In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Respondent,** **v.** **ROBERT MAURICE BLOOM,** **Appellant.**	**CAPITAL CASE** Case No. S095223

Los Angeles County Superior Court
Case No. A801380
The Honorable Darlene E. Schempp, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In 1983, appellant was convicted in the Los Angeles County Superior Court of three counts of first degree murder (Pen. Code, § 187), accompanied by multiple-murder special-circumstance findings (Pen. Code, § 190.2, subd. (a)(3)) and firearm-use findings (Pen. Code, § 12022.5) as to each count, as well as a dangerous-weapon-use finding as to one count (Pen. Code, § 12022, former subd. (b)). He was sentenced to death.

In 1989, this Court affirmed the judgment and sentence on automatic appeal and, concurrently with that decision, this Court rejected a habeas corpus challenge supplementing one of appellant's contentions. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1202-1203.) In 1992 and 1993, respectively, this Court denied further habeas corpus petitions challenging appellant's convictions. (Cal. Supreme Court case numbers S022735, S035229.)

In 1997, following federal habeas corpus proceedings, the United States Court of Appeals for the Ninth Circuit found that appellant had received ineffective assistance of counsel at trial and ordered the issuance of a writ of habeas corpus unless appellant was retried within a reasonable time. (*Bloom v. Calderon* (9th Cir. 1997) 132 F.3d 1267, 1269, 1278.)[1]

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[1] Specifically, at the first trial, the defense theory was that appellant "killed his father while in a heat of passion after witnessing his father kill his stepmother, and he was in a 'transitory state' when he killed his stepsister." (*Bloom v. Calderon*, *supra*, 132 F.3d at p. 1270.) The Ninth Circuit found that appellant's trial attorney had rendered ineffective assistance by failing to adequately prepare his "key" psychiatric witness. (*Ibid.*) As will be explained, appellant's defense attorneys at the second trial presented extensive expert testimony regarding appellant's mental state, but only against appellant's own wishes. Largely for that reason, appellant chose to relieve his attorneys at the close of the sanity phase and proceeded to testify at the penalty phase that the mental defense had been a ruse, that he had engaged in substantial planning for the murder of his father, and that he had killed his stepmother and stepsister when he unexpectedly found them in the house on the night chosen for the attack.

In June 1998, upon issuance of the United States District Court's judgment following the federal appeal, retrial proceedings commenced in the Los Angeles County Superior Court. (1CT 9-12.) In an information filed on August 27, 1998, the Los Angeles County District Attorney charged appellant with the murders (Pen. Code, § 187, subd. (a)) of Robert Maurice Bloom (Count 1) and Josephine Lou Bloom (Count 2), each with the personal use of a rifle (Pen. Code, §§ 1203.06, subd. (a)(1), 12022.5, subd. (a)), and the murder (Pen. Code, § 187, subd. (a)) of Sandra Hughes (Count 3) with the personal use of a rifle (Pen. Code, §§ 1203.06, subd. (a)(1), 12022.5, subd. (a)) and the personal use of scissors (Pen. Code, § 12022, subd. (b)). As to all three counts, the special circumstance of multiple murder (Pen. Code, § 190.2, subd. (a)(3)) was also alleged. (1CT 43-46.) The same day the information was filed, appellant pled not guilty to all counts and denied all the allegations. (1CT 51-52.) In January 2000, however, appellant entered a new plea to all counts of not guilty and not guilty by reason of insanity. (1CT 111.)

Pretrial proceedings were initially held before The Honorable Michael Hoff. On September 1, 2000, however, Judge Hoff recused himself and the matter was transferred to The Honorable Darlene E. Schempp. (4CT 863-865.)[2] A jury was sworn on September 28, 2000, opening statements in the guilt phase were given on October 6, 2000, and the presentation of evidence in the guilt phase commenced on October 10, 2000. (23CT 6039-6041, 6050-6051, 6056-6057.) Closing arguments in the guilt phase were given on November 1, 2, and 3, 2000. (23CT 6084-6086, 6089-6090.) On November 8, 2000, the jury returned a verdict as to Count 1, finding appellant guilty of first degree murder and finding true the firearm

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[2] Judge Hoff recused himself after it came to light that his son had gone to school with appellant. (See 3RT 415-416; 4RT 537-539.)

allegation. (23CT 6103-04, 6099-6102.)[3] Following the return of this verdict, one juror was excused by stipulation for personal reasons and replaced by an alternate juror. (23CT 6104.) The following morning, two more jurors were excused by stipulation for personal reasons and replaced by alternate jurors. (23CT 6105.) On November 14, 2000, the jury reported that it was unable to reach verdicts on the remaining counts. The prosecution then moved to dismiss the allegations in support of first degree murder as to Counts 2 and 3, the court granted the motion, and the jury was informed of the dismissal. Almost immediately thereafter, the jury returned verdicts as to Counts 2 and 3, finding appellant guilty of second degree murder as to each count and finding true all of the weapon-use allegations. (24CT 6206-6215.)

The sanity phase commenced on November 20, 2000. At the outset of the sanity phase, appellant voluntarily absented himself from the proceedings, which lasted a single day. (24CT 6217-6219.) The issue of sanity was argued to the jury on November 21, 2000. (24CT 6220-6221.) On November 30, 2000, after requesting and receiving readback of testimony from the guilt phase, the jury returned a verdict as to Count 1 that appellant was sane at the time of the murder. (24CT 6224-6229, 6233-6235.)[4] After further deliberation and further readback of testimony, the jury announced, on December 4, 2000, that it was unable to reach a verdict as to sanity on Counts 2 and 3. (24CT 6238-6240.) The following day, appellant elected to withdraw his plea of not guilty by reason of insanity and also elected to invoke his right to self-representation for purposes of the penalty phase. The court relieved defense counsel. (24CT 6263-6264.)

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[3] Over defense objection, this verdict was received in the absence of verdicts on the remaining counts. (34RT 4194-4198.)

[4] No proceedings were held between November 21 and November 27, 2000. (24CT 6220-6221, 6224-6225.)

The penalty phase commenced on December 6, 2000, with appellant acting as his own attorney. (24CT 6268-6269.) Following the presentation of evidence, argument was made to the jury on December 18 and 19, 2000. (24CT 6288-6291.) On December 20, 2000, after deliberations had begun, a juror was replaced with an alternate, over appellant's objection. (24CT 6293-6294.) The jury returned a verdict of death the following day, December 21, 2000. (CT 6306-6309.)

On January 19, 2001, the court denied appellant's automatic motion for modification of the verdict and entered a judgment of death. (24CT 6322-6327.)

Appeal to this Court is automatic.

STATEMENT OF FACTS

I. GUILT PHASE

A. The Prosecution's Case

1. The Murders

In the early morning of April 22, 1982, appellant killed his father, stepmother, and eight-year-old stepsister in their home on Sancola Avenue in Sun Valley, a suburb of Los Angeles. He was eighteen years old at the time. Three neighbors partially witnessed the event.

David Hughes and his girlfriend, Victoria Smith, were sleeping in a van in the driveway of Hughes's parents' house, next door to appellant's house. (17RT 2065-2069, 2161-2162.) Hughes awoke in the middle of the night to the sound of an argument. Looking out the window of his van, he saw appellant and appellant's father, Robert Bloom, Sr. ("Bloom"), on their lawn. Bloom was yelling for appellant to "come back," as appellant walked away. Bloom pursued appellant, and they both returned less than a minute

later. (17RT 2071-2074, 2099-2100.) They went back inside their house, and Hughes returned to his bed. (17RT 2081.)

A few minutes later, Hughes again heard arguing. (17RT 2081.) Smith also awoke at some point and heard the argument. (17RT 2162-2163.) According to Hughes, Bloom was saying something like, "Come back, you don't want to do that." He was standing in the walkway in the middle of his front yard, and appellant was in the street. It was dark, and Hughes could not see appellant very well. Nor did he hear appellant respond to Bloom. (17RT 2082-2084.) After a minute or two, Hughes heard a gunshot and saw Bloom grab his midsection and begin to jump up and down, screaming. (17RT 2084-2085.) Smith also heard the gunshot and, looking out the window, saw Bloom jumping up and down. She became scared and lay back down. (17RT 2164-2166.) Hughes saw Bloom run to his house as appellant chased him, pointing a rifle at Bloom. Appellant fired two more shots, and Bloom fell down across the threshold of the house. His legs were shaking violently and he was screaming. (17RT 2085-2087.) Appellant walked up to Bloom, straddled him, and fired two more shots into his torso. Bloom stopped moving entirely. (17RT 2088, 2101-2102.)

Hughes then saw appellant enter the house, after which he heard appellant's stepmother, Josephine Bloom, begin to scream. Hughes heard two shots, and the screaming stopped. An additional, single shot then sounded. (17RT 2089-2091.) Hughes, who had already begun dressing, went into his parents' house and called the police. (17RT 2091-2093.) After the phone call, Hughes went back to the van to get Smith, at which point he saw appellant through the dining room window of Bloom's house. Appellant was "messing" with the rifle. After a short time, appellant put the rifle down and stared out the window. (17RT 2093-2097.) Smith, too, saw appellant staring out the window. (17RT 2166.) Hughes then saw

appellant leave the house with the rifle and get into Josephine's car. Appellant drove away, turning north onto San Fernando Road from Sancola. Police arrived about five minutes later. (17RT 2097-2099; see also 17RT 2166.)

Moises Gameros, who lived across the street and several houses south of Bloom's house, also witnessed these events. Gameros awoke in the early morning of April 22, 1982, and heard someone yell "Robert" several times loudly. (19RT 2455-2456.) He went to his window and saw Bloom and appellant walking southwards down Sancola. Appellant was holding a rifle. Gameros heard Bloom say, "Well, that's it, Robert, I'm gonna call the cops." (19RT 2456-2463.) Bloom then headed back toward his house. As Bloom approached the house, appellant was "right behind him." Bloom attempted to grab the rifle from appellant. Appellant ran, and Bloom chased him. Gameros lost sight of Bloom and appellant at this point but heard a shot. (19RT 2467-2471.) Bloom then went back toward his house. Appellant followed, and shot Bloom in the back. Bloom fell down, and appellant shot him again. (19RT 2472-2474, 2477-2478.) Gameros then saw appellant doing "something" with the rifle for about 30 seconds or a minute, after which he went into the house. About 10 minutes later, appellant emerged and stood on the porch for several minutes. He then went back inside, came out again with the rifle, and drove away toward San Fernando Road. (19RT 2482-2488.)

2. Crime Scene Investigation and Arrest

Joseph Dvorak, a Los Angeles Police officer, was the first to arrive at the scene, at about 4:00 a.m. He found Bloom's body lying at the front door. Inside, he found Josephine's body in a bedroom. In another bedroom, he found appellant's young stepsister, Sandra, who was severely injured but alive. Sandra was taken to a hospital but died two days later. (18RT 2237-2245; 20RT 2611.) Numerous .22-caliber bullets, shell

casings, and live rounds were recovered from the scene, as well as a pair of scissors and a knife. The presence of live rounds was consistent with a malfunctioning firearm that had been cleared of jams. (18RT 2282-2313.) An autopsy later showed that Bloom had suffered multiple gunshot wounds. A gunshot to his abdomen, a close-range gunshot to his neck, and a gunshot to his head were all independently fatal. (20RT 2594-2602.) Josephine had suffered three gunshots to the head, each of which was independently fatal. (20RT 2603-2608.) Sandra had suffered one gunshot to the head, which was fatal. In addition, she had suffered 23 stab wounds, which were consistent with the scissors found at the scene. The nature of the stab wounds indicated that Sandra was moving around at the time they were inflicted, suggesting that the she was stabbed before she was shot. (20RT 2609-2621.)

Los Angeles Police Officer Michael McKean also responded to the scene of the murders. There, he talked to William Meyer, a neighbor. Meyer told McKean that he had a "hunch" where appellant might have gone. (20RT 2541-2543, 2569-2571.) Together they drove to Nettleton Street, about two and a half miles north, and found appellant walking alone. He was arrested without incident. (20RT 2543-2545, 2571-2573.) Later, police found Josephine's car at a park between Sancola and Nettleton. (20RT 2546.) The keys had been thrown into a nearby gravel pit. A search for the rifle was unsuccessful. (20RT 2634-2637.)

3. Events Surrounding the Murders

In April 1982, Martin Medrano read in a newspaper that appellant had been arrested. He approached police and told them that appellant had asked to buy a gun from him a few days before the murders. Appellant said he wanted to kill someone and that Medrano would read about it in the newspapers. He offered to pay $1200 for a handgun. (17RT 2184-2187.) Medrano told appellant he would get the gun, although really he intended

only to "burn" appellant—i.e., to take his money without actually providing a gun. Appellant visited Medrano four times over the next two days, seeming "desperate" for the gun, but he was unable to come up with the $1200. (17RT 2187-2192.) Medrano was a heroin addict at the time and did not immediately tell anyone about this incident because he was in violation of parole. He informed police about it after he was arrested for armed robbery. However, no promises were made to him in exchange for the information. Medrano had never been an "informant" in any other case. He had previously been convicted of forgery. (17RT 2189-2190, 2193-2197.)[5]

Christine Waller was a friend and ex-girlfriend of appellant's at the time of the murders. She lived on Nettleton Street. Appellant visited Waller's home often, and sometimes slept there. (18RT 2326-2328; see also 18RT 2259.)[6] He was staying there the week before the murders. (18RT 2336.) On April 20, 1982, Waller saw appellant with a rifle. He went out of Waller's backyard to a vacant field. Before he left, he told Waller to stay inside and not to ask any questions. (18RT 2329-2331.) Waller recognized the rifle as one that belonged to her brother, Raul Rosas. (18RT 3339.) Richard Avila, Waller's boyfriend at the time, also saw appellant outside with the rifle. About 10 minutes later, Avila heard five or six "pops." (18RT 2258-2264, 2327.) Appellant returned about 30 minutes after he had left. (18RT 2330.) He headed toward Rosas's room. When Avila tried to follow, appellant told him to return to the living room. (18RT 2264-2265.) Rosas later confirmed that he owned a .22-caliber rifle, which

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[5] The testimony of Martin Medrano from appellant's first trial was read into the record at retrial, because Medrano was unavailable. (17RT 2183.)

[6] Waller was also unavailable at the time of the retrial, and her prior testimony was read into the record. (18RT 2326.)

he kept in his bedroom. After the murders, he looked for the rifle but it was gone. (19RT 2404-2412; see also 19RT 2392-2394.)

On April 21, 1982, the day leading up to the murders, Waller saw appellant at about 6:00 p.m. He was pale, quiet, and tense. Waller knew him to become this way when he was upset. Appellant recovered after about a half-hour. (18RT 2333-3334, 3353-3354.) Waller's mother, Norma White, also saw appellant on the evening of April 21 and noticed that he was quiet and pale. (19RT 2385.) White talked to him later that night, and he seemed to have returned to normal. Appellant asked White to remind Waller to wake him up for school the next morning. He did not seem upset to White. (19RT 2386-2389.) The next morning, Waller went to appellant's room to wake him but he was not there. His bed looked slept in. (18RT 3334-3336.)

Several times, Waller had seen appellant argue with his father, whom she described as a "bully" with an explosive temper. Bloom would become angry with appellant despite appellant's efforts to please Bloom. She did not see any physical violence, however. Nor did she hear appellant express any fear that his father would hurt him. Appellant would sometimes cry and shake after arguing with his father. (18RT 3346-3359.) White had also met Bloom and had seen him very upset with appellant. She had heard Bloom yell, but had never noticed any injuries on appellant. (19RT 2389-2392.) White described appellant as respectful and polite; he was normal and not odd. (19RT 2380-2381.) Rosas also thought appellant seemed normal. (19RT 2404, 2418.) William Meyer, the neighbor who had led police to appellant, also thought that appellant seemed like "an average kid." (10RT 2574.) Meyer's then-girlfriend, Desiree Deza, had introduced Josephine to Bloom. Deza also did not think that appellant was unusual. (20RT 2560-2566.)

Richard Avila similarly thought appellant seemed normal. (18RT 2261.) He also described Bloom as a bully toward appellant. (18RT 2278.) According to Avila, they argued a lot, but he never saw physical violence. (18RT 2272-2273.) On April 21, 1982, while Avila was at Waller's house, Bloom stopped by and asked for appellant, but appellant was not there. Avila later told appellant that his father was looking for him. Appellant called Bloom, and Avila heard appellant say, "You're running my life now, but you won't be for long." Appellant seemed angry. (18RT 2266-2269.)

B. The Defense Case

At trial, the defense attempted to show that although appellant appeared normal he actually had severe mental impairments that prevented him from forming malice. The defense also attempted to show that appellant suffered physical abuse from his father and that the murder of Bloom was committed in the heat of passion. (See generally 30RT 3903-3933; 31RT 3936-4041.)

1. Appellant's Family History

According to appellant's mother, Melanie Bostic, Bloom was a physically abusive person. He hit her even while she was pregnant with appellant. (28RT 3542.) Bloom began hitting and slapping appellant when he was a baby. (28RT 3543-3545.) When appellant was a child, Bloom would scream at him, use foul language, and scare him. For example, Bloom would make appellant wait by the front door for him to come home, and if appellant was not there Bloom would beat him. (28RT 3546-3551.) The abuse increased in frequency, and eventually became a daily event. (28RT 3553.) By the time appellant was two years old, Bloom would hit him with his fists, knocking appellant across the room. (28RT 3554-3559.) Bloom terrorized appellant by flushing the toilet while he was potty training and by locking him in the yard with a dog that scared appellant.

(28RT 3547-3548, 3562-3563.) He also once ripped apart appellant's favorite stuffed animal in front of appellant. (28RT 3563.) Bloom would proclaim to appellant that he was "God" and that he would kill appellant. (28RT 3564.) Bostic left the family when appellant was in the first grade. (28RT 3545.) Appellant seemed like a normal little boy when she left. (28RT 3564-3565.) However, he did not have any real friends. He had an imaginary friend named Tony. (28RT 3566-3567.)[7]

Robin Bucell was married to Bloom for about three years after Bostic left the family. (24RT 2964-2969.) She had a son, Eric, with Bloom. (24RT 2982-2983.) According to Bucell, Bloom was manipulative, controlling, and abusive; he was a "tyrant." Bloom particularly focused his abuse on appellant, who in Bloom's eyes could do nothing right. Bloom would hit appellant and tell him he was "not worth shit." (24RT 2969-2972.) Bucell saw bruises on appellant, who was much smaller than Bloom. Appellant would never fight back against his father. (24RT 2971, 2977.) According to Bucell, Bloom did not hurt Eric, who was a baby at the time. Bucell, however, feared for her life while she was married to Bloom. Bloom had told her that he was a mafia hitman and had threatened to kill her. (24RT 2978-2984.) He physically abused her only one time, however. (24RT 2997.) Bloom controlled Bucell's paycheck and, when Bloom's mother lived with them for a time, he took her social security money. (24RT 2985-2986.) Eventually, having suffered constant abuse for three years, and fearing for her safety and Eric's, Bucell left Bloom. After

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[7] When recalled by the People on rebuttal, Bostic acknowledged that Bloom did sometimes express affection for appellant, as in a series of letters and telegrams he had sent to appellant. She claimed, however, that Bloom would "tell you anything" because he was a "con man." (29RT 3727-3741.)

she left, Bloom threatened to kill her, and she obtained a restraining order against him. (24RT 2989-2992.)

Bucell thought that appellant seemed "normal," although he was not "quite right," in that he did not have many friends and was not involved in school activities. (24RT 2987, 3010-3013.) She also acknowledged that appellant had a loving relationship with his grandmother and his mother and with Bucell herself. (24RT 2999-3001.) In addition, appellant suffered from kidney problems as a child. Bloom would take him to doctor's appointments once or twice a week. No suspicion of abuse was raised by any of the doctors during that time. Nor did Bucell report any abuse to authorities. (24RT 2993-2996.)

Eric Bloom recalled that Bloom married Josephine when he was five or six years old. He would visit Bloom on the weekends during that time. According to Eric, Bloom did not abuse him but he did beat appellant "all the time." (25RT 3049-3051, 3054, 3060.) Bloom frequently argued with Josephine, and would sometimes become angry with Eric or Sandra, although he did not hit them. Appellant would try to intervene if Bloom began to yell at Eric or Sandra. Often, appellant would take Eric out of the house to get ice cream "before anything else went on." (25RT 3053-3055, 3060, 3069-3070.) Sometimes, however, appellant would "get into it" with Bloom, who was larger than appellant and who had a "short fuse." On one occasion, Bloom threw appellant through a screen door. On another occasion, Bloom smashed appellant's face into a mirror. (25RT 3055, 3058, 3061-3062.) On still another occasion, after appellant got into a car accident, Bloom threw a hubcap at appellant, giving him a black eye. (25RT 3065.) Bloom would call appellant a loser and a "piece of shit" and would sometimes put appellant's head in the toilet. He also threw plates and silverware at appellant. Appellant would not physically fight back. (25RT 3059, 3063.) Eric heard appellant say that he was afraid of Bloom.

(25RT 3057.) He also heard appellant say that Bloom was going to kill him, that he could not take the pain anymore, and that he would not live to see his next birthday. (25RT 3068-3069.)

Richard Avila saw appellant interact with Sandra on several occasions. Appellant was kind towards her. Avila never saw appellant "be mean to Sandra in any way." (25RT 3047-3048.)

2. Psychological Evaluations of Appellant

a. Dr. Dale Watson

Dr. Dale Watson, a clinical psychologist, assessed appellant in 1993 and again in 1999 and 2000. (22RT 2700-2704, 2740-2741.) He concluded that appellant had "severe nonverbal neurocognitive dysfunction." (22RT 2766.) This meant that appellant had severe, long-term brain impairment that "significantly affect[ed] his ability to process particularly nonverbal information." (22RT 2769.) This type of brain damage would affect appellant's ability to react to new situations, to make decisions, to reason things out, to make judgments, and to weigh and consider options. (22RT 2772.)

Dr. Watson's diagnosis was based on a battery of tests he administered each time he examined appellant. According to Dr. Watson, appellant displayed some "oddities" and compulsive behavior during the tests, such as having memorized the sequence of English monarchs. (22RT 2711-2712.) The tests showed that appellant had some visual impairment, that his language processing was impaired, and that his judgment and problem solving was "significantly impaired." Tests on appellant's reasoning, planning, and organization yielded mixed results: some showed significant impairment and some showed that appellant was "pretty good" in these areas. (22RT 2724-2727.) Dr. Watson found it significant that appellant's verbal IQ score of 95 and his performance IQ score of 67

showed an uncommon disparity. This indicated to Dr. Watson that, although appellant had brain impairment associated with both hemispheres, his right-hemisphere impairments were more severe. (22RT 2715, 2718-2724; see also 22RT 2753.) This meant that appellant's verbal skills remained intact, so that he might appear normal to a lay observer. However, appellant's right-hemisphere deficits would still hamper his ability to process social information and to read emotional cues. Appellant would have "fluid intelligence" problems and would find it difficult to read social contexts. (22RT 2728-2731, 2748-2749.)

Dr. Watson thought that the most likely causes of appellant's brain dysfunction were Fetal Dilantin Syndrome or anoxia resulting from a near-drowning incident when he was a child. Dr. Watson also thought that head trauma from abuse was a possible cause. (22RT 2709, 2731-2734.) The possibility of a birth defect was supported by certain dysmorphic physical features exhibited by appellant (22RT 2708-2709, 2736-2737.) Dr. Watson's ultimate diagnosis was based on all the testing in the aggregate. In general, the 1999 and 2000 testing was "extremely consistent" with the 1993 testing, although there were some inconsistencies. (22RT 2741-2744; see also 22RT 2753-2766.) He thought that appellant had been cooperative during the testing. (22RT 2710-2711.) Moreover, Dr. Watson had specifically tested for malingering in 1999 and 2000 and had not detected any. (22RT 2742, 2750-2751.)

On cross-examination, Dr. Watson explained that the "core" mental deficit he had found in appellant related to appellant's ability to process emotional information. (22RT 2780.) He admitted that he did not find that appellant had an inability to plan and that none of the testing he did would rule out appellant's ability to formulate a plan to murder. (22RT 2780, 2728-2729, 2735-2739, 2747.) Dr. Watson also admitted that, while in grade school, appellant's IQ score had been tested at 110. Dr. Watson

disregarded that test, however, because there was inadequate documentation of how the test was administered. (22RT 2790.) On the other hand, Dr. Watson credited a different IQ test taken around the same time that resulted in scores similar to the scores produced in Dr. Watson's later testing. But Dr. Watson admitted that it "becomes difficult" to accept that score, given the accompanying documentation, which showed that appellant was misbehaving during the testing. (22RT 2790-2793.) Dr. Watson also observed that it was possible appellant was malingering during his testing, even though he passed the malingering tests. Given some of appellant's responses during testing, and given certain behavior by appellant, such as his apparently falling asleep, Dr. Watson had considered the possibility of malingering, but he ruled it out based on an assessment of the testing as a whole. (22RT 2810-2816, 2819-2820, 2841-284; 23RT 2883-2885, 2943-2944.)

Dr. Watson ultimately opined that appellant lacked the ability to conform his behavior to the requirements of the law "at th[e] very specific period of time" that he carried out the killings—"from the time that his father was shot until the killings had ended"—but he did have the ability to plan and carry out the killings. (22RT 2848-2849; 23RT 2888-2890, 2938.) Dr. Watson thought, however, that the crimes in this case did not involve very sophisticated planning and that the "emotional component" of the situation, i.e., that appellant's father was abusive, could have affected his ability to plan. (23RT 2927-2930.)[8]

[8]At trial, Dr. Watson admitted that out of about 30 cases, he had testified for the prosecution only twice. He also lectured to the defense bar about capital cases. (22RT 2784, 2794-2795.)

b. Dr. Mark Mills

Dr. Mark Mills, a forensic psychiatrist, also assessed appellant in 1993 and again in 1999. Unlike Dr. Watson, he diagnosed appellant with "dissociative disorder." (26RT 3118-3124, 3134-3136.) Dr. Mills opined that, on April 22, 1982, appellant dissociated—he lost awareness—sometime after he killed his father but before he killed Josephine and Sandra. (26RT 3145-3146, 3173.) The dissociation then ended gradually after appellant got away from the house. (27RT 3310-3311.) He explained that while appellant was in this state, he was on "auto pilot" and was unable to reason, to make judgments, and to weigh and consider options. (26RT 3145-3147, 3174.)

When pressed later, on cross-examination, Dr. Mills testified that even when appellant was in a dissociative state he was able to make decisions. Backing off of his initial "auto pilot" analogy, Dr. Mills testified that appellant may have made decisions to change his plan during the murders—such as switching from a jammed rifle to scissors—but that these were not so much "decisions" as "reflexes"[9] which were not thought through. (27RT 3302-3310; see also 27RT 3398-3398, 3416-3418.) Dr. Mills interpreted appellant's actions on the night of the murders, as described by eyewitnesses, as confused rather than purposeful, although in his opinion it is possible for a person to engage in purposeful behavior while dissociating. (27RT 3316-3320.)

Dr. Mills explained that he reached the diagnosis of dissociative disorder in 1993 after determining that appellant had been abused by his father, that he had risk factors for neuropsychological problems (such as

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[9] This word appears in the reporter's transcript as "reflections." However, given the context, it seems likely that Dr. Mills actually used the word "reflexes."

fetal Dilantin exposure and a near drowning incident), that he was wild and impulsive in school, that he appeared to have some kind of personality disorder, that he had no ongoing psychosis, and that his own recounting of the murders suggested dissociation. (26RT 3135-3136.) Dr. Mills admitted, however, that it was hard to reconstruct appellant's mental state so long after the fact and that the problem was compounded in this case because appellant was a "frequent liar." (26RT 3136-3137, 3169.)

Dr. Mills thought that appellant was a poor historian of his own abuse, but he credited that abuse had occurred based on previous assessments by other doctors and based on witness statements and testimony. (26RT 3152-3158.) Dr. Mills also credited appellant's explanation of the murders, which suggested dissociation, despite appellant's credibility problems, because it was consistent with his history of abuse and mental dysfunction. (26RT 3157-3160.) In Dr. Mills's opinion, appellant's mental dysfunction, as described by Dr. Watson, made him more susceptible to dissociation. (26RT 3148-3150.) That appellant had an underlying psychotic illness was corroborated, in Dr. Mills's opinion, by appellant's denial that he was mentally ill and by appellant's ability to tolerate high doses of antipsychotic medication. (26RT 3163-3165; see also 27RT 3395.)

Dr. Mills discounted a contrary opinion by Dr. Stalberg that appellant had antisocial personality disorder and was malingering. He thought that appellant did not fit the criteria for antisocial personality disorder, that the neuropsychological tests given to appellant were difficult to cheat, and that Dr. Stalberg had incorrectly characterized dissociative disorder. (26RT 3162, 3167-3168.) Ultimately, Dr. Mills admitted that the testing of appellant to determine his mental state at the time of the crimes was "not [done in a] timely manner. But [] in reality second best is as good as you get." (27RT 3296.)

Dr. Mills also acknowledged that there were some inconsistencies in appellant's test results—and, in fact, in 1993, Dr. Mills had found that appellant was not giving his best effort to the tests—but, like Dr. Watson, he thought that the tests, looked at as a whole, did not show malingering. (26RT 3194-3200; see also 27RT 3382-3383.) Also like Dr. Watson, Dr. Mills discounted appellant's grade-school IQ test showing a score of 110, but credited the test showing a score of 87, despite the notation accompanying the latter test suggesting that appellant had not given his best effort. (26RT 3188-3192; see also 27RT 3379-3382.) Nonetheless, Dr. Mills admitted that his description of appellant as "wild and impulsive" in school had been "hyperbolic." (26RT 3273-3275.) In addition, Dr. Mills thought that appellant's history of abuse had probably been exaggerated, but he concluded that the "tenor" and "thrust" of the witness statements reflecting regular abuse were generally convincing. (26RT 3205-3226, 3230-3236.) He also stated that, unlike Dr. Watson, he would categorize appellant's mental impairments as moderate, not severe. (26RT 3227-3228, 3238.) And he admitted that the more a person participates in psychological testing, the better that person may get at the tests. (27RT 3301.)

Dr. Mills was aware of statements given by two fellow inmates of appellant's—Catsiff and Alatorre—reporting that appellant had revealed various details of the murders to them shortly after his arrest. Dr. Mills completely discounted these statements, however, after talking to defense counsel and concluding that Catsiff and Alatorre were "jailhouse stoolies" who were not entitled to any credence. (26RT 3241-3253; see also 27RT 2789-2791.) Dr. Mills testified, however, that, even accepting the Catsiff and Alatorre statements, he would still diagnose dissociative disorder because it was possible, although "very unlikely," that appellant could have

remembered the details of the murders despite having dissociated. (26RT 3259.)[10]

In addition to "dissociative disorder," Dr. Mills thought that appellant suffered from Asperger's Disorder. This is a rare form of autism characterized by a failure to form normal social bonds. People with Asperger's Disorder may appear normal because they retain linguistic skills. (26RT 3139-3143.)[11] Dr. Mills recognized this diagnosis for the first time in 1999, because he was able to assess appellant more thoroughly and he had recently learned about Asperger's Disorder. In 1999, he also came to believe even more firmly in the diagnosis of dissociative disorder, given appellant's history of abuse. (26RT 3137-3139, 3143-3145.)

Dr. Mills explained that he thought the diagnosis of Asperger's Disorder was significant because people suffering from Asperger's Disorder lack empathy. They do not understand that human life is precious; to them, killing a person is no more significant than killing an ant. (27RT 3322-3323, 3328-3329, 3377-3378.) Addressing the diagnostic criteria for Asperger's Disorder, Dr. Mills explained that he believed appellant had a limited ability to form relationships. (See American Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders (4th ed. Text Revision 2000), p. 84 (DSM-IV-TR).)[12] Although appellant

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[10] Catsiff and Alatorre later recanted their statements, but Dr. Mills did not know that at the time he discounted the statements. He discounted them because defense counsel told him to do so. (26RT 3269-3272; 27RT 3418-3420.)

[11] Dr. Watson had recognized the possibility of Asperger's Disorder, but did not diagnose it. He thought it warranted further inquiry. (22RT 2849-2862; 23RT 2932-2936.)

[12] During this questioning on cross-examination, the prosecutor referenced the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, which lays out the following criteria for diagnosing Asperger's Disorder:

(continued...)

(...continued)

(I) Qualitative impairment in social interaction, as manifested by at least two of the following:

(A) marked impairments in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body posture, and gestures to regulate social interaction

(B) failure to develop peer relationships appropriate to developmental level

(C) a lack of spontaneous seeking to share enjoyment, interest or achievements with other people, (e.g., by a lack of showing, bringing, or pointing out objects of interest to other people)

(D) lack of social or emotional reciprocity

(II) Restricted repetitive & stereotyped patterns of behavior, interests and activities, as manifested by at least one of the following:

(A) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus

(B) apparently inflexible adherence to specific, nonfunctional routines or rituals

(C) stereotyped and repetitive motor mannerisms (e.g. hand or finger flapping or twisting, or complex whole-body movements)

(D) persistent preoccupation with parts of objects

(III) The disturbance causes clinically significant impairments in social, occupational, or other important areas of functioning.

(IV) There is no clinically significant general delay in language (E.G. single words used by age 2 years, communicative phrases used by age 3 years)

(V) There is no clinically significant delay in cognitive development or in the development of age-appropriate self help skills, adaptive behavior (other than in social interaction) and curiosity about the environment in childhood.

(VI) Criteria are not met for another specific Pervasive Developmental Disorder or Schizophrenia.

(DSM-IV-TR, p. 84.)

(continued...)

had relationships with people such as Christine Waller, Norma White, and his grandmother, Dr. Mills thought that these were not close relationships with emotional impact. Similarly, although appellant had made statements about Eric and Sandra reflecting empathy, Dr. Mills opined that appellant nonetheless did not feel empathy "in his heart of hearts." However, when pressed, Dr. Mills admitted that his report should not have stated that appellant had a "complete" lack of ability to empathize, but should have stated instead that appellant had a "substantial" lack of ability to empathize. Dr. Mills believed that a limitation in this regard was sufficient to diagnose Asperger's Disorder. (27RT 3329-3331.)

Similarly, Dr. Mills believed that appellant exhibited a "lack of social or emotional reciprocity" (see DSM-IV-TR, p. 84) despite his relationships with friends and family. (27RT 3335.) Dr. Mills also believed that appellant exhibited a "lack of spontaneous seeking to share enjoyment, interest or achievements with others." (DSM-IV-TR, p. 84.) His opinion was based on appellant's school records, which, according to Dr. Mills, showed that appellant was a loner who did not participate in athletics or other activities with his peers. Again, although appellant had relationships with his peers, Dr. Mills thought that appellant still fit this criterion because he did not have a "real network" of peers. (27RT 3335-3338.) Dr. Mills adhered to this opinion despite kindergarten records indicating that appellant enjoyed school, made friends, and was "well adjusted." (27RT 3341-3344.) He also adhered to this opinion despite various indications of appellant's academic success later in his school career. Dr. Mills again explained that, unlike Dr. Watson, he thought appellant's impairments were

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(...continued)

only moderate and that they principally impacted his peer relations. (27RT 3368-3370, 3377.)

With respect to stereotyped patterns of behavior (see DSM-IV-TR, p. 84), Dr. Mills thought that appellant's focus on historical facts, such as his memorization of the sequence of English monarchs and the counties of California, exhibited an "odd" or "weird" preoccupation. Dr. Mills believed that these preoccupations rose to a pathological level and amounted to a "considerable disability." (27RT 3346-3350.) Dr. Mills also found that appellant exhibited repetitive motor mannerisms, based on a test given by Dr. Watson. Dr. Mills further observed that appellant "twitched," which he thought was enough to make such finding. (27RT 3366.) Dr. Mills additionally found the remaining Asperger's criteria met and emphasized that he thought appellant was "significantly impaired" because of Asperger's syndrome and because of the cognitive deficits described by Dr. Watson. (27RT 3367-3368.)

Dr. Mills further explained that although appellant lacked empathy, he nonetheless knew intellectually that he had committed a crime and needed to cover it up. What he lacked was "the emotional understanding of what it all mean[t]." (27RT 3352-3356.) When challenged about the compatibility of Asperger's Disorder with dissociation, Dr. Mills explained that appellant's mental problems placed him precisely at a point where he was sufficiently emotionally "connected" so that the murder of his father would cause him to dissociate, but he was sufficiently "disconnected" so that he lacked the empathy to understand the significance of killing. However, when further pressed as to how these two qualities could coexist, Dr. Mills frankly stated, "I'm not sure." (27RT 3357-3359; see also 27RT 3372-3373, 3376.)

Dr. Mills thought that although appellant was "manifestly odd" he was "not crazy." (27RT 3359-3361.) Therefore, professionals examining

him, and laypeople interacting with him, would not necessarily notice anything amiss unless they were specifically looking for it. (27RT 3362-3365.)

c. Dr. William Vicary

Dr. William Vicary assessed appellant in 1984 for the purpose of determining whether he was competent to participate in legal proceedings. (28RT 3434-3435.) Based on his review of limited material at the time, and based on the "low threshold" of the competency inquiry, he deemed appellant competent to participate in the proceedings, although he had some reservations about appellant's ability to assist counsel because appellant exhibited some paranoia and agitation. (28RT 3437-3446.)

In 1993, Dr. Vicary assessed appellant again, and was able to review more materials and to interview appellant for two to two and a half hours. (28RT 3446-3447.) Based on the additional information, Dr. Vicary concluded that appellant had "a serious mental illness," but he did not reach any specific diagnosis. Dr. Vicary thought that appellant was likely to "snap" under stressful situations—that he was prone to having what may be termed variously as a psychotic break, an emotional explosion, or dissociation. In retrospect, Dr. Vicary concluded that appellant had not been competent to participate in legal proceedings in 1984. (28RT 3447-3451; see also 28RT 3495, 3518.)

On cross-examination, Dr. Vicary admitted that he was under probation by the California Medical Board for having made false statements in documents. (28RT 3501.) He also admitted that his 1984 report did not state that appellant appeared paranoid or agitated. Dr. Vicary explained that "something was wrong" with appellant but it "slipped under [his] radar screen." When he had stated in his 1984 report that appellant was not odd or peculiar, he was speaking in the context of the prison

population, and what he meant was that appellant was not "grossly crazy." (28RT 3460-3469.)

Dr. Vicary also admitted that appellant's lack of honesty was "a real problem" and that malingering was a possibility. (28RT 3454-3455, 3491-3492.) Nonetheless, Dr. Vicary thought that, overall, there was "legitimate consistent evidence of physical brain damage." (28RT 3492, 3517.) He posited that appellant's mental problems had not been apparent to him in 1984 because appellant was very articulate and Dr. Vicary did not have at his disposal any of the historical information that would have alerted him to appellant's impairments. In short, he was "fooled by [appellant's] verbal abilities." (28RT 3522-3524.)

II. SANITY PHASE

Dr. Philip Wolfson, a psychiatrist, testified for the defense at the sanity phase. (35RT 4266-4267.)[13] Dr. Wolfson rejected the theory of Dr. Watson, presented by the defense at the guilt phase, that appellant had severe mental impairments. (35RT 4430.) He also rejected the theory of Dr. Mills, also presented by the defense at the guilt phase, that appellant suffered from Asperger's Disorder. (35RT 4399, 4429; see also 35RT 4439-4440.) Instead, Dr. Wolfson opined that appellant had "a mixed personality disorder with borderline and dependent . . . personality disorder features." (35RT 4269.)

Dr. Wolfson explained that borderline personality disorder, according to the DSM-IV, consists of:

> [A] pervasive pattern of instability of interpersonal relationships, self-image, and affects . . . and marked by impulsivity beginning

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[13] Dr. Wolfson worked "almost 100 percent" for criminal defendants. (35RT 4323.)

> by early adulthood and present in a variety of contexts as indicated by five or more of the following:
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> [1] frantic efforts to avoid real or imagined abandonment;
>
> [2] a pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation;
>
> [3] identity disturbance markedly and persistently unstable self image or sense of self;
>
> [4] impulsivity in at least two areas that are potentially self damaging;
>
> [5] recurrent suicidal behavior, gestures or threats or self mutilating behavior;
>
> [6] affective . . . instability due to a marked reactivity of mood;
>
> [7] chronic feelings of emptiness;
>
> [8] inappropriate intense anger or difficulty controlling anger;
>
> [9] transient stress-related paranoid ideation or severe dissociative symptoms.

(35RT 4269-4270.) Dr. Wolfson spent about 20 total hours examining appellant in 1990 and 1992 and believed that appellant fit these diagnostic criteria. (35RT 4267-4268, 4270; see also 35RT 4290.)

With respect to instability of interpersonal relationships, Dr. Wolfson thought that appellant had "great difficulty in getting close to people on any sustained basis, although he tried." He also thought that appellant had "extremely poor self image" because he was the "class clown" and "usually the butt of other people's laughter and derision." (35RT 4271.) According to Dr. Wolfson, appellant also had a variable affect, with periods of depression and agitation, and he exhibited impulsivity and lack of control from early adulthood. (35RT 4271-4272.)

More specifically, Dr. Wolfson believed that the following criteria listed in the DSM-IV applied to appellant:

First, as to "frantic efforts to avoid real or imagined abandonment," Dr. Wolfson testified that appellant's abandonment by his mother, and his fear of abandonment by his father, engendered "terrible feelings of being left," beginning in early childhood. These feelings affected "who he is" in a "largely unconscious" way. (35RT 4273.)

Second, as to "a pattern of unstable intense interpersonal relationships," Dr. Wolfson testified that appellant's relationships, such as those with Christine Waller, Norma White, Sandra, and Josephine, were "often unpredictable, idealized and mostly in his head." (35RT 4273-4274.) His relationship with his mother was "totally chaotic," and his relationship with his father was one of dominance. Dr. Wolfson thought that appellant's relationship with Robin Bucell and Eric Bloom was hopeful and loving, but he did not see them frequently after they left his father. (35RT 4274-4275.)

Third, as to "identity disturbance markedly and persistently unstable self image or a sense of self," Dr. Wolfson thought appellant's view of himself had shifted throughout his life, ranging from an image of intelligence and potential to an image of unworthiness and failure. (35RT 4275-4276.) Dr. Wolfson believed that, in fact, appellant possessed a "slightly above average intelligence." (35RT 4276.)

Fourth, as to "impulsivity in two areas that are potentially self damaging," Dr. Wolfson identified "the acts that began coming out in his last year with the hold ups, the strange behavior in the navy, et cetera," and noted that "people describe him frequently as unpredictable, weird, laughter in strange places, inappropriate behavior." (35RT 4276.) Dr. Wolfson also pointed to appellant's grade-point average of 3.75 in his senior year of high school, as compared to his overall grade-point average of 2.2. (35RT 4276-

4277.) In addition, Dr. Wolfson identified an incident in which appellant "shot up" an apartment with a BB gun and an incident in which appellant attempted a robbery with a BB gun outside of a church. (35RT 4277-4279.)

Fifth, as to "affective instability due to marked reactivity of mood," Dr. Wolfson opined that appellant's "internal emotional environment is constantly in flux. He's either clowning or he's in great despair." Dr. Wolfson testified that, "I think prior to the homicides [appellant had a] fluctuating mood, from highs to lows, from anger to hurt, from depression to almost mania." (35RT 4280.)

Sixth, as to "chronic feelings of emptiness," Dr. Wolfson testified that because of appellant's abandonment issues and unstable relationships he "does not have much of a sense of who he is at deeper levels and . . . suffers from a great sense of despair which particularly came up in the year prior to the homicides." (35RT 4280-4281.)

