In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ANTHONY LETRICE TOWNSEL,** **Defendant and Respondent.**

Case No. S022998

Madera County Superior Court, Case No. 08926
Paul R. Martin, Judge

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

In a complaint filed September 26, 1989, the Madera County District Attorney filed a complaint charging appellant, Anthony Letrice Townsel, in count one, with the murder of Mauricio Martinez Jr., with malice aforethought (Pen. Code,[1] §187); in count two, with the murder of Martha Diaz with malice aforethought (§ 187); and, in count three, with the murder of Martha Diaz' fetus with malice aforethought (§ 187). It was further alleged that offenses alleged in counts one through three are committed under special circumstances within the meaning of section 190.2, subdivision (a)(3). (1 CT 50-51.)[2]

On November 2, 1989, the date set for preliminary hearing, appellant's counsel, Linda Thompson, made a "motion pursuant to [section] 1368" that appellant "be certified to the Superior Court." Counsel stated her motion was based on discussions with appellant and an unspecified "evaluation by a psychologist." (RTB 3-4) The court suspended proceedings and certified appellant to the Superior Court for a determination pursuant to section 1368. (XIII CT 3083.)

On November 3, 1989, the court appointed Dr. Charles Davis and Dr. Howard Terrell to examine appellant pursuant to section 1368. (XIII RT 3084.) In pertinent part, they were to determine if appellant was "presently able to understand the nature and purpose of the proceedings

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[1] All code references are to the California Penal Code unless otherwise indicated.

[2] "CT" refers to the Clerk's Transcript On Appeal; "RT" refers to the Reporter's Transcript. Where appropriate volume numbers will be indicated. "CTA" will refer to the transcript labeled "Additional Clerk's Transcript on Appeal." "RTA," "RTB," and "RTC" refer to the three reporters transcripts labeled A through C respectively. "ART" refers to the augmented reporter's transcript. "AOB" refers to Appellant's Opening Brief.

taken against him;" and, "presently able to cooperate in a rational manner with counsel in presenting a defense." (XIII CT 3088, 3091.)[3]

On December 1, 1989, both parties agreed to submit the competency matter on the reports of the appointed doctors. The court read and considered those reports and found appellant competent, finding it "extremely likely . . . [appellant] is malingering" in order to "escape culpability for his crime." (CT XI 2733-2734; CT XIII 3085.)

In an amended information filed January 16, 1991, by the Madera County District Attorney, appellant was charged in count one, with the murder of Mauricio Martinez Jr., with malice aforethought (§187); in count two, with the murder of Martha Diaz with malice aforethought (§ 187); in count three, with the discharge of a firearm at an inhabited dwelling (§ 246); in count four, with attempting to dissuade Martha Diaz from testifying (§ 136.1, subd. (c)(1)); and, in count five, with exhibiting a firearm in the presence of Martha Diaz in a threatening manner (§ 417, subd. (a)(2).)[4] It was further alleged as to counts one and two that they involved multiple murder special circumstances within the meaning of section 190.2, subdivision (a)(3); and, as to count two, that it involved a witness retaliation special circumstance within the meaning of section 190.2, subdivision (a)(10), involved infliction of injury resulting in the termination of the victim's pregnancy (§ 12022.9), and, involved personal use of a firearm within the meaning of sections 1203.06, subdivision (a)(1), and 12022.5. (III CT 618-621.)

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[3] A second case was pending involving a charge pursuant to section 273.5 (No. 41067) that was included in the orders regarding competency. (XIII CT 3086-3087.)

[4] The prosecutor's subsequent request to dismiss count five was granted. (V CT 1128; XIV RT 3340-3341.)

On January 17, 1991, appellant pleaded not guilty and denied the special allegations. (V CT 1076.)

On January 29, 1991, jury trial commenced with jury selection. (V CT 1078.)

On April 12, 1991, appellant was found guilty as charged, including a finding of true in the special allegations, except in count three in which appellant was acquitted. (V CT 1130-1132.)

On April 17, 1991, the penalty phase trial commenced. (V CT 1135.) On April 25, 1991, the jury returned a verdict of death. (V CT 1142.)

On September 13, 1991, the court imposed the death penalty as to counts one and two. The court imposed but stayed sentence on the remaining counts. Appellant was awarded 1,081 days of presentence custody credit. (V CT 1150-1151.)

This appeal from the judgments of death is automatic. (§ 1239, subd. (b).)

STATEMENT OF FACTS

A. Guilt Phase

In September of 1989, Mauricio Martinez, Jr and his wife, Teresa Martinez, lived at 27420 Saunders Road with their two children Crystal and Mauricio III, and Mauricio's friend Luis Anzaldua. (XI RT 2564-2565, 2609, 2652; XII RT 2826-2827; Exhib. No. 15 [photo of house].) Martha Diaz, Teresa's[5] sister, and Diaz's son, Andrew,[6] were also living with them. (XI RT 2564-2565, 2609.) Diaz had been living there for about three weeks. (XI RT 2652.) Diaz was about six months pregnant.

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[5] Numerous members of the Martinez family are mentioned herein. To avoid confusion respondent will reference them by their first names after initially stating their full names.

[6] Andrew will be referenced by his first name so as not to confuse him with Martha Diaz.

(XI RT 2571.) Mauricio Jr.'s parents, Mauricio Sr. and Connie Martinez, and his siblings, Rene Martinez, Rolando Martinez, and Marybell Martinez, lived next door at 27410 Saunders Road. (XI RT 2565, 2609, 2670, 2680.)

On September 18, 1989, Teresa saw appellant come to the window of her home and contact Diaz. Appellant asked Diaz about the baby. (XI RT 2570, 2571.) Teresa saw Diaz respond. The conversation between appellant and Diaz was not amicable. (XI RT 2571-2572.)

On the evening of September 21, 1989, Luidivina Hernandez and a friend were walking home from a store. Hernandez had known appellant and Diaz for years. Appellant pulled up in a vehicle and offered Hernandez and her fried a ride home, which Hernandez accepted. As they drove, appellant told Hernandez that he and Diaz had previously lived together. (XII RT 2732, 2737-2738.) Appellant asked Hernandez if she had seen Diaz or talked to her, and asked if Diaz had said anything about him. (XII RT 2738.) Hernandez replied that she had seen Diaz and Diaz had not said anything about him except that they were having problems. (XII RT 2738.) Hernandez told appellant that if he just left the situation alone Diaz would come back to him. (XII RT 2742-2743.) Appellant said that he did not want to have anything to do with Diaz or the baby. (XII RT 2738-2739.) He also said "if he couldn't have her nobody could[.]" (XII RT 2739.) The next day Hernandez told Diaz about the conversation she had with appellant. (XII RT 2741.)

On September 22, 1989, at about 10:00 a.m., appellant drove to Mauricio Jr.'s residence in a small brown car with an individual described as Mexican, with dark hair, mustache, and "sort of" a light complexion. (XI RT 2566-2567; XII RT 2872.) Appellant was driving the car. (XI RT 2566.) Teresa was by the entrance of the house. (XI 2567.) Appellant exited the vehicle, walked toward Teresa and handed her an envelope containing a letter. (XI 2567-2568; XIII CT 3114-3115; Exhib.

Nos. 1 [letter] and 2 [envelope].) The envelope had appellant's name and an address on it. (XI RT 2570; XIII CT 3115.) It had been mailed to appellant, along with the letter and criminal complaint, from the Madera Justice court on about September 20, 1989. (XII RT 2802-2806; XIII CT 3114, 3116; Exhib. No. 13 [complaint] and 14 [letter].)

In an angry tone, appellant pointed at the house and told Teresa to give it to Martha and tell her "she better stay inside the house." (XI RT 2568; XII RT 2873-2874.) Appellant then turned around and got back in the car and drove away. (XI RT 2569.)

Teresa called Diaz and she came out of the house. Teresa handed her the envelope and she opened it. The letter inside, dated September 20, 1989, was from the Madera Justice Court and addressed to appellant. It informed appellant that a criminal complaint charging appellant with violation of section 273.5 was on file with the court and directed him to appear in court on November 7, 1989. (XI RT 2569-2570; XIII CT 3114.)[7] Diaz' "eyes got big." (XI RT 2605.)

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[7] The letter was addressed to appellant and signed by a Justice Court Judge through a deputy clerk. Specifically, it stated:

> Dear Mr. Townsel:
>
> Please be advised that there is on file in the Madera Justice Court, Madera Judicial District, County of Madera, a criminal complaint charging you with the violation of section 273.5 PC of the State of California, a FELONY.
>
> You are hereby directed to appear in this court on 11-7-89 @ 8:30 A.M. Failure to appear will result in a warrant being issued for your arrest.

(XIII CT 3114.)

At about 5:00 p.m., Teresa and Diaz were sitting under the garage door in front of Teresa's house near the doorsteps. They were with their children and Anzaldua. (XI RT 2572, 2610-2611, 2632-2633, 2653.)[8] Rene was near a family owned ice cream truck parked between the two Martinez houses. He was preparing to go sell ice cream. (XI RT 2610, 2630, 2631; Exhib. No. 3 [diagram].) Appellant drove up in a gray Cadillac. (XI RT 2572-2573, 2610-2611, 2630, 2653.) He stopped the car in front of the Teresa's house. The driver's side was facing the house. (XI RT 2573, 2630-2631, 2653; Exhib. No. 3 [diagram].) Teresa recalled having previously seen Diaz drive that car on one occasion. (XI RT 2573, 2606.) Rene was not familiar with the Cadillac. (XI RT 2629-2630.) There was someone in the car with appellant. Teresa could not see who it was through the tinted side windows. (XI RT 2606-2607.)

From the car, appellant made a gesture with his left hand in the form of a pistol and yelled, get back in the house "'fucking little bitch [because] . . . your ass is mine after the baby is born.'" (XI RT 2573, 2611, 2633.) Anzaldua recalled the threat as, "'as soon as the baby is born you're dead. Your ass is mine.'" (XI RT 2653-2654.) Appellant then drove away toward Road 145. (XI RT 2573-2574, 2612.)

At about 8:00 p.m., Teresa, Diaz, Anzaldua, Mauricio Sr. and the children were inside of the house at 27410 Saunders. (XI RT 2574, 2612, 2654.) It was dusk out. (XI RT 2696.) Rene was in the kitchen on the phone. (XI RT 2612.) Teresa and Rolando heard what sounded like firecrackers. Teresa asked Anzaldua and Rolando, "'what was that.'" Teresa's in-laws rushed into the house. (XI RT 2574-2575, 2678.) Rene and Anzaldua recognized the sound as gunfire. Rene and Valerie looked

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[8] The garage is attached to the house and has a door leading inside. (XII RT 2828.)

out of windows facing the house at 27420 Saunders and saw appellant in that yard about five or six feet onto the lawn, shooting a handgun into the air. Appellant fired six or seven shots. (XI RT 2612-2613, 2633-2636, 2654, 2690-2692, 2697.) Appellant's gray Cadillac was parked in front of Mauricio Jr.'s house by the curb facing east. After shooting the gun appellant got into the car on the driver's side, slammed the door, and accelerated away fast. (XI RT 2612-2613, 2636-2637, 2677, 2691-2692.)[9]

Teresa and other family members went outside to investigate and found bullet shells by the driveway. (XI RT 2575, 2594-2595, 2699.) Rolando recalled they were on the street. (XI RT 2672-2673.) Sheriff's Deputy Gerald Kirkland subsequently arrived. He was told of the incident and suspect. He patrolled the area but could not find the suspect's vehicle. Some of the family members picked up shells as did the deputy. The deputy collected all the shells. (XI RT 2575, 2692-2693, 2699, 2776-2777.) They were .25 caliber shells. (XII RT 2775.) The deputy was informed that appellant was responsible for firing the rounds. (XI RT 2638.) Continuous broadcasts were made to law enforcement to be on the lookout for the suspect. (XII RT 2777.)

At about 11 p.m., appellant's gray Cadillac again drove by Teresa's house going slowly eastbound toward Raymond-Thomas. Rene and Rolando, next door, heard gunshots coming from the car. The shots came from the passenger side of the car. (XI RT 2613-2614, 2638-2639, 2671-2672, 2676-2677.)[10] The passenger window was all the way down.

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[9] Rene thought the car was a different vehicle from the one he saw appellant in earlier that day. (XI RT 2633.) But Rene and Rolando recalled it was a Cadillac they had seen Diaz drive once or twice previously. Diaz had identified it as belonging to appellant. (XI RT 2636, 2677.)

[10] Rene recalled a week or two earlier he had seen the same car follow him and his girlfriend to her house. The vehicle stopped in front of

(continued...)

Rolando saw two figures in the car. He saw a hand and the shape of a gun and "fire" coming from it that coincided with the shots he heard. (XI RT 2671-2672, 2676-2677.)

At that time, Anzaldua was in the living room of Teresa's house with Diaz and her son Andrew. Anzaldua's three year old daughter was also asleep in the room. They too heard the gunshots. (XI RT 2654-2655, 2667-2668.) The car proceeded by without stopping. (XI RT 2638.) It drove north on Raymond-Thomas at a high rate of speed and turned east on Avenue 13. (XI RT 2639.)

Teresa and Mauricio Jr. had been out that evening. (XI RT 2575-2576.) When they returned after 11 p.m. they found Diaz inside the house "shriveled up" and crying. She was scared. (XI RT 2576.)

The Sheriff's Department was called. (XI RT 2615, 2655.) The same deputy that responded earlier responded again. Rene and Rolando told him what direction the vehicle went. (XI RT 2640, 2679, 2777.) Rolando described the vehicle to the deputy. (XI RT 2679.) The deputy drove in the direction appellant's Cadillac headed but subsequently returned. (XI RT 2640, 2679.) Bullet shells were on the street. (XI RT 2673, 2679, 2777.) The family left the shells where they were found until the deputy returned. When he returned the deputy received the shells. They were .22 caliber. (XI RT 2640; XII RT 2775, 2777.)[11] Deputy Kirkland conducted surveillance of the area for 45 minutes by parking his car nearby and turning his lights out, with no result. (XII RT 2777.)

(...continued)
the house and waited. Rene and his girlfriend got out of the car they were in and the Cadillac left. Rene could not see the driver. (XI RT 2641.)

[11] It appears Rene confused the calibers, thinking they were .22 caliber at the 8 p.m. shooting and .25 caliber at the 11 p.m. shooting. (XI 2614-2615, 2640.)

The next day, family members noticed bullet holes in the garage door and through the garage window. (XI RT 2615-2616.)

On September 23, 1989, at approximately 11:30 a.m., Anzaldua, accompanied by Diaz and her son Andrew, drove his Monte Carlo toward the Old Timer's Day Parade in Madera. (XI RT 2655-2656.) As they drove through the intersection of Avenue 13 and Highway 145 they noticed a gray Cadillac parked by a mini mart. (XI RT 2656-2657.) There were two people near the Cadillac. (XI RT 2657.) Anzuldua was not wearing his glasses so he could not make out who the two people were. (XI RT 2657.) But Diaz "reacted scared. She was afraid." (XI RT 2658.) She said, "'there he is.'" (XI RT 2658.) One of the two men, a tall black male, got into the driver's seat. From what Diaz had said Anzaldua knew it was appellant. (XI RT 2669.)

Anzaldua drove into town at a high rate of speed because he "knew [he] was going to get chased." (XI RT 2658.) The driver of the Cadillac did in fact chase him. Anzaldua drove 70 miles per hour and the Cadillac matched his speed. (XI RT 2658.) Anzaldua drove down Highway 145 and turned on "I" Street. The light at that intersection was red so Anzaldua cut through a Seven Eleven parking area so he would not go through the intersection. The Cadillac sped through the intersection. Anzaldua could hear the Cadillac's tires as it turned. Anzaldua drove down "I" street at 55 or 60 miles per hour. He then made a right turn on Sixth Street heading toward the Sheriff's department a half block away. (XI RT 2658-2660.) As Anzaldua was pulling into the Sheriff's department, the Cadillac "slammed right into [a fire hydrant] on the corner of Sixth and 'I' Street." (XI RT 2660.)

Anzaldua and Diaz tried to get into the Sheriff's building but the doors were closed in front and back. Anzaldua saw a tall man with a dark complexion in blue pants and a white T-shirt walking toward them.

Anzaldua was familiar with the building because he worked there as a janitor for about a year. They went to the basement and hid for about ten minutes. After that they went upstairs and were allowed into the building. They spoke with the sergeant who was on duty. (XI RT 2660- 2662.) They were informed someone had been taken into custody. He was one of the two individuals who had been in the Cadillac. Anzaldua and Diaz went to the corner of "I" Street and Sixth Street and saw the individual there. He was a Mexican male. (XI RT 2662-2663.) Anzaldua and Diaz drove back to their residence. (XI RT 2663.)

On September 23, 1989, at approximately 12:30 to 12:45 p.m., Teresa was inside of her home, at 27420 Saunders Road, with Mauricio Jr., Mauricio III, Diaz and Andrew. (XI RT 2576-2577, 2579, 2668.) Teresa and Diaz were in the living room. (XI RT 2580, 2590; Exhib. No. 4 [diagram].) Mauricio Jr. was in their master bedroom. (XI RT 2580, 2595.) Teresa's daughter was in front of Mauricio Sr.'s home. (XI. RT 2579-2580.) Anzaldua, Valerie, Rene and Marybell were inside of Mauricio Sr.'s home. (XI RT 2663, 2681, 2693.)

A neighbor, David Sepulveda, living at 27430 Saunders Road, saw a grayish colored car that "looked like an LTD or something, Thunderbird or something." (XII RT 2708, 2707, 2715.) It drove next to his fence and stopped. He could not see the driver. (XII RT 2708, 2712-2714.) A black male, later determined to be appellant, exited the passenger side of the vehicle and headed toward a house west of his home. (XII RT 2709-2711.)

At that time Diaz bent down, picked up Andrew, stood up and saw appellant outside of their window. She took Andrew and ran back into the house. (XI RT 2580; Exhib. No. 4 [diagram].) Teresa looked out of the window and saw appellant. (XI RT 2851.) He was standing outside of the house. (XI RT 2668.) Appellant was wearing a white T-shirt and blue jeans. (XI RT 2619, 2664, 2695.) Teresa moved toward the front door

with the intention of asking appellant what he wanted with Diaz. (XI RT 2581.) As she stepped toward the door appellant opened it. (XI RT 2581, 2590.)

Appellant had a gun in his left hand down by his side. It was "silver and it was big." (XI RT 2581-2582.) Appellant walked in the house. (XI RT 2582, 2593-2594; Exhib. No. 4 [diagram].) Teresa froze. (XI RT 2581.) Appellant looked at her but did not say anything. (XI RT 2581, 2593.) His expression appeared serious but "normal." (XI RT 2581, 2592.) Appellant walked toward the hallway as Maurice Jr. walked from the bedroom down the hallway toward the entrance of the house. (XI RT 2582-2583.) Appellant and Maurice Jr. suddenly bumped into each other. Maurice Jr. did not raise his hands. (XI RT 2583, 2591, 2593; Exhib. No. 4 [diagram].) But appellant, saying nothing, immediately raised his gun and shot Maurice Jr. in the chest. (XI RT 2583, 2593, 2596-2597.) Appellant then shot Maurice Jr. again. (XI RT 2583-2584.) The shots were fired within a couple of seconds of appellant and Maurice Jr. bumping into each other. (XI RT 2596.) Maurice Jr. stepped back and appellant walked toward Mauricio Jr.'s master bedroom. (XI RT 2584; Exhib. No. 4.)

Appellant walked down the hall and took up a position where half of his body was inside and half of it was outside of the master bedroom. (XI RT 2584.) Appellant started shooting Diaz. Teresa heard three shots fired in rapid succession. (XI RT 2584, 2591, 2597.) Teresa ran toward her in-law's home next door at 27410 Saunders. (XI RT 2584, 2591.)

Rene, Valerie, Marybell, and Anzaldua had heard the numerous shots fired next door. (XI RT 2616, 2664, 2681, 2693.) Sepulveda also heard the shots from inside of his home. (XII RT 2717.) Teresa was screaming and yelling as she ran toward the house. Rene, Valerie and Marybell exited their house and met her. (XI RT 2584-2585, 2617, 2664, 2681, 2694.)

Teresa indicated the shooter was appellant. (XI RT 2668.) Teresa told them to get in the house. They went into the house. Teresa locked the door. However, she became concerned about her child who was still at Teresa's house. She started to exit Mauricio Sr.'s house but appellant exited the house next door "firing his gun up in the air." Appellant started coming toward the Mauricio Sr.'s house. Rene retrieved his rifle and loaded it. (XI RT 2585, 2618-2619, 2664, 2681-2682, 2685, 2694; XII 2711.) Teresa called 911. (XI RT 2686.)

According to Teresa, at Mauricio Sr.'s residence, she and Rene went to the open garage door and saw appellant was still coming. Marybell was also with them. Teresa encouraged Rene to shoot appellant. Rene hesitated but then shot him once. (XI RT 2586, 2590, 2683; Exhib. No. 3 [diagram].) As Rene recalled it, he, followed by Teresa, exited the side door into the garage. He saw appellant walking toward Raymond-Thomas. Appellant lifted up his handgun and shot Anzaldua's Monte Carlo, which was parked in the driveway next door, in the back of the gas tank. (XI RT 2619, 2625.) Rene was scared. He shot appellant one time. (XI RT 2620.) Marybell recalled appellant was walking away when shot. (XI RT 2686.) Appellant fell to the ground and crawled onto the lawn across the street on the corner. (XI RT 2620, 2686-2687, 2694.)[12]

Rene, who was scared, ran back inside and threw his gun into the basement and then ran to his brother's house. (XI RT 2620-2622.) Teresa went to get her child from her home. (XI RT 2586.) Rene and Teresa saw Mauricio Jr. lying face down on the porch. (XI RT 2586, 2621.) Rene called to his brother with no response. (XI RT 2621.) A neighbor went to

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[12] The neighbor, Sepulveda, recalled seeing appellant start to run across the street when he heard a shot and appellant fell down. (XII RT 2711-2713, 2716; Exhib. No. 3.)

Mauricio Jr. and claimed he was still alive. He tried using C.P.R. (XI RT 2587, 2621.) Rene ran inside to the master bedroom. He saw Diaz against the wall. She had bullet holes in her face and neck. He called to her but she did not respond. (XI RT 2621; Exhib. No. 4 [diagram].) Diaz's son Andrew was "standing in front of her crying. Looking at his mother." (XI RT 2621.) Rene's nephew, Marty, was crying in the hallway. Rene picked him up and took him back to Mauricio Sr.'s house. (XI RT 2621.) Rene called 911 and then returned to Teresa's house. (XI RT 2621.)[13]

Law enforcement personnel arrived. (XI RT 2587; XII RT 2711, 2716.) Madera County Sergeant Bob Homes responded to the area and saw appellant lying on his back. (XII RT 2718-2720.) Appellant had a "semi-automatic weapon in his right hand." (XII RT 2720.) It was a Tauras .9 millimeter handgun. (XII RT 2795; Exhib. No. 5 [handgun].) The hammer on the weapon was cocked and ready to fire. (XII RT 2720.) Sergeant Holmes kicked the weapon out of appellant's hand, which landed about four or five feet away. (XII RT 2720, 2722, 2726, 2729; XIII CT 3142-3143; Exhib. No. 7 [photo of gun].) Sepulveda went to the scene and told a law enforcement officer that appellant was the one that had done the shooting. (XII RT 2711.) Appellant, still lying on the ground, told Sepulveda to "'Shut up, don't say nothing.'" (XII RT 2711.) Sergeant Holmes asked appellant his name. Appellant provided his first and last name and admitted he "was the shooter." (XII RT 2720.) He also said he had been shot in the left shoulder. (XII RT 2720.)

Teresa saw appellant lying on his stomach on the ground at the corner of Raymond-Thomas and Saunders streets. She saw the sheriff's deputy

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[13] After paramedics arrived, Rene went to find his parents because they were in town. The next day he told his father that he had shot appellant. (XI RT 2622-2623.)

was there with appellant and walked over to appellant. (XI RT 2587-2588, 2589-2590, 2601-2603, 2667; Exhib. No. 3 [diagram].) Clemente Solis, Teresa's minister, Valerie, and Marybell were also nearby. (XI RT 2602, 2684, 2687, 2700.) Teresa asked appellant, "'Why my husband?'" (XI RT 2588, 2685.) Appellant responded that he "wasn't through yet." (XI RT 2588, 2696.) He said "Morris was going to come and finish the job." (XI RT 2589, 2685, 2696.)[14]

Sheriff Glenn Seymour arrived at the scene. (XII RT 2832.) Sergeant Holmes waived for him to come to his location. (XII RT 2832.) Sergeant Holmes asked the sheriff to watch appellant, while he investigated the shooting. The sheriff agreed to do so and he stayed with appellant. (XII RT 2720, 2832-2833, 2837-2838.) He tried to keep people away. A crowd was gathering and there were people hollering and crying. (XII RT 2836-2837, 2839.) Sheriff Seymour asked appellant what was going on. Appellant replied that "he was the shooter. 'I did it. There's no one else to worry about.'" (XII RT 2833.) A man, apparently Sepulveda, approached the sheriff and told him that he "had seen the man in the vehicle that had dropped [appellant] off" at that location earlier. (XII RT 2835, 2839-2840.) Appellant threatened Sepulveda by saying, "'Shut up or you will get it too.'" (XII RT 2835.)

The gun next to appellant was collected by Deputy Robert Van Horn from where it lay on the ground. (XII RT 2725-2726.) It was loaded with a bullet in the chamber and three or four bullets in the magazine, and had the safety off. (XII RT 2727, 2783; Exhib. Nos. 5 [weapon.] & 7 [photo of

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[14] Appellant's counsel now infers that Morris did not exist. (AOB 11, fn. 7.) No testimony substantiates that claim. In any event, appellant appears to have wanted to continue to instill fear in the family by making the statement. Marybell believed the statement was made when appellant was being put on a stretcher by paramedics. (XI RT 2688.)

gun.].) Deputy Van Horn unloaded it and ultimately secured it in an evidence locker. (XII RT 2727.) Ambulance personnel arrived and rendered medical assistance to appellant. (XII RT 2836.) As they did, appellant said, "'I was paid to do a job and I did it.'" (XII RT 2836.)

Sergeant Holmes had gone to the victim's home where he saw Mauricio Jr. on the front porch face down and deceased. (XII RT 2721.) Mauricio Jr. was lying in a pool of blood. (XII RT 2725.) He and other deputies entered the home and proceeded to the bedroom in the southwest corner of the house. They saw Diaz "down against the north wall" and she "was deceased." (XII RT 2721-2722, 2725, 2728.)

Deputy Sheriff James Angus was dispatched to 27420 Saunders Road to process the crime scene. He arrived about 1:30 p.m. (XII RT 2811-2813.) Deputy Angus collected .9 millimeter shell casings from: the driveway near Mauricio Jr. (Exhib. Nos. 9A, 9B); the front yard near the curb (Exhib. No. 9H); the walkway by the flower bed near the front door (Exhib. No. 9C); by the front door on the front porch (Exhib. No. 9D); the hallway near the front room near a wall heater (Exhib. No. 9E); on the floor of the northwest bedroom near Diaz (Exhib. Nos. 9F, 9G); on Diaz near her crotch (Exhib. No. 9I); underneath Diaz' left side (Exhib. No. 9J); and below the left rear portion of the Monte Carlo that was parked in front of the residence (Exhib. No. 9K). (XII RT 2815-2819.) Deputy Angus also recovered a bullet that had hit walls and ricocheted into the hall bathroom where it was located (Exhib. No. 9L) (XII RT 2819-2820); a bullet from underneath Diaz (Exhib. No. 9M); a bullet from the carpet behind the bed board of the bed in the room where Diaz was shot (Exhib. No. 10C); and a bullet from underneath the carpet near Diaz' head (Exhib. No. 11A). (XII RT 2821, 2822-2823.) He also located a lead fragment on the back step of the entrance into the garage. (XII RT 2792, 2824-2825.) Deputy Angus photographed the garage door, which contained bullet holes.

(XII RT 2825-2826; Exhib. No. 17.) The angles of the holes in the garage door indicated the shots had been taken from the driveway or street. (XII RT 2826.)

Subsequently, Rene found bullets at Mauricio Sr.'s house. One was in a night stand in the drawer and the other was sticking out of the stucco in back of the house. The later bullet had gone through a closet in the master bedroom and lodged in the stucco. Deputy Angus took possession of the bullets. (XI RT 2623-2624, 2821-2822; Exhib. Nos. 4 [diagram], 10A, and 10B.)

On September 23, 1989, at about 6:00 p.m., Dr. Jerry Nelson, a pathologist, was called to perform an autopsy on victims Diaz and Mauricio Jr. (XII RT 2751.) He determined Mauricio Jr. had two gunshot entry and exit wounds. (XII RT 2752.) The first entry wound was in the right side of the chest directly adjacent to the front of the right arm pit. (XII RT 2752, 2769.) The exit wound was on the right side of his chest about six and a half inches from the entry wound. (XII RT 2752.) This wound did not damage anything vital. (XII RT 2752.) The muzzle of the gun had been close enough when it fired that it left powder tattoos and residue on the left side of Mauricio Jr's face from his eyes to his chin. (XII RT 2753.) Maruicio Jr.'s head must have been turned as the bullet passed by the left side of his face, ultimately striking the right side of his chest and exiting the right side of his chest. (XII RT 2753-2754.) If Mauricio Jr. had his head downward instead of back and turned at that time it was very possible that his head would have been struck by the bullet. (XII RT 2754.) This bullet approached the body from the front and very steeply from above. (XII RT 2755.) It appeared that the victim had been crouched or bent forward at the waist when he was shot from an estimated 12 to 24 inches away. (XII RT 2755, 2767-2768, 2772.) It is a possible that the Mauricio

Jr. crouched or took a defensive posture when he bumped into appellant and saw that appellant was carrying a gun. (XII RT 2765-2766.)

Mauricio Jr.'s second wound was to the upper portion of the right shoulder, somewhat toward the front. (XII RT 2755.) The bullet had gone in the shoulder from above and proceeded downward at a 30 degree angle. (XII RT 2755-2756, 2770.) A difference in height could have added some of the degrees in the angle of the shot. (XII RT 2766-2767.) The entry wound had powder tattoos covering a two-inch area around the wound. That indicated that the muzzle of the gun was even closer than the other shot. (XII RT 2756.) This was the lethal shot. (XII RT 2756.) The bullet had passed into the lung and struck a pulmonary artery within the lower lobe of the right lung. Then it passed through the thoracic aorta, the major artery that leaves the heart. (XII RT 2756.) The bullet continued to the abdominal area where it struck the left kidney and then exited the left flank. (XII RT 2756.) Regarding this second wound, Mauricio Jr. would have been "crouched very low or bent at the waist to receive such a shot." (XII RT 2756.) The difference in trajectory between the first wound and second wound was explained by Dr. Nelson:

> "There is always some unconscious or very quick deflective movement when you're being attacked, particularly after the first shot. You're going to move, you're going to do your best to either protect yourself in some manner by bending over or rotating your body in an attempt to turn around and run perhaps. It's just a very common finding that we see."

(XII RT 2756-2757.)

Mauricio Jr. died as a result of massive internal hemorrhaging due to gunshot wounds to the right lung and the thoracic aorta. (XII RT 2757.) Dr. Nelson could not be certain which wound was inflicted first. The angles of the bullets were consistent with testimony that Maurico Jr. had bent down. (XII RT 2771-2772.)

Regarding Diaz, Dr. Nelson determined that she had been shot five times. (XII RT 2757.) She had numerous entry and exit wounds, including one wound where the bullet had exited and then re-entered Diaz' body. (XII RT 2757.) The first wound examined was in the upper portion of the right thigh. The trajectory of the bullet was from front to rear, 45 degrees downward and 25 degrees from the right. It exited the back and side of the right thigh. It would not have been a lethal wound. (XII RT 2758.) The second entry wound was located in the nape of the neck at the base of the skull. (XII RT 2758.) The bullet had exited the right side of Diaz' face near the angle of the jaw. (XII RT 2758.) It had traveled from the back 45 degrees to the right and 20 degrees downward, passing along the right side of her skull, fracturing the bone directly adjacent to the brain stem and resulting in a concussion of the brainstem. It also fractured the jaw bone near the mandible before it exited her face. (XII RT 2758-2759.) If Diaz was standing when she was hit by this gunshot, due to its vital location she would have collapsed almost instantaneously following that shot. (XII RT 2760.) This wound was lethal. (XII RT 2758.) After the bullet exited it re-entered and exited her right arm. This wound to her arm, labeled number four by Dr. Nelson, did not hit any vital structures. (XII RT 2759-2760.)

Dr. Nelson examined a third wound on Diaz. (XII RT 2759.) The entry wound was located slightly to the right of Diaz's nose and the exit wound was located in the upper portion of the right side of her neck. (XII RT 2759.) The trajectory of the bullet had been from front to rear, horizontal and 10 degrees to the right. (XII RT 2759.) It, like shot number two, would have caused Diaz to immediately collapse if she was standing when she received it. (XII RT 2760.) The bullet had passed through the nasal cavity, the right maxillary sinus and then along the base of the skull in the same area that wound number two crossed. Both bullets were involved

in the fracturing of the base of the skull and caused concussion of the brain stem which is located immediately adjacent to that particular area. (XII RT 2759.)

Dr. Nelson also noted gunshot wound number five. (XII RT 2760.) The bullet had passed through the upper portion of the left ear. It did not strike anything vital. (XII RT 2760.) He could not tell if the bullet came from the rear or front. (XII RT 2760.) Finally, gunshot wound number six was located in the front of the left thigh. (XII RT 2761.) The bullet came from below at a 30 degree angle and 25 degrees to the right, struck the femur, fracturing it, and ricocheted upward where it lodged in the muscle of the upper thigh. The bullet was recovered. (XII RT 2761.) Deputy Angus took possession of that bullet, Exhibit No. 12 A, and booked it into evidence. (XII RT 2761, 2814.)

Diaz died as a result of gunshot wounds two and three which fractured the base of the skull adjacent to the brain stem causing a brain stem concussion. (XII RT 2761-2762.) Following a brain stem concussion, blood pressure drops very quickly, respiration is effected and frequently stops, and the heart rate greatly diminishes or stops. (XII RT 2762.) Dr. Nelson further discussed the two lethal shots. He determined, given the position of Diaz's body after the shooting, that Diaz was shot in the back of the neck while she was standing and near the nose after she was down on her back with her head slightly up and looking toward the ceiling. That was also consistent with a bullet located in the carpet. (XII RT 2762-2763.)

Diaz was six months pregnant. (XII RT 2763.) The fetus appeared normal. "[T[he baby died simply because he lost his life support, his mother." (XII RT 2763-2764.)

Criminalist John Hamman tested appellant's .9 millimeter handgun. (XII RT 2779, 2782-2783, 2795-2796.) The magazine could hold 15 rounds and the chamber could hold one additional round for a total of 16

rounds. (XII RT 2797.) Hamman determined that the gun was functional. It will fire in single-action mode where the hammer is already back, and then takes a light trigger pull to shoot; or will fire in double-action mode where the trigger is farther forward and pulling the trigger requires more force. Doing so will cause the hammer to cock and then fire. (XII RT 2783-2785, 2795-2796.) The cartridge .9 millimeter casings gathered at the murder scene came from the firing of appellant's gun. (XII RT 2785-2788, 2796-2798; Exhib. Nos. 5 & 9 A-K [cartridge casings].) The bullet recovered from the hall bathroom at the murder scene was also determined to have been fired from appellant's gun. (XII RT 2787-2789, 2870; Exhib. No. 9L [bullet]).) The bullet that was recovered from underneath Diaz was determined to have probably been fired by the same gun. (XII RT 2789-2790, 2871; Exhib. No. 9M [bullet].) The bullet from the carpet behind the bed board of the bedroom murder scene and one of the bullets subsequently located by the family were also determined to have probably been shot by appellant's gun (XII RT 2790-2791; Exhib. Nos. 10A & C [bullets]); and the bullet from underneath the carpet near Diaz's head and a second bullet recovered by the family were determined to have been absolutely fired by appellant's gun. (XII RT 2790-2791, 2793, 2823; Exhib. Nos. 10B & 11A [bullets].) Another piece of a bullet, the one taken from Diaz' leg, was determined to have probably been fired by appellant's gun. (XII RT 2761, 2793-2794, 2814; Exhib. No. 12A [bullet piece].)

Hamman also testified that a .9 millimeter handgun is substantially more powerful than a .22 or .25 caliber handgun. (XII RT 2794.) Hamman knew of no manufacturer who made a .22 or 25 caliber handgun that came with a magazine that could hold 15 bullets. (XII RT 2800.)

1. Defense

a. Frank V. Powell, Ph.D

Frank V. Powell, Ph.D. was appellant's first witness. (XII RT 2879.) Dr. Powell is a psychologist. He is not a medical doctor. He is employed in private practice and spends most of his time evaluating individuals' personalities and functional intellectual levels. (XII RT 2879-2880, 2953, 2960.) Dr. Powell was hired by the defense. He charges $100 an hour for office time and $150 an hour for testimony, or alternatively $500 for half a day's testimony including travel. (XII RT 2953-2954.)

On January 15, 1991, at defense counsel's request, Dr. Powell met with appellant.[15] Dr. Powell had not been provided any police reports or other background information prior to appellant coming to his office. Dr. Powell interviewed appellant to get some history, check his mental status, and to "find out the reason for his being there." (XII RT 2881-2882, 2893, 2896, 2898-2899.) He did not know what appellant's mental status was like before his crime. (XII RT 2898.)

Dr. Powell opined appellant was aware and oriented "as to the time and the place and the person." (XII RT 2883, 2901.) He said appellant processed questions and responded slowly. He opined that appellant was "concretistic," i.e., appellant thought in a concrete and formalized way. (XII RT 2883.) Appellant's speech was clear, his eye contact was good, and he was cooperative. (XII RT 2884.) Appellant's emotional level was "normal or usual." (XII RT 2884.) His vocabulary was limited. (XII RT 2884.)

Dr. Powell asked appellant why he was in jail and appellant replied that "they said that [I] . . . killed [my] girlfriend and her brother-in law."

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[15] After this office visit with appellant, Dr. Powell did not see appellant until he testified on April 1, 1991. (XII RT 2896.)

(XII RT 2906.) Dr. Powell asked him if there was a weapon involved and appellant responded "yes, a gun." (XII RT 2906.) Appellant advised Dr. Powell that he had been in special education classes while attending public school. (XII RT 2956-2957.)

Appellant advised Dr. Powell that he was taking medication for the pain of his bullet wound, and he was also taking Elavil. Dr. Powell thought Elavil was antidepressant medication. (XII RT 2884-2885, 2900.) The only thing Dr. Powell could do to determine if appellant's medication would affect his behavior, verbalization, or thought processes was ask appellant when he took his medication. Appellant said he was taking the medication before bedtime. Dr. Powell felt the medication would have little effect on appellant's functioning level since it was 1:00 p.m. or 2:00 p.m. when he saw appellant. (XII RT 2899-2900.)

Dr. Powell did not believe appellant was a "valuable historian." (XII RT 2884.) Dr. Powell opined that appellant's judgment and memory were typical for a person with mental retardation. But while he did not believe appellant was depressed, overly anxious or preoccupied, he acknowledged that depression, anxiety or appellant's preoccupation with his situation could influence appellant's thought processes and attention. It would not be abnormal for appellant to be pre-occupied with his situation. (XII RT 2905, 2897-2898, 2955.)

Dr. Powell testified that appellant's mood, affect and behavior could vary in different examination circumstances and with different psychologists. Part of Dr. Powell's opinions about appellant were based on appellant's affect and emotional response as displayed to Dr. Powell personally. (XII RT 2898, 2900, 2955-2956.)

Dr. Powell administered the Wechsler Adult Intelligence Scale (hereafter Weschler), the Wide Range Achievement Test, Trials A and B, the Bender Gestalt test, and the Gilmore Oral Reading Test.

(XII RT 2885.) The Wechsler test "attempts to measure global or adjusting intelligence." (XII RT 2886.) Dr. Powell was asked if he was trained to be able to determine if someone is manipulating the results of the test and he responded, "Well, we try. And most of the training that we receive is experiential training as contrasted to classroom training." Dr. Powell felt over years one acquires experience "in getting a sense of when people are looking at you, when they're working hard and when they're just kind of leaning back and letting it all happen." (XII RT 2887, 2910.) Determining if someone in malingering on the tests, including all the subtests used, is subjective. (XII RT 2910, 2913, 2915, 2917, 2920, 2924, 2958.)
Dr. Powell acknowledged there is a study by "Heaten, Smith, Layman and Vogt"[16] showing individuals, who were given no training on how to fake or malinger, were able to fake the results of the Wechsler test without the examiners knowing it . . ." (XII RT 2925-2926.) He further admitted that a "criticism that has been suggested by some critics of the Wechsler" is that "there is no easy way to determine whether someone is malingering . . ." (XII RT 2925.) Dr. Powell "attempt[s] to work with the individual" to get as good a measure as he can get at the time of the testing. (XII RT 2925.) Dr. Powell opined appellant did not malinger on his testing. (XII RT 2887, 2915, 2935-2936.)

Dr. Powell stated he did not know if people who are charged with crimes are sometimes less honest than others when taking his tests. (XII RT 2932.) He acknowledged that it is possible for a person to deceive him and if someone were successful at it he would not know it. (XII RT

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[16] Respondent believes the spelling of the names for the authors of the study may be incorrect. (See e.g., Heaton, R. K., Smith, Jr., H. H., Lehman, R. A. W., & Vogt, A. T. (1978), *Prospects for faking believable deficits on neuropsychological testing,* Journal of Consulting and Clinical Psychology, 46, 892–900.)

2932.) Dr. Powell admitted "I don't think that [psychologists] do a bit better at [determining whether someone is lying] than anybody else, truth be known." (XII RT 2933).)

On the Wechsler test, Dr. Powell stated appellant's "adult intelligence test on his verbal I.Q . . . was 62." (XII RT 2887-2888.) "General category would be that of mental retardation." (XII RT 2888.) Dr. Powell felt comfortable saying the score placed appellant in the "bottom two percent" of the country. (XII RT 2888.) On the Wechsler, Dr. Powell also obtained a "performance I.Q. of 54." (XII RT 2888.) That is "less than one percentile." (XII RT 2888.) That is "again in the general category of the mentally retarded." (XII RT 2888.) Dr. Powell opined that appellant's overall I.Q. was 59. (XII RT 2937-2938.) Based on that score Dr. Powell rated appellant as "mildly mentally retarded." (XII RT 2947.) Dr. Powell testified that mild mental retardation would be noticeable to friends, family, teachers and counselors. (XII RT 2947.)

Dr. Powell testified that the Wechsler has been criticized as a "biased instrument in that it often times demands more than some people have been exposed to either in their homes or . . . else in the school process." (XII RT 2924.) "[T]he results of the Wechsler test could be caused by the lack of learning and experiences on the part of the individual taking the test . . ." (XII RT 2925.) For instance, test scores could be lower because "an individual who was in remedial classes in school wound [not] have the opportunities to learn as much as another individual so his test [results] would be lower because of that." (XII RT 2925.) "And one's verbal skills and vocabulary would affect the result of the test as well . . ." (XII RT 2925.) The children's Wechsler has been particularly criticized "on behalf of the Black population." (XII RT 2924.)

Dr. Powell also testified that "the results [of a Wechsler examination] could change based upon the mental state of the person taking the test on the day he took the test . . ." (XII RT 2924-2925.)

The Wide Range Achievement Test consists of three parts: a section where an individual is asked to read a series of words aloud and the tester determines if he reads the words correctly; a part where the individual is given words and he writes them using either printing or cursive (although in this case Dr. Powell wrote the words as appellant verbally spelled them because appellant was shackled); and an arithmetic portion where the individual does as many math problems as he can in ten minutes. (XII RT 2889, 2929-2931; Exhib. No. 18 [arithmetic and spelling portion].) Appellant scored in the first percentile in each area which: for reading, is "what would be the grade equivalent of the end of the fourth grade" (XII RT 2890, 2928-2929); for spelling, would "translate to roughly around the end of the third grade" (XII RT 2890); and for arithmetic, "would place [appellant] at about the beginning of the third grade . . ." (XII RT 2890.) Dr. Powell opined the results were consistent with his results on the Wechsler examination. (XII RT 2890.)

Dr. Powell next administered the Gilmore Oral Reading Test. (XII RT 2890, 2931.) It "requires a person to read aloud some paragraph. And following which [the examiner] ask[s] [the person] some questions about that which [he] had just read." (XII RT 2891.) "On reading a paragraph out loud [appellant] passed at the fifth grade level. He barely passed at the sixth grade, and then he failed the seventh grade level for reading." (XII RT 2891, 2932.) Appellant also "passed at the fourth grade level for understanding what he had read. He did not pass at the fifth grade level." (XII RT 2891.) For the Wide Range and Gilmore Oral tests determining malingering or faking is "subjective on the part of the examiner as well." (XII RT 2932.)

Dr. Powell next administered a "Trail Making Test." (XII RT 2892.) It is a screening device to see if there are noticeable difficulties as a result of "brain injury that the individual may have sustained in the past." (XII RT 2892.) Appellant was slow at completing the test but "he did not demonstrate the kind of confusion that a brain damaged patient usually demonstrates." (XII RT 2927.) Dr. Powell also followed up with the Bender Gestalt Test (hereafter Bender test) which "again is a screening instrument for brain function." (XII RT 2892-2893.) On the Bender test appellant "did well enough . . . by an adult scoring level that [Dr. Powell] did not feel that using this as a single instrument that [he] was finding any evidence of brain dysfunction." (XII RT 2892, 2926-2927.) Appellant was able to follow instructions on both tests. (XII RT 2927-2928.) Neither test showed "evidence of brain dysfunction." (XII RT 2892.) Appellant also said he could not remember having a head injury. (XII RT 2927.) Dr. Powell therefore "developed the opinion that this individual was mentally retarded for familial purposes rather than for brain lesion purposes." (XII RT 2892.) Dr. Powell stated that the tests he gave are widely accepted by psychologists. (XII RT 2893.)

Of the tests that he administered Dr. Powell opined that particularly the "intelligence test indicated" that appellant "was in the area of mental retardation." (XII RT 2892.)

Dr. Powell stated there are different levels for mental retardation. Some people who are mentally retarded can drive an automobile and hold employment that includes non-complex tasks with supervision. "There are limitations to their employment just as there are limitations to their ability to understand, comprehend, and remember." (XII RT 2894-2895.) Dr. Powell opined that "some [mentally retarded] people" with an overall I.Q. of 59, could pass both the written and driving parts of the driver's license test. (XII RT 2937-2938.)

Dr. Powell testified that he would "not expect someone with [appellant's] mental processes to read the newspaper." (XII RT 2961.) Dr. Powell does not believe there would be "an interest" in it and "many of the stories probably would not be comprehended." (XII RT 2961.)

Dr. Powell testified that after his testing he received the reports of one psychologist and two psychiatrists from the defense. Subsequently, the District Attorney also provided him with the reports of the two psychiatrists. (XII RT 2894.) Lea Christensen, Ph.D, had been first to test appellant, followed by Dr. Charles Davis, Dr. Howard Terrell,[17] and then Dr. Powell. (XII RT 2947.) Dr. Christensen, a psychologist and defense expert, tested appellant on October 25 and 27, 1989. (XII RT 2936.)

Dr. Christensen administered some of the same tests that Dr. Powell did. (XII RT 2933.) She and Dr. Powell had a different view of appellant. (XII RT 2933.) Dr. Christensen said she found evidence of hallucinations. Dr. Powell found no such evidence. (XII RT 2933.) Christensen found "organic hallicinosis" and Dr. Powell did not. (XII RT 2947.) Dr. Christensen felt there was mental retardation based on organic etiology but Dr. Powell disagreed. (XII RT 2933-2935.) In fact, because Dr. Powell found no evidence of "any brain damage or organic problems" he did not recommend a referral for neuropsychological testing. (XII RT 2954.) Moreover, Dr. Christensen found appellant had a seizure disorder. Dr. Powell "did not get from [appellant] a report of having seizures."

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[17] Dr. Terrell and Dr. Davis, both psychiatrists, had previously examined appellant for purposes of a competency hearing. On December 1, 1989, both parties agreed to submit the competency matter on their reports. The court read and considered those reports and found appellant competent, and further found it "extremely likely . . . [appellant was] malingering" in order to "escape culpability for his crime." (CT XI 2733-2734; CT XIII 3085.)

(XII RT 2947.) Dr. Powell also noted that, unlike him, Dr. Christensen found appellant was not oriented as to time, place or person. (XI RT 2936.)

Dr. Christensen's I.Q. scores for appellant, on the same Wechsler test Dr. Powell gave, were lower than those found by Dr. Powell. (XII RT 2935, 2956.) In their testing they would have used the same instruments, manual, sequence and rules of administration. (XII RT 2956.) Dr. Powell hypothesized that appellant may have picked up points on the verbal I.Q. in his testing because: appellant was "in a better mental state" when he tested with Dr. Powell; appellant was "taking fewer drugs" when he tested with Dr. Powell; or, appellant "had practice in effect by having had [the testing well over a year] before." (XII RT 2935.) Dr. Powell added that "a person's ability to achieve on the Wechsler test" could be affected adversely by the fact that the person was in an infirmary in pain under heavy medication and wearing a halo to prevent their head from moving. (XII RT 2958.)

Dr. Powell acknowledged that Dr. Christensen found appellant to be moderately to severely mentally retarded, while he only found appellant to be mildly mentally retarded. (XII RT 2946-2947.) Dr. Powell testified that most of his testing would have been inappropriate if appellant was profoundly mentally retarded. (XII RT 2955.)

Dr. Powell also recognized that the two psychiatrists who had interviewed appellant at about the same time as Dr. Christensen both found appellant to be "malingering and faking." (XII RT 2936.) Dr. Powell said one of the two psychiatrists, Dr. Terrell, had more precisely concluded appellant was malingering but there was a "small possibility" of a concurrent mental disorder. The "[n]umber [one] diagnosis was malingering." (XII RT 2958, 2960-2961.) Dr. Charles Davis, the other

psychiatrist, found appellant's diagnosis to be malingering. (XII RT 2961.)[18] Dr. Powell did not feel that if a subject found out he had been determined to be a malingerer, he would try to do a little bit better on the next test so he would not be discovered to be a malingerer again. (XII RT 2948.)

Dr. Powell noted that Dr. Davis had appellant read the police report of Deputy Van Horn out loud and appellant's only problem was that he mispronounced "Mauricio." (XII RT 2937.) When asked if that would not add proof that appellant was malingering on at least one of the Wechsler tests administered by either Dr. Christensen or himself, Dr. Powell stated, "I don't know about Dr. Christensen['s testing] because" Dr. Powell was not there to administer and observe it. (XII RT 2937.) He did not feel appellant's reading "necessarily" conflicted with his results. (XII RT 2937.)

Dr. Powell acknowledged that "[i]n general [the answers received from appellant by the other three examiners] . . . were not in conformity with the information that [he] was obtaining from him." (XII RT 2948.) He pointed out for instance that for Dr. Christensen, appellant could transfer four symbols from a code but with Dr. Powell he could transfer ten; for Dr. Christensen, he could not repeat four numbers forward but with Dr. Powell he could; for Dr. Christensen he could not repeat two numbers backward, but with Dr. Powell he could; for Dr. Christensen he did not know what a penny was, but with Dr. Powell he knew what a penny was; and, for Dr. Christensen he was not able to identify the similarity between an orange and a banana, but with Dr. Powell he could. (XII RT 2949-2950.) Appellant also gave specific information about his family to

[18] Dr. Powell said this did not affect his opinion about his own results. (XI RT 2936.)

Dr. Powell but he apparently could not do so in his previous examinations. (XII RT 2950-2951.) In appellant's recount of his crime, he told Dr. Powell that he was charged for killing his girlfriend and her brother-in-law but in the other examinations appellant told the examiners that he did not know who Diaz was. (XII RT 2951.) Dr. Powell finally acknowledged that "[g]iven all the reports, there is a possibility that at some time or place [during the various evaluations appellant] was malingering." (XII RT 2952-2953.)

b. Lea Christensen, Ph.D.

Lea Christensen, Ph.D., next testified for the defense. (XIII RT 2985.) Dr. Christensen testified that she is not a medical doctor but has been a licensed clinical psychologist since January of 1985. She is the only psychologist in Madera County in private practice. (XIII RT 2985, 3049, 3132.) Dr. Christensen has worked in various institutions including five years at Central Valley Regional Center. There she worked with the developmentally disabled. In doing so, she has dealt with people with I.Q.s of zero to 80. (XIII RT 2986.)

In October of 1989, at defense counsel's request, Dr. Christensen examined appellant in a hospital room in the Madera Jail. (XIII RT 2987.) Prior to making contact with appellant, defense counsel spoke with Dr. Christensen and gave her appellant's name, location, and advised her of the charges. Counsel told her that she was "having a problem figuring out how to approach [appellant] because [counsel] couldn't . . . make sense of him." Counsel said she could not get appellant to focus or cooperate. (XIII RT 2988-2989, 3051.) Counsel thought appellant was probably psychotic. (XIII RT 3051.)

On October 25, 1989, Dr. Christensen made her first contact with appellant. (XIII RT 2989, 3050.) Dr. Christensen believed appellant had been treated at Valley Medical Center that day and he was "under" seizure

medication. (XIII RT 2987-2988, 3025.) She did not see any medical records but a nurse told her he was taking medicine for a seizure disorder. (XIII RT 3054.) Dr. Christensen did not know if appellant was also using Elavil. (XIII RT 2988.) Dr. Christensen had requested medical records from defense counsel but counsel did not provide them. (XIII RT 3054-3055.)

Appellant was "wearing some type of head harness that was immobilizing his head movements." (XIII RT 2988.) He was on a table and it was not a controlled setting." (XIII RT 3025.) The room was not well lit and appellant was tired and in physical pain. (XIII RT 3025-3026, 3080.) Appellant had a bullet in his neck. (XIII RT 3074.)
Dr. Christensen conducted a mental status examination of appellant. (XIII RT 2990.) A mental status examination checks the person's current ability to listen, focus and respond to determine if there is anything that might interfere with the subject's performance on the testing. (XIII RT 3040.) During the examination appellant seemed to be listening and cocking his head. Dr. Christensen asked him if he was hearing voices and appellant replied, "yes." She asked him what the voices said and appellant gave her a vague answer. (XIII RT 3051-3052.) She ultimately opined he was significantly distracted by auditory hallucinations throughout her examination and subsequent testing. (XIII RT 3025, 3080.)
Dr. Christensen also opined appellant was not oriented as to time, person or place and had organic hallucinosis. (XIII RT 2990, 3073.)

Based on defense counsel's statements to her Dr. Christensen went in "looking for one kind of individual" but after discussing things with appellant, and after viewing his mental status, she ended up seeing a "different person than [she] was expecting." As a result, she felt she had not "brought quite the right implement" to test him. (XIII RT 2989, 2991, 3041, 3050-3051.)

Dr. Christensen nevertheless started her testing. (XIII RT 2991, 3108-3109.)[19] She explained that despite all the "auditory hallucinations and the other factors . . . present" she decided to proceed with testing because she did not believe appellant's hallucinations were a temporary condition, defense counsel had an immediate problem, and she "needed to have the information as soon as possible." (XIII RT 3081, 3108-3109.) She said in such circumstances she will "still try to get testing" done because she wants to know how the subject is currently functioning, "[w]hether or not [he is] hallucinating, whether or not [he is] under medication, whether or not [he has] a fever, whether or not [he is] having seizures." (XIII RT 3109.) Dr. Christensen testified that she has evaluated people who have had "seizures every minute and still have worked hard because that was their level of functioning under stress . . ." (XIII RT 3109.) She testified that she attempts to "compensate and deal with those particular factors." (XIII RT 3109.)

