SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. HUBER JOEL MENDOZA, Defendant and Appellant.	Calif. Supreme Court No. S143743 Stanislaus Co. Super. Ct. No. 1034046 Automatic Appeal

APPELLANT' S REPLY BRIEF

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Supreme Court

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APPELLANT'S REPLY BRIEF

ARGUMENT – COMPETENCY TRIAL

I. THE EVIDENCE PRESENTED TO THE JURY WAS INSUFFICIENT TO SUSTAIN THE VERDICT OF COMPETENCY, IN VIOLATION OF FEDERAL DUE PROCESS, THUS REQUIRING REVERSAL OF APPELLANT'S SUBSEQUENT CONVICTIONS

A. Introduction.

Appellant contends that the evidence was insufficient to sustain the jury verdict of competency. The strong evidentiary showing at the jury trial of his present incompetency, which was unrefuted by the prosecution, mandates a reversal of his convictions and sentence of death. It is a fundamental canon of criminal law, and a foundation of state and federal due process, that "[a] person cannot be tried or adjudged to punishment while such person is mentally incompetent." (*People v. Samuel* (1981) 29

Cal.3d 489, 494, citing Pen. Code, § 1367.) The United States Supreme Court has "repeatedly and consistently recognized that the criminal trial of an incompetent defendant violates due process." (*Cooper v. Oklahoma* (1996) 517 U.S. 348, 354 [internal quotation marks omitted]; see also *Indiana v. Edwards* (2008) 554 U.S. 164, 169-70 [the competency requirement is rooted in the federal constitution].)

Indiana v. Edwards, citing to *Godinez v. Moran* (1993) 509 U.S. 389 and *Drope v. Missouri* (1975) 420 U.S. 162, stressed that the standard "focuses directly upon a defendant's 'present ability to consult with his lawyer,'" and his ability to "'assist counsel in preparing his defense.'" (*Indiana v. Edwards*, 554 U.S. at 169-70.) When the trial court denied appellant's motion for judgment notwithstanding the verdict, it made no finding that the evidence was sufficient to show that appellant was able to consult with and assist counsel in his defense with a reasonable degree of rational understanding, as is required under the federal constitution.

Appellant contends that, as shown below, there was no such evidence. The testimony provided by the prosecution was shown to be based on an inadequate foundation, in the case of the expert, and irrelevant to the competency standard, in the case of the lay witnesses, and the prosecution's evidence in no way undermined or contradicted the evidence of incompetency presented by the defense.

B. The Trial Court Failed to Apply the Federal Standard for Assessing Competency.

Respondent first argues that appellant has failed to support his contention that the trial court denied appellant's motion for judgment notwithstanding the verdict without considering the federal constitutional requirements relating to competency. (RB 116.) According to respondent, the trial court stated that it had heard the evidence, including testimony by Dr. Cavanaugh, phone calls appellant made to his family, and conversations between appellant and jail staff, and thus necessarily applied the correct federal standard in assessing appellant's competency. (RB 116.)

However, as pointed out in the Opening Brief, the trial court found that the evidence showed appellant's ability to carry on "rational discussions and to rationally pursue" what he considered appropriate objectives. (5RT 760.) The federal constitutional standard for competency requires a present ability to make essential decisions critical to a fair trial, including whether to plead guilty or go to trial, to take or waive the right to testify and to call or cross-examine witnesses, and to assist counsel in whether (and how) to put on the defense and whether to raise one or more affirmative defenses. (*Godinez v. Moran*, 509 U.S. at 398; see also *Cooper v. Oklahoma*, 517 U.S. at 354 [accord].) An ability to carry on rational discussions about daily concerns, or to pursue objectives *appellant* believed "appropriate" does not meet the federal standard as set forth by the United

States Supreme Court, because a competent defendant must also be able to assist counsel in pursuing objectives counsel considers appropriate.

Respondent argues that even though prosecution expert Dr. Cavanaugh did not testify as to appellant's *present* competency, his testimony as to appellant's competency 10 months earlier was "relevant" to his present competency.[1] (RB 116.) According to respondent, Dr. Cavanaugh "concluded that appellant was able to assist his attorneys in conducting his defense, and could respond logically and rationally to questions." (RB 119, citing 4RT 521.) In fact, at the portion of the transcript cited by respondent, Dr. Cavanaugh testified to his opinion that appellant could assist his attorneys because he could respond rationally "to questions which didn't pertain to the trial" and because he "seemed to handle" hypothetical questions regarding what he would do if he was an attorney "without too much difficulty." (4RT 521.) However, what appellant actually said in response to Dr. Cavanaugh's hypothetical

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[1] Respondent repeatedly refers to testimony by prosecution "experts" Dr. Cavanaugh and Dr. Trompetter, arguing that "they did provide evidence regarding [appellant's] competency over the time he was incarcerated" and that testimony was relevant to his present competency. (RB 116, 117.) However, Dr. Trompetter gave no opinion as to appellant's competency at any time, had only observed him at the time of his arrest, and had not seen appellant since that time three years earlier. Respondent asserts that when Dr. Trompetter observed appellant the morning after the shooting, he "appeared" to understand the police interrogation and his responses "were organized." (RB 119.) This proves nothing about his present competency and is not even circumstantial evidence of his competency under the applicable federal standard, which requires more than giving an "organized" response to a question, as set out above in the text.

questions was that he would "leave it in God's hands." (Exh. 7, 1 CST 79-80.) Dr. Cavanaugh conceded that such responses did *not* demonstrate a good understanding of an attorney's function. (4RT 554-56.) Dr. Cavanaugh admitted that at almost every point in the interview dealing with things a competent client needed to do, appellant went off into religious rants. (4RT 572.)

Respondent points out that "the jury was not required to accept" the testimony by defense experts, citing to *People v. Marshall* (1997) 15 Cal.4th 1, 31. (RB 117.) *Marshall* held that a jury is not required to accept "at face value a unanimity of expert opinion," and appellant does not disagree. The *Marshall* case support's appellant's position, however, in that it emphasizes that the value of an expert's opinion depends upon the quality of the material on which it is based and the reasoning used to arrive at the conclusion. (*Id.* at 31-32.) In *Marshall* the jury was entitled to reject the unanimous opinion testimony of defense experts where those opinions were expressed with reservations. Moreover, one expert based his opinion on a 15-minute interview with the defendant; and the defendant refused an interview with the second expert. (*Id.* at 32.)

Here, by contrast, it was the prosecution's expert Dr. Cavanaugh who was forced to express reservations about his opinion,[2] and Dr.

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[2] For example, Dr. Cavanaugh conceded that appellant's responses did *not* demonstrate a good understanding of an attorney's function, and admitted that at

Cavanaugh who based his opinion on his interview with the defendant on a one-and-a-half hour interview with the appellant, but who did not administer any tests, or follow up with interviews of family members, and whose opinion, as appellant showed in some detail in the Opening Brief, was not supported by the interview with appellant upon which it was supposedly based. (See AOB at pages 69 to 81 [Dr. Cavanaugh's opinion was stale, compromised by faulty techniques, and without adequate foundation].)

Respondent's discussion of *Marshall* skews the thrust of that opinion. He claims that in this case, "as in *Marshall*, all of the [defense] doctors based their opinions [] primarily on interviews with appellant." (RB 118.) However, a 15-minute interview of the defendant by one defense expert, and no interview of the defendant by the second defense expert, as in *Marshall*, cannot be compared to the quality of material reviewed by the defense experts, and the reasoning underlying their conclusions in this case. Dr. Stewart reviewed appellant's mail, the police reports, and medical and mental health reports; he evaluated and interviewed appellant on seven different occasions; he interviewed appellant's wife; he administered competency assessment tests. (AOB 53-56.) Dr. Schaeffer interviewed appellant just four days prior to his

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almost every point in the interview dealing with things a competent client needed to do, appellant went off into religious rants. (4RT 554-56, 572.)

testimony at the competency trial, and pointed out the specific points of appellant's taped interview that he relied on to reach his conclusions – in stark contrast to the prosecution expert Dr. Cavanaugh, whose testimony was contradicted by the taped interview he supposedly relied on to reach his conclusion. (See AOB 69-74 [setting forth numerous examples].)

Respondent makes much of the fact that "a psychiatric nurse and deputy sheriff from the jail both had no difficulty in communicating with appellant," as if such banal communications could suffice to reject testimony by Drs. Stewart and Schaeffer as "unbelievable." (RB 118.) The assertion is preposterous, as is readily discernible from a review of the record and the applicable federal constitutional standard for competency. The record shows that the psychiatric nurse talked to appellant two years ago and testified only that she had no difficulty communicating with him. (4RT 653.) The nature of the communications was not stated. No specific communication was testified to. The nurse could not correctly state appellant's first name and apparently had no independent recollection of appellant except for his presence in her workplace. (4RT 649-54.) The deputy testified that he had brief conversations with appellant when passing by his cell, and that appellant was able to communicate sufficiently to ask for a cell change, or to say he was "fine" when asked. Their longest conversation was two minutes. (4RT 486-89.)

