S075727 SUPREME COURT COPY COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CEDRIC JEROME JOHNSON, Defendant and Appellant.	Los Angeles County Superior Court No. TA037977-01

SUPREME COURT
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APPELLANT'S REPLY BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, County of Los Angeles

HONORABLE JOHN J. CHEROSKE, SUPERVISING JUDGE

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DEATH PENALTY

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APPELLANT'S REPLY BRIEF

INTRODUCTION

In this reply to respondent's brief on direct appeal, appellant Cedric Jerome Johnson replies to contentions by respondent that necessitate an answer in order to present the issues fully to this Court. Johnson does not reply to arguments that are adequately addressed in his opening brief. The absence of a reply to any particular argument, sub-argument or allegation made by respondent, or of a reassertion of any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by Johnson (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but reflects his view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the

argument numbers in Appellant's Opening Brief.[1]

///

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[1] All statutory references are to the Penal Code unless stated otherwise.

The following abbreviations are used in this brief: "AOB" refers to Johnson's opening brief; "RB" refers to respondent's brief. As in the opening brief, citations to the record are abbreviated as follows. "CT" means the Clerk's Transcript. "SCT II" means part II of the Supplemental Clerk's Transcript. "RT" means the Reporter's Transcript. The page numbers for the reporter's transcript of the second trial begin with "2-." Thus, 23RT 2-1293-1303 means the pages numbered 2-1293 through 2-1303 of volume 23 of the reporter's transcript.

I.

BECAUSE DEFENDANT CEDRIC JOHNSON WAS TRIED BEFORE A BIASED JUDGE, HE WAS DENIED A FAIR TRIAL.

A. Judge Cheroske Did Not Read Johnson's Motion to Disqualify Hauser but Ruled On It Anyway, Thereby Depriving Johnson of His Full Right to Be Heard and Exhibiting Bias Against Johnson.

In his opening brief, Johnson established the first example of Judge Cheroske's bias towards him. On February 18, 1998, Judge Cheroske denied Johnson's written motion to disqualify attorney Steven Hauser, without reading Johnson's filed motion. By failing to read the motion but ruling on it anyway, Judge Cheroske denied Johnson his full right to be heard in court. (*Kennick v. Commission on Judicial Performance* (1990) 50 Cal.3d 297, 325 [judge's refusal to listen to defendants amounted to prejudicial conduct consisting of denial of parties' full right to be heard].)

Respondent answers by claiming that "the record actually indicates that Judge Cheroske read the motion." (RB 68.) Furthermore, according to respondent, "Judge Cheroske *expressly* said he had read appellant's motions. (1RT 120.)" (RB 69, italics added.)

Nowhere in the record, however, did Judge Cheroske say he read Johnson's motion to disqualify Hauser, let alone "expressly" say he read all of Johnson's motions. Indeed, despite the fact that at the February 18, 1998 hearing, Johnson informed Judge Cheroske *four* times that he had filed a motion to disqualify Hauser, not once did Judge Cheroske say at the hearing that he had *read* the motion to which Johnson repeatedly referred. And not once did Judge Cheroske even *mention* Johnson's filed motion itself, though Judge Cheroske ruled on the motion by denying it, as

respondent acknowledges. (1RT 152; RB 69.)

On February 18, 1998, Johnson and Hauser appeared before Judge Cheroske to address Hauser's status, among other issues. Judge Cheroske first explained that Hauser had previously been Johnson's attorney and his representation had terminated. Judge Cheroske asked Hauser to confirm the accuracy of the court's understanding that Hauser had been present at every proceeding in the case. When Hauser represented that he had been at every proceeding, Judge Cheroske appointed Hauser as stand-by counsel. (1RT 148.)[2]

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[2] The relevant portion of the reporter's transcript for the February 18, 1998 hearing is as follows:

The Court: If you have some sort of offer of proof, you can present that by way of a written motion with an affidavit, with your points and authorities. I will not accept just your bare allegation, because I would interpret that to mean, without any supporting facts, that it's another tactic that has been thought up someplace to avoid the appointment of Mr. Hauser as your stand-by counsel. You put together the proper motion with the affidavit signed under penalty of perjury by yourself or any other witnesses that you have and the points and authorities, and I'll reconsider it at that time. But for now, Mr. Hauser is the stand-by counsel.

Mr. Johnson: Your honor, I would let the record reflect that *I filed a disqualification*, though. I think that will outline clearly what Mr. Hauser was doing. He was misrepresenting statements of law, lying to the defendant, which amount to moral turpitude. I mean it's nothing else to be said. The document speak clearly for itself.

The Court: That's what I'm going to require from you.

Mr. Johnson: *You have a document in the file already.*

The Court: You are going to have to file a motion. That's what I've ruled.

Mr. Johnson: Isn't that a motion of disqualification?

The Court: You heard what I said.

Mr. Johnson: *I have filed a motion.* The record should

(continued...)

Johnson objected to Hauser's appointment. Judge Cheroske explained in turn that Hauser was not appointed to represent Johnson at all. As stand-by counsel, Judge Cheroske further explained, Hauser represented the court. (1RT 148.) Johnson responded by objecting to Hauser's acting "in any capacity" in this case. Johnson alleged that Hauser and the prosecutor were accomplices in "outrageous government misconduct." Johnson suggested that if stand-by counsel was appointed, then Hauser should not be appointed. Johnson explained that he intended to call Hauser as a witness to testify regarding his allegation. Judge Cheroske overruled Johnson's objection. Judge Cheroske then advised Johnson in detail with respect to Hauser's role as stand-by counsel. (1RT 149.) Johnson's raised a "continuous objection" to Hauser's appointment on the ground that Hauser would be called as a witness. (1RT 150.) Judge Cheroske said he could not just accept Johnson's "bare allegation," which he would interpret as just another tactic to avoid Hauser's appointment as stand-by counsel. Judge Cheroske advised Johnson that if he had "some sort of offer of proof," then Johnson could present it in a written motion with points and authorities and an affidavit signed by Johnson. (1RT 151.)

Johnson responded by informing Judge Cheroske -- for the first of

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[2](...continued)

reflect that.

The Court: Are you submitting it on the fact that you're not filing any additional motions at this time?

Mr. Johnson: I have a motion. *The record should reflect that I have already filed a motion.*

The Court: Therefore, having elected, as your own attorney, not to follow the court's advice and not to file a motion, your motion is denied.

(1RT 148-152, italics added.)

four times -- that he had already filed a motion to disqualify Hauser. Specifically, Johnson noted that he had "filed a disqualification" that clearly outlined Hauser's misconduct. Johnson explained that he had nothing more to add to his disqualification motion. Judge Cheroske reacted as if he had not heard what Johnson just said. Judge Cheroske stated: "That's what I'm going to require from you." Johnson explained further: "You have a document in the file already." When Judge Cheroske stated that Johnson would have to file a motion, Johnson asked the court, "Isn't that a motion of disqualification?" Instead of actually helping Johnson, as respondent claims Judge Cheroske was attempting to do (RB 69 ["Judge Cheroske attempted to help appellant by explaining what a meritorious motion would include"]), Judge Cheroske insisted, "You heard what I said." When Johnson stated again that he had filed a motion, Judge Cheroske asked, "Are you submitting it on the fact that you're not filing any additional motions at this time?" Johnson responded by informing Judge Cheroske for the fourth time that he had already filed a motion. Judge Cheroske then ruled, "Therefore, having elected, as your own attorney, not to follow the court's advice and not to file a motion, your motion is denied." (1RT 151-152.)

Although Johnson repeatedly told Judge Cheroske that he had filed a motion to disqualify Hauser, Judge Cheroske gave no indication at the February 18 hearing that he had actually read Johnson's filed motion. Respondent must agree because nowhere does respondent cite to a page in the reporter's transcript of the *February 18* hearing where Judge Cheroske even hints that he read Johnson's motion. Instead, respondent points to a moment in the record where *eight days* before the February 18 hearing, Judge Cheroske said he had gone through the file. (1RT 120.) This is

where, according to respondent, Judge Cheroske expressly said he read Johnson's motion to disqualify Hauser. But Judge Cheroske said no such thing.

When this case was transferred to Judge Cheroske on February 9, 1998, he noted for the record that Hauser was no longer Johnson's counsel because he had been discharged at Johnson's request. (1RT 114.) Two months earlier at a hearing before Judge Wu on December 16, 1997, Johnson acted in pro per and expressed his intention to have Hauser disqualified as his co-counsel. Apparently Johnson was working on his written motion to disqualify Hauser as the hearing proceeded. (1RT 46.) But instead of ruling on Johnson's motion to disqualify Hauser, Judge Wu relieved Hauser as Johnson's co-counsel based merely on Johnson's sincere belief that he could not work with Hauser. (1RT 52-57; 1CT 200.)

At the February 9 hearing, Judge Cheroske informed the parties that he wanted "to take the time to go through the file to get familiar with the history of all the orders that have been made in the case. I see some loose pleadings in the file that look like motions for various things. I'd like to bring myself completely up to speed on it, so I know exactly where we're going." (1RT 115.) Judge Cheroske told the parties to return the next day. (1RT 119.)

At the start of the hearing on February 10, 1998, Judge Cheroske stated as follows: "In the recess that we had from yesterday, I've *gone through* the file completely now. I've *gone through* all of the motions that have been filed." (1RT 120, italics added.) Judge Cheroske then specifically mentioned or addressed six motions at the hearing. (1RT 120, 129, 132, 138, 140.) Judge Cheroske did not mention Johnson's motion to disqualify Hauser – dated December 16, 1997, but not file stamped until

January 8, 1998 (1CT 210) – because he had no reason to address it. As Judge Cheroske recognized on February 9, he knew that Hauser had been dismissed as Johnson's co-counsel. Therefore it would be pointless for Judge Cheroske to read Johnson's hard-to-decipher, handwritten motion to disqualify Hauser, especially given that Judge Cheroske had many outstanding motions to address at the February 10 hearing.

Nevertheless, respondent interprets Judge Cheroske's statement that he had "gone through" all the motions to mean that Judge Cheroske expressly said he had read all the filed motions, including Johnson's motion to disqualify Hauser, which Judge Cheroske had not even mentioned. In context, however, Judge Cheroske did not say that he had *read* all of the motions. He merely represented that he had looked through the complete file including all the motions. If, during the recess since the day before, Judge Cheroske had read every page of the file including every page of every motion, he would have simply said so. Thus, respondent is mistaken.

In addition, when Judge Cheroske said on February 10 that he had "gone through" the complete file and "gone through" all the motions, the file was 392 pages long, consisting of 75 filed documents. (1CT 1-237; 1SCT II 1-155.) It strains credulity to maintain that when Judge Cheroske said he had gone through 75 documents and almost 400 pages, he was expressly representing that he had *read* 75 documents and 400 pages. Therefore, because Judge Cheroske had not read the complete file, he used language that indicated he had looked through or leafed through but had not read 392 pages.

Furthermore, because there was no reason for Judge Cheroske to read every paper filed before February 10 when he said he had gone

through the file, Judge Cheroske very likely did not read every paper. For example, before his appointment as Johnson's counsel, Hauser had submitted a proposal, dated October 15, 1997, to represent Johnson and to be compensated based on the complexity of this case. (1CT 44-47.) There was no reason for Judge Cheroske to read Hauser's proposal. Thus, when Judge Cheroske said on February 10, 1998, that he had gone through the file completely, he was not asserting that he had read Hauser's proposal. Nor was there any reason for Judge Cheroske to read any motion that had already been decided, for example, Johnson's hard-to-read, hand-written motion to disqualify Judge Wu. (1CT 219, 224, 232.) Similarly it is not likely that Judge Cheroske read the 135-page preliminary hearing transcript that was included in the file. (1CT 49-184.) Judge Cheroske might have gone through or leafed through the 135 pages, but it is highly unlikely that he would have read all 135 transcript pages of a preliminary hearing that ended over three months earlier. (1CT 49, 51, 177.) Thus, when Judge Cheroske used the words, "gone through," he was indicating that he had looked through but not that he had read the complete file and all of its motions.

Additional evidence that Judge Cheroske did not read Johnson's motion to disqualify Hauser is the motion itself. At the February 18 hearing, Judge Cheroske advised Johnson to file a motion with points and authorities. (1RT 151.) But Johnson did precisely that, as Judge Cheroske would have discovered if he had read Johnson's motion to disqualify Hauser. Johnson's motion cited Rule 2-100 of the California Rules of Professional Conduct, which prohibits counsel from communicating with a represented party in an action; *Chronometrics, Inc. v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597, 607, which noted that disqualification of counsel was

proper when counsel might be a witness in a forthcoming trial; and *Yorn v. Superior Court* (1979) 90 Cal.App.3d 669, which also addressed the disqualification of counsel. (1CT 211, 217-218.) As Johnson tried to explain to Judge Cheroske, his motion to disqualify Hauser was based on the fact that Johnson intended to call Hauser as a witness in the forthcoming trial, exactly what *Chronometrics* concerned. Arguably Johnson's motion may have been inadequate, but that was not the basis for Judge Cheroske's ruling. Johnson's motion included the points and authorities that Judge Cheroske required.

Judge Cheroske also advised Johnson that he could not simply accept Johnson's "bare allegation" that Hauser had committed misconduct "without any supporting facts" in an "affidavit signed under penalty of perjury by yourself." (1RT 151.) If Judge Cheroske had read Johnson's hand-written motion, he would have seen that Johnson went well beyond a bare allegation. Johnson filed a *five-page* declaration signed by Johnson under penalty of perjury, setting forth the supporting facts required by Judge Cheroske. (1CT 212-216.) For example, Johnson declared that Hauser had intentionally misrepresented statements of law that Hauser knew were false; Hauser allowed the district attorney to provide an incomplete murder book in that an autopsy report was missing from it (1CT 212); Hauser acted in complicity with the prosecutor by withholding evidence, including certain tapes (1CT 213); and Hauser misrepresented that he had won an acquittal in a capital case (1CT 215).

Again, Judge Cheroske did not rule on the merits of Johnson's motion by finding it legally or factually inadequate. Judge Cheroske denied Johnson's motion because Judge Cheroske found that Johnson never filed one, or to quote Judge Cheroske, "having elected, as your own

attorney, not to follow the court's advice and *not to file a motion*, your motion is denied." (1RT 151-152, italics added.)

But, as shown, Johnson did file a motion, a motion with points and authorities and a declaration by Johnson under penalty of perjury, precisely as required by Judge Cheroske. Thus, contrary to respondent's assertion that "the record refutes appellant's claim that Judge Cheroske did not read his motion" (RB 70), the record demonstrates that Judge Cheroske did not read Johnson's motion, yet he ruled on it anyway. By doing so, Judge Cheroske denied Johnson his full right to be heard, committed judicial misconduct, and exhibited bias against Johnson. (*Kennick v. Commission on Judicial Performance*, *supra*, 50 Cal.3d at p. 325.)

B. Judge Cheroske Forced Johnson to Argue His Motion for Ancillary Funds In Open Court With the Prosecutor Present – After Johnson Asked That Judge Cheroske Hear the Matter Ex Parte – In Blatant Violation of Penal Code Section 987.9's Charge That the Motion Be Heard Ex Parte and In Camera.

Respondent concedes that Judge Cheroske violated Penal Code section 987.9, but calls it a hyper-technical violation. (RB 73 ["Judge Cheroske committed a hyper-technical violation of section 987.9"].) The point is not so much that Judge Cheroske violated section 987.9, which he clearly did. Judges make mistakes, and obviously this does not necessarily mean a judge is biased against the wronged party. (*People v. Fuiava* (2012) 53 Cal.4th 622, 732.) The point here is that there is no question Judge Cheroske violated section 987.9, he knew he violated it, and he abused his power by ignoring Johnson's well-founded objections and proceeding to disclose confidential matters in open court without any regard for Johnson's statutory right to have matters related to the conduct

of his defense discussed in private.

As noted in the opening brief and confirmed in respondent's brief, Judge Cheroske had been a criminal defense lawyer who represented a capital defendant from preliminary hearing through verdict, and had presided over at least one capital case before Johnson's. (ARB 30, fn. 19; RB 47, fn. 18.) Thus, Judge Cheroske must have been well-acquainted with section 987.9 and its command that applications for capital defense funds be treated confidentially by the court outside the presence of the prosecutor. (Pen. Code, § 987.9 ["The fact that an application has been made shall be confidential and the contents of the application shall be confidential"].) But, here, when Judge Cheroske began to reveal in open court the contents of a previous section 987.9 motion Johnson had filed (1RT 161 [Judge Cheroske: "basically, what the motion says --"]), Johnson immediately and respectfully requested that the court hear the matter outside the presence of the prosecutor. Johnson also explained the basis of his request by stating that it was a funding motion. (1RT 161 ["Mr. Johnson: Your Honor, I would like to have it ex parte. It's a funding motion for the defense"].) But instead of showing Johnson the respect that any litigant is entitled to, Judge Cheroske ignored Johnson, abused his power, and disclosed the contents of the earlier filed motion. (1RT 161 ["The Court: What you wanted was $50,000"].) Then, on hearing Judge Cheroske reveal his prior request for funds, Johnson expressly objected. (1RT 161 ["Mr. Johnson: I would object for the record"].) But again, instead of addressing Johnson's objection and clear request to hear the matter ex parte, Judge Cheroske ignored Johnson for a second time and proceeded to rule on his motion in open court in front of the prosecutor (1RT 161 [Judge Cheroske: "the court is going to rule that . . ."]), despite

section 987.9's express prohibition against doing so. Section 987.9 provides in part: "The *ruling* on the reasonableness of the request shall be made at an in camera hearing." (Italics added.)[3]

Judge Cheroske's mistreatment of Johnson occurred at the second hearing in which he was involved in this case. As noted above, at the first hearing where he presided, four times Judge Cheroske ignored Johnson when he tried to explain to the court that he had already provided the information Judge Cheroske required. Thus, from the outset Judge Cheroske abused his power against Johnson, thereby suggesting that he entered the case with animosity toward Johnson. As the next arguments demonstrate, Judge Cheroske's animosity towards Johnson continued to grow to the point where eventually, Judge Cheroske committed a stunning breach of judicial ethics -- he deceived Johnson and showing no remorse, openly mocked Johnson for allowing himself to be deceived.

C. Judge Cheroske Warned Johnson That He Might Have to Wear a REACT Belt and Then Expelled Him from the Courtroom for Doing What Judge Cheroske Appeared to Approve the Day Before.

Judge Cheroske continued to demonstrate his animosity towards Johnson the next day when he effectively threatened possible bodily harm

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[3] Respondent asserts that no such motion is contained in the record and is not cited by appellant in his opening brief. (RB 72, fn. 27.) It is clear from the colloquy between Johnson and the trial court that the motion under discussion is a motion for funds and is sealed pursuant to Penal Code section 987.9. Were the contents of the motion at issue, Johnson would move to unseal these records so that respondent could respond. Since the contents are not at issue, but rather what is at issue is the court's conduct regarding the motion, and since the record cited by Johnson clearly shows that the Court was familiar with the motion, the record itself refutes respondent's implied suggestion that there may not be any such motion.

against Johnson, only to follow his unwarranted threat by expelling Johnson from the courtroom for making an objection Judge Cheroske found acceptable the day before. As noted above, on February 18, 1998, Judge Cheroske appointed Hauser as stand-by counsel and Johnson objected. The reporter's transcript shows as follows:

> [The Court:] And at this point in time, Mr. Hauser is appointed as stand-by counsel. And actually --
>
> Mr. Johnson: I would object for the record.
>
> The Court: Yes, sir. You have the right to make an objection. But Mr. Hauser is not being appointed to represent you at all. He's here to represent the court. And whether or not Mr. Hauser ever participates in this case will depend upon you.

(1RT 148-149.) Note that Johnson apparently interrupted Judge Cheroske, as shown by the court reporter's use of two dashes and the court's incomplete sentence. After reassuring the pro per defendant that he had the right to make the objection, Judge Cheroske explained to Johnson that Hauser was not appointed to represent Johnson. Rather, as Judge Cheroske informed Johnson, he appointed Hauser as stand-by counsel to represent the court. No doubt Johnson received Judge Cheroske's clarification as good news given that Johnson did not want Hauser representing him. At the same time, Johnson may well have found Judge Cheroske's explanation a curious one, especially the notion that a lawyer would represent the court in a criminal trial. As the record reveals, Johnson would not soon forget Judge Cheroske's account of Hauser's role.

Indeed, the following day, Judge Cheroske began the hearing by describing Hauser as *Johnson's* standby counsel. Because the day before,

Judge Cheroske had explained to Johnson that Hauser was not Johnson's stand-by counsel at all, Johnson objected to the court's introduction of Hauser as "stand-by counsel for Mr. Johnson." (1RT 165.) Judge Cheroske responded in part by informing the pro per defendant that it was not time for Johnson to object. (1RT 165.) Later Johnson told Judge Cheroske that he did not mean "to be rude or disrespectful," but he objected to the court stating that "Hauser was *my* standby." (1RT 203, italics added.) This is the extent of what should have occurred below, with Judge Cheroske explaining to Johnson that he should not interrupt the court when making an objection, and Johnson effectively apologizing to the court by stating that he did not mean to be rude or disrespectful, while offering a good faith basis for his objection. Instead, as shown by the reporter's transcript below, Judge Cheroske overreacted and threatened Johnson with a device that had the potential to cause Johnson serious bodily harm.

The reporter's transcript of the February 19 hearing provides in part as follows:

> The Court: The defendants are present. The District Attorney is present. The stand-by counsel for Mr. Johnson is present. And - -
>
> Mr. Johnson: I object to --
>
> The Court: Oh, sit down, just be quiet. It's not time for you to object.
>
> Mr. Johnson: I object to stand-by counsel.
>
> The Court: Let me tell you something right now. You're in the wrong place, *partner*, to start your *antics*, because I'm going to find good cause real shortly - - if you

> continue to do the interruptions, destroy the courtroom decorum, I'm going to order that you wear a *REACT Belt.*

(1RT 165, italics added.) Note that Johnson apparently interrupted Judge Cheroske, as shown by the court reporter's use of two dashes and the court's incomplete sentence. Thus, Johnson did exactly as he had done the day before, when Judge Cheroske approved of the manner and substance of Johnson's objection by informing Johnson, "You have the right to make an objection." (1RT 148.) But this time Judge Cheroske reacted with a quick temper and demanded that Johnson sit down and be quiet. When Johnson tried to explain his objection, Judge Cheroske responded with disparaging remarks, referring to Johnson disrespectfully as *partner* instead of by his name, and accusing Johnson of engaging in *antics* instead of making the sincere objection that it was.

Of much greater concern, however, which respondent failed to address entirely, was Judge Cheroske's overreaction in recklessly threatening Johnson with a REACT stun belt, a device that when activated, inflicts a 50,000-volt shock, causing substantial pain. (*People v. Mar* (2002) 28 Cal.4th 1201, 1215.) "It causes incapacitation in the first few seconds and severe pain during the entire period. Activation may lead to involuntary defecation and urination; immobilization may cause the victim to fall to the ground. [S]hock can 'cause muscular weakness for approximately 30-45 minutes,' and it is suspected of having triggered a fatal cardiac arrhythmia. The 'belt's metal prongs may leave welts on the victim's skins' that take months to heal." (*Hawkins v. Comparet-Cassani* (9th Cir. 2001) 251 F.3d 1230, 1234, citation omitted.)

Presumably, as a responsible jurist, Judge Cheroske had apprised

himself of the potential harm a REACT stun belt can cause. Thus, when Judge Cheroske threatened to use the stun belt against Johnson, who was already handcuffed (1RT 129), Judge Cheroske must have intended to activate it under circumstances similar to those that triggered the threat in the first place, that is, standing up while handcuffed, interrupting the court, and making an objection. Apparently, to Judge Cheroske, interrupting the court and making an objection destroys its decorum and justifies an order to wear a 50,000-volt stun belt. (1RT 165.)

Interrupting the court with an objection is a far cry from the sort of behavior that may justify the use of a REACT stun belt. Such extreme behavior may include "'violence or a threat of violence or other nonconforming conduct . . . .'" (*People v. Mar*, *supra*, 28 Cal.4th at p. 1217, quoting *People v. Duran* (1976) 16 Cal.3d 282, 291.) No judge has the right to use a stun belt against a defendant for interrupting the court with an objection.

That Johnson could have suffered severe pain and humiliating injury because, at worst, he interrupted a judge with an erroneous objection, is inexcusable. (*Hawkins v. Comparet-Cassani*, *supra*, 251 F.3d at p. 1234.) Judge Cheroske's attempt to intimidate a pro per defendant from exercising his full right to be heard should not be tolerated.

As shown, by the fourth hearing in this case involving Judge Cheroske, he had developed deep antagonism toward Johnson that left the judge blind to his duty to be fair and impartial. Judge Cheroske should have recused himself by this point, for he gave every indication that he would not be able to treat Johnson without bias.

