IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ANTHONY LETRICE TOWNSEL, Defendant and Appellant.	No. S022998 (Madera County Sup. Ct. No. 8926)

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of Madera

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ARGUMENT[1]

I
REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND RELIABLE GUILT AND PENALTY DETERMINATIONS BY FAILING TO SUSPEND THE PROCEEDINGS AND APPOINT THE DIRECTOR OF THE REGIONAL CENTER FOR THE DEVELOPMENTALLY DISABLED TO EVALUATE HIM IN LIGHT OF SUBSTANTIAL EVIDENCE THAT APPELLANT WAS BOTH MENTALLY RETARDED AND INCOMPETENT

A. Introduction

In his opening brief, appellant argued that the trial court was presented with substantial evidence sufficient to raise a reasonable doubt that he was competent to stand trial "as a result of . . . [the] developmental disability" of mental retardation. (Pen. Code, §§ 1367, subd. (a), 1370.1.) This evidence triggered the trial court's sua sponte duty to suspend the criminal proceedings and initiate competency proceedings to resolve that question, a mandatory and critical component of which was the appointment of and evaluation by "the director of the regional center for the developmentally disabled. . . ." (Pen. Code, § 1369, subd. (a); *People v. Castro* (2000) 78 Cal.App.4th 1415, 1417-1419 (hereafter *Castro*), cited generally with approval though disapproved on narrow other ground in *People v. Leonard* (2007) 40 Cal.4th 1370, 1388-1391 & fn. 3 (hereafter

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[1] The absence of a reply to any particular argument or allegation made by respondent does not constitute a concession, abandonment, waiver of forfeiture of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects his view that the issue has been adequately presented and the positions of the parties fully joined.

Leonard.)[2] The trial court's failure to do so violated Penal Code section 1369, as well as appellant's Eighth and Fourteenth Amendment rights to due process and heightened reliability in all stages of this capital proceeding. (AOB 48-57.)[3]

The competency proceedings held by the *pretrial* court, which entailed the appointment of and evaluations by psychiatrists and an ultimate determination that appellant was not incompetent *due solely to a mental disorder* – did not satisfy the trial court's duty to effectuate appellant's rights to *developmental disability* competency proceedings. (Pen. Code, § 1367, subd. (a); see also Pen. Code, §§ 1368, 1368.1, 1369; AOB 44-48, 60-82.) The appointed psychiatrists did not evaluate appellant for mental retardation and neither they nor the pretrial court considered whether appellant was incompetent as a result of mental retardation. (Pen. Code, § 1369, subd. (a) [when question is whether defendant is incompetent as a result of mental disorder, "the court shall appoint a psychiatrist or a licensed psychologist . . . to examine the defendant"].) Hence, the pretrial *mental disorder* competency proceedings did not satisfy the statutory requirements

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[2] As discussed at length in the opening brief, this Court discussed *Castro* at length and with approval but for that part in which the appellate court may have relied on a *per se* rule that a violation of section 1369 always and "*necessarily* requires reversal of any ensuing conviction." (*Leonard*, *supra*, 40 Cal.4th at 1389-1391 & fn. 3, italics original; AOB 64-68.)

[3] For ease of reference, appellant shall refer to the competency procedures to determine whether a defendant is incompetent as a result of a developmental disability such as mental retardation as "developmental disability competency" hearings or proceedings (Pen. Code, §§ 1367, 1369, subd.(a), 1370.1). He shall refer to the distinct procedures required to determine whether the defendant is incompetent as a result of a mental disorder as "mental disorder competency" hearings or proceedings. (*Ibid*).

for *developmental disorder* competency proceedings, provide the necessary safeguards codified in Penal Code section 1369, subdivision (a), to ensure that appellant was not tried while incompetent, dispel the doubts raised by the trial evidence that appellant was incompetent as a result of mental retardation, or render harmless the trial court's failure to initiate developmental disability competency proceedings. (AOB 60-82, citing, inter alia, *Leonard*, *supra*, 40 Cal.4th at pp. 1388-1391; *Castro*, *supra*, 78 Cal.App.4th at pp. 1410-1413, 1417-1420.)

Respondent disagrees on all counts. (RB 81-125.) According to respondent, any doubts about appellant's competency were resolved by the pretrial court's mental disorder competency proceedings and findings. (RB 86-94, 109-110, 112-115.) The subsequently presented evidence of appellant's mental retardation and incompetence did not constitute "substantial evidence" of those facts to warrant a mid-trial developmental disability competency hearing (RB 95-117), and even if it did, defense counsel waived appellant's right to that hearing by failing to request one. (RB 106-107, see also RB 123-124 & fn. 76.) Alternatively, the court's failure to hold developmental disability competency proceedings was harmless. (RB 121-125.) Finally, respondent contends that any error can be remedied by remanding to the trial court to hold a developmental disability competency hearing into whether appellant was competent to stand trial 22 years ago. (RB 117-121.) Respondent's arguments are without merit.

B. The Issue Presented in this Case is Whether There Existed Substantial Evidence of Appellant's Mental Retardation so that the Trial Court Should Have Exercised its Sua Sponte Duty to Initiate Developmental Disability Competency Proceedings

1. The Pretrial Court's Mental Disorder Competency Proceedings and Finding Are Legally Irrelevant to Appellant's Claim

At the outset, respondent devotes a significant portion of its brief to defending the *pretrial court*'s failure to hold a developmental disability competency hearing, the propriety of the pretrial mental disorder competency hearing, and the sufficiency of the evidence presented therein to support the pretrial court's finding that appellant was not incompetent due solely to a mental disorder. (RB 81-94.) Respondent's argument is a red herring.

The issue before this Court is not whether the *pretrial* court had a sua sponte duty to initiate developmental disability competency proceedings or whether its mental disorder competency finding was supported by the evidence before it. To the contrary, appellant does not dispute that neither the pretrial court nor the psychiatrists it appointed to evaluate him (neither of whom was a mental retardation expert) were aware of evidence that appellant was mentally retarded, that the pretrial court was therefore unaware that he was entitled to developmental disability competency proceedings and thus had no independent duty to protect or effectuate that right, or that the pretrial court's finding that appellant was not incompetent due solely to a mental disorder was supported by the limited evidence before it. (AOB 43-82.)

Nevertheless, while the pretrial court did not actively *violate* appellant's rights to developmental disability competency proceedings

(because it was unaware of the need for them), the pretrial mental disorder competency proceedings did not protect or effectuate those rights, either. either. As evidence subsequently presented to the *trial court* revealed, appellant was entitled by statute, due process, and the Eighth Amendment to developmental disability competency proceedings. (AOB 43-72; Pen. Code, §§ 1367, 1369, subd. (a).) Unlike the pretrial court, the trial court was presented with substantial evidence that appellant was incompetent "as a result of [the] developmental disability" of mental retardation (Pen. Code, §§ 1367, 1370.1) and hence *absolutely* entitled to developmental disability competency proceedings (Pen. Code, § 1369, subd. (a); *Castro*, 78 Cal.App.4th at pp. 1417-1419; *Leonard*, *supra*, 40 Cal.4th at pp. 1388-1390). (See also *Pate v. Robinson* (1966) 383 U.S. 375, 384-386 ("*Pate*") [in face of substantial evidence raising reasonable doubt as to defendant's competency, due process demands meaningful procedures adequate to protect defendant's right not to be tried and convicted while incompetent]; *People v. Pennington* (1967) 66 Cal.2d 508, 518-520 ("*Pennington*") [same – due process and state law].)

The trial court was also aware that the pretrial court found that appellant was not incompetent based on the reports of Doctors Terrell and Davis (13-RT 3087), who assessed him only for incompetency due to a mental disorder and did not test or evaluate him for mental retardation (13-RT 3043-3044, 3182-3183). (See also 12-RT 2936-2937, 2958-2959; 13-RT 3066-3067, 3086-3087, 3090, 3103-3106, 3113, 3182-3183.)[4] In other words, the trial court was on notice that the pretrial mental disorder

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[4] "RT" refers to the Reporter's Transcript on appeal. "CT" refers to the Clerk's Transcript.

competency proceedings did not satisfy appellant's rights to developmental disability competency proceedings (*Castro*, *supra*, 78 Cal.App.4th at pp. 1418-1419) and thus that the pretrial court's competency finding was not the "informed determination of the defendant's competence to stand trial" based on a "valid assessment" demanded by the constitution and state law (*Leonard*, *supra*, 40 Cal.4th at pp. 1388-1391). Hence, the trial court's failure to initiate developmental disability competency proceedings in the face of this evidence violated appellant's state and federal constitutional rights to "procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial."(*Drope v. Missouri* (1975) 420 U.S. 162, 172 ("*Drope*"); accord, *Pate, supra*, 383 U.S. at pp. 378, 386; *Leonard*, *supra*, at pp. 1388-1391; *Castro*, *supra*, at pp. 1418-1420.)

2. The Pretrial Court's Mental Disorder CompetencyFinding Did Not Require a Heightened Evidentiary Standard to Trigger the Trial Court's Duty to Initiate Developmental Disability Competency Proceedings Based on the Subsequently Presented, Substantial Evidence that Appellant Was Incompetent as a Result of Mental Retardation

Respondent also relies on the pretrial court's mental disorder competency proceeding and finding to contend that a different evidentiary standard governs the question of whether the trial court was required to initiate developmental competency proceedings than that required to initiate original competency proceedings. (RB 102, 105-106.) In this regard, it is well settled that a trial court has a independent statutory and constitutional duty "to suspend proceedings and conduct a competency hearing whenever the court is presented with *substantial evidence of incompetence, that is, evidence that raises a reasonable or bona fide doubt* concerning the

defendant's competence to stand trial." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 401, citing, inter alia, Pen. Code, § 1367, 1368; *Drope, supra*; *Pate, supra*; AOB 52-55, also citing, inter alia, *Pennington, supra*, 66 Cal.2d at pp. 518-520.)[5]

Respondent acknowledges the *Pate* standard as a general matter (RB 101), but contends that the evidentiary standard governing here is different:

> "When a competency hearing has already been held and the defendant has been found competent to stand trial . . . a trial court need not suspend proceedings to conduct a second competency hearing unless it 'is presented with a substantial change in circumstances or with new evidence' casting a serious doubt on the validity of that finding. [*People v. Jones* (1991) 53 Cal.3d 1115, 1152-1153]."

(RB 105-106, quoting *People v. Jones* (1997) 15 Cal.4th 119, 150, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn.1; see also RB 86 & 101.)

This articulation of the evidentiary standard that triggers a trial court's duty to initiate competency proceedings following a prior competency proceeding and finding was first made by the appellate court in *People v. Melissakis* (1976) 56 Cal.App.3d 52, 62), and first adopted by this Court in *People v. Jones*, *supra*, 53 Cal.3d at pp. 1152-1153; see also RB 86, 101, 105-106, and authorities cited therein following *Jones*, *supra*].)[6] Appellant has no quarrel with it. Indeed, despite respondent's protestations to the contrary (see RB 102 & fn. 60), appellant cited *Jones, supra*, 53 Cal.3d 1115, throughout his opening brief as one of the many authorities

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[5] For ease of reference, appellant shall refer to this evidentiary standard as the "*Pate* standard."

[6] For ease of reference, appellant shall hereafter refer to this articulation of the standard as the "*Jones/Melissakis*" standard.

supporting his claim (see AOB 53-54, 58-59 & fn. 21).

Appellant does dispute, however, respondent's apparent *interpretation* of the *Jones/Melissakis* standard. According to respondent, appellant has applied an "[in]correct standard" (RB 102) – i.e., the *Pate* evidentiary standard, as well as this Court's adoption of it in cases like *Pennington*, *supra* (AOB 52-60) – in arguing that evidence before the trial court triggered its sua sponte duty to initiate developmental disability competency proceedings. The "proper standard" applicable here, respondent contends, is that articulated in the *Jones/Melissakis* line of authority. (RB 102, and authorities cited therein.) Indeed, respondent argues, because appellant's argument rests on the "[in]correct" *Pate* substantial evidence "standard" and does not apply the "proper" *Jones/Melissakis* "standard," this Court should disregard appellant's claim in its entirely because he cannot "construct" a new argument utilizing the "proper standard for the first time in his reply brief." (RB 102 & fn. 60.)

While not made explicit, respondent's argument clearly rests on the implicit premises that: (1) the *Jones/Melissakis* standard is somehow fundamentally different, and more difficult for a defendant to satisfy, than the *Pate* substantial evidence standard; (2) the *Pate* standard only applies to original competency proceedings; and (3) when there has been *any* prior competency hearing and finding, the *Jones/Melissakis* standard and not the *Pate* standard applies. Respondent's interpretation of the law incorrect.

First, this case does not involve the kind of prior competency hearings and findings involved in the *Jones/Melissakis* line of authority. In the cases cited by respondent, the defendants were previously afforded the types of competency proceedings to which they were entitled (mental disorder competency hearings), which involved and resolved the same

factual and legal issues (whether the defendants were incompetent due to a mental disorder) that would be required in new hearings based on "new evidence" or a "change of circumstances." (RB 105-106, citing *People v. Jones*, *supra*, 15 Cal.4th at pp. 150-151; *People v. Marshall* (1997) 15 Cal.4th 1, 29-33; *People v. Lawley* (2002) 27 Cal.4th 102, 127-130, 136-138.) In other words, the defendant *was* given access to the adequate procedures to which he was entitled. (See *Drope*, *supra*, 420 U.S. at pp. 172 [due process guarantees "procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial"].) The question was whether the defendant was entitled to *additional* or *further* access to the same procedures.

Here, in contrast, "*[a]t no time* did" appellant receive the *developmental disability* "competency hearing to which []he was legally entitled." (*Castro*, *supra*, 78 Cal.App.4th at pp. 1419 [fact mental disorder competency hearings were held was irrelevant because defendant was never given access to the developmental competency proceedings to which he was entitled]; Pen. Code, § 1369, subd. (a); cf. *McGregor v. Gibson* (10th Cir. 2001) 248 F.3d 946, 952-953, and authorities cited therein [if prior competency hearing and finding was based on incorrect standard, it must be treated "as if no competency hearing was held at all'"]; AOB 52-71.) Hence, assuming there is a distinction between evidentiary standards required to initiate original and subsequent competency proceedings, the former standard applies here.

In any event, respondent's interpretation of *Jones/Melissakis* as articulating a different and greater evidentiary standard to initiate subsequent competency hearings than the *Pate* standard, and its premise that the *Pate* standard is limited to original competency proceedings, is

contrary to clearly established United States Supreme Court precedent. The high court has held that a trial court has an *ongoing duty* to be alert to evidence that raises a reasonable or bona fide doubt about the defendant's competency and initiate competency proceedings, notwithstanding whether the defendant was previously competent: "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." (*Drope, supra*, 420 U.S. at pp. 181.) Therefore, regardless of whether a defendant was previously competent or previously found to be competent, if subsequent evidence raises a reasonable or bona fide doubt as to the defendant's competency under the *Pate* substantial evidence standard, the trial court must suspend criminal proceedings and initiate competency proceedings. (*Id.* at pp. 180-181; *Pate*, *supra*, 383 U.S. at pp. 385; *Pennington*, *supra*, 66 Cal.2d at pp. 518-520.)

Hence, "the same standard of proof in trial courts applies in the first and subsequent decisions whether to hold a competency hearing." (*People v. Kaplan* (2007) 149 Cal.App.4th 372, 385; accord, e.g., *Melissakis*, *supra*, 56 Cal.App.3d at pp. 60-62 [applying *Pate* evidentiary standard described in *Pennington* to find that substantial new evidence triggered trial court's duty to initiate renewed competency hearings]; *Maxwell v. Roe* (9th Cir. 2010) 606 F.3d 561, 568 [under *Drope* and *Pate*, "same bona fide doubt" substantial evidence standard that triggers court's duty to institute original competency proceedings triggers duty to initiate subsequent competency proceedings].) In other words, the *Jones/Melissakis* standard "is the same standard applied by the trial court in determining whether an original competency hearing should be held" under *Pate* and this Court's

precedents. (*People v. Kaplan*, *supra*, at pp. 376, 385-386 [collecting and analyzing cases].) *Jones/Melissakis* simply illustrate *how* the *Pate* substantial evidence standard applies when the defendant has already been afforded a competency hearing. (*Kaplan*, *supra*, at pp. 385; *Melissakis*, *supra*, 56 Cal.App.3d at pp. 60-62; accord, *Maxwell v. Roe*, *supra*, 606 F.3d at pp. 568.) This point is reflected in the genesis of the standard itself – *Melissakis.* Indeed, because the *Melissakis* decision informs this Court's consideration of many of respondent's various contentions, addressed here and *post*, it warrants a detailed discussion here.

In *Melissakis*, pretrial competency proceedings were held in which the court appointed three psychiatrists ("Doctors A, B, and C") to evaluate the defendant. (*Melissakis*, *supra*, 56 Cal.App.3d at pp. 55-56.) Dr. A concluded that the defendant suffered a mental disorder that rendered him incompetent to stand trial. (*Id.* at pp. 56.) However, Doctors B and C found no evidence of a mental illness or disorder and therefore concluded that he was not incompetent. (*Ibid.*) The matter was submitted on the basis of the three evaluations, the pretrial court found that the defendant was not incompetent, and the case proceeded to trial. (*Id.* at pp. 56-57.)

Following the guilt phase in which the defendant testified on his own behalf, a bifurcated sanity phase was held to determine the defendant's sanity at the time of the offenses under Penal Code section 25 at which Doctors A, B, and C all testified. (*Melissakis*, *supra*, 56 Cal.App.3d at pp. 57-59.) Consistent with his pretrial opinion, Dr. A testified that the defendant suffered from a mental disorder. (*Ibid.*) Doctors B and C, however, "recanted their earlier beliefs" – which had been based on the defendant's refusal to answer questions during their pretrial evaluations – "that appellant had no discernible psychiatric problem." Based on the

defendant's trial testimony, they now believed that he suffered from paranoid schizophrenia. (*Id. at pp.* 59, 61.)[7]

On appeal, the defendant argued that the evidence presented at the sanity phase raised a reasonable doubt regarding his competency and triggered the trial court's duty to initiate competency proceedings, notwithstanding the pretrial hearings and findings of competency. (*Melissakis*, *supra*, 56 Cal.App.3d at pp. 59-60.) Applying the substantial evidence test set out in *Pennington*, *supra* (which in turn adopted the *Pate* substantial evidence test), the appellate court agreed. (*Id.* at pp. 60-62 & fn. 2, citing, inter alia, *Pennington*, *supra*, 66 Cal.2d at pp. 519-520, citing and adopting *Pate* standard.)

As a preliminary matter, the appellate court held that the pretrial court did not err in finding the defendant to be competent based on the evidence before the court at that time. (*Melissakis*, *supra*, 56 Cal.App.3d at pp. 60.) However, the new evidence subsequently presented at trial that Doctors B and C believed that the defendant suffered from a qualifying mental disorder together with Dr. A's pretrial opinion that the defendant was incompetent as a result of a mental disorder raised new doubt that the defendant was competent under the *Pennington/Pate* standard. (*Id.* at pp. 60-62 & fn. 2.) That doubt was not dispelled by the pretrial competency

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[7] As discussed in Part B-2, *post*, while all of the experts in *Melissakis* testified at trial that the defendant suffered from a mental disorder, none testified regarding his present competency nor were Doctors B and C "asked whether the newly acquired information [regarding his mental illness] would have affected their earlier opinions concerning appellant's ability to understand the nature of the proceedings and to cooperate with his counsel." (*Melissakis*, *supra*, 56 Cal.App.3d. at pp. 59, 61-62, fn. 3.)

hearings and findings which did not consider or resolve the new evidence of the defendant's mental disorder. (*Id.* at pp. 61-62.) To the contrary, and consistent with the high court's subsequent decision in *Drope*, *supra*, elaborating on the *Pate* standard, the appellate court emphasized:

> a trial judge may not avoid his own responsibility to make proper inquiry regarding a defendant's capacity to stand trial or to understand the nature of the sentencing procedure by relying solely upon a pretrial decision or pretrial psychiatric reports where, during the trial or prior to the sentencing, he is presented with a substantial change of circumstances or with new evidence which casts a serious doubt upon the validity of the pretrial finding of present [competency].

(*Melissakis*, *supra*, 56 Cal.App.3d at pp. 62.) Hence, the trial court erred by failing to initiate renewed competency proceedings in light of the new and additional evidence that the defendant suffered from a qualifying mental disorder, notwithstanding the correctness of the pretrial competency hearings and findings based on the evidence before that court at that time. (*Ibid.*)

This case bears striking similarities to *Melissakis*. As in *Melissakis*, a pretrial competency hearing was held here in which evidence of a qualifying mental condition (there, a mental disorder; here, mental retardation) was not detected or properly considered by the evaluating experts or pretrial court. (Pen. Code, §§ 1369, subd. (a), 1370.1; *Castro*, *supra*, 78 Cal.App.4th at pp. 1418-1420.) Like Doctors B and C in *Melissakis*, Doctors Terrell and Davis's pretrial evaluations discerned no evidence that appellant suffered a qualifying mental condition (or mental disorder) that rendered him incompetent. (Court's Exhibits 1 & 2; AOB 44-48.) As in *Melissakis*, the pretrial court's finding that appellant was not incompetent due to a mental disorder was based on those evaluations and

thus supported by evidence before that court at that time and thus that finding is not challenged on that basis here. (1-CT 49; 11-CT 2735; 13-CT 3085; *Melissakis*, *supra*, 56 Cal.App.3d at pp. 60; see Part 1, *ante*.)

Nevertheless, as in *Melissakis*, three qualified experts (Doctors Christensen, Powell and Schuyler) subsequently testified at trial that appellant *did* suffer from a qualifying mental condition for incompetency – in this case, mental retardation. (12-RT 2891-2892, 2905, 2926-2927, 2947; 13-RT 2993, 2997-2998, 3017, 3031, 3037-3039,13-RT 3164-3165; AOB 48-49.) As in *Melissakis*, that evidence was not considered in the pretrial competency proceedings at all; indeed, not even the possibility of appellant's mental retardation was considered in those proceedings, much less properly considered in accord with the special developmental disability competency proceedings mandated by statute. (Pen. Code, § 1369, subd. (a); *Castro*, *supra*, 78 Cal.App.4th at pp. 1418-1419; *Leonard*, *supra*, at pp. 1388-1391.) Also as in *Melissakis*, the trial court was also aware that a qualified expert – Dr. Christensen – had evaluated appellant prior to trial and determined that he was incompetent as a result of the qualifying mental condition of mental retardation; the trial court was further aware that the pretrial proceedings were mental disorder competency proceedings, not developmental disability competency proceedings. (13-RT 2987-2989, 3051, 3086-3089, 3103-3106.) In short, as in *Melissakis*, the trial testimony of three experts that appellant suffered from the qualifying mental condition of mental retardation together with the pretrial opinion of one of those experts that appellant was incompetent as a result of that developmental disability was sufficient to raise a reasonable doubt as to appellant's competency under the *Pennington/Pate* standard and trigger the trial court's duty to initiate midtrial (developmental disability) competency proceedings

– a doubt that was not dispelled and a duty that was not satisfied by the pretrial court's mental disorder competency proceeding and finding. (*Melissakis*, *supra*, 56 Cal.App.3d at pp. 60-62; accord, *Castro*, *supra*, 78 Cal.App.4th at pp. 1418-1420 [doubt raised by evidence that defendant was incompetent and mentally retarded was not dispelled by mental disorder competency proceedings].)

To the contrary, as in *Melissakis*, the new evidence of appellant's mental retardation and incompetence "cast[] a serious doubt upon the validity of the pretrial" competency finding. (*Melissakis*, *supra*, 56 Cal.App.3d at pp. 62.) Indeed, the new evidence of appellant's mental retardation cast an even more "serious doubt upon the validity of the pretrial" competency proceedings because they did not comport with the developmental disability competency proceedings demanded by the constitution and state law and thus conclusively revealed that the pretrial competency finding was not an adequately "informed" one (*Leonard, supra*, 40 Cal.4th at pp. 1391). (Accord, *Castro*, *supra*, 78 Cal.App.4th at pp. 1418-1420.) Hence, accepting respondent's insistence that the *Jones/Melissakis* standard governs here, it compels the conclusion that the trial court's failure to initiate developmental disability competency proceedings sua sponte violated state law and appellant's "due process right to a fair trial." (*Drope*, 420 U.S., at 172, 173; accord, *Pate*, *supra*, 383 U.S. at pp. 386-387; *Castro*, *supra*, at pp. 1418-1420; *Leonard*, *supra*, at pp. 1389-1391.)

C. The Trial Court's Independent Constitutional and Statutory Duty to Initiate Developmental Disability Competency Proceedings Was Not Waived or Forfeited by Appellant

Respondent next contends that the middtrial evidence of appellant's mental retardation and incompetency was not "'new evidence" with the meaning of the *Jones/Melissakis* standard. (RB 106-107.) According to respondent, "new evidence" under that standard is limited to evidence that did not exist at the time of the prior competency proceedings. (RB 106-107.) Accordingly, respondent reasons, if defendant or his counsel was aware of that evidence but chose not to present it in the prior competency proceeding, the defendant "should not . . . be allowed a second bite at the apple" when that evidence is later revealed to the trial court, even if it otherwise "cast[s] a serious doubt on the validity" of the prior competency finding. (RB 107.) Under this interpretation of *Jones*, respondent contends that because Dr. Christensen's opinion that appellant was mentally retarded and incompetent was available at the time of the pretrial mental disorder competency proceedings but counsel failed to present it to the pretrial court (or request developmental disability competency proceedings based upon it), appellant had no right to a developmental disability competency hearing based on that evidence when it was later revealed to the trial court. (RB 106-107.) Although respondent is careful to avoid the words "waiver" or "forfeiture," this is nothing but a waiver argument in sheep's clothing.

The only authority respondent cites in support of its interpretation of "new evidence" under *Jones/Melissakis* stands for the general rule that a defendant's failure to present evidence at trial waives or forfeits his right to present it in post-conviction proceedings to challenge the verdict or judgment. (RB 107, citing *People v. Wisely* (1990) 224 Cal.App.3d 939,

947-949 and *Pat Rose Assocs. v. Coombe* (1990) 224 Cal.App.3d 9, 23.) While that general waiver rule would be relevant to a claim that the *pretrial court* had a duty to hold a developmental competency proceeding despite its ignorance of any evidence that appellant suffered a developmental disability, it has no application to the claim raised here. (See AOB 53-54, 58-59 & fn. 21.)

Indeed, *Melissakis* itself reveals as much. In that case, Doctors B and C testified that their pretrial opinions that the defendant had no discernable mental disorder were based on the defendant's "refus[al] to comment upon any of the events leading up to or surrounding the" charged offenses," including his belief in [a] conspiracy" when they evaluated him pretrial. (*Melissakis*, *supra*, 56 Cal.App.3d at pp. 61.) However, based upon their observations of the defendant's guilt phase testimony on those topics, Doctors B and C changed their opinions and now concluded that the defendant suffered from a mental disorder. (*Id.* at pp. 59, 61.) In other words, the "new evidence" demanding the initiation of renewed competency proceedings in *Melissakis* was generated from the defendant's own mouth and thus extant at the time of the pretrial competency proceedings – the defendant had simply refused to share that evidence with the evaluating experts at the time of the pretrial competency proceedings. (*Melissakis*, *supra*, 56 CalAp.3d at pp. 59, 61.)

Here, as in *Melissakis*, the trial court was presented with new evidence that was extant at the time of the pretrial competency proceedings but had not been presented or considered by the pretrial court during those proceedings. Once the trial court was presented with that evidence, it had an *independent* duty to initiate developmental disability competency proceedings. (AOB 58-59 & fn. 21, citing, inter alia, *Pate*, *supra*, 383 U.S.

at pp. 384-386, *Castro*, *supra*, 78 Cal.App.4th at pp. 1416, 1419, and *People v. Jones*, *supra*, 53 Cal.3d at pp. 1152-1153.) The court's "*independent* duty" means just what is says and therefore "cannot be waived by defendant or his counsel." (*People v. Hale* (1988) 44 Cal.3d 531, 541.) Thus, this duty exists regardless of whether substantial evidence of incompetence is presented after a prior finding of competency,[8] the evidence was extant before the court became aware of it,[9] the defendant did not present the evidence to request a competency hearing or even whether the defendant affirmatively states that he does not want a competency hearing.[10]

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[8] See, e.g., *People v. Jones*, *supra*, 53 Cal.3d at pp. 1152-1153; *Maxwell v. Roe*, *supra*, 606 F.3d at pp. 572-574.

[9] See, e.g., *Blazak v. Ricketts* (9th Cir. 1993) 1 F.3d 891, 893, 898-900, cert. denied *Lewis v. Blazak* (1994) 511 U.S. 1097 (pre-sentence report submitted after guilty verdicts but before sentencing and which summarized prior mental evaluations triggered trial court's duty to initiate competency proceedings; specifically rejecting government's argument that defendant must present such evidence prior to trial or guilty verdicts to be entitled to prejudgment hearing); *Morris v. United States* (9th Cir. 1969) 414 F.2d 258, 259 (presentence report documenting history of mental illness and prior findings of sanity and insanity).

[10] See, e.g., *Castro*, *supra*, 78 Cal.App.4th at 1416, 1419, and authorities cited therein (where court is presented with evidence raising doubt as to competence and suspicion of mental retardation, defense counsel's failure specifically to request developmental disability competency proceedings "is irrelevant; when a doubt exists, the trial court must 'take the initiative in obtaining evidence on that issue'"); *People v. Ary* (2004) 118 Cal.App.4th 1016, 1025 ("*Ary I*") (where there existed evidence raising reasonable doubt as to defendant's competency and suspicion that he was mentally retarded, court erred in failing to initiate developmental disability competency proceedings *sua sponte*, which was

(continued...)

In short, respondent's interpretation of "new evidence" within the meaning of *Jones/Melissakis* is inconsistent with *Melissakis* itself. It is nothing more than a thinly veiled waiver argument in disguise, which is contrary to black letter law and must be rejected.[11]

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[10] (...continued)
not waived or forfeited by defense counsel's affirmative statement that the defendant's competency to stand trial was not in issue)

[11] Although defense counsel's omissions in the conduct of the pretrial competency proceedings are legally irrelevant to appellant's claim, he feels impelled to note that he vigorously disputes respondent's characterization of counsel's omissions as "tactical." (RB 106-107.) Appellant agrees his trial counsel *should* have alerted the pretrial court to Dr. Christensen's opinion, together with the corroborating evidence from his academic records revealing his low IQ scores, placement in special education classes and his family members (as reflected in their penalty phase testimony) that his abilities to function in several areas had always been impaired, and should have requested a developmental disability competency hearing based thereon. (See AOB 28-30, 35-39, 48-49, 137-138, 142.) Indeed, appellant submits that objective standards governing reasonable capital counsel performance demanded it. (See, e.g., *Hummel v. Rosemeyer* (3d Cir. 2009) 564 F.3d 290, 302-303.)

The record belies the existence of any conceivable, reasonable tactical basis for counsel's omissions nor does respondent identify any. Counsel obviously credited Dr. Christensen's opinion, requested competency proceedings, and would have had no reasonable basis to fear that an adverse developmental disability competency evaluation or determination would undermine appellant's mental retardation defense at trial because that evidence would have been inadmissible at trial. (See, e.g., *People v. Weaver* (2001) 26 Cal.4th 876, 960-962; *People v. Arcega* (1982) 32 Cal.3d 504, 522-524; *In re Hernandez* (2006) 143 Cal.App.4th 459, 474, 477.) Counsel's omissions only ensured that the pretrial court's competency proceedings were an empty formalism that did not and could not produce a reliable or informed determination that her client was competent to stand trial. Ultimately, while counsel's deficient performance in the conduct of the pretrial competency proceedings seems apparent from
(continued...)

D. There Existed Substantial Evidence Before the Trial Court Sufficient to Raise a Doubt About Appellant's Competency as a Result of Mental Retardation

Turning to the merits and focusing *solely* on Dr. Christensen's testimony, respondent disputes not only the existence of substantial evidence that appellant was incompetent (RB 101-111), but also disputes the existence of substantial evidence that he was (or is) mentally retarded (RB 111-116 & fn. 71). According to respondent, Dr. Christensen's diagnoses that appellant was both incompetent and mentally retarded were "wrong" (RB 115) for various reasons, primarily being that they were undermined by conflicting, "more credible" (RB 109) evidence. Therefore, the trial court did not violate state law or appellant's due process rights by failing to initiate developmental disability competency proceedings. (RB 95-117 & fn. 71.) Respondent's argument is without merit for several reasons.

1. Respondent's Argument is Inconsistent with the Substantial Evidence Rule

First and foremost, respondent's argument is inconsistent with the substantial evidence rule. As discussed in the opening brief:

> Evidence is "substantial" if it raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be

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[11] (...continued)
the face of the record, it is: (1) irrelevant to the trial court's sua sponte duty to initiate developmental disability competency proceedings once it became aware of the evidence requiring them; and (2) the distinct question of whether counsel's deficient performance deprived of appellant of his Sixth Amendment right to the effective assistance of counsel is more appropriately reserved for habeas corpus. (See, e.g., *People v. Tafoya* (2007) 42 Ca1.4th 147, 196.)

> dispelled by resort to conflicting evidence. . . . [The trial court's] sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue. It is only after the evidentiary hearing, applying the usual rules appropriate to trial, that the [trier of fact] decides the issue of competency of the defendant to stand trial.

(*Moore v. United States* (9th Cir. 1972) 464 F.2d 663, 666, cited with approval in *People v. Jones*, *supra*, 53 Cal.3d at pp. 1152, *People v. Danielson* (1992) 3 Cal.4th 691, 720, disapproved on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, and *People v. Kelly* (1992) 1 Cal.4th 495, 542; accord, e.g., *United States v. Mason* (4th Cir. 1995) 52 F.3d 1286, 1290 [in determining whether hearing required, trial court must "look at the record as a whole and accept as true all evidence of possible incompetence"]; *Speedy v. Wyrick* (8th Cir. 1983) 702 F.2d 723, 725 [court must assume truth of evidence of incompetence for *Pate* purposes].)

This principle is a familiar one, consistent with the long and "very well settled" meaning of "substantial evidence" (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570-571) which is no different in the *Pate* context than in any other (see, e.g., *People v. Humphrey* (1975) 45 Cal.App.3d 32, 37). That is, "substantial evidence" is simply evidence from which a "rational trier of fact could find" the disputed fact (see, e.g., *People v. Jones* (1990) 51 Cal.3d 294, 314) or as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (*Richardson v. Perales* (1971) 402 U.S. 389, 401, and authorities cited therein). (Accord, e.g., *People v. Cuevas* (1995) 12 Cal.4th

252, 260-261; *People v. Breverman* (1998) 19 Cal.4th 142, 162, 177; *Pennington*, *supra*, 66 Cal.2d at pp. 518-519.) "In deciding whether evidence is 'substantial' . . . a court determines only its bare legal sufficiency, *not its weight.*" (*Breverman*, *supra*, 19 Cal.4th at pp. 177, italics added.) Therefore, as discussed in the opening brief but ignored by respondent, "substantial evidence" does *not* mean uncontradicted, unconflicting, or even the "more persuasive" (*Pennington*, *supra,* 66 Cal.2d at pp. 518-519) or "strongest" evidence (*People v. Breverman*, *supra*, at pp. 149, 153, 155, 162-163, 177). (Accord, e.g., *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052; *People v. Hale*, *supra*, 44 Cal.3d at p. 541; *People v. Stankewitz* (1982) 32 Cal.3d 80, 92-93.) Furthermore, under this objective standard, "[c]ourts should not evaluate the credibility of witnesses, a task for the [trier of fact]." (*People v. Breverman*, *supra*, at p. 162; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Therefore, "[i]t is well settled that 'the testimony of a single witness'" – even if it conflicts with other evidence – "'is sufficient for the proof of any fact' (*People v. Richardson* (2008) 43 Cal.4th 959, 1030)" and thus constitutes "substantial evidence" (*People v. Avila* (2009) 46 Cal.4th 680, 703-704).

Under this standard, the testimony of a *single* qualified expert "who has had sufficient opportunity to examine the accused [who] states under oath with particularity that in his [or her] professional opinion the accused is, because of mental illness [or developmental disability], incapable of understanding the purpose or nature of the proceedings being taken against him or is incapable of assisting in his defense or cooperating with counsel" is "substantial evidence" of incompetence sufficient to trigger the court's duty to initiate competency proceedings. (*Pennington*, *supra*, 66 Cal.2d at p. 519, accord, e.g., *People v. Young* (2005) 34 Cal.4th 1149, 1217; *People*

v. Hale, *supra*, 44 Cal.3d at p. 541; *People v. Stankewitz*, *supra*, 32 Cal.3d at pp. 92-93.) Once this test is satisfied, it is "immaterial" if there exists conflicting or even "more persuasive" evidence to the contrary. (*Pennington*, *supra,* 66 Cal.2d at pp. 518-520; accord, e.g., *Hale*, *supra*, at pp. 539-541; *Stankewitz*, *supra*, at pp. 92-93; *Ary I*, *supra*, 118 Cal.App.4th 1016, 1024-1025; *McMurtrey v. Ryan* (9th Cir. 2008) 539 F.3d 1112, 1125, and authorities cited therein.)

Put simply, a court cannot "reject" a qualified expert's opinion "and credit conflicting evidence to deny a competency hearing." (*Stankewitz*, *supra*, 32 Cal.3d at p. 93; accord, *Pennington*, *supra,* 66 Cal.2d at pp. 512-514, 519 [incompetency opinion of expert alone constituted substantial evidence warranting hearing that could not be denied by crediting four expert opinions to the contrary]; *People v. Hale*, *supra*, 44 Cal.3d at pp. 539-541 [trial court could not reject expert opinion that defendant was incompetent by crediting subsequent expert opinions that defendant was no longer incompetent without holding hearing].) "The conflict can *only* be resolved upon a special trial before the judge or jury, if a jury is requested. (Pen. Code, § 1368)." (*Pennington*, *supra,* 66 Cal.2d at pp. 518-519.)

2. The Unanimous Opinions of Doctors Christensen, Powell, and Schuyler that Appellant Was Mentally Retarded Constituted Substantial Evidence Thereof

Applying the foregoing and well-settled principles here, respondent's contention that Dr. Christensen's mental retardation diagnosis did not constitute substantial evidence of that fact is without merit for several reasons. (RB 111-116 & fn. 71.) First, respondent overlooks that Dr. Christensen's mental retardation diagnosis did not stand alone. Doctors Powell and Schuyler also tested and evaluated appellant and, like Dr.

Christensen, diagnosed him as mentally retarded. (AOB 48; 12-RT 2891-2892, 2905, 2926-2927, 2947; 13-RT 3164-3165.)

Respondent does not dispute that Doctors Powell and Schuyler's mental retardation diagnoses constituted "substantial evidence" of that fact here. (See RB 81-125.) Nor did respondent dispute that there existed "substantial evidence" of appellant's mental retardation below, despite being given the opportunity to do so.

As discussed in the opening brief, by admitting the opinions of Doctors Christensen, Powell, and Schuyler and instructing the jurors with CALJIC No. 3.32 that they could consider the evidence of his mental retardation in assessing appellant's mental state, the court necessarily found that there was "substantial evidence" of mental retardation sufficient to support a factual finding thereon. (3-CT 796; 14-RT 3357; AOB 114-115, citing, inter alia, Evid. Code, §§ 402, subd. (c), 710, 801, and *People v. Moore* (2002) 96 Cal.App.4th 1105, 1115-1117 [provision of CALJIC No. 3.32 requires substantial evidence of mental disorder or defect]; accord, *People v. Panah* (2005) 35 Cal.4th 395, 484-485.) That finding applied equally for purposes of holding a developmental disability competency hearing under *Pate* and state law.

Not only did respondent not object below that there was insubstantial evidence of mental retardation to support the provision of CALJIC No. 3.32; *respondent requested the instruction* and thereby conceded the issue. (3-CT 796.) On this record, respondent cannot be heard to argue for the first time on appeal that the mental retardation evidence was not legally "substantial." (See, e.g., *People v. Sakarias* (2000) 22 Cal.4th 596, 636; *People v. Morris* (1991) 53 Cal.3d 152, 187-188.)

More importantly, any such argument is without merit. Pursuant to

the authorities discussed in Part 1, *ante*, there is no question that the unanimous expert opinions that appellant was mentally retarded constituted substantial evidence of that fact. The trial court not only implicitly found as much during the guilt phase. *It affirmatively found that appellant was "slightly mentally retarded"* as a mitigating factor during the section 190.4 proceedings. (16-RT 3785.) Of course, there is no category or recognized diagnosis of "slight" retardation nor was there any evidence of such in this case. The court was presumably referring, then, to the defense experts' opinions that appellant is "mildly" mentally retarded. (12-RT 2891-2892; 13-RT 3031, 3164; cf. *Holladay v. Allen* (11th Cir. 2009) 555 F.3d 1346, 1363 [trial judge's finding that defendant was "slightly mentally retarded" as mitigating factor was treated as finding of mild mental retardation].)[12]

Even viewed alone, Dr. Christensen was a qualified expert "who had sufficient opportunity to examine" appellant and "state[d] under oath with particularity that in [her] professional opinion" appellant is mentally retarded. (*Pennington*, *supra*, 66 Cal.2d at p. 519.) Hence, her opinion

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[12] For this reason and others, respondent's reliance on *People v. Lewis and Oliver* (2006) 39 Cal.4th 960 is misplaced. (RB 108.) There, this Court upheld the trial court's explicit ruling, supported by detailed factual findings, that an expert's "tentative but not definitive" opinion that the defendant was incompetent was not substantial evidence sufficient to warrant a hearing under *Pate*. (*Id.* at 1047-1049.) Here, in contrast, the trial court necessarily found that there was substantial evidence that appellant was mentally retarded. The trial court made no express finding that there was insufficient evidence that appellant was incompetent as a result of his mental retardation to warrant a hearing; to the contrary, the trial court never made any inquiry into appellant's competency at all. Absent an express ruling and findings that an expert opinion does not satisfy the substantial evidence test, *Lewis*, *supra*, is inapplicable. (*People v. Kaplan, supra*, 149 Cal.App.4th at 386.)

testimony "itself" was sufficient to satisfy the substantial evidence test. (*Ibid.*; see, e.g., *Ary I*, *supra*, 118 Cal.App.4th at pp. 1021-1023 [expert opinion defendant mentally retarded sufficient for *Pate* purposes].)

Respondent's reliance on other evidence – such as the mental disorder competency evaluations by Doctors Terrell and Davis (RB 109) – neither of which appropriately considered or assessed whether appellant was mentally retarded (AOB 60, 69-72) – and the testimony of Lee Coleman (RB 111) – who was not a mental retardation expert, did not personally evaluate appellant, and offered no opinion as to his mental retardation (AOB 83-150) – is "immaterial." (*Pennington*, *supra*, 66 Cal.2d at pp. 518-519; accord, e.g., *Castro*, *supra*, 78 Cal.App.4th at pp. 1410-1412, 1417 [medical records classifying defendant as developmentally disabled sufficient, as well as expert opinion testimony that defendant scored within mentally retarded range on non-verbal intelligence test, despite testimony of psychiatrist that he saw no signs that defendant was mentally retarded but who made no attempt to test or assess defendant for retardation].) In any event, respondent's contention, for instance, that Coleman's testimony was "more credible" than the mental retardation evidence is belied by the record, in which the trial court essentially discredited Coleman's testimony, or gave it "very little weight," in finding that appellant is retarded. (16-RT 3785.)

Equally without merit is respondent's contention that Dr. Christensen's diagnosis did not satisfy the clinical or legal definition of mental retardation because she did not address and thus did not satisfy the onset before the age of 18 prong of the clinical and legal definition of that

developmental disability. (RB 111-113.)[13] Indeed, respondent contends, the *only* evidence of appellant's intellectual functioning before the age of 18 – hearsay opinions contained in his school records and lay opinion testimony – established that he was not mentally retarded. (RB 111-113.) Not so.

Not only Dr. Christensen but also Doctors Powell and Schuyler all opined that appellant's mental retardation was hereditary or "familial," as opposed to being caused by brain injury or something external that could have happened after the age of 18. (12-RT 2892-2893; 13-RT 3074-3075, 3164-3165, 3172.) This evidence was sufficient to meet the onset before the age of 18 criterion for a mental retardation diagnosis. (See, e.g., *State v. White* (Ohio 2008) 885 N.E.2d 905, 917 [expert testimony that there was no evidence of brain injury or other external factor causing cognitive impairment was sufficient to support onset before age 18 prong of legal and clinical definitions of mental retardation].) Indeed, because a three-prong criteria is necessary to make a mental retardation diagnosis, the diagnoses in this case presumably incorporated them absent evidence to the contrary.

Respondent never objected, argued or presented evidence that the expert mental retardation diagnoses failed to incorporate all of the criteria

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[13] At the time of trial, as today, the three-pronged criteria necessary to make a mental retardation diagnosis and satisfy the same legal definition of that term are: (1) "significantly subaverage intellectual functioning"; (2) with deficits in adaptive behavior; and (3) manifesting during the developmental period, or before the age of 18. (See, e.g., Pen. Code, § 1001.20 (en. 1980); *Money v. Krall* (1982) 128 Cal.App.3d 378, 397; *Diagnostic and Statistical Manual* ("DSM")-III (3d ed. 1980), p. 28; *Penry v. Lynaugh* (1989) 492 U.S. 302, 308 & fn. 1; accord DSM-IV-TR (4th ed. text rev. 2000), p. 41; Pen. Code, § 1376; *Atkins v. Virginia* (2002) 536 U.S. 304, 308-309 & fn. 3.)

necessary to make them. If respondent believed that the experts' diagnoses themselves were insufficient to satisfy all three prongs of the mental retardation definition, then it was incumbent on respondent to make that objection or argument below and give appellant the opportunity to meet it with additional evidence. (See *People v. Morris*, *supra*, 53 Cal.3d at pp. 187-188.) Having failed to do so, it is unfair for respondent "'to press an issue . . . that was not presented below.' [Citation]." (*People v. Sakarias*, *supra*, 22 Cal.4th at pp. 636.) It is particularly unfair because the face of the record demonstrates that appellant could have met the objection and provided additional evidence going specifically to all three prongs of the clinical and legal definitions of mental retardation had he been given the opportunity to do so.

According to the prosecution's own guilt phase evidence, appellant scored consistently in the bottom second to fifth percentile on intelligence testing in grammar and high school, his childhood academic performance was below or well below average, he was placed in special education for the "educationally [*sic*] mentally retarded" throughout his school years, and his childhood retention, attention span, motor expression and communication skills were poor. (14-RT 3298C-3299B, 3300-3300-A, 3307-3311, 3319.) In addition, appellant presented substantial penalty phase evidence regarding his subaverage functioning in various areas throughout his life, including his difficulties in adapting to school, inability to learn or grasp basic concepts such as counting change correctly, behavioral problems, and a sporadic work history in a series of temporary menial jobs. (15-RT 3580-3582, 3584-3585, 3587, 3590-3592; 16-RT 3617, 3624-3627, 3643-3644.) This evidence corroborated the expert mental retardation diagnoses and all of the criteria necessary to make it.

Once again, the trial court implicitly found as much at the close of evidence when it found that appellant was mentally retarded based on the "overall test[ing]" and the evidence – which included evidence from his childhood – of his "actual performance." (16-RT 3785.) Thus, had respondent objected that the expert mental retardation diagnoses alone did not constitute "substantial evidence" of that developmental disability absent additional, specific evidence going to all of the diagnostic and legal criteria, appellant would clearly have been able to meet it.

At bottom, one or all of the mental retardation diagnoses unquestionably amounted to "substantial evidence" of that developmental disability for purposes of *Pate* and Penal Code sections 1369, subdivision (a) and 1370.1. Respondent's arguments to the contrary are either forfeited or based on "immaterial" (and incorrect) allegations of conflicting evidence. The evidence of appellant's mental retardation thus alerted the trial court that the pretrial court's mental disorder competency hearing and finding were not the adequate and necessary proceedings to which he was statutorily and constitutionally entitled and triggered its sua sponte duty to give appellant the process to which he was due.

3. The Evidence as a Whole Raised Reasonable Doubt that Appellant was Competent to be Tried, Convicted and Sentence to Death

Respondent similarly argues that there was insufficient evidence of appellant's incompetency to warrant a hearing because Dr. Christensen's incompetency diagnosis was "wrong" and overcome by "more credible" evidence. (RB 104, 106, 108-111; compare AOB 48-60.) Respondent's argument is without merit for the same reasons discussed above. Assuming, as the trial court was required to do, the truth of Dr. Christensen's expert

opinion without judging its weight or crediting conflicting evidence, it alone constituted substantial evidence sufficient to entitle appellant to developmental disability competency proceedings. (See, e.g., *Pennington*, *supra*, 66 Cal.2d at p. 519.)

Certainly, the combined weight of her testimony and other evidence respondent either ignores or distorts was sufficient to alert the court that appellant was entitled to those proceedings. (See, e.g., *Drope, supra*, 420 U.S. at pp. 177-182 [all evidence, both pre- and mid-trial, must be considered].) Although defense counsel neglected to request developmental disability competency proceedings, she did on a number of occasions express her concerns about appellant's competency, mental state, and inability to cooperate in preparing his defense. (See, e.g., *Maxwell v. Roe*, *supra*, 606 F.3d at pp. 574-575; see also *Medina v. California* (1992) 505 U.S. 437, 450 ["defense counsel will often have the best-informed view of the defendant's ability to participate in his defense"]; *Drope*, *supra*, 420 U.S. at p. 177 and fn. 13.)

The pretrial mental disorder competency proceedings were initiated because defense counsel expressed her doubts that appellant was competent. (RTB3.) She and Dr. Christensen later informed the trial court that counsel had sought Dr. Christensen's opinion in the first place because counsel was unable to secure appellant's cooperation in preparing his defense and believed that he was incompetent to do so. (13-RT 2987-2989, 3051, 3103-3105.) After Doctors Davis and Terrell's mental disorder evaluations, with which appellant was uncooperative, defense counsel reiterated her belief that he would not be "competent enough to help me and assist me in the defense" as required "throughout the course of the proceedings." (11-CT 2732.)

Indeed, a year after the pretrial court's mental disorder competency finding, defense counsel filed a motion with the trial court in which she expressed her belief that appellant was "suffering from some form of mental impairment" and seemed to have "no recollection of the events of September 23, 1989 [the date of the charged crimes] prior to his arrest," which was "necessary to assist in the preparation of the defense . . . ." (2-CT 586-587; see, e.g., *Ary I*, *supra*, 118 Cal.App.4th at p. 1024 [despite defense counsel's affirmative representation that competency was not in issue, her memorandum that defendant unable to recall important evidence, along with expert mental retardation opinion was, inter alia, substantial evidence demanding hearing sua sponte].)

Of course, by the time of Dr. Christensen's trial testimony, the trial court was aware of substantial evidence that appellant suffered from the "mental impairment" (2-CT 586-587) of mental retardation. The defense experts testified that mild mental retardation impairs its victim's abstract thinking and reasoning, memory, judgment, comprehension, and ability to make causal connections and consider the consequences of his or her actions. (12-RT 2894-2895, 2938; 13-RT 3032-3033, 3044-3045, 3086, 3097, 3127-3128, 3152-3153.) Although Doctors Powell and Schuyler did not testify and were not asked about their opinions of appellant's trial competency, as in *Melissakis*, *supra*, their diagnoses together with Dr. Christensen's opinion and defense counsel's representations raised a reasonable doubt about appellant's competency to stand trial as a result of mental retardation. (*Melissakis*, *supra*, 56 Cal.App.3d at p. 59, 61-62, fn. 3; accord, e.g., *Ary I*, *supra*, 118 Cal.App.4th at pp. 1021-1022, 1024; *Castro*, *supra*, 78 Cal.App.4th at pp. 1412, 1417-1420.)

Respondent counters that Doctor Powell's testimony that appellant

was "aware and oriented 'as to the time and the place and the person' (XII-RT 2883, 2901)" and was 'very cooperative' (XII-RT 2884, 2993)" during his evaluation, as well as Dr. Schuyler's testimony that appellant was aware of the charges against him and their significance and 'knows what's reality and what is not reality' (XIII-RT 3180)" during his later evaluation conflicted with Dr. Christensen's incompetency diagnosis. (RB 104.) Respondent misconstrues the meaning of competence.

As the high court has unequivocally held, competency requires *more than that "'the defendant (is) oriented as to time and place and (has) some recollection of events' . . . . '[T]he test must be whether he has a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding* – and whether he has a *rational* as well as a factual understanding of the proceedings against him.'" (*Dusky v. United States* (1960) 362 U.S. 402, italics added; accord, *Drope*, *supra*, 420 U.S. at p. 171.) Hence, "it is not sufficient merely that the defendant can make a recitation of the charges or the names of witnesses, for proper assistance in the defense requires an understanding that is 'rational as well as factual.'" (*United States v. Hemsi* (2d Cir. 1990) 901 F.2d 293, 295, quoting *Dusky*, *supra*, at p. 402.) Pursuant to these authorities, Doctors Powell and Schuyler's quoted impressions of appellant during their evaluations did not mean that he was able to consult with his counsel in a rational manner or conflict with Dr. Christensen's opinion that he was not.

Respondent similarly contends that Dr. Christensen's opinion that appellant was incompetent as a result of mental retardation was undermined by the conflicting, "more credible" opinions of Doctors Terrell and Davis that appellant was "malingering" during their mental disorder competency evaluations. (RB 107-109.) Respondent mixes apples and oranges.

As discussed at length in the opening brief, reflected in Penal Code section 1369, subdivision (a), recognized by this Court, and explained by Dr. Christensen, whether a person is incompetent as a result of mental retardation and whether a person is incompetent due solely to a mental disorder are two fundamentally different questions that require fundamentally different areas of expertise and fundamentally different evaluations. (AOB 60-72; *Leonard*, *supra*, 40 Cal.4th at pp. 1388-1391; *Castro*, *supra*, 78 Cal.App.4th at pp. 1418-1420.) Hence, a determination that a person is not incompetent due solely to a mental disorder does not conflict with, and certainly does not undermine the substantial nature of, a determination that he is incompetent as a result of a developmental disability such as mental retardation. (*Castro*, *supra*, at pp. 1418-1420; *Leonard, supra*, 40 Cal.4th at p. 1391; cf. *Ary I*, *supra*, 118 Cal.App.4th at pp. 1019, 1021-1022, 1025 [trial court's finding that defendant made knowing and voluntary waiver of *Miranda* rights notwithstanding mental retardation did not negate substantial evidence of incompetence sufficient to warrant *Pate* hearing]; *Pennington*, *supra*, 66 Cal.2d at pp. 515-516 [evidence and jury findings of sanity did not conflict with or negate substantial evidence of incompetency].)

Furthermore, Doctors Terrell and Davis did not affirmatively find that appellant did not suffer from a mental disorder, that he was competent, or that he was malingering or faking a mental disorder. (Court's Exhibits 1

& 2.)[14] Instead, both simply determined that he was "malingering (*lying*)" (Court's Exhibit 1 at p. 6 [Terrell]) when he responded "I don't know" or "I don't remember" to virtually all of their questions – including those about his own name, age, and birthplace (Court's Exhibits 1 & 2). Both further explained that appellant's refusal to cooperate with the evaluations by lying did not discount the possibility that he was incompetent. (Court's Exhibit 1 at pp. 1, 6-7; Court's Exhibit 2 at p. 5.) Indeed, Dr. Terrell opined that although "it is extremely likely that the Defendant is malingering (lying)," he "none the less [sic] believ[ed] that there is a small possibility that he also suffers from a concurrent mental disorder. If this is indeed true, I believe that this Mental Disorder is interfering with his ability to cooperate with Counsel in preparing for a Defense" and "therefore recommended that the Court find the Defendant incompetent to stand trial . . . . " (Court's Exhibit 1 at pp. 6-7.) For his part, Dr. Davis explained that because appellant was lying when he professed a lack of knowledge or recollection in response to virtually all of Dr. Davis's questions, Dr. Davis was simply unable to determine "if there is some legitimate disorder masked by the malingering or not" and hence unable to determine whether or not appellant was incompetent due to a mental disorder. (Court's Exhibit 2 at p. 5.) Therefore, he simply concluded that appellant had not "prove[d] by a

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[14] Respondent's references to Dr. Davis's report as Exhibit 1 and Dr. Terrell's as Exhibit 2 are incorrect. (RB 87-94.) The pretrial court admitted Dr. Terrell's report as Exhibit 1 and Dr. Davis's as Exhibit 2 (1-CT 49; 11-CT 2735 see AOB 45-47.) Although respondent notes that these exhibits were not part of the certified record received by respondent, respondent does not dispute that they are the exhibits that were received into evidence. (RB 82, fn. 52.) As such, they are necessarily part of the record on appeal. (Cal. Rules of Court, rule 8.610 (a)(3).)

preponderance of the evidence that he is incompetent to stand trial." (Court's Exhibit 2 at p. 2.)

These findings simply were not inconsistent with Dr. Christensen's opinion that appellant was incompetent as a result of mental retardation or Doctors Powell and Schuyler's corroborating diagnoses of mental retardation. As the mental retardation experts explained, there is a significant difference between "malingering" by *lying* during a personal interview and "malingering" by *faking* standardized test results and mental retardation. (13-RT 3043-3044, 3067, 3086-3090, 3113, 3168, 3176.) Doctors Powell, Schuyler, and Christensen all considered and rejected the possibility that appellant was "malingering" by faking the results of the various tests they separately administered and the ultimate question of his mental retardation; Dr. Christensen further rejected the possibility that appellant was malingering incompetency due to that developmental disability. (AOB 16-20, 25, 50, 71-72; see 12-RT 2887, 2879, 2883, 2887, 2910, 2912-2916, 2935, 2937; 13-RT 3022-3024, 3041-3042, 3067, 3092-3093, 3112-3113, 3159-3160, 3167, 3182-3183.) Indeed, the defense experts testified that it would be nearly impossible for someone to be able to fake the clinically consistent results of appellant's standardized test results and trick three different, qualified experts into believing he was mentally retarded. (13-RT 3043-3044, 3067, 3086-3090, 3112-3113, 3159-3160, 3168, 3176, 3178; AOB 20-22, 71-72.) As Dr. Schuyler further explained, he considered and rejected the possibility that appellant was malingering mental retardation despite the fact that he agreed that appellant was lying when he claimed not to recall basic personal historical facts, such as those relating to his crimes. (13-RT 3168.) Such malingering or lying behavior is not inconsistent with mental retardation; to the contrary, it exhibits a very

immature and primitive defense mechanism, which is entirely consistent with that developmental disability. (13-RT 3168, 3179.)

At bottom, there was simply no conflict in the findings of Doctors Terrell and Davis and those of Doctors Christensen, Powell and Schuyler. A trier of fact could have accepted that Doctors Terrell and Davis's findings that appellant was "malingering" by "lying" when he claimed ignorance in response to virtually all of their questions and their conclusions that they were therefore unable to determine whether he had a mental disorder that rendered him incompetent while still accepting the defense experts' opinions that appellant was not "malingering" mental retardation and Dr. Christensen's opinion that he was incompetent as a result of that developmental disability.

In any event, even assuming some conflict between their findings, it was "immaterial." (*Pennington, supra,* 66 Cal.2d at pp. 518-519; *People v. Hale*, *supra*, 44 Cal.3d at pp. 539-541; *People v. Stankewitz*, *supra*, 32 Cal.3d at pp. 92-93; *Ary I*, *supra*, 118 Cal.App.4th at pp. 1024-1025.) The trial court could not – nor is there any indication that the trial court did – resolve any conflicts in the evidence without holding a hearing. (See, e.g., *Melissakis*, *supra*, 56 Cal.App.2d at p. 62; *Maxwell v. Roe, supra*, 606 F.3d at p. 575, and authorities cited therein [once there is substantial new evidence of incompetency, the reasonable doubt it raises "'cannot be dispelled by resort to pre-existing conflicting evidence'"]; accord, *People v. Hale*, *supra*, 44 Cal.3d at p. 539; *People v. Stankewitz*, *supra*, 32 Cal.3d at pp. 92-93; *Pennington, supra,* at pp. 518-519; *McMurtrey v. Ryan*, *supra,*

539 F.3d at pp. 1125-1126.)[15]

In sum, given defense counsel's expressed doubts, Doctors Powell, Schuyler, and Christensen's expert opinion testimony that appellant was mentally retarded, and the additional testimony of Dr. Christensen, a qualified expert in assessing both mental retardation and competency who "had sufficient opportunity to examine" appellant and stated "under oath and with particularity that in his [or her] professional opinion" appellant was, as a result of his developmental disability, "incapable of assisting in his defense or cooperating with counsel, the substantial evidence test [was] satisfied." (*Pennington*, *supra*, 66 Cal.2d at p. 519; accord, *People v. Young, supra*, 34 Cal.4th at p. 1217; *People v. Stankewitz*, *supra*, 32 Cal.3d at pp. 92-93.)

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[15] Respondent further notes that when Dr. Christensen met with appellant, she realized that she had not 'brought quite the right implement" to test him but "[n]evertheless . . . began her testing." (RB 97.) To the extent that respondent is suggesting that Dr. Christensen administered the wrong test to appellant and based her opinions thereon, it is untrue. Dr. Christensen *brought* testing for mental disorder competency purposes but upon meeting with appellant realized that the appropriate testing implements for him were those she had utilized in making assessments for the Regional Center for the Developmentally Disabled. (13-RT 2989-2991, 2997-2998, 3038-3040, 3050-3051.) She was able to administer part of the appropriate testing by memory on that first day and returned two days later with the physical implements to complete the testing and evaluation. (13-RT 2991-2993, 2997-2998.) Her opinions were based on her administration of these appropriate tests, under the appropriate standards utilized by the Regional Center. (13-RT 3086-3090.)