Respondent also argues that appellant's phone calls with his relatives proved he was "capable of rational thought." (RB 119.) The standard however is not just whether appellant can be rational. The applicable federal standard for competency requires evidence that the defendant has a "present ability to consult with his lawyer," and an ability to "'assist counsel in preparing his defense.'" (*Godinez v. Moran*, 554 U.S. at 169-70.) Appellant's ability to discuss soccer scores with his children does not show that he was able to consult with and assist counsel in his defense with a reasonable degree of rational understanding, and assist in the many critical decisions necessary to such assistance.

The jurors and the trial court may have chosen to believe that testimony from the nurse and the deputy was sufficient to undermine the overwhelming defense testimony. That does not end the matter, however. The question before this Court is whether that testimony was constitutionally sufficient to support the verdict. This Court must decide whether the trial court could properly rely on compromised and stale testimony by Dr. Cavanaugh, as supposedly corroborated by wholly irrelevant testimony by jail staff that appellant could say "fine" when asked, in denying appellant's motion for judgment notwithstanding the verdict, where the defense evidence showed clearly that appellant was not competent under the federal standard.

Respondent acknowledges some of the flaws in Dr. Cavanaugh's

approach but contends that the doctor had reviewed "a lot of documentation" and was "clearly prepared." (RB 120-21.) . Respondent's argument that any evidence on competence offered, no matter how flawed, should be relied upon to determine competence questions undermines the notion that such evidence should be both relevant and sufficiently reliable. (*People v. Stoll* (1989) 49 Cal.3d 1136, 1156-1158.)[3]

In the Opening Brief, appellant set out a detailed analysis of the myriad problems with Dr. Cavanaugh's interview and thus his opinion. By contrast, respondent's argument in support of Dr. Cavanaugh's technique is

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[3] While not required by case law, there are standards of practice from the mental health professions pertinent to competency assessments that were in existence at the time of appellant's trial – and even more stringent and detailed standards in existence now. For example, the well-known authority on competence assessments, Dr. Thomas Grisso, from the University of Massachusetts, had published Competency to Stand Trial Evaluations: A Manual for Practice (1988) as of the time of the trial of this case. That work continues to be mentioned in leading texts on forensic mental health like Melton, et al.'s Psychological Evaluations for the Courts (3d Edition), a widely available guide on forensic evaluations. Grisso emphasizes that in assessing competency, the evaluator should address present ability, and devotes an entire section of his work to selecting methods, including specified types of competency assessment devices in existence even before appellant's trial. (Grisso, supra, page 10 and page 25, et seq.) Since the completion of appellant's case, there have been more stringent and detailed practice guides on competence evaluations published by relevant professional organizations. (See, e.g., AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial, 35 Journal of the American Academy of Psychiatry and Law S3 (2007 supplement)), indicating that the Practice Guideline "...reflects a consensus among members and experts about the principles and practice applicable to the conduct of evaluations of competence to stand trial." (*Id.*) The point here is that notwithstanding respondent's comments about how much data Dr. Cavanaugh may have had available, the competency determination must address timely and relevant questions, in a manner in line with generally accepted professional methods in the field.

vague and speculative, e.g., "Dr. Cavanaugh did not feel the need" to ask follow-up questions, and "it is highly unlikely the defense would permitted" further examination of appellant. (RB 121.) Because respondent does not address the specific arguments appellant made demonstrating that Dr. Cavanaugh's opinion lacked an adequate foundation, appellant refers this Court to his discussion in Appellant's Opening Brief. (AOB at 69-81.)

Respondent argues that testimony by Dr. Zimmerman, the court-appointed expert, supported the verdict of competency, because he testified that appellant could "answer questions precisely before he moved on to other topics" and because he could name his attorney and knew he was facing capital murder charges. (RB 121, citing 3RT 340-41, 352-53, 357-58.) The assertion is misleading. What Dr. Zimmerman actually testified to was that appellant "was able to answer my questions precisely at first. Long answers he tended to wander away from the questions." He was able to answer questions precisely as to time and place, but he was only "able to hold it together for a short period of time," and when his responses were longer he would wander into the things he was obsessed about. "He showed a deep indifference to the proceedings against him." (3RT 340-41.) Dr. Zimmerman found appellant "seriously impaired" and incompetent to consult with and assist counsel in his defense. (3RT 353, 373.) A criminal defendant who is only able to "hold it together" for short periods of time

and short answers cannot rationally assist counsel in the defense of a complex capital murder trial.

Respondent also claims that Dr. Schaeffer's testimony lent some support to the verdict because he testified that appellant could name his attorneys, and according to respondent, in the interview with Dr. Schaeffer, appellant "showed ability to assist his attorneys when and if he decided to do so." (RB 122, citing Supp. CT[4] 106-07, 109, 110, 112-13.) Respondent cites nothing in the Dr. Schaeffer interview to support his assertion that appellant could assist his attorneys "if he decided to do so." Dr. Schaeffer testified that appellant's ramblings, loose associations resulting from a thought disorder and appellant's inability to "stay [on] track mentally" rendered him *unable* to consult with or assist his attorneys. (4RT 634.) Dr. Schaeffer supported that conclusion with specific references to and quotations from portions of the interview. (4RT 626-34.) Respondent's failure to support his own conclusion that the interview showed appellant was able to assist counsel clearly demonstrates the weakness of his claim.

Respondent's final point is that *People v. Samuel*, 28 Cal.3d 489 is distinguishable, because in that case five experts testified that the defendant was incompetent, and there was no contrary expert testimony, whereas in this case the prosecution "offered two expert witnesses" in addition to the

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[4] The cite is to the Clerk's Supplemental Transcript, and not the Supplemental Clerk's Transcript. (See AOB at 57, fn. 36.)

jail deputy, a nurse, and the family phone calls. (RB 122-23.) Appellant repeats that Dr. Cavanaugh was the only expert who testified as to appellant's supposed competency. Dr. Trompetter offered no opinion whatsoever: his only "contact" with appellant was observing him during a police interview five years before. (4RT 580-81, 587.) Appellant has shown that testimony from the nurse, the jail deputy, and taped conversations with family members showed only that appellant could sometimes talk about daily matters in a somewhat coherent fashion. Such an ability is of a completely different nature and quality from an ability to consult with assist counsel in defending a capital murder. For that reason, and because Dr. Cavanaugh's testimony lacked an adequate foundation, the testimony as to appellant's present incompetency *was,* as in *Samuel* "persuasive and virtually uncontradicted." (RB 123, *Samuel* at 506.) *People v. Marks* (2003) 31 Cal.4th 197, 219, cited by respondent, did distinguish *Samuel* but because the "defense evidence was not compelling" and the prosecution's cross-examination "called into question the reliability of the [defense] experts' analyses."

C. Respondent Has Failed to Refute Appellant's Reliance on Comparative Jurisprudence as Supporting Authority for His Constitutionally Based Challenge to the Trial Court's Competency Decisions.

In his opening brief appellant cited numerous cases and statutes from other common-law jurisdictions for the proposition that comparative law

"supports the merits" of his claim that he was incompetent to stand trial under constitutional due process requirements and "sheds significant light on the legal factors that this Court is now called upon to consider" in determining what the Constitution requires in this context. (AOB 87.) He also argued that, consistent with *Drope v. Missouri*, 420 U.S. at 171, comparative jurisprudence elaborates on and "confirms that any significant change in circumstances mandates a new competency assessment at any stage of trial." (AOB 113.)

Respondent's cursory answer profoundly mischaracterizes this argument by conflating servant with master: appellant nowhere maintained that competency criteria derived from comparative law override constitutional standards, but rather that decisions from other jurisdictions applying common law principles serve to inform the analysis of the Due Process Clause in this context. Respondent cites no domestic precedent to the contrary, nor could he realistically do so; appellant's position is so well-grounded in United States Supreme Court jurisprudence as to be both obvious and unassailable.

For example, appellant argued:

> "When the trial court denied appellant's motion for judgment notwithstanding the verdict, it made no finding that the evidence was sufficient to show that appellant was able to consult with and assist counsel in his defense with a reasonable degree of rational understanding, as is required under the federal constitution."

