IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. ANDREW HAMPTON MICKEL, Defendant.	)	No. S133510 [Automatic Appeal]

Tehama County Superior Court No. No. CR45115
The Honorable S. William Abel, Judge

APPELLANT'S REPLY BRIEF

LAWRENCE A. GIBBS (SBN 98866)
P.O. Box 7639
Berkeley, California 94707
Tel: (510) 525-6847
Email: lawgibbs@gmail.com

Attorney for Defendant/Appellant
ANDREW HAMPTON MICKEL

DEATH PENALTY

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Introduction

On December 17, 2002, psychiatrist, Dr. A.M. Drukteinis, wrote a report, filed in a New Hampshire proceeding, stating that appellant's competence to stand trial was highly questionable. In a petition filed January 8, 2003, appellant's New Hampshire counsel, Mark Sisti, told the court that he also believed appellant was not competent.

Some 22 days later, and after only one meeting with appellant, James Reichle, appellant's California counsel, disagreed with Dr. Drukteinis and Mr. Sisti regarding appellant's competence. Reichle went further: he told the California court at his first appearance that he fully supported appellant's motion to represent himself in this capital case.

The trial court, mistakenly believed the right to self-representation was absolute. It therefore granted appellant's motion for self-representation. As the opening brief recounts, the results were as disastrous as they were predictable. At the guilt phase, Mr. Mickel sought to rely on a strange, non-existent defense, arguing that he was entitled to shoot a police officer who was refueling his patrol car because

it was "an appropriate act in defense of liberty." When the trial court precluded that defense, Mr. Mickel was overcome with emotion and vowed to remain silent at the guilt phase. True to his word, appellant called no witnesses and put on no defense. He did not cross-examine 17 of the 26 witnesses. What cross-examination appellant did was perfunctory. His closing argument at the guilt phase consisted of a few sentences in which he advised the jury to find him guilty.

It did not get better at the penalty phase. There, Mr. Mickel offered the jury a rambling description of the principles that motivated his actions, touching on the Declaration of Independence, the Federalist Papers, the Constitution, Paul Revere's Midnight Ride, the Colonists' battles against the British Redcoats, the Shot Heard 'Round the World, the Patriot Act, the development of professional police forces and the FBI, Prohibition, the St. Valentine's Day Massacre, and his travels to Israel and the Occupied Territories. He told the jury that what he was trying to accomplish was "for you guys to get this liberty and have this liberty." He concluded by asking the jury to "give me liberty or give me death."

Echoing Mr. Reichle's assessment of appellant, respondent takes the position that appellant was not only competent to stand trial, and competent to represent himself, but that he was a cogent, intelligent advocate. The record does not support this characterization.

The State of California has in independent interest in the integrity of its death judgments and, for that reason, has required counsel in all capital cases. (Penal Code section 686.1.) While the trial court believed that appellant's right to self-representation was absolute, provided he was competent to stand trial, we now

know, thanks to *Indiana v. Edwards,* that is not the case – particularly for a "gray-area" defendant like appellant who, due to mental illness, may not be competent to represent himself without the aid of counsel.

Based on the trial court's failure to require counsel in this capital case, together with other errors described in the opening brief, appellant respectfully requests that the judgment be reversed.

I. THERE WAS SUBSTANTIAL EVIDENCE OF APPELLANT'S INCOMPETENCE BEFORE THE TRIAL COURT

The Parties' Contentions

Appellant has argued that the trial court violated appellant's right to due process when, despite having substantial evidence of appellant's incompetence, it failed to suspend criminal proceedings pursuant to Penal Code sections 1367 and 1368. (AOB 39-58.) In particular, the trial court knew that scarcely six weeks prior to his arraignment in California, appellant had been examined by a psychiatrist in connection with the New Hampshire extradition proceedings. Based on the report of this mental health expert (Dr. A.M. Drukteinis), appellant's New Hampshire attorney informed that court that appellant "could not even identify himself, could not understand the court proceedings, and could not understand the difference between the Judge, the Prosecution, and the Defense." The trial court also knew that appellant was uncooperative with authorities in New Hampshire and had appeared in court wrapped only in a blanket; that appellant had made pretrial statements explaining his defense to murder based on bizarre notions of corporate immunity; and that appellant offered a non-existent defense at trial based on the "defense of liberty" in which he fashioned himself an American revolutionary fighting against the "Redcoats" of England. (AOB 39-44.) Appellant has argued that the Drukteinis report, alone, constituted substantial evidence of appellant's incompetence, and required suspension of the proceedings under Penal Code section 1368. If the contents of the Drukteinis report alone did not constitute substantial evidence, it surely did when pieced together with the other evidence recited above.

The State responds that the evidence before the trial court of appellant's incompetence was insufficient, for three reasons:

First, it was not clear that the trial court was aware of the contents of the Drukteinis report (RB 36, 45), or that the prosecution had provided it to the defense in discovery (RB 46).

Second, even if the trial court had the Drukteinis report, or had been aware of its contents, that report was still insufficient to raise a doubt of appellant's incompetence. This was because the report was preliminary only (RB 48); it was not subscribed under oath (RB 49); and it was equivocal and conclusory (RB 51).

Third, notwithstanding the Drukteinis report, other factors showed that appellant was fully competent. These facts included that appellant's advisory counsel, James Reichle, never expressed a doubt of appellant's competence. (RB 58.) Appellant appeared to be an intelligent and rational advocate. (RB 58-59.) And, appellant's confession of guilt and preference for the death penalty (when he told the jury to "give me liberty or give me death"), does not show incompetence. (*Id.*)

As appellant explains below, none of these points have merit. The record shows that the court was, in fact, informed of the contents of the Drukteinis report. That report was based on a sufficient examination and was sufficiently detailed to meet the requirements of section 1368. And, once substantial evidence was before the trial court, the fact that there was contrary evidence did not relieve the court of its obligation to suspend proceedings. That contrary evidence may only be considered when presented at a competency hearing. In sum, respondent misperceives the factual record and confuses appellant's burden at the competency hearing with the lower burden required to obtain such a hearing.

A. The Trial Court Was Aware Of The Contents Of Dr. Drukteinis' Report

The People's contention that "it is not clear" that the contents of the Drukteinis report was conveyed to the court (RB 36), is belied by the record. The record quite clearly discloses that the trial court was informed both of the Drukteinis report ***and*** its contents. Respondent does not dispute most of the relevant, underlying facts regarding the Drukteinis report. These facts disclose the following:

(1) On April 25, 2003, appellant's counsel, James Reichle, filed a motion in the trial court to prevent the public disclosure of eight categories of evidence including, "any mention of the extradition proceedings in New Hampshire or any information presented therein, including the contents or sealing of the Drukteinis report as to much of which Defendant asserts was divulged in violation of his attorney-client and psychotherapist privileges." (3 CT 643B-C.)

(2) On April 22, 2003, the court and the parties discussed Reichle's request to prevent disclosure of this evidence. (1 RT 66 et seq.) Reichle told the court that in New Hampshire "a lot of people were interviewed, and a lot of material was provided, some of which could be significantly inflammatory." (1 RT 68.) In that hearing, however, Reichle did not describe the substance of the Drukteinis report.

(3) On July 7, 2004, appellant filed a motion for change of venue. (4 CT 862-904.) One of appellant's reasons for moving to change venue was the publicity that the local press had given the case had "undermin[ed] the credibility of the Defendant ...." (4 CT 866.) In particular, appellant was concerned by publicity that

indicated that he was mentally incompetent or insane. Appellant himself thus told the trial court that in the New Hampshire proceedings, "[defense] attorney Sisti, without Defendant's consent and against his express instructions, attempted to lay a foundation for an insanity defense, making dramatic, unsubstantiated claims that the Defendant could not even identify himself, could not understand the court proceedings, and could not understand the difference between the Judge, the Prosecution, and the Defense." (4 CT 864-865.) Appellant further told the trial court in the venue motion that Sisti's "approach" to his case "solidified a belief in the community" that appellant was "actually insane and that he did not even know his name." (4 CT 866.) This sort of local publicity resulted in "the perceived deterioration of [appellant's] credibility [which] has become the central point to the local feelings and discussions regarding the case." (4 CT 866-867.)

(4) On August 25, 2004, the trial court conducted the hearing on appellant's motion to change venue. (2 RT 295 et seq.) Appellant introduced into evidence a large number of newspaper articles to support his contention that the community had been saturated with negative publicity about appellant. These articles were collected in three "News Books" and were admitted at the venue hearing as Exhibits D-1, D-2 and D-3. (See 2 RT 296 [Index to Venue Hearing]; 297 [minute order noting three News Books marked for identification) News Books One, Two and Three comprise the whole of Volumes 5, 6 and part of 7, respectively, of the Clerk's Transcript.

The News Books were admitted into evidence without objection. (2 RT 397.) At the end of the venue hearing, the trial court told the parties that "the Court has not had an opportunity to look at the exhibits, which I just got this morning." (2 RT

408.) The matter was therefore put over to give the court a chance to review those documents, and produce a written ruling. (*Id.*). On September 10, 2004, the trial court filed a written ruling granting the change of venue. (7 CT 1729-1733.) The court referenced the evidence it considered, "including [the] newspaper articles ...." (7 CT 1729.)

(5) As described in detail below, as many as 20 of the newspaper articles reviewed by the court described the extradition proceedings in New Hampshire, and the petition for writ of habeas corpus filed on January 8, 2003 by appellant's New Hampshire attorney, Mark Sisti. As described in the articles, the habeas corpus petition was premised on the claim that appellant was not competent to stand trial. The articles noted that the claim was supported by the psychiatric report of Dr. A.M. Drukteinis, which questioned appellant's competence.

The articles included the following:

The first article on the subject of appellant's incompetence supporting the venue motion appeared January 10, 2003 in the Redding Record Searchlight. Entitled, "Defense Raises Mental Issue," the article stated that appellant "may not be competent to stand trial," according to Sisti's New Hampshire petition. (6 RT 1234.) The article stated that, "Sisti wrote that he had 'legitimate concerns' about [appellant's] mental state, including his sanity and ability to understand the legal process." (*Id.*) Sisti "quoted a doctor who performed a preliminary psychological examination of McCrae," and concluded that "Mr. McCrae's competency to stand trial, or to rationally participate in other court proceedings, is highly questionable because of his irrational thinking." (*Id.*)

The next day the Chico Enterprise-Record published a similar article, also contained in the venue motion, which quoted Sisti as saying "'his client should not be extradited because he can't understand the court proceedings against him, according to the Concord [New Hampshire] Monitor.'" (5 CT 1235.) Similar articles describing the extradition proceeding and containing the same allegation, i.e., that appellant could not "understand the proceedings against him," appeared on January 11, 2003 in the Red Bluff Daily News (5 CT 1236); again in the same paper on January 15, 2003 [reciting Sisti's argument that "his client should not be extradited based on claims of mental incompetence."] (5 CT 1240); in the Oroville Mercury Register on January 15, 2003 (5 CT 1244); and in the Redding Record Searchlight on January 22, 2003 [reporting that Sisti was fighting extradition because "he questions McCrae's understanding of court proceedings and his ability to participate."].

The venue motion also contained an article published on January 15, 2003, in the Redding Record Searchlight, which reprised the story about appellant's challenge to extradition based on his incompetence. It noted that the habeas petition was supported by a statement from a "psychiatrist who examined McCrae. The doctor concluded that McCrae's ability to participate in court is 'highly questionable because of his irrational thinking.'" (5 CT 1242.) Sisti was quoted after a hearing on his petition as saying, "The issue of competency was raised by us ... We submitted a psychiatrist's report indicating [appellant] was incompetent to stand trial." (5 CT 1243.)[1]

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[1] The article noted, however, that appellant insisted that he was competent and was angered by his lawyer's petition. (*Id.*)

The venue motion was also supported by newspaper articles which described the New Hampshire judge's denial of the habeas corpus petition. On January 23, 2003, an article in the Chico Enterprise Record recounted Sisti's claim that appellant was "mentally unfit to stand trial," and that he was "not competent to proceed." (5 CT 1252.) The article noted that the New Hampshire court ruled that a defendant's competence was not necessary for extradition. (*Id.*) Several other articles noted the New Hampshire court's rejection of the claim that extradition should not be granted because appellant "could not understand the legal proceedings against him." (5 CT 1253 [Redding Record Searchlight, Jan. 23, 2003]; 1255 [Red Bluff Daily News, January 23, 2003], 1257 [Sacramento Bee, Jan. 23, 2003].)

Newspaper articles attached to the venue motion picked up on the case when appellant was returned to Tehama County. On January 30, 2003, the Red Bluff Daily News quoted the Tehama County district attorney as saying that "McCrae's attorney in New Hampshire tried to use the tactic that he was not competent," but that appellant insisted he was competent. (5 CT 1266.) The article noted that Sisti resisted extradition on the ground that "his client 'is not competent to proceed,'" and described appellant's disagreement with Sisti's tactics. (5 CT 1267) A similar article appeared in Red Bluff Daily News on February 6, 2003, again recounting Sisti's efforts to prove that appellant was incompetent. (5 CT 1305.)

Several other articles attached to the venue motion reported on appellant's return to Tehama County and noted the New Hampshire court's rejection of his claim that an incompetent defendant could not be extradited. (5 CT 1270-1271 [Oroville Mercury Register, Jan. 31, 2003]; 5 CT 1275 [Redding Record Searchlight, Jan. 31, 2003] [noting that appellant's lawyer "fought extradition,

questioning McCrae's sanity."]; 5 CT 1269 [Chico Enterprise Record, Jan. 31, 2003] [reporting that appellant's previous public defender argued appellant "was not competent to stand trial"]; 5 CT 1291 [Sacramento Bee, Feb. 5, 2003] [noting that appellant's New Hampshire lawyer "fought extradition, questioning McCrae's sanity."]

Finally, on February 26, 2003, after appellant's arraignment at which he admitted to killing Officer Mobilio, an article appeared in the Corning Observer, stating that appellant "is no longer on suicide watch ...." (5 CT 1326.)

The trial court acknowledged that it had read these exhibits which clearly and repeatedly reported that appellant's New Hampshire attorney believed appellant was incompetent, and that a psychiatrist, Dr. Drukteinis, had examined appellant and produced a written report stating that appellant's competence was "highly questionable." Thus, in its written ruling on the motion to change venue, the court specifically stated that "[t]he evidence presented by Defendant [in support of the motion to change venue] consists of expert testimony by Edward Bronson and supporting documents, including newspaper articles ...." (7 CT 1729.)

Based on these newspaper articles, the conclusion is inescapable that the trial court was fully aware of the substance of the Drukteinis report.

B. The Trial Court Also Knew That The Prosecution Had Provided the Drukteinis Report To the Defense In Discovery

There is further reason the trial court was chargeable with the knowledge of the New Hampshire proceedings containing Mr. Sisti's opinion that appellant was

incompetent, and Dr. Drukteinis' report supporting that opinion. The record in the instant case clearly discloses that the trial court understood that the prosecution had provided the Drukteinis report from the New Hampshire proceedings to the defense in the course of discovery. The People dispute this fact (RB 46), but they are wrong.

Here is what the record shows. In defense counsel James Reichle's declaration in support of his April 7, 2003 motion to seal the New Hampshire documents, Reichle stated that he had received 1100 pages of discovery from the prosecution, and that "**a review of the discovery** reveals potential evidence with little or no probative value for purposes of the preliminary examination that would, if announced publicly, undoubtedly and irrevocably prejudice the Defendant in the eyes of potential jurors." (3 RT 573, emphasis added.)

On April 22, 2003, the trial court conducted a hearing on various motions including Reichle's motion to seal the New Hampshire documents. (1 RT 32-80.) In proceeding on that motion to seal the documents, the trial court stated that it would follow a procedure dictated by the case of *Telegram-Tribune, Inc. v. Municipal Court* (1985) 166 Cal.App.3d 1072. (1 RT 72.) That procedure provided for an *ex parte* hearing at which the movant has an opportunity, without the other side being present, to describe the material to be sealed. (1 RT 73.) The following colloquy then took place:

> THE COURT: Now, in this case you [Mr. Reichle] are not asking to not have the Prosecution present?

MR. REICHLE: That's correct.

THE COURT: **This is Prosecution evidence; right**?

MR. REICHLE: **Right.** I have no objection to presenting it before the Prosecution.

(1 RT 73-74, emphasis added.)

The trial court then ordered Reichle to submit a list of the documents he wanted sealed. Reichle did so in a declaration filed April 25, 2003. Reichle's declaration, intended to seal the Drukteinis report, began with the following statement:

> "Counsel for Defendant hereby requests that, until and unless the Court rules otherwise at an *in camera* hearing, all of the following items (**found mainly at Discovery pages 320-397**) shall not be made public by the Prosecution at the Preliminary Examination or otherwise:
>
> ...(6) Any mention of the extradition proceedings in New Hampshire or any information presented therein, including the contents of the Drukteinis report as to much of which Defendant asserts was divulged in violation of his ... psychotherapist patient privilege."

(3 CT 643B-C, emphasis added.)

On May 1, 2003, the trial court conducted an *in camera* hearing on Reichle's request to seal the New Hampshire documents. Prior to that hearing, the prosecution indicated that it did not intend to introduce into evidence any of the documents listed in Reichle's declaration, including the Drukteinis report or the habeas corpus petition filed in New Hampshire. (3 CT 643F-G.) The issue of sealing the documents therefore became moot. (1 RT 82-86.) The trial court, nonetheless, imposed "a continuing order to the District Attorney's office as to the materials that

arise from this in-camera hearing, if there are any, that they will be sealed and will not be released to the public without further order of the Court." (1 RT 85.)