Dr. Christensen started with "the verbal portion of the I.Q. test," the Wechsler Adult Intelligence Scale –Revised (WAIS-R) (hereafter Weschler). (XIII RT 2991, 2998, 3001.) "The verbal portion consists of several questions that have to do with learning that one gets in school." (XIII RT 2991.) It has various subtest components. (XIII RT 2991-2992, 3001.) The first verbal subtest is the "information" test consisting of questions that start simple and gradually get very complex. (XIII RT

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[19] Dr. Christensen admitted that in another Madera County homicide case she proceeded with I.Q. testing of the defendant nearly to completion even though she knew something was wrong. She attempted to explain it by saying she could not pinpoint what the precise problem was until the very end of the second testing session, when she concluded the defendant was under the influence of a drug. (XIII RT 3081-3083.) Dr. Christensen also admitted that about a year before her testimony in this case, she diagnosed a one-week old baby. (XIII RT 3096.)

3001.) On that subtest appellant got "two questions right, that results in a [raw score of two and a] scale score of one." (XIII RT 3002, 3057.)[20] Another verbal subtest used was the Digit Span subtest. (XIII RT 3002.) It consists of the examiner giving a sequence of numbers which the subject repeats, and then a second sequence of numbers which the subject reverses in his mind and then states. (XIII RT 3002-3003.) On this subtest, appellant received a raw score of five and "got a scale score of two." (XIII RT 3003, 3057.) The next verbal subtest was the "vocabulary" test. It consists of putting a paper with a list of words in front of the test subject and asking him to define the words until he misses four in a row. The words are of increasing difficulty. (XIII RT 3004.) Appellant defined one word for full credit and another word for half credit, and did not define any other words. (XIII RT 3004-3005.) His raw score was three and his scaled score was one. (XIII RT 3005, 3058.)

Another verbal test was the arithmetic subtest. (XIII RT 3005-3006.) It involves orally presented arithmetic problems. Appellant was able to answer the first two questions but missed the next four. Appellant's raw score was two and his scaled score was two. (XIII RT 3006-3007, 3058.) Dr. Christensen said appellant could not add the numbers one plus two and he had no conceptualization of subtraction. (XIII RT 3068.)[21] Dr. Christensen acknowledged that, in a subsequent examination, Dr. Powell found appellant could add. (XIII RT 3072.) Dr. Powell also found appellant understood the concept of subtraction. (XIII RT 3072-

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[20] Raw scores on the subtests are converted to scale scores. (XIII RT 3003-3004.)

[21] Dr. Christensen commented that even if she knew appellant had taken a mathematics test that involved adding more complex numbers it would not change her opinion about appellant because she could not know if the tests are comparable. (XIII RT 3068-3070.)

3073.) When asked if she disagreed with Dr. Powell, Dr. Christensen answered, "No, all I'm saying [is] on the day I saw him he didn't have that concept." (XIII RT 3073.)

The next subtest was the "comprehension" test. (XIII RT 3007.) In that test the examiner asks social questions about the rules of society. (XIII RT 3007.) Appellant received a raw score of two and a scale score of two. (XIII RT 3008, 3059.) The last verbal subtest was the "similarity" test. (XIII RT 3009.) It asked questions like how are oranges and bananas the same, and how is a dog and a lion the same? (XIII RT 3009.) Appellant could not answer questions of this type. (XIII RT 3009.) He received a raw score of zero and a scale score of one. (XIII RT 3010, 3059.) Dr. Christensen opined appellant did not understand the concept "'same.'" (XIII RT 3059.) Dr. Christensen stated the verbal I.Q. level she obtained from appellant that day was 53. (XIII RT 2992-2993, 3017.)

Dr. Christensen then administered the "drawing test" which consists of having the subject draw a person, house and tree. The drawings are scored for personal features and I.Q. (XIII RT 2993.) Dr. Christensen said it is a "projective test" that is subjective but has a "fairly standardized scoring criteria for use as an I.Q. test." (XIII RT 3056.) Dr. Christensen testified it "isn't accepted by the State of California [as a] I.Q. test especially in special education circumstances." (XIII RT 3056.) On redirect she stated it is "one of the accepted tests for use in the school setting." (XIII RT 3114.) She stated currently it is used with Black students, along with I.Q. tests, to determine if the student is mentally retarded. (XIII RT 3114.) Dr. Christensen acknowledged that it is possible to be manipulated by the person taking this test. (XIII RT 3056.) Dr. Christensen had appellant first draw a male figure and she gave him a "ratio I.Q. score of 37. His performance was the same as [someone] four year[s], nine months old." (XIII RT 2993-2995.) Appellant then, at her

request, drew a female figure. She did not score that figure because the male figure was "highest." (XIII RT 2995.) Appellant next drew a house with windows and a door but no roof. (XIII RT 2995-2996.) That drawing was scored as a "personality feature." Dr. Christensen said "metamorphically not having a roof is seen to indicate lack of intellectual functioning." (XIII RT 2996.) There was "no scale whatsoever," for scoring the house. Dr. Christensen admitted "we don't have a method by which to set a mental age for the house." (XIII RT 2996-2997.) Appellant next drew a tree. (XIII RT 2997.) Dr. Christensen could not find the results of that test when she testified but recalled appellant was able to draw a tree. (XIII RT 2997.)

Dr. Christensen came back to see appellant on October 27, 1989. (XIII RT 2990.)[22] Dr. Christensen thought this time she had testing implements that would be more appropriate for appellant. (XIII RT 2997.) She brought the Bender Motor Gestalt Test (hereafter Bender test) and Street Survival Skills questionnaire along with the remaining performance section of the Wechsler. (XIII RT 2997-2998, 3010.)

Dr. Christensen initially conducted a mental status examination. (XIII RT 2990.) She again found appellant not to be oriented as to time, person or place. (XIII RT 2990.) According to Dr. Christensen, appellant did know it was October but did not know the day or year; nor did he know he was in jail. He also claimed not to remember her occupation. Since her last visit he seemed to remember little but her visual appearance. Appellant also indicated he did not remember her name or what she was going to do, five minutes after she told him. "That is not a common experience, even for I.Q.s below 50." She concluded appellant had an exceptionally poor

[22] On October 25, 1989, and on October 27, 1989, Dr. Christensen spent a total of about four hours with appellant. (XIII RT 3030.)

memory. (XIII RT 2990, 3070-3071.) Dr. Christensen opined appellant was not malingering because a malingerer would not think that an examiner would think he was mentally retarded if he said he did not remember her. "A malingerer will think of something different." (XIII RT 3071.)

Dr. Christensen administered the Bender test. She stated it is used to determine neurological damage or neurological chromosomal damage. It is also used as an I.Q. indicator. It is possible for a person taking this test to manipulate it as well. In this test a subject is handed a stack of plain paper and a pencil with an eraser and shown cards with simple designs. Then the subject is asked to copy the cards to the best of his ability. It can be timed but Dr. Christensen did not do so. Also, the cards were not laid down in front of appellant because they were working off of a hospital tray table. Dr. Christensen held the cards. With this test, using the Koppitz scoring method normally reserved for children, Dr. Christensen gave appellant an age equivalency of six years and a ratio I.Q. of 29. (XIII RT 2996, 2998-3000, 3057.)[23]

Dr. Christensen next continued with the Weschler by administering the performance subtests. (XIII RT 3000-3001, 3010.) The first subtest was the "picture completion" subtest. It consisted of showing appellant pictures from a booklet and asking him to tell the examiner what was missing from each picture. (XIII RT 3010.) Dr. Christensen said it appeared appellant did not understand the concept of "missing" as he was not able to answer any of the subtest questions. (XIII RT 3011-3012, 3059.) Appellant received a raw score of zero and a scale score of one. (XIII RT 3012, 3059.) The next subtest was the "picture arrangement test." (XIII RT 3012.) In this test appellant was supposed to arrange picture cards

[23] Dr. Christensen stated that within her field the Bender is considered a valid test. (XIII RT 3056-3057, 3114-3115.)

to make a story. The exercise is timed. (XIII RT 3012-3013.) Appellant achieved a raw score of one and a scaled score of two. (XIII RT 3014, 3059.) Next appellant did the "block design" subtest. (XIII RT 3014.) It consisted of matching designs of nine blocks with designs shown by the examiner. (XIII RT 3014.) Appellant got a raw score of two and a scaled score of three. (XIII RT 3015, 3060.) Appellant next did an "object assembly" subtest. (XIII RT 3015.) It is a jigsaw puzzle. He achieved a raw score of five and a scaled score of one. (XIII RT 3015, 3060.) The final subtest was the "digit symbols" test. (XIII RT 3015.) It is a symbol transfer test. (XIII RT 3016.) Appellant's raw score was four and scaled score was one. (XIII RT 3016, 3060.) Using a manual, Dr. Christensen calculated appellant's performance I.Q. as 50. (XIII RT 3017.)

By adding the scores from the verbal test, 53, to the score on the performance test, and using scores from a table on the Weschler, Dr. Christensen found appellant's full scale I.Q. to be 47. (XIII RT 3017.) Dr. Christensen attempted to explain how the higher numbers of 50 and 53 could lead to a full scale result of 47. She stated given the low numbers and the methods she used to make the calculation, "[s]ometimes your average isn't what it appears to be, your average it works out arithmetically. I[t] just doesn't look to make common sense to us." (XIII RT 3111-3112.) Dr. Christensen initially testified that the "full scale I.Q." fell within the "moderate" range of mental retardation although "the verbal and the performance I.Q. test[s]" fell within "the mild" range. (XIII RT 3031.) Later she testified that she had determined appellant had "moderate to severe retardation." She believed the cause of appellant's retardation might be a seizure disorder. (XIII RT 3073.)[24] She conceded, however, that

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[24] Dr. Christensen testified that the most common I.Q. cut-off for someone to be considered mentally retarded is 70. (XIII RT 3050.)

without medical records or a good history from the family there is no way to know if appellant's mental retardation is due to a seizure disorder. (XIII RT 3073-3074.) Dr. Christensen stated mental retardation can impact abstract thinking, judgment and long term memory. (XIII RT 3031-3032, 3044.) She said some persons with I.Q.s of 47 can read, some up to a third or fourth grade level. She would not expect them to be able to read a newspaper with comprehension. They may comprehend some cartoons and simple jokes. (XIII RT 3077.)

Dr. Christensen also administered the Street Survival Skills questionnaire. (XIII RT 3017.) It too can be subject to manipulation. (XIII RT 3063.) Manipulation detection on this test is also subjective. Dr. Christensen's method is to look for whether or not appellant's answers fit a pattern of fluid responses. (XIII RT 3063.) The test consists of nine booklets of questions and is used at regional centers. (XIII RT 3017-3018, 3037-3038.) It is used to determine a person's "functional abilities in life." (XIII RT 3020-3021, 3037.) The test does not necessarily indicate whether a person of low I.Q. is trainable in functional skills. Instead, it "gives [professionals] indications of areas [they] need to train into." (XIII RT 3022, 3039.) It can also tell professionals how far they have go in teaching the individual. (XIII RT 3064.)

Dr. Christensen said appellant was able to answer twenty-five of 216 questions. (XIII RT 3021.) Dr. Christensen opined it was "not possible" that appellant missed things she knows he was taught in school due to malingering. She opined appellant did not exhibit the "behavior" or a "pattern" that showed malingering. (XIII RT 3066.) Dr. Christensen learned from the test that appellant does not learn well passively; he needs direct repetitive teaching. (XIII RT 3064-3065.) That means that she would refer him to very low level, repetitive, structured jobs consisting of one or two part tasks, with constant supervision and direction. (XIII RT

3065, 3113, 3120-3122.) Dr. Christensen would not refer appellant to intermediate or high level work. "Anything with complex tasks involved [appellant] would not be able to handle." (XIII RT 3065.) "Complex jobs are jobs that generally require for each task completion [of] more than three steps." (XIII RT 3121.) For example, putting together bicycles without supervision would be a complex task. (XIII RT 3065.) Dr. Christensen could not "imagine [appellant] doing a whole bicycle even with supervision without having somebody else actually having hands-on involvement in the task." (XIII RT 3066.)[25] If Dr. Christensen learned that just prior to the crimes appellant was doing independent work involving complex tasks that could change her opinion about whether appellant was malingering during her testing. (XIII RT 3067-3068.)

Dr. Christensen stated the Wechsler was last revised in 1980. (XIII RT 3035, 3134.) She acknowledged that in the field of psychology the test has come under fire from some members of that community. (XIII RT 3035.) Its administration to persons of minority backgrounds, including Black individuals like appellant, has been criticized. (XIII RT 3036.) But Dr. Christensen professed she could not think of any reason to question the reliability of the test "in [her] circumstance" based "upon [her] being White and [appellant] being Black." (XIII RT 3037.) She also stated some of the original concerns about the test were addressed in the 1980 revisions. (XIII RT 3036, 3119, 3134.) Dr. Christensen acknowledged that a person's cultural background could cause him to end up with a lower

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[25] At one point on redirect Dr. Christensen opined that someone with an I.Q. of 67 could not put a 10-speed, 24-speed or mountain bike together but with supervision he might be able to assemble the type of bicycle that Dr. Christensen had as a child if he had "done three or four bikes in the past," and he was given lots of time, a quite space, and something to copy. (XIII RT 3122.)

score on the Wechsler. (XIII RT 3061.) "[C]ultural background" as well as things like the lack of training at home could have an impact on a person's ability to learn or function in school. (XIII RT 3115.) And a lack of learning could impact the scores on three of the subtests. According to Dr. Christensen, however, that would "not necessarily" affect the test results because "the other subtests may be able to pull it up and keep it at the same level within the statistical range for anyone's score." (XIII RT 3062, 3119.) Dr. Christensen admitted a person's "verbal skills and vocabulary could affect the results of the test . . ." (XIII RT 3062-3063.) She also conceded the test results could be impacted by a person's mental status or medication affecting his mental state on the day of testing. (XIII RT 3061-3062, 3026.)

Malingering could also affect the results of the tests. (XIII RT 3063.) Dr. Christensen acknowledged a study indicated that an individual without any training can fake the results on the Wechsler; but, while conceding that determining whether someone is malingering is a subjective task, she said she was trained at detecting malingering. (XIII RT 3061, 3063, 3113.) Specifically, she was trained to look at things like the way the test taker relates to her i.e., is he using delaying tactics or does he drop pencils or refuse to comply in a real passive manner. "Malingerers usually cannot figure out quickly enough how to fail in a way that would make sense or affect any diagnosis. And so we can usually compare against our experience." (XIII RT 3023.) Dr. Christensen added, "And then there's also just that gut level training that we get after all these years . . . you have a good sense you're being scammed." (XIII RT 3023.) She acknowledged there is not a substantial body of research indicating that a psychologist or psychiatrist can detect lying with any degree of accuracy. Dr. Christensen commented, "Just a greater likelihood than [the] normal population."

(XIII RT 3092.) Dr. Christensen felt she was "pretty good at determining malingerers." (XIII RT 3093.)

Dr. Christensen also stated it is so difficult to fake in a manner that would lead to a specific I.Q. level, "I've been doing this for years and I'm not sure I could pull it off." She added she had performed five or six hundred such examinations. (XIII RT 3024.) In addition, Dr. Christensen did not expect that appellant could manipulate and defraud three separate testers to achieve "a nearly equivalent result." (XIII RT 3112.)[26] It's not "the least bit likely [even] for someone who's very brilliant" and has administered the test. (XIII RT 3112-3113.) "I wouldn't predict I could do it." (XIII RT 3113.)

Dr. Christensen did not think that someone who is charged with a crime is more likely to malinger or lie than a typical paying customer. (XIII RT 3091.) Dr. Christensen did not believe appellant was malingering during his intelligence examination because appellant did not exhibit any avoidance behavior (e.g., purposefully looking off or not listening), would focus but get distracted, his test scores were inconsistent, and his "pattern of response . . . was not a malingerer pattern." (XIII RT 3041-3042.) In Dr. Christensen's opinion, a malingerer "would [also] tend to have certain things that they would flat refuse to do" and appellant did not give that type of response. (XIII RT 3042.) "He tried, he failed, and [Dr. Christensen had] . . . no sense that [she] was being manipulated." (XIII RT 3042.)

Dr. Christensen acknowledged it is possible for an individual to deceive her on her examinations and if someone did deceive her she would

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[26] The defense requested and was granted a continuance during trial between March 25, 1991, and April 3, 1991, so they could have more testing done. (XII RT 2859-2866.) It appears that Dr. Christensen was advised of the test results before she testified as that would have been appellant's third examiner. (See Dr. Schuyler's testimony.)

not generally know it until later. She did not know how many individuals have been successful at deceiving her. (XIII RT 3091- 3092.)

Dr. Christensen acknowledged that two psychiatrists, Dr. Davis and Dr. Terrell, examined appellant and concluded appellant was malingering. (XIII RT 3043.) She further acknowledged Dr. Terrell's conclusion that although auditory hallucinations could be typical of someone with schizophrenia, appellant's answers in general were "classical responses for someone who was malingering." (XIII RT 3053.) Dr. Christensen interpreted that to mean Dr. Terrell thought appellant had hallucinations but generally his responses indicated malingering. (XIII RT 3053.) Dr. Christensen acknowledged Dr. Davis' statement that since appellant was malingering so much he could not tell if there was any legitimate disorder. (XIII RT 3053.) Dr. Christensen interpreted that to mean that Dr. Davis could not make a judgment on whether or not appellant had hallucinations, not that there were no hallucinations. (XIII RT 3054.) The psychiatrists, having medical degrees, had approaches different from hers. (XIII RT 3043.) Dr. Christensen said the psychiatrists did not rely on testing, they relied on their subjective opinions, so she rejected their conclusion that appellant malingered. (XIII RT 3043-3044, 3067, 3113.) "[D]ull functioning" can be misinterpreted as not trying or purposely falsifying efforts. (XIII RT 3067.)

Dr. Christensen acknowledged that she had gone over Dr. Powell's testimony before her own testimony. She attempted to explain the differences in their findings. She saw that he found appellant's mental retardation to be familial and he disagreed with her finding that it was organic in nature. Dr. Christensen insisted they were "not in the least disagreement." Dr. Christensen claimed she had a lot of experience with

mental retardation and Dr. Powell's experience is "a different level."[27] She believed her experience made her aware of a sub classification of familial retardation that could include a seizure disorder. On the other hand, she also admitted "[w]e don't know if the family has other . . . members who are mentally retarded. We could only make a true familial [finding] if we have other family members who are mentally retarded." Dr Christensen agreed that Dr. Powell also found appellant's retardation familial because of appellant's performance on the Bender and Trail Making tests. (XIII RT 3074-3075.)

Dr. Christensen stated in her report that appellant had an "almost non-existent reasoning ability" but at trial she testified that Dr. Powell's test results changed her opinion. She now opined appellant's reasoning ability was "exceptionally limited," and not non-existent, because appellant was able to answer certain questions for Dr. Powell. (XIII RT 3085-3086.)

Dr. Christensen acknowledged that on the Wechsler some of the subtest scale scores she and Dr. Powell got were different and her full scale I.Q. for appellant (47) and Dr. Powell's full scale I.Q. score for appellant (59), were twelve points apart. (XIII RT 3025, 3027.) The discrepancy in full scale I.Q. scores was "significant." (XIII RT 3079.) "The major discrepancy comes within the two administrations in the verbal test." (XIII RT 3079.) Dr. Christensen was not surprised Dr. Powell and another examiner got higher I.Q. scores. (XIII RT 3031, 3110.) She thought the higher results could be because of the difference in environments, appellant's condition, and "if one is having a bad day or a good day you can score five to eight, ten points difference." (XIII RT 3025, 3028-3029.) She

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[27] Subsequently, she testified that of all the private practice psychologists in the area there were only three others that had the testing "experience and expertise . . . like Dr. Powell and I." (XIII RT 3132.)

pointed out when she tested appellant he was in a jail on a hospital table in an uncontrolled setting, the room was not well lit, appellant had a head harness on, he was "under medication,"[28] appellant was tired and in pain, and he was actively having substantially interfering auditory hallucinations. She testified all of these factors "could in fact have in inhibited his ability to perform the test . . ." (XIII RT 3025-3026, 3080.)

Dr. Christensen conceded:

> "I can't tell what may have caused the lower level performance [her testing reflected.]. I do know that day he obtained a lower level I.Q. And that . . . a year and a half later with Dr. Powell, totally different setting [he] got a higher I.Q."

(XIII RT 3080.)

She nevertheless insisted that the I.Q. scores she and Dr. Powell got were very close. (XIII RT 3080.)[29] She also professed that the difference in scores did not "necessarily" impugn the credibility of her testing. (XIII RT 3112.) Dr. Christensen ultimately qualified her I.Q. level finding, by limiting her I.Q. result for the defendant to what he had "[t]hat day" under those conditions. (XIII RT 3070, 3085, 3110.)

Dr. Christensen testified that at the time of her testing she concluded appellant was incompetent to stand trial; and, her opinion of appellant's condition at that time has not changed in light of other expert opinions, or the court's ultimate ruling finding appellant to be competent to stand trial.

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[28] Dr. Christensen testified at one point a nurse gave appellant medication and an hour later, when he was still being tested, "the medication would have been assuming full effect." (XIII RT 3029-3030, 3080.) But she commented that she did not note the medication appellant was taking so she did not "know if it's a sedating one." (XIII RT 3029.)

[29] Dr. Christensen stated that if a subsequent examiner got an I.Q. score of "63," when compared to her score of 47, that "would not be within the normal range of discrepancy." In such circumstances she would then, as now, be looking for differences in the testing environment to try and explain the difference in scores. (XIII RT 3079.)

(XIII RT 3086-3088.) Dr. Christensen's report also recommended a diversion program through Central Valley Regional Center, and a limited conservatorship, as an option for defense counsel to explore. This would allow appellant to get services because she thought appellant was not capable of functioning on his own in society and needed specialized protection, supervision and control. (XIII RT 3088-3090, 3106, 3125, 3126-3127.) Dr. Christensen has previously made this type of referral for persons charged with murder. (XIII RT 3125.) In those cases, those deemed dangerous and unpredictable were put in a developmental center. Others who were not deemed potentially violent or uncontrollable were placed in board and care homes with varying levels of supervision in different communities. (XIII RT 3126.) Her recommendation would not have allowed release of appellant into society totally unsupervised. (XIII RT 3126.)

Dr. Christensen testified a mentally retarded person can form the intent to kill, "[e]ven a three-year old can form an intent to kill." (XIII RT 3097, 3127.) Dr. Christensen stated generally that a person with an I.Q. of 47 to 59 would have more difficulty weighing options and consequences for an act than someone with a higher I.Q. (XIII RT 3044-3045.) She claimed usually a person with an I.Q. of 47, would view a situation as "here's a problem, I solve it immediately and I don't necessarily think of consequences beyond the next 5 minutes." Someone with an I.Q. of 59 "might think of the consequences [he] can view between morning and afternoon." A person with an I.Q. of 67 is probably "able to think that if [he does] this at 8:00 o'clock in the morning, there might be a consequence at 5:00 o'clock in the evening." (XIII RT 3128.)

Having scored appellant with a full scale I.Q. level of 47, Dr. Christensen would be surprised to learn that appellant had a driver's license. (XIII RT 3030.) Dr. Christensen also would not expect a person

with an I.Q. of 47 to drive an automobile but "it's not unknown." (XIII RT 3077.) With the I.Q. level of 59, she would "not necessarily" be surprised if appellant had a license. (XIII RT 3030.) "It's uncommon but it's not unheard of." (XIII RT 3031, 3078.) She thought a person with an I.Q. of 59 could possibly drive depending on the reason his I.Q. was 59. (XIII RT 3078.) Dr. Christensen testified whether appellant had a 47 I.Q. or a 59 I.Q. family and friends would know him to be slow, harder to educate, not always quick to acquire new information and not always high functioning in general compared to age peers. (XIII RT 3085.)

Defense counsel had Dr. Christensen examine a three page letter that was handwritten by appellant. It was dated March 30, 1991, and addressed to a female named Kayia. (XIII RT 3045, 3128-3129; XIV RT 3323 [stipulation that appellant wrote the letter]; XIII CT 3121-3123; Exhib. No. 19.) Dr. Christensen admitted that she would not expect that a person with a full scale I.Q. of 47 could write such a letter. (XIII RT 3046.) She thought that a person with a full scale I.Q. of 59 would be able to do so. (XIII RT 3046.) But when asked if someone with a 59 I.Q. could put together the sentence structure used within the letter, Dr. Christensen only replied, "It could happen." (XIII RT 3046-3047.) Dr. Christensen opined that hypothetically a person who wrote a letter with "fairly negative information" in it while in jail, while charged with a serious crime, and while aware that personnel in the jail were reading his correspondence, would be an example of a person with impaired judgment. (XIII RT 3046-3047.)

Dr. Christensen testified if someone included in a letter a statement that he had two family members on death row[30] when he does not, and says

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[30] Appellant wrote, "Baby I just pray they don[']t gas me[.] I have two family members on death row right now, I guess you can say it runs in (continued...)

he has already been in prison (the "jungle"),[31] when he has not does not show a lack of memory functioning. Instead, it shows a "fantasy life and lack of judgment." (XIII RT 3048-3049.) "[F]antasies are typically not a function of I.Q. at all." (XIII RT 3049.) Mental retardation may not give the person the intellectual control that "would prevent the fantasies from getting expressed." (XIII RT 3049.) Subsequently, Dr. Christensen modified her opinion saying this type of statement in the letter "could be fantasy. It could be make-believe. It could be a lot of different things." (XIII RT 3099-3100.) It could also be bragging, although that is "not exclusive [of] fantasy." (XIII RT 3100, 3130.) She opined higher functioning individuals would normally not let the public know the fantasy and would not put the fantasy in writing. (XIII RT 3130-3131.)
Dr. Christensen testified that appellant's statement about having two family members on death row "could be an exaggeration for increasing one's standing in a certain population. In most populations, that wouldn't be something that you would state. But it would be for inflation in one's standing." (XIII RT 3131.)

Dr. Christensen acknowledged that a statement in appellant's letter saying "all I want is to get out and get revenge" would show a level of reasoning, although she thought it showed poor reasoning and judgment.

(...continued)
the family if you know what I mean. Ha Ha." (XIII CT 3122, some capitalization correction.)

[31] Appellant's pen pal appears to have been in custody when he wrote to her. Here, he wrote, "So did you take the 16 months? You'll only end up doing eight or nine easy now short timer. I wish they offer[e]d me holiday time. I still remember the first time I went to the jungle[.] That was a hell of [an] experience for me." (XIII CT 3123, some capitalization correction.)

(XIII RT 3100, 3130.)[32] Dr. Christensen had read the police reports and she knew an unknown person drove appellant to the crime scene. In appellant's letter he said, "the D.A. can't wait to ask who else was there, you know, they know it was more than just me involved, but, baby girl, I didn't eat cheese, can't answer no questions." This came right after his statement about whether or not he should take the stand. Dr. Christensen admitted this "could" indicate a high level of reasoning. (XIII RT 3100-3101; XIII CT 3122-3123.)[33] But then Dr. Christensen claimed she could not tell if appellant's statement related to his taking the stand because "I do not know if there's a time frame in between those sentences." (XIII RT 3102.)

Dr. Christensen acknowledged that she testified in another case that in jail, inmates have been passing around information about tests since the 1860s. (XIII RT 3093.) Appellant is not the first person she has interviewed who was facing serious charges. In Madera County alone, she has interviewed at least four people who were charged with murder. (XIII RT 3093-3094.) She thought there was some "overlap" of their time in jail but she was not sure. (XIII RT 3094-3095.) She did not know if appellant could have received information in the jail about how to fake tests. (XIII RT 3095.) Dr. Christensen said she did not leave behind testing materials with any of the inmates. (XIII RT 3119.) If there was

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[32] Appellant wrote, "I'm still young I could do 20 years, [a]ll I want is to get out and get revenge, that[']s all I[']m living for baby." (XIII CT 3122, some capitalization correction.)

[33] Appellant specifically wrote, "So baby what do you think, should I take the stand on my behalf? Even tho[ugh] there[']s a lot of un[a]nswer[e]d questions in my case. I know the D.A. can[']t wait[] to ask who else was there. You know they know it was more than just me involved. But baby girl I don[']t eat cheese, can[']t answer no questions even tho[ugh] they want to gas me . . ." (XIII CT 3122-3123, some capitalization correction.)

information passed between them, Dr. Christensen opined that it would have been information from their memories. (XIII RT 3120.)

Dr. Christensen understood she could be wrong in all of her opinions. (XIII RT 3107.) But she calculated there was less than a one percent chance that she could be "100 percent wrong." (XIII RT 3133.)

Dr. Christensen initially claimed not to know what she would be billing for her time and testimony. She also claimed the question on that topic did not upset her. (XIII RT 3097.) Subsequently she said she would bill about $2,140 .00. (XIII RT 3107-3108.) Later on redirect she stated as of that time she would bill approximately $2,275.00. (XIII RT 3118.)

c. Bradley Schuyler, Ph.D[34]

Appellant's counsel next called Bradley Schuyler, Ph.D., to testify on his behalf. (XIII RT 3136.) Dr. Schuyler is a clinical psychologist with a specialization in neuropsychology. (XIII RT 3137.) Neuropsychology uses a variety of tests to determine which areas of the brain are and are not functioning normally. (XIII RT 3137.)

Dr. Schuyler stated it is very common in his profession to have an associate administer the tests. (XIII RT 3138.) In this case, Dr. Schuyler's associate, Dr. Ulem,[35] administered about 13 tests on appellant during a two day period. (XIII RT 3138, 3157, 3166-3167.) Dr. Schuyler did not recall where Dr. Ulem got his Bachelor's Degree. He recalled that Dr. Ulem received his Masters and Doctoral Degree from the California School of Professional Psychology in Fresno. (XIII RT 3167.) Dr. Ulem had been in private practice for four years and worked for a couple of years at Fresno Community hospital before that. (XIII RT 3167.) In addition to

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[34] The testing referenced here was apparently completed during a defense continuance of March 25, 1991, to April 3, 1991. (XII RT 2859-2866.)

[35] Dr. Ulem's first name was not indicated. (XIII RT 3138.)

Dr. Ulem's testing, Dr. Schuyler "had to rely on [appellant] . . . to a great extent and his answers. . ." (XIII RT 3167.)

Dr. Schuyler also relied on Dr. Ulem's ability to determine whether or not appellant was malingering. (XIII RT 3167.) He said it is Dr. Ulem's practice to note anything that could affect the test taker's performance on the tests. (XIII RT 3157.) Dr. Ulem did not indicate in his notes that appellant was not making an effort at the tests. (XIII RT 3158.) The only problem that Dr. Ulem mentioned in his notes was that at times appellant would say "'I don't know'" and Dr. Ulem would prompt appellant to "make an attempt or give a guess" to try and establish whether appellant did not in fact know the answer. (XIII RT 3158, 3181.) Dr. Schuyler felt appellant saying "I don't know" showed he had reached the limit of his ability; but he acknowledged that Dr. Terrell and Dr. Davis, based on their clinical interviews of appellant, concluded appellant's continuous "I don't know" answers indicated appellant was malingering. (XIII RT 3181, 3183.)

Dr. Ulem did a mental status examination on appellant. Appellant was oriented and aware of what was going. He was logical and coherent. It appeared his thought processes were appropriate to interact with the environment for purposes of the examination. Appellant knew "what's reality and what is not reality." It was concluded that it would be appropriate to administer the tests to appellant. (XIII RT 3138-3139, 3180-3181.)

The Halstead-Reitan Neuropsychological group of tests was administered. (XIII RT 3140.) They are designed to look for evidence of brain dysfunction. (XIII RT 3140.) In the tactile perceptual portion of the test, appellant was asked to close his eyes and then he was touched in progressively more complex ways. This tests appellant's ability to perceive the stimuli. (XIII RT 3141.) Dr. Schuyler stated "the results in general reveal some abnormal tactile perceptual abilities." (XIII RT 3141-3142.)

Regarding appellant's visual functioning another portion of the test showed appellant had no blind spots in his visual field. (XIII RT 3142.) In the gross motor testing, involving various physical activities (e.g., walking heal to toe or touching his own nose), appellant did not have any significant difficulties with his eyes open. (XIII RT 3143.) With his eyes closed he had "some difficulty." (XIII RT 3143.)

Appellant's memory was tested. He was given two subtests from the Denman Neuropsychological Memory Test, portions of the memory scale from the revised Wechsler and some of the memory subtests from the Woodcock-Johnson Psycho Educational Test Battery. (XIII RT 3144-3146.) From that testing Dr. Schuyler opined appellant showed generally impaired memory for both verbal and visual information and had some difficulty with long term memory retention. (XIII RT 3146-3147.) Dr. Schuyler concluded it was "overall safe to say [appellant] does have difficulty with learning with memory." (XIII RT 3147.)

Through various other tests Dr. Schuyler determined appellant's speech oral motor abilities appeared to be within normal limits. He "had no difficulty with verbal output, per se." (XIII RT 3152.) Some tests indicated appellant had a limited vocabulary. (XIII RT 3152.) Also consistent with the "general findings of the examination" appellant's ability to "think abstractly with languages appear[ed] to be very impaired, very concrete in quality . . ." (XIII RT 3152.) Dr. Schuyler further concluded appellant's ability to follow oral directions fell at about the second percentile; and, appellant appeared to have some auditory comprehension problems. (XIII RT 3151-3153.)

Dr. Schuyler determined appellant's reading was equivalent to someone in the 8th grade, third month. (XIII RT 3153.) Appellant also recognized words he had learned but he did not have strong phonetic skills. (XIII RT 3153-3154.) Appellant took a reading comprehension test and

from that Dr. Schuyler opined that appellant's approximate reading comprehension level was that of a beginning 4th grader. (XIII RT 3154-3155.) Considering a portion of the Wechsler and two academic achievement tests that were administered to appellant, in mathematics appellant achieved a grade level of fifth grade, sixth month. (XIII RT 3155.) Appellant was "able to do basic addition, subtraction, multiplication, [and] some division as long as it wasn't exceedingly complex." (XIII RT 3155.) Where he had difficulty was with word problems, where he earned a grade level of 3.4. (XIII RT 3155.) Dr. Schuyler opined appellant had an ability to spell at a "little above" a third grade level. But he also pointed out that the test that was used to make that determination "also involve[d] other types of writing skills like knowledge of contractions, word usage ability, and grammar so it went beyond spelling." (XIII RT 3156.)

After the entire Wechsler was administered to appellant he "earned a full scale I.Q. of 66, which is in the mild range of mental retardation." (XIII RT 3147, 3164.) Dr. Schuyler stated the results of the testing are "inconsistent with any type of organic brain damage." (XIII RT 3164.) Dr. Schuyler did not think the cause of appellant's retardation could be determined. There was no injury or trauma that could account for it so he was "assuming that this is purely . . . congenital or possibly hereditary . . ." (XIII RT 3172.)

Dr. Schuyler testified "[t]here was a concern raised about whether or not [appellant] was malingering by past examinations" so they paid attention to that possibility. (XIII RT 3159.) Dr. Schuyler opined "I don't believe that [appellant] was malingering" on the tests. "I think that . . . the tests are accurate in reflecting his abilities." (XIII RT 3159.)

On cross-examination, Dr. Schuyler acknowledged that during a clinical interview that he conducted with appellant, appellant claimed "not

to remember the details of the murders in question . . ." Dr. Schuyler could not find any clinical reason for appellant not to remember those facts and he determined appellant was "not being factual with me during my questions about that specifically." (XIII RT 3168.) Dr. Schuyler stated that appellant's lie could have been his use of an immature or primitive defense mechanism, which would have been consistent with his level of intellectual functioning. (XIII RT 3168, 3179.) Dr. Schuyler admitted that appellant's lying could also be consistent with an intelligent person who is charged with a crime. Dr. Schuyler opined an intelligent person might, however, be "a little more discerning about what they say they don't remember." (XIII RT 3168.) However, Dr. Schuyler further admitted that he has heard of very intelligent people accused of a crime saying they do not remember the crime. (XIII RT 3168.) Even doctors, psychologists or psychiatrists might do the same thing. (XIII RT 3168.) So "depending on how it's done" appellant's statement is also consistent with someone of normal intelligence as well. (XIII RT 3168-3169.)

Dr. Schuyler also acknowledged that although he did not know what was specifically asked by the others, appellant gave him more biographical information than Dr. Christensen, Dr. Terrell or Dr. Davis. (XIII RT 3171.) Appellant admitted his relationship with Diaz to Dr. Schuyler, although he denied any knowledge of her to one of the psychiatrists. (XIII RT 3171-3172.) Appellant told him that in the past he heard voices. Dr. Schuyler did not observe any evidence of appellant having any type of psychotic disorder at the time of his examination. (XIII RT 3172.) Dr. Schuyler, this time acknowledging all the lying appellant had been doing with the various therapists all along, now characterized all of appellant's lies as unsophisticated protection of himself:

> Well, . . . I personally don't have any doubt that [appellant] is aware of [the] . . . significance of the charges that are against

> him. And I think that in reviewing the chronology of the examinations that were performed, what he was doing at first was saying I don't know how to do anything. I mean even basic biographical data anybody would know about. [¶] Now, to me somebody who is functioning normally intellectually has reasonable ability to discriminate information. Initially he was not providing anything. I think over the course of several examinations he began going ahead and giving biographical data while continuing to not maintain a recollection for any of the events surrounding the crime. So, again . . . overall looking at what he's done on cross-examination that seems to be a fairly unsophisticated way of protecting oneself.

(XIII RT 3179.)

Defense counsel had Dr. Schuyler read appellant's letter, Exhibit No. 19. Dr. Schuyler opined that it would not be "inconsistent or uncommon for a person with a 66 I.Q. to be able to write that type of letter." (XIII RT 3166.) He opined writing a letter like this knowing that writing in jail is monitored "[d]oesn't show very good judgment under that context . . ." (XIII RT 3179-3180.)[36] Neither does committing premeditated murder in broad daylight. (XIII RT 3180.)

Dr. Schuyler further testified that a person could "[c]ertainly" manipulate test results by failing to answer certain questions or failing to perform certain tasks. (XIII RT 3159.) Dr. Schuyler was asked if it was common to manipulate tests to "come up with a fairly equivalent I.Q., level of prior tests" and he responded, "I think that would be fairly difficult to do. Not impossible." (XIII RT 3159.) But, he opined, "I think what would be clearly almost impossible to do within the context of a neuropsychological evaluation is to produce a profile of test results that are consistent with one another." (XIII RT 3159.) He opined the tests Dr. Ulem administered were consistent. (XIII RT 3160.)

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[36] Evidence that appellant knew some or all of his mail was being monitored was not provided.

Dr. Schuyler had been provided the reports of Dr. Powell, Dr. Christensen, Dr. Davis, and Dr. Terrell. (XIII RT 3160.) Dr. Schuyler stated, "[T]he only test in common that [Dr. Powell and Dr. Schuler] gave I believe was the Wechsler . . ." (XIII RT 3161.) Between Dr. Powell's I.Q. full score finding of 59 and Dr. Schuyler's I.Q. full score finding of 66, he did not see a "terribly great discrepancy." (XIII RT 3160-3161.) He felt it was an "acceptable difference" because when a person is retested there will be some variability from one examination to another. Also, "[t]here's a chance that a person is going to do better a second time around if there's any close proximity" in time between the first test and a retest. The person, even to "a degree" one who is mentally retarded and has memory problems, will have some recollection of the test the second time around. (XIII RT 3161, 3170, 3176.) Dr. Schuyler noted his test took place about two months after Dr. Powell's tests. (XIII RT 3161.) Hypothetically, while he would not expect it, if appellant was again tested and obtained a score of 70, that would also be within acceptable variation from Dr. Schuyler's score of 66. (XIII RT 3170-3171.) Dr. Schuyler also opined it would be "somewhat difficult" for a malingerer to be able to manipulate the I.Q. levels as close as he and Dr. Powell got. (XIII RT 3161.) The test taker would need to keep track of what he did in the test before. (XIII RT 3162.)

Dr. Schuyler acknowledged, however, that there was a "very significant" difference between the I.Q. score Dr. Christensen got of 47 and the score he got of 66. (XIII RT 3162, 3169.) He surmised the lower score was due to the environmental conditions where the testing took place and because appellant was recovering from an injury and taking medication. (XIII RT 3162, 3169.) He said that "would make the most sense to me." (XIII RT 3169.) Dr. Schuyler could not state whether the 19 point difference between the scores was unusual even for the environmental condition differences between his testing and Dr. Christensen's testing.

(XIII RT 3169.) "I wasn't there to . . . experience the conditions. I am merely offering my opinion as to accounting for the difference between her examinations versus . . . Dr. Powell's and myself." (XIII RT 3169.)

Dr. Schuyler acknowledged that appellant was using the antidepressant Elavil when he and Dr. Powell tested appellant. If taken at more than therapeutic doses, that drug can be sedating. (XIII RT 3169-3170.) He also conceded that when he tested appellant, appellant had ankle shackles on except during the motor examination, and there were guards posted outside the examining room. (XIII RT 3171.)

The Minnesota Multiphasic Personality Inventory (M.M.P.I.) was also administered to appellant. The M.M.P.I is a questionnaire requiring true/false responses that is designed to "sample different feelings, attitudes, experiences, and so forth." (XIII RT 3163.) It has been criticized because its questions were based on what Caucasian people from Minnesota in the 1950's would know. It was revised in the middle 1980's. Dr. Schuyler assumed the revisions would have attempted to try and correct the shortcomings of the prior test. (XIII RT 3173-3174.) Dr. Schuyler was not aware if any studies had been done to determine whether or not the revisions fully addressed the criticism. He was "not current on that literature." (XIII RT 3174.) Sources vary on this but Dr. Schuyler opined the test taker needs a fifth to six grade reading comprehension level to reliably give the test. (XIII RT 3163.) Dr. Schuyler was concerned about the validity of the test results because appellant had scored a lower reading comprehension level on other testing and so appellant may not have understood the questions. (XIII RT 3163, 3174-3175.) Although the testing could also "possibly" indicate appellant was trying to fake answers. (XIII RT 3174.)

d. Stipulation

The parties stipulated that if appellant's mother were called to testify she would state appellant does not have any family members currently on death row, appellant does not have any family members serving in prison with a sentence of life without the possibility of parole, appellant does not have any family members who have been serving 13 years or more in prison, and that appellant has not served a prison term. (XIII RT 3191-3192.)

2. Rebuttal

a. Lee Coleman, M.D.

Dr. Lee Coleman was called as a rebuttal witness by the prosecution. (XIV RT 3202.) Dr. Coleman is a medical doctor specializing in psychiatry. He has been employed in that capacity since 1969 and practices in Berkeley California. He received his Bachelor's degree from Occidental College, attended medical school at the University of Chicago, completed an internship in Pediatrics at Children's Medical Center in Seattle, and trained in both adult and child psychiatry at the University of Colorado Medical Center at Denver. (XIV RT 3203.)

Dr. Coleman explained a psychiatrist is a medical doctor who then specializes in the field of psychiatry. A psychologist has overlapping training in psychotherapy but is not medically trained or qualified to treat the body or to prescribe medications. Testing administration and theory is a major part of a psychologist's training. Generally psychiatrists do not do as much training on testing methods and generally do not administer psychological tests. They are, however, expected to be able to know of the testing and how to integrate the test findings in the overall picture of the person. (XIV RT 3203-3204, 3252-3253, 3262-3263.)

Beyond his work with patients Dr. Coleman, beginning in the 1970's, started developing a special interest in the area of psychiatry and the legal system.[37] He has studied the professional literature on the use of psychology and psychiatry in the clinical setting and the legal setting. In addition to there being literature on these professionals working in the clinical setting there is a "whole separate body of literature [by] people investigating when [these mental health professionals] work in the legal system." Dr. Coleman made a study of "the professional literature on the techniques of psychiatry and psychology as they apply in the legal system." Dr. Coleman also studies real life cases. He reviews how various methods, examinations and techniques are used by mental health professionals in those cases, and the conclusions of those professionals.[38] Then he compares his findings with what the professional literature says those techniques and methods should actually be able to do. (XIV RT 3203-3205, 3266.) Dr. Coleman has also testified before the California State Assembly and Senate and numerous other state Legislatures about the role of psychology and psychiatry in the legal system, and the laws having to do with psychiatry. (XIV RT 3206-3208.) Dr. Coleman also wrote a book called the "Reign of Error, Psychiatry Authority in Law," which was published in 1984. (XIV RT 3208, underline removed.) In addition, Dr. Coleman has written 38 articles, all dealing with aspects of psychiatry's role in the law and related social issues. (XIV RT 3208.)

Dr. Coleman has testified in courts many times regarding his opinions about the credibility and reliability of the tests and psychological

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[37] In the last few years, "it's gotten to the point where about 90 percent of [his] work is in the legal area. . ." (XIV RT 3266.)

[38] In addition, Dr. Coleman reads the documents of "the police, social workers, or interviewers of various sorts" that have been complied in the case. (XIV RT 3205.)

instruments being used for purposes of determining legal issues. He testifies far more often for the defense than the prosecution. (XIV RT 3209, 3234, 3242, 3269-3270.)

Based on all his study and experience with respect to the role of psychiatry and psychology in the legal system Dr. Coleman has observed that there is a lot of misunderstanding about what examinations and testing in the mental health field can offer in the legal system. Mental health professionals tend to overstate what they can objectively achieve with testing. There are many subjective factors that make the instruments used unreliable for purposes of helping with the questions being addressed in court. (XIV RT 3209-3210, 3264-3265, 3270.)

In this case, Dr. Coleman was provided and studied the police work, investigative interviews, some of the testimony at trial including that of Dr. Christensen, some jail "write-ups" regarding incidents that occurred between appellant and jail personnel, the reports of Dr. Christensen, Dr. Schuyler, Dr. Powell, Dr. Terrell, Dr. Davis, and letters written by appellant while in jail. (XIV RT 3219.)[39] However, because even with a defendant's mental history and the facts surrounding an offense psychiatrists and psychologists are not truly able to assist a jury with

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[39] Dr. Coleman was first contacted by the prosecution about two weeks before testifying and the information he received came in a little at a time. Initially, he was provided the investigative material, a jail incident report, and police reports. He was later mailed the reports of Dr. Terrell, Dr. Powell, Dr. Davis and Dr. Christensen, as well as the testimony of Dr. Christensen, which he reviewed. In the middle to late in the week before his testimony he received a portion of the trial testimony of some of the case in chief witnesses. On the morning of his testimony Dr. Coleman received a second letter written by appellant, which he read, and was provided Dr. Schuyler's and Dr. Powell's testimony. He started to read the testimony of Dr. Schuyler but did not get very far before he was called to testify. He was also only able to read a portion of Dr. Powell's testimony. (XIV RT 33219, 233, 3236-3238, 3241, 3249, 3250-3251.)

determining the mental state of a defendant at the time of his crime, Dr. Coleman does not provide opinions on the defendant's mental state. And he limits his opinions regarding tests and methodologies to "the tools of the professions that [he] know[s]." (XIV RT 3259-3262, 3269 [Dr. Coleman testifies about the "credibility or reliability of various tests and psychological methods . . ."].)

Regarding intelligence testing, Dr Coleman testified "an I.Q. test is not a reliable judge of somebody's intelligence." (XIV RT 3210.) That would apply to the Wechsler test as well as all other "pencil and paper" tests attempting to measure intelligence. (XIV RT 3211.) The results of the test tell how well the test taker did on the test but they do not tell the examiner why. (XIV RT 3243.) There are "too many things that can [a]ffect the score other than what you're trying to measure, which is intelligence." (XIV RT 3211.) Those things include the test taker's lack of sophistication in using the test instruments, in reading, and in vocabulary. No one has come up with an intelligent system of testing that does not, to some degree, rely on a level of sophistication in these areas. In addition, test subjects can earn lower scores because he or she is distracted, anxious, depressed, or has his "mind somewhere else." None of these things means the subject's intelligence is actually lower. (XIV RT 3211-3212.) "[W]e can [also] have a situation where the person does not want to do well. The tests are all designed on the assumption the person is trying to do the best [he] can. But there is nothing automatic about that." A person may have reasons he does not want to do as well as he can. (XIV RT 3212.)[40]

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[40] Dr. Coleman also explained that there is a difference in the dynamics of therapeutic arrangement versus one in which the subject has something at stake. In therapy in order to build up trust, the therapist comes from the point of view that the patient is being truthful. In that setting, a therapist is "not engaged in a relationship where the [examinee] (continued...)

Dr. Coleman testified that there are no psychological instruments for deciding which of the many factors he testified about may have affected a particular I.Q. score, it is "purely subjective." "It's just one human being, [a] psychologist, trying to figure it out and they don't have [a] special crystal ball for doing that." (XIV RT 3212.)

Moreover, there are "lots of studies" showing that examiners are not able to reliably distinguish between subjects who are fakers and those who are not. (XIV RT 3230.) Psychologists and psychiatrists are in no better position to determine someone's credibility than a layperson. In fact, after looking at this issue for 20 years, and reviewing hundreds of attempts by mental health professionals to determine a person's credibility, Dr. Coleman has concluded "their track record is far worse than laypersons." (XIV RT 3217-3218.) Dr. Coleman explained that if a mental health professional is trying to judge a person's credibility he or she tends to use an interview or psychological test because that is what he or she is trained to do. (XIV RT 3217.) But laypersons are more likely to utilize what Dr. Coleman believes is a more reliable way of determining credibility, the totality of a person's behavior. Laypeople are not "fooled into believing that they have some special technique that they learned in school for deciding what the truth is." (XIV RT 3217.)

Even more fundamentally, Dr. Coleman explained that test takers' internal thought processes cannot be scientifically studied:

(...continued)
has great legal consequences depending on what [the therapist] think[s]." It is "completely different than the idea of determining a narrow mental question such as [a] Court needs to look at." (XIV RT 3268-3269.) Plainly, the person with a legal issue may stand to gain by trying to lead the therapist to believe something the subject believes will give him an advantage. It is a "very, very different situation than in the therapy context." (XIV RT 3269.)

> [W]e certainly have no way to do scientific studies on whether or not a person is telling us the truth, whether or not a person can remember what they say they can – if they say they can't remember, . . . [or] whether people are doing their best on an examination. When it comes to those kind[s] of internal states of mind particularly when there are stakes to be won or lost such as in a legal issue, we don't have any way to scientifically set that up.

(XIV RT 3218.)

Dr. Coleman was asked if he knew of problems that have occurred with the I.Q. testing of Black individuals. He responded that the problems do not just impact Black people but affect anyone from segments of society where the educational background and language skills provided by the educational system are lower than in the dominant society. This occurs "mainly around minority groups and groups [with impoverished] background[s]." These groups get lower scores for reasons that "have nothing to do with what it is you're trying to investigate, and that is why these tests have been trashed by the professional community. They're not given any credibility by the professionals." (XIV RT 3230-3231.)

Dr. Coleman agreed that there are mentally retarded people. But he opined that the testing could not legitimately "quantify a person's intelligence" in "terms of numbers or to be exact." He did believe that one could, to some degree, get a rough sense of a person's intelligence level through "common sense observations of laypersons who are in contact with the person and who can speak about what they observed this person to be capable of doing in real life situations." (XIV RT 3256-3257.) Other available information like teacher observations and educational placement were also worth paying attention to but that information should not be considered in isolation. (XIV RT 3257.)

Addressing the mental state issues in the crimes of the instant case, Dr. Coleman opined that the Wechsler intelligence test would not assist the

jury. He articulated that for all the reasons he previously testified about, which are further substantiated by significant amounts of professional literature, the test is not accurate at measuring intelligence.[41] So if it is not accurate at measuring intelligence, it "certainly isn't going to help with the next questions about these mental [state] issues." (XIV RT 3222, 3243.) Moreover, "if a person does or does not demonstrate certain mental capacities through their behavior, then a test is kind of beside the point." (XIV RT 3223.) "There is no I.Q. score which no matter what number you get at the end of the test in anyway speaks to the person's behavior." (XIII RT 3216.) It is the person's behavior that will "tell you whether or not they have certain capacities . . ." (XIV RT 3216. 3223.) I.Q. tests were never designed to speak to the issue of the mental state of a defendant at the time of his crime. (XIII RT 3216.)

In addition, mental status examinations are not a reliable guide to what a person's orientation, understanding or current mental state is. (XIV RT 3210-3212.) In mental status examinations, there are standardized questions that examiners ask the subject but "you're still left with the same factor[s] I've discussed before, it's a subjective thing." (XIV RT 3213.) When the examiner gets an answer to one of the standardized questions he "is making a subjective judgment as to why the person gives good or not so good answers, and you have no reliable way to know whether the person is doing as well as [he] can do, whether [he is] not trying," or he is resisting extraction of an answer for other reasons. "So it just comes down to guess work as to the reason why the person answers the way [he] do[es]." (XIV RT 3213-3214.)

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[41] He reiterated, "They simply measure how well you do on the test. And [as previously explained] people can do lousy on the test . . . for all kinds of reasons that don't have a thing to do with intelligence." (XIV RT 3222.)

Dr. Coleman has studied hundreds of M.M.P.I. scores, their interpretations, and the professional literature on it, and determined that personality tests like the M.M.P.I. are also not reliable guides to a person's personality for "essentially the same reasons." (XIV RT 3210-3211, 3214, 3231-3232) Like the verbal tests, it is another question and answer test in a different form, i.e., 560 true/false questions where the person checks true or false on a piece of paper. (XIV RT 3214, 3222.) Like the verbal question and answer tests, the examiner still must "interpret subjectively why they answer the way they do." Although "people have tried to construct scales which would say whether the person is faking – faking good, faking bad, they never have been able to do it." (XIV RT 3214.) Also, there is no personality style that is relevant to determining issues like whether or not a person harbored malice. (XIV RT 3222.) The instruments were not designed for that purpose. (XIV RT 3216.)

Likewise, the Bender test would not be of assistance to the jury. (XIV RT 3223.) In that test, the subject is shown a series of simple geometric figures and asked to copy them on another piece of paper. The score is supposed to be an indication of whether the person has physical brain injury. (XIV RT 3223.) But "[t]here's absolutely no evidence" to support the claim that it can do that and there is "lots of evidence that it can't do it." (XIV RT 3223.) The scores simply do not tell the examiner whether or not there is something wrong with the subject's brain. (XIV RT 3224, 3258.) Nor is there any other evidence that Dr. Coleman was provided that indicated there was brain injury. (XIV RT 3258.) Moreover, even if there was a reliable test that could determine there was brain injury, it would not help because "if a person demonstrates behavior which would show certain intentions, then there's no test you can give which takes that away." (XIV RT 3224.) The determination of whether mental impairment in some way takes away a criminal intent is not assisted by tests but only by

the fact finder's evaluation of both verbal and non-verbal behavior, including the defendant's statements, and the context of the behaviors. This is all part of what a fact finder should consider and weigh as "part of evaluating the total picture." (XIV RT 3259-3261.)

Neuropsychological testing would also not be of assistance to the jury. (XIV RT 3224.) Neuropsychological tests are "subjective for the same reason[s] that the other tests are subjective." (XIV RT 3224.) "You're still basically asking the person questions and . . . asking [him] to perform certain tasks without any way" to reliably measure why he does what he does. They "are not in fact able to separate brain injured people or retarded people or any – people that have anything wrong with their brain from people who don't have anything wrong." (XIV RT 3225.) There is also a lack of correspondence between a person having a problem with their brain and issues of the type in this case; if the subject is "not capable of thinking a certain thing or planning a certain thing, then the evidence for that would be in the behavior that [he] engage[s] in, not in the test that [the examiner] gave." (XIV RT 3225.)

The Gilmore reading test or other reading tests would also not be of assistance to the jury because even a "person who is completely illiterate most certainly could be capable of the states of mind" at issue in this case. (XIV RT 3225-3226.)