(AOB 51.) Developing this point, appellant cited controlling United States Supreme Court precedent, for example, the decision in *Cooper*, 517 U.S. at 354, which in turn relies directly on the *Drope* axiom that trying a defendant "who lacks the capacity . . . to consult with counsel, and to assist in preparing his defense" is a "common-law prohibition" that is "fundamental to an adversary system of justice." (*Drope*, 420 U.S at 171-172.) The United States Supreme Court has acknowledged that the Due Process Clause-based competence standard that it has announced is rooted in the *Drope/Dusky* standard—a standard which this Court has referenced in its own decisions but without often describing it as the most basic definition of competence. (See *Indiana v. Edwards* (2008) 554 U.S. 164, 170-171 [noting that *Drope* and *Dusky* are "the two cases that set forth the Constitution's 'mental competence' standard. . ."].) Given the shared legal heritage of the standard that appellant relies on, it is surely instructive that other common law jurisdictions uniformly recognize that an express judicial determination of the defendant's sufficient ability to consult with and assist counsel is the essential prerequisite for finding competency to stand trial.

Citing extensive state and federal authority, appellant also demonstrated that the trial court erred by refusing to reconsider his competency based on substantial evidence of changed circumstances.

(AOB 104-113.) With *Drope* as his constitutional point of reference, appellant then established that other common law jurisdictions recognize that a wide range of changed circumstances will require a new competency determination, including such directly relevant considerations as the defendant's conduct and demeanor in court or reports from mental health experts. (AOB 113-118.) Furthermore, the factors relied on by the trial court for denying reconsideration (such as appellant's ability to carry out rudimentary daily tasks) have been distinguished in the instructive comparative jurisprudence from the competency required to assist and instruct counsel. (AOB 118-120.) Contrary to what respondent implies, this body of international decisions applying and elaborating on common-law competency requirements was cited not as supplanting constitutional safeguards but instead because it "bolsters appellant's claim based on state and federal constitutional law that the trial court erred in failing to reinstitute competency proceedings." (AOB 121.)

Indeed, virtually every United States Supreme Court decision addressing competency requirements draws support from the same general body of common law authority that appellant cited. (See, e.g., *Cooper*, 517 U.S. at 356 [turning "first to an examination of the relevant common law traditions of England"]; *Godinez v. Moran*, 509 U.S. at 404, Kennedy and Scalia, JJ., concurring in part and concurring in the judgment [discussing "[t]he historical treatment of competency that. . . has its roots in English

common law"]; *Leland v. Oregon* (1952) 343 U.S. 790, 798 [due process not violated by state statute requiring defendant to prove insanity beyond a reasonable doubt, a burden of proof that "remains the English view today"]; cf. *People v. Medina* (1990) 51 Cal.3d 870, 884 [holding that "*Leland* remains good law"].)

This Court is likewise no stranger to the use of comparative jurisprudence when determining the parameters of due process in a wide range of contexts. (See, e.g., *People v. Vogel* (1956) 46 Cal.2d 798, 804-805 [citing decisions by courts in England and Australia as supporting authority for holding that honest and reasonable belief in legality of a marriage is legitimate defense to bigamy charges]; *In re Newbern* (1960) 53 Cal.2d 786, 795 [consulting Blackstone's Commentaries and "a fairly recent English statute" as relevant in determining that California criminal statute violated due process]; *People v. Duran* (1976) 16 Cal.3d 282, 288 [recognizing that "[t]he rules governing the imposition of physical restraints upon criminal defendants find their origin in the English common law" and upholding "these common law pronouncements"].) In each instance, this Court obtained supplemental guidance in determining what due process required by consulting "the considered consensus of the English-speaking world. . . ." (*Ferguson v. Georgia* (1961) 365 U.S. 570, 582.)

Respondent does not argue that appellant has misrepresented any of the competency decisions from other jurisdictions; nor does he provide this Court with any conflicting common law authority to consider. Instead, he vainly attempts to recast appellant's reliance on comparative jurisprudence as supporting authority for a purely constitutional claim into an assertion of the supremacy of international law. However, misdirection is not rebuttal, and silence in response to a legal argument that is sufficiently pleaded and meritorious on its face is the functional equivalent to filing no response at all. In short, respondent has entirely failed to refute appellant's reliance on comparative common-law jurisprudence as supplemental support for his constitutionally-based challenges to the trial court's competency decisions.

D. Conclusion.

In sum, this Court should find that the overwhelming and unrefuted evidence established appellant's incompetency, requiring a reversal of his convictions and sentence.

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II. AFTER THE COMPETENCY JURY VERDICT AND BEFORE, DURING, AND AFTER THE GUILT/SANITY/PENALTY TRIAL, THE DEFENSE REPEATEDLY SHOWED SUBSTANTIAL CHANGED CIRCUMSTANCES AS EVIDENCE OF APPELLANT'S PRESENT INCOMPETENCY, SUCH THAT THE TRIAL COURT'S REFUSAL TO REINSTATE PROCEEDINGS WAS AN ABUSE OF DISCRETION, UNSUPPORTED BY THE FACTS, AND THE RESULTANT DUE PROCESS VIOLATION REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS

A. Introduction.

After the jury verdict of competency a year before the guilt/sanity/penalty trial, appellant repeatedly showed a substantial change of circumstances sufficient to warrant suspension of the proceedings for a further hearing on his present competency. The defendant's right to be competent during trial extends to all proceedings during trial and even after conviction. (*United States v. Duncan* (9th Cir. 2011) 643 F.2d 1242, 1238, citing *Indiana v. Edwards*, 554 U.S. at 170.)

The trial court's refusal to reinstate proceedings under section 1368 was unsupported by the facts, and as such was an abuse of discretion and a violation of appellant's federal due process rights, requiring a reversal of appellant's convictions. (*People v. Ary* (2011) 51 Cal.4th 510, 517-18.)

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B. The Changed Circumstances During Trial, Including Appellant's Documented Mental Deterioration, and His Uncontrollable Sobbing and Outbursts, Required The Trial Court to Suspend Proceedings for Another Determination of Appellant's Present Competency.

Appellant maintains that his demeanor during trial – uncontrollable sobbing and outbursts, and the report of Dr. Weiss constituted changed circumstances sufficient to require the suspension of proceedings under Penal Code section 1368 for a determination of his competency.

Respondent contends that there was no substantial change in circumstances. First, respondent argues that appellant's "outbursts and crying during the trial were not changed circumstances." (RB 139.) Respondent points out that during the preliminary hearing appellant spoke out saying he wanted to protect his children from the media, and that he was tearful prior to trial, e.g., when he visited the school principal, and when he was interviewed by the police and the psychologists. (RB 139-40.) Respondent contends that because appellant "had a tendency to cry and become emotional when discussing the facts of the case" the trial court was justified in finding no change in circumstances because appellant's demeanor was "basically the same." (RB 140.)

Respondent points to moments in time when appellant became tearful prior to the trial. However, *during the course of the trial*, appellant was immobilized by continuous sobbing, something that had not happened

before and something that was *not* the same as being "tearful" or "emotional" prior to the trial. The trial court ruled that there was no significant change in circumstances because appellant's behavior was "not different in kind from that previously exhibited during the course of the case." (11RT 2218.) However, as appellant noted in the Opening Brief, this is correct only insofar as the trial court meant that appellant had been crying inconsolably during the course of the guilt/sanity/penalty trial. Prior to the trial, appellant had not been crying continuously and uncontrollably. Respondent does not contend otherwise, and confines his argument to the unpersuasive claim that being "tearful" here and there is somehow the same as being overcome by sobbing to the point where he could not communicate with counsel and had to leave the courtroom. (See AOB 107-112.)

Respondent also argues that Dr. Weiss's report that appellant's mental condition had deteriorated since the time of the competency verdict a year earlier, and that his disease manifested itself in psychotic features, was either not new, or if it was, it was not a sufficiently significant change in circumstances warranting suspension of the proceedings. (RB 141-42.)

Appellant disagrees. *Maxwell v. Roe* (9th Cir. 2010) 606 F.3d 561, 574, held that where the initial competency determination is more than a year old, and the trial court is aware of the defendant's subsequent strange behavior, that is sufficient evidence to raise a reasonable doubt as to the

defendant's competency. The same is true here. The competency verdict was reached a year earlier, and the trial court was obligated to look at appellant's present condition. Dr. Weiss reported that his present condition had deteriorated since the competency verdict, and this was born out by appellant's subsequent behavior, i.e., his uncontrollable sobbing and outbursts.

Respondent's final point is that appellant's "discussion with the court" at his hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 "showed that appellant was capable of understanding the nature and purpose of the proceedings [] and was able to assist counsel if he chose to do so." (RB 144.) Respondent also claims that the trial court never doubted appellant's competency. This is a strange indeed, since at this *Marsden* hearing, after the discussion between appellant and the court, the trial court stated that appellant's "ideas" about the procedure, his plans to call only the witnesses "that don't lie," and that God would assist him in this matter showed him to be *incompetent* to represent himself.[5] (5RT 750.)

