant who had already been adjudicated competent, displayed an unwillingness to assist in his defense, but did not in that case "necessarily bear on his competence to do so." While that may have been true in *Medina*, here there was no adjudication of appellant's competence and therefore it is not a reasonable characterization of the evidence in this case. Nor does *Medina* stand for the proposition that irrational behavior is inconsistent with a reasonable doubt of competence.

> In discussing the evidence adduced at Robinson's trial, the Court [in *Pate v. Robinson* (1966) 383 U.S. 375] did, however, indicate that a history of irrational behavior is a relevant factor which, on the record before it, was sufficient to require further inquiry notwithstanding Robinson's demeanor at trial and the stipulated opinion of a psychiatrist that Robinson knew the nature of the charges against him and could cooperate with counsel when the psychiatrist examined him two or three months before.

(*Drope v. Missouri*, *supra*, 420 U.S. at p. 182, fn. 9.)

Similarly, respondent's assertion "[n]or can any instances of disruptive behavior or unwillingness to assist his attorneys support his competency claim, since mere belligerence does not show an inability to assist in his defense" (RB 136) encompasses a description that does not match the situation before the court. To be sure, simple disruptive behavior or mere belligerence alone may not in most cases be sufficient to raise a doubt of competence, although again

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[15] See Introduction, *ante*.

Drope indicates that either can be sufficient standing alone in some instances. (420 U.S. at p. 180.)

In *People v. Lewis* (2008) 43 Cal.4th 415, cited by respondent on this point, the behavior consisted of an isolated instance of outbursts by the defendant in relation to a particular witness and a request by defense counsel for a neurological workup and a BEAM scan based on a psychologist's letter indicating probable brain damage and abnormal brain function. (*Id.* at pp. 523-524.) That factual scenario does not correspond to the breadth and depth of the evidence on this record raising a doubt of appellant's competence.

Appellant agrees that simple "unwillingness" to assist counsel is generally insufficient *standing alone* to raise a doubt of competence. However, merely characterizing a defendant's disagreements with counsel or refusals to cooperate as "unwillingness" to assist is analysis by buzzword, without substance. If the evidence before the court raises a doubt whether such disagreement, refusal, or unwillingness may represent an *inability* to cooperate and has as its root psychiatric, psychological, neurological, cognitive and/or developmental deficits and dysfunctions, as it does here, merely assigning a conclusory and uninformative mischaracterization of "unwillingness" will not change the constitutional calculus that requires the suspension of proceedings and the conduct of proceedings to determine competence under section 1368.

There is a wealth of additional evidence in the record here not presented in the 1984 competence trial, including the results of mental health evaluations conducted contemporaneously or even before the prior trial, but which were not available to the experts testifying at the 1984 competence trial due to prior counsel's incompetent performance. As a result, the only effect the 1984 competence verdict could have, even if it had *any* reliability, is to present a

conflict in the evidence on this record. Again, such a conflict is insufficient to override the substantial evidence in the record raising a doubt of appellant's competence in 2000.

The mental health evidence presented to the trial court here concerning the first trial constitutes substantial evidence that appellant was incompetent at the prior trial, and was uncontradicted on that point. The basis of the expert opinions regarding the first trial were appellant's long-standing, lifelong impairments including brain-damage, which impairments are not expected to change. Even the prosecutor acknowledged on retrial that the logical conclusion was that if appellant was incompetent at the prior trial, he was probably incompetent at the retrial.[16]

Respondent contends that the prosecutor's acknowledgment is not binding on the trial court. (RB 136-137, fn. 64.) Regardless of whether it is binding or not, respondent presents no legal or logical reason for dismissing the prosecutor's position as irrelevant or as an unreasonable inference from the evidence. The prosecutor acknowledged the relevance, materiality, and probative value of the evidence of appellant's prior competence on the question of whether there was a doubt of appellant's competence at the retrial. In combination with other evidence, substantial doubt of appellant's

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[16] If the defendant was incompetent in 1983, there's no reason to believe that he's not incompetent today. Nothing has happened between 1983 and today that would in any way cure the defendant or help his mental state in any way. If he was not capable then of understanding the proceedings and aiding his attorney, then he is probably not capable now.

(2RT 203.)

competence is evident.

Respondent presents no basis for concluding that the expert testimony presented at the retrial is irrelevant to the consideration of appellant's competence. Instead, respondent relies upon an asserted lack of evidence connecting appellant's deficits and dysfunctions to his ability to consult with counsel rationally. (See, RB 135-137.) There are a number of flaws in this argument.

First, the purported absence of any *expert* evidence explicitly connecting appellant's various deficits and dysfunctions to his ability to rationally consult with counsel during the proceedings at issue here is primarily due to the trial court's refusal to appoint experts to assess that very question.

Second, there *is* substantial evidence in the record connecting those deficits and dysfunctions to appellant's ability to consult rationally with counsel. This includes defense counsel's repeated reference to questions about appellant's ability to consult rationally with counsel, and repeated statements that counsel's questions about appellant's ability stem from his deficits and dysfunctions. (See AOB 150-151.) This also includes Dr. Vicary's opinion linking appellant's serious mental illness and brain dysfunctions directly to his lack of competence at the prior trial proceedings. (AOB 35-37; 28RT 3447-3451; 2CT 280-284.)

Third, inherent in the testimony and evidence regarding appellant's deficits and dysfunctions is the inexorable conclusion, or at the very least a rational inference from the evidence, that those deficits and dysfunctions inevitably interfered with his ability to consult rationally with counsel.

Fourth, *People v. Hayes*, *supra*, upon which respondent relies on this point, does not support respondent's position. As appellant demonstrated above, the facts as set forth in this Court's opinion in *Hayes* about the

defendant in that case bear no similarity to appellant's case.

Finally, respondent ignores record evidence directly linking appellant's impairments with his understanding and with his ability to consult rationally with counsel. For example, at *Marsden* RT 506, defense counsel directly linked appellant's difficulties with counsel to his mental illness: "I personally think it's part of his illness of how he perceives things and how he processes information due to some neuropsychiatric difficulties that he has, temporal lobe problems." Respondent ignores the circumstances of appellant's attempted "recusal" of Judge Hoff which led to the judge recusing himself from this case ten days prior to the start of trial, directly interfering with defense counsel's conduct of the case. (See *Marsden* RT 537-538.)

Respondent's characterization of appellant's behavior or arguments does not accurately reflect appellant's statements in context; it masks the extent to which the impairments about which the experts opined interfered with appellant's ability to consult rationally with defense counsel.

Respondent acknowledges that there is evidence supporting the fact that appellant's high verbal ability did not reflect his actual pronounced cognitive deficits, citing a portion of Dr. Watson's testimony and portions of Dr. Vicary's testimony. (RB 141.) Respondent dismisses the relevance of this testimony on the grounds that "[t]hese opinions largely concerned appellant's mental defense and not the issue of competence directly. To that extent the opinions do not support a finding of incompetence." (RB 142.)

That the opinions were expressed in the context of testimony supporting appellant's mental defense, not competence to stand trial directly, is due in large part to the fact that none of the experts were *asked* about competence, and the trial court failed to comply with its constitutional responsibility to convene proceedings where the issue of competence could be directly

addressed. More important, their testimony about appellant's disorders, his mental processes, and his behavioral manifestations are relevant to his mental functioning whether that functioning relates to past or current functioning. In *Drope v. Missouri*, *supra*, 420 U.S. 162, the United States Supreme Court found similar circumstances militating toward requiring further inquiry into the defendant's competence, not relieving the trial court of its duty to conduct such inquiry.

> It does not appear that the examining psychiatrist was asked to address himself to medical facts bearing specifically on the issue of petitioner's competence to stand trial, as distinguished from his mental and emotional condition generally. Thus, it is not surprising that before this Court the dispute centers on the inferences that could or should properly have been drawn from the report. Even where the issue is in focus we have recognized 'the uncertainty of diagnosis in this field and the tentativeness of professional judgment.' *Greenwood v. United States*, 350 U.S. 366, 375, 76 S.Ct. 410, 415, 100 L.Ed. 412 (1956). Here the inquiry is rendered more difficult by the fact that a defendant's mental condition may be relevant to more than one legal issue, each governed by distinct rules reflecting quite different policies. See *Jackson v. Indiana*, 406 U.S. 715, 739, 92 S.Ct. 1845, 1858, 32 L.Ed.2d 435 (1972); *Pate v. Robinson*, 383 U.S., at 388-389, 86 S.Ct. 836, 843-844, 15 L.Ed.2d 815 (Harlan, J., dissenting); Weihofen, The Definition of Mental Illness, 21 Ohio St.L.J. 1 (1960). . . . However, at that stage, and with the obvious advantages of hindsight, it seems to us that it would have been, at the very least, the better practice to order an immediate examination under Mo.Rev.Code § 552.020(2) (1969).

(420 U.S. at pp. 176-177.)

Moreover, the testimony of Dr. Watson and Dr. Vicary is directly relevant to the reasonableness of, and reliability of, the trial court's own reliance on appellant's verbal abilities, i.e., that he was "articulate," in determining that the court was "not convinced" that appellant was

incompetent.

In addition, while Dr. Vicary's testimony and opinion were introduced in the context of appellant's mental defense at guilt, his original examination of appellant was in the context of the flawed 1984 competence determination, and he expressly stated that he had been fooled at the time appellant's verbal abilities, and erroneously reached the conclusion that he was competent at that time. (28RT 3522-3524.) In light of additional evidence obtained thereafter, Dr. Vicary testified that he believed that appellant had been incompetent at the time. (28RT 3447-3449; see also 2CT 280-284.) Thus, Dr. Vicary's testimony and opinion directly connect that aspect of appellant's behavior and his impairments to the issue of competence, albeit at an earlier time.

The evidence of appellant's deficits and dysfunctions, upon which Dr. Vicary based his more-informed opinion that appellant was incompetent in 1984, was to the effect that those deficits and dysfunctions were long-standing, raising a substantial doubt as to appellant's competence in these proceedings as well as the first proceedings.

Regardless of whether the testimony and declarations of the various defense mental health experts were expressly directed to the question of competence at the retrial, the evidence provided in that and other mental health evidence in the record identifying deficits and dysfunctions in appellant's intellectual and cognitive functioning, his mental illnesses, delusions and psychoses, and his inability to interact socially, all related to concepts directly relevant to his ability to comprehend the proceedings *rationally* and to assist counsel *rationally* in the conduct of his defense. The overwhelming weight of the expert opinions about the various deficits and dysfunctions based on multiple examinations and neuropsychological testing as well as by the substantial medical, psychological, psychiatric, and educational records

reviewed by the experts cannot be equated, as respondent suggests, to the nonspecific letter in *People v. Lewis*, *supra*, "recommend[ing] testing [] to confirm the existence of the alleged brain damage and to learn more about 'the origins of [defendant's] violent behavior' so as to serve 'the interests of justice' and determine if defendant's behavior could be controlled with medication." (43 Cal.4th at p. 525.)

To the extent that respondent relies on the fact that no specific expert testimony was given on the issue of appellant's present competence at the retrial, none of the experts was asked to opine on the issue except for Dr. Sharma, who indicated his inability to render an opinion one way or the other due to appellant's irrational refusal to cooperate in an evaluation during the penalty phase. That there is no explicit expert testimony or opinion that appellant was presently incompetent at the retrial is the result of the trial court's error in refusing, despite substantial evidence raising a doubt as to appellant's competence, to suspend proceedings and order expert evaluations on the question. It is a consequence of the trial court's error, not an excuse for it.

Respondent cites, inter alia, *People v. Rogers*, *supra*, 39 Cal.4th at pp. 848-849, for the proposition that because the expert testimony of Drs. Watson and Vicary "largely concerned appellant's mental defense and not the issue of competence directly, . . . the opinions do not support a finding of incompetence." (RB 142.) As explained, none of the cases cited suggest that such expert testimony is irrelevant to the determination of whether the record raises a reasonable doubt of a defendant's competence. But *Rogers* is illustrative of the difference between the cumulative weight of the evidence in appellant's case from those cases in which the failure or refusal to conduct a competence inquiry has been sustained by this Court.

In *Rogers*, this Court relied in part on the fact that defense counsel in that case did not declare any doubt of the defendant's competence. (39 Cal.4th at p. 848.) Here, in contrast, defense counsel made numerous representations to the trial court which indicated that appellant was incompetent, but that defense counsel had an erroneous understanding of the standard for competence. Moreover, defense counsel here eventually did declare a doubt as to appellant's competence. (See AOB 128-129, 150-151, 154-157.) This case is readily distinguishable from *Rogers.*

Similarly, in *Rogers*, this Court relied upon the fact that while the experts in that case testified that the defendant had a dissociative disorder, "[n]o medical expert, however, testified defendant was likely to dissociate during the trial." (39 Cal.4th at pp. 848-849.) In contrast, here Dr. Vicary did testify that under stress, such as a trial for his life, appellant could "snap," which Vicary said meant appellant could begin to dissociate, could lose his coping ability and judgment, could begin to have emotional eruptions, or could begin to engage in progressively more illogical thinking. (28RT 3449-3450, 3494-3495, 3517-3519; see AOB 157.)

Again, in *Rogers*, this Court relied upon the fact that "there was nothing in [that defendant's] testimony that would have caused the trial court to question whether he was unable to understand the proceedings or cooperate with counsel." (39 Cal.4th at p. 849.) In contrast, appellant's testimony and numerous dialogs with the court here provided ample basis for questioning the rationality of his understanding of the proceedings, or the rationality of his understanding of presenting a defense either representing himself or with counsel.

Respondent provides no basis justifying the trial court's disregard of the mental health evidence and fails to address appellant's arguments that the

disregard of that evidence constituted an abuse of discretion.

Respondent attacks the reliability of Dr. Vicary based on "his probationary status and shifting opinions," (RB 142) despite the uncontradicted evidence that during his three-year probation with the California Medical Board, Dr. Vicary testified as an expert for both prosecutors and defense attorneys. He testified as an expert during this period for the Los Angeles County District Attorney's Office, which was prosecuting appellant in this case.[17] (28RT 3501, 3508.)

Respondent's characterization of Vicary's testimony as showing "shifting opinions" is misleading. Vicary's testimony demonstrates that the revision of his expert opinion concerning appellant's competence in 1984 and his overall mental health then and since was based upon his review of substantial historical medical, psychiatric, psychological, social, and educational records concerning appellant. These documents had never been provided to Dr. Vicary (or any of the other expert witnesses) at the time of his initial 1984 examination of appellant or prior to his 1984 testimony, due to the ineffective investigation of appellant's medical and mental health history by appellant's defense counsel at the 1984 competence hearing.[18] In that sense,

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[17] As the prosecutor argued in objecting to examination of Dr. Vicary concerning the circumstances underlying his probationary status, "I don't believe he should now be allowed to go into it and try to justify it or minimize it. It's what it is. He's on probation. *He's already said he testified for the D.A. when he's on probation, so I mean obviously based on that it's not so important.*" (28RT 3504 (emphasis added).)

[18] See *Bloom v. Calderon, supra*, 132 F.3d 1267. Because the basis of the grant of relief in the Ninth Circuit was counsel's ineffective investigation, preparation, and presentation of mental health evidence at the guilt phase of appellant's prior trial, the court did not need to address that attorney's (continued...)

his most recent opinions were better informed. Even so, as Dr. Vicary explained, in his 1984 evaluation of appellant and his testimony at the 1984 competence hearing, he was not fully confident in his conclusion that appellant was able to assist counsel rationally in his defense. (See AOB 116; see also 2CT 259-260; 28RT 3445-3446.) After review of the additional crucial historical information, he concluded that appellant had not been able to rationally assist counsel. (See AOB 35-37; 2CT 280-284.)

Respondent also relies frequently on the trial court's repeated rejections of any doubt of appellant's competence. Respondent has no answer for the authorities cited in appellant's opening brief demonstrating the trial court's personal belief in the competence of defendant was not sufficient to override the substantial evidence raising a doubt of competence. Respondent's argument that the trial court could properly rely on its own subjective assessment of appellant's competence and refuse to credit expert opinion ignores the controlling authority cited in the opening brief to the contrary. A trial court's subjective assessment of a defendant cannot override substantial evidence raising a reasonable doubt as to that defendant's competence. (*People v. Jones* (1991) 53 Cal.3d 1115, 1153; *People v. Pennington* (1967) 66 Cal.2d 508, 518; *Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1089; AOB 137, 156, 169-170.) Respondent does not acknowledge or address these authorities. Instead, respondent argues that:

> A court is not required to accept an expert's opinion that a defendant is incompetent, particularly where the court finds the expert opinion "less than credible," and the record discloses that

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[18] (...continued)
investigation, preparation, and presentation of mental health evidence at the 1984 competence trial. Yet it is clear from the record that the ineffectiveness of defense counsel extended through the competence trial and verdict.

> underlying the competency claim are "various tactics to delay and derail the trial." (*People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1047-1048.)

(RB 142.)

The expert opinions and defense counsel's concerns in appellant's case cannot fairly be characterized in the same manner as in *Lewis & Oliver*. Nothing in *Lewis & Oliver* or any other case cited by respondent suggests that a trial court can disregard expert opinion arbitrarily or capriciously, based on its own subjective bias, based on an erroneous legal standard, or in what amounts to an abuse of its discretion. In *Lewis & Oliver*, there were conflicting expert opinions directly addressing the defendant's competence, and the trial court there identified specific flaws in the report and opinion of the one expert who opined that the defendant was incompetent. (39 Cal.4th at pp. 1046-1048.) *Lewis & Oliver* does *not* stand for the proposition that a trial court can substitute its own view of the defendant's mental health on some personally held but fallacious belief about the credibility of (defense) mental health experts. Respondent fails to address or answer the arguments in the AOB demonstrating the trial court's abuse of discretion in this case. (See AOB 168-169.)

Respondent unsuccessfully equates the trial court's reliance on its own interpretations of appellant's behavior and decisions in the courtroom with the "brief reference to the defendant's demeanor" in *Ramos*, *supra*, 34 Cal.4th at p. 509. (RB 143.) The trial court's reliance on its own interpretations was not a brief reference or make-weight factor, but was almost the whole basis for its refusal to conduct any inquiry into appellant's competence, or even appoint doctors to assist the court. The trial court repeatedly referenced its own interpretations, preferring them over any and all relevant expert opinion and

the opinions of defense counsel. (See AOB 168-169.) Respondent fails to address these examples of the trial court's use of an erroneous legal standard and arbitrary rejection of relevant and probative expert opinion.

Respondent argues that the requirement of the appointment of the director of a regional center for the developmentally disabled to evaluate appellant would only become relevant after the defendant has been found incompetent. (RB 143, fn. 66.) In fact, those provisions of section 1369 direct the appointment of the director of a regional center upon a finding of a doubt of a defendant's competence, not upon the ultimate determination of competence. Thus they applied here, for the substantial evidence raising a doubt of appellant's competence required, as a matter of law, a finding of such a doubt, and necessarily triggered the provision of that section.

Moreover, the provisions of section 1369 have a more pervasive relevance to the determination of appellant's competence, and demonstrate a serious flaw in the trial court's evaluation of appellant's behavior and decisions. This Court in *People v. Leonard* (2007) 40 Cal.4th 1370, 1385-1393, recognized section 1369's provisions as a legislative recognition of material differences between the evaluation of more common psychiatric illnesses and the evaluation of developmental disabilities, such as autism-spectrum disorders and mental retardation, as well as distinctions in the qualifications of experts called upon to make those evaluations. (See AOB 138-139.)

Similarly, although the trial judge unreasonably believed she was a more reliable diagnostician than the experts whose opinions are part of the record here, the specifics of certain of appellant's dysfunctions and deficits – e.g., his deficits in empathy and social relations, including impairment of his ability to read social cues, such as emotional context or facial cues, and to

process emotions and a lack of social or emotional reciprocity; the striking and extremely unusual disparity between his verbal and performance IQ scores; restricted, repetitive patterns of behavior, interests, and activities – are, according to those experts, of a type which the legislature has recognized as requiring specific expertise to evaluate. There is no evidence that the trial court had any expertise, or experience, in evaluating these deficits and dysfunctions. Yet the trial court alone determined that those deficits and dysfunctions did not raise a doubt of the rationality of appellant's understanding of the proceedings, his ability to assist counsel in presenting a defense or to prepare and present a defense on his own, or his decisionmaking during these proceedings.

Respondent ignores or mischaracterizes aspects of the evidence that raised a doubt of appellant's competence. For example, respondent summarizes defense counsel's several references to questions about appellant's competence as follows:

> defense counsel at the retrial expressed concern about appellant's competence (while not expressly declaring a doubt pursuant to section 1358 (*sic*)) . . . [and] defense counsel informed the court that appellant had become "increasingly agitated" after having stopped taking his prescribed medication.

(RB 135.) No mention is made of appellant's demonstration that defense counsel's failure to declare a doubt of appellant's competence was due to a mistaken understanding of the law governing appellant's right to be tried only if competent. (See AOB 154-156.) Respondent does quote part of defense counsel's statements that he "would have declared a 1368 doubt eons ago" (RB 112), but omits crucial portions of counsel's explanation:

> [T]he second prong [is] the ability to cooperate with counsel in a rational manner so as to prepare a defense, but for the unique posture of this case, I believe Mr. Bloom would be incompetent.

> . . .[B]ecause of the unique posture of this case, I don't need to talk to Mr. Bloom about facts, I don't need to talk to him about strategy. In many ways this was laid out because of the voluminous materials in preparation that arose out of the various appeals and ultimately the habeas proceedings and what the lawyers and the various mental health professionals did, our predecessors did. So I don't need Mr. Bloom to cooperate with me in that sense. . . . [I]f this were a different type of case in terms of how it came to us, vis-a-vis the preparation that needed to be done, where I needed to confer with the client, needed to plan strategy with the client, I would have declared a 1368 doubt eons ago . . . . I don't want to be accused of sandbagging in any way, shape or form, but it's something that's troubled us, I've alluded to it before, and, quite truthfully, if there is interference where he is in my view not cooperating with preparation of the case in a rational way, where he starts interfering with the tactical process, my view is that I will have to declare a doubt and then we'll do what we do.

(15RT 1948-1950 (emphasis added).)

Appellant demonstrated in the opening brief that this view of competence, centered as it was on the attorney's perceived needs rather than the defendant's rights to not be tried unless competent, undermined the value of defense counsel's conclusion that, while appellant "has always been skirting the edges of . . . 1368 Penal Code incompetence" (15RT 1948), counsel did not need him to be competent, and that he would therefore withhold a declaration of a doubt. (AOB 154-155.) Respondent ignores this portion of appellant's argument and instead asserts that nothing in the record actually relates to appellant's competence to rationally assist counsel. (See e.g., RB 136-137.) Further, respondent appears to rely upon the failure of defense counsel to say the magic words as evidence that appellant was in fact competent, without addressing the demonstration of counsel's error and counsel's contrary view that appellant's incompetence did not affect counsel's ability to represent him.

Respondent argues that the declaration of doubt was a tactic to delay and derail the trial (RB 142), but does not explain how this is so. Nor does respondent explain how defense counsel's failure to declare a doubt about appellant's competence *until* there was a perceived and reported change in his behavior during the sanity phase, or defense counsel's refusal to consent to appellant's irrational decision to withdraw his NGI plea amounted to "tactics to delay and derail the trial."[19] The "tactics to delay and derail the trial" referenced in *People v. Lewis & Oliver*, *supra*, 39 Cal.4th at p. 1047, were actions taken by the defendant and co-defendant in that case, not the actions taken by defense counsel. Moreover, the record unequivocally establishes that defense counsel's failure to declare a doubt of appellant's competence *before* they did was based on an erroneous legal standard, and that, in fact, defense counsel had an actual doubt of appellant's competence throughout these proceedings, including well before the start of the trial before Judge Schempp. (See AOB 154-156.)

In addition, there is no substantial support for any finding that the expert testimony and declarations were presented as a "tactic[] to delay and

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[19] Cf. *Drope v. Missouri*, *supra*, 420 U.S. at p. 177, fn. 13:

> The sentencing judge observed that 'motions for psychiatric examinations have often been made merely for the purpose of delay, and 'estimated that almost seventy-five percent of those sent for psychiatric examinations are returned mentally competent.' App. 202. Although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, see *United States ex rel. Rizzi v. Follette*, 367 F.2d 559, 561 (CA2 1966), an expressed doubt in that regard by one with 'the closest contact with the defendant,' *Pate v. Robinson*, 383 U.S. 375, 391, 86 S.Ct. at 845 (1966) (Harlan, J., dissenting), is unquestionably a factor which should be considered.

derail the trial." The testimony of Drs. Watson, Mills, Vicary, and Wolfson was integral to appellant's mental state defense. The declarations of Drs. Weiland, Vicary, Kivowitz, Lisak, and Verin were submitted pretrial in support of arguments to exclude prior testimony from the first, flawed trial and for curative measures to prevent prejudice to appellant from prior counsel's ineffective assistance. (2CT 124-401; see AOB 105-111.)

Given trial counsel's repeated warnings of concerns about appellant's competence, especially taking into account the erroneous standard counsel was employing in stating that appellant was competent up through the sanity phase, and given counsel's declaration of a doubt based upon changes in appellant's behavior in interactions with counsel outside of the courtroom after appellant had absented himself from the sanity phase, and given the facial irrationality of appellant's decision to withdraw his plea of NGI, there is no basis for any determination that the evidence raising a doubt about appellant's was part of any "tactic[] to delay and derail the trial." Respondent's implicit suggestion that, once appellant was allowed to represent himself, some of his behaviors became part of "tactics to delay and derail the trial," is contradicted by the record; had appellant wanted to delay the trial, he had only to keep his NGI plea in place and agree to a retrial of the sanity phase. Similarly, why, if appellant wanted to delay or derail the trial did he so vehemently reject the concept that he was mentally ill, and fight so hard against the concept that he might be incompetent? Suspension of the proceedings would clearly have delayed the trial, and probably have substantially derailed further prosecution of the case upon the probable jury finding that he was incompetent due to his demonstrated psychiatric, psychological, neurological, cognitive and developmental deficits and dysfunctions. Respondent's suggestion that there was evidence supporting a finding of "tactics to delay and derail the trial" has

no factual basis in the record or the realities of these proceedings.

Moreover, appellant's personal behavior during the penalty phase, even if intended to "disrupt or delay" the proceedings, was not thereby automatically inconsistent with incompetence. If such behavior, even if arguably goal-directed, arose from an irrational understanding of the proceedings or his role in those proceedings, as is the most likely explanation of almost all of his behavior throughout the proceedings, it is itself evidence, especially in context with all of the other evidence, that appellant was not competent to stand trial.

That suspension of proceedings at any point would have delayed the trial, or "derailed" the prosecution of appellant is not a consideration sufficient to prevent the enforcement of appellant's due process right not to tried, let alone sentenced to death, while incapable of a rational understanding of the proceedings or of rationally assisting counsel in the presentation of his case.

2. There was substantial evidence raising a doubt that appellant was incompetent prior to the jury's verdict in the sanity phase

In the opening brief, appellant demonstrated that beyond the evidence in the record before the guilt verdicts, additional evidence continued to mount, raising a doubt of appellant's competence. (AOB 157-161.)

Respondent's characterization of the additional evidence arising during the sanity phase is incomplete and ignores substantial aspects of appellant's argument. Respondent also fails to acknowledge that the claim is not based on the additional evidence alone, but on that evidence in combination with the evidence discussed in the previous section. Respondent analyzes the evidence in the abstract and in isolation, without regard to the evidence presented prior to the sanity phase.

Dr. Vicary's guilt phase testimony that appellant might "snap" under the stress of the trial continued to be important in explaining appellant's behavior and decisions after the guilt phase and throughout the sanity and penalty phases, and in providing background to defense counsel's declaration of a doubt that appellant remained competent after "substantial changes" during the days appellant was absent from court during the sanity phase. (36RT 4523.)

Respondent argues that Dr. Vicary's opinion regarding the likelihood that appellant would "snap" under stressful conditions did not raise a doubt about appellant's competence. (RB 138.) Again, respondent analyzes this evidence in isolation, and rather than in context with the other evidence relevant to that question. In the abstract, standing alone, such an opinion would not constitute substantial evidence raising a doubt of a defendant's competence. However, it did not stand alone, and was not a statement made without foundation or intended to be considered in the abstract. It was an opinion of a qualified expert who had personally examined appellant and had reviewed his substantial medical, mental health, educational, and social history. Dr. Vicary's testimony was an opinion describing potential outcomes resulting from appellant's specific constellation of deficits, dysfunctions, and illnesses, in the context of that history. There was evidence, discussed in the opening brief, which provided context to the opinion, raising a doubt, even assuming arguendo that appellant was competent through the guilt phase, whether he remained so by the end of the sanity phase.

Respondent argues that "nothing showed that appellant had in fact 'snapped.'" (RB 138.) However, respondent does not address either Dr. Vicary's explanation of his opinion or explain the evidence discussed in the opening brief which strongly indicates some change in appellant's mental state during this time period consistent with that opinion. Nor does respondent

address the trial court's duty to watch for changes in a defendant's mental state as a trial goes on, especially where the trial court has been put on notice that the trial itself may result in some deterioration of the defendant's mental state, including his competence. (See AOB 157-158.)

Respondent ignores Dr. Vicary's actual testimony, as well as the context. Dr. Vicary had opined that under stress, such as the stress of the trial, and particularly the stress of listening to mental health experts testify that he was mentally ill, appellant could have a psychotic break, could begin to dissociate, could lose his coping ability and judgment, could begin to have emotional eruptions, or could begin to engage in progressively more illogical thinking. (28RT 3449-3450, 3494-3495, 3499, 3517-3519.) All of this occurred as the sanity phase wound down and throughout the penalty phase. In addition, respondent ignores defense counsel's statement that in the preceding couple of days, during which appellant was in the presence of neither the trial court nor the prosecutor,[20] but during which defense counsel spent time with appellant outside of court, there had been "substantial changes" in appellant (36RT 4523) and that although counsel thought he had been marginally competent, "My view is there's been a change. He – I just do not feel he's able to cooperate at this point with counsel and I believe it is due to a mental illness." (36RT 4524; AOB 157-161.)

Respondent dismisses the relevance of appellant absenting himself from the sanity phase, citing *People v. Ramirez* (2006) 39 Cal.4th 398, 465-466 for the proposition that such voluntary absence "does not provide substantial evidence of incompetence." (RB 138.) While in *Ramirez*, this Court held that the defendant's absence from the penalty phase proceedings did not require a

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[20] Cf. *Drope*, *supra*, 420 U.S. at pp. 180-181.

competency hearing, it did not hold that such absence is irrelevant as a factor in determining whether or not a doubt of a defendant's competence exists. Again, respondent confuses the question of the sufficiency of a piece of evidence standing alone with the question of the relevance of that evidence to the determination of whether substantial evidence supports a doubt of competence. (See, e.g., *Drope*, *supra*, 420 U.S. at pp. 180-181.)

As is demonstrated in Argument IV in the opening brief and below, the record establishes that appellant did not have a rational understanding of the role the sanity phase played in the prosecution's attempt to obtain a death sentence against appellant. Appellant absented himself from the sanity phase at the same time his mental state was apparently changing, affecting his ability to rationally consult with counsel, which resulted in defense counsel declaring a doubt of his competence. This supports the conclusion that his absence from the sanity phase was a symptom of increasing irrationality and incompetence.

Respondent argues that a defense counsel's declaration standing alone is not determinative of the need for a competency hearing, citing *People v. Lewis*, *supra*, 43 Cal.4th at p. 525. (RB 138.) Although this Court in *Lewis* stated that, "although a defense counsel's opinion that his client is incompetent is entitled to some weight, such an opinion alone does not compel the trial court to hold a competency hearing unless the court itself has expressed a doubt as to the defendant's competence" (43 Cal.4th at p. 525), the United States Supreme Court has stated that "it is nevertheless true that judges must depend to some extent on counsel to bring issues into focus." (*Drope*, *supra*, 420 U.S. at pp. 176-177.)

> Although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, see *United States ex rel. Rizzi v. Follette*, 367 F.2d 559, 561 (CA2 1966), an expressed doubt in

> that regard by one with 'the closest contact with the defendant,' *Pate v. Robinson*, 383 U.S. 375, 391, 86 S.Ct. at 845 (1966) (Harlan, J., dissenting), is unquestionably a factor which should be considered.

(*Drope*, *supra*, 420 U.S. at p. 177, fn. 13.) There is no authority suggesting that the trial court may arbitrarily ignore such a declaration of doubt, as the trial court did here, particularly when that declaration is not standing alone.

Respondent also relies on the trial court's reference to defense counsel's declaration of a doubt as a "strategic plan" (45RT 5493) as if such a characterization constitutes some reason to dismiss or wholly disregard counsel's declaration of a doubt as to appellant's competence. Neither the trial court nor respondent has suggested what "strategic plan" was involved, or how it might undercut the significance of defense counsel's declaration of a doubt that appellant remained competent. Moreover, as set forth in the Introduction, *ante*, the trial court's stated basis for saying the declaration of doubt was a "strategic plan" is contradicted by the record.

Respondent again argues that the trial court was entitled to rely on its own assessment of appellant's behavior, citing *Ramos*, 34 Cal.4th at p.509 and *Lewis*, 43 Cal.4th at p. 526. (RB 138-139.) As explained in the opening brief and above, however, a trial court's subjective belief that a defendant is competent must give way in the face of substantial evidence raising a doubt of appellant's behavior. In addition, in the present case, the trial court applied an erroneous legal standard, apparently under the impression that competence proceedings need be conducted only where the trial court itself was convinced that appellant was in fact incompetent. Respondent offers no defense of the trial court's legal error. Respondent does, however, minimize the import of one statement by the trial court in response to defense counsel's declaration of a doubt as to appellant's competence. The court stated, "Well, at this point

there's no requirement – no need for him to cooperate with you. We're merely waiting for the verdict to come in the sanity phase." (36RT 4524; see AOB 160-161.) Respondent suggests it was just a "passing observation." (RB 139.) Whether or not it was a "passing observation," it was a legally incorrect statement, made in open court in appellant's presence, and at the very least undermined the attorney-client relationship. (See Arg. IV, VI.)

There also is no basis in the record for dismissing such a clearly erroneous statement as a mere "passing observation." The observation revealed the trial court's erroneous understanding of the constitutional principles underlying its duty to assess the evidence supporting defense counsel's declaration of a doubt, and to then suspend proceedings and conduct an inquiry into appellant's competence. Moreover, it was but one of such revelatory statements. (See AOB 168-169.)

Respondent relies upon the trial court's refusal to declare a doubt of appellant's competence "on the basis that appellant had been well behaved and 'extremely intelligent' throughout the trial. (36RT 4534-4535.)" (RB 139.) However, as explained in the opening brief, the basis of the trial court's ruling betrayed a misunderstanding of the applicable law and of the evidence. (See AOB 175-179; *Odle*, *supra*, 238 F.3d 1084.) In addition, the trial court was aware of defense counsel's efforts to "manage" appellant in the courtroom. (See AOB 178-179, fn. 62.)

3. There was substantial evidence raising a doubt that appellant was competent after defense counsel's declaration of a doubt, including at the time appellant withdrew his NGI plea and throughout the penalty phase at which he represented himself

Respondent's characterizations of the additional evidence upon which

appellant relies omit substantial aspects of that evidence, and are, to that degree, misleading. Respondent minimizes the substantial evidence which arose after defense counsel's declaration of a doubt, suggesting that it is merely evidence that "appellant's actions may certainly have been ill-advised." (RB 140.) Of course, almost any action by a capital defendant which is contrary to his best interests as a result of a lack of a rational understanding of the proceedings and/or an inability to rationally assist counsel in the conduct of the defense could be described as "ill-advised." Such a glib characterization does not answer the factual and legal bases of appellant's arguments as presented in the opening brief. (See Introduction, *ante*.)

Respondent minimizes the significance of the evidence of appellant's irrational or delusional beliefs, decisions, and actions, by dismissively referring to them in such terms as "may certainly have been ill-advised," "merely foolish," "may have ultimately proven to be unwise" (RB 140) and "misguided or unwise." (RB 141.) However, these characterizations are not factually supported by the record as discussed more fully in the opening brief. Again, respondent's piecemeal treatment of each fact, removed from the context of all the evidence raising a doubt of appellant's competence, must be rejected.