Instead of acknowledging his unfair treatment of Johnson, Judge Cheroske allowed his emotions to get the best of him again. After

threatening Johnson with the stun belt, Judge Cheroske asked Johnson, "Now do you understand me?" Johnson began to respond in a polite and respectful manner: "Your Honor, I, for the record - -." Judge Cheroske did not allow Johnson to complete his sentence. Instead he interrupted Johnson with another disparaging remark, "You're a pro at this." (1RT 165.) Respondent defends Judge Cheroske's intemperate comment by ignoring its obviously disrespectful significance, and by claiming that "Judge Cheroske was simply accurately describing appellant's behavior." Furthermore, according to respondent, "[b]y February 19, appellant had amply demonstrated that he intended to disrupt the proceedings at every opportunity. Most notably, Judge Brown granted and revoked appellant's pro per status in one proceeding. (1CT 30-31.)" (RB 75.)

Like Judge Cheroske's extreme overreaction to Johnson's conduct, respondent greatly exaggerates the negative quality of Johnson's behavior and speculates as to his intentions. Moreover, respondent implicitly recognizes that Johnson's behavior in Judge Cheroske's courtroom alone did not justify Judge Cheroske's mistreatment of Johnson. Thus, to excuse Judge Cheroske's threat, respondent points to Magistrate Brown's revocation of Johnson's pro per status due to his failure to answer the court's question. (1CT 30.)[4]

First, Johnson had already suffered the loss of his pro per status for

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[4] Magistrate Brown asked Johnson if he was ready to be arraigned. Johnson said he thought he had already been arraigned two weeks before. This colloquy followed. The court: "Are you ready to be arraigned today or do you want to file your demurrer?" Johnson: "I done said what I said." The court: "You didn't answer the question." Johnson: "I'm not going to answer." The court: "All right, then, I'm going to revoke your pro per status, Mr. Johnson." (1CT 30.)

his failure to answer Magistrate Brown's question. It hardly seems fair for Judge Cheroske not to give Johnson a chance to prove himself before Judge Cheroske. But respondent's assertion that Johnson's conduct before Magistrate Brown should justify Judge Cheroske's mistreatment of Johnson may explain why Judge Cheroske treated Johnson unfairly from the outset. If so, then Judge Cheroske entered this case with a bias against Johnson based on Johnson's conduct that Judge Cheroske did not witness.

Second, respondent's and perhaps Judge Cheroske's reliance on Johnson's conduct before Magistrate Brown highlights the problem when a judge forms an opinion of a defendant based on what may or may not have occurred with other judges, instead of basing one's understanding of a defendant on one's own personal experience with that defendant. Respondent's citation to Johnson's experience with Magistrate Brown may be a perfect example of relying on an incomplete picture to form one's opinion of another. Although respondent cited Johnson's loss of his pro per status, respondent ignored completely Magistrate Brown's later reinstatement of Johnson's pro per status. Thus, Magistrate Brown felt that Johnson had improved his behavior to the point where he could be trusted to represent himself properly. Furthermore, respondent omitted mention of Magistrate Brown's later assessment of Johnson at the end of the preliminary hearing, where she commended Johnson and expressed her appreciation for Johnson's good conduct during the preliminary hearing. (1CT 177.)

Finally, with respect to Judge Cheroske's expulsion of Johnson from the courtroom, respondent asserts that it was warranted by Johnson's repeated interruptions of Judge Cheroske. (RB 77.) Respondent misstates the record. Instead the record shows yet another overreaction by Judge

Cheroske.

After Judge Cheroske belittled Johnson with his remark, "You're a pro at this," the following transpired, and it plainly shows that Judge Cheroske lost his temper once again and in the process abused his authority:

> The Court: You're a pro at this.
>
> Mr. Johnson: I have not did nothing outrageous. I can object to anything you say. That is the law. You can show me --
>
> The Court: I'm going to give you five, and then you're out of here. One, two, three – are you going to keep talking, or am I going to talk?
>
> Mr. Johnson: No, your honor, speak.
> I'm letting you know --
>
> The Court: Fine. Remove him.

(1RT 166.) Thus, when Johnson tried to defend himself after Judge Cheroske's insult, Judge Cheroske interrupted *Johnson*. Then Judge Cheroske asked Johnson a question, "One, two, three -- are you going to keep talking, or am I going to talk?" Then when Johnson tried to answer the court's question by first agreeing that the court would talk, Judge Cheroske cut Johnson off and ordered him removed from the courtroom when Johnson began to explain what he was trying to communicate to the court. (1RT 166.)

The opening brief sets forth the full exchange between Judge Cheroske and Johnson. (AOB 30-31.) Like the above excerpt, it reveals a short-tempered judge who greatly overreacted to a pro per defendant trying to defend himself. Judge Cheroske was entitled to control his courtroom.

He was not entitled to threaten Johnson with a dangerous stun belt for repeating behavior the court found acceptable the day before. And he was not entitled to expel Johnson from the courtroom for responding to the court's question. A reasonable explanation for Judge Cheroske's hostility towards Johnson is that it was born of bias. As shown next, Judge Cheroske continued to demonstrate antagonism and bias toward Johnson.

D. Judge Cheroske Intentionally Flouted Constitutional Law – With Which He Personally Disagreed – By Threatening to Revoke Johnson's Self-representation "In a Heartbeat" If Johnson Did Not Always Behave Like a Lawyer At Every Pretrial Proceeding.

Similar to when he threatened to use a stun belt on Johnson for conduct that came nowhere close to justifying its use, Judge Cheroske repeated his abuse of power when he threatened to revoke Johnson's pro per status "in a heartbeat" if Johnson did not act like a lawyer at all times. Respondent answers by attempting to minimize Judge Cheroske's intimidating and hostile threat, misreading a case citation in Johnson's opening brief, and citing a case that actually undermines respondent's argument.

First, respondent claims that Judge Cheroske's threat to revoke Johnson's constitutional right of self-representation was appropriate. (RB 77.) Judge Cheroske's own language, however, shows that he misunderstood the criteria for the proper revocation of the right of self-representation. In short, Judge Cheroske warned Johnson that he was unlike patient judges whom Johnson had been exposed to; Judge Cheroske disagreed with appellate courts that required trial courts to allow any level of disruptive behavior before a trial judge would be justified in revoking a

defendant's pro per status; and most important, if Johnson repeated any of the conduct that he had displayed thus far in Judge Cheroske's courtroom, then Judge Cheroske would revoke Johnson's constitutional right of self-representation in a heartbeat.

Judge Cheroske expressed his dissatisfaction with the demands of appellate courts as follows:

> The appellate courts in their decisions involving a pro per seem to go into great detail with regard to commending trial judges for their infinite patience in dealing with pro pers who are disruptive, who don't follow protocol, and are just - - are just difficult to deal with.
>
> I frankly don't understand why an appellate court would ask a trial court to have *to put up with anything from a pro per*.

(1RT 199-200, italics added.) When Judge Cheroske said that appellate courts "ask" trial courts to put up with some disruptive conduct from pro per defendants before terminating self-representation, he likely meant that this Court has instructed lower courts to do so. (See, e.g., *People v. Carson* (2005) 35 Cal.4th 1, 10 ["Not every obstructive act will be so flagrant and inconsistent with the integrity and fairness of the trial that immediate termination is appropriate"].) Thus, Judge Cheroske declared his disagreement with the rulings of higher courts, which required trial courts to exhibit patience with pro per defendants before revoking their pro per status. By expressing his disagreement with higher courts, Judge Cheroske seemed to be suggesting that he might act on his disagreement, which as shown in the opening brief, he eventually did by revoking Johnson's pro per status in a heartbeat for conduct that did not justify Johnson's loss of a constitutional right.

Next, Judge Cheroske told Johnson he would have no hearing on the question and that Judge Cheroske would be the final arbiter to determine whether Johnson's conduct entitled Judge Cheroske to revoke Johnson's status. Then, in a key paragraph, Judge Cheroske explained the kind of behavior he expected from Johnson:

> So I want you to know from this point on that *you will behave like a lawyer*. In the event that you do not, sir, don't make any mistake about it - - I'm different than any of the other judges you've dealt with as a pro per - - make it clear to you, I would revoke your pro per status in a heart beat. And there will be no hearing about it. That's how it is going to happen.

(1RT 201, italics added.) And if there was any possibility that Johnson misunderstood Judge Cheroske's intent, then Judge Cheroske made sure to aggressively repeat the essence of his threat: "So all of this by way of saying to you from this point on, *you act like a lawyer. You act just like* Mr. Taylor here does, and *you act just like* Mr. Wright, and *just like* Mr. Hauser, and *all of the other attorneys you've dealt with*." (*Ibid.*, italics added.) Judge Cheroske's threat was simply inappropriate and in the context of his previous hostility towards Johnson, suggested a deep bias against Johnson.

Respondent claims that Johnson's opening brief isolated a few sentences from Judge Cheroske's admonition. (RB 77.) Not so. Judge Cheroske's message could not be clearer. If Johnson did not act like the lawyer that Judge Cheroske demanded, then Johnson would lose his constitutional right in an instant. But this is clearly not the law. (*People v. Carson*, *supra*, 35 Cal.4th at p. 10 ["Whenever 'deliberate dilatory or obstructive behavior' threatens to subvert 'the core concept of a trial' or to

compromise the court's ability to conduct a fair trial, the defendant's *Faretta* rights are subject to forfeiture"].) And Judge Cheroske had no right to abuse his power and intimidate Johnson by threatening him, with the apparent aim to discourage Johnson from asserting his right to be heard, else he suffer the loss of his cherished constitutional right to defend himself.

The strongest evidence of Judge Cheroske's antagonism towards Johnson is shown by the sort of conduct that Judge Cheroske believed would justify Johnson's pro per revocation:

> But I just want to clear the air between you and I at this point in time. And I want to do that *based on some incidences* that we've had already in our short relationship where you, in my opinion, were disruptive in that you were talking over me, you would not stop talking when I asked you to do so, and that you made personal attacks on the prosecutor in the case.

(1RT 199, italics added.) Thus, as suggested by Judge Cheroske, Johnson's transgressions consisted of inappropriate talking and calling the prosecutor a name. As noted above, Johnson interrupted Judge Cheroske the day after he interrupted Judge Cheroske seemingly with the court's approval. Johnson also called the prosecutor a "habitual liar." (1RT 190.)

The clear import of Judge Cheroske's threat is that if Johnson interrupted Judge Cheroske with an objection, then Judge Cheroske would revoke Johnson's constitutional right in a heartbeat. In an oft-cited footnote from *Faretta v. California* (1975) 422 U.S. 806, the United States Supreme Court stated in part: "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." (*Id.* at p. 834, fn. 46.) And in *Carson*, this

Court declared: "Termination of the right of self-representation is a severe sanction and must not be imposed lightly." (*People v. Carson*, *supra*, 35 Cal.4th at p. 7.) In order to impose this severe sanction, the question to ask is "does the defendant's misconduct seriously threaten the core integrity of the trial?" (*Ibid.*)

On one day Johnson apparently interrupted Judge Cheroske with an objection, and Judge Cheroske responded: "You have the right to make an objection." (1RT 148.) Judge Cheroske said nothing about an interruption. The next day Johnson apparently interrupted Judge Cheroske with an objection, and Judge Cheroske overreacted with a quick temper, insults, and the threat of a REACT belt, a device that could cause severe bodily harm. (1RT 165.)

Johnson's objections did not warrant the severe sanction that Judge Cheroske threatened to impose. Given Judge Cheroske's extreme antagonism towards Johnson, the evidence of Judge Cheroske's bias against Johnson was manifest.

Second, respondent seeks to show that Judge Cheroske's threat to revoke Johnson's constitutional right was supported by the case law. But in doing so, respondent misreads a case citation from Johnson's opening brief.

According to respondent, "appellant's claim is based on a faulty premise - - that *People v. Carson* (2005) 35 Cal.4th 1 stands for the proposition that a trial court may not revoke a defendant's pro per status without providing 'notice, an opportunity to be heard, and a decision before an impartial hearing body . . . .' (AOB 34.) *Carson* does not stand for that proposition at all." (RB 81-82.) Respondent badly misquotes Johnson's opening brief.

Johnson's opening brief provides as follows:

> Furthermore, no California published appellate decision has held that a trial court may revoke a defendant's fundamental right to self-representation in a heartbeat without any sort of hearing, as Judge Cheroske also threatened. On the contrary, in *Carson*, this Court directed the Court of Appeal to remand "the matter to the trial court for a full hearing as to the reasons for and necessity of terminating defendant's right of self-representation." (*People v. Carson* (2005) 35 Cal.4th at pp. 13-14, italics added; cf. *Wilson v. Superior Court* (1978) 21 Cal.3d 816, 822, 825-827 [holding that, because of the importance of out-of-court pro per privileges to the exercise of the constitutional right of self-representation, due process principles require (except in an emergency) notice, an opportunity to be heard, and a decision before an impartial hearing body before a defendant's pro per privileges are taken away].)

(AOB 34-35.) Thus, in quoting Johnson's opening brief, respondent omitted the reference to *Wilson v. Superior Court* (1978) 21 Cal.3d 816, 822, 825-827, which held that, absent notice and a hearing, a trial court could not revoke a pro per defendant's *out-of-court* privileges, there, access to the law library, telephones, and an investigator. Johnson does not read *Carson* to require in all instances notice, an opportunity to be heard, and a decision before an impartial hearing body to properly revoke pro per status. *Carson* is, however, an example of where this Court required a hearing before the defendant's pro per status could be revoked. (*People v. Carson*, *supra*, 35 Cal.4th at p. 13 ["we consider it prudent to return the matter to the trial court for a full hearing as to the reasons for and necessity of terminating defendant's right of self-representation"].)

In addition, the one case cited by respondent as a purported example of an appellate court holding that no hearing was needed to revoke a

defendant's right to self-representation, *People v. Pena* (1992) 7 Cal.App.4th 1294, 1309-1310, did not even involve a pro per defendant. (RB 82.)

Third and finally, respondent cites *People v. Welch* (1999) 20 Cal.4th 701, 735, for the proposition that because that case held it proper to deny a defendant's request to represent himself based on pretrial behavior, Judge Cheroske's warning to Johnson was appropriate. But again, respondent ignores the fact that the conduct that Judge Cheroske found to justify revocation of Johnson's right of self-representation does not come close to satisfying the demands of *Faretta*.

Welch stated as follows: "*Faretta* itself warned that a trial court 'may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.' (*Faretta, supra*, 422 U.S. at pp. 834-835, fn. 46 [95 S.Ct. at p. 2541].)" (*People v. Welch, supra*, 20 Cal.4th at p. 734.) Judge Cheroske gave the clear message that if Johnson interrupted him with a single objection, even three months before trial, that Judge Cheroske would revoke Johnson's pro per status. By no stretch of the imagination would this be permissible under *Faretta*, as Judge Cheroske himself seems to have acknowledged when he parted company with the appellate courts and his fellow trial judges.

In sum, Judge Cheroske's threat to revoke Johnson's self-representation in a heartbeat if he did not act at all times like a lawyer was blatantly hostile toward Johnson's constitutional right and clearly unsupported by the case law, as Judge Cheroske seems to have acknowledged. Judge Cheroske's apparent intent was to intimidate Johnson and discourage him from asserting his right to be heard. As another antagonistic act towards Johnson, it was strong evidence of Judge

Cheroske's deep bias against Johnson, which Judge Cheroske brought with him from almost the moment he entered this case.

E. Judge Cheroske Said He Would Continue the Date of the First Trial, but Then Denied Johnson's Continuance Motion After Substantially Misstating the Contents of Johnson's Moving Papers.

Johnson demonstrated in his opening brief yet another example of Judge Cheroske's abuse of power and capricious behavior towards Johnson, a pro per defendant, not a skilled and learned trial lawyer, and therefore an easy target for a judge who would overreach. At the February 23, 1998 hearing on Johnson's motion to continue the March 6, 1998 trial date, Judge Cheroske announced that "there's no way this case is going to be ready for trial on March 6th." (1RT 222.) When Judge Cheroske asked Johnson if he had "a specific date" in mind for a new trial date, Johnson responded, no. Judge Cheroske then asked Johnson, "When would you know?" Johnson answered, "I would like to come back within the next couple of weeks." Judge Cheroske replied, "That's fine. I have no problem with that." (1RT 222.) Therefore, Judge Cheroske agreed to return to the courtroom on March 5, 1998, when Johnson would propose a specific trial date. As Judge Cheroske informed the parties, "Mr. Johnson will be better prepared, I think, at that time to get a better idea as to what he's talking about in time." (1RT 223.)

This should have been a simple matter. Based on Judge Cheroske's statements, a reasonable expectation was that, when the parties returned on March 5, 1998, to hear Johnson's motion to continue the trial date, Johnson would propose a new trial date. Indeed, if Johnson had proposed a new trial date at the February 23 hearing, and that date was acceptable to Judge Cheroske, then the court would have simply set that date. Thus, based on

Judge Cheroske's statements at the February 23 hearing, the only issue to be decided at the rescheduled hearing on Johnson's motion was the new trial date itself.

Instead, the March 5 hearing turned into another occasion for Judge Cheroske to exercise arbitrary, unpredictable power. First, there was no question that the purpose of the hearing was to continue the trial date. Judge Cheroske had rescheduled the hearing himself on February 23. (1RT 222-223.) Indeed, Judge Cheroske's own minute order reflected that the purpose of the hearing was to hear a motion to continue the trial date. (1CT 272.) But instead of acknowledging the obvious purpose of the March 5 hearing on Johnson's motion to continue, Judge Cheroske toyed with Johnson from the outset. Judge Cheroske began by representing that he had read Johnson's motion to continue ("I have read it") and then by asserting that the motion "doesn't say what it is to be continued or that the request is to continue." (1RT 233.) The motion that Judge Cheroske referred to is the same motion that Judge Cheroske had before him at the prior hearing when the parties and Judge Cheroske discussed continuing the trial date, and when Johnson expressly told Judge Cheroske that it was a motion to continue the trial date. (1RT 221; 1SCT II 183-187.) More important, as the opening brief proved, and respondent completely ignores, Judge Cheroske was wrong to assert that Johnson's motion did not say what Johnson sought to continue. In fact the motion said seven times that its purpose was to continue the trial date. (AOB 41; 1SCT II 183-187.) Thus, despite Judge Cheroske's representation that he read the motion, one could reasonably question whether that was true. Judge Cheroske's forthrightness in dealing with Johnson is an issue that lies at the core of Johnson's contention that Judge Cheroske was biased against him at trial.

That question is discussed further below.

Respondent goes to great pains to show that Johnson purportedly "behaved inconsistently" with respect to the pace of this case. (RB 83.) Respondent misses the point. The point is that Judge Cheroske demonstrated severe antagonism towards Johnson by toying with him. Furthermore, Judge Cheroske's behavior was the epitome of caprice, in that he was given to sudden behavior changes. At the February 23 hearing, Judge Cheroske made it clear that the only issue to be addressed with respect to Johnson's motion to continue the trial date was the trial date itself. Judge Cheroske gave every indication that the March 5 hearing would be an informal discussion where the parties submitted their views on an appropriate trial date, with Johnson proposing a specific one. After misleading Johnson and the others as to the purpose of the hearing, Judge Cheroske abruptly shifted gears, apparently misrepresented that he had read Johnson's motion, substantially misstated the contents of Johnson's motion, and then acted in mercurial fashion by denying Johnson's motion with these words: "So that motion to continue *whatever it was to continue* is denied as being defective." (1RT 233, italics added.)

Johnson was a pro per defendant whose life the state sought to take. He chose to represent himself at trial. He was entitled to a judge who dealt with him fairly, impartially, and hence without bias. Instead he was met at every turn with a capricious, hostile judge who held absolute power over him. One can only imagine the level of frustration that Johnson felt.

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F. Without Just Cause, Judge Cheroske Instantly Revoked Johnson's Constitutional Right to Represent Himself.

As shown above, Judge Cheroske threatened to revoke Johnson's constitutional right of self-representation in a heartbeat if Johnson did not act like a lawyer at all times. Judge Cheroske promised Johnson he would give him no latitude in this regard, and Judge Cheroske delivered on his promise. So when Johnson accurately said that Judge Cheroske had misstated the law, Judge Cheroske revoked Johnson's pro per status in an instant. Respondent defends Judge Cheroske's extreme action by claiming that Judge Cheroske "was entitled to revoke self-representation when appellant failed to heed prior warnings that revocation would occur if he continued to engage in serious disruptive behavior." (RB 88-89.) Respondent also cites *Faretta's* instruction that a "trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." (*Faretta v. California*, *supra*, 422 U.S. at p. 834, fn. 46; RB 89.) Thus, respondent agrees that before a defendant's right of self-representation may be eliminated, the defendant must deliberately engage in serious and obstructionist misconduct.

The conduct that triggered Judge Cheroske's revocation of Johnson's right of self-representation was when, as respondent describes it, Johnson "accused Judge Cheroske of 'misrepresenting the law.'" (RB 89.) Respondent does not suggest that Johnson raised his voice or that he interrupted Judge Cheroske. Furthermore, respondent makes no effort to prove Johnson's assertion wrong. As shown in the opening brief, Judge Cheroske did misstate the law in requiring Johnson to provide the specific names of the experts Johnson intended to use before Judge Cheroske would

grant his motion for ancillary funds. (AOB 43.) Curiously, respondent does not claim that Johnson's statement itself constituted serious and obstructionist misconduct. Clearly, it does not. As Johnson stated in his opening brief, Johnson's contention that Judge Cheroske had misrepresented the law "did not remotely qualify for the termination of his *Faretta* rights." (AOB 44.) Respondent does not dispute this assertion, thus implicitly conceding the point.

Instead respondent points to Johnson's earlier conduct in front of Judge Cheroske, as well as his conduct before other judges, conduct of which Judge Cheroske may have been completely unaware and conduct that Judge Cheroske did not mention as having any influence on his decision. For example, respondent again mentions Magistrate Brown, who presided over Johnson's preliminary hearing and revoked Johnson's pro per status. But Magistrate Brown's revocation of Johnson's pro per status was improper. She rescinded Johnson's constitutional right because he failed to answer a question by the court. (1RT 30, 64.) Furthermore, she reinstated Johnson's self-representation shortly thereafter. (1CT 51, 64.) By reinstating Johnson's *Faretta* rights, Magistrate Brown was implicitly expressing her view that Johnson would not engage in serious and obstructionist misconduct at trial. Johnson's conduct during the preliminary hearing showed this to be an accurate assessment. When the preliminary hearing was over, Magistrate Brown commended Johnson for his appropriate behavior during the hearing. (1CT 177.) The other examples of Johnson's behavior, which respondent cites, did not result in the revocation of Johnson's pro per status, an indication by the judges involved that his conduct did not justify the loss of Johnson's right to represent himself. (RB 89.)

To justify Judge Cheroske's revocation of Johnson's pro per status, respondent needed to prove that Johnson's statement to Judge Cheroske constituted an example of the kind of serious and obstructionist misconduct in which Johnson would deliberately engage at trial three months later. (*Faretta v. California*, *supra*, 422 U.S. at p. 834, fn. 46; cf. *People v. Welch*, *supra*, 20 Cal.4th at p. 735 ["denying defendant's *Faretta* motion based on the disruptive behavior he had exhibited in the courtroom prior to making that motion"]; RB 89.) As noted, respondent does not contend that informing a court that it had misrepresented the law warrants the loss of a constitutional right. Although Judge Cheroske may have been offended by Johnson's use of the word "misrepresented," Johnson did not accuse the court of lying. The first definition of misrepresent provided by the American Heritage Dictionary is "To give an incorrect or misleading representation of." (American Heritage Dict. (4th ed. 2000) p. 1125.) Judge Cheroske did give an incorrect representation. But Judge Cheroske overreacted once again. Exhibiting a quick temper, he took a valuable right from Johnson. Judge Cheroske may have believed that Johnson was accusing him of intentionally misstating the law. It would have been a simple matter for Judge Cheroske to ask Johnson what he meant by his statement. But instead of seeking any clarification, Judge Cheroske took what Johnson plainly valued.

If Judge Cheroske were an impartial judge in this case, he would have sought clarification from Johnson. Instead he lost control. This was another example of the deep antagonism Judge Cheroske felt towards Johnson. A judge with such profound hostility towards a defendant would be an inappropriate judge to preside at the defendant's trial. And that is exactly what Judge Cheroske proved he was.

G. Judge Cheroske Deceived Johnson into Believing That the Jury Was Present -- Though It Was Not -- to See and Hear Johnson Testify from His Holding Cell Over One-way Closed Circuit Television.