In sum, the trial court's refusal to reinstitute competency proceedings, despite the evidence of significant changes in circumstances,

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[5] The trial judge later reversed his ruling that appellant was incompetent to represent himself when he learned that the standard for self-representation was the same as competency under section 1368, and then denied appellant's motion to represent himself as untimely. (5RT 760-65.) The *Marsden* motion was also denied.

deprived appellant of his federal due process rights and requires reversal of his convictions and sentence.

ARGUMENT – GUILT AND SANITY TRIAL

III. APPELLANT'S ABSENCE FROM EVIDENTIARY PORTIONS OF THE GUILT PHASE OF HIS TRIAL, WITHOUT VALID WAIVERS OF HIS RIGHT TO BE PRESENT, VIOLATED HIS STATUTORY AND CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO PRESENCE AND DUE PROCESS

A. Introduction.

Appellant maintains that he was incompetent throughout all phases of the trial and sentencing, and was thus also incompetent to waive his right to presence. Assuming arguendo that this Court rejects appellant's arguments as to competency, appellant contends that his absence from evidentiary portions of the trial, without an informed and express personal waiver of his right to presence, requires reversal of his convictions.

Although *People v. Davis* (2005) 36 Cal.4th 510, 531 held that a capital defendant can personally waive his right to presence, as long as his waiver is voluntary, knowing and intelligent under the standard set forth in *Johnson v. Zerbst* (1938) 304 U.S. 458, 464, appellant did not expressly waive his statutory or federal constitutional rights to presence at his trial

Respondent concedes statutory error but argues that appellant has failed to demonstrate prejudice from that error. Respondent also argues

that appellant waived his federal constitutional right to presence, by his conduct. Respondent thus does not address prejudice under the federal constitutional standard that places on respondent the burden of showing harmlessness beyond a reasonable doubt.

Appellant addresses first the federal error, and then the statutory error.

B. Respondent's Reliance on the Implied Waiver of the Federal Right to Presence Is Misplaced.

As to appellant's federal constitutional right to presence, respondent contends there was "nothing improper about the trial court's acceptance of appellant's conduct as [a] voluntary waiver of his presence." (RB 148.) Without expressly so stating, respondent relies on the line of cases that permit an "implied waiver" of the right to presence by disruptive conduct. Appellant referred to these cases in his Opening Brief. (See AOB 133, fn. 67, citing *People v. Concepcion* (2008) 45 Cal.4th 77, 81-82 and cases cited therein.) However, the implied- waiver-through-conduct rule has no application here as appellant was not disruptive.

Appellant is aware of no case, and respondent cites none, that permits an implied waiver of the right to presence by conduct from a non-disruptive defendant. Respondent refers to two cases in support of his waiver-by-conduct argument, but both cases involved both a personal waiver in addition to disruptive conduct. In *People v. Weaver* (2001) 6

Cal.4th 876, 965-67, after disruptive behavior, the defendant personally and expressly waived his presence during the playing of tape recordings after the trial court expressly informed him of his rights:

> MRS. HUFFMAN: Until the tapes are finished Mr. Weaver wishes to have his presence – wants to waive his presence.
> THE COURT: Okay.
> MRS. HUFFMAN: He didn't want to lose control and he wants to apologize to the court for that, but he can't handle it.
> THE COURT: All right. First of all, do you join in that request, Mrs. Huffman?
> MRS. HUFFMAN: Yes, I do, your Honor.
> THE COURT: Mr. Weaver, I discussed this with you last week when I was starting to view the films preliminarily, so I have explained to you your right to be present at all phases of the case; okay?
> THE DEFENDANT: Yes, sir.
> THE COURT: Okay. You understand that by law or by Constitution you have the right to be present during all proceedings in this case. Nevertheless, you may waive that right and consent that we proceed in your absence, which is, as I understand, what you wish to do and you wish to have us complete the showing of these tapes without your presence, after which time you will be brought back in and be here for the balance of the trial. [¶] Is that correct?
> THE DEFENDANT: Yes, your Honor. I am sorry about what happened. (*Id.* at 965-66.)

Similarly, in the second case relied on by respondent, *People v. Price* (1991) 1 Cal.4th 324, 405, involved a defendant who had expressly and personally waived his presence, and had been, and continued to be disruptive in the courtroom.

Accordingly, respondent's claim that the trial court could properly "accept" appellant's "conduct" as a voluntary waiver of his presence must be rejected.

C. Respondent's Argument that Appellant "Waived" His Right to Presence Ignores the Rule that Such a Waiver Must be Voluntary, Knowing, and Intelligent.

Respondent does not specifically address appellant's argument, discussed in some detail in Appellant's Opening Brief, that defense counsel's unsworn statement that appellant would waive his right to presence during evidentiary portions of the trial is constitutionally inadequate. (See AOB 132-133.) In *People v. Davis,* 36 Cal.4th 510, this Court held that counsel's supposed waiver of the right to presence is not valid, where the record shows only that counsel had discussed the matter with the defendant who agreed to waive, and where there was no evidence that defense counsel informed the defendant of his right or that the defendant understood the consequences of such a waiver. (See AOB 131-132.)

Respondent asserts only that counsel's waiver of appellant's right to be present "does not prove appellant's incompetence" since appellant made personal waivers at other times; and since appellant demonstrated an ability to request to be present when he wanted to, "[n]othing in the record suggests that [appellant] was unable to understand and waive his right to be present," and thus, he "validly waived" that constitutional right. (RB 148.) This is an astounding assertion. A waiver of a federal constitutional right, to be valid, must be voluntary, knowing and intelligent, as first set out in

Johnson v. Zerbst, 304 U.S. at 464, and reiterated by this Court in *People v. Davis*, 36 Cal.4th at 531.

Respondent not only ignores the correct standard, he turns it upside down, and argues that since "nothing" shows that appellant did not make a knowing, voluntary and intelligent waiver, he must have "validly waived" his constitutional right. This Court must reject respondent's cavalier dismissal of the proper standard and his glib dismissal of a federal constitutional right.

D. The Violation of Appellant's Federal Constitutional Right Was Prejudicial.

Because respondent wrongly concludes that appellant "waived" his federal constitutional right to presence either through his "conduct" (even though it was not disruptive), or through his attorneys (despite the rule set forth in *Davis*) respondent does not address the prejudice from the constitutional error, which requires a showing by respondent that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Instead, respondent's tack is to concede the statutory error, and then argue that under state law, appellant has failed to demonstrate prejudice.

Respondent's arguments that no constitutional error occurred are flawed, as set out above, and the federal constitutional error must be assessed for prejudice under the federal *Chapman* standard. Because

respondent cannot show the constitutional error to be harmless beyond a reasonable doubt, this Court must reverse. Appellant discusses prejudice in more detail below, after addressing respondent's arguments as to the statutory violation.

E. The Conceded Violation of Appellant's Statutory Right to Presence Was Prejudicial.

Respondent concedes that the trial court erred under Penal Code sections 977 and 1043 by permitting appellant to be absent during the taking of evidence, but argues that the error should be considered harmless because appellant has not demonstrated otherwise.

Respondent's citations are not helpful. (See RB 149-50.) First, he relies on *People v. Brown* (1988) 46 Cal.3d 432, 447-48, which set out a standard of prejudice for state penalty phase errors and did not involve the issue of a defendant's presence at trial. The error here involves the guilt phase and appellant's absence during evidentiary portions of the guilt phase. Respondent also cites *People v. Cleveland* (2004) 32 Cal.4th 704, 741, which did involve the defendants' absences but none of the absences were for evidentiary portions of the trial. *Cleveland* actually supports appellant's argument, in that this Court noted that none of the absences "involved examining witnesses or arguing to the jury," and that the defendants were never absent for proceedings at which their presence bore a substantial relation to their ability to fully defend. (*Id.* at 743.)

Respondent's truncated quotation from *Cleveland* leaves out the salient fact that none of the complained-of absences involved – as they do in this case – the taking of evidence before the jury. Respondent quotes the first portion of *Cleveland*: "It may be that if personal presence truly bears a substantial relation to a defendant's opportunity to defend against the charges, counsel's waiver would not forfeit the claim. However, the fact that counsel did not think defendants' presence was necessary strongly indicates that their presence did not, in fact, bear such a substantial relation." (RB 149-150.) The selective quotation is misleading as can be seen from the rest of the paragraph, deleted by respondent, but quoted in full here. *Cleveland* continued: "Some of these times, the defendants had simply not yet been brought into court, and the court and attorneys considered routine matters while awaiting their arrival. Sometimes there were discussions among the attorneys and court in chambers. **None of the occasions involved examining witnesses or arguing to the jury**. (*Id.* at 741; emphasis supplied.)