Respondent's reliance on an adage that "a lawyer who represents himself has a fool for a client" (RB 140) sheds no light on the question of whether or not appellant's decisions and actions were merely foolish decisions and actions by a rational person, or whether those decisions and actions are more reasonably understood as consistent with the substantial evidence of his psychiatric, psychological, cognitive, neurological, and developmental deficits and dysfunctions demonstrated by the substantial expert and record evidence.

Respondent quotes the prosecutor, who said during the penalty phase that she was not able to understand why appellant did some of the things he

did, but that appellant "seem[ed] to believe he has a strategy" under which "things that don't appear to help him" would "serve him in the end." (RB 140; 43RT 5190.) Of course, just as the prosecutor failed to understand appellant's conduct and could not articulate any rational basis for the things appellant did, respondent similarly is unable to articulate any rational basis for appellant's actions and decisions. Respondent avoids the arguments actually made in the opening brief and relies instead on simplistic and conclusory characterizations that appellant's self-representation was "more-than-effective," and "demonstrated rational decision-making in a clear ability to comprehend all the proceedings." (RB 141.) A comprehensive review of the record demonstrates the contrary.

Respondent dismissively characterizes appellant's decision to withdraw his plea of NGI, saying it "may have ultimately proven to be unwise." (RB 140.) As demonstrated in the opening brief, the decision to withdraw his plea of NGI did not "ultimately" prove to "unwise;" the withdrawal of the plea was contemporaneously and instantaneously *irrational*. To say it *may* have been merely "unwise," is to totally ignore the context in which the plea was withdrawn, the refusal of defense counsel to consent to the change of plea, counsel's reiteration of a doubt that appellant was competent, the irrationality of the reasons appellant gave for the change of plea, and all the evidence that demonstrated that appellant's understanding of the proceedings and his ability to assist counsel in his defense were substantially distorted by his psychiatric, psychological, neurological, cognitive, and developmental deficits and dysfunctions.

Respondent argues that a review of the "many specific and coherent legal arguments made by appellant, his examination of witnesses, and his arguments to the jury can leave no doubt that he perfectly well understood the

proceedings against him." (RB 140.) To the contrary, his decision-making, his choice of witnesses, his examination of witnesses, and his argument to the jury are more reasonably understood as demonstrating a view that the courtroom proceedings were somehow related to a school classroom,[21] and that he had a delusional understanding of the issues at hand even if he understood the basic stage directions of the play. His misunderstanding of the role of the judge and of the prosecutor arose repeatedly, e.g. his references to the judge as "the Lady of the court" (AOB 146); his "compliment" in comparing Judge Schempp to Judge Judy (15RT 1943); his argument to the jury that a trial is a show, and that they were to decide penalty by determining which side's case they liked better (48RT 5925-5926); his request that the prosecutor, Ms. Samuels, give him a grade on how well he did representing himself, and a request to the trial court that Samuels be ordered to do so. (50RT 6144-6145.)

Even if appellant understood the basic structure of a trial, he had fundamental impairments in understanding people, their reactions, their body language and facial mannerisms, how they thought, and how the jurors would make the decisions. As a result, his decisionmaking, including decisions about what witnesses to call, what questions to ask, what arguments to make, was

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[21] 26RT 3369-3370; 35RT 4417; 48RT 5925-5926; Exhibit 41. This interpretation perhaps best explains appellant's use of "permission slips" regarding questions about presentation of his defense case at the penalty phase. (33RT 4164-4178; 37RT 4623-4624; 38RT 4662; 40RT 4704-4709, 4747-4805; 41RT 4813-4828.)

> A permission slip in the United States is a form that a school or other organization sends home with a student to a parent in which the parent provides authorization for minor children to travel under the auspices of the school or organization for some type of event, such as a field trip.

(http://en.wikipedia.org/wiki/Permission_slip.)

fundamentally impaired by mental illness and cognitive dysfunction.

At best, respondent's argument raises a factual conflict which is insufficient to overcome the substantial evidence raising a doubt about appellant's competence to stand trial. This conflict should have been resolved by suspension of the proceedings, appointment of appropriate experts, and conduct of a jury trial on the question. Again, respondent fails to respond to the authorities cited in the opening brief establishing that factual conflicts are insufficient to defeat the trial court's constitutional and statutory duty to conduct competence proceedings.

C. Conclusion

As demonstrated in the opening brief, the record contains substantial evidence from expert declarations and testimony; from defense counsel's stated concerns regarding, and eventual declaration of doubt of, appellant's competence; and from appellant's own behavior, decisions (such as withdrawal of his NGI pleas to Counts Two and Three), testimony, and finally the conduct of his defense at the penalty phase, that raise a reasonable doubt that appellant was competent to stand trial.

Respondent does not establish any basis supported by the record for concluding that the expert declarations and testimony are factually incorrect or not worthy of belief concerning appellant's mental illness, brain damage, developmental disability, and cognitive impairments. Respondent fails to offer any reason why the expert declarations and testimony are not relevant to evaluating the rationality of appellant's understanding of the proceedings, his understanding of the decisions he would be required to make, the rationality of the decisions he did make, and the rationality of his conduct of his defense at the penalty phase. Respondent does not explain why the expert opinion in the record does not, alone or in context with the other evidence, raise a

reasonable doubt of appellant's competence.

On this record, under the specific facts before the trial court, the failure of the trial court to declare a doubt deprived appellant of due process and a fair trial, and requires reversal of the entire judgment.

Because the trial court failed to hold a hearing in this case, in the face of substantial evidence of appellant's incompetence, appellant was tried while incompetent; the error is structural and requires reversal of the entire judgment. (*Rohan v. Woodford, supra*, 334 F.3d at p. 818, citing *Satterwhite v. Texas* (1988) 486 U.S. 249, 256-257.) In the alternative, the penalty judgment must be reversed and the matter remanded for reinstatement of appellant's plea of not guilty by reason of insanity and retrial of the issue of sanity.

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IV.

THE TRIAL COURT ERRED IN ALLOWING APPELLANT TO WITHDRAW HIS PLEA OF NOT GUILTY BY REASON OF INSANITY

In the opening brief, appellant explained that allowing appellant to withdraw his NGI pleas to Counts Two and Three without defense counsel's consent amounted to a violation of Penal Code section 1081. (AOB 191-194.) Additionally, appellant demonstrated that, under the circumstances of this case, the trial court abused its discretion in allowing the withdrawal of the NGI plea without inquiring adequately into appellant's competence or taking appropriate steps to ensure that appellant adequately and rationally understood the nature and consequences of his decision and that the decision was rationally made. (AOB 195-209.) Appellant demonstrated that he had been given erroneous advice by the trial court concerning the sanity phase before he withdrew his NGI plea (AOB 199-202); the advisements given to appellant by the prosecutor failed to identify possible outcomes clearly and misstated potential outcomes of a sanity retrial (AOB 198-199); the withdrawal of the NGI pleas in this circumstance itself raised doubts about appellant's competence (AOB 202-203); the trial court erroneously failed to inquire into the basis for defense counsel's refusal to consent to withdrawal of the pleas (AOB 195, 204-205), and prejudicially interfered with the attorney-client relationship (AOB 203-204); and the trial court failed to take into consideration the overwhelming expert testimony that appellant had substantial limitations due to mental illness, developmental disability, and brain damage. (AOB 197-198, 205.)

Appellant demonstrated that the trial court's inquiry into appellant's understanding of the nature and consequences of his decision was inadequate under *People v. Merkouris* (1956) 46 Cal.2d 540 and *People v. Redmond*

(1971) 16 Cal.App.3d 931, and failed to meet federal constitutional standards. (AOB 185-186, 195-198, 205-208.)

Without addressing the particular and peculiar circumstances of the present case upon which appellant relies, respondent argues that section 1081 does not apply to the withdrawal of an NGI plea and that an NGI plea is not a plea of guilty. (RB 154-156.)

Respondent also argues that appellant's withdrawal of the NGI pleas was valid under *Merkouris* because of the claimed absence of "severe unresolved doubts" about appellant's competence. Respondent bases this claim on the 1984 competence adjudication after appellant's first trial, on appellant's ability to verbalize aspects of his case articulately, and on the trial court's refusal to order an assessment of appellant's competence. (RB 159.)

Respondent also argues that appellant was adequately informed concerning, and adequately comprehended, the circumstances and consequences of withdrawal of the NGI pleas (RB 161-164); that his reasons for doing so were rational, if not wise (RB 164); and that defense counsel's refusal to consent to appellant's withdrawal of the NGI pleas was merely a "tactical" disagreement. (RB 165.) Finally, respondent argues that any erroneous advice to appellant from the prosecutor or the trial court was harmless because under the totality of circumstances, appellant's withdrawal of the NGI pleas was voluntary and intelligent. (RB 165-166.)[22]

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[22] In a footnote, respondent reprises the argument that, "because this claim bears on appellant's mental defense, which he admitted in the trial court was false, appellate relief is unwarranted." (RB 153, fn. 75.) As demonstrated in the Introduction, *ante*, this argument is without merit.

A. The Trial Court Erred By Allowing Appellant To Withdraw His NGI Plea

1. Allowing appellant to withdraw his insanity plea without the representation or consent of counsel violated the protections against ill-advised pleas meant to prevent erroneous imposition of the death penalty

In responding to appellant's argument that the trial court violated Penal Code section 1018 by accepting the withdrawal of appellant's NGI plea without the consent of defense counsel, respondent fails to address several arguments actually made and authorities presented in the opening brief.

First, respondent quotes and addresses only a portion of section 1018 itself. Respondent represents, incorrectly, that the selected quote is *the only* relevant – and dispositive – part of the statute as it relates to this issue. While the sentence from section 1018 which respondent chose to quote is relevant,[23] appellant also relies upon another relevant part of section 1018, the last sentence in the statute, which states that "This section shall be liberally construed to affect these objects and to promote justice." (See AOB 184, 193; see also AOB 216, 220-221.) Respondent's brief does not addresses this language.

Having thus ignored relevant statutory language, respondent further ignores appellant's argument and authorities relevant to the interpretation and application of that statutory language. In the opening brief, appellant

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[23] "No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's counsel." (See RB 154.)

demonstrated that this Court has long recognized that section 1018's preclusion of a plea of guilty to a capital offense without counsel's consent reflects and implements this state's interests in preventing unjust convictions in capital cases driven by a defendant's ill-considered, uninformed or unreliable concession of guilt or waiver of a defense. (See *People v. Chadd* (1981) 28 Cal.3d 739, 748-751 (*Chadd*); cf. *People v. Vaughn* (1973) 9 Cal.3d 321, 327.) The restrictions on accepting a plea or changes of plea regarding capital murder were "an effort to eliminate the arbitrariness that *Furman* [*v. Georgia* (1972) 408 U.S. 238] found inherent in the operation of prior death penalty legislation." (*Chadd, supra*, 28 Cal.3d at p. 750.) The requirement of the consent of counsel protects the paramount interest of the state and the defendant, in preventing disproportional or wrongful convictions and death sentences in capital cases. These interests are among the "objects" which section 1018 is intended to "affect." (See Pen. Code §1018; AOB 184, 192-193.) Yet respondent nowhere addresses, much less challenges, these points.

Rather than address the arguments made and the authorities presented in the opening brief, respondent mischaracterizes the argument appellant has made, contending that "[t]he argument rests entirely on the proposition that the withdrawal of an insanity plea is the same as a 'plea of guilty of a felony.'" (RB 154.) Appellant's actual argument is that under the *particular* circumstances presented at the time of the withdrawal of *appellant's* NGI plea, *that* withdrawal was the functional equivalent of a guilty plea to second degree murder and an admission of the special circumstance, and the policies and interests underlying section 1018's requirement of counsel's consent to a guilty plea to a capital offense apply equally and fully to the withdrawal of *appellant's* NGI plea without the consent of counsel.

Appellant does not seek to change the terms of section 1018 as it relates

to the consent of counsel regarding pleas in capital cases, but to construe those terms in this instance as the express language of the statute requires, liberally, so as to affect the objects and interests intended to be protected thereby, and to promote justice. Instead of addressing this argument, respondent relies on interpretations and characterizations of NGI pleas in the abstract, without consideration of the circumstances in the present case.

Respondent focuses on the personal nature of the entry of an NGI plea, citing *People v. Medina* (1990) 51 Ca1.3d 870, 899-900 and *People v. Gauze* (1975) 15 Cal.3d 709, 717-718, 725. Appellant acknowledged that point (AOB 184), but that legal doctrine does not end the analysis or answer the issue presented by this case. Rather, once entered, and especially once a trial – capital or not, guilt or sanity – has commenced, a change of plea, including the withdrawal of an NGI plea, is not guaranteed, but is subject to the sound discretion of the trial court. The withdrawal of an NGI plea after a jury is unable to reach a unanimous verdict on that plea is not left to the whim, desire, or delusional system of the defendant; the defendant does not have, at that point, an unfettered right to withdraw the NGI plea.

Appellant cited *People v. Marshall* (1929) 99 Cal.App. 224, 227-228 (approved in *People v. Marshall* (1930) 209 Cal. 540) for the proposition that where both a not-guilty and an NGI plea have been entered, a guilt verdict is not complete until the NGI plea has been determined. (AOB 182-183, 192.) Respondent acknowledges the citation to *Marshall.* (RB 154.) However, without otherwise addressing the reasoning or holding of *Marshall* itself, respondent dismisses the proposition with the summary conclusion that "appellant's description of a guilt verdict as 'incomplete' until a sanity determination is made is inapt." (RB 155, fn.76.) In fact, in *Marshall*, the court described the effect of an unadjudicated NGI plea in exactly those

terms.[24] The holding of *Marshall* has been utilized over the years without any real disagreement on this particular point.[25] Respondent presents no basis for rejecting this analysis, and cites no case challenging or rejecting that analysis.

Respondent asserts that "no issue of guilt, and no resolution of any felony charge, is at issue in a sanity proceeding." (RB 154.) While it is true that the issues of guilt resolved at a guilt phase are not precisely at issue in the same fashion in a subsequent sanity phase, respondent's sweeping assertion that no resolution of a felony charge is at issue in a sanity proceeding is inconsistent with *Marshall* and the cases that have followed it. Insofar as a finding that the defendant was insane at the time of the commission of the crime precludes criminal sentencing regardless of the guilt verdict, and a finding of sanity removes any impediment to enforcing a prior verdict of guilt, the sanity proceeding by definition involves the resolution of the felony charge. Respondent's unsupported claims in this regard are inapt.

Respondent contends that "it is the personal right of a defendant to control the choice of plea," citing *People v. Medina* (1990) 51 Cal.3d 870,

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[24] Where a plea of insanity is interposed as well as one of not guilty, notwithstanding a verdict of guilty upon the issue presented by the latter plea, until it shall have been determined that at the time of the commission of the offense the defendant was sane, *the verdict is not complete*, nor is he found guilty for all purposes, but only upon condition that it be further decided that he was sane.

(99 Cal.App. at p. 228 (emphasis added).)

[25] See, e.g., *People v. Lyons* (1971) 18 Cal.App.3d 760, 780; see also *People v. Eggers* (1947) 30 Cal.2d 676, 691 ["judgment cannot be pronounced upon the verdict as to the issue of not guilty until the sanity of the defendant has been determined"].

899-900 and *People v. Gauze* (1975) 15 Cal.3d 709, 717-718, 725, and that the only restriction on that right is section 1018. Respondent also appears to suggest that appellant agrees with this characterization. Respondent incorrectly states that "appellant points out" that the only restriction on the personal right of a defendant to control the choice of plea is section 1018's requirement of consent of counsel to a plea of guilty to a capital crime. (RB 154.) To the contrary, appellant explicitly demonstrates that, upon entry of an NGI plea personally by defendant, withdrawal of the plea in the circumstances here is subject not only to counsel's consent and capital jurisprudence considerations, but, in all cases, to the sound discretion of the trial court, especially after a substantial portion of the trial has occurred or where the NGI plea has been submitted to a jury which has deliberated and has been unable to reach a unanimous verdict on the plea.

Respondent ignores the actual procedural posture presented in this case: there had already been a jury trial on appellant's NGI plea, and the jury had been unable to reach a unanimous verdict on that plea as to Counts Two and Three. Respondent's abstract review of the characteristics of an NGI plea (at RB 155) does not provide any reasoned basis for rejecting appellant's argument that section 1018's requirement of counsel's consent applies to the withdrawal of the NGI plea in this case, under these circumstances.

Respondent relies on *Medina* while acknowledging that it does not address the specific factual and procedural situation faced in appellant's case. (RB 156-157) Although *Medina* was a capital case, it did not address section 1018's bar on guilty pleas to capital offenses against the advice of counsel. The question in *Medina* was whether a defendant could *reinstate* a plea of not guilty by reason of insanity – adding defenses as opposed to forgoing them – against the advice of counsel. (*Medina*, *supra*, 51 Cal. 3d at 899-900.) The

court in *Medina* concluded that under those circumstances the decision was defendant's to make, citing *Gauze* and *Redmond*, *supra*, 16 Cal.App.3d 931. (*Id.* at p. 900.) Those decisions, however, focus on the personal rights of a defendant in a non-capital context.[26]

Respondent relies upon *Medina's* apparent approval of the rule stated in *Gauze*, to the effect that a presently sane defendant may withdraw an NGI plea, and that neither *Medina* nor *Gauze* indicated that section 1018 would be implicated in the withdrawal of NGI plea. Yet the specific issue here, in the procedural context here, with the specific facts on the record here, which is the basis for appellant's argument that the section 1018 requirement of consent of counsel is applicable here, and was violated, was not presented in either *Medina* (reinstatement of plea rather than withdrawal of plea) or *Gauze* (noncapital case). The reasoning of those cases is inapposite to the issue presented here.

Respondent does not address the further point made in the opening brief that the requirements and policies of section 1018 require that a change of plea such as is involved here requires that the defendant be represented by counsel, and that the trial court violated its constitutional obligations as well as its non-discretionary duty to ensure that appellant was represented by counsel throughout the change in plea. (See AOB 193-194.)

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[26] In *Medina*, although not discussed by the court, the reinstatement of the plea potentially increased and served the goal of reliability in the sentencing determination. Here, of course, withdrawing the plea – and making that withdrawal at the end of deliberations with the jury deadlocked – served the opposite goal.

2. Assuming arguendo that section 1018 did not preclude withdrawal of the NGI plea, the trial court abused its discretion accepting the withdrawal in this case

Even assuming arguendo that section 1018 does not per se preclude withdrawal of an NGI plea in the circumstances presented here, the record nonetheless establishes that the trial court abused its discretion by allowing withdrawal of the plea where: erroneous advice was given to appellant by the trial court; unclear, misleading, and inadequate advice was given to appellant by the prosecutor regarding the consequences of withdrawing the plea in these circumstances; the trial court's inquiry into appellant's competence and the rationality of his understanding and decision-making was inadequate under the circumstances; the record contains a demonstration of a substantial expert consensus of appellant's substantial mental and cognitive impairments; and the trial court gave inadequate consideration of, or inquiry into, the basis for, defense counsel's refusal to consent to withdrawal of the plea. This case is controlled by the principles stated in *People v. Merkouris*, *supra*, 46 Cal.2d 540 and *People v. Redmond*, *supra*, 16 Cal.App.3d 931, and that based on those principles the trial court erred by allowing appellant to withdraw his NGI pleas.

Respondent mischaracterizes appellant's argument as relying solely on the arguments that "the record demonstrates that appellant did not understand the gravity of the situation and because the court did not inquire into the basis of defense counsel's withholding of consent." (RB 157.) While those two points are part of the argument made in Argument IV.D.2. in the opening brief, they by no means comprise the entirety of the argument presented therein.

Respondent attempts to distinguish appellant's case from *People v. Merkouris* (1956) 46 Cal.2d 540, on the same basis that this Court

distinguished the situation in *People v. Gauze*, *supra*, 15 Cal.3d 709 from that in *Merkouris*, i.e., the withdrawal of the plea in *Merkouris* was not subject to section 1018; that "there were severe unresolved doubts about Merkouris's present sanity; and that the colloquy between the court and the defendant showed that Merkouris did not understand the gravity of his predicament." (RB 158, citing and quoting *Gauze*, *supra*, 15 Cal.3d at p. 718 [italics omitted].) However, the first factor upon which *Gauze* distinguished *Merkouris* was that *Gauze* involved whether or not a defendant could be compelled to *enter* an NGI plea, not whether a defendant could be prevented from *withdrawing* an NGI plea he entered previously. (*Gauze*, *supra*, 15 Cal.3d at p. 718.) The former situation is "*explicitly* covered" by section 1018. The latter situation is not "*explicitly* covered" by that section.[27] This Court made no more of a point than that, leaving open the possibility that the latter situation might be *implicitly* covered by section 1018, as appellant contends. Respondent's attempt to make more of that distinction than is made in *Gauze* itself fails.

The second distinction made by this Court in *Gauze* was that "there were severe unresolved doubts about Merkouris' present sanity; in contrast, defendant Gauze was twice found competent to stand trial." (15 Cal.3d at p. 718.) Respondent's attempt to distinguish appellant's case from *Merkouris* on this ground, and compare it favorably to the situation in *Gauze*, fails as well. Respondent acknowledges that "appellant raised a robust mental defense at the guilt and sanity phases, and defense counsel declared a doubt as to appellant's competence during the sanity phase." (RB 159.) However, respondent

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[27] "First, *Merkouris* involved a withdrawal of a plea and was thus not *explicitly* covered by Penal Code section 1018, as is the present case." (15 Cal.3d at p. 718 (emphasis added).)

dismisses these facts and relies instead on the earlier discredited 1984 competency verdict[28] and upon the trial court's continuing refusal to declare a doubt as to appellant's competence in these proceedings, even in the face of defense counsel's initial declaration of a doubt. (RB 159.) However, as noted in the opening brief, appellant was not found competent to stand trial during the *retrial* proceedings, the factual basis of the expert opinions underlying the competency verdict in 1984 had been completely undermined by evidence not considered at that time, and the reliability of that competency verdict had been further significantly compromised by the findings of the Ninth Circuit concerning the ineffectiveness of defense counsel in investigating, preparing, and presenting crucial mental health evidence even prior to those proceedings. (See AOB 197-198; see also AOB Arg. II, pp. 113-117.) Moreover, trial counsel effectively re-raised the question of appellant's competence prior to his withdrawal of the NGI pleas based on interactions with and observations of appellant outside the courtroom and outside the judge's presence, and reiterated those doubts following the withdrawal of the pleas. (40RT 4715-4716, 4726-4727.)

Respondent references the trial court's characterization of defense counsel's declaration of a doubt as to appellant's competence as a "strategic plan" (45RT 5493) as if such a description constitutes a reason to dismiss or wholly disregard counsel's declaration of a doubt as to appellant's competence. (RB159.) Neither the trial court nor respondent, however, identifies or explains what "strategic plan" was involved, or how it might undercut the significance of defense counsel's declaration of a doubt that appellant remained competent. (Cf. *Drope v. Missouri* (1975) 420 U.S. 162, 177, fn.13.)

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[28] Incorrectly identified by respondent as occurring in 1983.

Furthermore, as explained more fully in the Introduction, *ante*, the trial court made that "finding" during the penalty phase, after defense counsel had been dismissed, and without giving defense counsel an opportunity to respond. And as further explained in the Introduction, the "facts" underlying the trial court's "finding" are not only unsupported by the record but demonstrate the factual and legal flaws in the trial court's rulings concerning appellant's competence in this case and in evaluating mental health evidence and issues generally.

In the face of counsel's comments, given all the evidence supporting a doubt about appellant's competence, the court's failure to declare a doubt in light of the new information before allowing withdrawal of the plea, rendered the withdrawal of the NGI plea void. (See *Drope v. Missouri*, *supra*, 420 U.S. at pp. 179-181 (holding trial court's ongoing "protective duty" requires it to be alert to circumstances suggesting that defendant, even if competent at the outset, became unable to meet the competency to stand trial standard); *Medina v. California* (1992) 505 U.S. 437, 450 (noting defense counsel "will often have best-informed view of the defendant's ability to participate" in his or her defense).)

As to the trial court's continued refusal throughout the relevant proceedings to declare a doubt about appellant's competence, respondent presents no additional basis upon which to credit that refusal in the face of the substantial evidence raising a doubt of appellant's competence. As demonstrated in Argument III, the trial court's refusal at each stage of the proceedings was contrary to the evidence and the law, at the very least constituted an abuse of discretion itself, and in this context provides no relevant distinction from *Merkouris*, nor any relevant similarity to the two competency verdicts relied upon by this Court in *Gauze*.

Respondent characterizes the record as showing "that appellant was a sophisticated navigator of the legal waters he found himself in." (RB 159.) While a superficially enticing turn of phrase, the characterization is as empty in terms of analysis as the other characterizations of the record upon which respondent has relied, and is at odds with the actual facts of the record.[29] Respondent cites defense counsel's statement at the time of the withdrawal of the plea that, without joining in appellant's waivers, "I will concur that Mr. Bloom understands the procedure." (40RT 4693; RB 160.) But respondent omits defense counsel's subsequent clarification of what he meant by that:

I want to comment about something I said this morning. When

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[29] For example, Dr. Verin, former Chief Psychiatrist of the Forensic Mental Health Unit for the Los Angeles County Department of Mental Health at the time of appellant's first trial, described appellant's extensive mental impairments, and their consequences, as follows:

> His brain damage alone leaves him with confusing, faulty perceptions of the world around him. Although he struggles to make sense of verbal and visual stimuli, *he is unable to interpret accurately events, other people's emotions and motive, abstract or complex ideas, and – at times – simple communications*. He is often like a small child who is developing and discovering the meaning of his world. *Although he has islands of performance in some areas and may appear at times to the lay observer to be functioning normally, his comprehension is inescapably limited by islands of vacancy where his brain is simply not functioning adequately. His perception and interpretation of stimuli is distorted, and he is unable to reach rational decisions based on the limited information he understands. His processing of stimuli in his environment is colored by his life experiences as well as his faulty perceptions.*

(2CT 393 (emphasis supplied).) This is hardly consistent with a "sophisticated navigator of legal waters"; a better description of appellant's behavior might be that, while superficially articulate, because of his extensive impairments he is inescapably and irrationally naive.

> the court was taking waivers from Mr -- or I'm sorry. Mr. Gorin was actually taking waivers from Mr. Bloom this morning and asked me if I concurred in the waivers and the various withdrawals and I did not. I made a statement with regards to Mr. Bloom understanding the waivers. And just to be clear about this, I mean, I believe he understands the words. Thing is, how he processes it in his mind is another story. And I still believe he is not competent under 1368 of the Code. So with -- I just wanted to comment on my statement this morning because it wasn't a full statement.

(40RT 4726-4727.)

Similarly respondent omits that clarification of counsel's position in arguing that "it is a fairly obvious inference from the record that counsel's disagreement with appellant over withdrawal of the plea was a tactical one." (RB 165.) Such a characterization ignores trial counsel's clarification quoted above which includes an express reiteration of counsel's doubt that appellant was competent under section 1368. There is no room for doubt on this record that counsel's refusal to consent to withdrawal of the NGI plea was for any reason other than because it was an irrational decision by an incompetent defendant.

Respondent mischaracterizes the record concerning the prosecutor's erroneous advice to appellant that the guilt verdicts "absolutely ... without question[,] 100 percent positively trigger[] a penalty phase." (34RT 4239.) Respondent states that "as is apparent, the isolated issue, at that particular time, was simply whether the second degree murder verdicts precluded a penalty phase." (RB 162.) Nothing in the record supports that interpretation of the prosecutor's misstatement of the law, which was an interruption after a question directed to the trial court. Nor does respondent address the trial court's own misstatement of the law to the same effect when the question was asked again right after that interruption:

MS. DEETZ: You, the Lady of this Court, are telling Robert Bloom that the verdicts by this jury trigger a penalty phase?

THE COURT: Yes, Mr. Bloom, they do. The jury will consider whether it will be death or life without possibility of parole.

(34RT 4239.)

Nothing in the question appellant's counsel asked on appellant's behalf was directed to the question of whether the two second degree murder verdicts *precluded* a penalty phase. In neither of the questions is the word "preclude" used; the word used was "trigger." Neither the prosecutor's answer nor that of the trial court used the word "preclude;" the prosecutor used "trigger;" the trial court specifically affirmed that the verdicts "triggered" a penalty phase ("they do"); and the trial court affirmatively, and erroneously, stated that "The jury *will* consider whether it will be death or life without possibility of parole." (Emphasis added.)

The words used speak for themselves and provide no support for respondent's creative re-interpretation. Respondent accuses appellant of taking the statements out of context, yet it is respondent who is attempting to *create* a context which is not supported by the face of the record. Even if the prosecutor understood the question as respondent imagines, there is no basis for concluding that *appellant* so understood the prosecutor's and the trial court's answers. Those answers, on their face, constituted erroneous advice to appellant concerning the effect of the guilt verdicts and, inferentially, of the role or significance of the sanity phase in these proceedings. These erroneous statements were never thereafter addressed, nor were they corrected by either the prosecutor or the trial court.

Respondent cites statements which appear to be inconsistent with statements cited in the opening brief concerning appellant's understanding of

the role of the sanity phase in these proceedings. (RB 162-163.) That the record may contain apparently inconsistent indications by appellant of his understanding is not surprising; all it establishes, however, is that there are inconsistent indications by appellant concerning his understanding. He said on the record that he did not understand the "intricacies" of the sanity phase. (30RT 3795.) The record thoroughly demonstrates that he suffered from mental, developmental, and cognitive impairments which interfered with his ability to process and rationally understand the circumstances relevant to his decision-making, and interfered further with his decision-making itself. That he was affirmatively misadvised and subsequently made inconsistent statements concerning his understanding of relevant considerations does not excuse the trial court's inadequate inquiry into his understanding, but demonstrates the necessity here for a more careful, searching inquiry into appellant's understanding of his circumstances, his choices and the consequences of the choices which he was called upon to make. The trial court never corrected the erroneous advice given, and made no effort to conduct the careful, searching inquiry the circumstances here required.

Citing *People v. Mosby* (2004) 33 Cal.4th 353, 360-361, respondent argues that:

> to the extent the court or the prosecutor may have provided inaccurate information to appellant in some respect before he withdrew his insanity plea, the error should be deemed harmless because the record establishes that appellant's withdrawal of the plea was voluntary and intelligent under the totality of the circumstances.

(RB 165.) The reasoning of *Mosby* is inapplicable to appellant's wholly different facts.

Mosby was a noncapital case in which, after a jury verdict finding the

defendant guilty of selling cocaine, he admitted a prior conviction for drug possession which rendered him ineligible for probation. On appeal, he challenged the validity of the admission of the prior conviction based solely upon the incompleteness of, and not any legal misstatement in, the rights advisements given him prior to his admission. (33 Cal.4th at pp. 356-359.) This Court rejected the challenge, holding that the totality of circumstances showed that the defendant voluntarily and intelligently admitted the prior conviction. (*Id.* at pp. 364-365.)

The totality of circumstances here are substantially different from those in *Mosby*. First, appellant here faced the death penalty, not ineligibility for probation. Second, the plea at issue was not to an enhancement but went to the heart of the prosecution's case, involving complex issues which appellant had stated prior to the sanity phase that he did not understand, and upon which the trial court relied in refusing appellant's request to represent himself at the sanity phase. (See AOB Arg. VII.) Third, appellant had absented himself from the sanity proceedings. (See AOB Arg. VIII.) Fourth, substantial expert opinion before the trial court, including that of the testifying experts as well as declarations from non-testifying experts, bolstered by the review of substantial documentation of appellant's developmental, medical, social, educational, psychiatric, and neurological history, combined with defense counsel's declaration of doubt about appellant's competence and his ability to rationally process the information necessary to a voluntary and intelligent decision to withdraw his NGI pleas to Counts Two and Three, put the trial court on notice of appellant's multiple mental, developmental, and cognitive impairments and the likelihood that those impairments were at play in appellant's decision to withdraw his NGI pleas. No comparable circumstances were involved in *Mosby's* "totality of circumstances." The *totality* of the circumstances in this

case must be considered, not just isolated circumstances taken out of context as respondent's argument does.

No basis exists in the totality of circumstances here for a reasonable and reliable conclusion that, absent sufficient advisements and inquiry into his understanding of his situation and his alternatives, appellant had an adequate understanding and knowledge of that situation and of his alternatives to support a finding of a knowing and intelligent waiver of his rights and withdrawal of his NGI plea.

Appellant's prior experience in the criminal justice system does not support a finding that he voluntarily and intelligently withdrew his NGI plea. Not only was appellant's defense counsel at his prior trial found to have rendered constitutionally ineffective assistance of counsel (see *Bloom v. Calderon* (9th Cir. 1997) 132 F.3d 1267), but there is substantial evidence in the present record that appellant was incompetent to stand trial at the prior proceedings. (See AOB Arg. II, pp. 113-117.) Furthermore, there is substantial evidence raising a doubt of appellant's competence during the proceedings in the present case, including at the time he withdrew his NGI plea. (See AOB Args. III, IV, V.) That evidence includes evidence of his inability to recognize his own mental illnesses (see Introduction, *ante*) which is relevant both to his understanding of the evidence underlying the NGI plea and to his ability to assess his alternatives rationally.

Under the totality of circumstances, the inadequacy of and errors in the advisements given to appellant, and the inadequacy of the inquiry into his understanding were not harmless. Appellant contends that the withdrawal of the plea could not be knowing and intelligent regardless of any advisements and inquiry due to his incompetence to stand trial, but even assuming arguendo that the evidence of his mental illnesses, impairments, and cognitive

dysfunctions was not enough to raise a doubt of his competence, that evidence demonstrated a need for a careful and comprehensive inquiry into his understanding of what, as a practical matter, removed the only remaining impediment to a penalty phase and the possibility of the death penalty.[30] "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." (*Boykin v. Alabama* (1969) 395 U.S. 238, 243-244.)

As a result of the trial court's error in allowing appellant to withdraw his NGI plea to Counts Two and Three, reversal of appellant's convictions on Counts Two and Three, the finding of special circumstances, and the death penalty is required.

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[30] Respondent also suggests that part of appellant's motivation for withdrawing his NGI plea was that "he considered the mental defense weak and *knew the prosecution intended to present more evidence at a sanity-phase retrial.*" (RB 166.) The record does not support the suggestion that such a consideration was in any way involved in appellant's decision. Furthermore, whether the prosecution would have presented additional evidence in a sanity retrial also is speculative on this record. (See pp. 116-117, *post.*)

V.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO REINSTATE HIS PLEA OF NOT GUILTY BY REASON OF INSANITY

In the opening brief, appellant demonstrated that, even if the trial court did not err in allowing appellant to withdraw his NGI plea to Counts Two and Three, the court's subsequent denial of appellant's motion to reinstate the NGI plea was itself erroneous, an abuse of discretion which violated appellant's constitutionally guaranteed rights to due process, a fair trial, assistance of counsel, an impartial fact-finder, a fair hearing on his motion, and reliable determinations of guilt, sanity and penalty. (U.S. Const., 5th, 6th, 8th, 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16, 17.) In support of his motion appellant offered references to the record regarding his lack of understanding of the sanity phase and to defense counsel's doubt of his competence. He also explained, inter alia, he had no sleep the night before he withdrew the plea, was confused when he withdrew the plea, had not understood prosecutor Gorin's advisement, and only came to understand the consequences when he read the transcript of those proceedings. He further explained that he had difficulty processing oral information and needed things to be in writing. He also proffered defense counsel as corroborating witnesses to these facts and asked for a hearing. (AOB 211-215.) Appellant's description of his processing deficits was supported by proceedings and testimony that occurred before and during the guilt phase. The trial court abused its discretion by ignoring the corroboration of appellant's allegations available on the record before it and by refusing a hearing at which appellant could present further evidence corroborating his allegations. (AOB 215-222.) Appellant demonstrated that, as a result, the error requires reversal of the judgment of

sanity on Counts Two and Three, the special circumstance finding, and the penalty judgment. (AOB 222-223.)

Respondent counters with conclusory averments that the record supported the trial court's denial of the motion, without analytically rebutting or countering (1) the evidence supporting appellant's motion, which was cited and discussed in the opening brief; (2) appellant's proffer of further supporting and corroborating evidence, also cited and discussed in the opening brief; (3) the trial court's refusal to conduct a hearing on that proffered evidence, also cited and discussed in the opening brief; or (4) the authorities cited in the opening brief. Without any legal authority in support, respondent speculates groundlessly about appellant's subjective motivation in making the motion to claim that any error was harmless, and thus does not warrant appellate relief.