4. The Trial Court Was Presented With Substantial Evidence that Appellant Was "Presently" Incompetent and Mentally Retarded

Finally, respondent contends, even if appellant were incompetent at the time of Dr. Christensen's pretrial evaluation, it did not raise reasonable doubt about his "present" competency when that evidence was presented mid-trial. (RB 102-103; see, e.g., *Dusky v. United States* (1960) 362 U.S. 402 (*per curiam*).) According to respondent, Dr. Christensen's "test results were, by her own admission, only good for a particular day or testing under the conditions of that testing," (RB 108) and therefore her opinion was merely evidence that appellant was incompetent on the day of her evaluation, not at the time of her testimony (RB 102-105, 107-108). Her opinion, according to respondent, was so dependent on the conditions under which she evaluated him in the infirmary that it was no longer valid when his conditions changed and he was removed from the infirmary by the time of trial. (*Ibid.*) Indeed, respondent contends, the trial court could reasonably infer that defense counsel had secured appellant's cooperation and assuaged her own doubts about his competency after the pretrial competency finding based on her failure to request further competency proceedings. (RB 105.)

In other words, respondent essentially contends that even if appellant were incompetent when Dr. Christensen evaluated him, the court could find that his competency had been restored without ever affording him the statutory competency, commitment or restoration proceedings to which he was entitled. (RB 103-105; see Pen. Code, §§ 1368, et seq.) Respondent's contentions are unsupported by the facts and the law.

a. The Record Does Not Support Respondent's Contention That the Only Evidence of Incompetency Was Limited to the "Particular Day" and "Conditions" of Dr. Christensen's Pretrial Evaluation

Turning first to respondent's factual contentions, Dr. Christensen never testified that her opinion was "only good for a particular day or . . . under the conditions of [her] testing" and evaluation. (RB 108.) As to Dr. Christensen's opinion that appellant was mentally retarded, she did testify that the scores produced by her *intelligence testing* could have been detrimentally impacted by the distracting environment of the infirmary in which she evaluated him. (13-RT 3025, 3029-3030, 3079-3081, 3110.) During trial, Doctors Powell and Schuyler tested and evaluated appellant in their offices and did achieve higher scores, though still within the mentally retarded range. (12-RT 2881; 13-RT 3138-3139.) While appellant's performance on later testing under improved conditions led Dr. Christensen to conclude the degree of his mental retardation was less severe than she had originally believed, it did not alter her fundamental diagnosis and opinion that appellant was – as Doctors Powell and Schuyler diagnosed – mentally retarded. (13-RT 2935, 3022-3024, 3031, 3085-3086, 3110.)

As to Dr. Christensen's further opinion that appellant was incompetent, respondent is correct that she testified at trial, "I still believe at that time [of her evaluation] he was incompetent to stand trial." (13-RT 3086; RB 100-101, 103.) She never testified, however, that she no longer believed that appellant was incompetent or that her incompetency opinion was so dependent on the conditions under which she evaluated him that it was "only good for [the] particular day[s]" of her evaluation. (RB 108.)

To the contrary, as Dr. Christensen testified and defense counsel

explained to the trial court, counsel had asked Dr. Christensen not only to evaluate appellant for competency but also "for an evaluation to assist me in determining what I could do in regards to *treating Mr. Townsel if it was necessary to assure that I would have his full cooperation.*" (13-RT 2987-2989, 3103-3105, 3051, italics added.) In response, Dr. Christensen recommended a limited conservatorship and transfer to the Central Valley Regional Center for the Developmentally Disabled for treatment. (13-RT 3086-3090, 3103-3104, 3106-3107; see Pen. Code, § 1370.1.) Dr. Christensen's recommendation was consistent with the statutory provisions that would have applied had appellant been afforded developmental disability competency proceedings and adjudged incompetent. (AOB 172-176; Pen. Code, §§ 1369, subd. (a), 1370.1.) Of course, appellant never received the recommended regional center treatment because developmental competency proceedings were never initiated. (See AOB 49-50, 58-59, 172-176.)

Hence, this evidence indicated that Dr. Christensen's pretrial diagnosis was not merely that appellant was incompetent or unable to rationally cooperate with counsel on the day of her evaluation, but that he would remain so unless and until he received treatment that he never received. Indeed, when there is evidence that a defendant is incompetent as a result of a mental condition that is a permanent or continuous one, like mental retardation, it is reasonable to infer that his incompetency continues. (Cf. *In re Fosselman's Estate* (1957) 48 Cal.2d 179, 185-186 [although testamentary incapacity requires proof of incapacity at time of execution of will, "once it is shown that testamentary incompetency exists and that it is caused by a mental disorder of a general or continuous nature, the inference is reasonable [citation] . . . that the incompetency continues to exist"];

People v. Barry (1955) 44 Cal.2d 426, 432-433 [approving as correct statement of law instruction that if jury found some form of insanity prior to commission of crimes, then it should presume that defendant was still insane at time of crimes absent affirmative evidence to the contrary]; Code of Civ. Proc., § 3457 ["a thing continues to exist as long as is usual of things of that nature"]; *Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1089 [substantial evidence of present incompetency based on "history of mental impairment" and evidence that defendant was brain damaged, which suggested that his mental problems "lay not just in the past, but continued to the time of trial"].)

Consequently, this evidence was sufficient to raise a reasonable doubt about appellant's "present" competency when it was presented at trial. Certainly, absent Dr. Christensen's affirmative testimony that she had reevaluated appellant and no longer believed he was incompetent, the trial court could not assume as much without holding a hearing or at the very least inquiring further of her or defense counsel. To paraphrase this Court in rejecting an argument essentially identical to respondent's here, "had either the judge or the prosecutor believed that later [circumstances] negated Dr. [Christensen's] opinion, Dr. [Christensen] could have been [examined] to determine if [s]he still adhered to this opinion." (*Stankewitz, supra*, 32 Cal.3d at p. 93; accord, *People v. Hale*, *supra*, 44 Cal.3d at pp. 539-541; Pen. Code, § 1368 [where doubt arises, court should make inquiry of defense counsel].) "The essential point is that substantial evidence indicating appellant's inability to rationally assist his [counsel] had been presented. Whether that evidence would be sufficiently well-based to result in a finding of incompetency should have been determined in a full competency hearing [under section 1369, subdivision (a)]. The existence of

other evidence [like a change of circumstances from the time of the expert's original evaluation], even if deemed to be in conflict with the substantial evidence of incompetency, does not relieve the court of its duty to conduct a a competency hearing." (*Stankewitz, supra*, at p. 93.)

As to defense counsel, respondent is correct that she did not seek other competency proceedings after the pretrial mental disorder competency hearing. (RB 105.) However, respondent is incorrect in its assertion that "at no time after the original competency hearing, through Dr. Chrisensen's testimony, did defense counsel ever again claim that she had any doubt about appellant's competency . . . . ," as well as in its speculative conclusion that this meant counsel must have been able to secure appellant's cooperation after the pretrial competency finding. (RB 105.) As discussed in Part 3, *ante,* a year after the pretrial proceedings, defense counsel expressed her continued belief to the trial court that appellant was unable to assist her in the preparation of his defense due to a "mental impairment." (2-CT 586-587.)

More fundamentally, respondent's contentions that the trial court could presume that appellant was no longer incompetent based either on a subsequent change of circumstances (his removal from the infirmary where Dr. Christensen evaluated him) or defense counsel's failure to press the matter and seek additional, developmental disability competency proceedings are contrary to the law.

b. The Law Does Not Support Respondent's Contention That the Trial Court Could Determine That Appellant's Competency Was Restored after Dr. Christensen's Evaluation Without Ever Having Held a Developmental Disability Competency Hearing

Respondent's contentions here are remarkably similar to the ones it made and this Court rejected, in *People v. Hale*, *supra*, 44 Cal.3d 521 (hereafter *Hale*). There, on defense counsel's motion, the trial court declared doubt as to the defendant's competency and ordered pretrial psychological evaluations. (*Id.* at pp. 535-536.) The first psychiatrist to evaluate the defendant concluded that he was incompetent due to a mental disorder. The defendant was treated with antipsychotic medication and later evaluated by other psychiatrists, who agreed that the defendant had a mental disorder but concluded that medication had improved it and restored his competency. (*Id.* at pp. 536-537.) Still later, a final psychiatrist evaluated the defendant and reviewed the previous evaluations. That psychiatrist explained that when the defendant was previously evaluated and diagnosed as incompetent, he was very psychotic because his medication had not yet taken effect. However, as reflected by the subsequent psychiatric evaluations, his condition steadily improved with treatment and so stabilized by the time of the last psychiatrist's evaluation that the defendant no longer exhibited psychotic behavior and his competency was restored. (*Id.* at p. 538.)

After the trial court received and considered all of this evidence, the matter proceeded to trial without objection from defense counsel. (*Hale*, *supra*, 44 Cal.3d at p. 538.) However, the trial court never made any explicit findings or resolved the question of the defendant's competency on

the record. (*Ibid.*) On appeal from his ensuing conviction, the defendant argued that the court violated his statutory and constitutional rights by failing to hold a full competency hearing. (*Id.* at pp. 538-539.) This Court agreed. (*Id.* at pp. 539-541.)

The Court based its holding on two grounds. First (and not relevant here), the trial court's express declaration of doubt as to the defendant's competency amounted to an order for a full competency hearing which it could not vacate sub silentio. (*Hale*, *supra*, 44 Cal.3d at pp. 539-540.)

Second and relevant here, separate and apart from the trial court's declaration of doubt prior to the psychiatric evaluations, this Court found that the initial psychiatric opinion of incompetency "unquestionably" amounted to substantial evidence sufficient to raise an objective doubt that the defendant was competent and itself demand a hearing. (*Hale*, *supra*, 44 Cal.3d at pp. 539-540.) Respondent argued there that the doubt raised by this evidence was necessarily dispelled, and relieved the trial court of its duty to hold a hearing, for two related reasons.

First, respondent argued that the initial psychiatric opinion of incompetency depended on the defendant's unmedicated condition at that time; the subsequent psychiatric evaluations and opinions established that his condition had stabilized with drug therapy to such a degree as to remove any doubt about his present competency to proceed to trial. (*Hale*, *supra*, 44 Cal.3d at p. 540.) Indeed, respondent argued, defense counsel's failure to press for a hearing or object to proceeding to trial without one after the court and the parties received all of the evidence demonstrated that counsel agreed that the defendant's competency had been restored and "abandoned the competency issue after determining that pursuit of the issue would be fruitless." (*Id.* at p. 541.) This Court soundly rejected these arguments.

As noted above, the initial psychiatric opinion of incompetency "unquestionably" amounted to substantial evidence of incompetence. (*Hale*, *supra*, 44 Cal.3d at pp. 539-540.) The later opinions of other psychiatrists that drug therapy subsequently restored the defendant's competency *conflicted* with the earlier evidence of incompetency, but could not be deemed to override or negate it without holding a full hearing. (*Hale*, *supra*, 44 Cal.3d at p. 541.) As the Court explained, respondent's "contention, if accepted, would allow the court on its own motion and without a full airing of the evidence to 'reject substantial psychiatric evidence of [defendant's] mental incompetence and credit conflicting evidence to deny a hearing on competency. The *Pate* and *Pennington* decisions rejected this line of argument in holding that once substantial evidence in the form of a psychiatric opinion of incompetence was presented, the court was required to hold a competency hearing.' (*Stankewitz*, *supra*, 32 Cal.3d at p. 93; *Pennington, supra*, 66 Cal.2d at p. 518.)" (*Hale*, *supra*, 44 Cal.3d at p. 541; accord, *Stankewitz*, *supra*, at pp. 92-93 [rejecting respondent's argument that qualified expert's incompetency opinion was undermined by evidence of subsequent change of circumstances and thus dispelled the doubt about competency without holding a hearing].) The Court similarly rejected respondent's argument that the trial court could find that there was no longer reasonable doubt about the defendant's present competency to proceed to trial based on defense counsel's failure to object or press for a full hearing. This Court treated respondent's contention as a waiver argument inconsistent with black letter law that a defendant's statutory and constitutional right to a competency hearing "cannot be waived by defendant or his counsel." (*Hale*, *supra*, at p. 541, and authorities cited therein; accord, e.g., *Blazak v.*

Ricketts, *supra*, 1 F.3d at pp. 897-899 [expert opinion that defendant was incompetent, contained in presentence report presented to court after verdicts, raised reasonable doubt requiring hearing into trial competency without which doubt could not be dispelled by crediting subsequent opinions that defendant was in remission; further rejecting government's argument that defendant waived right to hearing by failing to request one or present evidence earlier].)

Respondent's arguments here are analytically identical to those it made and this Court rejected in *Hale*. Indeed, respondent's argument that Dr. Christensen's pretrial incompetency opinion was so dependent on the circumstances under which she evaluated him that a later change in circumstances dispelled any doubt that he was presently competent to stand trial thereafter has even less merit than its argument in *Hale*. Respondent's argument in *Hale* was at least based on the evaluations and opinions of qualified experts that later treatment with drug therapy removed any doubt about the defendant's present competency to proceed to trial. Here, no expert ever testified that appellant's incompetency as a result of mental retardation had been restored by a change of circumstances following Dr. Christensen's evaluation. If respondent's factually stronger but legally identical argument in *Hale* had no legal merit, a fortiori it has no merit here.

Respondent's argument is further undermined by its own emphatic insistence that the *Jones/Melissakis* standard governs whether the trial court had a duty to initiate midtrial developmental disability competency proceedings. (RB 86, 101, 105-106.) Under that standard and as previously discussed, even when there has been a prior competency hearing and finding, the trial court still has an ongoing duty to initiate competency proceedings if it becomes aware of "new evidence which casts a serious

doubt upon the validity of the pretrial finding of present [competency]." (*Melissakis*, *supra*, 56 Cal.App.3d at p. 62; accord, *People v. Jones*, *supra*, 53 Cal.3d at pp. 1152-1153; *People v. Jones*, *supra*, 15 Cal.4th at p. 150.) As the *Melissakis* decision makes clear, the focus on the "validity of" the *prior* competency finding necessarily incorporates "new evidence" that the defendant was incompetent at the time of the prior proceedings. There, as discussed in Part B, *ante*, a pretrial expert opinion that the defendant was incompetent as a result of a mental disorder, together with new evidence presented mid-trial that the defendant suffered from that mental disorder, was substantial evidence raising a reasonable doubt as to defendant's competency. Despite the fact that none of the experts explicitly testified to the defendant's "present" incompetence at the time of trial, the new trial evidence "cast[] a serious doubt upon the validity of the pretrial finding of present [competency]" and triggered the trial court's duty to hold new, mid-trial competency proceedings. (*Melissakis*, *supra*, 56 Cal.App.3d at pp. 57-62 & fns. 2 & 3.)[16]

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[16] *Melissakis* is consistent with the basic principles that: (1) a "prior medical opinion on competence to stand trial . . . standing alone . . . may, in some circumstances, be sufficient" to raise reasonable doubt as to the defendant's present competency and require a competency hearing (*Drope*, *supra*, 420 U.S. at 180); (2) a defendant must be competent at *all* critical stages of the trial, including the preliminary hearing (see, e.g., *Hale v. Superior Court* (1975) 15 Cal.3d 21, 221-227-228; *Drope*, *supra*, 420 U.S. at 182-183); and (3) the trial court must initiate competency proceedings whenever it becomes aware of substantial evidence, not previously resolved, that the defendant was incompetent at any critical stage of the proceedings prior to judgment (*People v. Rogers* (2006) 39 Cal.4th 826, 847; Pen. Code, § 1368, subd. (a); *Drope*, *supra*, at 181; *Blazak v. Ricketts*, *supra*, 1 F.3d at 893, 898-900 *Morris v. United States*, *supra*, 414 F.2d at 259.)

Applying *Melissakis*, as respondent insists we do, the absence of explicit testimony that appellant was still "presently" incompetent as a result of mental retardation when the incompetency evidence was presented to the trial court is of no moment. As in that case, the evidence as a whole was sufficient to raise reasonable doubt that appellant was incompetent to stand trial as a result of mental retardation, "cast[] a serious doubt on the validity of the pretrial finding of present [competency]," and triggered the trial court's sua sponte duty to initiate the developmental disability competency proceedings to which he had never been given access. (*Melissakis*, *supra*, 56 Cal.App.3d at p. 62; see also, *Castro, supra,* 78 Cal.App.4th at pp. 1418-1420; *Leonard, supra*, 40 Cal.4th at p. 1391.)

For all of the foregoing reasons, the trial court was presented with substantial evidence that appellant was mentally retarded and incompetent, but had never been given access to the developmental disability "procedures adequate" and *necessary* to protect his right not to be tried and convicted while incompetent. (*Drope*, *supra*, 420 U.S. at p. 172; *Pate*, *supra*, 383 U.S. at p. 386; *Leonard*, *supra*, 40 Cal.4th at p. 1391; *Castro, supra,* 78 Cal.App.4th at pp. 1418-1420.) The trial court's failure to initiate those proceedings on its own motion violated state law, appellant's "due process right to a fair trial" (*Drope*, *supra*, at pp. 172, 176), and his Eighth Amendment right to heightened reliability in the all stages of these capital proceedings. (*Pate*, *supra*, 383 U.S. at pp. 385-387; *Castro*, *supra*, at pp. 1418-1420; *Monge v. California* (1998) 524 U.S. 721, 732; Pen. Code, §§ 1367-1370.1.)

F. The Pretrial Mental Disorder Competency Proceedings and Finding Neither Satisfied Appellant's State and Federal Constitutional Rights to a Developmental Disability Competency Proceeding Nor Rendered their Deprivation Harmless

Respondent contends that even if the trial court violated Penal Code section 1369, subdivision (a), by failing to hold developmental disability competency proceedings, the error was harmless. (RB 121-125.) Respondent's argument is without merit.

1. Respondent Does Not Dispute That *Castro* and *Leonard* Govern Whether the Trial Court's Failure to Initiate Developmental Disability Competency Hearings Constituted a Structural Constitutional Violation or Merely Amounted to a Harmless State Law Violation

Respondent does not dispute that *Castro*, *supra*, 78 Cal.App.4th 1415 and *Leonard*, *supra*, 40 Cal.4th 1370, govern the question of harmless error here. (See RB 121-125; compare AOB 60-72.) That is, as discussed in the opening brief, the due process clause of the federal constitution demands that states "observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial." (*Drope*, *supra*, 420 U.S. at p. 172; *Pate*, *supra*, 383 U.S. at p. 386 *Leonard*, *supra*, 40 Cal.4th at p. 1391; *Castro, supra,* 78 Cal.App.4th at pp. 1418-1420.) In order to effectuate this guarantee and ensure a "'valid assessment'" and "informed determination" of the defendant's competency, our Legislature has mandated special developmental disability competency procedures requiring the appointment and evaluation by the regional center and a determination of whether the defendant is incompetent as a result of a developmental disability. (*Leonard*, *supra*, at pp. 1389-1391; accord, *Castro*, *supra*, at pp. 1417-1418; AOB 60-72.) Hence, qualifying

defendants have both a state law and federal constitutional right to the special developmental disability competency proceedings mandated under section 1369, subdivision (a). (*Leonard*, *supra*, at pp. 1389-1391; accord, *Castro*, *supra*, at pp. 1417-1418; AOB 60-72.)

A mental disorder competency proceeding in which the defendant is evaluated by psychiatrists for incompetency due solely to a mental disorder and the trier of fact determines only whether the defendant is incompetent on that basis does not satisfy this right or render its deprivation harmless. (*Castro*, *supra*, 78 Cal.App.4th at pp. 1418-1420; accord, *Leonard*, *supra*, 40 Cal.4th at pp. 1389-1390; AOB 60-72.) To the contrary, the deprivation violates the defendant's "due process right to a fair trial" (*Drope*, *supra*, 420 U.S. at pp. 172, 176) and is "per se prejudicial" (*Pennington*, *supra*, 66 Cal.2d at p. 521). (Accord, *Pate*, *supra*, 383 U.S. at pp. 385-387; *People v. Young* (2005) 34 Cal.4th 1149, 1217; AOB 60-72.)

This Court identified a narrow exception to these fundamental principles in *Leonard* when a trial court holds the *functional equivalent* of developmental disability competency proceedings. (AOB 64-72.) That is, when the "defendant was evaluated by doctors who" – like the regional center – "possessed the[] qualifications" necessary to assess the developmental disability in question, "attempt[ed] to determine . . . [and] assess the extent of [his or] her developmental disability,'" and "their testimony provided a basis for the trial court's ruling that defendant was competent to stand trial," the competency proceedings are the functional equivalent of the developmental disability proceedings mandated by section 1369, subdivision (a). (*Leonard*, *supra*, 40 Cal.4th at pp. 1390-1391.) As such, they satisfy the essential due process guarantee to "'procedures adequate to protect a defendant's right not to be tried or convicted while

incompetent to stand trial.'" (*Id.* at p. 1391, quoting *Drope*, *supra*, 420 U.S. at p. 172.) Under these limited circumstances – and *only* under these limited circumstances – a court's failure to follow the developmental disability competency procedures mandated by statute still violates state law, but the violation is harmless. (*Leonard*, *supra*, at p. 1391; AOB 60-72.)

2. Given Respondent's Tacit Concessions That Appellant Was Never Given the Developmental Disability Competency Proceedings to Which He Was Entitled or Their Functional Equivalent, this Court Cannot Find That the Resulting Constitutional Violation Was Harmless

As discussed in the opening brief, the mental disorder competency proceedings in this case are analytically indistinguishable from those deemed constitutionally inadequate in *Castro*, a holding this Court impliedly approved in *Leonard*. (AOB 60-72.) Respondent makes no attempt to distinguish the *Castro* proceedings from those in this case and thus does not dispute that they are indistinguishable. (See RB 121-125.) Similarly, respondent does not dispute that the mental disorder competency proceedings in this case did not constitute the functional equivalent of developmental disability competency proceedings as described in *Leonard*. (See RB 122-123; compare AOB 60-72.)

Instead, respondent contends that "although the circumstances of this case are somewhat different" from the proceedings in *Leonard*, "the outcome should be the same" (RB 122): this Court should find the trial court's error was harmless. (RB 121-125; see also RB 113 [developmental disability competency proceedings "likely would have resulted" in a determination that appellant was malingering, or faking mental retardation and incompetency].) According to respondent, a developmental disability

competency hearing and evaluation by the regional center would have resulted in a finding that appellant was not incompetent as a result of mental retardation, just as the mental disorder competency hearing resulted in a finding that appellant was not incompetent due solely to a mental disorder. (*Ibid.*)

Respondent's argument overlooks that "the outcome" of *Leonard* depended entirely on this Court's determination that the competency proceedings held therein – *unlike* the competency proceedings held in *Castro* – were the functional equivalent of the developmental disability competency proceedings mandated under section 1369, subdivision (a). In other words, the inquiry into whether the pretrial court's mental disorder competency proceedings in this case rendered harmless the trial court's failure to initiate developmental competency proceedings or satisfied due process begins and ends with whether the former proceedings were the functional equivalent of the latter.

Because respondent does not dispute that: (1) the pretrial mental disorder proceedings were not the functional equivalent of developmental disability competency proceedings as described in *Leonard*; (2) the mental disorder competency proceedings were analytically indistinguishable from those deemed constitutionally inadequate in *Castro*; or (3) *Leonard* and *Castro* control, no further inquiry is required. Respondent's tacit concessions necessarily lead to the conclusion that the trial court violated appellant's due process right to "procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial" (*Drope*, *supra*, 420 U.S. at p. 172) and necessary for a "valid assessment" and "informed determination" of competency (*Leonard*, *supra*, 40 Cal.4th at pp. 1389-1391). (Accord, *Castro*, *supra*, 78 Cal.App.4th at

pp. 1417-1418.)

Indeed, once that inescapable conclusion is drawn, no further harmless error inquiry is *permitted*. The error violated appellant's "due process right to a fair trial" (*Drope*, *supra*, 420 U.S. at pp. 172, 176) which is a "structural" error not susceptible of harmless error analysis on appeal (*People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 69-70), but rather is "per se prejudicial" (*Pennington*, *supra*, 66 Cal.2d at p. 521) and demands reversal. (Accord, *Pate*, *supra*, 383 U.S. at pp. 385-387; *People v. Young*, *supra*, 34 Cal.4th at p. 1217; *Castro*, *supra*, 78 Cal.App.4th at pp. 1418-1420; see also, e.g., *People v. Lightsey* (2012) 54 Cal.4th 668, 698-703 ("*Lightsey*") [violation of state law alone in conduct of *Pate* hearings rendered resulting competency findings unreliable and amounted to structural error not susceptible of harmless error analysis on appeal]; *Neder v. United States* (1999) 527 U.S. 1, 8, and authorities cited therein [fair trial violation is structural defect not susceptible of harmless error analysis]; *Jackson v. Denno* (1964) 378 U.S. 368, 391-392 [trial court's failure to hold hearing into voluntariness of confession could not be remedied by appellate court's harmless error analysis, which would be a "constitutionally inadequate substitute for a full and reliable determination of the voluntariness issue" to which defendant was legally entitled].)

Hence, respondent's harmless error analysis has no place here. Further, even if it did, the face of the record clearly refutes respondent's argument to the extent that it rests on the mental retardation prong of the incompetency showing. (See RB 121-125.) As previously discussed, the trial court affirmatively found that appellant was mildly mental retarded and essentially discredited Lee Coleman's otherwise improper testimony that purported to rebut that fact. (16-RT 3785.) Hence, it cannot seriously be

disputed that the trier of fact would not have made the same finding in a properly held competency trial. For all of these reasons, the deprivation of appellant's due process rights requires reversal.

3. Respondent's Waiver Argument Is Contrary to Black Letter Law

While respondent does not dispute that the mental disorder competency proceedings in this case were not the functional equivalent of developmental disability competency proceedings within the meaning of *Leonard*, respondent does contend that appellant cannot be heard to argue as much because he never objected on that ground below or requested developmental disability competency proceedings or their functional equivalent. (RB 123-124 & fn. 76.) This is simply another variation on respondent's waiver theme.

As discussed in Part C, *ante*, respondent's waiver argument is contrary to black letter law. Once the trial court was made aware of substantial evidence that appellant was entitled to developmental competency proceedings to which he had never been given access, it had a sua sponte duty to initiate those proceedings: "whether the appointment of the regional director was specifically requested . . . or not is irrelevant . . . ." (*Castro*, *supra*, 78 Cal.App.4th at pp. 1416, 1419, and authorities cited therein; Part C, *ante*.)

4. Respondent's Argument That the Evaluations of Appellant by All of the Experts in this Case Constituted Developmental Disability Competency Proceedings Is Contrary to the Law

Finally, respondent contends that "because appellant had been examined by two psychiatrists [Doctors Terrell and Davis], two psychologists [Doctors Christensen and Powell], and one neuropsychologist

[Dr. Schuyler], appellant received a fair competency determination by doctors who were qualified to assess him for both developmental disability and mental disorder." (RB 123.) Once again, respondent's argument is contrary to well settled law.

Setting aside the fact that the *only* expert who evaluated appellant for *both* competency and mental retardation was Dr. Christensen, the issue here is not whether appellant was deprived of a right to a "fair competency determination *by doctors* . . . ." (RB 123, italics added.) The issue is whether he was deprived of his right to a developmental disability competency *hearing* entailing an evaluation by the regional center (or comparable mental retardation experts) and a competency determination by a *trier of fact* – by jury, if requested. (Pen. Code, § 1369.) The answer is clearly yes: the trial court did not declare a doubt about appellant's competency, order a hearing, advise appellant of his right to a jury trial, appoint the regional center or any other experts to assess his competency, or indeed make any inquiry *at all* into appellant's competency much less any express findings on the matter. It is black letter law that a trial court's mere receipt of expert opinion evidence does not amount to a competency hearing. (*People v. Hale, supra*, 44 Cal.3d at pp. 539-541; *Pennington, supra*, 66 Cal.2d at pp. 520-521 & fn. 8, and authorities cited therein; *Pate*, 383 U.S. at p. 385.) Respondent's argument to the contrary must be rejected.

For all of the foregoing reasons, as well as those set forth in the opening brief, the trial court's failure to initiate developmental competency proceedings violated state law, as well as appellant's rights to procedural due process and heightened reliability in all stages of this capital proceeding. The pretrial mental disorder competency proceedings did not

substitute for those proceedings or render their omission harmless. Hence, the judgment must be reversed.

G. Complete And Unqualified Reversal is Required

Finally, respondent briefly contends that if the trial court's failure to hold developmental disability competency proceedings violated due process under *Pate* and requires reversal of the judgment, the matter should be remanded for a retrospective competency hearing to resolve whether appellant was competent to stand trial 22 years ago. (RB 118-120, fn. 23.) In making this assertion, respondent observes in a footnote that "this Court has yet to decide whether . . . 'federal constitutional error in failing to evaluate defendant's mental competence at the time of trial might be "cured" by means of a retrospective competency hearing . . . . '" (RB 119, fn. 72, quoting *People v. Ary* (2011) 51 Cal.4th 510, 516-517 ("*Ary*").) Nevertheless, respondent perfunctorily asserts that a postjudgment retrospective competency hearing "provides the most practical means to address a due process violation without any additional prejudice to appellant." (RB 119, fn. 72; cf. *People v. Clair* (1992) 2 Cal.4th 629, 653, fn. 2 [point made in perfunctory fashion is not properly raised]; *Placer Ranch Partners v. County of Placer* (2001) 91 Cal.App.4th 1336, 1342, fn. 9 [arguments raised in footnotes not properly briefed].) Respondent's contention is without merit.

As a preliminary matter, this Court has unequivocally held that a *Pate* violation demands reversal of the judgment. (*Ary*, *supra*, 51 Cal.4th at p. 515 & fn. 1, citing *People v. Young* (2005) 34 Cal.4th 1149, 1217; see also *Lightsey*, *supra*, 54 Cal.4th at p. 706.) It is true, as respondent observes, that the Court noted in *Ary* that it has not resolved the question of whether *Pate* violations, while reversible error, can nevertheless be

remedied with postjudgment retrospective competency hearings. Respondent ignores, however, this Court's emphasis on the complexity of that question. (*Ary*, *supra*, at pp. 516-517 (maj. opn.) and pp. 521-523 (con. opn. of Werdegar, J.); see also *Lightsey*, *supra*, at p. 704, fn. 15.) As the Court recently reemphasized in *Lightsey,* "the appropriate analysis and course of remedial action in a case of . . . *Pate* error is complex and subject to debate." (*Lightsey*, *supra*, at pp. 703-704.) Further, Justice Werdegar wrote separately in *Ary* to emphasize that "[r]eason exists to believe the United States Supreme Court would not approve the" postjudgment retrospective competency hearing "procedure." (*Ary*, *supra*, at p. 522, conc. opn. of Werdegar, J.)

Justice Werdegar is quite right. As will be shown below, the high court has unequivocally held that a trial court has a constitutional obligation to provide meaningful "procedures adequate to protect a defendant's right not to be tried and convicted while incompetent to stand trial" (*Drope*, *supra*, 420 U.S. at p. 172) that are "implemented with dispatch" upon a reasonable doubt of competency (*Drope*, *supra*, 420 U.S. at pp. 181-183) and result in a "concurrent determination" of competency (*Pate*, *supra*, 383 U.S. at p. 387). This obligation cannot be discharged, nor its violation remedied, with a postjudgment retrospective competency hearing and determination. Even assuming arguendo that postjudgment retrospective competency hearings might theoretically be capable of remedying some *Pate* violations under some narrow circumstances, the 22-year-old violation in this case cannot be remedied.

1. The Court's Decisions in *Ary* and *Lightsey*

This Court's recent decisions in *Ary*, *supra*, 51 Cal.4th 510, and *Lightsey*, *supra*, 54 Cal.3th 668 (both of which were issued after the filing

of appellant's opening brief) provide a useful starting point for the analysis. As the Court recognized in those cases (and as discussed in the opening brief and in detail in Part 2, *post*), the United States Supreme Court has consistently considered and rejected postjudgment retrospective competency hearings as constitutionally acceptable remedies for *Pate* violations. (*Lightsey*, *supra*, at pp. 704-705; *Ary*, *supra*, at pp. 521-523, conc. opn. of Werdegar, J.; *Drope*, *supra*, 420 U.S. at p. 183; *Pate*, *supra*, 383 U.S. at pp. 386-387; see also *Dusky v. United States*, *supra*, 362 U.S. at p. 403; AOB 74.) So too has this Court. (*Ary*, *supra*, at pp. 521-523, conc. opn. of Werdegar, J, and authorities cited therein; *Lightsey*, *supra*, at p. 705, and authorities cited therein; *Pennington*, 66 Cal.2d at p. 521; *Stankewitz, supra*, 32 Cal.3d at p. 94; AOB 74.)

Therefore, "*Pate* error was once generally considered automatically reversible, requiring a new trial of the charges (were the defendant found competent to stand trial at that time)." (*Lightsey*, *supra*, 54 Cal.4th at p. 704, and authorities cited therein; *Ary*, *supra*, 51 Cal.4th at pp. 521-523, conc. opn. of Werdegar, J.)

> At some point, however, [other] courts parsed the language of *Pate* and subsequent high court decisions addressing the constitutional violation (like *Drope, supra*, 420 U.S. 162, 95 S.Ct. 896) and discerned that the problem of remanding for the limited remedy of conducting solely what has been termed a 'retrospective competency hearing as a remedy for *Pate* error was *not the nature of the constitutional injury itself* but was instead the *inherent difficulty* of making a nunc pro tunc determination of the defendant's mental state.

(*Lightsey*, *supra*, 54 Cal.4th at p. 705, original italics.) Those courts began permitting retrospective competency hearings under limited circumstances in which a "meaningful" hearing and determination are possible

notwithstanding the difficulties emphasized in *Pate* and *Drope*. (*Lightsey, supra,* at pp. 705-706, and authorities cited therein; accord, *Ary*, 51 Cal.4th at pp. 521-522, conc. opn. of Werdegar, J.)

In both *Lightsey* and *Ary*, this Court expressly declined to resolve the complex question of whether those other courts are correct. (*Lightsey*, *supra*, 54 Cal.4th at pp. 704-706; *Ary*, *supra*, 51 Cal.4th at 516-517.) However, both decisions do reflect the Court's view of the *theoretically* remedial nature of postjudgment retrospective competency hearings – a view that is ultimately determinative of whether they can, in fact, ever be constitutionally appropriate remedies for *Pate* violations.

In this regard, the lower courts have interpreted the high court's analysis of the theoretically remedial nature of a postjudgment retrospective competency hearing in two ways. (See, e.g., Beaudreau, *Due Process or "Some Process?" Restoring Pate's Guarantee of Adequate Competency Procedures* (Spring 2011) 47 Cal. West. L. Rev. 369, 386-387, 392-393 (hereafter "*Due Process*").) The first – discussed in the opening brief – is that a postjudgment retrospective competency hearing is actually a harmless error hearing. (AOB 76-77, 80-82; accord, *Due Process*, *supra*, at pp. 400-405.) As with other constitutional violations, the *Chapman* standard applies to due process violations under *Pate*, requiring the state to bear the burden of proving *Pate* violations harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) In order to carry its burden, the state must prove beyond a reasonable doubt that the defendant was *not* tried and convicted while incompetent. (*James v. Singletary* (11th Cir. 1992) 957 F.2d 1562, 1570-1571 & fns. 11 & 12; *Watts v. Singletary* (11th Cir. 1996) 87 F.3d 1282, 1287 & fn. 6; *United States ex rel. Lewis v. Lane* (7th Cir. 1987) 822 F.2d 703, 706-707; *Nelson v. State* (Fla. 2010) 43 So. 3d 20, 33;

Thompson v. State (Fla. App. 2012) 88 So.2d 312, 317; *State v. Sanders* (W. Va. 2001) 549 S.E.2d 40, 54, fn. 10; *State v. Snyder* (La. 1999) 750 So. 2d 832, 855 fn.16; cf. *Sturgis v. Goldsmith* (9th Cir. 1986) 796 F.2d 1103, 1109 [remanding for determination of whether denial of defendant's federal constitutional right to be present at competency hearing was harmless under *Chapman* standard: "if the government can prove that [defendant] was, in fact, competent at the time of trial, the error will not require reversal of the conviction"]; *People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1276-1279 [*Chapman* standard applied to erroneous provision of jury instruction in competency hearing, which unconstitutionally raised defendant's burden of proving incompetency from a preponderance to clear and convincing evidence].)

The second view of the theoretically remedial nature of a postjudgment hearing is that it is a nunc pro tunc hearing into the defendant's competency at the time of trial. (*Due Process*, *supra*, 47 Cal. West. L. Rev. at pp. 393-400; see, e.g., *Moran v. Godinez* (9th Cir.1994) 57 F.3d 690, 696-698, overruled on other grounds by *Lockyer v. Andrade* (2003) 538 U.S. 63, 75-76.) In other words, in order to remedy the omission of a prejudgment or concurrent hearing to which the defendant was constitutionally entitled at trial, the nunc pro tunc hearing must act as a constitutionally "adequate *substitute*" for that hearing, such that the trial court can belatedly discharge its constitutional obligations under *Pate* in as meaningful a manner as it could have discharged them at trial. (*Silverstein v. Henderson* (2d Cir. 1983) 706 F.2d 361, 369; accord, e.g., *Moran*, *supra*, at pp. 696-698.)

In *Ary*, *supra*, 51 Cal.4th 510, this Court impliedly rejected the former view and adopted the latter. There, the court was bound by the law

of the case doctrine to assume (without deciding) that remanding for a postjudgment retrospective competency hearing was an appropriate remedy for the *Pate* violation in that case; the only issue was which party would bear the burden of proof on the issue of retrospective competency at the hearing. (*Ary*, *supra*, 51 Cal.4th at pp. 516-520.)

The court rejected the position that the state must bear the burden of proving the defendant's retrospective competency beyond a reasonable doubt. (*Ary*, *supra*, 51 Cal.4th at p. 520.) In so doing, it impliedly rejected the view that retrospective competency hearings are harmless error hearings to which the *Chapman* standard of harmless error review would necessarily apply.

Instead, the court held that Penal Code section 1369, subdivision (f), which imposes the burden on defendants to prove their concurrent incompetency by a preponderance of the evidence at *prejudgment Pate* hearings, would also apply to the issue of retrospective incompetency at a remedial postjudgment hearing. (*Ary*, *supra*, 51 Cal.4th at pp. 520-521; Pen. Code, § 1368.) The court's decision was based primarily on the high court's holding in *Medina v. California* (1992) 505 U.S. 437 and the two-judge majority opinion in *Moran v. Godinez*, *supra*, 57 F.3d 690. (*Ary*, *supra*, at 519-520.)

In *Medina*, the Supreme Court held that due process does not forbid imposing on a defendant the burden of proving *concurrent* incompetency by a preponderance of the evidence so long as a state otherwise observes the adequate procedures required by due process under *Pate* and its progeny. (*Medina*, *supra*, 505 U.S. at pp. 446, 449-452; *Ary*, *supra*, 51 Cal.4th at pp. 518-519.) In *Moran*, *supra*, a two-judge majority of a Ninth Circuit Court of Appeals panel interpreted *Medina* broadly, reasoning that although it

addressed the burden of proof at a prejudgment, concurrent competency hearing, the same rationale applies to remedial postjudgment, retrospective competency hearings because they operate as nunc pro tunc hearings. (*Moran*, *supra*, 57 F.3d at pp. 696-697.) That is, once it is determined that a "meaningful," postjudgment retrospective competency hearing and determination is "feasible," the postjudgment hearing is the "adequate procedure" required under *Pate* and acts as a constitutionally adequate alternative or substitute for a prejudgment, concurrent hearing and thereby satisfies due process. Based on the premise that the two proceedings are no different for constitutional purposes, the two-judge majority held over a vigorous dissent that the same rules and procedures – including any burden on the defendant to prove incompetency by a preponderance – necessarily apply equally to both proceedings. (*Id. at pp.* 696-698.)

Although this Court did not endorse the view that postjudgment retrospective hearings *can* remedy *Pate* violations, it did adopt *Moran's* view of the *theoretically* remedial nature of retrospective competency hearings as nunc pro tunc hearings. (*Ary*, *supra*, 51 Cal.4th at pp. 519-520, citing in accord *Tate v. Oklahoma* (Okla. Crim. App. 1995) 896 p. 2d 1182, 1187-1188 [since a postjudment retrospective competency hearing must act as a substitute for a prejudgment *Pate* hearing and restore the defendant to his original position in order to remedy a *Pate* violation, the same burden of proof may be placed on the defendant at both hearings].) Assuming that a remedial postjudgment, retrospective hearing can act as a constitutionally adequate substitute for a prejudgment, concurrent competency hearing under *Pate* and "'the defendant will be placed in a position comparable to the one he would have been placed in [at] the original trial. . . . no due process violation occurs by ultimately placing the burden of proving

incompetency on the defendant in a retrospective hearing.'" (*Ary* at p. 520, quoting *Tate v. Oklahoma*, *supra*, 896 p. 2d at pp. 1187-1188.)

This Court reiterated the *Ary* reasoning in *Lightsey*, *supra*, 54 Cal.4th 668. There, the court addressed whether the violation of *state law* requiring representation by counsel at the otherwise appropriate *Pate* hearings in that case could possibly be remedied by restoring the state law benefit of counsel to the defendant at a postjudgment competency hearing. (*Lightsey*, *supra*, 54 Cal.4th at pp. 691-692.) The court emphasized that the state law error there was fundamentally different from *Pate* error and therefore the possibility that the former might be so remedied does not necessarily mean that the latter can be. (*Id.* at pp. 703-704, 708-709.) With this caveat in mind, the court held that a postjudgment hearing could remedy the state law violation in that case so long as it could operate as the equivalent of the state law proceeding to which the defendant had been entitled at trial but denied and the defendant would be placed in "a position comparable to the one he would have been in had the violation not occurred . . . ." (*Id.* at p. 707.) This "would appropriately tailor the remedy 'to the injury suffered from the ... violation [without] unnecessarily infring[ing] on competing interests.' (*United States v. Morrison* (1981) 449 U.S. 361, 364.)" (*Lightsey*, *supra*, at p. 707, citing in accord *Ary*, *supra*, 51 Cal.4th at pp. 520-521 and *Tate v. Oklahoma*, *supra*, 896 p. 2d at p. 1188.)

The constitutional underpinnings of the views expressed in *Ary* and *Lightsey* are well-settled and familiar ones. As a general matter, "the fundamental requirement of due process is 'the opportunity to be heard' . . . which must be granted at a meaningful time and in a meaningful manner." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333, quoting *Armstrong v. Manzo* (1965) 380 U.S. 545, 552.) When a party has been deprived of a

constitutional right, the remedy must be tailored to the constitutional injury suffered by restoring the defendant to the position he would have enjoyed absent the deprivation. (See, e.g., *United States v. Morrison* (1981) 449 U.S. 361, 364-367 & fn. 2.) Under this principle, when a party has been deprived of a hearing to which due process entitles him, the only way to "wipe the slate clean" and "cure" or remedy the omission is to "restore[] the [party] to the position he would have occupied had due process of law been accorded to him in the first place." (*Armstrong*, *supra*, at p. 552; accord, e.g., *Milliken v. Bradley* (1974) 418 U.S. 717, 746 [remedy for constitutional violation must, "as all remedies," be designed as nearly as possible "to restore the victims . . . to the position they would have occupied in the absence of" the violation].)

Indeed, consistent with these principles, respondent implicitly recognizes that a "remedy" for "a due process violation" cannot cause "any additional prejudice to [the] appellant." (RB 119, fn. 72.) Hence, if the violation would leave the defendant at a disadvantage at a later hearing (such as having to bear a more difficult burden), it cannot be remedied with the later hearing; the only constitutionally acceptable remedy that would restore the defendant to his original position is invalidation of the judgment and a new trial. (See, e.g., *Armstrong*, *supra*, 380 U.S. at p. 552.)

While this Court has not held that a postjudgment, retrospective competency hearing *can* satisfy these remedial conditions, its *Ary* and *Lightsey* decisions implicitly recognize that such a hearing *must* satisfy those conditions in order to remedy a *Pate* violation. And therein lies the rub.

2. Due Process Demands a Prejudgment Hearing and "Concurrent Determination" of Competency, Which Cannot be Satisfied, Nor Its Violation Remedied, With a Postjudgment Hearing and Retrospective Determination of Competency

The high court has unequivocally held that when a reasonable doubt of incompetence arises, due process demands a *pre*judgment hearing "implemented with dispatch" and "concurrent determination" of competency, the deprivation of which violates the defendant's due process "right to a fair trial." (*Pate*, *supra*, 383 U.S. at pp. 385-387; accord, *Drope*, *supra*, 410 U.S. at pp. 172, 176; *Dusky v. United States*, *supra*, 362 U.S. at p. 403.) A postjudgment hearing and retrospective determination of competency neither satisfies due process nor remedies its violation because it is impossible to restore the victim to the position he would have enjoyed in its absence. (*Pate*, *supra*, 383 U.S. at pp. 385-387; accord, *Drope*, *supra*, 410 U.S. at pp. 182-183.) In other words, a postjudgment hearing and retrospective determination of competency is incapable of acting as a constitutionally adequate substitute for the hearing and determination demanded by due process. To the contrary, the only permissible remedy for the deprivation of the victim's due process right to a fair trial is a new trial held in accord with due process – i.e., a trial following a hearing and concurrent determination that the defendant is presently competent to be retried. (*Pate*, *supra*, 383 U.S. at pp. 385-387; accord, *Drope*, *supra*, 410 U.S. at pp. 182-183; see also *Morrison*, *supra,* 449 U.S. at *pp.* 364-367 & fn. 2; *Milliken v. Bradley*, *supra*, 418 U.S. at p. 746; *Armstrong v. Manzo*, *supra*, 380 U.S. at p. 552.)

This Court has already recognized as much. (*Pennington*, *supra*, 66 Cal.2d at p. 521; *Stankewitz*, *supra*, 32 Cal.3d at p. 94.) Indeed, the

teachings of *Pate*, *Drope*, and *Dusky* carry particular force under California law. There is no statutory or constitutional basis on which to depart from those decisions now.

a. The High Court's Decisions in *Pate*, *Drope*, and *Dusky*

Given the paramount importance of a defendant's competency to every aspect of the trial process (see, e.g., *Cooper v. Oklahoma* (1996) 517 U.S. 348, 354, and authorities cited therein), there is a concomitant need for – and due process right to – "procedures adequate *to protect* a defendant's right not to be tried and convicted while incompetent to stand trial." (*Drope*, *supra*, 420 U.S. at p. 172, italics added; accord, *Pate*, *supra*, 383 U.S. at pp. 378, 386.) The purpose of the hearing is obviously prospective and prophylactic; it is an "anticipatory, protective procedure" intended to *prevent* the trial and conviction of an incompetent person. (*Medina*, *supra*, 505 U.S. at p. 458, dis. opn. of Blackmun, J, joined by Stevens, J.; accord, *Cooper*, *supra*, at pp. 363-364, 367-368; *Drope*, *supra*, at p. 172; *Pate*, *supra*, at pp. 378, 386.)

In order for the procedure to be constitutionally "adequate," made at a meaningful time and in a meaningful manner, a competency hearing must be held prior to conviction or imposition of judgment, "implemented with dispatch" (*Drope*, *supra*, 420 U.S. at pp. 181-183), and entail a "*concurrent* determination" of competency (*Pate*, *supra*, 383 U.S. at p. 387, italics added). This procedure is necessary both to achieve its prophylactic purpose and ensure a reliable competency finding given the unique "need for concurrent determination" of competency. (*Pate*, *supra,* at pp. 386-387, italics added.)

Because the question is the defendant's *trial* competency,

contemporaneous evidence is necessary – for instance, psychological experts must assess, and any other witnesses must provide relevant evidence regarding, the defendant's competency at the time of trial. (*Pate*, *supra*, at pp. 385, 387 & fn. 7; see also *Medina*, *supra,* 505 U.S. at pp. 450-451, maj. opn., & *id.* at pp. 461-462, 464-466, dis. opn. of Blackmun, J., joined by Stevens, J.) Furthermore, the trier of fact on the issue of competency must be able to observe the defendant's conduct and demeanor at (or as near as possible to) the time that his competency is in question, before he is convicted and judgment imposed. (*Pate*, *supra*, 383 U.S. at p. 387.) Indeed, "[t]he defendant's demeanor and behavior in the courtroom can often be as probative on the issue of his competence as the testimony of expert witnesses." (*Sturgis v. Goldsmith* (9th Cir. 1986) 796 F.2d 1103, 1109; accord, e.g., *United States v. Turner* (8th Cir. 2011) 644 F.3d 713, 721; *United States v. Prince* (10th Cir. 1991) 938 F.2d 1092, 1094.) For all of these reasons, due process requires a prejudgment hearing and "concurrent determination" of competency whenever demanded by the evidence. (*Pate*, *supra*, at pp. 385-387.)

When a state statutory scheme provides for procedures adequate in this regard, a trial court's failure to observe them violates the defendant's due process "right to a fair trial" even without a showing that he was, in fact, tried while incompetent. (*Pate*, *supra*, 383 U.S. at pp. 385-387; accord, *Drope*, *supra*, 420 U.S. at pp. 172, 176; *Pennington*, *supra*, 66 Cal.2d at pp. 518-521.) California's statutory scheme "reflects those constitutional requirements" (*Ary*, *supra*, 51 Cal.4th at p. 517) by requiring that criminal proceedings be suspended and prejudgment competency hearings held whenever substantial evidence of incompetency arises "during the pendency of an action *and prior to judgment*" (Pen. Code, §§

1368-1369).

For the same reasons, the Court in *Pate* explicitly rejected the possibility that a postjudgment retrospective competency hearing would be a meaningful, adequate procedure to prevent the trial and conviction of an incompetent person or act as a constitutionally adequate substitute for a *Pate* hearing and thereby remedy a *Pate* violation. (*Pate*, *supra*, 383 U.S. at pp. 386-387.) Certainly, a postjudgment hearing, held *after* conviction, cannot serve its constitutional purpose as a protective procedure *to prevent* the trial and conviction of an incompetent person. (See *Id.* at *pp.* 378, 386; cf. *People v. Marks* (1988) 45 Cal.3d 1335, 1342 [purpose of *Pate* hearing "would be subverted if the trial court could proceed to trial without first" holding the hearing].) Moreover, a *Pate* violation necessarily results in the loss or erosion of critical evidence that would otherwise have been available at a concurrent trial hearing. The trier of fact on the issue of competency will not have the benefit of observing the defendant's courtroom demeanor and behavior at the time his competency is in question. (*Pate*, *supra*, 383 U.S. at pp. 385, 387.) Indeed, where, as in *Pate*, state law entitles the defendant to a jury trial on the issue of competency, a *Pate* violation completely deprives him and the trier of fact of the fact-finders' concurrent first-hand observations of the defendant during trial, when his competency is in question. (*Ibid.*)[17] Similarly, when there is no contemporaneous psychological evidence on the issue of the defendant's competency, expert

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[17] The applicable Illinois state law at issue in *Pate*, like California law, entitled defendants to a jury trial on the issue of competency. (*Pate*, *supra*, 383 U.S. at 385; Pen. Code, § 1369.) As this Court has recognized, Illinois's statutory competency scheme is "practically identical" to our own. (*Pennington*, *supra*, 66 Cal.2d at 521 & fn. 8 [*Pate* violations demand complete reversal without remand].)

witnesses cannot observe and assess the defendant's concurrent mental condition but rather would have to base their opinions on the much less reliable and often incomplete information contained in the printed record. (*Id.* at pp. 385, 387 & fn. 7.) Even when there might exist relevant contemporaneous evidence, witnesses would have to testify based on their memories of the defendant. Memories inevitably fade in the months or years that typically ensue between judgment and judicial acknowledgment of *Pate* violations and thereby make the evidence far less reliable than it would have been absent the violation. (See *Dusky v. United States*, *supra*, 362 U.S. at p. 403; *Pate, supra*, 383 U.S. at p. 387; *Drope, supra*, 420 U.S. at p. 183.) For all of these reasons, the unique "need for concurrent determination" of competency, the nature of the constitutional injury suffered by the victim from the failure to make one, and the impossibility of restoring the defendant to his original position absent the violation distinguishes *Pate* violations from others in which the state can belatedly "discharge its constitutional obligation[s] by giving the accused a separate," postjudgment hearing on remand. (*Pate*, *supra*, at p. 387; accord, *Dusky v. United States*, *supra*, 362 U.S. at p. 403 ["in view of the doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency of more than a year ago," meaningful postjudgment hearing into retrospective competency impossible].)

The high court adhered to these principles nine years later in *Drope*, *supra*, 420 U.S. 162. There, the state appellate court held that the combined weight of pretrial and midtrial evidence of incompetency did not require the trial court to initiate midtrial competency proceedings for two reasons. First, the evidence could not be considered collectively but rather had to be

viewed individually and its individual weight was insufficient. (*Id.* at pp. 170, 179-180.) Second, emphasizing the disruption to the trial that would be caused by midtrial competency proceedings, the state appellate court held that "it was within the discretion of the trial court, if he became aware of any doubts of competency during trial, to delay ordering sua sponte an examination and hearing until the close of the case" to the jurors, but "immediately thereafter" and prior to judgment. (*Drope v. State* (Mo. App. Ct. 1973) 492 S.W.2d 838, 842; *Drope*, *supra*, 420 U.S. at pp. 170, 182.)

The United States Supreme Court reversed, holding that the evidence must be viewed collectively and its combined weight was sufficiently substantial to demand that the trial court suspend the trial and initiate concurrent, midtrial competency proceedings under *Pate*. (*Drope*, *supra*, 420 U.S. at pp. 177-182.) The trial court's failure to invoke the state's statutory procedures and hold a prejudgment hearing consistent with *Pate* deprived the defendant of his "due process right to a fair trial." (*Id.* at pp. 172, 176.)

As to the state appellate court's holding that "it would have been permissible to defer [the hearing] until the trial had been completed" and "immediately thereafter" before judgment was imposed, the high court observed that "such a procedure *may* have advantages, *at least where the defendant is present at the trial and the appropriate inquiry is implemented with dispatch*." (*Drope*, *supra*, 420 U.S. at p. 182, italics added.)[18]

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[18] In observing the potential adequacy of such a procedure, the Court cited decisions addressing *pre*judgment competency proceedings. (*Drope*, *supra*, 520 U.S. at p. 182, citing *Hansford v. United States* (C.A.D.C. 1966) 384 F.2d 311 (*per curiam* order denying rehearing en banc denied) (statement of Leventhal, J.) ["I offer for consideration the possibility that

(continued...)

In that case, however, the defendant was absent during a critical stage of trial during which the trial judge – the would-be trier of fact on the issue of competency – was unable to observe him. (*Drope, supra,* at pp. 181-182.)[19] In other words, as in *Pate*, the trier of fact "would not be able to observe the subject of [its] inquiry" at critical times that his competency was in question. (*Pate*, *supra*, 383 U.S. at p. 387.) Furthermore, the "appropriate inquiry" was never made at all, much less "implemented with dispatch," "immediately" after "the trial had been completed" and prior to judgment. (*Drope*, *supra*, at pp. 181-183.)

Certainly a *post*judgment retrospective competency hearing, held years *after* the defendant was tried, convicted, and judgment imposed, would not be the "appropriate inquiry implemented with dispatch" due process demands. (*Drope*, *supra*, 420 U.S. at p. 183.) To the contrary, and particularly given the "inherent difficulties of . . . a *nunc pro tunc* determination [of competency] under the most favorable circumstance," the Court again rejected the possibility that a postjudgment retrospective competency hearing could satisfy a defendant's due process right to

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[18] (...continued)
the trial judge could proceed with the trial, particularly if the end is nigh, but schedule a psychiatric examination and hearing on competency immediately thereafter, perhaps even while the jury is deliberating"] and *Jackson v. Indiana* (1972) 406 U.S. 715, 740-741 [in declaring unconstitutional indefinite pretrial commitment of incompetent person not adjudged to be guilty, Court suggested in dicta possibility of procedure whereby incompetent defendant would be permitted, on motion by his counsel, to have issue of guilt/innocence tried without permitting conviction so as to eliminate need for detention where defendant is acquitted].)

[19] Under the Missouri statute at the time of the *Drope* decision, the trial judge was the sole trier of fact on the issue of competency. (See, e.g., *State v. Clark* (Mo. App. Ct. 1976) 546 S.W.2d 455, 468.)

"procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial" or otherwise remedy a fair trial violation resulting from the failure to observe such procedures. (*Id. at pp.* 172, 183.)

Thus, *Drope* affirmed and followed *Pate*'s dictates that the procedure demanded by due process must: (1) be held prior to judgment; (2) allow the trier of fact to observe the defendant during trial, when his competency is in question; and (3) be implemented with the dispatch necessary for a concurrent determination of competency. (*Drope*, *supra*, 420 U.S. at pp. 181-183; *Pate*, *supra*, 383 U.S. at pp. 378, 385-387.) The failure to provide this procedure violates the qualifying defendant's "due process right to a fair trial" even absent a showing that he was, in fact, tried while incompetent. Because a postjudgment hearing and retrospective determination of competency cannot, by definition, satisfy the basic requirements for a constitutionally "adequate" procedure, it cannot satisfy due process or remedy its violation "nunc pro tunc." Thus, the only constitutionally adequate remedy for the fair trial violation is reversal per se and a new, fair trial.

b. This Court's Interpretation of High Court Precedent and Its Application Under California's Statutory Scheme

This Court has recognized that *Pate* dictates a prejudgment, concurrent hearing and determination of competency whenever substantial evidence of incompetency arises and that the failure to hold one "deprives the defendant of his due process right to a fair trial." (*People v. Hale, supra,* 44 Cal.3d at pp. 539-540; accord, e.g., *Pennington*, *supra*, 66 Cal.2d at pp. 518-521; *People v. Marks*, *supra*, 45 Cal.3d at p. 1342.) The Court has further recognized that "in such cases the error is per se prejudicial" and

not susceptible of harmless error analysis. (*Pennington*, at p. 521; accord, *Stankewitz*, *supra*, 32 Cal.3d at p. 94.) "*Nor*, as the United States Supreme Court specifically held in *Pate*, *supra* 383 U.S. 375, 397, may the error be cured by a retrospective competency determination of defendant's competency during trial." (*Pennington*, *supra*, at 521, italics added; accord, *Stankewitz*, *supra*, at p. 94.) As *Pennington*'s use of the disjunctive "nor" demonstrates, a *Pate* violation not only requires reversal per se but also precludes qualified reversal for postjudgment retrospective competency hearings as a method of "curing" the violation. (Accord, *Stankewitz*, *supra*, 32 Cal.3d at p. 94; compare *Lightsey*, *supra*, 54 Cal.4th at pp. 699-703 [fact that an error requires reversal per se does not necessarily mean that reversal cannot be qualified with remand for postjudgment remedial hearing].)

Indeed, three features of California law underscore the reasons for which the high court has rejected postjudgment hearing and retrospective competency determinations as constitutionally adequate procedures equivalent to prejudgment *Pate* hearings or remedies for *Pate* violations. First, like the "practically identical" (*Pennington*, *supra*, 66 Cal.2d at p. 521, fn. 8) Illinois statutory scheme at issue in *Pate*, California is one of a handful of jurisdictions in which defendants are entitled to a jury trial on the issue of competency. (Pen. Code, § 1369; *Pate*, *supra*, 383 U.S. at p. 385.) A jury convened after the judgment to determine the issue of the defendant's retrospective trial competency is obviously deprived of its own observations of the defendant's demeanor at the time his competency is in issue. As previously discussed, the loss or destruction of this evidence due to a *Pate* violation was a critical consideration underlying *Pate* and *Drope*'s rejection of postjudgment retrospective competency hearings as constitutionally adequate substitutes for *Pate* hearings. (*Pate*, *supra*, 383

U.S. at pp. 385, 387; *Drope*, *supra*, 420 U.S. at pp. 182-183; *Maxwell v. Roe*, *supra*, 606 F.3d 561, 576-577, and authorities cited therein; *Lightsey*, *supra*, 54 Cal.4th at pp. 707-708; Fns. 18 & 21, *ante*.)[20]

Second, California defendants are presumed to be competent and bear the burden of proving their incompetency by a preponderance of the evidence. (Pen. Code, § 1369, subd. (f).) As previously discussed, this Court has held that the same presumption and burden apply at a postjudgment retrospective competency hearing (assuming such a hearing were constitutionally permissible). (*Ary*, *supra*, 51 Cal.4th at pp. 520-521.) But as *Pate* and *Drope* make clear and *Lightsey* implicitly recognizes, it would not be the same burden at all: a *Pate* violation necessarily results in the loss or erosion of evidence that would make the defendant's evidentiary burden more difficult to satisfy at a retrospective hearing. Thus, a

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[20] Some courts have distinguished *Pate* where the issue of competency is tried and heard by the trial judge, who was able to observe the defendant's demeanor during trial and can rely on his or her memories thereof at a retrospective hearing. (See, e.g., *Walker v. Att'y Gen.* (10th Cir. 1999) 167 F.3d 1339, 1347 & fn. 4 [distinguishing *Pate* where, inter alia, trial judge who had opportunity to observe defendant's demeanor at trial sat as trier of fact at retrospective competency hearing]; compare *People v. Harris* (Ill. App. 1983) 447 N.E.2d 941, 944 [meaningful retrospective incompetency hearing impossible because trial judge who observed defendant throughout the trial was deceased].) Appellant submits that even those decisions are inconsistent with *Pate* and *Drope* for the reasons discussed in the above text. In any event, even if retrospective hearings were constitutionally permissible under such circumstances, they only highlight why they are not in California.

It is no answer to say that a California defendant can waive his right to a jury in order to allow the state to attempt to remedy its violation of his constitutional rights. A "remedy" that requires a defendant to forfeit a right that he would have enjoyed absent the violation is not a constitutionally adequate "remedy" at all.

postjudgment retrospective hearing cannot "restore[] [the defendant] to the position he would have occupied had due process of law been accorded to him in the first place." (*Armstrong*, 380 U.S. at p. 552; accord *Milliken v. Bradley, supra,* 418 U.S. at p. 746.) A *Pate* violation leaves a California defendant at a much greater disadvantage than he would have faced in its absence, effectively punishes the defendant for the state's dereliction of its constitutional duties, and increases the risk of an erroneous competency finding to an intolerable degree. (See *Drope, supra*, 420 U.S. at pp. 183-183; *Pate, supra*, 383 U.S. at pp. 386-387; *Dusky v. United States*, *supra*, 362 U.S. at p. 403; *People v. Lightsey*, *supra*, 54 Cal.4th at pp. 707-708; see also *Cooper v. Oklahoma*, *supra*, 517 U.S. at pp. 354, 362-367 [imposition of burden of proving incompetency that is greater than proof by preponderance of concurrent incompetency – there by clear and convincing evidence – increases risk of erroneous competency determination and hence violates due process guarantee to adequate procedure].)