Contrary to the People's assertion, the record is clear. The trial court was fully aware that the New Hampshire documents, including the Drukteinis report, originated as "prosecution evidence" and that the prosecution provided those documents in discovery to the defense.

This fact is significant, for the following reason. The prosecution is only obligated to provide in discovery the categories of documents set forth in Penal Code section 1054.1. (*In re Littlefield* (1993) 5 Cal.4th 122, 129; Penal Code section 1054.5 (a) ["No order requiring discovery shall be made in criminal cases except as provided in this chapter."].) The discovery statute requires disclosure of five categories of evidence: the names and addresses of witnesses the prosecution intends to call at trial; statements of the defendant; relevant real evidence obtained as part of the investigation; relevant statements of witnesses the prosecution intends to call at trial; and exculpatory evidence. (Penal Code section 1054.1, subds. (a) through (f). The opinion expressed by Dr. Drukteinis in his report and the habeas petition filed in New Hampshire, provided here by the prosecution, do not constitute real evidence or statements of the defendant or witnesses the prosecution intended to call at trial. Indeed, in response to Reichle's motion to seal the documents, the prosecution expressly disclaimed any intent to use the evidence at trial. (3 CT 643F-G.) The inference thus arose that the prosecution turned over these documents in compliance with Penal Code Section 1054.1 either because the documents contained statements of appellant to Dr. Drukteinis, because they contained exculpatory

evidence, or both.[2]

The fact that the trial court understood (1) that the prosecution provided the Drukteinis psychiatric report in discovery, but (2) that the prosecution had no intention of calling Dr. Drukteinis as its witness, strongly suggested – at least in the prosecution's view – that the report, if believed, provided favorable evidence on appellant's competence to stand trial.

It is hardly surprising that the prosecution provided the evidence in discovery – such disclosure is fully consistent with, and would have been compelled by, the *prosecution's* obligation to enforce the terms of Penal Code section 1368. California law rejects the notion that the People have "a lesser interest in the issue of [a defendent's] mental competence to stand trial than defense counsel or respondent court." (*People v. Superior Court (McPeters)* (1985) 169 Cal.App.3d 796, 798.) In *McPeters*, the trial court held that the People were not entitled to demand a jury trial on the question of a defendant's competency to stand trial. The court of appeal granted the People's writ petition, affirming that, as a matter of due process, the

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[2] Of course, a psychiatric report that states that the defendant is not competent to stand trial is in fact exculpatory evidence. Evidence is exculpatory if there is "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (*United States v. Bagley* (1985) 473 U.S. 667, 682.) If the Drukteinis report were believed, appellant's competence to stand trial was "highly questionable." This would have likely resulted in a suspension of criminal proceedings, and no verdict at all – clearly an outcome of the proceeding that would have been different, and more favorable, than a verdict of capital murder. (See *People v. Soojian* (2010) 190 Cal.App.4th 491, 518–521 [holding that, to show prejudice, a hung jury is a more favorable result].)

People are equally obligated to ensure a defendant's competency. As the court explained,

> "We accept defendant's premise that the purpose of section 1368 is to avoid the due process violation which results from conviction of an accused person who is mentally incompetent to stand trial, but this premise does not support defendant's conclusion that petitioner [the State] has a lesser interest in an accurate adjudication of whether or not he is competent to stand trial. Neither justice nor due process of law is served if defendant is erroneously found to be incompetent to stand trial when, in fact, he is competent. It is petitioner's duty to see that the unnecessary delay in the murder prosecution which would result from an erroneous adjudication of mental competency does not occur."

(*Id.* at p. 798.)

The trial court in Mr. Mickel's case could readily have viewed the prosecution's disclosure in discovery of the Drukteinis report and the New Hampshire habeas corpus petition as the prosecution's effort to fulfill its due process obligation to ensure that an incompetent defendant is not subjected to the criminal process. While an attorney's opinion regarding his client's incompetence to stand trial is not determinative of the issue, "it is undoubtedly relevant." (*People v. Howard* (1992) 1 Cal.4th 1132, 1164 [discussing the impact of defense counsel's opinion of defendant's competence].) The trial court in the instant case knew the prosecution provided the Drukteinis report in discovery and therefore had good reason to know that the report, if credited, provided evidence of Mr. Mickel's lack of competence.

C. Even If The Drukteinis Report Was Not Filed In The Trial Court, The California Court Is Chargeable With Knowledge of The New Hampshire Extradition Proceedings Since They Were Instituted Pursuant To The California Court's Process

Even if the trial court was not fully aware of the Drukteinis report, under well-established principles of agency, the trial court was chargeable with knowledge of the proceedings in New Hampshire instituted at its behest.

It is axiomatic that the principal is charged with the knowledge of his agent "concerning a matter as to which he acts within his power to bind the principal...." (Rest.2d of Agency, section 272.) Agency principles have frequently been applied in analogous contexts in criminal proceedings. Thus, the United States Supreme Court has relied upon this principle of law to hold a prosecutor chargeable with knowledge of every member of the investigatory team "acting on the government's behalf." (*Kyles v. Whitley* (1995) 419 U.S. 419, 437; *Giglio v. United States* (1972) 405 U.S. 150, 154; *In re Brown* (1998) 17 Cal.4th 873, 879.) Similarly, in reliance on the principles established in *Giglio,* the Supreme Court has held that all police agencies involved in an investigation are chargeable with knowledge of a defendant's initial invocation of his right to remain silent. (*Arizona v. Roberson* (1988) 486 U.S. 675, 687-688 [citing *Giglio v. United States* (1972) 405 U.S. 150, 154].) More generally, all parties to a proceeding are chargeable with knowledge of "all subsequent steps taken in the cause, down to and including the judgment, even though he or she does not in fact appear and has no actual knowledge thereof." (*Corpus Juris Secundum* (Dec. 1012), Notice, section 13 [Notice of Judicial Proceedings], and cases cited therein.)

Here, the record shows that the New Hampshire court was expressly acting on the behalf of the California courts in the same case against Mr. Mickel. In the lexicon of agency law, the New Hampshire court had "actual authority" to act on appellant's case. As the Restatement (Third) of Agency, § 2.01, explains: "An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." As described below, that was precisely the relationship between the California and New Hampshire courts.

On December 12, 2002, the Tehama County Superior Court filed an "Amended Felony Complaint for Extradition" and issued a warrant for appellant's arrest for the murder of Officer David Mobilio. (2 CT 435-436.) Pursuant to that warrant, appellant was arrested in New Hampshire. (2 Supp.CT 129.) Extradition proceedings, based on the arrest warrant issued by Tehama County Superior Court and the complaint for extradition filed in the Tehama County Superior Court, were commenced in the Merrimack County Superior Court in New Hampshire. Appellant's attorney filed a petition for writ of habeas corpus in the New Hampshire court on the ground that appellant was not competent to assist counsel in the proceeding. (2 Supp.CT 128 et seq.) That petition was based on counsel's opinion that appellant was not competent, and was supported by Dr. Drukteinis's six-page. single-spaced psychiatric report stating that appellant's competence was "highly questionable." (2 Supp.CT 147-152.) The New Hampshire proceedings resulted in

appellant's extradition and return to the Tehama County Superior Court for arraignment.

In conducting the extradition proceedings, the New Hampshire court was acting at the behest of, and on behalf of, both the Tehama County Superior Court and the California executive. Under the agency principles applied by the United States Supreme Court in analogous situations (see *Giglio v. United States*, *supra*, 450 U.S. at p. 154; *Roberson*, *supra*, 486 U.S. at pp. 687-688), the Tehama County Superior Court was chargeable with knowledge of the proceedings, including the filings, in its agent court in New Hampshire. Those filings included Mr. Sisti's petition for writ of habeas corpus, supported by the full Drukteinis report.

Considering the foregoing, a clear picture emerges of the totality of the evidence before the trial court of appellant's mental state: the trial court knew from Reichle's motion to seal documents that appellant had been examined by a psychiatrist, who produced a written report on appellant's mental state, shortly after his arrest in New Hampshire. The court knew from appellant's venue motion and exhibits to that motion the contents of that psychiatric report -- that both appellant's New Hampshire attorney and Dr. Drukteinis had opined that appellant was not competent to stand trial, and had resisted extradition on that ground. Finally, the trial court knew that the prosecution had obtained these documents and had turned them over to the defense in discovery.

In addition to the facts from the New Hampshire proceedings, the trial court was aware of other facts showing appellant's incompetence. (AOB 78.) These included that appellant had been on suicide watch while awaiting proceedings in the case before it. (5 CT 1326.) The court also knew that, while appellant was incarcerated in New Hampshire, he was "disruptive and uncooperative with jail authorities there, refusing to dress," and that he had appeared in court in New Hampshire wrapped only in a blanket; that appellant had made pretrial statements explaining his defense to murder charges on the basis of bizarre notions, including that he had filed articles of incorporation and therefore enjoyed corporate immunity from prosecution for his shooting of Officer Mobilio; and that, in the guilt phase, appellant sought to defend against the charge of special circumstance murder on the ground that he was acting in "defense of liberty." Appellant believed that this defense gave him the right to shoot a police officer who was refueling his car. When the trial court precluded appellant from introducing evidence in support of this defense, appellant became extremely emotional, and told the court that he would not speak during the guilt phase. (8 RT 1830.)

All of these facts must be considered together. "In resolving the question of whether, as a matter of law, the evidence raised a reasonable doubt as to defendant's mental competence, [the reviewing court] may consider all the relevant facts in the record. (*People v. Danielson* (1992) 3 Cal.4th 691, 727, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069; [*People v.*] *Howard*, supra, 1 Cal.4th at p. 1164." (*People v. Young* (2005) 34 Cal.4th 1149, 1217.) Moreover,

"[e]vidence of incompetence may emanate from several sources, including the defendant's demeanor, irrational behavior, and prior mental evaluations. [Citations.]" (*People v. Rogers*, supra, 39 Cal.4th at p. 847.)" (*People v. Lewis* (2008) 43 Cal.4th 415, 524.) Considering all the pleadings in the case, including the exhibits to the motion for change of venue and Reichle's motion to seal the Drukteinis report, and the other information available to the trial court as described above, the court had before it substantial evidence of appellant's incompetence.

It is true that in the last two decades of capital jurisprudence, this court has rejected every claim that the trial court erred by failing to suspend criminal proceedings under section 1368, notwithstanding substantial evidence of the defendant's incompetence.[3] It appears, however, that the court has never rejected such a claim where it is based on two categories of evidence present in the instant case: an adequate written report from a psychiatrist stating that the defendant is not

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[3] Appellant's research has disclosed that this court has rejected the claim in nearly 25 cases in the last two decades. (*People v. Howard* (2010) 51 Cal.4th 15, 44-45; *People v. Rundle* (2008) 43 Cal.4th 76, 180; *People v. Lewis* (2008) 43 Cal.4th 415, 523; *People v. Halvorsen* (2007) 42 Cal.4th 379, 401-407; *People v. Rogers* (2006) 39 Cal.4th 826, 846-850; *People v. Ramirez* (2006) 39 Cal.4th 398, 466-468; *People v. Young* (2005) 34 Cal.4th 1149, 1217-1218; *People v. Blair* (2005) 36 Cal.4th 686, 711-719; *People v. Panah* (2005) 35 Cal.4th 395, 432-434; *People v. Ramos* (2004) 34 Cal.4th 494, 508-510; *People v. Stewart* (2004) 33 Cal.4th 425, 515-517; *People v. Koontz* (2002) 27 Cal.4th 1041, 1062-1069; *People v. Hayes* (1999) 21 Cal.4th 1211, 1281; *People v. Welch* (1999) 20 Cal.4th 701, 736-740; *People v. Frye* (1998) 18 Cal.4th 894, 951-952; *People v. Bradford* (1997) 15 Cal.4th 1229, 1372; *People v. Davis* (1995) 10 Cal.4th 463; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1110-1111; *People v. Howard* (1992) 1 Cal.4th 1132, 1163-1164; *People v. Danielson* (1992) 3 Cal.4th 691, 727-728; *People v. Price* (1991) 1 Cal.4th 324, 395-397; *People v. Gallego* (1990) 52 Cal.3d 115, 162-163.)

competent to stand trial, together with irrational behavior prior to trial and irrational behavior during the proceedings. While this court has confronted cases in which a mental health professional has provided the court with a statement that the defendant is not competent, (see *People Panah, supr* 35 Cal.4th 395; and *People Rodrigues, supra,* 8 Cal.4th 1060), in each of those cases the opinion was held insufficient for reasons that do not exist here. Thus, in *Panah*, neither of two psychiatrists who examined the defendant ultimately concluded that he was incompetent to stand trial, unlike the instant case. (*Panah, supra*, 35 Cal.4th at p. 433.) In *Rodrigues*, one psychiatrist (Dr. McKinsey) "had not had any opportunity to examine defendant," and consequently related a diagnosis that was devoid of particulars. (*Id.* at p. 1111.) The other doctor (Dr. Missett) had met with defendant but had not done any competency examination, and could only state that he "feels that the defendant has brain damage because of the two major seizures he has heard about through [the defense investigator]." (*Id.*)

In contrast to these cases, Dr. Drukteinis had a sufficient opportunity to examine appellant (see *post*, section I.D.1), and affirmatively stated that appellant's competence to stand trial was "highly questionable," i.e., highly doubtful. As explained below, this is precisely the kind of opinion that in itself constitutes substantial evidence under section 1368. (*People v. Pennington* (1967) 66 Cal.2d 508 [written psychiatric report constitutes substantial evidence of incompetence requiring suspension of proceedings under section 1368].)

D. The Drukteinis Report Constituted Substantial Evidence Of Appellant's Incompetence

Respondent argues, however, that even if the Drukteinis report was before the trial court, that report nonetheless does not constitute substantial evidence for three reasons: (1) prior to preparing it, Dr. Drukteinis did not have a sufficient opportunity to examine appellant; (2) the report was conclusory; and (3) it was not under oath. (RB 48-60.) The first two contentions are inaccurate. The third is insufficient to deprive the Drukteinis report of its force as substantial evidence.

1. In Preparing The Report, Dr. Drukteinis Had A Sufficient Opportunity To Examine Appellant.

The Drukteinis report appears in the Clerk's Transcript at 2 Supp.CT 147-152.) It is a six-page, single-spaced, typed document. In it, Dr. Drukteinis states that he interviewed appellant "for more than two hours" at the county jail; that he conducted a "mental status examination and a preliminary competency to stand trial assessment"; that he reviewed the document appellant penned, called the "Renewed Declaration of American Independence"; and that he had a "lengthy telephone interview with [appellant's] mother, Karen Mickel." (2 Supp.CT 20.) The report describes appellant's life-history. It describes his parents and their professions. It recounts appellant's "childhood emotional problems," that he was sent to counseling from the age of four, and suffered depression from the third or fourth grades; it described that, while in the seventh grade, appellant was diagnosed with chronic depression and placed on medication, which made him"irrationally fearful." It tells how, in the tenth grade, he was again placed on anti-depressants.

(2 Supp.CT 22-23.) It describes his three-year experience in the Army, his discharge and eventual enrollment in college. (2 Supp.CT 23.)

Based on the extensive life history, Dr. Drukteinis concluded that appellant suffered from "a chronic and cyclical history of Depressive Disorder, as well as more recent grandiose and persecutory thinking that can be seen in a Delusional Disorder." (2 Supp.CT 25.) "There is a strong fantasy and irrational expectation to his thinking, coupled with what appears to be a belief that what he did was not wrong. The relatively sudden change [from a nonviolent ideology] in his thinking to this intense set of beliefs also supports that they represent a mental disturbance rather than just a variant of political beliefs." (*Id.*) This prompted the doctor's conclusion that appellant suffered from a delusional disorder. The doctor concluded that "In my opinion, Mr. McCrae's competency to stand trial, or to rationally participate in other court proceedings, is highly questionable because of his irrational thinking." (*Id.*)

Respondent does not dispute that a written report such as this constitutes substantial evidence of incompetence if, *inter alia*, "the psychiatrist has had sufficient opportunity to examine the accused...." (*People v. Pennington* (1967) 66 Cal.2d 508, 519; *People v. Welch* (1999) 20 Cal.4th 701, 738.) Despite the abundant detail contained in Dr. Drukteinis' six-page, single-spaced report, respondent claims that the report was preliminary only, and that, therefore, the doctor "did not have a 'sufficient opportunity to examine' appellant as that phrase is contemplated in *Pennington*." (RB 49.) Respondent bases this contention on Dr. Drukteinis

statement that "[i]n order to complete a full independent psychiatric evaluation" he would need to review all police records and statements of appellant to friends and family (2 Supp.CT 20), and that the report sets forth "are preliminary findings that need to be assessed in light of all the discovery that becomes available and further personal interview and testing of [appellant]." (2 Supp.CT 25.)

Respondent's argument is based on the mistaken notion that *Pennington* requires that the reporting doctor have had a complete, or exhaustive, opportunity to examine the defendant. The case does not require that. Instead, it requires only that the reporting doctor have had a "*sufficient* opportunity" to examine the defendant.