Respondent defends the trial court's denial of appellant's motion by arguing the record shows that the request to reinstate the NGI plea was "merely an attempt to frustrate and delay the proceedings," and therefore could be denied on that ground without reference to any other evidence, citing *People v. Lawley* (2002) 27 Cal.4th 102, 148-151, *People v. Horton* (1995) 11 Cal.4th 1068, 1110-1111 and *People v. Williams* (1990) 220 Cal.App.3d 1165, 1170.

Those cases, the sole legal authority cited by respondent in defense of the trial court's denial of appellant's motion, are so dissimilar factually and legally from the facts of this case that they provide no support for the trial court's arbitrary disregard of both substantial evidence in the record supporting appellant's stated grounds and its refusal to hear or consider the additional evidence proffered by appellant in support of those grounds.

None of the three cases cited by respondent involved a motion to reinstate a plea of NGI. In none of the three cases cited by respondent did the

defendant proffer evidence in support of the motion at issue, as did appellant here. None of the three, consequently, addresses the situation here, where the trial court denied the motion while arbitrarily disregarding evidence supporting appellant's grounds for reinstatement of his NGI plea, and arbitrarily refusing to even consider further evidence proffered in support of the grounds stated.

In both *Lawley* and *Horton,* the defendant was found to be competent after competence proceedings were conducted. (*Lawley*, 27 Cal.4th at 130; *Horton*, 11 Cal.4th at p. 1108.) In contrast, the trial court here repeatedly refused to order an evaluation of appellant's competence to stand trial and therefore no plenary proceedings or expert opinions existed. The mental health evidence which was before the trial court here even in the different contexts of appellant's mental state at the time of the crime, or the expert declarations explaining his incompetence at the time of the first trial (see, e.g., AOB 105-111) strongly corroborated appellant's claims and explanations concerning his failure to understand the consequences of withdrawing his NGI plea to Counts Two and Three. (See AOB Arguments III, IV.)

In *Horton*, the defendant repeatedly made and then withdrew *Faretta* motions. The final such motion, made on the date scheduled for trial, was denied by the trial court which found the motion to be untimely and an attempt to manipulate the judicial process, to obstruct the prosecution, and to delay the trial. (11 Cal.4th at p. 1110.) In contrast, appellant's original NGI plea was not frivolous or otherwise improperly entered, but was supported by substantial evidence which ultimately convinced three jurors, by a preponderance of the evidence, that appellant was insane at the time of the homicides in Counts Two

and Three.[31] His withdrawal of the NGI plea to those two counts, on the other hand, was demonstrably irrational,[32] or at the very least uninformed and of questionable rationality, but his withdrawal of that plea cannot itself be described as obstructing the prosecution or delaying the trial. It had the contrary effect. If the motion to reinstate the NGI were granted, it would have derailed the penalty phase, but only by putting the prosecution in exactly the position it had been in prior to appellant's constitutionally flawed withdrawal of the NGI plea – the jury would have been dismissed and a new jury empaneled. The prosecution's pursuit of a death sentence properly would have been contingent on the result of the retrial of the sanity phase. What the prosecution would have lost was nothing to which they were entitled, but only the unwarranted "benefit" resulting from appellant's irrational withdrawal of the NGI plea. Nothing in the cases cited by respondent supports the trial court's arbitrary denial of an evidentiary hearing or of the motion without regard to the then-extant evidence supporting appellant's allegations.

If, at the time of the earlier withdrawal of the NGI plea or appellant's motion to reinstate that plea, the trial court had ruled properly and with due consideration to the relevant evidence, including defense counsel's refusal to consent to the withdrawal of the plea and doubts as to appellant's competence and the rationality of his thought processes, and had heard the evidence appellant proffered in support of reinstatement of the plea, the just and appropriate procedure would have occurred – the prosecution and appellant would have litigated appellant's sanity with appellant represented by counsel

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[31] *Cf. People v. Hernandez* (2000) 22 Cal.4th 512; *People v. Merkouris* (1956) 46 Cal.2d 540, 553-555.

[32] See AOB Arg. IV.

before a new and properly selected jury, and a new penalty phase would have occurred if that sanity phase resulted in a sanity finding on Count Two or Three or both. The penalty phase which would have been terminated by a grant of appellant's motion to reinstate the NGI plea was one which should not have occurred under the circumstances it did. The prosecution would have lost nothing to which it legitimately was entitled.

Respondent ignores all but one of the authorities cited in the opening brief.[33] Respondent does not challenge the proposition that, if appellant did not understand the meaning and consequences of his withdrawal of the NGI plea, then the withdrawal of the plea was invalid and the plea should have been reinstated. Respondent does not challenge the proposition that, if appellant had difficulty processing oral communication, and/or if his comprehension was compromised by a lack of sleep resulting from his anxiety over the circumstances which confronted him, he might not have understood prosecutor Gorin's statements at the time appellant withdrew his NGI plea. Respondent does not challenge the proposition that defense counsel were available to, and would, testify that appellant had difficulty processing oral communication and

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[33] E.g., *People v. Herrera* (1980) 104 Cal.App.3d 167, 172 [error to refuse to allow entry of NGI plea "just prior to trial" without considering evidence and authorities presented in support] (AOB 221); *In re Cortez* (1971) 6 Cal.3d 78, 85-86 ["'To exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision.'"] (AOB 216); *Schlumpf v. Superior Court* (1978) 79 Cal.App.3d 892, 901 ["A failure of the trial court to consider all the evidence is a failure to exercise discretion and requires reversal of the determination."] (AOB 216.)

The one case cited by appellant which respondent addresses is *People v. Medina* (1990) 51 Cal.3d 870, 899, and that for the same proposition for which it is cited by appellant, that a motion to reinstate the plea was addressed to the sound discretion of the trial court. (AOB 215-216; RB 178.)

relied on written materials such as daily transcripts to understand fully what occurred in court. Respondent does not challenge (directly, at least) the proposition that appellant's representations about his difficulty with processing oral communication are consistent with expert testimony concerning his developmental disability and cognitive dysfunctions. Instead, respondent makes a conclusory assertion that "[t]he record in this case simply does not support – and, indeed, strongly refutes – the contention that appellant was unable to adequately understand the proceedings" (RB 180), but without addressing the relevant expert testimony.

Respondent's sole argument is that the trial court's beliefs about appellant's behavior justified the trial court's decision to ignore contrary sworn expert testimony and to decline to take additional evidence designed to challenge and counter those beliefs.[34] Respondent's limited legal authorities do not support that argument. The arbitrariness of the denial was not just an abuse of discretion, but also denied appellant due process. (AOB 221-222;

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[34] Respondent does allege that "appellant did not identify with any specificity what consequence of the withdrawal he had only belatedly understood." (RB 179.) To the contrary, appellant specifically stated that he had not understood that the possibility of parole (i.e., no death penalty and no life imprisonment without possibility of parole) existed had he not withdrawn the NGI plea:

> I would just like to say as far as penalty, I know penalty. I know guilt. I am talking about sanity. [...¶] I don't understand the consequences or the intricacies of sanity. [...¶] I don't understand what Mr. Gorin was telling me that if I had a sanity retrial that there was a potential that I would get 27 to life. I got 18 years in the system. What makes you think that I would normally give up a chance at an early shot at parole and being back out on the street rather than risk death or life?

(44RT 5444-5445; see AOB 213.)

Truax v. Corrigan (1921) 257 U.S. 312, 332 ["The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry. . . ."]; *In re William F.* (1974) 11 Cal.3d 249, 254-255 [due process requires fundamental fairness in the fact-finding process]; *People v. Herrera* (1980) 104 Cal.App.3d 167, 172.)

Finally, respondent contends that any error was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836. (RB 181.) No authority is cited to support the implied assertion that the erroneous denial of a motion to reinstate a withdrawn NGI plea is subject to any harmless error analysis, much less the standard for state law errors. The refusal was prejudicial per se. The only way to resolve a hung jury on an NGI plea is a retrial of the plea. Even in the face of repeated hung juries, a court is without jurisdiction to simply dismiss an NGI plea and impose a judgment of guilt. (Cf. *People v. Hernandez* (2000) 22 Cal.4th 512 [trial court has no authority to dismiss or otherwise dispose of a defendant's NGI plea after repeated hung juries, where there is substantial evidence from which a jury might find the defendant to have been insane].)

Moreover, an erroneous denial of a motion to reinstate an NGI plea is a structural error and not amenable to harmless error analysis. It is thus necessarily reversible per se. Structural errors "'defy analysis by "harmless-error" standards' because they 'affect the framework within which the trial proceeds,' and are not 'simply an error in the trial process itself.'" (*United States v. Gonzalez- Lopez* (2006) 548 US 140, 148; see also *Neder v. United States* (1999) 527 U.S. 1, 7-9; cf. *Rose v. Clark* (1986) 478 U.S. 570, 577 ["Harmless-error analysis thus presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury"]; see also, *Arizona v. Fulminante* (1991) 499 U.S.

279, 309-310.)

If the error is not reversible per se, respondent has failed to establish either that *Chapman v. California* (1967) 386 U.S. 18, 24, is not the proper test of harm or to demonstrate the error is harmless beyond a reasonable doubt. Respondent argues the error is harmless under *Watson* by speculating that, at a retrial of the NGI plea to Counts Two and Three, the prosecution would call "several witnesses, including 'one of the foremost experts in the country on dissociative states.'" (RB 181, citing 40RT 4684.)

Nothing in the certified record on appeal supports this speculation. That the prosecutor said she would call such witnesses does not make it inevitable, true, or in any way relevant, especially given the prosecutor's repeated claims of contemporaneously available testimony of a neuropsychologist identified as Dr. Brooks, whom the prosecutor inevitably and repeatedly failed to produce. (See, e.g., 22RT 2853-2854, 43RT 5196, 46RT 5655.) Despite his availability and the relevance of his supposed expert testimony, Dr. Brooks was never called by the prosecutor as a witness at any stage of the trial, either for the jurors or outside of their presence. Nor was any other evidence, such as declarations, reports, or any other corroboration of the prosecutor's claims of Dr. Brooks's opinions proffered to either the trial court or the jurors. Given the prosecutor's omissions, the most reasonable interpretation of the record and of the prosecutor's claim regarding future witnesses is that it was wishful thinking.

Upon a retrial it is always possible that one party or the other or both might modify its presentation. But to conclude that the prosecution would have been more successful in obtaining unanimous verdicts of sanity as to Counts Two and Three based upon an unsupported (on this record) claim that the prosecution would get some unknown "foremost expert," who would

supposedly then testify reliably and credibly in a manner wholly inconsistent with the defense evidence, is not a reasoned analysis based on facts in the record, but unwarranted speculation and conjecture based upon a prosecutor's fantasy.

Moreover, respondent refers to "appellant's highly dubious theory regarding sanity" (RB 181)[35] without acknowledging either that three jurors were convinced by a preponderance of the evidence that appellant was not sane at the time of the homicides of Josephine and Sandy, or that the jury returned guilt phase verdicts of second rather than first degree murder as to those two counts at the guilt phase.

If the Court does not reverse the judgment and order a retrial of the sanity phase on Counts Two and Three, it should, at least, remand the matter to allow appellant the opportunity to present the evidence that he would have proffered if afforded an adequate hearing and argument supporting his motion to reinstate his NGI plea (see *People v. Boyd*, *supra*, 16 Cal.App.3d at pp. 907-909), and for that decision to be made based upon the evidence relevant to the motion.

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[35] As discussed in the Introduction, *ante*, respondent is inconsistent in characterizing the appellant's mental health evidence, calling it "robust" at times and "dubious" at others. The "dubious" characterizations are at odds with the realities of the effect of the defense mental health evidence on the guilt and sanity proceedings.

VI.

THE TRIAL COURT ERRED IN ALLOWING APPELLANT TO REPRESENT HIMSELF AT THE PENALTY PHASE

A. Introduction

In the opening brief, appellant demonstrated that, assuming arguendo the trial court committed no reversible error by failing to suspend proceedings to conduct competence proceedings (see Arg. III, ante), or by allowing appellant to withdraw his NGI plea to Counts Two and Three (see Arg. IV, ante), or by denying appellant's motion to reinstate that plea (see Arg. V, ante), the evidence of appellant's mental illness, brain damage, developmental disability, and cognitive deficits, and the patent irrationality of so many of his decisions, as well as the trial court's interference in the attorney-client relationship nonetheless establish that appellant did not make a "knowing and intelligent" decision to waive counsel and to represent himself at the penalty phase. Even if no error occurred in accepting appellant's waiver of counsel, denial of appellant's motions to exercise his right to counsel by reinstating defense counsel requires reversal of the resulting death judgment.

B. Respondent's reliance on *People v. Bloom* (1989) 48 Cal.3d 1194, is misplaced

Respondent relies on this Court's opinion on appeal from the flawed 1983 judgment, attempting to draw parallels to the factual and legal basis upon which that prior appeal was decided and the record and issues upon which this appeal rests. Respondent's reliance on that opinion is sorely misplaced.

Respondent relies heavily upon language from that prior opinion finding no error in appellant's self-representation in the penalty phase of that trial. (48 Cal.3d at pp. 1224-1225.) Respondent relies not only on statements of the law in the opinion applicable to waiver of counsel under *Faretta*, but

also upon characterizations of appellant's understanding of the relevant concepts and awareness of the dangers of representations. (RB 166-167.)

This Court's ruling in the first appeal cannot establish the propriety of self-representation here. That ruling was based on a materially different factual record, devoid of the substantial mental health evidence which led to the 9th Circuit's vacation of the entire judgment which this Court had affirmed. Due to ineffective assistance of defense counsel as later determined by the Ninth Circuit in *Bloom v. Calderon* (9th Cir. 1997) 132 F.3d 1267, the record upon which the first appeal was decided was missing the substantial evidence related to appellant's mental illness, developmental disability, brain damage, and cognitive deficits as well as relevant social, psychological, psychiatric, medical, and educational history and expert opinions presented in the proceedings at the retrial which is the subject of the present appeal. As a result, in the previous appeal, this Court was unaware of, and did not consider the effect of the additional evidence on issues relevant to guilt, sanity and penalty, competence, or, as particularly pertinent here, self-representation at the prior penalty phase. In contrast, the issue of appellant's self-representation in the present appeal is inextricably entwined with the mental health evidence in this record which was absent on the prior, flawed record, but which was presented to the trial court in the retrial proceedings, by expert declarations and expert testimony, prior to the trial court allowing appellant to discard his attorneys and test his damaged brain, and his irrational understanding of the proceedings and of the evidence against the prosecution's intent to obtain a death verdict. The analysis in the prior appeal simply does not address the factual context necessary to resolution of the issues on this appeal.

Respondent also relies on a quote about invited error from 48 Cal.3d at p. 1220. (RB 170.) However, while the quoted language is in the portion of

the opinion addressing appellant's self-representation at the penalty phase in the prior trial, the opinion did not address the situation presented here at all. Moreover, the quoted statement played no part in this Court's affirmance of the judgment on that first appeal. This Court did not hold, or even suggest, that the asserted *Faretta* error in that appeal, which was different from the *Faretta* error at issue in this appeal, was rejected due to invited error. (See 48 Cal.3d at pp. 1218-1226.) Respondent's reliance on that irrelevant dictum is misplaced.

C. The Court's Interference in the Attorney-client Relationship and Improper Communications with Appellant Violated Appellant's Due Process and Sixth Amendment Rights

In the opening brief, appellant noted numerous instances of trial court interference with the attorney-client relationship before appellant's withdrawal of his NGI pleas to Counts Two and Three, before dismissing defense counsel from the case, and before ever undertaking any inquiry into appellant's intended waiver of counsel for the penalty phase. Appellant argued that the trial court's interference violated appellant's rights and undercut the validity of the withdrawal of the NGI pleas as well as any waiver of the right to counsel at penalty phase. (AOB 226-233, 240-243.)

Respondent mischaracterizes the argument appellant made in this regard, describing it as a claim that the trial court violated due process "by engaging [appellant] in discussion about anticipated penalty-phase issues while he was still represented by counsel." (RB 166, 170.) While the trial court's interactions with appellant in those discussions did contribute to the interference in the attorney-client relationship, appellant's argument is not based upon the fact of those discussions alone. Appellant relies equally upon the manner in which those discussions took place, and more importantly, upon

specific instances of the trial court's interference with the attorney-client relationship which occurred in those discussions and in other proceedings, including proceedings relating to defense counsel's declaration of doubt as appellant's competence. The trial court's interference with an already difficult attorney-client relationship undermined defense counsel on issues about which defense counsel were regularly advising appellant, and regarding specific actions which defense counsel were advising appellant not to take.

Respondent does not address the difficult attorney-client relationship, the ongoing nature of defense counsel's advising appellant regarding representing himself, or defense counsel's objections to the trial court allowing appellant to act in pro per while defense counsel were vigorously representing him as counsel of record in the guilt and sanity phases.

Respondent does not acknowledge the evidence in the record that the issue of appellant's self-representation at the penalty phase was an ongoing matter of discussion between appellant and defense counsel. As pointed out in the opening brief, at the hearing at which appellant made his motion to represent himself in the penalty phase, he notified the trial court that he had been talking to his lawyers about "this *Faretta* issue on several occasions over the past two years," and counsel had been trying to change his mind about pursuing pro per status and would continue to do so. (15RT 1936-1937; AOB 227.) Thus, to the extent the trial court, directly or indirectly, encouraged appellant to represent himself, the court was inserting its encouragement on an issue about which defense counsel had advised, and continued to advise appellant, and thereby undercut defense counsel's authority.

Respondent argues that some part of the error here is the result of "invited error" because appellant initiated the discussions during which the trial court interfered with the attorney-client relationship. Respondent is

wrong both factually and legally. Clearly, the concept of invited error doesn't excuse error in granting a *Faretta* motion where, as here, the record does not support a finding that any purported waiver of counsel for the penalty phase was knowingly and intelligently made. Respondent does not cite any authority that applies invited error to such an appellate claim,[36] nor is appellant aware of any such authority.

Respondent relies upon an argument that "it was appellant who insisted from the outset of the case on representing himself at the penalty phase, *just as he had done at his initial trial.*" (RB 171 (emphasis added).) As explained above (see Introduction, *ante*), this Court's ruling in the first appeal cannot establish the propriety of self-representation here. That ruling was based on a materially different record, devoid of the substantial mental health evidence which led to the 9th Circuit's vacation of the entire judgment which this Court had affirmed.

The first appeal was decided on what turned out to be a flawed and incomplete record, devoid of substantial evidence related to appellant's mental illness, developmental disability, brain damage, and cognitive deficits as well as relevant social, psychological, psychiatric, medical, and educational history and expert opinion relevant to issues of guilt, sanity and penalty, due to ineffective assistance of defense counsel in investigating and presenting that substantial, probative and available material.

Respondent is incorrect in stating that appellant "adamantly insisted

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[36] Appellant does not understand respondent to address the invited error argument to the *Faretta* error itself, i.e., to the trial court's error in granting appellant's motion for self-representation, but only to appellant's argument that the trial court interfered in the attorney-client relationship. Nor would there be any basis for excusing the *Faretta* error itself as invited.

from the earliest stages of the retrial that he wanted to represent himself at the penalty phase." (RB 167, 171, 172.) On July 23, 1998, appellant made a motion to represent himself at all phases of the trial. That motion was denied. On January 20, 1999, appellant again moved to represent himself, then withdrew the motion on February 25, 1999. (1CT 86-87; ICP RT 142-152; 2RT 163.) He did not make the *Faretta* motion which was ultimately granted until the beginning of the guilt phase, on October 5, 2000. The record shows therefore, not only that appellant's requests regarding self-representation were different from his request at the first trial, but that appellant wavered during these proceedings on the details of his requests to represent himself.

At the beginning of the guilt phase appellant made his motion, in somewhat grandiose terms, to represent himself at the penalty phase in this retrial, stating that his intent was to seek death. (15RT 1935-1940.) Thereafter, his intent and his statements about that intent changed. This record does not reflect that appellant had a rational or an unwavering stable "intent." In the course of the guilt phase, he went from a stated intent to argue for death, to a stated intent to argue for life. He never explained that substantial change in his intent, or even acknowledged that it was a change, and no one inquired of him on the question. When he finally represented himself before the jury in the penalty phase, he intended to make a case for life, but ended up presenting a case so chaotic that the prosecutor said that, based on what he had been doing, she didn't know what he wanted.[37]

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[37] The prosecutor stated during argument about appellant's request to reinstate defense counsel as his attorneys:

> . . . now the defendant is seriously looking at the death penalty because he himself has created that situation. [¶] He has given the jury more information from which they will come back with

(continued...)

Moreover, after appellant made the operative request to represent himself on October 5, 2000, and addressed it once more on October 10, 2000, *he* did not raise it again for over two weeks. Nevertheless, in a *Marsden* hearing held on October 23, appellant ranted about the ways in which he claimed the mental defense presented by defense counsel would result in a verdict of capital murder. He did not raise the issue of representing himself at penalty in this hearing. Rather, the *trial court* told him, "If it gets to the penalty phase, I will let you represent yourself, okay?" (*Marsden* RT 3036.)

Appellant demonstrated marked inconsistency in his desire to represent himself – varying from wanting to represent himself for all purposes, to only for penalty phase in order to argue for death, to only for penalty phase to argue for life, for both the penalty and sanity phases, and finally to requesting reinstatement of counsel during the penalty phase. Moreover the record

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[37] (...continued)

> the death penalty than the prosecution has by his own statements, by his own testimony. [¶] And I am sure that he has some remorse about that *because maybe he really doesn't want the death penalty, although I don't know whether he wants the death penalty or not.*

(44RT 5450 (emphasis added).)

Later, the prosecutor argued that "I think the defendant has done some things that I *can't understand why he would do them*," and "He has put in things that don't appear to help him, but he does *seem to believe* he has a strategy whereby those things will serve him in the end. [¶] Now, I don't know what he is going to say when he testifies so *I am not sure how he thinks these things will help him* . . . ." (43RT 5189-5190 (emphasis added).)

The prosecutor also argued to the jury, "This has been a case where the defendant has acted *so odd* and *so strange* and so manipulative that *it is impossible to understand what he is trying to achieve here*." (43RT 5189 (emphasis added).)

establishes that self-representation was an issue about which defense counsel continued to advise appellant in an attempt to convince him *not* to represent himself. (see, e.g., ICP RT 148-149; 15RT 1936-1937; AOB 227.) Respondent's portrayal of a single minded, determined defendant, and one rationally comprehending the risks of self-representation and intent on assuming those risks, is simply not supported by the record.

Respondent addresses solely the fact of communications between appellant and the trial court. Because appellant initiated communications with the trial court about the penalty phase, respondent argues that appellant "was in no need of any encouragement from the court to proceed in [the] direction" of representing himself at the penalty phase (RB 171), and that "nothing in the court's or the prosecutor's exchanges with appellant strayed from matters strictly relevant to the penalty phase." (*Ibid.*)[38] However, respondent ignores the actual examples of the trial court's interference with the attorney-client relationship, including encouragement and validation of or agreement with appellant's belief that he was both competent and capable of representing

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[38] Respondent provides a string of citations to the Reporter's Transcript to demonstrate that appellant was the one who requested to be heard on penalty phase issues before that phase had been reached (RB 170), and that "nothing in the court's or the prosecutor's exchanges with appellant strayed from matters strictly relevant to the penalty phase." (RB 171.) As to one of the citations, respondent is incorrect. As stated above, the October 23, 2000 *Marsden* hearing at *Marsden* RT 3031-3037 did not involve penalty phase issues or the issue of appellant's request to represent himself until the trial court raised it for the first time at the end of the hearing by telling appellant that he would be allowed to represent himself at the penalty phase. While this incident was specifically addressed in the opening brief (see AOB 229-230, 232, 240-241, 246), respondent does not acknowledge the incident, instead burying any reference to the hearing in a claim which the transcript of the hearing refutes.

himself at the penalty phase, positions which were in direct opposition to defense counsel's advice to appellant on those matters. (See AOB 226-236, 240-243.)

Respondent ignores the point made in the AOB that the discussions of penalty phase matters over which the trial court presided during the guilt and sanity phases all occurred before the trial court made any inquiry into whether or not appellant's waiver of the right to counsel was knowing and intelligent, with a rational understanding of the risks and consequences of self-representation in this case. The trial court treated appellant as if he was already representing himself, over the objection of counsel who were representing him, and whom the trial court knew were still working to dissuade appellant from self-representation. This treatment simultaneously encouraged appellant that he was capable of self-representation and undermined the contrary advice which defense counsel gave appellant. In effect, without taking the steps necessary under *Faretta*, such as advising appellant of the dangers of self-representation and ensuring that appellant had a rational understanding of the risks and consequences, the trial court aligned itself against defense counsel on the advisability of appellant representing himself and the risks of doing so in this case.

Respondent's argument that no violation of due process or deprivation of the right to counsel occurred because "nothing about those exchanges so compromised the ability of defense counsel to represent appellant at the guilt or sanity phases" (RB 171) is incompatible with the record. The trial court's interference in the attorney-client relationship clearly affected at least two critical decisions by appellant made against the advice, and over the objection of, defense counsel: withdrawal of his NGI plea to Counts Two and Three and his decision to represent himself at penalty. It also undercut defense counsel's

ability to advise appellant effectively concerning the crucial issue of the effects of appellant's mental illnesses, deficits, and dysfunctions on those precise decisions.

Respondent selectively cites *People v. Martinez* (2009) 47 Cal.4th 399, 419 and *Martinez's* use of *Smith v. Superior Court* (1968) 68 Cal.2d 547, 559 "for [the] proposition that [the] state's duty with respect to the right to counsel is to refrain from unreasonable interference with individual's desire to defend himself in whatever manner he deems best." (RB 171.) The full quote from the relevant portion of *Martinez* provides the appropriate context:

> *The court must exercise circumspection in taking actions that may interfere with an existing attorney-client relationship*, and must remain "on [its] guard neither to infringe upon the defendant's right to counsel of his choice, nor to compromise the independence of the bar." (*Smith v. Superior Court* (1968) 68 Cal.2d 547, 559, 68 Cal.Rptr. 1, 440 P.2d 65 ["The value in issue ... is 'the state's duty to refrain from unreasonable interference with the individual's desire to defend himself in whatever manner he deems best, using every legitimate resource at his command'"]; see *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 697, 122 Cal.Rptr. 778, 537 P.2d 898; see also *People v. Jones* (2004) 33 Cal.4th 234, 244, 14 Cal.Rptr.3d 579, 91 P.3d 939; *Ingram v. Justice Court* (1968) 69 Cal.2d 832, 840, 73 Cal.Rptr. 410, 447 P.2d 650.)

(*People v. Martinez*, *supra*, 47 Cal.4th at pp. 419-420 (emphasis added).) Nothing in *Martinez* or the cases upon which it relies remotely justified the trial court's interference in the attorney-client relationship here. In fact, none of those cases involve the issue of self-representation.

Respondent also cites *Estelle v. McGuire* (1991) 502 U.S. 62, 75 for the proposition that error must infuse the trial with unfairness to rise to level of due process violation. (RB 171.) That is exactly what the trial court's mishandling of the issues of waiver, including the arbitrary and capricious

rejection of substantial mental health evidence before the court, and the improper interference in the attorney-client relationship, did in this case. It infused the proceedings, at least from the point that the jury was unable to reach a unanimous verdict on sanity on Counts Two and Three, through to the pronouncement of judgment, with unfairness rising to the level of a due process violation. As argued in the opening brief, the penalty judgment resulting from appellant's self-representation must be reversed and his NGI pleas to Counts Two and Three reinstated.

D. The Record Does Not Support a Finding That Appellant's Waiver of Counsel and Decision to Represent Himself Were Knowing and Intelligent

In the opening brief, appellant explained that the record does not support a finding that appellant knowingly and intelligently, with a rational understanding of the dangers and disadvantages of doing so in this case, waived his right to counsel at the penalty phase. As appellant explained, the trial court, over the objection of defense counsel who represented appellant at the time, allowed appellant to represent himself in proceedings in open court outside the presence of the jury during guilt and sanity deliberations without ever warning appellant about or conducting any inquiry concerning his understanding of the dangers and disadvantages of self-representation, and without obtaining an express waiver of counsel. After the trial court allowed appellant to withdraw his NGI pleas to Counts Two and Three, the trial court dismissed defense counsel and informed the jury that appellant would represent himself at the penalty phase. At this point, the trial court still had not conducted the necessary inquiry or given the necessary warnings about self-representation. When an after-the-fact waiver colloquy was conducted, no mention was made of the specific circumstances of this case which were

relevant to such a waiver. These specific circumstances included the evidence of appellant's mental illness, developmental disabilities, brain damage, and cognitive deficits, and appellant's repeated denials of such impairments and rejection of that evidence. In that belated colloquy, the trial court encouraged appellant's waiver of counsel and assured him of his qualifications to represent himself. The colloquy amounted to little more than a superficial rubber-stamping of appellant's plan to represent himself at the penalty phase. It was entirely inadequate to determine whether, and ensure that, appellant understood the dangers and disadvantages of representing himself in this case, especially in light of the evidence of appellant's mental, developmental, and cognitive impairments. Even if that evidence alone did not establish a doubt of appellant's competence or a doubt that his "waiver" of counsel was knowing and intelligent, and rationally based, the trial court was required in this circumstance to seek a further psychiatric evaluation of appellant directed to the issues of waiver of counsel and self-representation, but failed to do so. (AOB 251-253.) The evidence raised substantial questions as to whether appellant understood and was able to use relevant information rationally to fashion a response to the prosecution's case in aggravation. The trial court's colloquy did not address these questions. Ultimately, no express waiver of counsel was actually taken by the trial court at that time of the colloquy or at any time through the pronouncement of judgment in this case. (AOB 250.)

Respondent argues that the record shows that, as this Court held on the appeal from appellant's first trial, appellant understood the dangers and disadvantages of self-representation and knowingly and intelligently waived his rights. (RB 166-170.) But, as noted above the evidence of the two trials of appellant's mental illness and brain damage were different in every critical respect. Regarding the evidence that appellant is mentally ill, brain damaged,

developmentally disable and cognitively impaired, respondent relies on the trial court's repeated rejections of doubt about appellant's competence, arguing that the record "strongly refuted that appellant was incompetent." (RB 169.)

Respondent repeats an argument raised in response to appellant's Argument III regarding appellant's competence, characterizing the record as showing that appellant "argued cogently" about penalty phase issues. (RB 167.) Appellant incorporates the reply in Argument III, *ante*, to these same characterizations.

Respondent argues that "appellant well understood what he was doing, even if he behaved foolishly." (RB 170.) In light of the substantial record evidence explaining appellant's multiple major impairments, characterization of his irrational behavior and decisions as merely "foolish" is an unwarranted trivialization of his impairments and of a substantial and critical flaw in this trial, and of the trial court's inappropriate and constitutionally inadequate treatment of this impaired, and at best, marginally competent defendant.

Respondent also claims that "the jury rejected the mental defense at the guilt phase." (RB 169.) Respondent is wrong. Unlike the first trial, the jury here was unable to reach a verdict on the charge of first degree murder as to Counts Two and Three, and then reached a unanimous verdict of second degree murder on those two counts only after the prosecutor conceded and withdrew consideration of first degree murder from the deliberations. (24CT 6213-6215.)[39] Respondent does not explain how that constitutes a rejection of the defense mental health evidence rather than a partial acceptance of it.

Respondent's arguments rejecting the critical relevance of the mental

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[39] Of course, the jury was erroneously deprived of the opportunity to consider and return a verdict of voluntary manslaughter on those two counts. (See Arg. XI.)

health evidence to consideration of appellant's waiver of counsel and the adequacy of the trial court's inquiry to sustain the "waiver" in this case rely primarily, if not solely, on the trial court's repeated rejections of any doubt of appellant's competence. As demonstrated in Argument III, however, the trial court's rejection of any doubt in the face of the evidence was itself error, and can provide no support for respondent's arguments here.

Respondent argues in a footnote that "To the extent there was any deficiency in the particular *Faretta* admonitions that were administered to appellant, the error was harmless beyond a reasonable doubt." Respondent also cites *People v. Sullivan* (2007) 151 Cal.App.4th 524, 551, fn. 10, as noting a split of authority regarding the harmless error standard applicable to faulty *Faretta* advisements, i.e., whether it is structural error or subject to a finding of harmlessness beyond a reasonable doubt under *Chapman*.

Appellant explained in the opening brief that the error is structural in nature (AOB 264-266), and reiterates that position. Moreover, the trial court's errors were not a mere technical deficiency in the *Faretta* colloquy conducted, but permeated the entirety of the trial court's treatment of appellant's request to represent himself at penalty, including granting that request and treating him as representing himself even prior to the return of the verdicts in the guilt phase, the trial court's encouragement of appellant's desire to represent himself, and the trial court's continuing interference with the attorney-client relationship, undermining defense counsel's advice to appellant that he not represent himself at penalty, and not withdraw the NGI pleas to Counts Two and Three. It is impossible to assess the effect of these errors reliably on the available record and the ultimate outcome of the case, demonstrating the propriety of treating such pervasive errors as structural in nature, and requiring reversal of the penalty judgment without consideration of prejudice. (*Arizona*

v. Fulminante (1991) 499 US 279, 309-310 [per se reversal for "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless error' standards"]; see also *United States v. Gonzalez- Lopez* (2006) 548 US 140, 148.)

Even if the error here is assessed under *Chapman*, the relevant question is not, as respondent suggests, whether appellant would, beyond a reasonable doubt, have persisted in his attempt to represent himself at penalty if the trial court's waiver colloquy with appellant had been more thorough and less perfunctory and casual. Rather, another question must also be considered – had the trial court conducted a full and proper inquiry, taking into account rather than dismissing the mental health expert opinion, seeking additional psychiatric evaluation of appellant's understanding of the issues and of the dangers and disadvantages of representing himself at the penalty phase, would the court, beyond any reasonable doubt, have found that appellant's waiver of counsel was knowing and intelligent and rationally made with a rational understanding of the relevant circumstances and the dangers and disadvantages of representing himself at the penalty phase in this case? A finding that the waiver did not meet those crucial constitutional prerequisites would have prevented appellant from representing himself regardless of his desire to do so. Respondent has not and cannot establish beyond a reasonable doubt that such a finding would not have resulted from a full and searching inquiry, and that a result more favorable to appellant than a death sentence would not have been obtained had he been represented by counsel at the penalty phase.

Moreover, respondent has not and cannot establish beyond a reasonable doubt that, had the trial court not interfered in the attorney-client relationship as it did, and had the trial court not encouraged appellant in his desire to represent himself as it did, appellant would have persisted against the advice

of defense counsel in his intention to represent himself at the penalty phase.

The errors in the trial court's handling of appellant's request to represent himself at penalty therefore require reversal of the penalty judgment.

E. The Trial Court Abused Its Discretion By Denying Appellant's Motion to Exercise His Right to Counsel by Seeking Their Reinstatement During the Penalty Phase

In the opening brief, appellant demonstrated that the trial court erred in its denial of appellant's motions, made during the penalty phase, to reinstate defense counsel. (AOB 255-264.) The totality of circumstances[40] before the trial court at the time it denied the motions required that the motions be granted. In addition, the trial court abused its discretion by refusing to consider proffered evidence relevant to appellant's motion and the court's inquiry, and by arbitrarily rejecting the substantial evidence of appellant's mental impairments. These impairments were relevant and material to the validity of appellant's original decision to represent himself, and to his motion to reinstate defense counsel.