Seventh, as to "transient stress-related paranoid ideation or severe dissociative symptoms," Dr. Wolfson thought that appellant "clearly had some moments in the year prior to the homicides where he seemed absolutely psychotic." As an example, Dr. Wolfson pointed to appellant's imaginary friend, Tony. Dr. Wolfson thought that appellant had an "intense relationship" with Tony, and that having an imaginary friend at the age of 17 or 18 "basically as your bad alter ego fits criteria for what I call dissociative states." (35RT 4281.) Further, Dr. Wolfson opined that appellant exhibited "split personality," and that a "separation into opposites, good and evil" was a hallmark of borderline personality disorder. (35RT 4282.)

After discussing the diagnosis of borderline personality disorder, Dr. Wolfson explained that he thought appellant also exhibited traits of "mixed personality disorder," which were not as "developed" as his borderline

personality disorder but were "an extremely important part of it." (35RT 4282-4283.) Referring to the DSM-IV, Dr. Wolfson stated that mixed personality disorder is characterized by a pervasive and excessive need to be taken care of that leads to submissive and clinging behavior and fears of separation beginning by early adulthood and present in a variety of contexts. He testified that this disorder "speaks to" appellant's physical abuse at the hands of his father and his abandonment issues. (35RT 4283.) Dr. Wolfson also thought that this disorder was reflected in appellant's failure to develop "any real independent or autonomous sense of who he was," as exhibited by his failure to transition from high school to the workforce or to begin a career in the Navy. (35RT 4283-4284.)

Dr. Wolfson testified that, for appellant, the years 1979 to 1981 were "an extremely difficult period," which involved "terrible instability, emotional upheaval and difficulty." During this time, his father and mother were both abusive and appellant had an unstable living situation. (35RT 4286-4287.) Appellant tried to enter the Navy but was discharged after only 29 days, because he could not conform to the rules and regulations. According to Dr. Wolfson, this made appellant "extremely distressed and humiliated." He then began to "disintegrate"; his paranoia, stress, and psychotic episodes increased. (35RT 4288-4289, 4318-4320, 4408-4412.)

Dr. Wolfson related that, in 1981, when appellant was 18 years old, he was convicted of a misdemeanor as the result of the attempted robbery incident. As part of the legal process, he was examined by Dr. Naham, who diagnosed appellant with "borderline personality disorder evidenced by poor impulse control, explosiveness, inability to tolerate frustration, emotional immaturity, manipulativeness, and . . . sociopathic trends." (35RT 4279-4280, 4291.) Dr. Naham found that appellant exhibited paranoia and homicidal ideation, and he recommended inpatient

hospitalization. (35RT 4292.) However, appellant was never treated psychiatrically. (35RT 4293.)

Following the attempted robbery incident, appellant moved in with his father and also formed a connection with Christine Waller's family. (35RT 4293-4294.) On the one hand, appellant idealized his relationship with Norma White, while on the other hand, appellant's relationship with his father became "more and more intolerable." (35RT 4294-4295.) Appellant was struggling to make his own way in life, his father was undermining that struggle, and appellant had no one to rely on. (35RT 4295-4296.) Dr. Wolfson thought that appellant was in an "agitated confused state throughout that time" and he could not envision a way of escaping from the situation. (35RT 4297.)

Dr. Wolfson testified that, based on his examinations of appellant, he believed that appellant had had homicidal ideas toward his father for many years. (35RT 4298.) According to Dr. Wolfson, appellant hated his father for being abusive and dishonest, and for causing appellant himself to become a dishonest person. (35RT 4299.) Dr. Wolfson thought that appellant's homicidal ideas crystallized when he noticed the rifle at Christine Waller's house. According to Dr. Wolfson, this was the first time appellant realized he could actually hurt his father. (35RT 4300.) Since appellant was smaller than his father, he had always been intimidated by him and had been unable to do anything about it. (35RT 4301.)

Dr. Wolfson explained that after appellant discovered the rifle, he began to plan the killings, first by cultivating the alibi that he needed to stay at Waller's house and practice with the rifle in order to protect her family from potential intruders, and then by actually practicing with the rifle. (35RT 4301.) According to Dr. Wolfson, the fact that appellant was planning to murder his father while "pretending that he was a normal guy" evidenced that appellant was in a "delusional state of mind," and was, in

fact, "insane." (35RT 4320-4321; see also 35RT 4327 [it was "pretty crazy behavior" for appellant to practice with the rifle in such a way that others were aware of it].) It was irrational that appellant killed his father and it was irrational that he set up a "terrible alibi." (35RT 4332.) In short, the fact that appellant was 18 years old and killed his father was the reason why Dr. Wolfson found that he was insane; "a rational person doesn't resort to killing their father as a means of leaving their father." (35RT 4340-4331; see also 35RT 4367-4370, 4376-4379.)

Dr. Wolfson believed that appellant went to his father's house on the night of the murders intending to kill him, but that he did not intend to hurt Josephine or Sandra. Dr. Wolfson thought that appellant liked Josephine and Sandra. (35RT 4303.) In Dr. Wolfson's opinion, appellant had a substantial capacity to appreciate the criminality of his conduct with regard to his father, but lacked the substantial capacity to conform his conduct to the requirements of the law at the time he killed him. (35RT 4303, 4305.) Dr. Wolfson thought that appellant did not view shooting his father as something that was unjust. "He was just doing an act, that's how he had framed it. The insanity part begins with his idea of killing his father." Dr. Wolfson explained that this reflected insanity because "[t]o think that the only way out for a human being is to shoot and kill your father and you have no other options and you are 18 years of age and living apart to some extent and beginning to move to an independent direction, it's an insane thing to do to plan an execution of your father and then to go through with it." (35RT 4305.) In other words, appellant "was not restrained by notions of what's legal or criminal, rather he was driven by notions of his own personal unrelated[-]to[-]the[-]law desire to kill his father"; he simply thought about killing Bloom and did it, without thinking about its legality. (35RT 4325.) As Dr. Wolfson explained:

> . . . I think that's the heart of the insanity that he didn't choose not to conform to the law or choose to conform to the law. He went beyond the law. He was not in restraint by the law. He was killing his father in an irrational insane moment. He planned it. [¶] His irrationality, insanity, you could argue, goes back to the beginning of the plan to go from a plan to actually execute a plan to kill your father under these circumstances is proof of insanity to me.

(35RT 4419-4420; see also 35RT 4435-4437.)

Dr. Wolfson further explained that appellant knew it was a crime to kill his father but "on the personal level he felt . . . the killing of his father was just a deed." This was a product of appellant's mental illness because appellant could see no escape from his situation even though there were "many other choices" for appellant aside from killing his father. (35RT 4306.) Dr. Wolfson thought that appellant had been "moving outside of a sense of connection to reality for sometime," and that, at the point he killed his father, he was psychotic. (35RT 4306-4307.)

According to Dr. Wolfson, for appellant, the killing of his father was a "triumph over him," an extraordinary moment which put him in a "totally altered state." (35RT 4307-4308.) Appellant became "a different human being." (35RT 4312.)[14] In this altered state, when he heard Josephine and Sandra screaming, he simply reacted by shooting them, without any mental process. "It's an animal base response and he shoots the people that are there. It makes no sense whatsoever." (35RT 4308.) Dr. Wolfson concluded that appellant was not able to conform his conduct to the requirements of the law when he killed Josephine and Sandra. (35RT 4315-4316.) According to Dr. Wolfson, appellant was not able to explain

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[14] Dr. Wolfson testified, however, that this transformation was not attributable to appellant's mental illness; rather, it would be true of any person who killed his or her own parent. (35RT 4312.)

later why he had killed them and was "totally shaken" by it. (35RT 4316-4317.)

Dr. Wolfson was aware that Dr. Kling had diagnosed appellant with antisocial personality disorder and schizotypal personality disorder. He disagreed with those diagnoses on the basis that Dr. Kling had been working from "an entirely different story" with respect to the murders. (35RT 4312-4315.) Dr. Wolfson also disagreed with Dr. Stalberg, who had found that appellant had "a serious personality disorder but [was] in touch with reality" such that he had "no psychiatric defense available to him." Dr. Wolfson discarded that assessment, in part, because Dr. Stalberg had not met with appellant personally. (35RT 4399-4403) Similarly, Dr. Wolfson rejected the opinion of Dr. Kivowitz that appellant was sane at the time he killed his father. (35RT 4405-4406, 4428-4429.) In addition, Dr. Wolfson disagreed with Dr. Weiland, who had diagnosed appellant as having a paranoid disorder and antisocial personality disorder with paranoid features. (35RT 4429.) He also disagreed with a second report by Dr. Naham—authored after the 1981 evaluation and after the murders—diagnosing appellant with antisocial personality disorder. (35RT 4370-4373, 4428.)

Dr. Wolfson was confident in his conclusions based on the material he reviewed and his interviews of appellant, even though appellant frequently lied. (35RT 4307-4311; see also 35RT 4343-4346, 4350-4360, 4379-4398, 4403, 4406-4408.) He believed that he had reached a compassionate understanding of appellant's state of mind. (35RT 4426-4428.) In short, Dr. Wolfson thought that, of all the psychiatrists and psychologists to examine appellant, he was one of the few who had "gotten to the truth." (35RT 4429-4430; see also 35RT 4432-4435, 4440.)

III. PENALTY PHASE

A. The Prosecution's Case

As penalty-phase aggravating evidence, the prosecution principally relied on the circumstances of the murders in the present case. (See 41RT 4835-4845; 48RT 5836-5917.) However, the prosecution also presented evidence at the penalty phase of two additional instances of criminal behavior.

On November 3, 1981, appellant walked into a church while a group of about 25 people were having refreshments. He stayed for five to ten minutes and then left. (41RT 4848-4850.) Appellant returned later, while the group was engaged in bible study. He produced a rifle from his coat and pointed it at the head of one of the congregants, Frances Summe. Appellant demanded Summe's purse, but she resisted. When another congregant knocked over a chair, appellant became startled and ran away. (41RT 4851-4854.)[15]

On May 3, 1984, while in the law library at the Los Angeles County Men's Central Jail, appellant stabbed a fellow inmate, Curtis Wright, in the neck with a knife. The wound was small but was targeted at the jugular. (41RT 4907-4915.)[16]

In addition, the prosecution presented evidence concerning the impact of the crimes on the family of the victims. Charles Simpson, Josephine's uncle, explained that he and Josephine's parents were devastated by the murders, as were Sandra's father and his parents. (41RT 4975-4982.)

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[15] The court took judicial notice that appellant had admitted committing the robbery with a BB gun. (41RT 4907.)

[16] The parties stipulated that appellant had admitted committing this stabbing while the library guard was not looking. (41RT 4966.)

On cross-examination, Simpson also testified that appellant had threatened to carry out the killings long before they happened. Simpson explained that appellant was upset on the day of his father's wedding and had told Simpson that he did not want his father to marry Josephine. Appellant said, "Well, I got a half brother that's in the way and I don't need two more in the way. . . . If my dad lets Lulu or Sandy get in my way, I will kill Lulu and Sandy."[17] He also told Simpson, "If you get in the way, I will kill you." (41RT 4990-5000.)

B. The Defense Case

In his opening statement at the penalty phase, appellant told the jury that the whole defense case at the guilt phase had been "garbage." (42RT 5049.) He elaborated that the psychological experts were "quacks" and "charlatans" and "[t]he mental defense was fabricated, it was bullshit and it was garbage, and it was meant to trick you people." He explained that he had absented himself from the sanity phase because he did not want to be a part of the "trick" performed by his lawyers. (42RT 5060.) He then presented the following evidence.

1. Judge Hoff

Appellant first called Judge Hoff, who had presided over pretrial proceedings in this case. (42RT 5075-5076.) Judge Hoff testified that appellant had been unhappy with his attorneys had had tried to relieve them, unsuccessfully, including on the ground that he did not agree with the mental defense they intended to advance at trial. (42RT 5077-5078, 5156-5161.) Judge Hoff also testified that, during the proceedings held before him, he believed appellant was competent to stand trial. He thought that

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[17] "Lulu" was Josephine's nickname. (41RT 4975.)

some of the arguments appellant made were "very skillful," "very clear and smart," but some were "stupid." (42RT 5076, 5170.)[18]

2. Curtis Wright

Curtis Wright testified about the circumstances of the jailhouse stabbing. According to Wright, he had not had any trouble with appellant before the stabbing. Appellant attacked him from behind without warning and stabbed him in the neck. Appellant later told Wright that he had simply wanted to "catch a case" in order to stay in jail because he had met a woman there. (42RT 5091-5095.) Wright testified that he was "over" the incident and that he did not want appellant to receive the death penalty. (42RT 5098, 5104.)

3. Character Witnesses

Kathy Myers, Kelly Twomey, and Roz Kelly all testified that they had met appellant on the bus that transported inmates to court. They all thought that appellant was a nice, polite person, and they all stated that they planned to keep in touch with him. (42RT 5110-5124 [Kathy Myers], 5141-5144 [Kelly Twomey]; 47RT 5708-5712 [Roz Kelly].)

Cyril Sabbagh, Jodi Bolivar, and Elizabeth Meyer were Sheriff's deputies who had interacted with appellant in the courtroom, in the courthouse lockup, and in the jail, respectively. They all testified that appellant had been cooperative and respectful. (42RT 5151-5153 [Jodi Bolivar]; 44RT 5420-5422 [Cyril Sabbagh]; 47RT 5702-5703 [Elizabeth Meyer].)

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[18] The trial court also took judicial notice that appellant had objected to the mental defense and that appellant's attorneys Seymour Applebaum and Tonya Deetz had refused to testify at the penalty phase. (46RT 5669-5680.)

4. Family Witnesses

Byron Bostic, appellant's brother, testified that he had been visiting appellant in prison since he was a young boy. There was never any problem during the visits, and when he grew older he began taking his own family to visit appellant. (45RT 5497-5501.) Anna Maria Dean, the 10-year-old daughter of Byron Bostic's girlfriend, testified that she had visited appellant in prison four or five times and was not afraid of him. She thought of appellant as an uncle and would be comfortable visiting him alone. (43RT 5209-5217.)[19]

Melanie Bostic testified that her marriage to Bloom had been an unhappy one, that he had essentially blackmailed her into it, and that it had caused a break with her family. (45RT 5561-5570.) According to Bostic, Bloom was a con man. (46RT 5612-5614.) He was also physically abusive, even while she was pregnant with appellant, and they fought constantly. (45RT 5571-5579.) After appellant was born, Bloom began physically abusing him when he was just a toddler. (45RT 5584-5585.) At one point, Bostic took an interest in Satanism[20] and performed rituals on appellant, such as surrounding him with candles and offering him to the devil in exchange for money, fame, and Bloom's death. (45RT 5582.) She also neglected appellant, including during one instance when appellant fell in a pool and nearly drowned while she was talking on the telephone. He was two years old at the time. (45RT 5582-5584.)

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[19] In closing argument, appellant told the jury that he had called Dean as a witness because he wanted the jury to compare her to Sandra and to consider that he was "very nice to little girls." (49RT 6029-6030; see also 49RT 6118.)

[20] This word appears in the transcript as "sadism," but, as appellant notes, it appears from the context that the actual term used (or intended) was "Satanism." (AOB 65, fn. 18.)

Bostic eventually left the family; she was not sure how old appellant was at the time because she "didn't pay attention" to him. (45RT 5586.) She moved away and changed her name, becoming "deeply involved" in running various night clubs. (45RT 5585-5588, 5598.) Later, Bostic's boyfriends, as well as a subsequent husband, abused appellant, and appellant witnessed abuse against Bostic. (45RT 5590-5592.) Bostic also told appellant that she had had an abortion, which seemed to "mess[him] up." (45RT 5596-5597.)

Robin Bucell similarly testified that Bloom was a con artist and that her marriage to him had been based on lies. (45RT 5508-5515; see also 45RT 5535-5536, 5544.) He was also an intimidating and controlling person, and after she left the marriage she had to get a restraining order against him. (45RT 5516-5523; see also 45RT 5538-5541, 5543.) She thought that Bloom's discipline of appellant was excessive and that he had provoked appellant into killing him. (45RT 5519, 5532, 5549.) "To be honest," Bucell thought that appellant had done her a favor and that Eric was better off having been raised by a single parent than having had Bloom involved in his life. (45RT 5541-5542.)[21]

5. Expert Witness

Appellant also presented the testimony of Paul Monez, an attorney specializing in parricide cases. (47RT 5720-5722.) In his experience, either abuse or serious family dysfunction was usually at the root of cases where children kill their parents, and that was his opinion in this case based

[21] On cross-examination, however, Bucell admitted that Bloom's provocation of appellant could not explain why he killed Josephine or Sandra. (45RT 5550-5552.)

on what he had reviewed. (47RT 5723-5725, 5729-5730, 5748-5749.)[22] He testified, however, that in such cases it would be inconsistent with his experience that the child would kill others besides the parents. (47RT 5730-5732.) He also testified that appellant's rationale of killing Josephine and Sandra in order to protect Norma White's innocence was inconsistent with his experience in parricide cases. He explained that, usually, parricide is the result of a "storm of emotion" against the parent. (47RT 5734, 5777.) Monez acknowledged that sometimes parricide is simply committed by a sociopath—someone who places very little value on human life. (47RT 5765, 5778-5779.)[23]

6. Defendant Bloom

Appellant testified in his own behalf at the penalty phase.[24] Appellant told the jury that he had lied about the crimes at his initial trial but that now "[y]ou should hear the truth and you should know the truth." (43RT 5269; see also 42RT 5065-5066.) He then proceeded to review a transcript of his

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[22] Monez had been hired in 1993 during federal habeas corpus proceedings and at that time had reviewed materials provided to him by defense counsel. (47RT 5722-5723, 5761-5763.)

[23] During closing argument, appellant stated, "A sociopath is somebody that can do things in their self interest without having feelings in regards to other people. Well, I'm a sociopath. I'm not going to argue the point with you and I'm not going to argue with the prosecution about it." (49RT 6073; see also 48RT 5987; 49RT 5993, 6003 [the district attorney "will tell you that I'm a predator and he is probably right"].) He also was adamant that "this case is not about abuse." (48RT 5928; see also 48RT 5963.)

[24] Appellant apparently wore a yarmulke during at least this portion of the trial. (See 47RT 5715.) During closing argument, he told the jury that he had wanted to make the "subliminal" point that, if they voted for death, "you are going to send a Jew to the gas chamber." (49RT 6063.) He also suggested that they should vote for life since they would be deliberating during Hanukkah. (49RT 6116.) However, he later admitted that this was "a little bit" of a con. (49RT 6122.)

testimony from the first trial, with commentary about which parts were true and which parts were false. (See 43RT 5224-5227.)[25]

Appellant disliked his "old man" because he was a con artist. (43RT 5253-5254; see also 46RT 5622-5623.) He believed that Bloom was swindling Josephine out of her house and he disapproved of the marriage because he did not want to see Josephine and Sandra caught up in Bloom's schemes. (43RT 5240-5242.) Appellant told Josephine that he would help get her out of the marriage, but he did not tell her that he planned to kill Bloom. (43RT 5251-5255.)

According to appellant, he stayed at Norma White's house the week leading up to the murders in order to set up an alibi, having already decided to kill his father, and in order to gain access to the rifle. (43RT 5237-5238, 5245-5247.) On the night in question, he walked to the house and quietly let himself in. He was surprised, however, to find that Josephine and Sandra were home, asleep, since they had planned to be away. He woke up Josephine and motioned her into the kitchen, where they got into an argument. As a result, Bloom woke up. (43RT 5261-5266, 5294.) Appellant then got into an argument with Bloom, which, as recounted by the eyewitnesses, moved from the house into the street and culminated with his shooting Bloom at the threshold of the front door. (43RT 5283, 5308-5309.)

When appellant fired the last shot at Bloom, Josephine was standing nearby. She shouted, "Bobby, Bobby, No, this is not what I wanted, this is not what I wanted." (43RT 5309.) He then made a "summary decision" to kill Josephine. He shot her twice quickly in the head, and she collapsed. He then shot her in the head a third time "to make sure she was dead."

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[25] This testimony was essentially in narrative form, since appellant was acting as his own attorney.

(43RT 5310.) Sandra woke up during this shooting and ran to Josephine. She became hysterical, trying to wake up her mother and hitting appellant with her "little fists." (43RT 5271-5272, 5278, 5311.) Appellant shot Sandra with his last round but she did not die. He then stabbed her 23 times with the scissors but she still did not die. He retrieved a live round, loaded the rifle, and "shot Sandy in the face." (43RT 5311-5312, 5341.)[26] Even though she was still alive, appellant needed to leave, so he took Josephine's car and disposed of the rifle at Hansen Dam. (43RT 5286, 5307, 5312.)

Appellant repudiated the mental defenses that he suffered from Asperger's Disorder and that he dissociated during the murders, stating, "I'm not crazy, I'm not insane, and I'm not mentally impaired." (43RT 5300-5304; see also 43RT 5291, 5313.) Instead, appellant insisted that he had given Bloom "what the old man deserved" and that "Josie got herself killed and Josie got Sandy killed." (43RT 5272-5273, 5305-5306.) According to appellant, he was not "totally responsible" for the deaths of Josephine and Sandra; he told the jury that Josephine "shares culpability and responsibility for her own death" and for Sandra's, because they were at the house when they were not supposed to be there. (43RT 5272, 5306-5307; see also 43RT 5313.) He had not planned to kill Josephine, but it was a necessary evil for which he was sorry "[t]o a certain extent." (43RT 5306.) In appellant's view, he did Josephine a favor by getting her out of her marriage with Bloom, but she was ungrateful after witnessing the murder. (43RT 5312.) And once she became a witness, appellant had to eliminate her and Sandra in order to protect Norma White: "I couldn't let

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[26] Appellant explained that the rifle had been malfunctioning and that there were live rounds strewn about the house. (43RT 5291, 5310.)

Norma find out that I had killed the old man. It would have destroyed her innocence." (43RT 5305-5306; see also 43RT 5310-5312.)

Appellant testified that the murders of Josephine and Sandra had ultimately been a "waste," because he was caught anyway, and that if he had known about the other eyewitnesses ("that damn hippie David Hughes and his little bimbo girlfriend Victoria Smith and Moises Gameros") he would have killed them, too. (43RT 5305, 5310.) He observed that "[t]he only remorse I have is that I didn't do it when I was 16 or 17, because if I had done it then, then [Bloom] never would have been involved with Josie and he never would have been involved with Sandy. So he got what he deserved. Good riddance." (43RT 5305-5306.) He added, "If anything is my fault it's the killing of the old man and frankly I should get a medal for it." (43RT 5312-5313.)

On cross-examination, appellant admitted that his explanation for killing Josephine and Sandra was that, in essence, protecting Norma White's "innocence" meant more to him than their lives, or the lives of the other eyewitnesses. In fact, he would have been willing to kill as many witnesses as necessary, "until [] out of bullets." (43RT 5317-5318; see also 43RT 5333; 44RT 5369-5373.) He was also willing to do "whatever is necessary" to dissuade witnesses from testifying at trial. (43RT 5330-5331.) In his view, they deserved "pay back," since White "found out, her innocence was destroyed." (43RT 5331.)

Appellant further admitted that he was "absolutely" malingering during the psychological evaluations in 1999 and 2000. (44RT 5354-5355.) He had told "a bunch of different lies . . . calculated to get me a new trial."

(44RT 5356-5357.) Appellant again denied that he was "crazy." (44RT 5379-5381.)[27]

In addition, appellant admitted that he had tried to kill Curtis Wright ("a Christian dog") merely in an attempt to be charged with a new case so that he could remain in the Los Angeles County Jail, close to Denise Kronsberg ("a nice Jewish girl"), with whom he had begun a relationship. (44RT 5374-5375.) He could not say whether he would try to kill another inmate in the future if it served his personal convenience. (44RT 5385.)

When asked more specifically about the murder of Sandra, such as whether she was screaming and whether he thought she was in pain, he responded, laughing, "Do I care?" (43RT 5335.) He reiterated that he thought Josephine was an "ungrateful bitch" and that she had "brought it on herself" and Sandy. (43RT 5337.) On recross-examination, appellant admitted having previously stated:

> Wouldn't you call it torture to stab a little girl 23 times? I qualify it as torture. The victim suffered pain. How many times have you nicked yourself with a kitchen knife? It hurt. Imagine it running into your body 23 times. Think about that.

(44RT 5413.)[28]

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[27] On redirect examination, ostensibly to demonstrate his intelligence, appellant recited from memory the U.S. Presidents in chronological order, with the dates of their respective administrations and occasional historical commentary. (44RT 5399-5406.)

[28] Appellant denied that he was trying to "con" the jury or to sabotage his own case with his penalty-phase testimony. (43RT 5316, 5381, 5394.) By way of background, at appellant's initial trial, he elected to represent himself at the penalty phase, presented no mitigating evidence, and asked the jury to impose a sentence of death. (*People v. Bloom*, *supra*, 48 Cal.3d at pp. 1214-1217.) This Court later rejected his claims on appeal regarding this self-sabotage. (*Id.* at pp. 1218-1229.)

ARGUMENT

I. THERE WAS NOTHING ERRONEOUS OR UNCONSTITUTIONAL ABOUT PROCEEDING WITH RETRIAL FOLLOWING APPELLANT'S SUCCESSFUL APPEAL TO THE NINTH CIRCUIT

Appellant claims that his retrial 18 years after the murders violated his rights "to a fair trial, to present a defense, to confront witnesses against him, and to a reliable adjudication of guilt, sanity, and penalty, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution." (AOB 73; see generally AOB 71-86.) Specifically, appellant argues: (1) the unavailability of two psychological experts who had examined him closer in time to the murders than had the experts presented at the retrial undermined his presentation of a mental defense (AOB 75-82); (2) the unavailability of Christine Waller and Martin Medrano similarly hampered the presentation of the defense at the retrial (AOB 82); and (3) repeated references to appellant's prior trial and incarceration prevented a fair retrial (AOB 83-86). There was no prejudicial error.

A. Background

Prior to trial, the defense filed a motion to dismiss the case based on the unavailability of Dr. Kling, who was asserted to have been the first psychiatrist to examine appellant after the crimes, and Dr. Naham, who was asserted to have been the only psychiatrist to examine appellant before the crimes. According to the defense, Dr. Kling was deceased and Dr. Naham's license to practice had been revoked. The defense requested an evidentiary hearing to establish a factual basis for the motion. (1CT 100-105.) At a subsequent hearing, the trial court ruled that no evidentiary hearing was necessary because, even assuming the truth of the allegations made in the motion, there was no remedy for the loss of evidence. The court noted that the defense had admitted in the motion that there was no

legal authority on point and encouraged the defense to seek writ relief on the issue. (2RT 214-216.)

The defense next filed an opposition to the prosecution's motion in limine seeking admission of the prior testimony of Martin Medrano and Christine Waller. In that opposition, the defense argued that the prior testimony was inadmissible because appellant did not have an adequate opportunity to cross-examine the witnesses at his first trial since: (1) his attorney during the first trial rendered ineffective assistance; and (2) appellant was incompetent during the first trial. (2CT 124-401.)

The defense also filed a supplemental motion to dismiss the case, in order to cite additional authority, namely *People v. Sixto* (1993) 17 Cal.App.4th 374, which the defense contended authorized "curative measures" upon retrial following a reversal based on ineffective assistance of counsel. (3CT 448-527.)[29]

At a subsequent hearing, the court again denied the motion to dismiss the case, finding that the newly cited authority did not alter the analysis. (3RT 246.) The court also ruled that the testimony of Martin Medrano and Christine Waller was admissible. Specifically, after listening in camera to proposed additional cross-examination that the defense contended appellant's prior counsel should have conducted, and after some additional argument in open court, the court found that Medrano and Waller were adequately cross-examined at the first trial. (3RT 246-270; see also 3RT 316-317.)[30]

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[29] The defense had also relied on *Sixto* in its opposition to the prosecution's motion in limine.

[30] The parties later litigated specific redactions to the prior testimony of Medrano and Waller. (4CT 771-779, 809-825; 3RT 270, 402-410, 419-421.)

The defense also moved to preclude any reference during the retrial to the verdicts during the prior trial and to the fact that appellant had been on "death row" for the previous 18 years. (4CT 826-827; 3RT 293-295, 306-316.) While both parties and the court acknowledged that it would inevitably be obvious to the jury during the retrial that appellant had been previously tried and convicted in the same case (3RT 294, 312, 445), the court ruled that, pursuant to Penal Code section 1180, there could be no reference during the retrial to the prior verdicts themselves or the fact that appellant had been on "death row" (3RT 411-413, 442-446).

B. To the Extent Appellant's Claim Is Premised on Inadequate Investigation and Inadequate Preparation of Counsel, It Is Better Addressed on Habeas Corpus

Preliminarily, to the extent appellant's claim is premised on the ineffective assistance of his attorneys at the retrial—because their investigation and preparation was hampered by the prior deficient performance of appellant's attorney at the initial trial—the claim is better addressed on habeas corpus. (See AOB 72.) As this Court has recognized, "claims of ineffective assistance are often more appropriately litigated in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.) This is such an instance. Matters concerning counsel's investigation and preparation leading up to trial are not within "the four corners of the record on appeal." (*People v. Waidla* (2000) 22 Cal.4th 690, 743-744.) Accordingly, it is premature to consider this aspect of appellant's claim.[31]

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[31] Respondent notes, however, that appellant's characterization of aspects of this claim as involving the ineffective assistance of counsel may simply be inapt. As the Court of Appeal explained in *People v. Sixto* (1993) 17 Cal.App.4th 374, 380, a trial court's rulings do not "cause" ineffective assistance of counsel. Rather, where a defendant has asked for rulings at a retrial designed to combat the purported lingering effect of

(continued...)

In any event, appellant's claim is meritless, for the reasons that follow.

C. Appellant's Challenge to the Trial Court's Denial of His Motion to Dismiss Must Fail

Appellant first argues, in effect, that the trial court erred by denying his motion to dismiss. He contends that the unavailability of Drs. Naham and Kling at the retrial violated his "right to a fair trial, to present a defense, to confront witnesses against him, and to a reliable adjudication of guilt, sanity, and penalty, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as state constitutional and statutory law." (AOB 73-82.)

1. Since Appellant Expressly Repudiated the Mental Defense Below, Appellate Relief Based on Any Purported Error Impacting That Defense Is Unwarranted

At the outset, an inherent tension must be recognized in appellant's attempt to predicate appellate error on the alleged curtailment of a mental defense which he himself admitted in open court was no more than a "trick." (42RT 5060.) After relieving his attorneys, appellant called the mental defense "garbage" (42RT 5049), admitted that he had malingered during testing (44RT 5354-5355), and stated that the defense experts were "quacks" who had lied to try to get him a new trial (42RT 5060; 44RT 5356-5357). In short, appellant specifically repudiated the mental defense in the trial court. (See 43RT 5300-5304; see also 43RT 5291, 5313.) Under these circumstances, he is entitled to no relief on appeal based on any purported error relating to the presentation of that fabricated defense.

(...continued)
ineffective assistance of counsel from a prior trial, the fault for any hampering of counsel's performance at the retrial "lies with the court, not counsel." (*Ibid.*)

The constitutional principles invoked by appellant exist to vindicate the fairness of the trial process, and are grounded in the essential truth-seeking function of that process. (See, e.g., *Lockhart v. Fretwell* (1993) 506 U.S. 364, 370 [113 S.Ct. 838, 122 L.Ed.2d 180] ["The touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding"; prejudice inquiry focuses on whether trial was unreliable or fundamentally unfair]; *Taylor v. Illinois* (1988) 484 U.S. 400, 410-415 [108 S.Ct. 646, 108 S.Ct. 646] [right to present a defense is subject to "essential limitations," is designed to further fairness of trial process, and does not protect a plan to present fabricated testimony]; *Nix v. Whiteside* (1986) 475 U.S. 157, 171-175 [106 S.Ct. 988, 89 L.Ed.2d 988] [no due process or Sixth Amendment right of defendant to present false evidence]; *United States v. Cronic* (1984) 466 U.S. 648, 658 [104 S.Ct. 2039, 80 L.Ed.2d 657] ["the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial"].) Now that the veil has been lifted on appellant's trial defense strategy, and appellant has declared the mental defense a ruse, the Constitution cannot support reversal of his convictions based, effectively, on claims that his ability to mislead the jury with that defense was impermissibly restricted.[32]

2. The Trial Court Properly Denied Appellant's Motion to Dismiss

In any event, appellant's claim fails on its own terms. The trial court was correct that no legal authority supports dismissal of a case such as this one. In support of his claim, appellant relies, in part, on decisional authority discussing pretrial delay, exemplified by the United States

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[32] As will be addressed later, appellant was plainly competent throughout the trial, including when he repudiated his mental defense. (See Arg. VIII, *post.*)

Supreme Court's decision in *Barker v. Wingo* (1972) 407 U.S. 514 [92 S.Ct. 2182, 33 L.Ed.2d 101]. (AOB 76-77.) However, as this Court recently explained, those cases are distinguishable in a situation where, as here, the delay "is primarily attributable to the appellate process and defendant's collateral attack on his conviction and sentence." (*People v. McDowell* (2012) 54 Cal.4th 395, 413, citing *United States v. Ewell* (1965) 383 U.S. 116, 120 [86 S.Ct. 773, 15 L.Ed.2d 627].) In other words, where the prosecution had the right to retry the defendant "and did so in the normal course of events," a speedy trial claim will fail. (*McDowell, supra*, 54 Cal.4th at p. 414.)

Appellant also misplaces reliance on loss-of-evidence cases exemplified by *California v. Trombetta* (1984) 467 U.S. 479 [104 S.Ct. 2528, 81 L.Ed.2d 413]. (AOB 76.) As he admitted below, such cases involve the prosecution's bad-faith destruction of, or failure to preserve, evidence—a circumstance not present here. (1CT 104-105.)

Nor does *People v. Sixto, supra*, 17 Cal.App.4th 374 help appellant. (AOB 76-77.) In *Sixto*, the defendant's capital murder conviction was reversed on the ground that his trial attorneys had acted deficiently in failing to have certain blood samples properly analyzed. (*Sixto, supra*, 17 Cal.App.4th at pp. 379-380.) At the subsequent retrial, Sixto asked for various curative measures on the ground that the blood sample had not been preserved in the interim, which the trial court denied. (*Id.* at pp. 386-388.) On appeal, the Court of Appeal observed in the first place that a defendant is not denied effective representation at a retrial by the faults of his attorney at the initial trial, and that Sixto had already received proper relief for his original attorneys' incompetence by receiving a new trial. (*Id.* at pp. 380-381.) The court went on to observe, however, that "this does not necessarily mean Sixto received all the relief to which he was entitled," that all criminal defendants are entitled to a fair trial, and that "[i]f reversal and

the granting of a new trial are insufficient to ensure a fair trial upon remand, further relief should be granted." (*Id.* at p. 381.) Nonetheless, the Court of Appeal affirmed, finding that Sixto was entitled to a fair trial, not a perfect one, and that "judged upon its own facts" the retrial was not rendered unfair by the loss of the blood sample, for a variety of reasons. (*Id.* at pp. 393-396.) In particular, the Court of Appeal observed that, "[i]n the case at bench, despite the shortcomings of [original counsel], retrial counsel were able to bring out significant evidence which was not presented at the first trial. Thus, the second trial was not rendered a meaningless, futile replay of the first proceedings, even absent some sort of curative measures by the trial court." (*Id.* at p. 396.)

As is apparent, *Sixto* only undermines appellant's position. As in *Sixto*, appellant's retrial counsel in this case were able to present "significant evidence not presented at the first trial"; indeed, at the retrial they were able to present a robust mental defense. The retrial was therefore not merely a "meaningless, futile replay of the first proceedings." (*Sixto*, *supra*, 17 Cal.App.4th at p. 396.) All that occurred here is that the particular opinion testimony of two mental health experts who had examined appellant in the past were lost through the passage of time occasioned by the ordinary "deliberate pace" of the appellate and collateral review process. (See *McDowell*, *supra*, 54 Cal.4th at p. 413.) And those opinions were replaced by the opinions of the numerous expert witnesses presented at the retrial. Although Drs. Naham and Kling had examined appellant closer in time to the murders than the experts who testified at the retrial, the testimony of all the doctors was, in any event, equally circumstantial. (See *People v. Bloom* (1989) 48 Cal.3d 1194, 1208 ["Evidence of a defendant's state of mind is almost inevitably circumstantial"]; AOB 77 [complaining that retrial counsel were "forced" to present mental state evidence "indirectly"].) Further, both Dr. Naham

and Dr. Kling had, at least at one point, diagnosed appellant with antisocial personality disorder—a diagnosis that would have been highly damaging to the defense and favorable to the prosecution. (See 35RT 4312-4315 [Dr. Wolfson discussing Dr. Kling's diagnosis], 4370-4373, 4428 [Dr. Wolfson discussing Dr. Naham's diagnosis].) Thus, the loss of those witnesses impeded the prosecution's case as much as, if not more than, it impeded the defense case.

Under all the circumstances, then, it can hardly be said that appellant was denied a fair retrial due to the unavailability of Drs. Naham and Kling. Accordingly, the trial court's denial of appellant's motion to dismiss provides no basis for reversal.[33]

D. The Trial Court Properly Admitted the Prior Testimony of Christine Waller and Martin Medrano

Appellant argues that he was deprived of his right to due process, his right to present a defense, and his right against the introduction of unreliable testimony when the trial court erroneously admitted the former testimony of Christine Waller and Martin Medrano. (AOB 82.) Although this claim did not form a basis for appellant's motion to dismiss the case in the trial court, it appears that appellant raises here only the "very narrow due process argument" flowing from his evidentiary challenge to the admission of the prior testimony below. (See *People v. Partida* (2005) 37

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[33] Appellant also argues that the trial court erred by "refusing to fashion curative measures" with regard to the loss of Drs. Naham and Kling, pointing to a defense request for an instruction that the jury not consider the passage of time between the murders and the expert witnesses' examinations of appellant. (AOB 77-81.) But such an instruction would simply have been argumentative and misleading, since the passage of time was unquestionably relevant to a fair assessment of the experts' opinions. And in any event, again, considering all the circumstances, the absence of such an instruction could not have rendered appellant's trial unfair, in violation of due process. (See *Sixto*, *supra*, 17 Cal.App.4th at pp. 393-396.)

Cal.4th 428, 435-436.) For the reasons that will be discussed later, there was no error in the admission of the evidence, nor was there any constitutional violation. (*See* Arg. II, *post.*)

E. References at Appellant's Retrial to the "Prior Proceeding" and to His Incarceration Resulted in No Statutory or Constitutional Violation

Appellant also argues that numerous indirect references during his retrial to the "prior proceeding" and to his incarceration violated Penal Code section 1180 as well as several of his federal constitutional rights. (AOB 83-86.) The claim is forfeited and without merit.[34]

As noted, the defense moved at the outset of trial to preclude reference to appellant's prior trial and to the fact that he had been on "death row" for numerous years following that trial. (4CT 826-827; 3RT 293-295, 306-316.) The trial court ruled in his favor on that point (3RT 411-413, 442-446), and appellant does not now attack the court's ruling. Appellant instead claims that "[i]n spite of the court's ruling" the retrial was, in fact, "so infused with this error" that reversal is required. (AOB 83.)

The claim is forfeited. Appellant never renewed his objection under Penal Code section 1180 during the trial itself. (See *People v. Danielson* (1992) 3 Cal.4th 691, 729 [failure to renew objection forfeits claim on appeal].) Appellant's own attorney even went so far as to "admit defeat" on the issue of the jury hearing about appellant's prior incarceration (3RT 294), and to state that the only thing she was "worried about" was the jury hearing that appellant had previously been sentenced to death (3RT 313). Accordingly, this claim may not be heard on appeal.

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[34] Respondent understands this claim to be limited to the guilt phase. At the penalty phase, of course, appellant himself thoroughly addressed his incarceration and his testimony from the first trial.

In any event, the claim is without merit. Appellant does not argue that Penal Code section 1180, which simply states that the "former verdict or finding cannot be used or referred to" at a retrial, was directly violated. Rather, invoking a single nearly-50-year-old court of appeal decision, *People v. Kessler* (1963) 221 Cal.App.2d 187, appellant argues that even indirect references to his prior trial and incarceration rendered his retrial unfair. (AOB 83-85.) In *Kessler*, however, reversal was deemed appropriate only where the prosecution in a rape case had presented the largely irrelevant testimony of the defendant's probation officer, and the prosecutor's questions to the probation officer implied "that defendant had [previously] been found guilty of the particular charges [and that] defendant had been involved in other charges." (*Kessler*, *supra*, 221 Cal.App.2d at pp. 189-190.) The *Kessler* court's conclusion that reversal was required rested on the principle that the risk that the jury would draw improper inferences from the testimony of the probation officer should not have been incurred where the evidence was not necessary to the prosecution's case. (*Id.* at pp. 191-192 ["'The rule is one of necessity and the risk of misuse should not be incurred if the evidence is not directed to a disputed issue in the case'"].)

In contrast, here, references to a "prior proceeding" and to appellant's incarceration were all made in connection with relevant evidence. (See AOB 83-85 [pointing to use of prior testimony, impeachment of witnesses, and questioning of expert witnesses regarding effects of appellant's imprisonment].) In fact, *everyone* agreed in this case that it would simply be inevitable that the jury would learn that appellant was being retried and that he had been incarcerated for many years up until the time of the retrial. (3RT 294, 312-313, 445.) While appellant strongly emphasizes—apparently in an effort to suggest that the prosecution did not take the trial court's ruling seriously—the prosecutor's statements to the effect that it

was inevitable the jury would conclude there had been a prior trial in this case (AOB 83-84), even his *own attorney* expressed the same opinion. As noted, defense counsel admitted "we all I think are going to have to admit defeat on trying to keep from the jury the fact that Mr. Bloom's been imprisoned since the crime. That's going to come out. I don't think there's anything anyone can do about that." (3RT 294.) And later, defense counsel stated, "I'm not worried about [the jury] knowing it's a retrial. I'm worried about them knowing that there was a death verdict." (3RT 313.)

In short, then, no direct violation of Penal Code section 1180 occurred here because no reference was made at retrial to the prior verdict. And to the extent indirect references were made, they were simply a necessary consequence of the presentation of admissible evidence. (See AOB 84-85.) In the context of this capital murder trial, those indirect references did not pose an unacceptable risk that the jury would draw any prejudicial inference against appellant. (See *Kessler*, *supra*, 221 Cal.App.2d at pp. 191-192.) Accordingly, there was no state-law statutory violation.

Appellant's reliance on the federal Constitution fares no better. He cites no authority, and respondent has found none, holding that indirect references to a prior trial or incarceration may amount to a due process violation, or to any other constitutional violation. In passing in a different context, the United States Supreme Court has noted, "It is . . . likely that the jury will be aware that there was a prior trial, but it does not follow from this that the jury will know whether that trial was on the same charge, or whether it resulted in a conviction or mistrial." (*Chaffin v. Synchcombe* (1973) 412 U.S. 17, 26-27 [93 S.Ct. 1977, 36 L.Ed.2d 714].) While the court in *Chaffin* did not directly address the issue presented here, its apparent unconcern about a jury's general knowledge "that there was a prior trial" would undercut any reliance appellant places on the federal Constitution. Again, in the context of this capital murder case, any indirect

references to prior proceedings or incarceration that were made necessary by the admission of relevant evidence cannot have so infected the trial as to have rendered the proceedings fundamentally unfair.

For these reasons, appellant's claim fails.

II. THE TRIAL COURT PROPERLY ADMITTED THE PRIOR TESTIMONY OF CHRISTINE WALLER AND MARTIN MEDRANO

As noted (see Arg. I. A., *ante*), prior to trial, the defense formally opposed the introduction at appellant's retrial of the former testimony of Martin Medrano and Christine Waller on the ground that appellant did not have an opportunity for adequate cross-examination at the first trial because his attorney was ineffective and because appellant had been mentally incompetent. (2CT 124-401.) After a hearing, the trial court ruled that the former testimony was admissible (3RT 246-270; see also 3RT 316-317), and the court later ordered various redactions to the testimony (4CT 771-779, 809-825; 3RT 270, 402-410, 419-421; 17RT 2148-2151, 2179-2182). The issue arose again during trial, at which point the court again overruled the defense objection to admission of the former testimony. (17RT 2171-2179.) Appellant now challenges the trial court's admission of this testimony on the same grounds argued below: that it should have been excluded because his attorney at the first trial was ineffective and because appellant was incompetent. (AOB 87-127.) The trial court did not err in admitting the prior testimony.