Cleveland held that where the defendant was absent from proceedings **not involving jury argument or examination of witnesses**, but rather "routine matters" such as argument as to shackling and proceedings during jury deliberations, the attorneys' belief that the clients did not need to be present may be an indication that the matter did not bear a substantial relation to the opportunity to defend. But the fact that

Cleveland excepted from this remark the taking of evidence and arguing to the jury is a strong indication that in these instances, an attorney cannot waive the defendant's presence and the presence of counsel is not sufficient to ensure that the defendant's interests are represented.

Respondent further argues that appellant's attendance "would not have assisted the defense or otherwise altered the outcome of his trial." (RB 150.) According to respondent, since defense counsel were "familiar with the facts" and had been representing appellant for years, appellant's presence was not necessary during the presentation of testimony. (RB 150-51.)

Respondent's citations to authority do not support his argument. None of the cases he cited involved the defendant's absence at the taking of evidence. *People v. Benavides* (2005) 35 Cal.4th 69, 89 involved the defendant's absence during proceedings in which the prosecutor and defense counsel agreed to stipulate to the excusal of some jurors based on their questionnaires. *Benavides* pointed out that the defendant had no right to be present during these proceedings that did not bear a substantial relation to his opportunity to defend. *Benavides* relied on *Hovey*, in which the defendant complained of his absence during rereading of testimony. *Hovey* found that any error was "harmless beyond a reasonable doubt," i.e., applying the *Chapman* standard for review of prejudice. *People v. Johnson* (1993) 6 Cal.4th 1, 19 involved the

defendant's absence from an in-chambers conference on a collateral matter and thus did not come within the defendant's statutory right to present at a proceeding in which evidence was taken against him, or the federal right to be present at proceedings bearing a substantial relation to his opportunity to defend. *People v. Bradford* (1997) 15 Cal.4th 1229, 1357-58 involved the defendant's absence from various in-chambers proceedings, and evidentiary proceedings at which he expressly requested to be absent. *People v. Jennings* (2010) 50 Cal.4th 616, 682, cited at RB 146-147, found that the defendant had neither a statutory nor a constitutional right to presence at an in-chambers discussion of a question posed by the jury.

Here, in stark contrast, appellant was absent from proceedings during which evidence was presented to the jury – proceedings bearing a strong relation to the ability to defend. Respondent asserts as an *ipse dixit* that "appellant's presence was not necessary for effective cross-examination or to contribute to the fairness," and that specifically, his presence was not necessary "to prevent interference [*sic*] with his opportunity for effective cross-examination of Cindi or Hamiel" because defense counsel "had been representing appellant for years and were very familiar with the facts of the case." (RB 150.)

The argument is wholly unpersuasive, since in the years during which counsel had been representing appellant, they repeatedly complained to the court that appellant was incompetent and requested reinstatement of

proceedings under Penal Code section 1368 because appellant was currently unable to assist in the defense and would not discuss the case with them. (See Arg. I & II, above.) Moreover, in Arguments I and II, respondent repeatedly argues that appellant was competent and able to assist his attorneys. If that were correct, then he would have been able to assist counsel during cross-examination of Cindi and Hamiel. (See AOB 135-36.) In sum, respondent's arguments fail, and the statutory and constitutional violations of appellant's right to presence require reversal of his convictions and sentence.

IV. THE PROSECUTOR ERRED IN CLOSING ARGUMENT AT GUILT PHASE BY REFERRING TO FACTS NOT IN EVIDENCE AND VOUCHING, THUS VIOLATING APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONTATION, DUE PROCESS AND A FAIR TRIAL

A. Introduction.

Appellant contends that the prosecutor erred in closing argument by referring to facts not in evidence and vouching for the strength of his case when he compared the facts to other murder cases in which the homicide was preceded by an argument, i.e., cases which in contrast to this case presented a question as to malice and intent to kill; and by arguing that appellant's mental state evidence was insufficient to reduce the degree of murder because no killer is "all right in his head." (11RT 2178-79; 2200.)

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B. Appellant's Claim Is Properly Before This Court.

Respondent argues that appellant's claim of prosecutorial error should be deemed forfeited because although defense counsel objected, they did not request an admonition. Respondent acknowledges that the absence of a request for an admonition does not forfeit the issue for appeal if the court immediately overrules an objection so that the defendant has no opportunity to make such a request. (RB 154.)

Because this is precisely what happened here, and the issue is not forfeited. The absence of a request for a curative admonition does not forfeit the issue for appeal if "the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request." (*People v. Green* (1980) 27 Cal. 3d 1, 35 fn. 19; *People v. Pitts* (1990) 223 Cal. App. 3d 606, 692; *People v. Lindsey* (1988) 205 Cal. App. 3d 112, 116 fn. 1; see also *People v. Hill* (1998) 17 Cal. 4th 800, 820-821.) In addition, failure to request the jury be admonished does not forfeit the issue for appeal if "'an admonition would not have cured the harm caused by the misconduct.'" (*People v. Bradford* (1997) 15 Cal. 4th 1229, 1333, quoting *People v. Price* (1991) 1 Cal. 4th 324, 447.)

Respondent argues that this body of law should not be applied here because defense counsel had earlier raised a "misstatement of the evidence" objection to the prosecutor's argument that the gun had to have been "in a

very close range" because the evidence was that it was "close" rather than "very close," and the trial court ordered the prosecutor to rephrase. (11RT 2176.) From the fact that the trial court had previously told the prosecutor to rephrase an argument, respondent extrapolates an argument that counsel's failure to request an admonition should forfeit this issue because there was "no reason to suspect the trial court was predisposed to overrule objections" or that an admonition would have been futile. (RB 154.)

This makes no sense whatsoever, because the trial court *did overrule the defense objection* to the prosecutor's argument contrasting this case to other cases in which there was a question about the defendant's intent or malice. Thus, the applicable law is as stated above: where the trial court immediately overrules the objection so that defense counsel has no opportunity to request an admonition, the claim is not forfeited. (*Hill*, 17 Cal.4th at 820-21.)

Respondent's second argument is equally flawed. He argues that the fact that the objection overruled by the trial court was "lack of foundation" rather than "prosecutorial error," appellant's claim should be deemed forfeited. (RB 154.) Respondent has it exactly backwards. Had defense counsel objected on the grounds of "prosecutorial error," the objection would not have been sufficient to preserve the issue for appeal, as such a generic objection would not have informed the trial court of the issue it was

being asked to decide. (Cf. *People v. Carrillo* (2004) 119 Cal.App.4th 94, 101, citing *People v. Scott* (1978) 21 Cal.3d 284, 290.)

Respondent cites case law holding that "[t]o preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely and specific objection . . . ." (RB 154.) Thus he must (mistakenly) believe that "prosecutorial error" is a "specific objection" but that "lack of foundation" is not. Again, this is backwards. Lack of foundation is a specific objection, and a prosecutor's argument that lacks foundation, i.e., that is without evidentiary support, is a kind of prosecutorial error. However, an objection of "prosecutorial error" is meaningless, and defense counsel's failure to make a meaningless, non-specific objection instead of a specific one does not forfeit the issue for appeal: it preserves it.

C. The Prosecutor's Arguments Were Improper And Deprived Appellant of a Fair Trial.

As to the merits, respondent agrees that arguing facts outside the record constitutes prosecutorial error, but points out that the prosecute may state matters of "common knowledge" or "common experience." (RB 155.) However, respondent does not elaborate, or contend that the factual situations posed in his argument were common knowledge or illustrations drawn from common experience. Instead, he maintains that the prosecutor was "entitled" to distinguish the facts of this case "from a case where a couple of shots are fired following an argument." (RB 155.) Respondent

disagrees with appellant's assertion that the challenged argument suggested that appellant's case was worse than other murders because, unlike the other murders described to the jury by the prosecutor, it was not preceded by an argument. (RB 155.) Again, respondent fails to elaborate or explain his claim. Appellant contends that resort to the record and the prosecutor's exact words does show that appellant's case was worse than the shootings he described as being preceded by an argument, "tempers flare, somebody pulls a gun, shots are fired . . . somebody is dead," and followed by responses mitigating the act, "Well, I thought he had a gun. Well, I was just trying to scare him. Well, I didn't know it was loaded." (11RT 2178-79.) The prosecutor specifically told the jury that "those are cases where there's a question" as to intent to kill and malice, whereas in this case there was not. (11RT 2179.)

Respondent also argues that the challenged prosecutorial argument did not constitute improper vouching for the strength of its case but constituted "fair comment" on the evidence. (RB 155-56.) Put most simply: there was no evidence as to other murder defendants whose crimes were preceded by arguments, and flared tempers and followed by claims of lack of intent. Such evidence would have been excluded as completely irrelevant. For the prosecutor to argue that same inadmissible evidence as proof of appellant's guilt was therefore not a "fair comment" but an unfair vouching for the supposed "overwhelming" nature of the prosecutions' case.