In the opening brief, appellant identified –and respondent does not dispute (RB 172) – the factors that have been held to be relevant to the exercise of a trial court's discretion in ruling on a defendant's midtrial request to revoke self-representation and to reinstate his right to counsel. Respondent offers no response to appellant's analysis of those factors as they support appellant's motion. Instead, respondent argues only that: "appellant's request must be viewed not in isolation, as appellant now suggests, but in the context of how his trial unfolded." (RB 172.) Appellant has never argued that the motion to reinstate counsel must be viewed "in isolation" from the context

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[40] *People v. Lawrence* (2009) 46 Cal.4th 186, 192.

leading up to the motion. In fact, that context includes the evidence of appellant's mental illness, developmental disability, and cognitive deficits; the evidence that his understanding of the proceedings and of the issues to be decided was not rationally based; the trial court's interference in the attorney-client relationship and improper encouragement of appellant's decision to represent himself at penalty; and defense counsel's declarations of doubt of appellant's competence, all of which lend further weight to appellant's, not respondent's, position. And, appellant repeatedly urged to Court to review the totality of circumstances. (AOB 236, 262, 264.) Appellant also expressly relied upon circumstances not identified in *People v. Elliott's*[41] list of five relevant factors, including the trial court's errors handling the appellant's *Faretta* motion: treating appellant as representing himself well before any colloquy or inquiry into the issue was conducted, the inadequacy of the trial court's after-the-fact inquiry into the knowing and intelligent nature of appellant's "waiver" of counsel, and the inadequacy of the trial court's warning against the risks and disadvantages of self-representation. (AOB 262-263.)

The analysis appellant set forth in the opening brief explicitly included matters relevant to the "context of how his trial unfolded," all of which respondent ignores. These included first, appellant's prior history relating to self-representation (he had never previously, even in his prior trial, moved to reinstate counsel after having been granted self-representation) (AOB 256); second, his motion to reinstate his NGI pleas to Counts Two and Three, which was made immediately before his motion to reinstate counsel and included proffers of evidence supporting that motion which were ignored by the trial

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[41] *People v. Elliott* (1977) 70 Cal.App.3d 984, 993-994.

court (AOB 257-258; see AOB Arg. V); third, the evidence appellant proffered in support of the motion to reinstate counsel, which was ignored by the trial court (AOB 258); fourth, the "length and stage of the trial proceedings" (AOB 258-259); fifth, the disruption attendant upon appellant's self-representation, described by [the trial court/the prosecutor] and "making a mockery of the process" and "a ridiculous circus" (AOB 259); sixth, the prosecution's own prior motions to revoke appellant's self-representation (AOB 260-261); seventh, the availability of previous defense counsel to resume representation (AOB 260); eighth, appellant's demonstrated inability to represent himself in a rational manner in the penalty phase (AOB 261-262); and finally, the failure of the trial court to determine and consider all of the relevant evidence presented, proffered and readily available (AOB 264). For the most part, respondent does not address any of *those* relevant circumstances.

Respondent again erroneously claims that "appellant made his intention clear from the very outset of the guilt phase that he would represent himself during the penalty phase." (RB 172.) Here, although limiting the time frame to the trial, respondent still ignores the unstable nature of appellant's intent. As explained above, the record establishes that appellant vacillated in his intent to represent himself before his request to Judge Schempp to represent himself at penalty. This uncertainty on appellant's part is also part of the "totality of circumstances" relevant to the merits of appellant's motion to reinstate counsel. Appellant's purpose in representing himself during the penalty phase – similar to his desire or intent – was not stable, ranging from grandiose statements about "teach[ing the prosecution] a civics lesson in how to prosecute a death penalty case" (15RT 1938-1940), to planning to argue for life, to the point ultimately that, during the penalty phase, the prosecutor could not determine what he was trying to accomplish. (See fn. 37, *ante*.)

This last point also stands as a clear refutation of respondent's assertions that appellant:

> formulated a theory in mitigation and organized a long roster of witnesses to present in support of that theory. And he implemented his strategy by telling the jury that his attorneys had concocted the mental defense, that he had malingered on the psychological examinations, and that it should instead focus on his family history.

(RB 172-173.) Appellant's strategy was not that clear to the trial prosecutor as respondent claims it is now. Nor does the "strategy" described by respondent explain appellant's presentation of witnesses such as Curtis Wright. It is true that appellant had a roster of witnesses, but determining a rational strategy from that roster alone is challenging. Even appellant's reasons for presenting Roz Kelly as a witness had more to do with appellant's perception of her entertainment value than any reasonable mitigation strategy. The most telling method for discerning appellant's strategy, and the rationality of it, is to look at the evidence and witnesses that appellant did produce for the jury, the way he dealt with those witnesses, and the arguments he made. The only conclusion to draw from what he actually did is that his understanding of the concepts of mitigation and aggravation, of normal emotions, and of people was as impaired, as Drs. Mills, Watson, and Vicary had testified. His "strategy," such as it was, was not rational. The trial court and prosecutor both described appellant's presentation and demeanor at the time as a mockery and a circus, from which neither could determine his strategy, although they failed or refused to assess it as the result of and symptomatic of appellant's multiple impairments. In the attempt to portray appellant's behavior and performance as rational, respondent jettisons that contemporaneous analysis by the court and prosecutor.

Respondent asserts that the motion to reassert the right to counsel was one of a series of actions taken by appellant, including appellant's declaration of doubt of his own competence, followed by a threat to force a mistrial by disobeying court orders, by appellant "berat[ing] and threaten[ing] the prosecution, by another expression of doubt of his own competence followed by the inconsistent refusal to cooperate with Dr. Sharma's evaluation of him." (RB 173.) Respondent then argues that "as this sequence of events makes abundantly clear, appellant's request to relinquish self-representation was made as part of what can only be described as a temper tantrum born of his own frustration and resulting in a flurry of baseless attempts to derail the proceedings," that appellant was "playing games" and trying to create issues, and that "[i]n the words of the trial court, his requests were "cunning and manipulative." (RB 173.) Of course, the more logical contrary conclusion is that these were behavioral manifestations of appellant's mental decompensation and incompetence within the meaning of *Drope*, *Dusky*,[42] and section 1368. (See 28RT 3449-3450, 3495, 3499, 3517-3519.) This conclusion is bolstered by a further circumstance to be included in the relevant totality – the doubts expressed by defense counsel concerning appellant's competence being borne out by appellant's behavior thereafter – described as a "mockery" and a "ridiculous circus," with the trial court admitting that appellant could not be controlled. (42RT 5138-5140; 44RT 5391.)

Respondent attempts to defend the prosecutor's inconsistent behavior in twice unsuccessfully asking that appellant's self-representation be revoked, and thereafter – within a few hours after the second request – opposing

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[42] *Drope v. Missouri* (1975) 420 U.S. 162; *Dusky v. United States* (1960) 362 U.S. 402.

appellant's own motion for the same relief. Respondent argues that the prosecutor's *own* requests for revocation of self-representation were motivated by the prosecutor's objection to "appellant's misbehavior." (RB 174, fn. 83.) In supposed contrast, respondent suggests, the prosecution's objection to *appellant's* motion for revocation of self-representation and to reassert his right to counsel was motivated by the prosecutor's objection to "appellant's gamesmanship and misbehavior." (*Ibid.*) The logic of respondent's argument is not clear, unless it is to say that the prosecutor simply opposed whatever appellant wanted for the sake of opposition, even if it coincided with the position the prosecutor had espoused earlier the same day. Respondent's argument suggests that the gameplaying in this context was on the part of the prosecutor. Appellant's "misbehavior," on the other hand, is more reasonably interpreted as indicative of the irrationality of his understanding of the relevant circumstances, and precisely the kind of reaction Dr. Vicary had opined appellant was more prone to have under the pressure of a penalty phase trial as a result of his mental illness and other mental impairments.

Finally, respondent argues that any error in denying appellant's reinstatement motion is state law error only because "appellant knowingly, voluntarily, and intelligently waived his right to counsel before the penalty phase, thus waiving or forfeiting his absolute constitutional right to counsel that proceeding." (RB 176.) As urged, appellant does not agree that he made any such knowing, voluntary and intelligent waiver. Moreover, appellant has demonstrated that reinstatement of counsel was necessary because the evidence, the totality of circumstances before the trial court, demonstrated that the waiver had not been made knowingly and intelligently with a rational understanding of the dangers and disadvantages of self-representation by appellant in this case.

As demonstrated in the opening brief, the error in denying appellant's motion to reinstate defense counsel denied appellant his constitutional right to counsel as surely as any error made when the trial court accepted his "waiver" in the first place. The error is properly reviewed as structural error, just as any denial of counsel at a critical phase of the proceedings. Even assuming that it is not considered structural error, the *Chapman* standard for constitutional error is applies, and respondent cannot meet the state's burden of establishing that the error is harmless beyond a reasonable doubt. (AOB 264-268.)

Nevertheless, respondent argues that state law error in a penalty phase is reversible only if there is a reasonable possibility that the error affected the verdict, citing *People v. Brown* (1988) 46 Cal.3d 432, 447-448. Respondent further argues that "there is no reasonable possibility that he would have obtained a more favorable outcome had the court reappointed counsel." (RB 176.) The analysis is flawed. First, it is dependent upon an assumption that counsel would merely step in and continue the penalty phase with the same jury. Yet the attorney representing the Alternate Defender's office indicated to the trial court that, while they would have to accept reappointment to the case, defense counsel on reviewing the record, likely would move for a mistrial and possibly seek reinstatement of appellant's NGI plea. (46RT 5657.) If defense counsel were reinstated and made such motions, it is reasonably possible that the motions would have been granted, and it is reasonably possible that a result better than a death verdict would have resulted. There is no basis for the conclusion that motions which the defense was never allowed to make would have been denied. As shown in Arguments IV and V, there are substantial arguments supporting reinstatement of the NGI pleas which trial counsel had no opportunity to argue to the trial court as a result of the trial court's marginalization and subsequent dismissal of defense

counsel. Even assuming arguendo that this Court does not find error on this appeal sufficient to require reinstatement of the NGI pleas, it is apparent that the record would not have foreclosed reinstatement had the matter been argued by counsel rather than by appellant. Similarly, even if this Court does not find that the "waiver" of counsel was fundamentally flawed, defense counsel was dismissed without being able to argue the point, other than to declare a doubt of appellant's competence. Given the additional evidence of appellant's lack of a rational understanding of the proceedings and of the dangers and disadvantages of self-representation in this case, and the prejudicial matters introduced into the penalty phase by appellant while representing himself, grant of a mistrial motion would not have been foreclosed on this record. Instead, grant of a mistrial would have been reasonably possible, and a better result on retrial would have been reasonably possible.

Even if counsel was completely foreclosed from reinstatement of the NGI pleas and/or a mistrial, respondent is incorrect in claiming that "it is likely that any further psychological testimony would have carried 'very little credibility' and his attorneys would have been 'totally ineffective' in trying to mount a case in mitigation." (RB 177.) It may be true that appellant's behavior in conducting his own defense in the penalty phase made such a task more complicated, but, on the other hand, appellant's conduct certainly provided defense counsel with a clear demonstration for the jury of the behavioral manifestation of appellant's various impairments, and an opportunity for an appropriate expert to explain how those impairments contributed to or caused much of the irrational or objectionable behavior by appellant while representing himself. Especially because the penalty decision is a normative one, it is reasonably possible that, even if the NGI pleas were not reinstated and no mistrial granted, a more favorable result for appellant

would have been obtained. Reversal is thus required under *People v. Brown*. A fortiori, respondent has not, and cannot, carry its burden under *Chapman* to establish that the error was harmless beyond a reasonable doubt.

Under any standard, reversal of the penalty judgment is required.

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VII.

THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S MOTION TO REPRESENT HIMSELF AT THE SANITY PHASE

A. Introduction

Appellant maintains the trial court committed reversible error by failing to suspend proceedings to conduct competency proceedings (Arg. III, *ante*), by allowing appellant to withdraw his NGI plea to Counts Two and Three and then denying his request to reinstate the plea (Args. IV and V, *ante*), and by allowing him to represent himself at the penalty phase (Arg. VI, *ante*). If the Court rejects these claims – particularly if it determines that appellant was sufficiently competent to represent himself at the penalty phase – then it must find the trial court erred in denying appellant's motion to represent himself at the sanity phase.

B. Appellant Had a Constitutional Right to Represent Himself at the Sanity Phase Under *Faretta*

As respondent recognizes, appellant argued in his opening brief that *People v. Windham* (1977) 19 Cal.3d 121 was wrongly decided. (RB 144; AOB 271-73.) Respondent, however, misses the predicate and import of appellant's argument. The vice of *Windham* was not its determination that an untimely request may be denied, or its discussion of where such a timeliness line may be drawn in a specific case, but in its determination that the denial of a mid-trial request for self-representation is evaluated as an error of state law, rather than one of federal constitutional magnitude within the strictures and guidelines of *Faretta*. Quite simply, the bare timing of a request for self-representation does not transform a question of federal constitutional law into a state law issue, thereby rendering it amenable to state law harmless error analysis. *Windham* incorrectly assumed the contrary; that portion of *Windham*

which opined that review of an allegedly untimely request, which is denied, presented an issue of state law only, should be disapproved.

Respondent can point to no language in any United States Supreme Court decision to support its sweeping assertion that "*Faretta* 'clearly established' a 'timeliness element' as a component of the constitutional right of self-representation[]" such that an untimely request does not implicate the federal constitutional right of self-representation. (RB 144-45.) Rather, the rule is more modest: in an appropriate case, the timing of the request is part of the *Faretta* analysis to the extent that a tardy request involves obstructionist or disruptive behavior, misconduct, or will result in violating the dignity of the courtroom. (See *Indiana v. Edwards* (2008) 554 U.S. 164, 171 [noting that *Faretta* itself and its progeny made clear that the federal constitutional right to self-representation was not absolute and enumerating situations in which the request may be denied].) Timeliness – i.e., the point at which the motion is made – qua timeliness is not, in the abstract, a proper basis for denying a *Faretta* motion and the United States Supreme Court has never so held. Rather, timeliness is one of the circumstances that may, under the particular facts of a case, cause a court to conclude that granting the motion, because of its tardiness, would be prejudicially disruptive to the flow of the prosecution, involve undue delay, or otherwise undermine courtroom decorum. As demonstrated in the opening brief and below, no such concerns were at issue in appellant's request to represent himself at the sanity phase of trial.

Consequently, as urged in the opening brief, the question is whether the denial in this case respected appellant's Sixth and Fourteenth Amendment rights. As urged in the opening brief, it did not and reversal is required: "The right is either respected or denied; its deprivation cannot be harmless." (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 177, fn. 8; see also AOB 281.)

C. The Trial Court Erred In Denying Appellant's *Faretta* Motion in that the Reasons Articulated by the Trial Court Were Either Unsupported by the Record or Not Allowed to Trump the Right of Self-Representation

As appellant has shown (AOB 275-276), the trial court failed to "inquire *sua sponte* into the specific factors underlying [appellant's] request," as required under *Windham*, or to consider all of the "other factors" enumerated by the Court in that case – the quality of defense counsel's performance, the defendant's proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, as well as the reasonable possibility of disruption or delay. (*People v. Windham*, *supra*, 19 Cal.3d at p. 128.) Thus, even if *Windham*'s distinction between "timely" and "untimely" motion were correct, and if the *Windham* criteria are valid in whole or in part, the trial court nonetheless erred in violation of *Faretta*.

In any event, the three actual reasons provided by the court for its denial of appellant's request are either not supported by the record, uninformed, or inadequate under the law and manifestly inconsistent with the trial court's granting appellant the right to represent himself during the penalty phase. The alleged complexity of the sanity proceeding and the risk that appellant's efforts to schedule expert testimony might delay or disrupt the proceedings were equally–if not more–applicable to the penalty phase of appellant's capital case. The sanity phase testimony potentially bore striking similarities to the guilt phase mens rea evidence for which appellant was in court and about which he was aware. The penalty phase involved broader considerations and legal principles distinct from and in addition to these matters. Considering the sanity phase, but not the penalty phase in this case, as "complex" are irreconcilable rulings. Similarly, assigning speculative expert witness

scheduling problems as likely to delay the proceedings – particularly without ascertaining whether scheduling would in fact be a potential problem, or even whether experts would be called – and therefore justifying a denial of appellant's motion for self-representation in the sanity phase on that basis, while granting self-representation in the penalty phase during which the court knew appellant planned to present testimony, without a similar concern, are similarly irreconcilable rulings. Moreover, as explained in the opening brief appellant was entitled to ancillary assistance – which the court provided for appellant for penalty phase – for the precise purpose of facilitating the presentation of evidence. (AOB 276-77.) He was also entitled, under state law, to the assignment of stand-by or advisory counsel upon a proper showing, and appointment for the limited purpose of facilitating the presence of witnesses was well within the court's power. (See *People v. Bigelow* (1984) 37 Cal.3d 731, 742-44 [holding capitally charged defendant was entitled to advisory counsel under the circumstances of that case] 741, fn. 5 [noting that defendant's former counsel, although dismissed, "assisted him in arranging for his sister and brother to come from Canada to testify"].) The court did not ascertain whether its speculation about expert testimony, complexity, or a risk of delay were grounded in appellant's plans or reality and therefore these reasons were wholly uninformed. Not only were the reasons themselves inadequate or improper, but the inconsistency in the court's treatment of appellant's sanity and penalty phase requests also represents arbitrary and abusive decision-making.

Respondent counters, first, that the record discloses the trial court's consideration of certain of the factors this Court set out in *Windham*, including the "complexity of the case" and the "risk" that appellant's efforts to schedule psychiatric experts might delay or disrupt the proceedings. (RB 146-147,

quoting *People v. Marshall* (1996) 13 Cal.4th 799, 828.) Yet, as appellant has argued (AOB 277) the "complexity of the case" in and of itself is not a valid basis for denying a motion for self-representation. (*People v. Windham, supra* 19 Cal. 3d at p. 128 [right to self-representation "irrespective of how unwise such a choice might appear to be"], citing *People v. Robinson* (1997) 56 Cal.App.4th 363, 371-372 [defendant's education level and severity of charges irrelevant].) In any event, *People v. Lynch* (2010) 50 Cal.4th 693, 726, on which respondent relies (RB 146) is readily distinguishable. In *Lynch* the defendant sought to represent himself at a trial in which the prosecutor anticipated calling 65 witnesses, including elderly victim witnesses, and the discovery was "voluminous." (*Ibid.*) Here the court alluded to the possibility that appellant might wish to call expert witnesses, which it feared might delay the proceedings (33RT 4145-4146), but never *asked* appellant whether he intended to call any witnesses, much less how many; nor did the court ask the prosecutor these questions. And if, as respondent surmises, appellant was hostile to expert mental health testimony, there was reason to believe he would not have called any expert witnesses. The court also failed to ask appellant whether he would need a continuance to prepare for the sanity phase, and in fact appellant requested none. (Compare *People v. Nicholson* (1994) 24 Cal.App.4th 584, 592 [had defendants asked for a continuance or otherwise suggested or intended to delay the proceedings, which they did not, trial court would have been justified in denying *Faretta* motion].)

Respondent's suggestion that appellant's *Marsden* motions undercut his *Faretta* claim – because his complaints about his attorneys "centered on strategic and tactical disputes," and thus did not support his *Marsden* motions – misses the mark. At issue here is appellant's motion, under *Faretta*, to represent himself, not his *Marsden* motion. *People v. Dickey* (2005) 35

Cal.4th 884, 922, on which respondent relies and which addresses a claim of *Marsden* error, is not on point. (RB 147.) *People v. Scott* (2001) 91 Cal.App.4th 1197, which respondent also cites is equally inapposite. (RB 148.) In *Scott* the defendant had made an "equivocal" *Faretta* motion "*immediately after*" the trial court denied his *Marsden* motion. (*Id.* at p. 1205, italics in original.) He also had said he would require a continuance. (*Id.* at p. 1204.) Neither dispositive circumstance exists here. *People v. Williams* (1990) 220 Cal.App.3d 1165, another case respondent cites (RB 148), also involved an equivocal *Faretta* motion, in that the defendant wanted to represent himself *only if* the court denied his *Marsden* motion. (*Id.* at p. 1170.) That is not the case here where appellant ultimately unequivocally affirmed that he wanted to represent himself. (AOB 274 "It is still your desire to go pro per at the sanity phase, if we get there; is that correct?" "Yes, m'am"].)

Finally, respondent argues that the court properly considered the "inherent tension" between appellant's self-representation and the defense goal of proving appellant was not sane at the time of the homicides – referring to the court's stated concern that allowing appellant to represent himself at the sanity phase would convey to the jury a finding that he was sufficiently competent to do so. (RB 148, citing 30RT 4146.) Respondent's argument is fatally flawed. First, as appellant has explained (AOB 279), competence to stand trial in 2000, and sanity at the time of an offense in 1982, are factually and temporally distinct and governed by vastly different legal standards. There is no logical connection between the two. Second, the prospect that appellant might "sabotage" his defense by representing himself, given his expressed hostility toward mental state defenses, is not a proper basis for denying his *Faretta* motion. The Supreme Court, in *Faretta* itself, acknowledged that a criminal defendant who represents himself may "conduct his own defense

ultimately to his own detriment." (*Faretta v. California*, *supra*, 422 U.S. at p. 834 ["It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. . . . And although he may conduct his own defense ultimately to his own detriment, his choice must be honored . . . . " (citing *Illinois v. Allen* (1997) 397 U.S. 337, 350-351 (conc. opn. of Brennan, J.)]; see also *People v. Windham*, *supra* 19 Cal. 3d at p. 128; *People v. Robinson*, *supra*, 56 Cal.App.4th at pp. 371-372 .)

D. Reversal of the Judgment of Sanity on Count One, the Special Circumstance Finding and the Death Judgment Is Required

The trial court erred prejudicially in denying appellant's motion to represent himself as was his right under the Sixth Amendment. Appellant maintains the error is reversible per se.

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VIII.

THE TRIAL COURT ERRED BY ALLOWING APPELLANT TO ABSENT HIMSELF FROM SANITY PHASE PROCEEDINGS

In his opening brief, appellant demonstrated that the trial court violated his state statutory and federal constitutional rights by allowing appellant to absent himself from the sanity phase of his trial. The trial court's legally erroneous comments to appellant that the sanity phase was of no import and there would be a penalty phase regardless, and its inadequate inquiry into appellant's purported waiver of his right to be present in fact undermine any finding that appellant knowingly and intelligently waived his right to be present at a critical stage of the proceedings. (AOB 283-289.) Appellant further demonstrated that whether the error is considered structural, or is assessed under the *Chapman*[43] standard for federal constitutional error or the *Watson*[44] standard for state law error, the sanity verdict on Count One, the special circumstance and the resulting penalty judgment must be reversed, and appellant's plea of not guilty by reason of insanity reinstated as to all three counts. (AOB 290-295.)

Respondent concedes, as it must in light of appellant's nonwaivable right to be present during the taking of evidence, that the trial court violated state law in allowing appellant to absent himself from the evidentiary portion of the sanity phase. (RB 150 ["There was no prejudicial error."]; 152 [noting the error was "merely statutory"].) Respondent does not contest that appellant had a statutory and constitutional right to be present at the sanity phase of his trial. Nor does respondent argue against the proposition that if appellant's

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[43] *Chapman v. California* (1967) 386 U.S. 18.

[44] *People v. Watson* (1956) 46 Cal.2d 818.

"waiver" of his presence at the sanity phase is flawed, the error is of federal constitutional magnitude. Instead respondent argues that the trial court's inquiry into and acceptance of appellant's waiver of his presence were adequate and that there was no federal constitutional error. To support this argument, respondent relies on the purportedly "materially indistinguishable facts" in *People v. Moon* (2005) 37 Cal.4th 1, 20-21; *People v. Young* (2005) 34 Cal.4th 1149, 1212-1213; and *People v. Weaver* (2001) 26 Cal.4th 876, 965-967. (RB 151.) Respondent argues that any event, any error was statutory only, and harmless under the *Watson* standard. (RB 152-153.)[45]

Respondent's reliance on *People v. Moon* (2005) 37 Cal.4th 1; *People v. Young* (2005) 34 Cal.4th 1149, and *People v. Weaver* (2001) 26 Cal.4th 876, as factually "materially indistinguishable" from this case is misplaced and not borne out by the facts. In none of these cases is there comparable evidence raising a doubt about the defendant's competence, or the rationality of the decisions each defendant was asked to make, or the rationality of each defendant's articulated reasons for the decisions actually made. Moreover, in relying on these cases respondent sidesteps the requirement that a court must consider the unique circumstances of each case, "including the background, experience, and conduct of the accused" in assessing the validity of a waiver of a fundamental constitutional right. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.) And in none of those cases did the purported waiver follow legally incorrect comments and an inadequate inquiry.

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[45] In a footnote, respondent also reprises the argument that, because appellant "admitted" that the mental defense was false, appellate relief on this claim is unwarranted. (RB 150, fn. 74.) As demonstrated in the Introduction, *ante*, no behavior or statements by appellant waived or forfeited appellate review of each of the errors complained of, or the relief prayed for.

In *Moon*, where the defendant had elected to waive his presence at a crime scene viewing (where, according to defense counsel, he would likely remain on the bus in any event), there was no evidence the defendant lacked a rational understanding of the proceeding he would be missing. (*People v. Moon*, *supra*, 37 Cal.4th at pp. 20-21.) In *Young*, although there was evidence of the defendant's "borderline level intelligence," this Court expressly pointed out that "nothing" in the trial record even "suggest[ed]" that defendant "was unable to understand and waive his right to be present." (*People v. Young*, *supra*, 34 Cal.4th at 1213.) In *Weaver*, the defendant was found competent to stand trial based upon submission to the trial court of the conclusions to that effect by two appointed mental health experts. (26 Cal.4th at p. 903.) Moreover, the defendant in *Weaver* sought to absent himself only from only a portion of the sanity phase evidence and only due to a fear of becoming overly emotional during the playing of certain videotape evidence, rather than absenting himself, as here, from the entire proceeding due to an irrational understanding of the evidence and his own mental, cognitive, and developmental limitations. (*Contrast People v. Weaver*, *supra*, 26 Cal.4th at pp. 966, 968.)

In *Weaver*, this Court noted that the defendant there had cited no authority for his argument that a heightened waiver standard must be applied because of that defendant's mental problems, or that a trial court had a sua sponte duty to admonish the defendant about the importance of his decision to absent himself the courtroom. (26 Cal.4th at p. 967.) Appellant does not argue for a heightened waiver standard (and none is necessary), but relies upon the application of settled United States Supreme Court law to the issue of his waiver of his federal constitutional rights, including the rule that this Court is required, as was the trial court, to indulge every reasonable presumption

against the loss of a right to be present at a critical stage.[46] (See AOB 285, 288-289.)

Appellant *does* challenge the adequacy of the trial court's inquiry into appellant's understanding of his rights and the rationality of his understanding and of his decision, based upon the facts before the trial court in *this* case *at the time* the trial court allowed appellant to absent himself from the sanity phase.

Those facts included the fact that appellant had an irrational belief that the mental health evidence presented by defense counsel was false, that he had malingered in some meaningful way in the neuropsychological testing so as to make Dr. Watson's conclusions erroneous, and that he was not mentally ill or brain-damaged. (See, e.g., AOB 170-173.) As respondent argues regarding prejudice, "appellant unequivocally explained that, following the denial of his request for self-representation, he chose to absent himself from the sanity phase precisely because he was opposed to the mental defense." (RB 152.) However, the record establishes that his "opposition" was neither rationally based nor informed. (See Introduction, *ante*.)

On the facts presented here, the necessary conclusion must be that appellant's request to absent himself from the sanity phase was based upon an irrational understanding of the evidence, of its relevance to the proceedings and to the prosecution's efforts to have him killed, and of the role of the sanity phase vis-a-vis the penalty phase. No similar evidence was present in *Moon*,

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[46] *See Johnson v. Zerbst*, *supra*, 304 U.S. 458 (noting the courts indulge every presumption against waivers of fundamental constitutional rights); *Dusky v. United States* (1960) 362 U.S. 402 (holding that a criminal defendant, to be competent to stand trial, must have a rational, not merely factual, understanding of the proceedings and be able to assist counsel in a rational manner).

Weaver, or *Young*. Those facts in appellant's case required a more thorough inquiry into whether appellant's constitutional right to be present was being knowingly and intelligently waived, based upon a rational as well as factual understanding of the proceedings and of the decision at issue.

The more apt analogy is to *Drope v. Missouri* (1975) 420 U.S. 162 in which the Supreme Court relied in part upon the fact that the defendant was absent from a portion of the trial in determining that the trial court had erred in not conducting competency proceedings. (420 U.S. at p. 181.) Here, the trial court heard expert testimony from Dr. Vicary that the pressure of the trial could cause deterioration in appellant's mental state.[47] And of course, during the sanity phase, while appellant was not present in court, his ability to cooperate rationally with counsel apparently did deteriorate, according to defense counsel who had appellant brought into court while the jury was deliberating on sanity for the purpose of declaring a doubt as to his continued competence based on what counsel witnessed out of court. (36RT 4523.)

Central to respondent's argument, both as to the validity of the appellant's waiver of his right to be present and to the assessment of prejudice, is respondent's assumption that appellant's purported hostility to the mental health evidence, which respondent contends motivated appellant's decision to

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[47] As the trial court was aware, Dr. Vicary had opined in the guilt phase that appellant was more likely than a normal person to "snap," meaning suffer a breakdown, under stress, such as the stress of the trial, and particularly the stress of listening to mental health experts testify that he was mentally ill, which appellant adamantly denied. Dr. Vicary had not predicted a specific manifestation of such a breakdown, but testified that appellant could have a psychotic break, could begin to dissociate, could lose his coping ability and judgment, could begin to have emotional eruptions, or could begin to engage in progressively more illogical thinking. (28RT 3449-3450, 3494-3495, 3499, 3517-3519.)

absent himself from the sanity phase, was rationally based. However, the uncontradicted expert testimony on the record in this case demonstrates that appellant's denial of and inability to recognize any mental illness or cognitive dysfunction was itself indicative of the severity of his mental illness; it was quite simply a symptom of appellant's psychiatric illness and cognitive dysfunction. (See AOB 150-151; 26RT 3163-3164, 3395; see Introduction, *ante*.) As such, in light of the trial record, neither his hostility to (or fear of) the mental health evidence nor his request to absent himself from the sanity phase can, by definition, be determined to have been rationally based. The trial court's failure to inquire adequately as to these matters fatally undermined any validity of the purported waiver. The trial court arbitrarily ignored the expert testimony which was clearly relevant to the assessment of the rationality of appellant's decision to absent himself.

Respondent argues that any constitutional error was harmless beyond a reasonable doubt because "appellant wished to undermine the mental defense, and therefore his presence could only have impeded the efforts of his attorney. (See *Weaver*, *supra*, 26 Cal.4th at pp. 967-968.)" (RB 153.) That argument not only fails to respond to appellant's contention that the constitutional error is structural in nature, requiring reversal without any analysis of prejudice (AOB 290-295), but it is speculative on this record. Appellant had the same disagreement with the mental health evidence presented by defense counsel at the guilt phase, yet the jury returned second-degree, rather than first-degree, murder verdicts on Counts Two and Three at that guilt phase. Unless respondent is arguing that the results would have been even more favorable at the guilt phase if appellant had been absent for that phase as well–that his disagreement with the mental defense impeded the efforts of defense counsel at the guilt phase–the prediction that "his presence

would only have impeded the efforts of his attorneys at the sanity phase" is unsupported by the record[48] and insufficient to carry the state's burden of demonstrating beyond a reasonable doubt that the error was harmless. (*Chapman v. California*, *supra*, 386 U.S. 18.)

Respondent wholly ignores, however, the extraordinary closeness of the case and the difficulty the jury had reaching any decision on sanity. Additional evidence concerning appellant's mental state took one day to present, with argument following on the second and last day of the sanity phase, yet the jury deliberated for five days (more than twice the length of the proceedings) before returning a verdict on Count One and two additional days before announcing themselves deadlocked on Counts Two and Three. (24CT 6220, 6224, 6226, 6233, 6238-6240.) The jury requested the readback of guilt phase testimony during deliberations before returning the verdict on Count One and again during their further deliberations before deadlocking on Counts Two and Three. (24CT 6223-6228, 6234, 6236; See also AOB 291, 295.) The lengthy deliberations,[49] the requests to rehear testimony,[50] and an inability to reach a

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[48] If respondent is suggesting that appellant would have been unable to cooperate with counsel, such a state of the evidence thereby supports a doubt of appellant's competence to stand trial (see AOB Arg. III; Arg III, *ante*), not an excuse to allow him to absent himself based on his delusional beliefs concerning the evidence.

[49] "Longer jury deliberations 'weigh against a finding of harmless error [because l]engthy deliberations suggest a difficult case.' [citations omitted]." *United States v. Velarde-Gomez* (9th Cir. 2001) 269 F.3d 1023, 1036; see also *Thomas v. Chappell* (9th Cir. 2012) 678 F.3d 1086, 1103 (collecting cases); *Jennings v. Woodford* (9th Cir. 2002) 290 F.3d 1006, 1019 (holding guilt phase jury's deliberations for two full days indicated prejudice from trial counsel's failure to investigate mental state defense to capital murder charge); *Lawson v. Borg* (9th Cir. 1995) 60 F.3d 608, 612 (noting five days of (continued...)

verdict[51] are all judicially recognized as indicative of a close case as demonstrated in the opening brief. Moreover, all of this occurred after protracted deliberations and an inability to reach a partial verdict in the guilt phase on the similar question of appellant's mental state. On this record, respondent cannot carry the state's burden of establishing that the federal constitutional error was harmless beyond a reasonable doubt. Respondent's reference to *Weaver* (RB 153) does not fit the bill, for that case only assessed the error under *Watson*, without evaluating the error under *Chapman*.

In arguing that any error was harmless under *People v. Watson*, *supra*, respondent also fails to address the arguments made in appellant's opening brief, i.e., that the sanity deliberations show the matter was a close one for the jurors, even as to Count One, and that even under the *Watson* standard, "[i]n a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant." (*People v. Zemavasky* (1942) 20 Cal.2d 56, 62; see also *People v. Filson* (1994) 22 Cal.App.4th 1841, 1852, disapproved on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452 [relying in part on deliberations

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[49] (...continued)
protracted jury deliberations).

[50] *Merolillo v. Yates* (9th Cir. 2011) 663 F.3d 444, 457 (explaining that request for readback of medical testimony of three witnesses "illustrates the difficulty" presented by testimony); *Gantt v. Roe* (9th Cir. 2004) 389 F.3d 908, 916 (noting that even with prosecutorial suppression of evidence, jury struggled to reach a verdict as evidenced, inter alia, by requested readbacks of "several pieces of testimony"); *United States v. Blueford* (9th Cir. 2002) 312 F.3d 962, 976 (observing that jury's request for readback during deliberations meant jury "evidently did not regard the case as an easy one").

[51] *United States v. Pagui* (9th Cir. 1997) 114 F.3d 928, 935 (hung jury at first trial "persuades us that the case was close").

"longer than the evidentiary phase of the trial" in finding reversible error under either *Watson* or *Chapman*]; see authorities cited above; see also AOB 295.)

Respondent ignores a substantial and significant difference between appellant's case and the facts upon which this Court relied in assessing prejudice from the statutory error in *Young*. In *Young*, this Court specifically relied upon the fact that "[t]he jury was admonished not to speculate about [defendant's] absence, infer anything from it, or allow it to affect their deliberations in any manner." (34 Cal.4th at p. 1214; see also *People v. Dickey* (2005) 35 Cal.4th 884, 924 [jury instructed not to consider defendant's absence in their deliberations].) In contrast, as pointed out in the opening brief (AOB 286-287, 292), the jury in appellant's case received no such admonishment regarding appellant's absence. Each juror in appellant's sanity trial was free to interpret that absence in any way he or she saw fit and to use it in assessing the defense case at sanity.

None of the cases upon which respondent relies addresses the issue of prejudice under remotely similar circumstances to those presented here, i.e., that the jury deliberations on the one sanity verdict returned took substantially longer than the evidentiary portion of the sanity phase itself (24CT 6217-6240), and that the jury was unable to reach a verdict on sanity as to the other two counts, with three of the jurors having been convinced by a preponderance of the evidence that appellant was insane at the time of the commission of the homicides in Counts Two and Three. (39RT 4674-4675; 40RT 4697.)