Johnson has charged that Judge Cheroske deceived him and in the process violated the essential requirement of a judge to be honest. (AOB 51; *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 865.) This is respondent's answer:

> And although appellant complains that Judge Cheroske deceived him, there is nothing in the record indicating that Judge Cheroske or anyone else told him that the jury was present *on the day* his intentions were tested. Moreover, to the extent appellant was deceived, *he was deceived because Judge Cheroske wanted* to give appellant the opportunity to show he would not be disruptive if allowed to testify. For appellant to complain about Judge Cheroske's intentions or behavior is *absurd.*

(RB 94, italics added.) Respondent concedes, as it must, that Judge Cheroske deceived Johnson. Respondent excuses Judge Cheroske's deception, however, because of something Judge Cheroske wanted: "he was deceived because Judge Cheroske wanted . . . ." (*Ibid.*) Not only does respondent attempt to excuse Judge Cheroske's behavior, respondent submits that it is *absurd* for Johnson to complain that a judge, required to be honest without exception, has deceived him. Although Johnson cites authority for the proposition that judges must be honest in carrying out the duties of their office (AOB 52), respondent cites no authority for the proposition that respondent advocates -- that a judge may be dishonest -- for clearly there is none.

Respondent further attempts in the above excerpt to excuse Judge Cheroske's deception by observing that Judge Cheroske did not tell

Johnson on the day of his sham testimony that the jury was present. Respondent emphasizes this irrelevancy by also stating: "Notably, no one said to appellant that the jury was present." (RB 93.) Thus, respondent believes that it is significant no one told Johnson on the day he testified that the jury was present. Of course, Judge Cheroske did *not* tell Johnson that the jury was not present, either. Furthermore, respondent ignores the critical fact that the day before, Judge Cheroske told Johnson that the jury would be present the next day when he testified over closed circuit television. (23RT 2-1295 [Judge Cheroske to Johnson: "All they can see is your head and your shoulders. They will be listening, as we are, through a series of speakers"].) Johnson had to trust Judge Cheroske's representation that the jury was present because the video hook up transmitted a video picture only in one direction. That is, Judge Cheroske and the phantom jury could see Johnson, but Johnson could see no one. Having trusted Judge Cheroske and relying on his honesty, Johnson began to testify, believing that the jury was present in the courtroom, hearing Johnson and seeing him over the one-way closed circuit television. This is why Johnson spoke to the jury at one point with these words: "First of all, I wish to greet the jury. Good morning to y'all." (23RT 1364.) Because it was obvious that Johnson believed the jury was present based on Judge Cheroske's representation, Judge Cheroske had a duty to inform Johnson that the jury was *not* present. Instead he allowed this staged examination to continue, making a mockery of justice in his courtroom.

Clearly Judge Cheroske knew that he had misled Johnson to believe that the jury was present in the courtroom. Imagine the humiliation Johnson felt when Judge Cheroske mocked Johnson with these words: "Well, I have a little surprise for you, Mr. Johnson. The jury is not

present." (23RT 1366.) Bad enough that Judge Cheroske deceived Johnson, but then Judge Cheroske could not control himself one more time -- he had to add the contemptuous note ridiculing the trusting defendant who could not see what everyone in the courtroom could see, that no jury was there to hear his greeting, "Good morning to y'all." (23RT 1364.) This was a stunning low point in this case and proves beyond any question that Judge Cheroske's antagonism towards Johnson was so deep that it blinded him to the fundamental duty of every judge, to be honest so that every person who enters his or her courtroom feels that justice is served.

H. Conclusion

Judge Cheroske abused his power while treating Johnson, a capital defendant, with unapologetic contempt. He denied Johnson's motion to disqualify Hauser without reading it, and in the process denied Johnson his right to be heard. He acted like Johnson did not exist when Johnson made well-founded and polite objections to Judge Cheroske's disclosing in open court the contents of Johnson's confidential motion for ancillary funds, which Judge Cheroske knew quite well violated Johnson's right of privacy in the matter. Judge Cheroske threatened Johnson with exposure to a 50,000-volt stun belt that had the potential of seriously harming Johnson and then he expelled Johnson from the courtroom, all for making an objection Judge Cheroske found acceptable the day before. Judge Cheroske substantially misstated the contents of Johnson's motion to continue the trial date and then denied the motion for arbitrary reasons. Judge Cheroske threatened to revoke for clearly impermissible reasons Johnson's constitutional right of self-representation, and then delivered on his threat.

And then at trial, Judge Cheroske deceived and mocked Johnson in

a shocking display of scorn towards a defendant facing death.

For the reasons stated here and in the opening brief, the entire judgment should be set aside because Johnson was tried before a biased judge. (*Edwards v. Balisok* (1997) 520 U.S. 641, 647.)

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2.

JUDGE CHEROSKE ERRED IN BARRING JOHNSON FROM THE COURTROOM FOR HIS ENTIRE TRIAL.

A. Introduction

Judge Cheroske banished defendant Cedric Johnson from his entire capital trial based on conduct that preceded the trial. Judge Cheroske had no authority for doing so. No California Supreme Court decision has ever sanctioned the permanent expulsion of a capital or noncapital defendant from the entire trial for disruptive behavior. And no United States Supreme Court decision has either.

Under the United States Constitution (*Illinois v. Allen* (1970) 397 U.S. 337) and California statutory law (Pen. Code, § 1043), a defendant has the right to be present at his or her own trial. Consequently, a court must allow the defendant to be present at the commencement of trial, which in California is the beginning of jury selection. A court may remove the defendant from the courtroom for disruptive behavior only after the court has warned the defendant of the possibility of removal if the defendant continues to disrupt the trial. Once removed, the defendant may return to the courtroom on assurances to the court that the defendant will act appropriately.

This is how the California statutory scheme should operate to protect both the defendant's constitutional right to be present in the courtroom at every stage of the trial and the court's interest in maintaining proper courtroom decorum. Yet respondent incorrectly insists that Judge Cheroske had the authority to banish defendant Cedric Johnson from his entire trial based on Johnson's pretrial behavior. This is not a tenable position.

B. Judge Cheroske Erred By Barring Johnson from the Critical October 19 Hearing to Determine Whether Johnson Should Be Excluded from His Entire Trial.

A defendant's federal and state constitutional rights to be present at a hearing depend on whether: (1) the hearing is critical to the outcome of the case; and (2) the defendant's presence would contribute to the fairness of the hearing. (*People v. Perry* (2006) 38 Cal.4th 302, 313, citing *Kentucky v. Stincer* (1987) 482 U.S. 730, 745, and *People v. Bradford* (1997) 15 Cal.4th 1229, 1356-1357.) The October 19 hearing was critical to the outcome of this case because the hearing was called to determine whether Johnson would appear at his own capital trial. (See, e.g., *People v. Perry*, *supra*, 38 Cal.4th at p. 313 ["the removal of counsel will affect defendant's representation at trial, and is a matter on which defendant's views should be heard"].) Furthermore, Johnson's presence would have contributed to the fairness of the hearing because Johnson could have assured Judge Cheroske that he would conform his behavior at his retrial, he could have given his side of the encounter with Hauser, and he could have chosen to be restrained rather than excluded from his trial entirely. (AOB 65-66.)

Respondent does not dispute that the October 19 hearing was critical to the outcome of the case. Rather respondent argues that Johnson's presence at the hearing would have been "useless, or the benefit but a shadow." (RB 97.)

First, respondent relies on select words from two sentences written by Johnson in his four-page, "Formal Letter of Protest." (39CT 11523-11526.) The letter is dated November 16, 1998, two months after Johnson's encounter with Hauser (17RT 2-23) and a month after the

October 19 hearing. It is addressed to no one. (39CT 11523). According to respondent, Johnson spoke about "his behavior in attacking Hauser" when Johnson wrote in the letter "that he had behaved 'courteously' during the proceedings, but had been 'disrespected' because of his persuasive legal skills." (39CT 11525.)

As indicated by its title, the letter is a "protest." In essence Johnson protests his incarceration as unlawful and without probable cause. The letter protests the fact that charges have been filed against Johnson based on the testimony of unreliable witnesses. Thus Johnson alleges that his constitutional and civil rights have been violated. In addition, the letter alleges that the prosecutor withheld exculpatory evidence and that there has been a cover-up against Johnson by Hauser, the district attorney, and the court. The letter further states that Johnson has been denied effective assistance of counsel and that Hauser has made misleading statements to Johnson. (39CT 11523-11524.) The letter states: "I had tried to conduct myself courteously, and strictly by the law to argue issues entirely based on their merits. In return I've been disrespected an[d] penalized because of <u>my abilities</u> to comprehend an[d] articulate the law by the Constitution an[d] the book!!" (39CT 11525.) The letter goes on to assert that the trial is nothing but a circus and a sham. The letter ends by stating, "To continue to allow these proceeding[s] to continue is a miscarriage of justice an[d] a crime!" (39CT 11526.)

The letter does not mention any attack on or encounter with Hauser. Moreover, respondent's interpretation of Johnson's reference to courteous behavior makes no sense because it would mean that Johnson believed he behaved courteously "in attacking Hauser." Even assuming that Johnson was referring to his encounter with Hauser, the sentences on which

respondent relies would mean that Johnson had tried to be courteous *before* the encounter. Therefore, if anything, Johnson would be avoiding any mention of the encounter. Finally, at the end of the letter, Johnson may be arguing that continuing with his trial without his presence was a miscarriage of justice.

The letter is dated November 16, 1998, 11 days after Johnson's trial began with jury selection. (39CT 11500.) Rather than guess at Johnson's meaning, the fair thing would have been to invite Johnson to a hearing where he could have explained to the court exactly what he meant.

Second, respondent claims that Johnson's decision not to listen to the "proceedings makes a mockery of his claim that the *mere* fact that he was excluded from *one* hearing in the trial amounted to a federal constitutional violation." (RB 99, italics added.) To state the obvious, this was not merely one insignificant hearing, as respondent suggests. This was the hearing where a judge made the critical decision to exclude a defendant from appearing at his own trial, a capital one at that. The October 19 hearing was pivotal to Johnson's constitutional right to a fair trial.

In addition, as Judge Cheroske recognized, Johnson wanted to attend the October 19 hearing. Judge Cheroske declared, "I'm not going to ask him if he wants to be physically present, because I'm convinced that he would say he does." (17RT 2-95.) Moreover, it is illogical to suggest that Johnson's rejection of the offer to listen to the proceedings means he did not wish to be present. Johnson was constitutionally entitled to be present, and listening to the proceedings without any ability to influence them is no substitute for that constitutional right. The federal Constitution guarantees a defendant "the right to be present at any stage of the criminal proceeding that is critical to its outcome *if his presence* would contribute to the fairness

of the procedure." (*Kentucky v. Stincer*, *supra*, 482 U.S. at pp. 744-745, italics added.) Thus, Johnson's constitutional right only comes into play in the first place if his presence would contribute to the fairness of the procedure. If Johnson's presence would contribute to the fairness of the proceeding, then listening from his jail cell is not equal to sitting in the courtroom at counsel table. Being present is far superior because, unlike listening from a holding cell, it would have allowed Johnson to influence the proceeding. Thus, rejecting the offer to listen did not mean, as Judge Cheroske realized, that Johnson would have rejected an offer to be present at the hearing where Judge Cheroske decided to exclude Johnson from his capital trial.

Third, respondent contends that the record proves Johnson could not "have convinced Judge Cheroske to overlook his behavior." Respondent adds that "[n]othing said by appellant would have changed his mind." (RB 99.) Again, Johnson has not suggested that anything he might have said would have convinced Judge Cheroske *to overlook his behavior*. Johnson's opening brief makes no such claim. Instead, Johnson offered in his opening brief that his presence at the October 19 hearing would have contributed to the fairness of the hearing because Johnson could have assured Judge Cheroske that he would have acted appropriately at his trial. In addition, he could have explained any mitigating circumstances surrounding his encounter with Hauser, a change in Johnson's medication, for example. (AOB 65.) Johnson sat through his entire first trial, which ended in a mistrial before Judge Morgan after the jury heard Johnson testify. (18CT 5244, 5255, 5333.) Johnson should have been given the chance to do the same with Judge Cheroske presiding.

Furthermore, perhaps it is true that nothing said by Johnson would

have changed Judge Cheroske's mind. But that is not the point here. A defendant is entitled to be heard if his presence would contribute to the fairness of the procedure. (*Kentucky v. Stincer*, *supra*, 482 U.S. at pp. 744-745.) Fairness dictates that Judge Cheroske should have heard from Johnson, even if Johnson was unsuccessful in convincing Judge Cheroske. Hearing from Johnson was especially just because Hauser said nothing on Johnson's behalf. Despite being asked by Judge Cheroske whether he had anything to say at the October 19 hearing in response to the court's order excluding Johnson from all proceedings including trial, Hauser stood mum. (17RT 2-66.) Thus, Hauser did not argue that Johnson should be present in the courtroom at his own trial or that his "mere absence" was a violation of Johnson's constitutional right to be present. Nor did Hauser argue that Johnson should be given the choice between being excluded from his trial or being restrained. A failure to change Judge Cheroske's mind does not mean Johnson should not have been allowed to try.

Finally, respondent asserts that Johnson's absence from the October 19 hearing was harmless. (RB 100.) The *Chapman* harmless error standard appears to govern. (*People v. Davis* (2005) 36 Cal.4th 510, 530-531.)

Respondent continues to doubt Johnson's sincerity in wanting to be present at the October 19 hearing, but respondent's doubt is irrelevant to whether Judge Cheroske's error in excluding Johnson from the hearing was harmless. Respondent also claims again that nothing said by Johnson would have changed Judge Cheroske's mind, but respondent engages in no analysis that leads respondent to conclude so. (RB 100.)

Under *Chapman* the beneficiary of the error, here respondent, has the burden of proving beyond a reasonable doubt that the error did not

contribute to the result (*Chapman v. California* (1967) 386 U.S. 18, 24), or put differently, respondent has the burden of proving beyond a reasonable doubt that the result was "surely unattributable to the error" (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-280). Despite this burden, respondent makes no effort to discuss in meaningful detail why barring Johnson from the hearing did not contribute to Judge Cheroske's ruling that he could not be present at his own trial. Rather, respondent just asserts that Judge Cheroske would not have changed his mind. For this reason, respondent has failed to meet its burden under *Chapman*.

Instead of meeting its burden, respondent merely cites some cases and continues to doubt Johnson's sincerity about wanting to be present at the hearing, while repeating the preposterous notion that Johnson believed he had been courteous "in attacking Hauser." (RB 97, 99.) Of course, Johnson's sincerity and his "Formal Letter of Protest," where he remarked about how he had *tried* to be courteous, are irrelevant to whether Judge Cheroske erred in excluding Johnson from the October 19 hearing.

And although respondent cites to additional irrelevant matter -- hearsay statements by Hauser that rely on information from the prosecutor regarding Johnson's alleged absence from another trial (RB 100), respondent fails to mention the first trial in this case, which ended in a mistrial. Johnson attended that trial before Judge Morgan -- from jury selection to deliberations -- and testified on his own behalf at the guilt phase. (1CT 287; 18CT 5229-5257; 2RT 2784-13RT 2882.) The jury took seven ballots, finally hanging against both defendants 6-6 on count one and 11-1 in favor of guilt on count two. (15RT 3454-3489.) The jury was unable to reach any verdict, and the court declared a mistrial. (18CT 5333.)

Contrary to the mysterious other trial that respondent alludes to, the mistrial is actually relevant because it shows what might have occurred if Judge Cheroske allowed Johnson to be present and testify. And as shown by the mistrial's final jury vote, the evidence against Johnson was not overwhelming.

Finally, respondent repeats: "Nothing said by appellant would have changed Judge Cheroske's mind." (RB 100.) In analyzing harmless error, an appellate court must presume that a trial court follows the law, aside from the error itself. (*People v. Coddington* (2000) 23 Cal.4th 529, 644 [as an aspect of presumption that judicial duty is properly performed, appellate court presumes trial court knows and applies correct statutory and case law].) Thus, in determining whether Judge Cheroske's error in barring Johnson from the October 19 hearing was prejudicial, it must be presumed that Judge Cheroske would comply with the demands of *Illinois v. Allen* (1970) 397 U.S. 337 and Penal Code section 1043. As discussed below, these authorities mandate that a defendant must be present at the beginning of trial. And even assuming the defendant is removed for some period, the defendant must be allowed to return to trial "as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." (*Illinois v. Allen*, *supra*, 397 U.S. at p. 347; § 1043, subd. (c).) According to Judge Cheroske, Johnson wanted to be present for his trial. (17RT 2-95.) In light of the presumption that Judge Cheroske would have performed his judicial duty and followed the statutory and case law, respondent has failed to show beyond a reasonable doubt that Judge Cheroske would not have changed his mind regarding Johnson's presence. Hence, respondent has failed to carry its burden of proving beyond a reasonable doubt that the court's error

was harmless.

C. Judge Cheroske Erred By Failing to Provide Johnson the Essentials of Due Process At the October 19 Hearing On Whether Johnson Would Be Excluded from His Entire Trial.

Judge Cheroske ruled that Johnson had forfeited his fundamental constitutional right to be present at his own capital trial. Johnson explained in his opening brief that before Judge Cheroske could make that ruling, certain procedural protections had to be provided to Johnson. (AOB 66-69.) But according to respondent, Johnson was not only *not* entitled to these protections, he was not even entitled to a hearing because "Judge Cheroske personally witnessed *much* of the misconduct, including the attack on Hauser." (RB 101, italics added.) Elsewhere, respondent writes "there was no need for an evidentiary hearing because the misconduct occurred in Judge Cheroske's presence." (RB 102.) On the contrary, there is no evidence that Judge Cheroske witnessed any of the alleged misconduct.

Respondent cites no California appellate decision to support its position. Instead, respondent merely cites *State v. Lehman* (Minn. App. 2008) 749 N.W.2d 76, 79-80, and *United States v. Leggett* (3d Cir. 1998) 162 F.3d 237, 250-251, both decisions that addressed a defendant's forfeiture of the right to counsel, not as here, a forfeiture of the right to presence at a capital trial.

Specifically, in *Lehman*, no separate hearing was necessary because appellant's physical assault on his attorney occurred in full view of the district court. (*State v. Lehman*, *supra*, 749 N.W.2d at p. 83.) And in *Leggett*, the defendant assaulted his lawyer also "in full view of the district court," which the court concluded was itself "a direct presentation of

evidence." (*United States v. Leggett*, *supra*, 162 F.3d at p. 250.)

In addition, *Leggett* emphasized that it made its decision affirming the defendant's forfeiture of counsel because of the less significant right involved, the forfeiture of counsel at sentencing. As the court underscored, "the forfeiture of counsel at sentencing does not deal as serious a blow to a defendant as would the forfeiture of counsel at the trial itself." (*United States v. Leggett*, *supra*, 162 F.3d at p. 251, fn. 14.) *Leggett* indicated further that it "express[ed] no opinion" as to whether the defendant's misconduct would have justified the forfeiture of counsel during the trial, let alone, as here, the forfeiture of an important constitutional right for the entire trial. (*Ibid.*)

Unlike here, in *Lehman* and *Leggett*, the judges involved had personal knowledge of the attack, the kind of personal knowledge where if the judges had attempted to testify, their testimony would have been admissible. Had Judge Cheroske attempted to testify, his testimony would not have been admissible because there was no evidence that he had personally observed the encounter between Hauser and Johnson. (See *Johnson v. Western Air Exp. Corp.* (1941) 45 Cal.App.2d 614, 630 [witness properly precluded from testifying on matters witness did not personally observe].) Although respondent includes a "Factual Background" section for this argument (RB 96), respondent fails to cite where in the record it shows that Judge Cheroske personally witnessed the encounter between Johnson and Hauser, a peculiar omission given that respondent's argument turns on whether, as in *Leggett*, the defendant assaulted his lawyer in full view of the court, effectively amounting to a direct presentation of evidence. (*United States v. Leggett*, *supra*, 162 F.3d at p. 250.) According to Judge Cheroske's order permanently expelling

Johnson from the courtroom, Johnson "violently attacked Mr. Hauser in front of a panel of 400 jurors." (17RT 2-64.) The order does not mention whether Judge Cheroske witnessed the incident.

In addition, the encounter between Hauser and Johnson did not occur in Judge Cheroske's courtroom. It occurred in the jury assembly room where the court had moved the proceedings in order to accommodate the 400 prospective jurors who appeared. (17RT 2-24.) The record does not show where in the jury assembly room Judge Cheroske was located when the "attack" occurred. Hence, one could not draw an inference that Judge Cheroske saw what happened, based on the usual location of the bench and counsel's table in the typical California courtroom.

Thus, even under the standards established by *Lehman* and *Leggett*, the record lacks the necessary foundation to show that Johnson's encounter with Hauser occurred in full view of Judge Cheroske so that Judge Cheroske had personal knowledge of the incident, worthy of admissible testimony. A hearing was required before the court could find that Johnson forfeited his right to presence based on the encounter.

As respondent's first quote above concedes, Judge Cheroske did not witness all of the alleged misconduct. Respondent writes that Judge Cheroske witnessed "much." And although both quotes represent that all of the alleged misconduct occurred in the courtroom and on the record, respondent misstates the record. Judge Cheroske's own expulsion order demonstrates that most of the alleged misconduct occurred outside the courtroom and not on the record. According to the order, Judge Cheroske relied "[o]n at least six occasions" of alleged misconduct to permanently exclude Johnson. Only Johnson's encounter with Hauser occurred in the courtroom. (17RT 2-64-65.) Thus, under *Lehman* and *Leggett*, a hearing

was required.

Next respondent goes to great length in attempting to show that *King v. Superior Court* (2003) 107 Cal.App.4th 929, heavily relied on by Johnson in the opening brief (AOB 67), is inapposite. (RB 102-104.) Respondent fails.

Oddly, despite the fact that both *Lehman* and *Leggett* are forfeiture-of-counsel cases, respondent distinguishes *King* from this case because *King* is a forfeiture-of-counsel case. Furthermore, respondent asserts the following as the primary factor in distinguishing *King*: "First, that case was concerned with forfeiture of the right to counsel, and specifically distinguished the issue it faced from the decision to exclude a defendant from the courtroom, which it considered to be a less serious concern." (RB 103.) Respondent fails to cite any page of the *King* decision that supports its assertion about *King's* less-serious-concern remark. Johnson's counsel closely read the opinion and found no place where *King* distinguishes the decision to exclude a defendant from the courtroom as a less serious concern than the forfeiture of counsel.

Second, respondent distinguishes *King* by the fact that the misconduct in *King* "occurred out of the trial court's presence" and therefore required that the defendant "be represented by counsel who could confront that evidence." (RB 103.) But just like in *King*, Judge Cheroske did *not* witness all the alleged misconduct. Judge Cheroske's own order suggests at least four occasions that he did not personally witness. (17RT 2-64-65 [two occasions of spitting, threat(s), holding cell disturbances].)

Third, respondent points out that the defense attorney in *King* "actively worked against the defendant," while Hauser did not. (RB 103.) Respondent does not address Johnson's contention in the opening brief

about Hauser: "like the attorney in *King* who offered evidence of his client's violent behavior, Hauser advocated against his own client and breached his duty of loyalty when he alleged that Johnson's attack on him was 'merely a tool to either delay the trial or to eventually wind up defending himself,' which Hauser believed was Johnson's goal." (17RT 2-58.)

Respondent also fails to answer Johnson's contentions that Hauser's passivity and lack of advocacy caused Johnson considerable harm. Importantly, Hauser failed to object once to Judge Cheroske's exclusion of Johnson for his entire trial. And not once did Hauser argue for a video feed for Johnson, though the deputy district attorney even raised the issue. (17RT 2-93.) Not once did Hauser ask for a hearing, or even for the process due Johnson, before Judge Cheroske ruled that Johnson had waived his right to attend his own trial. At the permanent-exclusion hearing, Johnson was entitled to an attorney who, unlike Hauser, acted in accordance with "the overarching duty to advocate the defendant's cause." (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) Instead, Hauser was totally passive, until later at trial when he united with Judge Cheroske and the prosecutor to mislead Johnson into believing he was testifying to the jury over closed circuit television, when in fact the jury was not present to witness Johnson's testimony. (23RT 1364-1366.) There, Hauser actively worked with the prosecutor and the judge to mislead his own client.

Finally, respondent claims that unlike the judge in *King*, Judge Cheroske had no intermediate steps he could have taken short of permanently excluding Johnson. The opening brief cited *King* as authority for Johnson's claim that Judge Cheroske failed to provide Johnson with the procedure that he was due at the forfeiture hearing. Borrowing from *King*,

one appropriate procedure should have been to offer Johnson a choice between restraint and permanent exclusion. As the high court recognized in *Illinois v. Allen* (1970) 397 U.S. 337, 344, "in some situations . . . binding and gagging might possibly be the fairest and most reasonable way to handle a defendant who acts [disruptively]." But instead of giving Johnson the choice, Judge Cheroske did his thinking for him and chose exclusion. (17RT 2-64-66.)