Dr. Coleman was given a long hypothetical mirroring the facts in this case and asked to assume a juror would have to make a determination on the mental state at trial e.g., premeditation and deliberation, and malice aforethought. He was then asked if there was a test available that would require a juror, a layperson, to "abandon their position and come to a new position due to the results of that test"? (XIV RT 3219-3221.)
Dr. Coleman opined that there was no test in the mental health field that would "add anything or subtract anything or in any way be relevant to the

two things you've given me. One is the factual hypothetical . . . and then the questions which you're trying to answer about mental state." (XIV RT 3221.) There are no tests or examinations that would help, or, in Dr. Coleman's opinion, should influence the decision of the jury one way or the other. (XIV RT 3221.) He explained that if the jury is going to decide what the truth is about what happened, "of course, they would rely on all the evidence." But, based on Dr. Coleman's studies and work, "in my opinion, a person's behavior as a juror determines it to be from the evidence and [from] the circumstances surrounding the behavior as they determine it to be," is the most reliable guide that exists to determine what the person's mental state was during his crime. (XIV RT 3254.) "Whereas the psychiatric and psychological tests are completely unreliable, and if listened to or given weight will just simply bring confusion instead of something reliable like the evidence of the person's behavior." (XIV RT 3254.)[42] His point was that, in his opinion, the "tools of psychiatry and psychology" are of "no help" to a jury in deciding the mental states at issue. (XIV RT 3255.)

Dr. Coleman was asked about Dr. Christensen's testing and opinions. He testified that Dr. Christensen's I.Q. result of 47 was "completely meaningless when it comes to the question of [appellant's] intelligence." (XIV RT 3226.) "All it tells you is he gave answers which added up to a low score. But it tells you absolutely nothing about why he gave those answers." (XIV RT 3226.) Moreover, her diagnosis of organic hallucinosis was "preposterous." (XIV RT 3226-3227.) There "was absolutely no evidence" to the support a conclusion that there was an organic mental retardation cause, e.g., evidence of brain injury, drug use or

[42] Dr. Coleman did not know if his opinion was a majority opinion among psychiatrists or not. (XIV RT 3255.)

hormonal or metabolic abnormality. (XIV RT 3227.) Also, the "evidence which she cites [in her report] for it is the idea that [appellant] appeared to be distracted or preoccupied and then she was the one who first asked him whether he was hearing voices." She was not the only professional who had asked him that question, "so if he simply responds 'Yes, I am' that in no way is evidence for organic hallucinosis. It's really preposterous from a medical point of view." (XIV RT 3227.) In addition, it appeared from her report that she reached her results by ruling out other disorders but she did not mention ruling out that appellant was faking. (XIV RT 3227.)

Dr. Coleman further noted that it appeared that Dr. Christensen concluded that appellant suffered from seizures as she was told he took seizure medication. (XIV RT 3227-3228.) But Dr. Coleman found it "inconceivable that [she] would diagnose somebody through the behavior of a doctor." (XIV RT 3228.) "You don't diagnose people by what a doctor does. You diagnose people by the condition of the patient." (XIV RT 3228.) There are medicines in psychiatry that can be used for seizures but the same medicines can be used for other purposes. Sometimes "[d]octors can [also] recommend medications for the wrong reasons." (XIV RT 3228.) The fact that a person is taking seizure medication does not necessarily mean they have seizures. (XIV RT 3228.)

Dr. Christensen's report indicated that she felt appellant could not plan, be aware of consequences, or form causal connections. But Dr. Coleman testified if a layperson determined just the opposite, nothing in her report would require him to re-evaluate his opinion. "[T]here's nothing that Dr. Christensen has done which is in any way reliable, helpful, or in any way touches on the questions that are being looked into here." (XIV RT 3229.)

Dr. Christensen also felt that she was very qualified to determine if someone was lying to her. But Dr. Coleman noted that "her belief is

nothing more than a personal opinion. It's not a scientific opinion or an opinion which has any evidence to support it." (XIV RT 3229-3230.) Dr. Coleman felt "the specifics of this case are a good illustration of why those kinds of opinions [by Dr. Christensen] should not be relied upon." (XIV RT 3230.)

Dr. Coleman had reviewed Dr. Schuyler's report. He noted that Dr. Schuyler felt that the appellant was malingering with respect to his inability to recall the events and details of the crime, but had opined that the malingering was a primitive defense mechanism that was consistent with mental retardation. (XIV RT 3232.) Dr. Coleman absolutely did not agree with that assessment. (XIV RT 3232.) Denying knowledge or memory of the crime was a way for appellant, charged with murder, to throw off the mental health professional. (XIV RT 3233.)

b. School Records and Performance In School As A Learning Handicapped Student

(1) Leon Potter

Madera Unified School District School Psychologist and administrator Leon Potter is the school district custodian of records. (XIV RT 3297.) Appellant's records showed that in 1975 he was given an I.Q. test and scored a 70; in 1979 he scored a 75; and in 1982 he scored a 77. (XIV RT 3297C.) Appellant was placed in special education because of a "learning handicap." (XIV RT 3297A.) He was in a class for mentally retarded students on "what [was] called exceptional circumstances." This meant he "did not qualify by standard as a mentally retarded child" but he was nevertheless placed there because he was functioning at such a low range academically and functionally, and because he was having difficulty in the classroom. (XIV RT 3297C.) When a child is performing at that level, with parent consent, they can be placed in "EH classes" as was done here. (XIV RT 3297C-3298.)

According to the records, appellant was first referred for evaluation by his Kindergarten and first grade teachers because of his low academic progress and immature behavior. In first grade, he was functioning at a kindergarten level. (XIV RT 3299A.)

After testing, and conferring with his parents, appellant was placed in the special education program in 1975. (XIV RT 3298A, 3299C.)[43] The 1979 Wechsler for children I.Q. test was administered because in special education a re-evaluation is required every three years. (XIV RT 3298A, 3298C.) That test is the same one that is currently given. (XIV RT 3300B.) Report notes indicate when appellant took this test he did not enjoy the test situation and he was anxious and a little nervous, and his approach to tasks on the test was impulsive and rigid. He was sent to recess and "forgot" to come back. (XIV RT 3298A-3298C.) Notes further indicate that verbal test results came back in the second percentile, the performance score was in the fifth percentile, and the examiner thought he was functioning in the borderline range of intellectual abilities. The examiner indicated that appellant would probably benefit from continued enrollment in the "EMR program" for the remainder of the school year. (XIV RT 3298C-3299.) In 1982, the next re-evaluation was done. (XIV RT 3300.) The "WISK" was administered. (XIV RT 3300.) The overall score put appellant in the fifth percentile. (XIV RT 3300.) The examiner concluded that test put appellant in the "borderline to dull-normal range." (XIV RT 3300A.) At that time, appellant was placed in the Learning Handicapped Resource Specialist Program (LHRSP). (XIV RT 3300-3300A.)

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[43] Placement was with the understanding that appellant would be re-evaluated in one year, but that did not happen. (XIV RT 3299C.)

If appellant had been in school at the time of trial, he would not be given an I.Q. test because he is Black. (XIV RT 3300B-3300C.) A court case forbids it because of "biasness of the tests . . . they are not that accurate and should not be used for certifying Black students . . . as mentally retarded" for placement in mental retardation classes. (XIV RT 3301.)

(2) Dolores Olmos Rodriguez

Dolores Rodriguez has worked at Madera High School for 17 years. She is currently a counselor and has worked in that capacity for eight years. (XIV RT 3303C-3304.) Her duties are academic scheduling, testing, and personal, vocational and career development. (XIV RT 3304.) She was appellant's counselor in about 1983, 1984 or 1985. (XIV RT 3304A, 3304C.) She had personal contact with appellant during that time regarding academics and program changes. (XIV RT 3304A, 3304C.) She was the special education counselor and appellant was in the special education program at Madera High School as someone who was "learning handicapped." (XIV RT 3304A.) Such students take "a little bit longer to read or to comprehend what [they are] reading or to compute numbers." (XVI RT 3304A.) "[W]e teach them how to compensate for their disability." (XIV RT 3304A.) As a counselor for students in the Special Day Class program for students emotionally or educationally disturbed, she had contact with individuals who were mentally retarded. (XIV RT 3304B-3304C.) She explained that all those in special education are tested and placed in the program that they qualify for, and in the proper category. Appellant came to Madera High School already designated for special education with parent consent and she structured his program based on the testing and yearly evaluations he had. (XIV RT 3304B, 3304D.) The special education classes are structured to best meet the developmental needs of each student. (XIV RT 3304D.) If the student wants to learn, it

would be expected in his special education class he would get decent grades and be able to learn. (XIV RT 3304D-3305.) She did not consider appellant to be mentally retarded because based on her personal contacts with appellant there was nothing that indicated he was retarded. (XIV RT 3304B.)

(3) Elizabeth Davis

Elizabeth Davis has worked for Madera Unified School District for ten years. She worked at Madera High School the entire time. (XIV RT 3306.) She is a resource specialist in the special education department. (XIV RT 3306.)[44] She teaches students who "have learning problems . . . its generally with reading or math, and they are categorized by psychological tests" and determined to fit in a resource specialist class. (XVI RT 3306-3307, 3311.) Appellant was in her U.S. history class as a junior and possibly other classes as well. (XIV RT 3307, 3309, 3311.) The history class had about 10 to 15 students. (XIV RT 3312.) Davis saw appellant on a daily basis. (XIV RT 3309.) As his history teacher, and through academic testing, she observed appellant "did have some reading problems" (XIV RT 3307, 3313) but he had no problems with his reasoning abilities. (XIV RT 3308, 3313-3314.)

Appellant "probably" got a D in her class. (XIV RT 3311.) He did not reach his potential. "He was not a student who put forth a great deal of effort." For example, she had a problem getting him to do his homework and get papers turned in. (XIV RT 3307-3308, 3314-3316.)

As a camp counselor, Davis has "worked with mental[ly] retarded children" at her camp site. She is aware of varying levels of retardation. Based on her being appellant's teacher, and her experience working with

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[44] She does not have training as a psychologist. (XIV RT 3310.)

mentally retarded children at camp, she "wouldn't say that [appellant] was mentally retarded." (XIV RT 3308, 3310.)

(4) Susan McClure

Susan McClure is a resource specialist teacher in the special education department at Madera High School. She has worked in that capacity for about 11 or 12 years. (XIV RT 3317-3318.) She teaches English and Science and has previously taught math. (XVI RT 3318.) She has had courses in psychology to complete her special education teaching credential. (XIV RT 3322.) In what was probably appellant's freshman or sophomore year, appellant was her student. She believed she had him in an English class and possibly one or two other special education classes. She taught him for a year and had daily contact with him. (XIV RT 3318-3321.) Appellant did not turn in many homework assignments. (XIV RT 3322.) In dealing with special education programs, she knows there are varying levels of mental retardation. (XIV RT 3322.) Appellant had "some difficulties with reading and writing" but there was nothing she observed that "ever indicated to [her] that [appellant] was mentally retarded." (XVI RT 3319.)

c. Appellant's Good Vocational Testing, Ability To Handle Skilled/Complex Labor, Driver's License, And Daily Reading of the Madera Tribune

(1) Elena Magill

Elena Magill is a branch manager for Volt Temporary Services. The service provides people to various companies for temporary work. (XIV RT 3292.) To find these individuals, the company runs an advertisement in the newspaper or they recruit people at the library and people respond and fill out an application, take some tests, and provide references. (XIV RT 3292, 3296.) Tests are given immediately after completing the application to whoever has come in to apply. (XIV RT 3294C-3294D.) The tests are

"[n]ot really" timed but if the individual was there for two hours she would "label it." Half an hour to 40 minutes is acceptable. (XIV RT 3296B-3926C.) If the individual passes the tests satisfactorily, Volt tries to employ them with a company. (XIV RT 3292.)

On June 30, 1989, appellant came in and filled out an application. (XIV RT 3293 B-3294; Exhib. No. 20 [application of appellant].) "He applied for industrial work. He doesn't have the skills for [clerical] work. So he would only fit into that category." (XIV RT 3296B.) Then he took a test consisting of comparison and mathematics subtests. (XIV RT 3294-3294A; Exhib. No. 21 [tests taken].) Magill did not know if anyone else had filled out an application and taken the test when appellant took his. Test takers are observed through a big window to prevent cheating. (XIV RT 3294D, 3295A.)[45] In the comparison subtest, there are 20 questions comparing names and numbers. (XIV RT 3294A.) Appellant got 13 correct and missed 7. (XIV RT 3294B.) In the mathematics subtest, there are also 20 questions involving basic math. (XIV RT 3294A.) For example in question one, it indicates 16 times 4 is 64, and the test taker must indicate if that is correct or incorrect. (XIV RT 3294A-3294B; Exhib. No. 22 [answer sheet.]) On that subtest appellant got 17 answers correct and missed three. (XIV RT 3294B.) That score was "considered quite good." (XIV RT 3294C.)[46] As a result of appellant's application and

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[45] Magill recalled one person once cheating "[b]ut we caught her." (XIV RT 3294D.) She also testified that if the test is taken at the library, two people from her office sit in the room with the test takers. (XIV RT 3296A.)

[46] Appellant's test score was recorded on his application. There appeared to have been numbers that were erased and someone marked over them. Magill explained that "sometime[s] two or three applications are on the desk and somebody else's . . . test result [is] recorded on it so we find the error" and white it out. (XIV RT 3295B-3295C.) While she could not

(continued...)

test results, Magill placed appellant at two different companies three different times. (XIV RT 3294C.) "Sunsweet Dryers was the first one. Dow Chemical in two different departments was the second company." (XIV RT 3294 C.)

(2) Michael Russell

Michael Russell is a maintenance supervisor with Sunsweet Dryers, a prune drying plant. (XIV RT 3275.) The plant runs from August 1st through September 10th. (XIV RT 3276.) On August 16, 1989, appellant was an employee at the plant during the night shift. (XIV RT 3276, 3280.) He came through Volt Temporary Services. (XIV RT 3276.) Appellant worked for about 10 to 13 days. (XIV RT 3276-3277, 3281.) Russell only sent "good people to the night shift." (XIV RT 3280.) Four of his days, appellant was a scraper operator. The position that appellant held required "somebody that's talented, and can do things, that is responsible" because he must shut off the machine if there is a problem, load the machine each minute and 15 seconds, "shove the machine on a timing sequence," count cars, and make sure there are twenty-six trays per car. (XIV RT 3278-3279, 3283.)

Appellant had to make sure of that there were the correct number of trays per car. (XIV RT 3279.) Too many and it will "fall right down on him," and not enough and it fouls up the "other end where it's kicking out a stack of 26 every minute and 15 seconds." (XIV RT 3279.)

Timing and coordination are a necessity for someone employed as a scraper operator. (XIV RT 3279.) With the cars having to be put through every minute and 15 seconds "you only have less than three seconds to get

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(...continued)
personally know what happened then, that "would be the only situation it could happen." (XIV RT 3296.)

that unit in there." (XIV RT 3279.) It requires rhythm to do. The unit weights about 400 pounds and is on four wheels. "[N]ot everybody can do it." (XIV RT 3279.) If the system jammed, which happened every five to 10 minutes, appellant would also have to shut down the machine and help another person un-jam it and set it back up. (XIV RT 3279, 3284-3285.) Appellant was successful in performing his duties as a scraper. (XIV RT 3280.) After a time they start shutting down some of the machines and only keep some of them going; they try to keep some of their better employees. Russell was hoping to keep appellant. (XIV RT 3280.)

(3) Correctional Officer Paul Cain

Madera Correctional Officer Paul Cain had been assigned to "E" block at the jail from the middle of October to February 19, 1991. During that time appellant was an inmate in "E" block. Almost every day appellant inquired if the Madera Tribune had arrived. Once it arrived appellant would read it. He was observed to "hold the newspaper . . . 18 inches in front of his face or lay[] [it] on the table in front of him and face the newspaper." Appellant seemed to have a keen interest in the Tribune. But he had no interest in the Fresno Bee. He said the Fresno Bee "didn't know anything." During that time, articles about appellant would appear from time to time in the Tribune. (XIV RT 3287-3291.)

(4) Driver's License Stipulation

It was stipulated by the parties that appellant was "issued a California driver's license on October 24, 1986." (XVI RT 3323.)

3. Surrebuttal

The defense offered and the prosecutor accepted a surrebuttal stipulation stating "all mail between jail inmates in the Madera County Jail is subject to monitoring . . . [A]ll such mail is in fact examined. However,

whether the contents of a particular letter [was] actually read by jail authorities is left to the discretion of jail personnel." (XIV RT 3330.)

B. Penalty Phase

Martha Diaz was Marcella Lopez' friend. They knew each other for about ten years. (XV RT 3534.) On August 31, 1989, Lopez lived in an upstairs apartment at 125 Wilson Street in Madera. (XV RT 3533.) Diaz was there babysitting for Lopez. (XV RT 3534.) About 12:30 a.m., Lopez returned home from work and appellant was outside of her apartment. They talked briefly. (XV RT 3534-3535.) Diaz exited the apartment, walked downstairs, and got something from her car. She and Lopez then went back into the apartment together. (XV RT 3535.) After about five or ten minutes, appellant knocked on the door. Lopez partially opened the door, and appellant said he wanted to talk to Diaz. Diaz told Lopez she did not want to talk to appellant. (XV RT 3535, 3538.) Lopez told appellant that Diaz did not want to talk to him and asked him to leave. Appellant said he just wanted to ask her a question and then he "pushed the door" open and came in. (XV RT 3535-3536, 3539.)

Appellant told Diaz he wanted to talk to her in private and she refused and told him she had nothing to say to him. They argued and Diaz said she would call the police if he did not leave. (XV RT 3536.) Appellant got angry told her not to call the police because he had a warrant out for his arrest and he would go to jail. Diaz, who had not previously known about the warrant said, "Well, then, just leave," and she picked up the phone. (XV RT 3536, 3539.) As soon as she picked up the phone, appellant punched her in the mouth and then punched her a second time on the nose or head. He removed the phone from her hand and hung it up. (XV RT 3536-3537, 3540.) Diaz' mouth became very swollen and was bleeding. She held her head and complained about how it felt. (XV RT 3537, 3541.) Appellant left and the police were called. (XV RT 3540-3541.)

On the evening of May 31, 1990, Madera County Correctional Sergeant Rebecca Davis entered E unit where appellant was housed. (XV RT 3542-3543.) Appellant was sitting on a plastic chair in the door way of his cell. It was not his scheduled time to be out of his cell. Appellant claimed he was using another inmate's time. Sergeant Davis gave appellant a direct order to go into his cell and close the door. (XV RT 3542-3543, 3545.) Appellant failed to respond. She gave the order again with no response. After she gave the order a third time, he threw the chair he was sitting on toward Sergeant Davis. She stepped to the side or the chair would have hit her. She then pushed appellant into his room and closed the door. (XV RT 3543-3545.)

On June 28, 1990, at about 7:00 a.m., uniformed Correctional Officer Frank Reiland went to appellant's cell to try and calm him. He opened appellant's cell door.[47] Appellant tried to force his way by the officer. The officer stuck his hand out to prevent him from going out. Appellant then kicked the officer and took a punch at him, grazing his temple. (XV RT 3547-3553.)

Beatrice Cruz dated appellant in late 1985. In April 1986, she was no longer dating him. (XV RT 3559-3560.) On April 14, 1986, in the early evening, she saw appellant parked outside of her home. Cruz had a male friend there. He was just leaving. Appellant and he argued. Cruz told appellant to leave. She told him if he did not, she was going to call the police. Appellant called her a bitch and hit her in the mouth, making it bleed. Cruz called the police and appellant was arrested. (XV RT 3560-3562.) Sometime afterward appellant called her and said she was going to pay for calling the police and making a report. Appellant further stated,

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[47] At the time of trial, Officer Reiland was a Parole officer. (XV RT 3547.)

"'You better get out of that house, something is going to happen to you because I'm going to kill your wetback.'" (XV RT 3563.) Because Cruz had a boyfriend (now husband) who was from Mexico, appellant called him a "wetback." In addition, at a store, while she was with her boyfriend appellant told her "he was going to kill [her] wetback." (XV RT 3562-3563.) Regarding this incident, a complaint alleging that appellant violated section 242 (battery), and a minute order reflecting appellant's guilty plea to that charge, were admitted into evidence. (XV RT 3568-3571; Exhib. Nos. 28 and 29.)

The parties stipulated that if James Angus was called to testify he would testify that Exhibit No. 26 is an accurate photograph of victim Diaz with the bullet shell he observed on top of her crotch. (XV RT 3565-3566.)

C. Defense

Catherine Townsel, appellant's mother, testified her husband is a self-employed trucker; she had a close knit church oriented family; appellant is one of five children; all the children got along; appellant was born in Madera; as a child appellant played and got along with other children; when he started school he was immature, as sometimes boys mature a little slower than girls; appellant had friends in the neighborhood and at school; appellant did not have behavioral problems beyond those of other boys but, with her permission, at some point appellant did get paddled at school; in grade school he had difficulty reading and grasping things even though she and her husband worked with him; appellant could not keep up with the rest of his class; and school personnel suggested appellant be placed in special education and she agreed. (XV RT 3578-3585.) Some children teased him about being in that class and he did not like that. (XV RT 3582-3583.) They were the only Black family in their neighborhood so her children mostly associated with White and Mexican children. (XV RT 3583-3584.)

Appellant's mother stated that while appellant was in Junior High School, with the help he received from the school in the subjects he was slow in, appellant began to do better and she could not recall any behavioral problems. (XV RT 3586.)

In high school, appellant dated Cruz (then Torres), who was older than he was, and Ms. Townsel did not approve. When appellant was 17, he was not doing well in school and wanted to drop out. Appellant worked with her husband doing manual labor and with Boyle Electric and Sunkist. (XV RT 3587-3592.) Appellant is mechanically inclined and worked on cars and lawn mowers. (XV RT 3598.)

Ms. Townsel became aware of the relationships appellant had with other woman when he left home and then with Diaz. Diaz called her one of the times appellant was firing a gun around Diaz' house and she told Diaz to call the police because something was wrong. She also became aware of the incident that lead to the charges in this case. (XV RT 3593-3599.) Appellant's girlfriends were Hispanic. (XV RT 3599.) Appellant's mother does not believe in the death penalty. (XV RT 3599.)

Christine Ortiz and Elana Esparza testified that in the summer of 1988, they hung out with appellant and other friends. Appellant was a nice person with a sense of humor who did not drink or fight. (XV RT 3600-3606.) Bailiffs Jeffrey Doran and Jess Ozcoidi stated they have had no difficulties with appellant or any other prisoner while assigned to the courtroom. (XV RT 3606-3610; XVI RT 3612-3615.)

David Boyle and his family own a business named Boyle Electric. He has known appellant and his family for 12 years. Appellant has worked for him putting "pipes in slabs," doing general mechanical work on his trucks, and sometimes some janitorial work. He had no complaints about his work habits or conduct. (XVI RT 3616-3618.)

Correctional Sergeant Allen Patchell stated that he went over the disciplinary report with Officer Davis and determined that appellant had not thrown the chair at Officer Davis because appellant was so close to her that appellant would have hit her if appellant had intended to do so. Appellant slammed the chair to the ground and then it hit the officer. He stated Officer Davis said she had not moved. But Officer Davis' report said that she moved to avoid the chair. (XVI RT 3618-3623.)

Clefo Townsel, appellant's grandfather and a pastor, testified he used to be a trucker. He had contact with appellant prior to high school. He said at that time: they had a fine relationship; appellant's siblings did not tell him they had any trouble with appellant; in Sunday school, he instructed appellant to stay out of trouble; in Sunday school, appellant had difficulty staying up with the others; when appellant got to high school he did not have much contact with appellant; appellant worked with his father hauling hay and was a good worker; and, appellant was good at fixing things mechanically. Appellant worked on a plow and put a starter in his truck. (XVI RT 3624-3628.)

Dr. Frank Powell was recalled and gave a recount of the history of I.Q. testing. (XVI RT 3632-3634.) He stated law enforcement used I.Q. testing. (XVI RT 3634.) Dr. Powell reviewed Dr. Coleman's testimony and stated it did not make him question the results of the I.Q. tests he administered. He stated the criticisms Dr. Coleman expressed were not widely accepted in the field of psychology; there is overlap between psychologist and psychiatrists in that they both use an interview approach in treating the emotionally disturbed, although psychologists cannot prescribe medicine; he had special training in psychometrics; there is a recognized organization called the American Psychological Association that most psychologists belong to; psychometrics is often used in the educational system; it is still his belief that appellant should be categorized

as mildly mentally retarded; he read Potter's testimony and the I.Q. results would "[n]ot necessarily" be inconsistent with his results because he anticipates, as children get older, it "is possible that their measured test results" will decline; and, he does not consider an I.Q. drop of 77 to 59 to be very significant. (XVI RT 3634- 3639.)

A passage in one of appellant's letters read:

> These dump trucks found another way to dump, now they use your I.Q. I bet a lot of people laughed at that one. That's their new way of bullshitting us in court. Another one of Madera's finest, ha-ha, which has nothing to do with the crime itself.

This passage also did not change Dr. Powell's opinion about his results. (XVI RT 3639-3640, 3647; Exib. No. 30.)

Appellant's mother was recalled as a witness. She testified that if appellant got life without the possibility of parole she would visit him. Appellant told her he is praying. (XVI RT 3641.)

Appellant's father, David Townsel, stated when appellant was a child he was slow with counting money and reading. Appellant was respectful with him and did a good job while hauling hay with him. (XVI RT 3643-3644.)

ARGUMENT

I. APPELLANT FAILS TO DEMONSTRATE THAT HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND RELIABLE GUILT AND PENALTY DETERMINATION WERE VIOLATED BY THE TRIAL COURT NOT SUSPENDING PROCEEDINGS AND APPOINTING THE DIRECTOR OF THE REGIONAL CENTER TO EVALUATE HIM AFTER DR. CHRISTENSEN OPINED DURING TRIAL THAT APPELLANT WAS, AT THE TIME SHE TESTED APPELLANT, MENTALLY RETARDED AND INCOMPETENT TO STAND TRIAL

Appellant contends that while his counsel never alerted the court, either during his pretrial competency proceedings or during trial, that appellant may be incompetent to stand trial because of a developmental

disability, the trial court was required sua sponte to suspend proceedings and appoint the director of the regional center to evaluate him, when Dr. Christensen opined during trial that appellant, back during the period of his pretrial competency hearing, was incompetent to stand trial due to mental retardation. Appellant asserts Dr. Christensen's testimony was substantial evidence raising a reasonable doubt as to his competence so he was entitled to a second competency hearing. (AOB 43, 48-51, 53, 58-60, fn. 21.) Appellant argues that the failure of the trial court to suspend proceedings, seek a regional center evaluation, and hold a second competency hearing was not harmless and violated his constitutional rights to due process and to a reliable guilt and penalty determination and therefore his judgment should be reversed. (AOB 43, 60-82.)

Respondent contends not only did appellant fail to present any evidence of mental retardation during his pretrial competency hearing, where the trial court found appellant to be malingering and competent to stand trial, Dr. Christensen's trial testimony about appellant's alleged incompetence did not refer to appellant's *present inability* to stand trial and failed to provide substantial evidence of mental retardation causing alleged incompetence. Nor did appellant present the trial court with evidence of a substantial change of circumstances or with new evidence casting a serious doubt on the validity of the original competence finding. As such, the court was under no duty to suspend proceedings and appoint the director of the regional center to examine appellant, nor was the court obligated to hold a second competency hearing. No error, or constitutional violations, occurred. Finally, even assuming arguendo err occurred by the failure to appoint the regional center, it was harmless. But, if this court finds that appellant was entitled to a second competency hearing, the matter should be remanded for that purpose.

A. Relevant Legal Principles

Federal and state due process, and state law prohibit the conviction or sentence of a defendant who is mentally incompetent. (*People v. Ary* (2011) 51 Cal.4th 510, 517; *People v. Blair* (2005) 36 Cal.4th 686, 711.) A defendant is incompetent "if, as a result of mental disorder or developmental disability, [he or she] is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (See § 1367, subd. (a); see also *People v. Lewis* (2008) 43 Cal.4th 415, 524 [defendant is incompetent if he lacks a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational understanding of the proceedings]; *People v. Ary, supra*, at 517, quoting *Dusky v. United States* (1960) 362 U.S. 402, 402 ["[A] defendant is deemed competent to stand trial only if he "'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding'" and "'has a rational as well as factual understanding of the proceedings against him.'"].)[48] A defendant is presumed to be mentally competent unless proved otherwise by a preponderance of the evidence. (*People v. Ramos* (2004) 34 Cal.4th 494, 507 (*Ramos*); *People v. Ary, supra,* 51 Cal.4th at 518; *People v. Castro* (2000) 78 Cal.App.4th 1402, 1418, overruled on other grounds in *People v. Leonard* (2007) 40 Cal.4th 1370, 1389.)

"Our statutes provide for suspension of criminal proceedings when a doubt as to the defendant's competence arises in the trial judge's mind or when counsel informs the court of counsel's belief the defendant may be

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[48] A "'developmental disability' means a disability that originates before an individual attains age 18, continues, or can be expected to continue, indefinitely and constitutes a substantial handicap for the individual, and shall not include other handicapping conditions that are solely physical in nature. . ." (§ 1370.1, subd. (a)(1)(H).)

incompetent (§ 1368)." (*People v. Taylor* (2009) 47 Cal.4th 850, 861.) Even when counsel or the court do not entertain such a doubt, when a defendant presents substantial evidence of incompetency to stand trial, due process requires, sua sponte if necessary, a hearing on the issue. (*People v. Welch* (1999) 20 Cal.4th 701, 738; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1110.) However, evidence that "merely raises a suspicion that the defendant lacks present . . . competence but does not disclose a present inability because of mental illness [or mental retardation] to participate rationally in the trial is not deemed 'substantial' evidence requiring a competence hearing." (*People v. Deere* (1985) 41 Cal.3d 353, 358, emphasis added, disapproved on other grounds in *People v. Bloom* (1989) 48 Cal.3d 1194, 1228, fn. 9; *People v. Jacobo* (1992) 230 Cal.App.3d 1416, 1427.) "'Evidence is "substantial" if it raises a reasonable doubt about the defendant's competence to stand trial.'" (*People v. Danielson* (1992) 3 Cal.4th 691, 726, overruled on other ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

"Section 1369 provides for the appointment of psychiatrists as well as licensed psychologists to assess the defendant's mental competence (*id.*, subd. (a)); and it allows both the defense and the prosecution to present evidence to either support or counter a claim of the defendant's mental incompetence to stand trial (*id.*, subds. (b)-(d))." (*People v. Ary, supra,* 51 Cal. 4th 510 at 517-518.) "The defense may waive a jury trial and may even . . . submit the issue to the court on the written reports of psychologists or psychiatrists." (*People v. Taylor, supra*, 47 Cal.4th at p. 862.)

If it is suspected the defendant is developmentally disabled, the court shall appoint the director of the regional center for the developmentally disabled established under Division 4.5 (commencing with Section 4500) of

the Welfare and Institutions Code, or the designee of the director, to examine the defendant." (§ 1369, subd. (a).)

In other words, where the record shows the existence of incompetence because one of the specified conditions constituting a developmental disability which originated prior to the defendant's 18th birthday, which is expected to continue indefinitely, and which constitutes a substantial handicap for him, the court must appoint the regional center director to examine him as part of the competency proceedings. (See *People v. Leonard, supra,* 40 Cal.4th at pp. 1387-1388; *In re L.B.* (2010) 182 Cal.App.4th 1367, 1371-1372; § 1370.1, subd. (a)(1)(H).) Mental retardation is a developmental disability. (§ 1370.1, subd. (a)(1)(H)).[49] "[A]ppointment of the director of the regional center for the developmentally disabled (§ 1369, subd. (a)) is intended to ensure that a developmentally disabled defendant is evaluated by experts experienced in the field, which will enable the trier of fact to make an informed determination of the defendant's competence to stand trial." (See *People v. Leonard, supra,* 40 Cal.4th at p. 1391.) The erroneous failure to appoint the director of the regional center does not require reversal "unless the error deprived [the defendant] of a fair trial to determine his competency." (*People v. Leonard, supra*, 40 Cal.4th at p. 1390.)

On appeal, a finding of competence will be upheld where there is substantial evidence, viewed in the light most favorable to the verdict, supporting the finding. (*People v. Dunkle* (2005) 36 Cal.4th 861, 885 (*Dunkle*), disapproved on another point in *People v. Doolin* (2009)

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[49] Section 1376 currently defines "mentally retarded" to mean "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18." (Stats. 2003, ch. 700, § 1; see *People v. Jackson* (2009) 45 Cal.4th 662, 678.)

45 Cal.4th 390, 421, fn. 22; see *People v. Lawley* (2002) 27 Cal.4th 102, 131; *People v. Castro, supra,* 78 Cal.App.4th at p. 1402, 1418 [On appeal, a finding on the issue of a defendant's competence to stand trial "cannot be disturbed if there is any substantial and credible evidence in the record to support the finding"].)

Finally, while a pretrial competency determination does not by itself establish a defendant's competency during trial, a second competency hearing is only required if the trial court "'is presented with a substantial change of circumstances or with new evidence' casting a serious doubt on the validity of that finding." (*People v. Lawley, supra*, 27 Cal.4th at p. 136; *People v. Huggins* (2006) 38 Cal.4th 175, 220; *People v. Taylor, supra*, 47 Cal.4th at p. 864.)

B. Appellant's Arguments I, Subsections B, C And D, Fail To Demonstrate That When Defense Expert Christensen Testified That Appellant Was Incompetent Due To Mental Retardation A Year And A Half Earlier, That Immediately Triggered A Sua Sponte Duty By The Trial Court To Suspend Proceedings And Appointment Of The Regional Center Director For An Evaluation For A Second Competency Hearing

1. Based On The Evidence Before It, The Finding Of The Trial Court At Appellant's Pre-Trial Competency Hearing That Appellant Was Malingering And Competent To Stand Trial Was Correct And Is Effectively Unchallenged By Appellant

Initially, it is important to consider appellant's pretrial competency proceedings. On November 2, 1989, appellant's case came before the Bordon Justice Court, in Madera County, for a preliminary hearing. The prosecutor informed the court he was ready to proceed but appellant's counsel, Linda Thompson, stated she was not ready to proceed and declared a doubt about appellant competency: "I am making a motion pursuant to

[section] 1368, that my client be certified to the Superior Court. After discussion with [appellant] and after an evaluation by a psychologist, I do not believe he's competent to assist me in this preliminary hearing or in his defense . . ."[50] The court then suspended proceedings to obtain an evaluation from court-appointed experts and certified the matter to the Superior Court for a determination on competency. (XIII CT 3083; CTA 8; RTB 3-4.)

On November 3, 1989, Superior Court Judge Edward Moffat appointed psychiatrists Charles Davis M.D., and Howard Terrell M.D.,[51] both, Diplomats, American Board of Psychiatry & Neurology, to examine appellant pursuant to section 1368. (XIII 3084; Court's Exhibit Nos. 1 and 2.[52])

In a report by Dr. Davis dated November 17, 1989, Dr. Davis documented appellant's answers to a variety of questions during his evaluation of appellant. Those answers provided little information and

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[50] The psychologist was unidentified and no evaluations were tendered. Nor was there any indication that counsel suspected mental retardation. (*Contrast, People v. Castro, supra,* 78 Cal.App.4th at 1410-1411 ["Dr. Sanderson examined appellant and submitted a written report to defense counsel. Because Dr. Sanderson's report indicated appellant was developmentally disabled, defense counsel filed a motion pursuant to sections 1368.8 and 1369.9 which requested that the director of the regional center for the developmentally disabled be appointed to examine appellant pursuant to section 1369, subdivision (a)." Subsequently, "Defense counsel filed [a] further declaration. Attached to defense counsel's supplemental declaration were records from the State of California, Department of Rehabilitation . . . reflecting that appellant had a developmental disability classified as 'most severe.'"].)

[51] Also see American Journal Of Forensic Psychiatry, Volume 13, Number 2, 1992/35 [Re Dr. Terrell].

[52] Respondent received copies of what appellant has referred to as Court's Exhibit Nos. 1 and 2, from appellant. They do not appear to be part of the certified record received by respondent.

professed profound ignorance.[53] Appellant was performing so poorly he was asked if he was mentally retarded and even to that question he answered that he did not understand. Mental retardation was explained to him and appellant said, "'I don't know what that means.'" Appellant continued answering as such, for example, claiming he did not know his age, birthday, or place of birth, and, he asserted that he forgot his telephone number. Appellant said he thought he had one brother and one sister. He told Dr. Davis he did not know the name of his attorney. Dr. Davis asked him about the charge against him, and appellant said "'Someone shot me in the back. That is why I am here.'" He claimed not to know when he was shot. Appellant said he was walking – he could not remember where- and got shot and he was picked up by an ambulance. Appellant claimed he did not know where the ambulance took him. Dr. Davis advised appellant that a victim is not normally taken to jail, but to a hospital. Appellant stated, "'That is all I know.'" Appellant told Dr. Davis that he did not know what medication was he was taking, but subsequently told the doctor that he received medication for his nerves. He claimed not to know what a judge or jury were. (Court's Exhib. No. 1, pp. 1-4.) The report further reflected:

> [Appellant] was asked if he graduated from high school, and he sa[id], "What is that?" He went to school for a couple of years, he thinks. When asked if he played any sports, he sa[id], "I have always been by myself." Then he added, "People used to call me a retardo. I don't know why." When asked if he has had sexual relations with anyone, he sa[id], "I don't think so."
>
> He did not name any type of work that he ha[d] done.

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[53] Most of appellant's answers were essentially "What is that?," "Who is that?," and I don't know types of answers. (See, Court Exhib. No. 1.)

> He d[id]n't think that he has had a driver's license. He sa[id] that he doesn't have a car. His mother transports him wherever he needs to go.
>
> He was asked about his health, and he sa[id], "What is that?"
>
> . . .
>
> He sa[id] that he has never been in jail before. No prior arrests. He was informed that he is in jail with a charge of murder, and he sa[id], "I don't hate nobody." He was asked about having a gun. He sa[id] that he doesn't have a gun. There are no guns in his house.

(Court Exhib. No. 1, pp. 3-4.)

Appellant continued to allege ignorance about nearly everything. For instance, he claimed not to know what month or date it was; nor did he know the names of the months of the year. He claimed, after being told his interviewer was a doctor, that he did not know the interviewer was a doctor. He said he did not know what a doctor or psychiatrist was. He was asked if he had hallucinations and appellant said he told "'them'" he hears people and sees things. But when asked what the voices said, appellant would only comment that they talk to him but would not say what it was they talk to him about. Appellant said he attempted suicide that year by taking medicine but he did not know if he went to the hospital. (Court Exhib. No. 1, p. 4-5.)

[Appellant] was asked to read from the Crime Report that was prepared by Officer Van Horn dated September 23, 1989. What he read aloud was

> Martha came to stay at our house because she was afraid of Anthony (suspect). Martha is 5 months pregnant and he is the father. Martha made a report against Anthony for getting her pregnant. Suspect Anthony told Martha "After you have that baby, you better stay inside!" Then last night Anthony came to our house and started shooting, but nobody got hurt. Then today

> I was in the living room and saw Anthony coming. I called to Martha "Go to the bedroom, Anthony is here". My husband Mauricio came out of the bedroom and stood in the bedroom between Anthony and Martha. "He just started shooting". I ran next door and told them to help.

(Court Exhib. No. 1, p. 5.)

> The Defendant could read all of these words except "Mauricio." When he was reading about Martha, he asked "who is that". When asked if he knew that she was pregnant with his child, he acted like he didn't know Martha or anything about this.

(Court Exhib. No. 1, p. 5.)

Finally, having made his clinical observation of appellant, Dr. Davis concluded that appellant had not proved incompetence and he was "malingering." (Court Exhib. No. 1, p. 1.) More specifically, his report stated:

> DIAGNOSTIC IMPRESSION:
>
> Malingering.
>
> When an individual malingers to the extent that [appellant] did, one does not know if there is some legitimate disorder masked by the malingering or not.
>
> COMMENT:
>
> It is recommended that the Court find [appellant] to be competent and that he proceed with the charges against him, with or without his cooperation.

(Court Exhib. No. 1 p. 5.)

Dr. Terrell's report, dated November 21, 1989, showed similar answers by appellant. For example, appellant claimed, that he "has absolutely no idea how old that he is[,] . . . he does not know his own full name[,] . . . he does not know whether he is married or single[,] . . .[he has] no idea whether he has fathered children and [he] . . . has no idea where he was living prior to his arrest." (Court Exhib. No. 2, p. 2.)

CIRCUMSTANCES OF THE OFFENSE:

When asked to describe the circumstances leading to his arrest he replied, "Because I got shot."

The Defendant claims that he [is] not aware of any other reasons that would cause him to be incarcerated.

When asked if he was aware that he was charged with the murder of his girlfriend, her five month old unborn fetus, and her brother in law who attempted to protect her, he replied, "All I know is that I was shot."

(Court Exhib. No. 2, p. 2.)

In his report, Dr. Terrell also noted the details of appellant's offense as set forth in the police reports, including appellant's many admissions. (Court Exhib. No. 2, pp. 2-4.) Dr. Terrell attempted to get some past history from appellant. Appellant claimed to have one sibling. He said he had "no idea" where he was born or how much education he had. He also claimed not to know what street drugs or alcohol are. When asked if he heard voices appellant said he did, and, when asked what they said, he replied "'They just tell me, 'How are you doing?'" (Court Exhib. No. 2, p. 4.) Appellant said he was not aware if he had psychiatric treatment in the past; did not know if he had allergies to medications; he took a "'little pill'" as medication; and, when asked if he ever had surgery, he responded he "was shot in the back recently." (Court Exhib. No. 2, p. 4.) The report further noted:

MENTAL STATUS EXAMINATION:

The Defendant is a slender Black male with fair grooming habits. He is wearing a neck collar. He appeared to be Malingering by giving numerous answers which were not consistent with any known Mental Disorder. Eye contact was extremely poor.

(Court Exhib. No. 2, p. 4.)

It was also noted that appellant was alert and oriented to his first name, and to the fact that he was in jail. He claimed, however, that he "did not know the month, year, or his city location." (Court Exhib. No. 2, p. 5.)

Thought Content and Processes:

> Association w[as] relevant and coherent. He claimed to have experienced auditory hallucinations. When asked a number of simple questions to assess his general information he gave numerous, "I don't know" answers. Simple Math-The Defendant claimed that he did not know how much two and two was, nor could he perform any mathematical calculations of any sort. When asked abstractions in terms of similarities and differences, he then replied. "I don't know."

(Court Exhib. No. 2, p. 5.)

Appellant further claimed that he did not know the charges against him; he had "no idea" what murder was; he did not know if murder was a misdemeanor or felony; he did not know if a misdemeanor or felony was more serious; he had "no idea" who is attorney was; he had "no idea" what a plea bargain was; he had "no idea" who the officials were in a court of law; and, when asked the function of a judge, he replied, "'Yeah that black thing." (Court Exhib. No. 2, p. 5.) He also stated he did not know the function of an attorney, the district attorney or court reporter. (Court Exhib. 2, p. 6.) The report continued:

> I then spoke with three Officers who worked in Maximum Security along with the Defendant. They stated that [appellant] was noted to be somewhat peculiar, however he acted regularly with the other prisoners, read the newspapers virtually every day, and seemed to be conducting himself relatively appropriately.
>
> DIAGNOSES:
>
> Malingering.
>
> Psychotic Disorder NOS VS Possible Malingering.
>
> COMMENT:

> The Defendants poor eye contact, flat affect, and claims of experiencing auditory hallucinations, could be typical of a Psychotic Mental Disorder such as Schizophrenia.
>
> The majority of the Defendant's responses however, typified by, "I don't know answers" with regards to his full name, his age, place of birth, and marital status are not typical of Schizophrenia but are classical responses for someone who is malingering.
>
> I believe it is extremely likely that the Defendant is Malingering (Lying) about his answers in order to escape culpability for his crimes.
>
> None the less I believe that there is a small possibility that he also suffers from a concurrent mental disorder. If this is indeed true, I believe that this Mental Disorder is interfering with his ability to cooperate with Counsel in preparing for a Defense.
>
> It is therefore recommended that the Court find the Defendant incompetent to stand trial and that he be referred to Atascadero State Mental Hospital for Psychiatric Treatment until such time that he is Competent to stand trial.

(Court Exhib. No. 2, pp. 6-7.)[54]

On December 1, 1989, both parties appeared before the trial court and agreed to submit the competency issue on the reports of the appointed psychiatrists and the court made its ruling:

> THE COURT: It appears to me from reading the reports that I'm inclined to believe that the defendant has not proved by preponderate of the evidence that he is incompetent to stand trial. I believe that he is malingering as set forth.
>
> When you compare . . . Dr. Davis' opinion which is rather strong and Dr. Terrell's opinion . . . I believe it's extremely

[54] In the summary opinion on page one of Dr. Terrell's report he did not reference the "small possibility" when referring to the mental disorder. (Court Exhib. No. 1, p. 1.)

likely the defendant is malingering about his answers in order to escape culpability for his crime.

There's a small possibility that he is suffering from this disorder. I don't find that's sufficient enough.

So I will find that the defendant is presently mentally competent within the meaning of section 1368 of the Penal Code, and that he is presently able to understand the nature of the proceedings against him and able to assist counsel in the conduct of the defense in a rational manner.

(CT XI 2733-2735; CT XIII 3085.)

Appellant makes no attempt to demonstrate, based on the evidence before the trial court at the time of its ruling, that the trial court's ruling was erroneous. (See *People v. Leonard, supra,* 40 Cal.4th at p. 1393 [Review of trial court ruling on competence to stand trial is based on the evidence the trial judge had before it when making the ruling].) Nor does he claim - and no evidence would support such a claim - that at the time of the ruling, there was evidence before the court from which the court could or should have reasonably suspected that appellant suffered from mental retardation. (AOB 43-82; § 1369, subd. (a).) As the court found, appellant was competent and malingering to escape culpability for his crime. (CT XI 2733-2734; CT XIII 3085.) Accordingly, the pre-trial competency finding by the trial court was proper and stands without any substantive challenge by appellant. (See *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1517 [appellate court must presume order of trial court is correct; all intendments are indulged in to support it on matters as to which record is silent, and error must be affirmatively shown].)

2. Appellant Fails To Demonstrate That When Defense Expert Christensen Testified A Year And A Half Later That Appellant Was Incompetent Due To Mental Retardation A Year And A Half Earlier, That Immediately Triggered A Sua Sponte Duty By The Trial Court To Suspend Proceedings And Appointment Of The Regional Center Director For An Evaluation For A Second Competency Hearing

Appellant contends, in his arguments I, subsections C and D, that Dr. Christensen's testimony, as a matter of law, provided substantial evidence of incompetence due to mental retardation thereby raising a reasonable doubt that appellant was competent to stand trial. This, he argues, triggered the trial court's sua sponte duty to "suspend proceedings and appoint the director of the regional center," or his designee, to evaluate appellant and then have a second hearing to determine whether appellant was competent to stand trial. He further contends that failure to do so violated his rights to due process and heightened reliability in all stages of these capital proceedings, and requires reversal. (AOB 51, 56, 58-59, and footnote 21.) Respondent disagrees. Appellant fails to demonstrate that Dr. Christensen's testimony at trial provided substantial evidence that appellant, due to mental retardation, was *presently* incapable of understanding the purpose or nature of the criminal proceedings being taken against him or was incapable of assisting in his defense or cooperating with counsel because of mental retardation. Nor did Dr. Christensen present substantial evidence of mental retardation causing incompetence. Nor was there a substantial change of circumstances or new evidence that gave rise to a serious doubt about the validity of the original competency finding. Therefore, the trial court was under no duty to appoint the director of the regional center to assess appellant, nor to hold a second

competency hearing. Finally, assuming arguendo that error occurred, it was harmless.

a. Dr. Christensen's testimony

Dr. Christensen testified she had her own private practice. She had been a licensed clinical psychologist since January of 1985. (XIII RT 2985, 3049, 3132.) During her career Dr. Christensen worked in various institutions such as a prison, the Air Force, and San Diego schools. She also worked for five years at the Central Valley Regional Center. She did not indicate if she was a licensed psychologist while working at the regional center. At the regional center, she worked with the developmentally disabled. In so doing, she dealt with people with I.Q.'s of zero to 80. (XIII RT 2985-2986, 2966.)

According to Dr. Christensen, prior to the preliminary hearing, defense counsel hired her to examine appellant. Counsel informed Dr. Christensen that she thought appellant was probably psychotic and she was "having a problem figuring out how to approach [appellant] because [counsel] couldn't . . . make sense of him." Counsel could not get appellant to focus or cooperate. (XIII RT 2988-2989, 3051.) Dr. Christensen attempted to provide answers for defense counsel. (XIII RT 3081.)

When Dr. Christensen contacted appellant on October 25, 1989, he was "wearing some type of head harness that was immobilizing his head movements." (XIII RT 2988.) He was on a table and it was not a controlled setting. (XIII RT 3025.) The room was not well lit and appellant was tired and in physical pain. (XIII RT 3025-3026, 3080.) Appellant had a bullet in his neck. (XIII RT 3074.) Dr. Christensen conducted a mental status examination of appellant. (XIII RT 2990.) A mental status examination checks the person's current ability to listen, focus and respond to determine if there is anything that might interfere with the subject's performance on the testing. (XIII RT 3040.) During the

examination appellant seemed to be listening and cocking his head. Dr. Christensen asked him if he was hearing voices and appellant replied, "yes." She asked him what the voices said and appellant gave her a vague answer. (XIII RT 3051-3052.) She ultimately opined he was significantly distracted by auditory hallucinations throughout her examination and subsequent testing. (XIII RT 3025, 3080.) Dr. Christensen also opined appellant was not oriented as to time, person or place and had organic hallucinosis. (XIII RT 2990, 3073.) Based on what she saw, she determined that she had not "brought quite the right implement" to test appellant. (XIII RT 2989, 2991, 3041, 3050-3051.)

Nevertheless, Dr. Christensen began her testing. She had appellant complete the verbal portion of the Weschler, with its various subtests, and a drawing test. (XIII RT 2991, 2998, 2993, 3001.) She thought appellant's alleged hallucinations were a permanent condition. So despite all the "auditory hallucinations and the other factors" present she proceeded with testing because defense counsel "needed to have the information as soon as possible." (XIII RT 2988-2989, 3051, 3081, 3108-3109.) She said in such circumstances she proceeds with testing because she wants to know how the subject is currently functioning, "[w]hether or not they're hallucinating, whether or not they're under medication, whether or not they've got a fever, whether or not they're having seizures." (XIII RT 3109.)

On October 27, 1989, Dr. Christensen continued her testing by administering the Wechsler performance subtests, as well as various other tests she felt were appropriate for appellant. On that date, according to Dr. Christensen, appellant again was not oriented as to time, person or place. (XIII RT 2990, 2997, 3000-3001, 3010.).

Based on her testing, Dr. Christensen concluded that appellant had a total I.Q. score of 47 and "moderate to severe retardation." (XIII RT 3017, 3073.)[55]

However, by the time Dr. Christensen testified at trial in April of 1991, she was forced, primarily during cross-examination, to address the substantial issues related to her testing. The defense had called Dr. Powell as their first expert witness. By the time Dr. Christensen testified, she had read Dr. Powell's testimony and report and knew that Dr. Powell reached significantly different conclusions about appellant. (E.g., XIII RT 3074-3075.) Dr. Christensen acknowledged that on the Wechsler test some of the subtest scale scores she and Dr. Powell got were different. She attempted to explain it by saying "if one is having a bad day or a good day you can score five to eight, ten points difference." But when faced with the actual scores, she admitted that her full scale I.Q. for appellant (47) and Dr. Powell's full scale I.Q. score for appellant (59), were twelve points apart. (XIII RT 3025, 3027.) The discrepancy in full scale I.Q. scores was, she admitted, "significant." (XIII RT 3079.)[56] She noted "[t]he major

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[55] Dr. Powell, during testing shortly before trial, got an I.Q. score of 59. Subsequently, during a continuance obtained by the defense during the guilt phase of their case, Dr. Schuyler's associate, Dr. Ulem, also tested appellant. Dr. Schuyler testified that his colleague got an I.Q. score from appellant of 66. Both opined appellant was only mildly mentally retarded. (XII RT 2859-2866, 2937-2938, 2945-2946; XIII RT 3147, 3164.) Neither saw evidence of hallucinations or disorientation. (XII RT 2883, 2901, 2933; XIII RT 3138-3139, 3180-3181.)

[56] Dr. Schuyler later testified there was a "very significant" difference between the I.Q. score Dr. Christensen got of 47 and the score his colleague got of 66. (XIII RT 3162, 3169.) Even Dr. Christensen, apparently anticipating a hirer score from Dr. Schuyler's associate, acknowledged that if a subsequent examiner got an I.Q. score of "63," when compared to her score of 47, that "would not be within the normal range of discrepancy." (XIII RT 3079.)

discrepancy comes within the two administrations in the verbal test." (XIII RT 3079.) She thought the difference in scores "could be as a result of the different environments" of the testing. (XIII RT 3028-3029; see XV RT 3455 [Prosecutor pointed out in his closing argument "it was only upon being confronted by the other scores that Dr. Christensen mentioned the reasons why her results would be unreliable"].)

At another point Dr. Christensen more frankly admitted,

> I can't tell what may have caused the lower level performance [her testing reflected.[57]]. I do know that day he obtained a lower level I.Q. And that . . . a year and a half later with Dr.. Powell, totally different setting [he] got a higher I.Q.

(XIII RT 3080.)[58]

While holding fast to her I.Q. score, she nonetheless had to qualify it by stating the score she got was appellant's I.Q. for *"[t]hat day" under the conditions at that time.* (XIII RT 3070, 3085, 3110, *emphasis added*; see *People v. Marks* (2003) 31 Cal.4th 197, 219 ["[T]he defense evidence was not compelling. Although the defense presented expert testimony, the People's cross-examination called into question the reliability of the experts' analyses. As we have explained, expert testimony is only as reliable as its bases"].)[59]

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[57] This statement was consistent with Dr. Coleman's testimony that Dr. Christensen's I.Q. result of 47 was "completely meaningless when it comes to the question of [appellant's] intelligence." (XIV RT 3226.) "All it tells you is he gave answers which added up to a low score. But it tells you absolutely nothing about why he gave those answers." (XIV RT 3226.)

[58] Backtracking at that point, Dr. Christensen insisted the I.Q. scores were "still very close." (XIII RT 3080.)

[59] When the prosecutor directed her attention to the fact that her report did not mention appellant's I.Q. was "47 on that day," Dr. Christensen could only retort, "No, that date that report is written for that testing, well, evaluation that, that's what that report is written about." (XIII RT 3070.)

In the context of the much higher I.Q. test results achieved by Dr. Powell, the prosecutor further inquired of Dr. Christensen whether some of her opinions about appellant had changed. To a small degree Dr. Christensen, seemingly grudgingly, acknowledged they had. (XIII RT 3085-3086.) That lead to the testimony appellant relies upon for this argument (AOB 57):

> [PROSECUTOR LICALSI] Q In your report I believe you stated that you felt the defendant was not competent to stand trial and assist his attorney; is that correct?
>
> A Correct.
>
> Q Has that opinion changed?
>
> A My opinion based on what I had *at that time* and for the decision -- point I was making. I still believe *at that time* he was incompetent to stand trial.
>
> Q And you believe that even though the Superior Court, upon the reports of two psychiatrists found him to be competent?
>
> . . .
>
> THE WITNESS: I read the reports and I note one of the psychiatrist[s] found him to be incompetent and the other one did [not]. I do not always understand legal aspects. I'm going on the basis of his level of intellectual functioning and the *date I saw him* how much I perceived he would be able to assist his defense attorney in preparing for his defense, his awareness or lack of awareness of what a judge was, who you were. Who -- what a jury was for, what the bailiff was for. At this *time that I saw him* he did not have any understanding of who any of these people were. He couldn't differentiate even that his attorney was working for him and that you were essentially not working for him.
>
> MR. LiCALSI: Q That's what he told you?
>
> A That's what I learned after extensive questioning.
>
> Q From the defendant?

A From the defendant.