For the same reason, respondent's characterization of the defense evidence at the sanity phase as consisting of the "uncompelling theory

presented by Dr. Wolfson" (RB 152)[52] fails to accurately reflect the jurors' view of the issues to be decided. Whether respondent considers the evidence of insanity "uncompelling" is of no import given that the question clearly was seen as closely balanced *by the jury* as to all three counts and the jurors–understanding they were to consider the guilt phase evidence as well–asked to rehear some of that testimony as well.[53]

Respondent ignores these latter facts–that the evidence on the issue of sanity was not restricted to the testimony of Dr. Wolfson, but included the evidence from the guilt phase, including the testimony of Drs. Watson, Mills, and Vicary, and the jury asked for a readback of the testimony of Dr. Mills before returning any verdict as to sanity and announcing its inability to reach a verdict on Counts Two and Three. (24CT 6223.) Respondent also ignores the undoubted prejudicial effect upon appellant's understanding of what he was waiving by later withdrawing his NGI plea to Counts Two and Three (see Arg. IV) and on his preparation for and representation of himself at the penalty phase, including his "repudiation" of the mental health evidence.

Even if the error is not considered structural, respondent has not met, and cannot meet, the state's burden under *Chapman* of demonstrating that the error was harmless beyond a reasonable doubt. Even under the *Watson* standard applicable to the conceded state law error, given the closeness of the case, as evaluated by the jurors in this case, the error here in allowing appellant

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[52] See Introduction, *ante*, noting respondent's inconsistency in characterizing the strength of the defense mental health evidence.

[53] This Court in *Watson* recognized that where the case is a close one, where "there exists at least such an equal balance of reasonable probabilities[,] necessarily means . . . 'that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*People v. Watson, supra*, 46 Cal.2d at p. 837.)

to absent himself from the sanity phase requires reversal of the sanity verdict on Count One, the special circumstance, and the reinstatement of the plea of not guilty by reason of insanity as to all three counts.

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IX.

THE PROSECUTOR'S ERRORS REQUIRE REVERSAL ALONE OR CUMULATIVELY WITH OTHER ERRORS UNDERCUTTING APPELLANT'S DEFENSES

In the opening brief, appellant raised several occasions on which the prosecutor ran afoul of the law or the trial court's rulings in cross-examining witnesses and presenting her case to the jurors. (AOB 296-315.) With respect to each subclaim, respondent urges the Court to find no error occurred or that each error, viewed in isolation, was harmless. In addition, respondent argues that appellant has forfeited his right to review certain subclaims. Appellant addresses the substance of each subclaim, reserving a discussion of prejudice until the end of the argument so the missteps may be considered cumulatively.

A. The Question of Forfeiture

Respondent argues that four aspects of appellant's claim of misconduct have not been preserved for appeal. These four are (1) the prosecutor's improper use during her opening guilt phase statement in the present trial of appellant's penalty phase closing argument from his first trial (RB 83-84); (2) the prosecutor's closing argument characterizing the statements of Catsiff and Alatorre as reliable and truthful (RB 87); (3) prosecutorial disparagement and sarcasm in cross-examining the testifying mental health professionals (RB 89); and (4) the prosecutor's closing argument about the letters sent by Bloom, Sr. to appellant when the latter was in the Navy (RB 91). Appellant accepts the lack of similar forfeiture arguments against the other portions of appellant's claim as an acknowledgment that trial counsel preserved them for appellate review.[54]

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[54] These portions are (1) the improper use of the statements and (continued...)

The Court has recognized its discretion and power to review claims on direct appeal, even if it concludes the party seeking redress did not "do enough" to prevent or correct the error. (*People v. Williams* (1998) 17 Cal.4th 148, 161 n.6.) While the parameters of an appellate court's discretion are not clear, and few guidelines for the exercise of that discretion exist, the Court should review appellant's claim in full here.

The claim of prosecutorial misconduct involves a mix of patently preserved and, according to respondent unpreserved misconduct, all of which was aimed at the only contested issue – appellant's mental state at the time of the offenses. The effect of the misconduct therefore cannot be assessed without evaluating all of it cumulatively.

With respect to the misconduct described in sections B.1, B.2, and B.6, *infra*, defense counsel sought to litigate the issue in advance and/or objected at the outset to the prosecutor's proposed course of action and/or following the misconduct. Before trial, appellant's counsel litigated the prosecutor's use of material from the first trial. After the initial trial judge recused himself, appellant's counsel sought to raise a question about the prosecutor's use in opening statement of appellant's penalty phase argument, an issue she believed either was not decided or was decided contrary to the prosecutor's representations to the second trial judge. The judge rebuffed her efforts. (See Section B.1, *infra.*) Trial counsel objected – and then lodged a continuing objection – to the prosecutor's use of the informant's prior testimony as

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[54] (...continued)
testimony of the informants in cross-examining Dr. Mills; (2) improperly questioning the doctors on whether appellant had or did not have the requisite mental states; and (3) the use of and comment on appellant's decision and right not to testify.

reliable information. Although she did not renew her objection at the precise moment during the argument that the prosecutor did exactly what defense counsel tried to preclude earlier, defense counsel did renew her objection at the close of arguments, moved for a mistrial and asked for a curative instructions. (See Section B.2, *infra*.) Similarly, with respect to the use of the telegrams, trial counsel objected on multiple occasions during the cross-examination, again within minutes after the misstep in argument, and then once more at the end of the prosecutor's closing argument in the context of seeking a mistrial or admonition. (See Section B.6, *infra*.)

Under these circumstances, having been rebuffed or having entered a continuing objection and made the precise nature of the objection clear, trial counsel did all that she was required to do. (*People v. Scott* (1978) 21 Cal.3d 284, 290-91 [holding that where court understood, considered and overruled objection, it need not be "repetitiously renewed"].) The court made its adverse rulings and it was trial counsel's obligation to litigate appellant's case in light of those rulings. In other words, for all of these reasons, additional objections would have been futile. (See *People v. McKinnon* (2012) 52 Cal.4th 610, 654 [holding the failure to object is excused on futility grounds where earlier objection on similar grounds to similar evidence as ovverruled].) Consequently, the errors effectively have been preserved.

With respect to the missteps set forth in sections B.1, B.2., B.4, and B.6, *infra*, the prosecutor's argument or cross-examination went beyond the lower court's ruling setting forth the limited permissible uses of the "evidence." The prosecutor paraphrased and quoted a portion of appellant's 1983 penalty phase closing argument in her opening statement, although the lower court's ruling was that she could use edited portions of that statement in cross-examining any mental health professionals that might be called by the defense. (See Section

B.1, *infra*.) She also relied on the truth of the prior testimony of two jailhouse informants in cross-examining Dr. Mills and in closing argument, rather than confining her questioning to testing the bases of the doctor's opinion as authorized by the trial court. (See Section B.2, *infra*.) On a third occasion, the prosecutor asked questions similar to a question that was the object of a sustained objection. (See Section B.4, *infra*.) Finally, she used the telegrams sent to appellant by his father for their truth in contravention of the trial court's ruling that the prosecutor could cross-examine appellant's mother by asking her if the telegrams would change her opinion. (See Section B.6, *infra*.)

Appellant submits that in such circumstances, there is no injustice to the state in evaluating the the actions of a prosecutor who chooses to "tack[] too close to the wind" (*Kyles v. Whitley* (1996) 514 U.S. 419, 439) after she receives guidance in the form of a ruling from the trial court.

For these reasons, the equities favor this Court determining that appellant has not forfeited any of the claims raised in the opening brief.

B. The Prosecutor's Missteps Were Improper Under the Applicable Decisional Law

1. Use of Appellant's 1983 Penalty Phase Closing Argument in the Prosecutor's 2000 Opening Guilt Phase Statement

Contrary to respondent's position, this issue is preserved for review. Before trial, in front of Judge Hoff, the parties litigated whether and to what extent the prosecutor should be permitted to use appellant's prior testimony and penalty phase argument from the first trial. (See e.g., 3RT 246-248, 284-292, 297-306.) During one of the discussions with the court, defense counsel explicitly and separately challenged the use of appellant's closing penalty phase argument. (3RT 291-292.) The discussion among the lawyers and Judge Hoff centered on how and whether the prosecutor could use appellant's

1983 penalty phase closing arguments to challenge the opinions of appellant's experts on cross-examination. Although the parties and the court spent significant amounts of time redacting and excising appellant's penalty phase remarks for this purpose, the prosecutor's use of them in opening statement was not sanctioned. (3RT 248, 298-306, 411-414.)

Before the prosecutor's opening statement, defense counsel unsuccessfully asked the trial judge – Judge Schempp – to order the prosecutor to refrain from using appellant's argument in her opening statement in light of the earlier rulings by Judge Hoff. (14RT 1926, 1927.) The prosecutor interrupted a discussion of the matter by asserting – incorrectly – that Judge Hoff had ruled on everything adversely to appellant. When defense counsel attempted to register her disagreement, the court informed her that the court was not going to hear additional argument. (14RT 1928.) This refusal was consistent with the Judge Schempp's earlier comments that she would not revisit any issue determined before she became the trial judge. (4RT 558-559.) Shortly after Judge Schempp rebuffed defense counsel, counsel filed a memorandum confirming her duty to object and the trial court's duty to revisit and therefore reconsider, modify, or set aside earlier evidentiary rules. (23CT 6052-6053.)

This is an appropriate situation in which to find that a further objection would have been futile, and defense counsel had done all that was required, particularly in light of the trial court's refusal to hear argument on defense counsel's objection before the opening statement and in light of the prosecutor's questionable representation to the trial court that the issue had been litigated fully.

On the merits, respondent aptly notes that remarks in an opening statement constitute misconduct where the evidence is so patently inadmissible

that a prosecutor may be assumed to know that it could not be admitted. (RB 84.) Here the "evidence" to which the prosecutor referred meets that test. Appellant's statements were not sworn testimony: they were part of his argument to the jury during the first trial after he was allowed to represent himself. As such the comments were the equivalent of closing arguments of counsel, which are not evidence. In addition, the argument was made during the penalty phase, after the jury found appellant guilty: as trial counsel explained in objecting to the use of this argument, appellant essentially adopted and acquiesced in the jury's guilt verdicts and findings. (3RT 291.) There is no legal theory under which the prosecutor could have believed that use of appellant's penalty phase closing argument in her case in chief during the guilt phase was relevant and admissible affirmative evidence. It is not surprising that Judge Hoff "was horrified" when he learned of the prosecutor's representation that he authorized the prosecutor's use of appellant's argument in her opening statement, rather than, as edited, in questions to be asked of testifying doctors. (19RT 2450-2451.) As set forth in the opening brief at pages 299 and 314-315 and section C, *infra*, the prosecutor's opening statement use of appellant's penalty phase closing argument was prejudicial in conjunction and cumulatively with the other misconduct raised in the opening brief, and with the evidentiary and instructional errors set forth in Arguments I, II, X-XIII, all of which shared the common theme of denigrating and undercutting appellant's mental state presentations.

2. Cross Examination of Dr. Mills with the Jailhouse Informant's Statements and Argument Concerning Their Reliability

During her cross-examination of Dr. Mills and again in closing argument, the prosecutor significantly exceeded the court's ruling concerning

her use of the informants' prior testimony. The court's ruling allowed the prosecutor to cross-examine Dr. Mills on his consideration (or non-consideration) of the jailhouse informants' testimony offered during appellant's first proceedings in order to challenge the bases of his opinions. Instead of confining herself to the court's ruling, the prosecutor repeatedly sought to establish the truth of the informants' statements, used the false (and recanted) statements for their truth and finally, argued their truth and reliability. In so doing, the prosecutor relied on facts not in evidence and vouched for the informants' truthfulness. (AOB 301-306.) The prosecutor did so while admitting that she was not permitted to adduce testimony from these informants due to her office's policy concerning such witnesses (21RT 2672) and that she understood she was not to offer their statements or urge the jury to consider them for their truth (21RT 2680). Defense counsel first objected unsuccessfully in advance of Dr. Mills's testimony to any examination using these perjured statements (21RT 2665-2675) and then objected again during the cross-examination, asking that the court accept her objection as a continuing one to that line of examination. The court agreed and overruled counsel's objection. (26RT 3242.) The ensuing cross-examination, to be impeaching, depended heavily on the truth and reliability of the informants and the prosecutor hammered on these points in her questioning. (26RT 3242-3243, 3245, 3246, 3247, 3252, 3253, 3258, 3269, 3270.) The prosecutor's misconduct in cross-examination is fully preserved (and respondent does not argue to the contrary) and, as set forth in the opening brief and above, it cannot be justified under the trial court's rulings. With the other miscues and evidentiary errors undermining appellant's defense, it requires reversal.

Against this backdrop, respondent urges this Court to find that appellant forfeited his right to obtain appellate review of the prosecutor's closing

argument during which she vouched for the truthfulness of the informants and used their false and unreliable hearsay statements for their truth. (32RT 4096-4098.) Respondent's position is not supported by the record. Defense counsel did specifically object to this argument at the conclusion of arguments and asked the court to cite the prosecutor for misconduct, requested a mistrial, and asked that the jury be instructed that the prosecutor's use of this and several other pieces of evidence went beyond the purpose for which it was admitted. (32RT 4131.) In response, the trial court did reiterate earlier limiting instructions applicable to some of the evidence used by the prosecutor during argument but, inexplicably, not this aspect. (32RT 4137-4138.) Notably, the fact that the court acted on a portion of defense counsel's objection and request concerning the prosecutor's argument indicates that the court did not consider defense counsel's actions to be tardy.

This situation fits squarely within the Court's forfeiture exceptions: defense counsel's objection at the precise moment of the prosecutor's improper comment during argument would have been futile as defense counsel had objected earlier during the cross-examination and then again at the conclusion of closing arguments. (*See People v. McKinnon*, *supra*, 52 Cal.4th at 654; *People v. Scott*, *supra*, 21 Cal.3d at pp. 209-291.) The prosecutor's closing argument was no different from the cross-examination to which defense counsel unsuccessfully objected. And, the trial court took no action when defense counsel explicitly requested a special instruction to remind the jury of the limited use of the preliminary hearing testimony, moved for a mistrial, and asked that the prosecutor be cited for misconduct.

Respondent characterizes the prosecutor's actions as nothing more than an appropriate challenge to Dr. Mills's "summary disregard" of the informants' statements. (RB 86.) The characterization is ill-conceived. Dr.

Mills's disregard for the subsequently-recanted testimony was only valuable to the prosecutor if the jury believed the informants testified truthfully in the early 1980s. Recognizing this, the prosecutor set out to demonstrate their testimony, rather than their recantations, was truthful, a campaign that culminated in her rhetorical question to the jury that invited them explicitly to evaluate the truth of their testimony: "I am still asking you do you think it is reasonable that the detective in this case took these jailhouse snitches, put them on the stand and they were lying?" (32RT 4096-4097.) This use was improper as the prosecutor put the prestige of the prosecution team behind the informants' prior testimony and relied on facts unknown (and unknowable) to the jury to convince the jury to credit their statements.

As set forth in section C, *infra*, this miscue was prejudicial as a direct attack on one of the witnesses who anchored appellant's theory of the case, which was that he lacked the requisite mens rea to commit capital murder and the prosecution could not prove the contrary beyond a reasonable doubt.

3. Cross Examination of Dr. Mills and Dr. Watson on the Mental States Set Forth in Penal Code section 29

In the opening brief, appellant challenged the propriety of the prosecutor's cross-examination of Dr. Watson and Dr. Mills that focused on appellant's plan to kill his father, his intent and knowledge in shooting the other two victims, and his intent to pull the trigger, as violating the proscription against expert opinion testimony on a criminal defendant's purpose, knowledge, and intent. (AOB 307-09; 23RT 2950-2954, 2956; 27RT 3313-3316.) Respondent argues no misconduct occurred because the prosecutor did not knowingly and intentionally try to introduce inadmissible evidence. (RB 88.) Respondent's reliance on the need for a culpable

prosecutorial mental state is misplaced: in *People v. Hill* (1998) 17 Cal.4th 880, 822-823, the Court confirmed that misconduct need not be intentional to be actionable.

Respondent also defends the questioning as not inquiring into any of the mental states enumerated in Penal Code section 29. Instead, in respondent's view, the questioning "simply inquired whether the defendant volitionally carried out certain actions, manifesting goal-directed behavior." (RB 89.) According to respondent, in the context of appellant's dissociation defense, the line between cross-examining appellant's experts about their opinions and violating section 29 was indistinct. (*Ibid.*) The "line" was more than "fine" (27RT 3315), or not "easily defined" (RB 89); the line was nonexistent. The questions relating to appellant's plans and his intent to shoot his victims are directly proscribed by Penal Code section 29's ban on opinions about purpose and intent, particularly in the context of appellant's neurocognitive and psychiatric deficits. As set forth in section C, *infra*, the cross-examination was prejudicial.

4. Disparaging and Sarcastic Questioning

For the reasons set forth in section A, *supra*, the Court should review appellant's assignments of prosecutorial error – which included instances where defense counsel made no objection and an instance where an objection was made – set forth at pages 89-90 of the opening brief.[55] Respondent's

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[55] The misconduct to which an objection was sustained represents a variation on the prosecutor's habit of disregarding the limitations the trial court put on the prosecutor's use of information that are discussed in sections B.1, B.2, and B.6. On this occasion, after the trial court thwarted the prosecutor's attempt to question Dr. Watson on a mental health professional's inability to determine if an individual is telling the truth, the prosecutor asked the same (continued...)

answer on the merits requires only a brief reply. The prosecutor's comment during closing argument in *People v. Zambrano* (2007) 41 Cal.4th 1082, 1154-1155 (describing defense counsel's closing argument as a lawyer's game and attempt to confuse the jury by taking the witness's statement out of context), on which respondent relies, differs in character, frequency, and tone from the prosecutor's snide and scornful cross-examination of Dr. Watson and Dr. Mills. (See 22RT 2791, 2845; 23RT 2951-2952, 2954, 2955; 26RT 3184-3185.) The point of the prosecutor's questions in this case obviously was not to obtain answers, but to let the jury know the low regard she had for the doctors' evaluations and opinions by ridiculing them. Though a prosecutor may be permitted to "strike hard blows" (*Berger v. United States* (1935) 295 U.S. 78, 88), that adage shields neither the cross-examination at issue here nor the prosecutor's other missteps, all of which were designed to torpedo an array of mental health evidence that was sufficiently significant to render the case a close one, as set forth in section C, *infra*.

5. Comments Relating to Appellant's Failure to Testify

Respondent defends the prosecutor's questions to Dr. Vicary implicating appellant's non-testimonial courtroom demeanor in questioning the doctor about appellant's behavior in stressful situation as "a comment on the state of the evidence, in that it was a challenge to the expert's testimony itself." (RB 91.) Respondent's defense is flawed. A non-testifying defendant's courtroom demeanor is not evidence. (*United States v. Schuler* (9th Cir. 1987) 813 F.2d 978, 981 [deciding that a comment on non-testimonial demeanor

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[55] (...continued)
question twice more, using slightly different language. (Compare 22RT 2804 and 22RT 2805.)

violates the due process right to be convicted only upon evidence introduced at trial].) Even if courtroom, non-testimonial demeanor ever could be considered "evidence,"[56] it was irrelevant here because the inference to be derived from the purported evidence was speculative (*See People v. Morrison* (2004) 34 Cal.4th 698, 711.) The deduction the prosecutor wanted the jury to make was that the courtroom was stressful, appellant apparently did not "snap" (i.e., dissociate or become mentally incompetent or engage in other affirmative behavior) in the courtroom, and therefore his mental state at the time of the crimes – another stressful situation – was not compromised. As defense counsel pointed out, inferences drawn from such non-assertive silence are speculative and effectively operate against a defendant who has elected not to testify. (28RT 3495-3499.)

This was particularly true in appellant's case. As the record makes clear, appellant's mental illness and behavior required medication which was discontinued before trial. (*Marsden* RT 670; 26RT 3162-3163.) As defense counsel reminded the court, appellant's lawyers deliberately had devised a number of prophylactic steps to keep appellant's demeanor steady during courtroom proceedings, thereby rendering it even less relevant. (*See Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1089, n.6.) The ultimate inference the prosecutor wanted the jurors to draw not only was based on protected behavior, but it was likely false. As noted in the context of post-arrest silence, the "insoluable ambiguity" of such silence, makes its use inappropriate as a measure of guilt. (*Doyle v. Ohio* (1976) 426 U.S. 610, 619.) Similarly, here, appellant's purported non-assertive demeanor – about which the jurors may or

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[56] This Court arrives at a similar conclusion by determining that demeanor is not relevant, at least where penalty phase considerations are not at issue. (*See People v. Boyette* (2002) 29 Cal.4th 381,434-435.)

may not have been aware before the prosecutor's questioning – was ambiguous.

Whether viewed as an indirect comment on the right not to testify or as a violation of the fair trial right to have one's guilt or innocence determined on the basis of evidence introduced at trial, it was well-established at the time of appellant's trial that the use of non-testimonial demeanor violated the constitution. (*See United States v. Schuler*, *supra*, 813 F.2d at 981-82 and cases cited therein.) Respondent's position that the prosecutor was doing no more than challenging the expert's testimony is also illogical: the expert was a psychiatrist whose testimony was offered to raise a reasonable doubt about appellant's mens rea and establish his mental state defenses. The point of her cross-examination was to suggest that appellant harbored the requisite mens reas at the time of the crimes.

Respondent's defense of the prosecutor's closing argument that "we don't know" and "we will never know" (38RT 3819, 3831) certain facts about the crime fares no better. While comments on the state of the evidence are permissible, comments that the jury cannot know certain information improperly trade on a defendant's failure to testify where the defendant is the only potential source of that information. (See *People v. Harrison* (2005) 35 Cal.4th 208, 257 [citing prior authorities]; *Williams v. Lane* (7th Cir. 1987) 826 F.2d 654, 664-665 [collecting authorities].) Here the only person who could recount the substance of the conversation between appellant and his father inside the house or explain what motivated his father to leave the house was appellant. Similarly, appellant was potentially the only person who could explain to the jury his intent in going into the kitchen or what he was doing at the kitchen window. The record is not susceptible of any other interpretation: the comments highlighted appellant's silence.

6. The Prosecutor's Use of the Telegrams by Bloom, Sr.

Before and during the prosecutor's cross-examination of Melanie Bostic concerning the telegrams, defense counsel made numerous objections to any use of them and then to the use of their contents for the truth of the matters written by Bloom, Sr. (See e.g., 29RT 3709-3717, 3719, 3728-3729.) During her closing argument, the prosecutor used the telegrams for their truth, in contravention of the trial court's ruling. (30RT 3894.) Immediately after the end of the prosecutor's argument, defense counsel raised the issue. (30RT 3901.) The court declined to find the argument improper. (30RT 3902.) Thereafter, defense counsel raised the issue again, this time in the context of requesting a mistrial or limiting instruction for several occasions on which the prosecutor improperly used evidence that was admitted for a limited purpose; the telegrams were included in defense counsel's requests and again the court took no action with respect to the telegrams. (32RT 4131-4136.) In light of this factual background, the Court should reject respondent's position that "no objection was made to this argument." (RB 91.) As set forth *supra*, defense counsel had done all that she was required to do to make the court aware of the issue and the court rebuffed defense counsel on the merits.

On the merits of the claim, respondent argues that the court's rulings at the time the cross examination occurred allowed and justified the prosecutor's argument because the letters were admitted to show "the way the father related to the son." (RB 93.)[57] Appellant disputes this characterization:

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[57] Respondent quotes this language without attribution. It was not part of the court's ruling but part of the prosecutor's initial proffer. (29RT 3710.) The court's ruling was that they were not being offered for the truth so long as the prosecutor used them to ask Bostic if she was aware of them and whether (continued...)

on the question of whether the contents of the telegrams could be used for their truth, the trial court did not retreat from its position that they could be used to ask Bostic whether she was aware of the telegrams and whether Bloom, Sr.'s statements in them would change her opinion that Bloom never said he loved appellant. The prosecutor's argument that "there is some evidence in this case that he loved his son" based on "the telegrams in the Navy" that were "loving." is inconsistent with the court's ruling that the telegrams were not to be used for the truth of the statements.[58] The argument literally asked the jury to credit Bloom. Sr.'s statements. As set forth below, the cumulative effect of this miscue with the others was prejudicial.

C. The Prosecutorial Miscues were Prejudicial, Alone and Cumulatively with Other Errors Undermining Appellant's Mental State Defenses

The State cannot prove the prosecutorial miscues were harmless beyond a reasonable doubt, either singly or combined with the other errors that coalesced to undermine the only defense raised and all the experts presented to testify in support of that mens rea defense. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Respondent seeks to discharge the burden of demonstrating the misconduct was harmless beyond a reasonable doubt first by explaining that each instance of error was harmless because it was brief or discrete or fleeting. (RB 93-94.) Thereafter respondent opines that appellant's trial did not involve "a close guilt-phase case" and appellant's defense was "a not-very-compelling psychological narrative." (RB 94.)

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[57] (...continued)
that would change her opinion. (29RT 3716-3717.)

[58] Respondent and appellant read the record differently, with respondent suggesting that if error existed, it was judicial, not prosecutorial error. (RB 93.)

Respondent's itemized approach to harm is inconsistent with the law requiring a cumulative analysis of related errors. The practice of examining the effect of errors in concert is rooted in the commonsense notions that the "cumulative effect of multiple errors may still prejudice a defendant"even if "no single error examined in isolation is sufficiently prejudicial" to require granting relief (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381; accord, *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211), and that "a balkanized, issue-by-issue harmless error review" is not "very enlightening" in determining whether a defendant was prejudiced by symbiotic errors (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476). All the prosecutorial miscues targeted appellant's efforts to raise a reasonable doubt about his state of mind at the time of the crimes during the guilt phase and undermined appellant's subsequent affirmative defense of insanity. The prosecutor's impermissible use of unreliable information for its truth, capitalizing on appellant's non-testimonial demeanor and right to remain silent, and the several instances in which cross-examination of appellant's expert witnesses went beyond the bounds of propriety or the court's rulings were all designed to shore up a weak case that appellant harbored the mens reas necessary to be criminally liable for capital murder.

Respondent's view that the case was not close and appellant's mental state defenses were not compelling was not shared by the jury that heard the testimony and observed the witnesses. Guilt phase deliberations were protracted. Respondent glosses over the many hours of deliberations (spread over two full days and portions of two additional days) and the jury's request to rehear David Hughes's testimony before the jury found appellant guilty of first degree murder of Bloom, Sr. (23CT 6089-6094, 6098, 6103-6104.) The jury then deliberated for portions of three additional days. (23CT 6105-6106,

6107, 6213-6214.) After the jurors notified the court that they could not agree on the two remaining counts, the jurors explained to the court that they were divided between first and second degree murder by a vote of 7-5 on count II and three-ways among first degree murder, second degree murder, and involuntary manslaughter by a vote of 6-5-1 on count III. (34RT 4222-4224.) Respondent argues that the fact that the jury returned verdicts of second degree murder immediately after first degree murder was removed from their consideration renders the prosecutor's missteps harmless. On the contrary, the deliberations demonstrate that the jurors found this a close case, despite the prosecutor's misconduct, the court's failure to deliver voluntary manslaughter instructions with respect to counts II and III (see Argument XI), the court's failure to take any curative measures concerning the mental health evidence in light of the problems posed by the lapse of time between the first and second trials (see Argument I), the court's admission of the first-trial testimony of witnesses who subsequently became unavailable (see Argument II), the cross-examination of Dr. Watson concerning appellant's demeanor (see Argument X), and the constellation of issues regarding appellant's competence during the guilt and sanity phases (see Arguments III, IV, V, VI, and VIII). Absent the prosecutor's miscues in conjunction with one or more of these errors, at least one juror might have struck a different balance, and respondent cannot prove otherwise.

The sanity phase – during which the jurors were directed to and did consider[59] the evidence introduced during the guilt phase, where the foregoing misconduct occurred – presented an even closer case for the jurors. The jury

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[59] During the sanity phase, the jurors asked to have the guilt phase testimony of Dr. Mills read to them. (24CT 6223.)

not only asked to have the testimony of Dr. Mills and Dr. Wolfson read back to them, but they deliberated for portions of six days. (24CT 6220-27, 6230, 6233-38.) After finding appellant sane when he killed his father, the jury deadlocked over the other two counts. (24CT 6231, 6238.) Had the trial court not permitted appellant to withdraw his NGI plea at this point, which was done over counsel's objections and expressed doubts abut his current mental competence, a mistrial would have been declared. Consequently, there is even less reason to find respondent discharged the state's burden to demonstrate the errors were harmless beyond a reasonable doubt.

For reasons set forth in the opening brief, and herein, appellant's convictions and judgment of death should be reversed.

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X.

THE TRIAL COURT PREJUDICIALLY ERRED IN ALLOWING CROSS-EXAMINATION OF DR. WATSON CONCERNING APPELLANT'S AND DEFENSE COUNSEL'S BEHAVIOR AND DEMEANOR DURING THE GUILT PHASE

Appellant argued that the trial court erred in overruling defense counsel's objections and in denying their motion for mistrial regarding the prosecution's cross-examination of Dr. Dale Watson concerning the behavior and demeanor of appellant and defense counsel at counsel table. (AOB 316-329.) Despite addressing only one of appellant's authorities, respondent contends that the court did not abuse its discretion in allowing cross-examination on whether appellant fit a diagnostic criterion for a diagnosis Dr. Watson neither testified about nor made. (RB 74.) Respondent is incorrect.

A. The Trial Court Erred in Permitting Cross-examination Regarding Courtroom Interactions Between Appellant and His Counsel, and the Error Violated Appellant's Rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as Well as the Parallel Provisions of California's Constitution

1. The Trial Court's Error

Respondent relies solely on *People v. Hawthorne* (2009) 46 Cal.4th 67 (*Hawthorne*), to argue that the cross-examination at issue was proper, because experts can be cross-examined on the reasons for an opinion, including facts and other matters upon which the opinion is based. (RB 76-77.) However, as appellant pointed out in his opening brief, the prosecutor was setting up a straw-man when he asked Dr. Watson if appellant met Criterion 1-A for the DSM-IV diagnosis of Asperger's Disorder. (AOB 317, 328.) Dr. Watson never formed or offered an opinion as to whether appellant had Asperger's Disorder; defense counsel did not ask Dr. Watson about it during his direct

examination, and the defense expert who did testify that appellant met the diagnostic criteria for Asperger's Disorder did not rely on Criterion 1-A. (AOB 320-321.) In *Hawthorne*, in contrast, this Court found that the prosecutor was entitled to cross-examine the expert about factual inaccuracies in her report in order to rebut her opinion suggesting that defendant's criminal conduct was not volitional. (*People v. Hawthorne*, *supra*, 46 Cal.4th at pp. 93-94.)

Respondent also argues that the prosecutor's hypothetical questions did not infringe upon the attorney client relationship or appellant's right not to testify because they related to the expert's opinion regarding appellant's mental deficiencies. (RB 77.) This argument conflates two issues: relevance and infringement of appellant's rights under the Fifth and Sixth Amendments. As to the first issue, relevance, the argument fails because Dr. Watson never diagnosed appellant with Asperger's Disorder and the prosecutor, while cross-examining him, never attempted to relate Criterion 1-A to any other evidence about which Dr. Watson testified on direct examination. (See AOB 316-320 and testimony described and quoted therein.)

As to the second issue, as appellant demonstrated in his opening brief, the prosecutor's cross-examination of Dr. Watson unconstitutionally infringed upon appellant's Fifth Amendment right not to testify and his Sixth Amendment right to the assistance of counsel. (AOB 316, 323-326.) Respondent nevertheless argues that because it was readily observable, the demeanor evidence did not call for any explanation of communication between appellant and his attorneys. (RB 77.) For the reasons argued in appellant's opening brief (AOB 323-324), appellant urges the Court to reject this disingenuous argument, as well as the trial court's reliance on it. (22RT 2854.)

Respondent next argues that by offering expert opinion and evidence

on appellant's mental disease or defect that implicated appellant's demeanor, the defense put appellant's demeanor at issue. (RB 77.) First, as a factual matter, in presenting Dr. Watson's neuropsychological testimony, the defense did not offer testimony of a mental disorder to explain demeanor. Second, respondent seeks to extend this Court's general rule that a prosecutor properly can comment on a defendant's demeanor at the penalty phase (RB 77, citing *People v. Heishman* (1988) 45 Cal.3d 147, 197), to earlier phases of trial. Respondent argues that employed this way, using a defendant's demeanor as evidence against him does not infringe on his right to testify or forbear from doing so, amount to impermissible bad-character evidence, or relate to credibility. (RB 77.) However, respondent cites no authority for its position, and the better position is to the contrary. (See *State v. Adames* (N.J.Super. 2009) 975 A.2d 1023, 1035-1036 [mere reliance upon insanity defense does not permit prosecutor to comment upon defendant's nontestimonial behavior or make unsworn comments about defendant's conduct].) Morever, *People v. Heishman, supra*, 45 Cal.3d 147, is inapposite. The issue there involved defendant's facial demeanor at a penalty trial in which defendant had placed his own character in issue as a mitigating factor. (*Id.* at p. 197.)

Appellant was also unable to cross-examine the source of the prosecution's assertions regarding Criterion 1-A, i.e., the prosecution's expert. After three days of courtroom observations, that expert purportedly concluded that appellant did not have "marked impairment" in the use of the listed nonverbal behaviors. (22RT 2853-2854.) The expert's observations were not part of the record and therefore neither were the specific factual assertions concerning appellant's demeanor that were the premise of the prosecutor's questions. The question therefore served as unsworn testimony by the prosecutor. (See, e.g., *State v. Adames, supra*, 975 A.2d at pp. 1037-1038

[where defense expert opined that defendant had various symptoms of schizophrenia, including a "flat affect," prosecution's question to expert regarding defendant's smiling in courtroom were tantamount to unsworn testimony].) Appellant's inability to confront and cross-examine the prosecutor (or her silent expert) violated his rights under the Confrontation Clause of the Sixth Amendment. (U.S. Const., 6th, 14th Amends; Cal. Const., art. 1, § 15.) Moreover, by emphasizing Criterion 1-A during closing argument (AOB 328), the prosecutor improperly contrasted her own credibility with that of Dr. Watson. (*State v. Adames*, *supra*, 975 A.2d at p. 1037.)

The trial court invited the prosecutor to put on its expert. (22RT 2854.) Not surprisingly, the prosecution never did. It is doubtful that any competent, ethical psychologist would have opined that appellant met Criterion A-1 or not, based upon the unknown content of interactions observed from across a courtroom.[60] Had the expert done so, the defense could have cross-examined him successfully regarding the lack of information to support his opinion or the ethical and professional appropriateness of his opinions based solely on those observations.[61]

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[60] See *Specialty Guidelines for Forensic Psychologists, Assessment, 9.03 Opinions Regarding Persons Not Examined*, American Psychological Association. "Forensic practitioners recognize their obligations to only provide written or oral evidence . . . when they have sufficient information or data to form an adequate foundation for those opinions or to substantiate their findings." <https://www.apa.org/practice/guidelines/forensic-psychology.aspx?item> (as of March 27, 2014).

[61] See *Specialty Guidelines for Forensic Psychologists, Assessment, 9.03 Opinions Regarding Persons Not Examined*, American Psychological Association. "When it is not possible . . . to examine individuals about whom they are offering an opinion, forensic practitioners strive to make clear the impact of such limitations on the reliability and validity of their professional

(continued...)

Respondent does not specifically address appellant's argument that the prosecutor's question relied upon speculation rather than evidence, and as such was a wholly unreliable basis for expert opinion. (AOB 323-326.) The cross-examination regarding Criterion 1-A promoted impermissible speculation among the jurors, because under the guise of cross-examination, the prosecutor invited the jurors to themselves use the diagnostic criterion to interpret appellant's interactions with his attorneys. (AOB 328.) In the best of circumstances, when observing only a defendant's demeanor, jurors lack the knowledge or experience to interpret accurately a defendant's behavior because "[i]nterpretations of nonverbal communication are fallible and idiosyncratic." (*United States v. Cook* (C.A.A.F. 1998) 48 M.J. 64, 65.) Prosecution comments on a nontestifying defendant's demeanor are suspect because they assume that "there is a model of 'normal' courtroom behavior . . . . a defendant should not be subjected to a guilty verdict because his courtroom appearance did not comport with the prosecution's notion of a norm." (*Hughes v. State* (Del. 1981) 437 A.2d 559, 572.) Similarly, the prosecutor's notion that appellant's demeanor did not meet Criterion 1-A was an invalid basis for jury consideration.