The controlling cases, emanating from both the United States Supreme Court and from this court, indicate that a doctor's opportunity is sufficient if it permits the doctor to form a reasoned opinion regarding the defendant's competence. Indeed, many of these cases involve medical professionals who rendered adequate opinions based on far less of an opportunity to examine the accused than Dr. Drukteinis had.

The leading case is *Drope v. Missouri* (1975) 420 U.S. 162. In *Drope*, defendant argued that his trial violated due process when the trial judge failed to suspend criminal proceedings to inquire into defendant's competence. Defendant based his argument on a letter from a psychiatrist, retained by defense counsel, which was attached to a motion to continue the trial. The motion to continue was

based on counsel's claim that the initial psychiatric examination disclosed "defendant is not a person of sound mind and should have a further psychiatric examination before the case is forced to trial." (*Id.* at p. 164.) As in the instant case, "the report was in the form of a letter," (*id.* at p. 165, fn. 1), and not under oath, and described defendant as having "difficulty participating well," and that he "had a difficult time relating, and had "markedly circumstantial and irrelevant speech." The doctor noted, however, that "there was no sign as to the presence of any delusions, illusions, hallucinations, obsessions, ideas of reference, compulsions or phobias at this time." (*Ibid.*) "In a section entitled 'Impression,' the report stated that petitioner had 'always led a marginal existence,' that he had a 'history of anti-social conduct,' but that there were no 'strong signs of psychosis at this time.'" (*Ibid.*)

The trial court in *Drope* concluded that the report attached to the pretrial motion to continue did not contain sufficient indicia of incompetence because it recited that defendant was oriented in all spheres, did not have delusions and had no trouble answering questions testing his judgment. (*Id.* at p. 175.) The Supreme Court disagreed. The court explained:

> [I]t is ... true that judges must depend to some extent on counsel to bring [competency] issues into focus. Petitioner's somewhat inartfully drawn motion for a continuance probably fell short in that regard. However, we are constrained to disagree with the sentencing judge that counsel's pretrial contention that 'the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial,' did not raise the issue of petitioner's competence to stand trial.

(*Id.* at pp. 176-177.) The Supreme Court held that the psychiatrist's preliminary

examination, together with evidence that Drope attempted suicide during trial, was sufficient evidence requiring suspension of criminal proceedings and a hearing on competence. (*Id.* at pp. 179-180.)

The doctor's report attached to the motion to continue in *Drope* was far less exhaustive or compelling than Dr. Drukteinis' letter in the instant case. While both indicated that further psychiatric testing was necessary, the report in *Drope* did not directly address the defendant's competence. "It does not appear that the examining psychiatrist was asked to address himself to medical facts bearing specifically on the issues of petitioner's competence to stand trial, as distinguished from his mental and emotional condition generally." (*Id.* at p. 176.) In Mr. Mickel's case, by way of contrast, Dr. Drukteinis was asked to do precisely that. And he did, opining that appellant's competence was "highly questionable."

As *Drope* indicates, the fact that a psychiatric report is not conclusive, and even calls for further testing, does not deprive it of the force of substantial evidence, especially before a formal competency hearing had been ordered.

Decisions from this court are even more compelling. In *People v. Pennington*, *supra*, 66 Cal.2d 508, itself, this court held that a psychologist had a sufficient opportunity to examine the defendant (and therefore to provide the court with substantial evidence of incompetence), even though the psychologist based his testimony on a ***10 to 20 minute examination of the defendant*** the morning the

psychologist testified. In *Pennington*, a psychologist, Dr. Sussman, rendered an opinion that the defendant was not competent to stand trial. "He based his opinion on observations of defendant in the courthouse that same day, a 10-to-20 minute examination of defendant that morning, and previous contact he had with defendant in 1958," some seven years before trial, when he had treated Pennington in a mental hospital and diagnosed him as schizophrenic. In that 10 to 20 minute interview, Sussman observed Pennington laughing inappropriately, and Pennington told Sussman he was hearing voices. Sussman also witnessed Pennington engaging in an outburst of violence. (66 Cal.2d at p. 512.) This court held that Sussman's testimony, though based on a 10 to 20 minute interview and a seven year old diagnosis "was, by itself, substantial evidence which compelled the court to order a section 1368 hearing." (*Id.* at p. 519.) This court specifically held that Sussman's examination constituted "a sufficient opportunity to examine the accused ...." (*Id.*)

The doctor in *Pennington* had far less opportunity to examine the defendant than Dr. Drukteinis did. In *Pennington,* the doctor spent only 10 to 20 minutes with the defendant, and recalled a diagnosis seven years earlier. In the instant case, Dr. Drukteinis interviewed appellant for more than two hours, interviewed one family member, reviewed appellant's psychiatric history, and reviewed his writings. If the brief courthouse interview in *Pennington* constituted a "sufficient opportunity," then so must Dr. Drukteinis' far more extensive investigation.

Viewed against the governing caselaw of *Drope* and *Pennington*, the State's

assertion that the trial court could disregard the Drukteinis report because the doctor assertedly did not have a sufficient opportunity to examine appellant must be rejected.

2. The Drukteinis Report Was Not Equivocal Or Conclusory

Respondent next contends that Dr. Drukteinis' opinion – that appellant's competence was "highly questionable" – was equivocal and conclusory. (RB 51-52.) Respondent sees equivocation in the doctor's statement that the defendant's competence was "highly questionable," and argues that it does not amount to an opinion that appellant was incompetent. (*Id.*)

Dr. Drukteinis' opinion, however, is exactly the sort of opinion that section 1368 requires. Under section 1368, criminal proceedings must be suspended "when *a doubt* as to the defendant's competence arises in the trial judge's mind ...." (*People v. Taylor* (2009) 47 Cal.4th 850, 861[emphasis added]; *People v. Ramirez* (2006) 39 Cal.4th 398, 430-431.) The statement that a defendant's competence is "highly questionable" is identical to the statement that a defendant's competence is "doubtful." (Webster's New World Dictionary (1988) at p. 1102 [defining "questionable" as being "open to doubt"]; Webster's Third New Int'l. Dictionary (1986) at p. 1864 [defining "questionable" as "affording reason for being doubted"].) Dr. Drukteinis' opinion thus echoed the very standard required by the caselaw. (See Evid. Code section 805 [providing that an expert may "embrace[] the ultimate issue to be decided by the trier of fact"].)

Indeed, many cases have found that a similar opinion is sufficient to raise a doubt of the defendant's competence. (*McGregor v. Gibson* (10 Cit. 2001) 248 F.3d 946, 958 [noting that evidence before the trial court "demonstrated [defendant's] *questionable* competence".]; *Jermyn v. Horn* (3d Cir. 2001) 266 F.3d 257, 295 [noting that evidence in *Drope v. Missouri* that "the defendant's competence was *questionable*" required suspension of proceedings there]; *Crawley v. Dinwiddie* (10th Cir. 2009) 584 F.3d 916, 920 [noting that *Pate v. Robinson* (1966) 383 U.S. 375, stood for the proposition that, "a competency hearing is required where the evidence before the court strongly suggests the defendant's competence is *questionable*."].)

Respondent contends that Dr. Drukteinis' opinion that appellant's competence was highly questionable was nonetheless insubstantial because it was not based "on any specific mental illness, but on appellant's 'irrational thinking.'" (RB 52.) As an example of appellant's irrational thinking, Dr. Drukteinis noted appellant refused to consider a plea of insanity, his only available defense, "because he lacks insight into his mental disturbance." (2 Supp.CT 152.) Respondent suggests that this is an insufficient basis for a finding of incompetence.

The United States Supreme Court would not agree, as it relied on similar evidence in concluding that the defendant in *Drope v. Missouri* was incompetent. There, the defendant was charged with raping his wife, who was ambivalent about bringing charges against her husband. (*Drope*, *supra*, 420 U.S. at p. 166.) A week before trial, the defendant sabotaged his own case by attempting to choke his wife

to death. The Supreme Court observed that "[f]or a man whose fate depended in large measure on the indulgence of his wife, who had hesitated about pressing prosecution, this hardly could be regarded as rational conduct." (*Drope*, *supra*, 420 U.S. at p. 180.)

Dr. Drukteinis point was much the same: appellant had ambushed a police officer who was refueling his car, an act for which there was no defense other than the defense of insanity. Just as the defendant in *Drope* sabotaged his defense by compounding the crime against his wife, the principal witness against him, so appellant sabotaged his own case by refusing to consider his only defense, and instead attempting to defend his case on a non-existent "defense of liberty." As the Supreme Court observed in *Drope*, this could hardly be considered "rational conduct," and as such, it was an important factor for the trial court to consider in evaluating the defendant's ability to cooperate with counsel.

Nor was Dr. Drukteinis' opinion conclusory, i.e., lacking in "particularity" as required by this court's previous cases. (See RB 52.) Thus, for example, in *People v. Stankewitz* (1982) 32 Cal.3d 80, this court held that the defendant had come forth with substantial evidence of incompetence requiring the suspension of criminal proceedings. That evidence consisted of the testimony of Dr. Glenn, summed up by the court as follows:

> "In the psychiatrist's opinion, appellant had alternating feelings of persecution and grandiosity. Among these were paranoid delusions

> that his public defender was in collusion with the prosecutor, that people were talking about him behind his back, and that he could join the mafia in jail and have the jury killed if they convicted him. Dr. Glenn indicated that appellant's delusional system "interfered with his ability to cooperate in the conduct of his defense." Appellant appeared capable of cooperating with another attorney who was not a public defender, because he indicated to Dr. Glenn that he would accept a private attorney's evaluation that the prosecution had sufficient evidence to convict him of the killing. During the psychiatrist's testimony, it became clear that the dispute between appellant and his public defender was over whether the defense should contest the issue of whether appellant was the perpetrator of the charged offenses or whether a psychiatric defense based on appellant's mental condition should be presented."

(*Id.* at p. 88.) In holding that Dr. Glenn's testimony "satisfied the *Pennington-Pate* substantial evidence test," the court explained:

> "According to that testimony, appellant suffered from a mental disorder that prevented him from assisting his counsel in his defense in a rational manner. The psychiatrist's opinion was somewhat unusual in that it stated that appellant's problem was with his particular appointed counsel, due to a paranoid delusion focused upon the public defender's office. The psychiatrist also gave the opinion that due to the nature of appellant's mental disorder and the fixation upon the public defender, appellant might well be able to rationally assist a counsel appointed by the court from the private bar."

(*Id.* at p. 92.)

Stripped to its essentials, the testimony in *Stankewitz* was simply that the defendant had "paranoid delusions" that "interfered with his ability to cooperate" with the public defender, but not with private counsel. Dr. Drukteinis' report was far more detailed, containing an exploration of appellant's background and mental health history, together with a survey of his writings. Following that history, Dr.

Drukteinis reached the same conclusion as did Dr. Glenn in *Stankewitz*, namely that appellant's mental illness interfered with his ability to cooperate with the only defense available to him. If the evidence in *Stankewitz* was substantial, which this court has repeatedly said it was (see *People v. Lewis*, *supra*, 43 Cal.4th at p. 525; *People v. Welch*, *supra*, 20 Cal.4th at 737-738), then it was in substantial in appellant's case as well.

3. The Report Need Not Be Under Oath

Respondent finally contends that the Drukteinis report could not constitute substantial evidence of appellant's incompetence because it was not filed under oath. Once again, the United States Supreme Court's decision in *Drope v. Missouri*, *supra*, 420 U.S. 162, requires that this argument be rejected.

As discussed above, in *Drope*, defense counsel attached to his motion to continue an unverified letter from the psychiatrist, Dr. Shuman, to defense counsel.[4] Despite the fact that the letter was not under oath, the United States Supreme Court had little difficulty in finding that, together with Drope's attempted suicide, it constituted substantial evidence of incompetence under the due process clause of the Fourteenth Amendment.

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[4] The Supreme Court quoted the text of Dr. Shuman's letter, which text did not include a verification. (*Drope*, *supra*, 420 U.S. 165, fn. 1.) That was not an oversight. Dr. Shuman's full letter to defense counsel is appended to the state court's decision. (See *State v. Drope* (Mo.App. 1973) 498 S.W.2d 838, 844-847.) Dr. Shuman's letter was not under oath.

California cases, cited in the opening brief, are in accord. (AOB 50, fn. 4, citing *People v. Tomas* (1977) 74 Cal.App.3d 75, 91, citing *People v. Laudermilk* (1967) 67 Cal.2d 272, 286. Accord *United States v. Moore* (9th Cir. 1972) 464 F.2d 663, 666.) Respondent seeks to distinguish the holding of *People v. Tomas* on the ground that the doctor's report there was submitted to the court pursuant to an order appointing him to examine the defendant. (RB 50.) Respondent points out that, unlike the doctor in *Tomas*, Dr. Drukteinis was not appointed by the court, but was hired by appellant's New Hampshire attorney. (RB 50.)

This is surely a distinction without a difference. The doctor in *Drope v. Missouri* was hired by defense counsel. (*Drope*, *supra*, 420 U.S. at p. 165.) His unverified report was considered sufficient to raise the issue of Drope's incompetence. The doctors in *Pennington* were also retained by the defense. (*Pennington*, *supra*, 66 Cal.2d at pp. 511-512.) Their testimony was also deemed sufficient to raise the issue of the defendant's incompetence. The fact that Dr. Drukteinis' was retained by the defense is of no relevance to the force of his opinion.[5]

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[5] Respondent further tries to distinguish *Tomas* on the ground that the report in that case was filed with the court. (RB 50-51.) But as set forth in detail in the foregoing section of this brief, the trial court in the instant case was fully apprised in the exhibits to the venue motion of Dr. Drukteinis' examination and findings. These findings included that appellant's mental illness rendered his competence to stand trial "highly questionable." Contrary to respondent's claim, this finding directly linked appellant's mental illness to his competency. That is precisely what the cases require for suspension of criminal proceedings under section 1368. (See, e.g., *People v. Young* (2005) 34 Cal.4th 1149, 1216 [although expert testified to defendant's organic brain disorder, "he did not relate his findings in terms of

E. The Other Facts Respondent Cites As Indicia Of Appellant's Competence Do Not Overcome The Substantial Evidence Before The Court

Respondent further argues that other factors before the trial court indicated that appellant was perfectly competent. Respondent cites three chief factors: (1) appellant's counsel, James Reichle, never expressed a doubt as to appellant's competence (RB 58); (2) appellant's preference for the death penalty did not necessarily indicate incompetence (RB 58); and (3) throughout the proceedings, appellant appeared to be an intelligent and rational advocate (RB 59).

Before addressing each of these points, it must be understood that, if there is substantial evidence of incompetence, the mere existence of contrary evidence does not relieve the trial court of its obligation to suspend criminal proceedings. The United States Supreme Court has clearly and repeatedly made this point. In *Pate v. Robinson* (1966) 383 U.S. 375, the defendant had a long history of mental illness. Four witnesses expressed the opinion that he was insane. The state court held, however, that "the evidence here was not sufficient to require a hearing in light of the mental alertness and understanding displayed in Robinson's 'colloquies' with the trial judge." (*Id.* at p. 385.) The Supreme Court rejected this reasoning: "This reasoning offers no justification for ignoring the uncontradicted testimony of Robinson's history of pronounced irrational behavior. While Robinson's demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied

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defendant's competency to stand trial."].)

upon to dispense with a hearing on that very issue." (*Id.* at p. 385. See also *Drope v. Missouri*, *supra*, 420 U.S. at p. 179 [holding that while defendant's demeanor at trial may "obviate the need for extensive reliance on psychiatric prediction concerning his capabilities," under *Pate*, "this reasoning offers no justification for ignoring uncontroverted testimony of a history of pronounced irrational behavior."]. Accord, *People v. Lightsey* (2012) 54 Cal.4th 668, 691 [if substantial evidence presented, hearing is required even if "the sum of the evidence is in conflict."].)

By the same token, appellant's seeming clarity at times during trial, or the other factors on which respondent relies, did not permit the trial court to ignore other compelling evidence of appellant's incompetence. Appellant now turns to those other factors.

Respondent notes that Reichle had a great deal of contact with appellant, yet never expressed a doubt as to his competence. On this record, however, Reichle's opinion as to appellant's competence is entitled to little, if any, weight. First, "[i]t is true that 'defense counsel will often have the best-informed view of the defendant's ability to participate in his defense.' [Citation.] But counsel is not a trained mental health professional, and his failure to raise petitioner's competence does not establish that petitioner was competent." (*Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1088-1089.)

While this court has noted that trial counsel's opinion remains "significant

because trial counsel interacts with the defendant on a daily basis and is in the best position to evaluate whether the defendant is able to participate meaningfully in the proceedings," (*People v. Rogers* (2006) 39 Cal.4th 826, 848), Reichle's view in this case is not entitled to any such presumption of significance. That is because Mr. Reichle's view of appellant's mental state was "pre-fixed," without regard to the available evidence, a flaw this court has previously held deprives the opinion on a defendant's mental state of any significance. (*People v. Lewis* (2006) 39 Cal.4th 970, 1048.)