Respondent next offers as "instructive," *People v. Perry* (2006) 38 Cal.4th 302, 313-314, a case of marginal relevance where the defendant claimed that he had the right to be present at a bench conference to determine whether certain spectators should be excluded from the courtroom, especially because defense counsel worked against the defendant at the conference. (RB 103-104.) *Perry* is nothing like this case. In *Perry* the conference was on a routine procedural matter for which the defendant's attendance was not required. And this Court found that there was no showing defense counsel provided ineffective representation. (*Id.* at p. 314.)

Here, the hearing addressed a critical issue, Johnson's presence at his capital trial, and Hauser effectively provided no representation at the hearing, as indicated by the fact that Hauser never once objected to Judge Cheroske's expulsion of Johnson for his entire trial. (RB 69.) As even Judge Cheroske acknowledged, Johnson wanted to be present for his own trial. (17RT 2-95.) Therefore, as a lawyer who represented Johnson's interests, Hauser should have argued to the court that Penal Code section 1043, subdivision (c), required Johnson's presence at trial if Johnson agreed to conform his behavior.

Nor, as stated in the opening brief, did Hauser argue for a video feed

for Johnson, though the deputy district attorney raised the issue. (17RT 2-93.) Given that Judge Cheroske would eventually establish a video feed so Johnson could testify, Johnson would have had the opportunity to see his own trial if his lawyer had advocated on his behalf. (23RT 2-1364.) Hauser should have made some effort so his client could *see*, not simply hear, what was occurring at his trial, even if those efforts were unsuccessful. As an advocate, making the effort was Hauser's responsibility. Furthermore, Hauser should have proposed to Judge Cheroske that Johnson have the choice between restraint or exclusion. Instead, Hauser not only allowed Judge Cheroske to do Johnson's thinking, he allowed Judge Cheroske to do Hauser's thinking as well. And finally, as stated in the opening brief, Hauser advocated against his own client and breached his duty of loyalty when he alleged that Johnson's attack on him was "merely a tool to either delay the trial or to eventually wind up defending himself," which Hauser believed was Johnson's goal. (17RT 2-58; see AOB 69.) Respondent has no answer to this.

Accordingly, Judge Cheroske should have provided Johnson with the due process essentials at the important hearing called to decide whether Johnson would be present at his capital trial. Judge Cheroske should have given Johnson notice of the hearing, and allowed Johnson to be present, to introduce evidence, and to cross-examine witnesses. Judge Cheroske should have also found any facts supporting forfeiture by clear and convincing evidence. (*King v. Superior Court*, *supra*, 107 Cal.App.4th at p. 949.)

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D. Judge Cheroske Erred By Excluding Johnson from His Entire Trial, Thereby Depriving Johnson of the Reliable Decision-making Required By the Eighth Amendment.

Johnson established in his opening brief that Judge Cheroske violated the Eighth Amendment by excluding Johnson from his entire capital trial. (AOB 69.) Respondent disagrees. (RB 105.)

This case turned largely on the credibility of one witness, Robert Huggins. When Huggins testified at the first trial, Johnson was present in the courtroom. (18CT 5237.) Huggins testified that Johnson shot Gregory Hightower. (8RT 1851-1854, 1962.) On the final ballot before the court declared a mistrial, six jurors voted to acquit Johnson of the first degree murder of Hightower. (15RT 3484, 3489.) The logical inference is that six jurors did not accept Huggins's testimony as true beyond a reasonable doubt.

In response to Johnson's argument that Judge Cheroske violated the Eighth Amendment by excluding Johnson from his entire capital trial, respondent ignores Huggins, the 6-6 jury vote on the Hightower first degree murder charge, and the mistrial. (RB 105-107.)

The Confrontation Clause of the Sixth Amendment "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." (*Coy v. Iowa* (1988) 487 U.S. 1012, 1016.) "A witness 'may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts.' . . . . It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' In the former context, even if the lie is told, it will often be told less convincingly. . . . The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses. . . ."

(*Id.* at pp. 1019-1020, citations omitted.)

At all stages of the trial, "the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a *powerful influence* on the outcome of the trial." (*Riggins v. Nevada* (1992) 504 U.S. 127, 142 (conc. opn. of Kennedy, J., italics added).) That powerful influence is magnified in a capital sentencing proceeding, where "assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies." (*Id.* at p. 144 (conc. opn. of Kennedy, J.).)

Johnson was present for his first trial and he testified. Jurors had the opportunity to watch Johnson throughout the trial, including when he testified. They also had the opportunity to examine Huggins's demeanor when he testified in Johnson's presence that Johnson shot Hightower. Six jurors did not believe beyond a reasonable doubt that Johnson shot Hightower. When Johnson was retried in absentia because Judge Cheroske excluded him, the jury found Johnson guilty and voted for his death.

The United States Supreme Court "has stressed the 'acute need' for reliable decision-making when the death penalty is at issue." (*Deck v. Missouri* (2005) 544 U.S. 622, 632.) By expelling Johnson from his entire trial, Judge Cheroske failed to ensure the reliable decision-making and fairness that the federal Constitution mandates in a death penalty case.

Lastly, respondent cites *People v. Medina* (1995) 11 Cal.4th 694, 738 and *People v. Majors* (1998) 18 Cal.4th 385, 415, two capital cases, and claims "a defendant may be excluded from the entirety of a trial." (RB 105-106.) In neither case was the defendant excluded for his entire trial. In *Medina*, the "defendant was absent from the courtroom during much of

his trial." (*People v. Medina*, *supra*, 11 Cal.4th at p. 735.) Moreover, the defendant was absent almost entirely by choice. (*Id.* at p. 736 [court "directed that jail personnel be asked to contact defendant daily to determine whether he was willing to 'behave'"].) And in *Majors*, the defendant's absence was not from the entire trial, it was from the penalty phase and it too was by choice. (*People v. Majors*, *supra*, 18 Cal.4th at p. 413.) These cases do not stand for the proposition that a capital defendant or any defendant may be excluded for the defendant's entire trial.

E. By Barring Johnson from His Trial, Judge Cheroske Violated His Rights to Confrontation and Due Process, As Well As the Strict Requirements of Section 1043, Enacted to Protect Those Rights.

In his opening brief, Johnson showed that Judge Cheroske violated Johnson's constitutional and statutory rights to be present at his trial. Johnson established that Judge Cheroske was not entitled to exclude Johnson from his trial because each of the following conditions was not satisfied: (1) Johnson was not present at the beginning of the trial; (2) he did not commit misconduct that disrupted the trial; (3) Judge Cheroske did not warn Johnson that repeated misconduct could result in his removal from the courtroom; (4) Johnson did not commit continued misconduct during trial that made it impossible to carry on the trial with Johnson in the courtroom; and (5) Judge Cheroske did not inform Johnson that his right to be present could be reclaimed if Johnson was willing to conduct himself appropriately. (AOB 75.) As the high court has recognized, removing a defendant from any part of a noncapital trial is "deplorable." (*Illinois v. Allen*, *supra*, 397 U.S. at p. 347.) To ensure that a defendant's constitutional rights are protected and that trial courts resort to the deplorable remedy of removal under only the most extreme circumstances,

the high court and the Legislature have imposed strict and demanding requirements before a judge may justifiably remove a defendant for any part of the defendant's trial. These strict requirements were not met below.

1. Johnson Was Not Present In the Courtroom When His Trial Began.

As shown in Johnson's opening brief (AOB 76-77, 79), Judge Cheroske violated *Illinois v. Allen*, *supra*, 397 U.S. at p. 347 and Penal Code section 1043, when he did not allow Johnson to be present for the start of his trial. Respondent disagrees and argues that *Allen* does not require a court to wait until the trial commences before it can find that a disruptive defendant has forfeited the right to be present. And despite section 1043's express language mandating a defendant's presence at trial, while permitting a defendant's absence due to disruptive behavior *only* "after the trial has commenced in his presence," respondent asserts that under section 1043, a trial court need not wait until trial has commenced to excuse a defendant. (RB 108.) Thus, respondent insists that a defendant charged with a felony may be tried entirely in absentia.

Respondent misreads section 1043 and *Allen* and their constitutional demands. Both section 1043 and *Allen* require that a defendant must be present at the start of trial, thereby giving the defendant an opportunity to demonstrate proper behavior, before the court may remove the defendant for disruptive behavior.

Section 1043 provides in part:

> (a) *Except as otherwise provided* in this section, the defendant in a felony case shall be personally present at the trial.
>
> (b) The absence of the defendant in a felony case *after the trial has commenced in his presence* shall not prevent continuing the trial to, and including, the return of the verdict

> in any of the following cases:
>
> (1) Any case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom.
>
> (2) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent.
>
> (c) Any defendant who is absent from a trial pursuant to paragraph (1) of subdivision (b) may reclaim his right to be present at the trial as soon as he is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

(Italics added.)

Section 1043 is especially straightforward. Subdivision (a) provides that a defendant "*shall* be personally present at the trial." (Italics added.) Subdivision (a) is mandatory. (*People v. Howe* (1987) 191 Cal.App.3d 345, 350 ["shall" is mandatory].) Thus, a defendant must be present at trial. And subdivision (a) only allows two exceptions to this mandate, the defendant's disruptive behavior under subdivision (b)(1) -- the portion of the statute that Judge Cheroske cited as authority for Johnson's banishment from his entire trial (23RT 2-1403) -- and the defendant's voluntary absence under subdivision (b)(2). But in either case, the exceptions to the mandate that a defendant must be present at trial only come into play "after the trial has commenced in his presence." (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1394 ["section 1043, subdivision (b) allows a court to continue with a trial in the absence of a defendant *only when a trial has commenced in the defendant's presence* and a defendant is disruptive or has voluntarily absented himself."].) Accordingly, subdivision (b)(1)

could not be clearer. Judge Cheroske had no authority to bar Johnson for disrupting his trial without first allowing Johnson to be present for his trial.

Although respondent argues contrarily, respondent does not explain which language of the statute can be read to support its view that a trial court may permanently banish a defendant from a trial that was not commenced in the defendant's presence. (RB 108.) Respondent makes no argument because there is none to make. "After the trial has commenced in his presence" means exactly what it says. And because Johnson was not present at the commencement of his trial, Judge Cheroske was wrong to permanently exclude Johnson under section 1043, subdivision (b)(1).

Section 1043 is consistent with *Allen*. Although *Allen's* holding does not expressly mention that a defendant must be present for the commencement of trial, it is necessarily implied because, as *Allen* affirmed, a defendant has a constitutional right under the confrontation clause to be present during "every stage of the trial" (*Illinois v. Allen*, *supra*, 397 U.S. at p. 338, citing *Lewis v. United States* (1892) 146 U.S. 370); and "a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." (*Illinois v. Allen*, *supra*, 397 U.S. at p. 343.)[5]

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[5] Under the federal system, because jury selection begins the trial, a defendant must be present at the commencement of jury selection (*Lewis v. United States*, *supra*, 146 U.S. at pp. 373-374 [trial commences at least from time when empaneling the jury begins, a critical stage of trial]), and then under *Allen* a defendant may be removed for disruptive behavior.

Allen is over 40 years old. Nevertheless, respondent cites not one case where the trial court properly decided to banish the defendant from any part of the defendant's trial without the defendant having been present at the beginning of trial. Thus, because Johnson was not present for his trial when it commenced, Judge Cheroske violated *Allen* and section 1043.

Section 1043 is also consistent with its federal counterpart, rule 43 of the Federal Rules of Criminal Procedure (*People v. Granderson* (1998) 67 Cal.App.4th 703, 709-710) which, like section 1043, "essentially codified *Illinois v. Allen*" (*United States v. Lawrence* (4th Cir. 2001) 248 F.3d 300, 305). And like section 1043, rule 43 prohibits full trials in absentia, as the United States Supreme Court explained in *Crosby v. United States* (1993) 506 U.S. 255, 258.)[6]

In *Crosby*, the high court was asked to decide whether rule 43 "permits the trial in absentia of a defendant who absconds prior to trial and

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[6] When *Crosby* was decided, rule 43 provided in pertinent part as follows:

> "(a) PRESENCE REQUIRED. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, *except as otherwise provided by this rule.*
> "(b) CONTINUED PRESENCE NOT REQUIRED. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, *initially present,*
> "(1) is voluntarily absent *after the trial has commenced....*"

(*Crosby v. United States, supra,* 506 U.S. at p. 258, italics added.)

is absent at its beginning." The government argued that the rule permitted trial in the defendant's absence after the defendant failed to appear on the first day of trial or any time thereafter. Trial began and proceeded with the defendant's counsel actively participating throughout. Interpreting the express language of the rule, the Court "conclude[d] that Rule 43 does not allow full trials *in absentia*." (*Crosby v. United States*, *supra*, 506 U.S. at p. 258; *United States v. Arias* (11th Cir. 1993) 984 F.2d 1139, 1141 [*Crosby* "held that Rule 43 means precisely what it says: a defendant who absconds before trial may not be tried *in absentia*"].)

Crosby took the same approach to construing rule 43 as Johnson takes to construing section 1043, by first noting that the rule explicitly declared a defendant shall be present at every stage of the trial "except as otherwise provided by this rule." To the Court, "the language and structure of the Rule could not be more clear," in that the express use of the words, "except as otherwise provided," clearly indicated that "[t]he list of situations in which the trial may proceed without the defendant is marked as exclusive not by the 'expression of one' circumstance, but rather by the express use of a limiting phrase." (*Crosby v. United States*, *supra*, 506 U.S. at p. 259.)

And the list did not include voluntary absence *before* the trial started. Instead, rule 43 required that the defendant be "initially present" at trial before the defendant could be "voluntarily absent after the trial has commenced." Hence, a defendant could not waive his or her presence at trial if the defendant was not present at the beginning of the trial. (*Crosby v. United States*, *supra*, 506 U.S. at pp. 258-262; *People v. Howze*, *supra*, 85 Cal.App.4th at p. 1394 [high court interpreted rule 43 "to mean that a defendant could only waive his appearance by conduct when he failed to

appear after initially appearing at the time the trial actually commenced"].)

The Court's review of the common law, which the rule was meant to restate, supported its interpretation of rule 43. At common law, the defendant's presence was essential to a valid trial and the defendant's absence dictated a reversal of any conviction. "The right generally was considered unwaivable in felony cases. [Citation.] This canon was premised on the notion that a fair trial could take place only if the jurors met the defendant face-to-face and only if those testifying against the defendant did so in his presence." (*Crosby v. United States*, *supra*, 506 U.S. at p. 258.) Thus, "[t]he language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial *in absentia* of a defendant who is not present at the beginning of trial." (*Id.* at p. 262.)

At the time *Crosby* was decided in 1993, rule 43 included one other instance where the trial could proceed without the defendant. According to the Advisory Committee Notes to the 1975 enactment of rule 43, this second instance was added as a result of an amendment proposed by the United States Supreme Court to reflect its *Allen* decision. (*United States v. Brown* (6th Cir. 1978) 571 F.2d 980, 987, fn. 5 ["The major concern behind the 1975 Amendments to Rule 43 was to revise the rule to reflect *Illinois v. Allen*"]; *Gray v. Moore* (6th Cir. 2008) 520 F.3d 616, 623 [rule 43 "mirrors the central teachings of *Allen*"].) As enacted, rule 43(b)(2) read as follows: "(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present, (1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or (2) after being

warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom." (Pub.L. No. 94-64, 89 Stat. 370; see also *United States v. Gagnon* (1985) 470 U.S. 522, 524, fn. 1.)

As noted, *Crosby* found that under rule 43, the list of situations when the trial may proceed without the defendant was "exclusive." (*Crosby v. United States*, *supra*, 506 U.S. at p. 259.) And the second exclusive situation, added as a result of *Allen*, was when the defendant was disruptive during trial after being "initially present" during trial. Under the current version of rule 43, "the phrase 'initially present at trial' in a jury trial must refer to the day that jury selection begins." (*United States v. Benabe* (7th Cir. 2011) 654 F.3d 753, 771-772.) Because a trial begins for purposes of rule 43 when jury selection commences (*United States v. Bradford* (11th Cir. 2001) 237 F.3d 1306, 1309-1310 [joining "every other circuit to address the issue" in holding that a trial commences under rule 43 when the jury selection process begins]), a defendant must be present on the first day of trial before a federal court may remove the defendant for disruptive behavior. Thus, under the reasoning of *Crosby*, rule 43 does not allow a court to proceed with the trial in the defendant's absence due to disruptive behavior, unless the defendant was present on the first day of trial when jury selection began.

Like rule 43, the language of section 1043 is clear. It prohibits the trial in absentia of a defendant who is not present at the beginning of the trial. Section 1043 begins by making a defendant's presence at trial mandatory with limited exceptions. Those exceptions include when, "after the trial has commenced in his presence," the defendant has been disruptive. Thus, section 1043 simply does not permit a full trial in

absentia and mandates that the trial begin in the defendant's presence before the trial may continue in the defendant's absence due to the defendant's disruptive behavior.

Respondent argues that "there is no support for appellant's claim that trial had not commenced at the time Judge Cheroske made his ruling." (RB 109.) According to respondent, "[u]nder section 1043, a defendant is present when a trial 'commences' if he is 'physically present in the courtroom where the trial is to be held' and 'understands that the proceedings against him are underway.'" (RB 108.) Respondent quotes from *People v. Ruiz* (2001) 92 Cal.App.4th 162, 168-169, as to when a trial commences and claims that Johnson is mistaken in relying on dictum from *People v. Concepcion* (2008) 45 Cal.4th 77, that trial begins with jury selection. (RB 108.)

Relying on the court's thorough analysis in *People v. Granderson, supra*, 67 Cal.App.4th at p. 709, as to when a jury trial commences under section 1043, this Court has stated: "For the purposes of section 1043, a jury trial begins with jury selection." (*People v. Concepcion* (2008) 45 Cal.4th 77, 80, fn. 4.) Because Judge Cheroske did not permit Johnson to be present for jury selection, he violated section 1043's requirement that the trial commence in the defendant's presence."[7]

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[7] *Granderson* summarized its lengthy analysis as follows: "For reasons which follow, we conclude that the Legislature intended the word 'trial' in the phrase 'after the trial has commenced in [the defendant's] presence' to include jury selection. This interpretation is consistent with the ordinary and common sense meaning of 'trial' which, as a matter of constitutional law, includes jury selection as a critical stage. Moreover, it effectuates the purpose of Penal Code section 1043, subdivision (b)(2), which is intended to prevent a defendant from intentionally frustrating the (continued...)

Respondent considers *Concepcion's* approval of *Granderson's* holding as mere dictum. (RB 108.) Respondent raises an interesting point. The issue in *Concepcion* was whether under section 1043, an escapee's voluntary absence included the time reasonably required to return him to court after apprehension. (*People v. Concepcion, supra*, 45 Cal.4th at p. 79.) While *Concepcion's* adoption of *Granderson's* holding may not be essential to *Concepcion's* holding and therefore not itself binding on lower courts, it must be considered highly persuasive, since presumably it was the product of careful consideration by this Court. (*People v. Lozano* (1987) 192 Cal.App.3d 618, 632 [dictum is not essential to a court's holding, but the California Supreme Court's dictum may be highly persuasive when made after careful consideration].) This Court chose to approve *Granderson's* determination as to when trial commences under section 1043, though it had the opportunity to adopt the view that respondent advances, given that respondent's view first appeared in *People v. Lewis* (1983) 144 Cal.App.3d 267, 276, a decision repeatedly cited by *Granderson*. (*People v. Granderson, supra*, 67 Cal.App.4th 703, 708, 711, 712.) The inference is that this Court has already rejected respondent's proposed view. Moreover, as *Granderson* explained, its construction of section 1043 is consistent with the federal courts' interpretation of the analogous rule 43 of the Federal Rules of Criminal Procedure, another reason why this Court would adopt *Granderson's* view. (*People v. Granderson, supra*, 67 Cal.App.4th 703, 709.)

As noted and quoted above, respondent takes its interpretation of

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[7](...continued)
orderly processes of his trial by voluntarily absenting himself from the courtroom." (*People v. Granderson, supra*, 67 Cal.App.4th at p. 705.)

when trial commences under section 1043 from *People v. Ruiz*, *supra*, 92 Cal.App.4th at pp. 168-169. (RB 108.) But respondent's quote from *Ruiz* is incomplete. *Ruiz* actually held that "under section 1043 a defendant is present when a trial 'commences' if 'the defendant is physically present in the courtroom where the trial is to be held, understands that the proceedings against him are underway, confronts the judge and voluntarily says he does not desire to participate any further in those proceedings.'" (*People v. Ruiz*, *supra*, 92 Cal.App.4th at p. 167, quoting *People v. Lewis*, *supra*, 144 Cal.App.3d at p. 279.)

Respondent does not explain why it left out half of *Ruiz's* definition of when a trial commences under section 1043. Nevertheless, as the excluded language reveals, *Ruiz* is a case where the defendant voluntarily wished to be absent from his own trial. The defendant, in custody, appeared for trial on day one of the proceedings, when he expressed to the judge in courtroom chambers that he wished to be absent from his trial. On the second day of the proceedings, defense counsel and the bailiff both told the court that the defendant had informed them that he wished to be absent from his trial. On the third day of the proceedings and the final day of trial, defense counsel stated that the defendant "confirmed with me this morning that he does not want to be here." (*People v. Ruiz*, *supra*, 92 Cal.App.4th at p. 165.)

On appeal the defendant argued that section 1043 was violated because only absences beginning "after the trial has commenced" are allowed and his absence began *before* jury selection, which is before "trial." The appellate court disagreed, reasoning: "Nothing in the language of or policy behind section 1043 suggests that the defendant must wait to waive his personal presence until a time later than the moment after he

appears before the court for trial. No legitimate objective is served by requiring the waiver of one's presence to occur only after the potential jurors have been sworn for voir dire, the jury is impaneled or the first witness is sworn." (*People v. Ruiz*, *supra*, 92 Cal.App.4th at p. 168.) Thus, because the defendant was present in the courtroom on the first day of the proceedings when he appeared for trial, he expressed his desire to be absent from his trial, and he understood that the proceedings against him were underway, section 1043 was not violated. (*Ibid.*)

Respondent does not indicate why Judge Cheroske did not violate section 1043, even accepting respondent's view as to when trial commences. Clearly, Johnson was not present even under respondent's proposed interpretation because Johnson was not physically present in the courtroom where the trial was to be held, nor did he confront Judge Cheroske and voluntarily say he did not desire to participate any further in the proceedings. Jury selection began on November 5, 1998. (39CT 11500.) Beginning as early as September 17, 1998, and repeated on the record three times thereafter, Judge Cheroske ordered that Johnson would not be allowed back into his courtroom. (17RT 2-25, 2-47, 2-67, 2-94.) Under *Granderson's* or *Ruiz's* view of when trial commences for purposes of section 1043, Johnson was not present when his trial began. Consequently, Judge Cheroske violated section 1043's requirement that Johnson be present in the courtroom when trial commenced.

In sum, because *Allen* recognized that one of the most basic rights under the confrontation clause is the defendant's right to be present "at every stage of his trial," that courts must indulge every reasonable presumption against the loss of that right, and that removing a defendant from trial for even a short time is a deplorable act, the high court demands

– and section 1043 complies – that trial courts allow defendants to be present from the very beginning of trial, thereby giving defendants an opportunity to show that they will act appropriately at trial. (*Illinois v. Allen, supra*, 397 U.S. at pp. 338, 343, 347.) If a trial court believes justifiably that the defendant will disrupt jury selection, then arguably a court may fully restrain the defendant during jury selection, or the court may begin trial by only swearing in a few prospective jurors rather than a full venire, thereby avoiding a possible mistrial if a disruption does occur. Assuming the defendant is not disruptive, then the trial judge could bring in the remainder of the venire. On the other hand, if the defendant is disruptive after receiving the warning required by section 1043, subdivision (b)(1) and discussed below, then the court may properly remove the defendant, who would have been present at the start of trial, as required by section 1043. Thus, a defendant intent on disruption would not avoid trial.

Accordingly, under section 1043 and *Allen*, Judge Cheroske was wrong to exclude Johnson from his trial without first allowing Johnson to appear at trial. Johnson had the right to demonstrate that he could act in a nondisruptive manner at trial. Instead Judge Cheroske improperly relied upon Johnson's previous encounter with Hauser to deny Johnson this opportunity. And although Judge Cheroske had almost two months to reconsider his order barring Johnson from a courtroom for the entirety of his trial, Judge Cheroske stubbornly stuck to his initial ruling by refusing Johnson an opportunity to reclaim his proper place in the courtroom.