According to respondent, the prosecutorial argument that everyone who murders is "all right in the head" was a "fair comment on the evidence." (RB 156.) Yet respondent does not explain what evidence supported the comment about other murderers – of course there was none. Respondent also argues that the argument was "based on common knowledge and experience." (RB 156.) Appellant knows of no such common knowledge or experience as to as all murderers having something wrong with them mentally and, again, respondent does not cite to any. Finally, respondent claims that the argument as to all murderers was "fair comment" on defense counsel's argument that the jury should "carefully examine the evidence" including that of appellant's "history and his behavior in the days leading up to this event." (RB 156.) Yet once again, respondent fails to explain why a defense argument to consider the evidence adduced at trial should open the door to prosecutorial argument based on evidence *not adduced at trial* or how prosecutorial argument based on claims about the world of murderers and their mental states is a "fair comment" on the evidence at this trial.

In short, despite respondent's strenuous albeit senseless arguments, there is no excuse for the prosecutor's arguments challenged herein: the comments amount to prosecutorial error.

D. The Prosecutorial Errors Require Reversal.

Finally, respondent argues that error should be deemed harmless

because the trial court instructed the jury that argument was not evidence, and further instructed the jury as to the elements of the crime, including intent, and it must be assumed that the jury followed those instructions. (RB 156-58.)

Appellant discussed at some length why the prosecutorial error was prejudicial in this case. (See AOB 140-41.) In short, the jurors would have understood the improper assertions as a confirmation by an experienced prosecutor that appellant should be found guilty of first degree murder; and the error improperly diminished the defense evidence of heat of passion and mental problems, the heart of the defense case for second degree murder.

Respondent does not address these arguments and relies instead on the fact that the trial court gave the jury standard instructions. If these instructions alone were sufficient to cure any prosecutorial error, then no prosecutorial error would ever warrant reversal, since the instructions are given in every murder case.

Moreover, there is a wealth of case law rejecting the notion that an admonition to disregard is sufficient to eradicate the prejudicial impact. (See e.g., *United States v. Kerr* (9th Cir. 1992) 981 F.2d 1050; *United States v. Simtob* (9th Cir. 1990) 901 F.2d 799; *People v. Laursen* (1968) 264 Cal.App.2d 932, 939; *People v. Perez* (1962) 58 Cal.2d 229, 247; *People v. Bracamonte* (1981) 119 Cal.App.3d 644, 650.) As the United States Supreme Court observed years ago, "The naïve assumption that

prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." (*Krulewitch v. United States* (1949) 336 U.S. 440, 453.)

ARGUMENT -- PENALTY TRIAL

V. APPELLANT'S SENTENCE OF DEATH VIOLATES THE EIGHTH AMENDMENT PROTECTION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND DUE PROCESS BECAUSE APPELLANT WAS SERIOUSLY MENTALLY ILL AT THE TIME OF THE OFFENSES AND AT TRIAL

Appellant maintains that imposition of the death penalty on a defendant such as himself, who was seriously mentally ill at the time of the offenses and at trial violates the Eighth Amendment proscription against cruel and unusual punishment. (Cf. *Atkins v. Virginia* (2002) 536 U.S. 304 [Eighth Amendment prohibits the execution of mentally retarded persons]; *Roper v. Simmons* (2005) 543 U.S. 551 [Eighth Amendment prohibits the execution of defendants under the age of 18 at the time of the crime].

Respondent begins by noting (1) that *People v. Staten* (2000) 24 Cal.4th 434, 462, and other cases have held that capital punishment is not per se cruel and unusual, and (2) that *People v. Moon* (2005) 37 Cal.4th 1, 47-48 held that and the High Court's decisions in *Atkins* and *Roper* did not alter that conclusion. (RB 160.)

Respondent's points are immaterial to the claim raised here. First, appellant's claim is not that capital punishment is per se cruel and unusual,

but that imposition of capital punishment in the particular instance in which the defendant suffers from a major mental illness is cruel and unusual. Secondly, although *Moon* did address *Atkins* and *Roper v. Simmons*, and held that neither case convinced this Court that capital punishment "per se violate[d] the Eighth Amendment[]," *Moon* did not involve a claim that imposition of the death sentence on a mentally ill defendant was cruel and unusual. (*Moon,* 37 Cal.4th at 47-48.)

As the cases cited by respondent do not address the claim raised here, neither is dispositive. Indeed, *Moon* supports appellant's argument to the extent it recognizes that "[w]hether a given punishment is cruel and unusual [] is not a static concept." (*Id.* at 47.)

Respondent's next argument is that *Atkins* does not apply since appellant is not mentally retarded and does not exhibit the "three essential elements" of mental retardation. (RB 159, 161-62.) Of course, appellant does not claim otherwise.

Rather, appellant's argument is that the three rationales underlying both *Atkins* and *Roper v. Simmons* apply as well to defendants such as appellant who suffer from a major mental illness.[6] (See AOB 144-54.) The

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[6] As explained in *Harris v. Superior Court* (1992) 3 Cal.App.4th 661, 666-67: "In an attempt to extract legal principles from an opinion that supports a particular point of view, we must not seize upon those facts, the pertinence of which go only to the circumstances of the case but are not material to its holding. The *Palsgraf* rule, for example, is not limited to train stations."

three rationales used by the High Court in *Atkins* and *Roper v. Simmons* in reaching the determination that the death penalty was cruel and unusual were: (1) the evolving standards of decency marking the progress of a maturing society; (2) whether the execution of such persons would not further the policies of deterrence or retribution; and (3) the fact that the nature of the impairment leads to an unacceptable risk of wrongful executions. (*Atkins*, 536 U.S. at 312-20.)

Appellant has discussed these three rationales at length in the Opening Brief and has shown why they apply equally to a defendant suffering from a major mental illness and refers the Court to those arguments. (See AOB 145-53.)

Respondent addresses only the first of these rationales, and that only in part. His argument is that appellant has failed to show the existence of "a national legislative consensus" against the execution of mentally ill offenders, such as was the case in *Atkins* with mentally retarded offenders. (RB 163.) However, although evolving standards of decency are "informed" by legislation, the reviewing court also considers the consensus of professional organizations with expertise germane to the issue, and its own independent evaluation. (*Atkins,* 536 U.S. at 312, 316, fn. 21.)

Respondent cites to some cases that declined to extend *Atkins* to the mentally ill. (RB 163.) Appellant has cited other cases to the contrary. (AOB 146.) Thus, the case law is not dispositive. However, as pointed out

in Appellant's Opening Brief, there is a consensus among professional psychiatric and psychological organizations in opposition to the death penalty for the mentally ill. (AOB 149-50.) Moreover, studies show an emerging consensus in the general public against imposition of the death penalty on mentally ill offenders. (AOB 148-49.) Respondent does not, and cannot, counter these indicia of evolving standards of decency.

Nor does respondent offer any rebuttal to appellant's demonstration on the other two prongs of the test for determining whether a punishment is cruel and unusual, i.e., (1) that execution of a severely mentally ill offender does not serve the policies of deterrence or retribution, and (2) that execution of the several mentally ill enhances the risk of unjustified executions. Appellant therefore respectfully refers the Court to his discussion in the Opening Brief at pages 145 through 153.

Respondent dedicates most of his argument to the complaint that appellant has not shown that his mental illness is "akin to mental retardation or being a minor." (RB 164.) He relies on *People v. Castaneda* (2011) 51 Cal.4th 1292, 1345, which held that the defendant had failed to show that antisocial personality disorder was analogous for purposes of the death penalty to either mental retardation (as in *Atkins*) or juvenile status (as in *Roper v. Simmons*). (RB 162.)

Respondent's points are (1) that mental illness can be treated with medication, whereas mental retardation and status as a minor cannot; (2)

that appellant's mental illness was variable, but "mental retardation and infancy [] do not become more or less severe over time;" and (3) that appellant was not "vulnerable to influence or susceptible to [] irresponsible behavior" as is a minor. (RB 164-65.)

Whether or not respondent's assertions are correct,[7] they are off the mark. What renders the death penalty unconstitutional for mentally retarded and minor offenders is not that mental retardation cannot be medicated or that minority is a fixed status at a specific time.

Rather, the focus of the analysis is on the individual's moral culpability on the one hand, and society's moral justification on the other. Juveniles and the mentally retarded suffer certain deficiencies not of their own making and beyond their own control. The same is true for the severely mentally ill – whether medications exist that might alleviate some symptoms or not. These facts render them, as juveniles and mentally retarded offenders, less culpable individually, while also rendering retribution and deterrence less effective as public policies.