In *Lewis*, the defendant had argued that a psychiatrist retained by defense counsel had opined that the defendant was incompetent. This court held that the trial court was justified in rejecting the psychiatrist's opinion because it was "pre-fixed." As the court explained, the psychiatrist failed to consult readily available evidence showing the defendant was competent, and disregarded contrary evidence. (*Id.*) Under these circumstances, the trial court was entitled to discount the psychiatrist's opinion. (*Id.*)

In much the same way, Reichle's opinion that appellant was competent was "pre-fixed," and was of little weight. It must be remembered that Reichle met appellant for the first time on February 3, 2003. (1 RT 9.) The very next day, at his first appearance in the case, without any possibility of conducting even a cursory investigation into appellant's competence, Reichle told the court that he was supporting appellant's motion to represent himself. (1 RT 9.) Moreover, when

confronted with contrary evidence in the form of the New Hampshire pleadings, which contained the opinion of appellant's prior lawyer that he was not competent, and the opinion of Dr. Drukteinis that his competence was "highly questionable," Reichle responded by moving to seal those documents, and to keep them from the court. As in *Lewis*, Reichle thus took a position on appellant's competence before he could investigate it, and then disregarded contrary evidence. Under these circumstances, Reichle's opinion lacked the significance a defense counsel's opinion ordinarily carries.

Respondent's next argument – that appellant's preference for the death penalty did not display incompetence (RB 58) – must be rejected. As set forth in the opening brief, appellant put on no defense, gave a closing argument in the guilt phase which consisted of seven sentences and lasted two minutes,(10 CT 2553; 8 RT 1891-1892), and told the jury that "with the evidence that's been put in front of you, you should find me guilty." (8 RT 1892.) At the penalty phase, he asked the same jury (which had already taken his liberty) to "give me liberty or give me death." (10 RT 2295.)

This court's previous cases discussing the relevance of a defendant's "death wish" are not as clear-cut as respondent indicates. In *People v. Ramos* (2004) 34 Cal.4th 494, this court explained that, "a defendant's preference for the death penalty and overall death wish ***does not alone*** amount to substantial evidence of incompetence or evidence requiring the court to order an independent psychiatric

evaluation." (*Id.* at p. 509, citing *People v. Guzman* (1988) 45 Cal.3d 915, 963–965.) Of course, the court's holding in these cases is not that a defendant's request for the death penalty may not be considered in the competency equation. The holding is, rather, that it does not *alone* establish incompetence. The trial court must consider "all the relevant circumstances," (*People v. Howard* (1992) 1 Cal. 4th 1132, 1164), including the defendant's conduct at trial. Indeed, as this court has clearly suggested that a defendant's decision to forego any defense and seek the death penalty may be evidence of incompetence. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1064-1065 [discussing Mississippi case in which finding incompetence was justified where the defendant did not put on a defense and refused to address the jury at the sentencing phase].)

Of course, Mr. Mickel does not at all claim that his refusal to put on a defense and his preference for death, ***alone,*** constituted substantial evidence of his incompetence. He instead has based that claim on multiple pieces of evidence, only one of which is his preference for death. Appellant's position is thus fully consistent with this court's holding that a death-wish, alone, is not sufficient. Perhaps more importantly, appellant's position is equally consistent with this court's recognition that the decision to forego a defense and seek death may be relevant to the section 1368 calculus.

Finally, respondent claims that in view of appellant's rational, logical and intelligent advocacy, the trial court was correct in not suspending criminal

proceedings. The short answer is, as the Supreme Court has repeatedly observed, "while ... demeanor at trial might be relevant to the ultimate decision as to [the defendant's] sanity, it cannot be relied upon to dispense with the hearing on that very issue." (*Pate v. Robinson*, *supra*, 383 U.S. at p. 386; *Drope v. Missouri*, *supra*, 420 U.S. at p. 179.)

Based on Dr. Drukteinis written report of finding appellant's competence "highly questionable," together with his New Hampshire counsel's doubt as to appellant's competence, and other evidence recited in the opening brief, the trial court should have suspended criminal proceedings and conducted a hearing into appellant's competence. The failure to do so requires reversal.

II. APPELLANT WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S FAILURE TO INFORM THE TRIAL COURT OF THE RECENT DRUKTEINIS REPORT STATING THAT APPELLANT'S COMPETENCE TO STAND TRIAL WAS HIGHLY QUESTIONABLE.

The Parties' Contentions

In Argument I, appellant has contended that the trial court was aware of the Drukteinis report, and therefore erred by failing to suspend proceedings under section 1368. Assuming *arguendo* that this court disagrees and finds the trial was not aware of that report, appellant has argued that his counsel, James Reichle, rendered constitutionally ineffective assistance by failing to inform the trial court of the Drukteinis report. That report stated a doubt as to appellant's competence to stand trial. Reichle's failure to so advise the trial court amounted to conduct that fell below an objectively reasonable standard of competence expected of defense counsel in capital cases. Further, Reichle's omission regarding the Drukteinis report was prejudicial because it would have constituted substantial evidence of appellant's incompetence to waive the right to counsel, and would have precluded the trial court from accepting appellant's waiver of that right. (AOB 59-75.) Consequently, appellant was deprived of his right to counsel throughout the trial.

Respondent counters with four arguments: (1) the record sheds no light on why Reichle did not bring the Drukteinis letter to the court's attention, and the claim should therefore be brought by way of a petition for writ of habeas corpus in which counsel's motivations can be explored (RB 61); (2) the claim has no merit because

the Drukteinis report did not contain substantial evidence of appellant's incompetence (RB 66); (3) Reichle could have rationally decided not to present the Drukteinis report based on his own observations of appellant and the inherent shortcomings of the Drukteinis report (RB 66-72); and (4) there was no prejudice because, even if counsel had informed the trial court of the Drukteinis report, it did not contain substantial evidence requiring the trial court to declare a doubt (RB 72-73). These arguments should be rejected.

A. The Claim May Be Adjudicated On Direct Appeal Since There Could Be No Tactical Reason For Withholding The Report

The parties agree on the law regarding adjudication of a claim of ineffective assistance of counsel on direct appeal. Even if the record "sheds no light on why counsel acted or failed to act in the manner challenged," a claim of ineffective assistance of counsel may be brought on direct appeal in the if "there is no conceivable tactical purpose for for counsel's actions." (*People v. Lopez* (2008) 42 Cal.4th 960, 966, cited in AOB 61; RB 61, citing *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

While Respondent's argument is not exactly clear, it apparently contends that there could have been a tactical reason for Reichle's decision to withhold the Drukteinis report from the trial court. (RB 62.) Respondent suggests only one such reason: that Reichle "was clearly of the opinion that there was no substantial evidence of appellant's incompetence." (RB 62.)

Respondent's focus, however, is mistaken because tactical considerations are not permitted to enter into defense counsel's decision to inform the court about a defendant's possible incompetence. The law simply does not permit counsel to ignore a written psychicatric opinion doubting his client's competence. (AOB 69-73.) In his Opening Brief, appellant cited ten cases, both state and federal, in support of that proposition (*id.*), including two – *State v. Johnson* (Wis. 1986) 395 N.W.2d 176, 215-220, and *In re Fleming* (Wash. 2001) 16 P.3d 610, 616-617, which appellant discussed in some detail. (AOB 69-70.) These cases clearly hold that "[w]hen defense counsel knows or has reason to know of a defendant's incompetency, tactics cannot excuse failure to raise competency at any time "so long as such incapacity continues." (*In re Fleming*, *supra*, 16 P.3d at at p. 617.)

Respondent dismisses appellant's federal cases on the ground that they were "all decided in the context of a habeas corpus proceeding." (RB 68.) While this is true, it is hardly relevant. The cases are cited for the legal principle that counsel has an obligation to advise the court of evidence of his counsel's incompetence. It makes no difference whether that principle was enunciated in a habeas case or a direct appeal.

Respondent acknowledges, however, that appellant's opening brief also contained authority *from direct appeals* on the obligation of counsel to notify the court of his client's potential incompetence. (RB 68-70, discussing *State v. Johnson* (Wis. 1986) 395 N.W.2d 176, 215-220.) Respondent's Brief contains an extended

discussion of the facts in *Johnson*, apparently in an effort to convince the court that the Wisconsin Supreme Court was able to rule on the ineffective assistance claim on direct appeal because the appellate record was supplemented by a post-trial hearing exploring counsel's motivation for suppressing the psychiatrists' opinions. (RB 70.) But respondent fails to understand the scope of the Wisconsin Supreme Court's decision. The decision did not depend on counsel's motivations, since the court found that such motivations are ultimately irrelevant. As the court explained, counsel had no legitimate tactical reason for failing to raise substantial evidence of the defendant's incompetence. In the Wisconsin Supreme Court's view "We believe that considerations of strategy are inappropriate in mental competency situations. Thus, we hold that strategic considerations do not eliminate defense counsel's duty to request a competency hearing." (*Id.* at p. 221.)

As appellant has argued, Mr. Reichle's motivations in withholding Dr. Drukteinis' opinion from the trial court are not controlling. Strategic considerations of the sort that might be developed in a habeas proceeding cannot eliminate Reichle's obligations to bring the Drukteinis report to the court's attention.

For the same reason, respondent's effort to distinguish the Washington Supreme Court's decision in *In re Fleming* (Wash. 2001) 16 P.3d 610, must fail. (RB 70-71.) As in *State v. Johnson*, in *Fleming* the Washington Supreme Court held that counsel's tactics cannot trump counsel's obligations to advise the court of substantial evidence of his client's incompetence."When defense counsel knows or

has reason to know of a defendant's incompetency, tactics cannot excuse failure to raise competency at any time "so long as such incapacity continues." (*Id.* at p. 617.)

Contrary to respondent's reading of these decisions, because both *Johnson* and *Fleming* found counsel's tactical reasons to be irrelevant, or at least not controlling, the cases stand for the proposition that counsel's ineffectiveness may be adjudicated on direct appeal.

Respondent further contends that Reichle had a good reason not to raise appellant's competence with the trial court: that is, Reichle simply disagreed with Dr. Drukteinis and believed appellant to be competent. But acceptance of this argument would permit counsel, based on his own, untrained observations of his client's demeanor, to ignore contrary, professional psychiatric opinion. United States Supreme Court decisions do not permit counsel to do so. (See *Pate v. Robinson, supra,* 383 U.S. at p. 386 [holding that, as a matter of due process, where there is substantial evidence of incompetence, the defendant's apparently competent demeanor at trial could not be relied upon to dispense with hearing on that issue].)

Here, it is undisputed that Reichle had in his possession Dr. Drukteinis' report, signed on December 17, 2002, stating that appellant's competence was "highly questionable." Reichle was appointed the following month, on January 30, 2003. (2 CT 500.) Five days later, on February 4, 2003, Reichle appeared in court "supporting" appellant's motion for self-representation. (1 RT 9.)

Even if respondent is correct that Reichle's strategy was relevant, then within a few days after being appointed, Reichle had concluded that both Dr. Drukteinis and Mr. Sisti were wrong and that appellant was fully competent to represent himself in a potentially capital case. If respondent is correct, the Sixth Amendment imposes no impediment to counsel who, without any investigation, simply disregards a professional psychiatric opinion and deliberately withholds it from the trial court.

This is not the law. The A.B.A. Standards, explored in the opening brief, could not be clearer:

> "Counsel should make known to the court and to the prosecutor those facts known to counsel which raise the good faith doubt of competence."

(ABA Standards for Criminal Justice (1986) § 7-4.2(c).)[7] The courts have followed this particular aspect of the Guidelines in several cases. (*United States v. Boigegrain* (10th Cir. 1998) 155 F.3d 1181, 1188; *State v. Veale* (N.H. 2009) 972 A.2d 1009, 1015; *deShazer v. State* (Wyo. 2003) 74 P.3d 1240, 1248.) The rationale for the A.B.A. Standard is not difficult to discern. As the Tenth Circuit explained, "in addition to their duties as counselors, attorneys are also officers of the courts. The Constitution prohibits a court from trying defendants who are mentally incompetent.

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[7] This court has stated that the A.B.A. Guidelines "can be useful as 'guides' to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place." (*In re Reno* (2012) 55 Cal.4th 428, 466.) The portion of the Guidelines cited in the text, published in 1986, were in effect at the time of appellant's trial.

See *Pate v. Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). Of all the actors in a trial, defense counsel has the most intimate association with the defendant. Therefore, the defendant's lawyer is not only allowed to raise the competency issue, but, because of the importance of the prohibition on trying those who cannot understand proceedings against them, she has a professional duty to do so when appropriate." (*United States v. Boigegrain*, *supra*, 155 F.3d at p. 1188.)

Mr. Reichle was therefore obligated to bring the psychiatric report to the attention of the trial court. This claim may therefore be considered on direct appeal.

B. The Drukteinis Report Contained Substantial Evidence Of Appellant's Incompetence.

Respondent claims, however, that the Drukteinis report did not constitute substantial evidence (RB 66), and that his failure to bring it to the trial court's attention was therefore not ineffective assistance. Respondent relies on the same arguments it advanced in opposition to appellant's first claim, that the trial court erred by failing to suspend criminal proceedings under section 1368. Appellant has addressed those arguments above, in Part I.

Respondent offers a smattering of additional reasons Reichle could have disregarded the Drukteinis report. First, Reichle could have ignored the report because he "spent the most time with appellant," and reached a conclusion contrary to Drukteinis. But as pointed out above, Reichle reached the conclusion that appellant was competent, and decided to disregard Dr. Drukteinis' contrary view,

after only one meeting with appellant and without any investigation. While an attorney's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," (*Strickland v. Washington* (1984) 466 U.S. 668, 690), an attorney's decisions made in the absence of any investigation enjoy no such presumption of validity. (*Wiggins v. Smith* (2003) 539 U.S. 510, 521-523.)

Second, respondent says that Reichle could have ignored the report because both Dr. Drukteinis and appellant's New Hampshire attorney, Mark Sisti, "had been hired by appellant's parents to represent appellant in New Hampshire." Accordingly, "both Mr. Sisti's and Dr. Drukteinis's role in this case should be viewed with skepticism." (RB 66.) Appellant has pointed out, however, that neither the United States Supreme Court, nor this court, have required that the psychiatric opinion on competence be offered by a court-appointed lawyer or a court-appointed psychiatrist. (See *Drope v. Missouri*, *supra*, 420 U.S. at p. 165; *Pennington*, *supra*, 66 Cal.2d at pp. 511-512.)

Next, respondent claims that Reichle's own opinion of appellant's competence was supported by the record of appellant's advocacy. In Part I, above, appellant has explained by this rationale is not compelling: counsel may not rely on his own observations of the defendant's demeanor to reject substantial evidence of incompetence. (See *ante*, section I,E.) The United States Supreme Court has precluded the courts from relying on such observations of the defendant's demeanor

where there is sufficient evidence of incompetence. Reichle, who had the Drukteinis report and the Sisti habeas petition, clearly had such substantial evidence.

Moreover, appellant's record of advocacy hardly attested to his competence. As fully recounted in the opening brief, appellant tried to defend himself on the basis of a preposterous, non-existent defense for the crime of fatally ambushing a police officer; when the court precluded that defense, appellant became extremely emotional and vowed to remain silent and put on no defense; appellant told the jury to find him guilty; and, at the penalty phase, appellant asked the jury to "give me liberty or give me death." It is impossible to see how that can qualify as the work of "a logical, intelligent and capable advocate." (RB 71.)

C. The Error Was Prejudicial Because, At The Very Least, It Would Have Precluded The Trial Court From Permitting Appellant To Waive His Right To Counsel.

Finally, Respondent claims that if Reichle's representation fell below professional norms, it was not prejudicial. The reason given is that even if Reichle had presented the trial court with the Drukteinis report, that report did not contain substantial evidence of appellant's incompetence. Thus, the trial court would not have suspended proceedings anyway. (RB 72-73.)

Appellant has explained above why respondent is wrong, i.e., why the Drukteinis report contained substantial evidence, even though it was not under oath, and even though it stated that appellant's competence was "highly questionable." (See, ante, section I,D.3.)

In light of the substantial evidence contained in the Drukteinis report, the trial court would have been obligated to suspend criminal proceedings, or at a minimum, to deny appellant's motion for self-representation. Reichle's decision to withhold the Drukteinis report from the trial court was prejudicial, and requires reversal. (AOB 77-79.)

III. THE INFORMATION THE TRIAL COURT RECEIVED IN THE PRE-SENTENCE REPORT, FILED PRIOR TO JUDGMENT, RAISED A DOUBT REGARDING APPELLANT'S COMPETENCE.

The Parties' Contentions

Appellant has argued that prior to pronouncing judgment, the trial court received a number of letters from appellant's friends and family, who described appellant's long-standing mental illness. If the trial court did not have sufficient evidence of appellant's incompetence prior to receipt of this material, these letters sufficed to raise a doubt as to appellant's incompetence. At that point prior to pronouncing judgment, the trial court should therefore have suspended criminal proceedings pursuant to Penal Code section 1368.

The State has two responses: (1) the letters were hearsay, and therefore inadmissible and unreliable (RB 76-77); and (2) the letters did not contain any information pertaining specifically to appellant's trial competency. (RB 77-80.) Neither contention is correct.