A. Relevant Legal Standards

Both the California and the federal Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. (*People v. Fuiava* (2012) 53 Cal.4th 622, 674.) Penal Code section 1291 codifies an exception to that right for the admission of a witness's prior testimony. (*Id.* at p. 675; see also *People v. Blacksher* (2011) 52 Cal.4th 769, 805.) As

relevant here, a witness's former testimony is admissible under Evidence Code section 1291 if the witness is unavailable and the party against whom the testimony is offered was a party to the prior proceeding and "had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the [current] hearing." The same exception is recognized under federal constitutional law. (*Crawford v. Washington* (2004) 541 U.S. 36, 57 [124 S.Ct. 1354, 158 L.Ed.2d 177] [prior testimony admissible under federal Confrontation Clause if defendant had "an adequate opportunity to cross-examine"]; see also *People v. Wilson* (2005) 36 Cal.4th 309, 340 [if requirements of Evidence Code section 1291 are met, admission of former testimony does not violate Confrontation Clause].)

This Court independently reviews whether a trial court's admission of evidence violated the Confrontation Clause. (*People v. Seijas* (2005) 36 Cal.4th 291, 304.)

B. Ineffective Assistance of Counsel at the First Trial

Appellant first claims that he had no adequate opportunity to cross-examine Medrano and Waller at his first trial because his attorney in that proceeding was ineffective. (AOB 96-105.) The United States Supreme Court addressed just such an issue in *Mancusi v. Stubbs* (1972) 408 U.S. 204 [92 S.Ct. 2308, 33 L.Ed.2d 293]. There, as in this case, the defendant's conviction had been reversed by a federal habeas court on the ground that his attorney had rendered ineffective assistance at trial. (*Id.* at p. 209.) On retrial, the prior testimony of the central prosecution witness was admitted into the record because the witness was unavailable. (*Ibid.*) As here, the defendant argued that his attorney's ineffectiveness at the first trial "necessarily require[d] a finding that the cross-examination of [the witness] was constitutionally inadequate." (*Id.* at p. 214.) Also as here, the defendant proffered additional cross-examination questions he contended

could have been asked at the first trial. (*Ibid.*) The high court rejected the argument, finding that the prior ineffectiveness finding was not binding because it did not directly address the effectiveness of counsel's cross-examination but rested on a subsequently discarded per-se rule related to the timing of counsel's appointment. (*Ibid.*) The Court also found that actual ineffective assistance had not been established because the new questions proffered by the defendant did not "show any new and significantly material line of cross-examination" and because no inadequacy in the prior cross-examination had been demonstrated. (*Id.* at pp. 215-216.) On the latter point, the Court rejected the opinion of a lower federal appellate court that the cross-examination had been inadequate because counsel could have questioned the witness on a particular additional topic. (*Ibid.*) The Court thus concluded that there had been an adequate opportunity for cross-examination at the first trial and that the former testimony was properly admitted under the Confrontation Clause. (*Id.* at p. 216.)

The *Stubbs* decision compels rejection of appellant's claim that the prior testimony was inadmissible due to his previous attorney's ineffectiveness. As in *Stubbs*, the federal court's reversal of appellant's conviction did not address the actual effectiveness of counsel's cross-examination of the witnesses at issue. Rather, the Ninth Circuit found that counsel had failed to adequately prepare appellant's "key" psychiatric witness, resulting in a "devastating" report that was used to undermine his defense at trial. (*Bloom v. Calderon*, *supra*, 132 F.3d at pp. 1271-1278.) Thus, as in *Stubbs*, the previous federal-court finding of ineffectiveness does not resolve the more specific question of whether appellant was afforded an adequate opportunity to cross-examine the two witnesses at issue. Instead, appellant must make some showing that his attorney's

actual cross-examination of the witnesses was so compromised as to offend the Confrontation Clause. (See *Stubbs*, *supra*, 408 U.S. at pp. 214-216.)

In this regard, appellant argues that, unlike in *Stubbs*, the prior ineffectiveness finding here cannot be totally disregarded because it was not based on a rule unrelated to counsel's actual performance but was tied to counsel's failure to adequately pursue appellant's psychiatric defense, and that ineffectiveness colored counsel's treatment of the witnesses Medrano and Waller. (AOB 100, 103.) More specifically, appellant argues that his attorney was ineffective for failing to ask Medrano "relevant questions" about appellant's mental state and for similarly failing to ask Waller about appellant's behavior during the time leading up to the murders. (AOB 104-105.)[35] Appellant also relies on the additional cross-examination proffered by his attorneys at the retrial, arguing that counsel "identified 'new and significantly material lines of cross-examination' which were not pursued by prior counsel." (AOB 101, citing *Stubbs*, alteration omitted.)

It is not enough, however, merely to show that counsel could have asked additional questions on cross-examination. "[A]s long as a defendant was provided the opportunity for cross-examination, the admission of [former] testimony . . . does not offend the confrontation clause of the federal Constitution simply because the defendant did not conduct a particular form of cross-examination that in hindsight might have been more effective." (*People v. Samayoa* (1997) 15 Cal.4th 795, 851; see also *Stubbs*, *supra*, 408 U.S. at pp. 215-216.) In other words, the Constitution

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[35] Appellant also appears to suggest that counsel could have used the questioning of Medrano as a basis for further investigation. (AOB 104-105.) But even if that were true, it does not bear on the relevant question here: whether appellant was afforded an adequate opportunity to confront the witness at his trial.

"guarantees an opportunity for effective cross-examination, not a cross-examination that is as effective as a defendant might prefer." (*People v. Carter* (2005) 36 Cal.4th 1114, 1172, citing *United States v. Owens* (1988) 484 U.S. 554, 559 [108 S.Ct. 838, 98 L.Ed.2d 951].) Therefore, where a witness is unavailable, prior testimony is admitted so long as there has been "due cross-examination" (*People v. Rojas* (1975) 15 Cal.3d 540, 548), because it is not considered "an exact substitute for the right of confrontation at trial," but instead represents "a balancing of the defendant's right to effective cross-examination against the public's interest in effective prosecution" (*People v. Zapien* (1993) 4 Cal.4th 929, 975). (See also *People v. Ledesma* (2006) 39 Cal.4th 641, 686-687 [there is no "absolute bar" to the use of prior testimony from a proceeding in which the defendant received ineffective assistance of counsel; rather, courts look to the circumstances surrounding the prior testimony and how it was used in the subsequent proceeding].)[36]

Here, although appellant's attorney at the initial trial might have asked additional questions, nothing suggests that appellant was denied the opportunity for "due cross-examination" in that proceeding. Martin Medrano testified relatively briefly about appellant's attempts to purchase a gun from him. (17RT 2184-2197; see also Case No. 23874 29RT 3522-

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[36] Appellant's reliance on *Ledesma* is misplaced. (See AOB 96-99.) While it is true that the *Ledesma* court held, in the context of that case, that the use of the prior testimony for impeachment purposes was not erroneous because the witnesses in question were present and subject to cross-examination at the retrial, the court did not establish such a circumstance as a *requirement* for the admission of prior testimony from a proceeding in which the defendant received ineffective assistance of counsel. To the contrary, the court explained that the propriety of admitting such prior testimony depends on the circumstances of both the prior and the present proceedings. (*Ledesma*, *supra*, 39 Cal.4th at pp. 686-687.)

3538.)[37] Counsel made appropriate objections during direct examination and then consulted with appellant for about 10 minutes before beginning cross-examination. (Case No. 23874 29RT 3522-3538.) On cross-examination, among other things, counsel emphasized Medrano's drug addiction and criminal record, challenged the sequence of events he had testified to, and questioned his delayed reporting of the incident and failure to cooperate with the defense. (17RT 2197-2215; see also Case No. 23874 29RT 3539-3558.) Christine Waller testified, also relatively briefly, about having seen appellant practice with a rifle and about appellant's behavior on the day of the murders. (18RT 2326-2336, 2364-2371; see also Case No. 23874 26RT 3259-3277; Case No. 23874 33RT 3787-3797.) Comparatively, counsel's cross-examination of Waller was lengthy. And counsel again consulted with appellant for several minutes. (Case No. 23874 26RT 3310.) He asked about appellant's practice with the rifle, but mainly concentrated on appellant's relationship with his father and with Sandra. (18RT 2336-2360; see also Case No. 23874 26RT 3278-3313; Case No. 23874 33RT 3797.)

At appellant's retrial, his attorneys argued that counsel at the first trial should have investigated Medrano in order to better cross-examine him about his motive for testifying, that counsel should have cross-examined Medrano about appellant's "mental state," that counsel should have tested Medrano's credibility by asking why he came forward and whom he had talked to about the case, that counsel should have explored the context of Medrano's meetings with appellant and the specifics of their conversations, and that counsel should have used Medrano's criminal history and cooperation with the prosecution to establish that he had a "motive to lie."

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[37] Respondent refers to the reporter's transcript from the first trial by reference to this Court's case number in appellant's first appeal, No. 23874.

(3RT 254-259; 17RT 2171-2175.) With respect to Waller, appellant's attorneys at the retrial argued that the witness should have been cross-examined as to appellant's "mental illness," as to appellant's relationship with his father and other friends and family, and as to statements Waller made during her recorded interview with police. (3RT 259-263.)

Nothing about this proposed additional questioning, however, suggests either that appellant's attorney at the first trial was deficient in his cross-examination or that appellant was deprived of an adequate opportunity to confront the witnesses against him. As the trial court noted during the retrial, counsel's cross-examination at the first trial may not have been "perfect," but it was certainly adequate. (3RT 269-270.) In fact, it is difficult to see how cross-examination of Medrano—an admitted drug addict who met appellant only a few times—about appellant's "mental state" would have been very productive. And counsel did challenge Medrano's veracity at the initial trial. Similarly, counsel did ask Waller at the initial trial about appellant's demeanor around the time of the murders and about appellant's relationship with his father. Moreover, the unavailability of Medrano and Waller for renewed cross-examination did not hamper appellant's presentation of his mental defense, which was thoroughly explored through numerous lay and expert witnesses. (See Statement of Facts, *ante*.) Thus, as in *Stubbs*, appellant failed to proffer "any new and significantly material line of cross-examination that was not at least touched upon in the first trial." (*Stubbs*, *supra*, 408 U.S. at p. 215; see also *People v. Ceja* (1994) 26 Cal.App.4th 78, 87-88 [rejecting claim that ineffective counsel deprived defendant of adequate opportunity to cross-examine witness whose prior testimony was admitted where prior counsel cross-examined witness on several matters and current counsel proffered no additional cross-examination].)

And, again, the right of confrontation did not entitle appellant to cross-examination in precisely the way his attorneys at the retrial might have wished. Thus, even if his attorney at the initial trial could have advantageously explored other areas of cross-examination with Medrano and Waller, it was sufficient for purposes of Penal Code section 1291 and the Confrontation Clause that appellant was provided the opportunity for "due cross-examination," which he plainly was. (See *Stubbs*, *supra*, 408 U.S. at pp. 215-216; *Samayoa*, *supra*, 15 Cal.4th at p. 851; *Zapien*, *supra*, 4 Cal.4th at p. 975; *Rojas*, *supra*, 15 Cal.3d at p. 548.) The admission of the prior testimony was therefore not error for any purported deficiency on the part of appellant's attorney at his first trial.

C. Appellant's Asserted Incompetence at the First Trial

Appellant also claims that he had no adequate opportunity to cross-examine Medrano and Waller at his first trial because he was mentally incompetent during that proceeding. (AOB 105-122.) This argument also fails.

1. Background

At the guilt phase of appellant's first trial, the defense presented the testimony of an expert witness, Dr. Arnold Kling, in support of a diminished capacity defense. (See *People v. Bloom*, *supra*, 48 Cal.3d at p.

1207.)[38] The jury rejected that defense when it convicted him of three counts of first degree murder. (*Id.* at pp. 1202-1203.)[39]

On the day appellant was to be sentenced at his first trial, defense counsel declared a doubt as to his competence. (Case No. 23874 45RT 5139-5141.) The prosecution noted that "during the trial itself, as well as the penalty phase, as well as today, that whenever the defendant gets up to address the court, he is totally logical and coherent in everything he states, and everything he says." (Case No. 23874 45RT 5143.) Nonetheless, the trial court believed that a competency hearing was "mandatory" at that point because counsel had declared a doubt. The court therefore ordered a hearing, noting that there was "[n]o question that the defendant is bizarre. The question is whether or not he's competent to be sentenced. That is the issue we will decide." (Case No. 23874 45RT 5143-5152; see also Case No. 23874 2CT 558.)

A jury was empanelled and the defense presented one expert witness, Dr. Hyman Weiland, who opined that appellant suffered from paranoia and was unable to assist counsel. (Case No. 23874 46RT 5575, 5577.) The defense also presented the testimony of appellant's mother, Melanie Bostic, who testified that she noticed a deterioration in appellant's behavior during November 1983 and she had therefore hired Dr. Weiland to evaluate him.

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[38] The court at appellant's first trial instructed the jury on diminished capacity "out of an abundance of caution," even though the defense had already been abolished at the time of appellant's offenses. (See 25RT 3100.) At the retrial, the court properly refused to instruct on the defense because "at the time this crime was committed . . . that was not the law." (16RT 2037.)

[39] As noted, the United States Court of Appeals for the Ninth Circuit later granted appellant a writ of habeas corpus on the basis that his trial attorney had rendered ineffective assistance with regard to his handling of Dr. Kling. (See *Bloom v. Calderon*, *supra*, 132 F.3d at pp. 1271-1278.)

(Case No. 23874 46RT 5614-5620, 5626-5634.)[40] The prosecution presented Dr. Richard Naham, who testified that in his opinion appellant merely suffered from antisocial personality disorder and was "quite able to understand" the nature and purpose of the proceedings against him and was able to cooperate with counsel. (Case No. 23874 47RT 5674-5675.) Dr. Naham also thought that appellant was simply "playing stupid" when he testified. (Case No. 23874 47RT 5676.) In addition, the prosecution presented Dr. William Vicary, who opined that appellant exhibited "some degree of paranoia," centered around his Jewishness, but that it did not impair his understanding of the proceedings or impede his ability to cooperate with counsel. (Case No. 23874 47RT 5713-5715.) Dr. Vicary also thought that appellant was "hamming it up and faking" when he testified. (Case No. 23874 47RT 5717.)[41] Based on that evidence, the jury found that appellant was competent. (Case No. 23874 47RT 5778.)

When, at the retrial, the defense opposed the introduction of the former testimony of Medrano and Waller on the ground that appellant had been incompetent, it submitted voluminous materials to the court, including transcripts of the competency hearing from the first trial (2CT 135-276). The defense also submitted a 1993 declaration from Dr. Vicary, in which he explained that, based on his review of additional material and based on an

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[40] The jury was sworn in appellant's first trial on October 24, 1983, and the penalty-phase verdicts were returned on December 13, 1983. (Case No. 23874 2CT 349, 527.) Counsel declared a doubt as to appellant's competence on May 4, 1984. (Case No. 23874 2CT 558.)

[41] When the court appointed the three expert witnesses for the competency proceeding, it noted that Dr. Weiland was "from the defense side," Dr. Vicary was "from the People's side," and Dr. Naham was the choice of the court. (45RT 5148-5149.) However, while Dr. Naham later explained that he had testified about equally for the prosecution and for the defense in past cases, Dr. Vicary stated that he had testified much more for the defense. (Case No. 23874 47RT 5672, 5706.)

additional examination, he had "partially changed" his conclusions and thought that appellant was not able to assist his attorney at his first trial. (2CT 278-291.) The defense also presented a 1994 declaration from Dr. Weiland, in which he indicated that he continued to believe that appellant was incompetent at the first trial. (2CT 293-322.) In addition, the defense presented a declaration from defense counsel explaining that Dr. Naham's medical license had been revoked since the time of the first trial. (2CT 324-325.) The defense also presented a 1994 declaration from Dr. Julian Kivowitz, stating that he had examined appellant at the time of trial and also had reviewed further materials in 1993, and he was of the opinion that appellant was unable to assist his attorney at the time of trial. (2CT 327-339.) Further, the defense submitted a 1993 declaration from Dr. David Lisak, summarizing appellant's "social history," and describing the psychological effects of that history on appellant, including, in Dr. Lisak's opinion, that it was "extremely unlikely" appellant was able to assist his attorney at the time of trial. (2CT 340-385.) Finally, the defense submitted a 1993 declaration from Dr. Donald Verin, which stated that he had reviewed appellant's medical records and other materials and was of the opinion that appellant was unable to assist his attorney at the time of trial or to understand the proceedings. (2CT 387-401.)[42]

The trial court ruled that appellant's competence during the first trial would not be relitigated, that the Ninth Circuit's decision did not undermine the original competency finding, that the court at the first trial had conducted the competency hearing properly, and that the question of

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[42] The defense also submitted an incomplete letter written in 1993 by Dr. Arnold Kling to a former attorney of appellant's, as well as a transcript of Dr. Kling's federal-court testimony, in which he did not address appellant's competence to stand trial, but discussed appellant's mental state as it related to the commission of the crimes. (3CT 456-464.)

appellant's competence at the first trial and the admission of the prior testimony were "two separate issues." (2RT 216-224; 3RT 316-317.)

2. The Former Testimony Was Not Inadmissible on the Alleged Basis That Appellant Had Been Incompetent at His First Trial

Appellant claims that the trial court should not have admitted the former testimony of Medrano and Waller without holding a new hearing to determine whether he had been competent during his first trial. Specifically, he claims that the Ninth Circuit's issuance of a writ of habeas corpus effectively vacated the prior competency determination and that, in any event, a new hearing was justified on the basis of additional evidence. (AOB 113-122.) The trial court's decision not to hold a new competency hearing does not undermine its ruling admitting the former testimony.

As the trial court noted, even if appellant's competence at the first trial was relevant to the admission of the former testimony of Medrano and Waller, those questions remained "two separate issues." (2RT 219.) The question before the trial court was not appellant's competence to stand trial in itself, because the defense had *not* declared a doubt as to appellant's present competence. Instead, the question was whether the former testimony of Medrano and Waller was admissible on the basis that appellant had had an adequate opportunity to cross-examine them at his first trial. (See Evid. Code, § 1291.) The authority appellant relies on for the proposition that a renewed competency hearing should be held whenever there is a change in circumstances or new evidence is presented that casts doubt on a previous competency finding is therefore inapposite. (See AOB 114, citing *People v. Jones* (1991) 53 Cal.3d 1115, 1153, and other cases.) That authority concerns a court's ongoing duty to evaluate a

defendant's present competence to stand trial, not a court's discretion to admit or exclude evidence.[43]

Accordingly, appellant's asserted incompetence was not relevant, in itself, to the court's evidentiary decision. Rather, appellant had to show that his asserted incompetence was "directly related to the effectiveness of the cross-examination." (See *People v. Jones* (1998) 66 Cal.App.4th 760, 768.) Appellant resists this conclusion, relying, as he did below, on *Stevenson v. Superior Court* (1979) 91 Cal.App.3d 925, and arguing that there is an absolute bar to the use of prior testimony from a proceeding at which the defendant was incompetent. (AOB 111.) *Stevenson* should not be followed. In *Stevenson*, the court held that prior testimony from a preliminary hearing at which the defendant was incompetent was inadmissible at a later, renewed preliminary hearing because there had been no adequate opportunity for cross-examination in light of the defendant's inability to assist his attorney in effectively representing him. (*Stevenson, supra*, 91 Cal.App.3d at p. 930.) The *Stevenson* court, however, did not consider *Stubbs* or attempt to reconcile its conclusion with the principle that there is no absolute bar to the use of prior testimony from a proceeding at which counsel was ineffective. The court in *Stevenson* observed that the prior preliminary hearing at issue was "conclusively" violative of due process. (*Ibid.*) But a prior hearing at which counsel performed ineffectively is equally deficient as a constitutional matter; and, under

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[43] For similar reasons, the principle that relitigation of preliminary matters is generally permissible after a reversal and remand is inapposite here. (See *People v. Anderson* (2008) 169 Cal.App.4th 321, 331-332 [discussing *People v. Mattson* (1990) 50 Cal.3d 826].) Appellant was not seeking to relitigate his competency in itself, but was opposing admission of the former testimony of Medrano and Waller, which question was, in fact, litigated at the retrial.

Stubbs, that still does not answer the question whether testimony from such a proceeding may be admitted at a later proceeding.

In short, there is no principled basis upon which to distinguish prior testimony elicited at a proceeding during which the defendant was incompetent from testimony elicited at a proceeding during which counsel provided ineffective representation. As one subsequent court observed, "In light of [*Stubbs*], we may question the *Stevenson* court's conclusion that the defendant did not have to demonstrate precisely how his assistance would have improved the cross-examination . . . ." (*Jones*, *supra*, 66 Cal.App.4th at p. 768.) The standard of *Stubbs* and *Ledesma*—looking to whether the cross-examination was, in fact, impeded in such a way as to prevent confrontation—must therefore control. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In light of this standard, the trial court did not err by declining to hold a competency hearing in connection with determining the admissibility of the prior testimony. In the context of that determination, the trial court was entitled to rely on the competency hearing held during appellant's first trial, which indicated that he was not, in fact, incompetent at the time the prior testimony was elicited.[44] More specifically, the trial court was not obligated to disregard the prior competency hearing in light of the Ninth Circuit's issuance of a writ of habeas corpus. Rather, as the *Stubbs* decision teaches, the reversal of a conviction is not necessarily

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[44] Appellant observes that the competency hearing at his first trial did not address his competence during the trial itself, but focused on his competence for purposes of sentencing. This is true only because of the stage of the proceedings at which counsel declared a doubt. But the testimony at the competency hearing was not inherently limited to mental problems appearing post-trial, and the jury's determination in that proceeding—which was held very close to the time of trial—was certainly not irrelevant to the trial court's evidentiary determination at the retrial.

determinative of the specific question whether a defendant was afforded an adequate opportunity for cross-examination during the proceeding that was the subject of reversal; rather, that question must be assessed based on the particular circumstances of the prior cross-examination. (See *Stubbs*, *supra*, 408 U.S. at pp. 214; see also *Ledesma*, *supra*, 39 Cal.4th at pp. 686-687 [admission of prior testimony depends on circumstances of prior and present proceedings].)

Moreover, the alternative to relying on the prior competency determination was fraught with its own problems. Both this Court and the United States Supreme Court have noted the inherent difficulty in attempting to conduct a "retrospective competency hearing." (See *People v. Lightsey* (2012) 54 Cal.4th 668, 704-705 [discussing state and federal cases on the subject].) In cases where the defendant's competence is directly in issue, the question whether such a procedure can adequately be undertaken "is complex and subject to debate." (*Id.* at p. 704; see also *id.* at p. 704, fn. 15.) Here, where the question merely involved whether to admit the former testimony of Medrano and Waller, the court cannot be said to have erred by declining to undertake a retrospective competency hearing. Given that appellant's competence to stand trial had actually been litigated and resolved at the time of his initial sentencing in 1984, given that the additional evidence bearing on appellant's competence was generated some 10 years after the initial trial, and given that the retrial took place some 16 years after the initial trial, the court's decision to accept the initial competency determination for purposes of its evidentiary ruling does not render admission of the prior testimony erroneous.

Further, even had the trial court allowed retrospective relitigation of appellant's competency, a determination that appellant was incompetent would not itself have settled the pertinent evidentiary issue. As explained, appellant still would have had to show that his prior incompetence

somehow "directly related to the effectiveness of the cross-examination." (See *People v. Jones*, *supra*, 66 Cal.App.4th at p. 768.) Even the constitutional prohibition against trying a defendant who is mentally incompetent "focuses directly upon a defendant's 'present ability to consult with his lawyer,' a 'capacity to consult with counsel,' and an ability 'to assist counsel in preparing his defense.' These standards assume representation by counsel and emphasize the importance of counsel." (*Indiana v. Edwards* (2008) 554 U.S. 164, 174 [128 S.Ct. 2379, 171 L.Ed.2d 345], citing *Dusky v. United States* (1960) 362 U.S. 402 [80 S.Ct. 788, 4 L.Ed.2d 824] and *Drope v. Missouri* (1975) 420 U.S. 162, 171 [95 S.Ct. 896, 43 L.Ed.2d 103], citations and alterations omitted.) Because the issue of a defendant's competence is directly tied to the ability to aid *counsel's* performance, an argument seeking exclusion of prior testimony on the ground that there was no adequate opportunity for cross-examination in the prior proceeding due to the defendant's incompetence amounts to much the same thing as an argument that counsel's own ineffectiveness prevented adequate cross-examination. And, as explained, there is no "absolute bar" to the admission of prior testimony elicited at a proceeding in which counsel performed deficiently. (*Ledesma*, *supra*, 39 Cal.4th at pp. 686-687.) Rather, it must be shown that counsel's deficient performance actually prevented due cross-examination. (*Stubbs*, *supra*, 408 U.S. at pp. 214-216; see also *Ledesma*, *supra*, 39 Cal.4th at pp. 686-687; *Samayoa*, *supra*, 15 Cal.4th at p. 851.)

Here, for the reasons already explained, there has been no such showing. Counsel, in fact, cross-examined both Medrano and Waller to a substantial extent at the initial trial, and, in opposing admission of the prior testimony at the retrial, appellant offered no compelling illustration of how his former attorney's opportunity to cross-examine the witnesses was compromised. (See Arg. II. B., *ante*.) Accordingly, even had appellant

been able to show that he was incompetent during the first trial, the prior testimony would have remained admissible because appellant was afforded due cross-examination at that trial. (See *Stubbs*, *supra*, 408 U.S. at pp. 215-216; *Samayoa*, *supra*, 15 Cal.4th at p. 851; *Zapien*, *supra*, 4 Cal.4th at p. 975; *Rojas*, *supra*, 15 Cal.3d at p. 548.)[45]

D. Any Error Was Harmless

In any event, any error in admitting the prior testimony of Medrano and Waller was harmless beyond a reasonable doubt. (*Chapman v California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].) Appellant points to the harmless-error standard articulated in *Delaware v. Van Arsdall*, 475 U.S. 673, 684 [106 S.Ct. 1431, 89 L.Ed.2d 674], which asks whether, "assuming that the damaging potential of the cross-examination were fully realized," the unconstitutional restriction on cross-examination could still be deemed harmless depending on all the circumstances of the case. (AOB 124.) That standard does not precisely fit the present claim, inasmuch as the challenge is to the admission of the former testimony at the second trial and not directly to the defects occurring during the first trial. Since the witnesses were absent at the second trial, there would not have been any possibility to "fully realize" their cross-examination. In a situation such as this, it would make little sense to evaluate the impact of the former testimony in light of how prior counsel might have better cross-examined the witnesses, both because the defense at the retrial asked for *exclusion* of the evidence altogether and because such an analysis would border on improper speculation. (See *Coy v. Iowa*

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[45] To the extent the trial court erred by failing to hold a retrospective competency hearing as part of its determination whether to admit the former testimony of Medrano and Waller, the remedy would not be outright reversal but remand for the purpose of holding such a hearing. (See *Lightsey*, *supra*, 54 Cal.4th at pp. 703-710.)

(1988) 487 U.S. 1012, 1021-1022 [108 S.Ct. 2798, 101 L.Ed.2d 857] [where face-to-face confrontation has been denied, "[a]n assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence"].) Accordingly, it must be asked simply whether admission of the evidence, rather than exclusion, was harmless under the circumstances. (See, e.g., *People v. Rutterschmidt* (2012) 55 Cal.4th 650, 661.)[46]

As discussed, Medrano's testimony concerned attempts by appellant to purchase a gun prior to the murders, supporting the prosecution's premeditation theory. Similarly, Waller's testimony was directed to appellant's behavior on the day of the murders, his practice with the rifle, and his relationship with Bloom, again supporting the prosecution's premeditation theory. But the prosecution presented ample additional evidence of premeditation in that appellant took Rosas's rifle and practiced with it, which Avila and Rosas established at the retrial (18RT 2258-2265, 2327, 2330; 19RT 2404-2412), that appellant had a bad relationship with his father, which both Avila and White established at the retrial (18RT 2272-2273, 2278; 19RT 2389-2392), that Avila specifically heard appellant

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[46] In any event, an alternative analysis asking whether the outcome would have been the same had the jury heard "fully realized" cross-examination of the prior testimony would also demonstrate that any error was harmless, for the same essential reasons that will be explained: the prior testimony of Medrano and Waller was but a small part of the prosecution's compelling case on premeditation, and the additional proposed cross-examination would neither have undercut significantly the prosecution's case nor bolstered significantly the defense case. Nor was the guilt-phase case a close one.

tell his father in a fit of anger, "You're running my life now, but you won't be for long" (18RT at 2266-2269), and that appellant spent the night at Waller's house in an effort to establish an alibi, which was testified to by White and Avila at the retrial (18RT 2270-2273; 19RT 2383-2384, 2387-2388, 2397). The prosecutor emphasized *all* of these points, and not just Medrano's or Waller's testimony, in arguing premeditation. (See 30RT 3810-3813.) The evidence apart from Medrano's and Waller's prior testimony by itself compellingly showed premeditation. As defense counsel stated in the trial court, the prosecution "d[id]n't really need" the former testimony. (3RT 273.) Thus, even if the prior testimony should have been excluded, there is no reasonable doubt that the jury's decision would have been the same as to premeditation.

Nor did the introduction of the prior testimony hamper appellant's ability to present his mental-state defense. Appellant, in fact, presented a robust psychological defense through the testimony of three expert witnesses—Drs. Watson, Mills, and Vicary—as well as through the lay testimony of Richard Avila, Eric Bloom, and Melanie Bostic. While the prosecution did invoke the prior testimony of Waller in arguing against appellant's mental-state defense (see AOB 123), those instances were comparatively minor and isolated in the context of the entire argument. The prosecutor's argument overwhelmingly focused on the other evidence, and nothing about the invocation of Waller's prior testimony was especially damaging, or even salient. (See 30RT 3801-3902; 31RT 4042-4078; 32RT 4080-4128.) Moreover, appellant's mental defense was far from convincing. His expert witnesses attempted to explain why, despite overwhelming evidence of rational and goal-directed behavior, appellant actually suffered from such severe mental impairments that he could not form the mental state required for murder. But they could agree on no particular diagnosis, and, in the end, their testimony came across as merely

the retrofitted opinions of paid, partisan witnesses. Again, there is no reasonable doubt that the jury's decision would have been the same as to the mental defense, even if the prior testimony had been excluded.

The jury's deliberations bear this out. Contrary to appellant's argument (AOB 125-126), there is no indication that this was a close case, either as to premeditation or as to his mental defense, except with respect to the question whether he premeditated the murders of Josephine and Sandra—and that question was ultimately withdrawn by the prosecution, so there was no prejudice to appellant.[47] The jury here returned a first degree murder verdict as to Bloom (Count 1) after three days of deliberation, and after having asked a question about premeditation and requested to view various pieces of evidence and hear readback of testimony. (23CT 6087-6094, 6097-6104.) After three further days of deliberation, the jury announced that it was deadlocked as to Counts 2 and 3, involving Josephine and Sandra, respectively. The prosecutor then withdrew the first degree murder allegations as to Josephine and Sandra, and the jury immediately returned second degree murder verdicts. (23CT 6105-6108; 24CT 6206-6213.) This sequence of events strongly suggests that the jury was struggling with the question of premeditation as to Josephine and Sandra, but not as to Bloom. It also overwhelmingly suggests that it was not struggling with, or even seriously considering, the question of involuntary manslaughter based on appellant's mental defense. Thus, but for the issue that was resolved in appellant's favor, the jury's deliberations do not suggest that the case was a close one.

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[47] The prosecutor acknowledged this in her closing argument, expressly identifying the question of premeditation as to Josephine and Sandra as "the most difficult issue" in the case. (32RT 4121.)

Accordingly, if there was error in admitting the prior testimony of Medrano and Waller, it was harmless beyond a reasonable doubt.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING CROSS-EXAMINATION OF DR. WATSON CONCERNING APPELLANT'S DEMEANOR

Appellant argues that the trial court erred by permitting the prosecutor to ask questions on cross-examination of Dr. Watson during the guilt phase concerning appellant's behavior in the courtroom and interaction with defense counsel. (AOB 316-329.) There was no abuse of discretion.[48]

A. Background

On cross-examination of Dr. Watson during the guilt phase, the prosecutor raised the topic of Asperger's Disorder. Although, unlike Dr. Mills, Dr. Watson had not diagnosed that disorder, he had indicated in his report that it was a diagnosis to be "ruled out" upon further evaluation. (22RT 2849-2862.) During this questioning, Dr. Watson testified that he had included Asperger's Disorder in his report after talking to Dr. Mills because he thought it was "an intriguing diagnosis." Dr. Watson explained that his report stated that appellant "appears to meet the diagnostic criteria for Asperger's Disorder." (22RT 2849-2850.) The prosecutor then questioned Dr. Watson about those diagnostic criteria, the first of which was "impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction." Dr. Watson stated, with regard to this criterion, that "[h]is facial expression is poor. And so I think, again, I think it approaches meeting that criteria." The prosecutor then asked the following question:

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[48] Because this claim concerns appellant's mental defense, which he later repudiated and identified as a ruse in the trial court, appellate relief is unwarranted. (See Arg. I. C. 1., *ante*.)

"Hypothetically, if the defendant were to sit in the courtroom and make good eye contact with his defense attorneys and their assistant, and to watch the witnesses testify, and to then talk to his attorney, and then go back to watching the witness testify, would that tend to not be part of the criteria A?" The defense objected, and a sidebar discussion was held. (22RT 2851-2853.)

At sidebar, the defense argued that the prosecutor's hypothetical question lacked foundation because only appellant and his attorneys were privy to the content of their interactions and therefore to the context of his behavior. The prosecutor argued that appellant's behavior had been obvious to everyone in the courtroom and that she could call a witness to testify to it, if necessary. The defense further objected that the hypothetical question invaded the attorney-client privilege. The court ruled that there was no encroachment on the privilege by reference to nonverbal conduct in the courtroom, and overruled the objection. (22RT 2853-2857.)

The prosecutor then re-asked the question, and Dr. Watson admitted that appellant's courtroom behavior "would argue against" satisfaction of the criterion in question. He added, however, that he had not necessarily relied on that particular criterion, but had simply stated that appellant appeared to exhibit many features of Asperger's Disorder and had suggested further analysis. (22RT 2857-2858.) Dr. Watson then pointed to criteria which he believed appellant "potentially" satisfied, and the prosecutor continued to question him briefly regarding Asperger's Disorder. (22RT 2859-2862.)

On redirect examination, defense counsel returned to the topic, and Dr. Watson testified that appellant showed "signs" of meeting the criterion the prosecutor had asked about. Counsel also elicited, however, that evaluating appellant's behavior, including his interaction with counsel in the courtroom, would depend on context. Dr. Watson specifically testified

that it would be "hard to say" whether or not appellant's interaction with counsel would satisfy the criterion. (23RT 2832-2934.)

B. There Was No Abuse of Discretion

A trial court's ruling on an evidentiary objection such as the one made here is reviewed for abuse of discretion. (*People v. Cox* (2003) 30 Cal.4th 916, 955; *People v. Alvarez* (1996) 14 Cal.4th 155, 207.) Reversal is not warranted under this standard unless the trial court "exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Williams* (2008) 43 Cal.4th 584, 634-635, quotation marks and citations omitted.) There was no abuse of discretion.[49]

"In offering an expert opinion, the expert invites investigation into the extent of his knowledge, the reasons for his opinion, including facts and other matters upon which it is based and which he took into consideration; he may be subjected to the most rigorous cross-examination concerning his opinion and its sources." (*People v. Hawthorne* (2009) 46 Cal.4th 67, 93.) Here, Dr. Watson acknowledged on cross-examination that he had stated in his report that appellant "appears to meet the diagnostic criteria for Asperger's Disorder." (22RT 2849-2850.) The prosecutor was therefore entitled to challenge that opinion. This is true regardless of whether Dr. Watson had identified Asperger's Disorder as a formal diagnosis. By offering an opinion on the matter, he opened himself to "rigorous cross-examination." *People v. Hawthorne*, *supra*, 46 Cal.4th at p. 93.)

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[49] Respondent notes that to the extent appellant failed to make particular constitutional objections in the court below, such as an objection under the Fifth Amendment, those objections are forfeited, but for a "very narrow due process argument" flowing from the evidentiary challenge he did make. (See *People v. Partida* (2005) 37 Cal.4th 428, 435-436.)

It is true that prosecutorial references to a nontestifying defendant's demeanor or behavior in the courtroom are generally improper. (*People v. Heishman* (1988) 45 Cal.3d 147, 197.) However, this general rule does not hold where the defense itself puts the defendant's demeanor in issue. (*Ibid.* [defendant put demeanor in issue by invoking good character as mitigating factor during penalty phase].) By offering expert opinion on appellant's mental disease or defect that implicated appellant's demeanor and mannerisms, the defense itself put appellant's demeanor in issue. At that point, it was permissible for the prosecutor to ask about appellant's demeanor and mannerisms, using his courtroom conduct as an example. Such questioning did not implicate the concerns underlying the general prohibition against using a defendant's courtroom demeanor as evidence of guilt—namely that it amounts to impermissible bad-character evidence, infringes on the defendant's right not to testify, and does not relate to credibility. (*Ibid.*)

For similar reasons, the prosecutor's hypothetical question did not intrude upon the attorney-client relationship or infringe upon appellant's right not to testify. The question was directed specifically to appellant's demeanor and mannerisms *as they related to the expert's opinion regarding appellant's purported mental deficiencies* and was limited to observable behavior. Despite defense counsel's protests, it did not call for any explanation of the particular communications between appellant and his attorneys. Rather, as the diagnostic criterion at issue itself stated, the relevant behavior was appellant's "eye-to-eye gaze, facial expression, body postures, and gestures," none of which were privileged and all of which were readily observable by the jury and addressable by any of appellant's qualified expert witnesses.

Accordingly, the trial court did not abuse its discretion in overruling the defense objection to the prosecutor's hypothetical question.

C. Any Error Was Harmless

Even if there was error, there is no reasonable probability of an outcome more favorable to appellant had the court sustained his objection. (Evid. Code, § 353; *People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 611 [court's decision to admit or exclude evidence under ordinary evidentiary rules tested for harmlessness under *Watson*].)[50] Appellant's claim must therefore still be rejected.

Even if the defense objection should have been sustained, appellant greatly overstates matters by arguing that the prosecutor's single hypothetical question "transformed appellant and defense counsel into witnesses" and provoked speculation as to the content and context of attorney-client communications. (AOB 327-328.) As noted, the prosecutor's question focused on appellant's observable demeanor as it related to the testimony of the expert witness about appellant's purported mental impairment. Nothing about the question particularly called attention to any privileged matter or invited the jury to inquire into the *substance* of appellant's communications with his attorneys.

Moreover, the question objected to constituted a minute portion of the prosecutor's overall lengthy cross-examination of Dr. Watson, much less of the overall mental-defense evidence. In context, it was neither a particularly salient nor a particularly inflammatory point in the trial evidence. In any event, defense counsel effectively blunted any improper inference that may have been drawn by the jury by eliciting from Dr. Watson on redirect examination that any observation of appellant's courtroom demeanor was of limited value without knowing the context.

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[50] To the extent appellant has preserved any claim of federal constitutional error, the error was harmless beyond a reasonable doubt for the same reasons explained here.

(23RT 2832-2934.) And, again, the jury was properly instructed at the close of evidence on how to evaluate the bases of the expert witnesses' opinions. (29RT 3759-3760, 3768-3770.)

In addition, as explained, any error related to appellant's mental defense, such as the asserted error here, could have had little impact on the jury's verdict, because appellant's mental defense did not present a close issue. (See Arg. II. D., *ante*.) The prosecution's guilt-phase evidence overwhelmingly established that appellant behaved rationally. Conversely, appellant's mental defense, which rested on the testimony of several experts forced to try to explain away appellant's "normal" behavior and who could agree on no single diagnosis, was wholly unconvincing. As also explained, the jury's deliberations confirmed that appellant's mental defense was not a close question. The jury quickly returned a first degree murder conviction as to Bloom, and immediately returned a second degree murder verdict as to Josephine and Sandra after the prosecution withdrew the premeditation allegation as to those counts. (23CT 6087-6094, 6097-6108; 24CT 6206-6213.) Accordingly, nothing in the record shows that this was a close guilt-phase case with respect to appellant's mental defense.

Accordingly, if the court abused its discretion by overruling the defense objection to the prosecutor's hypothetical question, the error was harmless.

IV. THERE WAS NO PROSECUTORIAL MISCONDUCT

Appellant challenges several alleged improprieties by the prosecution at trial. Specifically, he contends that the prosecutor committed misconduct by: (1) referring during opening statement to appellant's penalty-phase argument from his first trial, in violation of a court order; (2) improperly questioning appellant's expert witnesses by vouching for the credibility of jailhouse informants, asking about appellant's specific intent, and posing

questions in a disparaging manner; (3) commenting during closing argument on appellant's failure to testify; and (4) relying on facts not in evidence during closing argument. (AOB 296-315.) There was no misconduct.[51]

A. Use of Appellant's Admissions from the First Trial During Opening Statement

1. Background

During preliminary proceedings before Judge Hoff, the prosecution sought admission of appellant's guilt-phase testimony from the first trial in its guilt-phase case in chief, in order to counter any suggestion that appellant was mentally deficient. Following argument on the issue, the court ruled the prior testimony admissible:

> Here, everybody is telling me that the real issue is Mr. Bloom's mental capacity and his mental abilities and as it goes to intent and maybe a manslaughter or some other lesser crime than first degree murder is charged.
>
> With that thought in mind, and also the thought that the defense is going to introduce doctors that are going to testify . . . that Mr. Bloom is—has some mental problems . . . .
>
> . . .
>
> . . . And the People, then, I would think have a burden of proving that—if they can—the doctors don't know what they're talking about and that maybe Mr. Bloom lied to them and their opinions as to Mr. Bloom's mental incapacities or capacity are really based on lies, and I think that's the whole reason that the People want to bring this in, that's what I keep hearing from Ms.

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[51] Several aspects of this claim relate to appellant's mental defense. As explained, to the extent the harm complained of concerns that mental defense, appellate relief is unwarranted, since appellant repudiated the defense and admitted in open court that it was fabricated. (See Arg. I. C. 1., *ante*.)

Samuels. And it seems to me that that's an appropriate thing to do, so I'm going to let it in.

(3RT 246-249, 271-285.)

The prosecution then sought admission of appellant's penalty-phase argument from the first trial in its guilt-phase case in chief, for the same reason.[52] Again, the court ruled that the argument was admissible as relevant "new information" bearing on appellant's mental state. (3RT 290-292, 297-305.) The defense objected specifically to "just reading this in," and the court observed, "I understand your point, but there's going to be some redaction of it." (3RT 306.)

Later, the court again indicated that it had already ruled on the "whole concept" of the admissibility of the prior argument, but that it would allow the defense to propose specific redactions thereto. Those specific redactions were later argued and ruled upon. During that discussion, the defense made clear that by proposing specific redactions it did not intend to abandon its objection "to the [admission of] the argument in its entirety." (3RT 421-423, 510, 517-525.)