Cases widely condemn prosecutorial comment on even one interaction between a nontestifying defendant and defense counsel that imply guilt. (See, e.g., *United States v. Leal* (6th Cir. 1996) 75 F.3d 219, 225, abrogation on other grounds recognized by *U.S. v. Kennedy* (6th Cir. 2004) 107 Fed.Appx. 518 [government concedes misconduct of prosecutor's comment regarding defendant's remark to defense counsel during particular testimony]; *United*

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[61] (...continued)
[] opinions, or testimony." <https://www.apa.org/practice/guidelines/forensic-psychology. aspx?item> (as of March 27, 2014).

States v. Schuler (9th Cir. 1987) 813 F.2d 978, 981-982 [reversing conviction and holding prosecutor's reference during argument to defendant having laughed during certain testimony improperly put his character in issue by implying he thought threatening the life of a President was a joke, and violated his Fifth Amendment right not to be convicted except on basis of evidence admitted at trial]; *United States v. Carroll* (4th Cir. 1982) 678 F.2d 1208, 1209-1210 [holding prosecution comments about defendant's examining court exhibit and then explaining it to his attorney were prohibited; interactions with defense counsel occur at any trial and do not demonstrate guilt or innocence]; *United States v. Corona* (5th Cir. 1977) 551 F.2d 1386, 1389 [noting it was improper to refer to defense counsel consulting with the defendant during trial to imply the defendant's guilt]; *People v. Schindler* (1980) 114 Cal.App.3d 178, 187-189 [holding defendant's constitutional right to counsel under state and federal constitution violated by prosecution's use of her choice of defense attorney to impeach her and rebut mental state defense].) The court's ruling here, which permitted the jurors to consider appellant's interactions with his defense counsel at trial as evidence to undercut the mental health defense during the guilt phase and the sanity phase, provides a much stronger basis for finding error.

2. The Court's Error and Prosecution's Subsequent Cross-examination of Dr. Watson Violated Appellant's Rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution as Well as the Parallel Provisions of California's Constitution

Respondent suggests that to the extent appellant failed to make particular constitutional objections in the court below, the objections are

forfeited, except for a "very new narrow due process argument" flowing from evidentiary challenges he did make and that any preserved errors were harmless beyond a reasonable doubt. (RB 76, 78, fns. 49, 50.)

However, appellant's constitutional claims are cognizable because appellant's objections sufficiently alerted the prosecutor and trial court to them and/or because the trial court's ruling, insofar that it was wrong for the reasons presented to the court, had the additional legal consequence of violating the Constitution. (*People v. Partida* (2005) 37 Cal.4th 428, 433, 434-435; *People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.)

Appellant's arguments that the prosecutor's question lacked foundation and was based upon speculation and facts that were not true and could not be proven (22RT 2852-2853), sufficiently preserved appellant's claims that the prosecution's cross-examination constituted a violation of the due process clause of the Fifth Amendment encompassing the right not to be convicted except on the basis of evidence adduced at trial and rendered his trial fundamentally unfair. (AOB 322-324; U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. 1 §§ 7, 15; *Taylor v. Kentucky* (1978) 436 U.S. 478, 485; *Estelle v. McGuire* (1991) 502 U.S. 62, 67-70.)

In addition, the prosecutor's question introduced irrelevant, inadmissible, speculative, and unreliable evidence because it was based on her own factual assertions in a manner contrasting her own credibility with Dr. Watson's, which violated appellant's right to due process and a fair trial. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16, 17; see *State v. Adames*, *supra*, 975 A.2d at p. 1038 [because defendant's guilt depended on which experts the jury believed, inappropriate questions to experts on whether appellant's courtroom demeanor was contrary to schizophrenia symptoms testified to by expert, and subsequent closing argument emphasizing same,

denied defendant a fair trial].)

Appellant's objections that it was improper to bring in appellant's courtroom relationship with his lawyers "because none of you are privy to what's going on here" (22RT 2854-2856); that it was defense counsel that had the information to counter the factual premise of the prosecution's question (22RT 2853, 2854-2857; AOB 324-325); and that the prosecution's use of an expert to sit in the courtroom to assess and interpret appellant's interactions with his attorneys in order to question Dr. Watson (22RT 2855-2857) was improper, adequately apprised the court and prosecutor that appellant's rights under the Fifth Amendment not to be compelled to be a witness against himself and Sixth Amendment right to counsel were at issue. (AOB 324-325; U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15-17; *Estelle v. Smith* (1981) 451 U.S. 454, 462 [availability of Fifth Amendment privilege turns in part upon "the exposure which it invites"]; *Strickland v. Washington* (1984) 466 U.S. 668, 686 [government may violate right to effective assistance when it interferes with ability of counsel to make independent decisions on how to conduct the defense].)

Appellant's objections also fairly informed the court that his inability to cross-examine either the prosecutor or his nontestifying expert violated appellant's rights under the confrontation clause to confront and cross-examine the witnesses against him. (U.S. Const., 6th, 14th Amends; Cal. Const., art. 1, §§ 7, 15-17; *Maryland v. Craig* (1990) 497 U.S. 836, 845-846.) This further violated appellant's right to due process, because confrontation and cross-examination ensure that evidence is reliable and "subject to the vigorous adversarial testing that is the norm . . . ." (*Maryland v. Craig* (1990) 497 U.S. 836, 847.) "The right . . . to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront

and cross-examine witnesses . . . have long been recognized as essential to due process." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294; see also *People v. Winson* (1981) 29 Cal.3d 711, 717 [recognizing that absence of proper confrontation calls into question ultimate integrity of fact-finding process].) Appellant's due process claim in this regard is not forfeited. (*People v. Partida, supra*, 37 Cal.4th at p. 435.)

For additional reasons, appellant requests that the Court review his claim that the inclusion of this irrelevant and speculative questioning by the prosecutor and subsequent argument had the effect of distorting the finding process to such an extent that the resulting verdict could not have possessed the reliability required by the Eighth Amendment. (*Beck v. Alabama* (1980) 447 U.S. 625, 638, fn. 13; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) First, additional objections on constitutional grounds would have been futile. The trial court rejected the basic premise of appellant's argument when it erroneously concluded that the interactions were not private but were evidence open to evaluation (22RT 2856), and thus also would have rejected an argument that transformation of the interactions into evidence for the jury's consideration violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (Cf. *People v. Wilson* (2008) 44 Cal.4th 758, 792-793 [defendant on notice that objection on same ground as co-defendant's would not have been futile had he satisfied the court's reasonable prerequisites to admission of the co-defendant's evidence].) Second, if the trial court was not adequately alerted to appellant's constitutional claims, this Court has discretion to review legal claims in the absence of specific objections based upon constitutional grounds at trial, even when an objection usually is required to preserve an issue for appeal. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) The Court has held "that a litigant may raise for the first time on appeal

a pure question of law which is presented by undisputed facts" and has recognized that California courts have "examined constitutional issues raised for the first time on appeal, especially when the enforcement of a penal statute is involved [citation], the asserted error fundamentally affects the validity of the judgment [citations], or important issues of public policy are at issue [citation]." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; see *People v. Hines* (1997) 15 Cal.4th 997, 1061 [considering merits of constitutional challenge to statute not made below]; *People v. Johnson* (2004) 119 Cal.App.4th 976, 984-985 [adjudicating a constitutional challenge that the defendant did not raise below]; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061 [same].)

Appellant's claim meets these requirements. It involves the deprivation of fundamental constitutional rights, i.e., the right to counsel, due process, a fair trial, to confront and cross-examine witnesses, and to a reliable determination of guilt and penalty. No additional factual development is necessary. This Court does not need to make any independent evidentiary analysis or credibility determinations; what remains are pure questions of law. This Court is in as good a position as the trial court to decide that issue, and has the discretion to do so. (See, e.g., *People v. Runyan* (2012) 54 Cal.4th 849, 859, fn. 3 [though not preserved below, court may consider new arguments that present pure questions of law on undisputed facts; "[n]or would we ignore a constitutional provision directly applicable to an issue in a case before us simply because a party had neglected to cite it. No unfairness thereby accrues to defendant; he has had a full opportunity, in his reply brief, to argue the relevance of [the issue]"][62]; *People v. Yeoman* (2003) 31 Cal.4th 93, 118.)

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[62] Here, respondent did not take advantage of the full opportunity to respond to appellant's constitutional claims. (See, e.g., AOB 316, 320, 323-
(continued...)

The issue also affects the validity of a capital judgment and significant policy concerns, i.e., whether raising mental health issues opens the door to a nontestifying defendant's demeanor as evidence, particularly when it involves scrutinizing interactions with counsel during all phases of trial.

For all these reasons, this Court should adjudicate appellant's constitutional claims on the merits.

B. The Error Was Prejudicial and Requires Reversal of the Judgment

Respondent argues that there was no prejudice for the same reason there was no error: the question was relevant and did not invite the jury to inquire into the substance of appellant's communications. (RB 78.) This circular logic cannot be credited. Respondent also argues that the issue was insignificant in the context of Dr. Watson's cross-examination and the overall mental health defense evidence. (RB 78.) Appellant disagrees, as explained in the opening brief. (AOB 327-328.) Moreover, the fact that the prosecutor thought Criterion 1-A was significant enough to be put before the jury over vociferous defense objections, and then present argument relating to it based upon misstated evidence, contradicts its current position. (See AOB 328; *Napue v. Illinois* (1959) 360 U.S. 264, 270-271 [fact that prosecutor "thought it important to establish before the jury that no official source had promised [leniency to witness]" supported determination that failure to disclose promise of leniency caused trial to be unfair].) Respondent's contention that defense

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[62] (...continued)
327.) The only mention is in the respondent's brief at page 76, footnote 49 (stating that constitutional objections, "such as an objection under the 5th Amendment" were forfeited, except for a narrow due process challenge), and page 78, footnote 50 (stating that any preserved constitutional objections were harmless beyond a reasonable doubt).

counsel's redirect examination effectively blunted any inproper inference (RB 78) is false, both because the jury remained free to use and interpret appellant's interactions with his client as evidence during the remainder of the trial, and in light of the prosecution's lengthy argument regarding Criterion A-1, which further misled the jury. (See AOB 328 and fn. 103.)

The court's ruling permitted the prosecution to introduce as evidence appellant's demeanor and interactions with his counsel, purportedly to impeach a defense expert. In fact, the prosecution's question told the jurors that appellant's interactions with his attorneys were unimpaired, and invited them to scrutinize them throughout the trial. Because there was conflicting evidence regarding the central issue of appellant's mental state at the time of the homicides, the prosecution's question and later argument were prejudicial. They were particularly prejudicial when considered cumulatively with other errors denigrating or undermining appellant's guilt and sanity phase mental defenses, including the errors set forth in Arguments I, II, IX, XI-XIII. They worked in tandem to undermine the only defense. (*Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 290, n.3, 298, 302-303.) Reversal is required. (AOB 327-329.)

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XI.

THE TRIAL COURT ERRED BY REFUSING TO GIVE VOLUNTARY MANSLAUGHTER INSTRUCTIONS ON COUNTS TWO AND THREE, REQUIRING REVERSAL ON THOSE COUNTS

At the conclusion of the guilt phase of appellant's trial, voluntary manslaughter instructions were requested by the defense as to all three counts. The trial court denied voluntary manslaughter instructions on Counts Two and Three. In the opening brief, appellant demonstrated that the trial court's denial of the requested instructions, including its reliance on *People v. Spurlin* (1984) 156 Cal.App.3d 119, was error, and that the error violated appellant's rights to due process, to a fair jury trial, to present a defense, to conviction on proof beyond a reasonable doubt and to reliable determinations of guilt, sanity, and penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Appellant further demonstrated that the error cannot be found harmless and therefore requires reversal of the convictions on Counts Two and Three, as well of the special circumstance finding and the death judgment.

Respondent argues that *Spurlin* was properly decided, is not inconsistent with controlling case law predating it, and is thus applicable to crimes, such as appellant's, occurring before it was decided in 1984. (RB 97-104.) Alternatively, respondent also argues that, regardless of *Spurlin*, substantial evidence did not support voluntary manslaughter instructions as to Counts Two and Three. (RB 104-105.) Finally, respondent argues that any error is harmless because the jury resolved the question of provocation against appellant. (RB 106-107.)

A. The Trial Court Erred in Refusing to Give Voluntary Manslaughter Instructions on Counts Two and Three

Having first ruled that it would instruct the jury on voluntary

manslaughter, the trial court reversed its ruling, stating, "I will not give [voluntary manslaughter instructions] on Counts 2 and 3 based on the fact that voluntary manslaughter would appear to be contrary to the mental disorder defense that has been raised." (29RT 3676.) The trial court then stated that it originally had intended to instruct on voluntary manslaughter on Counts Two and Three until she read *People v. Spurlin* (1984) 156 Cal.App.3d 119 and *People v. Saille* (1991) 54 Cal.3d 1103. The trial court did not explain how the stated basis of the ruling was supported by or related to the two cases which it cited.

In the opening brief, appellant demonstrated that the trial court's denial of the requested instructions as "contrary to the mental disorder defense that has been raised," was error. (AOB 344-345.) Appellant further demonstrated that the trial court's reliance upon *Spurlin* and *Saille* was erroneous. (AOB 345-361.)

Respondent does not defend the trial court's ruling that voluntary manslaughter was "contrary to the mental disorder defense." Respondent does argue that *Spurlin* was properly decided, is not inconsistent with controlling case law predating it, and is thus applicable to crimes occurring before it was decided in 1984, and that voluntary manslaughter instructions were properly refused. (RB 97-104.)

1. The Trial Court Erred in Denying Voluntary Manslaughter Instructions on Counts Two and Three as "Contrary to the Mental Disorder Defense That Has Been Raised"

Appellant demonstrated that the trial court's rejection of the instructions as "contrary to the mental disorder defense that has been raised" was erroneous. (AOB 344-345.) Respondent does not defend the trial court's

denial of the instructions on this ground. Respondent concedes, sub silentio, that the trial court's reasoning in this regard was error. Instead, respondent argues that de novo review of the determination of whether to instruct on voluntary manslaughter makes the trial court's reasoning irrelevant. (RB 105, fn. 56, citing *People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

2. Appellant Was Entitled to Voluntary Manslaughter Instructions on Counts Two and Three Even Absent Evidence Of Provocation By the Victims in Those Counts

In the opening brief, appellant explained that *People v. Spurlin*, which held that provocation adequate to sustain a heat of passion must come from the victim (156 Cal.App.3d at p. 126) was wrongly decided and that the analysis employed in that case was contrary to established and controlling case law (*People v. Logan* (1917) 175 Cal. 45; *People v. Valentine* (1946) 28 Cal.2d 121) and the applicable statute (Pen. Code, § 192). (AOB 345-358.) Appellant also demonstrated that *Spurlin's* deviation from established law was essentially unforeseeable prior to the time the offenses in this case were committed, and was therefore inapplicable to those offenses. (AOB 358-361; see subheading A.3., *post.*)

Respondent's defense of *Spurlin* (RB 97-104) – that it was analytically correct, consistent with preexisting law, and applicable to appellant's April 1982 crime – is based upon erroneous characterizations and interpretations of the applicable law, unsupported by the authorities upon which respondent relies. Respondent also urges that, regardless of *Spurlin*, the evidence did not support voluntary manslaughter as to Counts Two and Three. (RB 104-106.) This latter argument is bottomed on the flawed *Spurlin* analysis as well as upon a misapprehension of the law of voluntary manslaughter similar to that

recently rejected by this Court in *People v. Beltran* (2013) 56 Cal.4th 935.

In order to convince this Court that *Spurlin* was correctly decided, respondent cites a number of cases which in turn cite *Spurlin* or other cases citing *Spurlin*. However, as demonstrated in the opening brief (AOB 352, fn. 108), these cases merely cite *Spurlin* without analysis of the issues raised in the opening brief, and do not serve as authority on the issue raised by appellant. "[C]ases are not authority for propositions not considered." (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388; *People v. Johnson* (2012) 53 Cal.4th 519, 528.)

People v. Verdugo (2010) 50 Cal.4th 263, upon which respondent substantially relies, is not directly addressed in the opening brief, but suffers the same analytical deficiency as the others. *Verdugo* limits its analysis to a quotation from *People v. Avila* (2009) 46 Cal.4th 680, 705 to the effect that provocation must come from the victim. On that point, *Avila* only cited *People v. Lee* (1999) 20 Cal.4th 47, 59, which in turn cited only *In re Thomas C.* (1986) 183 Cal.App.3d 786, 798, which in turn cited *Spurlin* without independent analysis in support of the "general rule" supposedly stated in that case. None of these cases engaged in any independent analysis of the issue. (See AOB 352, fn. 108.) All, including *Verdugo*, accepted the *Spurlin* holding without any examination of the erroneous reasoning by which that holding was reached. *Verdugo* qualified its endorsement, however, stating that "Defendant cites no persuasive basis for us to revisit this settled principle." (50 Cal.4th at 294.) Whether this principle might be considered settled as a result of the repetitive, if analytically bankrupt, reliance on *Spurlin*, does not resolve the question of whether it was a proper statement of the law at the time *Spurlin* enunciated it in 1984. Moreover, none of the cases cited by respondent or relied upon by this Court to and including *Verdugo* considered the analysis set

forth in the opening brief. That analysis shows that *Spurlin* was erroneous at the time it was decided. Again, "cases are not authority for propositions not considered." Moreover, the analysis set forth in the opening brief constitutes a persuasive reason for this Court to revisit this "settled" principle and set it straight, if only for appellant, whose offenses were committed before the principle was ever pronounced, let alone "settled."

To support *Spurlin's* determination that the source of provocation controls the determination of whether a defendant acted in a heat of passion or sudden quarrel as set forth in section 192, respondent argues that "nothing supports [appellant's] view that the focus of heat-of-passion voluntary manslaughter is predominantly upon the defendant's mental state. . . ." (RB 100.) Respondent cannot cite any authority for this reasoning, other than *Spurlin* itself because respondent's position is contrary to the controlling case law both before and after *Spurlin*. As reiterated most recently by this Court:

> Adopting a standard requiring such provocation that the ordinary person of average disposition would be moved to kill focuses on the wrong thing. *The proper focus is placed on the defendant's state of mind,* not on his particular act. To be adequate, the provocation must be one that would cause an emotion so intense that an ordinary person would simply react, without reflection. To satisfy *Logan*, the anger or other passion must be so strong that the defendant's reaction bypassed his thought process to such an extent that judgment could not and did not intervene.

(*People v. Beltran*, *supra*, 56 Cal.4th at p. 949 (emphasis added); cf. AOB 352-356.)

In addition to this misconstruction of the applicable law, respondent relies upon a portion of *Spurlin* (156 Cal.App.3d at p. 125) to suggest that strict common law limitations on heat of passion remain incorporated in section 192, and that *Valentine's* rejection of common law limitations was but

one of a line of cases based on non-statutory principles which led to the adoption of non-statutory, diminished mental capacity voluntary manslaughter. (RB 99.) Consequently, respondent argues, "the *Spurlin* court followed 'several courts in other jurisdictions, interpreting common law principles, [that] have held the deceased must be the source of the defendant's rage or passion.' (*Id.* at p. 126.)" (RB 99.)

First, *Beltran*, *supra*, decided after respondent's brief was filed, undercuts this argument. Second, the argument misinterprets *Valentine* and misstates the state of the law at the time the offenses were committed in this case, at the time of appellant's first trial, at the time *Spurlin* was decided, and to date. *Spurlin* did identify two lines of California cases arising after the 1872 adoption of section 192, one following strict common law limitations, and the other recognizing a legislative intent to adopt a more liberal rule, leaving the jury to determine the adequacy of the provocation based on the facts and circumstances of the particular situation. (156 Cal.App.3d at p. 125.) *Spurlin* further acknowledged that in *Valentine*, this Court *overruled* the first line of cases. (156 Cal.App.3d at p. 124, fn. 2.) However, respondent fails to acknowledge, as *Spurlin* failed to acknowledge, that what this Court determined in overruling that first line of cases was that a strict common law construction of section 192 is error. Contrary to respondent's implied characterization (RB 99), *Valentine* was decided quite explicitly on a statutory interpretation of section 192 (28 Cal.2d at 141-144), and nowhere adopted anything which could be termed "non-statutory voluntary manslaughter."[63]

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[63] Respondent also cites *People v. Conley* (1966) 71 Cal.2d 303, as did *Spurlin*, as part of the line of cases concerned with non-statutory voluntary manslaughter. Neither respondent nor the *Spurlin* court explains any relevance (continued...)

While respondent approvingly cites the *Spurlin* court's decision to follow "several courts in other jurisdictions, interpreting common law principles," respondent omits any recognition that by doing so, the *Spurlin* court ignored the applicable statutory law of *this* jurisdiction and the controlling case law of *this* Court.

In *People v. Valentine*, *supra*, 28 Cal.2d 121, this Court recognized that the omission from Penal Code section 192 (as enacted in 1872) of the language from section 23 of the Crimes and Punishments Act of 1850, incorporating common law limitations on the types of provocation which could be adequate to arouse a heat of passion sufficient to make a homicide constitute voluntary manslaughter rather than murder, indicated a legislative intent to abandon those strict limitations in favor of a more liberal rule. (28 Cal.2d at pp 142-143.) Notably and critically, repealed section 23 of the former Crimes and Punishments Act of 1850 required provocation from the "person killed." Section 192 on the other hand, does not include that requirement that the provocation come from the "person killed." Applying the reasoning of *Valentine*, this second omission bespeaks a legislative intent, as of 1872, and continuing through appellant's trial, to reject that common law requirement, and instead leave the jury to determine "whether or not the defendant's reason was, at the time of his act, so disturbed or obscured by some passion . . . to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." (*People v. Logan* (1917) 175 Cal. 45, 49; *People v. Valentine*, *supra*, 28 Cal.2d at p. 139; *accord*, *Beltran* at pp. 947-950.)

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[63] (...continued)
of *Conley* to the issues presented in this case, which deals directly with statutory manslaughter under section 192.

Respondent cites *People v. Manriquez* (2005) 37 Cal.4th 547, 583 for the propositions that (1) the focus of heat-of-passion manslaughter "is *particularly* on the concept of 'provocation,' which has historically centered on a 'sudden quarrel' or 'heat of passion' with respect to the victim" and (2) "[t]he *key principle* is that the provoking conduct itself must 'be sufficient to obscure reason and render the average man liable to act rashly.' (RB 100 (emphasis added).) From these two points, without further citation to authority or explanation, respondent concludes: "Thus, inherent in the concept of 'provocation, and the narrow exception it affords for reducing murder to manslaughter, is that the killing be not merely the *result* of the provocation but that it be *related to* the provocation." (RB 100, emphasis in original.)

Respondent fails to explain how the claimed conclusion follows from the cited portions of *Manriquez* in a way that is relevant to the issues here. Respondent fails to explain how a killing can be the *result* of provocation without being thereby *related* to that provocation, regardless of the relation or lack thereof between the source of the provocation and the victim. Substantial evidence below supported a finding that the explosion of violence over a matter of a very few minutes was the result of provocation and sudden quarrel[64] and thereby related to it. What *Spurlin* held, and the position taken by the trial court and respondent here is something different: that the killing be not merely the result of the provocation but that it be specifically, wilfully, knowingly directed only at the source of specific provocation. There is nothing in the statutory or case law since *Valentine* which explains how Penal

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[64] Respondent is silent on the meaning and application of "sudden quarrel" in the facts presented here, and fails to establish any basis for concluding that manslaughter instructions are not supported on that ground as well as on the ground of provocation.

Code section 192 could be interpreted to include an unstated requirement that the killing be directed at, and limited to, the provocateur.

Respondent cites two cases decided after *Valentine* but before *Spurlin* – *People v. Bridgehouse* (1946) 47 Cal.2d 406, 410, overruled on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 89, and *People v. Conley* (1966) 64 Cal.2d 310.[65] In arguing that *Spurlin* is consistent with prior law rather than a departure, respondent notes that *Bridgehouse* "fit[s] comfortably within the 'settled' rule that '[t]he provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim, or be conduct reasonably believed by the defendant to have been engaged in by the victim.' (*Verdugo, supra*, 50 Cal.4th at p. 294, [respondent's emphasis omitted].)" (RB 101.) While *Bridgehouse* may be consistent with that "rule," that decision cannot be read to have stated such a limited "rule," or relied on such a limited rule in reaching its conclusion. Rather, the reasoning in *Bridgehouse* was a continuation of the reasoning in *Valentine*. In *Bridgehouse*, the provocative conduct came from the defendant's wife, who taunted the defendant and even threatened to kill him. In *Bridgehouse*, there was no provocative conduct by the victim, the wife's paramour, whom the defendant unexpectedly saw a few days after the defendant had moved out of the family home, and several months after his wife had revealed her affair to

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[65] At page 101 of the brief, respondent cites *Conley* as "71 Cal.2d 303." That cite is for a 1969 case, *People v. Graham*. While *Graham* does deal with the issue of voluntary manslaughter, including non-statutory voluntary manslaughter, it does not appear to address anything which is particularly germane to the issues presented in this appeal. Moreover, *Conley* was actually cited in *Spurlin*, albeit to no particular logical effect, while *Graham* was not. Appellant therefore assumes that respondent intended to cite *Conley* rather than *Graham*.

the defendant. (47 Cal.2d at pp. 407-411.)

As demonstrated in the opening brief, this Court's analysis in *Bridgehouse* is consistent with the principle that the adequacy of provocation is measured only by the objectively reasonable person test and not by any particular categories or genesis of provocation. The analysis by which this Court resolved *Bridgehouse* did not adopt or follow common law interpretations of other jurisdictions as *Spurlin* did. Rather, this Court focused not on the source of each provocative event, but on the defendant's state of mind and whether the series of events in that case would have provoked a reasonable person to react out of passion, without reflection and with reason and judgment obscured, as *Logan* and *Valentine* had instructed. *Bridgehouse* thus held that "as a matter of law . . . under the circumstances here presented there was adequate provocation to provoke in the reasonable man such a heat of passion as would render an ordinary man of average disposition likely to act rashly or without due deliberation and reflection." (*Ibid.*)

Respondent also argues that regardless of *Spurlin's* questionable rule, the evidence does not support voluntary manslaughter on Counts Two and Three. (RB 104-106.) At its core, respondent's argument is that, "even if there was substantial evidence showing adequate provocation by Bloom, appellant's altercation with his father was not sufficient 'to arouse the passions of the ordinarily reasonable man' *in the direction of launching a homicidal attack against Josephine and Sandra, who were wholly uninvolved in the dispute.*" (RB 105 (emphasis added).) The italicized portion is not any part of any applicable standard, nor does respondent cite any authority for such an analysis. Instead, respondent has distorted the requirements of section 192 in a manner which combines a proposition recently rejected by this Court in *People v. Beltran, supra*, 56 Cal.4th 935, with the erroneous *Spurlin* rule. In

Beltran, this Court rejected the State's argument that for voluntary manslaughter, the provocation must have been such that it would provoke a reasonable person to kill. Instead, this Court once again confirmed that the applicable test is that stated in *People v. Logan* and confirmed in *People v. Valentine*:

> the fundamental of the inquiry is whether or not the defendant's reason was, at the time of his act, so disturbed or obscured by some passion—not necessarily fear and never, of course, the passion for revenge—to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.

(*Logan*, *supra*, 175 Cal. at p. 49; *Valentine*, *supra*, 28 Cal.2d at p.139; *Beltran*, *supra*, 56 Cal.4th at pp. 948-949.)

As demonstrated in the opening brief, nothing in that standard suggests that once a heat of passion has been triggered by adequate provocation or a sudden quarrel, sufficient to obscure the reasoning and judgment of a reasonable person in the same circumstances, any differentiation can or should be made between multiple victims in a single explosion of violence without an adequate cooling period sufficient to dispel that state of mind.

Respondent similarly argues that substantial evidence does not support a finding "that a reasonable person would have been provoked to act rashly and without deliberation *as to the killings of Josephine and Sandra*." (Resp.Br. 106 (emphasis in original).) Again, the italicized portion is an attempt to by respondent to insert an artificial dividing line into the analysis which has no rational correlation to a reasonable consideration of appellant's state of mind during a single explosion of violence. Respondent's analysis is but a slightly modified restatement of the erroneous *Spurlin* analysis and of no assitance to respondent in this case.

3. Retroactive Application of *Spurlin* Violated Due Process

In the opening brief, appellant demonstrated that *Spurlin's* conclusion that for heat of passion to support voluntary manslaughter instructions the relevant provocation must come from the victim was an "unforeseeable judicial enlargement" of Penal Code section 192, applied retroactively to appellant, in violation of his federal due process right to fair warning of what constitutes criminal conduct. (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 353; *see also Rogers v. Tennessee* (2001) 532 U.S. 451, 459.) Appellant demonstrated that nothing in the language of section 192 itself suggests in any way that voluntary manslaughter can occur only where the provocation came from the victim. Appellant further demonstrated that a review of this Court's interpretations of section 192, from 1946 through the time of the crimes in this case, shows that this Court had explicitly and thoroughly rejected any categorical restriction on what could constitute adequate provocation sufficient to negate malice. Rather, this Court, without deviation from *People v. Valentine* in 1946 through the time of the homicides in this case, held that the sole test was whether under the circumstances, the provocation was sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection, and from this passion, rather than judgment. (See *People v. Valentine*, *supra*, 28 Cal.2d at pp. 136-144; *People v. Berry*, *supra*, 18 Cal.3d at p. 515; *People v. Borchers*, *supra*, 50 Cal.2d at p. 329; *People v. Bridgehouse*, *supra*, 47 Cal.2d at p. 409; see also *People v. Logan*, *supra*, 175 Cal. at p. 49.) Appellant demonstrated that neither CALJIC No. 8.42 as it read at the time of the crimes, nor as it was given at appellant's 1983 trial (1CTSuppII 38-44, 50-51, 215-216), nor the Use Notes for that instruction at

the time,[66] gave any indication that a categorical restriction on voluntary manslaughter based upon identity of victim and provoker applied. (Cf. *Clark v. Brown* (9th Cir. 2006) 450 F.3d 898, 915 ("no indication whatsoever in CALJIC 8.81.17, as it existed at the time of Clark's trial, that the concept of "concurrent" purposes in the context of special circumstance predated the California Supreme Court's decision in *Clark*.").)

Without directly addressing these points of appellant's argument, respondent relies instead upon the argument that, rather than constituting an unforeseeable change in the law, "*Spurlin* accurately analyzed California law and reached a conclusion in accord with the history of section 192 and the precedent interpreting that statute." (RB 104.)

Yet, in this section of respondent's argument, as with the argument in the previous section, respondent does not cite a single case which, after *Valentine* but prior to *Spurlin*, held or even suggested that under Penal Code section 192, the provocation sufficient to raise a heat of passion must come from the victim, or even that *Spurlin's* use of out-of-state common law precedent was appropriate to the analysis of that issue. Respondent's argument amounts to little more than a denial of appellant's argument without directly addressing or analyzing the actual arguments and authorities presented in the opening brief or providing any contrary authority.

Respondent's argument relies on *Spurlin* as consistent with prior precedent. As shown above, however, *Spurlin's* analysis and holding were novel and inconsistent with controlling California precedent. Respondent's argument that application of *Spurlin* did not violate appellant's due process rights therefore fails.

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[66] See CALJIC Nos. 8.40-8.44 (4th ed. 1979).

Appellant also noted in the opening brief that voluntary manslaughter instructions had been given at appellant's 1983 trial for offenses which occurred in April, 1982 and that further unfairness arose from the application of *Spurlin*, a 1984 case, to deny him voluntary manslaughter instructions at his 2000 retrial. Had his prior attorney provided effective assistance of counsel in that first trial, it is reasonably probable that such instructions would have resulted in a non-capital verdict. (AOB 360.) Respondent argues that the instructions at the first trial were erroneously based on diminished capacity, and that appellant had no right to the repetition of erroneous instructions. (RB 104, fn. 55.) Assuming arguendo that diminished capacity instructions would have been erroneous at the 2000 retrial, had appellant's prior counsel effectively investigated and presented appellant's available defenses at the 1983 trial, voluntary manslaughter instructions at the time would not have depended upon diminished capacity, but would have been supported by the evidence which was ultimately presented at appellant's second trial, of an explosion of violence over a matter of seconds ignited by provocation and a sudden quarrel, resulting in three homicides. The instructions requested and erroneously refused in the retrial did not rely on diminished *capacity*, but on appellant's *actual* state of mind, and would have been unaffected by the demise of diminished capacity manslaughter prior to the homicides. Finally, at the time of appellant's 1983 trial, there was no statutory or appellate authority which would have supported rejection of such instructions on the ground that the provocation necessary to a heat of passion must necessarily come from each of the victims.

Therefore, the application of *Spurlin* at appellant's 2000 retrial for a 1982 crime was fundamentally unfair and continued the prejudicial effects of prior counsel's ineffectiveness. (Cf. *People v. Sixto* (1983) 17 Cal.App.4th

374, 381.) Thus, even assuming arguendo that *Spurlin* might otherwise be given retroactive effect, doing so in this case, to appellant's prejudice, denied appellant due process of law. (U.S. Const., 14th Amend.; see AOB Arg. I, Arg. I, *ante*.)

B. The Error Was Prejudicial and Requires Reversal of Counts Two and Three

Respondent addresses the issue of prejudice only under the *Watson* standard, relying only upon this Court's use of that standard in *People v. Wharton* (1991) 53 Cal.3d 522, 572. (RB 106.)

The error in *Wharton* to which this Court applied the *Watson* standard is not the same error as was made in this case, to which the *Chapman*[67] standard applies. In *Wharton*, voluntary manslaughter charges were given as to the single homicide count charged in that case. (53 Cal.3d at p. 572.) In this case, voluntary manslaughter charges were denied as to two of three charged homicides. In *Wharton*, the error was in failing to give a requested pinpoint instruction that provocation sufficient to reduce murder to manslaughter need not occur instantaneously, but may occur over a period of time. (53 Cal.3d at pp. 569-570.) In this case, the error was the refusal to give the jury instructions which provided the opportunity to find that Counts Two and Three constituted only voluntary manslaughter rather than murder. The errors are not equivalent and *Chapman* is the controlling standard. (See *People v. Thomas* (2013) 218 Cal.App.4th 630, 633, 641-643.)

Appellant demonstrated in the opening brief that the error was either structural or subject to the *Chapman* standard for federal constitutional error, and under either standard must result in reversal of the convictions on Counts

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[67] *Chapman v. California* (1967) 386 U.S. 18, 24.

Two and Three as well as of the special circumstance finding and penalty judgment. (AOB 361-365.) Respondent presents no direct argument that any error was not structural, no direct argument that any error was not of constitutional dimension, and no direct argument that any error was harmless beyond a reasonable doubt under *Chapman.*

The question of the proper standard to be applied was recently the focus of *People v. Thomas*, *supra*, 218 Cal.App.4th 630. After the Court of Appeal had applied *Watson* to a similar error and thereby affirmed a conviction, this Court remanded the case to the Court of Appeal "with directions to address defendant's contention that the trial court's refusal to instruct on heat of passion voluntary manslaughter constituted federal constitutional error." *Thomas* concluded that the erroneous refusal to give voluntary manslaughter instructions, which were supported by substantial evidence, constituted federal constitutional error.

> When malice is an element of murder and heat of passion or sudden provocation is put in issue, the federal due process clause requires the prosecution to prove its absence beyond a reasonable doubt. (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 704.) Thus, in California, when a defendant puts provocation in issue by some showing that is sufficient to raise a reasonable doubt whether a murder was committed, it is incumbent on the prosecution to prove malice beyond a reasonable doubt by proving that sufficient provocation was lacking. (*People v. Rios*, *supra*, 23 Cal.4th at p. 461–462 [citing *Mullaney*].) *Mullaney* compels the conclusion that failing to so instruct the jury is an error of federal constitutional dimension. (Cf. *Patterson v. New York* (1977) 432 U.S. 197.)

(218 Cal.App.4th at p. 643.) Consequently, the error was properly assessed under the standard set forth in *Chapman v. California*, *supra*, requiring reversal unless it appears beyond a reasonable doubt that the error did not contribute to the verdict. (218 Cal.App.4th at pp. 633, 641-643.)