A. The Trial Court May Rely On Hearsay Evidence Of Incompetence

"Evidence of incompetence may emanate from several sources, including the defendant's demeanor, irrational behavior, and prior mental evaluations. [Citations.]" (*People v. Rogers*, supra, 39 Cal.4th at p. 847.)" (*People v. Lewis* (2008) 43 Cal.4th 415, 524.) More specifically, both the United States Supreme Court and this court have long held that the trial court may consider hearsay evidence in deciding whether to declare a doubt and suspend proceedings under section 1368. In *Drope*,

for example, the Supreme Court noted that the trial court had sufficient evidence of the defendant's incompetence, part of which was "hearsay information" about the defendant's suicide attempt during trial. (*Drope*, *supra*, 420 U.S. at p. 180, fn. 16.) More than half a century ago in *People v. Pennington*, *supra*, 66 Cal.2d 508, this court held that a hearsay declaration of a "psychiatrist or qualified psychologist [citation], who has had sufficient opportunity to examine the accused, states under oath with particularity that in his professional opinion the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken against him or is incapable of assisting in his defense or cooperating with counsel, the substantial-evidence test is satisfied." (*Id.* at p. 519. See also *People v. Welch*, *supra*, 20 Cal.4th at p. 738.)

In a variety of other contexts, it has similarly been held that the trial court may rely on hearsay in declaring a doubt as to the defendant's competence. (See, e.g., *People v. Tomas*, *supra*, 74 Cal.App.3d 75, 92 [court may consider psychiatric report submitted with presentence report]; *People v. Laudermilk*, *supra*, 67 Cal.2d at p. 286 [court considered medical reports submitted in connection with insanity plea].) The United States Supreme Court has similarly considered hearsay medical evidence in determining whether the due process clause requires suspension of proceedings. (*Drope v. Missouri*, *supra*, 420 U.S. at p. 164 [hearsay medical report attached to a motion to continue the trial].)

It is true that hearsay statements *may not* be offered at the competency

hearing itself, (*People v. Lawley*, *supra*, 27 Cal.4th at p. 131 ["Although it arises in the context of a criminal trial, a competency hearing is a special proceeding, governed generally by the rules applicable to civil proceedings. [Citation.]"]). Nevertheless, it is clear that such evidence *may* be considered by the court in deciding whether to conduct a hearing in the first place.

B. The Letters Pertained To Appellant's Trial Competence.

Respondent argues that the letters attached to the presentence report in appellant's case only described past mental illness and descriptions of bizarre behavior, neither of which are sufficient to raise a doubt of current incompetency.

Respondent's has an unduly crabbed reading of these letters. While the letters certainly did describe appellant's prior mental illness and bizarre behavior, fairly read, they communicated far more than that. Thus, appellant's mother informed the court that a psychiatrist who examined her son after the crime had determined that appellant suffered from psychosis. (13 CT 3635.) Appellant's brother told the court that appellant stated that "he had met God and met the Devil, and that God had told him to do this. He said that God told him, 'The law is in your hands,' and then went on to explain the implications of this 'message' from god, about how God endorsed this course of action." (13 CT 3637.) And, appellant's long-time friend, Tobias Smith, told the court that appellant suffered from manic-depression, and that, from 2002 onwards, appellant was "increasingly troubling and suicidal." (13 CT 3665-3666.)

The courts have frequently relied on these sorts of observations in determining whether there is substantial evidence of incompetence. Thus, in *Drope v. Missouri*, *supra*, 420 U.S. at p. 179, the Supreme Court relied on evidence of suicidal behavior. In *People v. Murdoch*, *supra*, 194 Cal.App.4th 230, the court relied on evidence of the defendant's belief that his victim was an angel, and not human.[8] And, a number of cases, including *Pate v. Robinson*, *supra*, 383 U.S. at pp. 380-382, have relied on evidence that the defendant had "irrational episodes," (*id.* at p. 380), "seemed to have a disturbed mind," (*id.*), or was psychotic. In *People v. Laudermilk*, *supra,* 67 Cal.2d at p. 283-284, this court relied upon evidence of "a previous diagnosis of schizophrenia and paranoia, a current diagnosis of a more paranoid condition, defendant's current unfeigned hallucinations, and defendant's fits of psychotic furor ...." The court in *Laudermilk* summarized the evidence in *People v. Pennington* as including defendant's medical history of schizophrenia, the defendant's unfeigned hallucinations in which he heard voices, frequently those of the devil, and the witness' finding that the defendant was then suffering from an acute mental sickness in which he was delusional and out of contact with reality. (*Id.* at pp. 283-284.)

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[8] Respondent suggests that *Murdoch* is distinguishable because the defendant needed medication to remain competent, and that the defendant had stopped taking his medication. (RB 57.) Respondent points out that there was no indication that Mr. Mickel was similarly required to take medication. (*Id.*) But whether a defendant fails to take required medication is not the litmus test for incompetence. The Drukteinis report was not conditional. That is, it did not condition appellant's competence on medication, but simply opined that, in view of appellant's history and behavior, appellant's competence was "highly questionable." In this respect, the evidence relating to appellant's competence was stronger than that in *Murdoch*.

The information in the letters from appellant's family and friends was similar to the information discussed in the foregoing cases. Through those letters, the trial court learned of appellant's psychosis, his conversations with god and the devil, and his previous diagnoses of mental illness from an early age. If such evidence was relevant to the issue of competence as dicussed in *Pate*, *Pennington* and *Laudermilk*, it is surely relevant here.

More to the point, appellant's mental disease obviously affected his present competence in the trial. As noted in the opening brief, appellant likened his fatal shooting of a police officer who was refueling his car, and whom he did not know, to the act of a colonial revolutionary fighting the Red Coats. (9 RT 2105.) When the trial court precluded appellant from introducing evidence in support of this defense, appellant became extremely emotional. (8 RT 1830.) Appellant then told the court that "I intend to sit in silent protest during the guilt phase, and I will not speak or raise any issues until the penalty phase." (*Id.*) At the penalty phase, he told the jury to "give me liberty or give me death." In light of the information in the letters from family and friends regarding appellant's psychosis, long-time mental illness and hallucinatory conversations with God and the Devil, the trial court could certainly have attributed appellant's strange trial behavior to his mental illness. This is precisely the sort of inference that requires suspension of proceedings. (See *Drope v. Missouri*, *supra*, 420 U.S. at pp. 174-176.)

The judgment must be reversed.

IV. APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED PENAL CODE SECTION 686.1 BY PERMITTING APPELLANT TO WAIVE COUNSEL WITHOUT FIRST ASSESSING WHETHER HE WAS COMPETENT TO PRESENT HIS DEFENSE WITHOUT THE ASSISTANCE OF COUNSEL.

The Parties' Contentions

Appellant has argued that the trial court erroneously permitted him to waive his right to counsel and represent himself in this capital trial. At the time of appellant's trial, California statutory law required the appointment of counsel in every capital case. (Penal Code section 686.1.) Notwithstanding the mandate of section 686.1, the trial court believed that if a defendant had the capacity to waive counsel, then the right to self-representation, secured by *Faretta v. California* (1975) 422 U.S. 806, was absolute. Subsequent decisions have established, however, that the right to self-representation is not absolute. *Indiana v. Edwards* (2008) 554 U.S. 164, recognized an exception to the right to self-representation for "gray-area defendants." These are defendants who may have the capacity to waive counsel, but may not have the capacity to represent themselves competently at trial. (*Id.* at p. 172; *People v. Johnson* (2012) 53 Cal.4th 519, 527.) *Edwards* held that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." (*Indiana v. Edwards*, *supra*, 554 U.S. at p. 178; *People v. Johnson*, *supra*, 53 Cal.4th at p. 527.)

In his opening brief, appellant has argued that he was just such a "gray-area" defendant. However, because the trial court wrongly believed that the right to self-representation was absolute, it did not consider whether appellant was competent to conduct trial proceedings without the assistance of counsel. Nor did the court consider whether, if appellant was not competent to that degree, it should appoint counsel pursuant to Penal Code section 686.1.

Respondent answers that *Indiana v. Edwards* did not overrule *Faretta*, and that a criminal defendant still has a right to self-representation if he can validly waive the right to counsel. (RB 101.) *Edwards* only created an exception to the *Faretta* rule for "gray area" defendants. Here, respondent argues, there was no evidence that appellant was a "gray area" defendant. In other words, there was no evidence that appellant suffered from a mental illness "to the degree he could not carry out the basic tasks needed to present a defense." (RB 108.) Accordingly, the State could not require him to have counsel, as mandated by section 686.1.

Respondent ignores both the evidence of appellant's mental illness, and his inability to present any defense remotely recognized by California law. As explained below, because the trial court believed the right to self-representation was absolute, it *never explored* whether appellant, by virtue of his mental illness, was a "gray-area" defendant who needed the assistance of counsel to present his defense.

Of great importance for the instant case, this court has recently explained that

California courts "should give effect to [the mandate of Penal Code section 686.1] when it can." (*People v. Johnson* (2012) 53 Cal.4th 519, 526.) That is, the trial court should appoint counsel in capital cases whenever doing so would not violate federal constitutional law. In *Johnson*, this court explained the factors the trial court should consider in deciding whether a defendant can – consistent with *Edwards* – be denied the right of self-representation. (*Id.* at p. 529-531.) Because the trial court failed to consider any of these factors, the judgment must be reversed.

A. There Was Substantial Evidence That Appellant Was Incapable of Presenting A Defense Without The Assistance Of Counsel.

Although *Indiana v. Edwards* did not require states to adopt heightened standards of competence for self-representation, it gave states that choice. "The *Edwards* court held only that states *may*, without running afoul of *Faretta*, impose a higher standard [than that required for competence to stand trial]...." (*People v. Taylor* (2009) 47 Cal.4th 850, 878.) In *People v. Johnson* (2012) 53 Cal.4th 519, this court accepted the invitation of *Indiana v. Edwards* to adopt a higher standard.[9]

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[9] Respondent does not suggest that *Indiana v. Edwards* and *People v. Johnson* are not retroactive. Nor could it. "As a matter of normal judicial operation, even a nonretroactive decision governs cases that are not yet final when the decision is announced." (*People v. Price* (2004) 120 Cal.App.4th 224, 237-238, citing *People v. Guerra* (1984) 37 Cal.3d 385, 399; *People v. Rollins* (1967) 65 Cal.2d 681, 685, fn. 3. See *Griffith v. Kentucky* (1987) 479 U.S. 324, 322 [constitutional rule, even if new, applies retroactively to cases not yet final on appeal]; accord, *People v. Reyes* (1998) 19 Cal.4th 743, 455.) Other states that have considered the question, have concluded that *Indiana v. Edwards* and any heightened standards of competence subsequently adopted are fully retroactive. (E.g., *State v. Jason* (Iowa 2009) 779 N.W.2d 66, 73; *State v. Connor* (Conn. 2009) 973 A.2d 627, 656; *State v. Wray* (N.C. App. 2010) 698 S.E.2d 137, 139) Moreover, under California law,

Because this court's decision in *People v. Johnson* is critical to appellant's claim presented here, appellant will review it in detail.

The *Johnson* court began by explaining that California law prior to *Faretta* did not provide for the right of self-representation. Two of its prior cases, *People v. Sharp* (1972) 7 Cal.3d 448, and *People v. Floyd* (1970) 1 Cal.3d 694, held there was no such right. (*Johnson, supra*, 53 Cal.4th at p. 526.) Yet, *Johnson* continued, "[s]till today, Penal Code section 686.1 provides that 'the defendant in a capital case shall be represented in court by counsel at all stages ....'" (*Id.*) The court then surveyed the developments in federal law from *Faretta* to *Edwards*. Quoting *Edwards*, the court explained:

> "*Edwards* held that 'the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from

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both *Edwards* and *Johnson* vindicate a right "which is essential to the integrity of the fact-finding process," and are therefore fully retroactive. (*People v. Carrera* (1989) 49 Cal.3d 291, 327.) *Indiana v. Edwards*, itself, was expressly premised on the need to preserve the integrity of the trial process. (554 U.S. at p. 176-177 [defendant's "lack of capacity threatens an improper conviction or sentence, [and] undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial."]; *State v. Jason, supra*, 779 N.W.2d at p. 73 [*Edwards* standards "assures the defendant of a fair trial."].) As they are expressly intended to secure the core values of a fair trial (see *People v. Lightsey* (2012) 54 Cal.4th 668, 695-696), *Edwards* and *Johnson* apply retroactively.

> severe mental illness to point where they are not competent enough to conduct trial proceedings by themselves.'"

(*Id.* at p. 527, quoting *Edwards v. Indiana*, *supra,* 554 U.S. at p. 174.)

The *Johnson* court agreed that California courts "should have discretion to deny self-representation to gray-area defendants," principally because "to refuse to recognize such discretion would be inconsistent with California's own law." (*Id.* at p. 528.) "In *People v. Floyd*, [citation], we upheld the denial of a capital defendant's request for self-representation citing, among other factors, his youth, his low level of education, and his ignorance of the law. [Citation.] Certainly, a defendant who could be denied self-representation under *Edwards* [citation], could also have been denied self-representation under *People v. Sharp* [citation], and *People v. Floyd*...." (*Id.*) The court thus concluded that, "*[c]onsistent with long-established California law*, we hold that trial court may deny self-representation in those cases where *Edwards* permits such denial." (*Id.*, emphasis added.) *Johnson* thus accepted the view that, under *People v. Sharp* and *People v. Floyd*, there was a standard in California for denying self-representation to marginally competent defendants.

The court then turned to the "standard for trial courts to employ when deciding whether to deny self-representation under *Edwards* [citation]." (*Id.*) The court declined to adopt a standard more specific than *Edward*'s standard: whether the defendant has the ability 'to carry out the basic tasks needed to present [one's] own defense without the help of counsel," or alternatively, whether defendants "suffer from severe mental illness to the point where they are not competent to

conduct trial proceedings by themselves." (*Id.* at p. 530.) Though the court declined to be more specific, it nonetheless held that trial courts could consider a variety of factors[10] "in their examinations and rulings," (*id.*), including whether:

(1) The defendant "possesses a reasonably accurate awareness of his situation, including not simply an appreciation of the charges against him and the range and nature of possible penalties, but also his own physical or mental infirmities, if any."

(2) The defendant is "able to understand and use relevant information rationally in order to fashion a response to the charges."

(3) The defendant can "coherently communicate that response to the trier of fact."

(4) The defendant has a mental disorder or disability that would prevent him from:

a) achieving a basic understanding of the charges, law, and evidence,

b) formulating simple defense strategies and tactics,

c) or communicating with the witnesses, the court, the prosecutor, and the jury in a manner calculated to implement those strategies and tactics in at least a rudimentary manner."

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[10] The factors were drawn from *People v. Burnett* (1987) 188 Cal.App.3d 1314, and two law review articles: Marks, *State Competence Standards for Self–Representation in a Criminal Trial: Opportunity and Danger for State Courts after Indiana v. Edwards*, (2010) 44 U.S.F. L.Rev. 825, 847; and Johnston, *Representational Competence: Defining the Limits of the Right to Self-representation at Trial,* (2011) 86 Notre Dame L.Rev. 523, 595. (*People v. Johnson, supra*, 53 Cal.4th at pp. 529-530.)

(5) The defendant has the ability to:

a) perceive problematic situations, generate alternative courses of action, maintain mental organization, and communicate decisions to a functionary of the court.

b) identify a plausible source of the prosecution, an ability to gather information to evaluate the state's case, a willingness to attend to the prosecution, and an ability to withstand the stress of trial.

c) for certain key decisions, such as selecting the defense to pursue at trial, a defendant should be capable of justifying a decision with a plausible reason.

(*Johnson*, *supra*, 53 Cal.4th at pp. 529-530.)

In granting appellant's motion for self-representation in the instant case, the trial court failed to consider any of these factors. (See 2 RT 246-249.)

B. The Trial Court Failed To Consider Any Factors Required By *People v. Johnson* Bearing On Whether Appellant Was Capable Of Presenting A Defense Without Counsel.

In the instant case, the trial court was confronted with a defendant whom it knew from court filings had recently been examined by a New Hampshire psychiatrist. As fully described above, in Argument I, the court knew that appellant's New Hampshire attorney believed appellant was not competent to stand trial; the court knew that a New Hampshire psychiatrist had examined appellant and determined that his competence to stand trial was "highly questionable," and specifically noted that appellant "could not even identify himself, could not understand the court proceedings, and could not understand the difference between

the Judge, the Prosecution, and the Defense." (4 CT 864-865.) Further, the court knew that appellant had espoused exceedingly bizarre ideas about the reasons for his conduct. And, when the trial court rejected his proffered "defense of liberty," appellant was overcome with emotion and vowed to remain silent during the guilt phase trial.

While respondent argues argue that these indicia were insufficient to establish appellant's incompetence to stand trial, they surely permit the conclusion that appellant's the mental difficulties could have interfered with the ability "to carry out the basic tasks needed to present [one's] own defense without the help of counsel." (*Johnson*, *supra*, 53 Cal.4th at p. 530.) The opinions of appellant's New Hampshire counsel and Dr. Drukteinis were that appellant was not even competent to stand trial, much less waive the right to counsel.

Added to this was defendant's irrational reaction to the court's rejection of his "defense of liberty" – vowing to remain silent during trial. It is difficult to understand how a defendant who vows to remain silent during his capital trial is able "to carry out the basic tasks needed to present [one's] own defense without the help of counsel." (*Edwards*, *supra*, 554 U.S. at pp. 175–176.)

In short, Dr. Drukteinis' opinion and the other indicia of appellant's mental illness were sufficient to characterize appellant as a "gray-area defendant." (See, e.g., *People v. Johnson*, *supra,* 53 Cal.4th 519 [holding defendant with possible

"delusional thought disorder" and communicative difficulties was gray-area defendant; *State v. Jason* (Iowa App. 2009) 779 N.W.2d 66, 75-76 [holding that defendant, a college graduate with Asperger's Syndrome may be a gray-area defendant based on psychiatrist's concerns about lack of "cognitive, perceptual, and affective responses."].)