Thereafter, Judge Hoff recused himself, and Judge Schempp took over the case. (4RT 539.) Judge Schempp specifically rejected the suggestion by the defense that Judge Hoff's pretrial rulings could be revisited. (4RT 558-559, 562-563, 571.) The defense acknowledged that "the People have sought to use our client's penalty argument in the first trial where he was pro per. [¶] Judge Hoff did a line-by-line redaction and that's already been ruled on. It is apparently going to come in." (4RT 585.)

Nonetheless, the defense subsequently asked the court to prohibit the prosecution from addressing any "contested issues" during opening

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[52] As at the retrial, appellant had elected to represent himself during the penalty phase of his initial trial. (See *People v. Bloom*, *supra*, 48 Cal.3d at p. 1203.)

statement, including "the testimony from the first trial from Mr. Bloom, the penalty argument from the first trial from Mr. Bloom." (14RT 1926-1927.) Understandably perplexed, the prosecutor responded, "It doesn't matter, it's not contested; it's all been ruled on. Everything she's mentioned has already been ruled on." (14RT 1927.) The court once again indicated it would not reconsider Judge Hoff's previous rulings, stating, "If there are unlitigated things, you bring it up to me prior to the 6th and I will address the issue. But I don't believe there's anything unlitigated at this point." (14RT 1928.)

During the prosecution's relatively brief opening statement, the prosecutor made reference to a single statement made by appellant during his 1983 penalty-phase argument, to the effect that he had thought about killing his father "weeks before" the murders. (16RT 1968.) The prosecutor also told the jury that it would learn appellant had lied about the murders during previous testimony in trying to "explain away" the evidence against him. (16RT 1983-1984.)

Subsequently, during the prosecution's case in chief but out of the presence of the jury, the prosecutor noted that appellant's prior argument would be read to the jury and that additional redactions had been made. The parties then again addressed redactions to the former argument, and the defense again noted that it did not intend to abandon its objection "to the entire thing coming in." (19RT 2425-2436.) As the discussion proceeded, however, the court became concerned that the use of appellant's prior argument—as opposed to his prior testimony—would violate Penal Code section 1180. The court commented, "It may be that this can come up in cross-examination of psychiatrists, it probably can." But ultimately, the court ruled that the prior argument would not be admitted during the prosecution's case in chief unless the prosecution could establish "that the Evidence Code 1220 on admissions supersedes 1180." (19RT 2436-2441.)

The prosecutor then noted that she had already made reference to the argument during her opening statement:

> MS. SAMUELS: . . . Also, I used it in my opening statement. I used a paragraph from it.
>
> The Court: Well, statements of counsel are not evidence, so we'll just leave it at that.
>
> MS. SAMUELS: Well, that puts me in a very bad position.
>
> The Court: But I would not allow counsel to argue that, that she made an opening statement regarding that.
>
> As I said, you can use it in cross-examination of the psychiatrists or in some other context, but not just in this context.

(19RT 2441.)

Later, the court acknowledged that it was a "very interesting issue," but reaffirmed the ruling. Judge Schempp also stated that she had talked to Judge Hoff about it and that he had agreed with her decision:

> I just about five minutes ago spoke to Judge Hoff about the ruling that I thought I had reversed his ruling on this morning under 1180. And he looked horrified. He looked at 1180 and he said, "I never meant for her to use it in her case unless it was for cross-examination of a psychiatrist or direct examination or whatever."
>
> He said, "If I didn't make that clear," he said that was his intention.

(19RT 1950-1951.)

2. The Claim Is Forfeited, and There Was No Misconduct

At the threshold, respondent notes that the argument is forfeited. "When a defendant believes the prosecutor has made remarks constituting misconduct during argument, he or she is obliged to call them to the court's attention by a timely objection. Otherwise, no claim is preserved for

appeal." (*People v. Morales* (2001) 25 Cal.4th 34, 43-44; accord, *People v. Bell* (1989) 49 Cal.3d 502, 538-539.) Appellant did not make an objection to the prosecutor's citation of his former argument during the opening statement itself. Further, prior to opening statements, appellant asked that the prosecution refrain from mentioning "contested" issues, at which point the court stated that it did not believe there were any remaining contested issues but that appellant should re-raise any concerns before the start of trial. Appellant does not appear to have done so. Rather, it was not until *after* opening statements that Judge Schempp was persuaded by the defense to revisit Judge Hoff's earlier decision and ruled appellant's prior argument inadmissible for purposes of the prosecution's case in chief. Appellant never raised in the trial court the claim that the prosecutor had violated a court order by making use of his prior argument during opening statement. Accordingly, his prosecutorial misconduct claim is forfeited.

In any event, there was no prosecutorial misconduct. "[R]emarks made in an opening statement cannot be charged as misconduct unless the evidence referred to by the prosecutor was so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted." (*People v. Davenport* (1995) 11 Cal.4th 1171, 1212-1213, overruled on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) That standard is plainly not met here. Not only is appellant unable to show that the evidence was "patently inadmissible," but the record demonstrates, to the contrary, that Judge Hoff's ruling appeared to contemplate the admission of appellant's statements during the prosecution's case in chief. The prosecutor had requested admission of the evidence for that purpose and the whole discussion of redaction proceeded along those lines—and, in fact, mirrored the discussion regarding admission of the prior testimony of witnesses Medrano and Waller, which was read into the record. Moreover, defense counsel's repeated objections to admission of the "entire" argument

suggests that defense counsel, too, understood Judge Hoff's ruling to contemplate admission of the former argument during the prosecution's case in chief. To the extent Judge Hoff did not "make clear" that he had authorized admission of the evidence only for cross-examination purposes, the prosecutor cannot be charged with deliberately referencing evidence during opening statement that was "patently inadmissible."

Accordingly, appellant's claim fails.

B. Cross-Examination of Expert Witnesses

1. Improper Vouching

Appellant argues that the prosecutor improperly vouched for the credibility of jailhouse informants Catsiff and Alatorre when she challenged Dr. Mills's summary rejection of Catsiff's and Alatorre's statements by asking how the informants could have gotten their information from a source other than appellant, asking whether Catsiff's memorialization of appellant's statements bolstered his credibility, asking how the informants could have known about the manner of killing before any autopsy reports had been issued, and asking whether the threat of perjury would have bolstered their credibility. Appellant also argues that the prosecutor improperly vouched for Catsiff and Alatorre during closing argument when she asked rhetorically whether it was reasonable to believe that the investigating detective would have presented witnesses who were lying, and when she stated that the witnesses would not have lied under oath. (AOB 302-305.) The argument fails.

"A prosecutor may make assurances regarding the apparent honesty or reliability of a witness based on the facts of the record and the inferences reasonably drawn therefrom. But a prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record." (*People v. Redd*

(2010) 48 Cal.4th 691, 740, quotation marks and citations omitted.) As appellant acknowledges, Catsiff and Alatorre were not actually witnesses at the retrial. (AOB 302.) Rather, their statements had been provided to Dr. Mills for use in his evaluation of appellant, and therefore the prosecutor was entitled to question the expert about his reliance—or lack thereof—on the statements. Thus, with respect to Catsiff and Alatorre, the prosecutor could not have engaged in any vouching for the credibility of a "witness." Instead, the prosecutor's cross-examination and argument simply challenged Dr. Mills's summary disregard of the statements of Catsiff and Alatorre. (See *People v. Hawthorne*, *supra*, 46 Cal.4th at p. 93 ["In offering an expert opinion, the expert invites investigation into the extent of his knowledge, the reasons for his opinion, including facts and other matters upon which it is based and which he took into consideration; he may be subjected to the most rigorous cross-examination concerning his opinion and its sources"].)

But in any event, the prosecutor here did not engage in any impermissible "vouching" regarding the material relied upon by Dr. Mills, even if such materials were subject to the rule against vouching. All of the prosecutor's questions to Dr. Mills were based on the record or on reasonable inferences that could be drawn from the record. It is not improper "vouching" to urge a witness's credibility based on facts in the trial record. (*People v. Medina* (1995) 11 Cal.4th 694, 757 ["Prosecutorial assurances, *based on the record*, regarding the apparent honesty or reliability of prosecution witnesses, cannot be characterized as improper 'vouching,' which usually involves an attempt to bolster a witness by reference to facts *outside* the record," original emphasis].) Thus, the prosecutor's questions about how the informants could have gotten their information from a source other than appellant, whether Catsiff's memorialization of appellant's statements bolstered his credibility, how the

informants could have known about the manner of killing before any autopsy reports had been issued, and whether the threat of perjury would have bolstered their credibility were entirely proper. These were questions based either on logical inferences or on matters of "record," meaning, in this case, matters that were before the expert who was rendering his opinion. To the extent the defense successfully objected during the prosecutor's questioning that certain facts referred to were not in evidence—or were not before the expert—those questions were rephrased in a permissible manner.[53]

With respect to appellant's challenge to the prosecutor's closing argument, that challenge is forfeited because he did not object to the argument in the trial court. (*People v. Morales*, *supra*, 25 Cal.4th at pp. 43-44.) But in any event, the prosecutor did not improperly "vouch" during closing argument for the material submitted to Dr. Mills. The prosecutor simply pointed out that the original, inculpatory testimony by Catsiff and Alatorre had been provided under oath, and that their later recantations had been unsworn. The prosecutor's emphasis on sworn testimony was not impermissible vouching. During closing argument, a prosecutor may reference matters "which are common knowledge or are illustrations drawn from common experience." (*People v. Hill* (1998) 17 Cal.4th 800, 819.) That a witness's sworn testimony might be more reliable that an unsworn statement is a matter of common knowledge or common experience, and certainly was within the permissible scope of argument.

Appellant's challenge to the prosecutor's rhetorical question whether it was reasonable to believe that the investigating detective would have

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[53] And, in any event, even the prosecutor's questions that were technically objectionable, such as those concerning autopsy reports, were matters of "logical" inference, as the trial court pointed out. (26RT 3246.)

presented witnesses who were lying is presented out of context. The statement was part of the same general argument emphasizing the witness's sworn testimony. And more importantly, it was directly preceded by an observation to the effect that it is common knowledge that jailhouse informants sometimes lie, and it was directly followed by the prosecutor's statement, "Okay. Maybe they were lying," which was then followed by further argument regarding the credibility of the informants. Thus, while the prosecutor's passing suggestion may have been that the detective would not have knowingly presented a lying witness, the prosecutor immediately dismissed that suggestion and proceeded to argue to the jury why the jailhouse informants were credible. This did not rise to the level of misconduct.

2. Questions About Specific Intent

Appellant next claims that the prosecutor committed misconduct by asking Dr. Watson and Dr. Mills several questions he contends bore on the ultimate issue of his mental state, in violation of Penal Code section 29, which prohibits an expert witnesses from opining "whether the defendant had or did not have the required mental states." (Pen. Code, § 29; AOB 307-309.) "The adversarial process generally permits one party to offer evidence, and the other party to object if it wishes, without either party being considered to have committed misconduct." (*People v. Harris* (2005) 37 Cal.4th 310, 344.) Thus, to rise to the level of misconduct, a prosecutor must have *knowingly and intentionally* attempted to introduce inadmissible evidence. (*Ibid.*; *People v. Scott* (1997) 15 Cal.4th 1188, 1218.)

After Dr. Watson had testified but before Dr. Mills took the stand, the defense objected to the prosecution's asking questions of the defense experts that bore on the ultimate issue of his intent to kill and also argued that if the prosecution asked about appellant's mental capacity then that would open the door for the defense to argue diminished capacity. The

court ruled that it would not instruct on the issue of diminished capacity but that the word "capacity" did not necessarily relate to that defense specifically and the prosecutor was entitled to cross-examine the expert witnesses on that topic depending on "where the defense goes" with the experts. (25RT 3091-3100.)

In cross-examining the experts, the prosecutor did not ask questions about any required mental state, such as malice, but simply inquired whether the defendant volitionally carried out certain actions, manifesting goal-directed behavior. (See AOB 308, citing 23RT 2950, 2952-2953, 2956 & 27RT 3313.) In fact, the prosecutor explained this precise distinction in response to a defense objection, at which point the court stated, "I think it is such a fine line. It is a very difficult question." (See 27RT 3314-3315.) The trial court's statement was apt. In the context of appellant's dissociation defense, the line between challenging the experts' opinions and violating Penal Code section 29 could not always be easily defined. On this record, then, it cannot be said that the prosecutor committed misconduct by knowingly and intentionally attempting to elicit evidence on the ultimate issue of appellant's mental state.

3. Sarcasm and Disparagement

Appellant argues that the prosecutor engaged in a "pattern of sarcasm and disparagement" with respect to appellant's mental defense while questioning expert witnesses, and he cites several examples of this alleged sarcasm and disparagement. (AOB 309-311.) Virtually all of the examples given by appellant were unobjected to, and therefore any misconduct claim as to those examples is forfeited. (*People v. Clark* (2011) 52 Cal.4th 856, 960.) But in any event, there was no misconduct. Simply put, appellant vastly overstates the extent to which the prosecutor's questioning could be characterized as sarcasm and disparagement, much less misconduct. Here, the prosecutor vigorously attacked appellant's mental defense and at times

used colorful terminology or appeared dismissive of the theory. But none of this was improper. As appellant acknowledges (AOB 309), intemperate behavior rises to the level of misconduct only when it amounts to the use of "deceptive or reprehensible methods to attempt to persuade either the court or the jury" or when it "infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) And while it is misconduct to attack defense counsel personally (*Hill, supra*, 17 Cal.4th at p. 832), it is permissible to disparage the *defense itself* (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1154-1155). That is all that occurred here.

C. *Griffin* Error

Appellant also argues that the prosecutor committed error under *Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106] by commenting on appellant's failure to testify. Specifically, he claims that the prosecutor indirectly did so during questioning of Dr. Vicary, who had testified that appellant was liable to "snap" in stressful situations. According to appellant, by establishing that the trial was a stressful situation, the prosecutor invited the jury "to infer facts about appellant's mental state during the crime from the absence of outbursts during court proceedings." (AOB 311-312.) In addition, appellant claims that the prosecutor committed *Griffin* error during closing argument by stating that "we will never know" certain details about the crime. (AOB 312.)

"*Griffin* forbids either direct or indirect comment upon the failure of the defendant to take the witness stand. The rule, however, does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses." (*People v. Mircham* (1992) 1 Cal.4th 1027, quotation marks and citations omitted.) With respect to the prosecutor's suggestion that appellant did not appear to have "snapped" under the stressful situation of his trial, this was plainly not

a comment on appellant's failure to testify, but was a comment on the state of the evidence, in that it was a challenge to the expert's testimony itself. While it is true, as appellant points out, that it is error under *Griffin* for a prosecutor to point to the absence of evidence that could only have been supplied by the defendant, appellant's behavior in the courtroom—or lack thereof—could have been explained by any of his own expert witnesses. (See *People v. Cornwell* (2005) 37 Cal.4th 50, 90-91 [no *Griffin* error where absence of evidence could have been explained by witnesses other than defendant].) In fact, this is precisely what the prosecutor was probing in her cross-examination of Dr. Vicary. There was therefore no *Griffin* error in this respect.

As to the prosecutor's comment during closing argument that "we will never know" certain details about the crime, this, too, was simply a comment on the state of the evidence. The prosecutor's argument was directed not to appellant's failure to take the stand but was made in the context of urging the jury to draw reasonable inferences about how the murders unfolded. (See 30RT 3831 ["We will never know that. It is certainly a reasonable interpretation of what was going on in that house that night"].) As this Court has observed, such a comment that the jury may "never know" a particular fact that the defendant could have testified to does not violate *Griffin*. (*People v. Mitcham*, *supra*, 1 Cal.4th at pp. 1050-1051 [addressing prosecutor's argument "we will never know what he thought"].)

D. Reliance on Facts Not in Evidence

Finally, appellant claims that, during closing argument, the prosecutor pointed to the letters Bloom had written to appellant during appellant's time in the Navy, improperly relying on them for their truth, a purpose for which they had not been admitted. (AOB 313-314.) Again, no objection was made to this argument, and therefore appellant's claim is forfeited.

(*Morales*, *supra*, 25 Cal.4th at pp. 43-44.) But in any event, there was no misconduct. A reference to facts not in evidence during argument is "clearly misconduct." (*Hill*, *supra*, 17 Cal.4th at pp. 827-828, quotation marks, alteration, and citation omitted.) Here, however, there was no such reference.

During trial, the prosecutor sought to question Melanie Bostic about the letters, in which Bloom had expressed his affection for appellant, in light of Bostic's previous testimony that Bloom did not show any affection toward appellant. The prosecutor argued, "they are not hearsay. They are being offered to show the tenor of the letters. The way the father related to the son." The court agreed, and allowed the questioning:

> My feeling is this. That they are not hearsay. They are not being offered for the truth of the matter asserted.
>
> However, I feel that the prosecution may inquire of Mrs. Bostic in light of her statement that he never showed any love. She doubted it.
>
> . . .
>
> The fact he has signed "I love you, Dad. I love you, too." "I love you" throughout all these letters, if that would change her opinion or if she was aware of that. I think that is a relevant issue because it is contrary to what she testified to yesterday.

(29RT 3707-3713.) The prosecutor later stated, "I am simply trying to show that the father wasn't always abusive to Robert. Melanie Bostic's testimony, in essence, is that he was always abusive, basically, every minute of every day. I believe she is aware of these telegrams. I believe I should be allowed to ask her about these." To which the court responded, "I agree." (29RT 3713-3719.)

As appellant notes, during the prosecutor's subsequent argument to the jury, she stated, "You heard the telegrams in the Navy—to the Navy when Robert was in the Navy and they were loving. Now, granted, maybe

he was trying to manipulate him for some reason. *But the point is, he could be loving*." (30RT 3894, emphasis added.) It is clear based on this record that the prosecutor referenced the letters for precisely the purpose they were admitted: to show "the way the father related to the son," i.e., that the relationship was not necessarily entirely abusive, contrary to the impression conveyed by Ms. Bostic. A prosecutor cannot be charged with misconduct "for simply referring to evidence that had been admitted by the court." (*People v. Schmeck* (2005) 37 Cal.4th 240, 301.) Rather, in this context, the appropriate challenge, if any, is to the court's predicate ruling, and not to the prosecutor's conduct. (*People v. Riggs* (2008) 44 Cal.4th 248, 325, fn. 40.) Because the prosecutor's reference to Bloom's letters tracked the court's ruling in admitting them, there was no misconduct.

E. Any Misconduct Was Harmless Here

In any event, any prosecutorial misconduct that may have occurred at trial was harmless beyond a reasonable doubt. (See *People v. Davis* (2009) 46 Cal.4th 539, 612 ["Under the federal Constitution, a prosecutor commits reversible misconduct only if the conduct infects the trial with such unfairness as to make the resulting conviction a denial of due process. By contrast, our state law requires reversal when a prosecutor uses deceptive or reprehensible methods to persuade either the court or the jury and it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct," quotation marks and citations omitted].)

All of the instances of alleged misconduct cited by appellant were relatively brief and discrete. The prosecutor's reference during opening statement to appellant's penalty-phase argument from the first trial used only one paragraph of that argument and did not emphasize the issue. And the jury was later instructed that the statements of counsel were not evidence. (29RT 3754.) Similarly, the alleged instances of improper

vouching, questioning about appellant's specific intent, and disparagement of the mental defense were fleeting episodes in the context of very extensive expert testimony presented at trial, and the jury was later properly instructed on the evaluation of expert testimony and the bases of the experts' opinions. (29RT 3759-3760, 3768-3770.) Likewise, the alleged *Griffin* error was isolated and, if error at all, was of a highly attenuated variety. Finally, the alleged improper reference to Bloom's letters constituted but one sentence during the prosecutor's entire, lengthy guilt-phase argument. Nothing about these alleged instances of misconduct, moreover, was so inflammatory as to overcome their essentially minor nature.

In addition, this was not, as appellant argues, a close guilt-phase case. The central question at the guilt phase concerned whether appellant premeditated the murders of Josephine and Sandra and whether his mental deficiencies rendered their killings manslaughter; in other words, whether (based on the prosecution's evidence) appellant was guilty of first or second degree murder, or whether (based on acceptance of appellant's mental defense) appellant was guilty of involuntary manslaughter. Appellant's prosecutorial misconduct allegations largely concern his mental defense, but that defense failed to gain any traction at trial. The prosecution's evidence overwhelmingly showed planning activity and rational behavior surrounding the murders, and also showed that appellant was a "normal" person. Against that evidence, the defense offered a not-very-compelling psychological narrative to the effect that, although appellant appeared normal, he actually suffered such severe mental deficiencies that he was unable to form the mental state required for murder. None of his proffered experts, however, could agree on a diagnosis, and each offered a psychological theory incredibly tailored to the legal standards at issue. In short, this defense smacked of the proverbial

"retrospectoscope" employed by paid experts, and was utterly unconvincing.

As noted, the jury's deliberations confirm that the only issue it was considering was whether appellant was guilty of first degree murder or second degree murder. (See Arg. II. D., *ante*.) The jury returned a first degree murder conviction as to Bloom relatively quickly for a case of this magnitude and returned a second degree murder verdict as to Josephine and Sandra immediately after the prosecution withdrew the premeditation allegation as to those counts. (23CT 6087-6094, 6097-6108; 24CT 6206-6213.) Accordingly, there is nothing to indicate that this was a close case, and, to the contrary, the evidence overwhelmingly showed that appellant was guilty of murder and not manslaughter.

To the extent there was any prosecutorial misconduct, then, it was harmless beyond a reasonable doubt.

V. THE TRIAL COURT PROPERLY DECLINED TO GIVE VOLUNTARY MANSLAUGHTER INSTRUCTIONS ON COUNTS 2 AND 3

Appellant argues that the court erred by declining to instruct the jury on voluntary manslaughter as to Count 2 (Josephine) and Count 3 (Sandra). (AOB 330-366.) Appellant is incorrect; the court properly instructed on voluntary manslaughter as to Count 1 (Bloom) only. Moreover, any error with respect to Counts 2 and 3 was necessarily harmless in this case, given the jury's rejection of a voluntary manslaughter theory as to Count 1.

A. Voluntary Manslaughter Instructions Were Not Warranted on Counts 2 and 3

1. Relevant Legal Principles

Manslaughter is "the unlawful killing of a human being without malice." (Pen. Code, § 192.) When a killing is committed "upon a sudden

quarrel or heat of passion" the offense is voluntary manslaughter. (Pen. Code, § 192, subd. (a).) The factor distinguishing the "heat of passion" form of voluntary manslaughter from murder is "adequate provocation." (*People v. Manriquez* (2005) 37 Cal.4th 547, 583-584.) The provocation "may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*Ibid.*) In other words, "[h]eat of passion arises when at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." (*Id.* at p. 584, quotation marks and citations omitted.) The heat of passion requirement for manslaughter has both an objective and a subjective component: the defendant must actually kill under the heat of passion; but the circumstances giving rise to the heat of passion are also viewed objectively. (*Ibid.*)

Heat-of-passion voluntary manslaughter is a lesser, necessarily included, offense of intentional murder because, whereas murder is defined as an unlawful killing with malice, "[m]alice is presumptively absent when the defendant acts upon a sudden quarrel or heat of passion on sufficient provocation." (*Manriquez, supra*, 37 Cal.4th at p. 583.) "A trial court must instruct on a lesser included offense if substantial evidence exists indicating that the defendant is guilty only of the lesser offense." (*Id.* at p. 584.) "'Substantial evidence' in this context is evidence from which a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed." (*Ibid*, quotation marks, alterations, and citations omitted].) A trial court's determination whether an instruction on the lesser included offense of voluntary manslaughter should have been given is reviewed de novo. (*Ibid.*)

2. Trial Court Proceedings

In the trial court, appellant requested voluntary manslaughter instructions as to all three counts. The prosecution countered, relying on *People v. Spurlin* (1984) 156 Cal.App.3d 119, that the provocation inciting a heat of passion must come from the victim. Since there was no evidence of adequate provocation by either Josephine or Sandra, the prosecution argued, voluntary manslaughter could not lie as to Counts 2 and 3. (29RT 3660-3663, 3666-3668.) The defense argued that the *Spurlin* decision, which was issued after the murders in this case, could not be applied retroactively and that it was wrong in that voluntary manslaughter verdicts would be appropriate as to Josephine and Sandra so long as appellant killed them while acting in a heat of passion provoked by Bloom. (29RT 3664-3665, 3668-3675.) The court agreed with the prosecution and, on the basis of *Spurlin*, declined to give voluntary manslaughter instructions as to Counts 2 and 3, but did instruct the jury on voluntary manslaughter as to Count 1. (29RT 3675-3677, 3772-3786.)

3. The Trial Court Correctly Followed *Spurlin* and found That Voluntary Manslaughter Was Precluded As A Matter of Law As to Non-Provoking Victims

The only question raised regarding the trial court's voluntary manslaughter instructions, either below or here, is the purely legal one whether the murder of a particular victim may be reduced to voluntary manslaughter based on adequate provocation from a source other than that victim. The trial court answered that question correctly. It is a "settled principle," repeatedly invoked by this Court, that "[t]he provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim, or be conduct reasonably believed by the defendant to have been engaged in by the victim." (*People v. Verdugo* (2010) 50 Cal.4th

263, 294; accord, *People v. Souza* (2012) 54 Cal.4th 90, 116; *People v. Moye* (2009) 47 Cal.4th 537, 549-550; *People v. Avila* (2009) 46 Cal.4th 680, 705; *Manriquez*, *supra*, 37 Cal.4th at p. 583; *People v. Lee* (2001) 20 Cal.4th 47, 59; see also *People v. Carasi* (2008) 44 Cal.4th 1263, 1306 ["To satisfy this test, the victim must taunt the defendant or otherwise initiate the provocation"]; *People v. Steele* (2002) 27 Cal.4th 1230, 1253 [voluntary manslaughter "requires provocation by the victim"].)

While it does not appear that this Court has addressed a situation precisely like the one here, where a defendant sought voluntary manslaughter instructions as to multiple victims based on asserted provocation limited to only one victim, all of this Court's citations to the principle that adequate provocation must come from the victim rely approvingly, either directly or indirectly, upon *Spurlin*, which did address that issue. (See *Souza*, *supra*, 54 Cal.4th at p. 116, [citing *Avila*]; *Verdugo*, *supra*, 50 Cal.4th at p. 294 [citing *Avila*]; *Moye*, *supra*, 47 Cal.4th at pp. 549-550 [citing *Thomas C.*]; *Avila*, *supra*, 46 Cal.4th at p. 705 [citing *Lee*]; *Carasi*, *supra*, 44 Cal.4th at p. 1306 [citing *Spurlin*]; *Manriquez*, *supra*, 37 Cal.4th at p. 583 [citing *Thomas C.*]; *People v. Steele*, *supra*, 27 Cal.4th at p. 1253 [citing *In re Thomas C.* (1986) 183 Cal.App.3d 786, 798, citing *Spurlin*; also citing *Spurlin* approvingly for different proposition]; *Lee*, *supra*, 20 Cal.4th at p. 59 [citing *Thomas C.*].) In addition, both Witkin and the use notes to CALJIC Nos. 8.37, 8.40, and 8.42 cite *Spurlin* approvingly for the same principle. (1 Witkin, Cal. Crim. Law 4th (2012) Crimes Against the Person §§ 233, 235, pp. 1056, 1058; Use Notes to CALJIC Nos. 8.37, 8.40, 8.42 (2012) pp. 623, 626, 631.) The principle therefore does indeed appear to be well established, as this Court has pointed out. (*Verdugo*, *supra*, 50 Cal.4th at p. 294.)

Nonetheless, appellant argues that these citations have been "fleeting and unconsidered" and that *Spurlin* was wrongly decided because the focus

of heat-of-passion voluntary manslaughter is the defendant's mental state and not the source of the provocation. (AOB 345-358.) In *Spurlin*, the defendant got into an argument with his wife and, while arguably acting under the heat of passion provoked by that argument, killed her. He then proceeded to kill his sleeping nine-year-old son. (*Spurlin*, 156 Cal.App.3d at pp. 122-123.) At trial, the court gave voluntary manslaughter instructions as to the wife's killing, but not as to the son's, reasoning that, "[i]f the mental state is produced by some other source, the offense is second degree murder, as it was at common law." (*Id.* at pp. 123, 125.)

The Court of Appeal in *Spurlin* affirmed. It explained that "statutory voluntary manslaughter derives from common law principles," and that, under the common law, "the concept of adequate provocation was extremely limited." (*Spurlin*, 156 Cal.App.3d at pp. 124, 126.) Thus, the court noted, beginning in 1875, a line of cases developed that adopted the strict, common law, approach to voluntary manslaughter, requiring a provoking "injury upon the person" rather than mere "words of reproach." (*Id.* at pp. 124.) As the *Spurlin* court further noted, another line of cases emerged at about the same time, based on non-statutory principles, which held that any type of provocation could negate malice, thus reducing murder to manslaughter. (*Id.* at p. 125.) This latter line of cases, the court further observed, led to the "nonstatutory" doctrine of "diminished mental capacity," and, while it could be argued that this doctrine would embrace the concept of heat-of-passion manslaughter as applied to the killing of a non-provoking victim, the doctrine had been statutorily abolished in 1981. (*Id.* at pp. 125-128.) Instead, the *Spurlin* court followed "several courts in other jurisdictions, interpreting common law principles, [that] have held the deceased must be the source of the defendant's rage or passion." (*Id.* at p. 126.)

The *Spurlin* decision was correct. Although manslaughter is defined as an unlawful killing without malice, heat-of-passion manslaughter could be described as a statutory exception to the malice requirement of murder. (See *People v. Wright* (2005) 35 Cal.4th 964, 979 (conc. opn. of Brown, J.) [discussing history of statutory and nonstatutory voluntary manslaughter and "blur[red] distinction" between heat-of-passion manslaughter and second degree murder].) Thus, like the related doctrine of imperfect-self-defense manslaughter, the doctrine of heat-of-passion manslaughter remains a narrow one. (See *Manriquez*, *supra*, 37 Cal.4th at pp. 581; *Lee*, *supra*, 20 Cal.4th at p. 59.) Its focus is particularly on the concept of "provocation," which has historically centered on a "sudden quarrel" or "heat of passion" with respect to the victim. (*Manriquez*, *supra*, 37 Cal.4th at p. 583; *Lee*, *supra*, 20 Cal.4th at p. 59.) The key principle is that the provoking conduct itself must "be sufficient to obscure reason and render the average man liable to act rashly." (*Manriquez*, *supra*, 37 Cal.4th at p. 583; *People v. Logan* (1917) 175 Cal. 45, 49-50.) Thus, inherent in the concept of "provocation," and the narrow exception it affords for reducing murder to manslaughter, is that the killing be not merely the *result of* the provocation but that it be *related to* the provocation.

While appellant is correct that the law regarding what *type* of provocation by the victim will suffice to support heat-of-passion voluntary manslaughter has been liberalized (see AOB 346-352; *People v. Valentine* (1946) 28 Cal.2d 121, 142-144), this Court has never signaled a retreat from Penal Code section 192's "provocation" requirement itself with respect to statutory manslaughter. In particular, and contrary to appellant's argument (see AOB 357-358), nothing supports the view that the focus of heat-of-passion voluntary manslaughter is predominantly upon the defendant's mental state, so that any killing following an adequate provocation, no matter how unrelated to that provocation, would be reduced

to manslaughter. To the contrary, as the *Spurlin* court pointed out, it was the doctrine of "nonstatutory voluntary manslaughter" that sought to place an emphasis on the defendant's mental state separate from any provocation—or any behavior at all—by the victim. (*Spurlin*, 156 Cal.App.3d at pp. 125-128; see also *People v. Conley* (1966) 71 Cal.2d 303, 318.) And that defense has been legislatively abolished. (*Spurlin*, 156 Cal.App.3d at p. 127-128.) It is thus manifestly the Legislature's intent that the defendant's mental state *not* constitute the controlling factor for purposes of reducing murder to manslaughter. (See Pen. Code, § 28.)

Neither *People v. Breverman* (1998) 19 Cal.4th 142, nor *People v. Minifie* (1996) 13 Cal.4th 1055, nor *People v. Bridgehouse* (1956) 47 Cal.2d 406, upon which appellant relies (see AOB 349-350, 355-356), represents a break from the foregoing principles. Rather, as appellant acknowledges, in those cases the victims were associated in some way with provocation by the non-victims. (*Breverman*, *supra*, 19 Cal.4th at pp. 149-152 [victim was part of provoking non-victim's group, which returned to scene of previous fight in order to continue hostilities]; *Minifie*, *supra*, 13 Cal.4th at pp. 1060-1064 [victim was close friend of non-victim Knight, and defendant had received threats from Knight's family and friends]; *Bridgehouse*, *supra*, 47 Cal.2d at pp. 407-411 [victim had been having affair with defendant's wife, and wife had recently argued with defendant about the affair].) Thus, these cases fit comfortably within the "settled" rule that "[t]he provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim, *or be conduct reasonably believed by the defendant to have been engaged in by the victim.*" (*Verdugo*, *supra*, 50 Cal.4th at p. 294, emphasis added.)[54] That

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[54] *Minifie* did not involve any voluntary manslaughter issue, but rather addressed the issue of self-defense, and it is the only case to

(continued...)

rule has no applicability here, however, where the asserted provocation was directly and discretely tied to the victim in Count 1 only, and the victims in Counts 2 and 3 were unassociated with the provocation. None of the cited cases supports extension of settled provocation principles to victims who are not even associated with the asserted provocation.

The *Spurlin* court also did not contravene *Valentine*, or err in any other respect, by looking to the common law for guidance. (See AOB 351-352.) In fact, the court in *Spurlin* accurately recounted the history of the divergent lines of authority concerning heat-of-passion manslaughter, based principally upon the analysis found in *Valentine* itself. (*Spurlin*, *supra*, 156 Cal.App.3d at pp. 124-125.) In reaching its conclusion that adequate provocation for purposes of heat-of-passion manslaughter must come from the victim, the *Spurlin* court did not purport to hold that explication of Penal Code section 192 was *limited to* common law principles, but rather stated only that section 192 "*derives from*" common law principles—an accurate statement, even in light of the Legislature's later relaxation of those principles. (*Id.* at p. 126, emphasis added.) Moreover, that statement must be viewed in light of the court's discussion of—and the distinction it highlighted between—statutory and nonstatutory voluntary manslaughter, the former of which evolved legislatively from the common law, and the

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(...continued)
formulate the inquiry in terms of whether the defendant "reasonably associated" the victim with the non-victim's behavior. (*Minifie*, *supra*, 13 Cal.4th at p. 1068.) Even assuming that formulation applies in the present context, it would not support a voluntary manslaughter instruction in this case because Josephine and Sandra were wholly *unassociated* with the asserted provocation by Bloom. Further, in *Minifie*, the defendant killed both the victim that was reasonably associated with the threats and a bystander. Nothing in the *Minifie* decision, however, suggests that the Court meant to extend the "reasonably associated" principle to the unassociated bystander.

latter of which was a judicial creation that substantially departed from common law concepts. But even more importantly, whatever is made of the *Spurlin* court's *analysis*, its *conclusion* was correct, for the reasons already discussed: nothing in California law supports a departure from the "provocation" concept to the extent that a manslaughter verdict would be warranted as to a victim wholly unassociated with the provocation that caused the defendant to act under a heat of passion.

Accordingly, the trial court correctly followed *Spurlin* here and declined to instruct the jury on voluntary manslaughter as to Counts 2 and 3, because the victims in those counts had not provoked appellant and they could not have reasonably been believed to have engaged in any provocation.

4. The Court Did Not Improperly Apply *Spurlin* Retroactively

Appellant also contends that, even if *Spurlin* was correctly decided, the trial court violated due process by applying its holding retroactively to appellant's crimes. (AOB 358-361.) The argument fails.

"As a rule, judicial decisions apply retroactively. Indeed, a legal system based on precedent has a built-in presumption of retroactivity. The general rule that judicial decisions are given retroactive effect is basic in our legal tradition. Courts sometimes make an exception to this general rule when the decision changed a settled rule on which the parties had relied. But where [a court] merely decid[es] a legal question, [and does] not chang[e] a previously settled rule, no reason exists to apply the exception." (*County of Sacramento v. Superior Court* (2009) 180 Cal.App.4th 943, 953, quotation marks and citations omitted.) "[T]he fact that no previous appellate decision made [the rule at issue] clear does not justify giving [a] decision prospective application only; instead, we are bound by the general rule that judicial decisions are given retroactive

effect." (*Id.* at p. 954.) Similarly, due process precludes the retroactive application of a judicial decision only if the rule announced is "'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" (*Rogers v. Tennessee* (2001) 532 U.S. 451, 461 [121 S.Ct. 1693, 149 L.Ed.2d 697], quoting *Bouie v. Columbia* (1964) 378 U.S. 347, 354 [84 S.Ct. 1697, 12 L.Ed.2d 894].)

For the reasons explained, *Spurlin* accurately analyzed California law and reached a conclusion in accord with the history of section 192 and the precedent interpreting that statute. No settled rule was changed, and the court's decision was certainly not "unexpected and indefensible." Indeed, to have held otherwise—that the killing of a non-provoking victim could support a manslaughter verdict—would have constituted a bold departure from the line of authority concerning statutory voluntary manslaughter. Accordingly, nothing about the *Spurlin* decision would warrant treating it under the exception to the general rule that judicial decisions apply retroactively.[55]

5. Aside from the *Spurlin* Rationale, Substantial Evidence Still Did Not Support the "Objective" Component of A Voluntary Manslaughter Defense As to Counts 2 and 3

Even disregarding the question addressed by *Spurlin*—whether heat-of-passion voluntary manslaughter may lie as a matter of law with respect to non-provoking victims—appellant's requested instructions as to Counts

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[55] Appellant suggests that it was fundamentally unfair that he received voluntary manslaughter instructions as to all three counts at his "flawed" first trial but not at the retrial. (AOB 360.) However, appellant points to no authority supporting the counterintuitive proposition that due process requires the repetition of an *incorrect* instruction at a retrial. And, indeed, appellant does not challenge on that basis the trial court's refusal to repeat the erroneous diminished capacity instructions at his retrial. (See 16RT 2037.)

2 and 3 were properly refused for another reason: no substantial evidence supported voluntary manslaughter on those counts.[56]

As noted, heat-of-passion voluntary manslaughter has both a subjective and an objective component: not only must the defendant have actually acted under a heat of passion, but the circumstances must have been such as to cause "a reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." (*Manriquez*, *supra*, 37 Cal.4th at p. 584, quotation marks and citations omitted.) This is "because 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.'" (*Ibid.*, quoting *Logan*, *supra*, 175 Cal. at p. 49.)

No substantial evidence supported the objective component of heat-of-passion voluntary manslaughter in this case as to Counts 2 and 3. That is, even if there was substantial evidence showing adequate provocation by Bloom, appellant's altercation with his father was not sufficient "to arouse the passions of the ordinarily reasonable man" in the direction of launching a homicidal attack against Josephine and Sandra, who were wholly uninvolved in the dispute. All of the evidence presented at trial showed that appellant engaged in an argument only with his father, inside and in front of the house, leading to the shooting of Bloom at the threshold of the house, followed immediately by the killings of Josephine and Sandra. (See Statement of Facts, *ante*.) Appellant's psychiatric evidence had no bearing on this issue. (See Pen. Code, § 28.) And he was not permitted to "set up

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[56] Again, a trial court's determination whether to instruct on voluntary manslaughter is reviewed de novo. (*Manriquez*, *supra*, 37 Cal.4th at p. 584.) Therefore, the court's actual reasons for declining the instruction are not controlling here.

his own standard of conduct." Because appellant's voluntary manslaughter theory fell short of showing by substantial evidence that a reasonable person would have been provoked to act rashly and without deliberation *as to the killings of Josephine and Sandra*, the court was not obligated to give voluntary manslaughter instructions with respect to Counts 2 and 3, even if the theory was not precluded as a matter of law.[57]

B. Any Error Was Necessarily Harmless Because the Jury Resolved the Provocation Question Against Appellant

Even if the trial court erred by failing to instruct on voluntary manslaughter as to Counts 2 and 3, the error was harmless under the *Watson* standard. (See *Watson*, *supra*, 46 Cal.2d at p. 836) If the factual question presented by an omitted instruction was necessarily resolved against the defendant under other, properly given, instructions, the failure to instruct is manifestly harmless. (See *People v. Wharton* (1991) 53 Cal.3d 522, 572 ["By finding defendant was guilty of first degree murder, the jury necessarily found defendant premeditated and deliberated the killing. This state of mind, involving planning and deliberate action, is manifestly inconsistent with having acted under the heat of passion"].) That is the case here.

There is no question in this case than any "adequate provocation" within the meaning of the voluntary manslaughter rule arose from appellant's quarrel with his father. (See AOB 344-345.) Appellant did not argue below, and he does not argue here, that either Josephine or Sandra provoked him to kill under a heat of passion. Thus, under appellant's instructional theory, the jury could have found him guilty of voluntary manslaughter as to Counts 2 (Josephine) and 3 (Sandra) only if they found

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[57] Issues concerning the objective component of voluntary manslaughter are pending before this court in *People v. Beltran*, case number S192644, review granted June 15, 2011.

that he was acting under the heat of passion *based on the adequate provocation of Bloom.*

But the jury was properly instructed as to voluntary manslaughter with respect to Bloom. That is, even though the court found that Bloom's provocation could not support voluntary manslaughter as to Josephine and Sandra, the jury was nonetheless instructed on Bloom's provocation as to the killing of Bloom himself, and therefore it had to consider the very question that appellant claimed would have supported voluntary manslaughter verdicts as to Counts 2 and 3. The jury rejected the voluntary manslaughter theory as to Bloom by convicting appellant of first degree murder on that count. (See *People v. Wharton*, *supra*, 53 Cal.3d at p. 572.) Having rejected the argument that appellant acted under a heat of passion provoked by Bloom, there was no remaining factual basis upon which the jury could have returned verdicts of voluntary manslaughter as to Counts 2 and 3, even had the court instructed the jury in accord with appellant's request. Accordingly, any error in the failure to instruct the jury on voluntary manslaughter as to Counts 2 and 3 was necessarily harmless in this case.[58]

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[58] Appellant's only answer to the manifest harmlessness of this asserted instructional error is to state that Count 1 must be reversed for reasons argued elsewhere in his brief and therefore cannot be taken into consideration in the harmlessness analysis. (AOB 365.) As explained herein, however, appellant's claims should all be rejected. Moreover, even if some unrelated error supported reversal of Count 1, appellant does not explain, nor can he, why the jury's rejection of the voluntary manslaughter theory upon which it was properly instructed should be disregarded.

VI. THE STANDARD INSTRUCTIONS ON SUPPRESSION OF EVIDENCE AND FLIGHT WERE NOT DEFECTIVE

Appellant argues that the standard instructions given to the jury here on the suppression of evidence (CALJIC No. 2.06) and flight (CALJIC No. 2.52) were improperly duplicative and argumentative, and permitted the jury to draw irrational inferences about appellant's guilt. (AOB 367-376.) This Court has previously rejected these same arguments. (See *People v. Streeter* (2012) 54 Cal.4th 205, 253-254 [CALJIC No. 2.52]; *People v. Dement* (2011) 53 Cal.4th 1, 52-53 (CALJIC No. 2.06].) Because appellant presents nothing new or significant that would call into question this Court's earlier holdings, his claim should be rejected summarily.

VII. NONE OF THE OTHER STANDARD JURY INSTRUCTIONS UNDERMINED THE TRIAL COURT'S PROPER INSTRUCTION ON REASONABLE DOUBT

Appellant argues that the standard instructions given to the jury on circumstantial evidence (CALJIC Nos. 2.01, 2.02), willfully false testimony (CALJIC No. 2.21), weighing conflicting testimony (CALJIC No. 2.22), testimony of a single witness (CALJIC No. 2.27), motive (CALJIC No. 2.51), and premeditation (CALJIC No. 8.20) undermined the requirement of proof beyond a reasonable doubt. Appellant acknowledges that this Court has previously rejected these arguments, but asserts them in order to preserve the claims for federal review. (AOB 377-388.)