For all of these reasons, and particularly in California, a postjudgment hearing and retrospective determination of competency simply cannot act as a constitutionally adequate substitute for the prejudgment hearing and concurrent determination of competency to which a qualifying defendant is entitled under the federal Constitution and California's comprehensive statutory scheme. The only way to remedy the constitutional injury suffered by a violation of *Pate* (and Penal Code section 1368, subdivisions (a) and (c) and "wipe the slate clean" is to reverse the judgment in its entirety and without qualification. (*Armstrong v. Manzo*, *supra*, 380 U.S. at p. 552; accord, *Pate*, *supra*, 383 U.S. at pp. 386-387; *Drope*, *supra*, 420 U.S. at pp. 182-183.)

c. Opinions that Have Approved of the Postjudgment Retrospective Competency Procedure as a Constitutionally Adequate Substitute for a Prejudgment *Pate* Hearing or Remedy for a *Pate* Violation are Contrary to *Pate* and *Drope*

Of course, as this Court has recognized, many other courts have come to a contrary conclusion by "pars[ing] the language of *Pate* and subsequent high court decisions addressing the constitutional violation (like *Drope, supra*, 420 U.S. 162, 95 S.Ct. 896) and discern[ing] that the problem of remanding for the limited remedy of conducting solely what has been termed a 'retrospective competency hearing as a remedy for *Pate* error was *not the nature of the constitutional injury* itself but was instead the *inherent difficulty* of making a nunc pro tunc determination of the defendant's mental state." (*Lightsey*, *supra*, 54 Cal.4th at p. 705, original italics; accord, *Ary*, *supra*, 51 Cal.4th at 520 & fn. 3, maj. opn.; *id.*, at pp. 521-523 & fn. 4, conc. opn, of Werdegar, J.)[21]

The first appellate court decision in California to adopt this view and order remand for a hearing was *Ary I*, *supra*, 118 Cal.App.4th at p. 1030. That decision is illustrative of the flawed reasoning underlying the view that a postjudgment retrospective competency hearing can be a constitutionally adequate remedy for a *Pate* violation under the high court's precedents.

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[21] The *Lightsey* and *Ary* decisions cited the following cases in support of this view: *Ary I*, *supra*, 118 Cal.App.4th at pp. 1030, *People v. Kaplan*, *supra*, 149 Cal.App.4th at pp. 388-389, *People v. Robinson* (2007) 151 Cal.App.4th 606, 617-618, *Moran v. Godinez*, *supra*, 57 F.3d at 696-698, *Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1089, *Tate v. Oklahoma* (Okla.Crim.App.1995) 896 p. 2d 1182, 1188 and *Com. v. Santiago* (2004) 579 Pa. 46, 855 A.2d 682, 693. (*Lightsey*, *supra*, 54 Cal.4th at p. 707; *Ary*, *supra*, 51 Cal.4th at p. 520 & fn. 3, maj. opn.; *id.*, at pp. 521-523 & fn. 4, conc. opn. of Werdegar, J.)

In that case, the appellate court followed the reasoning of other cases to conclude that the procedure is merely a disfavored remedy in most circumstances but not a categorically prohibited one in all. (*Ary I*, *supra*, 118 Cal.App.4th at pp. 1027-1030.) In reaching this conclusion, the appellate court held that neither *Pate* nor *Pennington* "settles th[e] question" of whether the remedy is categorically inadequate. Instead, *Pate* simply:

> speaks in terms of the "difficulty" of curing this error retrospectively because of practical evidentiary problems that might occur due to the lapse of time, a discussion suggesting that, in some circumstances, such a hearing might be appropriate. Nor does *Pennington* rule this possibility out. Rather, the *Pennington* court did nothing more than repeat the *Pate* court's conclusion – that a retrospective determination of competency would not, *in that particular case*, cure the due process error.

(*Ary I*, *supra*, 118 Cal.App.4th at pp. 1026-1027, italics original.)

In the *Ary I* court's view, although *Pennington* held that the remedy was prohibited based on the facts of that case, it did not foreclose the possibility that it could be an adequate remedy in cases where the record evidence is highly developed on the issue of competency. (*Ary I*, *supra*, 118 Cal.App.4th at pp. 1026-1027.) Specifically, according to *Ary I*, it did not speak to or prohibit the remedy on a record like *Ary I's* in which two pretrial proceedings were held four and five years earlier on defendant's competence to waive *Miranda* rights in which three experts testified that the defendant was mentally retarded, others testified to his competency to waive his *Miranda* rights and his seeming understanding of the proceedings but offered no opinion about his competency to stand trial, the defendant testified at the hearing, and defense counsel represented that the defendant

seemed unable to recall important evidence. (*Ary I*, *supra*, 118 Cal.App.4th at pp. 1021-1027.)

The first problem with *Ary I*'s interpretation of *Pennington* is the broad language of the latter decision. As discussed in Part b, *ante*, the *Pennington* Court held that the failure to hold a competency hearing in violation of California's competency statutory scheme, which is "practically identical" to the Illinois scheme in *Pate*, violates *Pate*. (*Pennington*, *supra*, 66 Cal.2d at pp. 520-521 & fn. 8.) In "*such cases*" – not merely in "this case" – this Court held, the error is reversible per se and may not "be cured by a retrospective competency determination of defendant's competency during trial." (*Pennington*, *supra*, 66 Cal.2d at 521; accord, *Stankewitz*, *supra*, 32 Cal.3d at p. 94.) The Court applied that prohibition without further discussion of the record in that case. (*Pennington*, *supra*, at p. 521; accord, *Stankewitz*, *supra*, at p. 94.) This leads to the second problem with the *Ary I* court's interpretation of *Pennington*.

In *Pennington*, the record was only two years old and contained extraordinarily well developed evidence on the specific question of the defendant's trial competency. That evidence included the trial court's request for and receipt of seven expert opinions specifically addressing that question, prior medical records, numerous representations by defense counsel throughout the trial that, inter alia, the defendant was irrational and hallucinating, and extensive other record evidence describing the defendant's conduct both inside and outside of the courtroom, such as "fits of psychotic furor observed by the witnesses in the courthouse and during trial." (*Pennington*, *supra,* 66 Cal.2d at pp. 511-515, 518-520.) As the actual record in *Pennington* demonstrates, the limitation the *Ary I* court read into it is illusory; if reversal was required despite such the extensive record

in *Pennington*, it does not leave open the possibility that any record (and certainly not the less developed record in *Ary II*) permits a *Pate* violation to be remedied on remand. (*Ary I*, *supra*, 118 Cal.App.4th at pp. 1026-1027.) Given the broad language and holding of *Pennington* on its actual facts, the only reasonable reading thereof is that it recognized a categorical prohibition against postjudgment retrospective competency hearings as a method to "cure" *Pate* violations in this state.

More importantly, the *Ary I* court held that regardless of how *Pennington* interpreted *Pate*, the high court's subsequent decision in *Drope* definitively resolved the matter. (*Ary I*, *supra*, 118 Cal.App.4th at p. 1027.) *Drope*, according to *Ary I*, "made quite clear that [a postjudgment retrospective competency] procedure is permissible although 'inherently difficult.'" (*Id.* at p. 1027.) In support of this interpretation of *Drope*, the appellate court cited decisions of the Ninth Circuit Court of Appeals as well as this Court's observation in dicta that *Drope* suggested "the possibility of a constitutionally adequate posttrial or *even postappeal* evaluation of the defendant's pretrial competence." (*Marks*, *supra*, 1 Cal.4th at p. 67, italics added; *Ary I*, *supra*, 118 Cal.App.4th at pp. 1027-1028, and authorities cited therein; accord *People v. Kaplan*, *supra*, 149 Cal.App.4th at pp. 386-387.) While the former observation is true, the latter is not and the distinction is critical.

As discussed in detail in Part 2-a, *ante*, the *Drope* Court observed that a deferred, post-verdict but *prejudgment* (or pre-conviction) hearing might satisfy due process under *Pate*. In so doing, *Drope* echoed *Pate*'s essential holding that the procedure demanded by due process must: (1) be held prior to judgment; (2) allow the trier of fact to observe the defendant during trial, when his competency is in question; and (3) be "implemented

with [the] dispatch" necessary for a concurrent determination of competency. (*Drope*, *supra*, 420 U.S. at pp. 180-183, and authorities cited therein; *Pate*, *supra*, 383 U.S. at pp. 385-387; fn. 20, *ante*.) If these essential requirements can be satisfied, a deferred *prejudgment* hearing may be permissible. (*Drope*, *supra*, 420 U.S. at p. 182.) If, as in *Drope*, however, those requirements are not satisfied, the defendant is deprived of his "due process right to a fair trial." (*Id.* at pp. 172, 176, 181-183.)

By definition, those requirements cannot be satisfied *post*judgment; hence, consistent with *Pate* and this Court's interpretation thereof in *Pennington*, the *Drope* Court explicitly held that a postjudgment retrospective hearing *cannot* satisfy due process or "cure" its violation. (*Drope*, *supra*, 420 U.S. at pp. 182-183; accord, *Pate*, *supra*, 383 U.S. at pp. 385-387.) In short, contrary to the reasoning of *Ary I* and other courts, *Drope* did not "ma[k]e quite clear that [a postjudgment retrospective competency] procedure is permissible although 'inherently difficult.'" (*Ary I*, *supra*, at p. 1027.) To the contrary, like *Pate*, the *Drope* court held just the opposite.

Thus, as illustrated by the reasoning of *Ary I*, cases that read *Pate* and *Drope* to permit the possibility of a meaningful, constitutionally adequate postjudgment retrospective competency hearing are flawed.

Indeed, neither *Ary I* nor any of the cases cited by this Court as approving that procedure make any mention at all of *Pate's* emphasis on the "need for *concurrent* determination" of competency or its conclusion that "this need for concurrent determination" of competency distinguishes *Pate* violations from *other* procedural due process violations that are capable of remedy with postjudgment hearings. (*Pate*, *supra*, 383 U.S. at p. 387; see *Lightsey*, *supra*, 54 Cal.4th at p. 707; *Ary*, *supra*, 51 Cal.4th at 520 & fn. 3,

maj. opn.; *id.*, at pp. 521-523 & fn. 4, conc. opn, of Werdegar, J.) Instead, like *Ary I*, they focus on *Pate* and *Drope*'s references to the "difficulties inherent" in postjudgment retrospective competency hearings and view them as invitations to remedy *Pate* violations when those "difficulties" might be mitigated. (See, e.g., *Moran v. Godinez*, *supra*, 57 F.3d at pp. 696-698.) For instance, these courts dismiss the fact that postjudgment hearing precludes the factfinder's ability to rely on its first-hand observations of the defendant at the time his competency is in question as a mere "difficulty" that can be surmounted if there is third-hand evidence available from other sources, including the trial judge, the prosecutor, and defense counsel. (*de Kaplanay v. Enomoto* (9th Cir. 1976) 540 F.2d 975, 986, fn. 11; *Pate v. Smith* (6th Cir. 1981) 637 F.2d 1068, 1072.) In their view, those "difficulties" are not obstacles but hurdles that if surmounted make a "meaningful" postjudgment retrospective competency hearing and determination "feasible," which is enough to qualify as a "procedure[] adequate to protect a defendant's right not to be tried and convicted while incompetent to stand trial" demanded by due process (*Drope*, *supra*, 420 U.S. at p. 172). (See, e.g., *Moran v. Godinez*, *supra*, 57 F.3d at pp. 696-698.)

But these decisions ignore *Pate* and *Drope*'s essential holdings that the *only* "meaningful" time and "meaningful" manner by which to provide a procedure adequate to *prevent* the trial and conviction of an incompetent person is *prior* to conviction or judgment, in a hearing when all, and the most reliable, evidence is available to the defendant and the trier of fact and a "concurrent determination" of competency can be made. *Pate* did not merely hold that a "concurrent determination" is best or preferable; it unequivocally held that it is *necessary* to an "adequate" procedure. For the

same reasons, neither *Pate* nor *Drope* suggested that the trier of fact's concurrent observations of the defendant are preferable but might be substituted with other evidence; to the contrary, in each case, the fact that the would-be trier of fact on the issue of competency would have been deprived of its own concurrent observations of the defendant at the time his competency was in question was essential to the Court's rejection of a postjudgment hearing as an adequate procedure. (*Pate*, *supra*, 383 U.S. at pp. 385, 387; *Drope*, *supra*, 420 U.S. at pp. 182-183; fns. 18 & 21, *ante*.) In other words, it is one of the reasons *why* a "concurrent determination" is *necessary* and why a retrospective one is inadequate.

Perhaps more fundamentally, cases approving the procedure are inconsistent with *Pate* and *Drope*'s basic holdings that the failure to hold a prejudgment hearing and make a concurrent determination of competency *itself* violates the defendant's "due process right to a fair trial" *even without a showing that the defendant was in fact tried while incompetent.* (*Drope*, *supra*, 420 U.S. at pp. 172, 176; *Pate*, *supra*, 383 U.S. at pp. 385-387.) This is so because when there is reason to doubt the defendant's trial competence but an adequate procedure is not held to determine that question, the Court cannot be confident that the defendant was tried while competent, which is an essential requirement to a fair trial. (Cf. *Kyles v. Whitely* (1995) 514 U.S. 419, 434 ["fair trial" is "a trial resulting in a verdict worthy of confidence"]; *Strickland v. Washington* (1984) 466 U.S. 668, 687-689 [fair trial is one whose "result is reliable"].) *Pate* and *Drope's* conclusions that a postjudgment retrospective competency hearing cannot remedy that fair trial violation is consistent with the fundamental principle that fair trial violations can be remedied with no less than a new, fair trial. At bottom, the nature of the constitutional injury suffered is not

that a *Pate* violation simply creates potentially surmountable "difficulties" in making a retrospective competency determination. The injury suffered is the deprivation of a defendant's "due process right to a fair trial," which results from the failure to afford a hearing that can only serve its purpose prior to judgment and is incapable of duplication – or restoring the defendant to his original position – thereafter.

This Court has already recognized that *Pate* categorically prohibits postjudgment retrospective competency hearings to "cure" *Pate* violations in this state. (See, e.g., *Pennington*, *supra*, 66 Cal.2d at p. 521; accord, *Stankewitz*, *supra*, 32 Cal.3d at p. 94.) The high court's subsequent opinion in *Drope* only reinforces those decisions. There is no reason to depart from them now: the erroneous failure to afford a qualifying defendant a prejudgment hearing and concurrent determination of competency deprives him of his due process right to a fair trial which may not "be cured by a retrospective competency determination of defendant's competency during trial." (*Pennington*, 66 Cal.2d at p. 521; accord, *Stankewitz*, *supra*, 32 Cal.3d at p. 94.)

3. Assuming Arguendo that Postjudgment Retrospective Competency Hearings Can Theoretically Remedy *Pate* Violations, the State Must Bear the Burden of Proving the Defendant's Retrospective Competence Beyond a Reasonable Doubt, a Burden It Cannot Satisfy in this Case

Should this Court determine that a *Pate* violation is theoretically capable of remedy with a postjudgment retrospective competency determination despite the impossibility of restoring the defendant to the position he would have enjoyed absent the violation, then it must reconsider its view of the remedial nature of retrospective competency hearings and

which party bears the burden of proof. As discussed in Part 1, *ante*, this Court's holding in *Ary* that a defendant would bear the same burden of proving incompetence by a preponderance at a postjudgment hearing that he would have born absent the *Pate* violation at a prejudgment hearing was premised on the condition that the two hearings could be the equivalent, the former operating as a substitute for the latter. (*Ary*, *supra*, 51 Cal.4th at pp. 519-521.) But as demonstrated above, the high court has made quite clear that this condition can never be met.

Assuming arguendo that a due process/fair trial violation under *Pate* can nevertheless be remedied with a postjudgment hearing, then the only way this can be achieved is if the postjudgment hearing operates as a limited harmless error hearing, as discussed in the opening brief and Part 1, *ante*. As such, the state must bear the burden of proving the constitutional violation harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The state can only carry that burden by proving the defendant's retrospective competency – i.e., that he was not tried and convicted while incompetent – beyond a reasonable doubt. (AOB 76, 80-82 & Part 1, *ante*.) For all of the reasons discussed in the opening brief and further in Part 4, *post*, respondent cannot satisfy that burden in this case. Hence, the judgment must be reversed.

4. Assuming Arguendo that Some *Pate* Violations Can be Remedied with Meaningful Postjudgment Hearings In Which the Burden of Proving Retrospective Incompetence is Born by the Defendant, the *Pate* Violation Cannot be Remedied In this Case

Finally, even if postjudgment hearings in which the defendants bear the burden of proving retrospective incompetence could theoretically remedy *Pate* violations in some cases, the *Pate* violation cannot be so remedied in this case for all of the reasons discussed in the opening brief. (AOB 72-82.) Respondent disagrees. (RB 118-121.)

Respondent relies on *Ary I*, *supra*, 118 Cal.App.4th 1016 – the first California decision to approve the possibility of remedying *Pate* violations – as reflecting the legal principles governing the question of remedy in this case. (RB 118-120.)[22] Without analyzing that decision, respondent rather summarily contends that it compels the conclusion that a postjudgment, retrospective developmental disability competency hearing would be a constitutionally adequate remedy for the *Pate* violation in this case. (RB 118-121.)

As shown below, actual analysis of the *Ary I* decision reveals that respondent's arguments are inconsistent with it, as well as the precedents of the high court and this Court. Even accepting the propriety of the remedy approved in *Ary I*, the *Pate* violation in this case cannot be so remedied but

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[22] Respondent inaccurately refers to this decision as "*Ary II.*" (RB 118, 120.) In fact, it was the first of the *Ary* decisions and hence its appropriate abbreviation is "*Ary I.*" (*Ary*, *supra*, 51 Cal.4th at 513-515.)

However, respondent correctly notes that this Court disapproved a narrow part of that decision to the extent that it remanded without first reversing the conviction. (*Ary*, *supra*, 51 Cal.4th at 515, fn. 1; RB 118-119.)

rather demands unqualified reversal.

a. The remand procedure approved in *Ary I*

As discussed in Part G-2-c, *ante*, the *Ary I* court reasoned that neither the high court's decisions in *Pate*, *Drope*, and *Dusky*, nor this Court's decisions in cases like *Pennington* categorically prohibited postjudgment retrospective competency hearings as a remedy for all *Pate* violations. (*Ary I*, *supra*, 118 Cal.App.4th at pp. 1026-1029.) Instead, according to *Ary I*, those decisions stand for a general rule that the procedure is a "disfavored" one that is usually inadequate to remedy most *Pate* violations as a matter of law. They simply and correctly applied that general rule by holding that the procedure would be inadequate as a matter of law based on the facts of those cases. (*Ibid.*)

However, the *Ary I* court held, the procedure is not necessarily prohibited as a remedy in dissimilar, "rare" and "highly unusual" cases in which there exists a highly developed record containing extensive evidence on the specific, critical issue of trial competency. (*Ary I*, *supra*, 118 Cal.App.4th at pp. 1026-1030.) Such "rare" and "highly unusual" records are sufficient to make a preliminary showing that a constitutionally adequate retrospective competency hearing *might* be possible (*Ary I*, *supra*, 118 Cal.App.4th at pp. 1028-1030, and authorities cited therein) or "feasible" (*Lightsey*, *supra*, 54 Cal.4th at pp. 707-711). (AOB 72-82.) "'[F]easibility in this context means [both] the availability of sufficient evidence to reliably determine the defendant's mental competence when tried earlier [and] . . . "the defendant will be placed in a position comparable to the one he would have been placed in prior to the original trial.'" [Citations.]" (*Lightsey*, *supra*, at p. 710.)

In those "rare" and "highly unusual" cases suggesting that a

meaningful hearing might be feasible, the appropriate procedure is for the reviewing court to remand to the trial court with directions to first conduct a hearing to determine whether a meaningful retrospective hearing would *actually* be feasible – an issue on which the state would bear the burden of proof. (*Ary I, supra*, 118 Cal.App.4th at pp. 1028-1029, and authorities cited therein; see also *Lightsey, supra*, 54 Cal.4th at pp. 706-711 [as remedy for state law violation, state bears burden on remand of proving "feasibility" by a preponderance of the evidence].) If the prosecution satisfies its burden, only then can the trial court remedy the *Pate* violation with a retrospective competency hearing. (*Ary I, supra*, 118 Cal.App.4th at pp. 1028-1029; see also *Lightsey, supra*, 54 Cal.4th at pp. 706-711.) As discussed above, this Court subsequently held that the defendant would bear the burden of proving his retrospective incompetency by a preponderance of the evidence at such a hearing. (*Ary, supra*, 54 Cal.4th at pp. 520-521.) (Hereafter "*Ary* remand procedure")

In reaching this holding, the *Ary I* court acknowledged that it was bound by this Court's decision in *Pennington, supra*, to the extent that it held the remedy inappropriate as a matter of law for the *Pate* violation there based on its particular facts. (*Ary I, supra,* 118 Cal.App.4th at pp. 1026-1027; *Pennington, supra*, 66 Cal.2d at pp. 518-521.) As discussed in Parts a and G-2-c, *ante*, the record in *Pennington* was only two years old and contained extensive evidence including the trial court's receipt of seven expert opinions specifically addressing the defendant's trial competency, prior medical records, defense counsel's repeated representations that the defendant was delusional and irrational, and substantial other record evidence describing the defendant's conduct both inside and outside of the courtroom. (*Pennington, supra,* 66 Cal.2d at pp. 511-515, 518-520.) Thus,

the *Ary I* decision implicitly recognized that the remand procedure is inappropriate as a matter of law based on similar or less developed records.

Similarly, the *Ary I* court cited the *Castro* court's decision on the question of remedy with approval. (*Ary I*, *supra*, 118 Cal.App.4th at pp. 1027-1028.)[23] As discussed above and in the opening brief, the *Castro* court held that the trial court's mental disorder competency proceedings in that case did not satisfy the defendant's due process and statutory rights to developmental disability competency proceedings. (*Castro*, *supra*, 78 Cal.App.4th 1417-1420; accord, *Leonard*, *supra*, 40 Cal.4th at pp. 1389-1391.) As to the question of remedy, the *Castro* court accepted the possibility of an adequate remedial, "postappeal" retrospective competency hearing in some cases. (*Castro*, *supra*, at p. 1419, citing *People v. Marks, supra,* 1 Cal.4th at p. 67.) As to that case, the record contained legally irrelevant mental disorder competency evaluations and proceedings, evidence that the defendant was mentally retarded, and one psychologist's opinion that the defendant was incompetent as a result of her intellectual deficits. (*Castro*, *supra*, at pp. 1410-1412.) In the face of this record, the *Castro* court held as a matter of law that the due process violation could not be remedied under *Pate, Drope,* and *Dusky* and reversed without qualification. (*Id.* at pp. 1419-1420.)

Ary I cited *Castro* as illustrative of the typical case in which a *Pate* violation results in a record that does not contain sufficient "useful contemporaneous information regarding a defendant's mental state at the time of trial and his ability, at that time, to understand the nature of the

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[23] Respondent also cites the *Castro* decision as reflecting the law governing remedy in this case. (RB 120, fn. 73.)

proceedings and assist in his defense" to permit a remedial, constitutionally adequate postjudgment retrospective competency procedure as a matter of law. (*Ary I*, *supra*, 118 Cal.App.4th at p. 1028, citing *Castro*, *supra*, 78 Cal.App.4th at pp. 1419-1420.) Although the *Castro* court correctly "acknowledged that, under other circumstances, a retrospective competency determination may be ordered," the *Ary I* court observed, it properly concluded "that such a procedure would not suffice *in the circumstances before it* . . . ." (*Ary I*, *supra*, 118 Cal.App.4th at pp. 1027-1028, italics added.)

In sum, the governing legal principles as reflected in *Ary I* are as follows: (1) a postjudgment retrospective competency proceeding is "disfavored" and generally inadequate as a matter of law to remedy most *Pate* violations; (2) *Pate* violations on records similar to or less developed than those in *Pennington* and *Castro* cannot be remedied with that procedure as a matter of law and hence demand unqualified reversal; and (3) other "rare" and "highly unusual" records containing more extensive evidence on the relevant issues of competency *may* be susceptible of remedy, but only if the state – on remand in an adversarial hearing – can first persuade the trial court that a meaningful retrospective competency hearing would be "feasible" – i.e., that there is "sufficient evidence to reliably determine the defendant's mental competence when tried earlier [and] . . . 'the defendant will be placed in a position comparable to the one he would have been placed in prior to the original trial.'" [Citations.]" (*Lightsey*, *supra*, 54 Cal.4th at pp. 706-711.)

Against these principles, respondent's arguments immediately begin to unravel.

b. Respondent's Arguments in Favor of Remand Are Inconsistent with *Ary I* and the Precedents of this Court and the United States Supreme Court

In the opening brief, appellant argued that a meaningful retrospective developmental disability competency hearing would be impossible in this case for several reasons. (AOB 75-79.) Rather than address those reasons in any meaningful way, respondent dismisses them in a footnote on two bases. (RB 120, fn. 73.)

First, respondent contends that this Court should *automatically* order the *Ary* remand procedure without considering whether or not a meaningful postjudgment retrospective competency hearing might be possible or "feasible." (RB 119-121, fn. 73.) Automatic remand is appropriate, according to respondent, because all questions relating to "feasibility" should be resolved solely by the trial court, not by this Court. (RB 120, fn. 73.) Of course, respondent's argument is contrary to *Ary I* and well established United States Supreme Court precedent.

A reviewing court can decide as a matter of law that a meaningful retrospective competency hearing would be impossible and reverse without qualification. (*Drope*, *supra*, 420 U.S. at p. 183; *Pate*, *supra*, 383 U.S. at p. 387; *Dusky v. United States*, *supra*, 362 U.S. at p. 403; AOB 72-76.) In most cases, a reviewing court *should* make that determination and reject the "disfavored" remand procedure as a matter of law under *Pate*, *Drope*, and *Dusky*. (See, e.g., *Ary I*, *supra*, 118 Cal.App.4th at p. 1028; *Castro*, *supra*, 78 Cal.App.4th at pp. 1419-1420; *Maxwell v. Roe*, *supra*, 606 F.3d at p. 576, and authorities cited therein; AOB 72-76.)

Alternatively, respondent contends, given "the substantial amount of [record] evidence regarding appellant's mental state" (RB 119), this Court

should determine as a matter of law that a meaningful retrospective competency hearing and determination would be "feasible" (RB 120, fn. 73). Therefore, the court should remand with directions to the trial court to bypass the preliminary "feasibility" hearing and proceed immediately with a retrospective developmental disability competency hearing at which appellant shall bear the burden of proving that he was incompetent to stand trial 22 years ago. (RB 120 & fn. 73.) This argument, too, is inconsistent with the *Ary* remand procedure itself – the only procedure that has been approved and applied in California – under which a feasibility determination can only be made by the trial court following an adversarial proceeding in which the state bears the burden of proof. (*Ary I*, *supra*, 118 Cal.App.4th at p. 1029; accord, *People v. Kaplan*, *supra*, 149 Cal.App.4th at p. 390; see also *Lightsey*, *supra*, 54 Cal.4th at pp. 706-711.)

In any event, respondent contends, the *Ary* remand procedure is appropriate here for the same reason: "as shown above, the substantial amount of evidence regarding appellant's mental state makes this case a primary candidate for remand, despite the passage of time." (RB 119.) Respondent makes this assertion without citation to the record or discussion of the evidence. Thus, appellant is left to assume that respondent must be referring to the decades-old opinions of Doctors Christensen, Powell and Schuyler, Davis and Terrell. But as discussed in the opening brief and ignored by respondent: (1) although Doctors Powell and Schuyler diagnosed appellant as mentally retarded, they were not asked their opinions as to whether he was incompetent as a result of his developmental disability; (2) Doctors Davis and Terrell were psychiatrists who only concluded that they could not determine whether appellant suffered from a *mental disorder* that rendered him incompetent to stand trial during their

very brief meetings with him over 24 years ago in which they did not consider or assess the question of mental retardation; as such, their opinions are irrelevant to the question of appellant's competency as a result of the developmental disability of mental retardation; and (3) the remaining uncontradicted opinion of Dr. Christensen that appellant was incompetent as a result of his developmental disability might support a finding that appellant was *in*competent to stand trial but would not support a *meaningful, highly reliable* determination that he was not. (AOB 76-79; *Ford v. Wainwright* (1986) 477 U.S. 399, 411 [constitution demands heightened reliability in determination of competency to be executed]; *Cooper v. Oklahoma*, *supra*, 517 U.S. at pp. 362-367 [*Pate* hearing must be adequate to support a reliable determination of trial competency].)

Indeed, as discussed in Parts a and F-2, *ante*, the record in this case is analytically indistinguishable from that in *Castro*. Just as in *Castro*, the record here contains legally irrelevant mental disorder competency evaluations and proceedings, evidence that appellant is mentally retarded, and one psychologist's opinion that he was incompetent as a result of that developmental disability. (*Castro*, *supra*, 78 Cal.App.4th at pp. 1410-1412.) As the *Castro* court held and the *Ary I* court acknowledged, a meaningful retrospective developmental disability competency proceeding would be impossible as a matter of law on this record. (*Castro*, *supra*, at pp. 1419-1420; *Ary I*, *supra*, 118 Cal.App.4th at pp. 1027-1028; AOB 60-72, 75-80.) Significantly, although respondent cites both *Castro* and *Ary I* as reflecting the law governing the remedy here, respondent makes no attempt to distinguish this case from *Castro*. (See RB 118-121 & fn. 73.) Respondent's silence speaks volumes.

Certainly, the record here is far less developed than in *Pennington*,

described in Parts a and G-2-c, *ante*. (*Pennington*, *supra,* 66 Cal.2d at pp. 511-515, 518-520.) If the *Ary I* court was correct that *Pennington* left open the possibility of remedying *Pate* violations in some cases but rather simply held that the violation could not be remedied as a matter of law based on the record in that case, then *Ary I* and *Pennington* compel the same conclusion based on the much older and comparatively skeletal record in this case. (*Ary I*, *supra*, 118 Cal.App.4th at p. 1026.) Of course, if *Ary I*'s interpretation of *Pennington* was incorrect and this Court *did* declare a categorical prohibition against "curing" *Pate* violations that arise from the failure to hold the competency hearing required by our statutes, then *Ary I*'s fundamental holding that *Pate* violations can be remedied was contrary to this Court's binding precedent, violated the doctrine of stare decisis, and should be disapproved. (See, e.g., *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see Part G-2-c, *ante*.) Either way, this Court's decision in *Pennington* demands unqualified reversal here.

To be sure, since the filing of respondent's brief, this Court approved the *Ary* remand procedure in *Lightsey*, but for a decidedly different error and on decidedly different facts. Rather than undermining appellant's argument, *Lightsey* bolsters it.

There, the trial court actually held full *Pate* hearings into the defendant's competency which entailed appropriate evaluations and testimony by three different expert psychiatrists. (*Lightsey*, *supra*, 54 Cal.4th at pp. 682-684, 686-688.) However, the trial court violated state law alone by permitting the defendant to represent himself at the hearings. (*Id.* at p. 698.) While the state law error required reversal per se, this Court followed the reasoning of *Ary I* and similar decisions to qualify that reversal. Given the unusually well-developed record in that case, this Court

held, it was at least theoretically possible to remedy the *state law* error and "give the defendant that to which he was entitled at trial – fair and reliable opportunity to prove his incompetence with the assistance of counsel . . . ." (*Lightsey*, *supra*, 54 Cal.4th at pp. 700-701, 706-709.) Hence, the court reversed but ordered the two-part *Ary* remand procedure. (*Id.* at pp. 707-711.)

In reaching this holding, the court emphasized that it was necessarily based on the fact that the trial court *did* hold full *Pate* hearings in which it developed substantial contemporaneous evidence relevant to the defendant's competency. Therefore, the Court cautioned, its decision could *not* be read as approving the possibility of the same remand procedure for a due process violation under *Pate*. To the contrary, in contrast to the circumstances of that case:

> in the circumstances of *Pate* error, where there was substantial evidence of incompetence but no proceedings to develop the record further, there is by definition a shortcoming in the evidence, and the trier of fact at a retrospective competency hearing would have to rely on after-the-fact opinions and evidence in the record (such as the defendant's courtroom behavior) that might only circumstantially assist in determining the defendant's mental state at the time of trial. Although, as the high court observed in *Pate*, the trier of fact at a retrospective competency hearing "would not be able to observe the subject of [its] inquiry" (*Pate*, *supra*, 383 U.S. at pp. 387, 86 S.Ct. 836), the factual basis for arriving at a fair and reliable decision *in defendant's case* is more fully developed than had no competency hearing been held.

(*Lightsey*, *supra*, 54 Cal.4th at pp. 707-708, italics added; *id.* at p. 704.)

Thus, *Lightsey* explicitly cautioned that it was not suggesting that the remand procedure would be an appropriate remedy for a due process

violation under *Pate*. Rather, it only echoed the reasons why the *Pate* violation that arose from the complete failure to afford appellant the developmental disability competency proceedings hearing to which he was entitled at trial is not susceptible of such remedy.

For all of the foregoing reasons, an inquiry into and determination of appellant's competency to be tried and sentenced to death over 22 years ago cannot be sufficiently meaningful or reliable to satisfy the demands of due process or the Eighth Amendment. (AOB 72-82.)[24] Therefore, remand would be an exercise in futility and a waste of ever more scarce judicial resources. Unqualified reversal is required.

5. Conclusion

In sum, the United States Supreme Court has consistently held that a postjudgment retrospective competency hearing can never act as a constitutionally adequate substitute for the prejudgment competency hearing and determination demanded by due process under *Pate* and thereby remedy the constitutional injury suffered by their omission. This Court has already recognized as much. (*Pennington*, *supra*, 66 Cal.2d at 521; accord, *Stankewitz*, *supra*, 32 Cal.3d at p. 94.) Courts that have interpreted the high court's decisions in *Pate, Drope,* and *Dusky* and this Court's decision in

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[24] Accord, e.g., *Silverstein v. Henderson* (2d Cir. 1983) 706 F.2d 361, 369 ["a retrospective determination of [defendant's] competency to stand trial would have to be based on three conflicting written reports [in record], a cold, sparse record, and the recollection of those who saw and dealt with him six years ago. Such a hearing would be wholly inadequate to substitute for the 'concurrent hearing' into competency mandated by *Pate*"]; *Maxwell v. Roe* (9th Cir. 2010) 606 F.3d 561, 576-577 [12 year passage of time since conviction and sparse relevant medical evidence precluded meaningful retrospective competency hearing as a matter of law and compelled unqualified issuance of writ without remand].)

Pennington as merely disfavoring that remedy, as opposed to establishing a categorical prohibition against it, have misconstrued the letter and the spirit of those decisions.

Assuming arguendo that postjudgment retrospective competency hearings can theoretically remedy *Pate* violations in some cases, they can only do so through operation as limited harmless error hearings in which the state must bear the burden of proving retrospective competency beyond a reasonable doubt. Because respondent will be unable to meet that burden and support a highly reliable retrospective competency determination in this case, unqualified reversal is required. Finally, even if a postjudgment competency hearing in which the defendant bears the burden of proving retrospective incompetency could be a constitutionally appropriate remedy for some *Pate* violations under limited circumstances, it would not be constitutionally acceptable here because a meaningful, highly reliable retrospective competency determination is impossible in this case.

For all of these reasons, the judgment must be reversed without qualification.

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II

THE TRIAL COURT VIOLATED STATE LAW, AS WELL AS APPELLANT'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BY PERMITTING LEE COLEMAN TO PRESENT HIS UNQUALIFIED AND LEGALLY INCORRECT "EXPERT" OPINION THAT ALL EXPERT DIAGNOSES OF MENTAL RETARDATION, ALONG WITH ALL RELATED INTELLIGENCE TESTING, ARE SO INHERENTLY UNRELIABLE AS A CLASS OF EVIDENCE THAT IT IS LEGALLY IRRELEVANT AND SHOULD BE COMPLETELY DISREGARDED BY JURORS

A. Introduction

In his opening brief, appellant argued that the trial court violated state law, as well as his Fifth, Sixth, and Eighth and Fourteenth Amendment rights by admitting the so-called "expert" testimony of Lee Coleman, a psychiatrist and professional debunker of psychological and psychiatric evidence in the courtroom, on several grounds. First, Dr. Coleman was not qualified to testify as an expert on the specific subject matter at issue, and on which he testified, in this case – mental retardation diagnoses and the tools by which they are made, including intelligence testing. (AOB 86-106.)

Second, his testimony that "all attempts to measure intelligence" and all expert mental retardation diagnoses on which they are based are fundamentally unreliable improperly encompassed issues of law. (AOB 107-130.) Because those legal questions had already been resolved to the contrary by the trial court, as well as by the Legislature and appellate courts, Dr. Coleman's testimony effectively told the jurors to disregard the law. (AOB 107-130.) Coleman's further testimony that all such evidence is legally irrelevant to a jury's assessment of the mens rea elements of criminal offenses and therefore should not be "listened to" and "should not influence the jury's decision one way or the other" was improper for the

same reasons. (AOB 107-130.)

Because the unanimous opinions of his three mental retardation experts, all of which were necessarily based on the administration and results of standardized intelligence and related testing, formed the core of appellant's defense, Dr. Coleman's unqualified testimony effectively told the jurors to disregard his defense. The trial court put its imprimatur on that improper testimony through its admission over defense counsel's repeated objections and its instructions. (AOB 116-133.)

The net effect of Dr. Coleman's testimony and the court's rulings and instructions violated appellant's state law rights to defend against the mental state elements of the charged crimes with evidence that he was mentally retarded, as well as his state and federal constitutional rights to a fair trial, a meaningful opportunity to present his defense, proof beyond a reasonable doubt and trial by jury on every element of the charged offenses and special circumstance allegations, and reliable jury verdicts that he was guilty of a capital offense. (AOB 133-150; see also *People v. Mills* (2012) 55 Cal.4th 663, 670-672, and authorities cited therein.) As the record resists a finding of harmless error under any standard, the judgment must be reversed. (AOB 133-150.)

Respondent disagrees. (RB 130-177.) Respondent is wrong.

B. In Order to Rebut the Defense Experts' Testimony, the Law Required that Dr. Coleman be Qualified as An Expert on the Specific Subject Matter of Their Testimony – Mental Retardation and the Methods by Which it Is Diagnosed

1. Respondent's Contention that Dr. Coleman "Was Not Called to Testify as an Expert on Mental Retardation" Diagnoses and Hence did Not Have to Qualify as an Expert on that Topic is Without Merit

Respondent does not dispute that Dr. Coleman had no demonstrated expertise on the specific subject matter of mental retardation and the methods by which it is diagnosed, including the administration and interpretation of standardized intelligence testing. (AOB 86-107; see RB 132-141.) To the contrary, respondent appears to concede his lack of expertise on this specific subject but contends that such qualification was unnecessary because Dr. Coleman "was not called to testify as an expert on mental retardation." (RB 132, 137-138, fn. 88.)

In support of this contention, respondent emphasizes that Dr. Coleman "did not testify whether or not [appellant] was mentally retarded." (RB 132, 137-138, fn. 8.) Instead, respondent contends, Dr. Coleman's testimony was offered and "admitted to attack the *basis* of the defense expert testimony." (RB 132, 137, original italics.) Respondent's characterization of Dr. Coleman's testimony is correct, but its conclusion therefrom that he "was not called to testify as an expert on mental retardation," and hence did not have to qualify as an expert on mental retardation or the methods by which it is and was diagnosed in this case, is incorrect.

The subject matter of the defense experts' testimony was, of course,

that appellant was mentally retarded, how that developmental disability is and was diagnosed in this case, and the general features of mild mental retardation. (AOB 12-24, 83-84 & fn. 27.) The "bases" for their mental retardation opinions were, inter alia, their experience, expertise, and professional judgment and their administration and interpretation of standardized tests commonly used to diagnose mental retardation, including the Wechsler Adult Intelligence Scale, Revised ("WAIS-R"), which measures intelligence, the Street Survival Skills Questionnaire and portions of the Woodcock-Johnson Psycho educational Test Battery, all of which are used to measure and assess adaptive skills and functioning, the Bender-Gestalt, Gilmore Oral Reading Tests, the Wide Range Achievement Test ("WRAT"), and various neuropsychological tests. (AOB 183-184, fn. 27; see, e.g., *Atkins v. Virginia*, *supra*, 536 U.S. at p. 309, fn. 5 [WAIS is the "standard instrument in the United States for assessing intellectual functioning"]; *State v. Hill* (Oh. App. 2008) 894 N.E.2d 108, 189 [Street Survival Skills and Woodcock-Johnson as adaptive behavior tests]; accord, *Ybarra v. State* (Nev. 2011) 247 P. 3d 269, 278; *Hall v. State* (Tex. CIM. App. 2004) 160 S.W.3d 24, 30-31; Tobolowsky, "*A Different Path Taken: Texas Capital Offenders' Post-Atkins Claims of Mental Retardation*" 39 Hat. Const. L. Qrtly. 1, 9, 14, fn. 385, and authorities cited therein [Street Survival Skills, Woodcock-Johnson, Wide Range Achievement Test all instruments used to measure adaptive functioning].) Hence, the defense experts' testimony was limited to the subject of mental retardation and its diagnosis.

As respondent recognizes on appeal, the prosecution offered Dr. Coleman as a rebuttal witness to testify in "rebuttal" about "what relevance" the defense experts' opinions "have specifically with respect to tests, what

relevance they have in determining an individual's state of mind and intelligence." (14-RT 3197.) Dr. Coleman would "explain to the jury *the tests are not relevant which were administered by the doctors, why they're not relevant. . . . And especially be asked about the other doctors and the results they got, what relevance they have, and the basis for the opinions of Dr. Christensen, Dr. Powell, and Dr. Schuyler . . . .*" (14-RT 3199, italics added.) In other words, the prosecutor offered Dr. Coleman as an expert to rebut and "challenge the defense expert methods" (*People v. Stoll* (1989) 49 Cal.3d 1136, 1159; *People v. Smithey* (1999) 20 Cal.4th 936, 967) of diagnosing appellant's *mental retardation* with, inter alia, the administration of intelligence and related testing, and to the value of their *mental retardation* diagnoses. (14-RT 3197-3199.)

And, as detailed in the opening brief, Dr. Coleman *did* purport to testify as an expert on that subject by testifying to the relevance and reliability of intelligence and related testing and on the reliability or value of expert "opinions based upon the results those tests" (14-RT 3215). (AOB 88, 103, 108-111, 114-116, 124-125; Part C-2, *post.*) As respondent acknowledges, "Dr. Coleman's testimony directly related to the very basis of appellant's expert witness testimony" that appellant is *mentally retarded.* (RB 137, italics added; accord, RB 132.) Indeed, Dr. Coleman pointedly reminded the jurors that he was not simply offering his personal opinion on those subjects, he was offering his "opinion . . . as an expert . . . ." (14-RT 3254.)

As discussed in the opening brief, an expert witness must have "special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a); AOB 86-107.) As respondent acknowledges

that Dr. Coleman's putative expert testimony "directly related to the very basis of appellant's expert testimony" that appellant is mentally retarded, and attacked the fundamental reliability of the testing and methodologies on which mental retardation diagnoses are based and were based in this case retarded), Dr. Coleman had to be qualified as an expert on that specific subject. (Evid. Code, § 720, subd. (a); *People v. Stoll*, *supra*, 49 Cal.3d at p. 1159 [rebuttal witness offered as expert to challenge defense experts' methods must also have expertise in those methods]; cf. *People v. Brown* (1985) 40 Cal.3d 512, 530 [in order to testify regarding fundamental validity or reliability of testing methodology in general, witness must have academic and professional credentials sufficient to qualify him as expert on that specific subject]; *Jambazian v. Borden* (1994) 25 Cal.App.4th 836, 844, 846-847, and authorities cited therein [testimony regarding "the standard of skill, knowledge and care prevailing in" expert professional field must come from qualified expert in that field].) Respondent does not dispute that Coleman did not qualify as an expert on that specific subject.

Instead, respondent vaguely describes Dr. Coleman's expertise as lying in the study of "tests and psychological instruments being used for purposes of determining legal issues," the "use of psychological and psychiatric methodologies . . . as related in a court of law," "psychological instruments being used for purposes of determining legal issues," "various method and techniques used by mental health professionals" in a legal setting, and in the "the testing and methodology of the profession that he 'knows,' and what could or could not be derived from that testing pursuant to the professional literature in the field and his own studies." (RB 132-141.) Whatever this description of Dr. Coleman's expertise means, it does not satisfy the foundational requirements for expertise on the specific

subjects of diagnosing mental retardation or the intelligence testing or other methods by which it must be diagnosed in general or was diagnosed in this case.

As this Court has long held, "'[t]he competency of an expert is relative to the topic and fields of knowledge about which the person is asked to make a statement. In considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited.' [Citation.]" (*People v. Kelly* (1976) 17 Cal.3d 24, 39.) Thus, a putative expert's qualifications must be "related to the *particular* subject upon which he is giving expert testimony. Qualifications on a *related* subject matter are *insufficient*." (See, e.g., *People v. Hogan* (1982) 31 Cal.3d 815, 852, italics added; AOB 89-90.) "'[I]t is not unusual that a person may be qualified as an expert on one subject and yet be unqualified to render an opinion on matters beyond the scope of that subject.'" (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1337, and authorities cited therein; accord, *People v. Parnell* (1993) 16 Cal.App.4th 862, 868-870, 872.)

It is true, as respondent observes, that Dr. Coleman testified that he had familiarized himself with a "separate body of literature of people investigating" whether *unspecified* psychiatric or psychological techniques "work in the legal system, in the same way as when they work with patients." (14-RT 3204-3205.) Similarly, he had reviewed "the actual use of these [unspecified] methods in the context of real life cases" against which he would "try to compare the [unspecified] methods and conclusions that are being put forth in cases with what we know in the professional literature of the actual ability of those [unspecified] techniques to do what is alleged that they can do." (14-RT 3205; see RB 132-141.) However, as discussed in the opening brief, this generalized testimony in no way

satisfied the foundational requirements for Dr. Coleman's specific expertise in *intelligence* testing and other "methods" or "techniques" used to *diagnose mental retardation.* (AOB 87, 100-103.)

The only time Dr. Coleman obliquely referred to relevant "professional literature" in this case was his broad testimony that "[t]he Wecshler intelligence test is an attempt to measure intelligence by a test. It cannot do it. There's just all kinds of professional literature documenting the fact that intelligence tests just don't measure intelligence. They simply measure how well you do on the test." (14-RT 3222.) "[U]nder no circumstances," he agreed, "does IQ testing . . . tell about [the subject's] intelligence." (14-RT 3243.) Intelligence "tests have been totally trashed by the professional community. They're not given any credibility by the professionals." (14-RT 3231.) Pressed about this testimony on cross-examination and whether his opinion reflected a minority view, Dr. Coleman responded that he did not know because "a lot of people who feel that way don't write articles [or] go court . . . . I really don't know who would end up in the majority." (14-RT 3255.)

A witness's vague reference to having reviewed some "professional literature" on a subject does not satisfy the foundational requirements to qualify as an *expert* on that subject. (Cf. *People v. Chambers* (1958) 162 Cal.App.2d 215, 219 [witness who had taken course in criminology in college, but had no practical experience in criminology or with fingerprints was not qualified to testify to fingerprint identification].) In this particular case, Dr. Coleman's testimony about what the "the professional literature" said about intelligence testing affirmatively established his lack of qualification as an expert on that subject or any other technique by which mental retardation is diagnosed.

This is so because the very Bibles of the "professional community" at the time of his testimony (as well as today) had long defined mental retardation as including "significantly subaverage intellectual functioning," which in turn is defined by the intelligence quotient obtained by assessment with one or more of the standardized, individually administered intelligence tests, such as the Wechsler Intelligence Scale given in this case. (AOB AOB 50-51, fn. 19, 103-105 & fn. 31, citing, inter alia, *Money v. Krall* (1982) 128 Cal.App.3d 378, 397, and authorities cited therein.) That definition was long incorporated in the law at the time of trial and remains so today. (*Money v. Krall*, *supra*, 128 Cal.App.3d at pp. 397-398, 400-401, and authorities cited therein; Pen. Code, § 1001.20; *Penry v. Lynaugh* (1989) 492 U.S. 302, 308 & fn. 1; see also *Atkins v. Virginia*, *supra*, 536 U.S. at p. 309, fns. 3 & 5; Pen. Code, § 1376.) While not perfect or infallible, so long as intelligence testing is properly administered and accounts for standard errors of measurement, it has long been and still today "remains . . . the measure of human intelligence that continues to garner the most support within the scientific community." (AAMR Manual (10th ed. 2002) at p. 51; AOB 103-105.)

In short, if Dr. Coleman had even the most rudimentary knowledge of the "professional literature" on the subjects of intelligence testing and diagnosing mental retardation, he would have known that it was simply untrue that intelligence tests have been "totally trashed by the professional community," that the "clear" majority of that community does *not* adhere to that view, and instead that the Bibles of the "professional literature" not only accept the fundamental reliability of intelligence testing but define mental retardation in terms that require the administration and interpretation thereof. (See AOB 103-106.) Therefore, accepting that Dr. Coleman read

some unidentified piece of "professional literature" suggesting that intelligence "tests have been totally trashed by the professional community" and "not given any credibility by the professionals" (14-RT 3231) because they are "completely unreliable" measurements of intelligence "under [all] circumstance[s]," that "professional literature" was either woefully outdated or patently incorrect. Dr. Coleman's review thereof no more qualified him as an expert on "what could or could not be derived from" intelligence testing or on the reliability of the methods by which mental retardation is and was diagnosed in this case than review of the *Dred Scott* decision qualify him as an expert on modern civil rights law. To the contrary, his testimony revealing that he based his opinions and conclusions on unidentified pieces of "literature" reflecting a fringe view that is contrary to that of the professional mental retardation community adopted by our Legislature affirmatively demonstrates that he did *not* have the "special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject" of intelligence testing or mental retardation diagnoses which necessarily incorporate it.

For these and all of the other reasons set forth in opening brief, Dr. Coleman was unqualified as an expert to "challenge the defense experts' methods" of diagnosing mental retardation (*People v. Stoll*, *supra*, 49 Cal.3d 1159) or "attack the basis of the defense expert testimony" that appellant is mentally retarded (RB 132, 137). (See also AOB 86-106.) The trial court committed serious error in admitting his so-called "expert" testimony over defense counsel's objections in violation of state law as well as appellant's Eighth and Fourteenth Amendment rights to a fundamentally fair trial and highly reliable verdicts in this capital case. (See, e.g., *Ege v. Yukins* (6th Cir. 2007) 485 F.3d 364, 375-378, and authorities cited therein

[erroneous admission of expert testimony violated defendant's right to fair trial under clearly established precedent of *Chambers v. Mississippi* (1973) 410 U.S. 284]; accord, *Snowden v. Singletary* (11th Cir. 1998) 135 F.3d 732, 737-739.)[25]

Finally, respondent appears to contend that even if Dr. Coleman were not qualified to testify as an expert on mental retardation diagnoses and the methods used to make them, he was qualified as an expert on the legal relevance of such evidence in the courtroom. According to respondent, Dr. Coleman's background qualified him to testify as an expert regarding the relevance of any and all "mental health professional testimony" – including that by mental retardation experts – "for purposes of determining legal issues" in a "court of law" or in the "legal setting" of the "courtroom." (RB 135-137.) Respondent's argument is without merit for two reasons.

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[25] Although it is not entirely clear, respondent seems to suggest in two footnotes that the defense experts were no more qualified to testify as experts on mental retardation and its diagnosis than Dr. Coleman was and therefore his "background" or expertise was sufficiently "comparable" to that of the defense experts to qualify him to attack the bases of their mental retardation diagnoses. (RB 133-134, fns. 84 & 85; compare AOB 102-103, citing *People v. Stoll*, *supra*, 49 Cal.3d at 1159.) It is understandable why respondent buries this "argument" in footnotes. First, it misrepresents key facts and is utterly contradicted by the record evidence of the defense experts' experiencing in diagnosing mental retardation. (AOB 12-24, 102-103.) Second, the defense experts testified as experts on the subject matter of their testimony – diagnosing mental retardation – without objection from the prosecutor and they necessarily qualified as mental retardation experts. In order to testify as an expert in rebuttal to "challenge the defense experts' methods" of diagnosing mental retardation (*People v. Stoll*, *supra*, 49 Cal.3d 1159) or "attack the *basis* of the defense expert testimony" (RB 132, 137) the law required that Coleman be qualified as an expert on those subjects.

First, Dr. Coleman did not limit his testimony to the legal relevance of appellant's "mental health professional testimony" "for purposes of determining legal issues" in a "court of law." (RB 135-137.) As demonstrated above and in the opening brief and discussed further below, Dr. Coleman also purported to testify as an expert on the reliability of expert mental retardation diagnoses and the methods by which they are made. Because he was unqualified to do so, the trial court erred in admitting his testimony.

Second, it is true that Dr. Coleman also testified to his "expert" opinion regarding the legal relevance of "mental health professional testimony" – including but not limited to mental retardation evidence – as a defense to the mental state elements of the charged crimes, separate and apart from the inherent unreliability of such evidence. However, the issue of his qualification to offer such testimony is beside the point. As discussed in the opening brief and Part C, *post,* even the most highly qualified expert on the law, mental retardation, and the relationship between the two cannot offer opinions on the law to the jury. (AOB 107-129.) "'Each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jurors on the relevant legal standards.' [Citation.]" (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1181.)

2. Respondent's Contention that Appellant Forfeited His Foundational Objections to Dr. Coleman's Lack of Expert Qualification is Without Merit

Alternatively, respondent contends that appellant forfeited his right to object to Dr. Coleman's qualifications on appeal for several reasons. (RB 130-132.) All are without merit.

a. Defense Counsel's Objections Satisfied Evidence Code section 353

First, respondent contends that appellant forfeited his right to object to Dr. Coleman's lack of expertise in the field of mental retardation because his in limine trial "objections never mentioned expertise in mental retardation as the basis for a foundation objection." (RB 130-131.) Instead, according to respondent, appellant's in limine objection merely "'question(ed) whether there was a sufficient foundation for a non-psychologist to testify about the sufficiency of the basis [*sic*] for his [own mental retardation] experts [sic] testimony." (RB 129.) Respondent's argument is belied by the record and the law.

The starting point for the analysis is Evidence Code section 353. It provides that in order to preserve the issue of the erroneous admission of evidence for appeal, there must "appear[] of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion . . . ." (Evid. Code, § 353, subd. (a). As this Court has explained in interpreting section 353, it:

> must be interpreted reasonably, not formalistically. "Evidence Code section 353 does not-exalt form over substance." [Citation.] The statute does not require any particular form of objection. Rather, "the objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility" . . . . and [enable] the court [to] make a fully informed ruling.

(*People v. Partida* (2005) 37 Cal.4th 428, 435, and authorities cited therein.)

Thus, the objection must be considered in context. As discussed above, Dr. Coleman was offered as an expert to "rebut[]" the defense

experts' testimony. As the prosecutor put it, he would testify about "what relevance" the defense experts' opinions "have specifically with respect to tests, what relevance they have in determining an individual's state of mind and intelligence" (14-RT 3197) and "explain to the jury the tests are not relevant which were administered by the doctors, why they're not relevant. . . . And especially be asked about the other doctors and the results they got, what relevance they have, and the basis for the opinions of Dr. Christensen, Dr. Powell, and Dr. Schuyler . . . . " (14-RT 3199.) Of course, "the opinions" at issue were the defense experts' opinions that appellant is *mentally retarded* and the "tests" they utilized as the "basis for the[ir] opinion" included, inter alia, intelligence testing.

It was in this context that defense counsel argued that Dr. Coleman was a psychiatrist, not a "psychologist" like appellant's mental retardation experts. (14-RT 3200-3201.) Defense counsel emphasized that psychiatrists in general do not necessarily have the "training" that "psychological" experts like appellant's have. (14-RT 3200-3201.) Further there has "been nothing in the offer of proof that [Dr. Coleman in particular] has any expert testimony [sic] that would qualify him to render opinions regarding psychological evaluations." (14-RT 3201.) "Absent that" proof, defense counsel concluded, "I don't believe there's a proper foundation. I don't believe it's proper rebuttal for this witness to be permitted to render opinions in regards to psychological evaluations." (14-RT 3201.) In context, defense counsel was obviously referring to the "training" *his* "psychological" experts had in evaluating and diagnosing *mental retardation* and the "psychological evaluations" *for mental retardation* in this case that Dr. Coleman was offered to rebut. (14-RT 3200-3201.)

Counsel's objections were consistent with the law governing the foundational requirements for a rebuttal witness to qualify as an expert to challenge the methodology or conclusions of defense experts. (*People v. Stoll*, *supra*, 49 Cal.3d at p. 1159; see also *People v. Brown, supra,* 40 Cal.3d at 530; *Jambazian v. Borden*, *supra*, 25 Cal.App.4th at pp. 844, 846-847.) Fairly understood, defense counsel was objecting that Dr. Coleman did not have a "comparable background" to the defense experts' sufficient to "challenge their methods" of diagnosing *mental retardation.* (*People v. Stoll*, *supra*, at p. 1159.)

In short, although the words "mental retardation" were not explicit in defense counsel's objections, they were necessarily implicit in the context of those objections and the prosecutor's offer of proof. Defense counsel's in limine objections that there was no factual "foundation" for Dr. Coleman's expert testimony attacking the defense experts' methods and conclusion because he lacked expertise on those subjects were "made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion [was] sought, and to afford the People an opportunity to establish its admissibility" by coming forward with evidence sufficient to establish Dr. Coleman's qualification to challenge the defense experts' methods of diagnosing appellant as mentally retarded. (*Partida, supra,* 37 Cal.4th at p. 435.) Respondent's contention to the contrary amounts to the ultimate triumph of "form over substance" and must be rejected. (*Ibid*; RB 130-131.)

b. Because Defense Counsel's In Limine Objections Satisfied Evidence Code section 353 and the Court's Ruling Thereon Was Not Tentative, It was Unnecessary for Defense Counsel to Repetitiously Renew their Foundational Objections During Dr. Coleman's Testimony

Alternatively, respondent contends that even if defense counsel's in limine "argument could be construed as a challenge to Dr. Coleman's expertise on the subject of 'mental retardation,'" defense counsel "failed to renew" those objections during Dr. Coleman's testimony. (RB 131, fn. 83; see also RB 144, citing, inter alia, *People v. Morris* (1991) 53 Cal.3d 152, 190, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1, and *People v. Brown* (2003) 31 Cal.4th 518, 547.) Therefore, respondent contends, appellant forfeited his right to challenge the erroneous admission of Dr. Coleman's testimony on appeal. (RB 131.) The very premise of respondent's argument is flawed.

In *Morris*, *supra*, 53 Cal.3d 152, cited by respondent, this Court held that when an in limine objection satisfies the requirements of section 353 and results in an unconditional ruling, it is unnecessary to renew the objection in order to challenge the ruling on appeal. (*Id.* at pp. 189-190; accord, e.g., *People v. Whisenhunt* (2008) 44 Cal.4th 174, 210-211; *People v. Brown*, *supra*, 31 Cal.4th at p. 547; *People v. Ramos* (1997) 15 Cal.4th 1133, 1171.) This rule is consistent with the general rule that a party is not required to make futile objections in order to preserve an error for appeal. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 820.) It is *only* when an in limine objection does not satisfy the requirements of section 353 or results in no ruling or a tentative or conditional ruling that the party seeking exclusion must renew his objection when the evidence is introduced.

(*Morris*, *supra*, at pp. 189-190; accord, e.g., *People* v. *Holloway* (2004) 33 Cal.4th 96, 133; *People v. Ramos*, *supra*, at p. 117.)

Here, defense counsel's in limine objections that Dr. Coleman was not qualified to testify as an expert on the subjects for which he was offered satisfied the requirements of section 353. Under Evidence Code section 720, the very nature of an objection to the expert qualifications of a witness not only gives the proponent the opportunity to establish the witness's qualifications, as required by section 353 (*Partida, supra,* 37 Cal.4th at p. 435); absent consent of the parties, it *requires* the proponent to do so before the witness testifies.[26] (See AOB 92.) Similarly, section 720 *only* allows the trial court to make a tentative or conditional ruling when the parties *consent* to receiving the witness's testimony conditionally, subject to the necessary foundation being supplied later; thus, absent consent of the parties, the very nature of an objection under section 720 requires a definitive ruling by the court before the witness testifies. (Evid. Code, § 720.) Here, defense counsel's objections satisfied section 353, they did not

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[26] Evidence Code section 720, subdivision (a) provides:

> A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

The only exception to the statute's requirement that the proponent of expert testimony prove the witness's qualifications upon the opponent's objection is when the parties' consent to receiving the witness's testimony conditionally, subject to the necessary foundation being supplied later. (Evid. Code, § 720, Law Rev. Com. Comment; Evid. Code, § 320)

consent to receiving Dr. Coleman's testimony conditionally, and therefore the court's ruling that it "will allow Dr. Coleman to testify" over counsel's objections was necessarily a definitive one. (14-RT 3201.) Under these circumstances, "it is not necessary to repetitiously renew the objection in the same trial to preserve the issue on appeal. [Citations.]" (*People v. Hall* (2010) 187 Cal.App.4th 282, 292.)

c. In Any Event, Defense Counsel Did Repeat Their Foundational Objections Throughout Dr. Coleman's Testimony

In any event, as discussed in the opening brief, defense counsel *did* repeat their foundational objections throughout Dr. Coleman's testimony. (AOB 86-88.) After Dr. Coleman testified to his training and experience but failed to mention any special training, experience, or expertise in the field of *mental retardation* or the intelligence and related testing methodology by which it is diagnosed (14-RT 3203-3209), defense counsel immediately interposed a foundational objection when the prosecutor sought to elicit his opinions on those subjects and asked to approach the bench (14-RT 3209-3210). The court refused to hear argument at bench and summarily overruled the objection. (14-RT 3210.) Nevertheless, defense counsel continued to make foundational objections throughout Dr. Coleman's testimony, all to no avail. (14-RT 3210-3211, 3215, 3219-3230.) Given the context in which the foundational objections were made in limine and repeated during Dr. Coleman's testimony, they were more than sufficient to alert the court that counsel were renewing their objections that Dr. Coleman's qualifications were insufficient to satisfy the foundational requirements to testify as an expert on the subjects he did. (*Lemley v. Doak Gas Engine Co.* (Supreme Court 1919) 40 Cal.App. 146, 155 [objection on lack of foundation grounds fairly presented insufficiency

of evidence to establish expert qualifications]; see also *Taylor v. Fishbaugh* (1938) 26 Cal.App.2d 300, 303.)

d. It Is Entirely Appropriate for a Party to Cite Additional Authorities on Appeal in Support of the Objections he Made at Trial and Repeats on Appeal

Finally, although defense counsel objected below that Dr. Coleman's mere status as a psychiatrist did not qualify him as an expert on the subjects on which he testified (14-RT 3200-3201), respondent contends that this Court should disregard the additional authorities appellant cites in further support of the same objection on appeal (see AOB 93-99). (RB 133). Citing *People v. Sanders* (2003) 31 Cal.4th 318, 323, fn. 1, and *People v. Amador* (2000) 24 Cal.4th 387, 394, respondent contends that appellant cannot elaborate on his trial objections with additional authorities or arguments on appeal. (RB 133.) Respondent is mistaken.