Respondent's only argument about the effect of the error is that the jury's verdict on Count One necessarily resolved the underlying question of adequate provocation against appellant. Appellant had noted this point in the opening brief, explaining that the verdict on Count One itself cannot stand. As demonstrated in Arguments I, II, IX-XIII in the opening brief and in this reply brief, prosecutorial misconduct as well as continuing prejudice at the retrial due to former counsel's ineffective assistance and prejudicial errors in the admission of evidence, in instructions, and in cross-examination of Dr. Watson require the reversal of Count One. Without a valid conviction on Count One, the instructional errors on Counts Two and Three must be evaluated on the evidence presented, without regard to the verdict on Count One.

Nevertheless, in footnote 58, at RB 107, respondent contends that, "even if some unrelated error supported reversal of Count 1, appellant does not explain, nor can he, why the jury's rejection of the voluntary manslaughter theory upon which it was properly instructed should be disregarded." The only indication that the jury rejected the voluntary manslaughter theory on Count One is the verdict of first-degree murder on that count. If that verdict, general as it is, is sufficiently flawed to require its reversal, as is demonstrated in the opening brief and elsewhere in this reply brief, it no longer acts either as a valid finding of first-degree murder or a valid rejection of voluntary manslaughter as to Count One, and clearly cannot stand as a valid rejection of voluntary manslaughter on Counts Two and Three, for which the jury was not given instructions. Nor does respondent provide any explanation as to how it could be so considered.

C. Conclusion

As demonstrated in the opening brief, the trial court erred in refusing voluntary manslaughter instructions as to Counts Two and Three, thereby

violating appellant's rights to due process, to a fair jury trial, to present a defense and to a reliable determination of guilt, sanity and penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Osborne v. Ohio*, *supra*, 495 U.S. at pp. 122-124 and fn. 17; *Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *Mullaney v. Wilbur*, *supra*, 421 U.S. at pp. 698-699; *People v. Breverman*, *supra*, 19 Cal.4th at pp. 188-189, dis. opn. of Kennard, J.) While the error is structural, and thus requires reversal without assessment of prejudice, even under the *Chapman* standard the error cannot be found harmless beyond a reasonable doubt, and therefore requires reversal of the convictions on Counts Two and Three, as well as of the special circumstance finding and the penalty judgment.

In the alternative, if this Court does not reverse the sanity verdict (Arg. VII, VIII), or reinstate appellant's NGI plea on Counts Two and Three (Arg. IV, V), appellant suggests that the Court reverse the convictions on Counts Two and Three with directions that, should the People fail to re-file murder charges within 60 days of issuance of the remittitur, the judgment be modified to reflect appellant's conviction for voluntary manslaughter instead of second degree murder as to Counts Two and Three. (See *People v. Thomas* (2013) 218 Cal.App.4th 630, 646.)[68]

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[68] Modification of the two second degree murder convictions if the state does not refile these charges is particularly appropriate in light of Mr. Bloom's obvious mental vulnerabilities.

XII.

THE TRIAL COURT ERRONEOUSLY AND PREJUDICIALLY DIRECTED THE JURY TO FOCUS ON CONDUCT BY APPELLANT AS EVIDENCE OF GUILT

In the opening brief, appellant demonstrated that the trial court erred in giving both CALJIC Nos. 2.06 and 2.52. The instructions improperly duplicated more general instructions, in a way that directed the jury to consideration of inferences supporting the prosecution while ignoring equivalent inferences favorable to the defense. (AOB 368.) The instructions were unfairly unbalanced, partisan, and argumentative (AOB 368-372), and permitted the jury to draw irrational inferences about appellant's guilt. (AOB 372-375.) The errors in giving the instructions, under both the federal and state constitutions, impermissibly lightened the burden on the prosecution, undermined the reasonable doubt requirement, and denied appellant a fair jury trial, due process of law, equal protection, and reliable jury determinations on guilt, the special circumstances, and penalty. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16, & 17.) Appellant further demonstrated that the errors were not harmless beyond a reasonable doubt. (AOB 375-376.)

Appellant acknowledged in the opening brief that this Court has previously rejected similar challenges made to CALJIC Nos. 2.06 and 2.52, but provided authority and argument as a basis for reconsideration of those prior decisions.

Respondent relies upon this Court's previous holdings rejecting similar challenges to CALJIC Nos. 2.06 and 2.52, without presenting any substantive arguments in support of the challenged instructions. (RB 108.) These points are covered fully in the opening brief, and no further reply by appellant on

those points is necessary except to renew his request that this Court reconsider its prior rulings in this area and, accordingly, reverse his convictions and sentence of death.

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XIII.

A SERIES OF GUILT PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT, REQUIRING REVERSAL OF THE ENTIRE JUDGMENT

In the opening brief, appellant demonstrated that a series of instructions given at appellant's trial (CALJIC Nos. 2.01, 2.02, 2.21, 2.22, 2.27, 2.51 and 8.20), violated basic constitutional principles under the Sixth, Eighth and Fourteenth Amendments. (AOB 377-388.) Respondent relies on this Court's continued rejection of these claims in other cases and does not present any substantive arguments in support of the challenged instructions, or in contradiction to the arguments set forth in appellant's opening brief. (RB 108.)

Appellant has acknowledged this Court's rejection of substantially similar claims regarding these jury instructions, but in the opening brief provided federal constitutional and state authority and argument for reconsideration of its prior decisions. No further reply by appellant is otherwise necessary on the substantive claim except to request that this Court reconsider its prior rulings in this area and, accordingly, reverse his death judgment.

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XIV.

THE TRIAL COURT'S ERRONEOUS EXCLUSION FOR CAUSE OF FOUR PROSPECTIVE JURORS BECAUSE OF THEIR DEATH PENALTY VIEWS REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE

In the opening brief, appellant demonstrated that the trial court erroneously excused four prospective jurors as unqualified to sit on a capital jury. The record shows that the trial court found the four prospective jurors to be disqualified, not because of any inability to return a verdict of death regardless of the evidence of aggravation and mitigation, but because of their views in prejudging hypothesized findings of aggravation and mitigation. The voir dire actually conducted, and the answers obtained thereby, did not provide the trial court with adequate information from which to make a determination that any of the four prospective jurors was unwilling or unable to deliberate and reach a penalty verdict based upon a consideration of the aggravating and mitigating evidence which would be introduced and according to the instructions which they would be given. The trial court also improperly inserted its own idiosyncratic, and factually untenable views of potential mitigating evidence into its findings of disqualification. The result is that the trial court excluded these prospective jurors on a basis broader than an inability to follow the law or abide by their oaths. (See *Wainwright v. Witt* (1985) 469 U.S. 412 (*Witt*); *Witherspoon v. Illinois* (1968) 391 U.S. 510 (*Witherspoon*); *Adams v. Texas* (1980) 448 U.S. 38, 48 (*Adams*).) As a result, the death judgment must be reversed. (*Gray v. Mississippi* (1987) 481 U.S. 648, 658, 668 (*Gray*).)

Respondent presents unfounded claims of forfeiture and/or waiver; addresses claims not made in the opening brief in order to dismiss them; largely fails to address the claims and arguments actually made in the opening

brief; and otherwise obfuscates, minimizes, and mischaracterizes the record relevant to the actual claims raised by appellant. Appellant urges this Court to fully review the actual record of the voir dire of the prospective jurors at issue, including the argument and rulings on the prosecution's challenges rather than rely upon respondent's distorted view of and representations about that record.[69]

A. The Trial Court Erred In Dismissing Four Prospective Jurors Based On Their Responses To Voir Dire Questions That Asked For Prejudgment Based Upon Hypothesized Findings of Fact

As set forth above, appellant demonstrated in the opening brief that the trial court erroneously excused four prospective jurors as unqualified to sit on a capital jury because of their views in prejudging hypothesized findings of aggravation and mitigation as asserted and described by the prosecution.

At various points, respondent confuses the legal issue of whether the prosecutor's questions were proper voir dire questions with the significantly different *Witt/Witherspoon* issue of whether a prospective juror's answer to such questions is an adequate basis for a trial judge to excuse a juror for cause. Respondent notes, as did appellant, that voir dire questioning may inquire about "circumstances likely to be present in the case being tried." (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005; RB 185; AOB 394.) Respondent notes that the scope of such questioning is generally subject to the trial court's

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[69] For ease of reference the relevant portions of the record for each prospective juror are:

No. 1650: 15CT 3878-3906, 10RT 1242-1261;
No. 8050: 20CT 5371-5399, 11RT 1334-1344;
No. 3606: 19CT 5023-5051, 11RT 1467-1476;
No. 5339: 21CT 5456-5483A, 12RT 1614-1625.

discretion. (RB 184 [citing *People v. Stitely* (2005) 35 Cal.4th 514, 540].) Respondent's argument de-rails, however, in claiming at various points that appellant has forfeited any claim of error regarding the prosecutor's voir dire questions by failing to object to those questions at trial (RB 193-194, 197) or that any error was invited by the defense also asking questions about hypothetical mitigation and aggravation (RB 201). This argument misses the point. Appellant is not arguing that the *questioning itself* constituted error. Rather, appellant demonstrated that the error was in the trial court's *excusal* of each prospective juror based upon their *answers* to questions which asked the juror to state his or her penalty determination based on posited findings of mitigation and aggravation.

This Court has long recognized the distinction. As explained in the opening brief, this Court, in *People v. Fields* (1984) 35 Cal.3d 329, 356-357, made clear that where a trial court excludes a prospective juror on the ground that the juror would automatically vote against the death penalty in the specific case before him or her, the trial court "must take care to avoid violation of *Witherspoon's* command that a juror can be dismissed for cause only if he would vote against capital punishment 'without regard to any evidence that might be developed at the trial of the case ....' (391 U.S. at p. 522, fn. 21.)" (35 Cal.3d at p. 358, fn. 13.) Thus:

> If a prospective juror has been informed of the evidence to be presented, his asserted automatic vote may be based upon this information, in which case exclusion of the juror because of his views on the death penalty would violate *Witherspoon.* For example, a juror who announces that he would automatically vote against death in the case before him because he has been told (whether true or not) that the prosecution case rests entirely on circumstantial evidence is not casting a vote without regard to the evidence, and cannot be excluded under the *Witherspoon* formula.

(*Ibid.*)

The aim of voir dire concerning "circumstances likely to be present in the case" is not to seek prejudgment on assumed evidence or findings in aggravation and mitigation, but to assist in the determination of the views of the prospective juror regarding imposition of the death penalty in the abstract, "to determine if . . ., because of opposition to the death penalty, [the prospective juror] would 'vote against the death penalty *without regard to the evidence produced at trial.*' [Citations.]" (*People v. Clark* (1990) 50 Cal.3d 583, 597 (emphasis added).)

Respondent fails to address the extent to which the answers these jurors gave to the hypotheticals were not statements made without regard to the evidence but were specifically hypothesized findings regarding the evidence. Nor does respondent adequately address the extent to which the hypotheticals presented and the prospective jurors' answers did not realistically reflect the actual issues to be decided by the jury in this case, and were, if not irrelevant to a determination of the jurors' qualifications to serve, not dispositive of their qualifications.

Respondent cites no case in which a trial court has been upheld in excluding a prospective juror because the prospective juror indicated he or she would return a verdict of life without possibility of parole *if* that prospective juror found certain mitigating evidence, or even certain categories of mitigating evidence, to be true.

Respondent cites no case in which a trial court has been upheld in excluding a prospective juror because the prospective juror indicated he or she would return a verdict of life without possibility of parole *if* that prospective juror found certain mitigating evidence, or even certain categories of mitigating evidence, to be true where the evidence at issue is contested by the

parties during the trial, or specifically and personally rejected or disavowed by the defendant at the penalty phase as it was here.

In the opening brief, appellant demonstrated that while the prosecutor had the prospective jurors assume certain findings of mitigation involving (1) indisputable severe mental illness, (2) lifelong daily abuse and (3) effects of in utero exposure to drugs, once the jury was sworn the prosecution vigorously contested and belittled the evidence that appellant was mentally ill at all or that he ever was abused. Moreover, at the penalty phase, appellant himself, having been allowed to represent himself, denied emphatically that he was mentally ill. (AOB 397-398, fn. 116.) Respondent characterizes the hypothesized findings which the prosecutor posited to the prospective jurors as merely "circumstances likely to occur in the case." Yet respondent fails to acknowledge that the hypothesized facts were not an honest reflection of the prosecutor's own expectations of the tenor of the mitigating evidence.

Respondent makes no effort to rebut appellant's demonstration of the vast discrepancy between the hypothesized mitigation in the prosecutor's voir dire and the prosecutor's actual characterization of the evidence of abuse and mental illness in closing argument at penalty phase. (*Ibid.*) Respondent makes only the factually unsupported claim that "the prosecution never sought to negate these factors, but did contest their severity and their impact upon appellant's culpability." (RB 194, fn. 87.)

Respondent notes the "inherent danger" in a trial court's ruling on the scope of voir dire, risking appellate challenge for being either to restrictive or too permissive, and notes the "broad discretion" afforded the trial court in that area. Respondent miscasts the issue and misperceives the "danger inherent in this situation," at least in this case. The error here is not the questions themselves which asked for prejudgment, but the trial court's reliance on the

answers to those question – answers given based upon misleading and incomplete questions hypothesizing findings as to mitigation and aggravation from which to make a hypothetical prejudgment – as supporting or requiring the disqualification of the prospective jurors. (*People v. Fields* (1984) 35 Cal.3d 329, 358, fn.13.) Nevertheless, it is the former non-issue upon which respondent has chosen to focus.

Appellant has not challenged the voir dire as too restrictive, nor has appellant challenged the voir dire as too permissive. Rather, appellant has challenged the trial court's determinations that the prospective jurors at issue were not qualified to sit as jurors in this case.

Appellant does not dispute the trial court's discretion in managing the scope of voir dire. Respondent misses the mark in trying to extend this discretion and the deference afforded to the trial court on appellate review to the trial court's rulings. (RB 184 ["This Court's statements, upon which appellant relies, that a prospective capital juror may be dismissed only upon a showing of impairment 'in the abstract' must therefore be understood in light of the foregoing principles" of the trial court's discretion regarding the scope of voir dire.].)

The "broad discretion" which applies to the scope of voir dire does not apply to a trial court's decision to excuse a prospective juror as unqualified to serve. The trial court's ruling on a prospective juror's qualification to serve as a juror in a capital case is severely circumscribed by constitutional considerations, as explained in, e.g., *Witt* and *Gray*. While a trial court's ruling on a prospective juror's qualification is subject to deference from a reviewing court on appeal where the prospective juror's answers are equivocal or contradictory, the trial court's rulings must be supported by substantial evidence of a disqualifying state of mind. (*People v. Maury* (2003) 30 Cal.4th

342, 376-377.) This Court therefore must independently assess the jurors' responses on the record "as a whole," in the correct factual context, and in light of the proper legal standards. (See *Darden v. Wainwright*, *supra*, 477 U.S. at p. 176.) Neither deference nor substantial evidence will save a ruling based upon an improper legal standard. (See *Gray*, *supra*, 481 U.S. at p. 661, fn. 10 [deference to the trial court's factual findings "is inappropriate where, as here, the trial court's findings are dependent on an apparent misapplication of federal law"]; cf. *Witt*, *supra*, 469 U.S. at p. 427, fn. 7.)

Respondent attempts to rely upon some sort of super-deference to whatever ruling the trial court made, divorcing review of the trial court's ruling from the actual context of the voir dire. That is not the sort of deference due to a trial court's rulings. The case law upon which respondent relies does not support such a rubber-stamp review of the trial court's disqualification of the prospective jurors. Rather, the controlling case law, as set forth in the opening brief, clarifies the responsibility of trial courts and reviewing courts in capital cases to protect the rights of capitally charged defendants against the government's attempts to seat a jury uncommonly willing to sentence defendants to death.

Although the trial court's factual "determinations of demeanor and credibility" are entitled to deference by the reviewing court *(Wainwright v. Witt, supra*, 469 U.S. at p. 428), the Sixth Amendment requires that a trial court's legal resolution of the issue of juror bias be examined in "the context surrounding [the juror's] exclusion" in order to determine whether it is "fairly supported by the record" (*Darden v. Wainwright* (1986) 477 U.S. 168, 176; *Witt, supra*, 469 U.S. at p. 434). Excusal of a prospective juror cannot be upheld unless there is substantial evidence in the record supporting the trial court's ruling. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962.) Moreover, this

Court can accord no deference to a trial court's decision to discharge a prospective juror that is based on an erroneous legal standard. (See *Gray*, *supra*, 481 U.S. at p. 661, fn. 10 [deference to the trial court's factual findings "is inappropriate where, as here, the trial court's findings are dependent on an apparent misapplication of federal law"]; cf. *Witt*, *supra*, 469 U.S. at p. 427, fn. 7.)

Appellant has demonstrated that the trial court's ruling excusing these prospective jurors was not supported by substantial relevant evidence that they "would 'vote against the death penalty without regard to the evidence produced at trial.'" Appellant has likewise demonstrated that the trial court's ruling was based upon an erroneous standard. No deference is due to the trial court's ultimate rulings on the qualifications of the four prospective jurors at issue regardless of any discretion which might apply to the scope of the questions asked of the jurors. Nothing respondent presents supports a different conclusion.

Respondent suggests that perhaps the prospective jurors' answers might be construed as conflicting or equivocal, so that the trial court's excusal might qualify for deference. However, there is no indication that the trial court excused them because of equivocal or conflicting answers. The trial court did not determine that these prospective jurors were fundamentally opposed to returning a verdict of death, or unlikely to consider a verdict of death regardless of the evidence in aggravation and mitigation. (Contrast *People v. Solomon* (2010) 49 Cal.4th 792, 832.) Nor did the trial court rely upon or even refer to the prospective jurors' demeanor or resolve perceived equivocation. (Contrast *People v. Lynch* (2010) 50 Cal.4th 693, 730.) In any case, whether the prospective juror equivocated on how strongly assumed findings of mitigation, whether mental illness, lifelong abuse, or in utero drug exposure,

would affect the ultimate decision is irrelevant. Such equivocation prior to and even during penalty deliberations is within the scope of a capital juror's duties under the law.

The voir dire relevant to the trial court's rulings of disqualification consisted of questions asking for prejudgment of the penalty issues based upon hypothesized evidence or posited findings of aggravation and mitigation. Respondent does not address the established unconstitutionality in concluding that a prospective juror is disqualified on the basis of such hypothetical prejudgments. Rather, respondent suggests only that the questions, and therefore the rulings based upon the jurors' answers thereto, merely referred to "facts and circumstances likely to exist" in this case.

If the prospective juror expresses an inability to impose the death penalty because of a disagreement with an established legal principle connected with the case, e.g., that the particular special circumstance, if found true, makes the defendant death-eligible, or a belief that an undisputed fact connected with the case, e.g., the defendant's age, should automatically disqualify him from eligibility for the death penalty, then a challenge for cause might, but does not necessarily, lie. In upholding the dismissal of two jurors because they could not consider a death verdict in a felony-murder situation regardless of the evidence, this Court observed:

> The people of the State of California have determined that burglary-murder is a category of crime for which a defendant may be subject to death, depending on the circumstances. [Citations.] This prospective juror unequivocally stated his inability to follow the law in this respect. His position was an abstract one regarding the felony-murder special circumstance, not a matter of evaluating the particular facts of this case.

(*Pinholster*, 1 Cal.4th at p. 917; see also *People v. Ervin*, *supra*, 22 Cal.4th at pp. 70-71 [abstract inability to impose death on the hirer in a murder-for-hire

case]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1093-1095 [age of defendant].)

On the other hand, a prospective juror may not be excluded merely because specified mitigation might, or even probably would, lead that juror not to impose the death penalty, because the law permits consideration of mitigation evidence. (*People v. Heard, supra*, 31 Cal.4th at pp. 965, 967, fn. 10.)

Thus the four prospective jurors were excused not because of their views on uncontested facts or circumstances, such as age or the nature of the special circumstance, or guiding legal principles, but because of their responses to hypothesized findings of fact regarding aggravation and mitigation. The excluded jurors were not asked whether, and did not indicate that, mere presentation of evidence of abuse or mental illness would result in a verdict of life without parole. Rather, the one excluded juror (No. 1650) who was asked, indicated that she could evaluate the evidence and determine for herself whether, and to what extent the defendant suffered from mental illness. (See 10RT 1250-1251.)

Respondent does not cite any case in which a prospective juror's answers to questions about " circumstances likely to occur in the case" were found to be a sufficient basis for excusing a juror where the relevant "circumstances" involved contested mitigation evidence, or differed from the evidence and argument actually presented at the penalty phase in that case.

The state's position at trial and on appeal was to trivialize and even question the evidence of abuse, mental illness, dilantin toxicity, brain damage, cognitive deficits and developmental disability, and on those matters and to convince the jury that the defense evidence on these matters was not true. Yet they successfully obtained the dismissal of four prospective jurors by having them prejudge the penalty determination on the assumption that the defense

evidence which would be presented was powerful and would necessarily be found to exist by the jury.

The trial court's failure to fulfill its constitutional responsibilities by rejecting the prosecutor's challenges to these four prospective jurors, or any of them, requires reversal of the penalty judgment.

1. No. 1650

In the opening brief, appellant demonstrated that the trial court erroneously excused prospective juror No. 1650 on the basis of her answers to misleading and incomplete hypothetical questions. The prosecutor's descriptions of aggravating and mitigating circumstances, which she asked the prospective juror to assume, were factually misleading and omitted the prosecutor's intent to contest the factual bases of the assumed mitigation. The explanations also were legally misleading, given the lack of full instruction to the prospective juror and the inconsistency between the questions themselves and the instructions a sworn juror would be required to follow. In addition, the trial court inserted into the determination that prospective juror No. 1650 was disqualified from serving its own idiosyncratic, factually questionable, and medically incorrect, view of mental health evidence and issues.

Respondent argues that the prosecutor's questions merely presented the prospective juror with "circumstances likely to be present in the case being tried," citing *Kirkpatrick, supra* (RB 187-188), and that the prospective juror demonstrated that she was subject to dismissal by "unambiguously stat[ing] that she would not be able to vote for death if the defendant, even if sane at the time of the crimes, was shown to be 'mentally ill, severely or otherwise' at the penalty phase" (RB 187).

Respondent's characterizations of the voir dire of prospective juror No. 1650 omits, ignores, and otherwise glosses over substantial portions of the voir

dire relevant to the evaluation of the trial court's ruling that she was disqualified to serve as a juror in a capital case.[70] (See AOB 392-393.)

Respondent seeks to justify the trial court's ruling on an answer or two lifted out of context from the entire voir dire. Respondent fails to explain how a requested prejudgment based on hypothesized findings of mitigation and aggravation constitutes evidence that a prospective juror will make a decision without regard to the evidence or without regard to the balance of mitigation and aggravation. Respondent ignores the trial court's insertion of its own idiosyncratic, biased views on mental health evidence[71] into its assessment of

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[70] While not dispositive of the issue, two characterizations of the record should be specifically noted. Respondent characterizes this prospective juror's questionnaire responses as indicating "that her daughter had been taken into custody because of her mental health problems (15CT 3882)". (RB 185.) The cited page of the questionnaire shows the prospective juror's answer to a question inquiring whether she, or any friends or relatives had ever been confined in or visited any jail, prison or juvenile detention facility: "I was in Juvenile Hall as a minor with child[;] Daughter in Jail - Mental lock up." Respondent's characterization of that answer is only a guess as to why the daughter was *taken* into custody. It is notable that neither the trial court nor the prosecutor inquired of the prospective juror during voir dire as to the circumstances of her daughter's experience which resulted in her custodial status in "Mental lock up."

Respondent also states that this prospective juror's questionnaire responses indicate "that her daughter had been receiving treatment [for mental problems] since the age of 15 (15CT 3885, 3892)." A review of the answer to Question No. 41 at 15CT 3885 indicates that treatment was from age 16. Appellant assumes the misstatement was inadvertent. In any case, that discrepancy does not affect the determination of the error in excusing this juror.

[71] THE COURT: Well, I don't know. I hardly think I would call [hearing voices] a substantial mental illness. I would hardly think I would call that

(continued...)

the prospective juror's qualifications to serve.

Respondent posits that the particular words actually used by the trial court are irrelevant to this Court's review of the issue. Respondent argues:

> Appellant also attacks certain of the trial court's particular statements in granting the prosecution's challenge for cause as to prospective juror number 1650. (AOB 409, 414.) But, however the court phrased its ruling, the question on appeal is simply whether substantial evidence supported exclusion of the juror as impaired. (See, e.g., *People v. Griffin*, *supra*, 33 Cal.4th at p. 558; see also *People v. Cook* (2007) 40 Cal.4th 1334, 1343 [record reviewed de novo to determine whether substantial evidence supports trial court's determination].)

(RB 189, fn. 85.) Neither *Griffin* nor *Cook* supports respondent's suggestion that the trial court's actual expressed findings and its actual ruling based on those findings are irrelevant to appellate review of that ruling. In neither *Griffin* nor *Cook*[72] did this Court disregard stated findings or the specific statements of the trial court. It does not appear from this Court's opinion in *Griffin* that the trial court there made any specific findings or statements other than the ultimate ruling of disqualification of the jurors in question. In *Cook*, the issue was whether the trial court had sufficient information to determine the prospective juror's qualifications reliably where the issue was submitted

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[71] (...continued)

> substantial. I read that in so many psychiatric reports which are far from the issue of sanity or insanity. But I just read one today coming up on a sentencing where he hears voices and I don't think that falls under substantial. Hearing voices – there's too many that hear voices. (10RT 1258.)

[72] The entire discussion of the *Witherspoon/Witt* issue in *Griffin* is found at 33 Cal.4th at pp. 558-562. The entire discussion of the *Witherspoon/Witt* issue in *Cook* is found at 40 Cal.4th at pp. 1341-1344.

solely on a questionnaire without additional voir dire, and this Court found that it had sufficient information. (40 Cal.4th at pp. 1343-1344.) Again, it does not appear from this Court's opinion that there was any dispute in that case relating to the trial court's articulated findings.

Respondent relies substantially, as did the trial court, upon the prospective juror's response to a particularly misleading question by the prosecutor:

> But when pressed by the prosecutor, prospective juror number 1650 admitted that even taking into account all the aggravating and mitigating circumstances, and even if she believed the aggravating circumstances outweighed the mitigating circumstances, the sole factor of mental illness would cause her to vote against death. (10RT 1253-1254.) This response squarely satisfied the *Kirkpatrick* standard and disqualified prospective juror number 1650.

(RB 188.)

As pointed out in the opening brief, the hypothetical the prosecution presented to the prospective juror was, by omission, a misleading description of the juror's duties, and the judge did not provide the juror with an accurate description of the process by which mitigating and aggravating circumstances would be weighed by each juror in deliberations at penalty. Because a capital defendant's mental illness is a legitimate penalty phase factor in mitigation, the weight of which is to be determined by each individual juror, the prospective juror's answer is consistent with a belief that the weight of such mitigation outweighed the aggravation. The record does not support the conclusion that the prospective juror understood the legal difference, under instructions she had not been given, between that explanation of her answer and the specific phrasing of the question as hypothesizing a finding that aggravation outweighs mitigation.

The juror's answer also must be assessed in the light of the incomplete and misleading factual hypotheses presented by the prosecutor's questions. As explained in the opening brief, the prosecutor, as an advocate, hypothesized findings as to aggravation and mitigation which omitted aggravation she knew the juror would hear and characterized the mitigation in way the prosecutor herself did not believe to be true. The questions did not inquire into the prospective juror's ability to consider the evidence which would be presented and to make findings on that evidence according to legal principles supplied in instructions to be given by the judge.

The trial court also based the decision to excuse the prospective juror on its own idiosyncratic view of the strength (or weakness) of certain mitigating evidence, ascribing to the prospective juror "preconceived ideas as to what the criteria would be for mentally ill" because the prospective juror would consider evidence that the defendant was "hearing voices" as a symptom of "substantial/serious" mental illness. (10RT 1258, 1260.)

Respondent states, "In this case, appellant's alleged mental impairment, to some degree, was plainly 'a circumstance likely to be present' in all phases of the trial. (See *Kirkpatrick*, *supra*, 7 Cal.4th at p. 1005.)" (RB 187.) Respondent misunderstands this concept. Rather than "a circumstance likely to be present," the question of appellant's mental illness, as well as questions of what, if any abuse he had suffered, or any other concepts of mitigation which might arise at trial, are more accurately described (at least at the time of voir dire) as "an issue likely to be raised, and contested, at trial." Voir dire to explore whether the prospective juror could determine such issues impartially on the basis of the evidence to be presented and the instructions to be given was appropriate, and all indications were that the prospective juror could do so. The voir dire that led to her excusal, on the other hand, was not directed

at determination of the contested issues, but instead assumed the contested issues of mitigation and aggravation had been resolved, including a finding that appellant was mentally ill, and asked the prospective juror to prejudge the penalty determination based on those assumed findings. The prospective juror's answers to that question, while not favorable to the prosecution, did not establish disqualification under *Witt*. No impairment of the prospective juror's performance as a juror was demonstrated by her answers to the hypotheticals presented to her.

Respondent presents the fallback position that "even if some of the answers given by prospective juror number 1650 could be construed as conflicting or equivocal, the trial court's ultimate resolution of the matter, after having had the opportunity to question and assess the prospective juror, is controlling," citing *People v. Lynch*, *supra*, 50 Cal.4th at pp. 733, 735 and *People v. Solomon*, *supra*, 49 Cal.4th at p. 830. Those cases are inapplicable to the voir dire, the answers, and the ruling in this case. In *Lynch*, the trial court specifically stated that its rulings on challenges to the prospective jurors at issue were based in part on observations of the jurors' demeanor, and specifically found that the prospective jurors' "views on capital punishment would prevent or substantially impair the performance of [their] duties as a juror in accordance with the court's instructions and [their] oath" (50 Cal.4th at p. 730.) The trial court here made no such finding. Instead, the trial court stated:

> I'm not going to ask for a stipulation. On my own I'm going to excuse her. I do not think she can be fair, and a great deal of that is based on the fact that she said her daughter has mental problems, her daughter has seen healthcare professionals. Her daughter is on S.S.I. from a mental condition. I think she has preconceived ideas as to what the criteria would be for mentally ill and I'm going to excuse her for – on the court's motion for

cause.

(10RT 1260.) There is no indication that the trial court's determination that prospective juror No. 1650 was disqualified was based upon a resolution of inconsistent or equivocal answers. The trial court neither noted nor relied on nor described equivocation or inconsistency. Nor did the trial court here refer to prospective juror No. 1650's demeanor as relevant to any determination.

In *Solomon*, again, the trial court specifically referenced one prospective juror's long pauses in answering specific questions about the ability to return a death verdict in the abstract, and to another prospective juror's "equivocating and backing off" in response to questions about her ability to return a death verdict in an appropriate case. There are no equivalent indications that the trial court here considered the answers equivocal or conflicting, or that the trial court relied on prospective juror No. 1650's demeanor in resolving any equivocal or conflicting answers.

The trial court's ruling disqualifying juror No 1650 was not a finding about her feelings about the death penalty in the abstract, but about the prospective juror's beliefs about mental illness, and in specifics about which the trial court harbored incorrect opinions.

In appellant's case, the full record of the voir dire, including the argument on the challenge to the prospective juror, specific findings made by the trial court, and trial court's stated bases for excusing the juror demonstrate that the trial court excused the juror on the basis of an erroneous standard, on specific findings that were inadequate to sustain the ruling.

Respondent seeks to distinguish the trial court's error here from that in *People v. Heard* (2003) 31 Cal.4th 946, 959-968, by asserting that "Prospective juror number 1650 stated unambiguously that the fact of the defendant's mental impairment would cause her to vote against death,

regardless of the balance of aggravating and mitigating factors. (10RT 1248-1249, 1253-1254.)" (RB 189.) Respondent mischaracterizes the record. The prospective juror was unambiguous in stating that she would have to listen to all the evidence, and would be able and willing to decide based upon the evidence *if*, and *to what extent*, appellant might be mentally impaired, and thereafter make a penalty determination. That is not the equivalent of a decision made "regardless of the balance of aggravating and mitigating factors."

Even considered separately, out of the context of the other questions, the prospective juror's answers demonstrated not a decision to be made *regardless* of the balance of aggravating and mitigating factors, but *because* of a balancing of hypothetical findings of aggravating and mitigating factors she was asked to make.

Respondent relies on *People v. Vines* (2011) 51 Cal.4th 830, 852-854, to suggest that the prospective juror's responses to the prosecutor's hypothetical findings of mitigation and aggravation were sufficient to leave the trial court with a "definite impression that prospective juror's performance would be impaired." (RB 188; see also 194, 198.) *Vines* involved a dissimilar situation. In *Vines*, a prospective juror was equivocal about her ability to return the death penalty in *any* case, *regardless* of the evidence. The trial court properly excused her, and this Court deferred "to the trial court's implicit determination regarding her state of mind." (51 Cal.4th at p. 854.) Such is not the case here. Rather than equivocate, prospective juror No. 1650 was consistent in her responses that she would have to hear and consider the evidence before making a determination about penalty, that she would follow the instructions from the trial court and would be able to return whichever she determined was warranted based on that evidence and those instructions. (See

AOB 412-413.) There is no evidence of equivocation or inconsistency. Instead, the voir dire of prospective juror 1650 which led to the trial court's ruling consisted almost entirely of a series of questions concerning assumed facts or assumed findings of mitigation and aggravation. Her answers were based upon what she was told to assume. She was asked to prejudge her penalty decision based upon those assumed findings. She was asked to balance those assumed findings of mitigation and aggravation and did so. Her answers to those questions necessarily involved a balancing of mitigation and aggravation, rather than any refusal to do so.

2. No. 8050

In the opening brief, appellant demonstrated that the trial court excused prospective juror No. 8050 based upon his answers to the prosecutor's questions positing facts in both aggravation and mitigation and asking for prejudgment of the penalty decision based on those hypothesized facts. (AOB 415-421.)

Respondent defends the trial court's excusal of the prospective juror on the grounds that he gave answers which could have supported a finding of disqualification before the prosecutor presented him with hypothetical facts and finding and requested that he prejudge the case on those hypotheticals. (RB 192-193.) However, this argument and respondent's review of the record distorts the context of the voir dire and ignores the trial court's initial and crucial *denial* of the prosecution's challenge for cause based on those answers.

Prior to the prosecutor's hypothetical prejudgment questions, the trial court denied the prosecutor's challenge, finding that she had not established that the prospective juror was disqualified. (11RT 1342.) The trial court then allowed the prosecutor further voir dire. In response, the prosecutor asked a question which posited specific mitigating evidence and asked of the

prospective juror if there is any chance he would return a death penalty. The prospective juror responded, "No. Chance. *Not with that scenario*. No way." (11RT 1343 (emphasis added).) The prospective juror then reiterated to defense counsel that he could not vote for the death penalty "with all the circumstances of the life that was just described to me." (11RT 1344.) It was the hypothetical prejudgments that changed the trial court's ruling from a denial to a grant of the challenge. The focus of the prosecution's subsequent voir dire, which was intended to and successfully did change the trial court's ruling, was on hypothesized evidence and findings. That the finding of disqualification was based on those questions and the prospective juror's answers to them is demonstrated indisputably by the chronology and context of the entire voir dire and the change in the trial court's ruling.

Respondent focuses first on aspects of the questionnaire and voir dire which arose before the trial court initially denied the challenges and which the trial court thus ruled did *not* sufficiently establish disqualification. Respondent argues that various answers in the prospective juror's questionnaire and the pre-challenge voir dire made the prospective juror subject to dismissal for cause for that reason alone. (RB 193.) In a footnote, respondent "acknowledges" that "the trial court did not excuse prospective juror number 8050 based on that rationale itself." (RB 193, fn. 86.) In fact, the trial court *denied* the challenge on that rationale, although allowing further voir dire. If deference is due to a trial court's findings, it is due to that first finding in this case. The change from denial to grant of the challenge occurred as a result of the prospective juror's answers to the questions asking for prejudgment, and was clearly based on the prospective juror's answers to those questions.