This Court has previously and repeatedly rejected arguments that CALJIC Nos. 2.01, 2.02, 2.21, 2.22, 2.27, 2.51, and 8.20 erode the requirement of proof beyond a reasonable doubt. (See, e.g., *People v. Friend* (2009) 47 Cal.4th 1, 53.) Because appellant presents nothing new or significant that would call into question this Court's earlier holdings, his claim should be rejected summarily. (*Ibid.*)

VIII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DECLINING TO HOLD A COMPETENCY HEARING

Appellant argues that the trial court erred and violated his constitutional rights by failing to hold a hearing on his competence to stand trial despite substantial evidence that he was incompetent. (AOB 128-181.) The argument fails. In short, while the record demonstrates that appellant was perhaps eccentric and made arguably foolish decisions while representing himself, the record also establishes that appellant was well aware of the nature of the proceedings and was more than able to assist counsel. In fact, the record shows that appellant was intelligent and able to navigate the legal proceedings with an expertise uncommon among criminal defendants. Because there was no substantial evidence indicating that appellant was incompetent to stand trial, the court did not abuse its discretion by declining to hold a competency hearing.

A. Facts Relating to Appellant's Competence, Insanity Plea, and Self-Representation

This claim and the following five claims concern trial proceedings that were overlapping and interrelated. Respondent therefore presents a consolidated statement of the relevant proceedings here, to better place the claims in context.

At appellant's initial trial in 1983, relying in part on the testimony of Dr. Arnold Kling, appellant raised a diminished capacity defense, which the jury rejected. (See *Bloom*, *supra*, 48 Cal.3d at pp. 1202-1203, 1207.) Appellant's competence to stand trial was litigated prior to the penalty phase in 1983, and a jury found him competent. (See Arg. II. C., *ante*.) Appellant exercised his right to represent himself at the penalty phase in 1983, at which he asked the jury to impose a punishment of death. And appellant was in fact sentenced to death. (See *Bloom*, *supra*, 48 Cal.3d at pp. 1214-1216.)

This Court affirmed appellant's convictions on appeal, and in the course of doing so commented that Dr. Kling's testimony was insufficient to raise a doubt about appellant's competency sufficient to undermine the voluntary withdrawal of his insanity plea. (*Bloom*, *supra*, 48 Cal.3d at p. 1214.) However, the United States Court of Appeals for the Ninth Circuit later found that appellant's trial attorney had rendered ineffective assistance in presenting Dr. Kling's testimony at the guilt phase and granted appellant a conditional writ of habeas corpus. (*Bloom v. Calderon*, *supra*, 132 F.3d at pp. 1271-1278.)

Retrial proceedings began in 1998. From the very early stages of the retrial, appellant was adamant that he was not incompetent, and he clashed with his attorneys over presentation of a mental defense, asking several times to replace his attorneys and to represent himself. During these proceedings, appellant made cogent arguments on a variety of legal issues. (See, e.g., 2RT 21-35, 49-52, 91-111, 142-152.)[59]

The issue of appellant's competence was raised toward the beginning of the trial, at which point defense counsel declined to declare a doubt as to appellant's competence, but suggested that the court have appellant evaluated anyway in light of his wish to represent himself. The court agreed with the suggestion. (2RT 148-151.) However, the court later "rethought" the issue, and appellant withdrew his request for self-representation in any event. (2RT 163.) Appellant later refused to cooperate with the prosecution's psychiatric expert. (3RT 372-379, 390-394, 489-493, 512-515; 4RT 604.)

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[59] Appellant was represented during the guilt and sanity phases of the retrial by Deputy Alternate Public Defenders Seymour Applebaum and Tonya Deetz. The prosecutors were Deputy District Attorneys Shellie Samuels and Dmitry Gorin.

Throughout pretrial proceedings, appellant continued to challenge his attorneys' strategy, making cogent arguments about the issues in his case. (See, e.g., 3RT 498-509; 4RT 666-671; 7RT 781, 822-925.) On the day opening statements were to be heard in the guilt phase, appellant made a *Marsden* motion, again insisting that he was competent and opposing his attorneys' plan to present a mental defense. Appellant explained that he had suggested "several viable defenses as an alternative to their mental defense" but counsel had rejected his proposals. The court denied the motion. (15RT 1929-1934, 1941.)

Appellant then made a request to represent himself during the penalty phase, acknowledging that it was premature but wanting to apprise the court and counsel of his intentions. Appellant stated that, as at his first trial, he wished to argue for death, and that he knew the consequences of what he was doing:

> I assure this court that I am making an intelligent and rational decision on this *Faretta* issue. I have been planning this for more than two years.
>
> I assure this court that I am of sound mind and legally competent to represent myself during the penalty phase of my trial.
>
> I assure this court that I can read, write and I am well spoken.
>
> I assure this court that I understand the criminal charges against me and I know the gravity of my situation.
>
> My trial strategy during the penalty phase is going to be the aggressive pursuit of a death verdict and my trial tactics during the penalty phase are going to consist of my opening statement to the jury in writing, cross-examination from the defense table of any and all prosecution witnesses, the presentation of defense witnesses, which I will do on direct examination from the defense table, and my closing argument to the jury in writing. And I've been planning this for more than two years in front of Judge Hoff's court.

> I have every intention of persuading the jury to return a death verdict in this case and seeing that justice is served.

(15RT 1935-1939.) The court indicated it would rule on the issue "if and when it goes to the penalty phase." (15RT 1940-1942.)

Defense counsel then informed the court that he believed appellant was "skirting the edges of his ability to cooperate with counsel." Counsel stated that he "would have declared a 1368 doubt eons ago" except that he did not believe that in this particular case he needed the input of appellant to plan his strategy. However, counsel explained that, if appellant started to interfere with the preparation of the defense, a doubt would be declared. (15RT 1949-1951.)

Throughout the guilt phase, appellant continued to challenge his attorneys' handling of the mental defense. He also continued to raise the issue of his self-representation at the penalty phase, attempting to discuss discovery and other procedural issues, but the court deferred those matters as premature. Again, appellant's arguments were substantial, articulate, and cogent. During these discussions, appellant did not again indicate that he intended to ask the jury for a death verdict, and it appears that, to the contrary, appellant had changed his mind and intended to argue for life. (See 15RT 1951-1952; 17RT 2043-2064, 2225-2231; 21RT 2685-2693; 24RT 3031-3037; 28RT 3614-3622; 29RT 3697-3701.)

On the morning closing argument was to begin in the guilt phase, appellant requested that he be permitted to represent himself during the sanity phase, should the jury convict him. Appellant explained that, even though his plan had always been to represent himself at the penalty phase only, he harbored a concern about the penalty phase that led him to alter that plan, and that "even though I don't understand the intricacies of the sanity phase, I feel I can do it." (30RT 3794-3797.) The court stated that it

would take the matter under submission because there would be adequate time to discuss it during jury deliberations. (30RT 3797-3798.)

Several days later, during jury deliberations, the court addressed the issue, after appellant stated that his concern about the penalty phase had been resolved but he nonetheless still wished to represent himself at the sanity phase. (33RT 4144-4145.) The court denied the request as follows:

> . . . I have given your request a great deal of consideration. And first of all, it is untimely since trial has already started.
>
> And secondly, it is discretionary with the court. It is not an absolute right at this stage.
>
> And things that I have considered in reaching the decision is, first of all, the complexity of the case. I indicated that to you on Friday I believe when you made the request. Thursday or Friday, whatever day it was. And I felt that you made your decision—one of the reasons why was because Miss Samuels alluded to the fact that she had not done a sanity hearing. And I indicated that was not a good reason because all of her other skills, of which I am sure you are very well aware, will still be there and be in place. It was only procedure.
>
> So the complexities of the case is certainly a strong factor in denying you the right to go pro per.
>
> Secondly, if you were pro per, the scheduling of witnesses that are all psychiatrists would be extremely difficult for you. Your counsel have made it quite clear they would not be back-up counsel. And for you to arrange [f]or calling psychiatric witnesses from the county jail would be very difficult and it would end with a disruption in the court proceedings.
>
> I told this jury we would be through hopefully by the first of December. And that would be difficult to do and have any disruption in the trial proceedings.
>
> And something that occurred to me over the weekend is that if I were to allow you to go pro per on the issue of whether or not you were sane at the time of the commission of the offense, I think the jury, even though they would be admonished that they are not to consider anything I have said or done in deciding their

verdicts, it would be very difficult for them to put out of their mind the fact that I was letting you represent yourself.

I don't see how they could do anything but take that that I had personally found you competent and competent enough to represent yourself at a very serious stage in the trial.

So balancing all of these reasons and things that I have said, the balance clearly requires that I deny your request to represent yourself at the sanity phase. So that's my answer.

(33RT 4145-4146.)

Appellant thereafter continued to raise issues about his self-representation at the penalty phase. Over defense counsel's objection, the court engaged appellant on some of those issues. He continued to discuss the legal issues in his case in detail and without apparent difficulty (irrespective of the wisdom of some of his positions). (See 33RT 4153-4190; 34RT 4198-4200, 4208-4211, 4217, 4220, 4246-4247, 4250-4251.)

After the jury returned its verdicts in the guilt phase, appellant stated that he had anticipated withdrawing his insanity plea before the sanity phase but he had changed his mind after the jury returned two second degree murder verdicts, and he now wished to proceed to a sanity phase. He explained:

. . . I always thought this jury was coming back with three first. And upon them coming back with three first I was going to withdraw NGI.

I was wrong. I was not wrong on purpose, I was just wrong as it turned out.

With the verdicts that just came in, it seems to me that maybe some of these jurors have bought—and this court knows how I feel about the mental defense, but apparently some of them have bought into this lemon that was sold them, okay?

And I just like to say that not speaking as a defendant, I am not going to speak to you as a defendant right now, I am going to speak to you as a convict, okay?

We always look for a way out, okay? And if I got a way out, I am going to take it.

So let's go ahead and have the sanity phase, but let's be very clear about something. I am not going to say it in front of Miss Samuels, but you know how I feel about this whole mental defense.

So me having the sanity phase, I am not changing my mind on that. I am just saying that maybe I have a way out so I am going to take it.

(34RT 4239-4241.)

Nonetheless, on the morning the sanity phase was set to begin, appellant informed the court that he did not wish to be in the courtroom during the presentation of evidence. (35RT 4252.) The following discussion occurred:

THE COURT: . . . Mr. Bloom, through your counsel, I have heard you do not want to be present during the sanity hearing. You've had a few moments to think about it. What is your desire now, do you want to be in the courtroom?

THE DEFENDANT: During the sanity phase, no.

THE COURT: Okay. You have a right to be here and—but it is your request that you not be present in the courtroom, is that correct?

THE DEFENDANT: During the sanity phase.

THE COURT: Only the sanity phase?

THE DEFENDANT: I want to be here for penalty.

THE COURT: Okay.

THE DEFENDANT: During the sanity phase.

THE COURT: You give up your right to be present in the courtroom and hearing the testimony, then, of the sanity phase?

THE DEFENDANT: During the sanity phase.

THE COURT: Okay. You do give it up, yes?

THE DEFENDANT: Are we talking about the testimony?

THE COURT: Yes, the psychiatrists or whoever else is called, you do not wish to be present in the courtroom, is that right?

THE DEFENDANT: I would like to be present during the reading of the verdict but not during the testimony. But for the reading of the verdict, I would like to be present but not for the testimony.

THE COURT: All right. Everyone satisfied?

MR. APPLEBAUM: I can indicate this, you are not going to have any kind of speakers or hearing devices in lock up. We will provide you with the transcripts of the proceedings. However, do you understand that?

THE DEFENDANT: You will give me the transcripts?

MR. APPLEBAUM: I will.

THE COURT: All right, that's all, then, you may go back—

(35RT 4252-4253; see also 36RT 4449-4450.)

The court later informed the jury, "Mr. Bloom has chosen not to be present during this second phase of the sanity proceedings which he has a right to make that choice." (35RT 4258.) No further mention was made of appellant's absence during the testimony or arguments at the sanity phase, which lasted one day.

Just after jury deliberations began in the sanity phase, defense counsel declared a doubt as to appellant's competence, stating that appellant had been "borderline" competent throughout the trial and that because of recent "substantial changes" counsel believed that appellant had become incompetent to stand trial. (36RT 4523-4524.) After a brief exchange with counsel, the court allowed appellant himself to speak to the issue. Appellant stated that he had made a "deal" with his attorney: that appellant

would not withdraw his insanity plea if counsel would not declare a doubt as to his competence. (36RT 4525-4526.) Appellant explained, "It was my idea not to be present during the sanity phase because I didn't want to sit here and listen to more—pardon my French—bullshit testimony by these damn quacks, by Tonya's doctors. Okay? So I absented myself from the courtroom." (36RT 4528.) Appellant also stated that he had cooperated with counsel regarding the sanity phase as a strategy: "the only reason that I absented myself from the sanity phase, it wasn't because of noncooperation, it was my idea. It went to a tactical decision in relation to penalty as part of my strategy in penalty." (36RT 4532-4533.) Because counsel had "sandbagged" him, appellant asked to be permitted to testify, so that he could "tell this jury exactly about the mental defense and exactly about the sanity phase . . . ." Namely, appellant wanted to inform the jury that he had been malingering during the psychological testing. (36RT 4528-4533.)

The court denied the request, and also found that appellant was competent:

> At this point I have observed the defendant for now since mid-September when I started this case and I don't see any change since the start. I know there's times when he's a little more agitated than others, but he has behaved himself throughout this proceeding and has never been disruptive to the court and he seems extremely intelligent. He knew the prongs of what it is about mental defense. I do not—at this point I will not declare a doubt as to his competency.

(36RT 4534-4535.)

The prosecution then echoed the court's comments about appellant's competence:

> MS. SAMUELS: I would similarly say I wasn't present for the *Marsden* motions, but for the other motions that I've been present for I've seen no change in the defendant from those times until hearing him speak today.

I think the defendant is competent. It's my position that the defendant isn't crazy and he never has been crazy.

. . .

I think that the defendant sounds coherent to me now, he sounded coherent to me each and every time he spoke to the degree that Mr. Gorin and myself have kept a book of all of the defendant's arguments to the court because they have been so coherent.

And in fear that this 1368 motion would be made at some time, we wanted ammunition to show the court how coherent in fact the defendant has been.

And I don't think that he—you know, he obviously is not an attorney, but short of being an attorney I can't remember another defendant I've heard speak that has been any more coherent than the defendant.

So I certainly don't have a doubt in my mind that he's competent. I'm not a psychiatrist. I know more about psychiatry now than I ever have in my life, I'll tell you that, but he certainly seems competent to me.

And I believe, Mr. Gorin—we've discussed this and I believe he agrees with me.

THE COURT: Do you agree, Mr. Gorin?

MR. GORIN: Yes, your honor.

The things he said today, he understands about the attorney-client privilege, he understands about cooperating with counsel.

It's interesting, every time he speaks, he's always looking at the court reporter to make sure that she notes every word that he's made. He knows everybody's positions in this court including the court's.

He understands all the concepts about the contract he mentioned today.

He understands about the malingering, so he understood all of Ms. Samuels' arguments in closing.

> He understood the two prongs of competency about cooperating with counsel, understanding the proceedings, and understood how important it was for him in the case thus far.
>
> His conduct appeared to be proper in front of the jury and he's also asked this court to have Judge Hoff come in and confirm the court's observation and our observation that he is competent and he has been competent in front of Judge Hoff. So he understands the court process just as he understood the court process 17 years ago.

(36RT 4535-4536.)

Appellant thereafter continued to raise issues concerning his self-representation at the penalty phase. Again, the court entertained discussion with appellant about penalty phase issues, and also ordered the exchange of discovery. Appellant's arguments continued to be thoroughly cogent. (See 36RT 4537-4544; 37RT 4545-4589, 4591-4625; 38RT 4636-4639, 4646-4673.)

Appellant was present when the jury returned its sanity-phase verdict on Count 1 and when, after several further days of deliberations, it announced that it was deadlocked on Counts 2 and 3. (38RT 4631-4643; 39RT 4674-4682; 40RT 4683-4696.)[60] The court stated that the defense had two options at that point: a mistrial could be declared and a new jury impaneled, in which case the matter would have to be sent to a different courtroom[61]; or appellant could waive a jury trial and have the court decide the issue, in which case the court intended to find appellant sane. In addition, the prosecutor announced that if sanity were retried, she intended to call three expert witnesses, including "one of the foremost experts in the country on dissociative states." (40RT 4683-4687.)

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[60] The split was nine for sane, three for insane. (40RT 4697.)

[61] Judge Schempp later explained that she would soon be taking over as presiding judge and would not have time to try cases. (40RT 4720.)

Appellant consulted with his attorneys for two hours, after which he announced that he wished to withdraw his insanity plea. (40RT 4688-4689.) The prosecution then took appellant's waiver:

> MR. GORIN: First, you have the right to have a jury for the plea that you are withdrawing. You are withdrawing the N.G.I., but you have the right to have a jury determine your sanity.
>
> Do you understand your right to a jury and give that right up?
>
> THE DEFENDANT: Yes, I do; and, yes, I do.
>
> MR. GORIN: Do you understand that the jury would have to unanimously find whether or not you are sane and you are deciding to give that right up, is that correct?
>
> THE DEFENDANT: Yes, I do.
>
> MR. GORIN: All right. In—and in the N.G.I. defense, as your attorneys exercised, you have the right to confront and cross-examine witnesses through the assistance of your lawyers, the right against self-incrimination, which is the right to remain silent, the right to call your own witnesses at no expense to you, and the right to have attorneys.
>
> Do you give all those rights up so we can proceed with this?
>
> THE DEFENDANT: We're talking about the sanity phase, right?
>
> MR. GORIN: Right.
>
> THE DEFENDANT: Yes, I do.
>
> MR. GORIN: And you understood all the rights I explained to you?
>
> THE DEFENDANT: I knew them all anyways. Yes, I do.
>
> MR. GORIN: Additionally, now that you waive your right to have an N.G.I. defense, you understand that the minimum, minimum, you are looking at in terms of punishment is life without the possibility of parole, do you understand that?
>
> THE DEFENDANT: Yes, I do.

MR. GORIN: Do you understand that there's a possibility that if the jury in the penalty phase after they hear all the evidence they could unanimously come back and also give you the death penalty. Do you understand that? I'm just advising you of all the possible consequences.

THE DEFENDANT: Well—

MS. DEETZ: Just yes or no.

THE DEFENDANT: I'm going to beat Ms. Samuels.

Yes, I do understand it.

MR. GORIN: You understand that potentially, possibly, you could get the death penalty by this jury?

THE DEFENDANT: I understand it, but it's not going to happen.

MR. GORIN: Okay.

Now, if you were to have a new trial, if you chose to have a new trial because the—if the jury came back hung and the jury was to declare a mistrial on Counts 2 and 3, what would happen is you would have a new trial on sanity and then potentially you would not be getting life or death, you would just potentially be getting 27-to-life. That's the best scenario for you in case you were to get a new trial and you were found insane in the new trial. Do you understand that, sir?

THE DEFENDANT: Yes, I do.

MR. GORIN: Does counsel join in these waivers and concur in the withdrawing of the N.G.I., Mr. Applebaum and Ms. Deetz?

MR. APPLEBAUM: I don't join in the waivers. I will concur that Mr. Bloom understands the procedure.

MR. GORIN: Does the court find that this waiver is knowingly, intelligently and effectively made?

THE COURT: I find that the waiver is knowingly—intelligently and knowingly made.

And, Mr. Applebaum, do you concur that this is a People versus West, that it's in his own best interest perhaps because of the make up of the present jury?

MR. APPLEBAUM: No.

THE COURT: You don't?

MR. APPLEBAUM: I don't. It's such a hybrid situation, judge.

THE COURT: Okay. All right. I won't press it, then.

MR. APPLEBAUM: I think Mr. Bloom should retain counsel for penalty, but he has chosen not to do so.

MS. SAMUELS: I would simply like to add I think that the waivers are fine. You have the right to all those rights, Mr. Bloom, that we told you about you would have if we were to proceed to a second sanity phase, do you understand that? Those rights aren't just for this jury.

If we were to proceed to a second sanity phase, you would have all those same rights: the right to remain silent, the right to call witnesses. Do you understand those rights and give up those rights?

THE DEFENDANT: I understand my rights, Ms. Samuels, and I give them up. Let's go to penalty.

MS. SAMUELS: You got it.

(40RT 4690-4694.)

Following the withdrawal of appellant's insanity plea, the court turned to the issue of appellant's self-representation at the penalty phase and took appellant's formal *Faretta* waiver:

THE COURT: All right. Mr. Bloom, by the *Faretta* case I'm required to give you certain things and I know you understand them and know all the consequences but it's necessary for the record if this case is on appeal, which it probably will be some day, that the other court understands that you understood what I'm saying. Okay? So let's start.

You understand, of course, that you have the right to be represented by counsel and you have knowingly and intelligently given up that right, so we are past that.

And you understand that there are many dangers and disadvantages in acting as your own lawyer and some of which are you are too involved in your own case to make the right decision in handling your case. Do you understand that?

MR. BLOOM: Yes, ma'am.

THE COURT: You do not have the legal training or experience to make the right decisions about your case. Do you understand that?

MR. BLOOM: I understand that Ms. Samuels and Mr. Gorin are more experienced than me, but, yes, I do understand. They have more experience.

THE COURT: And, as you have just acknowledged, that you will be opposed by an experienced prosecutor who will know how to handle the case, you certainly recognize that?

MR. BLOOM: I also recognize on legal matters Ms. Samuels is probably a lot smarter than me, but I made better grades in high school.

THE COURT: All right. You understand you'll receive no special treatment from the court?

MR. BLOOM: I wouldn't ask you for none.

THE COURT: And you will be required to follow the same rules and procedures that a lawyer must follow. Do you understand that?

MR. BLOOM: Okay.

Can I say something about that?

THE COURT: Sure.

MR. BLOOM: Okay. I want to qualify that answer.

I do understand that; however, I would like to say that if I accidentally make a mistake, it's a mistake on ignorance. So if I make a mistake, it's not on purpose.

I understand what you said, but, if I make a mistake, it's not on purpose, it's not to offend you or to offend Ms. Samuels, it's on ignorance because, like I said before—but, yes, I do understand that. But it will be an honest mistake.

THE COURT: Okay. You will—and you understand you'll be expected to know as much as an attorney does in handling your case?

MR. BLOOM: I know my case very well.

THE COURT: I think that's apparent.

MR. BLOOM: And I know Ms. Samuels' case very well.

THE COURT: And I'm sure you understand that if you—that if you are not happy with the penalty, the result of the case, that you cannot raise the issue of it would have been a different result if I had a lawyer, they could have done better. You've made your choice and it was free—

MR. BLOOM: I can't claim I.A.S. against myself.

THE COURT: Right.

MR. BLOOM: I understand that.

I want you to know that I'm not going to complain about you on appeal. I'm going to complain about Tonya and Mr. Applebaum, not about you, just about Tonya and Mr. Applebaum.

THE COURT: Complain about anyone you need to. If I'm included in that, I understand.

MR. BLOOM: I wouldn't do that.

THE COURT: You know the elements with which you are charged, I am certain, and you know the consequences and you know the defenses, that it's aggravating factors versus mitigating factors, you understand and know all of that, I'm sure?

MR. BLOOM: Aggravation has to substantially outweigh mitigation.

THE COURT: Correct.

MR. BLOOM: Penal Code section 190.3. I'm not stupid.

(40RT 4701-4703; see also 24CT 6241.)

Later the same day, the prosecution noted that Penal Code section 1018 requires that counsel consent to a guilty plea in a capital case. (40RT 4710.) Citing *People v. Medina* (1990) 51 Cal.3d 870, the People contended that the withdrawal of an insanity plea was not tantamount to a guilty plea and therefore did not require counsel's consent. (40RT 4711-4712.) The prosecution further requested, "out of an abundance of caution," that the court make a finding that appellant was competent to withdraw the plea. (40RT 4713.) The court again expressly found appellant competent:

> As I stated before, I think you are very articulate. I think you are aware of every single thing and understand the nature of and the consequences of everything that has happened in this court. And you are certainly well versed on the law.
>
> And I know sometimes you became agitated with the whole procedures as many of us do, even the jurors here. I think your agitation is explained by the process and what is going on. But I find you are fully competent to represent yourself. And I see no signs of mental incompetence.

(40RT 4713.)

The prosecution then requested that appellant state his reasons for withdrawing the insanity plea, and observed that appellant had made "a very rational decision" to withdraw his plea and that the record should be protected against a later competency challenge. (40RT 4714-4715.) Defense counsel objected to any discussion about their meeting with appellant, and also stated that they continued to entertain a doubt as to his

competence to stand trial. (40RT 4715-4716.) The court observed that it, too, thought appellant had made "a very intelligent decision" to avoid a sanity finding by the court that might then sway the "holdout" jurors. The court also ruled that appellant had no obligation to disclose his reasons. (40RT 4716-4717.)

Nonetheless, appellant waived his privilege and stated that while he would have preferred a declaration of mistrial and a new jury, he withdrew his plea because he did not want the case to be sent to a new trial judge, and that his attorneys disagreed with him about this strategy. (40RT 4719-4721.) The prosecutor confirmed that she had told the defense that the penalty phase would likely not be retried if the jury hung, although the decision was not up to her. (40RT 4721-4722.)[62] The prosecutor also summarized that appellant had, indeed, made a rational strategic decision: "He decided keeping [this judge] is more important than he has to keep a jury that he is not happy with. [¶] And that is a fairly legitimate strategic decision by the defendant that he wants to stay in [this] court and he is prepared to keep a jury that he is not entirely satisfied with in order to do so." (40RT 4722.)

The penalty phase then proceeded, with appellant acting as his own attorney. Appellant told the jury during his penalty-phase opening statement that the mental defense had been "fabricated" and that he had absented himself from the sanity-phase proceedings because he did not want to be part of the "trick" performed by his lawyers. (42RT 5060.) In addition, a substantial portion of appellant's penalty-phase evidence was directed to disavowing the mental defense presented earlier during the trial;

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[62] The prosecutor later reiterated that she had only told appellant that her recommendation to her office's committee would be to not retry the case, but that the ultimate decision was not hers to make. (44RT 5473.)

this included presentation of the testimony of Judge Hoff, who stated that he believed appellant had been competent during the proceedings before him. (42RT 5074-5080; 42RT 5156-5171.)

During the penalty phase, the prosecutor complained to the court that appellant was abusing his right to self-representation and "trying to make a circus of this hearing." The prosecutor asked the court to "either somehow control him or take away his pro per privileges." The trial court admonished appellant to follow the court's instructions. (41RT 5138-5140.)

Later during the penalty phase, appellant attempted to call his former attorneys as witnesses (in an effort to establish that he had been opposed to presenting a mental defense in the case). Counsel refused to testify, on the ground that they believed appellant remained incompetent and therefore could not waive his attorney-client privilege. The court noted that appellant had consistently been found competent. (43RT 5182-5183.) The prosecutor stated that the position of defense counsel appeared to be based on a strategy to delay resolution of the case, that appellant's behavior had not changed since earlier in the proceedings, when counsel declined to declare a doubt, and that "it is clear to everybody in this courtroom for months now that he is totally aware of what's going on. He is completely clear on what is happening and what has happened so far." (43RT 5185-5186, 5189-5190.) The court concurred:

> Well, I will state once again I feel strongly that the defendant is competent to represent himself. I do not see any need to appoint a doctor. [¶] There have been doctors repeatedly that have been appointed that have testified in this case. And not one psychiatrist, doctor or whatever they were that testified convinced me that he wasn't competent.

(43RT 5191.) The prosecution commented that its consulting psychiatrist, who had been in court the previous day, agreed that appellant was competent. (43RT 5196.)

Although the court declined to declare a doubt—because it had "absolutely none as to appellant's competence to waive the privilege"—it agreed to appoint Dr. Sharma to evaluate appellant for competency and advise the court in an effort to persuade appellant's attorneys to testify. The court also commented that it had more confidence in Dr. Sharma than in any of the psychiatrists who had testified during the trial. (43RT 5198-5199.) The court later also told appellant, "You heard [defense counsel's] position. I disagree with their position that you are [not] competent. They say you are incompetent, I say you are competent." The court also stated that appellant's failure to cooperate with Dr. Sharma would "in all likelihood" not help him in his effort to call his attorneys as witnesses. Addressing appellant's concern that Dr. Sharma might find him incompetent, the court further informed appellant, "I don't think he's going to say you are incompetent, but if he does I will certainly give you an opportunity to rebut it. . . . I've seen you and it would take a lot of convincing to convince me that you are incompetent to represent yourself." (43RT 5218-5222.)

The prosecutor thereafter again complained about appellant's behavior, stating that he was "uncontrollable in the courtroom, he does not honor objections, he says whatever he wants to say despite objections and this court's ruling. He's making a mockery of this entire trial." The prosecutor asked the court to revoke appellant's self-representation privileges, but the court denied the request on the ground that appellant's former attorneys had indicated they would refuse to resume representation and "it would cause a delay to appoint another attorney." (44RT 5391.)

Still during the penalty phase, after having told the jury that the mental defense had been a ruse, appellant asked to reinstate his insanity plea. He argued that the court had abused its discretion by allowing him to withdraw his insanity plea over the objection of counsel, because he had not understood the consequences. Appellant contended that he was unable to comprehend the court's admonitions until he read the transcripts, because he had trouble processing information orally. He also stated that he had had no sleep the night before withdrawing his plea and was confused at the time. (44RT 5435-5441.) The prosecution countered that appellant simply had "a very bad case of buyer's remorse," that there had previously been no indication that appellant did not understand oral information, and that, to the contrary, appellant had provided cogent reasons for withdrawing his plea. (44RT 5441-5443.)

The court agreed that appellant had "buyer's remorse," and denied the request:

> I asked you orally each *Faretta* motion and you answered it responsively. There wasn't any indication that you couldn't process the portion of the questions I was giving you.
>
> The record is clear that you understood your rights when you withdrew your plea.
>
> . . .
>
> And your request to reinstate your not guilty by reason of insanity plea is denied. You are clearly able to process information orally. And the record is replete with it. You have been able to do that up until today when you started taking notes and yet you were able to come back very quickly on redirect and just go boom, boom, boom through your notes and answered the questions.
>
> So your request is denied

(44RT 5446.)

Immediately thereafter, appellant declared a doubt as to his own competence, which the court rejected out of hand. (44RT 5447-5448.) Appellant then immediately requested to relinquish his right to self-representation and proceed with counsel. (44RT 5448-5449.) The court stated that counsel would be permitted to present the witnesses appellant already had under subpoena, but counsel would not be permitted to "go back and litigate anything else." The prosecution opposed the request, saying that appellant was simply "playing games" since he had already disparaged his attorneys in front of the jury, and he was "making a mockery of the entire process." (44RT 5449.) The prosecution argued that appellant was "very bright" and was trying to "create more issues" because the penalty phase had not gone well for him. (44RT 5450.) Further, the prosecution argued that appellant had never before suggested that he needed information in writing in order to process it and that counsel would undoubtedly have requested that his waivers be in writing if that had been the case. (44RT 5451-5452.)

The court stated that it agreed with the prosecution, and denied appellant's request:

> . . . I was thinking back in relation to his former counsel. When he called Mr. Applebaum a dump truck several of the jurors laughed.
>
> And he has continually referred to this, as he used the phrase, bullshit defense of insanity that they created and it was all in their minds. They told the psychiatrist what to do, which at this point in time counsel would have, in my opinion, very little credibility with the jury if they believe what you said, Mr. Bloom.
>
> So you have certainly put their reputation, their ethics in issue before the jury. And they would be totally ineffective to come in at this point after what you have done to represent you.

> You have made your own bed and to use an old phrase, you will just have to lie in it.
>
> I think you are being very cunning and manipulative. Upon reflection you probably think I should have done this or I shouldn't have done that. I should have changed my attitude, but you knew the consequences when we started this as a pro per. And you will continue to until we complete this case.

(44RT 5452-5453.)

Appellant then threatened to "force a mistrial" during the penalty phase. The court warned appellant that any intentional violations of court orders would be "at your own risk" and that the court would cut off his argument if necessary. (44RT 5453-5455; see also 46RT 5681-5700.)[63] A recess was taken, and when the court returned to the bench, the prosecution informed the court that appellant had berated counsel during the break. The prosecution also called a sheriff's deputy to the stand, who testified that appellant had threatened the prosecutors. (44RT 5456-5460.) Following that testimony, appellant renewed his motion to reinstate his insanity plea, and also again declared a doubt about his own competence. The court denied the motion and refused to "recognize" the declaration of doubt, noting that the court had already appointed Dr. Sharma to evaluate appellant in connection with the waiver of his attorney-client privilege and that appellant was "extremely competent to represent [him]self." (44RT 5460-5468.)

Ultimately, appellant made an express decision not to cooperate with Dr. Sharma, and Dr. Sharma was therefore unable to conduct any meaningful evaluation of appellant. (44RT 5220-5222, 5464-5468, 5474-5480.) In relation to these developments, the prosecution made a detailed

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[63] Appellant nonetheless continued to threaten to disrupt the proceedings when he felt he did not get his way. (See 46RT 5609-5610.)

statement regarding appellant's competence, to the effect that the declaration of doubt by the defense appeared to have been a strategic decision not based on any actual change in appellant's mental state. (45RT 5486-5489.) The court agreed that the declaration of doubt as to appellant's competence had been a "strategic plan" by the defense and again stated that "I still have absolutely no doubt as to the defendant's competence." (45RT 5493.)

The court later ordered defense counsel to testify, declaring, "I still do not have any doubt as to defendant's competence to represent himself. He's been on the stand for a great length of time. I've had an opportunity to observe him ask him direct questions and answer cross-examination questions." (46RT 5643.) When counsel still refused to testify, appellant again asked to reinstate his insanity plea and to relinquish self-representation. The court rejected the requests, observing: "Let the record reflect that during Mr. Bloom's outburst here, he was able to cite cases, name and citation without reference to anything. He is now inducing a ploy to interfere with the process of this penalty phase as he's not happy with the way things are going." (46RT 5650-5652.) The court further observed:

> I would also not have any confidence in any psychiatrists that examined the defendant since he has told in great detail how he malingered, how he knew how to work the system with the psychiatrist.
>
> . . .
>
> And the psychiatrists that would examine him now, he has told in great detail to the jury how he knows how to work the system, so he can work it to his advantage, he can—by stalling. He knows all of the tricks.
>
> So I think the court's opinion of his competence is as qualified as any psychiatrist at this point.

(46RT 5654-5655.) The court also again noted that, given appellant's disparagement of counsel before the jury, counsel would have "no credibility" if they were to resume representation at that point. (46RT 5650-5657.)

When appellant later claimed that his competence had been inadequately assessed because Dr. Sharma had never rendered an opinion, the court stated that no further evaluation was needed because it had found appellant competent, and "[m]y determination was based on my observations of [appellant] in court and many, many hours over three months and that's what my determination that [appellant was] competent was based on." (46RT 5684-5685.)

Appellant later made a lengthy and articulate closing argument at the penalty phase, in which he again repudiated the mental defense. He also emphasized the abuse he suffered from his father and he asked the jury to return a verdict recommending life in prison. (49RT 5925-5990, 5993-6088.)

B. Relevant Legal Principles

"The law on competency is well established." (*People v. Ramos* (2004) 34 Cal.4th 494, 507.) Due process and state statutory law (see Pen. Code, § 1367) prohibit the trial of a defendant who is mentally incompetent. (*Ibid.*) "To be competent to stand trial, [a] defendant must have 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and 'a rational as well as factual understanding of the proceedings against him.'" (*Ibid.*, quoting *People v. Welch* (1999) 20 Cal.4th 701, 737.) A defendant is presumed competent; however, a trial court is required, sua sponte if necessary, to stop the proceedings and conduct a hearing whenever it appears that there is substantial evidence of the defendant's incompetence to stand trial. (*Ibid.*; see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1110.) Substantial

evidence in this context is evidence that raises a reasonable doubt. (*Ramos*, *supra*, 34 Cal.4th at p. 507.)

Substantial evidence of a defendant's incompetence may arise from different sources, including expert psychological testimony, or the defendant's own behavior. (*Ramos*, *supra*, 34 Cal.4th at p. 507.) For example, a sworn expert opinion of incompetence to stand trial, based on an examination of the defendant, will satisfy the substantial evidence test. (*Id.* at pp. 507-508.) On the other hand, a mere "'litany of facts, none of which actually relate[] to his competence . . . to understand the nature of th[e] proceeding[s] or to rationally assist his counsel,'" is inadequate. (*Id.* at p. 508, quoting *People v. Hayes* (1999) 21 Cal.4th 1211, 1280-1281.) "In other words, a defendant must exhibit more than bizarre, paranoid behavior, strange words, or a preexisting psychiatric condition that has little bearing on the question of whether the defendant can assist his defense counsel." (*Ibid.*)

A trial court's decision whether to hold a competency hearing is entitled to deference because of the court's opportunity to observe the defendant during trial. (*People v. Rogers* (2006) 39 Cal.4th 826, 847.) The decision is therefore reviewed for abuse of discretion. (*Ramos*, *supra*, 34 Cal.4th at p. 507.)

C. Competence at the Guilt Phase

Appellant first claims that the court should have stopped the proceedings and held a competency hearing during the guilt phase based on the following circumstances: (1) a competency hearing was held in 1983 during the first trial; (2) counsel at the first trial was later found ineffective in his preparation of a mental defense; (3) the county jail initially found that appellant met "LPS" criteria (see Welf. & Inst. Code, § 5000 et seq.); (4) the original retrial judge in the case at one point expressed an intention to appoint a psychiatrist to evaluate appellant (but never did so); (5) several

defense experts in 1993 offered opinions during federal-court proceedings that appellant was incompetent at his initial trial; (6) two mental health experts testified at the initial trial that appellant was incompetent; (7) appellant demonstrated "odd behavior" and "paranoia and delusions" during the retrial; (8) appellant made paranoid allegations toward counsel during several *Marsden* hearings; (9) appellant exhibited an "odd, likely delusional" understanding of the legal system by making eccentric requests, using affected terminology, and choosing witnesses for irrational reasons; (10) appellant "demonstrated an irrational and unrealistic view of the facts and issues" in the case; (11) appellant had an "odd relationship with defense counsel"; (12) appellant denied his own mental disabilities; (13) defense counsel at the retrial expressed concern about appellant's competence (while not expressly declaring a doubt pursuant to section 1358); (14) appellant interfered with counsel's presentation of the case and made repeated *Marsden* motions; and (15) defense counsel informed the court that appellant had become "increasingly agitated" after having stopped taking his prescribed medication. (AOB 142-157.) The claim fails.

There was no substantial evidence of incompetence during the guilt phase. While it is obvious that appellant behaved eccentrically at trial and it is possible he suffered some sort of mental problem, it is equally obvious that appellant very well understood the proceedings against him and was more than sufficiently able to consult with his attorneys. (See *Ramos*, *supra*, 34 Cal.4th at p. 507; see also Arg. XIII. A., *post*.) Thus, "[t]he short answer to appellant's claim is that nothing in the record suggests that at any time during these proceedings appellant was unable to understand the nature of the proceedings or to assist counsel in conducting the defense in a rational manner." (*Hayes*, *supra*, 21 Cal.4th at p. 1282.) Rather, appellant presents merely "a litany of facts, none of which actually relate[] to his

competence . . . to understand the nature of th[e] proceeding[s] or to rationally assist his counsel." (*Id.* at pp. 1280-1281.)

This Court has repeatedly held that "bizarre, paranoid behavior, strange words, or a preexisting psychiatric condition that has little bearing on the question of whether the defendant can assist his defense counsel" are insufficient to show incompetence to stand trial. (*Ramos*, *supra*, 34 Cal.4th at p. 508; accord, *People v. Lewis* (2008) 43 Cal.4th 415, 524; *People v. Rogers*, *supra*, 39 Cal.4th at p. 847; *People v. Ramirez* (2006) 39 Cal.4th 398, 467.) Thus, appellant's "odd" and allegedly "paranoid" behavior cannot support his incompetency claim. Nor can any instances of disruptive behavior or *unwillingness* to assist his attorneys support his competency claim, since mere belligerence does not show an *inability* to assist in his defense. (See *Lewis*, *supra*, 43 Cal.4th at p. 526; *People v. Medina* (1995) 11 Cal.4th 694, 735.)

Appellant also relies heavily on expert opinion from 1983 and 1993 regarding his competence at the first trial. As explained, however, a jury found appellant competent at the time of the first trial, and the expert opinion from the federal habeas corpus proceedings is freighted with inherent problems attendant to retrospectively determining a defendant's competence to stand trial. (See *Lightsey*, *supra*, 54 Cal.4th at p. 704.) Similarly, none of that evidence was directed to appellant's competence in the *present* proceedings. Thus, it did not represent sworn expert testimony, "with particularity," that appellant was incompetent for purposes of *retrial*, which might have warranted a hearing. (See *Ramos*, *supra*, 34 Cal.4th at pp. 507-508.)[64] Nor could the trial testimony relating to appellant's mental

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[64] This is true, from the trial court's perspective, regardless of the prosecutor's opinion that if appellant was incompetent at the first trial he remained incompetent at the second trial. Of course, appellant was found

(continued...)

defense, the ineffective assistance of appellant's attorney at the first trial relating to his mental defense, or the county jail's LPS assessment support a competency claim. Again, this Court has repeatedly held that evidence of general mental problems, even severe ones, will not support a competency claim unless it can be specifically tied to the standard governing competency to stand trial. (See *Lewis*, *supra*, 43 Cal.4th at p. 525; *People v. Leonard* (2007) 40 Cal.4th 1370, 1415-1416; *Rogers*, *supra*, 39 Cal.4th at pp. 848-849.) No evidence before the trial court suggested that appellant's alleged mental impairments impacted, specifically, his ability to understand the proceedings and assist his attorneys.[65]

Finally, even taken together, the circumstances cited by appellant do not amount to substantial evidence of incompetence. As explained, none of the cited circumstances bore directly on appellant's ability to understand the proceedings and assist his attorneys. Nor does appellant's "litany of facts" have any accumulating effect: even cobbled together, they still do not bear directly on the competency standard. (See *Ramos*, *supra*, 34 Cal.4th at p. 508; *Hayes*, *supra*, 21 Cal.4th at pp. 1280-1281.) Indeed, the record strongly rebuts any allegation of incompetence, as appellant plainly understood the nature of the proceeds, the pertinent facts and issues, and his relationship with counsel. (See Arg. VIII. A., *ante*.) Accordingly, the trial court did not abuse its discretion by failing to hold a competency hearing during the guilt phase.

(...continued)
competent at the first trial, and these comments must be assessed in that context and in the context of the prosecution's continuing instance that appellant was at all times competent. (2RT 202-203.)

[65] In fact, it is notable that none of the four experts presented by the defense in this case were able to agree on a diagnosis of appellant's purported mental defects.

D. Competence at the Sanity Phase

Appellant also contends that the trial court should have held a competency hearing during the sanity phase, based on the following additional factors before the court: (1) defense counsel declared a doubt as to appellant's competence based on his sudden "deterioration"; (2) Dr. Vicary had opined during the guilt phase that appellant was likely to "snap" under stressful situations; and (3) appellant absented himself from the proceedings during the sanity phase. (AOB 157-161.) The claim again fails.