Respondent fails to recognizes the similarities between minor and mentally retarded offenders on the one hand, and severely mentally ill

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[7] Respondent cites no legal or scientific authorities for the first claim. Yet, there is some scientific research indicating respondent's assertion is wrong or at least incomplete. See *Science Now* (Jan. 2011) "Drug to Treat a Type of Mental Retardation Shows Promise" at <http://news.sciencemag.org/sciencenow/2011/01/drug-to-treat-a-type-of-mental-r.html>.

offenders on the other, because he ignores two of the three prongs set out in *Atkins* for assessing whether a sentence violates the Eighth Amendment. Analysis must focus on the facts that (1) the severely mentally ill offender, like the mentally retarded and minor offender is less morally culpable of his acts, while a death sentence lacks the same moral justification under the policies of deterrence or retribution for a mentally ill offender, as with juveniles and the mentally retarded; and (2) execution of the mentally ill, like execution of minor and retarded offenders, poses a heightened risk of unjustified executions.

Respondent is able to point out differences in the status and mental conditions of a severely mentally ill offender such as appellant, on the one hand, and juvenile and mentally retarded offenders on the other. Indeed, many differences can also be pointed out between juvenile offenders and mentally retarded offenders. For example, juveniles grow out of their status but the mentally retarded do not; mentally retarded offenders may fall along a wide range of intelligence and may be mildly or severely retarded, whereas juvenile offenders fall within a fixed terms of years. Any specific juvenile offender or mentally retarded offender may be responsible in certain aspects or at certain times of his or her life. These distinctions, like those pointed out by respondent, are inconsequential because they do not hone in on the factors specified for assessing an Eighth Amendment claim in *Atkins* and *Roper v. Simmons*, i.e., the reduced individual moral

culpability and reduced societal justifications of deterrence and retribution, and the heightened risk of unjustified executions.

Appellant suffered from a long-standing and severe mental illness with a neurological and chemical base that was beyond his voluntary control. His mental deficiencies, like those of the mentally retarded, makes him less culpable morally and deterrence and retribution less effective for purposes of the Eighth Amendment. It does not matter that some medications may exist for some forms of mental illness, especially since the record showed that it is common for the mentally ill to stop taking or refuse to take such medications, as did appellant. (12RT 2254-56.) Nor is it constitutionally significant that appellant's mental condition waxed and waned: the point is that his mental illness was beyond his voluntary control thus reducing his moral culpability.

As to the factor of heightened risk of unjustified executions, the record here is replete with evidence of how appellant's mental illness reduced his ability to assist and to trust counsel, thus heightening the risk of an unjustified death sentence. (See AOB 152-53.)

Respondent makes a final policy argument that malingering is not a "practical problem" in assessing mental retardation, suggesting that because malingering has received "attention in the clinical literature" of mental illness, extending the *Atkins* rationale to mental illness would establish an "ill-defined category" of offenders exempt from capital punishment. This

Court is called on to decide appellant's case only, and the record in this case indicates that there was no question of malingering on appellant's part. (13RT 2601-03, 2606.) In the more general sense, severe mental illness is no more an "ill-defined" category than is mental retardation, which comprises, as noted above, a wide range of subaverage intelligences, and is currently defined not solely by a fixed IQ number but by adaptive functioning. (See <http://en.wikipedia.org/wiki/Mental_retaradation>.)

In sum, this Court should vacate appellant's sentence of death as violative of the Eighth Amendment.

VI. IMPOSITION OF THE DEATH PENALTY ON A SEVERELY MENTALLY ILL OFFENDER SUCH AS APPELLANT VIOLATES THE FEDERAL CONSTITUTIONAL EQUAL PROTECTION CLAUSE AND REQUIRES REVERSAL OF APPELLANT'S SENTENCE

Respondent argues that since mental illness is (1) "not akin to mental retardation," since mental illness can be treated; and also (2) "not akin to being a minor," which is a fixed status, defendants with mental illness are necessarily not similarly situated to minors or the mentally retarded. Respondent thus concludes that it does not violate equal protection to impose the death penalty on mentally ill defendants such as appellant while prohibiting it on the other two groups. (RB 168-69.)

Appellant disagrees. Severely mentally ill offenders are similarly situated to the other two groups, for the reasons set forth in the Opening

Brief in Arguments V and VI, and above in Argument VI: juvenile, mentally retarded, and severely mentally ill offenders are all less morally culpable due to their status and conditions, over which they have no control, and society's goals of retribution and deterrence are less applicable to all three groups for the same reason.

VII. THE PROCESS USED IN CALIFORNIA FOR DEATH QUALIFICATION OF JURIES IS UNCONSTITUTIONAL AND WAS UNCONSTITUTIONAL IN THIS CASE

Appellant contends that these arguments supporting this claim are squarely framed and sufficiently addressed in Appellant's Opening Brief, and therefore makes no reply.

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

In *People v. Schmeck* (2005) 37 Cal.4th 240, a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.* at 303.) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id.* at 303, fn. 22.) In order to avoid

detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." *(Id.* at 304.)

Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed since then, appellant has, in Arguments VII and VIII of the Opening Brief, identified the systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them. Appellant contends that these arguments are squarely framed and sufficiently addressed in Appellant's Opening Brief, and therefore makes no reply.

POST-CONVICTION REVIEW FOR TREATY VIOLATIONS

IX. POST-CONVICTION REVIEW IS THE PROPER FORUM IN WHICH TO ADDRESS THE VIOLATION OFAPPELLANT'S CONSULAR TREATY RIGHTS AND APPELLANT HAS PROPERLY PRESERVED HIS VIENNA CONVENTION CLAIM FOR FURTHER FACTUAL DEVELOPMENT AND A PREJUDICE DETERMINATION IN STATE POST-CONVICTION PROCEEDINGS

Respondent concedes that the binding requirements of Article 36 of the Vienna Convention on Consular Relations applied to appellant following his arrest and that the authorities failed to comply with its

mandatory provisions. (RB 187 [recognizing without dispute that the trial court "found that the treaty applied" to appellant; RB 190-192 [referring repeatedly to the "Article 36 violation" and the "consular notification violation" in this case]).

Respondent's only justification for the failure of compliance is to imply that there were no indications of foreign nationality at the time of Mr. Mendoza's detention. (RB 187.) This is wrong: as the trial court learned through sworn testimony, there were ample reasons for the interrogating detectives to assume that appellant was a Mexican national. (AOB 197.). At a minimum, the police were obligated in these circumstances to "inquire further about nationality so as to determine whether any consular notification obligations apply." (U.S. Department of State, *Consular Notification and Access: Questions about Foreign Nationals* [Internet page as of December 10, 2001].)[8]

Respondent also concedes that the Mexican Consulate intervened promptly once it eventually learned of appellant's detention by means other than the required notification, immediately visiting him in jail and protesting the Vienna Convention violation to the trial court. (RB 186.) Indisputably, the Mexican Consulate demonstrated by these actions that it

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[8] Archived at: <http://web.archive.org/web/20011210030250/http://travel.state.gov/notification3.html#foreign>

was ready to assist appellant from the outset of his detention, but for the admitted breach of federal and state law.

Respondent likewise recognizes that the Consulate was prevented from extending the benefits of consular assistance to appellant for eleven months following his arrest, RB 186, and that the only other recorded instance of consular involvement appears in the record three years later, as a letter to the court urging reconsideration of his "present competence to stand trial." (RB 188-189.) Based solely on this fragmentary information, respondent contends that the treaty violation was "identified and remedied." (RB 191.) This is pure supposition.

Without further factual development, it is manifestly impossible to determine if timely consular involvement might not, for instance, have led to the development of the kind of evidence that has been deemed critical to factfinders in capital cases through earlier detection of appellant's untreated and accelerating mental illness, or the prompt appointment of culturally-appropriate defense experts, or the development of pivotal mitigating evidence during any periods of the defendant's comparative lucidity during

that pivotal first year.[9] These are all indispensable functions that Mexican consular officers routinely provide in a capital case.[10]

In fact, the record reveals that within months of the first consular contact, the defense became so concerned over appellant's mental health that it arranged for his psychiatric evaluation. (See AOB 12-13.) Among other critically important indicia of longstanding and untreated mental disorders, the evaluation revealed that appellant "was twice medicated" during his initial time in custody "but stopped taking the medications both times, which is common among mentally ill patients." (AOB 13, citing 12RT 2254-56). If anything, the available record suggests only that the Vienna Convention violation may well *not* have been remedied by consular involvement eleven months after the fact—by which time appellant's capacity to respond to and benefit from consular involvement may have deteriorated dramatically.

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[9] See, generally, ABA Guidelines for the Appointment and Performance of Counsel In Death Penalty Cases, 2008 Supplementary Guidelines, 36 Hofstra Law Review 639 *et seq.* (2008).