But that is not an inquiry the trial court here ever made. (See 2 RT 246-249.) Believing appellant's right to self-representation was absolute, the trial court failed to examine any of the criteria for competence to self-represent that this court has said in *Johnson* should be considered.

Examination of one such factor makes the point. The *Johnson* court has stated that trial courts should consider whether "for certain key decisions, such as selecting the defense to pursue at trial, a defendant should be capable of justifying a decision with a plausible reason." (*Johnson*, *supra*, 53 Cal.4th at p. 529-530.) Similarly, *Johnson* stated that trial courts should consider whether the defendant understands the charges against him, and "is able to understand and use relevant information rationally in order to fashion a response to those charges." (*Id.* at p. 529.)

In the instant case, appellant displayed no understanding of the charge of murder, and was demonstrably incapable of "selecting a defense to pursue at trial," and justifying it "with a plausible reason." Appellant was charged with murdering

a police officer, by ambush, who was refueling his car. Appellant's chosen "defense" was, in his own words, the "defense of liberty." (10 CT 2355-2396.) Appellant explained that he "took the action which underlies the charges in this case as an action in defense of liberty." (10 CT 2360.) In support of his defense, appellant asked the trial court to "take judicial notice of the Shot Heard Round the World," of and "Paul Revere's Midnight Ride." (10 CT 2366.) Appellant concluded that "if the California Constitution's guarantee of the right to defend liberty has any meaning at all, then defendant has the right to explain to a jury of his peers that his actions were factually in defense of liberty." (10 CT 2369.)

Understandably perplexed by appellant's claimed "defense of liberty," the trial court questioned appellant in chambers about his chosen defense. (8 RT 1819 et seq.) This was appellant's chance to give a plausible reason for the selection of that defense. Appellant told the court that did not know Officer Mobilio, and that had "no information or belief that Officer Mobilio had done anything that he felt needed to be remedied by this conduct." (8 RT 1819, 1821.) Appellant then reverted to his explanation about the Shot Heard Round the World, and the colonists fight against the Red Coats. (8 RT 1820.) In response to the court's questions about whether appellant knew anything about Officer Mobilio, appellant demonstrated his delusional thinking:

> "The same question is, the colonists who came to resist those Red Coats, have they ever had any specific contact with those Red Coats? Had they ever known them before? Had they ever had any personal interaction with them? The answer is no. But it doesn't really matter, because those specific Red Coats were out in an attempt

to enforce laws that were unjust and oppressive. And so it doesn't matter really whether or not who those specific Red Coats were. What matters is that they were out on patrol attempting to do, which is they were attempting to wrongfully imprison two people, and they were attempting to abridge and infringe and destroy the colonists' right to bear arms."

(8 RT 1820.)

The trial court's response could not have been clearer:

"This is not a defense that is recognized in the State of California or anywhere in the United States. ... "This isn't something that I can see any way is justified under a defense of liberty. This is anarchy."

(8 RT 1821, 1824.)

Appellant's response: "Well, I disagree with Your Honor on that point." (8 RT 1824.)

The trial court told appellant that "Shooting a cop on the street isn't part of [our legal] system." (8 RT 1827.)

Appellant's further then explained why he shot the officer:

"I would propose that I came forward in order to use the court system in order to have this right recognized. Because that's, that is how – that's typically how it works is that you, in order for Appellate Court to recognize a right, is that somebody practices that right and then it goes to court.

"If you go to court and say, in order to guarantee a right that you haven't exercised, then the Court is going to say, "All right, come

back when you are arrested. You have no standing to challenge – to protect this right."

"I have exercised the right in order that I would have standing within the court system to protect that right. There's no other way to have done it, Your Honor. That is how the system works. I have to have standing in order to claim that I was exercising that right."

(8 RT 1827-1828.)

The court then told appellant that his defense was no defense at all, and the court "cannot allow it to be raised as a defense ... I can't allow defense to go to the jury that are not cognizable in the law. I can't instruct on them. And therefore the evidence as to those theories are [sic] irrelevant." (8 RT 1830.)

At that point, the record reflects that appellant was overcome with emotion. (8 RT 1830.) Appellant "g[ave] the court notice that I intend to sit in silent protest during the guilt phase ...." (8 RT 1830.) True to his word, appellant presented no guilt phase defense.

There can be no dispute about the import of this colloquy. In deciding whether a defendant is competent to represent himself, the trial court must consider whether the defendant, "for certain key decisions, ***such as selecting a defense to pursue at trial***, ... [is] capable of justifying a decision with a plausible reason." (*Johnson*, *supra*, 53 Cal.4th at p. 529.)

The trial court itself expressly recognized that appellant utterly and totally

failed to select a cognizable defense for his capital trial, and utterly and totally failed to justify his purported defense with any plausible reason. And when his efforts to have the court recognize his defense of liberty failed, appellant vowed to remain silent at trial. This is simply not the expression of a defendant who has "the ability 'to carry out the basic tasks needed to present [one's] own defense without the help of counsel.'" (*Johnson*, *supra*, 53 Cal.4th at p. 530, quoting *Edwards*, *supra*, 554 U.S. at pp. 175-176.) It is the antithesis of such a defendant.

Because the trial court failed to consider the *Johnson* factors governing the determination of whether a defendant was competent to waive counsel, the judgment must be reversed. (AOB 116.)

V. THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY PERMITTED APPELLANT TO WAIVE COUNSEL AT THE PENALTY PHASE IN VIOLATION OF PENAL CODE § 686.1

The Parties' Contentions

In the preceding argument, appellant has urged that *Indiana v. Edwards* permitted the trial court to enforce Penal Code section 686.1's requirement of counsel at the guilt phase of appellant's case. But a defendant's interest in self-representation is even less following a conviction. (*Martinez v. Court of Appeal*, *supra*, 528 U.S. at p. 168.) Thus, even putting aside the implication of section 686.1 at the guilt phase, the trial court's failure to provide counsel at the penalty phase requires reversal of the death judgment.

Respondent first answers that the right to self-representation guaranteed by *Faretta* continues through the penalty phase, and that this court has previously so held. (RB 112; see AOB 122 [recognizing cases rejecting the argument, including *People v. Blair* (2005) 36 Cal.4th 686, 736-740; *People v. Koontz* (2002) 27 Cal.4th 1041, 1073-1074; *People v. Bradford* (1997) 15 Cal.4th 1229, 1364-1365; *People v. Bloom* (1989) 48 Cal.3d 1194, 1222-1223; *People v. Clark* (1990) 50 Cal.3d 583, 617 and fn. 26].) Second, respondent argues that the denial of self-representation is permissible at the penalty phase only to the extent that *Indiana v. Edwards* permits, i.e., only for a gray-area defendant who cannot present his case without the assistance of counsel. Appellant did not come within the class of defendants described in *Edwards*. (RB 112-113.)

A. Denial Of The Right Of Self-Representation At The Penalty Phase In The Instant Case Is Consistent With *Indiana v. Edwards* And Required By *People v. Johnson*

As appellant pointed out in his opening brief, previous litigants have unsuccessfully argued that the right of self-representation does not extend to the penalty phase of a capital trial. It is true that this court has rejected the argument, despite the caselaw holding that at the penalty phase, the state has a strong interest in ensuring individualized sentencing and the reliability of a death judgment. (E.g., *People v. Blair*, *supra*, 36 Cal.4th at pp. 736-740; *People v. Koontz, supra*, 27 Cal.4th at pp. 1073-1074; *People v. Bradford, supra*, 15 Cal.4th at pp. 1364-1365.)

It is also true, however, that only one decision – *People v. Taylor* (2009) 47 Cal.4th 850 – considered this issue *after* the Supreme Court's decision in *Indiana v. Edwards*. But in *Taylor*, the defendant argued only that counsel was required under the Fifth and Eighth Amendment at the penalty phase in order to ensure reliability of the death verdict. (*Id.* at p. 865.) This court responded that the defendant's "autonomy interest" that animated *Faretta* "applies in a capital penalty trial as well as in a trial of guilt." (*Id.*) This is so even where the defendant chooses to forego any investigation or presentation of mitigating evidence. (*Id*) Such a defendant may "rationally prefer" a death sentence to life in prison. (*Id.*)

What this court *did not consider* in *Taylor* was whether *Indiana v. Edwards* affected the analysis of the right of self-representation at the penalty phase. Opinions are not authority for issues they do not consider. (*Maguire v. Hibernia S.*

& L. Soc. (1944) 23 Cal.2d 719, 730; *Hart v. Burnett* (1860) 15 Cal. 530, 598–600, 603–604.)

It is clear that both *Indiana v. Edwards,* together with this court's subsequent decision in *People v. Johnson*, *supra*, 53 Cal.4th 519, imposed an important limitation on the right of self-representation at the penalty phase. Before *Indiana v. Edwards*, the argument for limitation of the right of self-representation at the penalty phase was based on the balancing of the state's interest in a reliable death judgment against the defendant's interest in autonomy. *Indiana v. Edwards* changed that equation by lessening the autonomy interest of gray-area defendants, and increasing the state's reliability interest with respect to them. As the Supreme Court explained in *Indiana v. Edwards*, "in our view, a right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel." (554 U.S. at p. 176.) Similarly, "insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." (*Id.* at pp. 176-177.)

For gray-area defendants, such as appellant, the balance between the competing interests of autonomy and reliability at the penalty phase must be re-struck. This court's recent decision in *People v. Johnson*, *supra*, 53 Cal.4th 519, instructs the trial court's how that must be done. Confronted with a defendant's request for self-representation, a trial court should consider various factors to

determine whether the defendant can proceed competently without the aid of counsel. While, as explained above, this court identified many factors for consideration, at a penalty phase of a capital trial, one factor stands out: a defendant must possess "a reasonably accurate awareness of his situation, including but not simply an appreciation of the charges against him and the range and nature of possible penalties, ***but also his own physical and mental infirmities, if any*** ...." (*Id.* at p. 529, emphasis added.)

This ability is critical at the penalty phase, since evidence in mitigation is frequently, if not almost always, based on some form of mental disease or defect. (See Penal Code section 190.3, subd. (h); (See, e.g., *Wiggins v. Smith* (2003) 539 U.S. 510, 524-525; *Rompilla v. Beard* (2005) 545 U.S. 374, 381-385. See generally A.B.A. Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. Feb. 2003) Guideline 4.1 - The Defense Team and Supporting Services, at p. 31.) A defendant who does not have an appreciation for "his own physical or mental infirmities" can hardly make rational decisions whether to present mitigation evidence at the penalty phase regarding his own mental illness. (See *People v. Lightsey* (2012) 54 Cal.4th 668 [holding that a potentially incompetent defendant may be prohibited from waiving counsel and representing himself at the hearing on his own comptency hearing].)

Commentators and courts that have considered the impact of *Indiana v. Edwards* on self-representation at the penalty phase have concluded that the right to

self-representation must be limited at the penalty phase. The rationales include a defenant's more limited right following conviction, the state's enhanced interest in individualized sentencing in a capital cases, and the special skills required to present mitigation. (Blume & Clark, "'Unwell': *Indiana v. Edwards* and the Fate of Mentally Ill Pro Se Defendants," 21 *Cornell Journal of Law & Public Policy* 151 (Fall 2011), at pp. 169-172; *Barnes v. State* (Fla. 2010) 29 So.3d 1010, 1025-1026.)

For the same reasons, this court should reconsider its view that competency to self-represent at trial necessarily implies that the defendant is competent to represent himself at the penalty phase. While the two stages may be part of a single trial, the stages are bifurcated and each requires distinct skills and investigation. (See AOB 144-145; Blume & Clark, "'Unwell': *Indiana v. Edwards* and the Fate of Mentally Ill Pro Se Defendants," *supra*, at pp. ; *State v. Reddish* (N.J. 2004) 859 A.2d 1173, 1200-1201.) Defendants who do not fall into the gray-area may be able to negotiate the complexities of mitigation. The same cannot be said of those defendants who, by virtue of mental illness, cannot appreciate "[their] own mental and physical infirmities," (*Johnson*, *supra*, 53 Cal.4th at p. 529), and are thereby unable to put on a case in mitigation "without the help of counsel.'" (*Johnson*, *supra*, 53 Cal.4th at p. 530, quoting *Edwards*, *supra*, 554 U.S. at pp. 175-176.) For such defendants, at least at the penalty phase, this court's decision in *People v. Johnson* strongly supports the view that the right to self-representation should be limited.

The supreme courts of New Jersey and Florida have taken the position that a capital defendant's opposition to, or inability to put on, mitigation evidence should not prevent the appointment of counsel to accomplish that task. (*State v. Reddish*, *supra,* 859 A.2d 1173, 1200-1205;. *Barnes v. State* (Fla. 2010) 29 So.3d 1010, 1022-1024.) The presentation of mitigation evidence, these courts held, is indispensable to the goal of securing the twin goals of fair trials for capital defendants and individualized sentencing as required by *Gregg v. Georgia* (1976) 428 U.S. 153.

Edwards' revolution lay in its recognition that the criminal justice system's goal of the appearance of fairness of trials is superior to the individual defendant's interest in autonomy. As *Edwards* put it, "insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial." (*Edwards*, *supra*, 554 U.S. at p. 176-177.)

Because the trial court never considered whether appellant's mental illness, including his inability to perceive his own mental illness, prevented him from conducting the penalty phase without the assistance of counsel, the judgment of death must be reversed.

VI. THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO OBTAIN AN UPDATED WAIVER OF COUNSEL AFTER THE STATE ELECTED TO SEEK THE DEATH PENALTY

The Parties' Contentions

On December 8, 2003, ten months after appellant's arraignment and numerous hearings, the trial court took appellant's waiver of counsel. At the time appellant waived his right to counsel, the State had not filed a Penal Code section 190.3 notice of an intent to seek death. The prosecution did so, however, on February 9, 2004, at the hearing following the granting of Mr. Mickel's waiver of counsel.

Appellant has argued that the State's filing of its notice of intent to seek death constituted a radical change in the nature of the prosecution, which required the trial court to advise appellant of the new penal consequences and procedures, insure that he understood those consequences and procedures, and obtain an updated waiver of counsel. At no time in this case, however, did the trial court conduct the necessary and proper inquiry to ensure that appellant waived his right to counsel with an understanding of the ultimate penal consequence he actually ended up facing. The trial court's failure to do any of these things rendered appellant's waiver of counsel invalid.

Respondent contends that, for two reasons, an updated waiver of counsel was not required. First, appellant's initial waiver was knowing and intelligent because

at the time he made that waiver, he was on notice that the State intended to seek death. (RB 122-123.) Second, the record discloses that appellant also understood the procedural complexities of a death penalty case , and the risks of self-representation. (RB 124-125.)

It is noteworthy that respondent does not contest the legal principle underlying appellant's claim. Thus, the parties appear to agree that a *Faretta* waiver remains in effect unless there is a "substantial change in the circumstances" of the case which requires the trial court to inquire whether defendant wishes to revoke his waiver. (See AOB 142-143.) Respondent's position seems to be that no such substantial change occurred in the instant case.

A. At The Time Appellant Waived His Right To Counsel, The State Had Not Provided Adequate Notice Of Its Intent To Seek The Death Penalty.

As proof of the fact that appellant was on notice of the State's intent to seek the death penalty, respondent cites to a number of portions of the record in which appellant's counsel, James Reichle, referred to the case as one involving a "special circumstance," and therefore having a "sentencing range [of] life without parole or death" (RB 115-116); or as being a "capital case" (RB 116); or as having a bifurcated guilt and penalty phase. (*Id.*)

However, these portions of the record only demonstrate that *Mr. Reichle* may

have understood that the People intended to seek the death penalty, and that *he* understood the procedures involved. They say nothing about appellant's own understanding. And it is appellant's understanding that is relevant, not his counsel's. Thus, any waiver of counsel must be personally made by the defendant, not by his counsel. (*People v. Floyd* (1970) 1 Cal.3d 694, 702-703; *In re Johnson* (1965) 62 Cal.2d 325, 334; *People v. Conrad* (1973) 31 Cal.App.3d 308, 323-324.) Merely insuring that a defendant's counsel understands the consequences of waiver is therefore insufficient to establish a voluntary and intelligent waiver on the part of the defendant. The advisements, in other words, must be given to the defendant and the waiver must be personally made by the defendant. (*Faretta v. California* (1975) 422 U.S. 806, 834 ["It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage."].) Mr. Reichle's understanding of the penal consequences is not relevant to the question whether appellant personally understood those consequences.

The State also rely upon a pleading filed by the People on December 4, 2003, which refers to the fact that "the defendant has been charged with a capital offense, namely, murder of a police officer while engaged in the performance of his duties." (RB 119.) This reference, too, is inadequate to have given notice that the People intended to seek the death penalty. A "capital case" is simply one in which death may be sought, or in which life without parole may be imposed. (*Gardner v. Superior Court* (2010) 185 Cal.App.4th 1003, 1013. See *Sand v. Superior Court* (1983) 34 Cal.3d 567, 570 ["Arguably the term "capital case" might be understood

either to define the nature of the offense charged—i.e., murder with special circumstances—or to describe the permissible punishment—i.e., that the death penalty may be imposed."].) The designation alone did not inform the defendant that the People would seek death rather than life without parole.