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2. Johnson Did Not Commit Any Misconduct During the Trial.

Because Judge Cheroske delivered on his promise and did not allow Johnson into the courtroom for his trial, Johnson did not have the chance to prove to the court that he would commit no misconduct. In any event, because there was no trial appearance for Johnson, there was no misconduct during trial.

Respondent, nevertheless, claims that under *People v. Ruiz*, *supra*, 92 Cal.App.4th 162, Johnson did commit misconduct during his trial. (RB 110.) As shown above, *Ruiz* has no application to this case. *Granderson* does, however, and under that case, Johnson's trial before Judge Cheroske began with jury selection on November 5, 1998. (39CT 11500; *People v. Granderson*, *supra*, 67 Cal.App.4th at p. 709.) Because Johnson committed no misconduct at this trial, Judge Cheroske was not entitled to bar Johnson from trial, and by doing so he violated Johnson's constitutional and statutory rights to be present at his trial.

3. Judge Cheroske Did Not Warn Johnson That His Misconduct Could Result in His Permanent Expulsion from Trial.

Section 1043, subdivision (b)(1) expressly provides that before a court may remove a defendant from trial for disruptive conduct, the judge must warn the defendant that he will be removed if he continues his disruptive behavior. *Illinois v. Allen*, *supra*, 397 U.S. 337, 343, requires an express warning as well. At no time did Judge Cheroske warn Johnson that his misconduct could result in his permanent expulsion from his entire trial. Respondent concedes as much by arguing that any such warning was implied. (RB 110.)

Respondent cites *People v. Rogers* (1957) 150 Cal.App.2d 403, which predates *Allen* by 13 years, for the proposition that a technical application of section 1043 would lead to absurd results unintended by the Legislature. Presumably respondent finds it absurd that Judge Cheroske should have been required to warn Johnson that further disruption could result in permanent, complete expulsion. (RB 110-111.) There is nothing absurd about it. Johnson had a fundamental, constitutional right to be present at his own capital trial. In its wisdom, the Legislature has complied with the high court's command and established strict requirements before that right can be taken. Admittedly, because section 1043 does not even allow for complete expulsion, in that it requires a trial court to permit an expelled defendant to "reclaim his right to be present at the trial as soon as he is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings" (§ 1043, subd. (c)), there is something questionable about requiring Judge Cheroske to warn Johnson of a remedy the court was not entitled to invoke. Nevertheless, assuming for the sake of argument that a court may permanently expel a defendant, because Judge Cheroske's choice of remedy was unprecedented and unpredictable, and in keeping with the high court's well established rule that "courts must indulge every reasonable presumption against the loss of constitutional rights" (*Illinois v. Allen*, *supra*, 397 U.S. at p. 343), the requirement of an express warning under *Allen* and section 1043 should have been honored.

In addition, respondent cites *People v. Majors*, *supra*, 18 Cal.4th 385, 415, as helpful background authority regarding a trial court's inherent power to establish order in its courtroom. (RB 110.) But nothing in *Majors* suggests that a court's inherent power to establish order overrides a

defendant's constitutional right to presence or the specific requirements of *Allen* and section 1043. (*Illinois v. Allen, supra*, 397 U.S. at p. 338 ["One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial"].)

Respondent argues that Judge Cheroske's warning was implied, as in *People v. Sully* (1991) 53 Cal.3d 1195, 1240. (RB 110.) It is doubtful that this Court's finding in that case, that section 1043's warning requirement was satisfied as a result of the defendant's exchange with the trial court, would apply to this case. (*People v. Sully, supra*, 53 Cal.3d 1195, 1240 ["the essential elements of the required warning were implicit in defendant's exchange with the court"].) There was no exchange between Johnson and Judge Cheroske before Judge Cheroske permanently expelled him. And nothing said by Judge Cheroske or any other judge in this case would lead a reasonable person to believe that Johnson was implicitly warned that further disruptive conduct would result in his *permanent* expulsion from his entire trial. Immediately after the encounter with Hauser, Judge Cheroske stated: "He is out of control. I will not allow him back in this courtroom." (17RT 2-25.) Judge Cheroske made his decision without providing any notice to Johnson so that someone could advocate on Johnson's behalf and so that Johnson could conform his behavior to accepted norms.

Furthermore, while this Court is the final word on what satisfies section 1043, respondent fails to cite any case where an implied warning satisfied *Allen*, which requires an express warning by the judge. (*Illinois v. Allen, supra*, 397 U.S. at p. 343.) Although *Sully* found no constitutional violation, it did not directly address *Allen's* warning requirement. (*People*

v. Sully, *supra*, 53 Cal.3d at pp. 1240-1241.)

In *United States v. Shepherd* (8th Cir. 2002) 284 F.3d 965, cited by respondent (RB 111), the Eighth Circuit implied that the trial court erred in failing to warn the defendant of his imminent removal, but the harm was minimal given when the removal occurred – just before the start of closing arguments. Therefore, the court found that the removal did not rise to a constitutional violation. (*Id.* at p. 967.) *Shepherd* does not support respondent. Removing a defendant just before closing argument hardly compares to barring a capital defendant from his entire trial, which rises to the level of a constitutional violation in every way. Furthermore, *Shepherd* suggested that an express warning was required under *Allen*. (*Ibid.* ["we think that the district court's failure to warn Shepherd about his imminent removal is troublesome"].) The trial court's failure to provide the warning, however, was too insignificant under the circumstances to warrant relief.

In arguing that Johnson was implicitly warned, whether by Judge Cheroske or as a result of his prior temporary expulsions, respondent fails to address the most important aspect of Johnson's expulsion, aside from the fact that he did not receive an express warning. Johnson's expulsion was permanent. It was his entire trial. Respondent cites no authority justifying the permanent expulsion of a defendant from his entire trial based on an implied warning. By the very language of section 1043, which underscores that a defendant must be present on the first day of trial and is entitled to reclaim the right to be present at trial, a permanent expulsion from a defendant's entire trial is not authorized.

As the oft-quoted excerpt from Justice Brennan's concurring opinion in *Allen* instructs: "Of course, no action against an unruly defendant is permissible except after he has been fully and fairly informed

that his conduct is wrong and intolerable, and warned of the possible consequences of continued misbehavior." (*Illinois v. Allen, supra,* 397 U.S. at p. 350 (conc. opn. of Brennan, J.).) And as the Sixth Circuit concluded in *Gray v. Moore* (6th Cir. 2008) 520 F.3d 616, "the warning requirement from *Allen* cannot be interpreted in any non-mandatory way, lest we substitute our own judgment of what the rule should be for that of the Court." (*Id.* at p. 624.) "[T]he proper reading of *Allen* requires a trial court to give the accused one last chance to comply with courtroom civility before committing the 'deplorable' act -- in the *Allen* Court's words -- of removing that person from his own trial." (*Ibid.*; *United States v. Lawrence, supra,* 248 F.3d at p. 305 ["Warning is an integral part of the rule, as well as to the constitutional underpinnings of the rule itself," citing *Allen*].)

A full and fair warning required that Judge Cheroske expressly warn Johnson. And most important, the full and fair warning should have apprised Johnson of the exact consequences that could result from continued misbehavior. A temporary expulsion is not a permanent expulsion. Assuming for the sake of argument that a permanent, complete expulsion is even permissible, Judge Cheroske should have expressly warned Johnson that continued disruptive behavior could result in his banishment from his entire trial. That Judge Cheroske did not so warn Johnson, means he violated *Allen* and section 1043.

4. Johnson's Behavior During Trial Did Not Make It Impossible to Conduct the Trial.

Illinois v. Allen stands for the proposition that only a defendant's conduct during the trial where the defendant is removed from the

courtroom can support that removal. The test to determine whether removal is appropriate is if the defendant "continues his disruptive behavior" and "insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." (*Illinois v. Allen*, *supra*, 397 U.S. at p. 343.) Under *Allen*, the defendant's conduct is limited to the trial itself, the very thing that the defendant continues to disrupt. Section 1043, subdivision (b)(1) is the same. As shown above, the trial must have begun in the defendant's presence under subdivision (b). Moreover, the defendant must continue his disruptive behavior after the court warns the defendant that he will be removed if he continues to do so. Thus, the high court in *Allen* and the Legislature in section 1043 have drawn clear lines: the behavior that a court may consider in removing a defendant from trial is limited to acts committed by the *defendant during the trial* that disrupt the trial.

Nevertheless, respondent argues that conduct outside Johnson's trial should have disqualified him from appearing at his trial. In addition respondent argues that conduct by someone other than Johnson should be considered. Neither satisfies *Allen* and section 1043, however.

Accordingly, all of the conduct respondent cites at pages 115-116 of respondent's brief are not acceptable grounds under *Allen* and section 1043 to banish Johnson. For example, respondent offers conduct committed by Johnson's wife and friend. (RB 115.) But because it was not committed by Johnson, it is not a ground under *Allen* or section 1043. Although respondent says that Johnson encouraged their behavior (RB 115), their behavior did not disrupt Johnson's trial, and is therefore irrelevant. Respondent also claims that other conduct committed by Johnson before the retrial provides grounds for barring Johnson from the courtroom, but

these acts do not because the conduct did not disrupt Johnson's retrial. For example, respondent refers to Johnson's conduct during the first trial before Judge Morgan, which ended in a mistrial, five months before the trial from which Johnson was expelled. (RB 115; 18CT 5333.) Nothing in *Allen*, section 1043, or the decisions of this Court permit a court to consider a defendant's conduct in prior trials to determine whether a court should permanently exclude the defendant from a subsequent trial.

Respondent also mentions behavior by Johnson "when he was represented by the public defender." (RB 115, citing 1CT 4.) This refers to a time when Johnson wanted to represent himself, but had not filled out the necessary papers. Respondent charges Johnson with acting disruptively, but there is no evidence in the record supporting respondent's charge. Nor does respondent explain how failing to fill out papers to represent oneself could be deemed behavior that is "so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom." (§ 1043, subd. (b)(1).) Furthermore, this behavior occurred over a year before the retrial. (1CT 4.)

Next, respondent points to Johnson's desire at one time to remove his counsel and that Johnson later changed his mind. Respondent adds that Hauser and co-defendant's counsel were concerned that Johnson's behavior would prejudice the jury against Johnson and his co-defendant, respectively. (RB 115.) These assertions fail to answer Johnson's observation that his behavior during trial did not disrupt the trial, as required by *Illinois v. Allen*, *supra*, 397 U.S. at pp. 339-341 and section 1043, subdivision (b)(1).

In a footnote, respondent seems to suggest that Johnson's filings in opposition to "the requests for extensions of time filed by his attorney in

the instant appeal" are somehow relevant. (RB 115, fn. 32.) Given that they occurred long after the trial and could not have disrupted it, and they were not disruptive but merely reflect a desire to have his appeal heard expeditiously, they are not relevant under *Allen* and section 1043.

Respondent offers that Johnson acted disruptively "when he was represented by attorneys in prior cases (1RT 142-144)." (RB 115.) Respondent's citation refers to Hauser's allegation that Johnson's modus operandi was to try to see how many defense attorneys he could go through and discourage to get off his case. Hauser made this allegation nine months before Johnson's retrial. Respondent does not explain how Hauser's unsubstantiated hearsay shows that Johnson disrupted his eventual retrial.

Next, respondent alludes to cursing and Johnson's use of his voice to disrupt the proceedings. Respondent also states: "Despite being removed from the courtroom repeatedly, he continued to misbehave." (RB 115.) Respondent fails to cite where in the record support for these claims is found.

Most remarkable, respondent cites Johnson's "instant crimes" (RB 116) as a ground to exclude Johnson from his trial. Not surprisingly, respondent cites no authority for the proposition that a defendant may be excluded from his own trial because the current crimes are capital crimes of violence, and there is some indication that the defendant has in the past committed violent acts. This simply cannot be a legitimate factor for the trial court to consider. If this Court deems it such, Johnson submits that the Court will be sanctioning future capital trials conducted without defendants, since as a specific legal matter all capital crimes are crimes of violence and as a general matter many capitally-charged defendants have

committed violent acts in the past.

Respondent asserts further that it is appropriate to take into account Johnson's allegedly disruptive behavior when he was called to testify in the retrial. (RB 115.) This assertion, too, is remarkable. First, although it occurred during the trial where Johnson was expelled, it occurred after Judge Cheroske made the decision to banish Johnson. Under the language of section 1043, conduct after the expulsion does not support the previous expulsion, given that the defendant is "removed if he continues his disruptive behavior." Moreover, if it is relevant, then Johnson's reaction must be examined in context. Johnson cursed after learning that Judge Cheroske had deceived him into believing the jury was present in the courtroom to see and hear Johnson's testimony over closed circuit television, when in fact the jury was not present. Furthermore, Johnson did not curse until Judge Cheroske taunted Johnson with the remarks, "Well, I have a little surprise for you, Mr. Johnson. The jury is not present." (23RT 2-1366-1367.) Imagine how Johnson must have felt, trusting that the jury was present. Johnson was surely stunned that a judge would deceive him, and then publicly humiliate him with the judge's "little surprise." Johnson's cursing is not a factor that can be considered here.

Finally, respondent submits that Johnson's encounter with Hauser justified Johnson's exclusion from trial. (RB 115.) This is clearly the primary reason Judge Cheroske permanently banished Johnson. It occurred six weeks before Johnson's trial, time enough for Judge Cheroske to hold a hearing where the court could have warned Johnson that any repeated disruption would result in his removal from trial to the extent permitted by *Allen* and section 1043. (17RT 2-25; 39CT 11500.) Despite respondent's attempts to rewrite *Allen's* holding and the specific requirements of section

1043, there is no provision in either *Allen* or section 1043 to take into account conduct in prior trials to determine whether a defendant should be removed in a subsequent trial. As both *Allen* and section 1043 make clear, the misconduct that disrupts the trial must occur during the trial where the defendant is removed. As proposed above, the proper approach for Judge Cheroske to take would have been to give Johnson a chance to prove himself at the subsequent November 5, 1998 trial. After warning Johnson, Judge Cheroske should have begun trial with a small number of prospective jurors to avoid any possible mistrial. Alternatively, arguably Judge Cheroske could have brought Johnson into the courtroom fully restrained for the start of trial, at which point Johnson could have conformed his behavior.

In his opening brief, Johnson cited six decisions where this Court has affirmed the defendant's absence from a portion of trial, but only when based on the defendant's disruption of the same trial. (AOB 82-83.) Respondent answers by citing a single case, *People v. Price* (1991) 1 Cal.4th 324, 406, for the proposition that a defendant's misconduct need not occur during trial. (RB 113.) But as the opening brief showed, the defendant in *Price* announced that he would not appear before the jury in chains, he walked out of the courtroom, and then he declined to dress in civilian clothes to be returned to the courtroom. The trial court found that the defendant had disrupted and continued to disrupt the trial. (*Id.* at pp. 405-406.) Thus, contrary to respondent's misinterpretation of *Price*, a defendant may be removed from a trial only if the defendant's behavior disrupts the same trial. Here, because Johnson's disruptive behavior occurred six weeks before the trial from which he was permanently expelled (17RT 2-25; 18CT 5342; 39CT 11500), Judge Cheroske violated

the precise requirements of *Allen* and section 1043 that a defendant must be allowed to be present on the first day of trial. This gives the defendant the opportunity to conform his behavior to accepted norms. It additionally ensures that a court will remove a defendant only if the defendant's behavior continues to disrupt the trial, after the defendant receives a warning that such continued behavior will result in removal from the courtroom.

5. Judge Cheroske Failed to Inform Johnson That He Could Reclaim the Right of Presence If He Was Willing to Conduct Himself Properly.

Judge Cheroske should have advised Johnson that if he was willing to behave properly, he could return to the courtroom. (*Illinois v. Allen*, *supra*, 397 U.S. at pp. 344, 346; § 1043, subd. (c); see also *People v. Medina*, *supra*, 11 Cal.4th at p. 739 ["court repeatedly made it clear to defendant that he would continue to be removed if his disruptive conduct persisted, and that he could return to the courtroom once he agreed to behave properly"].) But Judge Cheroske did not so advise Johnson even once because he avowed in no uncertain terms that he would never allow Johnson back in the courtroom, in blatant violation of *Allen* and section 1043.

Respondent answers by citing a single case, *United States v. Nunez* (10th Cir. 1989) 877 F.2d 1475, 1478, for the proposition that there is "no requirement that a defendant receive advisements 'ad infinitum' regarding the possibility of returning to the courtroom." Also, respondent argues that nothing "required Judge Cheroske to conduct a daily kabuki ritual where he would ask appellant if he would behave, and instead leave it to appellant to inform the court that he was willing to conduct himself consistently with

the decorum and respect inherent in the concept of courts and judicial proceedings." (RB 117.)

Respondent addresses an argument that Johnson did not make. Johnson was not looking for advisements ad infinitum or a daily kabuki ritual. Once would have been helpful. But Judge Cheroske did not advise Johnson even once because Judge Cheroske did not need to; he knew what Johnson's answer would be, he would want to attend his own trial. (17RT 2-95 ["I'm not going to ask him if he wants to be physically present, because I'm convinced that he would say he does"].) Notwithstanding the express requirements of *Allen* and section 1043 that a defendant be allowed to return to the courtroom if he indicates a willingness to conform his behavior, Judge Cheroske had no intention of allowing Johnson back in the courtroom, as he repeatedly stated.

On September 17, 1998, Judge Cheroske announced, "I will not allow him back in this courtroom." (17RT 2-25.) On September 21, 1998, he affirmed, "Mr. Johnson will not be brought back into this courtroom. I've already ordered it." (17RT 2-47.) And again on October 19, 1998, in perhaps his strongest declaration, Judge Cheroske said, "I'm not going to have him in this courtroom no matter what he promises." (17RT 2-67.) Finally, on the first day of trial, November 5, 1998, he unequivocally asserted, "That man will never be in this courtroom under any conditions that I can foresee." (17RT 2-94.)

Given that Judge Cheroske was adamant he would never allow Johnson back in the courtroom, it was reasonable for Johnson to believe him. By refusing Johnson any opportunity to return to the courtroom, Judge Cheroske violated section 1043, subd. (c) and *Allen*. (See *United States v. Ives* (9th Cir. 1974) 504 F.2d 935, 944, fn. 19 [approving *Allen*

language requiring that defendant have opportunity to reclaim right of presence].)

F. Barring Johnson from His Entire Trial Requires Reversal of the Judgment In Its Entirety.

Judge Cheroske's error in permanently excluding Johnson from his trial was structural and therefore reversible per se. (AOB 88.) It is hard to imagine a more complete case of an error affecting the entire conduct of the trial, from beginning to end, than the defendant's absence. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.) At the same time, the consequences were necessarily unquantifiable and indeterminate, thereby unquestionably qualifying as structural error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 282].) Hence the court's error was reversible per se. Alternatively, it was not harmless beyond a reasonable doubt. (AOB 88-91; *People v. Perry, supra*, 38 Cal.4th at p. 312 [erroneous exclusion of defendant for portion of trial is not structural error].)

Respondent answers by relying on *United States v. Shepherd, supra*, 284 F.3d at p. 968, assuming Johnson and Hauser would not have communicated with each other, and ignoring the fact that when Johnson confronted witnesses in the prior mistrial, especially Robert Huggins, Johnson's presence almost certainly affected the result in Johnson's favor. (RB 116-117.) Respondent also fails to mention that the error in *Shepherd* was de minimis, because the defendant was removed from the courtroom with only closing arguments remaining, unlike here where Johnson was tried entirely in absentia. Finally, the evidence against the defendant in *Shepherd* was "overwhelming" (*United States v. Shepherd, supra*, 284 F.3d at p. 968), a claim that respondent does not and cannot make here.

With respect to respondent's speculation that Johnson and Hauser

would not have talked at trial, that assumption is belied by what occurred at the first mistrial. When push came to shove with Johnson's life on the line, Johnson and Hauser communicated to put the defense on, though they did not communicate much before that. Then after the trial, they did not speak again. (17RT 2-69.) Thus, it is likely that Johnson and Hauser would have repeated this pattern at the retrial if Judge Cheroske had permitted Johnson to be present.

In any event, much more important than Johnson's communications with Hauser was Johnson's ability to confront witnesses, as demonstrated by his impact on Huggins. In addition, Justice Kennedy has stated that it is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the confrontation clause. (*Riggins v. Nevada*, *supra*, 504 U.S. at p. 142 (conc. opn. of Kennedy, J.).) At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial. (*Ibid.*) That the jury hung 6-6 in the mistrial based on Huggins's testimony in Johnson's presence, and then when Johnson was absent, the jury was unanimous, is compelling evidence that Johnson's presence would have been critical to the jury's decision. Thus, respondent has not proved beyond a reasonable doubt that the guilty verdicts were surely unattributable to the court's error in excluding Johnson for his entire trial. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-280.) Reversal is warranted.

3.

JUDGE CHEROSKE ERRED IN FINDING THAT JOHNSON WAIVED HIS RIGHT TO TESTIFY AT BOTH THE GUILT AND PENALTY PHASES.

Respondent gives short shrift to Johnson's argument by categorizing it as a repackaging of his prior claims. (RB 118.) Operating under this misconception, respondent devotes little time to actually responding to Johnson's argument, and the assertions respondent does make are inapt.

A. Judge Cheroske Erred In Finding Waiver Because He Should Have Given Johnson Another Warning and Chance to Conform His Behavior, and Considered Less Severe Options to Waiver.

Basically, respondent's view is that since Johnson engaged in disruptive conduct at times during the trial, the trial court did not have to take any particular steps to safeguard his right to testify before the jury. Respondent cites to four cases to support this generalized belief, but none of them do so. (RB 119.)

Respondent first offers *People v. Hayes* (1991) 229 Cal.App.3d 1226, 1233-1234, for the general proposition that a defendant may forfeit the right to testify due to his or her behavior. (RB 119.) But *Hayes* required multiple warnings to a disruptive defendant: "The courts have consistently held that although a defendant has the constitutionally protected right to be personally present at trial, that right can be waived when, despite *warnings*, a defendant persists in unruly, contumacious behavior. (*Illinois v. Allen*, *supra*, 397 U.S. at p. 346 [25 L.Ed.2d at pp. 360-361].)" (*People v. Hayes*, *supra*, 229 Cal.App.3d at p. 1233, italics added.) Such did not occur here, as Judge Cheroske gave Johnson only a single warning the day before he testified. When Johnson ultimately

testified in a narrative manner, Judge Cheroske did not warn Johnson that he would permanently lose his right to testify if he chose again to testify in a narrative. Nor did Judge Cheroske suspend the proceedings and give Johnson an opportunity to reconsider his behavior, though the day before Johnson testified, Judge Cheroske informed him that he would "kill both the audio and the video portion" of Johnson's televised testimony if Johnson did "not follow the rules" and give Johnson a chance to reconsider his behavior. (23RT 2-1298.)

Next, respondent relies upon *United States v. Nunez* (10th Cir. 1989) 877 F.2d 1475. (RB 119.) There, the defendant was warned and removed several times, was banished "for good" from trial on the fourth day of his twelve-day trial, indicated that he did not want to be part of the trial, and did not indicate any desire to return to the courtroom or to testify. Nor did the defendant argue on appeal that he was inadequately warned. (*Id.* at p. 1478.) Thus, *Nunez* is inapt because, unlike here, Johnson *was* inadequately warned, he wished to testify, and he was never part of the trial though he wanted to be. (17RT 2-95.)

Respondent also cites two decisions from other states, *State v. Chapple* (2001) 145 Wash.2d 310, 320 [36 P.3d 1025], and *State v. Irvin* (Mo. Ct. App. 1982) 628 S.W.2d 957, 960.[8] (RB 119.) The *Chapple* court stated that the trial court should be accorded great deference in assessing the relative threat and disruptiveness of the defendant. (*State v. Chapple*, *supra*, 145 Wash.2d at p. 320.) The question there was whether the defendant would testify from the witness stand in the courtroom with the

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[8] *Irvin* merely stands for the proposition that a defendant has no right to degrade the judicial system, a proposition Johnson does not contest.

jury present, despite evidence that the defendant would engage in violent behavior while on the stand. (*Id.* at p. 328.) In that situation, deference to the trial court was appropriate because the defendant had engaged in "dangerous conduct" during the trial, in addition to disrupting the trial through other misconduct. (*Id.* at p. 313.)

Here, the question for Judge Cheroske was whether he would allow Johnson to testify from a nearby jail cell by way of a closed circuit television over which Judge Cheroske had complete control. As Judge Cheroske explained, if Johnson did not follow the rules, he would simply turn off the televised transmission. (23RT 2-1298.)