In both *Sanders* and *Amador*, this Court declined to take judicial notice of documentary facts *as evidence* to support a suppression ruling that had not been tendered or considered by the trial court in the suppression hearing below: "The facts relevant to a suppression motion should be litigated and decided at trial, not on appeal." (*Amador*, *supra*, at p. 394; accord *Sanders*, *supra*, at p. 323, fn. 1.) From respondent's reliance on those cases, it seems clear that respondent has conflated the concepts of presenting new evidence or facts on appeal that were not presented below, which is generally prohibited, and presenting additional arguments and authorities on appeal to support a claim that was raised below, which is entirely appropriate. (See, e.g., *Giraldo v. California Dept. of Corrections and Rehabilitation* (2008) 168 Cal.App.4th 231, 251; *Miller-El v. Dretke* (2005) 545 U.S. 231, 241, fn. 2; *Lebron v. National Railroad Passenger*

Corporation (1995) 513 U.S. 374, 379; *Yee v. Escondido* (1992) 503 U.S. 519, 534; see also *People v. Thompson* (2010) 49 Cal.4th 79, 95, fn. 7, and authorities cited therein [where trial objection is repeated on appeal, it may be supported by further argument and authorities that error also had the effect of violating federal constitution].)

Put simply, "[a]n argument is typically elaborated more articulately, with more extensive authorities, on appeal than in the less focused and frequently more time pressured environment of the trial court, and there is nothing wrong with that." (*Puerta v. United States* (9th Cir. 1997) 121 F.3d 1338, 1341-1342.)[27]

For all of these reasons, defense counsel's repeated foundational objections both in limine and throughout Dr. Coleman's testimony that Dr. Coleman lacked the qualifications necessary to testify as an expert on the subjects of mental retardation and the methods by which it is diagnosed were more than adequate to preserve that challenge for appeal. Appellant's elaboration on those trial objections with additional supporting authorities and argument on appeal is entirely appropriate. For all of the reasons set forth above and in the opening brief, the trial court erred in admitting Dr. Coleman's unqualified "expert" opinion testimony.

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[27] Respondent further contends that appellant has forfeited his claims that the erroneous admission of Dr. Coleman's testimony also violated his federal constitutional rights. (RB 131-133; see also RB, 144, 152-153.) Appellant responds to this argument in Part E, *post.*

C. The Trial Court Erred in Permitting Dr. Coleman to Testify to Purely Legal Questions and Encourage the Jurors the Disregard the Law

As defense counsel further argued and objected below, Dr. Coleman's testimony was "not proper rebuttal [and] not [the] proper subject for expert testimony" (14-RT 3215) for two additional, closely related reasons. (AOB 107-129.) First, Dr. Coleman improperly testified to issues going to the legal relevance and admissibility of expert mental retardation opinions, which were pure questions of law not within the jury's province. (AOB 107-116, citing, inter alia, *Summers v. A.L. Gilbert Co.,. supra*, 69 Cal.App.4th at pp. 1178-1184.) Of course,"'it is thoroughly established that experts may not give opinions on matters which are essentially the province of the court to decide'. [Citation.]" (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 884.) Second, Dr. Coleman improperly testified that the jurors should resolve those legal questions in a manner contrary to the law reflected by the trial court's rulings, statute, and the federal constitution. (AOB 116-129, citing, inter alia, *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 66-67.)

1. Dr. Coleman Improperly Testified to the Purely Legal Questions Governing the Admissibility of the Defense Experts' Testimony Under Evidence Code section 801 and Effectively Encouraged the Jurors to Disregard the Law

As set forth in the opening brief, the preliminary fact requirements for the admission of expert opinion testimony under Evidence Code section 801 are purely legal questions. (AOB 107-108, 111-116; *People v. Alcala* (1992) 4 Cal.4th 742, 787 [preliminary facts of competency and reliability of witness testimony as prerequisites for admission are questions of law for the court, not jury]; Evid. Code, § 310 [admissibility of evidence is question

of law for the court]; §405 [preliminary fact determinations to be made exclusively by court].) Hence, by admitting the defense experts' mental retardation diagnoses under Evidence Code section 801, the trial court favorably resolved the legal questions that: (1) mental retardation is a proper subject of expert opinion, or that the diagnosis, meaning and effects of mental retardation is a "subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" (Evid. Code, § 801, subd. (a), italics added not needed) and (2) the defense experts' mental retardation opinions were "based on matter . . . that is of a *type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates*" – including the administration and interpretation of intelligence tests like the WAIS-R and other testing (Evid. Code, § 801, subd. (b), italics added; AOB 108, 111-116.)

By resolving those legal questions in appellant's favor, the trial court created the law of this case by which the jurors were bound. (See, e.g., *Summers v. A.L. Gilbert Co.*, *supra*, 69 Cal.App.4th at pp. 1178-1184; *In re Stankewitz* (1985) 40 Cal.3d 391, 399; *Sparf v. United States* (1895) 156 U.S. 51, 105-106; *Nieves-Villanueva v. Soto-Rivera* (1st Cir. 1997) 133 F.3d 92, 100.) In other words, once the court resolved those questions, the juror's sole function was to determine the *weight* and *credibility* of that evidence; they were not to decide whether mental retardation is a proper subject of expert opinion or whether the intelligence and other standardized testing use to make those diagnoses is, as a general matter, evidence "that is of a type that reasonably may be relied upon by an expert in forming" a mental retardation opinion or diagnosis.

Indeed, these questions of law were not only resolved in appellant's

favor by the trial court's rulings; under the general law established by the legislature and the judiciary, appellant was not only entitled to present the testimony of mental retardation experts in his defense (AOB 118-122; accord, *People v. Mills*, *supra*, 55 Cal.4th at pp. 670-672, and authorities cited therein); the law *required* that he present the opinions of qualified experts based in part on the administration and interpretation of intelligence tests in order to support his mental retardation claim (AOB 103-106, 122-124).

However, Dr. Coleman told the jurors that identifying mental retardation is so well within the common experience of ordinary lay persons that they are equipped to do so on their own without the assistance of an expert. (Evid. Code, § 801, subd. (a); AOB 109-110, 124.) Indeed, he testified that an expert's opinion does *not* "assist[] the jury" in determining mental retardation or mens rea. (14-RT 3209-3210; see also 14-RT 3219-3221, 3254-3255; AOB 109-111, 114-115, 124.) Similarly, Dr. Coleman told the jurors that intelligence testing and other standardized tests used to diagnose mental retardation are categorically, inherently unreliable measures of intelligence or intellectual functioning. (AOB 108-111, 129-129.) Therefore, he testified that "opinions based upon the results those tests" of such testing are equally, categorically unreliable. (14-RT 3215.)

In other words, Dr. Coleman told the jurors that: (1) an expert's mental retardation opinion would not "assist the trier of fact" within the meaning of Evidence Code section 801, subdivision (a) and therefore mental retardation is not a proper subject for expert opinion testimony; and (2) the intelligence testing on which the experts' opinions were partially based is "matter . . . of a type that reasonably may be relied upon by an expert" to measure intelligence or "in forming an opinion" about mental

retardation within the meaning of Evidence Code section 801, subdivision (b). (See also, e.g., *People v. Reeves* (2001) 91 Cal.App.4th 14, 43-44 [expert testimony attacking method in general or its fundamental validity, as opposed to errors that occurred in particular defendant's case, goes to admissibility of evidence, not its weight].) Hence, Dr. Coleman's testimony encompassed purely legal questions and effectively encouraged the jurors to disregard the law, as reflected by the trial court's rulings and the general law compelling those rulings. (AOB 108-111, 124-129.) Jurors "'are not allowed either to determine what the law *is* or what the law *should be*.' [Citation.]" (*In re Stankewitz* (1985) 40 Cal.3d 391, 399, original italics.) Dr. Coleman's testimony was inconsistent with this fundamental principle and, as such, was grossly improper. (AOB 108-111, 124-129.)

Respondent does not dispute that the preliminary fact requirements for the admission of the defense mental retardation expert opinions under Evidence Code section 801 were pure questions of law or that the trial court properly resolved those legal questions in appellant's favor by admitting their opinions. (See RB 142-160.) Nor does respondent dispute that it is improper for an expert to give an opinion on legal questions and particularly so when the expert's opinion is inconsistent with the law reflected by a trial court's legal rulings or the law that governs them. (See RB 142-160.) Instead, respondent's primary dispute is with appellant's argument that Dr. Coleman's testimony in this case violated these settled legal principles.

a. Dr. Coleman Testified that Identifying Mental Retardation is Not a Proper Subject of Expert Opinion Testimony and Intelligence and All Other "Psychological" Testing Is Not Matter of a Type that Reasonably May be Relied Upon in Forming An Opinion on Mental Retardation

Respondent dismisses as "hyperbole" (RB 144) appellant's contentions that Dr. Coleman categorically testified that identifying mental retardation and its effects is not a proper subject of expert opinion and that all intelligence and related testing is "completely unreliable," or not a type of matter that reasonably may be relied upon in forming a mental retardation opinion. (RB 144-151, 157-158, fn. 91.) Rather, according to respondent, Dr. Coleman's testimony was properly directed to the defense experts' opinions in this specific case and the flaws in their particular methodology. (RB 144-145.) Respondent's contention is belied by the record it ignores.

Dr. Coleman's testimony barely even touched upon the particular defense evidence in this particular case. (See AOB 108-109.) Instead, he mounted a globalized attack on *all* expert "mental health" or mental retardation diagnoses, and all of the standard intelligence and other testing instruments on which such diagnoses are based, as inherently unreliable measures of intelligence and evidence of mental retardation. Although appellant argued in the opening brief and the record indisputably reveals that this attack necessarily included, but was by no means limited to, the evidence in this case, the state's response makes it necessary to examine the record evidence in detail.

Dr. Coleman broadly testified that "an IQ test is not a reliable judge of someone's intelligence." (13-RT 3210; accord 14-RT 3211; 14-RT

3216.) He explicitly testified that his opinion applied to all IQ tests, including but not limited to the Wechsler Intelligence Scale: while the WAIS "is the one that is used more than any others, but it is – but what I said would hold for *all* attempts to measure intelligence with pencil and paper tests." (14-RT 3211, italics added.) As he put it, "[t]he Wecshler intelligence test is an attempt to measure intelligence by a test. It cannot do it. There's just all kinds of professional literature documenting the fact that intelligence tests just don't measure intelligence." (14-RT 3222.) Indeed, as noted above, the fundamental, categorical unreliability of all intelligence testing as measure of intelligence was not only his opinion; according to Dr. Coleman, intelligence "tests have been totally trashed by the professional community. They're not given any credibility by the professionals." (14-RT 3231.) Dr. Coleman agreed that "*under no circumstances* does IQ testing . . . tell about [a person's] intelligence." (14-RT 3243, italics added.) Asked if there were if there were *any* "legitimate means to quantify a person's intelligence" Dr. Coleman replied that there was no legitimate way to "quantify . . . in terms of numbers or to be exact. . . . not with any tests per se." (14-RT 3256; see also 14-RT 3260-3261.) All such tests under all circumstances are "completely unreliable" as measures of intelligence. (14-RT 3254.)[28]

Dr. Coleman's opinion not only applied to the results of such tests, but also to any "*opinions* based upon the results of those tests . . . ." (14-RT

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[28] Dr. Coleman provided similar testimony about the fundamental, inherent unreliability of other tests used to diagnose mental retardation, including the Bender-Gestalt, the Gilmore Oral Reading test, mental status exam, and neuropsychological testing. (14-RT 3223-3225.) However, he provided no testimony at all about the Wide-Range Achievement test or any other diagnostic instruments to measure adaptive deficits or functioning.

3215, italics added.) As Dr. Coleman testified, a reliable mental disorder or retardation "opinion . . . can't [be] based . . . reliably on *any* tests. Tests, in fact, do not allow [an expert] to form reliable opinions. He may, in fact, base his opinion on [a] test, but [it] would not be reliable *because* there was a test." (14-RT 3251, italics added; see Evid. Code, § 801, subd. (b) [expert opinion admissible only if "based on matter . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates"].)

Indeed, Dr. Coleman repeatedly testified that "the results of those tests and the opinions based upon the results of those tests have [no] *value to a jury*" (14-RT 3215) or are of no "*assistance to the jury*" (14-RT 3209-3210, italics added; see Evid. Code, § 801, subd. (a) [expert opinion only admissible when it would "assist the trier of fact"].) To the contrary, according to Dr. Coleman, identifying mental retardation and understanding its impact on cognitive functioning is so well within the common experience of the ordinary layperson that he or she not only can but should determine those questions based on his or her commonsense observations of a subject's behavior. (14-RT 3223-3224, 3256-3257, 3259; Evid. Code, § 801, subd. (a) [expert opinion only admissible if it involves subject "beyond common experience"].) In fact, Dr. Coleman testified, it is *only* a person's "behavior [that] will tell you whether or not they have certain capabilities . . . ." (14-RT 3223; see also 14-RT 3256-3257.)

Similarly, determining whether a person is malingering or faking a mental defect or illness is an entirely subjective determination that requires no expertise. (14-RT 3217-3218.) To the contrary, the training mental health professionals receive to detect faking through the use of "some special technique" actually results in unreliable credibility determinations.

(14-RT 3217-3218.) Therefore, in Dr. Coleman's opinion, so-called experts are "far worse" at detecting faking than laypeople who judge credibility based solely on their overall impressions of the subject's behavior. (14-RT 3217-3218.) For these reasons, as well, Dr. Coleman testified, expert diagnoses of mental defects or illnesses, which are necessarily premised on a determination that the subject is not malingering, are inherently unreliable. (14-RT 3217-3219.)

It was only after Dr. Coleman's extensive testimony attacking the inherent unreliability of all intelligence testing as measures of intelligence and all expert mental retardation diagnoses that the prosecutor briefly inquired into Dr. Coleman's opinion of Dr. Christensen's diagnosis. His testimony was not directed to any particular flaws she might have made in her administration of intelligence or other standardized testing in this specific case but rather attacked her diagnosis as merely an example of all unreliable diagnoses based on any such testing. Dr. Christensen's IQ scores were "completely meaningless when it comes to the question of his intelligence" for the same reasons that all intelligence testing is completely meaningless as measurements of intelligence. (14-RT 3226.) Dr. Christensen's opinion based thereon was simply "a good illustration of why *those kinds of opinions* should not be relied upon" since "there's nothing that Dr. Christensen has done which is in any way reliable, helpful, or in any way touches on the questions that are being looked into here" and her conclusions were "nothing more than a personal opinion without supporting evidence." (14-RT 3229-3330, italics added.) The prosecutor never even asked him to address Doctors Powell or Schuyler's diagnoses.

As the record of Dr. Coleman's testimony amply demonstrates, while it necessarily included the opinions in this case, it was not specifically

directed to them or to unique flaws in their methodology that are not shared by every expert who diagnoses mental retardation. (RB 144-145.) His testimony was that a layperson's observations of a subject's behavior alone is the only reliable evidence of mental retardation and that there is *no* reliable expert methodology by which to diagnose a mental defect like mental retardation and amounted to a wholesale, categorical assault on all expert mental retardation opinions and the intelligence testing on which they must necessarily be based and were necessarily based in this case. In other words, Dr. Coleman testified that identifying mental retardation is not a "subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" (Evid. Code, § 801, subd. (a)) and that intelligence testing and methods to detect malingering are not a "type" of "matter" that "reasonably may be relied upon by an expert in forming an opinion" on mental retardation (*id.*, subd. (b)).

In sum, Coleman's testimony encompassed the purely legal questions of the preliminary fact requirements for the admissibility of expert opinion testimony under Evidence Code section 801 and encouraged the jurors to disregard the trial court's resolution of those legal questions in appellant's favor. Respondent does not dispute that these preliminary fact requirements under section 801 are pure questions of law and thus not the proper subject of expert opinion. (AOB 113-116.) Nor does respondent dispute that the trial court resolved those legal questions in appellant's favor, that the jurors were bound by the law created by the court's rulings, or that it is improper for an expert to encourage jurors to disregard the law of the case. Hence, for these reasons alone, Dr. Coleman's testimony was improper and should have been excluded.

Although respondent agrees that the trial court's rulings reflected the

law of this case by which the jurors were bound, respondent disagrees that the general law compelled those rulings. (RB 153-157; compare AOB 122-124.) Although the point has become somewhat of an academic one, appellant briefly addresses it below. It is one thing for an expert to effectively urge the jurors to disregard the trial court's rulings (even if those rulings were legally incorrect). It is another, even more egregious matter altogether for an expert to effectively testify that the jurors should nullify the law of the land and decide a case based not on "what the law is," but on what the expert believes "the law should be." (*In re Stankewitz*, *supra*, 40 Cal.3d at p. 399.)

b. Dr. Coleman's Opinion Regarding the Inherent Unreliability of Intelligence Testing and Expert Mental Retardation Diagnoses Based Thereon Was Not Only Inconsistent with the Law of this Case but Also With the General Law Determined by the Legislature and Judiciary

Respondent disagrees that the legal definition of mental retardation for purposes of Penal Code section 28 is the same clinical definition California law had long adopted at the time of trial, which requires both intelligence testing and expert diagnosis. (See AOB 103-106, 122-124.) Respondent points out that Penal Code section 28 does not define mental retardation (of course, it does not even refer to mental retardation) and contends that its definition cannot be supplied by the authorities appellant cited in the opening brief because that definition is limited to the "civil commitment context." (RB 153-154, fn. 93.) Quite the opposite.

As discussed in the opening brief, at the time of trial the Legislature had already adopted the "generally accepted technical" or clinical "definition" of mental retardation in several code sections, *including the*

penal code. (*In re Krall* (1984) 151 Cal.App.3d 792, 795-797, citing, inter alia, former Pen. Code, § 1001.20, subd. (a)(1); *Money v. Krall*, *supra*, 128 Cal.App.3d 378, 397.)[29] That definition includes "significantly subaverage general intellectual functioning," which is necessarily measured by – and thus requires – the administration and results of standardized intelligence tests, the most generally accepted of which is the WAIS-R. (*Money v. Krall, supra*, at pp. 397-398, 400-401, and authorities cited therein; *In re Krall*, *supra*, at pp. 795-797; *Penry v. Lynaugh* (1989) 492 U.S. 302, 308 & fn. 1.) Consistent with that definition, there is a "[l]egislative recognition of the *necessity for expert diagnosis and opinion* upon a hearing to determine whether a person is mentally retarded . . . found in several code sections," including the *penal code*. (*In re Krall*, *supra*, 151 Cal.App.3d at p. 797, citing, inter alia, Pen. Code, §§ 1001.22, 1367, 1370.1, 1600 et seq.; Pen. Code, §§ 1369, subd. (a) and *People v. Leonard*, *supra*, 40 Cal.4th at pp. 1389-1390.) The court in *Money v. Krall*, *supra*, and *In re Krall*, *supra*, held that this definition was so well settled that it was the presumptively intended one in all contexts, absent an express statement of legislative intent to the contrary. (*Money v. Krall*, *supra*, at pp. 397-399.) Hence, the *Krall* decisions *extended* that definition, already found in the penal code, to that otherwise undefined term in Welfare & Institutions Code section 6500 (*In re Krall*, *supra*, 151 Cal.App.3d at pp. 795-797; *Money v. Krall*, *supra*, 128 Cal.App.3d at pp. 397-398, 400-401), or the "civil commitment context" (RB 153-154, fn. 93.) The *Krall* decisions' reasoning is born out by subsequent legislation in which the Legislature has utilized the same

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[29] Penal Code section 1001.20 long defined the term "mental retardation." It was amended in 2012 to substitute the term "intellectual disability" for the term "mental retardation."

definition for purposes of death eligibility. (Pen. Code, § 1376 and Sen. Com. on Public Safety, bill analysis of Sen. Bill No. 3 (2003-2004) Reg. Sess. [enactment of Pen. Code § 1376 intended to comply with *Atkins v. Virginia* and adopt definition of mental retardation already codified in Pen. Code, § 1001.20]; *In re Hawthorne* (2005) 35 Cal.4th 40, 47-48 [expert opinion required to make out mental retardation claim for purposes of section 1376].) There is no basis in reason to conclude that it does not also apply for purposes of Penal Code section 28. (See also *People v. Moore* (2002) 96 Cal.App.4th 1005, 1116-1117 [existence of mental disease or defect within meaning of Penal Code section 28 requires particularized expertise beyond common knowledge of laypersons].)

In any event, even assuming that the law does not impose those affirmative *requirements* for purposes of Penal Code section 28, as respondent contends, there is no question that the Legislature has determined that mental retardation is a proper subject of expert opinion testimony and intelligence testing is a matter of a type that may reasonably be relied upon by an expert in diagnosing mental retardation. Hence, Dr. Coleman's testimony was still inconsistent with this general law and, as such, was improper for the same reasons it was inconsistent with the law of the case created by the trial court's legal rulings. Just as "'it is thoroughly established that experts may not give opinions on matters which are essentially the province of the court to decide'" (*Sheldon Appel Co. v. Albert & Oliker, supra*, 47 Cal.3d at p. 884), so too it is established that a "psychologist's theories . . . cannot upset the established statutory and case law of this state. Their appeal may more properly be addressed to the Legislature." (*People v. Ray* (1967) 252 Cal.App.2d 932, 952; accord, e.g., *People v. Shipp* (1963) 59 Cal.2d 845, 854 [assertion that "capital

punishment is not proper in *any* case," as opposed to inappropriate in particular case based on its unique facts, effectively and improperly "urged the jury to disregard the Legislature's determination to the contrary"]; see also AOB 124-129.)

2. Dr. Coleman Improperly Testified to the Legal Relevance of Mental Retardation Evidence and Effectively Encouraged the Jurors to Disregard the Law

Dr. Coleman's testimony regarding the *legal* relevance of expert mental retardation evidence was "not proper rebuttal [and] not [the] proper subject for expert testimony" (14-RT 3215) for the same reasons (AOB 109-122). It went to a pure question of law not within the jury's province and encouraged the jurors to disregard the law governing that question as reflected by the trial court's rulings, statute, judicial decisions, and the federal constitution. (AOB 109-129.)

Like its legal rulings on the preliminary fact requirements of Evidence Code section 801, the trial court favorably resolved the *legal* relevance of the mental retardation experts' opinions, and the matter on which they were based, by admitting that evidence and instructing the jurors that they could consider it in determining whether appellant harbored the requisite "mental state" for murder. (AOB 107-108, 114-116; 14-RT 3195-3201, 3357; 3-CT 796 [CALJIC No. 3.32 (1988 ed.)]; Evid. Code, § 350 [only relevant evidence is admissible], § 310 [admissibility of evidence legal question]; *People v. Moore* (2002) 96 Cal.App.4th 1105, 1116-1117 [provision of CALJIC No. 3.32 requires substantial evidence of mental defect relevant to mens rea elements].) Consistent with that ruling, state law and the federal constitution entitled appellant to present and have the jurors consider his expert mental retardation evidence in determining

whether the prosecution had proved the mens rea elements of the charged crimes beyond a reasonable doubt. (AOB 118-121; see also *People v. Mills*, *supra*, 55 Cal.4th at pp. 670-672, and authorities cited therein; *Humanik v. Beyer* (3d Cir. 1989) 871 F.2d 432, 443; see also AOB 230-231, citing, inter alia, *Penry v. Lynaugh*, *supra*, 492 U.S. at pp. 322-323 [constitutional right to present and have jury consider mental retardation in mitigation and to counter premeditation and deliberation].)

However, Dr. Coleman testified that expert mental retardation diagnoses are "completely irrelevant" (14-RT 3222) to the jury's assessment of the mens rea elements of criminal offenses that should not be "listened to" (14-RT 3254) or "influence the [jury's] decision one way or another" (14-RT 3219-3221). (AOB 109-117, 124-129). In other words, contrary to the court's legal ruling and the law, Dr. Coleman improperly urged the jurors to completely disregard appellant's expert mental retardation evidence, and hence his mental retardation-based defense, as legally irrelevant to the question of mens rea. (See also *Humanik v. Beyer* (3d Cir. 1989) 871 F.2d 432, 443 ["if the defendant's evidence of mental disease or defect is sufficient to raise a reasonable doubt about the existence of the requisite intent [under state law], it cannot constitutionally be ignored"].)

Respondent does not dispute that the legal relevance and admissibility of appellant's mental retardation evidence to the issues of mens rea was a pure question of law that the trial court properly resolved in appellant's favor. (See RB 142-160.) Nor does respondent dispute that state law has decreed expert mental retardation evidence to be legally relevant to a jury's assessment of premeditation and deliberation and other specific intent mental states, thus conferring on defendants a right protected

by the federal constitution to present and have the jury consider such evidence on those questions. (See RB 142-160.)

Again, respondent's only real dispute is with appellant's assertion that Dr. Coleman's testimony violated these settled legal principles. (RB 148-150, 158-162.) Indeed, respondent contends that this Court has so held in previous cases. (RB 149-150.) Respondent is wrong on both counts.

a. Dr. Coleman Testified that Expert Mental Retardation Evidence Should not be "Listened to" As Legally Irrelevant to the Issue of Mens Rea and Therefore "Should Not Influence the [Jury's] Decision"

According to respondent, Dr. Coleman never suggested that expert mental retardation evidence is legally irrelevant. To the contrary, according to respondent, Dr. Coleman only "briefly mentioned the term 'relevance,'" which was a "logical point, not a legal one." (RB 148-149.) Instead, respondent repeatedly asserts, Dr. Coleman acknowledged that the jurors must consider appellant's expert mental retardation by testifying "that *the jurors should consider all the evidence*, but, demonstrated why appellant's expert witnesses had little to stand on, and therefore they provided no help to the jury here" (RB 162, italics added, citing 14-RT 3225, 3254-3255, 3259-3261; see also RB 149, citing 14-RT 3254 ["Dr. Coleman testified that to decide the truth the fact finder should 'rely on all the evidence'"]; RB 157, fn. 89 ["Dr. Coleman stated that all evidence should be considered"]). Therefore, according to respondent, his testimony was entirely appropriate. (RB 148-150, citing, inter alia, *People v. Babbitt* (1998) 45 Cal.3d 660, 699-700.) Respondent's contentions are plainly contradicted by the record.

When Dr. Coleman testified that the jurors should "rely on all of the

evidence," he explicitly excepted expert mental retardation evidence. (See RB 149, 157, 166, citing 14-RT 3244-3255.) At the cited portion of the record, defense counsel probed Dr. Coleman's testimony on direct-examination and asked if that opinion was that "a finder of fact such as the jury or a judge should decide a case solely on the facts surrounding the circumstances of the offense?" (14-RT 3254.) Dr. Coleman responded:

> Well, I would prefer to say it this way, that if you're – if they're going to decide the truth about what happened, of course, they would rely on all of the evidence. *But* when it comes to these mental questions that, in my opinion, a person's behavior as a juror determines it to be from the evidence and of the circumstances surrounding the behavior as they determine it to be is as reliable a guide as exists to determine what somebody's mental state was. *Whereas* the psychiatric and the psychological tests are completely unreliable, and if listened to or given weight will just simply bring confusion instead of something reliable like the evidence of the person's behavior. . . . My point is simply that the tools of psychiatry and psychology are in my opinion of no help in a jury or a judge deciding those mental issues.

(14-RT 3254-3255, italics added, cited at RB 49, 158, 162.)

Indeed, Dr. Coleman's testimony as a whole was replete with categorical pronouncements that any and all expert mental retardation opinions that are based on the administration of standardized, generally accepted intelligence and related testing are *irrelevant* to whether a defendant harbored mens rea elements like premeditation and deliberation and should not be "listened to" (14-RT 3254) or "influence the [jury's] decision one way or another" (14-RT 3219-3221, italics added). For instance, having elicited Dr. Coleman's testimony that all intelligence and other standardized testing used to diagnose mental retardation are inherently unreliable measures of intellectual functioning, the prosecutor explicitly

asked Dr. Coleman on direct-examination if "the results of those tests and the opinions based upon the results of those tests have any value to a jury[.]" (14-RT 3215;14-RT 3209-3210 [prosecutor asking if evidence would be of "any assistance to the jury?"].) According to Dr. Coleman "they are of no help whatsoever. In fact, I think they make the job more difficult." (RT 3215-3216.) "There is absolutely no correspondence" between test results and the "mental states that you're interested in here, premeditation, desire to – what your purpose was in committing a crime." (14-RT 32216.) Again, a person's "behavior," and only his behavior, "will tell us whether a person did or did not have the states of mind." (14-RT 3216.) At bottom, such evidence is "intentionally subjective and unreliable even when . . . used" to measure intelligence. (RT 3216.) "On top of that . . . . psychological tests and IQ tests" do not "help in the determination of whether or not the person had the kind of . . . mental states that you're interested in here . . . ." (14-RT 3216.)

Similarly, the prosecutor presented Dr. Coleman with a lengthy "hypothetical" asking him to assume not only the precise historical facts of this case but also that appellant had "never been diagnosed before as being mentally . . . retarded" before the crimes. (14-RT 3219-3221.) Based on those "hypothetically" assumed facts, the prosecutor asked Dr. Coleman if there were any "test" that would be relevant to the jurors' determination of whether appellant (as the subject of the "hypothetical") harbored premeditation, deliberation, or malice aforethought. (14-RT 3221.) Dr. Coleman responded that neither intelligence and other standardized testing results nor expert opinions based thereon "would add anything or subtract anything or in any way be *relevant to* . . . the questions which you're trying to answer about mental state. There is nothing in the bag of our tricks in the

mental health trade, testing, and examinations that we have which is of any help and in my opinion should not influence the decision one way or another." (14-RT 3221.)

The prosecutor pressed further, asking if the "Wechsler intelligence test" (a test administered by all of the defense experts in making their mental retardation diagnoses) should influence, or be considered by, jurors in deciding mens rea issues like premeditation and malice. (14-RT 3222.) Dr. Coleman responded that his "answer was the same" – such evidence is "*completely irrelevant* to the issue" of mens rea. (14-RT 3222, italics added.) Again, the WAIS-R "doesn't [even] measure intelligence"; it "certainly isn't going to help with the next questions about these mental issues." (14-RT 3222.)[30] For the same reasons, "the Bender Gestalt" test (also administered by the defense experts) would "absolutely not" "be of any assistance" to jurors in determining mental state. (14-RT 3223.) Asked if "the results of neuropsychological testing and the results" (which was administered and considered by Dr. Schuyler) "would have any or be of any assistance to the jury" in determining mental state, Dr. Coleman replied that they would not "for the same reasons." Neurological testing is an inherently unreliable way to assess cognitive functioning, brain damage, or mental retardation. (14-RT 3224-3225.) In any event, "if a person indeed has a problem with their brain in a way that's *relevant* for the questions

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[30] To be clear, Dr. Coleman first testified that the MMPI – on which none of the defense experts' mental retardation diagnoses were based – is "completely irrelevant" to a juror's determination of mental state. (RT 3222.) The prosecutor immediately responded by asking if the WAIS-R had any value to the jury, to which Dr. Coleman responded, "well, the answer is the same" (RT 3222), meaning that it – like the MMPI – is "completely irrelevant" (RT 3222).

you're trying to answer, that is if they're not capable of thinking a certain thing or planning, then the evidence for that would be the behavior that they are in engaged in, not in a test that you gave." (14-RT 3225, italics added, cited at RB 162.) Dr. Coleman similarly testified that the Gilmore Oral reading test "would [not] be of any assistance to a jury," because "there isn't any reading test which is *relevant* or helpful in these issues . . . ." (14-RT 3225, italic added, cited at RB 162.)

On cross-examination, defense counsel inquired into whether Dr. Coleman's direct-examination testimony was that "the only way that the conclusion can be arrived at that the mental deficit, whatever it was, played some part in the commission of the offense is by looking at all of the circumstances surrounding the offense" as opposed to tests results and expert opinions indicating "mental deficit" or retardation. (14-RT 3258-3259.) Dr. Coleman replied that this was an appropriate summary of his testimony: "Well, yes. . . . that's essentially what I'm saying is that whether or not mental state was impaired in some way so as to take away the criminal intent that the jury is looking at is . . . not assisted, that attempt is not assisted by the tests in psychiatric interviews but is only assisted by an evaluation of the behavior and the context of the behavior and what a layperson thinks it means." (14-RT 3259.) Put simply, a defendant's "behavior" at the time of the crimes is "the *only way* we have to legitimately determine what somebody's knowledge and intention was *as opposed to mental health techniques*." (14-RT 3260-3261, italics added, cited at RB 162.)

As the foregoing demonstrates, Dr. Coleman's testimony that the juror should "rely on all the evidence" explicitly excluded the expert mental retardation evidence. He repeatedly and emphatically testified that the

jurors should not consider, listen to, or be influenced by expert mental retardation evidence because it is "completely irrelevant" to their determination of mens rea. Respondent's contention to the contrary is a gross misrepresentation of the record. (RB 148-149 & fn. 98, 157, 162.)

As previously noted, respondent does not dispute that the legal relevance and admissibility of the expert mental retardation evidence were pure legal questions that had already been resolved in appellant's favor by the trial court. Nor does respondent dispute that the legal relevance of appellant's mental retardation evidence has been resolved in his favor by the Legislature which has conferred on defendants the right – protected by the federal constitution – to present and have the jurors consider such evidence in determining whether the prosecution has proved premeditation and deliberation and other mental states requiring specific intent. (AOB 118-122.) By asserting that expert "mental health" evidence like the defense mental retardation evidence here is never relevant in *any case* and should always be disregarded in assessing mens rea, Dr. Coleman "in effect urged the jury to disregard the Legislature's determination to the contrary." (*People v. Shipp, supra,* 59 Cal.2d at p. 854.)

b. Dr. Coleman's Testimony in this Case Exceeded the Bounds of Propriety this Court has Set in Previous Cases

Respondent contends that Dr. Coleman's testimony was proper in this case for the same reasons this Court has found his testimony to be proper in other cases. (RB 149-150.) As discussed in the opening brief, it is true that this Court has already addressed similar testimony by Dr. Coleman and spoken to the outer limits of its propriety. (AOB 125-129.) For instance, in *People v. Babbitt* (a case that did *not* involve mental retardation evidence), when defense counsel inquired of Dr. Coleman if the

thrust of his testimony was that jurors should not consider psychiatric or psychological testimony at all because it is unreliable, Dr. Coleman unequivocally responded in the negative, testifying: "*that would be trying to change the law because the law requires (the jury) to listen to it,* to consider it, and, in each expert's case to decide how much weight they want to give it." (*People v. Babbitt*, *supra*, 45 Cal.3d at pp. 698-699, italics added.) It was this testimony, this Court held, that kept Dr. Coleman's testimony within appropriate limits because he did *not* urge the jurors to disregard the law. (*Ibid.*) In contrast, however, the prosecutor in *Babbitt* exceeded those limits by relying on Dr. Coleman's testimony to argue that psychiatric and psychological evidence was legally irrelevant and had no place in the courtroom. (*Id.* at pp. 699-700.) This Court condemned the prosecutor's remarks as improperly encouraging the jurors to disregard the Legislature's determination to the contrary: the remarks "constituted an attack not against the specific testimony elicited about defendant" and were "directed not to evidence of defendant's mental state at the time of the offenses nor to the weight to be given the [defense] expert's testimony, but rather challenge[d] the entire system of permitting psychiatric testimony on behalf of criminal defendants." As such, they went "beyond the evidence and beyond any legitimate inference in the case. The law permits a defendant to assert a psychiatric defense and to have witnesses testify in his behalf. The courtroom is not the proper forum to challenge the propriety of this system." (*People v. Babbitt*, *supra*, at p. 700; accord, e.g., *People v. Smithey*, *supra*, 20 Cal.4th 936, 956-966 [in addressing Dr. Coleman's testimony, court implicitly recognized that it would be improper for him to have suggested that the jurors should "completely disregard" defense psychiatric evidence]; *People v. Danielson* (1992) 3 Cal.4th 691, 728-730

[same]; *People v. Ledesma* (2006) 39 Cal.4th 641, 713-714 [rejecting challenges to similar testimony by Dr. Coleman because the trial court "agreed that his testimony should be directed to the expert testimony in this case and sustained objections when Dr. Coleman appeared to be giving a general opinion concerning psychological evidence not specifically related to the present case"].)

Thus, this Court has drawn a line in the sand that Dr. Coleman may have narrowly avoided in prior cases, as respondent observes. However, he finally crossed it in this case. In contrast to his testimony in *Babbitt* explicitly emphasizing that he was *not* telling the jurors to disregard psychiatric evidence *because the law required that they "listen to it, consider it,"* Dr. Coleman did just the opposite in this case, telling the jurors that expert mental retardation evidence *not* be "listened to" (14-RT 3254) and "should not influence the [jury's] decision one way or another" (14-RT 3219-3221). Instead, like the prosecutor's *improper* remarks in *Babbitt*, Dr. Coleman's testimony was directed not to the weight of the particular evidence in this case but rather were directed – as respondent itself otherwise acknowledges – to the fundamental or complete unreliability and irrelevance of all such evidence "for purposes of determining legal issues" in *any* "legal setting" or "court of law" or in the "legal setting" of the "courtroom." (RB 135-137; *Babbitt*, *supra*, 45 Cal.3d at pp. 699-700.)

As such, Dr. Coleman "in effect urged the jurors to disregard the Legislature's determination to the contrary." (*People v. Shipp*, *supra*, 59 Cal.2d at p. 854.) Once again, "psychologists cannot upset the established statutory and caselaw of this state. Their appeal may more properly be addressed to the Legislature." (*People v. Ray*, *supra*, 252 Cal.App.2d at p. 952.) The trial court erred in permitting Dr. Coleman to do so over defense

counsel's repeated objections.

3. Appellant Has Not Forfeited His Challenges to the Substance of Dr. Coleman's Testimony on Appeal

Finally, respondent contends that appellant has forfeited his challenges to the substance of Dr. Coleman's testimony based on the same theories of forfeiture addressed and refuted in Part B-2, *ante*: (1) defense counsel's in limine objections were inadequate to satisfy Evidence Code section 353; (2) even if they satisfied section 353, defense counsel failed to renew those objections during Dr. Coleman's testimony; and (3) appellant cannot now elaborate on his trial objections with arguments and authorities that were not explicitly cited below. (RB 143-144, 152-153.) Respondent's contentions are equally without merit here.

As to defense counsel's objections immediately preceding Dr. Coleman's testimony, and as set forth in the opening brief (AOB 107-110), defense counsel anticipated that Dr. Coleman would testify that psychological experts like appellant's mental retardation experts "have absolutely no training by which they can render opinions within the courtroom setting. . . . Basically arguing that psychological experts have absolutely no expertise which qualifies them as experts to testify in a proceeding. . . . and saying that has absolutely no place within the courtroom setting and should be totally disregarded by the jury." (14-RT 3196.) Defense counsel argued that such testimony would be improper and therefore demanded an offer of proof. (14-RT 3195-3196.)

The prosecutor confirmed defense counsel's understanding of Dr. Coleman's proposed testimony and elaborated that he would be testifying to the "relationship between the psychiatric and psychological testimony in the courtroom setting and what relevance they have specifically with respect to

tests, what relevance they had in determining an individual's state of mind and his intelligence." (14-RT 3197.) Indeed, he would testify that the "doctors' . . . testimony" and the testing on which their opinions were based "are not relevant" and would explain "why they're not relevant." (14-RT 3197-3199.)

Defense counsel argued that Dr. Coleman's testimony in this regard would be improper rebuttal because the inherent reliability of the standardized tests administered in this case and legal relevance of mental retardation diagnoses based on their results are questions of law, not questions of fact for the jury. (14 3196-3200.) As defense counsel put it, Dr. Coleman's testimony would go the *legal* question of the admissibility of the evidence, analogous to a "*Kelly-Frye* scenario."[31] (14-RT 3196-3197; see RB 128.) Further, counsel argued, Dr. Coleman's testimony would effectively be telling the jury "what's relevant and what's not relevant testimony" (RT 3200), which would be improper because the "Court makes the rulings on what is relevant and what is not relevant, and is not for the expert to say what is relevant." (14-RT 3200.) And the court had already resolved those questions: "the Court has already admitted the testimony of the psychologists. There was no objection to those." (13-RT 3200.) "[S]ince [the defense mental retardation experts] have, in fact, been qualified as experts and allowed to present their expert testimony, that Dr.

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[31] Counsel was referring to *People v. Kelly* (1976) 17 Cal.3d 24 and *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, superceded as stated in *Daubert v. Merrill-Dow Pharmaceuticals* (1993) 509 U.S. 579, 587. Under *Kelly*, the "fundamental validity" or reliability of a new scientific method is an issue of admissibility to be resolved by court, whereas case-specific factors such as "careless testing" affects the weight of the evidence and not its admissibility].)

Coleman coming in and saying that has absolutely no place within the courtroom setting and should be totally disregarded by the jury[,] that would be an inappropriate opinion to render by Dr. Coleman." (14-RT 3196-3189.)

These are precisely the claims raised on appeal. Pursuant to the authorities discussed in Part B-2, *ante*, defense counsel's in limine objections were adequate to alert the court and the prosecutor to the reasons Dr. Coleman's testimony was objectionable and give them an opportunity to avoid error and therefore satisfied Evidence Code section 353. (See, e.g., *People v. Partida*, *supra*, 37 Cal.4th at p. 435, and authorities cited therein.) Having done so, "it [was] not necessary to repetitiously renew" their objections during Dr. Coleman's testimony. (*People v. Hall*, *supra*, 187 Cal.App.4th at p. 292.)

In any event, defense counsel *did* renew those objections throughout Dr. Coleman's testimony. Counsel repeatedly objected to Dr. Coleman's testimony on foundational, relevance, "improper rebuttal," and not "proper subject of expert testimony" grounds throughout the prosecutor's direct-examination of Dr. Coleman regarding the categorical0, inherent unreliability of intelligence and other testing and expert mental retardation diagnoses based thereon, to no avail. (14-RT 3209-3212, 3215-3216, 3219-3226.) So too did defense counsel repeatedly object to the prosecutor's questions about whether such evidence was "relevant" or of any "assistance" or "help" to the jury and Dr. Coleman's answers that it was not and therefore should not "influence the [jury's] determination" of mens rea. (*Ibid.*)

As it had in limine, the court summarily overruled defense counsel's objections. (*Ibid.*) To the extent that respondent contends counsel was

required to repeat his objections to every question on these topics and forfeited his claim by failing to do so, respondent is incorrect. Given the trial court's consistent rulings rebuffing defense counsel's objections on these topics, additional objections would not have been "useless . . . [and] would have served only to emphasize the matter to the jurors." (*People v. Zemavasky* (1942) 20 Cal.2d 56, 62.) Indeed, by repeatedly overruling the objections defense counsel made, the court implicitly conveyed to the jurors that they could – as Dr. Coleman urged – completely disregard as categorically unreliable and legally irrelevant appellant's mental retardation claim. (AOB 130-131, citing, inter alia, *People v. Hill*, *supra*, 3 Cal.4th at p. 1009 and *Caldwell v. Mississippi* (1985) 472 U.S. 320, 339.) Defense counsel was not required to make matters still worse by repeating futile objections in order to preserve them for appeal.

Finally, as further discussed in Part B-2, *ante*, it is entirely appropriate for appellant to expand and elaborate upon his trial objections with additional authorities and arguments on appeal. (RB 143-144, 152-153.) Dr. Coleman's testimony was improper because it went to the legal questions of the fundamental reliability and legal relevance of the expert mental retardation evidence underlying its admissibility that the trial court had already resolved in appellant's favor and was inconsistent with the court's legal rulings, as defense counsel argued below. For the same reasons, it was improper because it was inconsistent with the law compelling those rulings. "No useful purpose is served by declining to consider on appeal a claim that merely restates, under alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the

claim raised on appeal." (*People v. Yeoman* (2003) 31 Cal.4th 93, 117, 133; see also Part B-2, *ante*.) For all of these reasons, as well as those set forth in the opening brief, Dr. Coleman's testimony improperly encompassed legal questions and urged the jurors to disregard the law and appellant's corresponding constitutional rights to present and have the jury consider his mental retardation evidence in determining whether the prosecution had proved premeditation and deliberation and the specific intent elements of the charged crimes and special circumstance allegations. The court erred in admitting it over defense counsel's repeated objections.

E. Far From Curing its Erroneous Admission of Dr. Coleman's Testimony, The Trial Court's Instructions Only Compounded It

Next, respondent contends that the court cured any error in the admission of Dr. Coleman's testimony through its instructions. Specifically, respondent perfunctorily asserts that the trial court's provision of CALJIC No. 3.32 that the jurors "may" consider the mental retardation evidence, CALJIC No. 2.80 that the jurors "should give expert testimony the weight to which they think it is entitled," and CALJIC Nos. 2.83, 3.31. 3.31.5, and 8.11 corrected any misimpression left by Dr. Coleman's testimony. (RB 160-162; 3-CT 785, 788, 794-796.) Not so.

The only way the instructions could have cured Dr. Coleman's testimony would have been to directly correct it by explaining that: (1) identifying mental retardation requires diagnosis by a qualified mental retardation expert and is not a matter within the common experience of laypersons, contrary to Dr. Coleman's testimony; (2) absent proof that the defense experts' administration or interpretation of the intelligence or other testing was flawed in some specific way, the jurors could not reject their opinions merely on the ground that they were based on intelligence testing,

as Dr. Coleman urged them to do, because such testing is a necessary basis for all expert mental retardation diagnoses; and (3) while they were free to assign whatever weight they deemed appropriate to the defense experts' opinions, they could not disregard it as legally irrelevant, as Dr. Coleman urged them to do; to the contrary, expert mental retardation evidence is legally relevant to, and must be considered in assessing, whether the prosecution has proved the specific intent elements of first-degree murder, murder, the dissuading a witness charge, and the special circumstance allegations beyond a reasonable doubt.

Respondent does not explain how the court's provision of CALJIC Nos. 2.80, 2.83, 3.31. 3.31.5, 3.32 and 8.11 cured or corrected the misimpression left by Dr. Coleman's testimony in these regards or any other. (See RB 160-161.) This is no doubt because just the opposite is true: most of the cited instructions compounded, rather than cured, the erroneous admission of his testimony. (AOB 130-133.)

As discussed in the opening brief, the trial court seemingly approved Dr. Coleman's misstatements of the law by repeatedly and consistently overruling defense counsel's objections to them and ultimately instructing the jurors with CALJIC No. 3.32 that their consideration of appellant's mental retardation evidence was permissive ("you *may* consider" that evidence in assessing his "mental state") rather than mandatory ("you *must* consider" that evidence in assessing his mental state). (AOB 131.) Use of the term "may" conveys a choice or invitation that may be declined, as in "you may enter." (See, e.g., *Oxford American Dictionary* (1980 ed.) at p. 410 [defining "may" as "expressing permission . . . . ; *you may sit with us* is an invitation to do so . . . ."] Use of the term "must" on the other hand clearly conveys a command that must be obeyed, as in " you must enter."

(*Id.* at p. 439 [defining "must" as "express[ing] necessity or obligation . . . ."].) This instruction was erroneous on its face: "if the defendant's evidence of mental disease or defect is sufficient to raise a reasonable doubt about the existence of the requisite intent [under state law], it cannot constitutionally be ignored." (*Humanik v. Beyer*, *supra*, 871 F.2d at p. 443, and authorities cited therein; accord, *People v. Wells* (1949) 33 Cal.2d 330, 350-351, 355-357; AOB 119, 188-189, citing in accord, inter alia, *Martin v. Ohio* (1987) 480 U.S. 228, 233-234 and *Cool v. United States* (*per curium*) (1972) 409 U.S. 100, 103.) Instructions must be adequate to convey to the jury "that all the evidence, including the evidence going to [the defense] *must be considered* in deciding whether there was a reasonable doubt about the sufficiency of the state's proof of the elements of the crime." (*Martin*, *supra*, at pp. 229, 233-234, italics added.)

Although it is true that the 5th edition of CALJIC No. 3.32 used the permissive term "may," the trial court was "not obligated . . . to repeat the words chosen by the CJ committee however helpful they may be. Instead, the trial court's obligation is to state the law correctly." (*People v. Runnion* (1994) 30 Cal.App.4th 852, 858; accord *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 840.)[32] This duty is heightened where – as here – there is a danger that the jury will labor under a misimpression of the law absent correct instruction. (See, e.g., *People v. Livaditis* (1992) 2 Cal.4th 759, 784.) The trial court violated these duties by instructing the jurors with the permissive language of CALJIC No. 3.32. Certainly, it compounded the erroneous effect of Dr. Coleman's testimony by conveying that they were

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[32] The 6th edition of the instruction changed the language by using the mandatory term "should." (CALJIC No. 3.32 (9th ed. 1996).)

free to disregard appellant's mental retardation evidence, just as he urged them to do. (AOB 130-132.)

Respondent counters that this Court has approved the provision of CALJIC No. 3.32 in other cases and therefore concludes that it properly guided the jurors' consideration of the mental retardation evidence in this case and cured any erroneous impression given by Dr. Coleman's testimony. (RB 162.) Appellant predicted respondent's argument and reliance on those very cases in his opening brief and explained why they are inapplicable; as the state provides no response to this argument, appellant incorporates it here by this reference (AOB 131-132.

Respondent's unadorned reliance on the court's provision of CALJIC No. 2.80 as somehow curing or correcting the misleading effect of Dr. Coleman's testimony is similarly without merit. (RB 160-161.) That instruction told the jurors: "you are not bound to accept an expert opinion as conclusive, but should give it the weight to which you find it to be entitled. *You may disregard any such opinion if you find it to be unreasonable.*" (CT 785, italics added.) While it is certainly true that jurors may "disregard" an expert's opinion as "unreasonable" (Pen. Code, § 1127b), they may *only* do so "*after considering* the expert's opinion, reasons, qualifications, and credibility" (*People v. McDonald* (1984) 37 Cal.3d 351, 371, italics added) and only if "there are circumstances justifying a determination that it has no probative value or it is unreasonable" (*People v. Long* (1940) 15 Cal.2d 590, 607). Jurors cannot ignore or disregard expert opinion arbitrarily or on improper basis. (*People v. Long*, *supra*, at p. 607; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890; *Conservatorship of McKeown* (1994) 25 Cal.App.4th 502, 507-510.) Although other standard instructions explicitly state as much (BAJI No. 2.40 [while jurors can rejected expert

opinion testimony, they cannot "arbitrarily or unreasonably disregard" it]; CALJIC Nos. 3.18 [accomplice testimony]; CALJIC No. 3.20 [in custody informants].) Inexplicably, CALJIC No. 2.80 does not.

As demonstrated, Dr. Coleman urged the jurors to disregard the defense experts' mental retardation opinions for improper and arbitrary reasons inconsistent with the law. (Cf. *State v. White* (Ohio 2008) 885 N.E.2d 905, 914-915 [because mentally retarded people may appear "normal" to nonexperts, trial court abused its discretion in rejecting testimony of two experts that defendant was mentally retarded based on lay witness testimony that he appeared to function normally in some areas]; *Holladay v. Campbell* (N.D. Ala 2006) 463 F.Supp.2d 1324, 1344, aff'd by *Holladay v. Allen* (11th Cir. 2009) 555 F.3d 1346, 1362 [magistrate judge erred in rejecting defense expert's mental retardation opinion based on contrary opinion of putative expert who incorrectly dismissed results of intelligence testing despite lack of evidence that they were incorrectly administered and who incorrectly testified that intelligence testing was unnecessary to rule out mental retardation diagnosis].) CALJIC No. 2.80 seemingly endorsed that testimony, telling the jurors that they were free to disregard the mental retardation experts' opinions, just as Dr. Coleman urged them to do, but failing to inform them that they could *not* completely ignore those opinions or disregard them on an arbitrary basis, much less on the improper and arbitrary bases Dr. Coleman urged. Certainly, the court's provision of CALJIC No. 2.80 did not cure the erroneous misimpression left by Dr. Coleman's testimony, as respondent contends.

As to CALJIC No. 2.83 (RB 162), it told the jurors to resolve conflicts in expert testimony by weighing one expert's opinion against another based on their relative qualifications and credibility, the reasons for

their opinions, and the matters on which they are based. (3-CT 788.) Since the prosecution's only rebuttal "expert" was Dr. Coleman, the jurors undoubtedly applied CALJIC No. 2.83 to the conflicts between his testimony and that of the defense mental retardation experts. Hence, CALJIC No. 2.83 only fortified the court's error in permitting Dr. Coleman to testify as an "expert" to rebut, or provide expert testimony "conflicting" with, the defense experts' testimony when he was not qualified to do so. It also permitted the jurors to weigh the "relative qualifications" of Dr. Coleman against those of the defense experts and improperly declare Dr. Coleman – billed by the prosecutor as a renowned expert, author, and scholar, influential in shaping the law throughout the country – the winner. (15-RT 3457; see AOB 135-136.) And by telling the jurors that they could disregard expert opinions based on the matters on which they are based, CALJIC No. 2.83 (like CALJIC No. 2.80) permitted the jurors to improperly disregard the defense experts' opinions for the very reasons Dr. Coleman urged. Thus, like CALJIC Nos. 3.32 and 2.80, CALJIC No. 2.83 not only failed to cure the court's erroneous admission of Dr. Coleman's testimony, it increased the likelihood that the jurors were misled by it to appellant's considerable detriment.

Respondent does not explain how CALJIC Nos. 3.11, 3.11.5, or 8.11 cured the court's error nor is such explanation apparent from their face. (RB 162.) None of those instructions address any other subject that can even conceivably be considered as curative of Dr. Coleman's testimony.

Finally, although respondent argues that the court's instructions cured any misimpression from Dr. Coleman's testimony, respondent contends that appellant has waived or forfeited his right to rebut that argument, or otherwise contend that the court's instructions compounded

the prejudicial impact of Coleman's testimony, because he did not object to the instructions provided or request further instructions but rather joined in the instructions given. (RB 161.) Again, although appellant predicted and refuted this argument in his opening brief, respondent simply ignores it. (RB 161; compare AOB 130-133, fn. 35, 214-216.) Its omission is telling.

Certainly, to the extent that respondent argues the instructions cured the court's erroneous admission of Dr. Coleman's testimony, the waiver rule does not bar from appellant from rebutting that argument on appeal. (Cf. *Fratessa v. Roffy* (1919) 40 Cal.App.179, 188-189 [rule against raising claim for first time in reply brief is "hardly applicable" when "contention of appellant is made in response to the claim of respondents in their brief"].) Moreover, because the reviewing court must consider the entire record in assessing the harm caused by an evidentiary error, it is appropriate for a party to address any curative or exacerbating effect of the jury instructions (See, e.g., *People v. Guiton* (1993) 4 Cal.4th 1116, 1130; *Rose v. Clark* (1986) 478 U.S. 570, 583.) Finally, because appellant contends that the instructions were affirmatively misleading or erroneous and contributed to the reasonable likelihood that the jurors were misled about the critical legal principles governing their consideration of his defense in violation of his substantial rights, his claims are reviewable on appeal under Penal Code section 1259 notwithstanding the absence of an instructional objection or request below. (AOB 131-133; see also *People v. Letner* (2010) 54 Cal.4th 99, 180 [claim that combination of instructions and other misstatements of law created reasonable likelihood of misleading jurors in violation of defendant's substantial rights is reviewable on appeal under section 1259].) Further, "[t]he invited error doctrine will not preclude appellate review" where, as here, "the record fails to show that counsel had a tactical reason

for requesting or acquiescing" in an instructional error. (*People v. Moon* (2005) 37 Cal.4th 1, 27; AOB 215-216; see also Argument V-B-1, *post*)

For these and all of the other reasons set forth in the opening brief, the trial court's instructions only compounded the impropriety of Dr. Coleman's testimony and created a reasonable likelihood that the jurors were misled about the legal principles critical to a meaningful opportunity for appellant to present his defense, holding the prosecution to its burden of proof beyond a reasonable doubt, and ensuring a fundamentally fair trial that produced highly reliable verdicts that he was guilty of a capital offense. (AOB 118-132.)

F. The Net Effect of the Court's Erroneous Admission of Dr. Coleman's Testimony Compounded by Its Instructions Violated Appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment Rights, Which is Properly Reviewable On Appeal Despite Defense Counsel's Failure to Specifically Cite those Federal Constitutional Provisions in Support of their Objections Below

As appellant further argued in the opening brief, the net effect of the court's admission of Dr. Coleman's testimony over counsel's repeated objections and its instructions was to permit the jurors to completely disregard appellant's mental retardation evidence in determining whether the prosecution had proved the specific intent elements of the crimes, just as Dr. Coleman urge them to do. In other words, the jurors were effectively told that they were free to completely disregard appellant's mental-retardation based defense to the mental state elements of premeditation and deliberation and the specific intent to kill Ms. Diaz for the purpose of preventing her possible testimony against him in a future criminal proceeding. In so doing, the trial court not only violated state law but also reduced the prosecution's burden of proving those mental state elements

beyond a reasonable doubt and deprived appellant of his federal constitutional rights to due process, a fair trial, a meaningful opportunity to present his defense, and reliable jury verdicts that he was guilty of a capital offense and that the death penalty was warranted in this case. (AOB 91-92, 116-150; see also AOB 195, citing, inter alia, *Taylor v. Kentucky* (1978) 436 U.S. 478, 486-490 & fn. 14.)

Respondent's only answer to the merits of appellant's constitutional claims is a perfunctory one that "nothing in Dr. Coleman's testimony prevented appellant from having a meaningful opportunity to present his defense . . . . [or] precluded [him] from presenting any relevant evidence, including the opinions of his experts and their testimony about the methods, tests, and results they used to fashion their opinions about appellant's mental retardation." (RB 158-159.) But this is no answer to appellant's claims at all.

As discussed in the opening brief, appellant was not only "constitutionally entitled to present all relevant evidence of significant probative value in his favor" (*People v. Marshall* (1996) 13 Cal.4th 799, 836), but to a "*meaningful* opportunity to present a complete defense" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690, italics added). (AOB 118-122). Appellant's presentation of his expert mental retardation evidence was meaningless if the jurors could completely disregard it as inherently unreliable and legally irrelevant in any "courtroom" or "legal setting." (RB 135-137.) Hence, the trial court's rulings and instructions permitting, and Dr. Coleman's testimony encouraging, the jurors to do just that ran afoul of appellant's state and federal constitutional rights. (AOB 118-122, 130-150; accord, *Humanik v. Beyer*, *supra*, 871 F.2d at 440-443.)

Otherwise, respondent contends that appellant has forfeited his right

to challenge the errors' violation of his federal constitutional rights because he failed to cite the federal constitution in support of his objections below. (RB 131-133, 144, 152-153.) This contention is equally without merit.

As discussed in Part C-3, *ante*, defense counsel properly objected to the admission of Dr. Coleman's testimony on the grounds that it effectively and improperly told the jurors to completely disregard appellant's expert mental retardation evidence as legally irrelevant and inherently unreliable. On appeal, appellant argues that the admission of Dr. Coleman's testimony was wrong for all of the reasons argued below and had the additional legal consequence of violating his federal constitutional rights to due process, a meaningful opportunity to present his defense, and acquittal on less than proof beyond a reasonable doubt on all elements of the charged crimes. (AOB 91-92, 116-150; see *People v. Boyer* (2006) 36 Cal.4th 412, 441 & fn. 17, and authorities cited therein.) Thus, appellant's claims "involve application of the same facts or legal standards defendant asked the trial court to apply, accompanied by a new argument that the trial error . . . had the additional legal consequence of violating the federal Constitution. To that extent, defendant has not forfeited his new constitutional claims on appeal." (*People v. Thompson, supra,* 49 Cal.4th at p. 95, fn. 7, and authorities cited therein; see also AOB 182-183.)

Finally, in a single sentence, respondent contends that appellant's federal constitutional claims are not properly presented to this Court because they are raised in a "perfunctory" fashion without "demonstrat[ing] how his listed federal constitutional right were infringed." (RB 144.) Respondent's "argument" is fraught with irony. Appellant presented over 35 pages of points and authorities explaining how and why the court's admission of Dr. Coleman's testimony, compounded by its

instructions, violated his federal constitutional rights. (AOB 116-150.) This can hardly be characterized as a "perfunctory" argument, notwithstanding respondent's single-sentence "argument" to the contrary. (RB 144.)

For all of these reasons, as well as those set forth in the opening brief and further below, the trial court's errors violated not only state law but also appellant's federal constitutional rights. His federal constitutional claims are properly raised and presented to this Court for decision on their merits.