First, it is well established that defense counsel's declaration of a doubt as to the defendant's competence is "entitled to some weight" but is not itself determinative. (See *Lewis*, supra, 43 Cal.4th at p. 525.) That should be especially true where, as here, the trial court has made a finding that the declaration of doubt was merely a "strategic plan." (45RT 5493.) Moreover, a defendant's voluntary absence from proceedings does not provide substantial evidence of incompetence. (See *Ramirez*, *supra*, 39 Cal.4th at pp. 465-466.) Again, there is a distinction between belligerence and an *inability* to assist counsel. (See *Lewis*, *supra*, 43 Cal.4th at p. 526; *Medina*, *supra*, 11 Cal.4th at p. 735.) Finally, Dr. Vicary's opinion that appellant was likely to snap under stressful situations did not raise a doubt as to appellant's competence. At the time Dr. Vicary provided that testimony he was under probation by the California Medical Board for having made false statements in documents. (28RT 3501.) But perhaps more importantly, nothing showed that appellant had in fact "snapped." As the court and the prosecution both stated, appellant had been manifestly competent throughout the proceedings, and there had been no apparent change in that regard. (36RT 4534-4536.)

The trial court was entitled to rely on its own assessment of appellant's behavior in this context. (See *Ramos*, *supra*, 34 Cal.4th at p.

509 ["When a defendant has not presented substantial evidence to indicate he was incompetent and the court's declaration of a doubt is therefore discretionary, its brief reference to the defendant's demeanor is not error"]; *Lewis*, *supra*, 43 Cal.4th at p. 526 ["The trial court had the opportunity to observe defendant's behavior and demeanor at trial. The court observed that defendant was 'perceptive' and able to cooperate with counsel. Nothing in this record causes us to doubt the accuracy of the trial court's assessment"].) And, contrary to appellant's contention, while the court made a passing observation that appellant's cooperation was not necessary at the time counsel declared a doubt—during the jury's deliberations—it did not rest its decision on that observation. (See AOB 160.) Rather, the court quite specifically declined to declare a doubt on the basis that appellant had been well behaved and "extremely intelligent" throughout the trial. (36RT 4534-4535.) The trial record, reflecting appellant's numerous cogent arguments throughout, amply supports that finding. (See Arg. VIII. A., *ante*.)

The trial court did not abuse its discretion by failing to hold a competency hearing during the sanity phase.

E. Competence at the Penalty Phase

Appellant finally contends that the trial court should have held a competency hearing during the penalty phase, based on the following additional factors before the court: (1) the fact that appellant withdrew his sanity plea; (2) the reasons appellant gave for withdrawing the plea; (3) counsel's refusal to sanction the withdrawal; (4) counsel's reiteration of doubt as to appellant's competence; (5) appellant's treatment of witnesses while representing himself; (6) appellant's refusal to cooperate with Dr. Sharma; (7) appellant's testimony during the penalty phase; and (8) appellant's argument to the jury. (AOB 162-168.) However, while

appellant's actions may certainly have been ill-advised, they did not amount to substantial evidence of incompetence to stand trial.

There is, of course, a vast difference between merely foolish behavior and behavior that amounts to substantial evidence of incompetence to stand trial. "The adage that 'a lawyer who represents himself has a fool for a client' is the product of years of experience by seasoned litigators.'" (*Trope v. Katz* (1995) 11 Cal.4th 274, 292, quoting *Kay v. Ehrler* (1991) 499 U.S. 432, 437-438 [111 S.Ct. 1435, 113 L.Ed.2d 486].) Or, as the court here put it, a defendant representing himself "is always his own worst enemy." (46RT 5643.) While appellant's choices to withdraw his plea of insanity and to represent himself may have ultimately proven to be unwise, nothing in the record shows that they were the product of an inability to comprehend the proceedings or that they were intentionally self-defeating due to a mental impairment. (See AOB 162.) Rather, as the prosecutor at trial stated, ". . . the defendant has done some things that I can't understand why he would do them, but I think the majority of his opening statement and the majority of his witness list appears to be geared to getting a sentence of life without the possibility of parole. [¶] He has put in things that don't appear to help him, but he does seem to believe he has a strategy whereby those things will serve him in the end." (43RT 5190.)

Even a cursory review of the many specific and coherent legal arguments made by appellant, his examination of witnesses, and his arguments to the jury can leave no doubt that he perfectly well understood the proceedings against him. (See Arg. VIII. A., *ante*.) In *People v. Hayes*, this Court noted that a defendant's effective performance in representing himself can be powerful evidence of competence:

> . . . [A]ppellant persuaded the trial court to permit him to act as cocounsel during the penalty trial. His presentation of that motion, the support he offered for it, and his subsequent presentation of several presentence motions and arguments in

> support thereof demonstrate beyond any doubt that he was fully aware of the nature of the proceedings and able to assist counsel. Appellant's motions for a continuance, for new trial based on newly discovered evidence and denial of various constitutional rights, for a competency hearing, and his claim that he was unable to rationally assist defense counsel themselves reflect complete awareness of the nature of the proceedings and, on their face, completely rational legal decisionmaking.
>
> The trial court denied all of appellant's motions, and with respect to the motion for a competency hearing ruled that from the court's observation it appeared that appellant understood the nature of the proceedings and was able to assist and act as his own counsel. The court declared that no doubt had arisen in the court's mind as to appellant's mental competence.
>
> If appellant was in fact incompetent during any part of these proceedings that fact is not apparent on the face of this record. There was no error in failing to order a competency hearing.

(*Hayes*, *supra*, 21 Cal.4th at p. 1282.) The same analysis applies here: appellant's more-than-effective self-representation, however misguided or unwise, demonstrated rational decisionmaking and a clear ability to comprehend all the proceedings.

Nor can appellant's argument that his verbal ability masked his underlying incompetence be accepted. (See AOB 176-177.) Trying to thread the mental-defense needle amid abundant evidence of appellant's rational behavior, Dr. Watson testified at the guilt phase that, despite his verbal acuity, appellant's ability to process social information and read verbal cues was nonetheless deficient. (22RT 2728-2731, 2748-2749.) Dr. Vicary similarly testified that he had been "fooled" by the fact that appellant was articulate when he first examined him, but he believed that appellant had significant mental impairments based on additional information that subsequently came to light. (28RT 3522-3524.) Dr. Vicary emphasized the low threshold controlling his initial competency determination, but nonetheless stated that in light of the new information he

would have found appellant incompetent. (28RT 3438-3439, 3447.) These opinions largely concerned appellant's mental defense and not the issue of competence directly. To that extent, the opinions do not support a finding of incompetence. (See *Lewis*, *supra*, 43 Cal.4th at p. 525; *People v. Leonard* (2007) 40 Cal.4th 1370, 1415-1416; *Rogers*, *supra*, 39 Cal.4th at pp. 848-849.)

Dr. Vicary's opinion that, in retrospect, he thought appellant was incompetent during the first trial, was also not directly related to the retrial proceedings and, as explained, was subject to justifiable skepticism given his probationary status and shifting opinions. (See 28RT 3501.) But more importantly, appellant's own statements, decisions, and behavior so compellingly showed an understanding of the proceedings that the expert opinion appellant points to cannot, in context, have amounted to substantial evidence of incompetence. Given the sheer level of appellant's ability to cogently represent himself, there can be no doubt that appellant was competent.

Appellant's argument that the trial court improperly relied on its subjective assessment of appellant and failed to give deference to expert opinion must also be rejected. (See AOB 168-179.) A court is not required to accept an expert's opinion that a defendant is incompetent, particularly where the court finds the expert opinion "less than credible," and the record discloses that underlying the competency claim are "various tactics to delay and derail the trial." (*People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1047-1048.) Further, a court's "opportunity to observe defendant's behavior and demeanor at trial" can be critical in making a competency assessment, even in the face of a declaration of doubt by counsel, generalized expert testimony, and obstreperous behavior by the defendant. (*Lewis*, *supra*, 43 Cal.4th at p. 526.) "Although a court may not rely solely on its observations of a defendant in the courtroom if there is substantial

evidence of incompetence, the court's observations and objective opinion do become important when no substantial evidence exists that the defendant is less than competent to plead guilty or stand trial." (*Ramos*, *supra*, 34 Cal.4th at p. 509.) Thus, "[w]hen a defendant has not presented substantial evidence to indicate he was incompetent, and the court's declaration of a doubt is therefore discretionary, its brief reference to the defendant's demeanor is not error." (*Ibid.*) Here, there was no substantial evidence of incompetence, and therefore the court's reliance on its own observations of appellant's behavior was entirely appropriate.[66]

Accordingly, the trial court did not abuse its discretion by declining to hold a competency hearing during the penalty phase.[67]

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[66] Appellant's argument that the trial court erred by failing to appoint the director of a regional center for the developmentally disabled to evaluate him accordingly fails because that provision becomes relevant only after the defendant has been found incompetent. (See AOB 173-174; see also Pen. Code, § 1370.1, subd. (a)(1)(B).) Moreover, respondent points out that the evidence of a developmental disability here was far from concrete. Dr. Watson and Dr. Mills cursorily pointed to certain developmental factors as possible causes of appellant's purported mental disabilities, but their diagnoses were based ultimately not on those causes but on testing. (See 22RT 2708-2709, 2731-2737, 2741-2744; 26RT 3135-3136.) Moreover, Dr. Mills's diagnosis of Asperger's Disorder was not adopted by any other expert and Dr. Mills himself ultimately could not explain how it was consistent with his diagnosis of dissociative disorder. (27RT 3357-3359.) Thus, even had the trial court found appellant incompetent, it would not have been obligated to appoint the director of a regional center for the developmentally disabled.

[67] Should the Court disagree and find that the trial court erred, the appropriate remedy would be to remand the matter to allow the trial court to determine whether a retrospective competency hearing is feasible. Given that much of the evidence at trial focused on appellant's alleged mental impairments, and given that appellant was examined by mental health experts close in time to the trial, it may be that the inherent difficulties in conducting a retrospective competency hearing are "reduced" in this case. (See *Lightsey*, *supra*, 54 Cal.4th at pp. 702-711.)

IX. THE TRIAL COURT PROPERLY DENIED APPELLANT'S REQUEST TO REPRESENT HIMSELF AT THE SANITY PHASE

Appellant argues that "the trial court violated appellant's Sixth and Fourteenth Amendment rights by denying his motion to represent himself at the sanity phase." (AOB 269-282.) The claim must be rejected.[68]

A. The Court Properly Denied Appellant's *Faretta* Request

The Sixth Amendment to the United States Constitution guarantees a criminal defendant two mutually exclusive rights: the right to be represented by counsel at all critical stages of the criminal process (*Gideon v. Wainwright* (1963) 372 U.S. 335, 342 [83 S.Ct. 792, 9 L.Ed.2d 799]), and the "right to proceed *without* counsel when he voluntarily and intelligently elects to do so" (*Faretta v. California* (1975) 422 U.S. 806, 807 [95 S.Ct. 2525, 45 L.Ed.2d 562], original emphasis). The right to proceed without counsel is unconditional so long as the defendant's request is unequivocal and made within a reasonable time prior to trial. (*Faretta v. California*, *supra*, 422 U.S. at p. 819; *People v. Windham* (1977) 19 Cal.3d 121, 127-128.) On the other hand, an untimely request—i.e., one not made within a reasonable time prior to trial—is "addressed to the sound discretion of the trial court." (*Windham*, *supra*, 19 Cal.3d at p. 128, fn. 5.)

Appellant argues that this Court's well settled jurisprudence holding that an untimely *Faretta* motion is addressed to the trial court's discretion is incorrect and that the inquiry should instead solely focus on whether the defendant's request was unconditional. (AOB 271-274.) But contrary to appellant's fundamental implication, the Supreme Court in *Faretta* "clearly established" a "timeliness element" as a component of the constitutional

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[68] Again, because this claim bears on appellant's mental defense, which he admitted in the trial court was false, appellate relief is unwarranted. (See Arg. I. C. 1., *ante*.)

right to self-representation. (*Marshall v. Taylor* (9th Cir. 2005) 395 F.3d 1058, 1061 [addressing *Faretta* timeliness issue under federal habeas standard of 28 U.S.C., § 2254(d)].) This means that an untimely request to discharge counsel does *not* implicate the constitutional "unequivocal right of self-representation." (*Windham*, *supra*, 19 Cal.3d at p. 127.)

The United States Supreme Court has not drawn with any precision the dividing line between timely and untimely *Faretta* requests. (*Marshall*, *supra*, 395 F.3d at p. 1061.) However, while state and federal courts have disagreed where exactly that line is (see, e.g., *Windham*, *supra*, 19 Cal.3d at p. 128 [*Faretta* request timely if made within a reasonable time prior to the commencement of trial]; *Fritz v. Spalding* (9th Cir. 1982) 682 F.2d 782, 784 [*Faretta* request timely if made before jury empanelled, unless shown to be delay tactic]), there can be no reasonable dispute here that appellant's *Faretta* request, made during guilt-phase deliberations, was untimely (see *People v. Hamilton* (1988) 45 Cal.3d 351, 369 [capital trial, although divided into stages, is considered unitary proceeding and *Faretta* motion made during guilt-phase deliberations is untimely]). Accordingly, it was properly "addressed to the sound discretion of the trial court." (*Windham*, *supra*, 19 Cal.3d at p. 129, fn. 5; accord, *Bloom*, *supra*, 48 Cal.3d at p. 1220.)

In considering an untimely *Faretta* request, this Court has "directed trial courts to consider the 'quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.'" (*People v. Burton* (1989) 48 Cal.3d 843, 853, quoting *Windham*, *supra*, 19 Cal.3d at p. 128.) Appellant here attacks the trial court's particular reasoning in denying his motion, and also faults the court for not having made an express inquiry into some of the factors outlined in

Windham. (AOB 274-279.) However, *Windham* does not require a court to affirmatively state any particular reasons for denying an untimely *Faretta* request. (*Windham*, *supra*, 19 Cal.3d at p. 129, fn. 6.) Rather, a trial court's exercise of discretion on this issue will be upheld so long as "the record reflects its *explicit or implicit consideration*" of the *Windham* factors (*People v. Marshall* (1996) 13 Cal.4th 799, 828, emphasis added) or simply where "there were sufficient reasons on the record for the court to exercise its discretion to deny the request" (*People v. Perez* (1992) 4 Cal.App.4th 893, 904; see also *People v. Dent* (2003) 30 Cal.4th 213, 218 [trial court's denial of *Faretta* motion for improper reason will be upheld on appeal "if the record as a whole establishes defendant's request was nonetheless properly denied on other grounds"]). There was no abuse of discretion under this standard.

In denying appellant's request for self-representation at the sanity phase, the court cited the complexity of the case as a "strong factor" militating against granting the request. (33RT 4145.) This Court has explained that the "complexity of the case" is a proper consideration bearing on the timeliness of a *Faretta* request. (*People v. Lynch* (2010) 50 Cal.4th 693, 726.) Moreover, the complexity of the proceeding at which the defendant wishes to represent himself is directly related to potential disruption and delay, a consideration expressly sanctioned in *Windham*. (*Windham*, *supra*, 19 Cal.3d at p. 128.)[69] Indeed, the court also pointed

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[69] As appellant points out, regarding the complexity of the case, the court noted in particular that appellant faced an experienced adversary, and that consideration, per se, is not necessarily relevant to the *Windham* determination. (AOB 278.) However, the court's statement was made in response to *appellant's* apparent belief that, despite his unfamiliarity with the complexities of the sanity phase, he would be on equal footing with the prosecutor, who herself had never litigated a sanity phase. (See 30RT 3796-3797; 33RT 4145.) Thus, in context, this comment does not

(continued...)

directly to the risk of disruption and delay attendant to appellant's scheduling of psychiatric witnesses during the imminent sanity proceedings, a manifestly legitimate concern in the context of a mid-trial *Faretta* request. In other words, it was a "delay which might reasonably be expected to follow the granting of" appellant's request. (See *id.* at p. 128.) A trial court possesses discretion to credit this factor precisely because it is in the best position to measure the potential impact of disruption and delay. (See *People v. Welch* (1999) 20 Cal.4th 701, 734-735.)[70]

Appellant points to his numerous *Marsden* requests to replace counsel as support for his *Faretta* motion, on the basis that he had a history of dissatisfaction with counsel's representation. (AOB 280-281.) But appellant's history of conflict with his appointed attorneys also tended to cut against his *Faretta* request. Appellant's complaints against his attorneys largely centered on strategic and tactical disputes, and for that reason did not support substitution under *Marsden.* (See *People v. Dickey* (2005) 35 Cal.4th 884, 922 ["We do not find *Marsden* error where complaints of counsel's inadequacy involve tactical disagreements"].) Appellant's *Faretta* request was made only after his opposition to the mental defense had been well documented and his numerous challenges to

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(...continued)
undermine the court's reliance on the complexities of the case as a factor militating against self-representation.

[70] The fact that the court later accommodated similar concerns when it permitted appellant to represent himself at the penalty phase does not undermine the court's exercise of discretion at the sanity phase. (See AOB 276-277.) Although judicial discretion must be bound by rational judgment, inherent in the concept of discretion is a range of permissible decisionmaking, about which reasonable people might disagree. (See *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.) Thus, the court's later rethinking of the issue in a different context does not establish that its earlier decision was unreasonable or that its concerns about disruption and delay (at either phase) were unfounded.

counsel's strategy on that front had been rebuffed. Such a scenario—a request for self-representation following the denial of a request for substitution of counsel—may suggest that the *Faretta* request is the product of mere frustration. (See *People v. Scott* (2001) 91 Cal.App.4th 1197, 1206; see also *People v. Williams* (1990) 220 Cal.App.3d 1165, 1170 [dubbing this situation "the *Faretta* game"].)

Indeed, the trial court alluded to a problem related to appellant's frustration, when it pointed out the inherent tension between self-representation at the sanity phase and the goal of the defense in that proceeding to show that appellant was insane at the time of the crimes. (33RT 4146.)[71] The potential danger was actually more acute than this inherent tension. Given appellant's history of resistance to his attorneys' strategy of mounting a mental defense, it could reasonably be expected that appellant might sabotage the proceeding, either intentionally or unintentionally. This was an appropriate consideration under *Windham* because it bore on the stage of the proceedings and the potential for disruption and delay. (See *Windham*, *supra*, 19 Cal.3d at p. 128.)

Accordingly, the trial court appropriately exercised its discretion under *Windham* in denying appellant's request for self-representation at the sanity phase.

B. Any Error Was Harmless

In any event, even if the court abused its discretion by denying appellant's request to represent himself at the sanity phase, the error was harmless. While the erroneous denial of a timely *Faretta* request is

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[71] As appellant suggests, it is not necessarily inconsistent for a defendant to represent himself in arguing that at the time of the offenses he was sane (AOB 278-279), but the court was nonetheless correct in identifying a tension in such a scenario, because self-representation could *tend* to undermine the insanity argument.

reversible per se, the erroneous denial of an *untimely Faretta* request, because it does not implicate constitutional concerns, is considered harmless unless it is reasonably probable the defendant would have achieved a more favorable result absent the error. (*People v. Nicholson* (1994) 24 Cal.App.4th 584, 594-595.)[72]

At the conclusion of the sanity phase, after the jury had returned a verdict of sane as to Count 1 and indicated that it was hung as to Counts 2 and 3, appellant elected to withdraw his insanity plea and proceed to the penalty phase. (24CT 6224-6229, 6233-6235, 6238-6240, 6263-6264.) The People had not presented any evidence at the sanity phase and had proceeded only by way of cross-examination of the defense witness. The defense witness, Dr. Wolfson, had testified extensively about appellant's purported personality disorders, but ultimately his theory was reduced to a highly unpersuasive tautology—that the very fact appellant killed his father was what established he was insane (see 35RT 4320-4321, 4327, 4332, 4340-4341, 4367-4370, 4376-4379)—which also depended on the jury accepting that Dr. Wolfson simply possessed keener insight than the several other experts presented during the guilt phase, all of whom had reached different conclusions about the nature of appellant's asserted mental problems. (See 35RT 4429-4430 [Dr. Wolfson testifies he is one of the only experts to have "gotten to the truth"].)

Nothing in the record suggests that appellant could have achieved any better result than his attorneys did by getting the jury to deadlock on Counts 2 and 3. As noted, appellant was opposed to the mental defense in the first place, and he agreed to proceed to the sanity phase only after the jury

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[72] For the reasons already discussed (Arg. IX.B., *ante*), appellant's argument that even an untimely *Faretta* request is constitutionally based must be rejected. (See AOB 281-282.)

returned second degree murder verdicts on Counts 2 and 3, stating, "this court knows how I feel about the mental defense, but apparently some of the [jurors] have bought into this lemon that was sold them." (34RT 4240.) Not only would appellant have entered the sanity phase half-heartedly, but there is no indication that appellant had any better evidence to offer than Dr. Wolfson's testimony. And appellant, an untrained and sometimes eccentric advocate, could not have presented that testimony more effectively than his attorneys did. In short, it appears that the best, and only, chance the defense had of securing favorable sanity-phase verdicts was upon the testimony of Dr. Wolfson, and there is no reasonable probability that appellant would have achieved a better result had he presented that evidence himself.[73] Accordingly, any error was harmless.

X. THE TRIAL COURT PROPERLY PROCEEDED WITH THE SANITY PHASE DESPITE APPELLANT'S REFUSAL TO ATTEND

Appellant argues that the trial court violated his state statutory rights by permitting him to voluntarily absent himself from the sanity phase proceedings, and that the court violated his state and federal constitutional rights by failing to adequately secure a waiver of his right to be present. (AOB 283-295.) There was no prejudicial error.[74]

"A defendant has the right, under the Sixth Amendment of the federal Constitution, to be present at trial during the taking of evidence. Nonetheless, as a matter of both federal and state constitutional law, a

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[73] Prior to the start of the sanity phase, the defense indicated that Dr. Mills and Dr. Watson would also testify, but those witnesses were not ultimately called. (34RT 4218, 4241-4242.) However, the jury had already heard extensive testimony from those witnesses during the guilt phase.

[74] Moreover, because this claim bears on appellant's mental defense, which he admitted in the trial court was false, appellate relief is unwarranted. (See Arg. I. C. 1., *ante*.)

capital defendant may validly waive presence at critical stages of the trial." (*People v. Weaver* (2001) 26 Cal.4th 876, 966, quotation marks, alterations, and citation omitted.) With respect to these constitutional rights, appellant argues that the trial court failed to adequately ensure that his waiver was knowing, voluntary, and intelligent by offering an admonition regarding the importance of his presence and by making a more specific inquiry concerning his waiver. (AOB 288-289.) These same arguments have been repeatedly rejected on materially indistinguishable facts, namely, where the trial court engaged in only a brief colloquy to ascertain that the defendant, in fact, wished to leave the courtroom. (See *People v. Moon* (2005) 37 Cal.4th 1, 20-21; *People v. Young* (2005) 34 Cal.4th 1149, 1212-1213; *Weaver*, *supra*, 26 Cal.4th at pp. 965-967.)

As this Court observed in *Weaver*, there is "no authority for [the] argument that [a reviewing court] must apply a heightened waiver standard under the circumstances, or that the trial court had a sua sponte duty to admonish [the defendant] of the importance of his decision to absent himself from the courtroom." (*Weaver*, *supra*, 26 Cal.4th at p. 967.) Rather, here, as in *Weaver*, the "[d]efendant was represented by counsel, and he himself chose, for his own reasons, to leave the courtroom." (*Ibid.*) The trial court properly ascertained that appellant wished to waive his "right to be here." (35RT 4252-4253.) And contrary to appellant's suggestion now, the record shows that he knew exactly what he was doing—that he opposed the presentation of the mental defense and wanted to absent himself from the courtroom to disassociate himself from it as part of his strategy for the penalty phase. (36RT 4525-453.) Because there is "nothing to suggest defendant's waiver . . . was other than knowing and intelligent" (*Moon*, *supra*, 37 Cal.4th at p. 21), there was no constitutional violation.

As a matter of statutory law, this Court has held that Penal Code sections 977 and 1043, when read together, forbid a nondisruptive capital defendant's absence from evidentiary proceedings, even if the defendant voluntarily waives the right to be present. (*Weaver*, *supra*, 26 Cal.4th at pp. 967-968.) Nonetheless, because error under those provisions is merely statutory, reversal is required only if it appears reasonably probable that a result more favorable to the defendant would have been reached absent the error. (*Id.* at p. 968.)

For the reasons discussed in relation to appellant's claim that he should have been permitted to represent himself at the sanity phase, there is no reasonable probability that the defense would have achieved any better sanity-phase result had appellant been present during the proceedings. Specifically, appellant's best hope at the sanity phase rested upon the uncompelling theory presented by Dr. Wolfson, and yet his attorneys were still able to secure a deadlock as to Counts 2 and 3. (See Arg. IX. C., *ante*.) And indeed, appellant unequivocally explained that, following the denial of his request for self-representation, he chose to absent himself from the sanity phase precisely because he was opposed to the mental defense. He even asked, belatedly, for permission to testify at the proceeding so he could sabotage his insanity plea. (36RT 4523-4533.) Thus, far from indicating that appellant might have helped to produce a more favorable result had he been present at the sanity phase, the record shows that appellant only wished to undermine his attorneys' efforts. (See *People v. Dickey*, *supra*, 35 Cal.4th at p. 924 [error in allowing capital defendant to absent himself from penalty phase harmless, in part, because defendant's "lack of desire" to receive sympathy might have undermined counsel's argument].)

Appellant argues that any constitutional error must be considered structural, requiring automatic reversal. (AOB 290-292.) However,

structural error occurs only in a "very limited class of cases" involving some "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Johnson v. United States* (1997) 520 U.S. 461, 468-469 [117 S.Ct. 1544, 137 L.Ed.2d 718] [quotation marks and citation omitted; listing narrow range of cases in which structural error was found].) A defendant's voluntary absence from proceedings—particularly proceedings the defendant wishes to undermine—cannot reasonably be considered a defect affecting the very framework of the trial. (See AOB 290, citing *Hegler v. Borg* (9th Cir. 1995) 50 F.3d 1472, 1476 [discussing involuntary absence from readback of testimony, observing that "absence error" must be assessed "in the context of the particular proceeding," and finding no structural error].) To the extent there was constitutional error here, it was harmless beyond a reasonable doubt for the reasons explained: appellant wished to undermine the mental defense, and therefore his presence could only have impeded the efforts of his attorneys. (See *Weaver*, *supra*, 26 Cal.4th at pp. 967-968.)

There was therefore no prejudicial error.

XI. THE TRIAL COURT PROPERLY PERMITTED APPELLANT TO WITHDRAW HIS PLEA OF NOT GUILTY BY REASON OF INSANITY

Appellant argues that the trial court erred by permitting him to withdraw his insanity plea for two reasons: (1) it was tantamount to a guilty plea and therefore violated Penal Code section 1018 because counsel did not consent; and (2) the trial court failed to ensure that appellant understood the gravity of the situation. (AOB 182-209.) These arguments fail.[75]

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[75] Again, because this claim bears on appellant's mental defense, which he admitted in the trial court was false, appellate relief is unwarranted. (See Arg. I. C. 1., *ante*.)

A. The Withdrawal of Appellant's Insanity Plea Did Not Violate Penal Code Section 1018

Penal Code section 1018 provides, in relevant part: "No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall that plea be received without the consent of the defendant's counsel." (Pen. Code, § 1018.) Appellant first argues that the trial court violated section 1018 by permitting him to withdraw his insanity plea without the consent of counsel. (AOB 191-194.) The argument rests entirely on the proposition that the withdrawal of an insanity plea is the same as a "plea of guilty of a felony." (See AOB 192 [citing *People v. Marshall* (1929) 99 Cal.App. 224, 228 for proposition that guilt verdict is not complete until sanity verdict has been rendered].) However, neither the plain language of the statute nor this Court's prior treatment of sanity-phase proceedings supports such an interpretation.

Section 1018 speaks to a court's "receiving" a plea. Here, of course, no plea was *received*; rather, appellant *withdrew* a plea. Section 1018 is also directed to a plea "of guilty of a felony." But no issue of guilt, and no resolution of any felony charge, is at issue in a sanity proceeding. Thus, the plain language of the statute does not support appellant's implicit assertion that the Legislature intended section 1018 to restrict the withdrawal of an insanity plea. Generally, it is the personal right of a defendant to control the choice of plea. (See *People v. Medina* (1990) 51 Cal.3d 870, 899-900; *People v. Gauze* (1975) 15 Cal.3d 709, 717-718, 125.) The only restriction on that right, as appellant points out, is the statutory one at issue here, requiring the consent of counsel to enter a guilty plea in a capital case. (AOB 192-193.) Had the Legislature intended section 1018 to also restrict a defendant's decision to withdraw an insanity plea, it would have been a

simple matter to have said as much in the statute. (See *Gauze*, *supra*, 15 Cal.3d at p. 718 [distinguishing *People v. Merkouris* (1956) 46 Cal.2d 540 on ground that the case "involved the withdrawal of a plea and was thus not explicitly covered by Penal Code section 1018"].)

This Court's view of the nature of an insanity plea also undermines appellant's contention that the withdrawal of such a plea is tantamount to a plea "of guilty of a felony." As the Court has explained, an insanity plea raises "an *affirmative defense*, although one that does not negative an element of the offense." (*People v. Hernandez* (2000) 22 Cal.4th 512, 522, original emphasis.) Such a plea is "necessarily one of confession and avoidance." (*Id.* at p. 521, quotation marks and citation omitted.) "Commission of the overt act is conceded but punishment is avoided upon the sole ground that at the time the overt act was committed the defendant was insane." (*Ibid.*, quotation marks and citation omitted.) The sanity phase of a trial "differs procedurally from the guilt phase of trial in that the issue is confined to sanity and the burden is upon the defendant to prove by a preponderance of the evidence that he was insane at the time of the offense." (*Ibid.*, quotation marks and citation omitted.)[76]

Accordingly, a defendant's withdrawal of an insanity plea is no more tantamount to a guilty plea than would be a defendant's decision to forego an available affirmative defense at the guilt phase itself.[77] In fact, the withdrawal of an insanity plea acts to rescind the defendant's "confession"—albeit one that is redundant in case such as this one, where

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[76] For this reason, appellant's description of a guilt verdict as "incomplete" until a sanity determination is made is inapt. (See AOB 192.)

[77] While the presentation of an affirmative defense may be a tactical decision within the control of counsel, such a decision is not equivalent to a plea of guilty or not guilty, which is the relevant inquiry for purposes of section 1018.

the jury has already returned verdicts of guilt—and in that sense is flatly inconsistent with a guilty plea. But more saliently, what the withdrawal of an insanity plea accomplishes is simply to forego the defendant's effort at "avoidance" of the punishment that is already authorized by the jury's guilty verdict and for which the defendant presumptively qualifies. (See Pen. Code, § 1026, subd. (a) [defendant is presumptively sane at time of offense]; *Hernandez* , *supra*, 22 Cal.4th at p. 521 [defendant bears burden to prove insanity by preponderance of evidence].) For these reasons, the withdrawal of an insanity plea differs materially from the entry of a guilty plea and is not subject to the consent-of-counsel requirement set forth in section 1018.

This Court's decision in *Medina*, cited by the People in the trial court, is in accord. In that case, a capital defendant withdrew his insanity plea but later sought to reinstate it. The trial court permitted reinstatement of the plea, over counsel's objection. The defendant then complained on appeal that the court should not have allowed reinstatement of the plea. (*Medina*, *supra*, 51 Cal.3d at p. 899.) This Court noted "that prior cases generally have stressed that the decision to plead, or to change or withdraw a plea, is a matter lying within the defendant's, rather than his counsel's, ultimate control, regardless of tactical considerations." (*Id.* at pp. 899-900.) Citing *Gauze* approvingly, the Court also acknowledged the rule that "a presently sane defendant may withdraw an insanity plea, provided the court is satisfied that the defendant is making a free and voluntary choice with adequate comprehension of the consequences." (*Id.* at p. 900, quotation marks and citations omitted.) And, analogizing to that rule, the Court held that, since a criminal defendant cannot be compelled to present an insanity defense, he also cannot be forced to abandon one merely because counsel disagrees with the decision. (*Ibid.*)

As appellant points out, *Medina* did not directly concern the withdrawal of an insanity plea. (AOB 191.) However, *Medina's* discussion about a criminal defendant's power to withdraw an insanity plea, including its apparent approval of the *Gauze* rule[78], without any indication that section 1018 would be implicated in such a scenario, tends to support the trial court's determination that the consent of counsel was not required before appellant could withdraw his plea and, conversely, does not lend any support to appellant's contrary position.

Accordingly, the trial court's acceptance of appellant's decision to withdraw his insanity plea without the consent of counsel did not violate section 1018.

B. The Trial Court Did Not Abuse Its Discretion by Accepting the Withdrawal of Appellant's Insanity Plea

Appellant also argues that the trial court erred by accepting the withdrawal of his insanity plea because the record demonstrates that appellant did not understand the gravity of the situation and because the court did not inquire into the basis of defense counsel's withholding of consent. (AOB 195-209.) This argument also fails.

In *People v. Merkouris*, *supra*, 46 Cal.2d 540, this Court held that a trial court abused its discretion by accepting a defendant's withdrawal of an insanity plea where the record showed that the trial court entertained a doubt as to the defendant's competence to stand trial, counsel impliedly objected to withdrawal of the plea, and the court's colloquy with the defendant concerning the withdrawal showed that the defendant "did not

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[78] The *Gauze* court's statement that a presently sane defendant may withdraw an insanity plea was based on *People v. Redmond* (1971) 16 Cal.App.3d 931, in which the trial court refused to permit a defendant to withdraw his insanity plea on the ground that it was not in the interest of justice.

understand the gravity of his predicament." (*Id.* at pp. 553-555.) In *Gauze* and *Medina*, as noted, this Court later clarified that "'a *presently sane defendant* may withdraw an insanity plea, provided the court is satisfied that the defendant is making a free and voluntary choice with adequate comprehension of the consequences.'" (*Medina*, *supra*, 51 Cal.3d at p. 900, citing *Gauze*, *supra*, 15 Cal.3d at pp. 717-718, emphasis added.) The *Gauze* court noted, in particular, that the reason for the reversal in *Merkouris* involved three "crucial" factors: that the withdrawal of the plea there was not subject to section 1018; that "there were *severe unresolved doubts* about Merkouris's *present* sanity"; and that the colloquy between the court and the defendant showed that Merkouris did not understand the gravity of his predicament. (*Gauze*, *supra*, 15 Cal.3d at p. 718, first emphasis added.) Those same factors distinguish the present case from *Merkouris*.

As already discussed, the trial court here correctly determined that section 1018 did not apply to the withdrawal of appellant's insanity plea, and therefore counsel's refusal to consent to the withdrawal did not prevent the court from accepting it. (See Arg. XI. A., *ante*.)[79]

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[79] Neither *Gauze* nor *Merkouris* involved the consent requirement of section 1018, which was added in 1973, and which applies only to capital cases. (See *Sand v. Superior Court* (1983) 34 Cal.3d 567, 580, fn. 6.) The point made by the *Gauze* court was that, under section 1018, the decision to enter a particular plea—the circumstance at issue in *Gauze*—is a defendant's personal right that cannot be interfered with by counsel. As this Court later held in *Medina*, the *Gauze* rationale applies by analogy to a defendant's reinstatement of an insanity plea, the upshot of which is that a defendant can be *compelled* neither to present nor to abandon an insanity defense. (*Medina*, *supra*, 51 Cal.3d at p. 900.) Insofar as *Merkouris* indicates that counsel's non-consent is *relevant* to a trial court's exercise of discretion in accepting withdrawal of an insanity plea, it is simply one factor among many to consider. As will be explained, under all of the circumstances here, there was no abuse of discretion.

Further, there were not "severe unresolved doubts" about appellant's present sanity in this case. To be sure, appellant raised a robust mental defense at the guilt and sanity phases, and defense counsel declared a doubt as to appellant's competence during the sanity phase. But on the other hand, the issue of appellant's competence to stand trial had been adjudicated in favor of competence in 1983 (see Arg. II. C., *ante*), and the present record is replete with examples of appellant's ability to discuss the issues in his case articulately and in detail (see Arg. VIII. A., *ante*). Most importantly, the trial court repeatedly found appellant competent and refused to order a hearing on the basis of counsel's declaration of doubt. (See 36RT 4534-4536; 40RT 4714-4722; 43RT 5182-5191; 44RT 5446-5448; 46RT 5650-5655, 5684-5685.) Indeed, the court went so far as to find that the declaration of doubt by counsel was merely a "strategic plan" and there was "absolutely no doubt as to the defendant's competence." (45RT 5493.) As noted in *Gauze*, the *Merkouris* decision placed great emphasis on the fact that the record there reflected substantial evidence of incompetence, upon which the trial court was obligated to order a hearing pursuant to Penal Code section 1368. (See *Merkouris*, *supra*, 46 Cal.2d at pp. 552-554; see also *Gauze*, *supra*, 15 Cal.3d at p. 718.) This is not such a case. (See Arg. VIII, *ante*.) Far from reflecting "severe unresolved doubts," the record here shows the court's consistent *rejection* of any doubt about appellant's present competence.

The record in this case also does not support appellant's contention that he did not adequately comprehend the consequences of his decision. (See *Medina*, *supra*, 51 Cal.3d at p. 900; *Gauze*, *supra*, 15 Cal.3d at pp. 717-718.) As noted, the record amply shows that appellant was a sophisticated navigator of the legal waters he found himself in. More specifically, when appellant announced his intention to withdraw his insanity plea, he was expressly informed of the consequences, including

that the minimum punishment at the penalty phase would be life in prison without parole and that the "best case scenario" he was giving up was a sentence of 27 years to life (since the jury had already found him sane as to Count 1). Not only did appellant indicate that he understood the circumstances, but he did so adamantly. (40RT 4690-4694 ["I understand my rights, Ms. Samuels, and I give them up. Let's go to penalty"].) Moreover, appellant elected to withdraw his plea only after meeting with his attorneys for *two hours*. (40RT 4688-4689.) His own attorney even concurred that appellant understood the procedure, even though he did not agree with appellant's decision. (40RT 4693.) And appellant later provided a cogent explanation for his decision: that he did not want to lose the judge if sanity were retried. (40RT 4719-4721.)

Appellant nonetheless advances several reasons why he did not actually understand the consequences of his decision. He first claims that the admonitions given to him by the prosecutor referred only to his present sanity and not to his sanity at the time of the crimes. (AOB 198.) But that claim could be accepted only upon the most cramped and artificial reading of the colloquy. Appellant had previously demonstrated that he knew the legal standards regarding present competence, and that he also knew that a favorable verdict on sanity would affect punishment. (See 34RT 4246 ["If the jury finds me insane, then I will just withdraw *Faretta* and go to a hospital"]; 36RT 4525-4535 [appellant discusses legal standard relevant to present competence].)[80] Appellant, in fact, had spoken fluently about his

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[80] In fact, appellant had also entered and withdrawn an insanity plea at his first trial, which he then challenged on appeal for lack of adequate advisements. (See *Bloom*, *supra*, 48 Cal.3d at pp. 1213-1214.) Given appellant's legal acumen, this prior experience with sanity-phase issues may properly be taken into account in determining whether his similar withdrawal of the plea at the retrial was knowing and voluntary.

present competence and had spoken just as intelligently about his decision to proceed to a sanity phase as a "way out," and about his later decision to absent himself from it. (See, e.g., 15RT 1935-1939; 34RT 4239-4241; 36RT 4525-4533.) The colloquy occurred after the separate sanity phase had already been conducted, and during the colloquy itself, the prosecutor specifically highlighted the implications of appellant's decision—that a finding of insanity on Counts 2 and 3 would negate those charges, resulting in a sentence of 27 years to life. (40RT 4690-4694.) Read fairly and in context, there can be no legitimate doubt that the subject under discussion was the jury's determination of appellant's sanity at the time of the crimes, and not appellant's present competence.

Appellant also argues that, during the waiver colloquy, the prosecutor insufficiently described the sanity-phase process when he told appellant that the "best scenario" was a sentence of 27 years to life without also specifying that there were multiple routes to that result, either through insanity findings on Counts 2 and 3, repeated deadlock, or some combination of the two. (AOB 199; 40RT 4692.) However, the voluntariness of a defendant's withdrawal of an insanity plea is assessed under the standard of *Boykin v. Alabama* (1969) 395 U.S. 238 [89 S.Ct. 1709, 23 L.Ed.2d 274] and *In re Tahl* (1969) 1 Cal.3d 122. (See *Gauze*, *supra*, 15 Cal.3d at pp. 717-718.) This standard requires that a defendant be advised of the "consequences" of his decision but does not require "the spelling out of every detail." (*Tahl*, *supra*, at p. 132; see also *People v. Vest* (1974) 43 Cal.App.3d 728, 735.) The prosecutor's identification of the direct consequences of appellant's decision—which was itself accurate—was sufficient to ensure that withdrawal of the plea was knowing and voluntary.

Appellant further argues that he was misinformed about the consequences of the sanity phase when, after the jury returned its verdicts

in the guilt phase, the prosecutor stated that the guilt-phase verdicts "absolutely" triggered a penalty phase. (AOB 199-202; 34RT 4239.) But appellant takes the statement out of context. When the jury returned its guilt-phase verdicts, defense counsel asked whether those particular verdicts—"a first and two seconds"—were sufficient to trigger a penalty phase. It was in response to that question that the prosecutor stated, "Yes. They absolutely, yes, without question. 100 percent positively triggers a penalty phase." (34RT 4239.) As is apparent, the isolated issue, at that particular time, was simply whether the second degree murder verdicts *precluded* a penalty phase. The effect of the sanity phase was not addressed, and, in proper context, there was no reasonable implication that the sanity phase was irrelevant.

The same is true as to appellant's statement that "we are going to penalty." (See AOB 200; 34RT 4246.) This comment was also made shortly after the guilt-phase verdicts were returned, and, again, the context of the statement does not suggest any misinformation about the sanity phase. Just before making this statement, appellant explained that he wished to proceed to a sanity phase as a possible "way out," given the jury's return of two second degree murder verdicts. (34RT 4240-4241.) This strongly suggests that he understood a favorable sanity-phase verdict would preclude the death penalty. He nonetheless expressed skepticism about the efficacy of the mental defense that would be presented at a sanity phase. (34RT 4241 ["you know how I feel about this whole mental defense"].) Appellant later made the statement that "we are going to penalty" when pressing his long-expressed desire to discuss penalty-phase issues with the court, which had been deferred as premature. In context, it is apparent that he was simply eager to obtain penalty-phase-related rulings from the court and to persuade the court to hear him out.

Further, when the sanity phase *was* expressly discussed, it was described accurately. As noted, appellant viewed the sanity phase as a possible "way out." (34RT 4240-4241.) As appellant himself acknowledges (AOB 200-201), the prosecutor objected to his request to discuss penalty-phase issues, saying:

> . . . the defendant apparently wants his cake and he wants to eat it too.
>
> He wants a sanity phase in case there is some shot he's going to go to a hospital instead of prison. That's fine. We haven't done a sanity phase yet. He is not pro per right now. He has attorneys.
>
> I don't think it is appropriate that we put these attorneys aside so that we can discuss penalty because he is going to be pro per in penalty.
>
> If he wants a sanity, let's see what happens at the sanity. And if he doesn't get found insane, then we can discuss the penalty phase after he no longer has his attorneys.
>
> But I do not think it's a appropriate we keep slipping in and out of pro per status every time we discuss the penalty phase. And I would object to doing that.
>
> And I would ask if he wants a shot at sanity phase, fine. That's where we are. That's what we will talk about.
>
> But the People aren't interested in prematurely discussing penalty phase with someone who still has two attorneys.

(34RT 4250-4251.)

Similarly, appellant's own attorney later stated that whether a sanity phase would take place "would depend on how many verdicts of insane there are." (36RT 4537.) And, as already noted, the prosecutor in his colloquy with appellant at the time appellant withdrew the insanity plea specified that the "best scenario" for appellant at the sanity phase would be a sentence of 27 years to life. (40RT 4692.) The record as a whole, then,

does not reflect that appellant was misinformed about the consequences of the sanity phase and, to the contrary, establishes that appellant knew the sanity phase was a "way out" of the death penalty.