[10] As Mexico explained to the International Court of Justice, it is "not uncommon for Mexican nationals to develop a relationship of trust with consular officers that simply does not extend to their defense attorneys. . . . Consular officers can also detect symptoms of cognitive impairments that often go undetected by lawyers who do not speak Spanish, and cannot hear the verbal cues of mental illness." Memorial of Mexico, (Mex. v. U.S.), No. 128 (Avena and Other Mexican Nationals) (I.C.J. June 20, 2003) at ¶71, < http://www.icj-cij.org/docket/files/128/8272.pdf>. Timely consular interaction with the capital defense team will also "provide guidance on cultural factors, provide names of bilingual experts, and assist in investigating the national's life in Mexico." *Id.* at 76.

Nonetheless, respondent leaps to the extraordinary conclusion that where no prejudice is apparent from a glaringly incomplete appellate record, "post-conviction review is not warranted." (RB 192.) This position is legally, factually and logically untenable. Respondent props up this astonishing presumption by treating appellant's non-exclusive and purely illustrative examples of *potential* prejudice requiring further investigation as though they were actual prejudice claims raised after receiving the benefit of full factual development by habeas counsel. This distorts the issue presented: appellant did not (and could not) assert actual prejudice in his opening brief, since the incomplete appellate record provides none of the underlying facts required to support any such assertions. Respondent's attempt to treat appellate review as a surrogate for habeas corpus procedures is logically absurd and contravenes this Court's longstanding recognition of the crucial distinction between the two proceedings. Compare, e.g., *In re Ketchel* (1968) 68 Cal.2d 397, 401 ["an appellate court must restrict its review to that which appears on the trial record"] with *People v. Diaz* (1992) 3 Cal.4th 495, 557-558 and *People v. Seaton* (2001) 26 Cal.4th 598, 643 [both finding that when the appellate record "sheds no light" on the challenged acts or omissions, a reviewing court "should not speculate"; such a claim "should generally be made in a petition for writ of habeas corpus, rather than on appeal"]; see also *People v. Mendoza* (2007) 42 Cal.4th 686, 711 [citing *Seaton* and applying its rationale to a Vienna

Convention claim, noting that "[w]hether defendant can establish prejudice based on facts outside of the record is a matter for a habeas corpus petition" and agreeing that the claim "is appropriately raised in such a petition"].)

Along with its legal impropriety, respondent's argument that appellant could not have been prejudiced by the Vienna Convention violation is conclusory and unsupported by the record; at best, it raises disputed factual assertions that can only be resolved in post-conviction proceedings. For example, respondent alleges that the prosecutor's decision to seek the death penalty in this case was inevitable because "appellant had shot and killed three people," so that "there was nothing that a consular official could have done that appellant's attorneys did not do in his defense." (RB 191.) No evidence is offered to support these allegations, which are in any event squarely contradicted by the long history of uniquely valuable interventions by Mexican consulates in persuading California prosecutors not to seek the death penalty. (See, e.g., Claire Cooper, Foes of death penalty have a friend: Mexico, Sacramento Bee (June 26, 1994), at A24 [reporting that after this Court reversed a Mexican national's death sentence in 1992, the Mexican consul general successfully wrote to the district attorney "urging that death penalty charges

not be re-filed" and quoting the prosecutor as stating: "You don't ignore a document like that"].)[11]

Moreover, it is patently obvious that not every multiple homicide invariably results in a death penalty prosecution. Even in far more aggravated circumstances than this case presented, timely Mexican consular interventions have been instrumental in securing plea agreements. (See e.g., Greg Moran, Arellano Félix Case Ends Quietly With Guilty Pleas, San Diego Union-Tribune (Sept. 18, 2007) [interventions by Mexico helped persuade federal prosecutors in San Diego not to seek the death penalty against a drug cartel leader linked to at least 20 murders].)[12] And, particularly where the defendant's mental health is at issue, the number of victims is surely not the dispositive factor in the ultimate charging decision. (See, e.g., A.J. Flick and Karen Gullo, Loughner Pleads Guilty in Rampage, Avoids Death Sentence, Bloomberg News (Aug. 8, 2012) [reporting that the legally competent but mentally-ill defendant "pleaded guilty to killing six people" after "prosecutors agreed they wouldn't seek the death penalty"].)[13]

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[11] Available via <http://www.sacbee.com/2006/08/22/7178/search-the-bees-online-archives.html>

[12] Posted at <http://www.utsandiego.com/uniontrib/20070918/news_1n18death.html>

[13] Posted at <http://www.bloomberg.com/news/2012-08-07/loughner-pleads-guilty-after-being-found-competent.html>

So, too, for respondent's argument that appellant fully "received the benefit of consular notification in the preparation and presentation of his defense." (RB 192.) It is widely recognized that "[c]riminal defense attorneys are not equipped to provide the same services as the local consulate" and that prompt consular access "may very well make a difference to a foreign national, in a way that trial counsel is unable to provide." (*Ledezma v. State* (Iowa 2001) 626 NW.2d 134, 152 [internal citations omitted].) Here, however, the appellate record reveals nothing at all about the scope of consular involvement in defense preparations for the actual guilt and penalty phases, or the degree to which the Consulate's ability to assist appellant subsequent to its delayed involvement may have been undermined by his deteriorating mental state.

Accordingly, at this stage neither respondent nor this Court can accurately gauge to what extent appellant was denied "any benefit he would have otherwise received had the consulate been properly notified," or the degree (if any) to which the defense may have "obtain[ed] that assistance from other sources." (*People v. Mendoza*, 42 Cal.4th at 711.) As in *Mendoza*, respondent's reliance here on the solitary fact that the Consulate addressed the trial court to raise "the concerns that the government of Mexico has," and that this particular effort was unsuccessful establishes only that the appellate record itself "does not reveal any prejudice." (*Ibid.*)

This is the crucial element from the Court's prior jurisprudence that

respondent seeks to obfuscate: since the record is demonstrably incomplete, whether or not appellant can establish prejudice "based on facts *outside of the record* is a matter for a habeas corpus petition" and an Article 36 claim "is appropriately raised in such a petition." (*Ibid.* [emphasis added]; *In re Martinez* (2009) 46 Cal.4th 945, 957 [Vienna Convention claim based on non-record evidence was "reviewed and considered" in the "first habeas corpus petition" to determine "whether petitioner was prejudiced. . .because he was denied the assistance the Mexican government could have provided him. . ."].)

Only two factors pertaining to prejudice can be gleaned with any certainty from the existing record. First, appellant belatedly received at least *some* of the available "benefits of consular assistance." (*Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 350.) Second, the Consulate was in his case fully prepared to "conduct its own investigations, file amicus briefs and even intervene directly" in the proceedings. (*Osagiede v. United States* (7th Cir. 2008) 543 F.3d 399, 403.) These factors lay the foundation for a future prejudice analysis, but only following full factual investigation and development through, among other things, access to subpoena power, comprehensive discovery and an evidentiary hearing. (*Id.* at 413 [remanding Vienna Convention claim for further factual development in post-conviction proceedings and noting that "a credible assertion of the assistance the consulate would have provided would entitle the petitioner to

an evidentiary hearing"]; cf. *People v. Cruz* (2008) 44 Cal.4th 636, 689, fn. 7 [claim based on Vienna Convention violation "involving matters outside this appellate record, is properly raised on habeas corpus and will be addressed and resolved in that proceeding"].) Since the necessary expansion of the record is not possible on appellate review, any examination of prejudice at this stage would be unavoidably incomplete and conjectural.

Appellant has established from the uncontroverted record both that the Vienna Convention was violated and that the Mexican Consulate was prepared to assist him as soon as it became aware of his case. He has also properly preserved the claim for habeas corpus review, by demonstrating the need for further factual development leading to a comprehensive prejudice determination. Respondent's assertion that this issue may be addressed and denied on direct appeal must therefore be rejected.

CONCLUSION

Wherefore, for the foregoing reasons, appellant respectfully requests that this Court reverse his convictions and his sentence of death, and remand for a fair trial if and when appellant is found competent to stand trial.

DATED: October 2, 2012

Respectfully submitted,

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Huber Mendoza

CERTIFICATE PURSUANT TO RULE OF COURT 8.630(b)

I, Kathy R. Moreno, attorney for Huber Mendoza, certify that this Appellant's Reply Brief does not exceed 102,000 words pursuant to California Rule of Court, rule 8.630(b). According to the Word word-processing program on which it was produced, the number of words contained herein is 12,279 and the font is Times New Roman 13.

I hereby declare, under penalty of perjury, that the above is true and correct, this 2nd day of October, 2012, in Berkeley, CA.

Kathy Moreno

KATHY R. MORENO

CERTIFICATE OF SERVICE

I, Kathy Moreno, certify that I am over 18 years of age and not a party to this action. I have my business address at P.O. Box 9006, Berkeley, CA 94709-0006. I have made service of the foregoing APPELLANT'S REPLY BRIEF by depositing in the United States mail on October,___, 2012, a true and full copy thereof, to the following:

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I hereby declare that the above is true and correct.
Signed under penalty of perjury this __day of October, 2012,
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