G. Reversal is Required

In his opening brief, appellant argued that the errors were prejudicial and violated his federal constitutional rights to a fair trial and highly reliable capital murder verdicts because: (1) Dr. Coleman's testimony influenced the jurors to reject appellant's mental retardation claim because his supporting evidence was inherently unreliable and disregard it in assessing mental state on that basis (AOB 137-143); (2) Dr. Coleman's testimony, compounded by the court's instructions, influenced the jurors to disregard appellant's mental retardation evidence as legally irrelevant to their assessment of mens rea (AOB 134-137); and (3) these adverse findings in turn influenced the jurors first-degree murder verdicts. (AOB 143-150.) Certainly, absent the errors it is reasonably probable that at least one juror would been persuaded that appellant is mentally retarded, appropriately considered his mental defect on the questions of mens rea, and had reasonable doubt that his commission of the crimes was the product of the cold calculus and careful consideration of consequences demanded for

premeditation and deliberation. (AOB 91-92, 134; see also Part 1, *post.*)[33]

Respondent does not dispute that the jurors rejected appellant's mental retardation claim as inherently unreliable, just as Dr. Coleman urged them to do. (RB 170-177; compare AOB 137-143.) Instead, respondent contends that the jurors would have rejected and disregarded that evidence even if they had not heard Dr. Coleman's testimony because there existed strong, independent evidence discrediting it. (RB 170-177.) In other words, respondent essentially argues that Dr. Coleman's testimony was cumulative of other evidence discrediting appellant's mental retardation evidence and hence its admission was harmless. (*Ibid.*)

In any event, respondent contends that appellant's behavior in committing the crimes constituted such overwhelming evidence of premeditation and deliberation that any error was harmless. (RB 162-169.) In other words, respondent appears to contend that even if the jurors would have been persuaded that appellant is mentally retarded absent Dr. Coleman's testimony, they would still have found that he premeditated and

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[33] As noted in the opening brief, because the trial court instructed the jurors that they were limited to considering the mental retardation evidence in determining appellant's guilt of murder "as charged in counts I and II" and thus effectively instructed them that they were prohibited from considering it in determining his guilt of the dissuading a witness charge in count IV and the preventing witness testimony special circumstance allegation, appellant's harmless error analysis in this argument is limited – as were the jurors – to considering the impact of Dr. Coleman's testimony on the murder verdicts. (AOB 143, fn. 38 & 150, fn. 38.) The prejudicial effect of the instruction erroneously precluding the jurors from considering appellant's mental retardation-based defense on the crime charged in count IV and the special circumstance allegations, along with the cumulative effect of that error and Dr. Coleman's testimony, is addressed in Arguments V and VI, *post.* (See also AOB 216-221, 223-228.)

deliberated the killings. (*Ibid.*) Respondent's arguments are without merit.

1. Applicable Standards of Harmless Error Review

At the outset, it is important to clarify the appropriate standards of harmless error review applicable to appellant's claims. Because the errors violated his federal constitutional rights, appellant argued in the opening brief that respondent bears the burden of proving "beyond a reasonable doubt that the [constitutional violation] complained of did not contribute to the verdict obtained." (*Chapman v. California* (1967) 386 U.S. 18, 24; accord *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; AOB 133.) (Hereafter "*Chapman* test" or "*Chapman* standard".)

Respondent's only harmless error "analysis" under *Chapman* is as follows:

> Given the strength of the prosecution's case, which included significant mental state evidence, strong evidence demonstrating the inaccuracy of the testing involved, and defendant's own self-incriminating statements, it is not reasonably probable that a different result would have been obtained absent Dr. Coleman's testimony or the reading of CALJIC No. 3.32 to the jury. *And, for the same reasons, the same alleged errors were harmless beyond a reasonable doubt.*

(RB 177, italics added; see also RB 163 & fn. 100.) Respondent's apparent understanding of the *Chapman* standard is fundamentally flawed for several reasons.

First, it is clear that respondent erroneously equates the standard for establishing prejudice for state law violations, under which the defendant bears the burden of proving prejudice by demonstrating a reasonable probability that the result of the proceeding would have been more favorable absent the error (*People v. Watson* (1956) 46 Cal.2d 818, 835-

836) with the standard for determining prejudice from federal constitutional violations, under which prejudice is presumed and respondent bears the burden of rebutting that presumption beyond a reasonable doubt (*Chapman v. California*, *supra*, 386 U.S. at p. 24). Contrary to respondent's understanding, even if there are "reasons" why a defendant has not satisfied the *Watson* test, it does not follow that the state has satisfied the *Chapman* test "for the same reasons." (RB 177.)

Similarly, respondent's contention that the jurors would have rejected appellant's defense and returned first-degree murder verdicts even if they had not heard Dr. Coleman's testimony, fortified by the court's instructions, is inconsistent with the *Chapman* standard because the jurors in this case *did* hear Dr. Coleman's testimony and the bolstering instructions. (RB 177.) As the high court has explained, under the *Chapman* standard:

> the reviewing court [must] consider not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. [Citation.] Harmless-error review looks, we have said, to the basis on which "the jury *actually* rested its verdict." [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.

(*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279, italics original.) For these reasons alone, respondent has failed to satisfy its burden under *Chapman*.

Appellant further argued that the effect of the errors deprived him of his federal constitutional rights to a fair trial and highly reliable jury findings that he was guilty of a capital offense. (AOB 91-92, 134-150, citing, inter alia, *Ege v. Yukins* (6th Cir. 2007) 485 F.3d 364, 375-378 and

Chambers v. Mississippi (1973) 410 U.S. 284, 290, 302-303 & fn. 3; see also AOB 182-183, citing, inter alia, *Kyles v. Whitley* (1995) 514 U.S. 419, 434-438, 444; AOB 223-228 [Argument VI].) In this regard, it is well settled that even if an error does not itself violate the federal constitution, its effects on the trial as a whole may "so infuse[] the trial with unfairness as to deny due process of law.'" (*Estelle v. McGuire* (1991) 502 U.S. 62, 75, and authorities cited therein; accord, *Taylor v. Kentucky*, *supra*, 436 U.S. at pp. 484-90; *Kentucky v. Whorton* (1979) 441 U.S. 786, 788-790 (*per curiam*); *Chambers v. Mississippi*, *supra*, at pp. 290, 302-303 & n. 3; *Green v. Georgia* (1979) 442 U.S. 95, 96-97 (*per curium*); *Kyles v. Whitley*, *supra*, at pp. 434-438; *Strickland v. Washington* (1984) 466 U.S. 668, 687-689; *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.)

This principle is based on the fundamental proposition that the Fifth and Fourteenth Amendments guarantee every criminal defendant a fundamentally "fair trial, understood as a trial resulting in a verdict worthy of confidence," (*Kyles v. Whitley, supra*, 514 U.S. at p. 434), or one "whose result is reliable" (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-689). Hence, the test for a fair trial violation is whether an error undermines confidence in the reliability of the result; "[a] reasonable probability" that the result would have been different absent the error "is a probability sufficient to undermine confidence in the outcome" and establish a fair trial violation. (*Strickland*, *supra*, at p. 604; accord, *Kyles, supra, at p.* 434; see AOB 182-183, citing, inter alia, *United States v. Avila* (7th Cir. 2009) 557 F.3d 809, 821-822, *Anderson v. Goeke* (8th Cir. 1995) 44 F.3d 675, 679, and *Kirkpatrick v. Blackburn* (5th Cir. 1985) 777 F.2d 272, 278-279 & fn. 9; accord, e.g., *Brooks v. Kemp* (11th Cir. 1985) 762

F.2d 1383, 1399-1402 & fn. 28 (en banc), vacated on other grounds, 478 U.S. 1016 (1986), reinstated 809 F.2d 700 (11th Cir. 1987) [*Strickland's* "reasonable probability test to elaborate the underlying principle" of "fundamental fairness" is the uniform standard "applicab[le] to other areas in which fundamental fairness is the guide"]; *Rogers v. Lynaugh* (5th Cir. 1988) 848 F.2d 606, 608; *Sims v. Stinson* (S.D.N.Y. 2000) 101 F.Supp.2d 187, 194-199, and authorities cited therein;.)

Pursuant to these principles and as discussed in the opening brief, where erroneously admitted expert testimony is "material" – i.e., it is reasonably probable that the verdicts would have been more favorable in its absence – its admission results in a fair trial violation. (AOB 91-92, 134, citing, inter alia, *Ege v. Yukins*, *supra*, 485 F.3d at pp. 375-378; accord *Snowden v. Singletary* (11th Cir. 1998) 135 F.3d 732, 737-739 [erroneous admission of expert testimony resulted in fundamentally unfair trial].) As further discussed in the opening brief, the erroneous admission of Dr. Coleman's testimony deprived appellant of a fair trial under this test. (AOB 91-92, 134.)

Significantly, respondent agrees that even otherwise nonconstitutional errors result in a fair trial violation if it "reasonably probable" that the result would have been different in their absence. (RB 243.) Although respondent does not directly address the merits of appellant's fair trial claim here, it effectively does so in arguing that the errors were harmless under the state law test for a miscarriage of justice as articulated in *People v. Watson*, *supra*, 46 Cal.2d at pp. 835-836. (RB 163, 177.)

The *Watson* test for a "miscarriage of justice" under the California constitution is essentially identical to the test for fundamental unfairness

under the federal constitution. (See, e.g., *Richardson v. Superior Court*, *supra*, 43 Cal.4th at p. 1050, and authorities cited therein [*Watson* and fair trial violation test as articulated in *Strickland* essentially identical]; *People v. Watson*, *supra*, 46 Cal.2d at p. 836 [California's miscarriage of justice test reflects "the constitutional requirements of a fair trial and due process"]; Cal. Const., art. VI, § 13.) That is, the test for determining whether a "miscarriage of justice" has occurred is whether "'after an examination of the entire cause, including the evidence,' [the reviewing court] is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson*, *supra*, at pp. 835-836.)

This Court has ""made clear that a 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*."' [Citations.]" (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050.) Because California requires unanimous jury verdicts, this standard is satisfied if it there is a reasonable chance that even a *single* juror might have voted differently absent the error. (AOB 144, fn. 37, 163-164; see, e.g., *Wiggins v. Smith* (2003) 539 U.S. 510, 537; *People v. Soojian* (2010) 190 Cal.App.4th 491, 520, and authorities cited therein.)

In arguing that the errors were harmless under this standard, respondent focuses on the evidence supporting the verdicts without any discussion of how Dr. Coleman's erroneously admitted testimony might have *influenced the jury's* view of that evidence. (See RB 162-177.) Respondent's analysis is flawed.

In determining whether an error prejudicially influenced the jury, a reviewing court must consider the entire record, including the jury instructions and the arguments of counsel, and not merely the strength or

weakness of one party's evidence. (See, e.g., *Kyles v. Whitley*, *supra*, 514 U.S. at 434-438; *Strickland v. Washington, supra,* 466 U.S. at 687-689; *Kentucky v. Whorton* (1979) 441 U.S. 786, 788-790 (*per curium*); *Taylor v. Kentucky, supra,* 436 U.S. at 484-490; *Chambers v. Mississippi, supra,* 410 U.S. at pp. 290, 302-303 & fn. 3; *People v. Watson*, *supra*, 46 Cal.3d at p. 836; see also, e.g., *Williams v. Taylor* (2000) 529 U.S. 362, 398-399 [lower court erred in finding no reasonable probability of different result in absence of error, and hence no fair trial violation, based solely on strength of prosecution's case without considering totality of all of the relevant record evidence].) In other words, the reviewing court must consider not only the quantity of the evidence, but the nature of the error itself and its "qualitative impact" on the jurors' assessment and weight of the evidence as a whole (*United States v. Harrison* (9th Cir. 1994) 34 F.3d 886, 892) or "the relation of the error asserted to casting the balance for decision on the case as a whole . . . ." (*Kotteakos v. United States* (1946) 328 U.S. 750, 762 [discussing appropriate harmless error analysis for nonconsistitutonal violations of federal law]).

Under these principles and pursuant to the many authorities cited in the opening brief but ignored by respondent, it is well recognized that errors which "strike at the heart" of the sole defense or the critical issues that the jury must decide are usually prejudicial *under any standard.* (AOB 134.) Indeed, as the United States Supreme Court has held, when the net effect of even otherwise nonconstitutional errors makes a defense "far less persuasive than it might [otherwise] have been" in their absence, the defendant has been deprived of his right to a fundamentally fair trial in violation of due process. (*Chambers v. Mississippi*, *supra*, 410 U.S. 284, 290, 302-303 & fn. 3; accord, *Parles v. Runnells* (9th Cir. 2007) 505 F.3d

922, 927.) This is just such a case.

2. Respondent's Contention that the Errors were Harmless Because the Jurors Rejected Appellant's Mental Retardation Claim Based on Evidence Independent of Dr. Coleman's Testimony is Without Merit

As noted above, respondent and appellant agree that the jurors rejected the unanimous expert diagnoses that he is mentally retarded and therefore disregarded his mental retardation claim in determining whether he harbored the mens rea elements of the charged crimes. (RB 170-177; see AOB 134-143.) Respondent and appellant's disagreement lies with the *cause* of those adverse findings.

Appellant maintains that those findings were influenced by Dr. Coleman's testimony. (AOB 134-143.) In its absence, there is a reasonable chance that at least one juror would have been persuaded that appellant was mentally retarded. Respondent, on the other hand, maintains that there was such strong evidence negating appellant's mental retardation claim independent of Dr. Coleman's testimony that the jurors would necessarily have rejected his claim even in its absence. (RB 170-177.) Put another way, respondent essentially argues that Dr. Coleman's testimony was cumulative of other evidence discrediting appellant's mental retardation evidence and therefore its admission was harmless.

Respondent contends that essentially two categories of independent evidence discredited the defense expert's unanimous opinions that appellant is mentally retarded: (1) the People's lay and anecdotal evidence regarding "appellant's abilities" (RB 172-177; compare AOB 137-143); and (2) evidence that the WAIS-R is inherently unreliable and thus the defense experts' diagnoses based thereon were "highly questionable" (RB 170-172).

As a preliminary matter, the trial court did not agree with respondent's view of the evidence. As discussed in Argument I, *ante*, the trial judge – who, unlike the jurors, presumably knew the law and thus presumably knew that Dr. Coleman's testimony about the reliability of intelligence testing and expert mental retardation diagnoses was contrary to the law – found that appellant was "slightly" or mildly mentally retarded based on "overall test[ing]" and "actual performance." (16-RT 3785.) In making this finding, the trial judge gave "very little weight to Dr. Coleman's testimony . . . ." (16-RT 3785; see *Holladay v. Allen*, *supra*, 555 F.3d at p. 1363 [trial judge's finding in mitigation that defendant was "slightly mentally retarded" viewed as finding of mild mental retardation and later considered with other evidence to conclude that defendant had satisfied definition of mental retardation within the meaning of *Atkins*].) In other words, absent Dr. Coleman's testimony – which the trial court effectively disregarded based on its unique legal knowledge – the trial court found that appellant was mildly mentally retarded. This finding is compelling evidence that the jurors would have reached a similar finding in the absence of Dr. Coleman's testimony.

In any event, the evidence on which respondent relies did not even conflict with the expert mental retardation diagnoses, much less negate it. Even assuming arguendo that there was competent, conflicting evidence going to the critical mental retardation question on which appellant's defense hinged, it cannot be seriously disputed that Dr. Coleman's testimony influenced the jurors' resolution of any conflicts against appellant.

a. The Lay and Anecdotal Evidence Was Not Inconsistent with the Experts' Mental Retardation Diagnoses; Even it If it Were, it Is Reasonably Probable That Dr. Coleman's Testimony Influenced the Jurors to Resolve Any Conflicts In the Evidence Against Appellant

As the prosecutor argued below, respondent argues on appeal that its anecdotal evidence regarding appellant's abilities or seeming abilities to function in certain areas, the lay opinions of two former school teachers and a "counselor" (or administrator), and the hearsay conclusions contained in appellant's school records, all contradicted the unanimous defense experts' opinions that appellant was mentally retarded. (RB 172-177.) Of course, appellant predicted this argument and refuted it at length in the opening brief. (AOB 137-143.) Rather than repeat that argument here, appellant incorporates it by this reference.

Respondent does, however, build on some of the arguments it made at trial that warrant further reply here. First, as appellant predicted in the opening brief, respondent argues that appellant's mental retardation evidence was refuted by the prosecution's evidence that he was able to drive, had a California's driver's license, had been employed sporadically in a factory job, written letters in jail like People's Exhibit 19, and read – or appeared to read – the newspapers covering his trial. (RB 172-177.)

However, as appellant argued in the opening brief, there was no evidence to support the notion that a person's abilities (or seeming abilities) to function in these areas is inconsistent with mild mental retardation. (AOB 137-140.) To the contrary, all of the defense experts testified that these abilities are *not* inconsistent with mild mental retardation. (*Ibid.*, citing 12-RT 2894-2895, 2938; 13-RT 3045-3047, 3065, 3077, 3122-3123,

3153-3155, 3164, 3166.)

Respondent attempts to counter appellant's argument in this regard by seizing on the full scale IQ score of 47 produced by Dr. Christensen's initial testing and her testimony that someone with an IQ of 47 typically would not have those abilities. (RB 172-173.) Respondent's argument is a red herring.

Appellant's claim was not that he had an IQ of 47. His claim was that he is mildly mentally retarded. (15-RT 3416-3420.) As this Court has recognized in this regard, mental retardation "is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence." (*In re Hawthorne*, *supra*, 35 Cal.4th at p. 49; accord, *People v. Superior Court* (*Vidal*) (2007) 40 Cal.4th 999, 1012.) Nor does a person "earn a specific IQ – we actually earn a range of IQ's that most likely includes our true IQ." (Kaufman (2009) *IQ testing 101* at p. 143; accord, e.g., *Vidal*, *supra*, at p. 1007, fn. 4 ["every intelligence test has a standard error of measurement (SEM), a range lying around the tested score within which the true IQ is likely to lie"]; *Money v. Krall*, *supra*, 128 Cal.App.3d at pp. 386-397, 400-401 [true intelligence measured within range or band rather than by a specific score]; *Thomas v. Allen* (N.D. Ala. 2009) 614 F.Supp.2d 1257, 1270 [defendant's true "intellectual functioning ability" fell within a band of scores].) While Dr. Christensen's initial testing did produce a full scale IQ score on the WAIS-R of 47 (13-RT 2992-2993, 3017), the defense also presented evidence that appellant obtained a full scale WAIS-R score of 59 on Dr. Powell's subsequent testing (12-RT 2888) and a full scale WAIS-R score of 66 on Dr. Schuyler's final round of testing (13-RT 3147). All of these

scores fell within a range of mental retardation in which his true intelligence quotient lies. (12-RT 2879, 2880-2881, 2885, 2888-2892; 13-RT 3031-3032, 3137, 3147, 3164; *Vidal*, *supra*, 40 Cal.4th at p. 1007, fn. 4.) Based in part on these scores, appellant was diagnosed as mildly mentally retarded and defense counsel argued that all of the evidence demonstrated that appellant is mildly mentally retarded. (12-RT 2947, 13-RT 3164, 15-RT 3416-3420.)[34]

Indeed, neither appellant's mental retardation claim nor Dr. Christensen's ultimate mental retardation diagnosis depended on the accuracy of the initial full scale IQ score of 47 her testing produced. Dr. Christensen later reviewed Dr. Powell's subsequent evaluation and was questioned about his opinion and the score of 59 he achieved with his testing; Dr. Christensen did not disagree with the score of 59 his testing produced or otherwise question its reliability as a reflection of the range in which appellant's true intelligence quotient lay. (See, e.g., 13-RT 3025-3027, 3023-3033.)

Evidently, Dr. Christensen had not actually reviewed Doctor Schuyler's evaluation by the time she testified, presumably because it was

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[34] Furthermore, all of the experts testified that their mental retardation diagnoses did not rest solely on the results they achieved from intelligence testing, but also considered various other factors, including the Wide Range Achievement Test, Street Survival Skills Questionnaire and portions of the Woodcock-Johnson Psychoeducational Test Battery, which are used to measure and assess adaptive skills and functioning (12-RT 2885-2888, 2899; 13-RT 2993, 2997-2998, 3017, 3019-3022, 3037-3039, 3147), his educational and family history (12-RT 2956-2957; 13-RT 3178), their personal interviews with appellant, consideration of other testing and evaluations, and their clinical judgment (12-RT 2891-2892, 2905, 2926-2927, 2933, 2947; 13-RT 3022-3024, 3041-3042, 3086, 3092-3093, 3110-3113, 3137-3139, 3159-3161, 3164-3167, 3172).

not available yet. (13-RT 2979-2980.) However, she was informed that appellant had achieved a higher full scale score (though still in the mentally retarded range) on testing administered after Dr. Powell's and both parties explored her opinion about it. (13-RT 3032-3033, 3079, 3121-3123.)[35] Dr. Christensen did not testify that this score was any less accurate or reliable than the score she achieved in her initial testing or inconsistent with her essential diagnosis of mental retardation. To the contrary, she acknowledged that the initial score of 47 her testing produced was likely at the very bottom of appellant's possible range of intelligence, and thus lower than his *true* intelligence quotient, due to a number of factors. (13-RT 3026-3031, 3078-3081, 3085-3086.) While Dr. Christensen's *initial* diagnosis was that appellant was moderately to severely mentally retarded based in part on the initial full scale score of 47, Dr. Christensen retreated from that initial diagnosis after appellant was evaluated further by Doctors Powell and Schuyler. At trial, Dr. Christensen testified that although she was still convinced that appellant is mentally retarded based on all of the evidence before her at the time of trial, she now believed that his mental retardation was less severe than she had originally diagnosed. (13-RT 3086.)

Ultimately, defense counsel argued to the jury that the initial score of

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[35] Unfortunately, both parties misstated the full scale IQ score of 66 that Dr. Schuyler's testing actually produced (13-RT 3147) throughout their examination of Dr. Christensen as both "63" and "67." (13-RT 3032-3033, 3079 [prosecutor and defense counsel referring to score of "63"], 3121-3123 [defense counsel referring to score of "67"].) Nevertheless, the testimony as a whole demonstrated that this slight difference was clinically insignificant and thus Dr. Christensen's testimony regarding scores of 63 or 67 would apply equally to the actual score of 66.

47 produced by Dr. Christensen's testing was a less accurate reflection of his true IQ than his later, higher scores within the mildly mentally retarded range. (15-RT 3416-3420.) Nevertheless, the evidence as a whole demonstrated that appellant was mildly mentally retarded. (15-RT 3416-3420.)

In the context of appellant's actual claim of mild mental retardation, Dr. Christensen and the other defense experts explicitly testified that mildly mentally retarded people (including people with an IQ score of 59) can hold jobs, drive cars, pass the written and driving tests for a driver's license, write letters like appellant had written in jail, read or appear to read the newspaper (though they may not comprehend much of it), and perform repetitive jobs that are not particularly complex. (12-RT 2894-2895, 2938; 13-RT 3030-3031, 3045-3047, 3077, 3123; AOB 138-141.)[36] Respondent points to no evidence to contradict the defense experts' testimony that appellant's abilities, or seeming abilities, in these areas were not inconsistent with mild mental retardation. To the contrary, their testimony was consistent with clinical standards and the prevailing view of the expert mental retardation community. (AOB 139, citing, e.g., *State v. White* (Ohio

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[36] Appellant's test results were also consistent with their testimony. The results of different tests administered by Doctors Powell and Schuyler were consistent with mild mental retardation and placed appellant's reading comprehension abilities at about the fourth grade level. (12-RT 2890-2891; 13-RT 3153-3155, 3164.) The presumably intelligent jurors no doubt understood that a fourth grader is capable of reading a newspaper or following simple instructions. Test results consistent with mild mental retardation also indicated that appellant was capable of doing simple arithmetic at about the third through fifth grade levels. (12-RT 2918-2919, 2890, 13-RT 3155.) A third or fifth grader can count to 26, as required for the temporary scraper operator position in which appellant was employed for less than two weeks. (14-RT 3275-3276, 3278-3279, 3285.)

2008) 885 N.E.2d 905, 914 ["a mildly mentally retarded individual can qualify for a driver's license and that licensed driver status is not a good criterion for distinguishing between people who are and are not retarded"], DSM IV-TR at p. 43 [by adulthood, those classified as mildly mentally retarded "usually achieve social and vocational skills adequate for minimum self-support, but they may need supervision, guidance, and assistance, especially when under unusual social or economic stress"], and AAMR Manual (10th ed. 2002), *supra*, at p. 41 ["adaptive skills limitations often coexist with strengths in other adaptive skills areas"]; AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Support* (11th Ed. 2010) ("AAIDD Manual") at pp. 7, 45 [mental retardation diagnosis is based on limitations, things that a person cannot do or cannot do adequately, and is not ruled out by co-existing strengths in other areas]; Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues* (2003) 27 Mental & Physical Disability L. Rep. 11, 21, fn. 29 ["[t]he skills possessed by individuals with mental retardation vary considerably, and the fact that an individual possesses one or more that might be thought by some laypersons as inconsistent with the diagnosis...cannot be taken as disqualifying"].)[37]

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[37] Accord, e.g., *Holladay v. Allen*, *supra*, 555 F.3d at pp. 1349-1350, 1360 (mentally retarded defendant could, inter alia, " drive a car," write letters, "cook whatever he wanted," "administer blood sugar tests to himself" to manage his diabetes, escape from prison, steal a car, and remain at large for eight months while he "traveled extensively around the Southeast, staying in motels, trading and selling cars, and finding odd jobs"); *Rivera v. Quarterman* (5th Cir. 2008) 505 F.3d 349 (bilingual); *Wiley v. Epps* (N.D. Miss 2009) 668 F.Supp.2d 848, 887-888, 900, 904-905, 907-908 ("held a drivers license" and drove cars, was an "honorably

(continued...)

Next, as the prosecutor further argued at trial and appellant predicted in the opening brief (AOB 137-138), respondent contends that appellant's mental retardation claim was negated by school records containing the hearsay opinions of non-testifying psychologists and a psychometrist who evaluated him and concluded that he merely had a "learning handicap" but was not mentally retarded. (RB 172, 177; see 14-RT 3297A, 3297C-3298.) In making this argument, respondent ignores appellant's anticipatory reply that this evidence was hearsay, improperly admitted over defense objection, and hence should not be considered as a competent part of the state's case in this Court's harmless error analysis. (AOB 137, citing *People v. Archer* (2000) 82 Cal.App.4th 1380, 1390-1397 [in evaluating prejudice from error, "we must consider only evidence that was properly admitted"]; see also AOB 157-163, citing *People v. Reyes* (1974) 12 Cal.3d 486, 502-503 [Argument III-C]; Argument III, *post.*)

However, in its Argument III, respondent does address appellant's argument that those opinions were inadmissible hearsay. (RB 198-199.) In

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[37] (...continued)
discharged" U.S. Army veteran, "a good, reliable worker with steady employment at various employers," worked "driving a truck," "performed household maintenance, repaired automobiles, babysat children, ran errands, supported his family and did numerous other things"; in school, he always obtained "above-average scores every year in the category of 'working well with others'"); *Thomas v. Allen* (N.D. Ala. 2009) 614 F.Supp.2d 1257, 1312 ("able to obtain a driver's license," drove tractors, "played baseball;" "none of these abilities are inconsistent with the diagnosis of mental retardation and in fact typify the skill set that is commonly seen for individuals that fall within this diagnostic category"); *United States v. Davis* (D. Md. 2008) 611 F.Supp.2d 472, 500-501, 503 (mentally retarded "can marry, have children, converse using multi-syllable words, have a checking account and/or credit card, have a driver's license, and commit crimes.")

that argument, respondent *concedes* that the opinions contained in the school records were hearsay and inadmissible to prove their truth that appellant was/is not mentally retarded. (RB 198-199; see Argument III, *post*, and AOB 159-160.) Nevertheless, respondent contends that although it is a "close question" (RB 198) the evidence was properly admitted because it "related to" the "act, condition, or event" of appellant's placement in special education classes and not offered for its truth, or as a "direct diagnosis," that appellant was not mentally retarded. (RB 198-199.) Yet respondent's harmless error argument here *does* rely on those opinions for their truth that appellant was not mentally retarded but merely had a "learning handicap." (RB 172, 177.) Thus, respondent's Argument III conceding the inadmissibility of that hearsay evidence for its truth demonstrates that respondent's reliance on the evidence for that very purpose here is inappropriate. (And, as discussed in detail in Argument III, *post*, respondent's reliance on that evidence for its truth here demonstrates the fatuousness of its Argument III that respondent did not present and rely on the evidence for the same, concededly improper, purpose below.)

At the same time, the *facts* the school records recorded – such as appellant's low IQ scores within the mentally retarded range, his poor academic performance and his placement in special education classes for the "educationally mentally retarded" – were properly admitted. (AOB 137-138; see also AOB 158-162 [Argument III-C]; Argument III, *post*.) Respondent ignores that those facts actually *supported* appellant's mental retardation claim. (AOB 137-138; see, e.g., *Lambert v. State* (Ok Crim.App.Ct. 2005) 126 P.3d 646, 652-653 [defendant's poor academic performance and placement in "educably mentally handicapped" classes, inter alia, important evidence in proving defendant's claim of mental

retardation].)

Similarly, appellant anticipated respondent's reliance on his former teachers' and a "counselor's" lay opinions that he was not mentally retarded and argued that this evidence was also erroneously admitted and therefore should not be considered as part of the state's case for purposes of harmless error analysis here. (RB 172; AOB 138; see also AOB 157-163 [Argument III-C].) Again, respondent ignores that argument with respect to the analysis of prejudice arising from Dr. Coleman's testimony, but separately contends in its Argument III that: (1) those opinions were properly admitted; or (2) alternatively, the lay and hearsay opinion evidence was such an insignificant part of the state's case that the jurors could not have been influenced by it and therefore its erroneous admission was harmless. (RB 177-201; see also Argument III, *post.*)

Appellant addresses respondent's contention that the lay opinion evidence was properly admitted in Argument III, *post.* However, like its analysis of the hearsay evidence in Argument III, respondent's contention in Argument III that the lay and hearsay opinion evidence was insignificant and harmless is starkly inconsistent and irreconcilable with its argument here that the evidence was such compelling proof rebutting appellant's mental retardation claim that the jurors would necessarily have credited it over appellant's evidence even without Dr. Coleman's testimony. Respondent cannot have it both ways. Appellant agrees that the lay and hearsay opinion evidence influenced the jurors' rejection of his mental retardation claim. However, because that evidence was erroneously admitted, this Court must not rely on it as a competent evidentiary basis on which the jurors would nevertheless have rejected appellant's claim even without Dr. Coleman's testimony.

Appellant also anticipated and refuted respondent's remaining contentions regarding its anecdotal evidence in his opening brief. (RB 172-177; compare AOB 137-143; see also AOB 152-156 [Argument III-B]; Argument III-C, *post*.) Since respondent does not address appellant's anticipatory arguments in this regard, he simply incorporates them by reference here. For the reasons discussed therein and above, respondent's *competent* lay and anecdotal evidence did not even conflict with, much less undermine, appellant's unanimous, unrebutted expert opinion evidence that he is mildly mentally retarded.

In any event, even assuming, arguendo, that respondent's interpretations of its evidence were reasonable ones with evidentiary support, the most that can be said is that there was a conflict in the evidence on a "close and vital issue" – the prosecution's lay and anecdotal evidence suggesting (for sake of argument) the absence of mental retardation on the one hand versus the unanimous expert opinions that appellant is mentally retarded on the other. The critical question then becomes the impact of Dr. Coleman's testimony on *the jurors'* resolution of that conflict. (See Part 1, *ante*, citing, inter alia, *Hawkins v. United States* (1958) 358 U.S. 74, 80-81 [erroneously admitted evidence, though "in part cumulative," may have "tipp[ed] the scales against petitioner on [a] close and vital issue"].) Respondent's harmless error analysis, limited to envisioning a hypothetical trial in which the jurors never heard Dr. Coleman's testimony, does not answer that question. (See RB 162-177.)

As discussed in the opening brief, the jurors *did* hear Dr. Coleman's "expert" testimony that they should disregard expert mental retardation evidence as inherently unreliable, which "struck at the heart" of appellant's defense. (*People v. Quartermain* (1997) 16 Cal.4th 600, 623.) The jurors

also heard Dr. Coleman's testimony that they should *only* consider a defendant's abilities and behavior and the opinions of laypersons based thereon in determining whether he is mentally retarded, which bolstered the prosecution's lay and anecdotal evidence. (*People v. Gonzalez* (1967) 66 Cal.2d 482, 493-495 [in close case, "'any substantial error tending to discredit the defense, or to corroborate the prosecution, must be considered prejudicial'"].) And the jurors heard the prosecutor's argument that they, like *law*making bodies throughout the country, should take their direction from Dr. Coleman given his exalted status as a renowned and highly influential expert on the use and relevance of mental health evidence in a court of law. (14-RT 3457; see also 14-RT 3206-3209; AOB 136, citing, inter alia, *Johnson v. Mississippi* (1988) 486 U.S. 578, 586 [prosecutor's reliance on erroneously admitted evidence in summation indication of prejudice]; *People v. Hernandez* (2003) 30 Cal.4th 835, 877.) On this record and assuming, as respondent contends, that there was a conflict in the mental retardation evidence that the jurors resolved against appellant, it is beyond dispute that Dr. Coleman's testimony influenced that adverse finding and thereby made appellant's defense "far less persuasive than it might [otherwise] have been." (*Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 290, 302-303 & fn. 3.)

b. Respondent's Contentions That the Defense Experts' Diagnoses Were "Highly Questionable" Because they Were Based in Part on the Administration and Interpretation of the WAIS-R is Unsupported by Any Evidence Other than Dr. Coleman's Improperly Admitted Testimony

Respondent further contends that the defense experts' mental retardation diagnoses were "highly questionable" and incredible on their face because they were based in part on the administration of the WAIS-R. (RB 170-171.) While this was precisely what Dr. Coleman's erroneously admitted testimony urged the jurors to find, respondent contends that they would have done so even in its absence based on the defense experts' own admissions that the WAIS-R is not infallible, its interpretation may be subjective, and it has been subject to criticism. (RB 170-171.) Indeed, according to respondent, the fact that the testing in this case produced three different full scale IQ scores "showed the imprecision and subjectivity of the methodologies and the resulting opinions in this case." (RB 171.) Given this "strong evidence demonstrating the inaccuracy of the testing involved," respondent contends that Dr. Coleman's testimony was harmless. (RB 177.) Nonsense.

As a preliminary matter, respondent has simply misstated parts of the defense expert testimony. For instance, according to respondent, Dr. Powell "admitted" that "there is a published study showing individuals, who were given no training on how to fake or malinger, 'actually were able to fake the results of the Wechsler test without the examiner knowing it . . . .' (XII-RT 2925-2926.)" (RB 170.) Not so.

The language respondent quotes is not from Dr. Powell's testimony

at all but rather from a *question* the prosecutor posed to Dr. Powell that did *not* elicit his affirmative response. The actual colloquy was as follows:

> Q [the prosecutor]: In fact, there have been – there has been at least one study done where individuals who were given no training on how to take or how to malinger actually were able to fake the – the results of the Wechsler test without the examiner knowing it, is that correct?
>
> A [Dr. Powell]: I think there was one. I'm not sure it was on this edition.
>
> Q: That was studied by Heaten, Smith, Layman, and Vogt?
>
> A: Do you remember the date of that?
>
> Q: I'm not sure.
>
> A: I can't help you either.

(12-RT 2925-2926.) By "this edition," Dr. Powell was referring to the then-current, revised edition of the WAIS that he and the other experts administered in this case. (12-RT 2908, 2956.)

Having failed to elicit the sought-after information from Dr. Powell, the prosecutor posed the same question to Dr. Christensen on cross-examination. Unlike Dr. Powell, she did agree with the prosecutor that there had been a study "indicat[ing] that an individual without any training can fake the results of the Wechsler." (13-RT 3063.) However, she qualified that answer, explaining that "once that study was done, the information was worked on and the training programs were changed such that those of us being trained after that study were getting a lot of emphasis on how to detect malingering. That is not a new study. The study is an old study." (13-RT 3063.) Like Dr. Powell, Dr. Christensen explained that the WAIS had been revised over the years to address and resolve problems and

criticisms over earlier versions of the test. (13-RT 3035-3036, 3119.)

In short, contrary to respondent's representation, Dr. Powell's actual testimony was that there *might* have been such a study on an earlier edition of the Wechsler than the version administered to appellant. Dr. Christensen subsequently confirmed that such a study did exist but it was an "old" and outdated study that did not apply to the current version and the way it is administered and was administered to appellant.

To be sure, the defense experts did agree that the WAIS-R is not infallible and that the interpretation of its results can be subjective. As discussed above and in the opening brief, these points of unavoidable uncertainty in measuring intelligence with intelligence tests are undisputed; however, they are accounted for in the administration and interpretation of the tests.

Standard errors of measurement are in any intelligence test, including the WAIS-R; therefore, as previously discussed, an IQ score does not purport to be precise but rather represents a range around which true intelligence quotient lies. (See, e.g., *Vidal*, *supra*, 40 Cal.4th at p. 1007, fn. 4; see generally AAMR Manual (10th ed. 2002), *supra*, at pp. 51-66.) As such, and as the experts testified in this case, the WAIS-R is amply reliable enough to measure intellectual functioning for purposes of diagnosing mental retardation. (See, e.g., 12-RT 2908, 2956-2957; 13-RT 3025-3027, 3161, 3170.)

As Dr. Powell explained, the WAIS-R is "a standardized test. We all give the same items. We all use the same manual. We all follow the same sequence of subtests. We all follow the same rules in administering the instrument." (12-RT 2956.) Given those protocols and evolving revisions to the test to mitigate the potential for error, "we feel very comfortable with

it[s] [reliability] at the present time." (13-RT 2908.) Dr. Christensen similarly testified that the revisions had resolved earlier criticisms going to the reliability of the test and there was no basis on which to "question the reliability" of the revised edition she had administered to appellant. (13-RT 3036-3037.) To the contrary, all of the experts expressed confident opinions that appellant was mentally retarded based, inter alia, on their administration and interpretation of that test. (See, e.g., 12-RT 2908, 2956-2957; 13-RT 3025-3027, 3161.) Again, their testimony going to the fundamental reliability of the WAIS-R reflects the consensus of their professional community in which that test is the "standard instrument in the United States for assessing intellectual functioning" to support mental retardation diagnoses. (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 309, fn. 5; see also, e.g., *People v. Superior Court* (*Vidal*), *supra*, 40 Cal.4th at pp. 1006-1007, fn. 4, and authorities cited therein; *In re Hawthorne*, *supra*, 35 Cal.4th at pp. 48-49, and authorities cited therein; AAMR Manual (10th ed. 2002) at p. 51; AAMR Manual (9th ed. 1992), *supra*, at p. 25.) In short, the defense experts' testimony did not lead to the inference made explicit in Dr. Coleman's testimony that the WAIS-R is an inherently unreliable measure of intelligence, as respondent suggests. (RB 170-172.) Respondent's contention that their testimony was cumulative of Dr. Coleman's and hence harmless is utterly without merit.

Nor was there any evidence to support respondent's assertion that the different IQ scores yielded by the experts was evidence of the inherent unreliability of the WAIS-R or flaws in its administration in this case. As previously discussed, an IQ score does not purport to be a precise reflection of true IQ but rather represents a *range* of intellectual functioning in which true IQ lies. Thus, the real question in determining subaverage intellectual

functioning is not the accuracy of a particular score, but whether the scores achieved fall within a *range* of mental retardation, accounting for standard error measurement or other clinically accepted factors. (See, e.g., *Vidal*, *supra*, 40 Cal.4th at p. 1007 & fn. 4; *In re Hawthorne*, *supra*, 35 Cal.4th at p. 48; *Money v. Krall*, *supra*, at pp. 386-387, 400-401.)

The evidence before the jurors was consistent with these principles: different IQ scores "may be the result of numerous factors, not necessarily impugning the credibility of the testing or the reliability of the testing." (13-RT 3112.) As Dr. Schuyler explained, "on any person who is being tested with the same instrument, *there is going to be a normal amount of variability from one examination to another.*" (13-RT 3161, italics added.) Dr. Christensen confirmed that there is a "range of acceptable variation" in IQ test results. (12-RT 3025-3027.) In addition, other factors may account for acceptable variance between IQ scores, such as the phenomenon of "practice effects," which may result in improved performance on subsequently administered tests without undermining an essential mental retardation diagnosis. (12-RT 2935; 13-RT 3161.)

As to the different IQ scores achieved in this case, they all fell within the mentally retarded range. (12-RT 2888; 13-RT 3031, 3147.) All of the experts were questioned about the different scores and all testified that they were either clinically insignificant or attributable to clinically acceptable explanations that did not impugn the reliability of their essential mental retardation diagnoses. (See AOB 20-24 [summarizing testimony explaining differences in scores]; see also, e.g., 12-RT 2935-2936, 2946-2947; 13-RT 3025-3031, 3079-3081, 3112, 3161-3162.) To the contrary, the fact that they all produced WAIS-R scores within the mentally retarded range and produced scores on other tests consistent with those results corroborated the

reliability of their mental retardation diagnoses. (13-RT 3112-3113, 3159-3160, 3178.)

Indeed, the fact that appellant achieved *higher* scores, though still within the mentally retarded range, on each subsequently administered WAIS-R indicated that he was making a genuine effort to improve is performance. A "malingerer," on the other hand, typically attempts to perform worse or achieve lower scores on each subsequently administered test. (RT 2935; see also-RT 13-RT 3022-3024, 3161, 3169.) In other words, appellant's improved scores only further corroborated the experts' essential mental retardation diagnoses.

Respondent also points to the prosecution's rebuttal evidence that appellant had childhood "IQ scores in school that were even higher," being full scale scores on the Wechsler Intelligence Scale for Children ("WISC") of 70, 75, and (possibly) 77. (RB 172.) Although respondent does not make the argument explicitly, the implication is that these scores were somehow inconsistent with the defense experts' findings and thus further demonstrated the unreliability or "inaccuracy of the testing involved" in this case. (RB 172, 177.)[38] However, respondent points to no competent evidence on which the jurors would have drawn that conclusion. (RB 172-177.)

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[38] The trial evidence was less than certain that appellant achieved a childhood score of 77 in 1982. The school records custodian, Mr. Potter, tentatively testified that he "believe[d], . . . if [he] remember[ed] correctly" that appellant achieved a score of 77 in 1982. (14-RT 3297B-3297C.) Because defense counsel did not correct this testimony, appellant accepts for purposes of this appeal *only* Potter's testimony that he might have achieved a score of 77 in 1982 and shall reserve for habeas corpus his challenge to the inaccuracy of that evidence.

To the contrary, as discussed in the opening brief but ignored by respondent, the full scale WISC score of 70 that appellant achieved on in 1975 and the full scale score of 75 he achieved in 1979 fell within the mentally retarded range. (See, e.g., *Atkins v. Virginia*, *supra*, 536 U.S. 309 & fn. 5; *In re Hawthorne*, *supra*, 35 Cal.4th at p. 48; DSM-IV-TR at p. 42.) Even the (alleged) full scale WISC score of 77 in 1982 was not necessarily inconsistent with mental retardation. (See, e.g., *People v. Superior Court (Vidal)*, *supra*, 40 Cal.4th at pp. 1003-1004.) As Dr. Powell testified at the penalty phase, appellant's childhood IQ scores were not inconsistent with and did not affect his opinion that appellant is mildly mentally retarded for a number of reasons, including that the WISC and the adult version of that test administered by the defense experts are different instruments that compare different populations. (16-RT 3637-3640.)

To be sure, the jurors did not hear this evidence that appellant's childhood IQ scores fell within the mentally retarded range or otherwise were not inconsistent with the defense experts' mental retardation diagnoses during the guilt phase because defense counsel inexplicably did not present it. The jurors did, however, hear Dr. Powell's guilt phase testimony that the "average" IQ is 100, from which the jurors could obviously infer that his childhood IQ scores were significantly below the "average." (12-RT 2888-2889.) The jurors similarly heard other evidence that appellant's intellectual and other functioning were well below average when he was evaluated in 1975, 1977, and 1982. As discussed in the opening brief, the 1975 evaluation revealed that appellant failed kindergarten; his teachers reported that his academic progress was extremely slow and his behavior was unusually immature; his communication skills and cognitive development were poor; although he was seven or eight years old, he could

not read any words, compute any math problems, and could only spell his name. (14-RT 3299A-3299B.) Reevaluated in 1977, appellant's verbal score on the WISC was in the second percentile, meaning 98 percent of children scored above him, and his performance score was in the fifth percentile. (RT 3298C-3299.) In 1982, his "overall score" on the WISC was in the fifth percentile and his score on Bender Gestalt was in the third. (14-RT 3300-3300A.)

Based on all of this evidence, defense counsel argued in her guilt phase summation that appellant's childhood IQ scores demonstrated that his intellectual functioning was "subpar" or well below the average. (15-RT 3415-3416.) Therefore, defense counsel argued, this prosecution evidence did not conflict with but rather corroborated appellant's mental retardation claim. (15-RT 3414-3417.)

In contrast, respondent points to no competent evidence that appellant's childhood IQ scores were inconsistent with the defense experts' mental retardation diagnoses or that they demonstrated the inherent unreliability of the WAIS-R. (See RB 172.) Respondent's contention that the jurors nevertheless drew those conclusions independent of the erroneously admitted evidence is without merit.

In sum, there was no evidence on which the jurors could have – much less necessarily would have – determined that the WAIS-R is inherently unreliable or that all of the defense experts made some unidentified mistake in its administration and interpretation in this case. Certainly, there was not "strong evidence demonstrating the accuracy of the testing involved" from which the jurors necessarily would have discredited "the resulting opinions in this case[.]" (RB 170, 172, 177; cf., e.g., *Holladay v. Campbell, supra*, 463 F.Supp.2d at p. 1342, fn. 22, aff'd by

Holladay v. Allen, *supra*, 555 F.3d at 1357-1358 [magistrate judge erred by rejecting defense expert's testimony that differences in IQ scores did not render them unreliable and dismissing IQ scores based on contrary testimony of state's expert when neither state's expert nor judge cited any authority to support such a conclusion and there was no evidence that the tests were improperly administered].)

To be sure, jurors are free to discredit expert opinions on reasonable bases supported by the evidence. (Pen. Code, § 1127b.) However, respondent has offered none; to the contrary, the only bases on which respondent contends the jurors discredited the unanimous expert opinions that appellant is mentally retarded are unreasonable ones whose only evidentiary support *was Dr. Coleman's erroneously admitted testimony*. As the foregoing demonstrates, the essence of respondent's contentions of harmless error are really restatements of Dr. Coleman's testimony: the WAIS-R is inherently unreliable and therefore the defense experts' mental retardation diagnoses based in part thereon were equally unreliable (RB 170-172); appellant's behavior and abilities and the impressions of laypersons based on their observations, on the other hand, was the only reliable evidence and determinative proof that appellant is not mentally retarded (RB 172-177). If – as respondent contends – the jurors necessarily made those findings, it is beyond dispute that they did so based on Dr. Coleman's erroneously admitted testimony.

Indeed, by influencing the jurors to reject appellant's mental retardation claim, Dr. Coleman's testimony rendered appellant's defense "far less persuasive than it might [otherwise] have been" (*Chambers v. Mississippi*, *supra*, 410 U.S. pp. 290, 302-303 & fn. 3) absent which there is a "reasonable chance" that at least one juror would have been persuaded by

the unanimous expert opinions that appellant is mentally retarded. (*Richardson v. Superior Court*, *supra*, 43 Cal.4th at p. 1050). (Part 1, *ante*.) As discussed in the opening brief and in Part 4, *post*, there is an equally reasonable chance that a juror so persuaded would have had reasonable doubt that he premeditated and deliberated killings. (AOB 143-150.)

3. Dr. Coleman's Testimony Influenced the Jurors to Disregard Appellant's Mental Retardation Evidence In Determining Whether He Harbored the Mental State Elements of Murder

Even if the jurors did not affirmatively resolve appellant's mental retardation claim against him as inherently unreliable and incredible based on Dr. Coleman's testimony, that does not end the matter. Separate and apart from his testimony that expert mental health or retardation evidence like that in this case is inherently unreliable, Dr. Coleman testified that such evidence is legally irrelevant to the jurors' assessment of mens rea and therefore should be disregarded. (See, e.g., 14-RT 3216, 3224-3225.) In other words, even assuming that a test could reliably measure a person's intelligence or cognitive functioning, its results and expert opinions based thereon are still "completely irrelevant" (14-RT 3222) of no "value" (RT 3215), no "assistance" (14-RT 3209-3210, 3223-3225), and "no help in the determination of whether or not the person had the kind of . . . mental states that you're interested in here . . . ." (14-RT 3216) and therefore should not "influence [the jury's] determination would way or another" (14-RT 3219-3221).

Thus, the jurors were effectively told that they did not need to resolve whether or not appellant's expert mental retardation diagnoses were correct because even if they were, that evidence was legally irrelevant to their determination of mens rea. As discussed in the opening brief but

ignored by respondent, it is well recognized that such opinions on the law from putative "experts" can be extraordinarily prejudicial. (AOB 134-135, citing, e.g., *Specht v. Jensen* (10th Cir. 1988) 853 F.2d 805, 808-809 and *Summers v. A.L. Gilbert Co.*, *supra*, 69 Cal.App.4th at pp. 1185-1190.) "The danger is that the jury may think that the 'expert' in the particular branch of the law knows more than the judge – surely an impermissible inference in our system of law." (*Marx & Co. v. Diner's Club, In.* (2d Cir. 1997) 550 F.2d 505, 512; accord, e.g., *Nieves-Villanueva v. Soto-Rivera* (1st Cir.1997) 133 F.3d 92, 100.)

As further discussed in the opening brief (and above), that danger was particularly acute in this case given: (1) Dr. Coleman's putative status as a renowned expert and author on the relationship between the law and mental health evidence who had influenced legislation on the subject across the country (14-RT 3206-3209); (2) the prosecutor's reliance on his status and testimony to argue that appellant's "test[s]" and resulting expert opinions were irrelevant to the jury's determination of mens rea (14-RT 3457); and (3) the trial court's instructions that not only failed to disabuse the jurors of the notion that they were free to disregard appellant's mental retardation evidence as legally irrelevant to their determination of *mens rea*; they seemingly endorsed Dr. Coleman's misstatement of the law (Part D, *ante*). (AOB 135-137; *Summers v. A.L. Gilbert Co.*, *supra*, 69 Cal.App.4th at pp. 1186-1187 [erroneously admitted expert opinion on question of law prejudicially influenced jurors under *Watson* standard where court's instructions were neither inconsistent with nor as expansive as the expert's opinion].) Indeed, as discussed in Arguments V and VI of the opening brief and *post*, by instructing the jurors with CALJIC No. 3.32 that they could *only* consider appellant's mental retardation evidence on the question of

whether he harbored the malice element of the murder charges under Penal Code section 187, the trial court effectively told the jurors that they could *not* consider that evidence in determining whether he harbored the specific intent elements of the dissuading a witness charge and special circumstance allegation or the premeditation and deliberation element of first-degree murder. (AOB 187-212; 3-CT 796; 14-RT 3357.) That instruction was consistent with, and thus seemed further to endorse, Dr. Coleman's testimony that the evidence was legally irrelevant and should be disregarded in resolving those issues.

On this record, even if the jurors did not necessarily reject appellant's expert mental retardation evidence as inherently unreliable, respondent cannot prove that they resisted the enticing invitation to avoid having to resolve its credibility by simply ignoring it as legally irrelevant. To the contrary, whether on the ground that it was inherently unreliable or legally irrelevant, it is reasonably probable that the errors caused the jurors to disregard appellant's expert mental retardation evidence in determining whether the prosecution had proved the mens rea elements of the crimes beyond a reasonable doubt. Absent those errors, it is reasonably probable that the jurors would have been persuaded that appellant is mentally retarded, which would have raised reasonable doubt that he premeditated and deliberated the killings. (AOB 142-150.)

4. Given the Critical Value of Mental Retardation to a Defendant's Ability to Engage in the Cold Calculus and Careful Weighing of Consequences Demanded of Premeditation and Deliberation, The Error Cannot be Deemed Harmless Under Any Standard

Respondent counters that the evidence that appellant intentionally killed the victims with premeditation and deliberation was so strong that

any errors were harmless. (RB 164-169.) In context, respondent's contention appears to be that even if the jurors had found that appellant is mentally retarded and properly considered that finding in determining whether he harbored the mens rea elements of first-degree murder, their verdicts would have been the same. Therefore, by respondent's reasoning, the prejudicial influence of Dr. Coleman's testimony leading the jurors to reject and disregard appellant's mental retardation evidence was ultimately harmless. Respondent's argument is without merit.

As a preliminary matter, respondent argues that appellant's mental retardation evidence had little, if any, relevance to whether he intended to kill or harbored express malice and therefore the jurors would have found that he possessed that mental state notwithstanding whether he is mentally retarded. (RB 165-169.) Respondent's contention is another red herring.

Appellant has never contended that the errors were prejudicial with respect to the jurors' findings of express malice/intent to kill. (See AOB 143-150.) To the contrary, as appellant unequivocally put it throughout his opening brief, "based on the evidence and the law . . . the critical question at trial was *not* whether appellant intended to kill the victims, or harbored express malice, but rather whether he committed those killings with premeditation and deliberation." (AOB 193; see also AOB 143-150, 192-212.)

With respect to that critical question, respondent does not acknowledge or address the relevance of mental retardation to the elements of premeditation and deliberation. (See RB 163-169; compare AOB 143-150.) Instead, respondent simply recites appellant's *acts* in committing the crimes and declares them to constitute such "overwhelming" evidence of premeditation and deliberation that any errors were harmless. (RB 165-

169.) Once again, respondent's harmless error analysis mirrors Dr. Coleman's erroneously admitted testimony: appellant's behavior alone was the determinative evidence of premeditation and deliberation to which his mental retardation bore no relevance. Respondent's analysis is as flawed as Dr. Coleman's testimony.

As this Court has recognized "the controlling issue as to degree" between first (premeditated and deliberated) and second degree murder "depends not alone on the character of the killing but also on the quantum of personal turpitude of the actor." (*People v Wolff* (1964) 61 Cal.2d 795, 823, superceded in part by Penal Code section 28 and 1981 amendment of section 189.) Hence, evidence of a mental disease or defect under Penal Code section 28 can make the difference between first and second degree murder. (See, e.g., *People v. Cortes* (2011) 192 Cal.App.4th 873, 912-913; *People v. Padilla* (2002) 103 Cal.App.4th 675, 679; *In re Thomas C.* (1986) 183 Cal.App.3d 786, 794, 796-798 & fn. 3.) The same behavior that might be consistent with premeditation and deliberation in a "normal," unimpaired person may be inconsistent with those mental states in a mentally impaired person. (See, e.g., *People v Wolff, supra*, 61 Cal.2d at pp. 822-823 [while there was "ample time" for "normal person" to premeditate and deliberate, mental condition that impaired actual ability to do so negated those mental states].)

Here, as discussed in the opening brief, even without appellant's mental retardation, the circumstances of the crimes were certainly susceptible of reasonable conflicting interpretations, one being that they evinced premeditation and deliberation and one being that they evinced a rash, impulsive explosion of violence inconsistent with premeditation and deliberation. (AOB 144-150.) This is precisely the kind of balanced

evidence to which a finding of mental retardation can make all the difference and raise reasonable doubt that the defendant's "behavior was . . . the product of cold-blooded premeditation" and not "a compulsive reaction . . . ." (*Williams v. Taylor* (2000) 529 U.S. 362, 396 [reasonably probable that evidence of borderline mental retardation, which would have supported view that defendant's violent crimes were not premeditated, would have produced different penalty verdict]; see also, e.g., *People v. Cortes*, *supra*, 192 Cal.App.4th at pp. 912-913 [where facts of crime, including multiple stab wounds, were reasonably susceptible of different interpetations, erroneous restrictions on defense expert's mental disorder testimony was prejudicial under *Watson* standard because excluded mental disorder testimony "could well have offered the jury a basis to infer an alternate explanation for the number of wounds inflicted on the victim besides premeditation and deliberation"].)

As the high court has recognized but respondent ignores, mildly mentally retarded people are impaired "in areas of reasoning, judgment, and impulse control" and "there is abundant evidence that" mentally retarded people "often act on impulse rather than pursuant to a premeditated plan" and the "cold calculus" that constitutes deliberation "is at the opposite end of the spectrum of mentally retarded offenders." (*Atkins v. Virginia*, *supra*, 536 U.S. at pp. 306, 318-320; accord, *Penry v. Lynaugh*, *supra*, 492 U.S. at pp. 322-323 [mental retardation highly relevant to question of whether defendant acted "deliberately"].) The mental retardation experts in this case echoed these principles.

According to the experts, mild mental retardation impairs an individual's abstract thinking and reasoning, memory, judgment, comprehension, and ability to make causal connections and consider the

consequences of his or her actions. (12-RT 2894-2895, 2938; 13-RT 3032-3033, 3044-3045, 3086, 3097, 3127-3128, 3152-3153.) Further, the jurors were instructed:

> The word "deliberate" means formed or arrived at or determined upon *as a result of careful thought and weighing of considerations for and against the proposed course of action* . . . .
>
> If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection *and not under a sudden heat of passion or other condition precluding the idea of deliberation*, it is murder of the first-degree . . . .
>
> *[A] mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation as will fix an unlawful killing as murder of the first-degree.*
>
> To constitute a deliberate and premeditated killing, the slayer *must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, [he] [she] decides to and does kill.*

(3-CT 800-801 [CALJIC No. 8.20]; 14-RT 3359-3360, italics added.)

Reading their testimony against this instruction, the defense experts effectively testified that mild mental retardation impairs an individual's ability to engage in the kind of thought process required for premeditation and deliberation. Their testimony was unrebutted by any other witness.

Therefore, had the jurors been persuaded that appellant is mentally retarded, they would have accepted that his ability to premeditate and deliberate was impaired. And had they properly considered those findings in assessing appellant's mental state, it "could well have offered the jury a

basis to infer an alternate explanation" for appellant's behavior before, during, and immediately after the crimes "besides premeditation and deliberation." (*People v. Cortes*, *supra*, 192 Cal.App.4th at pp. 912-913.) On this record, respondent simply cannot prove that a properly considered finding of mental retardation would not have raised reasonable doubt that the killings were the product of premeditation and deliberation as opposed to the "unconsidered . . . rash[,] impuls[ive]" acts of a mentally retarded man. (3-CT 800-801.) In other words, respondent cannot prove beyond a reasonable doubt that the jury's first-degree, premeditated and deliberated murder verdicts were "surely unattributable" to the erroneous admission of Dr. Coleman's testimony, compounded by the court's instructions and the prosecutor's argument, that appellant's mental retardation evidence was inherently unreliable, legally irrelevant, and should be disregarded in determining his mental state. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.)

To the contrary, there is at least a "reasonable chance" that the first-degree murder verdicts would have been different absent the errors' influence on the jurors to disregard appellant's mental retardation evidence. (*Richardson v. Superior Court*, *supra*, 43 Cal.4th at p. 1050, and authorities cited therein; *Cortes*, *supra*, 192 Cal.App.4th at pp. 913-914.) The errors thus undermined the heightened confidence demanded in the reliability of the capital murder verdicts in this case and resulted in a fundamentally unfair trial and a miscarriage of justice under the state and federal constitutions. For these and all of the other reasons set forth in the opening brief, the murder verdicts must be reversed and the special circumstances

and death judgment necessarily based thereon set aside.[39]

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[39] See footnote 33, ante, and AOB 143, fn. 36, 150, fn. 38, 187-222 [Argument V].)

III

THE TRIAL COURT VIOLATED STATE LAW AND APPELLANT'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BY ADMITTING THE OPINIONS OF UNQUALIFIED LAY WITNESSES, AS WELL AS HEARSAY DECLARANTS, THAT APPELLANT WAS NOT MENTALLY RETARDED IN HIS DEVELOPMENTAL YEARS

A. Introduction

As discussed in the opening brief, in an attempt to rebut the unanimous expert opinions that appellant is mildly mentally retarded, the prosecution presented the opinions or conclusions of nontestifying psychologists contained in appellant's school records that he was not mentally retarded but rather merely "learning disabled." Because it is inadmissible hearsay, the trial court erred in admitting this evidence over defense counsel's objection. (AOB 157-163.) In addition, the prosecution elicited the opinions of three lay witnesses – Ms. Davis and Ms. McClure, two of appellant's former school teachers, and Ms. Rodriguez, a former "counselor" who facilitated class scheduling – that they would not "categorize" appellant as mentally retarded. Because those witnesses were not qualified as experts to diagnose mental retardation and that subject is not a proper subject of lay opinion, the trial court erred in admitting their opinions over defense counsel's objections. (AOB 152-156.)

The cumulative effect of the admission of this evidence undermined the core of appellant's mental retardation defense, violated his rights federal constitutional rights, and requires reversal. (AOB 162-168; see also AOB 91-92, 134 and Argument II-E, *post*.))

Respondent disagrees on all counts. (RB 177-201.) Respondent is wrong.

B. The Trial Court Erred in Admitting the Hearsay Conclusions of Nontestifying Psychologists and a Psychometrist that Appellant Was Not Mentally Retarded for their Truth

1. The Hearsay Conclusions and Opinions by the Nontestifying Evaluators Were Inadmissible

As appellant set forth in the opening brief, the nontestifying psychologists' opinions or conclusions that he was not mentally retarded were hearsay. They did not fall within the business or official records exception because they were not "acts, conditions, or events" within the meaning of those exceptions. (AOB 157-163, citing *People v. Reyes* (1974) 12 Cal.3d 486, 503 [hearsay opinions and conclusions, such as psychiatrist's opinion about mental disease contained in business records, are *not* "acts, conditions, or events" within the meaning of business or official records exception to hearsay rule].)

Respondent concedes that the hearsay declarants' conclusions or opinions that appellant was not mentally retarded were hearsay and inadmissible for their truth. (See RB 198-199.) Nevertheless, while conceding that it is a "close question," respondent fleetingly contends that the conclusions were properly admitted because they were not a "direct diagnosis" but rather "*related to*" the "act, condition, or event" of appellant's placement in special education classes that was properly admitted under the business records exception. (RB 198-199, citing Evid. Code, § 1271.) Respondent's contention is without merit.

As discussed in the opening brief, appellant agrees that the prosecutor's evidence that he was enrolled in special education classes for the "educationally [sic] mentally retarded" recorded an "act, condition, or event" and thus was admissible under Evidence Code sections 1271 and/or

1280. (AOB 160.) However, that evidence *corroborated* appellant's mental retardation claim. (See, e.g., *Lambert v. State, supra*, 126 P.3d at pp. 652-653 [defendant's poor academic performance and placement in "educably mentally handicapped" classes, inter alia, important evidence in proving defendant's claim of mental retardation].) The prosecutor was obviously not seeking to corroborate appellant's claim but undermine it and did so by offering for its truth the hearsay conclusions that appellant was not mentally retarded. Indeed, respondent relies on the evidence for the same hearsay purpose on appeal.