Appellant additionally argues that his withdrawal of the insanity plea "made no sense," suggesting that this establishes that the withdrawal was not knowing and voluntary. (AOB 202-204.) But again, the wisdom of appellant's choices is a different matter from the voluntariness of his decision. As appellant explained to the trial court, he decided to withdraw the plea because he preferred to retain the same judge at the penalty phase, which he would forfeit by electing to retry sanity. (40RT 4719-4721.) Even though the jury had hung nine-to-three at the sanity phase, the prosecution had indicated it intended to call several witnesses at a retrial, which would have been held before a different jury, and appellant had stated that he had little faith in his mental defense to begin with. (34RT 4240-4241; 40RT 4683-4687.) Contrary to appellant's assertion, the withdrawal did not provide "no benefit." As appellant himself pointed out, he was able to retain the same trial judge, which he would have lost were the penalty phase to be retried. Even if the *wisdom* of appellant's choice was debatable, there was nothing so irrational about his decision as to indicate that the withdrawal of his insanity plea was not knowing and voluntary.

Citing *People v. Redmond, supra*, 16 Cal.App.3d at 931, appellant also argues that the trial court should have made "some inquiry of counsel as to their reasons for withholding consent" before accepting the withdrawal of appellant's insanity plea. (AOB 205-206.) But *Redmond* merely reiterates the rule that the withdrawal of a defendant's insanity plea is subject to the requirements of *Boykin* and *Tahl*. (*Redmond, supra*, 16 Cal.App.3d at p. 938.) Nothing in the *Boykin-Tahl* standard specifically requires a probing inquiry of counsel if "the court is satisfied that the

defendant is making a free and voluntary choice with adequate comprehension of the consequences." (*Medina*, *supra*, 51 Cal.3d at p. 900; *Gauze*, *supra*, 15 Cal.3d at pp. 717-718; see also *Tahl*, *supra*, 1 Cal.3d at p. 133 [no "recitation of a formula by rote" is required].) In fact, counsel here actually *objected* to any discussion of the two-hour meeting with appellant prior to the withdrawal of his plea. (40RT 4715-4716.) Nonetheless, it is a fairly obvious inference from the record that counsel's disagreement with appellant over withdrawal of the plea was a tactical one. Although counsel had earlier declared a doubt about appellant's competence (36RT 4523-4524)—a declaration that the court later found to be merely a "strategic plan" (45RT 5493)—counsel acknowledged that appellant "understands the procedure" with respect to the sanity phase and suggested that their disagreement stemmed from counsel's opinion that appellant "should retain counsel for penalty, but he has chosen not to do so" (40RT 4690-4694). Thus, it is clear that any further inquiry of counsel would merely have intruded upon privileged matters and would not have materially assisted in determining whether appellant's decision was knowing and voluntary.

For all of these reasons, the record amply showed that appellant understood the consequences of his decision. The court therefore did not abuse its discretion in accepting withdrawal of appellant's insanity plea.

C. Any Defect in the Advisements Given to Appellant Prior to Withdrawal of His Insanity Plea Should Be Deemed Harmless

Finally, respondent notes that, to the extent the court or the prosecutor may have provided inaccurate information to appellant in some respect before he withdrew his insanity plea, the error should be deemed harmless because the record establishes that appellant's withdrawal of the plea was voluntary and intelligent under the totality of the circumstances. (Cf. *People v. Mosby* (2004) 33 Cal.4th 353, 360-361 [error in *Boykin-Tahl*

advisements is harmless if record affirmatively shows guilty plea was voluntary and intelligent under totality of circumstances].) For the reasons already discussed, appellant demonstrated that he knew the significance of the sanity phase as a "way out" of the death penalty, that he considered the mental defense weak and knew the prosecution intended to present more evidence at a sanity-phase retrial, and that he made a knowing and intelligent decision to keep, in his estimation, a favorable judge for the penalty phase. Any error having to do with particular advisements given to appellant before he withdrew his plea was therefore harmless under the totality of the circumstances.

XII. THE TRIAL COURT PROPERLY PERMITTED APPELLANT TO REPRESENT HIMSELF AT THE PENALTY PHASE

Appellant argues that the trial court erred by permitting him to represent himself at the penalty phase because the record demonstrates that he did not knowingly and intelligently waive his right to counsel. He also argues that the court violated due process by engaging him in discussion about anticipated penalty-phase issues while he was still represented by counsel. Additionally, appellant argues that the court abused its discretion by failing to later grant appellant's request to reinstate counsel. (AOB 224-268.) The claim again fails.

A. Appellant's *Faretta* Waiver Was Knowing and Intelligent

As this Court stated in appellant's first appeal, "[a] defendant seeking self-representation should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open. The test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant

understood the disadvantages of self-representation, including the risks and complexities of the particular case." (*Bloom*, *supra*, 48 Cal.3d at pp. 1224-1225, quotation marks and citations omitted.)

And as the Court also stated in appellant's first appeal, even if "[t]he trial court in this case gave few specific warnings or advisements regarding the risks of self-representation, . . . in the unusual situation facing the court an elaborate catalog of dangers and pitfalls was unnecessary." (*Bloom*, *supra*, 48 Cal.3d at p. 1225.) The Court continued:

> As the trial court observed, defendant would be assisting rather than opposing the prosecutor and not only appreciated the risk of a death verdict but actively sought it. The record reveals, and the trial court found, that defendant possessed sufficient intellect to understand the proceedings and to address the court and the jury. Defendant was aware of the possible penalty verdicts on each count, and was advised by the trial court that his decision was "an enormous mistake." Defendant acknowledged that the prosecutor had practiced law longer than defendant had been alive and thus would be a skilled opponent. The record therefore establishes that defendant was sufficiently aware of the dangers and disadvantages of self-representation and made his decision with open eyes.

(*Ibid.*)

Those observations are equally applicable here, even though the particular circumstances of appellant's first trial differed in some respects from the circumstances of the retrial. Not only had appellant been through the same procedure at his first trial, at which time he understood the dangers and disadvantages of self-representation, but he had adamantly insisted from the earliest stages of the retrial that he wanted to represent himself at the penalty phase. (See, e.g., 15RT 1935-1939.) Throughout the retrial proceedings leading up to the penalty phase, he argued cogently about the penalty phase and pressed the court for rulings on various penalty-phase issues. (See, e.g., 15RT 1935-1939, 1951-1952; 17RT 2043-2064, 2225-2231; 21RT 2685-2693; 24RT 3031-3037; 28RT 3614-3622;

29RT 3697-3701; 33RT 4153-4190; 34RT 4198-4200, 4208-4211, 4217, 4220, 4246-4247, 4250-4251; 36RT 4537-4544; 37RT 4545-4589, 4591-4625; 38RT 4636-4639, 4646-4673.) Under the circumstances, given the extensive discussion that had already occurred, when the court finally took appellant's formal *Faretta* waiver, it was not necessary to engage in "an elaborate catalog" of the dangers and disadvantages of self-representation. There could have been no doubt at that point that appellant understood he was foregoing the right to counsel, that the possible penalty was death, that he would be facing an experienced adversary, that he knew the applicable legal standards, and that he would be forfeiting any ineffective-counsel claim, all of which were reaffirmed in any event during the court's colloquy with him. (40RT 4701-4703.) In fact, again, not only did appellant knowingly and intelligently waive his rights, he adamantly did so. (40RT 4703 ["I'm not stupid"].) Accordingly, the standard of *Faretta* was satisfied here. (See *Bloom*, *supra*, 48 Cal.3d at p. 1225.)[81]

Appellant nonetheless argues that his waiver was not made with "eyes open" because the trial court treated his self-representation as a foregone conclusion, encouraged the decision rather than counseled him against its dangers, and ultimately engaged in only a perfunctory waiver colloquy. (AOB 246-251.) But only the most partisan reading of the record could support that characterization. As noted, it was appellant himself, having done the same thing at his initial trial, who insisted on self-representation at

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[81] To the extent there was any deficiency in the particular *Faretta* admonitions that were administered to appellant, the error was harmless beyond a reasonable doubt. (See, e.g., *People v. Sullivan* (2007) 151 Cal.App.4th 524, 551, fn. 10 [noting split of authority regarding harmless error standard applicable to faulty *Faretta* advisements].) As the record here makes plain, there can be no reasonable doubt that appellant would have waived his right to counsel regardless of any irregularity in his colloquy with the court.

the penalty phase, beginning even before opening statements were made at the guilt phase of the retrial. And given the extensive discussions appellant had had with the court about the penalty phase and other legal issues, the waiver colloquy was more than sufficient because "the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." (*Bloom*, *supra*, 48 Cal.3d at pp. 1224-1225, quotation marks and citations omitted.)

Appellant also argues that his waiver was invalid because his mental infirmities prevented a rational understanding of the proceedings. (AOB 251-255.) But the trial court repeatedly found appellant competent, as had the jury at appellant's initial trial. (Case No. 23874 47RT 5778; 36RT 4534-4535; 40RT 4713, 4716-4717; 43RT 5182-5183, 5191, 5218-5222; 44RT 5446; 45RT 5493; 46RT 5643, 5654-5655, 5684-5685.) Moreover, appellant himself vigorously maintained that he was competent, and his ability to articulately discuss the issues involved in his case left little doubt that he was correct. (See generally, Arg. VIII., *ante*.) Defense counsel, of course, presented a robust mental defense, but the jury rejected the mental defense at the guilt phase, and that same jury rejected his insanity defense as to Count 1 before deadlocking as to Counts 2 and 3. And while counsel declared a doubt as to appellant's competence at the close of the sanity phase, the court later found that declaration to be merely a "strategic plan." (45RT 5493.) Thus, far from "squarely settl[ing] the matter" of appellant's purported incompetence (AOB 251), the record here strongly refutes that appellant was incompetent. Again, that appellant may have displayed odd mannerisms or made unwise decisions related to his defense does not show that he did not rationally understand the proceedings. The "record as a

whole" shows that appellant well understood what he was doing, even if he behaved foolishly.[82]

B. The Trial Court Did Not Interfere with the Attorney-Client Relationship

Appellant also argues that the trial court violated due process and his right to counsel by engaging him in discussion of penalty-phase issues prior to his *Faretta* waiver, while he was still represented by counsel. (AOB 240-244.) However, it was appellant himself who repeatedly requested to be heard on sanity-phase issues before the case had reached that stage. (See, e.g., 15RT 1951-1952; 17RT 2043-2064, 2225-2231; 21RT 2685-2693; 24RT 3031-3037; 28RT 3614-3622; 29RT 3697-3701; 33RT 4153-4190; 34RT 4198-4200, 4208-4211, 4217, 4220, 4246-4247, 4250-4251; 36RT 4537-4544; 37RT 4545-4589, 4591-4625; 38RT 4636-4639, 4646-4673.) "The rule against invited error generally precludes a defendant from obtaining reversal of a judgment by asserting error in the granting of the defendant's own motion." (*Bloom*, *supra*, 48 Cal.3d at p. 1220; see also *Medina*, *supra*, 51 Cal.3d at p. 900 ["defendant is in no position to complain on appeal of the trial court's order granting his [own] request"].) Because appellant invited this error, if any, his claim is not cognizable on appeal.

In any event, there was no denial of due process or compromise of appellant's right to counsel. Appellant chiefly claims that the harm done to

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[82] Appellant faults the court for failing to follow up on the "aborted" competency evaluation by Dr. Sharma during the penalty phase. (AOB 252.) However, the court appointed Dr. Sharma only in an effort to persuade defense counsel to testify. The court noted at the time that it maintained no doubt as to appellant's competence and expected Dr. Sharma to find him competent. (43RT 5182-5191, 5198-5199, 5218-5222.) Thus, in proper context, neither the appointment of Dr. Sharma nor the fact that Dr. Sharma's evaluation remained incomplete because of appellant's decision not to cooperate can support his claim of incompetence.

him consisted in the court's improper influence on his decision to represent himself over counsel's objection. (AOB 242-243.) But again, that characterization is at odds with the record. It was appellant who insisted from the outset of the case on representing himself at the penalty phase, just as he had done at his initial trial. Appellant was in no need of any encouragement from the court to proceed in that direction, and to the extent the court assumed, prior to appellant's formal *Faretta* waiver, that appellant would represent himself at the penalty phase, that assumption was simply in accord with appellant's clearly stated intention.

Moreover, even if the more prudent course would have been to defer any discussion of the penalty phase until after appellant's formal *Faretta* waiver, nothing in the court's or the prosecutor's exchanges with appellant strayed from matters strictly relevant to the penalty phase—at which, after all, appellant did ultimately represent himself. (See, e.g., 15RT 1951-1952; 17RT 2043-2064, 2225-2231; 21RT 2685-2693; 24RT 3031-3037; 28RT 3614-3622; 29RT 3697-3701; 33RT 4153-4190; 34RT 4198-4200, 4208-4211, 4217, 4220, 4246-4247, 4250-4251; 36RT 4537-4544; 37RT 4545-4589, 4591-4625; 38RT 4636-4639, 4646-4673.) Accordingly, nothing about those exchanges so compromised the ability of defense counsel to represent appellant at the guilt or sanity phases as to amount to a violation of due process or a deprivation of the right to counsel. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 75 [112 S.Ct. 475, 116 L.Ed.2d 385] [error must infuse trial with unfairness to rise to level of due process violation]; see also *People v. Martinez* (2009) 47 Cal.4th 399, 419 [citing *Smith v. Superior Court* (1968) 68 Cal.2d 547, 559 for proposition that state's duty with respect to right to counsel is to refrain from unreasonable interference with individual's desire to defend himself in whatever manner he deems best].) Nor, for the same reasons, can appellant show any prejudice

resulting from this asserted transgression. (See *Chapman v California, supra*, 386 U.S. at p. 24.)

C. The Trial Court Did Not Abuse Its Discretion by Rejecting Appellant's Request for Reinstatement of Counsel; Nor Was Any Error Prejudicial

1. There Was No Error

Appellant also argues that the trial court abused its discretion by rejecting his request to reinstate counsel, and he discusses a number of factors relevant to the court's decision as outlined in *People v. Elliott* (1977) 70 Cal.App.3d 984, 993-994, concluding that the cited factors weighed in his favor. (AOB 255-264.) Those factors are: (1) the defendant's history of substituting counsel or switching from self-representation to counsel-representation; (2) the reasons for the request; (3) the length and stage of the proceeding; (4) the disruption or delay which might reasonably be expected to ensue; and (5) the defendant's effectiveness in acting as his own attorney. (*People v. Lawrence* (2009) 46 Cal.4th 186, 192.) However, as this Court has observed, "the trial court's discretion is to be exercised on the totality of the circumstances, not strictly on the listed factors." (*Ibid.*)

Thus, appellant's request must be viewed not in isolation, as appellant now suggests, but in the context of how his trial unfolded. As noted, appellant made his intention clear from the very outset of the guilt phase that he would represent himself during the penalty phase. Appellant eagerly discussed penalty-phase issues with the court and the prosecutor as the penalty phase neared. He formulated a theory in mitigation and organized a long roster of witnesses to present in support of that theory. And he implemented his strategy by telling the jury that his attorneys had concocted the mental defense, that he had malingered on the psychological

examinations, and that it should instead focus on his family history. (See 42RT 5043-5073.)

When in the middle of the penalty phase appellant asked to reinstate his insanity plea, he offered only the most specious reasons for the request. (44RT 5435-5441; see Arg. XIII, *post.*) That request, which was denied, was then immediately followed by a declaration of doubt as to his own competence. Appellant's declaration of doubt was counter to everything he had maintained throughout the trial and everything he had told the jury at the penalty phase and therefore was rightly rejected in summary fashion. (44RT 5447-5448.) Only after these two requests had been denied did appellant ask to relinquish his right to self-representation. (44RT 5448-5449.) And when that request was also denied, appellant threatened to force a mistrial by disobeying court orders. (44RT 5453-5455; see also 46RT 5681-5700.) Following all of this, appellant berated and threatened the prosecution, declared another doubt as to his own competence, and nonetheless refused to cooperate with Dr. Sharma's examination of him. (44RT 5456-5468, 5474-5480.)

As this sequence of events makes abundantly clear, appellant's request to relinquish self-representation was made as part of what can only be described as a temper tantrum born of his own frustration and resulting in a flurry of baseless attempts to derail the proceedings. Both the prosecution and the court correctly pointed out that appellant was simply "playing games" and trying to create "issues." In the words of the trial court, his requests were "cunning and manipulative." (44RT 5449-5453.) The totality of the circumstances reflected by this record amply support that conclusion. Further, as the trial court also pointed out, appellant had already slandered his attorneys and expressly repudiated their defense. (44RT 5452-5453.) There was therefore little appellant's former attorneys would have been able to accomplish by resuming representation, at least

without a significant delay; and appointing new counsel would undoubtedly have caused even more disruption.

Under these circumstances, a court does not abuse its discretion by declining to reinstate counsel. (See, e.g., *People v. Lawley* (2002) 27 Cal.4th 102, 148-141 [request to relinquish right to self-representation that strongly suggests an attempt to delay the trial may be denied]; see also *People v. Horton* (1995) 11 Cal.4th 1068, 1110-1111 [citing approvingly discussion of "*Faretta* game" in *Williams*, *supra*, 220 Cal.App.3d at p. 1170 to effect that *Faretta* motion is properly denied under circumstances showing defendant was "juggling" Sixth Amendment rights in effort to delay proceedings].)[83]

2. Any Error in Failing to Reinstate Counsel Was Harmless

Finally, respondent submits that any error in failing to reinstate counsel in the middle of the penalty phase was harmless. Appellant contends the error should be deemed structural. (AOB 264-268.) Not so.

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[83] Appellant emphasizes that the prosecutor took apparently inconsistent positions in the trial court, first asking the court to revoke his right to self-representation and later opposing his request to relinquish that right. (See, e.g., AOB 261.) The prosecutor's positions on the issue do not inform the correctness of the trial court's ruling. Nonetheless, respondent notes that the prosecutor's positions were not inconsistent, looked at in the broader context of the proceedings. The prosecutor objected twice to appellant's misbehavior during the penalty phase, at which point she suggested that the court revoke his right to self-representation. (41RT 5138-5140; 44RT 5391.) When appellant later threw his tantrum, making a flurry of various requests in an effort to disrupt and delay the proceedings, including his request to reinstate counsel, the prosecutor's objection to those requests was again made in opposition to appellant's gamesmanship and misbehavior. (44RT 5435-5453.) In either context, the prosecutor's focus was plainly on proceeding with the penalty phase without whatever disruption appellant was then perpetrating.

The erroneous denial of a defendant's constitutional rights to counsel and self-representation in the first instance have been held to constitute structural error, reversible per se, because the "consequences [] are necessarily unquantifiable and indeterminate," and that application of the structural error standard is based "upon the difficulty of assessing the effect of the error." (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 148-149 & fn. 4 [126 S.Ct. 2557, 165 L.Ed.2d 409]; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275, 282 [113 S.Ct. 2078, 124 L.Ed.2d 182]; *Arizona v. Fulminante* (1991) 499 U.S. 279, 310 [111 S.Ct. 1246, 1113 L.Ed.2d 302]; *McKaskle v. Wiggins* (1984) 465 U.S. 168, 177 n. 8 [104 S.Ct. 944, 79 L.Ed.2d 122].) However, as noted, the category of constitutional errors deemed "structural" is a narrow one. (See Arg. X, *ante*.)

As also noted, the Sixth Amendment right to counsel is not absolute. For example, an untimely request for self-representation does not implicate constitutional concerns and is instead addressed to the trial court's discretion. (See Arg. IX. A., *ante*.) Similarly, this Court has addressed a trial court's abuse of discretion in the related Sixth Amendment contexts of a defendant's request for advisory counsel (see *People v. Crandell* (1988) 46 Cal.3d 833) and request for co-counsel (see *People v. Williams* (2006) 40 Cal.4th 287) and has reviewed the trial court's erroneous exercise of discretion using the *Watson* standard of review. Moreover, as this Court has noted, "even in a situation as extreme as the denial of counsel [at the preliminary hearing], the U.S. Supreme Court has held that the harmless error rule is applicable." (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 530, citing *Coleman v. Alabama* (1970) 399 U.S. 1, 11 [90 S.Ct. 1999, 26 L.Ed.2d 387].)

Accordingly, once the absolute constitutional right to the assistance of counsel has been knowingly, intelligently, and voluntarily waived, neither

the state nor the federal Constitution includes an unfettered right to thereafter reassert the constitutional right to counsel. (*People v. Lawley*, *supra*, 27 Cal.4th at p. 149; see also *People v. Dunkle* (2005) 36 Cal.4th 861, 908 ["The right to representation by counsel persists until a defendant affirmatively waives it"]; *People v. Elliott*, *supra*, 70 Cal.App.3d at pp. 997-998, cited with approval in *People v. Gallego* (1990) 51 Cal.3d 115, 164; *State v. Guitard* (Conn. 2001) 765 A.2d 30, 34 ["Once the defendant 'embarked on the path of self-representation,' however, his constitutional right to counsel ceased."] In the instant case, appellant knowingly, voluntarily, and intelligently waived his right to counsel before the penalty phase, thus waiving or forfeiting his absolute constitutional right to counsel that proceeding. As a result, the decision to grant a request for reinstatement of counsel was left to the court's discretion. (*People v. Lawley*, *supra*, 27 Cal.4th at pp. 149; *People v. Elliott*, *supra*, 70 Cal.App.3d at pp. 997-998.) Under these circumstances, the erroneous exercise of discretion to deny a request to reappoint counsel is not an error the United States Supreme Court has recognized as structural, but is instead at best an error of state law only. (See *People v. Hill* (1983) 148 Cal.App.3d 744, 762 ["Standing alone, such abuse of discretion in denial of a request for reinstatement constitutes only state law error."].) In a capital case, state-law error affecting the penalty phase is reversible only where there is a "reasonable possibility" that the error affected the verdict. (See *People v. Brown* (1988) 46 Cal.3d 432, 447-448.)

Even if the trial court exceeded the bounds of reason in denying appellant's request to revoke his *Faretta* waiver, there is no reasonable possibility that he would have obtained a more favorable outcome had the court reappointed counsel. At the point appellant made his request for reinstatement of counsel, he was already about halfway through his case in mitigation at the penalty phase. Most importantly, appellant had already

given his opening statement and had already testified, telling the jury that his mental defense was fabricated, essentially blaming Josephine (whom he dubbed an "ungrateful bitch") for her murder and the murder of Sandra, and admitting that he had callously described the stabbing of Sandra as "torture." (44RT 5337, 5413.) Moreover, as the trial court noted in denying appellant's request to reinstate counsel, in addition to repudiating the mental defense and admitting to malingering, appellant had specifically disparaged his defense attorneys. Therefore, it is likely that any further psychological testimony would have carried "very little credibility" and his attorneys would have been "totally ineffective" in trying to mount a case in mitigation. (44RT 5452-5453.)

Given the heinous nature of the crimes, and given the damage appellant did to his own mitigation case even before requesting reappointment of counsel, there is no reasonable possibility that the penalty phase could have been salvaged and that the jury would not have returned a verdict recommending death.[84]

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[84] Appellant describes the penalty phase of his trial as "a farce." (AOB 268.) While that description is manifestly hyperbolic—as noted, appellant had a coherent theory in mitigation (focusing on his troubled upbringing and, in particular, on his relationship with his father) and presented numerous witnesses in support of it—there is little question that appellant ultimately made bad choices and offered counterproductive testimony that likely sealed his own death verdict. But this is precisely the danger against which defendants seeking self-representation—including appellant here—are warned. (See 40RT 4701-4702 [appellant is warned, and acknowledges, that there are "dangers and disadvantages" in representing himself, that he will be up against experienced adversary, that he will receive no special treatment and will be required to follow the rules, and that he will not be able to complain about his own performance on appeal].) As this Court noted in appellant's first appeal—in which appellant challenged the court's grant of his *Faretta* request on the basis that he should not have been permitted to argue for death—both this Court and the United States Supreme Court have emphasized the importance of

(continued...)

XIII. THE TRIAL COURT PROPERLY REJECTED APPELLANT'S ATTEMPT TO REINSTATE HIS PLEA OF NOT GUILTY BY REASON OF INSANITY

In a claim closely related to the two previous claims, appellant argues that the trial court abused its discretion by declining to permit him to reinstate his insanity plea. (AOB 210-223.) This claim fails, too, for similar reasons. As appellant acknowledges, a request to reinstate a previously withdrawn plea is addressed to the sound discretion of the trial court. (AOB 215-216; *Medina*, *supra*, 51 Cal.3d 870, 899.) There was no abuse of discretion here.

Again, appellant's request to reinstate his insanity plea must be viewed in its proper context: as part of a scattershot attempt to derail the penalty-phase proceedings. As explained, appellant made his request to reinstate his insanity plea midway through the penalty phase. (44RT 5435-5441.) When the request was denied, he immediately followed it with a declaration of doubt as to his own competence, which was also denied. (44RT 5447-5448.) He then asked to relinquish his right to self-representation, which was again denied. (44RT 5448-5449.) Appellant reacted to all of this by threatening to force a mistrial by disobeying court orders (44RT 5453-5455; see also 46RT 5681-5700), berating and threatening the prosecutors, renewing his self-declared doubt as to

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(...continued)
"an accused's ability to control his or her own destiny and to make fundamental decisions affecting trial of the action." (*Bloom*, *supra*, 48 Cal.3d at p. 1222.) It is the essence of the right to self-representation that a defendant be permitted to exercise that control, even if counterproductive, and Sixth Amendment protections are not undermined when the "dangers and disadvantages" of which the defendant has been forewarned actually come to pass.

competence, and then nonetheless refusing to cooperate with Dr. Sharma's examination of him (44RT 5456-5468, 5474-5480).

Moreover, the reasons appellant gave for the request to reinstate his insanity plea were transparently specious. Noting the correct abuse-of-discretion legal standard, and citing the *Medina* and *Merkouris* decisions as well as excerpts of transcripts of previous hearings in the case, appellant claimed that the trial court should not have permitted withdrawal of the plea because his attorney had objected to it and because he had not understood the consequences of the withdrawal due to lack of sleep and difficulty processing oral (as opposed to written) information. (44RT 5437-5441, 5443-5445.) But as both the prosecutor and the trial court immediately noted, appellant had consistently been able to discuss legal issues throughout the trial in an intelligent manner—including when he made the very objection at issue—and without apparent difficulty in processing information orally; appellant had shown no lack of comprehension at the time he waived his right to counsel and withdrew his plea, based on oral admonitions; and instead, appellant's motion plainly appeared to be the product of "buyer's remorse." (44RT 5441-5443, 5446.) And notably, appellant did not identify with any specificity what consequence of the withdrawal he had only belatedly understood.

The trial court correctly observed that the "the record is replete" with examples of appellant's ability to comprehend the issues in his case when discussed orally. From the beginning of the trial, appellant eagerly and fluently discussed legal issues with the court and counsel. (See Arg. XIII. A., *ante*.) Moreover, the record supports the court's suggestion that appellant's request was simply part and parcel of his attempt to sabotage the penalty phase after it had gone badly for him. The court had earlier agreed with the prosecutor that appellant was "making a mockery" of the penalty phase. (44RT 5391.) And, following appellant's equally meritless

request to reinstate counsel, the court found that he was simply being "cunning and manipulative." (44RT 5452-5453.)

Appellant nonetheless contends that the trial court abused its discretion by failing to adequately inquire into the bases of his wish to reinstate his insanity plea. (AOB 217-222.) But, as with appellant's other, related claims, no additional and more detailed inquiry was required under the circumstances. At the time appellant made the request, it was plain that it was motivated by frustration and recalcitrance, and that appellant's aim was to secure a second chance at the penalty phase rather than to relitigate the sanity phase. Nor can appellant's renewed invocation of his purported mental problems support his claim. (AOB 218-219.) As has been repeatedly noted, the trial court consistently rejected the suggestion that appellant was incompetent to stand trial. (See, e.g., 36RT 4534-4535; 40RT 4713; 43RT 5191; 44RT 5446; 46RT 5643, 5654-5655, 5684-5685.) The record in this case simply does not support—and, indeed, strongly refutes—the contention that appellant was unable to adequately understand the proceedings.

Ultimately, appellant claims that the court should have allowed him to reinstate the plea simply because his initial withdrawal of the plea should not have been granted in the first place. (AOB 220-222.) But as already explained, there was nothing problematic about his withdrawal of the plea. Appellant had been expressly informed of the consequences, he acknowledged that he was giving up a "way out" of the death penalty, and he explained that he was doing so because of his skepticism of the mental defense and because he did not want to lose the judge if he retried the penalty phase. (34RT 4240-4241; 40RT 4690-4694, 4719-4721.) Moreover, appellant made his decision only after meeting with counsel for two hours, and appellant's own attorney stated that appellant understood the procedure. (40RT 4688-4689, 4693.) Nothing about appellant's initial

withdrawal of the plea supported his request to reinstate it; to the contrary, the fact that appellant plainly knew what he was doing strongly supported the trial court's rejection of his later "cunning and manipulative" request to reinstate the plea.

Where the record shows that the defendant's request to reinstate an insanity plea is merely an attempt to frustrate and delay the proceedings, a court does not abuse its discretion by denying the request. (Cf. *Lawley*, *supra*, 27 Cal.4th at pp. 148-141 [request to relinquish right to self-representation that strongly suggests an attempt to delay the trial may be denied]; *Horton*, *supra*, 11 Cal.4th at pp. 1110-1111 [citing approvingly discussion of "*Faretta* game" in *Williams*, *supra*, 220 Cal.App.3d at p. 1170.)

Further, any error was harmless. (See *Watson*, *supra*, 46 Cal.2d at p. 836.) Had appellant been permitted to reinstate his plea, the sanity phase would have been retried, this time with the prosecution calling several witnesses, including "one of the foremost experts in the country on dissociative states." (40RT 4684.) Given appellant's highly dubious theory regarding sanity—not to mention his own doubts and misgivings about any mental defense in this case—there is no reasonably probability that he would have achieved a better result had he reinstated his insanity plea. (See Arg. IX. B., *ante*.)

XIV. THE TRIAL COURT PROPERLY SCREENED THE JURY FOR DEATH QUALIFICATION

Appellant argues that the trial court erroneously excluded four prospective jurors for cause based on their death-penalty views, in violation of *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776] and *Wainwright v. Witt* (1985) 469 U.S. 412 [105 S.Ct. 844, 83

L.Ed.2d 841]. (AOB 389-433.) Substantial evidence supported the court's excusal of each juror for cause.

A. Relevant Law

A criminal defendant facing the death penalty has the right to "an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause." (*Uttecht v. Brown* (2007) 551 U.S. 1, 9 [127 S.Ct. 2218, 167 L.Ed.2d 1014].) A state similarly "has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." (*Ibid.*) "[T]o balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible." (*Ibid.*) The standard is whether the juror's views, either for or against the death penalty, "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Wainwrightv. Witt*, *supra*, 469 U.S. at p. 424; *People v. Danielson, supra,* 3 Ca1.4th at pp. 712-713; see also *People v. Ghent* (1987) 43 Ca1.3d 739, 767 [adopting *Witt* standard as test for right to impartial jury under article I, section 16 of California Constitution].)

The *Witt* standard repeatedly has been described as a "clarification" of the test earlier articulated in *Witherspoon v. Illinois*, *supra*, 391 U.S. 510. In *Witherspoon*,

> the United States Supreme Court implied that a prospective juror could not be excused for cause without violating a defendant's federal constitutional right to an impartial jury unless, as relevant here, he made it "unmistakably clear" that he would "*automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case [before the juror]. . . ."

(*People v. Mickey* (1991) 54 Cal.3d 612, 679, quoting *Witherspoon, supra*, 391 U.S. at p. 522, fn. 21, italics in *Witherspoon*.)

As the *Witt* court held, however, the Constitution in fact does not require that a juror's bias be proved with "unmistakable clarity":

> This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. [Fn. omitted.] Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

(*Wainwright v. Witt, supra*, 469 U.S. at pp. 424-425.)

"In many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress of being a prospective juror in a capital case, such equivocation should be expected." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1094.) For this reason, "[d]eference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." (*Uttecht, supra*, 551 U.S. at p. 9; see also *People v. Avila* (2006) 38 Cal.4th 491, 529 ["appellate courts recognize that a trial judge who observes and speaks with a prospective juror and hears that person's responses (noting, among other things, the person's tone of voice, apparent level of confidence, and demeanor), gleans valuable information that simply does not appear on the record"].) So long

as substantial evidence supports the trial court's determination, its ruling will be affirmed. (*People v. Griffin* (2004) 33 Cal.4th 536, 558; *People v. Memro* (1995) 11 Cal.4th 786, 817-818.)

Appellant stresses that prospective jurors may not be dismissed "based on their attitudes towards specific evidence at issue in the case, or their responses to questions calling for prejudgment of the case." (AOB 393-399.) As this Court has noted, however, a trial court managing death-qualification voir dire faces the precarious challenge of avoiding the "two extremes" of, on the one hand, restricting voir dire to the point that it is "so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried," and, on the other hand, allowing an inquiry that is "so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented." (*People v. Cash* (2002) 28 Cal.4th 703, 721-722; accord, *People v. Valdez* (2012) 55 Cal.4th 82, 164-165.) The danger inherent in this situation is manifest. A trial court that takes a relatively restrictive approach to voir dire will be challenged on appeal for that reason. (See, e.g., *Cash*, *supra*, 28 Cal.4th at pp. 718-719; *Valdez*, *supra*, 55 Cal.4th at p. 164.) And a trial court that takes a relatively permissive approach to voir dire will be challenged for the reasons asserted by appellant here. Consequently, a trial court is vested with "broad discretion" over the number and nature of questions on voir dire about the death penalty. (*People v. Stitely* (2005) 35 Cal.4th 514, 540.)

This Court's statements, upon which appellant relies, that a prospective capital juror may be dismissed only upon a showing of impairment "in the abstract" must therefore be understood in light of the foregoing principles. (See, e.g., AOB 394-396, citing *People v. Ervin* (2000) 22 Cal.4th 48, 70; *People v. Pinholster* (1992) 1 Cal.4th 865, 916.)

While a court must navigate a middle path between the "two extremes" of death-qualification voir dire, reliance on the circumstances of the case in making a cause determination is not prohibited: "A prospective juror who would invariably vote either for or against the death penalty *because of one or more circumstances likely to be present in the case being tried*, without regard to the strength of aggravating and mitigating circumstances, is . . . subject to challenge for cause, whether or not the circumstance that would be determinative for that juror has been alleged in the charging document." (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005, emphasis added; accord, *Cash*, *supra*, 28 Cal.4th at p. 720 ["A challenge for cause may be based on the juror's response when informed of facts or circumstances likely to be present in the case being tried"].)

"[T]he qualifications of [prospective] jurors challenged for cause are matters within the wide discretion of the trial court, seldom disturbed on appeal." (*People v. Jones* (2003) 29 Cal.4th 1229, 1246.)

B. Prospective Juror Number 1650

1. Background

Like all of the prospective jurors in this case, prospective juror number 1650 submitted responses to a questionnaire prior to voir dire. (15CT 3878, 3906.) The questionnaire asked a variety of abstract questions regarding the death penalty, and, as to those questions, prospective juror number 1650 averred that she would not automatically vote for or against the death penalty in a particular case, noting that each case had to be assessed based on its own circumstances. (See 15CT 3887-3892.) As to several more specific questions, however, prospective juror number 1650 explained that she had a daughter with mental problems (15CT 3879, 3893), that her daughter had been taken into custody because of her mental problems (15CT 3882), and that her daughter had been receiving treatment

since the age of 15 (15CT 3885, 3892). With respect to the case at hand, prospective juror number 1650 stated that she would "always accept as correct" the opinion of a psychologist or psychiatrist (15CT 3885), and "if the person has a mental problem I would have a problem with the death penalty" (15CT 3889).

On voir dire, the trial court explained to prospective juror number 1650 that the penalty phase would be reached only if the jury first found the defendant sane at the time of the offenses, and prospective juror number 1650 agreed that she could follow the court's penalty-phase instructions under those circumstances. (10RT 1242-1243.) Defense counsel also explained that the trial would be conducted in three separate phases, and prospective juror number 1650 again stated that she would not have a problem voting for death "if it was the proper case." (10RT 1245-1248.) The prosecutor then pointed out that there is a "huge spectrum between being insane and being 100 percent rational." Asked whether she could impose the death penalty if the defendant were found sane at the time of the crimes but nonetheless showed during the penalty phase that he was "mentally ill, severely or otherwise, that he is not normal, that he is a disturbed young man," prospective juror number 1650 answered, "no." (10RT 1248-1249.)

Upon further questioning by defense counsel, prospective juror number 1650 reaffirmed that she would be unable to impose the death penalty if it were shown that the defendant had mental problems. However, she agreed that she would be comfortable deciding during the penalty phase whether it were established that the defendant was, in fact, mentally ill and would be able to weigh all the aggravating and mitigating factors. (10RT 1249-1252.) However, upon further questioning by the prosecutor, prospective juror number 1650 stated that, in performing that weighing, she did not think she could ever impose the death penalty on a defendant whom

she believed to be mentally ill. (10RT 1253-1254.) Upon questioning by the court, prospective juror number 1650 clarified that the defendant's mental problems would have to be more than "just a little" before she would be unable to impose the death penalty. (10RT 1257-1258.)

The prosecutor argued that prospective juror number 1650 had a "preconceived idea" that she could not impose the death penalty in a case involving a defendant with mental problems, and asked the court to strike the prospective juror for cause. (10RT 1254.) Defense counsel argued that prospective juror number 1650 had stated that she would be able to weigh aggravating and mitigating circumstances and would simply use mental illness as a mitigating factor. (10RT 1254-1255.) After hearing further argument, the court dismissed prospective juror number 1650 for cause, stating that the prospective juror could not be fair and that, based on her experiences with her daughter, she appeared to have preconceived ideas about the criteria for mental illness. (10RT 1260.)

2. Substantial Evidence Supported the Exclusion of Prospective Juror number 1650 for Cause

In this case, appellant's alleged mental impairment, to some degree, was plainly "a circumstance likely to be present" in all phases of the trial. (See *Kirkpatrick*, *supra*, 7 Cal.4th at p. 1005.) Prospective juror number 1650 unambiguously stated that she would not be able to vote for death if the defendant, even if sane at the time of the crimes, was shown to be "mentally ill, severely or otherwise" at the penalty phase. (10RT 1248-1249.) In other words, this single factor would determine her vote. Consequently, her ability to apply the state-law framework in a capital case was impaired under the *Kirkpatrick* standard, which permits the excusal for cause of "[a] prospective juror who would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating

and mitigating circumstances . . . ." (*Kirkpatrick*, *supra*, 7 Cal.4th at p. 1005.) Prospective juror number 1650's statements during voir dire amount to substantial evidence supporting dismissal under this standard. (See *People v. Vines* (2011) 51 Cal.4th 830, 853 [prospective juror's bias need not be shown with unmistakable clarity; sufficient that trial judge be left with definite impression that prospective juror's performance would be impaired].) There was no error.

Appellant argues that prospective juror number 1650 affirmed that she would consider the aggravating and mitigating factors at the penalty phase, and would simply consider mental illness as a mitigating factor, and that therefore her statements did not satisfy the *Kirkpatrick* standard. (See AOB 410, 412-413.) But when pressed by the prosecutor, prospective juror number 1650 admitted that, even taking into account all the aggravating and mitigating circumstances, and even if she believed the aggravating circumstances outweighed the mitigating circumstances, the sole factor of mental illness would cause her to vote against death. (10RT 1253-1254.) This response squarely satisfied the *Kirkpatrick* standard and disqualified prospective juror number 1650. (See *Kirkpatrick*, *supra*, 7 Cal.4th at p. 1005.) And in any event, even if some of the answers given by prospective juror number 1650 could be construed as conflicting or equivocal, the trial court's ultimate resolution of the matter, after having had the opportunity to question and assess the prospective juror, is controlling. (See *People v. Lynch*, *supra*, 50 Cal.4th at pp. 733, 735; *People v. Solomon* (2010) 49 Cal.4th 792, 830.)

Appellant also attempts to analogize this case to the decision in *People v. Heard* (2003) 31 Cal.4th 946, 959-968, in which this Court reversed a death judgment based on the improper dismissal of a prospective juror following his answers to voir dire questions concerning "psychological factors" present in the case. (AOB 410-412.) However, as

this Court observed in *Heard*, the prospective juror's voir dire answers there "made it quite clear that he would not vote 'automatically'" based on the psychological factors that were at issue in that case. (*Id.* at p. 964; see also *id.* at pp. 959-962 [prospective juror's voir dire answers, including that he was not committed to any particular position and was prepared to follow the law, although he was "absolutely committed" to the position that psychological factors "*might auger* toward life without possibility of parole," emphasis added].) Rather, the trial court in *Heard* excused the prospective juror merely on the basis that his answers suggested he would vote for life without parole, even if not invariably so. (*Id.* at p. 965; see also *id.* at p. 967 ["in response to a series of awkward questions posited by the trial court, Prospective Juror H. indicated he was prepared to follow the law and had no predisposition one way or the other as to imposition of the death penalty"].) The same is not true here. Prospective juror number 1650 stated unambiguously that the fact of the defendant's mental impairment would cause her to vote against death, regardless of the balance of aggravating and mitigating factors. (10RT 1248-1249, 1253-1254.) *Heard* is therefore not analogous.[85]

Because substantial evidence showed that prospective juror number 1650's ability to apply the law was impaired, the court properly dismissed her.

C. Prospective Juror Number 8050

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[85] Appellant also attacks certain of the trial court's particular statements in granting the prosecution's challenge for cause as to prospective juror number 1650. (AOB 409, 414.) But, however the court phrased its ruling, the question on appeal is simply whether substantial evidence supported exclusion of the juror as impaired. (See, e.g., *People v. Griffin*, *supra*, 33 Cal.4th at p. 558; see also *People v. Cook* (2007) 40 Cal.4th 1334, 1343 [record reviewed de novo to determine whether substantial evidence supports trial court's determination].)

1. Background

In response to the generic death-penalty inquiry in the questionnaire, prospective juror number 8050 stated that he would not automatically vote one way or the other. (20CT 5382-5383.) However, he also gave several responses indicating that he was ambivalent about the death penalty, including that his beliefs would "maybe" make it difficult for him to sit as a juror in this case (20CT 5379), that his general feelings about the death penalty "go back and forth," and that the death penalty is used "too often" (20CT 5380). With respect to these issues, he thought that "too many cases have legal accessibility problems from a money standpoint" and that it is "not always an even playing field." (20CT 5380.) Prospective juror number 8050 also stated that "people with money can sometimes get a better defense" (20CT 5385) and that he viewed the death penalty as "a legislated emotional response to crime" (20CT 5380). In addition, prospective juror number 8050 wrote in the supplementary space provided on the questionnaire, "I sometimes question the death penalty!" (20CT 5390, original punctuation.)

Asked about these responses on voir dire, prospective juror number 8050 stated:

> . . . I have been thinking about this the last week and I have a hard time with it.
>
> I mean, if you take all of those questions that you're asking in total that I answered, I have a problem with poorer defendants not having enough money to get better legal counsel.
>
> I don't understand why we have the death penalty. I don't believe it is a deterrent. I think it is more of an emotional response that's been legislated most of the time.
>
> So I mean, this is just how I honestly feel. Now, I like to think that I would be able to follow the rules, but emotionally that's how I feel about it.

(11RT 1335.)

The prosecutor asked whether, if instructed that there were no circumstances under which he would be compelled to vote for death, he would ever be able to do so, and he responded, "I don't know. Honest to God, I don't know. I would like to think I would be able to follow the rules and not think about it, but I would have to think about it and I just don't know." (11RT 1336.) The prosecutor then explained in greater detail the three phases of the trial and again emphasized that the jurors would be asked to weigh aggravating and mitigating circumstances but would never be compelled to return a verdict of death. In response, prospective juror number 8050 stated that he would "probably not" vote for death and, "I would probably go with life in prison." (11RT 1336-1338.)