(XIII RT 3086-3087, emphasis added.)

She then added that she believed appellant based on "everything that I had from him, not just on the basis of his responses to my direct questions." (XIII RT 3088.)

b. Appellant Fails To Demonstrate That Dr. Christensen Provided Substantial Evidence Of Incompetence Due To Mental Retardation

Appellant, from the above quoted testimony of Dr. Christensen, and her assertion that appellant was mentally retarded, claims that at trial Dr. Christensen provided substantial evidence that appellant was not competent to stand trial due to mental retardation and that required the court to have appellant assessed by the regional center and another competency hearing. (AOB 51, 57, citing XIII RT 3031, 3086-3087, 58-59 and footnote 21.) He is incorrect.

> "When the accused presents substantial evidence of incompetence, due process requires that the trial court conduct a full competency hearing. [Citation.] "Evidence is 'substantial' if it raises a reasonable doubt about the defendant's competence to stand trial." [Citations.] Absent substantial evidence of a defendant's incompetence, 'the decision to order such a hearing [is] left to the court's discretion.' [Citation.]"

(*People v. Panah* (2005) 35 Cal.4th 395, 432.)

> "When a competency hearing has already been held and the defendant has been found competent to stand trial . . . a trial court need not suspend proceedings to conduct a second competency hearing unless it "is presented with a substantial change of circumstances or with new evidence" casting a serious doubt on the validity of that finding. [Citations.] [Citations.]"

(*People v. Jones* (1997) 15 Cal.4th 119, 150, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

When, as here, a mental competency hearing has already been held and the defendant has been found competent to stand trial, the reviewing court applies "a deferential standard of review to a trial court's ruling concerning whether another competency hearing must be held. [Citation.] [This Court] review[s] such a determination for substantial evidence in support of it." (*People v. Huggins* (2006) 38 Cal.4th 175, 220.)

First, respondent submits that appellant's contention fails because appellant's entire argument fails to apply or even discuss the standard applicable where a competency hearing has previously taken place and appellant was found competent i.e., he does not discuss whether the court was presented with a substantial change in circumstances or new evidence casting serious doubt on the validity of the original competency finding. Therefore, respondent submits he has failed to fulfill his duty to affirmatively show error under the proper standard. (See AOB 53-57, 69; see *People v. Leonard, supra*, 40 Cal.4th at 1415-1416; cf. *People v. Klimek* (1959) 172 Cal.App.2d 36, 44 ["'It is the duty of the defendants to show error, and that means defendants are under an affirmative duty in that respect. It is not proper to attempt to shift that burden upon the court or respondent.'"])[60] As such, his contention should be rejected.

Second, even assuming arguendo that appellant is applying the correct standard, his claim fails because he did not provide substantial evidence of incompetence. "Evidence that . . . does not disclose a *present inability* because of mental [retardation] to participate rationally in the trial is not deemed 'substantial' evidence requiring a competence hearing." (*People v. Deere, supra,* 41 Cal.3d at p. 358 , emphasis added, disapproved on other

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[60] Nor may appellant construct an argument using this standard for the first time in his reply brief. (*People v. Peevy* (1998) 17 Cal.4th 1184, 1206 ; *People v. Lewis, supra,* 43 Cal. 4th at p. 536.)

grounds in *People v. Bloom, supra,* 48 Cal.3d at p. 1228, fn. 9; see *People v. Young* (2005) 34 Cal.4th 1149, 1217 [substantial evidence "if psychiatrist or qualified psychologist . . . [states] in his professional opinion the accused *is*, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken against him or is incapable of assisting in his defense," emphasis added]; *People v. Hale* (1988) 44 Cal.3d 531, 539 ["[When] defendant has come forward with substantial evidence of present mental incompetence, he is entitled to a section 1368 hearing as a matter of right under *Pate v. Robinson, supra,* [1966] 383 U.S. 375."].) As demonstrated I, B, 2, a, above, Dr. Christensen, at trial almost a year and a half after her original testing, did not testify that appellant had the *present* inability to understand the nature of the criminal proceedings or to assist his counsel rationally. She merely expressed her opinion about appellant's competence at the "time that [she] saw him" a year and a half earlier. (XIII RT 3087.) Therefore, at the time of her testimony Dr. Christensen failed to provide substantial evidence that appellant was incompetent to stand trial and the court had no duty to act upon her testimony. (*People v. Deere, surpa,* 41 Cal.3d at p. 358; see also *People v. Kelly* (1992) 1 Cal.4th 495, 543 ["The testimony defendant now cites did not specifically address defendant's present competency . . ."]; *People v. Masterson* (1994) 8 Cal.4th 965, 971["The sole purpose of a competency proceeding is to determine the defendant's present mental competence. . ."].)

Indeed, none of appellant's experts, having tested appellant's cognitive ability and mental status well after Dr. Christensen, claimed that appellant, at the time of trial, was, or in any way appeared to be, incompetent to stand trial due to mental retardation or for any other reason. (§ 1367, subd. (a).) Instead, in stark contrast with Dr. Christensen's conclusions that appellant, when tested, was a disoriented, hallucinating,

significantly distracted person with non-existent reasoning ability and no idea which attorney was working on his behalf or the People's behalf (XIII RT 2990, 3025, 3080, 3086-3087), Dr. Powell found appellant to be aware and oriented "as to the time and the place and the person." (XII RT 2883, 2901.) He found no evidence of hallucinations. Appellant's speech was clear, his eye contact was good, and he was "very cooperative." (XII RT 2884, 2993.) Likewise, Dr. Schuyler, discussing testing by his associate that occurred during the course of the trial, concluded appellant was oriented and aware what was going on. "He knows what's reality and what is not reality." (XIII RT 3180.) Dr. Schuyler's colleague opined that appellant's thought processes were appropriate to interact with the environment for purposes of the examination. (XIII RT 3180-3181.) Dr. Schuyler also had no doubt that appellant was aware of the significance of the charges against him. (XIII RT 3179.) In addition, appellant himself displayed a level of sophistication about the legal process, and a clear understanding of the roles of the attorneys when he wrote a letter indicating that he was considering whether he should testify on his own behalf. He expressed his understanding that the prosecutor may question him about who his accomplice was and he weighed his strong desire not to reveal the identity of his accomplice against the possibility that he might get the death penalty. (XIII CT 3122-3123.)[61] Thus, appellant's own actions, and the testimony of his other experts, actually provided affirmative evidence of appellant's present ability to participate rationally in the trial.

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[61] Appellant specifically wrote on March 31, 1991, "So baby what do you think, should I take the stand on my behalf? Even tho[ugh] there[']s a lot of un[a]nswer[e]d questions in my case. I know the D.A. can[']t wait[] to ask who else was there. You know they know it was more than just me involved. But baby girl I don[']t eat cheese, can[']t answer no questions even tho[ugh] they want to gas me . . ." (XIII CT 3122-3123, some capitalization correction.)

Furthermore, at no time after the original competency hearing, including through Dr. Christensen's testimony, did defense counsel ever again claim that she had any doubt about appellant's competence and seek a second hearing on the issue. (See *Medina v. California* (1992) 505 U.S. 437, 450; *People v. Rogers* (2006)39 Cal.4th 826, 848 ["Although trial counsel's failure to seek a competency hearing is not determinative [citation omitted], it is significant because trial counsel interacts with the defendant on a daily basis and is in the best position to evaluate whether the defendant is able to participate meaningfully in the proceedings"]; contrast *People v. Castro, supra*, 78 Cal.App.4th at pp. 1420-1413 [counsel re-raised issue due to continued concern about competence and documentation of severe disability].) Thus, it is reasonable to infer that once appellant became more cooperative, and stopped displaying behavior to try and appear distracted and ignorant of the process, competency was no longer an issue, even for defense counsel. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1112 ["Significantly, defense counsel did not further pursue the competency issue once defendant became cooperative"]; see also *Booth v. Superior Court* (1997) 57 Cal.App.4th 91, 100 and fn. 11; AOB 58, and cases cited therein.)

Accordingly, there was no evidence of present incompetence before the court to raise a reasonable doubt as to appellant's competence (see *People v. Jones* (1991) 53 Cal.3d 1115, 1152), and therefore the court had no sua sponte duty to hold a second hearing.

Third, as noted above, "[w]hen, as here, a competency hearing has already been held and the defendant was found to be competent to stand trial, a trial court is not required to conduct a second competency hearing unless 'it "is presented with a substantial change of circumstances or with new evidence"' that gives rise to a 'serious doubt' about the validity of the competency finding. [Citation.]" (*People v. Marshall* (1997) 15 Cal.4th 1,

33; see also *People v. Lawley, supra,* 27 Cal.4th at p. 136.) "[O]nce a defendant has been found to be competent, even bizarre statements and actions are not enough to require a further inquiry." (*People v. Marks* (2003) 31 Cal.4th 197, 220.) The trial court may also appropriately take into account its own observations in determining whether the defendant's mental state has significantly changed during the course of trial. (*People v. Marshall, supra,* 15 Cal.4th at p. 33; see also *People v. Jones* (1991) 53 Cal.3d 1115, 1152-1153.)

Here, as demonstrated in argument I, B, 1, above, the court, based on the evidence before it in a pretrial competency hearing, properly determined that appellant was competent and malingering to escape culpability for his crime. (CT XI 2733-2734; CT XIII 3085.) That decision is unchallenged on appeal, and appellant "points to nothing in his guilt phase efforts indicating he had lost the ability to understand the nature of the criminal proceedings" since the court determined that appellant was competent at the pretrial hearing. (*People v. Taylor, supra,* 47 Cal.4th at p. 864.) In fact, the only new evidence regarding his mental state significantly changing since the competency hearing was additional evidence provided by appellant and his other experts significantly *confirming* that appellant was *not* the disoriented, hallucinating, uncooperative person he claimed to be with Dr. Christensen and the psychiatrists at their pretrial examinations. As already shown, the evidence provided by Dr. Powell, Dr. Schuyler, and appellant himself, showed him to be coherent, cooperative and able to understand the charges against him and the nature of the proceedings. (XIII CT 3122-3123; XII RT 2883-2884, 2901, 2993; XIII RT 3179-3181.)

Moreover, respondent submits that Dr. Christensen's testimony about appellant's alleged incompetence due to mental retardation was not "new evidence" (*People v. Marshall, supra,* 15 Cal.4th at p. 33) since, according to appellant, her information was available to him at the time of the

competency hearing but he tactically chose not to present it at that time. (AOB 44, fn. 17; 49, citing XIII RT 3103-3105; 50, fn. 18; RTB 3.) Appellant should not now be allowed a second bite at the apple. (Compare *People v. Wisely* (1990) 224 Cal.App.3d 939, 948-949 [recognizing the general rule that "'once a trial court has decided a new trial motion, it may not reconsider its ruling or entertain subsequent requests for new trial'" absent a showing the second motion for new trial is "based upon new law or facts which the defendant did not know, and could not have known, at the time of the original motion," because "'otherwise, proceedings on new trial motions might "become interminable" [Citation.]'"]; cf *Pat Rose Assocs. v. Coombe* (1990) 225 Cal.App.3d 9, 23 [defendant did not avail himself of the opportunity to present evidence at the trial, he should not be permitted a second bite at the apple on appeal], disapproved on another ground in *Adams v. Murakumi* (1991) 54 Cal.3d 105, 116.)

Furthermore, even assuming arguendo that despite its availability at the time of the competency hearing and appellant's failure to submit it at that time, Dr. Christensen's testimony could be reviewed for purposes of reconsidering the pretrial competency finding, the outcome would be the same. Dr. Christensen did not testify that appellant was *presently* incompetent for any reason. Dr. Christensen merely testified that a year and a half earlier she "perceived" appellant would not be able to assist his defense counsel because he did not have an understanding of who a judge was, or what a jury was, and did not know the roles of the attorneys. (XIII RT 3087.) This was not a "substantial change of circumstances or new evidence" that could raise any doubts about the original competency finding because appellant also told the two appointed psychiatrists who evaluated him for the pretrial competency hearing essentially the same thing. (Court Exhib. No. 1, pp. 2, 4; Court Exhib. No. 2. pp. 5-6.)

In fact, the trial testimony indicates that appellant went much further with the two appointed psychiatrists by claiming even more fundamental ignorance. For example, he claimed he did not know his own full name,[62] age or birth date, place of birth, marital status, whether he had fathered any children, whether he had a driver's license,[63] or even where he was living at before he was arrested. Appellant also claimed he forgot his phone number. He told one of the psychiatrists that he had one sibling and the other that he had two. He denied having a car, saying his mother transported him wherever he needed to go.[64] He also claimed to know virtually nothing about his victims or his crime. (Court Exhib. No. 1, pp. 1-4; Court Exhib. No. 2, pp. 2, 6.)

While Dr. Christensen apparently clung to the belief that appellant's grossly exaggerated ignorance was attributable to appellant's "level of intellectual functioning," the evidence plainly demonstrated that her intelligence testing of appellant (the only thing that could arguably be considered "new evidence") was under extreme conditions, appellant's exaggerated answers strongly indicated he malingered, and her test results were, by her own admission, only good for a particular day of testing under the conditions of that testing. In short, her estimate of appellant's actual intelligence was not credible. (XIII RT 2987-2988, 2990, 3025, 3080-3081, 3108-3109; XIV RT 3226 [score of 47 was "completely meaningless. . ."]; see *People v. Lewis and Oliver* (2006) 39 Cal.4th 970,

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[62] Contrast XII RT 2720 (at the crime scene appellant gave law enforcement his first and last name); XVI RT 3798 (appellant confirms his full name in court).

[63] See XVI RT 3323 (license issued on October 22, 1986).

[64] See e.g., XI RT 2568-2569, 2566, 2572-2573, 2610-2611, 2612-2613, 2630, 2636-2637, 2653, 2677, 2691-2692 2630 (appellant driving a car throughout the period he was terrorizing Diaz and her family).

1047-1049 & fn. 25 [expert opinion that defendant was incompetent was not substantial evidence when court concluded it was not credible].)

In contrast, the psychiatrists, at least one of which appears to have considered the possibility of mental retardation (Court Exhib. No. 1, p. 1 [asks appellant about mental retardation]; XIII RT 3067, 3181-3182), made a far more credible determination that appellant was intentionally producing false or grossly exaggerated psychological symptoms with the motive of escaping culpability for his crimes. (Hurley, K.E. & Deal, W.P. (2006), *Assessment Instruments Measuring Malingering Used With Individuals Who Have Mental Retardation: Potential Problems and Issues, Mental Retardation*, Volume 44 (2) 112; Court's Exhib. No. 1, p. 5; Court Exhib. No. 2, pp. 4, [appellant malingering - answers were not consistent with any known mental disorder], 6; compare e.g., XII RT 2950-2951 [contrary to what appellant did with the psychiatrists during the period competence was being determined, appellant gave Dr. Powell detailed information about his family and his crime]; XIV RT 3211-3212 [Dr. Coleman testified I.Q. tests presume the test taker is doing his best but the test taker may have reason not to do his best].)[65] Surely if appellant had shown any *credible* indication of mental retardation affecting his ability to assist counsel, or to understand the judicial proceedings, the psychiatrists would have made a recommendation for regional center testing themselves. (See §1369, subd. (a).) No such referral came and, more importantly, there was no credible evidence that would support such a recommendation.

[65] Even Dr. Schuyler, unlike Dr. Christensen, recognized that appellant was lying during his early examinations by pretending to know so little, although Dr. Schuyler tried to attribute the lies to the unsophisticated defense mechanism of a mentally retarded person. (XIII RT 3179.)

Furthermore, Dr. Christensen testified about appellant's claim that he was hallucinating.[66] But appellant's claim of hallucinations was not new evidence; appellant made the same claim with the two psychiatrists who examined him pretrial. (XIII RT 3025, 3080; Court's Exhib. Nos. 1, p. 4 and 2.) However, unlike Dr. Christensen, one of the psychiatrists obtained a broader view of how appellant actually functioned outside of his visits with the clinicians. That physician checked with jail personnel and determined that at that facility appellant acted relatively normally with the other prisoners, read the newspapers nearly every day, and otherwise conducted himself appropriately. (Court Exhib. No. 2, p. 6.) There was no indication appellant was hallucinating. (Also compare XII RT 2933 [Dr. Powell found no evidence of hallucinations]; XIII RT 3180 [Dr. Schuyler testified appellant was oriented to reality.])

Therefore, none of the information Dr. Christensen provided was new evidence or, to the extent it might be considered new, was information that could possibly cause a serious doubt about the validity of the original competency determination. Thus, her testimony did not raise a reasonable doubt about appellant's competence, and her testimony did "not comprise substantial evidence of incompetence necessitating a hearing." (*People v. Weaver* (2001) 26 Cal.4th 876, 954; see also *People v. Kelly* (1992) 1 Cal.4th 495, 543 ["There was no evidence of a change of circumstances, much less a substantial change. The substance of the defense testimony relied upon on appeal was generally included in the facts defense counsel

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[66] Dr. Christensen simply asked appellant if he was hallucinating and appellant responded that he was. No specific testing was done for hallucinations and she did not indicate in her report that she ruled out faking by appellant. (XIV RT 3227.) Nor did Dr. Christensen ever make a connection between appellant's alleged auditory hallucinations during her testing and her opinion that appellant was mentally retarded.

recited when they expressed their doubts as to competency in the first place. The testimony defendant now cites did not specifically address defendant's present competency, and gave no reason to doubt, and certainly no reason to seriously doubt, the continuing validity of the unanimous expert opinion and the court finding that did specifically address the subject"]; *People v. Leonard, supra,* 40 Cal.4th at p. 1416.)

Finally, Dr. Christensen's testimony did not provide substantial evidence of mental retardation as it relates to appellant's competency. As noted above, during trial, not only did Dr. Christensen have to acknowledge appellant's physical condition and the deplorable testing conditions during her testing, which obviously negatively impacted the accuracy of her intelligence tests (XIII RT 2988 , 2990, 3025-3026, 3040, 3051-3052, 3073-3074, 3080), she also had to concede that her 47 I.Q. score, which she opined showed moderate to severe mental retardation, was appellant's intelligence level *on the day* of the testing *under those extreme conditions.* (XIII RT 3070, 3085, 3110; see *People v. Marks, supra,* 31 Cal.4th at 219.) A test result that was reliable, in Dr. Christensen's opinion, for a particular day or only under particular conditions can hardly be considered substantial evidence of a developmental disability. (E.g., § 1370.1, subd. (a)(1)(H) ["expected to continue, indefinitely . . ."].) As stated by Dr. Coleman, Dr. Christensen's I.Q. result of 47 was "completely meaningless when it comes to the question of [appellant's] intelligence." (XIV RT 3226.) "All it tells you is he gave answers which added up to a low score. But it tells you absolutely nothing about why he gave those answers." (XIV RT 3226; also see Arg. II, F.)

Nor did Dr. Christensen testify that she discussed her findings with appellant's family or friends, or note any review of appellant's school records and work history to see if they corresponded with her test findings, showed adaptive deficits, or demonstrated that the alleged deficits

manifested before age 18. (See *People v. Jackson, supra,* 45 Cal.4th at 678; *People v. Leonard, supra*, 40 Cal.4th at pp. 1387-1388; *In re Hawthorne,* (2005) 35 Cal.4th 40, 47; *In re L.B.*(2010) 182 Cal.App.4th 1367, 1371-1372; also see *People v. O'Dell* (2005) 126 Cal.App.4th 562, 572 [Expert's opinion cannot constitute substantial evidence if unsubstantiated by facts]; § 1370.1, subd. (a)(1)(H); e.g., XIII RT 3085 [Dr. Christensen testified, "The results [of her testing] are very specific to the setting, that time, and . . . [she] d[id]n't have family and friends that [she] had access to see if there was correspondence between my test results and their experience of him"].)

If Dr. Christensen had made those inquiries, she would have seen that the last I.Q. score appellant got in school, in 1982, was 77 (*30 points* above Dr. Christensen's score). (XIV RT 3297C.) Moreover, she would have discovered that appellant's placement in school with the "'educationally mentally retarded'" (AOB 49), was not because there was a determination that appellant was mentally retarded, it was because he was functioning at such a low range academically in the classroom that his parents specially consented to the placement so appellant could receive extra help. (XIV RT 3297C-3298.) Indeed, while there is no question appellant had "difficulties with reading and writing," his teachers and counselors did not notice anything about him that indicated to them that he was mentally retarded. (XII RT 2947 [Dr. Powell testified that mild mental retardation would be noticeable to friends, family, teachers and counselors]; XIV RT 3304B, 3308, 3310 3319.)

Moreover, intelligence testing is designed with the presumption that the test taker will do his best. Here, as noted, substantial evidence affirmatively demonstrated that appellant was malingering during the period Dr. Christensen and the appointed psychiatrists were evaluating him in an effort to evade culpability for his vicious crimes. (See, XII RT 2952-

2953; XIII RT 3043, 3067-3068, 3179; XIV RT 3213, 3294C; Courts Exhibits Nos. 1 and 2; Arg. I B. 1.)[67] Had Dr. Christensen inquired with appellant's family, friends, counselors, or employers, or, reviewed appellant's school records, respondent submits she likely would have come to that conclusion herself. (XIII RT 3067-3068 [Dr. Christensen testified that if she learned that just prior to the crimes appellant was doing independent work involving complex tasks that may have changed her opinion about whether appellant was malingering during her testing]; XIV RT 3275-3280 [appellant did complex work independently]; see J Am Acad Psychiatry Law 31:104, 2003 [Discussing the dissent in *Atkins v. Virginia* (2002) 536 U.S. 304, ""Justice Scalia's concern that capital defendants may malinger as mentally retarded to avoid the death penalty may well be justified. To minimize the risk of successful malingering, the clinician should review collateral records, including school records, employment records, and interviews with persons who know the defendant to determine whether the reported intellectual impairments have actual disabling effects on the individual's life and had an onset before adulthood."].)

Instead, Dr. Christensen expressed her opinions that: her training and experience made her a very good lie detector;[68] and, appellant did not lie to

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[67] Appellant states it would be "nearly impossible to 'fake' consistent results on several different standardized tests." (AOB 72.) However, appellant's test results were not "consistent." For example, Dr. Schuyler testified that that there was a "very significant" difference between Dr. Christensen's score of 47, and Dr. Ulem's score of 66. He was forced to try and surmise a reason for the 19 point difference. (XIII RT 3162, 3169.)

[68] Dr. Christensen said, for example, she is trained to look at things like the way the test taker relates to her, i.e., she checks to see if he is using delaying tactics or if he drops pencils or refuses to comply in a real passive manner. She added, "[a]nd then there's also just that gut level training that we get after all these years . . . you have a good sense you're being"

(continued...)

her during his testing. According to Dr. Christensen, "[Appellant] tried, he failed, and [she had] . . . no sense that [she] was being manipulated." (XIII RT 3024, 3042, 3061, 3063, 3070-3071, 3093, 3113, 3023.) But, as noted by Dr. Coleman, Dr. Christensen's opinion about her own ability to detect lying was not a "scientific opinion or an opinion which has any evidence to support it." (XIV RT 3229-3230.) Dr. Christensen also dismissed Dr. Davis' and Dr. Terrell's determinations that appellant was malingering as being subjective and not based on testing. (XIII RT 3043-3044, 3067.) But, Dr. Christensen did not testify that she herself provided any testing that was designed to determine if appellant was malingering. Nor did she specifically claim that the tests she administered would objectively demonstrate whether appellant was malingering. (XIII RT 3067, 3087; see *Beyond Full Scale IQ: A New WAIS-III Indicator of Mental Retardation*, Journal of Scientific Psychology, p. 12, March 2008 ["At this time there exist no validity scale(s) on standard measures of intelligence to detect malingering . . ."].)[69] In fact, Dr. Christensen admitted that malingering can affect test results, and she further conceded that determining if someone is malingering on testing is *subjective*. Dr. Powell concurred. (XII RT 2910, 2913, 2915, 2917, 2920, 2924, 2958; XIII RT 3061, 3063.) Thus, the basis for Dr. Christensen's opinions about appellant in fact hinged on her subjective conclusion that appellant was not malingering while she questioned him *and cognitively tested him*.

(...continued)
deceived. She opined, "Malingerers usually cannot figure out quickly enough how to fail in a way that would make sense or affect any diagnosis. And so we can usually compare against our experience." (XIII RT 3113, 3023.)

[69] Instead, Dr. Christensen essentially claimed her tests provided the correct way to interpret appellant's "lack of ability to perform." (XIII RT 3067.)

And, the evidence very plainly demonstrated that Dr. Christensen's subjective opinions about appellant were *wrong*. For example, Dr. Christensen's belief that appellant's inability to "perform" as attributable to a lack of low intellectual functioning that her testing showed (XIII RT 3067, 3087), was completely undermined by the fact that he was not the underperformer that she was lead to believe. As previously noted, at the time that Dr. Christensen, Dr. Terrell and Dr. Davis examined appellant, he not only claimed a lack of knowledge about court personnel and procedures, he claimed not to know even the most basic information about himself, his family or his case. It was readily apparent to Dr. Davis and Dr. Terrell, in the context of appellant's overall behavior, that appellant was lying. And, that opinion was confirmed by the evidence obtained after competency was decided showing appellant did, in fact, know substantial information about himself, his family, his victims and his crime. It also showed he had the ability to make reasoned judgments about whether he should testify; and, that he was not the disoriented, hallucinating, grossly ignorant person that he displayed to Dr. Christensen. (Court's Exhib. Nos. 1 and 2; CT 3122-3123; XII RT 2572-2573, 2610-2611, 2630, 2333, 2653 2709-2711, 2720, 2883-2884, 2901 2933, 2950-2951; XIII 3067, 3070-3071, 3087, 3100-3101; XVI RT 3798; CT 3122-3123.)

Moreover, appellant's other expert witnesses did not provide substantive support for Dr. Christensen's belief that appellant was not malingering during her intelligence testing. For example, although Dr. Christensen felt she was a great lie detector, Dr. Powell frankly testified, "I don't think that [psychologists] do a bit better at [determining whether someone is lying] than anybody else, truth be known." (XII RT

2933.)[70] Dr. Powell further testified that he had considered Dr. Christensen's report and the reports of the two psychiatrists who evaluated appellant for the competency hearing. (XII RT 2947, 2894, 2933.) He acknowledged that "[g]iven all the reports, there is a possibility that at some time or place [during the evaluations appellant] was malingering." (XII RT 2952-2953.) Dr. Schuyler directly, albeit subtlety, went further by acknowledging that appellant was lying during his early examinations. (XIII RT 3179.) Thus, appellant's own experts did not bolster Dr. Christensen's opinion that appellant was being honest with her and did his best on her tests.

Dr. Coleman, having studied the tools of psychology and their use in the court system, also demonstrated that: the testing instrument Dr. Christensen used was unreliable (e.g., XIV 3210-3210, 3230-3231); her I.Q. score of 47 was meaningless (e.g., XIV RT 3226); and, her diagnosis that appellant's alleged mental retardation was organic in nature was "preposterous" and had "no evidence" to support it. (XIV RT 3226-3228.)

Therefore, Dr. Christensen's intelligence testing and results, and her opinions based on those results, had little if any meaning. Appellant fails to demonstrate that he provided sufficient evidence of mental retardation impacting his competency to require the court to seek assessment of appellant by the Director of the regional center.[71]

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[70] Dr. Coleman had determined that clinicians are worse than laypersons at detecting lying. (XIV RT 3217-3218.)

[71] Of course, even if appellant had presented substantial evidence of mental retardation, that would not automatically demonstrate that appellant was incompetent to stand trial. (See *People v. Ary* (2004) 118 Cal.App.4th 1016, 1022-1023 (*Ary II*); *State v. Shields* (Del. Super. Ct. 1990) 593 A.2d 986, 1007 ["Mental retardation by itself is not usually sufficient to support a finding of incompetence to stand trial, i.e., 'being mentally retarded is neither a necessary nor sufficient condition for being found

(continued...)

In sum, there was not substantial evidence that appellant suffered from a developmental disability that caused him to be unable to understand the proceedings or assist his attorney. Consequently, the trial court had no sua sponte obligation to suspend proceedings, order regional center testing, or have a second competency hearing. Appellant's claim to the contrary fails. (See *People v. Rodrigues, supra,* 8 Cal.4th at p. 1107-1112; *People v. Frye* (1998) 18 Cal.4th 894, 952, overruled on other ground in *People v. Doolin, supra,* 45 Cal.4th at 390, fn. 22; *People v. Alvarez* (1996) 14 Cal.4th 155, 211-212.) No error occurred.

C. If Error Occurred Because Appellant Was Entitled To A Second Competency Hearing, Then That May Be Remedied By Remand For A Determination By The Trial Court Whether A Retrospective Competence Determination May Be Made, And Then A Competency Determination; Assuming Arguendo Error Occurred By Not Appointing The Regional Center To Assess Appellant, Contrary To Appellant's Position In His Argument I.E., It Was Harmless

Appellant asserts, in his argument I.E., that Dr. Christensen's testimony at trial provided substantial evidence that he was mentally retarded and incompetent, thus triggering a statutory duty on the part of the trial court to refer defendant to the regional center director and to order a second competency hearing. He contends that failure to do so requires reversal of his conviction. (AOB 60-72.) As demonstrated above, Dr. Christensen failed to provide substantial evidence of incompetence or

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(...continued)
incompetent . . .'"]; *State v. Thoi Vo* (Neb. 2010) 279 Neb. 964, 971 ["[E]ven if a diagnosis of mental retardation were established, it would not necessarily imply incompetence to plead or stand trial"]; Note, *Incompetency to Stand Trial* (1967) 81 Harv. L. Rev. 454 ["The question of competency to stand trial relates rather to the appropriateness of conducting the criminal proceeding in light of the defendant's present inability to participate effectively"].)

mental retardation. But assuming arguendo that this Court determines that substantial evidence of incompetency was demonstrated, and appellant was entitled to a hearing, then the judgment must be reversed and the matter remanded to the trial court for a determination on competency. However, if this Court finds no substantial evidence of incompetency at the time Dr. Christensen testified, then any assertion about appointment of the regional center is not ripe for determination, and, in any event, any error would be harmless.

1. Assuming Arguendo That Appellant Demonstrated That He Was Entitled To A Competency Hearing Due To Substantial Evidence Of Incompetency At The Time Dr. Christensen Testified, Then The Matter Should Be Reversed And Remanded To The Trial Court For A Determination On Competence

For the reasons stated in argument I, B, respondent strongly urges this Court to find no prejudicial error because appellant failed to demonstrate that he was entitled to a second competency hearing at the time Dr. Christensen testified at trial. However, should this Court determine that prejudicial error occurred because a second competency hearing was not held, and that violated appellant's due process rights, respondent submits that the appropriate remedy is for the judgment to be reversed and remanded for additional determinations by the trial court. In some cases the due process violation of denial of a competency hearing can be cured by holding a retrospective competency hearing. (See *Ary II, supra,* 118 Cal.App.4th at pp. 1025-1029, and cases cited therein; *People v. Kaplan* (2007) 149 Cal.App. 4th 372, 390; also see *People v. Ary, supra,* 51 Cal. 4th at p. 515, fn. 1 [This Court disapproved of *Ary II, supra,* 118 Cal.App.4th at 1030, insofar as it did not reverse the judgment before remanding for further

proceedings].)[72] Respondent contends that, as shown above, the substantial amount of evidence regarding appellant's mental state makes this case a primary candidate for a retroactive competency hearing, despite the passage of time. (See *Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1089.)

Respondent therefore submits this case should be remanded to the trial court with instructions to determine if retrospective determination of competence is feasible, i.e., the court should determine if there is sufficient evidence to reliably determine the defendant's mental competence when tried in 1991. (*People v. Kaplan* (2007) 149 Cal.App.4th 372, 390 ["We reverse the judgment and remand to the trial court with directions to decide whether a retrospective competency hearing should be held . . ."]; *Moran v. Godinez* (9th Cir. 1994) 57 F.3d 690, 696.)

> Relevant to determining feasibility of a post judgment hearing on a defendant's mental competence when tried are the factors set out by the Court of Appeal in *People v. Robinson* (2007) 151 Cal.App.4th 606, 617 [60 Cal. Rptr. 3d 102]: """(1) The passage of time, (2) the availability of contemporaneous medical evidence, including medical records and prior competency determinations, (3) any statements by the defendant in the trial record, and (4) the availability of individuals and trial witnesses, both experts and non-experts, who were in a position to interact with [the] defendant before and during trial."""

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[72] Respondent acknowledges that this Court has yet to decide whether "(1) . . . federal constitutional error in failing to evaluate defendant's mental competence at the time of trial might be 'cured' by means of a retrospective competency hearing [citation]; and (2) the prosecution at that hearing must establish the availability of evidence concerning defendant's mental condition when he was tried earlier, in order to show the feasibility of a retrospective hearing, but the prosecution need not prove feasibility beyond a reasonable doubt" (*People v. Ary, supra,* 51 Cal. 4th at pp. 516-517); but respondent submits that the above suggested approach provides the most practical means to address a due process violation without any additional prejudice to appellant.

(*People v. Ary, supra,* 51 Cal.4th at p. 520, and fn. 3.)[73]

At that stage, respondent submits it would be the People's burden to convince the trial court that there "is sufficient evidence on which a 'reasonable psychiatric judgment' of defendant's competence to stand trial can be reached." (See *Ary II, supra,* 118 Cal.App.4th at p. 1029; see *Odle v. Woodford, supra,* 238 F.3d at pp. 1089–1090 ["We have said that retrospective competency hearings may be held when the record contains sufficient information upon which to base a reasonable psychiatric judgment."]) If the trial court determines a retrospective competency hearing cannot be held, it should be directed to retry appellant on the charge. (See *People v. Kaplan, surpa,* 149 Cal.App.4th at p. 390.)

If competency can be determined at a hearing, then respondent submits appellant bears the burden of proving incompetence at the time of trial by a preponderance of evidence. (*People v. Ary, supra,* 51 Cal. 4th at pp. 520-

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[73] To demonstrate why he believes a retrospective competency hearing should not be held, appellant reargues his position about Dr. Christensen's qualifications, his interpretation of Dr. Terrell's and Dr. Davis' conclusions, and his concern about mental retardation testing not being provided by the medical professionals for his competency hearing, even though there was no substantial reason for the court to suspect such testing needed to be provided. He also argues that Dr. Davis may be deceased. (AOB 75-78.) However, as demonstrated above, there is exceptionally strong evidence demonstrating appellant was competent and Dr. Christensen's conclusions, when finally revealed and explored, were exceptionally flawed. Indeed, respondent submits that there is sufficient evidence in the record for this Court, on appeal, to conclude that a retrospective competence hearing can be held. (See *People v. Castro, supra,* 78 Cal.App.4th at pp. 1419-1420.) In any event, appellant's assertions may properly be considered by the trial court. (See *People v. Danielson, supra,* 3 Cal.4th at p. 727, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046; also see, e.g., *United States v. Renfroe* (D.Del. 1988) 678 F. Supp. 76, 78 [decision on whether a retrospective competency hearing can be held is "a legal inquiry which 'the court must make for itself'"].)

521; § 1369, subd. (f); see *People v. Medina* (1990) 51 Cal.3d 870, 881.) In the event appellant is found to have been competent to stand trial, the judgment should be reinstated. If appellant is found to have been incompetent to stand trial, appellant should receive a new trial. (See *People v. Ary, supra,* 51 Cal. 4th at 515, fn. 1; *People v. Young* (2005) 34 Cal.4th 1149, 1217; *People v. Robinson* (2007) 151 Cal.App.4th 606, 619 ["The case is remanded to the trial court with instructions to hold a retrospective competency hearing . . . In the even defendant is found to have been competent to stand trial the judgment shall be reinstated. In the event defendant is found to have been incompetent to stand trial, defendant shall receive a new trial."])

2. If Appellant Has Failed To Demonstrate That He Was Not Entitled To A Competency Hearing At The Time Dr. Christensen Testified, Then Any Claim Related To Appointment Of The Regional Center Is Not Ripe; In Any Event, Any Error In This Regard Is Harmless

Respondent submits that the only context that appointment of the regional center would even arise is if at the time Dr. Christensen testified either a doubt about appellant's competence was declared by the court or counsel, or if appellant had provided sufficient evidence of incompetence. (See, e.g., *People v. Leonard, supra,* 40 Cal.4th at pp. 1387-1389.) Therefore, because no doubt about competency was declared, and substantial evidence did not demonstrate incompetence during trial (Arg. I, B), appellant, for this reason alone, was not entitled to appointment of the regional center for evaluation of his competency.

In addition, even assuming arguendo that the director of the regional center should have been appointed, any error was harmless. The failure to appoint the director of the regional center does not require reversal "unless the error deprived [the defendant] of a fair trial to determine his

competency." (See *People v. Leonard, supra,* 40 Cal.4th at p. 1390.)[74] In *Leonard*, the trial court appointed two psychiatrists to evaluate the defendant, but did not appoint the director, although the trial court *knew* appellant had epilepsy, a kind of developmental disability. (*People v. Leonard, supra,* 40 Cal.4th at pp. 1385, 1387-1389.) This Court held the trial court erred, because a purpose of the statutory scheme is "to ensure that a developmentally disabled defendant's competence to stand trial is assessed by those having expertise with such disability." (*People v. Leonard, supra,* 40 Cal.4th at pp. 1388, 1389.) However, "the trial court's competency determination was based on evidence from experts who were familiar with defendant's developmental disability and who considered it in evaluating his competence." (*Id.*, at p. 1390 [describing each doctor's training and experience].) Because Leonard had been evaluated by qualified experts, the trial court was able to make an informed determination of his competency to stand trial; his right not to be tried while incompetent had been protected. (*Id.*, at pp. 1390-1391.)[75]

Although the circumstances of this case are somewhat different, respondent submits the outcome should be the same. As recounted in detail above and in the statement of facts, appellant was evaluated by Dr. Christensen, Dr. Powell, Dr. Schuyler, Dr. Davis and Dr. Terrell. Dr. Christensen evaluated appellant for mental retardation and competence.

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[74] Again, appellant does not challenge the results of his pretrial competency determination. (AOB 69-72.)

[75] In this case, whether appellant had a developmental disability that impaired his competency depended in large part on whether he malingered on Dr. Christensen's testing and clinical examination a year and a half before trial. The issue was not, as in *Leonard*, the degree to which a known developmental disability affected his competence. (See *People v. Leonard, supra,* 40 Cal.4th at p. 1387.) No one presented evidence at the time of his competency hearing of mental retardation, and no one presented evidence at the time of his trial that appellant was at that time incompetent.

Dr. Powell and Dr. Schuyler evaluated appellant for mental retardation. Dr. Terrell and Dr. Davis both evaluated appellant for competence. Only Dr. Christensen concluded that appellant, a year and half before her testimony, was moderately to severely mentally retarded and incompetent to stand trial. However, as already shown, the evidence overwhelmingly demonstrated that the trial court correctly determined that that during the period that Dr. Christensen and the two psychiatrists were examining appellant, he was of malingering and competent; and, as such, appellant's malingering impacted all of Dr. Christensen's determinations, making them inaccurate. (CT XI 2733-2734; CT XIII 3085; Court Exhib. No. 1, pp. 1, 5; Court Exib. No. 2, p. 6; see *People v. Hightower* (1996) 41 Cal.App.4th 1108, 1111; Arg. I, B.)

Accordingly, because appellant had been examined by two psychiatrists, two psychologists, and one neuropsychologist, appellant received a fair competency determination by doctors who were qualified to assess him for both developmental disability and mental disorder. The evidence simply bore out the original conclusion of the trial court that appellant was malingering and competent. In these circumstances, respondent submits that appellant suffered no harm from any failure to appoint the director of the regional center. (*People v. Leonard, supra,* 40 Cal.4th at p. 1390.)

Appellant nevertheless argues the physicians who found he was malingering lacked training and experience in mental retardation and, in particular, the ability to distinguish mental retardation from malingering. (AOB 69, 71.) But at the competency hearing, defense counsel submitted the matter on the reports. (CT XI 2733-2734; CT XIII 3085; compare *People v. Oglesby* (2008) 158 Cal.App.4th 818, 824 [defense counsel here stated """we had made a tactical decision at the time to submit on the report that found him competent. . ."""].) He did not choose to find out what the

psychiatrists training and experience was as it relates to mental retardation or malingering. Accordingly, appellant's argument is forfeited. (See *People v. Weaver* (2001) 26 Cal.4th 876, 904; *People v. Bolin* (1998) 18 Cal.4th 297, 321 [defendant's contention that evidence was inadmissible "because the witness was not qualified to render an expert opinion" was forfeited for lack of objection in the trial court]; also see *People v. Blacksher*, 2011 Cal. LEXIS 8582 (Cal. Aug. 25, 2011) *36 ["Because defendant failed to raise these objections below, they are forfeited"].)[76]

Appellant further asserts he may have been so mentally retarded that the psychiatrists mistook his low mental functioning for malingering. (AOB 71-72.) But, as previously shown, this was plainly refuted by their reports, in which they describe intentionally exaggerated or false behaviors and statements. They show an appellant with a lack of memory about his full name, marital status, his crime and family history, as well as having poor eye contact and alleged auditory hallucinations which he could only vaguely describe. These behaviors and statements combined did not fit any mental disorder. (See Court's Exhib. No. 2, p. 6.)[77] Nor could they be

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[76] Appellant also complains that Dr. Terrell and Dr. Davis did not attempt to determine appellant's intelligence (AOB 70) but, as shown, the doctors had *no reason* to conduct such testing because they found he was *faking* his symptoms. On the other hand, Dr. Christensen's opinion that appellant was incompetent because of appellant's alleged low mental functioning depended on whether appellant earnestly tried to do well on her tests and whether appellant's clinical behaviors were genuine. As shown, he did not try to honestly complete his tests and his clinical behavior was not genuine.

[77] Appellant, implicitly acknowledging the mountain of evidence demonstrating that he was lying to Dr. Terrell and Dr. Davis, asks was his "avoidance behavior" (i.e., lying about his knowledge of family history and the facts of his crimes) evidence "of a competent defendant unwilling to cooperate or evidence of a mentally retarded, incompetent defendant unable to cooperate?" (AOB 72, italic removed.) Appellant answered the question

(continued...)

attributed to mental retardation because appellant did not exhibit these symptoms and exaggerated inability to perform when later tested by his other experts.[78]

Thus, respondent submits that appellant suffered no harm from any failure to appoint the director of the regional center. (*People v. Leonard, supra,* 40 Cal.4th at p. 1390.) Nor has a violation of any of constitutional rights been demonstrated. (*Id.,* at 1391.)

II. APPELLANT FAILS TO DEMONSTRATE THAT HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE TRIAL COURT ALLOWING AN EXPERT OPINION THAT APPELLANT'S ALLEGED DIAGNOSIS AND THE INSTRUMENTS FOR THAT DIAGNOSIS WERE UNRELIABLE

Appellant contends that his Fifth, Sixth, Eighth, and Fourteenth Amendment Rights were violated by Dr. Coleman's testimony because: (1) Dr. Coleman was unqualified to testify as an expert on the subject of mental retardation and related testing of intelligence and other functions; (2) Dr. Coleman's testimony "improperly told the jurors to resolve questions of law;" and, (3) Dr. Coleman's testimony "improperly told jurors to resolve questions of law in a manner contrary to law." (AOB 85.) Appellant further claims that the prejudicial effect of Dr. Coleman's testimony was compounded by an instruction that told jurors they could disregard the mental retardation evidence as legally irrelevant and refuse to

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(...continued)
himself. He was obviously able to cooperate on these topics because he materially did so with Dr. Powell and Dr. Schuyler at a later time after the issue of competence had been decided. Therefore, he was a competent defendant "unwilling to cooperate" (AOB 72) at the time.

[78] Indeed, appellant does not explain how a low mental capacity would, for example, cause appellant to have hallucinations and an inability to recall his own full name, when these symptoms subsequently simply disappear.

consider it in assessing appellant's mental state at the time of the crimes. (AOB 85.)

Respondent submits that: Dr. Coleman was qualified to testify to the unreliability of the testing and methodologies used as the basis for appellant's experts' testimony, and properly explain limitations of psychological/psychiatric testimony; Dr. Coleman did not improperly resolve questions of law, nor tell the jurors to resolve a question of law in a manner contrary to the law, as his testimony went to the weight and not the admissibility of the witnesses testimony; and, the jury was properly instructed. Moreover, even assuming error occurred, appellant fails to demonstrate prejudice.

A. Introduction

Appellant presented evidence purporting to demonstrate appellant's low intellectual functioning and intellectual capabilities for the purpose of demonstrating he was incapable, at the time he killed his victims, of forming the mental states of deliberation and express or implied malice aforethought required for first degree murder. (XV RT 3414, 3419.) To demonstrate appellant's low functioning, appellant provided three experts. The first expert, Dr. Christensen, tested appellant and received a total I.Q. score of 47; the second expert, Dr. Powell, tested appellant and received a total I.Q. score of 59; and, the third expert, Dr. Ulem, an associate of Dr. Schuyler, tested appellant and received a total I.Q. score of 66. Depending on which score was considered, appellant was deemed to be moderately to severely retarded (XII RT 2945-2946; XIII RT 3031, 3147, 3164, 3073; XV 3416-3419) or only mildly retarded by the witnesses. (XII RT 2859-2866, 2937-2938, 2945-2946; XIII RT 3147, 3164.) Through his expert witnesses, appellant attempted to explain what, at times even the defense witnesses acknowledged, were "significant" or "very significant" differences in the defense I.Q. scores. (XIII RT 3079, 3162,

3169.) But it was undisputed that each of those experts relied heavily on standardized psychological tests (e.g., the Wechsler) and methodologies to reach their conclusions about appellant's intellectual level. (XII RT 2887-2888, 2937-2938; XIII RT 3025, 3027, 3147.) In that regard, the prosecutor offered Dr. Coleman as a rebuttal witness.

1. Pre-testimony Hearing

At a hearing held just prior to Dr. Coleman testimony, appellant, through counsel, asked for an offer of proof regarding Dr. Coleman's testimony because, he asserted, pursuant to *People v. Mendibles* (1988) 199 Cal.App.3rd 1277, rebuttal should be "restricted to that made necessary by the defendant's case." (XIV 3195, 3201.) Appellant asserted his experts did not render "legal conclusions or opinions as to the state of mind of the defendant" because section 29[79] forbids it and therefore Dr. Coleman's proposed testimony would not be appropriate rebuttal. (XIV RT 3195, 3198-3199.)

Appellant further argued that Dr. Coleman's testimony would be "irrelevant at this point in time as well." (XIV RT 3196.) Counsel for appellant argued she had read Dr. Coleman's book[80] and she expected him to testify that the psychiatric and psychological professions have "absolutely no training by which they can render opinions within the courtroom setting." (XIV RT 3196.) Appellant asserted "we believe that

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[79] Section 29 provides: "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact."

[80] *The Reign of Error, Psychiatry, Authority, and Law,* by Lee Coleman, M.D., Boston, MA; Beacon Press, 1984, by Lee Coleman, M.D.

argument would be more appropriate in a Kelly-Frye[81] scenario [and it is] not appropriate as rebuttal." (XIV RT 3196.) Appellant argued that if Dr. Coleman testified that expert testimony has no place in a courtroom setting and should be disregarded, that would be an "inappropriate opinion to render . . ." (XIV RT 3196-3197.) Appellant asserted the court determines relevance. (XIV RT 3200.)

The prosecutor, citing *People v. Prince* (1988) 203 Cal.App.3d 848, and *People v. Turner* (1990) 50 Cal.3d 668, explained that Dr. Coleman's testimony would rebut testimony of defense psychologists regarding the tests they administered, the relationship between psychology and courtroom testimony as it relates to the testing, and their relationship to the defense determination of appellant's intelligence and thereby his state of mind. (XIV RT 3197-3199.)

> Dr. Coleman's testimony would be [able] to explain to the jury the tests are not relevant which were administered by the doctors, why they're not relevant. And Dr. Coleman is not going to give any opinion as to the defendant's mental state. Dr. Coleman never gave such an opinion and he would also say that is something the jury should determine.

(XIV RT 3199.)

The prosecutor further explained that Dr. Coleman could be asked about the results of the defense clinicians tests and their relevance as the basis for their opinions. The prosecutor affirmed that Dr. Coleman's testimony was relevant to the determination of the weight and credibility of the defense expert witness testimony. (XIV RT 3199.)

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[81] *People v. Kelly* (1976) 17 Ca1.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014, 994. This court has held *Kelly-Frye* is inapplicable in these circumstances. (See *People v. Smithey* (1999) 20 Cal.4th 936, 967-968.

Appellant "question[ed]" whether there was a sufficient foundation for a non-psychologist to testify about the sufficiency of the basis for his experts testimony. (XIV RT 3200-3201.) The court ruled, allowing Dr. Coleman to testify. (XIV RT 3201.)

As noted by this Court in *People v. Smithey* (1999) 20 Cal.4th 936, 965:

> On several occasions [this Court] ha[s] considered testimony of Dr. Coleman that was virtually identical to that offered in this case, and in each instance [this Court] rejected defense claims based upon such testimony.

(*People v. Clark* (1993) 5 Cal.4th 950, 1019 [22 Cal.Rptr.2d 689, 857 P.2d 1099]; *People v. Danielson, supra,* 3 Cal.4th at pp. 728-731; *People v. Babbitt* (1988) 45 Cal.3d 660, 698-700 [248 Cal.Rptr. 69, 755 P.2d 253] [claim of prosecutorial misconduct arising from reliance upon Dr. Coleman's testimony]; see also *People v. Prince* (1988) 203 Cal.App.3d 848, 856-859 [250 Cal.Rptr.154] [cited with approval in *Danielson*].) (See also *People v. Ledesma* (2006) 39 Cal.4th 641, 714.)

As will be demonstrated, appellant's claims here should likewise be rejected.

B. Appellant Fails To Demonstrate That Dr. Coleman Was Unqualified To Provide His Rebuttal Testimony

Appellant complains that "Dr. Coleman was not qualified to testify as an expert on the subject of mental retardation or associated intelligence and other testing utilized to diagnose mental retardation." (AOB 99.) Respondent submits that appellant's claim as it relates to the subject of mental retardation and any related constitutional right violation assertions are forfeited. Moreover, his substantive claim as it relates to mental retardation or associated testing is without merit.

1. Standard Of Review

"'A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. (Evid. Code, § 720, subd. (a).)'" *People v. Loker* (2008) 44 Cal.4th 691, 738.) Issues related to test and method reliability and validity may be thoroughly explored on cross-examination at trial and through rebuttal testimony of another expert of comparable background. (See *People v. Smithey, supra,* 20 Cal.4th at 967; *People v. Stoll* (1989) 49 Cal.3d 1136, 1159.) "A trial court's determination to admit expert evidence will not be disturbed on appeal absent a showing that the court abused its discretion in a manner that resulted in a miscarriage of justice." (*People v. Robinson* (2005) 37 Cal.4th 592, 630; also see *People v. Harris* (2005) 37 Cal.4th 310, 335; *People v. Gray* (2005) 37 Cal.4th 168, 202; *People v. Cole* (2004) 33 Cal.4th 1158, 1195; *People v. Wells* (2004) 118 Cal.App.4th 179, 186.) It is the province of the jury to decide whether an expert's opinion is reasonable and to determine the weight to be given to expert testimony. (*People v. Smithey, supra,* 20 Cal.4th at p. 966.)

2. Appellant's Assertion About Dr. Coleman's Lack Of Expertise On Mental Retardation Is Forfeited; Moreover, It Provides No Basis For The Trial Court To Reject Dr. Coleman's Testimony

Appellant asserts that Dr. Coleman did not demonstrate his knowledge, experience and training in "the field of mental retardation – whether in assessing diagnosing, studying, or treating people who are mentally retarded." (AOB 88-92.) Appellant made no specific objections or arguments on this basis. Nor did he argue that Dr. Coleman did not have "expertise with regard to the particular kinds of mental retardation . . . at issue in this case." (AOB 87; XIV RT 3200-3201; see *People v. Clark*

(1993) 5 Cal.4th 950, 988, fn. 13 ["When a party does not raise an argument at trial, he may not do so on appeal"].) Appellant's objections never mentioned expertise in mental retardation as the basis for a foundational objection.[82] Therefore, because appellant failed to make a foundational objection clearly based *on the particular subject raised on appeal*, his contention is forfeited. (Evid. Code, § 353; see *People v. Bolin* (1998) 18 Cal.4th 297, 321; *People v. Hogan* (1982) 31 Cal.3d 815, 852; *People v. Holt* (1997) 15 Cal.4th 619, 666-667 [a claim of the erroneous admission of evidence is preserved for appeal if the timely objection to admission of the evidence alerted the trial court to the nature of the anticipated evidence and the basis on which exclusion was sought and afforded the opposing party an opportunity to establish its admissibility]; see also *People v. Marks* (2003) 31 Cal.4th 197, 228 ["A general objection to the admission or exclusion of evidence, or one based on a different ground from that advanced at trial, does not preserve the claim for appeal"].)[83]

Finally, appellant failed to argue that his "federal due process right to a fair trial" was at issue. Therefore, this claim is also not congnizable on appeal. (AOB 91; *People v. Earp* (1999) 20 Cal.4th 826, 893; see *People v. Hardy* (1992) 2 Cal.4th 86, 150; *People v. Rodrigues* (1994) 8 Cal.4th

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[82] Appellant's cited objections during Dr. Coleman's trial testimony all related to testimony regarding testing or methodology, not mental retardation. (AOB 88, citing XIV RT 3210-3211, 3215, 3219-3224.)

[83] In addition, even assuming arguendo that appellant's pre-testimony argument could be construed as a challenge to Dr. Coleman's expertise on the subject of "mental retardation," he failed to renew his contention on those grounds during Dr. Coleman's trial testimony. For this additional reason, his claim should be rejected. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 159.)

1060, 1116, fn. 20 [perfunctory assertions without argument are insufficient].)

Assuming arguendo that appellant's claims are reviewable, they lack merit. Appellant's claim is a red herring. (AOB 101.) Dr. Coleman was not called to testify as an expert on mental retardation. He testified about the testing and methodology of the profession that he "knows," and what could or could not be derived from that testing pursuant to the professional literature in the field and his own studies. (XIV RT 3204-3205, 3224, 3261-3262.) He did not testify whether or not appellant was mentally retarded. (See e.g., AOB 140 [Appellant admits Dr. Coleman was not asked if appellant's "demonstrated abilities were inconsistent with being mentally retarded."]) Therefore, the prosecution's rebuttal evidence was properly admitted to attack the *basis* of the defense expert testimony and not to provide an opinion on whether appellant was mentally retarded. (*People v. Doolin, supra,* 45 Cal.4th at p. 437; see Arg. II, b, 3, infra.) Accordingly, this contention fails to demonstrate an abuse of discretion by the trial court.

3. In His Argument II, B, 3 And 4, Appellant Fails To Demonstrate That The Trial Court Abused Its Discretion By Allowing Dr. Coleman's Testimony Regarding The Testing And Methodologies Used By The Defense Experts

Appellant next claims that there was an insufficient foundation for Dr. Coleman's testimony on the intelligence testing and methodologies utilized by the defense experts and that violated his federal constitutional rights to a fair trial, proof beyond a reasonable doubt, trial by jury on every element of the charges, a meaningful opportunity to present his defense, and reliable jury determination he was guilty of a capital offense. (AOB 100-106.) Respondent submits that appellant's constitutional claims

are forfeited and appellant fails to demonstrate that the trial court abused its discretion by allowing Dr. Coleman to testify on these matters.

Initially, respondent submits that appellant's constitutional claims are forfeited because they are raised for the first time on appeal, and appellant does not demonstrate how these various federal constitutional rights were infringed. (AOB 106; *People v. Earp, supra,* 20 Cal.4th at p. 893; see also *People v. Hardy, supra,* 2 Cal.4th at p. 150; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1116, fn. 20 [perfunctory assertions without argument are insufficient].)