This court has suggested as much in *People v. Visciotti* (1992) 2 Cal.4th 1. There, the defendant argued that the State's notice of intent to introduce aggravating evidence under section 190.3 was inadequate. (*Id.* at p. 70.) The court rejected the argument, holding that notice was adequate because "[s]pecial circumstances were charged ***and*** the People gave notice of the aggravating evidence it intended to offer at the penalty phase." (*Id.,* emphasis added.)

In the instant case, of course, a special circumstance was charged prior to Mr. Mickel's entry of his *Faretta* waiver. But, the section 190.3 notice of intent to introduce aggravating evidence and thereby seek the death penalty was not given prior to that waiver. While it is true that, based on the special circumstance charge, Mr. Mickel was aware that the offense carried either life without parole or death, without the added specification that the People intended to introduce aggravating evidence to seek death, the special circumstance charge alone was insufficient notice to the defendant that death will be sought.

Thus, the prosecution's filing of its section 190.3 statement – after appellant had waived his right to counsel – marked the first time that the State had committed

itself to pursue a sentence of death rather than life without parole. This constituted a "substantial change in the circumstances" of the case, requiring a renewed waiver of the right to counsel.

Respondent also cites to a brief filed by appellant in support of his motion for self-representation, in which appellant made statements indicating his belief that the case was a death penalty case. (RB 117-119, citing 3 CT 751-765.) Specifically, appellant argued that, since the trial court may appoint a second counsel to represent the defendant "in a death penalty case," it should appoint Mr. Reichle to be appellant's co-counsel in the instant case. (3 CT 756-760.)

Appellant's statements in his brief filed in support of his motion for self-representation indicates no more than what has previously been established: namely that appellant understood that based on the charges of special circumstance murder, the case could carry a possible sentence of life without parole or the death penalty. (See 3 CT 686 [Information charging special circumstances noted the "sentencing range" to be "LWOP/Death". See AOB 130.) Respondent misses two important points. First, when appellant filed this brief in support of waiving counsel, the State had not yet committed itself to seeking death. That did not happen until February 9, 2004, after appellant had been permitted to waive counsel. The State's declaration on that date that it would do so thus marked a dramatic shift in the penalty the State was seeking. Second, in light of the State's declaration of its intent to seek death, an entire panoply of procedures came into play. It is undisputed that

the trial court did not advise appellant of any of these consequences of a death penalty prosecution.

This omission on the court's part has added significance in light of its prior dealings with Mr. Mickel on the issue of self-representation. Early in the case, Mr. Mickel stated his intent to waive counsel. (1 RT 11. See AOB 128-129.) When the trial court advised appellant of the complexities of a preliminary hearing, Mr. Mickel relented and agreed to have counsel represent him through that stage. (1 RT 14.)

Had the trial court similarly advised appellant of the complexities of a death penalty prosecution, which far exceed the complexity of a preliminary examination, it is highly likely that appellant would have made the same decision he did with respect to the preliminary hearing. Unfortunately, however, such advisements were never given. In the absence of such advisements, it can hardly be said that appellant waived counsel with "his eyes open," (*Faretta*, *supra*, 317 U.S. at p. 242), and with a full understanding of "the disadvantages of self-representation, including the risks and complexities of the particular case.' (*People v.* Koontz, *supra*, 27 Cal.4th at p. 1070; *People v. Lawley* (2002) 27 Cal.4th 102, 140.)

Respondent also relies on *People v. Lawley* (2002) 27 Cal.4th 102, 140, and *People v. Blair*, *supra*, 36 Cal.4th at p. 708, in arguing that appellant understood the State was seeking his death, and that he understood the "risks and complexities" of self-representation in such a case. (RB 123.)

Both cases are very different from appellant's case. In *Lawley*, the prosecution filed a section 190.3 notice of intent to seek the death penalty *prior* to the defendant's motion for self-representation. (*People v. Lawley*, *supra*, App. Opn. Br., at pp. 3-4 [stating that the prosecution filed the section 190.3 notice on June 16, 1989, and that defendant entered his *Faretta* waiver on August 14, 1989.].) Similarly, in *People v. Blair*, the defendant entered his *Faretta* waiver on September 19, 1986. (36 Cal.4th at p. 703.) When the trial court took the waiver, it made it crystal clear to the defendant that the prosecution was seeking the death penalty: As this court noted, the trial court "stressed to defendant that this was a special circumstances case in which the state was asking for his life ...." (*Id.* at p. 703.)

Nothing of the sort happened in Mr. Mickel's case. Unlike *Lawley*, prior to Mr. Mickel's *Faretta* waiver, the prosecution did not file its notice of intent to introduce aggravating evidence in order to seek the death penalty. And, unlike *Blair*, prior to Mr. Mickel's *Faretta* waiver, the trial court did not advise him that the State was asking for his life. Mr. Mickel's *Faretta* waiver was thus given prior to the State's commitment to seeking the death penalty. For that reason, when the State finally committed itself on February 9, 2004 to seeking the death penalty, the circumstances of the case drastically changed, and a new waiver of the right to counsel was required.

B. The Trial Court Completely Failed To Advise Appellant Of Any Of The Risks Of Self-Representation In, Or Complexities Of, A Death Penalty Case, And His Waiver Of Counsel Was Therefore Involuntary.

Appellant has further argued that, in assessing the need for additional advisements once the State committed itself to seeking death, this court must follow United States Supreme Court law established in *Patterson v. Illinois* (1988) 487 U.S. 285. (AOB 143-144.) Because the Respondent's Brief declines to discuss *Patterson*, a brief review of that law is appropriate.

The Supreme Court in *Patterson* addressed whether a defendant's pre-indictment waiver of counsel for purposes of interrogation carried over to post-indictment questioning by the authorities. In answering this question, the court stated that

> "we have defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel. An accused's waiver of his right to counsel is 'knowing' when he is made aware of these basic facts."

(*Id.* at p. 298.)

The Supreme Court held that no additional advisements were required in *Patterson* because it "d[id] not discern a substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at postindictment questioning." (*Id.* at pp. 298-299.)

Under *Patterson*, the touchstone for determining whether a defendant can waive his right to counsel without new advisements being administered, is a "pragmatic" one, based on whether there is "a substantial difference between the usefulness of a lawyer" at the two stages. If there is such a difference, a new waiver is required.

When a defendant knowingly and voluntarily waives a constitutional right based upon an assumed set of facts or circumstances, but where circumstances change and render invalid the assumptions upon which the original waiver was made, courts have long held tha the initial waiver is invalid. (*Harrison v. United States* (1968) 392 U.S. 219, 222-223 [where a defendant waives right against self-incrimination to respond to state's introduction of confession in its case-in-chief, and the confession is later held inadmissible on appeal, the defendant's initial waiver is invalid and the state may not introduce the confession at a second trial]. Accord, *People v. Hopkins* (1974) 39 Cal.App.3d 107, 118-120 [defendant waived right to jury trial based on an accurate understanding of the charges, but state then amended the information to add more charges; held, changed circumstances rendered initial waiver of jury trial invalid]; *People v. Luick* (1972) 24 Cal.App.3d 555, 557-559 [same]; *People v. Ray* (1965) 238 Cal.App.2d 734, 735 [same]; *People v. Walker* (1959) 170 Cal.App.2d 159, 166 [same].)

The question respondent in the instant case seems unwilling to address is whether, consistent with *Patterson*, there is a substantial difference between the usefulness of a lawyer in a murder case involving only a prison sentence, as opposed

to a murder case involving the death penalty. Appellant has explained why there simply can be no dispute on this question. (AOB 144-145.)

As appellant has pointed out, the American Bar Association's "ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases" (rev. ed.2003), reprinted in 31 Hofstra L.Rev. 913, 1027 (2003), spanning 130 pages, identify the specific obligations of capital counsel, from investigating the case and the client's background, to conducting voir dire, to presenting a penalty phase. Leading commentators have expounded on the additional complexity of death penalty cases and the need for specially trained and qualified counsel. (See e.g., J. Leibman, "The Overproduction of Death," 100 Columbia L.R. 2030, 2102-2103 (2000); *Blume & Clark,* "'Unwell': Indiana V. Edwards and the Fate of Mentally Ill Pro Se Defendants," *supra*, at pp. 1200-1201.

The United States Supreme Court has acknowledged that special competence is required for an attorney representing a defendant subject to the death penalty. (*Martel v. Clair* (2012) 132 S.Ct. 1276, 1284.) Congress has acknowledged the same point. When the federal death penalty statute was passed, it amended the provisions in the United States Code for appointment of counsel in capital cases. (*Martel v. Clair*, *supra*, 132 S.Ct. at p. 1284.) The new statute grants federal capital defendants and capital habeas petitioners enhanced rights of representation, in light of what it calls "the seriousness of the possible penalty and ... the unique and complex nature of the litigation." (*Id.* at pp. 1284-1285.) The Supreme Court explained the rationale for the need for enhanced legal reprepresentation in capital

cases:

> "The statute aims in multiple ways to improve the quality of representation afforded to capital petitioners and defendants alike. Section 3599 requires lawyers in capital cases to have more legal experience than § 3006A demands. Compare §§ 3599(b)–(d) with § 3006A(b). Similarly, § 3599 authorizes higher rates of compensation, in part to attract better counsel. Compare § 3599(g)(1) with § 3006A(d) (2006 ed. and Supp. IV). And § 3599 provides more money for investigative and expert services. Compare §§ 3599(f) (2006 ed.), (g)(2) (2006 ed., Supp. IV), with § 3006A(e) (2006 ed. and Supp. IV). As we have previously noted, those measures "reflec[t] a determination that quality legal representation is necessary" in all capital proceedings to foster "fundamental fairness in the imposition of the death penalty." *McFarland*, 512 U.S., at 855, 859, 114 S.Ct. 2568."

(*Martel v. Clair*, *supra*, 132 S.Ct. at p. 1285.)

In view of the inherent complexities of a death penalty case, it is simply too late in the day for anyone to contend that there is no marginal "usefulness" to having counsel in such a case. Under the framework dictated by *Patterson v. Illinois,* new waivers of counsel were required when the State formally declared its intention to seek death.

Respondent suggests, however, that additional advisements were unnecessary because the record demonstartes that "appellant understood the disadvantages of self-representation, including the risks and complexities of the particular case." (RB 123, citing *People v. Blair,* supra, 36 Cal.4th at p. 708, and *People v. Lawley*, *supra*, 27 Cal.4th at p. 140.

These two decisions are thoroughly distinguishable on this point as well. *Lawley* rejected a claim that the trial court's admonitions were inadequate, stating two reasons: the defendant had significant experience with the criminal justice system (having been a defendant in six prior trials); and "[t]he record suggests no confusion on defendant's part regarding the meaning of the admonitions, risks of self-representation, or the complexities of his case...." (*Id.* at p. 140.) *Blair* rejected the same claim because the defendant there also had prior experience in a murder trial, and because, after the prosecution stated its intention to seek death, the trial court specifically warned the defendant that "[a]t this point, the stakes have just gone up quite a bit. Now, you are a layman, and you really need a lawyer. It's your life." (*Blair*, *supra*, 36 Cal.4th at p. 710.)

Mr. Mickel's case is quite different. Unlike Lawley and Blair, appellant had no prior experience with the criminal justice system, and no inferences about his understanding of the procedures could be drawn. The trial court, itself, realized this when it questioned appellant about pre-trial procedures. Hearing appellant's answers, the trial court stated that appellant did not "demonstrate a very sophisticated or, for that matter, any grasp of the law." (1 RT 11.) Because appellant affirmatively demonstrated no understanding of the procedures, the court cannot draw a contrary inference from a silent record, i.e., a record in which appellant fails to express confusion. Moreover, unlike the instant case, the trial court in *Blair* went to great lengths to impress upon the defendant that "the State is asking for your life," (*id.*) and that he would therefore benefit from a lawyer. As explained in the opening brief, the trial court never examined appellant about the

penal consequences of the case. (AOB 130-132.)

Unlike *Blair* and *Lawley*, appellant's case was one in which, prior to his waiver of counsel, an unsophisticated defendant demonstrated his lack of understanding of pretrial procedures, was not advised that the State was seeking death, and was not informed of the complexities of a death penalty case. It is difficult to see how a waiver of counsel, in these circumstances, can be characterized as knowing and intelligent.

The trial court's failure to obtain a new waiver of counsel requires reversal of the judgment. (*People v. Lightsey* (2012) 54 Cal.4th 668, 699 [denial of counsel at critical stage is structural error requiring reversal].)

VII. THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO AN IMPARTIAL JURY BY FAILING TO ADEQUATELY VOIR DIRE AND REMOVE JURORS WHO STATED ON THEIR QUESTIONNAIRES THAT THEY WOULD AUTOMATICALLY VOTE FOR DEATH IF A DEFENDANT WERE CONVICTED OF THE MURDER OF A POLICE OFFICER.

The Parties' Contentions

Appellant has argued that the trial court violated his constitutional right to an impartial jury by failing to investigate and remove the four seated jurors who stated under penalty of perjury that they believed the state should automatically put to death a defendant who kills a police officer engaged in his duties. (AOB 151-177.) The result is that appellant was tried, convicted and sentenced to death by a jury actually biased against him.

Respondent counters with two contentions. First, appellant forfeited the claim in the trial court by failing to challenge the jurors for cause, failing to use peremptory challenges against them, and failing to object to the panel as constituted. (RB 157-159.) Second, the claim is meritless because the voir dire of these jurors indicated that they could in fact follow the law. (RB 161-170.)

As explained below, the claim has not been forfeited, and the record does not show that the jurors would refrain from automatically imposing the death penalty on a defendant who murders a police officer in the performance of his duty.

A. The Claim Was Not Forfeited Because It Involves Seated Jurors Who Were Actually Biased.

Appellant has argued that his failure to challenge the four jurors who stated they would automatically vote for death in a case like appellant's in which the defendant murdered a police officer engaged in the performance of his duties, did not forfeit review of that claim because those jurors were actually biased. Appellant relied for this proposition on this court's decision in *People v. Foster* (2010) 50 Cal.4th 1301, in which the court stated, quoting *Johnson v. Armontrout* (8th Cir. 1992) 961 F.2d 748, 754, that "[w]hen a defendant fails to object to the qualifications of a juror, he is without remedy only if he fails to prove actual bias." (*Id.* at p. 1325.) The *Foster* court then went on to analyze the appellant's claim that various jurors were actually biased against him. (*Id.* at pp. 1325-1326.)

Respondent argues that *Foster* does not mean what it plainly says. It is common, says respondent, for a court to first hold a claim forfeited, then address the merits anyway. (RB 159.) Respondent says that the fact that *Foster* cited to *People v. Hillhouse* (2002) 27 Cal.4th 469, supports its point. There, too, the court held a the jury selection claim had been forfeited, but "then chose to address the claim on the merits as if it had been cognizable on appeal ...." (RB 160.)

Respondent misreads *Foster* and misunderstands the nature of a claim that a seated juror is actually biased. The claim that an unchallenged, potential juror is actually biased does not dissipate once the juror actually seated. That biased juror obviously continues to sit on the jury for the duration of the case. In such a situation,

where the trial judge is aware of the juror's actual bias, California statutes require the judge to investigate the juror's actual bias and discharge that juror if necessary. Thus, Penal Code section 1089 provides:

> "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, ... the court may order the juror to be discharged ...."

Similarly, Code of Civil Procedure section 233 provides:

> "If, before the jury has returned its verdict to the court, a juror becomes sick or, upon other good cause shown to the court, is found to be unable to perform his or her duty, the court may order the juror to be discharged...."

Both statutes require the trial judge, at any time, to investigate and discharge a juror who is not fit to serve. (*People v. Burgener* (1986) 41 Cal.4th 505, 519.) *Burgener* explained that, "these statutes have established that, once a juror's competence is called into question, a hearing to determine the facts is clearly contemplated. [Citations.] Failure to conduct a hearing sufficient to determine whether good cause to discharge the juror exists is an abuse of discretion subject to appellate review. [Citations.].)" (*Id.* at pp. 519-520.) While the decision to conduct a hearing is subject to the trial court's discretion, "once the court is put on notice of the possibility a juror is subject to improper influences it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and failure to make this inquiry must be regarded as error. (People v. McNeal, supra, 90 Cal.App.3d 830, 838–840.)" (*Id.* at p. 520.) Finally, "[i]t is beyond question that a criminal verdict rendered with the participation of a juror

unfit for the proper discharge of her duty ... must be reversed." (*Id.* at p. 521.)

Thus, while the defendant's failure to challenge a prospective juror may forfeit a claim "that the voir dire was inadequate," (*Foster*, *supra*, 50 Cal.4th at p. 1324), it does not forfeit a claim that a seated juror was actually biased. A seated juror's actual bias is a state of affairs that, under the statutes set forth above, places an obligation on the trial court to act, independently of the defendant's objection.