According to Judge Cheroske, Johnson waived his right to testify because he did not testify in a question-and-answer format and made comments instead. (23RT 2-1366-1367.) Thus, the issue on appeal is whether Johnson waived his right to testify by his conduct, while taking into consideration whether Judge Cheroske adequately warned Johnson beforehand. Given the extremely controlled environment, where Johnson was confined to a jail cell and could not realistically disrupt the trial because of Judge Cheroske's total command over the audio/video transmission, Judge Cheroske's ruling should be reviewed de novo and not accorded great deference. (See *United States v. Pino-Noriega* (9th Cir. 1999) 189 F.3d 1089, 1094 [defendant's claim of denial of right to testify reviewed de novo]; *People v. Perry* (2006) 38 Cal.4th 302, 311 [de novo standard of review applied to trial court's exclusion of defendant from trial, either in whole or in part, insofar as trial court's decision entails a measure of the facts against the law].)

Respondent also disputes Johnson's contention that Judge Cheroske should have considered reading to the jury Johnson's testimony from the

prior mistrial as a less severe alternative to finding that Johnson had waived his right to testify altogether. Respondent believes it was not Judge Cheroske's responsibility to make this suggestion and there is no indication that Johnson would have consented to this option. (RB 119-120.)

Respondent's summary rebuff of Johnson's argument fails to recognize that the law indulges every reasonable presumption against the loss of constitutional rights and ignores *Allen's* instruction to lower courts to consider all options to such a loss. (*Illinois v. Allen, supra*, 397 U.S. at pp. 343-344.) As to whether Johnson would have accepted this alternative, there is no reason to infer he would not have. Johnson clearly wanted to testify, and there is no reason to believe that given the option between no testimony at all and his prior testimony being read to the jury, that he would not have chosen to have his prior testimony read.[9]

B. Johnson Was Not Represented By Counsel At the Hearing Where Hauser Plotted With Judge Cheroske and the Prosecutor to Deceive Johnson.

Respondent incorporates Arguments II.B.-II.C. of its brief. Johnson incorporates the same from his reply.

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[9] Respondent's citation to *State v. Mosley* (Tenn. Crim. App. 2005) 200 S.W.3d 624 is totally inapt. There, the defendant disrupted the trial during his cross-examination and maintained the jury should have been allowed to consider his direct examination without him having been subjected to cross-examination. (*Id.* at pp. 633-634.) Here, the jury would have heard both the direct examination from the prior trial and the extensive cross-examination that was conducted.

C. Judge Cheroske Denied Johnson Due Process By Inducing Johnson to Relinquish His Right to Remain Silent, Breaching a Promise to Johnson, and Then Using Johnson's Statements Against Him to Deny Johnson the Right to Testify.

Respondent claims that Johnson forfeited his argument that Judge Cheroske deceived him because it was not raised at trial, a somewhat stunning claim given the circumstances. (RB 120.) Because Johnson's counsel participated in the charade that led to the deprivation of Johnson's right to testify, there was no one available to preserve this issue at the trial level. Even if this Court believed that Johnson himself, despite the fact he was represented by counsel, had the obligation to make an objection, he was excluded from participating at the court hearing that put the procedure in place. Consequently, he was not in a position to object to the procedure. Finally, any forfeiture should be excused because it would have been futile to raise an objection with the same judge who deceived Johnson.

Respondent next argues that there was no violation by Judge Cheroske because "there is no statement in the record in which Judge Cheroske told appellant the jury was present." (RB 120.) Apparently respondent relies on the fact that Judge Cheroske did not tell Johnson *on the day* of his testimony that the jury was present. Nevertheless, the record demonstrates overwhelmingly that Judge Cheroske and the parties led Johnson to believe that he was giving testimony before the jury and that Johnson believed he was testifying before the jury. (See 23RT 2-1296-1298; 23RT 2-1302-1303; 23RT 2-1362-1367.) To suggest otherwise is simply disingenuous.

Respondent also claims that Johnson did not make a statement in response to Judge Cheroske's deceit that could be used to prove the

charges against Johnson. (RB 120.) Respondent misses the point. Judge Cheroske used deception to draw a response from Johnson which he then used to find that Johnson waived his right to testify. And it is Johnson's right to testify that should be restored to him by granting him a new trial where he is allowed to testify.

Finally, respondent insists that it is "absurd" for Johnson to argue that a judge has no authority to explore whether a defendant intends to use his right to testify as a means of causing a mistrial. (RB 120-121.) That is not Johnson's argument; Johnson's argument is that a trial court has no authority to employ deceit and then find a defendant has waived his right to testify based upon the court's deceitful act. Respondent fails to address this argument.

D. Johnson Did Not Waive His Right to Testify At the Penalty Phase.

Respondent fails to answer the bases for Johnson's contention that he did not waive the right to testify at the penalty phase. Instead respondent asserts that Johnson forfeited the claim. (RB 121.) But as shown in the opening brief, there could be no forfeiture without hearing from Johnson himself. (AOB 111-116.) Under the circumstances of this case, where Johnson had been deceived and taunted by Judge Cheroske, and Johnson was aware that Hauser had participated in the deception (23RT 2-1364), it was especially critical that Johnson attend the conferences called to determine whether he would testify during the penalty phase. Furthermore, because of the deception, Johnson had no reason to believe any communication from any agent of the court or Hauser. Therefore, Judge Cheroske should have brought Johnson into the courtroom to hear Johnson's view on the matter.

This case is unlike the one on forfeiture respondent cites, *People v. Evans* (2008) 44 Cal.4th 590, where the Court found the defendant forfeited his right to testify at sentencing. There, the defendant was present in the courtroom at the time of sentencing, the trial court asked in the defendant's presence whether the matter was submitted, defense counsel agreed that it was, and the defendant said nothing, though he had every opportunity to speak up, as shown by his later remarks on the record. (*Id.* at p. 600.) Here, Johnson should have received what the defendant in *Evans* received – access to the courtroom and an opportunity to speak on the record.

The final case respondent cites, *People v. Bradford* (1997) 15 Cal.4th 1229, supports Johnson in that it recognizes the obligation of a trial court to admonish the defendant and secure on the record the defendant's express waiver of the right to testify, when a conflict between the defendant and defense counsel regarding the matter comes to the court's attention. (*Id.* at p. 1332.) Judge Cheroske was aware of an all-encompassing conflict between Johnson and Hauser because Judge Cheroske created the conflict by enlisting Hauser in a conspiracy to deceive Johnson into forfeiting his right to testify at the guilt phase. In light of Johnson's overall conflict with and distrust of Hauser, Judge Cheroske should have received Johnson's express waiver on the record, assuming that was his wish. There was no forfeiture.

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4.

THE LOWER COURT ERRED THRICE IN SUMMARILY DENYING JOHNSON'S MOTIONS TO REMOVE COUNSEL WITHOUT HOLDING A *MARSDEN* HEARING.

A. Introduction

Cedric Johnson made his final *Marsden* motion during the first trial on June 1, 1998, which the court denied. (9RT 2054, 2061-2071.) After the court ruled on Johnson's motion, nine witnesses testified for the prosecution, numerous prosecution exhibits were admitted with no objections by the defense, and the defense called seven witnesses. (18CT 5239, 5241, 5243, 5244, 5255, 5256.) In addition, the court instructed the jury on June 7, 1998, and the prosecutor and defense counsel presented their closing arguments to the jury on June 8, 1998. (14RT 3163-3202; 15RT 3207, 3263.) The first trial ended in a mistrial on June 19, 1998. (18CT 5333; 15RT 3486.) After the trial, Johnson had weeks to study the reporter's transcript of the entire trial before he tried to make a *Marsden* motion to replace his appointed counsel, Steven Hauser, on July 7, 1998, which the court automatically denied. (2RT 302 [judge orders daily transcripts of first trial prepared for Johnson to read]; 16RT 3503 [court summarily denies Johnson's request for another attorney].) Johnson also tried to have Hauser replaced on July 14 and September 17, 1998, and each time Johnson was quickly rebuffed without a hearing. (16RT 3508; 17RT 2-23.)

Respondent argues that, because Johnson moved to replace Hauser on several occasions during the first trial, Johnson had an adequate opportunity to voice his complaints about Hauser. Respondent further claims that Johnson voiced complaints about Hauser solely as a tactic to

disrupt the proceedings. (RB 121-122.) Finally, respondent faults Johnson for not explaining to the court the specific, new complaints that he had against Hauser. (RB 124-125.)

Respondent's points are without merit.

Johnson's final *Marsden* motion during the first trial was on June 1, 1998. Any deficiencies in Hauser's performance that arose *after* that date were not addressed by any of the *Marsden* motions brought before that date. And, as indicated, every time Johnson tried to complain about Hauser after June 1, 1998, no judge would listen to him. Furthermore, the hasty, summary denials precluded Johnson from offering any specific complaints about Hauser. Finally, there is no evidence that holding a posttrial hearing to examine Johnson's complaints about Hauser's performance would have disrupted the proceedings in any way. And respondent fails to cite any case that might illustrate just how a hearing on a *Marsden* motion would disrupt the proceedings and justify the denial of the *Marsden* motion on that ground alone.

Respondent cites *People v. Barnett* (1998) 17 Cal.4th 1044, 1103, 1109-1110, for the propositions that a court properly denies a request for a *Marsden* hearing where the defendant's objections are repetitive of previous ones or where nothing significant happens since a prior *Marsden* motion. Respondent misreads *Barnett.* The reference to repetitive objections was made by the trial court, not by this Court as a basis for affirming the lower court's denial of the defendant's *Marsden* motion. (*Id.* at p. 1103.) In any event, because the judges in this case refused to hear Johnson's *Marsden* motions, Johnson did not have a chance to even make his objections, repetitive or not. *Barnett* is also inapposite because, as shown above, several significant events happened in between Johnson's

final *Marsden* motion heard on June 1, 1998, and his ensuing effort to have Hauser removed, first on July 7, 1998. That is, 16 witnesses testified, prosecution exhibits were admitted, the court instructed the jury, counsel presented closing arguments, and Johnson had an opportunity to review the reporter's transcript for the entire trial. Any of these could have provided a reason to challenge Hauser's performance. Thus, these significant developments required the lower court to entertain Johnson's *Marsden* motions and not summarily reject them without hearing what Johnson had to say.

Finally, citing *People v. Leonard* (2000) 78 Cal.App.4th 776, 787, respondent claims that any error was harmless in light of Johnson's opportunities to complain about Hauser on and before June 1, 1998. *Leonard* concluded that any error in failing to conduct an adequate *Marsden* hearing on the first day of trial was harmless because the trial court held a *Marsden* hearing later in the trial and the appellate court assumed the defendant's written catalog of complaints against his counsel was exhaustive. (*Id.* at pp. 787-788.) Here, the trial court never held another *Marsden* hearing after June 1, 1998, and therefore never heard any of Johnson's complaints about Hauser's performance that arose after that date. Thus, the trial court's error was not harmless.

As shown in the opening brief, the court's error requires reversal and a new trial. (AOB 135-140.) Respondent, however, offers *People v. Lopez* (2008) 168 Cal.App.4th 801, 815, as authority for remand to the trial court for a posttrial *Marsden* hearing. (RB 127.) But as *Lopez* made clear, in the usual case case, *Marsden* error requires a new trial. The *Lopez* court remanded for a hearing, however, because of the unique circumstances presented by that case: no indication of ineffective assistance of counsel

was in the record, the trial was free from error, and the only outstanding issue was the *Marsden* motion arising from a conflict of interest with the public defender's office. (*Id.* at p. 815.) Those circumstances do not exist in this case. Accordingly, for the reasons stated here and in the opening brief, the judgment should be reversed.

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5.

JOHNSON WAS CONSTRUCTIVELY DENIED COUNSEL AT HIS SECOND TRIAL DUE TO THE COMPLETE BREAKDOWN IN COMMUNICATION WITH HIS ATTORNEY, WHICH BEGAN AT THE END OF THE FIRST TRIAL.

"Where a criminal defendant has, with legitimate reason, completely lost trust in his attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel." (*Daniels v. Woodward* (9th Cir. 2005) 428 F.3d 1181, 1198.) This is the essence of Cedric Johnson's argument. Therefore, the issue is whether Johnson had a legitimate reason for completely losing trust in Hauser.

Johnson had an abundance of reasons to distrust Hauser, from the beginning of their relationship, when Hauser disclosed in a public document that Johnson was mentally unstable and violent (AOB 146), to the end of their relationship, when Hauser deceived Johnson into believing that the jury was present in the courtroom to witness Johnson testify from his holding cell (AOB 184). And in between Hauser repeatedly deceived not only Johnson but also the court, while harming Johnson in the process. (AOB 162-167, 174.)

Largely failing to respond to the many instances where Hauser deceived Johnson and the court, respondent attacks Johnson's conduct instead and claims that Johnson attempted to manufacture a conflict with Hauser for the purpose of delaying the trial. (RB 128.) Thus, respondent engages in misdirection when the real question is whether *Hauser's* conduct would reasonably cause a defendant to lose all trust in him. (*Daniels v. Woodward*, *supra*, 428 F.3d at p. 1198.)

In an attempt to support its misdirection, respondent lifts a phrase

from an opinion of this Court and then misuses it. Respondent cites *People v. Smith* (1993) 6 Cal.4th 684 for the proposition that a defendant may not force the substitution of counsel by the *defendant's own conduct* that manufactures a conflict. (*Id.* at p. 696, citing *People v. Hardy* (1992) 2 Cal.4th 86, 138.) In *Smith*, some heated words were spoken between the defendant and his attorney before the defendant pleaded guilty to the charges at the recommendation of counsel. (*People v. Smith*, *supra*, 6 Cal.4th at p. 696.) This Court's observation with respect to a defendant's manufacturing a conflict made clear that if the *defendant's* misconduct was the cause of the conflict with counsel, then substitution of counsel would be unwarranted. (*Ibid.*) The Court made the same point in *Hardy*, where the defendant filed two frivolous federal lawsuits against his counsel for the plain purpose of manufacturing a conflict with counsel in order to delay the trial. (*People v. Hardy*, *supra*, 2 Cal.4th at p. 138.)

Here, however, the breakdown in communication between Johnson and Hauser was not caused by the defendant's conduct. It was caused by Hauser's own misconduct. Johnson did not force Hauser to make misrepresentations to the court, to disparage Johnson in a public document, to stand mum instead of supporting Johnson's meritorious claims to be freed from life-threatening restraints, to publicly disclose Johnson's confidential communications, to place his own interests ahead of those of his client, and to cooperate with the trial court and prosecutor in deceiving Johnson by pretending to examine him in front of a phantom jury. Hauser did all those things, with the result that Johnson lost all trust in Hauser, as any client would.

As shown in the opening brief, Hauser time and again publicly disclosed Johnson's confidential communications, a very effective means

of earning a client's distrust. (AOB 150-153.) Respondent answers by asserting that the disclosures were trivial, not confidential, strategic, and that the claim on this specific ground is forfeited. (RB 133-134.)

In any fiduciary relationship, maintaining confidences builds trust. And disclosing them destroys it. Thus, for example, telling the court that Johnson wanted Hauser to make a mistrial motion based on jurors' hearing a gunshot in a nearby courtroom not only betrayed Johnson's confidences, it was a signal from Hauser that he did not believe in the merits of the motion. (9RT 2111; AOB 150.) And contrary to respondent's view that Johnson should not have expected Hauser to keep his communications confidential because Johnson did not want Hauser as his lawyer, Hauser should have been even more mindful of his obligation to maintain Johnson's confidences under these circumstances. Hauser should have also used the opportunity to build trust with Johnson. Furthermore, respondent cites no authority that allows a criminal defense lawyer to publicly breach any and all confidences simply because the client seeks substitute counsel. (RB 133.)

Respondent further claims that Hauser breached his duties to "maintain inviolate the confidence, and at every peril to himself . . . preserve the secrets, of his or her client" (Bus. & Prof. Code, § 6068, subd. (e)(1)), because this was a means to indicate to the court that he was successfully communicating with Johnson. (RB 133.) Respondent relies upon *People v. Vargas* (1975) 53 Cal.App.3d 516, 527-528, and further claims that any trivial disclosure simply reflected a valid strategic decision to maintain credibility with the court. *Vargas* does not grant a defendant's lawyer carte blanche to disclose a confidential attorney-client communication merely because counsel makes a strategic decision to do so.

The client holds the privilege, not counsel. (*OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 901; Evid. Code, § 954.) In *Vargas*, the defendant failed to appear on the second day of trial. Defense counsel made a disclosure to the court that was circumstantial evidence of the defendant's flight and consciousness of guilt. Setting a strict standard before a lawyer may disclose a client's confidential communication, the court ruled that the disclosure was excused because it was "necessary to protect the client's interest." Counsel made the disclosure in connection with an application for a continuance of the trial. As such, the court found that it was "an exemplary tactical choice, to reveal all the facts to the court in the hopes of securing time to communicate with his client and to induce him to return for trial or change of plea." (*Id.* at p. 528.)

None of Hauser's disclosures was necessary to protect Johnson's interest, and respondent concedes as much by insisting that Hauser's breaches were trivial. But nor were they trivial, especially as they reflected Hauser's lack of respect for Johnson. And as noted, in the case of Hauser's unwillingness to take responsibility for the mistrial motion, the disclosure harmed Johnson's interests by undermining the strength of the motion. Hauser also breached his duty by telling the court that Johnson was to blame for Hauser's difficulty in locating Johnson's wife to testify. Clearly it was not necessary to protect Johnson's interest for the court to learn that Johnson was discouraging a witness from testifying. (AOB 151; 13RT 2889, 2921.)

As for respondent's forfeiture claim in footnote 35 on page 134, respondent appears to suggest that any complaint about Hauser that Johnson did not raise below should be deemed forfeited. Whether

Hauser's breaches of confidentiality are seen as grounds for the appointment of new counsel or as examples of the harm Johnson suffered due to the constructive denial of counsel, no forfeiture occurred because Johnson repeatedly tried to voice his complaints but on three separate occasions, no judge was willing to listen. (16RT 3503, 3508; 17RT 2-23.)

Next, respondent contends that it is "rather ridiculous" for Johnson to expect that Hauser should have supported his objections to being physically restrained, beginning with the preliminary hearing on October 27, 1997, because of what occurred 13 months later between Johnson and Hauser. (RB 134.) Obviously the encounter between Johnson and Hauser in November 1998 is wholly irrelevant both to whether Johnson should have been restrained 13 months earlier and whether Hauser should have advocated for his client. Again, the issue here is whether Johnson had a legitimate reason to distrust Hauser. A serious assault on Johnson's dignity, and an impingement on his ability to defend himself, occurred when he was physically restrained, especially without any showing that justified the restraints. That Johnson's own counsel did not deem it worthy to support Johnson in his complaint on this critical matter would logically cause Johnson, or any other defendant in his situation, to lose confidence in his counsel.[10]

Respondent also rejects Johnson's contention that Hauser committed an inexcusable breach of loyalty by failing to object to the life-threatening

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[10] Respondent alludes to a comment by the prosecutor regarding his "feeling" that Johnson had intimidated a witness. (RB 134; 1CT 55.) As the next page of the record shows, nothing came of his feeling. Judge Haynes did not grant the prosecutor's request to punish Johnson by having his pro per materials removed. (1CT 56.)

REACT stun belt. (AOB 156.) Respondent makes the bald claim that by the time Judge Morgan ordered the stun belt, "appellant had engaged in extensive misconduct." Respondent further claims that "Hauser was not deficient in any way." (RB 135.) But respondent provides no record citation to support the claim that Johnson had engaged in extensive misconduct. Hauser betrayed Johnson by not supporting Johnson's well-founded objections to wearing a stun belt.

Lastly, the opening brief explained that Hauser told Judge Hom that because he accepted the appointment to represent Johnson, he lost his *priority* position to receive another appointment to represent a capital defendant. (1RT 144.) This explanation provides a reason why it was important to Hauser to represent Johnson, and why Hauser did not abide by his client's wishes to withdraw. If Hauser was removed as Johnson's counsel, then he would lose his priority position on the list of capital defense counsel. Accordingly, contrary to respondent's assertion, there is no reason to believe that Hauser could have simply obtained another lucrative appointment as capital counsel if he was removed as Johnson's attorney. (RB 135.)

"The effective functioning of the fiduciary relationship between attorney and client depends on the client's trust and confidence in counsel. The courts will protect clients' legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney-client relationship." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821, brackets and citations omitted.)

Trust is at the center of this argument. (AOB 143-187; see, e.g., AOB 163 [Hauser acknowledging that Johnson "doesn't trust me," citing 3RT 617].) Yet respondent fails to use the word even once in also failing

to address the central point of Johnson's argument. (RB 127-137.)

Due to Hauser's deceit and breaches of loyalty and confidences, Johnson eventually lost all trust in Hauser, leading to a complete breakdown in communication between the two. This complete breakdown required the lower court to replace Hauser for the second trial. (*People v. Abilez* (2007) 41 Cal.4th 472, 488, 490.) For the reasons stated here and in the opening brief, the judgment should be reversed.

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6.

JUDGE CHEROSKE ERRED IN FAILING TO REMOVE HAUSER AS JOHNSON'S COUNSEL.

Respondent claims that the sixth argument of Johnson's opening brief "simply repeat[s] the claims discussed above - - Hauser should have been replaced by a different attorney, and no hearing should have been held without appellant's presence." (RB 137.) Respondent is mistaken.

The sixth argument revolves around the conferences held on September 17, 1998, September 21, 1998, and October 2, 1998, to decide whether Hauser should represent Johnson in a trial where the prosecutor intended to call Hauser as a witness to testify against Johnson. Johnson was constructively denied counsel at these conferences because no one advocated his interests at these critical stages. (AOB 192.) Johnson was also denied due process because he was not present at the conferences. (AOB 195.) Finally, Hauser should have been removed as Johnson's counsel because of his three disqualifying conflicts with Johnson: (1) Hauser was a material witness against his client; (2) he was likely very angry with Johnson, which affected his performance as Johnson's counsel; and (3) he had divided loyalties between Johnson and Judge Cheroske as a result of his agreement with Judge Cheroske not to testify or argue mitigating circumstances surrounding his altercation with Johnson. (AOB 208.) None of the claims in the sixth argument were raised previously in the opening brief.

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7.

JOHNSON WAS INCURABLY HARMED AND DENIED A FAIR TRIAL WHEN THE MAIN PROSECUTION WITNESS VOLUNTEERED THAT HE WAS AFRAID OF JOHNSON BECAUSE JOHNSON HAD ALREADY BEATEN TWO MURDER CASES.

Robert Huggins was the only prosecution witness who testified to seeing Johnson and Betton shoot the victims, thus making him a key witness. But his credibility was undermined by his testimony to the contrary at the preliminary hearing, by his delay in coming forward (even though Hightower was his stepbrother), and by the fact that he was in custody facing charges when he decided to come forward. Huggins said he did not come forward sooner because Johnson was "still running around on the streets," which worried him because Johnson "had already beat two cases like this." (21RT 2-860.)

Everyone at trial agreed that this latter comment was inadmissible and not evidence to be considered by the jury. Respondent makes no contention otherwise. Rather, respondent maintains that the presentation of this evidence to the jury did not render the trial unfair–the test for whether Johnson should have been granted a mistrial. (RB 137-140.) The reasons respondent provides, however, do not support this conclusion.

Respondent's initial contention is that the statement had no effect on the jury's determination of Huggins's credibility because if they believed he was telling the truth, the jurors would have already believed appellant to be a killer–so inferentially the statement would have been of no moment–and if they disbelieved Huggins, they would have disregarded the improper evidence as another lie. (RB 139.) This reasoning is structurally

flawed.

Respondent's reasoning is dependent upon a view of the evidence that requires this Court to find that the issue of Huggins's credibility was fully resolved by the jury without its considering this inadmissible statement. There is simply no way this Court can make that determination.[11] Nor does the law suppose that a jury approaches credibility in this manner. For example, CALJIC No. 2.21.2, an instruction the jury was provided in this case, requires that the jury consider "all the evidence" in resolving whether to accept a witness's testimony. (23RT 2-1416.) The idea that the jury would have somehow resolved the issue of Huggins's credibility without considering this statement is insupportable.

Further, Huggins's testimony about Johnson beating prior murder cases bore directly on Huggins' credibility – indeed the prosecutor's questioning at that time was calculated to explain why Huggins waited to come forward, and why he testified differently at the preliminary hearing. If the jury believed Johnson had committed and avoided conviction for prior murders, it likely would have believed that Huggins stayed silent out of fear, and not because his allegations were false. The prosecutor tried to explain away Huggins's credibility problems by arguing that he feared harm from Johnson. (20RT 2-658-659; 24RT 2-1448.) Indeed, the same argument was used as a basis for the jury to reject testimony from any witness who failed to incriminate Johnson. (24RT 2-1443-1444, 2-1448, 2-1453.)