Defense counsel then asked prospective juror number 8050 if he could imagine any "situation of murders" in which he would consider voting for the death penalty. The prospective juror responded, "I have read serial murder stories or things like that where emotionally I was like let's string this guy up right now. [¶] But when it would come back down to when it comes down to just this non emotional level, I don't think I would vote for the death penalty." (11RT 1338-1339.) Upon further questioning, prospective juror number 8050 stated that he would not automatically vote one way or the other and that he simply did not know what he would do in a given situation, although he would "definitely weigh heavy on the life side." (11RT 1339-1340.) He maintained, moreover, that he had "a problem with the death penalty" and that, while he could vote for death if the "circumstances were right," those circumstances would not involve "a thought out process" but "would probably be something closer to home and something spur of the moment." (11RT 1340.)

Based on those responses, the court declined to grant the prosecution's cause challenge but, observing that the prospective juror was

"90 percent hanging on one side of the wall," allowed further questioning. (11RT 1341-1342.) The prosecutor then gave prospective juror number 8050 a hypothetical scenario involving a defendant who had been abused by his father during his upbringing and who suffered from physical and mental problems. Given that hypothetical scenario, prospective juror number 8050 stated that there was "no chance" he would vote for death. (11RT 1342-1343.) Defense counsel then added to the scenario that one of the victims was an eight-year-old girl. Prospective juror number 8050 nonetheless maintained that he would not vote for death "with all the circumstances of the life that was just described to me." (11RT 1343-1344.)

Defense counsel stated, "submit it," and the trial court excused the prospective juror for cause. (11RT 1344.)

2. Substantial Evidence Supported the Exclusion of Prospective Juror Number 8050 for Cause

Prospective juror number 8050 stated unambiguously that he would be unable to vote for death as part of a "thought out process." Although prospective juror number 8050 maintained that there might be some circumstance in which he could vote to impose the death penalty, he thought that such a circumstance would "be something closer to home and something spur of the moment." (11RT 1340.) This case, of course, required prospective juror number 8050 to engage in a "thought out process" with respect to the imposition of penalty, and did not present a scenario that was "close to home" within the definition of that term suggested by the prospective juror. (See 11RT 1338-1339 [discussing "serial murder" scenario provoking "emotional" reaction].) Thus, the prospective juror's voir dire responses showed that he could not "consider imposing the death penalty in this case as a reasonable possibility."

(*People v. Schmeck* (2005) 37 Cal.4th 240, 262.) He was therefore subject to dismissal for cause for that reason alone.[86]

Further, when asked whether he could vote for death in a case involving a defendant who had been abused by his father during his upbringing and who suffered from physical and mental problems, even if one of the defendant's victims was an eight-year-old girl, prospective juror number 8050 emphatically stated that he could not. (11RT 1342-1344.) This answer, too, subjected the prospective juror to dismissal for cause because it showed that he would "invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances . . . ." (*Kirkpatrick*, *supra*, 7 Cal.4th at p. 1005.) Indeed, after prospective juror number 8050 gave this answer, defense counsel merely "submitted" the question of cause to the trial court. (11RT 1344.) While this did not forfeit his present challenge on appeal, "it does suggest counsel concurred in the assessment that the juror was excusable." (*Schmeck*, *supra*, 37 Cal.4th at p. 262, quoting *People v. Cleveland* (2004) 32 Cal.4th 704, 734.)

Nonetheless, appellant now argues that the hypothetical question posed to the prospective juror provided no basis for exclusion because it improperly asked him to prejudge the facts of the case and it was inaccurate to the extent it assumed that the mitigating factors it presented would be uncontested by the prosecution. (AOB 419-420.) But appellant never objected to the prosecutor's hypothetical questioning during voir dire, and,

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[86] This is true even though the trial court did not excuse prospective juror number 8050 based on that rationale by itself. As noted, the test on appeal is simply whether substantial evidence supported exclusion of the juror on the basis of impairment. (See *People v. Cook*, *supra*, 40 Cal.4th at p. 1343; *People v. Griffin*, *supra*, 33 Cal.4th at p. 558.)

in fact, defense counsel added to the hypothetical. Therefore this portion of his claim is forfeited. (*People v. Visciotti* (1992) 2 Cal.4th 1, 47.) In any event, it cannot be said that the facts presented to the prospective juror were "so specific [as to] require[] the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented." (*Cash*, *supra*, 28 Cal.4th at pp. 721-722.) The hypothetical scenario, upon which the defense itself elaborated, did not present a summary of evidence, but rather identified only three generic factors likely to be present in the case: childhood abuse of the defendant by his father; mental and physical impairments on the part of the defendant; and an eight-year-old victim. This was not a "summary of the mitigating and aggravating *evidence*" of the type this Court warned against in *Cash*, but was simply an identification of "one or more *circumstances* likely to be present in the case," which may properly support dismissal for cause under *Kirkpatrick*.

Moreover, for precisely the same reason, the fact that the prosecution later contested the extent of appellant's abuse and his mental and physical impairments, does not render improper the hypothetical scenario presented to the prospective juror.[87] The point of the hypothetical was to present relatively generic "circumstances likely to be present," and not to catalog or attempt to forecast the precise evidence that might be adduced during the penalty phase. Again, the questioning was squarely within the scope of the *Kirkpatrick* standard. And prospective juror number 8050's responses left far more than a "definite impression" that he would be unable to vote for death in this case. (See *Vines*, *supra*, 51 Cal.4th at p. 853.)

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[87] The prosecution never sought to negate these factors, but did contest their severity and their impact upon appellant's culpability.

Because substantial evidence showed that prospective juror number 8050's ability to apply the law was impaired, the court properly dismissed him.

D. Prospective Juror Number 3606

1. Background

When asked in the questionnaire about her general attitudes toward the death penalty, prospective juror number 3606 expressed some qualms. She stated, "I am against it in theory. However there are some people I could have let them get the death penalty. I don't like the idea of the state killing people." She also stated, "The death penalty is not given with any consist[e]ncy. Each state has their own rules. Minorities seem to be on death row in larger proportion than whites. More poor men on death row than rich. Too much doubt with some cases." She thought that life without parole was "an excellent alternative to the death penalty." And she explained that she had become "more ambiguous" about her opinion on the death penalty; that she "really d[id]n't want to have it but c[ould] see why some people get it." (19CT 5032.) Prospective juror number 3606 also stated, "I believe the rich get better defenses b/c they are able to pay for 'the best.'" (19CT 5037.) She nonetheless stated that she would not automatically vote one way or the other in a capital case and that she would decide the case based on its circumstances. (19CT 5034-5037.)

On voir dire, defense counsel established that prospective juror number 3606 had ambivalent feelings about the death penalty and asked if she could vote for it "if it became necessary." (11RT 1468-1469.) She responded, "I think so. I'm not sure. It would have to be awful." (11RT 1469.) Pressed further, prospective juror number 3606 stated that she "hope[d]" she would be able to vote for death in the right situation, and that

she would not automatically vote either way but her "preference would be life in prison." (11RT 1469-1470.)

The prosecutor then established that prospective juror number 3606 understood that even if the defendant were found sane at the time of the crimes the penalty-phase evidence in mitigation might show that he had mental problems short of insanity. (11RT 1471-1472.) Presented with a hypothetical situation in which the defendant showed that he had mental problems, had been abused by his father, and had been exposed to drugs in utero, prospective juror number 3606 said that she would "probably not" be able to vote for death. (11RT 1472.) When asked more specifically if she could vote for death if she believed the defendant was mentally ill, she stated, "no." (11RT 1473.)

Defense counsel followed with a series of questions asking whether prospective juror number 3606 could vote for death in certain egregious circumstances, having already found the defendant guilty at the guilt phase and sane at the sanity phase. The prospective juror continued to vacillate, and stated that "it would have to be really horribly horrendous." (11RT 1473-1476.) Eventually, defense counsel asked if prospective juror number 3606 could vote for death in a case where the defendant, in addition to killing two other people, stabbed an eight-year-old girl multiple times with a pair of scissors and shot her in the face, but the defendant also showed that he had been abused as a child and was mentally ill. The prospective juror answered, "Then I would say no. If he is mentally ill I could not give him the death penalty," regardless of the degree of mental illness. (11RT 1476.)

The prosecutor made a motion to excuse prospective juror number 3606 for cause, the defense "submitted," and the court granted the motion. (11RT 1476.)

2. Substantial Evidence Supported the Exclusion of Prospective Juror Number 3606 for Cause

Appellant again asserts that the trial court improperly excused the prospective juror for cause because the hypothetical scenario presented to her called for prejudgment of the facts and did not establish that she was unwilling to assess the aggravating and mitigating circumstances at the penalty phase. (AOB 426-427.) Again, however, appellant did not object to the hypothetical questioning in the trial court, but only added to the scenario presented to the prospective juror, and therefore this particular claim is forfeited. (*People v. Visciotti*, *supra*, 2 Cal.4th at p. 47.) Moreover, with respect to prospective juror number 3606, the critical portion of the voir dire—the point at which she indicated her impairment—was when she was asked if she could vote for death if the defendant established that he was mentally impaired. Both the prosecution and the defense asked the question, and the prospective juror unambiguously stated that she could not vote to impose the death penalty in that circumstance, regardless of the degree of mental illness. (11RT 1473, 1476.) Against the background of the hypothetical aggravating and mitigating factors presented by both parties, prospective juror number 3606's answer established, contrary to appellant's assertion, that the sole factor of mental illness—a factor likely to be present in the case—would cause her to invariably vote against the death penalty without regard to the strength of aggravating and mitigating circumstances. For this reason, she was subject to exclusion for cause. (*Kirkpatrick*, *supra*, 7 Cal.4th at p. 1005.)

Moreover, to the extent the hypothetical aggravating and mitigating factors presented to the prospective juror were relevant to the assessment of her answer regarding mental illness, the prosecution again did not offer an impermissible preview of the penalty-phase evidence, but simply asked the prospective juror about "one or more circumstances likely to be present in

the case," which is a permissible basis for a cause challenge. (See *Cash*, *supra*, 28 Cal.4th at pp. 721-722; *Kirkpatrick*, *supra*, 7 Cal.4th at p. 1005.) And the defense again submitted the matter to the trial court, suggesting that it, too, agreed that prospective juror number 3606 was excludable for cause. (*Schmeck*, *supra*, 37 Cal.4th at p. 262.) On this record, the trial court was entitled to excuse prospective juror number 3606 based on a "definite impression" that she would be unable to vote for death in this case. (See *Vines*, *supra*, 51 Cal.4th at p. 853.)

Because substantial evidence showed that prospective juror number 3606's ability to apply the law was impaired, the court properly dismissed her.

E. Prospective Juror Number 5339

1. Background

In completing the questionnaire, prospective juror number 5339 affirmed that he would not automatically vote one way or the other in a capital case and that his evaluation of the case would depend on the circumstances. (21CT 5467-5470.) However, he also stated that he would be unable to evaluate the testimony of a police officer by the same standards as any other witness. (21CT 5464.) He explained that he believed the death penalty should be invoked "only when necessary if police officer is killed or multiple counts of murder," that he thought the frequency of imposition of the death penalty was "about right," and that he was "for" life without parole as a "fair" alternative. (21CT 5465, 5469.) Prospective juror number 5339 believed that criminals were treated fairly, and he had confidence in the criminal justice system. (21CT 5470.)

On voir dire, prospective juror number 5339 stated that he had been charged with a felony based on writing a bad check, but "it was broken down to a misdemeanor." (12RT 1617.) He also retracted his previous

answer regarding his evaluation of the testimony of a police officer, affirming that he would give it the same weight as any other witness. (12RT 1617.)

Upon questioning by the defense regarding his general views on the death penalty, prospective juror number 5339 stated, ". . . I used to be very strong on the death penalty, but now I'm not as strong as I used to be . . . ." (12RT 1619.) Prospective juror number 5339 explained, in response to further questions, that, with respect to multiple murders, he would not automatically vote for death but would want to evaluate other factors, such as the number of victims and whether the defendant showed remorse. (12RT 1619-1621.) When asked more specifically whether he would consider mitigating factors in a case involving three murders and an aggravating prior stabbing, he agreed that he would. (12RT 1621.) He also stated that he considered himself more in favor of life without parole than death but that he would follow the court's instructions and consider voting for death in this case if the aggravating factors substantially outweighed the mitigating factors. (12RT 1621-1622.) Nonetheless, when told that even if the aggravating factors substantially outweighed the mitigating factors he would not be compelled to vote for death, prospective juror number 5339 stated that he would then "probably" not vote for death. (12RT 1622.) After that statement, defense counsel sought to rehabilitate prospective juror number 5339 by asking whether, despite his preference for life, he would still consider the aggravating and mitigating evidence and vote either way depending on the evidence. The prospective juror agreed. (12RT 1622-1623.)

But the prosecutor then asked prospective juror number 5339 whether he was comfortable with the answers he had just given, and the prospective juror stated that he was "a little bit confused about some of these things." (12RT 1623.) The prosecutor then explained in more detail that a separate

penalty phase would be held at which the jury would evaluate whether the aggravating factors substantially outweighed the mitigating factors, but that, even if the jury so concluded, it was not obligated to vote for death. The prosecutor asked whether prospective juror number 5339 would ever vote for death in that circumstance, and the prospective juror replied, "No, I don't think so." (12RT 1624.) The prosecutor then asked, "So are you telling us now that as long as there's an option of life without parole you will always choose that over the death penalty?" The prospective juror replied, "Yes." (12RT 1625.)

The prosecutor challenged prospective juror number 5339 for cause, the defense "submitted," and the court excused the prospective juror. (12RT 1625.)

2. Substantial Evidence Support the Exclusion of Prospective Juror Number 5339 for Cause

As appellant points out, prospective juror number 5339 initially appeared "neutral" with respect to the death penalty. (AOB 430-431.) However, when the procedure governing the jury's determination of penalty was finally made clear to him during voir dire, the prospective juror's answer was clear and unequivocal: so long as the option for life without parole remained a permissible alternative, he would *always* vote for that alternative. (12RT 1625.) Plainly, this was not a prospective juror that could "consider imposing the death penalty in this case as a reasonable possibility." (*Schmeck*, *supra*, 37 Cal.4th at p. 262.) He was therefore properly subject to dismissal for cause. And indeed, once again, the defense submitted the matter to the trial court, suggesting that it, too, agreed that prospective juror number 5339 was excludable for cause. (*Ibid.*) Moreover, as noted, even if some of the answers given by the prospective juror could be construed as conflicting or equivocal, the trial court's ultimate resolution of the matter, after having had the opportunity to

question and assess the prospective juror, is controlling. (See *Lynch*, *supra*, 50 Cal.4th at pp. 733, 735; *Solomon*, *supra*, 49 Cal.4th at p. 830.) There was therefore no error.

Appellant again argues that the hypothetical aggravating and mitigating factors prospective juror number 5339 was asked about improperly called for prejudgment of the case. (AOB 431-432.) But, as to this prospective juror, the hypothetical factors were offered by the defense, and therefore any error on that score was invited. Even more importantly, however, those hypothetical factors ultimately were not pertinent to the prospective juror's disqualification. As noted, the key consideration focused on by the prosecutor was prospective juror number 5339's inability to vote for death so long as life without parole remained an option. (12RT 1623-1625.) It was that consideration that rendered him unable to apply the state-law framework in capital cases.

Because substantial evidence showed that prospective juror number 5339's ability to apply the law was impaired, the court properly dismissed him.

F. Any Error Was Harmless

Assuming this Court were to find that any prospective jurors had been erroneously excluded, the error was harmless. As the Chief Justice recently observed, the United States Supreme Court in *Gray v. Mississippi* (1987) 481 U.S. 648, 666 [107 S.Ct. 2045, 95 L.Ed.2d 622] examined two theories upon which harmless error analysis might be applied to a violation of the review standard created under *Witherspoon-Witt*. (*People v. Riccardi* (2012) 54 Cal.4th 758, 840-846 (conc. opn. of Cantil-Sakauye, C.J.).) The majority in *Gray* rejected only one of those theories, however; that is, it rejected the contention that an erroneous *Witherspoon-Witt* exclusion had no effect on the composition of the jury. The *Gray* Court found that the exclusion necessarily had an effect on the jury composition, even if one

assumed that the prosecutor in any circumstance would have exercised a peremptory challenge against the death-scrupled prospective juror. Thus, as the Chief Justice concluded in *Riccardi*, "*Gray* stands for the proposition that *Witherspoon-Witt* error is reversible per se because the error affects the composition of the panel '"as a whole"' [citations] by inscrutably altering how the peremptory challenges were exercised [citations]." (*Id.* at p. 842 (conc. opn. of Cantil-Sakauye, C.J.).) But as the Chief Justice also noted in *Riccardi*, one year after *Gray* the high court in *Ross v. Oklahoma* (1988) 487 U.S. 81 [108 S.Ct. 2273, 101 L.Ed.2d 80] rejected the *Witherspoon-Witt* remedy as well as the rationale developed for it in *Gray*, as applied to a wrongly included pro-death juror, explaining that the Sixth Amendment is not implicated simply by the change in the mix of viewpoints held by jurors (be they death penalty supporters or skeptics) who are ultimately selected. (*Riccardi*, *supra*, at pp. 842-844 (conc. opn. of Cantil-Sakauye, C.J.).)

Notwithstanding the Chief Justice's observations in *Riccardi*, this Court felt "compelled to follow that precedent that is most analogous to the circumstances presented here[,]" which was *Gray*, as opposed to *Ross*. (*Riccardi*, *supra*, 54 Cal.4th at pp. 845 (conc. opn. of Cantil-Sakauye, C.J.).) Respondent respectfully asks this Court to revisit this conclusion in light of the observation that, in *Gray*, the People (as well as the dissent) had argued the error had *no effect* on the case. Here lies "a reasoned basis" (*id.* at p. 844 fn. 2) for the different results in these cases. The "no-effect" rationale for adopting a harmless error rule only goes so far, and allowed the *Gray* Court to reject it so long as there was some effect on the jury composition. The People's proffered rationale therefore never required the Court to account for the nature of a *Witherspoon-Witt* violation. Here, however, respondent asks the Court to do so. Respondent submits that the appropriateness of harmless error analysis should take into account the "differing values" particular constitutional rights "represent and protect[.]"

(*Chapman v. California*, *supra*, 386 U.S. at p. 44 (conc. opn. of Stewart, J.).)

Witherspoon protects capital defendants against the state's unilateral and unlimited authority to exclude prospective jurors based on their views on the death penalty. Accordingly, "'*Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude . . . .' [Citation.]" (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 423.) Beyond this protection is the simple misapplication of the *Witherspoon-Witt* standard because it does not grant the prosecution the unilateral and unlimited power to exclude death-scrupled jurors, and as this Court has recognized, no cognizable prejudice results simply from the absence of any viewpoint or the existence of any particular balance of viewpoints among the jurors. (*People v. Riccardi*, *supra*, 54 Cal.4th at pp. 843-844 (conc. opn. of Cantil-Sakauye, C.J.); *Lockhart v. McCree* (1986) 476 U.S. 162, 177-178 [106 S.Ct. 1758, 90 L.Ed.2d 137].) Thus, exclusion of a juror through misapplication of the *Witherspoon-Witt* standard results in mere "technical error that should be considered harmless[.]" (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 666.)

XV. APPELLANT WAS NOT PREJUDICED BY THE TRIAL COURT'S FAILURE TO REINSTRUCT THE JURY ON EVIDENTIARY PRINCIPLES AT THE PENALTY PHASE

Appellant argues that, after the trial court told the jury at the outset of penalty phase deliberations to disregard all previous instructions, the court erred by failing to reinstruct the jury at the penalty phase on the "various limitations on consideration of evidence" that had applied during the guilt and sanity phases. (AOB 434-440.) The error was harmless.

As this Court noted in *People v. Blacksher, supra,* 52 Cal.4th at 769, a failure to reinstruct at the penalty phase "on the applicable principles of evaluating the credibility of witnesses" is error, but the error is harmless if

"'the jury expressed no confusion in this regard and never requested clarification.'" (*Id.* at pp. 845-846, quoting *People v. Carter* (2003) 30 Cal.4th 1166, 1221.) As in *Blacksher* and *Carter*, the error in this case did not prejudice appellant.

Aside from airing general concerns about the lack of instructions addressing the jury's consideration of evidence, appellant points to only three concrete examples of how the error might have affected his case. First, appellant notes that the jury received no instructions about expert testimony, such as those prohibiting the jury from considering for their truth appellant's statements to physicians (see 23CT 6122) or appellant's school and medical records (see 23CT 6123), which would have applied to the testimony of Paul Monez. (AOB 436-437.) However, Monez did not testify to any such matters—at least not directly or substantially—because he did not use any such materials to diagnose appellant with anything. Rather, Monez testified as an attorney specializing in parricide cases and opined simply whether aspects of the crimes in this case were consistent or inconsistent with his experience concerning abused children who kill their parents in a "storm of emotion." (47RT 5720-5749, 5760-5779.)

Appellant also notes that the jury was not instructed regarding the proper consideration of an expert's testimony and hypothetical questions posed to an expert (see 23CT 6139, 6141). (AOB 437, fn. 122.) The basic thrust of the instruction regarding hypothetical questions is that the jury should not assume that the hypothetical facts have been established as true. In the context of Monez's testimony, however, the hypothetical questions posed by the prosecution (see, e.g., 47RT 5766-5768, 5772-5774, 4776-5777) were based on the evidence from the guilt phase, at which appellant had been convicted of all three murders. Therefore, the danger addressed by the hypothetical-question instruction was not present here, or was at least greatly diminished. Moreover, Monez's testimony was plainly

couched in terms of opinion evidence; there was nothing about that testimony that might have led the jury to think it should be accepted as conclusive, which is the risk that the general instruction concerning expert testimony seeks to ameliorate (see 23CT 6139). In short, appellant points to no specific way in which the jury was likely to have misused the expert testimony at the penalty phase in the absence of the cited instructions. Since there was no such danger, the failure to give those instructions was not prejudicial.

Second, appellant argues that, in the absence of instructions limiting the consideration of certain impeachment evidence used by the prosecution at the guilt phase—namely, the statements of jailhouse informants Catsiff and Alatorre, and appellant's juvenile medical records—the jury could have considered that evidence for its truth at the penalty phase. (AOB 438.) However, while it is true that the jury was told it could base its penalty determination upon the evidence received during the guilt phase (24CT 6297-6298), none of the evidence appellant points to was actually highlighted, or even mentioned, during the penalty phase. In light of the evidence and arguments actually presented, there is no likelihood that the absence of expert-witness instructions caused the jury to use the evidence improperly. The absence of those instructions was therefore not prejudicial.

Third, appellant claims that the absence of an instruction informing the jury not to take any cue from the judge (see 23CT 6177) might have caused the jury to allow its decision to be influenced by the "trial court's comments rebuking and disparaging appellant" and the court's "making and sustaining its own objections to appellant's examination of witnesses" during the penalty phase. (AOB 439.) However, appellant points to only one example of the court's "rebuking and disparaging" him (46RT 5616-5617), which consisted simply of a fully warranted, correct, and reasonable

admonition that appellant follow the evidence code and the court's rulings in his presentation of evidence. Similarly, appellant cites only two examples of the court's interposing of its own objections (45RT 5538, 5544), both of which occurred close in time during examination of the same witness. Again, the objections were proper and reasonable, and appellant does not appear to contend otherwise. In context, there is no reasonable possibility that the actions of the court appellant points to actually influenced the jury's decisionmaking simply because it was not specifically warned against that risk.

Moreover, as to all three alleged instructional problems, they could not have affected the outcome of the penalty phase, considered either individually or together, because the penalty determination in this case was not a close question. The nature of the crimes, and in particular the execution of Josephine and the brutal stabbing of Sandra, were unquestionably horrendous. And the prosecution's penalty-phase evidence tended to show that appellant lacked regard for human life. Indeed, whatever doubt the prosecution's case may have left about that point was swept away with the defense case. During the defense case, appellant refused to take responsibility for murdering Josephine and Sandra, instead blaming them for simply being in the wrong place at the wrong time—even calling Josephine an "ungrateful bitch" (43RT 5337)—and admitting that he had callously described the stabbing of Sandra as "torture" (44RT 5413). In that context, nothing about appellant's abusive relationship with his father could have mitigated his crimes, and, in fact, appellant's own expert witness admitted that the murders of Josephine and Sandra were inconsistent with his experience in parricide cases and that it was possible the murders were simply the result of sociopathic behavior. (47RT 5730-5732, 5734, 5765, 5777-5779.)

On this record, the jury took only six and a half hours to determine that appellant deserved to die for his crimes, giving no indication that it struggled with the decision. And, in particular, the jury did not express any confusion about, or request clarification of, any evidentiary matters that would have been covered by the omitted instructions. (See *People v. Blacksher*, *supra*, 52 Cal.4th at pp. 845-846.)[88] The decision was simply not a close one.

Accordingly, the error does not require reversal.

XVI. THE TRIAL COURT'S INSTRUCTION TO THE JURY UPON REPLACEMENT OF A JUROR DURING PENALTY-PHASE DELIBERATIONS WAS NEITHER ERRONEOUS NOR PREJUDICIAL

During penalty-phase deliberations, the trial court excused a juror and replaced that juror with an alternate. (50RT 6134-6143.) The court then instructed the jury pursuant to CALJIC No. 17.51.1, as follows:

> Members of the Jury. A juror has been replaced by the alternate juror. The alternate juror was present during the presentation of all of the evidence and arguments of counsel and reading of instructions during the guilt phase of the trial and sanity phase. However, the alternate juror did not participate in the jury deliberations which resulted in the verdicts and findings returned by you to this point.

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[88] Appellant points to the jury's "difficulties" in rendering unanimous verdicts at the guilt phase, and its failure to reach sanity verdicts as to Counts 2 and 3 before appellant withdrew his insanity plea as evidence that the case was a close one. (AOB 440.) Even if those points could be considered as indicia that the guilt-phase and sanity-phase cases were close, the penalty phase involved an entirely different consideration. Once appellant actually qualified for the death penalty, the "normative" decision whether he, in fact, deserved to die was not a difficult one, particularly after he admitted that his mental defense was a ruse.

> For the purposes of this penalty phase of the trial, the alternate juror must accept as having been proved beyond a reasonable doubt those guilty verdicts and true findings rendered by the jury in the guilt phase of the trial.
>
> . . .
>
> Your function now is to determine along with the other jurors in the light of the prior verdicts and findings and the evidence and law what penalty should be imposed. Each of you must participate fully in the deliberations including any review as may be necessary of the evidence presented in the guilt phase of the trial.

(50RT 6141-6142.)[89]

Appellant did not ask for any different instruction. He now claims, however, that the instruction was erroneous, and violated his state and federal constitutional rights, because it did not expressly tell the jury "to begin penalty deliberations anew." (AOB 441-447.) The claim must be rejected.

California law secures to a criminal defendant the right to a unanimous verdict of guilt (*People v. Collins* (1976) 17 Cal.3d 687, 693), and, in a capital case, a unanimous penalty verdict (*People v. Loy* (2011) 52 Cal.4th 46, 78 [while verdict as to penalty itself must be unanimous, jury need not unanimously determine aggravating factors]). Regarding that right, this Court has observed that "[t]he requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them." (*People v. Collins*, *supra*, 17 Cal.3d at p. 693.) In other words, each juror "must fully participate in the deliberations." (*Id.* at p. 694.) Thus, when a

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[89] Just after reading this instruction, the court clarified that the alternate juror also had to accept the jury's previous verdict as to Count 1 at the sanity phase. (50RT 6142-6143.)

juror is replaced during deliberations, a trial court should tell the jury to set aside its previous deliberations and begin deliberating anew. (*Ibid.*)

Here, the trial court did not expressly say that the jury should "begin penalty deliberations anew." (AOB 441.) Nonetheless, and in accord with the reasoning of *Collins*, the trial court did tell the jury that each juror "must participate fully in the deliberations." (50RT 6142.) Although the *Collins* decision specified certain instructional language that should be delivered by the court upon replacement of a deliberating juror, including that the jury should start "deliberations again from the beginning," that instructional language derives directly from the principle that the right sought to be protected is that of "full participation" by each juror in deliberations. (*Collins*, *supra*, 17 Cal.4th at p. 694.) The instruction given here expressly articulated that concept.[90]

Moreover, by admonishing the jury that "[y]our function now is to determine *along with the other jurors*" the appropriate penalty, and that "[e]ach of you must participate fully" in that determination, the instruction fairly conveyed that the replacement juror was obligated to participate in the entire deliberative process and not merely begin mid-stream—in other words, that the deliberations had to begin anew. (50RT 6141-6142 [emphasis added].) In fact, this Court, in passing, has characterized the instruction given here, CALJIC No. 17.51.1, in just such a way, stating that it "directs the jury to begin deliberations anew with regard to penalty with

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[90] Thus, by failing to request amplifying language when the court read the jury CALJIC No. 17.51.1, appellant forfeited any claim of error on appeal. (See *People v. Sanders* (1995) 11 Cal.4th 475, 533 ["A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language"; quotation marks, alteration, and citation omitted].)

[a] newly appointed alternate juror." (*People v. Thompson* (2010) 49 Cal.4th 79, 138.)

In *People v. Proctor* (1992) 4 Cal.4th 499, this Court concluded that an instruction upon the replacement of a deliberating juror need not "embody all elements of the instruction required by [*Collins*]." (*Id.* at pp. 536-537.) There, the trial court told the jury that it "would be helpful and in connection with commencing your deliberations again, that you kind of start, start from scratch, so to speak, so that Mr. Rhoades has the benefit of your thinking as well as give him an opportunity for his input also." (*Id.* at p. 536.) This Court observed that, although the instruction did not expressly require the jury to disregard its prior deliberations, the admonition given by the trial court "implied" that concept and also "emphasized" that the jury was to begin anew "with the full participation of the alternate." (*Id.* at p. 537.)[91] As in *Proctor*, although the instruction given here did not contain all the elements of the suggested instruction laid out in *Collins*, its language at least fairly implied the concepts upon which

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[91] In light of *Proctor*, it is difficult to reach a conclusion other than that the Court of Appeal's earlier decision in *People v. Martinez* (1984) 159 Cal.App.3d 661, was wrong. (See AOB 446.) In *Martinez*, the court, upon substitution of a deliberating juror, told the jury to begin deliberations anew but did not expressly admonish the jury to set aside its prior deliberations. The jury had deliberated only about an hour before the substitution and thereafter deliberated an additional six days, and the Court of Appeal observed that the case was a "close" one. The *Martinez* court found prejudicial error on this record. (*Id.* at pp. 664-666.) However, in *Proctor*, as noted, this Court held that the omission of the specific admonition to set aside prior deliberations was not error in light of other portions of the instructions that conveyed the *Collins* requirements. (*Proctor*, *supra*, 4 Cal.4th at pp. 536-537.) And *Proctor* also found that any error was harmless because the juror substitution had occurred less than an hour into deliberations and the jury then continued to deliberate for an additional two and a half days. (*Id.* at p. 537.)

Collins was premised—most importantly that each juror had to "participate fully" in deliberations.

In addition, it is worth noting that the jury was twice instructed, during the guilt phase, to begin deliberations anew when a deliberating juror was replaced with an alternate. (34RT 4206-3407, 4212.) In light of those prior instructions, it is even more likely that the jury understood CALJIC No. 17.51.1 as requiring deliberations to begin anew with the participation of the replacement juror. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 831 [challenged instruction viewed in context of instructions as a whole to determine whether it is reasonably likely jury improperly applied the instruction]; *People v. Ayers* (2005) 125 Cal.App.4th 988, 997 [jurors assumed to be intelligent and capable of understanding, correlating, and following all instructions].)[92] There was therefore no instructional error.

In any event, even if the trial court erred by reading the jury CALJIC No. 17.51.1 without adding a specific admonition to begin deliberations anew, the error was not prejudicial. Penalty phase instructional error is harmless if there is no reasonable possibility that it affected the verdict. (See, e.g., *People v. Williams* (2010) 49 Cal.4th 405, 459.)[93] In evaluating

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[92] Respondent acknowledges that at the outset of penalty-phase deliberations the jury was told to disregard all the instructions given at the guilt phase. (49RT 6126; 24CT 6297.) In context, however, that instruction could only have been reasonably understood to require the jurors to disregard prior instructions with respect to the substantive sentencing decision—i.e., with respect to being "guided by the applicable factors of aggravating and mitigating circumstances" (49RT 6129; 24CT 6301)—and not with respect to operational matters such as beginning deliberations anew upon the replacement of a juror with an alternate.

[93] Appellant argues that the error should be considered structural. (AOB 444.) However, as noted, structural error occurs only in a "very limited class of cases" involving some "defect affecting the framework

(continued...)

this type of error a court "may consider whether the case is a close one and compare the time the jury spent deliberating before and after the substitution of the alternate juror." (*Proctor*, *supra*, 4 Cal.4th at p. 537.)

As explained, the penalty-phase case here was not close. The nature of the crimes was unquestionably brutal. The prosecution's penalty-phase evidence tended to show that appellant lacked regard for human life. And during the defense case, appellant refused to take responsibility for murdering Josephine and Sandra, instead blaming them for simply being in the wrong place at the wrong time, calling Josephine an "ungrateful bitch" (43RT 5337), and admitting that he had callously described the stabbing of Sandra as "torture" (44RT 5413). Against that background, nothing about appellant's abusive relationship with his father could have mitigated his crimes, and, even his own expert witness admitted that the murders of Josephine and Sandra were inconsistent with his experience in parricide cases and that it was possible that the murders were simply sociopathic (47RT 5730-5732, 5734, 5765, 5777-5779). (See *Collins*, *supra*, 17 Cal.3d at p. 697 [finding no prejudice based on strength of prosecution's case]; see also *People v. Odle* (1988) 45 Cal.3d 386, 406, disapproved on another ground by *People v. Prieto* (2003) 30 Cal.4th 226, 256 [same, noting that

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(...continued)
within which the trial proceeds, rather than simply an error in the trial process itself." (*Johnson v. United States*, *supra*, 520 U.S. at pp. 468-469 [quotation marks and citation omitted; listing narrow range of cases in which structural error was found].) This Court has consistently deemed instructional error of the variety asserted here to be susceptible to harmless error review. (See, e.g., *Proctor*, *supra*, 4 Cal.4th at p. 537; *Collins*, *supra*, 17 Cal.3d at p. 697.) Appellant also argues that the error should be assessed under the beyond-a-reasonable-doubt standard of *Chapman v California*, *supra*, 386 U.S. at p. 24. (AOB 444-445.) As this Court has noted, California's reasonable-possibility standard is the "same in substance and effect" as the *Chapman* standard. (*People v. Dykes*, *supra*, 46 Cal.4th at p. 786, quotation marks and citation omitted.)

prosecution's case was "overwhelming"]; compare *Martinez*, *supra*, 159 Cal.App.3d at pp. 665-666 [finding *Collins* error prejudicial where case was "close," issues before jury were "not simple," and approximately six days of deliberations as well as lengthy readback of testimony were required].)

Further, the jury required only about six and a half hours to decide that appellant deserved to die for his crimes; two of these hours transpired after the juror substitution. This confirms that the jury did not struggle with the penalty determination. And, in the context of a penalty-phase case that was not at all close, this was sufficient deliberation to reflect the full participation of the replacement juror. (Compare *Griesel v. Dart Industries, Inc.* (1979) 23 Cal.3d 578, 582-583, 585 [failure to tell jury to begin deliberations anew was prejudicial where juror was replaced after seven days of deliberation and non-unanimous civil verdict was then reached after four additional hours of deliberation]; see also fn. 89, *ante*.)

In short, the failure to expressly admonish the jurors to begin deliberations anew—after having told them, in accord with CALJIC No. 17.51.1, that the full participation of each juror was required—could not have altered the outcome of the penalty-phase here given the strength of the prosecution's case and given that the length of deliberations both confirms that the penalty determination was not a close issue and does not suggest that the replacement juror failed to fully participate.

XVII. CALIFORNIA'S CAPITAL-PUNISHMENT SYSTEM IS CONSTITUTIONAL

Appellant raises a variety of constitutional challenges to California's capital-punishment system, recognizing that this Court "has consistently rejected cogently-phrased arguments pointing out these deficiencies" but wishing to preserve the claims for federal review. (AOB 448-464.)

Because appellant presents nothing new or significant that would call into question this Court's earlier holdings, respondent addresses each claim summarily. (See, e.g., *People v. Welch* (1999) 20 Cal.4th 701, 771-772; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255-1256.)

This Court has previously rejected the argument that Penal Code section 190.3, factor (a), is unconstitutionally overbroad (AOB 448-450 [Argument 17(A)]). (*People v. Brown* (2004) 33 Cal.4th 382, 401; *People v. Jenkins* (2000) 22 Cal.4th 900, 1050-1052; see also *Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750].)

This Court has previously rejected the argument that, as a constitutional matter, a capital-sentencing jury must be required to find that aggravating factors outweigh mitigating factors beyond a reasonable doubt (AOB 448-451; Argument 17(B)(1)). (*People v. Sapp* (2003) 31 Cal.4th 240, 316-317; *People v. Jones* (2003) 30 Cal.4th 1084, 1126-1127; *People v. Holt* (1997)15 Cal.4th 619, 683-684 ["the jury need not be persuaded beyond a reasonable doubt that death is the appropriate penalty"].) Nothing in the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct.2428, 153 L.Ed.2d 556], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], or *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] compels a different result than previously reached by this court. (*People v. Mendoza* (2007) 42 Cal.4th 686, 707; *People v. Gray* (2005) 37 Cal.4th 168, 237; *People v. Ward* (2005) 36 Cal.4th 186, 221.)

This Court has previously rejected the argument that the state or federal Constitution requires a burden of proof to be allocated in a capital sentencing proceeding (AOB 452-453; Argument 17(B)(2)). (*People v. Michaels* (2002) 28 Cal.4th 486, 541; *People v. Jones*, *supra*, 30 Cal.4th at p. 1127.)

This Court has previously rejected the argument that, as a constitutional matter, a capital-sentencing jury must find aggravating factors unanimously (AOB 453-545; Argument 17(B)(3)(a)), and nothing in *Apprendi*, *Ring*, *Blakely*, or *Cunningham* compels a different result than previously reached by this Court. (*People v. Prieto* (2003) 30 Cal.4th 226, 275; *People v. Monterroso* (2004) 34 Cal.4th 743, 796; *People v. Morisson* (2004) 34 Cal.4th 698, 731.)

This Court has previously rejected the argument that it is unconstitutional to use unadjudicated criminal activity as an aggravating factor (AOB 454-455; Argument 17(B)(3)(b)). (*People v. Snow* (2003) 30 Cal.4th 43, 126; *People v. Maury* (2003) 30 Cal.4th 342, 439; *People v. Michaels* (2002) 28 Cal.4th 486, 541-542.) Nothing in *Apprendi*, *Ring*, *Blakely*, or *Cunningham* affects those holdings because that line of cases has "no application to the penalty phase procedures of this state." (*People v. Martinez*, *supra*, 31 Cal.4th at pp. 700-701.)

This Court has previously rejected the argument that the phrase "so substantial" in CALJIC No. 8.88 is unconstitutionally vague (AOB 456; Argument 17(B)(4)). (*People v. Carter* (2003) 30 Cal.4th 1166, 1226.)

This Court has previously rejected the argument that the word "warrants" in CALJIC No. 8.88 is unconstitutionally ambiguous or imprecise (AOB 456-457; Argument 17(B)(5)). (*People v. Boyette* (2002) 29 Cal.4th 381, 465.)

This Court has previously rejected the argument that CALJIC No. 8.88 unconstitutionally fails to inform the jury that it must return a sentence of life without parole if it determines that the aggravating factors do not outweigh the mitigating factors (AOB 457-458; Argument 17(B)(6)). (*People v. Catlin* (2001) 26 Cal.4th 81, 174.)

This Court has previously rejected the argument that the state or federal Constitution requires a capital-sentencing jury must be instructed as

to burden of proof and unanimity with respect to mitigating factors (AOB 458-459-361; Argument 17(B)(7)). (*People v. Lewis* (2008) 43 Cal.4th 415, 534; *People v. Rodgers*, *supra*, 39 Cal.4th at p. 897.)

This Court has previously rejected the argument that a capital-sentencing jury must, as a constitutional matter, be instructed as to a "presumption of life" (AOB 459-460; Argument 17(B)(8)). (*People v. Prieto*, *supra*, 30 Cal.4th at p. 271.)

This Court has previously rejected the argument that a capital-sentencing jury must, as a constitutional matter, return written findings (AOB 460; Argument 17(C)). (*People v. Snow*, *supra*, 30 Cal.4th at p. 126; *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

This Court has previously rejected the argument that CALJIC No. 8.85 unconstitutionally employs restrictive adjectives (AOB 461; Argument 17(D)(1)). (*People v. Prieto*, *supra*, 30 Cal.4th at p. 276.)

This Court has previously rejected the argument that a trial court is required, as a constitutional matter, to delete inapplicable sentencing factors from CALJIC No. 8.85 (AOB 461; Argument 17(D)(2)). (*People v. Taylor* (2001) 26 Cal.4th 1155, 1179-1180.)

This Court has previously rejected the argument that the state or federal Constitution requires that a capital-sentencing jury be told that certain factors enumerated in CALJIC No. 8.85 are relevant only as mitigating factors (AOB 461; Argument 17(D)(3)). (*People v. Farnam* (2002) 28 Cal.4th 107, 191.)

This Court has previously rejected the argument that a sentence of death in California must be subject to "intercase proportionality review" to survive constitutional scrutiny (AOB 462-463; Argument 17(E)). (*People v. Foster* (2010) 50 Cal.4th 1301, 1368.)

This Court has previously rejected the argument that California's capital punishment system violates the Equal Protection Clause (AOB 463;

Argument 17(F)). (*People v. Prieto*, *supra*, 30 Cal.4th at p. 276; *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.)

And finally, this Court has previously rejected the argument that California's capital punishment system unconstitutionally violates international norms (AOB 463-464; Argument 17(G)). (*People.v. Snow*, *supra*, 30 Cal4th at p. 43.)

Appellant provides no compelling argument as to why these issues should be revisited. Accordingly, they should all be summarily rejected.

XVIII. THERE IS NO CUMULATIVE PREJUDICE IN THIS CASE

Appellant argues that reversal is required based on the accumulated prejudice arising from multiple errors, even if those errors individually could be deemed harmless. (AOB 465-470.) But where few or no errors have occurred, and where any such errors found to have occurred were harmless, the cumulative effect does not result in the substantial prejudice required to reverse a defendant's conviction. (*People v. Price* (1991) 1 Cal.4th 324, 465.) The essential question is whether the defendant's guilt was fairly adjudicated, and in that regard a court will not reverse a judgment absent a clear showing of a miscarriage of justice. (*People v. Hill, supra,* 17 Cal.4th at p. 844; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box* (2000) 23 Cal.4th 1153, 1214, 1219.) For the reasons explained, there was no error in this case, and even if there was error it was harmless. Appellant points to several alleged errors, or small groups of related errors, that are discrete and unrelated, and therefore have no accumulating effect. (See AOB 467-468.) Thus, even considered in the aggregate, the alleged errors could not have affected the outcome of trial. There was no miscarriage of justice, and reversal is not required on this ground.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment of conviction and the penalty of death be affirmed in their entirety.

Dated: January 30, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13-point Times New Roman font and contains 60, 575 words.

Dated: January 30, 2013

KAMALA D. HARRIS
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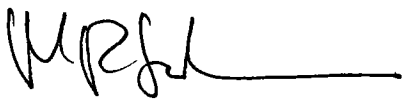

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Robert Maurice Bloom**
Case No.: **S095223**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 30, 2013, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 30, 2013, at Los Angeles, California.

K. Amioka
Declarant

Signature

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