Contrary to respondent's argument, this conclusion is not changed by *People v. Foster*'s citation to the earlier decision in *People v. Hillhouse*, *supra*, 27 Cal.4th 469. The court in *Foster* cited *Hillhouse* solely *for the definition* of "actual bias," not for the proposition that claims of actual bias are forfeited.[11]

The jurors' questionnaires in the instant case disclosed their actual bias as that term was defined in *Hillhouse*. The trial court was fully aware, from the answers of seated jurors 7877, 7017, 10155, and 9466 to question 39(D), that they believed a

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[11] This precise passage in *Foster* is as follows: "'Actual bias' is 'the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.' (Code Civ. Proc., § 225, subd. (b)(1)(C); *People v. Hillhouse* (2002) 27 Cal.4th 469, 488.) Page 488 of the *Hillhouse* decision simply states the definition of actual bias that was summarized in *Foster*: "A party may challenge a prospective juror for actual bias, defined as a state of mind that would prevent that person from acting impartially and without prejudice to the substantial rights of any party." (*Id.*) Nothing in the court's citation to *Hillhouse* indicates that, contrary to *Foster's* explicit statement, a claim of actual bias is waived by the failure to object at the voir dire stage.

defendant who commits a crime like the one with which appellant was charged, should be automatically put to death. This answer constituted actual bias, which under statutory law, the trial court was obligated to investigate and act upon. The claim that it failed to do so, and that appellant was consequently convicted and sentenced to death by jurors having an actual bias, is therefore not forfeited.

B. The Record Does Not Show That the Jurors 7877, 7017, 10155, and 9466 Would Refrain from Automatically Imposing the Death Penalty on a Defendant Who Murdered a Police Officer in the Performance of His Duty.

Respondent further argues that the totality of the voir dire indicates that none of the jurors under review would automatically impose the death penalty for the murder of an officer in the performance of his duties, and that instead they could follow the law. (RB 164-171.) "A careful review of the record in this case," (RB 164), does not support this assertion.

1. Juror 7877

Respondent agrees that Juror 7877 "did indicate in response to Question 39 that the State of California should automatically put to death everyone who ... 'is convicted of murder plus the murder was of a police officer while the police officer was engaged in the performance of his duties." (RB 165, citing 37 CT 10721.) Respondent points out, however, that Juror 7877 told the court that "he/she would not automatically vote for or against the death penalty in every case of first degree murder," and further indicated that "there was no reason he/she could not be fair and impartial," and "follow the court's instructions." (RB 165.)

Appellant has explained in his opening brief why neither of these two statements contradict Juror 7877's belief that the death penalty should be automatic for the murder of a police officer. (AOB 169, 171-173.) As explained in greater detail there, a juror could state that they would not automatically vote for death "in every case of first degree murder," yet still adhere to the belief that, if the victim in a particular case was a police officer engaged in his duties, the death penalty should be automatic. Further. the juror's willingness to follow the court's instructions came in answer to a general question which did not specify any particular instruction. Moreover, the instructions that the court had discussed with the jurors, or which appeared on the questionnaire had nothing to do with refraining from the automatic application of the death penalty for certain crimes. (AOB 172-173.)

Juror 7877's views on the automatic application of the death penalty for murderers of police officers remained undiluted by the further voir dire.

2. Juror 7017

Respondent acknowledges that Juror 7017 also answered question 39-D by saying that he/she would automatically vote for death in a case in which a defendant murdered a police officer engaged in the performance of his duties. (RB 166, citing 38 CT 10940.) Respondent points out, however, that Juror 7017 also stated that "he/she would not automatically vote for or against the death penalty in every case of first degree murder, no matter what the evidence might be," he/she would "follow the rules," and said there was no reason he/she could not be impartial or follow the court's instructions. (RB 166.) For the same reasons, explained above in relation

to Juror 7877, these answers did not indicate that Juror 7017 abandoned the view that the death penalty should be automatic for murders of police officers.

Respondent further points out that Juror 7017 said he/she could impose life without parole "where the allegation is that Officer Mobilio was a peace officer who was intentionally killed ...." (RB 166.) In his opening brief, appellant explained why this answer did not repudiate Juror 7017's answer to question 39-D. (AOB 169-170.) In short, the juror's willingness to consider alternate penalties where it is simply *alleged* that the murder victim was a police officer engaged in his duties signified only that the juror was willing to adhere to the presumption of innocence. By merely asking for the juror's views on ***unproven allegations***, this question (number 49) did not qualify the jurors' stated belief that convicted murderers of police officers should automatically be put to death.

Juror 7017 did not repudiate his/her views on the automatic application of the death penalty for murderers of police officers.

3. Juror 10155

Respondent concedes that Juror 10155 also answered question 39-D by saying that he/she would automatically vote for death in a case in which a defendant murdered a police officer engaged in the performance of his duties. (RB 167, citing 38 CT 11079.) Respondent repeats its argument that this juror's answer to question 49, inquiring whether he/she could impose life in prison where it is "alleged" that the murder was of a police officer, sufficed to ameliorate the juror's affirmative

answer to question 39-D. For the same reasons given above with respect to Juror 7017's response, it does not. The question dealt only with unproven allegations, not a conviction.

Respondent also notes that this juror said that, "depending on the circumstances," he/she could reject the death penalty. (RB 167.) Presumably, respondent is referring to Juror 10155's answers to question 54. What that question actually asked was whether, "[g]iven the fact that you will have two options available to you, can you see yourself, ***in the appropriate case***, rejecting the death penalty and choosing life imprisonment without the possibility of parole instead?" As appellant has pointed out, the operative phrase in this portion of question 54 is, "in the appropriate case." A juror who answered question 39-D in the affirmative could, of course, choose life "in an appropriate case." But a case in which the defendant murdered a police officer in the performance of his duties would not, in the juror's view, ever constitute "an appropriate case" for that disposition.

Juror 10155 gave similar answers as Jurors 7877 and 7017 when the court asked if they could be fair and impartial, or if they would automatically vote for death "in every case of first degree murder no matter what the evidence might be. As argued above, these answers did not repudiate the affirmative answer to question 39-D. While Juror 10155 may not automatically vote for death in every case of first degree murder, the relevant question is whether he/she would automatically vote for it in a particular case where the victim was a police officer engaged in his duties. The voir dire did not cause Juror 10155 to repudiate that affirmative answer.

4. Juror 9466

Respondent agrees that Juror 9466 put a "?" in answer to whether the death penalty should be automatic for murderers of police officers, presumably indicating that the juror was unsure a life sentence should be an considered in a case involving the murder of a police officer. (RB 168.) Respondent points out that this juror gave similar answers to the other jurors discussed above. But as explained above, none of these answers specifically repudiated the possibility that Juror 9466 would automatically vote for the death penalty if appellant were convicted of murdering a police officer in the performance of his duty.

Respondent next faults appellant generally for "isolat[ing]" the juror's answers to question 38 and then "arguing that because of the responses to Question 39 the jurors made 'crystal clear' that their willingness to consider alternate penalties did not apply when the special circumstance was the murder of a police officer." (RB 170.) Respondent suggests Question 39 was actually less clear than appellant contends: it only asked the jurors whether they ***"feel"*** that the state should automatically put to death everyone who kills a police officer. The fact that a juror "feels" that way, does not mean they cannot follow the court's instructions. (RB 170.)

Respondent's argument cannot be accepted. Each of the jurors who felt that the death penalty should be automatic for Mr. Mickel's offense, failed to disavow that "feeling" in response to any other question. The simple fact is that these jurors were *never* asked if, after *finding a defendant guilty* of murdering a police officer

engaged in the performance of his duties, they could impose life without parole. As such, their biased answer to Question 39 remained unmitigated.

In sum, neither the jurors' other answers on the questionnaire nor the trial court's cursory voir dire caused any of the foregoing jurors to reconsider or repudiate their view that the death penalty should automatically be imposed on a defendant who murders a police officer engaged in the performance of his duties. These jurors, all of whom sat on the jury throughout the trial, were therefore actually biased within the meaning of *People v. Foster*. The judgment of death must therefore be reversed.

VIII. THE JUDGMENT MUST BE REVERSED BECAUSE THE TRIAL COURT DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO TESTIFY IN HIS OWN DEFENSE, WHICH TESTIMONY COULD HAVE PROVIDED A BASIS FOR REDUCTION OF THE CRIME TO SECOND-DEGREE MURDER.

The Parties' Contentions

Appellant has argued that the trial court violated Mr. Mickel's Sixth Amendment right to put on a defense by precluding him from testifying about the facts of the crime and his motive for committing it. (AOB 178-207.) While the trial court considered appellant's proffered testimony irrelevant to any recognized defense, the trial court was wrong. Although not characterized as such at trial, appellant's testimony was relevant to a defense to premeditation based on his unreasonable belief that prompted the murder. Such a belief, which can negate premeditation, need not be reasonable, so long as it is honestly held. (AOB 202-207.) Appellant has argued that the error was structural, requiring automatic reversal (AOB 199-202) or at a minimum, federal constitutional error subject to *Chapman v. California* (1967) 386 U.S. 18. (AOB 202-207.)

Respondent has three responses. First, echoing the trial court, respondent contends that appellant's testimony was properly excluded because it was not relevant to any cognizable defense. (RB 183-186.) Second, even if appellant's testimony was relevant, "it was proper to exclude it as more prejudicial than probative," under Evidence Code section 352. (RB 186-187.) Third, even if it was erroneously excluded, appellant cannot establish prejudice because the jury eventually heard appellant's testimony at the penalty phase and sentenced him to

death. (RB 187.)

Respondent's arguments are meritless.

A. Appellant's Testimony Was Relevant To A Defense That Could Have Negated Premeditation And Reduced His Crime To Murder Of The Second Degree.

Respondent contends that appellant's testimony was not "remotely related to any recognized defense or justification for homicide," and was merely "a platform to advance a political agenda." (RB 186-186.) In taking this position, respondent refuses to discuss or consider the claim made in appellant's opening brief that the testimony was relevant to the defense against a finding of premeditation. (AOB 204-205.) As appellant explained, evidence tending to prove that the defendant acted from a delusion cannot negate malice, but is relevant to negate premeditation. (See *People v. Padilla* (2003) 103 Cal.App.4th 675, 679.) Indeed, at the time of appellant's trial, a standard CALJIC jury instruction specifically addressed this point:

> "A hallucination is a perception that has no objective reality. [¶] If the evidence establishes that the perpetrator of an unlawful killing suffered from a hallucination which contributed as a cause of the homicide, you should consider that evidence solely on the issue of whether the perpetrator killed without deliberation and premeditation."

(CALJIC No. 8.73.1 (2004 ed.).)

Appellant's testimony as to his motive for the murder, which disclosed his entirely unreasonable delusion that he was acting pursuant to the dictates of the

Declaration of Independence, and in response to Paul Revere's Midnight Ride and the invasion of the Red Coats, would have provided a basis for negating premeditation. Respondent is therefore incorrect in arguing that the evidence was not relevant.

B. A Trial Court May Not Exclude, Under The Guise Of Evidence Code Section 352, The Defendant's Testimony About The Crime And His Motive For Committing It, Where These Matters Are Relevant To A Defense.

Respondent next argues that, even if the defense evidence was relevant, the trial court could have excluded it under Evidence Code section 352 as more prejudicial than probative. (RB 186-187.) Here, too, respondent ignores the theory of relevance of appellant's testimony based on negation of premeditation, and argues only that the testimony was "a platform to advance a[] [political] agenda," and was "not probative of any valid or recognized legal defense ...." (RB 187.)

Respondent's argument cannot stand, in light of the demonstrable relevance of the evidence to a recognized defense to a finding of premeditation. Under these circumstances, the trial court has no discretion to exclude such evidence under a state's relevancy statute such as section 352, particularly where the prosecution has introduced evidence on the very same matters. (AOB 190-193; *United States v. Scheffer* (1998) 523 U.S. 303, 308 [holding that "the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a

weighty interest of the accused."]; *Holmes v. South Carolina* (2006) 547 U.S. 319, 328-329; *Rock v. Arkansas* (1987) 483 U.S. 44; *Ferguson v. Georgia* (1961) 365 U.S. 570.)

Thus, while a trial court may invoke Evidence Code section 352 to exclude cumulative or marginally relevant testimony, it may not do so where the prosecution has introduced evidence on the same matters, and where the evidence supports a defense to premeditation. (*Id.*)

C. The Erroneous Exclusion Of Appellant's Testimony Was Either Structural Error Requiring Automatic Reversal, Or Prejudicial Error Under *Chapman v. California.*

Appellant has argued that the trial court's preclusion of appellant's testimony in violation of the Sixth Amendment right to present a defense was either structural error, or at a minimum, federal constitutional error reviewed under *Chapman v. California*. (AOB 197-203.) Respondent declines to engage this legal argument; instead, it declares that the mere exclusion of evidence is tested for prejudice under the state standard of *People v. Watson* (1956) 46 Cal.2d 818, 837. (RB 187.)

While respondent is correct that the exclusion of evidence is ordinarily reviewed under *Watson*, that is not the case for exclusion of the defendant's own testimony in support of a recognized defense. As appellant explained in his opening brief, exclusion of this sort of evidence implicates the defendant's Sixth Amendment right to present a defense and is, therefore, given stricter scrutiny. (AOB 199-202;

See *Rock v. Arkansas*, *supra*, 483 U.S. 44; *Ferguson v. Georgia* (1961) 365 U.S. 570; See *Martinez v. Ylst* (9th Cir. 1991) 951 F.2d 1153, 1157.)

Respondent nonetheless reasons that under the *Watson* standard, the exclusion of appellant's testimony was harmless because the jury heard appellant's testimony at the penalty phase and sentenced him to death. (RB 187.) Respondent's theory is that the jury "therefore did not find the evidence to be compelling mitigation for appellant's actions." (*Id.*) But respondent's argument has no force if the correct standard of prejudice is, as appellant has urged, automatic reversal or the standard of *Chapman v. California,* which requires the State to prove that the error was harmless beyond a reasonable doubt.

The State cannot carry this burden, even in light of the death verdict following appellant's testimony. This is so because the State's argument hinges on assumption that the jury at the guilt phase engaged in the same factual inquiry and was bound by the same legal principles as at the penalty phase. The State's argument is really a variant of that explored in *People v. Sedeno* (1974) 10 Cal.3d 703. In *Sedeno*, this court held that the failure to give an instruction is harmless error if "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, ..." (Id. at p. 721.)

In the instant case, a reviewing court cannot determine that the factual

question of appellant's mental state omitted at the guilt phase was resolved at the penalty phase. This is because the evidence at the penalty phase upon which the jury deliberated contained far different evidence than was presented at guilt. First, at the penalty phase, the jury was presented with extensive victim impact evidence. Indeed, the jury heard emotional testimony from Officer Mobilio's wife, his parents, various colleagues and a student who participated in the DARE program that Officer Mobilio taught. Moreover, the death verdict came after appellant himself asked the jury to impose the death sentence, which was doubtless a powerful impetus for the verdict. A reviewing court cannot say with any confidence that the verdict of death was based on the jury's discrediting appellant's testimony of his mental state rather than the additional evidence in aggravation the jury presented.

Further, the jury's decision at the penalty phase is based on a number of factors. (See Penal Code section 190.3.) In deliberating on the penalty, the jurors may well have credited appellant's delusion, as was suggested by one juror's question whether appellant "was on drugs." (10 CT 2599.) Yet, the same jurors may still have decided that the other factors favoring death, supported by the People's case in aggravation, outweighed appellant's mental-state limitations.

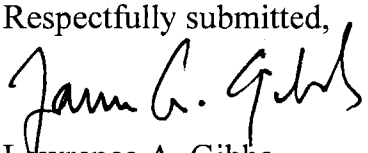
For these reasons, unlike *Sedeno*, no necessary inferences can be drawn from the death judgment regarding how a jury, properly instructed on CALJIC No. 8.73.1, would have evaluated the proof of premeditation. Because the factual record at guilt and penalty were not identical, respondent cannot carry its burden of proving beyond a reasonable doubt that the jury would have rejected the evidence at the guilt phase. The judgment must therefore be reversed.

CONCLUSION

The judgment should be reversed.

Dated: January 17, 2013

Respectfully submitted,

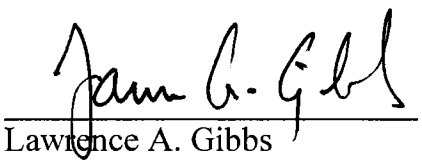


Lawrence A. Gibbs
Attorney for Appellant

CERTIFICATE PER CAL. RULES OF COURT, RULE 8.204(c)

I certify that this petition is produced in 13-point proportional type and contains 26,060 words.

Date: January 17, 2013



Lawrence A. Gibbs

PROOF OF SERVICE

I declare that I am employed in the County of Alameda. I am over the age of eighteen years and not a party to this cause. My business address is P.O. Box 7639, Berkeley, California. Today, I served the foregoing **Appellant's Reply Brief**, on all parties in this cause by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid, in the United States mail at Berkeley, CA, addressed as follows:

Office of Attorney General
1300 I St., #1100
P.O. Box 944255
Sacramento, CA 94244-2550

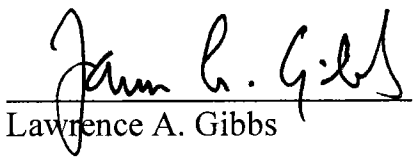
Gregg Cohen
Tehama County District Attorney
444 Oak Street, Room L
Red Bluff, CA 96080

Tehama County Superior Court
445 Pine St.
P.O. Box 1170
Red Bluff, CA 96080

Andrew Mickel V-77400
San Quentin State Prison
San Quentin, CA 94974

Scott Kauffman
CAP
101 Second St., #600
San Francisco, CA 94105

I declare under penalty of perjury that the foregoing is true and correct. Executed on January , 2013 in Berkeley, California.



Lawrence A. Gibbs