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[11] This argument by respondent is apart from a general argument that there was no harm because the jury was instructed to disregard the statement. Respondent posits this argument as a separate basis supporting its view that the trial was not unfair.

At any rate, appellant's claim does not turn only on the question of whether the evidence of uncharged crimes affected the jury's determination of Huggins's credibility, but also turns on the bedrock principle that evidence of uncharged crimes improperly leads jurors to infer that the defendant committed the charged crimes. Where, as here, a jury hears of uncharged criminal acts similar to the charged crime, it leads to an "inevitable pressure on lay jurors to believe that 'if he did it before he probably did so this time.'" (*People v. Beagle* (1971) 6 Cal.3d 441, 453, overruled on other grounds in *People v. Castro* (1985) 38 Cal.3d 301; Law Rev. Com. Comment to Evid. Code, § 2201 [character evidence tends to distract the trier of fact from the main question of what actually happened on the particular occasion and permits the trier of fact to reward the good man and punish the bad man because of their respective characters].)

Huggins's "volunteered" uncharged acts evidence dovetailed perfectly with the prosecutor's overarching theme that there were few witnesses in the case because Johnson was a known "snitch-killer" in the community and individuals therefore were afraid to come forward. From the outset, the prosecution's theory of premeditation was that Johnson sought to kill Faggins and Hightower because they might one day be snitches in some unidentified, hypothetical future criminal case. (20RT 2-654; 24RT 2-1453.) Huggins's testimony that Johnson "beat" the earlier cases added to this theme by raising the specter that Johnson successfully had intimidated – or even killed – the witnesses in those two cases, making concrete an otherwise speculative prosecution theory. (See, e.g., 20RT 2-654, 2-658-659 [prosecutor's opening statement directed jury's attention to the explanation Huggins would give for his reluctance to implicate Johnson]; 20RT 2-661-662, 2-671 [defense opening emphasized Huggins's

months-long delay in reporting and his speaking up only when taken into custody himself on criminal charges].) Thus, while the question of whether a particular incident is incurably prejudicial often can be "by its nature a speculative matter" (*People v. Haskett* (1982) 30 Cal.3d 841, 854), here it was clear from the trial's start that Huggins's explanation for his inconsistent statements was the key to the case, and therefore the prejudice from the other crimes evidence was concrete, not speculative.

In closing argument, the prosecutor said this about Huggins's testimony:

> He didn't come forward. I understand that. That was his brother. You have to decide whether or not you understand that. [¶] He told you that C.J. was still running around outside. That's why he didn't come forward. [¶] To make matters worse, he was placed in the same cell by mistake with C.J. . . . [¶] My argument to you is that any type of situation like that is threatening and intimidating, and you're liable to say anything.

(24RT 2-1448.) A jury would infer from this argument that what made the situation "threatening and intimidating" was Johnson's history of successfully beating cases and remaining free to retaliate against the snitches who implicated him. That inference would carry over to the jury's consideration of each lay witness's testimony, since each of them knew Johnson and lived in or had family in the Jordan Downs housing development. (20RT 2-676; 21RT 2-800, 2-820, 2-822; 22RT 2-1043, 2-1112-1113.)

Respondent next asserts the statement that Johnson "had already beat two cases like this" was vague. (RB 139.) It is true, as respondent states, that this is not an explicit statement that Johnson committed two other murders. It is a statement, however, from which any reasonable juror

would have drawn the inference that appellant had previously been charged with two other murders–cases like this–and had not been convicted. It is hard to see what is vague about Huggins's statement.

As a component part of its vagueness assertion, respondent makes reference to the fact the jury was instructed to disregard the statement. (RB 139.) While a reviewing court generally presumes that the jury has followed instructions (*People v. Sanchez* (2001) 26 Cal.4th 834, 852), some prejudice is so great that no limiting instruction, "however thoughtfully phrased or often repeated," can erase a prejudicial image from the jurors' minds. (*People v. Guerrero* (1976) 16 Cal.3d 719, 730.) Indeed, "[t]he limited value of the admonition is implicitly recognized by the tendency of the courts to give it weight when the evidence of guilt is convincing [citation] and to disregard it when the case is a close one [citation]." (*People v. Duran* (1969) 269 Cal.App.2d 112, 118; see also *People v. Ozuna* (1963) 213 Cal.App.2d 338, 339 [appellate court found admonition did not cure the prejudice, and it was "self-deceptive to assume that the jurors could put out of their minds" the stricken testimony; *People v. Bentley* (1955) 131 Cal.App.2d 687, 689-690, overruled on other grounds in *People v. White* (1958) 50 Cal.2d 428 [in prosecution for child sex abuse, officer's statement that defendant was suspect in earlier case was prejudicial error notwithstanding court's direction that volunteered testimony should be disregarded]; *People v. Morgan* (1978) 87 Cal.App.3d 59, 68, overruled on other grounds in *People v. Kimble* (1988) 44 Cal.3d 480 [admonition would not have cured the harm resulting from erroneously admitting evidence that defendant had committed prior unidentified offense for which he was on parole].) The prejudice here, as in these cases, was simply too great to cure by admonition.

Further, the context and content of the admonition given by the court make it likely that the jury did not heed it. The admonition came well after the improper testimony, interrupted by the noon recess and the prosecutor's presentation of four other witnesses (21RT 2-862-930), and the court did not identify for the jury precisely what testimony it was required to disregard. (21RT 2-925-930.) The decision in *People v. Wharton* (1991) 53 Cal.3d 522, 566, is instructive here because it represents an admonition to the jurors that made their task crystal clear:

> [The witness] blurted out a statement about the defendant, Mr. Wharton. If you heard the statement, you're instructed to disregard it. Mr. Wharton had nothing to do with any injuries that were sustained by [the witness]. You shall take it as a fact that Mr. Wharton had nothing to do with the injuries of [the witness]. You shall not draw any adverse inferences against Mr. Wharton from the fact that any witness was injured while in or out of the jail.

(*Id.* at p. 565.) In this case, the generic admonition given – "whenever I order anything stricken by way of testimony, it's not in evidence; and you're not to consider it for any purpose" (21RT 2-931) – was completely unlike the "direct and pointed" admonition that reduced the prejudice in *Wharton*. (*Wharton*, at p. 566.)

Whether the harm flowing from improper testimony is incurable – and whether a defendant has therefore been denied due process – often depends on the strength of the case against him. (See *People v. Bolden* (2002) 29 Cal.4th 515, 555 [mistrial not warranted and defendant not denied due process where improper reference was insignificant in context of entire trial].) That the prosecution herein needed to develop the theme that witnesses were afraid to come forward sprang from one essential circumstance: that there was not a lot of evidence against the defendants

and the eyewitness testimony was pocked with inconsistencies and failed to gibe with forensic evidence. The weakness of the case against Johnson is further shown by the fact that the first trial resulted in a hung jury, and that the jury in the second trial deliberated for four days after hearing less than five days of evidence. (18CT 5333; 39CT 11515-11543; 24RT 2-1581-1612; *People v. Cooper* (1991) 53 Cal.3d 771, 837 ["We have sometimes inferred from unduly lengthy deliberations that the question of guilt was close"]; *People v. Taylor* (1986) 180 Cal.App.3d 622, 634 [finding error prejudicial in light of entire record, including first jury's not reaching a verdict].) Even the prosecutor did not believe Huggins; the deputy district attorney conceded to the jury that, based on the evidence, there was no way to determine whether Terry Betton or Johnson shot Faggins. (24RT 2-1466.) Newton, the other eyewitness, recanted his statement against the defendants, and the defense presented alibi evidence for both defendants, and accounts from two women that they saw other armed male strangers near the scene at the time of the crime. (23RT 2-1326, 1344, 1346; 23RT 2-1319, 1324-1326; 23RT 2-1377.) The instruction to disregard was unavailing under the circumstances of this case.

Finally, respondent believes that the statement could have had no effect on the penalty phase determination. (RB 139-140.) This belief is belied by cases which hold that one of the reasons for not placing uncharged offenses before the jury is that the jury will have a tendency to punish the defendant for these offenses as well as for the charged crime. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [evidence of uncharged offenses "increased the danger that the jury might have been inclined to punish defendant for the uncharged offenses"]; *People v. Mason* (1991) 52

Cal.3d 909, 949-950 [evidence of uncharged offenses "can tempt a jury to convict in order to punish a defendant for the uncharged offenses"]; see also *People v. Griffin* (1967) 66 Cal.2d 459, 466 ["evidence of other crimes always involves the risk of serious prejudice"].) Huggins's testimony, ineffectively stricken as it was, essentially put before the jury uncontested factor (b) evidence of Johnson's other criminal conduct. (§ 190.3, subd. (b).) Huggins's statement told the jury that Johnson – a multiple murderer – had prior multiple murders. Although the jury was instructed not to consider other criminal acts besides the battery on Hauser as aggravators (40CT 11634), the same reasons that render the guilt-phase instruction regarding this evidence unavailing also serve to undermine the effectiveness of the penalty-phase instruction. Jurors would find Johnson's prior commission of unpunished multiple murders highly relevant to the moral decision of whether he should live or die. Their duty at penalty was to assess Johnson's entire life history in reaching its verdict, which would have made it especially difficult for them to erase the information from their minds when making the explicitly moral, all-encompassing, judgment.

The trial judge erred in denying a mistrial based on the uncharged crimes evidence because the evidence created the clear inference that Johnson had twice murdered but escaped conviction. The admission of this evidence irreparably damaged Johnson's chances of receiving a fair trial. (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) The trial court's ruling undermined the penalty verdict as well. Johnson's state and federal rights to due process, a fair trial, and a fair and reliable penalty verdict were breached and reversal of the guilt and penalty verdicts is required. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 7.)

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8.

THE COURT ERRED IN ADMITTING ROCHELLE JOHNSON'S HEARSAY STATEMENT THAT "CJ DIDN'T HAVE TO KILL HIM."

The prosecution tried to create a third eyewitness in this case by introducing inadmissible hearsay from Leonard Greer that he saw Rochelle Johnson just after the killing and she attributed it to Cedric Johnson by saying, "CJ didn't have to kill him." (22RT 2-1116.) The prosecutor then argued from that unreliable hearsay statement that Rochelle had witnessed the shootings and knew more about the crimes than anyone else. The prosecutor also used the hearsay evidence to attack the credibility of Rochelle, defendant Betton's alibi witness, and to build on the central prosecution theme that anyone who failed to inculpate defendant Johnson did so out of fear. The trial court erred in admitting the hearsay, and the error violated Johnson's rights to a fair trial and a reliable verdict.[12] (AOB 244-256.)

A. The Hearsay Statement Was Not a Prior Inconsistent Statement.

Respondent believes the hearsay statement was admissible as a prior inconsistent statement. The basis for respondent's argument is that the statement was inconsistent with the overall thrust of Rochelle's testimony, i.e., it was inconsistent in effect rather than a contradiction in terms. (RB 140-141.) Johnson agrees that the issue to be resolved here is whether the prior statement is materially inconsistent with the witness's testimony. (*People v. Arias* (1996) 13 Cal.4th 92, 153.) Johnson disagrees, however,

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[12] Meaning no disrespect, Rochelle Johnson will be referred to as Rochelle to distinguish her from appellant.

with respondent's assertion that this situation exists in the present case.

The only analysis respondent offers to support its view that the hearsay statement was admissible is its assertion that Rochelle's telling Greer that "'C.J. didn't have to kill him' was directly contradictory to Rochelle's testimony that she never told anyone that appellant was one of the shooters." (RB 141.) On its face, though, Rochelle's alleged prior statement was not inconsistent with her testimony. She testified, in essence, "I did not see the shooting." The hearsay statement was not "I saw CJ kill Hightower and/or Faggins," which would have been inconsistent with Rochelle's trial testimony and admissible as a prior inconsistent statement. Instead, the statement was "CJ didn't have to kill him," which was not a prior statement inconsistent with Rochelle's testimony, and the trial court abused its discretion in admitting it.

B. Rochelle's Statement Was Not Based on Personal Knowledge.

Both parties agree that Rochelle's statement was not admissible unless it was based on personal knowledge. (AOB 246-251; RB 141.) Respondent asserts that personal knowledge is established because: (1) Rochelle admitted she was at the party given by Shetema and that people there knew Faggins was in danger; (2) the killings were committed in front of a large group of people; (3) Greer said Rochelle was crying and had blood on her when she made the statement; (4) Rochelle made the statement at the location of the shooting shortly after it occurred; and (5) Rochelle's mother later broke a window because she was upset about "Rochelle's involvement in the shooting." (RB 141.) These facts do not constitute substantial evidence that Rochelle had personal knowledge regarding the shooting itself.

There were many people at Shetema's party and there was no special meaning attributed to Rochelle's attendance. Even if some people at the party knew Hightower and Faggins were in danger, they were killed after they left the party. The fact that they were ultimately killed in front of a large group of people is meaningless unless there is some reason to infer that Rochelle was a member of that group at the time the killings occurred. The presence of blood on Rochelle and her presence at the location were both explained by the fact that she used her medical training to try to help Hightower after he was shot and crashed his car. As for Annette Johnson being upset, a mother and grandmother (of Rochelle's young son) would understandably be upset and concerned about safety, whether Rochelle actually saw the shootings, or merely went to the scene and tried to help the victim immediately after he was shot.

The factors upon which respondent relies are perfectly consistent with Rochelle's testimony of events – that she left the party for home and then returned to render medical aid to Hightower after the shooting – and indeed that Rochelle had blood on her is more consistent with one who rushed to give CPR, not with a bystander who saw the killing perpetrated. Further, assuming Rochelle even made the statement, each of the circumstances raised by respondent would be equally consistent with someone having *told* Rochelle that Johnson shot Hightower (double hearsay) as with her having seen the event. In short, the factors relied upon by respondent do not constitute substantial evidence that Rochelle had personal knowledge of the shooting.

This is especially true because Rochelle adamantly and consistently denied that she had seen the shootings. (23RT 2-1195-1196 [Rochelle told Detective Vena within hours of shootings that she did not know who shot

the victims].) Huggins – whose credibility the prosecution endorsed – testified that Rochelle was not at the shootings. (22RT 2-1005-1006.) Charles Lewis, who was in Hightower's car just before Hightower was shot, also denied that Rochelle was in the car or at the shooting scene. (22RT 2-1039, 1045.) Rochelle's mother Annette Johnson, who saw Rochelle a short time after the shootings, supported Rochelle's account that she never claimed to have seen who shot the victims. (20RT 2-743, 2-755-756, 2-761.)

C. Reversal Is Required.

Johnson makes extensive argument as to why admission of Rochelle's hearsay statement violated his constitutional rights and prejudiced him at trial. (AOB 251-256.) Respondent addresses none of these arguments. Rather, respondent merely states that any error in admitting the statement was harmless because other evidence "dispositively established appellant's guilt." (RB 141.) Respondent misperceives the proper way to apply the harmless error test.

The issue in determining harm is not whether otherwise admissible evidence is sufficient to establish a defendant's guilt. Respondent cites no support for such a proposition; nor is there any. Under respondent's formulation, as long as a reviewing court can find the evidence sufficient to support a guilty verdict–having removed the inadmissible evidence–every error would automatically be harmless. Such a formulation runs afoul of both the state and federal tests for harmless error.

The test under the federal Constitution is whether the complained of error contributed to the verdict that was rendered. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) That is not the test respondent asserts. The test under the state Constitution is whether it is reasonably probable

that a result more favorable to the appellant would have been reached in the absence of the complained of error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) That is not the test respondent asserts. Neither of these standards is satisfied by merely asserting that the evidence is sufficient to support a conviction. Consequently, appellant's arguments regarding the violation of his constitutional rights and the prejudice attendant to the violation of those rights stands unrebutted.

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9.

THE COURT ERRED WHEN IT EXCLUDED POLICE CORROBORATION OF NEWTON'S TESTIMONY THAT HE INCULPATED JOHNSON TO OBTAIN A PROSECUTORIAL FAVOR IN HIS OWN CRIMINAL CASE.

Tyrone Newton used, possessed and sold drugs. Consequently, he was arrested often. Newton was also a snitch. He often provided information to Detective Barber in return for his release from jail and the dropping of charges; though on at least one occasion he was imprisoned -- in that instance, 16 months for possession of marijuana for sale. (20RT 2-779; 21RT 2-807; 22RT 2-1098.)[13]

On October 11, 1996, while in custody after his arrest for cocaine possession, Newton was interviewed by Sergeant Waters of the Los Angeles Police Department, and he incriminated Johnson regarding the instant offense. During the interview, he talked about having been an informant for Detective Barber. Shortly afterwards, he was released from jail. He was not prosecuted for possessing the cocaine. (20RT 2-779; 21RT 2-794, 807; 22RT 2-1098.)

Newton testified that he lied when he incriminated Johnson during the interview. (20RT 2-793.) According to Newton, he lied because an unidentified police officer told him, before he met with Waters, that the cocaine possession case would be dropped if he incriminated Johnson as the police instructed. (21RT 2-800-801.)

At trial, however, no police officer corroborated Newton's testimony that he lied about Johnson in return for having the cocaine

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[13] Presumably Detective Barber was with the Los Angles Police Department, but the record does not indicate so.

possession charges dropped. Therefore, to corroborate Newton's testimony, the defense sought to examine Waters on what Newton told her about his experiences with Barber. During his interview with Waters, Newton told her about being an informant for Barber, including that on one occasion, Newton was caught with a lot of drugs and Barber helped him out. (22RT 2-1099.) The judge did not permit the jury to hear this from Waters. If the defense had been allowed to examine Waters on this, then the jury would have had a clearer picture of what motivated Newton to falsely incriminate Johnson. Newton mentioned the benefits he received from Barber because he was expecting to receive a similar benefit from Waters – release from jail and dismissal of the drug case against him. (22RT 2-1099-1100.) But the court barred further examination – examination that would have both corroborated and given further meaning to Newton's testimony, thus leaving the jury to guess about the point of this spare cross-examination.

Respondent claims that the jurors heard all the evidence Johnson wanted them to hear, except where Waters acknowledged that Newton said he had received favorable treatment on prior occasions. (RB 145.) Not so. Waters's testimony consisted of two sentences on this subject; that Newton told her he had been an informant for Barber (22RT 2-1098), and that Newton said to Waters, "the more y'all get me off ya'll line, the happier I will be" (22RT 2-1107). This testimony was too thin, the latter sentence even opaque, for the jury to understand that Newton had spent some time discussing with Waters the kind of deal he expected by incriminating Johnson. The more Newton talked with Waters about his experience as a snitch, the more it was obvious that Newton wanted to be released from jail and his cocaine possession case dismissed, in return for the false

information he provided Waters. Newton's mention to Waters of receiving prior favors from Barber appeared on its face unrelated to the shooting at Jordan Downs. But Newton persisted in talking about the subject with Waters anyway. There could only have been one reason. Newton wanted a deal, like the deals he had with Barber. The jury should have heard this from the witness stand to corroborate Newton's testimony that he had a motive to talk to Waters, and that motive caused him to lie.

Respondent also claims that Johnson forfeited this issue because Judge Cheroske's ruling was tentative and the court "expressly invited the defense" to revisit the issue. (RB 143-144.) Respondent cites to nowhere in the record where this express invitation appears, for there was no such invitation. Furthermore, respondent fails to cite any case on point, merely citing *People v. Ervine* (2009) 47 Cal.4th 745, 777, for the inarguable proposition that an evidentiary claim is forfeited if not made first at trial. (RB 144.)

The closest statement in the record that could even arguably support respondent's position is Judge Cheroske's comment that the prosecution's objection was going to be sustained "for right now." (22RT 1100.) Such a statement simply indicates that additional argument can be made if the facts or circumstances change. At the time of this comment, however, everything relevant to the trial court's ruling was already before it; thus, the court's comment was of no moment and the ruling was effectively a final ruling on the admissibility of this evidence. But even assuming Judge Cheroske expressly invited the defense to revisit the court's ruling, it would be a startling development in California law were this Court to find that an erroneous ruling is insulated from review on the merits simply because the trial court expressly invites counsel to revisit the ruling.

Respondent further asserts that the trial court did not abuse its discretion in its ruling and that no constitutional error is presented by the exclusion of this evidence. (RB 143-145.) Initially, respondent believes that placing this evidence before the jury would have been confusing and cumulative. (RB 144.) To a certain extent, these are contradictory positions. If the evidence would have been cumulative to evidence already presented, it is certainly would not have been confusing to the jury. In any event, the evidence was neither. It served a very specific purpose of corroborating Newton's testimony and making real to the jury that the atmosphere under which Newton's incriminatory statements were made was a barter situation–a marketplace transaction if you will–and not some freely-made statement like one would normally expect from a witness to a crime. (See AOB 267.) This concept is not a confusing one and since there was no corroboration of this aspect of the interview, it was not cumulative.

Respondent's view that no constitutional error occurred has essentially been addressed in full in Appellant's Opening Brief. (AOB 267-269.) That argument is incorporated fully in this reply. Johnson simply points out, as he did in his opening brief, that the key to the constitutional error presented here is the failure to permit the type of cross-examination contemplated by the Sixth Amendment. Rather than address the specific assertions upon which Johnson bases his claim, respondent relies upon more general cases that are not directly pertinent to the issue at hand. (RB 144.) This approach is unavailing.

Finally, respondent argues that any error excluding further cross-examination of Waters was harmless. (RB 145.) But if Waters corroborated that Newton had reason to lie about witnessing the shootings

at Jordan Downs, and the jury believed Newton did lie, then that would leave Huggins as the only eyewitness, given that Greer admitted at trial that he lied about seeing the shootings. (22RT 2-1132, 2-1143.) This was a close case, as evidenced by the first mistrial. (18CT 5333.) And as the prosecutor informed the jury in closing argument, it would be "ridiculous" for the jury to make its decision based on Huggins, Greer, or Newton *alone*. (24RT 2-1559-1560.) Johnson agrees. Relying solely on Huggins to identify Johnson as a shooter would be ridiculous. The court's error was not harmless and requires reversal.

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10.

THE COURT ERRED PREJUDICIALLY IN FAILING TO INSTRUCT THE JURY THAT IT SHOULD VIEW WITH CAUTION NEWTON'S REPUDIATED OUT-OF-COURT ACCOUNT OF JOHNSON'S PRE-OFFENSE STATEMENTS.

A. Introduction

Respondent agrees with Johnson that the trial court erred in failing to instruct the jury to view with caution an oral admission purportedly made by Johnson to Tyrone Newton. Respondent insists, however, that the error was harmless because the court told the jurors under other instructions to view Newton's account with caution. (RB 146-147.) On the contrary, no other instructions so advised the jury. Furthermore, respondent fails to take into account the powerful impact an explicit cautionary instruction by a judge has on a jury. Finally, because Newton's account amounted to an anticipatory confession by Johnson -- a bombshell -- the fact that an express cautionary instruction was absent caused Johnson fatal harm. Hence, the judgment should be reversed.

Evidence of a defendant's out-of-court admission is "dangerous." (*People v. Gardner* (1961) 195 Cal.App.2d 829, 832.) Over 60 years ago, this Court addressed the dangers presented by the introduction of such evidence:

> The dangers inherent in the use of such evidence are well recognized by courts and text writers. *It is a familiar rule that verbal admissions should be received with caution and subjected to careful scrutiny, as no class of evidence is more subject to error or abuse.* Witnesses having the best motives are generally unable to state the exact language of an admission, and are liable, by the omission or the changing of words, to convey a false impression of the language used. No other class of testimony affords such temptations or

> opportunities for unscrupulous witnesses to torture the facts or commit open perjury, as it is often impossible to contradict their testimony at all, or at least by any other witness than the party himself. It was undoubtedly such considerations that led the Legislature to make the admitting of extrajudicial admissions into evidence conditional on the giving of a cautionary instruction.

(*People v. Bemis* (1949) 33 Cal.2d 395, 398-399, italics added, citations and internal quotation marks omitted.) Accordingly, to protect a defendant from an unscrupulous or inexact witness, the Legislature imposed on trial courts the obligation to command juries to exercise caution and scrutinize carefully a defendant's extrajudicial verbal admission. (*People v. Ford* (1964) 60 Cal.2d 772, 800; CALJIC No. 2.71.7.)

Tyrone Newton is exactly the sort of witness the Legislature must have had in mind in requiring juries to be cautious in evaluating evidence of a defendant's oral admission. As Newton admitted to the jury, he lied to the police for his own corrupt reasons when he told them that, shortly before Hightower and Faggins were shot, Johnson expressed an intention to kill them. (2SCT II 323-327; 20RT 2-779-780.) The prosecutor argued to the jury in turn that Newton's original statement to the police was true and his recantation was the lie. (24RT 2-1453.) Presented with this conflicting and confusing state of affairs, the jury needed the court's assistance to determine which of Newton's versions was true. Thus, it was important for the judge to demand that the jury treat Newton's statement to the police with skepticism and scrutinize it carefully because it could be the product of a corrupt motive rather than an unbiased observation.