In its other arguments, respondent relies on these conclusions that appellant "did not qualify by standard as a mentally retarded child but he's functioning in a low borderline range academically" (14-RT 3297C) that merely qualified him as "learning handicap[ed] (14-RT 3297A, 3297C-3298) in his school years as proof undermining his mental retardation claim (RB 112, 172, 177). Just as respondent relies on those conclusions for their truth to undermine appellant's mental retardation claim on appeal so too did the prosecutor offer the evidence for the same, prohibited hearsay purpose at trial. As such, it was inadmissible. (*People v. Reyes*, *supra,* 12 Cal.3d at pp. 502-503; AOB 157-163.)[40]

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[40] Curiously, though conceding that the conclusions in the school records were hearsay and thus inadmissible for their truth (RB 198-199), respondent represents in a footnote that "at least with the 1975 testing, it was Potter himself who evaluated the results because the person who did the testing was under (his) supervision at that time." (RB 199, fn. 121, citing 14-RT 3298.) Respondent's point is unclear. Whatever Potter meant by that statement, he testified not only that he did not personally conduct the 1975 testing (14-RT 3298), but also that he did not personally evaluate appellant at that time; instead, a psychometrist named Ruth Milor authored

(continued...)

2. Appellant's Continuing Trial Objections on Hearsay and Foundational Grounds Were More than Sufficient to Preserve his Challenge to the Evidence on the Same Grounds on Appeal

Alternatively, respondent contends that appellant has forfeited his right to argue that the school record evidence contained inadmissible hearsay. (RB 196-197.) Although respondent does not dispute that defense counsel made an otherwise proper and immediate "continuing objection" on hearsay and foundational grounds when the prosecutor elicited the conclusion evidence or that the prosecutor failed to articulate *any* hearsay exception to justify its admission (AOB 157-163; 14-RT 3297A), respondent nevertheless contends that appellant has forfeited his right to argue that the evidence did not fall within the business records or any other exception to the hearsay rule on appeal because he failed to make that specific objection below. (RB 197-198.) Respondent's argument turns the law on its head.

As discussed in the opening brief (AOB 158), it is well settled that a

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[40] (...continued)
the 1975 evaluation. (14-RT 3299A.) As discussed in the opening brief and otherwise recognized by respondent, a mental retardation evaluation and diagnosis turns not only on the administration of IQ testing and its results: mental retardation "is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence." (*In re Hawthorne*, *supra,* 35 Cal.4th at p. 49; accord, *People v. Superior Court* (*Vidal*), *supra,* 40 Cal.4th at p. 1012; AOB 160-162; see also RB 153-157.) Hence, it is the overall 1975 evaluation that resulted in the conclusion that appellant was not mentally retarded that is in issue; that evaluation and conclusion were not made by Mr. Potter; therefore that conclusion was inadmissible hearsay. (*People v. Reyes*, *supra*, 12 Cal.3d at 502.)

general hearsay objection from the opponent shifts the burden to the proponent to articulate a hearsay exception or exception under which she is offering the evidence and "to lay a proper foundation for its admissibility under an exception to the hearsay rule.' [Citation.]." (*People v. Livaditis* (1992) 2 Cal.4th 759, 778-779, and authorities cited therein; accord, e.g., *People v. Hovarter* (2008) 44 Cal.4th 983, 1011; *People v. Morrison* (2004) 34 Cal.4th 698, 724.) In other words, it is not the opponent's burden to make the prosecutor's argument for him by identifying any and all hearsay exceptions that might conceivably apply only to argue that they are inapplicable.

To be sure, in making the very same hearsay objection to the evidence on appeal, appellant anticipated respondent's belated contention (unarticulated by the People below) that the only hearsay exception that could even conceivably apply would be the business or official records exception. (AOB 158-159; Evid. Code, §§ 1271, 1280; see RB 194-195, 198-199.) But the fact that appellant did anticipate and refute respondent's belated argument on appeal does not mean that he was required to do so at trial. Indeed, if the waiver doctrine applied at all under these circumstances, it would preclude respondent as the proponent of the evidence from raising a hearsay exception for the first time on appeal that it never raised below. (See, e.g., *People v. Livaditis*, *supra*, 2 Cal.4th at p. 778 [proponent's failure to assert exceptions to the hearsay rule in response to a hearsay objection by opponent forfeits proponent's right to argue exception on appeal].)

At bottom, it is well settled that a general or standing hearsay objection – such as that undisputedly made by defense counsel here – is sufficient to preserve an appellate challenge to the erroneous admission of

hearsay evidence. (See, e.g., *People v. Gurule* (2002) 28 Cal.4th 557, 621; *People v. Woodell* (1998) 17 Cal.4th 448, 457-458.) Respondent's contention to the contrary is frivolous and must be rejected.[41]

C. The Lay Witnesses' Testimony Constituted Improper Opinions on the Existence Vel Non of Appellant's Mental Retardation

In addition to the hearsay opinions, the prosecutor presented the opinions of Susan McClure, Elizabeth Davis, and Dolores Rodriguez that they would not "categorize" appellant as mentally retarded over defense counsel's objections that those witnesses lacked the necessary foundational qualifications "to render such . . . opinion[s]." (14-RT 3304B; AOB 152-156.) As appellant argued in the opening brief, those witnesses lacked the foundational training, education and experience necessary to offer expert opinions on the existence vel non of mental retardation. (AOB 152-156;

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[41] In a footnote, respondent contends that defense counsel's own cross-examination into the substance of the conclusions in the school records "demonstrates that appellant's general hearsay objection was not specifically intended to cover this aspect of the official or business records exceptions." (RB 197-198, fn. 120.) Appellant is not entirely sure what to make of respondent's contention. To the extent that respondent means defense counsel forfeited his objection to the evidence by eliciting its full substance on cross-examination, respondent's theory is without merit. The court having overruled defense counsel's continuing hearsay objection and admitted the prosecutor's misleadingly incomplete parts of those conclusions, defense counsel's subsequent cross-examination regarding the rest of their substance was a classic "defensive act" intended to mitigate the adverse effect of the court's erroneous ruling that in no way forfeited or affected his right to challenge that ruling on appeal. (See, e.g., *People v. Turner* (1990) 50 Cal.3d 708, 744, and fn. 18 ["defensive acts" to mitigate effect of adverse ruling do not amount to waiver]; Witkin, *Cal. Procedure*, Ch. XIII, § 387 (4th ed.) [invited error doctrine does not apply to defensive acts].)

Evid. Code, § 801.) Because such expertise is necessary to render an opinion on the existence vel non of mental retardation, it is not a proper subject for lay opinion. (*Ibid.*; Evid. Code, § 800.) Hence, the trial court erred in admitting that evidence over counsel's objections. (AOB 152-156.)

Respondent does not dispute that Mses. Davis, McClure, and Rodriguez did not have the training, experience, or education to render expert opinions on whether appellant was mentally retarded. (RB 185; compare AOB 152-156.) Nevertheless, respondent contends that their testimony was properly admitted because: (a) it did not constitute "opinion" evidence at all (RB 185-186); in any event (b) identifying mental retardation is a proper subject for lay opinion under Evidence Code section 800 (RB 180-181, 186-187). Respondent's contentions are without merit.

1. The Lay Witnesses' Testimony Constituted Opinion Evidence that Appellant was not Mentally Retarded

Respondent's theory on appeal that Mses. Davis, McClure, and Rodriguez did not offer opinions that appellant was not mentally retarded is an abrupt about-face inconsistent with the People's argument at trial that their opinions were the legal equivalent of (though factually stronger than) the opinions offered by the defense experts. It is also inconsistent with the law and the evidence.

"An opinion is an inference from facts observed." (*People v. Ojeda* (1990) 225 Cal.App.3d 404, 410, and authorities cited therein.) Typically, witnesses are limited to testifying to facts, leaving inferences and conclusions to be drawn by the jury. (*Ibid.*) The exceptions to this general rule are lay and expert opinions that meet the foundational requirements of the Evidence Code. (Evid. Code, §§ 800, 801; see also Evid. Code, § 87.) In other words, when a witness's testimony goes beyond their personal

observations of facts and encompasses their conclusions based on facts, they are opinions subject to the rules governing such evidence.

Here, the lay witnesses did testify to facts they had observed and recalled about appellant, such as his poor performance in their classes. (AOB 153-154; 14-RT 3307-3311, 3319, 3322.) As appellant argued in the opening brief, that evidence was properly admitted. (AOB 153-154.)

However, their testimony also went beyond observed facts. They were specifically asked to draw their *conclusions* about appellant's mental retardation, purportedly based on their experience in general and their observations of him in particular. (But see Part 2, *post.*)

For instance, Ms. Rodriguez was the first of the lay witnesses the prosecutor called. After eliciting facts regarding her unspecified "contact" with mentally retarded people and her "personal contacts" with appellant, the prosecutor asked her to draw a conclusion based on these facts: "*based upon your personal contacts with the defendant, did you consider Mr. Townsel to be in the category of a mentally retarded person*?" Over defense counsel's objection that Ms. Rodriguez lacked the qualifications necessary "to render such an opinion," Ms. Rodriguez was permitted to answer, "oh, no." (14-RT 3304B, italics added.) Over the same objection, the prosecutor asked Ms. Davis to draw a conclusion based upon the facts she had observed: "*based upon* your working with these type of children and being appellant's teacher, *would you categorize Mr. Townsel as being mentally retarded?*" to which she responded, "No, I wouldn't say he was mentally retarded." (14-RT 3308, italics added; see also-RT 3319 [prosecutor asking Ms. McClure if any of the behavior she had observed led to the inference or "ever indicated to you that appellant may be mentally retarded," to which she responded in the negative].)

Clearly, the prosecutor presented the witness's testimony as "inference[s] from facts [they] observed" that appellant was not mentally retarded, which were, by definition, "opinions." (*People v. Ojeda*, *supra*, 225 Cal.App.3d at p. 410, and authorities cited therein.) Indeed, no one disputed defense counsel's characterization of their testimony as "opinions." (14-RT-3304B.) To the contrary, the court and the parties agreed that their testimony was just that.

The jurors were instructed that they had heard the "opinion testimony of lay witnesses." (3-CT 786 [CALJIC No. 2.81].) As discussed in Argument II-D, *ante*, the jurors were also instructed regarding "expert opinion" testimony (CT 785 [CALJIC No. 2.80]) and resolving conflicts between "the opinion of one expert against that of another" (CT 788 [CALJIC No. 2.83]).

Against these instructions, the prosecutor addressed the defense experts' opinions that appellant was mentally retarded and argued that the "rebuttal witness" testimony of Mses. Rodriguez, Davis, and McClure "*showed the opposite of what the defense psychologists stated*" about the existence of his mental retardation. (14-RT 3391.) "Two of those individuals had worked with the mentally retarded in the past" (14-RT 3391-3392) and "had quite a bit of experience dealing with mentally retarded people" (15-RT 3455), the prosecutor emphasized, yet contrary to "what the defense psychologists stated" they all testified that "they did not in any way consider the defendant to be mentally retarded" (14-RT 3391-3392). In other words, the prosecutor tried the case on the theory that their testimony was as much "opinion" evidence that appellant was *not* mentally retarded as was the testimony of Doctors Christensen, Powell and Schuyler constituted "opinion" evidence that he was.

Of course, "[t]he rule is well settled that the theory upon which a case was tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal." (See, e.g., *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1134, 1350, fn. 12, and authorities cited therein.) Having tried the case below on the theory that the testimony of Mses. Rodriguez, Davis, and McClure constituted opinions that appellant was not retarded which directly conflicted with and undermined the defense expert opinion testimony that he was, the People cannot be heard to argue a new and different theory on appeal.

2. The Existence Vel Non of Mental Retardation is Not a Proper Subject of Lay Opinion Testimony as a Matter of Law

In any event, respondent contends that the existence of mental retardation is a proper subject of lay opinion so long as it meets the foundation requirements of Evidence Code section 800. (RB 180-188.) Respondent points out that lay opinion is permitted on the subject of a person's "sanity" (see Evid. Code, § 870; former Code of Civil Procedure section 1870) and there is no """logical reason why a qualified lay witness cannot give an opinion as to a mental condition less than insanity""" so long as it is rationally based on the perception of the witness under Evidence Code section 800. (RB 180-181, quoting *People v. DeSantis* (1992) 2 Cal.4th 1198, 1228, quoting in turn *People v. Webb* (1956) 143 Cal.App.2d 402, 412; see also RB 181, fn. 111; 186-187.) But therein lies the rub: because identifying mild mental retardation requires specialized experience, education, and knowledge beyond the ken of a layperson, a layperson's opinion thereon can never satisfy the foundational requirements of Evidence Code section 800.

In this regard, the only California decision to directly address the question of whether mental retardation is the proper subject of lay opinion has answered it in the negative, explicitly holding that identifying mental retardation is not a "proper subject[] of lay opinion." (*In re Krall* (1984) 151 Cal.App.3d 792, 795-797.) Although *Krall* was the centerpiece of appellant's argument in the opening brief (AOB 152-156), the state's only response to it is buried in a footnote. Respondent does not dispute the soundness of that holding, but rather perfunctorily contends that it does not apply here because it was limited to the "civil commitment" context. (RB 181, fn. 111, incorporating by reference "argument" made in footnote at RB 153, fn. 95; see also RB 154.) Nonsense. On its face, *In re Krall* stands for just the opposite proposition, extending the rules already existing in the *Penal Code to* "the civil commitment context."

a. *In Re Krall's* Holding that The Existence Vel Non of Mental Retardation is Not a Proper Subject of Lay Opinion Testimony Applies In Both the Penal and Civil Commitment Contexts

As discussed in Argument II-C-1-b, in an earlier decision the court had turned to the definition of mental retardation in the *penal* and other contexts and extended it to the "civil commitment context" by applying it to that otherwise undefined term in Welfare and Institutions Code section 6500. *Money v. Krall* (1982) 128 Cal.App.3d 378, 397, citing, inter alia, Pen. Code, § 1001.20; accord *In re Krall*, *supra*, 151 Cal.App.3d at p. 797, and authorities cited therein.) Thus, the clinical and legal definition of the term "mental retardation" is: (1) "significantly subaverage intellectual functioning"; (2) with deficits in adaptive behavior; and (3) manifesting during the developmental period, or before the age of 18. (*In re Krall*,

supra, at p. 797, and authorities cited therein.)

Based on this definition, the *Krall* court correctly recognized that these diagnostic criteria by which mental retardation is defined under California law are matters beyond the common knowledge and experience of the ordinary layperson. (*In re Krall*, *supra*, 151 Cal.App.3d at p. 797; accord, e.g., *People v. Chapple* (2006) 138 Cal.App.4th 540, 547 [given statutory definition of body armor, its existence vel non can only be determined by an expert and thus is not a proper subject of lay opinion].) Indeed, there is a long "[l]egislative recognition of the necessity for expert diagnosis and opinion upon a hearing to determine whether a person is mentally retarded found in several code sections," including the *Penal Code*, which logically *extended* to the "civil commitment context" (RB 181, fn. 111, incorporating RB 153, fn. 95. (*In re Krall*, *supra*, at p. 797, citing Pen. Code, §§ 1001.22, 1367, 1370.1, 1600 et seq. and Welf. & Inst. Code, §§ 5008, subd. (a), 6504.5, 6507.) Penal Code sections 1001.22, 1369 and 1370.1 reflect a legislative determination that identifying mental retardation is not only beyond the common knowledge and experience of the ordinary layperson; it is even beyond the common knowledge and experience of the ordinary psychiatrist or psychologist. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1389-1390.)[42] Of course, when a subject "involves concepts beyond common experience . . . [it is] a proper subject of expert testimony *but not lay opinion.*" (*People v. Chapple*, *supra*, 138 Cal.App.4th at pp. 548-549,

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[42] Penal Code sections 1369, subdivision (a) and 1370.1, and this Court's interpretation thereof are discussed in detail in Argument I, *ante*, and the opening brief. (AOB 55-72.) Like sections 1369, subdivision (a) and 1370.1, Penal Code section 1001.22 requires evaluation and diagnosis by the uniquely qualified experts at the regional center to determine whether a possibly diversion eligible defendant is mentally retarded.

and authorities cited therein, italics added; accord, e.g., *People v. DeHoyos* (2013) 57 Cal.4th ___, 158 Cal.Rptr.3d 797, 844, and authorities cited therein; *People v. Williams* (1988) 44 Cal.3d 883, 915; *People v. Williams* (1992) 3 Cal.App.4th 1326, 1332-1333.) Hence, as the court in *In re Krall* recognized, the existence vel non of mental retardation is "not a proper subject[] of lay opinion" in *either* the penal or the civil commitment context. (*In re Krall*, *supra*, 151 Cal.App.3d at p. 797; accord, e.g., Witkin, Cal. Evid. 4th (2000) Opinion, § 24, p. 554; *State v. McClain* (N.C. App. Ct. 2005) 610 S.E.2d 783, 792-794, conc. opn of Wynn, J. [mental retardation not proper subject of lay opinion under statutes essentially identical to California's].)

At bottom, the state's only response to *In re Krall*, *supra*, buried in a footnote, that its holding only applies in "civil commitment context" and does not extend to the penal context is the exact opposite of what that case represents. (RB 181, fn. 111, incorporating by reference "argument" made in footnote at RB 153, fn. 95; see also RB 154.) On the other hand, the cases on which respondent relies for the proposition that laypersons are qualified to determine the existence vel non of mental retardation are inapposite. (RB 186-187.)

That is, respondent's contention that *People v. Whitson* (1998) 17 Cal.4th 229, 242, *People v. Ary*, *supra*, 118 Cal.App.4th at pp. 1022 ("*Ary I*")[43], and *Murphy v. State* (Okla Crim, App. 2003) 66 p. 3d 456, 459, fn. 3, specifically endorsed the propriety of lay opinion on the existence vel non of mental retardation is simply untrue. (RB 186-187.) It is true that lay

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[43] As previously noted (footnote 22, *ante*) although respondent refers to this decision as "*Ary II*," its appropriate designation is "*Ary I*."

opinion testimony regarding the defendant's mental retardation was given in *Whitson* and *Ary I*; however, there was no challenge or holding in either case regarding the admissibility or propriety that evidence. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Avila* (2006) 38 Cal.4th 491, 566, and authorities cited therein.)

As to *Murphy v. State*, *supra*, 66 p. 3d 456, an Oklahoma appellate court simply held that a lay witness could offer a competent opinion, based on her personal observations and experience, about an individual's abilities to function in certain areas, which is relevant to the ultimate question of whether that individual is mentally retarded. (*Id.* at p. 459, fn. 3.) Appellant has no quarrel with that proposition: an individual's ability to function in certain areas – such as to drive, count change, hold a job – is a matter within the common experience of laypeople assuming the appropriate foundation (e.g., personal knowledge) is laid. But whether or not that person's abilities or lack thereof is a result of mental retardation or the lack thereof is not. (See, e.g., *Conservatorship of Torres* (1986) 180 Cal.App.3d 1159, 1162-1163 [while layperson may be able to determine from common experience whether an individual can care for his own basic needs, she cannot "determine from common experience whether that inability results from a mental disorder"].) Here, for instance, appellant agrees that a teacher unqualified as an expert to diagnose mental retardation can nevertheless draw rational inferences from her personal observations and experience that a student is an average, below average or above average pupil, that he performed well or poorly on assignments, or that he was quick or slow to grasp concepts. But he or she cannot offer an opinion on the ultimate question of whether or not that student is mildly mentally retarded. (*In re Krall*, *supra*, 151 Cal.App.3d at p. 797.) Indeed, *In re Krall*'s holding is

consistent with well established law governing the admissibility of lay opinion evidence.

b. *In re Krall* is Consistent With Well Established Law Governing the Admissibility of Lay Opinion Evidence

To be sure, respondent is correct that Evidence Code section 870 (former Code of Civil Procedure section 1870, subdivision (10)) permits lay opinion testimony on an individual's "sanity" if certain foundational requirements are satisfied.[44] (RB 180-181.) The foundational requirement on which respondent implicitly relies is found in subdivision (c), which permits such opinion evidence if "the witness is qualified under Section 800 or 801 to testify in the form of an opinion." (RB 180-181.) Evidence Code section 801, of course, governs the admissibility of *expert* opinion evidence.

Evidence Code section 800 governs the admissibility of lay opinion evidence. It provides:

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[44] Evidence Code section 870 provides:

> A witness may state his opinion as to the sanity of a person when:
>
> (a) The witness is an intimate acquaintance of the person whose sanity is in question;
>
> (b) The witness was a subscribing witness to a writing, the validity of which is in dispute, signed by the person whose sanity is in question and the opinion relates to the sanity of such person at the time the writing was signed; or
>
> (c) The witness is qualified under Section 800 or 801 to testify in the form of an opinion.

> If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:
>
> (a) Rationally based on the perception of the witness; and
>
> (b) Helpful to a clear understanding of his testimony

Thus, Evidence Code section 870, subdivision (c) does not represent an exception to the ordinary rules of evidence governing the admissibility of opinion evidence but is merely a restatement of them. Like lay opinion on any other subject, lay opinion on a person's "sanity" – or an opinion on a "mental condition less than insanity" (RB 180-181) – is only admissible under section 870, subdivision (c) if it can satisfy the foundational requirements of Evidence Code section 800.

It is well settled that Evidence Code section 800 limits the subject matter of lay opinion to "'one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness,' and requires no specialized background." (*People v. Chapple*, *supra*, 138 Cal.App.4th at p. 547, quoting *People v. Cole* (1956) 47 Cal.2d 99, 103; accord, e.g., *People v. Williams* (1988) 44 Cal.3d 883, 915 ["lay opinion testimony is admissible where no particular scientific knowledge is required"]; *People v. Blacksher* (2011) 52 Cal.4th 769, 836 [testimony regarding "' "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact"'" goes "beyond mere lay opinion"].) Thus, "matters that go beyond common experience and require particular scientific knowledge [or expertise] may not properly be the subject of lay opinion testimony." (*People v. DeHoyos*, *supra*, 57

Cal.4th at p. ___, 158 Cal.Rptr.3d at p. 844, and authorities cited therein.)

It is certainly true that the foundational requirements of Evidence Code section 800 might be capable of satisfaction when it comes to *some* "mental conditions," as respondent observes. (RB 180-181.) "Love, hatred, sorrow, joy, and various other mental and moral operations, find outward expression, as clear to the observer as any fact coming to his observation, but he can only give expression to the fact by giving what to him is the ultimate fact, and which, for want of a more accurate expression, we call opinion." (*Holland v. Zollner* (1894) 102 Cal. 633, 639; see, e.g., *People v. McAlpin* (1991) 53 Cal.3d 1289, 1307, and authorities cited therein ["'appearance of a person who suffers severely is sufficient to manifest his condition to anyone of ordinary intelligence and experience'" and therefore is the proper subject of lay opinion based on witness's own perceptions]; *People v. Deacon* (1953) 117 Cal.App.2d 206, 210 [anger or fear].) It does not follow, however, that a lay witness can offer an opinion on any and all "mental conditions," including a particular mental illness, mental disorder, or developmental disability.

To the contrary, this Court and others have recognized that there is a significant difference between "sanity" or "mental conditions" that can be detected by persons of common intelligence and specific mental diseases, illnesses, defects, or developmental disabilities like mental retardation that can only be detected or diagnosed by an expert. (*People v. Kelly* (1992) 1 Cal.4th 495, 540.) "Although mental illness (or defect) may cause insanity, the concepts are different. Mental illness is a medical diagnosis . . . ." (*Ibid.*, italics added; accord, e.g., *Ellis v. State* (Ga. App. Ct 1983) 309 S.E.2d 924, 926-927 [while lay opinion on "sanity" permissible under statute, opinion on "paranoia" is not; "since paranoia is a medical term

relating to a mental disorder, only a qualified expert . . would be competent to diagnose and define such a mental disorder"]; *People v. Moore* (2002) 96 Cal.App.4th 1005, 1116-1117 [existence of mental disease or defect within meaning of Penal Code section 28 requires particularized expertise beyond common knowledge of laypersons]; *Conservatorship of Torres* (1986) 180 Cal.App.3d 1159, 1162-1163 [while layperson may be able to determine from her personal experience and observations that an individual cannot care for his or her basic needs, layperson cannot "determine from common experience whether that inability results from a mental disorder" because that subject calls for expertise].)[45]

Like other diagnosable mental disorders and developmental disabilities, mild mental retardation is not so commonly understood or

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[45] See also, e.g., *State v. Davis* (N.C. 1998) 506 S.E.2d 455, 470-471 (while lay opinion that defendant seemed "mentally disturbed" permissible, nurse's lay opinion that defendant appeared "psychotic" was not; psychosis is psychiatric diagnoses beyond common knowledge of layperson that only expert is competent to make); *State v. Raine* (Mo. Ct. App. W.D. 1992) 829 S.W.2d 506, 510 (lay opinion that defendant is not "mentally right" permissible but lay opinion as to existence of particular mental disease of defect is not); *Mullis v. Virginia* (Va. App. Ct) 351 S.E.2d 919, 925 (lay witness cannot express an opinion regarding the existence of a particular mental disease or condition that requires expertise to diagnose, such as paranoia); *Doyle v. State* (Okla. Crim App. Ct. 1989) 785 p. 2d 317, 322 (lay opinion by defendant's sister as to whether he had any "psychological problems" inadmissible under general prohibition against lay witnesses offering opinions calling for medical diagnosis); *People v. Murray* (1967) 247 Cal.App.2d 730, 735 (while layperson may be able to identify intoxication and therefor offer an opinion thereon, the of drug and alcohol intoxication on an individual's ability to think, process, information, or differentiate between reality and hallucination is "an issue of extraordinary complexity requiring sophisticated knowledge of pharmacology, toxicology, and psychology" beyond the ken of laypersons and hence is not a proper subject of lay opinion).

easily recognized as to be manifest to a nonexpert or "find outward expression, as clear to the observer as any fact coming to his observation . . . . " (*Holland v. Zollner*, *supra*, 102 Cal. at p. 639.) As the high court has emphasized, the mentally retarded are not "all cut from the same pattern . . . . [T]hey range from those whose disability is not immediately evident" – being the "vast majority" who fall within the category of mild mental retardation – "to those who must be constantly supervised." (*City of Cleburne Texas v. Cleburne Living Center* (1985) 473 U.S. 432, 442 & fn. 9; accord, e.g., *Penry v. Lynaugh*, *supra*, 492 U.S. p. 344 , conc. & dis. opn. of Brennan, joined by Marshall, JJ., and authorities cited therein [citing professional literature recognizing that as between mild, moderate, and profound mental retardation, there are "'marked variations in the degree of deficit manifested'"]; *State v. White, supra,* 885 N.E.2d at pp. 914-915 [because retarded people may appear to be "normal" to layperson not qualified to diagnose that developmental disability, trial court abused its discretion in rejecting testimony of two experts that defendant was mentally retarded based on lay witness testimony that he appeared to function normally in some areas]; Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues* (2003) 27 Mental & Physical Disability L. Rep. 11, 21, fn. 29; Ellis & Luckasson, *Mentally Retarded Criminal Defendants* (1985) 53 Geo. Wash. L. Rev. 414, 427, cited in *Atkins v. Virginia*, *supra*, 536 U.S. at p. 318, fn. 24; Blume, J, et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases* (Summer 2009) 18 Cornell L. H. & Public Policy 689, 707-710.)

Hence, *In re Krall*'s holding that the existence vel non of mental retardation is not a "proper subject[] of lay opinion" is consistent with these

well established principles. (*In re Krall*, *supra*, 151 Cal.App.3d at p. 797.) As respondent has provided no reasoned basis on which to conclude otherwise, no further discussion of this aspect of the issue is necessary.

3. Assuming Arguendo that a Lay Opinion on the Existence Vel Non of Mental Retardation Might Theoretically be Capable of Satisfying the Foundational Requirements of Evidence Code Section 800, the Opinions in this Case Did Not

Finally, even if a layperson's opinion on the existence vel non of mental retardation could conceivably satisfy the foundational requirements of Evidence Code section 800 in some case, the result would be the same. Evidence Code section 800, subdivision (a) requires that a lay witness's opinion be "rationally based on the perceptions of the witness." This means that the opinion must be based solely on the witness's "personal knowledge" or "personal observations." (See, e.g., *People v. McAlpin*, *supra*, 53 Cal.3d at pp. 1306-1308 & fn. 12, and authorities cited therein.) "Personal knowledge" means "a present recollection of an impression derived from the exercise of the witness's own senses" (Law Rev. Com. Comment to Evid. Code, § 702; see also Evid. Code, § 170; 2 Witkin, *Cal. Evid.4th* (2000) Witnesses. § 46, p. 297.)

The admissibility of a lay opinion on a particular mental condition requires that the witness have sufficient personal experience to be able to identify that condition as a general matter. (See, e.g., *People v. Navarette* (2003) 30 Cal.4th 458, 493-494; *People v. Ruiz* (1988) 44 Cal.3d 589, 621-622.) Moreover, a lay opinion must be based *solely* on the witness's own personal observations of the person whose mental condition is in issue. (See, e.g., *People v. McAlpin, supra,* 53 Cal.3d at pp. 1306-1308, and authorities cited therein.) If lay opinion involves a "difficult assessment"

that not all laypeople are equipped to make, then there must be a showing that the particular lay witness has sufficient personal knowledge and experience to make "such a difficult assessment." (*People v. Ruiz*, *supra*, 44 Cal.3d at pp. 621-622; accord, *People v. Navarette*, *supra*, at pp. 493-494.) For instance, while alcohol intoxication is within the common experience and understanding of most laypeople, narcotics intoxication is a more difficult assessment that not all laypeople can make; hence, there must be a foundational showing of particularized personal knowledge and experience necessary to make that more difficult assessment. (*People v. Navarette*, *supra*, 30 Cal.4th at pp. 434-494.) Evidence that a lay witness has merely "read about" or "heard about" narcotics intoxication without a showing that she has personally experienced or observed narcotics intoxication is insufficient. (*Ibid.*; accord *People v. Ruiz*, *supra*, at pp. 621-622 [while a defendant's potential for rehabilitation or ability to adjust to prison might the appropriate subject of lay opinion upon an adequate foundation under *People v. Coleman* (1960) 71 Cal.2d 1149, 1167, it is a "difficult assessment to make" and requires a particularized foundational showing that a laywitness has sufficient "academic credentials" and personal "experience" necessary to make "such a difficult assessment"].)

Hence, even assuming that a laywitness might be capable of identifying mild mental retardation or ruling it out based solely on her personal observations and experience, it is unquestionably a "difficult assessment" to make. (*People v. Ruiz*, *supra*, 44 Cal.3d at pp. 621-622.) Hence, there must be a foundation adequate for a particular lay witness to make such a difficult assessment. (*Ibid.*)

Respondent contends that the necessary foundation was satisfied here because "each [lay] witness . . . [had] ample experience with mentally

retarded people, and, more importantly experience *with appellant . . . .*" (RB 185-186, italics added.) Respondent is incorrect: the record establishes that the witnesses did not have the "academic credentials or experience necessary to make such a difficult assessment" as identifying or ruling out mild mental retardation as a general matter. (*People v. Ruiz*, *supra*, 44 Cal.3d at pp. 621-622; accord, *People v. Navarette*, *supra*, 30 Cal.4th at pp. 493-494.) Nor did the prosecution establish that the witnesses' personal interactions with and memories of appellant were sufficient to make such a difficult assessment about him in particular. (See, e.g., *People v. McAlpin*, *supra*, 53 Cal.3d at pp. 1305, 1308-1309.)

a. Ms. Rodriguez

Before Mses. Rodriguez, McClure, and Davis testified, defense counsel alerted the court that he was concerned about the degree to which their testimony would be based on their own personal experience, observations, and memories of appellant based on a conversation he had overheard them having in the hallway in which one of them was expressing her lack of recollection and another was providing her with information. (14-RT 3302C.) He also overheard Ms. Rodriguez mention that she had obtained information from an unidentified third party about a relative of appellant's who had attended the school, which raised the possibility that she was obtaining information from other sources. (14-RT 3302C-3303.) Defense counsel moved for the prosecution to lay a foundation outside of the presence of the jury that the witnesses' testimony would be based on their own personal knowledge and not information from outside sources. (14-RT 3302C-3303.) The court denied the motion, ruling that the matter could be explored on direct and cross-examination but directing the prosecutor to "make sure the testimony you elicit is of their personal

recollection and not hearsay. Let's make more of a foundation than would normally be required." (14-RT 3303-3303A.)

Ms. Rodriguez was the first witness called following this colloquy. With respect to her general experience, although her job title was "counselor," she described essentially administrative duties relating to "academic scheduling, testing, personal, vocational, and career development." (14-RT 3304-3304A.)[46] Of particular relevance, one of her duties was academic scheduling based on the results of *third party*'s testing and evaluations. (14-RT 3304-3304A.) The only evidence that she had ever had any exposure to mentally retarded children was her answer to the prosecutor's question asking if she had ever "work[ed] with mentally retarded people," in which she replied, "yes, I was also a counselor in the S.D.C. program, which would be the students who were either emotionally disturbed or educationally disturbed." (14-RT 3304A-3304B.) This did not directly answer the prosecutor's question regarding her experience with *mentally retarded* children, since she and the other school personnel all testified that the special education program was not reserved for the mentally retarded (14-RT 3297A-3298, 3304A-3304D, 3306-3308) but included students who simply had "learning problems" or "learning handicap[s]" (14-RT 3297A, 3304A, 3306-3307), meaning they had "problem[s] either in reading, language development, math." (14-RT 3304A-3304D, 3306-3308, 3311.) Indeed, special education teacher Davis testified that she had *never* worked with mentally retarded children in a "school situation." (14 RT 3308.) Therefore, the fact Ms. Rodriguez had

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[46] Ms. Rodriguez never elaborated on her vague reference to "testing."

worked in the special education program did not necessarily mean that she had worked with mentally retarded students; even if she did, she provided no testimony regarding the frequence or extent of her interaction with them or whether they were the kind of mildly mentally retarded children (like appellant) "whose disability is not immediately evident" to inexperienced laypersons or whether they were the kind of more obviously, severely retarded children "who must be constantly supervised." (*City of Cleburne Texas v. Cleburne Living Center*, *supra*, 473 U.S. at p. 442 & fn. 9.) She only testified to working with children who had been evaluated and classified by third parties, thus suggesting that her knowledge was based not on her own personal perceptions of any observable manifestations of that disability that she could apply to appellant but rather based on their classification by third parties. (14-RT 3304A-3304D; see *People v. Navarette*, *supra*, 30 Cal.4th at pp. 493-494; *People v. McAlpin*, *supra*, 53 Cal.3d at pp. 1306-1308 & fn. 12, and authorities cited therein.) Indeed, this soon became clear when asked about her "personal knowledge" of appellant. When the prosecutor asked if she had any "personal knowledge of whether or not appellant had any learning disability[,]" she replied that she did but explained that the basis of her "personal knowledge" was her knowledge that appellant had been placed in the special education program for a "learning handicap[]." (14-RT 3304A.) As she later explained, appellant entered the school already having been so classified by unidentified third parties and was never personally tested or evaluated by Ms. Rodriguez herself (who testified to no qualifications to conduct such testing or evaluation). (14-RT 3304B; see also 14-RT 3304C-3304D.)

The prosecutor next asked Ms. Rodriguez to describe appellant's particular "learning handicap[]" or "disabilities." (13-RT 3304A.) She

evidently was unable to do so beyond his classification in that category because she did not address his particular issues at all but rather generally explained that students are placed in special education because they have been classified with learning disabilities and described the kinds of disabilities that "*a student would have*" in that program as a general matter. (14-RT 3304B, italics added.)

Based on the foregoing, the prosecutor finally asked Ms. Rodriguez over defense counsel's objection on "lack of foundation" grounds, "based upon your personal contacts with the defendant, did you consider Mr. Townsel to be in the category of a mentally retarded person?" to which she replied "oh no." (13-RT 3304B.) The prosecutor asked Ms. Rodriguez to explain the basis of her opinion. (14-RT 3304B.) Once again, rather than testifying to any *personal* knowledge, observations or interactions with the mentally retarded or appellant in particular, Ms. Rodriguez explained generally, "Well, in order to be placed in the special ed program in our district or any district, a student has to be tested and there are various types of testing, one, to see if the student qualifies for the program and then in what category. This is done with the parent [sic] consent. And Anthony as I recall came in – came in to Madera High School already in the special ed program." (14RT 3304B.) In other words, she would not "categorize" appellant as mentally retarded because *the school* had not "categorized" him as mentally retarded but rather as "learning handicapped" (14-RT 3304A-3304B; see also 14-RT 3304D.) Of course, the jurors had just heard that appellant's school records contained the evaluations and conclusions by non-testifying school psychologists that he "did not qualify by standard as a mentally retarded child," but was categorized as "learning handicap[ped]" and placed in special education for that reason. (14-RT 3297A-3297C,

3298-3300A.) The unmistakable import of Ms. Rodriguez's testimony as a whole was that her opinion that appellant did not fall within the mentally retarded "category" was based at the very least in part if not entirely on hearsay conclusions in the school records to that effect. Certainly, it is clear that her opinion went "beyond the facts [s]he personally observed" and for that reason was "inadmissible" as lay opinion testimony. (*People v. McAlpin*, *supra*, 53 Cal.3d at p. 1308, cited by respondent at RB 181.) Nevertheless, the prosecutor closed his examination by asking her again, "based on your personal contacts was there anything that indicated that he may be mentally retarded?" to which she again replied, "No. Not at all." (14-RT 3304B.)

b. Ms. McClure

Special education teacher McClure testified to no training or experience with the mentally retarded at all. (AOB 154-155.) While she recalled that appellant had difficulty in both reading and writing, nothing "ever indicated to [her] that Mr. Townsel may be mentally retarded." (14 RT 3319.) She testified to no reason for her opinion, such as abilities he displayed that she believed inconsistent with mental retardation. The absence of any experience or exposure to the mentally retarded left Ms. McClure utterly unqualified to offer an expert or lay opinion about the existence vel non of appellant's mental retardation. (*People v. Navarette*, *supra*, 30 Cal.4th at pp. 493-494.)

c. Ms. Davis

Special education teacher Davis testified that she had never worked with mentally retarded people in a "school situation." (14-RT 3308.) The only evidence that she had any experience "working with" the mentally retarded was her vague testimony that she had worked "as a camp counselor

at *one time* and I had mentally retarded children at my camp site." (14-RT 3308, italics added.) Based solely on this "one time" and otherwise unexplained exposure to mentally retarded children, and over defense counsel's objection that this was an inadequate foundation for her opinion, the prosecutor was permitted to elicit Ms. Davis's opinion that she would not categorize appellant as mentally retarded. (14-RT 3308.)

On cross-examination, defense counsel asked Ms. Davis, "based on [her] experience as a camp counselor, are their different levels of people who are mentally retarded?" and if "some people are more severely mentally retarded than others?" to which she simply agreed without elaboration. (14-RT 3310.) This was the entirety of Ms. Davis's testimony regarding her knowledge about and experience with mentally retarded people.

Ms. Davis did not testify to the duration of her "one time" exposure to mentally retarded children as a camp counselor or how much time had elapsed since then (such as whether it was a "camp" that lasted a week or an entire summer where she worked as a teenager); she did not describe the nature of her "work" (e.g., such as whether she it was academic, athletic, cleaning, or toasting marshmallows); nor did she testify to the degree of their retardation, such as whether they suffered the difficult to detect degree of mild mental retardation or whether suffered from some more obvious disability like Down's Syndrome. (See *City of Cleburne Texas v. Cleburne Living Center*, *supra*, 473 U.S. at p. 442 & fn. 9.) Again, absent a showing that Ms. Davis had sufficient experience with children who suffered from mild mental retardation to be able to identify it or exclude it in others, there was an inadequate foundation for her opinion about the existence vel non of appellant's mild mental retardation. (See, e.g., *People v. McAlpin*, *supra*,

53 Cal.3d at pp. 1305, 1308-1310; *People v. Navarette, supra,* 30 Cal.4th at pp. 493-494.)

Furthermore, Ms. Davis's memory of appellant was hazy at best; she could not recall when he had been her student, whether he had been in one or more of her classes, whether or not he had any problems with his "reasoning abilities," or even what grade she had awarded him (a "D"). (13-RT 3307-3315.) The only thing she was able to remember was that he had problems reading and completing homework assignments, but she would not classify him as mentally retarded. (14-RT 3307-3311.) Like Ms. McClure, Ms. Davis testified to nothing about his abilities or behavior that she believed inconsistent with mental retardation. At the same time, she testified that he was in one of her "resource specialist" classes, which she explained are classes for students who have been "categorized by psychological tests" as having "learning problems" (14-RT 3311) but not mental retardation (14-RT 3311, 3308). In other words, school officials had placed appellant in Ms. Davis's "resource specialist" class because he had been "categorized by psychological tests" as a student with "learning problems" but not mental retardation. Given her lack of relevant experience and inability to recall anything of substance about appellant, her testimony that she would not categorize him as mentally retarded was clearly influenced by the fact that he was in her class in the first place because someone else had tested him and "categorized" him as having "learning problems" short of mental retardation. For this reason, as well, her lay opinion was improper. (See, e..g., *People v. McAlpin*, *supra*, 53 Cal.3d at pp. 1306-1308 & fn. 12, and authorities cited therein.)

For all of the foregoing reasons, as well as those set forth in the opening brief, the trial court erred in admitting Mses. Rodriguez, McClure,

and Davis's opinions that appellant was not mentally retarded over defense counsel's objections.

4. The Prosecutor's Cross-Examination of Dr. Powell Did Not Transform the Inadmissible Lay Opinions into Admissible Evidence

Even if otherwise inadmissible, respondent contends that testimony the prosecutor elicited from Dr. Powell on cross-examination opened the door to the admission of the lay opinions. (RB 178-182.) Specifically, and as discussed in the opening brief, the prosecutor asked Dr. Powell whether appellant's mild "mental retardation [would] be noticeable in [*sic*] friends and family?" Dr. Powell replied, "I would think so." The prosecutor continued, "would it be noticeable to teachers and counselors?" Dr. Powell replied "should be." (12-RT 2947.) Respondent's contention that this testimony opened the door to the admission of the otherwise inadmissible lay opinions is without merit for several reasons.

First, Dr. Powell's isolated, affirmative responses to whether mental retardation would be "noticeable" to "teachers and counselors" were ambiguous. It was far from clear that he meant that actual *mild mental retardation* could be identified by unqualified laypersons as opposed to simply meaning that some of the *signs or symptoms* of mental retardation – such as being slower than other students or lacking in other adaptive skills displayed by his peers – would be apparent to untrained laypersons like teachers, family or friends. Given his testimony and that of the other experts as a whole, the latter interpretation was the only reasonable one.

When the prosecutor asked Dr. Christensen if "friends and teachers of the defendant would be able to recognize" his mental retardation, she explained, "we would expect that family and friends would know him to be slow, harder to educate, not always quick to acquire new information and

not always high functioning in general compared to age peers." (13-RT 3084-3085.) Her testimony was consistent with the thrust of all of the experts' testimony – including that of Dr. Powell – that the administration and interpretation of standardized testing, along with experience in assessing people for mental retardation, is necessary to determine if an individual is mentally retarded. (12-RT 2910, 2935, 2948; 13-RT 3023, 3043-3044, 3067, 3112-3113, 3159-3160, 3182-3183.) Indeed, they testified that even trained psychiatrists Terrell and Davis could not (and did not) identify or exclude mild mental retardation without such testing and experience. (12-RT 2937; 13-RT 3043-3044, 3067, 3113, 3182-3183.) Given the thrust of their testimony, the volumes of professional literature on the subject, and statutory provisions requiring that special expertise to determine the existence vel non of mental retardation, it would be absurd to read Dr. Powell's brief and isolated agreement that appellant's mental retardation would be "noticeable" to teachers or family to mean that unqualified laypersons, who have no particularized training, experience, or education in identifying or diagnosing mild mental retardation and who did not administer or interpret standardized testing necessary to identify or rule out mental retardation, would be able to differentiate a mildly mentally retarded person from someone who is learning disabled, has "difficulties" with reading, math, completing homework assignments, and receives near-failing grades in special education classes designed to accommodate for learning disabilities.

To be sure, to the extent that the defense experts testified that friends, family, or teachers would notice some of the *symptoms or manifestations* of appellant's mild mental retardation that are within the common knowledge and understanding of laypersons (such as difficulties

with math or reading or complex skills), it was entirely appropriate for the prosecutor call lay witnesses and inquire into their recollections about those subjects of common knowledge and understanding. (13-RT 3084-3085.) But the prosecutor crossed the line by eliciting lay opinions about the existence vel non of mental retardation itself.

As demonstrated, the opinions were inadmissible as a matter of law because they failed to meet the foundational requirements of Evidence sections 800 or 801. The ambiguous testimony the prosecutor elicited from Dr. Powell on cross-examination – which was clarified by Dr. Christensen and the defense experts' testimony as a whole – did not change that law and transform inadmissible evidence into admissible evidence. (See, e.g., *People v. Samuels* (2005) 36 Cal.4th 96, 128 [prosecution's evidence that defendant was not cooperative in police investigation did not open door to inadmissible evidence that she cooperated by offering to take polygraph]; *People v. Armendaiz* (1984) 37 Cal.3d 573, 588 & fn. 16 [eliciting statement on cross-examination does not permit the introduction of inadmissible evidence solely in order to contradict it]; *People* v. *McDaniel* (1943) 59 Cal.App.2d 672, 677 ["open the gate theory is a popular fallacy . . . a party may not, under the guise of cross-examination, introduce evidence that is not competent within the meaning of the established rules"].)

Finally, although defense counsel repeatedly objected to the lay witnesses' opinions on foundational grounds – even moving for a foundational showing for their opinions in limine – the prosecutor never argued that they were excused from meeting the foundational requirements of Evidence Code sections 800 or 801 based on its "open the gates" theory of admissibility below. To the contrary, the prosecutor attempted to lay a foundation for their opinions by inquiring into their experience with

mentally retarded people, but simply failed to do so. Had the prosecutor argued that they were excused from doing so because Dr. Powell's responses opened the door to their opinions notwithstanding whether they were actually qualified to render them, appellant would have had the opportunity to defeat it by recalling Dr. Powell and clarifying his ambiguous responses to conform to Dr. Christensen's testimony, the thrust of the defense experts' testimony about diagnosing mental retardation, and the view of his professional community reflected in the law: while some of the symptoms of appellant's mild mental retardation would be "noticeable" friends, family, and teachers, unqualified laypersons cannot identify or rule out mild mental retardation itself. Having deprived appellant of the opportunity to meet respondent's "open the gates" theory of admissibility with further factual development at trial, it is unfair for respondent "'to press an issue . . . that was not presented below.' [Citation]." (*People v. Sakarias*, *supra*, 22 Cal.4th p. 636.) For any and all of these reasons, Dr. Powell's brief and ambiguous responses to the prosecutor's cross-examination did not transform the otherwise inadmissible opinion evidence into competent and admissible evidence.

D. The Cumulative Effect of the Erroneously Admitted Evidence Was Prejudicial, Violated Appellant's State and Federal Constitutional Rights to a Fair Trial and a Meaningful Opportunity to Present His Defense, and Requires Reversal

Finally, appellant argued in the opening brief that the cumulative effect of the lay and hearsay opinions that appellant was not mentally retarded as a youth was devastating to his mental-retardation based defense. (AOB 162-168.) This was particularly so when considered with Dr. Coleman's improperly admitted testimony that the opinions of laypersons

on the existence vel non of mental retardation are far more reliable than the inherently unreliable and legally irrelevant opinions of so-called "experts." (AOB 165; see also Argument II, *ante,* and AOB 109-110, 124 [Argument II].)

Appellant tendered the evidence of his mental retardation as the core of his defense in order to raise a reasonable doubt that he engaged in the cold calculus and careful weighing of the consequences demanded of premeditation and deliberation and the specific intent elements of the dissuading a witness charge and special circumstance allegation. Taken as a whole, the erroneously admitted evidence was presented to remove that doubt. The erroneous admission of the evidence thus tended to reduce the prosecution's burden of proving appellant's guilt beyond a reasonable doubt and impair appellant's right to a meaningful opportunity to present his defense in violation of the Sixth and Fourteenth Amendments. (AOB 162-168.) Because it is reasonably probable that the result would have been more favorable absent the combined effect of the erroneously admitted evidence, its admission undermines the heightened confidence demanded of the verdicts in this capital case and resulted in a fundamentally unfair trial in violation of the Eighth and Fourteenth Amendments and a miscarriage of justice in violation of our state constitution. (AOB 162-168, citing, inter alia, citing, inter alia, *Ege v. Yukins* (6th Cir. 2007) 485 F.3d 364, 375-378; see also Argument II-E, *ante*; AOB 182-183.)

As a preliminary matter, respondent asserts in a footnote that appellant does not claim that the erroneously admitted hearsay evidence was prejudicial. (RB 188, fn. 116; see also RB 199-200.) This is simply untrue. Appellant raised both the erroneously admitted lay opinions and hearsay opinions under one argument heading and argued their cumulative impact

because they both tended to show the same thing: the possibility of appellant's mental retardation was consistently considered and rejected throughout his school years and thus his mental retardation claim made for the first time at trial was an obvious fabrication. (AOB 164-165; see also AOB 223-228 [Argument VI].) Thus, as appellant put it, "[l]ike Dr. Coleman's testimony, the erroneously admitted opinions of appellant's former school teachers, counselor, *and unidentified hearsay declarants that appellant was not mentally retarded as a child* struck straight to the heart of appellant's defense." (AOB 164, italics added.) All of this erroneously admitted childhood evidence "clearly suggested that appellant's claim of mental retardation was a farce and a sham, made too conveniently for the first time when he faced murder charges." (AOB 164-165.)[47]

Otherwise, in two distinct, perfunctory "arguments," respondent contends that each error was individually harmless for essentially the same reasons addressed in Argument II-E, *ante*: appellant's mental retardation evidence was weak and rebutted by the prosecution's evidence – here including Dr. Coleman's testimony – while the prosecution's case in support of the essential mens rea elements of the charged crimes was strong. (RB 188-190, 199-201.) Respondent makes these arguments in a generalized fashion without specifically addressing appellant's arguments explaining why and how the errors simultaneously undermined his defense

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[47] Indeed, appellant repeated and elaborated on his argument that the cumulative effect of these errors and those committed throughout his trial was prejudicial and violated his federal constitutional rights in Argument VI of his opening brief. (AOB 225-226 [arguing combined lay opinion and hearsay evidence that appellant was not mentally retarded as youth as important prong of prosecution's rebuttal case to remove doubt about mental state elements of charged crimes].)

and artificially inflated the prosecution's case to his considerable detriment. (*Ibid.*) For the reasons discussed in Argument II-E, *ante*, as well as the opening brief (AOB 133-150, 163-168), which are incorporated by reference herein, respondent's perfunctory harmless error "analysis" is contrary to the law and belied by the facts.

While respondent largely ignores appellant's specific claims of prejudice in its harmless error argument, respondent does address some of them in a series of footnotes. (RB 188-189, 199-201 & fns. 116, 117, 118, 122.) Respondent's arguments are not properly presented to this Court and therefore should be disregarded without consideration. (See, e.g., *Placer Ranch Partners v. County of Placer* (2001) 91 Cal.App.4th 1336, 1342, fn. 9 [arguments raised in footnotes not properly briefed].) In any event, they are without merit.

In one footnote, respondent disputes appellant's argument that the erroneously admitted evidence was prejudicial because it purported to demonstrate that appellant was not mentally retarded as a youth and thus that his mental retardation claim was a sham manufactured for purposes of trial. (RB 189, fn. 118; see AOB 164-165.) Respondent dismisses this theory of prejudice on the ground that the jurors were never instructed that the definition of mental retardation requires its existence and manifestation before the age of 18 and therefore they would not necessarily have deemed the erroneously admitted evidence to be inconsistent with his mental retardation claim. (RB 189, fn. 118.) Not so.

While it is true that the jurors received no instructions on the definition of mental retardation, the defense experts testified that appellant's mental retardation was hereditary or "familial," as opposed to being caused by brain injury or something external that could have

happened after the age of 18. (12-RT 2892-2893; 13-RT 3074-3075, 3164-3165, 3172.) Hence, the lay witness testimony and the hearsay evidence that appellant was evaluated for mental retardation three times during his childhood and deemed not retarded contradicted the defense experts' opinions central to his defense. Furthermore, even though respondent disputes that the long standing clinical and legal definition of mental retardation (which includes the onset before age 18 requirement) applied to appellant's claim for purposes of Penal Code section 28 (RB 153-157; Argument II-C-1-b, *ante*), respondent otherwise relies on the erroneously admitted evidence as compelling proof rebutting appellant's mental retardation claim (RB 172-177; Argument II-E-2-a, *ante*). If respondent concludes as much despite its position that the traditional definition of mental retardation was inapplicable here, surely the jurors concluded as much despite the absence of an instruction on the traditional definition of mental retardation.

Respondent similarly disputes appellant's argument that the lay opinion evidence was particularly harmful given Dr. Coleman's testimony that expert mental retardation opinions are inherently unreliable and should be disregarded while lay opinions regarding the existence vel non of mental retardation is the only reliable evidence thereof that should influence the jurors. (AOB 165-166.) In various footnotes, respondent contends that Dr. Coleman did not testify that lay people are better equipped to assess mental retardation than so-called experts; instead, he merely testified that a person's behavior is "as reliable a guide as exists" to determine whether a defendant harbored a particular mens rea element, like premeditation, at the time of the crime. (RB 179, fn. 110; 188-189, fn. 117.) Respondent's characterization of Dr. Coleman's testimony, buried in footnotes to its

conclusory harmless error argument, is contradicted by the record

As discussed in Argument II-C-2 and C-4, *ante*, and the opening brief, Dr. Coleman clearly testified that a layperson's impression of a defendant's behavior, as opposed to experts's opinions based on the administration and interpretation of tests and other expert methodologies, is the *only* reliable evidence of intellectual functioning and mental retardation. For instance, asked if there were *any* "legitimate means to quantify a person's intelligence" and determine whether he or she is mentally retarded, Dr. Coleman explicitly testified that there is *no* legitimate way to quantify intelligence "with any tests per se." (14-RT 3256.) And expert "opinions based upon the results those tests" are inherently unreliable. (14-RT 3215.) Instead, the *only* "legitimate" or reliable evidence of a person's intelligence consists of "observations, *common sense observation of laypersons who are in contact with that person and who can speak about what they observed this person to be capable of doing in real life situations.*" (14-RT 3256-3257, italics added; see also Argument II-C-2 & C-4, *ante*.)

Indeed, according to Dr. Coleman, experts are "far worse" than laypersons at determining whether an individual is truly intellectually impaired or faking it. (14-RT 3217-3218.) Again, this is so because lay people focus solely on the only reliable evidence of intellectual functioning – the subject's behavior – while experts utilize inherently unreliable methodologies or testing methods in making that determination. (*Ibid.*)

Hence, and as discussed in Argument II, *ante*, Dr. Coleman urged in his putative role as a renowned expert on the relationship between mental health evidence and the law that jurors should be guided solely by nonexpert impressions of a defendant's behavior in determining both the existence vel non of mental disorders and the mens rea elements of a

charged crime ignore the inherently unreliable opinions of so-called "experts." That testimony gave far greater weight to the lay opinions here than in the ordinary case, the combined effect of which made appellant's mental retardation-based defense "far less persuasive than it might [otherwise] have been." (*Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 302-303 & fn. 3; accord, *Taylor v. Kentucky*, *supra*, 436 U.S. at pp. 486-490 & fn. 14; *Parles v. Runnells, supra*, 505 F.3d at p. 927.)

As to the hearsay opinions, respondent contends that they were harmless because they were undisputed. (RB 201 & fn. 122.) According to respondent, defense counsel had the "opportunity to review the materials," but "apparently saw no defect in their conclusions" because counsel did "not seek the rebut the [evidence] at the guilt phase of [appellant's] trial or challenge the testing or conclusions contained in the records with his own experts." (RB 201.) Respondent's contention is nonsensical.

The failure to dispute the truth of erroneously admitted hearsay evidence has absolutely no tendency in reason to show that its effect was harmless. Just the opposite: any such failure only tends to reinforce the putative truth of the evidence and hence its prejudicial effect in the minds of the jurors. Hence, the jurors likely treated this hearsay evidence, immune from and thus unchallenged through the crucible of adversarial testing, as conclusive proof that appellant was not mentally retarded in his youth, which made his adulthood claim of mental retardation and his defense based thereon "far less persuasive than it might have been." (*Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 302-303 & fn. 3.)

Alternatively, respondent contends that the hearsay evidence was harmless because it formed only a small part of the prosecution's case, the insignificance of which is demonstrated by the prosecutor's failure to

mention it in his summation. (RB 200.) It is true that the People did not explicitly refer to the hearsay opinions in their trial summation; nevertheless, its importance to the state's case is amply demonstrated by the People's reliance on that evidence on appeal.

As discussed in Argument II-E-2-a, *ante*, respondent contends in its Argument II that the hearsay opinions that appellant was not mentally retarded was such compelling proof that the jurors would necessarily have rejected appellant's mental retardation evidence based upon it even absent Dr. Coleman's testimony. (RB 172, 177.) Respondent's irreconcilable contention here that the evidence was so insignificant that it could not have influenced the jurors is specious. As respondent otherwise contends, the hearsay opinions were seemingly potent evidence contradicting appellant's mental retardation claim and thus substantially diminished his defense.

Furthermore, the hearsay opinions were not merely brief references buried in the otherwise admissible testimony of a prosecution witness. The prosecutor called Dr. Potter solely in order to rebut appellant's mental retardation claim with the hearsay opinions contained in the school records, thus signaling their importance to the jurors. (14-RT 3297-3298.) Dr. Potter's testimony immediately preceded the lay opinion testimony of Mses. Davis, McClure, and Rodriguez. Their lay opinions were consistent with, even echoed, the hearsay opinions in the school records. Indeed, as previously discussed, Mses. Rodriguez and Davis's testimony clearly appears to have been based at least in part on the fact that appellant had already been "categorized" as having a "learning handicap" but not mental retardation, as reflected by the hearsay in the school records. Thus, the hearsay and lay opinions were presented together as a powerful body of evidence – indeed the prosecutor's only "opinion" evidence on the critical

issue of appellant's mental retardation – to directly contradict the defense experts' mental retardation opinions, just as respondent otherwise recognizes in its Argument II. (RB 172, 177.)

And the prosecutor *did* explicitly rely on the lay opinions in summation, arguing that they were more reliable and persuasive than the "opposite" opinions of the defense experts. (See AOB 165-167, citing 14-RT 3391-3392, 15-RT 3454-3455.) By respondent's own converse logic, the prosecutor's reliance on that evidence in summation is a potent indication of its prejudicial impact on the jurors' resolution of the mental disorder and mental state issues on which appellant's defense hinged. (AOB 165-167, citing, inter alia, *People v. Powell* (1967) 67 Cal.2d 32, 56-57 [prosecutor's reliance on evidentiary error in summation demonstrated its critical nature to the prosecutor and so too the jury].)

In another footnote, respondent counters that the prosecutor's summation was appropriately limited to arguing that the lay witness opinions contradicted the defense experts' opinions because Dr. Powell agreed that appellant's mental retardation should be "noticeable" to teachers, families and friends. (RB 189, fn. 118.) This was certainly one point of the prosecutor's argument but not the only point. After the prosecutor detailed the defense experts' opinion testimony that appellant was mentally retarded, the prosecutor argued that Mses. Davis, Rodriguez, and McClure's testimony "showed the opposite of what the *defense experts* stated." (14-RT 3391, italics added.) It was only arguing that the lay opinions contradicted *all* of the defense expert opinions that the prosecutor emphasized *in addition* that "*one* of the defendant's own expert witnesses said that [appellant's mental retardation] would be noticeable." (14-RT 3391-3392; see also 15-RT 3454-3455.) At bottom, the thrust of the

prosecutor's argument was plain: the lay opinion testimony that appellant was not mentally retarded contradicted and undermined appellant's defense expert opinion testimony that he was. It is certainly reasonably probable that the jurors agreed, which influenced their rejection of appellant's defense. (See, e.g., *People v. Powell*, *supra*, 67 Cal.2d at pp. 56-57; *Johnson v. Mississippi* (1988) 486 U.S. 578, 586.)

Of course, apart from Dr. Coleman's (improper) globalized attack on all "psychological" expert opinion evidence in the courtroom, the hearsay and lay opinions constituted the prosecutor's only direct evidence to contradict appellant's defense expert's opinions. For all of these reasons, as well as those set forth in the opening brief, the erroneously admitted evidence was "crucial" (*Ege v. Yukins*, *supra,* 485 F.3d pp. 375-378), undermined evidence "central" to appellant's defense (*Crane v. Kentucky*, *supra*, 476 U.S. at p. 690), made appellant's "far less persuasive than it might [otherwise] would have been" (*Chambers v. Mississippi*, *supra*, 410 U.S. at pp. 294, 302-303), reduced the prosecution's burden of proving the mens rea elements of the charged offenses beyond a reasonable doubt and deprived appellant of a meaningful opportunity to fully present his defense. (U.S. Const., Amend,. VI, XIV; see, e.g., *Taylor v. Kentucky*, *supra*, 436 U.S. at pp. 486-490 & fn. 14.) Given the closeness of the prosecution's case for premeditation and deliberation and the strength of appellant's mental retardation evidence to raise a reasonable doubt that the prosecution had proved those elements, and pursuant to the authorities cited in Argument II-E, *ante*, and incorporated herein by reference, it is "reasonably probable" that the result would have been more favorable absent the combined effect of the evidentiary errors. Hence, they resulted in a miscarriage of justice in violation of the state constitution, a fundamentally

unfair trial in violation of the federal constitution, and undermine confidence in the heightened degree of reliability demanded of the capital murder verdicts demanded under the Eighth and Fourteenth Amendments. (Argument II-E, *ante.*) The murder convictions, special circumstances, and death judgment must be reversed.[48]

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[48] See footnote 33, *ante*, and footnotes 36 and 40 of the opening brief. (AOB 143, 168.)