Moreover, as a basis for appellant's claims, appellant cites and quotes from numerous professional manuals and journals apparently attempting to establish that psychiatrists primarily focus on mental illness and not mental retardation, however, he never submitted these authorities to the trial court, nor to the jury for consideration and therefore they too should not be considered here. (AOB 93-97; see *People v. Sanders* (2003) 31 Cal.4th 318, 323, fn. 1; *People v. Amador* (2000) 24 Cal.4th 387, 394.)

Regarding the substantive issue, as previously noted, the prosecution may call, in rebuttal, an expert of comparable background to *challenge defense expert methods*. (*People v. Stoll, supra,* 49 Cal.3d at p. 1136, 1159.) Here, appellant notes the number of evaluations that Dr. Christensen and Dr. Powell[84] stated they performed, and

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[84] In his argument IV, 2, B, 4, d, appellant proclaims Dr. Powell "had extensive experience administering and interpreting intelligence and other psychological tests and had performed about 100 evaluations like the one in this case." (AOB 102, citing XII RT 2879-2883; see also XVI RT 3636-3637.) However, appellant's citations to XVI RT 3636-3637, are irrelevant to this issue since the testimony there occurred in the penalty phase well after Dr. Coleman's testimony and the decisions made by the trial court. (See *People v. Berryman* (1993) 6 Cal.4th 1048, 1070, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, (continued...)

Dr. Christensen's experience at the regional center,[85] and that Dr. Shuyler was neuropsychologist. Appellant then claims Dr. Coleman had no comparable special training or experience. (AOB 102.)

(...continued)
fn. 1.) The remaining testimony was rather limited. At pages XII RT 2879-2883, Dr. Powell testified he "spent most of his time and activity in evaluating individuals in terms of their personality and their functioning level in -- intellectual level" and some time helping individuals to "manage the problems that they're having at the moment." (XII RT 2879-2880.) He also stated he has completed about one hundred psychological evaluations. (XII RT 2882-2883.) Beyond this, appellant's citations do not demonstrate, as he claims, "extensive experience administering and interpreting intelligence and other psychological tests." (AOB 102.)

[85] Appellant states "Dr. Christensen was a clinical psychologist who had worked with the developmentally disabled at the Central Valley regional center." (AOB 102, citing XIV RT 2986, 3037-3039, 3050.) However, while appellant's citations – actually in RT volume XIII - substantiate that she testified that at some time she worked in a regional center for an unspecified period, they do not establish that she was a licensed clinical psychologist when she did so. She worked at various locations, e.g., in a prison, in the Air Force, and San Diego schools for many years. (XIII RT 2985-2986.) But she had only been a "licensed clinical psychologist since January of *1985.*" (XIII RT 3049, emphasis added.) The trial was in *1991.* She never claimed to have been a licensed psychologist while working at the regional center. Appellant also seeks to bolster Dr. Christensen's credentials by stating, "She has extensive, specialized training and experience in the mental retardation field." (AOB 102, citing XIII RT 3075.) However, appellant's record citation only shows Dr. Christensen attempting to explain away Dr. Powell's testimony that he was in *disagreement with her* about appellant's mental retardation being familial. She professed, "I have a lot of experience with regards to mental retardation and [Dr. Powell's] experience is . . . a different level. And I am aware of the sub classifications of familial retardation." (XIV RT 3075.) Nothing specific was said about "extensive, specialized training." (AOB 102.) Finally, appellant points to testimony where Dr. Christensen claimed a person would have to be an "expert" in the testing implements and scoring methods to achieve an I.Q. level he or she wanted the examiner to get. In that context, she then added, she could not do it and she had performed five or six hundred such examinations. (XIV RT 3024.)

But Dr. Coleman testified he is a medical doctor specializing in psychiatry. He has been employed in that capacity since 1969 and practices in Berkeley California. He received his Bachelor's degree from Occidental College, attended medical school at the University of Chicago, completed an internship in Pediatrics at Children's Medical Center in Seattle, and trained in both adult and child psychiatry at the University of Colorado Medical Center at Denver. (XIV RT 3203.)

Dr. Coleman explained a psychiatrist is a medical doctor who then specializes in the field of psychiatry. A psychologist has overlapping training in psychotherapy but is not medically trained or qualified to treat the body or to prescribe medications. Testing administration and theory is a major part of a psychologist's training. Generally psychiatrists do not do as much training on testing methods and generally do not administer psychological tests. They are, however, expected to be able to know of the testing and how to integrate the test findings in the overall picture of the person. (XIV RT 3203-3204, 3252-3253, 3262-3263.)

Even more importantly, Dr. Coleman had developed an expertise in the area of mental health professional testimony in the courtroom. Beyond his work with patients Dr. Coleman, beginning in the 1970's, started developing a special interest in the area of psychiatry and the legal system.[86] He then studied the professional literature on the use of psychology and psychiatry in the clinical setting and the legal setting. In addition to there being literature on these professionals working in the clinical setting there is a "whole separate body of literature [by] people investigating when [these mental health professionals] work in the legal system." Dr. Coleman made a study of "the professional literature on the

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[86] In the last few years, "it's gotten to the point where about 90 percent of [his] work is in the legal area . . ." (XIV RT 3266.)

techniques of psychiatry and psychology as they apply in the legal system." Dr. Coleman also studies real life cases. In that regard, he reviews how various methods, examinations and techniques are used by mental health professionals in those cases, and the conclusions of those professionals.[87] Then he compares his findings with what the professional literature says those techniques and methods should actually be able to do. (XIV RT 3203-3205, 3266.) Dr. Coleman has also testified before the California state Assembly and Senate and numerous other state Legislatures about the role of psychology and psychiatry in the legal system, and the laws having to do with psychiatry. (XIV RT 3206-3208.) Dr. Coleman also wrote a book called the "Reign of Error, Psychiatry Authority in Law," which was published in 1984. (XIV RT 3208, underline removed.) In addition, Dr. Coleman has written 38 articles, all dealing with aspects of psychiatry's role in the law and related social issues. (XIV RT 3208.)

Dr. Coleman has also testified in courts many times regarding his opinions about the credibility and reliability of the tests and psychological instruments being used for purposes of determining legal issues. He testifies far more often for the defense than the prosecution. (XIV RT 3209, 3234, 3242, 3269-327; see, e.g., *People v. Ledesma, supra,* 39 Cal.4th at p. 661 ["The prosecution also presented testimony from a psychiatrist, Dr. Lee Coleman, who challenged the reliability of the defense experts and disputed their conclusions. Dr. Coleman opined that the various psychological tests and assessment tools employed by the defense experts were unreliable or irrelevant. . ."].)

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[87] In addition, Dr. Coleman reads the documents of "the police, social workers, or interviewers of various sorts" that have been complied in the case. (XIV RT 3205.)

Dr. Coleman does not provide opinions on a defendant's mental state and limits his testimony about tests and methodologies to "the tools of the professions that [he] know[s]." (XIV RT 3259-3262, 3269 [Dr. Coleman testifies about the "credibility or reliability of various tests and psychological methods . . ."].)

Respondent submits this background in not only comparable, but exceeded that of appellant's clinicians in the *study* of the use of psychological and psychiatric methodologies, techniques, and the results of those tests and methods as related in a court of law. This expertise allowed Dr. Coleman to come to specific conclusions, particularly in a legal setting, about whether expert testimony from a clinician about their testing and methodologies was consistent with what the literature says those tests could accomplish. Dr. Coleman's testimony was properly admitted in rebuttal because of his specialized background, and his testimony directly related to the very *basis* of appellant's expert witness testimony. (Evid. Code, §§ 721, subd. (a), 780; See, e.g., *People v. Smithey, supra,* 20 Cal.4th at 965-966 [the rebuttal testimony of a prosecution expert critical of forensic psychiatry and of the opinions of the defense experts was relevant to the weight of those opinions, and its admission was neither improper nor prejudicial]; *People v. Prince* (1988) 203 Cal.App.3d 848, 856-858 [the testimony of a prosecution expert was relevant to the weight and credibility of the defense expert opinions on the defendant's competency to stand trial].)[88]

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[88] Appellant appears to acknowledge the breath of psychological and psychiatric testing that Dr. Coleman has testified about but nonetheless asserts he has not been able to find a case where Dr. Coleman qualified "as an expert regarding mental retardation and associated intelligence testing." (AOB 101.) However, as noted above, Dr. Coleman was not brought in as an expert on mental retardation; and, respondent submits that his testimony (continued...)

Respondent further submits that Dr. Coleman's testimony about the substance of the intelligence testing, and the inherent weaknesses of that testing, with very little dispute by appellant's experts, further demonstrated his expertise. For example, not only did Dr. Coleman often describe the testing he was referencing, but he noted, virtually without challenge to its accuracy, obvious problems with the testing such as the fact the examiner cannot objectively ascertain whether someone performs poorly on a test simply because he is distracted, anxious, not interested, not trying, motivated by legal issues, malingering, or because a racial or educational bias built into the tests; and, the test results must be interpreted subjectively. (XIV RT 3211-3214, 3218, 3221-3225, 3230-3231, 3224, 3258, 3243, 3264-3265; compare *People v. Smithey*, supra, 20 Cal.4th at 965.) He further noted there are no psychological instruments for deciding which of these factors may be affecting the score; it is "purely subjective." The testing psychologist simply tries to figure it out and he or she does not "have a special crystal ball for doing that." (XIV RT 3212., 3230, 3229-3230; see, e.g., *The Reign of Error, Psychiatry, Authority, and Law*, by Lee Coleman, M.D., Boston, MA; Beacon Press, 1984), p. 5 ["Biased I.Q. tests have been used to support negative evaluations of black and other minorities. [footnote omitted] The error here is to regard the 'test' results as definitive. The 'tests' of psychology depend on subjective interpretation of the practitioner and are useful only as an adjunct to the clinical practice of psychiatry or psychology. Like psychiatry, psychology has no procedure to obtain objective findings"]; *Beyond Full Scale IQ: A New WAIS-III*

(...continued)
demonstrates that he had a wide breath of knowledge about psychological tests, such as utilized here, commonly used as the basis for testimony in court. Moreover, he only testifies about the tools of the profession that he knows. (XIV RT 3259-3262, 3269.)

Indicator of Mental Retardation, Journal of Scientific Psychology, p. 12, March 2008 ["At this time there exist no validity scale(s) on standard measures of intelligence to detect malingering . . ."]; also see *Money v. Krall* (1982) 128 Cal.App.3d 378, 396 ["[T]he experts acknowledge that performance on intelligence tests is affected by cultural variables and other factors," citing Herr, *The New Clients: Legal Services for Mentally Retarded Persons* (1979) 31 Stan.L.Rev. 553, 556]; *Ford v. Long Beach Unified Scho. Dist.* (9th Cir 2002) 291 F.3d 1086, 1088; *Larry P. v Ryles* (9th Cir. 1984) 793 F.2d 969, 982-983 [Standford-Binet and the Wechsler Intelligence Scale for Children have a discriminatory impact on black children]; compare, *People v. Cruz* (1980) 26 Cal.3d 233, 248 [Dr. Shoor "explained to the jury why he did not use psychological tests: He believed, based on years of experience, that they were not reliable"].)

Indeed, while Dr. Coleman was able to focus entirely on issues of this type, through cross-examination, the prosecutor was able to elicit similar information from appellant's witnesses as well, confirming Dr. Coleman's extensive knowledge about these tests and methodologies. (See, e.g., XII RT 2887, 2910, 2913, 2910, 2915, 2917, 2920, 2924-2926, 2958.)

Appellant nevertheless speculates what Dr. Coleman may or may not have learned during his training as a psychiatrist, references the legislative requirement to refer a defendant suspected of incompetence due to mental retardation to the regional center, and points to the requirements of a few other states for presumably similar testimony (AOB 93-98); but appellant does not directly address the breadth of experience Dr. Coleman actually testified to regarding his study of the psychiatric and psychological testing and methodologies, and their use in legal decisions, including his study of

individual cases. (AOB 100.)[89] Therefore, his other references provide little support for his position.

Appellant also cites *People v. Brown* (1985) 40 Cal.3d 512, 530, to support an assertion that Dr. Coleman was not sufficiently impartial to testify as an expert. (AOB 103.) Appellant's contention is forfeited because he failed to make this argument to the trial court. (See *People v. Clark* (1993) 5 Cal.4th 950, 988 fn 13 ["When a party does not raise an argument at trial, he may not do so on appeal"].) Moreover, appellant's citation does not assist him here because his cited page in *Brown* references expert qualifications for *Kelly-Frye* purposes. (*Id.*) Here, appellant does not make a *Kelly-Frye* claim. (AOB 41-279.) Nor is there a basis for doing so. (See *People v. Smithey, supra,* 20 Cal.4th at pp. 967-968.)

In addition, the entire factual basis for his sufficiently "impartial" claim is a small bit of out of context testimony. (AOB 103-106.) Appellant cites XIV RT 3231, for the proposition that Dr. Coleman states intelligence tests are not given any credibility and are trashed by the professional community, and he cites XIV RT 3255 for the proposition that Dr. Coleman opined it was "possible" the majority in his profession viewed all intelligence testing under all circumstances are completely and totally

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[89] Some of the evidence that appellant does review is inaccurately stated. For example, appellant claims that Dr. Coleman testified he "was 'more familiar with personality testing' than I.Q testing." (AOB 100, citing XIV RT 3243-3244.) That was not his testimony. *Appellant never specifically asked about Dr. Coleman's familiarity with I.Q. testing.* Instead, at the cited pages appellant asked, "Do you know some of the areas in which the Federal Government uses I.Q. testing? [Dr. Colman] No, I can't be specific. I'm more familiar with their use of personality tests, it's not an I.Q. test, but I would be very surprised if they don't also use I.Q. tests somewhere." (XIV RT 3243-3244.) Obviously, Dr. Coleman was not saying he was "more familiar with personality testing' than I.Q testing." (AOB 100.)

unreliable. (AOB 103.) Appellant then cites professional journals and claims that standardized tests are considered reliable and are the only way to address intellectual aspect of mental retardation. And, he demonstrates his own bias by maligning Dr. Coleman, calling him insufficiently trained and personally invested in his testimony. (AOB 104-105.)

At XIV RT 3231, the context for Dr. Coleman's statement about the test was his testimony about the bias of the I.Q. test with undereducated groups which often are minority and impoverished populations. In that context, "*that's why*" the tests have been trashed by the professional community (emphasis added). There was certainly nothing about this statement that demonstrated bias. (See, e.g., *Larry P. v. Riles*, 793 F.2d 969, 975-76 (9th Cir. 1986) [discussing racial bias in IQ tests and upholding district court's order enjoining use of such tests]; *The Reign of Error, Psychiatry, Authority, and Law*, by Lee Coleman, M.D., (Boston, MA; Beacon Press, 1984), p. 5.) Indeed, while not so strident, even Dr. Powell and Dr. Christensen noted similar criticism within their profession. (XII RT 2924; XIII RT 3035-3036.) Regarding appellant's citation to XIV RT 3255, Dr. Coleman merely stated he did *not know* if his opinion was a majority opinion *among psychiatrists* because a lot of professionals that agree with him do not write articles or testify about their opinions. If all psychiatrists were polled, he did *not know* if there would be a lot of psychiatrists who would agree with him or if it would be the majority. Again, appellant fails to demonstrate bias.

As can be seen, even if appellant's "impartiality" argument was reviewable and had legal relevance, once context is provided to appellant's factual claims, they fail.

Accordingly, appellant fails to demonstrate that the trial court abused its discretion. (See *People v. Clark* (1993) 5 Cal. 4th 950, 1019.)

C. The Trial Court Did Not Submit A Question Of Law To The Jury

Appellant next complains that the trial court erred by permitting Dr. Coleman to testify regarding questions of law vital to his defense. Appellant asserts that Dr. Coleman's testified about the unreliability and irrelevance of all intelligence testing and expert diagnosis on mental retardation under all circumstances; and, that was an attack on the legal admissibility of such evidence, which is a question of law exclusively for the court to decide. As such, appellant contends that the jury was told his defense was irrelevant and should be disregarded with no consideration at all; moreover, appellant claims his Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated. (AOB 110-111, 115.) Respondent submits that appellant's contention is forfeited. Moreover, it is erroneous. Dr. Coleman's testimony, in context, merely went to the weight of the evidence and did not improperly involve questions of the law.

1. Procedural History

As previously noted, Dr. Coleman testified that the opinions of the defense experts were based upon tests that are unreliable, unscientific, and irrelevant, because, among other things, the examiner cannot accurately ascertain whether someone performs poorly on a test simply because he is distracted, anxious, not interested, not trying, motivated by legal issues, malingering, or because of the impact of a racial or educational bias built into the tests; and, the test results must be interpreted subjectively. (XIV RT 3211-3214, 3218, 3221-3225, 3230-3231, 3224, 3258, 3243, 3264-3265.) Dr. Coleman pointed out that there are no psychological instruments for deciding which of these factors may be affecting the score, it is "purely subjective." The testing psychologist simply tries to figure it out and he or she does not "have a special crystal ball for doing that." (XIV RT 3212., 3230, 3229-3230.) Dr. Coleman also noted that mental

health professionals do not have special skills for determining if a defendant is being truthful with them; they may, based on Dr. Coleman's study of the issue for 20 years, actually be far worse at such determinations than laypersons. (XIV RT 3217-3218.) Given these circumstances, Dr. Coleman concludes, opinions based on the testing and methodology should not be given weight in deciding the relevant mental issues before the court. (XIV RT 3254.)

Appellant proclaims that Dr. Coleman's testimony was an "attack on the reliability and relevance of an *entire class of evidence* – i.e., all intelligence testing and *all* expert diagnoses of *all* mental retardation in *all* circumstances." Appellant further interprets this as an "an attack on the *admissibility* of such evidence, questions of law exclusively for the court." (AOB 111, italics in the original.) Appellant also contends Dr. Coleman's testimony told the jury they should disregard his defense without any consideration at all. (AOB 110.) As will be shown, appellant's assertions are meritless.

2. Appellant's Claim That Dr. Coleman Testified On The Law Is Not Reviewable On Appeal; Moreover, It Is Meritless

Appellant's contention is not cognizable on appeal. At no time during trial did appellant express an objection on the ground that Dr. Coleman's testimony was testimony on the law or "told the jurors . . . that [appellant's] very *defense* was irrelevant and should be disregarded without any consideration at all." (AOB 110, 115, emphasis added; see *People v. Nelson* (2011) 51 Cal.4th 198, 223 ["[T]he 'defendant's failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable. . . Although no 'particular form of objection' is required, the objection must 'fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting

party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling.'"].) In addition, while appellant made a general assertion at the pre-testimony hearing that it was his "understanding" that "the Court makes the ruling on what is relevant and what is not relevant, and it is not for the expert to say what is relevant" (XIV RT 3200), assuming arguendo this was an objection, appellant failed to renew it on this ground when the challenged testimony was actually elicited by the prosecution. (See AOB 109, citing XIV RT 3210-3211, 3214-3215, 3221-3225, 3231, 3234.) Therefore, appellant's contentions are forfeited. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 159; *People v. Brown* (2003) 31 Cal.4th 518, 547 (*Brown II*); *People v. Morris* (1991) 53 Cal.3d 152, 190, overruled on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

Moreover, appellant's constitutional claims are forfeited because they are raised for the first time on appeal, and appellant does not demonstrate how his listed federal constitutional rights were infringed. (AOB 111; *People v. Earp, supra,* 20 Cal.4th at p. 893; see *People v. Hardy, supra,* 2 Cal.4th at pg. 150; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1116, fn. 20 [perfunctory assertions without argument are insufficient].)

Assuming arguendo appellant's claims are preserved for appeal, they have no merit. Respondent first notes that, contrary to appellant's hyperbole, Dr. Coleman was never asked about all intelligence testing and all expert diagnoses of all mental retardation in all circumstances. (AOB 111.) The testimony, in context, was more directed than that. For example, using appellant's record citations (AOB 109-110), the transcript shows the prosecutor elicited testimony that psychological tests and instruments such as the Wechsler, mental status examination, and M.M.P.I. personality examination were not reliable. The Bender and neuropsychological tests were also addressed. Dr. Coleman provided context for those opinions by

explaining specifically *why* each test was unreliable (e.g., a variety of factors affecting the test taker and test results, the bias built into testing like the Wechsler, and the interpretations made of the test that are subjective).[90] Dr. Coleman further explained *why* those tests would be of no help in addressing the premeditation, deliberation and malice aforethought mental states at issue (e.g., test unreliability, tests were not designed for that purpose, behavior is a better guide for determining mental states at the time of a crime, and if a defendant does or does not demonstrate certain mental capacities through their behavior, then a test score is beside the point). Dr. Coleman then opined that there was no testing in the mental health field that would help one way or the other with that determination. (XIV RT 3210-3211, 3214-3215, 3219-3226, 3231.) Thus, the testimony elicited by the prosecutor was directed at the type of testing that was relied upon by appellant's witnesses for their opinions, and, the resulting argument about the mental states at issue. It did not broadly address "all intelligence testing and all expert diagnoses of mental retardation under all circumstances." (AOB 111.)

On cross examination, *defense counsel* asked a broader question. After Dr. Coleman testified that psychotherapy may help emotionally troubled patients, defense counsel asked, "But it's your position that *under no circumstances* does IQ testing tell anything about a person; is that accurate or is that not accurate?" Dr. Coleman again answered more precisely, "Well, it tells how well they did on the test, but it doesn't tell why. It doesn't tell about their intelligence and most certainly doesn't allow you to go from that to something like was the person planning something or any of those kinds of issues." (XIV RT 3243, emphasis

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[90] As noted in argument II, B, appellant did very little to challenge these common sense observations about the testing.

added.) Subsequently, defense counsel asked if it was his opinion that a judge or jury should decide a case solely on the facts surrounding the circumstances of the offense? Dr. Coleman testified that to decide the truth the fact finder should "rely on all the evidence" but he reiterated his "opinion" that "mental state" issues are more reliably determined by the person's behavior. In that context, he opined "psychiatric and psychological tests are completely unreliable, and if listened to or given weight will just simply bring confusion instead of something reliable like the evidence of the person's state of mind." (XIV RT 3254.) Dr. Coleman stated that was an "opinion I'm offering as an expert based on my studies and work." (XIV RT 3254.)

Again, despite *appellant's prompting* to address "all circumstances," Dr. Coleman did not discuss "all expert diagnoses of all mental retardation in all circumstances." (AOB 111.)[91] Therefore, the factual underpinning for appellant's appellate claim is faulty.

More importantly, respondent acknowledges that Dr. Coleman did in fact express his strong opinion, based on very specific reasons, that the

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[91] In another bit of hyperbole, appellant, citing XIV RT 3256-3257, claims Dr. Coleman testified that determining whether someone is mentally retarded "is simply a matter of common sense that lay persons are entirely capable of making based solely on their observations of a person's behavior." (AOB 110.) Actually, at the cited pages, during cross-examination, Dr. Coleman testified there was not a legitimate means to "quantify" intelligence "in terms of numbers or to be exact" through tests. He stated "to some degree" one can get a "rough sense" of a person's intelligence level through "common sense observations of laypersons who are in contact with the person and who can speak about what they observed this person to be capable of doing in real life situations." He would also consider other available information. (XIV RT 3256-3257.) Thus, the cited pages, when placed in context, were a reference to quantification of intelligence, not diagnosing mental retardation which, of course, is a broader factual question. (See *Campbell v. Superior Court* (2008) 159 Cal.App.4th 635, 650.)

testing and methodology relied upon by appellant's experts, as the basis for their opinions in this case, was unreliable and that made their opinions suspect, but that testimony was properly admitted. Contrary to appellant's apparent position, there is no question that such rebuttal testimony is properly admitted to attack the basis for the defense expert testimony (Evid. Code, §§ 721, subd. (a), 780; see *People v. Doolin, supra,* 45 Cal.4th at p. 437; Cf. *People v. Gardeley* (1996) 14 Cal.4th 605, 618 ["Like a house built on sand, the expert's opinion is no better than the facts on which it is based"]) and to provide relevant information for the jury to consider in determining the weight and credibility of the defense expert opinions. (*People v. Doolin , supra,* 45 Cal.4th at p. 437, citing, e.g., *People v. Smithey, supra,* 20 Cal.4th at p. 965–966 [the rebuttal testimony of a prosecution expert critical of forensic psychiatry and of the opinions of the defense experts was relevant to the weight of those opinions, and its admission was neither improper nor prejudicial]; *People v. Prince* (1988) 203 Cal.App.3d 848, 856–858 [the testimony of a prosecution expert was relevant to the weight and credibility of the defense expert opinions on the defendant's competency to stand trial]; contrast cases cited at AOB 115 [*Kelly-Frye* determination made by court].[92])

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[92]As this Court made clear in *People v. Smithey, supra,* 20 Cal.4th at 967:

> California courts have accepted a qualified expert's decision to base his or her opinion regarding mental state upon standardized psychological tests such as those used by the defense experts in this case, and have not suggested that *Kelly* applies to expert opinions based upon such tests. (*People v. Stoll* (1989) 49 Cal.3d 1136, 1154, 1157-1158 [265 Cal. Rptr. 111, 783 P.2d 698].) Instead, "issues of test reliability and validity may be thoroughly explored on cross-examination at trial. (See [Evid. Code,] § 721, subd. (a).) The prosecution

(continued...)

Appellant nevertheless characterizes Dr. Coleman's testimony as an attack on an "entire class of evidence" that challenged the legal admissibility and relevance of his expert testimony and therefore it submitted to the "jurors questions of law and permit[ted] the jurors to resolve those questions in a manner inconsistent with the law. . ." (AOB 110-111, 115-116, 129.) However, the record plainly demonstrates that neither the prosecutor nor Dr. Coleman disputed the

> admissibility of the defense experts' opinions based upon the results of psychological testing. Rather, Dr. Coleman stated his opinion that psychological evaluations and testing are unreliable because the results must be interpreted subjectively and the expert has no means to determine whether extraneous causes, such as malingering, affect the results.

(*People v. Smithey, supra,* 20 Cal.4th at. 967; e.g., XIV RT 3211-3212.)

Therefore, Dr. Coleman's testimony did not challenge the legal admissibility of appellant's expert testimony nor invite the jury to decide its admissibility. (*Id.*; *People v. Danielson, supra,* 3 Cal.4th at 730, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal. 4th 1046, 1069 fn. 13; *People v. Turner* (1990) 50 Cal. 3d 668, 686 ["The People called forensic psychiatrist Stewart Coleman to testify that psychological tests and opinions are useless in the courtroom"].)

Indeed, even where Dr. Coleman actually briefly mentioned the term "relevance," any fair minded reading of the comment shows that he was making a *logical point*, and *not a legal one.* For example, Dr. Coleman was asked if psychological tests could require a layperson to abandon a

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(...continued)

> also may call, in rebuttal, another expert of comparable background to *challenge defense expert methods*. [Citation.]"

(*People v. Stoll* (1989) 49 Cal.3d 1136, 1159, italics added.)

determination previously made, based on the facts, about premeditation and deliberation or malice aforethought. Dr. Coleman testified that there is not a test in the mental health field that would "add anything or subtract anything or in any way be *relevant* to the two [mental states] you've given me." (XIV RT 3221.) This was simply the logical point that he had been making all along, i.e., that based on his experience and studies, these instruments are unreliable and were never designed for determining mental state at the time of the crime and have no ability to accurately speak to those issues. (XIV RT 3216, 3222.) In context, his meaning is clear. (Compare, *People v. Ledesma, supra,* 39 Cal.4th at p. 661 ["Dr. Coleman opined that the various psychological tests and assessment tools employed by the defense experts were unreliable or *irrelevant* to the issues and that none of them were useful in determining, after the fact, the nature of a defendant's state of mind at an earlier time," emphasis added].)

Moreover, as in the other cases where this Court has considered Dr. Coleman's testimony, Dr. Coleman did not did not suggest that psychologists be barred from expressing their opinions in the courtroom. Instead, he merely strongly addressed the weaknesses of the psychological testimony provided by appellant's experts in a courtroom setting. (E.g., XIV RT 3254 [Dr. Coleman testified that to decide the truth the fact finder should "rely on all the evidence" but reiterated his "opinion" that "mental state" issues are more reliably determined by the person's behavior and psychological test should be given no weight when determining state of mind]; see *People v. Babbitt* (1988) 45 Cal.3d 660, 699-700[93] [Dr. Coleman

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[93] Appellant, relying heavily upon this Court's opinion in *People v. Babbit, supra,* 45 Cal.3d 660, asserts that it is improper to ask or allow the jury to decide a question of law. (AOB 113, 116, 125-126.) His reliance on *Babbitt* is misdirected. This Court in *Babbitt* found nothing improper in Dr. Coleman's *testimony,* but said that the prosecutor's argument that the (continued...)

testified, "I am arguing as my opinion based on all the things I've said in terms of my background that [psychiatric and psychological testimony] does not really – shouldn't be given any weight, that after being considered, it shouldn't be given any weight."]; also compare, *People v. Ledesma, supra,* 39 Cal.4th at p. 661 ["Dr. Coleman opined that the various psychological tests and assessment tools employed by the defense experts were unreliable or irrelevant to the issues and that none of them were useful in determining, after the fact, the nature of a defendant's state of mind at an earlier time"]; *People v. Smithey, supra,* 20 Cal.4th at p. 965 ["Dr. Coleman acknowledged that he believes using a psychiatrist to determine mental state in a forensic setting is 'so flawed in its concept that it's completely worthless'"]; *People v. Turner, supra,* 50 Cal. 3d at p. 686 ["The People called forensic psychiatrist Stewart Coleman to testify that psychological tests and opinions are useless in the courtroom"]; *People v. Prince, supra,* 203 Cal.App.3d 848, 853 ["Dr. Lee Coleman, a psychiatrist, testified for the prosecution that the 'expert' opinions of psychiatrists and psychologists as to competency are unreliable and deserve no weight or credibility"].)

Finally, the trial court directed the jury to accept and follow the law as the court provided. The court further instructed the jury that it may consider evidence of mental defect or disorder to determine whether or not appellant formed the requisite mental states, and, that they should give

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(...continued)
admission of such expert testimony constituted a "social cancer" approached misconduct. (*People v. Babbitt, supra,* 45 Ca1.3d at p. 700.) The prosecutor's comments "were directed not to evidence of defendant's mental state at the time of the offenses nor to the weight to be given his experts' testimony, but rather, challenged the entire system of permitting psychiatric testimony on behalf of criminal defendants." (*Id.*) However, no such argument was made here by the prosecutor. Moreover, the *testimony* in *Babbitt*, as here, was broadly directed to the experts' testimony and their methods and was therefore based on the evidence. (*Id.*, at p. 698.)

expert testimony the weight to which they think it is entitled. (3 CT 760, 785, 796.) These instructions, presented without objection, correctly informed the jury of the actual law they were to follow.

For all the forgoing reasons, appellant fails to demonstrate that the trial court abused its discretion by allowing Dr. Coleman's testimony, or that appellant's constitutional rights were violated. Nor is any prejudice demonstrated.

D. Appellant Fails To Demonstrate That The Trial Court Erred By Admitting Dr. Coleman's Testimony Because Of Alleged Legally Incorrect Opinions About The Law

Appellant next contends that, Dr. Coleman testified in conflict with the law and did not: tell the jury that the "law not only allows but requires a defendant to present expert testimony and related intelligence test results to support a claim of mental retardation, that such evidence is legally relevant to determining issues of mental state in a criminal trial;"or that "the law requires jurors to consider that evidence in resolving questions of mental state, or that he (Dr. Coleman) was not asking the jurors to disregard the law." Appellant further complains that Dr. Coleman's testimony was not limited to the defense presented in this particular case. For these reasons appellant submits that the trial court's admission of Dr. Coleman's testimony violated state law, as well as appellant's federal constitutional rights to a fair trial, proof beyond a reasonable doubt and trial by jury on every element of the charged offenses and special circumstance allegations, a meaningful opportunity to present his defense, and reliable juror determinations that he was guilty of a capital offense. (AOB 116-117, 128-129.) Respondent contends that none of appellant's claims are cognizable on appeal, nor do they have any merit.

1. Appellant's Contentions Are Forfeited

Appellant's claims are not cognizable on appeal for several reasons. First, appellant failed to make an objection or renew any pre-testimony objections on the grounds now asserted (e.g., appellant never made an objection on the grounds that Dr. Coleman was testifying in a manner contrary to the law). (*People v. Letner and Tobin, supra,* 50 Cal.4th at pp. 159; *Brown II, supra,* 31 Cal.4th at p. 547; *People v. Morris* (1991) 53 Cal.3d 152, 190; see AOB 124, citing XIV RT 3214-3216,3219-3226,3231,3241, 3254-3257.[94])

Second, if appellant felt the instruction on the law was incorrect or he felt further instruction was necessary (e.g., that the "law not only allows but requires a defendant to present expert testimony and related intelligence test results to support a claim of mental retardation, that such evidence is legally relevant to determining issues of mental state in a criminal trial;"or that "the law requires jurors to consider that evidence in resolving questions of mental state, or that he (Dr. Coleman) was not asking the jurors to disregard the law"), then he was required to make an objection and/or request additional instruction. (See *People v. Lee* (2011) 51 Cal.4th 620, 638; *People v. Holloway* (2004) 33 Cal.4th 96, 154; *People v. Davis* (1995) 10 Cal.4th 463, 543.)

Third, appellant failed to object on the constitutional grounds he now asserts and fails on appeal to argue why each right was violated. (*People v. Earp* (1999) 20 Cal.4th 826, 893; see *People v. Burgener* (2003) 29 Cal.4th 833, 869 ["It is elementary that defendant waived these claims by failing to articulate an objection on federal constitutional grounds below"]; *People v. Hardy* (1992) 2 Cal.4th 86, 150; *People v. Rodrigues, supra,* 8 Cal.4th at

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[94] At pages 3254 thorough and 3257 of the Reporter's Transcript, the testimony was elicited *by appellant*.

p. 1116, fn. 20 [perfunctory assertions without argument are insufficient]; see AOB 124-125, citing XIV RT 3214-3216,3219-3226,3231,3241, 3254-3257.) For all these reasons, appellant's claims are forfeited.

2. Appellant Fails To Demonstrate That Dr. Coleman Testified About The Law Erroneously Or That His Testimony Was Not Appropriately Limited; Nor Does He Demonstrate That Dr. Coleman Should Have Testified On The Law About How His Testimony Or The Testimony Of The Defense Experts Should Be Viewed By The Jury

Assuming arguendo that appellant's claims are reviewable, they lack merit. Appellant founds his claim on assertions that the "clinical and legal definitions of mental retardation necessarily incorporate scores from standardized testing" and "California law has long *required* a diagnosis and opinion by a qualified expert to support a claim of mental retardation." (AOB 123, emphasis in the original.) It should first be noted that none of appellant's cited case or statutory authority directly *required* defense counsel at the time of appellant's trial in 1991, in the context of a *criminal trial*, where mental retardation was being used as part of a mental state defense, to prove mental retardation through the use of experts or particular testing. (AOB 122-124.)[95]

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[95] E.g., *Money v. Krall* (1982) 128 Cal.App.3d 378, 397 and *In re Krall* (1984) 151 Cal.App.3d 792, involved *civil commitments* under Welfare and Institutions Code section 6500; *People v. Moore* (2002) 96 Cal.App.4th 1105, 1116-1117, was decided over ten years after appellant's case and discussed a "medical diagnosis" shown through expert "medical" testimony; *Atkins v. Virginia* (2002) 536 U.S. 304, 309, fn. 5, was decided over ten years after appellant's trial; *In re Hawthorne* (2005) 35 Cal.4th 40, 47-48, was decided fourteen years after appellant's trial; Penal Code section 1001.20, subdivision (a), defines mental retardation but did not require specific testing or expertise in criminal cases; and, Penal

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However, respondent acknowledges that at the time of appellant's trial, court of appeal case authority, in civil commitment context under Welfare and Institutions Code section 6600 (mentally retarded persons dangerous to themselves or others), that did outlined the issues. (See *Money v. Krall* (1982) 128 Cal. App. 3d 378, 397.) In *Money*, the Fifth Appellate District of the Court of Appeal of California, acknowledged there was no statutory definition for mental retardation, but it explained:

> "Mental retardation" has long had a generally accepted technical meaning." In the most widely used definition, the American Association on Mental Deficiency explains that mental retardation 'refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior' and appearing in the 'developmental period.' (Herr, *The New Clients: Legal Services for Mentally Retarded Persons* (1979) 31 Stan.L.Rev. 553, 555 [hereafter cited as Herr].) Within this general definition, there has been considerable controversy, particularly concerning the upper boundaries of the condition. (*Id.*, at pp. 555-556.) The level of "general intellectual functioning" is identified through standardized intelligence tests; the I.Q. ceiling values inherently are somewhat arbitrary. (DSM-III, supra, at p. 37.) Also, the experts acknowledge that performance on intelligence tests is affected by cultural variables and other factors. (Herr, *supra,* at p. 556.) These points of unavoidable uncertainty underscore the importance of the multifactor diagnostic approach under both the DSM-II and DSM-III.

(*Id.*, at 397.)

Subsequently, in *In Re Krall* (1984) 151 Cal.App.3d 792 (*Krall II*), the Second Appellate District of the Court of Appeal of California, again in a Welfare and Institutions Code section 6500 case, found the trial court in that case provided an erroneous jury instruction regarding the definition of

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(...continued)
Code section 1376, subdivision (a)(1), was not enacted until 2003 (see Stats 2003 ch 700 § 1 (SB 3).

mental retardation. (*Id.*, at 796.) The court went on to point out that the agency seeking commitment of the appellant only called lay witnesses, two of them having had custody and control of appellant to age 12 or 13 (appellant was 25 years of age), and two teenage girls to prove dangerousness. The court found it necessary for there to be expert diagnosis and opinion on each of the factors necessary for a mental retardation finding for there to be an "evidentiary foundation for the jury's finding of mental retardation." (*Id.*, at 796-797.)

More recently, the law has taken a broader view. As aptly summarized by the Court in *Campbell v. Superior Court* (2008)159 Cal.App.4th 635, 650

> "[M]ental retardation is a question of fact. [Citations.] It is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence. [Citations.]" (*Hawthorne, supra,* 35 Cal.4th at p. 49; see *Vidal, supra,* 40 Cal.4th at p. 1012.) "The court 'shall not be bound by the opinion testimony of expert witnesses or by test results, but may weigh and consider all evidence bearing on the issue of mental retardation.' [Citations.]" (*Hawthorne, supra,* 35 Cal.4th at p. 50.) "The Legislature has mandated that trial courts, in determining mental retardation for *Atkins* purposes [citation][[96]],

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[96] In *Atkins v. Virginia, supra,* 536 U.S. 304, decided well after appellant's case, the United States Supreme Court held that execution of the mentally retarded violated the Eighth Amendment. The *Atkins* Court, however, "le[f]t to the State[s], the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." (*Id.*, at p. 317.) The California legislature responded by enacting section 1376, which was applicable in "any case in which the prosecution seeks the death penalty" and established procedures for the determination of mental retardation in preconviction capital cases. (§ 1376, subd. (b)(1).) The statute defines "mentally retarded" as "the condition of significantly subaverage general intellectual functioning existing concurrently with

(continued...)

> find whether the individual's 'general intellectual functioning' is significantly impaired (§ 1376, subd. (a)), but has not defined that phrase or mandated primacy for any particular measure of intellectual functioning. The question of how best to measure intellectual functioning in a given case is thus one of fact to be resolved in each case on the evidence . . ." (*Vidal, supra,* 40 Cal.4th at p. 1014.)

Accordingly, while, in the context of appellant's criminal trial in 1991, there does not appear to have been a legal mandate at the time, respondent agrees that then, and now, testing and opinions of psychiatrists or psychologists are a primary way of providing *evidence* of mental retardation that the finder of fact would consider along with other evidence. (Cf., *Clark v. Arizona* (2006) 548 U.S. 735, 758 ["[T]here is 'mental-disease evidence' in the form of opinion testimony that Clark suffered from a mental disease with features described by the witness. As was true here, this evidence characteristically but *not always* [fn omitted] comes from professional psychologists or psychiatrists who testify as expert witnesses and base their opinions in part on examination of a defendant, usually conducted after the events in question"]; But see *In re Hawthorne* (2005) 35 Cal.4th 40, 48 ["[S]ignificantly subaverage intellectual functioning may be established by means other than IQ testing"]; *Morris v. Dretke* (5th Cir. 2005) 413 F.3d 484, 497 [There is "no binding authority that requires an IQ test specifically, that is, entirely alone, at the core, or as any singular threshold, to provide the basis for a finding of mental retardation."]; also see *People v. Cruz* (1980) 26 Cal.3d 233, 248 ["No rule requires that an expert psychiatric opinion be based on particular tests"].) But the trial court is not bound by such evidence, and "may weigh and consider all

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deficits in adaptive behavior and manifested before the age of 18." (§ 1376, subd. (a).)

evidence bearing on the issue of mental retardation.' [Citations.]" (*Hawthorne, supra,* 35 Cal.4th at p. 50.)

However, at the time of appellant's trial, whether expert opinion and testing was considered a legal mandate, or simply a way to provide evidence of a condition like mental retardation, neither assists appellant. It appears that appellant premises his claim on the assumption that Dr. Coleman was testifying *about the law* when he testified about the unreliability of the psychological testing, and the expert opinions based on that testing. (AOB 116-117.) But, as shown in Argument II, C, above, he did not.[97] Neither the prosecutor, nor Dr. Coleman, ever challenged the *legal* admissibility or relevance of appellant's expert testimony or the tests that they relied upon. (*Id.*) Nor, of course, did Dr. Coleman testify that psychological evidence should be barred from the courtroom. (AOB 126-128.)[98] Instead, Dr. Coleman properly presented effective testimony that factually attacked the basis of the defense expert testimony (Evid. Code, §§ 721, subd. (a), 780; see *People v. Doolin, supra,* 45 Cal.4th at p. 437), which in fact went to the weight and credibility of the opinion of appellant's experts. (See, e.g., *People v. Smithey, supra,* 20 Cal.4th at pp. 965–966.) That does not violate "state law" or any federal constitutional principles. (XOB 129; Compare, *Id.* ["Coleman acknowledged that he believes using a psychiatrist to determine mental

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[97] Respondent incorporates that section here as though fully set forth herein. Respondent notes that the factual statements upon which appellant bases his contention are erroneous, or at least exaggerated (or testimony elicited by appellant himself), and that is also addressed in Argument II, C, and for that additional purpose, respondent incorporates by reference that subdivision (AOB 124).

[98] As previously noted, Dr. Coleman stated all evidence should be considered. However, he strongly maintained his opinion that the testing was unreliable, biased, and subjective so it was factually irrelevant to the issues at trial. (XIV RT 3225, 3254-3255, 3259-3261.)

state in a forensic setting is 'so flawed in its concept that it's completely worthless'"]; *People v. Ledesma, supra,* 39 Cal.4th at pp. 641, 661 ["Dr. Coleman opined that the various psychological tests and assessment tools employed by the defense experts were unreliable or irrelevant to the issues and that none of them were useful in determining, after the fact, the nature of a defendant's state of mind at an earlier time"], 713-714.)

Appellant nevertheless contends Dr. Coleman's testimony was "inconsistent with state law and indeed the very definition of mental retardation" (AOB 124), but none of appellant's cited authority (AOB 122-123) provides that the tests related to mental retardation, or the corresponding opinions based on those tests, are themselves not subject to challenge. In fact, as previously demonstrated, the opposite is true. (See, e.g., *People v. Smithey, supra,* 20 Cal.4th at p. 967.) And, since Dr. Coleman did not testify as to legal admissibility or relevance of evidence at all, his testimony plainly was not "inconsistent" with the law on those or any other topics.

Appellant also claims Dr. Coleman's testimony was not limited to the defense presented in this particular case. (AOB 128.) However, assuming arguendo that this claim is not forfeited, he fails to substantiate his claims. In fact, Dr. Coleman directly addressed the defense since he either addressed the tools used to assess appellant or the expert opinions presented in appellant's defense. (See, e.g., *People v. Ledesma, supra,* 39 Cal.4th at p. 661 ["Dr. Coleman opined that the various psychological tests and assessment tools employed by the defense experts were unreliable or irrelevant to the issues and that none of them were useful in determining, after the fact, the nature of a defendant's state of mind at an earlier time"].)

Moreover, nothing in Dr. Coleman's testimony prevented appellant from having a meaningful opportunity to present his defense by "'present[ing] all relevant evidence of significant probative value in his

favor.'" (AOB 118, quoting *People v. Marshall* (1996) 13 Cal.4th 799, 836; see *People v. Green* (1980) 27 Cal.3d 1, 19, disapproved on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3; see also *People v. Mickey* (1991) 54 Cal.3d 612, 688.) Appellant was never precluded from presenting any relevant evidence, *including the opinions of his experts* and their testimony about *the methods, tests and results* they used to fashion their opinions about appellant's alleged mental retardation. (*Ake v. Oklahoma* (1985) 470 U.S. 68, 81; *People v. Danielson, supra,* 3 Cal.4th at p. 729-730; *People v. Bobo* (1990) 229 Cal.App.3d 1417, 1442; see, e.g., XII RT 2945-2946; XIII RT 3031, 3147, 3164, 3073; XV 3414, 3416-3419.)

In addition, as also previously shown, the trial court properly instructed the jury it must follow the law as expressed by the court, and further directed the jury on the law regarding expert testimony, mental states, evidence of mental defect, and resolution of conflicting expert testimony. (3 CT 760, 765-767, 785, 788, 794-796.) Therefore, nothing in Dr. Coleman's testimony improperly impacted the law of the case.

Appellant finally complains that Dr. Coleman did not tell the jury that the "law not only allows but requires a defendant to present expert testimony and related intelligence test results to support a claim of mental retardation, that such evidence is legally relevant to determining issues of mental state in a criminal trial;"or that "the law requires jurors to consider that evidence in resolving questions of mental state; or that he (Dr. Coleman) was not asking the jurors to disregard the law." (AOB 128, italics removed.) However, assuming arguendo that this claim is not forfeited, appellant fails to provide any legal authority that would require Dr. Coleman to testify about the law in this manner (AOB 128); indeed, he provides just the opposite. (E.g., AOB 113, citing, inter alia, *Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178 ["There are limits to

expert testimony, not the least of which is the prohibition against admission of an expert's opinion on a question of law"].) This claim must also therefore fail.

Thus, Dr. Coleman's testimony was plainly consistent with state law and presented no constitutional violations; nor is any prejudice demonstrated.

Again, appellant fails to demonstrate that the trial court abused its discretion by allowing Dr. Coleman's testimony.

E. Appellant's Claim That The Court Erred By Instructing The Jury With A Modified CALJIC No. 3.32 Is Forfeited And, If Considered, Meritless

At the conclusion of the guilt phase of the trial, the court instructed the jury pursuant to a modified version of CALJIC No. 3.32, as follows: "Evidence has been received regarding a mental defect or mental disorder of the defendant, . . . at the time of the crime charged in Counts I and II. You may consider such evidence solely for the purpose of determining whether or not the defendant . . . actually formed the mental state which is an element of the crime charged in Counts I and II, to wit Murder.[99]" For the first time on appeal, appellant complains that in light of Dr. Coleman's testimony the jury could reasonably have been misled to believe they could refuse to consider constitutionally relevant defense evidence. Appellant submits that the combination of the testimony and instruction deprived him of his right to a fair trial, a meaningful opportunity to present a defense, proof beyond a reasonable doubt, a trial by a jury on all elements of his

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[99] Appellant and the prosecutor both agreed to and submitted this instruction to the court. (CT 796 [Defense and prosecutor request the instruction]; XIV RT 3337 [Both of appellant's attorneys affirm the instructions selected are acceptable, as does the prosecutor].)

crimes and the special circumstance allegations, and a reliable jury verdict. (AOB 132-133.)

Appellant's contention is not reviewable on appeal because: (1) he failed to object to the instruction on any of these grounds, including the constitutional grounds (*People v. Geier* (2007) 41 Cal.4th 555, 590; see *People v. Burgener* (2003) 29 Cal.4th 833, 869 ["It is elementary that defendant waived these claims by failing to articulate an objection on federal constitutional grounds below"]); (2) he failed to make these arguments in the trial court (*People v. Clark, supra,* 5 Cal.4th at p. 988, fn. 13); (3) he failed to request modifications to the instruction, which was a correct statement of law, or propose additional instructions. (*People v. Geier* (2007) 41 Cal.4th 555, 579); and, by requesting it and arguing it, he invited any conceivable error. (*People v. Seaton* (2001) 26 Cal.4th 598, 668.) Accordingly, appellant's claim should be summarily rejected.

Even if appellant has preserved his claim, it does not have merit. "Whether instructions are correct and adequate is determined by consideration of the entire charge to the jury." (*People v. Holt* (1997) 15 Cal.4th 619, 677.) "[This Court] must determine how it is reasonably likely the jury understood the instruction, and whether the instruction, so understood, accurately reflects applicable law." (*People v. Raley* (1992) 2 Cal.4th 870, 899.)

Here, apparently appellant believes the portion of the instruction providing "You *may* consider such evidence . . ." (AOB 130, some italics in original removed), allows the jury to permissively consider evidence of his mental retardation as it did not use mandatory language. He asserts it put the trial court's "imprimatur on Dr. Coleman's testimony" telling jurors they could refuse to consider it "as legally irrelevant." (AOB 131.) However, the instruction's obvious emphasis is on the purpose for the mental defect evidence and not whether it should be considered. Moreover,

as appellant concedes, this Court has already rejected similar challenges to CALJIC No. 3.32 (AOB 131, citing as examples *People v. Smilely, supra,* 20 Cal.4th at 988, *People v. Musslewhite* (1988) 17 Cal.4th 1216, 1247, and *People v. Jones, supra,* 53 Cal.3d at p. 1145.) As in those cases, the instructions here as a whole adequately informed the jury how to handle expert testimony and that it could consider the evidence of appellant's alleged mental defect in deciding whether the prosecutor had carried his burden of proving the mental elements of the charged offenses beyond a reasonable doubt. (See, e.g., 3 CT 785, 788, 794-795, 796, 799; CALJIC Nos. 2.80 [expert testimony], 2.83 [resolution of conflicting expert testimony], 3.31 [concurrence of act and specific intent], 3.31.5 [mental state], 3.32 [evidence of mental disease – received for a limited purpose], 8.11 [malice aforethought- defined.]) The instructions did not hinder defense counsel from emphasizing to the jury during the closing guilt phase argument that the requisite mental states had not been proven because of appellant's alleged mental defect. (See *People v. Smiley, supra,* 20 Cal.4th at p. 988.)

In addition, as previously demonstrated, appellant's factual premise is wrong. (See Arg. II, C and D.) Dr. Coleman did not testify that appellant's expert testimony was "legally irrelevant." (AOB 131.) In fact, he testified that the jurors should consider all the evidence, but, demonstrated why appellant's expert witness testimony had little to stand on, and therefore they provided no help to the jury here. (XIV RT 3225, 3254-3255, 3259-3261.)

Thus, appellant has failed to demonstrate that the jury would reasonably read CALJIC No. 3.32 as appellant does. Nor does he demonstrate error or prejudice, constitutional or otherwise.

F. Assuming Arguendo That Error Occurred, Appellant Fails To Demonstrate Prejudice

Appellant next contends that he was prejudiced by Dr. Coleman's testimony and the presentation of CALJIC No. 3.32 to the jury. (AOB 133-150.) Respondent submits that no error occurred and therefore appellant is unable to demonstrate prejudice and, in any event, even if error occurred, it was harmless under any standard.

Appellant fails to establish, under the state standard of review, that there was a reasonable probability that the alleged errors affected the verdict. (*People v. Carter* (2003) 30 Cal.4th 1166, 1221; *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 918 [a reasonable probability under Watson "'does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility'"]; *People v. Brown* (1988) 46 Cal.3d 432, 446-448 *(Brown III)*; also see *People v. Kraft* (2000) 23 Cal.4th 978, 1035 ["Application of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights"]; *People v. Peters* (1982) 128 Cal.App.3d 75, 86 ["While we are satisfied the court erred by including the bracketed portion of CALJIC [instructions] in its instructions to the jury, we do not determine the mere giving of those instructions requires reversal. Indeed, that should occur only after an examination of the entire cause, including the evidence, if the reviewing court is of the opinion it is reasonably probable a result more favorable to the appealing party would have been reached in the absence of the error (*People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243]")].) Moreover, even assuming arguendo that that a federal standard of review of constitutional error applied, it appears beyond a reasonable doubt that the assumed error did not contribute to the death verdict. (*Chapman v. California* (1967) 386 U.S. 18, 24.)[100]

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[100] "The beyond-a-reasonable-doubt standard of *Chapman* 'requir[es] the beneficiary of a [federal] constitutional error to prove

(continued...)

Appellant does not demonstrate that the trial court abused its discretion by allowing Dr. Coleman's testimony. Appellant fails to show: Dr. Coleman was insufficiently qualified to testify on rebuttal as an expert;[101] Dr. Coleman's testimony improperly told the jurors to resolve questions of law; or Dr. Coleman's testimony improperly told jurors to resolve questions of law in a manner contrary to law. Nor has appellant demonstrated that improper testimony was compounded by CALJIC No. 3.32 (see Arg. II, A-D). For this reason alone, appellant fails to demonstrate prejudice under any standard. (*People v. Smithey, supra,* 20 Cal.4th at p. 966; see *People v. Lewis* (2001) 26 Cal.4th 334, 371; *People v. Staten* (2000) 24 Cal.4th 434, 456, fn. 4 ["Defendant also contends that the state law error violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Because no error appears, the constitutional claim fails"].)

Moreover, assuming arguendo that some or all of appellant's claims demonstrated error, they are still nonetheless harmless. Section 187 defines the crime of murder as the "unlawful killing of a human being … with

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(…continued)
beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' (*Chapman, supra,* 386 U.S. at p. 24.) 'To say that an error did not contribute to the ensuing verdict is … to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' (*Yates v. Evatt* (1991) 500 U.S. 391, 403 [114 L. Ed. 2d 432, 111 S. Ct. 1884].) Thus, the focus is what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is "whether the … verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [124 L. Ed. 2d 182, 113 S. Ct. 2078].)" (*People v. Neal* (2003) 31 Cal.4th 63, 86.)

[101] Even assuming arguendo that Dr. Coleman's initial testimony was not sufficient to provide a foundation, as also noted in Argument II, B, 3, his testimony about the tests and opinions involved strongly demonstrates that he was qualified to testify on the topic.

malice aforethought." (§ 187, subd. (a).) Malice aforethought "may be express or implied." (§ 188.) "It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (*Ibid.*)

The evidence of appellant's crimes and special allegations, including the mental states of premeditation and deliberation, was overwhelming. Diaz and appellant were no longer living together. Appellant had abused Diaz. (XIII CT 3114, 3116.) Diaz was six months pregnant with appellant's child. (XI RT 2571.) Even when speaking about the baby, however, they were not speaking amicably. (XI RT 2570-2572.) But appellant still had in mind that "if he couldn't have her nobody could[.]" (XII RT 2739.)

Appellant was then served with a complaint related to his abuse of Diaz and drove to Mauricio Jr's house, where Diaz was living, and showed the court documentation to Teresa. (XI RT 2570, 2567-2568; XIII CT 3114-3115.) In an angry tone, appellant pointed at the house and told Teresa to give it to Martha and tell her "she better stay inside the house." (XI RT 2568; XII RT 2873-2874.) Diaz' attempts to hold appellant responsible for his abuse, made the situation very dangerous for her.[102] Soon thereafter appellant and a cohort drove by Mauricio Jr's house, parked in front of the house and, from the car, appellant made a gesture with his left hand in the *form of a pistol* and yelled to Diaz, who was in front of the house, for her to get back in the house "'fucking little bitch [because]. . .

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[102] Compare, XV RT 3536-3537, 3540, where appellant punched Diaz in the mouth and then on the nose or head with a second punch when she threatened to call the police after he forced his way into an apartment where Diaz was babysitting.

your ass is mine after the baby is born.'" (XI RT 2573, 2611, 2630-2631, 2633.) Anzaldua, who was also standing nearby, recalled the threat as, "'as soon as the baby is born *you're dead.* Your ass is mine.'" (XI RT 2653-2654, emphasis added.) Appellant's motive and intent to kill Diaz because she was pursuing the complaint were already clear.