Respondent argues, however, that the instructions provided the jury were an adequate substitute for the court's missing directive to the jury to

be careful and cautious in determining whether Newton's statement to the police was true. Specifically, respondent urges that because the jury knew that it had to decide whether Newton told the truth when he testified that his statement to the police was a lie, and the court provided the jury with instructions to evaluate Newton's credibility, the jury necessarily would have evaluated Newton's testimony "with the same caution contemplated by the omitted instruction." (RB 147.)

In essence respondent contends that the cautionary instruction is pointless, that its guidance is provided elsewhere in the standard credibility instructions given Johnson's jury. But respondent is wrong. No instruction or combination of instructions directed the jurors to evaluate with caution Newton's account to the police where he related Johnson's purported admission.

In every criminal jury trial, the court must instruct the jury to assess the credibility of every witness. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883-884; Pen. Code, § 1127 [requiring judges to instruct jurors that they are the exclusive judges of witness credibility].) Johnson's jury was so instructed. (23RT 2-1414-RT2-1416.) Thus, the court provided the jury with some of the basic tools to determine whether Newton spoke the truth when he told the jury that he lied to the police. (RB 146, citing CALJIC Nos. 2.13 [prior consistent or inconsistent statements], 2.20 [believability of witness], 2.21.1 [discrepancies in testimony], 2.21.2 [witness willfully false], 2.22 [weighing conflicting testimony], 2.23 [believability of witness convicted of a felony].) But these limited tools, the only instructions to which respondent refers, are provided in every trial where evidence of a defendant's oral admission is introduced and a felon testifies. Nevertheless, because an unscrupulous witness such as Newton

may fabricate the defendant's oral admission, and it would likely remain unrebutted because rebuttal would require the defendant to waive the protections of the Fifth Amendment, trial courts are required to instruct juries to be cautious, to be skeptical, to be careful in scrutinizing whether the defendant made the statement in the first place. But none of the cited CALJIC instructions directs a jury to be cautious in evaluating evidence of a defendant's oral statement, unlike CALJIC No. 2.71.7. Respondent's argument plainly fails.

Furthermore, Newton's account of Johnson's intention to kill Hightower and Faggins amounted to evidence of an anticipatory confession by Johnson. As this Court has repeatedly recognized, confessions almost invariably provide persuasive evidence of a defendant's guilt, thereby operating as "'a kind of evidentiary bombshell which shatters the defense.'" (*People v. Neal* (2003) 31 Cal.4th 63, 86, quoting *People v. Cahill* (1993) 5 Cal.4th 478, 503.) A confession is much more likely than other evidence to affect the outcome of a trial and thus is much more likely to be prejudicial. (*Ibid.*)

Johnson's alleged statement to Newton was a classic bombshell, just as the prosecutor intended, when he repeatedly emphasized its importance to the jury and made it the cornerstone of the prosecution's theory of premeditation. (20RT 2-653; 24RT 2-1453, 1463, 1471, 1473, 1559, 1562-1563, 1566-1567.) In light of the overwhelming importance of Newton's statement to the police in Johnson's conviction, the corresponding importance of the cautionary instruction's omission cannot be overstated. But for the court's mistake in failing to instruct the jury in language similar to CALJIC No. 2.71.7, there is a reasonable probability that the jury would have reached a different conclusion about Johnson's

guilt and the degree of the crimes committed. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) It follows that respondent has failed to carry its burden of proving beyond a reasonable doubt that the court's error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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11.

THE COURT DENIED JOHNSON A FAIR TRIAL BY INSTRUCTING THE JURY THAT IT COULD INFER GUILT FROM HIS "VOLUNTARY ABSENCE" WHEN THAT ABSENCE WAS CAUSED BY THE COURT'S DECISION TO EXCLUDE HIM FROM THE COURTROOM.

The essence of Johnson's claim is that the trial court, by a series of instructions, enabled the jury to utilize the trial court's decision to exclude Johnson from his own trial as evidence of his guilt of the charged crimes. (AOB 286-301.) This occurred because the trial court told the jury that Johnson voluntarily absented himself from the trial (23RT 1422), and that a person's flight after being accused of a crime is a fact which, if proved, can be considered in determining guilt (23RT 1417-1418).

Respondent believes that the trial court's instruction -- that Johnson's absence was voluntary -- was correct; thus, there was no problem with informing the jury of that fact. Nor was there any prejudice stemming from the trial court's failure to eliminate from the standard flight instruction that portion that allows the jury to utilize a person's flight after accusation of a crime as a circumstance of guilt. Therefore, respondent believes Johnson's claim is meritless. (RB 147-150.) Respondent arrives at this conclusion by utilizing faulty logic and an approach that blinks at reality.

Initially, respondent asserts that the trial court's instruction to the jury that Johnson was voluntarily absent from the trial was an accurate factual statement because the trial court's order barring Johnson from the entirety of his trial was due to voluntary actions taken by Johnson. (RB 148.) As Johnson argues extensively in the opening brief (see AOB 56-

91), his exclusion from the courtroom for the entirety of his trial was improper; thus, the court's decision to exclude him was not legitimately based upon his actions. That being the case, his absence from trial was not a voluntary absence even under respondent's skewed interpretation of the word voluntary.

However, even if one accepts respondent's contention that Johnson was properly excluded from his trial due to his actions (See *Illinois v. Allen* (1970) 397 U.S. 337, 346 [defendant can lose right to be present at trial due to unruly conduct]), the trial court's instruction was still erroneous. The trial court's use of the term "voluntarily absented" to describe a situation where a defendant putatively forfeits his right to be present was incorrect. It was wrong because it was an abridged description of a more complex legal theory, done for the purpose of coming up with a simplistic label; one that changed the meaning of the legal theory it was meant to describe.

The legal theory at issue is that a defendant has a constitutional right to be present at his or her trial, but if a defendant acts volitionally to disrupt that trial the defendant forfeits the right to be present. The point of this legal theory regarding the voluntary actions of a defendant is that voluntariness relates to the actions that led to the result, i.e., expulsion from the courtroom, and the subsequent loss of the right to be present at trial. By stating that Johnson voluntarily chose to absent himself from the trial, the trial court altered the legal theory so that it seemed the voluntary actions of the defendant were geared toward absenting himself from trial, rather than creating disruptive conduct. That created an instruction that was wrong as a legal matter and wrong as a specific matter in this case, since there was no doubt that Johnson wished to be present during the trial. (See 19RT 2-565-566 [Johnson's counsel arguing to court that Johnson wants to attend

trial].)

While the term voluntary absence, in this type of situation, may be one that courts are entitled to use as a shorthand description of the forfeiture of the right to be present, a jury of laypersons would not know this. Therein lay the problem. The jury would assume the more common definition of "voluntarily;" that the person is taking an action based on his or her own free will or choice. (See American Heritage Dict. (4th ed. 2006) p. 129.) The action which a jury would logically assume the defendant had taken would be the action to choose not to be present at trial, not the action to disrupt. Under the facts of this case, that simply does not apply to Johnson. As the trial judge freely admitted, it was not Johnson's choice to be absent from the trial. (17RT 2-95.) Even if Johnson voluntarily chose to be disruptive–thus giving the trial court the power to exclude him–he did not make the choice to not be present. Rather that result was imposed upon him. Consequently, the point respondent seeks to make regarding the fact that Johnson was absent due to his own actions is of no moment and the instruction is wrong.

To instruct the jury that a defendant's absence is voluntary because of a legal fiction, created as a shorthand nomenclature for when a defendant effectively waives the right to be present, makes no sense. At best, it is illogical and serves no purpose. At worst, it can affirmatively damage a defendant's right to a fair determination of guilt. The latter occurred here.

Appellant acknowledges that this Court has seemingly approved referring to a defendant's absence from the courtroom as being voluntary when the defendant expressed an intention to disrupt the proceedings unless he was permitted to remain outside the courtroom. (See *People v.*

Sully (1991) 53 Cal.3d 1195, 1241.)

The first distinction is that the defendant in *Sully* actually was engaging in disruptive actions for the purpose of being excluded from the courtroom. Thus, the object of his volitional acts was the purpose the jury would infer, to wit: to choose to act in a disruptive manner so that exclusion from the courtroom would be the result. Here, however, whatever the goal of the disruptive actions, the record makes clear the object was not exclusion from the courtroom.

The second distinction between *Sully* and this case is that an essential part of the Court's holding in *Sully* was that instructing on the defendant's absence raised no prospect of prejudice. (*People v. Sully*, *supra*, 53 Cal.3d at p. 1241.) In other words, it simply did not matter that this instruction was given because there was no reason to believe the jury could use it in any fashion to the defendant's detriment. Such is not the case for Johnson.

The crux of the problem here, as opposed to the situation that existed in *Sully*, is that the jury here did have a way to directly utilize the trial court's voluntary absence instruction in a manner detrimental to Johnson. There was a direct and logical link between the voluntary absence instruction and the flight instruction that was given to the jury.

The jury was instructed that they could consider, in determining Johnson's guilt, whether he had fled after the commission of a crime or after being accused of a crime. (40CT 11572.) Although there was evidence of flight after the crime, respondent seemingly concedes error in giving that portion of the instruction that addressed flight after accusation

of a crime.[14] (See RB 148-149.) Consequently, the only question is whether Johnson was prejudiced by this instruction. When considered in conjunction with the instruction that Johnson was voluntarily absent from trial, the answer is yes.

Respondent believes the answer is no because the trial court gave an instruction that Johnson's voluntary absence could not be used in any way and there was no evidence that Johnson fled after being accused. (RB 149-150.) Respondent's approach is unavailing. The supposed curative instruction was not as curative as respondent believes, and common sense leads to the conclusion that the jury would have inferred that Johnson had fled after being accused.

As to the instruction on voluntary absence, telling the jurors that they should not let Johnson's absence from "the proceedings" affect their verdicts, or the findings they were being asked to make in connection with their verdicts (40CT 11572), is not the same thing as instructing them that they cannot consider his absence from trial as an inferential fact that he fled after being accused of a crime. Nor is it the same thing as instructing the jurors that they could not use "the fact of appellant's absence in any way," as respondent asserts. (RB 149.)

The trial court's instruction in this regard was very precise: the jury was instructed it could not use Johnson's absence from trial as an independent factor affecting the guilt or innocence determination, i.e., the verdict. That does not address, however, whether the jurors could use his absence from trial as an inferential fact relative to the determination of

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[14] Respondent argues that there was no prejudicial error and that any error was harmless, but never asserts that the instruction on this aspect of flight was not error. (RB 148-149.)

whether he fled after being accused of a crime; which then, in turn, could be considered for whatever purpose the jury chose in determining guilt or innocence. In other words, the instruction told the jury they could not use absence as a primary factor in determining guilt, but did not tell the jury it could not use absence as a secondary fact in support of a finding of flight, which could then be used to infer guilt.

Respondent also believes that the jury would not have used Johnson's absence to find he fled from the accusation of a crime because no evidence was presented to that effect.[15] (RB 149-150.) Respondent's view of the type of "evidence" that enables a jury to utilize the flight instruction is at odds with the law. In *People v. Snyder* (1976) 56 Cal.App.3d 195, the defendant was present on the first day of trial when the jury was impaneled, but did not appear for the second day of trial or at anytime thereafter. The defendant was "noticeably absent during trial, but no evidence was formally offered" relating to his absence. (*Id.* at p. 198.) Nevertheless, over the defendant's objection, the court gave the jury a flight instruction addressing a defendant's flight after being accused of a crime. (*Ibid.*) On appeal, the Court of Appeal held that the facts supported the giving of a flight instruction. (*Id.* at p. 199.) In other words, the fact that the jury could see that the defendant was absent was all the "evidence" necessary to support such an instruction. Respondent's interpretation of

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[15] Presumptively, respondent is not asserting that the jury could not infer that Johnson's absence occurred because he fled from the accusation of a crime. Such a position would be untenable since the jury was aware that Johnson had been arrested, placed in custody, and had examined witnesses during his preliminary hearing. (See 21RT 2-934-936; 22RT 2-981, 2-1008.) Consequently, there was evidence before the jury indicating that his absence occurred after an accusation had been made.

the meaning of "evidence" in this context is simply wrong. The jury here had all the "evidence" it needed to find that Johnson had absented himself from trial after being accused of a crime.

The result of the series of errors embodied in this claim was that Johnson's jury was told that he chose to not attend his trial, when that was not true. The jury was then instructed that it could consider that absence as an indicium of flight, which could then be used as an indicium of guilt. In effect, the error in instructing on the initial untruth was compounded so that it became a supporting basis for a guilt verdict. That constitutes a manifest miscarriage of justice and a denial of due process of law. (See AOB 295-301.)

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12.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO DIRECT THE JURY'S ATTENTION TO THE STAR PROSECUTION WITNESS'S PRIOR MISDEMEANOR CONDUCT AND ITS IMPACT ON HIS ALREADY WEAKENED CREDIBILITY.

Spousal abuse is a crime of moral turpitude that reflects a readiness to do evil. (*People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402.) As such it has some tendency in reason to shake one's confidence in the abuser's honesty. (*Id.* at p. 1401.) This, however, is not necessarily self-evident. Hence, the trial court needed to instruct the jury that it could use Robert Huggins's abusive misconduct as a basis to judge his credibility. (AOB 302-313.) Respondent attempts to excuse the trial court's failure to instruct by claiming that any such error was harmless. (RB 150.) Respondent is mistaken.[16]

According to respondent, *People v. Horning* (2004) 34 Cal.4th 871,

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[16] Respondent's twelfth argument is entitled, "ANY FAILURE TO GIVE CALJIC No. *2.23.1* WAS HARMLESS." (RB 150, italics added.) Johnson's corresponding argument in the opening brief is that the trial court erred prejudicially in omitting the misdemeanor conduct factor from CALJIC No. *2.20*. (AOB 303 ["Thus, the misdemeanor-conduct factor applied and the court erred in omitting it," citing "*People v. Galloway* (1979) 100 Cal.App.3d 551, 567 [when any one of CALJIC No. 2.20's factors finds support in the evidence, the trial court errs by excising that factor from its instructions"]; AOB 306 ["Johnson Was Prejudiced Because the Omitted Factor Was the Straw That Would Have Broken the Camel's Back of Huggins's Already Weak Credibility"].) Johnson's argument also noted that the court did not cover the concept elsewhere by instructing the jury with CALJIC No. 2.23.1. (AOB 302-303, 311.) Contrary to respondent's understanding, Johnson did not "contend[] that the trial court committed reversible error in failing to instruct the jury with CALJIC No. 2.23.1." (RB 150.)

is "directly on point" and compels a harmless error finding. (RB 151.) But as shown in the opening brief, *Horning* is distinguishable. (AOB 310-312.)

In *Horning*, a testifying witness was apparently so lacking in sufficient importance to the prosecution's case that the parties failed to discuss that he was a convicted felon when they discussed jury instructions, even though they specifically addressed whether any witness had suffered a felony conviction. The trial court nonetheless should have instructed the jury sua sponte that the witness's felony conviction could be used to assess his credibility. (*People v. Horning*, *supra*, 34 Cal.4th at p. 910.) This Court found the error harmless, however, because contrary to the defendant's view, the jury did not evaluate the witness's "testimony as if it had come from a thoroughly credible witness." (*Id.* at p. 911.)

Horning explained its reasoning. The witness had testified that he was serving a 12-year prison sentence for a felony burglary conviction, and also had convictions for resisting arrest and criminal trespass. The jury was permitted to consider the burglary and other convictions because the court instructed that jurors may consider anything that has a tendency to disprove the truthfulness of the witness's testimony. In addition, defense counsel thoroughly cross-examined the witness and challenged his credibility. Finally, defense counsel argued that the jury should not believe the word of a convicted felon in prison, while the prosecutor only briefly cited his testimony to the jury and also stated that the witness was "certainly no prize in his own right." (*People v. Horning*, *supra*, 34 Cal.4th at p. 910.)

Here, in acute contrast to the minor witness at issue in *Horning*, Huggins was *the* most important prosecution witness against Johnson. At the first trial, Huggins testified that he saw Johnson shoot Hightower.

(8RT 1850-1852.) After hearing this testimony, six jurors voted to acquit Johnson, thereby likely indicating a reasonable doubt that Huggins was credible. The court then declared a mistrial. (15RT 3484, 3486, 3489.) Huggins testified similarly at the retrial, but this time the jury found Johnson guilty. (21RT 2-848-849, 955; 40CT 11611.) Consequently, Huggins's credibility was likely a close question. (21RT 2-849.) And any error affecting the assessment of Huggins's credibility at the retrial would most likely *not* be harmless. (See *Lewis v. Mayle* (9th Cir. 2004) 391 F.3d 989, 999 [where case turns on credibility of one prosecution witness, evidence that discredits that testimony may raise a reasonable doubt in the jurors' minds].)[17]

Furthermore, although Huggins testified that he had a misdemeanor conviction for spousal abuse (22RT 2-1092-1093), and the court instructed jurors that they may consider anything that has a tendency to disprove the truthfulness of a witness's testimony (23RT 2-1414), it is highly unlikely jurors would think that this general instruction applied to Huggins's

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[17] See also *Giglio v. United States* (1972) 405 U.S. 150, 154-155 [where government's case "depended almost entirely on" one witness's testimony, credibility of that witness "was therefore an important issue in the case"]; *United States v. Torres* (10th Cir. 2009) 569 F.3d 1277, 1282-1284 [where testimony from one witness is central to prosecution's case, courts are particularly sensitive to importance of cross-examination as to witness's credibility, and have required new trials where information relevant to that credibility came to light after trial]; *United States v. Morena* (3d Cir. 2008) 547 F.3d 191, 196 [government's evidence insufficient to overcome prejudice resulting from prosecutor's misconduct, where case hinged on testimony of one witness with significant credibility issues and a few items of circumstantial evidence]; *People v. Quintero* (2009) 394 Ill.App.3d 716, 728-729 [915 N.E.2d 461, 472] [finding error prejudicial where outcome of trial depended on testimony of one witness, whose credibility was suspect].

misconduct. Spousal abuse is not a crime like the prior burglary conviction in *Horning*. The latter offense usually involves theft and therefore dishonesty, which directly and openly relates to a witness's credibility. (Pen. Code, § 459; *People v. Hunt* (1985) 169 Cal.App.3d 668, 675 [burglary conviction involving theft reflects on a witness's dishonesty].) Indeed, in addition to the prior burglary conviction used for impeachment in *Horning*, the defendant was convicted of burglary felony murder for entering a house with the intent to commit theft. (*People v. Horning*, *supra*, 34 Cal.4th at p. 903.) The jury likely assumed that the defendant's prior burglary conviction also involved theft and dishonesty. Thus, because the *Horning* jury was instructed that it could use anything that might disprove the defendant's honesty, jurors likely used the prior burglary conviction to assess the defendant's credibility.

Johnson's jury, on the other hand, had no reason to believe it could use Huggins's spousal abuse to determine his credibility. As noted, spousal abuse is a crime of moral turpitude that reflects a readiness to do evil. (*People v. Rodriguez*, *supra*, 5 Cal.App.4th at p. 1402.) But unlike burglary involving theft, it is not a crime of dishonesty. "Obviously it is easier to infer that a witness is lying if the [crime] of which he has been convicted involves dishonesty as a necessary element than when it merely indicates a 'bad character' and 'general readiness to do evil.'" (*People v. Castro* (1985) 38 Cal.3d 301, 315.) Hence, *Horning's* jury had an easier time inferring that the defendant lied at trial because he had a prior burglary conviction.

Accordingly, the trial court erred prejudicially by failing to include misdemeanor conduct in the list of factors in CALJIC No. 2.20 that may be considered in determining a witness's believability.

13.

INSTRUCTING THE JURY WITH CALJIC NO. 17.41.1 VIOLATED JOHNSON'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, REQUIRING REVERSAL.

Johnson argues that this Court should reconsider its previous rulings and hold that instructing the jury with former CALJIC No. 17.41.1 violates a defendant's rights under the Sixth, Eighth, and Fourteenth Amendments. (AOB 315.) Rather than attempt to refute the arguments Johnson sets forth in his opening brief, respondent merely notes that this Court has previously rejected this claim and urges the Court to decline Johnson's invitation to reconsider its prior rulings. (RB 152.) As explained at length in the opening brief, *People v. Engelman* (2002) 28 Cal.4th 436, was wrongly decided in holding that the instruction did not violate the defendant's federal and state constitutional rights. (*Id.* at pp. 442-445.) This Court should hold that instructing the jury in this case with former CALJIC No. 17.41.1 violated Johnson's rights under the Sixth, Eighth, and Fourteenth Amendments.

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14.

A SERIES OF GUILT PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT.

Johnson argues that certain guilt phase instructions given to the jury reduced the prosecution's burden of proof. (AOB 327.) Rather than attempt to refute the arguments Johnson sets forth in his opening brief, respondent merely notes that this Court has previously rejected these claims and urges the Court to decline Johnson's invitation to reconsider its prior rulings. (RB 153.) As explained at length in the opening brief, because the instructions violated the federal Constitution in a manner that can never be "harmless," the judgment in this case must be reversed.

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15.

THE TRIAL COURT ERRED IN REJECTING PROPOSED INSTRUCTIONS THAT WOULD HAVE PROPERLY GUIDED THE JURY IN ITS PENALTY DETERMINATION.

Johnson argues that CALJIC Nos. 8.85 and 8.88, given to the jury in this case, are insufficient to convey to a jury that it could consider mercy in determining penalty. (AOB 341.) In addition, CALJIC No. 8.88 is inadequate to express the concept that death is a "worse sentence" than life without the possibility of parole. (AOB 343.) Therefore, to properly convey these concepts, the jury should have been instructed as Johnson requested. Rather than attempt to refute the arguments Johnson sets forth in his opening brief, respondent merely notes that this Court has previously rejected these claims and urges the Court to decline Johnson's invitation to reconsider its prior rulings. (RB 153.) For the reasons explained at length in the opening brief, this Court should conclude that CALJIC Nos. 8.85 and 8.88 were inadequate to protect Johnson's constitutional rights, and the jury should have been instructed as Johnson requested. Johnson's penalty should be vacated.

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16.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT JOHNSON'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Johnson argues that this Court should reconsider its previous rulings and hold that California's death penalty statute violates the United States Constitution. (AOB 348.) Rather than attempt to refute the arguments Johnson sets forth in his opening brief, respondent merely offers rote responses. Hence the issues are joined, and no further reply is necessary.

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17.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT.

Johnson argues that the cumulative effect of the errors at trial require reversal of his convictions and sentence of death even if any single error considered alone would not. (AOB 365.) Respondent offers only a rote response. (RB 158.) Hence the issue is joined, and no further reply is necessary.

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CONCLUSION

For the reasons stated, the judgment must be reversed in its entirety.

Dated: August 2, 2013

Respectfully submitted,

Michael J. Hersek
State Public Defender

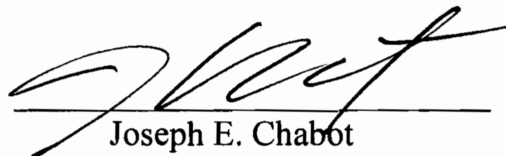
Joseph E. Chabot
Sr. Deputy State Public Defender

Lawyers for Appellant
Cedric Jerome Johnson

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.630(b)(2))

I, Joseph E. Chabot, am the Senior Deputy State Public Defender assigned to represent appellant, Cedric Jerome Johnson, in this automatic appeal. I counted the words in this brief with the computer program used to prepare the brief and certify that it is 37,300 words, excluding the tables and certificates.

Dated: August 2, 2013



Joseph E. Chabot

DECLARATION OF SERVICE

Re: *People v. Cedric Jerome Johnson*

Case No. TA037977-01
Supreme Court No. S075727

I, Randy Pagaduan, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, Suite 1000, Oakland, CA 94607. On this day, I served a true copy of the attached:

APPELLANT'S REPLY BRIEF

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

Cedric Jerome Johnson, #K-61104 CSP-SQ 1-EB-80 San Quentin, CA 94974	Marc A. Kohm, D.A.G. Office of the Attorney General 300 South Spring Street Los Angeles, CA 90013
Honorable John J. Cheroske Los Angeles Co. Superior Court Compton Courthouse 200 W. Compton Blvd. Compton, CA 90220	Gilbert S. Wright, Esq. Los Angeles Co. District Attorney 210 West Temple Street Los Angeles, CA 90012
Steven K. Hauser, Esq. 1717 4th Street, #300 Santa Monica, CA 90401	

Each said envelope was then, on August 2, 2013, sealed and deposited in the United States mail at Alameda, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on August 2, 2013, at Oakland, California.

DECLARANT