Respondent suggests that this Court need not defer to the trial court's initial denial of the challenge based on the responses upon which respondent

now seeks to rely. Respondent suggests, implicitly at least, that this Court ignore *that* finding and instead defer only to respondent's characterization of the trial court's ultimate finding of disqualification, and to do so on the basis of record facts which the trial court specifically found insufficient to establish disqualification. (RB 193, fn. 86.) For this unsustainable proposition, respondent cites *People v. Griffin* (2004) 33 Cal.4th 536, 558, and *People v. Cook* (2007) 40 Cal.4th 1334, 1343. Neither of the cases cited justify the distortion of appellate review which respondent seeks. Appellant's discussion of *Griffin* and *Cook* in the context of juror 1650 applies with equal force here. (See pp. 223-224, *supra*.)

Respondent argues that because the defendant did not object to the prosecutor's hypothetical question asking for prejudgment, and because defense counsel added to the hypothetical, appellant has waived his claim, citing *People v. Visciotti* (1992) 2 Cal.4th 1, 47. (RB 193-194.) As demonstrated above, respondent's claim of waiver depends upon a mischaracterization of appellant's argument as directed to the questions asked rather than to the trial court's determination of disqualification based on the prospective juror's responses. There is no waiver. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 643.)

Respondent argues that the hypothetical question presented by the prosecution did not present facts so specific about the potential likely mitigating and aggravating evidence as to require the prospective jurors to prejudge the penalty issue based on that summary, citing *People v. Cash* (2002) 28 Cal.4th 703, 721-722. (RB 194.) Respondent characterizes the hypothetical as merely presenting "relatively generic 'circumstances likely to be present.'" Respondent's view of the record as presenting "only three generic factors likely to be present in the case" (RB 194) is squarely

contradicted by the key hypothetical itself. The prosecutor's actual question as well as the entirety of the prosecution's voir dire after the trial court initially denied the challenge, is quoted in the opening brief, although not in respondent's brief:

> Q Sir, if we go into the penalty phase of this case and *you have heard that the defendant was abused his whole life, and you have heard that the defendant has had physical problems, and if you hear that the defendant has mental problems, has had mental problems, if you hear as I expect you will that the defendant was even having – even in utero was having medical things done to him by drugs his mother was taking, and you hear how badly his father abused him his whole life, his father being one of the victims in this case,* and then you're given the instruction by the judge that if the aggravating circumstances substantially outweigh the mitigating circumstances you may vote for the death penalty, okay? And you go back into the jury room is there any chance you're going to come out of there with a death penalty?
>
> A No.
>
> Q No chance?
>
> A No chance. *Not with that scenario.* No way.

(11RT 1343 (emphasis added); AOB 418.) There is nothing "generic" about the enumerated factors; the question outlines some of the mitigating evidence which might have been expected in appellant's case, and which, unknown to the juror, the prosecution intended to contest. The question cast these facts as undisputed information the jurors would hear. The prosecutor specifically asked for – and received – prejudgment on those presumed findings. The prospective juror's responses were not an indication of views on the death penalty in the abstract, or even a type of evidence in the abstract, which would impair the prospective juror's ability to follow the court's instructions. Rather, those responses were wholly consistent with a determination made after

consideration of the evidence and weighing of the aggravating and mitigating circumstances according to the trial court's instructions. The prospective juror's responses were not disqualifying.

Respondent provides no argument or rationale for differentiating between "factors likely to be present" and "a summary of the mitigating and aggravating evidence likely to be present." Respondent instead simply claims the voir dire was the former and "cannot be said" to be the latter. (RB 194.) In any case, however, the character of the questions is not dispositive. Rather the issue here is whether the trial court excused the prospective juror not because of his views on the death penalty in the abstract but because of his views on the assumed mitigation and aggravation, without regard to the extent to which that mitigation or aggravation might be contested by the parties.

In *Cash*, *supra*, 28 Cal.4th at pp. 721-722, this Court addressed the scope of voir dire, not grounds for dismissal of a prospective juror as unqualified, or the federal constitutional limitations on the state's ability to disqualify jurors for their capital punishment views. In *Cash*, this Court held that because:

> defendant's guilt of a prior murder (specifically, the prior murders of his grandparents) was a general fact or circumstance *that was present* in the case and that could cause some jurors invariably to vote for the death penalty, regardless of the strength of the mitigating circumstances, the defense *should have been permitted to probe the prospective jurors' attitudes as to that fact or circumstance*.

(28 Cal.4th at p. 721 (emphasis added).) In *Cash*, unlike the aggravation and mitigation here, the existence of the prior murders was not contested. Appellant has not argued that the prosecution should not have been permitted to probe the prospective jurors' attitudes as to expected aggravation and mitigation. Appellant is arguing, and *Cash* does not address, that "probing"

attitudes which amounts to calling for prejudgment on hypothesized evidence or findings of mitigation and/or aggravation, whether contested or not, is not a legitimate basis for a trial court's determination that a prospective juror is disqualified. As explained in the opening brief and above, this Court, in *People v. Fields*, *supra*, 35 Cal.3d 329, made clear that trial courts must take care not to disqualify a juror based on his or her opposition to the death penalty based on specific testimony or evidence that might be presented in the case before the juror. (*Id.* at p. 358, fn. 13; AOB 393-394.) Respondent neither contests the holding from *Fields*, nor addresses appellant's argument thereon.

Respondent cites *People v. Schmeck* (2005) 37 Cal.4th 240, 262, as authority that defense counsel's submission of the question without argument suggests that counsel agreed that the juror was excusable. (RB 193.) This argument depends upon a distortion of the record. In fact, defense counsel did argue the matter, successfully. (11RT 1341-1342.) After the trial court's initial denial of the challenge, and only after further voir dire by *both* the prosecutor and defense counsel, defense counsel eventually submitted the matter. Nothing more was needed. This Court cannot reasonably interpret that "submission" as having conceded the merits of the prosecutor's challenge.

3. No. 3606

In the opening brief, appellant demonstrated that the prosecutor's challenge to prospective juror No. 3606, and the trial court's ruling granting the challenge, were based upon the prospective juror's answers to questions which posited findings of aggravation and mitigation and asked for prejudgment of the penalty decision on the basis of those posited findings. In other words, the record demonstrates that the prosecutor challenged prospective juror No. 3606 and the trial court excused her not because she had moral or other scruples against the death penalty in the abstract that might

impair her ability to follow the court's instructions, but because she might vote for life without parole if the defense successfully convinced the juror to credit a case in mitigation which the prosecution characterized as showing that appellant was "severely mentally ill," had "profound mental problems," and was "constantly abused" by his father "every day of his life for the first 18 years of his life." As demonstrated in the opening brief, the excusal of this prospective juror was error requiring reversal of the death judgment. (AOB 421-427.)

Initially, respondent repeats the meritless argument that defense counsel's failure to object to the prosecutor's voir dire forfeited any objection concerning that voir dire. (RB 197.) Respondent cites *People v. Visciotti*, *supra*, 2 Cal.4th 1, in support of this forfeiture argument. In *Visciotti*, however, the defendant's complaint on appeal was that the prosecutor improperly used voir dire "to indoctrinate prospective jurors and preargue his theory of the case" and to "ask[] each juror to commit himself or herself in advance to a position." (*Id.* at p. 46.) Recognizing that the scope of the inquiry permitted in voir dire is within the discretion of the trial court, this Court noted that any claim of abuse of discretion as to questions which arguably exceed the proper scope will be deemed waived in the absence of a timely objection. (*Id.* at p. 48.) As demonstrated above, this argument misses the issue of the judicial, not prosecutorial, error presented in the opening brief. *Visciotti* neither altered the legal standard set forth in *Witt* which governs the ultimate exclusion of a prospective capital juror, nor imposed a requirement of an objection to specific questions on voir dire to preserve a claim of *Witt* error on appeal. (See *People v. McKinnon*, *supra*, 52 Cal.4th at p. 643.)

Respondent asks this Court to uphold the trial court's ruling on the ground that the prospective juror "indicated her impairment" when she

"unambiguously stated that she could not vote to impose the death penalty [if defendant established that he was mentally impaired], regardless of the degree of mental illness. (11RT 1473, 1476.)" (RB 197.) From this answer, respondent concludes that the prospective juror established "that the sole factor of mental illness – a factor likely to be present in the case – would cause her to invariably vote against the death penalty without regard to the strength of aggravating and mitigating circumstances." (RB 197.) Citing *Kirkpatrick*, *supra*, 7 Cal.4th at p. 1005, respondent contends that the prospective juror was thus subject to exclusion of cause. (RB 197.)

Respondent's logic is flawed. A statement by a prospective juror that, *if* the defendant's evidence establishes to her satisfaction a substantially mitigating fact, the prospective juror would assign substantial, even overwhelming weight to the mitigating fact is *not* a statement that her vote would be *without regard* to the evidence or to the strength of the aggravating and mitigating circumstances. Rather it is a statement which assumes the juror has, within the hypothetical, evaluated the evidence and weighed the evidence in aggravation and in mitigation, in keeping with the juror's oath and responsibilities under the trial court's instructions. It is a qualifying, not a disqualifying, statement. This is especially true where, as respondent acknowledges, prospective juror No. 3606's answer was given "[a]gainst the background of the hypothetical aggravating and mitigating factors presented by both parties." (RB 197.) In other words, the answer was given *with regard for*, not disregard of, the balance of the hypothesized mitigation and aggravation. This Court has made clear that such a position taken by a juror is insufficient to sustain a finding of disqualification. Excusal for cause is only permissible where a "juror's reluctance to impose the death penalty was based not on an evaluation of the particular facts of the case, but on an abstract

inability to impose the death penalty" in the type of case before him or her. (*People v. Ervin, supra*, 22 Cal. 4th at p. 70, citing *People v. Pinholster, supra*, at p. 916; *People v. Fields, supra*, 35 Cal.3d at pp. 356-357; see AOB 393-397.) The prospective juror's answers did not indicate a disqualifying abstract inability to impose the death penalty in *this type* of case.

Respondent's reliance on *Kirkpatrick* and a characterization of the prosecutor's description of the mental health mitigation as merely a "circumstance likely to be present in the case" suffers from similar flaws. Respondent fails to acknowledge that the issue of appellant's mental health was a contested one. The prosecutor contested the validity, reliability, and relevance of the defense evidence on the subject at every stage of the proceedings after the jury was sworn. By the time of the penalty phase, appellant himself was contesting the validity of the evidence that he was mentally ill. (See AOB 398-399, fn. 116.) Yet the prosecutor did not ask if the prospective juror was willing or able to evaluate and consider contested evidence relevant to appellant's mental health according to the court's instructions. Instead, the prosecutor jumped ahead to hypothetical *findings* or assumptions that the evidence established that appellant *was* mentally ill, "very disturbed," and that he suffered lifelong daily abuse at the hands of his father, and in utero effects of drugs taken by his mother. These were not simply "circumstances likely to be present in the case." These were detailed case-specific mitigating circumstances the juror was to assume were undisputed. If a particular juror found that circumstance to be established by the evidence, he or she would be required by the trial court's eventual instructions to consider it – and give it whatever weight he or she deemed appropriate in reaching a penalty decision. Nothing in *Kirkpatrick* suggests that the prosecution is allowed to present to prospective jurors a hypothetical

mitigation case, which it intends to dispute at trial, and then exclude from the jury as unqualified any prospective juror who indicates that, if the defense establishes such mitigation to that juror's satisfaction, that mitigation will be persuasive or even conclusive on the issue of penalty. Such indications from a prospective juror are not made without regard to the evidence, not indicative of views of the death penalty "in the abstract," but are based on "an evaluation of the particular facts of the case." (*People v. Ervin, supra*, 22 Cal.4th at p. 70.) Such indications do not demonstrate a disqualifying state of mind, and will not support a finding of disqualification.

Respondent concedes that the prospective juror's answers to questions asking for prejudgment based on hypothesized mitigation were the basis for the trial court's excusal. Where respondent's argument strays from the controlling federal case law is in the claim that this demonstrated the prospective juror's impairment. (See RB 197 ["Moreover, with respect to prospective juror number 3606, the critical portion of the voir dire – *the point at which she indicated her impairment* was when she was asked if she could vote for death *if the defendant established that he was mentally impaired.* Both the prosecution and the defense asked the question, and the prospective juror unambiguously stated that she could not vote to impose the death penalty *in that circumstance*, regardless of the degree of mental illness. (11RT 1473, 1476.)"] (emphasis added).) Respondent thus contends that the prospective juror "indicated her impairment" by stating that *if* she determined that the defense *established* the specific mitigating circumstance of mental illness, she would not vote for death. The "indication," however, was critically qualified. There is no indication that the prospective juror could not or would not evaluate the evidence presented and determine pursuant to the court's instructions whether or not the defense established that mitigating

circumstance. No questions were asked of the prospective juror concerning that issue. Rather the questions, upon which the trial court ruled, specified an *assumption of a finding* of that mitigating circumstance.

This highlights the further fallacy in respondent's reasoning: the prospective juror's finding of that specific mitigating circumstance would not be made "without regard to the strength of aggravating and mitigating circumstances." Rather, that finding, if the prospective juror were to make it after hearing the evidence, would itself be integral to the prospective juror's *evaluation* of the strength of aggravating and mitigating circumstances, not without regard to the strength of those circumstances. It would be wholly compatible with the court's instructions and the law.

Prospective juror No. 3606's answers never suggested she would return a verdict of life without parole without considering the evidence in aggravation as well as in mitigation. In fact, throughout her voir dire, and in her questionnaire answers, she consistently wanted to know all the relevant circumstances before making a decision. (19CT 5036-5037, 5040; 11RT 1470, 1473-1476.) She confirmed on voir dire that, even if instructed that she would not be required to return a verdict of death, she could probably do so if she felt that was appropriate (11RT 1470), and her responses to the prosecutor's hypotheticals were consistent with a reasonable, qualified juror following the court's instructions and coming to a penalty verdict after fully considering all the relevant aggravating and mitigating evidence. She confirmed in her questionnaire that she could set aside her feelings and follow the court's instructions. (19CT 5036.) Nothing in her answers on voir dire conflicted with those responses.

Respondent again cites *People v. Schmeck, supra*, 37 Cal.4th at p. 262, as authority that defense counsel's submission of the question of prospective

juror No. 3606's qualification to serve without argument suggests that counsel agreed that the juror was subject to excusal for cause. (RB 198.) In the circumstances presented here, however, counsel had no duty to do more. The burden was on the prosecutor to establish the juror's disqualification, not upon defense counsel to establish qualification. This Court cannot reasonably conclude on this record that counsel's submission was a statement of agreement that the prospective juror was legally disqualified from serving.

4. No. 5339

Appellant demonstrated in the opening brief that the trial court excused prospective juror No. 5339 based upon his answers to the prosecutor's questions positing "findings" in both aggravation and mitigation and asking for prejudgment of the penalty decision based on those hypothesized findings. (AOB 430-432.)

Respondent argues that the prospective juror's answers were "clear and unequivocal: so long as the option for life without parole remained a permissible alternative, he would always vote for that alternative" (RB 200) and that "the key consideration focused on by the prosecutor was prospective juror number 5339's inability to vote for death so long as life without parole remained an option." (RB 201.)

Respondent's characterization of the "key consideration" on which the prosecutor focused is not supported by actual record of the voir dire, which again shows the prosecutor's reliance upon assumed facts and findings of aggravation and mitigation as the basis for her challenge to this prospective juror.

As respondent acknowledges, this prospective juror "initially appeared 'neutral' with respect to the penalty." (RB 200.) Upon her opportunity to voir dire the prospective juror, the prosecutor first elicited that, although the

prospective juror had told defense counsel that he would weigh aggravation and mitigation, and that he could return the verdict that he thought was proper and just, whether it was death or life without parole, he was "getting a little bit confused about some of the things." (12RT 1623.) The prosecutor did not clarify the point of confusion. Instead, the prosecutor told the prospective juror he would never have to vote for the death penalty, that the judge would instruct him that he could only consider the death penalty if he found that aggravation substantially outweighed mitigation. The prosecutor then asked:

> Q: So even if you find that to be true, even if you find the aggravating factors -- the fact that three people are killed and the fact that one of them's an eight-year-old girl and the fact that they were relatives or whatever other things about those crimes you find aggravating, – even if you find that substantially outweighs the evidence that you hear from the defense about the defendant's horrible childhood and the fact that he's mentally ill and the fact that he's been abused his whole life, if you are given the choice of voting for life without parole, would you ever vote for death?
>
> A: No, I don't think so.
>
> [Prosecutor]: So are you telling us now that as long as there's an option of life without parole you will always choose that over the death penalty?
>
> A: Yes.
>
> [Prosecutor]: Thank you.
>
> [Defense Counsel]: Submitted.
>
> [Prosecutor]: Challenge for cause.
>
> THE COURT: All right. I'm going to excuse you.

(12RT 1624-1625.)[73]

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[73] The entirety of the prosecutor's voir dire of this prospective juror (continued...)

The context of the prosecutor's voir dire demonstrates that the prosecutor, whose burden it was to establish the prospective juror's disqualification, was relying upon the prejudgment she elicited from the prospective juror, based upon the hypothesized "facts" and "findings" which she presented him, as the basis for her challenge. There is no factual foundation for a conclusion that the challenge was based on anything else, or that the trial court granted the challenge for any other reason. If, as is true under the law, such prejudgment on hypothesized facts and findings is a legally insufficient basis for the exclusion of a prospective juror under the state and federal constitutions, the only conclusion based upon this record is that the trial court committed error requiring reversal of the death judgment in this case.

The insufficiency of the voir dire to establish this particular prospective juror's disqualification stems from more than the fact that the juror was given hypothesized facts and findings and asked to prejudge the penalty decision. In addition that prejudgment was based on misleading hypotheticals and incomplete instruction from which the trial court could not reasonably find that the prospective juror's answers reflected a disqualifying state of mind concerning the death penalty in the abstract. The only "instruction" which the prospective juror received came from the prosecutor to the effect that "you will never have to vote for the death penalty," and that "You may only consider the death penalty if you find that the aggravating or bad things about the defendant substantially outweigh the good things about the defendant." (12RT 1624.) No instruction was given about the meaning of mitigation or aggravation, or

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[73] (...continued)
occupies approximately 1 1/3 pages of reporter's transcript.

how findings of mitigation or aggravation were to be made or weighed in making a penalty determination. There is no basis for assuming that the prospective juror understood the prosecutor's hypothetical that he had "found" aggravation to "outweigh" mitigation in terms consistent with the instructions which he would have eventually been given before actually deliberating in a penalty phase. There is also no basis for concluding on this record that the prosecutor's questions regarding the prospective juror "ever" voting for death or "always" voting for life were understood by the prospective juror as presenting abstract considerations divorced from the hypothesized "facts" and "findings" of aggravation and mitigation.

Moreover, the hypothesized "facts" and "findings" were misleading, failing to account for the contested nature of the "facts," as explained above. The hypothetical question posited findings of aggravation and mitigation and asked the prospective juror to prejudge the penalty based upon those purported findings. The juror was not asked by the prosecutor whether he could fairly and impartially evaluate and consider the evidence before *making* such findings.

Respondent ignores the lack of instruction or explanation before the juror gave the answers upon which respondent relies. Rather, respondent asserts that the prospective juror was instructed fully and understood the import of the questions being asked and the answers given, claiming that the disqualifying answers came after "the procedure governing the jury's determination of penalty was finally made clear to him during voir dire" (RB 200.) The record does not support a finding that "the procedure governing the jury's determination of penalty was . . . made clear to" the prospective juror. The prospective juror had not been instructed concerning the scope of the weighing process involved in determining what penalty was warranted. The

prospective juror was not informed fully that a single mitigating circumstance could be found by a juror to outweigh all aggravating circumstances. Returning a verdict of life without parole under the findings of mitigation and aggravation hypothesized for the juror would satisfy his oath and the court's instructions. Nothing in prospective juror No. 5339's responses to the hypothetical questions demonstrated any additional or deeper antipathy to the death penalty in the abstract than that disclosed by his previous answers. The hypothetical itself presumed the juror's consideration of the aggravation and the mitigation before reaching a verdict. The juror's answer cannot, therefore, be interpreted as indicating that he would return a life-without-parole verdict under all circumstances and without regard to the aggravation. Thus, prospective juror No. 5339's answer to the prosecutor's hypothetical was not disqualifying under *Witt*.

Respondent presents a fall-back position, that if the answers could be construed as conflicting or equivocal, the trial court's ultimate resolution of the issue is controlling. (RB 200-201.) Appellate deference is due to a trial court's ruling only where that ruling is based on the trial court's resolution of conflicting or equivocal responses by a prospective juror. (*People v. Maury*, *supra*, 30 Cal.4th at pp. 376-377.) No such deference is due where, as here, the trial court's ruling is based on voir dire responses which, as a matter of law, are not disqualifying.

Appellant has already addressed respondent's waiver argument predicated on *Schmeck* above. Respondent's additional "invited error" argument is predicated on respondent's incorrect view that the error centers in the prosecutor's questions rather than the trial court's erroneous *Witherspoon/Witt* ruling.

B. Conclusion

No substantial evidence supports the trial court's finding that prospective juror Nos. 1650, 8050, 3606 and 5339 were substantially impaired in their ability to comply with their oaths as jurors. Instead, the record demonstrates that the trial court's rulings that the jurors were disqualified were based upon an erroneous legal standard. The trial court's findings are due no deference from this Court and the judgment of death must be reversed. (*Gray*, *supra*, 481 U.S. at p. 661, fn. 10, 668.)

Respondent argues that this Court should reconsider whether automatic reversal of the death judgment is the appropriate remedy, citing the Chief Justice's concurring opinion, joined by Justices Baxter, Chin, and Corrigan, in *People v. Riccardi* (2012) 54 Cal.4th 758, 840-846 (conc. opn. of Cantil-Sakauye, C.J.). In that concurring opinion, the Chief Justice posited that the United States Supreme Court's opinion in *Gray* was in tension with its decision a year later in *Ross v. Oklahoma* (1988) 487 U.S. 81 and suggested that further elucidation from the High Court on the subject would be of assistance. (54 Cal.4th at pp. 840-846, Cantil-Sakauye, J., concurring.) Justice Liu wrote a separate concurring opinion explaining that *Ross* distinguished itself from *Gray* on a clear and valid ground. (*Id.* at pp. 846-848, Liu, J., concurring.)

However, in *Riccardi*, this Court unanimously held that the dismissal of a juror for cause based on her views concerning the death penalty and her ability to serve did require reversal of the ensuing death sentence:

> Although this error did not result in the seating of an unqualified juror, it requires automatic reversal of defendant's sentence of death under existing United States Supreme Court precedent. (*Gray v. Mississippi* (1987) 481 U.S. 648, 659-667, 107 S.Ct. 2045, 95 L.Ed.2d 622 (*Gray*) (opn. of the court); *id.*, at pp. 667-

668, 107 S.Ct. 2045 (plur. opn.); *id.*, at p. 672, 107 S.Ct. 2045 (conc. opn. of Powell, J.).)

(*Riccardi*, *supra*, 54 Cal.4th at p. 778.) To the same effect: "[T]he erroneous excusal of a prospective juror for cause based on that person's views concerning the death penalty *automatically* compels the reversal of the penalty phase without any inquiry as to whether the error actually prejudiced defendant's penalty determination." (*Riccardi*, *supra*, 54 Cal.4th at p. 783, original emphasis.)

Until the high court indicates otherwise, *Gray* controls the result here. Indeed, in a unanimous *post-Riccardi* decision authored by the Chief Justice, this Court again acknowledged that *Gray* continues to control the outcome of cases such as the one at bar. (*People v. Whalen* (2013) 56 Cal.4th 1, 26.) If the trial court erred in excluding any of these four prospective jurors for cause, as appellant has demonstrated, the consequences of that error are governed by settled law, and automatic reversal of the death judgment is compelled under that law.

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XV.

THE TRIAL COURT'S INSTRUCTION AT THE PENALTY PHASE TO DISREGARD INSTRUCTIONS GIVEN AT OTHER PHASES OF THE TRIAL, AND THE FAILURE TO GIVE OTHER NECESSARY AND APPROPRIATE INSTRUCTIONS, REQUIRES REVERSAL OF THE DEATH JUDGMENT

The trial court erred by instructing the jury at the conclusion of the penalty phase to disregard all previous instruction, while failing to instruct them appropriately and fully in the law applicable to their evaluation of the evidence at penalty phase. In the opening brief, appellant set out numerous examples of critical instructions that the jurors thereby necessarily were ordered not to consider. (AOB 437-439.) Appellant also demonstrated in the opening brief that this error requires reversal of the penalty judgment. (AOB 434-440.)

Respondent concedes the error, as is appropriate, but contends that the error is harmless. However, respondent bases this contention on an erroneous standard of review. Respondent apparently perceive *People v. Blacksher* (2011) 52 Cal.4th 769 and *People v. Carter* (2003) 30 Cal.4th 1166, as establishing a new standard of review for this type of error, necessarily finding the error harmless "if the jury expressed no confusion in this regard and never requested clarification." (RB 203-204 (internal quotes omitted].) Respondent is wrong.

Neither *Blacksher* nor *Carter* established such a rule. While in each case the fact that the jury neither expressed confusion nor requested clarification was considered in assessing prejudice, in neither case was it used as a per se assessment of the lack of prejudice. Both cases specifically assessed prejudice under accepted standards for federal constitutional error (*Chapman v. California, supra*, 386 U.S. at p. 24 [reversal required unless

error harmless beyond a reasonable doubt] and under the state law applicable to penalty phase errors (*People v. Brown* (1988) 46 Cal.3d 432, 446-448 [reversal required if reasonable possibility that error affected the verdict][74]). (*People v. Blacksher*, *supra*, 52 Cal.4th at 846; *People v. Carter*, *supra*, 30 Cal.4th at pp. 1221-1222.)

Respondent mischaracterizes appellant's argument regarding the instructions concerning expert testimony and the various bases of expert testimony, asserting that appellant complains only of the lack of such instruction as it related to the testimony of Paul Mones at the penalty phase. (RB 204.) However, the erroneous instruction to disregard previous instructions affected the jury's consideration during the penalty phase of all the expert testimony from prior phases as well as of Mones's testimony.[75] The jurors were told to base their decision on all of the evidence presented, including evidence presented at prior phases of the trial, and at the same time were instructed to disregard all prior instructions, necessarily including those governing the evidence from prior phases. (See AOB 437-438.) The plain implication from these instructions was that the jury, in the penalty phase, was freed of restrictions contained in the earlier phases' instructions in evaluating that evidence. Respondent fails to address this effect of the error.

Concerning other instructions which the jury was told to disregard, respondent argues that the subject of the instructions was not "highlighted, or

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[74] This Court has described the *Brown* test for state law errors in a capital penalty phase is the same in substance and effect as *Chapman's* "reasonable doubt" test. (*People v. Ashmus* (1991) 54 Cal.3d 932, 990; *People v. Gonzalez* (2006) 38 Cal.4th 932, 960–961.)

[75] Contrary to respondent's characterization, Mones testified as an expert, expressing opinions based upon his experience, upon information reviewed, and upon hypotheticals offered. (47RT 5719-5779.)

even mentioned during the penalty phase." (RB 205.) Yet, the jury was told that in penalty deliberations it was to "determine what the facts are *from the evidence received during the entire trial* unless you are instructed otherwise." (24CT 6297; 49RT 6126.) Because the jury is presumed to follow the instructions, it must be presumed that they did consider all the evidence received at the guilt and sanity phases, *and* that they disregarded any instructions applicable to that evidence which had been given in those phases. There is no basis in the record for concluding otherwise.

Respondent also argues that the error was harmless because the penalty decision was not a close one. On its face, the record contains facts which indicate that the penalty decision was not a foregone conclusion, including the jury's difficulties in reaching verdicts on Counts Two and Three in the guilt phase and the hung jury as to those two counts in the sanity phase. Respondent argues that "the jury took only six and a half hours to determine that appellant deserved to die for his crimes, giving no indication that it struggled with the decision." In fact, after four hours of deliberation, at the time a juror asked to be excused, that juror told the trial court the jury was unlikely to reach a verdict that day. (50RT 6135.) That the reconstituted jury reached a verdict only about 2 hours after the substitution of a new juror strongly suggests that deliberations did not begin anew, as the law required. (See Arg. XVI, *post* and AOB 441-447.) The result is equally consistent with a jury having reached its decision more readily because it was released from the evidentiary boundaries imposed by the guilt and sanity phase instructions under which the decisions at those phases had been so difficult. There is no basis for determining beyond a reasonable doubt that the erroneous instruction to the jury to disregard all prior instructions did not affect the jury's deliberations and verdict, and that the error was not instrumental in or did not contribute to the speed of the

verdict, as well as the verdict itself. Reversal of the penalty judgment is therefore required.

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XVI.

THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY TO BEGIN PENALTY DELIBERATIONS ANEW UPON REPLACEMENT OF A SITTING JUROR WITH AN ALTERNATE JUROR

Appellant demonstrated that the trial court committed reversible error when, upon substituting in an alternate juror during penalty deliberations, the court failed to instruct the jury, pursuant to CALJIC No. 17.51, to disregard its previous deliberations and to begin anew. (AOB 441-447; *People v. Collins* (1976) 17 Cal.3d 687.)

Respondent acknowledges that the trial court failed to instruct the reconstituted jury in the terms of CALJIC No. 17.51, but argues there was no error. Respondent argues that, although the trial court failed to expressly state that the jury was to disregard prior deliberations and begin deliberations anew, CALJIC No. 17.51.1, which was given, included concepts from which the jury would have intuited the directives not given. Respondent's argument that CALJIC 17.51.1, which does not direct the jury to disregard prior deliberations and begin deliberations anew, includes some of the underlying concepts, and thus serves the purposes of the direct instruction of CALJIC 17.51, is novel. (RB 209-210.) No case has so held.[76] This Court recently confirmed, in

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[76] Respondent cites *People* v. *Thompson* (2010) 49 Cal.4th 79, 138 as stating that CALJIC No. 17.51.1 "directs the jury to begin deliberations anew with regard to penalty with the newly appointed alternate juror." (RB 210.) While *Thompson* does say that, it unquestionably is wrong. CALJIC No. 17.51.1 says no such thing; it addresses the situation where a juror is replaced by an alternate juror during the penalty phase, but does not address the specific situation faced when a juror is replaced during penalty deliberations. (See *People v. Nunez* (2013) 57 Cal.4th 1, 59-60.) Nor does *Thompson* include any analysis by which such a conclusion can reasonably be drawn. In that case, the (continued...)

People v. Nunez, *supra*, 57 Cal.4th 1, that where the jury's penalty phase deliberations have already begun when juror substitution occurs, it is error to give only CALJIC No. 17.51.1 and not CALJIC No. 17.51. (57 Cal.4th at pp. 58-60.)

Respondent also relies upon *People v. Proctor* (1992) 4 Cal.4th 499, 537, for the proposition that the precise phrasing of CALJIC No. 17.51 is not necessary to comply with the mandate of *People v. Collins*. However, *Proctor* is of no help to respondent here. In *Proctor*, this Court specifically relied upon the trial court having told the jury "to 'kind of start, start from scratch, so to speak,'" which, in the context of the trial court's other statements "implied that the jury should disregard its previous deliberations." (4 Cal.4th at p. 537.) There was no comparable implication in the instructions appellant's penalty jury received. Respondent's argument that CALJIC No. 17.51.1 "fairly implied" the concepts of *Collins* and CALJIC No. 17.51 receives no support from the critically distinguishing facts involved in *Proctor*.

Under either the standard of *Chapman v. California* (1967) 386 U.S. 18, 24 or *People v. Brown* (1988) 46 Cal. 3d 432, 446-449, the error was not harmless. In arguing that there was no prejudice from the error, respondent acknowledges that the Court "may consider whether the case is a close one *and* compare the time the jury spent deliberating before and after the substitution of the alternate juror." (*People v. Proctor*, *supra*, 4 Cal.4th at p. 537 (emphasis added); RB 211-212.) However, respondent relies almost

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[76] (...continued)
issue faced here was not considered, for the alternate juror was placed on the jury before penalty deliberations began. (49 Cal.4th at p. 138.) Cases are not authority for matters not considered therein. (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388; *People v. Johnson* (2012) 53 Cal.4th 519, 528.)

exclusively upon the first alternative, arguing that the case was not a close one. Respondent glosses over the evidence from the deliberations in this case that strongly suggests that the deliberations prior to the juror substitution were not disregarded. (See AOB 446.)

In *People v. Nunez, supra*, 57 Cal.4th at p. 60, this Court found that the language of CALJIC No. 17.51.1, combined with the personal and normative nature of the penalty decision, rendered the error in not instructing according to CALJIC No. 17.51 in that case harmless. Assuming arguendo that such an analysis might, in the proper case, satisfy federal constitutional concerns under *Chapman*, it does not do so here. Not only was the jury not told to begin deliberations anew, but the evidence of the significantly shorter deliberations after the substitution in this case strongly suggests that they did not do so. (AOB 446.) In combination with the conceded error in the trial court's instruction for the jurors to disregard all previous instructions (see Arg. XV, *ante*), the error here not only ensures that the jury did not apply the terms of CALJIC No. 17.51 to their penalty deliberations from the giving of the instruction during guilt deliberations, but further removes any assurance that the jury deliberations in penalty, whether before or after the substitution, were conducted according to the necessary guided discretion. As such, the instructional errors fundamentally removed any reliability from the penalty deliberations, rendering the errors structural in nature and reversible per se as set forth in the opening brief. (AOB 444.) At the least, there is no reliable basis on this record for a determination that the state has shown the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

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XVII.

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

In his opening brief, appellant made a multifaceted attack on the constitutionality of California's capital-sentencing scheme, including standardized instructions that are designed for its implementation. (AOB 448-464.) Respondent contends that no error occurred relying solely on prior case law of this Court, without additional analysis. (RB 213-217.)

Appellant has acknowledged this Court's rejection of appellant's claims regarding the unconstitutionality of California's death penalty statute and the jury instructions relating to it, but provided authority and argument for reconsideration of its prior decisions. Respondent has not presented any substantive arguments in support of the constitutionality of the statute and of the challenged instructions, or in contradiction to the arguments set forth in appellant's opening brief. No further reply by appellant is therefore necessary except to request that this Court reconsider its prior rulings in this area and, accordingly, reverse his death judgment.

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XVIII.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

In response to appellant's argument that reversal is required based on the cumulative effect of the errors in this case (AOB 465-470), respondent simply contends that no errors occurred, or, to the extent that error was committed, the errors are harmless or have no accumulating effect. (RB 317.) The error in respondent's position is fully answered in the opening brief as well as in individual arguments in this reply brief. The positions of the parties are fully joined, and no further reply is therefore necessary.

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CONCLUSION

For all the reasons stated above, the entire judgment must be reversed. Should the entire judgment not be reversed, still, appellant's pleas of not guilty by reason of insanity to Counts Two and Three must be reinstated and remanded for a retrial on those pleas, and the sentence of death must be reversed.

DATED: May 30, 2014

Respectfully submitted,

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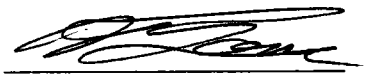
CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I am the Deputy State Public Defender assigned to represent appellant, ROBERT MAURICE BLOOM, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 73,504 words in length.

Dated: May 30, 2014



WILLIAM T. LOWE
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Robert Maurice Bloom* Cal. Supreme Ct. No. S095223
(Los Angeles Co. Sup. Ct. No. A801380)

I, Randy Pagaduan, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, Suite 1000, Oakland, CA 94607; and that on May 30, 2014, I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

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

Office of the Attorney General
Attn: Michael Johnsen, D.A.G
300 South Spring St., Ste. 1702
Los Angeles, CA 90013

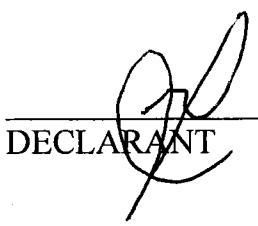
Maria Arvizo-Knight
Death Penalty Coordinator
Los Angeles County Superior Court
210 W. Temple Street, Room M-3
Los Angeles, CA 90012

Michael Laurence
Barbara Saavedra
Samantha Jacobs
Habeas Corpus Resource Center
303 2nd Street, Suite 400 South
San Francisco, CA 94107

Service upon Appellant, Robert Maurice Bloom, will be completed by utilizing the 30-day post-filing period within which to hand deliver a copy to him at San Quentin State Prison.

Each said envelope was then, on May 30, 2014, sealed and deposited in the United States mail at Oakland, Alameda County, 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 May 30, 2014, at Oakland, California.



DECLARANT