Appellant next terrorized Diaz and her family members by driving up, getting onto Teresa's lawn, and firing five or six rounds into the air with a .25 caliber handgun, and then getting back into his car and driving off rapidly. (XI RT 2612-2613, 2633-2637, 2654, 2677, 2690-2692, 2697, 2775.) Late that night, appellant and a cohort again drove by and appellant fired shots, this time from a .22 caliber gun. (XI RT 2613-2614, 2638-2640, 2671-2672, 2676-2677; XII RT 2775, 2777) A terrified Diaz was left "shriveled up" and crying in the house. (XI RT 2576.) Appellant continued to stock and terrorize Diaz, when the next day she, Anzaldua and Diaz's son Andrew attempted to go to a Parade in town. (XI RT 2655-2656.) Appellant spotted them and chased them in his vehicle until he "slammed right into [a fire hydrant] on the corner of Sixth and 'I' Street" and the three escaped. (XI RT 2658, 2660, 2669.)

Appellant then made his final move. On September 23, 1989, at approximately 12:30 to 12:45 p.m., Teresa was inside of her home, at 27420 Saunders Road, with Mauricio Jr., Mauricio III, Diaz and Andrew. (XI RT 2576-2577, 2579, 2668.) Teresa and Diaz were in the living room. (XI RT 2580, 2590.) Mauricio Jr. was in their master bedroom. (XI RT 2580, 2595.) This time, demonstrating clear premeditation, appellant had his cohort drop him off a distance away. (XII RT 2708, 2707, 2709-2715.) As he approached the house, he was spotted by Diaz from inside, and she picked up her son and fled to the back bedroom. (XI RT 2580-2581.) Before Teresa could get to the front door, appellant opened it and walked in the house armed; this time appellant brought with him the more deadly 9

millimeter handgun, instead of the .22 caliber or .25 caliber handguns he previously used. (XI RT 2581-2582, 2593-2594; XII RT 2795; XIV RT 3380-3381; Exhib. No. 5 [handgun].) Teresa froze. (XI RT 2581.) Appellant looked at her but did not say anything. (XI RT 2581, 2593.) A determined appellant had an expression that looked serious but "normal." (XI RT 2581, 2592.) Appellant walked toward the hallway as Maurice Jr. walked from the bedroom down the hallway toward the entrance of the house. (XI RT 2582-2583.) Appellant and Maurice Jr. suddenly bumped into each other. Maurice Jr. did not raise his hands. (XI RT 2583, 2591, 2593; Exhib. No. 4 [diagram].) Quite possibly, Maurice Jr., seeing the gun, crouched in a defensive position. (XII RT 2765-2766.) But appellant, saying nothing, immediately raised his gun and shot Maurice Jr. in the chest at close range. (XI RT 2583, 2593, 2596-2597.) Appellant then shot Maurice Jr. again with a lethal shot. (XI RT 2583-2584; XII RT 2753, 2755-2756, 2767-2768, 2772.) Mauricio Jr, based on the trajectory of the bullet, would have been "crouched very low or bent at the waist" when he was hit with the second shot. (XII RT 2756.) Clearly, even with Maurice Jr., appellant showed express and implied malice, as well as premeditation and deliberation, and an obvious intent to kill. (XIV RT 3384-3385.)

Undeterred by what he had just done, appellant proceeded down the hallway to the master bedroom to finish what he had set out to do. (XI RT 2584; Exhib. No. 4.) As he reached the master bedroom he took up a position with half of his body inside and half of it outside of the room and began shooting Diaz. (XI RT 2584, 2591, 2597.) Plainly displaying express malice and an intent to kill, appellant shot Diaz in the back of the head, which put her down. Then he shot her in the face as she was on the floor or just about on the floor. He also shot her in the crotch area, and elsewhere. The shots to the front and back of the head were fatal. (XI RT 2621; XII RT 2759-2763; XIV RT 3383; XV RT 3565-3566; Exhib.

No. 26; see *People v. Smith* (2005) 37 Cal.4th 733, 741.) "[T[he baby [Diaz was carrying] died simply because he lost his life support, his mother." (XII RT 2763-2764.) Appellant, having the presence of mind and control to choose his victims, left Diaz's son, Andrew, in the room, "standing in front of [Diaz] crying. Looking at his mother." (XI RT 2621.)

Subsequently, after appellant was shot himself, a neighbor went over and told a law enforcement officer that appellant was the one that had done the shooting. (XII RT 2711.) Appellant, still lying on the ground, told Sepulveda to "'Shut up, don't say nothing.'" (XII RT 2711.) Sheriff Seymour, however, asked appellant what was going on. Appellant replied that "he was the shooter. 'I did it. There's no one else to worry about.'" (XII RT 2833.) But when Teresa confronted appellant by asking, "'Why my husband?'" (XI RT 2588, 2685.) Appellant, now showing some bravado and apparently wanting to continue to instill fear in that family, responded that he "wasn't through yet." (XI RT 2588, 2696.) He said "Morris was going to come and finish the job." (XI RT 2589, 2685, 2696.)[103] Certainly, the evidence of all the requisite mental states were overwhelming based on the evidence of the crime.

Appellant admits that even a mentally retarded person can form the intent to kill (see XIII RT 3097, 3127), but seems to hang his hat on Dr. Christensen's general testimony that mental retardation can impact abstract thinking, judgment and long term memory. From that he seems to implicitly contend that he may have acted impulsively from rage instead of with premeditation or a cold calculus. (AOB 143-146; citing

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[103] Appellant's counsel now infers that Morris did not exist. (AOB 11, fn. 7.) No testimony substantiates that claim. Appellant's cohort was not prosecuted at this trial.

Dr. Christensen's testimony at XIII RT 3032-3033.)[104] However, as demonstrated above, appellant did not show impulsive behavior. He received court documents letting him know that Diaz had filed a criminal complaint for the abuse he had inflicted. He did not immediately go and kill the victim. Instead, he engaged in a series of actions over the course of a couple of days designed to terrorize and ultimately punish Diaz for her conduct. He let her know through Teresa that he had received the court documents and that he was angry, then he later threatened to kill her, and then he fired shots at different times in front of her home with small caliber handguns. Inferably, Diaz nevertheless did not seek to have charges dropped. Appellant decided it was time to follow through on his threats; showing a great deal of planning and premeditation, appellant acquired a larger caliber handgun and had his cohort drop him off at a distance, obviously trying to protect his cohort from being identified but still getting close enough to complete his plan to kill Diaz. Then he followed through, and in the process, quickly decided to murder Mauricio Jr., because he saw him as interfering with his plan to kill Diaz. (*People v. Mayfield* (1997) 14 Cal.4th 668, 767 ["The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . .' [Citations.]"].) There was nothing impulsive about appellant's actions, they were very calculating.[105]

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[104] As demonstrated in Argument I, Dr. Christensen's I.Q. scores and opinions had little credibility.

[105] Even Dr. Christensen had to admit that someone with an I.Q. of 59 "might think of the consequences [he] can view between morning and afternoon" and a person with an I.Q. of 67 is probably "able to think that if

(continued...)

Moreover, appellant, even without Dr. Coleman's testimony, failed to convincingly demonstrate mental retardation; and, appellant's own witnesses showed that appellant's I.Q. test results were highly questionable. For example, Dr. Powell admitted: the literature suggests that people react differently with different psychologists (XII RT 2900, 2955-2956); determining if someone in malingering on the Wechsler test, including all the subtests used, is subjective (XII RT 2910, 2913, 2915, 2917, 2920, 2924, 2958); the Wechsler has been criticized as a "biased instrument in that it often times demands more than some people have been exposed to either in their homes or . . . else in the school process" (XII RT 2924); "the results of the Wechsler test could be caused by the lack of learning and experiences on the part of the individual taking the test . . ." (XII RT 2925); a person's verbal skills and vocabulary would affect the result of the test as well . . ." (XII RT 2925); "the results [of a Wechsler examination] could change based upon the mental state of the person taking the test on the day he took the test . . ." (XII RT 2924-2925); and, there is a published study showing individuals, who were given no training on how to fake or malinger, "actually were able to fake the results of the Wechsler test without the examiners knowing it . . ." (XII RT 2925-2926). Even Dr. Christensen, who was the most strident and defensive about her results (see XIV RT 3395-3398), admitted that a person's cultural background or lack of instruction at home could cause him to end up with a lower score on the Wechsler (XIII RT 3061); a person's "verbal skills and vocabulary could affect the results of the test . .." (XIII RT 3062-3063); and, test

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(...continued)
[he does] this at 8:00 o'clock in the morning, there might be a consequence at 5:00 o'clock in the evening." (XIII RT 3128.)

results could be impacted by a person's mental status or medication affecting his mental state on the day of testing. (XIII RT 3061-3062, 3026.)

The discrepancies between the three defense experts showed the imprecision and subjectivity of the methodologies and the resulting opinions in this case. For example, Dr. Powell, who used essentially the same tests and methodologies as Dr. Christensen, testified Dr. Christensen said she found evidence of hallucinations. Dr. Powell found no such evidence. (XII RT 2933.) Dr. Christensen found "organic hallicinosis" and Dr. Powell did not. (XII RT 2947.) Dr. Christensen felt there was mental retardation based on organic etiology but Dr. Powell disagreed. (XII RT 2933-2935.) In fact, because Dr. Powell found no evidence of "any brain damage or organic problems" he did not recommend a referral for neuropsychological testing. (XII RT 2954.) Dr. Powell also noted that Dr. Christensen found appellant to be *moderately to severely mentally retarded*, while he found appellant to only be mildly mentally retarded. (XII RT 2945-2946.)

Also, appellant's three experts testified to three different total I.Q. scores for appellant of 47, 59 and 66. (XII RT 2945-2946; XIII RT 3031, 3147, 3164, 3073; XV 3416-3419.) Dr. Christensen acknowledged that on the Wechsler some of the subtest scale scores she and Dr. Powell got were different and her full scale I.Q. for appellant (47) and Powell's full scale I.Q. score for appellant (59), were twelve points apart. (XIII RT 3025, 3027.) The discrepancy in full scale I.Q. scores was "significant." (XIII RT 3079.)[106] She noted "[t]he major discrepancy comes within the two administrations in the verbal test." (XIII RT 3079.) She had to admit

[106] Dr. Schuyler later testified there was a "very significant" difference between the I.Q. score Dr. Christensen got of 47 and the score he got of 66. (XIII RT 3162, 3169.)

that "if one is having a bad day or a good day you can score five to eight, ten points difference." (XIII RT 3025.) She thought the difference in scores also "could be as a result of the different environments" of the testing. (XIII RT 3028-3029.) She ultimately, being left little choice, qualified her own I.Q. score by stating the score she got was appellant's I.Q. *on "[t]hat day" under the conditions at that time.* (XIII RT 3017, 3070, 3110, emphasis added.) Dr. Powell further acknowledged that "[g]iven all the reports, there is a possibility that at some time or place [appellant] was malingering." (XII RT 2952-2953.)

In addition, rebuttal testimony demonstrated that appellant had I.Q. scores in school that were even higher: 70 in 1975, 75 in 1979, and 77 in 1982. (XIV RT 3297C.)

Dr. Powell testified that even mild mental retardation would be noticeable to friends, family, teachers and family. (XII RT 2947; also see XIII RT 3085.) In school, appellant had been placed in special education, with his parents permission, because of a "learning handicap" (XIV RT 3297, 3298A, 3299C, 3300-3300A) but was not considered by school personnel to be mentally retarded. (XIV RT 3304B.) In other words, even those involved with appellant as teachers or counselors did not notice his alleged mental retardation.

In addition, appellant's abilities further demonstrated he was not mentally retarded. Dr. Christensen testified, having given appellant a full scale I.Q. level of 47, she would be surprised to learn that appellant had a driver's license. (XIII RT 3020.) Dr. Christensen would not expect a person with an I.Q. of 47 to drive an automobile but "it's not unknown." (XIII RT 3077.) Dr. Christensen testified that with I.Q. level of 59, as found by Dr. Powell, she would "not necessarily" be surprised appellant had a license. (XIII RT 3030.) "It's *uncommon* but it's not unheard of." (XIII RT 3031, 3078, emphasis added.) She opined a person with an I.Q.

of 59 could possibly drive depending on the reason his I.Q. was 59. (XIII RT 3078.) But it was stipulated by the parties that appellant had in fact been "issued a California driver's license on October 24, 1986." (XVI RT 3323.) And, as previously shown, he was also driving a Cadillac on a regular basis without any apparent difficulty.

Dr. Christensen further stated some persons with I.Q.s of 47 can read, some up to a third or fourth grade level. (XIII RT 3077.) She would not expect them to read a newspaper with comprehension. (XIII RT 3077.) People with I.Q.s at that level would probably not comprehend an editorial page but may comprehend some cartoons and simple jokes. (XIII RT 3077.)[107] But rebuttal testimony demonstrated that in the jail almost every day appellant inquired if the Madera Tribune had arrived. Once it arrived appellant would appear to read it. He was observed to "hold the newspaper . . . 18 inches in front of his face or lay[] [it] on the table in front of him and face the newspaper." Appellant seemed to have a keen interest in the Tribune. But he had no interest in the Fresno Bee. He said the Fresno Bee "didn't' know anything." During that time, articles about appellant would appear from time to time in the Tribune. (XIV RT 3287-3291.) It is

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[107] Appellant, citing Dr. Christensen's testimony at XIII RT 3123, writes that Dr. Christensen testified that it would not be unusual for a person with an I.Q. level of 67 to "read or attempt to read a newspaper." (AOB 140.) Actually, she only stated that it would not be unusual for a person with an I.Q. of 67, to "look" at a newspaper and "*attempt* to read" it. (XIV RT 3123, emphasis added.) She continued, "at about 67 you *start* having people watch the news and show interest in the external environment outside of the home." (XIV RT 3123, emphasis added.) Appellant also asserts in parenthesis that an I.Q. of 67 is "closer to his true intelligence quotient" than Dr. Christensen's score, but XIII RT 3123 does not show her testifying to that. Nor is there an indication why appellant now chooses a score of 67 over any of his other scores.

reasonable to infer that appellant was in fact reading the newspaper, and was most interested in the newspaper that had stories about him.

Defense counsel had also previously shown Dr. Christensen a three page letter that was handwritten by appellant while in jail. (XIII RT 3045, 3128-3129; XIV RT 3323 [stipulation that appellant wrote the letter]; XIII CT 3121-3123; Exhib. No. 19.) Dr. Christensen conceded that she would not expect that a person with a full scale I.Q. of 47 could write such a letter. (XIII RT 3046.) But she opined that a person with a full scale I.Q. of 59 would be able to write that type of letter. (XIII RT 3046.) When asked if someone with a 59 I.Q. could put together the sentence structure used within the letter, Dr. Christensen could only reply, "It could happen." (XIII RT 3046-3047.) She also commented on the substance of the letter. Dr. Christensen had read the police reports and she knew it was reported that an unknown person drove appellant to the crime scene. In appellant's letter he said, "the D.A. can't wait to ask who else was there, you know, they know it was more than just me involved, but, baby girl, I didn't eat cheese, can't answer no questions." This came right after his statement about whether or not he should take the witness stand. Dr. Christensen admitted this "could" indicate a high level of reasoning. (XIII RT 3100-3101; XIII CT 3122-3123.) But, again backtracking apparently to continue to support the defense, she then claimed she could not tell if appellant's statement related to his taking the stand because "I do not know if there's a time frame in between those sentences." (XIII RT 3102.) Appellant was clearly showing a high level of reasoning. (XIII CT 3122-3123.) Indeed, in school appellant had no problem with his reasoning ability. (XVI RT 3308, 3313-3314.)

Dr. Christensen testified that due to appellant's low level of intellectual functioning, she would not refer appellant to intermediate or high level work. "Anything with complex tasks involved [appellant] would

not be able to handle." (XIII RT 3065.) "Complex jobs are jobs that generally require for each task completion more than three steps." (XIII RT 3121.) For example, putting together bicycles without supervision would be a complex task. (XIII RT 3065.) Dr. Christensen could not "imagine [appellant] doing a whole bicycle even with supervision without having somebody else actually having hands-on involvement in the task." (XIII RT 3066.)[108] She would only refer him to very low level, repetitive, structured jobs consisting of one or two part tasks, with constant supervision and direction. (XIII RT 3065, 3113, 3120-3122.)

But, in rebuttal testimony, the evidence demonstrated appellant took a test with a temporary work agency. In the comparison, subtest there are 20 questions comparing names and numbers. (XIV RT 3294A.) Appellant got 13 correct and missed 7. (XIV RT 3294B.) In the mathematics subtest there are also 20 questions involving basic math. (XIV RT 3294A.) For example in question one it indicates 16 times 4 is 64, and the test taker must decide if that is correct or incorrect. (XIV RT 3294A-3294B; Exhib. No. 22 [answer sheet].) On that subtest appellant got 17 answers correct and only missed three. (XIV RT 3294B.) That score was "considered quite good." (XIV RT 3294C.)[109] As a result of appellant's application and test

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[108] At one point on redirect Dr. Christensen also opined that someone with an I.Q. of 67 could not put a 10-speed, 24-speed or mountain bike together but with supervision he might be able to assemble the type of bike that Christensen had as a child if he is given lots of time and a quiet space and something to copy. (XIII RT 3122.)

[109] Appellant's test score was recorded on his application. There appeared to have been numbers that were erased and someone marked over them. The witness explained that "sometime[s] two are three applications are on the desk and somebody else's . . . test result [is] recorded on it so we find the error." (XIV RT 3295B.) While she could not personally know what happened then, "[i]t would be the only situation it could happen." (XIV RT 3296.)

results Magill placed appellant at two different companies three different times. (XIV RT 3294C.) "Sunsweet Dryers was the first one. Dow Chemical in two different departments was the second company." (XIV RT 3294C.)

At Sunsweet Dryers appellant worked on the night shift. (XIV RT 3276, 3280.) The manager only sent "good people to the night shift." (XIV RT 3280.) Appellant worked in a complex position, he was a scraper operator. The position that appellant held required "somebody that's talented, and can do things, that is responsible" because he must shut off the machine if there is a problem, load the machine each minute and 15 seconds, "shove the machine on a timing sequence," count cars, and make sure there are twenty-six trays per car. (XIV RT 3278, 3283.) Appellant had to make sure of the number of trays per car. (XIV RT 3279.) Too many and it will "fall right down on him," and not enough and it fouls up the "other end where it's kicking out a stack of 26 every minute and 15 seconds." (XIV RT 3279.) Timing and coordination are also a necessity for someone employed as a scraper operator. (XIV RT 3279.) With the cars having to be put through every minute and 15 seconds "you only have less than three seconds to get that unit in there." (XIV RT 3279.) It requires rhythm to do. The unit weights about 400 pounds and is on four wheels. "[N]ot everybody can do it." (XIV RT 3279.) If the system jammed, which happened every five to 10 minutes, he would also have to shut down the machine and help another person un-jam it and set it back up. (XIV RT 3279, 3284-3285.) Appellant was successful in performing his duties as a scraper operator. (XIV RT 3280.)

In fact appellant's manager noted that after a time they start shutting down some of the machines and only keep some of them going; they try to keep some of their better employees. The manager was hoping to keep appellant. (XIV RT 3280.)

Appellant's expert testimony about his abilities being consistent with mental retardation were therefore strongly rebutted. Appellant's actual abilities further demonstrated the unlikelihood that appellant was mentally retarded. (Compare, *People v. Smithey, supra,* 20 Cal. 4th at p. 1015 [Evidence demonstrated although defendant's I.Q. was low, there was no mental retardation as defendant indicated that "he could communicate, take care of immediate personal needs, perform skilled labor, earn money, form friendships, drive and repair automobiles, and adapt well to living and working in prison"].)

In sum, a reversal is unwarranted. Given the strength of the prosecution's case, which included significant mental state evidence, strong evidence demonstrating the inaccuracy of the testing involved, and defendant's own self-incriminating statements, it is not reasonably probable that a different result would have been obtained absent Dr. Coleman's testimony or the reading of CALJIC No. 3.32 to the jury. And, for the same reasons, the same alleged errors were harmless beyond a reasonable doubt. (*People v. Rogers* (2009) 46 Cal. 4th 1136, 1167-1168.)

III. APPELLANT FAILS TO DEMONSTRATE THAT THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING THE OBSERVATIONS OF LAY WITNESSES, TEACHERS AND COUNSELORS, THAT THEY DID NOT NOTICE ANYTHING INDICATING APPELLANT WAS MENTALLY RETARDED DURING HIS SCHOOL YEARS; MOREOVER, APPELLANT'S CLAIM REGARDING THE SCHOOL RECORDS IS FORFEITED, AND, IF NOT, MERITLESS; ASSUMING ERROR, IT WAS HARMLESS

Appellant contends that the trial court erred by admitting testimony by appellant's teachers and counselors, Davis, Rodriguez, and McClure, that each of them "did not believe appellant was mentally retarded" (AOB 151) while attending school. Appellant asserts they did not have the necessary specialized training to testify as experts regarding whether or not appellant

suffered from mental retardation, and, their testimony was also improper lay opinion. (AOB 151-156.) Appellant further contends that the trial court erred when it allowed into evidence testimony from Potter, a school psychologist and school district custodian of records, expressing opinions or conclusions from school records that appellant was not mentally retarded and was learning handicapped. Appellant claims the alleged errors violated his Fifth, Sixth, Eighth, And Fourteenth Amendment rights. (AOB 151-163.)

Respondent submits that the testimony of Davis, Rodriguez, and McClure were properly admitted lay testimony that did not require specialized training. Moreover, even assuming arguendo that their testimony was admitted in error, it was plainly harmless. Respondent further submits that appellant's contention regarding Potter's testimony is not reviewable on appeal as appellant's trial court objection failed to fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons appellant believed the evidence should be excluded. In addition, even assuming arguendo that appellant's contention is reviewable on appeal, it lacks merit and, if error occurred, it was harmless.

A. Introduction

In relevant part, appellant's first expert witness, Dr. Powell, testified that given a "full scale [I.Q. score of] 59," the I.Q. score appellant received through Powell's I.Q. testing, appellant was mildly mentally retarded. Dr. Powell testified he would think "such mental retardation [would] be noticeable" to friends and family, and it should be "noticeable to teachers and counselors." (XII RT 2947.) Dr. Christensen subsequently similarly testified that, although she got an I.Q. score of 47 for appellant, and claimed that, at least on the day of the testing, appellant was moderately to severely retarded, even "with the I.Q. of 59 we would expect that family

and friends would know him to be slow, harder to educate, not always quick to acquire new information and not always high functioning in general compared to age peers." (XIII RT 3017, 3070, 3973, 3084-3085.)[110]

In addition, Madera Unified School District School Psychologist and record custodian Leon Potter testified, in rebuttal testimony, that District records showed that in 1975 appellant was given an I.Q. test and scored a 70; in 1979 he scored a 75; and in 1982, he scored a 77. (XIV RT 3297C.) Appellant was placed in special education because of a "learning handicap." (XIV RT 3297A.) Appellant was in a class for mentally retarded students on "what [was] called exceptional circumstances." This meant he "did not qualify by standard as a mentally retarded child" but he was nevertheless placed there because he was functioning at such a low range academically and functionally; and, because he was having difficulty and in the classroom. (XIV RT 3297C.) When a child is performing at that

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[110] Appellant claims Dr. Coleman "testified that determining whether a person is mentally retarded does not require any expertise. A lay person is just as qualified, if not more so, to determine someone is mentally retarded." (AOB 152, citing XIV RT 3215-3216, 3221-3226, 3255-3257.) In context, however, the cited testimony was directed more at the testing and its limitations regarding the relevant mental states at issue (e.g., premeditation and deliberation) rather than broad judgments about laypersons being "as qualified [as experts], if not more so, to determine someone is mentally retarded." (AOB 152; compare, *People v. Babbitt* (1988) 45 Cal.3d 660, 679 ["In essence, Dr. Coleman testified that psychiatrists and psychologists are no better equipped than lay persons to infer what a defendant's mental state was at the time of an alleged offense"].) In any event, the prosecutor, in providing testimony from appellant's teachers and counselors about appellant, was obviously responding to appellant's expert testimony that those familiar with appellant would have noticed his mental retardation. (See, e.g., XIV 3391-3392; XV 3454-3455.)

level, with parent consent, he can be placed in "EH classes" as was done here. (XIV RT 3297C-3298.)

B. Appellant Fails To Demonstrate That The Court Abused Its Discretion By Admitting Into Evidence Testimony Of Appellant's Teachers And Counselor That They Did Not Notice Indications That Appellant Was Mentally Retarded When They Knew Him As A Student

1. Standard On Appeal

> "[C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reaction of others. ..."

(*Atkins, supra,* 536 U.S. at p. 318.)

As explained by this Court, "mental retardation is a question of fact. [Citations.] It is not measured according to a fixed intelligence test score or a specific adaptive behavior deficiency, but rather constitutes an assessment of the individual's overall capacity based on a consideration of all the relevant evidence. [Citations.]" (*Hawthorne, supra,* 35 Cal.4th at p. 49; see *Vidal, supra,* 40 Cal.4th at p. 1012.) "The court 'shall not be bound by the opinion testimony of expert witnesses or by test results, but may weigh and consider *all* evidence bearing on the issue of mental retardation.' [Citations.]" (*Hawthorne, supra,* 35 Cal.4th at p. 50, emphasis added.)

Moreover, it has long been the rule that "all relevant evidence of mental condition affecting the formation of a specific intent is admissible on the trial of the 'not guilty' plea." (*People v. Webb* (1956) 143

Cal.App.2d 402, 412.) This includes lay opinion regarding the defendant's mental state. (*Ibid.*) Indeed, this Court, quoting Webb, has held, "'there is no logical reason why qualified lay witnesses cannot give an opinion as to mental condition less than sanity' [citation] or to similar cognitive difficulties." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1228; see *People v. McAlpin* (1991) 53 Cal.3d 1289, 1306-1310 [defendant charged with lewd conduct with a minor; two women who had dated him could express opinion he was not a sexual deviant based on their observations of him with their own daughters].) The primary qualifications for lay opinion testimony are that it be rationally based on the witness's perception and helpful to a clear understanding of his testimony. (Evid. Code, § 800.)[111]

This Court reviews the trial court's decisions to admit or exclude lay opinion testimony for an abuse of discretion. (*People v. Thompson* (2010) 49 Cal.4th 79, 128-130; *People v. Mixon* (1982) 129 Cal.App.3d 118, 127; see also *People v. Medina* (1990) 51 Cal.3d 870, 887, affd. sub nom. *Medina v. California* (1992) 505 U.S. 437.) Likewise, the trial court decision to admit rebuttal testimony will not be disturbed on appeal in the

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[111] Appellant asserts lay witnesses may not "offer their opinions or conclusions that a person is or is not mentally retarded." (AOB 154.) The primary case appellant relies on, a case involving a civil commitment, was discussed in detail in respondent's Argument II, D. Respondent incorporates that discussion herein as though set forth in full. The second California case, *People v. Moore* (1992) 96 Cal.App.4th 1105, 1116-1117 is distinguishable. It involved a defendant asking for a CALJIC No. 3.32 (mental disease/defect) instruction where no expert testimony was provided to support the instruction. However, here, expert opinions were provided and the other evidence presented was simply additional evidence "'bearing on the issue of mental retardation.' [Citations.]" (*Hawthorne, supra,* 35 Cal.4th at p. 50.) Respondent submits that such lay testimony is proper where it is rationally based on the witnesses' perception and is helpful to understand the witness's testimony. (*People v. DeSantis, supra,* 2 Cal.4th at 1228.)

absence of an abuse of discretion. (*People v. Young* (2005) 34 Cal.4th 1149, 1199.)

2. Appellant Fails To Demonstrate That The Court Abused Its Discretion By Allowing The Testimony Of School Personnel Regarding Mental Retardation

Appellant claims that the trial court erred by allowing appellant's teachers and counselor to testify they did not "believe that [appellant] was mentally retarded" (AOB 151, 154 [testimony that appellant was "*not* mentally retarded"], italic in original) when they knew him as a student. Respondent submits that no error occurred.

As noted above, appellant's expert witness, Dr. Powell, testified that appellant's alleged mental retardation, with a full scale I.Q. score of 59, would be noticeable to appellant's teachers and counselors. (XII RT 2947.) (Dr. Christensen subsequently provided similar testimony (XIII RT 3017, 3070, 3973, 3084-3085).) No expert claimed it was necessary to have "specialized training in assessing or diagnosing mental retardation" (AOB 154) for a teacher or counselor to notice appellant's alleged mental retardation. As will be shown, contrary to appellant's apparent position, appellant's teachers and counselor made no attempt to offer expert diagnosis of appellant as being with or without mental retardation; instead, they, based on their experience with appellant, testified they did not believe him to be mentally retarded. In other words, they did not notice anything that indicated he was mentally retarded.

a. Dolores Olmos Rodriguez

Dolores Rodriguez testified she was a counselor at Madera High School for 17 years. (XIV RT 3303C-3304.) Her duties are academic scheduling, testing, and personal, vocational and career development. (XIV RT 3304.) She was appellant's counselor in 1983, 1984 or 1985.

(XIV RT 3304A, 3304C.) She had personal contact with appellant during that time regarding academics and program changes. (XIV RT 3304A, 3304C.) She was the special education counselor at that time and appellant was in the special education program at Madera High School as someone who was "learning handicapped." (XIV RT 3304A.) Such students take "a little bit longer to read or to comprehend what [they are] reading or to compute numbers." (XVI RT 3304A.) "[W]e teach them how to compensate for their disability." (XIV RT 3304A.)

Rodriguez testified that as a counselor for students in the Special Day Class program for students emotionally or educationally disturbed she had contact with individuals who were mentally retarded. (XIV RT 3304B-3304C.) She explained that all those in special education are tested and placed in the program that they qualify for, and in the proper category. Appellant came to Madera High School already designated for special education with parent consent and she structured his program based on the testing and yearly evaluations he had. (XIV RT 3304B, 3304D.) She testified that based on her "personal contacts" with appellant she did not "consider" appellant to be mentally retarded as there was nothing that "indicated he may be retarded." (XIV RT 3304B.)

b. Elizabeth Davis

Elizabeth Davis testified that she has worked for Madera Unified School District for ten years. She had worked at Madera High School the entire time. (XIV RT 3306.) She was a resource specialist in the special education department. (XIV RT 3306.) She teaches students who "have learning problems . . . its generally with reading or math, and they are categorized by psychological tests" and determined to fit in a resource specialist class. (XIV RT 3306-3307, 3311.) Appellant was in her U.S. history class as a junior and possibly other classes as well. (XIV RT 3307, 3309, 3311.) The history class had about 10 to 15 students. (XVI RT

3312.) Davis saw appellant on a daily basis. (XVI RT 3309.) As his history teacher, and through academic testing, she observed appellant "did have some reading problems" (XIV RT 3307, 3313) but he had no problems with his reasoning abilities. (XVI RT 3308, 3313-3314.)

Appellant "probably" got a D in her class. (XIV RT 3311.) He did not reach his potential. "He was not a student who put forth a great deal of effort." For example, she had a problem getting him to do his homework and get papers turned in. (XIV RT 3307-3308, 3314-3316.)

As a camp counselor Davis has "worked with[[112]] mental[ly] retarded children" at her camp site. She is aware of varying levels of retardation. Based on her being appellant's teacher, and her experience working with mentally retarded children at camp, she "wouldn't say that [appellant] was mentally retarded." (XIV RT 3308, 3310.)

c. Susan McClure

Susan McClure testified she is a resource specialist teacher in the special education department at Madera High School. She had worked in that capacity for about 11 or 12 years. (XIV RT 3317-3318.) She teaches English and science and has previously taught math. (XVI RT 3318.) She has had courses in psychology to complete her special education teaching credential. (XIV RT 3322.) In what was probably appellant's freshman or sophomore year, appellant was her student. She believed she had him in an English class and possibly one or two other special education classes. She taught him for a year and had daily contact with him. (XIV RT 3318-3321.) Appellant did not turn in many homework assignments. (XIV RT 3322.) In dealing with special education programs she knows there are

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[112] Appellant mistakenly claims Davis had only worked at a camp site where mentally retarded children were present. (AOB 155, 166.) As shown, she actually "worked with" these children. (Also see AOB 31 ["[S]he had worked with the mentally retarded as a camp counselor"].)

varying levels of mental retardation. (XIV RT 3322.) Appellant had "some difficulties with reading and writing" but there was nothing she observed that "ever indicated to [her] that [appellant] was mentally retarded." (XIV RT 3319.)

d. Appellant Fails To Demonstrate That The Trial Court Abused Its Discretion; The Witnesses Did Not Provide Expert Testimony And Properly Testified About Whether Or Not They Noticed Anything That Indicated Appellant Had Mental Retardation

As can be seen, the prosecutor did not offer the testimony of the school staff to provide "*expert* opinion that [appellant] was or was not mentally retarded." (AOB 156, emphasis added.) The expert opinion had been provided by appellant's psychologist witnesses. Instead, the prosecutor addressed an *aspect* of Dr. Powell's testimony, i.e., his testimony that appellant's alleged mental retardation would have been be noticed by appellant's counselors and teachers. (See XIV 3391-3392; XV 3454-3455; *People v. Smith* (2005) 35 Cal. 4th 334, 359 ["When, as here, a mental health expert offers a diagnosis, this opens the door to rebuttal testimony questioning that diagnosis or suggesting an alternative diagnosis"].)[113]

The prosecutor sought information about whether the witnesses had noticed appellant's alleged mental retardation. Each witness, all with ample experience with mentally retarded people, and, more importantly,

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[113] The prosecutor, in his closing argument, noted the witnesses' testimony that appellant had some learning difficulties in school but none of the witnesses considered appellant mentally retarded. "One of the defendant's own expert witnesses said that that would be noticeable." (XV RT 3391-3392; also see XV RT 3455 ["[T]he relevance of [this] testimony is that one of the defendant's own experts testified that the mental retardation of [appellant] would be observable and . . . all three of them testified they did not consider [appellant] mentally retarded . . ."].)

experience *with appellant*, testified they had not. Specifically, Rodriguez testified that she did not consider appellant mentally retarded as nothing in her experience with appellant "indicated he may be retarded." (XIV RT 3304B.) Davis confirmed that based on her being appellant's teacher, and her experience working with mentally retarded children at camp, she "wouldn't say" that appellant was mentally retarded. (XIV RT 3308, 3310.) And, McClure testified that appellant had "some difficulties with reading and writing" but there was nothing that "ever indicated" to her that appellant was mentally retarded. (XVI RT 3319; Cf. *People v. Whitson* (1998) 17 Cal.4th 229, 242 ["Defendant's high school special education teacher testified regarding defendant's 'attention deficit syndrome' and poor academic performance in school. On cross-examination, the teacher stated his belief that defendant was 'possibly borderline retarded.'"]; *Ary II, supra,* 118 Cal.App.4th 1016, 1022 ["Defendant was in a special education curriculum in high school. One of his special education teachers reported that she believed defendant to be mentally retarded"].) Neither Dr. Powell, nor any other defense expert, ever testified that teachers or counselors had to have "specialized training in assessing or diagnosing mental retardation" (AOB 154) to make this type observation.[114] Nor has appellant cited, or respondent found, any case authority requiring particular expertise for this type of testimony. And, of course, their testimony directly corresponded to defense expert testimony indicating that appellant's alleged mental retardation would be noticed.

Moreover, to the extent that, under these circumstances, the testimony of the three witnesses can be considered a lay opinion on mental

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[114] In fact, both Dr. Powell and Dr. Christensen testified that even family members and *friends* would notice appellant's mental retardation. (XII RT 2947, 3084-3085.)

retardation, the witnesses were qualified to make it as it was based on the witness' perception and helpful to a clear understanding of their testimony. (Evid. Code, § 800; see *People v. Melton* (1988) 44 Cal.3d 713, 744; Cf. *Turner v. American Sec. & Trust Co.* (1909) 213 U.S. 257, 260 ["Where the issue is whether a person is of sound or unsound mind, a lay witness, who has had an adequate opportunity to observe the speech and other conduct of that person may, in addition to relating the significant instances of speech and conduct, testify to the opinion on the mental capacity formed at the time from such observation. [Citation omitted]. In no other way than this can the full knowledge of an unprofessional witness with regard to the issue be placed before the jury, because ordinarily it is impossible for such witness to give an adequate description of all the appearances which to him have indicated sanity or insanity"];also see *Murphy v. State*, 2003 OK CR 6, 66 P.3d 456, 459, n. 3 (Okla. Crim. App. 2003) ["Manifestation before the age of eighteen" is a fact question intended to establish that the first signs of mental retardation appeared and were recognized before the defendant turned eighteen. Lay opinion and poor school records may be considered"].)[115] Appellant's concerns about that evidence pertains more to the weight of the testimony, rather than its admissibility. (See *People v. Medina* (1990) 51 Cal.3d 870, 887.) Appellant has failed to demonstrate that the trial court abused its discretion.

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[115] Compare, *Ex parte Briseno* (Tex. Crim. App. 2004) 135 S.W.3d 1, 17-18 ("Deputy of Dimmit County testified that he had had approximately ten different dealings with applicant and found him to be 'intelligent, shrewd, and very cunning.' This witness had interrogated applicant before and noted that: someone that's mentally retarded ... it's hard to carry a conversation with them sometimes because they wander a lot. [Applicant] does not wander. He can keep a conversation going and he can stay in sequence.")

e. Appellant Fails To Demonstrate Prejudice In His Argument III, D[116]

Appellant asserts that the erroneous admission of evidence, that his teachers and counselor did not believe appellant was mentally retarded while he was in school, caused him prejudice. (AOB 163-167.) Respondent disagrees.

Assuming arguendo that error occurred and the evidence constituted improper lay opinion testimony, it was plainly harmless under any standard (*Lilly v. Virginia* (1999) 527 U.S. 116, 139-140; *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836-837; *People v. Superior Court (Ghilotti), supra,* 27 Cal.4th at 918) in view of the exceptionally strong evidence, including admissions by appellant, demonstrating every element of each of the offenses and special circumstances such as the mental states of premeditation and deliberation; the disparity and unreliability of appellant's defense team I.Q., testing, as demonstrated through their own expert testimony as well as that of Dr. Coleman;[117] substantial adaptive skill evidence of appellant's work life

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[116] Appellant asserts that he was prejudiced by the testimony of the teachers and counselor about mental retardation in argument III, D (AOB 163). He does not make any contentions regarding the admission of the evidence in his school records (see Arg. III, C) in his argument III, D. Therefore, respondent addresses appellant's Argument III, D, here.

[117] As a pillar for his prejudice argument appellant argues that he suffered prejudice because Dr. Coleman's testimony undoubtedly gave the teacher and counselor testimony weight. In support, citing XIV RT 3222-3225, 3254, appellant claims Dr. Coleman "explicitly testified" that opinions of experts that appellant is mentally retarded are "'completely unreliable'" and that "opinions of lay people," such as "teachers and [a] counselor who interacted with" appellant are "highly reliable." (AOB 165.) Nonsense. At the cited pages, Dr. Coleman's testified that various psychological and psychiatric *testing* was unreliable and further testified that a person's behaviors , and the circumstances surrounding that behavior, are "as reliable a guide as exists" to determine what somebody's mental

(continued...)

further demonstrating appellant was not mentally retarded (see, e.g., Arg. II, F; XIV RT 3393-3394; see *People v. Carter, supra,* 30 Cal. 4th at 1197); the narrow use of the teacher and counselor rebuttal testimony to address appellant's expert testimony that teachers and counselors would notice appellant's mental retardation (XII RT 2947; see XIV 3391-3392; XV 3454-3455);[118] the fact that the defense was allowed to cross-examine each witness and, if appellant so chose, expose the basis for each witnesses' opinion to the jury; and, the fact that the jury was instructed that it need not accept a lay opinion but should give it weight, if any, to which it is

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(...continued)
state was. At the cited pages, he did *not* state expert *opinions* are "'completely unreliable'" and opinions of lay persons such as "teachers or counselors who interacted with appellant" are "highly reliable." Therefore, appellant's exaggerated claims about Dr. Coleman's testimony does not assist his prejudice claim.

[118] Contrary to appellant's assertion, the prosecutor did not argue that the teachers and counselor testimony "'trumped the defense experts' contrary opinions" (AOB 165.); instead, in context, he pointed out that appellant's own experts opined that friends, family, teachers and counselors would have noticed appellant's alleged mental retardation, and rebuttal witnesses, teachers and a counselor, did not see mental retardation in appellant. (XIV 3391-3392; XV 3454-3455.)

Moreover, respondent notes that appellant did not ask for instruction regarding the definition of mental retardation, including that it must manifest before age 18. Nor did he present any substantive evidence of that factor in the defense portion of his case. Nor did he even argue to the jury in the guilt phase argument that mental retardation must manifest before the age of 18. Nevertheless, appellant speculates that somehow the jury knew that his mental retardation should have manifested before age 18 and therefore the alleged opinion evidence by his teachers and counselor improperly showed his mental retardation claim to be a farce and sham. (AOB 164-165; see *Atkins, supra*, 536 U.S. at p. 318.) Such speculation should not be considered. (See *People v. De Coe* (1938) 25 Cal.App.2d 522, 525.) Moreover, as previously demonstrated, the evidence of the teachers and counselor was directed at far more narrow testimony of appellant's experts stating his alleged mental retardation would be noticed by people who knew him.

entitled.[119] Under these circumstances, their opinions, even if in error, were not prejudicial. (See *People v. Hinton* (2006) 37 Cal.4th 839, 911; *People v. Mickle* (1991) 54 Cal.3d 140, 184-185.)

Nor has appellant demonstrated a "cumulative effect" (AOB 167, citing his Argument VI) or any other reason for his "convictions, special circumstances, and death judgment" to be reversed. (AOB 168, merely citing his footnote 36, in his Argument II; Cf, *Zelayeta v. Pacific Greyhound Lines, Inc.* (1951) 104 Cal.App.2d 716, 723 ["Appellants argue the question of the admissibility of Edwards' opinion as if it were the most vital evidence in the case. They greatly overemphasize and exaggerate its importance"].)

C. Appellant Failed To Preserve His Contention Regarding The Testimony Of School Psychologist Potter About Alleged Conclusions Contained In Appellant's School Records; Moreover, The Trial Court Properly Allowed The Testimony Of School Psychologist Potter Regarding Appellant's Classroom Placement; Additionally, If Error Occurred, It Was Harmless

On appeal, appellant appears to concede that much of the testimony of School Psychologist, and custodian of records, Potter, regarding information contained in appellant's school records was properly admitted under the official and business records exceptions to the hearsay rule. (AOB 160.) But, he complains that testimony by Potter on direct examination of third party opinions and conclusions that appellant "was not mentally retarded, but rather merely 'learning handicapped' or of 'low intellectual functioning' were not" admissible. (AOB 160.) Respondent

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[119] As appellant aptly illustrates by his strenuous attempts to minimize the witnesses' knowledge about mental retardation (AOB 155-156), appellant made the most of his full opportunity to cross-examine the school personnel regarding the basis for their opinions.

submits that appellant's contention is not congnizable on appeal, and, even if it is reviewable, it lacks merit. Moreover, assuming arguendo error occurred, it was harmless under any standard.

1. Relevant Testimony Of School Psychologist Potter

a. Direct Examination

School Psychologist Potter, a 32 year veteran of the Madera School District, was called as a rebuttal witness. He established that, in addition to being a school psychologist, he was a custodian of records for student records in Madera Unified School District and he maintained those records. He had those records, consisting of psychological evaluations, actual tests and special education records, with him in court. (XIV 3297-3397A, 3298C, 3300A.)

> [PROSECUTOR LiCALSI:] Q Your records indicate that . . . this individual was in special education?
>
> A. That is correct.
>
> MR. LITMAN: Objection, Your Honor. Lack of foundation. Calls for hearsay. And I'd like to have this as a continuing objection.
>
> THE COURT: Overruled. You may proceed.
>
> MR. LiCALSI: Q Do your records indicate for what purpose he was . . . in special education?
>
> A Because of a learning handicap.

(XIV RT 3297A.)

Potter then testified about I.Q. testing that had been administered to appellant, the years they were administered (1975, 1979, and 1982) and the resulting scores (70, 75, and 77 respectively). (XIV RT 3207A-3297C.)

> [PROSECUTOR LiCALSI:] Q Based upon this individual's I.Q. scores was he ever considered . . . mentally retarded by the Madera Unified School District?
>
> A Okay, let me explain that he was placed in a class for mentally retarded students. He was placed there only on what

we call exceptional circumstances, meaning he did not qualify by standard as a mentally retarded child but he's functioning in a low borderline range academically, functioning very lowly, was having difficulty in the classroom. When you have circumstances, even though a student does not test mentally retarded, if they're in the borderline range under exceptional circumstances with parental consent you can place them in EH classes as was done in this case here.

(XIV RT 3297C-3298.)

Potter explained that appellant was placed in this class because his achievement was not as high as should be expected of him. (XIV 3298.)

b. Cross-Examination

During appellant's cross examination, Potter testified that he did not administer the 1975 test, but he "evaluated the results because the person who did the testing was under [his] supervision at that time." (XIV RT 3298.) Appellant then asked detailed questions about the 1979 report of Psychologist Katherine Cannistraci, particularly portions relating to appellant's discomfort with taking the Wechsler examination, and the behavioral observations of appellant. (XIV RT 3298-3298C.) The record then shows:

[DEFENSE COUNSEL LITMAN] Q Now, in regards to the Wechsler for children her assessment was that he was currently functioning as would a child in the borderline range of intellectual abilities?

A. That is correct, that's what it states.

. . .

Q And the teacher concluded that [appellant] would probably benefit from continued enrollment in the EMR program, that's on page three.

. . .

A That is correct.

Q Continue enrollment for the remainder of the school year so he can complete his Distar Program in spelling and arithematic [*sic*]?

A Uh-hmn.

Q What was the Distar Program?

A It's a type of educational correctional program for reading and spelling and math too.

(XIV RT 3298C-3299.)

Appellant then began asking about the 1975 testing, administered by Psychometrist Ruth Milor. (XIV RT 3299-3299A.) Appellant asked about the related report as well, getting testimony that the report indicated appellant's "attention span and motor expression skills were poor." After more detailed questioning about the 1975 testing and notes taken by Potter in 1975 (XIV RT 3299A-3299C.), appellant asked:

[DEFENSE COUNSEL LITMAN:] Q After the testing was done in '75, the recommendation was that [appellant's] parents be conferred with regarding the possibility of placing him in a special education class for the educationally mentally retarded.

A Is that -- if you read on exceptional circumstances.

Q On exceptional circumstances?

A That is correct.

(XIV RT 3299C.)

After further questioning about the 1975 testing, appellant asked about the evaluation report regarding appellant that was completed by District Psychologist Artis Williams in 1982. (XIV RT 3300.)

[DEFENSE COUNSEL LITMAN:] Q It said at that time [appellant] was placed in the LHRSP Program?

A That's right. LH meaning learning handicapped. RSP meaning Resource Specialist Program.

Q So the test that was administered was the WISK?

A Yes, that is correct.

Q And at that time he was in the fifth percentile.

A All over score was fifth percentile.

. . .

Q And Mr. Williams concluded that that placed [appellant] in the borderline to dull-normal range of intellectual functioning?

A That is correct.

Q Apparently he, on the Bender-Gestalt, he was scored at the third percentile?

A That is correct.

. . .

. . . Q The conclusion was that [appellant] continued to be placed in the learning handicapped RSP Program with careful monitoring; is that correct?

A That is correct.

(XI RT 3300-3300A.)

Appellant further established through Potter that I.Q. testing is recognized by the schools as a legitimate means of determining placement of students. (XIV RT 3300B.)

2. Relevant Legal Principles

"It is the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection at the trial on the ground sought to be urged on appeal [citations] . . . ." (*People v. Welch* (1972) 8 Cal.3d 106, 114-115; *People v. Green* (1980) 27 Cal.3d 1, 21-22, fn. 8; Evid. Code, § 353, subd. (a).) In addition, a ruling on that ground must have been sought in the trial court. (*People v. Alaniz* (1986) 182 Cal.App.3d 903, 907.)

"'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code § 1200, subd. (a).) The business records exception to the hearsay rule, Evidence Code section 1271, provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made

in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

The official records exception to the hearsay rule, Evidence Code section 1280, provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered . . . to prove the act, condition, or event if . . . : [¶] (a) The writing was made by and within the scope of duty of a public employee; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

"'The trustworthiness [component of the business records and official records exceptions] is established by a showing that the written report is based upon the observations of public employees who have a duty to observe the facts and report and record them correctly.'" (*People v. Parker* (1992) 8 Cal.App.4th 110, 116.) The trial court has broad discretion in determining whether a party has established the foundational requirements of these exceptions to the hearsay rule. (*People v. Martinez* (2000) 22 Cal.4th 106, 120.) On appeal, this Court reviews the trial court's determination for abuse of discretion. (*People v. Cowan* (2010) 50 Cal.4th 401, 462.)

In *People v. Reyes* (1974)12 Cal.3d 486, this Court held that a psychiatric evaluation did not qualify as a business record because

> "[t]he psychiatrist's opinion that the [patient] suffered from a sexual psychopathology was merely an opinion, not an act, condition or event within the meaning of [Evid. Code, § 1271].". . . 'In order for a record to be competent evidence under that section it must be a record of an act, condition or event; a

> conclusion is neither an act, condition or event . . . . Whether the conclusion is based upon observation of an act, condition or event or upon sound reason or whether the person forming it is qualified to form it and testify to it can only be established by the examination of that party under oath. . . .'"

(*Id.*, at p. 503, quoting *People v. Williams* (1960) 187 Cal.App.2d 355, 365.)

3. Appellant's Contention Is Forfeited

Here, appellant made a general "[c]alls for hearsay" objection at the beginning of Potter's testimony about the school records, when the prosecutor asked Potter if the records indicated appellant was in special education. As part of the objection, appellant stated he would "like to have this as a continuing objection." The court overruled the objection. (XIV 3297A.) Generally, where a party has "once formally taken exception to a certain line or character of evidence, he is not required to renew the objection at each recurrence thereafter of the objectionable matter." (*Green v. Southern Pac. Co.* (1898) 122 Cal. 563, 565.) But, on appeal, even appellant concedes that the vast majority of Potter's testimony was admissible under the official or business records exceptions to the hearsay rule under Evidence Code section 1271. (AOB 160; also see Evid.Code, § 1280.) Instead of broadly attacking the admissibility of Potter's testimony from school records as being "hearsay," he now narrowly targets a small portion of Potter's direct testimony, regarding records showing appellant did not meet the standard for mental retardation placement and that he was in special education because he was learning handicapped. He asserts this particular testimony does not fall within the business record hearsay exception because it constitutes an opinion or conclusion, and not an "act[], condition, or event[]" under Evidence Code section 1271. (AOB 159, citing *People v. Reyes, supra*, 12 Cal.3d at pp. 486, 503.)

Respondent submits that appellant's broad "[c]alls for hearsay" objection at the beginning of Potter's testimony (XIV 3297A), did not fairly inform the trial court that appellant did not believe a specified portion of the testimony did not come within a business records exception, because that particular portion of the testimony constituted a "conclusion [and] not an act, condition or event" under the Evidence Code section 1271. (Evid. Code, § 353; *People v. Reyes, supra*, 12 Cal.3d at p. 503; AOB 159-160.) As this Court stated in *People v. Partida* (2005) 37 Cal.4th 428 (*Partida*), the purpose for requiring that an objection be specific is to "fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling." (*Id.*, at p. 435; also see *Bundy v. Sierra Lumber Co.* (1906) 149 Cal. 772, 776 ["Had attention been called directly in the court below to the particular objection which it is now claimed the general objection of appellant presented, that court would have had a concrete legal proposition to pass on, and counsel for plaintiff would have been advised directly what the particular complaint against the question was, and, if he deemed it tenable, could have withdrawn the inquiry or reframed his question to obviate the particular objection"]; see *People v. Morris* (1991) 53 Cal.3d 152, 187-188 [citing *Bundy*].) That was not done here.[120] Accordingly, appellant's claim should be summarily rejected.

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[120] In fact, as shown above, on cross-examination appellant himself elicited even more detailed testimony from Potter that, using appellant's reasoning on appeal, did not involve an "act, condition, or event" under Evidence Code section 1271. (XIV RT 3298C ["borderline range of intellectual abilities"], 3299 [teacher "concluded" appellant would benefit from EMR enrollment], 3299A-3299B [appellant's "attention span and

(continued...)

4. Assuming Arguendo That Appellant's Claim Is Cognizable On Appeal, It Lacks Merit; But, If Error Occurred, It Was Harmless

It appears that appellant is solely challenging the admission of testimony during direct examination that school district records indicated appellant was placed in special education "[b]ecause of a learning handicap" (XIV RT 3297A) and that he did not "qualify by standard as a mentally retarded child but he's functioning in a low borderline range academically . . ." (XIV RT 3927C; AOB 157-158, 160.) As previously noted, this Court, in *People v. Reyes, supra,* 12 Cal.3d at p. 486, found that a diagnosis in a victim's psychiatric records from 20 years earlier did not meet the requirements of Evidence Code section 1271 that the record be "'of an act, condition or event.'" (*People v. Reyes, supra,* 12 Cal.3d at p. 503.) Respondent acknowledges this is a close question, but submits that, at the time this information was raised on direct examination, the thrust of Potter's testimony related to *placement* of appellant in a classroom that was designated as being for the educationally mentally retarded, and how that placement was determined, and was not testimony about a direct diagnosis. (XIV RT 3297A [purpose appellant was in special education was because of a learning handicap]; XIV RT 3297C [appellant was "placed there only on what we call exceptional circumstances, meaning he did not qualify by standards as a mentally retarded child but he's functioning in a low borderline range academically . . ."]; see *Thompson v. McNeil* (2009) 129 S.Ct. 1299, 1304, dis. op. J. Brenner ["Garritz's

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(...continued)
motor expression skills were poor"], 3299C [recommendation after testing for placement in educationally mentally retarded class for exceptional circumstances].) Respondent submits this further demonstrates that appellant's general hearsay objection was not specifically intended to cover this aspect of the official record or business record hearsay exceptions.

testimony was consistent with the picture of petitioner painted by other witnesses. For example, one of petitioner's teachers testified that while in elementary school petitioner consistently scored in the mid-70's on IQ tests; those scores qualified him for classes for the educable mentally retarded. (Citation omitted). His teachers also described him as 'slow,' a 'follower' who was 'always . . . eager to please.'"].) Therefore, respondent submits that had appellant, in fact, made an objection on this point, this testimony would have fallen within the business or official records exceptions. Appellant fails to show an abuse of discretion by the trial court.

Assuming arguendo err occurred, it was harmless. (*Lilly v. Virginia, supra,* 527 U.S. at 139-140; *Chapman v. California, supra,* 386 U.S. at 24; *People v. Watson, surpa,* 46 Cal.2d at 836-837; *People v. Superior Court (Ghilotti), supra,* 27 Cal.4th at p. 918.) Appellant professes that admission of the alleged opinion portion of Potter's direct testimony, reduced the prosecutor's burden of proof, deprived him of a meaningful opportunity to present a defense, due process, and to a reliable jury verdict in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States. (AOB 162.) He is incorrect.