IV

THE PROSECUTOR' IMPROPER CROSS-EXAMINATION OF DR. CHRISTENSEN VIOLATED STATE LAW AND APPELLANT'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. Introduction

In the opening brief, appellant argued that the prosecutor's cross-examination of Dr. Christensen was improper in the following ways: (1) he elicited Dr. Christensen's opinion that she believed appellant was incompetent to stand trial and further that she still "believe[ed] that even though" – in the prosecutor's words – "the Superior Court, upon the reports of two psychiatrists found him to be competent" (13-RT 3086-3087), which was irrelevant and inadmissible (AOB 170-174); (2) he cross-examined her regarding her recommendations for treatment of appellant's incompetency through the Central Valley Regional Center for the Developmentally Disabled, which was also irrelevant (AOB 171-176); and (3) his questioning implied the existence of facts harmful to appellant – i.e., that appellant had had the opportunity to confer with other defendants Dr. Christensen had evaluated in the jail which made it "possible that the defendant could receive information on how to fake tests in the jail . . . ." – which Dr. Christensen could not and did not affirm and which the prosecutor presented no evidence to prove (13-RT 3095) (AOB 176-182).

Respondent contends that the prosecutor's cross-examination in all respects was proper. (RB 210-214, 217-218.) As to (2) and (3), *ante*, only, respondent contends appellant forfeited his challenges. (RB 213, 216-217.) Finally, respondent contends any errors were harmless. (RB 218-222.) Respondent's contentions are without merit.

B. The Prosecutor's Cross-Examination Eliciting Dr. Christensen's Irrelevant and Inadmissible Opinion That Appellant Was Not Competent to Stand Trial Only to Impeach it With the Superior Court's Equally Irrelevant and Inadmissible Competency Finding was Improper

Respondent contends that Dr. Christensen's opinion that appellant was incompetent and still "believe[d] that even though the Superior Court, upon the reports of two psychiatrists, found him to be competent" (13-RT 3086-3087) was relevant, though its theory of relevance is difficult to grasp. (RB 211-212.) Respondent first notes that Dr. Christensen was cross-examined about her mental retardation diagnosis and whether it was inconsistent with other evidence, such as Doctors Terrell and Davis's findings that appellant was "malingering" by lying during their mental disorder evaluation. (RB 211-212.) "In light of this," respondent concludes:

> it was proper to ask Dr. Christensen if she still believed appellant was . . . competent [sic] "even though the Superior Court, upon the reports of two psychiatrists, found him to be competent?" (XIII-RT 3087.) Her exceptional reluctance to acknowledge even the potential for malingering, and its effects on her examination results [record citations] demonstrated her bias, whether she thought appellant's alleged incompetence was based on mental retardation *or* other mental defect. In other words, the answer to the prosecution's question was relevant to challenge the import, weight, and credibility of Dr. Christensen's opinions. [Citations.] [¶] Moreover, . . . the evidence strongly demonstrated that Dr. Christensen's finding regarding appellant's intelligence and incompetence were skewed by appellant's malingering, and, for this additional reason, the relevance of her opinions in light of the psychiatrists' and court's conclusions was self-evident.

(RB 212.)

Appellant is not entirely sure what to make of respondent's

argument. Respondent's contentions that the cross-examination somehow demonstrated Dr. Christensen's "bias" in reaching her incompetency opinion and that her answer was relevant to challenge the "import, weight, and credibility of [her] opinion*s*" – which appellant can only assume would include her incompetency opinion – appear to presuppose that her opinion about appellant's competency was relevant and thus properly subject to impeachment. In other words, respondent's contention begs the fundamental question of whether Dr. Christensen's competency opinion, elicited by the prosecution on cross-examination over defense counsel's relevance objection (13-RT 3086-3087), was relevant and admissible at all.

Of course, as discussed in the opening brief, it was not. (AOB 170-174.) It has long been recognized in this regard that "the purpose of [an] inquiry [into competency] is not to determine guilt or innocence [and] *has no relation* to the plea of not guilty [even] by reason of insanity . . . . Th[e] purpose [of the inquiry] is *entirely unrelated to any element of guilt* and there is no indication of any legislative intent that *any result* of this inquiry into a *wholly collateral matter* be used in the determination of guilt." (*Tarantino v. Superior Court* (1975) 48 Cal.App.3d 465, 469-470, italics added, cited with approval in *People v. Weaver* (2001) 26 Cal.4th 876, 959-960; see also Evid. Code, § 210 [defining "relevant evidence"]; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9 [a "collateral matter" is "'one that has no relevancy to prove or disprove any issue in the action'"].)[49] This Court

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[49] *Tarantino* is the genesis of this Court's adoption of a judicially created rule of immunity prohibiting admission of a defendant's statements to the psychiatrists appointed to determine competency and their fruits, including the results of the evaluations and competency proceeding, in the guilt phase of trial for several reasons, including a defendant's Fifth

(continued...)

recently reiterated the same principle in an analytically identical context in holding that an expert's opinion regarding a defendant's sanity is irrelevant in the guilt phase of a criminal trial: "'The question of a defendant's sanity is entirely irrelevant at the guilt phase . . . . [W]hile the evidence at the guilt and sanity phases "may be overlapping" [citation], the defendant's sanity is *irrelevant* at the guilt phase and evidence tending to prove insanity [or sanity], as opposed to the absence [or presence] of a particular mental element of the offense, is *inadmissible*.'" (*People v. DeHoyos, supra*, 57 Cal.4th ____, at p. 158 Cal.Rptr.3d at p. 834, quoting *People v. Mills* (2012) 55 Cal.4th 663, 667, 672, original italics.)

Hence, Dr. Christensen's incompetency opinion had no relevance to the issues of guilt that the jurors were to resolve. Nor was her incompetency opinion in any way relevant to impeach her mental retardation opinion (nor does respondent seem to argue otherwise). The prosecutor's cross-examination eliciting Dr. Christensen inadmissible opinion was improper. (See, e.g., *People v. Smithey*, *supra*, 20 Cal.4th at

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[49] (...continued)
Amendment privilege against self-incrimination. (*People v. Arcega* (1982) 32 Cal.3d 504, 520-526; *People v. Pokovich* (2006) 39 Cal.4th 1240, 1253 [extending immunity to preclude use of statements made during competency evaluations for impeachment purposes at trial because, inter alia, it would have a negligible impact on the truth-seeking function of trial given that competency proceedings are unrelated to the validity of the criminal charge and thus unlikely to result in statements relevant to the guilt phase].) This rule of immunity is not raised here because defense counsel did not invoke it below. Nevertheless, *Tarantino* also stands for the proposition that the results of competency proceedings – including opinions and court findings on the ultimate issue of the defendant's competency – are irrelevant and "wholly collateral" to the issue of a defendant's guilt at the guilt phase of trial. It is for this proposition that appellant relies on it in support of his irrelevance objection below.

pp. 957-960.)

To the extent that respondent's argument can be taken to mean that Dr. Christensen's incompetency opinion became relevant only for the purpose of impeaching it with the superior court's competency finding, which in turn undermined her credibility as a whole and the reliability of her mental retardation opinion, it is equally without merit.

Again, the issue of appellant's competency or incompetency to stand trial was irrelevant or "collateral" to the issue of his guilt in the criminal proceedings. (*Tarantino v. Superior Court*, *supra*, 48 Cal.App.3d at pp. 469-470; cf. *People v. DeHoyos*, *supra*, 57 Cal.4th at pp. ___, 158 Cal.Rptr.3d at pp. 833-834; *People v. Mills*, *supra*, 55 Cal.4th at pp. 667, 672.) To be sure, "[a] matter collateral to an issue in the action may nevertheless be relevant to the credibility of a witness who presents evidence on an issue; always relevant for impeachment purposes [is] . . . . the existence or nonexistence of any fact testified to by the witness. [Citations]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9.) However, this general rule is subject to one important and well-settled limitation: "a party may not cross-examine a witness upon collateral matters for the purpose of eliciting something to be contradicted. [Citations]. This is especially so where the matter the party seeks to elicit would be inadmissible were it not for the fortuitous circumstance that the witness lied [or provided impeccable testimony] in response to the party's questions." (*People v. Lavergne* (1971) 4 Cal.3d 735, 744.) Pursuant to this principle, "it is improper to elicit otherwise irrelevant testimony on cross-examination merely for the purpose of contradicting it." (*People v. Mayfield* (1997) 14 Cal.4th 668, 748; accord, *People v. Fritz* (2007) 153 Cal.App.4th 949, 956.) In other words, if respondent's theory is that Dr. Christensen's

incompetency opinion was "'relevant only to the prosecutor's plan to impeach it" with otherwise inadmissible evidence, it is "improper" and did not transform irrelevant and inadmissible matter into relevant and admissible impeachment evidence. (*People v. Fritz, supra,* 153 Cal.App.4th at p. 956, citing *People v. Mayfield, supra*, 14 Cal.4th at p. 748, citing in turn *People v. Lavergne, supra*, 4 Cal.3d at p. 744.)

In any event, even assuming that Dr. Christensen's challenged incompetency opinion had some relevance to the reliability of her mental retardation diagnosis, the superior court's actual competency finding did not tend to prove that it was incorrect or incredible. (Cf. *People v. Buffington* (2007)152 Cal.App.4th 446, 454-456 [defense expert psychologist's opinions in other, unrelated cases had no "tendency in reason to prove his opinion in this case was unreliable unless the jury had some basis in reason to reject the reliability of the psychologist's opinion in those cases"; absent that basis, prosecutor's cross-examination eliciting that evidence was improper].) As discussed in Argument I, *ante*, and the opening brief, the superior court's determination that appellant had not proved his incompetence due solely to a mental disorder by a preponderance of the evidence did not address or resolve whether he was incompetent as a result of mental retardation and hence did not contradict or disprove Dr. Christensen's opinion that he was. (Argument I, *ante*; AOB 56-72 [Argument I] & 173-174, 183 [Argument IV].)

Quoting an isolated passage out of context from this Court's decision in *People v. Leonard* (2007) 40 Cal.4th 1370, respondent argues to the contrary that the superior court and Dr. Christensen's competency determinations answered "'not two questions, but one: whether, *based on a combination of all factors, including both* psychiatric disorders and

developmental disabilities, the defendant is competent to stand trial.'" (RB 213, quoting *People v. Leonard*, at p. 1392, italics added.) Based on this passage, respondent contends that the superior court's competency finding directly contradicted and disproved Dr. Christensen's incompetency diagnosis. (RB 213.) Respondent distorts the meaning of *Leonard* beyond recognition.

The passage from *Leonard* on which respondent relies was directed to the unique facts of that particular case. As previously discussed, the competency proceedings in that case entailed the appointment of experts qualified in *both* the fields of mental illness *and* the defendant's particular developmental disability who evaluated and considered "*not only* defendant's psychiatric disorder, *but also* his" developmental disability in assessing his competence. (*People v. Leonard*, *supra*, 40 Cal.4th at pp. 1385-1387, 1390-1392, italics added; Argument I-D, *ante*; AOB 60-72.) Based on these unique facts, this Court held that although the trial court did not follow the letter of Penal Code section 1369, subdivision (a) by appointing the specially qualified director of the regional center to evaluate the defendant for incompetency due to his developmental disability, the competency proceedings that were held were the functional equivalent of both the developmental disability and mental disorder competency proceedings mandated by the Legislature. (*Leonard*, *supra*, at pp. 1390-1391; Argument I-D, *ante*; AOB 60-72.) Against this background, this Court rejected the defendant's argument that the determination of his competency required the court and experts to separately address two *distinct* questions: (1) whether the defendant was incompetent as a result of a developmental disability; and (2) whether he was incompetent due to a mental or psychiatric disorder. (*Leonard*, *supra*, at pp. 1391-1392.) When,

as in that case, a qualified expert adequately considers and assesses competency due to both a developmental disability and a psychiatric disorder or a combination thereof, the Court held that one competency determination that is based upon all of these factors is sufficient. (*Ibid.*)

Otherwise and as fully discussed in Argument I, *ante*, and the opening brief, the *Leonard* Court recognized that the Legislature had mandated distinct proceedings, different from a mental disorder competency proceedings, to address the distinct issue of a defendant's competency or incompetency due to a developmental disability for good reasons. (*People v. Leonard*, *supra*, 40 Cal.4th at pp. 1388-1392; accord, *People v. Castro* (2007) 78 Cal.App.4th 1415.) A typical mental disorder competency proceeding, wherein psychiatrists not necessarily qualified to assess developmental disability are appointed and evaluate only whether the defendant is competent due to a mental disorder and the trier of fact makes a competency determination based on that limited evidence, does not and cannot resolve the distinct question of competency as a result of a developmental disability. (*Leonard*, *supra*, 40 Cal.4th at pp. 1388-1391, citing with approval *People v. Castro*, *supra*, 78 Cal.App.4th at pp. 1418-1420; Pen. Code, § 1369, subd. (a); Argument I-D-3, *ante*; AOB 60-72.)

As already discussed at length, the competency proceedings in this case fell in the category of a typical mental disorder competency proceeding, not the atypical hybrid proceedings involved in *Leonard*. Psychiatrists Terrell and Davis addressed only whether appellant was incompetent due *solely* to a mental disorder. They did not consider or assess whether appellant had a developmental disability at all, much less whether that developmental disability (alone or in combination with a mental disorder) precluded him from rationally assisting his counsel in the

preparation of his defense. (Courts Exhibits 1 & 2.) Because neither could confidently determine whether or not appellant had a mental disorder, the superior court found that appellant had not carried his burden of proving that he was incompetent due to *solely* to a mental disorder. (11-CT 2733-2735.)

For her part, Dr. Christensen did not offer any opinion about whether appellant suffered from a mental disorder or defect apart from the developmental disability of mental retardation. Her opinion was limited to the issue of appellant's inability to assist counsel in a rational matter as a result of his mental retardation. (13-RT 3086-3087; see also 13-RT 2987-2989, 3103-3105.) Hence, the superior court's competency finding and Dr. Christensen's incompetency opinion were not inconsistent.

Based on these facts and consistent with the law recognized in *Leonard*, the superior court's competency finding did not resolve whether appellant was incompetent as a result of mental retardation and thus did not contradict or disprove Dr. Christensen's opinion that he was, as respondent contends. Hence, any theory of relevance that necessarily depends on the incorrectness of Dr. Christensen's opinion is without merit. (*People v. Buffington*, *supra*, 152 Cal.App.4th at pp. 454-456.)

For all of these reasons as well as those set forth in the opening brief, the issue of appellant's competency was irrelevant to any legitimate issue for the jurors to resolve in these criminal proceedings. The trial court erred in permitting the prosecutor's cross-examination of Dr. Christensen on this subject over defense counsel's objections.[50]

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[50] In a puzzling footnote, respondent suggests that appellant's argument here that Dr. Christensen's incompetency opinion was irrelevant (continued...)

C. The Prosecutor's Cross-Examination of Dr. Christensen Regarding Her Irrelevant Recommendations for Treatment of Appellant's Incompetency Was Improper

1. Defense Counsel's Objections to the Prosecutor's Cross-Examination of Dr. Christensen Regarding Her Recommendation for Treatment of Appellant's Incompetency Were Sufficient to Preserve his Challenge on Appeal

As to the prosecutor's cross-examination of Dr. Christensen regarding her recommendation for treatment of appellant's incompetency (AOB 171-176), respondent focuses on a single question out of context – "I believe you also mentioned that the defendant should be referred to the Central Valley Regional Center for placement?" (13-RT 3088) – and contends that because defense counsel did not object to it, appellant has forfeited his appellate challenge to the prosecutor's cross-examination on this subject (RB 213-214). Respondent's contention distorts both appellant's challenge and the record on which it is based.

Appellant takes issue not only with the irrelevance of Dr. Christensen's recommendation that he be treated by the regional center, which itself was not harmful to him. Appellant challenges the prosecutor's entire line of cross-examination on that irrelevant subject, including his

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[50] (...continued)
at the guilt phase is inconsistent with his Arguments I, *ante*, and in the opening brief that it was highly relevant evidence triggering the trial court's sua sponte duty to initiate developmental disability competency proceedings. (RB 210, fn. 127.) Of course, the issues are fundamentally different: the issue here is the relevance of appellant's competency or incompetency to the questions of *guilt the jurors* were to resolve in the criminal proceedings; the issue in Arguments I is the relevance of the same evidence to *trial court's* ongoing duty to *suspend the criminal proceedings* and initiate competency proceedings. There is nothing inconsistent about appellant's positions.

explicitly misleading characterization that Dr. Christensen had "basically" recommended that appellant be released and "placed back into society" and his misleading implication that her recommendation was inconsistent with the law. (AOB 171-176, 183-184.) The record *as a whole*, which respondent tellingly ignores, demonstrates that defense counsel adequately preserved this challenge for appeal.

When the prosecutor opened his cross-examination into this subject by asking Dr. Christensen if she had recommended "diversion" for appellant and what that meant, defense counsel objected on relevance grounds. (13-RT 3088.) The court tentatively sustained the objection pending a sidebar conference to be held at recess. (*Ibid.*)

The prosecutor pressed, asking Dr. Christensen whether she had recommended that "the defendant should be referred to the Central Valley Regional Center for placement?" (13-RT 3088.) When Dr. Christensen agreed that she had, the prosecutor responded: "and basically, if I understand correctly, you felt that the defendant should be placed back in society and monitored very closely[.]" (*Ibid.*) Defense counsel again objected on relevance grounds. (13-RT 3088-3089.) This time, the court overruled the objection and allowed inquiry into the subject, to which Dr. Christensen tried in vain to explain that she was "talking about . . . the referral process for handling persons of lower intelligence *and how they're handled differently than persons of normal intelligence*, and I was trying to let [defense counsel] at this point know avenues she could get to that she could – where she could get free services that are already available to appellant, and which could assist her in preparing her case." (13-RT 3089, italics added.) After the court overruled counsel's objection to it, the line of inquiry continued until it again culminated in the prosecutor's

conclusion, "Doesn't that mean that you recommend that he be placed back out into society?" (13-RT 3089-3090.) Defense counsel again objected on relevance grounds and the trial court again overruled the objection. (13-RT 3089-3090.) Dr. Christensen again refuted that characterization, explaining that her recommendation was simply that appellant is "eligible for this program," wherein the "people in the program would be able to assist in deciding the proper way of treating him" as a "developmentally disabled" person. (13-RT 3090.)

At the deferred sidebar conference, the prosecutor explained that his theory of relevancy was based on Dr. Christensen's recommendation for "diversion" in her report. (13-RT 3103.) According to the prosecutor, "the law is very clear that diversion only applies to misdemeanors." Therefore, "it just goes to . . . the witness's overall credibility." (13-RT 3103.) Defense counsel responded that the focus of Dr. Christensen's initial evaluation "was relating to competency. . . prior to her even having police reports, knowing what the charges were, et cetera. I was asking for an evaluation to assist me in determining what I could do in regards to treating appellant if it was necessary to assure that I would have his full cooperation. Those were simply suggestions. That has no bearing whatsoever on credibility of this witness." (13-RT 3103.) When the court inquired if Dr. Christensen's report mentioned the term "diversion," defense counsel replied that it was only "one word" taken out of context; in response to defense counsel's request for recommendations as to how to treat appellant and restore his competency, Dr. Christensen had recommended a "referral to C.V.R.C. diversion program," which is "not the legal diversion program that [the prosecutor] is trying to bring forward," not inconsistent with the law, as the prosecutor contended, and thus had no "bearing whatsoever on

credibility[.]" (13-RT 3103-3104.) Indeed, as discussed in the opening brief, Dr. Christensen's recommendation for treatment by the regional center was entirely consistent with the law that would have applied had the trial court held proper *developmental disability* competency proceedings that resulted in a finding of incompetency. (AOB 174-176, citing Pen. Code, § 1370.1, subd. (a).) Nevertheless, the court rejected defense counsel's argument and ruled the prosecutor's cross-examination on this subject was proper. (13-RT 3104.)

Consistent with defense counsel's argument and Dr. Christensen's prior responses to the prosecutor's questions, when cross-examination on this subject resumed, Dr. Christensen denied that she had recommended "that Mr. Townsel should be eligible for the diversion program[.]" (13-RT 3106.) While agreeing that she had "mention[ed]" diversion in her report, she explained that her recommendation was for referral to the "regional center under regional center directives [which] *is different from normal diversion programs*." (13-RT 3106; see Pen. Code, § 1370.1.) Finally, the prosecutor asked, "you weren't referring to the diversion program in the Penal Code?" (13-RT 3107.) Again consistent with defense counsel's argument, she replied, "No. It's a special one." (13-RT 3107; see Pen. Code, § 1370.1.)

As the foregoing makes clear, defense counsel repeatedly objected to the subject of Dr. Christensen's recommendation for treatment of appellant on relevance grounds, which were overruled. (13-RT 3088-3090, 3103-3104.) To the extent that defense counsel did not object to every question in this line of inquiry, it is clear from the court's rulings on the objections counsel did make that any more would have been futile. (See, e.g., *People v. Hill*, *supra*, 17 Cal.4th at p. 820 [defense counsel not obligated to make

futile objections to preserve error for appeal].) Both Dr. Christensen's testimony and defense counsel's argument were more than sufficient to alert the court that the prosecutor's theory of relevancy, being that Dr. Christensen's recommendation was inconsistent with the law and thus undermined her credibility, was wrong. (13-RT 3103-3104.) Indeed, Dr. Christensen's testimony and defense counsel's objections and argument as a whole were sufficient to alert both the court and the prosecutor that his cross-examination on this subject was also misleading, based on his misinterpretation of the word "diversion" as meaning the kind of program for misdemeanants that would allow them to be "placed back into society." (13-RT 3088-3090, 3103-3104, 3106-3107; see, e.g., *People v. Partida*, *supra*, 37 Cal.4th at pp. 434-435 [no particular form of objection required so long as it fairly informs the court and the party offering the evidence of the reasons for exclusion and provides them opportunity to respond appropriately].) Respondent's forfeiture argument based on an isolated question and answer taken out of context of the whole record is without merit. (RB 213-214.)

2. Dr. Christensen's Recommendation for Treatment of Appellant's Incompetency Was Irrelevant and thus the Prosecutor's Cross-Examination on that Subject Was Improper

As to the merits of appellant's challenge, respondent perfunctorily asserts that "the evidence that had been elicited by that point [of the prosecutor's cross-examination regarding Dr. Christensen's recommendation] had demonstrated that Dr. Christensen had drawn significant opinions at the time of her report without taking into account many factors that had skewed her testing and opinions. (Arguments I, II, and C.) In light of this evidence the questioning of Dr. Christensen about

her own opinions and recommendations . . . was plainly relevant to her credibility, or lack thereof." (RB 214.) Nonsense.

For all of the reasons discussed above, the competency determinations by Dr. Christensen and the superior court were irrelevant for any legitimate purpose in the guilt phase of this case. Even if impeachment of her competency opinion were relevant to her credibility as a whole, respondent does not explain how her *recommendation for treatment* of his incompetency impeached any part of her testimony. Respondent does not contend that her recommendation was inconsistent with the law, as the prosecutor argued (and defense counsel refuted) below. (13-RT 3103-3104.) Nor does respondent dispute that her recommendation was entirely consistent with the law governing the treatment of developmentally disabled defendants who, as Dr. Christensen believed, are incompetent to stand trial. (AOB 174-176, citing Pen. Code, § 1370.1.) Hence, just as defense counsel argued below, her recommendation had "no bearing whatsoever on [the] credibility of this witness." (13-RT 3103-3104.) Respondent's conclusory assertion to the contrary, unsupported by any meaningful argument or analysis, is without merit and must be rejected. (AOB 170-176.)[51]

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[51] It should also be emphasized that appellant disputes respondent's various characterizations of the evidence as establishing that Dr. Christensen's opinion was discredited by other evidence or that she had "drawn significant opinions at the time of her report without taking into account many factors that had skewed her testing and opinions." (RB 214; see also RB 205, 211-213.) As discussed in Argument I, respondent's characterization of the evidence is incorrect and Dr. Christensen "took into account" all "factors," including Doctors Terrell and Davis's evaluations and opinions that he was "malingering" by dishonestly withholding information from them, the possibility that the environmental conditions under which she evaluated appellant resulted in an IQ score lower than his

(continued...)

D. The Prosecutor's Cross-examination of Dr. Christensen Suggesting the Existence of Facts Harmful to Appellant, but of Which She Had No Knowledge and Which the Prosecutor Did Not Otherwise Offer or Present Any Evidence to Prove Was Improper

1. Summary of Prosecutor's Cross-Examination, Appellant's Objections, and His Argument on Appeal

Also on cross-examination of Dr. Christensen, the prosecutor asked her about if she had testified in a previous case that "jail inmates have been passing around information about tests ever since the 1860s . . . ." (13-RT 3093.) Dr. Christensen affirmed that fact. (13-RT 3093.) She also affirmed that she had "interviewed" three other defendants, a Mr. Coleman, Mr. Tex, and a Mr. Pizarro, who had also been charged with murder in Madera County. (13-RT 3093-3094.)

The prosecutor then stated that "they were all in jail around in the same time; isn't that correct?" (13-RT 3094.) Defense counsel objected that "around the same time" was vague; the trial court overruled the objection because "she's an expert" and "[s]he can answer if she knows." (13-RT 3094.) Dr. Christensen replied that she did not know – "I think there's some overlap, but I'm not really sure." (13-RT 3094.)

Next, the prosecutor asked Dr. Christensen to affirm that she had "testified in Mr. Coleman's trial in May of 19[90]" and that "the defendant

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[51] (...continued)
true IQ (though still in the mentally retarded range), his improved scores under different conditions which caused her to modify her initial opinion, and criticisms of the Wechsler Intelligence Scale. (See Arguments I and II-D-2, *ante*.) Apart from the superior court's irrelevant competency determination, respondent identifies no specific "factors" that Dr. Christensen failed to "take account" and "skewed her testing and opinions." Respondent's non-specific hyperbole is no substitute for actual evidence.

was in custody during that time since he was arrested in September of 1989[.]" (13-RT 3094-3095.) Dr. Christensen replied, "yes. But I don't know when Mr. Coleman was transferred out of county. So I don't know. I don't know when appellant was referred to the main population out of the infirmary." (13-RT 3095.) In other words, Dr. Christensen affirmed the explicit facts in the prosecutor's questions, but could not affirm the implication therein that appellant and Mr. Coleman were confined together in a way that would allow them to share "information about tests." (13-RT 3093-3095.)

Nevertheless, the prosecutor continued, asking Dr. Christensen to affirm that she was "also subpoenaed to testify in the Michael Pizarro case in May of 1990[.]" (13-RT 3095.) Dr. Christensen did affirm that fact. (*Ibid.*) The prosecutor next asked her to affirm that "Mr. Tex's case is still going on[.]" (*Ibid.*) Dr. Christensen replied that she did not know that was therefore unable to affirm that fact. (*Ibid.*) The prosecutor did not ask her about when she had interviewed Mr. Tex or when he was in custody at the Madera County Jail.

Thus, Dr. Christensen was only able to affirm that she had "interviewed" three other defendants charged with murder in Madera County, that she had testified at the trial of one in May 1990, had been subpoenaed the same month to testify at the trial of another, and that appellant had been in custody since his arrest in September of 1989. (13-RT 3094-3095.) She explicitly testified that she was unable to affirm if they were in custody at the same time or they were confined together in the same place within the jail, like the infirmary or among the main population. (13-RT 3095.) The prosecutor did not ask, and Dr. Christensen did not affirm, whether she had "interviewed" her other patients before she had

tested and evaluated appellant or that she had given them all the same test or tests.

Nevertheless, the prosecutor finally asked Dr. Christensen to affirm that it was "possible that the defendant could receive information on how to fake tests in the jail[.]" (13-RT 3095.) Given her prior answers and the absence of any evidence of the foundational facts necessarily implied in the question, defense counsel objected that the prosecutor's question "calls for speculation." (*Ibid.*) The court overruled the objection. (*Ibid.*) Defense counsel pressed that Dr. Christensen "is not an expert as to what is transpiring in the jail and would have no way of knowing and assumes foundational facts which she has no knowledge of." (13-RT 3095.) The prosecutor did not respond to this objection by explaining that he believed Dr. Christensen did know of facts that would allow for such a possibility that she could affirm, did not offer to prove those facts through other means, and the court did not ask the prosecutor to justify his questions. Instead, although Dr. Christensen had already testified that she did not know and could not affirm the foundational facts that the men were in custody at the same specific place and the same time which were necessarily implied and assumed by the question, the trial court overruled defense counsel's objection again and simply directed Dr. Christensen, "you may answer if you can"; put another way, the court directed Dr. Christensen to affirm or deny that "possibility" if she had knowledge of the foundational facts it necessarily assumed. (13-RT 3095.) Of course, as Dr. Christensen had already testified, she testified that she could not "answer" whether or not that was possible: "I don't know. I don't know – see, I don't know where he is. I don't know enough to know – I know that it has happened in history. I don't know how – I don't know where [appellant] is to know if

he's had any contact with any of them." (13-RT 3096.) On redirect examination, Dr. Christensen testified that she did not give her patients any paper tests or other materials. Therefore even if they had contact with each other and discussed the testing, the discussion would have to have been based on memory alone. (13-RT 3199-3120.)

Hence, the "possib[ility] that the defendant could receive information on how to fake tests in the jail" necessarily assumed that: (1) Dr. Christensen tested her other patients before appellant; (2) she administered the same test or tests to them that she had administered to appellant; and (3) appellant and her other patients must have been confined together at the same time and in the same place in such a way as to permit the kind of extensive contact that would be necessary for her other patients to teach him my memory how to "fake" the results of the tests she administered to them. Those facts were not in evidence. Given Dr. Christensen's testimony that she could not even affirm whether appellant and her other patients were in custody at the same place and time, the prosecutor knew that she could not affirm that it was "possible that the defendant could receive information on how to fake tests in the jail[.]" (13-RT 3095.) And when she did not affirm that harmful possibility or the facts on which it necessarily rested, the prosecutor made no offer or attempt to prove them by other means.

As set forth in the opening brief, the prosecution's question asking Dr. Christensen to affirm the "possib[ility] that the defendant could receive information on how to fake tests in the jail" was an improper one clearly designed "solely for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given." (*People v.*

Wagner (1975) 13 Cal.3d 612, 619-620.) It is "improper to ask questions which clearly suggest[] the existence of facts which would have been harmful to defendant, in the absence of a good faith belief by the prosecutor that the questions would be answered in the affirmative, or with a belief on his part that the facts could be proved, and a purpose to prove them, if their existence should be denied.' [Citation.]" (*People v. Perez* (1962) 58 Cal.2d 229, 241). (AOB 178-181.) Having asked the questions without expecting or receiving Dr. Christensen's affirmation of the harmful facts implied therein or presenting any evidence to prove them, the prosecutor effectively left the jurors with his own "unsworn testimony not subject to cross-examination. . . . [which,] 'although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.' (citations omitted)." (*People v. Bolton* (1979) 23 Cal.3d 208, 213, AOB 178-181.) Hence, the prosecutor's cross-examination was improper.

Respondent counters that appellant has forfeited his right to challenge the prosecutor's cross-examination. (RB 216-217.) Alternatively, respondent contends that the cross-examination was proper. (RB 217-218.) Respondent is wrong.

2. Defense Counsel's Objections Were Sufficient to Preserve Appellant's Right to Challenge The Prosecutor's Improper Cross-Examination on Appeal

First, respondent contends that appellant forfeited his claim that the "trial court erred in overruling defense counsel's objections to the prosecutor's questions insinuating that appellant had had the opportunity to confer with the other defendants Dr. Christensen had evaluated, which made it 'possible that the defendant could receive information on how to

fake tests in the jail . . . .'" (AOB 178, citing 13-RT 3095) because appellant "did not make such a broad objection in the trial court" (RB 216). Appellant is not entirely sure what respondent means when it refers to "such a broad objection," but his challenge below and on appeal is to the prosecutor's specific question asking Dr. Christensen to affirm that "it is possible that the defendant could receive information on how to fake tests in the jail" and to the facts necessarily implied therein. Defense counsel objected to that question on the ground that it "call[ed] for speculation" because it "assum[ed] foundational facts which she [testified she] has no knowledge of" and it was unreasonable to believe that she had such knowledge despite her testimony refuting it because she "is not an expert as to what is transpiring in the jail and would have no way of knowing" the "foundational facts" the question "assume[d]." (13-RT 3095.) Counsel's objection was clearly sufficient to preserve his claim on appeal that the "trial court erred in overruling defense counsel's objections to the prosecutor's questions insinuating that appellant had had the opportunity to confer with the other defendants Dr. Christensen had evaluated, which made it 'possible that the defendant could receive information on how to fake tests in the jail . . . .'" (AOB 178.)[52]

Respondent next contends that the real thrust of appellant's argument is that the prosecutor committed misconduct but because defense counsel did not use the word "misconduct" in making their objections, they forfeited

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[52] In another baffling contention buried in a footnote, respondent contends that appellant has not challenged the trial court's ruling on his objection that the prosecutor's concluding question called for "speculation." (RB 217, fn. 132.) This is simply untrue. (AOB 177-178, 180, citing *People v. Loker* (2008) 44 Cal.4th 691, 708 [cross-examination which invites jurors to speculate about matters not in evidence is improper].)

appellant's right to challenge the prosecutor's cross-examination on appeal. (RB 216.) Not so.

Defense counsel's objections were consistent with the general rule that it is improper to ask a witness questions "solely for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given." (*People v. Wagner*, *supra*, 13 Cal.3d at p. 619 [prosecutor committed misconduct when he failed to make an offer of proof or introduce any evidence to substantiate the implications from his questions that defendant had committed other crimes]; AOB 178-181.) In order to preserve a challenge to this kind of misconduct, an objection need only be sufficient to alert the trial court and the prosecutor to the prosecutor's need to lay a foundation for his questions by demonstrating a good faith basis for them and, should the witness fail to affirm the existence of the facts implied therein, by offering and presenting evidence to prove those facts through alternative means and to give the trial court an opportunity to avoid error in the absence of such independent proof by sustaining the objection and striking the questions. (See, e.g., *People v. Price* (1991) 1 Cal.4th 324, 481-482; see also *People v. Walker* (1991) 54 Cal.3d 1013, 1023 [purpose of the objection requirement is to give party opportunity to meet objection absent which the court is alerted to the error and has an opportunity to avoid it].) If an objection is sufficient in this regard, it is unnecessary to add the word "misconduct." Thus, this Court has held that objections on the grounds that the prosecutor's question "assumed facts not in evidence" (*People v. Price, supra*, 1 Cal.4th at pp. 481-482) and that the prosecutor's question was irrelevant because there was no evidence of the facts implied therein (*People v. Young*, *supra,* 34

Cal.4th at pp. 1185-1186) were sufficient to preserve the defendant's misconduct claims for appeal.

Pursuant to these authorities, defense counsel's objections were sufficient to alert the court and the prosecutor that the prosecutor's cross-examination was improper because it assumed facts about which Dr. Christensen had already testified she had no knowledge, to give the prosecutor an opportunity to meet that objection by offering a good-faith basis to believe that Dr. Christensen could affirm the facts implied therein or to prove them by other means, and to give the trial court an opportunity to avoid error if the prosecutor could not justify his questioning on those grounds. Although it was clear from her testimony that Dr. Christensen could not affirm the harmful facts implied in the question and the prosecutor did not offer a justification for asking it anyway, the trial court overruled the objection by directing Dr. Christensen to "answer if you can," meaning that she could affirm (or deny) the "possib[ility] that the defendant could receive information on how to fake tests in the jail" if she were able to do so. (13-RT 3095.) Given that the court knew from her testimony that she would not be able to do so, the court apparently reasoned that there was no impropriety in the prosecutor's question if it elicited a negative answer. Of course, the court was wrong: the impropriety of a prosecutor's questions implying the existence of facts harmful to the defendant that he knows the witness cannot affirm and are not otherwise in evidence is "not cured by the fact that his questions elicited negative answers. By their very nature the questions suggested to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question." (*People v. Wagner*, *supra*, 13 Cal.3d at pp. 619-620.) At bottom, defense counsel's objections were sufficient to give the trial court

an opportunity to avoid error but the court failed to do so. Appellant is now entitled to challenge that error on appeal.

3. The Prosecutor's Cross-Examination Implied the Existence of Facts Harmful to Appellant Without a Good Faith Basis to Believe That Dr. Christensen Could Affirm Them or Any Proffer of Evidence to Prove Them by Other Means and Was Therefore Improper

Although the prosecutor did not offer a good faith basis to believe that Dr. Christensen could affirm the facts implied in his questioning or proffer evidence to prove them when she was unable to do so, respondent nevertheless contends that "the requisite 'good faith' (here) can be inferred from the record because 'the factual specificity of the prosecutor's questions implies that they were based on information obtained during the prosecutor's review of records available to the defense . . . .' (*People v. Hughes* (2002) 27 Cal.4th 287, 388; see *People v. Mickle* (1991) 54 Cal.3d 140, 191.)" (RB 217-218.) Respondent's argument is without merit.

Respondent's argument ignores that the objectionable "question" was the prosecutor's conclusion that it was "possible that the defendant could receive information on how to fake tests in the jail[.]" (13-RT 3095.) That "question" implied the existence of foundational facts that Dr. Christensen *had already testified* she could not affirm. (13-RT 3094-3095.) As she had testified before that point, she did not know if they were all in jail at the same time; "I think there's some overlap, but I'm not really sure." (13-RT 3094.) And while she could affirm that she had testified at Mr. Coleman's trial in May 1990 (while he was presumably in custody) and appellant had been in custody since September 1989, she did not "know when Mr. Coleman was transferred out of county. So I don't know. I don't know when appellant was referred to the main population out of the

infirmary." (13-RT 3095.) The record belies any "good faith" belief on the part of the prosecutor that his question would elicit an answer affirming that it was "possible that the defendant could receive information on how to fake tests in the jail[.]" To the contrary, the record affirmatively demonstrates that the prosecutor *knew* that Dr. Christensen would be unable to affirm that conclusion (and the facts implied therein). Hence, it was clear that the prosecutor's question was designed "solely for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given." (*People v. Wagner*, *supra*, 13 Cal.3d at p. 619, and authorities cited therein.) For these and other reasons, respondent's reliance on cases like *People v. Mickle*, *supra*, 54 Cal.3d 140, and *People v. Hughes*, *supra*, 27 Cal.4th 287, is misplaced.

When a prosecutor cross-examines the defendant (*People v. Mickle, supra*, 54 Cal.3d at pp. 190-191; *People v. Friend* (2009) 47 Cal.4th 1, 80-82) or other witness (*People v. Hughes*, *supra*, 27 Cal.4th 825 at pp. 386-388) about his or her own statements or conduct and it was clear from the prosecutor's questions or explicit representations that the questions are based on specific record evidence – such as when a prosecutor indicates that he is reciting from the witness's own recorded police statements (*Hughes*, *supra*) or letters the defendant wrote (*Friend*, *supra*) or when the prosecutor is referring to the specific instance, places, and times reflected in instructional records that the defendant himself has produced (*Mickle, supra*) – this Court has held that it can be inferred from "[t]he factual specificity of the challenged questions . . . that they stemmed from information gleaned during the prosecution's review of records obtained from" – or otherwise available to – "the defense" (*Mickle*, *supra*, at p. 191;

accord *Friend*, *supra*, 80-82; *Hughes*, *supra*, at pp. 386-388). Under these circumstances, the record clearly demonstrates the prosecutor's good faith belief that the witness has knowledge of the facts implied about his or her own statements and conduct and is able to affirm them and that the prosecutor possessed evidence with which he is prepared to prove those facts if the witness denies them. (*People v. Perez*, *supra*, 58 Cal.2d at p. 241.) In other words, these are not instances in which the prosecutor asked his questions designed "solely for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given." (*People v. Wagner*, *supra*, 13 Cal.3d at p. 619.)

Here, in stark contrast, the challenged cross-examination of Dr. Christensen was not directed to her own acts or conduct of which it would be reasonable to assume she had knowledge, but rather was directed to whether the defendants she had evaluated were confined at the same time and place to allow for the possibility that they could teach appellant (from memory) how to fake his test results. The only questions specifically directed to matters about which she could reasonably be expected to know were those about the month and year in which she testified at the trial of one defendant, was subpoenaed to testify at the trial of another, and the date appellant was arrested and taken into custody. (13-RT 3094-3095.) Otherwise, the prosecutor simply asked her broadly and vaguely if they were "all in jail around the same time," which Dr. Christensen testified that she could not affirm. (13-RT 3094.) From the prosecutor's cross-examination as a whole, it appears that the only basis for asking that broad question was the inference that they were in the jail around the same time given the dates of their trials. But Dr. Christensen was careful to testify that

her knowledge about the dates of two of their trials and appellant's arrest did not mean she knew whether the men were actually in custody at the same place and time to give them an opportunity to meet. The prosecutor asked no questions about the dates that she evaluated her other patients or whether he evaluated them before appellant, whether she had provided her other patients with any testing materials that they could retain in the jail, or even whether she had given them all the same test from which it could be inferred that her other patients could teach appellant how to "fake" the results of the tests she had given to him even assuming that they had the opportunity to meet.[53] The prosecutor asked no other questions that were specifically directed to matters she would necessarily or reasonably be expected to know that could allow her to affirm the "possib[ility] that the defendant could receive information on how to fake tests in the jail" from her other patients. As defense counsel argued, the prosecutor had no reasonable basis on which to assume that Dr. Christensen was sufficiently familiar with the organization and structure of the jail to be able to affirm the opportunity for them to interact; she was a private psychologist, not a jail guard or employee. Nor did the prosecutor ask any questions that suggested that the facts necessarily implied therein were based on specific records or information with which the prosecutor could prove those facts when Dr. Christensen could not affirm them. For instance, the prosecutor never asked if appellant and the other patients all shared the same jail classification, if they were housed in the same block or unit, if they all had

[53] Indeed, as defense counsel later elicited, she did not provide any of the defendants with any papers or materials and therefore their knowledge about her tests would be based solely on memory. (13-RT 3199-3120.)

access to all parts of the jail or if any of them had restricted access based, for instance, on behavioral problems, illness, gang status, or heightened threat from other inmates, or whether any of them were in the infirmary at the same time as appellant or whether appellant was released from the infirmary while the other patients were still confined in the jail, from which one might be able to infer that his questions were based on jail records which – although there was no reason to believe that Dr. Christensen could affirm the facts recorded therein – provided a source of evidence with which the prosecutor could prove those facts by other means when Dr. Christensen could not affirm them.

The prosecutor's questions simply implied that appellant and Dr. Christensen's other patients had all been confined in the Madera County Jail around the same time based on the dates of their trials and the prosecutor had a source of knowledge unknown to the jury that she had evaluated her other patients before appellant and provided them with information that gave them the means and opportunity to appellant how to "fake" the results of the tests she had administered. To the lay jurors, who were inexperienced with the complexities of jails and classification systems and who were likely to treat the experienced prosecutor's implications with unquestioning acceptance, his questions certainly "suggested to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question." (*People v. Wagner*, *supra*, 13 Cal.3d at pp. 619-620.) However, as a matter of law, the prosecutor's questions simply did not evince the kind of specificity from which it could reasonably be inferred that they were based on some specific source of evidence that the prosecutor either had reason to believe Dr. Christensen would know or that he was prepared to offer if she did not.

Thus, *Mickle*, *Hughes*, and similar cases are inapposite.

For these and all of the reasons discussed in the opening brief, the record clearly demonstrates that the prosecutor knew from Dr. Christensen's earlier testimony that she could not affirm "possib[ility] that the defendant could receive information on how to fake tests in the jail" and the foundational facts necessarily implied therein and that he asked the question not for the answer she would give but rather to circumvent the rules of evidence and get before the jurors the harmful facts immune from adversarial testing. (AOB 178-181.)

D. The Improper Cross-Examination of Dr. Christensen Was Prejudicial, Violated Appellant's State and Federal Constitutional Rights to a Fair Trial and Highly Reliable Capital Murder Verdicts, and Demands Reversal of the Murder Convictions, Special Circumstances, and Death Judgment

Finally, appellant argued that it is reasonably probable that the result of the trial would have been different absent the cumulative effect of the prosecutor's improper cross-examination. (AOB 182-186.) Hence, the prosecutor's misconduct resulted in a miscarriage of justice under the state constitution and a fundamentally unfair trial and constitutionally unreliable capital murder verdicts in violation of the Eighth and Fourteenth Amendments of the federal constitution. (AOB 182, citing, inter alia, *Anderson v. Goeke* (8th Cir. 1995) 44 F.3d 675, 679, and authorities cited therein, *Kirkpatrick v. Blackburn* (5th Cir. 1985) 777 F.2d 272, 278-279 & fn. 9, and authorities cited therein, and *Kyles v. Whitley*, *supra*, 514 U.S. at p. 434.)

Respondent disagrees. (RB 218-222.) At the outset, respondent contends that appellant forfeited his federal constitutional claims because he failed to cite the federal constitution in support of his trial objections below

and "fails to adequately articulate *how* each federal constitutional claim was violated by the few alleged errors" on appeal. (RB 219, original italics .) For the reasons already stated in refuting respondent's identical argument discussed in Argument II-E, *ante*, respondent is mistaken. (See also AOB 182-186.)

With respect to the prejudicial impact of the prosecutor's cross-examination of Dr. Christensen regarding appellant's competency to stand trial, this Court has recently emphasized that introducing such irrelevant mental condition evidence in the guilt phase of a criminal trial tends to "'confuse and mislead the jury'" and "complicate[] matters at the guilt phase by injecting the subject of sanity" – and, by logical extension, competency – when it is not "in issue." (*People v. Mills*, *supra*, 55 Cal.4th at pp. 680-681.) For the reasons discussed in the opening brief and further below, this is just such a case.

Significantly, respondent not only fails to dispute that the prosecutor's cross-examination in this regard clearly implied that the superior court's competency finding was relevant to the mental state issues the jurors were to decide, that the superior court had made a factual and legal finding contrary to Dr. Christensen's opinion that appellant was incompetent due to mental retardation, or that it undermined the credibility of Dr. Christensen's mental retardation opinion. (See RB 212-213; compare AOB 183-184.) Respondent affirmatively argues that these were the clear implications from the prosecutor's cross-examination. (RB 212-213; see also RB 220-221.) Respondent's only dispute is that these implications were misleading.

As discussed in Part B, *ante*, respondent contends that the superior court's competency finding disproved Dr. Christensen's diagnosis and

thereby undermined her credibility and the reliability of her mental retardation diagnosis. (RB 212-213.) As further discussed in Part B, *ante*, respondent's contention is without merit with respect to the question of error. At the same time, respondent's contention carries significant persuasive value on the question of prejudice by effectively making appellant's argument for him: if respondent – armed with its legal training and knowledge of the superior court's actual determination that appellant had not proved his incompetency due solely to a mental disorder – believes that the superior court's competency finding contradicted Dr. Christensen and undermined her mental retardation diagnosis, then surely the jurors – who were unarmed with such training and knowledge – reached the same incorrect conclusion. (Cf. *People v. Fletcher* (1996) 13 Cal.4th 451, 471 ["if the legally trained prosecutor was unable to" understand correct legal principles, then a reviewing court "safely can infer that this was true of the lay jurors as well"].) That conclusion falsely and unfairly diminished the strength of appellant's mental retardation evidence central to his defense.

Respondent similarly assists appellant's argument that the prosecutor's cross-examination implying the existence of extrajudicial facts harmful to appellant was prejudicial. (AOB 185-186.) As discussed in Part D, *ante*, respondent affirmatively contends that the prosecutor's questions so clearly implied that he possessed evidence that appellant and Dr. Christensen's other patients were in custody together and had the means and opportunity to learn how to "fake" the results of tests on which Dr. Christensen based her mental retardation diagnosis (and presumably the same tests on which Doctors Powell and Schuyler based their diagnoses) that this Court should conclude as much despite his failure to present such evidence. (RB 217-218; see also RB 222.) Again, while respondent's

contention is without merit on the question of error (Part D, *ante*), it is compelling proof that the error was prejudicial: if respondent believes the prosecutor's questions so clearly implied the existence of those facts that this Court should assume their existence despite the absence of any evidence to prove them, surely the lay jurors drew the same inference. (See AOB 185-186, citing, inter alia, *People v. Wagner*, *supra*, 13 Cal.3d at pp. 619-620.) It is that very inference which results in prejudice, that is not "cured by the fact that [the prosecutor's] questions elicited negative answers. (*People v. Wagner*, *supra*.) To the contrary, a prosecutor's implication that there exists evidence harmful known to him but to which the jurors are not privy, though "worthless as a matter of law," can be "dynamite" for jurors. (*People v. Bolton*, *supra*, 23 Cal.3d at p. 213.) Where, as here, the implied facts undermine the defense in a close case, this Court has held the error is prejudicial under the "reasonable probability" standard. (*Wagner*, *supra*, at pp. 620-621.) Under these circumstances, the standard concluding instruction that questions are not in evidence, which respondent relies on here (RB 222), is insufficient to cure the harm (*Wagner*, *supra*, 13 Cal.3d at p. 621).

As to the prosecutor's cross-examination regarding Dr. Christensen's recommendation for treatment, respondent contends that it was harmless because the prosecutor never explicitly argued that her recommendation was inconsistent with the law. (RB 221; compare AOB 183-184.) But that was the very theory of relevancy the prosecutor argued to the trial court below: Dr. Christensen's recommendation was inconsistent with the law, which undermined her credibility as a whole. (13-RT 3103; Part C-1, *ante*.) While respondent is correct that the prosecutor never explicitly argued that theory to the jurors, the message was implicit from the tenor of his

questioning. (See Part C-1, *ante*; AOB 183-184.)

Alternatively, if respondent is correct that the jurors had no reason to think that Dr. Christensen's recommendation was inconsistent with the law, the prosecutor's cross-examination was still prejudicial but for another reason. While it is clear from the relevant statutory provisions and defense counsel's sidebar argument to the trial court that Dr. Christensen was recommending treatment options for appellant's *incompetency*, the prosecutor's cross-examination obfuscated that legal point for the jurors.

The prosecutor repeatedly characterized her suggestion as a recommendation that appellant's developmental disability made him eligible for release "back in society and monitored very closely" by the regional center. (13-RT 3088-3090.) While Dr. Christensen denied that she recommended releasing appellant, the prosecutor elicited her agreement that she did recommend that appellant "should be referred to the Central Valley Regional Center for *placement*," that "the regional center oversees . . . housing and work programs that are specifically developed for the developmentally disabled criminal offender . . . . ," and that the program for which he was eligible was "a program that when you have somebody who's developmentally disabled, that you find punishments or living situations, or work situations, or other types of situations where you can protect them, and enable them to live at their highest level without getting in trouble, without getting hurt." (13-RT 3088-3090.) If – as respondent contends – the jurors had no reason to think that Dr. Christensen's testimony in this regard was inconsistent with the law, the prosecutor's cross-examination suggested at best that if appellant were found to be a "developmentally disabled criminal offender," he would be eligible for "housing and work programs" or "living situations or work situations" outside of the confines of a prison. At worst,

it suggested that if appellant were found to be a "developmentally disabled criminal offender," he would be eligible for release "back in society" under the supervision of the regional center. The prejudicial impact of these suggestions cannot be overstated: they created a powerful incentive for the jurors to reject appellant's mental retardation claim (and ultimately vote for death) in order to ensure that he would not be classified as a "developmentally disabled criminal offender" who would be eligible for release "back in society" or for special "housing and work programs" outside of the confines of a prison. "The instinctive reaction of a socially minded person to [that] picture . . . is too well understood to require further elucidation." (*People v. Mallette* (12940) 39 Cal.App.2d 294, 299-300; accord, *People v. Sorenson* (1964) 231 Cal.App2d 88, 91-92 [remarks that insanity verdict allowed possibility that mental hospital would "turn (the defendant) loose"]; *People v. Morse* (1964) 60 Cal.2d 631, 643-644 [suggestion in penalty trial that life without parole verdict would allow possibility of parole creates danger that jurors will vote for death in order to foreclose that possibility].)

For these and all of the other reasons discussed in the opening brief, the prosecutor's improper cross-examination in all respects unfairly tended to discredit appellant's mental retardation claim and the defense on which it hinged. (AOB 182-186.) Given the closeness of the question of whether appellant's mental state was inconsistent with premeditation and deliberation given his mental retardation and the circumstances under which he committed the crimes, it is reasonably probable that the first-degree murder verdicts would have been more favorable absent the misconduct. (AOB 182-186; see also Argument II-E, *ante*.) The misconduct therefore resulted in a miscarriage of justice, a fundamentally unfair trial, and

constitutionally unreliable capital murder verdicts, which requires reversal of the murder convictions and the special circumstances and death judgment based thereon.[54]

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[54] See footnote 33, *ante*

V

THE TRIAL COURT COMMITTED A SERIES OF INSTRUCTIONAL ERRORS CONCERNING APPELLANT'S ONLY VIABLE DEFENSE, THE CUMULATIVE EFFECT OF WHICH VIOLATED STATE LAW AND HIS CONSTITUTIONAL RIGHTS AND REQUIRES REVERSAL OF THE JUDGMENT

A. Introduction

The only instruction the jurors were given to guide their consideration of appellant's mental retardation evidence was as follows:

> Evidence has been received regarding a mental defect or mental disorder of the defendant, Anthony Townsel at the time of the *crime charged in Counts I and II.* You may consider such evidence *solely for the purpose* of determining whether or not the defendant Anthony Townsel actually formed *the mental state which is an element of the crime charged in Counts I and II, to wit Murder.*

(3 CT 796, italics added [CALJIC No. 3.32 (5th ed. (1988)); 14 RT 3357.)

In the opening brief, appellant argued that the instruction erroneously precluded the jurors from considering his mental retardation evidence, in determining whether the prosecution had proved beyond a reasonable doubt: (1) the specific intent elements of the preventing witness testimony charge under Penal Code section 136.1, subds. (a)(1) and (c)(1) and special circumstance allegation under Penal Code section 190.2, subdivision (a)(10); and (2) the premeditation and deliberation elements of first-degree murder in violation of Penal Code section 189, which was not "the crime charged in Counts I and II" under the instruction. (AOB 182-211.)

Respondent does not dispute that premeditation and deliberation and the specific intent elements of the preventing witness testimony charge and allegations were elements of the crimes on which the prosecution bore the burden of proof beyond a reasonable doubt under state law and the federal

constitution. Nor does respondent dispute that a mental defect like mental retardation is relevant and admissible to raise a reasonable doubt that a defendant actually formed those mental state elements and thus a defendant is entitled to present and have the jury consider such evidence when supported by the facts. (See RB 223-239; compare AOB 118-122, 188-192.)

Instead, respondent disputes that the instruction violated these principles. (RB 223-224, 228-239.) Alternatively, respondent contends that any errors were forfeited or harmless. (RB 223-224, 225-228, 239-242.) Respondent's contentions are without merit.

B. The Instruction Precluded the Jurors from Considering Appellant's Mental Retardation Evidence in Determining Whether the Prosecutor Had Proved the Specific Intent Elements of the Dissuading a Witness Charge and Preventing Witness Testimony Special Circumstance Allegation in Violation of State Law and Appellant's Federal Constitutional Rights

Significantly, respondent does not dispute that the court's provision of CALJIC No. 3.32 precluded the jurors from considering appellant's mental retardation evidence in determining whether the prosecutor had proved beyond a reasonable doubt that he killed Martha Diaz with the specific intent to prevent her (possible) testimony against him in a (possible) future criminal proceeding arising from her battery complaint, which was the essential specific intent element of the preventing witness testimony charge and special circumstance allegation. (See RB 228-232; compare AOB 188-192.) Instead, respondent contends that there was no error in prohibiting the jurors from considering that evidence because it was not part of appellant's defense theory to that charge and allegation nor was there substantial evidence to support the theory. (RB 229-232.)

Alternatively, respondent contends that any instructional error was forfeited or invited. (RB 225-228.) Respondent's arguments have no factual or legal merit.

1. The Instructional Error Was Neither Waived, Forfeited Nor Invited

Addressing respondent's latter point first, appellant largely predicted and refuted it in the opening brief and hereby incorporates the arguments and authorities discussed therein. (AOB 212-216.) He did not anticipate, however, the nature of respondent's actual argument which misstates appellant's challenges, ignores the binding precedents of this Court and misstates the governing legal principles, and assumes the existence of facts that are not supported by the record.

The heart of respondent's argument is the premise that CALJIC No. 3.32, which was provided in this case is a "standard insruction" and therefore necessarily a correct statement of the law. (RB 227.) Based on that premise, respondent contends that what appellant is "actually arguing" is that the instruction "was correct, but in hindsight it was incomplete because it omitted" the preventing witness testimony charge and special circumstance allegation. (RB 227.) Having set up this straw man, respondent easily knocks it down based on the well-settled rule an instruction correct in law cannot be challenged as incomplete absent request for amplification. (RB 225, 227.) Further, respondent emphasizes, that correct instruction is a pinpoint one that need only be given on request. The court did so and was under no sua sponte duty to do any further or additional pinpointing. (RB 226-227.) Finally, without pointing to any expression of tactic or strategy by counsel, respondent speculates that counsel invited its "incompleteness" because he requested the instruction as

provided and "tactically" chose to omit the crimes and mental states not mentioned. (RB 223-224.) Not so.

As to respondent's essential premise that CALJIC No. 3.32 is a correct instruction which justifies application of various rules of forfeiture, it is without merit for several reasons. As a preliminary matter, respondent's contention that CALJIC No. 3.32 is necessarily a correct statement of law simply because it is a "standard instruction" is flawed. As discussed in Argument II-D, *ante*, "CALJIC . . . is not itself the law. Like other pattern instructions, it is merely an attempt at a statement thereof." (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.)

In any event, the issue here not whether the "standard instruction" embodied in CALJIC No. 3.32 is a correct statement of the law. Apart from its permissive use of the word "may," appellant agrees (for purposes of this argument) CALJIC No. 3.32 as it appears in the CALJIC instructions is generally a correct statement of law. But it is only a correct statement when it is provided in accord with the Use Note, which the trial court in this case failed to do. (See AOB 198.)

And therein lies the real issue: whether the instruction as *provided in this case* was correct. The instruction provided was incorrect not merely because it failed to follow the Use Note or even merely because it omitted relevant crimes and particular mental states.[55] As appellant explained in the opening brief:

The instructional error went beyond a mere omission,

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[55] While respondent later argues that the instruction was inapplicable to the preventing witness testimony charge and special circumstance (see Part 2, *post*) even respondent does not and cannot dispute that the instruction violated the Use Note directions by failing to specify premeditation and deliberation (see Part D, *post*).

> *however*. On its very face, CALJIC No. 3.32 is a *limiting* instruction. (*People v. Leever* (1985) 173 Cal.App.3d 854, 866.). The explicit language of the instruction told the jurors that the "*sole*" purpose for which they could consider the evidence of mental retardation was whether appellant possessed the "mental state" for the charged *murders alone*. (3 CT 796; 14 RT 3357.) This Court "presume[s] that jurors follow limiting instructions" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1115) and has applied that presumption to CALJIC No. 3.32 (*People v. Coffman* (2004) 34 Cal.4th 1, 83 [jurors provided with CALJIC No. 3.32, limiting their consideration of mental disorder evidence to specific issue, are presumed to have limited their consideration of evidence to that issue and no others]). Hence, the instruction *affirmatively* and erroneously directed the jurors that they were precluded from considering the evidence on any other issue, such as the mental state elements of the dissuading a witness charge and witness killing special circumstances, and it must be presumed that they followed the instruction. (See also, e.g., *People v. Snow* (2003) 30 Cal.4th 43, 98 [where instruction stated that it applied to "crime charged," lay jurors would *not* have applied it to "special circumstance"].)

(AOB 191, italics added.)

Indeed, although respondent ignores it, the law is well settled that an instruction which specifically lists the items that the jury can consider under a particular legal principle but omits items that the jury must also consider is not merely an incomplete instruction but a facially erroneous one. (AOB 202-203.) It is equally well settled that even when a trial court is not under a sua sponte obligation to instruct on a particular legal principle, once it undertakes to instruct on that principle it has a sua sponte duty to do so accurately and completely. (AOB 214.[56] "[W]hen a partial instruction has been given we cannot but hold that the failure to give complete instructions

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[56] Additionally, at the time of trial, mental defect instructions were required to be given sua sponte in any event. (AOB 212-214.)

was prejudicial error." (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015, and authorities cited therein.)

This Court has applied this principle in the analytically identical context of voluntary intoxication instruction with CALJIC No. 4.21, which, like CALJIC No. 3.32, is a pinpoint instruction that directs the jurors to consider evidence of intoxication in determining whether the prosecution has proved the listed specific intent elements of listed crimes and special circumstance allegations. (AOB 214, citing People *v. Castillo*, *supra*, at p. 1015; accord, *People v. Pearson* (2012) 53 Cal.4th 306, 325.) In *People v. Pearson*, as in this case, the trial court instructed the jurors that they could consider intoxication in determining whether the defendant had formed the specific intent elements of a list of charged crimes, but omitted from the list the crime of torture. This Court held that the instruction was erroneous on its face, and the claim was not forfeited by the defendant's failure to request an instruction including the crime of torture, his failure to object to the instruction as given, or indeed the fact that he requested the instruction as given without expressing any intent or basis to omit the crime of torture. (*Ibid.*) This Court applied the long standing rule discussed in the opening brief but dismissed by respondent that even though the instruction is a pinpoint one that need only be give on request, once the court provides the instruction, it has a sua sponte due to instruct correctly and completely. (*Ibid.*) The court's instruction omitting torture affirmatively and erroneously implied that the jurors were precluded from considering the intoxication evidence in determining whether the prosecution had proved its specific intent element beyond a reasonable doubt and violated the court's sua sponte instructional obligations. (*Ibid.*)

Pursuant to these authorities, the trial court's provision of CALJIC

No. 3.32 was facially incorrect by affirmatively precluding the jurors from considering the mental retardation evidence in determining whether the prosecution had proved the mental state elements of the crimes and special circumstances that were omitted from the instruction and therefore violated the trial court's sua sponte duties. (AOB 214-215.) Indeed, in *People v. Rogers* (2006) 39 Cal.4th 826 – on which respondent principally relies(RB 232-236) – this Court explicitly held that a challenge to CALJIC No. 3.32 on the ground that it precludes consideration of mental defect evidence on omitted mental states is reviewable on appeal under Penal Code section 1259 notwithstanding the absence of a trial objection or request for further instruction. (*Rogers*, *supra*, at p. 881, fn. 28; see AOB 212-216.)