First, appellant fails to explain specifically *how* Potter's small bit of challenged direct examination testimony deprived him of each of his constitutional rights to a fair trial, due process, confrontation and cross-examine of the witnesses against him,[121] right to present a meaningful defense or an opportunity to be heard, or his right to a reliable guilt or

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[121] At least with the 1975 testing, it was Potter himself who "evaluated the results because the person who did the testing was under [his] supervision at that time." (XIV RT 3298.) Appellant participated in significant cross-examination of Potter on the 1975 testing and conclusions. (E.g., XIV RT 3299A-3299C.)

penalty verdict. (AOB 162-163.) Thus, the claim is not reviewable. (See *People v. Smith* (2003) 30 Cal.4th 581, 616, fn. 8 ["We need not consider such a perfunctory assertion unaccompanied by supporting argument."]; *People v Turner* (1994) 8 Cal.4th 137, 214, fn. 19 ["We discuss those arguments that are sufficiently developed to be cognizable. To the extent defendant perfunctorily asserts other claims, without development and, indeed, without a clear indication that they are intended to be discrete contentions, they are not properly made, and are rejected on that basis."]; *People v. Freeman* (1994) 8 Cal.4th 450, 482, fn. 2 (same); *People v. Mayfield* (1993) 5 Cal.4th 142, 196 ["Defendant's constitutional claims largely are asserted perfunctorily and without argument in support. Therefore we do not consider them. [Citation.]"]; *People v. Jones* (1998) 17 Cal.4th 279, 304, [defendant who presents claim perfunctorily and without supporting argument invites rejection in similar fashion].)

Second, even assuming arguendo that appellant's prejudice argument is reviewable, it lacks merit. Potter's challenged rebuttal testimony was an exceedingly small part of the prosecutor's case. It could not have reasonably had an impact on the prosecutor's burden of proof. Moreover, the prosecutor did not use the so-called opinions or conclusions in his closing argument (instead noting the differences in the scores in the I.Q. examinations in school and the varied but much lower scores of the tests administered by the defense experts) (XIV RT 3393-3394); and, with or without this testimony, the jury already had substantial reason to find the requisite mental states for the charged offenses and special circumstances, and, to further find that appellant had been malingering in his defense testing and the defense I.Q. scores were unreliable. (See, Arg. I & II.F, supra.; XIV RT 3210-3211; see *People v. Cowan* (2010) 50 Cal.4th 401, 463-464.)

Furthermore, appellant, having had the opportunity to review the materials, apparently saw no defect in their conclusions. He did not seek to rebut the testimony at the guilt phase of his trial or challenge the testing or conclusions contained in those records with his own experts.[122] Indeed, in his cross-examination of Potter he explored the alleged conclusions in detail and even added additional conclusions and opinions to the testimony. (XIV RT 3298C ["borderline range of intellectual abilities"], 3299 [teacher "concluded" appellant would benefit from EMR enrollment], 3299A-3299B [appellant's "attention span and motor expression skills were poor"]; 3299C [recommendation after testing for placement in educationally mentally retarded class for exceptional circumstances].) Therefore, based on all these circumstances, the "exclusion of this evidence would not have made a difference in assessing the evidence that was presented to support the defense theory that defendant was [a mentally retarded] person who would not [have the mental states to] commit [the charged] crimes [and special circumstances]. In addition, the evidence against defendant was overwhelming." (See *People v. Page* (2008) 44 Cal.4th 1, 49; See Arg. II.F.) Accordingly, under any standard, no prejudice is demonstrated.

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[122] Appellant merely notes that Dr. Powell was recalled during the *penalty phase* of the trial and testified that appellant's I.Q. score of 77 was not "necessarily" inconsistent with mental retardation. (AOB 161.) No testimony was presented regarding the propriety of the alleged opinions in the school record reports or the test scores based on a review of the tests by appellant's experts. (Compare, *People v. Smithey, supra,* 20 Cal.4th at p. 1015 ["The prosecutor also challenged the reliability of the conclusions reflected in defendant's school records"].)

IV. APPELLANT FAILS TO DEMONSTRATE THAT HIS STATE LAW AND FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE THE TRIAL COURT OVERRULED SEVERAL OBJECTIONS TO QUESTIONS FOR DR. CHRISTENSEN BY THE PROSECUTOR; MOREOVER, IF ERROR OCCURRED, IT WAS HARMLESS

Appellant claims that his Fifth, Sixth, Eighth and Fourteenth Amendment rights, and state law, was violated because the court overruled his relevance objection when the prosecutor asked Dr. Christensen on cross-examination: if she believed that appellant was competent even though previously the court found him competent based on the report of two psychiatrists (AOB 170); and, asked Dr. Christensen regarding her "recommendation that [appellant] be referred to the Central Valley Regional Center for the Developmentally Disabled for placement." (AOB 174.) Appellant further contends that state law and the above mentioned constitutional rights were violated, and prosecutorial misconduct occurred, when the court allowed the prosecutor to ask Dr. Christensen about circumstances in the jail that may have allowed appellant to learn information about how to fake tests. (AOB 176-182.) Respondent submits that appellant's regional center and misconduct claims are forfeited and, in any event, they are meritless. Moreover, no state law errors occurred and even assuming arguendo that error occurred, it was harmless.

A. Legal Principles

To be admissible, evidence must be relevant. (Evid. Code, § 350.) Relevant evidence "means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The trial court has broad discretion in determining the relevance of evidence. [Citation.] [This Court] review[s] for abuse of discretion a trial court's rulings on the

admissibility of evidence. [Citations.]" (*People v. Harris* (2005) 37 Cal.4th 310, 337.)

> [W]hen an objection to evidence is raised under Evidence Code section 352, the trial court is required to weigh the evidence's probative value against the dangers of prejudice, confusion, and undue time consumption. Unless these dangers 'substantially outweigh' probative value, the objection must be overruled. [Citation.]

(*People v. Jenkins* (2000) 22 Cal.4th 900, 1008.)

Moreover,

> It is important to keep in mind what the concept of "undue prejudice" means in the context of section 352. "'Prejudice' as contemplated by section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of undue prejudice. . . .'" The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.'" [Citation.] [Citation.]
>
> "The prejudice that section 352 'is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations]. "Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors. [Citation.]" [Citation.]' . . . In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008-1009 [62 Cal.Rptr.2d 164].)

(*People v. Branch* (2001) 91 Cal.App.4th 274, 286; *People v. Jones* (2007) 157 Cal.App.4th 580, 599.)

Additionally, the scope of cross-examination of an expert witness is especially broad. (*People v. Lancaster* (2007) 41 Cal.4th 50, 105.)

> "A party 'may cross-examine an expert witness more extensively and searchingly than a lay witness, and the prosecution [is] entitled to attempt to discredit the expert's opinion. [Citation.] In cross-examining a psychiatric expert witness, the prosecutor's good faith questions are proper even when they are, of necessity, based on facts not in evidence. [Citation.]' " (*People v. Wilson* (2005) 36 Cal.4th 309, 358 [30 Cal.Rptr.3d 513, 114 P.3d 758], quoting *People v. Dennis* (1998) 17 Cal.4th 468, 519 [71 Cal.Rptr.2d 680, 950 P.2d 1035].)

(*People v. Alfaro* (2007) 41 Cal.4th 1277, 1325; *People v. Ledesma, supra,* 39 Cal.4th at p. 695 ["'The scope of cross-examination permitted under [Evidence Code] section 721 is broad, and includes examination aimed at determining whether the expert sufficiently took into account matters arguably inconsistent with the expert's conclusion."]; Evid. Code, § 721, subd. (a).)[123]

The appellate court reviews the trial court's control of cross-examination, and its evidentiary rulings, for abuse of discretion. (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1008; *People v. Adan* (2000) 77 Cal.App.4th 390, 394.)

"The erroneous admission of [irrelevant evidence] warrants reversal of a conviction only if the appellate court concludes that it is reasonably

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[123] Evidence Code section 721, subdivision (a), provides in part that an expert witness "may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to . . . the matter upon which his or her opinion is based and the reasons for his or her opinion."

probable the jury would have reached a different result had the [evidence] been excluded. [Citation.]" (*People v. Scheid* (1997) 16 Cal.4th 1, 21.)

Furthermore, "'It is improper for a prosecutor to ask questions of a witness that suggest facts harmful to a defendant, absent a good faith belief that such facts exist.'" (*People v. Bolden* (2002) 29 Cal.4th 515, 562.)

B. Appellant Fails To Demonstrate That The Trial Court Abused Its Discretion By Overruling Relevance Objections To The Prosecutor's Question: Asking Dr. Christensen If She Believed That Appellant Was Incompetent Even Though The Court Found Him Competent Based On The Report Of Two Psychiatrists; And, The Prosecutor's Question Asking Dr. Christensen About Her Recommendation That Appellant Be Referred To The Central Valley Regional Center For The Developmentally Disabled For Placement

As previously demonstrated in argument I., through cross-examination, including that referenced herein, it was demonstrated that Dr. Christensen's opinions regarding her intelligence level scores for appellant, and her opinions about appellant's competence, were not credible due to the conditions of appellant's testing and due to appellant's severe malingering during the period of her testing. Respondent incorporates by reference our argument I, as though fully set forth herein.

1. Dr. Christensen's Testimony

Appellant cites to a small portion of Dr. Christensen's testimony, at XIII RT 3087-3090, as the basis for his claim that the prosecutor provided a "scathing cross-examination" that provided irrelevant material. (AOB 170-173.) Dr. Christensen had just testified her opinion, as expressed in her report, was that appellant "had almost non-existent reasoning ability." She then admitted that her opinion had changed after she "learned of higher I.Q. scores" obtained by appellant's other experts. (XIII RT 3085-3086.) Seemingly grudgingly, she testified "[n]ow I see that he has an

exceptionally limited reasonability. It is not non-existent because he was able to answer for Dr. Powell some of those questions." (XIII RT 3086.)[124] In pertinent part, and without objection, the prosecutor asked, and she acknowledged, that in her report[125] she stated she "felt the defendant was not competent to stand trial and assist his attorney." (XIII RT 3086.) The prosecutor asked her if this opinion had changed and she responded that she still "believe[d] at that time he was incompetent to stand trial." (XIII RT 3086.)

> [MR. LICALSI, Prosecutor] Q And you believe that even though the Superior Court, upon the reports of two psychiatrists found him to be competent?
>
> MS. THOMPSON [Defense Counsel] Objection. Irrelevant.
>
> THE COURT: Overruled.
>
> THE WITNESS: I read the reports and I note one of the psychiatrist[s] found him to be incompetent and the other one did [not].[[126]] I do not always understand legal aspects. I'm

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[124] Throughout Dr. Christensen's cross-examination, she was recalcitrant; trying wherever she could to minimize or justify the substantial differences in her test results and conclusions of appellant's other witnesses. (E.g., XIII RT 3017, 3070, 3073 [Dr. Christensen: I.Q. 47 moderate to severe mental retardation]; 3147, 3162, 3169 [Dr. Shuyler: I.Q. score 66, "very significant" difference from Dr. Christensen; mild retardation range]; XIV RT 3395-3398. [prosecutor's argument].)

[125] Dr. Christensen was referencing a report for testing she had completed at least a year and a half before her testimony. (XIII RT 3080.)

[126] Dr. Davis' report of November 17, 1989, concluded:

> DIAGNOSTIC IMPRESSION:
>
> Malingering.
>
> When an individual malingers to the extent that [appellant] did, one does not know if there is some legitimate disorder masked by the malingering or not.
>
> COMMENT:

(continued...)

going on the basis of his level of intellectual functioning and the date I saw him how much I perceived he would be able to assist his defense attorney in preparing for his defense, his awareness or lack of awareness of what a judge was, who you were. Who -- what a jury was for, what the bailiff was for. At this time that I saw him he did not have any understanding of who any of these people were. He couldn't differentiate even that his attorney

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(...continued)

It is recommended that the Court find [appellant] to be competent and that he proceed with the charges against him, with or without his cooperation.

(Court Exhib. No. 1 p. 5.)

Dr. Terrell's report of November 21, 1989, concluded:

DIAGNOSES:

Malingering.

Psychotic Disorder NOS VS Possible Malingering.

COMMENT:

The Defendants poor eye contact, flat affect, and claims of experiencing auditory hallucinations, could be typical of a Psychotic Mental Disorder such as Schizophrenia.

The majority of the Defendant's responses however, typified by, "I don't know answers" with regards to his full name, his age, place of birth, and marital status are not typical of Schizophrenia but are classical responses for someone who is malingering.

I believe it is extremely likely that the Defendant is Malingering (Lying) about his answers in order to escape culpability for his crimes.

None the less I believe that there is a small possibility that he also suffers from a concurrent mental disorder. If this is indeed true, I believe that this Mental Disorder is interfering with his ability to cooperate with Counsel in preparing for a Defense.

It is therefore recommended that the Court find the Defendant incompetent to stand trial and that he be referred to Atascadero State Mental Hospital for Psychiatric Treatment until such time that he is Competent to stand trial.

(Court Exhib. No. 2, pp. 6-7.)

was working for him and that you were essentially not working for him.

MR. LICALSI: That's what he told you?

A That's what I learned after extensive questioning.

Q From the defendant?

A From the defendant.

Q And in referring that decision you believed him?

A I believed his response level as far as how his response level was, especially in that his response level corresponded directly to the test results that I had already achieved.

Q That's a, yes, you believed him?

A Yes, I believed him at the time, on the basis of everything that I had from him, not just on the basis of his response to my direct questions.

Q You also in your report recommended diversion for the defendant; is that correct?

A Correct.

. . .

MR. LICALSI: Q I believe you also mentioned that the defendant should be referred to the Central Valley Regional Center for placement?

A Correct.

Q And basically, if I understand correctly, you felt that the defendant should be placed back in society and monitored very closely?

MS. THOMPSON: Objection. Irrelevant.

THE COURT: Overruled.

THE WITNESS: It would be a fairly huge assumption for someone to interpret that statement and say I'm meaning place him back into society. What I was talking about there was the referral process for handling persons of lower intelligence and how they're handled differently than persons of normal intelligence, and I was trying to let Miss Thompson at this point know avenues she could get to that she could -- where she could

get free services . . . that are already available to Mr. Townsel, and which could assist her in preparing her case.

Q You stated regional center oversees, also oversees housing and work programs that are specifically designed for the developmentally disabled criminal offender, is that correct?

A Where?

Q Last page, second to the last paragraph, second to the last -- third to the last, second to the last and last sentence of that paragraph.

A Correct.

Q I believe you also recommended a limited conservatorship for the defendant; isn't that correct?

A Correct.

Q And that was to focus on controlling social contacts and residence and providing mandatory adult level supervision; is that correct?

A Correct.

Q Doesn't that mean that you recommended that he be placed back out into society?

MS. THOMPSON: Objection. Irrelevant.

THE COURT: Overruled.

THE WITNESS: I recommended -- if I were to recommend that he would be placed out in society I would have recommended that directly. I wouldn't have done it so obtusely.

MR. LICALSI: Q What does that mean then?

A It means I think he's eligible for this program. And I think referral to the program would mean that the people in the program would be able to assist in deciding the proper way of treating him. It is a program that when you have somebody who's developmentally disabled, that, you find punishments or living situations, or work situations, or other types of situations where you can protect them, and enable them to live at their highest level without getting in trouble, without getting hurt. I wasn't saying anything about returning him to society by these statements.

(XIII RT 3087-3090)

The prosecutor then continued his questioning about malingering. (XIII RT 3090-3091.)

2. The Prosecutor's Cross-Examination Was Relevant

In his argument IV, B.1 and 2, appellant first contends that the trial court abused its discretion by overruling appellant's relevance objection to the question by the prosecutor asking if Dr. Christensen still believed, as she had opined in her report, that appellant was competent even though previously the court found him competent based on the report of two psychiatrists. (AOB 170, 174; see XIII RT 3086-3087.)[127] Appellant is incorrect.[128]

As shown in Argument I, on December 1, 1989, the parties agreed to submit that matter of competence to the trial court based on the reports of the two court appointed psychiatrists. Appellant decided not to submit Dr. Christensen's report or to have her testify at the competency hearing although it was the first report to have been completed. The trial court ruled:

> THE COURT: It appears to me from reading the reports that I'm inclined to believe that the defendant has not proved by

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[127] It is ironic that appellant on the one hand bases his entire first argument on testimony arising from this question of the prosecutor but here argues the evidence was irrelevant. (AOB 48-51.)

[128] Respondent notes that in appellant's argument IV, B, 2, appellant broadly discusses legal relevance but does not address his specific objections. (AOB 170-173, citing XIII RT 3087-3090.) Instead, he broadly references the "prosecutor's cross-examination" or "line of inquiry" going to irrelevant matters. (AOB 173-0174, italics added.) However, appellant did not make relevance objections, in the cited record, to a line of questioning and therefore any such claim is forfeited. (AOB 170-173; see *People v. Friend* (2009) 47 Cal.4th 1, 81.) Respondent will, however, address the specific questions that appear to be raised by appellant.

> preponderate of the evidence that he is incompetent to stand trial. I believe that he is malingering as set forth.
>
> When you compare . . . Dr. Davis' opinion which is rather strong and Dr. Terrell's opinion . . . I believe it's extremely likely the defendant is malingering about his answers in order to escape culpability for his crime.
>
> There's a small possibility that he is suffering from this disorder. I don't find that's sufficient enough.
>
> So I will find that the defendant is presently mentally competent within the meaning of section 1368 of the Penal Code, and that he is presently able to understand the nature of the proceedings against him and able to assist counsel in the conduct of the defense in a rational manner.

(CT XI 2733-2735; CT XIII 3085; RTB 3; also see AOB 44 fn. 17, 49, citing XIII RT 3103-3105, 50 fn. 18.)

By the time the prosecutor asked Dr. Christensen about whether or not she had changed her mind about her incompetency finding in light of the trial court ruling, he had, in alia, established at trial through Dr. Powell that: her conclusions about appellant were substantially different from Dr. Powell's (e.g., XII 2933-2936, 2946-2951, 2954)[129] Dr. Terrell and Dr. Davis both determined that appellant was malingering, with one psychiatrist finding a small possibility of a concurrent mental disorder, during the period competence was being determined (XII RT 2936, 2948, 2958, 2960-2861); Dr. Powell did not believe psychologists were any better at determining if someone is lying than anybody else, and it was possible that appellant malingered sometime during that early period that included

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[129] Due to the obvious difference, even Dr. Christensen had to find some explanation for the large difference in scores between her testing and that of her defense colleagues. She primarily blamed the environmental conditions. (XIII RT 2988, 2990, 3025-3026, 3040, 3051-3052, 3073-3074, 3080.). Even she had to admit that her I.Q. score was only good for the day of her testing under the extreme conditions of her testing. (XIII RT 3070, 3085, 3110.)

Dr. Christensen's evaluation (XII 2933, 2952-2953); and, when faced with the significant differences between her testing results and those of Dr. Powell's, Dr. Christensen began to, at least slightly, change some of her opinions about appellant. (E.g., XIII RT 3025, 3027, 3079; see Arg. I,B, 2, a.)

It this light, of course it was proper to ask Dr. Christensen if she still believed appellant was, as written in her report at least a year and half earlier, competent "even though the Superior court, upon the report of two psychiatrists found him to be competent?" (XIII RT 3087.) Her exceptional reluctance to acknowledge even the potential for malingering, and its effect on her examination results (e.g., CT XI 2733-2734; CT XIII 3085; XIII RT 3024, 3061, 3063, 3066, 3071; see Arg. I, B and C.), demonstrated her bias, whether she thought appellant's alleged incompetence was based on mental retardation *or* other mental defect. In other words, the answer to the prosecutor's question was relevant to challenge the import, weight and credibility of Dr. Christensen's opinions. (See *People v. Montiel* (1993) 5 Cal.4th 877, 924 ["It is common practice to challenge an expert by inquiring in good faith about relevant information, including hearsay, which he may have overlooked or ignored"]; *People v. Coleman* (1985) 38 Cal.3d 69, 92 ["The courts have traditionally given both parties wide latitude in the cross-examination of experts in order to test their credibility"].)

Moreover, as shown in Argument I, B, the evidence strongly demonstrates that Dr. Christensen's finding regarding appellant's intelligence and incompetence were skewed by appellant's malingering, and, for this additional reason, the relevance of her opinions in light of the psychiatrists' and court's conclusions was self-evident.

Appellant, however, asserts that Dr. Christensen found him incompetent because of "mental retardation" and the court found him

competent because he did not have a mental disorder other than a developmental disability; therefore, he claims one is not relevant to the other. (AOB 174.) But this Court in *Leonard* rejected the claim that "a competency inquiry under section 1369 involves two distinct questions: (1) whether the accused is incompetent as a result of a psychiatric disorder, and (2) whether the accused is incompetent as a result of a developmental disability. To the contrary, these are not two separate questions, but one: whether, based on a combination of all factors, including both psychiatric disorders and developmental disabilities, the defendant is competent to stand trial." (*People v. Leonard, supra*, 40 Cal.4th at pp. 1391-1392.) Therefore, because competence is one question, and appellant's malingering/competence, plainly was relevant to Dr. Christensen's conclusions (see Arg. I, B), appellant's assertion fails.

3. Cross-Examination Regarding Dr. Christensen's Referral To CVRC Was Proper

Appellant next asserts, in his Argument IV, B, 2, that the trial court erred because it allowed the prosecutor to make an irrelevant inquiry of Dr. Christiansen about her "recommendation that [appellant] be referred to the Central Valley Regional Center for the Developmentally Disabled for placement." He claims that her referral was proper pursuant to certain statutory provisions. (AOB 174-176.) Appellant's contention is forfeited, and, if considered, meritless.

As demonstrated in above in (Arg. IV, B, 1.), appellant made no objection when the prosecutor asked whether Dr. Christensen mentioned in her report "that the defendant should be referred to the Central Valley Regional Center for Placement?" (XIII RT 3088.) Accordingly, his claim

is forfeited. (*People v. Seaton* (2001) 26 Cal.4th 598, 655.)[130] Moreover, assuming arguendo, it is reviewable, plainly the evidence that had been elicited by that point had demonstrated that Dr. Christensen had drawn significant opinions at the time of her report without taking into account many factors that had skewed her testing and opinions. (See Arg. I, B and C.) In light of that evidence, the questioning of Dr. Christensen about her own opinions and recommendations in her report, including her CVRC recommendations, was plainly relevant to her credibility, or lack thereof. (See *People v. Ledesma, supra,* 39 Cal.4th 641, 695 ["The scope of cross-examination permitted under [Evidence Code] section 721 is broad, and includes examination aimed at determining whether the expert sufficiently took into account matters arguably inconsistent with the expert's conclusion."]) Accordingly, the prosecutor's questions on the CVRC recommendation were properly allowed.

C. Appellant Fails To Preserve For Review Or Demonstrate A Claim That Prosecutorial Misconduct Was Committed Or That The Trial Court Abused Its Discretion, When The Prosecutor Asked About Opportunities For Appellant To Discuss Or See Testing Materials In The Jail

1. Testimony Of Dr. Christensen

At trial Dr. Christensen acknowledged that she testified in another case, Coleman, that in the jail inmates have been passing around information about tests since the 1860s. (XIII RT 3093.) She further

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[130] As previously noted, appellant never made an objection to a line of questioning so if appellant means to be asserting that here, that too is forfeited. (AOB 170-173; see *People v. Friend* (2009) 47 Cal.4th 1, 81.) In addition, appellant does not raise any arguments about those questions to which he actually made an objection, e.g., the question about placement back in society. (XIII RT 3088.) In any event, for the reasons set forth above, the prosecutor's questions were relevant.

acknowledged that appellant was not the first person she had interviewed who was facing serious charges. In Madera County alone she had interviewed at least four people who were charged with murder: Coleman, his cousin Michael Tex, Michael Pizarro, and appellant. (XIII RT 3093-3094.) Dr. Coleman thought there was "some overlap" of the time when appellant and the others were in the jail but she was not sure. (XIII RT 3094-3095.)[131] In May of 1990, she testified in Coleman's trial. Appellant was also in custody at that time. But she did not know when Coleman was transferred out of county or when appellant was referred out to the main population at the jail. (XIII RT 3094-3095.) She was also subpoenaed to testify in Pizarro's case in May of 1990. She did not know if Tex's trial was still going on at the time of her testimony. (XIII RT 3095.)

> [Prosecutor] Q So it is possible that the defendant could receive information on how to fake tests in the jail; isn't that correct?
>
> MR. LITMAN [Defense Counsel]: Objection. Calls for speculation.
>
> THE COURT: Overruled.
>
> MR. LITMAN: She is not an expert as to what is transpiring in the jail and would have no way of knowing and assumes foundational facts which she has no knowledge of.
>
> THE COURT: Overruled. You may answer if you can.
>
> THE WITNESS: I don't know. I don't know -- see, I don't know where he is. I don't know enough to know -- I know that it has happened in history. I don't know how -- I don't know where he is to know if he's had any contact with any of them.

(XIII RT 3095-3096)

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[131] It was at this juncture that appellant made a vague as to time objection which the court overruled and allowed Dr. Christensen to answer if she knew. (XIII RT 3094.)

On redirect, Dr. Christensen testified that she did not leave behind testing materials with any of the inmates. (XIII RT 3119.) If there was information passed between them, Dr. Christensen opined that it would have been information they had memorized. (XIII RT 3120.)

2. Appellant's Claims Are Forfeited

On appeal, appellant makes a broad based assertion that the trial court "erred in overruling defense counsel's objections to the prosecutor's questions that [appellant] had had the opportunity to confer with the other defendants Dr. Christensen had evaluated, which make it 'possible that the defendant could receive information on how to fake tests in the jail . . .'" (AOB 178.) But appellant did not make such a broad objection in the trial court. (AOB 176-178, citing XIII RT 3093-3095.) Accordingly, his claim is forfeited. (See *People v. Marks* (2003) 31 Cal.4th 197, 228 ["A general objection to the admission or exclusion of evidence, or one based on a different ground from that advanced at trial, does not preserve the claim for appeal".]) Appellant also makes a general assertion that the "trial court erred in overruling defense counsel's objections to this line of questioning." (AOB 181.) This general assertion to a line of questioning is also forfeited because appellant made no such objection. (*People v. Friend* (2009) 47 Cal.4th 1, 81 ["[D]efense counsel only objected on the ground of relevance, not on the ground that the prosecutor had no factual basis for these lines of questioning, and defendant therefore has forfeited his claim"].)

The thrust of appellant's appellate assertions, however, appears to be a prosecutorial misconduct claim: that the prosecutor asked questions that he did not have a good faith belief that Dr. Christensen knew the answer to or that he could prove. (AOB 178-179.) However, he failed to make that objection in the trial court as well, therefore it too is forfeited. (See *People v. Bolden* (2002) 29 Cal.4th 515, 564 ["When the prosecutor was

questioning Inspector Gerrans about the wallet and credit cards, defense counsel objected to certain questions on the grounds of hearsay and assuming facts not in evidence, but the defense did not object that the prosecutor was engaging in misconduct by implying facts the prosecutor was unable to prove. Because there was no specific objection on this ground, the issue is not preserved for appellate review."])[132]

3. Assuming Arguendo That Appellant's Misconduct Claim Is Reviewable, It Is Without Merit

Assuming arguendo that appellant had made a prosecutorial misconduct claim in the trial court, the trial court would have correctly overruled it. "'It is improper for a prosecutor to ask questions of a witness that suggest facts harmful to a defendant, absent a good faith belief that such facts exist.'" (*People v. Osband*, *supra*, 13 Cal.4th 622, 695.) But, the requisite "good faith" [here] can be inferred from the record because "the factual specificity of the prosecutor's questions implies that they were based on information obtained during the prosecution's review of records

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[132] Interestingly, appellant also does not argue that the trial court was incorrect in overruling his two objections that he actually made, i.e., he does not argue that counsel's objection that "'around the same time' was vague" (AOB 177; XIII RT 1394) or "'calls for speculation'" objections (AOB 177-178; XIII RT 1395) were improperly overruled on those grounds. Accordingly, appellant is left with no legitimate argument to make on appeal.

Respondent further notes, regarding appellant's actual objections, the Court ensured that Dr. Christensen would answer the question that elicited the vagueness as to time objection, *only* "if she knows" and Dr. Christensen was actually able to understand and answer the question asked. (XIII RT 3094.) Also regarding appellant's "calls for speculation" objection (XIII RT 3095), the court again, quite properly, advised her to answer "if you can." (XIII RT 3095.) If she could not answer the question, then she had the opportunity to say so. If she could answer the question, then it would not be speculation. She answered the question factually. (XIII 3095-3096.) No abuse of discretion occurred on the grounds actually raised below.

available to the defense . . ." (*People v. Hughes* (2002) 27 Cal.4th 287, 388; see *People v. Mickle* (1991) 54 Cal.3d 140, 191.) As shown above, inter alia, it was clear the prosecutor knew from records: Dr. Christensen, a psychologist hired by the defense, had testified that test swapping was historically common; Dr. Christensen had several clients charged with murder that she had been evaluating in the Madera jail; Dr. Christensen had been subpoenaed to testify in some of their cases; appellant was in custody at about the same time that Dr. Christensen's other clients were in custody at the same jail; appellant was not only in the "infirmary" (AOB 181) but had also been in E block of the jail (XIV RT 3287-3291); and, appellant had been found to be a malinger. (Contrast, *People v. Perez* (1962) 58 Cal.2d 229, 240-241 [no evidence supported questioning].) Respondent submits that under these circumstances it is reasonable to infer that the prosecutor had a good faith belief that Dr. Christensen, who plainly was not unaccustomed to working with the jail, was aware if her clients, including appellant, had opportunities to contact each other and possibly talk about her testing. The record does not indicate bad faith on the prosecutor's part nor any constitutional violations.

D. Appellant Fails To Demonstrate Prejudice[133]

Appellant complains that that state law error prejudiced him by violating his rights to due process, a fair trial, and proof beyond a reasonable doubt. (AOB 162-186.) Respondent submits that appellant's claim is not reviewable; moreover, to the extent it is reviewable, appellant fails to demonstrate prejudice.

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[133] Appellant references his Arguments II, F, and III, D. (AOB 182.) Respondent incorporates by reference our corresponding contentions demonstrating their fallacy.

Respondent submits that appellant's constitutional contentions are not cognizable on appeal because they were not raised in the trial court, he fails to adequately articulate *how* each federal right was violated by a the few alleged errors, and appellant failed to make any of the misconduct or CVRC referral question objections that he raises on appeal. (See AOB 186; *People v. Earp, supra,* 20 Cal.4th at p. 893; *People v. Clark, supra,* 5 Cal.4th at p. 988, fn. 13 ["When a party does not raise an argument at trial, he may not do so on appeal."]; *People v. Rodrigues, supra,* 8 Cal.4th at p. 1116, fn. 20 [perfunctory assertions without argument are insufficient].)

In any event, appellant fails to demonstrate prejudice under any standard:

> [T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70 [116 L.Ed.2d 385, 112 S. Ct. 475]; *Spencer v. Texas* (1967) 385 U.S. 554, 563–564 [17 L. Ed. 2d 606, 87 S.Ct. 648]; *People v. Falsetta* (1999) 21 Cal.4th 903, 913 [89 Cal.Rptr. 2d 847, 986 P.2d 182] ["The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair"]; see also *Duncan v. Henry, supra,* 513 U.S. at p. 366.) Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional Watson test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. (*People v. Earp* (1999) 20 Cal.4th 826, 878 [85 Cal. Rptr. 2d 857, 978 P.2d 15]; *People v. Watson, supra,* 46 Cal.2d at p. 836.)

(*People v. Partida* (2005) 37 Cal.4th 428, 439.)

Specifically, appellant claims he was prejudiced because: (1) the prosecutor's question about the superior court finding of competence based on the psychiatrist's reports "implied that the competence questions the lower court and Dr. Christensen considered were one and the same" and that "diminished the reliability of Dr. Christensen's opinions and her

credibility. . ." (AOB 183); (2) the prosecutor's questions to Dr. Christensen about her recommendation referring appellant to the regional center implied that her recommendation was "bizarre, dangerous, and inconsistent with the law and accepted practices;" (AOB 183-184); and, (3) the prosecutor's question about appellant having an opportunity to confer with other defendants Dr. Christensen evaluated implied the "'prosecutor had a source of information unknown to them which corroborated the truth of the matters in question'" which undermined all the expert opinions of mental retardation (AOB 185.) Appellant is incorrect.

First, the prosecutor's question about the prior competence finding did not improperly imply the competence questions were the same. It was a straight forward question on the issue of competence which, of course, considers mental disorders of all types. (See *Leonard, supra,* 40 Cal.4th at pp. 1391-1392.) As demonstrated above, appellant makes much of the fact that Dr. Christensen felt appellant was incompetent due to alleged low intellectual functioning, instead of other mental defect, but in both cases she and the psychiatrists were attempting to determine if appellant could "assist his defense attorney in preparing for his defense" and understand the proceedings. (XIII RT 3087; see also *Leonard, supra,* 40 Cal.4th at pp. 1391-1392.) Dr. Christensen's opinion was founded on her belief that appellant was not malingering. The similarity of the determinations by the psychiatrists was self-evident because they too depended on a determination of whether or not malingering was occurring. Thus, even assuming arguendo that the jury could have read an improper implication into the question – standing alone- Dr. Christensen answered the prosecutor's question and spelled out s*pecifically what she had determined and why.* (XIII RT 3087.) *Nothing was left to implication.* Accordingly, if Dr. Christensen's "credibility" and "reliability" were diminished, that was because the evidence demonstrated, inter alia, her failure to give proper

weight to the findings of the psychiatrists that appellant was malingering. There was nothing unduly prejudicial about the prosecutor's question or Dr. Christensen's answer. (See *People v. Branch*, *supra*, 91 Cal.App.4th at p. 286 ["Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant"].)

Second, nothing about the prosecutor's questions to Dr. Christensen about her regional center recommendation implied that her recommendation was "bizarre, dangerous, and inconsistent with the law and accepted practices." (AOB 183-184.) The questions appellant objected to were directed at the specific recommendation of Dr. Christensen without reference to its legality or acceptance as part of the question. Moreover, Dr. Christensen had the opportunity to fully explain her recommendation, including under what circumstances that appellant could be placed in the community with supervision. (XIII RT 3088-3090, 3106, 3125, 3126-3127.) Allowing Dr. Christensen to explain her own recommendation can hardly be considered a suggestion that it was "bizarre" or unlawful. (AOB 183-184.). In addition, given that the jurors already had substantial information showing Dr. Christensen's recommendation was suspect, it cannot reasonably be argued that this bit of specific information about her recommendation caused undue prejudice.

Appellant also references the prosecutor's closing argument where he pointed out Dr. Christensen's bias and antagonism toward the prosecutor. Appellant appears to believe that the argument was based on the two objected to regional center questions. (AOB 184, citing 3396.) Appellant is mistaken. At pages XIV RT 3395 to 3398, the prosecutor, in context, illustrated that her defensiveness and antagonism was evident throughout her cross examination because she was forced to address the

many opinions she had that were contrary to or substantially different from *all the other experts*. Many of the statements she made at trial that demonstrated her conclusions were suspect were never mentioned in her report and only came to light due to cross examination. Accordingly, the cross examination as a whole *properly* "undermine[d] Dr. Christensen's credibility and [the prosecutor] made use of it as such in his summation." (AOB 184.) The addition of the cross examination on her regional center recommendation did not add substantially more damage to an already damaged credibility.

Third, while it was a reasonable inference from the evidence presented that appellant, a malingerer with a motive to lie, may have conferred with Dr. Christensen's other clients about the testing, even assuming arguendo that evidence of that possibility was erroneously admitted, it did not cause prejudice. The objected to questions were brief; Dr. Christensen finally claimed she did not "know if [appellant] had any contact" with her other clients (XIII RT 3095); and then the questioning on the specific topic ceased. (XIII RT 3095-3096.)[134] Moreover, the jury was specifically instructed not to assume to be true "any insinuation suggested by a question asked a witness" because a question is not evidence. In these circumstances, in this case with overwhelming evidence of guilt, any possible error was harmless. (III CT 763; *People v. Collins* (2010) 49 Cal.4th 175, 225; see *People v. Mooc* (2001) 26 Cal.4th 1216, 1234 [assuming jury followed instruction that prosecutor's question not evidence]; *People v. Lenart* (2004) 32 Cal.4th 1107, 1130; also see *People v. Hines* (1997) 15 Cal.4th 997, 1036-1038.)

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[134] It was appellant that subsequently re-raised the issue. (XIII RT 3119-3120.)

Therefore, whether the alleged errs are reviewed individually or together, under any standard, appellant fails to demonstrate prejudice.

V. APPELLANT FAILS TO DEMONSTRATE INSTRUCTIONAL ERROR VIOLATING STATE LAW OR APPELLANT FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT'S RIGHTS WHEN IT INSTRUCTED WITH THE CALJIC NO. 3.32 SPECIFICALLY REQUESTED AND AGREED UPON BY APPELLANT AND THE PROSECUTOR

Appellant contends that the CALJIC No. 3.32 instruction he and the prosecutor requested was erroneous because it omitted the dissuading a witness charge (§136.1, subds. (a)(1) and (c)(1)) and the witness killing special circumstance (§ 190.2, subd. (a)(10)) from the list of crimes which the jury could consider the evidence of mental retardation. He further contends that because the instruction references mental state (singular) instead of mental states (plural) it is reasonably likely that the jury believed it was permitted to consider evidence of mental retardation solely on the question of whether he intended to kill, or harbored express malice, and that they were prohibited from considering that evidence on the question of whether the killings, though intentional, were committed without premeditation and deliberation. Appellant asserts that these errors were prejudicial and violated state law and his Fifth, Sixth, Eighth, and Fourteenth amendment rights. (AOB 187-222.)

Respondent contends that none of appellant's assertions about the instruction he requested and deemed acceptable are reviewable on appeal because he failed to object on any grounds now raised; failed to make his current arguments in the trial court; failed to ask the trial court to clarify or amplify the instruction; and, the alleged error was invited. Moreover, appellant was not entitled to have the witness dissuading charge and witness killing special circumstance listed in CALJIC No. 3.32, as he chose not to request it as part of his pinpoint instruction. In addition, it was not

required to be provided sua sponte because appellant was not relying on mental retardation as his defense to that charge and special circumstance, nor does he demonstrate there was substantial evidence supportive of such a defense. Furthermore, the instruction would not have lead the jury to believe it could not consider the defense mental retardation evidence in determining whether appellant's killing of the victims was premeditated and deliberate. No state law or constitutional error occurred. Finally, even assuming arguendo that error occurred, appellant fails to demonstrate prejudice under any standard.

A. Relevant Legal Principles

The trial court has a duty to correctly instruct the jury "on the general principles of law relevant to the issues raised by the evidence." (*People v. Najera* (2008) 43 Cal.4th 1132, 1136.) On appeal, this Court examines the challenged instruction as well as the entire charge to determine whether the court conveyed the applicable law to the jury. (*People v. Kelly* (1992) 1 Cal.4th 495, 525-526 (*Kelly*).) An instruction can only be found to be ambiguous or misleading if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words. (*People v. Frye* (1998) 18 Cal.4th 894, 957) Similarly, the United States Supreme Court has emphasized, "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is 'whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process.'" [Citations.] " [A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."[citation.] If the charge as a whole is ambiguous, the question is whether there is a "reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.

[Citation.]" (*Middleton v. McNeil* (2004) 541 U.S. 433, 437; *People v. Letner and Tobin, supra,* 50 Cal.4th at p. 182.)

B. Appellant Fails To Demonstrate That The CALJIC No. 3.32 Instruction Improperly Precluded The Jury From Considering Evidence Of Mental Retardation For The Dissuading A Witness Charge Or The Witness Killing Special Circumstance

1. Appellant's Contention Is Not Cognizable On Appeal; Nor Has Appellant Demonstrated, In His Argument D, Any Legitimate Reasons Not To Apply Forfeiture Or Invited Error Principles

Respondent submits that appellant's contention is not reviewable on appeal because he: (1) failed to object to this instruction on any of his now stated grounds, including the constitutional grounds (*People v. Geier*, *supra*, 41 Cal.4th at p. 590; see *People v. Burgener*, *supra*, 29 Cal.4th at p. 869); failed to make this argument in the trial court (*People v. Clark*, *supra*, 5 Cal.4th at p. 988, fn. 13); and, (3) failed to ask the trial court to clarify or amplify the instruction . (*People v. Moore* (2011) 51 Cal.4th 1104, 1139-1140; *People v. Cole* (2004) 33 Cal.4th 1158, 1211; see *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 ["'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language'"].)

In addition, appellant "invited any conceivable error in giving the[] instruction[] because he [tactically] asked the trial court to give" it. (*People v. Seaton* (2001) 26 Cal.4th 598, 668; *People v. Turner* (2004) 34 Cal.4th 406, 434 ["Here, defendant asked the court for an instruction informing the jury 'of the consequences of a finding of incompetency.' The prosecutor objected, but the trial court expressed an inclination to give such an instruction. Subsequently, defendant and the prosecutor agreed to the language of the instruction at issue here. Because defendant made a

conscious and deliberate tactical choice to request the instruction, he cannot challenge it now. [citation.]"]; *People v. Hardy* (1992) 2 Cal.4th 86, 152 [counsel requested instruction and had a tactical reason for doing so as he utilized it to make his closing argument; error is invited and defendant is "precluded from challenging the correctness of the instruction on appeal."]; *People v. Hernandez* (1988) 47 Cal.3d 315, 353; *People v. Wader* (1993) 5 Cal.4th 610, 657; 3 CT 796 [defense and prosecutor request the instruction]; XIV RT 3337 [both of appellant's attorneys affirm the instructions selected are acceptable, as does the prosecutor]; XV 3413-3414, 3419-3420 [in closing argument defense counsel references mental states for counts one and two and, making obvious use of his requested instruction, explains that is why the defense presented evidence on appellant's intellectual functioning].)

In appellant's argument V, D, he argues that it would be unfair to require an him to request a modification of the CALJIC No. 3.32, that he and the prosecutor both requested because "the law that existed at the time of [appellant's] trial [also] imposed on trial courts a *sua sponte* duty to provide CALJIC No. 3.32 . . . when supported by the evidence." (AOB 212-212.) Assuming without conceding that was the state of the law at the time of trial, here the trial court *did* provide CALJIC No. 3.32. So whether or not the court was required to provide the instruction sua sponte is not relevant. In addition, it was provided because the parties had asked for it, and deemed it "acceptable." (3 CT 796; XIV RT 3337.) Appellant was not relieved from his duty to object or request appropriate clarifying or amplifying language if he felt it was too general or "incomplete." (*People v. Andrews* (1989) 49 Cal.3d 200, 218.)

On the other hand, appellant appears to assert the instruction was not a sua sponte instruction, but once presented by the court, it must be presented correctly and be responsive to the evidence. (AOB 194, 214;

compare, *People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) But even assuming arguendo that is true, the court did provide correct instructions responsive to the evidence as agreed to by appellant himself (XIV RT 3337); if appellant subsequently thought otherwise, especially since *he submitted the instruction*, respondent submits he had duty to object or request clarification of the instruction. (See *People v. Hart* (1999) 20 Cal.4th 546, 622; *People v. Stone* (2008) 160 Cal.App.4th 323, 331.)

In another attempt to defeat the rule requiring that he seek clarification or amplification of the instruction, appellant also characterizes his argument about the witness intimidation charge and witness killing special circumstance as an argument that the instruction was "incorrect" and not one that the instruction was incomplete or in need of clarification. (AOB 214-215.) However, as appellant illustrates, insofar as the instruction limited consideration of mental defect or disorder evidence to charged counts, that was correct and consistent with the standard instruction. (See AOB 198, citing CALJIC No. 3.32 (5th ed. 1988.).) Respondent therefore submits that contrary to appellant's characterization, appellant is actually arguing that the instruction he requested and approved was correct but, in hindsight, he now feels it was incomplete because it omitted the witness dissuading count and witness killing special circumstance. Accordingly, he was required to seek additional or clarifying instruction if appellant felt CALJIC No. 3.32 was incomplete. (*People v. Dennis* (1998) 17 Cal.4th 468, 514 ["If defendant believed the instructions were incomplete or needed elaboration, it was his obligation to request additional or clarifying instructions."]; see AOB 190 ["The trial court *omitted* the dissuading a witness charge . . . and the 'witness killing' special circumstance . . . from the list of crimes for which the jury could consider the evidence.", emphasis added].)

Therefore, for the reasons stated above, appellant's claims are not reviewable on appeal and should be summarily rejected.

In any event, even assuming arguendo that this Court chooses to review appellant's claims (§ 1259; see *People v. Rundle* (2008) 43 Cal.4th 76, 149 [Citing § 1259]; *People v. Smithey*, *supra*, 20 Cal.4th at p. 976, fn. 7 [same]), as will be demonstrated, they are meritless.

2. Assuming Arguendo That Appellant's Claim That CALJIC No. 3.32 Improperly Prohibited Jury Consideration Of Mental Retardation For The Dissuading A Witness Offense And The Witness Killing Special Circumstance Is Reviewable On Appeal, It Lacks Merit

Appellant contends that he was deprived of various state and federal constitutional rights because in CALJIC No. 3.32 the trial court erroneously "omitted the dissuading a witness charge . . . and the 'witness killing' special circumstance" from the "list of crimes" for which the jury could consider evidence of mental defect or mental disorder. (AOB 190.) Respondent disagrees.

Appellant and the prosecutor agreed upon, and requested, a modified CALJIC No. 3.32 (3 CT 796; XIV 3337.) The court provided the instruction as requested. It read:

> Evidence has been received regarding a mental defect or mental disorder of the [appellant] at the time of the crime charged in Counts 1 and 2. You may consider such evidence solely for the purpose of determining whether or not the [appellant] actually formed the mental state which is an element of the crimes charged in Counts 1 and 2; to wit, murder.

(XIV RT 3357-3358)

Appellant now complains that the trial court failed to sua sponte include his dissuading witness offense and his witness killing special circumstance as listed "crimes" in the instruction. It appears that he asserts it was a theory of his defense for his alleged mental retardation to be used

to show he did not have the specific intent necessary for the crime and special circumstance. (AOB 187, 190-192.)

A defendant is entitled upon request to an instruction that accurately states the law and pinpoints the theory of his defense if it is supported by substantial evidence. (*People v. Hughes* (2002) 27 Cal.4th 287, 361; *People v. Ward* (2005) 36 Cal.4th 186, 214; *People v. Adrian* (1982) 135 Cal.App.3d 335, 339.) There is no requirement that such an instruction be given sua sponte. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119.)[135]

The trial court's duty to instruct sua sponte regarding a defense arises only where it appears the defendant is relying on such a defense, or where there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Maury* (2003) 30 Cal.4th 342, 424.) In determining whether the evidence is sufficient to warrant a jury instruction, the trial court determines whether "there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt . . ." (*People v. Salas* (2006) 37 Cal.4th 967, 982.)

Here, it is plain that appellant did not request that his pinpoint CALJIC No. 3.32 instruction specifically list his dissuading a witness offense and witness killing special circumstance as part of the theory of his defense. (3 CT 796; see *People v. Saille*, *supra*, 54 Cal.3d at p. 1119.)

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[135] Appellant cites a list of cases from the federal court of appeal for the proposition that "a defendant is entitled to complete an accurate instructions on factually supported theories of defense" and a failure to do so violates due process (AOB 188-189, citing, e.g., *Clark v. Brown* (9th Cir. 2006) 450 F.3d 898, 917 and *Conde v. Henry* (9th Cir. 2000) 198 F.3d 734, 739–740). Appellant's authority is not binding on this court. (*People v. Williams* (1997) 16 Cal.4th 153, 190.). Moreover, unlike in his cited cases, the defense asked for the instruction as given. Furthermore, as will be seen, this Court's opinions, as well as the United States Supreme Court authority referenced in argument V.A., appropriately addresses the relevant issues.

Accordingly, the trial court was not obliged to provide it as part of a pinpoint instruction.

Moreover, the trial court did not have a sua sponte duty to list the offense or special circumstance in the instruction. Appellant was not relying on his alleged mental retardation for purposes of his defense for either the dissuading witness offense or the witness killing special circumstance because he requested the instruction without listing either (3 CT 796) and he argued a completely different defense. (See *People v. Maury*, *supra*, 30 Cal.4th at p. 424) Making strong use of the circumstantial evidence instructions provided by the court (III CT 769-771; CALJIC Nos. 2.01 and 2.02), the defense acknowledged that the circumstances could show that appellant's verbal threats and threatening conduct were an attempt to dissuade Diaz from pursuing the felony section 273.5 case in which she was the victim. But, in a lengthy and detailed argument, the defense strenuously attempted to persuade the jury that the facts actually circumstantially demonstrated that appellant's conduct was actually the result of "jealousy" and "frustration" and it was not an attempt to dissuade Diaz from testifying. The defense did not rely on appellant's level of intellectual functioning at all for this offense. (XV RT 3433-3441.) In addition, the defense made the same argument for appellant's witness killing special circumstance, arguing that the killing was due to jealousy and not because the victim was a witness to the crime against her. (XV RT 3441-3443.) Therefore, appellant did not rely on mental retardation to defend against these contentions and it cannot reasonably be argued that omission of the charge and special circumstance from CALJIC No. 3.32, ran contrary to the defense theory of the case for these allegations. (Cf., *People v. Rogers* (2006) 39 Cal.4th 826, 872; *People v. Coddington Coddington* (2000) 23 Cal.4th 529, 653 ["This argument is no more than an invitation to second-guess trial counsel's tactics."].)

Furthermore, appellant does not even try to demonstrate that there was substantial evidence supportive of such a defense for the witness dissuasion charge and witness killing special circumstance. (See AOB 188-192 [Arg. V. B.];[136] *People v. Maury*, *supra*, 30 Cal.4th at p. 424; *People v. Stanley* (1995) 10 Cal.4th 764, 793; *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282-283 [contentions "bereft of factual underpinning, record references, argument, and/or authority" deemed forfeited]; also see *People v. Lewis* (2009) 43 Cal.4th 415, 536, fn. 30 ["Generally, a contention may not be raised for the first time in the reply brief."]) Indeed, given the exceptionally strong evidence of appellant's intent to dissuade and finally kill Diaz because of her role in reporting appellant and being a witness,[137] and the lack of evidence that alleged mental retardation played

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[136] Appellant only argues some of the facts in his Argument V. F., in an attempt to show alleged error was not harmless, not that there was substantial evidence of the defense requiring the court to sua sponte alter the instruction to list the witness dissuasion count and witness killing special circumstance. (AOB 218-221.)

[137] For example, the evidence demonstrated that almost immediately after being notified of the complaint filed with the court, appellant drove to the Mauricio Jr.'s residence, saw Teresa, got out of his car, walked up to her and showed her the written notification he had received from the court. (XI RT 2566-2570, 2570, 2605; XII RT 2802-2806 ,2872; XIII CT 3114-3116; Exhib. Nos. 1 [letter] and 2 [envelope] No. 13 [complaint] and 14 [letter].) In an angry tone, appellant pointed at the house and told Teresa to give it to Martha and tell her "she better stay inside the house." (XI RT 2568; XII RT 2873-2874.) Appellant thereafter drove by while Diaz was outside and he gestured with his left hand in the form of a pistol and yelled, get back in the house "'fucking little bitch [because]. . . your ass is mine after the baby is born.'" (XI RT 2573, 2611, 2633.) His behavior became increasingly menacing (e.g., shooting in the air near Diaz' home, shooting at the house, chasing her and Anzldua in a vehicle) very quickly leading to his execution of the victim. (XI RT 2584, 2615-2616., 2658, 2671-2672, 2676-2677 2658-2660; XII RT 2815-2819, 2821, 2822-2823; Exhib. No. 4.) Appellant's intent to dissuade and ultimately kill to prevent Diaz from pursuing the felony section 273.5 charge was clear.

any role in his actions, respondent submits that there was no evidence presented by appellant that could remotely raise a reasonable doubt about his intent. (*People v. Salas*, *supra*, 37 Cal.4th at p. 982.)

Accordingly, there was no requirement that the trial court provide a CALJIC No. 3.32 that was any different than that requested by appellant himself. Nor was the jury "completely preclud[ed]" from "consideration of [appellant's] defense to dissuading a witness charge and witness killing special circumstance allegation." (AOB 191.) His actual defense to the crime and special circumstance was fully argued and considered. (XV RT 3433-3441.) Therefore, no state law or federal constitutional violations occurred.

C. Appellant Fails To Demonstrate That It Is Reasonably Likely That The Jurors Believed That They Were Limited To Considering The Evidence Of Alleged Mental Retardation For Malice Aforethought And Were Precluded From Considering It In Relation To Premeditation And Deliberation; There Were No State Law Or Federal Constitutional Violations

Appellant next asserts that the trial court erred because CALJIC No. 3.32, and the instructions as a whole would have lead the jury to believe it could not consider the defense mental retardation evidence in determining whether the killing of the victims was premeditated and deliberate. (AOB 192-212.) Appellant is incorrect.

Initially, respondent submits that for the same reasons set forth in argument V, B, 1, *supra*, appellant's contention is not reviewable on appeal, particularly since appellant requested the instruction and deemed all the instructions provided acceptable. (See, e.g., *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012; *People v. Seaton* (2001) 26 Cal.4th 598, 668; but see, *People v. Rogers* (2006) 39 Cal.4th 826, 881, fn. 28.) In any event, as will be seen, when evaluating the instructions given as a whole, there is

no reasonable likelihood that the jury misunderstood or misapplied the instruction. (*People v. Rundle*, *supra*, 43 Cal.4th at p. 149.)

In *People v. Rogers*, *supra*, the defendant was convicted of one first degree and one second degree murder (Pen. Code, §§ 187, 189) and a multiple murder special circumstance allegation was found true. (Pen. Code, § 190.2, subd. (a)(3)). Similar to the instant case, the jury was in instructed as follows:

> Evidence has been received regarding a mental disease or mental defect or mental disorder of the defendant at the time of the offenses charged in counts one and two and in the lesser included offense of voluntary manslaughter. You may consider such evidence solely for the purpose of determining whether or not the defendant actually formed the mental state which is an element of the crimes charged in the information and the crime of voluntary manslaughter.

(*People v. Rogers, supra,* 39 Cal.4th at p. 880.)[138]

The defendant contended that the trial court "erred by failing to identify the specific mental state or states—namely premeditation and deliberation—to which defendant's mental health evidence was relevant." He further pointed out that the use note for the instruction directed the trial judge to "specify the mental state or intent required in each specific count."

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[138] As set forth in argument V, B, 2, above, appellant and the prosecutor agreed upon, and requested, a modified CALJIC No. 3.32. (III CT 796; XIV 3337.) As read to the jury, it provided:

> Evidence has been received regarding a mental defect or mental disorder of the [appellant] at the time of the crime charged in Counts 1 and 2. You may consider such evidence solely for the purpose of determining whether or not the [appellant] actually formed the mental state which is an element of the crimes charged in Counts 1 and 2; to wit, murder.

(XIV RT 3357-3358)

The defendant also asserted that the trial court exacerbated the error by failing to provide CALJIC No. 3.31.5 (concurrence of act and mental state) which would have set forth the necessary mental state for first degree murder, i.e., premeditation and deliberation. He contended that the instructions taken as a whole would have "led the jury to believe it could not consider the defense mental health evidence in determining whether the killing of [the victim] was premeditated and deliberate." (*People v. Rogers*, *supra*, 39 Cal.4th at pp. 880-881.)

This Court considered the defendant's claims but found no merit in them, stating:

> We disagree. [footnote omitted] We previously have rejected claims that a trial court erroneously failed to identify premeditation and deliberation as mental states to which evidence of mental disease or defect was relevant, in cases where the trial court either explained that premeditation and deliberation were mental states necessary for a conviction of first degree murder (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1247–1249 [74 Cal.Rptr.2d 212, 954 P.2d 475]; *People v. Jones* (1991) 53 Cal.3d 1115, 1145 [282 Cal.Rptr. 465, 811 P.2d 757]) or instructed that " '[t]he mental state required is included in the definition of the crime charged' " (*People v. Smithey* (1999) 20 Cal.4th 936, 988 [86 Cal.Rptr.2d 243, 978 P.2d 1171]). We also have rejected a similar claim regarding the instruction relating voluntary intoxication to mental state. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1014, fn. 2 [68 Cal.Rptr.2d 648, 945 P.2d 1197] [pinpoint instruction relating voluntary intoxication to premeditation and deliberation not required where jury was fully instructed on first degree premeditated murder and also instructed that the requisite mental states would be defined " 'elsewhere in these instructions' "].) In the foregoing cases, in light of full instructions defining first degree murder including an explanation of premeditation and deliberation, we concluded "a reasonable jury would have understood that the requisite mental states (as set forth in the definitions of the crimes) were the same 'mental states' that could be considered in connection with the evidence of defendant's mental disease, defect, or disorder." (*People v. Smithey*, *supra*, 20 Cal.4th at p. 989.)

> Although, in contrast to the cases cited above, the jury neither was informed that premeditation and deliberation were mental states, nor told that the mental state required for each crime was included in the definition of that crime, the instructions as a whole nonetheless adequately informed the jury it could consider defendant's evidence of mental disease or defect in deciding whether he premeditated and deliberated the killing of [the victim]. As we explained in *People v. Castillo*, *supra*, 16 Cal.4th at page 1017: "Premeditation and deliberation are clearly mental states; no reasonable juror would assume otherwise. Moreover, they refer to the quality of the intent to kill." Similarly here, the instruction on first degree murder fully explained the concepts of premeditation and deliberation. The jury would have understood that they are mental states. "By relating [mental disease or defect] to mental state, the [challenged] instruction necessarily directed the jury's attention to evidence of [mental disease or defect] as it related to premeditation and deliberation." (*Ibid.*)
>
> Moreover, defense counsel's argument reinforced the notion inherent in the instructions that premeditation and deliberation are mental states. Several times in argument, defendant's counsel equated the concept of mental state with premeditation and deliberation. Counsel argued the prosecution had to prove mental state beyond a reasonable doubt, and then asked the jury to consider whether the prosecution "had proven a state of premeditation and deliberation beyond a reasonable doubt." Counsel also asked rhetorically whether defendant killed [the victim] "with the high level of mental state of weighing considerations for and against?" Under all the circumstances, no reasonable juror would have assumed premeditation and deliberation were not "mental states" as that term was used in the instruction relating defendant's evidence of mental disease or defect to the mental state necessary for the charged crimes. (Cf. *People v. Castillo*, *supra*, 16 Cal.4th at p. 1017.)

(*People v. Rogers*, *supra*, 39 Cal.4th at pp. 881-882.)

The facts in the instant case likewise convincingly demonstrate that the jury here would not have reasonably read the instructions as forbidding them from considering the defense mental retardation evidence in determining whether the appellant's killing of the victims was premeditated

and deliberate. In the instant case the instructions were even more complete than those in *Rogers* as here the jury was, in fact, informed that the mental state required for each of the crimes was included in the definition of the crime, and that there must be a concurrence of act and intent in the mind of the perpetrator. (CALJIC Nos. 3.31, 3.31.5; III CT 794, 795; see *People v. Smithey*, *supra*, 20 Cal.4th at p. 988.) It was also explained that murder is in two degrees, and if the jury decided murder was committed, it must indicate whether that murder was in the first or second degree. (CALJIC No. 8.70; III CT 812.) The instruction on first degree murder "fully explained the concepts of premeditation and deliberation." (*People v. Rogers*, *supra*, 39 Cal.4th at pp. 881-882; CALJIC No. 8.20; III CT 800-801.) Moreover, as this court explained in *Rogers*, no reasonable jury would assume that premeditation and deliberation are not mental states. They "clearly" are. (*Id.*) Therefore, by relating "mental defect or mental disorder" to mental state, CALJIC No. 3.32, necessarily directed "the jury's attention to evidence of [mental retardation] as it related to premeditation and deliberation." (*People v. Castillo* (1997) 16 Cal.4th 1009, 1017; *People v. Rogers*, *supra,* at p. 882.)

In addition, similar to *Rogers*, defense counsel reinforced the concept that premeditation and deliberation were mental states directly connected to both murder counts, and that mental retardation could be considered in determining whether appellant formed those mental states.

> [DEFENSE COUNSEL] In Counts 1 and 2 the People have alleged that the killings of Mauricio Martinez and Martha Diaz were murder in the first degree. In order to prove the defendant guilty of first degree, the People will have to prove the defendant killed willfully, deliberately, and with premeditation and harbored express malice aforethought. Willfully under this instruction means intentional.

(XV RT 3413.)

Counsel then defined premeditation and deliberation, and argued that for the requirements of premeditation to exist the jury must "find the killing was perceived by clear deliberate intent on the part of the defendant to kill, which was the result of premeditation . . .: (XV RT 3413.) She further argued about the deliberation or reflection that finding would take, and the complexities of making that finding. She then clearly stated, "And that is the reason why the defense presented evidence relating to [appellant's] intellectual functioning and intellectual capabilities." (XV RT 3413-3414.) Furthermore, as appellant concedes, trial defense counsel argued that appellant "did not premeditate and deliberate due to his mental retardation." (AOB 207; XV RT 3419-3420.) There is no question that counsel's argument further reinforced an understanding of the instructions allowing mental retardation evidence to be considered in relation to premeditation and deliberation. [139]

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[139] In his argument V, C, 4, appellant faults trial counsel for not specifically mentioning "CALJIC No. 3.32" in her closing argument (AOB 209) but rarely if ever did either attorney mention a specific CALJIC number; and, more importantly, defense counsel plainly applied its principles. (XV RT 3413-3414.) Appellant is also critical of trial defense counsel because at one point she argued that due to appellant's alleged mental retardation he was incapable of harboring express or implied malice. (AOB 209-210; XIV 3414-3415.) Appellant notes that the prosecutor countered this argument by, inter alia, pointing out that Dr. Christensen had conceded that a mentally retarded person could form the intent to kill. Appellant then asserts these arguments added to "the confusion" because the referenced part of defense counsel's argument did not direct the jury to the premeditation and deliberation issue, and the prosecutors response might have made the jurors think the only issue mental retardation could be considered for is intent to kill and express malice. (AOB 210-211; XIV 3456.) However, neither of these arguments had anything to do with the premeditation and deliberation issue, except for the fact that some of the evidence that showed malice aforethought also showed premeditation. (See, e.g., XIV RT 3384.) In any case, the premeditation and deliberation issue was fully addressed by both parties in addition to the intent to kill and

(continued...)

Accordingly, under these circumstances, no reasonable juror would have assumed that they could not apply evidence of appellant's alleged mental retardation to the mental states of premeditation and deliberation. (*People v. Rogers*, *supra,* 39 Cal.4th at p. 882; *People v. Rundle* (2008) 43 Cal.4th 76, 150.)

Appellant nevertheless continues his exceptional parsing of the CALJIC No. 3.32 instruction that he requested. (Also see Arg. II, E; *Boyde v. California* (1990) 494 U.S. 370, 380-381 ["'Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might.'"]; *People v. DeFrance* (2008) 167 Cal.App.4th 486, 496). He complains the instruction was misleading because it referred to the required "mental state" in the "singular" rather than in the plural, and referenced an "element" of the crime which he believes the jury likely thought was a reference solely to the malice aforethought mentioned in the information and, he asserts, it did not include premeditation and deliberation. (AOB 198-203; *People v. Rogers*, *supra*, 39 Cal.4th at p. 880 [similar instruction given].) Again, respondent submits that for the reasons already set forth above, the jury could not reasonably have failed to make the appropriate connection. In *Rogers*, this Court found no error even when "the jury neither was informed that premeditation an deliberation were mental states, nor told that the mental state required for each crime was included in the definition of that crime . . ." (*Id.*, at p. 881.) This Court so found because, *as here*, "no reasonable juror, when properly instructed on the elements of first degree murder, could fail to realize that premeditation and deliberation are mental states at issue in such

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(...continued)
express malice parts of the argument. (XIV RT 3384-3386, 3413-3414, 3419-3420; XV 3459-3460.) Thus, appellant's assertions fail to assist him in any fashion.

a charge and to make the connection between the elements of the crime and the limited purpose of the admission of mental defect evidence." (*People v. Rundle*, *supra*, 43 Cal.4th at p. 150.) There is simply no possibility, given the facts already set forth that the jury failed to make the connection between the use of mental state evidence and premeditation and deliberation. (*Id.; see People v. Rodrigues, supra,* 8 Cal.4th pp. 1143-1144.)

Therefore, contrary to appellant's position, his claim is not so "unique" that this Court's cases do not address the issues (AOB 204-205, fn. 48). No state law or federal constitutional error occurred.

D. As Shown In Argument V, B, 1, Appellant's Contentions Are Not Reviewable On Appeal

Appellant provides a general argument stating why his various contentions should not be considered waived or forfeited; and, he asserts any errors should not be considered invited. (AOB 212-216.) For the reasons set forth in respondent's Argument V, B, 1, respondent submits appellant is incorrect.

E. Assuming Arguendo That Error Occurred, It Was Harmless

Assuming arguendo that appellant has demonstrated error by the trial court providing the CALJIC No. 3.32 instruction that appellant requested, respondent submits that it is not "reasonably probable the jury would have reached a different verdict had the court given CALJIC No. 3.32 [with the modifications appellant now claims were necessary.]. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].)" (*People v. Ervin* (2000) 22 Cal.4th 48, 91; also see *People v. Earp* (1999) 20 Cal.4th 826, 887 ["[I]t is not reasonably probable that had the jury been given

defendant's proposed pinpoint instruction, it would have come to any different conclusion in this case."])[140]

1. Assuming Error, There Was No Prejudice Related To Appellant's Witness Dissuading Offense And Witness Killing Special Circumstance

The omission of appellant's witness dissuasion offense and witness killing special circumstance from the CALJIC No. 3.32 instruction caused no harm. As previously demonstrated, appellant's attempt to demonstrate mental retardation was strongly challenged in through cross-examination, and rebuttal testimony. For example, the evidence demonstrated that Dr. Christensen's testing had virtually no credibility and appellant malingered during her testing. Moreover strong evidence was offered in rebuttal demonstrating that appellant had some learning difficulties but he was not mentally retarded. (See Arg. I, B and C; II, F; III, B, 2). In addition, the testing relied upon by appellant as the basis for his expert witness testimony was unreliable and subjective (XIV RT 3211-3214, 3218, 3221-3225, 3230-3231, 3224, 3258, 3243, 3264-3265.)

Also, the jury rejected appellant's defense that mental retardation caused him not to have the requisite mental states for murder, as the jury convicted him of both counts. (V CT 1130-1132.) There is therefore no reason to believe the jury would have accepted this defense for appellant's witness dissuading charge and witness killing special circumstance.

Additionally, much like appellant does on appeal (AOB 218-220), trial counsel acknowledged the evidence demonstrating appellant's intent to

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[140] Appellant has failed to demonstrate constitutional error (see *People v. Flood* (1998)18 Cal.4th 470, 502-503; contrast e.g., *Neder v. United States* (1999) 527 U.S. 1, 16-17 [instruction omits an element of the offense]), but even assuming arguendo that he had done so, for the same reasons stated herein, the alleged error would be harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

dissuade a witness and kill Diaz to prevent testimony, but argued that the circumstances could reasonably show a different intent, i.e., that appellant's conduct and killing were due to jealousy and frustration and not because Diaz would testify in the felony section 273.5 case. The jury was fully instructed on this defense. Trial counsel, inferably aware that there was little to no evidence that mental retardation had any effect on this charge and allegation, properly decided not to pursue a mental retardation defense here as it would have had no chance of success. (III CT 769-771; CALJIC Nos. 2.01 and 2.02; XV RT 3433-3443.) [141] Therefore, for this and all the reasons stated above, any error was harmless.

2. Assuming Error, There Was No Prejudice Related To The Premeditation And Deliberation Finding Necessary For A First Degree Murder Conviction

Assuming arguendo appellant's requested CALJIC No. 3.32 instruction was by itself erroneously limiting as it relates to the use of mental retardation evidence for the premeditation and deliberation issue, there was no harm. Even without a modification to CALJIC No. 3.32, the instructions given informed the jury that the mental state required for each

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[141] While appellate counsel deems the intent evidence "extremely close" (AOB 219) and now uses a slightly different tactical argument of the facts for appellate purposes (AOB 220 [arguing appellant's conduct was inconsistent with preventing witness testimony]), both trial and appellate counsel have simply attempted to put the best face on very unfavorable facts for appellant, e.g., showing threats, shootings, a car chase, and a killing all stemming from appellant's receipt of documents from the court notifying him of the case against him for assaulting Diaz. (E.g., XI RT 2566-2570, 2570, 2584, 2605, 2615-2616., 2658, 2671-2672, 2676-2677 2658-2660 ; XII RT 2802-2806, 2815-2819, 2821, 2822-2823, 2872-2874; XIII CT 3114-3116; Exhib. Nos. 1, 2 4, 13, 14.) Trial counsel's assessment of the facts and choice of argument, were clearly the best alternative given the very strong evidence of intent and the lack of evidence demonstrating mental retardation had any effect whatsoever on appellant's crime and special circumstance.

of the crimes was included in the definition of the crime, and there must be a concurrence of act and intent in the mind of the perpetrator (CALJIC Nos. 3.31, 3.31.5; III CT 794, 795.); explained that murder is in two degrees and informed the jury it must decide if the murder is in the first or second degree (CALJIC No. 8.70; III CT 812); and, the first degree murder instruction fully explained the concepts of premeditation and deliberation (CALJIC No. 8.20; III CT 800-801)

Moreover, no reasonable jury would assume that premeditation and deliberation are not mental states (*People v. Rogers*, *supra,* 39 Cal.4th at pp. 881-882.) and by relating "mental defect or mental disorder" to mental state, CALJIC No. 3.32, necessarily directed "the jury's attention to evidence of [mental retardation] as it related to premeditation and deliberation." (*People v. Castillo* (1997) 16 Cal.4th 1009, 1017; *People v. Rogers*, *supra,* 39 Cal.4th at p. 882.) In addition, appellant's trial counsel, consistent with the above instructions and principles, fully argued his mental retardation evidence as it related to premeditation and deliberation. (See, e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 381 [Jury instruction argumentative in favor of prosecution; "In light of defense counsel's closing argument, which presented factors that defendant wanted the jury to consider, we do not find it reasonably likely that the jury applied the wrong criteria to determine whether defendant knew the wrongfulness of his conduct."]) Furthermore, appellant's evidence of mental retardation was strongly challenged, and, given appellant's conviction for the underlying murder charges with their specified intents, his mental retardation defense was clearly soundly rejected by the jury. Under all these circumstances, no harm occurred.

VI. APPELLANT RECEIVED A FAIR TRIAL; TO THE EXTENT ANY ERROR OCCURRED, THE EFFECT WAS HARMLESS IN BOTH THE GUILT AND PENALTY PHASE

Appellant complains that the cumulative effect of the errors at each phase of trial denied him his constitutional rights to a fair trial, proof beyond a reasonable doubt and trial by jury on every element of the charged offenses, a meaningful opportunity to present a defense, a reliable jury verdict that he was guilty, and a reliable penalty determination. He therefore asserts reversal of both the guilt and penalty judgments is required. (AOB 223-243.) Respondent disagrees.

A defendant is entitled only to a fair trial, not a perfect one, even where he has been exposed to substantial penalties. (See *People v. Marshall* (1990) 50 Cal.3d 907, 945; see also *United States v. Hasting* (1983) 461 U.S. 499, 508-509.) When a defendant invokes the cumulative error doctrine, the litmus test is whether the defendant received due process and a fair trial. (*People v. Kronmeyer* (1987) 189 Cal.App.3d 314, 349.) Therefore, any claim based on cumulative errors must be assessed "to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*Ibid.*; see *People v. Carrera* (1989) 49 Cal.3d 291, 332 [accord]; *People v. Williams* (2009) 170 Cal.App.4th 587, 646 [accord].)

For the reasons articulated in Arguments I through V, ante, respondent submits that many of appellant's contentions are forfeited, and, in any event, either no errors occurred or that any alleged error either considered individually or together was harmless under any standard. (*People v. Booker* (2011) 51 Cal.4th 141, 195; *People v. Morrison* (2004) 34 Cal.4th 698, 731; *People v. Slaughter* (2002) 27 Cal.4th 1187, 1223; *People v. Panah* (2005) 35 Cal.4th 395, 501 ["Defendant contends the cumulative effect of error during the proceedings in his case, from pretrial

rulings through the penalty phase, requires reversal. We have either rejected his claims of error or found any errors to be individually harmless. We also conclude their cumulative effect does not require reversal of the judgment."]; *People v. Valdez* (2004) 32 Cal.4th 73, 139["[N]one of the errors, individually or cumulatively, significantly influence[d] the fairness of defendant's trial or detrimentally affect[ed] the jury's determination of the appropriate penalty," internal quote marks removed]; *People v. Rogers, supra,* 39 Cal.4th at p. 911 ["When considered cumulatively with the guilt phase errors, we likewise find no reasonable possibility that a different penalty verdict would have been rendered absent these errors. The errors therefore were harmless beyond a reasonable doubt."]; *People v. Williams* (2009) 170 Cal.App.4th 587, 646 ["any errors which we have found, and any others we may have assumed for purposes of argument, were harmless under any standard, whether considered individually or collectively."]; Cf. *People v. Coddington, supra,* 23 Cal.4th at pp. 627-628 [assertion that the prosecution had no right to seek an independent psychiatric examination of defendant, the court's vouching, and the improper cross-examination of the defense experts, harmless in sanity phase].)

Appellant received a fair trial, in which the evidence of his guilt and aggravating circumstances was overwhelming. (See *People v. Jennings* (2010) 50 Cal.4th 616, 691 ["In light of the extensive and overwhelming evidence of defendant's guilt and the aggravating circumstances of his crime, we conclude that there was no substantial error and that the cumulative effect of any possible errors does not warrant reversal of the judgment."]; also see, e.g., *People v. Carter* (2003) 30 Cal.4th 1166, 1231 [rejecting cumulative error claim where trial court failed to admonish the jury pursuant to section 1122 and to reinstruct the jury with general evidentiary principles in the course of its penalty phase charge].) Nor, given the strength of the evidence, and the arguments in I through V, ante,

has appellant provided any legitimate basis for jurors to have any lingering doubts about all the mental states of his offenses. (*People v. Cruz* (2008) 44 Cal.4th 636, 689.) Accordingly, his claim of cumulative error must be rejected.

VII. APPELLANT'S CLAIM IS FORFEITED, AND NEVERTHELESS FAILS TO DEMONSTRATE PREJUDICIAL STATE OR CONSTITUTIONAL ERROR FROM THE TESTIMONY OF APPELLANT'S THREAT TO MS. CRUZ AND HER BOYFRIEND THAT REFERRED TO THE BOYFRIEND AS A WETBACK

Appellant contends for the first time on appeal that it was prejudicial error under Evidence Code section 352 for the court to allow evidence at the penalty phase of a threat to Ms. Torres (herein Cruz) that he was going to kill her boyfriend because that threat included the word "wetback" in reference to Cruz's boyfriend. Appellant asserts the court did not exercise its discretion or alternatively that it abused its discretion. (AOB 244-254.) Appellant also contends that the cumulative effect of this error and the alleged guilt phase errors violated his state and federal constitutional rights to a fair penalty verdict and he demands reversal of the death judgment. (AOB 254-256.) Respondent submits that appellant's claim is forfeited because of his failure to object on the grounds now asserted; moreover, his claims lack merit and fail to demonstrate prejudice.

A. Relevant Record

1. Motion In Limine

On September 7, 1990, the prosecutor filed his notice of evidence to be presented in aggravation pursuant to section 190.3. In pertinent part it referenced evidence of "criminal activity involving force and violence" including "(a) 242 PC on Beatrice [Cruz] on April 14, 1986" and "(b) 136.1(c)(1) PC on Beatrice [Cruz]on April 17, 1986." (3 CT 607-608.)

On January 28, 1991, appellant filed an objection and a motion to strike. (3 CT 631.) In pertinent part, it objected to the April 17, 1986 section 136(c) (1) incident because, appellant asserted, it could "be characterized as a non-violent or non-criminal act." Appellant further asserted it was "such a minimally egregious misdemeanor charge, (which in fact was dismissed), that it should not even be put before the jury . . ." Appellant asserted it was a violation of his Eighth and Fourteenth amendment rights. (3 CT 633-634.)

On April 15, 1991, the prosecutor filed a response. (3 CT 877.) In relevant part, it responded to appellant's specific objection:

> The California Penal Code provides for evidence of criminal activity which involved the express or implied threat to use force or violence. Penal Code Section 190.3(b). Every person who knowingly and maliciously attempts to prevent or dissuade any witness or victim from giving testimony at a proceeding authorized by law, where the act is accompanied by an express or implied threat of force or violence upon a witness or victim or any other third party, is guilty of a felony. Penal Code Section 136.1(c)(1) (1986).
>
> In the present case, the People intend to present evidence that the defendant committed a battery upon Beatrice (Torres) Cruz on April 14, 1986. Subsequent to his arrest, the Defendant made telephone calls to Ms. Torres on or about April 17, 1989, wherein the Defendant told her "she was going to pay." According to the victim, the Defendant again called her and advised her, "I'm going to kill your wetback," and told her "you better get out of the house because something is going to happen to you!" According to the victim, the Defendant stated he was mad for having him arrested.
>
> In the present case, the facts fall within express or implied threats of force and violence upon a witness and a third party. Thus, said criminal activity (P.C. 136.1(c)(1)) is admissible as evidence in aggravation.

(3 CT 877)

On April 16, 1991, a hearing on the motion was held. The court noted that the defense argument "appears to be" that the 136.3(c)(1)

threatening conduct is a misdemeanor and non-violent, and the People's position is that it is a felony. (XIV 3490-3491.)

Appellant then argued: the offense may have been initially charged as a misdemeanor; the threats related to Cruz' boyfriend and not Cruz; there was insufficient evidence of the offense; it was improper use of a misdemeanor charge; and appellant thought the threat case may have been dismissed. (XIV RT 3491-3492.) The court reminded appellant that the prosecutor could present evidence of a dismissed matter. (XIV RT 3492.) Appellant conceded that point but asked for an evidentiary hearing because appellant believed an offer of proof was not sufficient for the court to determine if the matter should be introduced to the jury. (XIV RT 3492.) The prosecutor argued that 190.3, does not distinguish between a felony and misdemeanor; the conduct violated section 136.1(c)(1); the statements made to Cruz were of a nature that they were implied and expressed threats to injure her and another individual, and that related to the fact that she had appellant arrested for battery; and the mere fact that a case is dismissed, in this case with a *Harvey*[142] waiver, does not preclude the People from presenting evidence on this matter.. (XV RT 3493.)

Appellant again argued for an evidentiary hearing. (XV RT 3493-3494.) The court asked the prosecutor to read his offer of proof into the record. The prosecutor read the offer of proof from his written response (set forth above). (3 CT 878; XV RT 3494-3495.) Appellant asserted that case law required the Court to hold an evidentiary hearing, but, when asked by the court, appellant could not provide any case authority so holding; moreover, the prosecutor pointed out that the case authority cited as generally relevant by appellant also did not support appellant's position.. The prosecutor submitted that his offer of proof was sufficient. (XV RT

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[142] *People v. Harvey* (1979) 25 Cal.3d 754.

3495-3499.) Appellant asserted that they are also arguing under Evidence Code section 352 "such evidence" is extremely prejudicial and its probative value is outweighed by that prejudice. (XV RT 3500.)

The matter was submitted and the court ruled:

> THE COURT: Very well, then, the prosecution will be allowed to introduce evidence of the threatening a witness in the person of Beatrice Torres. And the Court is accepting the offer of proof as preliminary showing and there will not be any testimony taken beyond that.
>
> However, according to the cases, if any inappropriate testimony is elicited, upon proper objection the Court is required to come down with a strong admonishment against the People and instruct the jury not only to disregard it but to actually admonish the prosecutor for admitting such evidence. So the Court has in mind that that's a requirement that must be done if any inappropriate evidence is admitted.

(XV RT 3500)

2. Evidence At Trial

Section 190.3 authorizes the admission of evidence, as a factor in aggravation, regarding "the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence . . ." (See also § 190.3, factor (b).) Under that rubric, the prosecutor presented Cruz's testimony. She testified that she dated appellant in late 1985. In April 1986, she was no longer dating him. (XV RT 3559-3560.) On April 14, 1986, in the early evening, she saw appellant parked outside of her home. Cruz had a male friend there. He was just leaving. Appellant and the male friend argued. Cruz told appellant to leave. She told him if he did not, she was going to call the police. Appellant called her a bitch and hit her in the mouth, making it bleed. Cruz called the police and appellant was arrested. (XV RT 3560-3562.)

Cruz further testified that sometime afterward appellant called her and said she was going to pay for calling the police and making a report. Cruz stated, without objection, that appellant also said, "'You better get out of that house, something is going to happen to you because I'm going to kill your wetback.'" (XV RT 3563.) Because she had a boyfriend (now husband) who was from Mexico, appellant called him wetback. In addition, at a store, while she was with her boyfriend appellant told her "he was going to kill [her] wetback." (XV RT 3562- 3563.)

Regarding this incident, a complaint alleging that appellant violated section 242 (battery), and a minute order reflecting appellant's guilty plea to that charge, were also admitted into evidence. (XV RT 3568-3571; Exhib. Nos. 28 and 29.)

B. Appellant's Contention Is Forfeited; Moreover, It Has No Merit, And Shows No Prejudice

Appellant now asserts that the evidence of appellant's reference to "wetback" was racist against Latinos and "bore minimal probative value, which was substantially outweighed by its danger of undue prejudice" to appellant in these capital proceedings. (AOB 254.)

Appellant contention is not reviewable. As shown above, appellant asserted a general Evidence Code section 352 assertion at the very end of his in limine argument. However, in the context of all the arguments presented before that objection, he was asserting that under Evidence Code section 352, the testimony about the threats in general were more prejudicial than probative. Appellant never argued, or *even mentioned*, that the term "wetback" should be excluded from his threat. He expressed absolutely no concern over it. Therefore, appellant's claim is forfeited (Evid. Code, § 353; *People v. Lindberg* (2008) 45 Cal.4th 1, 25 ["Because he failed to request that the trial court sanitize the evidence of the prior uncharged robberies by excluding references to the assaults, however, he

cannot raise this issue for the first time on appeal."]; See *People v. Bolin* (1998) 18 Cal.4th 297, 321; *People v. Hogan* (1982) 31 Cal.3d 815, 852; *People v. Holt* (1997) 15 Cal.4th 619, 666-667; *People v. Clark, supra,* 5 Cal.4th at p. 988, fn. 13 ["When a party does not raise an argument at trial, he may not do so on appeal.."])[143] Moreover, even assuming arguendo that appellant's pre-testimony objections to the prosecutor's offer of proof concerning the threats constituted an in limine motion to exclude evidence of the reference to "wetback," appellant was required to renew his objection at trial, when the trial court would have the opportunity to evaluate his objection in light of the actual evidence presented. His failure to do so also forfeits his claim. (*Brown II, supra,* 31 Cal.4th at pp. 518, 547; *People v. Letner and Tobin, supra,* 50 Cal.4th at p. 159.)

In any event, appellant's claim is meritless. Appellant himself dated Latinas, so his claim that he was painted as a racist is, at best, dubious. (XV RT 3599.) Moreover, the foregoing evidence (including the alleged racial slur) was admitted without objection,[144] appellant himself injected the wetback reference into his own threat making it part of his criminal behavior, "and the prosecutor made no attempt to use such evidence to paint [appellant] as a racist. Under the circumstances, the court did not err in admitting it." (*People v. Medina* (1995) 11 Cal.4th 694, 766; also see *People v. Scott* (1997) 15 Cal.4th 1188, 1219; *People v. McPeters* (1992)

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[143] Nor did appellant's reference to constitutional violations at the motion in limine, come in the context of an objection to the reference to "wetback." (3 CT 633-634.) Therefore, appellant's perfunctory constitutional claims (AOB 256) are also forfeited. (*People v. Earp, supra,* 20 Cal.4th at p. 893; see *People v. Hardy* (1992) 2 Cal.4th 86, 150.)

[144] Appellant appears to blame the court for not mentioning at the in limine motion "prejudice or issues related to prejudice arising from the evidence of [appellant's] racist remark." (AOB 249-250.) But that was obviously because appellant never asserted that he felt he was being prejudiced by his remark.

2 Cal.4th 1148, 1189 ["[D]efendant himself injected race into his criminal behavior.'"])

Nor is the evidence of the probative value of the threats as a whole, as was the issue at the motion in limine, "'substantially outweighed by the probability that [the] admission [of the word wetback would] . . . create substantial danger of undue prejudice, of confusing the issues or of misleading the jury.'" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) "'Prejudicial'" is not, of course, the same as "'damaging.'" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Not even appellant argues that his threat was not relevant. (See AOB 244-256.) Plainly it was relevant pursuant to the section 190.3, factor (b) allegation. Moreover, despite appellant's hyperbole about his remark (the reference to wetback) causing a "tremendous danger of undue prejudice" (AOB 249-250) likely inflaming the jurors passions against him (AOB 250), given the nature of appellant's offense and all the remaining testimony both in aggravation and mitigation, this small bit of evidence could not reasonably cause undue prejudice. Appellant also complains the prosecutor, in his closing argument "highlighted the evidence of [appellant's] racism." (AOB 255.) This too is mere exaggeration. The prosecutor's simply accurately restated the whole threat, in context, in his closing argument (AOB 255, citing XVI 3689), causing no harm. Thus, the probative value of this evidence plainly outweighed any imagined prejudice. (See *People v. Doolin* (2009) 45 Cal.4th 390, 439.["'Unless the dangers of undue prejudice, confusion, or time consumption 'substantially outweigh' the probative value of relevant evidence, a section 352 objection should fail'"].) Accordingly, for all these reasons, appellant's contention fails.

Finally, appellant's asserts that the "cumulative effect" of this error and the alleged guilt phase errors, made his case for life "'far less persuasive than it might (otherwise) have been.'" (AOB 256.) He deems

that a constitutional violation. However, because no error occurred, and no prejudice is shown, cumulative or otherwise, his claim fails. (See Arg. VI.)

VIII. RESPONDENT DOES NOT OBJECT TO APPELLANT'S REQUEST FOR THIS COURT TO INDEPENDENTLY REVIEW THE RECORDS THE TRIAL COURT REVIEWED IN RULING ON APPELLANT'S PITCHES MOTION; IF THIS COURT FINDS THE TRIAL COURT ERRED IN DETERMINING WHAT WAS DISCOVERABLE MATERIAL, AND IT REVEALS THAT MATERIAL TO APPELLANT AND ALLOWS ADDITIONAL BRIEFING BY APPELLANT, RESPONDENT REQUESTS AN OPPORTUNITY TO RESPOND

Appellant requests that this Court conduct an independent review of the files that the trial court reviewed pursuant to his pre-penalty phase motion for discovery of any complaints filed against Officer Frank Reiland.[145] Appellant asks this Court to determine whether the trial court should have ordered the disclosure of some of the materials in the arresting officer's personnel records because they are relevant to his ability to defend against the aggravating evidence provided by Officer Reiland. (AOB 257, 260-261; II CT 499; § 190.3, subd. (b).).

A. Relevant Record

On April 16, 1991, a hearing was held on appellant's motion for discovery (II CT 498; XV RT 3519.) The trial court reviewed Officer Reiland's "personnel file maintained at DOC;" a "file of reports written by Officer . . .Reiland;" a "pre-employment background file;" and, a "personnel file maintained at [the] County Personnel Office" regarding Officer Reiland. The court found "only one report written which [sic] Officer Reiland appears to be significant to this case." The court had copies made of the report and provided them to the parties. (XV RT 3519;

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[145] Appellant's motion also referenced Officer Rivera but he does not seek review regarding that request. (AOB 258, fn. 53.)

see VII CT 1655 [order making personnel files part of the sealed record on appeal.].) Defense counsel confirmed with the court that there was "no evidence in the file of any complaints against Officer Reiland for excessive use of force or harassment." (XV RT 3519-1520.)

B. Relevant Legal Principles

As summarized by this Court in *People v. Gaines* (2009) 46 Cal.4th 172, 179:

> "[O]n a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer accused of misconduct against the defendant. [Citation.] . . . If the defendant establishes good cause, the court must review the requested records in camera to determine what information, if any, should be disclosed. [Citation.] Subject to certain statutory exceptions and limitations [citation], 'the trial court should then disclose to the defendant "such information [that] is relevant to the subject matter involved in the pending litigation.'" [Citations.]" (Also see *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535-536 ; Evid. Code, §§ 1043–1045.)

On appeal, this Court should review the "record of the documents examined by the trial court" and determine whether the trial court abused its discretion in refusing to disclose any of the contents of the officer's personnel records. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229; see also *People v. Hughes* (2002) 27 Cal.4th 287, 330.)

C. Respondent Does Not Oppose An Independent Review Of The Records Reviewed By The Trial Court

Respondent does not oppose appellant's request that this Court independently review the confidential documents reviewed by the trial court pursuant to appellant's discovery motion to ensure that Offer Reiland's records contained no discoverable material. If this court finds that the trial court erred in determining what was discoverable material, and it

reveals that material to appellant and allows additional briefing by appellant, respondent requests an opportunity to respond.

IX. APPELLANT FAILS TO DEMONSTRATE THAT CALIFORNIA'S DEATH PENALTY STATUTE AS INTERPRETED BY THIS COURT AND APPLIED IN APPELLANT'S CASE VIOLATES THE UNITED STATES CONSTITUTION

Appellant claims that a number of aspects of California's capital punishment sentencing scheme violate the United States Constitution. However, appellant acknowledges that each of the arguments herein have been rejected by this Court. (AOB 262) Appellant offers no convincing justification for this Court to reconsider the appellant's claims. Accordingly, appellant's claims must be denied.

A. California's Capital Punishment Is Not Impermissibly Broad

Appellant asserts that "California's capital sentencing scheme is unconstitutional because it does not meaningfully narrow the pool of murderers eligible for the death penalty." (AOB 263.) Respondent disagrees.

In *McCleskey v. Kemp* (1987) 481 U.S. 279, the Supreme Court summarized the constitutional prerequisites that a state must satisfy before a sentence of death may be lawfully imposed:

> In sum, our decisions since *Furman* [*v. Georgia,* 408 U.S. 238] have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must

> allow it to consider any relevant information offered by the defendant.

(*Id.* at pp. 305-306.)

If these limits are satisfied, "the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 309. There is no exclusive "right way" for a state to implement its capital sentencing mechanism. (*Spaziano v. Florida* (1984) 468 U.S. 447, 464.) The narrowing function described in *McCleskey* may be performed at either the guilt or penalty phase of a capital case. (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 246.) This court has consistently held that California's death penalty law performs the constitutionally required narrowing function. (*People v. Dunkle* (2005) 36 Cal.4th 861, 939; *People v. Morrison* (2004) 34 Cal.4th 698, 730; People v. Stanley (1995) 10 Cal.4th 764, 842-843.)

In *Karis,* the Ninth Circuit has also rejected the argument that California's statutory scheme does not adequately narrow the class of persons eligible for the death penalty. (*Karis v. Calderon* (2002) 283 F.3d 1117, 1141, fn. 11.) That Court explained:

> The California statute satisfies the narrowing requirement set forth in *Zant v. Stephens,* 462 U.S. 862, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983). The special circumstances in California apply to a subclass of defendants convicted of murder and are not unconstitutionally vague. *See id.* at 872. The selection requirement is also satisfied by an individualized determination on the basis of the character of the individual and the circumstances of the crime. *See id.* California has identified a subclass of defendants deserving of death and by doing so, it has "narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed." *Arave v. Creech,* 507 U.S. 463, 476, 123 L. Ed. 2d 188, 113 S. Ct. 1534 (1993).

(*Id.*)

California's statutory scheme fulfills the narrowing requirement, *Karis,* 283 F.3d at page 1141, footnote 11, in two ways. First, special circumstances define and delimit those murders that are death-eligible. (Pen. Code, § 190.2.) Before a defendant may become death eligible, he must be convicted of first-degree murder, and at least one special circumstance must be found true beyond a reasonable doubt. The latter requirement, the United States Supreme Court has held, adequately "limits the death sentence to a small subclass of capital-eligible cases." (*Pulley v. Harris* (1984) 465 U.S. 37, 53; see *Karis,* 283 F.3d at p. 1141, fn. 11.) Second, the jury's discretion is narrowed and channeled by the list of aggravating circumstances in the selection phase. (Pen. Code, § 190.3; see *Karis,* 283 F.3d at p. 1141, fn. 11.)

Thus, appellant has failed to show that that Penal Code section 190.2 is impermissibly broad. Accordingly, his claim must be denied.

B. The Application Of Penal Code Section 190.3, Subdivision (a), Did Not Violate Appellant's Constitutional Rights

Appellant contends that the death penalty is invalid because section 190.3, subdivision (a), is applied too broadly, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (AOB 264-265.) Appellant correctly states that this statute has withstood attack on its constitutionality in the United States Supreme Court. (*Tuilaepa v. California* (1994) 512 U.S. 967, 976.) Further, this court has repeatedly rejected appellant's contention. (*People v. Schmeck* (2005) 37 Cal.4th 240, 304 ["Nor does the death penalty statute as construed by this court fail to perform the narrowing function required by the Eighth Amendment . . . Section 190.3, factor (a), as applied, does not fail to sufficiently minimize the risk of wholly arbitrary and capricious action prohibited by the Eighth Amendment"]; *People v. Ervine* (2009) 47 Cal.4th

745, 810-811 ["[W]e reject defendant's claim that... factor (a) of section 190.3 is unconstitutionally vague and permits arbitrary and capricious application of the death penalty"].) Appellant fails to show that the application of Penal Code section 190.3, factor (a) violated his constitutional rights. Accordingly, appellant's claim must be denied.

C. California's Death Penalty Statute And Accompanying Jury Instructions Are Not Unconstitutional For Failing To Require Proof Beyond A Reasonable Doubt

1. California's Capital Punishment Scheme Does Not Violate The Federal Constitution By Failing To Require The State Prove Several Elements In The Penalty Stage Beyond A Reasonable Doubt

Appellant claims his federal constitutional rights under the Sixth Amendment were violated because "California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality." (AOB 265, 267.) He claims that *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, *Blakely v. Washington* (2004) 542 U.S. 296), and *Cunningham v. California* (2007) 549 U.S. 270, compel this court to find the California law unconstitutional. (AOB 266-267.) Respondent disagrees.

Appellant acknowledges that this court has held the reasonable doubt standard is not required to ensure the California capital punishment scheme's constitutionality. (AOB 266.) For example, this Court recently held that "California's death penalty scheme is not unconstitutional in failing to assign to the state the burden of proving beyond a reasonable doubt the existence of an aggravating factor . . . Nor does any constitutional provision require an instruction informing jurors they may impose a sentence of death only if persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty . . . Recent high court decisions interpreting the Sixth

Amendment right to jury trial—[*Apprendi]*, [*Ring]*, and [*Blakely]*—do not undermine our prior conclusions." (*People v. Taylor* (2010) 48 Cal.4th 574, 662 (*Taylor II*); *People v. Prieto* (2003) 30 Cal.4th 226, 263.) Other than reliance on the *Apprendi* line of cases, appellant has not expressed a reason why this court should reconsider its decisions rejecting appellant's claim. Accordingly, appellant's claim must be denied.

Appellant also claims his right against cruel and unusual punishment and due process are violated if aggravating factors were not required to be proved beyond a reasonable doubt. (AOB 267.) Appellant correctly acknowledges that this court has rejected this contention. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Further, appellant offers no justification for this court to reconsider this decision. Accordingly, appellant's claim that the right against cruel and unusual process and due process is without merit.

2. The Penalty Jury Was Not Required To Have Been Instructed That The State Had The Burden of Persuasion, Nor That There Was Not A Burden Of Proof Requirement

Appellant claims the jury should have been instructed that the prosecution had the burden of persuasion regarding a number of elements of the penalty phase. (AOB 267.) However, this Court has held that "the trial court need not and should not instruct the jury as to any burden of proof or persuasion at the penalty phase." (*People v. Blair, supra*, 36 Cal.4th 686 at p. 753, citing *People v. Carpenter* (1997) 15 Cal.4th 312, 417–418; *People v. Holt* (1997) 15 Cal.4th 619, 682–684; *People v. Hayes* (1990) 52 Cal.3d 577, 643.) Thus, appellant is incorrect to assert the jury should have received instruction regarding the burden of persuasion. Accordingly, this claim must be denied.

Appellant also claims that if no burden of proof instruction were necessary, that the jury should have been informed as such. (AOB 268.) Appellant only cites a case that upheld the use of an instruction which

informed the jury that no burden of proof was required; appellant cites to no case *requiring* that this instruction be given. (*People v. Williams* (1988) 44 Cal.3d 883, 960.) "To be sure, it is not error if the trial court chooses to instruct the jury in the broad terms defendant would have preferred" but there was no requirement that it do so. (*People v. Thornton* (2007) 41 Cal.4th 391, 468.) Accordingly, this claim must be denied.

3. Appellant's Death Verdict Is Not Required To Be Premised On Unanimous Jury Findings

a. Aggravating Circumstances Are Not Required To Be Premised On Unanimous Jury Findings

Appellant claims his constitutional rights were violated because there was no assurance that a unanimous jury found the aggravating circumstances to be true. (AOB 269.) However, as held by this Court:

> The jury is not constitutionally required to achieve unanimity as to aggravating factors. (*People v. Brown*, *supra*, 33 Cal.4th at p. 402; *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

(*People v. Harris* (2005) 37 Cal.4th 310, 365-366.)

Appellant does not state any convincing reasons why the Court should reconsider its decisions. Accordingly, appellant's claim must be denied.

Appellant also claims his equal protection rights were violated because non-capital defendants are entitled to unanimous verdicts when charged with special allegations that may increase the severity of the sentence. (AOB 269.) However, this Court has held California's death penalty statute does not violate equal protection by denying capital defendants certain procedural safeguards, such as jury unanimity and written jury findings, while affording such safeguards to noncapital

defendants.[146] (*People v. Parson (2008)* 44 Cal.4th 332, 370; *People v. Harris* (2008) 43 Cal.4th 1269, 1323; *People v. Watson (2008)* 43 Cal.4th 652, 703-704; also see *People v. Williams* (2010) 49 Cal.4th 405, 470 [Death penalty scheme not constitutionally flawed by its failure to require jury unanimity concerning the existence of aggravating factors; "Neither the equal protection clause nor the due process clause requires that the same disparate-sentence review be applied to noncapital and capital cases."].) Thus, the trial court did not violate equal protection by not requiring unanimity regarding the aggravating circumstance. Accordingly, appellant's claim must be denied.

b. Unadjudicated Criminal Activity

Appellant claims that his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the federal constitution were violated when the prosecution presented evidence of appellant's prior criminal activity, pursuant to section 190.3, factor (b), without instructing the jury that the prior criminality must be a unanimous finding. (AOB 270.) However, as appellant acknowledges, this claim has been repeatedly rejected by this Court. (*People v. Blair*, *supra*, 36 Cal.4th at p. 753 ["There is no requirement under the Eighth or Fourteenth Amendments that a jury find the existence of unadjudicated criminal activity under section 190.3, factor (b), unanimously or beyond a reasonable doubt"]; *People v. Anderson*

[146] Appellant only cites to *Myers v. Ylst* (1990) 897 F.2d 417 for the proposition that a noncapital defendant afforded more protection than a capital defendant violates the equal protection clause of the Fourteenth Amendment (AOB 270); however, the case merely states that the "equal protection clause prohibits a state from affording one person (other than the litigant whose case is the vehicle for the promulgation of a new rule) the retroactive benefit of a ruling on a state constitution's right to an impartial jury while denying it to another," rather than that equal protection is violated when non-capital defendants get safeguards capital defendants do not. (*Id.*, at p. 421.)

(2001) 25 Cal.4th 543, 590 ["We have consistently applied the rule that while an individual juror may consider violent 'other crimes' in aggravation only if he or she deems them established beyond a reasonable doubt, the jury need not unanimously find other crimes true beyond a reasonable doubt before individual jurors may consider them"]; *Taylor II, supra,* 48 Cal.4th at pp. 574, 651["we have found no requirement under the Sixth, Eighth, or Fourteenth Amendment that the jury unanimously agree on the existence of unadjudicated criminal conduct beyond a reasonable doubt"]; *People v. Ward, supra*, 36 Cal.4th at pp 221-222 ["the jury "may properly consider evidence of unadjudicated criminal activity involving force or violence under factor (b) of section 190.3 and need not make a unanimous finding on factor (b) evidence."]) Thus, appellant is incorrect to claim trial court erred by not instructing the jury that unanimity regarding the finding of unadjudicated criminal activity is required. Accordingly, appellant's claim must be denied.

4. The Jury Instructions Regarding The Standard To Be Used To Balance Aggravating Versus Mitigating Factors Were Not Vague or Ambiguous

Appellant claims the language used to instruct the jurors in deciding whether to impose the death penalty, specifically that jurors needed to be persuaded that the aggravating circumstances were "so substantial" compared to the mitigating circumstances, is impermissibly broad and vague, and violates the Eighth and Fourteenth Amendment of the federal constitution. (AOB 271-272.) However, appellant's argument has been repeatedly rejected by this court. (*Taylor II, supra*, 48 Cal.4th 574 at pp. 658-659 [". . . the instruction stated that to impose death, the jury must be persuaded "that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.". . . [the instruction's] reference to aggravating

circumstances that are "so substantial" is not impermissibly vague. . ."], citing *People v. Carrington* (2009) 47 Cal.4th 145, 199; *People v. Bramit* (2009) 46 Cal.4th 1221, 1249; *People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Because appellant offers no new justification for this Court to reconsider their decisions, appellant's claim must be denied.

5. The Jury Instructions Setting The Standard for Death If It Is "Warranted," Rather Than "Appropriate," Does Not Violate Appellant's Constitutional Rights

Appellant claims that the jury should have been instructed to impose the death penalty only when death is "appropriate," rather than when the aggravating evidence "warrants" death; thus, he asserts that CALJIC No. 8.88 violated his constitutional rights under the Eighth and Fourteenth Amendment. However, this argument has been repeatedly rejected in this Court. (*People v. Bramit*, *supra*, 46 Cal.4th 1221 at pp. 1249-1250 ["CALJIC No. 8.88 is also not unconstitutional for failing to inform the jury that: (a) death must be the appropriate penalty, not just a warranted penalty"]; *Taylor II*, *supra*, 48 Cal.4th 574 at pp. 658-659 ["[CALJIC No. 8.88's] description of the jury's central duty as determining whether death is "warranted," rather than "appropriate," is not misleading."].) Appellant does not demonstrate why this Court should reconsider the cases rejecting his argument. Accordingly, appellant's argument must be rejected.

6. CALJIC No. 8.88 Is Not Unconstitutional Because It Fails To Inform The Jury That It Is Required To Return A Verdict Of Life Without Parole If It Found The Death Penalty Inapplicable

Appellant contends that CALJIC No. 8.88, used to instruct the jury in the instant case, is unconstitutional because it does not inform the jury that it is required to return a verdict of life without parole if "any mitigating circumstance outweighed the aggravating circumstances." (AOB 273.)

This claim has been rejected by this Court, which held the instruction "[i]s not unconstitutional for failing to inform the jury that if it finds the circumstances in mitigation outweigh those in aggravation, it is required to impose a sentence of life without the possibility of parole [citation]." (*People v. Moon* (2005) 37 Cal.4th 1, 42; see also *Taylor II*, *supra*, 48 Cal.4th at pp. 658-659; *People v. Jackson* (2009) 45 Cal.4th 662, 701-702; *People v. Carter* (2005) 36 Cal.4th 1215, 1279.) Appellant has not provided any reason for this Court to depart from its prior decisions. Accordingly, appellant's claim must be denied.

7. The Jury Instructions Were Not Unconstitutional For Failing To Inform The Jury The Standard Of Proof Regarding Mitigating Circumstances And That The Finding Was Not Required To Be Unanimous

Appellant claims that the jury instructions were unconstitutional because they did not establish a burden of proof as to mitigating circumstances. (AOB 274.) However, this Court has held that the jury is not required to be instructed as to the burden of proof for mitigating circumstances.[147] (*Taylor II*, *supra*, 48 Cal.4th at pp. 568-569 ["Nor is the instruction defective because it fails to convey to jurors that defendant has no burden to persuade them that death is inappropriate" citing *People v. Parson*, *supra*, 44 Cal.4th at p. 371].) Appellant has not determined convincingly stated why this Court should depart from its prior decision. Accordingly, appellant's claim must be denied.

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[147] Because appellant does not specify which jury instruction he is referring to, it is presumed CALJIC No. 8.88 is the instruction in question because this instruction "describe[s] the process of weighing the factors in aggravation and mitigation to arrive at the penalty determination." (*People v. Taylor*, *supra*, 48 Cal.4th at pp. 658-659.)

Similarly, appellant claims that the jury instructions were unconstitutional because they do not instruct the jury unanimity is not required in finding mitigating circumstances, and thus there is a "reasonable likelihood the jury erroneously believed unanimity required." (AOB 274-275.) This Court has rejected appellant's contention. (*People v. Moon*, *supra*, 37 Cal.4th at p. 43 ["[the instruction] is not unconstitutional for failing to inform the jury that it need not be unanimous before any juror can rely on a mitigating circumstance."].) Nor is the fact that a unanimity instruction was given in the guilt phase change the outcome. (*People v. Phillips* (2000) 22 Cal.4th 226, 239.) Appellant has convincingly stated why this Court should depart from its prior decisions. Accordingly, appellant's claim must be denied.

8. The Penalty Jury Was Not Required To Be Instructed Regarding the Presumption Of Life

Appellant claims that by not instructing the jury that there is a presumption of life imprisonment without parole in the penalty phase, his constitutional rights under the Eighth and Fourteenth Amendments of the United States Constitution were violated. (AOB 276.) Appellant acknowledges that this court has rejected this claim, and cites to no authority mandating this court reconsider its decisions; appellant only relies on his interpretation as to the fairness of the California death penalty laws. (AOB 276; see also *People v. Moon*, *supra*, 37 Cal.4th at p. 43, citing *People v. Maury* (2003) 30 Cal.4th 342, 440; *Taylor II*, *supra*, 48 Cal.4th at p. 662, citing *People v. Whisenhunt* (2008) 44 Cal.4th 174, 228.) Thus, appellant has failed to demonstrate this Court should reconsider its decisions rejecting his claim. Accordingly, appellant's claim must be denied.

D. The Penalty Jury Was Not Required To Make Written Findings To Ensure Meaningful Appellate Review Or That His Constitutional Rights Were Not Violated

Appellant claims the jury's failure to make written findings during the penalty phase of the trial violated his federal Constitutional rights, and right to meaningful appellant review. (AOB 276.) However, as appellant acknowledges, this claim has been rejected by this Court. (*Taylor II*, *supra*, 48 Cal.4th at p. 662 ["The lack of a requirement that the jury make a written statement of its findings and its reasons for the death verdict does not deprive a capital defendant of the rights to due process, equal protection, and meaningful appellate review that derive from the Fifth, Eighth, and Fourteenth Amendments" citing *People v. Farley* (2009) 46 Cal.4th 1053, 1134 ; *People v. Wilson* (2008) 43 Cal.4th 1, 32]; *People v. Moon*, *supra*, 37 Cal.4th at p. 43.) Appellant references no authority or justification for this Court to reconsider its previous decisions. Thus, appellant has not demonstrated that the instructions violated his Constitutional rights. Accordingly, appellant's claim must be denied.

E. The Non-Modified CALJIC No. 8.85 Given To The Penalty Jury Did Not Violate Appellant's Federal Constitutional Rights

Appellant contends that by denying his request to modify CALJIC No. 8.85 to remove the adjective "extreme" from requirement the jury must find an "extreme mental or emotional disturbance" to be able to consider the mental disturbance as a mitigating factor, and the trial court violated his rights under the Fifth, Sixth, Eight, and Fourteenth Amendments of the federal constitution. (AOB 277.) Appellant acknowledges that this Court has rejected this contention. (See *People v. Moon*, *supra*, 37 Cal.4th at p. 42 ["we hold CALJIC No. 8.85 is not unconstitutional. . . For using "restrictive adjectives" such as "extreme" and "substantial"]; *People v. Bramit, supra*, 46 Cal.4th at p. 1249 ["The use in the sentencing factors of

the phrases "*extreme* mental or emotional disturbance" . . . does not inhibit the consideration of mitigating evidence or make the factors impermissibly vague."] Thus, appellant has not demonstrated that the instructions violated his constitutional rights. Accordingly, appellant's claim must be denied.

F. Intercase Proportionality Review For California Capital Cases Is Not Required By The Eighth And Fourteenth Amendments To The United States Constitution

Appellant claims "[t]he failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment." (AOB 278.) Appellant acknowledges the California capital sentencing scheme does not require intercase proportionality review. (AOB 278.) However, appellant does not attempt to justify why this Court should require intercase proportionality review; further, appellant's claim has been rejected by this Court. (See *Taylor II*, *supra*, 48 Cal.4th at pp. 662-663 ["The failure to provide intercase proportionality review does not violate the Eighth and Fourteenth Amendments" citing *People v. Avila (*2009*)* 46 Cal.4th 680, 724; *Pulley v. Harris*, *supra*, 465 U.S. at pp. 50–51]; *People v. Moon*, *supra*, 37 Cal.4th at p. 48 ["As we have on many occasions, we further reject defendant's claim that the California death penalty law violates his rights under the Eighth and Fourteenth Amendments to the United States Constitution for failing to provide intercase proportionality review. . . The United States Supreme Court agrees."].) Thus, appellant has not demonstrated that his constitutional rights were violated. Accordingly, appellant's claim must be denied.

G. The California Capital Sentencing Scheme Does Not Violate The Equal Protection Clause

Appellant claims that California's capital sentencing scheme violates the Equal Protection Clause by providing a defendant in a capital case with fewer procedural protections than a defendant in a non-capital case. (AOB

278.) Appellant claims that because "there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence," the scheme is unconstitutional. (AOB 278.) Appellant acknowledges that these claims have been rejected by this court; further, respondent has already demonstrated that appellant has failed to make a cognizable burden of proof claim (Arg. IX, C (1) & (2)); jury unanimity regarding aggravating circumstances claim (IX Arg. C (3)); and written finding requirement claim (IX Arg. D.). Accordingly, appellant's claim must be denied.

H. California's Use Of The Death Penalty Does Not Fall Short Of International Norms

Appellant claims that because of the "international community's overwhelming rejection of the death penalty as a regular form of punishment" and a United States Supreme Court decision, *Roper v. Simmons* (2005) 543 U.S. 551, referencing international standards to prohibit the use of capital punishment against those who committed their offenses as juveniles, California's death penalty scheme violates international law, the federal constitution, and "evolving standards of decency." (AOB 279.) However, appellant has not cited to any authority that establish the international community's "overwhelming rejection of the death penalty;" further, appellant's reliance on *Roper* is misplaced because appellant was not a juvenile when he committed his crime. As appellant acknowledges, this Court has rejected appellant's claims. (AOB 279; see also *Taylor II, supra*, 48 Cal.4th at p. 661 ["We likewise reject defendant's contention that imposing the death penalty absent a showing of intent to kill violates international law. . ."]; *People v. Ward, supra*, 36 Cal.4th at p. 222; *People v. Bramit, supra*, 46 Cal.4th at p. 1250.) Accordingly, appellant's claim must be denied.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: September 14, 2011

Respectfully submitted,

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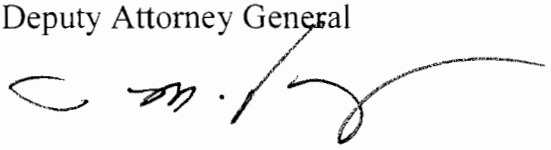

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 74,341 words.

Dated: September 14, 2011

KAMALA D. HARRIS
Attorney General of California

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Townsel**
No.: **S022998**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 14, 2011, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 2550 Mariposa Mall, Room 5090, Fresno, CA 93721, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 14, 2011, at Fresno, California.

Jacquelyn Ornelas
Declarant

Signature

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