Finally, respondent's perfunctory claim of invited error is equally without merit. (RB 225-226.) As a preliminary matter, although respondent emphasizes throughout its argument that defense counsel affirmatively requested the instruction *with* the omissions (RB 225-231, 240-241), the record does not support that assertion. As discussed in the opening brief, there is no discussion about CALJIC No. 3.32 at all on the record. The only record evidence regarding the source of the instruction is as follows.

First, the clerks's transcript containing a copy of CALJIC No. 3.32 as provided bore boxes entitled "Requested by People" and "Requested by Defense," both of which were checked. (3 CT 796.) That instruction (like all of the others provides) also bore boxes entitled "Given as Requested" and "Given as Modified," but *neither* was checked. Hence, it does not reveal whether the instruction was "given as requested" by defense counsel rather than "given as modified" on prosecutor's or court's own motion.

Second, following the unreported instructional conference, the trial

court made a broad statement that "the record will reflect that Court and counsel have gone through all of the jury instructions *and numerous of them have been modified.* And it's my understanding that the jury instructions as now selected and to be given to the jury are acceptable to both sides; is that correct?" (14 RT 3337, italics added.) All counsel simply replied in the affirmative without further discussion or explanation. (14 RT 3337.) There were no objections or discussion of what was actually requested by one party but refused and modified by the court. (AOB 216-217.)

Thus, there is no evidence to prove whether defense counsel affirmatively requested the instruction as provided – as respondent emphatically contends throughout its argument (RB 225-231, 240-241) – or whether defense counsel requested a correct and inclusive version of CALJIC No. 3.32, which the court refused and modified and defense counsel simply acquiesced in the court's ruling. (Cf. *People v. Moon* (2005) 37 Cal.4th 1, 28 [where trial court stated on record: "pursuant to stipulation or at least the lack of opposition I assume both attorneys are jointly requesting I give these instructions," and defense counsel simply replied in the affirmative, record did not necessarily demonstrate that counsel requested challenged instruction rather than merely acquiesced in it].)

In any event, it is black letter law that the invited error doctrine will not preclude appellate review absent counsel's "express[ion] of a deliberated tactical purpose" (*People v. Valdez* (2004) 32 Cal.4th 73, 115) "for requesting *or* acquiescing" in an instructional error (*People v. Moon*, *supra*, 37 Cal.4th at p. 27, italics added). (AOB 215-216.) Here, as discussed in the opening brief, the record contains no express statement of a tactical basis for either requesting or acquiescing in the erroneous

instruction and hence the invited error doctrine is inapplicable. (AOB 215-216.)

Although respondent neither acknowledges the requirement of an express tactical explanation on the record nor attempts to justify an attempt to imply one, it is true that a tactical reason may be implied under limited circumstances that do not apply here. First, the instruction complained of cannot be one, like the instructional error here, that results from a violation of the trial court's independent, sua sponte instructional duties. (*People v. Marshall* (1990) 50 Cal.3d 907, 931; *People v. Wickersham* (1982) 32 Cal.3d 307, 333-334.) Second, the act alleged the have invited the error must be an "affirmative" action as opposed to a failure to act. (*People v. Coffman* (2004) 34 Cal.4th 1, 49.) Second, the record must support a "clearly implied tactical reason" for defense counsel to have "intentionally caused the trial court to err." (*Ibid.*, citing, e.g., *People v. Catlin* (2001) 26 Cal.4th 81, 149-150.) Finally, "[i]t must also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake." (*People v. Coffman*, *supra*, at p. 49, citing *People v. Wickersham*, *supra*, 32 Cal.3d at p. 330.) For the reasons discussed above, the record in this case satisfies none of these requirement to justify departing from the rule requiring an express statement of trial tactics and implying a reasonable tactical decision. For these and all of the reasons set forth in the opening brief, appellant neither forfeited nor invited the affirmatively erroneous instruction undercutting his sole defense. (AOB 212-216.)

2. Substantial Evidence Supported the Instruction as to the Preventing Witness Testimony Charge and Special Circumstance Allegation

Significantly, respondent does not dispute that the court's provision of CALJIC No. 3.32 precluded the jurors' consideration of appellant's

mental retardation in determining whether the prosecution had proved the specific intent elements of the preventing witness testimony charge and special circumstance allegation. To the contrary, respondent contends that this is precisely what the instruction's omission of that charge and allegation was intended to do. Respondent simply contends that this was entirely appropriate. (RB 228-232; see also RB 225-226, 240-241.)

Specifically, respondent concedes that CALJIC No. 3.32 was a defense theory instruction in this case, which a trial court is required to provide with respect to a charge of allegation "only [1] if it appears that the defendant is relying on such a defense, *or* [2] if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Maury* (2003) 30 Cal.4th 342, 424, internal quotation marks and citations omitted, cited at RB 229.) Although this test is phrased in the alternative, respondent devotes virtually its entire argument to its contention that appellant's mental retardation evidence was not part of his defense theory to the preventing witness testimony charge and special circumstance allegation. (RB 229-230.)

Respondent barely touches on the alternative question of whether substantial evidence supported a mental retardation-based defense theory to raise reasonable doubt that appellant formed the specific intent elements of that charge and allegation. (RB 221.) Importantly, respondent does not dispute that the unanimous opinions by appellant's three experts that he was mentally retarded constituted "substantial evidence" of that "mental defect" for purposes of Penal Code section 28 or CALJIC No. 3.32. (See RB 223-239.) Nor does respondent dispute that there was substantial evidence supportive of a mental retardation-based defense to the premeditation and deliberation elements of first-degree murder. (See RB 232-239.) Instead,

in a single sentence, respondent declares that there was not substantial evidence to support a mental retardation-based defense to the specific intent elements of the preventing witness testimony charge and allegation because there was "exceptionally strong evidence" of those mental states as compared to a "lack of evidence that alleged mental retardation played any role in his actions" (RB 231) – a contention that again reveals respondent's misunderstanding of the substantial evidence test (see Argument I, *ante*) and in any event is untrue. Indeed, respondent contends, "appellant does not even try to demonstrate that there was substantial evidence supportive of such a defense" (RB 231) – a contention which is simply untrue (see AOB 218-221; see also AOB 83-84, 119-1201, 143, fn. 36, 187-221).

As to appellant's defense theory, respondent's contention that mental retardation "played no role" in it is based on two pieces of record evidence and inferences respondent draws from them. First, respondent's contention is based on its assumptions – discussed in Part 1, *ante* – that defense counsel "tactically" requested CALJIC No. 3.32 as provided. According to respondent, the omission of the preventing witness testimony charge and allegation was meaningful and deliberately intended to preclude the jury's consideration of the mental retardation evidence as part of the defense theory to that charge and allegation. (RB 229-230.) Appellant agrees that the jurors certainly would have interpreted the instruction in that way. He does not, however, agree with respondent's premise that this was the instruction "tactically" intended or requested by defense counsel for the reasons discussed in Part B-1, *ante,* and the opening brief. (AOB 215-216.)

Otherwise, respondent's contention that appellant did not rely of mental retardation as part of his defense theory to the preventing witness testimony charge and allegation is based entirely on defense counsel's

closing argument. Focusing solely on the argument of one of appellant's two attorneys, respondent contends that defense counsel never specifically mentioned mental retardation evidence in arguing that appellant did not possess the requisite mental state elements of the preventing witness testimony charge and allegation. (RB 230, citing 15-RT 3433-3443 [argument of defense counsel Litman].) Instead, according to respondent, his defense theory was that appellant killed Ms. Diaz "as a result of 'jealousy' and 'frustration' and it was not an attempt to dissuade Diaz from testifying." (*Ibid.*)

Respondent's argument is based on the unmistakable but utterly incorrect premise that appellant's mental retardation and the defense theory that his intense feelings of jealousy and anger motivated the killing and raised reasonable doubt that he formed the specific intent elements of the preventing witness testimony charge and special circumstance were somehow mutually exclusive. To the contrary appellant's defense to *both* first-degree murder and preventing witness testimony was that his actions were born solely of intense feelings of anger, jealousy, and impotence directed at Martha.[57] (15-RT 3417-3410, 3420, 3434-3444 [closing arguments of both defense attorneys]; see also 3-CT 805-809 [instructions on voluntary manslaughter in heat of passion requested by defense].) Significantly, respondent does not – and indeed cannot – dispute that mental retardation was central to that defense theory against the intent elements of first-degree murder. To the contrary, as discussed in detail in the opening brief, it is clear that mental retardation and appellant's intense emotions

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[57] By "all of the crimes," appellant excludes, of course, the Penal Code section 246 charge which incorporated only a general intent element to which his mental state defense theory was legally irrelevant.

were not mutually exclusive bases for his defense theory but rather inextricably intertwined. (AOB 142-150, 188-192, 218-221; see also Argument II-E, *ante*.)

Respondent's attempt to parse appellant's defense to first-degree murder from his defense to the preventing witness testimony charge and allegation is evidently based on the structure of his closing argument but respondent ignores the substance of that argument. As to its structure, appellant was represented by two attorneys – Ms. Thompson and Mr. Litman – who divided the closing argument as well as the issues to be addressed therein.

Ms. Thompson was the first attorney to argue; she was tasked primarily with addressing the mental retardation evidence and the charges of murder and their degree. (15 RT 3406-3428.) However, she also addressed the preventing witness testimony charge and allegation as it related to the overall defense theory that appellant's actions were motivated solely by feelings of anger, jealousy and impotence which his mental retardation left him unable to overcome with sound judgment or careful consideration or weighing of the consequences of his actions. In arguing that the events leading to the killing were prompted by appellant's anger and jealousy (15 RT 3406-3407), Ms. Thompson emphasized that when appellant first went to Ms. Diaz's house and made angry and veiled threats against her to her sister, he never mentioned anything about dropping her charges, or not testifying, or going to jail (15 RT 3407). Likewise, when he returned later that evening, he never mentioned anything about the battery charge or her testimony. (15 RT 3408.) She then detailed the evidence immediately preceding, during and after the crimes themselves, which evidenced no concern about future murder charges or the testimony of the

many witnesses against him. (15-RT 3409-3412.) Ms. Thompson then discussed the diagnoses by the three experts that appellant was mentally retarded. (15-RT 3416-3410.) Referring to their testimony about the general features of mental retardation, she argued that "Mr. Townsel lacks the mental and intellectual functioning in order to participate in abstract thinking or dealing with consequences and judgment." (15-RT 3419.) She argued that it was clear that "Mr. Townsel acts without thinking" and that all of his conduct leading to, during, and immediately after the killings were inconsistent with anyone who was considering the consequences of his actions. (15 RT 3420.) As she put it, his behavior "show[s] plainly Mr. Townsel doesn't think. He acts and reacts, but those are mere unconsidered rational [sic] reflexive actions." (15 RT 3421.) The jury had to find that he killed Ms. Diaz after "weighing the pros and cons" of his actions, but the facts surrounding their commission "where everyone could identify him as the perpetrator" together with his mental retardation showed that he did not do. (15-RT 3422-3423.) To be sure, much of Mr. Thompson's argument was directed to the mental state elements of first-degree murder but they applied equally to whether appellant killed Ms. Diaz with the specific intent of preventing her (possible) testimony against him in a possible future criminal proceeding arising from the battery complaint – as indicated by Ms. Thompson's emphasis on the absence of evidence that he had any concern about that charge or the possibility of her testimony, much less any concern about the inevitable testimony of numerous other witnesses against him in an inevitable future murder trial. (15 RT 3407-3408, 3422-3423.)

Mr. Litman presented the next part of appellant's closing argument. He explained to the jurors that he would be addressing "Count 4, the charge of dissuading . . . a witness from testifying [and] . . . the special

circumstance allegations." (15-RT 34330.) He further explained, "I'm not going to be reviewing. I'm only going to be addressing a portion of them. I was going to tell you – in fact, I have a little note that there will be some overlap but I'm going to try and avoid repetition. Either Mrs. Thompson and I think an awful lot alike or she was copying my notes." (15 RT 3429.) Thereafter, he described the specific intent element of the preventing witness testimony charge and special circumstance allegation and emphasized that the prosecution bore the burden of proving it beyond a reasonable doubt. (15-RT 3433-3434.) As Ms. Thompson had argued, Mr. Litman argued that "if you follow the law and you consider the evidence which you have heard, you know the real reason why these crimes were committed and what transpired. . . . [Y]ou will see that what Mr. Townsel did what he did out of anger over the breakup of the relationship that he had with Martha Diaz and out of jealousy. Based on his belief in his own mind that somehow Martha Diaz was involved in relationship with Luis Anzaldua." (15 RT 3434.) He echoed Ms. Thompson's arguments regarding the lack of evidence that he had any concern about the possibility of Ms. Diaz testifying against him. (15-RT 3436-3437.) Like Ms. Thompson, he argued that "what Mr. Townsel, he did out of anger, and he did out of jealousy, and he did out of frustration, and that when he did these things he wasn't thinking about trying to dissuade Martha Diaz from testifying as a witness against him." (15-RT 3438; see also 15-RT 3439-3442 [detailing evidence that appellant committed all of the crimes in impulsive, angry, jealous state].)

From the foregoing, it is true, as respondent observes, that Mr. Litman did not *specifically* mention the mental retardation evidence as it related to the overall defense theory that appellant's sole motivation for the

crimes was anger and jealousy and that he killed in the impulsive heat of those emotions. But given the structure and substance of the closing argument as a whole, appellant's mental retardation was just as central to that defense theory to first-degree murder (which respondent does not dispute) as it was to the same defense theory to the preventing witness testimony charge and allegation. (See AOB 142-150, 218-221.)

At the same time, appellant agrees that both counsel could have been much more clear regarding the relevance of the mental retardation evidence to the specific mental state elements in dispute. (See AOB 209-210.) But this is *precisely why* clear and accurate instructions were so vitally important in this case and precisely why trial courts are required to provide such instruction whenever "there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case" even if the defendant does not openly rely on such a theory. (*People v. Maury*, *supra*, 30 Cal.4th at p. 424, cited at RB 229.)

In this regard, even if respondent is correct that Mr. Litman's closing argument did not openly rely on the mental retardation evidence as a basis for his defense theory to the preventing witness testimony charge and allegation, it is beyond dispute there was substantial evidence of mental retardation from which a reasonable juror could have had reasonable doubt that he harbored the specific intent element of that charge and allegation given the circumstances surrounding the crimes. (See Argument I-D-1, citing, inter alia, *People v. Breverman, supra*, 19 Cal.4th at pp. 149, 153, 155, 162-163, 177.) As discussed in Argument I-D, *ante*, in measuring the substantiality of the evidence in this regard, respondent's single-sentence "argument" that the prosecution presented "exceptionally strong evidence" of that mental state – even if true – is irrelevant. (*Ibid.*; RB 231.)

Expert testimony that the defendant suffers from a diagnosed mental disorder or defect and that describes general features thereof which would be relevant to a specific intent element is substantial evidence warranting a mental disorder or defect instruction under Penal Code section 28. (*People v. Larsen* (2012) 205 Cal.App.4th 810, 823-828, and authorities cited therein [specific testimony that mental disorder actually precludes or precluded formation of mental state is prohibited and therefore not necessary].) Here, as appellant argued in the opening brief but respondent essentially ignores, the defense experts testified that mental retardation, like appellant's, impairs an individual's abstract thinking and reasoning, memory, judgment, comprehension, and ability to consider the consequences of his or her actions and to make causal connections. (12-RT 2894-2895, 2938; 13-RT 3032-3033, 3044-3045, 3086, 3097, 3127-3128, 3152-3153; AOB 219-221.) This testimony was consistent with the view that appellant actions were purely impulsive and emotional "rather than pursuant to a premeditated plan" to kill Ms. Diaz at all much less for the specific purpose of preventing her (possible) testimony against him in a (possible) future criminal proceeding arising from the battery complaint. (*Atkins v. Virginia*, *supra*, 536 U.S. at pp. 318-320.)

There was no evidence that there would even be a criminal proceeding that would require Ms. Diaz's testimony arising from the battery complaint. To be sure, that was a possible outcome or "causal" effect that an unimpaired person might have been able to connect to his earlier actions and thereafter carefully consider and weigh. However, the expert testimony that mental retardation impairs an individual's ability to make causal connections was highly relevant to the fundamental question of whether appellant even *understood* that Ms. Diaz's battery complaint could have the

causal effect of resulting in her "testimony" at some future criminal proceeding. (AOB 218-221.)

On the other hand, a future murder trial at which all of the people who witnessed his actions before, during, and after the crime would testify against him was inevitable. Yet, as defense counsel argued, appellant's conduct revealed that he was utterly concerned about, or unable to appreciate, that consequence due to the reason-obscuring combination of his intense emotions and mental retardation. The same defense theory would logically apply to whether he considered the even more remote and tenuous consequence that his actions would prevent Ms. Diaz from testifying against him in a possible battery trial. (AOB 218-221.) The trial court erred by instructing the jurors that they were precluded from considering appellant's mental retardation in determining whether the prosecution had proved beyond a reasonable doubt the specific intent elements of that charge and special circumstance allegation.

C. It Is Reasonably Likely That the Jurors Believed That They Were Precluded from Considering That Constitutionally Relevant Mental Retardation Evidence in Determining Whether the Prosecution Had Proved the Mental State Elements of Premeditation and Deliberation for First-degree Murder Beyond a Reasonable Doubt

As noted above, rather than identifying the relevant mental state elements, the trial court's mental disorder instruction referred generally to "mental state" and identified the crime to which the jurors' consideration of the mental retardation evidence was limited. As further discussed above, it is significant that respondent *agrees* the jurors would necessarily have understood that the instruction's omission of crimes and allegations (like the preventing witness testimony charge and allegation) was meaningful and intentional and prohibited them from considering the evidence in

determining whether the prosecution had proved the "mental state" elements of the omitted crimes and allegations. (RB 228-232; see also RB 225-226, 240-241.)

Nevertheless, respondent does dispute that the jurors could have understood that the omission of first-degree murder was also meaningful and intentional and prohibited them from considering the evidence in determining whether the prosecution had proved the premeditation and deliberation "mental state" elements of that omitted crime. (RB 232-239.) Respondent's argument rests almost entirely on this Court's decision in *People v. Rogers*, *supra*, 39 Cal.4th 826, and otherwise ignores the record as a whole. *Rogers* is inapposite and respondent's analysis ignoring the whole record is inconsistent with the "reasonable likelihood" standard of review.

In *Rogers*, the defendant challenged the trial court's failure to follow the Use Note to former CALJIC No. 3.36 (renumbered CALJIC No. 3.32) by failing to specifically identify "premeditation and deliberation" and instead instructing the jurors that they could consider the defendant's mental disorder evidence on the "mental state" elements of the listed crimes. (*People v. Rogers*, *supra*, 39 Cal.4th at pp. 880-881.) In addition, the defendant challenged the trial court's failure to explain that "premeditation and deliberation" are "mental states" in any of its other instructions. From these combined omissions, the defendant argued that the jurors would not have understood that premeditation and deliberation were "mental states" and therefore would not have understood that they could consider his mental disorder evidence in determining whether the prosecution had proved those "mental states" beyond a reasonable doubt. (*Ibid.*) This Court disagreed.

Although premeditation and deliberation were not explicitly described as "mental states," this Court held, premeditation and deliberation "are clearly mental states; no reasonable juror would assume otherwise. . . . [T]he instruction on first-degree murder fully explained the concepts of premeditation and deliberation. The jury would have understood that they are mental states." (*People v. Rogers*, *supra*, 39 Cal.4th at pp. 881-882.) Furthermore, defense counsel "reinforced the notion inherent in the instructions that premeditation and deliberation are mental states. Several times in argument, defendant's counsel equated the concept of mental state with premeditation and deliberation." (*Id.* at p. 882.) Furthermore, this Court relied on its previous decisions that when an instruction informs the jury that it can consider mental disorder evidence on the "mental state elements" of listed crimes (or of "all" crimes), it is unnecessary to specifically identify those elements because they are specified and defined in the other instructions on the listed crimes. (*Id.* at p. 881, citing, inter alia, *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1247-1249.) For all of these reasons, this Court held that because the jurors understood that premeditation and deliberation were "mental states" of first-degree murder, they would have understood that they should consider the defendant's mental disorder evidence in resolving the existence of those mental state elements. (*Ibid.*)

Here, however, appellant does not dispute that the jurors understood that premeditation and deliberation were "mental states." To the contrary, he agrees that the instructions cited by respondent (RB 236) informed them as much. The question here is not whether the jurors understood that premeditation and deliberation are mental states but whether they understood that they were the "mental state which is an element" on which

the jurors could consider the mental retardation evidence under CALJIC No. 3.32. To illustrate, the jurors also would have necessarily understood that the intent to kill for the specific purpose of preventing witness testimony w also a "mental state." But that does not mean that they understood that it was the "mental state" referred to in the court's provision of CALJIC No. 3.32. To the contrary, respondent agrees that they would *not* have understood CALJIC No. 3.32's reference to "mental state" to include the mental state elements of the omitted preventing witness testimony charge and allegation.

Nor does appellant's position that the jurors were reasonably likely to understand that the "mental state" in CALJIC No. 3.32 referred *only* to malice aforethought necessarily rest on the trial court's failure to follow the Use Note and specifically identify premeditation and deliberation, either. (Compare *People v. Rogers*, *supra*, 39 Cal.4th at pp. 880-881.) To be sure, had the trial court done so, the problem with the instruction would have been resolved. But it could also have been resolved in other ways. For instance, if the instruction had informed the jurors that they could consider the mental retardation evidence "for the purpose of determining whether or not the defendant Anthony Townsel actually formed the mental state*s* which *are* element*s* of *first-degree murder* and murder," the instructions as a whole would have been adequate because CALJIC No. 8.20 defined the mental state elements of first-degree murder. For the same reasons, if the instruction had informed the jurors that they could consider the evidence "for the purpose of determining whether or not defendant Anthony Townsel actually formed the mental states which are elements of *all* of the crimes, degrees of crimes, and special circumstance allegations covered in these instructions," the instructions as a whole would have been adequate.

(*People v. Rundle* (2008) 43 Cal.4th 76,148-150 [instruction that "[y]ou may consider [mental disorder] evidence solely for the purpose of determining whether or not the defendant actually formed *any* intent or mental state which is an element of the crimes charged" adequate notwithstanding failure to specify mental states in instruction or explain that mental states were defined in other instructions].) Even an instruction tracking the language of former CALJIC No. 3.35 would have been adequate when read with the other instructions by explaining, "[w]hen a defendant is charged with a crime which requires that a certain specific intent or mental state be established in order to constitute *the crime or degree of crime*, you must" consider mental disorder evidence for the purpose of determining whether or not the defendant formed the "specific intent or mental state essential to constitute the *crime or degree of crime* with which he is charged." (Former CALJIC No. 3.35 (4th ed. 1979), italics added.) By specifically referring to a "degree of crime," reasonably intelligent jurors would have made the connection to other instructions referring to "first-degree murder" as a "degree of murder" and its additional essential specific intent elements of premeditation and deliberation. (CALJIC Nos. 8.20, 8.70, 8.71.)

Unlike *Rogers* and the other decisions it cited that resolved different challenges to different versions of CALJIC No. 3.32 (or former 3.36), the problem with the instruction as provided here is two-fold: (1) as respondent itself recognizes, the jurors would necessarily have understood that crimes and allegations omitted from the instruction were necessarily excluded from their consideration and first-degree murder was omitted (see also, e.g., *People v. Snow* (2003) 30 Cal.4th 43, 98 [where instruction stated that it applied to "crime charged," lay jurors would not have applied it to "special

circumstance"]) ; and (2) the instruction was specific in limiting the jurors' consideration of the evidence "*solely* for the purpose of determining whether or not the defendant Anthony Townsel actually formed *the mental state which is an element of the crime charged in Counts I and II, to wit Murder,*" which – as discussed in the opening brief and further below – the jurors were likely to understood as meaning the "Counts I and II" charge of "murder" in violation of Penal Code section *187* and its *sole* "mental state which is an element" of malice aforethought. This issue was neither presented nor resolved in *Rogers* or in any other cases before this Court. "It is axiomatic that cases are not authority for propositions not considered." (*People v. Avila* (2006) 38 Cal.4th 491, 566, and authorities cited therein.)

Given respondent's other concessions, the question here comes down to what the jurors were reasonably likely to understand to be the "*mental state which is an element of the crime charged in Counts I and II, to wit Murder.*" If it is reasonably likely that the jurors would have understood that the "crime [of murder] charged in Counts I and II" was murder in violation of Penal Code section *187* and that the "mental state which is an element" of that crime was simply malice aforethought, then it is reasonably likely that the jurors were misled to believe that they were precluded from considering constitutionally relevant mental retardation evidence in determining whether the prosecution had proved the additional mental state elements of premeditation and deliberation required for the uncharged crime of first-degree murder in violation of Penal Code section 189. (*Boyde v. California* (1990) 494 U.S. 370, 380; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 71-72).

As discussed in the opening brief, in order to resolve it that question, the *entire* record – including all of the instructions, the language of the

actual "charge in Counts I and II," and the arguments of counsel – must be considered from a layperson's perspective. (AOB 194-195, citing, inter alia, *Estelle v. McGuire*, *supra*, 502 U.S. at pp. 71-72, *Cupp v. Naughten* (1973) 414 U.S. 141, 147, and *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1035 & fn. 16; see also AOB 196-212 [examining entire record].) Rather than considering the entire record, however, respondent only addresses isolated portions which, in respondent's view, demonstrate that the jurors understood CALJIC No. 3.32 to include premeditation and deliberation. (RB 236-237.)

But as detailed in the opening brief, the only connection between the language of the court's provision of CALJIC No. 3.32 referring to the "mental state which is an element of the crime charged in Counts I and II, to wit Murder" could be found in the actual language of the information charging the "crime charged in Counts I and II" and the language of CALJIC No. 8.10, which instructed the jurors on the crime charged in "Counts I and II." The jurors would necessarily have understood from reading all of this information together that the "crime charged in Count I and II – to wit Murder" was murder in violation of Penal Code section 187 and that the "mental state that is an element of the [murder] charged in Counts I and II" was the sole mental state of malice aforethought. Also based on the information, the other instructions, and the language of CALJIC No. 8.20 on first-degree murder, it is at least likely (if not certain) that the lay jurors would not have interpreted CALJIC No. 3.32 as including, and thus would have interpreted it as excluding, first-degree murder and its mental state*s* which *are* elements of that crime, premeditation and deliberation. (AOB 199-202, citing, inter alia *Hitchcock v. Dugger* (1987) 481 U.S. 393, 397-399 [instruction specifying factors

jurors "may" consider necessarily implied that it "may not" consider factors that were not mentioned]; see also *People v. Pensinger* (1991) 53 Cal.3d 1210, 1242-1243 [instruction to consider intoxication on malice or intent to kill elements of murder does not convey that jurors should consider intoxication on omitted and different intent element of torture-murder].) Respondent, however, completely ignores the information that actually charged "the crime charged in Counts I and II, to wit murder," the instruction on that charge with CALJIC No. 8.10, and the absence of any language in the information or instructions on first-degree murder to tie it to the language of CALJIC No. 3.32. (RB 236-237.)

Appellant further argued that the interpretation of the instruction as limiting consideration of the evidence to the mental state of malice aforethought and not premeditation and deliberation was bolstered by the court's provision of a modified version of CALJIC No. 8.45 that the jurors could conclude that appellant had committed involuntary manslaughter and not murder or voluntary manslaughter if it found that "due to a mental defect or mental impairment, . . . he was unable to form *malice aforethought or an intent to kill.*" (3 CT 810; 14 RT 3364-3365; see also 2 CT 2340 [correcting word "voluntary" on line 16 of 14 RT 3365 to read "involuntary"].) However, the jurors were not provided with a parallel instruction that they could conclude that appellant had committed second degree murder and not first-degree murder if they found that "due to a mental defect or mental impairment, . . . he was unable to form premeditation and deliberation." (3 CT 810; 14 RT 3364-3365; see also 2 CT 2340.) As discussed in the opening brief, read together with the other instructions and the language of the charging document, it is reasonably likely that the jurors would have understood that they were not given a

similar instruction on the effect of a finding that appellant harbored malice but did not harbor premeditation and deliberation due to his mental retardation because they simply were not *permitted* to make any such finding. (AOB 202-203, citing, inter alia, *People v. Dewberry* (1959) 51 Cal.2d 548, 557 [instruction that doubts between greater and lesser offenses are to be resolved in favor of lesser and specified first and second degree murder but did not mention second degree and manslaughter left "clearly erroneous implication" that rule did not apply to omitted choice].) Once again, respondent completely ignores this record evidence and appellant's argument based on it. (See RB 236-237.)

Appellant finally argued that the prosecutor's closing and rebuttal arguments focusing almost exclusively on the mental retardation evidence as it related to malice and the intent to kill leaves no doubt that it is at least reasonably likely that the jurors understood their consideration of the mental retardation evidence was limited to the issue of malice, or intent to kill. (AOB 205-207, 210-211, citing, inter alia, *Taylor v. Kentucky*, *supra*, 436 U.S. at pp. 486-490 & fn. 14 and *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1035 & fn. 16.) Once again, respondent completely ignores the prosecutor's argument in this regard and simply skips to isolated parts of defense counsel's argument, which respondent contends clarified the relevance of the evidence to the elements of premeditation and deliberation. (RB 236-237.) In making this argument, respondent also ignores defense counsel's argument as a whole. (RB 236-237; compare AOB 209-210, and authorities cited therein.) Respondent also ignores the many authorities cited in the opening brief for the proposition that even if defense counsel's argument clearly connected the instruction to the premeditation and deliberation elements, it did not nullify the misleading effect of the

instructions compounded by the prosecutor's argument. (AOB 207-209, and authorities cited therein.)

In short, the state's argument – which is based almost exclusively on an inapposite case and ignores the record as a whole on which a lay jury's likely understanding of an instruction necessarily turns – is no response at all. For all of the reasons discussed above and in the opening brief, it is reasonably likely that the jurors were misled to believe that it could not consider constitutionally relevant evidence (*Boyde v. California*, *supra*, 494 U.S. at p. 380) and applied the law in a manner inconsistent with state law and appellant's federal constitutional rights (*Estelle v. McGuire*, *supra*, 502 U.S. at pp. 71-72).[58]

D The Instructional Errors Precluding the Juror from Considering Appellant's Mental Retardation Evidence On the Only Disputed Issues of Intent Violated Not only State Law But Also Appellant's Sixth, Eighth, and Fourteenth Amendment Rights

As appellant further argued in the opening brief, the court's instructional error also violated his federal constitutional rights. (AOB 188-192,; see also AOB 118-122.) The state's only response to this argument is buried in another footnote. Ignoring appellant's citations to United States Supreme Court authority, respondent simply contends that the federal circuit authorities appellant cited in his opening brief are not binding on this Court. (RB 229, fn. 135.)

Respondent is correct that the federal circuit authorities cited in the

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[58] Respondent briefly contends that any error was forfeited or invited based on the same theories addressed in Part B-1, *ante*. (RB 239.) For the same reasons discussed therein, as well as in the opening brief, respondent's argument is without merit. (Part B-1, *ante*, and authorities cited therein; AOB 212-216.)

opening brief are not binding on this Court, but they are persuasive authority, they construe United States Supreme Court authority on this topic, and respondent offers no reasoned basis for this Court to dismiss them for the fundamental proposition that the federal constitution entitles defendants to complete and accurate instructions on defense theories to negate an element provided they are supported by the law and the facts. (AOB 188-192; see also AOB 118-122.) Indeed, the authorities of the United States Supreme Court, cited in the opening brief but ignored by respondent, compel that conclusion. In *Martin v. Ohio* (1987) 480 U.S. 228, for instance, the high court held that an instruction precluding the jury's consideration of relevant evidence in determining whether there is reasonable doubt as to the state's case "would relieve the state of its burden and plainly run afoul of *Winship*'s mandate" in violation of due process. (*Id.* at pp. 223-224, citing *In re Winship* (1970) 397 U.S. 358; *Cool v. United States*(1972) 409 U.S. 100, 103 (*per curiam*) [jury instruction allowing consideration of defense witness testimony only if jury was convinced of its truth beyond reasonable doubt "impermissibly obstructs exercise of" the right to present evidence in one's defense and "has the effect of substantially reducing the Government's burden of proof" in violation of *Winship*, *supra*].)

The Third Circuit Court of Appeals has applied the high court's precedents in interpreting a state statute similar to California's, under which a defendant is entitled to present mental disorder evidence to raise reasonable doubt that he actually formed the specific intent element of a charged crime. (*Humanik v. Beyer*, *supra*, 871 F.2d p. 436-442.) Under the precedents of the high court, including, inter alia, *Martin v. Ohio*, *supra*, 480 U.S. at pp. 223-224 and *In re Winship, supra*, 397 U.S. at p. 364, the

Court of Appeals concluded that it necessarily follows that "if the defendant's evidence of mental disease or defect is sufficient to raise a reasonable doubt about the existence of the requisite intent, *it cannot constitutionally be ignored*." (*Humanik v. Beyer*, *supra*, 871 F.2d at 443, italics added.) Hence, an instruction that "bar[s] consideration of" mental disorder evidence "by the jury in determining whether the state has proved the requisite state of mind beyond a reasonable doubt" violates due process. (*Ibid.*)[59] The same high court precedent compels the same conclusion in this case. (See also AOB 118-122, 188-190.)

Furthermore, respondent ignores the capital nature of this case. (See AOB 118.) "The Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case." (See, e.g., *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.) That heightened demand for reliability and accuracy applies to both the sentencing and guilt or death-eligibility stages of a capital trial. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) When the legislature has recognized the relevance of particular evidence to raise reasonable doubt on an element of a death-eligible offense or to mitigate against the state's case for death, it becomes constitutionally relevant evidence for Eighth and Fourteenth Amendments. Indeed, for the reasons discussed in the opening brief and above, factually supported mental disorder evidence is "constitutionally relevant" to whether the

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[59] The state law examined in *Humanik* was a New Jersey law imposing on defendants the initial burden of proving by a preponderance of the evidence the existence of a mental disorder that was capable of preventing formation of the specific intent elements of charged crime; once that preliminary showing was satisfied, the evidence could be considered for purposes of determining whether the defendant *actually* formed those specific intent elements and thereby raise reasonable doubt as to their existence. (*Humanik v. Beyer*, *supra*, 871 F.2d at 438-440.)

prosecution has proved the essential specific mental state elements of charged crimes and special circumstance allegations for due process purposes, separate and apart from the capital nature of the proceeding. In this regard, it is well settled that an instruction which precludes – or which is reasonably likely to be understood as precluding – the jurors' consideration of "constitutionally relevant" evidence violates the defendant's Eighth and Fourteenth Amendment rights. (*Boyde v. California*, *supra*, 494 U.S. at p. 380; see also *Estelle v. McGuire*, *supra*, 502 U.S. at pp. 71-72.) Certainly, an instruction precluding the jurors' consideration of vital evidence central to the sole defense to the mens rea element of a capital crime creates a constitutionally intolerable risk to the accuracy of the jury's factual findings that "the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime" and the reliability of its death-eligibility and death verdicts in violation of the Eighth and Fourteenth Amendments. (See *Beck v. Alabama*, *supra*, at pp. 636-637, 642-643.)

For these and all of the other reasons set forth in the opening brief, the trial court's instructional error precluding the jurors from considering appellant's mental retardation evidence in determining whether the prosecution had proved beyond a reasonable doubt the premeditation and deliberation element of first-degree murder and the specific intent elements of the preventing witness testimony charge and special circumstance allegation violated appellant's federal constitutional right under the Sixth, Eighth and Fourteenth Amendments. (AOB 118-122, 188-190.) Respondent's perfunctory contention to the contrary must be rejected.

E. The Judgment Must be Reversed

1. Standard of Harmless Error Review

As set forth in the opening brief, because the court's instructional errors violated appellant's federal constitutional rights, respondent bears the burden of proving them harmless beyond a reasonable doubt. (AOB 216, citing, inter alia, *Chapman v. California* (1967) 386 U.S. 18, 24.) Even assuming that the errors alone were not of constitutional dimension, it is reasonably probable that the verdicts would have been different in their absence. (AOB 216-222.) Hence, they resulted in a miscarriage of justice under the sate constitution. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) For the same reasons, they undermine confidence in the reliability of the verdicts in violation of the due process clause of the federal constitution and certainly the heightened degree of confidence demanded of the reliability of the verdicts in this capital case in violation of the Eighth and Fourteenth Amendments. (Argument II-E.)

Respondent contends that the errors were harmless under the *Watson*, "reasonable probability" standard of prejudice. (RB 239-242.) In a footnote, respondent contends that "for the same reasons stated herein the alleged error would be harmless beyond a reasonable doubt" under the *Chapman* standard. [Citation.]" (RB 240, fn. 140.) As discussed in Argument II-E, *ante*, respondent erroneously conflates the *Watson* and *Chapman* standards. (Argument II-E, *ante*, and authorities cited therein.) Respondent's harmless error analysis under the *Watson* standard does not even attempt to meet its burden of proving beyond a reasonable doubt that the instructional errors did not influence the verdicts under the *Chapman* standard. Respondent having failed to carry its burden, application of the *Chapman* standard compels reversal for the reasons discussed in the

opening brief. (AOB 216-222.) Furthermore, respondent's contention that the errors were harmless under the *Watson* standard is without merit.

2. The Instructional Error, Particularly When Combined With the Evidentiary Errors Raised in Argument II through IV, Requires Reversal of the Preventing Witness Testimony Charge and Special Circumstance Allegation

Respondent very briefly contends that the instructional error was harmless under the *Watson* standard for three reasons. (RB 240-241) First, respondent contends that "appellant's attempt to demonstrate mental retardation was strongly challenged in through [sic] cross-examination and rebuttal testimony." (RB 240.) Appellant agrees that the strength of his mental retardation evidence was substantially diminished *due to the evidentiary errors* discussed in Arguments II-IV, *ante*, and the opening brief. As noted in Arguments II-IV, *ante*, and the opening brief, the evidentiary errors impacting the weight of appellant's mental retardation evidence had no impact on the jurors' actual verdicts on the preventing witness testimony charge and allegation because they were told that they could not consider his mental retardation evidence at all. (See AOB 143, fn. 36, 150, fn. 38, 168, fn. 40, 170, fn. 41, 186, fn. 54.) However, to the extent respondent is arguing that the mental retardation evidence was so weak that the jurors would have reached the same verdicts even if they had been properly instructed to consider it, then the cumulative effect of the evidentiary errors must be considered. (AOB 217 [incorporating evidentiary errors in arguing that "the prosecution's *properly admitted* evidence attempting to rebut appellant's mental retardation evidence was weak"]; see also AOB 223-228 [arguing cumulative effect of errors], citing, inter alia, *Taylor v. Kentucky, supra,* 436 U.S. 478, 487, fn. 15 [in close

case, combined effect of instructional omission and prosecutor's argument resulted in fundamentally unfair trial], *Chambers v. Mississippi supra*, 410 U.S. 284, 290, 302-303 & fn. 3 [cumulative effect of evidentiary rulings making defense "far less persuasive than it would otherwise have been" resulted in fundamentally unfair trial], *People v. Hill*, *supra*, 17 Cal.4th 800, 845, and *Parles v. Runnells, supra*, 505 F.3d 922, 927-928, 933-934, and authorities cited therein.) For all of the reasons discussed in Arguments I through IV, *ante,* and in the opening brief, as well as in Argument VI, *post*, and in the opening brief, it is reasonably probable that the verdicts would have been different absent the cumulative effect of the evidentiary and instructional errors. (See AOB 223-228.) As the state makes no meaningful response to that argument (see RB 243-245; Argument VI, *post*), no further discussion of this contention of harmless error is necessary.

Next, respondent contends that the error was harmless because the jurors rejected appellant's mental retardation-based defense theory in finding the premeditation and deliberation elements of first-degree murder beyond a reasonable doubt. (RB 240.) According to respondent, these findings demonstrate that the jurors would also have rejected appellant's defense theory had they been instructed to consider it in determining whether the prosecution had proved the specific intent elements of the preventing witness testimony charge and allegation. (*Ibid.*) Of course, this argument is based on the premise that the instruction told the jurors that they could consider the evidence in determining whether appellant had premeditated and deliberated, which appellant has already addressed and refuted in Part C, *ante*, and the opening brief. (AOB 192-210.) Because the jurors were limited to considering appellant's mental retardation for the sole purpose of determining whether he actually formed the intent to kill or

express malice, the jurors' first-degree murder verdicts only reflect that they rejected appellant's mental retardation-based defense theory as it related to that element. That finding is meaningless for purposes of harmless error analysis because appellant's own evidence established that his mental retardation would not impair his ability to form the intent to kill. (13-RT 3097; see AOB 192-193, 210.) In other words, the fact that the jurors rejected a defense without any factual foundation in no way demonstrates that they would have rejected a defense with considerable factual support. In any event, even if the jurors did consider appellant's mental retardation in determining whether he premeditated and deliberated, the specific intent elements of the preventing witness testimony charge and allegation require more than premeditation and deliberation. The jurors' adverse finding on the latter does not demonstrate that there is no "reasonable chance" that they would have made a more favorable finding on the former had they received proper instructions. (See *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050, and authorities cited therein.)

Third and finally, respondent contends that the instructional error was harmless because the evidence did not require the instruction. (RB 240-241.) Appellant has fully addressed respondent's contention that the evidence was insufficient to require the instruction in Part B, *ante.* Otherwise, respondent's contention that the error was harmless because there was no error is circular and warrants no further discussion.

For all of these reasons, as well as those set forth in the opening brief, the instructional error, particularly combined with the cumulative effect of the evidentiary errors, was prejudicial under any standard, resulted in a fundamentally unfair trial and a constitutionally unreliable death-eligibility finding in violation of the Eighth and Fourteenth Amendments,

and requires that the preventing witness testimony charge be reversed and the special circumstance allegation set aside. (AOB 217-221; see also Arguments II though IV, *ante*, and Argument VI, *post*; AOB 83-186, 223-243.)

3. Reversal of the First-degree Murder Verdicts, and the Death-eligibility Special Circumstances and Death Judgment Necessarily Based on Those Verdicts, Is Required

As to the instructional error precluding the jurors' consideration of appellant's mental retardation evidence in determining whether the prosecutor had proved premeditation and deliberation, respondent's only argument is that the error was harmless because there was no error. (RB 241-242.) Appellant having fully addressed respondent's contention that there was no instructional error in Part C, *ante*, respondent's circular argument here warrants no further reply.

For all of the reasons discussed above and in the opening brief, the error was prejudicial under any standard and resulted in a fundamentally unfair trial and constitutionally unreliable capital murder, death-eligibility, and death verdicts. (AOB 221-222; see also Argument II-E, *ante;* AOB 133-150.) The first-degree murder verdicts, both special circumstance allegations, and the death judgment must be reversed.

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VII

THE ADMISSION OF EVIDENCE SUGGESTIVE OF APPELLANT'S RACISM AGAINST LATINOS VIOLATED STATE LAW AND APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND ITS COMBINED EFFECT WITH THE GUILT PHASE ERRORS DEPRIVED APPELLANT OF A FAIR PENALTY TRIAL AND A CONSTITUTIONALLY RELIABLE DEATH VERDICT

A. Introduction

In the opening brief, appellant argued that the trial court abused its discretion under Evidence Code section 352 by admitting cumulative aggravating evidence that he had previously threatened Beatrice Cruz using the racist slur "wetback." (AOB 244-254.) The effect of the ruling injected inflammatory but constitutionally irrelevant evidence of appellant's racism against Latinos, a minority group to which both of the victims belonged, into the jury's penalty decision in violation of the Eighth and Fourteenth Amendments. (AOB 249-256.) The cumulative effect of this, along with the guilt phase errors, was prejudicial, violated appellant's rights to a fair penalty trial and a reliable death verdict and demands reversal of the death judgment. (AOB 254-256.)

Respondent contends that appellant forfeited his claims. (RB 249-250.) In any event, respondent contends the evidence was properly admitted. (RB 250-251.) Because there was no error, respondent contends, there was no prejudice. (RB 251-252.) Respondent's arguments are without merit.

B. Appellant's Trial Objections to the Evidence Under Evidence Code section 352 and the Eighth and Fourteenth Amendments Were Sufficient to Preserve Appellant's Claims on Appeal

Although defense counsel objected orally and in writing to admission of the evidence on the grounds that its probative value was substantially outweighed by its danger of undue prejudice and that its admission would violate appellant's Eighth and Fourteenth Amendment rights (3-CT 633-635; 15-RT 3500), respondent contends that appellant has forfeited his claims on appeal (RB 249-250). According to respondent, appellant's argument is that "the term 'wetback' should [have been] excluded from [a] threat" that appellant otherwise recognizes on appeal as having been relevant and admissible. (RB 249, 251.) Having framed appellant's claim as a challenge to the trial court's failure to "sanitize" the racist slur from otherwise relevant and admissible evidence, respondent contends that he forfeited it by failing to make that request below. (RB 249.) But this is not appellant's claim.

As set forth in the opening brief, the prosecutor offered *three* threats appellant had allegedly made to his former girlfriend, Beatrice Cruz, for precisely the same purpose: to show that he had attempted to dissuade her from testifying against him in a possible future criminal proceeding arising from her complaint that he had battered her in violation of Penal Code section 136, subdivision (c)(1), which was admissible aggravating evidence under section 190.3, subdivision (b). (AOB 244-245, citing 3-CT 877-878; 15-RT 3495.) Specifically, the prosecutor offered to prove that after he had been arrested for battering Ms. Cruz: (1) appellant telephoned her and threatened that she was "going to pay"; (2) he later phoned her again and made second threat, "'you better get out of the house because something is

going to happen to you'"; and (3) in the same call, he made the third threat that he was going to "kill [her] wetback," referring to Ms. Cruz's Latino boyfriend. (*Ibid.*)

In both their written and oral objections, defense counsel objected below, inter alia, that the probative value of the threats evidence was outweighed by its danger of undue prejudice under Evidence Code section 352 and that its admission would violate appellant's rights under the Eighth and Fourteenth Amendments. (AOB 244-245, 248-249, citing 3-CT 633-635; 15-RT 3500.) The trial court summarily overruled the objection without discussion and admitted all of the threats evidence in its entirety. (AOB 245, 247-249, citing 15-RT 3500.)

Defense counsel's objection on section 352 grounds triggered the trial court's duty to apply that statute to the evidence and engage in the weighing process it demands. (AOB 246-247, citing, inter alia, *People v. Wright* (1985) 39 Cal.3d 576, 582-583, 585, and authorities cited therein.) Appellant's claim on appeal is that an appropriate analysis under section 352 compelled the conclusion that the final threat was cumulative of the first two, unnecessary for the ostensible purpose for which it was offered, and thus bore little if any probative value. (AOB 246, 252-253, citing, inter alia, *Wright*, *supra*, at p. 585; Part C, *ante*.) An appropriate section 352 analysis also compelled the conclusion its minimal probative value was substantially outweighed by its enormous danger of undue prejudice in this case given the otherwise irrelevant yet extraordinarily inflammatory racist slur it contained against Latinos when the victims were Latino. (See AOB 249-252, and authorities cited therein; see also Part C, *ante*.) In other words, appellant's claim is that the third threat should have been excluded in its entirety upon a proper section 352 analysis and not that the threat was

properly admitted but the racist slur should have been excised from it. Pursuant to the authorities discussed in Part II-B-2, *ante*, appellant's objection to the threats evidence under section 352 was sufficient to alert the court to its duty to analyze the evidence under section 352 and avoid error and thus sufficient to satisfy the objection requirement and preserve appellant's appellate challenges to the trial court's abuse of discretion in admitting the evidence under section 352. (Argument II-B-2, and authorities cited therein.)[60]

Alternatively, respondent contends that defense counsel forfeited appellant's claim by failing to renew their objections to the evidence when it was presented to the jurors. (RB 248.) Respondent apparently bases this contention on the premise that the trial court's ruling was tentative, subject to reconsideration upon another objection when the evidence was introduced. (RB 248.) Respondent's premise is flawed. The trial court did admonish the prosecutor to keep the evidence within the limits of its proffer allowed by its ruling. If the evidence presented went "*beyond that*," the court would admonish the prosecutor "upon proper objection . . . ." (15-RT 3500, italics added.) Of course, the racist slur fell squarely within the prosecutor's offer of proof and did not go "beyond" the court's ruling admitting the evidence in the proffer. (15-RT 3500.) Hence, pursuant to the authorities cited in Argument II-B-2, *ante*, it was unnecessary for

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[60] It is true that appellant briefly argued in the alternative that the third threat could have survived a proper section 352 analysis by omitting the racist slur and thereby nullifying its danger of prejudice. (AOB 254.) But this alternative argument is rooted in the same theory: defense counsel's section 352 objection alerted the court to the need to conduct an appropriate section 352 analysis and avoid error and it is the court's failure to do so that resulted in the erroneous admission of the evidence challenged on appeal. (AOB 248-252, and authorities cited therein.)

defense counsel to repeat their objections when the same evidence was presented to the jurors. (Argument II-B-2, and authorities cited therein.)

Finally, respondent contends in a footnote that appellant's Eighth and Fourteenth Amendment claims have been forfeited. (RB 250.) Not so. Defense counsel added objections to the evidence on Eighth and Fourteenth Amendment grounds. (3-CT 633-634.) In any event, appellant's claims that the effect of the court's erroneous admission of the evidence violated his Eighth and Fourteenth Amendment rights are properly before this Court pursuant to the authorities cited in Argument II-E, *ante*. (See also *People v. Partida* (2005) 37 Cal.4th 428, 433-439 [trial objection to evidence under Evidence Code section 352 is sufficient to preserve appellate claim that error had additional consequence of violating federal constitutional rights].)

C. The Trial Court's Admission of the Third Threat Suggestive of Appellant's Racism Against Latinos, a Minority Group to Which the Victims Belonged, Abused Its Discretion Under Evidence Code section 352 and Resulted in a Violation of Appellant's Eighth and Fourteenth Amendment Rights

Alternatively, respondent contends that the trial court did not abuse its discretion under section 352 by admitting the evidence. (RB 250-251.) But in arguing the probative value of the threat that incorporated the racist slur, respondent does no more than contend that the threat was relevant under Penal Code section 190.3, subdivision (b). (RB 251.) Of course, the bare relevance of the threat is not the issue.

Relevant evidence is subject to exclusion under Evidence Code section 352 if its "probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (AOB 246.)

In assessing the probative value of evidence, the trial court should consider, inter alia, whether the issue on which it is offered is disputed, whether it is cumulative of other evidence going to prove the same issue, and whether it is necessary or important to prove that issue. (AOB 246-247.)

In this regard, the state provides no response at all to appellant's detailed argument explaining why the final threat was cumulative of the first two ostensibly offered for the same purpose and unnecessary. (AOB 252-253.) Appellant takes this as a tacit concession that the threat, though relevant, bore minimal probative value. (AOB 246-247, 252-252.) The state's contentions regarding its potential for prejudice are equally lacking as a response to appellant's argument it posed a tremendous danger of undue prejudice given that the racist slur it contained was constitutionally irrelevant yet so inflammatory that the jurors would necessarily consider it in making their penalty determination. (RB 250-251; compare AOB 249-252, and authorities cited therein.)

Respondent contends that the evidence posed no danger of unfair prejudice for three reasons. First, the racist remark could not have harmed appellant because the other aggravating evidence against him was so strong. (RB 251.) This is simply another way of saying that the trial court's admission of the evidence was not prejudicial under the *Watson* standard of prejudice for violations of state law at the guilt phase. (*People v. Watson* (1956) 46 Cal.2d 818, 835-836.) Of course, respondent's argument is off the mark.

The "undue prejudice" contemplated by Evidence Code section 352 is not the same as the standard for prejudice under *Watson*, meaning that the evidence must be so prejudicial that it will persuade a jury otherwise inclined to acquit (or vote for life) to convict (or vote for death). Rather, in

assessing the danger of undue prejudice under section 352, the trial court should consider, inter alia, whether the evidence tends to invoke an emotional or other bias against the defendant and whether there is a danger that the jurors will consider the evidence for improper purposes or "in some manner unrelated to the issue on which it was admissible." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1016; AOB 247.) And this is the very heart of appellant's argument which respondent ignores.

Significantly, respondent does not dispute that race played no role at all in the crimes in this case. (AOB 251; see RB 245-252.) Yet respondent ignores that in such cases, evidence of the defendant's racism is not only improper aggravating evidence for purposes of Penal Code section 190.3. (AOB 250.) As a matter of federal constitutional law, evidence of racism in such cases is "totally without relevance" to a jury's penalty phase decision. (*Dawson v. Delaware* (1992) 503 U.S. 159, 165-167; AOB 250-251.) And a juror's consideration or reliance on constitutionally irrelevant evidence in rendering his or her death verdict violates both the Eighth Amendment and the due process clause of the Fourteenth Amendment. (AOB 250-251, citing, inter alia, *Zant v. Stephens* (1983) 462 U.S. 862, 885.)

Respondent further ignores that although racism evidence is constitutionally irrelevant in such cases, it is inevitable that jurors will consider it in deciding the appropriate penalty. (AOB 249-252.) At worst, where – as here – the defendant is charged with crimes against a person of a minority group, evidence of his racism against that group creates a real danger that jurors will improperly infer that the crimes were racially motivated to the defendant's considerable detriment. (AOB 251-252.) At best, jurors view racism as "morally reprehensible" and evidence of the defendant's bad character. (*Dawson v. Delaware*, *supra*, at 165-167;

Dawson v. State (Del. 1992) 608 A.2d 1201, 1204-1205; *Burns v. 20th Century Ins. Co.* (1992) 9 Cal.App.4th 1666, 1675; AOB 249-250.)

Against this background, respondent next contends that the evidence posed no danger of unfair prejudice here because the prosecutor made no attempt to use it to portray appellant as a racist. (RB 250.) Were this so, the prosecutor would not have mentioned the racist slur at all because it was completely without relevance to prove appellant's threat to Ms. Cruz. Nevertheless, the prosecutor was careful to incorporate the racist slur in his written offer of proof before presenting it, elicited not only testimony that appellant used the term "wetback" in threatening Ms. Diaz but drove the point home by eliciting testimony that the term is a slur used against Latinos, and finally pointedly reminded the jurors of that racist slur in closing argument. (AOB 255-256; 3-CT 877; 15-RT 3562-3563, 3689.) Given the irrelevance of the slur to prove the threat, it would have left the jurors with the "feeling that the [racism] evidence was employed simply [so] the jury would find [it] morally reprehensible." (See *Dawson v. Delaware*, *supra*, 503 U.S. at 167.) Certainly, it posed a danger that the jurors would consider the slur in a "manner unrelated to the issue on which [the threat] was admissible" (*People v. Edelbacher*, *supra*, 47 Cal.3d at 1016) and for impermissible purposes (AOB 246-256, and authorities cited therein). (Cf. *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920, and authorities cited therein [due process violation can arise "if there are no permissible inferences the jury can draw" from other misconduct evidence]; *People v. Albarran* (2007) 149 Cal.App.4th 214, 228-231, and authorities cited therein [admission of gang evidence violated defendant's due process right to fair trial where insufficient evidence to show crimes gang motivated; since there were "no permissible inferences" to be drawn from

the evidence, its "paramount function" was to show defendant's "criminal disposition"].)

Finally, respondent contends that appellant's use of the slur "wetback" could not have painted him as a racist because he dated Latinas, after all. (RB 250.) In other words, by respondent's logic, appellant could not have harbored any animus against Latinos because he dated two of them. *But he killed one of those Latinas and the prosecution's evidence showed that he beat and threatened the other.* (RB 250.) Hence, appellant's use of the term "wetback" not only tended to show that he was racist; it created the danger that the jurors would infer from it that his murder, assault, and threats against his Latina girlfriends, along with the murder of Ms. Diaz's Latino brother-in-law, were racially motivated. (AOB 251-252.)

In short, the evidence posed an extraordinary danger of inflaming the jurors's passions and invoking a strong emotional bias against appellant which the jurors would consider against appellant in a constitutionally intolerable manner. This is precisely the kind of undue prejudice Evidence Code section 352 is designed to avoid. Given that the final threat containing the slur was cumulative, unnecessary and bore little probative value, an appropriate section 352 analysis should have "left [the trial court] with the feeling that the [threat] was employed simply because the jury would find [the racists] beliefs [revealed therein] to be morally reprehensible." (*Dawson v. Delaware*, *supra*, 503 U.S. at 167.) For these and all of the other reasons set forth in the opening brief but ignored by respondent, the trial court abused its discretion in admitting the evidence under Evidence Code section 352, resulted in the injection of inflammatory but constitutionally irrelevant evidence into the jury's penalty decision in

violation of the Eighth and Fourteenth Amendments. (AOB 249-256.)

Finally, appellant argued that the cumulative effect of this and the guilt phase errors on the jury's penalty determination was prejudicial and resulted in a fundamentally unfair penalty trial and a constitutionally unreliable death verdict in violation of state law and the Eighth and Fourteenth Amendments. (AOB 254-256.) The state's only response to this argument is that there was no prejudice because there was no error. (RB 251-252.) Hence, no further discussion is necessary. For all of the foregoing reasons, as well as those set forth in the opening brief, the death judgment must be reversed.

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VI

THE CUMULATIVE EFFECT OF THE ABOVE ERRORS UNDERCUTTING APPELLANT'S MENTAL RETARDATION-BASED DEFENSE WAS PREJUDICIAL AND VIOLATED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Appellant further argued in the opening brief that even if no one of the error raised in Arguments I through V amounted to a constitutional violation or was sufficiently prejudicial to demand reversal, their cumulative effect was prejudicial and violated appellant's federal constitutional rights to a fair trial, to proof beyond a reasonable doubt and trial by jury on every element of the charges, to a meaningful opportunity to present his defense, and to reliable jury verdicts that he was guilty of a capital offense. (AOB 223-228; accord *United States v. Al-Moayad* (2d Cir. 2008) 545 F.3d 139, 178; *United States v. Santos* (7th Cir. 2000) 201 F.3d 953, 965; *Alvarez v. Boyd* (7th Cir. 2000) 225 F.3d 820, 824-825.)

Alternatively, Mr Townsel argued that even if the cumulative effect of the errors was not sufficiently prejudicial in the guilt phase to demand reversal of the convictions and special circumstance allegations, the effect on the penalty phase was prejudicial and violated his state and federal constitutional rights to a fair penalty trial and a reliable death verdict. (AOB 228-243; accord, *Cargle v. Mullin* (10th Cir 2003) 317 F.3d 1196, 1207-1208, 1224-1225; *Magill v. Dugger* (11th Cir. 1987) 824 F.2d 879, 888.)

In the face of these 20 pages of detailed analysis of the cumulative impact of the errors on both the guilt and penalty verdicts, the state provides a two-page "response" that consists primarily of string citations interspersedwith a handful of conclusory assertions – unsupported by any discussion of the evidence, specific response to appellant's points, or

attempt to addressthe different effects of the errors on the guilt and penalty trials – that there were no errors or they were harmless. (RB 243-245.) The state's response warrants no reply. Appellant incorporates by reference here his argument in the opening brief. (AOB 223-243.)

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VIII

APPELLANT REQUESTS THAT THIS COURT CONDUCT AN INDEPENDENT REVIEW OF THE PERSONNEL FILES THE TRIAL COURT REVIEWED IN RULING ON HIS *PITCHESS* MOTION AND DETERMINE WHETHER THE TRIAL COURT ERRONEOUSLY WITHHELD DISCOVERABLE EVIDENCE FROM THEM; IF THE TRIAL COURT DID ERR, THE EVIDENCE MUST NOW BE DISCLOSED AND APPELANT MUST BE GIVEN AN OPPORTUNITY TO DEMONSTRATE PREJUDICE FROM THE ERROR

In the opening brief, appellant requested that this Court conduct an independent review of the files that the trial court reviewed in ruling on his "*Pitchess* motion." (AOB 257-261; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) If this Court determines that the trial court erred in failing to order disclosure of relevant, material information, that information must now be disclosed to appellant, who must be given an opportunity to demonstrate prejudice from the error. (AOB 257-261.)

"Respondent does not oppose appellant's request . . . ." (RB 253.)

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IX

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

In his opening brief, appellant argued that many features of California's capital-sentencing scheme, both on their face and as applied in this case, violate the United States Constitution and international law. (AOB 262-279.) Respondent disagrees. (RB 254-267.)

Appellant considers this issue to be fully joined by the briefs on file with this Court. For all of the reasons set forth in the opening brief, appellant's death judgment violates international law and the federal Constitution and must be reversed.

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CONCLUSION

For the foregoing reasons, as well as those stated in appellant's opening brief, the judgment must be reversed.

DATED: August 26, 2013

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

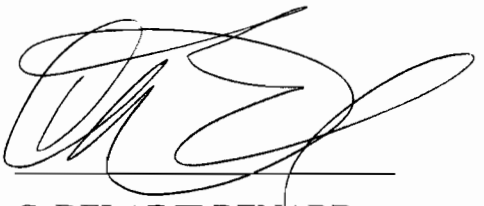
C . DELAINE RENARD
Senior Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL

Cal. Rules of Court, rule 8.630

I, C. Delaine Renard, am the Senior Deputy State Public Defender assigned to represent appellant, Anthony Letrice Townsel, in this automatic appeal. On August 1, 2013, this Court granted my motion to file appellant's reply brief in excess of the 47,600-word limit specified in Rule 8.630, subd. (b)(1)(C) of the California Rules of Court (up to 90,000 words). I have conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 89,764 words in length.



C. DELAINE RENARD
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Anthony Letrice Townsel* Superior Court No. 8926
Supreme Court No. S022998

I, KECIA BAILEY, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1111 Broadway, 10th Floor, Oakland, California 94607, that I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

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

Louis Vasquez
Supervising Deputy Attorney General
Office of the Attorney General
2550 Mariposa Mall, Room 5090
Fresno, CA 93721

Mr. Anthony Letrice Townsel, H-10300
CSP-SQ
3EB-22
San Quentin, CA 94974

Madera County Superior Court
Clerk of the Court
209 West Yosemite Avenue
Madera, CA 93637

Each said envelope was then, on August 26, 2013 sealed and deposited in the United States Mail at Alameda, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 26, 2013 at Oakland, California.

DECLARANT